

Reauthorization of Marine Mammal Protection Act

In December, 1987, the Pacific Marine Fisheries Commission published a "Report of Proposed Amendments to the Marine Mammal Protection Act" (see attached Executive Summary, December 1, 1987). These modifications to the Act would result in a more integrated and rational approach to the management of marine mammals, marine fishes, and fisheries. The report identified the need for (a) governmental authority to lethally take nuisance animals at government facilities even when the animals are depleted*; (b) the take of depleted mammals by commercial fishermen; (c) reinvolvement by coastal states in mammal management via cooperative state/federal programs; and (d) federal funding for research and management.

A February, 1988 U.S. Court of Appeals opinion restricted NMFS from legally issuing fishing permits that would allow the incidental take of a marine mammal that is depleted. This ruling focused the reauthorization process on the issue of depleted takes by commercial fishermen.

Representatives of the environmental community and the commercial fishing industry met in April and May to prepare a compromise position on reauthorization (see attached Joint Proposal, May 10, 1988).

This proposed program, which would last for only three years, would allow commercial fishermen to incidentally take depleted species under a special "letter of exemption", provided: (a) Fishermen periodically report their interactions with mammals (subject to penalty for failure to obtain the permit or to report the interactions); (b) fishermen do not intentionally kill depleted mammals in the course of protecting their fishing gear and catch; (c) industry pays for the data processing of this new permit and reporting system; (d) industry develops an education program; and, (e) observers be placed on several west coast and Alaska fisheries.

The International Association of Fish and Wildlife Associations is concerned (see attached statement by Gordon Robertson) that the joint proposal fails to address most of the issues raised by PMFC and, in particular, the proposal does not lead to greater latitude in managing the marine ecosystem. IAFWA views the proposal as a stop gap measure that will cost millions of dollars to implement yet "provide no better indication of how regional management of fishery resources can be meshed with rational management of marine mammals".

Congressional staff are currently drafting a bill for reauthorization that will consider, in part, the joint proposal. The draft is not expected until mid-August.

NMFS has recently prepared a Draft Status Report on Marine Mammals Involved in Commercial Fisheries. This report confirms concerns of the west coast that some populations may be declared depleted and that other populations are unknown (i.e. "defacto depleted"). Further, the report suggests that east coast harbor porpoise and bottlenose dolphins may be adversely impacted by current levels of incidental take in fisheries.

* Under MMPA, a mammal population is considered "depleted" not only when it is shown to be below Optimum Sustainable Population but also when the population's status is unknown.



International Association of Fish and Wildlife Agencies

(Organized July 2, 1902)

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STATEMENT OF THE INTERNATIONAL ASSOCIATION OF FISH AND WILDLIFE AGENCIES
CONCERNING REAUTHORIZATION OF THE MARINE MAMMAL PROTECTION ACT, HR 4189
FOR HOUSE SUBCOMMITTEE ON FISHERIES AND WILDLIFE CONSERVATION
AND THE ENVIRONMENT
MAY 10, 1988

by

Gordon C. Robertson, Legislative Counsel

The International Association of Fish and Wildlife Agencies, founded in 1902, is a quasi-governmental organization of public agencies charged with the protection and management of North America's fish and wildlife resources. The Association's governmental members include the fish and wildlife agencies of the states, provinces and federal governments of the U.S., Canada, and Mexico. All 50 states are members. The Association has been a key organization in the promotion of the principles of sound resource management and the strengthening of federal, state and private cooperation in protecting and managing fish and wildlife and their habitats in the public interest.

The development of the Marine Mammal Protection Act (MMPA) in 1972 represents a significant step ever by the U.S. Congress to recognize an important wildlife resource and provide for its long-term conservation. The MMPA has resulted in a number of important successes in marine mammal protection. Populations of species such as California sea lions, northern elephant seals, and harbor seals have increased greatly. As much as the Association acknowledges the importance of marine mammal conservation, the Association is also aware of resource conflict that currently cannot be adequately addressed under the MMPA. The MMPA does not provide for integrated management of marine mammals with other living resources in the marine environment, and with man.

The Pacific Marine Fisheries Commission (PMFC), an affiliate member of IAFWA, prepared for this year's reauthorization by examining the issue of marine mammals/fishery interactions and proposing modifications to MMPA that would result in a more integrated and rational approach to the management of marine mammals, marine fishes and fisheries. (See Report on Proposed Amendments to the Marine Mammal Protection Act, PMFC, December 1, 1987.) The PMFC report identified the need for (a) governmental authority to lethally take nuisance animals at government facilities even when the animals are "depleted"¹; (b) the take of "depleted" mammals by commercial fishermen; (c) reinvolvement by coastal states in mammal management via cooperative state/federal programs; and

¹Under the Act "depleted" by no means necessarily suggests the population is actually threatened and, in fact, a population whose status is unknown is treated as if it is depleted.

(d) funding for research and management. The intent of these recommendations is to build on earlier amendments (such as the 1981 recognition of the need for "small takes" by commercial fishing operations and the 1986 change which allows the take of depleted species (by industries other than fishing) toward the goal of establishing a regional decision-making process whereby government, fishing, environmental, oil and gas, and other users of living marine resources (including marine mammals) can rationally sustain the populations, as well as sustain both the non-consumptive and the consumptive uses.

The Association's Marine and Estuarine Committee has already endorsed the philosophy and recommendations of PMFC. We have also reviewed the May 10, 1988 document entitled "Recommended Changes from the Conservation Community and the Fishing Industry." Our review indicates the agreement will not lead to greater latitude in managing the marine ecosystem.

- * It does not address the practical need to regain state involvement in day-to-day programs for marine mammals.
- * It does not assure government control of nuisance animals when their populations are "depleted", a management tool that government has for other wildlife.
- * It does not allow the intentional lethal take of marine mammals by fishermen (to protect their gear and catch) when the mammal population is decreasing or its status is unknown, even though the take may have no adverse impact on the population, yet the mammal's impact on the fisherman's business may be significant.
- * It does not accept the data from the long-standing foreign observer program in Alaska, so it requires major expenditures of federal dollars to reverify what are known to be insignificant takes of mammals in EEZ fisheries.
- * It does not address if a fishery impact is adversely affecting a mammal stock but instead subjects all fisheries with a "continuous, documented" take to the requirements of the special exemption. The real issue is whether or not the fishery interaction has a significant impact on the mammal resources. Nothing in the proposal suggests criteria or a process to determine on a fishery-by-fishery basis whether fishery interactions are actually impacting the viability of the mammal stocks. In this instance, minimal taking in any fishery is not valid criterion for mitigation or fishery control.

There are sufficient differences between foreign and domestic fishing operations to support the need for a domestic fishery observer program with verification as only one aspect. The program should be directed and implemented by the National Marine Fisheries Service and use specially trained observers to gather information needed to design and implement necessary research on fishery/marine mammal interactions.

On behalf of the proposal, it does require NMFS to prepare recovery plans which should better direct research programs to critical areas. It also addresses the need for better reporting by fishermen as well as an education program. The federal government has a responsibility for working with industry to implement these programs. Most importantly, it does allow most fishing to continue in the face of interactions with "depleted" species, although a five-year exemption is more realistic than only three years.

In conclusion, the Association strongly identifies with the need to move the MMPA toward an integrated management of marine mammals with other living marine resources and the uses of these resources by man. The recent proposal by the environmental community and representatives of the fishing industry appears to be a stop gap measure that will put undue burden on some segments of industry, use up significant fiscal resources, and, at the end of three years, provide no better indication of how regional management of fishery resources can be meshed with rational management of marine mammals.

IAFWA encourages a more comprehensive approach to marine mammal management and welcomes the opportunity to work with Congress on addressing the needs of the marine environment and all its users.

NOTE: STELLER'S SEA LION INTENTIONAL LETHAL TAKE ISSUE
UNRESOLVED.

MARINE MAMMAL PROTECTION ACT

RECOMMENDED CHANGES FROM THE CONSERVATION COMMUNITY AND THE
FISHING INDUSTRY

10 May 1988

This is a proposal to amend the MMPA to allow for a limited three-year special exemption in order to acquire and analyze data on the types, levels and implications of marine mammal-fisheries interactions. It is designed to continue protection for marine mammals, to enable commercial fishing to continue, and to improve on the current data collection, reporting and analysis systems.

I. Summary of Mutual Goals & Efforts

The conservation community and the fishing industry agree to support the following efforts:

1. The collection, compilation, and analysis of data on, 1) the marine ecosystem, 2) the population and biology of marine mammals, 3) the interactions of marine mammals with fishing operations and 4) the interaction of marine mammals with other marine mammals, in a form that is accessible, that interfaces with existing data bases, and that corresponds with regional approaches to be developed in the future.
2. To work with each other and with the resource agencies at the federal and state levels that manage marine resources to fill the information gaps that currently exist, and to develop recovery plans and pursue mitigation measures to reduce interactions consistent with the intent of the MMPA, and require the Agency to develop recovery plans.

