

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

25 January 2005

VADM Conrad C. Lautenbacher, Jr., Ph.D.
Under Secretary for Oceans and Atmosphere
Department of Commerce
14th Street and Constitution Avenue, N.W.
Washington, D.C. 20230

Dear Admiral Lautenbacher:

The Marine Mammal Commission and its Committee of Scientific Advisors on Marine Mammals held their annual meeting 26-28 October 2004 in Hawaii to review issues related to the conservation of marine mammals, with a special focus on Hawaii and the Pacific islands area. We were pleased that staff members from the National Oceanic and Atmospheric Administration (NOAA), particularly the National Marine Fisheries Service (NMFS) and the National Ocean Service (NOS), were able to participate in our discussions. They provided much valuable information and useful insight into the issues that we jointly face.

On the basis of the discussions during our meeting and other information reviewed by us, the Commission and Committee commend NOAA on the many positive measures that it has taken to conserve living marine resources in the Pacific region. Most notably, we commend NOAA for creating the Pacific Islands Regional Office (PIRO) and Pacific Islands Fisheries Science Center (PIFSC) of NMFS to address critical marine resource research and management throughout the Pacific islands. We also recognize and commend the major efforts that staff in various parts of NOAA have made to work cooperatively with their resource management counterparts in other federal and state agencies. In particular, we commend all participants in the range-wide population study of humpback whales in the Pacific Ocean (SPLASH), including the Hawaiian Islands Humpback Whale National Marine Sanctuary, the Southwest Fisheries Science Center, and the National Marine Mammal Laboratory.

We offer the following recommendations on additional steps that we think NOAA should take to further conservation of marine mammals and their ecosystems in the Pacific islands region.

- **The Marine Mammal Commission recommends that NOAA, and particularly NMFS, complete intergovernmental cooperative agreements and provide funding for (1) implementation and enforcement of the Marine Mammal Protection Act (MMPA), (2) activities relating to implementation of section 6 of the Endangered Species Act (ESA), (3) management of the Northwestern Hawaiian Islands (NWHI) Coral Reef Ecosystem Reserve, (4) management of swimmer and boater interactions with spinner dolphins, and (5) coordination of monk seal volunteer efforts on Kauai.**

As the primary federal agency concerned with ocean affairs, NOAA is in a pivotal position to conduct, coordinate, and facilitate the many conservation and management actions that are needed throughout the Pacific islands region. At the Commission's annual meeting many speakers addressed the theme that PIRO, PIFSC, and the NOS's National Marine Sanctuary Program (NMSP) need to work cooperatively with other federal agencies, state and local officials in Hawaii, and the public to manage living marine resources. Given the huge area needing attention, the diversity of issues, and the complex pattern of overlapping jurisdictions, the ability of NMFS and NOS personnel to deal with all issues will always be limited. A number of specific areas where cooperative agreements with willing partners offer good opportunities to improve management are identified in the recommendation above, and NOAA should complete those agreements as quickly as possible. Some of the agreements may facilitate NOAA's ability to transfer funds to cooperators such as the State of Hawaii, and we encourage you to ensure that funding is made available where needed to support cooperative efforts.

- **The Marine Mammal Commission recommends that NOAA, the Fish and Wildlife Service, and the State of Hawaii conclude a Memorandum of Agreement (MOA) to coordinate their management efforts in the NWHI.**

Within the NWHI there are a number of adjacent and sometimes overlapping conservation units and legal jurisdictions including the NWHI Coral Reef Ecosystem Reserve and a potential NWHI national marine sanctuary; the U.S. Exclusive Economic Zone; critical habitat and a protected resource zone established by NMFS to protect monk seals; the Hawaiian Islands and Midway Atoll National Wildlife Refuges; and the State of Hawaii's Kure Island Wildlife Refuge and a proposed marine refuge for all state waters around emergent lands in the NWHI. The need for strong cooperation on managing marine resources in this region is obvious, and development of a MOA to formalize cooperation was mandated by President Clinton in Executive Order 13178. In 2001 regional offices of NOAA's NMSP and NMFS, the Fish and Wildlife Service, and the State of Hawaii, began drafting such a MOA with the purpose of promoting the long-term conservation and protection of coral reefs and the related marine ecosystem in the region through cooperative interagency actions. A draft MOA was completed early in 2003, but it has not yet been approved. Given current management needs and ongoing efforts to develop an ecosystem-based approach for management of the NWHI, approval and implementation of this agreement should be a high agency priority. NOAA should act expeditiously to complete its review of the draft MOA, resolve any concerns it may have with the Fish and Wildlife Service and the State, and finalize and implement the agreement.

- **The Marine Mammal Commission recommends that the NOAA Office of General Counsel establish a regional office in Hawaii to provide legal support for the new Pacific Islands Region.**

All NMFS regional offices other than PIRO have a General Counsel's office affiliated with, and located in, the same city. Attorneys advising PIRO and PIFSC are currently based in Long

Beach, California. To better handle the variety of current issues and those likely to arise, and to appreciate the subtleties involved therein, a NOAA Office of General Counsel in Honolulu would be a significant asset to PIRO, and one should be created.

