



MARINE MAMMAL COMMISSION

7 May 2024

Mr. Eric Roberts, NOAA Superintendent
Papahānaumokuākea Marine National Monument
1845 Wasp Blvd., Building 176
Honolulu, HI 96818

ATTN: PMNM-Sanctuary Designation

Dear Mr. Roberts:

On 1 March 2024, the National Oceanic and Atmospheric Administration's (NOAA) Office of National Marine Sanctuaries (ONMS) published a proposed rule to designate marine portions of Papahānaumokuākea Marine National Monument (PMNM) as the Papahānaumokuākea National Marine Sanctuary (PNMS). This announcement also included a draft environmental impact statement (DEIS) on the action and a draft management plan (89 Fed. Reg. 15272). The PMNM, which then extended 50 nm seaward from all islands and emergent lands of the Northwestern Hawaiian Islands (NWHI), was created by two Presidential Proclamations in 2006.¹ In 2016, a subsequent Presidential Proclamation expanded the PMNM to the seaward limit of the U.S. Exclusive Economic Zone, creating the Monument Expansion Area (MEA).² In the PNMS proposal, the PMNM and the MEA together are referred to as "the Monument," while the MEA is referred to as the Outer Sanctuary Zone (OSZ).

The Marine Mammal Commission (the Commission), in consultation with its Committee of Scientific Advisors, has reviewed the proposed rule and DEIS, and offers the following comments and recommendations. The Commission strongly supports the establishment of the PNMS, and in general is satisfied that the proposed sanctuary would provide adequate protections for marine mammals and their habitat. However, the Commission is concerned about a weakening of some of the proposed fishing regulations, as described below. The Commission recommends that NOAA proceed with the Sanctuary designation as described in the preferred option while ensuring that subsequent development and finalization of fishing regulations maintain the full force of all previous monument protections.

The Commission is concerned that NOAA has not fully assessed the potential impacts of fishing activities that may be permitted within the OSZ. The impacts of marine mammal interactions with some gears could be significant. The process for developing regulated fishing activities is separate from and on a different timetable than that of the sanctuary designation. Specifically, the

¹ Presidential Proclamation 8031 (26 June 2006): <https://www.federalregister.gov/documents/2006/06/26/06-5725/establishment-of-the-northwestern-hawaiian-islands-marine-national-monument>, and the amending Proclamation 8112 (28 February 2007): <https://www.govinfo.gov/content/pkg/WCPD-2007-03-05/pdf/WCPD-2007-03-05-Pg237-2.pdf> established the PMNM and its boundaries.

² Presidential Proclamation 9478 (31 August 2016): <https://www.federalregister.gov/documents/2016/08/31/2016-21138/papahamcrnaumokuamcrkea-marine-national-monument-expansion> established the MEA.

Commission has three concerns regarding fishing activities proposed to be permissible within the OSZ.

Native Hawaiian Subsistence Practices Fishing

The Commission supports sustainable subsistence fishing by native Hawaiians in the OSZ. However, the Commission is concerned that the proposed regulations governing the OSZ would create a loophole that could allow for what would amount to prohibited commercial fishing under the guise of native Hawaiian subsistence fishing.

The MEA Proclamation encompassed all of the protections created under the PMNM Proclamation, including a prohibition on commercial fishing. Importantly, the MEA Proclamation established that NOAA “may permit...non-commercial fishing, provided that the fish harvested ... *cannot enter commerce through sale, barter, or trade, and that the resource is managed sustainably* [emphasis added].”

Under the provisions of the National Marine Sanctuaries Act (NMSA), ONMS invited the Western Pacific Regional Fisheries Management Council (WPRFMC) to draft fishing regulations for the proposed sanctuary that would be consistent with the 2006 and 2016 Presidential Proclamations and the goals and objectives of the proposed PNMS.³ After a prolonged exchange,⁴ the WPRFMC conveyed final proposed regulations to NOAA on 14 April 2023.⁵ While NOAA rejected WPRFMC’s proposal to allow the sale of catch for the recovery of trip costs, it found that the proposed regulations “fulfill the purposes and policies of the ... NMSA and the goals and objectives of the proposed sanctuary.”⁶

However, The Commission believes that another element of WPRFMC’s proposed regulations is not consistent with the proclamations described above and the goals and objectives of the proposed sanctuary, and, therefore, should be similarly rejected.

The section of the proposed fishing regulations titled “Disposition of Native Hawaiian Subsistence Practices Catch” states that “an individual holding a valid MEA Native Hawaiian Subsistence Practices Fishing permit may bring catch back to the main Hawaiian Islands for consumption, including community sharing, *barter and trade*” (emphasis added). By definition in federal regulations applying to Hawaiian federal fisheries, ‘non-commercial’ catch includes ‘subsistence’ and ‘traditional indigenous’ fishing, and therefore would include what the WPRFMC has termed “Native Hawaiian Subsistence Practices Fishing.”⁷ As described above, the MEA Proclamation allows for the permitting of non-commercial fishing, but *does not allow catch to enter commerce through barter or trade*. Therefore, the Commission recommends that NOAA limit the

³ See 19 November 2021 letter to the Chairman of the WPRFMC; reproduced at DEIS page 187.

