

Territorial Sea

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CALIFORNIA v. NOAA: May NOAA Require Changes in State Coastal Management Programs?

INTRODUCTION

On May 29, 1987, Secretary of the Interior Donald P. Hodel wrote to his colleague, the late Malcolm Baldrige, Secretary of Commerce:

Mac,

I would appreciate your taking the time to review the impact of the California Coastal Commission on the development of energy resources as well as on individual freedom and property rights. This is critical to the Administration's commitment to promote a free society. If we countenance an agency usurping power because it is a state-federal hybrid or for any other reason, we are failing in our responsibility to the President's and our commitments to America's form of government.

Don¹

Secretary Hodel's hyperbolic note to Secretary Baldrige enclosed a letter from J. Steven Griles, Hodel's Assistant Secretary for Land and Minerals Management and the Interior official in charge of the outer continental shelf (OCS)

energy development program, to Anthony J. Calio, Administrator of the National Oceanic and Atmospheric Administration (NOAA), the agency within Commerce responsible for coastal zone management. Griles recommended to Calio that NOAA determine that the California Coastal Commission (CCC), the State coastal management agency with authority to prohibit offshore oil and gas projects that may adversely affect California's coastal zone, "is failing to adhere to and deviating from the [federally] approved California Coastal Management Plan."² The results of such a finding could include the loss of federal financial assistance for the CCC (in 1987-88, approximately \$2 million) and the withdrawal of federal approval of the California Coastal Management Program (CCMP). Lacking federal approval of its coastal management program, California would lose its authority under the Coastal Zone Management Act (CZMA)³ to control offshore oil and gas development permitted by Interior under the Outer Continental Shelf Lands Act

¹ Communication from Secretary of the Interior Donald P. Hodel to the late Secretary of Commerce Malcolm Baldrige (May 29, 1987) [on file with the author].

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² Letter from Assistant Secretary of the Interior J. Stevens Griles to National Oceanic and Atmospheric Administration (NOAA) Administrator Anthony J. Calio (May 29, 1987) [on file with the author].

³ 16 U.S.C. §§ 1451 - 1464.

(OCSLA)⁴ — an outcome that some officials in Interior and the oil industry have long sought.

Interior's comments and recommendations coincided with NOAA's periodic review and evaluation of the CCMP required by section 312 of the CZMA (16 U.S.C. § 1458). These section 312 reviews are intended to ensure that state coastal management programs are implemented as approved by the Secretary of Commerce under the CZMA. If NOAA finds that a state program has unjustifiably "deviated" from its approved program, then the sanctions described above (loss of funding, withdrawal of program approval and federal consistency authority) may be invoked.

Not surprisingly, NOAA's evaluation of the CCMP, which it conducted during the spring and summer of 1987, initially concluded that California had "deviated substantially" from its approved program with respect to offshore energy projects permitted by Interior under the OCSLA.⁵ Although NOAA deleted this finding in its final evaluation report, the agency nevertheless sought to require that California modify its approved program to include policies applicable to offshore energy development that, in effect, would be favorable to Interior and the oil industry.⁶ To coerce California to comply with this demand, NOAA withheld most of the State's grant under the CZMA. When negotiations to resolve this dispute collapsed in December 1987, California filed a legal action challenging NOAA's authority to impose grant conditions requiring the State to materially alter its federally-approved program.

On April 13, 1988, United States District Court Judge Eugene F. Lynch granted California a preliminary order enjoining NOAA from seeking to enforce any grant conditions during the pendency of the State's action, including any action to withdraw federal approval of the CCMP or to withdraw or reduce federal funding. More importantly, Judge Lynch found that once the federal government had approved a state coastal management program under the CZMA, it could not subsequently "revisit" program approvability issues and require program changes not agreed to by the state. Further, NOAA's grant condition requiring that the CCC develop "guidelines" for mitigating the coastal zone effects of offshore energy projects constituted a "demand"

that California change its coastal program and, as such, was impermissible.⁷

Judge Lynch's preliminary order effectively resolved California's legal action against NOAA. Soon thereafter, and after several key staff changes within NOAA, the agency abandoned its effort to force California to modify its coastal management policies respecting offshore energy development and agreed to settle the lawsuit.⁸ The settlement agreement, however efficacious it may be toward establishing a normal relationship between the CCC and NOAA, leaves somewhat unsettled the substantial legal issues addressed by Judge Lynch in granting California's motion for a preliminary injunction.⁹ In addition, a serious policy question arises from Judge Lynch's preliminary order respecting the national coastal management program. After the development and approval of state coastal programs by NOAA under the CZMA, what responsibility should the federal agency have to oversee not only state agency performance in implementing approved programs but to ensure that state programs continue to improve their ability to handle the increasingly serious environmental and development problems in the nation's coastal areas? Finally, this latest episode in the ongoing dispute between Interior (and the oil industry) and California over the development of the large energy resources offshore the State apparently confirms the major regulatory role that the CCC is intended to play under both federal and state law. How may Interior and the industry adjust to this outcome? These matters are considered briefly below.

⁴ 43 U.S.C. §§ 1331 - 1356; 1801 - 1866.

⁵ Office of Ocean and Coastal Resource Management (OCRM), NOAA, Draft Evaluation of the California Coastal Management Program (CCMP) Covering the Period from August 1984 through August 1987 1 (Aug. 19, 1987) [hereafter Draft Evaluation].

⁶ OCRM, NOAA, Final Evaluation of the California Coastal Management Program (CCMP) Covering the Period from August 1984 through August 1987 33-38 (Nov. 23, 1987) [hereafter Final Evaluation].

⁷ California v. NOAA, No. C-88-0015 EFL (N.D. Cal. April 13, 1988) (order granting preliminary injunction) [hereafter Order].

⁸ By July 1988, when the parties agreed to settle *California v. NOAA* on terms favorable to the State, both the NOAA Administrator and General Counsel who had initiated the review of the CCMP had already left the agency. In addition, several key officials in OCRM and the Office of General Counsel who were deeply involved in the review had resigned their positions or were reassigned. Peter L. Tweedt, the Director of OCRM, returned to his former agency — Interior's Minerals Management Service. The Associate Director of OCRM who had directed the review of the CCMP left the agency, and the NOAA attorney handling the legal aspects of the evaluation and the subsequent lawsuit (who formerly was an attorney for Interior) was reassigned out of the Office of General Counsel.

⁹ The settlement agreement (July 1988) signed by NOAA and California dropped the requirement that the State must adopt guidelines governing the application of CCMP policies to offshore energy projects, and merely requires that the State develop a "compendium" of past CCC actions respecting OCS projects in order to assist future applicants for federal permits for such projects. The compendium will not be incorporated into the CCMP, and NOAA will exercise no control over the development of the document. The parties were able to agree regarding other significant improvement tasks growing out of NOAA's evaluation of the CCMP.

BACKGROUND

The Coastal Zone Management Act

State participation in the national coastal zone management program is voluntary. The CZMA imposes no obligations upon the states other than those that the states agree to assume in order to receive federal financial assistance to develop and implement coastal management programs. Moreover, the CZMA does not preempt any state authority over coastal resources and activities. The federal goal expressed in the Act is to encourage and assist the states “in preparing and implementing management programs to preserve, protect, develop and . . . restore the resources of the coastal zone of the United States.”¹⁰ To this end, the federal government supports states’ efforts “to exercise their full authority over the lands and waters of the coastal zone”¹¹ principally by providing funding to pay the expenses of coastal programs, and by agreeing that the activities and projects of federal agencies as well as federally-permitted activities and projects must be consistent with the coastal management program policies.¹² A state that adopts a federally approved coastal management program is delegated substantial authority over activities requiring a federal permit which affect the coastal zone. A state may prohibit activities it determines are inconsistent with its coastal program policies.¹³

¹⁰ S. REP. NO. 753, 92d Cong., 2d Sess. 1 (1972).

¹¹ 16 U.S.C. § 1451(i).

¹² 16 U.S.C. § 1455 (funding); 16 U.S.C. 1456 (federal consistency authority).

¹³ Section 307(c)(3)(B) of the CZMA (16 U.S.C. § 1456(c)(3)(B)) specifically subjects oil company applicants for federal permits to carry out oil and gas exploration and development projects on the OCS to the requirements of federally approved state coastal management programs, if such projects affect resources and land or water uses located in the coastal zone (the “federal consistency doctrine”). California’s adroit use of its federal consistency authority over OCS oil and gas projects is the source of Interior’s complaint about the CCMP referred to above (*see supra* notes 1 and 2 and accompanying text). However, the record of the CCMP’s review of such projects indicates that the State agency has objected to relatively few, although substantial changes in these projects have been negotiated between the oil industry and agency staff in order to comply with California’s coastal management policies. Under the CZMA, if the coastal state objects to an OCS project, the applicant may appeal such objection to the Secretary of Commerce, who may allow the project to be permitted by the federal agency if the Secretary finds that the project, despite the state’s objection, is nevertheless consistent with the national objectives of the CZMA or is necessary in the interest of national security (15 CFR 930.121 and .122). For further discussion and analysis of the federal consistency doctrine, see Eichenberg & Archer, *The Federal Consistency Doctrine: Coastal Zone Management and “New Federalism”*, 14 ECOLOGY L.Q. 9 (1987) and Archer & Bondareff, *Implementation of the Federal Consistency Doctrine - Lawful and Constitutional: A Response to Whitney, Johnson & Perles*, 12 HARV. ENVTL. L. REV. 115 (1988).

