

REAUTHORIZATION OF THE MARINE MAMMAL PROTECTION ACT

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Reauthorization of the Marine Mamma...

HEARING

BEFORE THE

COMMITTEE ON COMMERCE,
SCIENCE, AND TRANSPORTATION

UNITED STATES SENATE

ONE HUNDRED THIRD CONGRESS

FIRST SESSION

JULY 14, 1993

Printed for the use of the Committee on Commerce, Science, and Transportation



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C O N T E N T S

	Page
Opening statement of Senator Gorton	75
Opening statement of Senator Hollings	2
Opening statement of Senator Kerry	1
Opening statement of Senator Stevens	3
Prepared statement of Senator Cohen	76

LIST OF WITNESSES

Foster, Dr. Nancy, Acting Assistant Administrator for Fisheries, National Marine Fisheries Service	3
Prepared statement	6
Gilman, Brad, the Gulf of Alaska Coalition	52
Prepared statement	53
Hofman, Dr. Robert J., Scientific Program Director, Marine Mammal Commission	11
Prepared statement	13
Iudicello, Suzanne, Senior Program Counsel, Center for Marine Conservation	41
Prepared statement	43
Kaelin, Jeff, Executive Director, Maine Sardine Council	61
Prepared statement	64
Thornburgh, Guy N., Executive Director, Pacific States Marine Fisheries Commission	48
Prepared statement	50
Young, Sharon, on behalf of the Marine Mammal Protection Coalition	68
Prepared statement	70

APPENDIX

Sierra Club, prepared statement of	93
Stansbury, Dina, Executive Director, Friends of the Sea Otter, prepared statement of	95

REAUTHORIZATION OF THE MARINE MAMMAL PROTECTION ACT

WEDNESDAY, JULY 14, 1993

U.S. SENATE,
COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION,
Washington, DC.

The committee met, pursuant to notice, at 1:13 p.m. in room SD-628, Dirksen Senate Office Building, Hon. John F. Kerry presiding. Staff members assigned to this hearing: Lila H. Helms and Penelope D. Dalton, professional staff members; and John A. Moran, minority staff counsel.

OPENING STATEMENT OF SENATOR KERRY

Senator KERRY. The hearing will come to order. My apologies for being a little late.

We are back again for the reauthorization of the Marine Mammal Protection Act. I think we come here, all groups interested in this, with an understanding that since its implementation in 1972 it has really been pretty successful in protecting and conserving marine mammal populations.

We have reexamined this act in the past, and we have reauthorized it in the past, so we review that process today with a certain amount of history, and today we come more narrowly focused on the need for amendments to the act in order to establish a new regime to govern the incidental taking of marine mammals in commercial fishing efforts.

I am not going to go through the history of the act, except to say that we would all agree that with respect to most species we have learned a lot and have been pretty successful in our effort to preserve and protect while remaining sensitive to some of the needs of our fishing folks.

In 1988, in an effort to respond to the concerns of fishermen, a lot of the restrictions were lifted in the moratorium. Now we are at the critical point where the interim exemption expires in a few months, and the fishing folks could be stopped from fishing and the fisheries could be closed altogether.

Needless to say, we need to come up very quickly with an understanding of whether the new regime proposed by NMFS is the way to go, or whether the industry/conservation working group has an alternative proposal governing interactions that may in fact be better. The purpose of the hearing today is to examine both sides of this issue and to try to get a sense of where we go.

We are going to hear from the acting head of the National Marine Fisheries on the recommendations of NMFS with respect to

the amendments, then we will hear from representatives of the working group on their counterproposal, and finally from representatives of the conservation group's concerns about both of these proposals. We look forward to a good working session today. Mr. Chairman, your comments, please.

OPENING STATEMENT OF SENATOR HOLLINGS

Mr. CHAIRMAN. Today, we begin consideration of the reauthorization of the Marine Mammal Protection Act. The task at hand is not an easy one. There are no simple solutions to reducing interactions between marine mammals and fishermen.

This hearing will focus on the need for MMPA amendments to establish a new regime governing these interactions. The MMPA was enacted in 1972 in response to increasing popular sentiment and growing concern for the welfare of marine mammals. The act notes the adverse impact of human activities on some marine mammal populations, and the need to restore those populations that have been severely depleted.

A comprehensive Federal program to conserve marine mammals has been established by the MMPA. The central feature of the Federal program is a moratorium on the taking of all marine mammals by persons subject to U.S. jurisdiction. In addition, the moratorium on the taking or importation of marine mammals may be waived under certain conditions. One of these conditions—the one we are addressing in today's hearing—is the incidental taking of marine mammals in the course of commercial fishing operations.

Everyone in this room recalls that a Federal court ruled in 1987 that a permit could not be issued if there was a chance that fishermen would take marine mammals from a depleted population. As a result of that ruling, Congress amended the MMPA in 1988 to provide a 5-year exemption to commercial fishermen while the National Oceanic and Atmospheric Administration and Congress addressed the issues raised by the court decision. The 5-year exemption allowed the nonintentional killing of marine mammals during fishing operations and required fishermen to carry observers and collect better scientific data on populations of marine mammals and the interactions between marine mammals and fisheries. This statutory exemption expires on October 1, 1993.

In addition to the interim exemption, the 1988 amendments required the Secretary of Commerce, after consultation with the Marine Mammal Commission, to submit to Congress a proposal for a permanent regime to govern the interactions between marine mammals and commercial fishermen. That proposed regime was forwarded to Congress on December 4, 1992. Both the conservation community and the fishing industry expressed serious concerns about the Department of Commerce proposal and responded by establishing a working group of industry and conservation representatives who negotiated an alternative proposal.

Today, we will hear from NOAA and from the authors of the negotiated alternative on the options they would like Congress to pursue in revising the MMPA to manage the interaction between commercial fisheries and marine mammals. I look forward to hearing suggestions on implementing a new regime that allows fishing operations to continue while maintaining marine mammal protection.

Thank you, Mr. Chairman.

Senator KERRY. Thank you, Mr. Chairman. As usual, my friend and very interested partner in these issues from Alaska is here. I would ask if you have any opening comments.

OPENING STATEMENT OF SENATOR STEVENS

Senator STEVENS. Thank you, Mr. Chairman. I am pleased to be here again with you.

I believe this is the way to fashion legislation. We have the proposal that has been worked out by the agency, and now we have another proposal worked out by the environmental community and the fishing industry.

I look forward to being able to join you and Senator Hollings and other interested members of the committee in proposing legislation to deal with this issue. It is essential that we do deal with it this year.

Today's testimony will be the start of a long process which will resolve this issue here and in the House. I am pleased to be with you.

Again, I congratulate you, because I think it is very good that we get on this as early as possible and that the MMPA be further amended to include this new agreement as it is fashioned here today. I assume the service is going to be willing to yield a little bit and that we are going to find some way to mesh these proposals together, so thank you very much.

Senator KERRY. Thank you, Senator Stevens. I agree. I hope we can find good ground. I think there is, as I sat and looked at these issues, so let us proceed.

Dr. Foster, thank you for being with us today. Dr. Hofman, likewise. We appreciate it.

Without further ado, we turn to you for your opening statements?

STATEMENT OF DR. NANCY FOSTER, ACTING ASSISTANT ADMINISTRATOR FOR FISHERIES, NATIONAL MARINE FISHERIES SERVICE; ACCOMPANIED BY DR. THOMAS EAGLE, FISHERY BIOLOGIST, NATIONAL MARINE FISHERIES SERVICE

Dr. FOSTER. Thank you, Mr. Chairman.

As you indicated, I do know my name sometimes. My name is Nancy Foster, and at the present time I am the Acting Assistant Administrator for Fisheries.

I want to tell you how much I appreciate this opportunity to appear before this committee to talk again about the MMPA. I am just going to summarize briefly some of my remarks, and I have submitted my testimony for the record.

Senator KERRY. Without objection, the full testimonies will be placed in the record as if read.

Dr. FOSTER. Thank you.

As you indicated, when we set about the business of coming up with our proposal to replace the interim exemption, we knew that we had to do two things. We had to come up with a proposal that adequately protected marine mammals and one that did so allow-

ing commercial fishing to go on, and also a proposal that did not unduly restrict commercial fisheries.

Based on Marine Mammal Commission guidelines we did develop this proposal a little late, but we got it here this December 1992. I would like to just touch on a few key points in that proposal that we think are significant.

When we set about doing the proposal, we knew that any proposal that worked would have to do certain things and would have to have certain elements: one, we had to have an ability in the proposal to focus our agency resources on the marine mammal stocks that were most critically affected.

We also had to have a mechanism in the proposal to allow us to update the status of the stocks to determine how many animals could safely be removed from a population without disadvantaging the stock. Then we needed to be able to monitor the incidental removals from the populations.

We also know that we could not consider commercial fishing outside the context of other human-related takes, so we have an element in the proposal that calculates the total number of animals that can be removed from a population by all forms of taking and still not disadvantage the stock.

We conducted a quite lengthy and extensive public and scientific review of the potential biological removal calculation, and then additional review of our allocation plans.

We were very careful in our proposal to make sure that we were consistent with the MMPA's goal to reduce mortality and serious injury to insignificant levels approaching the rate of zero. One way we went about this was, in looking at our research program, realizing that over the years our research objectives would shift from looking at stock assessments, doing stock assessment work, to looking at efforts that would be designed to reduce incidental mortality such as gear designs. This would allow us to be ahead of the curve so that we would be conserving the marine mammal stocks before they became critical.

I think one thing that is important to note is that we are here today not just looking at one proposal as you indicated. In fact, in a way we have essentially three proposals before us.

While on the one hand that may appear to complicate everybody's job, I think it is a really fantastic opportunity, because we will be able to pick and choose the very best bits from all of these approaches and come up with something that we can all live with in the future.

I also think it is important to note how pleased we are at the efforts that have taken place between the industry and the environmental community. I think that this forms excellent groundwork for us to continue to work really well together when we try to implement the proposal that finally comes out.

Now, I would like to mention just a few concerns about the negotiated proposal. In my formal testimony we go through several of what I call operational concerns, but these are things that for the most part I believe we can work out. In some instances, they are simply different ways to get to the same place, so I will not go through those now, but I will mention three fundamental concerns that we have with the negotiated proposal.

The first concern, probably the most important philosophical or practical difference between our two proposals, is the question—with whom rests the burden of proof for takes?

Under the Fisheries proposal and under the MMPA prior to 1988, it was set up so that no takes were allowed, and no takes are allowed in our proposal unless the user can demonstrate that the take is necessary and the take is not going to adversely affect marine mammal stocks.

It appears to us that under the negotiated proposal, takes would be allowed unless the Government could demonstrate that such takes disadvantaged the stock, so we see this as an important shift in the burden of proof, an important philosophical distinction that actually goes to the heart of the MMPA as it was originally conceived.

We think it is an issue that represents a significant departure, at least in this instance, away from the MMPA's precautionary principle for managing or conserving marine mammals. I think it is something that we need to look at carefully before we decide to take that step.

Second, I think it is fair to say that all of us who have worked on proposals agree that when we come up with our stock assessment reports, these documents should be subjected to scientific scrutiny and rigorous peer review before they are used by us, or before they go out for general public review.

We take the position that this review should be done by scientists with expertise in marine mammal biology and population dynamics, and scientists who are not employed by groups with vested interests in the results of the evaluation, because we are talking, after all, about science. We are not talking about policy at this particular stage.

Finally, with regard to the conservation teams, this idea is rather intriguing. We think that it has merit, and that certainly it warrants further discussions. We have had at least one discussion with the group that put this plan together, and we will be talking to them again.

Our concerns focus on the role and the makeup of these conservation teams. We believe that as currently written, the role is a bit too broad, and really is more undefined than anything else. We are concerned, again, about the representation on this team.

If you take what you read in the proposal at face value, it looks as though it is going to be a very large group, that it will include primarily representatives from special interest groups, and sometimes, depending on what role the team is asked to play, that is OK and would be a good thing. I just think we need to talk about it. I think that the conservation team idea could be made to work, depending, again, on its role.

Finally, in conclusion, I just want to say that I think it is important to recognize that there are many similarities between these proposals. We find that looking at the proposal from the third group represented here today, many of the concerns are handled by our proposal. So, I think everybody is closer together than you might imagine at first glance.

Thank you for allowing me to testify, and we will be pleased to answer any questions you might have. I have with me Dr. Thomas Eagle, who is our scientist on staff.

[The prepared statement of Dr. Foster follows:]

PREPARED STATEMENT OF NANCY FOSTER, PH.D.

Mr. Chairman and Members of the committee: I am Nancy Foster, Acting Assistant Administrator for Fisheries, National Oceanic and Atmospheric Administration (NOAA), U.S. Department of Commerce. I appreciate the opportunity to testify before this Committee.

We are here today to discuss the reauthorization of the Marine Mammal Protection Act (MMPA), which has been an important element in the conservation of our Nation's living marine resources. The MMPA establishes a comprehensive program for marine mammal protection. The MMPA recognizes that marine mammals are important elements of marine ecosystems and resources of great aesthetic, recreational, and economic significance. Furthermore, marine mammals contribute to biodiversity.

The 1988 amendments to the MMPA added section 114, which established an interim exemption to the moratorium on the taking of marine mammals incidental to commercial fishing operations through September 30, 1993. The interim exemption resulted from an agreement between some members of the environmental community and the fishing industry. It allowed commercial fishing to continue while the National Marine Fisheries Service (NMFS) gathered information on the nature and extent of interactions between commercial fishing operations and marine mammals necessary to assess the impact on marine mammal stocks.

Section 114 directed NMFS to develop a regime to govern interactions between marine mammals and commercial fishing operations after September 30, 1993. To be consistent with the major goals of the MMPA, the regime would need to provide adequate protection for marine mammals. To allow many commercial fishing operations to continue to operate lawfully, the regime also would have to permit a limited number of marine mammals to be removed incidental to fishing activities. These takings would have to be authorized, in many cases, where populations are below their optimum sustainable levels or where inadequate data are available to determine optimum sustainable populations (OSP). The regime would also have to include the ability to collect additional data and incorporate these data into future decisions.

In December 1992, NMFS submitted its "Proposed Regime to Govern Interactions Between Marine Mammals and Commercial Fishing Operations" (NMFS proposal) to Congress. Subsequently, a negotiating group, composed of representatives of the fishing industry and environmental community, submitted its proposal (negotiated proposal) in June 1993. A number of environmental groups that initially were part of the negotiating group were dissatisfied with the negotiated proposal and identified a series of concerns, which were submitted to legislative staff in late June 1993 (protection proposal). In this testimony, I will discuss the general provisions of the NMFS proposal; provisions of the other proposals; how each addresses the necessary elements of a successful management regime; and additional specific details.

NMFS PROPOSAL

NOAA provided the specifics of the NMFS proposal in testimony before the House Subcommittee on Environment and Natural Resources on April 20, 1993. I have supplied that testimony to the Committee, but would like to summarize the proposal.

NMFS has developed a management regime which would focus research and management activities where they are most needed. The immediate goal of the NMFS regime would be to determine how many marine mammals may be removed from a population stock without disadvantaging that stock and to monitor the number of incidental removals from populations. NMFS would rely on a system driven by data obtained through stock assessment research and based on stock status relative to OSP in order to determine the number of authorized removals.

For each marine mammal stock, NMFS would determine a Potential Biological Removal (PBR). The PBR is the total number of animals that may be removed from a marine mammal population by all forms of taking while allowing the stock to remain within, or recover to, OSP. Using data collected during the Interim Exemption period, NMFS would prepare Stock Assessment Reports for each stock of marine mammals that interacts with commercial fishing operations in U.S. waters and use these reports to calculate a PBR for each stock.

Where necessary data are available, NMFS would use these to calculate PBR. When necessary information is unknown or of poor quality, NMFS would use conservative default values for population growth rates to calculate PBR. PBR calculations for stocks that are determined to be below OSP levels, or for which the status is unknown, would include a recovery factor to reduce PBR for the affected stocks. The calculated PBR values would be examined for each stock and, where necessary, modified to ensure that fishing operations do not prevent the recovery of depleted stocks.

Following calculation and adjustment of PBR for each stock of marine mammals, as well as public and scientific review of the calculated values, NMFS would draft a plan to allocate a portion of PBR for marine mammal stocks to commercial fisheries. The plan would be developed in conjunction with other Federal and state agencies and Fishery Management Councils. The Councils would hold public hearings, solicit public comments, and submit recommended changes to NMFS.

The NMFS regime includes stock assessment research to determine the status of all marine mammal populations. Eventually, estimates of population growth derived from research data would replace default values of population growth used to calculate potential removals. NMFS would draft a long-term research plan to continue assessments of marine mammal stocks to update Stock Assessment Reports. All aspects of the stock assessment and PBR allocation process would be reviewed by Scientific Peer Groups composed of impartial members of the scientific community. In addition, NMFS would develop methods to assess and monitor the status of marine mammal populations on a long-term basis.

Under the proposal, NMFS would classify fisheries in terms of take rate and stocks taken in order to best focus resources on the most severe interaction problems. Fisheries that take disadvantaged stocks or large numbers of marine mammals would receive a high priority for research and management attention. NMFS would have the authority to place observers on any fishing vessel operating in U.S. waters. Priorities for observer coverage would depend upon a fishery's level of interaction and the status of interacting marine mammals. Fishermen in those fisheries not subject to observer coverage would be required to maintain information concerning fishing effort and interactions with marine mammals and to submit this information to NMFS.

The proposal contains provisions to authorize the taking of depleted marine mammals, including those listed as threatened or endangered under the Endangered Species Act (ESA). Procedures for this authorization would adhere to requirements of section 101(a)(5) of the MMPA and section 7 of the ESA for listed species.

The non-lethal taking of marine mammals would be allowed under the proposed regime to deter marine mammals from damaging the fishermen's gear or catch or to provide for personal safety. The proposed regime also would authorize intentional lethal taking of some marine mammals for personal safety or if fishermen can demonstrate that marine mammals cause a significant negative impact on the fishery and non-lethal measures were tried and proven to be ineffective. Lethal removals would be allowed only if they were within the allocated PBR. As is currently the case in the MMPA, intentional lethal taking of any cetacean or depleted pinniped, including those listed as threatened or endangered, would not be allowed.

Finally, the proposed regime contains provisions to reduce the taking of marine mammals incidental to commercial fishing operations, consistent with the goal of the MMPA to reduce mortality and serious injury to insignificant levels approaching a rate of zero. Under the proposed regime, the major objective of research efforts will eventually shift, as our knowledge increases, from assessing populations and determining the impact of incidental removals on population status to efforts designed to reduce mortality incidental to fishing operations. Any critical problems, once identified, would be addressed in a timely manner.

NEGOTIATED PROPOSAL

Representatives of the conservation and fishing communities formed a negotiating group to discuss the issue of MMPA reauthorization. As a result of these discussions, the negotiating group developed its own proposal for managing interactions between commercial fisheries and marine mammals to replace the Interim Exemption upon its expiration.

The group's stated goals were to develop a management system that would reduce mortality and serious injury rates to insignificant levels approaching zero, and to take aggressive action to decrease the need to list species as threatened or endangered under the ESA. The most immediate focus of management actions is on marine mammal stocks that are in decline or at low population levels, but which are not yet listed under ESA.

Specifically, the group set forth a program to authorize incidental takes of marine mammals dependent on population levels. In order to ensure that takes do not adversely affect marine mammal stocks, the proposal calls for NMFS to develop and publish a preliminary stock assessment of all marine mammal populations occurring in U.S. waters, using the best available data. The assessments would include mean population estimates, a "Realistic Minimum Population Estimate," an estimate of the annual net productivity rate (if available), estimates of total lethal take for all marine mammal stocks, a list of critical and non-critical stocks, and proposed recovery factors for each stock not at OSP. Final assessments would be published after review and comment.

The group also proposed the establishment of Conservation Teams for all critical stocks. These teams would advise the Secretary of Commerce concerning all conservation measures needed for critical stocks. The teams' primary purposes would be to review the scientific information for stocks and identify problems and mitigation measures to help critical stocks attain non-critical status. Teams would be charged with reducing lethal takes below the calculated removal level, and reducing incidental fishing mortality to an insignificant rate approaching zero within ten years. Teams would remain in place until a stock is removed from the critical list, meeting at least annually to review progress.

In the negotiated proposal, intentional lethal taking of marine mammals by fishermen would be prohibited. The negotiated proposal, however, contains a process to authorize intentional lethal taking of individually identified, non-depleted pinnipeds by government agencies under special circumstances.

COMPARISON TO NMFS PROPOSAL

The most important philosophical and practical difference between the NMFS proposal and the negotiated proposal is with whom the burden of proof to take action lies. Under the NMFS plan, as with the MMPA prior to the 1988 amendments, no takes are allowed unless the user is able to demonstrate that the take is necessary and will have no adverse impacts on marine mammal stocks. Under the negotiated proposal, all takes would be allowed unless NMFS demonstrates that there will be an adverse impact on a stock. This is an important philosophical distinction and involves a major principle underlying the MMPA concerning the protection of marine mammals. Placing the burden on those entities that wish to take marine mammals provides a significantly added measure of protection for marine mammal stocks for which data are uncertain and fiscal and personnel resources are limited. In addition, the proposals differ in their approach to vessel registration and observer requirements.

Aside from this major difference, the negotiated proposal does not differ greatly from the NMFS proposal. Both proposals recognize the need to focus efforts and resources on stocks that are most affected by fishery interactions, and also to consider and evaluate all human related sources of mortality or injury. Both proposals provide for short-term assessments of stock status. However, the negotiated proposal focuses effort only on short-term monitoring of critical stocks, while the NMFS proposal provides not only for such monitoring but also for long-term monitoring of all marine mammal stocks to ensure their recovery to, or maintenance within, OSP. Each proposal advocates the development and implementation of management actions and technologies designed to reduce the rates of incidental mortality and injury of marine mammals in commercial fishing operations to insignificant levels. Finally, both proposals work within the framework of existing laws, namely the MMPA and ESA, to accomplish these conservation measures with minimal disruption to fishing operations.

While the negotiated proposal is consistent with and shares the overall vision of the NMFS long-range plan, the two proposals take different approaches to solving many of the problems they cite. For example, the negotiated proposal contains three different processes to authorize the taking of marine mammals incidental to commercial fishing: (1) a general permit approach for stocks within OSP; (2) ESA section 7 consultations for threatened and endangered species of marine mammals; and (3) an undefined authorization process for other stocks to be developed by Conservation Teams.

This aspect of the negotiated proposal could lead to complex management problems. If a given fishery interacts with more than one stock of marine mammals, as do most, then several processes may be required. This could be problematic if, for example, the Conservation Teams for two or more stocks of marine mammals of unknown or depleted status recommended different authorization processes. In addition, if a variety of application/registration processes are allowed, construction of a central data base may be impossible. The negotiated proposal would rely on existing

State data bases, rather than the centralized registry developed by NMFS during the Interim Exemption. The lack of uniform information is a liability of the negotiated proposal. The NMFS proposal would require mandatory registration of all fisheries that interact with marine mammals. This would ensure compliance with basic procedures for conservation and would facilitate compilation of a useful and complete database. The protection proposal supports the NMFS approach.

We believe the negotiated proposal's time frame for publishing preliminary and final stock assessment reports is unrealistic. The negotiated proposal would require preliminary stock assessments within 45 days and final status assessments for all stocks of marine mammals within 90 days of enactment. At a minimum, developing draft status documents and final assessment documents would likely require 90 and 180 days, respectively.

All groups agree that draft status assessment reports should be subjected to scientific scrutiny, and thorough review by a team of experts. The negotiated proposal would utilize a Scientific Evaluation Working Group. The NMFS proposal called for a similar evaluation group, the Scientific Peer Review Group, to be composed of scientists with specialized expertise. The negotiated proposal does not specify any qualifications for participation on the review group, but NMFS believes the group should consist of scientists with experience in marine mammal biology and population dynamics.

The negotiated proposal's Conservation Teams would recommend management actions for critical stocks to the Secretary of Commerce. The Secretary could then accept or reject these recommendations and publish regulations for notice and comment. In the NMFS proposal, input from interested parties would be received during the notice-and-comment period and public hearings consistent with the Administrative Procedures Act (APA). The protection proposal would include input from Conservation Teams, but recommends that such advice be provided on a regional basis and that recommendations be restricted to methods of reducing mortality and injury of marine mammals.

The major advantage of convening Conservation Teams is that they would encourage the affected parties to participate in the problem-solving process more than might occur under the APA alone. The major disadvantage is increased costs in time and money. Any investment in these teams may come at the expense of other areas of the management program, such as population assessments, observer coverage, or mortality reduction technology. Allowing representatives with vested interests to recommend management actions may not be best for the long-term conservation of marine mammals. Therefore, NMFS recommends that if Conservation Teams are established, they be regional, they be limited to a small number of members, and their role be limited as suggested by the protection proposal.

PROTECTION PROPOSAL

Fifteen environmental groups, several of which were part of the negotiating group, were dissatisfied with the negotiated proposal. The protection proposal cites seven concerns with the negotiated proposal which might reduce its effectiveness. These concerns are very similar to those of NMFS.

The protection proposal calls for: (1) mandatory registration of all fishing vessels, regardless of level of interaction with marine mammals; (2) a centralized registration system for more efficient tracking of fishing effort; (3) mandatory observer coverage of all fisheries; (4) development of regional Conservation Teams which would have an advisory role targeted to developing strategies for reducing interactions within their region; (5) funding specifically earmarked for research into development of technology to reduce marine mammal mortality; (6) mandatory long range stock assessment programs; and (7) no permits for the lethal taking of stocks listed as threatened or endangered and a stringent process for permitting takes from depleted stocks.

ELEMENTS OF AN IDEAL PROPOSAL

Despite the differences among the three proposals, they share essential components and offer valuable contributions to the design of a viable regime for managing interactions between marine mammals and commercial fishing. Taken together, the proposals reinforce important concepts that we all agree must be exhibited in a management regime. By differing, they provide constructive criticism of potentially weak or missing elements of a successful regime. This is not surprising since the development of NMFS' proposed regime over the past two years resulted from public notice and comment in addition to numerous consultations with interested parties. This process of give and take has produced a strong workable product, and I believe,

influenced the key features of the alternative proposals. I would like to discuss our views on the critical elements distilled from these proposals.

Available resources must be focused where they are needed most. The NMFS proposal focuses resources on those fisheries with the greatest interaction with marine mammal stocks of most concern. The negotiated proposal limits the focus to marine mammal stocks of most concern.

A successful management regime must also contain requirements for assessing the status of marine mammal stocks, obtaining accurate scientific data, and providing funding for such activities. While all proposals set forth requirements for stock assessments to determine management priorities, there must also be a legally binding mandate to assure that research would be undertaken if funds are limited. The protection proposal stressed the importance of dedicating funds to monitor population trends in order to make OSP determinations and to ascertain stocks in need of the greatest attention, and indicated that without a legislative mandate to provide for long range stock assessment, vital goals of the MMPA may not be attained.

Priorities must be established under any plan, and under the NMFS proposal, management priorities would be determined by assessing the status of each marine mammal stock with respect to OSP and affording highest priority to the most critical populations. A workable approach must also consider short- and long-term data needs through a long-term research plan coordinated with annual research efforts according to a rational schedule for completion of all stock assessments. All research plans and reports describing research activities should be made available for peer and public review. The stock assessments should be conducted in accordance with sound scientific principles and adequately funded so that there would be no doubt that the research would be completed in a thorough and timely manner.

Another vital element for a successful management regime is a mechanism for using the scientific data collected through the stock assessment program to determine potential take levels. Such determinations need to be made by qualified marine mammal scientists in accordance with sound scientific principles. Any responsible management approach must have a framework for calculating the total number of animals that may be removed from marine mammal populations while allowing the stock to remain within, or recover to, OSP. This allowable number, whatever it is called, must be calculated using reliable data where available, or conservative default values. For stocks of uncertain status or which are below OSP levels, the calculations should include a recovery factor so that a portion of the net annual production will be protected, thus enhancing the recovery of depleted stocks. The calculations should be subjected to rigorous peer and scientific review before becoming final, to ensure accountability and fairness.

Any regime needs to provide for observer monitoring of takes to verify the level of interaction between vessels and marine mammals, ensure that quotas are not exceeded, and confirm that management efforts are focused on priority interactions. However, to be successful, the observer program must be effectively deployed, adequately funded, and legally mandated under the MMPA. For example, the observer program could be a limited, stock-based monitoring program in which advisory groups could recommend the use of observers for critical stocks and NMFS would have the discretion to monitor others. At the other extreme, a more extensive, fishery-based program that would institute mandatory observer coverage of all fisheries could be required. The most efficient approach is probably observer coverage that is fishery-based rather than stock-based, and that potentially subjects all fisheries to monitoring but that focuses on those fisheries with significant interactions with marine mammals. Monitoring all fisheries would be prohibitively expensive and an unwise use of resources. For example, NMFS believes that resources would be best allocated by providing a higher level of observer coverage on those fisheries with known high levels of marine mammal interactions, and occasional monitoring of other fisheries.

Although the regime would apply only to commercial fishing, the impact of fishery-related removals of marine mammals cannot be evaluated and managed properly unless done in concert with removals from all other sources of human-related mortality or serious injury, such as subsistence harvest and vessel traffic. In addition, the indirect effects of human activity in the marine environment should also be considered because exploitation of marine resources may degrade marine mammal habitat and prey availability. All proposals recognize the importance of considering these interactions in developing a viable management regime.

The regime must be consistent with requirements of the MMPA, the ESA and other statutes related to the conservation and management of marine resources such as the Coastal Zone Management Act. Ideally, the regime would establish a reasonable administrative framework to permit some removals from disadvantaged stocks, yet preserve the special protections provided by each statute in order to pro-

tect marine mammal species of concern. All proposals recognize the need to extend special protection to disadvantaged stocks, and to authorize the taking of depleted marine mammals. However, the mechanisms differ. For example, NMFS' procedures for this authorization would adhere to requirements of section 7 of the ESA when appropriate and section 101(a)(5) of the MMPA. The negotiated proposal would forego MMPA mechanisms and use the ESA section 7 consultative process to develop reasonable and prudent measures related to fishing when incidental take of threatened or endangered marine mammals occurs. In contrast, the protection proposal would not authorize taking of marine mammals listed under the ESA; however, the Secretary would retain discretion to waive prosecution for accidental takes in fishing operations.

Study and planning alone will not reduce marine mammal takes. To achieve the goals of the MMPA, the management regime must also provide for developing and implementing actions or technologies designed to reduce incidental mortality of marine mammals in commercial fishing operations. Both the NMFS and negotiated proposals discuss two approaches to reduce bycatch of marine mammals in fishing operations: (1) restrictions to ensure that incidental mortality does not exceed a PBR level; and (2) development of safer fishing gear and methods. Both proposals generally discuss the need for the latter, but differ in approach to the former. NMFS proposed to estimate this PBR and allocate portions of this number among activities that use marine resources. The negotiated proposal included fishery-specific limits for incidental mortality of marine mammals as a tool for the Conservation Teams.

CONCLUSION

The Interim Exemption Program provided an opportunity for us to gather crucial information on marine mammal stocks, fishing efforts and interactions. Based on this information, and through exhaustive technical and public review, NMFS developed a proposed regime to govern interactions between marine mammals and commercial fishing operations. A group composed of members of the fishing and environmental communities negotiated an alternative proposal that included many aspects of the NMFS proposal. Several environmental groups that were part of the negotiating team did not support details of the negotiated proposal and developed specific alternatives to controversial details, most of which supported the NMFS proposal.

Although many of the elements of the NMFS and negotiated proposals are similar, there are major differences between them. In summary, NMFS is concerned with the following elements of the negotiated proposal:

(1) The philosophical and practical shift of the burden of proof. The negotiated proposal would authorize taking unless it could be shown that the taking would delay or prohibit recovery.

(2) The Scientific Evaluation Working Group. This group should be composed only of scientists with expertise in marine mammal population dynamics and who are not employed by organizations with a vested interest in the results of evaluation.

(3) The Conservation Teams. These teams have the advantage of encouraging the participation of affected parties. However, the role of these groups is too broad and undefined. Allowing representatives of involved groups, without specifying qualifications, to recommend all management actions would not be the best approach for the conservation of marine mammals. If the groups were assigned only review authority, then input from interested parties would be appropriate. However, if the groups initiate proposed management actions, then special-interest influence should be removed.

Thank you Mr. Chairman and Members of the Committee for this opportunity to express the views of the Department. I would be pleased to answer any questions you or other Members may have.

Senator KERRY. Thank you very much, Dr. Foster.

Dr. Hofman, you are joined by Michael Gosliner, and we are delighted to have you.

STATEMENT OF DR. ROBERT J. HOFMAN, SCIENTIFIC PROGRAM DIRECTOR, MARINE MAMMAL COMMISSION; ACCOMPANIED BY MICHAEL GOSLINER, GENERAL COUNSEL, MARINE MAMMAL COMMISSION

Dr. HOFMAN. Thank you, Mr. Chairman, Mr. Stevens.

Like Dr. Foster, it is a pleasure to be here. Like her, I also know my name. I am Bob Hofman. I am the Scientific Program Director

from the Marine Mammal Commission. Mike Gosliner is the Commission's General Counsel.

The Commission was asked to provide an assessment of both the National Marine Fisheries Service's proposed regime to govern interactions between marine mammals and commercial fisheries after October 1, and the alternative regime proposed by representatives of the fishing industry and certain environmental groups.

In my written statement, I detailed some of the background of the two proposals, including the guidelines that the Commission provided to the National Marine Fisheries Service as directed by the 1988 Marine Mammal Protection Act amendments.

The proposals are similar in many respects. Both, for example, would afford priority attention to stocks that are endangered, threatened, or depleted, and likely to be jeopardized further, or that are likely to become endangered, threatened, or depleted if steps are not taken to reduce taking.

Also, both would continue the Marine Mammal Protection Act goal of reducing the mortality and serious injury of marine mammals incidental to commercial fishing operations to insignificant levels approaching zero.

Both proposals also would authorize the incidental take of depleted as well as nondepleted species in certain situations and would establish a straightforward procedure for conservatively calculating biologically acceptable removal levels when the status of the relevant stock is unknown or is uncertain.

The proposals differ in a number of very substantive ways. Under the joint industry/environmental community proposal, for example, owners of vessels that engage in fisheries that take marine mammals would not be required to register and would not be in violation of the Marine Mammal Protection Act if they engaged in fisheries that take marine mammals without registering.

Under the industry/environmental group proposal, marine mammal stocks which interact with fisheries would be classified according to their size, trends, and the level of incidental take. Fisheries would not be classified according to the frequencies that they take marine mammals, as they would be under the regime proposed by the National Marine Fisheries Service.

Under the industry/environmental community proposal, marine mammal stocks that are endangered or threatened and likely to be further jeopardized, or that are likely to become endangered or threatened as a result of incidental taking, would be designated as critical stocks and receive priority attention.

Conservation teams, as Dr. Foster indicated, would be established to develop conservation plans for each stock so designated but not yet listed as or not endangered or threatened under the Endangered Species Act.

As Dr. Foster indicated, conservation teams would include representatives of the affected fisheries and interested environmental groups.

The principal responsibility of the conservation teams as we understand it would be to develop and oversee implementation of strategies to reduce the incidental taking of marine mammals to insignificant levels approaching zero within 10 years.

As the Commission understands it, under the joint industry/environmental community proposal, fishermen would be authorized to take marine mammals not listed as endangered or threatened under the Endangered Species Act without restriction provided that they report any lethal taking. This is in part the issue that Dr. Foster referred to as the burden question.

