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Issued on: June 11, 2008.

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 229

[Docket No. 070717352-8511-0]

**RIN 0648-AV65**

#### **Taking of Marine Mammals Incidental to Commercial Fishing Operations; Atlantic Pelagic Longline Take Reduction Plan**

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Proposed rule; notice of availability of draft take reduction plan; request for comments.

**SUMMARY:** The National Marine Fisheries Service (NMFS) announces the initial determination that the pelagic longline fishery has a high level of mortality and serious injury across a number of marine mammal stocks, and proposes regulations to implement the Atlantic Pelagic Longline Take Reduction Plan (PLTRP) to reduce serious injuries and mortalities of pilot whales and Risso's dolphins in the Atlantic pelagic longline fishery. The PLTRP is based on consensus recommendations submitted by the Atlantic Pelagic Longline Take Reduction Team (PLTRT). This action is necessary because current serious injury and mortality rates of pilot whales and Risso's dolphins incidental to the Atlantic pelagic longline component of a Category I fishery are above insignificant levels approaching a zero mortality and serious injury rate (zero mortality rate goal, or ZMRG), and therefore, inconsistent with the long-term goal of the Marine Mammal Protection Act (MMPA). The PLTRP is intended to meet the statutory mandates

and requirements of the MMPA through both regulatory and non-regulatory measures, including a special research area, gear modifications, outreach material, observer coverage, and captains' communications.

**DATES:** Written comments on the proposed rule must be received no later than 5 p.m. eastern time on September 22, 2008.

**ADDRESSES:** You may submit comments, identified by the Regulatory Information Number (RIN) 0648-AV65, by any of the following methods:

- Electronic Submissions: Submit all electronic public comments via the Federal eRulemaking Portal <http://www.regulations.gov>.
- Facsimile (fax): 727 824-5309, Attn: Assistant Regional Administrator, Protected Resources.
- Mail: Assistant Regional Administrator for Protected Resources, NMFS, 263 13th Avenue South, St. Petersburg, FL 33701.

Instructions: All comments received are a part of the public record and will generally be posted to <http://www.regulations.gov> without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

NMFS will accept anonymous comments. Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

This proposed rule, references, and background documents for the PLTRP can be downloaded from the Take Reduction web site at <http://www.nmfs.noaa.gov/pr/interactions/trt/teams.htm#pl-trt.htm> and the NMFS Southeast Regional Office website at <http://sero.nmfs.noaa.gov/pr/pr.htm>.

#### **FOR FURTHER INFORMATION CONTACT:**

Laura Engleby or Jennifer Lee, NMFS, Southeast Region, 727-824-5312, or Kristy Long, NMFS, Office of Protected Resources, 301-713-2322. Individuals who use telecommunications devices for the deaf (TDD) may call the Federal Information Relay Service at 1-800-877-8339 between 8 a.m. and 4 p.m. eastern time, Monday through Friday, excluding Federal holidays.

#### **SUPPLEMENTARY INFORMATION:**

#### **Bycatch Reduction Requirements in the MMPA**

Section 118(f)(1) of the MMPA requires NMFS to develop and implement take reduction plans to assist in the recovery or prevent the depletion

of each strategic marine mammal stock that interacts with Category I and II fisheries. It also provides NMFS discretion to develop and implement a take reduction plan for any other marine mammal stocks that interact with a Category I fishery, which the agency determines, after notice and opportunity for public comment, has a high level of mortality and serious injury across a number of such marine mammal stocks.

The MMPA defines a strategic stock as a marine mammal stock: (1) for which the level of direct human-caused mortality exceeds the potential biological removal (PBR) level; (2) which is declining and is likely to be listed under the Endangered Species Act (ESA) in the foreseeable future; or (3) which is listed as threatened or endangered under the ESA or as a depleted species under the MMPA (16 U.S.C. 1362(2)). PBR is the maximum number of animals, not including natural mortalities, that can be removed annually from a stock, while allowing that stock to reach or maintain its optimum sustainable population level. Category I or II fisheries are fisheries that, respectively, have frequent or occasional incidental mortality and serious injury of marine mammals.

The immediate goal of a take reduction plan for a strategic stock is to reduce, within six months of its implementation, the incidental serious injury or mortality of marine mammals from commercial fishing to levels less than PBR. The long-term goal is to reduce, within five years of its implementation, the incidental serious injury and mortality of marine mammals from commercial fishing operations to insignificant levels approaching a zero serious injury and mortality rate, taking into account the economics of the fishery, the availability of existing technology, and existing state or regional fishery management plans. The insignificance threshold, or upper limit of annual incidental mortality and serious injury of marine mammal stocks by commercial fisheries that can be considered insignificant levels approaching a zero mortality and serious injury rate, has been defined at 50 CFR 229.2 as 10 percent of the PBR for a stock of marine mammals.

#### **Impetus and Scope of the Plan**

The impetus for this plan was a 2003 settlement agreement between NMFS and the Center for Biological Diversity (CBD), that required the convening of a Take Reduction Team (the PLTRT) under the MMPA by June 30, 2005, to address serious injury and mortality of short- and long-finned pilot whales and common dolphins in the Atlantic

portion of the Atlantic Ocean, Caribbean, Gulf of Mexico, Large Pelagics Longline Fishery, then, and currently, listed as a Category I fishery. At the time of the settlement agreement, the western North Atlantic stocks of these three species were identified as strategic stocks.

Based on updated information, the 2005 U.S. Atlantic and Gulf of Mexico Marine Mammal Stock Assessments report (SAR) reclassified long- and short-finned pilot whales as non-strategic. The SAR indicated that serious injuries and mortalities in the Atlantic pelagic longline fishery were primarily limited to the Mid-Atlantic Bight (MAB) (Waring *et al.*, 2006). Although the 2006 SAR lists the status of long- and short-finned pilot whales as unknown, the draft 2007 SAR again reports that the estimated average annual human-related mortality and serious injury for the last five years does not exceed PBR and the stocks are not strategic (Waring *et al.*, 2007a; Waring *et al.*, 2007b).