The Secretary of Commerce has delegated to NOAA the authority to develop and approve state coastal programs under the CZMA. In addition, NOAA is responsible for a “continuing review” of state coastal programs to determine whether such programs are being implemented as approved by the agency and whether the states are pursuing “significant improvements” in coastal management as required by the CZMA.¹⁴ In certain circumstances when a state is found to have unjustifiably “deviated” from implementing its approved program, NOAA may withdraw federal approval and funding of the state program.¹⁵ As noted above, loss of federal program approval would result in the revocation of the state’s federal consistency authority over federally-permitted activities.¹⁶

NOAA’s Review of the California Coastal Zone Management Program

In August 1987, NOAA circulated its draft evaluation of the CCMP. The draft included the finding that California was “deviating substantially” from its approved coastal program. The circumstances of this evaluation are highly controversial. California claimed that the NOAA officials in charge of the evaluation had “preconceived” ideas about the CCMP’s performance before the evaluation began, that NOAA had engaged in improper review procedures by conducting “secret” meetings with individuals and organizations critical of the CCMP despite the legal requirement that such meetings be conducted in public, that NOAA had ignored the findings and opinions of non-federal members of the evaluation team in preparing its report, and that the record of the evaluation did not support the agency’s findings.¹⁷

In November 1987, NOAA issued its final evaluation report. Although the report ostensibly dealt with a wide range of issues (e.g., the CCC’s continuing delay in approving local coastal programs, the adequacy of the CCMP’s permitting and enforcement functions, alleged improprieties by members of the CCC in approving permit applications, etc.), it quickly became clear that NOAA officials were primarily interested in obtaining changes in CCMP policies related to outer continental shelf oil and gas exploration and development projects. Acting on complaints by Interior and the oil industry that these policies were “vague” and insufficiently detailed to allow the industry to determine whether their projects would be consistent with the CCMP, NOAA insisted that the CCC incorporate “guidelines” in its approved pro-

¹⁴ 16 U.S.C. § 1458.

¹⁵ *Id.*

¹⁶ 16 U.S.C. § 1456(c).

¹⁷ Declaration of Peter M. Douglas, Executive Director, CCC, California v. NOAA, No. C-88-0015 EFL (N.D. Cal. filed Jan. 13, 1988) [hereafter Douglas Declaration].

gram. In particular, NOAA emphasized specifying the standards which the CCC would apply to "mitigate" the adverse effects of OCS energy projects on coastal resources, values, and activities.¹⁸

California resisted the demand to amend its program to incorporate specific OCS mitigation standards. The State argued that it needed the flexibility to address the greatly varying circumstances of each project, and that a case-by-case, negotiated process was preferable.¹⁹ In November and December 1987, CCMP and NOAA officials engaged in lengthy negotiations over the conditions to be attached to the 1987/1988 program grant to address the evaluation findings. Agreement was reached on all tasks to be included in the grant but one — NOAA's proposed task requiring the preparation and adoption of detailed mitigation standards applicable to OCS projects. At one point in the negotiations, NOAA evidently agreed to accept the CCC's offer to compile a "compendium" of past CCC actions on OCS projects to assist permit applicants, and, in addition, to prepare "non-binding" guidelines for the OCS if such guidelines were permissible under California law, or, if they were not, to seek permission from the Legislature to enact such non-binding guidelines.²⁰ NOAA subsequently rejected this offer and continued to insist that the CCC adopt binding guidelines for OCS projects as part of its coastal management program.

¹⁸ Final Evaluation 33-38, *supra* n. 6.

¹⁹ In *American Petroleum Institute v. Knecht*, 456 F. Supp. 889 (C.D. Cal. 1978), *aff'd*, 609 F.2d 1306 (9th Cir. 1979), the oil industry had previously (and unsuccessfully) challenged the CCMP on precisely the same issues raised by NOAA in its 1987 review of the California program. Judge Lynch noted this decision approvingly in his preliminary order [Order at 3-4, *supra* n. 7]:

In [*API v. Knecht*], the central dispute was whether the CCMP lacked "the requisite specificity Congress intended management programs to embody . . . so as to enable private users in the coastal zone subject to an approved a program to be able to predict with reasonable certainty whether or not their proposed activities will be found 'consistent' with the [management plan]." 456 F. Supp. at 918. The *Knecht* court agreed with NOAA's position that Congress did not intend a requirement that states "establish such detailed criteria that private users be able to rely on them as predictive devices for determining the fate of projects without the interaction between the relevant state agencies and the user." *Id.* at 919. Accordingly, the court refused to enjoin the approval of the CCMP. Since *Knecht*, the CCMP has remained largely unchanged

²⁰ Douglas Declaration at 20-21, *supra* n. 16. Whether the guidelines at issue would be "non-binding" or binding upon the CCC is of course a significant matter. The CCC wished to maintain its practice, sanctioned by both state and federal law (*see supra* n. 18), to address the specific circumstances of each OCS project. Interior and the industry sought to restrict the range of mitigation measures available to the CCC, some of which have necessitated substantial and costly project changes. NOAA's goal was to gain control over the content of the proposed guidelines by requiring that

By mid December, the CCC was already well into the 1987-1988 fiscal year, and program tasks to fulfill the requirements of the current grant negotiated by NOAA and the CCC were falling seriously behind schedule. NOAA had authorized the CCC to spend 1/12 of its basic program implementation funds from the grant each month during October, November, and December 1987, while negotiations were underway.²¹ However, the CCC was prohibited from spending the remainder of its basic program funds and any funds to implement significant improvement tasks until California agreed to adopt the OCS guidelines demanded by NOAA. At this point Congress intervened and attached a provision to the appropriations bill for the Department of Commerce compelling NOAA to release the remaining basic program funds to the CCC. This bill became law on the morning of December 22.²² On the same day NOAA released

they be submitted to NOAA for review and approval before they would become applicable to OCS projects. In effect, NOAA's aim was to assert a veto over state law and policies intended to protect the coastal zone when such policies might restrict or prohibit federal activities, such as OCS oil and gas projects.

²¹ Complaint at 9-10, *California v. NOAA*, No. C-88-0015 EFL (N.D. Cal. filed Jan. 13, 1988).

²² An Act Making Appropriations for the Department of Commerce Pub. L. No. 100-202, Title 1, 101 Stat. 1329-5 (1987). Sens. Alan Cranston (D-Ca) and Pete Wilson (R-Ca) and Rep. Leon Panetta (D-Ca) played prominent roles in securing language in Commerce's appropriations act directing the Secretary to release funding for the CCMP, and prohibiting at least for a short time any effort by NOAA to withdraw approval of California's program. The California congressional delegation strongly opposed the effort by NOAA and Interior to curb California's federal consistency authority over OCS projects. On June 1987, members of the delegation wrote to Secretary Hodel chastising him for his note to Secretary Baldrige:

These wild accusations appear aimed at influencing the current Commerce Department evaluation of California's [CCMP]... While an effort to ensure a fair and balanced evaluation is appropriate, an attempt to harass this agency and to characterize its actions as unAmerican is not.

On August 19, 1987, the delegation wrote forthrightly to the acting Secretary of Commerce:

There is no question that California has operated within the requirements of the [CZMA]. It has also abided by the terms of its coastal management plan and the grants which it has received from the Department. It has conducted a balanced program which has permitted environmental protection and economic development to co-exist.

We are particularly concerned by reports which suggest that the focus of the draft findings will be on the Coastal Commission's use of mitigations.

We believe that the Commission's practices in this area are being properly conducted, pursuant to both state law and the

the entire grant to the CCC, subject to the condition that the CCMP be modified to incorporate guidance standards for OCS projects. This condition (Task 1.4) provided in relevant part:

The [CCC] will develop guidelines concerning the application of the [California] Coastal Act Chapter 3 policies . . . to consistency certifications for OCS Plans of Exploration and Development and Production . . . and will adopt such guidelines in accordance with California law. Once the [CCC] adopts guidelines, it will submit them to [NOAA] for review and approval as a program change.²³

California accepted the grant under protest, and, on January 5, 1988, commenced its legal action against NOAA contesting the agency's legal authority to require California to change its coastal management program.

Judge Lynch's Analysis

Judge Lynch focused on two questions in his analysis of the legal issues presented by California's action against NOAA: (1) "whether NOAA possesses the authority under the CZMA to coerce a modification of a state's previously approved coastal management program through conditions attached to federal funding;" and (2) "whether NOAA has attempted to exercise such authority by conditioning significant improvement funding on the accomplishment of Task 1.4."²⁴

To answer the first question, Judge Lynch examined the relevant provisions of section 312(a) of the CZMA, which directs NOAA to "conduct a continuing review of the performance of coastal states" in order to determine "the extent to which [each] state has implemented and enforced the program approved by [NOAA] . . . and adhered to the terms of any grant . . . funded under this chapter." He noted that section 312(c) authorizes NOAA to reduce and withdraw funds (up to 30% of the annual grant) if the agency finds that the coastal state "is failing to make significant improvement in achieving the coastal management objectives specified in [section 303 of the CZMA]," or "is failing to make satisfactory progress in providing in its management program" for

federally-approved coastal management plan, and that these practices are an appropriate method of reconciling growth and development with environmental protection

We urge you, therefore, not to withdraw the Department's approval of [the] California coastal plan, or to delay the state's Fiscal Year 1987 grant, or to seek to impose burdensome conditions on the grant. If you do so, we can assure you that we would respond with quick and decisive legislative action.

²³ Order at 6, *supra* n. 7.

²⁴ *Id.* at 7.

the inventory, designation, and protection of coastal areas containing resources of national significance.²⁵ Finally, he considered the circumstances set forth in section 312(d) according to which the agency may disapprove a state program - NOAA "shall withdraw approval of the management program of any coastal state . . . if [NOAA] determines that the coastal state is failing to adhere to [and] is not justified in deviating from (1) the management program approved by [NOAA], or (2) the terms of any grant . . . funded under [the CZMA], and refuses to remedy the deviation."²⁶

Because Judge Lynch's preliminary order will not be published, it is worthwhile to set forth his analysis of these various provisions of the CZMA describing the authority of the federal government over state coastal programs:

The structure and logic of these provisions imply that NOAA does not possess the authority to condition all "significant improvement" grants on a program change. For example, while subsection (c) [of section 312] plainly contemplates that NOAA may place conditions on grants, subsection (a) strongly suggests that NOAA's function, once the state obtains program approval, is limited to ensuring that the state has "*implemented and enforced* the program *approved by [NOAA]*" (emphasis added by Judge Lynch).

Similarly, [subsection (d)] obligates NOAA to withdraw approval if the state unjustifiably deviates from the approved program, again intimating an expectation by Congress that NOAA, rather than seeking changes in an approved program, would promote adherence to such a program. Notably, the [CZMA] nowhere authorizes NOAA to withdraw program approval on the basis of NOAA's determination that the plan as originally approved no longer complies with the CZMA's requirements.