Restricting take would require that an affected stock be designated a critical stock, that a conservation team be established and agree that taking must be restricted to prevent the stock from becoming endangered or threatened, and that the conservation team recommends and the National Marine Fisheries Service then promulgates regulations to restrict take.

On a related matter, the industry/environmental community proposal apparently assumes that there will be no need, and it makes no explicit provision, for allocating the allowable take among various fisheries and other possible user groups.

Finally, under the joint industry/environmental community proposal, the National Marine Fisheries Service would be given discretionary authority but would not actually be required to develop and implement an observer program or a program for assessing and monitoring the status of the affected marine mammal stocks.

In general, the Commission believes that the regime proposed by the National Marine Fisheries Service would be more workable and actually cheaper to implement than the alternative regime proposed by the fishing industry and environmental groups. However, the Commission also believes that the service's proposal could be strengthened by incorporating several of the elements from the fishing industry/environmental community proposal.

The Commission believes, for example, that it would be useful to constitute regional groups along the lines of the conservation teams described in the industry/environmental community proposal to develop and overview implementation of long-term strategies for reducing incidental take to as near zero as practicable.

If necessary, these regional groups also could be asked to consider and provide advice to the service on allocation of take if current levels of take are greater than the biologically acceptable level.

That finishes this brief summary, Mr. Chairman. If you or Mr. Stevens or others have questions, I would be happy to try to answer them.

Thank you.

[The prepared statement of Dr. Hofman follows:]

PREPARED STATEMENT OF ROBERT J. HOFMAN, PH.D.

I am Robert Hofman, Scientific Program Director of the Marine Mammal Commission. I appreciate this opportunity to present the Marine Mammal Commission's views regarding the system that should be used to govern interactions between marine mammals and commercial fisheries after expiration of the interim, five-year exemption enacted in 1988.

BACKGROUND

When the Marine Mammal Protection Act was enacted in 1972, it was recognized that marine mammals were taken incidentally in several fisheries, particularly the yellowfin tuna purse seine fishery in the eastern tropical Pacific. It also was recognized that prohibiting such take could impair commercial fisheries and have significant socio-economic impacts. Thus, the Act provided that the Secretaries of the Interior and Commerce could issue permits authorizing the incidental taking of non-de-

pleted species and stocks when the taking would not disadvantage them—i.e., cause the stocks to be reduced below their optimum sustainable population level. It also was recognized that, at least in some cases, incidental take might be avoided or reduced by altering fishing gear or practices. Thus, one of the goals of the Act is to reduce the incidental kill and serious injury of marine mammals permitted in the course of commercial fishing operations to as near zero as practicable.

During Marine Mammal Protection Act reauthorization hearings held in 1981, representatives of the U.S. fishing industry noted that many fisheries caught only small, biologically insignificant numbers of marine mammals and that it was burdensome to require fishermen involved in those fisheries to go through the same permitting procedures necessary to ensure that fisheries taking large numbers of marine mammals do not disadvantage the affected species or population stock. This made sense and the Act was amended in 1981 to allow the Secretaries to authorize the unintentional taking of small numbers of non-depleted marine mammals incidental to commercial fishing operations when, after notice and opportunity for public comment, the Secretary finds that the total of such taking would have a negligible impact on the affected species or population stock, and provides guidelines for establishment, by the involved fishermen, of a cooperative system for monitoring the taking.

Subsequently, a number of studies were undertaken to assess and monitor the species and numbers of marine mammals being taken incidentally in both U.S. fisheries and fisheries in other parts of the world (e.g., in the large-scale, high seas driftnet fisheries in the North Pacific). These studies indicated that incidental take was more common than had previously been thought and that, in some cases, the number of animals being taken was much greater than thought. For example, studies done in the early and mid-1980s indicated that there was a substantial incidental take of harbor porpoise in gill net fisheries in both California and New England.

In 1987, a permit issued by the Department of Commerce to the Federation of Japan Salmon Fisheries Cooperative Association authorizing the incidental take of Dall's porpoise in the Japanese North Pacific salmon driftnet fishery was challenged successfully in a lawsuit filed by the Kokechik's Fisherman's Association, representing Alaska subsistence fishermen, and several environmental groups. The court found that issuing the single-species permit violated the Marine Mammal Protection Act because other species for which a permit could not be issued (e.g., northern fur seals) would inevitably be caught if the Japanese were allowed to fish as authorized by the permit.

The court's decision overturned a long-standing National Marine Fisheries Service' interpretation of the Marine Mammal Protection Act's permit provisions and cast serious doubt on the Service's ability to issue incidental take permits for other fisheries, including several domestic fisheries whose permits were to expire at the end of 1988. For some fisheries, there was insufficient information to determine what species of marine mammals were likely to be taken incidentally. In other cases, it appeared that there were insufficient data to make the required determination that the affected marine mammal species and population stocks were within their optimum sustainable population range and would not be disadvantaged as a result of the incidental taking. In addition, small numbers of depleted species for which incidental take permits could not be issued were known to be taken incidentally in some fisheries.

In response to the uncertainties raised by the Kokechik decision and the growing recognition that incidental take levels were greater in some fisheries than previously thought, representatives of the U.S. fishing industry and environmental community jointly proposed in 1988 that Congress exempt U.S. fishermen from the general permit and "small take" provisions of the Marine Mammal Protection Act for a period of three years while gathering information needed to make the required determinations. In response, Congress amended the Marine Mammal Protection Act in 1988 to exempt most U.S. commercial fisheries from the general permit and "small take" provisions of the Act for a period of five years. The three-year exemption period proposed by the fisheries and environmental groups was increased to five years to provide more time to gather and evaluate necessary information.

The 1988 amendments directed that the National Marine Fisheries Service classify all U.S. fisheries according to the frequency that they take marine mammals. They required that owners of vessels engaged in fisheries that take marine mammals more than rarely must register with the Service and obtain an exemption certificate. They also required that vessel owners report incidental taking and provide such other information as determined necessary by the National Marine Fisheries Service to reliably determine the nature and extent of the incidental take problem. In addition, the amendments required that the Service develop an observer program to verify the reliability of the data reported by fishermen.

The Marine Mammal Commission was directed to develop and make available to the Secretary and to the public recommended guidelines to govern the incidental taking of marine mammals in the course of commercial fishing operations, other than those subject to section 104(h) (2) of the Act, after October 1, 1993. The amendment specified that the guidelines:

- “(A) be designed to provide a scientific rationale and basis for determining how many marine mammals may be incidentally taken under a regime to be adopted to govern such taking after October 1, 1993;
- “(B) be based on sound principles of wildlife management, and be consistent with and in furtherance of the purposes and policies set forth in this Act; and
- “(C) to the maximum extent practicable, include as factors to be considered and utilized in determining permissible levels of such taking—
 - “(i) the status and trends of the affected marine mammal population stocks;
 - “(ii) the abundance and annual net recruitment of such stocks;
 - “(iii) the level of confidence in the knowledge of the affected stocks; and
 - “(iv) the extent to which incidental taking will likely cause or contribute to their decline or prevent their recovery to optimum sustainable population levels.”

The Commission, in consultation with its Committee of Scientific Advisors, developed and, in January 1990, provided draft guidelines to the National Marine Fisheries Service and other interested parties, including fisheries groups and environmental organizations, for review and comment. The guidelines were revised and finalized, taking into account comments on the draft. The recommended guidelines were provided to the National Marine Fisheries Service in July 1990. The Commission also prepared and provided the Service a summary of the substantive comments it had received on the draft guidelines and an explanation of how those comments had been addressed.

In its recommended guidelines, the Commission noted, among other things, that Congress had directed that the guidelines be based upon sound principles of wildlife management, and be consistent with and in furtherance of the purposes and policies of the Marine Mammal Protection Act. In this context, the Commission called attention to the “New Principles for the Conservation of Wild Living Resources” formulated during two 1975 workshops sponsored by the President’s Council on Environmental Quality, the World Wildlife Fund-U.S., the Ecological Society of America, the Smithsonian Institution, and the International Union for the Conservation of Nature and Natural Resources (Holt, S. J. and L. M. Talbot. 1978. *New Principles for the Conservation of Wild Living Resources*. Wildlife Monographs No. 59. 33 pp.).

After noting both the New Principles and the intents and provisions of the Marine Mammal Protection Act, the Commission expressed the view that it would be appropriate in certain cases to allow the incidental taking of depleted as well as non-depleted species and population stocks of marine mammals and that the general objectives of the regime to govern marine mammal-fisheries interactions after 1 October 1993 should be to:

1. maintain the fullest possible range of management options for future generations;
2. restore depleted species and populations of marine mammals to their optimum sustainable level with no significant time delays;
3. reduce the incidental take to as near zero as practicable; and
4. as possible, minimize hardships to commercial fisheries while achieving objectives 1, 2, and 3.

The Commission recommended that the Regime to Govern the Taking of Marine Mammals Incidental to Commercial Fishing Operations after 1 October 1993:

- reaffirm the Marine Mammal Protection Act’s goal of maintaining marine mammal populations within their optimum sustainable population range;
- reaffirm the Act’s goal to reduce the incidental kill and serious injury of marine mammals in the course of commercial fishing operations to insignificant levels approaching a zero mortality and serious injury rate;
- reinstate the substantive, although not necessarily the procedural, requirements of the general permit and small take provisions of the Marine Mammal Protection Act for marine mammal populations known or reasonably believed to be within their optimum sustainable population range;
- allow the incidental take of marine mammals listed as endangered or threatened under the Endangered Species Act or depleted under the Marine Mammal Protection Act when: (1) a recovery plan or conservation plan, including an implementation plan, has been developed, adopted, and put into place; (2) the authorized level of take, by itself and in combination with other sources of mortality, is not likely to cause or contribute to a further population decline or cause more than a ten percent increase in the estimated time it would take for the affected species or population to recover to its maximum net productivity level; (3) ongoing and planned

monitoring and enforcement programs are adequate to ensure that the authorized levels of take are not exceeded and to detect any unforeseen effects on the size or productivity of the affected species or population; and (4) there is good reason to believe that the incidental take has been or will be reduced to as near zero as practicable;

- authorize, on an experimental basis, for periods of three to five years, the incidental take from species and population stocks whose status is uncertain when: (1) the authorized level of incidental take clearly would have a negligible effect on population size and productivity; and (2) ongoing or planned assessment, monitoring, and enforcement programs are adequate to ensure that the authorized level of take will not be exceeded, the status of the affected species or population stock will be determined with reasonable certainty within three to five years, and possible ways to avoid or reduce the level of incidental take will be identified and implemented;

- streamline and continue the vessel registration and reporting programs initiated under the 1988 Marine Mammal Protection Act amendments;

- grant explicit authority to the Secretary of Commerce to place observers aboard any commercial fishing vessel operating in U.S. waters; and

- provide necessary funding or authorize the collection of user fees sufficient for observer and other marine mammal monitoring programs.

The Commission's Recommended Guidelines assumed that, at the end of the five-year exemption period, sufficient information would be available to accurately estimate: the level of incidental take in various fisheries; the status of the affected marine mammal stocks; and the level of take that could be permitted without causing the affected populations to be reduced or maintained below their optimum sustainable population level. When it transmitted the Recommended Guidelines to the National Marine Fisheries Service, the Commission noted that this assumption would not be valid unless additional population assessments were undertaken promptly by the Service.

The Commission's Recommended Guidelines also pointed out that marine mammals and fisheries may interact indirectly as well as directly -- e.g., by competition for the same prey species. To ensure that marine mammals are not disadvantaged by over-exploitation of important prey species, the Commission recommended that the Service promulgate regulations under the Fishery Conservation and Management Act requiring fishery management councils to assess and take into account the food requirements (and uncertainties related thereto) of marine mammals and other non-target species when calculating the optimal yield of fishery resources. To help determine how this might best be done, the Commission recommended that the Service hold a workshop or series of workshops to identify and evaluate possible procedures for assessing interactions and ensuring that fisheries do not directly or indirectly disadvantage marine mammal populations. The Commission suggested, among other things, that the workshops consider the establishment of: thresholds below which exploitation of fish stocks should be prohibited; guidelines and procedures for addressing uncertainty with respect to the status of and the functional relationships among fisheries resources and other components of the marine ecosystem; and research and management programs needed to fill critical gaps in knowledge of the structure and dynamics of marine ecosystems.

The Commission's Recommended Guidelines were used by the National Marine Fisheries Service as the basis for developing its Proposed Regime to Govern Interactions between Marine Mammals and Commercial Fishing Operations. The Service also took into account comments and suggestions provided by other Federal and state agencies and by the fishing industry and environmental community. The proposal was forwarded to Congress in December 1992.

In June 1993, representatives of the U.S. fishing industry and certain environmental groups provided an alternative proposal for a regime to govern marine mammal-fisheries interactions after 1 October 1993. Subsequently, other environmental groups—the Marine Mammal Protection Coalition—expressed concern about and proposed alternatives to several of the provisions in the joint industry/environmental community proposal.

COMPARISON OF THE PROPOSALS

Take of Listed Species: The recommended guidelines provided by the Marine Mammal Commission, the proposed regime provided by the National Marine Fisheries Service, and the alternative regime proposed jointly by the industry and environmental community all would allow taking from depleted stocks, including those listed as endangered or threatened under the Endangered Species Act, provided the taking would not significantly delay recovery time. The Commission's guidelines and the National Marine Fisheries Service's proposal define significant delay as more

than a ten percent increase in the time-it would take a depleted species or population stock to recover to its maximum net productivity level—the lower limit of the optimum sustainable population range. The joint industry/environmental community proposal would allow conservation teams, constituted to decide what actions must be taken to protect critical stocks (see below), to decide, on a case-by-case basis, what would constitute a significant delay in recovery time. It would not replace or change the provisions of Public Law 99-625 which sets forth conditions for protecting and managing the threatened sea otter population in California, including provisions for limiting interactions with fisheries.

The alternative proposal provided by the Marine Mammal Protection Coalition would prohibit all lethal taking from species and stocks listed as endangered or threatened under the Endangered Species Act.

Take of Species Whose Status is Unknown or Uncertain: As noted earlier, the Marine Mammal Commission's guidelines recommended that taking be authorized for periods of three to five years from species and population stocks whose status is uncertain when: (1) the authorized level of incidental take clearly would have a negligible effect on population size and productivity; and (2) ongoing or planned assessment, monitoring, and enforcement programs are adequate to ensure that the authorized level of take would not be exceeded, and the status of the affected species or population stock would be determined with reasonable certainty within three to five years. The intent was to minimize impacts on both the affected fisheries and marine mammal stocks, while providing an incentive to get more reliable information on the distribution, size, and vital rates of the affected stocks.

The regime proposed by the National Marine Fisheries Service noted that it could take many years to obtain the information necessary to assess the status of all stocks subject to incidental taking in the course of commercial fishing operations. The Service therefore proposed a system for estimating biologically acceptable take levels—referred to as Potential Biological Removal Levels—using minimum population estimates, conservative estimates of population growth potential, and a safety factor to ensure that the authorized take level could not cause a depleted species or population stock to be reduced or maintained below its maximum net productivity level, even when that level is unknown.

Zero Mortality Goal: All of the proposals have as a goal reducing the mortality and serious injury of marine mammals incidental to commercial fishing operations to as near zero as practicable. However, both the recommended guidelines provided by the Marine Mammal Commission and the regime proposed by the National Marine Fisheries Service would afford priority initially to identifying and ensuring that incidental take levels do not exceed the level which would cause the affected species or population stocks to be reduced or maintained for significant periods of time below their maximum net productivity level. Neither would make reduction of incidental take to insignificant levels approaching zero an immediate priority. The joint fishing industry/environmental community proposal would make reduction of incidental take to near zero the primary goal. It calls for the reduction of mortality and serious injury incidental to commercial fishing operations to as near zero as practicable within ten years; it proposes that progress be reviewed at the end of three years to determine if the goal is likely to be met and, if not, what should be done differently.

Authorization to Fish and to Take Marine Mammals: Both the guidelines recommended by the Commission and the regime proposed by the National Marine Fisheries Service would continue the system, mandated in the 1988 Marine Mammal Protection Act amendments as part of the interim exemption, which requires that vessels engaged in fisheries with more than a remote possibility of taking marine mammals register with the National Marine Fisheries Service, and which specifies that fishing in such a fishery, without registration, constitutes a violation of the Marine Mammal Protection Act. These requirements make it possible to document, with reasonable certainty, the number of vessels engaged in fisheries that take marine mammals. They also provide an effective means for ensuring that vessel owners comply with reporting requirements, since registrations cannot be renewed if any required reports are outstanding.

The proposal from the fishing industry and environmental community would eliminate both the vessel registration requirement and the provision making it a violation of the Marine Mammal Protection Act for a vessel to fish without being registered. The proposal would require fishermen to report all lethal taking of marine mammals, and would make such taking a violation of the Marine Mammal Protection Act only if it is not reported, or violates a fishery-specific provision adopted by the Secretary in response to a conservation team recommendation. Thus, except in special cases, a fisherman would not be subject to penalties under the Marine Mammal Protection Act unless he or she were actually observed to take a marine

mammal incidentally in the course of fishing and it can reasonably be shown that the taking was not reported.

Start-Up: The regime proposed by the National Marine Fisheries Service would be phased in over several years. When fully implemented, it would prohibit taking of marine mammals incidental to commercial fishing operations, except when the taking has been explicitly authorized and it has been determined, through appropriate rulemaking, that the authorized level of take, by itself and in combination with other forms of taking, would not cause the affected-species or population stock to be reduced or maintained below its maximum net productivity level.

As the Commission understands it, the regime proposed by the fishing industry and the environmental community would authorize fishermen to incidentally take marine mammals not listed as endangered or threatened under the Endangered Species' Act, without restriction, provided they report any lethal take, until such time as: conservation teams are constituted by the National Marine Fisheries Service; the conservation teams agree and recommend to the Secretary that taking should be restricted to prevent the affected stock from becoming endangered or threatened; and the Secretary promulgates regulations to give effect to the conservation team's recommendations. The regime would require that the Secretary (the National Marine Fisheries Service) complete stock assessments and designate critical stocks within 90 days following enactment; that the Service establish and convene conservation teams for all critical stocks (see below) within 120 days; that draft conservation plans and proposed regulations for implementing them be published for public review and comment within 60 days after they are submitted by the conservation teams; and that the final conservation plans and implementing regulations must be completed within 120 days after submission. There would be no restrictions on the time that the conservation teams have to develop and submit conservation plans to the Secretary.

As the Commission understands it, the principal purpose of the conservation teams would be to establish and oversee implementation of a long-term strategy, by fishery, for reducing incidental take to insignificant levels approaching zero within ten years. The proposal also calls for conservation teams to recommend priorities for long-term research programs, including research on predator/prey relationships. Although the intent of this proposal is not explained, it suggests that industry and environmental groups, like the Marine Mammal Commission, recognize that marine mammals and fisheries interact indirectly, as well as directly, and that it eventually will be necessary to assess, monitor, and possibly regulate indirect as well as direct interactions.

Critical Stocks: Under the regime proposed by the fishing industry and environmental community, those stocks that are endangered or threatened and likely to be jeopardized further, or that are likely to become endangered or threatened, as a result of incidental taking in the course of commercial fishing operations would be designated as critical stocks and receive priority attention. As the Commission understands it, there would have to be evidence that population size is small and/or declining before a stock would be designated critical. If stock size and trend were unknown, a stock could not be designated critical, even if the incidental take rate were known or thought to be very high.

The National Marine Fisheries Service's proposed regime also would focus priority attention on stocks that are, or are likely to become, endangered or threatened. However, under the National Marine Fisheries Service's proposal, fisheries also would be classified according to the frequency that they take marine mammals. The level of take as well as the status of the affected marine mammal stocks both would be considered when deciding where research and management efforts should be focused. Thus, the regime proposed by the National Marine Fisheries Service is much more likely than the regime proposed by the fishing industry and the environmental community to identify and deal with interactions before they cause obvious population declines and require severe remedial measures, possibly including prohibitions on fishing.

Allocation: As noted earlier, the regime proposed by the National Marine Fisheries Service would establish a straightforward procedure for calculating Potential Biological Removal Levels, taking into account the status, and uncertainties concerning the status, of the affected marine mammal stocks. The Service's proposal assumes that in some cases current levels of take would be greater than would be biologically acceptable. It therefore proposes a process for allocating the Potential Biological Removal among all potential user groups. The process would take 8-10 months, and would provide opportunity for review and comment by fishery management councils and state agencies, as well as the public.

As the Commission understands it, the regime proposed by the fishing industry and the environmental community assumes that there will be no need to allocate

takes among fisheries or other user groups—i.e., the conservation teams will be able to identify and fishermen will voluntarily implement measures which will reduce incidental taking below the biologically acceptable level. The proposal indicates that conservation plans may, if necessary, recommend measures to reduce lethal take from non-fishing sources and identify the appropriate bodies to undertake possible corrective measures.

The Commission believes that, at least initially, it is likely that there will be cases where current removals, from all sources, are greater than the estimated biologically acceptable removal level. Consequently, it will be necessary to establish a process for allocating takes among the various users. The process that the National Marine Fisheries Service has proposed is lengthy and, in some circumstances, could necessitate allocations being made a year in advance or result in allocations not being made until after the fishing season begins. A possible alternative mechanism, that might be more efficient, would be to constitute regional groups, along the lines of the conservation teams proposed by industry and the environmental community, and make the regional groups responsible for considering and providing advice to the National Marine Fisheries Service on allocation of take, whenever necessary, as well as on development and implementation of long-term strategies for reducing incidental take to insignificant levels.

Mortality Estimation and Verification: All parties recognize that accurate estimates of mortality and serious injury incidental to commercial fishing operations are essential to determine whether remedial measures are necessary, and whether the measures taken are being successful. Further, all parties recognize that reports provided by fishermen may not always provide accurate information on the species or numbers of animals being taken and that, in some cases, it may be necessary to require reporting of fishing effort, as well as marine mammal catch, and to place observers aboard fishing vessels, or conduct observations from other platforms, to verify and correct for possible errors in species identification and catch levels reported by fishermen. Further, all parties agree that the National Marine Fisheries Service should be given authority to place observers aboard any fishing vessel that can accommodate observers safely.

Under the National Marine Fisheries Service's proposed regime, the Service would continue the present observer program, placing priority on fisheries that take marine mammals from depleted stocks and stocks believed to be declining. The goal would be to estimate incidental take levels with a coefficient of variation (CV) of twenty percent or less. The Service's proposal also recommends that the Service be given authority to require that fishermen maintain and submit logbooks or other records to allow accurate estimation of fishing effort.

The regime proposed by the industry and environmental community would authorize the Secretary to place observers aboard fishing vessels, but would not make the observer program mandatory. It would authorize the Service to require reporting of fishing effort and other data, beyond the species and numbers of marine mammals killed, only if such data are not being collected by other means—e.g., through a state licensing and reporting program.

The proposal from the Marine Mammal Protection Coalition questions the utility of a discretionary observer program. It argues that "[t]he Secretary should be charged with instituting a mandatory observer program which would monitor incidental take of critical stocks and assess the level of interactions with marine mammals in all fisheries."

Population Assessment and Monitoring: Under the National Marine Fisheries Service's proposed regime, the Service would develop and implement a long-term research program to assess and monitor the size, vital rates, and trends in all marine mammal stocks that have more than a remote possibility of interacting with fisheries. Priority would be afforded to depleted and declining stocks and to stocks with high levels of incidental take. The research program would be peer reviewed and updated annually.

The regime proposed by the industry and environmental community would give the Secretary discretionary authority to develop and implement a long-range research and monitoring program. The proposal from the Marine Mammal Protection Coalition would make long-range stock assessment and monitoring mandatory.

The Marine Mammal Commission believes that a long-range population assessment and monitoring program will be an important and necessary component of the regime to govern marine mammal-fisheries interactions.

SUMMARY AND CONCLUSIONS

In summary, the Marine Mammal Commission, after consultation with affected parties, developed and, in July 1990, provided recommended guidelines to the Na-

tional Marine Fisheries Service for a regime to govern marine mammal-fisheries interactions after the interim exemption expires on 30 September 1993. The Commission's recommended guidelines were based upon the guidance provided by Congress in Section 114(l)(1) of the Act.

The guidelines provided by the Commission were used by the National Marine Fisheries Service to help develop its Proposed Regime to Govern Interactions Between Marine Mammals and Commercial Fishing Operations. The Service's proposal, forwarded to Congress in December 1992, tracks and is generally consistent with the recommended guidelines provided by the Commission.

The alternative proposal provided by representatives of the U.S. fishing industry and certain environmental groups is similar to the National Marine Fisheries Service's proposal in many respects. Both, for example, would afford priority attention to stocks that are endangered or threatened and likely to be jeopardized further, or are likely to become endangered or threatened, if steps are not taken to limit incidental take. Also, both would continue the present Marine Mammal Protection Act goal of reducing the mortality and serious injury of marine mammals incidental to commercial fishing operations to insignificant levels approaching zero. Likewise, both proposals would authorize the incidental take of depleted as well as non-depleted species in certain situations, and would establish a clear procedure for conservatively estimating biologically acceptable removal levels when the status of the affected stocks are unknown or uncertain. However, the proposals differ in a number of substantive ways.

The major differences are that under the joint industry/environmental community proposal:

1. vessel owners would not be required to register vessels that engage in fisheries which have more than a remote likelihood of taking marine mammals, and would not be in violation of the Marine Mammal Protection Act if they engaged in such fisheries without registering;

2. marine mammal stocks which interact with fisheries would be classified according to their size and trends. Fisheries would not be classified according to the frequencies that they take marine mammals. Marine mammal stocks that are endangered or threatened and likely to be further jeopardized, or are likely to become endangered or threatened, as a result of incidental taking in the course of commercial fishing operations would be designated as critical stocks and receive priority attention. If the size and trend of the stock are unknown, the stock could not be designated critical, even if the incidental take rate were known or thought to be very high;

3. conservation teams would be established to develop conservation plans for each stock designated as a critical stock, but not listed as endangered or threatened under the Endangered Species Act. The teams would include representatives of the affected fisheries and interested environmental groups. The principal responsibility of the conservation teams would be to describe and oversee implementation of programs to reduce the incidental taking of marine mammals in the course of commercial fishing operations to insignificant levels approaching a zero mortality and serious injury rate, within ten years;

4. fishermen would be authorized to take marine mammals not listed as endangered or threatened, without restriction, provided they report any lethal taking, until such times as conservation teams are constituted and agree that taking must be restricted to prevent the affected stock from becoming endangered or threatened, and the National Marine Fisheries Service promulgates regulations to restrict take;

5. no consideration is given to the possibility that current levels of take are greater than the biologically acceptable level and that it therefore may be necessary to establish a process for allocating the allowable take among a number of fisheries and other user groups;

6. the National Marine Fisheries Service would be given discretionary authority, but would not be required, to develop and implement an observer program or a program for assessing and monitoring the status of the affected marine mammal stocks; and

7. the National Marine Fisheries Service would be unable to require maintenance and submission of logbooks or other records that could be used to estimate fishing effort, unless such information cannot be obtained through other presently existing programs—e.g., state licensing programs.

The proposal from the Marine Mammal Protection Coalition calls for continuing the pre-1988 ban on issuing permits authorizing the incidental take of endangered and threatened species. In addition, it calls for mandatory registration of all fishing vessels; continuation of a mandatory observer program; and development of a long-range program to assess and monitor the affected marine mammal stocks.

The Marine Mammal Commission continues to believe that it would be appropriate, in certain limited situations, to authorize taking in the course of commercial fishing operations from depleted as well as non-depleted marine mammal stocks. Further, the Commission believes that, in general, the regime proposed by the National Marine Fisheries Service would be more workable, and cheaper to implement, than the alternative regime proposed by the fishing industry and environmental groups. However, the Commission also believes that the Service's proposal could be strengthened by incorporating several elements from the fishing industry/environmental community proposal. The Commission believes, for example, that it would be useful to constitute regional groups, along the lines of the conservation teams described in the industry/environmental community proposal, to develop and oversee implementation of long-term strategies for reducing incidental take to as near zero as practicable. If necessary, these regional groups also could consider and provide advice to the National Marine Fisheries Service on allocation of take if current levels of take are greater than the biologically acceptable level.

Thank you Mr. Chairman and members of the Committee for this opportunity to express the views of the Marine Mammal Commission. I would be pleased to try to answer any questions that you or other members may have.

Senator KERRY. Thank you very much. We do have questions, and I think it would be helpful for us to try to explore this a little bit.

Dr. Foster, I listened to your explanation of things that one program did versus another, and likewise, Dr. Hofman. Try to give us the hard line, bottom line here. What is the advantage of what you have proposed versus what the industry/conservation proposal seeks to do?

Dr. FOSTER. Several elements of our proposal are missing. In the environmental/industry proposal, for example, one thing that we believe is a very valuable management tool is mandatory registration and a centralized data base. It is not registering just to have people register. We already have a mechanism in place that we developed during the interim exemption, so it will not be expensive to build on this system.

We believe that such a system serves us well when we need to contact fishermen, if we want to place observers, and if we want to get information out. It gives us information on time and area details. For example, with regard to lethal take, we can pick up on trends that are taking place out there before a situation becomes a problem. And the conditions out there are certainly not static, so because you do not have a problem today in a fishery, does not mean that you won't have a problem tomorrow. And without registration and observer coverage, I think that we are severely handicapped in how well we do this job.

The other aspect is, I think, the way we approach targeting our resources. We have devised a system, as Dr. Hofman mentioned, where we classify stocks, and then fisheries by the stocks with which they interact. That allows us to focus attention on fisheries interacting with the critical stocks. The fishery knows ahead of time what is likely to be required of the individuals. A fisherman only has to contend with one set of restrictions, instead of doing it stock by stock, depending on marine mammal with which you interact.

Those issues, and along with those issues, of course, go observer coverage on the hot spot areas, the critical fisheries and critical stock; long-term monitoring of the stocks. I think also the burden of proof issue is, perhaps, our overriding concern. With regard to conservation teams, I think some discussions of how they could

best be used, and how we could capture what it is the negotiated proposal was looking for, and still make everyone of us comfortable.

Senator KERRY. Now, is your burden of proof argument based on the fundamental, underlying concept of the MMPA, that we want to get to either an insignificant level approaching zero, or zero? Is that the theory underlying the burden, the placement of the burden?

Dr. FOSTER. The theory is, I think, the original MMPA started out with a moratorium, no takes; unless you come in and you meet certain requirements, and you get a permit for a public display take. Unless you come in and you do meet certain requirements; unless you the taker can demonstrate, that your action will not disadvantage the stock.

Now it has flipfopped. Now the negotiated proposal says, you are hereby authorized to take, unless the Government can show that what you are doing will disadvantage the stock. So, it completely reverses the burden of proof. Maybe you want to add to that?

Dr. HOFMAN. I think that accurately describes the issue.

Senator KERRY. Well, I understand there is the flipflop. I am trying to understand, I mean, here we have two entities polarized on this concept. And I am going to test both. I want to understand what the foundation is for your position. And your foundation is essentially that that is the best way to protect the animals?

Dr. FOSTER. Yes. Yes, I think so. Indeed.

Senator KERRY. And absent the moratorium, there is sort of a flagrant kind of lack of production of burden, and a permissiveness that results in takings?

Dr. FOSTER. It also makes it very difficult for the Government to enforce or to carry out the provisions of the proposal. If now the burden of proof is on us to prove that what is going on is a problem, it becomes very, very expensive, in addition to the fact that it philosophically is different.

Because if you had the same amount of money for enforcing either proposal, and you wanted the same degree of protection, we believe it would cost more to enforce, more to carry out the negotiated proposal, because of that burden of proof. Because the Government would now have to see a violation, in order for there to be a violation. We would have to see someone take a marine mammal. And the way you would do that is through use of observers, and that would become even more expensive. Would you like to add something?

Senator KERRY. The counterargument, obviously, in this process is: Wait a minute, folks. You are the ones saying there is a value here. You are the ones implementing a prohibition. You are the ones asserting a compelling governmental interest for this process. You are the ones who are restricting our access and livelihood. Therefore, you ought to be able to tell us why; and moreover, it is extremely expensive for us to come in, weigh it against all of your taxpayer paid lawyers, and so forth, and assert our rights. So therefore, the burden ought to be yours. I am just playing the advocate here.

Dr. FOSTER. Certainly. I guess what we are saying is that, in the beginning, in the MMPA, one of the strongest underpinnings of the MMPA was this burden of proof. Maybe that is what we want to

explore now: Whether or not circumstances have changed. But the underpinning of the MMPA was that there shall be no takes, unless you can demonstrate the need for the take. Not that you can take whatever you want, unless the Government demonstrates why not.

Senator KERRY. Now, assuming that you were to stick with the original concept, and I am not asserting any reason not to, I am just saying assuming you do, you accept a continued concept that there is a legitimacy in the taking of nuisance mammals; is that correct?

Dr. FOSTER. Yes, our proposal provides for that. But our proposal says that the person who has the need to take the animals will have to explain why.

Senator KERRY. And historically, NMFS has dealt with the taking of nuisance mammals in that fashion, with a showing of need.

Dr. FOSTER. That is the way we would have handled it, under the exemption. But in fact, as far as I know, it never came up. We have not had an actual proposal to take, yet.

Senator KERRY. Is it still the goal of NMFS, in arriving at this framework, to embrace a zero mortality goal? Or has that changed in any way?

Dr. FOSTER. No. We think that in our proposal we have maintained, again, what we thought was one of the basic goals of the original law. We would do that, as I indicated, through our research effort, by beginning to focus on ways in which you might cut down on incidental mortality through gear research, coming up with different fishing techniques, this kind of thing. So that over time—

Senator KERRY. But what you in effect do, Doctor, through your current proposal, is lay out a regime that does create a framework for calculating the total number of marine mammals that can be removed on a continuing basis, correct?

Dr. FOSTER. This is correct.

Senator KERRY. If you are allowing in your framework for a continual taking, on a continuing basis, while simply relating that to trying to keep the stock either at, or above, or bring it up to the optimum sustainable population, you are in effect embracing something that will continually fall short of a zero mortality goal?

Dr. FOSTER. Correct. Except that, in our proposal, we set the PBR, allowable take, and then we do all of these other things that will cut down on the existing incidental mortality; looking at all aspects of the fishery, other ways that you can cut it down. And over time, you do cut down on the allowable take. Just because you can take a certain number does not mean you automatically get that number.

I mean, this will be looked at very thoroughly by the team of scientists, other ways to continually ratchet down this take. So, we are not remaining static. We do intend to do everything we can to ratchet down that take. So that, for example, if you have a PBR of 100, and next year you have a fishery that is only taking 20, well, you are not going to give them a take of 100. So, you begin to slowly ratchet it down. I mean, you will never reach zero, of course. But you do as much as you can to continually decrease it.

Senator KERRY. The industry and conservation groups are both critical of the classification process, for classifying the critical and noncritical stocks. I do not know if you want to join in also, Dr. Hofman; but they have proposed an alternative scientific framework for trying to do that. What are the fundamental differences between your approach to classifying stocks and the industry/environmental approach?

Dr. FOSTER. Again, I think under our approach, by categorizing the fishery based on the kinds of stocks they are interacting with, we feel that we are able to narrowly focus all of our requirements, our restrictions, our attention if you will, to those fisheries, and those marine mammal stocks that are most in need.

We think, under our proposal, that a fisherman, as I indicated earlier, knows what category his fishery has been put in, so he knows the kinds of things that are going to be required, and he will only have to answer to that one regime. The way we understand the negotiated proposal, you classify the stocks with which a fishery interacts. It may interact with three or four different stocks. Each stock may be looked at by a conservation team, and you may have different requirements; so that a fisherman would be subjected to different management regimes.

