


MEMORANDUM

TO: Council, AP and SSC Members

FROM: Clarence G. Pautzke 
Executive Director

DATE: September 20, 1990

SUBJECT: Marine Mammals

ACTION REQUIRED

Reports on Steller sea lions, Section 7 consultation, and guidelines for incidental takes of marine mammals in commercial fisheries after October 1, 1993.

BACKGROUND

Status Report on Steller Sea Lions

Last April NMFS published an emergency rule listing the Steller sea lion as threatened under the Endangered Species Act of 1973. The rule implemented protective measures including a ban on the discharge of firearms around sea lions, buffer zones around listed rookeries, and an incidental take quota of 675 animals in commercial fishing operations. The emergency rule will expire December 3, 1990.

On July 20, 1990, NMFS published two notices in the Federal Register. The first was an advanced notice of proposed rulemaking to solicit comments to assist it in developing a proposed rule that will consider the designation of critical habitat and a broader range of conservation measures than those published last April. Critical habitat requirements could include breeding rookeries, haul-out sites, feeding areas and nutritional requirements. Conservation measures mentioned include:

1. Reducing the quota for allowed mortalities incidental to commercial fishing operations;
2. Limiting trawling to daylight hours;
3. Prohibiting fishing for pollock when they are carrying roe;
4. Reducing the overall quota of groundfish;
5. Increasing the buffer zones and including buffer zones around other rookeries and haul-out areas throughout the species range;
6. Regulating subsistence taking; and
7. Designating critical habitat.

NMFS will consider public comments on the notice in conjunction with recommendations of the Steller Sea Lion Recovery Team and the Marine Mammal Commission.

The second notice published by NMFS proposes a more permanent fix to supplant the emergency rule of April 5, 1990. It lists Steller sea lions as threatened and implements protective measures

similar to the emergency rule, i.e., no shooting, buffer zones, and an incidental take quota of 675 animals.

Section 7 Consultations

The listing of Steller sea lions as threatened triggered the need for Section 7 consultations under the Endangered Species Act to determine whether fisheries off Alaska are likely to jeopardize the survival of endangered or threatened species. Although the Steller sea lion listing prompted the consultation, NMFS has determined that it will address all endangered and threatened species in the plan areas including blue, bowhead, fin, gray, humpback, sei and sperm whales. NMFS-Alaska Region will forward their biological opinions to the Central Office by mid-December.

NMFS also intends to work with the Council to develop reasonable and prudent alternatives and measures to avoid or minimize any adverse effects of the fisheries on listed species. The Council needs to determine how best to facilitate this process.

Marine Mammal Incidental Take Guidelines after October 1, 1993

The pace is beginning to pick up on developing a regime to govern the incidental taking of marine mammals in commercial fisheries after October 1, 1993. That is when the current five-year agreement, developed through amendment to the Marine Mammal Protection Act in 1988, will expire. The amendment directed the Marine Mammal Commission to develop guidelines to supplant the five-year agreement. They did so in 1989 and circulated their recommendations for comment in January 1990. The Marine Mammal Commission sent their draft guidelines and responses to public comments to NMFS on July 12, 1990. In your notebooks under C-6(a) are letters of August 1 and July 12 from the Commission summarizing their recommendations, and a response of July 23 from the Pacific States Marine Fisheries Commission on behalf of a host of industry groups. I have copies available of the more formidable documents from the Marine Mammal Commission detailing their entire program.

The schedule appears to be as follows:

- | | |
|---------------------|--|
| July 12, 1990 | Marine Mammal Commission sends guidelines to NMFS. |
| August 1, 1990 | Marine Mammal Commission sends guidelines to public. |
| By February 1, 1991 | NMFS develops and makes available for public review a proposed regime to govern incidental takings. |
| Early 1991 | NMFS, USF&W, MMC hold workshops to review marine mammal data availability and research needs. |
| 1991-1992 | NMFS, USF&W, MMC hold workshops with <u>fishery councils</u> to identify procedures for assessing interactions between fisheries and marine mammals and ensuring that fisheries do not directly or indirectly disadvantage marine mammals. |
| By January 1, 1992 | Secretary of Commerce submits recommended plan to Congress. |
| October 1, 1993 | 1988 five-year amendment expires. |

The Council and NMFS needs to consider how to interact on this issue over the next year.

