

Background

This document, published at 66 FR 50148, October 2, 2001, inadvertently omitted the RIN.

Correction

Accordingly, the RIN is corrected to read as set forth above.

Authority: 16 U.S.C. 1531-1544; and 16 U.S.C. 742a *et seq.*, unless otherwise noted.

Dated: October 15, 2001.

William T. Hogarth,

Assistant Administrator of Fisheries, National Marine Fisheries Service.

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DEPARTMENT OF COMMERCE**National Oceanic and Atmospheric Administration****50 CFR Part 223**

[Docket No.010723187-1241-02, I.D. 0611011]

RIN 0648-AP33

Threatened Fish and Wildlife; Status Review of the Gulf of Maine/Bay of Fundy Population of Harbor Porpoise under the Endangered Species Act (ESA)

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

ACTION: Notice of final determination and response to comments; notice of availability of final harbor porpoise status review; removal from candidate species list.

SUMMARY: The National Marine Fisheries Service (NMFS) has completed a status review of the Gulf of Maine/Bay of Fundy (GOM/BOF) stock of harbor porpoise (*Phocoena phocoena*). Based on analysis of the best scientific and commercial data available, as required by the Endangered Species Act (ESA), NMFS determined that listing this stock of harbor porpoise as threatened or endangered is not warranted at this time. In addition, based on the current status of the GOM/BOF stock, NMFS is removing this stock from the ESA candidate species list. This notice also announces the availability of the final status review.

DATES: This determination was made on September 28, 2001.

ADDRESSES: Copies of the final report of the status review can be obtained from: NMFS, Marine Mammal Division, 1315 East-West Highway, Silver Spring, MD

20910; or NMFS, Northeast Region, One Blackburn Drive, Gloucester, MA 01930-2298.

FOR FURTHER INFORMATION CONTACT:

Emily Hanson, Office of Protected Resources, 301-713-2322 ext. 101; or Kim Thounhurst, Northeast Region, 978-281-9138. Individuals who use a telecommunications device for the deaf 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:**Electronic Access**

The final report of the status review on the GOM/BOF population of harbor porpoise is accessible by the Internet at <http://www.nero.nmfs.gov/porptrp/>.

Background

On August 2, 2001 (66 FR 40176), NMFS published a draft review of the biological status of the Gulf of Maine/Bay of Fundy (GOM/BOF) harbor porpoise stock. In the draft status review, NMFS made the preliminary determination that listing the GOM/BOF stock as threatened under the ESA was not warranted and that NMFS intended to remove the GOM/BOF harbor porpoise stock from the ESA candidate species list. In a status review completed in 1999 (64 FR 465, January 5, 1999), NMFS determined that listing the GOM/BOF population of harbor porpoise as threatened under the ESA was not warranted. NMFS also published a notice retaining the population on the ESA candidate species list to continue to monitor the species status and the results of implementation of the Harbor Porpoise Take Reduction Plan (HPTRP)(64 FR 480, January 5, 1999). The 1999 status review notice and the August 2001 draft status review notice also provided information on the background of ESA actions involving the GOM/BOF population of harbor porpoise, reviewed available scientific and commercial fishery information affecting the species, evaluated the status of the species according to criteria listed in the ESA, and described regulatory mechanisms in place to address harbor porpoise mortality and serious injury incidental to commercial fishing activities.

After consideration of the draft status review and public comments received, NMFS has determined not to list the harbor porpoise as threatened or endangered under the ESA and to remove the species from the ESA candidate species list. No significant

changes have been made to the final report of the status review since publication of the draft in the **Federal Register** on August 2, 2001. The final status review is available to the public as a separate document. See **ADDRESSES** or information on Electronic Access in the **SUPPLEMENTARY INFORMATION** section of this notice for information on obtaining a copy of the final status review.

Comments and Responses

A summary of the comments on the status review and NMFS responses follows.

Comments on the Need for Listing

Comment 1: Three commenters supported NMFS' decision not to list harbor porpoise as threatened or endangered under the ESA.

