

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

5 August 2004

Mr. Peter T. Young  
Chairperson  
Board of Land and Natural Resources  
Hawaii Division of Aquatic Resources  
1151 Punchbowl Street, Room 130  
Honolulu, Hawaii 96809

Dear Mr. Young:

In response to a request by the Division of Aquatic Resources, the Marine Mammal Commission, in consultation with its Committee of Scientific Advisors on Marine Mammals, has reviewed and offers the following comments on proposed rules to establish the Northwestern Hawaiian Islands Marine Refuge (Chapter 60.5 of Title 13 of the Hawaii Administrative Rules). The purpose of the proposed refuge is to establish an entry permit program to protect and conserve the coral reef ecosystem of the Northwestern Hawaiian Islands (NWHI) and its related marine resources "...using the best available science and a precautionary approach."

The proposed rules for the new marine refuge replace a previous proposal to establish state waters in the NWHI as a marine fisheries management area. The Marine Mammal Commission commented on that previous proposal by letter of 30 January 2002 noting its concern about possible effects of lobster fishing on Hawaiian monk seals in the NWHI. To help ensure that such effects were fully considered in issuing any state permits, the Commission recommended that the proposed rules be expanded to clarify that management decisions would (1) be based on a precautionary approach, (2) complement management programs in adjacent national wildlife refuges and marine reserves, and (3) be made in consultation with federal agencies charged with managing marine resources in those adjacent federal areas.

The revised proposal squarely addresses the above-noted comments. It also includes new provisions whose intent appears to be the establishment of most state waters around the NWHI as areas in which commercial and recreational fishing would be prohibited and removal of resources would be limited to certain conditional activities. The identified exceptions to extraction restrictions in these areas seem reasonable and appropriate and, in our view, the identified no-extraction areas are a welcome and significant improvement in the conservation value of the proposed action. It will greatly strengthen the protection of Hawaiian monk seals and other components of the regional ecosystem.

Because the NWHI regional ecosystem includes one of the largest, least disturbed coral reef systems in the world, this proposal is a matter of global as well as national significance. Although the region's two National Wildlife Refuges administered by the Fish and Wildlife Service and the recently designated NWHI Coral Reef Ecosystem Reserve managed by the National Ocean Service provide a strong level of habitat protection, without complementary protection for the state waters

that form the core of the regional reef ecosystem, the comprehensive protection that the region so richly deserves and needs would be incomplete.

In our view, the proposed rule provides an outstanding basis for filling this gap and protecting the key habitats and species not otherwise subject to protection under the region's two National Wildlife Refuges or the Coral Reef Ecosystem Reserve. However, we note that some language in the revised proposal could be interpreted in such a way as to authorize fishing in areas that appear to have been intended as no-fishing areas. We also believe that additional protection is needed in certain areas, particularly around Necker and Nihoa Islands, to assure resource protection and enforceability. Finally, we believe a few minor technical changes would be helpful. Specific language to address these points is recommended in the attached specific comments. With these changes, the Marine Mammal Commission believes that the proposed rule to designate the NWHI Marine Refuge will be a fitting and highly effective conservation measure, and we urge the Department to adopt the proposed rule as quickly as possible.

The Commission also would like to take this opportunity to thank the Division's staff, particularly William Devick and Athline Clark, for their efforts to modify a proposed action based on received comments. Too often agencies undergo a public comment process on proposed actions with little interest in seriously entertaining outside views or suggestions. Such clearly was not the case with this proposal. We commend the Division's staff for all that it did to consider and address our comments and those of others.

Once again, the Marine Mammal Commission commends the Division for developing this important conservation proposal. We hope these comments are helpful. If you or your staff have questions, please call.

Sincerely,

A handwritten signature in black ink that reads "David Cottingham". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

David Cottingham  
Executive Director

Attachment

cc: Mr. William S. Devick

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**Marine Mammal Commission's  
Specific Comments on Proposed Rules to Establish  
the Northwestern Hawaiian Islands Marine Refuge**

Section 13-60.5-2, Boundaries: This section notes that, for enforcement purposes, the Northwestern Hawaiian Islands marine refuge would include "...all state waters extending three miles seaward of any coastline beginning and including Nihoa Island and Kure Atoll, but excluding Midway Atoll..." To improve clarity, this clause might be revised to state that the refuge would include "all state waters extending three miles seaward of any emergent land in the Northwestern Hawaiian Islands from Nihoa Island in the east to Kure Atoll in the west, including all state waters around Nihoa Island and Kure Atoll, but excluding Midway Atoll, as shown..."

