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Fisheries and the Marine Mammal Protection Act

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Learning Objectives

- Identify how the Marine Mammal Protection Act's (MMPA) take prohibition applies to Council authorities
- Describe how the MMPA applies to “other applicable law” for fishery management consideration
- Explain how MMPA take reduction plans and teams relate to Fishery Management Plan development

Basics of the MMPA

- Enacted in 1972, amended since
- Prohibits “take” of marine mammals, with limited exceptions
- Protects all marine mammals regardless of status
- Additional protection for ESA-listed species
- Highly protective standard
 - Optimum sustainable population



Fishing and the MMPA

- Assessing and reducing take
 - Section 117
 - Stock assessment reports
 - Scientific Review Groups
 - Section 118
 - Taking of marine mammals incidental to commercial fishing operations
 - Zero mortality rate goal

Potential Biological Removal (PBR)

- Developed because data required to evaluate stock status relative to the optimum sustainable population level is difficult to obtain
- *Definition:* the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population

$$\text{PBR} = N_{\text{min}} * 1/2 R_{\text{max}} * RF$$

“Strategic” Stocks

Marine mammal stocks are “strategic” if:

- Human-caused mortality/serious injury exceeds PBR,
- The stock is declining and likely to be listed as threatened under the ESA,
- The stock is ESA-listed, or
- The stock is depleted.



MMPA Section 118 – List of Fisheries

- Classify all U.S. commercial fisheries on an annual List of Fisheries according to levels of mortality and serious injury by stock
 - Category I - **Frequent** incidental mortality and serious injury of marine mammals
 - Category II - **Occasional** incidental mortality and serious injury of marine mammals
 - Category III - **Remote likelihood or no known** incidental mortality and serious injury of marine mammals



MMPA Section 118 - Requirements

All Commercial Fisheries

- Report marine mammal mortalities/injuries

Category I and II Fisheries

- Registration and authorization of incidental take using the annual **MMPA List of Fisheries (LOF)**
- Accommodate observers
- Comply with Take Reduction Plans

MMPA Section 118 - Take Reduction Program

- Required to develop and implement a take reduction plan for strategic stocks that interact with Category I and II fisheries
 - May also develop plans for non-strategic stocks that interact with Category I fisheries
- Goals:
 - **Short-term** goal (within 6 months): mortality & serious injury < PBR
 - **Long-term** goal (within 5 years): mortality & serious injury < insignificance threshold (i.e., 10% of PBR), considering:
 - Economics of the fishery
 - Availability of existing technology
 - Existing state/regional fishery management plans

Take Reduction Teams

- Stakeholder-based teams
 - Include Council reps
- Rigorous timeline in MMPA:
 - Develop draft Plan by **consensus** within 6 months
 - NMFS publishes proposed Plan within 60 days of receipt
 - Up to 90 days of public comment
 - NMFS publishes final Plan within 60 days of close of public comment period



Take Reduction Plans

Plan contents:

- Review of stock assessment information
- Mortality/serious injury estimates
- Regulatory or voluntary measures for bycatch reduction
- Dates for achieving Plan goals



Examples of Regulatory & Voluntary Measures

- Modifications to fishing gear and/or practices (e.g., specific hooks, pingers, weak links, gear marking)
- Fishery-specific limits on mortality and serious injury
- Time/area closures
- Expert skipper's panels and/or educational workshops



Council/AP Representatives on Take Reduction Teams

- Atlantic Large Whale
 - New England: **Cherri Patterson** (member)
 - Mid-Atlantic: **Karson Coutre** (staff)
 - South Atlantic: **Charlie Phillips** (member)
- Bottlenose Dolphin
 - Mid-Atlantic: **vacant**
 - South Atlantic: **Chris Conklin** (member)
- False Killer Whale
 - Western Pacific: **Asuka Ishizaki** (staff)
- Harbor Porpoise
 - New England: **Robin Frede** (staff)
 - Mid-Atlantic: **Karson Coutre** (staff)
- Pacific Offshore Cetacean
 - Pacific: **David Crabbe** (member)
- Pelagic Longline
 - Mid-Atlantic: **Kiley Dancy** (staff)



Marine Mammal Commission



- The Commission is an independent agency of the U.S. Government established by the MMPA to provide oversight of marine mammal conservation programs carried out by federal agencies (e.g., NMFS and U.S. Fish & Wildlife Service)
- 3 Commissioners are appointed by the President of the United States and approved by the U.S. Senate
- Committee of Scientific Advisors and Commission staff work with Commissioners to provide oversight and recommendations
- Commission staff serve as Take Reduction Team members and attend Scientific Review Group meetings, among other duties
- www.mmc.gov

Summary



- MMPA prohibits take of marine mammals, but provides exception for incidental take in commercial fisheries (and a program to authorize and reduce take)
- Take Reduction Planning is a consensus-based, collaborative process to develop take reduction measures
 - Communication between Councils/NMFS is important to ensure fishery management is complementary
- Councils are an important partner in marine mammal conservation; number of ways for Council representatives to be involved

Questions?



