

MARINE MAMMAL COMMISSION
4340 East-West Highway, Room 700
Bethesda, MD 20814-4447

29 January 2009

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 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