



28 February 2002

The Honorable Donald L. Evans
Secretary
U.S. Department of Commerce
14th Street and Constitution Avenue, NW
Room 5851
Washington, D.C. 20230-0001

Dear Secretary Evans:

Large scale bycatch, the incidental catch of birds, mammals, turtles, and fish, plagues the marine fisheries of the United States and the world. Bycatch endangers vulnerable species and threatens the commercial viability of formerly prosperous fisheries. In order to address this problem in United States waters, Oceana requests, pursuant to 5 U.S.C. § 553(e), that the Department of Commerce, through the National Marine Fisheries Service (NMFS), initiate rulemaking to establish a program to count, cap, and control bycatch in the nation's fisheries. As discussed in detail below, federal law has required such a system for years, yet NMFS has failed to comply with those obligations to date. Further delay in complying with these legal mandates is unacceptable.

Scientists estimate that approximately 44 billion pounds of fish are discarded each year in commercial fisheries world-wide,¹ roughly equivalent to 25% of the world's total landings. This estimate includes only discarded fish bycatch, and excludes retained bycatch, bycatch from recreational fisheries and subsistence fisheries, and unobserved deaths. Additionally, this estimate does not include bycatch of marine mammals, seabirds, or other non-fish species. Therefore, the true amount of bycatch resulting from world fisheries is substantially higher than the current estimate. Applying this estimate to United States' fisheries and relying on data collected by NMFS and others, it is clear that billions of pounds of fish, marine mammals, seabirds, sea turtles, and other non-fish species are caught and wasted as bycatch each year in this country.²

Despite clear legal mandates requiring the avoidance and minimization of bycatch, NMFS is allowing this senseless waste of marine life to continue. To count, cap and control bycatch as required by law, NMFS should undertake the following actions immediately:

1. Develop and implement a workplan for placing observers on enough fishing trips to provide statistically reliable bycatch estimates in all fisheries. This task involves several steps (taking into account the diversity of vessel category, gears used, and fishing region): (a) determining how many fishing trips must be observed, where observers should be stationed, and other details; (b) identifying

¹ Alverson, Dayton L. 1998. *Discarding Practices and Unobserved Fishing Mortality in Marine Fisheries: An Update*. From a Report Prepared For National Marine Fisheries Service, 29 Apr. 1998. Seattle: Sea Grant Washington.

² Oceana has published a report that provides further details on the bycatch problem. A copy is enclosed.

funding sources to support such observer coverage, including taxpayer subsidies, taxing landings or user fees; and (c) hiring, training, and deploying the necessary observers.

2. Incorporate reasonable estimates of bycatch into all total allowable catch levels and other restrictions on fishing.
3. Set absolute limits on the amount of directed catch and bycatch (including non-fish bycatch) that can occur in each fishery, and close the fishery when the applicable catch or bycatch limit (whichever is reached first) is met.
4. Within 12 months of initiating rulemaking, develop, approve, and implement bycatch assessment and reduction plans for commercial and recreational fisheries. Such plans should include, at a minimum, (a) an assessment of the fishery according to its bycatch, including its types, levels, and rates of bycatch on a per-gear basis and the impact of that bycatch on bycaught species and the surrounding environment; (b) a description of the level and type of observer coverage necessary accurately to characterize total mortality (including bycatch) in the fishery; (c) bycatch reduction targets and the amount of directed and bycatch mortality allowed in each fishery to meet the target; and (d) types of bycatch reduction measures (such as closed areas, gear modifications, or effort reduction) that will be employed in the fishery, including incentives for those who use gears that produce less bycatch. Beginning 12 months after rulemaking commences, NMFS should not permit fishing in any fishery that lacks a functioning bycatch plan.

Oceana is prepared to assist you in any way that it can to help ensure that NMFS takes these actions.

