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December 15, 2005

Gerry Leape
Vice President for Marine Conservation
The National Environmental Trust
1200 18th Street NW
Washington, D.C. 20036

Re: Prohibition on the Importation of Fish from Salmon Farms Where Seals are Shot

Dear Mr. Leape:

In response to your request, this letter provides a legal opinion as to whether action can be taken under the Marine Mammal Protection Act ("MMPA") against foreign aquaculture companies engaged in the practice of shooting seals or sea lions to deter them from remaining in the vicinity of net pens used for salmon farming.

Aquaculture operations, particularly those involving salmon and other fish farming, often result in interactions with pinniped populations. Salmon aquaculture operations concentrate large numbers of seal and sea lion prey in relatively small net pen areas, and accordingly attract seals and sea lions to the vicinity of the net pens. To deter marine mammals from remaining near the pens, certain salmon farmers in foreign countries use seal bombs or other explosives to scare the seals away, or shoot at or near the seals. The practice of shooting seals near net pens is fairly common in Canada (where a license is required), parts of Europe, and Chile, but is prohibited in the United States by the MMPA. There are non-lethal methods of deterrence, such as double net pens, that are effective at keeping seals from preying on farmed salmon.

The problem is becoming quite significant. It is reported that over 5,000 sea lions and seals have been killed since 1990 in British Columbia. In Chile, one account indicates that thousands of sea lions are shot and killed each year by guards hired expressly for that purpose. An estimated 3,500 seals die annually from gun shots in Scotland. This practice also takes place in Norway.

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The MMPA prohibits the "take" of any marine mammal. 16 U.S.C. § 1371. "Take" is defined as "harass, hunt, capture, or kill, or attempt to harass, hunt, capture or kill any marine mammal." *Id.* at § 1362(13). A person may legally take steps to deter a marine mammal from damaging fishing gear or catch, or from damaging private property, but only if deterrence measures do not result in the death or serious injury of a marine mammal. *Id.* at § 1371(a)(4)(A). The Secretary has adopted the following prohibition on lethal take of marine mammals during commercial fishing operations: "[i]t is prohibited to intentionally lethally take any marine mammal in the course of commercial fishing operations unless imminently necessary in self-defense or to save the life of a person in immediate danger, and such taking is reported in accordance with the requirements of § 299.6." 50 C.F.R. § 229.3(f). Under the MMPA regulations, the definition of "commercial fishing" includes aquaculture operations. *Id.* at § 229.2(2).

Shooting at or near a marine mammal to deter it from fishing gear or catch during commercial fishing is considered a "take" under the MMPA, regardless of whether the animal is struck. *In re Datz*, 1995 WL 1311356 (N.O.A.A. 1995). In addition, the National Marine Fisheries Service took administrative action through a proposed rule providing deterrence regulations and guidelines, published on May 5, 1995. 60 Fed. Reg. 22345. While final agency action has not yet been taken on the proposed rule, the guidelines reflect the agency's clear view that lethal deterrence, including shooting at pinnipeds, is prohibited under the MMPA. For example, the guidelines state that "NMFS proposes to prohibit the use of firearms or other devices that propel injurious projectiles." *Id.*

Under the MMPA, the intentional lethal taking of pinnipeds is permitted only in the very limited circumstances of where a State applies to the Secretary for authorization to remove individually identifiable pinnipeds which are having a significant negative impact on the decline or recovery of certain salmonid fishery stocks. 16 U.S.C. § 1389. Salmon raised in aquaculture operations are not included in the stocks covered by this exemption, and therefore deterrence methods which kill or seriously injure the seals are prohibited. In addition, taking of marine mammals may be permitted incidental to commercial fishing operations. *Id.* at § 1387. However, shooting pinnipeds for deterrence purposes is not covered by this authorization. As a result, under the MMPA, persons subject to the jurisdiction of the United States would be prohibited from the practice of shooting pinnipeds at salmon net pens.

The MMPA prohibits importation of illegally taken marine mammals, or of fish that are caught in a manner which would violate the MMPA if the fish are caught in the United States. Section 102(c) of the MMPA provides that:

[i]t is unlawful to import into the United States any of the following: . . .

(3) Any fish, whether fresh, frozen, or otherwise prepared, if such fish was caught in a manner which the Secretary has proscribed for persons subject to the jurisdiction of the United States, whether or not any marine mammals were in fact taken incident to the catching of the fish.

Id. at § 1372(c)(3).

This prohibition has direct application to the practice of using lethal deterrence against seals and sea lions at net pens in foreign countries. Clearly, the use of lethal deterrence in these circumstances is "proscribed" under the MMPA and its implementing regulations. In addition, there is no question that the use of these practices is part of the "manner" by which fish are "caught" at foreign salmon farms. The regularity with which lethal deterrence is employed and the use of standardized practices such as hired guards establishes that this practice is part and parcel of those fishing operations.

Added support for this interpretation can be found in the legislative history of the MMPA. Congress explained that, once the Secretary acts to control the types of gear "that can be used in commercial fishing", section 102(c)(3) "would also ban the importation of fish" caught by those methods. S. Rep. 824, 92d Cong., 2d Sess. 15 (1972). While concluding that the prohibition would "close the United States market to the tuna fish caught in this fashion," the Senate Report makes it clear that the prohibition applies to any "commercial fishing." The House Report reaches the same conclusion, stating: "[section 102(c)(3)] also prohibits the importing of fish caught outside of the United States where the fish were caught by techniques which the Secretary concludes are injurious to marine mammals." H.R. Rep. 707, 92d Cong., 1st Sess. 24 (1972).

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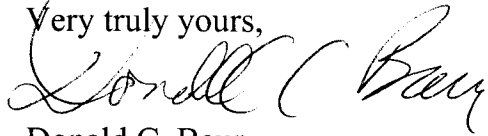
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Under this legislative history, the shooting of seals at salmon farm net pens is clearly prohibited. Not only does the MMPA itself prohibit lethal take of this nature, but the Secretary has taken regulatory action to "proscribe" this activity.

As this analysis makes clear, the MMPA provides a strong and directly applicable legal tool to address this problem. Fish caught from the salmon farms operated by companies in foreign countries that engage in lethal deterrence is subject to the importation ban of section 102(c)(3). In addition to the clear prohibition against importation of fish from salmon farms where seals are shot under section 102(c)(3), it is possible that this activity may fall within the scope of section 101(a)(2) of the MMPA and the related import restrictions. This is a question that would require further analysis. We would be happy to consult with you further on this issue.

Please contact me if you have any questions about this analysis.

Very truly yours,

A handwritten signature in cursive script that reads "Donald C. Baur". The signature is written in black ink and is positioned above the printed name.

Donald C. Baur

DCB:jlz