Senator KERRY. Some might argue that that approach will provide better conservation and a more realistic relationship, if you will, to that particular fishing environment, than a more all-encompassing and less specific one, which is what you seem to have proposed. And it may be less confusing, I think, in the application.

Dr. FOSTER. Perhaps I am not being very clear. It seems to me that ours would be less confusing.

Senator KERRY. Well, help us understand that. I will tell you this: I am confused.

Dr. FOSTER. Sometimes I am confused, too. All right. What we are saying is that by classifying the fishery, you can narrow the scope of your problem fisheries.

For example, we did a trial run early on this year, before we had all of the data.

Senator KERRY. Give us an example. You classify a whole fishery. What are you talking about?

Dr. FOSTER. We classified fisheries that would be category 1 fisheries. These would be the fisheries that interact with our alpha stocks. These are the stocks that are endangered, threatened, or depleted. So, these are the critical species, the stocks in trouble.

So, our category 1 fisheries react with those stocks; and we came up with about six. We think that looking at some new information, we may come up with even fewer. And so we would have this many fisheries that we would be targeting with the bulk of our resource management.

Senator KERRY. Targeting to do what?

Dr. FOSTER. Well, we would be focusing all of our attention there. We would be looking at what needed to be done, in order to conserve these stocks. We would be looking at restrictions on fishing, area time closures. We would be looking at gear possibilities; we would be working with the fishery management councils, to see what could be done through the fishery management plans, this

kind of thing. And we would have observer coverage on these fisheries, provided we had the funding.

So that is where the attention would be, because that is where the primary problem is.

Senator KERRY. And how do you see that as differing from the industry/environmental proposal, where they would concentrate on the particular stocks within those fisheries?

Dr. FOSTER. I think that is different, because you could be a fisherman, again, who interacted with several different alpha stocks. Let us say you interacted with several different stocks in trouble. So, you could have different management requirements for each of those stocks.

Senator KERRY. But it is my understanding that the industry conservation proposal focuses on the state of each individual fish stock, and the marine mammal population.

Dr. FOSTER. And so does ours.

Senator KERRY. Correct. But yours is more concerned with the fishing frequency of interaction, while theirs is more concerned with the state of the stock.

Dr. FOSTER. No.

Senator KERRY. That is not fair?

Dr. EAGLE. The National Marine Fisheries Service proposal does one thing that is very similar to theirs. We classify stocks, and the industry proposal also classifies stocks. And in the classification scheme, we use total removal, that is, from all sources.

The Fisheries' proposal is slightly more conservative in some of the parameters that are used in calculating these. The PBR that we calculate is a fundamental part of our definition of alpha stocks, or the stocks of concern. And that is calculated on a minimum estimate of abundance. It is purposely conservative, using usually a default population growth.

The industry conservation group classification scheme would use the same population growth rates, but apply it to a point estimate, or a mean estimate, of the population size. Therefore, the agency is slightly more conservative in protecting marine mammals. The agency also looks at the fisheries, and you know, classifies fisheries to denote the major hotspots. The idea that we approached was that we are looking at the reauthorization, or something to replace section 114, which dealt with fisheries. So, we sought to focus a lot of our effort on those fisheries that are causing the most problems with marine mammals.

Senator KERRY. Well now, again, to do that you have to have some fairly decent data input; do you not?

Dr. EAGLE. Yes, you do.

Senator KERRY. And the theory of the moratorium in the last 5 years was that we were going to use it to gather data. But there are some serious questions about the degree to which adequate data has been gathered, on which either plan is based. Is that a fair statement?

Dr. EAGLE. That is a fair statement, from what we have produced so far. Some of the estimates, particularly in Alaska, you know, you take the populations we have there, particularly the ones that are a statewide distribution: It takes us 3 years to survey

the whole State, and do an adequate job. We do one section per year.

We started our population assessments in 1991, fiscal year 1991, so we are just coming to end of this 3-year segment on that. These data will be available to us in, you know, late this year, early next year.

Senator KERRY. Is it unfair to ask why it began in 1991, if the effort was designated in 1988?

Dr. FOSTER. Well, to do population assessments, we actually did not get funding until 1991. So, we began in earnest at that time. Before that time, we were doing what we always had done, using the existing funding. But this required a much larger effort, and we did not get the funding until later.

Senator KERRY. Can you share with us where we have adequate data, at this point? And where we do not?

Dr. FOSTER. Tom can certainly speak to this in more detail, but I think we have adequate information now for minimal population estimates, for all of the stocks for which we are responsible, which is about 60. But out of that 60, we only have OSP calculations for 4. So, where we are looking for information is in trends.

Senator KERRY. Right. Which four do we have the OSP's on?

Dr. EAGLE. It is Northern Fur Seals; no, I am sorry, not Northern Fur Seals. It is Northern Elephant Seals, the Harbor Porpoise in California. I have to look these up. Dahl's Porpoise, and the Gray Whale.

Senator KERRY. Would you say that the two proposals that we have currently address the gaps in information at this point?

Dr. EAGLE. I think the NMFS proposal addresses the data gaps in the long term, looking at the Marine Mammal Protection Act's idea of or goal of maintaining populations within their optimal sustainable population. That is a long-term monitoring effort. And the negotiated proposal does not contain provisions for a long-term monitoring program. It is focusing year to year on the stocks of concern.

And there is merit to that idea. We are just fighting the problems that we have. The opposite side of that is we do not get a handle—we do not move ahead of the game. We do not try to see where we are in the noncritical stocks.

Senator KERRY. Now, it would seem to me from experience, and I will make this my last question before I cede to my colleague, but it strikes me based on what I have learned about how the information has been gathered that the log book process has proven wholly inadequate, and that the only data source on which you could reasonably rely would be the independent monitoring data which was immediately processed and recorded.

Again, would you comment on that or respond?

Dr. FOSTER. I think perhaps it may be too strong a statement to say they were totally useless. I mean, certainly if you are looking for take information you need observer coverage. But we got a lot of information out of the log books just about fishing practices, where people are fishing, you know, fishing effort, this kind of information.

Senator KERRY. But nothing that really deals with the question of critical stock and OSP on which the fundamental decisions have to be based.

Dr. EAGLE. Only to the extent that we can use our population data and other sources of data to determine distribution of marine mammals, and if we can take the log books and determine where fishing activities are occurring, particularly with the gear we know have been problematic, then we can use some of this information to see.

Senator KERRY. But we are in the business of oversight and creating appropriate accountability, would you recommend to us that we could rely on log books, or must we guarantee a monitoring process, observers on board, to appropriately have the accountability the MMPA seeks? Dr. Hofman.

Dr. HOFMAN. I will comment on that, Mr. Kerry, and several others. First, I think it is clear from what happened over the course of the last 5 years that an observer program will be essential. The observer program provides a sample, a reliable sample, of the number and species of animals being taken.

As Dr. Eagle started to say, I think, that the observer program by itself is not sufficient to get an accurate estimate or to make an accurate estimate of the number of animals taken because we also need to know the fishing effort. And we cannot get that datum from the observer program.

In some cases, I think, the most efficient way to get effort data is through the kind of log book system that currently exists. And I think in part, again, in terms of efficiency, that registration is the most efficient way to deal with this.

Senator KERRY. But again, even for fishing effort, even for location, time at sea, time fishing, and so forth the log book is only as good as the data put in it.

Dr. HOFMAN. That certainly is true.

Senator KERRY. It will never be independent. So, if somebody wants to downplay the amount of fishing time or minimize the impact on a particular area by suggesting they were in a different area, there is absolutely no way to prevent them from doing that if it is self-reported.

Dr. HOFMAN. Well, that is certainly true. But I think it is important to remember that there are at least two possible sources of error. One is deliberate, as you indicated; the other is caused by problems with identification of species, for example.

If you sent me out on a fishing vessel in a lot of places I could not identify many of the marine mammals—particularly the cetaceans—that they take. To expect a fisherman to be able to accurately identify all species is about as unreasonable as to expect me to be able to do so, actually more unreasonable. So, I think some of the error, and maybe a lot of the error, is just unavoidable. The way to deal with it is through the observer program.

I think that to the extent there is a problem with fishermen accurately reporting in their logs where they are fishing and how many sets they make, for example, the problem goes far beyond the marine mammal problem. It goes right to the heart of effective management of fisheries, because if we cannot say what the fishing effort is and what is being taken in terms of pollack, for example,

in the Bering Sea or the Gulf of Alaska, we cannot effectively manage the fisheries. So, this is not a problem, in my view, that is unique to marine mammals.

Senator KERRY. I absolutely agree with that. Senator Stevens.

Senator STEVENS. Thank you, Mr. Chairman. I think we have votes here in just a minute, and I will want to come back and go into some things.

But let me start out with where I am coming from. We have three substantial communities in my State that are involved here—the commercial fishing people, the Alaska natives, and a very interested environmental group. I hear some new terms here, so I want to sort them out if I may. They relate to your question of who has the burden of proof, Dr. Foster.

You used the statement, and I wrote it down, that you were looking at critical species, those threatened, endangered, or depleted. You just used that term. This proposal before us establishes a new listing of critical species, critical stocks some people say.

I am not sure whether I am hearing a new term that amounts to a stock or a species that is threatened of being threatened, or whether we are still hearing the same listing that you referred to as those that are currently threatened, endangered, or depleted. Now, which is it?

Dr. FOSTER. I can explain to you. I should have clarified. What we are saying is that our so-called alpha stock, those marine mammal stocks that we will focus more attention on, are those stocks that are either endangered, threatened, or depleted, or stocks where the take exceeds the PBR so that then—

Senator STEVENS. Now, that is something new that is not in the law right now, that last part, right?

Dr. FOSTER. This is our way of classifying the stock.

Senator STEVENS. Do you classify them today under existing law that way?

Dr. FOSTER. No, under the proposal.

Senator STEVENS. Existing law only deals with threatened, endangered or depleted. Now, this new alpha stock list of yours, does it include more than threatened, endangered, or depleted species?

Dr. FOSTER. Yes. But this is not a listing in the sense of listing under the ESA. We are trying to figure out a way to classify the marine mammal stock into really two categories, those that are in trouble or on their way to being in trouble possibly, and those that are not in trouble.

Senator STEVENS. We have got a vote, so let me be rude if I may. I am sorry and I apologize about it, but I want to pursue this before I lose—if I walk over there and come back, I may not have the same idea in my mind.

Is the proposal from the industry environmental group, which includes critical stocks, the same as your alpha group?

Dr. FOSTER. Yes, I think so. Would you think so?

Dr. EAGLE. It is very similar. It is not exact, but it is very, very similar.

Senator STEVENS. All right. Well, let me put on my native hat now. I have got the right, as an Alaska native, to intentionally take species for subsistence that you are trying to regulate over there

where the people wear other hats in my State in commercial fishing for incidental take.

Now, as a native I have a right to take species and you cannot limit that take unless those species, the stocks and this is stocks, are on a list as being threatened, endangered, or depleted. You cannot stop me because you have a fear that they might be. The burden of proof today is on you to prove, as far as the natives are concerned, that they are either threatened, endangered, or depleted. Do you disagree with that?

Dr. FOSTER. No.

Senator STEVENS. Dr. Hofman, do you disagree with that?

Dr. HOFMAN. I think that is accurate.

Senator STEVENS. Now, does your proposal change that for the natives this year?

Dr. FOSTER. No.

Senator STEVENS. Do you add another step for them?

Dr. FOSTER. No. We have calculated the PBR, that is the potential biological removal, and it includes all human related removal from the population, and we take subsistence uses off the top. And subsistence rarely becomes an issue.

Senator STEVENS. Well, in the proposal from the industry and the environmental groups, there is a critical stock section for where the total take is primarily conducted by Alaska natives who have the right to use marine mammals for subsistence. The Secretary would have the discretion to analyze the recovery factor and the calculated removal level recommended by the conservation teams, and use modifications to enable a longer recovery time based upon social, cultural, and economic consideration.

Now, it says, where the native subsistence is the primary source of mortality, the recovery factor decision becomes a policy decision about timing and the Secretary's actions shall reflect the needs of subsistence users.

Now, is that not proposing something that goes further than existing law? Does it give the Secretary greater discretion?

Dr. FOSTER. It actually goes even a little further. It is a little more flexible than our proposal and, as a matter of fact, one that we are interested in because we were struggling.

Senator STEVENS. Your flexibility or my natives' flexibility.

Dr. FOSTER. The flexibility for both.

Senator STEVENS. Where is the burden of proof now? No, I think you are saying you want more authority to regulate the Eskimo take of marine mammals.

Dr. FOSTER. No, I am not saying that, not at all. What we are saying is that under our proposal, when we get to those one or two or three stocks where we have a problem because the subsistence take is very high and is going to exceed or possibly bump right up against the total take, that we would sit down with the native population and try to figure out a way that we could work with them to help reduce take on everybody's part.

But the negotiated proposal has an even more innovative approach to that which we are looking at really seriously because what they are saying is when you reach that situation and you bump up against the take ceiling, that you can sit down and evaluate alternative ways to get to recovery of a marine mammal spe-

cies. You can take a long time to get there and let the Alaska natives take more up front, or you can do it faster.

Senator STEVENS. We have to go vote. You take the Alaska Eskimo coastline and you start it at Maine and do you know where you end up? New Orleans. What we are saying is that if a stock was being taken more heavily at Point Barrow, and you had that information available, you could say to the people, you cannot take mammals now because our indications are that there is too much take, that the take is exceeding the legal limits. I see an additional step here.

Again, the burden of proof now is on the Secretary. But I do not see that in this negotiated proposal because it says you can make a policy decision about the recovery, meaning you could stretch out the amount that could be taken over a period of time. Instead of taking 10 a year, you could take 10 every 2 years. Is that what this says?

Dr. FOSTER. No. What that means is instead of taking 10 years to recover the marine mammal stock, you could take 50 years to recover the marine mammal stock, which would mean that the natives could take more right now. They could exceed the recommended level.

Senator STEVENS. But you do not see it the other way around. If you can lengthen it, can you not shorten it?

Dr. FOSTER. Well, you could.

Senator STEVENS. The decision on timing and recovery shall reflect the needs of subsistence users. It does not say it has to.

Dr. FOSTER. No, but the underlying assumption—

Senator STEVENS. If I am taking 10 now, you are not going to tell me that in order to stretch it out I can only take 5?

Dr. FOSTER. No. You see, the underlying assumption in both proposals, ours and the negotiated proposal, is that subsistence users have a right to take.

Senator KERRY. We are going to stand in recess just for a few minutes. We will vote, and then we will come right back. We stand in recess.

[A brief recess was taken.]

Senator KERRY. The hearing will come back to order.

We apologize. We had two votes back to back. Only Senator Stevens could tell you what we just did.

Senator, we will come back to you. We will pick up where you left off if you would like.

Senator STEVENS. Thank you.

If I may, I have in front of me, Dr. Foster and Dr. Hofman, an AP daily news story from Tacoma, WA, which talks about this act. And the threat has changed, according to this. Well, let me read one little excerpt:

Biologists estimate there are more than 30,000 harbor seals now living year-round in the State, compared with only 2,000 in 1972.

There are other similar estimates of increases in the marine mammal populations. I had a story from the Kodiak Daily Mirror concerning the increase in the sea otter population, and how the population was seriously threatened in the past and now has substantial numbers.

I would be glad to put this in the record if you like, Mr. Chairman.

Senator KERRY. Without objection, we will put it in the record. [The information referred to follows:]

[Kodiak Daily Mirror, June 14, 1993]

SEA OTTER REVIVAL SPURS EFFORTS TO RENEW TRADE IN PELTS

(By Ian Mader—Associated Press Writer)

JUNEAU, ALASKA (AP)—The remarkable comeback of Alaska's sea otters and a federal court ruling may spark a revival of trade in otter pelts not seen since the animals were hunted to near extinction a century ago.

Alaska Natives, the only people allowed to hunt otters under federal law, have been harvesting growing numbers in Southeast Alaska. They are trying to develop worldwide markets for otter products—from blankets to sex organs.

The spurt in hunting follows a federal court decision that broadly defined the sea-otter products Natives can make and sell. Federal law still bans the sale of raw pelts. They must be altered into handicrafts for sale, but what constitutes alteration remains unclear.

Conservationists and tour-boat operators say too many otters are being killed. Some accuse a handful of Natives of violating the law's intent by trying to export pelts that have been minimally altered.

The state Department of Fish and Game, commercial fishermen and Natives say the growing otter population poses a nuisance in Southeast. The otters, estimated up to 10,000 in the region, compete with fishermen for abalone, sea urchins and other shellfish.

"They're out there multiplying as fast as rabbits," said Embert James, a Tlingit Indian and commercial fisherman from Ketchikan.

"First we had white fishermen taking all our seafood, now we have the sea otters, who are even more dangerous. Gee, when they eat two-thirds of their weight in seafood a day, that's a lot of sea-food."

Southeast's sea urchin population was reduced by about two thirds in the past year, and Fish and Game biologists attribute most of the decrease to otters.

Doug Woody, a state fisheries biologist, said Fish and Game will close the sea urchin fishery in Sitka Sound next year because of the effect of sea otters.

Tony DeGange, a sea otter expert with the U.S. Fish and Wildlife Service, said about 750 otters have been reported killed by Native hunters so far this year. In recent years, hunts have averaged about 200. Most of the hunting is being done out of Sitka, Hoonah and Ketchikan.

No state or federal agency can regulate the Native hunts unless the statewide population of sea otters is threatened. The Fish and Wildlife Service tags and keeps data on harvested otters. It has taken no position yet on whether the hunts need to be limited.

James said he and his brothers have spent up to \$150,000 on phone calls and travel to Asia and Europe to market otter products.

"We just have to get the product samples there to let them look at," he said. "We could make coats out of them, we could make shawls, we could make dancing blankets."

Tlingit William Pfeifer of Ketchikan helped set up Alaska Native Fur Products in December to sell sea-otter products to tourists from cruise ships.

"I think that we can develop an industry that the Natives can benefit from, both economically and culturally," Pfeifer said.

Natives from Southeast villages hope to come up with a management plan that determines the harvest level at which the otter population can be sustained, he said. Fish and Wildlife also is doing a count of sea otters in Southeast and planning a management plan of its own.

DeGange held meetings in Southeast villages earlier this year to explain to Natives their hunting rights, the court decision, and the threat the otter surge is posing to seafood harvests.

"I guess Fish and Wildlife was kind of implying to us to go out and harvest these animals," Pfeifer said. "My concern is that the Natives don't get set up in this whole thing. My role has been to keep track of the legality of this."

DeGange said he did not urge Natives to do large-scale hunting, and has recently sent letters asking them to limit their hunts until after the agency completes its census this summer.

"We asked hunters to cool their heels, to be conservative," he said.

[Longview Daily News, Tacoma, WA, July 12, 1993]

GROUPS AGREE THAT LAWS PROTECTING SEALS NEED TO BE CHANGED

TACOMA—Fishing and conservation groups agree a federal law to protect seals and other marine mammals needs changes to protect other ocean resources.

The question in congressional hearings that start this week is how much the mammals will have to suffer.

The 1972 Marine Mammal Protection Act made it a crime to harm seals and their aquatic kin such as sea lions and otters. The result has been exploding populations of those animals, which feed on salmon and other species.

An estimated 2,000 seals and sea lions now swim up the Columbia River each year, taking a growing bite out of salmon and steelhead runs and angering local gillnetters and others.

"The act has been extremely successful," said Terry Wright of the Northwest Indian Fisheries Commission. "The problem is, it's been too successful."

In the congressional hearings, fishing and conservation groups will argue for changes in the act before it is reauthorized this year.

Many fishermen hope the act will be reworked to make it easier to "manage" marine mammals through hunting or selective killing of net-raiding animals.

"I liken it to wild horses and burros * * * or elk herds," said Guy Thornburgh, executive director of the Pacific States Marine Fisheries Commission. "At some point the government has to have greater flexibility to deal with these robust populations of animals."

Most conservationists agree the law should allow killing of nuisance animals. But they're wary of giving fishermen a license to kill or of blaming marine mammals for the decline of Northwest salmon runs.

"It is outrageous and simplistic to say that because these animals eat fish and because humans want these fish that shooting these animals is going to be a way to resolve the fisheries problem," said Peigin Barrett, director of the Marine Mammal Center in San Francisco.

Anacortes fisherman Ed Knudson disagreed. He estimated he loses up to 20 percent of his catch to seals.

"It's definitely getting worse every year, because nothing is done about it," he said.

The population of harbor seals, Washington's most abundant marine mammal, is growing by 6 percent to 10 percent a year, according to the National Marine Fisheries Service. Biologists estimate more than 30,000 harbor seals now live year-round in the state, compared with only about 2,000 in 1972.

There are an estimated 10,000 seals and sea lions from the central Oregon Coast to Grays Harbor. Gillnetters report seeing the mammals farther upriver than ever before. In March, hundreds of seals took over a tiny sand bar at the mouth of the Cowlitz River and rested between raids on fish runs.

"The supreme irony would be protecting seals and sea lions that don't really need protection, while they're feeding ravenously on endangered salmon," said Bob Eaton of Salmon for All, an Oregon fishing organization.

Senator STEVENS. Is the threat different to the marine mammals now than it was when we passed the original bill? First, we had a marine mammal moratorium and then put into effect a marine mammal act. Is the threat different?

Dr. HOFMAN. Dr. Foster just looked at me and suggested that I answer this question.

Dr. FOSTER. He has been around longer.

Senator STEVENS. But not as long as I have, and it does seem to me that it has changed. But I just would like to have your opinion. [Laughter.]

Dr. HOFMAN. When the Marine Mammal Protection Act was passed, I think the record indicates that there were three major problems: commercial whaling, the clubbing of baby harp seals, and the incidental take or directed take of porpoise in the yellowfin tuna purse seine fishery. I think those were the three principal things that led to the Marine Mammal Protection Act.

There presently is a moratorium on commercial whaling. There has been an end to the commercial harvest of harp seals. And, in my view, the incidental take of porpoise in the yellowfin tuna purse seine fishery has reached levels which are biologically insignificant. We have the same issue with respect to that fishery as we are talking about here with other fisheries, in terms of the goal of a zero mortality and serious injury rate.

So, what we have today, as a result of the moratorium on taking imposed by the Marine Mammal Protection Act, is increases in a number of populations. There also, however, have been decreases. Steller sea lions I think are the best example that I can think of immediately, although also in the central Gulf of Alaska, there have been decreases in harbor seal populations. There had been a decline in the North Pacific fur seal through I think the early 1980's. The most recent data, and either Dr. Eagle or Dr. Foster may be able to speak to that, suggest that that decline has at least stopped, and may have reversed.

So, the big issues in the late sixties and 1970's, largely are under control. Things that we did not recognize, and in some cases have developed since then, large-scale high seas driftnet fisheries, for example, did not exist in a substantive way in the late sixties and early 1970's. And that, as I think everybody knows and agrees, appears to have been quite a large problem.

Senator STEVENS. Well, I remember seeing a story that indicated that the number of steelhead going up many of the steelhead streams had been reduced to an absolutely low level. And in place of salmon and steelhead runs that were once very robust, we now have very robust populations of sea lions and seals that are lining up along the mouths of the rivers and destroying the fish runs.

Is that true?

Dr. HOFMAN. I think in some areas there certainly is a problem. There clearly are some fish stocks that have declined substantially. Certainly, there have been increases in a number of marine mammal populations. Do they indicate cause and effect? I do not think the science is good enough at this stage to make that determination.

Senator STEVENS. Well, let me put it this way, then, Dr. Hofman. We have a very active and I think really good management system for fish stocks and the recovery of the fish stocks. What management do you have over the level of marine mammals today? What takes of marine mammals, except for Alaska natives, are a ??? for the purpose of management?

Dr. HOFMAN. I am not sure I completely understand the question, Senator Stevens.

Senator STEVENS. Well, what are you going to do about the Collets River, where they say that hundreds of seals took over the mouth of the river, or about the estimates of the 30,000 harbor seals that live in the State, compared to 2,000 in 1972? Why should there be that explosion in the population of marine mammals and a decrease in fisheries to the point that they are thinking now about regulating the taking of salmon in Alaska waters in order to protect the rivers of Washington State?

Dr. FOSTER. I would answer your question as follows. I would not argue with the information implying that the increase in marine

mammal populations is the cause of the decrease in the salmon populations. I think it is a correlation and that there is no justification for it.

I am not saying that it is not the case.

Senator STEVENS. Well, you do not have any management over the size of marine mammal populations today. You do not have any authority under this act to go out and reduce the levels of population where they are to the point of destroying another food source or species.

Dr. HOFMAN. Now I understand the question. Yes, I think the authority exists in the Marine Mammal Protection Act to manage those populations. If the populations are determined to be within their optimum sustainable level, there is a provision in the Marine Mammal Protection Act which allows a State agency, a Federal agency, or a private organization, a fisheries group, to come in and to propose taking of marine mammals for that purpose. But the authority exists.

Senator STEVENS. But the burden is on them to prove what you say we cannot we prove, right? The burden is on them to prove that the reason there are no fish going upstream is that there are 30,000 seals at the mouth of the river?

Dr. HOFMAN. No, the burden in this case is to demonstrate only that the marine mammal population is above its maximum net productivity level.

Senator STEVENS. Well, I suggest to you that it is not too different from my wolves and the caribou, which I will go into at another time. But you know the problem our State has with regard to wolves and caribou?

Dr. HOFMAN. I do.

Senator STEVENS. There are people who believe that the goal ought to be zero taking of any marine mammal ever. And you are fostering this more than you are supporting the balance that should be there for the total management of the ecosystem.

Dr. Foster, do you want to talk?

Dr. FOSTER. Yes, I just wanted to say that our proposal does allow for lethal takes. As Bob said, even under the interim exemption, we have the authority to do that. But we make it very clear in this proposal—

Senator STEVENS. Have you ever done it?

Dr. FOSTER. Well, no one has actually ever asked and, no, we have not done it. But I do expect that we will get some requests over the next months.

Senator STEVENS. Well, I am going to have some other questions, Mr. Chairman. I would like to add just one thing, though, about the fishermen. I told the chairman on the way over to the floor about a friend of mine up in the north country who complained to me that he was having trouble with the FAA. I went to see him.

He had a nice summer camp with a tent and was flying 20 hours a day. And he said that he was in trouble with the FAA. And I said, "Well, are you doing your maintenance on time?" And he said, "Sure." He pulled out his cot, where he had all of these forms. They were all checked off. He had done them. He had the dates and had done them.

So, I went back to Anchorage and I talked to the FAA and said, "What is wrong?" They said, "Well, you know, he never mailed any of those to us." So, I got him on the phone and said, "Why don't you mail them?" He said, "My God, you know, I am flying 20 hours a day. They just keep sending me forms to fill out."

Now, my point is, is the result of what we are doing here going to increase the forms that fishermen, four or five people on a 45- or 50-foot boat have to fill out? Are we going to have to have more descriptions of the time and place of incidental takes and the species and the scientific information that even Dr. Hofman says he may not have himself? Are we going to have forms that, if they do not get them in on time, you are going to say they are going to lose their permit to fish?

What are these forms going to add up to under this new system?

Dr. FOSTER. Well, in our proposal, I think any additional forms that need to be filled out would be minimal. I mean, we are carrying on with registration. We will propose to register more fishermen than are now registered. But, in terms of the actual observer coverage and things like that, it would be less.

Senator STEVENS. And who is going to pay for that?

I told the chairman why you had not done the research that was necessary to get him the data he needs, that we all need, because there was money in 1989 and 1990, but you did not spend it. I earmarked it in 1990 for the year 1991, and you had to spend it.

If you want to look that up in the record, it is true. I earmarked it. You had to do the marine mammal studies, and now we have that information. But, under these proposals, where are you going to get the money to do all of the work that is required?

Dr. FOSTER. Well, that is a good question. We have done a lot of—

Senator STEVENS. Do you have estimates of cost? What will it cost?

Dr. FOSTER. Well, I cannot tell you exactly. But I can tell you that we already have in our budget, as you know, around \$10 million that we spend now on observer coverage and marine mammal assessments. So that would continue to be used.

Senator STEVENS. What if we need to use that money for other purposes?

Dr. FOSTER. The marine mammal money?

Senator KERRY. It is my understanding it is going to cost \$19 million, almost \$20 million.

Dr. FOSTER. The numbers that you have resulted from a real quick staff-level proposal. These are not very definitive numbers. But that was the best guess back then for an off-the-cuff estimate of cost. We have been doing a lot of talking about it in past weeks, and I think that we can get more refined numbers and we will probably be lower than that.

Senator STEVENS. Is it all going to be taxpayer financed?

Dr. FOSTER. No. We are suggesting that—well, we are looking at various alternatives. For one thing, we are allowed to charge for the cost of issuing a certificate or a registration form to the fishermen.

Senator KERRY. So, the fishing vessel registration would be a fee-based thing?

Dr. FOSTER. Yes. Now they pay \$30, and we have explored the possibility of raising that anywhere from making it \$50 to anything else.

Senator STEVENS. How about an assessment of about \$10 on every one of the environmental group members that wants to see a zero take on marine mammals? The environmental community does not pay anything to support this program.

Dr. FOSTER. I think that is something that you could look at.

Senator STEVENS. Something worth exploring?

Dr. FOSTER. Why not? I am sure they will be willing to pay.

Senator STEVENS. I will thank them when they get here.

Thank you, Mr. Chairman.

Senator KERRY. Thank you very much, Senator.

The working group proposal, the industry conservation proposal puts a requirement on you to publish a critical and noncritical stock list within 45 days of enactment, and a final rule within 90 days. Can that be met?

Dr. FOSTER. Well, 5 years ago, when I was here, I would have said quickly, of course, it can. Well, this time I do not think it can. We are looking right now at the deadlines. We think that, to be perfectly reasonable, there would have to be some extensions to those deadlines.

Senator KERRY. To which ones?

Dr. FOSTER. Well, to all of them.

Senator KERRY. So, you are not able to get a critical stock assessment, even a basic critical stock assessment within 45 days?

Dr. FOSTER. Speak up, you are the one who knows this.

Dr. EAGLE. Well, I do not think we could do that and have it published in the Federal Register within 45 days. It would have to go through several layers of clearance.

Dr. FOSTER. We are just trying to be reasonable on our deadlines for once, instead of getting trapped.

Senator KERRY. So, the deadlines are something that we are going to have to look at carefully?

Dr. FOSTER. Yes. But I think it is not a major problem coming up with something.

Senator KERRY. The working group also proposes, as opposed to having the universal registration, to rely on the data bases of the existing Federal, State tribal fishing permit systems. They would only require a separate marine mammal system, where those systems do not exist. What problems do you see in that regime, if any? Why is that not acceptable?

Dr. FOSTER. Well, we do—Tom, would you like to go through that?

Dr. EAGLE. First of all, the data bases are set up for different purposes. In fact, we have explored using some of those. The people who set up the interim exemption program explored using those data back when we first set this up, and the level of data were inconsistent with what we needed. Therefore, to adapt those data bases would have cost more than to develop our own.

Consequently, we have our own data base right now. We have been operating this system for a number of years, and have a good program in place.

Senator KERRY. But hold on a second. You are telling us you want universal registration. You do not have that today. So, you clearly do not have an adequate data base, even according to your own judgment?

Dr. FOSTER. We have registration of our old categories I and II fisheries, so we have the system in place.

Senator KERRY. But you want universal registration?

Dr. FOSTER. Yes.

Senator KERRY. That is opposed by the working group, who suggest that you can accomplish your goal by taking the data base of the existing State and tribal and Federal permit system. You could tap into existing permit systems, and then you would not have to develop a whole new bureaucracy or process of registration. But you are saying, no, that is not adequate. If you are saying you need this larger system, why will what they are proposing not do the job?

Dr. FOSTER. I do not think it is that we need a larger system, sir. We have the system in place. We have at least two-thirds—let us say two-thirds of the universe is already registered. So, what we are doing is just talking about getting more names into the data base from that other one-third out there.

Senator KERRY. Completing the one-third that are not there?

Dr. FOSTER. Right.

Senator KERRY. Do you know what one-third, more or less? Is it a particular sector—is it tribal? What population would be affected by this extra third that is being added?

Dr. FOSTER. It was not tribal. It was our category III fisheries, which were fisheries that did not have—they had some interaction with marine mammals, but not what we were calling significant interactions.

Senator KERRY. Dr. Hofman, what about quotas as a management tool? You recommend, or NMFS recommends quotas. The working group has an alternative to quotas. Where do you come out on the quota issue as a tool?

Dr. HOFMAN. This is a case, Mr. Chairman, where I think that there may be some confusion between the two proposals. I am not entirely sure that I fully understand the proposal from the industry and the environmental community in several areas. This is one.

Under the National Marine Fishery Service proposal, there would be a calculation of what they refer to as the potential biological removal level. If their estimate of the total take from all sources, including, but not limited to fisheries, were above that level, they would establish, at least initially, the estimated PBR as a cap, or, I think the term you are using is "quota." And then they would look to allocating that cap or that quota among the various users.

I am not sure I fully understand what the industry and environmental community are proposing. You may want to ask the representatives of industry and the environmental community this same question. I think what they are saying is they would go through a similar kind of calculation, and want to make sure that the total take is not above the biologically acceptable level, but there they stop.

The issue is what do we do if the catch is greater than the calculated PBR. Do we limit catch and allocate the quota among the various users? This is an area, at least to me, that is gray in the proposal from the industry and environmental community. In the introduction, as I read it, they say they want to avoid quotas and allocations among possible competing fisheries. But I do not know how they propose, then, to deal with the situation when the actual take is greater than would be biologically acceptable. I do not know the answer to that question.

Senator KERRY. Well, we will address that with them.

Before we wrap up this panel, the conservation team effort is one that you seem to have afforded a certain amount of positive comment. But, on the other hand, you think they are too broad and too undefined. You are concerned about it. I mean, they still leave the power in the hands of the Secretary, ultimately, to make a decision, but they provide a certain flexibility. That does not appeal to you?

Dr. FOSTER. No. I think I said there are several aspects of it that do appeal to us. In fact, we would like very much—

Senator KERRY. To build on that?

Dr. FOSTER [continuing]. To use this concept. And we will just have to work with them as to exactly what the role would be. Because I think that the role would determine the kinds of people that would serve on these teams.

Senator KERRY. What concerns you the most about the working group proposal?

What red flag comes up in front of you and says to you, this really will not work, we cannot accept this, because it really threatens what we are trying to do?

Dr. FOSTER. Well, I think the issue that I mentioned earlier, the burden-of-proof issue, the fact that it seems to us—and we do need to talk to them some more, but it seems to us that their way of classifying stocks and not classifying fisheries would—we think we would lose a lot of information in that process, and a lot of control.

Sometimes I think that part of our problem is we do not really understand yet exactly how their process would work, and I think that with a few more conversations we might be able to come up with something.

Senator KERRY. It seems to me there ought to be a ground here to pull these efforts together. After all, you do have a coalition here of the industry and conservation groups, and both have compromised. It is fairly significant, I think, when you get two passionately involved entities with very different concerns coming to the table and agreeing on something.

You know, one's goal is to go out and catch and perhaps not be as intimately involved in the byproduct of that catch, and the other's goal is to be totally involved in the byproduct and to protect it. They say, we think we have a good way to do this.

It seems to me that since you are the governmental entity whose fundamental goal is not dissimilar to at least the goal of one of those groups, the fact that they have signed off ought to interest you.

Dr. FOSTER. And it does.

Senator KERRY. I would think there may be a ground here to try to marry the best of both efforts, conceivably.

