

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

13 January 2006

Mr. Christopher E. Yates
Marine Mammal Branch Chief
Protected Resources Division
Pacific Islands Regional Office
National Marine Fisheries Service
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 advance notice of proposed rulemaking seeking public comment on whether to promulgate regulations to protect spinner dolphins in the main Hawaiian Islands. The Commission is pleased that the National Marine Fisheries Service is considering initiating such a rulemaking. The issue of human interactions with spinner dolphins in Hawaii was discussed at the Commission's 2002 and 2004 annual meetings and continues to be of great interest to the Commission.

Based on information presented at the Commission's 2002 meeting, it appeared that spinner dolphins were routinely being taken (harassed) by boaters and swimmers in certain areas but that little was being done to take enforcement action to stem these apparent violations of the Marine Mammal Protection Act. Moreover, the Commission heard from Service scientists and managers that these interactions seemingly were having effects at the population level, with the dolphins using favored nearshore resting areas less frequently than they had previously. Following the 2002 meeting, the Commission wrote to the Administrator of the National Oceanic and Atmospheric Administration recommending that more be done to enforce the Act's taking prohibition as it pertains to close approaches of spinner dolphins (see enclosed 6 May 2003 letter). The Commission further recommended that, if the agency is reluctant to pursue cases because it does not believe that there are clear-cut standards as to when a taking has occurred, the Service should promulgate regulations establishing objective criteria for making such determinations.

The Commission again considered the issue of human interactions with spinner dolphins at its 2004 annual meeting, held in Kona, Hawaii. The Commissioners, members of the Committee of Scientific Advisors on Marine Mammals, and Commission staff also took the opportunity to visit one of the areas frequented by tour operators to see firsthand the types of interactions that are occurring. Some of the activities that we witnessed involved intentional pursuit of the animals, resulting in disturbance of the dolphins, which can reasonably be considered instances of harassment.

Following the 2004 meeting, the Commission wrote to the Service's Regional Administrator in Hawaii (see enclosed 25 January 2005 letter, at pages 5-6) again recommending that the Service

Mr. Christopher E. Yates
13 January 2006
Page 2

strengthen its enforcement efforts as a means of curbing the problems presented by human/dolphin interactions. The Commission also recommended that the Service work closely with the State of Hawaii to address needed protections for spinner dolphins and convene a meeting of government agencies and other stakeholders to develop a comprehensive approach for addressing this issue. The Commission believed that participants should consider when, where, and how interactions could be conducted without adversely affecting the dolphins. The Commission recommended, among other things, that the Service and others consider the desirability of establishing protected areas where dolphins can rest undisturbed by humans and/or of placing other limitations on human activities in areas frequented by spinner dolphins.

The Commission views the advance notice of proposed rulemaking as a first step in developing the type of comprehensive solution to this problem envisioned in its previous letters. The Commission continues to believe that many of the activities directed at spinner dolphins in Hawaii constitute harassment as defined under section 3(18) of the Marine Mammal Protection Act. That is, the dolphins, at least in some cases, are being pursued and/or annoyed, and the interactions clearly have the potential to disturb individual dolphins by disrupting their behavioral patterns. In addition, these types of interactions appear to be having effects at the population level, potentially resulting in injury to the stock by excluding animals from preferred resting habitat. Although we appreciate the Service's reluctance to pursue enforcement cases that it thinks would be difficult to prove, to the extent that such reluctance is based on ambiguities in the applicable definitions, it is incumbent upon the agency to take steps to resolve those ambiguities. Thus, the Commission recommends that, as part of the rulemaking under contemplation, the Service take steps to clarify what activities do and do not constitute harassment.

The simplest way to do this would be to limit distances to which boats and swimmers may intentionally approach dolphins (e.g., 100 feet, 50 yards, etc.) and/or to impose restrictions on other activities that may occur in areas used by dolphins (e.g., following dolphins, operating boats at high speed, in-water activities, etc.). If such an approach is followed, the Service needs to recognize that some ambiguities likely will persist. For example, it may not always be clear whether a vessel or swimmer approached a dolphin or vice versa. Thus, to the extent possible, any regulations should anticipate such situations and include sufficient guidance to allow enforcement officers to make these difficult judgments and the agency to sustain enforcement actions in appropriate instances. If properly crafted, such regulations should provide the Service with the tools it needs to bring a stop to the illegal taking of spinner dolphins in Hawaii.

