



MARINE MAMMAL COMMISSION

1 June 2010

Mr. Eric C. Schwaab
Assistant Administrator for Fisheries
National Marine Fisheries Service
1315 East-West Highway
Silver Spring, Maryland 20910

Dear Mr. Schwaab:

In two recent letters to you, the Marine Mammal Commission provided recommendations on the conservation of Hawaiian monk seals and Pacific cetacean stocks resulting from discussions at our 2009 annual meeting in Honolulu last December. I write now to address one additional specific issue reviewed by the Commission during its meeting: the conservation of spinner dolphins in the waters around the main Hawaiian Islands. Management of this species has long been controversial because of the potential harassment of dolphins by people wishing to swim with or otherwise interact with them. The Commission provides the following recommendations to further the management of this issue and promote the long-term conservation of spinner dolphin populations in Hawaiian waters.

RECOMMENDATIONS

The Marine Mammal Commission recommends that the National Marine Fisheries Service secure the necessary funding and take the necessary steps to study and conserve the spinner dolphin populations in the Hawaiian archipelago, including—

- assessing the abundance and trends, distribution, movement, habitat-use patterns, productivity, and human-related threats for each recognized spinner dolphin stock in the Hawaiian archipelago;
- strengthening and extending its Dolphin Smart program to include all islands where dolphin-watch tours are offered or where human-dolphin interactions routinely occur;
- hiring a Dolphin Smart program coordinator to oversee implementation of the program and related management activities;
- increasing its enforcement presence in areas where interactions between dolphins and people occur, documenting potential cases of harassment, and passing on such documentation to the appropriate authorities for prosecution when a take has occurred;
- providing funds to purchase, operate, maintain, and staff a vessel dedicated to enforcement of the Marine Mammal Protection Act and other pertinent statutes and regulations;
- working with NOAA's Office of the General Counsel to examine the priorities assigned to enforcement of the various statutes under the agency's jurisdiction, including the Marine Mammal Protection Act; and
- considering alternative sources of funding to support spinner dolphin conservation measures, such as pursuing statutory changes to the Marine Mammal Protection Act to allow

the Service to use fines collected from spinner dolphin harassment violations to promote related conservation efforts and working with the state of Hawaii to examine the possibility of generating revenue from vanity license plates.

RATIONALE

Hawaiian spinner dolphins feed offshore at night and use particular nearshore bays during the daytime to rest and socialize. Their predictable behavior makes it easy for people who are interested to interact with them in the wild. Despite benign intentions, swimmers, tour boat operators, and kayakers disturb spinner dolphins during the dolphins' daily resting periods. Such disturbance constitutes harassment and can cause stress, disrupt important behavior (e.g., nursing, resting), lead to displacement from or avoidance of important habitat, and reduce reproductive success. Both individual dolphins and their populations may be affected.

For more than a decade, the Marine Mammal Commission has been recommending that the Service take steps to address human-dolphin interactions in Hawaii. Based on a contract report completed in 2000, the Commission wrote to the Service (see attached letter of 23 May 2000), recommending that it promulgate regulations specifying that any activity intended to enable in-water interactions between people and dolphins is prohibited by the Marine Mammal Protection Act and is illegal unless the party involved has obtained appropriate authorization.

At the Commission's 2002 annual meeting, Service representatives indicated that spinner dolphins were using certain nearshore resting areas less frequently than they had previously, presumably as a result of increased human presence and disturbance. The attorney representing NOAA's Office of the General Counsel agreed that incidents of harassment were occurring but were not being prosecuted because the Office did not believe such disturbance was having a significant impact on the dolphin populations. The Commission wrote to the Administrator following that meeting (see attached letter of 6 May 2003), noting that such interactions have the potential to affect spinner dolphins in multiple ways and urging the agency to enforce the taking prohibition of the Marine Mammal Protection Act as it pertains to the harassment of spinner dolphins in Hawaii. The Commission also noted that, if enforcement officials believed that the applicable definitions were too ambiguous to support the pursuit of cases, the Service should promulgate regulations to establish objective criteria for determining when a take has occurred.

The Commission revisited this issue again at its 2004 annual meeting and again recommended that the Service strengthen its efforts to enforce the taking prohibition of the Marine Mammal Protection Act as it pertains to human-dolphin interactions in Hawaii (see attached letter of 25 January 2005). The Commission also reiterated the need for the Service to issue additional, enforceable guidance as to what constitutes harassment of marine mammals in general and Hawaiian spinner dolphins in particular. Further, the Commission recommended that the Service enlist the help of state officials in enforcing the taking prohibition by entering into a cooperative enforcement agreement with and providing funding to the state of Hawaii.

In December 2005 the Service published an advance notice of proposed rulemaking, seeking advice on whether it should promulgate regulations to protect wild spinner dolphins around the main Hawaiian Islands and, if so, how such regulations might be structured. The Commission commented (see attached letter of 13 January 2006) and again stressed the need for the Service to clarify which activities do and do not constitute harassment of spinner dolphins under the Marine Mammal Protection Act. The Commission recommended that the Service adopt regulations that set forth enforceable criteria, such as specifying the minimum allowable distance for approaching dolphins, and that it also set aside certain areas as refuges, including the most important resting areas. Although more than four years have passed since the Service published its notice, it has yet to propose such regulations.

During this interval, the Service has made some progress in studying spinner dolphins and managing human interactions with them. In particular, it has supported genetic research that revealed that spinner dolphins in the Hawaiian archipelago comprise seven separate stocks, including three around the main Hawaiian Islands. The delineation of multiple stocks prompts a need for further stock assessment research. With that in mind, the Marine Mammal Commission recommends that the National Marine Fisheries Service assess the abundance and trends, distribution, movements, habitat-use patterns, productivity, and human-related threats for each recognized spinner dolphin stock in the Hawaiian archipelago.

