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September 8, 2003

VIA FACSIMILE AND UNITED STATES MAIL
Chief
Marine Mammal Conservation Division
Attn: ZMRG
Office of Protected Resources
National Marine Fisheries Service
1315 East-West Highway,
Silver Spring, MD 20910
301–713–0376 (Fax)

Re: Comments of Oceana concerning "Advance notice of proposed rulemaking; request for comments" on options for defining the Zero Mortality Rate Goal (ZMRG) of the Marine Mammal Protection Act, 68 Fed. Reg. 40888 (July 9, 2003).

Dear Ms. Wieting:

Oceana welcomes this opportunity to submit comments concerning options for defining the requirement of the Marine Mammal Protection Act (MMPA) to "reduce incidental mortality and serious injury of marine mammals" incidental to commercial fisheries "to insignificant levels approaching a zero mortality and serious injury rate." 16 U.S.C. § 1387(b)(1).. This requirement is known as the Zero Mortality Rate Goal (ZMRG).

The National Marine Fisheries Service (NMFS) must make sure that any regulatory definition of ZMRG carries out the Congressional intent of not only ensuring healthy populations of marine mammals, but also of reducing incidental takes of marine mammals in commercial fisheries as much as possible. Accordingly, Oceana urges NMFS to consider a three-part approach to defining ZMRG in the upcoming rulemaking. First, NMFS should adopt as a rule its current definition of ZMRG set forth as option 1 in the advance notice of proposed rulemaking (ANPR). Option 1 serves as a backstop to ensure that incidental mortality does not significantly injure marine mammal populations. Second, to address the Congressional intent to limit incidental mortality of marine mammals as much as possible, if current levels of incidental mortality and serious injury from commercial fishing on a marine mammal population are lower than the option 1 backstop would allow, ZMRG for each commercial fishery interacting with that population must be set no higher than the current level of takes. Third, to address the Congressional intent that incidental mortality approach a zero rate, NMFS must periodically revisit the levels set for marine mammal populations in each fishery whose rate does not yet fully approach zero, and gradually reduce those levels over a period of years in order to force technology to reduce takes to "insignificant levels approaching a zero mortality rate."

BACKGROUND

The MMPA's legislative and regulatory history make clear that Congress intended NMFS not only to restore marine mammal populations to healthy levels, but also to reduce incidental marine mammal takes in commercial fisheries as much as possible. Data on existing take levels and the effects of NMFS' three options for defining ZMRG demonstrate the need for additional components in the definition of ZMRG to ensure that incidental take levels are set as low as possible and continue to approach a zero mortality rate.

I. THE ZMRG PROVISION IN LEGISLATION

The ZMRG provision of the MMPA entered the initial 1972 Act in response to the large number of porpoises killed by purse seiners fishing for yellowfin tuna in the Eastern Tropical Pacific. Congress understood that the American people opposed this slaughter. As Senator Hollings explained, "[w]e had hearings with the public informed and everything else. And if we knew how to legislate it so that there would be no taking of porpoises, we would legislate it." 118 Cong. Rec. S25271-2 (1972).

The Congressional debate shows that in considering ZMRG, Congress focused not on maintaining porpoise populations at a certain level, but on reducing takes in the purse seine fishery as much as possible.

The House originally considered the Marine Mammal Protection Act in 1971 and considered it again, passing a bill, in March 1971. 117 Cong. Rec. H44947-61 (1971); 118 Cong. Rec. H7683-716 (1972). The original House bill did not include a ZMRG provision. Instead, the House set forth provisions to "insure that such taking [of marine mammals] does not occur to the disadvantage of the species or stocks." H.R. Rep No. 92–707, at 24 (1971) (discussing H.R. 10420 § 102, "Limitations on Taking of Marine Mammals"). The House committee stated that it did not want to shut down or significantly curtail the activities of the yellowtail tuna purse seining fleet so long as the Secretary of Commerce ''is satisfied that the tuna fishermen are using the best available technology to assure minimal hazards to marine mammal populations'' *Id.*

In contrast to the House, when the Senate considered its MMPA bill in 1972, it focused more on the undesirability of *any* takes from commercial fisheries. 118 Cong. Rec. S25227-301 (1972); *id.* S25422-40 (1972). During the debate, Senator Harris of Oklahoma introduced the concept of ZMRG, *id.* at S2570 (Amendment 1276 to S. 28271), in an amendment providing, in part, that "in any event the incidental kill or incidental serious injury of marine mammals permitted in the course of commercial fishing operations shall be reduced to insignificant levels approaching a zero mortality and serious injury rate." *Id.* at S25271. Senator Hollings agreed that the ZMRG amendment included "language that would make it practical and realistic in stating both the purpose and the goal of the Senator and the Committee's purpose and goal." *Id.* During the debate, Senator Harris modified the proposed amendment to add the qualifying language that ZMRG was "the immediate goal" of the Act. *Id.* (introducing Amendment 1345).