Any regulations promulgated by the Service should also recognize that human interactions with spinner dolphins in Hawaii apparently are having cumulative impacts that are changing habitat-use patterns and potentially having population-level effects. Regardless of whether a particular human/dolphin encounter rises to the level of harassment of one or more dolphins, these broader impacts on the population provide a sufficient basis for the Service to regulate these activities because such regulations are necessary and appropriate to further the purposes of the Marine Mammal Protection Act. Such regulations could provide protection by closing certain areas to

activities directed at dolphins, limiting the number of vessels authorized to enter sensitive areas, or requiring operators to abide by certain practices as a condition of access.

In that regard, the Service should recognize that dolphin watching/swimming activities in some areas have been linked to serious population-level impacts, including reductions in population size and diminished survival of calves. Most recently, a 14-year study of the impacts of tourism on Pacific bottlenose dolphins in Shark Bay, Western Australia (Bejder 2005), found that, as vessel activity in the study area increased, use of the site by dolphins declined significantly. The study also found that cumulative exposure to vessels had a negative impact on the ability of female dolphins to produce and raise offspring successfully.

The broad policy statements set forth in section 2 of the Marine Mammal Protection Act provide a separate basis on which to regulate activities that may be having adverse effects on spinner dolphin habitats in Hawaii. Specifically, section 2(2) of the Act provides that “efforts should be made to protect essential habitats, including the rookeries, mating grounds, and areas of similar significance for each species of marine mammal from the adverse effect of man’s actions...” The legislative history that accompanied the most recent amendment of this provision (H.R. REP. NO. 439, 103d Cong., 2d Sess.29 (1994)) noted the oversight Committee’s view that the Service “...has authority [under this provision] to promulgate regulations to protect marine mammals and their habitats under the general rulemaking authority of section 112 of the MMPA.” The Commission believes that the resting habitat of spinner dolphins constitutes an area of significance for the animals that merits protection under the broad directive of the Act to protect essential habitats.

The Marine Mammal Commission, in consultation with its Committee of Scientific Advisors on Marine Mammals, has reviewed the information contained in the advance notice of proposed rulemaking and, in light of that information and the information reviewed at the Commission’s recent annual meetings, recommends that the Service move forward promptly to promulgate regulations to provide greater protection to spinner dolphins in Hawaii and to the habitat on which they depend. The situation clearly warrants an enhanced level of protection. As discussed above, various statutory provisions provide authority for such regulations. The Commission believes that the best approach is one that draws on all of these authorities to provide the appropriate level of protection to spinner dolphins while not unnecessarily precluding responsible viewing opportunities. In this regard, the Commission recommends that the Service go forward with a proposed rule 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.

Mr. Christopher E. Yates
13 January 2006
Page 4

The Commission believes that there are a variety of possible ways to structure regulations to achieve the desired results. We have not attempted to explore all of the possible alternatives at this stage. We would, however, like 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,

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

David Cottingham
Executive Director

Enclosures

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

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

25 January 2005

William Robinson, Regional Administrator
Pacific Islands Regional Office
National Marine Fisheries Service
1601 Kapiolani Blvd., Suite 1110
Honolulu, HI 96814

Dear Mr. Robinson:

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 you and several of your staff members from the Pacific Islands Regional Office (PIRO) were able to participate in our discussions. You collectively 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 PIRO 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 PIRO staff have made to work cooperatively with their resource management counterparts in other federal and state agencies. In particular, we note PIRO's efforts to develop 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 PIRO's efforts to develop a cooperative stranding network in the main Hawaiian Islands, and the work that has been done to produce a revised version of the Hawaiian Monk Seal Recovery Plan.

