



MARINE MAMMAL COMMISSION

30 August 2010

Rebecca Lent, Ph.D.
Director, Office of International Affairs
National Marine Fisheries Service
1315 East-West Highway
Silver Spring, MD 20910

Dear Dr. Lent:

The Marine Mammal Commission, in consultation with its Committee of Scientific Advisors on Marine Mammals, has reviewed the National Marine Fisheries Service's 30 April 2010 *Federal Register* advance notice of proposed rulemaking (75 Fed. Reg. 22731) to implement section 101(a)(2) of the Marine Mammal Protection Act concerning imports of fish and fish products. In the notice, the Service describes several standards applicable under the Marine Mammal Protection Act and the Endangered Species Act that may be used to evaluate the impact of foreign fisheries on marine mammals, and it requests comments on those standards as well as on procedures for applying those standards to foreign nations seeking access to U.S. fish markets. Based on its review of the *Federal Register* notice, the Marine Mammal Commission offers the following recommendations and rationale.

RECOMMENDATIONS

The Marine Mammal Commission recommends that the National Marine Fisheries Service—

- adopt performance-based standards for evaluating the impact of foreign fishing on marine mammal stocks;
- expand its programs to export or otherwise facilitate transfer to other nations those U.S. fishing practices, technologies, and programs for reducing marine mammal bycatch that are found to be effective and practicable for those nations;
- conduct feasibility analyses on the performance-based standards and select those that would be clear, consistent, uniformly applied, and easily verifiable, given available or new sources of information;
- collaborate with relevant trade-related offices in the Departments of Treasury, State, and Homeland Security as well as the U.S. Trade Representative in carrying out the feasibility analyses, while keeping in mind that the trade implications of implementing section 101(a)(2) must be secondary to meeting the conservation-oriented mandate of that provision;
- include in the feasibility analyses all of the standards applicable to U.S. fisheries regardless of whether those standards have yet to be met fully by U.S. fisheries;
- develop its proposed rule with sufficient detail to allow for meaningful comment and, if adopted, create regulations to provide sufficient direction to other countries, agency reviewers, and the public as to what information they would be required to submit and how that information would be evaluated;
- specify in the proposed rule the requirement that fish-exporting nations provide “reasonable proof” of the effects of their fishing operations on marine mammals;

- specify in the proposed rule where the burden of proof lies with respect to imports of fish and fish products under section 101(a)(2) of the Marine Mammal Protection Act;
- establish regulatory procedures under which fish-exporting nations must submit promptly the required level of proof concerning the effects that each applicable commercial fishery is having with respect to marine mammal mortality and serious injury relative to U.S. standards;
- require that any findings of non-compliance or inadequate proof be forwarded immediately to the Secretary of the Treasury so that the U.S. government can take the steps necessary to ban fish imports from offending nations;
- stipulate that consultations with those nations whose fish products are banned from U.S. markets be undertaken rapidly to identify and rectify the causes of marine mammal bycatch in excess of U.S. standards, with the dual goals of protecting marine mammals and resuming trade;
- work closely with the Department of the Treasury to identify ways in which the envisioned regulations would address not only the procedures for assessing the effects of foreign fisheries on marine mammals but also the procedures for imposing or lifting import bans based on those assessments; and
- require any nation seeking to export fish products, or any intermediary nation seeking to re-export fish or fish products, to the United States to provide documentation or evidence regarding marine mammal bycatch in the harvest of those products relative to U.S. standards.

RATIONALE

When it enacted the Marine Mammal Protection Act in 1972, Congress recognized the importance of promoting marine mammal protection beyond U.S. waters. Section 101(a)(2) of the Act (16 U.S.C. § 1371(a)(2)) directs the Secretary of the Treasury to “ban the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of United States standards.” That provision further directs the Secretary of Commerce to “insist on reasonable proof from the government of any nation from which fish or fish products will be exported to the United States of the effects on ocean mammals of the commercial fishing technology in use for such fish or fish products exported from such nation to the United States.” Although these requirements have been included in the Act since its original enactment, implementing regulations have never been promulgated and the provision has been rarely used.

