

Dated: December 8, 1998.

**William N. Rhea,**

*Acting Regional Administrator, Region 6.*

[FR Doc. 99-20 Filed 1-4-99; 8:45 am]

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## ENVIRONMENTAL PROTECTION AGENCY

### 40 CFR Part 52

[KY98-1-9808b: FRL-6199-2]

#### Approval and Promulgation of Air Quality Implementation Plans; Kentucky; Basic Motor Vehicle Inspection and Maintenance Program

**AGENCY:** Environmental Protection Agency (EPA).

**ACTION:** Proposed rule.

**SUMMARY:** The EPA is approving the State Implementation Plan (SIP) revision submitted on November 10, 1997, by the Commonwealth of Kentucky, through the Kentucky Natural Resources and Environmental Protection Cabinet. This revision modifies the implementation of a basic motor vehicle inspection and maintenance (I/M) program in Jefferson County, Kentucky, to require loaded mode testing of vehicles instead of the current idle testing. In the final rules section of this **Federal Register**, the EPA is approving the Commonwealth's SIP revision as a direct final rule without prior proposal because the Agency views this as a noncontroversial revision and anticipates no adverse comments. A detailed rationale for the approval is set forth in the direct final rule. If no adverse comments are received in response to this rule, no further activity is contemplated in relation to this proposed rule. If EPA receives adverse comments, the direct final rule will be withdrawn and all public comments received will be addressed in a subsequent final rule based on this proposed rule. The EPA will not institute a second comment period on this document. Any parties interested in commenting on this action should do so at this time.

**DATES:** To be considered, comments must be received by February 4, 1999.

**ADDRESSES:** Written comments should be addressed to: Dale Aspy at the EPA Regional office listed below.

Copies of the documents relative to this action are available for public inspection during normal business hours at the following locations. The interested persons wanting to examine these documents should make an appointment with the appropriate office at least 24 hours before the visiting day.

Air and Radiation Docket and Information Center (Air Docket), U.S. Environmental Protection Agency, 401 M Street, SW, Washington, DC 20460.

Environmental Protection Agency, Region 4, Air Programs Branch, 61 Forsyth Street, Atlanta, Georgia 30303.

Air Pollution Control District of Jefferson County, 850 Barrett Avenue, Suite 205, Louisville, Kentucky 40204.

Division for Air Quality, Department for Environmental Protection, Natural Resources and Environmental Protection Cabinet, 316 St. Clair Mall, Frankfort, Kentucky 40601.

**FOR FURTHER INFORMATION CONTACT:** Dale Aspy, Regulatory Planning Section, Air Planning Branch, Air, Pesticides & Toxics Management Division, Environmental Protection Agency, Region 4, 61 Forsyth Street, Atlanta, Georgia 30303. The telephone number is (404) 562-9041. Reference file KY98-1-9808.

**SUPPLEMENTARY INFORMATION:** For additional information see the direct final rule which is published in the rules section of this **Federal Register**.

Dated: November 5, 1998.

**A. Stanley Mieburg,**

*Acting Regional Administrator, Region 4.*

[FR Doc. 99-18 Filed 1-4-99; 8:45 am]

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 227

[Docket No. 981231331-8331-01; I.D. 122898G]

#### Threatened Fish and Wildlife; Listing of the Gulf of Maine/Bay of Fundy Population of Harbor Porpoise as Threatened Under the Endangered Species Act (ESA)

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

**ACTION:** Proposed rule; withdrawal.

**SUMMARY:** NMFS has determined that listing of the Gulf of Maine/Bay of Fundy (GOM/BOF) population of harbor porpoise, *Phocoena phocoena*, as threatened under the ESA is not warranted at this time. Therefore, NMFS withdraws the January 7, 1993, proposal to list the GOM/BOF population of harbor porpoise as threatened under the ESA. Since publication of the proposal to list, additional information regarding the status of the GOM/BOF harbor

porpoise population, its commercial fishery bycatch rate, and management actions implemented to reduce harbor porpoise bycatch have become available to justify reevaluation of the factors that prompted the original proposed listing.

**ADDRESSES:** Requests for copies of this determination or a complete list of references should be addressed to the Chief, Marine Mammal Division (PR2), Office of Protected Resources, NMFS, 1315 East-West Highway, Silver Spring, MD 20910.

**FOR FURTHER INFORMATION CONTACT:** Margot Bohan, F/PR2, NMFS, (301) 713-2322, Laurie Allen, Northeast Region, NMFS, (978) 281-9291, or Kathy Wang, Southeast Region, NMFS, (727) 570-5312.