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

- **The Marine Mammal Commission recommends that PIRO conduct Marine Mammal Protection Act (MMPA) and ESA reviews of all activities in Hawaii and elsewhere in the Pacific Islands Region that pose potential impacts to, and could involve take of, marine mammals. In particular, we recommend that PIRO conduct an ESA section 7 consultation on the potential effects of high-speed ferries on listed marine mammals, particularly humpback whales and monk seals.**

Presenters at the annual meeting described several projects that exist or are being planned that have the potential to harm marine mammals. Two important examples include 1) offshore mariculture pens for tuna and other species that are planned for the Kona coast and which pose several threats for marine mammals, and 2) high-speed inter-island ferry service. As we understand

it, PIRO has not consulted on either of these activities under section 7 of the ESA, and no incidental or other taking authorizations have been sought under MMPA provisions. It is unclear to us why consultation has not occurred and authorizations have not been requested, and we recommend to PIRO that all activities such as these should be carefully evaluated and properly dealt with under the relevant statutes.

With specific regard to the Hawaii Superferry project, the potential for injury of and disturbance to humpback whales and other species is clear. High-speed ferry operations in Hawaii and elsewhere pose a risk of collisions with marine mammals and sea turtles, potential disturbance from noise produced by boats and machinery, and other threats such as oil spills. If the operation of these ferries, or any interdependent or interrelated activities, require federal action, authorization, or funding, the Commission believes that the federal action agency has an obligation to conduct appropriate environmental analyses under the National Environmental Policy Act and a section 7 consultation under the ESA because a "may affect" situation is obvious. This documentation and consultation should be done as soon as possible to attempt to resolve potential conflicts before they arise. Such reviews would provide a mechanism for identifying potential adverse effects and mitigation measures to prevent them.

- **The Marine Mammal Commission recommends that PIRO and the Pacific Islands Fisheries Science Center (PIFSC) develop a plan for research on and management of Pacific Islands Region cetaceans that will provide information on stock structure, abundance, and fishery-related mortality levels as required to assess fishery/marine mammal interactions under the MMPA.**

The NMFS, particularly the Southwest Fisheries Science Center (SWFSC), has conducted and contracted for some cetacean research that has focused on the Exclusive Economic Zone (EEZ) around the Hawaiian Islands. Little is known about the abundance, distribution, and stock structure of cetaceans in other parts of the vast Pacific islands region. The PIFSC is just now beginning to develop cetacean research capabilities. The PIRO has ongoing observer programs that have provided some information on levels of incidental take of protected species in domestic fisheries. Cetaceans in the EEZ may be part of larger Pacific populations, and those populations may experience takes in both domestic and international fisheries. Also, there may be discrete subpopulations of some species within the EEZ that are subject to local anthropogenic impacts.

Developing an effective program for research and management of cetaceans in the Pacific islands region involves considerable logistical difficulties, as well as other challenges. To properly identify research and management goals, and strategies for achieving those goals, PIRO and PIFSC should work collaboratively with experienced cetacean biologists at the SWFSC and elsewhere within NMFS. In addition, PIRO and PIFSC will need to hire personnel with appropriate expertise, or develop that expertise through collaborative projects with the SWFSC or others. We note that some needs may be addressed, at least in part, through development of island-based research and management efforts in coordination with other agencies such as the U.S. Navy and Coast Guard. For example, the Navy may be able to provide logistical assistance for research in the Marianas or at

Guam. Such opportunities for collaboration should be fully evaluated in the process of developing the overall plan. The Marine Mammal Commission would be happy to help with this difficult issue in any way it can.

- **The Marine Mammal Commission recommends that NMFS and PIRO 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 PIRO convene a take reduction team for false killer whales in the Pacific Islands region to develop a broad range of options for reducing take levels.**

The Hawaiian longline fisheries were recently elevated to Category I under the MMPA, based in part on the bycatch of false killer whales in the fisheries which exceeded the calculated potential biological removal level for the Hawaiian stock by almost 400 percent. The Commission supports NMFS' decision to reclassify these fisheries and recommends that NMFS develop and implement a take reduction plan for the Hawaiian stock of false killer whales as required by section 118 of the MMPA. The Commission believes that a take reduction team is the best mechanism to bring relevant stakeholders together to discuss and evaluate the various options and impacts, and we recommend that PIRO convene such a team.