The 2005 SAR also reported that within the previous five years, there were no observed serious injuries or mortalities of common dolphins in the pelagic longline fishery; therefore, this stock was reclassified as non-strategic in the 2005 SAR, based on estimates of serious injuries and mortalities in both the pelagic longline fishery as well as other observed fisheries.

Risso's dolphins, although not included in the settlement agreement, also sustain serious injuries and mortalities incidental to the Atlantic pelagic longline fishery.

For Risso's dolphins and long-finned and short-finned pilot whales, estimated serious injury and mortality levels in the pelagic longline fishery exceed the insignificance threshold but do not exceed the PBR level for the stocks. Because these species are below PBR and considered non-strategic stocks but interact with a Category I fishery, NMFS directed the PLTRT to develop and submit a draft Take Reduction Plan to the agency within 11 months, in accordance with the long-term goal of MMPA section 118, focusing on reducing incidental mortalities and serious injuries of pilot whales and Risso's dolphins to a level approaching a zero mortality and serious injury rate within five years of implementation of the plan.

#### History of the PLTRT

In accordance with the MMPA and the settlement agreement, NMFS convened the PLTRT in June 2005. NMFS announced the establishment of the PLTRT on June 22, 2005, in the

**Federal Register** (70 FR 36120). NMFS selected team members according to guidance provided in MMPA section 118(f)(6)(C). NMFS strove to select an experienced and committed team with a balanced representation of stakeholders. Members of the PLTRT included fishermen and representatives of the Atlantic pelagic longline fishing industry, environmental groups, marine mammal biologists, fisheries biologists, and representatives of the Mid-Atlantic Fishery Management Council, the Marine Mammal Commission, and NMFS.

Four professionally facilitated meetings and two full-team conference calls were held between June 2005 and May 2006. During these meetings, NMFS presented abundance estimates, serious injury and mortality estimates of pilot whales and Risso's dolphins, characterization and regulatory structure of the pelagic longline fishery, and analyses of observer, logbook, and other fisheries data to the PLTRT. In addition, NMFS developed a predictive model that analyzed a number of variables (e.g., environmental factors, gear types, etc.) to determine which variables may be useful in predicting and/or minimizing interactions between marine mammals and longline gear as well as possible impacts on target species catch and bycatch of other protected species (e.g., sea turtles). Each meeting included facilitated discussions to draft and revise various components of the PLTRP, with an emphasis on management and research recommendations. The PLTRT reached consensus at the May 2006 meeting, and on June 8, 2006, submitted to NMFS a Draft PLTRP including recommendations for bycatch reduction measures, as well as research needs and other non-regulatory measures (PLTRT, 2006).

#### Distribution, Stock Structure, and Abundance of Pilot Whales

In the MAB, the Atlantic pelagic longline fishery interacts with two species of pilot whales that occur in that area. Long-finned pilot whales are distributed worldwide in cold temperate waters in both the Northern (North Atlantic) and Southern Hemispheres. In the North Atlantic, the species is broadly distributed and thought to occur from 40° to 75° N. lat. in the eastern North Atlantic and from 35° to 65° N. lat. in the western North Atlantic (Abend and Smith, 1999). Short-finned pilot whales are also distributed worldwide in warm temperate and tropical waters. In U.S. Atlantic waters, this species is found in the Gulf of Mexico (GOM) and in the western North

Atlantic as far north as the central MAB. Both species tend to favor the continental shelf break and slope, as well as other areas of high relief, but are also present offshore in the pelagic environment. In the western North Atlantic, they may be associated with the north wall of the Gulf Stream and with thermal fronts (Waring *et al.*, 1992).

The two species are difficult to distinguish during visual abundance surveys, and therefore, in many cases, reference is made to the combined species, *Globicephala* spp. Due to this difficulty in species identification, the species' boundaries for short-finned and long-finned pilot whales in the western North Atlantic have not been clearly defined. However, their distributions are thought to overlap along the U.S. mid-Atlantic coast between 35° and 39° N. lat. (Payne and Heinemann, 1993; Bernard and Reilly, 1999). The greatest area of overlap in distribution of the two species seems confined to an area along the shelf edge between 38° and 40° N. lat. in the MAB, where long-finned pilot whales are present in winter and summer and short-finned pilot whales are present at least in summer (Waring *et al.*, 2007a).

Stock structure is not well known for long-finned or short-finned pilot whales in the North Atlantic. Indirect and direct studies on long-finned pilot whales indicate that there is some degree of stock differentiation within the North Atlantic (Mercer, 1975; Bloch and Lastein, 1993; Abend and Smith, 1995; Abend and Smith, 1999; Fullard *et al.*, 2000). For short-finned pilot whales, there is no available information on whether the North Atlantic stock is subdivided into smaller stocks.

The total number of pilot whales off the eastern U.S. and Canadian Atlantic coast is unknown, although estimates from particular regions of their habitat (e.g., continental slope) exist for select time periods (see Waring *et al.*, 2006 for a complete summary). Observers at sea cannot reliably distinguish long- and short-finned pilot whales visually. As a result, sightings of pilot whales are not identified to species and resulting survey estimates are considered joint estimates for both species. The best available estimate for *Globicephala* spp. in the U.S. Exclusive Economic Zone (EEZ) is the sum of the estimates from the summer 2004 U.S. Atlantic surveys, 31,139 (Coefficient of Variation, or CV=0.27), where the estimate from the northern U.S. Atlantic is 15,728 (CV=0.34), and from the southern U.S. Atlantic is 15,411 (CV=0.43) (Waring *et al.*, 2006). This joint estimate is the most

recent available, and these surveys include the most complete coverage of the species' habitats (although the PLTRT recognized that this estimate was limited to the U.S. EEZ). For *Globicephala spp.*, the minimum population estimate, which accounts for uncertainty in the best estimate (Wade and Angliss, 1997), is 24,866.

