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Subject: Marine Mammal Protection Act requirements applicable to the Atlantic
Trawl Gear Take Reduction Plan Process

ISSUES:

The Atlantic Trawl Gear Take Reduction Team (TRT) members raised several procedural questions during the course of its first meeting in September 2006, concerning their responsibilities. The questions are as follows:

Question 1: Clarify the timeline and requirements under the Marine Mammal Protection Act (MMPA) for development of a Take Reduction Plan (TRP) for marine mammal stocks that are non-strategic; i.e., does the 11 month timeline specified in the MMPA for development of a plan and 5 year timeline for reaching Zero Mortality Rate Goal (ZMRG) apply?

Question 2: What is the TRT's responsibility for common dolphins since the take of that species is near ZMRG (+/1 one)?

Question 3: Clarify how and why white-sided dolphins were added to the TRT's purview and what are the TRT's responsibilities under Section 118 of the MMPA to address takes of this species; i.e., does 11 month requirement for development of a TRP and the 5-year timeline to achieve ZMRG apply?

SHORT ANSWERS:

Short Answer to Question 1: Neither the 11 month timeline for development of a TRP nor the



year goal for reaching ZMRG apply to non-strategic stocks that do not interact with Category I fisheries.

Short Answer to Question 2: Since the take of common dolphins is approaching the insignificance threshold, NMFS and the TRT have discretion not to impose measures to further reduce the level of take..

Short Answer to Question 3: White-sided dolphins were added to the TRT's purview as the result of the reasonable exercise of NMFS' discretion, since they are taken as bycatch by the same trawl fisheries that take common dolphins and pilot whales. Neither the 11 month timeline for development of a TRP nor the 5 year goal for reaching ZMRG apply.

BACKGROUND:

The Atlantic Trawl Gear Take Reduction Team (TRT) was established pursuant to a 2003 settlement agreement in the lawsuit captioned *Center for Biological Diversity v. Evans*. The lawsuit challenged NMFS' failure to establish TRTs for several "strategic stocks" of marine mammals. A "strategic stock" is one for which, in this context, the level of direct human-caused mortality exceeds the potential biological removal (PBR) level (Section 3(19) of the MMPA) In the settlement agreement, NMFS agreed to establish, by September 2006, a TRT for the Squid/Mackerel/Butterfish trawl fishery that operates off the east coast, due to the bycatch of pilot whales and common dolphins in these fisheries. These bycatch marine mammal species were considered "strategic" stocks in 2003. When the TRT was ultimately constituted these stocks were no longer "strategic." Nevertheless, NMFS established the TRT to consider the bycatch of these marine mammal species as well as white-sided dolphins. NMFS also expanded the scope of the TRT's duties to include the consideration of the impact of all east coast trawl fisheries on marine mammal stocks.

DISCUSSION:

Question 1

While the TRT was established pursuant to a court-approved settlement agreement to address stocks that were strategic at the time of the settlement, the parties to that agreement did not agree to any deadlines for when the TRP would be completed, nor when ZMRG would be achieved. Given these facts, it is necessary to decide what timeframes, if any, are specified by Section 118(f) of the MMPA for TRPs developed by the TRT..

As enacted in April 1994, Section 118(f)(1) of the MMPA says "[NMFS] **shall** develop and implement a [TRP] designed to assist in the recovery...of each **strategic stock** which interacts with" a Category I or II fishery (emphasis added), "and **may** develop and implement [a TRP] for any other marine mammal stocks which interact with [a Category I fishery]" which NMFS determines after public notice and comment, has a "high level of mortality and serious injury across a number of such marine mammal stocks." Thus, absent the 2003 settlement agreement, NMFS, pursuant to Section 118(f)(1), would have convened a TRT for the Atlantic trawl fisheries and common dolphins, pilot whales and white-sided dolphins only if these non-strategic

stocks: (1) interacted with a Category I fishery; and (2) it determined, after notice and public comment, that there is a “high level of mortality and serious injury across a number of such marine mammal stocks.” However, these stocks do not interact with any Category I fisheries, and NMFS did not make any such determination after notice and comment in this case. In fact, the take levels for the marine mammal stocks being considered by the TRT appear to be low (12% of PBR for common dolphin (very close to the ZMRG standard of 10% of PBR); 24% of PBR for pilot whales (short -finned and long-finned); and 9% of PBR for white-sided dolphins). Thus, absent the 2003 settlement agreement, the TRT/TRP process would likely not have addressed these stocks. So, given the language of Section 118(f)(1), the TRT was established to deal with a situation not addressed by Section 118.

