

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.

(1) 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.

NRC



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M E M O R A N D U M

DATE: June 15, 1988

TO: Congressman Gerry E. Studds
Senator John B. Breaux
Senator Brock Adams
Mr. Bo Bricklemyer
Mr. Deming Cowles
Mr. Ted Kronmiller

FROM: D. L. Alverson ^{For} *[Signature]*
NRC

SUBJECT: MMPA

The attached June 14, 1988, letter to Mr. George Manina further addresses the noted industry members' understanding of our marine mammal industry/conservation group agreement.

cc: Signers

NRC



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June 14, 1988

Mr. George Manina
O'Connor and Hannan
1919 Pennsylvania Avenue
Suite 800
Washington, D.C. 20006

Dear George:

In regard to the recent telephone discussions with Dr. Alverson concerning the fishing industry/conservation group agreement, there remains some confusion regarding the interpretation of the provisions dealing with the observer program commitments. Regardless of what you may have been told via the grapevine, the fishing industry will abide by the agreement. Accordingly, we hope this letter will clarify our view of this issue. We do not feel that our interpretation constitutes a difference in substance, but the current language which includes specific numbers for trawl observers for years one and two gives rise to concern on the part of our constituents (which include longliners, trawlers, crabbers, and seiners). In order to clarify this issue, the following explanation of our understanding is provided:

1. The overall groundfish and crab observer program for the Bering Sea and Gulf is based on an across-the-board 20 percent coverage for the three basic fleets--trawl, longliner, and crab. Rough estimates of these three fleet sizes were given in the proposal.
2. We also understood that if there were areas where significant marine mammal/fisheries interactions occur (such as areas 1 and 4 identified during the negotiations), NMFS would have the authority to increase the coverage up to 35 percent for those areas of concern. However, in no instance was the coverage in any specific fishery to fall below 20 percent.

The area of confusion revolves round the specific numbers of trawl observers (14+10) given in the May 8th text and later changed to (15+9) in the May 10th rewrite of the agreement. These numbers were derived by taking 20 percent of our preliminary estimate of 70 working vessels in the DAP trawl

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fleet which gave rise to the 14 observers and 35% x 70 which gave rise to the number 24. The latter figure (24) constituted the maximum number of observers which were presumed would be required if the entire Gulf and Bering Sea were identified as "problem areas" by the NMFS. We had expected that the actual requirement would fall between 14 and 24, but recognized that these numbers would be adjusted in accordance with final confirmation of vessel numbers in the fleet and needs as identified by NMFS.

The trouble with using a specific number of observers for any fleet in the agreement is that the entire exercise was based on our preliminary estimates of fleet sizes. You will recall that the fishing industry committed themselves to getting a firmer fix on these numbers. We expect to complete this assignment in the next day or two and to FAX the revised estimates to you. We will try to convert vessel coverage into man months of observer time by fleet so Congress can get a better fix on costs. Even so, this will remain at best an estimate due to the fluidity with which vessels move into and out of areas and fisheries.

Thus we do not have any problem with raising the percent coverage to 35 percent for the DAP trawl fleet or other fleet units in those areas in which the NMFS determines there is a problem with the reliability of data concerning marine mammal/fisheries interaction. We just don't wish to have the coverage made mandatory for any other areas if the statistical validity of the data in those other areas is adequate with 20 percent coverage, and/or if no particular marine mammal problem prevails in such regions.

Another area of concern to us is the discussion on page 11 regarding redeployment of observers in subsequent years. The last sentence in the paragraph provides for reallocation of observers to "other fisheries as needed." We presume this reallocation could be to any of the major fisheries carrying observers off Alaska, Washington, Oregon, and California, or new fisheries identified as having potential problems. Is that your understanding? Placement of the paragraph in the Bering Sea and Gulf of Alaska section would seem to imply our only option was reallocation of observers to the trawl fisheries. We believe the purpose of the reallocation paragraph was to provide for new problems or concerns raised for any of the fisheries and in any area on an as-needed basis to deal with marine mammals/fisheries interactions.

In conclusion, it is our intent to abide by the written agreement and we do not intend to make an issue or further

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debate the observer numbers. We presume that the first priority in usage of these observers will be to insure the 20 percent coverage of all areas and to use the remaining observers to cover identified problem areas.

Sincerely yours,

Dayton L. Alverson

Dayton L. Alverson
Industry Coordinator and Negotiator

- Alaska Factory Trawler Association by *Edward O. Evans*
- Alaska Groundfish Data Bank by *Chris Blackburn / Tele. 54*
- American High Seas Fisheries Association by *Pete Granger*
- Fishing Vessel Owners Association by *Robert Alverson*
- The Highliners Association by *Lynd S. ...*
- Northwest Fisheries Association by *...*
- North Pacific Fishing Vessel Owners' Association by *W. A. Smith*
- Midwater Trawlers Cooperative by *Steve Hughes*
- Pacific Independent Trawlers Association by *Alvin Petersen*
- Pacific Seafood Processors Association by *Benny D. Collier*
- Puget Sound Gillnetters Association by *...*
- Purse Seine Vessel Owners' Association by *Robert J. Francis*
- Alaska Draggers Association by *...*