3. To create a special, limited, three-year exemption from the incidental take permit requirements of the Act, for certain marine mammals, that will permit a joint effort to gather data and to inform user groups of the importance of their role in information collection.
4. To establish a process to assure that population reviews and changes in status designations are open and efficient, provide opportunity for timely input from the industry and the environmental community and occur in accordance with specified performance deadlines.
5. To urge the Congress to resolve the indemnification issue presented by observers, appropriate the funds for and pass, a three-year reauthorization of the MMPA to undertake proposed research, data collection and management activities described herein.
6. To meet annually with each other and with appropriate resource management agencies and the Marine Mammal Commission to assess and evaluate the progress of the three-year effort.

II. Education

The U.S. commercial fishing industry includes extremely diverse groups with varying interests and level of awareness concerning the operative provisions of the MMPA. The MMPA and its requirements may be unfamiliar to portions of the industry, as evidenced by the lack of participation in the present permit system. Thus, education of the user groups is a major issue which must be addressed by the industry, conservation community and government. As a beginning point for the development of an effective marine mammal education program, the industry, at its own expense, will develop and implement a comprehensive three year education program in 1988 with levels of effort and participation as mutually agreed upon by industry, by the conservation community and government. The program will inform fishermen about the operative provisions of the MMPA, types of permits, reporting needs, status of marine mammal populations, consequences of declining populations, known methods of reducing interactions and mortalities and the importance of cooperation in data collection.

III. Population Status Review Process

There has been insufficient opportunity for the fishing industry or the conservation community to make meaningful technical contributions during the early stages of the status review process regarding marine mammal species or population stocks involved in fisheries interactions in some instances. As a result, the technical opinions and information available outside the Agency 1/ have not always contributed to the status determination decision process.

The conservation community and the industry jointly propose that the review processes be modified to provide for the convening of species-specific workshops at the earliest stage of population review. Convening of the workshop would occur whenever the Agency receives a petition requesting a status review, or whenever the agency undertakes such review upon its own initiative after a determination that substantial information warrants the review. 2/ Participation in the workshops is dependent upon the species or population stock under consideration, but will always include balanced representation from the fishing industry, the conservation community, state and federal agencies, the Marine Mammal Commission and academia.

1/ "Agency" as used in this document means, as appropriate, the National Marine Fisheries Service and/or the Fish & Wildlife Service.

2/ A status workshop shall not be convened for the current NMFS effort to determine the status of Northern fur seals.

Upon Receipt/initiation (Day 1):

Immediately upon receipt of a petition, or the initiation of an Agency internal process, to undertake a status review which could result in a change of determination or designation, the Agency will notice such in the federal register, and provide possible participants with a copy of the appropriate documents.

Within 30 days (By day 30)

When a petition has been filed, the Agency will determine whether substantial information has been presented that such a review is warranted. If this determination is made in the negative, the Agency shall provide the petitioner with a statement of reasons and publish that in the Federal register.

Within 60 days (By day 90)

If the information is sufficient to review the status, the Agency will convene a workshop to review best available data and to evaluate the population status and trends.

Within 60 days (By day 150)

Within 60 days after the meeting, the workshop participants will submit to the Agency a report summarizing the views and positions of all the participants based upon their review of best available data and evaluation of current status and trends.

Within 60 days (By day 210)

Within 60 days of the receipt of the workshop report, the Agency will publish in the Federal Register a) the findings of the workshop participants, b) if there is disagreement, the findings of the agency and a statement explaining why the Agency disagrees with the workshop participants' analyses, c) the Agency's proposed rule (or finding that no change is required) and d) a call for comments during a 45 day period.

After 45 days (On day 255)

Begin assessment of comments after the close of the comment period.

Within 45 days (By day 300)

45 days after the close of the public comment period on the proposed rule, the Agency shall publish in the Federal Register any final rule and allow for a 30 day cooling off period.

After 30 days (On day 330)

Final rule takes effect.

IV. Three-year Limited Exemption

The following proposal is aimed at providing, for U.S. commercial fishing operations conducted by U.S. flag vessels, a special, limited, three-year exemption to the incidental take permit provisions allowed by Sec. 101(a)(2) of the MMPA in accordance with the provisions of Sec. 101(a)(4) and Sec.'s 103-104 for certain species specific in IV.A. It is applicable to those fisheries that have a continuing, documented interaction with certain marine mammals and that cannot qualify, either for a small take exemption as set out in Sec. 101(a)(4) because the take is not small with a negligible impact on a nondepleted species or population stock, or for a general permit under Sec.'s 103-104 because a lack of data makes a determination of OSP impossible or because the species has been designated depleted.

_3/

The special limited exemption will be applicable to those fisheries identified by the NMFS as having continuing documented interactions with certain marine mammals (as set out below in section IV. A). The NMFS will convene a meeting of fishing industry and conservation community scientists before 1989 to assist in developing the final list of identified fisheries, or use the current NEPA process (relative to renewal of general incidental take permits under the MMPA) to identify such fisheries. A determination will be made, fishery by fishery, as to when general and small take permits are inapplicable and when an exemption letter is a necessity - and issuance of such letter can be conditioned upon reasonable mitigation measures. NMFS, through this same process, shall also determine those fisheries which have no continuing, documented interactions; in fact have only a very remote possibility of interactions with marine mammals. Vessels engaged in such a fishery (which, by example, may include crab pot fisheries) shall not be required to have general permits, small take permits or a letter of exemption, but shall be required to report the interaction to the NMFS within forty-eight hours. An unintentional, incidental take by such a vessel shall not result in a violation. Failure to report by any vessel shall expose that vessel to the full range of penalties for illegal takings under the MMPA. NMFS may terminate a fisheries status in this category and require a letter of exemption or other authorization if it determines that the level of take exceeds the "very remote possibility" threshold.

_3/ In the case of a catcher boat/processor boat operation, the take of any marine mammal is attributed to the catcher boat. This does not however, absolve the processor boat from reporting requirements.

The program has five elements: 1) participation, 2) verification, 3) data management, 4) research, and 5) recovery plans and mitigation. Each of these elements is essential to the success of the special exemption and its acceptance by the fishing industry and the conservation community. They will, as well, contribute to future efforts to develop comprehensive marine mammal/fishery regional conservation plans endorsed by both the conservation community and the fishing industry.

The amendments which are proposed hereinafter only extend to the incidental taking 4/ of marine mammals set out in section IV.(A). No changes are proposed for existing permitting procedures for species or population stocks above OSP as established in Sections 103 and 104 of the MMPA. The proposed special exemption does not extend beyond three years.

The special exemption for continued fishing activities associated with marine mammals is contingent upon pursuing the following agreed-upon criteria and programs:

A. Marine Mammals Involved For This Exemption

The following Marine mammal species subject to interactions with fisheries are allowed to be taken under the special exemption: Steller's sea lion, Northern fur seal, harbor porpoise, harbor seal, killer whale, California sea lion, white-sided dolphin, beluga whale, pilot whale, grey seal, ribbon seal, walrus. In no case shall the exemption apply to any species or population stocks listed under the Endangered Species Act, southern sea otters or any species taken by the tuna industry.

4/ The definition of incidental takes for the purpose of this three-year limited exemption, applicable to those species in IV.A. is the same as is set out in the current general permit regulations for species and population stocks above OSP (this includes intentional, non-lethal deterrence, except for cetaceans). Provided however, the provisions as contained in existing regulations which allow, (after all non-lethal deterrent methods have been pursued), the intentional killing of a marine mammal upon the showing that it was causing substantial and immediate damage to catch or gear or about to cause personal injury, shall only apply in cases where species are increasing in population size. In no case shall the intentional killing of any cetaceans, southern sea otters or of any species which are declining, such as Steller's sea lions or Northern fur seals, be allowed.

B. Participation

1. Acquisition of letter of exemption:

- a) All vessels/operators in fisheries identified by NMFS using the process identified in section IV must acquire an annual (calendar year) letter of exemption prior to fishing.
- b) During the three-year period, holders of the letter will be exempt from the permit requirements of Sec.'s 103/104, and from the prohibitions on incidental taking of marine mammals. However, in the case of Steller's sea lions, the total incidental take shall not exceed 1350 per year and in the case of Northern fur seals shall not exceed 50 per year. The reason for these caps is that any level of take of these declining species will contribute to the decline.

