



DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 229

[Docket No. 130703586-3834-02]

RIN 0648-BD43

Taking of Marine Mammals Incidental to Commercial Fishing Operations; Harbor Porpoise Take Reduction Plan Regulations

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

ACTION: Final rule.

SUMMARY: NMFS issues this final rule to amend the regulations implementing the Harbor Porpoise Take Reduction Plan (Plan).

This rule revises the Plan by eliminating the consequence closure strategy enacted in 2010, based on deliberations by the Harbor Porpoise Take Reduction Team (Team). This action is necessary to prevent the improper triggering of consequence closure areas based on target harbor porpoise bycatch rates that no longer accurately reflect actual bycatch in New England sink gillnets due to fishery-wide changes in fishing practices.

DATES: Effective September 30, 2013..

ADDRESSES: Copies of the final Environmental Assessment (EA) for this action, as well as the Harbor Porpoise Take Reduction Team

meeting summaries and supporting documents, may be obtained from the Plan website (<http://www.nero.noaa.gov/hptrp>) or by writing to Kate Swails, NMFS, Northeast Region, Protected Resources Division, 55 Great Republic Drive, Gloucester, MA 01930.

FOR FURTHER INFORMATION CONTACT: Kate Swails, NMFS, Northeast Region, 978-282-8482, Kate.Swails@noaa.gov; Kristy Long, NMFS Office of Protected Resources, 301-427-8440, Kristy.Long@noaa.gov.

SUPPLEMENTARY INFORMATION:

Background

The Harbor Porpoise Take Reduction Plan (Plan) was implemented in late 1998 pursuant to section 118(f) of the Marine Mammal Protection Act (MMPA) to reduce the level of serious injury and mortality of the Gulf of Maine/Bay of Fundy (GOM/BOF) stock of harbor porpoises (63 FR 66464, December 2, 1998). NMFS amended the Plan in 2010 (75 FR 7383, February 19, 2010) to address increased mortalities of harbor porpoises in New England and Mid-Atlantic commercial gillnet fisheries due to non-compliance with the Plan requirements and observed interactions occurring outside of existing management areas.

The 2010 amendments, based largely on consensus recommendations from the Team, included the expansion of seasonal and temporal requirements within the Plan's management

areas, the incorporation of additional management areas, and the creation of a consequence closure strategy in which the use of gillnet gear would be prohibited in three closure areas off the coast of New England if target rates of harbor porpoise bycatch were exceeded.

Detailed background information on the development of the consequence closure strategy was provided in the proposed rule (78 FR 52753, August 26, 2013) for this action and is not repeated here.

Consequence Closure Area Monitoring

Consequence closure area monitoring began with the start of the first full management season after implementation of the 2010 amendments. The first monitoring season occurred from September 15, 2010, through May 31, 2011, and the second occurred from September 15, 2011, through May 31, 2012. During this time, the two-year average observed harbor porpoise bycatch rate for the areas associated with the Coastal Gulf of Maine Closure Area exceeded the target bycatch rate, triggering the implementation of the Coastal Gulf of Maine Closure Area (Figure 1). During management seasons two and three (September 15, 2011, through May 31, 2012, and September 15, 2012, through May 31, 2013, respectively), preliminary analysis of the raw observed bycatch data indicated that the two-year average observed harbor

porpoise bycatch rate for the area associated with the Cape Cod South Expansion and Eastern Cape Cod Closure Areas appeared to exceed the target bycatch rate, which would have triggered the implementation of these two closures beginning February 1, 2014.