To prompt the Service to take action under section 101(a)(2) of the Act with respect to swordfish imports, on 5 March 2008 the Center for Biological Diversity and the Turtle Island Restoration Network submitted a petition for rulemaking to the Departments of Homeland Security, Treasury, and Commerce to compel those agencies to carry out their “non-discretionary” duties imposed by this section. On 29 January 2009 the Commission submitted comments on this petition (copy enclosed) in which it stressed the importance of applying both quantitative and performance standards in evaluating the actions and marine mammal take levels of nations seeking

to export fish to U.S. markets. The Commission also recommended immediately collecting marine mammal bycatch and enforcement information from those nations seeking to export swordfish products, directly or as an intermediary exporting nation, to the United States.

The Service has now issued an advance notice of proposed rulemaking to identify standards that it will apply to other nations in evaluating whether or not their fisheries result in excessive incidental kill or serious injury of marine mammals relative to U.S. standards, as well as procedures for applying those standards. First and foremost, the Commission stresses the need to observe the statutory mandate and legislative intent faithfully in identifying those standards and processes. The Commission also understands the importance of defining those standards clearly and consistently so that they are readily apparent to other nations, flexible enough to allow the standards to be met through the management systems unique to each nation (which vary in terms of available information, stock status, fishing practices, and management measures), and verifiable through acceptable forms of proof or evidence. These criteria will help facilitate trade among those nations that achieve bycatch reduction goals that meet or exceed U.S. standards. At the same time, the Commission notes the urgency of developing these standards and procedures without unnecessary delay, given the immediate threats facing marine mammals from foreign fisheries, the need to satisfy this as-yet-unrealized congressional mandate, and the potential for fishery imports to be enjoined or limited through legal action because foreign nations are unable to demonstrate that their marine mammal bycatch does not exceed unarticulated U.S. standards. The Commission believes that prompt issuance of regulations to implement section 101(a)(2) would facilitate global marine mammal conservation by providing incentives for other nations to take concrete steps to protect marine mammal stocks encountered by their fisheries. Such regulations also would have the effect of ensuring that U.S. fishermen—who are required to apply bycatch-reducing management measures, such as caps on effort and potentially costly gear modifications—are not put at an economic disadvantage vis-à-vis those nations that do not implement effective conservation measures.

It is with these considerations in mind that the Commission offers the following recommendations on defining the standards and procedures for implementing section 101(a)(2) of the Act.

Standards

In the advance notice of proposed rulemaking, the Service describes nine options for defining the standards and states that it may proceed with any one or a combination of these options. Several of the options (one through seven) are performance-based standards or are defined on the basis of the outcome or achievements of marine mammal stock protection measures required by existing U.S. statutes. These options would evaluate marine mammal mortality and serious injury based on the potential biological removal rate, the zero mortality rate goal, depletion or impeded recovery below a stock's optimum sustainable population, immediate adverse impact on a stock, and/or jeopardized status of a stock (whether or not threatened or endangered). Other options (eight and nine) are based on the existence of regulations or processes intended to protect marine mammal stocks, not necessarily on the effectiveness of those regulations or processes in achieving the expected or desired results. For example, the Service would evaluate whether regulatory

programs or measures have been implemented by nations, either unilaterally or through that nation's membership in a relevant regional fisheries management organization. As described in the notice, those measures or programs would have to be comparable to the marine mammal protections in place for U.S. fisheries.

The language in section 101(a)(2) provides clear direction that the standards should be performance-based by stating that it is referring to foreign fish caught with technology “which *results in* the incidental kill or incidental serious injury of ocean mammals in excess of U.S. standards” (emphasis added). The language emphasizes the actual injury and mortality levels or rates that occur in foreign fisheries, while being silent on the actual measures, regulatory programs, or other methods used to address marine mammal bycatch reduction in foreign fisheries. Therefore, to be consistent with the Act, the Marine Mammal Commission recommends that the National Marine Fisheries Service adopt performance-based standards for evaluating the impact of foreign fishing on marine mammal stocks. By adopting performance-based standards, the Service would ensure that the focus is on the health or status of marine mammal stocks, and it would have the additional benefit of allowing fishing nations to utilize a wide range of management measures or regulatory programs appropriate to their specific conditions. Considering the diversity of stocks, fishing practices and technologies, and overall management systems employed in different nations, this avoids the difficulties of trying to impose on each nation a uniform U.S.-based management system that may or may not be appropriate. Instead, the Marine Mammal Commission recommends that the National Marine Fisheries Service expand its programs to export or otherwise facilitate transfer to other nations those U.S. fishing practices, technologies, and programs for reducing marine mammal bycatch that are found to be effective and practicable for those nations.

