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*Where the Rubber Meets the Road:
Stakeholders and the Take Reduction Teams of the
Marine Mammal Protection Act*

Suzanne Iudicello⁶⁹

In my opinion, the presentations this morning have been quite pessimistic. We have talked a lot about conflict. Yes, I am a lawyer, and yes I did participate in the *Kokechik* case,⁷⁰ which was one of the first cases that opened up the notion that interactions between protected species and fisheries was an area that had to be paid attention. Nonetheless, I do believe in the old style of conflict resolution and really do yearn for those safe, civic places where people can talk about problem-solving. That is what I am going to touch on in my presentation.

As I go into the material, I would like to acknowledge the contribution of my colleague, Nina Young, of the Ocean Conservancy, who was co-author of a law review article⁷¹ with me on which this talk is based in part, and who helped me get up-to-date on the marine mammal take reduction teams.

I would like to describe to you what the take reduction teams are. Take reduction teams were created under the Marine Mammal Protection Act⁷² amendments of 1994. I would like to walk you through them with four questions in mind. So let us keep these questions in our heads as you hear all these details about dates and people that I am going to talk about.

- What was successful about the take reduction team process?
- Did those teams provide an alternative to litigation?
- What did not work about them?
- Can that process be applied in other marine resource conflicts?

69. Independent consultant, Junkyard Dogfish Consulting, and writer on fisheries issues, who participated in the litigation in 1987 that began the examination of interactions between fisheries and marine mammals under the Marine Mammal Protection Act. See note 70.

70. *Kokechik Fishermen's Ass'n v. Secretary of Commerce*, 839 F.2d 795 (D.C. Cir. 1988), cert. denied, 488 U.S. 1004 (1989).

71. Nina M. Young & Suzanne Iudicello, *Blueprint for Whale Conservation: Implementing the Marine Mammal Protection Act*, 3 OCEAN & COASTAL L.J. 149 (1997) (discussing the implementation of the MMPA's incidental take provisions); see also Nina M. Young, *The Conservation of Marine Mammals Using a Multi-Party Approach: An Evaluation of the Take Reduction Team Process*, 6 OCEAN & COASTAL L.J. 293 (2001).

72. 16 U.S.C. 1361-1407 (1994 & Supp. 2000).

Are take reduction teams a possible solution? We are all talking this morning about how we wish we could find an answer to conflict and an alternative to litigation. Do these teams give us one possibility?

I will begin with a little background. The MMPA was one of those command and control laws that was passed in the fervor of the environmental movement of the late 1960s and early 1970s. The premise was that marine mammals are species of special concern that need to be protected. Marine mammal numbers were declining, and Congress saw fit to stop that by setting in place a policy that basically declared you could not kill marine mammals, unless you were allowed to by a series of permits and applications.

The MMPA was amended in 1988 and again in 1994. The reason for considerable attention by the fishing organizations, environmental groups, and NMFS was that fishing operations were taking marine mammals in the course of their work. The first big example was the Japanese driftnet fleet for salmon that operated in the U.S. EEZ into the 1970s and 1980s. That fishery was shut down for a short period of time over marine mammal issues. The *Kokechik* case brought fishermen and environmentalists to the table to figure out what was going to be done with the fishery. It was fine when Alaska fishermen and national environmental groups were together filing a lawsuit against the Japanese over our salmon, but now U.S. fishermen were going to take marine mammals and we were going to get shut down. So we attempted to figure out what we could do about it.

My colleagues earlier today described that litigation can have some benefits. It is a tool akin to the two-by-four the muleskinner uses to wop the mule up the side of its head to get its attention. Then you can lead the mule down the road. I would not agree though with Mr. Tienson that once you wop the mule over the head that the door is then open for trust and communication. I think the mule probably hates your guts, though he still might follow you down the road.

In any case, there were some changes in 1988 to the MMPA creating an interim exemption program where fishermen were allowed to have incidental takes of marine mammals, but provisions in the law called for a subsequent plan on how takes were going to be reduced. That brings us to the 1994 amendments. The premise of the 1994 amendments was that allowing incidental takes in fishing was going to be based on the status of the marine mammal population. This involved finding out the status and trend of a species, what the fishing operation was doing, determining which fisheries were interacting with marine mammals, how many they were taking, what were the biological limits, and how many could be taken incidentally in the course of fishing before such takes really affected what was going on with the population. Those 1994 amendments were developed out of a recommendation that was a joint proposal negotiated

between fishing groups and environmental groups. These groups sat at many, many tables for months and months with a formal facilitation process, and they devised a proposal that they took to Congress and that was enacted into law with modifications.