#### SUPPLEMENTARY INFORMATION:

##### Background

Prompted by 1989 and 1990 data indicating that the rate of harbor porpoise bycatch in the gillnet fishery was large relative to the available estimates of harbor porpoise abundance in the GOM/BOF, NMFS announced its intent on February 12, 1991, to review the status of harbor porpoise in U.S. waters for possible listing as threatened or endangered under the ESA. At the time that NMFS was reviewing harbor porpoise status, the Sierra Club Legal Defense Fund, on behalf of the International Wildlife Coalition and 12 other organizations, pursuant to 16 U.S.C. 1533(b), submitted a petition to NMFS (September 18, 1991) to add the GOM/BOF harbor porpoise population to the U.S. List of Endangered and Threatened Wildlife (50 CFR part 17), as a threatened species. NMFS determined that the petition presented substantial information indicating that the petitioned action might be warranted (56 FR 65044, Dec. 13, 1991). Under section 4(b)(3)(A) of the ESA, if a petition is found to present such information, a review of the status of the species concerned is mandated. To ensure a comprehensive status review, NMFS solicited information and comments specific to harbor porpoise in the GOM/BOF and adjacent waters.

On May 5-8, 1992, NMFS conducted a workshop to review the status of the GOM/BOF harbor porpoise and adjacent populations (as described in Gaskin, 1984) offshore eastern North America (NMFS, 1992). Participants at that workshop reviewed the best available scientific data on the population structure, abundance, reproductive rates, and levels of bycatch for each of the populations considered. The information reviewed during the harbor porpoise workshop and that received

during the request for information as part of the status review provided NMFS with the scientific information necessary to complete the status review and respond to the petition. NMFS concluded that the harbor porpoise in the GOM/BOF represented a population sufficiently discrete to justify management as a separate population under the ESA. The GOM/BOF population, as proposed, included all harbor porpoise whose range extended throughout waters of eastern North America from (and including) the BOF, Nova Scotia, south to eastern Florida.

NMFS further concluded that the level of bycatch in the Northeast multispecies sink-gillnet fishery, as well as the known, but not quantified, level of bycatch outside the GOM including the Canadian BOF multispecies gillnet fishery, and the coastal southern New England/Mid-Atlantic gillnet fisheries were a threat to the GOM/BOF harbor porpoise throughout all or a significant portion of its range. The bycatch-to-abundance ratio indicated that the estimated bycatch by these fisheries needed to be reduced by more than 50 percent to be sustained by the present GOM/BOF harbor porpoise population. The regulatory measures in place at the time were considered inadequate to reduce this bycatch. As a result, NMFS proposed, in accordance with section 4(b)(3)(B) of the ESA, to list the GOM/BOF population of harbor porpoise as threatened under the ESA and provided for a 90-day comment period (58 FR 3108, January 7, 1993).

Following publication of the proposed rule, NMFS received several comments requesting that public hearings be held throughout New England. In response to these requests, NMFS extended the comment period on the proposed rule until August 7, 1993 (58 FR 17569, April 5, 1993).

During the extended comment period, NMFS completed analyses of data from the 1992 harbor porpoise abundance surveys to estimate abundance and analyses of the 1992 observer data used to estimate total bycatch in the Northeast multispecies sink-gillnet fishery. These analyses were presented and discussed at a meeting of the NEFMC Groundfish Committee, Harbor Porpoise Subgroup, on June 16, 1993. The information presented indicated a decline in the bycatch between 1990 and 1992 and an increased abundance estimate in 1992 over 1991. Following this meeting (in a letter dated August 7, 1994), NEFMC requested a 6-month extension of the final decision-making period on the proposal to list harbor porpoise. An extension was appropriate because, according to NEFMC and

others present at the June 16 meeting, the data presented by NMFS suggested that the GOM/BOF harbor porpoise population was not distinct and, thus, was not a species under the ESA.

Under section 4 of the ESA, if there is a substantial disagreement regarding the sufficiency or accuracy of the available data relevant to the determination or revision concerned, NMFS may extend, for up to 6 months, the 1-year period of determination. On November 8, 1993 (58 FR 59230), in accordance with this provision, the date for the final determination on the proposal to list was extended for 6 months to allow for further data accrual and analyses regarding the harbor porpoise stock structure. In addition, during this extension, NMFS conducted further review of the bycatch trend, analysis of the 1993 bycatch data prior to final determination, and further consideration of all data, including the abundance survey data, relevant to the final determination. NMFS reopened the comment period for an additional 30 days (to close on August 11, 1994) to allow for public comment following completion of these analyses (59 FR 36158, July 15, 1994).

The New England Harbor Porpoise Working Group (HPWG) met on July 21, 1994, to discuss the 1992 bycatch data under consideration regarding the ESA listing proposal. The HPWG, formed in 1990, was composed of fishermen, environmentalists, and scientists whose purpose was to define the extent of the harbor porpoise problem and to identify solutions to reduce the incidental take of harbor porpoise in gillnets and to minimize the impacts on the fishery. The HPWG recommended that the updated bycatch estimates should be more fully explained so that public review and comment could provide more meaningful input to NMFS prior to the final listing determination. NMFS prepared a document in August 1994 that addressed HPWG concerns. The comment period on the proposed listing was scheduled to close on August 11, 1994, which would not have allowed enough time for public review of the NMFS document regarding HPWG concerns; therefore, the comment period on the proposed rule was further extended until September 11, 1994 (59 FR 41270). Additional meetings with conservation groups resulted in a decision to wait for 1995 data prior to proceeding with a listing determination.