These provisions indicate that NOAA does not have authority to revisit the approvability of a plan. In other words, once NOAA determines that a program satisfies the requirements of the CZMA and grants final approval, it may no longer examine the content of an approved program, only the adequacy of its execution. Only if NOAA determines that the state is not, in fact, satisfactorily implementing its plan, and the state refuses to remedy this deficiency, may NOAA withdraw approval, and even then it must follow the notice and hearing procedures specified in [section 312(e)]. In short, a careful reading of the enforcement provisions of the CZMA leaves the clear impression that NOAA may not use its power over funding to accomplish indirectly what

²⁵ 16 U.S.C. § 1458(c).

²⁶ 16 U.S.C. § 1458(d).

it may not accomplish directly: enforce alteration of the approved program itself.²⁷

Judge Lynch observed that his analysis of the federal-state roles under the CZMA does not mean that state coastal programs are “set in stone,” because the CZMA establishes a procedure by which changes to programs may be made.²⁸ However, in his view, the CZMA provides that the states shall decide in the first instance whether a change is desirable or necessary. In a sentence that NOAA officials are destined to hear quoted as long as there are state coastal programs, Judge Lynch characterized NOAA’s (and the federal government’s) authority over state coastal management officials:

Thus, while NOAA must determine whether the modification complies with the statutory scheme, Congress evidently intended that NOAA would play a passive role in this process, merely reviewing proposals put forth by the state.²⁹

Judge Lynch offered the following interpretation of congressional intent in structuring the federal-state relationship reflected in these provisions of the CZMA. If the rule were otherwise, then the coastal states could have no confidence in the continuing validity of the initial approval by the federal government of their coastal programs:

As the relevant federal personnel and policies changed, the states would be subject to repeated review and pressure to change an already approved coastal program. Having expended significant resources on the development of a plan, they could be faced with the choice of revamping the plan or losing the federal assistance. It seems unlikely that Congress intended such a result.³⁰

Finally, Judge Lynch noted the one exception to his conclusion that the CZMA does not authorize NOAA to compel a change in a state program by conditioning the release of federal funds upon such change. In 1986, Congress amended section 312(c) to provide that NOAA could cut off funding keyed to a significant improvement task (but not to exceed 30% of the grant), if the state failed to provide in its management program for the inventory, designation, and protection of coastal areas containing resources of national significance:

Here, for the first time, Congress empowered NOAA to sanction a state for the failure to amend its coastal

program, as opposed to poor implementation of the program. This implies a congressional belief that NOAA does not otherwise possess such authority.³¹

NOAA’s Authority over State Programs

Judge Lynch’s conclusion that NOAA may not redetermine the approvability of state programs and require changes desired by the federal government (except for the limited exception noted above) is essentially correct. But, if the federal government may not compel changes in state programs (with one exception), is it correct to characterize the federal role in the program amendment process, once state programs have been approved, as merely “passive?”

As originally enacted in 1972, the CZMA apparently contemplated such a role for the federal government. The 1980 amendments to the CZMA, however, established the requirement that coastal states, in order to receive any federal funds, must make “significant improvements” in coastal management by spending an increasing proportion of their annual grants (up to 30%) toward achieving the national objectives specified in section 303 of the Act (section 306(a)(3)).³² The 1980 amendments also revised NOAA’s program evaluation duties by requiring that the agency, in addition to reviewing state program performance, must also review the manner in which state programs “addressed the coastal management needs identified in [section 303],” and mandated that NOAA must reduce federal funding (subject to the 30% limit) to any state that fails to make “significant improvement” toward meeting these needs or objectives.³³

The legislative history of the 1980 amendments indicates how NOAA should exercise this new authority over state programs to require “significant improvements.” The amendments were intended to give NOAA “an additional tool in allocating a portion of the federal funds among the states on the basis of their willingness to address issues of national significance:”

Although [up to] 30 percent of the 306 grant shall be targeted toward significant improvements, this is not intended to [imply] that improvements will be needed in each of the areas identified in section 303(2) [I]t is anticipated that NOAA will negotiate with the state to develop a work program that will establish priority uses for the improvement funds. The [House] Committee [on Merchant Marine and Fisheries] hopes that this process will allow NOAA and the states enough flexibility to address correctly those most important and pressing areas where improvements are necessary.³⁴

²⁷ Order at 9-10, *supra* n. 7.

²⁸ See 16 U.S.C. § 1455(g).

²⁹ Order at 10, *supra* n. 7.

³⁰ *Id.* at 10-11.

³¹ *Id.* at 11.

³² Pub. L. 96-464, §5(a), 94 Stat. 2062 (1980).

³³ Pub. L. 96-464, §9(a), 94 Stat. 2065 (1980).

To summarize, the CZMA and NOAA's regulations require that a state with a federally approved coastal management program must nevertheless carry out significant program improvement tasks during each grant period.³⁵ Failure to undertake any significant improvement tasks would preclude basic program implementation funding under the CZMA. The Act and regulations contemplate a negotiation process by which the state and NOAA will reach agreement on the specific tasks to be performed by the state to fulfill its obligation to improve its program. States are expected to take the initiative in proposing significant improvement tasks.³⁶ However, as a result of its continuing review of state programs, NOAA must evaluate the manner in which states have addressed national coastal management objectives, and, it is reasonable to assume, may identify areas needing improvement.³⁷ Further, NOAA must determine ("in consultation with the State") whether each task proposed by the state during the negotiation process will lead to sufficient "significant improvement" to satisfy the statutory requirement.³⁸ Although under the CZMA and agency regulations, and Judge Lynch's decision, NOAA lacks authority to compel a state to undertake a specific significant improvement task, these duties are not "passive". Once agreement is reached on a set of tasks, a work schedule for each task is established which identifies the funds allotted to the task and appropriate "benchmarks" by which to determine whether the task has been achieved. If NOAA subsequently determines that the state has failed to carry out specific tasks, only those funds may be withheld which are allotted to such tasks, which may not exceed 30% of the grant.³⁹

How then are disputes over significant improvements to be resolved? The answer evidently intended by Congress and affirmed by Judge Lynch is that such disputes may not be resolved. But, however untidy or unsatisfactory this result may seem, it is nevertheless consistent with the policies established by the Congress in the CZMA. The states are the

appropriate entities to manage the coastal zone. They must be "encouraged" to exercise their "full" authority over coastal areas and resources. Since participation by the states in the national coastal management program is voluntary, nothing in the CZMA may be construed to preempt state authority.⁴⁰

The role of the federal government in promoting improvement in coastal management is not insignificant. Congress obviously intended both the states and NOAA to negotiate these matters from relatively equal positions. (Recall that the states have already undergone a lengthy and complex procedure to develop coastal management programs that meet the approval standards of the CZMA.) NOAA and a host of other federal agencies were actively involved in this process of program development; NOAA itself has determined that these standards have been met by the states. Therefore, it does not seem unreasonable that, although NOAA may actively pursue certain areas of "improvement" that have been identified as part of its ongoing review of state programs, the states may propose other areas and oppose NOAA's recommendations. Out of this process should emerge a negotiated agreement on a set of improvement tasks acceptable to both NOAA and the states.

Since 1980, this result has been the rule. Why was California an exception in 1987? A cynic might argue that NOAA did not seek an "improvement" in California's coastal management program, but to "change" or limit the State's authority to manage OCS oil and gas projects.

³⁴ H.R. REP. No. 96-1012, 96th Cong., 2d Sess. 20, 42 (1980).

³⁵ 16 U.S.C. § 1455; § 306; 15 CFR 923.101-.105.

³⁶ See 15 CFR 923.103.

³⁷ 16 U.S.C. § 1458; 15 CFR 928.1-.5 and 923.103(b).

³⁸ 15 CFR 923.103(b).

³⁹ Judge Lynch misconstrues the purpose of 15 CFR 923.103, stating that it "suggest[s] that even in implementation matters, NOAA is not to present its own agenda of proposed projects." In view of NOAA's authority to evaluate the manner in which the state addresses national coastal management needs and objectives, and the requirement in the regulations that the state and agency shall "negotiate" the specific significant improvement tasks to be carried out by the state, it would be exceedingly odd that Congress wished the agency to be silent on these matters in its dealings with the coastal states.

⁴⁰ That state participation in the national coastal zone management program established under the CZMA is voluntary does not justify the attitude on the part of federal officials, as expressed in the brief filed by the Department of Justice in this case, that the coastal states may take federal assistance under the CZMA or leave it: "the grant program under the CZMA is voluntary, and the CCC is under no obligation to request funds from NOAA" (Defendants' Memorandum in Opposition to Preliminary Injunction, California v. NOAA, C-88-0015 EFL (N.C. Cal. filed Feb. 5, 1988)). The national program is voluntary for serious reasons of federalism. If state participation in the program were obligatory, substantial authority over lands and resources heretofore exercised by the states and local governments would be preempted by the federal government. In contrast, the policy set by the Congress in the CZMA is to "encourage" the states to exercise their "full" authority over coastal lands and resources by offering them incentives (federal funding and authority over federally conducted and permitted activities) to develop coastal programs meeting federal standards. These standards are rooted in the findings made by the Congress in the CZMA that important national interests are served by having state and local coastal programs, rather than federal agencies, manage and protect coastal resources. Therefore, the view apparently held by officials of the current Administration that, because the program is voluntary it is immaterial whether the states participate or not, is profoundly wrong. Obviously, without state participation the national coastal management policy fails.

Whether this view is correct or not, the episode has served to underscore the foresight of Congress in carefully structuring the federal-state coastal management program. Apparently the national program is a genuine partnership, and the federal government may not arbitrarily change the bargain struck in the CZMA.

California, Interior, and OCS Oil and Gas

California has emerged in a relatively stronger position vis-a-vis Interior, NOAA, and the oil industry respecting OCS energy policy as a result of Judge Lynch's order. How may Interior and the industry adjust to this outcome?⁴¹ Barring the unexpected, the force of Judge Lynch's legal analysis is not likely to be contradicted. NOAA and the Department of Justice have, in effect, abandoned their at-

tempt under section 312 of the CZMA to change California's OCS energy policies, and the application of these policies to OCS oil and gas projects has been validated once again. It would seem prudent for Interior officials to do what many in the oil industry have already done - accept that there is a legitimate state interest in offshore industrial activities, that Congress has empowered the states to exercise authority over these activities under the CZMA, and that state coastal policies must be recognized as lawful requirements to be followed by federal agencies. Whether this adjustment will be made depends upon several factors, not the least of which is the outcome of the impending Presidential election. It may be recalled that the last major innovation in OCS energy policy — the 1978 amendments to the OCSLA — followed upon the 1976 election and the incoming administration's decision that the offshore leasing process should be expanded to include state and local participation as well as to achieve other goals (limit the discretion of the Secretary of the Interior over offshore leasing, require environmental safeguards, etc.). But if the effort continues to reduce the role of coastal states in managing offshore energy production, then it certain that the conflict will worsen, whatever the outcome of the election.