2. Reporting System:

In order to develop a comprehensive data base on marine mammal/fishery interactions, it is essential that the fishing industry participate in reporting interactions. Absent a 100% observer program, the information and observations of fishermen must form one of the bases of any program. As a condition of receiving and retaining the exemption from the prohibitions of the MMPA, all vessels/operators holding exemption letters must:

- a) Compile information to be submitted in a report at the close of the season, or bi-annually, if the season is longer than six months;
- b) At a minimum each report must include the following information:
 - Regional Fishery Type (gear, region, species of fish)
 - Statistical area, date and time of observation/interaction
 - Species and types of observation/interaction
 - 1) Statement of no interaction
 - 2) All marine mammals incidentally killed during fishing
 - 3) All marine mammals incidentally injured during fishing including nature of injury
 - 4) All marine mammals deterred from gear or catch
 - 5) All marine mammals lethally removed to protect life, gear, or catch

- Desired optional additional information
 - 6) Species of marine mammals observed
 - 7) Marine mammals killed by other marine mammals
 - 8) Damage to gear or loss of catch to marine mammal

c) Reports must be filed even if there were no marine mammals observed or interactions noted.

3. Process

The process of obtaining a letter of exemption and compiling reported data must be developed in consultation with NMFS, the fishing industry which will be responsible for assuring that the program will be adequately funded, the conservation community and the appropriate state agencies. A major element is that a non-federal, centralized authority shall be responsible for issuing the letters of exemption, processing the information and making the data available. It must be computer accessible by the public within six months of the close of the calendar year.

4. Penalties

NMFS is responsible for enforcing this section. Penalties for violation are:

- a) Vessels/operators fishing without a letter of exemption will be subject to the full penalties of the MMPA's prohibitions on the taking of marine mammals.
- b) A vessel/operator having a letter of exemption in any year will not be entitled to a letter of exemption in the subsequent year, unless the vessel/operator files the required report.
- c) In the first year of the exemption period, failure to report will result in the issuance of a warning letter.
- d) In the second year of the exemption, failure to report will result in a \$50 fine.
- e) In the third year, failure to report will result in a \$100 fine for the first required report not filed; a \$250 fine for the second report not filed; and a \$500 fine for the third report not filed.

5. Citizen Suit

If after the beginning of the third year, NMFS fails to proceed against a violator, then after 60 days notice and the failure of NMFS to commence legal

action, a citizen may bring an action for the violation of this section against the vessel/operator for treble the penalty, except that if the vessel/operator qualifies as being below the Federal poverty level, there shall be no trebling.

C. Verification System

There will be two types of verification. All fisheries with continuing, documented interactions will be subject to Type 1. Fisheries with continuing, documented interactions may also be subject to Type 2. Any of the verification programs could include education efforts, dockside and shorebased interviews and observations, observers aboard marine patrol vessels and observers aboard fishery vessels. In all cases, maximum use will be made of existing verification programs. The observer program will be federally funded and in year 1 the industry will identify the vessels upon which observers will be placed; in years 2 and 3, a similar procedure will be followed unless insufficient vessels have been available, in which case NMFS will implement the program. The conservation community and industry recognize the nationwide concern for exposure of the vessel owner/operator to liability involved in accepting onboard observers. Placement of a sufficient number of observers, in order to achieve statistically significant verification of the take of marine mammals will be hindered until this issue is resolved. The conservation community and industry will seek congressional action to indemnify vessel operators and owners from liability resulting from onboard observers.

Type 1. This type has two components: the first is instructive, designed to help fishermen understand the system in which they are participating and to assist them in filing the proper reports in the required form. The second component is a cross-check of the reliability of the reports filed. This type will be accomplished through a combination of efforts, and will occur throughout the three-year exemption. The object of Type 1 verification is to obtain a picture of the activity reported by fishermen, and compare it to the cross-check. The comparison of the two should have "statistical" validity. Type 1 is applicable to all subject fisheries throughout the exemption period.

Type 2. This type, divided into two sub-types, is designed to determine and verify the level of incidental takes. It will occur in those fisheries which have not only a continuing, documented interaction with marine mammals, but where the interaction occurs with those species and population stocks of greatest concern. The first sub-type is used in fisheries where an historical observer data base on incidental take exists. The second sub-type is used in fisheries where there is no such data base. The coverage will range from 20 - 35% in the first year, and be adjusted thereafter as set out below.

(a) Where a historical observer data base exists, verification will use onboard observers (consistent with vessel capacity) for the first year to confirm the variation in takes reported from prior observer data including foreign fishing observer program and state observer programs and for Years 2 and 3, this sub-type will use the information on the variation in take obtained in Year 1 to design and implement an observer program with sufficient observer coverage to yield estimates of marine mammal take at a reasonable, statistically significant level.

(b) Where documentation of the level of interactions is limited, the Year 1 verification system will use a combination of efforts as appropriate to each fishery to establish a baseline indicating the variance in the levels of take. For Years 2 and 3, based upon the information of the variation in take obtained from Year 1 data, a program will be designed and implemented to yield estimates of marine mammal take at a reasonable, statistically significant level.

The fisheries identified below for verification by Type 2a or 2(b) have been selected based upon a literature survey. When, pursuant to the current NEPA process relative to renewal of several incidental take permits under the MMPA, NMFS DEIS and status of stocks reports are issued, these may be used to readjust the list of these fisheries, as mutually agreed upon. The verification shall be started in Year 1 and using the information derived from each project, continued for years two and three, unless it is shown that there is no significant, continuing interaction. Should new information be developed or new experimental fisheries be initiated, new Type 2 verification and monitoring efforts may be necessary.

Bering Sea and Gulf of Alaska. (Steller's sea lions, Northern fur seals, small cetacea including harbor porpoise, orca whales, harbor seals, ribbon seals and northern elephant seals). Type 2(a).

Except where provided below for longline and crab vessels, observer coverage of fishing activities in the Bering Sea/Gulf of Alaska shall, in years one and two, be based on a minimum 20 percent onboard observer coverage in each of the following fleets during each season for each fishery:

1. Groundfish factory trawlers (currently approximately 27 vessels);
2. Groundfish trawlers delivering to shoreside or other facilities (currently approximately 40

vessels);

3. Domestic motherships that only process fish caught by U.S. flag catcher boats (currently approximately 3 vessels);

4. Cod/sable/halibut longline vessels (currently approximately 50 vessels of sufficient size to carry observers); and

5. Crab vessels (currently approximately 110 vessels).

Except that, the total number of observers placed aboard groundfish factory trawlers, groundfish trawlers delivering to shoreside or other facilities and domestic motherships shall be at least twenty-four for each of two years. Thus, in each of years one and two, the minimum number of observers placed aboard groundfish factory trawlers, groundfish trawlers delivering to shoreside or other facilities and domestic motherships shall be approximately six, eight and one respectively. The remaining nine observers to be placed aboard groundfish factory trawlers, groundfish trawl vessels and domestic motherships will be allocated by NMFS based upon marine mammal and fisheries concerns. In year three, based on data collected in years one and two and on other relevant information, NMFS may adjust the observer coverage appropriately. For the longline fisheries listed above, NMFS may adjust the observer coverage after one year. For crab fisheries, observers added pursuant to this program may be reallocated after year one. If NMFS adjusts the observer coverage downward, in the case of longline or crab, the observers shall be transferred to other fisheries as needed based on marine mammal and fisheries concerns.

If, during years one and two, observer data, and data from other relevant sources, indicates a need for additional observer coverage in one or more of the Bering Sea/Gulf of Alaska fisheries enumerated above, NMFS shall place other observers in that fishery without subtracting from the number of observers operating in other fisheries. This program is in addition to existing observer coverage associated with joint venture operations. Nothing in this Agreement shall detract from any voluntary arrangement, or from any requirement of a state, or a Regional Fishery Management Council to employ more than 20% observer coverage on any fleet in any fishery.

Observers placed aboard vessels in the

Bering Sea/Gulf of Alaska shall be Living Marine Resource Observers and shall collect marine mammal data as provided for in this Agreement, fishery data as directed by NMFS, and such other data as required by NMFS, including, as practical, bird/fishery interaction. Funding for the Living Marine Resource Observers shall be divided equally between the Marine Mammal Protection Act and the Magnuson Fishery Conservation and Management Act. Observers funded under either statute will perform the defined functions discussed above.

Purse Seine, Round Haul and Lampara squid, anchovy and mackerel fishery, central-southern California. (harbor porpoise, pilot whales, Cal. sea lions) (Type 2(b))

Drift gillnet thresher shark fishery, Washington-Oregon. (Steller's sea lions, harbor porpoise, harbor seal, Dall's porpoise) (Type 2(a))

Salmon set and drift gillnet fisheries, Prince William Sound/Copper River (Steller's sea lions, harbor porpoise, sea otters, harbor seals, Dall's porpoise) (Type 2(b))

Salmon drift gillnet fisheries, Unimak and False Pass (Steller's sea lions, harbor porpoise, beluga whales, gray whales, harbor seals) Type 2(b)).

