Committee on Resources

Subcommittee on Fisheries Conservation, Wildlife and Oceans

Statement

TESTIMONY OF
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ON BEHALF OF
THE HUMANE SOCIETY OF THE UNITED STATES
BEFORE THE
SUBCOMMITTEE ON FISHERIES CONSERVATION, WILDLIFE AN OCEANS
OF THE
UNITED STATES HOUSE OF REPRESENTATIVES
ON SECTION 118 OF THE MARINE MAMMAL PROTECTION ACT
APRIL 6, 2000

Mr. Chairman, members of the Subcommittee, my name is Sharon Young and I am a marine mammal consultant for The Humane Society of the United States (HSUS). On behalf of The HSUS and its 7.3 million members and constituents, I am grateful for the opportunity to present our views on the implementation of the Marine Mammal Protection Act (MMPA), specifically the use of take reduction teams that are required as a part of Section 118 of the Act. I will review the requirements of the Act and our perspective on the degree of compliance by the National Marine Fisheries Service (NMFS) with its mandates.

BACKGROUND

In 1994, Congress enacted amendments to the MMPA that were intended to provide a structure for complying with the Act's mandate that fishery-related mortality and serious injury of marine mammals be reduced to levels that are "insignificant and approaching zero," the so-called zero mortality rate goal of the Act. These amendments required the periodic assessment of stock or populations of marine mammals and they provided a means of identifying marine mammal stocks that were subjected to levels of mortality and serious injury that were likely to be unsustainable [Section 117].

For each stock of marine mammals a Potential Biological Removal Level (PBR) was determined. This PBR is the product of a mathematical formula that is based on calculations of the population abundance and reproductive rate and a fractional conservation factor called the recovery factor. The PBR represents the maximum number of marine mammals, not including natural mortalities, that can be removed from a stock while allowing the stock to reach or maintain its optimum sustainable population. Some stocks may be designated as strategic stocks if the level of direct human-caused mortality exceeds the PBR or if they are listed as threatened or endangered under the Endangered Species Act (ESA), as depleted under the MMPA or are declining and likely to be listed. Once these strategic stocks were identified, Section 118 required the NMFS to identify those fisheries most likely to interact with them. Interactions with marine mammals are referred to as "takings." Fisheries with a likelihood of taking strategic stocks of marine mammals are

represented on take reduction teams, whose mandate is to develop a plan to reduce the mortality and serious injury of marine mammals to below PBR within 6 months and to the zero mortality rate goal within 5 years. Take reduction teams were to be comprised of representatives of conservation groups, representatives of the affected fisheries, scientists, state and federal managers and any other stakeholders.

The MMPA provided a clear timetable for ensuring that the goals were met by the NMFS on a timely basis. Specifically, the law required that the status of all marine mammal stocks be assessed within 9 months of the enactment of the MMPA amendments [Section 117 (a)-(c)]. The MMPA was enacted in May of 1994, so stock assessments were supposed to be in place by February of 1995, although they were not actually completed until August of 1995. The Secretary was charged with convening take reduction teams for strategic stock within 30 days of the publication of the stock assessments. The MMPA states: "at the earliest possible time (not later than 30 days) after the Secretary issues a final stock assessment…for a strategic stock, the Secretary shall…..(i)establish a take reduction team for such stock and appoint the members of such team in accordance with subparagraph(C);" [Section 118(f)(6)(A)]. The first take reduction team (Team) was not convened until six months after publication of the stock assessments, and four and a half years after the first stock assessments, some teams still have not been convened.

The MMPA provides six months for the Team to develop a draft plan to reduce mortality and serious injury to below PBR. If the Team cannot reach consensus on a plan, the Secretary has an additional 60 days to develop his own plan; or if the Team does reach consensus, this 60-day period is used by the Secretary to review the plan and publish a draft plan for public comment[Section 118(f)6)(B)]. The public comment period on the published proposal is not to exceed 90 days. Following the close of the public comment period, the Secretary has 60 days to consider the comments and issue a final plan and implementing regulations [Section 118(f)(6)(C)].

The goal of the take reduction plan is to reduce mortality and serious injury to below PBR within 6 months of the implementation of the plan. [Section 118(f)(5)(A)]. Under the schedule established in the MMPA when it was enacted in May of 1994 , fisheries should have been at or below PBR by October of 1996. Because of the extremely high levels of mortality of harbor porpoise in gillnet fisheries in the Gulf of Maine, Congress made special provisions for this fishery. MMPA provided that the Secretary may "modify the time period required for compliance with section 118 (f)(5)(A), but in no case may such modification extend the date of compliance beyond April 1, 1997." [SEC 120 (j)(2)]

Because of delays within the NMFS, no fisheries were able to comply with the MMPA deadlines for reducing their interactions with strategic stocks to below PBR by October of 1996. In fact, no take reduction plans had even been published by this date. Gulf of Maine harbor porpoise were still being killed at a rate almost three times their PBR when the April 1997 deadline came and went without publication of any take reduction plan.

