



MARINE MAMMAL COMMISSION

17 October 2011

Mr. Lance Smith
Regulatory Branch Chief
Attn: Proposed False Killer Whale Take Reduction Plan
Protected Resources Division
Pacific Islands Regional Office
National Marine Fisheries Service
1601 Kapiolani Blvd., Suite 1110
Honolulu, HI 96814

Dear Mr. Smith:

The Marine Mammal Commission, in consultation with its Committee of Scientific Advisors on Marine Mammals has reviewed the proposed rule for the False Killer Whale Take Reduction Plan (76 Fed. Reg. 42082) and offers the following recommendations and rationale.

RECOMMENDATIONS

The Marine Mammal Commission recommends that the National Marine Fisheries Service adopt the proposed rule to implement the False Killer Whale Take Reduction Plan subject to the following changes or clarifications:

- consider defining weak hooks based not only on the diameter of the wire used to make them, but also on the force required to straighten them (e.g., an average 205 pounds);
- adopt the proposed formula based on the potential biological removal level (PBR) for defining the trigger to close the southern exclusion zone and include in the regulations a corresponding PBR-based formula to determine when the zone should be reopened;
- either (1) include all take reduction measures under authority of the Marine Mammal Protection Act in 50 C.F.R. part 229, or (2) require in the final rule that any changes to take reduction measures under 50 C.F.R. part 665 follow the same procedures as those required to change take reduction measures in 50 C.F.R. part 229, including advance review and consultation with the False Killer Whale Take Reduction Team;
- (1) arrange for marine mammal observer coverage of the shortline fishery and (2) expand the False Killer Whale Take Reduction Team to include a representative of that fishery; and
- adopt and implement all of the proposed non-regulatory measures referenced in the preamble to the proposed rule.

RATIONALE

The proposed rule contains core elements of a plan for reducing the incidental take of the Hawaiian pelagic, Hawaiian insular, and Palmyra Atoll stocks of false killer whales within the U.S. Exclusive Economic Zone around Hawaii and Palmyra Atoll. The rule is intended to address takes by (1) the deep-set longline fishery principally for tuna and (2) the shallow-set longline fishery principally for swordfish. The take of false killer whales from the Hawaiian pelagic stock is estimated

to be 7.3 whales per year, which exceeds the stock's PBR of 2.5 whales per year. The take from the Palmyra stock is estimated to be 0.3 whales per year, which is well below its calculated PBR of 6.4 whales per year. The take from the insular stock is estimated to be 0.6 whales per year, which is equal to its PBR of 0.61 whales per year. However, information on the fisheries and their incidental take rates for the insular stock are incomplete. The proposed rule focuses primarily on reducing take from the Hawaiian pelagic stock because its estimated take clearly exceeds PBR. In addition, the plan focuses principally on measures to reduce bycatch in the deep-set longline fishery for tuna because most shallow-set longline fishing for swordfish occurs north of the U.S. Exclusive Economic Zone off Hawaii where false killer whale abundance declines and fishing within U.S. waters results in a very low level of bycatch. The proposed rule is based on regulatory measures recommended by consensus by the False Killer Whale Take Reduction Team at its meeting in July 2010.

The proposed rule (1) requires fishermen to use weak hooks, (2) closes areas within about 50 nautical miles of the main Hawaiian Islands (MHI), (3) closes to longline fishing all waters of the U.S. Exclusive Economic Zone south of the MHI if false killer whale bycatch in deep-set longlines exceeds PBR after the plan goes into effect, (4) establishes a certification program to inform vessel owners and operators of ways to reduce interactions with marine mammals, (5) establishes requirements for captains when dealing with marine mammal interactions, and (6) requires posting placards that explain what to do when marine mammals are hooked or entangled. These provisions would be implemented under authority of the Marine Mammal Protection Act and/or the Magnuson-Stevens Fishery Conservation and Management Act.

Some provisions of the proposed rule differ from the take reduction team's recommendations, but the Commission believes that the rationale provided by the Service for most of those changes seems reasonable. The Marine Mammal Commission recommends that the National Marine Fisheries Service adopt the proposed rule to implement the False Killer Whale Take Reduction Plan subject to the changes or clarifications discussed below.

Requirements for weak hooks

The proposed rule would require that the deep-set longline fishing fleet use "weak" 16/0 circle hooks with a maximum wire diameter of 4.0 mm. This measure is consistent with the take reduction team's recommendation and is based on a belief that such hooks would straighten and pull free under the strain of a struggling false killer whale. This would allow the animal to escape without serious injury, but would still be strong enough to catch target species of tuna. To assure that the hooks are the weakest part of the fishing gear, the rule also would require that monofilament leaders and branch lines be at least 2 mm in diameter.

