

ENDANGERED SPECIES AND MARINE MAMMALS

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THE ENDANGERED SPECIES ACT, THE MARINE  
MAMMAL PROTECTION ACT, AND COMMERCIAL FISHERIES

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The Eighth Annual National Fishery Law Symposium  
October 11, 1990  
Seattle, Washington

I. Introduction.

Commercial fishing operations invariably have impacts on ocean life other than the targeted fish species. Nets, lines, hooks, and traps can harm other animals, even if unintended or "incidental". National policies have been established by federal legislation that seek to protect two classes of such animals-- marine mammals, and endangered and threatened species of both plants and animals-- the Marine Mammal Protection Act ("MMPA")<sup>1/</sup> and the Endangered Species Act ("ESA").<sup>2/</sup>

Both the ESA and the MMPA create regulatory restraints on commercial fishing operations that are designed to protect these specially selected categories of animals and plants. Each is guided by biological determinations and considerations which take precedence over economic and financial objectives. The first serious restraint of commercial fishing activity by the U.S. Congress with such goals in mind was the banning of commercial whaling in 1971.<sup>3/</sup> Yet that ban is not entirely consistent with the policies in the ESA and the MMPA, which will be explained below, but is instead a political decision based on ethical considerations.

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1/ 16 U.S.C. 1361 et seq. The MMPA was also amended in several important respects in 1988. Pub. L. 100-711; November 23, 1988.

2/ 16 U.S.C. 1531 et seq. The ESA was significantly amended and reauthorized in 1988 by Pub. L. 100-478.

3/ A moratorium on commercial whaling by U.S. vessels was adopted by Congress in December, 1971 and made part of the MMPA. 16 U.S.C. § 1372(f). Although the Whaling Convention Act of 1949 and its implementing regulations created a regulatory regime for commercial whaling, the only whaling still allowed is that by native Americans for subsistence in Alaska. 16 U.S.C. §§ 916-917(1); Title 50 C.F.R. Part 230.

The most well-known fisheries/marine mammal issue has been the continuing controversy over the intentional encirclement of dolphins in the course of fishing for yellowfin tuna in the Eastern Tropical Pacific Ocean. The other issue that has achieved national headlines is the incidental catching of endangered and threatened turtles in the shrimp fisheries of the Gulf of Mexico. More recently, the National Marine Fisheries Service ("NMFS") has listed the Stellar sea lion, found mainly in Alaska, as a threatened species and has accepted four petitions to list certain Columbia River salmon runs as threatened or endangered.<sup>4/</sup>

Almost every segment of the commercial fishing industry in the U.S., to some degree, is regulated by the MMPA. Fisheries in which endangered or threatened species might be taken are also subject to the ESA. A major effort has been underway, ever since the 1988 amendments to the MMPA, to educate all fishermen as to their duties under that law. Already stiff fines and penalties have been levied on those who have ignored those duties.<sup>5/</sup>

This outline is intended to give a general explanation of the MMPA and ESA. Very few lawyers will be involved in the more contentious and difficult procedures with respect to listing, setting of quotas and the like. Most will be advising individual fishermen about the laws and what they must do, on a day-to-day basis, to avoid violating the law.

## II. The Endangered Species Act.

### A. Brief Outline of the Statute.

#### 1. Purpose of the ESA.

The ESA creates an affirmative duty on the part of NMFS to protect populations of animal species under its jurisdiction from becoming "threatened" or "endangered" and to undertake regulatory measures that conserve threatened or endangered species. Once an

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4/ In September, 1990, NMFS accepted four petitions to list the Snake River races of spring, summer, and fall chinook salmon and Lower Columbia River coho salmon as endangered or threatened. The agency is now reviewing available biological information pursuant to § 4 of the ESA prior to making its decision whether to list any of these species.

5/ The September edition of the Fishermen's News reported that a dozen fishermen in the Cook Inlet salmon drift-gillnet fleet have received fines, including one of \$375 for not having the required MMPA sticker displayed and one for \$1,000 for not being properly registered.

animal species is listed under the ESA--a determination to be based solely on the best scientific and commercial data available, NMFS must adopt regulations to provide for the conservation of the species. These regulations would include designation of critical habitat, development of a recovery plan, and other necessary and appropriate measures, to prevent further decline. NMFS must also assure that no Federal action is taken that would jeopardize the continued existence of any threatened or endangered species. Provisions are also included in the ESA for cooperation with the States to carry out the purposes of the Act.