Senator Harris summarized, "if we said that it is our immediate goal to do so, that it would be binding upon the Secretary of Commerce to use every effort he could for the development of technology and also by enforcement power and so forth as to move us as rapidly as possible toward approaching a zero mortality rate and serious injury rate" *Id.*[1] The revised Amendment was agreed to and became part of the Senate bill. *Id.* The conference bill retained the Senate language, which became codified at 16 U.S.C. § 1371(a)(2). The Joint Explanatory Statement also made clear that "...the objective of regulation would be to approach as closely as is feasible the goal of zero mortality and injury to marine mammals...It may never be possible to achieve this goal, human fallibility being what it is, but the objective remains clear.'' H.R. Rep. No. 92–1488, at 23 (1972). Hence, the legislative history of ZMRG as it was introduced in the Act makes clear that the focus is not just on maintaining healthy population sizes, but also on limiting incidental takes altogether.

Almost ten years later, in 1981, Congress modified ZMRG for the Eastern Tropical Pacific yellowfin tuna purse seine fishery, but left ZMRG intact for all other fisheries. The 1981 bill allowed purse seiners to satisfy ZMRG by using existing technology, *see* H. R. Rep. No. 97–228, at 17 (1981), but left ZMRG unchanged for other commercial fisheries in order to continue ''to stimulate new technology for reducing the incidental taking of marine mammals.'' *Id.* at 17–18. By leaving ZMRG unchanged for other commercial fisheries, Congress reemphasized the importance it placed on forcing technology to reduce takes. In 1992, Congress superseded the 1981 yellowfin tuna legislation, imposing specific numerical limits on incidental mortality. International Dolphin Conservation Act of 1992, Pub. L. No. 102–523, 106 Stat. 3425 (1992). This action demonstrated that Congress was returning to its goal of forcing technology even for the yellowfin tuna fishery. In 1997, Congress again amended the yellowfin tuna provisions of the MMPA to establish (1) an annual mortality cap for the Eastern Tropical Pacific purse seine fishery of 5,000 dolphins; (2) a "commitment and objective to progressively reduce dolphin mortality to a level approaching zero;" and (3) population-specific dolphin mortality limits for the Eastern Tropical Pacific purse seine fishery of less between 0.2 and 0.1 percent of the minimum estimate of the population size through 2000 and thereafter less than or equal to 0.1 percent of the minimum population estimate. International Dolphin Conservation Act of 1997, Pub. L. No. 105–42 § 302(3), 111 Stat. 1122 (codified at 16 U.S.C. 1412 (1997)).

In 1988, Congress imposed an "exemption" on the existing MMPA incidental take requirements of 16 U.S.C. §§ 1371, 1373, and 1374, while it developed new statutory language. 16 U.S.C. § 1383(a)(1). Even in its exemption provision, Congress restated its intention to achieve ZMRG. *Id.* In 1994, Congress enacted the contemplated new statutory language, by adding a new section 118 (1) establishing a procedure, through the use of take reduction plan, to

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[1] Senator Williams of New Jersey, a co-sponsor of the amendment, also made clear that, "I realize there is no way to assure that not one marine mammal will be killed during commercial fishing operations. However, I also believe that no matter what the odds against a zero mortality rate may be, we must nevertheless make that our primary objective" *Id.* at S25287.

achieve ZMRG for high-take-level fisheries within five years; and (2) setting a deadline for all commercial fisheries to achieve ZMRG within seven years. Pub. L. No. 103-238 §11 (codified at 16 U.S.C. § 1387(b) (ZMRG deadline) and (f)(2) (take reduction plan mechanism to achieve ZMRG in certain fisheries)(1994)). Section 118 explicitly required that a take reduction plan should consider economic and technological factors in determining how to achieve ZMRG within five years. *Id.* at § 1387(f)(2).

