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PACIFIC  
REGIONAL  
FISHERY  
MANAGEMENT  
COUNCIL

## Western Pacific Regional Fishery Management Council Problems and Concerns

### Protected Species

The Council continues to monitor the progress of a number of Endangered Species Act (ESA) and Marine Mammal Protection Act (MMPA) issues relevant to the region.

Among the handful of ESA listing petitions currently processed for the Western Pacific region, the Council is particularly concerned about the loggerhead turtle and Hawaiian insular false killer whale (FKW) distinct population segments (DPS) and listing proposed rules.

In the **loggerhead turtle proposed rule**, the North Pacific DPS is proposed for an endangered listing despite overwhelming scientific evidence that the nesting population in Japan has shown an increasing trend for over ten years, and that many of the previously-existing threats to the population have been eliminated in the last several decades. In the **FKW proposed rule**, the Hawaiian insular FKW DPS is proposed for an endangered listing despite questionable scientific evidence regarding the size of the historical population and evaluation of current threats, especially those from various fishing activities. In both cases, the **use and interpretation of scientific information by NMFS is questionable**, leading to unduly pessimistic proposed rules regarding loggerhead turtles and false killer whales.

The following is a list of ongoing ESA and MMPA issues:

#### Proposed Rules:

- Proposed rule to list the Hawaiian insular false killer whale distinct population segment as endangered under the ESA
  - Petition:* Submitted in 2009 requesting the listing of the insular population of Hawaiian false killer whale as endangered and designation of critical habitat
  - Status:* The Biological Review Team (BRT) published a status review in August 2010. NMFS published a 12-month finding and proposed rule on November 17, 2010 to designate the Hawaiian insular false killer whales as a DPS and list them as endangered. Public comments were accepted until February 15, 2011. Publication of the final rule is due on November 17, 2011.
- Proposed rule to list the North Pacific loggerhead as an endangered distinct population segment under the ESA
  - Petition:* Submitted in 2007 requesting designation of North Pacific as a distinct population segment (DPS) and list as endangered
  - Status:* NMFS completed a Loggerhead Turtle Status Review in 2009, concluding that the species should be divided into 9 DPSs. In March 2010, NMFS proposed listing of the 7 of the DPSs, including the North Pacific DPS, as endangered. Public comments were solicited until September 2010. Final

listing rule was originally due in March 2011, and was subsequently extended until September 16, 2011.

- Proposed rule to revise monk seal critical habitat under the ESA
  - Petition:* Submitted in 2008 to revise Hawaii monk seal critical habitat by adding areas in the NWHI and MHI
  - Status:* In June 2009, NMFS published a 12-month finding stating that revision of HI monk seal critical habitat is warranted. Publication of the proposed rule is pending.

#### Status Reviews (Petitioned and Non-Petitioned)

- Petition to list 83 coral species under the ESA
  - Petition:* Submitted in October 2009 requesting the listing of 83 coral species (75 in the Pacific, 8 in the Caribbean), and designation of critical habitat
  - Status:* NMFS established a BRT to determine the status of the species. Publication of the status review is pending.
  
- Petition to list the bumphead parrotfish under the ESA
  - Petition:* Submitted in January 2010 requesting the listing of bumphead parrotfish, and designation of critical habitat
  - Status:* NMFS established a BRT to determine the status of the species. Publication of the status review is pending.
  
- Status review of the humpback whale under the ESA
  - Status:* NMFS published FR notice in August 2009 to initiate a status review of the humpback whale, listed as endangered under the ESA. The last status review was conducted in 1999. NMFS convened the first BRT meeting in May 2010. A draft status review document is currently in preparation, with peer review to follow. NMFS is unable to provide a timeline for the completion of the status review at this time.
  - Note:* This status review was not initiated by a petition, and thus there are no statutory deadlines for the completion of the review. Humpback whales were downlisted from “vulnerable” to “least concern” on the IUCN Red List in 2008. The chair of the IUCN cetacean specialist group, Randall Reeves was quoted in a Guardian article dated September 28, 2009 that the US should remove humpbacks from the list if the populations have sufficiently recovered.

