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Agenda Item 4.3: **Possible Amendment of ASCOBANS to cover all species of Cetaceans**

Agenda Item 5.6: **Accessions of Range States; Extension of Agreement Area**

Implications for ASCOBANS of Enlarging the Agreement Area and Including All Cetaceans

Submitted by: **European Cetacean Society**

NOTE:
IN THE INTERESTS OF ECONOMY, DELEGATES ARE KINDLY REMINDED TO BRING THEIR OWN COPIES OF THESE DOCUMENTS TO THE MEETING

Secretariat's Note

In accordance with the Triennium Work Plan for 2004 - 2006 adopted by the 4th Meeting of the Parties to ASCOBANS (Esbjerg, Denmark, 2003), the 12th Meeting of the Advisory Committee, held in Brest, France, from 12 - 14 April 2005, discussed the possible amendment of ASCOBANS to include all cetacean species.

The Meeting came to the conclusion that the implications of such an extension were not entirely clear and therefore established an ad hoc working group to produce a paper for consideration by AC13. ECS and WDCS agreed to draft this review, focusing on implications for a) extensions to the Agreement area to make it contiguous with the ACCOBAMS Agreement area (which had already been decided at MOP4), and b) consideration of the inclusion of all cetacean species rather than only small cetaceans (all toothed whales and dolphins of the Sub-Order Odontoceti, excluding the sperm whale, recorded from the region).

This document is the first of two parts of this review and should be read in conjunction with AC13/Doc. 22b, which examines the legal implications of the above-mentioned issues.

IMPLICATIONS FOR ASCOBANS OF ENLARGING THE AGREEMENT AREA & INCLUDING ALL CETACEANS

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1. Background At the 12th meeting of the ASCOBANS Advisory Committee in Brest (France) on 12-14 April 2005, the European Cetacean Society and Whale & Dolphin Conservation Society agreed to prepare a paper on implications for a) extensions to the Agreement area to make it contiguous with the ACCOBAMS Agreement area (which had already been decided at MOP4), and b) consideration for the inclusion of all cetacean species rather than only small cetaceans (all toothed whales and dolphins of the Sub-Order Odontoceti, excluding the sperm whale, recorded from the region) (which has still to be considered).

Pending ratification of the relevant amendment, the Agreement area remains as defined in the original Agreement text, i.e.:

"the marine environment of the Baltic and North Seas, as delimited to the north-east by the shores of the Gulfs of Bothnia and Finland; to the south-west by latitude 48°30'N and longitude 5°W; to the north-west by longitude 5°W and a line drawn through the following points: latitude 60°N/longitude 5°W, latitude 61°N/longitude 4°W, and latitude 62°N/longituide 3°W; to the north by latitude 62°N; and including the Kattegat and the Sound and belt Passages but excluding the waters between Cape Wrath and St Anthony Head."

Following the entry into force of the amendment, the Agreement area will be defined as follows:

"The marine environment of the Baltic and North Seas and contiguous area of the North East Atlantic, as delimited by the shores of the Gulfs of Bothnia and Finland; to the south-east by latitude 36°N and longitude 15°W; to the north-west by longitude 15° and a line drawn through the following points: latitude 59°N/longitude 15°W, latitude 60°N/longitude 05°W, latitude 61°N/longitude 4W; latitude 62°N/longitude 3W; to the north by latitude 62°N; and including the Kattegat and the Sound and Belt passages." (see ASCOBANS Document MOP4/Doc. 9(S), 11 August 2003).

2. Conservation & Management Implications

2.1 Agreement Area Extension

The number of small cetacean species recorded within the original Agreement area is 26. By extending the Agreement area south to the Approaches to the Mediterranean Sea, no new species have been added (see Table 1b; for Latin names, see Appendix 1) but some species that are rare or irregular in the current area have become more prominent, relating either to their more pelagic habits or because they favour warmer waters. Notable amongst these is the striped dolphin which is common in the Bay of Biscay and around the Iberian Peninsula, whilst the following species, though remaining scarce, are likely to be more common: Cuvier's beaked whale, pygmy sperm whale, and false killer whale. Likewise, by extending west to include waters west of Ireland, no new species is added, but the following pelagic species, whilst remaining scarce, are likely to be more common: northern bottlenose whale, Sowerby's beaked whale and True's beaked whale.