NMFS had not yet made a final determination when, in fiscal year 1996, Congress imposed a 1-year moratorium on listing species under the ESA. During 1997 and 1998, NMFS has kept the listing issue under review in light of

new population abundance and bycatch data, ongoing Fishery Management Council and NMFS fishery management efforts to reduce harbor porpoise bycatch, and the MMPA Section 118 Take Reduction Team (TRT) process. New bycatch data, new fishery regulations, and implementation of the HPTRP provide substantial new information to be considered in making the final listing determination. For a fuller discussion of the new data and management implementations, see the section below entitled "Summary of ESA Factors Affecting the Species".

#### Summary of Comments and Responses

Several significant comment period extensions and reopenings have occurred since publication of the original proposal to list GOM/BOF harbor porpoise. Recently, due to the passage of time, the availability of new/additional information and the desire to review the best scientific information available during the decision-making process, a document was published (63 FR 56596, October 22, 1998) in the **Federal Register** to reopen the comment period on the proposed listing of the GOM/BOF population of harbor porpoise for 30 days. This document summarized information that has become available since publication of the proposed rule to supplement our understanding of the species' status and factors affecting the species. The following comments and responses address existing concerns regarding the proposed listing of GOM/BOF porpoise under the ESA.

#### *Comment on Definition of Distinct Population or "Species"*

**Comment 1:** To consider harbor porpoise in the GOM/BOF for ESA listing, that group of animals needs to qualify as a distinct population or "species" under the ESA. Until recently, questions remained as to whether harbor porpoise in the GOM/BOF qualify for protection under the ESA's definition of "species."

**Response:** On February 7, 1996, NMFS and the U.S. Fish and Wildlife Service (USFWS) published a policy to clarify their interpretation of the phrase "distinct population segment of any species of vertebrate fish or wildlife" for the purposes of listing, delisting, and reclassifying species under the ESA (61 FR 4722).

The policy outlines three elements to be considered in deciding the status of a possible distinct population segment as endangered or threatened under the ESA: (1) Discreteness of the population segment in relation to the remainder of the species to which it belongs; (2) the

significance of the population segment to the species to which it belongs; (3) the population segment's conservation status in relation to ESA standards for listing (i.e., is the population segment, when treated as if it were a species, endangered or threatened?).

**Discreteness.** A population segment of a vertebrate species may be considered discrete if it satisfies either one of the following conditions: (a) It is markedly separated from other populations of the same taxon as a consequence of physical, physiological, ecological, or behavioral factors (quantitative measures of genetic or morphological discontinuity may provide evidence of this separation); or (b) it is delimited by international governmental boundaries within which differences in control of exploitation, management of habitat, conservation status, or regulatory mechanisms exist that are significant in light of section 4(a)(1)(D) of the ESA.

The former criterion is particularly relevant for GOM/BOF harbor porpoise. Seasonal movements into the northern GOM/BOF during summer, the known summer reproductive periodicity and spatial segregation from other conspecific groups, and the subsequent dispersal during late fall and winter from the GOM south to at least North Carolina strongly suggest a unified, single breeding assemblage. All lines of biological evidence (genetic, life history, organochlorine, heavy metal and movement data) strongly support a species status recognition under the ESA.

**Significance.** If a population segment is considered discrete under one or more of the above conditions, its biological and ecological significance should then be considered. NMFS, therefore, considered available scientific evidence of the discrete population segment's importance to the taxon to which it belongs. This consideration included, but was not limited to, the following: (a) Persistence of the discrete population segment in an ecological setting unusual or unique for this taxon; (b) evidence that loss of the discrete population segment would result in a significant gap in the range of a taxon; (c) evidence that the discrete population segment represents the only surviving natural occurrence of a taxon that may be more abundant elsewhere as an introduced population outside its historical range; or (d) evidence that the discrete population segment differs markedly from other populations of the species in its genetic characteristics.

Specifically, the GOM/BOF population of harbor porpoise is an important upper trophic level predator in the GOM and there is a significant

genetic difference between the GOM/BOF population of harbor porpoises and the Gulf of St. Lawrence and Newfoundland harbor porpoises. This difference is even greater when considering only females, thus indicating that females are more site-specific to the GOM/BOF than are males (Wang et al. 1996).

Harbor porpoise that concentrate in the GOM/BOF during the reproductive season also occupy shelf water habitat of the eastern United States during other times of the year. Therefore, the viability of harbor porpoise in shelf waters of the eastern U.S. is strongly dependent on the existence of a healthy, reproductive population of harbor porpoise in the GOM/BOF.

Based on current information available to NMFS, the only supportable decision that can be reached is that the harbor porpoise that occur in the GOM and BOF do represent a distinct population segment and, therefore, a species under section 3(15) of the ESA.