I do agree with my colleague that we want to try to manage with a minimum intrusion, which is always a delicate balance, I understand that, and we do not, nor can we, always achieve what everybody will define as delicate, but I would like to see if we cannot explore that a little bit, so that as we move toward the markup here we are coming at it from a closer direction. I think we could be.

Would you share that sense?

Dr. FOSTER. Oh, yes, I think so, and I think that—well, again, I think if we can overcome the sort of fundamental concerns by talking them through that we ought to be able to find enough common ground. In fact, there is enough common ground already.

Senator KERRY. Dr. Hofman.

Dr. HOFMAN. If I may, Mr. Chairman, several points may help clarify some of the issues.

First, with respect to the burden-of-proof issue, there is an important point I think that has not yet come up, and it is actually a point of agreement. That is, under the Marine Mammal Protection Act as originally written, there was a categorical prohibition on taking from stocks that were endangered, threatened, or depleted, with the basic exception of taking for scientific research.

I think everybody agrees that that total restriction both is unnecessary in terms of the affected stocks and may have—in fact would have—impacts on fisheries that are unnecessary. I think everybody agrees that provision should be made under certain circumstances to allow the taking of stocks that are listed as endangered and threatened under the Endangered Species Act and depleted under the Marine Mammal Protection Act.

I think everybody is looking to a change in the Marine Mammal Protection Act now that would authorize taking of listed species in certain circumstances.

One of the directives provided by Congress was that this new regime be based upon sound principles of wildlife management. What the commission used and cited in the guidelines that it provided to the National Marine Fisheries Service with respect to that directive was this paper that was a product of a series of workshops in 1975 called, "New Principles for the Conservation of Wild Living Resources."

One of the basic principles is that management should be risk averse. This is true for management of fisheries as well as marine mammals and other wild living resources. Traditionally, the basic conservation ethic has been do nothing until there is clear evidence of a problem. So, everything was reactive.

What this principle indicates, and I think what Dr. Foster is talking about, is we need to be getting into the risk averse kind of management where instead of being reactive we are proactive. I think the Marine Mammal Protection Act really was the first demonstration of legislative intent in this regard, not only in the United States but throughout the world.

The third point is the issue of critical stocks. I think again there is agreement that we are not going to have sufficient resources in terms of either money or people to try to do everything, so that the task is to identify those places where we have the worst problems

and where we should be targeting our resources. I think there is categorical agreement on that.

If you look at the two proposals, the issue of critical stocks versus the way they are identified, as I understand them, in the environmental community/industry proposal three variables are considered—the size of the stock, the trend, and the level of the incidental take.

It is not clear what happens if you do not know anyone of them. In the National Marine Fisheries Service proposal, they classify stocks as alpha and beta stocks, and then they classify fisheries according to the level of take, so it would be possible to identify a priority stock under the National Marine Fisheries Service's proposal simply because we know that there is a high level of take.

If we are dealing with a pelagic species like Risso's dolphins, for example, that we know very little about, to guess the population level within an order of magnitude would be almost impossible. There is no information on trends. Under the National Marine Fisheries proposal there would be the possibility of identifying that species and the fishery as something that we should look at.

This may be an area where the proposal from the environmental community and the fishing industry simply is not fleshed out enough. I think with that, I will stop, unless you have another question.

Senator KERRY. Thank you very much. We are going to move on to the next panel. We will follow up with you. We will have plenty of time to slug this out in our offices and conversations, and I am sure we will get together and come up with a good proposal, so we look forward to doing that.

Senator Stevens.

Senator STEVENS. Mr. Chairman, before Dr. Foster and Dr. Hofman leave, is it possible that we could put together sort of a working team comprised of your people and people from this industry/environmental group and our committee staff to see if we could mark up the two and make them compatible without a battle?

Senator KERRY. Absolutely.

Senator STEVENS. We are not really qualified for this battle. I am not armed for it. I think we need the help of all three groups to advise us.

Senator KERRY. I totally agree. What I think we would like to do if we can is in short order get a meeting of all the parties together, try to work it out a little bit separately, and then come together as a group.

I think we would like to do that. I think it makes a lot of sense, and I intend for us to do that. Hopefully, I am sure we would get everybody agreeing and come up with a good proposal and will move it through here rapidly.

Senator STEVENS. Thank you very much.

Senator KERRY. Thank you. We appreciate it.

May we ask our second panel to come forward and affirm everything I just said?

Senator KERRY. Ms. Iudicello, we are going to begin with you and roll down the line here. We will ask each of you to try to hold to the green light/red light routine, and then we will have some time for a dialog. We would appreciate it. Thank you.

**STATEMENT OF SUZANNE IUDICELLO, SENIOR PROGRAM
COUNSEL, CENTER FOR MARINE CONSERVATION**

Ms. IUDICELLO. Thank you, Mr. Chairman, Senator Stevens. Good afternoon. My name is Suzanne Iudicello. I am counsel for the Center for Marine Conservation. The center was the coordinating body for the environmental groups who participated in the joint negotiations.

The groups that signed on to the document that was submitted to you in addition to the center include the Animal Protection Institute, Friends of the Sea Otter, Greenpeace, National Audubon Society, the Marine Mammal Center, and the World Wildlife Fund.

It is very timely that you have held this hearing today as we near the deadline of September 30, when the interim exemption program that you enacted 5 years ago will stop.

I would like to preface the remarks that I am going to make about the joint proposal with some thanks to the committee and the committee staff for encouraging our groups to get together.

This is not the first time this has happened, and you have been encouraging us to get together with the industry since the early eighties in working together on driftnets, so we appreciate the opportunity and your confidence in our ability to talk to each other instead of at each other. We would like to move on to get on to some problemsolving.

Our statement takes three steps today. First of all is to discuss why it is time to replace the interim exemption. The second is to give you an idea of why we believe the joint proposal has a lot of good conservation in it. The third are some brief comments on some of the other proposals you have before you.

In the 1988 amendments, you enacted an interim exemption. It was a temporary deal. The idea was to take 5 years to gather some information so that we could better understand what was the real problem of incidental take of marine mammals in commercial fishing.

We are now reaching the end of that 5-year period. The full program that the agency implemented, the Marine Mammal Exemption Program, has actually been on line for 3 years, but we have learned a lot from that exemption program.

We have learned more about the nature of the interactions. We have learned that we cannot rely solely on log books. We have learned that observed takes are five to eight times greater than reported takes in self-reporting log books.

We have also learned, contrary to some of the assertions that you have heard today, that universal registration does not really get you all the information you might want to have, either. I will talk about that a little later.

Basically, the exemption program may have had some difficulties, but it did accomplish what it was supposed to do. It gathered information, and in our view it is time to stop describing this problem and get on with solving it. We think that the joint proposal does that, and I am going to talk just about the conservation aspects of the joint proposal and why we think that it does meet the protection requirements of the MMPA.

From a conservation community perspective, the thrust of any incidental take regime ought to be to reduce fishing caused mortality.

ties so that marine mammal populations can grow and recover to their optimum sustainable population level.

It is important to keep studying interactions so that we understand better how to prevent them and avoid them, but what is not important is to document and allocate body counts. That is one of the reasons why we do not like the quota-based system, which basically says, this is the number of animals you may kill. Now you can go fight about who gets to kill them.

In our opinion, the joint proposal gets to the real heart of the matter, which is, is fishing-caused mortality the source of the problem that the marine mammal population is facing, and if it is, let us get at that. Let us stop the takes. Let us reduce the interactions to the point where the fishing-caused mortality is no longer the principal source of a decline. We think our proposal will do that.

In the questions, we can illuminate some more of the details, but for now I would just like to briefly say why we are confident that this will occur.

First of all, our proposal puts a focus on marine mammals and marine mammal stocks and the effect of fishing-related mortality on them. We do not focus on fisheries except in that they interact.

The calculation that we use to decide what we call the calculated removal level of marine mammals is very similar to the one that the agency has proposed. We took a lot of wisdom and advice from their proposal on how they reached that calculation, and we think that it is conservative in three ways—that is, risk averse.

We use a best minimum estimated population abundance. We use a minimum reproductive level, and we apply a recovery factor. Third, we call for immediate reduction of takes below what the agency would call the PBR and what we call the calculated removal level.

Unlike the agency proposal, which would take somewhere from 5 to 7 years to get takes below that PBR, our proposal would do it immediately.

The keystone of our proposal, no pun intended, and with great gratitude to the facilitators who helped us reach it, is to reduce fishing-caused mortality to insignificant levels approaching zero. It is the principal objective of the MMPA, and it is an essential theme of our proposal. We would request that it be mandated for all populations within 10 years, and our proposal suggests 3- and 6-year checkpoints so that progress can be assessed.

Our proposal, like the agency proposal, would focus immediate attention and resources on what we have called critical stocks, similar but not exactly like their alpha stocks, but over the long term we recognize that the attention has to be on all marine mammal stocks. With regard to the zero mortality rate goal, we provide for secretarial action to reduce the takes from all stocks over time.

The real difference here is that our proposal brings people to the table—conservationists, fishing industry, and the agency—to come up with a plan. The plan would be what it is that happens after we come out with our calculation, and we think that the best way to find out what you can do to reduce takes and improve fishing behavior so that marine mammals are not taken, is to bring the people who actually know how to do it to the same place at the same time to work together.

In conclusion, I would like to emphasize again that we think it is time to move on to solving problems. We have learned a lot from the interim exemption. The size of the problem appears to be more manageable than what we knew. The 40 populations of marine mammals that are subject to incidental mortality from fishing, significant levels of take by fishing is fewer than one-half, and maybe fewer than a dozen. Significant interaction occurs only in a few fisheries.

One of the key things—and I will wrap this up—is that our proposal, unlike the agency proposal, absolutely finally outlaws what the fishery calls “shooting from the stern deck.” When you look at the numbers of marine mammals that died in the course of so-called deterrence actions, that cause is greater in many fisheries than it is from entanglement in gear, and so we think the industry acquiescence in an absolute ban on intentional killing was a major achievement.

We thank you for this opportunity, and we will be happy to answer questions.

[The prepared statement of Ms. Iudicello follows:]

PREPARED STATEMENT OF SUZANNE IUDICELLO

Mr. Chairman and Members of the Committee, thank you for the invitation to present our views on the reauthorization of the Marine Mammal Protection Act (MMPA). My name is Suzanne Iudicello; I am counsel for the Center for Marine Conservation. The Center served as the coordinator for the conservation groups who participated in the negotiations with fishing groups and who endorse the Conservation and Fishing Community Negotiated Proposal submitted to you on June 10, 1993: the Animal Protection Institute, Friends of the Sea Otter, Greenpeace, National Audubon Society, The Marine Mammal Center, and the World Wildlife Fund. A copy of the joint agreement is attached for the hearing record.

Among their interactions with humans, marine mammals eat fish that are also the target of our commercial fishing fleets, and occur in areas where fishing is conducted. As a result they are incidentally taken during commercial fishing operations. Your hearing to focus on the incidental taking of marine mammals in commercial fishing operations reflects the critical, and often volatile, nature of this issue. It is very timely, given the September 30 expiration date of the Interim Exemption Program enacted in the 1988 Amendments.

Our testimony addresses (1) the need for a system to replace the interim exemption, (2) an overview of the joint conservation/fishing community proposal, and (3) comments on the alternative regimes proposed by the National Marine Fisheries Service and others.

I wish to preface my remarks by thanking the Committee for its encouragement to the conservation and fishing communities to work together to find common ground and creative approaches to incidental take. Too often adversary interest groups forget that once we make someone part of the solution, they are less likely to be part of the problem. The opportunity to work together on incidental take issues first presented itself as early as six years ago with cooperation on the control of high seas driftnets, continued during the 1988 Amendments to the MMPA, and through the development of the present joint proposal. This work has always been encouraged by Members of the Committee, and we appreciate your direction and confidence.

BACKGROUND

The Marine Mammal Protection Act was passed by Congress in 1972 to protect marine mammals of “great international significance * * * aesthetic and recreational as well as economic.” For two decades its mandate has been to protect whales, dolphins, porpoises, seals, and sea lions, walruses, polar bears, sea otters, and manatees through its major provision: a moratorium on the taking of all marine mammals by persons subject to U.S. jurisdiction. Another goal of the MMPA is that the “incidental kill or incidental serious injury of marine mammals permitted in the course of commercial fishing be reduced to insignificant levels approaching a zero mortality * * * rate.”

The Act gives the Secretary of Commerce authority to waive the moratorium, if the best available scientific evidence reveals it would not disadvantage a marine mammal stock to do so. Certain limited exemptions are allowed for takes of small numbers of marine mammals for a variety of purposes, including incidental (not intended) takes during commercial fishing.

The National Oceanic and Atmospheric Administration, (NOAA), through an Administrative Law process, was responsible for determining whether or not a given marine mammal population stock was within its Optimum Sustainable Population (OSP). Only after such a determination could the agency waive the moratorium on takes, and issue regulations permitting incidental takes of marine mammals.

Although NMFS issued numerous general permits to domestic fisheries beginning in 1974, and to foreign fisheries operating within U.S. waters beginning in 1977, none of these were, developed through on-the-record rulemaking proceedings. In fact, for most of these permits all parties recognized that NMFS lacked sufficient information on the status of affected populations, take rates, fishing effort, and other factors necessary to make the determinations required by the MMPA. Indeed, the inability to gather the extent of information necessary for formal rulemaking to waive the moratorium was one reason for the small take exemption enacted in 1981.

In 1984, the agency had issued eight, five-year general permits to domestic commercial fisheries on the West Coast, allowing the annual take of 2,120 Steller's sea lions, 45 North Pacific fur seals, 1,835 California sea lions, 2,155 harbor seals, 60 elephant seals and 200 cetaceans. Two small take letters of exemption also had been issued for East Coast fisheries for a take of small numbers of non-depleted species with a negligible impact. Both sets of permits were to expire at the end of 1988. In January of 1988, NOAA announced in the Federal Register its intention to prepare an Environmental Impact Statement on the proposed reissuance of domestic and foreign general permits. But while NOAA Fisheries were developing the impact statement, it became clear that there was insufficient scientific information, not only to claim that most of the marine mammal population stocks were within their OSP, but also to determine what the impact of commercial fishing takes would be on the stock. Without the OSP determinations, the agency could not make findings required to waive the MMPA moratorium and promulgate regulations authorizing the incidental take of marine mammals.

At the same time, the U.S. Court of Appeals for the District of Columbia Circuit Court underscored the MMPA's mandate that no incidental take permits could issue without OSP findings. In *Kokechik Fishermen's Association v. the Secretary of Commerce*, the court upheld a lower court's ruling that set aside the marine mammal incidental take permit issued to the Japanese salmon driftnet fishery. The lawsuit challenged the permit on the grounds that NMFS allowed the taking of Dall's porpoise, but did not authorize the take of other marine mammals, in particular depleted northern fur seals, which were frequently taken incidentally in salmon driftnets. The court declared that NMFS could not issue permits for Dall's porpoise if northern fur seals (or, for that matter, other marine mammals for which a permit could not be issued) would inevitably be taken.

NMFS was unable to determine OSP for affected marine mammal stocks by the end of 1988 and the *Kokechik* decision uncovered what was inherently flawed about the permit issuing system lack of sufficient information to be certain that incidental takes would not harm marine mammal stocks. This situation brought together representatives of the environmental community and the fishing industry during the spring and summer of 1988 to find a way to enable fishermen to go fishing, yet minimize the harmful impact of that activity on marine mammals. They hammered out a series of points that they presented jointly to the Senate Commerce Committee and the House Merchant Marine and Fisheries Committee. In November, Congress passed the MMPA Amendments of 1988 establishing an information gathering program and an Interim Exemption Program for Commercial Fisheries.

1. *It Is Time to Replace the Interim Exemption With a Program That Reduces Incidental Take of Marine Mammals*

The 1988 amendments to the MMPA included a five-year program exempting commercial fisheries from the taking prohibitions of the Act. This limited exemption allows incidental takes of marine mammals in fishing gear ranging from coastal gillnets in New England to massive trawls in the Bering Sea—interactions between 38 different fisheries (except those in the eastern tropical Pacific yellowfin tuna purse seine fishery) and 40 species of marine mammals. The exemption was designed to allow commercial fishing to continue while NMFS stepped up its data gathering, observations, and research on marine mammal/fishing interactions. The objective of the Interim Exemption Program was to provide time to collect reliable information about marine mammal and commercial fishing interactions and to com-

plete conservation and recovery plans, while at the same time allowing commercial fishing operations to continue in return for the temporary exemption from incidental take regulations, the commercial fishing industry was to participate in the data-gathering program by carrying mandatory on-board observers, compiling log books, and reporting marine mammal interactions.

The Exemption was meant to be temporary; the interim period is over. It is time to move on to a new regime for a number of reasons. The Marine Mammal Exemption Program (MMEP) created to implement the 1988 Amendments has given us a picture of incidental take sufficient to identify what are probably the true problem areas. It has also pointed up the problems associated with universal registration requirements and reliance on self-reporting by fishermen. Finally, it has demonstrated the importance of industry endorsement and education as a critical element in the success of any regulatory regime. The following summaries of results from the program are taken from an analysis on incidental take in commercial fisheries to be published next month by the Center for Marine Conservation.

- *Level of Interaction.* Data from the Marine Mammal Exemption Program vessel logbooks and observer reports indicate that in 1990 76,450 marine mammals were harassed, and 8,750 killed. In 1991 51,475 and 6,207 animals were harassed and killed respectively.

- *Significance of Incidental Take.* Whether fishing caused significant mortality for a marine mammal population depends on the size of the population, the trend, and the level of the takes. For the purpose of our analysis, we have defined "significant" as takes of more than 0.5 percent of a cetacean population or more than 1.0 percent of a pinniped population because at that level population recovery would be delayed by approximately 10 years. Marine mammal mortality in fishing operations, as reported by observers and vessel/owner logs in registered fisheries in 1990 and 1991, shown a significant impact on seven species of marine mammals, including 14 separate stocks within those species.¹

Another six stocks merit attention because data on marine mammal population abundance is insufficient to determine whether the incidental mortality has a significant impact on the population. New stock assessments to be released by NMFS in the coming months may change this picture slightly.

- *Participation.* According to MMEP reports, about 15,756 vessels registered in 1990, and 12,156 in 1991. Of those, about 12,978 and 10,313 submitted reports in 1990 and 1991. All vessels in two categories of fisheries are required to register, but because NMFS is unable to quantify the number of vessels engaged in every fishery, the rate of registration is unknown. Furthermore, of those vessels that registered, in 39 percent of the fisheries during 1990 and in 21 percent of the fisheries in 1991 fewer than half reported. In some cases, the categories of fisheries are so broad or combine so many different types of fisheries that they are not illustrative or comparable to the way state and federal fishery managers characterize either the fisheries, the effort or the permits.

- *Data Verification.* Comparison of observer data to logbook data indicates that on average mortality rates recorded in observer data were five to eight times greater than those recorded in logbook data. Delays in reporting and data entry made it impossible to address misidentifications, discrepancies in incidental take between years. Finally, statistical analyses of observer data were too late to verify logbook data, analyze and respond to trend data or reclassify fisheries on annual basis.

- *Assessment of Effort.* The Program did not specify a uniform, consistent manner for recording fishing effort, so it is difficult to analyze the results of reports. Since an assessment of the nature and extent of incidental take is linked to fishing effort, it is necessary to understand how a vessel was reporting days fished or number of sets and whether it was reported as per net, the number of nets, or soak time or some other variable in relation to the number of marine mammal interactions. Therefore, recorded effort in days was different both within a fishery and between fisheries.

- *Education.* Industry-sponsored education efforts were to have supplemented the agency's information and outreach about the Marine Mammal Exemption Program. It is noteworthy that registration and reporting occurred at greater rates in regions and fisheries where industry associations conducted education efforts. Despite the continued prohibition on intentional killing except to protect gear or catch, marine mammal shootings increased during the period. According to The Marine Mammal Center, more marine mammals stranded with bullet wounds in 1992 than in the prior eight years combined. In a half dozen fisheries in 1990 and 1991, more marine mammals were killed by "deterrence" actions than by interactions with gear.

¹Bottlenose dolphin, northern right whale dolphin, Risso's dolphin, pilot whale, harbor porpoise, California sea lion, harbor seal.

In summary, while the Exemption Program had its difficulties, it accomplished what it was supposed to do: gather information on the extent of the problem. It is now time to quit describing the problem, and start solving it.

2. *The Joint Proposal Offers a Means To Solve Real Problems*

From a conservation perspective, the thrust of any incidental take regime should be to reduce fishing-caused mortality so that marine mammal populations can recover to their optimum sustainable population. While further study of the nature of interactions is important, conservation and protection of marine mammals is not accomplished by refining, allocating, and verifying, marine mammal body counts. As you consider the various proposals before you, we ask that you examine whether the suggested requirements reduce takes, or whether they concentrate on accumulating further documentation that they occur.

In our view, the Joint Proposal gets to the heart of the matter: is fishing caused mortality the problem? If so, reduce it to a level where it is no longer the principle factor in causing marine mammal population declines or slowing their recovery. This tight focus is the major distinguishing characteristic between our proposal and the other ideas you have heard today.

The Joint Proposal has a likelihood of succeeding in this goal because it retains the goals of the MMPA, but involves affected parties at every step of way, it gets priority attention and funding to the marine mammal stocks most critically affected by incidental take, it is premised on application of the best available science, it requires immediate reduction of lethal takes to a level that allows recovery to begin and calls for further reductions within specified periods of time, and it represents a hard won commitment from the fishing industry to stop shooting marine mammals—a major cause of mortality in a number of fisheries. The conservation groups who endorse this proposal are satisfied that the final negotiated product is an example not only of good faith, but of good sense and good conservation.

The negotiated agreement shares many of the elements of the NMFS proposal, particularly with respect to its reliance on stock assessments, analysis of take, rigorous peer review, and use of a calculation to arrive at a marine mammal mortality or "removal level" that will promote the recovery of the population. Unlike the agency proposal, however, our proposal takes the emphasis off calculating and allocating quotas of dead animals, and puts the emphasis on reducing, avoiding, and preventing lethal interactions in the first place.

The elements included in the Joint Proposal that we believe make it protective of marine mammals are as follows:

1. The focus is on marine mammals, and the effect of fishing-related mortality on their populations, not on registering, categorizing, or allocating to fisheries.

2. The calculation of the number of marine mammals that may be removed from a population takes a conservative approach in estimating population and reproductive rates, and in applying a recovery factor.

3. Reduction of takes to the calculated removal level must take place immediately for populations of marine mammals deemed critical due to their population status or trend, or current level of fishing related mortality.

4. Reduction of takes to insignificant levels approaching zero—a principle objective of the MMPA—is not only the central theme of the proposal, it is mandated for all populations within 10 years, with three- and six-year check points to assess progress.

5. While it focuses agency resources and immediate attention on marine mammal populations most in need of protection, it provides for Secretarial action to reduce takes from all stocks over time.

6. It specifies a role for conservationists to work with government and the fishing industry in devising and recommending conservation plans tailored to address specific regional problems, and emphasizes solving those problems close to the source.

7. It provides these conservation teams the flexibility to recommend a wide variety of measures, including full observer coverage, permitting, or fishing closures where necessary.

8. Conservation team recommendations, and subsequent Secretarial action, must be consistent with the MMPA's mandate that the measures will not disadvantage the marine mammal population in question, and will be consistent with the purposes and policies of the Act.

9. Finally, it makes clear once and for all that shooting marine mammals is outlawed.

These elements, along with built-in safeguards that call for Secretarial action to reduce takes if the conservation plan measures are not achieving required benchmarks, or if new gear or new effort pose unforeseen problems, make this proposal workable from the conservation standpoint. Finally, the negotiating parties recog-

nized that fishing-caused mortality is not the only contributor to declines in marine mammal populations. Our recommendations include direction to the agency to assess other sources of mortality, and to work with other appropriate federal agencies to reduce mortality from causes other than commercial fishing.

3. *Comments on Other Proposals*

As stated above, the Joint Proposal incorporates many of the elements of the NMFS Proposed Regime to Govern Incidental Takes of Marine Mammals in Commercial Fishing. Rather than reiterate these common themes, the following brief comments, from a conservation perspective, summarize a few of the most important reasons why our proposal differs from the agency's recommendations.

First, the agency's proposed timeline for implementation would not reduce incidental takes below the Potential Biological Removal (PBR) level until 5-7 years after implementation. In contrast, the joint proposal calls for immediate reductions, with a maximum of three years to achieve significantly declining rates of incidental lethal take below the calculated removal level.

Secondly, although the agency proposal states that it maintains the goal of reducing incidental take to insignificant levels approaching zero, it contains no specific mechanism to achieve this goal.

Third, the agency proposal would allow intentional killing of marine mammals, including depleted, threatened and endangered species.

Finally, the proposed NMFS regime is, fundamentally, a quota-based system that is likely to generate more industry attention on competing for quotas of marine mammal mortality than on changing fishing behavior to reduce fishing caused mortality.

In response to recommendations from animal protection groups for a more stringent approach to controlling incidental take, we ask the question: what additional benefit will we achieve and at what cost? While we agree with many of the premises upon which these groups have based their proposal, we believe that the concerns are by and large addressed in the Joint Proposal. Therefore, the following comments go only to the issues where the two approaches differ significantly.

First, universal fishing vessel registration does not target effort the key factor necessary to determine the real effects of fishing on marine mammals. Although the concept has initial appeal, it still does not address the fundamental questions of who is fishing, where, when, and how. One vessel may be used in several fisheries at different times of the year, or in both state and, federal fisheries, or not at all in a given year. Even with a universal registration, assessing effort will require correlation of the one vessel's registration with all the fisheries in which it participates and how that effort is defined. Otherwise, registration contributes nothing to an accurate assessment of incidental take. The Interim Exemption Program demonstrated that, with the exception of federal and state fisheries that are either under permit or licensing programs, this correlation is not possible without extraordinary commitments of time and resources.

The Joint Proposal addresses the question of effort by providing for use of federal, state, and tribal fishing permits. Where those permits do not exist or are not made accessible to the agency, we propose requiring a marine mammal permit. In our view, this gets at the issue of effort assessment without unnecessary duplication and cost. The purpose of requiring effort assessment under the MMPA should be focused on reliable monitoring of fisheries to assess their impacts on marine mammals. If the point of a universal registration is to find out how many people are fishing regardless of their interactions with marine mammals, it should be faced squarely during the Magnuson Act reauthorization. If the point of universal registration is to collect fees, then that issue should be addressed head on, not wrapped in statistical rhetoric.

With regard to the call for mandatory levels of observer coverage, we wonder first, what will it cost and whether it realistically can be financially supported, and second, what is the incremental benefit? The 1988 amendments specified levels of observer coverage, and the mandate was impossible for the agency to meet, not only because of limited money, but also because some fisheries have thousands of vessels. While it is clear from the results of the Exemption Program that self-reporting underestimates by far observed interactions, we should provide the agency the flexibility to deploy observers according to its professional judgment about what provides a level of coverage sufficient to verify and extrapolate the reported data. That level may be 100 percent—an option that could be precluded by setting a statutory requirement.

If there is a distinction to be drawn between animal protection and conservation group approaches to incidental take, it is that in our community, we are ready to recognize that incidental take is just that: an accident that occurs incident to fishing

operations. We are also prepared to recognize the extent of the problem as it has been documented, and to focus on it where it is causing a problem for marine mammal populations. Those problem areas are identifiable and we should hit them hard with all the management, regulatory and enforcement measures at our disposal. Where fishery interactions are not a problem, or where they have an insignificant effect on marine mammal populations, or where they are not the real cause of population declines or slowed recovery, why devise an elaborate system of rules and penalties? The financial resources we have available for marine conservation are too thin as it is. We cannot afford to squander them to fix something that "ain't broke."

In conclusion, we believe it is time to move on to solving problems. We have learned a lot from the interim Exemption you enacted five years ago. The size of the problem appears to be more manageable than we knew five years ago: of the 40 populations of marine mammals that are subject to incidental mortality from fishing operations, fishing caused mortality is significant for fewer than half, and may not be a factor for a half dozen others. This significant interaction occurs in fewer than a dozen fisheries.² We learned that where industry associations took the initiative to educate and apply peer pressure to their members, registration and self-reporting were far more successful than in fisheries where there was no such effort. We learned that across-the-board log book requirements did not provide much useful information without some additional means of verification. We learned that the price of mandatory levels of observer coverage was beyond our fiscal capability. We learned that intentional killing of marine mammals is a considerable source of mortality in some fisheries. And also we learned that in seven of the twelve fisheries with significant takes, the source of mortality was "deterrence".

We urge you to consider the Joint Proposal because it builds upon what we've learned about the problem of incidental take of marine mammals. In our view, this approach will advance us from documentation of a problem to problem solving, and will move the fishing industry from being part of the problem to being part of the solution.

Thank you again for this opportunity to testify. We look forward to working with you as you continue your deliberations on the reauthorization of the MMPA. I will be pleased to answer any questions from the Committee.

Senator KERRY. Thank you very much, Ms. Iudicello.

Mr. Thornburgh, I am going to try to balance the arguments around here, so please proceed.

STATEMENT OF GUY N. THORNBURGH, EXECUTIVE DIRECTOR, PACIFIC STATES MARINE FISHERIES COMMISSION

Mr. THORNBURGH. Yes, sir, thank you.

I am Guy Thornburgh, executive director of the Pacific States Marine Fisheries Commission.

More mammals are taken incidental to the fisheries along our Pacific Coast than in the fisheries of either the Atlantic Coast or all of Alaska. This certainly is not a boast on our part, but an indication of how important reauthorization of the Mammal Act is to our Pacific Coast.

It also happens to be a fact that most mammal populations of our coast are not depressed. And after 20 years of MMPA, many fisheries are now actually negatively impacted by abundant populations of mammals along our Pacific Coast. A balanced reauthorization of MMPA is very important to us. We need to continue the opportunity to catch the Nation's surplus of fish, while reducing our take of marine mammals. And we also want to achieve some

² Alaska Prince William Sound Drift Gillnet; Alaska Bristol Bay Set and Drift Gillnet; Washington and Oregon Lower Columbia River Region, Willapa Bay, Grays Harbor Drift Gillnet; Washington Puget Sound Region and Inland Waters Salmon Set and Drift Gillnet; California Halibut and Angel Shark Set Gillnet; California Herring Purse Seine; Washington, Oregon, California Salmon Troll; Alaska Southern Bering Sea and Aleutian Islands Sablefish Longline; Alaska Prince William Sound Sablefish Longline; Washington and Oregon Salmon Net Pen; Gulf of Maine Groundfish/Mackerel Sink Gillnet; Atlantic, Caribbean, and Gulf of Mexico Tuna, Shark, and Swordfish Longline.

relief from the pressures of the expanding populations of seals and California sea lions.

Our Pacific Coast supports the management regime proposed by the conservation and fishing community working group, and we are here today to encourage you to accept that proposal in its entirety and transform it into law. The proposal was difficult to formulate, and it is a tough pill to swallow for many in the fishing community. Yet, we support it as a compromise.

We compliment the commitment from those in the conservation community who stuck with the fishing representatives throughout the entire exercise and who helped fabricate this product. From our perspective, there are seven highlights of this agreement.

First, it is a focus of our Nation's limited resources at solving the few hot spots of fishery interactions through the development of conservation plans for critical stocks. There are but a few of these hot spots, and conservation teams will tackle these problems.

The teams which the negotiations propose are quite progressive. They would be regional in nature, capable of focusing on not just one species, but several stocks at the same time. The teams consist of experts from all affected parties, and the tools available to the team would be diverse and tough enough to get the job done.

Second, the proposal reaffirms the MMPA goal for commercial fisheries to reduce mortalities to a rate approaching zero. And if progress is not made within 3 years, the fishing community agrees that the Secretary could mandate significant reduction in take to achieve that goal.

Third, the agreement prohibits any and all intentional lethal takes by commercial fishermen. We would no longer kill mammals that cause substantial damage or loss to our gear or catch, and we would no longer kill mammals to assure our own personal safety on board boats from animals that are tangled in our gear.

We agreed to this provision with tremendous controversy within our Pacific Coast industry, but it was our key tradeoff for other provisions of the compromise.

Fourth, the majority of marine mammal stocks are not critical, and it is very important to us that the regime for these noncritical stocks does not include across-the-board permits, quotas, observer programs, and fees.

Fifth, the program explicitly recognizes the treaty rights of our Northwest Indians, which include the subsistence, ceremonial, and commercial use of marine mammals.

Sixth, important to our Pacific Coast is the proposal to allow all citizens the legal opportunity to nonlethally chase mammals from private property, such as harbors, docks, and sport fishing boats, just the same as citizens can do for other wildlife.

And, finally, just as significant as any other component of the agreement for the Pacific Coast is resolution of the issue of nuisance animals. This aspect of the deal is a requirement long sought by our west coast, and one we respect the conservation community for accommodating.

So, those are our seven highlights. We prefer this compromise proposal to the solution proposed by the National Marine Fishery Service for the following reasons:

NMFS used the classic notice and comment process to develop their proposal. Unlike our process, where affected parties worked together to share a solution, the NMFS proposal failed to build commitments, and is not a package we can buy into. The NMFS proposal is overly burdensome, with MMPA and ESA authorizations, permits, et cetera. Their proposal fails to explicitly focus fiscal resources on the true hot spots of interaction.

It tries to allocate too many quotas of marine mammals between fisheries, which we think is impractical and in fact unworkable. Their algorithm for potential biological removals is too conservative. And NMFS did not even attempt to address public deterrence or nuisance animals, and they danced around the tribal issue.

Mr. Chairman, we also know there are opponents to the management regime proposed by the fishery and conservation community—not from the fishing industry, but from certain animal welfare groups. Frankly, I never expected that many of them would be able to identify with our program. Their philosophy is overly protective, and their solutions are unnecessarily burdensome and expensive.

So, in conclusion, we hope that you understand the tremendous progress that was made by the negotiations, and that you identify with that program, which is supported by so many in the conservation and fishing community.

We from the Pacific Coast request that you incorporate this proposal with all of its components and subtleties into the Marine Mammal Act.

Thank you.

[The prepared statement of Mr. Thornburgh follows:]

PREPARED STATEMENT OF GUY N. THORNBURGH

I am Guy Thornburgh, Executive Director of the Pacific States Marine Fisheries Commission. I represent the interests of commercial, sport charter, recreational, and tribal fisheries of California, Oregon, Washington, and Idaho. Diverse groups such as Trout Unlimited, Northwest Indian Fisheries Commission, Oregon Trawl Commission, Pacific Coast Fisheries Legislative Task Force, and California Department of Fish and Game (to illustrate just a few), all share a common approach to changes to the Marine Mammal Protection Act.

More marine mammals are taken incidental to our fisheries along the Pacific coast than in the fisheries of the Atlantic or Alaska. This is not a boast, but serves as an indication of the importance of our role in reauthorization.

It also happens to be a fact that most mammal populations of our west coast are NOT depressed (indeed, several pinnipeds populations are extremely robust). Our fisheries are NOT jeopardizing the well being of mammal populations, and many fisheries now are actually negatively impacted by abundant populations of mammals.

A balanced reauthorization of MMPA is very important to us. We need to continue the opportunity to catch the nation's surplus of fish while in the presence of marine mammals; and we want to achieve some relief from the pressures of the expanding populations of pinnipeds.

The fish harvesters, anglers, and managers of our Pacific coast support the management regime proposed by the Conservation and Fishing Community Working Group, and we are here today to encourage you to accept this proposal in its entirety and transform it into law. The proposal was difficult to formulate and it is a tough pill to swallow for many in the fishing community. Yet we support it as a compromise which serves the interests of the marine mammals, the conservation community, and the fishing community.