## 2. The Listing Process.<sup>6/</sup>

The ESA sets forth a deliberative process for NMFS to determine whether a particular species should be listed as either threatened or endangered, which must be published as a regulation. The first step is to review the available technical and scientific literature to determine the status of the population of the species, using the best available scientific and commercial data.

The ESA's primary standards are defined as follows:

"Endangered" means in danger of extinction throughout all or a significant portion of a species' range.

"Threatened" means likely to become endangered within the foreseeable future throughout all or a significant portion of species' range.

The decision to list a species is discretionary with NMFS, subject to the requirement that the agency (1) follow statutory procedure, (2) act within the scope of its authority, and (3) avoid acting in a manner that is arbitrary, capricious, an abuse of its discretion, or otherwise not in accordance with law.

In deciding whether to list a species, NMFS must look at several factors:

1. The present or threatened destruction, modification, or curtailment of that species' habitat or range.
2. Overutilization of the species for commercial, recreational, or educational purposes.

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<sup>6/</sup> Interagency regulations for listing species and designating critical habitat are found at 50 C.F.R. Part 424.

3. Disease or predation.
4. Inadequacy of existing regulatory mechanisms.
5. Other natural or manmade factors affecting the continued existence of the species.

The ESA also contains provisions for "listing" petitions from any interested person seeking to add, or delete, a species on either list. The petition must contain substantial scientific or commercial information for NMFS to act on it. Upon receipt of such a petition, NMFS must go through a public evaluation process, within a limited timeframe, and then decide whether to act on it or not.

Determinations for action by NMFS require publication prior to the effective date of the listing or action; notice to various parties, including to affected State agencies; and a hearing, if one is requested on a timely basis. Time restrictions for completing the listing process are set at one or two years, depending on sufficiency of data.

The current NMFS list of endangered species is found in 50 C.F.R. § 222.23 and is made up primarily of certain species of whales, turtles, and seals. The list of threatened species is at 50 C.F.R. § 227.4. The Stellar sea lion has recently been added to the threatened list.<sup>2/</sup>

### 3. Designation of Critical Habitat.

Concurrently with a determination to list a species as threatened or endangered, NMFS must designate the geographical critical habitat of the species, based on the best scientific evidence available--after taking into consideration economic and any other relevant impacts. Currently designated critical habitat is found in 50 C.F.R. Part 226. An example of critical habitat is the Stellar sea lion rookery areas along the Alaska coast.<sup>8/</sup>

Critical habitat need only be designated if NMFS can in fact determine what habitat is critical, that is--essential to the conservation of the species and which may require special management considerations or protection. Only in extraordinary

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7/ No one has successfully challenged a listing decision in court. However, NMFS has won a lawsuit attacking them for not listing a species of salmon. American Fisheries Society v. Verity, Civil No. 88-0174 RAR-JFM (E.D. Cal. Feb. 1989).

8/ A series of maps of such areas can be found on pages 29799-29824 of the Federal Register of July 20, 1990.

circumstances is the entire geographical area occupied by the species to be declared critical.

#### 4. Other Regulatory Actions.

The result of an endangered listing is a flat ban on the taking, incidental or otherwise, of that species. The term "take or taking" is very broadly defined and means to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct. For threatened species, NMFS is authorized to put in place any regulations deemed necessary and advisable to provide for the conservation of the species. These regulations may include all the acts prohibited with respect to an endangered species or other special measures aimed at "conservation".<sup>9/</sup>

In this context, conservation means any method or procedures determined necessary by NMFS to bring any species to the point that further action under the ESA is no longer necessary. The seminal example of such regulations are those required in shrimping operations to protect sea turtles. These include using Turtle Excluder Devices ("TEDS") in certain fishing areas and at certain times, and resuscitating captured turtles for return to the sea. These regulations are found at 50 C.F.R. § 227.72(e).<sup>10/</sup>

With regard to Stellar sea lions, NMFS has promulgated an interim emergency rule listing the Stellar sea lion as threatened and providing for a series of protective measures, pending the development of permanent regulations.<sup>11/</sup>

#### 5. Emergency Actions.

Emergency action is defined in the ESA as any emergency posing a significant risk to the well-being of a species. Emergency actions allow NMFS to bypass the usual procedural requirements for listing a species described above.

