



Marginalization of fisheries through competing Acts/Authorities (MMPA, ESA, Sanctuaries, Monuments)

A. Monuments and Sanctuaries

The advent of the 21st century marked a period when the Western Pacific Region was seen to provide opportunities for the establishment of large areas closed to all fishing or closed to commercial fishing. Moreover, these closures were implemented in a top-down process through the Antiquities Act by the Executive Branch of Government that allowed the participatory inclusion of the public to be side stepped. To date about 15% of the US EEZ in the Western Pacific has been put off limits to fishing, with only some tightly controlled limited recreational or traditional subsistence use potentially permitted.

No tangible fishery benefits have accrued from the implementation of these closed areas. Indeed they appear to counter the perceived wisdom that MPAs can be used as a fishery enhancement tool, either for near shore coral reef fish or pelagic species. The Northwest Hawaiian Islands is the largest and oldest of the monuments and provides an object lesson in the marginalization of fishing. The establishment of this monument began life as a 'coral reef reserve' in 2000 through an executive order by President Bill Clinton. The initial reserve restricted fishing to the levels in the 12 months prior to the issuance of the EO, and prevented the issuance of any new fishing permits to fish in this area. In a probably unintentional back-handed compliment to this Council, the boundaries of the reserve and ultimately the monument were those implemented by this Council to protect monk seals and green sea turtles from interacting with pelagic longline vessels

This effectively throttled fisheries in the Northwestern Hawaiian Islands through a zero cap for lobsters and precious corals and restricted caps for troll and bottomfish fisheries. The reserve was supposed to morph into a Sanctuary and the process of public consultation began between 2000 and 2006. However, the then Chair of the Council for Environmental Quality, John Connaughton persuaded President George W. Bush to use the Antiquities Act to side step the public consultation process, through which the coral reef reserve would transform into a sanctuary, and declared the Northwestern Hawaiian Islands as a Marine National Monument. Part of the persuasion for doing this was a high profile voyage by Jean-Michel Cousteau to the NWHI which was broadcast on National Public Television.

In essence, the establishment of a monument representing 15% of the US EEZ around Hawaii and 60% of the coral reef resources in the Hawaiian Archipelago. If we believe the benefits of marine Protected Areas (MPAs), as posited by their devotees, then we should expect some benefits to spill over in to the Main Hawaiian Islands from this huge area closure. However, genetic work would suggest that fish and invertebrate resources flow from the MHI to the NWHI, where they accumulate over time, and from direct observation amount to a large proportion of the fishable biomass within the Hawaii Archipelago. With the closure of the

NWHI, this puts these resources off limits and lessens opportunities for Hawaii's fishermen. Moreover, it condemns Hawaii's near shore fishermen dependant on those fishery resources in the Main Hawaiian Islands, and should overfishing occur, there is no potential for fishing NWHI stocks.

In addition, one of the key attributes for the NWHI monument was that the complete cessation of fishing would be a benefit for the highly endangered Hawaiian monk seal. Unfortunately, the monk seal population has continued decline by about 5% per year, while expanding in the MHI. In essence, doing nothing has resulted in a population increase, while closing the NWHI has failed to arrest the decline in the monk seal population. As noted below, there are ramifications from this increasing population of MHI monks seals in relation to critical habitat definition under the Endangered Species Act.

Other Marine National Monuments have been established through executive orders and the Antiquities Act in American Samoa, The Pacific Remote Island Area (PRIAs) and the Commonwealth of the Northern Mariana Islands (CNMI) through the use of the Antiquities Act. In the case of the PRIAs this action has effectively removed any possibility of commercially exploiting reef and bottomfish resources, or near shore commercial troll fishing. Though seldom fished by troll vessels, islands such as Palmyra and Kingman Reef are within the range of larger troll/handling vessels from Hawaii. The equatorial islands of Howland & Baker, Jarvis and Palmyra & Kingman Reef have been important fishing grounds at various times for Hawaii based longliners and the US purse seine fleet. Though still able to fish in these areas, they are prohibited from fishing within 50 miles of these islands due to monuments which are primarily concerned with coral reef resources.

The monument in the Mariana Islands, or to give its full title, the Marianas Trench National Marine Monument was established to protect the eponymous trench and its unique habitats. As well as the Trench, the monument includes volcanic units, i.e. seamounts, primarily in the EEZ around the CNMI, and to annex the top three islands of the CNMI (Uracas, Maug, and Asuncion). Again the special features of these islands was extolled to underscore their need for protection. In common with the NWHI Monument, the top three islands in the CNMI chain were effectively protected from anthropogenic effects by their distance from the inhabited southern islands of the archipelago. Moreover, there's nothing particularly species about these islands, and they have less bio-diversity than the southern islands. Further, the Department of the Interior (DOI), which holds administrative sway over the US territories, was not included in the EO that established the trench. However, the DOI caused the US Fish and Wildlife Service to establish wildlife refuges on Uracas, Maug, and Asuncion. Moreover, the DOI wants the CNMI Government to abandon their claim for the submerged lands (0-3 nm) around Uracas, Maug, and Asuncion, which they are seeking for the entire CNMI. This would mean that as well as being dispossessed of the terrestrial components of the three northern islands, the CNMI would also lose the territorial waters it is seeking to have established for the archipelago.