MARINE MAMMAL COMMISSION
1825 CONNECTICUT AVENUE, N.W. #512
WASHINGTON, DC 20009

12 July 1990

The Honorable William W. Fox, Jr., Ph.D.
Assistant Administrator for Fisheries
National Marine Fisheries Service
National Oceanic and Atmospheric Administration
Department of Commerce
Silver Spring, MD 20910

Dear Dr. Fox:

The 1988 amendments to the Marine Mammal Protection Act established, until 1 October 1993, an interim exemption allowing marine mammals, other than southern sea otters, to be taken incidental to commercial fisheries. The amendments require the Secretary of Commerce to recommend to Congress by 1 January 1992, a regime to govern the authorization of incidental takes upon expiration of the interim exemption.

As a first step in developing legislation to govern taking of marine mammals incidental to commercial fisheries after 1 October 1993, the Marine Mammal Commission was directed to develop and transmit to the Department of Commerce recommended guidelines. The guidelines are to provide a scientific rationale for determining the allowable level of take, are to be based on sound principles of wildlife management, and are to be consistent with the purposes and policies of the Marine Mammal Protection Act.

The Commission, in consultation with its Committee of Scientific Advisors, developed and, on 26 January 1990, circulated draft guidelines to interested parties, including fisheries groups and environmental organizations. The Commission also published a notice of availability in the Federal Register and invited public comment. At the request of several fisheries groups, the public comment period on the draft guidelines was extended until 30 March 1990.

Numerous comments on the draft guidelines were received. The Commission, in consultation with its Committee of Scientific Advisors, took those comments into consideration in preparing the Recommended Guidelines which are enclosed. The enclosed document summarizes the comments on the draft and indicates how they were addressed.

In the Recommended Guidelines, the Commission, in consultation with its Committee of Scientific Advisors, recommends, among other things, that the legislation to govern the incidental taking of marine mammals after 1 October 1993:

1. reaffirm the Marine Mammal Protection Act's goal to reduce the incidental kill and serious injury of marine mammals in commercial fisheries to insignificant levels approaching a zero mortality and serious injury rate;
2. reinstate the substantive, although not necessarily the procedural, requirements of the General Permit and small take provisions of the Act [sections 101(a)(2) and 101(a)(4)] for marine mammal populations known or reasonably believed to be within their optimum sustainable population levels;
3. allow the incidental take of marine mammals listed as endangered or threatened under the Endangered Species Act or designated as depleted under the Marine Mammal Protection Act if:
(a) a recovery plan or conservation plan, including an implementation plan, has been developed, adopted, and put in place; (b) the authorized level of take, by itself and in combination with other sources of mortality, is not likely to cause or contribute to a further population decline or cause more than a ten percent increase in the best available estimate of the time it will take the affected species or population to recover to its maximum net productivity level; (c) ongoing and planned monitoring and enforcement programs are adequate to insure that the authorized level of take is not exceeded; and (d) there is good reason to believe that the incidental take has been or will be reduced to as near zero as practicable;
4. authorize, on an experimental basis, for periods of three to five years, the incidental take of marine mammals from populations whose status is uncertain if: (a) the authorized level of take clearly would have a negligible effect on population size and productivity; and (b) ongoing or planned assessment, monitoring, and enforcement programs are adequate to insure that the authorized levels of take will not be exceeded, that the status of the affected stock will be determined with reasonable certainty within three to five years, and that possible means for avoiding or reducing the level of incidental take will be identified and action taken thereon;
5. streamline and continue the vessel registration and reporting programs initiated under the 1988 Marine Mammal Protection Act amendments;

6. grant the Secretary of Commerce explicit authority to place observers aboard any U.S. commercial fishing vessel as well as any foreign commercial fishing vessel operating in U.S. waters; and

7. provide necessary funding or authorize the collection of user fees sufficient for observer and other marine mammal monitoring programs.

In addition, the Marine Mammal Commission, in consultation with its Committee of Scientific Advisors on Marine Mammals, recommends that the act of fishing without the appropriate marine mammal incidental take authorization be made a violation of the Marine Mammal Protection Act. Such a prohibition was incorporated into the interim exemption for commercial fisheries and is much easier to enforce than the Act's taking prohibition, which requires observation of the illegal take. As noted in the Recommended Guidelines, the Secretaries of Commerce and the Interior should be granted discretion to waive the fishing prohibition for fisheries determined to have only a remote possibility of taking marine mammals.