We compliment the commitment from those in the conservation community who stuck with the fishing community throughout the entire exercise and who helped fabricate the workable and tolerable compromise.

WORKING GROUP PROPOSAL

The highlights of this proposal from our perspective include:

- A sincere focus of our nation's limited fiscal resources at resolving the few "hot spots" of fishery/mammal interactions through the development of conservation plans for "critical stocks" of marine mammals. Information collected from the 5-year interim exemption program shows us there are but a few fisheries with truly significant takes of mammals and there are a few populations of mammals that are decreasing for one reason or another. Conservation teams will tackle these problems. The teams which we proposed are quite progressive—they would be regional in nature, capable of focusing on not just one species, but several stocks at the same time for an ecosystem approach; the teams would consist of experts from all affected parties (government, fishing, tribal, conservation, etc.); and the tools available to the teams would be diverse and contain teeth of "Jurassic Park" effectiveness to get the job done (tools such as onboard observers, mammal quotas, and fishery closures).

- The proposal reaffirms the MMPA goal for commercial fisheries to reduce serious injuries and mortalities to a rate approaching zero. If demonstrable progress is not made within three years, the proposal empowers the Secretary to mandate through regulations significant reduction in take to achieve the goal within 10 years nationwide.

- It prohibits any and all intentional lethal takes by commercial fishermen. We would no longer remove mammals that cause substantial damage or loss to our gear or catch, and we would no longer remove mammals to ensure personal safety from animals-entangled in our gear. We agreed to this provision, with tremendous controversy within our Pacific coast industry, but it was our key grade-off for other provisions in the compromise. To assure this provision, we also agreed that firearms could not be used to deter mammals from our fishing activities.

- The regime for non-critical stocks (which are the majority of mammal stocks) would include a rational system of authorization to take mammals in the course of fishing operations, no mandatory quotas, no mandatory across the board observer programs, and no fees. The use of logbooks, observers, permits, fishery restrictions, etc. are, of course, still available at the Secretary's discretion even for these non-critical stocks in order to assure their conservation.

- The program explicitly recognizes the treaty rights of our Northwest Indians, which include the subsistence, ceremonial and commercial use of marine mammals. We anticipate in the future the co-management of mammals between the tribes and NMFS.

- Very important to our Pacific coast is the proposal to allow all citizens the legal opportunity to non-lethally deter mammals from private property, such as harbors, docks, and sport fishing boats.

- Finally, yet just as significant as any other component of the agreement, is resolution of the issue of nuisance animals, (i.e., those animals identified as habitually exhibiting behavior that cannot otherwise be deterred). This aspect of the deal is a requirement long sought by our west coast and one we respect the conservation community for accommodating.

NMFS PROPOSAL

We prefer the compromise proposal to the solution proposed by the National Marine Fisheries Service for the following reasons:

- NMFS used the classic notice and comment process to develop their proposal. Unlike our process where affected parties worked together to share a solution, the NMFS proposal failed to build commitments and is not a package we can "buy" into.

- It is overly burdensome with MMPA and ESA authorizations and permits, and it still retains the concept of the authorization to fish under MMPA. (We strongly believe the authorization to fish should reside under the Magnuson Act or state authority, while the authorization to take mammals appropriately lies under MMPA).

- The proposal fails to explicitly focus fiscal resources on the "hot spots" of interaction and critical stocks of mammals.

- Its "quota" system and resultant allocation of mammals between fisheries is impractical and we believe unworkable.

- The algorithm for potential biological removals is too conservative.

- Finally, NMFS did not attempt to address public deterrence or nuisance animals and they danced around the tribal issue.

OTHER PROPOSALS

Mr. Chairman, we all know there are opponents to the management regime proposed by the fishery and conservation community—not from the fishing industry,

but from animal welfare groups. Frankly, I never expected that many of them would be able to identify with our program. Their philosophy is overly protective and their solutions are unnecessarily burdensome and expensive.

We hope that you understand the tremendous progress made by the "negotiations" and that you identify with this program, which is supported by so many in the conservation and fishing community. We request that you incorporate this proposal, with all of its components and subtleties, into the MMPA.

Thank you!

Senator KERRY. Thank you very much, Mr. Thornburgh. Mr. Gilman.

STATEMENT OF BRAD GILMAN, THE GULF OF ALASKA COALITION

Mr. GILMAN. Mr. Chairman, my name is Brad Gilman. I represent the Gulf of Alaska Coalition. We are comprised of coastal Alaskan communities, fishermen and shore-based processors that have a definite stake in resolving this issue quickly.

My fishermen include both Alaskan Native Aleut fishermen and Alaskan Native subsistence users in the Western Gulf of Alaska and the Northern Bering Sea.

I am going to just suspend the first three pages of my oral testimony, because I have dealt with it in the written testimony and, instead, use the remainder of my time to list the position of the coalition on what we consider to be the substantive issues in dispute.

First, our proposal does not weaken the protection which has existed for marine mammals. Prior to the *Kokechik* decision, fishermen were authorized to incidentally take marine mammals and were allowed to intentionally shoot animals off the stern deck to protect gear and catch. As part of the 1988 amendments, the Congress permitted these practices to continue unrestrained. Our proposal, in contrast, prohibits intentional lethal kills and sets statutory benchmark requirements for fishermen to meet over time.

Second, the Congress should not continue a centralized registration system on a nationwide basis. The Congress should instead direct all available funds to resolving the problems within the hot spot fisheries. Management measures are likely to include fishery-specific or region-specific registration systems to verify fishing effort by time and area. A nationwide registration system would serve only to consume scarce resources.

Third, specific management measures should not be specified by law. For instance, there should be no mandatory requirement for a specific level of observer coverage or log book reporting. Each hot spot fishery will have its own unique set of facts and circumstances. Maximum flexibility should be given to the conservation teams and the Secretary of Commerce to creatively deal with interaction levels. The adoption of uniform national management measures over situation-specific conservation regimes would in many cases cause confusion, frustration and lead to ridiculous results.

Fourth, there should be no blanket prohibition on the taking of depleted, threatened or endangered species under the MMPA. The regulatory authority of NOAA, under the Endangered Species Act, to prevent jeopardy to the continued existence of threatened or endangered species is more than sufficient.

NOAA's ESA authority includes the ability to limit the level of lethal takes. The MMPA process should instead be directed at the regulation of incidental takes in commercial fishing in order to avoid an ESA listing and later disbanding if the animal, nonetheless, is listed under the ESA.

Fifth, stakeholders should be granted meaningful participation on both the conservation teams and the scientific peer review group. We consider coastal communities, Alaska Natives, treaty tribes, fishermen, and the environmental community as interested stakeholders, depending on the mammal stock in question.

Stakeholder participation is vital to minimizing confrontation and encouraging cooperative problem resolution. It is the fishermen on the grounds that are going to have to enforce this regime.

The coalition understands the need to limit participation to increase the effectiveness and reduce cost for administering the conservation team process. This can be done through regionalization of the conservation teams and representation of a class of stakeholder, instead of each individual group having participation.

All meetings of conservation teams should be open to the public, so nobody feels excluded.

[The prepared statement of Mr. Gilman follows:]

PREPARED STATEMENT OF BRAD GILMAN

The Gulf of Alaska Coalition is comprised of coastal communities and fishing groups located and operating in the southwest region of Alaska. Its members include the Aleutians East Borough, the Kodiak Island Borough, the Peninsula Marketing Association, and the Alaska Groundfish Data Bank.

The Aleutians East Borough and Kodiak Island Borough have a number of coastal communities which depend entirely on commercial fishing for their livelihood. Some of these communities are also recognized under the Alaska Native Claims Settlement Act. The Peninsula Marketing Association represents resident fishermen in the East Aleutian Islands/Alaska Peninsula area. Many of these fishermen are of Aleut descent. Some continue the historic practice of subsisting on marine mammals. The Alaska Groundfish Data Bank represents shorebased groundfish trawlers and shorebased processors in Kodiak, Alaska. All have a vital interest in reauthorizing 114 of the Marine Mammal Protection Act in a manner which is fair to the fishing industry, Alaska Native subsistence users, and coastal economies.

BACKGROUND

The issue of the accidental (commonly referred to as "incidental") take of marine mammals in the course of commercial fishing operations has long been recognized as a continuing problem. Fishing operations cause a large amount of fish to be immobilized for brief periods of time. The potential for a "free meal" presents a natural attraction for highly intelligent marine mammals to interact with fishermen. This has resulted in both the intentional and accidental killing of marine mammals ("lethal takes").

The Marine Mammal Protection Act includes a general moratorium on the taking of marine mammals which are below their "optimum sustainable population". The MMPA authorizes exceptions to the rule, including the ability for fishermen to take marine mammals in the course of commercial fishing operations. Prior to 1988, this came in the form of a small take exemption or a general incidental take permit. This system dramatically changed as a result of Federal litigation aimed at the curtailing the take of marine mammals by the Japanese high seas driftnet fleet which was operating within the U.S. Exclusive Economic Zone. In *Kokechik Fishermen's Association v. The Secretary of Commerce*, 839 F.2d. 795, the plaintiffs succeeded in their challenge to the permit which authorized the incidental lethal take of marine mammals in the course of the Japanese fishery.

The *Kokechik* decision also applied to how the Department of Commerce, through the National Marine Fisheries Service, authorized the incidental take of marine mammals in domestic fishing operations. *Kokechik* held that NMFS had no authority under the MMPA to issue incidental take permits when a species of mammal

was either below "optimum sustainable population" ("OSP") or where there had been no OSP determination. Most mammal stocks did not have OSP determinations, and NMFS was unable to make such determinations without years of data collection. The specter of imminent closure of many fisheries nationwide forced the Congress to visit the issue of marine mammal/fishery interactions.

Concurrent with the 1988 legislative process, a group comprised of the fishing industry and the environmental community convened in an effort to negotiate a solution which would allow the fishing industry to continue to operate while making progress on reducing incidental takes in commercial fisheries. An agreement was reached and was adopted by the Congress in its essential form as the MMPA Amendments of 1988, Public Law 100-711. The Amendments were codified as new § 114 of the MMPA. The primary focus of the program was to identify the true levels of interaction between commercial fisheries and marine mammal populations, and to highlight problem areas. This took the form of a centralized data gathering system administered by NMFS. The information used to develop the database came from observer coverage and logbook reports from fishermen. The *Kokechik* moratorium on incidental takes was suspended for five years pending the development of this database. Although the Secretary of Commerce was given authority to respond to emergency situations, the Interim Exemption Program was not designed as a management regime to regulate interaction levels.

The Interim Exemption to the *Kokechik* moratorium expires on October 1, 1993. The Senate Commerce Committee and House Merchant Marine and Fisheries Committee have indicated a collective intent to develop a permanent conservation and management regime through the reauthorization of § 114 in some form by this date.

The task of developing a regime to regulate accidental takes in the commercial fishery has proven to be controversial. In response to congressional concerns over the timeframe for action, environmental groups and the fishing community again convened a negotiating group. This negotiation was professionally facilitated by the Keystone Center. The negotiators ("Negotiating Group") met on March 15 & 16; April 5 & 6; April 24-27; and May 24 & 26. The negotiations resulted in a compromise proposal submitted to the Congress and entitled "Conservation and Fishing Community Final Negotiated Proposal for a Marine Mammal Research and Conservation Program to be Enacted Through the Marine Mammal Protection Act Reauthorization of 1993" (the "Proposal").

The Gulf of Alaska Coalition categorically supports the Proposal and all of its component parts. The Proposal represents the substantive give-and-take of a diverse group of interests which have dramatically different philosophies on how to manage marine resources. Forty groups within the conservation and fishing communities are sponsoring the proposal. A number of prominent animal rights groups also actively participated in good faith in the negotiations, but at the end were not able to support the package adopted by the rest of the group.

The following comments are directed at an overview of the Proposal; attempts to clarify how the program should work in practice if properly administered; and discusses issues which appear to be in dispute. The page numbers corresponding to the Proposal which are described are included in parentheses.

AUTHORIZATION TO INCIDENTALLY LETHALLY TAKE MARINE MAMMALS IN THE COURSE OF COMMERCIAL FISHING OPERATIONS

The Proposal provides a legislative authorization for fishermen to incidentally take marine mammals in the course of commercial fishing operations, when the interactions involve marine mammals which would have fallen under the *Kokechik* moratorium. For interactions with mammal stocks at OSP, the pre-*Kokechik* regime applies. (General Authorization, pg. 3).

Under the legislative authorization, neither individual fishermen nor classes of fishermen are required to engage in a permit process to incidentally take marine mammals. Instead, the Secretary is given specific regulatory authority over the fishing industry to achieve certain statutorily-defined goals (see discussion of critical Stocks below). The legislative authorization does not include the right to intentionally kill marine mammals. This approach is modeled after the Interim Exemption, which provided for a general legislative authorization to take marine mammals instead of a permit system.

One valid criticism of the Proposal has been directed at the different approaches to handling interactions which involve stocks at OSP, as compared to interaction with stocks below OSP. Fishing groups are required to seek an additional general permit or small take permit for interactions with stocks at OSP, but are not required to seek such permits at stocks below OSP. The Gulf Coalition believes that the issuance of general permits or small take permits by NOAA would be ministe-

rial in nature, therefore, this may be a distinction without a difference. We strongly support the requirement that fishermen not be required to go through some form of permitting process for stocks below OSP. The energy and resources of the industry and the Federal government should be on resolving problem interactions, not forcing fishermen or groups to engage in a formalistic permitting process.

There is also a legislative authorization to incidentally take marine mammals which have been listed as threatened or endangered pursuant to the Endangered Species Act. This authorization is in fact the threshold for determining whether a mammal stock in trouble is to be regulated pursuant to § 114 of the MMPA or § 7 of the ESA. It is the intent of the Negotiators that a mammal stock be regulated under one conservation regime or another, but not both. For animals not yet listed under ESA, the MMPA conservation plan approach embodied in the Proposal would prevail. Once an animal is listed, however, the MMPA conservation plan would cease to exist and human interactions with the animal would be regulated pursuant to the ESA.

All existing provisions of the ESA would continue to be applicable, with the exception that any conservation and recovery program would be conducted pursuant to § 7 of the ESA (governmental consultation) rather than § 10 of the ESA (individual permitting). This is accomplished by stating in statute that the General Authorization to incidentally take marine mammals is a federal action sufficient to trigger § 7. The intent of the Negotiators was to eliminate the anomaly whereby the Federal fisheries would otherwise be regulated pursuant to the § 7 consultative process, while the state-regulated fisheries would be forced to engage in a more onerous § 10 permitting process. The policy basis for treating Federal and State fisheries differently was lost to the Negotiators.

A point has been repeatedly raised that the Proposal reduces the existing protections afforded to marine mammals because it currently waives the rigid moratorium on taking depleted species. This is true, however, the approach is reflective of the prior action of the Congress in enacting the Interim Exemption in 1988. The interim Exemption also waived the moratorium with respect to the incidental take of marine mammals. It also waived the moratorium with respect to the intentional shooting of marine mammals by commercial fishermen. Prior to *Kokechik*, the current interpretation of the MMPA allowed for the incidental taking of species not yet determined to be at OSP. In other words, the absolute protection for depleted and de facto depleted (i.e. mammals for which no OSP determination has yet been made) through a rigid moratorium on incidentally taking depleted species was theoretical. The year that it became the law of the land per *Kokechik*, the Congress enacted the Interim Exemption because the application of a rigid moratorium was too harsh.

The Congress should instead review the merits of the Proposal in relation to the conservation program (or lack thereof) set forth under the Interim Exemption. Once this comparison is complete, the Coalition is confident that the only conclusion which can be drawn is that the conservation plan approach is a dramatic improvement in the conservation of marine mammal resources in decline, while protecting the legitimate needs of fishermen to continue with their livelihood.

CLASSIFICATION OF "CRITICAL" AND "NON-CRITICAL STOCKS"

The Proposal develops a scientific framework for prioritizing the use of Federal resources. The fundamental tenet of the Proposal is that Federal resources should be directed at those mammal stocks of greatest and immediate concern. In order to identify which animals should be addressed first, the Negotiators devised a scientific matrix to classify stocks as "critical" and "non-critical".

The elements of the Matrix are population size and/or trend in the growth or decline of an individual mammal stocks; and the level of total lethal takes being borne by the population. The lethal takes are not limited to only those attributed to the incidental take of marine mammals. The takes include all mortality directly related to humans.

Specifically, the Matrix would channel Federal resources toward three situations. The first involves mammal populations in decline or, (if the trend is unknown) have a small population, for which the total lethal take level is determined to be high (referred to as Matrix Class 1 stocks). The second involves mammal populations which are in decline or (if trend is unknown) the population is small, for which the total lethal take level is medium or moderate (Matrix Class 2 stocks). The third involves mammal populations which are stable or (if the trend is unknown) are of moderate size, for which lethal take levels are high (also Matrix Class 2). These were generally referred to by the Negotiators as the "hot spot" areas. (Matrix, page 8; Response to Critical Stocks, page 13).

The NMFS proposal sought to channel funds to those fisheries which have the highest known levels of interaction with marine mammal stocks. The Proposal slightly shifts this focus to mammal populations in trouble, for which direct human-caused mortality may be a problem. The intent of the Negotiators was to use the conservation program to prevent, to the extent practicable, a listing of the species under the ESA. High levels of take for mammal populations which are increasing or large should also be addressed (i.e. Matrix Class 3), but the Negotiators agreed that limited Federal funding should be available first to respond to mammal populations with serious problems.

The Proposal requires the Secretary to publish an initial rule setting forth stock assessments, estimates of take, lists of interacting fisheries and a designation of critical and noncritical stocks. This list is to be based on the best information available and is to be updated on an annual basis as better information is received. The proposal also requires an annual peer review of the data compiled and used by NMFS in the Matrix ranking system, as well as other information provided by NMFS to the conservation teams. This peer review is to be accomplished by a Scientific Evaluation Working Group.

CONSERVATION OF "CRITICAL STOCKS"

The Proposal does not set forth a comprehensive regime to monitor and observe all interactions between fishermen and marine mammals populations. Rather, it provides a decisionmaking framework and management regime to respond to most critical interaction situations. The Proposal focuses Federal attention and resources where the level of total direct lethal mortality is having a significant impact on marine mammal populations in trouble.

Statutory Performance Benchmarks

The Secretary of Commerce is assigned the responsibility to assure that the statutory benchmarks are being achieved by the parties in question. The benchmarks are as follows: (1) Total lethal takes must be reduced as quickly as possible to the Calculated Removal level; (2) the fishing industry must develop a strategy to reduce incidental mortality rates to insignificant levels approaching zero within ten years (referred to as the Zero Rate Mortality Goal). (Conservation Teams, page 10).

The Secretary is required to monitor the performance of the industry with respect to the Zero Rate Mortality Goal. Three years from the date of enactment of the legislation codifying this proposal, the Secretary must determine whether significant progress has occurred, and must undertake regulatory actions as necessary to force compliance with the statutory benchmark. (Response for All Stocks, pg. 13).

Involvement of "stakeholders"

The proposal provides the Secretary with a mechanism to involve the significant stakeholders in the formulation of the strategy to meet these two statutory benchmarks. The stakeholders are considered to be the fishing industry, environmental groups, Alaska Natives and Treaty Tribes, coastal communities and state interests. The intent behind this heightened involvement in the process is to reduce confrontation and encourage a cooperative effort to resolve any problems between marine users and the mammal resource. By involving the stakeholders, the Federal government is more likely to receive support for conservation efforts within the affected communities and interest groups.

The intent to foster cooperation of the stakeholders is embodied in the Conservation Team concept. A team comprised of Federal and State officials, academic experts, and stakeholders would be convened by the Secretary of Commerce. The Secretary would have the direct authority to identify Team members. The Secretary would have the responsibility to assure balanced representation on the Conservation Team. (Convene the Team, pp. 10-11).

A number of issues have arisen with respect to administrative, financial and political restraints in convening such teams. The first centers around limited Federal funding for the implementation of the MMPA Program. If the formation and administration of the conservation teams become too complex and cumbersome, the administrative costs could conceivably dilute the scope and breadth of the program. The Gulf Coalition recognizes these concerns as valid.

We suggest that regional conservation teams be formed when to do so would bring economies of scale to the conservation effort and make it more cost effective. In Alaska the core conservation team might include a fishery manager and biologist from NMFS, a fishery manager and biologist from the State of Alaska, and one marine mammal academic. Subgroups of stakeholders could then be formed for specific mammal populations as part of the discussion with the core group. The participation

of fishing industry stakeholders might be further narrowed by geographic region or gear type.

For instance, Alaska harbor seals range throughout coastal Alaska. The Secretary of Commerce might consider appointing one member to represent Alaska Native subsistence interests, and one or two members from the Alaskan salmon industry (depending on the geographic spread of the harbor seal throughout the coastal range). The subsistence and fishing industry representatives may also be used to represent Alaskan coastal community interests. An environmental representative could also be appointed to the subgroup. This would put the subgroup at 3-4 members. Other subgroups might even be smaller. Beluga whales in Cook Inlet involve only subsistence users. The subgroup for this animal might involve two people, a subsistence representative and an environmental representative. The Secretary might consider appointing the same environmental representative to each subgroup.

Funding would be directed to the expedited formation of these teams, developing initial recommendations to fill in gaps in data, and drafting a conservation plan. It is intended that these informal groups be established on a short-term basis to jump start the conservation process. A series of work group sessions would be required at the outset. The Gulf Coalition acknowledges that these work groups would consume a significant share of the initial MMPA Program administrative funding. Once a plan is approved by the Secretary, the relevant subgroup could be disbanded or put in a dormant status unless it is determined that the plan as set forth is not accomplishing the two statutory benchmarks. Additionally, the subgroup could be asked to evaluate and comment on the ongoing investigation of indirect causes of mortality, such as changes in ecosystems or predator-prey relationships which may have been prompted by Conservation Team recommendations. (explained below) At such time that the Secretary concludes that conservation plans for the mammal stocks in the region are in place and functioning as intended, the core Conservation Team could then be disbanded indefinitely.

Finally, the Gulf Coalition recommends that conservation team members representing stakeholders not be entitled, as a matter of law, to per diem expenses. The better approach is to provide discretionary funding for the Secretary to pay for per diem expenses when, in the Secretary's sole discretion, a specific individual is deemed to be a critical member of a conservation team and cannot participate without such per diem funds. For instance, the Secretary may want to assign an academic expert to the team. Since the academic expert is not a "stakeholder" in the classic economic or public interest sense, per diem may be a necessary element in inducing the expert to participate. There may also be situations where stakeholders in remote areas do not have the financial capacity to participate, yet they are in the middle of the hot spot interaction being discussed.

Paying for stakeholder travel should, however, be the exception to the rule. Stakeholders with established associations or who routinely hire advocates at the Federal and State level should be deemed to have sufficient financial capacity to fund the per diem of the team participant.

A second concern is that the makeup of the conservation teams could create bias if the commercial, subsistence, and environmental interests do not have the same number of representatives on each conservation team. The Gulf Coalition submits that the intent of this proposal is not to set up a "majority-rules" forum where one group of stakeholders can out vote or shout down another group. The conservation teams are instead forums for coming up with a long-term and balanced approach to meeting the two statutory benchmarks. It is an attempt to reach a facilitated solution between the regulators, the regulated, and other interested parties which will bear the weight of public scrutiny, increase cooperation within the regulated community, and achieve the conservation goals.

To the extent that the political or personal dynamics of the discussions destroy the effectiveness of the forum, it should be pointed out that the Secretary of Commerce has final responsibility for the plan. The role of the conservation teams are purely advisory. The teams have six months to come up with a plan acceptable to the Secretary. If the Secretary determines that a stakeholder is using the forum to obstruct achievement of the statutory benchmarks, the Secretary must assume the direct responsibility of completing the plan. It is intended, however, that Secretary's representatives on the conservation teams will consult with the NOAA leadership to assure that the teams are headed in the right direction.

A third concern is the fear that a conservation team forum could be used by stakeholders to achieve economic advantage over their competitors. The Gulf Coalition believes that this concern is unfounded. The system is not, however, designed to permit the use of marine mammals as a weapon against others. All conservation team deliberations would be open to the interested public. Interested parties would have an opportunity to stay informed of the data being used in the deliberative process

and the options being discussed. Any proposed option which cannot bear public scrutiny can be revealed to the Secretary or his delegated representatives at any time. The Secretary is not obligated to adopt a recommendation for which there is no substantive basis.

The last concern is the potential for stakeholders to have species-specific or region-experts participate in the Scientific Evaluation Working Group, the peer review process for the data used in the Matrix and the establishment of the Calculated Removal Level. (explained below). There is concern that stakeholders would use scientists on retainer to try and unfairly influence the data used by the Secretary and the conservation teams. The Negotiators do not believe that participation of scientists employed by the stakeholders would result in this outcome.

The question which should be asked is instead whether the scientist in question has species-specific or region-specific expertise. If so, the insights would have value for the members of the Working Group in the ongoing course of their peer review. The Working Group would not be responsible for making management decisions or analyzing raw data. Peer review is instead a sounding board to identify the strengths and weaknesses of the scientific assumptions relied upon, and to identify significant gaps in necessary information.

To the extent that such scientists participate in the peer review, the Coalition believes that the various stakeholders should bear their cost of participation.

Response to Critical Stock Interactions

Conservation teams and the Secretary have certain prescribed timeframes for preparing and approving conservation plans. These timeframes vary depending on whether estimated total lethal takes are above the Calculated Removal Level ("Tier 1 response") or below the Calculated Removal Level ("Tier 2 response"). (Response to Critical Stocks, pp. 13-15). ("Calculated Removal Level, pp. 7 note, 10).

All resource management tools are available to the Secretary to achieve the statutory benchmarks. There are no mandatory management methods which are to be applied in all cases, instead the conservation teams and the Secretary are given complete discretion to devise a long-term strategy to bring total lethal takes below the Calculated Removal Level and to achieve insignificant mortality rates of incidental takes in the commercial fisheries. (Conservation Teams, pg. 12).

The use of discretion over tool-specific mandates was adopted by the Negotiators in recognition of the extreme diversity within the various regions of the country, and among the various fisheries or other user groups. The adoption of uniform national standards over situation-specific conservation regimes would in many cases cause confusion, frustration, and lead to ridiculous results. In some cases rigid national performance standards may require the closure of fisheries when the level of interactions would not justify such results. In other cases, mandatory requirements are unrealistic and cannot be achieved (see below under "Issues in Dispute").

This is not to say that conservation measures could not be draconian in nature. When an industry sector is refusing to cooperate with a conservation team or the Secretary and is clearly not seeking to change behavioral patterns in a manner consistent with its statutory obligations, a conservation team may use fishery-specific lethal take limits or time/area closures to coerce compliance. To the extent that the statutory mandates can be encouraged instead of coerced, however, a range of other tools are available to the conservation teams and the Secretary. These include educational efforts, workshops, expert skipper panels, development of alternative gear, and incentive programs. The intent of the Negotiators is to create an atmosphere of maximum flexibility to foster creativity and reduce confrontation.

One issue which continues to arise is the lack of a mandatory, centralized registration system for all fishermen. A number of animal rights groups have raised this issue as a serious failure because it does not provide NMFS with the ability to monitor mammal stocks and fishermen interaction in a comprehensive fashion.

It is true that the proposal does not call for a mandatory registration regime. Centralized registration would not necessarily provide any further enhancement of the conservation goals of the MMPA. NMFS attempted to develop a centralized data base, but the magnitude of the data gathering responsibilities has made the centralized system ineffective as a means of comprehensively monitoring and managing interactions with marine mammals. Included in this program would be the continuation of the mandatory logbook program and some minimum level of mandatory observer coverage for all fisheries.

It is ridiculous and unfair to require fishermen who have little, if any, interaction with marine mammals to engage in an annual registration drill. Logbooks have proven not to be effective in monitoring interactions levels. Some might argue that there is value to mandatory registration, mandatory levels of observer coverage, and

mandatory logbooks in order to be able to determine whether fishermen are cheating on their logbooks. We disagree.

Instead of establishing a comprehensive system, administered by NMFS at a centralized location, to detect whether fishermen cheat on their reporting requirements, the entire focus of the Federal process should be channeled at identifying the marine mammal stocks which are in trouble. For those stocks, a comprehensive system would be developed, and the Federal resources would be limited toward establishing a comprehensive database, reporting through logbooks if warranted, and observer coverage. The database would be comprehensive with respect to the mammal stock in question and those fisheries likely to interact with that stock.

The Proposal would grant the conservation teams and the secretary with the authority to assure that a system is in place to verify total fishing effort and arrive at estimates on the rates of lethal takes within the industry. Many fisheries are regulated under Federal and State permitting systems. One of the first tasks of the conservation teams would be to evaluate the effectiveness of the two databases used in the permitting process. To the extent that it can be accomplished in an expeditious and cost-effective manner, the two systems could be merged together to form a comprehensive data base. To the extent that the systems are incompatible, or the state is precluded from releasing the information to the Federal government for reasons of confidentiality, the Proposal authorizes the Secretary to require MMPA permits to verify effort. (Monitoring Program, pg. 17). There is no compelling justification for a nationwide registration program.

Alaska Native Subsistence

Subsistence use of Alaska Natives is only at issue when the total lethal take level of a Matrix Class 1 or Matrix Class 2 stock exceeds the Calculated Removal Level and subsistence use is a significant component of total take. In such cases, it is critical that Alaska Natives become active players in designing a regime to reduce total takes below the Calculated Removal Level.

The Marine Mammal Protection Act provides the Secretary of Commerce (or Interior in the case of sea otters and walrus) with the authority to regulate subsistence takes when the animal in question is depleted, threatened or endangered. In the event that total lethal takes exceed the Calculated Removal Level and the primary source of take is Alaska Native subsistence, it is in the interest of the subsistence users to take the manner into their own hands before there is a formal classification of the stock as depleted, threatened, or endangered. Alaska Natives have had a longstanding history of success in the self-regulation of subsistence when the long-term viability of their subsistence resource is in question. The conservation team concept was designed to maximize the Alaska Native community's desire for some degree of self-determination.

Additional flexibility has been built into the proposal when Alaska Native subsistence is the primary source of mortality. Within the calculated Removal Level, a percentage "recovery factor" is included to assist in the recovery of the stock. This factor is a policy determination of the pace of the recovery. As part of the establishment of the calculated Removal Levels for each mammal stock, the Secretary shall assign a recovery factor. The Secretary will consider the policy ramifications of various recovery factor options through notice-and-comment rulemaking. When subsistence takes are the issue, however, the relevant conservation team shall review the impacts of the recovery factor on Alaska Native subsistence takes and may recommend another recovery factor, taking into account socio-cultural and economic considerations. Any final decision of the Secretary must take into consideration the needs of subsistence users. (Final Rules, pg. 10; Response to Critical stocks, pg. 13)

RESPONSE TO NON-CRITICAL STOCKS

These are the stocks which fit the description for Matrix Class 3 through 5. They generally involve populations where lethal take levels are moderate or low and populations are healthy. To the extent funding is available, attention may be directed at Matrix Class 3 stocks in the future. (Matrix, pg. 8; Response to Non-Critical stocks; pg. 16).

By definition, the total lethal takes from these stocks do not exceed the calculated Removal Level. The one remaining statutory benchmark is to meet the Zero Rate Mortality Goal by reducing the incidental mortality rates within a given commercial fishery to insignificant rates approaching zero. The Coalition believes that most fisheries interacting with these stocks are probably already interacting at insignificant rates. It is the responsibility of each fishing group sector, however, to monitor its own fishing practices to reduce interactions in order to ensure that it is meeting its statutory obligation.

The Proposal would provide the Secretary of Commerce with the discretion to assess population size of non-critical marine mammals or to monitor fishermen who interact with non-critical stocks. The decision to monitor a non-critical stock/fishery interaction is at the sole discretion of the Secretary. Such a decision may be a result of information from non-governmental sources, from fishery observer data, or from formal petitions from third parties for an investigation. Fishermen must take Federal observers if requested by the Secretary under this program.

Reasons for monitoring a non-critical stock might include changes in fishing practices; verification that the stock is noncritical; and verification that a specific fishing group is meeting its statutory benchmark of achieving insignificant mortality rates. The provision for non-critical stocks is, in essence, a preventive measure against a stock being listed as critical due to fishing interactions.

Reporting

All fishermen are required to report lethal takes of marine mammals in the course of their fishing operation. Reporting of such takes would not subject a fisherman to any violation. Failure to report lethal takes or serious injury would expose the fisherman to penalties. The information obtained from this reporting would be made available to the Scientific Evaluation Work Group and to the public through the annual publication of the information.

If the reporting results in a determination by the Secretary that there is an anomalous change in mortality levels, the Secretary is provided with emergency authority to implement regulatory measures to arrest the increase in takes. If the mortality levels are such that the animal may move from "Non-Critical" to "Critical" on the Matrix, the Secretary has the authority to convene a conservation team in anticipation of this occurrence.

Other

Four other issues were addressed by the Negotiators, three of which are contained in this Proposal and one of which was adopted separately.

First, the proposal bans the intentional lethal killing of marine mammals by commercial fishermen to protect gear and catch. The authority to lethally kill mammals was authorized under the Interim Exemption. This prohibition represents a major strengthening of the MMPA in practice.

Many commercial fishermen were upset with the fishing industry participants who agreed to this restriction. For many fishermen, it is difficult to watch the significant destruction of gear and catch by mammal stocks which are robust and increasing. These problems appear particularly severe in California, Oregon, Washington, and Maine. The Coalition was actively involved in the negotiations on this matter. We agreed to the prohibition on lethal killings because of the concessions made by the environmental participants to provide flexibility to resolve problems arising from the incidental take of declining marine mammal populations by commercial fishermen. This must nonetheless be considered a significant concession on the part of the commercial industry.

Second, the Proposal provides the ability for citizens to protect property, and for commercial fishermen to protect gear, to use measures to deter mammals, provided such measures do not kill or seriously injure the mammals. If NMFS determines that a certain practice in fact kills or seriously harms a mammal, the agency may impose regulations to prevent such use. The Negotiators felt that citizens should have some mechanism for minimizing the damage done by mammals if they did not have the right to remove the creatures through lethal means.

Third, the Negotiators specifically acknowledged that there is nothing in the MMPA which defines the rights of the Pacific Northwest Treaty Tribes with respect to their traditional hunting and fishing rights, as recognized by existing treaties with the Federal government.

Finally, a number of the participants in the Negotiations conducted a separate negotiation to develop a special regime for determining under what circumstances a Federal or State wildlife manager may be authorized to lethally remove nuisance pinnipeds. Information provided about the harm to fish stocks in the Pacific Northwest and aquaculture facilities in Maine provided a compelling justification for having a process in place to permit the removal of individually identified pinnipeds who have demonstrated habitual behavior, and are causing economic or biological harm. This process contains sufficient safeguards to avoid abuse. While there are no circumstances in the Gulf of Alaska which warrant the use of this process in our region, the Coalition does support the proposed Nuisance Animal regime based on the case that was made throughout the negotiations.

ISSUES IN DISPUTE

There are likely to be a number of issues raised by NOAA, the animal rights groups, or other members of the interested public. In this testimony, the Coalition has attempted to anticipate the most significant issues and address them accordingly. A brief statement of the Coalition's views on the issues in dispute are as follows:

1. *Centralized Registration:* We oppose it as a mandatory measure on a nationwide basis. The conservation teams and the Secretary should instead be permitted to craft their own verification regime after determining what type of program makes sense for Critical Stock management. Mandatory registration for Non-Critical Stocks serves no legitimate purpose, and unduly burdens the administration of the Program.