Small cetaceans face a wide range of conservation threats. These can be grouped into eight main categories:

- Direct human exploitation (hunting)
- Competition with fisheries for food
- Incidental capture in fishing gear
- Contaminants and pathogens
- Sound disturbance
- Vessel strikes
- Habitat modification
- Climate change

In the original Agreement area, there was no hunting of small cetaceans (at least not under national or EU legislation) but the other seven threats applied (to varying degrees). This has remained the case with the Agreement area extended south and west, and although their relative importance may vary regionally, none is likely to change substantially. Introducing a more oceanic component to the Agreement area has included a greater proportion of the population of deep-water species of small cetaceans such as beaked whales, and a current conservation concern for those is the use of mid-frequency active sonar which has been linked to mass strandings. Fishing activities in the original Agreement area result in by-catch for several species, with harbour porpoise and common dolphin particularly recorded. Extending the area south has added striped dolphin as a frequently by-caught species. Types of fishing activity that have incidental catches of striped dolphins tend to catch common dolphins as well.

2.2 Extension to all Cetaceans

Up to fourteen species of baleen whale and one large toothed whale, the sperm whale, are currently recognised in the world. Of these, seven baleen whale species and the sperm whale have been recorded in the ASCOBANS Agreement area (see Table 1a). Enlarging the area has added no more species, although the status of some has changed: the blue whale occurs regularly in small numbers in the Bay of Biscay and far offshore west of

Ireland, and fin whales may be more abundant, occurring regularly off Southern Ireland, the Bay of Biscay, and west of the Iberian Peninsula. The northern right whale is vagrant in both areas (due to historical human exploitation), as is the Bryde's whale (whose distribution is primarily tropical or sub-tropical). The status of sei whale, minke whale, and humpback whale has not been materially affected by enlarging the Agreement area.

Of conservation threats listed, all eight can apply to large cetaceans in the original Agreement area, and extending this does not introduce new threats. Vessel strikes leading to serious injury or death tend to involve large cetaceans (like fin whale and sperm whale), and they are likely to be more vulnerable to loud low frequency sounds such as produced during oil and gas exploration.

3. ASCOBANS and other International Conventions

The expansion of the mandate of the ASCOBANS treaty to include all cetaceans may cause questions to arise about overlaps of competency with other international treaty bodies such as the International Whaling Commission (IWC). Table 2 illustrates the current ratification status of ASCOBANS parties with respect to some other treaty bodies that relate to cetacean conservation. The situation of some other countries may also be of importance as the recently agreed extension of the geographical scope of the treaty (Resolution No. 4 of ASCOBANS MOP 4) encompasses maritime zones under the sovereignty or jurisdiction of, *inter alia*, France, Ireland, Portugal, Spain and the United Kingdom (including the Isle of Man) and, of these, only France and the United Kingdom are currently parties to ASCOBANS.

A formal opinion about the overlapping competency issue has recently been obtained from a legal expert (Owen, 2006) and the comments following are largely based on this opinion, except where clearly stated otherwise. In general terms, Owen (2006) notes that with respect to "conflict or complementarity between international organisations, there is no general proposition in international law that two international organisations with competence in the same sector may not co-exist and operate simultaneously." Furthermore, the treaty directly addresses this issue by requiring the ASCOBANS Secretariat to, *inter alia*, "facilitate the exchange of information and assist with the coordination of monitoring and research …between the Parties and international organizations engaged in similar activities" (Article 4(2). Furthermore, under Article 5(1) the ASCOBANS Advisory Committee is required to have regard to "the need not to duplicate the work of other international bodies and the desirability of drawing on their expertise" and Article 6(2)(1) of ASCOBANS identifies, *inter alia*, a number of secretariats of treaties which are entitled to send observers to meetings of the ASCOBANS MOP. Finally, the Annex to ASCOBANS, in its first paragraph, states that its measures are to be applied "in conjunction with other competent international bodies" and paragraph 2 of the Annex requires that investigations regarding species and threats are to be "coordinated and shared in an efficient manner between the Parties and competent international organizations". Existing overlap with other bodies, and how to best manage it, has thus already been recognised by the drafters of the treaty and this reflects the fact that the original small cetacean focus of the Agreement has already

required this to be considered. The relevance of other international bodies and fora to cetacean conservation has also been recognised in various resolutions of the ASCOBANS MOP.

