

**Western
Pacific
Regional
Fishery
Management
Council**

July 25, 2011

VIA ELECTRONIC FILING AND POSTAL MAIL

Chief, Marine Mammal and Sea Turtle Conservation Division
Attn: List of Fisheries
Office of Protected Resources
National Marine Fisheries Service
1315 East-West Highway
Silver Spring, MD 20910

Re: Proposed List of Fisheries for 2012 (RIN 0648-BA76)

Dear Sir/Madam:

The Western Pacific Regional Fishery Management Council (the Council) appreciates this opportunity to provide comments to the National Marine Fisheries Service (NMFS) on the proposed List of Fisheries (LOF) for 2012¹. The Council believes that the proposed elevation of the “HI charter vessel” and “HI trolling, rod and reel” fisheries from Category III to Category II is not consistent with the regulatory definition of a Category II fishery, and thus such an elevation is not warranted at this time. The Council also disagrees with the Category II classification of these fisheries based on subjective use and interpretation of anecdotal reports. Additionally, the Council disagrees with the current Category II classification of the “HI shallow-set (swordfish target) longline/set line” fishery given that collective impacts of all commercial fisheries on the Hawaii pelagic stock of bottlenose dolphins is biologically insignificant. Finally, the Council has concerns regarding the arbitrary standard NMFS apparently applies in determining fishery classifications.

Proposed Elevation of “HI Charter Vessel” and “HI Trolling, Rod and Reel” Fisheries from Category III to Category II

In the 2012 LOF, NMFS proposed to elevate the “HI charter vessel” and “HI trolling, rod and reel” fisheries from Category III to Category II based on their fishing techniques and anecdotal reports of hookings of Pantropical spotted dolphins (HI stock). NMFS explains that

¹ See 76 Fed. Reg. 37716 (June 28, 2011).

there are no quantitative data available to conduct the two-tier analysis for fishery classification² given the absence of observer coverage in either of these fisheries.

NMFS further points to the regulatory definitions of a Category II fishery, and states that “in the absence of reliable information on the frequency of incidental serious injuries and mortalities, MMPA regulations specify that NMFS should determine whether the incidental serious injury or mortality is “occasional” (i.e., Category II) by evaluating other factors such as fishing techniques, gear used, methods used to deter marine mammals, target species, seasons and areas fished, qualitative data from logbooks or fisher reports, stranding data, and the species and distribution of marine mammals in the area, or at the discretion of the NMFS Assistant Administrator (50 CFR 229.2).”

Given available information for the Hawaii charter and troll fisheries, NMFS estimates that each fishery will have at least one incidental serious injury or mortality of the Hawaii stock of the Pantropical spotted dolphin per year, and concludes that the level of take represents a minimum of 1.6% of the PBR³. Based on this minimum interaction rate, NMFS concludes that the Category II classification is warranted for both the “HI charter vessel” and “HI trolling, rod and reel” fisheries.

We argue that NMFS prematurely concluded that the two fisheries meet the Category II classification due to the following reasons:

- a) NMFS fails to provide the upper limit estimation of interaction, thus failing to provide sufficient information to establish that the fisheries are responsible for the annual removal of more than 10% of the PBR; and
- b) Anecdotal reports used to project the possible level of interaction in each fishery suggests, at best, incidental serious injury or mortality is extremely rare.

a) NMFS Fails to Provide the Upper Limit Estimate of Interaction

According to the regulatory definitions that NMFS alludes to above: “Category II fishery means a commercial fishery determined by the Assistant Administrator to have occasional incidental mortality and serious injury of marine mammals. A commercial fishery that occasionally causes mortality or serious injury of marine mammals is one that, collectively with other fisheries, is responsible for the annual removal of more than 10 percent⁴ of any marine mammal stock’s potential biological removal level and that is by itself responsible for the annual removal of between 1 and 50 percent, exclusive, of any stock’s potential biological removal level (50 CFR 229.2).” (emphasis and footnote added)

In the determination of the Hawaii charter and troll fisheries, NMFS estimates the minimum interaction rate (1.6% of the PBR per fishery), but does not establish a maximum

² According to the two-tiered Fishery Classification Criteria developed by NMFS, the two-tiered approach first addresses the total impact of all fisheries on each marine mammal stock (Tier 1) and then addresses the impact of individual fisheries on each stock (Tier 2) (60 FR 45086, August 30, 1995).