#### **Distribution, Stock Structure, and Abundance of Risso's Dolphins**

Risso's dolphins occur worldwide in warm temperate and tropical waters roughly between 60° N. and 60° S. lat., and records of the species in the western North Atlantic range from Greenland south, including the Gulf of Mexico (Kruse *et al.*, 1999). In the U.S. Atlantic EEZ, the species is most commonly seen in the MAB shelf edge year round and is rarely seen in the Gulf of Maine (Waring *et al.*, 2004). Risso's dolphins are pelagic, preferring waters along the continental shelf edge and deeper, as well as areas of submerged relief such as seamounts and canyons (Kruse *et al.*, 1999). There is no information available on population structure for this species.

Abundance estimates for Risso's dolphins off the U.S. or Canadian Atlantic coast are unknown, although eight estimates from particular regions of their habitat exist for select time periods (Waring *et al.*, 2006). Sightings of Risso's dolphins are almost exclusively in the continental shelf edge and continental slope areas. The best available abundance estimate for Risso's dolphins in the U.S. EEZ is the sum of the estimates from the summer 2004 U.S. Atlantic surveys, 20,479 (CV=0.59), where the estimate from the northern U.S. Atlantic is 15,053 (CV=0.78), and from the southern U.S. Atlantic is 5,426 (CV=0.540) (Waring *et al.*, 2006). This joint estimate is the most recent available, and the surveys have the most complete coverage of the species' habitat (although the PLTRT recognized that this estimate was limited to the U.S. EEZ). The minimum population estimate for the western North Atlantic Risso's dolphin, which accounts for uncertainty in the best estimate (Wade and Angliss, 1997), is 12,920.

#### **Potential Biological Removal and Serious Injury and Mortality Estimates**

PBR is defined as the product of minimum population size (in this case, of the portion of the stock surveyed within the U.S. EEZ), one-half the maximum productivity rate, and a recovery factor (MMPA Sec. 3(20), 16 U.S.C. 1362). The maximum productivity rate for both pilot whales and Risso's dolphin is 0.04, the default

value for cetaceans (Barlow *et al.*, 1995). The recovery factor, which provides greater protection for endangered, depleted, or threatened stocks, or stocks of unknown status relative to optimum sustainable population (OSP), is 0.48 for both species because the CV of the average mortality estimate is between 0.3 and 0.6 (Wade and Angliss, 1997), and because both stocks are of unknown status. The PBR for both species of western North Atlantic pilot whales combined (i.e., *Globicephala spp.*) is 249, and the PBR for the western North Atlantic stock of Risso's dolphin is 129 (Waring *et al.*, 2007b).

The 2007 draft SAR reported an average combined annual serious injury and mortality incidental to pelagic longline fishing of 86 pilot whales (CV=0.16) and 34 Risso's dolphins (CV=0.32), based on the years 2001–2005 (Waring *et al.*, 2007b). However, more recent estimates (Fairfield-Walsh and Garrison, 2007; Garrison, 2007) bring the 5-year average combined serious injury and mortality for pilot whales to 109 animals (CV=0.194, years 2002–2006) and for Risso's dolphins to 20 animals (CV=0.381, years 2002–2006). Based on this information, serious injury and mortality of pilot whales and Risso's dolphins in the Atlantic pelagic longline fishery is below PBR, but exceed the insignificance threshold. NMFS believes there is a high level of serious injury and mortality in the Atlantic pelagic longline fishery across a number of marine mammal stocks, warranting the development and implementation of a take reduction plan for both pilot whale and Risso's dolphin stocks.

#### **Components of the Proposed PLTRP**

The proposed PLTRP takes a stepwise, adaptive management approach to achieve the long-term goal of reducing serious injuries and mortality of pilot whales and Risso's dolphins in the Atlantic pelagic longline fishery to insignificant levels approaching a zero mortality and serious injury rate within five years of implementation. A series of management measures are designed to make an initial significant contribution to reducing serious injury and mortality. The proposed PLTRP also includes research recommendations for better understanding how pilot whales and Risso's dolphins interact with longline gear, as well as assessing current and potential new management measures. The PLTRT agreed to evaluate the success of the final PLTRP at periodic intervals over the next five years and to consider amending the PLTRP based on

the results of ongoing monitoring, research, and evaluation.

The proposed PLTRP reflects the results of a predictive model, which analyzed a number of variables (e.g., environmental factors, gear characteristics, etc.) to determine which variables may be useful in predicting and/or minimizing interactions between marine mammals and longline gear, and possible impacts on target species catch and bycatch of other protected species (e.g., sea turtles). A total of 39 variables were developed and considered as potential explanatory factors in the predictive model. These variables are classified into five major categories: environment, space and time, gear type, effort, and catch. These analyses employed Pelagic Observer Program (POP) data collected from 1992 to 2004 and modeled the effects of gear and environmental factors on the probability of interacting with pilot whales or Risso's dolphins.

The predictive model proved to be an invaluable tool for the PLTRT to develop management strategies, since multiple variables could be tested and evaluated. For pilot whales, variables found to have significant correlations included fishing area (81 percent of interactions occur along the MAB), distance from the 200 m (109 fathoms) isobath (all interactions were observed within 40 km (21.6 nautical miles, nm) of the 200 m (109 fathoms) isobath), water temperature (peak interactions occur between 70–80° F (21–27° C)), mainline length (interactions were twice as high in sets with mainline lengths greater than 20 nm (37.02 km)) and swordfish damage (interaction rates were three times higher in sets with damage to swordfish catch). Further analysis of the mainline length effect indicated that fishing with mainlines less than 20 nm (37.02 km) in length resulted in an approximately 50 percent reduction in the probability of interacting with a pilot whale relative to longer mainline lengths. For Risso's dolphins, similar results were found, although correlations were not as strong. Interactions with Risso's dolphins were also significantly correlated with the Northeast Coastal area and with sets that used squid as bait.

After considering the results of the predictive model, the PLTRT recommended a suite of management strategies to reduce mortality and serious injury of pilot whales and Risso's dolphins in the Atlantic pelagic longline fishery. This proposed rule addresses both the regulatory and non-regulatory measures recommended by the PLTRT. NMFS proposes to incorporate nearly all of the PLTRT's

consensus recommendations in the Draft PLTRP into the proposed PLTRP, with only minor modifications. Changes from the PLTRT's consensus recommendations are noted, along with the rationale for any proposed change.