**Status.** If a population segment is discrete and significant (i.e., it is a distinct population segment), its evaluation for an endangered or threatened status will be primarily based on a review of the factors enumerated in ESA section 4(a) after taking into account conservation efforts implemented pursuant to section 4(b)(1)(A). In the next several sections of this document, the conservation status of GOM/BOF harbor porpoise is evaluated and discussed within these contexts.

#### *Comments on the Need for the ESA Threatened Listing*

**Comment 2:** Several commenters support a final determination to list the GOM/BOF harbor porpoise as threatened under the ESA. According to these commenters, the factors that formed the basis for the proposed listing still exist, and the current mortality rate is not sustainable.

**Response:** NMFS has implemented appropriate conservation strategies that are expected to reduce bycatch to the extent that an ESA listing is unnecessary. NMFS recognizes that the fishery bycatch rate has not yet been reduced to a sustainable level. However, it appears that bycatch levels are on a downward trend due to bycatch reduction measures currently in place as a result of state, Federal and Canadian fishery management. In particular, the HPTRP is in place and is expected to reduce bycatch below the potential biological removal (PBR) level for harbor porpoise. Based on available data, the current times and areas of protective coverage are broad-based and

demonstrate that the HPTRP can expect to reach its goal without placing additional burdens on the fishery.

**Comment 3:** Several commenters are opposed to a determination to list at this time, in light of NMFS' intent to implement an HPTRP to take effect in December 1998.

**Response:** NMFS agrees that an ESA listing at this time is not warranted. Federal legislative and regulatory actions have been taken in the U.S. to protect the GOM/BOF harbor porpoise. NMFS expects that the recently implemented HPTRP will provide the measures and mechanisms necessary to assure that harbor porpoises do not become threatened as a result of fishing practices. Also, Canada has begun to address the need for bycatch mitigation in the Canadian BOF.

**Comment 4:** One commenter proposed that listing harbor porpoise as a threatened species in North Carolina waters is not necessary for the protection of this species. Although a small number of harbor porpoise, five to be exact, were taken during observer trips off North Carolina, the commenter explained that these porpoises were taken by large mesh monkfish gillnets or dogfish gillnets, which will be eliminated from North Carolina waters in the near future as a result of fishery management plan restrictions and stock rebuilding measures. Furthermore, observer data indicate, at most, a remote likelihood that the state's traditional small net gillnet fishery would cause incidental mortality or serious injury.

**Response:** NMFS has determined that an ESA threatened listing is not warranted at this time.

#### *Comments on Bycatch Reduction Measures*

The final rule that implements the HPTRP (63 FR 66464, December 2, 1998) contains a number of comments/responses on bycatch reduction measures.

**Comment 5:** Several commenters claimed that NMFS has failed to take necessary actions under the MMPA or ESA to protect the GOM/BOF harbor porpoise. Another commenter supported and urged NMFS to follow through with the adoption of a bycatch reduction program that incorporates reasonable management measures (such as time and area closures), with assistance directed to the gillnet fishery for gear mitigation research and field experiments.

**Response:** The final rule implementing the HPTRP (63 FR 66464, December 2, 1998), as well as the notice reopening the comment period regarding this listing determination (63

FR 56596, October 22, 1998), address management actions that were implemented and are currently in place to reduce bycatch. NMFS believes that the actions will effectively reduce the threats to the species to prevent a need for listing. A specific discussion of the Gulf of Maine and Mid-Atlantic Take Reduction Teams' progress and negotiations toward this objective is contained in the HPTRP Environmental Assessment and Final Regulatory Flexibility Act analysis (HPTRP/EA/FRFA) and the final rule (63 FR 66464, December 2, 1998) implementing the HPTRP.

*Comment 6:* Several other commenters raised concerns regarding the MMPA as a mechanism for further reducing the incidental kill of harbor porpoise. They explained that there is little assurance that the reauthorized MMPA would be successful in providing protection, especially if the GOM/BOF harbor porpoise were not listed under the ESA. They also claimed that the proposed HPTRP relies on an overly optimistic pinger effectiveness rate of 80 percent and that it does not contain sufficient closures and pinger requirements to achieve PBR. The term PBR is defined as "the maximum number of animals not including natural mortalities, that may be annually removed from a marine mammal stock without compromising the ability of the stock to reach or maintain its optimum population level. The commenters further stated that, although the MMPA provides a timetable and process by which the kill of marine mammals should be reduced to an insignificant level that approaches zero, this process is not yet in place and may or may not result in meaningful reduction in kill rates.

*Response:* Section 118(f) of the MMPA authorizes NMFS to develop take reduction plans designed to assist in the recovery or to prevent the depletion of each strategic stock which interacts with a commercial fishery. The immediate goal of a take reduction plan is to reduce the incidental mortality or serious injury of that species incidentally taken in the course of commercial fishing operations to levels less than the PBR level established for that species under MMPA section 117. The long-term goal of the take reduction plan is to reduce the level of mortality and serious injury of strategic stocks incidentally taken in the course of commercial fishing operations to a level approaching a zero mortality rate. NMFS expects the HPTRP to reduce fishery takes of harbor porpoise to below PBR within the next 6 months, thus preventing a need to list.

