



MARINE MAMMAL COMMISSION

3 June 2013

Donna Wieting
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 Ms. Wieting:

The Marine Mammal Commission, in consultation with its Committee of Scientific Advisors on Marine Mammals, has reviewed the notice of proposed rulemaking regarding the List of Fisheries for 2013 (77 Fed. Reg. 23708). The Commission generally concurs with the proposed changes for 2013, and it provides the following recommendations for your consideration.

RECOMMENDATIONS

Based on its review of the draft List of Fisheries for 2013, the Marine Mammal Commission—

- concurs with the National Marine Fisheries Service that the California thresher shark/swordfish drift gillnet fishery should be elevated to Category I, the California/Oregon/Washington stock of sperm whales should be added to the list of species or stocks incidentally killed or injured in this fishery, and interactions with this stock provide the basis for the Category I classification;
- concurs with the National Marine Fisheries Service that the Bering Sea and Aleutian Islands rockfish trawl fishery should be classified as a Category II fishery;
- recommends that the National Marine Fisheries Service investigate methods to reduce the likelihood that killer whales will approach working trawlers, provided those methods do not cause a population impact greater than the current mortality rate from fishery interactions;
- recommends that the National Marine Fisheries Service adopt its earlier proposal and reclassify the Hawaii charter vessel and Hawaii trolling and rod and reel fisheries as Category II;
- recommends that the National Marine Fisheries Service initiate observer coverage in the Hawaii charter vessel and Hawaii trolling and rod and reel fisheries to obtain the data necessary to assess rigorously the risk that this fishery poses to the Hawaii stock of pantropical spotted dolphins;
- concurs that the Alaska Bering Sea/Aleutian Islands Pacific cod longline fishery should be classified as Category III;
- recommends that the National Marine Fisheries Service continue its observer coverage of the Bering Sea/Aleutian Islands Greenland turbot longline and other longline fisheries, and

- continue to develop and implement methods to minimize the likelihood of interactions between longline gear and marine mammals including, but not limited to, killer whales;
- concurs that the Alaska Bering Sea sablefish pot fishery should be classified as Category III;
 - recommends that the National Marine Fisheries Service make every feasible effort to (1) characterize the risk from this and other longline fisheries in the same region that pose a risk to the marine mammals (i.e., determine the nature, rate, and outcome of such interactions), and (2) develop and implement fishery management measures to avoid or minimize the risk; and
 - recommends that (1) the eastern Gulf of Mexico coastal bottlenose dolphin stock, (2) the northern Gulf of Mexico continental shelf bottlenose dolphin stock and the Gulf of Mexico oceanic Gervais beaked whale stock, and (3) the eastern Gulf of Mexico coastal bottlenose dolphin stocks remain on the lists of species or stocks incidentally killed or injured in the (1) Gulf of Mexico gillnet, (2) Atlantic Ocean, Caribbean, Gulf of Mexico large pelagic longline, and (3) Gulf of Mexico menhaden purse seine fisheries, respectively, until such time that an apparent lack of interaction can be confirmed by adequate observer coverage over a five-year period.

The Marine Mammal Commission also has reviewed its recommendations from previous years in the context of the proposed List of Fisheries for 2013, and the Marine Mammal Commission—

- recommends that the National Marine Fisheries Service elevate the Atlantic Ocean, Gulf of Mexico, Caribbean commercial passenger fishing vessel fishery and all other fisheries that similarly could be responsible for the observed taking of bottlenose dolphins until such time that the Service can reliably attribute the take to the responsible fishery or fisheries;
- repeats its recommendation that the Service further investigate and report on any factors that may account for the notable recent increase in takes of Risso's dolphins in the mid-Atlantic bottom trawl fishery;
- again recommends that the Service work with the Commission to develop an effective long-term strategy for determining marine mammal stock structure and abundance, potential biological removal levels, and fisheries mortality and serious injury rates in the Gulf of Mexico;
- again recommends that the Service work on its own and in collaboration with states to develop reliable methods for estimating the number of participants in fisheries as a measure of fishing effort in those fisheries; and
- recommends that, starting with the 2014 List of Fisheries, the Service include with its listing for each fishery's estimate of fishing effort, the number of participants, the sources of that estimate (i.e., number of active participants, number of licensed vessels or persons, the numbers in the previous List of Fisheries, or other information).

