



# MARINE MAMMAL COMMISSION

5 September 2014

Mr. Jon Kurland  
Assistant Regional Administrator for Protected Resources  
Alaska Region, NMFS  
ATTN: Ellen Sebastian  
P.O. Box 21668  
Juneau, AK 99802-1668

Dear Mr. Kurland:

The Marine Mammal Commission (Commission), in consultation with its Committee of Scientific Advisors on Marine Mammals, has reviewed the National Marine Fisheries Service's (NMFS) 24 July 2014 *Federal Register* notice (79 Fed. Reg. 43007) proposing changes to the regulations governing the taking of northern fur seals for subsistence on the Pribilof Islands. The proposed changes were prompted by a petition submitted by the Pribilof Island Aleut Community of St. George Island, Traditional Council, in 2006. The Council is seeking authority for the community to take 150 male fur seal pups per year for subsistence purposes. Applicable regulations currently restrict harvest to sub-adult male fur seals less than 124.5 centimeters in length during a harvest season that runs from 23 June through 8 August. The proposed harvest of fur seal pups would be conducted later in the year. NMFS is proposing that a second harvest period be added that would allow the annual taking of up to 150 young of the year male fur seals from 16 September through 30 November. The Commission offers the following comments and recommendations on the proposed rule.

## **Reconciling Harvest Provisions for St. George and St. Paul**

The existing regulations governing subsistence taking of fur seals on the Pribilof Islands (50 C.F.R. § 216.72) generally apply to both St. George and St. Paul Islands. To accommodate the changes needed to authorize the taking of pups on St. George Island, NMFS is proposing to delete current subsection (c) and bifurcate that provision by placing the requirements applicable to each island under separate subsections (d) and (e). The Commission agrees that this makes sense. However, with its proposed changes, NMFS has not consistently retained all of the currently applicable requirements in the two subsections. For instance, proposed subsection (d), applicable only to St. George, retains the provision specifying that harvest scheduling is at the discretion of the Pribilovians and requiring them to give adequate advance notice of planned harvests so that NMFS can arrange for monitoring. Proposed subsection (e), applicable only to St. Paul, omits those provisions. Also, there is a requirement under proposed section 216.72(d)(5) that NMFS and community members on St. George meet annually to review harvest implementation and practices, but no similar requirement is included for St. Paul.

On the other hand, proposed subsection (e) retains certain elements from the existing regulations that are omitted from proposed section (d). For instance, the requirement that sub-adult male fur seals harvested on St. George Island not exceed 124.5 centimeters in length has been



dropped without any explanation. Similarly, the requirement that sealers refrain from taking seals with tags or entangling debris, unless authorized by NMFS scientists, would continue to be applicable on St. Paul, but apparently not on St. George. In addition, as discussed further below, proposed subsection (d) drops the requirement that sealers on St. George be “experienced,” while retaining that requirement in subsection (e) for sealers on St. Paul.

There are other slight differences between the two subsections as well. For example, the proposed rule uses different language in the two subsections to delineate the prohibition on the taking of adult fur seals and female seals – one applies to any taking of an adult seal and the other only to intentional taking. To address the apparent discrepancies in the requirements that would apply to St. George and to St. Paul, the Marine Mammal Commission recommends that NMFS carefully review the provisions of subsections (d) and (e) to (1) ensure that each provision captures all of the requirements in the existing regulations that should be carried forward in the amended regulations and (2) either reconcile the differences between the two provisions or provide a detailed explanation for any such differences. Among other things, NMFS may want to restructure subsection (d) to differentiate more clearly the requirements that apply to the harvest of sub-adult males (e.g., start dates, maximum size of harvestable seals, etc.) from those applicable to the harvest of young of the year.

### **Take of Female Fur Seals**

The preamble to the proposed rule explains that, because of the breeding ecology of northern fur seals, the survival of female seals plays a bigger role in recruitment to the population than does survival of males. NMFS observes that “the harvest of female fur seals, whether or not they are sexually mature, has been repeatedly shown to have direct adverse effects on fur seal populations.” Elsewhere, NMFS notes that “population modeling indicates female young of the year may have at least five to six times higher reproductive value than male young of the year...” As such, the regulations include fairly rigorous standards to minimize the taking of female seals and would require suspension of the harvest on St. George if two female seals are killed and termination for the year if three female seals are killed. The Marine Mammal Commission agrees that these limits are appropriate and recommends that they be retained in the final rule.

