

# **Committee on Resources**

## **Subcommittee on Fisheries Conservation, Wildlife and Oceans**

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### **Background**

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March 30, 2000

### **MEMORANDUM**

TO: Members, Subcommittee on Fisheries Conservation, Wildlife and Oceans

FROM: Subcommittee Majority Staff

RE: Oversight hearing on the Marine Mammal Protection Act

At 10:00 a.m. on Thursday, April 6, 2000, the Subcommittee on Fisheries Conservation, Wildlife and Oceans will meet in Room 1334 Longworth House Office Building to conduct an oversight hearing on Section 118 of the Marine Mammal Protection Act. Those invited to testify include: Ms. Penelope Dalton, Assistant Administrator of Fisheries, National Marine Fisheries Service; Mr. John Reynolds, Chairman, Marine Mammal Commission; Mr. Pat White, Maine Lobstermen's Association; Mr. Bill Foster, Mid-Atlantic Coastal Gillnet Industry; Ms. Nina Young, Center for Marine Conservation; Ms. Sharon Young, Human Society of the United States; and Mr. John Calambokidis, Cascadia Research Collective.

### **BACKGROUND**

#### **The Marine Mammal Protection Act:**

The Marine Mammal Protection Act (MMPA) was enacted in 1972 for the purpose of ensuring that marine mammals are maintained at, or in some cases restored to, healthy population levels. The original Act established a moratorium on the taking (under the MMPA a "take" is defined as "to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal") or importing of marine mammals and marine mammal products except for certain activities which are regulated and permitted.

Under the MMPA, jurisdiction over marine mammals in the wild is split between two agencies, the U.S. Fish and Wildlife Service (USFWS) (under the Department of the Interior) and the National Marine Fisheries Service (NMFS) (under the National Oceanic and Atmospheric Administration within the Department of Commerce). The USFWS has jurisdiction over sea otters, polar bears, manatees, dugongs, and walrus, while the NMFS has jurisdiction over all other marine mammals. The 1994 amendments transferred authority of captive marine mammals to the Animal and Plant Health Inspection Service (APHIS) (under the Department of Agriculture).

Due to a lawsuit, which effectively prevented the issuance of permits to incidentally take marine mammals in the course of commercial fishing operations, the Congress amended the MMPA in 1988 to establish a five-year interim exemption for commercial fishing operations and marine mammals. That exemption expired on October 1, 1993, but has twice been extended by temporary measures.

During the interim exemption period, NMFS developed a three-tiered fishery classification system based on each fishery's level of interaction with marine mammals. Category I fisheries were defined as those in which it is highly likely that one marine mammal will be taken by a randomly selected vessel during a 20-day period. A Category II fishery is one in which there is some likelihood of taking one marine mammal during a 20-day period, and a Category III fishery is one in which it is highly unlikely that any marine mammal will be taken during a 20-day period.

The proposal required fishing vessel owners to register their vessels operating in either Category I or II fisheries and to

follow certain recording and reporting requirements during fishing operations and in some cases, carry observers. The Proposed Regime to Govern Interactions between Marine Mammals and Commercial Fishing Operations was transmitted to Congress in December 1992 following public comment. Following the submittal of the proposed regime to Congress, debate continued as to whether the proposal met the goals of the Act.

In 1994, in an effort to end this continuing debate, Congress reauthorized the MMPA (P.L. 103-238) and made a number of changes to the Act. Section 117 requires that marine mammal stock assessments be prepared to provide the necessary scientific basis for the new incidental take regime. This section also requires that the assessments include information on the sources and levels of human-caused mortality and serious injury, and identify strategic stocks for which Take Reduction Plans are needed.

Section 118 establishes the requirements for the new incidental take regime for commercial fisheries. This section requires that the NMFS publish a list of commercial fisheries classified according to the frequency in which the fishery causes mortality or serious injuries to marine mammals. This differs from the 1992 NMFS proposal for classification in that it is based on mortality or serious injury rather than interaction or take of the marine mammal. The new regime also includes a mechanism for authorizing a limited incidental take of marine mammals which are listed as endangered or threatened.