2. *Mandatory Logbooks and Observer Coverage Levels:* We also oppose these as mandatory elements required by statute. Each has value as management tool, depending on the circumstances.

3. *Permitting:* We oppose a mandatory permitting program. There should be a generic legislative authorization to incidentally take marine mammals. The Federal resources should be directed at problem resolution through the conservation team mode.

4. *Threatened and Endangered Species:* There should be no blanket prohibition on the taking of threatened or endangered species under the MMPA. The regulatory authority of the agency under the ESA to prevent jeopardy to the continued existence of threatened or endangered species is more than sufficient, and includes the ability to prohibit all takes when necessary. The MMPA process for regulating incidental takes in commercial fishing should apply until an animal is listed, then be disbanded in favor of the traditional ESA recovery plan process.

5. *Stakeholders:* Stakeholders should be granted meaningful participation on both the conservation teams and the Scientific Evaluation Working Group. Stakeholder participation is vital to minimizing confrontation and encouraging cooperative problem resolution.

6. *Funding:* The Proposal is designed to apply whatever funding is available to the stocks deemed most critical by the agency. The actual performance of the program for management of Critical Stocks functions irrespective of funding levels; funding should not be cited as a reason that the program won't work. Funding levels are relevant only to the issue of how many Critical stocks are addressed by conservation teams in any given year.

The Coalition is opposed to mandatory user fees assessed against the fishing industry. It is the Congress which enacted the policy that marine mammals desired heightened protection not afforded to land-based mammals. By declaring marine mammal conservation a national priority, the Nation should be required to pay for the program through the annual appropriation process.

In conclusion, the Gulf of Alaska Coalition appreciates the opportunity to present this testimony to the National Ocean Policy Study. We are prepared to assist you throughout the legislative process in enacting a marine mammal conservation regime which is effective and treats the fishing industry fairly.

Senator KERRY. Thank you very much, Mr. Gilman. It was very helpful. Mr. Kaelin.

STATEMENT OF JEFF KAELIN, EXECUTIVE DIRECTOR, MAINE SARDINE COUNCIL

Mr. KAELIN. Yes, sir. Senator Kerry, Senator Stevens, thank you for the opportunity to be here today to discuss the MMPA reauthorization with you. I am Jeff Kaelin, the executive director of the Maine Sardine Council. Our six factories utilize about 35,000 metric tons of herring each year to produce about 40 million dollars' worth of canned sardines and other canned herring products.

I am also here as the president of the Associated Fisheries of Maine. This organization is an umbrella group of about 50 fishing-related businesses and several fisheries associations operating in our State.

And, finally, I appear today as government relations coordinator for the Maine Aquaculture Association. That industry is becoming

a stable one, and has excellent potential for growth—no pun intended there either.

I participated in negotiations between fisheries groups and environmental organizations in an effort to provide Congress with an alternative to the NMFS-proposed regime to govern the interactions between our industry and marine mammals after September 30. All of the fishing groups that I represent and work with want to be part of a process that ensures both the viability of marine mammal stocks and fisheries in our region.

The Maine Sardine Council's interest was to work toward the development of a program that would not threaten to shut down our category III herring fishery due to any impacts that New England's sink gillnet fleet might be having on the region's harbor porpoise population.

The NMFS-proposed regime would have made it possible for any fishery interacting with a marine mammal stock of concern, like the harbor porpoise, to be shut down once a particular potential biological removal level of take was reached. The possibility that Maine's herring fishery, recognized by the interim exemption program as offering not more than a remote likelihood of taking any marine mammal, might be shut down due to problems associated with another gear type just did not make sense to us.

The Maine Sardine Council has signed on the negotiated proposal, which I will call the critical stock regime, because we believe that this possibility has been eliminated.

Even though our fishery could be a focus of a conservation team which may be established to consider the viability of the east coast harbor porpoise population, we are confident that our fishery will be recognized as already operating at an insignificant level of incidental mortality and serious injury rate of those animals.

The Associated Fisheries of Maine also supports the negotiated critical stock regime because of the fact that its two member associations most likely to be impacted by changes to the MMPA this year, the Sardine Council and the Maine Gillnetters Association, have agreed to do so.

While I do not directly represent the Maine Gillnetters Association, I worked closely with that organization during the negotiation process. At the close of the discussions, the Maine Gillnetters Association did, too, agree to support the critical stock regime.

In my view, they took this position primarily because the conservation team concept represents a partnership between Government and industry, which is intended to develop strategies to mitigate takes while allowing for the continued viability of a fishery. A partnership like this has not existed during most of the interim exemption program.

It was not until very recently that NMFS began to pursue a policy of working with the gillnet industry to help to develop alternatives which would reduce the fishery's impact on harbor porpoise. During most of the past 5 years, the response to being asked to do so was countered by the assertion that Congress had only given the agency the authority to count animals and fishery interactions, inferring that it was the sole responsibility of industry to develop alternative fishing strategies.

The negotiated critical stock proposal, which has been presented to you, will protect both fishermen and marine mammal stocks where interactions are recognized to be of concern. This approach will develop cooperation and ultimately will focus scarce resources where they can be expected to have the greatest impact.

The Maine Aquaculture Association has not taken a position on this regime because the marine mammal interactions about which our salmon net pen industry is concerned arise from the presence of robust harbor seal and gray seal populations in Eastern Maine.

During the winter months of the past 2 or 3 years, Maine's \$50 million salmon net pen industry has experienced losses from seal predation that are estimated to be as high as \$5 million each year.

I participated in the discussions that produced a second proposal, concerning the intentional lethal taking of pinnipeds for the Maine Aquaculture Association. Unfortunately, our efforts to develop a regulated permitting system which allows for the continuation of intentional lethal takes of individual animals from robust seal populations, to protect gear and catch in the marine finfish aquaculture industry, ultimately failed.

Accordingly, we did not sign on to this proposal, and must now work with you and NMFS to develop a process that will be successful in helping to resolve a serious predator control problem. The proposal's requirement that individual animals be identified before the beginning of a 135-day permit application review period does not constitute a workable permitting process for the salmon net pen industry.

We are concerned that the reauthorization of the MMPA this year may not produce an opportunity for finfish growers to develop a legal strategy for coping with the impact of abundant and growing seal populations in eastern Maine. Our inability to be successful in this effort will create a significant impediment to the continued development of the marine finfish aquaculture industry in the Northeast.

In order to help to avoid this outcome, today we are asking that the National Marine Fishery Service immediately establish an informal intentional lethal taking task force. This group should begin to meet to consider the possible authorization of a general permit for salmon farmers before this winter.

At the same time, we ask this committee to develop a specific authorization for the salmon net pen industry to request from the National Marine Fishery Service a permit for the intentional lethal taking of individual nuisance animals which can be identified to a wildlife management agency for removal once habitual predatory behavior is exhibited, and after other nonlethal means of deterrence have failed.

These brief comments attempt to summarize for you the major MMPA reauthorization issues which I understand to be of interest to several Maine fisheries. Many other technical issues could be discussed, but I will instead respond to any questions which you may have for me.

On behalf of the Maine Sardine Council, the Associated Fisheries of Maine and the Maine Aquaculture Association, I want to thank you again for the opportunity to be here today. And I would like to thank both of you personally for all of your efforts on behalf of

the fishing industry in our region and in our State and nationally, too.

Thank you very much.

[The prepared statement of Mr. Kaelin follows:]

PREPARED STATEMENT OF JEFF KAELIN

Senator Kerry, members of the Committee, thank you for the opportunity to discuss the pending reauthorization of the Marine Mammal Protection Act with you today.

I am Jeff Kaelin, the Executive Director of the Maine Sardine Council. Maine's sardine industry consists of four companies operating six factories located between Bath and Lubec, Maine. These factories utilize about 35 thousand metric tons of herring each year to produce more than \$40 million worth of canned sardines and other canned herring products.

Today, I am also here as the president of the Associated Fisheries of Maine. This organization is an umbrella group of about 50 fishing-related businesses, and several fisheries associations, operating in our state.

Finally, I also appear before you today as the Government Relations Coordinator for the Maine Aquaculture Association. Maine's aquaculture industry is becoming a stable industry and has terrific potential for growth.

Beginning in February, participated in discussions between fisheries groups and environmental organizations in an effort to provide Congress with an alternative to the National Marine Fisheries Service's (NMFS) proposed regime to govern the interactions between marine mammals and commercial fishermen after September 30th. All of the fishing groups that I represent and work with want to be part of a process that ensures both the viability of marine mammal stocks and fisheries in our region.

My primary motivation for getting involved in this process, in behalf of the Maine Sardine Council, was to work towards the development of a program that would not threaten to shut down our Category III herring fishery due to any impacts that New England's ink gillnet fleet might be having on the regions harbor porpoise population.

The NMFS' proposed regime would have made it possible for any fishery "interacting" with a marine mammal stock of concern—like, potentially, the harbor porpoise—to be shut down once a particular "potential biological removal" level of take was reached. The possibility that Maine's herring fishery, recognized by the Interim Exemption Program during the past five years as offering not more than a "remote likelihood" of taking any marine mammal, might be shut down due to problems associated with another gear type just didn't make sense to us.

The Maine Sardine Council has signed on to the negotiated proposal for a marine mammal research and conservation program, which I will call the "critical stock regime", because we believe that this possibility has been eliminated. Even though our fishery would potentially be a focus of a Conservation Team which may be established to consider the viability of the east coast harbor porpoise population, we are confident that our fishery will be recognized as already operating at an insignificant level of incidental mortality and serious injury rate of these animals.

The Associated Fisheries of Maine also supports the negotiated critical stock regime because of the fact that its two member associations most likely to be impacted by changes to the Marine Mammal Protection Act this year—the Maine Sardine Council and the Maine Gillnetters Association—have agreed to do so.

While I do not directly represent the Maine Gillnetters Association I worked closely with that organization during the negotiation process. At the close of the discussions, the Maine Gillnetters Association agreed to support the critical stock regime.

In my view they took this position primarily because the Conservation Team concept represents partnership between government and industry which is intended to develop strategies to mitigate takes while allowing for the continued viability of a fishery. A partnership like this has not existed during most of the Interim Exemption Program.

During the past two or three years, a "Harbor Porpoise Working Groups"—made up of members of the fishing and environmental community in New England, along with government and university representatives, and with support from the New England Fishery Management Council—has been meeting to discuss and develop methods to reduce the rate of take of harbor porpoise in the sink gillnet fishery and examine the status of the region's harbor porpoise population.

Unfortunately, it was not until very recently that the NMFS began to pursue a policy of working with the gillnet industry to help to develop alternatives which

would reduce the fishery's impact on harbor porpoise. During most of the past five years, the response to being asked to do so was countered by the assertion that Congress had only given the agency the authority to count animals and fishery interactions, indicating that it was the sole responsibility of industry to develop alternative fishing strategies.

The negotiated critical stock proposal which has been presented to you will protect both fishermen and marine mammal stocks where interactions are recognized by the government to be of concern. This approach will develop cooperation and, ultimately, will focus scarce resources where they can be expected to have the greatest impact.

The Maine Aquaculture Association has not taken a position on the negotiated critical stock regime because the marine mammal interactions which Maine's salmon net pen industry is concerned about arise from the presence of robust harbor seal and gray seal populations in Eastern Maine where a new fishing industry is developing.

The critical stock proposal does not address situations where the Marine Mammal Protection Act has worked, to the extent that some marine mammal populations today are large and growing due to their protected status.

During the winter months of the past two or three years, Maine's \$50 million salmon net pen industry has experienced losses from seal predation that are estimated to be as high as \$5 million each year.

In behalf of the Maine Aquaculture Association, I participated in the discussions that produced a second proposal which concerns the "Intentional Lethal Taking of Pinnipeds". Unfortunately, our efforts to develop a regulated permitting system which allows for the intentional lethal taking of individual animals from robust seal populations—to protect gear and catch in the marine finfish aquaculture industry—ultimately failed.

Accordingly, we did not sign on to this negotiated proposal and must now work with the Congress and the NMFS to develop a process—before the seasonal behavior of some harbor and gray seals needs to be deterred again this winter—that will be successful in helping to resolve a serious predator control problem. Both this Committee and the NMFS has a record of supporting the limited intentional lethal taking of abundant marine mammals to mitigate a demonstrable significant negative impact to a fishery.

The Maine Aquaculture Association supports the negotiated Intentional lethal take proposal's recommendations that regional task forces be established to consider permit applications for the taking of nuisance animals and that the assistance of a wildlife management agency be required in the taking.

The agreement's requirement that individual animals be identified before the beginning of a 135 day permit application review period does not constitute a workable permitting process for the salmon net pen industry, however.

We are concerned that the ongoing reauthorization of the Marine Mammal Protection Act may not produce an opportunity for marine finfish growers to develop a legal strategy for coping with the impact of abundant and growing seal populations in Eastern Maine. Our inability to be successful in this effort will create a significant impediment to the continued development of the marine finfish aquaculture industry in the Northeast.

In order to help to avoid this outcome, today we are asking that the NMFS immediately establish an informal "Intentional Lethal Taking Task Force". This group would begin to meet to consider the possible authorization of a general permit for salmon farmers before this winter. We believe that the NMFS has the existing authority to begin to examine this problem today. A copy of our letter, to NMFS Acting Assistant Administrator Dr. Nancy Foster, making this request is attached to this statement.

At the same time, we ask this committee to develop a specific authorization for the salmon net pen industry to request, from the NMFS, a permit for the intentional lethal taking of individual nuisance animals that can be identified to a wildlife management agency for removal once habitual predatory behavior is exhibited—and after other, nonlethal means of deterrence have failed.

These brief comments attempt to summarize for the Committee the major Marine Mammal Protection Act Reauthorization issues that I understand to be of interest to several Maine fisheries. Many other technical issues could be discussed but I will instead respond to any questions which Committee members may wish to ask me.

On behalf of the Maine Sardine Council, the Associated Fisheries of Maine, and the Maine Aquaculture Association, I want to again thank you for the opportunity to talk with you today about this very important legislation.

LETTER FROM JEFF KAE LIN

JULY 14, 1993.

Dr. NANCY FOSTER,
National Marine Fisheries Service,
Silver Spring, MD 20910

DEAR DR. FOSTER: In behalf of the Maine Aquaculture Association (MAA), I am writing to ask you to assist Eastern Maine's salmon net pen industry as it attempts to respond to a serious harbor and gray seal predation problem that is taking a significant, annual economic toll.

As the attached article from the May 17, 1993 Bangor Daily News explains, "salmon farming has had a profound (economic) effect on (this) area". This year, the MAA's finfish committee has identified reducing the economic impact of seal predation as its first priority.

During the winter months of the past two or three years, Maine's \$50 million salmon net pen industry has experienced losses from seal predation that are estimated to be as high as \$5 million each year. Now that the presence of the industry has stabilized in Eastern Maine, seal predation incidences are increasing. Efforts are already underway in this state to attempt to grow both halibut and cod in marine waters. As the marine finfish aquaculture industry in this region grows, we can expect these predatory attacks to become an even greater problem.

Recently, funds have been made available from the state-supported Maine Aquaculture Innovation Center (MAIC) to assist growers in addressing the situation.

On April 15, a portion of these funds were used when Maine's salmon aquaculture industry held a Predator Control Seminar in Eastport, Maine. In addition to Maine participants, individuals from British Columbia, Nova Scotia, and New Brunswick, Canada shared their knowledge of harbor and gray seal behavior and discussed non-lethal means of deterring seal predation occurring around marine finfish aquaculture facilities.

The proceedings of this conference are now being published by the MAIC. As soon as they become available, I will make sure that you receive a copy. The results of the seminar confirmed that, even though all available non-lethal means of deterrence are being employed, the periodic intentional lethal take of individual seals is a necessary tool for the continued success of this industry.

Because this marine mammal/commercial fisheries interaction is of concern to this new Maine fishing industry, the MAA asked me to participate in the discussions between fishing industry and environmental organization representatives that began in February, and concluded recently, when two proposals to amend the Marine Mammal Protection Act were communicated to Capitol Hill.

The second of these proposals, which concerns the "Intentional Lethal Taking of Pinnipeds", does not meet the needs of Maine's finfish aquaculture industry. A copy is enclosed. Even though the MAA participated in these facilitated discussions for more than three months, our efforts to develop a regulated permitting system—that would allow for the intentional lethal taking of animals to protect gear and catch in the marine finfish aquaculture industry—ultimately failed.

Today, we must work with the National Marine Fisheries Service and the Congress to develop a process—before the seasonal behavior of some harbor and gray seals needs to be deterred again this winter—that will be successful. Both Congress and NMFS has a record of supporting the limited intentional lethal taking of abundant marine mammals to mitigate a demonstrable significant negative impact to a fishery.

We are concerned that the ongoing reauthorization of the Marine Mammal Protection Act may not produce an opportunity for marine finfish growers to develop a legal strategy for coping with the impact of abundant and growing seal populations in Eastern Maine.

In order to avoid this outcome, we ask that NMFS immediately establish an informal, regional "Intentional Lethal Taking Task Force". This group would begin to meet to consider the possible authorization of a general permit for the salmon net pen industry.

The suggestion that regional task forces be established to consider permit applications for the taking of some animals is supported in the second "agreement" between some environmentalist and fishery groups to which I referred earlier. We believe that NMFS has the existing authority to begin to examine this problem today.

This "agreement" also would require the assistance of a "wildlife management agency" in the taking.

The MAA supports these two areas of cooperative thought but recognizes that the agreement's requirement that individual animals be identified before the beginning

of a 135 day review period does not constitute a workable permitting process for the salmon net pen industry.

I hope that our goals have been made clear to you by this petition. We would be pleased to work with you and your staff to develop any additional information that may be pertinent to the process that we are suggesting.

Thank you for your attention to and your consideration of our request.

With best regards,

Sincerely,

JEFF KAE LIN,
Governmental Affairs Coordinator.

[Bangor Daily News, May 17, 1993]

SALMON INDUSTRY POISED FOR NO. 1

NEW MARKETS, TECHNOLOGY PROPELLING YOUNG ENTERPRISE

LUBEC (AP)—Maine's expanding fish-farming industry, which tripled since the 1990 harvest, is poised to surpass lobster as Maine's most valuable ocean resource this year or next, fisheries experts say.

Fish farmers harvested about 13.5 million pounds of fish last season—12.9 million pounds of salmon and 600,000 pounds of trout. The harvest was valued at close to \$50 million.

The enterprise is now maturing, with new markets, new technology and new ways to add value to the product.

Jim Anderson, a professor at the University of Rhode Island who for years has studied Maine's fish farming, said the industry is entering a "mature phase."

"Maine," he said, "can continue to expand."

James Wilson, a professor at the University of Maine who also has studied the marketing of salmon, agrees with Anderson, but with a big "if." "It all depends on the market," he cautioned.

Inside a former sardine cannery, workers pack whole, 10-pound Atlantic salmon into boxes that will be shipped to different points across the country.

Across the room, another group of workers skin and bone salmon fillets with special machines, then cut the fish into precise portions destined for dinner trays on American Airlines flights.

"This is the future," said Colin McLernon, president of Eastport-based Maine Pride Salmon Inc., as he watched workers measure out portions of salmon for the airline. "This will give us the steady, stable industry we need."

Robert J. Peacock II, general manager of R.J. Peacock Canning Co. in Lubec, said salmon—along with sea urchins—has transformed Lubec from a deadend town to a flourishing community.

Peacock in 1992 processed 3 million pounds of salmon for seven companies; this year the amount will rise to 5 million pounds.

"Salmon has changed the mind-set—not just the economy, but the way people think here," he said.

In the late 1980s, state officials predicted that by 1992 farm-raised salmon would be worth nearly \$100 million, far exceeding the value of lobster and approaching the value of all other wild fisheries combined.

Overexpansion caused the state's leading fish farm to be sold to a Canadian company a couple of years ago. Other farms were involved in a legal dispute about the trade practices of the Norwegian salmon industry.

A glut of salmon worldwide caused a price plunge in 1989 that nearly devastated the Maine salmon industry. This past winter, more than 200,000 salmon froze to death when the water temperature dropped below freezing.

That has changed.

According to the Maine Aquaculture Innovation Center, salmon farming now provides 250 full-time jobs, 200 part-time jobs and 100 full-time equivalent positions.

A new bank, a new grocery store and a new motel have opened in Eastport, a town of 1,989 that had several boarded-up buildings downtown a few years ago.

Owen Lawler, who is active in the Chamber of Commerce and built the Motel East three years ago, said salmon farming has had a profound effect on the area. "I don't think the average person realizes how big this industry is getting," he said.

Traditionally, fish farmers have sold whole salmon to their buyers, who then cut them into steaks and fillets for retail sale for menu items. But now, the farms are testing their own new products, such as frozen salmon.

The only frozen salmon now sold in the United States is wild pink salmon from Alaska.

In Lubec, Peacock will soon have a sophisticated \$250,000 machine that will bone and fillet salmon with less labor. He also is developing a freezing technique to develop a line of frozen salmon products, something not done in Maine now.

At Maine Pride, for example, McLernon since November has been selling precut, 95-gram fillets that are eventually served on American Airlines' flights.

The simple act of filleting adds 40 percent to the value of salmon. Last week, United Airlines also agreed to serve Maine salmon on some of its flights.

"We're at the tip of the iceberg of developing a world-class food industry," McLernon said.

Senator KERRY. Thank you very much, Mr. Kaelin. Ms. Young.

STATEMENT OF SHARON YOUNG, ON BEHALF OF THE MARINE MAMMAL PROTECTION COALITION

Ms. YOUNG. Good afternoon. I am Sharon Young, a wildlife specialist for the International Wildlife Coalition, which is headquartered in Falmouth, MA. I am actually one of your constituents, Senator Kerry.

I appreciate the opportunity to testify today on behalf of the International Wildlife Coalition, the Humane Society of the United States, and a coalition of nine other conservation groups which comprise the Marine Mammal Protection Coalition. We have submitted more detailed written testimony.

Marine mammal mortality due to fishery interactions is a serious problem—5 years of data gathering have shown that more than 100,000 marine mammal die each year in human interactions, much of it fishery related. In the same 5 years, five more marine mammal stocks have been proposed or accepted for listing as threatened or depleted.

In an attempt to address the serious problem of marine mammal mortality in the fishing industry, proposals have been submitted by both the National Marine Fisheries Service and the working group. We believe that the working group proposal is actually weaker in many respects than that of the NMFS proposal. For that reason, the majority of conservation groups participating in the negotiation process did not sign on an agreement.

In order to develop an effective program to govern interaction between marine mammals and commercial fisheries, it is necessary for a regime to be able to, one, identify the scope and nature of activity of the fishing industries which may interact with them. Two, monitor and quantify interactions with marine mammals. Three, provide realistic measures for reducing incidental take. Four, allow for stricter protection of some stocks, with more fragile populations. And five, generate consistent and adequate funding.

Both the regime proposed by the National Marine Fisheries Service and the working group fail in at least some of these areas.

Registration—the National Marine Fisheries Service proposal provides for mandatory, centralized annual registration of vessels which may interact with marine mammals. This allows data collection on the nature and scope of fishery interactions, and allows ready identification of vessels which may require additional monitoring.

The negotiated document is weaker because it does not have a centralized annual registration, and thus identification of vessels

and monitoring of interactions would be difficult if not impossible in many cases.

Monitoring—the monitoring of interactions is deficient in both proposals. The NMFS proposal would apparently continue to rely on annual self-reporting by vessel owners which has been disturbingly inaccurate. NMFS statistics show that on average vessel owners report killing only one marine mammal for every six calculated by the onboard observer program. The discrepancy is as high as 2,100 percent.

NMFS prioritized observer coverage to fisheries with the highest level of marine mammal mortality. However, the working group document does not. It focuses instead on monitoring fisheries which interact with a short list of critical stocks and virtually ignores mortality in more than 40 of the 64 stocks in which interactions take place. The negotiated document also relies heavily on self-reporting.

The deficiencies in this monitoring program we believe are so serious that it is doubtful that anyone would be able to reliably determine whether overall levels of mortality in marine mammals are rising, falling, or remaining the same.

Reducing mortality—neither the NMFS proposal nor the negotiated document adequately deals with providing a means to reduce mortality in marine mammals. Although the negotiated document would use conservation teams to focus on reducing mortality in so-called critical stocks, it once again ignores the vast majority of stocks and relies on voluntary reductions.

Voluntary measures to reduce take have not occurred during the past 5 years of the exemption program, despite Congressional mandate to do so.

Endangered species—both the NMFS proposal and the negotiated document permit the killing of endangered and threatened species of marine mammals. The negotiated document further weakens protection of ESA listed stocks by turning management of these species over to ESA recovery teams. The ESA and Marine Mammal Protection Act both offer different types of legal protection, and we believe that removal of NMFS oversight is a costly mistake for endangered species.

Funding—the NMFS proposal for centralized registration would generate registration fees to help pay for administration of the program. The negotiated document lacks even this rudimentary component. Instead, it relies on a patchwork of State, tribal, and Federal fishing permits, and presumes the NMFS can find the large number of vessels not registered under these permits, and that it can do so without registration fees to pay for the effort.

Lack of a registration system also makes it impossible to impose user or landing fees if it is necessary to provide additional funding in the future.

Because of the failings in one or both of these proposals, we recommend the following components to be included in any management regime. One, centralized mandatory registration of all vessels. Two, mandatory observer program, providing NMFS with the authority to place observers on any vessel which can safely carry them.

Three, conservation teams with at regional, not species-specific focus. Teams would be advisory only and would recommend methods for reducing incidental mortality in their region. Four, funding should be specifically earmarked for research into development of methods to reduce marine mammal mortality. Five, management authority for ESA listed marine mammals should remain with the National Marine Fisheries Services with no permits issued for takes of these stocks.

In 1972, Congress authorized the Marine Mammal Protection Act in keeping with the wishes of the American people for special protection of these species. Since that time, commercial fisheries' interactions have not been regulated to an extent that would realize this protection.

We implore Congress to reauthorize a strong Marine Mammal Protection Act which can, in fact, reduce the level of mortality to which these animals have continued to be subjected. We believe that the approach which we have outlined will provide a basis for the recovery of marine mammals, and the wise conservation of marine resources, and is in keeping with the wishes of the American people and the spirit and the intent of the MMPA.

Once again, I would like to thank you for the opportunity to address the committee. We are prepared to assist you in any way to improve this situation, and I will be happy to answer your questions.

[The prepared statement of Ms. Young follows:]

PREPARED STATEMENT OF SHARON YOUNG

Good afternoon. I am Ms. Sharon Young, wildlife consultant for the International Wildlife Coalition (IWC). I appreciate having the opportunity to testify today on behalf of the IWC and the Humane Society of the United States (HSUS) with regard to the problem of management of fishery interactions with marine mammals. We are joined in our testimony by 9 other organizations which make up the Marine Mammal Protection Coalition, representing a combined constituency of over 3 million persons.

We appreciate the Committee's interest in preserving the principles of the Marine Mammal Protection Act of 1972 and look forward to working with you, Mr. Chairman, and the Committee staff, during the re-authorization process.

INTRODUCTION

As you know, one of the primary goals of the MMPA is to reduce marine mammal mortality to "an insignificant level approaching zero". The zero mortality rate goal is fundamental and must not be eroded. Without it, marine mammal populations cannot be expected to remain at, or recover to their optimal sustainable populations (OSP). In 1988, Congress passed an interim exemption program within the MMPA, designed to gather data on the extent of interactions between marine mammals and commercial fisheries. We are concerned that the past five years of this interim exemption program have significantly undermined the original legislative intent of Congress when it first passed the MMPA in 1972. As we face the re-authorization of the MMPA, proposals have been put forth by both the National Marine Fisheries Service (NMFS) and in a joint document from 7 conservation and more than 30 fishing industry groups. We are concerned that both of these proposals are significantly flawed, and as a consequence, deny marine mammals sufficient protection from excessive takes by the fishing industry. Congress and the American people have long supported legislation which fully protects marine mammals from unnecessary mortality; however, that protection has never been achieved. The overriding concern of the organizations that I represent today is that the reauthorization of the MMPA must achieve verifiable and significant reductions in the overall level of marine mammal mortality which occurs in fishing operations.

BACKGROUND INFORMATION

For the past five years, under the interim exemption program, NMFS has been gathering data to assess the nature and severity of the problem of marine mammal interactions with fisheries. These data show that interactions occur to a far greater extent than Congress or the American public realized. In fact, NMFS currently estimates that more than 100,000 marine mammals are killed each year in human interactions, much of it fishery related. This astounding rate of death does not even include natural mortalities to which all animal populations are subjected. After 20 years of MMPA protection, fishery kills have resulted in NMFS placing 31 out of 64 marine mammal stocks in priority categories for urgent study. In just the five years of the interim exemption program, three more stocks of marine mammals have been accepted or proposed for listing as threatened under the Endangered Species Act or as depleted under the MMPA. Two additional stocks have experienced severe losses and are being considered for petitions to list them for protection. This is a tragic pattern which cannot be allowed to continue. Crisis management must cease. NMFS must take a pro-active stance to prevent fisheries-related problems. This can only be done by mandating immediate reductions in lethal incidental takes, based on the data which have been gathered during the past five years. Investment in preventing problems is much less expensive fiscally and biologically than the cost of trying to reverse serious population declines.

When Congress passed the interim exemption program in 1988, it directed NMFS to develop a plan to expeditiously reduce unnecessary mortality. Instead of immediate action, NMFS has proposed a system which, by its own admission, will not even begin to address the critical issues of caps on marine mammal kills by the fishing industry, or the development of monitoring systems and enforcement measures for AT LEAST two more years. During that time, NMFS has stated that it expects fisheries to effect voluntary reductions in marine mammal mortalities. Voluntary reductions in kill was also a charge to the fishing industry by Congress during the present five-year exemption program. However, such voluntary reductions have not occurred.

In March 1993 fishing industry and conservation community groups began a series of negotiations to formulate an alternative to the NMFS proposal which would reduce the level of marine mammal deaths and address concerns over the NMFS proposals which were held by both sides. IWC, HSUS and several other groups which I represent attended these facilitated meetings. The end result of these meetings was a document which a majority of conservation groups could not support. This negotiated document lacked a mechanism for generating funds, lacked a reliable system for monitoring interactions, and once again left marine mammals with a degree of protection which falls far short of Congress' original intent in its authorization of the MMPA.

Additionally, a number of concerns with the NMFS proposal have not been addressed in the negotiated document. Conversely, the negotiated document lacks some of the protections and common sense components which were contained in the original NMFS proposal.

SUMMARY OF CONCERNS WITH THE NMFS PROPOSAL

1. *Slow Implementation allows Inadequate protection of marine mammal populations which are sustaining critical levels of mortality.* Fisheries required to achieve the most substantial reductions in take could be permitted up to four years to reduce their take. For example, the Gulf of Maine population of harbor porpoise is declining and is currently being killed at a rate above the ability of the population to sustain itself. Rather than demanding that the gillnet fishery which interacts with these porpoise reduce its take immediately in order to protect the harbor porpoise population, the NMFS proposal would allow this fishery to be granted an extended period to comply because they have to make a very large reduction. This would subject the harbor porpoise to additional years of unsustainable levels of mortality, which places it in further jeopardy.

2. *Fisheries are encouraged to reduce incidental mortality, however the formula for determining the allowable "removal" provides no incentive for these reductions.* The formula proposed by NMFS (which multiplied the population estimate and the reproductive rate times a recovery factor, to encourage growth) set de facto quotas. As long as fisheries did not exceed this "quota", they would not be penalized. In some cases this quota was quite high. For example fisheries would be allowed to kill up to 2,700 common dolphins in California and up to 6,000 northern sea otters. These numbers are clearly not at an "insignificant level, approaching zero" as the MMPA directs, and there is no incentive to reduce the level of mortality. In some

cases these "quotas" would allow a higher rate of kill than fisheries were currently inflicting. This does not encourage reduction in mortality.

3. *The system for reporting and monitoring marine mammal kills is inadequate, and enforcement programs are vague at best.* Self reporting by vessel owners has been shown to be totally unreliable. On-board observers provided the only reliable means of determining the extent of the problems. Overall, the mean discrepancy between observer calculations and log book reports was 600 percent. This means that, on average, vessel owners reported killing only 1 marine mammal for every 6 calculated by on-board observers. The discrepancy in reporting was as high as 2,100 percent, however no specific program was proposed to remedy this problem. Furthermore, compliance with registration and reporting declined annually. Vessel owners submitted fewer logbooks each year, and each year of the program, fewer and fewer vessels registered with the program, despite a legal mandate to do so. No enforcement actions restricted their fishing, and the NMFS proposal merely states that if vessels exceeded their allowable kill of marine mammals, the fishery "might" be restricted. This is not acceptable.

4. *A number of fisheries, having significant interaction-problems with marine mammals, would escape regulation.* Large numbers of non-commercial fisheries that use gear identical to that implicated in high levels of marine mammal deaths remain unregulated. Their counterparts who fish commercially in the same area with the same gear are subject to registration and reporting requirements. For example, fishers in the mid-Atlantic states who use gill nets to fish for bait are not required to register, while neighboring fishers who sell their catch are subject to registration. Additionally, experimental fisheries are assumed to have low levels of marine mammal mortality unless monitoring proves otherwise. For example, the growing pair trawl industry (an experimental fishery) was given the benefit of doubt, despite the fact that long nets pulled through the ocean are well known to entangle marine mammals.

5. *Fisheries would be permitted to kill marine mammal species which are listed as threatened or endangered.* Even species such as humpback whales have an allowable removal level under the proposed NMFS regime.

CONCERNS WITH THE NEGOTIATED DOCUMENT

While the document negotiated jointly by the fishing community and 7 of the conservation groups attempted to deal with these deficits, the document does not substantially address many of these concerns, and even weakens some of the NMFS proposals.

1. *There is no centralized system for registration of fishing vessels.* While NMFS proposed registering all of the approximately 100,000 vessels presumed to interact with marine mammals, the negotiated document does not. Instead, it proposes combining data bases from the Fisheries Conservation Management Act (FCMA) registration with those of states and native tribes and issuing MMPA registrations to all those not registered under one of these three systems. This assumes that all data bases are compatible, which they are not. It also assumes that vessels not registered in one of these data bases can be readily identified and subsequently registered under an MMPA permit. These assumptions are not only incorrect, they are expensive to correct. NMFS would have to expend personnel and program funds to combine and analyze information, with no registration fees coming in to offset this considerable expense. The lack of a centralized system also makes it difficult to track effort. Without knowledge of how many vessels are fishing; and where, when and how they fish, it is impossible to determine the level of interaction with marine mammals.

2. *The system for monitoring interactions with marine mammals is not adequate.* The negotiated document relies heavily on self-reporting, which has already shown itself to be highly unreliable. Furthermore, use of observers would occur only if recommended by conservation teams which are convened solely to protect marine mammal stocks sustaining critical levels of interactions. Those marine mammal stocks which are not considered "critical" would not be monitored by observers no matter how high the level of take unless the level can be somehow documented and the Secretary uses his/her discretionary powers to intervene. For example, the California set gillnet industry was identified by NMFS as a "problem" fishery, due to extremely high levels of interaction with harbor seals. Under the negotiated document, this fishery is not likely to be subject to observer coverage although the NMFS proposal would have required observers. The reason for this discrepancy is that harbor seals are not considered a "critical" stock under the negotiated document and thus the fishery would not be a priority. On the other hand, NMFS prioritized the fishery because of the unduly high, and reducible, level of kill.