RATIONALE

California thresher shark/swordfish drift gillnet fishery

The Service proposes to elevate the California/Oregon thresher shark/swordfish drift gillnet fishery from Category II to Category I based on the observed entanglement in 2010 of two sperm

whales. The whales most likely belonged to the California/Oregon/Washington stock. One animal died and the other was seriously injured. These were the first sperm whale deaths or serious injuries known by the Service to have occurred in this fishery. Based on observer coverage of 11.9 percent in 2010, the Service estimated the total take by mortality or serious injury to be 16 sperm whales. When averaged over the past five years, the mean take was estimated to be 3.2 whales per year, which is more than double the potential biological removal of 1.5 for this stock. Therefore, the fishery meets the criterion for classification as a Category I fishery. The Marine Mammal Commission concurs with the National Marine Fisheries Service that the California thresher shark/swordfish drift gillnet fishery should be elevated to Category I, the California/ Oregon/Washington stock of sperm whales should be added to the list of species or stocks incidentally killed or injured in this fishery, and interactions with this stock provide the basis for the Category I classification.

Bering Sea and Aleutian Islands rockfish trawl fishery

The Service proposes to elevate the Bering Sea and Aleutian Islands rockfish trawl fishery from Category III to Category II based on the observed mortality in 2010 in the eastern Bering Sea of a killer whale from the Gulf of Alaska, Aleutian Islands, Bering Sea transient stock. The mean annual mortality for this stock from interactions with this fishery is 0.25 whales, which is greater than 1 percent of the potential biological removal of 5.5 whales. In addition, the mean annual mortality of whales in this stock for all fisheries is 1.25 whales, which is greater than 10 percent of the stock's potential biological removal. Therefore, the Marine Mammal Commission concurs with the National Marine Fisheries Service that the Bering Sea and Aleutian Islands rockfish trawl fishery should be classified as a Category II fishery.

In recent years, three other killer whales from the same stock were killed in the Alaska Bering Sea, Aleutian Islands flatfish trawl fishery. All four whales were following vessels that were actively fishing and died after being struck by the vessels. To avoid such occurrences in the future, the Marine Mammal Commission recommends that the National Marine Fisheries Service investigate methods to reduce the likelihood that killer whales will approach working trawlers, provided those methods do not lead to a population impact greater than the current mortality rate from fishery interactions.

Hawaii charter vessel and Hawaii trolling, rod and reel

In 2012 the Service proposed to elevate the Hawaii charter vessel and Hawaii trolling, rod and reel fisheries from category III to Category II based on the strong likelihood of occasional interactions with the Hawaii stock of pantropical spotted dolphins. The Service reported that the charter and commercial trolling vessels frequently troll multiple lines through schools of spotted dolphins to catch tuna that aggregate below them. The Service cited anecdotal reports from fishermen and scientists that spotted dolphins occasionally take lures or bait and sometimes become hooked in the mouth or on the body. Although quantitative information on mortality and serious injury rates were not available for these fisheries, the Service evaluated other factors, including fishing techniques, gear used, target species, effort levels, and anecdotal and eyewitness observations, to estimate the likelihood of interactions. The Service concluded that each year each of the fisheries was likely to result in at least one death or serious injury of a spotted dolphin. One take per year in each fishery would represent 1.6 percent of the stock's potential biological removal level (61

animals). However, in the final List of Fisheries the Service changed its assessment and stated that the evidence was insufficient to support elevation of the fishery from Category III to Category II, and that they would reconsider elevation in the 2013 proposed List of Fisheries.