The section of the law that bears most on this discussion today was one that created a process for planning to reduce incidental takes of marine mammals in fisheries over time.⁷³ The planners were to be fishermen, environmental groups, academics, scientists, agency managers, gear experts, and any other interested parties. These teams were to develop a plan for each stock that was a strategic stock. A strategic stock meant that there was a human-caused mortality that was significant to the population, that there was fishing mortality as a subset of the human-caused mortality, and that the injury and mortality were both significant. The plans were anticipated to include both regulatory and non-regulatory measures, so they could have voluntary ideas, rules, and research ideas. There was a lot of flexibility.

The one thing that was not flexible was how fast this had to get done. There was a six-month deadline by which the takes of marine mammals had to be below what was termed potential biological removal (PBR). PBR is a calculated number that says you can take up to a certain number and not have an adverse effect. Incidental takes in fishing operations had to be below that PBR within six months.

The idea was that the take reduction teams would come up with a consensus proposal. That proposal would go in draft to NMFS, which would then publish the draft plan and some proposed regulations to implement it in the *Federal Register*. There would be a period of public comment, the proposal would be put in final form, and the plans would then go into operation on the fishing grounds. Ideally, we anticipated seeing quick reductions of these interactions.

The agency convened six teams in the period between 1996 and 1997. The teams were: (1) Pacific Offshore Cetaceans; (2) Atlantic Offshore Cetaceans; (3) Gulf of Maine harbor porpoise; (4) Mid-Atlantic harbor porpoise; (5) Atlantic large whale, and that last one has not been convened, so we will not talk about it just yet.

These five teams were to be convened and operated with the help of a professional facilitator, who was contracted to pull together lists of people who could participate. NMFS always had representatives on the teams. The teams met five to eight times over a six-month period. You can see [referring to transparency] that a lot of this was going on simultaneously and for many of the fishing groups and environmental groups, sometimes

73. 16 U.S.C. § 1387.

Team	Members	Meeting Location	First Meeting	Draft to NMFS	Draft Plan/ Proposed Regulations Published	Final Regs Published	Follow-up Meetings
Pacific Offshore Cetacean	12	San Diego Los Angeles San Francisco	Feb. '96	Aug. '96	Feb. '97	Oct. '97; May '98; Jan. '99	May '97; June '98; May '99 2000, 2001
Atlantic Offshore Cetacean	18	Boston	May '96	Nov. '96	Not published	Partial May '99 Dec. '98	Disbanded
Gulf of Maine Harbor Porpoise	22	New England (outside Boston)	Feb. '96	Aug. '96	Aug. '97	Dec. '98	Dec. '97; Oct. '99; Dec. '00
Mid Atlantic Harbor Porpoise	32	Virginia Beach Washington, DC	Mar. 97	Aug. '97	Sept. '98	July '97; Feb. '99	Feb. '99; Feb. & Apr. '00; June '01
Atlantic Large Whale	32	Boston	Sept. '96	Feb. '97	Apr. '97		
Atlantic Bottlenose Dolphin	TO BE CONVENED						

the same person was participating. This resulted in a tremendous personal commitment for individual stakeholders and for the agency, too. You really had to make a huge commitment of time to participate, and the stakeholders did their work.

The cost was not just personal in terms of the time commitment of the participants. The agency had to prepare marine mammal stock assessments. They had to make status determinations. They had to provide all this information to the teams, as well as, convene the teams and pay the facilitators and so on. This process cost about \$5 million a year. It was not cheap.

As you can see [referring to transparency] the teams pretty much did their job in the six-month time period. They came up with a host of practical methods to reduce their interactions and harm to marine mammals. I am not going to go through all of them here because we do not have that much time, but the ideas that the fishermen, the gear people, the environmental advocates, and everybody else came up with ranged from pingers, which are devices that are put on nets that send out a sound that deters marine mammals away from nets, to closures of which some were seasonal and sometimes related to passage of the animals, such as during whale migrations. Some of the teams even came up with ideas that related to the structure of the fishery. For example, the Atlantic Offshore Cetaceans team decided that the biggest problem they had was overcapitalization of the fishery and that they just needed to reduce effort. If they had fewer boats out there, they would be having fewer incidental takes of marine mammals.

Most of the plans were implemented at least in part. The Pacific Offshore Cetacean team hit below the PBR target right away. In New England, where the takes of harbor porpoise had environmentalists on the brink of litigation for years due to the critically endangered status of harbor porpoise, the take has been below PBR for two consecutive years now. The latest stock assessment for harbor porpoise shows that there are more animals, and that the take is going to be below PBR again, which is great news.

One of the plans that I thought was the most interesting was one that developed when the Mid-Atlantic harbor porpoise team and the New England harbor-porpoise team started looking jointly at their respective ideas. The fishermen in the Mid-Atlantic had been telling NMFS and the take reduction teams that incidental takes of marine mammals did not occur within their fisheries. Observer data were showing dead harbor porpoise, and it turned out that the way fishermen in Virginia geared up, namely the kind of twine they used for their mesh, the size of their mesh, where they deployed, the time of day they deployed, and how they hauled back were not taking marine mammals. However, when their brethren came down from New England and started fishing in coastal waters off the Mid-

Atlantic, the way the New England fisherman geared up was taking marine mammals in significant numbers. As a result, a plan was devised for the Mid-Atlantic area that captured the old notion "when in Rome, do as the Romans do." The final plan that came out integrated a whole menu of options that incorporated fishing practices from the Mid-Atlantic with the direction that if you are going to fish off the coast of Virginia, employ these operational practices, and you will not have a marine mammal problem. Today, this plan has been a success.