Columbia River salmon drift gillnet fisheries, Washington-Oregon (Steller's sea lions, Northern fur seal, harbor porpoise, harbor seals, gray whales, California sea lions). (Type 2(b))

California set gillnet halibut (harbor porpoise, sea otter, harbor seal, California sea lion) (Type 2(a)).

D. Data Acquisition, Compilation & Analysis

It is obviously important that information about marine mammals provided by fishermen, observers, monitors, state resource agencies, enforcement agencies, stranding networks and researchers should be compiled, analyzed and made accessible in a useful way. In addition, to move jointly toward a process that integrally manages marine resources, a complete and accurate information base about that environment is necessary. To that end, the agency or its designated contractor shall design a data management system that compiles the information in a timely

manner and is compatible with other coastwide data bases. The information must be computer accessible to the public within six months of the end of the reporting period.

E. Research

Research plans and programs should be designed with a view to laying an important part of the groundwork for integrated, regional conservation of marine mammals and fisheries to be implemented after the conclusion of the three-year exemption, consistent with the MMPA and the MFCMA.

Research into marine mammal population dynamics, biology and fishery interactions undertaken by the agency should be keyed to the verification program, and initially focus on the species and population stocks of most concern, i.e., Steller's sea lions, northern fur seals and harbor porpoise (a species which is subject to incidental takes in a wide variety of fisheries but about which little is known).

Research efforts should be funded and undertaken by industry which focus on gear technology and fishing practices that minimize interactions and mitigate the impacts of incidental takes of marine mammals. The first annual meeting shall be used to ascertain the proper focus and levels of funding for this effort. Where appropriate, industry should make its vessels available to researchers as platforms of opportunity for this research and other related information gathering.

F. Recovery Plans, Ecosystem Protection Zones, and Mitigation Measures

The purpose of this section is to provide a more effective means whereby marine mammals and the ecosystems upon which they depend, may be protected and conserved. The elements include development of recovery plans, establishment of ecosystem protection zones, measures to provide extraordinary relief in emergency situations, and other mitigation mechanisms as appropriate.

1. Recovery plans: the agency shall develop and implement recovery plans for the conservation and rebuilding of declining populations of Northern fur seals, Steller's sea lions and harbor porpoise. In the first year a recovery plan must be completed for Northern fur seals and be begun for Steller's sea lions; in the second year the recovery plan for Northern fur seals must be implemented, the recovery plan for Steller's sea lions completed and a recovery plan for harbor porpoise begun; and in the third year, the recovery plan for Steller's sea lions must be implemented and the recovery plan for harbor porpoise completed and implementation begun.

2. Habitat Protection Zones: Where the operations of a fishery have significant adverse impact on the marine

habitat upon which marine mammals depend and where such impacts could be reduced by restrictions on the manner of operations or location of the fishery, the agency shall propose for adoption to the appropriate state, or Council if affected, habitat protection zones. These areas will afford protection to marine mammals and the marine habitat upon which they depend through time, area or gear restrictions (or a combination thereof),. Habitat protection areas under consideration include hauling-out areas, rookeries and mating areas and areas of similar significance.

3. As research programs are undertaken and more information becomes available, mitigation measures including restrictions on the season or other period of time the animals may be taken; on the manner and locations in which the animals may be taken; and on fishing techniques which have been found to cause undue fatalities to any species of marine mammal in a fishery, may become appropriate to accomplish the goals of this section. Provisions shall be made to enable the agency to implement such measures through regulation.

4. In situations where the need to act immediately is critical to the protection or survival of a marine mammal species or population stock, authority shall be granted to the agency to establish emergency protection measures after consultation with the appropriate state agency and appropriate regional fishery management council.

V. Joint Objectives

The following joint objectives are ways to measure the success of each year of the special three-year exemption and the information gathering period as a whole.

- Year 1:
- Sufficient education and information materials disseminated so that 40% of vessels/operators have received exemption letters and are reporting properly.
 - Non-federal centralized authority identifies appropriate entry points in data base, identifies additional sources of marine mammal data, designs and distributes report forms, develops mechanism for receiving reports and process data.
 - Agency designs and begins implementation of three-year research plan, begins recovery plans for Steller's sea lions and begins and completes recovery plan for Northern fur seals.

- Year 2: - Increased participation so that 60% of vessels/operators have received exemption letters and are reporting properly.
- Data entry, analysis of first year letter of exemption reports, refinements in system, and provisions made to make information accessible.
- Continue research program as identified in Year 1, complete recovery plans for Stellar sea lions, implement recovery plan for Northern fur seals and begin recovery plan for harbor porpoise.
- Year 3: - Full participation so that 100% of vessels/operators have received exemption letters and are reporting properly.
- Data receiving and processing system fully and readily accessible and compatible with other data bases.
- Conclude research program as identified in Year 1, implement recovery plan for Steller's sea lions and complete recovery plan for harbor porpoise and begin its implementation.

By March, 1991, agency prepares and submits a report to Congress on the level of achievement of each of the elements and objectives for the three-year period. Within 60 days of receiving the report Congress conducts hearings to assess the program.

VI. Funding

Both parties agree that the data collection, research, verification and analysis aspects of this agreement are essential for the success of the proposed program as well as effective conservation of the marine mammal and fishery resources of concern. It is important for Congress to recognize that resolution of the important multiple use ocean interaction questions will require substantial new government funding. Both parties will urge Congress that such funding is vital to and constitutes the foundation of the negotiated agreement.

VII. Miscellaneous

The Agency must prepare marine mammal recovery plans for all species designated as depleted or listed under the ESA. Time lines will be established regarding completion of such plans, and an amendment shall establish these plans as a permanent requirement of the Act with general applicability.

NOTE: STELLER'S SEA LION INTENTIONAL LETHAL TAKE ISSUE
UNRESOLVED.

MARINE MAMMAL PROTECTION ACT

RECOMMENDED CHANGES FROM THE CONSERVATION COMMUNITY AND THE
FISHING INDUSTRY

10 May 1988

This is a proposal to amend the MMPA to allow for a limited three-year special exemption in order to acquire and analyze data on the types, levels and implications of marine mammal-fisheries interactions. It is designed to continue protection for marine mammals, to enable commercial fishing to continue, and to improve on the current data collection, reporting and analysis systems.

I. Summary of Mutual Goals & Efforts

The conservation community and the fishing industry agree to support the following efforts:

1. The collection, compilation, and analysis of data on, 1) the marine ecosystem, 2) the population and biology of marine mammals, 3) the interactions of marine mammals with fishing operations and 4) the interaction of marine mammals with other marine mammals, in a form that is accessible, that interfaces with existing data bases, and that corresponds with regional approaches to be developed in the future.
2. To work with each other and with the resource agencies at the federal and state levels that manage marine resources to fill the information gaps that currently exist, and to develop recovery plans and pursue mitigation measures to reduce interactions consistent with the intent of the MMPA, and require the Agency to develop recovery plans.

3. To create a special, limited, three-year exemption from the incidental take permit requirements of the Act, for certain marine mammals, that will permit a joint effort to gather data and to inform user groups of the importance of their role in information collection.
4. To establish a process to assure that population reviews and changes in status designations are open and efficient, provide opportunity for timely input from the industry and the environmental community and occur in accordance with specified performance deadlines.
5. To urge the Congress to resolve the indemnification issue presented by observers, appropriate the funds for and pass, a three-year reauthorization of the MMPA to undertake proposed research, data collection and management activities described herein.
6. To meet annually with each other and with appropriate resource management agencies and the Marine Mammal Commission to assess and evaluate the progress of the three-year effort.

II. Education

The U.S. commercial fishing industry includes extremely diverse groups with varying interests and level of awareness concerning the operative provisions of the MMPA. The MMPA and its requirements may be unfamiliar to portions of the industry, as evidenced by the lack of participation in the present permit system. Thus, education of the user groups is a major issue which must be addressed by the industry, conservation community and government. As a beginning point for the development of an effective marine mammal education program, the industry, at its own expense, will develop and implement a comprehensive three year education program in 1988 with levels of effort and participation as mutually agreed upon by industry, by the conservation community and government. The program will inform fishermen about the operative provisions of the MMPA, types of permits, reporting needs, status of marine mammal populations, consequences of declining populations, known methods of reducing interactions and mortalities and the importance of cooperation in data collection.