Response: No information has been received since the publication of the draft status review to change NMFS' preliminary determination that listing is not warranted at this time.

Comments on the Status of Harbor Porpoise

Comment 2: One commenter, citing various potential negative biases in the mortality estimate, stated that actual mortality of harbor porpoise is likely to be higher than the annual estimated average mortality presented in the draft status review.

Response: NMFS recognizes that mortality estimates contain uncertainties. However, the estimates of mortality in U.S. and Canadian waters presented in the draft status review are the best available estimates. Additionally, these uncertainties are incorporated into the population viability analysis, as discussed in the draft status review, which predicted no chance of extinction in 100 years. These mortality estimates are reviewed and updated annually in NMFS Marine Mammal Stock Assessment Reports. The draft revised stock assessment for harbor porpoise, including mortality data from 1999 and 2000, is expected to be reviewed by the Atlantic Marine Mammal Scientific Review Group in November of 2001. The draft estimates will also be made available for public review and comment in the 2002 Stock Assessment Reports.

Comment 3: One commenter stated that NMFS must undertake the research recommended by the take reduction team to: (1) determine whether pingers were functioning on both sides of an actual take; and (2) randomly test net strings to determine the proportion of functioning versus deployed pingers.

Response: NMFS is preparing to conduct this research and anticipates conducting preliminary testing of pingers in the fall of 2001.

Comment 4: One commenter discussed the maximum rate of increase and recovery factor parameters, which are used to assess the status of harbor porpoise.

Response: The maximum rate of increase and recovery factor that NMFS used in conducting the harbor porpoise status review have been reviewed by the Atlantic Marine Mammal Scientific Review Group and the public through the annual Stock Assessment Report (SAR) process as mandated by section 117 of the MMPA. These values are the best available for the assessment of the harbor porpoise population. NMFS will consider this comment in its review of the SAR.

Comments on the Adequacy of Regulatory Mechanisms

Comment 5: One commenter stated that any changes in Fishery Management Council actions are likely to result in an increase in harbor porpoise mortality, and there is no plan in place to prevent this from happening. Therefore, the commenter concluded that current regulatory mechanisms are not adequate to protect harbor porpoise.

Response: NMFS' current strategy for reducing serious injury and mortality of harbor porpoise in commercial fisheries is to combine measures promulgated under the Marine Mammal Protection Act (MMPA) and the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act). In the final rule implementing the HPTRP (63 FR 66464, December 2, 1998), NMFS considered the cumulative scope of management actions under the Magnuson-Stevens Act and MMPA that would affect harbor porpoise bycatch and determined that a combined strategy was the best administrative approach. This strategy has reduced the bycatch to below the PBR level in both 1999 and 2000. If Fishery Management Plan (FMP) changes that may increase harbor porpoise bycatch are proposed, NMFS has authority under the MMPA to implement measures to reduce bycatch to appropriate levels. This adaptive strategy is adequate to address potential increases in harbor porpoise bycatch.

Comment 6: One commenter stated that if NMFS is considering the reduction in mortality that is gained through fishery management actions as a means of assessing the efficacy of management measures, NMFS must also consider the result if these temporary actions are altered or removed. The

commenter noted that if closures are lifted or re-configured, the mortality of harbor porpoise is likely to increase once again. These questions about the stability of the Fishery Management Council actions lead, as a consequence, to doubts about their adequacy over the long term.

Response: NMFS and the New England Fishery Management Council (Council) are responsible for meeting the objectives of the Multispecies FMP, which include harbor porpoise conservation goals parallel to those under the MMPA. In addition, a member of the Council staff also sits on each of the two Harbor Porpoise Take Reduction Teams.