In the proposed 2013 List of Fisheries the Service reports that it is collaborating with the state of Hawaii to collect additional information. Based on analysis of the available data the Service concluded that “current information does not suggest that total commercial fishery-related mortality and serious injury of the stock exceed 10 percent of the PBR of 61,” and, therefore, that the subject fishery should remain a Category III fishery. However, the Service bases this conclusion on a series of observations that are not sufficient to assess the takes from the fishery. The Service cites a lack of reported takes, a reportedly small number of participants whose fishing activities might put pantropical spotted dolphins at risk, a limited area of overlap between the dolphins and the fishery, the assumption that some of the risk may be from recreational fishing, and the likelihood that some interactions would not result in serious injury or death. These factors are offset by the earlier, equally uncertain, anecdotal reports of pantropical spotted dolphins being hooked in this fishery. The draft 2013 List of Fisheries states that “in the absence of evidence of mortality/serious injury, NMFS concludes ... that a Category III classification ... is appropriate.”

The Marine Mammal Commission disagrees with this conclusion, for it shifts the burden of proof away from fishery management and removes the incentive to collect the data needed to characterize the level of take. High rates of interactions between charter and rod and reel fisheries in other regions (e.g., the Gulf of Mexico and U.S. East Coast) indicate that hook and line fisheries pose a substantial risk to dolphins from both entanglement in, and ingestion of, fishing gear. However, interaction rates are difficult to estimate without dedicated observer coverage. Therefore, the Marine Mammal Commission recommends that the National Marine Fisheries Service adopt its earlier proposal and reclassify the Hawaii charter vessel and Hawaii trolling and rod and reel fisheries as Category II. In addition, the Marine Mammal Commission recommends that the National Marine Fisheries Service initiate observer coverage in the Hawaii charter vessel and Hawaii trolling and rod and reel fisheries to obtain the data necessary to assess rigorously the risk that this fishery poses to the Hawaii stock of pantropical spotted dolphins. The outcome of that assessment would be used to determine if the stock should remain in Category II, or be reclassified as Category III.

Alaska Bering Sea/Aleutian Islands Pacific cod longline fishery

The Service proposes reclassifying the Alaska Bering Sea/Aleutian Islands Pacific cod longline fishery from a Category II to a Category III fishery because the last observed serious injury or mortality occurred in 2003. The Marine Mammal Commission concurs that the Alaska Bering Sea/Aleutian Islands Pacific cod longline fishery should be classified as Category III. However, the Commission notes that the Bering Sea/Aleutian Islands Greenland turbot longline fishery has taken two killer whales in recent years, thus demonstrating the ongoing risk of longline fishing to killer whales and the general need for effective mitigation and monitoring of interactions with longline fisheries. Therefore, the Marine Mammal Commission also recommends that the National Marine Fisheries Service continue its observer coverage of the Bering Sea/Aleutian Islands Greenland turbot longline and other Bering Sea/Aleutian Islands longline fisheries, and continue to develop and implement methods to minimize the likelihood of interactions between longline gear and marine mammals including, but not limited to, killer whales.

Alaska Bering Sea sablefish pot fishery

The Service proposes to reclassify the Alaska Bering Sea sablefish pot fishery from a Category II to a Category III fishery because the last observed serious injury or mortality occurred in 2002. On that basis, the Marine Mammal Commission concurs that the Alaska Bering Sea sablefish pot fishery should be classified as Category III. However, the Commission notes that pot fisheries in the Pacific and the Atlantic are known to be responsible for the entanglement and serious injury or death of numerous large whales. As is well known, a very high density of pot gear regularly results in serious injuries or deaths of endangered North Atlantic right whales. This risk raises concern because the eastern North Pacific right whale population has been estimated at about 30 animals, for which the potential biological removal level has been estimated to be one animal every 20 years—that is, the loss of even one individual could reduce the viability of the population considerably. Therefore, the Marine Mammal Commission recommends that the National Marine Fisheries Service make every feasible effort to (1) characterize the risk from this and other longline fisheries in the same region that pose a risk to the marine mammals (i.e., determine the nature, rate, and outcome of such interactions), and (2) develop and implement fishery management measures to avoid or minimize the risk.

