MMPA Bulletin

NMFS Office of Protected Resources *November, 1994*

NMFS IS DEVELOPING REGULATIONS TO IMPLEMENT THE "FISH FIX"

The National Marine Fisheries Service (NMFS) will be holding a number of working sessions to discuss draft proposed implementing regulations for section 118 of the MMPA. Section 118 establishes the long-term regime for governing marine mammal/commercial fishing interactions. To maximize outside involvement in the drafting process, we are holding working sessions with interested parties to focus on specific issues, receive feedback on a working draft of the proposed regulations, and to solicit alternative ideas and options in addition to those presently outlined in the draft.

Working sessions will be held in Gloucester, MA, on November 19, in Silver Spring, MD, on November 30, and in Seattle, WA, on December 2 (these dates are tentative). They will focus on Section 118 regulatory concerns such as:

- defining "insignificant levels of serious injury and mortality approaching zero";
- revising the criteria for categorizing fisheries;
- developing a registration process under Section 118 which is compatible with existing state and Federal fishing permits;
- issuing authorizations to fisheries which interact with marine mammal stocks listed as endangered or threatened under the Endangered Species Act (ESA);
- developing a process for establishing Take Reduction Teams.

These working sessions are to afford NMFS staff an opportunity to receive feedback and ideas from interested groups which have a working knowledge of the legislation and its goals. They are not designed to be public hearings, nor are they intended to replace public comment and review. There will be a 90-day public review and comment period following publication of the proposed regulations in the *Federal Register*, scheduled for January 1995.

In some instances, the working draft contains more than one option for implementation of a particular issue. However, these are by no means exhaustive as we hope to encourage discussion of alternative suggestions as well as methodologies currently incorporated into the draft. If you are interested in receiving a copy of the draft-in-progress and would like to attend one of the working sessions or submit comments on the draft, contact Laurel Bryant, Permits Division, 301/713-2289, or Vicki Credle, Marine Mammal Division, 301/713-2322.

UPDATE ON STOCK ASSESSMENT REPORTS AND SCIENTIFIC REVIEW GROUPS

The 1994 amendments to the MMPA require NMFS and the U.S. Fish and Wildlife Service (FWS) to develop stock assessment reports for all marine mammal stocks in waters under the jurisdiction of the U.S. As discussed in the September *MMPA Bulletin*, availability of the draft stock assessment reports and the methodology used to determine each stock's Potential Biological Removal (PBR) level was announced in the *Federal Register* on August 9, 1994. The public comment period for this notice, originally scheduled to close November 7, 1994, is being extended to December 1, based on a request from constituent groups in Alaska.

Public comments on the methods used to develop draft stock assessment reports and to determine PBR levels are critical. These methods will form the basis for how final stock assessment reports will be developed, and will likely represent NMFS policy for an extended period. Discussion of the draft stock assessment reports and PBR methods were the focus of NMFS' first meeting with all of the regional Scientific Review Groups (SRGs) on October 12-13, 1994, in Seattle, Washington.

Overall, SRG members supported the approaches NMFS and FWS scientists used in preparing draft stock assessment reports. They offered several helpful suggestions to refine the approach that was used in preparing draft stock assessments. For instance, SRG members generally agreed that stocks need to be better defined in the area of take, but that careful consideration must be given to methods used for splitting or lumping management units. Also, survey methods should incorporate certain correction factors when a direct count is used, in order to account for animals not counted. Direct counts of pinnipeds (seals and sea lions) often miss those animals that are not hauled out on the beach when the survey is performed.

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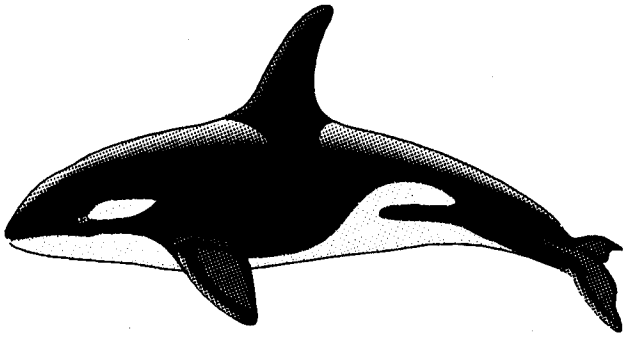
This is the second in a series of bulletins on what the National Marine Fisheries Service is doing to implement the Marine Mammal Protection Act (MMPA). This bulletin describes ongoing activities of the Office of Protected Resources to carry out certain provisions of the 1994 amendments to the Act.