In addition, the Service has decided to initiate a time-area closure management plan and is supporting a related research project to (1) assess the efficacy of the closures and (2) provide more detailed information on the effects of swim-with and boating activities on spinner dolphins in their resting bays. The Marine Mammal Commission supports this plan and project with the understanding that they are intended to provide the information needed to implement protective measures for the dolphins.

Consistent with that objective, the Commission encourages the Service to continue its public outreach and education programs designed to inform tour operators, Hawaii residents, and tourists about the taking prohibition of the Marine Mammal Protection Act, the risks that human interactions pose to spinner dolphins, and the actions that should be taken to minimize those risks. In this regard, the Commission commends the Pacific Islands Regional Office for initiating a Dolphin Smart program on the island of Hawaii to certify qualifying dolphin-watch operators as “responsible” wildlife viewing companies. The Marine Mammal Commission recommends that the National Marine Fisheries Service strengthen and extend its Dolphin Smart program to all islands where dolphin-watch tours are offered or where human-dolphin interactions routinely occur. In addition, the Marine Mammal Commission recommends that the National Marine Fisheries Service hire a Dolphin Smart program coordinator to oversee implementation of the program and related management activities. The Dolphin Smart program also provides an opportunity for the Service to strengthen its cooperation with state wildlife programs, and the Commission encourages the Service to solicit the involvement of the state of Hawaii in such outreach efforts.

To ensure that protective measures are heeded by the public, the Marine Mammal Commission also recommends that the National Marine Fisheries Service increase its enforcement

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presence in areas where interactions between spinner dolphins and people occur, document potential cases of harassment, and pass on such documentation to the appropriate authorities for prosecution when a take has occurred. The Commission believes that the existing statutory and regulatory provisions are sufficiently clear to support bringing enforcement actions now, at least for egregious violations of the Act. During its annual meeting this past December, the Commission learned that the Service's enforcement branch does not have a single vessel for carrying out its functions. The Marine Mammal Commission therefore recommends that the National Marine Fisheries Service provide funds to purchase, operate, maintain, and staff a vessel dedicated to enforcement of the Marine Mammal Protection Act and other pertinent statutes and regulations in the waters around the main Hawaiian Islands. The Service also should be cooperating with the state of Hawaii and the U.S. Coast Guard to increase its enforcement capabilities.

In addition, the Commission is aware that the Service's Office of Law Enforcement is now undergoing a review and changes in direction have occurred or are being considered. The Marine Mammal Commission recommends that the National Marine Fisheries Service and NOAA's Office of the General Counsel use this review to examine the priorities assigned to enforcement of the various statutes under the agency's jurisdiction, including the Marine Mammal Protection Act. In general, the Commission believes that the Service should be investing more effort in enforcement of the Marine Mammal Protection Act and, more specifically, in enforcement of the Act's taking prohibition with respect to spinner dolphins and other species that are subject to high levels of human interactions in the wild.

Finally, the Commission recognizes that costs associated with the enforcement, management, and research measures necessary to protect spinner dolphins might exceed current appropriation levels. To address any shortfall, the Marine Mammal Commission recommends that the National Marine Fisheries Service consider alternative sources of funding to support spinner dolphin conservation measures, such as pursuing statutory changes to the Marine Mammal Protection Act to allow the Service to use fines collected from spinner dolphin harassment violations to promote related conservation efforts and working with the state of Hawaii to examine the possibility of generating revenue from vanity license plates.

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

Sincerely,



Timothy J. Ragen, Ph.D.
Executive Director

Attachments

Cc with attachments: Rear Admiral Stephen E. Mehling
Ms. Lois J. Schiffer
Ms. Laura Thielen

MARINE MAMMAL COMMISSION
4340 EAST-WEST HIGHWAY, ROOM 905
BETHESDA, MD 20814

23 May 2000

The Honorable Penelope D. Dalton
Director
National Marine Fisheries Service
1315 East-West Highway
Silver Spring, MD 20910

Dear Ms. Dalton:

The National Marine Fisheries Service published a final rule (56 Fed. Reg. 11693) in March 1991 amending its regulatory definition of "take" under the Marine Mammal Protection Act to include feeding or attempting to feed marine mammals in the wild because of the likely adverse effects of such activities. The regulation was challenged but upheld in 1993 by the Fifth Circuit Court of Appeals (Strong v. United States, 5 F.3d 905 (5th Cir. 1993)). Operators of commercial dolphin-feeding cruises were notified of the rule and most either ceased operation or shifted to offering dolphin watching cruises. Subsequently, a number of commercial operators began offering opportunities for people to enter the water and swim with wild dolphins. Despite the 1991 ruling, some of these programs reportedly are being facilitated by illegal feeding.

Placing swimmers in the water to interact with wild dolphins, like providing dolphins food to facilitate viewing, could be detrimental to both people and dolphins. To better determine the nature and significance of the risks, the National Marine Fisheries Service asked the Commission to conduct a review of available information concerning the nature and possible adverse effects of commercial swim-with-wild-dolphin programs. The results of the review are described in the enclosed contract report by Samuels et al.

The report points out that interactions between humans and wild dolphins fall into four general categories: (1) interactions with "solitary, sociable" dolphins that are curious and typically make first contact with humans and then gradually become habituated to in-water encounters; (2) interactions with dolphins that are conditioned, by being offered food, to accept in-water encounters with humans; (3) interactions involving gradual conditioning (habituation) of dolphins, without provision of food, to accept in-water encounters with humans; and (4) interactions resulting from opportunistic encounters with


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unhabituated dolphins. The report concludes that (a) all four of these types of in-water encounters with swimmers can cause behavioral disruptions (Level B harassment, as defined in the Marine Mammal Protection Act); (b) any interactions that are a product of, or will result in, habituation increase the risk of dolphins being attracted to and being hit and killed or injured by boats; (c) although feeding dolphins to promote opportunities for in-water encounters is prohibited, it is being done routinely in some areas and can increase the risk of both people and dolphins being killed and injured -- e.g., dolphins can be fed harmful foods and be hit by boats while seeking food, and people can be bitten or butted while feeding dolphins or when dolphins seek food from swimmers and boaters engaged in other activities; (d) interactions with unhabituated dolphins often take place in areas where the target animals congregate for rest or social activities, and disruptions of these behaviors can have cumulative adverse effects on social structure, reproduction, and population viability; and (e) the risks of behavioral disruptions and deaths and injuries resulting from commercial swim-with-dolphin programs can be reduced by careful management of the programs, but cannot be eliminated.

