

MARINE MAMMAL COMMISSION
4340 East-West Highway, Room 700
Bethesda, MD 20814-4447

14 May 2009

Rebecca Lent, Ph.D.
Director, Office of International Affairs
National Marine Fisheries Service
1315 East-West Highway
Silver Spring, MD 20910

Dear Dr. Lent:

The Marine Mammal Commission, in consultation with its Committee of Scientific Advisors on Marine Mammals, has reviewed the National Marine Fisheries Service's 14 January 2009 proposed rule (74 Fed. Reg. 2019) regarding illegal, unreported, and unregulated (IUU) fishing activities and bycatch of protected living marine resources (PLMRs). The rule would implement identification and certification procedures under the High Seas Driftnet Fishing Moratorium Protection Act to promote compliance with international fisheries management and conservation agreements and thereby encourage bycatch reduction methods in international fisheries comparable to those in U.S. fisheries. Based on its review, the Marine Mammal Commission offers the following recommendations and rationale.

RECOMMENDATIONS

The Marine Mammal Commission recommends that the National Marine Fisheries Service—

- include in the final rule detailed descriptions of the U.S. standards that will be used to assess comparability of other nations' regulatory regimes or set forth a process for publishing and updating such descriptions elsewhere. To be comprehensive, these standards likely will require both quantitative criteria (i.e., limits on bycatch rates or numbers) and restrictions on gear types and fishing practices needed to satisfy those criteria;
- establish deadlines for notification, consultation, and certification findings with respect to PLMR bycatch;
- work with the Department of State to protect and conserve PLMRs by prompting protective actions in relevant international fora and seeking to amend treaties to which the United States is a party. Among other things, those actions and treaties should require the collection and sharing of data pertaining to fishery interactions, stock status, bycatch estimates, and implementation of bycatch mitigation measures;
- revise the proposed rule to provide greater detail on the types of data and information it will require from nations and the standards it will use to judge the sufficiency of documentary evidence for certifying them;
- establish procedures that would allow other U.S. government agencies, foreign governments, international fishery management organizations, nongovernmental organizations, industry organizations, and the public to provide information pertinent to identification and certification processes. Such opportunities should include a public notice and comment period after the Service receives a response from a nation and prior to formal certification; and

- defer implementation of alternative certification procedures until such time as nations or regional fishery management organizations adopt monitoring and verification procedures coupled with mandatory real-time tracking and documentation of products obtained in compliance with bycatch reduction provisions.

RATIONALE

The Magnuson-Stevens Fishery Conservation and Management Reauthorization Act of 2006 amended the High Seas Driftnet Fishing Moratorium Protection Act to require that the United States address IUU fishing and the bycatch of PLMRs. The Moratorium Protection Act requires the Secretary of Commerce (or the Service, acting on the Secretary's behalf) to identify for Congress those nations whose fishing vessels engage in IUU fishing or fishing practices that result in the bycatch of PLMRs. The Moratorium Protection Act also requires the Secretary to prohibit the importation of fish products from nations certified as having failed to take corrective action against vessels engaged in IUU fishing or the bycatch of PLMRs in excess of U.S. standards.

Comparability Standards

Under the proposed regulations the Service would identify and certify countries based on a comparability requirement. Section 300.203(a)(2) of the proposed rule would require the Service to "take into account if the nation has implemented measures designed to end or reduce such bycatch that are comparable in effectiveness to U.S. regulatory requirements." Section 300.203(d)(2)(i) would require that the nation provide "documentary evidence of implementation, and enforcement, of a regulatory program to conserve such PLMRs that is comparable in effectiveness to regulatory measures required under U.S. law to address bycatch in the relevant fisheries."

The proposed rule does not specify the standards that the Service will use to assess whether a nation's regulatory program is "comparable in effectiveness." However, several U.S. laws and implementing regulations set forth applicable standards. The Marine Mammal Protection Act, for example, contains standards applicable to the bycatch of marine mammals. Section 118(f) requires the development and implementation of a take reduction plan for any fishery or group of fisheries that cause incidental mortality and serious injury in excess of the potential biological removal level of any marine mammal stock. Section 118(b)(1) requires that U.S. commercial fisheries reduce incidental mortality and serious injury of marine mammals to insignificant levels approaching a zero rate. Both the potential biological removal level and zero mortality rate goal are quantitative performance standards to which U.S. fishermen are subject. They also are subject to a variety of process requirements designed to reduce the bycatch of marine mammals. Some of these stem from take reduction plans implemented under the Marine Mammal Protection Act and others are prescribed by international treaties or fishery management plans developed under the Magnuson-Stevens Fishery Conservation and Management Act. These regulations vary among fisheries but may prohibit or require changes in fishing gear (e.g., mesh sizes or the use of pingers) and/or practices (e.g., soak time or net length) or mandate other restrictions (e.g., time/area closures) to avoid or reduce marine mammal bycatch. Together these laws and regulations provide a broad framework for