One consensus recommendation will not be implemented through this proposed rule, but will be implemented under different authority. Specifically, the PLTRT recommended NMFS develop and implement a mandatory certification program to educate owners and operators of pelagic longline vessels about ways to reduce serious injury and mortality of marine mammal bycatch. On August 19, 2005, NMFS published a proposed rule to consolidate the management of all Atlantic Highly Migratory Species (HMS) under one Fishery Management Plan (FMP) (70 FR 48804). The proposed rule included a certification program to educate vessel owners and operators on using required equipment to handle and release sea turtles and other protected species (with recertification every three years). The PLTRT recommended that the certification program proposed in the August 2005 Draft Consolidated HMS FMP and associated proposed rule (70 FR 48804) be expanded to incorporate information regarding marine mammal interactions, including:

- Safe handling and release techniques for marine mammals;
- Current regulations and guidelines that apply to the fishery, especially those related to marine mammal bycatch, and an explanation of the purpose and justification of those regulations and guidelines;
- Information from logbooks and auxiliary forms associated with particular research projects;
- Guidelines for captain's communications;
- Updates on NMFS' observer program, including relevant recent findings;
- Description of research and monitoring projects aimed at reducing marine mammal bycatch, including an explanation of the purpose of this research and a description of key research results to date; and
- Information on marine mammal species identification.

NMFS is proposing to implement the PLTRT's recommendation using NMFS' existing regulatory authority at 50 CFR 635.8, Workshops. On October 2, 2006, NMFS published the Consolidated HMS FMP and the associated final rule (71 FR 58058), which requires all HMS longline fishermen to attend a NMFS workshop and earn certification in mitigation, handling, and release techniques for sea turtles, sea birds, and other protected

species. This rule provides NMFS with the authority necessary to implement the PLTRT's recommendation without additional regulation. Since 2007, NMFS has incorporated education on careful handling and release techniques for marine mammals, current regulations and guidelines that apply to the fishery related to marine mammal bycatch, and an explanation of the purpose and justification of those regulations and guidelines into these workshops. NMFS proposes to expand the content of the workshops as appropriate to meet the needs of the PLTRP.

The PLTRT also discussed other mitigation and conservation measures that they did not include in their consensus recommendations because they were either economically or technologically infeasible or did not meet the goals of the MMPA. Information on these can be reviewed in the Draft PLTRP (PLTRT, 2006).

#### Proposed Regulatory Measures

NMFS proposes the following three regulatory measures: (1) Establish a Cape Hatteras Special Research Area (CHSRA), with specific observer and research participation requirements for fishermen operating in that area; (2) set a 20-nm (37.02-km) upper limit on mainline length for all pelagic longline sets within the MAB; and (3) develop and publish an informational placard that must be displayed in the wheelhouse and the working deck of all active pelagic longline vessels in the Atlantic fishery.

#### *Cape Hatteras Special Research Area*

The PLTRT recommended NMFS designate a special research area offshore of Cape Hatteras (hereafter referred to as the CHSRA) with specific observer and research participation requirements for fishermen operating in that area. The proposed CHSRA includes all waters inside and including the rectangular boundary described by the following lines: 35° N. lat., 75° W. long., 36° 25' N. lat., and 74° 35' W. long. In order to use pelagic longline gear within this area, the PLTRT recommended NMFS implement through regulations the following requirements: (1) The owner and operator of the vessel must accept, facilitate, and be capable of taking scientific observers; (2) the owner and operator of the vessel must be both willing and able to participate in government-sponsored research targeting marine mammal bycatch reduction; pilot whale behavior, biology, ecology; or other related topics; and (3) the operator of the vessel must

maintain daily communications with other local vessel operators regarding marine mammal interactions with the goal of identifying and exchanging information relevant to avoiding bycatch of marine mammals and other protected species.

The proposed CHSRA encompasses a 5,927 sq km (2,288 sq mile) region that over the past five years has exhibited both high fishing effort and high pilot whale bycatch rates. NMFS delineated the area to encompass the vast majority of the observed interactions and to exclude the area where inshore longline vessels target yellowfin tuna and coastal sharks, since the inshore area had low observed interaction rates.

Vessels in the proposed CHSRA would be required to carry observers when requested. In the proposed regulations, vessels deploying or fishing with pelagic longline gear in the CHSRA or transiting through the CHSRA with pelagic longline gear onboard must call the NMFS Southeast Fisheries Science Center (SEFSC) at least 48 hours prior to embarking on the trip. This requirement would be in addition to any existing selection and notification requirement for observer coverage by the POP. If a vessel is assigned an observer, the vessel must take the observer during that trip; if the vessel refuses to take the observer, the vessel is prohibited from deploying or fishing with pelagic longline gear in the CHSRA or transiting through the CHSRA with pelagic longline gear onboard. NMFS also proposes that no waivers be granted to vessels fishing in the CHSRA that do not meet observer safety requirements.

The collection of observer data representing all vessels in an area is critical not only for obtaining accurate (i.e., unbiased) estimates of bycatch, but also for collecting information about factors that may be important for mitigating bycatch (NMFS 2004). For this reason, NMFS believes full compliance with observer requirements in the CHSRA is essential. As noted earlier, vessels that fish primarily in the MAB have higher observed marine mammal take rates than those in other areas. However, 58 percent of pelagic longline vessels reporting effort in the MAB between 2001 and 2005 have never been observed in the MAB. This is because certain vessels are routinely exempted from observer coverage because they do not meet the observer safety or accommodations requirements, which may bias observer data (i.e., data would not be representative of actual fishing effort). In order for NMFS to accurately monitor levels of serious injury and mortality of marine mammals incidental to the pelagic longline

fishery, and thereby, monitor the effectiveness of the final PLTRP, data collected by observers must be representative of both fishing effort and bycatch. By not allowing exemptions for observer coverage within the CHSRA, NMFS will be able to improve observer data and bycatch estimates within the CHSRA.