The extent of the delays and the consequent impact of the delay on both fisheries and marine mammals varied with each Team.

THE TAKE REDUCTION TEAMS

As previously mentioned, stock assessments for all marine mammals were released to the public in August of 1995, a delay of a little of over six months after the nine months granted in the MMPA's timetable. Twenty-three (23) stocks of marine mammals were designated as strategic stocks because the estimate of total annual mortality in commercial fisheries exceeded their PBR; some of these were endangered species.

The MMPA mandated that take reduction teams be convened for these stocks and/or the fisheries interacting with them. An additional five species were considered strategic because they were listed as endangered under the ESA, although fishery related mortality and serious injury of these stocks were less than their PBR and therefore a Team for these stocks was not a high priority.

When the NMFS reported its 1995 activities to Congress, it stated that a "coordination process" to "initiate" Teams was begun in September 1995. The report states that they had contracted with a facilitator who was to be responsible for convening six (6) take reduction teams during 1996 to address the mortality of the strategic stocks whose PBR was exceeded. Some of these Teams were to address mortality in multiple stocks of marine mammals that interacted with a single fishery. NMFS stated that these six teams would be "in order of priority: Gulf of Maine stock (population) of harbor porpoise; Atlantic offshore cetaceans; Pacific offshore cetaceans; and the Atlantic baleen whales (humpback and northern right whales)." Furthermore they reported that "[t]he development of [Teams] for three other stocks; the Atlantic coastal stock of bottlenose dolphins; and the eastern and western stocks of Steller sea lions, *is also being considered*." We have emphasized the last four words, as these stock are all strategic stocks with known fishery interactions. Bottlenose dolphins were being killed in numbers exceeding their PBR and were a depleted stock; therefore a take reduction team was mandatory. Steller sea lions were declining in portions of their range and portions of the stock have been designated as endangered or threatened. Despite apparent statutory obligation, no take reduction teams were convened in 1995.

Even if allowance is made for the fact that the stock assessments were late in development, thereby delaying the convening of take reduction teams, the MMPA states that take teams must be established "at the earliest possible time (not later than 30 days) after the Secretary issues a final stock assessment." Despite this clear mandate, NMFS did not convene the first take reduction team until February 12, 1996, a delay of six (6) months after the stock assessments were released in August of 1995. As of the date of this testimony NMFS has convened only four of the six teams that they themselves had identified as having "the highest priority for the development of take reduction plans to reduce incidental bycatch of…strategic stocks." Four and one half years after the publication of the first stock assessment, there are still no take reduction teams for coastal stocks of bottlenose dolphins nor for Steller sea lions in Alaska. Even when teams were convened, commercial fisheries were unable to meet any of the statutorily mandated deadlines in the MMPA for reducing mortality to below the PBR, largely as a result of delays in implementing take reduction recommendations. With the exception of the Pacific Offshore Cetacean Team, I have represented the HSUS on all of these Teams. I would like to offer my observations on the successes and failures of the take reduction process. I would like to start with the proverbial "good news."

Pacific Offshore Cetacean Team

In contrast to the other fisheries that have been part of the take reduction process, this Team almost serves as a model for how the process can work. The team was convened in February, 1996 and submitted a plan as mandated in August of 1996. The NMFS published the draft and final plans in a timely manner and in early 1997 the plan was implemented. Since that time, its measures have apparently been effective in reducing mortality in the Pacific driftnet fishery. While there have been some issues of compliance by the fishery with some portions of the take reduction plan, the NMFS has gone forward to address these problems with education programs and enforcement and this Team's efforts appear to have been a success. The same cannot be said of the other take reduction teams.

Gulf of Maine Harbor Porpoise Teams

The NMFS convened two Teams to address mortality of Gulf of Maine harbor porpoise. One team included fisheries in the Gulf of Maine and the other focussed on mid-Atlantic fisheries. The take reduction team for the coastal gillnet fishery from Maine to New York was convened on Feb 12, 1996. The Team dealing with mortality in the mid-Atlantic was not convened until one year later in February of 1997. At the time that the first team was convened, an estimated 1,500 harbor porpoise died annually in gillnets in New England, Canada and the mid- Atlantic, although the PBR for harbor porpoise was only 403 animals. Approximately 1,200 porpoises died in New England alone.