The Rose Atoll MNM created additional difficulties for the Council since the boundary coordinates of the MNM were incongruent with the existing pelagic fishery management area implemented under MSA. The Council had implemented 50 nm areas around the islands of American Samoa to exclude pelagic fishing vessels > 50ft in length to protect small vessel troll

and longline vessels from competitive interactions with large longline and purse seine vessels. Apart from the incongruence, the net result was a reduction of the area that could be fished by large longline and purse seine vessels within the US EEZ around American Samoa. This resulted in the Council, having to amend its FEP to re-designate the boundaries of the fishery management area.

Elsewhere, such as the Main Hawaiian Islands and American Samoa, expansion of a humpback whale sanctuary and the Fagatele Bay sanctuary are being proposed without any serious rationale as the need, purpose or impacts of such activity. The humpback whale sanctuary is perhaps the best example of a mission in search of a purpose. Already protected by the Marine Mammal Protection Act and the Endangered Species Act, there was no rationale about establishing a sanctuary for humpback whales other than the federal dollars this may bring in to the State of Hawaii. The North Pacific humpback population has rebounded spectacularly at an average growth of 7% per year, due to its not being hunted, not because areas of Hawaii's coastal waters were designated as sanctuary. The National Marine Sanctuaries Program, flush from its non-success with the humpbacks now proposes to expand the remit of this initiative to take in more species, namely green sea turtles and monk seals, and designate new sanctuary boundaries.

The Fagatele Bay sanctuary was established initially in response to a crown of thorns outbreak in American Samoa. The sanctuaries program proposes to add additional areas to the sanctuary program and outlaw fishing within some of these new locations, without any serious rationale for coral reef conservation. Indeed, despite much hyperbole about overfishing on American Samoa's reefs, all indications are that they are at best moderately exploited and that current fishery management measures as SCUBA spearfishing bans, and local traditional community fishing controls have maintained reef fish stocks. Nevertheless, a case is being made that American Samoa's coral reefs and a volcanic mud-hole 15,000 ft deep on the abyssal plain require the protection of sanctuary designation.

B. Protected Species Issues

1. NMFS and ESA Petitions

NMFS repeatedly fails to reject Endangered Species Act (ESA) listing petitions outright that do not contain sufficient scientific information to warrant possible listing, misinterpret available data, or apply data from one region to infer population trends or status in other regions. For example, the petition to list scalloped hammerhead sharks suffered from misrepresentation of Pacific and global shark data, while petitions to list bumphead parrotfish and 83 species of coral contained limited and biased data on wide-ranging species that are otherwise abundant and not in imminent danger of extinction. NMFS continually takes the path of least resistance and allows the petitions to move forward with a 90 day finding and request for comments. As a result, Council staff are spending increasing amount of time to research and draft responses to petitions.

2. NMFS and Best Scientific Information Available (BSIA) under the MMPA

With protected species NMFS ignores the need to use the BSIA, and will happily use unverified anecdotal information and agency discretion in management decisions by NMFS. An excellent example is the proposed reclassification of Hawaii troll and charter fisheries from

Category III to Category II in the 2012 List of Fisheries under the Marine Mammal Protection Act (MMPA) based on extremely limited anecdotal information on interactions with pantropical spotted dolphins. While the MMPA permits the use of anecdotal information under certain circumstances, NMFS should make every attempt to verify such information prior to inclusion in documents. Further, under MMPA actions, application of BSIA is often delayed, leading to inflexible management of marine mammal stocks based on outdated and underestimated population estimates. For example, the False Killer Whale Take Reduction Plan (FKWTRP) for the Hawaii longline fishery was based on outdated FKW population estimates, even though new information was emerging on higher FKW population abundances, meaning that longline takes may be a less serious issue than presupposed. There needs to be a serious evaluation of the operational aspects of the MMPA and its inflexibility.

3. Failure by NMFS to Recognize Species Recovery and Delist Species under the ESA

If species listed under the ESA recover and meet their recovery target they should be delisted. ESA listing carries with it a great deal of regulatory baggage which can be burdensome to fishermen and the public. Examples of recovered species which are still listed include the Hawaiian green turtle, and North Pacific humpback whale. There is no reason to keep these species listed under ESA, and it is a disservice to the intent of the ESA to keep them listed. Removal of ESA listing does not mean the removal of protection. The humpback whale, with a 7% annual population increase, would still enjoy the protection of the MMPA, and a State of Hawaii management plan would be required as part of the delisting process for the green turtle.