Successful implementation of the recommended regime to govern the incidental take of marine mammals in commercial fisheries will depend, in large part, on the procedures by which the required determinations are made. Although not specifically directed to do so by the 1988 Marine Mammal Protection Act amendments, the Commission, in consultation with administrative law experts, is reviewing procedural aspects of the issue. The Commission's goal is to try to identify a streamlined alternative or alternatives to formal rulemaking. To be acceptable, any alternatives would have to provide for full scrutiny of the evidence before the agency, provide for independent review of the data, and require a complete explanation of the decisionmaker's rationale based on a fully developed record.

The legislative history of the 1988 amendments explains that the interim exemption was not intended to "supersede, or otherwise affect, any provisions of the Endangered Species Act...". Thus, the taking of endangered or threatened marine mammals, while not a violation of the Marine Mammal Protection Act, would remain unlawful under the Endangered Species Act. Unless a mechanism to authorize the incidental take of listed marine mammals under the Endangered Species Act is incorporated into the 1993 legislation, a court, following the decision in

Kokechik Fishermen's Association v. Secretary of Commerce, may rule that no incidental take of any marine mammals can be authorized for a fishery that has more than a remote possibility of also taking an endangered or threatened marine mammal. The Commission believes that the take of small numbers of listed marine mammals in certain instances, as recommended in the Guidelines, would not detrimentally affect the species or its recovery and provision should be made to authorize taking in those instances.

One assumption behind the 1988 amendments was that, at the end of the five-year, interim exemption, sufficient information would be available on the status of marine mammal stocks taken incidentally in commercial fisheries and the impact of fisheries on those marine mammal stocks to enable the Secretaries of Commerce and the Interior to authorize specific levels of take based on sound principles of wildlife management. In developing its Recommended Guidelines, the Marine Mammal Commission has accepted that assumption. Given the comments on the draft guidelines by the Service and others, however, it is likely that, unless substantial, additional population assessment efforts are undertaken immediately, the Service will not have the information needed to make status determinations for many, if not most, of the marine mammal stocks come 1993. There may even be some instances where it will not be possible to provide a reliable minimum population estimate for a stock subject to incidental taking or to determine whether the stock is increasing, stable, or decreasing. If this is the case, it is important that the Service so advise Congress. If a description of what can and should be done to fill the information gaps between now and October 1993 is provided to Congress, sufficient resources may be made available to allow the necessary studies to proceed on a priority basis.

Toward this end, the Commission recommends in the Guidelines that the National Marine Fisheries Service and the Fish and Wildlife Service, in consultation with the Marine Mammal Commission, hold a workshop or series of workshops, as soon as possible, but starting no later than in early 1991, to:

1. review available information concerning the species and numbers of marine mammals being taken incidental to various fisheries, the status of the affected marine mammal stocks, the effects of the incidental take, by itself and in

combination with other forms of take, on the stocks, and the nature and effectiveness of steps that have been taken to identify and implement changes in fishing gear and practices to avoid or reduce the incidental take;

2. determine factors, such as changes in habitat and lack of information on historic abundance, other sources of mortality, etc., that may make status of stock determinations difficult to make, and describe how problems caused by these factors might best be addressed;

3. identify additional information, if any, that will be needed to make required status of stock and other determinations; and

4. describe the research programs required to obtain and analyze needed data and the monitoring/management programs needed to ensure that authorized levels of take do not have unanticipated consequences and that levels of take are reduced to as near zero as practicable.

With respect to reducing levels of take incidental to fishing operations, the Commission notes that fisheries groups, during the 1988 reauthorization of the Marine Mammal Protection Act, agreed to undertake and fund a special research program on gear technology and fishing practices designed to minimize the take of marine mammals. The workshop(s) would provide an excellent opportunity to review the progress of this research program and to provide direction for additional studies.

As noted in the Recommended Guidelines, marine mammals may be affected indirectly as well as directly by commercial fisheries. The Magnuson Fishery Conservation and Management Act, through its definition of "optimum yield," requires the Fishery Management Councils and the National Marine Fisheries Service to consider relevant ecological factors when setting harvest levels. To date, however, fishery management plans have not routinely considered or provided for maintaining the level of fish and shellfish resources necessary to support optimum sustainable marine mammal populations.