The Gulf of Maine take reduction team met, reviewed data on bycatch and population status, and reached consensus on a plan to reduce mortality of harbor porpoise to below PBR. As mandated by the MMPA, the plan was submitted to NMFS in August of that year, six months after the Team was convened. The plan relied on strategic closures in times and places of highest mortality and on use of acoustic deterrent devices, called pingers, to try to deter harbor porpoise from becoming entangled in the nets. The team also recommended that the NMFS undertake research to determine whether or not pingers were likely to displace porpoise from important habitat and whether porpoises might become habituated to the sound of pingers and fail to respond, resulting in decreased effectiveness of the devices.

Development of this plan involved hard work and compromise by both the conservation group representatives and fisheries representatives on the team. Deliberations were further complicated by the fact that the New England Fisheries Management Council was also considering closures for conservation of groundfish. The timing of some of these closures was not necessarily compatible with the ideal time for closures to conserve harbor porpoise. The Council representative on the Team indicated that the Council was unlikely to consider effects on harbor porpoise as it structured its closures. Indeed, shortly after the Team met, the Council's plan was released. It incorporated some of the closures recommended by the Team, but did not include some times and areas in which the Team had determined that high mortality of porpoises might occur. The NMFS did not act on any of the Team's recommendations.

The MMPA established April 1997 as the date by which Gulf of Maine gillnet fisheries must be below the PBR. This date came and went. Mortality of harbor porpoises in 1997 exceeded 1,200 animals, with 775 killed in New England fisheries alone, yet the NMFS took no action on the consensus plan that was submitted by the Team in August of 1996.

The NMFS convened a separate mid-Atlantic Team to address mortality of harbor porpoise from New York through North Carolina. This team formally began deliberations in February of 1997. The Team submitted a plan to NMFS in August of that year. The Team reached consensus on all portions of a plan, with the exception of a recommendation to conduct an experiment with pingers that would have been for the sole benefit of New England boats fishing in the mid-Atlantic during the winter. A review of data from NMFS indicated to the Team that local fishermen in the mid-Atlantic caught fewer harbor porpoise than boats from New England that fished in the same time and area. Because local fishermen used fishing gear that differed from that used by the New England boats, the Team's plan relied on requiring use of prevailing local practices. The NMFS took no action on this plan either.

In December of 1997, the NMFS reconvened the Gulf of Maine Team to review a plan proposed by the NMFS that would have adopted the Fishery Management Council closures that had thus far failed to substantially reduce mortality. With no published plan in place, uncertain as to the utility of this meeting and frustrated by delays, the majority of representatives of the fishing industry on the Team did not attend the two-day meeting. Because the team was no longer representative of the stakeholders involved, no formal consensus recommendations could be put forward.

In 1998, subsequent to this Team meeting, the New England Fishery Management Council implemented additional closures to conserve groundfish, some of which were in areas and times that had historically high mortality of harbor porpoise. This provided some additional reduction of mortality in harbor porpoise.

In August of 1998, the HSUS, the Center for Marine Conservation, and several other plaintiffs filed suit against the NMFS for failure to meet the deadlines under the MMPA and for failure to take action on a petition to list harbor porpoise under the ESA. While the MMPA had stipulated that mortality of harbor porpoise was to have been below PBR by April of 1997, in 1997 and 1998 mortality was still over 1,000 animals a year. The NMFS had taken no action to publish a take reduction plan. The MMPA deadlines were clear and the court was extremely sympathetic to the plight of the porpoises who were being killed in unsustainable numbers in the face of continuing inaction by the NMFS. As a consequence of the suit, the NMFS entered into a settlement agreement with the plaintiffs. Under the terms of the agreement, the NMFS was to publish a plan to reduce mortality by December of 1998. The NMFS plan relied on closures established by the New England Fisheries Management Council and closures recommended by the mid-Atlantic harbor porpoise Team. It also included a requirement for the use of pingers in much of the Gulf of Maine, and the use of prevailing local practices in the mid-Atlantic. The NMFS also committed to conducting the research recommended by the Gulf of Maine Team. Additionally, the settlement agreement included a schedule for releasing bycatch data to stakeholders in a timely manner. The NMFS has missed two of the four deadlines stipulated in the settlement agreement for reporting data. The HSUS is currently considering appealing once again to the Court to force the NMFS to obey its legal obligations.