In addition to the proposed requirement for carrying observers, NMFS proposes requirements for vessels in the CHSRA to participate in research. The establishment of the CHSRA and the research participation requirement form an essential component of the proposed PLTRP, enabling focused research on pilot whale interactions with the pelagic longline fishery, thus contributing to achieving the objectives of the PLTRP. Obtaining better data for characterizing fishery interactions is a high priority. The PLTRT was limited in its ability to develop management strategies to reduce the frequency of interactions between pilot whales and longline fishing gear due to a lack of information regarding the nature, timing, and causes of these interactions. The proposed CHSRA would enable NMFS to assess current and potential new management measures and would be fundamental in formulating effective bycatch reduction strategies.

To implement the research participation requirement, NMFS proposes that in addition to observing normal fishing activities, observers also conduct additional scientific investigations aboard pelagic longline vessels in the CHSRA, as authorized by MMPA section 118(d)(2)(C). These investigations would be designed to support the goals of the PLTRP. The observers will inform vessel operators of the specific additional investigations that may be conducted during the trip. An observer may direct vessel operators to modify their fishing behavior, gear, or both. Instead of or in addition to carrying an observer, vessels may be required to carry and deploy gear provided by NMFS or an observer or modify their fishing practices. By calling the NMFS SEFSC, per the observer requirement described above, vessels would be agreeing to take an observer and acknowledging they are both willing and able to participate in research in the CHSRA without any compensation. If vessels are assigned any special research requirements, they must participate in the research for the duration of the assignment. If they do not participate in the research, they are prohibited from deploying or fishing with pelagic longline gear in the CHSRA

or transiting through the CHSRA with pelagic longline gear onboard.

Although NMFS strongly supports the PLTRT's goal of identifying and exchanging information among vessel operators relevant to avoiding bycatch of marine mammals and other protected species, NMFS is not proposing regulations to require the operator of the vessel to maintain daily communications with other local vessel operators regarding marine mammal interactions within the CHSRA. Implementation of this recommendation via regulation would require NMFS to conduct extensive surveillance for monitoring and enforcement. Even then, NMFS would rarely have information on an individual vessel's fishing conditions, catch, and bycatch. Thus, enforcement of such a regulatory requirement would be impractical.

Available information from three case studies of voluntary captains' communication programs supports the inference that voluntary communication programs have substantially reduced fisheries bycatch and provided large economic benefits that outweigh the relatively nominal operating costs (Martin *et al.*, 2005). For this communication strategy to be effective, the exchange of information must be timely, the entire fleet in a region must cooperate, and it must result in an action being taken to either avoid or reduce bycatch (e.g., captains need to describe the nature of their protected species interactions, discuss the results of any mitigation or safe handling/release measures used, and share best practices).

Atlantic pelagic longline fishermen are already motivated to avoid interactions with marine mammals, as these interactions can result in significant economic loss due to loss of both target catch and gear from depredation and entanglements, respectively. Marine mammal interactions also represent a safety risk to vessel operators and crew, as pilot whales caught in gear can be very dangerous due to their size and strength. For these reasons, NMFS believes outreach would be more effective in this fishery. Therefore, NMFS will work instead with CHSRA researchers and fishermen to encourage captains' communications in the CHSRA through voluntary cooperation and as part of ongoing research.

#### *Mainlength Line*

NMFS proposes, in accordance with the PLTRT recommendation, to set a 20-nm (37.02-km) upper limit on mainline length for all pelagic longline sets within the MAB, including the

CHSRA. Operators of individual fishing vessels would be allowed to fish multiple sets at one time, if they so desired, but the mainline length for each set could not exceed 20 nm (37.02 km).

The predictive model developed for pilot whales was used to explore the potential effects of a mandated reduction in mainline length to less than or equal to 20 nm (37.02 km). Of the potential changes to fishing gear discussed by the PLTRT, this management measure was the only one to have a significant effect on pilot whale interactions. The predictive model estimates a reduction in pilot whale interactions of approximately 26 percent when longlines in the MAB are limited to less than 20 nm (37.02 km) in length. This reduction assumes that fishermen will sometimes fish additional sets to compensate for hooks lost by limiting mainline length to 20 nm (37.02 km). The PLTRT considered a 50 percent compensation in fishing effort for lost hooks a reasonable scenario.

At NMFS' discretion, per the PLTRT's recommendation, NMFS may waive this restriction in the CHSRA in specific cases to support research for reducing bycatch of marine mammals in the pelagic longline fishery. In cases where NMFS intends to waive this restriction, NMFS will consult with the PLTRT and publish a notice of the decision in the **Federal Register**.

#### *Careful Handling and Release Guidelines Posting Requirement*

The PLTRT recommended NMFS develop and publish an informational placard that must be displayed in the wheelhouse and on the working deck of all active pelagic longline vessels in the Atlantic fishery. The placard would be based on the existing marine mammal careful handling and release guidelines for pelagic longline gear. The PLTRT specified the placard should draw on information presented in a mandatory certification program and reference filling out a Marine Mammal Injury and Mortality Reporting Form for every marine mammal interaction as required by MMPA section 118(e) and 50 CFR 229.6.

NMFS proposes to implement this PLTRT recommendation. NMFS believes this proposed action would facilitate the careful handling and release of any pilot whale, Risso's dolphin, or other small cetacean caught incidentally during pelagic longline fishing. The posting requirement would ensure NMFS' guidelines are readily available for reference during a capture or entanglement event.

### Proposed Non-regulatory Measures

The PLTRT recommended implementing the following non-regulatory measures: (1) Provide for 12 to 15 percent observer coverage throughout all Atlantic pelagic longline fisheries that interact with pilot whales or Risso's dolphins; (2) encourage vessel operators (i.e., captains) throughout the fishery to maintain daily communications with other local vessel captains regarding protected species interactions, with the goal of identifying and exchanging information relevant to avoiding protected species bycatch; (3) update careful handling/release guidelines, equipment, and methods; and (4) provide quarterly reports of marine mammal interactions in the pelagic longline fishery to the PLTRT.