The establishment of the 8 August end date for the harvest of sub-adult males is designed to minimize the risk that female seals will be taken. As indicated by NMFS in the preamble to the proposed rule, this has been quite effective – on St. George Island only five female seals have been killed accidentally since 1987. On St. Paul, the accidental killing of female seals has been somewhat higher, 36 since 1987, but on average, still less than two per year. Extending the sub-adult harvest beyond 8 August was tried in the 1980s, and that experience confirmed that the risk of taking female seals increases after that date, as sub-adult females mix with the males and efforts to differentiate between male and female seals under harvest conditions proved unreliable. Accordingly, NMFS amended its regulations in 1992 to eliminate a provision that allowed extending the sub-adult harvest beyond 8 August. Given this history, the Commission supports NMFS’s decision to retain the 8 August termination date for the sub-adult harvest on St. George in the proposed rule and to institute a separate harvest season for young of the year.



As discussed under the next heading, it is not entirely clear how the harvest on St. George will be conducted and what monitoring will be carried out. Section 216.74 of the proposed rule recognizes that NMFS representatives are responsible for compiling information related to sources of human-caused mortality and serious injury of marine mammals and that the Pribilovians are responsible for reporting on the “actual level of subsistence take.” However, that provision is somewhat vague on how these tasks will be accomplished and in what timeframe. Because of the novelty of the proposed young of the year harvest, it remains unclear whether efforts to avoid taking female pups will be successful or whether the suspension and termination thresholds will be reached quickly. For that reason, it is essential that there be sufficient monitoring, at least at the outset, to ascertain on a near real-time basis whether female seals are being killed and that those responsible for managing the harvest are notified promptly when either threshold is reached. This is particularly true if harvests will be conducted simultaneously on more than one rookery or by multiple sealing crews, both of which are possibilities as the proposed regulations are currently written. The Marine Mammal Commission therefore recommends that NMFS revise the proposed regulations to specify the applicable monitoring and reporting requirements more precisely and to ensure that those requirements are sufficient to provide timely information to decision makers whenever female seals are killed. It would also be useful if NMFS addressed the issue of possible simultaneous harvests more explicitly in the final rule. If the community of St. George has no interest in conducting simultaneous harvests, this should be specified in the rule and appropriate changes made to the regulatory language.

On a related point, the Commission is sympathetic to one of the comments submitted on the supplemental environmental impact statement (SEIS) questioning the reliability of self-reporting. Under-reporting of marine mammal takes has been identified as a problem in a parallel situation – the reporting by fishermen of mortality and injury of marine mammals under the Marine Mammal Protection Act’s incidental take regime. NMFS discounts this concern, noting that reports submitted by the Tribal Council since 2003 are consistent with data collected independently by NMFS observers in previous years. However, NMFS fails to recognize two important points. First, the incidence of taking female seals accidentally in the harvest of sub-adult seals has been infrequent enough that there has been no downside to submitting accurate reports. This may not be the case with the proposed harvest of young of the year. Second, under the existing regulations, there is no immediate impact if a small number of female seals are taken accidentally in a given year. This would not be the case under the proposed regulations. Taking just two or three female seals could have immediate and important consequences for the community. In making this observation, we in no way mean to impugn the honesty or integrity of the people of St. George. Nevertheless, NMFS needs to recognize that there is a significant potential for a conflict of interest that should be addressed.

In its response in the SEIS, NMFS indicated that it intends to have staff present during the first three seasons of the autumn harvest of young of the year. We agree that this is a good idea. The Marine Mammal Commission therefore recommends that NMFS include in the final rule a more complete description of its plans for staff members to monitor and report on young of the year seal harvests, particularly during the initial years. The reliability of the information from these first seasons will be particularly important to ascertain whether there are any unanticipated problems with the new harvesting regime and confirm that hunters can avoid taking female seals. NMFS’s response also indicated that, because canine teeth would be collected from all harvested seals, and those teeth



could be used to identify the sex of each seal, there was a disincentive to report inaccurately. Although this may be the case, this serves as a credible deterrent to misreporting only if there is a reasonable likelihood that NMFS will conduct the necessary analyses. Given the agency's current budget, it is unclear that it will have sufficient personnel and other resources to do so. Because of the importance of preventing the accidental killing of female seals and of detecting such occurrences when they occur, the Marine Mammal Commission recommends that the regulations be revised to rely on self-reporting in lieu of on-site monitoring by NMFS observers only if (1) a tooth (or other appropriate sample) from each harvested young of the year seal is collected and provided to NMFS, (2) NMFS commits to conducting the required analyses on a yearly or more frequent basis, and (3) NMFS determines that it will have sufficient resources to conduct those analyses in any given year.