3. *The system of conservation teams, as proposed, is likely to be expensive, duplicative, and may not adequately protect marine mammals.* While their role is proposed to be advisory, conservation teams have authority to adjust recovery factors for critical stocks and take other actions which may duplicate or supplant NMFS or Marine Mammal Commission functions. Providing separate conservation teams for each "critical" stock is likely to be expensive and still leaves 40 or more marine mammal stocks without on-going oversight. Furthermore, the composition of the conservation teams (based on the participant pool which was suggested) is likely to be weighted with managers and user groups and contain minimal representation from conservation interests. This approach is analogous to Fishery Management Councils managing marine mammals.

4. *There is no specific quantifiable mechanism to achieve the commitment to reduce marine mammal mortality and serious injury to a rate approaching zero within 10 years.* While it is laudable that the fishing industry agreed to uphold the commitment to the zero mortality rate goal and to reduce takes to an insignificant level within 10 years, it is necessary to provide a means to achieve this goal and a method for analyzing its accomplishment. This proposal does neither. The negotiated document does contain a specific goal of 10 years for reducing takes, and is thus more specific than the NMFS proposal. However, with an inadequate and unreliable system for monitoring lethal takes, it is doubtful whether anyone can reliably assess whether any reductions have really taken place.

5. *The proposed interface with the Endangered Species Act (ESA) is likely to result in a process that allows excessive take and would delay recovery of threatened and endangered stocks.* The negotiated document does not address the problem inherent in the NMFS proposal of allowing takes of endangered and threatened species. Furthermore, it removes the oversight of NMFS in managing these species. Allowing management of threatened and endangered species to default to ESA recovery teams, and removing the oversight of the MMPA is likely to result in the taking of marine mammals from fragile stocks. The MMPA and the ESA each offer distinct types of legal protection for endangered and threatened marine mammals. In a report to the U.S. Fish and Wildlife Service by its own biologists, it was stated that roughly 60 percent of vertebrate species listed under the ESA have recovery goals which could lead to the species extinction. This raises the concern that it may be impossible for the negotiated document to assert that takings allowed under the "reasonable and prudent measures" provision of Section 7 of the ESA meet a standard of protection sufficient to protect and recover marine mammal populations. Endangered and threatened species should continue to enjoy the protection of both the MMPA and the ESA.

6. *The issue of funding this regime is not adequately addressed.* While the NMFS proposal, with its centralized registration system, allowed imposition of a registration fee which would pay for the costs of administering the program and analyzing monitoring data, the negotiated document lacks even this basic funding mechanism. Because the negotiated document lacks a centralized registration system, it would be difficult to identify individual vessels within fisheries that have a critical level of marine mammal mortality. Only if vessels can be identified, is it possible to assess them (or their fishery as a whole) additional fees to help offset any additional observer coverage which might be necessary to monitor interactions. Additional options for raising funds, such as imposition of user or landing fees, would also be difficult without a centralized data base.

In fact, many of the proposals contained in the negotiated document were originally made to NMFS as comments by the fishing industry on the initial NMFS proposals. According to NMFS records, the fishing industry proposed that NMFS: "focus on hot spots, then reduce fishery takes (by unspecified methods) * * * They [fishermen] were * * * concerned that * * * factors allowing marine mammal species to recover were overly conservative and unnecessarily restrictive * * * Almost all fishermen were concerned that only fisheries seriously interacting with marine mammals should be the focus of monitoring * * * They were concerned that an MMPA authorization to fish be required only in those fisheries where significant impacts on at-risk stocks [their term] are occurring." NMFS rejected these proposals, but they have re-emerged at the heart of the negotiated document. In their reply rejecting the proposals, NMFS stated that the impact of adopting these proposals would be "* * * little control over the incidental take of most marine mammals" under this de facto extension of the exemption program. NMFS further stated that: "* * * several populations of marine mammals could be disadvantaged, some significantly under this sub-alternative before corrective steps could be implemented," and that "impact to other marine wildlife * * * is likely to be similar to the level being experienced presently". NMFS commented that under the fisheries proposal "* * * no limits would be established for commercial fishing unless it was determined that

fishing operations were having a 'significant adverse impact' on one or more marine mammal stocks."

The NMFS proposal has flaws which are significant, but the proposal by NMFS is still likely to be more protective of marine mammals than the negotiated document, and furthermore allows imposition of fees to help fund the proposed regime.

PROPOSED ALTERNATIVES

We propose the following components which should be contained in any regime to manage interactions between commercial fisheries and marine mammals. Some of them have been synthesized from the more positive aspects of the NMFS proposal, while others are designed to close "loopholes" which leave marine mammals without adequate protection.

1. *A centralized, mandatory registration of all vessels.* NMFS estimated that a mere \$50 registration fee could generate up to \$5 million to help support the cost of a management regime. Without a central system, imposition of fees to fund the program would be extremely difficult. Furthermore registration is the foundation of a reliable monitoring program. Before one can determine whether marine mammal deaths are increasing, decreasing or remaining stable, it is necessary to know all of those vessels within an industry which may be contributing to the mortality.

2. *A mandatory observer program.* The Secretary should have the authority to place observers on any vessel which can safely carry them if he/she feels that it is necessary to monitor the level of interactions with marine mammals. Prudent practice would dictate that observers should first be directed to monitoring those fisheries with the most critical levels of interactions, but the Secretary should also have authority to place them on any vessel to help verify the level of marine mammal mortality. Fisheries which have a significant interaction problem and require greater observer coverage could be charged differentially to off-set the cost of the program. The institution of a central registry would make such assessments possible. Without a well designed observer program, it will not be possible for the Secretary to accurately determine whether levels of marine mammal mortality are rising, falling or remaining stable. The use of observers should not be determined by the conservation teams.

3. *Conservation teams should have a regional (not species specific) focus, and their primary task should be advising the Secretary on methods of reducing incidental mortality.* Construction of the teams to address regional problems prevents duplication of effort where a fishery interacts with more than one stock. Concern over stocks sustaining critical levels of mortality may provide the impetus for forming each regional team, but the regional focus is more cost efficient and allows stocks in the region which are not 'critical' to receive some oversight. The teams should focus on developing strategies for reducing mortality and may also assist in identifying stocks or situations requiring additional research attention. The Secretary should be responsible for collecting and evaluating stock assessment data and for setting recovery factors to assist stocks in reaching their former abundance. This should not be the responsibility of the conservation teams. For example, in the northeast, there are significant interaction problems with the harbor porpoise, but there are also concerns about pilot whale interactions, and interactions with the coastal mid-Atlantic stocks of bottle nosed dolphins. Both the swordfish industry and the set gillnet industry may interact with these stocks and a number of others. A regional team could address the interactions problems of all fisheries involved. Once the Secretary sets the maximum tolerable removal level for each stock (population x reproductive rate x recovery factor), these levels could be conveyed to the team. It would then be the task of the team to formulate recommendations on the most effective methods for reducing takes, to construct timelines for reductions, and identify data gaps in research that might help mitigate incidental take.

4. *Funding should be specifically earmarked for research into development or modification of technology or behavior which may mitigate marine mammal mortality.* The fishing industry has made a commitment to work toward the zero mortality and serious injury rate goal, yet without funds to develop technology and methods for reducing mortality, no reductions are likely. The past five years of the exemption program have shown that voluntary reductions do not occur without significant inducement, and without funding to investigate mitigation strategies. For example, in the years since passage of the MMPA, the Gulf of Maine set gillnet industry continued to inflict unacceptably high rates of mortality on harbor porpoise. Currently, the gillnet industry is working to try to reduce mortality. The reason for this change is that harbor porpoise were proposed for listing as a threatened species under the ESA because of the intolerable level of death the stock was sustaining. Furthermore, fishermen agreed to work with conservation groups to discuss strategies for reduc-

ing takes; and went with conservation groups to lobby successfully for funds to investigate promising advances in technology to reduce mortality. Without the incentive of the proposed listing and the influx of research moneys, this change in their commitment to and success in reducing takes would not be occurring. The commitment to reducing takes to an insignificant level approaching zero within 10 years, coupled with penalties for failure, can provide some incentive to other fisheries; but monies need to be spent on helping develop the means to achieve this commitment.

5. *The National Marine Fisheries Service should retain primary oversight for endangered and threatened species of marine mammals.* No permits should be issued for the lethal taking of these stocks. Conservation teams can provide oversight on fishery interactions with threatened and endangered stocks and can provide recommendations for mitigation. The Secretary should retain management authority under the MMPA. We are concerned that the issuance of permits to take these stocks undermines the protection which is inherent in their designation as ESA listed stocks.

6. *There should be no intentional lethal taking of marine mammals except to protect human health and safety.* The specter of shooting or otherwise killing nuisance marine mammals is one which is universally distasteful to the public. There was an outpouring of public sentiment against dolphins dying in the tuna industry, even though these stocks were presumed at that time to be abundant and it was more expensive for the industry to fish using other methods. This same sense of concern extends to other marine mammals, whether or not they are abundant or inconvenient to fishing operations. Engineering is the solution to problems with marine mammals, not killing them. Regardless of the species, killing nuisance animals has never been shown to be an effective long-term solution. The public does not support deliberately killing marine mammals and is likely to strongly protest any federal sanction of such actions.

CONCLUSION

In order to develop an effective program to govern interaction between marine mammals and commercial fisheries, it is necessary for a regime to be able to: (1) identify the scope and nature of activity of the fishing industries which may interact with marine mammals; (2) monitor and quantify interactions with marine mammals; (3) provide realistic measures and incentive for reducing incidental take; (4) allow for stricter protection of some stocks with more fragile populations; and (5) generate consistent and adequate funding.

Both the NMFS proposal and the negotiated document fail in some of these areas. The proposals we have outlined are intended to provide a framework to meet these objectives.

Again, I would like to thank you for the opportunity to address the Committee with our concerns. I would like to close by emphasizing that management of marine mammals based on high rates of incidental death is contrary, not only to the intent of the MMPA, but also to the wishes of the American people. Therefore we implore Congress to re-authorize a strong MMPA which includes reasonable regulation of the fishing industry, contains a means of reliably assessing the on-going level of fisheries interactions, includes research into mitigation measures to reduce lethal takes and provides stringent enforcement to ensure compliance. The groups which I represent believe that this approach will provide for the recovery of marine mammals and the wise conservation of marine resources, and is in keeping with the spirit and intent of the MMPA.

Thank you for the opportunity to express our views. We are prepared to assist in any way to improve this critical situation.

Senator KERRY. Thank you very much, Ms. Young. We have to vote again. We have been joined by Senator Gorton. I would like to probably take a recess and come back, and we will begin a round of questions. We will enjoy having a good dialog with you.

Senator Gorton, before we do that, did you want to make a quick opening of any kind?

OPENING STATEMENT OF SENATOR GORTON

Senator GORTON. Thank you, Mr. Chairman. We do not have very much time for that quick opening.

Senator KERRY. That is why I said quick.

Senator GORTON. This is a most interesting hearing, and there are some very real clashes here, clashes between those who have come to this agreement and those who disagree with it.

The peculiar problems that we have in the State of Washington and in Seattle with herhal and herhal's progeny and the impact they are having on the causing of the listing of other marine species, though not mammal species, each of which is going to have to be considered in connection with this reauthorization.

I think it is a most important hearing, and a vitally important subject.

Senator KERRY. Thank you very much, Senator.

Senator STEVENS. Mr. Chairman, I failed to ask to put Senator Cohen's statement in record following mine.

Senator KERRY. Without objection his statement will be placed in the record.

[The prepared statement of Senator Cohen follows:]

PREPARED STATEMENT OF SENATOR COHEN

Mr. Chairman, I appreciate your calling this hearing to explore issues regarding the reauthorization of the Marine Mammal Protection Act.

It has been 20 years since marine mammals were offered the special protection they properly deserve. Once again, the Congress is faced with the unenviable task of updating this legislation to better fit the inevitable changes associated with the management of the oceans and their inhabitants.

Representing a coastal state, my interest in the Marine Mammal Protection Act stems from two factors: First, my constituents know first hand the grandeur and the beauty of the many marine mammals which frequent the shores of Maine, and they have a vested interest in their protection. Second, my state supports a thriving commercial fishing industry which must coexist with these mammals and the regulations that protect them. I am therefore doubly interested in this reauthorization.

In November of last year, the National Marine Fishery Service put forth its "Proposed Regime to Govern Interactions Between Marine Mammals and Commercial Fishing Operations." While this proposal provided innovative measures, it was criticized both by commercial fishing groups and the environmental community for different reasons.

As efforts to manage the ocean and its resources have proved many times, the best solutions are those which were formulated from the bottom up. Regulatory schemes which are created without meaningful input from those who have a vested interest in our oceans often fail because they lack the integral support of those must live within these guidelines. Fortunately two groups have come together to offer their own bottom up proposal for this reauthorization.

All too often commercial fishing groups and environmental groups are seen as foes locked in mortal combat, each representing a radically different viewpoint. It is my experience, however, that when these two groups sit down and discuss conservation issues, they quickly learn that they have more in common than not. These groups share an interest in the preservation of our oceans as a fertile habitat for all marine life, and while they often disagree on the means to achieve that end, if they maintain focused on their objective, a negotiated solution often follows.

Fortunately, recent events demonstrate once again that the environmental community and commercial fisherman can work together to formulate meaningful and effective policy recommendations. Throughout this past spring, representatives from both environmental and commercial fishing groups have been meeting with the objective of crafting a workable reauthorization of the Marine Mammal Protection Act. And while there were serious disagreements along the way, this coalition has managed to put together a proposal upon which a significant majority of the participants could agree.

This negotiated solution is not without its flaws or its detractors, but I believe that this proposal provides a realistic and workable solution that should be the foundation upon which this committee will build a successful reauthorization. While we are far from finished, with this proposal we are well on our way. I offer my congratulations and my thanks to this group for their efforts.

I again want to thank the chairman for initiating this hearing. I look forward to working with the Committee throughout this reauthorization process.

Thank you.

Senator KERRY. We will recess and get back just as fast as we can.

[A brief recess was taken.]

Senator KERRY. Folks, thank you. I do not blame you for talking on into the day as we chew up your time, and I apologize and thank you very much for your patience with us.

We just ended the round of testimony, so if we could begin and ask a few questions I think it will be very helpful in trying to draw out the record here a little bit.

Ms. Iudicello, you began with an expression of the good work done and the numbers of different groups that came together on this. I think it is an excellent piece of work, incidentally, notwithstanding there are still differences of opinion and people who oppose it, and that is understandable.

As you hear Ms. Young explain her fairly clear feelings about some of the problems, I wonder if you would address how it is and why it is that your group came to be in a different position, and where you put the issues that Ms. Young raised with respect to the inadequacies of the current agreement.

Ms. IUDICELLO. Thank you, Mr. Chairman. I would be happy to answer that. First of all, I think we need to be a little more forthright about who is representing whom in terms of what kinds of groups they are. The groups that signed on to the document characterized themselves as conservation groups, and we can get into an argument about semantics, but I think the truth of the matter is that the group who did not sign on to the document, with maybe one or two exceptions, if you look at them are better described as animal protection groups. So, there is a really fundamental difference of approach from whence we start.

A few of the groups who did not sign on to the joint agreement stuck with the process through the entire series of meetings and negotiations to the very end. And of those who went through the whole process, a few did not sign on. There were those who dipped in and out of the process from time to time but really did not commit very much effort, who later signed on to the counterproposal. Now, that is sort of the politics of it.

I think what is really important, though, is that we have to come face to face with the question—actually we do not, you do, of whether the MMPA is going to provide mechanisms whereby incidental takes, that is accidents, takes that are not intentional or directed or meant to be, whether the MMPA is going to treat that kind of behavior in a punitive manner or in a preventive manner. Just what are we getting at here?

And I think the difference is that our group are willing to acknowledge that there are places where there are problems, and in those places, those areas, what we call critical stocks or stocks where actual mortality that is caused by fishing operations is the problem, then you bring all the regulatory, management, and enforcement tools you have to bear on dealing with fishing.

If fishing mortality is not the problem, then what is the purpose of creating an elaborate registration and observing and reporting and monitoring scheme to verify over, and over, and over again

what is not a problem, zero takes, or one take. And I think it is really important that we focus on what the problem is.

Our review of the NMFS data, in contrast to the some 150,000 animals cited earlier, was that in 1990 both log book and observer reports, 76,000 marine mammals were harassed, and 8,750 were killed. Now, that is both log book and observer. In 1991, 51,475 were harassed and 6,207 were killed.

The next point is that of the animals that were killed, the issue of stern deck shooting is very significant cause of mortality in seven fisheries. And the fishing community agreement to stop that practice, to just have it banned clearly and outright in the law, no wiggle room, no gear catch protection, no fine points, just out and out banned, no shooting, is really is going to accomplish a lot of reduction in mortality.

Senator KERRY. What is the estimate of the percentage of 6,000 and 8,000 that are stern deck shootings?

Ms. IUDICELLO. May I respond to that? I could go through this table and add it up but I think that would waste our time. But I would be happy to provide you with that exact number.

Senator KERRY. Sure.

[The information referred to follows:]

LETTER FROM SUZANNE IUDICELLO, SENIOR PROGRAM COUNSEL, CENTER FOR
MARINE CONSERVATION

JULY 19, 1993.

The Honorable JOHN KERRY,
U.S. Senate,
Washington, DC 20510

DEAR MR. CHAIRMAN: Thank you again for the opportunity to appear before your committee last week. The hearing on the Marine Mammal Protection Act reauthorization was very successful in drawing out the issues and illuminating the points of diversion between the proposal put forth by the National Marine Fisheries Service (NMFS) and that made by the parties to the conservation/fishing community agreement.

We were gratified to hear you and Senator Stevens recommend that the conservation/fishing community representatives meet with agency officials and your staff to further resolve remaining differences between our two approaches to governing incidental take. We look forward to such meetings and to working with the committee on a fast timetable for introduction of reauthorizing legislation. To that end, we already have begun discussions with NMFS to narrow down the issues in dispute.

You requested information on the amount of marine mammal mortality caused by intentional shooting in the course of fishing operations. According to data compiled by the Marine Mammal Exemption Program, in 1990, fishing vessels harassed 76,450 animals, and killed 8,750. Of the latter, 451 (5.1 percent) were killed as a result of "deterrence" or shooting, as reported by fishermen in their vessel logbooks. In 1991, 51,475 marine mammals were harassed, and 6,207 killed. Fishing vessel logbooks reported that of those animals killed, 233 (3.7 percent) died as a result of deterrence actions. Observer reported data do not differentiate between incidental and intentional mortality, so we are unable to provide that figure separately, but the extrapolation of observed marine mammal deaths is incorporated in the total mortality figures. The fisheries in which deterrence actions accounted for more deaths than mortality caused by animals running into fishing gear are (in both 1990 and 1991): Alaska Bristol Bay Set and Drift Gillnet, Washington Puget Sound Region and Inland Waters South of the Canadian Border Salmon Set and Drift Net Fishery, and Washington, Oregon, California Salmon Troll Fisheries.

One issue that the parties agreed to, but that was not brought out at the hearing, is the issue of intentional feeding of marine mammals in the wild. It became evident during our discussions that one of the causes of problem interactions in harbors and at docks was that animals were emboldened after repeated hand feeding at the docks. Because the fishing industry requested additional flexibility in the MMPA to enable citizens to use noninjurious methods to chase marine mammals away from

boats and docks, we countered that a preventive mechanism to avoid feeding so encounters that can damage property and injure people were less likely in the first place. As a result, the following language was included in our agreement: "The parties agree that the term 'harass' includes the intentional feeding or attempting to feed marine mammals in the wild."

We urge the committee to incorporate this agreement in amendments to the MMPA by adding to section 102(g) the following:

"(g) It is unlawful to feed or attempt to feed a marine mammal in the wild, including operating a vessel or providing other platforms in order to feed, offer, give, or attempt to give food of nonfood items to marine mammals in the wild. This does not include the routine discard of bycatch during fishing operations or the routine discharge of waste or fish byproducts from fish processing plant or their platforms if the discharge is otherwise legal and is incidental to operation of the activity."

Finally, we understand the committee is considering a second MMPA hearing later this month to discuss issues other than incidental take. As you know, the center has sponsored a workshop, produced a report, and commented extensively on proposed regulations governing approach distances for whale watches and private boaters. We believe that with minimal direction from the Congress, many of the issues involved in this subject could be addressed flexibly and successfully through administrative proceedings, particularly a negotiated rulemaking process that would provide a forum to deal with special regional concerns. We would be pleased to provide a witness for your hearing, or a detailed statement for the record. We have taken the opportunity to provide your staff with background information on this issue.

Thank you again, Senator Kerry. We look forward to problem solving with you, the agency, and the fishing industry.

Sincerely,

SUZANNE IUDICELLO,
Senior Program Counsel.

Ms. IUDICELLO. But I think the really important issue here is we have a lot of problems. We do not have very much money for marine conservation in general. It is very important that we get the most bang for the buck, and if it ain't broke what do we need to fix?

Senator KERRY. Do you want to respond to that, Ms. Young?

Ms. YOUNG. Sure. My primary response is that the concerns that are raised by the groups that I am representing are not don't kill no whales no time no place. They are very real and substantive concerns about the mechanisms of how a program works.

If you cannot register vessels, the patchwork of State, tribal, and Federal permits proposed by the working group assumes that you can mesh all those data bases, and you cannot. They are not all compatible. It takes a lot of effort to figure out how they all work together. And there are a lot of vessels, under 1 ton vessels, and so on, that are not registered in any of them and you have to figure out who they all are and find them, and get them registered. And again, that working group system has no registration fee to pay for it.

Without a meaningful registration system you can promise all you want about reducing mortality, but it makes it very difficult to determine exactly who is fishing and where they are and so on, and much of that is critical.

Senator KERRY. Well, let us assume you get beyond the registration issue and the data base gathering. Where do you folks come out on the nuisance lethal option? I mean, what happens for instance in the situation where Senator Stevens points out you have mammals that are becoming literally a nuisance to another part of the ecosystem and to the commercial enterprise that we are, in fact, licensing.

How do you deal with that compared to other kinds of stocks where we do recognize nuisance? I can think of plenty of places in Massachusetts where, against some people's views incidentally, we have come to the conclusion that it is better to permit a taking, for instance in the deer population on a number of the islands, such as Crane Reservation. For the sake of the deer in essence, and for the capacity to conserve we have allowed a taking.

Where do you come out on that kind of "conservation or management approach"?

Ms. YOUNG. At this point I can only speak on behalf of two of the groups that I am representing. As Suzanne pointed out, I am representing a coalition of groups some of which are, in fact, very prohibitionistic in their point of view. So, I can speak on behalf of two groups.

Senator KERRY. They say none, zero. OK.

Ms. YOUNG. The two groups that I represent most specifically are the International Wildlife Coalition and the Humane Society of the United States. And as everyone sitting at this table knows, I am the person that originally drafted that nuisance animal permit during the negotiated process. That was me. And so I have myself, on behalf of those two organizations, acknowledged the fact that there are situations that exist where it may be necessary to mitigate a nuisance. And we specifically initially agreed that it would be individually identifiable animals.

The history of wildlife management is very spotty, but it certainly indicates that you cannot make a universal decision that killing large numbers of animals is necessarily going to solve a problem. Coyote management is a classic example of how that does not work. And, in fact, deer and predators are very different.

When you are dealing with fast breeding ungulate populations like deer, or when you are dealing with rodent populations that breed very quickly, you have got a very different kind of management issue than you have when you are dealing with predators, which basically employ very different reproductive strategy.

But predator management of nuisance animals has historically not been very effective. And one of the things that we have maintained is that it is important to invest in engineering solutions. As long as you have resource there that is attractive and available, some animal will exploit it. If you kill the animal that is currently exploiting it, somebody else is just going to come along.

It is like a woodchuck in your garden. As long as your garden is there and is not fenced, if you kill that woodchuck another one is just going to come along because you have got a prime resource in the middle of the territory. If you cannot make it unattainable by fencing or some other barrier, or if you cannot make it unattractive in some way, through repellents or whatever, it is still going to be exploited.

And what we believe is that there has not been really sufficient attention paid to looking at an entire ecosystem, as Dr. Hofman said earlier. Certainly it is true that you have situations where you have abundant marine mammals and you see a decline in fish stocks, and certainly there is some correlation there, but it is not a cause-and-effect situation.

But you also have to look at other variables as well. For example, the siltation in the river. Is it closing down the opening so that you are getting a congregation that was not there previously? You have to look at pollution factors that may be affecting the reproduction of the species of fish or acid rain or things like that that may affect productivity.

So, there are usually a lot of variables at play. And unfortunately in situations where you have predators interacting with prey species to the detriment of the prey species, oftentimes it is not as simple as saying the predator is at fault. Usually there are other interactors that have to be considered if you want to find a viable solution. And that is what we advocate.

Senator KERRY. And just very quickly, before I turn to colleagues, and also Mr. Kaelin, if you would join in this answer with Ms. Young, what is the most troubling aspect of the NMFS program or of the coalition working group program in your view?

Mr. KAELIN. Well, starting with the NMFS proposal, as I said in my testimony, it is difficult in 5 minutes to fully express perhaps an idea. But we—as I said earlier, I am concerned about category III fisheries, current category III fisheries, coming under any additional regulation at all when there is no demonstrable impact by those fisheries on marine mammal stocks. I think that is what NMFS is proposing, with mandatory observers and registering all vessels—it just does not seem to make sense to us if we are already category III fisheries, and over the last 5 years data has been developed that does not show we have had an impact, why should we have additional regulation?

I think that is probably our biggest problem with the NMFS proposal. There are some positive aspects, but the idea that there is a quota and once it is met fisheries will be shut down—perhaps NMFS might argue that those like our herring fishery that are not having a great impact might not be shut down—but if you read the NMFS proposal, it does not give you that assurance. I think that would be our biggest problem with that proposal.

I think with the negotiated, so-called, critical stocks regime, which is the one that refers to the use of conservation teams and refers to putting our scarce resources—addressing them toward mammal problems that do exist, I think the greatest shortfall is that robust stocks were not at all addressed. We attempted to address what do you do about large stocks of mammals, some of the issues that Senator Stevens was raising, I think, really were kind of left off the table. We did not get into how we change the Marine Mammal Protection Act, or maybe we do not have to, to address large stocks of animals.

I think that is the problem with the overall agreements that we have worked out. It does not—our agreements really do not address nuisance animal situations from robust stocks adequately. So, I guess that would be my answer, sir.

Senator KERRY. Ms. Young, do you want to add to that?

Ms. YOUNG. [Nods negatively.]

Senator KERRY. Senator Stevens.

Senator STEVENS. Thank you. Ms. Iudicello, I want to go on record again as thanking your organization for its great help along with others on the driftnet issue. I would just say for the record

I got two great telegrams this year. The first one was when the Cook Inlet Fishery took the limit off of king salmon. The run was so great that the limit which was previously one per fisherman was taken off entirely.

The second was from my good friend who is the leader of the opposite party, as a matter of fact, in the House of Representatives from our State. He urged me to come join him on Montana Creek because the king salmon were coming in at 60 and 80 pounds. They had almost disappeared for years. So, the proof of what we all did on driftnets is there for people to see in Alaska this year. It is a wonderful thing.

Now, back to the situation here, though, I have read your testimony. I appreciate what you say. I have some problems about it because having just been home and talked to some of my Eskimo friends, they see this as another mechanism to get greater control over their subsistence fishery. Do you see this in the proposal that came from the industry and environmental groups?

Ms. IUDICELLO. Probably, there are several thousands of years of justification for that, and experience. But certainly, in the context of our negotiations, there was no intention—in fact, we explicitly stated a number of times both in the agreement and to some folks who were observing from both Rural Cap and some other native organizations—we expressed clearly our position that we had no intention to move outside the four corners of section 114 of the MMPA; that is, we are talking about incidental take in commercial fishing. We had no intent to regulate or increase the likelihood of regulation of subsistence.

Indeed, the issue of revisiting the recovery factor, the recovery time in cases where subsistence was a major source of take, the whole debate on that issue and the whole point of taking it up was raised by some Alaskans and some Alaskan Natives who were observing the proceedings. And they came to us and said “Well, you know, the recovery factor is a mathematical calculation. And when you come up with this calculation it does not take into account that there might be—you are going to pop out with a number that is basically a cap, and what if we are over that number? Then you are going to affect our subsistence.”

We went back and, with some excellent assistance from Lloyd Lowery from the Alaska Department of Fish and Game, walked through the issue to the point where we decided that what we needed to do there with that recovery factor was acknowledge that the time of recovery of a marine mammal stock—whether you get harbor seals or beluga whales or whatever it is to OSP in 5, 10, 20 years—is a policy call when, in order to do so, you are affecting somebody’s sustenance. And that in order to give the flexibility to change the mathematical calculation, we agreed that the Secretary ought to be able to adjust the recovery factor downward which expands the time longer.

It did not occur to us at the time that that flexibility might work the other way around. We certainly never intended it that way. The idea was if you do your mathematical calculation, let us say, and you come out with a number for seals at 100, and that would cut into the subsistence use, then you would redo the recovery fac-

tor so that you came out with 200. It did not occur to us that the flexibility could be used to make it 50.

Now, this is not the most graceful drafting, as I am sure you recognized when you looked at the joint proposal. So, I think the intent certainly was not there, and we would be delighted to work with the committee staff and others to make sure that that is very clear in whatever the committee proposes in legislation.

Senator STEVENS. Thank you very much. I would like to make sure in the drafting, as well, and I think we can. But I think this record of your statement would be sufficient in any court. I thank you very much for that.

Ms. Young, I was very pleased to hear you articulate your position about the nuisance problem, and I think that there has been a substantial meeting of the minds, here. I appreciate your answer. I just want to say that to you.

With regard to your testimony, Ms. Iudicello, about the use of firearms on ocean mammals, I have long thought that that ought to be illegal in a criminal sense unless a permit was issued by a State or the Federal Government or the mammal was taken under the exemption for subsistence use. We would be very pleased to work with you on that. I think there are marauders out there who misuse firearms.

I am also a gun nut so I am not against guns. I am just saying that some people misuse them, and I think Federal law ought to protect mammals from the intentional shooting by those who incidentally catch mammals in pursuit of their livelihood. So, we would be glad to work with you on that.

Mr. Gilman, the problem I mentioned before about the taking from "other sources of legal takes from noncritical stocks," and whether or not that would expand the Secretary's authority over subsistence use, relates to the conversation I just had with Ms. Iudicello. What do you think about this proposal? Does it give the Secretary authority to regulate the subsistence use of species that are not on one of these lists so far?

Mr. GILMAN. Neither the critical stock proposal under the conservation team approach nor the noncritical stock proposal changes in any way, shape, or form, the regulatory structure over subsistence that currently exists within the MMPA. And the confusion, I think, is over what is not explained in the proposal. We are in a dilemma. I represent Aleut native fishermen in the South Peninsula and North Peninsula area of the Aleutian Islands. There are also Aleut native subsistence users of harbor seals and other marine mammals.

We were told that there was only one bottomline as a condition for our participation in this negotiation; that is, this regime we negotiated could not in any way, shape, or form, increase the regulatory structure over subsistence—period—and that we would walk away from the deal if it were attempted. That discussion occurred on a number of occasions in our Seattle meeting.

The way we have worked it out is that the conservation team process is a consensus building mechanism. You have to build by consensus, and you have a short timeframe to do it. The only stock in Alaska that we have identified as critical, that has both fishing interaction and subsistence use is Alaska harbor seals. They are a

candidate for the threatened species list at some point if the trend in their population decline does not reverse.

In order to avoid any issue of regulation of subsistence, we just left it on the table and decided not to deal with it. Harbor seals are primarily taken by subsistence users, a large part in my area by my villages. The first would be to form a conservation team. Subsistence users would be part of the conservation team. If they did not agree to the discussions there would be no consensus. The issue would go back to the Secretary. The Secretary would be able to do nothing unless the species is designated under preexisting law as depleted, threatened, or endangered.

We advocated that approach because we want a forum before there is a listing under the Endangered Species Act, because we have already tasted what it is like to be regulated under the Endangered Species Act. We want a prethreatened species forum where we can sit down as a group and come up with a plan that minimizes impacts on subsistence users and minimizes impacts on commercial fishermen, and, if we can, conduct it on a voluntary basis to avoid a threatened species listing.

If those animals get listed under ESA, and the only taker of harbor seals is Alaska Native subsistence users and the stock starts to crash toward the endangered level, then the regulatory requirements that will be imposed will be much more Draconian 5 or 10 years from now than if we try and work them out with time and in a cooperative forum.

So, Senator, this was our idea, and we pushed it very aggressively.

Senator STEVENS. Well, that is good. I am glad to have that in the record, too. I have to tell you, when I read it I misunderstood it, because it looked to me like it might create a "threatened to be threatened" list, which people have talked about for animals on shore. I had not heard it for the marine environment, but we do have a proposal in the Endangered Species Act to talk about a new listing before being threatened. I thought that is what I was seeing here, too.

Mr. GILMAN. And the difference, the substantive difference between Alaska harbor seals and walrus on the west coast of Alaska is that the Government has sufficient information to designate harbor seals as depleted. The Government does not have sufficient information to designate walrus. So, under our concept you could not form a conservation team on walrus because they do not have any regulatory authority over nondepleted species when subsistence is the only take or the primary take.

Senator STEVENS. Let me go back to all of your. Anyone who wants to comment be my guest.

Neither proposal before us deals with the critical issue of funding. We have various estimates of what the proposal would cost. There are not any registration fees in the negotiated proposal. There are not any user fees. There is no proposed new way to pay this cost. And yet, the bill that NOAA works under is already over-spent for this year. There is no money for proposed individual fishing quotas, or even for some existing programs in the NOAA budget.

We have got new problems coming in New England that are going to be very costly, and I think extremely necessary. I hope to hold some hearings on those, too, again this year Mr. Chairman. But what do you all suggest? Did anyone in these meetings suggest where the money's going to come from to pay for this cost of up to \$20 million a year? Mr. Gilman.

Mr. GILMAN. We started in the negotiation, the very first meeting, with the premise that we had to have a reality check and that any management regime would be subject to appropriation because the group as a whole would not agree to user fees across the board for the fishing industry. From the very beginning we tried to structure a proposal that was subject to appropriations, assuming that we were trying to hold on to baseline appropriations, which is approximately \$10 million.

The proposal that we submitted will spend \$10 million, it will spend \$2 million, it will spend \$200 million. It is a substantive proposal subject to appropriations. We may have only enough money to deal with the two most critical stocks at this time. We know what the critical stocks are. We spent 5 years figuring out where the hot spot areas are. If all we have is \$10 million and somebody has estimated that they can only get to Alaska harbor seals and Gulf of Maine harbor porpoise with that \$10 million, for the first 2 years, well, by God, let's do it then. And let's solve the problem.

It gets into the issue of registration. We, of course, need a registration regime, on a stock-specific, region-specific basis. We should attempt to merge existing data bases. If merger is not possible, we need to create a new data base.

And of course we need observers. In some fisheries we may need 5 percent. In some fisheries we may need 50 percent, and in some fisheries we may need 100 percent observer coverage. The funding should be dedicated to those hotspot areas to fund the creation or the merging of a stock-specific data base, fund an observer program, and resolve a specific problem with the funding you have, and then move on.

Senator STEVENS. Any other comments?

Mr. KAELIN. I guess I would like to make one comment. In over 10 years of fishing in the Gulf of Maine and Georges Bank area personally, there was one marine mammal encounter that I witnessed. I did not work in the gillnet fleet. So, as far as user fees go, people in my part of the world believe similar to what someone mentioned earlier, that perhaps the environmental community has more interest in funding this program than we do. If we could see a way where we could equally create user fees on, not only fishermen, but people who want to protect marine mammals, then maybe we could talk about user fees.

