



MARINE MAMMAL COMMISSION

15 September 2021

Dr. Shannon Bettridge, Chief
Marine Mammal and Sea Turtle Conservation Division
Office of Protected Resources
National Marine Fisheries Service
1315 East-West Highway
Silver Spring, MD 20910

Dear Dr. Bettridge:

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 List of Fisheries (LOF) for 2022 (86 Fed. Reg. 43491). The Commission generally concurs with the proposed changes, with the exceptions described herein.

Massachusetts mixed species trap/pot fishery

NMFS has proposed to add the Massachusetts mixed species trap/pot fishery as a new Category II fishery, separate from the broader Category I Northeast/Mid-Atlantic American lobster trap/pot and the Category II Atlantic mixed species trap/pot fisheries. The new fishery includes, but is not limited to, trap/pot fisheries targeting American lobster, black sea bass, whelk, tautog, jonah crab, and rock crab in Massachusetts state waters. This proposal stems from a request from the Massachusetts Department of Marine Fisheries to consider separating out the trap/pot fixed gear fishery in Massachusetts from other, similar fisheries to reflect new management measures that would be implemented in 2022 (86 Fed. Reg. 43501).

The Commission disagrees with the proposed separation of this new fishery and its placement in Category II. The trap/pot fisheries operating throughout New England and the Mid-Atlantic, including Massachusetts, are documented to be responsible for the deaths and serious injuries of endangered North Atlantic right whales, and humpback and minke whales (Hayes et al. 2021). NMFS has determined that the annual level of mortality and serious injury in the Northeast/Mid-Atlantic American lobster trap/pot fishery (of which the Massachusetts trap/pot fishery is a part) exceeds 50 percent of each stock's Potential Biological Removal (PBR) level.¹ Although take reduction plans and regulatory measures have been in place since 1995, there has been no appreciable reduction in mortalities and serious injuries. Applicable regulations include gear modifications and gear marking requirements similar to those being implemented in Massachusetts. To determine *a priori* that new regulations and measures yet to be imposed in Massachusetts state waters will be effective at reducing mortality and serious injury rates to less than 50 percent of each stock's PBR² is premature and inconsistent with NMFS implementing regulations for categorizing fisheries (60 Fed. Reg. 45086). This is particularly true given NMFS's 25-year history of overly

¹ <https://www.fisheries.noaa.gov/national/marine-mammal-protection/northeast-mid-atlantic-american-lobster-trap-pot-fishery-mmpa>

² The minimal criterion for reclassification as a Category II fishery.

optimistic projections about the effectiveness of take reduction plans, which have yet to meet the immediate goal of MMPA section 118(f)(2) to reduce serious injury and mortality to below PBR within six months of a plan's implementation. It is reasonable to assume, by analogy to the existing trap/pot fisheries in the region, that any new trap/pot fishery will similarly result in incidental mortality and serious injury of whales.

Despite its poor track record in assessing the effectiveness of proposed take reduction measures, NMFS once again is putting faith in unproven regulations that have yet to be implemented. This is especially concerning given the recent increase in North Atlantic right whale deaths due to both entanglements in fishing gear and vessel strikes (Davies and Brilliant 2019). North Atlantic right whales are also experiencing poor growth and health (Christiansen et al. 2020), declining abundance (Pace et al. 2017, Pettis et al. 2020), and persistently low reproductive rates (Pettis et al. 2020), signaling an increased risk of extinction. The Commission therefore recommends that NMFS (1) retain the Massachusetts mixed species trap/pot fishery as part of the broader Category I Northeast/Mid-Atlantic American lobster trap/pot fishery until any new management measures are determined to be effective in reducing serious injuries and deaths sufficiently over a number of years and (2) continue efforts to reduce mortality and serious injury of right whales and other baleen whales in trap/pot fisheries and other fisheries subject to the Atlantic Large Whale Take Reduction Plan.