#### MMPA FKW TRT

- MMPA false killer whale take reduction for pelagic stock
  - Background:* False killer whales are currently not listed under the ESA nor are they designated as depleted under the MMPA. However, the Hawaii Pelagic stock of false killer whales is considered “strategic” because the average number of interactions between this stock and the deep-set component of the Hawaii longline fishery is above Potential Biological Removal (PBR). The deep-set component of the fishery is categorized as a Category I fishery due

to the incidental mortality and serious injury of false killer whales. Under the MMPA section 118, NMFS shall develop and implement take reduction plans (TRP) to assist in the recovery or prevent the depletion of strategic marine mammal stocks that interact with Category I and II fisheries.

*Status:* A take reduction team (TRT) was organized by NMFS in 2010 to develop the TRP. The TRT submitted the draft TRP to NMFS on July 19, 2010. Publication of the proposed rule is pending (OVERDUE).

### **Hawaiian Islands Humpback Whale National Marine Sanctuary (HIHWNMS)**

The HIHWNMS released their scoping report in April 2011 which includes input from over 12,000 comments received since 2009. The Sanctuary 5-year review will require an environmental impact statement (EIS) as they are considering expanding the physical boundaries and including additional species i.e. monk seal, sea turtle, and dolphins. Issues raised during the scoping session included water quality, whale protection, enforcement, marine mammal entanglement, ocean literacy, native Hawaiian culture, marine heritage, management effectiveness, offshore development and climate change. Sanctuary Advisory Committee (SAC) created two working groups for the two priority issues: 1) Offshore Development; and 2) Aquaculture.

Sanctuaries will partner with University of Hawaii (UH) Aquaculture Program to host an aquaculture conference focusing on offshore citing criteria and ensuring food security. The workshop will be limited to 40-50 people and will be held at the UH Campus Ballroom on June 21-23, 2011.

Problems with Sanctuary review:

- Species being considered are already managed through ESA, MMPA and other existing authorities and management regimes.
- Transparency of the process – publicizing the public meetings as a review of their existing program but then including other species as outcome.
- Consideration of public input – of the 12,000 comments received, over half were from a national/international petition/spam campaign and very little local input.

### **Poor Advice and Performance of NOAA General Counsel - Migratory Bird Treaty Act (MBTA) Permit for Hawaii Longline Fishery**

Until the recent litigation over Amendment 18, NOAA General Counsel and Commerce lawyers maintained that the MBTA did not apply beyond the 3 nm boundary of the United States territorial waters. However, following the litigation on Amendment 18, NOAA General Counsel decided to request a permit under the MBTA for the shallow-set fishery to avoid litigation on this issue. However, there is no permitting process under MBTA so NMFS and US Fish and Wildlife Service have been developing a special permit for the fishery.

However, the draft permit has gone back and forth over the issue of what is required under the permit. NMFS maintains that the fishery has taken all the necessary measures to minimize bird interactions, and that additional requirements should not be imposed.

The MBTA would need to have specific language to apply beyond the three mile limit which would have to be inserted by Congress, and therefore is inapplicable to the Hawaii longline fishery. Moreover, if this fishery has to be permitted then other fisheries with much larger seabird takes would need to be permitted also, including the various Alaska fisheries which kill thousands of seabirds annually. NOAA General Counsel has once again failed to adequately defend the Hawaii longline fishery and which may establish the precedence whereby the USFWS has regulatory authority over a federally managed fishery, something that was never envisaged by Congress.

### **Failure to Adequately Defend the Hawaii Longline Fishery**

The Hawaii-based commercial longline fleet consists of two separately operated and managed fisheries - the shallow-set (swordfish-target) gear configuration fishery and the deep-set (tuna-target) gear configuration fishery. A maximum of 164 vessels, which may not exceed 101 feet in length, are authorized to participate in total in these limited access fisheries. Approximately 125 vessels are currently engaged in commercial longline fishing under this limited access permit program.

Pelagics FMP Amendment 18 removed the pre-existing annual limit on the number of fishing gear deployments (sets) in the shallow-set fishery, while maintaining existing regulatory requirements and conservation measures to reduce and to offset sea turtle interactions and mortality, including the required use of circle hooks and 100 percent federal observer coverage. Amendment 18 proceeded through a lengthy series of public meetings and reviews, including preparation of a Supplemental Environmental Impact Statement analyzing the environmental impacts of nearly twenty different alternative actions.

