



Marine Conservation Alliance

promoting sustainable fisheries to feed the world

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Alyeska Seafoods
Alaska Draggers Association
Alaska Groundfish Data Bank
Alaskan Leader Fisheries
Alaska Pacific Seafoods
Aleutian Islands Brown Crab Coalition
Aleutian Pribilof Island Community Development Association
Akutan, Alka, False Pass, Nelson Lagoon, Nikolski, St. George
At-Sea Processors Association
Bristol Bay Economic Development Corp.
Aleknagik, Clark's Point, Dillingham, Egegik, Ekuik, Ekwok, King Salmon, Lovelock, Manokotak, Naknek, Pilot Point, Port Heiden, Portage Creek, South Naknek, Tokeak, Twin Hills, Ugashik
Central Bering Sea Fishermen's Association
St. Paul
City of Unalaska
Coastal Villages Region Fund
Chelomak, Chevak, Esk, Goodnews Bay, Hooper Bay, Kipruk, Kongiganak, Kwigillingok, Mekoryuk, Napakiak, Napaskiak, Newtok, Nightmute, Oscarville, Platinum, Quinhagak, Scammon Bay, Toksook Bay, Tunululiak, Tununak
Groundfish Forum
High Seas Catchers Cooperative
Icicle Seafoods
McCarty and Associates
Mid-Water Trawlers Cooperative
Mothership Group
PV Excellence
PV Ocean Phoenix
PV Golden Alaska
North Pacific Fisheries Research Foundation
North Pacific Longline Association
North Pacific Scallop Cooperative
Norton Sound Economic Development Corporation
Brevig Mission, Diomedes, Elm, Gambell, Golovin, Kayuk, Nome, Saint Michael, Savoonga, Shaktoolik, Stebbins, Teller, Unalakleet, Wales, White Mountain
Pacific Seafood Processors Association
Prowler Fisheries
Seafood Cold Storage Association
Southwest Alaska Municipal Conference
Trident Seafoods Corp.
United Catcher Boats
Akutan Catcher Vessel Assoc.
Arctic Enterprise Assoc.
Northern Victor Fleet
Peter Plan Fleet Cooperative
Unalaska Co-op
Unisea Fleet Cooperative
Westward Fleet Cooperative
U.S. Seafoods
Western Alaska Fisheries, Inc.
Yukon Delta Fisheries Development Association
Alakanuk, Erimonak, Grayling, Kotlik, Mountain Village, Nunam Iqa

March 4, 2005

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

Dear Mr. Payne:

These preliminary comments are submitted by the Marine Conservation Alliance ("MCA") in response to NMFS' proposed 2005 classification of fisheries under the Marine Mammal Protection Act, 69 Fed. Reg. 70094 (Dec. 2, 2004) ("Proposed Rule"). These preliminary comments will be supplemented by more extensive and detailed comments when NMFS reopens the comment period on the Proposed Rule. MCA has been advised by NMFS officials that NMFS will have a second comment period on the Proposed Rule. In reliance on this promise, MCA will, in these preliminary comments, simply identify issues which are of concern. During the next comment period, MCA will submit more detailed analyses.

MCA was established in 2001 by fishing associations, communities, Community Development Quota groups, harvesters, processors, and support sector businesses to promote the sustainable use of North Pacific marine resources by present and future generations -- based on sound science, prudent management, and a transparent, open public process. The MCA supports research and public education about the fishery resources of the North Pacific, and seeks practical solutions to resource use questions to protect the marine environment and to minimize adverse impacts on the North Pacific fishing community.

The Proposed Rule incorrectly classifies the Bering Sea Aleutian Islands ("BSAI") Pollock Trawl Fishery, BSAI Flatfish Trawl Fishery, BSAI Greenland Turbot Longline Fishery, BSAI Pacific Cod Fishery, and Bering Sea Sablefish Pot Fishery as Category II fisheries.