4. Return to a 'Black Box Approach' in ESA Section 7 Consultations

The Council has continued to be frustrated to gain applicant status in the ESA Section 7 consultations, despite being the agency that has had to implement fishery management measures through the MSA process. The process by which jeopardy determinations and incidental takes were developed was a mystery that confounded the Council's Scientific and Statistical Committee (SSC), which includes several expert population dynamics experts. Recently we had experienced a more open process by which the modeling procedures were explicitly presented to the SSC, and the BiOp draft shared with Council staff for comments. Unfortunately we have seen something of a return to the past practices, with NMFS unwilling to share information with the Council or its SSC regarding Biological Opinions prior to making them public. An example of this is the **re-consultation of the Hawaii shallow-set longline fishery under Amendment 18 of the Pelagic FEP**. A limited webinar presentation on a published loggerhead turtle climate-forcing model was made to the SSC, but no details were provided on unpublished components of the model (including analysis on leatherback turtles) or the development of the reasonable and prudent measures which differ substantially from the original Amendment 18 BiOp, and could have far reaching consequences for the fishery and its management.

5. Overly Conservative Measures becoming the Norm in NMFS Decisions Regarding Protected Species Actions

A petition from ENGOs has led to most of the Main Hawaiian Islands coastline and waters out to the 500-meter depth contour, including Penguin Bank, being proposed as critical habitat for the Hawaii monk seals. The 500-meter depth for critical habitat is excessive, given that most available data suggest that juveniles in the MHI prefer to forage within 100-meter depth and recent data showed that only *some* diving up to 489m were recorded. In addition, As

noted in WPRFMC's comments to NMFS, critical habitat designations are apparently not required for species listed prior to 1978 (monk seals were listed in 1976). Further, existing critical habitat in the NWHI has not helped in the recovery of the species, while monk seals in the MHI continue to grow without any protection from critical habitat. Despite assurances from NMFS that the critical habitat expansion will have little impact on fishing, inclusion of waters out to 500-meter depth provides a perfect attack vector for further constraints to fishing to be sought through petitioning and litigation by ENGOs. The **proposed ESA listing of Hawaiian insular false killer whales** is also another example of a conservative measure resulting from an ENGO petition, with a questionable dataset from a single aerial survey in 1989 was used to establish an unrealistically high historical abundance while all other data suggested a stable population over the last two decades.

6. Arbitrary Implementation of a Migratory Bird Treaty Act (MBTA) Permit for Hawaii Longline Fishery

A notice of a special permit¹ for the Hawaii longline fishery under the Migratory Bird Treaty Act (MBTA) was published in the Federal register on January 12, 2012, along with a supporting Draft Environmental Assessment (DEA), with a 30 day comment period. The WPRFMC understands that such a permitting process is at best dubious under the MBTA. The Act 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. Further if this fishery has to be permitted, then other fisheries with much larger seabird takes would need to be permitted, including the various Alaska fisheries which kill thousands of seabirds annually. This also applies to any other fishery and may indeed apply to any other federally permitted activity which presents a hazard to migratory birds such as air traffic or installation of alternative energy sources such as wind farms. The issuance of a single permit for the Hawaii longline fishery appears to meet the criterion for an arbitrary and capricious application of the MBTA in this instance.

7. Disturbing Trend by NMFS to Marginalize the MSA process Through the Use of Protected Species Statues.

The MBTA permit for the Hawaii shallow set longline fishery is one example of a disturbing trend by NMFS to marginalize the MSA process through the use of protected species statutes. Other examples are the False Killer Whale Take Reduction Plan, which includes several changes to the management of the Hawaii deep set tuna fishery, including mandatory use of circle hooks and spatial closures in the event of exceeding PBR (see item 2 above). A further example is the capitulation in litigation over Amendment 18 to the Council's Pelagic FEP which modified the management of sea turtle interactions in the longline fishery (see item 4 above). As a result a new BiOp has been generated and this will include a new Incidental Take Statement (ITS) and modified Recommended and Prudent Measures (RPMs). The indications from NMFS are that in both cases the management measure would be implemented through direct rule making rather than as amendments to the Councils FEP.

¹ Permitted activities under the MBTA include falconry, raptor propagation, scientific collecting, special purposes (rehabilitation, educational, migratory game bird propagation, and salvage), take of depredating birds, taxidermy, and waterfowl sale and disposal. There is no permitting process specifically for marine fishing activities under the MBTA, and therefore a special permit was developed for this purpose.