³ 61 Pantropical spotted dolphins per year, based on the minimum population size within the U.S. EEZ of the Hawaiian Islands (2010 SAR)

⁴ This threshold of 10% is explained in the final rule implementing section 118 of the MMPA (60 FR 45086, August 30, 1995). According to this final rule, the report of the 1994 PBR Workshop (included in the NOAA Technical Memorandum NMFS-OPR-95-6) “indicated that if the total annual incidental serious injury and mortality level for a particular stock did not exceed 10 percent of the PBR level, the amount of time necessary for that population to achieve OSP would only increase by 10 percent. Thus, 10 percent of the PBR level for a particular stock was equated to “biological insignificance.” The Workshop report also notes that the legislative record of MMPA “frequently refers to another, implicit goal which is to minimize interference with commercial fishing enterprises while meeting the other goals.” (emphasis added)

interaction rate. Based on the definitions of a Category II fishery, the total impacts of all fisheries on the Hawaii stock of the Pantropical spotted dolphin must also exceed 10% of the PBR. The only other fishery that has interactions with this stock is the “HI deep-set (tuna target) longline/set line” fishery (proposed 2012 LOF), but the annual mortality and serious injury for this fishery is negligible at approximately 0.8% of the PBR⁵ (2010 SAR).

Therefore, in order to meet the regulatory definitions of a Category II fishery (i.e., “occasional” incidental serious injury or mortality), NMFS should provide sufficient information to establish that the “HI charter vessel” and “HI trolling, rod and reel” fisheries combined are likely responsible for the annual removal of over 9.2% of the PBR, or 5.6 animals. However, as we describe in the following section, we do not believe that the available information is sufficient to assume this level of interaction.

b) Available Anecdotal Reports Suggest that Serious Injury or Mortality are Rare

The available anecdotal reports of fishery interactions with Pantropical spotted dolphins, at best, suggest a “remote” likelihood of mortality and serious injury (i.e., Category III). NMFS cites the following references containing anecdotal information to establish the projected interaction rate:

1. Rizzuto, J. 2007. Big fish await HIBT teams. West Hawaii Today 39(218): 1B, 4B.
2. Courbis, S., R.W. Baird, F. Cipriano, and D. Duffield. 2009. Population structure of pantropical spotted dolphins near the main Hawaiian Islands: Evidence of multiple genetic stocks. Abstract and poster presented at the 18th Biennial Conference on the Biology of Marine Mammals, Quebec City, October 2009.
3. R.W. Baird unpublished data cited in Courbis, S., R.W. Baird, F. Cipriano, and D. Duffield. 2010. Population structure of pantropical spotted dolphins near the Main Hawaiian Islands: Evidence of multiple genetic stocks for management. Report to the Pacific Scientific Review Group 2010, PSRG-2010-19, 24 p.

Rizzuto (2007) describes a single account in which a spotted dolphin is hooked by a troll vessel after the dolphin grabbed a trailing small lure. The fishermen attempted to take the lure out, but after seeing that this stressed the animal, they cut the line as short as they could. This is the only available written account of an actual interaction of a spotted dolphin in the troll fishery, which alone suggests the rarity of such events. Further, Jim Rizzuto, author of the 2007 article that described this account, recently submitted a testimony to NMFS in response to the proposed 2012 LOF. This testimony, included below with Rizzuto’s permission, emphasizes the rarity of spotted dolphin interactions in the troll fishery and questions the use of the article in the proposed rule:

“I am writing in regard to the proposed rule changes involving the Hawaii troll fishery for tuna and in particular to the reference noted as Rizzuto, J. 2007. I am the author of that reference and disagree with the way it is being used and extrapolated. I have observed and written about the Hawaii troll fishery for 50 years and have heard of only once instance where a spotted dolphin may have run afoul of a troll fisherman's hooks. I wrote about that instance because if so, it is so rare. The incident itself came to me as a third-

⁵ The Hawaii-based deep-set longline fishery has the following 5-yr estimates of annual mortality and serious injury for 2004-2008: 0.5 (CV=0.7) Pantropical spotted dolphins outside of U.S. EEZs; and none within the Hawaiian Islands EEZ (2010 SAR).

hand account without the who, what, when and where needed to establish it as real data. Without those details and as a hearsay statement, it would not be admissible as evidence in any matter of importance. Indeed, the account is significant by its rarity and by the inclusion of the information that the dolphin was treated gently and cut loose without suffering the stress of being brought close to the boat. If, indeed, this was not just a "fish story," the dolphin was cut loose with every expectation it would rid itself of the hook. Shedding the hook is very reasonable considering that fish do it all of the time. When troll fishermen put a hooked mahimahi or ono in the fishbox, the fish almost always shakes the hooks free in a few moments. Dolphin are, of course, even more clever than fish. The use of this very iffy incident to support a rule change in the troll fishery is an example of how flimsy the evidence is for such a need and calls into question the whole basis for considering a change."