- **The Marine Mammal Commission recommends that NOAA and NMFS strengthen enforcement of the MMPA as it pertains to human-dolphin interactions in Hawaii, and that cases be brought at least for the most clear instances of harassment. We also recommend that NOAA/NMFS provide additional guidance as to what constitutes harassment as it pertains to this issue, and that they take appropriate actions to clarify and mitigate the situation short of rulemaking.**

Based on discussions at the annual meeting and other information available to us, the Commission believes that some of the ongoing activities involving spinner dolphins and boaters and swimmers in Hawaii unambiguously satisfy the MMPA's definition of harassment (i.e., an "act of pursuit, torment, or annoyance"). Inasmuch as tour operators leave port with the express purpose of finding and getting near dolphins these activities can appropriately be characterized as an act of pursuit, and additional pursuit occurs when a vessel or swimmer follows animals in an attempt to get closer to them. The resulting disruption of behaviors can be measured by the reactions of individual dolphins as they move away from approaching vessels and swimmers or, at the population level, by shifts in usage patterns of traditional resting areas. The Commission reiterates its previous recommendation that greater enforcement attention be given to human-dolphin interactions in Hawaii and that cases be brought at least for the most clear instances of harassment.

At the Commission's annual meeting, there was general agreement by the participants in the discussion of spinner dolphins that some of the difficulty in addressing potentially harmful interactions stems from ambiguity in the statutory definition of the term "harassment". Both the Director of the NMFS Office for Law Enforcement and a representative of the NOAA Office of General Counsel identified this as a significant impediment to pursuing the types of enforcement actions the Commission has recommended. Since enforcement officials believe that they are impeded in their ability to pursue cases by ambiguities in the definition of harassment, it is incumbent on NOAA to resolve those ambiguities. In this regard, NMFS first proposed regulations that would limit approaches to marine mammals in 1992 and revisited the matter in an advance notice of proposed rulemaking in 2002. Currently, efforts to resolve these issues seem to be stalled pending possible legislative action to amend the MMPA's definition of harassment. The Commission agrees that proceeding with a comprehensive rulemaking may be inefficient if changes to the underlying statutory provisions are imminent. Nevertheless, action is needed soon, and the Commission recommends that NOAA/NMFS consider actions that could be taken to clarify and mitigate the situation short of rulemaking. For example, publication of a policy statement that provides explicit guidance and public notice of what NMFS considers pursuit or annoyance of marine mammals, and what activities have the potential to disturb marine mammals, would help clarify for the public and enforcement agents what types of interactions are and are not permissible. Such a policy statement would be most helpful if it were tailored to address the specific situations involving spinner dolphins in Hawaii.

- **The Marine Mammal Commission recommends that, as part of development of the proposal for a NWHI national marine sanctuary, NOAA/NMFS work with the Western Pacific Fishery Management Council (WPFMC) to develop draft fishery management regulations that are consistent with the Executive Orders establishing the NWHI Coral Reef Ecosystem Reserve.**

Executive Orders establishing the NWHI Coral Reef Ecosystem Reserve specifically mandate management of the reserve to protect the region's marine resources following a science-based and precautionary management approach. They also establish specific management measures that limit commercial fishing and direct that efforts to consider designation of the area as a national marine sanctuary "supplement or complement" the provisions of the Executive Orders. In its 9 August 2004 letter to you, the Commission recommended that NOAA's sanctuary proposal adopt fishery management measures that would protect endangered Hawaiian monk seals and the NWHI ecosystem.

The National Marine Sanctuaries Act (NMSA) requires that regional fishery management councils be given an opportunity to draft fishing regulations that meet the stated goals and objectives of any proposed sanctuary. The NMSP worked with the Reserve's Advisory Council (RAC) to develop draft goals and objectives. On 20 September 2004, the Director of the NOS NMSP sent a guidance package to the WPFMC for its use in developing fishery management rules for the proposed NWHI sanctuary, which included a modified version of the goals and objectives recommended by the RAC. During the Commission's annual meeting, a representative of the RAC expressed concern that the changes made by NOS had seriously weakened their recommended goals concerning management of fisheries. Also, a WPFMC representative stated that the Council was considering a new alternative not set forth in the NMSP guidance document, and that procedures under the Magnuson-Stevens Fishery Conservation and Management Act for developing fishing regulations would require a substantially longer time frame than the 120 days provided in the NMSA. The Commission is concerned that the WPFMC is working on this issue in ways that are inconsistent with the Executive Orders, the NMSA, and the needs for protection of resources in the NWHI. We therefore recommend that NOAA pay close attention to this issue, and work with the WPFMC to ensure that any fishery management alternative developed for the proposed sanctuary be consistent with the Executive Orders, provide comprehensive, strong, and lasting protection for the NWHI ecosystem, and protect the prey resources of Hawaiian monk seals.

- **The Marine Mammal Commission recommends that PIRO and the PIFSC be provided increased funding to carry out the full range of research and management activities necessary to conserve marine mammals and sea turtles in the Pacific Islands region.**

As discussed above and in greater detail in the enclosed letters, PIRO and the PIFSC are responsible for a wide range of research and management actions that extend far beyond those that were addressed by the former Pacific Islands Area Office and the Honolulu Laboratory. In many cases, the needed actions were not adequately supported in the past. To meet their research and conservation responsibilities for monk seals, spinner dolphins, humpback whales, and various other

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species of cetaceans throughout Hawaii and the Pacific Islands Region, PIRO and the PIFSC will require operational funds substantially greater than that provided to the former area office and laboratory. Accordingly, we urge NOAA to provide necessary funds to carry out the full range of marine conservation and protection programs.

We hope that these recommendations and comments are helpful to you. Additional specific recommendations relating to these and other topics discussed at our annual meeting are being communicated directly to appropriate administrators and directors. Copies of those letters are enclosed for your information. I would like to contact your office to arrange a time in the near future that Commission Chairman John Reynolds and I could meet with you and your staff to discuss these recommendations.

Sincerely,

A handwritten signature in black ink that reads "David Cottingham". The signature is written in a cursive style with a long horizontal flourish at the end.

David Cottingham
Executive Director

cc: Congressman Neil Abercrombie
Senator Daniel Akaka
Congressman Ed Case
Senator Daniel Inouye
Kitty Simonds

Enclosures