Recent field tests referenced in the preamble to the proposed rule indicate that these hooks will not reduce significantly either the size or total catch of target species. Whether or to what extent weak hooks will reduce mortality and serious injury of false killer whales is not clear, but the Commission believes this mitigation measure warrants implementation to determine its effectiveness. Recent tests of weak hooks in the Gulf of Mexico have reduced by more than 50 percent the unintended bycatch of large bluefin tuna without affecting the catch of smaller targeted yellowfin tuna. Hawaii longliners are currently using stainless steel 15/0 circle hooks made of 4.5

mm diameter wire, which straighten under a force of about 303 pounds compared to about 205 pounds for the similar 16/0 hooks made of 4.0 mm diameter wire.

The preamble to the proposed rule notes that 16/0 hooks with 4.0 mm diameter shafts may not be available for several months after publication of the final rule. However, other hooks that are suitable for catching target species that straighten under a 205 pound pulling force may be available. The best hooks would have two characteristics: (1) they would straighten out when a false killer whale is hooked, and (2) they would be of a limited size for enforcement purposes. That is, enforcement officers will not be able to assess whether hooks are legal if they are judged so solely on the force required to straighten them. Instead, those officers will need some measureable criteria for making that assessment. For that reason, the Marine Mammal Commission recommends that the National Marine Fisheries Service consider defining weak hooks based on the diameter of the wire used to make them, and on the force required to straighten them (e.g., an average 205 pounds). The Service could then test available hooks to determine which meet those standards and provide fishermen with a list of approved hook types and hook manufacturers allowed in the fishery. In addition, the thickness of monofilament line may not be a consistent indicator of breaking strength, and a similar performance-based standard should be considered together with the requirement that 2.0 mm diameter line be used for all longline leaders and branch lines.

Prohibited area for the MHI longline fishery

The proposed rule would prohibit, on a year-round basis, both deep-set and shallow-set longline fishing within 50 nautical miles of the MHI. The measure would replace a smaller closed area with seasonally changing boundaries. The new closure would provide a high level of protection for the Hawaii insular population of false killer whales, which is currently being considered for listing as endangered under the Endangered Species Act. Available information indicates that few, if any, false killer whales in this population move beyond about 50 nautical miles from shore around the MHI. Although the evidence that false killer whales from the Hawaii insular stock are taken by longlines is limited (e.g., scars on animals that appear to have been inflicted by longline gear), bycatch of the Hawaiian pelagic stock by the deep-set longline fishery clearly indicates that the insular stock would be vulnerable to fishing within its range. Given the small size of the insular population—estimated at about 150 whales—the proposed year-round MHI closure is necessary to address this risk.

Closing and reopening the southern exclusion zone

The proposed rule would establish a temporary southern exclusion zone covering all waters in the U.S. Exclusive Economic Zone south of the MHI if false killer whale bycatch from the Hawaii pelagic stock exceeds a pre-determined level. The trigger for this action in the proposed rule differs from that recommended by the take reduction team. The team recommended closing the zone based on a specified threshold level or “trigger” of observed false killer whale mortalities or serious injuries (e.g., two whales for the initial closure) inside the Exclusive Economic Zone. The Service’s proposed rule would close the area based on a formula designed to ensure that bycatch averaged over a five-year period would not exceed PBR. When that trigger was met, the zone would remain closed for the remainder of the fishing year and reopen at the beginning of the next fishing

year (i.e., 1 January). Under this approach, the Service would assume that all takes counted against PBR could occur during the first year of the plan. If that were to occur, however, and the zone was closed during the first year, just one confirmed death or serious injury in the deep set fishery in any of the next four years would result in reclosing the area until such time as the regional administrator decided to reopen the area. The Service also proposes to reconvene the take reduction team to consider additional measures if closure of the southern exclusion zone appears likely.

As indicated above, if the southern exclusion zone is closed for the second time, it will remain closed until the regional administrator decides to reopen it. This differs substantially from the approach recommended by the team. The team recommended that the zone be reopened if one or more of the following criteria is met:

- (1) the Service determines reopening is warranted based on consideration of the take reduction team's recommendations and evaluation of all relevant circumstances (e.g., the mortality or serious injury was a result of non-compliance with gear requirements, rather than an indication that the take reduction plan measures were ineffective);
- (2) in the two-year period immediately following the date of the southern exclusion zone's closure, the deep-set longline fishery has zero observed false killer whale incidental mortalities or serious injuries within the remaining open areas of the Exclusive Economic Zone around Hawaii;
- (3) in the two-year period immediately following the date of the closure, the deep-set longline fishery has reduced its combined rate of false killer whale incidental mortalities and serious injuries within the remaining open areas of the Exclusive Economic Zone around Hawaii and on the high seas (including the exclusive economic zone around Johnston Atoll but not Palmyra Atoll) by an amount proportionate to the rate that would be required to reduce false killer whale incidental mortality and serious injury within the Exclusive Economic Zone around Hawaii to below the stock's PBR; or
- (4) the average estimated level of false killer whale incidental mortality and serious injury in the deep-set longline fishery within the remaining open areas of the Exclusive Economic Zone around Hawaii for up to the five most recent years following implementation of the final take reduction plan is below the PBR for the Hawaii pelagic stock of false killer whales at that time.

