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ON BEHALF OF THE UNITED FISHERMEN OF ALASKA

BEFORE THE

SUBCOMMITTEE ON FISHERIES. CONSERVATION, WILDLIFE AND OCEANS

HOUSE COMMITTEE ON RESOURCES

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As you may know, the Alaskan commercial fishing industry has been gravely impacted by lawsuits brought against the National Marine Fisheries Service ("NMFS") for alleged violations of the Marine Mammal Protection Act ("MMPA") and the Endangered Species Act. More such suits loom threateningly on the horizon.

A central problem that your Subcommittee needs to address in considering legislation reauthorizing the MMPA is that the MMPA creates serious ocean management issues by elevating one species above all others in oceans management. We support amendments to the MMPA that will allow the Act to achieve its important objectives while also preventing distortions in the ocean ecosystem --- distortions caused by the fact that the MMPA calls for the oceans to be managed for the benefit of only one species.

Because of the inherent problems in the management philosophy embedded in the MMPA, the following issues must be addressed in any MMPA reauthorization.

1) Zero Mortality Rate Goal ("ZMRG"). The Act requires that commercial fishermen reduce the incidental mortality and serious injury of marine mammals to an insignificant level approaching a zero mortality and serious injury rate. No one advocates unnecessary incidental injuries and mortalities and every Alaskan commercial fisherman seeks to prevent that. The problem is not with that goal. The problem is with the MMPA's philosophy that the ocean is to be managed by placing marine mammals above all other species and that anything above a zero mortality and injury rate is unacceptable. Indeed, a zero mortality policy is the equivalent of treating all marine mammals as if they have been listed as endangered under the Endangered Species Act, even if the population is healthy and growing at a significant rate.

As a biological management tool, ZMRG creates distortions in the ecosystem. In a terrestrial context, the Forest Service, for many years, managed the National Forest System by identifying the primary species it wished to benefit in each national forest and then managing the forest for the benefit of those species. That system of giving management priority to a limited number of species is similar to the MMPA which gives marine mammals primacy in the ocean. In contrast to the MMPA, the Forest Service generally abandoned this single species policy because it adversely affected biodiversity by attempting to manage the environment for the benefit of a few species without full consideration of the needs of other species. Similarly, managing the ocean environment for the benefit of one species places other species at a disadvantage and threatens biodiversity. Endangered salmon, for example, a food source for certain marine mammals, have been harmed by this policy.

A technical report titled "Effects of Marine Mammals on Columbia River Salmon Listed Under the Endangered Species Act," prepared under contract for the Department of Energy, concluded that sea lions and harbor seals, whose populations are now at or exceed historic levels because of the MMPA, are "preying heavily" on endangered Columbia and Snake River salmon. The report, issued before the last MMPA reauthorization, found that "pinnipeds are taking a disproportionate number" of Columbia and Snake River salmon listed under the Endangered Species Act and concluded: "Threatened and endangered salmon must have representation in the [MMPA] reauthorization process." They did not, and the problem grows worse. In testimony presented to the House Resources Committee in October, 2001, NMFS asserted there are "serious concerns about . . . the impacts of pinnipeds on salmon listed under the Endangered Species

Act." NMFS also testified that marine mammals may be impairing the recovery of certain endangered and threatened salmon. The policy question is whether the MMPA's requirements for marine mammal protection should have priority over all other management decisions, including the protection and recovery of endangered species.

In Alaska, scientists for the U.S. Geological Survey studying the Glacier Bay ecosystem have stated that the expanding sea otter population will have a "very large impact on the crab population. We would expect the number of crabs to decline dramatically." A University of Alaska scientist studying sea otters concluded that in Glacier Bay "it's just a matter of time before the otters put fishermen out of business. . . ." That scientist also found that sea otters are changing the ecosystem in other ways by eating large numbers of sea urchins, which eat macro algae, which means a significant increase in the amount and the density of kelp.

In California, sea otters eat abalone. But they eat such large quantities of mature abalone that the ecosystem is left with significantly reduced quantities and the remaining abalone are small juveniles.

The Canadian Department of Fisheries and Oceans has concluded that growing marine mammal populations in that country are hindering the recovery of depressed cod stocks. Indeed, some experts have commented that marine mammals consume between three and six times the entire worldwide commercial fisheries catch.

Our point is that there are consequences for other ocean species that flow from the MMPA's decision to manage the oceans by giving marine mammals the first and highest priority.

We want to emphasize that we do not support or condone actions which lead to marine mammal mortality and injury, but ZMRG is an unscientific and an unrealistic management tool. It should be replaced by a concept applied in many other environmental protection statutes --- that the regulated industry should use the best practicable and economically feasible technology to avoid and minimize adverse environmental impacts. Indeed, this was the policy of Congress when ZMRG was first enacted and applied to the eastern tropical tuna fishery. See H. Rept. 92-707 (1971) at 24 and S. Rept. 92-863 (1972) at 6. See also H. Rept. 97-228 (1981) at 17. But Congress has allowed NMFS to move away from that standard. Today NMFS defines ZMRG in a way that is intended to return marine mammal populations to their pristine levels.