With respect to the IWC, Owen comments that whilst the IWC does indeed have functions regarding the management (and conservation) of whale species "that does not mean that the IWC alone has the power to adopt restrictions at the international level on human activities that may negatively affect whales." Indeed, Owen further draws attention to Article 65 (and, by reference, Article 120) of the LOSC (a treaty with 149 parties as at 15 March 2006)[1] which states, *inter alia*, that: "States shall cooperate with a view to the conservation of marine mammals and in the case of cetaceans shall in particular work through the appropriate international organizations for their conservation, management and study" (emphasis added). Owen comments that "The failure to date of the ICRW [the International Convention for the Regulation of Whaling, which founded the IWC] to provide for binding rights and obligations at the international level in relation to threats other than hunting demonstrates that: (a) international organisations other than just the IWC are needed to help protect cetaceans; and (b) it was entirely appropriate for the LOSC (in Articles 65 and 120) to envisage that conservation, management and study of cetaceans would be effected by more than just one international organisation."

Owen (2006) suggests that the relationship between the IWC and the ACCOBAMS MOP should be a useful indicator of how the relationship between the IWC and the ASCOBANS MOP would progress assuming an extension in the subject matter of ASCOBANS to all cetaceans, because ACCOBAMS [ASCOBANS's sister agreement] covers all cetaceans. Owen concludes that "the general theme is one of cooperation…. mainly at the level of workshops, assessments, research and monitoring". Owen also looks in detail at relations between ASCOBANS and NAMMCO and finds again evidence of ongoing collaboration.

All ten of the existing ASCOBANS parties are also European Community (EC member states and therefore bound by EC conservation measures. However, whilst the EC could become a signatory to ASCOBANS, so far, it has chosen not to do so. Despite this, in recent years, the Commission has been regularly taking part in the meetings of ASCOBANS. Important issues that arise include the need to work within the requirements of European law and the issue of European fisheries competency, noting the exclusive power of the EC to make rules for fisheries conservation. Owen notes that an expanded competency of ASCOBANS would make its meetings increasingly important as fora for discussion and agreement regarding the implementation of the Habitats Directive in respect of ALL cetaceans.

4. Conclusions & Recommendations

Enlarging the Agreement Area has not introduced any major change either to the cetacean fauna of concern or to the main conservation issues that impinge upon those species. Likewise, the proposal to include all cetaceans within the Agreement, thus

[1] <www.un.org/Depts/los/index.htm>.

complementing its sister Agreement, ACCOBAMS, is not thought to introduce any new conservation problems to address, although some (e.g. ship strikes, and sound disturbance from the seismic industry) may shift to some extent in importance. Whaling takes place adjacent to the ASCOBANS Agreement area. However, whaling comes under the jurisdiction of IWC (International Whaling Commission), which already has a special relationship with ASCOBANS through CMS.

The review by Owen illustrates that the mutual interests of various other treaties and bodies are best served by close collaboration, and that any opportunities for further development of this collaboration will only become more useful and important to cetacean conservation. A good foundation of collaboration has already been put in place with the relevant bodies and here is an opportunity to see this firm foundation built upon and improved.

We see the following advantages to including all cetaceans in the ASCOBANS Agreement:

1) It facilitates consideration at government level of all conservation issues affecting cetacean species; at present, no other legislative instrument or management body gives equal weight to examining all conservation problems for all cetaceans in the region (thus ensuring that issues like ship strikes, by-catch and sound disturbance affecting large cetaceans remain on the radar screen, and would receive more attention politically).
2) It would provide complementarity with its sister Agreement ACCOBAMS, and be more attractive for potential new Parties such as Spain and Portugal.
3) It would encourage closer co-operation with management authorities such as IWC
4) It offers a holistic approach to cetacean conservation which makes logical sense.

Our recommendation is therefore that parties propose at MOP4 for the inclusion of all cetacean species in the Agreement

5. Acknowledgements

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6. Reference

Owen, D. 2006. *The interaction between the ASCOBANS MOP and the IWC, NAMMCO and EC*. A report for the Whale & Dolphin Conservation Society, Chippenham, UK.

APPENDIX 1: List of 35 European Cetacean Species and their Latin Names

ORDER CETACEA

SUB-ORDER MYSTICETI, the Baleen Whales

Family Balaenidae (right whales)

Balaena mysticetus	Bowhead or Greenland right whale*
Eubalaena glacialis	North Atlantic right whale

Family Balaenopteridae (rorquals)

Balaenoptera acutorostrata	Minke whale
B. borealis	Sei whale
B. edeni	Bryde's whale
B. musculus	Blue whale
B. physalus	Fin whale
Megaptera novaeangliae	Humpback whale