In December of 1999 the Gulf of Maine Team was again reconvened. The Team was presented with data indicating that the mortality had declined dramatically and was apparently close to PBR, although the NMFS was unable to determine how much of this decline was due to Fishery Management Council mandated closures and how much was due to increased use of pingers. The Fishery Management Council was due to meet shortly after the Team and there was some concern that shifting closures might adversely affect the reduction in mortality. The Team expressed its concern that action by the New England Fishery Management Council to change closures might undermine the efforts of the take reduction team. The Council, in fact, did not make any substantive changes, but the risk remains that as groundfish recover and the Council changes the configuration of its closures, harbor porpoise mortality may increase as a result of Council actions, over which the Team has no control.

The Team dealing with harbor porpoise mortality in the mid-Atlantic was reconvened in January of this year. Although mortality in gillnets had apparently declined, the NMFS was unable to inform the Team which components of the plan were most effective in reducing the mortality. Fisheries representatives on the Team were frustrated that changes to the Team's plan had impacted fisheries not included on the Team and the Team had not been consulted before the changes were made by NMFS when it published the plan. The Team was also informed by NMFS that fishermen in North Carolina had been refusing to take federal observers aboard their boats, despite a statutory obligation to do so. This, combined with low levels of observer coverage in a number of gillnet fisheries, results in an incomplete picture of the true mortality of animals in this area and mortality estimates are therefore likely to be underestimates. Furthermore, it is likely that porpoise are being caught in bait and recreational gillnets that are not covered by the mandates of the take reduction plan.

In sum, the two Teams addressing mortality of harbor porpoises were largely able to reach consensus on their take reduction plans, only to see their plans remain unpublished. In the interim, Team members resigned in frustration with the process and large numbers of harbor porpoise continued to die

unnecessarily. Although it entered into a binding settlement agreement that required it to release data, the NMFS has failed to comply with its legal obligations, making it difficult for Team members to understand the trend in porpoise mortality or the reasons for any trend.

The Mid-Atlantic Team for Bottlenose Dolphins

In its report to Congress for the year of 1996 (released October 1997), NMFS stated that it had not yet convened a Mid-Atlantic Team; however, "NMFS expects to convene this team in the spring of 1997 to address incidental takes of harbor porpoise and bottlenose dolphins in ocean gillnet fisheries from New York to North Carolina." As stated above, a mid-Atlantic team was convened in February of 1997, almost two years after the timetable outlined by the MMPA. However, the Team was directed by the NMFS to focus its efforts solely on harbor porpoise. Because the HSUS made the Team aware of the obligation to reduce mortality in bottlenose dolphins, the Team reached consensus on a number of recommendations for additional data that should be gathered prior to it or another team being convened to address the problem. The Team also reached consensus on a recommendation that if NMFS had not convened a bottlenose dolphin team by January of 1999, the mid-Atlantic harbor porpoise team should itself address the need to reduce mortality in bottlenose dolphins.

Although its initial meetings ended in August of 1997, the mid-Atlantic harbor porpoise team was not reconvened until January of 2000 and it was still not charged with reducing bottlenose dolphin mortality. In 1999, the HSUS sent a letter to NMFS notifying them of our growing concern that they had not yet convened a team for bottlenose dolphins, despite repeated promises to do so, and threatening litigation. We received a commitment from NMFS to convene a Team in the fall of 2000, following completion of expanded data gathering efforts. In the interim, and because we are committed to the importance of stakeholder involvement, the HSUS has sought and received funds from NMFS and private sources to fund a series of meetings with fishermen in North Carolina. In keeping with the spirit of collaboration, this project was developed jointly by myself, Bill Foster of the North Carolina Fishermen's Association and Dr. Andrew Read of Duke University. The meetings were intended to allow the industry to share information about the operation of their fisheries and their observations of entangled animals in order to begin a dialogue that can lead to the development of solutions. These meetings are on-going and the next one will occur in May of this year. We hope that these meetings will result in information that will inform the take reduction team process once a team is convened. The HSUS also hopes that the NMFS will abide by its agreement to convene a Team this year. We would like to avoid litigation as a means of enforcing their statutory obligation to protect bottlenose dolphins.

Atlantic Offshore Cetacean Team

This team was convened on May 23, 1996 to address the incidental mortality and serious injury of a number of pelagic (i.e. offshore) whale species including pilot whales, white-sided dolphins, common dolphins and beaked whales. When the Team was convened, it included representatives of three commercial fisheries: the Atlantic longline fleet, the Atlantic driftnet fishery and the experimental pair trawl fishery, all of which target swordfish and/or large tuna. Midway through the meetings, the NMFS discontinued the experimental pair trawl fishery, although the representatives of the fishery continued to attend the meeting. The Team submitted a consensus take reduction plan to NMFS in November of 1996. Over three years later, the NMFS still has not acted to implement recommendations in the plan.