Section 118 also authorized NMFS to use Take Reduction Teams (TRT) when developing Take Reduction Plans. The take reduction team process is a multi-year process which relies on approximately 2-3 years of observer coverage, followed by up to a year of negotiations, several months to develop regulations, and ongoing monitoring, enforcement, and research. The MMPA requires that the teams be convened within 30 days of the issuance of final stock assessment reports for stocks interacting with a category I or II fishery and must submit their plans within six months for strategic stocks and within eleven months for non-strategic stocks. Members of the TRT were to have expertise regarding the conservation or biology of the marine mammal species which the Plan will address, or the fishing practices that result in the incidental mortality and serious injury of such species. Each TRT is required to develop a draft Plan, by consensus, and submit it to the Secretary. After the Plan is adopted, the team meets at least annually to monitor the progress of the goals established in the Plan.

The immediate goal of the Take Reduction Plan is to reduce, within six months of its implementation, the incidental take of marine mammals below each marine mammal stocks's Potential Biological Removal (PBR) level. PBR is the maximum number of marine mammals that may be removed from the stock and allow the stock to reach or maintain optimum sustainable populations levels. The long term goal of the Take Reduction Plan is to reduce, within five years of its implementation, the incidental take of marine mammals to insignificant levels approaching a zero mortality and serious injury rate.

Five Teams have been convened under this section: the Gulf of Maine Harbor Porpoise TRT; the Mid-Atlantic Coastal Gillnet TRT; the Atlantic Offshore Cetacean TRT; the Atlantic Large Whale TRT; and the Pacific Offshore Cetacean TRT.

### Gulf of Maine Harbor Porpoise TRT

The team was formed to reduce the incidental take of harbor porpoise in the Gulf of Maine groundfish sink gillnet fishery. In August 1996, the team submitted its draft plan to NMFS. The draft plan contained restrictions which expanded closures included in Amendment 7 of the Multispecies Fishery Management Plan, developed by the New England Fishery Management Council. It also required the use of acoustic deterrent devices (pingers) on gillnets to further reduce harbor porpoise bycatch. NMFS published the proposed rule on August 13, 1997, with public comment extending to January 14, 1998. In December 1997, the team reconvened and expressed concerns about the bycatch measures contained in the plan as published and implemented by NMFS. NMFS published a revised proposed rule on September 11, 1998 and combined it with a proposed rule for reducing takes of harbor porpoises in the Mid-Atlantic. The final Harbor Porpoise TRT which combined management measures from both the Gulf of Maine and Mid-Atlantic, was published December 1998 and was effective January 1, 1999. The management measures included time/area closures and pingers. The team last met in December 1999.

## Mid-Atlantic Coastal Gillnet TRT

The team was convened on February 25, 1997, to address the incidental take of harbor porpoise in the ocean gillnet fisheries in the Mid-Atlantic region. New England gillnet fishermen and Mid-Atlantic gillnet fishermen fish in the region and observer data showed a higher rate of bycatch from the fishermen from New England. The different bycatch rates were thought to be due to differences in gear characteristics, such as twine diameter, mesh size, and the number and length of sets. To reduce the bycatch of harbor porpoise the team recommended a combination of area closures and gear modifications. The recommendations were implemented by NMFS in December 1998. The team met in February 2000 to discuss the implementation of the plan and revisions to further reduce the bycatch of harbor porpoises.