The information and analyses in the report provide compelling evidence that any efforts to interact intentionally with dolphins in the wild are likely to result in at least Level B harassment and, in some cases, could result in the death or injury of both people and marine mammals. The Marine Mammal Protection Act prohibits any such taking without prior authorization. The Marine Mammal Commission therefore recommends that the National Marine Fisheries Service promulgate regulations specifying that any activity intended to enable in-water interactions between humans and dolphins in the wild constitutes a taking and is prohibited unless appropriate authorization is obtained.

If you or your staff have any questions concerning this recommendation, please let me know.

Sincerely,


John R. Twiss, Jr.
Executive Director

MARINE MAMMAL COMMISSION
4340 EAST-WEST HIGHWAY, ROOM 905
BETHESDA, MD 20814-4447

6 May 2003

Vice Admiral Conrad C. Lautenbacher, Jr., Ph.D., USN (Ret.)
Under Secretary for Oceans and Atmosphere
Department of Commerce
14th and Constitution Avenue, N.W., Room 5128
Washington, D.C. 20230

Dear Vice Admiral Lautenbacher:

The Marine Mammal Commission held its 2002 annual meeting in San Diego, California. That meeting focused on issues pertaining to marine mammal species occurring along the West Coast of the United States, Alaska, and Hawaii. Among the issues considered was the increasing frequency with which marine mammals are being subjected to taking by harassment through directed human-marine mammal interactions and NOAA's response to these ongoing violations of the Marine Mammal Protection Act. In keeping with the regional focus of the meeting, we concentrated on harassment related to close approaches to various pinniped species along the California coast and on swim-with-the-dolphin activities in Hawaii. However, similar activities are occurring in other regions, most notably dolphin swim programs in the southeastern United States.

In California, some of the most high-profile situations (e.g., Children's Pool in La Jolla and the concentration of elephant seals at Piedras Blancas) are being addressed by cordoning off certain areas and establishing docent programs. These measures appear to have successfully transformed those problem situations into ones where the public has an opportunity to view marine mammals in a setting that is educational and safe and that minimizes the likelihood of taking marine mammals. This being the case, we encourage the Service to continue to support the development and operation of such programs, including sponsorship when necessary.

In contrast, commercial operators in Hawaii are routinely offering the public opportunities to interact with dolphins in ways and at distances that result in unauthorized takings and that are generally viewed as having adverse effects on the affected populations. In certain areas, such as Kealahou Bay, tour operators take advantage of the daily patterns of spinner dolphins that forage offshore at night and return to shore to rest during the day. The influx of swimmers into these areas during the day and their close approaches to the dolphins result in disturbance to the dolphins and prompt avoidance behavior on the part of the animals. According to information presented by the National Marine Fisheries Service at our meeting, recent studies indicate that dolphins are using these resting areas less frequently than they did previously, presumably as a result of the disturbance associated with increased human presence. The Service's representative based his information on a 1999 report in the Service's *Marine Mammal Protection Act Bulletin* (4th Quarter, 1999) that reported more than a 20 percent reduction over 13 years (1979/1980 to 1993/1994) in the number of days that spinner dolphins use Kealahou Bay. During that time "...there was a tremendous growth in

swim with dolphins activities in Kealahou Bay." This is similar to reports in the literature of dolphin use of an area declining after multiple encounters of humans swimming with the animals. The Service representative also noted that a search of the Internet for wild dolphin swim programs available in the Kona area resulted in 332 different matches (see enclosed example of web page and recent article from the local newspaper, *West Hawaii Today*).

Despite the frequency of encounters between swimmers and dolphins, the predictability of when and where they will occur, and the clearly discernable disturbance that results, NOAA has taken little or no enforcement action to address the problem. At our meeting we heard from representatives of the National Marine Fisheries Service's Office of Protected Resources, the Office of Law Enforcement for the Service's Southwest Region, and the NOAA Office of the General Counsel. All of them agreed that, at least in some instances, the activities that are ongoing in Hawaii constitute harassment. Yet, cases are not being brought, primarily because this issue is given low priority by the general counsel's office. As the senior enforcement attorney for the Southwest Region put it, "we tend to focus on cases that have a significant impact on whatever the resource is."

In the opinion of the Marine Mammal Commission and its Committee of Scientific Advisors, the situation in Hawaii clearly rises to that level. Even though each incident in which dolphins are closely approached or pursued may result only in disturbing the animals (constituting Level B harassment), these activities collectively constitute Level A harassment in that they have the potential to injure the dolphins and the dolphin populations by increasing stress levels, denying the animals the opportunity to rest, and causing them to abandon important sanctuaries where, among other things, they care for their calves. As such, the Commission believes that it is imperative that NOAA do more to address the situation in Hawaii, including educating the operators and the public about which activities comport with the law, informing them that penalties will be sought when violations occur, and pursuing enforcement actions when animals are harassed.

We appreciate that agency resources are limited but believe that with a small, but directed effort targeted at this problem, a clear message will be sent that NOAA will no longer stand by and allow dolphins to be taken with impunity in violation of the Marine Mammal Protection Act. A similar heightening of enforcement and prosecutorial effort directed at unlawful takings of marine mammal is also needed in the Southeast Region, where swim programs directed at bottlenose dolphins have proliferated in recent years. Reportedly, those programs often involve or are facilitated by feeding the animals, an activity that the National Marine Fisheries Service has explicitly prohibited by regulation.