The classification of fisheries depends on two data sets. First, NMFS must calculate the Potential Biological Removal ("PBR") for the marine mammal population. Second, NMFS must determine the number of marine mammals from each population killed or seriously injured by each

fishery interacting with the marine mammals. The data and analyses on which NMFS relies are flawed. For example, certain Alaska fisheries are proposed for inclusion in Category II because of interactions with transient and resident populations of killer whales. Yet, in computing the PBR for these species, NMFS relied on five year old data. NMFS did not include new data showing increased population levels which could affect the PBR calculation. There is also concern that when observers are unable to determine the precise identity of an animal, NMFS will count the animal as a member of each population or stock of which it might be a member, thus double counting a single serious injury or mortality. Moreover, the formula used by NMFS to extrapolate the total number of serious injuries and mortalities attributable to a fishery further exaggerates the total number. NMFS uses observer reports, which may already bias the computation, to estimate the total number of marine mammals seriously injured or killed by the fishery. NMFS then adds reported numbers of marine mammals seriously injured or killed that were not seen in fisheries observers' "observed hauls" to that estimated number. This computation results in an exaggeration of the level of serious injury and mortality attributed to a fishery because it counts those serious injuries and mortalities that occurred on unobserved hauls more than once. Thus, there are significant questions about the data on which NMFS relied and about the methodology used by NMFS in proposing to place certain Alaska fisheries into Category II. MCA will elaborate on these and other issues during the second comment period on the Proposed Rule.

There is also a legal and structural issue associated with the fishery categorization process. Section 118(c), 16 U.S.C. § 1387(c), of the MMPA defines a Category I fishery as one with frequent individual mortality and serious injury of marine mammals. A Category II fishery has an occasional incidental and serious injury of marine mammals, and a Category III fishery has a remote likelihood of, or no known, incidental mortality and serious injury of marine mammals. NMFS has developed a formula for placing fisheries into these categories which is arbitrary and capricious and which may well violate the equal protection and due process clauses of the U.S. Constitution.

NMFS' formula for categorizing fisheries is found at 50 C.F.R. § 229.2. There, NMFS defines a Category I fishery as one that is responsible for the annual removal of 50% or more of any stocks' PBR. A Category II fishery is one that, collectively with other fisheries, is responsible for the annual removal of more than 10% of any marine mammal stocks' PBR and that, by itself, is responsible for the annual removal of between 1% and 50% of any stocks' PBR. A fishery will fall into the Category III classification if it, together with other fisheries, is responsible for the annual removal of 10% or less of the marine mammal stocks' PBR or that fishery, by itself, is responsible for the annual removal of 1% or less of the marine mammal stocks' PBR.

In short, if a fishery is the only one interacting with a strategic marine mammal stock and it is responsible for the serious injury or death of 1% of the PBR, the fishery is placed into Category III and subject to no further regulation under this section of the MMPA. But, if a second and new fishery enters the scene and it is responsible for taking 10% or more of the PBR, then the first fishery, which a moment ago was determined to be having no impact on the marine mammal stock, is suddenly transformed into a fishery having a significant impact and a fishery which must be subject to additional regulation. Such arbitrary classifications are legally suspect.

Indeed, the regulations provide that if only one fishery is interacting with a strategic marine mammal stock, and it is responsible for 10% or less of the PBR, then it is a Category III fishery since it, together with all other fisheries interacting with that marine mammal stock, is responsible for the serious injury and mortality of 10% or less of the PBR.

MCA will expand on the issues discussed above and on other issues during the second comment period on the Proposed Rule. MCA has limited its comments at this time in reliance on NMFS' assurance of a second comment period and so that MCA might continue its analysis of NMFS' data and methodology.

MCA also understands NMFS may be preparing an Environmental Assessment ("EA") on the Proposed Rule. If so, MCA urges NMFS to allow public comment on that EA which must, by law, regulation and judicial precedent, address the biological, social and economic impacts of the Proposed Rule.

Sincerely,

A handwritten signature in black ink, appearing to read "David Benton". The signature is fluid and cursive, with a long horizontal stroke at the end.

David Benton
Executive Director