Are there any lessons for us to learn from the take reduction teams? What was successful about the process? The first and most obvious thing is that the take reduction team process worked. Takes of marine mammals in fishing operations are below PBR in every plan operating fisheries here except the one where the agency disbanded the team and did not implement the plan, which is another story altogether.

Besides that obvious success, the stakeholder participants found a lot to like about the system. NMFS contracted for an evaluation by the facilitators of the process, and overall the participants felt that they could express their views, that they had a venue for exchanging information, and that even when they did not reach consensus they thought the process was worthwhile simply because they had an opportunity to express their ideas and talk to their colleagues and adversaries.

Another positive outcome of the team approach was that it fostered ingenuity. The practical problem-solving atmosphere that was created in the take reduction teams made room for ideas that could be discussed among the fishermen, the gear experts, the conservation advocates, and the managers. The Mid-Atlantic harbor porpoise take reduction team is an excellent example of this ingenuity. There were other areas that proved to be creative problem solvers as well. In the Pacific Offshore Cetacean team, for example, the team tried their first experiment with pingers, which was very successful, but then they figured out the way they were deploying the pingers was dangerous to the fishermen and that a different head-rope length was necessary. The team met again and modified the pinger specifications. The take reduction team process is a very interactive process, and all the take reduction teams continue to talk on a regular basis.

Did the take reduction teams provide an alternative to litigation? Yes and no. Conservation groups sued in 1998 to compel NMFS to implement the plans that the Gulf of Maine and Mid-Atlantic harbor porpoise teams actually submitted.⁷⁴ Those advocates would argue that they sued to implement what the parties agreed to and, in fact, were supporting the

74. Plaintiff's Complaint, *Center for Marine Conservation v. Daley* (D.D.C. 1998) (Civ. No. 1:98CV02029 EGS).

process. Litigation in and of itself can be very threatening to people and it has, according to some folks I have talked to, created some mistrust and eroded the relationships that they had built over the course of the team deliberations.

In the case of northern right whales, on the other hand, conservation groups maintain that if the take reduction team had not existed as a venue to discuss how to reduce fishing-caused mortality of these critically endangered whales, they would undoubtedly have taken the agency to court under the ESA not the MMPA. Now the Atlantic large whale team is moving ahead with discussions. They have got some measures in place, and they are working on critical habitat issues and gear testing, in addition to pushing the use of nets with weak links, which allow for whales to pass through. They are testing these weak links nets to see how far they can go. So in some cases the take reduction team process did stop litigation, while in other cases it did not.

So what did not work? What do we want to continue from the take reduction teams? The survey of the participants conducted by RESOLVE, Incorporated, who was the facilitator for the meetings and conducted the survey, offers information on process design, participant selection, timing, and preparation for the meetings. I would suggest it is a good resource for anyone who is looking to follow this model.

The most significant problem that participants cited is the disconnection between the teams and the agency. NMFS had the six-month statutory deadline to meet. This deadline was too short to both learn about the issues and reach consensus. The teams worked as fast as they could, then they gave their plan to NMFS, and sometimes it was a year or possibly two years before the agency acted on the plans by which time other events had overtaken the plans.

The most disruptive case of this was the Atlantic Offshore Cetacean team whose recommendations were made irrelevant by the discontinuation of the very fisheries they were working on: the pair trawl and driftnet fisheries for swordfish. So from the standpoint of the fishing industry and the conservation community that decision obviated the process and made them very reluctant to come back again and participate in something where they did not think their work was going to be used. An environmentalist participant noted that NMFS had forced the group to litigate on the environmental side.

So can the take reduction team process be applied in other marine resource conflicts? It might be too soon to tell, but the Pacific Offshore Cetacean team, which is held out by many as the definitive model, gives us reason to look for opportunities. Not only did the Pacific Offshore Cetacean team reach its objective, they also voluntarily took on another resource conflict issue by looking at marine turtle problems. At its last

meeting this year, the Pacific Offshore Cetacean team was examining how to integrate what is being done under the MMPA with what is required under the Magnuson Act to open the fishery and what is required under the ESA to protect marine turtles. They are making recommendations to NMFS on how to develop reasonable and prudent alternatives under the ESA that were actually developed under the take reduction team's open discussion, give-and-take process. If this model is to be applied successfully in other conflicts, we have to make some improvements. I look forward to discussing during the panel what those might be.