Shortly after the Team concluded its meetings, the NMFS temporarily closed the driftnet fishery on an emergency basis because there was no take reduction plan in place to reduce the risk to north Atlantic right

whales that the fishery had previously entangled. An eleven day re-opening of the driftnet fishery in the summer of 1998 resulted in the deaths of over 300 whales and dolphins and several endangered turtles, but the full fishery quota was not caught. The PBR was exceeded for several species of dolphins and beaked whales and no take reduction plan had been published to prevent this mortality. The HSUS notified the NMFS of its intent to file for a restraining order if the NMFS pursued its intent to allow the boats to return to sea to catch the remaining allocation of its fishery quota without a take reduction plan in place. The NMFS did not allow the fishery to catch the remainder of its quota and, in fact, permanently closed the fishery in 1998 without publishing a take reduction plan that might have allowed the fishery to continue to operate while still reducing mortality of a number of whale species.

A management plan published by NMFS to address conservation of swordfish contained some of the Team's recommendations that affected the longline fishery. Other recommendations were disregarded and remain unpublished to this day.

In 1998 and 1999, the NMFS informed the Atlantic Scientific Review Group, of which the HSUS is a member, that the same whale and dolphin species for which the Team was convened are also being killed in substantial numbers by the trawl fishery for squid, mackerel and butterfish. This fishery had not been part of the take reduction team, as insufficient observer coverage was available to quantify its interactions with these stocks. Although the fishery is now believed to kill large numbers of animals, the Team has never been reconvened to reassess its recommendations for the longline fishery and address mortality in this offshore trawl fishery.

The Atlantic offshore cetacean team is an unfortunate illustration of the failure of NMFS to keep faith with the spirit of take reduction teams and of its disregard for the mandates of the MMPA. A consensus plan, developed by the team in 1996, has never been published. Two of the original fisheries were disallowed, partly as a result of their high level of interaction with marine mammals, though there was no opportunity to determine whether or not a take reduction plan might have mitigated those interactions. Subsequent to the final meeting of the Team, a new fishery was identified as interacting with the same marine mammal species, and yet it has not been included in the take reduction team to reduce this mortality and serious injury. Hundreds of marine mammals continue to die or be injured in the longline and offshore trawl fisheries with no take reduction plan in place and no apparent plans by the NMFS to reconvene this team, which has not met in almost 4 years. This is another Team whose efforts were apparently in vain and which may result in litigation to force action by the NMFS.

Atlantic Large Whale Team

This Team was convened to address the mortality of a number of species of large baleen whales: north Atlantic right whales, humpback whales, fin whales and minke whales. The major focus of the team was the mortality and serious injury of right whales, the most critically endangered species of large whale. The team was convened in August 6, 1996, following a suit filed by Max Strahan of Greenworld which alleged that the NMFS had failed to protect right whales from death and serious injury in gillnets and lobster pots set in the waters of the northeast.

The task of this team was difficult because, although the likelihood of any particular lobster pot entangling a whale was extremely low , the likelihood of a whale getting entangled in some lobster pot or gillnet was extremely high: over 60% of whales show evidence of entanglement at some point in their lives. Furthermore, the PBR for right whales was calculated to be 0.4 whales per year; in other words, less than one whale could be killed or seriously injured every 2.5 years. With 300 or fewer right whales remaining,

and evidence mounting that the population is in decline, it was urgent that measures be taken to alter current fishing practices that were entangling whales, although there had been virtually no research into alternative fishing practices that might reduce risk.

Over the course of six months, the Team had productive negotiations, but was unable to reach consensus on all of its recommendations and requested additional time to meet. The NMFS did not grant this request. It took the findings from the team's February report into consideration and issued a draft plan in April of 1997. Satisfied that the NMFS was taking steps to address the problem of entanglement, the Federal District Court in Massachusetts dismissed the complaint against the NMFS.

The draft plan may have been a step toward addressing the problem, but it required extensive, untested modification of fishing gear, even in areas where right whales were unlikely to occur (e.g. in harbors of Rhode Island and Maine). It was roundly denounced by both conservation and fishery groups for a variety of reasons. Fishermen from New England appealed to their Congressional Representatives and Senators for relief. Senator Olympia Snowe convened field hearings on the plan that were heavily attended and very heated. The NMFS reconsidered its proposal and issued an interim final plan in July of 1997. This interim plan reduced the stringent requirements for gear modification requirements. Conservation and animal welfare groups charged that it now did virtually nothing to reduce risk. Indeed, in the July Federal Register notice that announced the plan, the NMFS admitted that it relied on "current best fishing practice," which were clearly insufficient to protect right whales . The NMFS made a commitment to undertake additional gear research. The success of the plan was heavily dependent upon disentangling whales that became entangled in fishing gear, although there was only one disentanglement team on the entire east coast, located in Cape Cod, Massachusetts.

