



**THE HUMANE SOCIETY**  
OF THE UNITED STATES

Sam Rauch

Acting Assistant Administrator for Fisheries  
National Marine Fisheries Service  
1315 East-West Highway  
Silver Springs, MD 20910

September 10, 2012

Dear Assistant Administrator Rauch:

On behalf of the more than 11 million members and constituents of The Humane Society of the United States (The HSUS), we are writing to urge you to deny a recent proposal by representatives of gillnet boats from Massachusetts, New Hampshire and southern Maine to lift the impending fall closure of the Northern Gulf of Maine (NGOM) that was put in place to protect Gulf of Maine harbor porpoise. The proposal also suggests the possibility of substituting a shorter closure in February and March (Northeast Seafood, 2012). To concede to their demands outside of public process, and against the advice of your own scientists, would be ill advised for a number of reasons.

**The recommendation for a fall “consequence closure” was developed by consensus by a multi-stakeholder Take Reduction Team that included gillnet representatives.** In 2007, it was evident that widespread failure by fishermen in the NGOM to comply with the mandated use of acoustic pingers was causing unsustainable mortality to harbor porpoise. Pingers have proven both in experiments and in the real world that they are highly effective in deterring fatal interactions. In the course of negotiations by the Team, the fishery agreed that an incentive was needed to impel compliance. This was a consensus agreement. The request to lift the impending closure suggests that representatives of the fishery may have bargained in bad with other fishermen and representatives on the Team. This seriously undermines productive functioning of the Team. The agency should not now reward such actions by granting the request.

**Lifting the closure essentially punishes fishermen who complied with regulatory mandates and undermines future compliance.** The failure to reduce mortalities and serious injuries to levels less than the Potential Biological Removal (PBR) as mandated by the Marine Mammal Protection Act (MMPA), 16 U.S.C. § 1387(f)(1)-(2), was due to non-compliance with mandatory use of otherwise highly effective acoustic pingers. To reward those who did not comply by obviating consequences for illegal actions is a slap in the face to fishermen who complied with regulatory requirements. Those who did comply with the law are essentially being given the message that they were

Eric L. Bernthal, Esq.  
*Chair of the Board*

Jennifer Leaning, M.D., S.M.H.  
*Vice Chair*

Kathleen M. Linehan, Esq.  
*Board Treasurer*

Wayne Pacelle  
*President & CEO*

Michael Markarian  
*Chief Program & Policy Officer*

Laura Maloney  
*Chief Operating Officer*

G. Thomas Waite III  
*Treasurer & CFO*

Andrew N. Rowan, Ph.D.  
*Chief International Officer  
& Chief Scientific Officer*

Roger A. Kindler  
*General Counsel  
Vice President & CLO*

Janet D. Frake  
*Secretary*

**DIRECTORS**

Jeffrey J. Arciniaco  
Eric L. Bernthal, Esq.  
Michael J. Blackwell, D.V.M., M.P.H.  
Jerry Cesak  
James Costos  
Anita W. Coupe, Esq.  
Neil B. Fang, Esq., CPA  
Jane Greenspun Gale  
Cathy Kangas  
Jonathan D. Kaufelt, Esq.  
Paula A. Kislak, D.V.M.  
Jennifer Leaning, M.D., S.M.H.  
Kathleen M. Linehan, Esq.  
John Mackey  
Mary I. Max  
Patrick L. McDonnell  
Judy Ney  
Sharon Lee Patrick  
Judy J. Peil  
Marian G. Probst  
Jonathan M. Ratner  
Joshua S. Reichert, Ph.D.  
Walter J. Stewart, Esq.  
Andrew Weinstein  
Jason Weiss  
David O. Wiebers, M.D.  
Lona Williams

foolish to have done so since there is no consequence for breaking the law. To lift the closure at the behest of an industry that has failed in its commitment to abide by regulations would just encourage more non-compliance in the future and completely undermine the efforts that NMFS has already made to reduce mortality.

**Rescinding the closure that affects a few dozen boats in the Gulf of Maine means that, in order to reach the MMPA goal of reaching PBR, additional risk reduction measures will need to be imposed elsewhere in the gillnet fleet.** The MMPA is clear in its mandates. If harbor porpoise mortality is allowed to increase in one area, and mortality exceeds PBR, then other areas will need to further reduce mortality to compensate. 16 U.S.C. § 1387(f)(5). This would unfairly affect gillnetters operating to the south of Cape Cod and in the mid-Atlantic. This places an unfair burden on fisheries that have been operating as required.