SUB-ORDER ODONTOCETI, the Toothed Whales

Family Physeteridae

Physeter macrocephalus	Sperm whale

Family Kogiidae

Kogia breviceps	Pygmy sperm whale
K. sima	Dwarf sperm whale

Family Ziphiidae

Hyperoodon ampullatus	Northern bottlenose whale
M. bidens	Sowerby's beaked whale
M. densirostris	Blainville's beaked whale, dense-beaked whale
M. europaeus	Gervais' beaked whale
M. grayi	Gray's beaked whale
M. mirus	True's beaked whale
Ziphius cavirostris	Cuvier's beaked whale

Family Monodontidae

Delphinapterus leucas	White whale, beluga
Monodon monoceros	Narwhal

Family Delphinidae

D. delphis	Common or short-beaked common dolphin
Feresa attenuata	Pygmy killer whale
Globicephala macrorhynchus	Short-finned pilot whale
G. melas	Long-finned pilot whale
Grampus griseus	Risso's dolphin
Lagenodelphis hosei	Fraser's dolphin
Lagenorhynchus acutus	Atlantic white-sided dolphin
L. albirostris	White-beaked dolphin
Orcinus orca	Killer whale
Peponocephala electra	Melon-headed whale
Pseudorca crassidens	False killer whale
S. coeruleoalba	Striped dolphin
S. frontalis	Atlantic spotted dolphin
Tursiops truncatus	Bottlenose dolphin or common bottlenose dolphin

Family Phocoenidae (porpoises)

Phocoena phocoena	Harbour porpoise

* Recorded from Norway (but outside the ASCOBANS Agreement Area)

Table 1: Status of Cetacean Species Occurring in enlarged ASCOBANS Agreement Area, by Country

		COUNTRY													
CETACEAN SPECIES		**NO**	**DK**	**SE**	**FI**	**PO**	**LI**	**DE**	**NL**	**BE**	**UK**	**IE**	**FR**	**ES**	**PT**
a) baleen whales & large toothed whales															
Bowhead whale		VAG[1]	-	-	-	-	-	-	-	-	-	-	-	-	-
N. Atlantic right whale		VAG	-*	-	-	-	-	-	VAG	-*	VAG	VAG	-*	VAG	VAG
Minke whale		COM	COM[2]	RAR	-*	-	-	RAR	RAR	VAG	COM[3]	REG[4]	REG	REG	COM
Sei whale		RAR	VAG	VAG	-	-	-	VAG	VAG	VAG	RAR	REG	RAR	RAR	REG
Bryde's whale		-	VAG	-	-	-	-	-	-	-	-	-	-	-	-
Blue whale		RAR	-*	-	-	-	-	-	-*	-*	RAR	RAR	VAG	RAR	VAG
Fin whale		REG	VAG	VAG	-	-	-	VAG	VAG	VAG	REG	REG	RAR	REG	REG
Humpback whale		REG	VAG	VAG	VAG	-*	-	VAG	VAG	-*	RAR	RAR	VAG	RAR	RAR
Sperm whale		REG	RAR	VAG	-	VAG	-	VAG	VAG	VAG	RAR	RAR	REG	REG	REG
b) small cetaceans															
Pygmy sperm whale		-	-	-	-	-	-	-	-*	-	VAG	VAG	RAR	VAG	VAG
Dwarf sperm whale		-	-	-	-	-	-	-	-	-	-	-	VAG	VAG	-
N. bottlenose whale		REG	VAG	VAG	-	-*	-	VAG	VAG	-*	REG	REG	RAR	REG	-
Sowerby's beaked whale		RAR	VAG	VAG	-	-	-	VAG	VAG	-*	RAR	RAR	RAR	RAR	RAR
Blainville's beaked whale		-	-	-	-	-	-	-	VAG	-	VAG	-	VAG	VAG	RAR
Gervais' beaked whale		-	-	-	-	-	-	-	-	-	-	VAG	VAG	-	RAR
Gray's beaked whale		-	-	-	-	-	-	-	-*	-	-	-	-*	-	-
True's beaked whale		-	-	-	-	-	-	-	-	-	-	VAG	VAG	VAG	-
Cuvier's beaked whale		-	-	VAG	-	-	-	-	VAG	-*	RAR	RAR	REG	REG	RAR
Beluga		RAR	VAG[5]	VAG	VAG	-*	VAG	VAG	VAG	VAG	VAG	-	-	-	-
Narwhal		RAR	-	VAG	-	-	-	-	-*	-	-*	-	-	-	-
Common dolphin		REG	REG	VAG	VAG	VAG	-	VAG	RAR	VAG	COM	COM	COM	COM	COM
Pygmy killer whale		-	-	-	-	-	-	-	-	-	-	-	VAG	VAG	-
Short-finned pilot whale		-	-	-	-	-	-	-	-	-	-	-	VAG	VAG	-
Long-finned pilot whale		COM[6]	RAR	VAG	-	-	-	VAG	VAG	VAG	COM	COM	COM	COM	COM
Risso's dolphin		VAG	-*	VAG	-	-	-	VAG	VAG	-	REG	REG	REG	REG	COM
Fraser's dolphin		-	-	-	-	-	-	-	-	-	VAG	-	VAG	-	-
Atlantic white-sided dolphin	COM	RAR	RAR	-	-	-	VAG	RAR	VAG	COM	COM	RAR	RAR	RAR	
White-beaked dolphin		COM	COM[7]	RAR	VAG	VAG	-	RAR	REG	RAR	COM	REG	RAR	VAG	-
Killer whale		REG	REG[8]	VAG	-	-	-	VAG	VAG	-*	REG	REG	RAR	RAR	REG
Melon-headed whale		-	-	-	-	-	-	-	-	-	-*	-	VAG	-	-
False killer whale		VAG	-*	-*	-	-	-	-*	-*	-	VAG	VAG	VAG	VAG	RAR
Striped dolphin		VAG	VAG	VAG	-	VAG	-	VAG	VAG	VAG	RAR	RAR	COM	COM	COM
Atlantic spotted dolphin		-	-	-	-	-	-	-	-	-	-	-	VAG	-	-
Bottlenose dolphin		VAG	VAG	VAG	-*	-	VAG	VAG	RAR	RAR	COM	COM	COM	COM	COM
Harbour porpoise		COM	COM	COM	RAR	REG	VAG	COM	COM	COM	COM	COM	REG	REG	COM