In February of 1999 the Team was reconvened. At that meeting, the Team recommended additional funds for research. It recommended that gear modification requirements be changed to pair anchoring requirements with requirements for weaker breaking strength in the rope of the buoy line. It recommended suspension of gear marking requirements. The only recommendation arising from this meeting that the NMFS implemented was the recommendation to suspend the requirement that gear be marked to help identify the origin and nature of the gear if it entangled a whale. It failed to act on the other consensus recommendations, and in fact reduced spending for gear research.

Despite their commitment to research, the 1998 gear research budget of $130,000 was reduced in 1999 to $115,000 and salary monies for NMFS personnel were deducted from this amount. Disentanglement funds were limited. While funds were expended to train hundreds of fishermen in Maine to identify right whales and report entanglements, fishermen in other states received no training. It was only after the death of a humpback whale in tended fishing gear in North Carolina that fishermen in that state finally obtained training and disentanglement response equipment. The reliance on disentanglement response has not been a panacea. Although several whales have been successfully disentangled, others have died or were lost subsequent to attempts to disentangle them and have not been seen since. Clearly the promise of research and the reliance on disentanglement have not been adequate. Measures contained in the plan to prevent disentanglement have also failed.

Since implementation of the plan in 1997, right whales have continued to become entangled, resulting in their serious injury or death. In 1998, right whale #2212 was entangled three separate times in lobster gear set in Cape Cod Bay and it is considered seriously injured as a result of gear remaining in its throat. In 1999, right whale #2030 became entangled in gillnetting off the coast of Massachusetts and, after several unsuccessful attempts to disentangle her, died that year of injuries sustained in the entanglement. Already in

2000 a dead right whale was seen floating off the coast of Rhode Island with fishing gear encircling its tail stalk. Additionally, at least 3 other right whales have been entangled and, based on the nature of the entanglements, are likely to be seriously injured. Humpback whales, minke whale and fin whales have also become entangled and seriously injured or killed as a result. Clearly the take reduction plan is not working and requires significant modification.

In February of 2000 the Team was again reconvened. The Team again recommended that NMFS dramatically increase funding of gear research to try to identify a technological solution to the problem of entanglement. Team members reached consensus on some limited changes in the list of gear modifications to try to reduce risk. They were unable to reach consensus on the need for additional closures or on a means of responding to aggregations of whales in unexpected areas, such as happened in the winter of 1998-99 off Block Island Sound near Rhode Island. A meeting is scheduled for April 11 of this year to discuss contingency response to unexpected right whale aggregations.

As a result of efforts by a coalition of non-governmental organizations and fishing groups, Congress provided an additional three million dollars for research related to right whales for this fiscal year. Despite the clear need for innovative gear research, out of a Congressional budget allocation of $750,000 for gear research, the initial NMFS budget proposal identified less than fifty thousand dollars for this purpose. The remainder of the monies were designated to fund projects not related to research on gear modification (e.g. telemetry work to track whales, funding permanent staff positions for existing staff, etc). An outcry by members of the Team resulted in some reallocation of spending priorities, but we await word of final budget allocations.

We do not yet know how the NMFS will address the large number of deaths and serious injuries that have occurred in the wake of their take reduction plan, especially in the face of the failure of the take reduction team to reach consensus on recommendations other than expanded gear research.

Given the history of failure by the NMFS to act on a timely basis and in the face of a mounting death toll in right whales, in March the HSUS filed a notice of intent to sue under the ESA and the MMPA. It is with reluctance that we move in this direction; however, the history of the take reduction team process to date indicates that without litigation or threat of litigation, little is accomplished, even when the statutory requirements are perfectly clear and the body count of animals continues to rise.

Alaska Steller Sea Lion Team

In their report to Congress on activities undertaken in 1996, the NMFS states that they had not yet convened this team; however they stated that "NMFS expects to convene this team to address incidental takes of Steller sea lions in Alaska Commercial fisheries. The team will be facilitated by Mediation Services, Seattle, Wa." As of the date of this testimony in April of 2000, this team has still not been convened. Given the fact that Steller sea lions continue to decline in some parts of their range, the need for oversight of fishery-related mortality is critical. It may be that the issue of failure to convene a take reduction team will become one of the many issues being litigated with regard to Steller sea lions.