The overall HPTRP strategy for the GOM is a series of short, discrete, and complete closures in combination with much larger time/area closures where pinger use is required. Pingers have been proven to be effective in reducing harbor porpoise takes in gillnets; however NMFS recognizes that pingers are not 100 percent effective. Thus, the strategy for the overall HPTRP remains a combination of complete closures and pinger use. This combination is expected to reduce bycatch in those areas of high harbor porpoise bycatch through complete closures while requiring pinger use outside closure times and areas to compensate for the interannual variability of both harbor porpoise and fishing effort that may shift bycatch outside the discrete closure areas. NMFS expects these strategies to achieve adequate results without the need for additional closures.

The HPTRP is based on an overall bycatch reduction scenario that is intended to spread the bycatch reduction effort throughout the fishery where bycatch occurs; this means that a bycatch reduction measure is in place during the time period in which effort shifts might occur. It relies on each of its components working together collectively to reach MMPA PBR goals. NMFS will review harbor porpoise bycatch rates to ensure that the pinger effectiveness rate is being realized.

*Comment 7:* A commenter recommended that NMFS review the impacts of the HPTRP immediately following the first year of plan implementation to determine if consideration of an ESA listing is still warranted.

*Response:* NMFS intends to reevaluate the effectiveness of the HPTRP management measures and the effectiveness of the MMPA to achieve harbor porpoise conservation in 1999. If bycatch goals are not achieved, more restrictive measures to reduce bycatch may be warranted. NMFS and the TRTs will need to identify other measures that may reduce bycatch to MMPA-required levels.

*Comment 8:* Several commenters expressed concern that further restrictions on fishermen as a result of listing would be a significant, unnecessary hardship.

*Response:* NMFS has determined not to list GOM/BOF harbor porpoise under the ESA; therefore, no hardship would result.

*Comment 9:* The commenter stated that the current management provisions should be tested.

*Response:* NMFS intends to continually review harbor porpoise

bycatch to determine whether the time-area closures and pinger requirements are effective at reducing the bycatch to the specified levels within the designated time frame. The MMPA requires TRP evaluation at 6-month intervals and modifications as necessary.

*Comment 10:* Several comments referred to the fact that the ESA listing determination needs to take into account the bycatch in Canada as well as the bycatch in U.S. fisheries. The Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act) gives the Secretary of Commerce authority to place pressure on foreign governments who fail to take adequate steps to protect and preserve marine resources. Rather than simply focus on the U.S. fleet, the commenter suggested that pressure should be brought to bear on Canada to reduce their bycatch.

*Response:* NMFS agrees with the commenter that bycatch must be reduced throughout the range of this population. NMFS, therefore, is working with DFO-Canada, and other appropriate state and Federal agencies to develop protective measures that will result in a reduction of bycatch of the GOM/BOF harbor porpoise throughout their range. These programs are described in "Summary of Factors Affecting the Species, D. The Inadequacy of Existing Regulatory Mechanisms".

Relative to the GOM and BOF, NMFS and DFO-Canada further recognize that this issue, being transboundary, requires the cooperative efforts of both agencies if the situation is to be resolved. Toward that end, both agencies acknowledge that management and legal requirements differ in each country; however, both agencies are committed to the reduction of the incidental take of porpoise in their respective fisheries.

Furthermore, NMFS has met with representatives of the Canadian Government to discuss the HPTRP in U.S. waters and to encourage Canada to participate in reducing the overall fishing mortality on this stock. DFO-Canada developed its Harbor Porpoise Conservation Plan and has implemented an observer program that has documented a continuous reduction in bycatch in their BOF gillnet fisheries.

#### **Species Status and Factors Affecting the Species**

This final determination gives consideration to new geographic range data, population abundance and bycatch data, NEFMC/NMFS' ongoing fishery management efforts to reduce harbor porpoise bycatch, and the progress in

mortality reduction under the MMPA. Since publication of the proposed rule and as indicated in the notice reopening the comment period on the proposed rule, the following information has become available to supplement our understanding of the species' status and factors affecting the species.

#### Stock Structure (Discreteness)

Recent analyses involving mitochondrial DNA (Wang, 1996), organochlorine contaminants (Westgate, 1997), heavy metals (Johnston, 1995), and life-history parameters (Read and Hohn, 1995) support the currently accepted hypothesis of four separate distinct populations in the western North Atlantic: the Gulf of Maine/Bay of Fundy, Gulf of St. Lawrence, Newfoundland, and Greenland populations (See response to Comment 1).

#### Abundance

Three abundance surveys were conducted during the summers of 1991, 1992, and 1995. The population estimates were 37,500 in 1991, 67,500 in 1992, and 74,000 in 1995. Refer to Palka (1995a and 1996) for detailed information.