FEDERAL LAW REQUIRES BYCATCH MONITORING AND MINIMIZATION

Counting, capping and controlling bycatch is required by several federal statutes and their implementing regulations. In particular, the Magnuson-Stevens Fishery Conservation and Management Act (MSA), the Endangered Species Act (ESA), the Marine Mammal Protection Act (MMPA), and the Migratory Bird Treaty Act (MBTA) require NMFS to count, cap and control bycatch.

I. MAGNUSON-STEVENSONS ACT

A. Statutory Language

Congress added explicit bycatch reduction requirements to the MSA in the Sustainable Fisheries Act Amendments of 1996 (SFA), Pub. L. No. 104-297, 110 Stat. 3559 (1996). The SFA added national standard 9 to the MSA, requiring that “[c]onservation and management measures shall, to the extent practicable, (A) minimize bycatch and (B) to the extent bycatch cannot be avoided, minimize the mortality of such bycatch.” 16 U.S.C. § 1851(a)(9). The SFA also added a requirement that fishery management plans (FMPs) minimize bycatch and bycatch mortality. *Id.* § 1853(a)(11). Therefore, any FMP or regulation prepared to implement an FMP *must* contain measures to minimize bycatch in fisheries to the extent practicable.

The SFA also added the requirement that FMPs “establish a standardized reporting methodology to assess the amount and type of bycatch occurring in the fishery.” 16 U.S.C. § 1853(a)(11). In order to “assess the amount and type of bycatch occurring in [a] fishery,” a reporting methodology must be reasonably reliable. What is more, the MSA authorizes the Secretary to “require that one or more observers be carried on board a vessel of the United States engaged in fishing for species that are subject to [a fishery management] plan,” *id.* § 1853(b)(8), and gives the Secretary “general responsibility to carry out any fishery management plan or

amendment approved or prepared by him,” *id.* § 1855(d). The statute therefore gives the Secretary the authority to require observers and, where they are necessary to properly account for bycatch, requires him to do so.

Most fisheries in the United States rely on logbooks compiled by fishers to monitor the amount and type of marine organisms (including fish, marine mammals, sea turtles, and invertebrates) that are discarded during fishing trips. Especially in light of acknowledged bycatch underreporting in certain fisheries (including New England groundfish and pelagic longlining for highly migratory species), this system cannot be considered reasonably reliable. Thus, the MSA requires greater observer coverage than the extremely meager levels that currently exist.

B. Implementing Regulations

NMFS has promulgated its interpretation of national standard 9 and the bycatch reporting requirements of the MSA in its national standard guidelines. With respect to reporting, the guidelines provide:

[a] review, and, where necessary, improvement of data collection methods, data sources, and applications of data must be initiated for each fishery to determine the amount, type, disposition, and other characteristics of bycatch and bycatch mortality in each fishery When appropriate, management measures, such as at-sea monitoring programs, should be developed to meet these information needs.

50 C.F.R. § 600.350(d)(1).

With respect to bycatch control requirements, the guidelines require that regional fishery management councils “consider the bycatch effects of existing and planned conservation and management measures.” *Id.* § 600.350(b). See also *id.* § 600.350(d)(2) (requiring analysis of bycatch effects of all measures). In undertaking the required analysis, the guidelines specify that “[t]he priority under [national standard 9] is first to avoid catching bycatch species where practicable. Fish that are bycatch and cannot be avoided must, to the extent practicable, be returned to the sea alive.” *Id.* § 600.350(d). NMFS goes on to list multiple factors that should be considered in evaluating the practicability of measures that could minimize bycatch.³ See *id.* § 600.350(d)(3).

C. Federal Court Interpretations

Two federal courts have already held NMFS in violation of the law for its failure to count, cap and control bycatch. The United States District Court for the District of Columbia recently found that the Northeast Multispecies FMP governing groundfish fishing in New England violated the MSA. The court held that “by keeping intact the status quo, [NMFS] refuse[s] to give effect to the clear will of Congress, which expressly directed [NMFS] to more accurately measure and reduce bycatch.” *Conservation Law Found. v. Evans*, No. 00-1134 (D.D.C. Dec. 28, 2001), slip op. at 21. Furthermore, the court found “that after the SFA was enacted, Defendants adopted no new measures to minimize bycatch and bycatch mortality. . . . Such an approach both ignores and frustrates the will of Congress.” *Id.* at 24.