To suggest future bulletin topics, or to be included on the mailing list for future editions, please contact Laurel Bryant or Tawand Hodge at the Office of Protected Resources, (301) 713-2289 or 713-2319, respectively. Or write to us at the National Marine Fisheries Service, Office of Protected Resources, 1315 East-West Highway, Silver Spring, MD 20910, Attn: MMPA Bulletin.

National Marine Fisheries Service, Silver Spring, MD 20910

SRG members criticized the approach of reducing abundance estimates when they are more than 5 years old, as it could not be supported scientifically. The members agreed that old data are unreliable and should not be used for estimating PBR; however, they did not reach a consensus on a specific method. In addition, SRG members agreed that default recovery factors were acceptable only when very little was known about the status and human-related mortality of a given stock. The groups recommended that NMFS and FWS assign recovery factors using a stock-by-stock examination of available information.

SRG members did not reach a consensus on what criteria to use to determine when fishery interactions have "insignificant levels of mortality and serious injury approaching a rate of zero". In general, they found that NMFS' method of evaluating the biological significance of incidental mortality was scientifically sound, but it may not fully address the intent of the law.



Marine mammals are particularly significant in the lives and cultures of Native Alaskans. In recognition of this, NMFS will meet with Alaska Native organizations before preparing final stock assessment reports for those marine mammal stocks affected by subsistence and handicraft uses.

When the public comment period is over, comments will be forwarded to SRG members to be evaluated for consideration in additional SRG recommendations. In December and January, the SRGs will meet once again to finalize recommendations on the process and to discuss individual stock assessment reports. Following these meetings, NMFS and FWS will review SRG and public comments and prepare guidance for final stock assessment reports.

The final reports should be completed in March, 1995. For further information, contact Tom Eagle, Marine Mammal Division, 301/713-2319.

NMFS ISSUES GENERAL AUTHORIZATION FOR SCIENTIFIC RESEARCH

On October 3, 1994, NMFS published an interim final rule for the General Authorization of scientific research under the 1994 MMPA amendments. The General Authorization provides a simplified process for authorizing research activities involving low levels of harassment (Level B).

The amendments define Level B harassment as "pursuit, torment or annoyance" having the "potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to migration, breathing, nursing, breeding, feeding, or sheltering". Scientific research activities involving no more than Level B harassment may be authorized under the General Authorization. Research activities involving Level A harassment, which is defined as having the "potential to injure", will require a permit.

The interim rule identifies research activities expected to cause no more than Level B harassment. Such activities include photo-identification studies, behavioral observations, and vessel and aerial population surveys. These research activities may be authorized through a process of notification to NMFS via certified mail. Within 30 days of receipt, NMFS will respond to the applicant as to whether the research is included under the General Authorization or whether a permit will be required. If the research includes marine mammals listed under the Endangered Species Act (ESA), activities involving no more than a Level B harassment will automatically be covered under the General Authorization when the researcher is issued a scientific research permit for such activities under the ESA.

As indicated above, the types of research to be included under the General Authorization are specifically identified in the rule. However, a more flexible option allowing NMFS to authorize other methods based on more extensive information submitted through the notification process is discussed in the preamble to the interim final rule. NMFS hopes to receive comments and suggestions regarding this alternative as well as other aspects of the interim final rule.

Due to the rigorous implementation schedule mandated by the amendments, NMFS did not have time to consult in advance with the scientific community or to seek public comment through a Proposed Rule. The agency, therefore, issued this as an interim final rule to allow for immediate implementation of the General Authorization while seeking the active involvement of the research community and the public in developing a final rule to be issued in early 1995. Prospects of issuing a joint final rule with FWS are currently being explored by both agencies.