General Concerns With the Take Reduction Team Process

There are a number of general issues of concern that have come to light as a result of the stock assessment and Take Reduction Team process. Among them are the role of recreational fisheries in the mortality of marine mammals, the insufficiency of funds to monitor fisheries and determine the degree of mortality, the

failure of the NMFS to enforce mandates of the take reduction plans and the inappropriate use of research and implementation monies to fund base operating expenses.

Recreational Fisheries

Meetings of the mid-Atlantic Take Reduction Team brought to light the issue of recreational fisheries interacting with marine mammals. Section 118, which focuses on commercial fisheries, does not provide jurisdiction over recreational fisheries. Gillnets that are used to catch bait for personal use are similar in design and method of operation to that of commercial gillnets. Similarly, recreational gillnets are used in the mid-Atlantic to catch fish that are consumed by the owner. Both commercial fishermen and scientists working in the area have observed dolphins and porpoises caught in these nets that are not under the jurisdiction of Section 118 of the MMPA. Recreational lobster gear poses a risk to whales that is no less than that posed by commercial lobster pots, yet may not receive the same degree of oversight.

We believe that there should be a mechanism for quantifying the nature and extent to which recreational fisheries interact with marine mammals when they use gear that is similar in type to that of commercial gear known to kill or injure marine mammals.

Quantifying the Impact of Fishery Interactions

This may be a very significant problem that results in an underestimate of the number or impact of mortalities in fisheries that may interact with marine mammals. For example, since the 1994 amendments to the MMPA, stock assessments for marine mammals in and around the Hawaiian Islands acknowledge that there has been no effort directed to determining the population abundance of most stocks and there is no observer coverage on most fisheries in this area. We have no way of knowing how many animals there are, let alone whether commercial fisheries may be having a negative impact on their populations. Resources must be directed to assess stocks and fisheries in this area.

The funding for the observer program is insufficient to provide anything but rudimentary observer coverage in many fisheries. We wish to offer several examples. Many Alaskan gillnet fisheries have historically had little or no observer coverage. The extensive Atlantic longline fleet, which is known to seriously injure hundreds of animals each year, has less than 5% observer coverage to monitor its operations and, in some areas or times when interactions may occur, there is virtually no observer coverage to document interactions. The Atlantic Offshore Cetacean Team reached consensus on a recommendation to increase the rate of coverage on the longline fleet and to reexamine placement of observers, but this has never occurred. Observer coverage of many small boat gillnet operations in the mid-Atlantic is almost non-existent. As a consequence, the extent of their interactions is poorly understood, although we find marine mammals stranded with evidence of entanglement in the areas in which these fisheries operate. The lack of observer coverage for the deepwater trawl fishery prevented its inclusion in the Atlantic Offshore Cetacean Take Reduction Team, although more recent limited coverage has revealed that they apparently have a substantial interaction with marine mammals.

Because of a lack of resources there are a number of fisheries with a likelihood of killing marine mammals but about which we know little. Until we can provide additional and more uniform observer coverage, we are unlikely to be able to understand the extent of fishery interactions with marine mammals. This results in an underestimate of mortality and an inability to track the efficacy of take reduction measures.

The NMFS needs to request, and Congress needs to grant sufficient funding to assure an adequate observer

program that will be able to detect sources, levels and trends in marine mammal mortality.

Enforcement of Provisions of Take Reduction Plans

Although we have focussed much of our testimony on the glacial speed of the NMFS response to MMPA mandates to convene take reduction teams and publish take reduction plans, there is also a problem that arises with enforcement of the plans once they are published.

When they are reconvened, the teams are often informed of serious problems with violations of the plans. These violations hamper the ability to accurately depict the level of interaction and undermine the provisions of the plan itself. For example, as mentioned previously, fishermen in parts of North Carolina have routinely refused to take federal observers, with absolutely no consequence resulting from their having violated the law. This provides disincentive to other fishermen who are law abiding and it means that the data that are gathered do not provide a random and representative look at the fishery's interactions with marine mammals. The result of this skewed picture is that we may either underestimate the number of animals killed, to the detriment of the marine mammal population; or we may overestimate the number of animals killed, to the detriment of the fishery. Similarly, the harbor porpoise team in the Gulf of Maine has been told at both of its reconvenings that fishermen that have been documented by federal observers to be fishing in closed areas. No enforcement action has been taken against them. Again, this is a disincentive to those fishermen who are obeying the law and it undermines the effectiveness of the take reduction plan. These are but two examples of a broader problem.

It is paramount that the NMFS examine the compliance issues that have come to light in these teams and take action against violators. Where implementing regulations are unclear or other internal administrative policies prevent action, these situations must be remedied. Furthermore, it is urgent that Congress provide adequate funds to both the NMFS and Coast Guard to assure that their resources are sufficient to enforce compliance with laws and regulations.