During our discussion of the issue of human-marine mammal interactions, it was suggested that harassment cases are difficult to win because there is no clear-cut standard as to how close is too close to approach a wild marine mammal. Members of our Committee of Scientific Advisors who have spent time at Kealahou Bay, however, thought that, in many instances, it was clear when harassment had occurred – a swimmer intentionally approached a dolphin, the dolphin's resting behavior was disrupted, and further avoidance behavior was exhibited upon repeated approaches. A videotape of such an interaction should be sufficient to sustain an enforcement action. If, however,

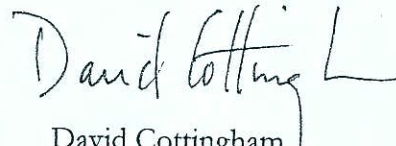
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NOAA's enforcement officers and attorneys are reluctant to bring cases based on such a fact pattern, the Commission recommends that the National Marine Fisheries Service act promptly to promulgate regulations to establish objective criteria for determining when a taking has occurred. Such regulations could be structured to address interaction problems at specific sites where problems are particularly acute (e.g., the dolphin resting bays in Hawaii), to address specific types of interactions (e.g., in-water activities), or to be part of a more generic rulemaking on approaching wild marine mammals, such as that envisioned in the Service's 30 January 2002 advance notice of proposed rulemaking.

At a recent meeting with the NOAA General Counsel and others, Mr. Walpole informed us that the agency has a good record of prosecuting commercial operators and individuals for these activities. We had been aware of a prosecution in Hawaii in the early 1990s but few since then. We would like to learn more about the specifics of recent successful efforts to prosecute individuals who are intentionally harassing marine mammals so that we can inform members of the Commission and the Committee of Scientific Advisors on Marine Mammals.

The Commission welcomes the opportunity to work with the involved components of NOAA in developing a strategy for addressing this important issue in a timely manner.

Sincerely,



David Cottingham
Executive Director

Enclosures

cc with enclosures: William T. Hogarth, Ph.D.
Mr. Dale J. Jones
James R. Walpole, Esq.

MARINE MAMMAL COMMISSION
4340 EAST-WEST HIGHWAY, ROOM 905
BETHESDA, MD 20814

25 January 2005

William T. Hogarth, Ph.D.
Assistant Administrator for Fisheries
National Marine Fisheries Service
1315 East-West Highway
Room 14564
Silver Spring, MD 20910

Dear Dr. Hogarth:

The Marine Mammal Commission and its Committee of Scientific Advisors on Marine Mammals held their annual meeting 26-28 October 2004 in Hawaii to review issues related to the conservation of marine mammals, with a special focus on Hawaii and the Pacific islands area. We were pleased that several staff members from the National Marine Fisheries Service (NMFS) were able to participate in our discussions. They provided much valuable information and useful insight into the issues that we jointly face.

On the basis of the discussions during our meeting and other information reviewed by us, the Commission and Committee commend NMFS on the many positive measures that it has taken to conserve living marine resources in the Pacific region. We recognize and commend the major efforts that staff in Pacific Islands Regional Office (PIRO) and Pacific Islands Fisheries Science Center (PIFSC) have made to work cooperatively with their resource management counterparts in other federal and state agencies. In particular, we note NMFS's work on a cooperative agreement on managing monk seals with the State of Hawaii Department of Land and Natural Resources pursuant to provisions of section 6 of the Endangered Species Act (ESA). We also commend efforts to develop a cooperative stranding network in the main Hawaiian Islands, and NMFS' leadership and participation in the range-wide population study of humpback whales in the Pacific Ocean (SPLASH) including efforts by the Southwest Fisheries Science Center and the National Marine Mammal Laboratory.

We offer the following recommendations on additional steps that we think NMFS should take to further conservation of marine mammals and their ecosystems in the Pacific islands region.

- **The Marine Mammal Commission recommends that NOAA, and particularly NMFS, complete intergovernmental cooperative agreements and provide funding for 1) implementation and enforcement of the Marine Mammal Protection Act (MMPA), 2) activities relating to implementation of section 6 of the ESA, 3) management of the Northwestern Hawaiian Islands (NWHI) Coral Reef Ecosystem Reserve, 4) management of swimmer and boater interactions with spinner dolphins, and 5) coordination of monk seal volunteer efforts on Kauai.**

As the primary federal agency concerned with research on and management of exploited and protected marine resources, NMFS is in a central position to conduct, coordinate, and facilitate the many conservation and management actions that are needed in the Pacific islands region. At the Commission's annual meeting many speakers addressed the theme that NMFS, especially PIRO and PIFSC, need to work cooperatively with other federal agencies, state and local officials in Hawaii, and the public to manage living marine resources. Given the huge area needing attention, the diversity of issues, and the complex pattern of overlapping jurisdictions, the ability of NMFS personnel to deal with all issues will always be limited. A number of specific areas where cooperative agreements with willing partners offer good opportunities to improve management are identified in the recommendation above, and NMFS/NOAA should complete those agreements as quickly as possible. Some of the agreements may facilitate NMFS's ability to transfer funds to cooperators such as the State of Hawaii, and we encourage you to ensure that funding is made available where needed to support those efforts.

- **The Marine Mammal Commission recommends that NMFS provide support and resources for development and coordination of stranding responses for all marine mammals within the main Hawaiian Islands, as well as other islands in the region.**

The logistical difficulties facing a stranding network in the Pacific islands region are daunting, where the shoreline is dispersed over thousands of miles of the central Pacific Ocean, and among many islands, atolls, and archipelagoes some of which are uninhabited or very sparsely populated. However, development of an effective stranding response network is feasible within the more populated and accessible main Hawaiian Islands. Personnel from PIRO, PIFSC, the Hawaiian Islands Humpback Whale National Marine Sanctuary, State of Hawaii agencies, and the volunteer Hawaiian Islands Stranding Response Group (HISRG) have all collaborated informally in responses to entanglements and strandings. Currently, the HISRG responds to the majority of strandings for which a response is made. The HISRG, however, is based on Oahu, and its ability to respond effectively to strandings on other islands is limited by funds, personnel, and logistics.