Similarly, in August 2001, the United States District Court for the Northern District of California decided a case concerning the Pacific groundfish fishery. *NRDC v. Evans*, 168 F. Supp. 2d 1149 (N.D. Cal. 2001). In

³ The guidelines also appear to identify factors that should be considered if a council desires to implement “a management measure that does not give priority to avoiding the capture of bycatch species” because of the “net benefits to the Nation.” 50 C.F.R. § 600.350(d). Because the MSA sets a practicability standard, not a “net benefits” standard, see 16 U.S.C. §§ 1851(a)(9), 1853(a)(11), this section of the guidelines is unlawful. Oceana requests, as part of this petition, that the illegal guidance be rescinded.

that case, environmental groups challenged fishing quotas that were first based on the assumption that there was *no* bycatch of two severely overfished species, and then were amended by relying on data from a 15-year-old study. The court held that

[t]he 1996 SFA amendments to the MSA require that NMFS ‘establish a standardized reporting methodology to assess the amount and type of bycatch occurring in the fishery and . . . minimize bycatch.’ NMFS has not done this. Evidence . . . points to increasing bycatch percentages for bocaccio and lingcod as landing limits necessarily decline to protect the species. NMFS has not accounted for this evidence of increased bycatch percentages in its specifications, instead using static estimates that are 15 years old. NMFS has not observed to [*sic*] its duty to obtain accurate bycatch data. Nor has the agency bothered to explain its decision to ignore these factors and not adjust . . . bycatch percentages in the face of evidence that it should They are thus “not in accordance with the law.”

Id. at 1154 (first ellipsis in original, citation omitted).

In sum, there can be no doubt that NMFS must count, cap and control bycatch pursuant to the MSA.

II. ENDANGERED SPECIES ACT

The ESA requires NMFS to count, cap and control endangered and threatened species bycatch. The ESA prohibits any take (including bycatch) of endangered species, see 16 U.S.C. § 1538(a), and it also protects threatened species. After a marine species is listed as endangered or threatened, NMFS must prepare and implement a recovery plan to guide regulatory efforts to recover the species. *Id.* § 1533(f).

NMFS may allow endangered or threatened species bycatch resulting from a federally-authorized activity (such as fishing) through an incidental take statement generated after consultation. The ESA requires federal agencies to ensure that their activities do not jeopardize the continued existence of any endangered or threatened species. *Id.* § 1536(a)(2). Thus, in its role as fisheries regulator, when a fishery it authorizes is likely to affect a listed species by taking bycatch, or NMFS proposes to change the regulations for that fishery in a way that is likely to affect a listed species by allowing bycatch, NMFS must consult with the agency that regulates marine wildlife. *Id.* § 1536(a)(3). In its role as the agency that regulates marine wildlife, NMFS, upon being consulted by itself, is required to issue a biological opinion determining whether the fishery is likely to jeopardize the continued existence of the listed species. *Id.* § 1536(b)(3)(A). If NMFS finds jeopardy, it must set forth reasonable and prudent alternatives which would allow the fishery to go forward without jeopardizing the species. *Id.* Moreover, to permit takes NMFS must issue an incidental take statement specifying the impact of the fishery’s bycatch on the species, the reasonable and prudent measures that must be taken to minimize that impact, and the terms and conditions under which the fishery can go forward. *Id.* § 1536(b)(4)(C).

In sum, the ESA tightly regulates the incidental catch of endangered species. The statutory provisions outlined above require NMFS to count, cap and control bycatch of endangered and threatened species.

