

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

25 January 2005

William T. Hogarth, Ph.D.
Assistant Administrator for Fisheries
National Marine Fisheries Service
1315 East-West Highway
Room 14564
Silver Spring, MD 20910

Dear Dr. Hogarth:

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 several staff members from the National Marine Fisheries Service (NMFS) 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 NMFS on the many positive measures that it has taken to conserve living marine resources in the Pacific region. We recognize and commend the major efforts that staff in Pacific Islands Regional Office (PIRO) and Pacific Islands Fisheries Science Center (PIFSC) have made to work cooperatively with their resource management counterparts in other federal and state agencies. In particular, we note NMFS's work on a cooperative agreement on managing monk seals with the State of Hawaii Department of Land and Natural Resources pursuant to provisions of section 6 of the Endangered Species Act (ESA). We also commend efforts to develop a cooperative stranding network in the main Hawaiian Islands, and NMFS' leadership and participation in the range-wide population study of humpback whales in the Pacific Ocean (SPLASH) including efforts by the Southwest Fisheries Science Center and the National Marine Mammal Laboratory.

We offer the following recommendations on additional steps that we think NMFS 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 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 research on and management of exploited and protected marine resources, NMFS is in a central position to conduct, coordinate, and facilitate the many conservation and management actions that are needed in the Pacific islands region. At the Commission's annual meeting many speakers addressed the theme that NMFS, especially PIRO and PIFSC, 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 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 NMFS/NOAA should complete those agreements as quickly as possible. Some of the agreements may facilitate NMFS'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 those efforts.

- **The Marine Mammal Commission recommends that NMFS provide support and resources for development and coordination of stranding responses for all marine mammals within the main Hawaiian Islands, as well as other islands in the region.**

The logistical difficulties facing a stranding network in the Pacific islands region are daunting, where the shoreline is dispersed over thousands of miles of the central Pacific Ocean, and among many islands, atolls, and archipelagoes some of which are uninhabited or very sparsely populated. However, development of an effective stranding response network is feasible within the more populated and accessible main Hawaiian Islands. Personnel from PIRO, PIFSC, the Hawaiian Islands Humpback Whale National Marine Sanctuary, State of Hawaii agencies, and the volunteer Hawaiian Islands Stranding Response Group (HISRG) have all collaborated informally in responses to entanglements and strandings. Currently, the HISRG responds to the majority of strandings for which a response is made. The HISRG, however, is based on Oahu, and its ability to respond effectively to strandings on other islands is limited by funds, personnel, and logistics.

At the Commission's annual meeting, representatives from PIRO indicated that a formal stranding network is being developed with a plan to have a coordinator on each of the main Hawaiian Islands. Also, NMFS has established a toll-free hotline that allows members of the public to report strandings in the main Hawaiian Islands. The Commission endorses these efforts and recommends that the stranding network be further developed in consultation with all of the collaborators identified above. We note that an effective stranding network will require sufficient PIRO personnel to respond to stranding events or to coordinate the activities of response personnel from other agencies or volunteer groups, as well as funds for travel, supplies, etc. NMFS should provide the resources necessary to implement an effective stranding network in the main Hawaiian Islands, and to the extent possible on other islands as well.

- **The Marine Mammal Commission recommends that NMFS issue final regulations or guidelines on stranding response, including criteria to assess circumstances for when**

stranded animals should be taken into rehabilitation facilities and criteria for when animals in rehabilitation facilities should be released.

Following its 2003 annual meeting, the Commission wrote to NMFS about several aspects of the agency's stranding response programs. Among other things, the Commission identified a need to establish 1) national standards concerning the qualifications of stranding network participants, 2) criteria for determining when stranded marine mammals should be removed from the wild for rehabilitation and care, and 3) criteria for determining when, and under what conditions, rehabilitated marine mammals should be returned to the wild. Information concerning the stranding program in the Pacific Islands Region presented at the 2004 Commission meeting indicated that action is still needed to resolve these issues. We are particularly concerned that the Service has yet to finalize the draft guidelines for determining when stranded or rehabilitated marine mammals should be released in the wild. Legislation enacted more than 10 years ago specifically directed the Service to develop such criteria and considerable work in developing them has already been done. As such, the Commission recommends that finalizing the release criteria be made a priority of the stranding program during 2005.

