

MARINE MAMMAL COMMISSION
4340 East-West Highway, Room 700
Bethesda, MD 20814-4447

11 August 2008

Ms. Susan Wang
National Marine Fisheries Service
Southwest Region
Protected Resources Division
501 West Ocean Boulevard, Suite 4200
Long Beach, CA 90802-4213

Dear Ms. Wang:

The Marine Mammal Commission, in consultation with its Committee of Scientific Advisors on Marine Mammals, has reviewed the National Marine Fisheries Service's 11 July 2008 proposed rule (73 Fed. Reg. 39915) to amend the regulations governing vessels authorized to fish for tuna in the eastern tropical Pacific Ocean. To a large extent, the proposed regulatory changes track resolutions adopted by the United States and other parties to the Inter-American Tropical Tuna Commission and the Agreement on the International Dolphin Conservation Program or constitute non-substantive changes to clarify and update the regulations. For the most part, the Marine Mammal Commission supports the proposed changes. There are, however, certain proposed changes that are questionable or that require further explanation, given applicable law and related congressional directives. These are discussed below, along with suggestions for additional changes that the Service might want to consider.

RECOMMENDATIONS

Based on its review of the proposed rule, the Marine Mammal Commission recommends that the National Marine Fisheries Service—

- decline to adopt its proposed redefinition of the term “tuna product” in the final rule;
- revise its regulations to propose new criteria for distinguishing between vessels that are capable of catching tuna by setting purse seine nets to encircle dolphins and those that are not or, at a minimum, explain what it has done and is doing to carry out the directive in this regard from the 2005 Consolidated Appropriations Act;
- explain in the final rule that the lighting requirement and the suggestion that dolphin sets may be completed in darkness in no way alters the prohibition on making sundown sets (or initiating sets at night) as established in the Marine Mammal Protection Act and set forth elsewhere in the Service's regulations; and
- delete section 300.22(b)(4)(i)(C) of the regulations and make corresponding changes to clause (D) of that provision to bring the regulations up to date.

RATIONALE

The Service proposes to revise the definition of the term “tuna product” in section 216.3 to specify that it refers to “any product processed for retail sale and intended for human consumption...” that contains yellowfin and other specified tuna products. As noted in the preamble to the proposed rule, the Service’s intention is to clarify that tuna products only include products intended for human consumption. However, the term “tuna product” also is statutorily defined at 16 U.S.C. § 1385 to mean “a food item which contains tuna and which has been processed for retail sale...” There is nothing that limits this definition to products for human consumption. In fact, the legislative history accompanying the adoption of the statutory definition specifies that the term “means a food item, *including pet food*, which contains tuna and which has been processed for retail sale, except perishable sandwiches, salads, or other products with a shelf life of less than 3 days” (emphasis added). (See H.R. REP. NO. 579, 101st Cong., 2nd Sess., at 14.) The point of labeling tuna was, in part, that consumers would be willing to spend more for tuna for their own consumption and that of their pets if the fish were taken in a dolphin-safe manner and thereby reward fishermen operating at extra cost to be dolphin-safe. The proposed change in the definition is a substantive one that would exempt tuna destined for use as pet food from various requirements pertaining to the importation, tracking, and labeling of tuna products in a way that is inconsistent with the applicable statutory definition of the same term and that is clearly inconsistent with congressional intent. The Marine Mammal Commission therefore recommends that the Service decline to adopt its proposed re-definition of the term “tuna product” in the final rule.