<https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-take-reduction-plans-and-teams>



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Endangered Species Act Section 7 Consultation

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The Endangered Species Act (ESA)

- Focuses on protecting species in their natural environments
- Gives joint authority to the National Marine Fisheries Service and the U.S. Fish and Wildlife Service
- Provides a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved ...

Pertinent Sections of the ESA

Section 4 – the process by which species are added or removed from the endangered species list

Sections 5 and 6 – discuss land acquisition and cooperation with the States in carrying out the ESA

Section 9 - prohibits take of endangered species. Take is defined as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”

Pertinent Sections of the ESA...

Section 7 – Interagency Cooperation

- **Section 7(a)(1)** – Federal agencies shall use their authorities to carry out their programs for the **conservation** of endangered & threatened species
- **Section 7(a)(4)** – requires Federal agencies to confer with the Service on any action that is likely to jeopardize the continued existence of ***proposed*** species or destroy or adversely modify ***proposed*** critical habitat

Why Does a Federal Action Agency Consult under the ESA?



- Section 7(a)(2) – Federal agencies must ensure that actions they fund, authorize, or carry out are **not likely to jeopardize** the continued existence of listed species or **destroy or adversely modify** critical habitat
- Use the **best scientific and commercial data available**.

Consultation Pathways

Informal consultation - when the effects “may affect, but are not likely to adversely affect” listed species or critical habitats.

- The effects are insignificant, discountable or wholly beneficial.
- If the Service concurs, they issue a letter of concurrence

Formal consultation - when the effects “may affect, and are likely to adversely affect” listed species or critical habitats.

- The services prepare a biological opinion

Consultation Timelines



- Initiated with a **written request and complete initiation package**
- Informal consultation ends with Letter of Concurrence – response from the Service usually within 60 days, can extend to 120 days
- Formal consultation ends with issuance of Biological Opinion in 135 days of receipt of a complete initiation package, can extend timeline

Biological Opinion

- Summarizes the effects of a Federal “action” on ESA-listed species and/or designated critical habitat
- Provides NMFS *conclusion* whether or not the action is likely to jeopardize the continued existence of an ESA-listed species or destroy or adversely modify critical habitat
- Represents the *opinion* of NMFS and considers technical, legal, and policy issues relative to the project

Biological Opinion Conclusion

= *Jeopardy and/or Destruction/Adverse Modification of Critical Habitat*



Reasonable and Prudent Alternative(s)

- Be consistent with the intended purpose of the action;
- Be consistent with the scope of the Federal agency's legal authority;
- Be economically and technologically feasible;
- Not jeopardize the continued existence of listed species or result in destruction or adverse modification of critical habitat

Can include Reasonable and Prudent Measures (RPMs)

Biological Opinion Conclusion

= No Jeopardy and/or No Destruction/Adverse Modification of Designated Critical Habitat



Reasonable and Prudent Measure(s)

- Define Mandatory Terms and Conditions that are actions necessary to minimize the impacts of incidental take and comply with the RPMs
- Cannot require major modifications to project design

Incidental Take Statements & Conservation Recommendations

Incidental Take Statement - Specifies the Amount or extent of take

- Set forth terms and conditions (including reporting requirements) to implement the RPMs; and,
- Complying with the terms and conditions of an ITS exempts the Federal agency from take prohibitions (Section 9).

Conservation Recommendations - Discretionary measures to minimize or avoid adverse effects

Reinitiation of Consultation Requirements



- Take limit is exceeded;
- New information reveals unexpected effects;
- Action is modified in a way not previously considered; or,
- A new species is listed or critical habitat designated that may be affected by the action.



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Questions?

<https://www.fisheries.noaa.gov/national/laws-and-policies/fisheries-management-policy-directives>



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MMPA & ESA Exercise

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October 19, 2023

Fictitious Scenario

- Bottom trawl fishery targeting flatfish operates in the Aleutian Islands during summer
- Category II on the MMPA List of Fisheries due to documented bycatch of several marine mammals:
 - Harbor porpoise, harbor seals, killer whales, northern fur seals, spotted seals, and Steller sea lions.
- Western Distinct Population Segment (DPS) of Steller sea lion, which occurs in the Aleutian Islands, is listed as endangered under ESA
- Bycatch of spotted seals and harbor porpoise exceeds each stock's PBR level
- Fishery also catches Atka mackerel and Pacific cod, which are prey species for Steller sea lions

Question 1

Is a Take Reduction Team required under the MMPA?
If so, which marine mammals would be addressed by the Team?