**The agency's own scientists have recommended proceeding with the prescribed fall closure.** Scientists from the NMFS northeast Fisheries Science Center have confirmed that mortality is unacceptably high and due largely to non-compliance with regulatory mandates. (Orphanides and Palka, 2012; Bullard, 2012). The data relied on in the agency's closure recommendation is not subject to any other interpretation than that which the agency has already ascribed to it. Disregarding the advice of your own experts in this instance would be the essence of arbitrary and capricious decision-making.

**You have stated that you “agree that the closure is necessary to ensure that harbor porpoise bycatch levels are reduced to those required” by the MMPA and expressed support for changes to the Take Reduction Plan to arise from informed discussion of the Take Reduction Team.** In your July 17, 2012 response to a letter from the HSUS, you reiterated your commitment to imposing the closure required by your regulations. You also expressed a commitment to allowing the MMPA-mandated multi-stakeholder reduction team to meet in October to consider alternate measures. To make changes to the consensus plan outside of the Take Reduction Team process, thereby excluding most of the team's stakeholders is counter to the requirements of the MMPA, 16 U.S.C. § 1387(f)(7), and undermines this Team and an otherwise public process.

**Agreeing to this demand may jeopardize the negotiations of other Take Reduction Teams.** Conceding to a demand by a small segment of this fishery to amend a take reduction plan that was the product of a consensus agreement jeopardizes agreements reached in other Teams. There is no incentive for members of a Team to agree to compromises if they know that any subset of an interest group can prevail upon NMFS to amend the Plan without the need of including input from scientists, or from fisheries in other areas that might be affected, or even informing other interest groups on the Team that changes are being considered.

**Altering the Plan in a way that undermines harbor porpoise protection measures may jeopardize the Agency's desire to move forward in a timely manner with ground fish management in 2013.** The agency is considering framework adjustments and other management measures that would affect multi-species fishery management for 2013 and beyond [e.g., 77 Fed. Reg. 37387 (June 21, 2012)]. In the past, the existence of the Harbor Porpoise Take Reduction Plan has been used as mitigation against significant impacts that in turn allowed the

agency to reach a Finding of No Significant Impact (FONSI) for the operation of the fishery (NEFMC, 2011 at page 133). Should the agency choose to rescind the currently mandated closure and thereby alter the take reduction plan, its prior analyses that relied on that Plan for groundfish management would no longer pertain. As such, in order to comply with the mandates of the National Environmental Policy Act, NMFS would be required to supplement its prior environmental analysis before taking fishery management actions. 40 C.F.R. § 1502.9(c)(1). Moreover, eliminating such an essential mitigation measure could jeopardize timely implementation of new groundfish measures if NMFS is not able to constrain additional harbor porpoise mortality and serious injuries.

For all the reasons above, the closure must remain in place until such time as the multi-stakeholder MMPA-mandated Take Reduction Team can meet in October to recommend new measures. You cannot allow a small portion of the gillnet fleet to dictate amendments to regulations that implement the requirements of the MMPA, particularly because any changes may unfairly affect other segments of the fleet and possibly undermine the agency's own groundfish management goals.

We urge you to stand by your decision, announced in a letter to the gillnet industry on April 19, 2012 and affirmed in a letter of September 6, 2012 as well as the commitment you made in your July 17th reply letter to us.

Sincerely,



Sharon B. Young  
Marine Issues Field Director  
The Humane Society of the United States  
syong@humanesociety.org

#### Resources Cited

Bullard, J. 2012. Letter from John Bullard to Jacqueline Odell. September 6, 2012. Available at: <http://www.savingseafood.org/images//nmfs%20response%20to%20nsc%20hp%20request%20september%206%202012.pdf>

NEFMC, 2011. Framework Adjustment 42 to the Northeast Multispecies Fishery Management Plan, Including an Environmental Assessment, Regulatory Impact Review and Initial Regulatory Flexibility Analysis. Prepared by the New England Fishery Management Council in Consultation with the mid-Atlantic Fishery Management Council and the National Marine Fisheries Service. Re-Submitted January 21, 2011. Available at: [http://www.nefmc.org/nemulti/frame/fw45/110120\\_Final\\_FW\\_45\\_Resubmit.pdf](http://www.nefmc.org/nemulti/frame/fw45/110120_Final_FW_45_Resubmit.pdf)

Northeast Seafood Coalition. 2012. Northeast Seafood Coalition. 2012. Letter to Sam Rauch from Jacqueline Odell. August 10, 2011. Available at:  
<http://www.savingseafood.org/images//hp%20request%20august%209%202012%20final.pdf>

Orphanides CD, Palka D. 2012. 2010-2011 HPTRP Consequential Bycatch and Compliance Rates. US Dept. Commerce, NEFSC Ref. Doc. 12-08; 25 p. Available from: National Marine Fisheries Service, Woods Hole, MA 02543-1026 or at <http://nefsc.noaa.gov/publications/>