We were informed at our meeting that the Service has convened a take reduction team to reduce cetacean mortality associated with Atlantic longline fisheries. Service representatives suggested that the agency was deferring creation of a Hawaiian take reduction team in hopes that the Atlantic team could develop mitigation options that would apply in both locations. The Commission notes that well executed take reduction teams provide a regional forum for local fishermen, agency staff, and environmental groups to work together to reach solutions, so a take reduction team offers both tangible and intangible benefits locally. Furthermore, the Commission questions whether methods and gear used in the two locations are sufficiently similar to permit common mitigation measures. Therefore, the Commission reiterates its recommendation that a take reduction team be formed to address false killer whale bycatch specifically in the Pacific islands area.

- **The Marine Mammal Commission recommends that the PIRO develop a network and standardized protocols for responding to and documenting monk seal haul-outs on each of the main Hawaiian Islands.**

Participants in the October 2002 Workshop on the Management of Monk Seals on Beaches in the Main Hawaiian Islands identified a number of steps needed to facilitate and standardize actions taken to protect monk seals hauling out on beaches in the main Hawaiian Islands. Among other things, the workshop report recommended the development of a training program and manuals for explaining the role of volunteers and others in responding to monk seal haul out events, establishing a formal mechanism for people involved in monk seal protection to share information on their efforts and needs, and the establishment of monk seal response networks on each of the main Hawaiian Islands. To help organize and expand main Hawaiian Island monk seal haul out response efforts, the Marine Mammal Commission transferred \$40,000.00 to PIRO in Fiscal Year 2004. To date it appears that little has been done to follow up on the above recommendations, and to the best of our knowledge PIRO has yet to use the funding provided by the Commission to help address these needs. The PIRO needs to increase its efforts to organize monk seal haul out response and reporting networks in the main Hawaiian Islands. We also request that PIRO report to the Commission on how they have expended the funding that we provided to them for this effort.

- **The Marine Mammal Commission recommends that PIRO, PIFSC, the Fish and Wildlife Service, and State of Hawaii agencies cooperate to address the growing problem of loss of suitable haulout and pupping habitat for monk seals in the NWHI.**

In the NWHI, monk seals rest, give birth, and care for their young on many reefs and islands, some of which are very small and barely above sea level. At the Commission's annual meeting, monk seal researchers pointed out that many of these islands are experiencing considerable erosion, particularly of the sandy beaches preferred by seals. In at least one case, an area that had previously been heavily used for pupping has virtually disappeared. Maintaining suitable habitat for monk seals may be critically important for recovery of the species. The Commission recognizes that these habitats are extremely vulnerable to erosion from wave action and potential rises in sea level, and finding ways to prevent or mitigate such losses may be difficult. Nonetheless, we are encouraging all involved agencies to give attention to this issue, and to consider ways to protect, and

if possible restore and enhance, island habitats used by monk seals in the NWHI.

- **The Marine Mammal Commission recommends that NMFS and PIRO 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 PIRO work with the State of Hawaii to develop a program to certify qualifying dolphin-watch operators as "responsible" wildlife viewing companies.**

The NMFS has adopted guidelines that describe proper ways to watch and interact with marine mammals and sea turtles in Hawaii. The guidelines call for people to stay at least 50 yards away from dolphins, not feed them, and operate vessels carefully when near the animals. The State of Hawaii has used those guidelines when developing concessionaire contracts for kayaking operations at some state parks. Tour operators who spoke at the Commission's meeting recommended the development of a certification program for tour guides that would encourage

Mr. William Robinson
25 January 2005
Page 6

voluntary compliance with the wildlife watching guidelines, and the State expressed an interest in working cooperatively to develop solutions to problems caused by human activities in spinner dolphin resting areas. The Commission believes that such a tour guide certification program would be an important component of the education and outreach programs needed to resolve problems with spinner dolphin harassment, and that PIRO should work with the state and others to develop such a program.

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 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 extending to the right.

David Cottingham
Executive Director

Enclosures