



MARINE MAMMAL COMMISSION

25 August 2023

Laura Engleby, Chief
Protected Species Branch
Southeast Fisheries Region
NOAA Fisheries
St. Petersburg, Florida

Dear Ms. Engleby:

On 15 December 2020, the National Marine Fisheries Service (NMFS) published a proposed rule to amend the Pelagic Longline Take Reduction Plan (PLTRP) (85 Fed. Reg. 81168). The Marine Mammal Commission (the Commission, herein), in consultation with its Committee of Scientific Advisors on Marine Mammals, reviewed the proposed PLTRP amendments, and, on 16 February 2021, sent NMFS comments and recommendations regarding the proposed rule.¹ After taking into account the Commission's recommendations, and public comments, NMFS published the final rule amending the PLTRP on 6 June 2023 (88 Fed. Reg. 36965), over two years after receiving the Commission's letter.

Section 202(d) of the Marine Mammal Protection Act (MMPA) states that “[a]ny recommendations made by the Commission to the Secretary and other Federal officials shall be responded to by those individuals within *one hundred and twenty days* after receipt thereof” (emphasis added). Further, “[a]ny [Commission] recommendations which are not followed or adopted shall be referred to the Commission together with a *detailed explanation* of the reasons why those recommendations were not followed or adopted” (emphasis added). It appears that NMFS did not follow or adopt *any* of the Commission's recommendations and, to date, NMFS has provided only cursory responses or explanations as to why.

Breaking strength of branchlines and hooks

The proposed rule would have permitted terminal gear in the pelagic longline fishery with the following characteristics: non-forged, round-shank, size 16/0 and 18/0 hooks that straighten with a force not to exceed 300 lb, and 1.8-mm branch lines with breaking strength of at least 300 lb, each based on manufacturer specifications when new. The Commission, in its 16 February 2021 letter, noted that the intention of the terminal gear proposal was to make the hook the weakest element of the gear, with the expectation that force exerted by a hooked cetacean against the gear secured by the crew would straighten or break the hook before the line broke, thus releasing the

¹ <https://www.mmc.gov/wp-content/uploads/21.02.16-Fougeres-PLTRP-amendment.pdf>

hooked cetacean with less serious injuries. The Commission recommended that achieving this goal would require stronger branch lines,² for which it provided the following rationale—

“[As proposed,] fishermen would be permitted to use hooks and lines of the same or very similar breaking strength (300 pounds), which would likely lead to nearly as many lines breaking as hooks failing. Fishermen on the PLTRT [Pelagic Longline Take Reduction Team], and industry experts, have asserted that nylon monofilament used for branch lines has a greater breaking strength than the nominal strength published by the manufacturer. They report that the published value is a minimum (PLTRT 2020), and suggest that the actual breaking strength is more than 350 lbs. While this is likely true, neither the team nor NMFS has confirmed the assertion using industry or experimental data. The most important problem with this assertion is not its veracity, but rather that there are no publicly available data that provide estimates of how much stronger the lines are. There are two, compounding uncertainties here. First, it is not known what the strength differential between lines and hooks needs to be to ensure that most hooked pilot whales will be released by the hook’s straightening rather than the line’s breaking. And, second, it is not publicly known what the differential is between the actual and published breaking strength of 1.8 mm line.”

Further, the Commission notes that branch lines degrade and lose strength with use. Thus, an additional uncertainty is the rate at which branch lines in use degrade and lose strength. NMFS did not adopt the Commission’s recommendation or make any change to the proposed measure, and offered no explanation, let alone the “detailed explanation” called for by the MMPA, for not following the Commission’s recommendation. The only rationale for its decision in the final rule is as follows—

“Based on these comments,³ we did not change the proposed strength for gangions (i.e., leaders or branch lines) or hooks.”

Hook size

With respect to the allowed hook sizes, the Commission recommended that only 16/0 hooks be authorized⁴—

² “The Commission recommends that NMFS... require the pelagic longline fishery to use 2.0 mm monofilament nylon line, or if using other materials, the terminal line elements must have a breaking strength of 400 pounds or greater when new.”

³ While not entirely clear, it appears that NMFS is referring to comments received from two industry groups claiming that the nominal branch-line strength, 300 lbs, is a minimum, but this claim was not validated and true breaking strengths were not determined.

⁴ “The Commission therefore recommends that NMFS select and implement the “hooks” sub-action of alternative 3 with the following changes (see deleted text in strikeout font): In the EEZ portion of the FEC, SAB, MAB, and NEC fishing areas, the owner or operator of an Atlantic PLL vessel must use only circle hooks meeting the criteria specified at 50 CFR § 635.21 and the following specifications: (i) 16/0 or 18/0 circle hooks; (ii) hook shanks must be made of round wire that can be measured with a caliper or other appropriate gauge; (iii) hook wire diameter does not exceed

“The Commission supports the proposed requirement that fishermen use non-forged hooks with round-wire shanks. However, the Commission does not support the use of 18/0 hooks. As reported in the draft environmental assessment, McLellan et al. (2015a,b) found that “18/0 hooks...regardless of material or manufacturing process, were more likely than 16/0 hook[s] to be able to be hooked onto the deep, lingual surface of the mandible, particularly in smaller animals, which can result in fracturing the bone.” Such injuries are more likely to be life-threatening (NMFS 2012).”