At the Commission's annual meeting, representatives from PIRO indicated that a formal stranding network is being developed with a plan to have a coordinator on each of the main Hawaiian Islands. Also, NMFS has established a toll-free hotline that allows members of the public to report strandings in the main Hawaiian Islands. The Commission endorses these efforts and recommends that the stranding network be further developed in consultation with all of the collaborators identified above. We note that an effective stranding network will require sufficient PIRO personnel to respond to stranding events or to coordinate the activities of response personnel from other agencies or volunteer groups, as well as funds for travel, supplies, etc. NMFS should provide the resources necessary to implement an effective stranding network in the main Hawaiian Islands, and to the extent possible on other islands as well.

- **The Marine Mammal Commission recommends that NMFS issue final regulations or guidelines on stranding response, including criteria to assess circumstances for when**

stranded animals should be taken into rehabilitation facilities and criteria for when animals in rehabilitation facilities should be released.

Following its 2003 annual meeting, the Commission wrote to NMFS about several aspects of the agency's stranding response programs. Among other things, the Commission identified a need to establish 1) national standards concerning the qualifications of stranding network participants, 2) criteria for determining when stranded marine mammals should be removed from the wild for rehabilitation and care, and 3) criteria for determining when, and under what conditions, rehabilitated marine mammals should be returned to the wild. Information concerning the stranding program in the Pacific Islands Region presented at the 2004 Commission meeting indicated that action is still needed to resolve these issues. We are particularly concerned that the Service has yet to finalize the draft guidelines for determining when stranded or rehabilitated marine mammals should be released in the wild. Legislation enacted more than 10 years ago specifically directed the Service to develop such criteria and considerable work in developing them has already been done. As such, the Commission recommends that finalizing the release criteria be made a priority of the stranding program during 2005.

- **The Marine Mammal Commission recommends that NMFS continue existing levels of funding and support for ongoing research and recovery work on monk seals in the NWHI by the PIFSC, and provide additional funding needed for studies of monk seals in the main Hawaiian Islands.**

The Commission recognizes that PIFSC staff have conducted a well-designed monk seal research program for many years. Ongoing studies to assess monk seal colonies in the NWHI appear to be well organized and on track. Researchers have identified and provided direction for important recovery actions, including 1) the closure or restriction of certain fisheries potentially affecting monk seals, 2) the removal of debris that could entangle and kill seals, 3) the removal of selected individual sharks and aggressive adult male seals responsible for localized pup mortality, and 4) the development of methods to improve juvenile monk seal survival rates. Important studies to identify monk seal prey and to examine the potential effect of prey availability on monk seal population trends also appear to be progressing. The NMFS should continue to provide funding for these efforts, at least at existing levels.

Monk seals are hauling out and giving birth to pups with increasing frequency in the main Hawaiian Islands. To assess monk seal biology and management needs in this area, PIFSC should initiate a main Hawaiian Islands monk seal research program similar in scope to that undertaken in the NWHI. Research objectives should include the identification of monk seal foraging areas, description of movement and site-fidelity patterns, and collection of samples to identify prey preferences. The NMFS should provide PIFSC with additional funding to design and conduct the necessary studies, many of which are described in the report from the October 2002 Workshop on the Management of Monk Seals on Beaches in the Main Hawaiian Islands, sponsored by the Commission, NMFS, and the State of Hawaii, and the soon-to-be-released revision of the Hawaiian Monk Seal Recovery Plan.

- **The Marine Mammal Commission recommends that NMFS provide the State of Hawaii Division of Aquatic Resources with funding for a Kauai monk seal response coordinator.**

With the exception of Niihau which is private and largely inaccessible, the main Hawaiian Island with the greatest number of monk seal haul-out events is Kauai. Kauai beaches are heavily used by people for recreational purposes, and when seals haul out it has frequently been necessary to post temporary protection zones around them to minimize human disturbance. Far more demanding management situations also occur commonly on Kauai, such as protection of mother-pup pairs hauled out on popular beaches and treatment of seals injured by fishing hooks. Hiring of a full-time monk seal response coordinator on Kauai was identified as a high priority by participants at the October 2002 monk seal workshop. Subsequently, the Commission provided funding to the Hawaii Division of Aquatic Resources to hire a temporary coordinator with the expectation that a permanent coordinator would be hired with funds provided by NMFS. The NMFS did provide funding for the position in 2004, but it was filled for only a few months and about eight months of support now remain. As we understand it, the Division plans to request funding for continued support for this position as part of an anticipated grant request under section 6 of the ESA, once it concludes a cooperative agreement with NMFS. In the interim NMFS should ensure that sufficient funds are available to the Division to have a fulltime monk seal response coordinator on duty year-round on Kauai.

- **The Marine Mammal Commission recommends that NMFS develop a tiered system to direct and authorize volunteers and agency partners that assist with monk seal management needs in the main Hawaiian Islands.**

Participants at the October 2002 monk seal workshop recommended that NMFS develop a three-tiered system for organizing and training non-NMFS partners in assisting in monk seal management tasks. The three tiers involved tasks that 1) do not involve the “taking” of monk seals as defined under the MMPA, 2) require the “taking” of seals, but with relatively low risks to the animals, and 3) require expert training to capture or treat distressed seals. The latter two categories would require various levels of expert training and either letters of authorization or permits to carry out specified tasks. Such a system would establish a network of trusted, trained partners throughout the main Hawaiian Islands who could help assure the quickest, most effective response possible, particularly for situations not easily reached by PIRO staff stationed in Oahu. We note that staff from NMFS headquarters, the Pacific Islands Area Office, and the Honolulu Laboratory attended the workshop and helped to shape these recommendations. At the Commission’s 2004 annual meeting, volunteers assisting with monk seal management efforts reiterated their interest in such a system, but to our knowledge no steps have been taken to follow up on this workshop’s recommendation. The NMFS should act expeditiously to design and implement the system that was recommended at the October 2002 workshop.