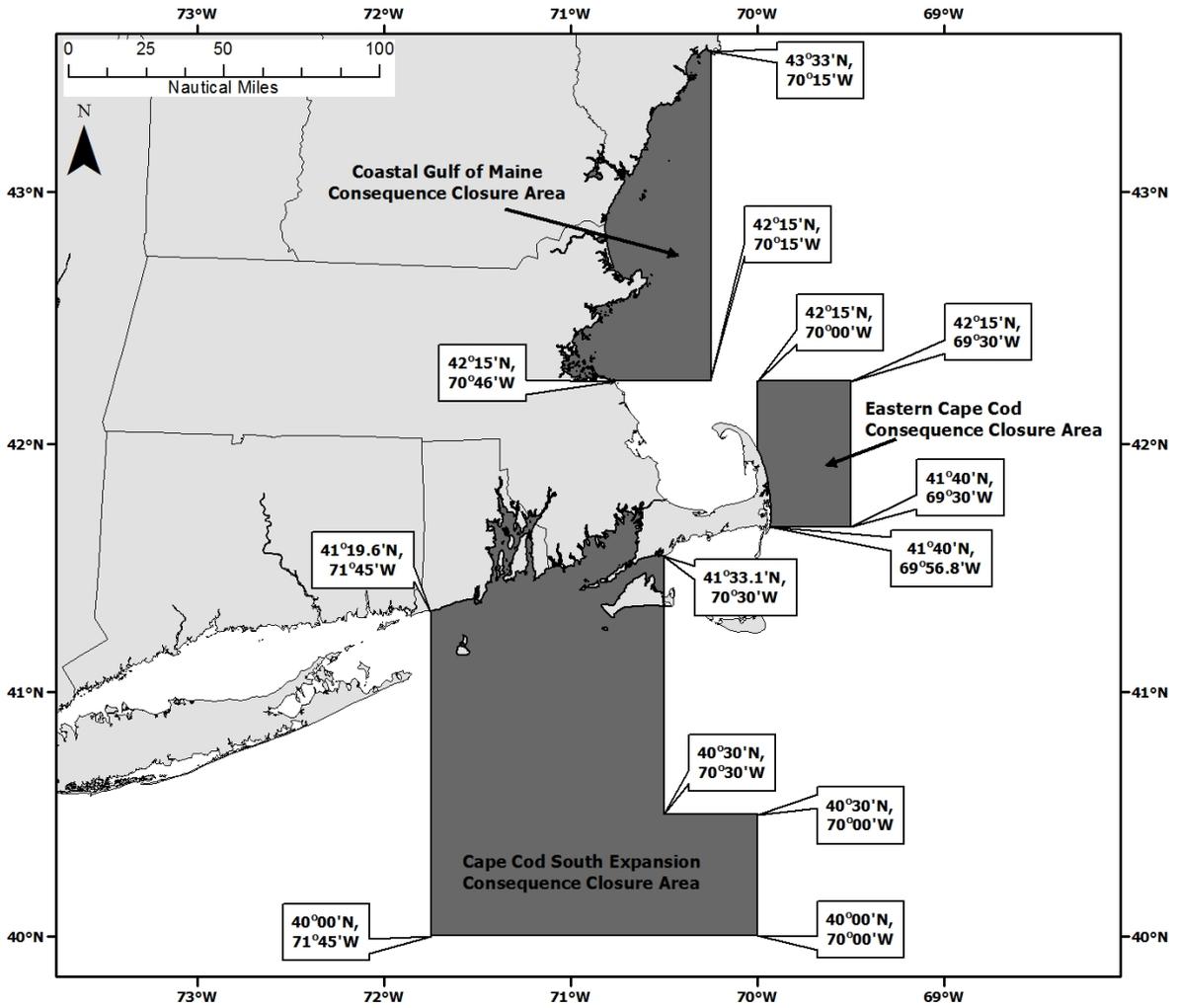


Figure 1. Harbor Porpoise Take Reduction Plan Consequence Closure Areas

Identifying a Need for Modifying the Plan

The consequence closure target bycatch rates were based on the number of observed harbor porpoises caught per metric tons of fish landed between 1999 and 2007 within the areas subject to a closure. Since the advent of sectors, the overall fishing effort generally remained the same and the number of harbor porpoise caught actually decreased and is below the stock's potential biological removal (PBR) level (Table 1). However, because fish landings also decreased, the observed bycatch rates increased above the closure area target bycatch rates resulting in the triggering of the closures. As stated previously, the bycatch rate trigger was intended to function such that the triggering of it meant that the overall bycatch of harbor porpoise was above PBR. Given the overall reductions in fish landings, however, this calculation no longer holds true.

Preliminary data indicate that the annual 2010-2012 harbor porpoise bycatch estimates are below PBR, and that the 5-year average incorporating the most recent data from 2011-2012 is also below PBR.

