



MARINE MAMMAL COMMISSION

24 October 2016

Ms. Susan Pultz, Chief
Conservation Planning and Rulemaking Branch
Protected Resources Division
National Marine Fisheries Service
Pacific Islands Regional Office
1845 WASP Blvd., Bldg. 176
Honolulu, Hawaii 96818

Re: Hawaiian Spinner Dolphin Proposed Rule
Docket No. 080302361-6677-01

Dear Ms. Pultz:

The Marine Mammal Commission (the Commission), in consultation with its Committee of Scientific Advisors on Marine Mammals, has reviewed the proposed rule published by the National Marine Fisheries Service (NMFS) on 24 August 2016 (81 Fed. Reg. 57854) to establish protective regulations for Hawaiian spinner dolphins under the Marine Mammal Protection Act (the MMPA). The Commission offers the following comments and recommendations.

The Commission has given considerable attention to spinner dolphins in Hawaiian waters over the past two decades due to the high incidence of human interactions with this species, particularly in nearshore resting areas. This issue has been a topic of discussion during at least four Commission annual meetings beginning in 2002 and the focus of several Commission letters and recommendations since then. As noted in our 13 January 2006 comments on NMFS's advance notice of proposed rulemaking, the Commission believes 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. It also appears that such activities could be having population-level effects by disturbing dolphins or excluding them from preferred resting habitat. The Commission has therefore advocated that NMFS take a more aggressive stance on enforcing the MMPA's take prohibition as it applies to spinner dolphins in Hawaii. Because enforcement actions are hampered by ambiguities in the standards for determining when a taking has occurred, the Commission has recommended that NMFS promulgate regulations that establish objective criteria for making such determinations. Therefore, the Commission is pleased that NMFS is proceeding with this rulemaking to clarify what would constitute violations of the MMPA.

This rulemaking has been characterized by some as a move by NMFS to ban swimming with wild spinner dolphins. The Commission believes that it should be characterized differently. Since its enactment in 1972, the MMPA has prohibited the taking of marine mammals. Despite this prohibition, spinner dolphins have for many years been routinely exposed to activities that impermissibly take marine mammals. All that this rulemaking is doing is clarifying what constitutes a take, making the long-standing prohibition more understandable and enforceable.

Although the Commission is generally very supportive of NMFS's efforts to regulate approaches by swimmers and vessels to spinner dolphins, it has some concerns with the specifics of the proposed rule. Some of these stem from the lack of a clear articulation by the agency of the statutory basis for the proposed regulations. As noted in the preamble to the proposed rule, section 112(a) of the MMPA authorizes NMFS to prescribe regulations that are necessary and appropriate to carry out the purposes of the Act. However, it is not entirely clear which purpose or purposes of the Act the proposed regulations are intended to achieve. It appears that the sole, or at least the primary, purpose is to prevent unauthorized taking of spinner dolphins¹. The Commission recommends that the final rule provide a clearer discussion of the statutory basis for the regulations and explain how the regulations further the identified purpose(s).

The 50-yard approach limit

If we are correct that the regulations are primarily intended to identify and specifically prohibit those activities that constitute taking, they fall short of the mark. NMFS has made a clear and convincing case that approaching within 50 yards of a spinner dolphin, be it by swimmers or vessels, constitutes a take. Intentionally approaching dolphins at such distances is an act of "pursuit" (and also "annoyance") that "has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavior patterns...." As such, it constitutes Level B harassment. In addition, there is ample evidence that routine approaches at such distances in important resting areas "has the potential to injure a marine mammal or marine mammal stock in the wild" (Level A harassment). As noted in the preamble to the proposed rule, chronic disturbance and a lack of consistent, undisturbed resting periods can injure dolphins and have adverse effects at the population level by reducing the amount of energy available to forage and care for young. Chronic disturbance can result in habitat abandonment and declines in reproductive success. It also could have adverse effects on the health of individual dolphins or resident populations.

The proposed rule considers, but then discounts adopting an approach limit greater than 50 yards. NMFS specifically discusses arguments in favor of and against adopting a 100 yard approach limit, as exists for humpback whales in Hawaiian waters, on page 57862 of the *Federal Register* notice. The agency decides against proposing this longer limit because "not all approaches within 100 yards result in take." Further, NMFS notes that a distance greater than 50 yards "may diminish both the experience of dolphin watching and opportunities to participate in dolphin watching, because these animals are small and may be difficult to spot at a distance."