NOTES

Countries: NO = Norway; DE = Denmark; SE = Sweden; FI = Finland; PL = Poland; LI = Lithuania; DE = Germany; NL = Netherlands; BE = Belgium, UK = United Kingdom; IE = Ireland; FR = (Atlantic) France; ES = (Atlantic) Spain (excl. Canaries); PT = (Atlantic) Portugal (excl. Azores & Madeira)

For Latvia and Estonia, there is insufficient information on status of most species, although no species is regular, and harbour porpoise occurs at best as a vagrant

Cetacean Status (based on records since 1980): VAG = Vagrant; RAR = Rare; REG = Regular (but Uncommon); COM = Common; - = Not Recorded; * = Record(s) before 1980

Despite frequent references to it in handbooks, rough-toothed dolphin, *Steno bredanensis*, has not been recorded with certainty from the ASCOBANS region. There are two nineteenth century records ascribed to *Steno* from the Netherlands, one based only upon a description and drawing, and the other on a skull found in a ditch, but no skeletal evidence of the former has been found, and the origins of the latter are uncertain and may derive from a sailor's travels elsewhere in the world.

[1] VAG in northern Norway only, [2] REG in Kattegat/Baltic, [3] but REG in Channel & Southern North Sea, [4] but COM in Southwest; [5] but annual, periodically, [6] but periodic, at other times RAR, [7] REG in Kattegat/Baltic, [8] RAR in Kattegat/Baltic

Table 2. ASCOBANS RANGE STATES (as of April 2006)

Range states to ASCOBANS	Ratified signatory to ASCOBANS	EU member	Ratified signatory to IWC	Ratified signatory to NAMMCO	Ratified signatory to OSPAR	Ratified signatory to HELCOM
Belgium	Y	Y	Y	N	Y	N
Denmark	Y	Y	Y	N	Y	Y
Finland	Y	Y	Y	N	Y	Y
Germany	Y	Y	Y	N	Y	Y
Lithuania	Y	Y	Y	N	N	Y
Netherlands	Y	Y	Y	N	Y	N
Poland	Y	Y	Y	N	N	Y
Sweden	Y	Y	Y	N	Y	Y
UK	Y	Y	Y	N	Y	N
Estonia	N	Y	Y	N	N	Y
France	Y	Y	Y	N	Y	N
Ireland	N	Y	Y	N	Y	N
Latvia	N	Y	Y	N	N	Y
Norway	N	N	Y	Y	Y	N
Portugal	N	Y	Y	N	Y	N
Russia	N	N	Y	N	N	Y
Spain	N	Y	Y	N	Y	N