determining comparability, but the proposed rule does not indicate whether the Service will consider all such requirements in certifying nations or afford them some latitude in implementing the certification program. For the certification process to achieve its objectives, the involved nations must have a clear understanding of the requirements against which they will be judged. To that end, the Service must articulate clear standards for comparability findings. The Marine Mammal Commission therefore recommends that the Service include in the final rule detailed descriptions of the U.S. standards that will be used to assess comparability of other nations' regulatory regimes or set forth a process for publishing and updating such descriptions elsewhere. To be comprehensive, the standards likely will require both quantitative criteria (i.e., limits on bycatch rates or numbers) and restrictions on gear types and fishing practices needed to satisfy those criteria.

Deadlines for Consultations

The proposed rule specifies time lines for notifying and consulting with nations engaged in IUU fishing. However, the rule does not identify similar time lines for notifications and consultations with nations whose fisheries engage in PLMR bycatch. Once the Service has identified those nations, section 300.203(b)(1) would direct the Secretary, acting through the Secretary of State, to notify them. Paragraph 2 would require that the Secretary of State notify identified nations about the requirements under the Moratorium Protection Act, and subsection (c)(1)(3) would require that the Secretary of State initiate consultations. Both actions are required "as soon as possible...."

Although this regulatory language is identical to that in the Moratorium Protection Act (section 610(b)(1) and (2)), the Commission believes the Service should establish specific deadlines for issuing notifications and completing consultations. Doing so is necessary if nations are to achieve compliance with the comparability requirements in a timely manner. Under the IUU fishing provisions, the Secretary has 60 days after submission of the biennial report to Congress to notify identified nations and relevant international fishery management organizations and to initiate consultations. For PLMR bycatch notification and consultation, "as soon as possible" is too vague and open-ended a standard. Without a more explicit requirement, the Service may not complete these processes before the next biennial report is due. More importantly, the Service has not proposed a deadline by which identified nations are to meet the applicable comparability requirements or face certification. Therefore, the Marine Mammal Commission recommends that the National Marine Fisheries Service establish deadlines for notification, consultation, and certification findings with respect to PLMR bycatch.

International Negotiations

The international consultations and negotiations that flow from the identification of a bycatch problem are key elements of the Moratorium Protection Act. Section 300.203(c)(2) of the proposed rule calls on the Secretary, acting through the Secretary of State, to "[s]eek agreements...calling for international restrictions on the fishing activities or practices... that result in bycatch of PLMRs and, as necessary, initiate the amendment of any existing international treaty to which the United States is a party for the protection and conservation of the PLMRs...." One of the most important aspects of such agreements is the collection of information to guide management of

PLMR bycatch. The Service's most recent analysis (NOAA 2008) demonstrates that stock assessments and bycatch estimates are lacking for most pelagic and transboundary cetacean stocks. This also is true for other PLMRs such as sea turtles and sharks. The lack of such basic information will severely hamper the Service's efforts to identify bycatch problems and evaluate the adequacy of a nation's regulatory program.

With respect to sea turtles, the United States has advanced resolutions in several regional fishery management organizations that call on contracting parties to (1) implement sea turtle bycatch mitigation measures, (2) collect and share information on interactions with sea turtles in fisheries that those parties manage, and (3) share information detailing sea turtle/fishery interactions (see enclosure). Section 300.302(d)(2)(ii) of the proposed rule would require nations to provide documentary evidence of a management plan that will "assist in the collection of species-specific data on PLMR bycatch to support international stock assessments and conservation efforts...." Such data are essential for identifying populations being put at risk and establishing protection and conservation priorities. The Service and the Department of State should promote similar resolutions in regional fishery management organizations. Those resolutions should require member nations to gather information for species-specific stock assessments and bycatch estimates in fisheries prosecuted in their waters and for high-seas (international) fisheries in which their vessels participate. The Marine Mammal Commission recommends that the Service work with the Department of State to protect and conserve PLMRs by prompting protective actions in relevant international fora and seeking to amend treaties to which the United States is a party. Among other things, those actions and treaties should require the collection and sharing of data pertaining to fishery interactions, stock status, bycatch estimates, and implementation of bycatch mitigation measures.