As for determining which performance-based standards to adopt, the Commission notes that the Act is silent on this matter. It is in this area that the Service can best employ its discretion to consider other elements that would facilitate sound, clear, and verifiable standards that could be applied uniformly. By working with other federal agencies to conduct a feasibility analysis of each option—considering what data are currently available or readily obtainable, new data and information needs, enforcement and verification requirements, and clarity and practicality for other nations—the Service would be able to choose the standards that would most effectively facilitate trade among countries seeking to comply and thereby promote the health of global marine mammal stocks. The Marine Mammal Commission recommends that the National Marine Fisheries Service conduct feasibility analyses on the performance-based standards included in the notice and select those that would be clear, consistent, uniformly applied, and easily verifiable given available or new sources of information. Additionally, the Marine Mammal Commission recommends that the National Marine Fisheries Service collaborate with relevant trade-related offices in the Departments of the Treasury, State, and Homeland Security as well as the U.S. Trade Representative in carrying out the feasibility analyses, while keeping in mind that the trade implications of implementing section 101(a)(2) must be secondary to meeting the conservation-oriented mandate of that provision.

In identifying the standards against which foreign fisheries will be judged to determine if they have met the requirements of section 101(2)(a), the Service stated its intent “to select only

standards and associated criteria that have been met by U.S. domestic fisheries” (75 Fed Reg. 22733). The Commission notes that providing this degree of flexibility in regulations implementing section 101(a)(2) would be inconsistent with the statutory language, which clearly refers to applicable U.S. standards, rather than the actual performance of U.S. fishermen in meeting those standards.¹ Clearly, the best approach for ensuring equivalent treatment of U.S. and foreign fisheries and avoiding claims of unfairness in applying the selected standards would be for the Service to take the steps necessary to bring domestic fisheries into compliance. Nonetheless, in the interim, the Act specifically directs that foreign fisheries meet the same marine mammal protection performance standards that are applied to domestic fisheries. That being the case, the Commission sees no justification for discounting those standards simply because they have yet to be attained fully in U.S. fisheries. Therefore, the Marine Mammal Commission recommends that the National Marine Fisheries Service include in the feasibility analyses all of the standards applicable to U.S. fisheries, regardless of whether those standards have yet to be met fully by U.S. fisheries.

The Marine Mammal Commission further recommends that the National Marine Fisheries Service develop its proposed rule with sufficient detail to allow for meaningful comment and, if adopted, create regulations to provide sufficient direction to other countries, agency reviewers, and the public as to what information they would be required to submit and how that information would be evaluated. Among other things, a proposed rule should indicate clearly the agency’s thinking regarding whether—

- a single standard or multiple standards would be used and, if multiple standards are used, how it will select which ones to apply in a specific instance;
- determinations would be made on a country-by-country basis, for separate fisheries, for individual vessels, for individual shipments of fish, or in some other manner; and
- evaluations would be based on foreign fisheries achieving a rate of incidental mortality and serious injury of marine mammals comparable to that for U.S. fisheries or on not exceeding some specific number (e.g., a stock’s potential biological removal level).

If, for example, the standards against which foreign fisheries are to be evaluated were based on reducing mortality and serious injury to below each stock’s potential biological removal level, the Service would need to address questions such as—

- whether all forms of anthropogenic taking would be considered or just take levels in fisheries;
- whether, for stocks subject to taking in multiple fisheries by multiple countries, each country (or fishery) would be allowed to take up to the potential biological removal level or whether such determinations would be made across all involved fisheries; and

¹ In contrast to this general provision of section 101(a)(2), which refers to U.S. standards, Congress clearly knows how to mandate the comparability of foreign fisheries to the actual performance of U.S. fishermen in meeting those standards, when that is its intent. See for example, previous section 101(a)(2)(B)(ii), enacted in 1988, which required countries seeking to export yellowfin tuna harvested in the eastern tropical Pacific to the United States to provide documentary evidence that the average rate of incidental taking of marine mammals is comparable to the rate achieved by United States vessels. (Section 4(a)(2) of Pub. L. 100-711)

- how it would address situations where information on marine mammal stock structure, abundance, and population dynamics is insufficient to determine what stocks are being taken and what the potential biological removal levels of those stocks are.