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PUBLICATION ANNOUNCEMENT

The Marine Law Institute is pleased to announce the availability of its most recent publication, **EAST COAST FISHERIES LAW AND POLICY: PROCEEDINGS OF THE CONFERENCE OF EAST COAST FISHERIES LAW AND POLICY**. MLI sponsored this multi-disciplinary conference, held June 17-20, 1986, in Portland, Maine, to help chart the future direction of fisheries management on the East Coast, and on Georges Bank in particular.

The published proceedings reflect achievement of an important goal of the conference - open debate among fishery interest groups from the northeastern United States and Atlantic Canada. Lawyers, scientists, industry representatives, regulators, and scholars convened to offer their views on a variety of management alternatives analyzed from a variety of perspectives. Gathered together in **EAST COAST FISHERIES LAW AND POLICY**, these experts' views are an invaluable resource to those interested in how fisheries resources are managed.

EAST COAST FISHERIES LAW AND POLICY is a hard bound, 500-page volume. The basic price is \$25. Subscribers to **TERRITORIAL SEA** may obtain a copy for \$20. Call or write Beverly Bayley-Smith, Subscriptions Manager, Marine Law Institute, 246 Deering Avenue, Portland, ME 04102 (207) 780-4474, to order your copy.

Reauthorizing the Marine Mammal Protection Act: Purposes, Porpoises, and Proposals — An East Coast Perspective

INTRODUCTION

The Marine Mammal Protection Act [hereafter MMPA or the Act] is fundamental to preservation of marine wildlife and its habitat. The MMPA represents a moral position with regard to marine mammal species — harm to these species is forbidden except under specified circumstances and conditioned on governmental approval.¹ Despite a general moratorium on “taking”² marine mammals, harm to these creatures is allowed in the conduct of commercial fishing operations. The MMPA contains provisions which allow commercial fishermen, both foreign and domestic, to take specified numbers of marine mammals incidental to their fishing operations. The absolute moral injunctive of the Act — the moratorium on harm to these creatures — is mollified by economic and practical considerations. Employing existing, commonly used types of fishing gear, marine mammals become entangled in nets. Thus, the commercial harvest of fish has harm to marine mammals as one of its external costs. The Act recognizes this reality by creating limited exceptions to the moratorium.

The relationship between these two elements of the MMPA, the ethically and ecologically motivated prohibition against harm and the economic concession to commercial fishing, is currently at issue as Congress considers a three year reauthorization of the Act.³ A court decision on the West Coast has limited commercial fishermen’s ability to gain governmental approval to conduct fishing operations where harm to certain marine mammals is likely. This decision prompted environmentalists and commercial fishing interests to seek changes in the Act to allow fishermen to fish while information necessary for effective marine mammal protection is compiled. These groups are seeking to include language in the legislation reauthorizing the MMPA which gives effect to their negotiated settlement.

¹ The Secretary of the Interior, acting through the United States Fish and Wildlife Service (FWS) and the Secretary of Commerce, who has vested his authority in the National Oceanic and Atmospheric Administration and the National Marine Fisheries Service (NMFS), are charged with executing the Act’s provisions. Each agency has responsibility for particular species. Due to the species involved, this article focuses primarily on NOAA/NMFS’ conduct of their MMPA obligations.

² “Taking” includes killing, harassing, capturing, and hunting as well attempting to do those acts. 16 U.S.C. §1362(12).

³ The history of the MMPA shows that this has always been a delicate balance. The tuna fishery’s impact on porpoises has resulted in several amendments to the Act. See *infra* text accompanying notes 7 and 8. The effects of tuna fishing on marine mammals are also a subject of controversy in this most recent effort to reauthorize the MMPA.

This article focuses on the implications of the proposed changes to the MMPA, and the resulting reconciliation of the Act’s competing objectives, for East Coast fisheries. The basic structure of the MMPA’s provisions accommodating commercial fishing are explained as well as the *Kokechik* decision,⁴ which prompted interest group cooperation in an attempt to suitably amend the Act. Next, proposed changes in the current regulatory regime will be examined with an eye to the changes’ effectiveness in addressing certain marine mammal issues on the East Coast. By way of illustration, particular attention is paid to the New England groundfish gillnet fishery and its effect on marine mammal populations of the Gulf of Maine.

The article’s major conclusions are several. The proposed changes to the MMPA do not effectively address East Coast issues. The negotiated agreement which interest groups seek to incorporate into the MMPA is geared to the conditions of the West Coast. Additional changes to the Act are needed. The small take provisions of the Act, pursuant to which several East Coast, domestic fishing operations with a “negligible” impact on affected mammal species, have been allowed to take marine mammals, should be amended to provide criteria specifying what biological information must underlie the decision to issue such a permit. In particular, the reauthorized MMPA should mandate measures to ensure the continued viability of the harbor porpoise in the Northwest Atlantic. Other elements of the industry/conservationist proposal should also be extended to cover East Coast fisheries. The reauthorized MMPA should provide adequate funding for collection and assessment of data necessary to determine the health of marine mammal populations impacted by these commercial fishing operations.

THE MARINE MAMMAL PROTECTION ACT’S PROVISIONS AFFECTING COMMERCIAL FISHING

The MMPA was enacted in 1972 in response to growing concerns that marine mammal populations were dangerously declining. The Act attempts to ensure that these species’ populations, integral elements in a host of ocean ecosystems, remain at healthy levels.⁵ Maintenance of sustainable marine mammal populations necessitates restrictions on anthropo-

⁴ *Kokechik Fishermen’s Association v. Secretary of Commerce*, 839 F.2d 795 (D.C. Cir. 1988).

⁵ H.R. REP. No. 228, 97th Congress, 1st Sess., 11 (1981).

centric uses of the ocean environment. Activities must be conducted in a manner which comports with the Act's protectionist stance.

Congress expressly recognized the need to regulate commercial fishing operations. The regulatory tools chosen reflect not only the MMPA's overarching wildlife protection aims but also concessions to the practical realities of commercial fishing. The MMPA's immediate goal is to reduce the incidental kill or serious injury to marine mammals that occurs due to commercial fishing to insignificant levels approaching zero mortality.⁶

The MMPA establishes three distinct regulatory programs to see that this immediate objective is realized in various fisheries. Each is briefly discussed below.

The Tuna/Porpoise Program

MMPA makes special provision for the tuna fleet although, for the most part, this program is just a gloss on the general permit program discussed below. In general, the Act provides that its "approaching zero mortality" goal is met if tuna boats employ the best available fishing technology and take steps to reduce incidental harm to marine mammals which tend to become involved in the tuna boats' nets. Congress crafted this special exemption in recognition that the "tuna industry, . . . , would be faced with severe economic consequences if a court interpreted the zero mortality goal in the strictest sense and failed to take into account the economic and technological practicability of achieving that goal."⁷ Congress has established a quota system in addition to the general technology-based standard. Tuna boat operators can take only a specified number of certain marine mammal species incidentally to their fishing effort. When the quota is reached fishing effort must cease.⁸

The other two regulatory programs apply more generally and are the focus of this article.

The Small Take Program

"Citizens of the United States" engaged in commercial fishing operations can obtain government approval to take small numbers of non-depleted marine mammals.⁹ The

Secretary can issue five year permits to U.S. fishermen if, after notice and opportunity for public comment, the Secretary determines that:

- (1) the total of such takings will have a "negligible impact on such species" over the five year period; and
- (2) there is provision for a cooperative monitoring system among involved fishermen.¹⁰

A small take permit may be revoked if information subsequently collected shows that the taking is not in fact negligible or the Act's goals would be better served without allowing such a taking.¹¹ This provision authorizes permits for incidental, i.e., accidental, takes only.

An apparent weakness of the small take provision is its lack of concrete standards to determine the meaning of "negligible". There is no regulatory definition and the population standards outlined in the Act do not apply to permit decisions under this section. Therefore, NMFS has no affirmative obligation to determine the OSP of species impacted by fisheries eligible for small take permits prior to issuing a permit.

This presents a curious anomaly. No permit may issue to take depleted species, i.e., those below OSP.¹² But in issuing a small take permit NMFS is not required to make a finding on the issue of OSP. The small take program rests on assumptions that if only a limited number of marine mammals is taken in the course of a fishery the effect will necessarily be insignificant and that reporting provisions and other monitoring devices are adequate to portray what is happening at sea. The small take program seems geared to protecting marine mammals retroactively. Takes are allowed until information is gathered which indicates that the permitted impact was not negligible after all.

The General Permit Program

Domestic *and foreign* fishing operations are eligible for another type of permit to take certain marine mammal species incidentally to their fishing effort. These incidental take permits are necessary where more than small numbers of marine mammals are harmed or killed by fishing gear. Under this program, a general permit is obtained for an entire fishery or fleet. For example, the North Pacific Fishing Vessel Owners Association holds a permit for virtually all fishing operations off Alaska's coast. Individual fishermen obtain letters of inclusion entitling them to take certain marine

⁶ 16 U.S.C. §1371(a)(2).

⁷ H.R. REP., *supra* note 5 at 14.

⁸ 16 U.S.C. §1374(h), as amended by P.L. 98-364.

⁹ Under the MMPA, "depleted" refers to a species determined to be below its "optimum sustainable population" (OSP), i.e., not at the carrying capacity of its environment. 16 U.S.C. § 1362(1) (definition of depleted); 16 U.S.C. § 1362(8) (definition of OSP). A species listed as threatened or endangered under the Endangered Species Act is depleted for MMPA purposes. 16 U.S.C. § 1362 (1).

¹⁰ 16 U.S.C. § 1371(a)(4)(A).