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<sup>9/</sup> Industry groups have not been successful in challenging ESA conservation regulations in court. The case of State of Louisiana ex rel. Guste v. Verity, 853 F.2d 322 (5th Cir. 1988) details the great deference given NMFS in drafting the turtle regulations by a reviewing court.

<sup>10/</sup> See also 50 C.F.R. § 222.41 which states that shrimpers who use TEDs will not be subject to civil penalties for incidental capture of endangered turtles.

<sup>11/</sup> The emergency regulations were published on April 5, 1990 and will expire on December 31, 1990. 55 Fed. Reg. 12645-12662. NMFS published proposed "permanent" rules on July 20, 1990. 55 Fed. Reg. 29792-29825.

Emergency action is authorized regardless of whether a species is listed as endangered or threatened. What is necessary is that NMFS determine that an emergency exists which poses a significant risk to the well-being of the species. Presumably, having the population decline to the point that the species deserves to be listed as endangered or threatened is such an emergency.

Emergency regulations under the ESA are effective for 240 days from the date of publication, during which time the agency is to begin the normal rulemaking process for listing or proposing conservation actions under the ESA. Emergency regulations will survive an initial court challenge so long as the agency explains the reasons for its action in the published notice, informs the responsible State agency of its intentions, and has a reasonable basis for its action. In City of Las Vegas v. Lujan,<sup>12/</sup> the appellate court gave considerable deference to the Interior Department in the emergency listing of the desert tortoise because of the previous agency finding that that species of tortoise warranted endangered status.

The emergency regulations protecting the Stellar sea lion outlaws shooting near them, establishes buffer zones around rookeries, and sets an incidental kill quota of no more than 675 annually in Alaskan waters and adjacent areas of the U.S. Exclusive Economic Zone. Upon reaching the quota, fishermen cannot kill any more and must change their fishing activities to ensure that no further deaths occur.

#### 6. Recovery Plans.

The ESA also requires the responsible agency to develop and implement a recovery plan for the conservation and survival of an endangered or threatened species. The 1988 ESA amendments expanded the requirements for a recovery plan, requiring specific content, including "objective, measurable criteria" for delisting the species.

#### 7. Coordination with States.

The ESA is a statute replete with overtones of preemption of state regulatory authorities. The ESA does not occupy the entire field of protecting wildlife and fish, but does supersede state laws that would allow acts to occur that would conflict with Federal regulations protecting endangered or threatened species.

There are several provisions in the Act requiring notice to and coordination with the states, including: (1) notice to state

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<sup>12/</sup> 891 F.2d 927 (D.C. Cir 1989).

agencies of proposed listings and conservation regulations; (2) duty to justify to a state the reasons for not following that state's advice on any action taken; and (3) approval of any state program for the conservation of an endangered or threatened species.

8. Interagency Cooperation.<sup>13/</sup>

Once NMFS has taken action to protect an endangered or threatened species, other Federal agencies are obligated to insure that actions taken by them do not jeopardize the continued existence of the species. Exemptions from this requirement may be approved by the special Endangered Species Interagency Committee set up to deal with such exemptions. This entire process will be discussed in more detail in B below.

B. Incidental Take.

1. Introduction.

Provision is made in the ESA for activities that inevitably will take endangered or threatened species "incidentally". Obviously, fishing operations are of this type, the best example being shrimping and turtles. "Incidental take" is defined as takings that result from, but are not the purpose of, carrying out any otherwise lawful activity.<sup>14/</sup> Incidental takings can be either intentional or accidental.

Incidental takings can be authorized in three ways: (1) a biological opinion is issued to the effect that the anticipated incidental take is not likely to jeopardize the continued existence of the species [§ 7(b)(3)]; (2) the God Committee issues an exemption [§ 7(h)]; or (3) a permit is issued pursuant to § 10.