On the first point, the Commission disagrees with the agency's interpretation of the MMPA take definition. To be considered a take by Level B harassment, there need not be overt signs of disturbance in each instance, there only needs to be the *potential* for such disturbance, and associated changes in natural behavioral patterns. Based on the information considered in the preamble to the proposed rule, all approaches within 100 yards of spinner dolphins in nearshore resting areas have the potential to disturb the animals and change their behavior patterns.

¹ For example, the discussion of the proposed rulemaking on page 57860 of the *Federal Register* notice states that "the prohibitions in this proposed rule are designed to protect spinner dolphins from take...." However, on page 57859, the discussion suggests that the purpose is to provide "*sufficient protection* to spinner dolphins from human interactions (emphasis added)."

On the second point, the Commission appreciates why NMFS is trying to balance the needs of the dolphins against the desire of the public to get as close to dolphins as possible to enhance their viewing opportunities. However, the Commission questions whether such balancing is appropriate if the goal of this rulemaking is to delimit an approach distance at which taking is expected to or potentially can occur. The sole question should be how dolphins respond or potentially respond to approaches at the identified distances. If dolphins routinely show signs of disturbance at distances of 100 yards or greater, then that should be the applicable standard, irrespective of the impacts establishing such an approach limit will have on those who might want to approach closer to the dolphins.

The Commission is struck in particular by the referenced study by Symons (2013). As described in the preamble to the proposed rule, that study found that spinner dolphins are less likely to rest when swimmers are present within 150 meters. If dolphins are being disturbed at distances of 150 meters to the point where their resting behavior is being changed, approaches by swimmers at such a distance should be considered Level B harassment. The Commission therefore recommends that NMFS adopt a regulation that prohibits swimmers from approaching or attempting to approach within 150 yards² of spinner dolphins in Hawaiian waters. If NMFS declines to establish such an approach limit, it should explain either why (1) an approach at such a distance is not considered to be a take by Level B harassment if it has a demonstrated potential to disrupt resting behavior or (2) if such an approach does constitute Level B harassment, why it is not contained within the regulations.

The effects of approaches to dolphins by vessels at distances greater than 50 yards is less clear and, as explained in the preamble, confounded by the small sample size during periods when control conditions for the referenced study existed. It is somewhat alarming, however, that vessels or swimmers, or both, are within 100 yards of dolphins over 80 percent of the time when the dolphins are using essential resting areas. Although the results of Tyne (2015) were equivocal, the author expressed concern that observed periods of rest might not be sufficient to provide restorative benefits to Hawaiian spinner dolphins. Other studies have shown that long-term disturbance of dolphins by vessels can reduce the fitness of populations in areas other than Hawaii (e.g., Bejder et al. 2006). The Commission believes that NMFS should interpret the available information cautiously, giving the benefit of the doubt to the welfare and health of the dolphins. Furthermore, although the results of the Tyne study might not be as clear as one would like, other research cited by NMFS (Forest 2001, Timmel et al. 2008) noted that close approaches by vessels to spinner dolphins in the main Hawaiian Islands, at distances ranging from 10 m to 300 m, resulted in the disruption of the dolphins' behavior. The Commission therefore recommends that NMFS also adopt a vessel approach limit of 150 yards (see footnote 2 regarding our use of yards). Adopting a single standard applicable to both swimmers and vessels will make the regulations easier to enforce. It also should enable researchers to study more rigorously the effects of approaches by vessels to distances of between 50 and 150 yards by creating the control conditions that were largely unavailable to Tyne.