#### Summary of ESA Factors Affecting the Species

Species may be determined to be threatened or endangered due to one or more of five factors described in section 4(a)(1) of the ESA. These factors are discussed here, as they apply to the GOM/BOF harbor porpoise, in light of additional/new information that has become available since the species was originally proposed for listing.

##### A. The Present or Threatened Destruction, Modification, or Curtailment of Habitat or Range

The shoreline bordering the nearshore habitat of this species along the eastern U.S. coastline is developed in many areas and is potentially threatened with further physical modification. There is no new or additional evidence to indicate that such modification or destruction has contributed to a decline of this population or that the range of this species has changed significantly as a result of habitat loss. In addition, habitat modification does not appear to have contributed to a decline of this population. This factor was not a basis for the proposed listing.

##### B. Overutilization for Commercial, Recreational, Scientific, or Educational Purposes

One of the principal factors for proposing to list the GOM/BOF

population of harbor porpoise as threatened under the ESA was the level of harbor porpoise bycatch in commercial fisheries in the GOM/Bay of Fundy/Mid-Atlantic. GOM/BOF harbor porpoise takes have been documented in the Northeast multispecies sink gillnet, Mid-Atlantic coastal gillnet, and Atlantic pelagic drift gillnet fisheries, and in the Canadian Bay of Fundy sink gillnet fishery and herring weir fishery. The average annual mortality estimate from 1992 to 1997 for the above U.S. fisheries is 1,749 harbor porpoise. Refer to the U.S. Atlantic and Gulf of Mexico Marine Mammal Stock Assessment Report (Waring, *et al.*, 1997) and the notice reopening the comment period (63 FR 56596, October 22, 1998) for detailed fishery bycatch information. Additionally, the HPTRP EA provides detailed bycatch information for the Gulf of Maine sink gillnet and Mid-Atlantic coastal gillnet fisheries.

##### C. Disease or Predation

There is no indication that disease has had a measurable impact on GOM/BOF harbor porpoise. Likewise, there is no new evidence, since the proposed listing, to indicate that predation has contributed to the decline of GOM/BOF porpoise. This particular factor was not a basis for the proposed listing.

##### D. The Inadequacy of Existing Regulatory Mechanisms

This factor and Factor B formed the basis for the proposed listing. As discussed in the notice reopening the comment period (63 FR 56596, October 22, 1998), following are the regulatory mechanisms that have gone into effect since publication of the proposed rule.

**NMFS/NEFMC Bycatch Reduction Measures:** In 1994, as part of Amendment 5 to the NE Multispecies FMP, the NEFMC proposed, under authority of the Magnuson Fishery Conservation and Management Act (16 U.S.C. 1801 *et seq.*), a 4-year program to reduce the harbor porpoise bycatch off New England to 2 percent of the estimated harbor porpoise population size per year by phasing-in time and area closures to sink gillnet gear. NMFS adopted and implemented NEFMC's first year closure recommendations on May 25, 1994 (59 FR 26972). Harbor porpoise bycatch rates increased in 1994 despite the new time-area gillnet fishing closures enacted by NMFS on May 25, 1994, therefore, NMFS expanded both the time and area of the fall closure around an area of high bycatch called Jeffreys ledge (60 FR 57207).

In November 1995, NMFS implemented Framework Adjustment 14 (60 FR 55207) which enlarged and

redefined the Mid-Coast Closure Area in both time and area during 1995 in an effort to achieve the necessary reductions in harbor porpoise bycatch. The Mid-Coast closure was closed to fishing with sink gillnets from March 25 through April 25. Framework Adjustment 14 also required closure of an area in southern New England, south of Cape Cod, from March 1 to 30.

Amendment 7 to the NE Multispecies FMP, implemented in July 1996, implemented marine mammal gillnet closures as part of an overall groundfish effort reduction program. In addition, the NEFMC recommended the use of pingers (based on results of the 1994 experiment) in several experimental fisheries to evaluate their use as bycatch reduction tools.

Framework 25 to the NE Multispecies FMP (63 FR 15326, March 31, 1998), was implemented on May 1, 1998. Framework 25 implemented gillnet fishing closures throughout the GOM to conserve cod (*Gadus morhua*). However, these closures are expected to have bycatch reduction benefits to harbor porpoise as well.

**Coastal Atlantic States Bycatch Reduction Efforts:** In the fall of 1994, NMFS met with the Atlantic States Marine Fisheries Commission's (ASMFC), Management and Science Committee, to discuss ways that the ASMFC could address marine mammal bycatch in its interstate fishery management plans. Since November 1995, the ASMFC has amended its Interstate Fishery Management Program charter so that protected species/fishery interactions are addressed in the ASMFC's fisheries management planning process. This means that each state fishery management plan will contain a section that describes protected species issues relevant to the fishery in question. Additionally, NMFS and USFWS representatives with protected species expertise have been incorporated into the ASMFC's species technical committees, and plan development and review teams.