Standards for Documentary Evidence

Under proposed section 300.302(d)(2)(i), the Secretary can positively certify a nation only if it has provided "documentary evidence of implementation, and enforcement, of a regulatory program to conserve such PLMRs that is comparable in effectiveness to regulatory measures required under U.S. law to address bycatch in the relevant fisheries." In its certification analyses the Service intends to consider whether the nation under consideration is collecting and sharing data; is implementing an observer program; has implemented bycatch reduction and mitigation strategies, techniques, and equipment (including training and assistance for bycatch reduction technology and equipment); is implementing a program of surveillance, control, and monitoring of fishing activities; and is enforcing bycatch reduction measures. Monitoring and enforcement are essential to any bycatch reduction program. In this regard, the Service must evaluate not only the statutory or regulatory requirements that apply to a fishery, but also the level and effectiveness of a nation's efforts to achieve compliance with them. Experience under the Marine Mammal Protection Act has demonstrated that simple certification by a government official is not necessarily sufficient "documentary evidence" of comparability or effective implementation of what appears on paper to be a comparable program. Wherever possible, the Service should verify information using data from observer programs or regional fishery management organizations. For these reasons, the Marine Mammal Commission recommends that the Service revise the proposed rule to provide greater

detail on the types of data and information it will require from nations and the standards it will use to judge the sufficiency of documentary evidence for certifying them.

Public Participation

The proposed regulations would provide only very limited opportunities for public participation. For example, section 300.204(f) of the proposed rule merely states that “[c]ertification determinations will be published in the biennial report to Congress” but provides no opportunity for public comment. Appropriately, nations are provided with an opportunity to support or refute preliminary certification determinations. The public should be provided the same opportunity. Therefore, the Marine Mammal Commission recommends that the Service establish procedures that would allow other U.S. government agencies, foreign governments, international fishery management organizations, nongovernmental organizations, industry organizations, and the public to provide information pertinent to identification and certification processes. Such opportunities should include a public notice and comment period after the Service receives a response from a nation and prior to formal certification.

Alternative Certification

Proposed section 300.207 would establish an alternative certification procedure whereby the Secretary could allow entry of fish or fish products on a shipment-by-shipment, shipper-by-shipper, or other basis as long as the Service determines that those fish or products were harvested using practices that do not result in protected marine species bycatch or were harvested using practices that—

- (1) are comparable to those of the United States, taking into account different conditions, and
- (2) include the gathering of species-specific data that can be used to support international and regional stock assessments and conservation efforts for protected living marine resources.

The proposed regulations state that “fish or fish products offered for entry under this section must be accompanied by a completed documentation of admissibility form. ... The documentation of admissibility must be executed by a duly authorized official of the country named in the finding and the documentation of admissibility must be validated by a responsible official(s) designated by NMFS.”

The proposed alternative certification process is complex and may not provide sufficient documentation to support an assertion that a particular shipment was harvested in a way that did not result in bycatch of protected species. Negatively certified nations might exploit loopholes in these procedures to ship fish products into the United States through alternatively certified nations or vessels or based on the word of a single government official. The proposed alternative certifications should require rigorous chain-of-custody documentation, greater controls on transshipment than currently exist, and real-time monitoring and verification to substantiate that individual vessels,

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shipments, or shippers fully comply with the bycatch reduction measures. Implementation is likely to tax the Service's limited resources and may undermine the general identification and certification procedures established by these regulations. The Marine Mammal Commission recommends that the Service defer implementation of these alternative certification procedures until such time as nations or regional fishery management organizations adopt monitoring and verification procedures coupled with mandatory real-time tracking and documentation of products obtained in compliance with bycatch reduction provisions.

Please contact me if you wish to discuss the Commission's recommendations or rationale.

Sincerely,

A handwritten signature in black ink, appearing to read "Timothy J. Ragen" followed by a flourish and the word "for".