#### *Increased Observer Coverage*

The PLTRT recommended NMFS increase observer coverage to 12 to 15 percent throughout all Atlantic pelagic longline fisheries that interact with pilot whales and Risso's dolphins to ensure representative sampling of fishing effort. They specified sampling should be designed to achieve statistical reliability of marine mammal bycatch estimates and should also take into account the objectives of marine mammal bycatch reduction. If resources are not available to provide such observer coverage for all fisheries, regions, and seasons, the PLTRT recommended NMFS allocate observer coverage to fisheries, regions, and seasons with the highest observed or reported bycatch rates of pilot whales. The PLTRT recommended additional coverage be achieved by either increasing the number of NMFS observers who have been specially trained to collect additional information supporting marine mammal research, or by allowing designated and specially-trained "marine mammal observers" (deployed by either NMFS or cooperating researchers) who would supplement the traditional observer coverage.

NMFS proposes to implement this recommendation within the constraints of available funding. A simulation analysis evaluating the effects of increased observer coverage on the precision of bycatch estimates indicated: (1) 12 to 15 percent observer coverage would result in the most significant gains in precision, (2) setting a higher target in this range would "guard" against unforeseen problems placing observers on vessels, and (3) further increases in coverage would yield relatively little additional precision despite significantly higher costs. Pilot whales are primarily

observed to interact with the longline fishery in the MAB and Northeast Coastal areas; Risso's dolphins interact with the fishery in these areas as well as the Northeast Distant area. Based on these observations, NMFS proposes to, within the constraints of available funding, increase observer coverage to 12 to 15 percent, in order of priority, in the (1) CHSRA, (2) MAB, and (3) other areas, such as Northeast Coastal. While this measure is geared towards improving the precision of serious injury and mortality estimates, additional coverage would also better characterize fishing operations and marine mammal behavior, facilitate collection of data needed for research, and increase opportunities to collect biopsy samples from hooked or entangled marine mammals.

#### *Captains' Communications*

The PLTRT recommended NMFS encourage vessel operators (i.e., captains) to maintain daily communication with other local vessel operators regarding protected species interactions throughout the Atlantic pelagic longline fishery with the goal of identifying and exchanging information relevant to avoiding protected species bycatch. Captains' communication were considered as both a strategy for avoiding marine mammals' exposure to vessels and gear and as a strategy for reducing the probability of an interaction once marine mammals are in the vicinity of the gear.

NMFS is proposing to implement this non-regulatory recommendation. The basis for NMFS' support of a voluntary captains' communications program is provided in the discussion of the CHSRA.

#### *Careful Handling and Release Guidelines*

The PLTRT recommended NMFS update the guidelines for careful handling and release of entangled or hooked marine mammals. They recommended NMFS' guidelines include descriptions of appropriate equipment and methods. They also encouraged both NMFS and the pelagic longline industry to develop new technologies, equipment, and methods for safer and more effective handling and release of entangled or hooked marine mammals. They recommended developments be evaluated carefully and incorporated into revised guidelines for careful handling and release of marine mammals when appropriate.

In the winter of 2006, in preparation for the workshops for HMS fishermen, NMFS worked with the PLTRT and other NMFS staff in updating a

preexisting placard to reflect the best available information on careful handling and release of marine mammals. This version of the placard has been distributed at the training workshops in 2007 and 2008. NMFS proposes to periodically update the guidelines per the PLTRT's recommendation, based on any new technologies, equipment, and methods for safer and more effective handling and release of entangled or hooked marine mammals.

#### *Additional Research and Data Collection*

The PLTRT also recommended short-, medium-, and long-duration research and data collection goals designed to enhance the success of the PLTRP. While the predictive model provided tremendous guidance to the PLTRT, there is a significant lack of information concerning how pilot whales and Risso's dolphins interact with the pelagic longline fishery. Thus, many of the research recommendations are general in scope and applicable to both pilot whales and Risso's dolphins unless specified otherwise. The complete list of these recommendations can be found in Section IX of the Draft PLTRP (PLTRT, 2006). The PLTRT recommended that priority be given to: (1) research on species that are closest to or exceed PBR levels; (2) research to evaluate the effects of implemented management measures, and (3) research on species specific abundance, mortality, and post-hooking survivorship. The PLTRT also recommended that, as funds become available for pelagic longline take reduction-related research, a subgroup of the PLTRT be convened to advise on selection of research projects based on priorities and the amount of funds available.

NMFS proposes to pursue the additional research and data collection goals outlined by the PLTRT, within the constraints of available funding. Further, NMFS proposes to consider the PLTRT's recommendations for additional research and data collection when establishing NMFS' funding priorities. NMFS would follow the recommendations to the extent that good scientific practice and resources allow. As feasible and appropriate, NMFS would consult with PLTRT members during this process.

#### *Adaptive Management and Monitoring*

The proposed PLTRP takes a stepwise, adaptive management approach to achieving the long-term goal of reducing, within five years of its implementation, serious injuries and

mortalities of pilot whales and Risso's dolphins in the Atlantic pelagic longline fishery to insignificant levels approaching a zero mortality and serious injury rate. A series of monitoring and evaluation steps are built into the five-year implementation phase of the proposed PLTRP.

Under the proposed PLTRP, the PLTRT will periodically: (1) analyze the status of scientific information on pilot whales and Risso's dolphins, (2) evaluate the effectiveness of the PLTRP, and (3) adjust the PLTRP's management measures and research program, as appropriate, to ensure that the goal of the PLTRP will be met within 5 years of its implementation. Per the PLTRT's request, NMFS will provide any updates available on the following types of information to inform these periodic assessments: (1) Status of PLTRP implementation, (2) SARs; (3) habitat analyses; (4) data collection and research findings; (5) voluntary efforts carried out by the pelagic longline industry; (6) status of observer coverage; and (7) predictive model results for pilot whales and Risso's dolphins, based on updated data.