The ASMFC is in the final stages of developing the Atlantic Coastal Cooperative Statistics Program. This program will coordinate a wide range of fisheries data and information, including protected species bycatch data, from all Atlantic coastal states. This data management system will improve the ability of NMFS and other regulatory agencies in identifying the most effective management measures to address protected species bycatch in state and Federal waters.

**Harbor Porpoise Take Reduction Teams and Plan:** For detailed information on the Gulf of Maine and

Mid-Atlantic Take Reduction Teams and the development of the HPTRP, see ADDRESSES.

On December 2, 1998, (63 FR 66464) NMFS issued a final rule to implement a HPTRP in the Gulf of Maine and Mid-Atlantic waters. The HPTRP and final rule include a range of management measures to reduce the bycatch and mortality of harbor porpoise. In the GOM, the HPTRP includes time and area closures and time/area periods during which pinger use would be required in the Northeast, Mid-coast, Massachusetts Bay, Cape Cod South, and Offshore Closure Areas. In the Mid-Atlantic area, the HPTRP includes time/area closures and modifications to gear characteristics, including floatline length, twine size, tie downs, and number of nets, in the large mesh and small mesh fisheries. NMFS expects that the HPTRP and implementing final rule will reduce bycatch to below the designated PBR level within 6 months of implementation.

**Canadian Mitigation Measures:** In the mid-1990s, several Canadian initiatives, including fishery effort reduction, required pinger use, expanded observer coverage, and fisher education programs, resulted in a significant reduction of harbor porpoise bycatch in the BOF. On October 7, 1994, NMFS received a Harbor Porpoise Conservation Plan for the BOF, drafted by DFO-Canada, for comment. Following responses to comments, the HPCP was incorporated into DFO-Canada's long-term management of fisheries to reduce harbor porpoise entanglements. In 1995, DFO-Canada published the "Harbor Porpoise Conservation Strategy for the Bay of Fundy." The strategy combines effort reduction, required pinger use, expanded observer coverage, and fisher education program to reduce bycatch. Since implementation of their conservation strategy, Canadian fishery bycatch has been reduced progressively to approximately 20 to 50 harbor porpoise per year.

Regarding harbor porpoise that have been trapped each summer in herring weirs in the western BOF and along southwestern Nova Scotia (Smith, Read, and Gaskin, 1983), the DFO-Canada is now requiring that a grate be placed over the entrance to the weir in order to stop anything larger than herring (i.e., marine mammals, basking sharks, etc.) from entering through the entrance of the weir.

#### *E. Other Natural or Manmade Factors Affecting its Continued*

##### *Existence*

Other potential human-induced factors that may be affecting this harbor porpoise population include high levels of contaminants in their tissues. Concentrations of organochlorine contaminants from 110 GOM/BOF harbor porpoise were recently measured (Westgate, 1995). Polychlorinated biphenyl (PCB) levels, the most prominent contaminant, and dichlorodiphenyl trichloroethane (DDT) levels were both higher in the GOM/BOF harbor porpoise than in the Gulf of St. Lawrence and Newfoundland harbor porpoise, although they are now much lower they were 10 years ago, as reported in Gaskin *et al.* (1983). Trace metal contaminants were also measured, and it was found that mean concentrations of copper, zinc, and mercury were similar to values previously reported for harbor porpoise in other regions of the world (Johnston, 1995). No obvious pathology has been noted in more than 300 necropsies of harbor porpoise incidentally captured in gillnets in the Bay of Fundy (A.J. Read, unpublished data). Although it is not known whether these contaminants have other effects, the presence of these contaminants in harbor porpoise tissues does not appear to pose a serious threat to this population.

#### **Final Determination**

Section 4(b)(1) of the ESA requires the Secretary to make final listing determinations solely on the basis of the best scientific and commercial data available and after taking into account state and Federal efforts being made to protect the species. Therefore, in making this listing determination, NMFS has assessed the status of the species, identified factors that have led to the decline of the species, and evaluated available

conservation measures to determine whether such measures ameliorate risks to the species.

The most significant factor that NMFS considered in this decision is the existing mechanisms to reduce the level of bycatch which was published after the proposal to list. NMFS evaluated the likelihood that the bycatch reduction programs implemented in Canada and at the state and Federal levels would affect the GOM/BOF harbor porpoise population in the future.

NMFS believes these conservation efforts will help the sustainability of the GOM/BOF population of harbor porpoise based on the following: (1) Strong commitments have been made to carry out these programs; (2) the parties with the authority to implement the bycatch reduction efforts have followed appropriate procedures and formalized

the necessary documentation and; (3) objectives and time frames for achieving these objectives have been established and include adaptive management principles. NMFS believes that the bycatch reduction programs currently in place will effectively address the factors causing the decline of the GOM/BOF harbor porpoise population and increase the population's sustainability.