2. Section 7.

The ESA contemplates a "protection agency" (i.e. NMFS) and an "action agency".<sup>15/</sup> Section 7 mandates consultations between a protection agency and an action agency anytime the action agency authorizes, funds or carries out an action that, inter alia, might jeopardize the continued existence of an endangered or

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<sup>13/</sup> Regulations describing the process for interagency coordination, in particular the § 7 consultation process, are set forth at 50 C.F.R. Part 402.

<sup>14/</sup> 50 C.F.R. § 402.02.

<sup>15/</sup> In the case of marine species and commercial fisheries, NMFS appears to be both the "protection" and "action" agency.

threatened species. If, after consultations and evaluating the proposed action, NMFS finds no jeopardy, then a statement to such effect is issued and the described incidental take may occur without violating the ESA (consistent with restrictions, if any). Section 7 only applies to activities where there is Federal involvement or control, not purely private activities.

The ESA, however, contains a provision which appears to limit the use of § 7 to allow the incidental take of listed marine mammals in the course of commercial fishing operations. A § 7 incidental take may be allowed only if, in the case of endangered or threatened marine mammals, it is authorized pursuant to section 101(a)(5) of the MMPA.<sup>16/</sup> This provision of the MMPA deals only with exemptions to that Act's moratorium on the taking of marine mammals in activities other than commercial fishing.<sup>17/</sup> NMFS has thus concluded that a § 7 "incidental take does not appear to be provided for, such as the taking of marine mammals incidentally to commercial fishing operations within the U.S. territorial sea."<sup>18/</sup> Notwithstanding this conclusion, the emergency regulations with respect to Stellar sea lions allows an annual incidental take of 675 animals in commercial fishing operations.

Ordinarily, if during the § 7 consultation process the protection agency and action agency reach an impasse with respect to a disputed action, the action agency or the governor of the affected state may appeal to the God Committee for an exemption. It is not clear whether this process is available to the marine mammal/commercial fishing situation due to the above interpretation of NMFS.

The process of applying for a § 7(g) exemption is described in 50 C.F.R. Part 450. After reviewing the application, the God Committee may either approve or deny the exemption. To date, this process has only been used twice.

### 3. Section 10.

NMFS just this year issued regulations implementing § 10 of the ESA, which was added in 1982. Section 10 was added to

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<sup>16/</sup> 16 U.S.C. § 1371(a)(5).

<sup>17/</sup> In its Recommendations to Govern the Incidental Taking of Marine Mammals in the Course of Commercial Fishing Operations after 1 October 1993, the Marine Mammal Commission discusses this issue at length.

<sup>18/</sup> This conclusion is found in the Federal Register Notice of May 18, 1990, containing the final rules for § 10 permits for endangered marine species. 55 Fed. Reg. 20604.

address incidental take situations which do not involve Federal agencies and thus § 7 does not apply. The intention was to give NMFS the ability to allow incidental taking pursuant to a conservation plan that assures that (1) the taking is incidental; (2) to the maximum extent practicable, the impacts of the taking are minimized and mitigated; (3) adequate funding for the plan is available; (4) the taking will not appreciably reduce the likelihood of the survival and recovery of the species in the wild; and (5) additional measures required by NMFS will be met.

Under NMFS regulations, § 10 permits are only available for endangered species and only for the incidental taking of marine species within the U.S. and the territorial sea (but not the Exclusive Economic Zone beyond the territorial sea). Only one § 10 permit has ever been issued--for a species of butterfly affected by a housing development near San Francisco.<sup>19/</sup>

C. Penalties Under the ESA.

1. Civil Penalties.

Violators of the regulations promulgated by NMFS are liable for a penalty of not more than \$12,000 or \$25,000, depending on the type of violation. All such violations are handled under NOAA's general penalty procedures.

2. Criminal Penalties.

Knowing violators may also be prosecuted criminally and be fined up to \$50,000 or be sentenced to jail for up to one year, or both, for certain violations. Lesser violations carry a fine of up to \$25,000 or a jail term of up to six months, or both.

3. Forfeitures.

NMFS is given authority to seek forfeiture of nets or vessels used to violate the ESA.