- **The Marine Mammal Commission recommends that NMFS continue existing levels of funding and support for ongoing research and recovery work on monk seals in the NWHI by the PIFSC, and provide additional funding needed for studies of monk seals in the main Hawaiian Islands.**

The Commission recognizes that PIFSC staff have conducted a well-designed monk seal research program for many years. Ongoing studies to assess monk seal colonies in the NWHI appear to be well organized and on track. Researchers have identified and provided direction for important recovery actions, including 1) the closure or restriction of certain fisheries potentially affecting monk seals, 2) the removal of debris that could entangle and kill seals, 3) the removal of selected individual sharks and aggressive adult male seals responsible for localized pup mortality, and 4) the development of methods to improve juvenile monk seal survival rates. Important studies to identify monk seal prey and to examine the potential effect of prey availability on monk seal population trends also appear to be progressing. The NMFS should continue to provide funding for these efforts, at least at existing levels.

Monk seals are hauling out and giving birth to pups with increasing frequency in the main Hawaiian Islands. To assess monk seal biology and management needs in this area, PIFSC should initiate a main Hawaiian Islands monk seal research program similar in scope to that undertaken in the NWHI. Research objectives should include the identification of monk seal foraging areas, description of movement and site-fidelity patterns, and collection of samples to identify prey preferences. The NMFS should provide PIFSC with additional funding to design and conduct the necessary studies, many of which are described in the report from the October 2002 Workshop on the Management of Monk Seals on Beaches in the Main Hawaiian Islands, sponsored by the Commission, NMFS, and the State of Hawaii, and the soon-to-be-released revision of the Hawaiian Monk Seal Recovery Plan.

- **The Marine Mammal Commission recommends that NMFS provide the State of Hawaii Division of Aquatic Resources with funding for a Kauai monk seal response coordinator.**

With the exception of Niihau which is private and largely inaccessible, the main Hawaiian Island with the greatest number of monk seal haul-out events is Kauai. Kauai beaches are heavily used by people for recreational purposes, and when seals haul out it has frequently been necessary to post temporary protection zones around them to minimize human disturbance. Far more demanding management situations also occur commonly on Kauai, such as protection of mother-pup pairs hauled out on popular beaches and treatment of seals injured by fishing hooks. Hiring of a full-time monk seal response coordinator on Kauai was identified as a high priority by participants at the October 2002 monk seal workshop. Subsequently, the Commission provided funding to the Hawaii Division of Aquatic Resources to hire a temporary coordinator with the expectation that a permanent coordinator would be hired with funds provided by NMFS. The NMFS did provide funding for the position in 2004, but it was filled for only a few months and about eight months of support now remain. As we understand it, the Division plans to request funding for continued support for this position as part of an anticipated grant request under section 6 of the ESA, once it concludes a cooperative agreement with NMFS. In the interim NMFS should ensure that sufficient funds are available to the Division to have a fulltime monk seal response coordinator on duty year-round on Kauai.

- **The Marine Mammal Commission recommends that NMFS develop a tiered system to direct and authorize volunteers and agency partners that assist with monk seal management needs in the main Hawaiian Islands.**

Participants at the October 2002 monk seal workshop recommended that NMFS develop a three-tiered system for organizing and training non-NMFS partners in assisting in monk seal management tasks. The three tiers involved tasks that 1) do not involve the “taking” of monk seals as defined under the MMPA, 2) require the “taking” of seals, but with relatively low risks to the animals, and 3) require expert training to capture or treat distressed seals. The latter two categories would require various levels of expert training and either letters of authorization or permits to carry out specified tasks. Such a system would establish a network of trusted, trained partners throughout the main Hawaiian Islands who could help assure the quickest, most effective response possible, particularly for situations not easily reached by PIRO staff stationed in Oahu. We note that staff from NMFS headquarters, the Pacific Islands Area Office, and the Honolulu Laboratory attended the workshop and helped to shape these recommendations. At the Commission’s 2004 annual meeting, volunteers assisting with monk seal management efforts reiterated their interest in such a system, but to our knowledge no steps have been taken to follow up on this workshop’s recommendation. The NMFS should act expeditiously to design and implement the system that was recommended at the October 2002 workshop.

- **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 consider actions that could be taken to clarify and mitigate the situation short of rulemaking.

