



MARINE MAMMAL COMMISSION

13 September 2018

Jon Kurland
Assistant Regional Administrator for Protected Resources
National Marine Fisheries Service, Alaska Region
P.O. Box 21668
Juneau, AK 99802-1668

Dear Mr. Kurland:

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) proposed rule to revise the regulations governing the taking of northern fur seals for subsistence on the Pribilof Islands (83 Fed. Reg. 40192). The Commission has commented previously on several of the elements of the proposal rule,¹ although those comments and the Commission's recommendations seem to have had little impact on the substance of the proposed rule.

NMFS is proposing major revisions to the regulations governing the hunting and harvesting of fur seals on St. Paul. Among other things NMFS is proposing to—

- expand the season during which taking for subsistence would be allowed (to allow some type of taking year-round except between 31 May and 23 June);
- change the allowable taking methods to permit the use of firearms between 1 January and 31 May and to allow hunters to target seals in the water as well as on land;
- extend the season during which roundups of sub-adult seals for harvest can be conducted beyond the current 8 August cut-off date, allowing any juvenile seal to be harvested until 31 December;
- allow sex/age classes other than two- to five-year old sub-adult male seals to be harvested (including male pups, males up to seven years old, and a limited number of female seals);
- relax restrictions on the take of female fur seals (allowing up to 20 to be killed accidentally per year);
- lift restrictions limiting roundups of seals for harvest to certain rookeries and haulout grounds and the frequency of harvests at those locations;
- incorporate an overall annual harvest limit of 2,000 fur seals into the regulations; and task the St. Paul Island Co-Management Council with responsibility to monitor and manage the harvest.

¹ See, e.g., [letter of 24 August 2012](#) commenting on the notice of receipt of a rulemaking petition from the Pribilof Island Community of St. Paul Island and the Aleut Community of St. Paul Island-Tribal Government, [letter of 27 August 2015](#) providing scoping comments on a supplemental environmental impact statement concerning the proposed changes, and [letter of 27 February 2017](#) commenting on the draft supplemental environmental impact statement.

The Commission recognizes that many of these proposals are being put forward at the request of the Pribilof Island Community of St. Paul Island and the Aleut Community of St. Paul Island (ACSPI), and represent a fundamental shift away from a regulatory approach to managing the taking of fur seals to one based on co-management between NMFS and the ACSPI. The Commission supports co-management under the Marine Mammal Protection Act (MMPA), and has spent considerable time and effort seeking ways to improve cooperation between Federal resource agencies and Alaska Native Organizations. However, in this instance, both the MMPA and the Fur Seal Act (FSA) are at play, with the latter statute allowing subsistence taking, but only pursuant to regulations issued under section 103(b) of the FSA. Here, NMFS is proposing to eliminate much of its previous regulatory structure in favor of deferring to the discretion of the Co-Management Council. Although this approach may give the St. Paul community the desired assurance that its needs and preferences will be accommodated, and presumably can be designed to safeguard fur seal conservation, the process should be expanded beyond NMFS and the ACSPI. Specifically, the process should be designed to solicit public input, provide transparency, and promote accountability.

As the Commission noted in its August 2015 comments on preparation of the supplemental Environmental Impact Statement (SEIS), the trajectory of the St. Paul Island fur seal population since the 1980s, when the subsistence regulations were initially adopted, has been consistently downward, particularly over the past 20 years. Pup production on St. Paul has declined fairly steadily since 1994 and in 2016 was only about 42 percent of what it had been in 1994. This continuing decline is particularly worrisome because the abundance of this stock had already dropped by more than half between the late 1950s and 1988, when NMFS designated the stock as depleted under the MMPA. Given the population trend over the past 60 years, and the fact that the population continues to decline for unknown reasons, the Commission recommends that NMFS take a precautionary approach to implementing regulatory changes that may contribute to that decline. In particular, given the importance of female seals to eventual population recovery, the Commission recommends that the regulations be structured to continue to include provisions to minimize the taking of female seals.

One shortcoming of the proposed rule with respect to female seals is the proposal to remove certain provisions that NMFS refers to as “duplicative and unnecessary” regulatory restrictions. Among these are the current provisions at 50 C.F.R. § 216.72(d)(5), (d)(9) and (e)(4), all of which include prohibitions on the intentional taking of various age classes of female fur seals. Some of the proposed changes to these provisions are appropriate given the changes already promulgated in regulations applicable to St. George Island and in light of some of the changes for St. Paul Island proposed in this rulemaking. However, the Commission recommends that a regulatory prohibition on the intentional taking of female fur seals be retained, albeit not necessarily in these particular sections. NMFS argues that these provisions are unnecessary because they are duplicative of the general prohibition set forth in section 102 of the FSA. However, there is no specific prohibition on the intentional taking of female seals in the FSA and a limited number of takes of female seals would be allowed each year under the proposed rule. Without these prohibitions, the intentional taking of female seals up to those annual limits would be permissible. If the subsistence needs of the Pribilovians can be met without taking any female seals or with only a minimum number of unintentional takes of females, then that is what the regulations should be promoting.