II. ZMRG REGULATORY PROPOSALS

On June 16, 1995, NMFS proposed regulations to implement the new incidental take provisions of the 1994 amendments, but failed to promulgate a definition for ZMRG. 60 Fed. Reg. 31666. NMFS initially proposed that a fishery could achieve ZMRG either by (1) holding incidental mortality and serious injury of marine mammals, in combination with all other fisheries, to no more than 10 percent of PBR of the affected populations of marine mammals, or (2) where total mortality for all fisheries exceeded 10 percent of PBR for one or more populations of marine mammals, by holding mortality caused by an individual fishery down to one percent or less of the PBR of the relevant population(s) of marine mammals. *Id.*. The proposed definition was related to proposed regulations for classifying fisheries, such that only those fisheries that achieved ZMRG would be classified as Category III and exempt from the take reduction plan process. While NMFS did promulgate its fishery classification regulations, NMFS noted in the final rule that the definition of ZMRG had been removed because the agency was still considering what would be an appropriate goal. 60 Fed. Reg. 45086 (Aug. 30, 1995).

NMFS has settled litigation alleging that it has not complied with the provisions of 16 U.S.C. § 1387, by agreeing, in part, to promulgate a regulatory definition of ZMRG. Advance notice of proposed rulemaking, 68 Fed. Reg. 40888 (July 9, 2003). Accordingly, NMFS issued an ANPR propounding two questions: (1) what level of takes is "insignificant," (T_{ins}) and (2) whether available technology and economic feasibility should be taken into account in determining ZMRG? *Id.* at 40891. NMFS proposed three options for defining T_{ins}: (1) T_{ins} would equal 10 percent of PBR; (2) T_{ins} would equal the mortality rate that would cause a 10 percent delay in recovery; and (3) T_{ins} would equal 0.1 percent of the minimum estimated population size for cetaceans and 0.3 percent of the minimum population size for pinnipeds. The following table compares the effects of these options with PBR and current estimated mortality levels.

Table 1:
Actual Marine Mammal Takes in Fisheries Compared to NMFS' Proposed Options

Species	PBR	Estimated Minimum Annual Takes	Option 1	Option 2	Option 3	Some Fisheries Involved and Their Takes
CA Sea lion	6591	1208	659.1	659.1	329.5	CA driftnet fishery for sharks and swordfish (158); CA set gillnet fishery for halibut and angel shark (1012); WA, OR, CA domestic groundfish trawl fishery [At-sea processing Pacific whiting fishery only] (1); WA, OR salmon net pen fishery (7); Canada: BC salmon pen fishery (30)
Common Dolphin, (Western North Atlantic Stock)	227	375	22.7	47.3	23.6	Mid-Atlantic coastal gillnet (12), North Atlantic bottom trawl (19), Northeast multispecies sink gillnet (42), Mackerel joint venture (17) and Atlantic squid, mackerel, butterfish trawl fisheries (285)
Humpback Whale	11	>5.8	1.1	10.9	5.4	Bering Sea/Aleutian Islands groundfish trawl (0.4); CA salmon troll fishery (0.2) ; Southeast Alaska salmon drift gillnet (0.2); Southeast Alaska salmon purse seine (0.2); Crustacean pot stranding (0.4); and others
N. Atlantic right whale	0	1	0	0.58	0.2	groundfish gillnet gear, cod traps, herring weirs, pelagic drift gillnet fishery,
Beluga whales	1055.2	>0.5	105.5	106	53	Bristol Bay salmon drift gillnet (>0.25); Bristol Bay salmon set gillnet (>0.25)
Harbor seal	9012	111	901.2	1025.8	512.9	Northeast Multispecies Sink Gillnet (108); Mid Atlantic Coastal Sink Gillnet (3)
Dall's porpoise	2274	53.9	227.4	317.5	158.7	WA/OR/CA domestic groundfish trawl fisheries (10); CA/OR thresher shark/swordfish drift gillnet fishery (2.2); Bering Sea/Aleutian Is. (BSAI) groundfish trawl (6); Gulf of Alaska (GOA) groundfish trawl (1.2); BSAI groundfish longline (1.6); AK Peninsula/ Aleutian Island salmon drift gillnet (28); Southeast Alaska salmon drift gillnet (4.6);

*All numerical values used in calculations are from NOAA's most recent posted stock assessments for each species.

