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NGO in general consultative status with the Economic and Social Council of the United Nations

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Dear Ms. ~~Wieting~~, Donna

On behalf of the more than seven million members and constituents of The Humane Society of the United States (HSUS) I am submitting the following comments on the Advance Notice of proposed rulemaking for the definition of the zero mortality rate goal (68 FR 40888). Since it was enacted with the 1972 passage of the Marine Mammal Protection Act (MMPA), the so-called zero mortality rate goal (ZMRG) has symbolized the desire of the American people to see that fisheries operate with due care and not with wanton disregard of the lives and welfare for marine mammals with whom their fishing gear may interact. It remains a key underpinning of the MMPA that urges further progress in methods and technology to assure that death and serious injury of marine mammals is truly infrequent and accidental.

In the Federal Register Notice, the National Marine Fisheries Service (NMFS) has proposed three options for defining the ZMRG While The HSUS generally supports option one (retaining the current de facto definition of the ZMRG as ten percent of the potential biological removal (PBR) level), we also support supplemental language to address concerns raised by this and other options.

NMFS' Current De Facto Definition of PBR

As the NMFS acknowledges in the Notice of Proposed Rulemaking, in June of 1995 (60 FR 3166) it announced its intent to define the zero mortality rate goal. Under that Proposed Rule, a fishery would be deemed to have met the zero mortality rate goal (ZMRG) if it, in combination with all other interacting fisheries, killed and/or seriously injured no more than 10 percent of the PBR level of any stock. The HSUS supported this proposed definition. The NMFS also proposed that if combined mortality and serious injury for a marine mammal stock that interacted with multiple fisheries exceeded 10 percent of PBR, a single fishery would be deemed to have met the ZMRG if it was responsible for killing or seriously injuring less than one percent of the PBR for that particular marine mammal stock. The HSUS opposed this portion of the proposal, in part, because if there were more than 10 interacting fisheries and each took one percent of the PBR, a

stock could be unfairly and significantly disadvantaged over a stock with only a single interacting fishery. Indeed, we are pleased to see that the NMFS has not proposed this again as one of the options.

Since 1995, in all of its annual stock assessments, the NMFS has used 10 percent of PBR as one of the measures for assessing the status of stocks. For example, in the 2002 stock assessment for Gulf of Maine harbor porpoise (*Phocoena phocoena*), NMFS states "[t]he total fishery-related mortality and serious injury for this stock is not less than 10% of the calculated PBR and, therefore, cannot be considered insignificant and approaching zero mortality and serious rate."(NMFS 2002a) The NMFS provides no justification in the current federal register notice of proposed rulemaking that suggests that this de facto definition was no longer considered scientifically justifiable or unfeasible. There is no apparent need for a new interpretation of the definition. The Service simply argues that it "could result in over-regulation of some fisheries." We disagree that this is sufficient reason to consider alternative definitions. Indeed, disadvantaging stocks should be of greater concern. Thus we support a continuation of the use of NMFS' current de facto definition.

The Impact of Various Proposed Options on Marine Mammal Stocks

The Federal Register outlines three options to define ZMRG that the NMFS is considering. They can be summarized as:

- Option 1: continuing the use of 10% of PBR to define the ZMRG
- Option 2: defining ZMRG using a standard of a 10% delay in recovery
- Option 3: calculating ZMRG as 0.1% of Nmin (cetaceans) and 0.3% of Nmin for pinnipeds.

As the NMFS acknowledges in the Federal Register Notice, option three is the least protective of endangered and other fragile marine mammal stocks. Option one, by contrast, is somewhat more protective of both endangered and abundant stocks. As an example of the different impacts, we offer three sample scenarios and the resultant ZMRG level under each of these different options for Gulf of Maine humpback whales (*Megaptera novaeangliae*), which are ESA listed; Gulf of Maine harbor porpoise, which have no special ESA status; and California sea lions (*Zalophus californianus*), which are considered a robust stock. (NMFS 2002a, NMFS 2002b)

Stock	**Option 1 ZMRG**	**Option 2 ZMRG**	**Option 3 ZMRG**
GOMe. Humpback	0.1	1.3	0.6
Harbor porpoise	75	149	75
California sea lion	833	417	417

As can be seen by this example (which can be repeated with other similar stocks represented in this continuum of stock status from endangered to robust), Option one is generally the most protective of endangered stocks. As stock abundance increases, Options one and three

begin to equalize and finally end with option three being the most protective of abundant stocks.

Congressional Intent in Prioritizing Protective Efforts

The need to prioritize conservation efforts to those species that are most vulnerable is evident not only in the 1994 amendments to the MMPA, which target fishery take reduction efforts to strategic stocks, but also in the 1971 language explaining the views of the Merchant Marine Committee of the House of Representatives as they reported out the MMPA legislation. After finding that some stocks of marine mammals have become or may be depleted as a result of human activities, the Committee stipulated a greater concern for vulnerable stocks, stating in the section on Findings and Declaration of Policy that "measures should be immediately taken to replenish any species or population stock which has already diminished beyond [the point at which they can maintain that equilibrium at which they may be managed on an optimum sustained...basis](Report to Accompany H.R. 10420, December 4, 1971). This language underscores the priority that NMFS should afford to protecting vulnerable stocks in its choice of definitions for the ZMRG. For this reason alone, Option one is the preferable option to assure adherence to the intent of the MMPA. We can support neither Option two nor Option 3.