The subsistence regulations promulgated in the 1980s recognized the importance of female seals to the reproductive potential of the population and its recovery and placed a very high priority on avoiding, or at least minimizing, the risk that female seals will be taken. In the 1986 subsistence regulations, the harvest season was set to end on 8 August to minimize the risk of taking female seals. Those regulations also provided for extending the harvest beyond 8 August if subsistence needs remained unmet, but contained two provisions that specifically limited the allowable, accidental take of female seals. The annual harvest was to be terminated if either (1) the total number of female seals harvested during the season exceeded one half of one percent of the seals harvested or (2) more than five female seals were taken during any consecutive seven-day period after 8 August.

Closing the season for harvesting sub-adult males on August 8 has proven effective in minimizing the accidental harvest of females. That being the case, the Commission thinks that the proposal to extend the harvest season for sub-adult seals through December 31 poses an unnecessary risk of killing female seals and is ill-advised. According to the reports available on NMFS's website, only 44 female seals were killed accidentally in subsistence harvests on St. Paul between 1995 and 2017 and, in about 40 percent of those years, no females were reported killed. This being the case, we are concerned about the proposal to increase the allowable take of female seals to 20 per year. This would allow about a ten-fold increase in the take of females above the average achieved over the past 23 years. We note further that adopting a 20-seal threshold (if one assumes an annual harvest of 2,000 seals as would be authorized under the proposed rule) would allow female seals to be taken at twice the rate allowed under the 1986 regulations. Moreover, authorizing lethal taking of up to 20 female fur seals per year would exceed five percent of the annual harvest when viewed in light of the actual average harvest level since 2005.

In the two instances when the harvest was extended beyond August 8, unacceptably high numbers of female seals were taken, causing the harvest to be terminated for the remainder of the year. For example, on a single harvest-day in September 1986, 16 of the seals taken (out of a total of about 70) were females. This shows not only that there is a significant risk of taking sub-adult female seals during the proposed harvest season extension, but that the cap on the taking of females, which would foreclose harvest opportunities for the remainder of the year, could be reached quite quickly, even in a single day. The experiences with harvest extensions in 1986 and 1987 prompted NMFS to amend the harvest regulations in 1992 to eliminate the extension provision altogether. Despite this history, and the demonstrated difficulty of even experienced sealers to be able to differentiate between sub-adult males and sub-adult females once they begin to comingle, the proposed rule would allow sub-adult seals to be harvested any time between June 23 and December 31. Given the demonstrated risk of taking females after August 8, the likelihood that less experienced sealers (who would be allowed to participate in the harvest under the proposed regulatory changes) would be less able to differentiate between male and female seals, and the implications for shutting down further harvests that year, the Commission recommends that NMFS retain the prohibition on harvesting sub-adult fur seals after August 8. Instead, NMFS should authorize harvest of other age classes later in the year in a way that poses less risk of taking female seals.² As NMFS notes in the preamble to

² As discussed in the proposed rule and the Commission's February 2017 letter commenting on the draft SEIS residents of St. Paul prefer using younger seals for subsistence. Thus, it is unclear that the residents of St. Paul have much interest in harvesting or hunting older seals except during January-May, when they may be the only seals available. If there is little

the proposed rule, “from September through December all fur seals generally occupy similar terrestrial habitat, and there is little if any predictable separation among males and females as is found earlier in the year.” Thus, it may be that the only age class for which sex can be determined reliably at this time of year is pups, which can be safely handled and visually examined to determine their sex.

NMFS amended its regulations in 2014 specific to harvesting fur seals on St. George Island. Those regulations retained the August 8 termination date for harvesting sub-adult fur seals, but added a separate harvest season (September 16-November 30) authorizing the harvest of pups on St. George Island. In 2015-2017 (the only years for which harvest reports are available subsequent to the regulatory changes), no female seals were killed accidentally. Presumably, a similar approach can be taken on St. Paul to enable the community to obtain fresh meat for more of the year, while still minimizing the risk that female seals will be killed. Further in this regard, we note that the regulations applicable to St. George specify the harvest protocols to be used, which are designed to minimize risks of taking female seals, avoid stressing seals, reduce disturbance to or overharvest at particular haulout sites, and provide opportunities for monitoring by NMFS. In contrast, the proposed regulations for St. Paul are silent on all of these issues except as they may be addressed indirectly via the proposed harvest seasons and proposed limits on the total numbers of seals that may be taken and on the take of female seals. While we appreciate that NMFS and ACSPI may adopt similar provisions as part of the envisioned co-management approach, without any constraints on the exercise of their discretion in the regulations, this provides little assurance to the public that such measures will in fact be included. The Commission therefore recommends that the regulations themselves include certain minimum requirements (e.g., that only male pups may be intentionally harvested and that all pups be sexed prior to harvest) and provide structure for subsequent co-management agreements by requiring that an acceptable harvest management regime include elements designed to minimize the chances of taking of female seals, limit disturbance of seals at any rookery or haulout, ensure that taking is humane, provide opportunities for independent monitoring of hunting and harvesting activities, etc.