Although the preamble to the proposed rule noted that the National Marine Fisheries Service would consider these and other factors when deciding to reopen the fishery, it did not specify what criteria would be used, thereby leaving the matter entirely to the discretion of the regional administrator.

As explained in the preamble to the proposed rule, the trigger to close the zone should be devised to ensure that PBR is not exceeded, even if PBR changes based on new information. Although the Service may wish to re-open the zone, it should do so only when it can provide assurance that PBR will not be exceeded. Therefore, the Marine Mammal Commission recommends that the National Marine Fisheries Service adopt the proposed PBR-based formula for defining the trigger to close the southern exclusion zone and include in the regulations a corresponding PBR-based formula to determine when the zone should be reopened.

The rule's legal implications

The Service proposes to codify different requirements of the proposed rule under two different parts of the Code of Federal Regulations (C.F.R.). Some requirements would be added to 50 C.F.R. part 229 pertaining to the implementation of take reduction plans. Other requirements would be implemented under 50 C.F.R. part 665 pertaining to fishery management plans authorized under the Magnuson-Stevens Fishery Conservation and Management Act. For cross-referencing purposes, a note would be added to part 229 for the take reduction plan stating that deep-set vessel operators also must comply with the specified sections of part 665 governing the management of fisheries in the western Pacific.

The rationale for and implications of not including all proposed regulatory measures together under 50 C.F.R. 229 are not clear. Whereas the Service normally relies on fishery management councils to advise it on implementing and amending rules pertaining to fishery management, it relies on advice from take reduction teams when adopting and revising provisions of take reduction plans. The Commission's concern here is whether this bifurcated rulemaking approach will result in confusion regarding authorities and potential conflicts between the two parts of the regulations.

Such conflicts resulted when fishery managers attempted to implement fishery measures in regulations to codify the take reduction plan for Gulf of Maine harbor porpoises. In that case, the Service relied on a closed fishing area implemented as part of a fishery management plan to limit harbor porpoise bycatch levels, but then deferred to fishery management council recommendations to modify the boundaries of the closed fishing area in ways that increased harbor porpoise bycatch. In adopting those modifications, the Service neither accounted for effects of the action on harbor porpoise bycatch nor sought approval for the change from the harbor porpoise take reduction team.

In light of that experience, the Marine Mammal Commission recommends that the Service either (1) include all take reduction measures under authority of the Marine Mammal Protection Act in 50 C.F.R. part 229, or (2) require in the final rule that any changes to take reduction measures under 50 C.F.R. part 665 follow the same procedures as those required to change take reduction measures in 50 C.F.R. part 229, including advance review and consultation with the False Killer Whale Take Reduction Team.

Potential interactions with the shortline fishery

Currently, some fisheries registered with the State of Hawaii use longline type fishing gear that is set in short lengths (<1 nm). These fisheries are not represented on the take reduction team or factored into the take reduction plan because fishery participants have not reported takes of false killer whales. However, to date, these fisheries have not been observed by fishery or marine mammal observers. One of these fisheries (the Hawaii shortline fishery) was added to Category II of the Service's list of fisheries in 2010, thereby requiring its participants to register with the Service and accept an observer if asked to do so. At several meetings the take reduction team has noted the need to collect information on fishing practices in these fisheries (e.g., the number of participants, and

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where and when they fish) and to place observers on shortline vessels to assess and monitor any marine mammal interactions. At its July 2011 meeting, many take reduction team members supported adding a representative of the shortline fishery to the team.

In the preamble to the proposed rule the Service acknowledged the need to assess the shortline and kaka fisheries and conduct related research and stated that it plans to do so when funds become available. The Service did not indicate how or when it would provide observers for those fisheries or include representatives from those fisheries on the team. The Marine Mammal Commission recommends that the National Marine Fisheries Service (1) arrange for marine mammal observer coverage of the shortline fishery and (2) expand the False Killer Whale Take Reduction Team to include a representative of that fishery. The Service's intent to take such steps should be noted in the preamble to the final rule.

Non-regulatory measures

The *Federal Register* notice notes that the Service proposes to include a number of non-regulatory measures as part of the False Killer Whale Take Reduction Plan. They include: (1) increasing observer coverage in the deep-set longline fleet from 20 to 25 percent of the fishing effort, (2) expediting determinations of false killer whale mortalities and serious injuries in the fishery, (3) improving the data collected on interactions between the fishery and marine mammals, (4) notifying members of the take reduction team of known or possible false killer whale interactions as they occur, and (5) convening the take reduction team on a timely schedule to review important developments and recommend needed adjustments to the take reduction plan. This list of actions appears appropriate and constructive and the Marine Mammal Commission recommends that the National Marine Fisheries Service adopt and implement all of the proposed non-regulatory measures referenced in the preamble to the proposed rule.

I hope these recommendations are helpful. Please contact me if you have any questions.

Sincerely,

A handwritten signature in black ink, appearing to read "Timothy J. Ragen" followed by a flourish and the word "for".

Timothy J. Ragen, Ph.D.
Executive Director