Although not addressed specifically in the literature cited in the *Federal Register* notice, it makes sense that the level of disturbance of dolphins by vessels and swimmers depends not only on

² Or in the context of this rulemaking, we believe that 150 yards would be a satisfactory accommodation for the difference in units being used and the need to have a standard that is easily understood by the regulated public.

their distance from the dolphins, but also on other factors such as the number of vessels or swimmers and the duration of the approach. For example, having 50 vessels surrounding a school of resting dolphins for half an hour would presumably have greater adverse effects than 5 vessels surrounding those dolphins for five minutes at the same distance. The proposed rule does not address these other variables. The Commission is particularly concerned about the additive effects of larger numbers of vessels and longer visits if NMFS were to adopt a relatively small approach limit (e.g., 50 yards) that arguably does not capture all, or perhaps even much, of the potential taking. The Commission therefore recommends that, if NMFS declines to adopt the Commission's recommendations concerning increasing the proposed approach distance, it include provisions in the final rule to limit the number of vessels that may approach a group of dolphins at the same time, limit the amount of time that any vessel can remain within some specified distance of a group of dolphins (i.e., ≥ 50 yards), establish a maximum operating speed for vessels within a specified distance of dolphins (e.g., 150 yards), and perhaps set forth other operating conditions.

Area of coverage

As drafted, the approach limits in the proposed rule would apply only to waters within 2 nautical miles of shore around the main Hawaiian Islands and in the specified area between Maui, Lanai, and Kahoolawe. The Commission agrees with NMFS that these are the areas where spinner dolphins are most susceptible to close approaches and where the problem of disturbance by swimmers and vessels is most acute. However, close approaches to dolphins by swimmers or vessels in other areas, although less likely to occur, also have the potential to disturb the animals. If the Commission is correct in assuming that the purpose of the rule is to clarify what constitutes taking and to proscribe such conduct, then the approach regulations should also apply elsewhere within Hawaii. Although it may be much less likely that swimmers will approach within a few yards of spinner dolphins in areas outside those specified in section 216.20(a) of the proposed rule, it should be clear that such behavior would constitute an impermissible taking should such an approach occur. The Commission therefore recommends that NMFS expand the coverage of the approach regulations to include all waters subject to U.S. jurisdiction surrounding the main Hawaiian Islands. In making this recommendation, the Commission also recognizes that the distances at which dolphins might be disturbed by swimmers or vessels in other areas and at other times when they are engaged in other behavior might be different than in resting areas. Nevertheless, there is some distance at which approaches by swimmers or vessels have the potential to disturb dolphins regardless of their behavioral state, and that should be reflected in the regulations.

Closed areas

There are at least two statutory bases under the MMPA that NMFS might use to support establishing closed areas. First, certain areas might be closed to human activities as a measure to prevent the taking of marine mammals. Second, NMFS has authority to adopt regulations that are necessary and appropriate to carry out the directive under section 2(2) of the MMPA to protect essential habitats. As noted on page 57864 of the *Federal Register* notice, the Spinner Dolphin Acoustic Population Parameters and Human Impact Research (SAPPHIRE) Project identified five sites that constitute "essential daytime habitats where human activities are largely Hawaiian spinner dolphin-directed, where closures are logistically feasible." The Commission agrees that these dolphin-resting sites constitute essential habitat where additional protection might be necessary and appropriate.

The Commission believes that NMFS, as first step, should close some essential resting areas based on the rationale that such closures are necessary to prevent unauthorized taking. This would apply only in a few of the smaller areas identified for possible closure, where it would be unlikely that vessels or swimmers could avoid coming within 150 yards of a dolphin, the approach limit recommended by the Commission. If some, but not all, of the five identified areas were to be closed, it would provide the opportunity for NMFS or others to conduct additional research to evaluate the effects of such closures to inform decisions on whether other essential habitats also warrant additional protection.

If however, NMFS declines to adopt the Commission's recommendations concerning the 150-yard approach distance and closure of some areas to prevent taking, the Commission recommends that the agency initiate a separate rulemaking to establish time-area closures in the five identified bays that provide essential resting habitat. It is unlikely that voluntary time-area closures (DEIS alternative 5) would be sufficient to provide the necessary protection to those areas.

Each of the five identified areas provides essential resting habitat for spinner dolphins. It also appears that special protection of those areas is necessary and appropriate. The additional protection provided by time-area closures in those areas would be particularly important if the approach rule failed to incorporate the full area where taking may or is likely to occur. It appears that all of the areas are equally important as resting areas and face similar types and levels of human pressures. Unless NMFS can somehow distinguish among the five areas (e.g., some are essential and some are not) or determine that enhanced protections are necessary or appropriate in only some of them, it will run the risk of having establishment of time-area closures in only some, but not all, of the identified areas deemed arbitrary and capricious. Selective closures also run the risk of sending vessels in larger numbers to the areas that are not closed and exacerbating the disturbance at those sites.