⁴ See DEIS Appendix C.

⁵ Reproduced at DEIS page 210.

⁶ 31 May 2023 letter from NOAA to the Director of the WPRFMC; reproduced at DEIS page 212.

⁷ “Non-commercial fishing means fishing that does not meet the definition of commercial fishing in the Magnuson-Stevens Fishery Conservation and Management Act, and includes, but is not limited to, sustenance, *subsistence, traditional indigenous*, and recreational fishing” (50 C.F.R. § 665.12; emphasis added).

disposition of Native Hawaiian Subsistence Practices Fishing catch to community sharing,⁸ and reject the portion of the WPRFMC proposed regulations that would allow for the *barter and trade* of such catch.

The Commission recognizes that the phrases “fish harvested ... cannot enter commerce through ... barter, or trade” (MEA Proclamation) and “bring catch back ... for consumption, including ... barter and trade” (WPRFMC proposed regulations), differ in that the latter does not refer to catch “not entering commerce.” If the WPRFMC proposed regulations were modified to guarantee that catch brought back did not “enter commerce” through any mechanism, and that penalties would be imposed otherwise, then the Commission could endorse the proposed regulation.

Prohibited Activities 7-14

The sanctuary proposal would reestablish 14 generally prohibited activities, but allow some activities to be conducted by permit, including non-commercial fishing (Activity 7). The sanctuary proposal states that a non-commercial fishing permit would be “exempt from prohibitions 7-14,” including drilling, dredging, abandoning structures, injuring any living resource, and discharging material.⁹ The issuance of a permit allowing non-commercial fishing activity should not be construed as a blanket exemption from all of the other permissible prohibitions under the MEA Proclamation and hence the sanctuary. Moreover, the proposed non-commercial fishing permit would be inconsistent with goals stated in the DEIS that a permitted activity 1) “be conducted with adequate safeguards for the resources and ecological integrity of the monument” and 2) that “the end value of the activity outweighs its adverse impacts on monument resources, qualities, and ecological integrity.”¹⁰

To maintain consistency with the goals of the proposed PNMS, the Commission does not support the authorization of non-fishing activities in conjunction with non-commercial fishing permits. Therefore, the Commission recommends that NOAA clarify that a non-commercial fishing permit does not exempt permit holders from the prohibitions for Activities 8-14. Thus, applicants for non-commercial fishing in the Monument would be required to obtain a separate permit to conduct any of the other prohibited activities besides non-commercial fishing (i.e., Activities 8-14).¹¹

Environmental Impacts of Non-commercial Fishing

The fishing regulations proposed by WPRFMC would “amend the Hawaii and Pelagic Fishery Ecosystem Plan (FEP) to prohibit commercial fishing and allow for *sustainable* non-commercial fishing” in the MEA [emphasis added]. Further, the proposed regulations would establish annual catch limits that would allow the removal of up to 350,000 lb of bottomfish and 180,000 lb of pelagic fish from the Monument. The bottomfish limit is near the maximum caught in any year in NWHI prior to the establishment of the PMNM when commercial fishing was allowed. Moreover, because the OSZ contains very little area shallow enough for bottomfish fishing, the

⁸ Another portion of the proposed WPRFMC regulations allows for the community sharing of non-commercial catch; at DEIS page 210.

⁹ See DEIS page 26 for the full list; only activities 1-6 would be ineligible for permitting.

¹⁰ DEIS at page 50.

¹¹ While fishing would necessarily violate the prohibition on “injuring any living resource”, a permit should still be required, because a non-commercial fishing permit would allow the “injuring” of only certain species of fish.

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latter would be so concentrated as to create the potential for local depletion. Neither the WPRFMC's letter nor the DEIS describes how these limits were derived or offers analytic evidence that these proposed limits would be sustainable. The letter also lacks an analysis of risk to marine mammals resulting from these activities, as required in the MMPA. Of special concern are ESA listed species and those known to interact regularly with pelagic fisheries. The DEIS does not include a sustainability assessment, which may be because the development, analysis, and environmental compliance of non-commercial fishing regulations for the OSZ are being conducted separately by NMFS and the WPRFMC, in consultation with ONMS.¹² Since the fishing regulations proposed by WPRFMC are being considered separately from, and out of phase with the DEIS, the Commission is concerned that other agencies and the public are unable to comprehensively assess the full and cumulative environmental impact of the proposed sanctuary and fishing regulations prior to designation of the PNMS. Therefore, the Commission recommends that NOAA ensure that NMFS and the WPRFMC expedite the public review of proposed non-commercial fishing regulations and environmental impact analysis to ensure they are consistent with the protections created under the PMNM Proclamation.

We hope these comments and recommendations are helpful. Please contact me if you have questions.

Sincerely,



Peter O. Thomas, Ph.D.
Executive Director

¹² DEIS at page 11.