Comments on the interim final rule must be postmarked or received by November 17, 1994. For further information, contact Ann Terbush, Chief, Permits Division, 301/713-2289.

PUBLIC DISPLAY STANDARDS AVAILABLE FOR REVIEW

On October 6, NMFS announced in the Federal Register that the American Zoo and Aquarium Association (AZA) and the Alliance of Marine Mammal Parks and Aquariums (Alliance) have submitted, for purposes of reference, the professionally recognized standards on which their members base their education and conservation programs.

The 1994 amendments to the MMPA included substantial changes with regard to the public display of marine mammals. One of these changes eliminated the requirement

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that NMFS determine whether education/conservation programs are acceptable. The MMPA now only requires persons holding marine mammals or requesting a permit to capture or import marine mammals for purposes of public display to offer a program for education or conservation purposes that is based on professionally recognized standards of the public display community. Because any person holding a marine mammal for public display is a member of the public display community, any such person may identify the professionally recognized standards on which their education or conservation program is based.

However, in approving permits for capture or imports, NMFS must determine that education or conservation programs are based on professionally recognized standards. To do this, following enactment of the 1994 amendments, NMFS contacted representatives of the public display community requesting that a copy of these standards be developed and submitted to NMFS for publication, thus enabling persons seeking marine mammals for public display purposes to reference a Notice in the Federal Register rather than having to submit a listing of such standards with each application.

NMFS contacted the AZA and the Alliance, which together represent approximately 60% of the U.S. facilities holding marine mammals for public display. NMFS recognizes that the AZA and the Alliance do not represent the entire public display community. Consequently, other members or representative organizations of the public display community may also submit alternative standards on which their education or conservation programs are based. NMFS will publish notice of such alternative standards for reference by members of the public display community. Any additional standards that are submitted as part of an application to capture or import will be published by NMFS as a part of the public notice of receipt of a permit application.

For further information, contact Ann Terbush, Chief, Permits Division 301/713-2289.

NMFS RECOGNIZES TREATY RIGHTS OF PACIFIC NORTHWEST TRIBES

On May 4, 1994, NMFS received a letter from the Northwest Indian Fisheries Commission (NWIFC) advising that treaty Indian tribes were beginning to develop harvest and management plans for local marine mammal populations, and asking for NMFS assistance in this undertaking. For many years, treaty Indian tribes in the Northwest have maintained that the MMPA does not abrogate their treaty rights to harvest marine mammals on usual and accustomed grounds.

The letter from NWIFC was precipitated by the 1994 amendments to the MMPA which state that "Nothing in this Act, including any amendments to the Marine Mammal Protection Act of 1972 made by this Act - (1) alters or is intended to alter any treaty between the United States and one or more treaty Indian tribes...."

At its June meeting, the NWIFC distributed an agenda which outlined the elements of tribal marine mammal management plans. These elements include population estimates for the units they wish to manage; estimates of annual recruitment for each management unit; a permit system that will maintain harvest within the targeted take; a reporting and inspection system that allows for both accurate accounting and needed biological sampling information to be collected; and a reporting system that provides summarized, annual harvest information to co-managers. In addition, it was indicated that tribal regulations would be necessary prior to harvest. These would include time and area openings, individual limits or tags, and biological constraints such as species, sex, size or other biological parameters.

On June 17, 1994, NMFS received a draft annual fishing regulation from the Makah tribe for the 1994/1995 season proposing to take 15 harbor seals and 10 California sea lions annually from January 1 to December 31, within the Makah tribe's usual and accustomed grounds. The draft includes notation that hunting permits will be issued to individual hunters and that the harvest will be recorded with Makah Fisheries Management.