¹¹ 16 U.S.C. § 1371(a)(4)(B).

¹² See note 9 *supra*.

mammals lawfully under this general permit.¹³ General permits are issued for broadly defined gear types.¹⁴

Administrative decision on a general permit application follows a cumbersome, formal rulemaking procedure. The MMPA¹⁵ provides that “[m]arine mammals may be taken incidentally in the course of commercial fishing operations and permits may be issued therefore . . . subject to regulations prescribed . . . in accordance with [the Act].” A general permit must specify the number and kind of marine mammals which may be taken as well as where, when, and by what methods the taking may occur.¹⁶ The applicant must demonstrate that any taking will be consistent with the Act’s purposes, policies, and regulations.¹⁷

The substantive policies of the Act and their implementing regulations¹⁸ prescribe rules of practice and procedure for issuance of regulations authorizing incidental takes of marine mammals. Such regulations must “be made on the record after opportunity for an agency hearing....”¹⁹ These provisions require that the regulations, based on the best available scientific information, “insure that [any] such taking will not be to the disadvantage of” species taken and “will be consistent with the purposes and policies” of the MMPA.²⁰

Two of Congress’ express MMPA policies are particularly relevant to the discussion here. First, Congress, enacting the MMPA in 1972, determined that marine mammal population stocks “should not be permitted to diminish beyond the point at which they cease to be a significant functioning element in the ecosystem of which they are a part, and, consistent with this major objective, they should not be permitted to diminish below their optimum sustainable population.”²¹ Second, Congress noted that “there is inadequate knowledge of the ecology and population dynamics of such marine mammals and of the factors which bear on their ability to reproduce themselves successfully.”²²

¹³ See 50 CFR § 216.24(c).

¹⁴ See 50 CFR § 216.24(1987).

¹⁵ 16 U.S.C. § 1371(a)(2).

¹⁶ See 16 U.S.C. § 1374 (b)(2).

¹⁷ Congress apparently relied on this provision, which places the burden of justifying the taking squarely on the applicant, as an important safeguard. If the burden is not met, no permit may issue. See H.R. REP. NO. 707, 92d Cong. 1st Sess. 18, cited in *Richardson*, *infra* n. 27 at 1145.

¹⁸ See 50 CFR § 216 Subpart G (1987).

¹⁹ 16 U.S.C. § 1373(d).

²⁰ 16 U.S.C. § 1373(a).

²¹ 16 U.S.C. § 1361 (2).

²² 16 U.S.C. § 1361 (3).

Congress’ emphasis on knowledge of the population impacts of incidental fishing mortality is reflected in the obligations of the Secretary. The Secretary, prior to issuing regulations authorizing a taking, must publish concurrently with or before public notice his intent to issue regulations, a statement which describes the estimated population levels of species affected by the regulation, the impact of the proposed regulation on the species’ optimum sustainable population (OSP), and the evidence on which the regulations are based.²³ Where a marine mammal population is below its OSP, the Act prohibits NMFS from allowing takings that would be to the “disadvantage of those species.”²⁴ NMFS, obliged to implement the Act “for the benefit of protected species rather than for the benefit of commercial exploitation”, lacks the discretion to issue a permit to take species incidentally to commercial fishing “when estimates of the optimum sustainable populations of the species involved and of the effect of that taking upon the optimum sustainable populations are not available.”²⁵

THE KOKECHIK DECISION

A recent decision of the United States Court of Appeals for the D.C. Circuit, *Kokechik Fishermen’s Association v. Secretary of Commerce*,²⁶ has foisted an expansive view of the MMPA’s wildlife protection policies on the federal agencies responsible for the Act’s implementation. As a result, NMFS’ ability to issue permits necessary to the conduct of a number of fisheries, primarily on the West Coast, has been hampered. The decision, which decidedly shifted the Act’s bias toward marine mammal protection and further away from concessions to commercial fishing, has prompted efforts to amend relevant portions of the Act during this congressional session.

The *Kokechik* case deals with the scientific underpinnings of the general permit program. The court’s reasoning also raises interesting issues concerning the small take program, which have important implications for the New England gillnet fishery. These considerations are discussed below.

Kokechik is a logical extension of an earlier MMPA case, *Committee for Humane Legislation v. Richardson*.²⁷ In *Richardson*, the court ruled that NMFS could not issue a general permit for incidental take of marine mammals if the agency lacked information on the OSP of the affected

²³ See 16 U.S.C. § 1373(d)(1)-(4).

²⁴ See 16 U.S.C. § 1373(a); Committee for Humane Legislation, Inc. v. Richardson, 540 F.2d 1141 (D.C. Cir. 1976).

²⁵ *Richardson*, *supra* at 1148.

²⁶ 839 F.2d 795 (D.C. Cir. 1988).

²⁷ 540 F.2d 1141 (D.C. Cir. 1976).

species. *Kokechik* holds that NMFS cannot issue a permit, authorizing taking of species for which OSP is known, if the agency lacks OSP data on species which, though not included in the permit, will in fact be taken in the course of the fishery. In effect, NMFS must consider the impact of a commercial fishery on all marine mammals affected whether or not the applicant has sought permission to harm them.

Events culminating in the D.C. Circuit's decision began in 1981, when NMFS issued a three year general permit, authorizing taking a set number of Dall's porpoise, northern fur seals, and northern sea lions, to the Federation of Japan Salmon Fisheries Cooperative Association (the Federation).²⁸ Congress extended the permit in 1982 until June 9, 1987, on the condition that research be conducted to reduce incidental mammal takes.²⁹ On July 21, 1986, the Federation applied for a five year general permit, which was in substance an extension of its expiring permit.³⁰

NMFS' responded to the analysis required by the Act by discussing the population status and effects of the permit on Dall's porpoise alone. The required public notice included no statement of the fishery's effect on northern sea lions, fur seals, or a variety of other mammals in fact taken in the course of the Japanese salmon gillnet fishery.³¹

Following the formal rulemaking hearing, the administrative law judge (ALJ) recommended issuance of a five year permit authorizing incidental taking of Dall's porpoise and fur seals. The allotted number was to decrease annually.³² The ALJ took care to point out that a number of species, including harbor porpoise, Pacific white-sided dolphin, and killer whale, were ensnared infrequently (and presumably in small numbers) in the nets of the Federation. However, the Federation had not applied for a permit to take these species, concerning which there was no scientific information on OSP in the record. Therefore, the ALJ concluded that the MMPA forbade taking these species.³³

The Secretary's final decision for the most part mirrored the ALJ's. It provided a three year general permit allowing only Dall's porpoise to be taken. The Secretary, too, con-

²⁸ Japan is entitled to fish for salmon inside the U.S. EEZ in the North Pacific pursuant to a protocol amending the International Convention for the High Seas Fisheries of the North Pacific. 4 U.S.T. 380, T.I.A.S. No. 2786, amended by 30 U.S.T. 1095, T.I.A.S. No. 9242. For reference to domestic implementing legislation governing this foreign fishery see *Kokechik*, *supra* n. 26 at 797.

²⁹ 16 U.S.C. § 1034(b) (1982).

³⁰ *Id.* at 798.

³¹ *Id.*

³² *Id.*

³³ *Id.*

cluded that the lack of scientific information precluded issuance of a permit including sea lions, fur seals, harbor porpoise, killer whales, and several other species.³⁴ As a result, the MMPA prohibited all takings of these unpermitted species.

The result was a curious one. Permit in hand, the Federation could fish and lawfully take Dall's porpoise. Yet any other type of mammal entwined in its nets would constitute a violation of the MMPA. The track record of this high seas, salmon gillnet fishery made it evident that these violations would in fact occur regularly. The Secretary's decision apparently rested on the conclusion that these illegal incidental takes were biologically insignificant. If the Federation were composed of U.S. fishermen, a small take permit could have been issued.³⁵ The Secretary in effect chose to extricate the Federation from this anomaly in the Act and allow what was in essence a "small take" of these other species.³⁶

The Kokechik Fishermen's Association, a group of Alaskan commercial fishermen, joined environmentalists in opposing the Secretary's decision. The U.S. District Court for the District of Columbia issued a preliminary injunction enjoining issuance of the permit and thus the Federation's conduct of the salmon gillnet fishery in the U.S. Exclusive Economic Zone.³⁷

On appeal, the D.C. Circuit Court of Appeals affirmed. The court framed the main issue as one of "pure statutory interpretation"—"whether the Secretary of Commerce may legally issue a permit allowing incidental taking of one protected marine mammal species knowing that other protected species will be taken as well."³⁸

In answering "no" a majority of the court made several key points which have called agency practice in implementing the MMPA into question, and sent industry and conservationist forces first to the negotiating table, then to Congress to seek amendments nullifying the court's decision. First, the MMPA's findings and purposes sections demonstrate that the Act is to be implemented for the benefit of marine mammals.³⁹ Thus, the Act's fundamental goals require that interpretations of its ambiguities resolve doubt in favor of the protected species. Second, the court questioned whether the MMPA would preclude issuance of a permit when, unlike in

³⁴ *Id.* at 799 & n.8.

³⁵ See *supra* text accompanying notes 9-12.

³⁶ See *Kokechik*, *supra* n. 26 at n.9.

³⁷ *Kokechik Fishermen's Association v. Baldrige*, 679 F. Supp. 37 (D.D.C. 1987).

³⁸ *Kokechik*, 839 F.2d at 800.

³⁹ *Id.* As noted above, the court had made this clear a decade earlier in the *Richardson* decision.

the case before it, takings of unpermitted species were “only a very remote possibility”.⁴⁰ Third, the court rejected the Secretary’s position that the negligibility of the unpermitted takings made issuance of the permit consistent with the Act’s goals and purposes.⁴¹ Congress had expressly limited the permit exemption for small, negligible takes (which require no demonstration or discussion of the fisheries impact on OSP or any similar objective measure of population strength) to “citizens of the United States.”⁴² “The MMPA does not allow for a Solomonic balancing of animals and fisheries such as the Secretary attempted.”⁴³

In sum, the court held that the Secretary violated the MMPA by issuing a permit which in fact allowed the taking of marine mammals by a foreign fishing concern without determining whether those species were at the OSP level. The dissent aptly characterized the expansive interpretation given the MMPA by the majority. In effect, the court held that “no permit may issue for *any* species until a permit for *all* mammals likely to be entangled can lawfully issue.”⁴⁴

On its face, the impact of the decision is limited to fisheries, operating under the general permit exemption of the MMPA, in which interactions with marine mammals are anticipated. Yet the decision’s implications are broad. *Kokechik* foreshadowed the shut down of major West Coast fisheries since biological information essential to the regulatory analysis it mandated simply has not been collected for a variety of species. NMFS indicated that it would be unable to issue general permits for eight domestic, West Coast fisheries whose permits are scheduled to expire at the end of 1988.⁴⁵

The court pointed out that if the Secretary believed the MMPA required amendment to correct this result, the halls of Congress were the place to go.⁴⁶

⁴⁰ *Id.* at 801.