Funding Issues

Earlier, we pointed out some of the problems with the NMFS budget for research related to the right whale take reduction plan. This problem is epidemic. Protected species budgets and MMPA implementation funds are routinely robbed for so called "base funding" shortfalls. That is, the NMFS has insufficient funds to pay for operating costs and permanent staff positions and, rather than fund recommendations by take reduction teams for additional research or personnel, uses these funds to pay for general operating budgets. This is an unacceptable practice.

We urge the NMFS to clearly and accurately depict their needs for on-going operating costs and we further urge that Congress grant sufficient base funding to meet these needs. Funds identified for implementing Take Reduction Team recommendations and for conducting research that helps us understand and reduce levels of mortality in marine mammals must be used for their intended purpose.

Conclusions and Recommendations

The 1994 amendments put in place a system that was designed to allow conservationists, fishermen and scientists to join with government managers to develop plans that reduce mortality of marine mammals consistent with the mandates of the MMPA. This system can work. The illustration provided by the Pacific Offshore Cetacean Take Reduction Team is, in part, an example of this. Where the system has failed, it is

generally not as a result of an inability of stakeholders to comprehend the problem and work collaboratively to develop a solution. In most cases the teams have reached consensus on the vast majority of their recommendations and when the plans are implemented, they generally appear to be effective. The take reduction teams have not failed; rather, it is the National Marine Fisheries Service that has failed the take reduction teams.

On the Atlantic coast, NMFS has been slow to convene teams, then recommendations made by Teams are tabled without action unless there is court oversight. The Large Whale Team was convened subsequent to litigation, and litigation dogs it to this day. The Harbor Porpoise Team, considered by NMFS to be its highest priority, was convened late and despite consensus recommendations, no plan was published for over two years until litigation was filed. The Atlantic Offshore Team still has not had its recommendations published and the driftnet fishery was closed without any attempt made to publish a take reduction plan. Four years after the MMPA mandate to convene a team, there is still no take reduction team for bottlenose dolphins, although they are listed as a depleted stock under the MMPA. After being threatened with litigation, NMFS now promises to convene a Team this year. There is still no Team for Steller sea lions in Alaska, although NMFS listed this as one of the six priority teams.

These delays have cost hundreds and hundreds of animals their lives and may threaten extinction of north Atlantic right whales. Where the failure to convene teams or to implement plans is a result of funding and personnel insufficiency, the NMFS must seek and Congress should grant adequate funds. But funding alone does not seem to explain the failure of the NMFS to take action on take reduction plans. Some of the team's recommendations that are intended to reduce risk would have cost the agency nothing, yet the NMFS refused to act on them. For example, the 1999 consensus recommendation by the Atlantic Large Whale Take Reduction Team to amend the gear technology list to require anchoring requirements along with requirements for weak links was simply a clarification of an existing regulation. It could have been accomplished by a fairly non-controversial Federal Register notice; yet it was never done. A more egregious example of this perplexing failure to act is the fact that litigation was necessary to force publication of the take reduction plan for harbor porpoise although the plan had been largely complete for over a year prior to the suit.

The delays also undermine the confidence of Team members in the take reduction process. It is arduous work for diverse stakeholders to develop a plan that all can agree is likely to be effective and is acceptable to all interested parties. It is frustrating to have this hard work end with the NMFS refusing to publish a plan, often for years, with little or no explanation for the delay. The take reduction team process was designed to reduce the need to use lobbying and litigation as management tools. Instead, delays have forced both the fishing industry and conservation groups to use the very tools that the process was designed to obviate, further weakening confidence in the efficacy of the process.

The failure of the NMFS to meet its statutory obligations leads to a waste of resources that must be consumed by legal fees, lobbying efforts and oversight hearings. More importantly, the failure to meet statutory obligations under the MMPA has lead to a needless waste of animal's lives.

While The HSUS urges Congress to appropriate sufficient funds to allow the NMFS to carry out its mandates, we also urge you to more directly monitor and oversee the agency's actions. Section 118 of the MMPA was the product of years of negotiation, compromise, and consensus, but without Congressional and constituent oversight, the NMFS has consistently failed to carry out the recommendations that so many spent so much labor achieving (both during the formulation of Section 118 and during the formulation of take reduction plans). We urge you to watch over the NMFS, because without your insistence that the

NMFS obey your laws, we fear that the MMPA will continue to be implemented by the judicial branch of government, an inefficient and dangerous standard operating procedure.

We thank the Sub-Committee for seeking constituent input regarding the implementation of the 1994 amendments.

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