The Marine Mammal Commission also recommends that the National Marine Fisheries Service specify in the proposed rule the requirement that fish-exporting nations provide “reasonable proof” of the effects of their fishing operations on marine mammals. Presumably, countries would be required to submit not only summary information on the level of mortalities and serious injuries that occur but also the basis for those estimates (e.g., are they based on adequate observer coverage, reports from fishery participants, or some other source). The Service will be able to determine if the exporting nation has provided reasonable proof only if that type of information is available. If a potential biological removal level standard is proposed, the Service also should indicate whether the exporting country would be responsible for submitting information on which the necessary determinations would be based, including information on stock structure, abundance estimates and the uncertainty surrounding those estimates, presumed or actual growth rates of the affected stocks.

In addition, the Marine Mammal Commission recommends that National Marine Fisheries Service specify in the proposed rule where the burden of proof lies with respect to imports of fish and fish products under section 101(a)(2) of the Marine Mammal Protection Act. That is, does a generally applicable ban remain in place until an exporting nation demonstrates that the fish were caught in a way that was consistent with U.S. standards, or is a ban imposed only after the Secretary has determined that excess marine mammal mortality and serious injury have occurred? In this regard, section 101(a)(2) suggests that the Secretary of the Treasury is to impose a ban only after a problem has been identified. On the other hand, section 101(a)(2)(A) indicates an affirmative duty on exporting countries to demonstrate that the fish were caught in a way that is consistent with the requirements of the Act.

Procedures

In the advance notice of proposed rulemaking, the Service states that it is considering developing (1) a process for evaluating bycatch in foreign import-supplying fisheries that would be consistent with the domestic approach for managing marine mammal bycatch and (2) a process for assessing and certifying nations for bycatch of marine mammals. The Service does not elaborate on the former, other than noting it would be consistent with the process outlined in sections 117 and 118 of the Act. The latter process for assessing and certifying nations, as described in the notice, would be based on the process for implementing section 610 in the High Seas Driftnet Fisheries Moratorium Protection Act (16 U.S.C. 1826k). It would involve requesting reasonable bycatch evidence and proof from nations with import-supplying fisheries, initiating consultations with those nations that fail to supply reasonable proof or that have bycatch in excess of U.S. standards, allowing time for those nations to address their bycatch issues and meet U.S. standards, and recommending a ban on imports from those nations that ultimately fail to meet U.S. standards.

The Commission understands the Service's interest in using existing processes to evaluate marine mammal bycatch in domestic and foreign fisheries. To the extent that those processes are consistent with section 101(a)(2) of the Marine Mammal Protection Act, it may be reasonable and prudent to adopt elements of those processes. However, the Commission notes that section 101(a)(2)(A) includes language relating to the process for evaluating the bycatch of foreign fisheries. As noted previously, that provision directs the Secretary of Commerce to "insist on reasonable proof from the government of any nation from which fish or fish products will be exported to the United States of the effects on ocean mammals of the commercial fishing technology in use for such fish or fish products exported from such nation to the United States."

There are critical differences between the processes under the High Seas Driftnet Act and section 101(a)(2) of the Marine Mammal Protection Act, most notably with respect to the degree of consultation, the opportunity to take remedial action, and the immediacy of any import ban. The High Seas Driftnet Act indicates that a ban would be recommended (not imposed) only following lengthy periods of information sharing, consultation, and attempted improvements. Given the various circumstances surrounding each allegation of a nation having potentially excess marine mammal bycatch, such a process could take several years before a ban is recommended. In contrast, the language of section 101(a)(2) directs the Secretary of the Treasury to impose a ban (not recommend a ban) on the imports in question whenever he or she determines that the fish or fish products have been caught with fishing technology that results in excess kill or serious injury as compared to U.S. standards. That provision makes no allowance for delaying the imposition of a ban pending consultation and attempted remediation. That provision also does not appear to contemplate information sharing beyond placing an affirmative duty on nations wishing to export fish or fish products to the United States to provide reasonable proof of how the commercial fishing technologies they employ affect marine mammals. Presumably, this information is to be used either to impose or lift the ban in question.