⁴¹ See *id.* at 801-2.

⁴² *Id.*; U.S.C. § 1374 (a)(4)(A).

⁴³ *Kokechik*, 839 F.2d at 802 & n. 15.

⁴⁴ *Id.* at 806 (Starr, J. dissenting). The dissent questioned the workability of this requirement and reasoned that Congress had instead fashioned a species by species system. In its view, the permit system is structured to allow fishing despite these inevitable takes since fishermen have no way of knowing with certainty which species will end up in their nets (especially when using gear as non-selective as gillnets). *Id.* at 804 (Starr, J. dissenting).

⁴⁵ MARINE FISH. MANAGEMENT, July 1988 at 5-6. NOAA is in the process of preparing the programmatic EIS for the general permit program. See 53 Fed. Reg. 9795 (March 25, 1988).

⁴⁶ *Kokechik*, 839 F.2d at 802.

REAUTHORIZATION AND AMENDMENT OF THE MMPA: THE CONSERVATIONIST/INDUSTRY PROPOSAL

Following *Kokechik*, environmentalists and fishing industry representatives coalesced in hopes of reaching an agreement on how to amend the MMPA to address their constituents’ concerns. Environmentalists presumably saw the writing on the wall. The MMPA was coming up for reauthorization. Economically important sectors of the fishing industry were potentially facing Draconian limits on their operations. One can infer that the fear of congressional backlash at *Kokechik*, possibly undoing any gains realized through litigation and leading to a weakened MMPA, may have helped bring the environmental community to the negotiating table. Similarly, fishing industry representatives probably recognized the strong support in Congress for marine mammal protection and foresaw a difficult process in obtaining legislative relief. Thus, the stage was set for a compromise.

After extensive negotiations, participating conservation and fishing industry interests agreed on a number of efforts they would jointly support in the course of the reauthorization and amendment of the MMPA. The list of organizations participating in the negotiations is revealing. It includes a number of national conservation organizations, such as the National Audubon Society, Sierra Club, and Greenpeace, the leader of the conservationist forces forming the “MMPA Reauthorization Coalition”. The fishing interests at the table represented a narrower constituency. They are primarily West Coast industry associations. Several East Coast fishing interests also took part as “observer-participants”.⁴⁷ The text of the solution arrived at reflects this West Coast bias.

The heart of the agreement⁴⁸ is a three year limited exemption, to commence in January, 1989, allowing fisheries in which interactions occur with marine mammals of unassessed population strength (i.e., no OSP data) to continue for up to three years while necessary biological information is collected and analyzed.

The exemption involves a detailed, multi-faceted permit program which only U.S. commercial fishing operations sailing under the U.S. flag may take advantage of. Fisheries eligible for the proposed program are those in which interactions with marine mammals are documented and likely to occur and which are ineligible for either the small take program, due to the numbers of animals affected, or for the incidental take program, due to the lack of basic biological information. NMFS will identify eligible fisheries as well as those where interactions with marine mammals are only remotely possible. The latter are not subject to the new program which is also inapplicable to tuna fisheries.

⁴⁷ MARINE FISH. MANAGEMENT, July 1988 at 6.

⁴⁸ The discussion of the conservationist/industry coalition’s agreement which follows is taken from a May 10, 1988 memorization of the terms of the agreement and a subsequently drafted summary.

The exemption proposal has the following five elements, which form a unified strategy facilitating both current fishing efforts and future regulatory actions: participation, verification (monitoring), data management, research, and mitigation and recovery plans.

The proposal is geared to improving fishermen's participation in information gathering efforts. Individual fishermen must obtain annual letters of exemption. Eligibility for successive letters is contingent on compliance with reporting requirements. Fishermen holding letters of exemption must provide detailed information at the close of a fishing season or biannually (whichever is more frequent) on interactions with marine mammals. The agreement suggests establishment of a non-federal central agency to process letters of exemption and gather and compile data collected. NMFS is empowered to enforce reporting requirements. If the agency fails to enforce violations, a citizen suit may be filed at the close of the three year period. The agreement reflects a realization that fishermen can be a significant source of biological information and that their cooperation and assistance are essential to achievement of the MMPA's objectives.

The paltry number of fishermen participating in current general permitted fisheries is cited as a fundamental regulatory problem. In 1987, for example, participation was greatest in the trawl fishery where 70% of those fishing applied for certificates of inclusion. However, only 9% of those included under the permit filed reports on interactions with marine mammals as required by the general permit. A scant 2% of fishermen in the stationary gear category filed the mandatory reports.⁴⁹ The lack of participation results in collection of little information about fishery impacts on marine mammals.

This problem is complicated by the current regulatory practice of issuing general permits to broadly defined classes of fishermen without reference to differences in gear types or attention to the circumstances of individual fisheries. The several large organizations holding general permits have no power to enforce compliance by their members and bear no clearly defined responsibility for their members' transgressions of MMPA permit conditions. In short, there is little data on fisheries' impacts and the information that does exist is poorly correlated to individual areas and fisheries. With only an imprecise picture of what is happening, NMFS is hard pressed to pinpoint problem fisheries or practices for particularized regulatory attention.⁵⁰

The agreement recognizes the need for verification of data collected on marine mammals. Verification, i.e., means of

monitoring the activities of fishermen participating in the program to confirm or expand vital biological information, is of two types. The first applies to all fisheries; the second covers only those fisheries where interactions with marine mammals are of greatest concern. Uniformly applicable measures include instructional efforts to inform fishermen on how to comply with reporting requirements and a cross-checking of the reliability of information filed. In fisheries where marine mammal species of special concern are affected, other measures will be taken to ensure the accuracy of information collected. The main feature of this added effort is the use of on-board observers. In fisheries where there is an historical observer data base, on-board observers will be used in the first year of the exemption period to confirm data on previously observed variations in take. Thereafter, an effective observer program will be designed using information gained in the first year. In other fisheries subject to this type of verification, a combination of methods will be used to determine variations in take prior to design and implementation of an appropriate observer program. The agreement identifies a number of West Coast fisheries in which an observer program will be implemented.

The coalition agreed on an important, educational complement to its data collection and verification proposals. Industry will fund a three year program designed to acquaint fishermen with the requirements of the MMPA, including reporting responsibilities, the status of marine mammal populations and their ecological importance, known technologies for reducing interactions, and the vital role of fishermen to the MMPA's success.

The agreement stresses the importance of making information gathered useful and contemplates compilation of technical and scientific data underlying policy decisions in a form compatible with existing coastal data bases. The goal is resource management to coordinate technical decisions made under ocean law statutes, principally the Magnuson Fishery Conservation and Management Act and MMPA. Similarly, research is to be tied to the verification program and focus on species of particular concern, including harbor porpoise, northern fur seals, and Steller's sea lions. The agreement also envisions industry funded and conducted research to develop gear and fishing practices less harmful to mammal populations.

The final component of the exemption program amply demonstrates that the proposal is not meant simply to maintain the status quo. The agreement calls on NMFS to develop recovery plans for the three West Coast species most threatened by commercial fishing — Steller's sea lion, harbor porpoise, and northern fur seal. Recognizing that the natural integrity of their habitat is essential to the survival of marine mammals, the coalition proposes that NMFS nominate areas for designation as protected habitat by the appropriate state or regional fishery council. Within these areas, fishing and other human activities would be restricted as necessary. The coalition has also proposed that NMFS be given authority to

⁴⁹ Testimony of the Center for Environmental Education (presented by Bo Bricklemeyer, Greenpeace, USA), *Hearing on MMPA Reauthorization, Subcommittee on Fisheries and Wildlife Conservation and the Environment of the House Merchant Marine and Fisheries Committee* (May 10, 1988) at 13.

⁵⁰ *Id.* at 16.

adopt emergency protective measures, such as fishery closures where prompt action is critical to a species' survival and recovery.

The negotiated proposal is not just a quick fix of immediate problems arisen in the wake of *Kokechik*. The package of mutual objectives sought shows that parties to the agreement are calling for a comprehensive and systematic program correcting fundamental deficiencies with the MMPA.⁵¹ This comprehensive revision of the incidental take program will require substantial funding. Both parties to the agreement stress that the data collection, research, verification, and analysis envisioned by the coalition are essential to the program's success. Without concurrent advances in scientific knowledge, a three year exemption from the strictures of the MMPA for fisheries causing harm to marine mammals would be potentially disastrous to marine mammal populations now teetering on the brink of collapse.

Congress has begun to consider this joint proposal. Hearings were held in the House on May 10 and in the Senate on May 19 on Congressman Studds' (D.-Mass.) bill, H.R. 4189, to reauthorize the Act. Participating industry groups and conservationists unveiled and explained to congressmen their scheme to revise the Act at those hearings. Draft legislation, translating the terms of the negotiated agreement into amendments to the MMPA, has been prepared and circulated to members and their staffs for review. The agreement will likely be offered as an amendment to the Studds bill. Since both the regulated community and representatives of concerned beneficiaries of the MMPA mutually constructed and concur on the amendments suggested by their agreement, it seems likely that the substance if not the sum of their proposal stands a good chance of becoming law.

The remainder of this article examines the status of the New England gillnet fishery, an East Coast fishery enjoying an exemption to the MMPA's moratorium. The case of this fishery suggests that elements of the comprehensive restructuring of the general permit program should be extended to cover the small take program and that regulators and scientists should pay particular attention to fishery impacts on the harbor porpoise of the U.S. Northwest Atlantic.