The history of implementation of harbor porpoise conservation measures under the Multispecies FMP, as described in the draft status review, clearly demonstrates the commitment of both NMFS and the Council to conserve harbor porpoise by restricting the Northeast sink gillnet fishery for groundfish as appropriate. NMFS has multiple options to address any risks to harbor porpoise that might arise through proposed changes to the Multispecies FMP. In addition, NMFS is a member of the Council, including the Council's Plan Development team, and works cooperatively with the Council staff in developing changes to the FMP. Therefore, NMFS will be aware of any of the Council's proposed groundfish regulatory changes that may directly or indirectly affect harbor porpoise, and NMFS will work with the Council and the two Harbor Porpoise Take Reduction Teams to determine whether any changes to the Multispecies FMP would require additional measures to protect harbor porpoise in the HPTRP regulations.

Comment 7: One commenter stated that fishery-related management actions have had a positive impact on harbor porpoise bycatch, and that effect cannot be understated.

Response: See responses to Comments 5 and 6.

Comment 8: One commenter stated that if mortality of harbor porpoise is to be curtailed, then it is critical to enforce the laws and regulations protecting them. The commenter also stated that the current level of enforcement is inadequate. Another commenter stated that NMFS must seriously consider using observer data to identify individual violators.

Response: Increased enforcement presence was also recommended by the Gulf of Maine Harbor Porpoise Take Reduction Team. At the Team's recommendation, NMFS is working on a compliance and enforcement plan for

the HPTRP. At-sea boardings and direct observations of violations by NMFS enforcement and U.S. Coast Guard officers are the primary source of enforcement evidence used to develop a case. Observer data are used to provide a measure of overall compliance with Take Reduction Plan requirements and aid in focusing enforcement efforts.

Comment 9: One commenter noted that while NMFS states in the draft status review that the agency will monitor actions taken by the Council, and "may also revise the HPTRP to incorporate all measures necessary to ensure reduced harbor porpoise bycatch rather than relying on FMP time-area closures", it makes no commitment to do so.

Response: As described in the response to Comment 6, NMFS is actively involved in the Council process. The Council is also directly involved in the harbor porpoise take reduction process through membership of Council staff on the Harbor Porpoise Take Reduction Teams.

It is appropriate to manage harbor porpoise bycatch through both the Magnuson-Stevens Act and MMPA as described in the response to Comment 6. NMFS has the authority to adjust the U.S. harbor porpoise bycatch reduction program through the MMPA and/or the Magnuson-Stevens Act if the agency determines that proposed changes to FMPs would reduce harbor porpoise protection. It is important to emphasize that the Multispecies FMP also includes an objective requiring the reduction of harbor porpoise bycatch.

Comment 10: One commenter stated that the increase in harbor porpoise mortality between 1999 and 2000 may be an indication that mitigation measures are not sufficient.

Response: For both years the bycatch is below the PBR level. However, NMFS agrees that increases in bycatch are a concern and will continue to monitor the harbor porpoise bycatch and the effectiveness of the HPTRP.

Comment 11: One commenter stated that NMFS must revise the HPTRP to incorporate as requirements, not merely by reference, all of the measures necessary to achieve both a take level below PBR and the zero mortality rate goal.

Response: The current suite of measures under the MMPA and Magnuson-Stevens Act have already reduced the bycatch of harbor porpoise to below the PBR level. If the level of bycatch increases such that it exceeds PBR or does not continue toward the zero mortality rate goal, the agency will reconvene the take reduction team to address the issue.

Comment 12: NMFS' bycatch reduction strategy is strongly predicated on a calculated level of pinger effectiveness for various areas and seasons. This calculation does not accommodate any variation due to harbor porpoise habituation to pingers or the catch of harbor porpoise in pingered nets as a result of the failure of fishermen to fully comply with the pinger requirements.

Response: The expected level of pinger effectiveness does not consider habituation or non-compliance. However, it is not currently possible to quantify these potential effects. Furthermore, through the Harbor Porpoise Take Reduction Teams, NMFS has the authority to modify the HPTRP based on a new expected level of pinger effectiveness should such information become available.