Justifications for selecting Option 1

As we have previously stated, option one is the most conservative for the most vulnerable stocks. We agree with the NMFS that it has added advantage of being a familiar measuring stick to those who are considering priorities for management action and resources. It is simple to calculate for each stock. Furthermore, we believe that it is scientifically justifiable. As NMFS acknowledges, model simulations indicated that it assures no more than a 10% delay in recovery (obviating the need to consider option 2). As for its being scientifically sound, in a report of a 1999 joint meeting of the Scientific Review Groups, it was noted that the use of 0.1% of Nmin for cetaceans as the definition of negligible impact for purse seine fisheries (cited as precedent for Option three) "yields similar results to the NMFS definition of the ZMRG as 10% of a stock's [PBR]" (Merrick 1999). One might expect that scientists who can analogize the essential results of what now are being called Options 1 and 3 could justify either. Thus either has scientific merit. Because it is somewhat more conservative for vulnerable stocks, we favor Option 1.

Concerns about Option 1

While we have stated our preference for Option 1, we must also raise the concern that it can yield scenarios that one would be hard-pressed to justify are "approaching zero." Under any of the options, including Option one, interactions (and thus mortalities) can continue to increase as marine mammal populations grow, while still being considered to meet the definition of the ZMRG. This would seem counter to the intent specified in the MMPA that rates be "reduced to insignificant *levels approaching zero* mortality and serious injury."

(16USC 1371 Sec. 101(a)(2) emphasis added). While we do not believe that the Congress intended this to mean that the death rate must be absolutely zero, we *do* believe that the language in the Act indicates that this is not a static concept, but is intended to ensure that mortality is always reduced to its lowest feasible level.

Under Option one, the ZMRG for California sea lions is 833. The NMFS may consider this to be *biologically* insignificant in impact, but the deaths of 833 animals should not be lightly dismissed as "insignificant." If one adds this number to the often enormous "legal" ZMRG levels for other marine mammal stocks, deaths of pinnipeds alone in the US would be in the thousands each year. These numbers would surely shock an American public who wishes to see marine mammal deaths minimized, and would not consider the deaths of thousands of marine mammals each year in the US to be "insignificant."

To address the concern that mortalities may raise with increases in population abundance, HSUS believes that if the use of technology or practices can be identified that can reduce the death rate of, for example, California sea lions from a ZMRG of 833, there is no reason that a fishery should not be compelled to use them. We would like to see NMFS incorporate this concept into the definition and would generally support similar comments to that effect that are being submitted by Oceana. Furthermore, we believe that the NMFS needs to develop a mechanism for either capping mortality at current ZMRG levels or "ratcheting" fisheries to lower levels that can be put in place as marine mammal stocks increase. This would prevent death rates from increasing ever higher as marine mammal stocks finally begin to recover.

Questions raised by NMFS in the Federal Register Notice

NMFS requested comment on whether fisheries should be considered to have met the ZMRG if they are below PBR but simply have no other methodologies available to reduce mortality and serious injury to lower levels such as the ZMRG level. We believe, in short, that the answer is "no."

There are countless examples of fisheries methodologies or technology becoming available only after statutory pressure is exerted to reduce mortalities of marine mammals to levels that fisheries may have protested are too restrictive already. For example, the situation in the Eastern tropical Pacific with tuna purse seines has improved only under pressure on the industry via strict statutory and regulatory mandates. Similarly technologies such as neutrally buoyant rope to reduce entanglement risk to right whales, and the development of pingers for use with harbor porpoise became available only after fisheries were forced to meet legal mandates. Had they been allowed to maintain a status quo in mortalities, by arguing that there were no methods available at that particular point in time to allow further reductions, then it is doubtful that any of the methods that *have* been developed would have been developed.

Indeed, in 1981, when Congress created an accommodation for the purse seine fishery in the ZMRG, the House Committee report specifically noted that "the Committee is cognizant of the need to ensure that the best marine mammal safety techniques and equipment are used in the future. With this in mind, the Committee intends that its amendment be understood to require the use of new and improved marine mammal safety techniques and equipment once they have been developed…" (Report to accompany HR 4084, September 16,1981). While this refers to the purse seine fishery, it clearly signals Congress' intent that there be no "status quo" but rather there should be a continual process of reductions even in the future. The report goes on to contrast the progress made by the purse seine fishery with the failure to make progress in other fisheries and thus it did not exempt them from the original language, stating "[t]he existing goal in the Act can properly be used to stimulate new technology for reducing the incidental taking of marine mammals." (ibid) Again, this seems to signal the intent that there be no status quo and, rather, that the goal should be seeking ever new technology that can reduce the incidental takings. The HSUS believes that this Congressional intent can be applied to the actual definition of the ZMRG such that it should not be a static number, regardless of the biological significance of the mortality rate; and further that Congress didn't intend to allow for the excuse that the ZMRG should not apply to a fishery simply because there is a lack of currently available technology.

The HSUS would strongly oppose any argument that the achievement of the ZMRG is satisfied at simply because a fishery is below the PBR and has not yet identified additional measures or technology to further reduce mortality and serious injury to the level of the ZMRG.

Conclusion

In summary, The HSUS supports the choice of Option 1, using 10 percent of PBR to define the ZMRG. We also believe that the NMFS should develop a mechanism to assure that mortalities do not simply increase as populations increase, and to consider a means of requiring the development of technology to reduce high rates of death in robust stocks. We do not believe that the temporary lack of available technology should excuse a fishery from meeting mandates to reduce mortalities to the PBR or the ZMRG. The ZMRG stands as an incentive to develop further methods of achieving the ultimate desire of the American people that marine mammal mortality and serious injury be truly incidental and unavoidable.

Thank you for the opportunity to comment on the Advance Notice of Proposed Rulemaking. Feel free to contact me if I can elaborate on any of our comments.

Sincerely,

Sharon B. Young
Marine Issues Field Director

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