Table 1: Recent harbor porpoise population abundance, PBR, and bycatch estimates

Year	2009 ¹	2010 ²	2011 ³	2012 ³
Population Abundance (coefficient of variance)	89,054 (CV=0.47)	79,883 (CV=0.32)	79,883 (CV=0.32)	79,883 (CV=0.32)
Potential Biological Removal Level	701	706	706	706
Annual U.S. Gillnet Bycatch Estimate	792	646	396	340
5-Year Average U.S. Gillnet Bycatch Estimate	877	786	671	630

¹ Waring et al. 2012

² Waring et al. 2013

³ C.D. Orphanides, personal communication, September 16, 2013

NMFS convened the Team to discuss potential amendments to the Plan in November 2012, February 2013, April 2013 (workgroup), May 2013, and June 2013. During those meetings, the Team discussed the appropriateness of the consequence closure strategy and discussed potential replacement management measures.

At the May 2013 meeting, the Team agreed that the consequence area target bycatch rates no longer accurately reflect compliant bycatch rates in New England. At the conclusion of the May 2013 meeting, the Team did not agree on whether a replacement was needed for the consequence strategy or what that replacement might be. However, a majority of the Team

recommended eliminating the current consequence closure strategy from the Plan and continuing Team discussions on what other actions should be taken in lieu of the consequence closure to ensure compliance with the pinger requirements and achieve MMPA goals. The Team also recommended that NMFS modify the Plan's Other Special Measures provision, found at § 229.32(f), to require a consultation with the Team before action is taken to amend the Plan using this provision. Any input received by Team members would be considered before exercising the Other Special Measures provision of the Plan. These recommendations formed the basis of this final rule.

At its June 2013 meeting, the Team continued discussions on what other actions should be taken to ensure compliance with pinger requirements. In particular, the Team discussed increasing enforcement efforts to ensure compliance with pinger requirements in New England. Based on the Team's recommendation, as a mechanism for increasing compliance with pinger requirements in New England, NMFS will examine data collected by fisheries observers regarding pingers on observed hauls, and will provide those data to NOAA's Office of Law Enforcement (OLE). To facilitate enforcement efforts, those data will include the time and area of fishing activity of observed gillnet vessels along with other relevant information,

including vessel homeport, registration number, etc. NMFS will work with OLE to evaluate any potential enforcement efforts, which may include at-sea operations in collaboration with state joint enforcement agreement partners and the U.S. Coast Guard as well as dockside activities. If as a result of these increased monitoring and enforcement efforts NMFS determines that bycatch is exceeding the PBR level, the Assistant Administrator for Fisheries (after consulting with the Team) may take action to address the situation.

NMFS will continue working with the Team to consider what additional management measures may be necessary to ensure compliance with the pinger requirements. Thus far, NMFS and the Team have formed Monitoring and Enforcement Workgroups to facilitate these discussions.

Comments and Responses

NMFS published the proposed rule amending the Plan in the Federal Register on August 26, 2013 (78 FR 52753). Upon its publication, NMFS issued a press email announcing the rule; posted the proposed rule on the Plan website; and notified affected fishermen and interested parties via several NMFS email distribution outlets. The publication of the proposed rule was followed by a 15-day public comment period, which ended on September 10, 2013. NMFS received seven comments via facsimile,

letter, or electronic submission. All comments received were thoroughly reviewed by NMFS. The comments addressed several topics, such as Team deliberations, bycatch reduction goals, and the Other Special Measures provision of the Plan. The comments received are summarized below, followed by NMFS's responses.

Length of Comment Period

Comment 1: Two commenters requested an extension of the 15-day comment period.

Response: NMFS believes that the length of the 15-day comment period was adequate given the simplicity of the analysis support the proposed rule. This action seeks to remove an inappropriately triggered fishing closure that was based on an obsolete trigger to prevent unnecessary economic impacts from occurring prior to the closure's start on October 1, 2013. A 15-day period provides both an adequate length of time for comment and allowed an expedient implementation of this final rule.

Economic Impacts of Closure

Comment 2: One commenter described how the closure in Southern New England would negatively affect winter income. This commenter stated changes in the groundfish fishery accompanied by a high fuel cost and lower fish prices have reduced overall effort and gear in the water.