III. Population Status Review Process

There has been insufficient opportunity for the fishing industry or the conservation community to make meaningful technical contributions during the early stages of the status review process regarding marine mammal species or population stocks involved in fisheries interactions in some instances. As a result, the technical opinions and information available outside the Agency 1/ have not always contributed to the status determination decision process.

The conservation community and the industry jointly propose that the review processes be modified to provide for the convening of species-specific workshops at the earliest stage of population review. Convening of the workshop would occur whenever the Agency receives a petition requesting a status review, or whenever the agency undertakes such review upon its own initiative after a determination that substantial information warrants the review. 2/ Participation in the workshops is dependent upon the species or population stock under consideration, but will always include balanced representation from the fishing industry, the conservation community, state and federal agencies, the Marine Mammal Commission and academia.

1/ "Agency" as used in this document means, as appropriate, the National Marine Fisheries Service and/or the Fish & Wildlife Service.

2/ A status workshop shall not be convened for the current NMFS effort to determine the status of Northern fur seals.

Upon Receipt/initiation (Day 1):

Immediately upon receipt of a petition, or the initiation of an Agency internal process, to undertake a status review which could result in a change of determination or designation, the Agency will notice such in the federal register, and provide possible participants with a copy of the appropriate documents.

Within 30 days (By day 30)

When a petition has been filed, the Agency will determine whether substantial information has been presented that such a review is warranted. If this determination is made in the negative, the Agency shall provide the petitioner with a statement of reasons and publish that in the Federal register.

Within 60 days (By day 90)

If the information is sufficient to review the status, the Agency will convene a workshop to review best available data and to evaluate the population status and trends.

Within 60 days (By day 150)

Within 60 days after the meeting, the workshop participants will submit to the Agency a report summarizing the views and positions of all the participants based upon their review of best available data and evaluation of current status and trends.

Within 60 days (By day 210)

Within 60 days of the receipt of the workshop report, the Agency will publish in the Federal Register a) the findings of the workshop participants, b) if there is disagreement, the findings of the agency and a statement explaining why the Agency disagrees with the workshop participants' analyses, c) the Agency's proposed rule (or finding that no change is required) and d) a call for comments during a 45 day period.

After 45 days (On day 255)

Begin assessment of comments after the close of the comment period.

Within 45 days (By day 300)

45 days after the close of the public comment period on the proposed rule, the Agency shall publish in the Federal Register any final rule and allow for a 30 day cooling off period.

After 30 days (On day 330)

Final rule takes effect.

IV. Three-year Limited Exemption

The following proposal is aimed at providing, for U.S. commercial fishing operations conducted by U.S. flag vessels, a special, limited, three-year exemption to the incidental take permit provisions allowed by Sec. 101(a)(2) of the MMPA in accordance with the provisions of Sec. 101(a)(4) and Sec.'s 103-104 for certain species specific in IV.A. It is applicable to those fisheries that have a continuing, documented interaction with certain marine mammals and that cannot qualify, either for a small take exemption as set out in Sec. 101(a)(4) because the take is not small with a negligible impact on a nondepleted species or population stock, or for a general permit under Sec.'s 103-104 because a lack of data makes a determination of OSP impossible or because the species has been designated depleted.

3/

The special limited exemption will be applicable to those fisheries identified by the NMFS as having continuing documented interactions with certain marine mammals (as set out below in section IV. A). The NMFS will convene a meeting of fishing industry and conservation community scientists before 1989 to assist in developing the final list of identified fisheries, or use the current NEPA process (relative to renewal of general incidental take permits under the MMPA) to identify such fisheries. A determination will be made, fishery by fishery, as to when general and small take permits are inapplicable and when an exemption letter is a necessity - and issuance of such letter can be conditioned upon reasonable mitigation measures. NMFS, through this same process, shall also determine those fisheries which have no continuing, documented interactions; in fact have only a very remote possibility of interactions with marine mammals. Vessels engaged in such a fishery (which, by example, may include crab pot fisheries) shall not be required to have general permits, small take permits or a letter of exemption, but shall be required to report the interaction to the NMFS within forty-eight hours. An unintentional, incidental take by such a vessel shall not result in a violation. Failure to report by any vessel shall expose that vessel to the full range of penalties for illegal takings under the MMPA. NMFS may terminate a fisheries status in this category and require a letter of exemption or other authorization if it determines that the level of take exceeds the "very remote possibility" threshold.

3/ In the case of a catcher boat/processor boat operation, the take of any marine mammal is attributed to the catcher boat. This does not however, absolve the processor boat from reporting requirements.

The program has five elements: 1) participation, 2) verification, 3) data management, 4) research, and 5) recovery plans and mitigation. Each of these elements is essential to the success of the special exemption and its acceptance by the fishing industry and the conservation community. They will, as well, contribute to future efforts to develop comprehensive marine mammal/fishery regional conservation plans endorsed by both the conservation community and the fishing industry.

The amendments which are proposed hereinafter only extend to the incidental taking 4/ of marine mammals set out in section IV.(A). No changes are proposed for existing permitting procedures for species or population stocks above OSP as established in Sections 103 and 104 of the MMPA. The proposed special exemption does not extend beyond three years.

The special exemption for continued fishing activities associated with marine mammals is contingent upon pursuing the following agreed-upon criteria and programs:

A. Marine Mammals Involved For This Exemption

The following Marine mammal species subject to interactions with fisheries are allowed to be taken under the special exemption: Steller's sea lion, Northern fur seal, harbor porpoise, harbor seal, killer whale, California sea lion, whited-sided dolphin, beluga whale, pilot whale, grey seal, ribbon seal, walrus. In no case shall the exemption apply to any species or population stocks listed under the Endangered Species Act, southern sea otters or any species taken by the tuna industry.

4/ The definition of incidental takes for the purpose of this three-year limited exemption, applicable to those species in IV.A. is the same as is set out in the current general permit regulations for species and population stocks above OSP (this includes intentional, non-lethal deterrence, except for cetaceans). Provided however, the provisions as contained in existing regulations which allow, (after all non-lethal deterrent methods have been pursued), the intentional killing of a marine mammal upon the showing that it was causing substantial and immediate damage to catch or gear or about to cause personal injury, shall only apply in cases where species are increasing in population size. In no case shall the intentional killing of any cetaceans, southern sea otters or of any species which are declining, such as Steller's sea lions or Northern fur seals, be allowed.

B. Participation

1. Acquisition of letter of exemption:

- a) All vessels/operators in fisheries identified by NMFS using the process identified in section IV must acquire an annual (calendar year) letter of exemption prior to fishing.
- b) During the three-year period, holders of the letter will be exempt from the permit requirements of Sec.'s 103/104, and from the prohibitions on incidental taking of marine mammals. However, in the case of Steller's sea lions, the total incidental take shall not exceed 1350 per year and in the case of Northern fur seals shall not exceed 50 per year. The reason for these caps is that any level of take of these declining species will contribute to the decline.

2. Reporting System:

In order to develop a comprehensive data base on marine mammal/fishery interactions, it is essential that the fishing industry participate in reporting interactions. Absent a 100% observer program, the information and observations of fishermen must form one of the bases of any program. As a condition of receiving and retaining the exemption from the prohibitions of the MMPA, all vessels/operators holding exemption letters must:

- a) Compile information to be submitted in a report at the close of the season, or bi-annually, if the season is longer than six months;
- b) At a minimum each report must include the following information:
 - Regional Fishery Type (gear, region, species of fish)
 - Statistical area, date and time of observation/interaction
 - Species and types of observation/interaction
 - 1) Statement of no interaction
 - 2) All marine mammals incidentally killed during fishing
 - 3) All marine mammals incidentally injured during fishing including nature of injury
 - 4) All marine mammals deterred from gear or catch
 - 5) All marine mammals lethally removed to protect life, gear, or catch

- Desired optional additional information
 - 6) Species of marine mammals observed
 - 7) Marine mammals killed by other marine mammals
 - 8) Damage to gear or loss of catch to marine mammal

c) Reports must be filed even if there were no marine mammals observed or interactions noted.

3. Process

The process of obtaining a letter of exemption and compiling reported data must be developed in consultation with NMFS, the fishing industry which will be responsible for assuring that the program will be adequately funded, the conservation community and the appropriate state agencies. A major element is that a non-federal, centralized authority shall be responsible for issuing the letters of exemption, processing the information and making the data available. It must be computer accessible by the public within six months of the close of the calendar year.