Given the directives in the Act, the Marine Mammal Commission recommends that the National Marine Fisheries Service establish regulatory procedures under which fish-exporting nations must submit promptly the required level of proof concerning the effects that each applicable commercial fishery is having on marine mammal mortality and serious injury relative to U.S. standards. The Marine Mammal Commission further recommends that the National Marine Fisheries Service require that any findings of non-compliance or inadequate proof be forwarded immediately to the Secretary of the Treasury so that the U.S. government can take the steps necessary to ban fish imports from offending nations. However, that should not be the end of the process. The Commission notes that fisheries bycatch has been identified as the leading anthropogenic cause of marine mammal mortality worldwide² and recognizes a compelling need to reduce marine mammal mortality and serious injury in fisheries of other nations. The United States should work aggressively to reduce marine mammal bycatch in those fisheries and should use all tools at its disposal, including those provided under section 101(a)(2) of the Marine Mammal Protection Act, to pursue that goal. Therefore, the Marine Mammal Commission recommends that

² Read, A.J., P. Drinker, and S. Northridge. Bycatch of Marine Mammals in U.S. and Global Fisheries. *Conservation Biology* 20:163–169.

the National Marine Fisheries Service stipulate that consultations with those nations whose fish products are banned from U.S. markets be undertaken rapidly to identify and rectify the causes of marine mammal bycatch in excess of U.S. standards, with the dual goals of protecting marine mammals and resuming trade. By following such a process, the United States would be in compliance with the Act, provide incentive to other nations to reduce marine mammal bycatch, and promote the overall health and status of marine mammal stocks worldwide.

Section 101(a)(2) places responsibilities on both the Secretary of Commerce and the Secretary of the Treasury. The Secretary of Commerce is to receive and review information on fishing practices and the effects of those practices on marine mammals, and presumably determine whether the level of incidental mortality and serious injury exceeds U.S. standards. The Secretary of the Treasury is required to ban the importation of fish and fish products caught using fishing technology that results in excess take levels. It is not entirely clear from the statutory language how those responsibilities mesh with one another or what steps the Secretary of the Treasury needs to take to impose an importation ban once a determination of excess mortality and serious injury has been made. The Marine Mammal Commission therefore recommends that the National Marine Fisheries Service work closely with the Department of the Treasury to identify ways in which the envisioned regulations would address not only the procedures for assessing the effects of foreign fisheries on marine mammals but also the procedures for imposing or lifting import bans based on those assessments. The Commission believes that it would be preferable to cover all aspects of this process in a single set of regulations and thus encourages the Service to work closely with the Department of the Treasury to identify ways that this might be accomplished, perhaps through a joint rulemaking.

In the notice, the Service also seeks comments on whether or not the processes should apply to intermediary nations or those that re-export fish or fish products to the U.S. from fisheries based in other nations. The language of section 101(a)(2) in this regard is clear. Its provisions apply to any nation seeking to export fish or fish products to the United States. It contains no language to suggest that these requirements are limited to harvesting nations. Moreover, interpreting section 101(a)(2) as being limited to harvesting nations makes no sense from the standpoint of achieving the conservation goals of the Marine Mammal Protection Act. Providing a readily available loophole under which non-compliant fish and fish products could be “laundered” through intermediary nations and imported into the United States would frustrate the intent of the fish import provision. Therefore, the Marine Mammal Commission recommends that the National Marine Fisheries Service require any nation seeking to export fish products, or any intermediary nation seeking to re-export fish or fish products, to the United States to provide documentation or evidence regarding marine mammal bycatch in the harvest of those products relative to U.S. standards.

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Please contact me if you need additional information about the Commission's recommendations.

Sincerely,

A handwritten signature in blue ink that reads "Timothy J. Ragen". The signature is written in a cursive style with a large, sweeping initial 'T'.