To ensure that both direct and indirect effects of commercial fisheries on marine mammal and other non-target species are considered and appropriately factored into fishery management plans, the Marine Mammal Commission recommends that the Service promulgate regulations requiring that the food requirements of such species, and any uncertainties related

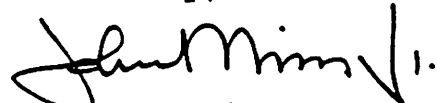
The Honorable William W. Fox, Jr., Ph.D.
12 July 1990

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thereto, be considered and appropriately factored into estimates of the optimum yield of fishery resources. In this regard, the Commission recommends that the National Marine Fisheries Service and the Fish and Wildlife Service, in consultation with the Commission, the various Fishery Management Councils, and other appropriate organizations and individuals, organize and hold a workshop or series of workshops in 1991 or 1992 to identify and evaluate possible procedures for assessing interactions between fisheries and marine mammals and ensuring that fisheries do not directly or indirectly disadvantage marine mammals. The Commission would be willing to assist the Services in developing the scope(s) of work for the workshop(s) and identifying possible participants.

We would be pleased to answer any questions you may have about the Commission's Recommended Guidelines.

Sincerely,



John R. Twiss, Jr.
Executive Director

Enclosures: Recommended Guidelines
Response to Comments

cc with enclosures: The Honorable Ernest F. Hollings
The Honorable Gerry E. Studts
The Honorable John F. Turner



PACIFIC STATES MARINE FISHERIES COMMISSION

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EXECUTIVE DIRECTOR
 GUY N. THORNBURGH

July 23, 1990

Dr. Nancy Foster
 Director
 Office of Protected Resources
 1335 East-West Highway
 Silver Spring, MD 20910

RE: Scoping process; draft EIS for incidental take of
 marine mammals in fisheries

Dear Nancy:

The Pacific States Marine Fisheries Commission and the Pacific Fishery Management Council have closely followed the implementation of the Marine Mammal Protection Act and its amendments. The forthcoming proposal by the Secretary of Commerce to govern the incidental taking of marine mammals in commercial fishing operations will shape the course of the management of living marine resources into the next century. Our interests are in assuring that commercial, recreational and tribal uses of marine and anadromous fish are not needlessly sacrificed.

Although Congress explicitly requested a regime for the incidental take in fisheries, we believe that NMFS, as steward of the Nation's marine ecosystem, should take the initiative and suggest to Congress an overall **rational management** system for marine mammals. We look for strong leadership now, in order to avoid further issues like Herschel, the gray whale remaining "endangered", and the \$950,000 annual expenditure for a Columbia River observer program when the mammal populations are actually **increasing** at a rapid rate. We encourage National Marine Fisheries Service to be bold and recommend to Congress a mammal management system in **harmony** with this nation's demand for consumptive renewable resources.

We've reviewed the outline for the draft EIS which was prepared for the scoping process. **Six alternatives** are listed. Option D (amend MMPA to implement Marine Mammal Commission guidelines), was already addressed in our comments to the MMC when they published their draft proposal in March. These comments are appended for your review, and show our concerns. We've also reviewed the latest version of their proposal, which is similar to the draft version, and find no reason to change our position.

To address the other options we first looked at the problem facing the Nation when Congress passed the interim exemption program. There was insufficient information on the status of the populations and on fishery takes; there were

inadequate provisions for the taking of "depleted" species, in part a function of the "defacto" provision of the Act and in part due to the interpretation of OSP; and there was no clear structure for managing the mammal resources. We find that none of the options alone fully address these problems, so we propose that you consider the following as option "G - Other":

- * Clarify that the upper bound of the OSP range is not necessarily the historical carrying capacity, but instead a more realistic, contemporary capacity that recognizes natural and human induced changes in the ecosystem, including the management of all other marine resources.

OSP should also be clarified to relate the boundaries of the geographic ranges of populations to the actual management of fisheries and mammals. Must the condition of the harbor seal population in the entire Pacific be determined and addressed in order to simply implement a refined management plan for harbor seals in one river system where they happen to be increasing?

- * Modify Sections 101, 102 and 104 to allow the take of depleted species such that:
 - I if the depleted population is increasing, then continue the existing fishery/mammal management program which is allowing the growth.
 - II if the depleted population is stable and it can be shown that the take by fisheries is preventing an increase, then reduce the fishery impact to allow such an increase to occur.
 - III if the population is decreasing then reduce the take by the fisheries.
 - IV if the population status is unknown then collect information on its status, provided the issue is high enough priority to justify the expenditures on the research.