- **The Marine Mammal Commission recommends that NOAA and NMFS strengthen enforcement of the MMPA as it pertains to human-dolphin interactions in Hawaii, and that cases be brought at least for the most clear instances of harassment. We also**

recommend that NOAA/NMFS provide additional guidance as to what constitutes harassment as it pertains to this issue, and that they consider actions that could be taken to clarify and mitigate the situation short of rulemaking.

Based on the information available to us, including first-hand observations of interactions, the Commission believes that some of the ongoing activities involving spinner dolphins and boaters and swimmers in Hawaii unambiguously satisfy the MMPA's definition of harassment (i.e., an "act of pursuit, torment, or annoyance"). Inasmuch as tour operators leave port with the express purpose of finding and getting near dolphins these activities can appropriately be characterized as an act of pursuit, and additional pursuit occurs when a vessel or swimmer follows animals in an attempt to get closer to them. The resulting disruption of behaviors can be measured by the reactions of individual dolphins as they move away from approaching vessels and swimmers or, at the population level, by shifts in usage patterns of traditional resting areas. The Commission reiterates its previous recommendation that greater enforcement attention be given to human-dolphin interactions in Hawaii, and that cases be brought at least for the most clear instances of harassment.

At the Commission's annual meeting, there was general agreement by the participants in the discussion of spinner dolphins that some of the difficulty in addressing potentially harmful interactions stems from ambiguity in the statutory definition of the term "harassment". Both the Director of the NMFS Office for Law Enforcement and a representative of the NOAA Office of General Counsel identified this as a significant impediment to pursuing the types of enforcement actions the Commission has recommended. Since enforcement officials believe that they are impeded in their ability to pursue cases by ambiguities in the definition of harassment, it is incumbent on NMFS to resolve those ambiguities. In this regard, NMFS first proposed regulations that would limit approaches to marine mammals in 1992 and revisited the matter in an advance notice of proposed rulemaking in 2002. Currently, efforts to resolve these issues seem to be stalled pending possible legislative action to amend the MMPA's harassment definition. The Commission agrees that proceeding with a comprehensive rulemaking may be inefficient if changes to the underlying statutory provisions are imminent. Nevertheless, action is needed soon, and the Commission recommends that NOAA/NMFS consider actions it could take to clarify and mitigate the situation short of rulemaking. For example, publication of a policy statement that provides guidance and public notice of what NMFS considers pursuit or annoyance of marine mammals, and what activities have the potential to disturb marine mammals, would help clarify for the public and enforcement agents what types of interactions are and are not permissible. Such a policy statement would be most helpful if it were tailored to address the specific situations involving spinner dolphins in Hawaii.

- **The Marine Mammal Commission recommends that NMFS enter into and provide funding for joint enforcement agreements with the State of Hawaii to assist in implementing and enforcing the MMPA, including spinner dolphin management issues.**

At the Commission's annual meeting, NMFS officials reported that a cooperative enforcement agreement between NMFS and the State of Hawaii authorizes state officials to enforce

various federal statutes, including the MMPA and the ESA. It was reported, however, that funding to the State for cooperative enforcement activities under the MMPA has not been, and in fact cannot be, provided under that statute. The Commission would like clarification of how NMFS has reached such a conclusion.

Section 107(b) of the MMPA authorizes the Secretary to designate state officers and employees to enforce the provisions of the Act. Section 109(k) authorizes and directs the Secretary to enter into cooperative arrangements with appropriate state officials for the delegation to the State of the administration and enforcement of the Act. Neither provision specifically prohibits the Secretary from providing funding to a State to assist in such efforts. In fact, section 109(k) specifies that agreements entered into under that authority “shall contain such provisions as the Secretary deems appropriate to insure that the purposes and policies of this Act will be carried out.” It seems that ensuring that the State’s efforts are adequately funded would be one such element. In addition to these provisions, the Secretary has broad authority under section 112(c) of the Act to enter into “such contracts, leases, cooperative agreements, or other transactions as may be necessary to carry out the purposes” of the Act with, among other entities, any State agency. It appears to the Commission that at least one of these authorities could be used to provide federal funding to the State of Hawaii for cooperative enforcement activities under the MMPA, and we encourage NMFS to do so.

- **The Marine Mammal Commission recommends that NMFS work with the State of Hawaii and the Commission to convene a workshop to address the increasing impacts of swim-with-the-wild-dolphin operations in Hawaii.**

At its annual meeting, the Commission heard from NMFS managers, enforcement personnel, and scientists, as well as independent researchers, tour operators, and other stakeholders concerning human-dolphin interactions in Hawaii. The Commission, its Committee of Scientific Advisors, and invited guests also visited one of the areas north of Kailua-Kona frequented by tour operators focused on spinner dolphins to get a better understanding of the types of interactions that are occurring. While there, we observed activities that many people aboard considered intentional pursuit and harassment of dolphins.

In addition to considering increased enforcement as a means of addressing the problems presented by human-dolphin interactions in Hawaii, the Commission and participants at the Commission’s meeting considered possible alternative solutions. In fact, the Commission believes, as did many of the meeting participants, that other alternatives may be preferable to relying almost entirely on rigorous enforcement of the MMPA’s taking prohibition. Toward this end, the Commission recommends that NMFS convene a meeting of federal, state, and local government agencies, researchers, tour operators, and other stakeholders to develop a comprehensive approach to the problem that looks at when, where, and how such activities may be conducted without adversely affecting the dolphins. The Commission would welcome the opportunity to help organize and participate in such a meeting or workshop.

Among other things, the workshop should consider the desirability of establishing protected areas where dolphins can rest undisturbed by humans. Other alternatives should also be considered such as temporal and/or spatial access restrictions, limits on the number of vessels allowed in an area, and access restricted to tour operators that adopt and comply with specified, responsible wildlife-viewing practices. Most importantly, the workshop should consider what regulatory mechanisms are available to provide protection for dolphins, such as MMPA taking prohibitions, State of Hawaii laws and regulations, and the National Marine Sanctuaries Act.