Response: Although NMFS has not formally closed the Eastern Cape Cod and Cape Cod South Consequence Closure Areas, NMFS agrees that such a closure would result in a negative economic impact from the inappropriate triggering of the consequence closure areas within the Southern New England Management Area.

Support for Elimination of the Consequence Closure Strategy

Comment 3: Two commenters supported eliminating the existing consequence closure strategy while continuing Team deliberations to further revise the Plan. Both noted that flaws in the strategy had been identified by the fishing industry and the Team, yet the closures had been recently triggered despite positive signs in harbor porpoise population trends.

Response: NMFS agrees with both the need to remove the consequence closure strategy from the Plan and the goal to continue Team discussions of alternative management options.

Use of Other Special Measures

Comment 4: Three commenters supported the use of the Other Special Measures provision in consultation with the Team to modify the Plan. All noted that this provision provides NMFS flexibility to modify the Plan in a timely fashion should the need arise.

Response: NMFS agrees with these comments regarding the need for Team input should issues regarding the use of the Other

Special Measures provision of the Plan arise and has amended that provision in this final rule.

Modification of the Consequence Closure Strategy

Comment 5: One commenter stated that the justification for the consequence closure strategy still exists, and rather than eliminating it NMFS, should consider modifying it. The commenter noted that the Team agreed that the existing closure boundaries and time frames were appropriate and perhaps the trigger should be modified.

Response: The notion of keeping the current consequence strategy boundaries and time frames intact, but developing a revised trigger for the consequence closure strategy was discussed by the Team at multiple meetings in 2013. However, the current action to remove the consequence closure strategy in its entirety was chosen because the Team could not develop a viable alternative during its deliberations. NMFS and the Team will continue to discuss the efficacy of the consequence strategy, including discussions concerning closure triggers.

Comment 6: One commenter was concerned that there is a lack of a consequence measure in the mid-Atlantic. If bycatch levels in the mid-Atlantic region increase or hinder progress in achieving the Plan's zero mortality rate goal, it could trigger consequence closures in New England that would affect New

England fishermen rather than those in the mid-Atlantic that prompted the closures.

Response: The lack of consequence measures in the mid-Atlantic region was discussed during the Team's 2013 deliberations, but no clear measure emerged from the discussions. NMFS acknowledges the concerns of the commenter and suggests that removing the current consequence closure strategy serves to prevent such a scenario from occurring in the short-term. In the long-term, NMFS and the Team will continue to closely monitor harbor porpoise bycatch in all fisheries throughout the species' range.

Comment 7: One commenter stated that the consequence closure strategy should be retained due to chronic non-compliance and fluctuating harbor porpoise mortality levels. The commenter referred to an earlier NMFS decision to shift the consequence closure from fall 2012 to winter 2103 suggesting that the increase in mortality that occurred after the shift indicates that eliminating a consequence closure encourages non-compliance.

Response: Harbor porpoise bycatch in U.S. gillnet fisheries has been reduced from an estimated 646 porpoises in 2010 to an estimated 340 porpoises in 2012, well below the stock's PBR level of 706 porpoises. NMFS believes that continuing with the

current consequence closure strategy that is based on an obsolete trigger will create an unnecessary economic burden while resulting in a limited conservation gain. To address poor levels of pinger compliance, NMFS is increasing its enforcement effort. NMFS will continue to monitor both harbor porpoise bycatch and Plan compliance data to ensure that these continue on their current trends.

Zero Mortality Rate Goal

Comment 8: One commenter stated that the ultimate mandate of any proposed measure must be to achieve the zero mortality rate goal (ZMRG), and that success in reducing bycatch to below the PBR level, an interim goal, is not a sufficient reason to disregard the consequence closure strategy. Instead this commenter suggested that the strategy trigger be replaced with PBR-based triggers that would decrease bycatch in a stepwise fashion towards the ultimate goal of ZMRG. Another commenter expressed similar views and stated support for a ratcheting approach based on mortality estimates that would allow the agency to achieve its statutory mandates.