4. Penalties

NMFS is responsible for enforcing this section. Penalties for violation are:

- a) Vessels/operators fishing without a letter of exemption will be subject to the full penalties of the MMPA's prohibitions on the taking of marine mammals.
- b) A vessel/operator having a letter of exemption in any year will not be entitled to a letter of exemption in the subsequent year, unless the vessel/operator files the required report.
- c) In the first year of the exemption period, failure to report will result in the issuance of a warning letter.
- d) In the second year of the exemption, failure to report will result in a \$50 fine.
- e) In the third year, failure to report will result in a \$100 fine for the first required report not filed; a \$250 fine for the second report not filed; and a \$500 fine for the third report not filed.

5. Citizen Suit

If after the beginning of the third year, NMFS fails to proceed against a violator, then after 60 days notice and the failure of NMFS to commence legal

action, a citizen may bring an action for the violation of this section against the vessel/operator for treble the penalty, except that if the vessel/operator qualifies as being below the Federal poverty level, there shall be no trebling.

C. Verification System

There will be two types of verification. All fisheries with continuing, documented interactions will be subject to Type 1. Fisheries with continuing, documented interactions may also be subject to Type 2. Any of the verification programs could include education efforts, dockside and shorebased interviews and observations, observers aboard marine patrol vessels and observers aboard fishery vessels. In all cases, maximum use will be made of existing verification programs. The observer program will be federally funded and in year 1 the industry will identify the vessels upon which observers will be placed; in years 2 and 3, a similar procedure will be followed unless insufficient vessels have been available, in which case NMFS will implement the program. The conservation community and industry recognize the nationwide concern for exposure of the vessel owner/operator to liability involved in accepting onboard observers. Placement of a sufficient number of observers, in order to achieve statistically significant verification of the take of marine mammals will be hindered until this issue is resolved. The conservation community and industry will seek congressional action to indemnify vessel operators and owners from liability resulting from onboard observers.

Type 1. This type has two components: the first is instructive, designed to help fishermen understand the system in which they are participating and to assist them in filing the proper reports in the required form. The second component is a cross-check of the reliability of the reports filed. This type will be accomplished through a combination of efforts, and will occur throughout the three-year exemption. The object of Type 1 verification is to obtain a picture of the activity reported by fishermen, and compare it to the cross-check. The comparison of the two should have "statistical" validity. Type 1 is applicable to all subject fisheries throughout the exemption period.

Type 2. This type, divided into two sub-types, is designed to determine and verify the level of incidental takes. It will occur in those fisheries which have not only a continuing, documented interaction with marine mammals, but where the interaction occurs with those species and population stocks of greatest concern. The first sub-type is used in fisheries where an historical observer data base on incidental take exists. The second sub-type is used in fisheries where there is no such data base. The coverage will range from 20 - 199 in the first year, and be adjusted thereafter as set out below.

(a) Where a historical observer data base exists, verification will use onboard observers (consistent with vessel capacity) for the first year to confirm the variation in takes reported from prior observer data including foreign fishing observer program and state observer programs and for Years 2 and 3, this sub-type will use the information on the variation in take obtained in Year 1 to design and implement an observer program with sufficient observer coverage to yield estimates of marine mammal take at a reasonable, statistically significant level.

(b) Where documentation of the level of interactions is limited, the Year 1 verification system will use a combination of efforts as appropriate to each fishery to establish a baseline indicating the variance in the levels of take. For Years 2 and 3, based upon the information of the variation in take obtained from Year 1 data, a program will be designed and implemented to yield estimates of marine mammal take at a reasonable, statistically significant level.

The fisheries identified below for verification by Type 2a or 2(b) have been selected based upon a literature survey. When, pursuant to the current NEPA process relative to renewal of several incidental take permits under the MMPA, NMFS DEIS and status of stocks reports are issued, these may be used to readjust the list of these fisheries, as mutually agreed upon. The verification shall be started in Year 1 and using the information derived from each project, continued for years two and three, unless it is shown that there is no significant, continuing interaction. Should new information be developed or new experimental fisheries be initiated, new Type 2 verification and monitoring efforts may be necessary.

Bering Sea and Gulf of Alaska. (Steller's sea lions, Northern fur seals, small cetacea including harbor porpoise, orca whales, harbor seals, ribbon seals and northern elephant seals). Type 2(a).

Except where provided below for longline and crab vessels, observer coverage of fishing activities in the Bering Sea/Gulf of Alaska shall, in years one and two, be based on a minimum 20 percent onboard observer coverage in each of the following fleets during each season for each fishery:

1. Groundfish factory trawlers (currently approximately 27 vessels);
2. Groundfish trawlers delivering to shoreside or other facilities (currently approximately 40

vessels);

3. Domestic motherships that only process fish caught by U.S. flag catcher boats (currently approximately 3 vessels);

4. Cod/sable/halibut longline vessels (currently approximately 50 vessels of sufficient size to carry observers); and

5. Crab vessels (currently approximately 110 vessels).

Except that, the total number of observers placed aboard groundfish factory trawlers, groundfish trawlers delivering to shoreside or other facilities and domestic motherships shall be at least twenty-four for each of two years. Thus, in each of years one and two, the minimum number of observers placed aboard groundfish factory trawlers, groundfish trawlers delivering to shoreside or other facilities and domestic motherships shall be approximately six, eight and one respectively. The remaining nine observers to be placed aboard groundfish factory trawlers, groundfish trawl vessels and domestic motherships will be allocated by NMFS based upon marine mammal and fisheries concerns. In year three, based on data collected in years one and two and on other relevant information, NMFS may adjust the observer coverage appropriately. For the longline fisheries listed above, NMFS may adjust the observer coverage after one year. For crab fisheries, observers added pursuant to this program may be reallocated after year one. If NMFS adjusts the observer coverage downward, in the case of longline or crab, the observers shall be transferred to other fisheries as needed based on marine mammal and fisheries concerns.

If, during years one and two, observer data, and data from other relevant sources, indicates a need for additional observer coverage in one or more of the Bering Sea/Gulf of Alaska fisheries enumerated above, NMFS shall place other observers in that fishery without subtracting from the number of observers operating in other fisheries. This program is in addition to existing observer coverage associated with joint venture operations. Nothing in this Agreement shall detract from any voluntary arrangement, or from any requirement of a state, or a Regional Fishery Management Council to employ more than 20% observer coverage on any fleet in any fishery.

Observers placed aboard vessels in the

Bering Sea/Gulf of Alaska shall be Living Marine Resource Observers and shall collect marine mammal data as provided for in this Agreement, fishery data as directed by NMFS, and such other data as required by NMFS, including, as practical, bird/fishery interaction. Funding for the Living Marine Resource Observers shall be divided equally between the Marine Mammal Protection Act and the Magnuson Fishery Conservation and Management Act. Observers funded under either statute will perform the defined functions discussed above.

Purse Seine, Round Haul and Lampara squid, anchovy and mackerel fishery, central-southern California. (harbor porpoise, pilot whales, Cal. sea lions) (Type 2(b))

Drift gillnet thresher shark fishery, Washington-Oregon. (Steller's sea lions, harbor porpoise, harbor seal, Dall's porpoise) (Type 2(a))

Salmon set and drift gillnet fisheries, Prince William Sound/Copper River (Steller's sea lions, harbor porpoise, sea otters, harbor seals, Dall's porpoise) (Type 2(b))

Salmon drift gillnet fisheries, Unimak and False Pass (Steller's sea lions, harbor porpoise, beluga whales, gray whales, harbor seals) Type 2(b)).

Columbia River salmon drift gillnet fisheries, Washington-Oregon (Steller's sea lions, Northern fur seal, harbor porpoise, harbor seals, gray whales, California sea lions). (Type 2(b))

California set gillnet halibut (harbor porpoise, sea otter, harbor seal, California sea lion) (Type 2(a)).

D. Data Acquisition, Compilation & Analysis

It is obviously important that information about marine mammals provided by fishermen, observers, monitors, state resource agencies, enforcement agencies, stranding networks and researchers should be compiled, analyzed and made accessible in a useful way. In addition, to move jointly toward a process that integrally manages marine resources, a complete and accurate information base about that environment is necessary. To that end, the agency or its designated contractor shall design a data management system that compiles the information in a timely

manner and is compatible with other coastwide data bases. The information must be computer accessible to the public within six months of the end of the reporting period.

E. Research

Research plans and programs should be designed with a view to laying an important part of the groundwork for integrated, regional conservation of marine mammals and fisheries to be implemented after the conclusion of the three-year exemption, consistent with the MMPA and the MFCMA.

Research into marine mammal population dynamics, biology and fishery interactions undertaken by the agency should be keyed to the verification program, and initially focus on the species and population stocks of most concern, i.e., Steller's sea lions, northern fur seals and harbor porpoise (a species which is subject to incidental takes in a wide variety of fisheries but about which little is known).