The timing of these assessments would be tied to both the availability of data and the time needed to adequately evaluate the effectiveness of management measures or the results of the research program. As requested by the PLTRT, NMFS will provide them with quarterly reports of bycatch of marine mammals in the pelagic longline fishery. The quarterly reports will help determine when it will be timely and useful for the PLTRT to reconvene. In conjunction with the receipt of quarterly bycatch reports, the PLTRT agreed to assess the merits of convening future PLTRT meetings, either in-person or by teleconference.

#### Public Comments Solicited

NMFS is soliciting comments on any aspect of this proposed rule, including the development and implementation of the PLTRP pursuant to MMPA section 118(f)(1) and the specific regulatory and non-regulatory measures proposed. NMFS is particularly interested in comments concerning (1) NMFS' view that the level of bycatch signifies a high level of bycatch in the Atlantic pelagic longline fishery across a number of marine mammal stocks, warranting the development and implementation of a take reduction plan for pilot whale and Risso's dolphin stocks, (2) NMFS' decision to implement the PLTRT's recommendation for a mandatory certification program using NMFS' existing authority at 50 CFR 635.8, Workshops, (3) the research

recommendations and priorities for better understanding how pilot whales and Risso's dolphins interact with longline gear, as well as for assessing current and potential management measures, (4) the CHSRA requirements, (5) expected fishing effort compensation under the proposed mainline length restriction, and (6) information on careful handling and release of marine mammals.

#### Classification

NMFS determined that this action is consistent to the maximum extent practicable with the enforceable policies of the approved coastal management programs of North Carolina, Virginia, Maryland, Delaware, New Jersey, New York, Connecticut, Rhode Island, and Massachusetts. This determination has been submitted for review by the responsible state agencies under section 307 of the Coastal Zone Management Act.

This proposed rule does not contain policies with federalism implications under Executive Order 13132.

This proposed rule has been determined to be not significant under Executive Order 12866.

NMFS prepared an initial regulatory flexibility analysis (IRFA), pursuant to section 603 of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), that describes the economic impact this proposed rule, if adopted, would have on small entities. A description of the action, why it is being considered, and its legal basis are included in the preamble of this proposed rule. A summary of the analysis follows. For a copy of this analysis, see the ADDRESSES section.

NMFS considers all HMS permit holders to be small entities because they either had average annual receipts less than \$4.0 million for fish-harvesting, average annual receipts less than \$6.5 million for charter/party boats, 100 or fewer employees for wholesale dealers, or 500 or fewer employees for seafood processors. These are the Small Business Administration (SBA) size standards for defining a small versus large business entity in this industry. An "active" pelagic longline vessel is considered to be a vessel that reported pelagic longline activity in the HMS logbook. The number of active HMS pelagic longline vessels has been precipitously decreasing since 1994. In the MAB, only 85 unique pelagic longline vessels reported effort between 2001 and 2006. The number of vessels fishing in the MAB has declined in recent years, and between 2003 and 2006, the number of vessels reporting effort in the MAB ranged between 38 and 41.

The alternatives considered and analyzed include four options. Alternative 1 (the no action alternative) would maintain the status quo management for the pelagic longline fishery under the HMS FMP. Alternative 2 would implement only the non-regulatory components recommended in the Draft PLTRP, while allowing time for collecting additional scientific data prior to implementing regulatory measures. Alternative 3, the preferred alternative, would limit the mainline length to 20 nm or less within the MAB, designate the CHSRA with associated observer and research participation requirements, and require all pelagic longline vessels to post an informational placard on careful handling and release of marine mammals. Alternative 4 would include a six-month closure (July-December) of the southern MAB sub-regional area and a year-round mainline length reduction throughout the MAB, inclusive of that sub-regional area.

Under the status quo alternative, it is estimated that the Atlantic pelagic longline fleet generates an estimated \$24.6 million in revenues. Applying average species weights reported to dealers in 2004 and the average 2006 ex-vessel prices reported by dealers in the MAB region, NMFS estimated the potential change in fishery revenues from the mainline length restriction, depending on the level of compensation in fishing effort, to range from an increase of \$777,747 (full compensation in the number of hooks fished) to a loss of \$819,523 (no compensation in the number of hooks fished), with an estimated loss of \$239,383 with 50 percent compensation in the number of hooks fished. This change in revenues would impact 41 or fewer vessels per year based on current trends in the number of active pelagic longline vessels and the number of vessels that operated in the MAB in 2006. If one assumes that 41 vessels are affected by this restriction, then the estimated annual impact per vessel ranges from an increase of \$18,969 per vessel to a decrease of \$19,988 per vessel, with an estimated decrease of \$5,838 under the most likely scenarios (50 percent compensation in fishing effort).

The economic costs of Alternative 4 were evaluated based upon historical observed catch rates and reported effort in the MAB fishing area only for the period 2002 to 2004. The impact of the closure of the southern region of the MAB from July-December was estimated by assuming no catch in that area, resulting in a total estimated cost of \$770,000. The combined effect of the 6-month closure and the mainline length



restriction through the MAB resulted in an estimated cost of \$1.64 million, reflecting only lost catch and assuming no compensation or redistribution of effort. The reduction in revenues would impact 41 or fewer vessels per year based on the current trends in the number of active pelagic longline vessels and the number of vessels that operated in the MAB in 2006. If one assumes that 41 vessels would be affected by this restriction, then per vessel impacts are estimated to be \$40,000.

Alternative 1 (the no action alternative) and Alternative 2 were not selected because they were not expected to meet the conservation objectives of the proposed rule or the goals in MMPA section 118. Both Alternative 3 and Alternative 4 would meet the objectives of the proposed rule. Alternative 4 was not selected because, although it would meet objectives of the proposed rule, it would likely result in larger economic impacts to small entities than the preferred alternative.

#### References Cited

A complete list of all references cited in this proposed rule can be found on the PLTRT website at <http://www.nmfs.noaa.gov/pr/interactions/trt/teams.htm#pl-trt.htm> and the NMFS Southeast Regional Office website at <http://sero.nmfs.noaa.gov/pr/pr.htm>, and is available upon request from the NMFS Southeast Regional Office in St. Petersburg, FL (see ADDRESSES).