But the point I am trying to make is there are really very few fisheries interactions in New England that are a problem to any marine mammal stocks. In fact, the harbor porpoise may not even be in trouble, to the extent that a conservation team may be established, given the information that NMFS has just published about that stock.

So, I think from our perspective, because there are really very few problems in this area, we do not think user fees can be supported.

Senator STEVENS. Well, I am inclined to agree with you in some ways, but I do not see too many rich little old ladies in tennis shoes who are going to put up money to save the harbor seal or the porpoise, either.

The fact of the matter is I had hoped that one of you might mention the concept of finding some way to make those who commit waste through the bycatch and discard of fish stocks pay into a fund that might help fund initiatives such as this. I am looking at the problem of excessive bycatch of nontarget species, and waste in the processing of fish, and discard during the harvesting of fish. I think there is an excessive amount of this.

This is an area that the environmental community could work with us on, and if those people who are committing it want to continue to be wasteful, they ought to pay for the species and stocks that they are denying others. It would be possible, I think, to find some other sources of funding. But that is for the Magnuson Act, not for this act.

Thank you very much, Mr. Chairman.

Senator KERRY. Thank you very much, Senator Stevens. Senator Gorton.

Senator GORTON. Mr. Chairman, you and Senator Stevens have covered most of the very sensitive areas of this proposal, and I would just like to ask for the comments of, I suspect, probably the three on this panel who are interested in it on the specific problem with respect to takings in Puget Sound, and I guess both for me and the Senator for Oregon along the Columbia River.

California sea lions mostly congregating at the head of the Lake Washington ship canal have caused such a dramatic decline in the steelhead salmon run as to cause it to be on the verge of being listed under the Endangered Species Act. I note some of the requirements here before a taking can take place, including all possible steps to do something other than taking or killing those mammals. But over the course of the last several years we have used fake killer whale sounds, rubber tipped arrows, underwater fireworks—they have even trapped and transported California sea lions and taken them all the way to California. They are brilliant mammals. They can find their way back to Puget Sound from California. And they do, a place at which they can feed in such luxury.

On the Columbia River, some 2,000 seals and sea lions are coming up the Columbia River practically to totally fresh water, competing with commercial fishermen. We had hundreds of them on a little sandbar at the mouth of the Cowlitz River, which is 50 miles or more up the Columbia, resting between feeding.

I guess my question is, Do you think that this particular application is really covered by either the NMFS proposal or by the compromise proposal? If either were adopted, would we have to go through this whole process again, a process which for all practical purposes has been completed? And is there or should there be a provision for the situation of marine mammals who literally are contributing to the endangerment of various salmon species within constricted waterways such as Puget Sound and the head of some of its lakes and streams or the Columbia River.

I think there are probably three of you here who are—I am not sure that the gentleman from Maine or maybe even Mr. Gilman

necessarily has a view on that, but I would sure appreciate the views of the other three of you.

Mr. THORNBURGH. Senator, I certainly have a view. I believe that the nuisance animal provision that we negotiated with the environmental community will deal with the issue at the Ballard Locks.

Senator GORTON. Do we have to start all over again?

Mr. THORNBURGH. I do not think we have to start over on proving all the steps for nonlethal deterrence. We will have to go through the exercise, at least on paper, in documenting that we did those forms of deterrence. But I am presuming that we are not going to have to go through and redemonstrate that we will have to retranslocate, and so forth.

I think that, in fact, the language should probably read that all reasonable possible steps have been taken. I guess I am concerned, what happens in another circumstance in Puget Sound, where fish are threatened. Are we going to have to go through a 5-year translocation process to demonstrate it, or not? I am not certain. I am presuming that, when someone applies under this process, goes in front of the special board to hear it, that they are going to recognize that reasonable steps have been taken in Puget Sound on pinnipeds, and that—

Senator GORTON. And that one place in Puget Sound is relatively similar to another?

Mr. THORNBURGH. I am presuming that would happen. Relative to the Cowlitz and the robust population of harbor seals, nothing in the proposal addresses the overabundance of animals in a herd-type situation; only identifiable individuals that have become a nuisance.

We talked about robust. Frankly, I do not think we had enough time to get to it. It was suggested that the fishing community use the current act, and the OSP provisions: If a species is at OSP, then we could go in and use the general waiver provisions. The irony of that is that the Fisheries Service has continued to state that those animals are not at OSP, even though most of us in wildlife management would clearly argue that a population as robust and as plentiful as that would seem to be at OSP.

So, the fish industry is going to pursue this issue of OSP. We are going to try to test and see if, in fact, there are ways to demonstrate that those animals are at OSP. And if not, we may come back and suggest that it is not a workable system, if you can never declare a population that robust to be at OSP; how can we ever get toward management of a stock, if we cannot even get past the first step in the statute?

Senator GORTON. Thank you. Ms. Young.

Ms. YOUNG. You know, again, to reiterate what I said a little earlier, when that process was originally discussed in the negotiations, because I was part of all of them and, as I said—anyway, I do not want to repeat myself.

The situation where you have a specific identity of individuals, such as hershal, who are causing problems, was what brought to the table the issue of nuisance animals. And we set it up to be able to deal with just that kind of situation. The Humane Society has been involved in a similar situation with endangered tortoise and crows, where they helped set up a system where you could lethally

remove crows who were causing a problem for the endangered tortoise.

So, precedents certainly exist for that. And some, not all, of the organizations whom I represent, I think, recognize that and would welcome being a part of the process that is set up to deal with it. So that particular situation you are referring to was, in fact, exactly what we had in mind when the negotiation process dealt with nuisance animals.

Senator GORTON. Thank you.

Ms. IUDICELLO. I do not have that much to add to what Guy or Sharon said. I think they both described very precisely what we crafted. I think what you are hearing, certainly from a conservation community perspective, is that the idea that there can be an overabundance of marine mammals is counter to our world view.

There was a lot of discussion earlier of burden of proof, and where it lies, and who has it, and so on and so forth. And I think what we said early on in the negotiations is that, if a user of marine resources want to make a case that an overabundance of species X causes a problem for species Y and they ought to be culled, because that is what we are talking about here, then there really is a burden on that applicant to come forward and prove that the animal is at OSP.

And if it is, then the Marine Mammal Protection Act contains provisions to waive the moratorium, and go through rulemaking, and allow either a transfer of management to the State, which would then manage the population as you would with deer; or you could get a permit to do a variety of things. But you do have to get to that OSP determination in the first place.

And we have encouraged the west coast, particularly Pacific Northwest Coast industry folks and some of the tribal fishermen as well, to get the ball rolling, kick it off, start it, make an application and see what happens. The agency cannot duck the issue forever. If you put on expert witnesses, and you can prove that an animal is at OSP, then you have got options.

Senator GORTON. Thank you, Mr. Chairman.

Senator STEVENS. Mr. Chairman, could I ask just one more question, and make one comment? I did not ask this, and I got caught up in my other questions, I apologize. But the negotiated proposal's conservation team would have benchmarks for each fishery, for immediate and long-term goals to reduce the incidental fishing mortality to an insignificant rate approaching zero, within 10 years.

Now there are all kinds of concepts about how to ensure that the benchmarks are met. But I would like to know: Do you believe the conservation team approach provides protection to fishermen to prevent benchmarks from being set so low, or ratcheted down too quickly, as many feel happened to the tuna fishermen in the eastern tropical Pacific? I assume you are familiar with that.

Ms. IUDICELLO. Yes, sir. The benchmark idea, as you will note in the proposal and in fact it is one of the criticisms that the Marine Mammal Protection Coalition has of it, is that they are vague. This is not a quota setting, ratcheting, cap kind of proposal. Our idea was that the whole point of this is to aim downward at reducing takes; not to aim upward until you have met the quota or the bag limit.

And so the idea of benchmarks was that, using the notion of reducing take over time to an insignificant level, the conservation team would then look at all the possible ways that they could change fishing behavior—whether it was time and area closures, or seasonal closures, or new gear, or whatever it would be—and come up with a plan that would say: By doing these things, in 3 years we will have moved from 10 to 10 minus x , and then 10 minus $2x$ over time. And you would keep checking in, to make sure they were making progress.

Insignificant rate approaching zero does not mean no takes. I think there is a fundamental acknowledgement that accidents happen; but the point is, to try to avoid them. And since the fishing industry would be at the table with the conservation team, we presume that it is very unlikely that there would be an annual ratchet down kind of approach that would eventually shut someone down.

Senator STEVENS. Well, does it have to be tied to the mortality of marine mammals in the fishing industry, or is it just reducing stocks? Mortalities could also be caused by sports vessels or other causes, you know. People sitting at the end of docks, shooting at marine mammals. I think there is a lot more to it, this benchmark, is it tied just to mortality by commercial fishermen?

Ms. IUDICELLO. Yes.

Senator STEVENS. Solely?

Ms. IUDICELLO. Yes.

Senator STEVENS. You cannot have a benchmark set just because of a decline in stock levels?

Ms. IUDICELLO. Correct.

Senator STEVENS. Anyone else?

Mr. GILMAN. I would add a little to that, because we struggled with the same issue until we understood that we were talking about mortality rates, and not levels of take, as far as our statutory benchmark.

When we went back and looked at our mortality rates, we soon discovered that the Alaska salmon fleets and groundfish fleets are already at insignificant levels approaching zero, based on two things: First, because the groundfish fleet was regulated under the ESA to protect steller sea lions, we dramatically reduced our interaction level with stellers to the point where you are talking roughly a .001 percent interaction rate, based on fishing effort in the Gulf of Alaska and the Bering Sea. It is almost at zero.

Second, the Alaska salmon fleets in the central, southeast, and western gulf began a voluntary program about 1989, to make sure that our fleets were not shooting seals, and were doing their best to harass the animals away from the nets. When you hear about those high statistics of harassment, this means we are keeping them away from the nets. We have virtually no deaths. Shumagin Island salmon fleets took no harbor seals in 1991, period. Our mortality rate for harbor seals is zero.

So, we accepted the concept of using the mortality rate because you can take a significant number of animals, and yet still have an insignificant mortality rate.

Senator STEVENS. Thank you very much. Incidentally, you were discussing, Mr. Chairman, the problem of dealing with nuisance animals—I mentioned before, our State has been through this with

the wolf problem; and if you think it is a simple thing to deal with, it is not. We were trying to protect the indigenous people's, the native people's food chain, their land-based subsistence animals.

And we proposed a State-regulated taking of the wolves, which had expanded in population at the same time the caribou herd had been collapsing. You all read about it and have seen the reactions. Maybe some of you all were involved in it, I do not know. But I have got to tell you, this nuisance animal problem is going to increase as the populations of these marine mammals continue to increase in our State; and while I am willing to make it a crime to shoot them, the protection has to assume that someone has the right, at some point, to manage the levels, to protect the other resources that we depend on.

I hope that we will get there sometime. Ms. Young, I think you and I might have lunch some day, and see if we can find a way to come through that. You do not think you want to do that; right?

Ms. YOUNG. No, I would be happy. Am I allowed to buy, or do you buy, or?

Senator STEVENS. I buy. [Laughter.]

Senator KERRY. Are you going to spread that around a little bit? [Laughter.]

Ms. YOUNG. Oh, I am easy.

Senator KERRY. After all this, you reminded me, I do come from your State. [Laughter.]

Ms. YOUNG. Then it is a lot more convenient.

Senator STEVENS. Mr. Kaelin had a comment.

Mr. KAELIN. Mr. Chairman, if I could respond to Senator Stevens' last comment, I am referring now to the net pen predation issue which I talked about in my statement. We know that this is not going to be an easy issue for our industry to deal with. The public perception that marine mammals are on a higher plane than other land-based predators is very clear to us, and it is not going to be easy. We have had people threaten to boycott our fish, and so forth.

But we feel that we have no alternative but to meet this issue headon, and that is why we have called for this task force, so we could get it public and create a legal solution, and as our industry grows, put the problem behind us. We are very interested in developing technological answers too, and we have all of them employed that exist.

So, I do agree it is difficult, but we do not see any choice—we cannot keep our head in the sand. We have advised those people in our organization who want to go illegal on this issue, that it is the wrong way to go. So, I would like to just add that.

Senator STEVENS. Thank you very much. We appreciate your answers.

Senator KERRY. Let me just ask a quick question of Ms. Young, if I can. I share your concern about the observer program, which I said earlier, and the need for observers, and the level of data. Between the two programs, the two sort of data-gathering proposals of NMFS and the working group, where do you come out?

Ms. YOUNG. I would definitely support the NMFS proposal. You know, I think that they deal more effectively with the need to have reliable sampling.

Senator KERRY. OK. Now, all of you, I would just like to check on one thing. We have these opposing views in front of us, and obviously, as you said earlier, it is our prerogative and our responsibility to come up with something. What happens to the working group? As we kind of pick something here, are we going to have your support in an effort to try to fashion something, or is this a take it or leave it thing, in any of your views?

Mr. GILMAN. Senator, I would never come in front of this committee and say anything is take it or leave it. I have seen people do that in the past, and they have usually had their head handed to them on the spot. So, I think yes, we would cooperate, to our fullest.

Senator KERRY. Well, I appreciate that. You know, I had an extra head right down here to show you. [Laughter.]

As we said with the prior panel, I am confident we can work this out in the next days, hopefully. I think nobody is well-served here, by having this become contentious in a silly way. I think we really need to seek the best level that we can to meet the interests. We may not make everybody happy, but I am confident that we can enhance the goals and purposes of the MMPA, which we all understand; and simultaneously, be sensitive to some of the other needs that are out there.

So, let us try to do that, if we can, and our staff will be in touch with you all. Dr. Hofman, I appreciate your sitting through this. I know Dr. Foster did for a while, and then we broke up to vote. I think that is important, to have folks listening to what is going on here, on both sides.

I think you are all to be congratulated for working, even those who may not agree with the final product, for having been so much a part of the effort to get there, and get a product. I really think it is a great leading indicator of our capacity to be able to, sort of, pick up where you have left off now, and come together with a good program. And we are going to try to do that, obviously, so that we could come in here without contention, and see if we can move this thing through on schedule, in a sensible way.

So, we will leave the record open for a couple of days, in case colleagues have any additional questions, or we need to fill it out for the record. We will be back in touch with you. We thank you very, very much for your testimony, and for traveling the distance some of you did. We appreciate it.

We stand adjourned. We thank you.

Senator STEVENS. And I thank you.

[Whereupon, at 4:50 p.m., the hearing was adjourned.]

APPENDIX

PREPARED STATEMENT OF SIERRA CLUB

On behalf of the Sierra Club, we offer the following comments on the reauthorization of the Marine Mammal Protection Act of 1972:

The Sierra Club has been a strong supporter of the Marine Mammal Protection Act since its inception. We urge Congress to move forward with reauthorization of this important wildlife and marine conservation law.

COMMERCIAL FISHERIES INTERACTIONS WITH MARINE MAMMALS

The Sierra Club has reviewed proposals from a number of groups and agencies to address the problem of marine mammal interactions with commercial fisheries.

We encourage Congress to carefully examine the recommendations of the MMPA Negotiating Group (Keystone Center Memorandum), which outlines a negotiated series of proposals to address these issues.

Sierra Club generally endorses the proposals of the MMPA Negotiating Group, with the exceptions noted below. We are impressed by the degree of cooperation and progress made by the negotiated process through the Keystone Center, and we commend the work of the conservation organizations and the commercial fishing organizations in coming up with a solid plan.

In particular, the Sierra Club supports the following elements from the Negotiating Group:

- the recommendations maintain the need for incidental take permits, based on stock assessments, strong scientific input, and public participation;
- the recommendations continue to prohibit intentional killing of marine animals;
- the recommendations continue the goal of zero mortality for fisheries interactions;
- the recommendations provide a means for a coordinated and goal-oriented program to protect marine mammals while maintaining commercial fishing activities.

The Sierra Club in summary, strongly urges Congress to adopt the MMPA Negotiating Group recommendations, with the following exception on reporting.

- Sierra Club is very concerned with the continuing lack of detailed, scientifically valid information on marine mammal interactions. We therefore strongly urge that Congress adopt, in addition to above recommendations, an effective program of mandatory reporting by fishermen of marine mammal/fisheries interactions and a program of observer coverage to supplement existing information on marine mammal interactions and to provide information on the effectiveness of efforts to reduce mortality of marine mammals.

We recognize this is a burden on the commercial fishing industry. Nevertheless we believe it is in the long-term interests of both the commercial fishing industry and the conservation community, to maintain as much valid, defensible data as possible on the real issues of marine mammal/fisheries interactions.

For the purposes of this reporting and enforcement, registration of all boats is necessary.

We further note that there is overlap, both in terms of reporting and in terms of enforcement, between the National Marine Fisheries Service and the Magnuson Fisheries Act now under review by Congress. To minimize overlap and confusion NMFS should be required to establish a joint program of on-board observers, mandatory reporting, data collection, enforcement, and boat registration for purposes of both conservation laws, MMPA and Magnuson. (See attached, new Bycatch recommendation that Marine Fish Conservation Network has submitted for the Magnuson Fisheries Conservation Act).

Some concerns have been raised about the concept of establishing Conservation Teams to address fishery regulation under the recommendations by the MMPA Negotiating Group. The Sierra Club feels the cooperative nature of the Conservation Teams may prove helpful to resolving conflicts; however, a Conservation Team can

also lead to delays and inaction. We recommend that language be included to ensure that the National Marine Fisheries Service can take action on a fishery/marine mammal issues when a Conservation Team is deadlocked. We further suggest that Congress authorize establishing Conservation Teams as a pilot project in a few cases to determine how well the concept will work in problem resolution.

ALASKA MARINE MAMMAL MANAGEMENT

The Sierra Club supports amending the Marine Mammal Protection Act to allow federal intervention before populations become depleted. Currently, hunting of marine mammals by Natives can only be regulated after a species is declared to be depleted, after a species is declared to be depleted, a declaration that can be made only after time-consuming administrative proceedings, potential administrative appeals and litigation.

In urging Congress to provide the U.S. Fish and Wildlife Service (in the instance of polar bear, sea otter, walrus and other pinniped management) and the National Marine Fisheries Service (in the instance of cetaceans) with the authority they need for sound management and protection of these species, we want to emphasize that we are not suggesting a change in the present Native exemption to the moratorium on taking. Nor are we recommending regulatory authority a substitute for increased State-Federal-Native cooperation in the management of these internationally significant species. We strongly support both the exemption and increased cooperation among the users and the wildlife management agencies, backed by added regulatory authority for the U.S. Fish and Wildlife Service and National Marine Fisheries Service, in addition to their current authority to regulate "wasteful take."

We appreciate the opportunity to provide congress with the Sierra Club's recommendations on these issues.

Thank you for considering our views.

PROPOSED AMENDMENTS TO THE MAGNUSON FISHERY CONSERVATION AND MANAGEMENT ACT OF 1976

OBJECTIVE—MINIMIZE BYCATCH

* * * * *

SUMMARY OF THE PROBLEM

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Neither the Magnuson Act nor the 602 guidelines for preparing FMPs specifically deal with bycatch. Managers may account for bycatch impacts in developing plans, but they seldom do. The act needs more specific regulations designed to reduce or eliminate bycatch.

* * * * *

NEEDED ACTION

* * * * *

- explicitly define bycatch and establish a national policy to reduce bycatch in all commercial fisheries to "insignificant levels approaching zero";

* * * * *

- require all fishery management plans to establish a program for reducing bycatch by all gear within the plan's jurisdiction;

- mandate a comprehensive assessment of the level of bycatch of all gear in each fishery;

- strengthen existing conservation engineering programs within the federal government by increasing funding and establishing cooperative efforts with the fishing industry in research and development of new, more selective gear. These efforts should be funded by increased appropriations and fees imposed on those fishing operations with significant levels of bycatch; and

* * * * *

AMENDMENTS SUGGESTED BY THE MARINE FISH CONSERVATION NETWORK

* * * * *

Section 3.—Definitions (new—renumber)

(2) The term "bycatch" means the incidental catch, take or harvest of:

- (A) marine mammals, birds, turtles, and fish that are not the target species of the fishery in which a fishing vessel is engaged,
 (B) all fish discarded or lost during fishing operations, and
 (C) fish of the same species targeted by the fishery in which a fishing vessel is engaged which are prohibited by conservation and management measures promulgated under a fishery management plan.

* * * * *

Section 303.—Contents of Fishery Management Plans (new—renumber)

* * * * *

(b) Discretionary Provisions (new—renumber)

() establish, in cooperation with industry, a program for the elimination of bycatch through fees and incentive programs. Such fees collected through bycatch programs shall be made available to the Councils to be used exclusively for bycatch related management activities, including but not limited to costs of observer programs and cooperative efforts with the government on research and development of selective fishing gear and other technological devices for the reduction of bycatch.

Section 304(d)—Establishment of Fees (amended)

The Secretary shall be regulation establish the level of any fees which are authorized to be charged pursuant to section 303(b)(1). The Secretary may enter into a cooperative agreement with the States concerned under which the States administer the permit system and the agreement may provide that all or part of the fees collected under the system shall accrue to the States. (Strike the last sentence which reads "The level of fees charged under this subsection shall not exceed the administrative costs incurred in issuing the permits.")

PREPARED STATEMENT OF DINA STANSBURY, EXECUTIVE DIRECTOR, FRIENDS OF THE SEA OTTER

Friends of the Sea Otter ("FSO") appreciates this opportunity to provide testimony on the reauthorization of the Marine Mammal Protection Act ("MMPA").

FSO is a non-profit conservation organization that was formed in 1968 to protect the southern sea otter and its marine habitat. To the degree determined by the relationship to the southern sea otter population, FSO also occasionally becomes involved in issues related to Alaska and Russia sea otter population biology and management. Over 4,700 members in 50 states and 20 foreign countries support FSO's efforts.

In 1977, FSO was instrumental in having the Southern sea otter listed as "threatened" under the Endangered Species Act ("ESA"). Since then, FSO has testified in Washington, D.C. during ESA and MMPA reauthorization hearings. FSO also played an active role in achieving state legislation that restricted the use of gill nets in near-shore waters along central California significantly reducing incidental take in fishing operations. These restrictions have been one of conservation's greatest success stories—a precipitous decline in the status of a threatened population was dramatically reversed through cooperative efforts, and the fragile Southern sea otter population is now undergoing modest growth.

Since 1984, FSO has participated in a Southern sea otter recovery process that resulted in the translocation of 139 sea otters to San Nicolas Island through the years 1987 to 1990. Intended to provide a "reserve" colony of sea otters to be drawn from after a major oil spill, the uncertain success of the San Nicolas translocation program has instead shown us that we need expanded recovery efforts. Based on the slow growth of translocated sea otter populations, and the devastation that results from an oil spill the size of the *Exxon Valdez* spill in 1989, we now know that the establishment of small isolated groups of Southern sea otters will not ensure their future.

Sea otters have a profound effect in the structuring and health of the near shore ecosystem. Many scientists have attributed to otters the role of a "keystone" species, i.e., one that shapes and drives the underlying food pyramid. Sea otters occur largely in the near shore environment (within one mile of shore), generally foraging in waters 120 feet or shallower, and conducting all other activities at or near the water's surface. They are highly visible to people. Their engaging appearance and behavior drive a tourist industry; their high visibility makes them prime subjects for shore based behavioral research and population studies; their consumption of shellfish puts them in direct competition with commercial shellfish enterprises; and their susceptibility to oil puts them at odds with oil exploration and transport. Through the years of the sea otter hunt, otters were driven toward extinction for their valuable fur. Through the recent years of recovery, sea otters have faced the risks of

human competition for food, the chronic effects of water pollution, incidental take in fisheries, and the potential for oil spills caused by oil transport or development. It is clear that the Southern sea otter is a central player in issues of both a regional and global nature, and it is a litmus species for how well we are governing human interactions with the marine environment.

Since its enactment in 1972, the MMPA has been one of the sea otter's most important protections. The requirements of the MMPA played a major role in the state of California's effort to protect the otter from staggering losses in the near shore set gill and trammel net fishery. As the California Department of Fish and Game has stated, these losses "could be the most significant mortality reactor contributing to the apparent lack of sea otter population growth in California waters during the past decade."

The MMPA also has been an important force in reintroducing the southern sea otter to San Nicolas Island, promoting an observer program for incidental take, and conducting valuable scientific research. To continue this progress, we need a strongly reauthorized MMPA.

Our testimony today is limited to the issue of incidental take of sea otters in commercial fishing operations in California and Alaska. We will submit testimony on other MMPA issues in the future.

Any incidental take of Southern sea otters could jeopardize species recovery. Even low levels of take could lead into a period of population stasis or decline similar to that of the mid-1970's to the mid-1980's.

Before the current net bans were enacted by the California legislature, sea otters were drowning in large numbers (with take exceeding annual growth of the population through reproduction) in large mesh entangling fishing nets set primarily for halibut. While the gill net restrictions have reduced the number of otter drownings, they have not stopped them. In addition, there is one 20 mile area along the central California coast with no gill net restrictions, where commercial net fishing occurs and a small colony of sea otters is now present on a year-round basis. The potential for incidental take remains a threat in this area, as does take in illegal nets in closed areas.

Protecting Southern sea otters from incidental take also is a key aspect of the ESA and MNPA recovery efforts. For example, in establishing the legal basis for translocating sea otters to San Nicolas island, Public Law No. 99-625 also established an area around the translocation site and throughout the parent population range (including room for natural expansion) where sea otters would be fully protected and incidental take prohibited. The concept of an absolute prohibition of incidental take in these areas was an essential underpinning of Public Law No. 99-625. (Public Law No. 99-625 also designated areas where otters would not be allowed to colonize, where incidental take during legal fishing operations would not be prohibited, and where specified protections of the ESA would not apply.)

The State of California coined in the effort by prohibiting fishing nets and the discharge of firearms around the San Nicolas Island translocation site. As a result, sea otters are fully protected north of Point Conception and around their reoccupied habitat at San Nicolas Island.

By honoring in the 1988 interim exemption from the MMPA incidental take prohibition the understanding that there would be no incidental take of Southern sea otters in its entire range except the designated area south of Point Conception, Congress expressly reaffirmed the importance of prohibiting the incidental take of Southern sea otters. That protection remains as necessary today as it was in 1988. In addition, the incidental take of sea otters in Alaska is becoming an issue of major concern which has been overlooked by the federal government. Much takes have never been authorized under the MMPA, although they are occurring in large numbers.

In accordance with the requirements of section 114 of the MMPA and the terms of the 1988 interim incidental take authorization, the National Marine Fisheries Service ("NMFS") has submitted a proposed regime to govern the incidental take of marine mammals in commercial fishing operations. FSO participated in this review, including the Marine Mammal Commission's ("MMC") preliminary effort of providing guidelines to NMFS. Throughout the public review of the proposed regime, FSO has argued strenuously for complete protection of southern sea otters from incidental take in accordance with the congressional mandate in Public Law No. 99-625. The U.S. Fish and Wildlife Service ("FWS") has agreed that no new incidental take authorizations should be established for this species, see Exhibits 1 and 2, and has provided these views to NMFS. Of course, NMFS must defer to FWS on its recommendations for this species. This understanding between the NMFS and the FWS has been clearly documented. See Exhibit 3. The NMFS will defer to the FWS

in the matter of sea otters, and the EWS has stated that sea otter take will be left at zero.

With respect to the MMPA incidental take program that will result from these hearings, FSO believes that several guiding principles must be followed:

1. No incidental take of Southern sea otters should be authorized inconsistent with existing law;
2. The current purposes and policies of the MMPA must remain in place, including the zero mortality goal;
3. A permit system based on the current mechanisms in the MMPA must be used to authorize incidental take and drive MMPA recovery efforts for sea otters in Alaska and other marine mammals;
4. A conservative bias must be exercised in favor of Alaskan sea otters and other marine mammals;
5. The burden of proof for obtaining authorization for incidental take must be placed on the fishing industry;
6. Efforts should be made to work with the fishing industry to develop fishing techniques and gear that will reduce incidental without undue burdens on the industry; and
7. Finally, adequate observation, verification and reporting of incidental takes are essential. There is no excuse for anything less than full and accurate reporting and cooperation with verification efforts by all those involved in incidental take.

FSO is now participating in the negotiations between the environmental community and the fishing industry over the development of an appropriate program to govern incidental take of marine mammals. We are now actively involved in all meetings and communications, and signed on to the final consensus document. The negotiated proposal reflects our commitment to working with all interested parties to identify and address those areas of resource conflict that affect sea otters or their habitat. The negotiated proposal is well-founded and robust, from both scientific and management perspectives, and upholds the intent and purpose of the MMPA with respect to sea otters. Sea otters in both California and Alaska will be offered all the same protections they have been offered in the past. FSO's position in these negotiations was guided by the general principles set forth in this testimony and our previous submissions to the federal agencies during the section 114 public review procedures.

For many years, sea otters in California and Alaska have been seriously affected by incidental take. FSO hopes that the lessons learned as a result of the sea otter's experience will find application in the effort to protect other marine mammals.

Thank you for considering our views. FSO supports a strong MMPA. We look forward to working with this Subcommittee during the 1993 reauthorization, and in the future, to advance the MMPA's purposes and policies.

LETTER FROM SAM MARLEN, DIRECTOR, FISH AND WILDLIFE SERVICE

DECEMBER 2, 1991.

Dr. GREGORY K. SILBER,
Friends of the Sea Otter,
Carmel, CA 93922

DEAR DR. SILBER: Thank you for your October 9 letter requesting the Fish and Wildlife Service take special, expedited measures to participate in the review being conducted by the National Marine Fisheries Service (NMFS) to develop recommendations to Congress regarding incidental taking of marine mammals by commercial fisheries.

The Fish and Wildlife Service (Service) has been informed by NMFS staff that an interim document soon will be distributed to numerous interested parties, including Friends of the Sea Otter. The document is intended to clarify misconceptions and other aspects of the Draft Legislative Environmental Impact Statement (DLEIS) and proposed regime. I understand that comments will be accepted. Service biologists will continue meeting with NMFS to ensure that the proposed regime does not compromise the Service's position that no incidental taking should be allowed for Californian sea otters and manatees.

I appreciate your efforts and support throughout this program review. If I can be of any further assistance, please let me know.

Sincerely,

SAM MARLEN,
Director.

LETTER FROM RICHARD N. SMITH, DIRECTOR, FISH AND WILDLIFE SERVICE

MARCH 24, 1992.

Dr. WILLIAM W. FOX, Jr.
*National Marine Fisheries Service,
Silver Spring, MD 20910*

DEAR BILL: The Department of the Interior recently provided comments to Dr. Charles Karnella on the National Marine Fisheries Service (NMFS) revised draft of the Proposed Regime to Govern Incidental Taking of Marine Mammals in Commercial Fishing Operations (copy enclosed). However, I felt it might be useful if I wrote to you directly about concerns the Fish and Wildlife Service (Service) has with the proposal as it relates to southern sea otters and West Indian manatees, both of which are protected under the Endangered Species Act (ESA). If implemented, we are concerned that the regime proposed by NMFS will undermine hard won conservation measures already established for these species.

The decline of the California sea otter population from the mid-1970's to mid-1980's has been largely attributed to accidental drownings in fishing nets. It was only after the 1990 California closure of gill and trammel net fishing within the 30 fathom contour that most if not all incidental take was eliminated within the sea otter range, effectively achieving the zero mortality goal of the Marine Mammal Protection Act (MMPA) and the draft revised recovery plan. Congress acknowledged the adverse impact of commercial fisheries on southern sea otter populations when it expressly excluded them from the 5-year commercial fishery exemption granted in the 1988 amendments to the MMPA. I suggest that this establishes a precedent for excluding from the proposed regime endangered and threatened species known to be highly vulnerable to incidental take by commercial fisheries.

Further, in 1986, Congress passed Public Law 99-625 authorizing the establishment of an experimental population of southern sea otters. This special legislation, which is independent of the MMPA and ESA, includes zonal management whereby incidental take is prohibited in the translocation area around San Nicolas Island. Outside this area in the "management zone," intentional take is prohibited, but incidental take, such as by commercial fisheries, is not a violation of the ESA. We believe the proposed regime, were it applicable to southern sea otters, would possibly conflict with the translocation law.

The U.S. population of the West Indian manatee is classified as a separate subspecies and numbers approximately 1,455 individuals. Most remaining populations outside of Florida are thought to be small and declining in size due to poaching, incidental take in nets, habitat degradation, and other threats. Thus, the species' long term survival may depend on the success efforts to protect it in the southeastern United States.

In 1990, 216 dead manatees were salvaged in the southeastern U.S.; in 1991, 181 were salvaged. Nearly one-third of these deaths were human-related, most due to motorboat collisions but some were the result of tangling in nets or in trap lines. Considering its low reproductive rate, it is not likely the species can sustain this level of mortality and continue to survive. The Service has taken the position in our section 7 biological opinions under the ESA, that the incidental take of one manatee would present a jeopardy situation. Therefore, we believe that any analytical system that purports to designate any level of incidental take for the manatee would be in violation of that section of the ESA. Both the Revised Manatee Recovery Plan and the draft revision of the Southern Sea Otter Recovery Plan identify recovery tasks which specifically address the need to reduce the incidental take to levels approaching zero.

Another concern expressed in the Department's January 28 letter is the failure of the document to acknowledge the Service's management responsibility for the species under our jurisdiction, including our recovery responsibility under the ESA. Despite our noting this in our comments on the original draft, the omission persisted in the revised version. Furthermore, the revised draft includes revised formulae which translate into even higher Potential Biological Removal (PBR) levels than those in the original draft. For manatees the PBR increased from 2 to 14; for southern sea otters the PBR increased from 9 to 58. These levels would exceed the jeopardy level for these species and therefore heighten my concern for the future of these species under the proposed regime.

The Service is opposed to any sanctioning or perceived sanctioning of incidental take of these species by commercial fishing activities. Although we prefer exclusion of endangered and threatened species under Service jurisdiction from the proposed regime, we would be willing to discuss alternatives that effectively accomplish the same result, to the extent they were not precluded by special legislation such as the sea otter translocation law.

I hope this helps to illustrate and emphasize our position regarding exclusion of these species from NMFS's incidental take proposal. I would be very happy to discuss this further if you wish.

Sincerely,

RICHARD N. SMITH,
Director.

LETTER FROM NANCY FOSTER, PH.D., ACTING ASSISTANT ADMINISTRATOR FOR
FISHERIES, NOAA, DOC

MAY 5, 1993.

Mr. DONALD C. BAUR,
Perkins Coie,
Washington, DC 20005-2011

DEAR MR. BAUR: Thank you for your letter regarding the inclusion of southern sea otters and manatees under the proposed regime for governing interactions between marine mammals and commercial fishing operations. You requested a clarification of the National Marine Fisheries Service's (NMFS) position concerning excluding southern sea otters and manatees from the regime.

We feel strongly that our proposal would not authorize incidental take ore sea otters at levels that would delay the recovery of this species. However, NMFS would defer to the U.S. Fish and Wildlife Service management decisions regarding species governed by applicable wildlife protection laws, including the Marine Mammal Protection Act (MMPA), the Endangered Species Act, and other special legal requirements enacted by Congress to address sea otter management.

Our approach is consistent with our interpretation of section 114(l) of the MMPA, which directs NMFS to develop a regime to "govern incidental taking of marine mammals, other than those subject to section 104(h)(2) of this title."

I hope this letter provides adequate clarification of this matter.

Sincerely,

NANCY FOSTER, Ph.D.,
Acting Assistant Administrator for Fisheries.

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