In all cases I - IV, it is understood that the goal of the Act is to reduce incidental kill or serious injury of marine mammals to insignificant levels. It is explicit in our option that such reductions are a function of technical feasibility and economic practicality.

In cases II and III, intentional takes (mortalities and serious injuries) are prohibited and mandatory observer programs should be implemented to document the take of mammals, provided the issue is a high enough priority to warrant the expense.


In cases II and III, the regulatory programs which reduce the take of mammals should not necessarily be quotas, particularly if the quotas are arbitrary formulas that result in significant curtailment of fisheries without appreciable benefits to the mammal populations. Preferred programs would include time/area restrictions and gear modifications. Such programs should be developed by state rulemaking authorities in the territorial sea and inland waters, and

by the Regional Management Councils in the EEZ. If these authorities fail to respond adequately and/or in a timely fashion, then provisions should be made for the Secretary to implement his own program.

- * Modify the Endangered Species Act to allow for takes of endangered or threatened marine mammals by commercial fisheries when the takes are not detrimental to the recovery of the population throughout its range.
- * The expensive, burdensome permitting/reporting system of the "interim exemption" is not carried forward in this option. Limited observer programs (for cases of sufficiently high priority) to verify fishery takes are adequate.

We understand that your agency's task force will meet in early August to prepare a first draft. Once the draft is prepared, we invite members of the task force to join the environmental/fishing industry work group for an informal discussion of the draft. This will provide an excellent opportunity to explain to us the details and rationale of the proposal, as well as for NMFS to receive immediate feedback. The Pacific States Marine Fisheries Commission has agreed to coordinate such a meeting.

Sincerely,



Lawrence Six
Executive Director
Pacific Fishery Management Council



Guy N. Thornburgh
Executive Director
Pacific States Marine Fisheries Commission

PACIFIC FISHERY MANAGEMENT COUNCIL

CHAIRMAN
Richard A. Schwarz

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EXECUTIVE DIRECTOR
Lawrence D. Six

Phone: Commercial (503) 326-6352
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March 22, 1990

Mr. John Twiss, Executive Director
Marine Mammal Commission
1625 Eye Street, NW
Washington, DC 20006

Dear Mr. Twiss:

Thank you for the opportunity to comment on the proposed guidelines governing incidental take of marine mammals in commercial fisheries after October 1993. The Pacific Fishery Management Council develops fishery management plans for ocean fisheries in the Exclusive Economic Zone off the coasts of Washington, Oregon and California. Commercial fisheries in our jurisdiction are impacted by marine mammal regulations and guidelines implemented pursuant to the Marine Mammal Protection Act as amended, including the subject guidelines.

We offer some general comments followed by specific comments on a section-by-section basis.

General

We appreciate the fact that the guidelines attempt to achieve the goals of the Marine Mammal Protection Act (MMPA) and Endangered Species Act (ESA) while trying to accommodate the needs of commercial fisheries. Provisions to allow limited takes of depleted, threatened and endangered mammals add flexibility in the real world of competing uses of living marine resources and conflicting federal statutes.

Striking a balance between the MMPA and the Magnuson Fishery Conservation and Management Act (MFCMA) is a difficult but necessary process if we are to avoid large adverse economic and social impacts.

Principles of Wildlife Management

The 1988 amendments to the MMPA require that the incidental take guidelines be based on sound principles of wildlife management. We support this approach, but there is an inherent conflict between wildlife management principles and the MMPA. One of the key principles of wildlife management and the MFCMA is to maximize yields to the extent possible over the long term. The MMPA attempts to protect populations and maximize the size of them.

The principles of wildlife management should influence heavily any regulations impacting commercial fisheries. This may mean that we will not be able to maximize the number of some marine mammals so that we may continue to harvest fish.

Proposed Management Guidelines

We agree that it is appropriate to authorize the incidental taking of depleted and non-depleted species of marine mammals to allow rational utilization of other resources and to obtain needed information. We support objective number 3 to minimize hardship to commercial fisheries, but it should not be subservient to objective 2, to reduce incidental take to as near zero as is technically and economically feasible. How do you define technically and economically feasible?

The grouping of mammal populations according to status would appear to be a logical approach, except that the data necessary to categorize populations does not exist for many species. Adequate assessment data is available only for a small number of species, and it will be well after 1993 before the required assessments are completed.