Section 13-60.5, Definitions: This section includes definitions of several terms used in the proposed rule. We believe it would be useful to make some changes to several of these definitions.

The term "marine life" is defined as any species of "saltwater fish, shellfish, mollusks, crustaceans, corals, or other marine animals..." Although captured by the term "other marine animals," it may be helpful to expand the list of covered species to explicitly include marine mammals, sea turtles, and seabirds.

The term "scientific purposes" is defined as "observing, identifying, describing, investigating, and theoretically explaining natural phenomena..." To carry out scientific research, it often is necessary to collect samples of living or non-living components of the marine environment. Although the collection of samples could be implied under the term "investigating," it may be useful to clarify that this term includes collecting marine life and abiotic samples for analysis and study. This could be done by adding the following to above-noted the list of activities: "...collecting biological and non-biological samples."

The definition of "take" in this section makes three references to "aquatic resources." Because the term "marine life" is defined earlier in this section and is used elsewhere in the proposed rule, we suggest that the term "aquatic life" in this definition be changed to "marine life" to ensure that there is no ambiguity as to what the term "take" covers.

Finally, the definition of the term "trolling" seems to differ from that provided for definitions for other fishing methods (i.e., the definitions of "hand-line fishing" and "pole-and-rod fishing") in that it does not reference the taking of marine life, which seems important. To make it consistent with the other fishing definitions, we suggest revising the definition to read "'trolling' means attempting to engage or engaging in the act of taking marine life while pole-and-line or hand-line fishing while in from a moving boat, ..." (added words underlined).

Section 13-60.5-4 (2), Prohibited Activities: This clause in the list of unlawful actions would be clearer if it were revised to read "To take for the purpose of sale or to sell marine life taken from the refuge..." (added words underlined).

Section 13-60.5-5 (b), Permitted Activities: To clarify whether or not activities associated with the purposes list in this section (i.e., scientific or educational purposes, non-extractive purposes, and non-commercial subsistence, cultural, and religious use by Native Hawaiians) require a permit, consideration should be given to expanding the beginning of this section as follows:

“A person may only enter the refuge, with a valid permit or authorization issued from the department, to engage in activities...” (addition underlined).

In addition, we note that it is occasionally necessary to remove some plants, animals, or abiotic components of the ecosystem to further conservation and management objectives. Examples include limited removals of male monk seals and sharks to promote Hawaiian monk seal recovery, the incidental removal of marine life during debris clean-up, removal of exotic species, collection of evidence as part of law enforcement actions, and the removal of sand and sediment contaminated with pollutants. To ensure that such activities can be authorized as necessary, we recommend expanding section 13-60.5-5(b)(1) to read: “Scientific, management (or conservation), or educational purposes;” (addition underlined). If one or both terms are added, it may be useful to add a definition of the term(s) in section 13-60.5-3.

Finally, we note that the activities allowed under this subsection may be carried out subject to permit conditions in areas identified in subsection 13-60.5-5(d) (i.e., areas where extractive activities are to be precluded or further restricted). By listing fishing activities separately in subsection (a) and not referencing them under subsections (b) or (d) we assume that the intent was to exclude fishing as described in subsection (a) from the areas listed in section (d), while conditionally allowing listed activities in the subsection (i.e., b) in those areas. We believe this is an appropriate and very important conservation measure for protecting the reef ecosystems. However, by noting that subsection (b) applies to activities listed in, “...but not limited to,” those listed in its three numbered parts, it would appear that fishing activities could be included this subsection at the department’s discretion. We assume that this was not the intent. In addition, other than the conservation and management activities noted above and the activities already mentioned in the numbered clauses 1-3 of this subsection, we are unable to think of any other activities that may be necessary or appropriate to allow in the areas listed in section (d). Therefore, to clarify and ensure that fishing activities listed in subsection are not among those to be considered in subsections (b) or (d), we recommend that the beginning of this section be changed to read:

“A person may enter the refuge only to engage in activities that do not degrade the coral reef ecosystem; or related marine resources and species as specifically authorized by law ~~such as,~~ but not limited to, those for the following purposes: ...”.