As co-administrators of the MMPA and trustees for the tribes, the Department of Interior's (DOI) Bureau of Indian Affairs and FWS have been working cooperatively with NMFS in reviewing the relationship of the MMPA to the rights of treaty tribes. After extensive legal review, and concurrence from DOI, NMFS responded in September to the NWIFC stating that there is no clear evidence that the MMPA abrogates the Makah's tribal treaty rights of sealing at usual and accustomed grounds and stations. As such, the MMPA does not prohibit the 1994/1995 harvest proposed by the Makah tribe. In addition, neither harbor seals nor California sea lions are listed as threatened or endangered under the ESA, therefore that statute's prohibitions are not an issue.

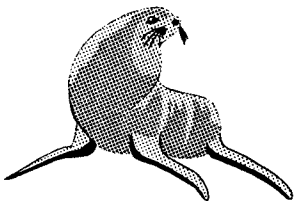
NMFS did recommend, however, that the Makah tribe establish 1994/1995 season regulations which specify biological constraints on the harvest of marine mammals. NMFS has also encouraged the NWIFC to develop regulations in their general management plans which reflect the biological constraints outlined at their June meeting, such as time/area openings,individual limits or tags, and the species, sex, and size of animals harvested.

As noted in the President's Executive Memorandum of April 29, 1994, Federal agency activities which affect Native American tribal rights "...should be implemented in a knowledgeable, sensitive manner respectful of tribal sovereignty." Although there are many outstanding issues related to the interaction of the MMPA and treaty Indian hunting and fishing rights, NMFS hopes to cooperatively resolve these issues with the tribes and pursue the establishment of effective co-management for these living marine resources.

For further information, contact Patricia Montanio, Chief, Marine Mammal Division, 301/713-2319, or Joe Scordino, NMFS Northwest Region, 206/526-6143.

PINNIPED TASK FORCE IS MEETING TO DISCUSS SEA LION - STEELHEAD CONFLICT

The Pinniped-Fishery Interaction Task Force, which is to make recommendations on the Washington State application to consider lethal removal of California sea lions preying on steelhead at the Ballard Locks (see *MMPA Bulletin*, September, 1994), is holding a four day meeting November 1 through 4, in the Building 9 - Auditorium/Conference Room, at NOAA's Western Regional Center, 7600 Sand Point Way N.E. in Seattle. The meetings will commence at 10:00 am on Tuesday and at 8:00 am on the next three days.



The Task Force has reviewed the details of the sea lion-steelhead conflict at its last two meetings, and will now concentrate its efforts on development of recommendations on lethal removal and suggestions for non-lethal alternatives, if available and practicable. All meetings are open to the public; however, the public may not discuss or debate issues with the Task Force.

The Task Force is expected to conclude its deliberations during this four-day meeting. However, if additional meetings are necessary to finalize recommendations, the Task Force will meet again on November 16-17 (location to be determined).

For further information, contact Ken Hollingshead, Marine Mammal Division, 301/713-2055, or Joe Scordino, NMFS Northwest Region, 206/526-6143.

NMFS ON FAST TRACK TO IMPLEMENT INTENTIONAL LETHAL TAKE PROHIBITION

NMFS is on a fast track to prepare regulations to implement the prohibition on intentional lethal takes contained in the 1994 amendments to the MMPA. These regulations will prohibit commercial fishers from intentionally seriously injuring or killing marine mammals in order to protect gear or catch.

Under the current interim exemption program, fishers are authorized to intentionally use lethal means to deter certain marine mammals from gear or catch, provided that all non-lethal means have been attempted. The number of animals that have been intentionally lethally taken each year, based on fishers' logbooks, has averaged approximately 250 animals. The actual numbers may be higher. Most of the animals taken are California sea lions and harbor seals.

The prohibition on intentional lethal taking of marine mammals will affect only those fisheries that use shooting or other lethal means to deter marine mammals. Fishers that have relied on shooting and other potentially lethal methods of deterring marine mammals away from fishing gear or catch will have fewer options available. NMFS is encouraging fishers to develop safer, non-lethal and non-injurious methods of deterring marine mammals. Guidance for the development of such methods will be available when NMFS publishes its proposed deterrence regulations in January, 1995.

The expected effective date of the lethal taking prohibition is January 1, 1994. For further information, contact Dean Wilkinson, 301/713-2319.

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