Research efforts should be funded and undertaken by industry which focus on gear technology and fishing practices that minimize interactions and mitigate the impacts of incidental takes of marine mammals. The first annual meeting shall be used to ascertain the proper focus and levels of funding for this effort. Where appropriate, industry should make its vessels available to researchers as platforms of opportunity for this research and other related information gathering.

F. Recovery Plans, Ecosystem Protection Zones, and Mitigation Measures

The purpose of this section is to provide a more effective means whereby marine mammals and the ecosystems upon which they depend, may be protected and conserved. The elements include development of recovery plans, establishment of ecosystem protection zones, measures to provide extraordinary relief in emergency situations, and other mitigation mechanisms as appropriate.

1. Recovery plans: the agency shall develop and implement recovery plans for the conservation and rebuilding of declining populations of Northern fur seals, Steller's sea lions and harbor porpoise. In the first year a recovery plan must be completed for Northern fur seals and be begun for Steller's sea lions; in the second year the recovery plan for Northern fur seals must be implemented, the recovery plan for Steller's sea lions completed and a recovery plan for harbor porpoise begun; and in the third year, the recovery plan for Steller's sea lions must be implemented and the recovery plan for harbor porpoise completed and implementation begun.

2. Habitat Protection Zones: Where the operations of a fishery have significant adverse impact on the marine

habitat upon which marine mammals depend and where such impacts could be reduced by restrictions on the manner of operations or location of the fishery, the agency shall propose for adoption to the appropriate state, or Council if affected, habitat protection zones. These areas will afford protection to marine mammals and the marine habitat upon which they depend through time, area or gear restrictions (or a combination thereof). Habitat protection areas under consideration include hauling-out areas, rookeries and mating areas and areas of similar significance.

3. As research programs are undertaken and more information becomes available, mitigation measures including restrictions on the season or other period of time the animals may be taken; on the manner and locations in which the animals may be taken; and on fishing techniques which have been found to cause undue fatalities to any species of marine mammal in a fishery, may become appropriate to accomplish the goals of this section. Provisions shall be made to enable the agency to implement such measures through regulation.

4. In situations where the need to act immediately is critical to the protection or survival of a marine mammal species or population stock, authority shall be granted to the agency to establish emergency protection measures after consultation with the appropriate state agency and appropriate regional fishery management council.

V. Joint Objectives

The following joint objectives are ways to measure the success of each year of the special three-year exemption and the information gathering period as a whole.

- Year 1:
- Sufficient education and information materials disseminated so that 40% of vessels/operators have received exemption letters and are reporting properly.
 - Non-federal centralized authority identifies appropriate entry points in data base, identifies additional sources of marine mammal data, designs and distributes report forms, develops mechanism for receiving reports and process data.
 - Agency designs and begins implementation of three-year research plan, begins recovery plans for Steller's sea lions and begins and completes recovery plan for Northern fur seals.

- Year 2:
- Increased participation so that 60% of vessels/operators have received exemption letters and are reporting properly.
 - Data entry, analysis of first year letter of exemption reports, refinements in system, and provisions made to make information accessible.
 - Continue research program as identified in Year 1, complete recovery plans for Stellar sea lions, implement recovery plan for Northern fur seals and begin recovery plan for harbor porpoise.
- Year 3:
- Full participation so that 100% of vessels/operators have received exemption letters and are reporting properly.
 - Data receiving and processing system fully and readily accessible and compatible with other data bases.
 - Conclude research program as identified in Year 1, implement recovery plan for Steller's sea lions and complete recovery plan for harbor porpoise and begin its implementation.

By March, 1991, agency prepares and submits a report to Congress, on the level of achievement of each of the elements and objectives for the three-year period. Within 60 days of receiving the report Congress conducts hearings to assess the program.

VI. Funding


Both parties agree that the data collection, research, verification and analysis aspects of this agreement are essential for the success of the proposed program as well as effective conservation of the marine mammal and fishery resources of concern. It is important for Congress to recognize that resolution of the important multiple use ocean interaction questions will require substantial new government funding. Both parties will urge Congress that such funding is vital to and constitutes the foundation of the negotiated agreement.

VII. Miscellaneous

The Agency must prepare marine mammal recovery plans for all species designated as depleted or listed under the ESA. Time lines will be established regarding completion of such plans, and an amendment shall establish these plans as a permanent requirement of the Act with general applicability.

MEMORANDUM

TO: Council, SSC and AP Members

FROM: Clarence G. Pautzke 
Executive Director

DATE: June 15, 1988

SUBJECT: Marine Mammal Issues

ACTION REQUIRED

Information only.

BACKGROUND

(a) Status of Stellar Sea Lions and Northern Fur Seals(1) Stellar Sea Lions

On May 6, 1988 NMFS published in the Federal Register a notice of a proposed rule designating the Stellar sea lions in Alaska as depleted. In its notice, NMFS requested comments on the available scientific information regarding the stock status and possible causes of stock declines as well as potential impacts of a depletion designation. Comments must be submitted by July 5, 1988 to: Dr. Nancy Foster, Director, Office of Protected Resources and Habitat Programs (F/PR), NMFS, Washington, DC 20235.

② Northern Fur Seals. On May 18, 1988, NMFS designated the Pribilof Island population of North Pacific fur seals as depleted under the MMPA. The Act requires this designation when a marine mammal species or population stock is below its optimum sustainable population (OSP).

With some exceptions, the MMPA imposed a moratorium on any taking of marine mammals in U.S. waters. The Secretary of Commerce may issue permits to allow specified takings of mammals incidental to commercial fishing. Intentional takings of a depleted species or population stock are allowed only for research, or for subsistence and handicraft purposes by Alaska natives. Small, incidental takings that have a negligible impact on these species or stocks may be authorized for certain activities, but not commercial fishing.

Until recently, NMFS interpreted the Act to allow the issuance of permits for the incidental taking of marine mammals, when the species or population stocks specified on the permit would not be disadvantaged, without requiring a finding that all other marine mammal species that could possibly be taken were at OSP. This practice was challenged in the case, Kokechik Fishermen's Association, et al vs Secretary Commerce, et al.

The court action arose out of the issuance of a permit by NMFS to the Federation of Japan Salmon Fishermen's Association (Federation) allowing the incidental take of Dall's porpoises in a commercial salmon fishery that is conducted in the U.S. EEZ under the authority of the INPFC. The original request was for a permit to allow the taking of Dall's porpoises and northern fur seals from the Commander Island stock. The Secretary found that the MMPA prohibited issuing a permit for taking of northern fur seals because the record did not contain sufficient information to support a finding that the Commander Island population was at OSP. The Secretary then informed the Federation that any taking of fur seals would result in the assessment of civil penalties as provided in the Act.

The decision to issue the permit was challenged on the grounds that the MMPA does not grant the Secretary of Commerce the discretion to permit commercial fishing operations to take one marine mammal species when the issuance of a permit to take a second species or stock is not allowed if the fishery would inevitably take mammals of the second species or stock. The U.S. District Court for the District of Columbia found for Kokechik and the matter was appealed by the Department of Commerce and the Federation. In February, 1988 the U.S. Court of Appeals affirmed the lower court's ruling and interpreted the MMPA to prohibit the Secretary from issuing a permit for the taking of any marine mammal species or population stock unless the Secretary also issues a permit for the taking of all species that will be affected by the fishing operation.

On May 11, 1988 the Court of Appeals denied the Secretary of Commerce's request for a rehearing and on May 31, 1988 denied a request for a stay of the ruling pending the filing of a petition for a writ of certiorari with the Supreme Court. The Secretary then filed a request for a stay with the U.S. Supreme Court. That request was denied on June 9 thereby prohibiting the Federation from fishing for salmon in U.S. waters this year.

Because of the denial of a stay, the Japanese have threatened to withdraw from the INPFC and have refused to take U.S. observers on their high seas squid vessels. If the court ruling stands, U.S. fishing operations that may incidentally take depleted species of marine mammals will be placed in jeopardy unless the Marine Mammal Protection Act is amended to allow small incidental takes of depleted species in commercial fishing operations.

(b) Marine Mammal Protection Act Reauthorization

On April 19, 1988, the House Merchant Marine and Fisheries Committee, Subcommittee on Fish and Wildlife Conservation and Environment, held a hearing on H.R. 4189, a bill that reauthorizes the Marine Mammal Protection Act (MMPA) through FY 1993. Prior to this hearing, representatives from the commercial fishing industry and environmental groups held a series of meetings to develop a consensus position on MMPA amendments. The industry/environmentalist proposal, a summary of which is attached [item C-2(a)], was presented at the hearing by Lee Alverson.