October 15, 2008, the Regional Administrator of NMFS's Pacific Islands Region issued a "no jeopardy" biological opinion regarding proposed Amendment 18 and authorizes the annual incidental take of 46 loggerhead and 16 leatherback sea turtles. This would result in 2.4 adult female mortalities. NMFS concluded in the Amendment 18 biological opinion, based upon the best available science, that this level of effect is "statistically indistinguishable from zero" and "so low relative to the total population size that its effects on the population cannot be distinguished from the effects of natural mortality".

National advocacy groups have engaged in a ten-year campaign to litigate Hawaii-based commercial longline fisheries out of existence. These groups filed a lawsuit challenging aspects of the final MSA implementing regulations issued by NMFS and aspects of the related biological opinion. The Federal Government and the plaintiff advocacy groups entered into a private agreement to settle the case.

The settlement included the remand of those portions of the Amendment 18 implementing regulations, and the Amendment 18 biological opinion, which authorize the annual incidental take of 46 loggerhead sea turtles in the shallow-set fishery, and the implementation for a limited duration of an amended incidental take authorization limit of 17 loggerhead sea turtles.

The court-ordered incidental take limits of 17 loggerhead and 16 leatherback sea turtles takes annually by the shallow-set fishery are not based upon the best available science or any

science whatsoever. The willingness of NOAA General Counsel to seek a settlement and the unwillingness of NMFS to stand behind their science undercuts the rational and benefits of the conservation measures developed by the Council through the MSA process. Moreover, the failure to defend the fishery and Amendment 18 continues a climate of uncertainty in this fishery, which acts as a disincentive to investment in and discourages new entry into the fishery. US fisheries must be supported by NMFS using and standing behind the best scientific information and being managed through the MSA process.

### **Consistency between Federal and Local Shark-Finishing Laws**

The Council is still waiting for an opinion on the possession of shark fins and recent State and territory laws banning their possession outright. This means that possessing imported dried shark fins for the restaurant trade is banned along with the possession of fins by fishermen who want to land sharks. The completion of a legal opinion is complicated by the adoption of similar measures by Hawaii, California, Guam and CNMI. The opinion is likely to state that territories/states cannot arbitrarily ban shark fin possession when there are already existing fishery management plans (WPRFMC and PFMC) and laws regulating the possession of shark fins. NOAA GC PIR is to complete a revised analysis prior to the Western Pacific Council's June 2011 meeting factoring in recent changes to the Shark Fin Prohibition Act and recently passed Marianas law.

### **Scientific Integrity**

Following on President Obama's pledge to restore scientific integrity, the Office of Science and Technology Policy (OSTP) called (December 17, 2010) for all Executive Departments and Agencies to provide progress reports on the development of their scientific integrity policies within 120 days. On April 22, 2011, OSTP reported that 30 executive branches and agencies have responded to the call for reports. Of these, only six agencies turned in draft or final policies and it was noted that NOAA had publicly released its draft policy in March 2011. The Councils should have been briefed on the draft policy before it was publicly released at the January 2011 CCC meeting. Many of the Council's issues with NMFS stem from the quality and application, or lack thereof, of the best scientific information to inform fishery policy development and decision making.

### **National Standard 10 – Safety at Sea**

NMFS issued a proposed rulemaking to provide background information and request public comment about potential adjustments to National Standard 10 (NS10). A few primary issues are cited: 1) the current guidelines are 13 years old, and fishery management and science have evolved since then, 2) new policies and requirements have been implemented. New policies such as catch shares have the potential to impact safety at sea. The current guidelines do not contain guidance on analytical methods to evaluate safety, including analyzing fatality rates. Therefore, NMFS is proposing revisions that address safety with respect to: 1) assembling fatality, injury, and vessel loss information, 2) developing fatality, injury, and loss rates, 3) evaluating risks, 4) safety considerations and mitigation measures, 5) recreational fishing, 6) establishing a safety committee, 7) stock assessment and fishery evaluation reports, and 8) fishery impact statements. Of note, however, is that no other law requires addressing safety at sea when implementing management actions, such as the National Sanctuaries Act, Antiquities Act, Coastal Zone and Management Act, etc. Therefore, other agencies and laws should be

brought up to the gold standard of the Magnuson-Stevens Act that the fishery councils operate under. Initial results from the NIOSH report on the association of fishermen fatalities with the implementation of MPAs on Guam indicate that safety at sea must be considered more rigorously in these types of management actions.

