

MARINE MAMMAL COMMISSION
4340 EAST-WEST HIGHWAY, ROOM 905
BETHESDA, MD 20814

24 November 2006

Mr. Christopher E. Yates
Marine Mammal Branch Chief
National Marine Fisheries Service
Protected Resources Division
Pacific Islands Regional Office
1601 Kapiolani Boulevard, Suite 1110
Honolulu, HI 96814

Dear Mr. Yates:

The Marine Mammal Commission, in consultation with its Committee of Scientific Advisors on Marine Mammals, has reviewed the Service's *Federal Register* notice announcing its intent to prepare an environmental impact statement to assess the potential impacts on the human environment that could result from regulations being considered to protect wild Hawaiian spinner dolphins, and to assist in selection of a preferred alternative to mitigate impacts people are having on the dolphins. The Service is requesting public comments on issues that should be addressed in the environmental impact statement.

RECOMMENDATIONS

The Marine Mammal Commission provided comments on the Service's advance notice of proposed rulemaking by letter of 13 January 2006 (enclosed and incorporated here by reference). In that letter, the Marine Mammal Commission recommended that the Service adopt a multi-faceted approach to protect spinner dolphins and the habitat on which they depend. Thus, the Marine Mammal Commission recommends that, in drafting its environmental impact statement, the Service develop a preferred alternative that includes time/area closures, restrictions on operating conditions (e.g., speed limits), and codification of the Service's existing guidelines for viewing spinner dolphins.

The Marine Mammal Commission further recommends that the draft environmental impact statement focus not only on the taking prohibition of the Marine Mammal Protection Act as the statutory basis for possible regulations to protect spinner dolphins but also discuss the independent authority under sections 2(2) and 112(a) of the Act as an additional basis for regulations designed to protect essential habitats, such as spinner dolphin resting areas.

RATIONALE

As reflected in its comments on the advance notice of proposed rulemaking, the Commission believes that the problems of spinner dolphin harassment and human intrusion into dolphin resting areas are multi-faceted and will require a solution based on multiple approaches. As

such, we do not believe that the establishment of partial time/area closures as the sole regulatory mechanism for addressing these problems should be the preferred alternative, as the Service appears to be proposing in its *Federal Register* notice. Among the drawbacks of relying exclusively on partial time/area closures, are that this approach would --

- (1) “lock in” areas based on existing data and the current understanding of spinner dolphin behavior. The Commission believes that a more flexible regulatory approach to establishing time/area closures would be preferable, whereby the Service could modify time and area closures as new data and circumstances warrant without the need for additional rulemaking;
- (2) likely result in swimmers and boaters being able to intercept dolphins as they travel to and from closed areas and/or shifting the focus of swimming and boating activities to areas that are not closed, thereby putting additional stress on animals that use those habitats; and
- (3) likely omit some areas where spinner dolphins occur regularly but where closures would not be practicable (e.g., small bays that provide access points where island residents engage in swimming, fishing, etc.).

Therefore, as we recommended in our 13 January 2006 letter, the Service should look to a combination of approaches that --

- closes certain areas (e.g., those areas identified as the most important resting areas) to all human activities, either during specified hours or when dolphins are present;
- allows access to other areas used by dolphins subject to certain operating conditions (which might include speed limits, limits on the number of vessels, etc.);
- establishes generally applicable rules for all other areas, specifying minimum approach distances (e.g., no approaches closer than 50 yards) and other limitations (e.g., no touching animals, no pursuing animals, etc.); and
- provides the maximum possible clarity for enforcement purposes.

Although all of these elements are encompassed in the alternatives identified in the *Federal Register* notice, nowhere does the Service indicate that it is considering an alternative that would use these approaches collectively.

As a related matter, the Commission believes that the discussion of “Current MMPA Prohibitions and NMFS Guidelines and Regulations” is unnecessarily focused only on the taking prohibition of the Act. Nowhere does it mention the Service’s responsibility to take steps to protect essential marine mammal habitat or the tools available under the Act that enable it to do so. This shortcoming needs to be addressed in the draft environmental impact statement.

The Commission also questions the characterization of Alternative 1, the “No Action Alternative.” Under this alternative, no additional regulatory action would be taken. The Service


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notes that this would perpetuate the status quo, with the likely result that “the current (and increasing) frequency and intensity of human interactions with spinner dolphins would likely continue.” As we have indicated in previous letters to the Service concerning spinner dolphins, some of these problems could be alleviated if the Service enforced the existing taking prohibition more aggressively. Although we support the Service’s proposal to issue new regulations to clarify which activities are allowed and which are prohibited, and to enhance enforcement of the taking prohibition, opting not to promulgate such regulations would not necessarily have to result in a continuation of the existing law enforcement policy regarding human dolphin interactions. A sub-alternative that should be considered under the No Action Alternative is to improve enforcement of the existing prohibition.

The Commission reiterates its desire to work closely with the Service as it develops a proposed rule. Also, we note that development and effective enforcement of regulations will require strong involvement by the State of Hawaii’s Department of Land and Natural Resources, and we encourage the Service to involve the state fully in this process as it proceeds.

Please let me know if you have any questions concerning these comments and recommendations or if you would like to discuss them further.

Sincerely,



Timothy J. Ragen, Ph.D.
Executive Director

Enclosure

cc: w/enclosures: William T. Hogarth, Ph.D.
Mr. James H. Lecky
Mr. Peter Young