To directly examine the potential risk of extinction of GOM/BOF harbor porpoise, a population viability analysis (PVA) was recently prepared (Wade Draft Report to NMFS). A PVA is used to estimate future trends of a population to estimate the probability of extinction of the population given certain assumptions. Using 1991, 1992, and 1995 abundance data and 1992 through 1996 bycatch data, stochastic population dynamics models of the GOM/BOF harbor porpoise population were developed to evaluate the probability of persistence of the population over the foreseeable future (the next 20 to 100 years). Each of the models predicted a very high probability of extinction within 100 years under the current levels of mortality/bycatch, whereas the probability of extinction within 20 years was estimated to be low. Reducing the current mortality/bycatch level by one-half would decrease, but not eliminate, the probability of extinction in 100 years; but it was estimated to eliminate any probability of extinction within 20 years. Finally, reducing the current mortality/bycatch to one-quarter of the current level was estimated to make the risk of extinction within 100 years unlikely.

HPTRP implementation is expected to reduce the current fishery mortality/bycatch level to below PBR within the next 6 months. Hence, based on this PVA and successful reduction of bycatch through HPTRP implementation, NMFS anticipates the elimination of any probability of extinction within the next 100 years.

The current measures enable NMFS to achieve reduction of harbor porpoise bycatch to sustainable levels, while minimizing the overall impact to affected fisheries. In view of the currently decreasing levels of bycatch in Canadian fisheries and the regulatory mechanisms now being implemented under the MMPA, NMFS concludes that listing the GOM/BOF population of harbor porpoise as threatened under the ESA is not warranted at this time.

NMFS and the appropriate agencies will continue to monitor the bycatch levels and adjust the bycatch reduction programs as necessary to promote reduced bycatch. NMFS will consider

any new regulations that may affect harbor porpoise or the implementation of the HPTRP and evaluate whether management measures need to be changed at that time. NMFS intends to reconvene the TRTs semiannually during the first year of plan implementation in order to track the HPTRP's progress toward the 6-month MMPA PBR goal.

This action is exempt from review under E.O. 12866.

Dated December 30, 1998.

**Andrew A. Rosenberg,**

*Deputy Assistant Administrator for Fisheries, National Marine Fisheries Service.*

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 648

[I.D. 122498C]

RIN 0648-AL31

#### **Fisheries of the Northeastern United States; Amendment 9 to the Northeast Multispecies Fishery Management Plan (FMP) Amendments to Address the Sustainable Fisheries Act Requirements and Other Measures**

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

**ACTION:** Notice of availability of an amendment to a fishery management plan; request for comments.

**SUMMARY:** NMFS announces that the New England Fishery Management Council has submitted Amendment 9 to the Northeast (NE) Multispecies Fishery Management Plan (FMP) for Secretarial review and is requesting comments from the public. Amendment 9 addresses new Sustainable Fisheries Act requirements for NE multispecies, among other measures.

**DATES:** Comments must be received on or before March 8, 1999.

**ADDRESSES:** Comments on this proposed rule should be sent to Jon C. Rittgers, Acting Regional Administrator, 1 Blackburn Drive, Gloucester, MA 01930. Mark the outside of the envelope, "Comments on Proposed Rule for Amendment 9 to the NE Multispecies FMP."

Copies of Amendment 9, the regulatory impact review, and the environmental assessment are available from Paul J. Howard, Executive Director, New England Fishery Management Council, 5 Broadway, Saugus, MA 01906-1036.

**FOR FURTHER INFORMATION CONTACT:** Susan A. Murphy, Fishery Policy Analyst, 978-281-9252.

**SUPPLEMENTARY INFORMATION:** If approved, Amendment 9 would: (1) Include Atlantic halibut in the NE Multispecies FMP; (2) Establish new or revised overfishing definitions for cod, haddock, pollock, redfish, white hake, yellowtail flounder, windowpane flounder, winter flounder, American

plaice, witch flounder, Atlantic halibut, and ocean pout; (3) revise specifications of optimum yield; (4) add a framework process to allow for aquaculture projects and modifications to the overfishing definitions; (5) postpone the Vessel Monitoring System beyond May 1999; (6) prohibit brush-sweep trawl gear when fishing for multispecies; (7) increase the winter flounder minimum fish size to 13 inches; and (8) implement a one-fish halibut possession limit of 36 inches or greater.

A proposed rule that would implement Amendment 9 may be published in the **Federal Register** for public comment, following NMFS' evaluation of the proposed rule under the procedures of the Magnuson-Stevens Fisheries Conservation and Management Act. Public comments on the proposed rule must be received by the end of the comment period on Amendment 9 in order to be considered in the approval/disapproval decision on the FMP amendment. All comments received by March 8, 1999, whether specifically directed to the FMP amendment or the proposed rule, will be considered in the approval/disapproval decision. Comments received after that date will not be considered in the approval/disapproval decision on the FMP amendment.

**Authority:** 16 U.S.C. 1801 *et seq.*

Dated: December 29, 1998.

**Gary C. Matlock,**

*Director, Office of Sustainable Fisheries, National Marine Fisheries Service.*

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