III. MARINE MAMMAL PROTECTION ACT

The MMPA, 16 U.S.C. §§ 1361-1421h, establishes a “moratorium” on takes of marine mammals, *id.* § 1371. The Act includes an exception for commercial fisheries, allows incidental takes, but creates a regulatory system that strives to avoid and minimize takes. Specifically, the MMPA provides that “it shall be the immediate goal [of the MMPA] that the incidental mortality or serious injury of marine mammals occurring in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate” by April 30, 2001. *Id.* § 1387(a)(1).

The MMPA establishes a complex regulatory system to achieve this goal. The Act requires NMFS regularly to assess marine mammal populations, categorize fisheries according to how often they take marine mammals, develop conservation plans to rebuild depleted marine mammal populations to optimal levels, and produce take reduction plans for fisheries that take depleted marine mammals. 16 U.S.C. §§ 1383b, 1386, 1387. Within six months of implementation, take reduction plans must reduce take to levels less than the potential biological removal level, defined as “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.” *Id.* §§ 1362(20), 1387(f)(2). Within five years, take reduction plans must reduce take to insignificant levels approaching zero. *Id.* § 1387(f)(2). The MMPA requires NMFS to closely monitor marine mammal takes, *id.* 1387(d), and to issue a report by April 1998 describing the progress of the nation’s fisheries towards the zero mortality goal, *id.* § 1387(b)(3).

In short, NMFS must count, cap, and control bycatch of marine mammals in order to comply with the MMPA. It has failed to do so. Indeed, nearly four years after the 1998 deadline established by the MMPA, NMFS has not submitted the report on its progress. This delay not only violates the law, it demonstrates that the agency has failed to evaluate its progress in reducing marine mammal bycatch in commercial fisheries. Further, NMFS has failed to meet the requirement to reduce marine mammal bycatch to insignificant levels by April 2001.⁴

IV. MIGRATORY BIRD TREATY ACT

The MBTA, 16 U.S.C. §§ 703-712, prohibits taking any migratory bird, including seabirds, except as permitted by regulations issued by the Department of Interior. *Id.* §§ 703, 704. NMFS is required to ensure that its fishery management actions comply with the MBTA. 16 U.S.C. § 1854(a), (b); *Humane Soc’y of the United States v. Glickman*, 217 F.3d 882, 888 (D.C. Cir. 2000) (MBTA applies to federal agencies). An applicable Executive Order requires NMFS to develop and implement, by January 2003, a Memorandum of Understanding with the Fish and Wildlife Service (FWS) that “shall promote the conservation of migratory bird populations.” Executive Order 13186, Responsibilities of Federal Agencies to Protect Migratory Birds § 3(a) (January 10, 2001). For its part, the FWS states in its Waterbird Bycatch Policy Statement that its goal is the “elimination of waterbird bycatch in fisheries.” In sum, NMFS must monitor and report the bycatch of seabirds that occurs in fishing operations and take steps to reduce seabird bycatch.

In February 2001, NMFS issued a National Plan of Action for reducing seabird bycatch. That plan of action deferred taking any action to address seabird bycatch until a national seabird bycatch assessment had been done. Additionally, the document states that it is a voluntary document and does not appear to recognize that NMFS has any responsibility to protect seabirds under the MBTA.

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In sum, bycatch remains a serious problem in United States fisheries. Several federal laws require NMFS to count, cap and control all forms of bycatch. Pursuant to 5 U.S.C. § 553(e), we formally request that NMFS immediately undertake a rulemaking to fulfill these statutory objectives. We also formally request that this rulemaking include the actions described in the four-point outline at the outset of this letter.

Very truly yours,

⁴ Marine Mammal Commission (MMC). 2001. Annual Report to Congress 2000. Bethesda, MD: Marine Mammal Commission.

Stephen E. Rody
President

Enclosure

Cc: The Honorable Conrad C. Lautenbacher, Jr.
Under Secretary for Oceans and Atmosphere and NOAA Administrator

The Honorable William T. Hogarth, Ph.D
Assistant Administrator for Fisheries