- **The Marine Mammal Commission recommends that, as part of development of the proposal for a NWHI national marine sanctuary, NOAA/NMFS work with the Western Pacific Fishery Management Council (WPFMC) to develop draft fishery management regulations that are consistent with the Executive Orders establishing the NWHI Coral Reef Ecosystem Reserve.**

Executive Orders establishing the NWHI Coral Reef Ecosystem Reserve specifically mandate management of the reserve to protect the region's marine resources following a science-based and precautionary management approach. They also establish specific management measures that limit commercial fishing and direct that efforts to consider designation of the area as a national marine sanctuary "supplement or complement" the provisions of the Executive Orders. In its 9 August 2004 letter to Admiral Lautenbacher, the Commission recommended that NOAA's sanctuary proposal adopt fishery management measures that would protect endangered Hawaiian monk seals and the NWHI ecosystem.

The National Marine Sanctuaries Act (NMSA) requires that regional fishery management councils be given an opportunity to draft fishing regulations that meet the stated goals and objectives of any proposed sanctuary. The NMSP worked with the Reserve's Advisory Council (RAC) to develop draft goals and objectives. On 20 September 2004, the Director of the NOS NMSP sent a guidance package to the WPFMC for its use in developing fishery management rules for the proposed NWHI sanctuary, which included a modified version of the goals and objectives recommended by the RAC. During the Commission's annual meeting, a representative of the RAC expressed concern that the changes made by NOS had seriously weakened their recommended goals concerning management of fisheries. Also, a WPFMC representative stated that the Council was considering a new alternative not set forth in the NMSP guidance document, and that procedures under the Magnuson-Stevens Fishery Conservation and Management Act for developing fishing regulations would require a substantially longer time frame than the 120 days provided in the NMSA. The Commission is concerned that the WPFMC is working on this issue in ways that are inconsistent with the Executive Orders, the NMSA, and the needs for protection of resources in the NWHI. We therefore recommend that NMFS pay close attention to this issue, and work with the WPFMC and NMSP to ensure that any fishery management alternative developed for the proposed sanctuary be consistent with the Executive Orders, provide comprehensive, strong, and lasting protection for the NWHI ecosystem, and protect the prey resources of Hawaiian monk seals.

William T. Hogarth, Ph.D.
25 January 2005
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- **The Commission recommends that full funding be provided for completion of the SPLASH (Structure of Populations, Levels of Abundance and Status of Humpbacks) program.**

The Commission is very impressed by preliminary results of the interagency and international effort to conduct a range-wide population study of humpback whales in the Pacific Ocean. The results of this research will be invaluable for future management of the species, and the collaboration among researchers provides a model for future studies of other transboundary marine mammal species. The Commission recommends that NMFS continue to fully support the SPLASH program for its final year of field work, and for the subsequent analysis of data and publication of results.

We hope that these recommendations and comments are helpful to you. Additional specific recommendations relating to these and other topics discussed at our annual meeting are being communicated directly to appropriate administrators and directors. Copies of those letters are enclosed for your information. I would like to contact your office to arrange a time in the near future that Commission Chairman John Reynolds and I could meet with you and your staff to discuss these recommendations.

Sincerely,

A handwritten signature in black ink, appearing to read "David Cottingham", with a long, sweeping horizontal line extending to the right.

David Cottingham
Executive Director

Enclosures

MARINE MAMMAL COMMISSION
4340 EAST-WEST HIGHWAY, ROOM 905
BETHESDA, MD 20814

13 January 2006

Mr. Christopher E. Yates
Marine Mammal Branch Chief
Protected Resources Division
Pacific Islands Regional Office
National Marine Fisheries Service
1601 Kapiolani Boulevard, Suite 1110
Honolulu, HI 96814

Dear Mr. Yates:

The Marine Mammal Commission, in consultation with its Committee of Scientific Advisors on Marine Mammals, has reviewed the advance notice of proposed rulemaking seeking public comment on whether to promulgate regulations to protect spinner dolphins in the main Hawaiian Islands. The Commission is pleased that the National Marine Fisheries Service is considering initiating such a rulemaking. The issue of human interactions with spinner dolphins in Hawaii was discussed at the Commission's 2002 and 2004 annual meetings and continues to be of great interest to the Commission.

Based on information presented at the Commission's 2002 meeting, it appeared that spinner dolphins were routinely being taken (harassed) by boaters and swimmers in certain areas but that little was being done to take enforcement action to stem these apparent violations of the Marine Mammal Protection Act. Moreover, the Commission heard from Service scientists and managers that these interactions seemingly were having effects at the population level, with the dolphins using favored nearshore resting areas less frequently than they had previously. Following the 2002 meeting, the Commission wrote to the Administrator of the National Oceanic and Atmospheric Administration recommending that more be done to enforce the Act's taking prohibition as it pertains to close approaches of spinner dolphins (see enclosed 6 May 2003 letter). The Commission further recommended that, if the agency is reluctant to pursue cases because it does not believe that there are clear-cut standards as to when a taking has occurred, the Service should promulgate regulations establishing objective criteria for making such determinations.

The Commission again considered the issue of human interactions with spinner dolphins at its 2004 annual meeting, held in Kona, Hawaii. The Commissioners, members of the Committee of Scientific Advisors on Marine Mammals, and Commission staff also took the opportunity to visit one of the areas frequented by tour operators to see firsthand the types of interactions that are occurring. Some of the activities that we witnessed involved intentional pursuit of the animals, resulting in disturbance of the dolphins, which can reasonably be considered instances of harassment.

Following the 2004 meeting, the Commission wrote to the Service's Regional Administrator in Hawaii (see enclosed 25 January 2005 letter, at pages 5-6) again recommending that the Service

strengthen its enforcement efforts as a means of curbing the problems presented by human/dolphin interactions. The Commission also recommended that the Service work closely with the State of Hawaii to address needed protections for spinner dolphins and convene a meeting of government agencies and other stakeholders to develop a comprehensive approach for addressing this issue. The Commission believed that participants should consider when, where, and how interactions could be conducted without adversely affecting the dolphins. The Commission recommended, among other things, that the Service and others consider the desirability of establishing protected areas where dolphins can rest undisturbed by humans and/or of placing other limitations on human activities in areas frequented by spinner dolphins.