#### List of Subjects in 50 CFR Part 229

Administrative practice and procedure, Fisheries, Reporting and recordkeeping requirements.

Dated: June 18, 2008.

John Oliver,

Deputy Assistant Administrator for Operations, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 229 is proposed to be amended as follows:

#### PART 229—AUTHORIZATION FOR COMMERCIAL FISHERIES UNDER THE MARINE MAMMAL PROTECTION ACT OF 1972

1. The authority citation for part 229 continues to read as follows:

**Authority:** 16 U.S.C. 1361 *et seq.*

2. In subpart A, § 229.3, paragraphs (t) and (u) are added to read as follows:

##### § 229.3 Prohibitions.

\* \* \* \* \*

(t) It is prohibited to deploy or fish with pelagic longline gear in the Mid-Atlantic Bight unless the vessel:

(1) Complies with the placard posting requirement specified in § 229.36(c); and

(2) Complies with the gear restrictions specified in § 229.36(e).

(u) It is prohibited to deploy or fish with pelagic longline gear in the CHSRA or to transit through the CHSRA with pelagic longline gear onboard unless the vessel is in compliance with the observer and research requirements specified in § 229.36(d).

3. In subpart C, § 229.36 is added to read as follows:

##### § 229.36 Atlantic Pelagic Longline Take Reduction Plan (PLTRP).

(a) *Purpose and scope.* The purpose of this section is to implement the PLTRP to reduce incidental mortality and serious injury of long-finned and short-finned pilot whales and Risso's dolphins in the Atlantic pelagic longline fishery off the U.S. east coast, a component of the Atlantic Ocean, Caribbean, Gulf of Mexico large pelagics longline fishery, as delineated on the MMPA List of Fisheries.

(1) *Persons subject to this section.* The regulations in this section apply to the owner and operator of any vessel that has been issued or is required to be issued an Atlantic HMS tunas, swordfish, or shark permit under § 635.4 or § 635.32 and that has pelagic longline gear onboard as defined under § 635.21(c).

(2) *Geographic scope.* The geographic scope of the PLTRP is the Atlantic federal EEZ off the U.S. East Coast. The regulations specified in paragraphs (b) through (e) of this section apply to all U.S. Atlantic pelagic longline vessels operating in the EEZ portion of the Mid-Atlantic Bight.

(b) *Definitions.* In addition to the definitions contained in the MMPA and §§ 216.3 and 229.2 of this chapter, the following definitions apply.

(1) *CHSRA (Cape Hatteras Special Research Area)* means all waters inside and including the rectangular boundary described by the following lines: 35° N. lat., 75° W. long., 36° 25' N. lat., and 74° 35' W. long.

(2) *Mid-Atlantic Bight* means the area bounded by straight lines connecting the mid-Atlantic states' internal waters and extending to 71° W. long. between 35° N. lat. and 43° N. lat.

(3) *Observer* means an individual authorized by NMFS, or a designated contractor, placed aboard a commercial fishing vessel, to record information on marine mammal interactions, fishing operations, marine mammal life history information, and other scientific data; to collect biological specimens; and to perform other scientific investigations.

(4) *Pelagic longline* has the same meaning as in § 635.2 of this title.

(c) *Marine Mammal Handling and Release Placard.* The placard, "Marine Mammal Handling/Release Guidelines: A Quick Reference for Atlantic Pelagic Longline Gear," must be kept posted inside the wheelhouse and on the working deck. You may contact the NMFS Southeast Regional Office at (727) 824-5312 to request additional copies of the placard.

(d) *CHSRA*—(1) *Special observer requirements.* If you deploy or fish with pelagic longline gear in the CHSRA or transit through the CHSRA with pelagic longline gear onboard, or intend to do so, you must call NMFS Southeast Fisheries Science Center, 1-800-858-0624, at least 48 hours prior to embarking on your trip. This requirement is in addition to any existing selection and notification requirement for observer coverage by the Pelagic Observer Program. If you are assigned an observer, you must take the observer during that trip. If you do not take the observer, you are prohibited from deploying or fishing with pelagic longline gear in the CHSRA or transiting through the CHSRA with pelagic longline gear onboard. You must comply with all provisions of § 229.7, Monitoring of incidental mortalities and serious injuries. In addition, all provisions of § 600.746, Observers, apply. No waivers will be granted under § 229.7(c)(3) or § 600.746(f). A vessel that would otherwise be required to carry an observer, but is inadequate or unsafe for purposes of carrying an observer and for allowing operation of normal observer functions, is prohibited from deploying or fishing with pelagic longline gear in the CHSRA or transiting through the CHSRA with pelagic longline gear onboard.

(2) *Special research requirements.* In addition to observing normal fishing activities, observers may conduct additional scientific investigations aboard your vessel designed to support the goals of the PLTRP. The observer will inform you of the specific additional investigations that may be conducted during your trip. An observer may direct you to modify your fishing behavior, gear, or both. Instead of carrying an observer, you may be required to carry and deploy gear provided by NMFS or an observer or modify your fishing practices. By calling in per § 229.36(d)(1), you are agreeing to take an observer. You are also acknowledging you are both willing and able to participate in research, as per this paragraph, in the CHSRA consistent with the PLTRP without any compensation. If you are assigned any



special research requirements, you must participate in the research for the duration of the assignment. If you do not participate in the research, you are prohibited from deploying or fishing with pelagic longline gear in the CHSRA or transiting through the CHSRA with pelagic longline gear onboard.

(e) *Gear restrictions.* No person may deploy a pelagic longline that exceeds 20 nautical miles (nm) (37.04 km) in length in the Mid-Atlantic Bight, including in the CHSRA, unless they have a written letter of authorization from the Director, NMFS Southeast Fishery Science Center to use a pelagic

longline exceeding 20 nm in the CHSRA in support research for reducing bycatch of marine mammals in the pelagic longline fishery.

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