THE CASE OF THE NEW ENGLAND GILLNET FISHERY

There is no doubt that the agreement discussed above is a well thought out and well integrated approach to fundamental

flaws in implementation of the MMPA. At present, reliable scientific knowledge on a number of mammal species is needed to inform regulatory decisions and to ensure that fisheries are conducted compatibly with the MMPA's primary objective—wildlife protection. The dearth of biological information and the uncertainty shrouding what is known, due to disincentives in the regulatory system which discourage candid reporting by fishermen, make judgments on the impact of fishing effort on mammal populations difficult on the East Coast as well as the West.⁵²

The conservationist/industry agreement came in response to the problems of the West Coast. It is designed with West Coast issues in mind. At the May 19 MMPA hearing in the Senate, NOAA Administrator Evans, who testified that the agreement was "acceptable" to NOAA, expressed concern that the proposal "does not adequately cover" East Coast fisheries.⁵³

Although East Coast fisheries' interactions with marine mammals are generally less frequent and involve fewer animals, NMFS has identified several fisheries of concern. Menhaden fishermen, operating in waters of the South Atlantic and the Gulf of Mexico, entangle bottle-nosed dolphins (*Tursiops truncatus*) in their nets. Heavy losses in that population due to many lethal strandings last year have potentially increased the significance of the incidental take. Mid-water trawl fisheries for mackerel and squid experience incidental takes of various dolphin species and occasional entanglements of whales. In the Gulf of Mexico shrimp fishery and the lobster fishery of the Gulf of Maine, where whales have become entangled in lines connecting strings of lobster traps, takes are less frequent but occur with some regularity.⁵⁴

⁵² Apparently, the only marine mammals affected by commercial fishing which NMFS knows are above OSP are the Dall's porpoise, several dolphin varieties, northern elephant seals, and northern sea otters. Testimony of the Center for Environmental Education, *supra* n. 49 at 9.

⁵³ Dr. Evans was also concerned that foreign fishermen would be unable to take advantage of the new exemption program. Exclusion of the foreigners could have a significant on the East Coast mackerel fishery, for example. The East Coast mackerel fishery has both a foreign directed fishery and a joint venture element. East Germans, Poles, and Dutch are the principal foreign participants. Approximately eight American vessels were involved in the joint venture fishery in 1988. The value of the fishery is estimated at \$10-19 million. Pat Jerrior, NMFS, Gloucester, Mass., personal communication, June 30, 1988. The fishery season ended, more or less on schedule, in early May. Next year there is concern that the foreigners, who can not by law obtain a small take permit and who may be ineligible for a incidental take permit due to a lack of biological information on affected mammals, may not participate in the joint venture fishery. A decision to forgo the fishery would hurt Americans benefitting from the joint venture.

⁵⁴ Kenneth Hollingshead, NMFS, Washington, D.C. personal communication, August 17, 1988.

⁵¹ The Northwest Indian Fisheries Commission, for example, stressed the importance of consideration of the elements of the proposal as a unified whole which should not be dismantled for political reasons. Testimony of the Northwest Indian Fisheries Commission, *Hearing on MMPA Reauthorization, Subcommittee on Fisheries and Wildlife Conservation and the Environment of the House Merchant Marine and Fisheries Committee* (May 10, 1988).

The most destructive fishery on the East Coast is also conducted in the Gulf of Maine. The impact of the New England gillnet fishery on marine mammals, particularly harbor porpoise (*Phocena phocena*), has become an issue of concern to NMFS, conservationists, scientists, and others concerned with the preservation of marine mammals. A sizable incidental take of this species also occurs in the conduct of a gillnet fishery in Canada's Bay of Fundy. The lack of scientific knowledge about the harbor porpoise makes gauging the biological significance of these fishery inflicted losses difficult. Problems in this fishery merit special attention on the order of that provided specific West Coast fisheries in the industry/conservationist proposal discussed above.⁵⁵

Background on the Gulf of Maine Gillnet Fisheries

Gillnets and congregations of marine mammals, seeking the same food fish, tend to coincide — to the greater detriment of the latter. In New England two major types of gillnet gear are fished. Anchored gillnets are used in a winter mackerel fishery in Cape Cod Bay and throughout the waters of New England to fish for groundfish species which include cod, haddock, hake, pollock, and cusk.⁵⁶ In the past, drift gillnets have been used on Georges Bank and areas of the Gulf of Maine to harvest swordfish. This practice is much less frequent since the settlement of the U.S./Canada boundary on the Bank which closed American fishermen out of areas productively fished with this gear.⁵⁷ The anchored, set gillnets, particularly those employed in the capture of groundfish, are the principal cause for concern.

⁵⁵ Interestingly, the coalition's proposal calls on NMFS to develop a recovery plan for the Pacific harbor porpoise, frequently netted in the North Pacific. The harbor porpoise put at risk by East Coast gillnetters is the same species. Separated by the land mass of the Western Hemisphere, these are distinct populations. *Phocena* populations in the Baltic and Black sea, off the coast of Peru, and elsewhere suffer significant mortality due to commercial fishing. Dr. David Gaskin, University of Guelph, personal communication, August 17, 1988. It seems that, in combination, fishing activities may threaten the entire species.

⁵⁶ Draft Final Report, (gillnet section) "Harbor Seal Populations and Fisheries Interactions With Marine Mammals In New England", February 6, 1987, contract no. NA-84-EA-C-00070, prepared for the Northeast Fisheries Center, NMFS at 2;4 (hereafter New England Marine Mammal Report or Draft Final Report). This report was prepared by researchers at the University of Maine, headed by Dr. Jim Gilbert, using data gathered from fishermen covered under a small take exemption permit issued to the New England gillnet fishery. The regulatory history of the fishery will be discussed below. That report provides much of the factual information on the gillnet fishery relied on by the author.

⁵⁷ *Id.* at 2.

Groundfish gillnets are typically set just off the bottom in depths of 35-100 fathoms.⁵⁸ The nets are made of monofilament and are often strung together to lengths of one mile.⁵⁹

Gillnets are a non-selective type of fishing gear — fish species of all types, seabirds, and mammals can become wound in their meshes. Researchers have shown that gillnets fished in New England waters entangle cetaceans, pinnipeds, such as harbor seals, and odontocetes, such as harbor porpoises.⁶⁰ The incidental take of harbor porpoise attributable to groundfish gillnets has been "identified as the greatest potential conflict between marine mammals and New England's gillnet fisheries."⁶¹

Gillnetting for groundfish is not the mainstay of many fishermen who use this gear. The gillnet effort in New England varies with a number of factors, including groundfish prices, weather, abundance of fish, and action in other fisheries. A number of those who gillnet groundfish may also fish for scallops, lobsters, or other species as the market dictates.⁶² Many gillnetters are day boats fishing nearshore coastal waters, although some larger vessels, principally out of Portland, Maine and Gloucester, Massachusetts, fish offshore.⁶³

A similar situation exists in Canada's maritime provinces, where the gillnet fishery operates primarily from June to September and concentrates on pollock and cod. At present there are about 30 gillnetters licensed in the Bay of Fundy area who actively fish.⁶⁴ The economic importance of the fishery depends on market prices for species other than groundfish, and other factors akin to those at work in New England.

Canadian scientists studying harbor porpoise's interactions with gillnets in the Bay of Fundy estimate that from 100-150 *Phocena* are caught and killed annually. Unlike the U.S.,

⁵⁸ *Id.* at 4.

⁵⁹ *Id.*

⁶⁰ Roughly half of the population of right whales, an endangered species, bears scars from past entanglements with fishing gear. This problem is not limited to gillnet gear, however. Douglas Beech, Wildlife Biologist, NMFS, Gloucester, personal communication, June 30, 1988.

⁶¹ Draft Final Report at 10.

⁶² *Id.* at 5.

⁶³ *Id.* at 4.

⁶⁴ See Read and Gaskin, *Incidental Catch of Harbor Porpoises by Gill Nets*, J. WILDL. MANAGE., 52:(3):517-23, 518. Dr. Gaskin is among the foremost authorities on harbor porpoise in the Northwest Atlantic.

Canada has no laws which regulate incidental takes of harbor porpoise or other marine mammals.⁶⁵

Unanswered Questions about Gillnets' Impacts on Harbor Porpoise

The reasons for concern are easily stated yet basic biological information needed to assess the gillnet fishery's impact is lacking.⁶⁶ Although researchers studying marine mammal/fisheries interactions in the Gulf of Maine noted more entanglements in surface mackerel gillnets than in the groundfish gillnets, the impact of the latter was considered more serious for several reasons.

The mackerel nets entangle Atlantic white-sided dolphins, for the most part, which can often be released alive. The winter mackerel fishery is also small and seasonal. Thus, it does not appear to be a significant threat.⁶⁷ Groundfish gillnetting takes place year round in some places, coincidentally with concentrations of marine mammals in others, and is conducted over a wide area. Ensnared when nets are set, *Phocena* caught in gillnets most often come aboard dead.⁶⁸ Estimates of the number of harbor porpoise which perish each year in New Englanders' gillnets range from 30-600.

Scientists can be no more precise as to the biological impact of the fishery. Researchers who studied mammals' interactions with the New England gillnet fishery in the Gulf of Maine concluded that "[n]either our incidental take estimates nor current population estimates are adequate to determine the impact of gillnet-related mortality on the harbor porpoise population."⁶⁹ Researchers took care to note that the data on incidental takes of *Phocena* suggested that "the groundfish gillnet fishery has the potential to exceed the annual quota of 180 porpoise allowed in the MMPA exemp-

tion." (The following section discusses the New England gillnetters' MMPA exemption.)

Other sources of mortality add to the significance of losses in the Gulf of Maine. Read and Gaskin⁷⁰ estimate that 300-400 harbor porpoises are killed each season on Jeffrey's Ledge, off the coast of New Hampshire, where there has been no systematic study of marine mammal/fisheries interactions. Likewise, a significant but unassessed number of lethal takes are believed to occur in fisheries conducted off southwestern Nova Scotia.⁷¹

Fundamental pieces of biological information about the harbor porpoise population in U.S. territorial waters of the East Coast, as well as the West Coast, are unknown. What is known indicates that gillnetting which takes place during the summer months in the Bay of Fundy and the eastern most territorial waters of the United States, the Cobscook/Passamaquoddy Bay region in Maine, may be placing the health of the harbor porpoise population at risk.