The Dolphin Protection Consumer Information Act (16 U.S.C. § 1385) establishes the labeling standard and related requirements for tuna products harvested in the eastern tropical Pacific Ocean. The Act draws a distinction between large purse seine vessels and those “of a type and that the Secretary has determined, consistent with the International Dolphin Conservation Program, is not capable of deploying its purse seine nets on or to encircle dolphins...” Historically, the Service has assumed that vessels with 400 short tons (362.8 metric tons) or more capacity are capable of making sets on dolphins and those with less capacity are not. In several places, the proposed rule retains this distinction and establishes different requirements for the two classes of vessels accordingly. However, retaining this dividing line and institutionalizing it throughout the regulations run contrary to a congressional directive enacted as part of the Consolidated Appropriations Act, 2005 (Pub. L. No. 108-447). Acting on evidence that some smaller vessels are capable of making sets on dolphins, Congress directed the Service to dedicate funding toward “revising downward its definition of a vessel that is not capable of setting on or encircling dolphins to reflect the fact that vessels smaller than 400 short tons are known to engage in this practice.” (See H.R. REP. NO. 792, 108th Cong., 2nd Sess., at 805.) Although we understand that the Service has been working with the Inter-American Tropical Tuna Commission to develop more precise criteria for distinguishing between vessels that are capable of catching tuna by setting purse seine nets to encircle dolphins and those that are not, the Service has yet to revise its definition. It has been more than three and a half years since Congress directed the Service to dedicate funding and effort toward revising the applicable definition. The proposed rule does not include any proposal that responds to that directive or even mention that it exists. Instead, the proposed rule would perpetuate this now-discredited dividing line between vessels that are capable of setting on dolphins and those that are

not. The Marine Mammal Commission therefore recommends that the Service revise its regulations to propose new criteria for such distinctions or, at a minimum, explain what it has done and is doing to carry out the directive from the 2005 Consolidated Appropriations Act.

The Service is proposing to specify that vessels that are issued dolphin mortality limits “must be equipped with long-range, high intensity floodlights with a sodium lamp of at least 1000 watts, or a multivapour lamp of at least 1500 watts for use in darkness to ensure sufficient light to observe that procedures for dolphin release are carried out and to monitor dolphin mortality.” The intent of this specification is not to allow additional sets at night but rather to ensure that dolphins would be released successfully from any sets that, for some reason, had not been completed by sundown. The Commission agrees that the proposed change, which would provide additional guidance concerning lighting requirements, is appropriate. However, the Marine Mammal Commission recommends that the final rule and/or the preamble accompanying that rule clearly explain that the lighting requirement and the suggestion that dolphin sets may be completed in darkness in no way alter the prohibition on making sundown sets (or initiating sets at night) established in the Marine Mammal Protection Act (16 U.S.C. § 303(a)(2)(B)(v)) and set forth elsewhere in the Service’s regulations (50 C.F.R. § 216.24(c)(6)(iii)).

One of the stated purposes of the proposed rule is to update the regulations. In that context, we note that section 300.22(b)(4)(i)(C) of the proposed rule retains a provision that ceased to be applicable at the end of 2005. The Marine Mammal Commission recommends that this provision be deleted and corresponding changes made to clause (D) to bring the regulations up to date. In addition, the Service should consider whether retaining the reference to 2005 in section 300.22(b)(ii) is necessary.

Finally, the Commission also believes that it would be helpful if the final rule provided additional context for assessing the need for and appropriateness of the proposed changes in this rule, particularly in light of the low level of participation in this fishery by U.S. purse seine vessels. For example, although we agree that the regulations should include notification requirements designed to ensure that the United States does not lose any of its allocated fleet capacity (8,996 mt) upon the transfer of a vessel to a foreign flag, it should be noted that for several years the United States has not come near to achieving the authorized level. In fact, only two U.S. purse seine vessels currently are listed on the Regional Vessel Register maintained by the Inter-American Tropical Tuna Commission, one active and one inactive, and together they have a combined capacity of less than 500 mt. Similarly, the proposed rule goes into considerable detail about setting priorities for placing U.S. purse seine vessels under active status on the register and for replacing vessels removed from the register, but these seem to have little practical application. In contrast, the United States has, by far, the largest number (1,757) of other types of vessels on the Regional Vessel Register, and the proposed rule will have limited effect on the operation of those vessels. As such, requirements pertaining to these other types of vessels likely will be applicable to many more U.S. fishermen. Although some of these insights can be inferred from information provided in the section of the proposed rule concerning the Regulatory Flexibility Act, it would be useful if the final rule more explicitly discussed the practical implications of the proposed regulatory changes considering the composition and fishing practices of the U.S. fleet.

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Please let me know if you would like to discuss any of the Commission's comments and recommendations.

Sincerely,

A handwritten signature in blue ink that reads "Timothy J. Ragen". The signature is written in a cursive style with a prominent initial "T".

Timothy J. Ragen, Ph.D.
Executive Director