Unmanned aircraft systems (UASs)

As explained on page 57860 of the *Federal Register* notice, the proposed 50-yard approach limit would apply to approaches by water or air, including approaches using a UAS or drone. The discussion in the preamble is silent concerning approaches by fixed- and rotary-wing aircraft. Presumably, an approach distance of 1,000 feet rather than 50 yards would apply to those larger types of aircraft. The Commission recommends that NMFS clarify in the final rule that approach by fixed- and rotary-wing aircraft within 1,000 feet of spinner dolphins is prohibited.

In addition, the Commission is concerned that the provisions in the proposed rule concerning UASs are inconsistent with other NMFS policies concerning use of these systems and fails to recognize applicable Federal Aviation Administration (FAA) regulations. Based on the discussion in the preamble, NMFS considers UASs to be "objects" for purposes of applying section 216.20(b)(3) of the proposed rule and are subject to the 50-yard approach limit. However, guidance for using UASs provided by the NMFS Office of Protected Resources recommends that UASs be kept a safe distance of at least 1,000 feet from marine mammals.³ In addition, the Commission notes that regulations issued by the FAA consider UASs to be "aircraft" and establish a maximum altitude

³ <http://www.nmfs.noaa.gov/pr/uas.html>

of no more than 400 feet above ground level for the use of small UASs (<55 lbs.). Given the regulations established by the FAA and the guidance from the Office of Protected Resources, the Commission recommends that the final rule consider UAS to be “aircraft” as well as “objects” and that it prohibit their use within 1,000 feet of spinner dolphins in Hawaiian waters, except as authorized by permit or other authorization issued under the MMPA, consistent with current NMFS guidelines. Alternatively, NMFS could consider revisiting its general guidance on the use of UASs near marine mammals if it believes that there is some altitude below 400 feet (the maximum altitude allowed under FAA regulations) at which these systems can be safely operated without having the potential to disturb marine mammals.

Marine Mammal Species other than Spinner Dolphins

To date, when NMFS has chosen to regulate approaches to marine mammals, it has done so on a case-by-case basis, issuing regulations that are specific to particular species and locations. For the most part however, NMFS has relied on voluntary compliance with guidelines issued by the agency by those engaged in watching or approaching marine mammals. Such guidance varies by region and taxonomic group⁴. The Commission staff has noted the reluctance of NMFS’s enforcement offices to pursue cases that involve the taking of marine mammals absent more explicit criteria and has raised the need for more uniform and generally applicable regulatory guidance with NMFS staff, who responded positively to the idea of pursuing such a rulemaking. The Commission continues to believe that such an approach is preferable to waiting for acute problems to become apparent before issuing regulations. Generally applicable regulations would enhance enforcement of the MMPA’s taking prohibition by providing clearer, more objective standards and would provide a baseline from which species- or location-specific regulations might be fashioned in appropriate instances.

This issue is relevant here because we are concerned that the loss of some viewing and interaction opportunities with spinner dolphins, which is expected to result from this rulemaking, will prompt tour operators to redirect their activities to other species for which there currently are no approach regulations and no objective criteria for bringing enforcement actions for violations of the MMPA’s taking prohibition. Since NMFS published its advance notice of proposed rulemaking for spinner dolphins 11 years ago, some operators have begun offering tours that target several offshore cetacean species, including endangered false killer whales and sperm whales. At least some of these tours include close approaches by vessels and in-water close approaches by swimmers. The prospect that finalizing the spinner dolphin regulations will result in an increase in activities targeting other species underscores the need for NMFS to proceed promptly with publishing generally applicable approach regulations, or at least general approach regulations for all marine mammal species that occur in Hawaiian waters.

⁴ A summary of these is provided in http://www.nmfs.noaa.gov/pr/pdfs/education/viewing_interacting_wild_marine_mammals2011.pdf.

Thank you for considering these comments and recommendations. Please let me know if you would like to discuss our comments or have any questions concerning them.

Sincerely,

A handwritten signature in blue ink that reads "Rebecca J. Lent". The signature is written in a cursive style.

Rebecca J. Lent, Ph.D.
Executive Director

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