Among other things the consensus proposes to address the ruling in Kokechik, described above, by allowing for the take of depleted species in commercial fishing operations during the next three years under certain conditions: one of those being the establishment of an observer program that would provide for a minimum of 20% observer coverage on certain segments of the Bering Sea and Gulf of Alaska fishing fleets. The observers are to be living marine resources observers, not just marine mammal observers, and are to be funded by the federal government.

The consensus limits the application of any MMPA amendments allowing the take of depleted species in commercial fisheries in U.S. waters to U.S. vessels. Testimony was offered at the House hearing to the effect that the U.S. government should negotiate separate agreements with relevant foreign countries regarding any MMPA exemptions.

The topic of application of the proposal to foreign vessels was also raised during a MMPA hearing by the Senate Commerce Committee on May 19. Senator Stevens proposed that, should the MMPA be amended along the lines of the industry/environmentalist proposal, foreign fishing operations be afforded the same exemptions as domestic fishermen, but only if the foreigners agree to allow U.S. observers on their boats outside the EEZ.

No substantive legislation accommodating the industry/environmentalist proposal or any other amendment has, yet, been drafted. House and Senate staff members are expected to produce draft legislation within the next two weeks.

May 18, 1988

SUMMARY

Joint Proposal Of The Fishing Industry
And Conservation Community
To Amend The Marine Mammal Protection Act

The joint proposal of the fishing industry and conservation community is intended to ensure that:

- ° The commercial fishing industry will be able to continue to operate legally in the presence of marine mammals; and
- ° The program for marine mammal protection will be advanced by improved data acquisition/analysis and management procedures.

The proposal would:

- ° Continue the availability of general permits for fisheries which do not interact with marine mammals that are depleted or de facto depleted;
- ° Continue small-take permits for fisheries where takings of marine mammals are few and the effect is negligible (e.g., possibly East Coast fisheries);
- ° Establish a new "rare take" exemption from the Act for fisheries where interactions with marine mammals are a very remote possibility (e.g., crab pot operations), requiring only limited reporting; and
- ° Establish new "letters of exemption" for fisheries which do not qualify for general or small-take permits or the "rare take" exemption (e.g., Bering Sea/Gulf of Alaska groundfish trawl, and certain West Coast purse seine and gillnet operations).

The new program for letters of exemption will have the following characteristics:

- ° A duration of three years;
- ° A periodic reporting requirement on each fisherman;
- ° An observer requirement for fisheries of special concern (e.g., Bering Sea/Gulf of Alaska groundfish trawl, minimum 20% coverage, with 35% coverage in particularly important areas); and

- ° New administrative penalties for failure to obtain exemptions or to report interactions as required.

Principal features of the observer program include:

- ° Acquisition of data concerning fisheries, marine mammals and birds;
- ° Funding by the Federal Government;
- ° Indemnification of vessel owners/operators by the Federal Government; and
- ° Verification efforts on other fisheries of special concern where observers are not appropriate (e.g., small vessels).

Other elements of the proposal include:

- ° More reliable procedures for assessing the status of marine mammal stocks;
- ° Increased research;
- ° An improved system of data acquisition, compilation, and analysis; and
- ° A provision for effective mitigation measures including:
 - °° marine mammal recovery plans (three species completed in three years);
 - °° ecosystem protection zones; and
 - °° emergency fishing restrictions.



SIMILAR STATEMENT SENT TO SENATE SUBCOMMITTEE ON NATIONAL OCEANS POLICY STUDY

International Association of Fish and Wildlife Agencies

(Organized July 2, 1902)

444 North Capitol St., NW, Suite 534, Washington, DC 20001 (202) 624-7890

Jack H. Berryman, Executive Vice President

STATEMENT OF THE INTERNATIONAL ASSOCIATION OF FISH AND WILDLIFE AGENCIES CONCERNING REAUTHORIZATION OF THE MARINE MAMMAL PROTECTION ACT, HR 4189 FOR HOUSE SUBCOMMITTEE ON FISHERIES AND WILDLIFE CONSERVATION AND THE ENVIRONMENT

MAY 10, 1988

by

Gordon C. Robertson, Legislative Counsel

The International Association of Fish and Wildlife Agencies, founded in 1902, is a quasi-governmental organization of public agencies charged with the protection and management of North America's fish and wildlife resources. The Association's governmental members include the fish and wildlife agencies of the states, provinces and federal governments of the U.S., Canada, and Mexico. All 50 states are members. The Association has been a key organization in the promotion of the principles of sound resource management and the strengthening of federal, state and private cooperation in protecting and managing fish and wildlife and their habitats in the public interest.

The development of the Marine Mammal Protection Act (MMPA) in 1972 represents a significant step ever by the U.S. Congress to recognize an important wildlife resource and provide for its long-term conservation. The MMPA has resulted in a number of important successes in marine mammal protection. Populations of species such as California sea lions, northern elephant seals, and harbor seals have increased greatly. As much as the Association acknowledges the importance of marine mammal conservation, the Association is also aware of resource conflict that currently cannot be adequately addressed under the MMPA. The MMPA does not provide for integrated management of marine mammals with other living resources in the marine environment, and with man.

The Pacific Marine Fisheries Commission (PMFC), an affiliate member of IAFWA, prepared for this year's reauthorization by examining the issue of marine mammals/fishery interactions and proposing modifications to MMPA that would result in a more integrated and rational approach to the management of marine mammals, marine fishes and fisheries. (See Report on Proposed Amendments to the Marine Mammal Protection Act, PMFC, December 1, 1987.) The PMFC report identified the need for (a) governmental authority to lethally take nuisance animals at government facilities even when the animals are "depleted"¹; (b) the take of "depleted" mammals by commercial fishermen; (c) reinvolvement by coastal states in mammal management via cooperative state/federal programs; and

¹Under the Act "depleted" by no means necessarily suggests the population is actually threatened and, in fact, a population whose status is unknown is treated as if it is depleted.

(d) funding for research and management. The intent of these recommendations is to build on earlier amendments (such as the 1981 recognition of the need for "small takes" by commercial fishing operations and the 1986 change which allows the take of depleted species (by industries other than fishing) toward the goal of establishing a regional decision-making process whereby government, fishing, environmental, oil and gas, and other users of living marine resources (including marine mammals) can rationally sustain the populations, as well as sustain both the non-consumptive and the consumptive uses.

The Association's Marine and Estuarine Committee has already endorsed the philosophy and recommendations of PMFC. We have also reviewed the May 10, 1988 document entitled "Recommended Changes from the Conservation Community and the Fishing Industry." Our review indicates the agreement will not lead to greater latitude in managing the marine ecosystem.

- * It does not address the practical need to regain state involvement in day-to-day programs for marine mammals.
- * It does not assure government control of nuisance animals when their populations are "depleted", a management tool that government has for other wildlife.
- * It does not allow the intentional lethal take of marine mammals by fishermen (to protect their gear and catch) when the mammal population is decreasing or its status is unknown, even though the take may have no adverse impact on the population, yet the mammal's impact on the fisherman's business may be significant.
- * It does not accept the data from the long-standing foreign observer program in Alaska, so it requires major expenditures of federal dollars to reverify what are known to be insignificant takes of mammals in EEZ fisheries.
- * It does not address if a fishery impact is adversely affecting a mammal stock but instead subjects all fisheries with a "continuous, documented" take to the requirements of the special exemption. The real issue is whether or not the fishery interaction has a significant impact on the mammal resources. Nothing in the proposal suggests criteria or a process to determine on a fishery-by-fishery basis whether fishery interactions are actually impacting the viability of the mammal stocks. In this instance, minimal taking in any fishery is not valid criterion for mitigation or fishery control.

There are sufficient differences between foreign and domestic fishing operations to support the need for a domestic fishery observer program with verification as only one aspect. The program should be directed and implemented by the National Marine Fisheries Service and use specially trained observers to gather information needed to design and implement necessary research on fishery/marine mammal interactions.

On behalf of the proposal, it does require NMFS to prepare recovery plans which should better direct research programs to critical areas. It also addresses the need for better reporting by fishermen as well as an education program. The federal government has a responsibility for working with industry to implement these programs. Most importantly, it does allow most fishing to continue in the face of interactions with "depleted" species, although a five-year exemption is more realistic than only three years.

In conclusion, the Association strongly identifies with the need to move the MMPA toward an integrated management of marine mammals with other living marine resources and the uses of these resources by man. The recent proposal by the environmental community and representatives of the fishing industry appears to be a stop gap measure that will put undue burden on some segments of industry, use up significant fiscal resources, and, at the end of three years, provide no better indication of how regional management of fishery resources can be meshed with rational management of marine mammals.

IAFWA encourages a more comprehensive approach to marine mammal management and welcomes the opportunity to work with Congress on addressing the needs of the marine environment and all its users.