Timothy J. Ragen, Ph.D.
Executive Director

Enclosure

Literature Cited

Young, N. M., and S. Iudicello. 2007. Worldwide bycatch of cetaceans. U.S. Department of Commerce, NOAA Tech. Memo. NMFS-OPR-36, 276 pp.

Resolution to Reduce Sea Turtle Mortality in NAFO Fishing Operations

Proposal by the United States of America and Japan

Background/Explanatory Memorandum:

At its 26th Annual Symposium on Sea Turtle Biology and Conservation, the members of the International Sea Turtle Society (ISTS) adopted a resolution calling upon the world's regional fisheries management organizations (RFMOs) to urge their members to adopt and implement the FAO "Guidelines to Reduce the Mortality of Sea Turtles in Fishing Operations" (the FAO Guidelines). This ISTS resolution was forwarded to NAFO with a request for action.

It is generally agreed that RFMOs can play a valuable role in support of global adoption and implementation of the FAO Guidelines. Given NAFO's on-going efforts to minimize bycatch and the fledging NAFO initiative on application of ecosystem considerations to the Organization's fisheries management decision-making, NAFO should support global implementation of the FAO Guidelines as appropriate. As the waters of the Convention area include critical foraging habitat for the leatherback turtle (*Dermochelys coriacea*), adoption and implementation of the FAO Guidelines would be both proactive and precautionary.

Thus, it is proposed that, in addition to generally supporting adoption and implementation of the FAO Guidelines, NAFO Contracting Parties should provide information on existing domestic data collection (e.g., species identification, fate and condition at release, relevant biological information, and gear configuration) and/or observer training efforts relating to sea turtle interactions in NAFO-managed fisheries in the NAFO Convention Area.

NAFO should also consider, where appropriate, increasing cooperation both among NAFO Contracting Parties and with other regional, subregional and global organizations, to facilitate sharing of data and development of compatible and appropriate bycatch reduction measures. Such efforts may be enhanced by integration of sea turtle interaction data collection by NAFO observers.

Resolution to Reduce Sea Turtle Mortality in NAFO Fishing Operations

Preamble:

Recognizing the cultural and ecological significance of sea turtles in the Northwest Atlantic Ocean;

Recognizing that the FAO Committee on Fisheries (COFI) endorsed "Guidelines to Reduce Sea Turtle Mortality in Fishing Operations" at its Twenty-sixth Session, held in March 2005, and that these guidelines are directed towards members and non-members of FAO, fishing entities, subregional, regional and global organizations, whether governmental or non-governmental concerned with fisheries management and sustainable use of aquatic ecosystems;

Further recognizing that implementation of these guidelines should be consistent with the Code of Conduct for Responsible Fisheries as well as with the Reykjavik Declaration on Responsible Fisheries in the Marine Ecosystem with regard to ecosystem considerations and based on the use of the best available science;

Taking into account the importance placed by the guidelines on research, monitoring, the sharing of information, and public education on sea turtles;

The Contracting Parties of NAFO resolve as follows:

1. NAFO Contracting Parties (CPs) should, as appropriate, individually and collectively implement the FAO “Guidelines to Reduce Sea Turtle Mortality in Fishing Operations” (the Guidelines) to reduce the incidental catch of sea turtles and ensure the safe handling of all turtles that are captured.
2. NAFO CPs should continue to enhance the implementation of their existing turtle mitigation measures using best available scientific information on mitigation techniques.
3. NAFO should encourage CPs to collect, and provide to the NAFO Secretariat, all available information on interactions with sea turtles in fisheries managed by NAFO in the NAFO Convention Area and urges them to foster collaboration with other CPs in the exchange of information in this area.
4. NAFO should cooperate with other regional, subregional and global organizations to share data on sea turtle bycatch and to develop and apply compatible bycatch reduction measures as appropriate.
5. Beginning in 2007, CPs should provide to the NAFO Secretariat a detailing of sea turtle fishery interaction data (e.g., species identification, fate and condition at release, relevant biological information and gear configuration), including data collected by their respective national observer programs, in fisheries managed by NAFO in the NAFO Convention Area and any sea turtle-specific training provided to these observers. This information will be compiled by the NAFO Secretariat and reported to the Scientific Council and to the Fisheries Commission.
6. The Fisheries Commission should monitor the progress of CPs in applying this resolution and develop relevant strategies for the further consideration of the Commission in 2008. Information produced as a result of this resolution will be provided by the NAFO Secretariat to the FAO.