## Atlantic Offshore Cetacean TRT

The team was convened in 1996 to reduce the incidental take of right whales, humpback whales, sperm whales, beaked whales, pilot whales, common dolphins, bottlenose dolphins, and spotted dolphins in the Atlantic pelagic driftnet, longline and pair trawl fisheries. The team submitted its draft plan in November 1996, which contained recommendations for seasonal closures, increased observer coverage, limits on capacity expansion into the fishery, and allocation of catch limits over a longer season. Before finalizing the plan, NMFS published a final rule prohibiting the use of driftnet gear in the swordfish fishery. In addition, the pair trawl gear is not currently authorized for fishing in the Atlantic tuna or swordfish fishery. A final plan was not published since many of the recommendations are being implemented in the Highly Migratory Fishery Management Plan which was developed at the same time as the Take Reduction Plan. For the recommendations not implemented in the HMS Plan NMFS is preparing a proposed take reduction plan for the non-regulatory aspects of the TRT Plan pertaining to the longline fishery. NMFS plans on reconvening the team in 2000 to discuss the need for further reduction measures.

## Atlantic Large Whale TRT

The team was established in 1996 to address takes of right whales, humpback whales, fin whales, minke whales in the South Atlantic shark gillnet fishery, the Gulf of Maine and Mid-Atlantic lobster trap/pot fishery, the Mid-Atlantic gillnet fishery, and the Gulf of Maine sink gillnet fishery. The team submitted its report on February 1, 1997. The team did not reach consensus on all aspects of the plan. The interim rule was published in July 1997, and after extensive public comment the final rule was published February, 1999 with an April 1, 1999 effective date. The final regulations have minimal impacts on fisheries, while reducing the incidental take of large whales. On April 9, 1999, the NMFS published a final rule with partial stay concerning the final rule's gear marking regulations until November 1999, in order for the TRT to consider improvements. The team is scheduled to meet in April 2000 to review the plan.

## Pacific Offshore Cetacean TRT

The team was established in 1996 and submitted its draft plan to reduce the incidental take of beaked whales, pilot whales, pygmy sperm whales, sperm whales, and humpback whales in the California/Oregon swordfish drift gillnet fishery in August 1996. Recommendations included in the plan were: minimum depth of 36 feet below the water surface for the top of the net; pingers on all nets; reduction of inactive permits in California and Oregon; and that vessel operators be required to attend educational workshops. The final plan and implementing regulations were published October 1997, with an effective date of October 30, 1997. The six month review of the plan and the data regarding marine mammal takes showed the takes to be below PBR. The team met again in 1999 to review the bycatch estimates, which showed the regulations were successful in reducing the incidental take of small cetaceans. The team recommended additional measures dealing with observer coverage, the use of observer data for enforcement, and to expand the use of pingers. The team is scheduled to meet this month.

## ISSUES

- Take Reduction Teams were authorized in the 1994 amendments and the Secretary of Commerce has used a TRT in five instances. There has been some concern that while NMFS worked with the TRTs, much of what the TRTs recommended was ignored. Many of those involved in the TRT process have felt that their time was wasted because NMFS unilaterally changed the recommendations of the TRT without explanation. What is the

Agency's response to this concern?

- Concerns have been raised regarding the length of time it has taken NMFS to publish the draft plan and proposed regulations. In some cases it has taken a year or more to publish the draft plan and proposed regulations. Why has it taken so long? What steps can be taken to minimize the time between the submittal of the draft plan and publishing it with the proposed regulations?
- There is some concern that recreational fishing activities adversely affect marine mammal populations and cannot be addressed within take reduction plans. Do changes need to be made to the Act to allow recreational fishermen to participate in the TRT process and minimize the impacts recreational fishing may have on marine mammals?
- There is a great deal of concern being raised by constituents from Maine to North Carolina over the general lack of marine mammal stock data and subsequent use of the precautionary approach in the TRT process. How will the Agency rectify the 'lack of scientific data' issue for future Take Reduction Teams? Will the convening of teams be delayed until accurate data is collected?
- We have heard that the next Take Reduction Team proposed is for Atlantic bottlenose dolphins. What is the Agency's schedule to convene a team for bottlenose dolphins? What other marine mammal populations will the Agency convene a take reduction team for after bottlenose dolphins?
- The Agency has been using observers in some fisheries. What is the percentage of observers used in each of the fisheries that have had take reduction plans developed? What is the percentage in fisheries without take reductions plans, but with interactions with marine mammals?

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