Response: NMFS acknowledges that there may be alternatives to the consequence closure strategy and these should continue to be explored by the Team. However, since no clear consensus alternative arose during Team meetings in 2013, NMFS is removing

the consequence closure strategy and will continue to discuss the efficacy of some form of consequence strategy with the Team. NMFS and the Team have formed Monitoring and Enforcement Work Groups to facilitate these discussions.

Comment 9: One commenter stated that U.S. fisheries have not reached the 2001 MMPA goal of reaching ZMRG level (10% of PBR) for harbor porpoise, yet the Agency proposes to eliminate key conservation protections without substituting any substantive measures to ensure further mortality declines towards ZMRG.

Response: NMFS acknowledges that the Plan has not reached ZMRG. However, harbor porpoise bycatch in U.S. gillnet fisheries is declining significantly below the PBR level of 706 porpoises to an estimated 340 porpoises per year in 2012. In addition, the consequence closure was implemented as a backstop management measure to encourage compliance with Plan pinger requirements. The consequence closure strategy was not developed as a means for reducing harbor porpoise bycatch to reach ZMRG.

Comment 10: One commenter stated that NMFS proposes to rely on enforcement to increase compliance, but did not think this is an adequate substitute and will not reduce serious injury and mortality. The commenter referred to information presented to

the Team showing that observers have documented individual vessels violating pinger requirements with no subsequent enforcement action taken. The commenter further stated that it is premature for the agency to assume it will be able to increase enforcement to an extent that will result in greater compliance.

Response: NMFS disagrees and is confident that the revised enforcement strategy developed in consultation with the Team will adequately improve compliance with pinger requirements. The revised strategy specifically focuses on pinger requirements under the Plan.

Comment 11: One commenter stated that the proposed rule and EA do not discuss the MMPA's ZMRG long-term goal or explain how the rule will ensure that bycatch levels remain below PBR.

Response: NMFS disagrees and notes that there has been significant progress toward meeting the Plan's MMPA goals. Harbor porpoise bycatch has been significantly reduced below the stock's PBR level and NMFS believes that current monitoring and law enforcement efforts will continue to ensure the effectiveness of the Plan in further reducing harbor porpoise bycatch.

Objection to Characterization of TRT meeting

Comment 12: One commenter objected to language in the proposed rule stating that a majority of the Team recommended eliminating the current consequence closure strategy from the Plan, and continuing Team discussions on what other actions should be taken in lieu of the consequence closure to ensure compliance with pinger requirements. The commenter believes this statement mischaracterizes the Team's deliberations, and that it is inappropriate to suggest that a majority of the Team support a measure unless that supports reflects a majority of all members of the Team. The commenter stated that during the meeting several members left prior to the Team's deliberation on NMFS' proposal to remove the consequence closure strategy.

Response: The statement that a majority of Team members voted in favor of the current action is an accurate characterization of the events of the TRT meeting. A quorum was present at the May 2013 meeting during which the vote occurred, even though members who left the meeting before the end missed their opportunity to participate in the voting process. In addition, NMFS received no objections to the vote following the May 2013 meeting or during the June 2013 Team teleconference.

Comment 13: One commenter stated that it was inappropriate for NMFS to discuss in the rule only the elements and views on the NMFS proposal to remove the consequence closure strategy,

but not the elements of the other proposals considered by the Team during its last meeting.

Response: During the Team meetings in 2013, no clearly-defined alternatives to the consequence closure strategy emerged from the Team nor were voted upon. If a clearly-defined alternative had emerged during those meetings, NMFS would have included it within the analyses supporting this action. NMFS is committed to continuing work with the Team to develop any additional take reduction measures to achieve Plan goals.

Concerns with Data Used to Assess Impact of Bycatch on Porpoises

Comment 14: One commenter stated that language in the EA asserts that the expanded pinger requirements of the 2010 Plan amendments were successful and it is reasonable to assume that bycatch is likely to stay low, obviating the need for consequence closures. However, the commenter states that NMFS neglects to point out that it is the failure of the industry to use the correct complement of functional pingers that underlies the patterns of varying bycatch levels.

Response: NMFS agrees that current harbor porpoise bycatch reductions are largely due to the expansion of management measures implemented in the 2010 final rule amending the Plan. However, NMFS believes that changes in levels of compliance with pinger requirements resulted in fluctuating harbor porpoise

bycatch levels. Concerns by both NMFS and the Team regarding pinger compliance have resulted in the revised law enforcement strategy discussed earlier.