Removals from the lists of species or stocks incidentally killed or injured

The draft 2013 List of Fisheries proposes the addition to, or deletion from, the lists of species or stocks incidentally killed or injured for several fisheries. The Marine Mammal Commission concurs in most cases with those changes. However, in three cases the Service proposes to remove stocks for fisheries that have no or very low rates of observer coverage: (1) the eastern Gulf of Mexico coastal bottlenose dolphin stock from the Gulf of Mexico gillnet fishery list, (2) the northern Gulf of Mexico continental shelf bottlenose dolphin stock and the Gulf of Mexico oceanic Gervais beaked whale stock from the Atlantic Ocean, Caribbean, Gulf of Mexico large pelagic longline list, and (3) the eastern Gulf of Mexico coastal bottlenose dolphin stock from the Gulf of Mexico menhaden purse seine fishery list. The removal of these stocks is based on the lack of reports or observations of interactions in the last five years, but, because self-reporting by fishermen is uncommon and these fisheries have low rates of observer coverage, the lack of reported incidents is an insufficient basis for making changes to the list. Therefore, the Marine Mammal Commission recommends that (1) the eastern Gulf of Mexico coastal bottlenose dolphin stock, (2) the northern Gulf of Mexico continental shelf bottlenose dolphin and the Gulf of Mexico oceanic Gervais beaked whale stocks, and (3) the eastern Gulf of Mexico coastal bottlenose dolphin stocks remain on the lists of species or stocks incidentally killed or injured in the (1) Gulf of Mexico gillnet, (2) Atlantic Ocean, Caribbean, Gulf of Mexico large pelagic longline, and (3) Gulf of Mexico menhaden purse seine fisheries, respectively, until such time that an apparent lack of interaction can be confirmed by adequate observer coverage over a five-year period.

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The following sections pertain to previous Commission recommendations.

Atlantic Ocean, Gulf of Mexico, Caribbean commercial passenger fishing vessel

In its 2012 List of Fisheries, the Service described eight stranded bottlenose dolphins entangled or hooked by confirmed hook and line gear, one dead bottlenose dolphin entangled in suspected recreational fishing gear, and 29 additional stranded bottlenose dolphins entangled in gear consistent with recreational hook and line gear. On that basis, the Service added bottlenose dolphins (Gulf of Mexico bay, sound, and estuarine stock) to the list of species or stocks incidentally killed or injured in the Category III Atlantic Ocean, Gulf of Mexico, Caribbean commercial passenger fishing vessel fishery. The Commission concurred with that listing, but recommended that the Service, in fact, had sufficient evidence to conclude that the fishery should be elevated from a Category III to Category II fishery.

The Service did not follow the Commission's recommendation. It argued that the data were insufficient to warrant elevation, apparently because the Service could not estimate reliably the number of animals taken in this fishery versus similar recreational fisheries. The Commission appreciates the difficulty faced by the Service in these situations, but believes that the Service is not taking the precautionary approach that it should. As stated many times in its letters to the Service, the Commission believes the Service has a responsibility—together with the fishing industry—to monitor fisheries well enough to estimate their take levels reliably or to err in the direction of potential over-protection of marine mammals when monitoring is insufficient. The precautionary approach is necessary to ensure there is a strong incentive to make necessary improvements in fishery management. In this case, the more precautionary approach would be to elevate all fisheries that might have caused such take. An alternative would be to elevate the fishery deemed most likely to have caused the take. Either situation provides incentive for the fishing industry to help the Service get better data. The approach taken by the Service does just the opposite, removing any incentive to improve fishery practices in ways that would reduce risks to marine mammals. To ensure that the incentive for improvement exists, the Marine Mammal Commission recommends that the National Marine Fisheries Service elevate the Atlantic Ocean, Gulf of Mexico, Caribbean commercial passenger fishing vessel fishery and all other fisheries that similarly could be responsible for the observed taking of bottlenose dolphins until such time that the Service can reliably attribute the takes to the responsible fishery or fisheries.

Mid-Atlantic bottom trawl

The 2012 List of Fisheries described the deaths of 15 Risso's dolphins (western North Atlantic stock) in the Category II mid-Atlantic bottom trawl fishery in 2010. As a result, the Service added the stock to the list of species or stocks incidentally killed or seriously injured in that fishery. The Marine Mammal Commission concurred with the Service's proposal and recommended that the Service further investigate factors that may have accounted for the apparent increase in takes of Risso's dolphins in this fishery. In the final 2012 List of Fisheries the Service stated that it would "evaluate the Risso's dolphin bycatch events from 2010 and [would report] its findings in the 2012 SAR." However, the Service did not report any such findings in the 2012 stock assessment report for the western North Atlantic Risso's dolphin stock. Therefore, the Marine Mammal Commission repeats its recommendation that the National Marine Fisheries Service investigate and report on any factors that may account for the notable recent increase in takes of Risso's dolphins in the mid-Atlantic bottom trawl fishery.

