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BLUE WATER FISHERMEN'S ASSOCIATION

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May 27, 2004

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

Dear Mr. Payne:

On behalf of the members of Blue Water Fishermen's Association (BWFA), I submit the following comments on the proposed threshold level to define Zero Mortality Rate Goal (ZMRG) that applies to the requirements under the Marine Mammal Protection Act (MMPA) published in the *Federal Register* on April 29, 2004.

BWFA represents fishermen, fish buyers and supporting supply companies involved in the harvest of Atlantic highly migratory marine species with members from Maine to Texas and California to the Caribbean. Our fishermen use pelagic hook and line longline gear to catch swordfish, tunas and oceanic sharks. Primarily, our comment will be confined to this fishery's issues.

We strongly support the goal that all fisheries data be carefully examined to determine the true level of serious injury and/or incidental mortality. There must also be consistency in the methods used from fishery to fishery, in both the Atlantic and Pacific. The application of serious injury guidelines to estimate mortality for fisheries must be consistent across all applicable fisheries in an equitable manner.

NMFS is proposing to define ZMRG as 10% of the potential biological removal ("PBR") for the marine mammal species. However, the Proposed Rule asserts that if NMFS decides the data is uncertain for a species, then NMFS can use an even more restrictive numerical standard for ZMRG. There are five problems with the Proposed Rule.

The legislative history of the ZMRG provisions makes it clear that Congress intended that ZMRG is achieved when industry employs the best available technology that is economically and technologically feasible. The Proposed Rule ignores legislative history and establishes ZMRG as a fixed numerical standard. Compounding this problem is that the Proposed Rule states that if NMFS decides, by some unknown process and standard, that the data are uncertain, then NMFS can establish a different ZMRG standard. Not only does this further violate Congressional intent that ZMRG is not to be a numeric standard, but this provision of the rule is legally suspect as void for vagueness because it vests NMFS with the power to do anything it wants and establishes no standards or guidelines for the exercise of this arbitrary power.

The MMPA's goal is to maintain marine mammal populations at their optimum sustainable population ("OSP"). NMFS considers a fish population at its OSP when the population is at 60% of the habitat's carrying capacity. Nevertheless, the Proposed Rule states that the effect of NMFS' proposed ZMRG definition will be to maintain marine mammals at 90-98% of the habitat's carrying capacity.
Scientists agree that if human induced mortality does not exceed PBR, then a marine mammal species will achieve OSP. Thus, ZMRG is unnecessary to achieving the Act's goal of OSP.

The statutory formula for determining PBR is already extremely conservative. To compute PBR, the minimum marine mammal population is multiplied by 50% of the maximum annual net reproduction rate. The resulting 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. The problems associated with this very conservation PBR formula are magnified by the proposed ZMRG definition. Under that definition, NMFS will compute ZMRG by reducing the PBR by 90%.

The ZMRG definition gives marine mammals the preeminent place in the ecosystem. NMFS' interest in ecosystem management apparently does not extend to marine mammals. NMFS has testified that marine mammal populations at or near their historic carrying capacity, i.e., at their ZMRG level, are likely to be inhibiting the recovery of endangered and threatened salmon.

Given that NMFS seems determined to adopt its proposed ZMRG definition, BWFA would support a legislative amendment when reauthorizing the MMPA that states that ZMRG is not a numerical standard but is satisfied if industry is using the best available technology which is economically and technologically feasible. In addition, BWFA recommends that the MMPA be revised to include recreational fisheries known to similarly interact with marine mammals.

Marine mammal interactions in our fishery are rare-random events that occur when the mammal seeks our gear to prey upon our hooked fish, primarily tunas. Pelagic longline gear is a passive component of these interactions which have been documented by observers to result in the marine mammal being released alive greater than 96% of the time. We need an active deterrent to discourage predation on our catch. When can we expect government research assistance to resolve these unwanted interactions? When can we expect the final regulations to implement the Secretary's Guidelines for safely deterring marine mammals that were mandated in the 1994 Amendments to the MMPA, nearly a decade ago?

Thank you for considering our views on the Proposed Rule on defining ZMRG. If you have any questions, please contact me at (609)361-9229.

Sincerely,

Nelson R. Beideman

Nelson R. Beideman
Executive Director, BWFA