Moreover, additional pieces of anecdotal information in the Rizutto (2007) article are ignored by NMFS. These include evidence that encounters by bait fishermen with dolphins mostly occur with rough-toothed and bottlenose dolphins depredating on bait⁶, and that fishermen have observed repeatedly that dolphins are able to rid themselves of the hook as long as they are cut free. In particular, the latter piece of anecdotal information suggests that many hooked dolphins survive and recover from the interactions, indicating that not all hookings result in the removal of the animal from the population. The lack of acknowledgement by NMFS to these and other anecdotal information in the article suggests a selective and arbitrary use of anecdotal information by NMFS. We caution against such biased use of anecdotal information⁷, as this may leave NMFS open to litigation.

Courbis and colleagues (2009) note in the introduction of their conference poster that commercial and recreational troll fisheries pose a concern to the Pantropical spotted dolphin population in the Main Hawaiian Islands (MHI). They claim that trolling vessels "occasionally hook individuals, disturbing groups, and likely resulting in vessel collisions, but provides no actual account of troll fishery interaction with the species or reference for this claim. The authors also include a photograph of a spotted dolphin with boat propeller wounds, and suggest that the wound may be associated with fishing. The authors fail to acknowledge other types of vessels in the waters around the MHI such as tour boats (e.g., whale/dolphin watching tours, SCUBA/dive/snorkel tours, submarine tours, parasailing tours, speedboat tours), sail boats, offshore service vessels, tug and barge vessels, research vessels, military vessels and submarines, and shuttle vessels and ferries (e.g., Maui-Molokai shuttles). Given that collisions of humpback

⁶ This information is supported by a publication by Nitta and Henderson (1993), which is frequently used by NMFS to document false killer whale interactions in Hawaii troll and longline fisheries. In regards to troll fisheries, Nitta and Henderson refer to depredation of target catch by false killer whales and depredation of live bait by rough-toothed and bottlenose dolphins, but interactions with Pantropical spotted dolphins are not mentioned. Citation: Nitta, ET and Henderson JR. (1993) A review of interactions between Hawaii's fisheries and protected species. Marine Fisheries Review, 55(2): 83-92.

⁷ NOAA Information Quality Guidelines (http://www.cio.noaa.gov/Policy_Programs/IQ_Guidelines_110606.html) states that the "objectivity" standard applies to information disseminated by NOAA. "Objectivity" is defined in the Guideline as follows: "Objectivity consists of two distinct elements: presentation and substance. The presentation element includes whether disseminated information is presented in an accurate, clear, complete, and unbiased manner and in a proper context. The substance element involves a focus on ensuring accurate, reliable, and unbiased information. In a scientific, financial, or statistical context, the original and supporting data shall be generated, and the analytic results shall be developed, using sound statistical and research methods." (emphasis added)

whales with whale watching boats and other non-fishing vessels are known to occur (Lammers et al., 2003⁸), impacts from non-fishing boats to Pantropical spotted dolphins cannot be excluded. Further, the photograph of a Pantropical spotted dolphin with a propeller wound, again, only confirms that spotted dolphins survive and recover from such incidents, and does not confirm that such incidents lead to mortality or serious injury.

Courbis and colleagues (2010) refer to unpublished data by Robin Baird, noting that “fishers asked about the practice admit that occasionally hooking of pantropical spotted dolphins occurs.” NMFS refers to this anecdotal information without attempts to verify the information, or providing any information regarding the source of the anecdotal information reported to Baird. The use of anecdotal reports is permitted under the MMPA pursuant to section 118 (60 FR 67063, December 28, 1995). However, NMFS should reconsider the use of anecdotal information for which the source has not been verified, as such information is inconsistent with the definition of “objectivity” in the NOAA Information Quality Guidelines⁹. We urge NMFS to develop a standard in using anecdotal reports in rule making to require verification of anecdotal information and to ensure that decisions are made on the best available science.

Courbis and colleagues (2010) also refer to unpublished data by Robin Baird pointing to “several” individuals photographed in the region that have marks associated with fishing. Again, this information only confirms that those individuals survived the incident, and does not confirm that such incidents cause serious injuries or mortalities. Further, the authors do not specify whether these injuries may be caused by troll and charter fisheries, or by other fisheries. Moreover, the 2010 Stock Assessment Report (SAR) estimates that the current best available abundance for Pantropical spotted dolphins within the Hawaiian Islands EEZ is 8,978 individuals, and “several” individuals with markings would suggest a rare interaction rate.