In response, NMFS stated in the Federal Register Notice for the final rule—

“When the PLTRT developed this consensus recommendation in 2015, discussion focused on hook types, with Team members drawing on a combination of NMFS Southeast Fisheries Science Center analysis, weak hook study (C. Bergmann) and hook testing (McLellan et al., 2014 and McLellan unpublished data) to identify hooks more likely to straighten under the force of a hooked pilot whale, which included 18/0 circle hooks with a 4.40 mm (0.173 in) wire diameter (PLTRT, 2015).”

NMFS did not change the proposed measure in the final rule, and while NMFS offered an explanation for its decision in this case, the explanation did not address the specifics of the Commission’s concern over 18/0 hooks. NMFS justified its inclusion of 18/0 hooks because one of the 18/0 hooks considered by the Southeast Fisheries Science Center was “more likely to straighten under the force of a hooked pilot whale”. However, this explanation did not respond to the issue raised by the Commission, which was the increased risk of more serious bone-fracture injuries posed by 18/0 hooks, whether they straighten or not.

Delay in rulemaking

In its 16 February 2021 letter, the Commission noted that NMFS had not published the proposed rule within the statutorily mandated timeframe. The PLTRT was convened in 2015 and 2016 to identify alternative bycatch reduction measures to address shortcomings of the 2009 final rule (74 Fed. Reg. 23349), and developed its consensus recommendations for amending the rule in October 2016, which were summarized and submitted to NMFS in December of that year.⁵ However, the agency did not publish the proposed rule to implement the PLTRP’s recommendations until December 2020 (85 Fed. Reg. 81168), missing by more than four years the MMPA’s deadline to publish a proposed rule within 60 days of receiving a draft plan from the TRT. This prompted the Commission to recommend that adequate staffing and funding be prioritized in NMFS’s regional offices and supported by leadership at the agency’s headquarters to ensure that TRT recommendations for reducing serious injury and mortality of marine mammals in commercial fishing gear are evaluated and acted on in a timely manner, as required by the MMPA. In reply, NMFS noted the problem and provided the following response in the final rule—

⁴0.05 mm if 16/0 or 4.4 mm if 18/0; and (iv) each hook has a straightening force not to exceed 300 pounds based on manufacturer’s specifications when new.”

⁵ https://media.fisheries.noaa.gov/dam-migration/final_oct31_pltrt_webinar_kom_dec_opr2.pdf

“We acknowledge the [Commission’s and others’] concerns. In this instance, the delays associated with this rule reflected the need to prioritize other legally-mandated, complex regulatory actions, including those associated with statutory and court-ordered deadlines, with limited available resources.”

Here, too, the response fails to address the core of the Commission’s comments and recommendation. NMFS explains neither what competing statutory deadlines were given priority over the MMPA’s take-reduction mandate nor why this was done. The timelines established under section 118(f) of the MMPA demonstrate the high priority Congress placed on the timely development and implementation of take reduction plans for marine mammals, something that NMFS’s response fails to acknowledge. Congress directed NMFS to proceed from the establishment (or reconvening) of a TRT to publication of a final rule implementing the take reduction plan within 13 months for strategic stocks, and 18 months for non-strategic stocks. Admittedly these are ambitious schedules, but it is difficult to fathom any legitimate reason for NMFS taking more than six and a half years between receiving consensus take reduction recommendations from the TRT (December 2016) and publishing a final rule (June 2023) — something that Congress directed the agency to accomplish in seven months. We note further that this was not a particularly complex rulemaking. Only 16 sets of public comments were submitted and only minor changes were made between the proposed and final rules.

It also is worth noting that the delay in implementing amendments to the take reduction plan is more than a bureaucratic choice. It has real-world consequences. As explained in our 2021 letter commenting on the proposed rule, hundreds of marine mammal deaths could have been prevented had NMFS moved more quickly in publishing a proposed rule. And scores more likely died during the two years it took to publish the final rule.

Finally, the Commission notes that NMFS is delaying the implementation of the terminal gear requirements by one year to give industry time to ensure the production and availability of the gear to meet those requirements is in place. The Commission is concerned that after a six-year delay in implementing the measures NMFS has added year another year of delay to the implementation of this portion of the rule. NMFS could have addressed supply-chain issues with manufacturers and fishermen in the two-year period following the receipt of public comments.

The Commission recognizes the strong commitment of regional and programmatic staff to carrying out the requirements of the MMPA, and the constraints in the last decade that have impinged on their ability to meet those requirements in a timely manner. The Commission raises these concerns to draw attention to the need for the agency to ensure its priorities and funding allocations better comport with the mandates of the MMPA and support the TRP/TRT processes in the Southeast and in other regions.

As detailed above, the responses to the Commission’s recommendations on the proposed rule contained in the final rule fall short of the mark established under section 202(d) of the MMPA. We request that the agency provide the legally required “detailed [and germane] explanation” of the reasons why the Commission’s recommendations were not followed or adopted in the final rule.

Ms. Laura Engleby

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We look forward to receiving NMFS's response in the near future.

Sincerely,

A handwritten signature in blue ink that reads "Peter O. Thomas".

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

Cc: David Bernhart, Assistant Regional Administrator for Protected Resources,
Southeast Fisheries Region, NMFS

Shannon Bettridge, Ph.D., Chief, Marine Mammals and Sea Turtles Division,
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