### **Regulatory Review**

NOAA published a Federal Register notice on March 14, 2011, seeking information for a preliminary plan that addresses Executive Order 13563 on improving regulation and regulatory review. The purpose of NOAA's review is to make the agency's regulatory program more effective and less burdensome. The Council submitted comments in response to the notice. First, MSA and NEPA are duplicative with respect to requirements for impact statements pertaining to socio-economic impacts, fishery impacts, and biophysical impacts. However, they also have contradictory timelines for public input. Steps should be taken to make promulgation of regulations under all Acts the same or introduce exceptions. Second, all agencies implementing fishery regulations for resources under the purview of the fishery management councils should promulgate their regulations under the authority of the MSA instead of other laws, e.g. National Marine Sanctuaries Act or the Antiquities Act. Also, unless otherwise exempted, all agency employees should be subject to the same regulations as the public. Third, the review process is inefficient and unwieldy, and therefore should be streamlined. Lastly, the Council recommended that NOAA could engage the public through more press releases when proposed and final rules are published, particularly because the public is not constantly scouring Federal Register notices for notification of regulations.

### **Fisheries Development in American Samoa**

In September 2009, a devastating tsunami hit American Samoa. The Council, in coordination with DMWR, developed a survey for vessel owners that had vessels damaged or destroyed by the tsunami. Council staff helped compile the information that suggested that over 20 vessels have been severely damaged or destroyed by the tsunami. Also destroyed was a recently built fish storage/processing facility that was funded by the Western Pacific Community Demonstration Project Program. Based on the information collected with the help of the Council, the American Samoa government provided NMFS a package requesting Fisheries Disaster Relief Assistance (~\$5 million) in August 2010. In March 2011, NMFS PIRO began to work with DMWR and Council staff on completing information related to the disaster relief request as well as following up with individuals that are seeking disaster relief assistance. PIRO Sustainable Fishery staff are preparing a report for Mike Tosatto's consideration, from which if the findings are conclusive, he will request NOAA approve disaster relief. According to PIRO SF staff, the only fishery that has seen a drop in revenue that indicates a fishery failure resultant from the tsunami, is the bottomfish fishery that experienced an 80 percent drop in landings/revenue from 2009 and 2010. The longline fishery did not see any drop in revenue, therefore, it may be unlikely for longline fishery participants that reported damages to their vessels or equipment to receive disaster relief funding.

In 2010, the Council initiated projects listed in the American Samoa Marine Conservation Plan with funding from the Sustainable Fisheries Fund. Projects include fuel storage and ice making facilities in the Manua Islands, two new boats ramps on Tutuila, support for establishing a fishermen's cooperative, and improved fisheries data collection. The Manua Islands, which are

located 80 miles from Tutuila, are a small community with little economic opportunities and strong reliance on fishing. The fuel storage and ice making facilities will support the Manua Islands small vessel fleet in harvesting fish for community uses as well as export to Tutuila markets. The next phase is to provide cold storage facilities to maintain the quality of the catch. The boat ramps in Tutuila are located in areas that will allow greater access by boaters from the Tutuila's western end by establishing ramps in the central portion of the island. Also, the location of the boat ramps will support fire and rescue and disaster relief in the event of a road closure. In 2009, a new fish market was constructed in the village of Fagatogo using DOC EDA funding. The American Samoa government's plan was to have fishermen's cooperative run the fish market, but a fishermen's cooperative has yet to be formed with fishermen as members. Furthermore, the design of the fish market lacks adequate drainage and retail display equipment to make it a modern fish market facility. The Council, in coordination with local American Samoa agencies, is focusing on redesigning the fish market to make it usable.

### **Budget Cuts**

NMFS budget cutbacks will impact the fishery information collection and processing programs at the Regional Science Center that support Council's policy development efforts.