Based on the information available to us, including first-hand observations of interactions, 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 NMFS 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 harassment definition. 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 it could take to clarify and mitigate the situation short of rulemaking. For example, publication of a policy statement that provides 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 NMFS enter into and provide funding for joint enforcement agreements with the State of Hawaii to assist in implementing and enforcing the MMPA, including spinner dolphin management issues.**

At the Commission's annual meeting, NMFS officials reported that a cooperative enforcement agreement between NMFS and the State of Hawaii authorizes state officials to enforce

various federal statutes, including the MMPA and the ESA. It was reported, however, that funding to the State for cooperative enforcement activities under the MMPA has not been, and in fact cannot be, provided under that statute. The Commission would like clarification of how NMFS has reached such a conclusion.

Section 107(b) of the MMPA authorizes the Secretary to designate state officers and employees to enforce the provisions of the Act. Section 109(k) authorizes and directs the Secretary to enter into cooperative arrangements with appropriate state officials for the delegation to the State of the administration and enforcement of the Act. Neither provision specifically prohibits the Secretary from providing funding to a State to assist in such efforts. In fact, section 109(k) specifies that agreements entered into under that authority “shall contain such provisions as the Secretary deems appropriate to insure that the purposes and policies of this Act will be carried out.” It seems that ensuring that the State’s efforts are adequately funded would be one such element. In addition to these provisions, the Secretary has broad authority under section 112(c) of the Act to enter into “such contracts, leases, cooperative agreements, or other transactions as may be necessary to carry out the purposes” of the Act with, among other entities, any State agency. It appears to the Commission that at least one of these authorities could be used to provide federal funding to the State of Hawaii for cooperative enforcement activities under the MMPA, and we encourage NMFS to do so.

- **The Marine Mammal Commission recommends that NMFS work with the State of Hawaii and the Commission to convene a workshop to address the increasing impacts of swim-with-the-wild-dolphin operations in Hawaii.**

At its annual meeting, the Commission heard from NMFS managers, enforcement personnel, and scientists, as well as independent researchers, tour operators, and other stakeholders concerning human-dolphin interactions in Hawaii. The Commission, its Committee of Scientific Advisors, and invited guests also visited one of the areas north of Kailua-Kona frequented by tour operators focused on spinner dolphins to get a better understanding of the types of interactions that are occurring. While there, we observed activities that many people aboard considered intentional pursuit and harassment of dolphins.

In addition to considering increased enforcement as a means of addressing the problems presented by human-dolphin interactions in Hawaii, the Commission and participants at the Commission’s meeting considered possible alternative solutions. In fact, the Commission believes, as did many of the meeting participants, that other alternatives may be preferable to relying almost entirely on rigorous enforcement of the MMPA’s taking prohibition. Toward this end, the Commission recommends that NMFS convene a meeting of federal, state, and local government agencies, researchers, tour operators, and other stakeholders to develop a comprehensive approach to the problem that looks at when, where, and how such activities may be conducted without adversely affecting the dolphins. The Commission would welcome the opportunity to help organize and participate in such a meeting or workshop.

Among other things, the workshop should consider the desirability of establishing protected areas where dolphins can rest undisturbed by humans. Other alternatives should also be considered such as temporal and/or spatial access restrictions, limits on the number of vessels allowed in an area, and access restricted to tour operators that adopt and comply with specified, responsible wildlife-viewing practices. Most importantly, the workshop should consider what regulatory mechanisms are available to provide protection for dolphins, such as MMPA taking prohibitions, State of Hawaii laws and regulations, and the National Marine Sanctuaries Act.

- **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 Admiral Lautenbacher, 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 NMFS pay close attention to this issue, and work with the WPFMC and NMSP 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.

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- **The Commission recommends that full funding be provided for completion of the SPLASH (Structure of Populations, Levels of Abundance and Status of Humpbacks) program.**

The Commission is very impressed by preliminary results of the interagency and international effort to conduct a range-wide population study of humpback whales in the Pacific Ocean. The results of this research will be invaluable for future management of the species, and the collaboration among researchers provides a model for future studies of other transboundary marine mammal species. The Commission recommends that NMFS continue to fully support the SPLASH program for its final year of field work, and for the subsequent analysis of data and publication of results.

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, appearing to read "David Cottingham", with a long horizontal flourish extending to the right.

David Cottingham
Executive Director

Enclosures