Comments on the Removal of Harbor Porpoise from the Candidate Species List

Comment 13: Two commenters supported and two commenters opposed removal of harbor porpoise from the ESA candidate species list.

Response: NMFS is removing the GOM/BOF stock of harbor porpoise from the ESA candidate species list. This action is appropriate because of the current status of the species and the adequacy of regulatory mechanisms available to address risks to the population. NMFS will continue to monitor the status of harbor porpoise pursuant to the stock assessment process mandated under section 117 of the MMPA. In addition, NMFS will continue to monitor harbor porpoise bycatch, compliance with the HPTRP, and the potential effect of changes in FMPs on harbor porpoise bycatch. The removal of this stock from the ESA candidate species list does not change NMFS' mandates under the MMPA with regard to harbor porpoise protection under the HPTRP or other MMPA programs.

Final Determination

Section 4(b)(1) of the ESA requires the Secretary of Commerce to make a listing

determination solely on the basis of the best scientific and commercial data available and after taking into account efforts being made to protect the species. Therefore, in reviewing the status of the GOM/BOF population of harbor porpoise, NMFS has assessed the status of the species according to the criteria in the ESA.

Since 1999, NMFS has obtained no information demonstrating that factors other than mortality incidental to commercial fishing could cause the stock to be in danger of extinction or likely to become so in the foreseeable future or that available regulatory mechanisms are inadequate to reduce harbor porpoise mortality and serious injury. After analysis of the GOM/BOF population of harbor porpoise under the five ESA listing factors, NMFS has determined that the stock is not in danger of extinction throughout all or a significant portion of its range, and it is not likely to become endangered in the foreseeable future. Therefore, listing the GOM/BOF population of harbor porpoise as threatened or endangered is not warranted at this time. In addition, because of the current status of the species it is appropriate to remove the GOM/BOF harbor porpoise population from the ESA candidate species list.

The most significant factors that NMFS considered in making this determination are the new abundance estimate from the 1999 survey and the results of measures promulgated under the MMPA through the HPTRP and under the Magnuson-Stevens Act through the Northeast Multispecies FMP that directly or indirectly reduce the level of harbor porpoise mortality incidental to commercial fishing in U.S. waters, the Harbor Porpoise Conservation Strategy implemented by the Canada Department of Fisheries and Oceans, and the existing authority by which regulatory agencies can adapt management measures if unanticipated changes in porpoise bycatch patterns occur. Although it is likely that porpoise mortality will continue to occur incidental to fishery operation, existing regulatory mechanisms and authority

for amending these mechanisms to address bycatch in commercial fisheries are adequate to ensure that bycatch in commercial fisheries do not cause harbor porpoise to be in danger of extinction throughout all or a significant portion of its range, and it is not likely to become endangered in the foreseeable future.

Although the HPTRP and other bycatch reduction efforts have reduced the incidental take of harbor porpoise in gillnet fisheries to below the PBR level in both 1999 and 2000, it is clear that harbor porpoise bycatch must continue to be monitored. NMFS has documented non-compliance with HPTRP regulations that may have reduced its effectiveness, requiring additional outreach and enforcement measures. Furthermore, fishery management measures have changed since the implementation of the HPTRP and may continue to change via the annual adjustment process in the Multispecies FMP. It is possible that closures implemented for fish conservation will be removed when fish stocks reach their rebuilding targets, which could result in an increased risk to harbor porpoise and may require adjustment of the HPTRP.

NMFS will continue to monitor bycatch levels and will adjust the HPTRP as necessary to maintain bycatch levels within the goals established by section 118 of the MMPA. NMFS will also monitor any proposed regulations and proposed changes to existing regulations that may affect harbor porpoise bycatch and consider whether management measures need to be changed. NMFS intends to reconvene the two Harbor Porpoise Take Reduction Teams as necessary to monitor the implementation of the HPTRP relative to MMPA goals.

Authority: 16 U.S.C. 1531 *et seq.*

Dated: October 12, 2001.

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