Hawai'i troll fishery

In its [28 October 2020](#) letter commenting on the 2021 proposed LOF, the Commission recommended that NMFS reclassify the Category III "Hawai'i troll" fishery as a Category II fishery, based on documented serious injuries due to hooking or entanglement of spotted dolphins in fishing line, as summarized in the 2012 proposed LOF (76 Fed. Reg. 37716) and more recent, reliable estimates of rates of troll vessels fishing in and through spotted dolphin groups (Baird and Webster 2020). Despite the Commission's recommendation and the evidence supporting it, which indicated a more than remote likelihood of mortality and serious injury of spotted dolphins in the troll fishery, NMFS declined to make this revision. NMFS stated that without known mortality and serious injury of spotted dolphins that could be attributed specifically to the Hawai'i troll fishery, and with a minimum population estimate and PBR calculated for only one of the four spotted dolphin stocks in the Hawai'i islands region, it would evaluate classification of the fishery by analogy (86 Fed. Reg. 3034). It then used, for comparison, other hook and line fisheries elsewhere in the Pacific and in the Gulf of Mexico. However, unlike the Hawai'i troll fishery, those fisheries do not seek out dolphin aggregations and intentionally troll through them to target the associated fish species. As such, comparing the Hawai'i troll fishery to other hook and line fisheries that do not target dolphins as part of their fishing strategy is an inappropriate analogy, and should not be used as the basis for classifying this fishery.

NMFS considered the information presented in Baird and Webster (2020), but noted in its response that the study did not estimate mortality or serious injury rates incidental to the troll fishery. Mortality and serious injury rates generally are not quantifiable without a dedicated observer program, which currently does not exist for the Hawai'i troll fishery. The information presented in Baird and Webster (2020) was based on direct and systematic observations of troll fishing vessels associated with dolphins, and provided quantitative information indicating that vessels fishing in association with spotted dolphin groups do so most regularly off Hawai'i Island, and that those

associations occur throughout the year. NMFS acknowledged that the study did indicate “a high frequency of associations between troll and rod and reel fishing, and pantropical spotted dolphins, and in particular with the Hawai’i Island stock. This information suggests hookings and/or entanglements may occur, and the fishing technique of trolling through groups and repositioning presents a heightened risk of hooking or entanglement to pantropical spotted dolphins” (86 Fed. Reg. 3034). Yet, NMFS concluded that this information alone does not provide sufficient evidence that spotted dolphins are being seriously injured or killed on an “occasional basis.”

The Commission disagrees with this conclusion and considers the information presented in Baird and Webster (2020), coupled with anecdotal reports of dolphins being entangled or hooked in gear used in this fishery³, to be sufficient to warrant a determination that “occasional” serious injuries and mortalities of marine mammals are likely to occur in the Hawai’i troll fishery. The Commission therefore recommends, once again, that NMFS reclassify the Category III Hawai’i troll fishery as a Category II fishery, based on observations that troll fishermen are intentionally setting hook and line gear in and around groups of spotted dolphins as a means for targeting tuna, thereby resulting in, at minimum, an occasional level of serious injury or mortality. If NMFS again concludes that recategorization of the fishery is not warranted, the Commission recommends that NMFS provide a quantitative means to verify marine mammal serious injury and mortality rates in the Hawai’i troll fishery through a dedicated observer program or alternative monitoring scheme (e.g., electronic monitoring or remote observers).

Removal of species and/or stocks from the LOF

Tables 1, 2, and 3 of the 2022 proposed LOF list the marine mammal species and/or stocks known to be incidentally killed or injured (seriously or non-seriously) in each fishery, using the best available data through 2018. As NMFS notes (86 Fed. Reg. 43503), the list is based on information from stock assessment reports, injury determination reports, bycatch estimation reports, observer data, logbook data, stranding data, disentanglement network data, fisherman self-reports (i.e., Marine Mammal Authorization Program reports), and anecdotal reports.