Gulf of Mexico fisheries

In commenting on the proposed List of Fisheries in several recent years, the Commission has expressed ongoing concern about the lack of information on many species and stocks of marine mammals in the Gulf of Mexico, with emphasis on bottlenose dolphins. Specifically, it has noted the relatively poor state of information about stock structure, abundances, potential biological removal levels, and rates of interaction with different fisheries. The inadequacy of such information constrains the Service's ability to characterize marine mammal and fishery interactions and to manage the fisheries so that takes of marine mammals are reduced. Once again, in the proposed 2013 List of Fisheries, the Service has had to rely on assumptions about which stocks (e.g., of bottlenose dolphins), are affected by which fisheries, how often takes occur, and the significance of those takes for the affected stocks. Although the Commission supports the assumptions made and precautionary measures taken to date, it notes that managing by assumption is not a sound long-term conservation strategy, especially when the assumptions are likely to have significant social and economic impacts. The lack of information about marine mammals also limits our collective ability both to understand the impacts of non-fishery-related threats to marine mammals—such as oil spills, exposure to noise, toxic algae, and hypoxia—and to implement appropriate response, restoration, and conservation activities.

In responding to the Commission's past recommendations, the Service has stated consistently that collection of information about fishery interactions is a high priority and will occur if resources become available. The Service also has emphasized the value of information gathered via fisherman self-reports and stranding networks. In its response to the Commission's letter on the proposed 2011 List of Fisheries, the Service noted how, as a result of the BP/Deepwater Horizon MC252 oil spill response and restoration efforts, additional surveys and mark-recapture studies were underway for some bay, sound, and estuarine stocks, and that this work would provide updated abundance estimates and potential biological removal levels for some stocks. However, in response to the Commission's letter on the 2012 List of Fisheries, the Service did not address the substance of the recommendation, noting that "the Commission should continue to provide comments regarding enhanced stock assessments during the public comment period for the annual SARs." The Commission appreciates the Service's recognition of the importance of collecting adequate data in these areas. However, the Commission also believes that those efforts and investments would benefit from a more comprehensive, aggressive, and innovative strategy. Therefore, the Marine Mammal Commission again recommends that the National Marine Fisheries Service work with the Commission to develop an effective long-term strategy for determining marine mammal stock structure and abundance, potential biological removal levels, and fisheries mortality and serious injury rates in the Gulf of Mexico. That strategy should be based, in part, on analysis of the limiting factors, needed resources, and available courses of action.

Numbers of vessels/persons

The Service proposes to update its reports on the numbers of vessels/persons for several fisheries around the country, and in many cases the new numbers again represent marked increases or decreases. The Commission's understanding is that the newly proposed numbers are intended to reflect potential effort, and that "a clear measure of effort for all state fisheries in the Northeast and Mid-Atlantic has not been determined due to the manner in which many state permits allow for the

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use of multiple gear types” (75 Fed. Reg. 68478). Although the Service has tried to reassure the Commission that these large adjustments in vessel/person numbers have no management or observer implications, the Commission remains concerned about the considerable uncertainty in the numbers. In the Commission’s view, accurate information about effort is critical for good management of fisheries and their effects. Therefore, the Marine Mammal Commission again recommends that the National Marine Fisheries Service work on its own and in collaboration with states to develop reliable methods for estimating the number of participants in fisheries as a measure of fishing effort in those fisheries. The Commission recommends that, starting with the 2014 List of Fisheries, the Service include with its listing for each fishery’s estimate of fishing effort, the number of participants and the sources of that estimate (i.e., number of active participants, number of licensed vessels or persons, the numbers in the previous List of Fisheries, or other information).

Please let me know if you have any questions regarding the Commission’s recommendations or rationale.

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