DISCUSSION

NMFS should adopt a definition for ZMRG that carries out the Congressional intent to limit as much as possible incidental mortality of marine mammals. The first component of that rule should be the proposed option 1 for T_{ins} in the ANPR. T_{ins} would serve as a backstop, such that mortality on marine mammal populations must never be any higher than T_{ins}, to ensure that incidental mortality does not significantly injure marine mammal populations. The second component should be a requirement that if current rates of incidental mortality and serious injury from commercial fishing on a marine mammal population are lower than the option 1 backstop would allow, ZMRG for each commercial fishery interacting with that population must be set no higher than the current level of takes of the relevant population in that fishery. Third, to address the Congressional intent that incidental mortality approach a zero mortality rate, NMFS must periodically revisit the ZMRG set for each population in each fishery and gradually reduce that level in order to force technology to reduce takes to "insignificant levels approaching a zero mortality rate." This three-part proposal would ensure that populations are being protected and would require steady progress towards ZMRG, while allowing time for technology and practices to be developed to limit mortality.

I. NMFS SHOULD ADOPT 10% OF PBR (OPTION 1) AS THE BACKSTOP T_{INS} COMPONENT OF THE ZMRG DEFINITION

Oceana supports the use of option 1 as T_{ins} for many of the reasons set forth in the ANPR. First, option 1 is "[f]amiliar to NMFS' constituents because this definition was proposed in the 1995 proposed rule implementing section 118 of the MMPA (60 FR 31666, June 16,1995)." 68 Fed. Reg. at 40891. Second, it is "[e]asy to calculate and explain because it is based on the well understood PBR equation." *Id.* Third, it is "[c]onsistent with the current definition for Category III fishery, such that the List of Fisheries would provide an easy metric for which fisheries have met T_{ins}." *Id.* at 40892.

NMFS notes as a downside of option 1 that "it may lead to overly conservative levels of protection for certain endangered species." 68 Fed. Reg. at 40892. Every precaution should be taken to eliminate incidental takes of endangered species by commercial fishing operations and promote the recovery of these species. Moreover, ZMRG does not mean, as NMFS seems to think, only restricting takes to levels that promote the recovery of depleted populations, but also liming takes to levels *approaching a zero mortality rate*. In that context, setting T_{ins} at levels that ensure the recovery of endangered species, while still allowing commercial fishing operations to continue, simply cannot be criticized as "overly conservative."

Given that option 1 is familiar, easy to use, and consistent with the existing List of Fisheries, NMFS must overcome a high burden to explain why option 2 or option 3 should be selected instead. NMFS fails to provide reasons to make the change. Option 2 is dramatically less protective of endangered species because it sets T_{ins} at PBR instead of 10 percent of PBR, as in option 1. 68 Fed. Reg. at 40892. Therefore, option 2 should be rejected. Option 3 would set T_{ins} at 5%-50% of PBR depending on the species. *Id.* Because option 3 sets T_{ins} at 50% of PBR for

endangered species, it is five times less protective than option 1 (10% of PBR). *Id.* While option 3 sets T_{ins} for healthy populations at 5% of PBR (more conservative than option 1), the tradeoff of less protection for endangered species makes this option unattractive. Moreover, Oceana proposes to make progress towards a zero mortality rate through the following two components of its proposal, so it is unnecessary to be as restrictive as option 3 in the T_{ins} component of the ZMRG definition.

In sum, option 1 for T_{ins} is superior to the other options proposed by NMFS and should be adopted as the T_{ins} component of the ZMRG definition.

II. NMFS SHOULD CAP TAKES AT EXISTING LEVELS

The statutory ZMRG language requires not only that marine mammal takes be reduced to "insignificant levels," as described by the T_{ins} component of the definition, but also that such levels be "approaching a zero mortality and serious injury rate." 16 U.S.C. § 1387(a)(1). Under option 1, some commercial fisheries would be allowed to kill more marine mammals than are currently taken. For example, option 1 would allow fisheries affecting beluga whales to kill 105 belugas a year, even though the current mortality estimate is less than 1 a year. Fisheries affecting harbor seals would be allowed to kill 901 seals, even though the current mortality estimate is 111 a year. Fisheries affecting Dall's porpoises would be allowed to kill 227 porpoises even though the current mortality estimate is only 54 a year. Table 1, *supra*. Thus, current mortality data shows that several fisheries can do better at approaching a zero mortality rate, even though their takes are below the option 1 definition of T_{ins}. Because the goal is to approach a zero mortality and serious injury rate, the ZMRG definition must have a component that describes current performance and requires, at a minimum, that there be no backsliding. Accordingly, in addition to limiting takes to no higher than T_{ins}, the definition of ZMRG should limit takes to no higher than current levels.