The Commission views the advance notice of proposed rulemaking as a first step in developing the type of comprehensive solution to this problem envisioned in its previous letters. The Commission continues to believe that many of the activities directed at spinner dolphins in Hawaii constitute harassment as defined under section 3(18) of the Marine Mammal Protection Act. That is, the dolphins, at least in some cases, are being pursued and/or annoyed, and the interactions clearly have the potential to disturb individual dolphins by disrupting their behavioral patterns. In addition, these types of interactions appear to be having effects at the population level, potentially resulting in injury to the stock by excluding animals from preferred resting habitat. Although we appreciate the Service's reluctance to pursue enforcement cases that it thinks would be difficult to prove, to the extent that such reluctance is based on ambiguities in the applicable definitions, it is incumbent upon the agency to take steps to resolve those ambiguities. Thus, the Commission recommends that, as part of the rulemaking under contemplation, the Service take steps to clarify what activities do and do not constitute harassment.

The simplest way to do this would be to limit distances to which boats and swimmers may intentionally approach dolphins (e.g., 100 feet, 50 yards, etc.) and/or to impose restrictions on other activities that may occur in areas used by dolphins (e.g., following dolphins, operating boats at high speed, in-water activities, etc.). If such an approach is followed, the Service needs to recognize that some ambiguities likely will persist. For example, it may not always be clear whether a vessel or swimmer approached a dolphin or vice versa. Thus, to the extent possible, any regulations should anticipate such situations and include sufficient guidance to allow enforcement officers to make these difficult judgments and the agency to sustain enforcement actions in appropriate instances. If properly crafted, such regulations should provide the Service with the tools it needs to bring a stop to the illegal taking of spinner dolphins in Hawaii.

Any regulations promulgated by the Service should also recognize that human interactions with spinner dolphins in Hawaii apparently are having cumulative impacts that are changing habitat-use patterns and potentially having population-level effects. Regardless of whether a particular human/dolphin encounter rises to the level of harassment of one or more dolphins, these broader impacts on the population provide a sufficient basis for the Service to regulate these activities because such regulations are necessary and appropriate to further the purposes of the Marine Mammal Protection Act. Such regulations could provide protection by closing certain areas to

activities directed at dolphins, limiting the number of vessels authorized to enter sensitive areas, or requiring operators to abide by certain practices as a condition of access.

In that regard, the Service should recognize that dolphin watching/swimming activities in some areas have been linked to serious population-level impacts, including reductions in population size and diminished survival of calves. Most recently, a 14-year study of the impacts of tourism on Pacific bottlenose dolphins in Shark Bay, Western Australia (Bejder 2005), found that, as vessel activity in the study area increased, use of the site by dolphins declined significantly. The study also found that cumulative exposure to vessels had a negative impact on the ability of female dolphins to produce and raise offspring successfully.

The broad policy statements set forth in section 2 of the Marine Mammal Protection Act provide a separate basis on which to regulate activities that may be having adverse effects on spinner dolphin habitats in Hawaii. Specifically, section 2(2) of the Act provides that "efforts should be made to protect essential habitats, including the rookeries, mating grounds, and areas of similar significance for each species of marine mammal from the adverse effect of man's actions...." The legislative history that accompanied the most recent amendment of this provision (H.R. REP. NO. 439, 103d Cong., 2d Sess. 29 (1994)) noted the oversight Committee's view that the Service "...has authority [under this provision] to promulgate regulations to protect marine mammals and their habitats under the general rulemaking authority of section 112 of the MMPA." The Commission believes that the resting habitat of spinner dolphins constitutes an area of significance for the animals that merits protection under the broad directive of the Act to protect essential habitats.

The Marine Mammal Commission, in consultation with its Committee of Scientific Advisors on Marine Mammals, has reviewed the information contained in the advance notice of proposed rulemaking and, in light of that information and the information reviewed at the Commission's recent annual meetings, recommends that the Service move forward promptly to promulgate regulations to provide greater protection to spinner dolphins in Hawaii and to the habitat on which they depend. The situation clearly warrants an enhanced level of protection. As discussed above, various statutory provisions provide authority for such regulations. The Commission believes that the best approach is one that draws on all of these authorities to provide the appropriate level of protection to spinner dolphins while not unnecessarily precluding responsible viewing opportunities. In this regard, the Commission recommends that the Service go forward with a proposed rule that:

- closes certain areas (e.g., those areas identified as the most important resting areas) to all human activities, either during specified hours or when dolphins are present;
- allows access to other areas used by dolphins subject to certain operating conditions (which might include speed limits, limits on the number of vessels, etc.);
- establishes generally applicable rules for all other areas, specifying minimum approach distances (e.g., no approaches closer than 50 yards) and other limitations (e.g., no touching animals, no pursuing animals, etc.); and
- provides the maximum possible clarity for enforcement purposes.

Mr. Christopher E. Yates
13 January 2006
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The Commission believes that there are a variety of possible ways to structure regulations to achieve the desired results. We have not attempted to explore all of the possible alternatives at this stage. We would, however, like to work closely with the Service as it develops a proposed rule. Also, we note that development and effective enforcement of regulations will require strong involvement by the State of Hawaii's Department of Land and Natural Resources, and we encourage the Service to involve the state fully in this process as it proceeds.

Please let me know if you have any questions concerning these comments and recommendations or if you would like to discuss them further.

Sincerely,

A handwritten signature in black ink, appearing to read "David Cottingham", with a long horizontal flourish extending to the right.

David Cottingham
Executive Director

Enclosures

Cc: w/enclosures: William T. Hogarth, Ph.D.
Mr. James H. Lecky
Mr. Peter Young