It is unreasonable to expect NMFS to collect adequate data to determine the status of all marine mammal stocks by 1993 or to develop reliable estimates of incidental catches of marine mammals in all fisheries by 1993.

A. Populations Within OSP Range

The last clause in the first full paragraph on page 9 gets at one of the most serious problems concerning the proposals in this document. There is insufficient funding available to NMFS to do even a minimal job of carrying out the objectives of the MMPA. For that matter, NMFS has insufficient funds for many of its major programs, including the MFCMA. We cannot support a user fee collected from commercial fishermen to fund marine mammal programs. If Congress wants these programs, then adequate federal funding should be appropriated.

B.C. Endangered, Threatened or Depleted Populations

We agree that the Endangered Species Act should be amended or clarified to authorize the taking of endangered or threatened marine mammals in commercial fisheries. The six provisions on page 11 appear to be more restrictive than the ESA, which requires that the proposed action not jeopardize the continued existence of the species. The data requirements of provision 3 are quite onerous given the state of knowledge and lack of federal funding for these programs.

The incidental take formulas on page 12 are arbitrary and without scientific justification, and display unreasonable optimism concerning the accuracy of abundance estimates. A measurable decline due to incidental takes depends on the accuracy of existing estimates.

The incidental allowance for northern sea lions in the central part of their range would be 22 animals using the suggested formula in case 3a. We are concerned about the status of these mammals and agree that incidental take must be minimized, but a quota of 22 animals is not realistic given the number of fishing vessels in this area.

We envision large commercial fisheries over wide areas will be terminated under these provisions without appreciable benefits to the endangered population. It may be more practical to pursue programs to identify changes in fishing gear or practices that minimize incidental take. At a minimum, there needs to be a process allowing dialogue among all of the interests in setting incidental take numbers.

The contents of conservation plans need to be realistic given the state of our knowledge and fiscal constraints.

D. Populations With Uncertain Status

We appreciate the Commission's willingness to consider incidental takes on an experimental basis to gather needed information. Since our knowledge of most mammal populations is limited, most will fall into this category, which conservatively limits or prohibits incidental take. Incidental takes need to be realistic and established through adequate dialogue among the affected parties.

Related Needs/Recommendations

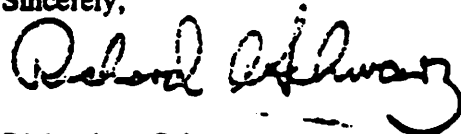
We do not agree that the Councils must define overfishing as reductions in fish stocks that would reduce marine mammal populations below the maximum net productivity level calculated with respect to abundance prior to fishery development. The term "overfishing" in the MFCMA National Standards Guidelines refers to reductions in recruitment potential for a fish stock. The extension of the overfishing term to include the "ecological factors" aspect of optimum yield is inappropriate and will hinder current efforts to develop specific, operational guidelines for determination of the potential for overfishing.

It is not realistic or practical to try to manage for marine mammal abundances prior to fishery development. We don't have the luxury of going back to times when man did not have significant impacts on natural resources. We can't get rid of the dams, agriculture practices, offshore oil development, logging and other activities that have seriously impacted fish stocks and fisheries. We need to consider all present day impacts on resources when trying to manage them.

Determination of the level of fish abundances necessary to maintain optimum sustainable marine mammal populations will be many times more difficult than our already difficult task of determining the level of fish abundance that produces the optimum fish yield. The fishery stock assessment community has insufficient resources to improve measurements of fishery-marine mammal interactions. In the foreseeable future, we will not be able to respond to the recommendations on page 19, and we welcome input from other groups on the impacts of fisheries on marine mammals.

The recommendations in this section place emphasis on providing food for mammals, birds and other species. The principles of wildlife management and the MFCMA, on the other hand, emphasize long-term sustainable yields for human benefit. We hope that the guidelines will be revised to reflect traditional concepts of resource conservation and management.

Sincerely,



Richard A. Schwarz
Chairman



PACIFIC STATES MARINE FISHERIES COMMISSION

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EXECUTIVE DIRECTOR
GUY N. THORNBURGH

March 27, 1990

John R. Twiss, Jr.
Executive Director
Marine Mammal Commission
1625 Eye Street, N.W.
Washington, D.C. 20006

Dear John:

Thank you for the opportunity to comment on the discussion draft of the Proposed Guidelines to Govern the Incidental Taking of Marine Mammals in the Course of Commercial Fishing Operations.