With respect to the proposal to establish a hunting season and allow the use of firearms between 1 January and 31 May, telemetry data suggest there may be a low risk of taking female seals at that time of year. Also, because seals occur only sporadically at St. Paul Island during this period and in fairly low numbers, there does not seem to be much concern about the disturbance of seals from the use of firearms early in the proposed hunting season. However, as the season progresses, male seals begin to arrive on St. Paul Island with greater frequency and start to occupy established breeding sites. As such, disturbance from the use of firearms would become a greater concern later in the proposed hunting season. A more significant concern with the proposed use of firearms and allowing hunters to target seals in the water as well as on land is the potential for struck and lost seals. Using data from Steller sea lion hunts, NMFS speculates that struck and lost rates for the proposed hunt of fur seals could range from 9 to 50 percent. However, the actual struck and lost rate for Steller sea lion hunts (and by analogy the predicted rate for the proposed fur seal hunt) could be substantially higher because these events likely are under-reported. In any event, the loss rate during the proposed hunt is likely to be much higher than for harvests, in which all targeted individuals are successfully taken.

or no interest in harvesting older juvenile seals at other times of the year, and doing so poses a risk of taking female seals, then it would be appropriate for the regulations to prohibit such taking as well.

One element of what is considered “wasteful take” under the 1986 fur seal harvest regulations is employing harvest methods that are not likely to ensure successful killing and retrieval of each selected fur seal. The Commission is not suggesting that hunting not be allowed because it is less likely to lead to the successfully killing and retrieval of each seal when compared to a traditional harvest, particularly since alternative methods for taking seals are not available during the proposed hunting season. Nevertheless, the proposed hunt is a new practice and one that requires extra scrutiny, at least at the outset, to obtain reliable information on struck and lost rates, understand conditions under which retrieval of a shot seal is less likely, and inform possible limitations on hunting practices in the future. The Commission therefore recommends that the regulations require NMFS and ACSPI to conduct such monitoring.

NMFS is proposing to eliminate the requirement that harvests be rotated among the specified haulouts on St. Paul. The discussion in the preamble notes that there is confusion regarding the names of some of the haulouts that render the provision ineffective today. The discussion also notes that the original rule establishing this requirement lacked a clear rationale and highlighted differences between the regulations applicable to St. Paul, where haulouts could be visited only once per week, and those applicable to St. George, where haulouts could be visited twice weekly. However, NMFS fails to address the underlying issue, whether it is a good management practice to rotate harvests among haulouts to minimize the frequency of disturbance and to distribute taking among the rookeries. The Commission supports this practice³ and recommends that the regulations retain the requirement that no particular haulout or rookery on St. Paul be subject to harvest more than once per week. If the names are confusing, the regulations need not specify those areas, by name, so long as the frequency of visits to each is appropriately limited. As NMFS indicates in the preamble, there likely are more haulouts on St. Paul than recognized in the existing regulations. If so, it should be easier to schedule harvests such that none is visited more than once per week. As for the “discrepancy” between the regulations applicable to St. Paul and St. George, this appears to be tied to the number of haulouts and rookeries where seals congregate on the two islands. Because St. George has fewer locations from which seals may be taken (only six are identified in the existing regulations), limiting visits to once per week could have restricted harvest opportunities. This is not the case with St. Paul. Further in this regard, the Commission notes that, under this proposed rule, the regulations would retain the existing limit on the frequency of harvests from specified haulouts and rookeries on St. George.

Currently, the applicable regulations require NMFS to review periodically the subsistence needs of St. Paul and St. George and to adopt a lower bound and upper bound of anticipated need. When the lower bound is reached, the harvest is temporarily suspended while NMFS reassesses subsistence needs and allowed to resume if NMFS determines that the needs have yet to be satisfied. At the request of the St. Paul community, NMFS is proposing to eliminate these requirements and in-season adjustments of the allowable harvest levels. Instead, St. Paul asked that the maximum allowable harvest levels be included in the regulations. The proposed allowable harvest levels would be 2,000 fur seals on St. Paul and 500 fur seals on St. George. These levels correspond to the upper bounds of the projected subsistence needs of the residents of the two islands adopted most recently by NMFS in 2017, which have remained unchanged since the early 1990s.