III. NMFS SHOULD ADOPT A MECHANISM TO ENCOURAGE RATES TO CONTINUE APPROACHING ZERO

Because ZMRG means not just reducing takes to "insignificant levels," but striving always to be "approaching a zero mortality rate," a static approach of adopting a T_{ins} backstop and a cap on mortality at current levels is necessary but not sufficient. A look at prospective take levels under the first two components of the Oceana proposal demonstrates the need for a dynamic approach, especially for large marine mammal populations. For example, fisheries that take California sea lions would have to cut their takes in half, from the current annual mortality estimate of 1,208, but would still be authorized to take 659 animals each year. Similarly, the Northeast Multispecies sink gillnet fishery would still be allowed to take up to 108 harbor seals. Table 1, *supra*. It simply defies common sense to treat such three-digit numbers as levels "approaching a zero mortality rate."

NMFS should look for guidance to the approach Congress took in the International Dolphin Conservation Program. As discussed above, that program has a component equivalent

to T_{ins}, the "per-stock per-year dolphin mortality limit." 16 U.S.C. § 1412(3). The program also has a dynamic provision to further approach a zero mortality rate. Congress capped annual dolphin mortality at 5,000 animals, with "a commitment and objective to progressively reduce dolphin mortality to a level approaching zero through the setting of annual limits." *Id.* §1412(1). Similarly, for the ZMRG definition, NMFS should make the ZMRG definition dynamic by incorporating a third component which takes as variables the increasing ability to improve technology and increase economic investment over time. Accordingly, NMFS should determine whether a fishery has satisfied the ZMRG definition, below T_{ins} in light of the ability to improve technology and increase economic investment over time.

Thus, NMFS should periodically revise the allowed level of takes. Such periodic revisions will gently spur technology and fishing practices in the direction of avoiding takes, while not placing undue strain on the fishing industry. Oceana recommends that allowed levels of takes pursuant to the ZMRG definition be revisited for downward revisions at suitable periods, perhaps concurrently with the review of the stock assessment reports if such reviews happen with appropriate frequency. Additionally, NMFS may determine from time to time that the level of takes for some populations have fully approached a zero mortality rate, at which point further reductions would cease to be possible. For these populations, NMFS may determine that downward revisions are not necessary.

IV. OCEANA'S THREE-PART PROPOSAL ACCURATELY CAPTURES THE ROLE THAT TECHNOLOGICAL AND ECONOMIC CONCERNS SHOULD PLAY IN DEFINING ZMRG

Oceana's three-part proposal addresses technological and economic concerns by capping takes at levels currently technologically and economically achievable, while incorporating a provision to force technology and progressively approach a zero mortality rate. The ANPR asks whether (1) technological and feasibility concerns should "not be considered in evaluating whether or not a fishery had achieved the ZMRG," or rather whether (2) if (a) incidental mortality *exceeded* T_{ins} in a particular fishery, but "existing technology would not allow further reductions of incidental mortality and serious injury in an economically feasible manner," then that fishery would have complied with ZMRG, but (b) where existing technology would allow further economically feasible reductions, those reductions would be required to satisfy ZMRG. 68 Fed. Reg. at 40891.

Oceana's proposal rejects both suggestions in the ANPR in favor of a third choice. Because T_{ins} is a backstop, NMFS must insist that T_{ins} be satisfied, full stop, regardless of economic feasibility arguments. Otherwise, fisheries will continue to harm entire marine mammal populations. Because ZMRG is meant to reduce takes to "insignificant levels approaching a zero mortality rate," not just put a backstop on harm, fishery takes must be capped at existing levels.

Furthermore, because "approaching zero" is a dynamic concept, the levels of take should not be frozen at T_{ins} or current take levels, whichever is lower. Thus, Oceana's proposal would

reduce takes below current levels, where appropriate, but unlike NMFS second option, Oceana would not insist on immediate reductions where current levels are already below T_{ins}, even were such reductions to be immediately feasible. Instead, Oceana proposes that takes should be progressively, gradually lowered, taking into account technological and economic factors. Thus, Oceana urges NMFS to reject both its proposals concerning technological and economic feasibility, in favor of a proposal that is more protective of the environment *and* more accommodating to technological and economic concerns than the proposals in the ANPR.

CONCLUSION

Thank you for considering these comments on the ANPR. For the reasons set forth above, Oceana requests that NMFS define ZMRG by (1) adopting the option 1 T_{ins} of no more than 10% PBR as a backstop setting forth the maximum allowable annual take; (2) capping fishery takes at current levels; and (3) gradually reducing takes over time with the goal of approaching a zero mortality rate. We would be pleased to talk with you and your staff about the concerns expressed in this letter.

Sincerely,

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