Timothy J. Ragen, Ph.D.
Executive Director

Enclosure

MARINE MAMMAL COMMISSION
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29 January 2009

Rebecca Lent, Ph.D.
Director, Office of International Affairs
National Marine Fisheries Service
1315 East-West Highway
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Dear Dr. Lent:

The Marine Mammal Commission, in consultation with its Committee of Scientific Advisors on Marine Mammals, has reviewed the National Marine Fisheries Service's 15 December 2008 *Federal Register* notice (73 Fed. Reg. 75988) announcing receipt of a petition submitted to the Departments of Homeland Security, Treasury, and Commerce from the Center for Biological Diversity and the Turtle Island Restoration Network. The petition seeks a ban on the importation of swordfish and swordfish products from certain countries under section 101(a)(2) of the Marine Mammal Protection Act. Based on its review of the *Federal Register* notice and the petition, the Marine Mammal Commission offers the following recommendations and rationale.

RECOMMENDATIONS

The Marine Mammal Commission recommends that the National Marine Fisheries Service—

- apply section 101(a)(2) of the Marine Mammal Protection Act by adopting both quantitative standards, such as whether the fisheries are exceeding the potential biological removal levels of the affected marine mammal stocks, and performance standards, such as whether a foreign fishery has adopted fishing practices that are comparable to those of the United States and that prohibit the use of gear types that result in high rates of incidental taking or that require other restrictions or modifications designed to reduce the taking of marine mammals;
- take immediate steps to obtain the information required under section 101(a)(2)(A) from all countries that export swordfish to the United States and work with other appropriate federal agencies to ban swordfish imports from any country that fails to provide reasonable proof that the fishing technology in use does not result in the incidental kill or serious injury of marine mammals in excess of U.S. standards;
- apply the provisions of section 101(a)(2) to intermediary exporting nations by requiring those countries to provide documentation as to how swordfish or swordfish products they export to the United States were harvested and what impact those fisheries had on marine mammals even though their own vessels may not have participated directly in catching the fish; and
- require nations wishing to export swordfish or swordfish products to the United States to provide information on the methods and effectiveness of fishery monitoring and enforcement activities and consider that information in making determinations under section 102(a)(2).

RATIONALE

The Center for Biological Diversity and the Turtle Island Restoration Network submitted a petition to the Departments of Homeland Security, Treasury, and Commerce to request that those agencies carry out “non-discretionary” duties imposed by section 101(a)(2) of the Marine Mammal Protection Act (16 U.S.C. § 1371(a)(2)). The petitioners ask that the Secretaries consider this a formal petition for rulemaking pursuant to 5 U.S.C. § 553(e).

Section 101(a)(2) of the Marine Mammal Protection Act directs the Secretary of the Treasury to “ban the importation of commercial fish or products from fish which have been caught with commercial fishing technology which results in the incidental kill or incidental serious injury of ocean mammals in excess of United States standards.” Subparagraph (A) of that provision further directs the Secretary of Commerce to “insist on reasonable proof from the government of any nation from which fish or fish products will be exported to the United States of the effects on ocean mammals of the commercial fishing technology in use for such fish or fish products exported from such nation to the United States.” The petitioners make a compelling case that swordfish fisheries in various countries are resulting in significant mortality and serious injury of marine mammals.

In its *Federal Register* notice, the National Marine Fisheries Service faults the petitioners for not articulating the U.S. standards that they allege have been exceeded by some fishing nations and for failing to define those standards. The Service also specifically requests comments on how it should define the “United States standards” referenced in section 101(a)(2) of the Marine Mammal Protection Act. The Commission finds it curious that the Service seems to be at a loss to identify those standards on its own. The National Marine Fisheries Service is the agency responsible for implementing not only the Marine Mammal Protection Act but also for establishing, implementing, and enforcing the requirements applicable to U.S. swordfish fisheries. If the Service is unaware of the marine mammal standards applicable to this and other U.S. fisheries or is unable to articulate those standards, how has it been making the determinations for which it has been responsible under section 101(a)(2) for more than 35 years?