We are not surprised by the document -- it is professionally written; it closely addresses the assignment given the Commission in the 1988 Amendments; and is ultra conservative.

Similarly, we're sure you won't be surprised by our comments -- they echo the long standing position of the fisheries industry that the MMPA is in desperate need of significant amendment to truly balance marine mammals within an ecosystem which houses other living marine resources. Further, we cannot accept this proposal as a realistic long term solution.

However, we do see embodied within the proposal a skeletal approach with merit, and we invite the Commission to meet with the fishing industry to discuss in detail: (a) the Commission's rationale for the various components of the proposal, (b) options the Commission considered but did not incorporate in the proposal, and (c) the fishing industry's reactions and ideas.

The components of the Commission's proposal which we identify with include:

- The concept of general categories of management problems (page 6) according to the status of the affected population and/or the likely effect of the incidental take on the population. However, we have reservations with the number and complexity of the categories proposed.

- We also endorse the Commission's belief (page 7) that:

"... it would be appropriate in some cases to authorize the incidental taking of depleted as well as non-depleted species and population stocks of marine mammals to allow rational utilization of other resources, and to help obtain information needed for ecologically sound resource management. In such cases, the general objectives should be to:

1. restore the affected species or population stock to its optimum sustainable level with no significant time delays;
2. reduce the incidental take to as near zero as is technically and economically feasible; and
3. minimize hardship to commercial fisheries while achieving objectives 1 and 2."

We certainly believe non-depleted and depleted populations (including threaten/endangered) can be taken along with other resources. We surely recognize that ecologically sound resource management, (which is the balancing of non consumptive and consumptive uses while acknowledging that no population can be treated out of context with other species), requires considerable information. We also see the benefit of restoring populations to reasonable levels, although current interpretations of OSP levels (e.g. California sea lions) are arguable. We even understand an incidental take approaching zero when it is technically and economically feasible because we have no industry affinity for needlessly taking animals. And obviously we insist on minimizing hardships to our fisheries.

Our concerns with the proposal are more numerous and are outlined below.

- This proposal is entirely dependent on OSP -- populations are categorized relative to their OSP; stringent requirements to rebuild to OSP; populations are "depleted" when below OSP; populations are "disadvantaged" when reduced below OSP; etc.

Yet the industry sees the definition and application of OSP as completely out of step with modern wildlife management practices. The booming population of California sea lions is considered below OSP; gray whales are still endangered; OSPs are based on carrying capacity defined as the largest known population level in history; and in this proposal the lower end of OSP (maximum net productivity) should be "calculated with respect to abundance prior to fishery development" (page 19)! It's difficult for the industry to focus on this proposal given this approach to OSP.

This is not to say our industry is insensitive to low population levels. We are very concerned with Stellar sea lions, for example, and are committed to helping see that such population declines are reversed.

- An important component of the directions which were given the Commission by the 1989 amendments was to base the guidelines on "sound principles of wildlife management". However, there is a dilemma when wildlife management must mesh with the "protectionist" policies implicit with the Commission's approach to OSP.

The Commission's choice and interpretation of wildlife principles warrants discussion. Interestingly, the principles were formulated at workshops that were sponsored by five entities lacking in experience in wildlife management. The groups are, quite frankly, environmental groups aligned with nonconsumptive uses of wildlife.

The Commission believes these principles are "generally consistent" with the purposes and policies of the MMPA (see page 5). We disagree. The Commission has simply lifted prose from the principles in an attempt to substantiate the Commission's interpretation of the Act. On the other hand, (a) we believe the principles speak to an ecosystem that is balanced for use while avoiding misuse, but the MMPA protects mammals as if they are the center of the ecosystem with less regard for the other elements and uses of the ecosystem; (b) we see the principle of waste as meritorious, but waste and zero mortality are not necessarily synonymous; and (c) the principles surely don't suggest that marine mammals are disadvantaged when their population is below the current definition of MNP.

Contrary to the Commission, we believe that wildlife management principles recognize ecological balance in the face of man's consumptive utilization. Wildlife management (1) understands that populations achieve different yet acceptable population levels once the ecosystem experiences exploitation, (ie. carrying capacities changes); (2) recognizes that species cannot be utilized or protected out of context with other components of the ecosystem; and (3) utilizes tools including not only habitat protection, restrictions on take, and control of species introductions but also such tools as population control (e.g. thinning, culling, harvesting).