## Harvest Methods

Existing regulations, applicable to the harvest of sub-adult male fur seals on St. George and St. Paul, specify that seals may only be taken "by experienced sealers using the traditional methods, including stunning, followed immediately by exsanguinations. The harvesting method shall include organized drives of subadult males to killing fields..." Because of the long history of Pribilovians in harvesting sub-adult male seals, it was pretty clear at the time that the subsistence regulations were promulgated, who was allowed to take seals and by what methods. In contrast, because a harvest of young of the year has not been authorized for more than 100 years, it is less clear now who should be authorized to harvest the seals and by what methods. The proposed rule tries to address this by eliminating the requirement that sealers on St. George be "experienced" and by leaving the harvest methods somewhat vague, while specifying that whatever they are, they will be designed "to reduce disturbance, injury, and accidental take of female seals." The regulations also indicate that those methods are expected to include organized drives of fur seals from congregating areas to inland killing fields, followed by stunning and immediate exsanguination, unless NMFS, in consultation with the Pribilovians conducting the harvest, determine that alternative methods will not result in increased stress to harvested and unharvested seals, increased disturbance or injury to resting seals, or the accidental take of female seals. The Commission agrees that whatever harvest methods are ultimately adopted, they should be designed to achieve these goals. Making these determinations will require collection and analysis of fairly detailed information on the responses of seals to harvest practices and may benefit from review by veterinarians as well as agency biologists.

The Commission concurs that, in general, these requirements make sense. Because no one living on St. George has been authorized to harvest young of the year, it makes no sense to require that experience with such harvesting be a prerequisite. Similarly, because it is unclear whether the harvesting methods employed for sub-adult males will be appropriate for harvesting young of the year, some degree of flexibility is needed. Nevertheless, we do not see a need to change the existing requirements as they pertain to the harvest of sub-adult males. As such, the Marine Mammal Commission recommends that proposed section 216.72(e) be split into two paragraphs, separating the provisions governing the harvest of sub-adult males from those governing the harvest of young of the year and retaining all of the current provisions applicable to the harvest of sub-adult males. In particular, the Commission recommends that the regulations continue to require that only experienced sealers<sup>1</sup> be allowed to participate in the harvest of sub-adult males. Similarly, it would

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<sup>1</sup> Here and elsewhere, we refer to "experienced sealers" to mean not only those with experience dating back to the days of the commercial harvest, but those who have subsequently received appropriate training from other



seem to make sense, at least at the outset, that only “experienced sealers” (i.e., those with experience taking sub-adult males) be allowed to participate in the harvest of young of the year.

As the proposed rule is drafted, it appears that NMFS and the Pribilovians intend, at least initially, to apply harvest methods similar to those used for sub-adult males to the harvest of young of the year to determine whether they are effective or changes need to be made. This makes sense, but it would be helpful if the preamble to the final rule provided some additional detail about what is anticipated in terms of who would be harvesting the seals, what monitoring would be conducted, and how proposed changes to the harvesting protocol, if any, would be identified, considered, and approved.

Two points in particular that need to be clarified are whether more than one sealing team would be allowed to operate on St. George at a given time and, if so, whether they would be allowed to harvest on different rookeries. If multiple sealing teams would be operating simultaneously, particularly on different rookeries, this would have implications for what monitoring is conducted and how deaths of females are reported to ensure that the suspension and termination thresholds are not exceeded.

### **Harvest Locations**

The existing regulations restrict harvests on St. George Island to two rookeries, Northeast and Zapadni. That restriction was included in the regulations to facilitate research ongoing in the 1980s to maintain experimental and control sites. If, as the preamble indicates, that line of research is no longer being pursued, there does not appear to be a compelling reason to exclude harvests from other rookeries and haulouts. In fact, there may be advantages to spreading harvesting effort more broadly as NMFS suggests. However, unlike the current regulations, which limit harvests at each haulout on St. George to no more than twice per week, and harvests at each haulout on St. Paul to no more than once per week, the proposed rule does not include any limitation on the frequency with which harvests could be conducted at the specified sites on St. Paul. We hope that this is merely an oversight. So that rookeries and haulout sites are not disturbed any more than is necessary, the Marine Mammal Commission recommends that NMFS include in the final rule a provision limiting harvests at any of approved sites on St. George to no more than once per week.