Alternatively, the concern could be addressed by adding the words “For purposes other than the taking of marine life subject to the restrictions of subsection (a), ...” at the beginning of this section.

Section 13-60.5-5 (d): This section lists areas in which no extractive activities are to be allowed, with the possible exceptions of limited extractions associated with activities listed in subsection (b). The Marine Mammal Commission commends the Division for recognizing the importance of establishing areas where more stringent restrictions on the extraction of resources, especially by commercial and recreational fishing, will apply. The small nature of these isolated reef caps makes them especially vulnerable to adverse impacts and the shallow areas in state waters are likely among the components of the NWHI reef system that are most vulnerable to such effects. Most importantly, by precluding extractive activities in these areas, the state’s Refuge will provide much needed protection for places that endangered Hawaiian monk seals use for feeding.

The first numbered paragraph in this subsection lists three atolls in which all state waters are provided protection. The second paragraph lists five other atolls in which only state waters shallower than 20 fathoms are protected. According to maps referenced for the latter five sites, there are no areas within the state's three-mile jurisdiction at either Maro Reef or Gardner Pinnacles that are deeper than 20 fathoms. At Laysan and Lisianski Islands, the maps accompanying the proposed rule show only one or two isolated spots that equal or exceed a depth of 20 fathoms – these include two bathymetric readings of 20 and 21 fathoms at Lisianski Island and one isolated reading of 35 fathoms at Laysan Island. The Necker Island map shows two small areas at the northern and eastern edge of state jurisdiction where water depths exceed 20 fathoms, and these two areas are apparently no more than 21 fathoms deep. As we understand it, bathymetry data for the NWHI are limited and known to be unreliable in some cases. Therefore, it is difficult to be certain about the existence, location, and shape of these or other potential reef depressions that are deeper than 20 fathoms.

In our view, excluding such small, isolated areas from the restrictions on extraction otherwise conferred to areas listed in paragraph (2) does not make sense from a conservation perspective. For example, among other things, recently released satellite-tagging studies done by the Pacific Islands Fisheries Science Center show that monk seals use all state waters around these atolls. Furthermore, having such depth-based open areas in a region with uncertain bathymetry would enormously confound enforcement efforts, which will be very difficult at best in such a remote location. In addition, we are concerned that it could encourage encroachment into protected areas by extractive activities, particularly fishing, permitted in the very small areas left open. Therefore, to simplify enforcement and better protect the areas around these important reef habitats, the Commission believes it would be more sensible to make all state waters at these five locations subject to the provisions of section 13-60.5-5 (d). Accordingly we recommend deleting part (2) of this subsection, adding all five sites (i.e., Maro Reef, Gardner Pinnacles, Laysan Island, Lisianski Island, and Necker Island) to paragraph (1), and renumbering paragraph (3) to (2).

The paragraph of this subsection currently numbered (3) proposes establishing waters within 10 fathoms of Nihoa as a non-extractive zone. We understand this boundary is very close to the island's shore – as close as about 100–150 feet at some locations. This could allow fishing boats close enough to the island to disturb resting monk seals and might also disrupt the movement of seals approaching or leaving the island. Such a close approach also could entice some fishing boats to attempt to land on the island illegally. To avoid such disturbance and discourage illegal landings, the Commission recommends that this boundary be extended at least a mile from the island's shore. Because rectangular boundaries are easier for mariners and enforcement agents to plot, we suggest establishing a rectangular boundary with north-south and east-west lines that contain an inscribed circular perimeter that is at least one mile from shore.

Section 13-60.5-6(d): This section appropriately requires permit holders to submit reports to the Department and indicates that the report information will be kept confidential. Some of the information obtained from permit reports could be of considerable use in understanding and tracking activities and their potential impacts on the Refuge. We recognize that state law may require certain types of permit report information to be kept confidential, but we would encourage the Department to make available any other report information that is not protected in that manner.