NMFS is proposing to remove several marine mammal species and stocks from the lists of those identified as being subject to incidental mortality or injury in various fisheries, due to an absence of *recently observed* mortalities or injuries. For some fisheries, NMFS defines “recently observed” to mean within the most recent five years; for other fisheries “recently observed” is not defined. This is inconsistent with NMFS’s implementing regulations, which merely state that the LOF is to “list the marine mammals that have been incidentally injured or killed by commercial fishing operations” (60 Fed. Reg. 45086). The underlying purpose is to identify those species and/or stocks with a history of interactions with a fishery, and with the potential to have continued interactions in the future. Because that list is intended to identify *all* species and stocks that are known to have been incidentally killed or injured in the fishery, it should not be subject to an arbitrary temporal cutoff and should reflect data from more than the most recent five-year time period. Moreover, that list should also not be limited only to species and stocks *observed* to have been subject to incidental mortality or injury. Even in fisheries with high levels of observer coverage⁴,

³ As summarized in the 2020 stock assessment report for the Hawaiian Islands stock complex of pantropical spotted dolphins (Caretta et al. 2021).

⁴ Observer coverage levels for the Alaska fisheries are summarized in Muto et al. (2021).

observers likely are unable to detect all marine mammal interactions with fishing gear (Pace et al. 2021) or to identify all marine mammal species with a high level of confidence.

Table 1 summarizes the fisheries for which changes to the list of species and stocks identified as being subject to incidental mortality or injury in the fishery are proposed. The Commission recommends that NMFS retain, in the LOF, the complete listing of species and stocks that are known to be subject to mortality or injury in the fishery based on all available data, not just data obtained by observer programs in the last five years.

Table 1. Fisheries in the LOF for which NMFS has proposed to remove the indicated species and stocks based on no recently observed mortality or injury, but which the Commission has recommended should be retained. [Abbreviations used: Alaska (AK), Hawai'i (HI)]

Fishery	Category	Species and/or stocks proposed to be removed from the list which should be retained
HI deep-set longline	I	Bottlenose dolphin, HI Pelagic Kogia spp., HI Pygmy killer whale, HI Risso's dolphin, HI Striped dolphin, HI
HI shallow-set longline	II	Blainville's beaked whale, HI Bottlenose dolphin, HI Pelagic Humpback whale, Central North Pacific Risso's dolphin, HI Rough-toothed dolphin, HI Striped dolphin, HI
AK Bering Sea, Aleutian Islands pollock trawl	II	Bearded seal, AK (Beringia) Beluga whale, Bristol Bay Beluga whale, Eastern Bering Sea Beluga whale, Eastern Chukchi Sea Northern fur seal, Eastern Pacific Spotted seal, AK
AK Bering Sea, Aleutian Islands Greenland turbot longline	III	Killer whale, AK resident
AK Bering Sea, Aleutian Islands Pacific cod longline	III	Spotted seal, AK
Bering Sea, Aleutian Islands Atka mackerel trawl	III	Bearded seal, AK (Beringia)
AK Bering Sea, Aleutian Islands rockfish trawl fishery	III	Killer whale, Gulf of Alaska, Aleutian Islands, Bering Sea transient Killer whale, Eastern North Pacific AK resident
AK Gulf of Alaska flatfish trawl	III	Northern elephant seal, North Pacific
AK Gulf of Alaska Pacific cod trawl	III	Harbor seal, AK
AK Gulf of Alaska Pollock trawl	III	Dall's porpoise, AK Fin whale, Northeast Pacific

Fishery	Category	Species and/or stocks proposed to be removed from the list which should be retained
		Northern elephant seal, North Pacific
AK Gulf of Alaska Pacific cod pot	III	Harbor seal, Gulf of AK (Cook Inlet/Shelikof Strait)
AK Gulf of Alaska groundfish jig	III	Fin whale, Northeast Pacific
Western Pacific pelagic longline (HI deep-set component)	I	Humpback whale, Central North Pacific Pygmy killer whale, HI
Western Pacific pelagic longline (HI shallow-set component)	II	Blainville's beaked whale, HI Mesoplodon spp. (stock unknown) Rough-toothed dolphin, HI

Thank you for the opportunity to comment on the proposed 2022 LOF. Please contact me if you have any questions.

Sincerely,



Peter O. Thomas, Ph.D.,
Executive Director

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