

MARINE MAMMAL COMMISSION
4340 EAST-WEST HIGHWAY, ROOM 905
BETHESDA, MD 20814

1 June 2004

Mr. P. Michael Payne, Chief
Marine Mammal Conservation Division
Office of Protected Resources
National Marine Fisheries Service (F/PR2)
1315 East-West Highway
Silver Spring, MD 20910

Dear Mr. Payne:

The Marine Mammal Commission, in consultation with its Committee of Scientific Advisors on Marine Mammals, has reviewed the National Marine Fisheries Service's proposed rule (69 Fed. Reg. 23477) for defining the term "Zero Mortality Rate Goal" (ZMRG) under the Marine Mammal Protection Act. Defining the ZMRG is necessary to implement the pertinent requirements of section 118 of the Act.

Based on our review of the applicable statutory provisions, the advance notice of proposed rulemaking (68 Fed. Reg. 40888), and the *Federal Register* notice describing the proposed rule, we concur with the Service that option 1 is the most appropriate of the three options outlined in the advance notice. Option 1 defines the ZMRG threshold as 10 percent of a stock's potential biological removal level (PBR). In a 10 September 2003 letter (attached) responding to the advance notice, the Commission explained its preference for option 1 based on three considerations: whether the options (1) utilized all available data on the species or stock involved, (2) were relatively simple or straightforward to implement, and (3) were suitably protective and consistent with the statutory mandate. Option 1 uses all available data and is simple to implement and familiar to managers and stakeholders. Most important, of the three options, it is the most protective of species or stocks listed as endangered or threatened under the Endangered Species Act or designated as depleted under the Marine Mammal Protection Act. For these reasons, the Marine Mammal Commission recommends that the Service select option 1, as indicated in the proposed rule, to define the ZMRG.

The Commission also recommended a modification to option 1 to address situations in which 10 percent of PBR still constitutes a relatively large number. In our 10 September 2003 letter we used the example of the northern fur seal. The eastern Pacific stock has a PBR of about 17,000, which means that as many as 1,700 fur seals could be killed without exceeding the ZMRG. In our view, the goal of approaching a zero mortality and serious injury rate was intended to go beyond PBR requirements and provide continued impetus for improvements in fishing gear and methods to reduce losses to the lowest level practicable. Accepting the loss of 1,700 animals, even if biologically insignificant to the stock, does not seem consistent with that long-term goal. For that reason, the Commission's 10 September letter recommended that the Service modify option 1 by adding a

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second component that compels further reductions in mortality and serious injury for those stocks with high PBR levels. The Marine Mammal Commission reiterates that recommendation here.

Finally, in the advance notice of proposed rulemaking, the Service raised the question of whether it should conclude that the ZMRG had been met if mortality and serious injury exceeded the ZMRG threshold calculated for a stock when further reductions were not immediately feasible due to technological or other limitations. In the proposed rule, the Service addressed this question in its response to comments 58-60, wherein the Service indicates that “[s]uch a fishery would not have achieved target levels of incidental mortality and serious injury as described in the ZMRG.” As indicated in its 10 September letter, the Commission concurs with this response. To conclude otherwise would effectively undermine the purpose of the ZMRG. Because the conclusion that such a fishery has not achieved target levels is necessary to motivate further improvements in fishing gear and methods, the Marine Mammal Commission recommends that the Service make this point explicitly in the final rule.

Please contact me if you have questions about these recommendations or comments.

Sincerely,

A handwritten signature in black ink that reads "David Cottingham". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

David Cottingham
Executive Director

one attachment