As Congress noted when it was developing the Section 117 stock assessment and Section 118 take reduction provisions of the MMPA, “In determining whether a stock is taken incidental to the course of commercial fishing operations, **the Secretary should use a test of reasonableness**. For example, if only one marine mammal has been recorded as being lethally taken, that does not justify the expenditure of time and money on a stock assessment.” (H.Rep. 439, 103d Cong., 2d Sess., at 36 (March 21, 1994), emphasis added). “[Section 118] directs the Secretary to establish [TRTs] for strategic stocks within 30 days after the publication of a final stock assessment, **and provides discretion for establishing teams for other stocks.**” (Id., at 37 (emphasis added)). “Priority for the development of [TRPs] will be accorded to stocks designated as strategic and stocks which the Secretary believes may be approaching strategic status.” Id. On the Senate side, the intent was similar. “The **primary purpose of this legislation** is to establish criteria for identifying and **prioritizing marine mammal stocks most affected** by interactions with commercial fishing operations. **Emphasis is placed on the need for immediate action to protect those stocks that...are in decline or at low population levels.** (S. Rep. 220, 103d Cong., 2d Sess., at 6 (Jan. 25, 1994), emphasis added).

In fact, the Senate bill would have only required TRPs for strategic stocks (called ‘critical stocks’ in the Senate bill, with no TRPs required or even mentioned for non-‘critical’ stocks). While the legislative history of the MMPA reflects a mandate to set priorities among stocks for which take reduction measures are needed, it does not foreclose the possibility of establishing TRTs and TRP for those stock that do not interact with Category I fisheries but experience significant levels of take.

With respect to what, if any, timeframes apply to TRPs for non-strategic stocks, the 6 month short-term goal of Section 118 to reduce takes below PBR is stated only in the context of TRPs “for a strategic stock.” (See Section 118(f)(2)). The long-term, 5 year, goal to reduce takes to ZMRG likewise applies only to “the plan” (i.e., a TRP for a strategic stock). *Id.* Assuming, however, that Section 118 does allow a TRT to exist in this situation and to develop a TRP, the question becomes, do any of the Section 118 time requirements apply?

For marine mammal stocks and TRTs that are addressed in Section 118 the following apply:

- for strategic stocks where take by Category I or II fisheries is above PBR, the TRT is required to submit a draft plan to NMFS **within 6 months of the TRT’s establishment.** (Section

118(f)(7)(A))

- for strategic stocks where take by Category I or II fisheries is below PBR, and for non-strategic stocks that interact with Category I fishery for which NMFS has determined there is a “large number of mortalities or serious injuries across a number of such stocks,” the TRT is required to submit a draft plan to NMFS **within 11 months of the TRT’s establishment**. (Section 118(f)(8)(A)). If the TRT does not meet its 11 month deadline, NMFS is required to publish a proposed TRP and implementing regulations within 13 months of the TRT’s establishment. (Section 118(f)(8)(B)(ii)).

These are the only situations and timeframes addressed by Section 118. There are no timeframes specified for situations like the one involving the TRT, which has been established to address non-strategic stocks that do not interact with Category I fisheries and for which NMFS has not determined (after public notice and comment) that there is a “high level of mortality and serious injury across a number of such...stocks.” Therefore, none of the Section 118 deadlines for submitting draft TRPs or for publishing proposed or final implementing regulations apply to the TRT.

Question 2

Section 118(b)(1) provides “Commercial fisheries shall reduce incidental mortality and serious injury of marine mammals to insignificant levels *approaching* a zero mortality and serious injury rate...” (Emphasis added). Fisheries are not required to reduce take to ZMRG, only to “**insignificant levels approaching**” ZMRG. If the take level of common dolphins is considered by NMFS to be an “insignificant” level of take approaching ZMRG, then Section 118(b)(1) is satisfied. Section 118(b)(2) allows “[f]isheries that maintain insignificant serious injury levels *approaching* a zero rate shall not be required to further reduce their mortality and serious injury rates.” (Emphasis added).

The NMFS definition of the “insignificance threshold” is 10% of PBR. The estimate for common dolphin bycatch presented at the TRT meeting in Sept. 2006, was 12% of PBR. While this is not at/below the 10% insignificance threshold, it is close. How much or whether to try to further reduce this rate of bycatch, taking into account the statutory considerations of “the economics of the fishery [and] the availability of existing technology” (Section 118(f)(2)), relegates this decision to the area of NMFS’ and the TRT’s discretion.

Question 3

White-sided dolphins were added to the TRT’s purview because they appear as bycatch in the same trawl fisheries that take common dolphins and pilot whales. Section 118(f)(6)(B) allows NMFS to request a TRT to address multiple stocks within a region or fishery if it determines that doing so would facilitate the development and implementation of a TRP. The 11 month requirement for development of a TRP and 5 year timeline to achieve ZMRG do not apply to white-sided dolphins in the context of the Atlantic trawl fisheries for the reasons outlined in response to Question 1, above.