- The concept of categories of management problems (page 5) is workable (the industry proposed categorization in the negotiations with the environmentalists in 1987) but the Commission has made it too complicated and too dependent on unobtainable levels of knowledge of the resources (given fiscal priorities). The Commission outlines quite a diversity of combinations -- known to be at or above OSP; reasonably thought to be at or above OSP; levels of take determined to be insufficient to reduce the stock below MNP; levels of take so small as to be negligible; Endangered Species Act populations that are increasing, decreasing, stable or uncertain; depleted species that are increasing, decreasing; stable or uncertain; species whose status is uncertain; species when take is uncertain, etc.

We see categories more in line with "Is the population in any real form of trouble?; Is fishing responsible for this trouble?, and if so, What should be done to alleviate the problem?"

- We don't see the need for all fisheries after 1993 to continue to be subjected to permits, reports and observers. The expense of such a program is unwarranted, in lieu of the myriad of other programs in the biosphere that need funding.
- The approach to endangered/threatened species (page 11) is dependent on enormous knowledge of the population, far more than is reasonable to expect we can obtain.

The scenarios for defining a negligible effect of the incidental take of listed species (page 12) rely on "historic population size". This approach is completely unacceptable because it fails to recognize true carrying capacity in a world that utilizes living marine resources.

Also, we believe the goal for a threatened/endangered species is to apply whatever measures are necessary to get it off the list and then apply measures to rebuild the population according to MMPA. The "time" to rebuild to MNP (pages 11 & 12, last paragraphs) should not be a factor in removing a population from the ESA list.

- The section on depleted populations (page 13) puts an unrealistic and unacceptable burden on the agencies and industry, given that "depleted" species includes such animals as the burgeoning California sea lion.
- The section on "Species/Populations whose Status is Uncertain" (page 14) concludes that it is consistent with MMPA and wildlife principles that incidental taking should not be authorized. This is absurd. No rational principles of wildlife management would necessarily come to this conclusion and the 1987 court interpretation of the Act is obviously inconsistent with a long term national conclusion of "no take", or else Congress wouldn't have passed the five year amendment.
- The "Related Needs/Recommendations" section (page 18) causes considerable concern to the fishing industry.

How can the Commission possibly expect MFCMA, the fishing industry, consumers of fish, and true principles of wildlife management (which acknowledge consumptive use) to PROTECT fishery resources so that marine mammals can achieve abundance levels reflective of pre-fishery exploitation?

Is the Commission actually suggesting that the basic issue now is to restore all marine mammal populations to levels that occurred prior to man's use of marine resources? Is this the latest interpretation of MMPA's "the health and stability of the marine ecosystem"?

In conclusion, we respect the use of public comment through the Federal Register process but we believe this issue is too important (particularly given the conservative proposal put forward by the Commission) not to expect a more open exchange of positions between the Commission and our industry.

We believe that working sessions with the Commission would serve as an important precursor to the Secretary of Commerce's assignment under the Admendments. We wish to address further with the Commission: MFCMA on par with MMPA, rather than it being subservient to MMPA; the need for credibility in implementing MMPA & ESA, rather than discouraging examples such as Herschel, California sea lions as "depleted" and gray whales as endangered; and our interest in helping restore mammal populations that are truly in need of recovery to rational levels, rather than devising elaborate, expensive programs to restore mammals to unreasonable levels in lieu of man's right and need for utilization of living marine resources.

Sincerely,

Alaska Crab Coalition

Alaska Factory Trawlers Association

Alaska Groundfish Data Bank

Aleutian East Borough

Brad Gilman

American High Seas Fisheries Association

Americans for Marine EcoBalance

Diane Pleshner, Secretary

Arctic Alaska Fisheries Corporation

Bering Sea Fishermen's Association

California Gillnetters Association

Fishermen's Marketing Association

Fishing Vessel Owner's Association

Highliners Association

Midwater Trawlers Association

National Fisheries Institute

Northwest Indian Fisheries Commission

North Pacific Fishing Vessel Owner's Association

Pacific Coast Federation of Fishermen's Association

Pacific Seafood Processors Association

Pacific States Marine Fisheries Commission

Peninsula Marketing Association

Brad Gilman

United Fishermen of Alaska

United Fishermen's Marketing Association