III. The Marine Mammal Protection Act.

A. Introduction.

In 1988, Congress responded to a court interpretation of the MMPA forbidding NMFS from issuing any permits to take marine mammals unless it could be determined that the stock of each affected marine mammal species was at its optimum sustainable population ("OSP") and such taking was not otherwise to the

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<sup>19/</sup> See Friends of Endangered Species, Inc. v. Jantzen, 760 F.2d 976 (9th Cir. 1985).

detriment of the mammals affected.<sup>20/</sup> As a consequence, no permits could be issued to commercial fishing vessels that take marine mammals in the course of their normal fishing operations. To resolve the crisis created by this court decision (and the fact that NMFS lacked sufficient data to make OSP determinations for most species of marine mammal), Congress amended the MMPA. The 1988 MMPA amendments added a new provision entitled "Interim Exemption for Commercial Fisheries" to deal specifically with this problem.

The new Commercial Fisheries Exemption accomplishes the following:

- Becomes the exclusive provision governing the incidental taking of marine mammals by commercial fishermen (except for tuna purse seining).
- Authorizes the incidental take of marine mammals for five years, until October 1, 1993.
- Creates new permit and reporting requirements, based on categories of likely interaction with marine mammals, for commercial fishing vessels.
- Authorizes the creation of an observer program, as part of an expanded effort to obtain more data about the take of marine mammals in commercial fishing operations.
- Directs NMFS to promulgate emergency regulations if, on the basis of information gathered, it is determined that the incidental take of marine mammals in a fishery is "having an immediate and significant adverse impact on a marine mammal population or, in the case of Stellar sea lions...that more than 1,350...will be incidentally killed during a calendar year". Before acting, NMFS must consult with the regional council or state agency in the area affected.

A more permanent resolution of conflicts between marine mammals and commercial fishing is to follow the collection of data and the submission, by the Marine Mammal Commission on February 1, 1990, of guidelines to govern the incidental taking of marine mammals in commercial fishing operations after October 1, 1993.

B. The MMPA: A Summary.

The structure of the MMPA is similar to that of the ESA.

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<sup>20/</sup> Kokechik Fishermen's Association v. Secretary of Commerce, 839 F.2d 795 (D.C. Cir. 1988).

Policies establish the principal that marine mammal populations are to be specially protected, thresholds are identified, and a regulatory system is created to achieve the objectives of the Act. Subject to certain exceptions (including those relating to commercial fishing), no marine mammal may be taken unless the stock has been determined to be at or above its optimum sustainable population ("OSP"). If the stock is below its OSP it is considered "depleted". It should be noted that a depleted stock may nonetheless be quite healthy and growing in population; it is simply not at its optimum sustainable population under the MMPA. Under § 3(1)(C), all endangered or threatened species of marine mammals are also considered depleted under the MMPA.

The MMPA establishes a moratorium on the taking of marine mammals except as authorized under and in accordance with the Act and its implementing regulations. One of the general exemptions allowed is the taking of marine mammals in the course of commercial fishing operations. However, the original exemption has now been abandoned because of the inability of NMFS to perform all the necessary research for OSP determinations. Congress did reaffirm a basic goal with respect to this exemption: To immediately reduce the incidental kill or serious injury of marine mammals in the course of commercial fishing operations to insignificant levels approaching zero mortality and serious injury rate.<sup>21/</sup>

Permission of NMFS is required for all takings. Data collection is a primary goal of the permit system. Non-permitted takings are subject to penalty. Prior to amendments added in 1986, the MMPA was in some respects more strict with respect to incidental takings than the ESA.<sup>22/</sup> The 1986 amendments allowed for the taking of depleted and non-depleted marine mammals incidentally to certain specified activities other than commercial fishing.

C. The Commercial Fisheries Exemption.

1. Effect of the Exemption.

Congress in 1988 carved out a special exemption from certain (but not all) requirements of the MMPA for commercial fishing operations, given the lack of adequate data to make necessary findings as to the status of affected marine mammal stocks. Thus, commercial fishing activity can "take" marine mammals even if the impact on the stock is not known. The exemption is

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<sup>21/</sup> A separate regulatory regime applies to fishing for tuna found in association with dolphins.

<sup>22/</sup> The amendments were contained in Public Law 99-659, Title IV, §411 that became law on November 14, 1986.

interim only and expires on October 1, 1993, in theory to be replaced by a new regime that is based on the information gathered under the interim exemption.