- a) Yes – spotted seals, harbor porpoise, Steller sea lions
- b) Yes – spotted seals and harbor porpoise
- c) No

Question 1 - Answer

(a) Yes – spotted seals, harbor porpoise, Steller sea lions

- MMPA trigger for convening a TRT is a *strategic stock* that interacts with a *Category I or II fishery*
- At a minimum, the strategic stocks interacting with the Category II bottom trawl fishery should be addressed
 - Spotted seals and harbor porpoise: strategic because mortality & serious injury > PBR
 - Steller sea lions: strategic because ESA-listed

Question 2

If NMFS convened a Take Reduction Team, which of the following would not be on the team?

- a) Seal biologist
- b) Alaska native
- c) Fisherman from the AK Kodiak salmon purse seine fishery
- d) Representative from the state of Alaska

Question 2 - Answer

(c) Fisherman from the AK Kodiak salmon purse seine fishery

- AK Kodiak salmon purse seine fishery operates in different area and uses a different gear type from the AK BSAI flatfish trawl fishery
- MMPA membership requirements:
 - Scientists with expertise in conservation or biology of the marine mammals stocks covered by the TRT (spotted seals, harbor porpoise, and Steller sea lions)
 - Fishermen and industry representatives with expertise in the *affected fishery*
 - FMC representative (North Pacific FMC)
 - Alaska Native representative
 - Representatives from environmental organizations
 - Representative from the state of Alaska
 - Marine Mammal Commission

Question 3

Is NMFS required to consult under Section 7(a)(2) of the ESA for this fishery management plan?

- a) Yes
- b) No

Question 3 - Answer

(a) Yes

- Fishery may affect ESA-listed Steller sea lions
- NMFS Sustainable Fisheries Division must consult under ESA **Section 7(a)(2)** with NMFS Protected Resources Division to ensure the proposed fishery is not likely to **jeopardize** the continued existence of the species or result in **destruction or adverse modification** of its critical habitat

Question 4

Is NMFS required to confer under Section 7(a)(4) of the ESA? If so, under what circumstances?

- a) Yes, NMFS Sustainable Fisheries Division would be required to confer under Section 7(a)(4) if the proposed fishery was likely to jeopardize the continued existence of *Atka mackerel* or result in **destruction or adverse modification** of its critical habitat.
- b) Yes, NMFS Sustainable Fisheries Division would be required to confer under Section 7(a)(4) if the proposed fishery was likely to jeopardize the continued existence of *the Western DPS of the Steller sea lions* or result in **destruction or adverse modification** of its critical habitat.
- c) No, no conferencing would be required.

Question 4 - Answer

(c) No, no conferencing would be required

- NMFS Sustainable Fisheries Division would not be required to **confer** under **Section 7(a)(4)** because there are no species in the area that are proposed for listing under the ESA.
- Even if a species was proposed for listing in that area, **conferencing** would be required only if the proposed fishery were likely to **jeopardize** the continued existence of the proposed species.

Question 5

Could a Section 7 biological opinion issued by NMFS impose any additional restrictions on the fishery?

- a) No, it is inappropriate for NMFS to impose any additional restrictions on the fishery. The fishery is already overregulated.
- b) Yes, but NMFS could impose only reasonable and prudent measures.
- c) Yes, NMFS could impose reasonable and prudent measures or reasonable and prudent alternatives, and terms and conditions.

Question 5 - Answer

(c) Yes – NMFS could impose RPMs or RPAs and terms and conditions.

- If NMFS determines the proposed fishery is likely to jeopardize the continued existence of the western DPS of Steller sea lion, or adversely modify its critical habitat, NMFS would suggest **reasonable and prudent alternatives (RPAs)** which it believes would not result in jeopardy or adverse modification and could be taken by the agency.
- If NMFS concludes that the proposed fishery would not result in jeopardy or adverse modification, but that it may adversely affect the Steller sea lion, NMFS would provide **reasonable and prudent measures (RPMs)** which it believes are necessary or appropriate to minimize impacts of the incidental take of Steller sea lion.
- In either case, NMFS sets forth **terms and conditions** that must be complied with to implement the measures or alternatives specified.

Question 6

Which of the following is an example(s) of an RPM?

- a) NMFS will monitor the take of marine mammals in this fishery.
- b) NMFS will prohibit retention of Atka mackerel by all federally permitted vessels in one subarea.
- c) NMFS will prohibit retention of Pacific cod by all federally permitted vessels in two subareas.

Question 6 - Answer

(a) NMFS will monitor the take of marine mammals in this fishery

- RPMs are measures necessary or appropriate to minimize impacts, not modifications to the proposed fishery
- For example, monitoring terms and conditions under the RPM may include specific observation requirements and/or research and reporting plans