NMFS proposed to include a new conservation measure in the revised rule (section 216.72(d)(4)) that would prohibit the harvest of young of the year fur seals from any breeding area where the recent analysis “projects that pup production has greater than a 5 percent probability of falling below a level capable of sustaining a harvest in 10 years.” The Marine Mammal Commission supports this addition and recommends that it be included in the final rule. NMFS explains in the preamble of the proposed rule that it intends to use 500 as the pup-production threshold for evaluating quasi-extinction or minimum sustainable pup-production size. The agency bases this proposed standard on its experience with Lagoon Rookery, which reached a low of 388 pup births and, although it later returned to 500 births, eventually went extinct. It seems that, if the threshold of 500 pup births was attained at Lagoon Rookery, but insufficient to prevent that rookery from going

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experienced sealers and have acquired sufficient skill and knowledge to conduct a harvest using traditional methods without unduly stressing the seals. By extension, it would also include inexperienced sealers who are receiving the necessary training under the tutelage of experienced sealers.



extinct, then NMFS needs to consider establishing a higher threshold of pup production as the appropriate standard.

Also, it is not clear to the Commission why the proposed limit on allowing harvests at breeding areas that have low pup production and a low probability of sustaining harvest over a 10-year period should be applicable only to the harvest of young of the year. It would appear that the potential contribution to recruitment of the population of a male pup is no greater than that of a sub-adult male. As such, the Marine Mammal Commission recommends that this proposed conservation measure be expanded to prohibit any harvest from those breeding areas that NMFS projects have greater than a 5 percent probability of falling below a level capable of sustaining harvest in 10 years. This standard should be applied to harvests on both St. George and St. Paul.

### Specific Comments

Proposed section 216.72(f) carries forward an error in section 216.72(e)(1) of the current regulations. It continues to reference section 215, which was deleted and merged with section 216 in a previous rulemaking. The proper reference to section should be to section 216.71 and/or section 216.72.

Proposed section 216.72(g) sets forth three criteria under which the harvest of fur seals in a given year would be terminated. The first two paragraphs specify that it is the take “provided for in § 216.71” that would be terminated; the third paragraph does not. That phrase should be inserted after the word “take” in section 216.72(g)(3).

Proposed section 216.74 states that “Federal scientists and Pribilovians cooperatively manage the subsistence harvest of northern fur seals under § 119 of the Marine Mammal Protection Act...” While that statement is partially correct, enforceable limits on the numbers of seals that can be taken and restrictions on the methods of taking flow from the provisions of the Fur Seal Act and parts of the Marine Mammal Protection Act other than section 119 (see the discussion in the emergency final rule published on 9 July 1986, 51 Fed. Reg. 24828). Thus, it would be more accurate to revise this statement to read something like: “The subsistence harvest of northern fur seals under these regulations is managed under the Fur Seal Act (16 U.S.C. § 1151) and the Marine Mammal Protection Act (16 U.S.C. § 1361) and is conducted in accordance with cooperative agreements entered into by NMFS and the Pribilovians under section 119 of the Marine Mammal Protection Act.”

Proposed section 216.81(b) is intended to clarify that the prohibition on the unauthorized take of fur seals remains applicable during periods other than from 1 June to 15 October (the dates covered by subsection (a)). It is not clear why NMFS saw a need to include a separate subsection stating that sealers are allowed access to rookeries and hauling grounds on St. George Island for the purpose of authorized harvests between 16 September and 30 November, rather than to amend subsection (a) to include these dates. We are concerned that, because there is no parallel provision allowing sealers access to rookeries and haulouts during the period of the sub-adult male harvest, this level of specificity for the fall harvest could be interpreted as suggesting that such authority is lacking. We had assumed that sealers were among those “authorized by a representative of the

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National Fisheries Service” to enter fur seal rookeries. However, adding proposed subsection (b) undercuts this argument.

Thank you for considering our comments. If you or your staff has questions, please don't hesitate to call.

Sincerely,

A handwritten signature in blue ink that reads "Rebecca J. Lent". The signature is written in a cursive style with a vertical line separating the first and last names.

Rebecca J. Lent, Ph.D.  
Executive Director