Comment 15: One commenter stated that NMFS fails to account for all bycatch in the proposed rule and EA stating that the impacts of Canadian takes on the Gulf of Maine stock of harbor porpoise is not considered in the rule or EA. The commenter stated that a proper accounting of fishery takes relative to PBR must include mortalities from U.S. gillnet fisheries, other U.S. fisheries and Canadian fisheries that affect the same stock.

Response: NMFS disagrees with the statement that bycatch in Canadian fisheries is not accounted for. Annual marine mammal stock assessment reports published by the Northeast Fisheries Science Center include estimates of harbor porpoise bycatch in Canadian fisheries. However, the mandate of the Team and the Plan is to address harbor porpoise bycatch in U.S. commercial fisheries. Regarding harbor porpoises, this mandate primarily includes Northeast sink and mid-Atlantic gillnet fisheries.

NEPA Comments on the Draft Environmental Assessment

Comment 16: One commenter stated that NMFS failed to properly define the purpose and need in the EA. The commenter felt that the purpose and need was unreasonably narrow, leading to a narrow range of alternatives. The commenter suggested that

NMFS narrowly defined the purpose and need in order to rationalize a pre-determined decision. The commenter asserted that NMFS should have focused its purpose and need on objectives and duties under the MMPA to conserve marine mammals and ensure bycatch rates achieve ZMRG.

Response: The purpose and need statement has been revised in the final EA to provide greater clarity, but NMFS disagrees with the commenter regarding the intended purpose of this action. Under NEPA, NMFS has the discretion to describe a proposed action's purpose and need in any way that meets our statutory authority. NMFS undertook the proposed action in response to information indicating that the consequence closures are not achieving their intended purpose as backstop measures to promote pinger compliance. Under current plan regulations, harbor porpoise bycatch is trending downward and declining well below the PBR level.

Comment 17: One commenter noted that NMFS only considers two options as alternatives in the EA, and stated that NMFS has failed to rigorously explore and objectively evaluate all reasonable alternatives.

Response: NEPA calls for agencies to evaluate all reasonable alternatives, which include those that may be reasonably carried out. However, the discussion of alternatives

does not need to be exhaustive. When determining whether it was necessary to take this action, the Team and NMFS considered the best scientific information available. This information indicates that the consequence closures are not functioning properly and have been inappropriately triggered. Given the negative economic impacts of the inappropriately triggered consequence closures and the development of a law enforcement plan focused on improved pinger compliance, NMFS determined that it was necessary to consider taking immediate action to remove the closures. Including and assessing additional alternatives that do not address the need to act immediately would fail to meet the purpose and need of this action. NMFS will continue working with the Team to determine the best approach to developing any appropriate replacement measures to the consequence closure strategy.

Comment 18: One commenter stated that there were future actions and foreseeable impacts that had not been fully considered in the EA.

Response: The cumulative effects analysis of the final EA has been revised to address some of these concerns. This includes more detail regarding recent developments in wind energy and under the Spiny Dogfish Fishery Management Plan. However, the discussion of the Omnibus Habitat Amendment was not

altered because the Amendment and its draft environmental impact statement remain under development at this time. Until the New England Fishery Management Council has finalized the range of alternatives and analyzed the environmental consequences of that action, the impacts are uncertain. Therefore, it is not possible to evaluate the potential impacts to harbor porpoise at this time.

Classification

The Office of Management and Budget (OMB) has determined that this action is not significant for the purposes of Executive Order 12866.

All of the entities (fishing vessels) affected by this action are considered small entities under the Small Business Administration (SBA) size standards for small fishing businesses. On June 20, 2013, the SBA issued a final rule revising the small business size standards for several industries effective July 22, 2013 (78 FR 37398). The rule increased the size standard for Finfish Fishing from \$4.0 to \$19.0 million, Shellfish Fishing from \$4.0 to \$5.0 million, and Other Marine Fishing from \$4.0 to \$7.0 million. NMFS has determined that the new size standards do not affect the analyses prepared for this action. The fisheries affected by this final rule are the Northeast sink gillnet and Mid-Atlantic

gillnet fisheries. The population of vessels that are affected by this action includes commercial gillnet vessels fishing in state and federal waters from Maine to New York.