The Commercial Fisheries Exemption also specifically allows the incidental take of any marine mammal species that is depleted under the MMPA. The Exemption does not allow the "intentional" lethal taking of any marine mammal whose population is depleted. So long as a fisherman is registered and holds an exemption certificate, he will not be subject to penalties for the incidental take of marine mammals, except for the take of California Sea Otters or the intentional take of depleted populations.

The Exemption does not authorize the taking of an endangered or threatened species, incidentally or intentionally--only the ESA can authorize such takings. Section 17 of the ESA states that MMPA provisions that are more restrictive than the ESA shall take precedence.

## 2. The Classification of Various Fisheries.

To implement the Commercial Fisheries Exemption, NMFS has developed a list of fisheries that fit into three categories: (I) fisheries where the incidental taking of marine mammals is frequent; (II) fisheries where the incidental taking of marine mammals is occasional; and (III) fisheries where the incidental taking of marine mammals is remote or unknown.<sup>23/</sup> Each category is regulated differently:

Category I [Fisheries in which it is highly likely that more than one marine mammal will be incidentally taken by a randomly selected vessel in a 20-day period]:

- Registration and Exemption Certificate required.
- Permit must be displayed.
- Logs of marine mammal information must be kept.
- Reports must be filed at end of year or season.
- Vessels must carry observers if required.
- Observers on 20-35 percent of fishing activity.

Category II [Fisheries in which there is some likelihood that one marine mammal will be incidentally taken by a randomly selected vessel in a 20-day period, but there is little likelihood that more than one marine mammal will be incidentally taken]:

- Registration and Exemption Certificate required.

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<sup>23/</sup> The list for 1990 was published on December 19, 1989. 54  
Fed. Reg. 51718-51728.

- Permit must be displayed.
- Logs of marine mammal information must be kept.
- Reports must be filed at end of season or year.

Category III [Fisheries in which it is highly unlikely that any marine mammal will be incidentally taken by a randomly selected vessel during a 20-day period]:

- Must report any lethal incidental taking within 10 days of returning from fishing trip.

NMFS is in the process of making modifications in the listing of fisheries for 1991. See 55 Fed. Reg. 29078-29081; July 17, 1990.

### 3. Reports and Observers.

The implementing regulations set forth the format for logbooks and reports. In the annual report, it must be stated that there was no incidental take of marine mammals, if such is the case. False reports will be subject to penalty. The agency is also to establish a program of verifying and improving the quality of the reporting system.

Considerable attention is given in the new exemption to the placement of observers. Funding is authorized, up to \$ 8 million, but in the event funding is inadequate to meet the goals of the exemption, observers will be allocated to each fishery in accordance with stated priorities in the Act. Furthermore, the agency is directed to develop an "alternative observation program" for fisheries in which the desired level of observers is not available or information is not adequately reliable.

On a continuing basis NMFS must review the information developed under the exemption. If NMFS finds, on the basis of this information, that the incidental take in commercial fishing operations is having an immediate and significant adverse impact on a marine mammal population, then the agency must adopt emergency regulations to prevent, to the maximum extent practicable, any further taking.<sup>24/</sup>

Data collected is to be kept confidential, except that aggregated or summarized data may be released if that release does not disclose, directly or indirectly, the identity or business of any person.

### 4. Recommended Guidelines for Post-1993.

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<sup>24/</sup> The statutory language also requires emergency action if the number of Stellar sea lions killed annually exceeds 1,350 or the kill of North Pacific sea lions exceeds 50.

The Congress established a process for developing a new regime to govern the incidental taking of marine mammals in the course of commercial fishing operations after the Commercial Fishing Exemption expire on October 1, 1990. The first step is for the Marine Mammal Commission to prepare guidelines, containing scientific rationale and sound wildlife management principles, and transmit those guidelines to NMFS.<sup>25/</sup> The next step is for NMFS to develop a new regime in consultation with the Commission, the Regional Fishery Management Councils, and others for publication in the Federal Register on or before February 1, 1991. The final recommended program is then to be transmitted to the Congress for its consideration on or before January 1, 1992.

The Commission's transmittal letter summarizing its recommended guidelines is attached to this paper.

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<sup>25/</sup> The Commission published proposed guidelines on January 26, 1990 and transmitted its Recommended Guidelines on July 12, 1990.