



MARINE MAMMAL COMMISSION

7 November 2016

Ms. Susan Pultz, Chief
Conservation Planning and Rulemaking Branch
Protected Resources Division
Pacific Islands Regional Office
National Marine Fisheries Service
1845 Wasp Boulevard, Building 176
Honolulu, HI 96818

Dear Ms Pultz:

The Marine Mammal Commission (the Commission), in consultation with its Committee of Scientific Advisors on Marine Mammals, has reviewed the National Marine Fisheries Service's (NMFS) notice (81 Fed. Reg. 62010) regarding the interim final rule to protect humpback whales in Hawaii, and offers the following comments and recommendations.

Background

The interim final rule establishes limits on how close people, vessels, and aircraft can approach humpback whales within the U.S. Exclusive Economic Zone around Hawaii. The new rule replaces similar regulations promulgated under authority of the Endangered Species Act (ESA), but which are no longer valid because the North Pacific population of humpback whales is no longer listed as endangered or threatened. However, humpback whales remain subject to restrictions on taking under the Marine Mammal Protection Act (MMPA), including taking that results from intentionally approaching whales and incidental taking by vessel operations that may cause harassment or the injury or death of whales from ship strikes. Therefore, the interim rule reinstates the same basic protection measures (i.e., a 100-yard approach limit by people and all types of vessels on or in the water, and a 1,000 ft minimum altitude limit for all types of aircraft except unmanned aircraft systems over humpback whales in Hawaii) using agency authority under the MMPA. The preamble to the interim rule requests comments on those provisions.

As indicated in the Commission's 20 July 2015 letter on the NMFS proposal to reclassify humpback whale populations (enclosed), the Commission believes that reissuing these rules under the authority of the MMPA is appropriate and commends NMFS for implementing them as an interim rule such that there has been no gap in the protection from taking afforded to humpback whales in Hawaii. As also indicated in the July 2015 letter and as discussed below, the Commission believes that some further modification of the rule is warranted to better ensure that the regulations prevent injuries to and harassment of humpback whales, particularly by vessels and aircraft involved in whale-watching activities.

Comments and recommendations

The preamble to the interim rule notes that documented vessel strikes on whales in Hawaii increased 20-fold between 1976 and 2011 with 61 percent of the strikes over that period due to tour vessels, such as whale-watching, diving, and snorkeling vessels (Lammers et al. 2013). The high frequency of ship strikes involving whale-watching vessels also was documented in the review by Laist et al. (2001), which reports that whale-watching vessels are among the vessel types with most records of injuries and deaths to large whales, including humpback whales, due to this cause. These findings strongly indicate that the operation of vessels observing whales requires special precautions, especially when they are in close proximity to the whales. In addition, the preamble to the interim final rule notes that humpback whale behavior (e.g., swim speed, respiration, diving, and social behavior) may be altered by the close proximity of vessels to animals, including vessels 100 yards or more away. Such behavioral changes could be considered as “harassment” under the MMPA’s definition of that term. Recognizing that vessels engaged in whale-watching may find themselves even closer than 100 yards from a whale if it moves towards the vessel, the Commission believes extra care is warranted for vessels both when they are moving toward and when they are moving away from a whale.

To minimize the risk of ship strikes and harassment, whale-watching guidelines often include advice on measures in addition to approach distances such as those specified in the interim rule. For example, whale-watching guidelines developed for the Hawaiian Islands Humpback Whale National Marine Sanctuary¹ recommend that vessels travel at slow speed in areas where ship strikes might occur and, if they are within 100 yards of a whale, stop and leave the engines running out of gear. Similarly, whale-watching guidelines developed by NMFS for humpback whales in the northeastern United States² recommend specific procedures for approaching and moving away from whales. Those guidelines advise that whale-watching vessels limit their speed to 7 knots when within half a mile of a whale, and to 10 knots when between one-half and 1 mile of a whale. The Northeast U.S. guidelines also advise vessel operators to maintain a course parallel to the whales’ heading when approaching or moving away from a whale.

The Commission believes that such procedures should be followed by all vessel operators that are observing whales to minimize the chance of ship strikes or altering whale behavior. As noted in its July 2015 letter, the Commission continues to believe that approach regulations for humpback whales should specify vessel operating procedures such as those noted above to better protect whales whenever whale-watching vessels are approaching or moving away from whales, particularly when they find themselves closer than 100 yards to a humpback whale because the whale moves towards a stopped vessel. Therefore, the Commission recommends that NMFS expand the provisions of the interim final rule for approaching humpback whales in Hawaii to include provisions such as the following:

¹ See Sanctuary web site at http://hawaiihumpbackwhale.noaa.gov/explore/whale_guidelines.html.

² See NMFS website at <https://www.greateratlantic.fisheries.noaa.gov/Protected/mmp/stories/whalewatchingoct2012.pdf>.

1. Vessels engaged in whale-watching activities are to limit their speed to 10 knots or less when a whale or whales are sighted within one mile of the vessel and to 7 knots or less when they are within one-half mile of the whale(s);
2. If a vessel approaching a whale or whales finds another vessel already closer than 200 yards to the whale(s), it must remain further than 200 yards from the whale(s) until the other vessel moves beyond 200 yards of the whale(s);
3. When a vessel approaching a whale for purposes of observation is closer than a certain distance (e.g., 500 yards), head-on approaches are to be avoided and instead vessels should maneuver such that any approach is made from behind the whale using an angle of less than 45 degrees from the whale's heading;
4. When within 100 yards of a whale, engines are to be placed in idle and remain running; and
5. When leaving the whale(s), vessels must angle away from the animal(s) and gradually increase speed consistent with speeds cited in 1 above.

Unmanned aircraft systems (UASs)

The Commission also notes that provisions in the interim rule concerning UASs appear to be inconsistent with other NMFS policies on operating UASs and with Federal Aviation Administration (FAA) regulations. As described in the preamble to the interim final rule, NMFS considers UASs to be “objects” but also indicated that UASs are considered “aircraft” for many other purposes (81 Fed. Reg. 62013). And, although the rule itself does not define the term “object,” section 216.19(a)(3) of the interim rule prohibits a person from causing an “object” to approach within 100 yards of a humpback whale. 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 ft 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 of no more than 400 ft 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” rather than “objects” and that it prohibit the use of UASs within 1,000 ft of humpback whales 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 ft (the maximum altitude allowed under FAA regulations) at which these systems can be safely operated without having the potential to disturb marine mammals.

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

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I hope these comments and recommendations are helpful. If you or your staff has questions, please let me know.

Sincerely,

A handwritten signature in blue ink that reads "Rebecca J. Lent". The signature is written in a cursive style with a large initial 'R'.

Rebecca J. Lent, Ph.D
Executive Director

References

Lammers, M.O., A.A. Pack, E.G. Lyman, and L. Espiritu. 2013. Trends in collisions between vessels and North Pacific humpback whales (*Meaptera novaeangliae*) in Hawaiian waters (1975-2011). *Journal of Cetacean Research and Management*, 13(1): 73-80.

Laist, D.W., A.R. Knowlton, J.G. Mead, A.S. Collet, and M. Podesta. 2001. Collisions between ships and whales. *Marine Mammal Science*, 17(1): 35-75.