³ Please refer to page 7 of the Commission’s 27 February 2017 comments on the draft SEIS for further discussion of this issue and the susceptibility of fur seals to disturbance associated with repeated entries to rookeries.

The Commission appreciates that NMFS and St. Paul want to eliminate the potential for in-season review of community needs (which is triggered if the lower bound of the established range is reached) and to provide greater certainty concerning allowable annual harvest levels. Nevertheless, given all of the changes being proposed to the regulations concerning when, where, how, and what seals may be taken, it is premature to institutionalize specific harvest levels, particularly for St. Paul⁴, where the changes in hunting and harvest practices would be most profound. Although NMFS has more than 30 years of information to draw on to establish the appropriate limit for St. Paul, much of that information would cease to be relevant if other proposed regulatory changes are adopted. For example, it is expected that at least some seals taken during the proposed hunting season will be older and larger than those taken in past harvests, but it remains unclear how many such seals will be taken during the hunt or how much meat those seals will provide to the community. Likewise, it remains to be seen how the proposed changes to the harvest regime will affect projected needs. If there is a large-scale shift away from harvesting sub-adult males in favor of taking pups, this presumably would require more seals to be taken to provide a comparable amount of meat. Given the current uncertainty, the Commission recommends that NMFS postpone adopting the proposed harvest limits, or any other numerical harvest limits that reflect community subsistence needs, until other proposed changes have been adopted and implemented and sufficient information is available to evaluate how those changes affect hunting and harvest practices, and the numbers and sizes of seals being taken.

The Commission also believes that NMFS should provide a well-reasoned explanation for whatever harvest levels it eventually adopts. The Commission has evaluated the proposed levels several times, most recently in our comments on the draft SEIS and in a [19 June 2017 letter](#) commenting on proposed subsistence needs for 2017-2019. The Commission will not reiterate its concerns here, other than to note that the projected subsistence needs, which would be enshrined in regulations, exceed recent harvest levels by approximately a factor of five. The referenced letters from the Commission provide further discussion of this point. The preamble to the proposed rule suggests that actual harvest levels and trends over the past two decades are not appropriate indicators of subsistence needs, noting, among other things that subsistence opportunities have been lost because of the requirements to use experienced sealers and because of conflicts between the harvest season and the availability of wage-paying employment. Certainly these are relevant factors, but NMFS has not made a compelling argument that they account for the degree of disparity between projected subsistence needs and actual harvest levels. NMFS cites the administrative burden associated with suspending the harvest once the lower bound of projected need is reached, assembling updated information on remaining need, and reviewing that information as reasons for doing away with the two-step process. Given that it has been some 25 years⁵ since the lower bound has been reached and this provision invoked, it seems like the feared administrative burden is overstated.

⁴ Even though the regulations allowing the harvest of pups on St. George have been in place for a few years, it is unclear that we have enough information on how this has affected usage patterns to set an appropriate harvest limit by regulation.

⁵ We equivocate somewhat here because neither the proposed rule nor the draft SEIS provides a table or other summary information on harvest levels since the subsistence regulations were adopted in the mid-1980s except for Figure 4.3-1 in the draft SEIS, which is presented at a scale that makes it impossible to discern actual harvest levels.

The existing regulations contain various data collection requirements. NMFS, with cooperation from St. Paul residents that participate in the harvest, is tasked with compiling, on a daily basis, information on the number of seals taken in the subsistence harvest and on the extent of utilization of harvested seals. To a large extent, these responsibilities have been ceded to ACSPI, which now submits an annual subsistence harvest report to NMFS. However, these reports do not provide much information on the amount of meat provided by the sizes of seals being harvested. This may not be very important currently, given that the harvest is limited to sub-adult male seals and we already have considerable information on the usage patterns and the amount of meat yielded from two- and three-year-old seals. Given the proposal to allow other age and size classes of seals to be taken, this sort of information will take on added importance as we try to understand how the addition of a hunting season and changes to the harvest that provide a longer season that allows different age-classes to be taken will affect usage patterns and the numbers of seals taken for subsistence. In addition, experience with self-reporting schemes has shown them generally to be less reliable than ones using independent observers. As such, the Commission recommends that NMFS, at least at the outset of implementing revised regulations, take on a renewed responsibility for monitoring and reporting on new harvest practices, particularly those that could increase the probability of there being struck and lost seals, increase the risk of taking females, and increase the potential for disturbing seals at rookeries and haulouts.

The Commission appreciates the opportunity to comment on the proposed rule and hopes that NMFS finds our recommendations helpful. Please contact me if you have any questions concerning the points raised in this letter.

Sincerely,



Peter O. Thomas, Ph.D.
Executive Director