The ZMRG methodology starts with the minimum marine mammal population estimate. This number is multiplied by 50% of the expected annual net reproduction rate. The resulting number is half of what NMFS estimates as the annual net reproduction of the minimum population. That number is then reduced by multiplying it by a recovery factor of 0.1 for endangered species, 0.5 for threatened or status uncertain species and 1.0 for others. NMFS then reduces the resulting number by 90%. Any fishery taking fewer than this final number is at ZMRG. This ZMRG formula is designed to return marine mammal populations to the levels that would exist in a pristine environment. It places marine mammal populations above all others.

2) End Discrimination. All users of ocean resources should be subject to the same standards. If ZMRG is the proper ocean management policy, then every user of ocean resources who interacts with marine mammals should be held to that standard. However, as now written, ZMRG applies only to commercial fishermen. Yet, recreational boating activities, large and concentrated recreational fisheries, and merchant shipping can each have a significant impact on marine mammals. Recreational boating activities in Florida, for example, have a major impact on manatees, but no ZMRG is applied to this activity. Testimony presented at last week's MMPA hearing conducted by the Senate Commerce Committee showed that merchant ships collide with marine mammals, often killing them. In fact, the testimony stated that so many endangered right whales are killed by vessel collisions that population models predict this additional mortality may drive the species to extinction. If ZMRG is the correct policy, why isn't it applicable to everyone?

3) Fisheries Categorization. To achieve ZMRG, the MMPA requires NMFS to categorize commercial fisheries into three groups. Category i fisheries are those with a frequent incidental mortality and serious injury of marine mammals. Fisheries having only an "occasional" incidental mortality or serious injury of marine mammals are considered category ii fisheries. For any fishery placed into category i or ii, NMFS must develop a formal marine mammal take reduction plan whose objective is to achieve ZMRG. Only a category iii fishery, one which has a "remote likelihood or no known incidental mortality or serious injury" of marine mammals, escapes the requirement for a take reduction plan to achieve ZMRG.

These statutorily created categories again underscore the fact that the MMPA establishes a goal of

managing the ocean for marine mammals above all other creatures. The categories do not reflect any realistic set of management priorities based on the true impact of an action on marine mammals. Instead, only those fisheries with a remote or no interaction with marine mammals escape the ZMRG regulatory process. In other words, if you have already achieved ZMRG then no further regulation is applied. And, once again, the take reduction plan process only applies to commercial fishermen --- it does not apply to other ocean users.

Further exacerbating this problem is the fact that the process by which NMFS assigns commercial fisheries to various categories is unscientific and arbitrary. For example, the southeast Alaska salmon purse seine fishery is listed as a category ii fishery based solely on the fact that several years ago one humpback whale swam through a seine net ripping apart the net. Similarly, the Cook Inlet set gillnet salmon fishery was classified by NMFS as a category ii fishery despite vigorous protest from the fishermen about the absence of any sighting of marine mammal interactions. When NMFS actually gathered incidental take information based on NMFS observer data, NMFS discovered that the fishermen were correct and the fishery belonged in category iii. Categorization of fisheries must be based on sound science, not isolated examples and conjecture.

4) Potential Biological Removal (“PBR”). A first blush, the concept of PBR appears to provide a management concept similar to that contained in the Magnuson-Stevens Fishery Conservation and Management Act where managers determine the allowable biological catch. However, under the Magnuson-Stevens Act, management decisions are based on preventing removals from exceeding a biologically safe amount. In stark contrast, the PBR concept in the MMPA seeks to continue building all marine mammal populations, even healthy stocks, to their optimum sustainable population (“OSP”). NMFS defines OSP as a range between the largest possible population and the maximum possible net reproduction rate. The MMPA’s concept of PBR as a management tool is, once again, premised on giving marine mammals the primary place in the ecosystem. As noted above, this distorts ocean management to the disadvantage of other species and to the disadvantage of persons whose livelihood depends on a balanced ecosystem.

Compounding these problems is the fact that, far too often, PBR determinations and decisions are made based on weak and limited data. This lack of data serves only to complicate ocean management issues when all other species are secondary and all doubts are resolved in favor of the primary species.

5) Liability In Any Observer Program. The MMPA requires commercial fishermen to accept an observer when NMFS so demands. The problem is that many vessels are too small to accommodate another person. Vessel captains are often required to reduce crew size, which affects the ability to operate the boat safely, or to add another person. The observer, whose presence on board a small vessel inhibits crew movement, thereby impacting safety. For the small vessel fleets, all observers should be staged in a NMFS vessel. If that is not possible, the program should indemnify the vessel owner from any third-party claims associated with the requirement to have an observer onboard.

We look forward to working with the Committee to amend the MMPA so that it is a balanced and responsible law that relies on sound science, requires the use of the best practicable commercially and economically feasible technology in mitigating impacts to marine mammals, treats all ocean users the same, and does not impose requirements which jeopardize human safety.

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