The Marine Mammal Protection Act contains a number of standards applicable to the taking of marine mammals that the Service should consider in making determinations under section 101(a)(2). Several are general standards established under section 2 of the Act, such as maintaining the health and stability of the marine ecosystem and recovering marine mammal populations to and maintaining them at optimum sustainable population levels. Section 103(a), which applies to waivers of the Act’s taking moratorium and which formerly governed the taking of marine mammals by commercial fisheries, specifies that authorized levels of taking not be to the disadvantage of the affected species and stocks. The Act also includes standards specific to the taking of marine mammals in commercial fisheries. For example, section 118(f) requires the development and implementation of a take reduction plan for any fishery or group of fisheries for which incidental mortality and serious injury exceed the potential biological removal level of any marine mammal stock. Section 118(b)(1) further requires that U.S. commercial fisheries reduce incidental mortality and serious injury of marine mammals to insignificant levels approaching a zero rate. All of these are germane standards that the Service must consider, although the Commission believes that it would

be inappropriate to hold fish exporting nations to achieving a zero mortality rate goal until that goal has been achieved by their U.S. counterparts.

As summarized in the petition, U.S. fishermen who catch swordfish are subject to a variety of requirements designed to reduce the incidental take of marine mammals. Some stem from take reduction plans implemented under the Marine Mammal Protection Act. Others are set forth in fishery management plans developed under the Magnuson-Stevens Fishery Conservation and Management Act, and some are provisions of state law. These requirements are all relevant to the extent that they are designed to avoid or reduce the taking of marine mammals and should be considered part of the standards applicable to U.S. fishermen. The only fishery for which Congress established additional standards for making findings under section 101(a)(2) is the purse seine fishery for tuna in the eastern tropical Pacific. Those standards provide a template that the Service could follow in this instance. Thus, the Marine Mammal Commission recommends that the Service apply section 101(a)(2) of the Marine Mammal Protection Act by adopting both quantitative standards, such as whether the fisheries are exceeding the potential biological removal levels of the affected marine mammal stocks, and performance standards, such as whether a foreign fishery has adopted fishing practices that are comparable to those of the United States and that prohibit the use of gear types that result in high rates of incidental taking or that require other restrictions or modifications designed to reduce the taking of marine mammals.

Based on its review of the information presented in the rulemaking petition, the Commission expects that at least some countries exporting swordfish to the United States are using fishing practices that are likely to result in the incidental kill or serious injury of marine mammals at levels in excess of those countenanced under U.S. law. To address that concern, the Marine Mammal Commission recommends that the Service take immediate steps to obtain the information required under Marine Mammal Protection Act section 101(a)(2)(A) from all countries that export swordfish to the United States and work with other appropriate federal agencies to ban swordfish imports from any country that fails to provide reasonable proof that the fishing technology in use does not result in the incidental kill or serious injury of marine mammals in excess of U.S. standards.

The petition indicates that some countries, such as Singapore, export swordfish products to the United States as intermediary rather than harvesting nations. Unlike the provisions applicable to imports of yellowfin tuna, which set forth separate requirements for intermediary and harvesting countries, the general requirements of section 101(a)(2) and subparagraph (A) are applicable to all countries that export fish or fish products to the United States. For that reason, the Marine Mammal Commission recommends that the Service apply the provisions of section 101(a)(2) to intermediary exporting nations by requiring those countries to provide documentation as to how swordfish or swordfish products they export to the United States were harvested and what impact those fisheries had on marine mammals even though their own vessels may not have participated directly in catching the fish.

Finally, section 101(a)(2)(A) requires the Secretary to “insist on reasonable proof” regarding fishery effects on marine mammals. As is often the case in fisheries management, the imposition of various requirements does not, by itself, ensure compliance. Hence, monitoring and enforcement are

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essential elements of fishery management. In its review of the information provided by foreign nations wishing to import swordfish into the United States, the Service must take into account not only the statutory or regulatory requirements imposed on foreign fishermen but also the corresponding level of compliance. Doing so will require evaluation of monitoring and enforcement measures. Therefore, the Marine Mammal Commission recommends that the Service require nations wishing to export swordfish or swordfish products to the United States to provide information on the methods and effectiveness of fishery monitoring and enforcement activities and consider that information in making determinations under section 102(a)(2).

Sincerely,



Timothy J. Ragen, Ph.D.
Executive Director