The harbor porpoise is one of the smallest and shortest lived cetaceans. Its western Atlantic population ranges from North Carolina well into Canada's maritime provinces.⁷² Harbor porpoise are frequent visitors to the Gulf of Maine in summer months. However, the Bay of Fundy is perhaps the species' most critical summer habitat. Researchers estimate that up to 80% of the population below the Gulf of St. Lawrence summers here.

The harbor porpoise is a migratory animal which spends its winters in an unknown offshore area and, like many summer visitors, repairs to the coastal and estuarine waters in the warmer months. The species seems to follow seasonal abundances of prey fishes, such as herring and mackerel. Mating occurs in the summer from early June to August. Thus, one can expect that the many porpoises congregating in the Fundy region are an important element of the population's breeding stock.

The harbor porpoise suffers losses due to several human activities, a marine pollution and incidental takes due to fishing. To date, the most overtly destructive activity has been gillnetting. Yet accurate assessment of the significance of the gillnet fishery's impact is currently impossible. There is no reliable estimate of the total East Coast population and no precise definition of sub-populations. Thus, no one really knows what part of the total is affected by fishery activities. Correspondingly, the level of incidental take by American and Canadian fishermen and its impact on the species are unknown. The species' offshore movements, where it goes and its route of return to coastal waters, are also unknown.

⁶⁵ This lack of regulation is at once a boon and a curse. Faced with no potential penalty, Canadian fishermen are apt to be more candid in reporting incidental takes. The penalty provisions of the MMPA have all but dried up NMFS' sources of informal data on marine mammals' interactions with fisheries. This loss hampers regulatory efforts. Dr. David Gaskin, University of Guelph, letter to author, August 16, 1988.

⁶⁶ *Review of the Harbor Porpoise (Phocena phocena) in the U.S. Northwest Atlantic*, prepared for the U.S. Marine Mammal Commission, contract no. MM8AC016, May 1980, pulls together a great deal of what is known about the harbor porpoise species. One of the Review's primary conclusions is that more research is needed to determine impact of human activities on this species.

⁶⁷ Draft Final Report, *supra* note 56 at 10-11.

⁶⁸ *Id.* at 6. Read and Gaskin, believe that the majority of *Phocena* are caught when nets are fishing rather than when being set or retrieved. See *supra* note 64 at 522.

⁶⁹ Draft Final Report, *supra* note 56 at 11.

⁷⁰ See *supra* note 64 at 522.

⁷¹ *Id.*

⁷² *Review*, *supra* note 66 at 3. References to the biology of the harbor porpoise in this section are derived from this review, unless otherwise indicated.

However, based on current minimum population estimates for the Fundy and Cobscook/Passamaquoddy Bay regions,⁷³ the *known* incidental catch of harbor porpoise may be nearly 7.5% of the total population. This level of mortality greatly exceeds NMFS' usual benchmark for the small take program. NMFS ordinarily considers takes of less than 1% to be "negligible".⁷⁴

This level of mortality appears to have serious implications for the Northwest Atlantic *Phocena* population. Studies conducted in the Fundy region indicate that the gillnet fishery there, in existence in its present form for 10-15 years, may "have compressed the size and possibly the age structure of the population, perhaps reducing the reproductive lifetime of females."⁷⁵ Under these circumstances, "the potential for population growth and subsequent resilience to exploitation is limited, as demonstrated by the collapse of harbor porpoise populations in the Baltic and Black seas."⁷⁶

In simple, lay terms, the plight of the harbor porpoise in the Northwest Atlantic is serious and gillnetting is a major contributing factor.

The New England Gillnetters' MMPA Exemption

From 1983 to date, New England gillnetters, at least those who have opted to participate in the program, have fished under a small take exemption permit. The University of Maine acted as receiver and assumed responsibility for collection and collation of data received from fishermen on interactions with marine mammals.⁷⁷ The permit is scheduled to expire December 31, 1988. There are indications that a fishermen's organization, the New England Gillnetters Association, will assume the reporting duties imposed under the new permit expected to be sought for the fishery.⁷⁸

The small take permit issued to the gillnetters imposed an annual quota of 180 harbor porpoise. As noted above, available research makes several important points: (1) this quota is likely to be exceeded in a given year; (2) due to the

lack of adequate population studies, there is no way of judging with confidence whether the incidental take of harbor porpoise threatens the stability of the population in the waters of the northeastern United States and maritime Canada; and (3) the best available studies suggest that known incidental takes may significantly affect the species' viability in the Northwest Atlantic.

As the time for NMFS consideration of an application to renew the New England gillnetters' MMPA exemption draws near, the reasoning, if not the letter, of the *Kokechik* decision casts its shadow. What scientific information there is has generated considerable doubt that the incidental take of harbor porpoise in the New England gillnet fishery is in fact negligible. The impact of the Canadian gillnet industry on the species adds significantly to this uncertainty. If NMFS makes that determination, the fishery can not obtain a small take exemption.⁷⁹ Also, it seems that there is insufficient information about the harbor porpoise to inform a determination on OSP, i.e., to determine whether the species is "depleted".⁸⁰ No one really knows what population, or populations, should be considered. Thus, under the reasoning of *Richardson* and *Kokechik*, the fishery seems ineligible for an incidental take permit. In short, the threat of a shut down of the New England gillnet fishery looms as a distinct possibility, the odds of which would no doubt increase with the involvement of conservation and animal welfare organizations.

NMFS, the gillnet industry, and not least, the harbor porpoise are at a critical juncture. NMFS, it seems, would be hard pressed to sanction conduct of the gillnet fishery without violence to the fundamental purpose of the MMPA's regulatory scheme — assurance that human uses of the marine environment do not threaten the biological integrity of marine mammal populations. The industry's economic importance forebodes a struggle if NMFS withholds an MMPA exemption. Harbor porpoise all the while continue to drown in fishermen's nets.

This state of affairs is analogous to that of West Coast fisheries which have joined with Greenpeace and others in seeking changes to the MMPA. The reauthorized MMPA should include measures to address the problems of the New England gillnetters and perhaps other East Coast fisheries.

RECOMMENDATIONS

The proposal of the conservationist/industry coalition provides a model for action to address concerns in the New England gillnet fishery. An interim program allowing a

⁷³ Available information indicates that harbor porpoises frequenting these areas form a single population migrating north-south as well as inshore-offshore although additional study is merited to confirm this thesis. Read and Gaskin, *supra* note 64 at 522.

⁷⁴ Kenneth Hollingsworth, NMFS, personal communication, August 17, 1988.

⁷⁵ Read and Gaskin, *supra* note 64 at 522.

⁷⁶ *Id.*

⁷⁷ The study discussed in the previous section, *see supra* note 56, was based in part on data collected during the first three years of this five year permit.

⁷⁸ COMMERCIAL FISHERIES News, July 1988 at 19.

⁷⁹ *See supra* text accompanying notes 9-12.

⁸⁰ *See* 16 U.S.C. § 1362(1); note 9 *supra* and accompanying text.

limited take of harbor porpoise should be included in the amended MMPA, provided the best available scientific information shows that the population can weather continuation of the current level of mortality. This would allow collection of needed biological information and continued receipt of some economic benefit by fishermen, whose livelihood depends on gillnetting. As in the coalition's proposal, there should be a concerted effort to involve fishermen in the program. Education, of *and by* fishermen, involving explanations of the purposes of enhanced protection for the harbor porpoise and the practicalities of commercial fishing in the region, must be emphasized.

Funding is critical, both for the data collection and verification aspects of the program and for conduct of much needed research. Efforts should be made, as the coalition's proposal suggests, to coordinate research conducted under various ocean programs.⁸¹ Government or preferably industry should invest in the development of gillnets less destructive of marine mammals, or comparably priced alternatives. Researchers in California are working with techniques of making gillnets acoustically detectable to marine mammals such as harbor porpoise which navigate by sonar.⁸²

Changes in fishing practices should also be explored. Regulators, in consultation with fishing industry representatives, should seriously consider a phase out of gillnet gear. This would give those economically dependent on this gear type time to explore and adopt alternatives without financial hardship. Gillnets are simply wasteful of marine resources. They non-selectively take target and non-target fish species and entangle other marine organisms indiscriminately. Lost,

they continue to fish and kill. Regardless of its present utility and economic importance, this gear type should have no place in long term management strategies.

Mitigation measures could be included in the interim exemption given the gillnet fishery. These changes in current fishing practices, such as temporary area closures, should be openly explored with affected fishermen before imposition. The realities of enforcement and human nature urge active involvement of the industry. Researchers who investigated marine mammal interactions with the gillnet gear suggested several other possible mitigation measures, including heavier anchors to sink net ends more quickly (porpoises can become entangled when nets are being set), delay in setting nets until the surface is clear of cetaceans (a practice which could reduce the efficiency of the fishery), and broadcast of electronic signals when nets are set.⁸³

Once the requisite study and analysis of data on fishery impacts on the harbor porpoise population has been done, a future course of action must be plotted. The range of alternatives includes a ban on gillnetting in certain areas or all areas frequented by harbor porpoise, development of a recovery plan for the north Atlantic population similar to the one included in the coalition's proposal, and reissuance of a small take or general permit containing conditions and mitigation measures dictated by study of the fishery.

CONCLUSION

The *Kokechik* decision has focused attention on the moral commitment made in the MMPA and the need for long-overdue programs to address significant deficiencies in meeting that commitment. Unless a similar effort is made with respect to East Coast marine mammal populations, we are still in danger of failing to meet the Act's central social and ecological goals which stress maintenance of biological diversity through protection of marine mammal species.

Todd R. Burrowes

⁸¹ The Marine Research Act of 1988, S. 2068, introduced this session by Senator Mitchell (D.-Me.) could provide vehicle for coordination of research, as well as an additional source of funding. The bill calls for the establishment 10 regional, multi-state research centers, one of which would study the Gulf of Maine. A plethora of environmental problems have descended on coastal areas in the wake of Americans' "mad dash to the sea" and burgeoning coastal developments. Considerable scientific and technical resources are needed to forestall severe corruption of estuarine and coastal ecosystems.

⁸² Andrew Read, University of Guelph, personal communication, August 18, 1988.

⁸³ See *supra* note 56 at 9-10.

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