

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

6 May 2003

Vice Admiral Conrad C. Lautenbacher, Jr., Ph.D., USN (Ret.)
Under Secretary for Oceans and Atmosphere
Department of Commerce
14th and Constitution Avenue, N.W., Room 5128
Washington, D.C. 20230

Dear Vice Admiral Lautenbacher:

The Marine Mammal Commission held its 2002 annual meeting in San Diego, California. That meeting focused on issues pertaining to marine mammal species occurring along the West Coast of the United States, Alaska, and Hawaii. Among the issues considered was the increasing frequency with which marine mammals are being subjected to taking by harassment through directed human-marine mammal interactions and NOAA's response to these ongoing violations of the Marine Mammal Protection Act. In keeping with the regional focus of the meeting, we concentrated on harassment related to close approaches to various pinniped species along the California coast and on swim-with-the-dolphin activities in Hawaii. However, similar activities are occurring in other regions, most notably dolphin swim programs in the southeastern United States.

In California, some of the most high-profile situations (e.g., Children's Pool in La Jolla and the concentration of elephant seals at Piedras Blancas) are being addressed by cordoning off certain areas and establishing docent programs. These measures appear to have successfully transformed those problem situations into ones where the public has an opportunity to view marine mammals in a setting that is educational and safe and that minimizes the likelihood of taking marine mammals. This being the case, we encourage the Service to continue to support the development and operation of such programs, including sponsorship when necessary.

In contrast, commercial operators in Hawaii are routinely offering the public opportunities to interact with dolphins in ways and at distances that result in unauthorized takings and that are generally viewed as having adverse effects on the affected populations. In certain areas, such as Kealakekua Bay, tour operators take advantage of the daily patterns of spinner dolphins that forage offshore at night and return to shore to rest during the day. The influx of swimmers into these areas during the day and their close approaches to the dolphins result in disturbance to the dolphins and prompt avoidance behavior on the part of the animals. According to information presented by the National Marine Fisheries Service at our meeting, recent studies indicate that dolphins are using these resting areas less frequently than they did previously, presumably as a result of the disturbance associated with increased human presence. The Service's representative based his information on a 1999 report in the Service's *Marine Mammal Protection Act Bulletin* (4th Quarter, 1999) that reported more than a 20 percent reduction over 13 years (1979/1980 to 1993/1994) in the number of days that spinner dolphins use Kealakekua Bay. During that time "...there was a tremendous growth in

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swim with dolphins activities in Kealakekua Bay.” This is similar to reports in the literature of dolphin use of an area declining after multiple encounters of humans swimming with the animals. The Service representative also noted that a search of the Internet for wild dolphin swim programs available in the Kona area resulted in 332 different matches (see enclosed example of web page and recent article from the local newspaper, *West Hawaii Today*).

Despite the frequency of encounters between swimmers and dolphins, the predictability of when and where they will occur, and the clearly discernable disturbance that results, NOAA has taken little or no enforcement action to address the problem. At our meeting we heard from representatives of the National Marine Fisheries Service’s Office of Protected Resources, the Office of Law Enforcement for the Service’s Southwest Region, and the NOAA Office of the General Counsel. All of them agreed that, at least in some instances, the activities that are ongoing in Hawaii constitute harassment. Yet, cases are not being brought, primarily because this issue is given low priority by the general counsel’s office. As the senior enforcement attorney for the Southwest Region put it, “we tend to focus on cases that have a significant impact on whatever the resource is.”

In the opinion of the Marine Mammal Commission and its Committee of Scientific Advisors, the situation in Hawaii clearly rises to that level. Even though each incident in which dolphins are closely approached or pursued may result only in disturbing the animals (constituting Level B harassment), these activities collectively constitute Level A harassment in that they have the potential to injure the dolphins and the dolphin populations by increasing stress levels, denying the animals the opportunity to rest, and causing them to abandon important sanctuaries where, among other things, they care for their calves. As such, the Commission believes that it is imperative that NOAA do more to address the situation in Hawaii, including educating the operators and the public about which activities comport with the law, informing them that penalties will be sought when violations occur, and pursuing enforcement actions when animals are harassed.

We appreciate that agency resources are limited but believe that with a small, but directed effort targeted at this problem, a clear message will be sent that NOAA will no longer stand by and allow dolphins to be taken with impunity in violation of the Marine Mammal Protection Act. A similar heightening of enforcement and prosecutorial effort directed at unlawful takings of marine mammal is also needed in the Southeast Region, where swim programs directed at bottlenose dolphins have proliferated in recent years. Reportedly, those programs often involve or are facilitated by feeding the animals, an activity that the National Marine Fisheries Service has explicitly prohibited by regulation.

During our discussion of the issue of human-marine mammal interactions, it was suggested that harassment cases are difficult to win because there is no clear-cut standard as to how close is too close to approach a wild marine mammal. Members of our Committee of Scientific Advisors who have spent time at Kealakekua Bay, however, thought that, in many instances, it was clear when harassment had occurred – a swimmer intentionally approached a dolphin, the dolphin’s resting behavior was disrupted, and further avoidance behavior was exhibited upon repeated approaches. A videotape of such an interaction should be sufficient to sustain an enforcement action. If, however, NOAA’s enforcement officers and attorneys are reluctant to bring cases based on such a fact

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pattern, the Commission recommends that the National Marine Fisheries Service act promptly to promulgate regulations to establish objective criteria for determining when a taking has occurred. Such regulations could be structured to address interaction problems at specific sites where problems are particularly acute (e.g., the dolphin resting bays in Hawaii), to address specific types of interactions (e.g., in-water activities), or to be part of a more generic rulemaking on approaching wild marine mammals, such as that envisioned in the Service's 30 January 2002 advance notice of proposed rulemaking.

At a recent meeting with the NOAA General Counsel and others, Mr. Walpole informed us that the agency has a good record of prosecuting commercial operators and individuals for these activities. We had been aware of a prosecution in Hawaii in the early 1990s but few since then. We would like to learn more about the specifics of recent successful efforts to prosecute individuals who are intentionally harassing marine mammals so that we can inform members of the Commission and the Committee of Scientific Advisors on Marine Mammals.

The Commission welcomes the opportunity to work with the involved components of NOAA in developing a strategy for addressing this important issue in a timely manner.

Sincerely,

A handwritten signature in black ink that reads "David Cottingham". The signature is written in a cursive, flowing style with a long horizontal stroke at the end.

David Cottingham
Executive Director

Enclosures

cc with enclosures: William T. Hogarth, Ph.D.
Mr. Dale J. Jones
James R. Walpole, Esq.