The Chief Counsel for Regulation of the Department of Commerce has certified to the Chief Counsel for Advocacy of the Small Business Administration that this final rule would not have a significant economic impact on a substantial number of small entities. Economic impacts for this action were evaluated as part of the 2009 EA that supported the most recent Plan amendments published as a final rule on February 19, 2010 (75 FR 7383). Although changes to the fishery have occurred since the final rule, this analysis is used to illustrate the difference in economic impacts between the preferred action and the status quo. Although overall commercial landings have changed since 2009, the number of vessels and level of overall fishing effort have remained relatively constant. Therefore, NMFS believes that these data provide a basis for concluding that this action, removing the consequence closures, will not have a significant impact on a substantial number of small entities.

The 2009 EA estimated economic impacts of the preferred alternative (which was adopted in the final rule) before and after triggering the three consequence closure areas. The EA estimated that triggering the three closures (now the status

quo) would impact 29.7% (290 vessels) of the total gillnet fleet. Revenues for the affected vessels were also estimated to be reduced by 2-28% (\$2,600-\$26,400) and 1-25% (\$1,500-\$15,300) for small (<40ft) and large (>40ft) vessels, respectively. By removing the regulations implementing these consequence closure areas from the Plan, this action would prevent this loss of revenue from occurring. As a result, an initial regulatory flexibility analysis is not required and has not been prepared.

This final rule waives the typical 30-day delayed effectiveness period and is effective immediately. The 30-day delay period of 5 U.S.C. § 553(d) may be waived for good cause. The contents of this action serve to remove existing commercial fishing restrictions and to prevent negative economic impacts from otherwise occurring as the Coastal Gulf of Maine closure Area would have been effective beginning October 1, 2013. Delaying the effectiveness of this rule is contrary to the public interest, because any delay will prevent additional fishery activities, thereby reducing revenues, and provide no meaningful benefit to the harbor porpoise. Accordingly the 30-day delay in effectiveness is both unnecessary and contrary to the public interest, and this rule will become effective immediately.

References

Waring GT, Josephson E, Maze-Foley K, Rosel, PE, editors.
2012. U.S. Atlantic and Gulf of Mexico Marine Mammal Stock
Assessments -- 2011. NOAA Tech Memo NMFS NE 221; 319 p.

Waring GT, Josephson E, Maze-Foley K, Rosel, PE, editors.
2013. U.S. Atlantic and Gulf of Mexico Marine Mammal Stock
Assessments -- 2012. NOAA Tech Memo NMFS NE 223; 419 p.

List of Subjects in 50 CFR Part 229

Administrative practice and procedure, Confidential
business information, Fisheries, Marine mammals, Reporting and
recordkeeping requirements.

Dated: September 30, 2013

Alan D. Risenhoover,
Director,
Office of Sustainable Fisheries,
performing the functions and duties of the
Deputy Assistant Administrator for Regulatory Programs,
National Marine Fisheries Service.

For the reasons stated in the preamble, 50 CFR part 229 is
amended as follows:

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

1. The authority citation for 50 CFR part 229 continues to read as follows:

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

2. In § 229.33, paragraphs (a)(2)(iii), (a)(3)(iii), (a)(4)(iii), (a)(5)(iii), (a)(6)(iii), and (d) are removed and paragraph (f) is revised to read as follows:

§ 229.33 Harbor Porpoise Take Reduction Plan Implementing Regulations—Gulf of Maine.

* * * * *

(f) Other special measures. The Assistant Administrator may, after consultation with the Take Reduction Team, revise the requirements of this section through notification published in the Federal Register if:

(1) NMFS determines that pinger operating effectiveness in the commercial fishery is inadequate to reduce bycatch below the stock's PBR level.

(2) NMFS determines that the boundary or timing of a closed area is inappropriate, or that gear modifications (including pingers) are not reducing bycatch to below the PBR level.

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[FR Doc. 2013-24278 Filed 09/30/2013 at 4:15 pm; Publication
Date: 10/04/2013]