Furthermore, NMFS cites the unpublished data by Baird (Courbis et al, 2010) and notes that “eighteen out of 47 (38%) opportunistic sightings of Pantropical spotted dolphin near the Main Hawaiian Islands (MHI) between November 2006 and July 2008 included one or more (maximum six) troll fishing vessels actively “fishing on” groups of the dolphins.” Based on the experience of a Council staff who once assisted in Robin Baird’s research cruise off Kona, Hawaii, researchers conducting cetacean surveys will approach aggregated troll fishing vessels on the knowledge that they may be “fishing on” groups of dolphins. The visual cue of fishing vessels aggregating is much easier to detect than small Pantropical spotted dolphins at the surface. As such, it is likely that the anecdote described above provides an unnaturally high proportion of dolphin sightings associated with troll fisheries. In other words, the actual encounter rate of Pantropical spotted dolphins with troll fishery vessels is likely much lower than the unpublished data by Baird.

Finally, NMFS considers the fishing techniques, evidence of takes from eyewitness reports, and the level of effort in the Hawaii troll and charter fisheries to project that each fishery will have at least one incidental serious injury or mortality of a Pantropical spotted dolphin. The only level of effort NMFS considers in this projection is the total number of vessels for the two fisheries, which is 2,305 vessels. However, NMFS fails to consider that not all troll and charter vessels are targeting tuna, and not all tuna-targeting troll vessels are “fishing on” dolphins. For

⁸ Lammers MO, Pack AA, Davis L (2003) Historical evidence of whale/vessel collisions in Hawaiian waters (1975–present). OSI Technical Report 2003-01. Prepared for the Hawaiian Islands Humpback Whale National Marine Sanctuary. Oceanwide Science Institute, Honolulu, HI

⁹ See footnote 7.

example, according to the 2008 Pelagics Annual Report compiled by the Council¹⁰, landings of all tunas combined accounted for approximately 50% of all landings by MHI troll fisheries¹¹. Considering the landings and the fact that “fishing on” dolphins is only one of many techniques¹² utilized by troll fishermen to target tuna, the amount of effort spent by Hawaii troll fishermen that have the potential of resulting in interactions with spotted dolphins are much lower than projected by NMFS. It appears that NMFS applied assumptions that likely resulted in the overestimation of the projected level of incidental serious injury or mortality of Pantropical spotted dolphins.

In summary, the anecdotal reports referenced by NMFS in the proposed 2012 LOF points to “remote” likelihood of mortality and serious injury, and certainly do not provide sufficient evidence that the “HI charter vessel” and “HI trolling, rod and reel” fisheries combined are likely responsible for the annual removal of more than 10% of the PBR. Therefore, Category II classification should not be warranted for these fisheries.

Category II Classification of the Hawaii Shallow-Set Longline Fishery

The “HI shallow-set (swordfish target) longline/set line” fishery has been listed as Category II since 2009 when the longline fishery was first listed in the LOF as two separate fisheries (shallow-set and deep-set components). In the 2009 LOF (74 FR 58859, November 16, 2009), the classification of the shallow-set fishery was driven by the serious injury and mortality rate of humpback whales. However, in the 2011 LOF (75 FR 68468, November 8, 2010), NMFS determined that the classification of the shallow-set fishery was no longer driven by humpback whale interactions, but instead by the Hawaii pelagic stock of bottlenose dolphins. From 2004-2008, one bottlenose dolphin was observed seriously injured within the Hawaiian Islands EEZ, which resulted in an average serious injury and mortality rate of 0.2 bottlenose dolphins per year, or 1.1% of the PBR of 18.

The Council believes that the Category II classification of the Hawaii shallow-set fishery is no longer warranted, as the Hawaii pelagic stock of bottlenose dolphins has a serious injury and mortality rate that is biologically insignificant. The only other fishery in the proposed 2012 LOF listed to have incidental serious injury or mortality of the Hawaii pelagic stock of bottlenose dolphins is the “HI deep-set (tuna target) longline/set line” fishery, which has an average serious injury and mortality rate of 0.2 bottlenose dolphins per year. With the two fisheries combined, the serious injury and mortality rate is 2.2% of the PBR of 18. Given that this interaction rate is based on reliable observer data with 100% coverage in the shallow-set fishery and over 20% coverage in the deep-set fishery, the two-tiered analysis for fishery classification can be conducted. Tier 1 of the analysis considers the total impact across all commercial fisheries on each marine mammal stock, and places all fisheries interacting with the stock in Category III if the total interaction rate is equal to or less than 10% of the PBR, unless a fishery qualifies as another Category for a different stock. No other marine mammal stock qualifies the Hawaii shallow-set fishery for Category II or Category I; therefore this fishery should be listed as Category III.

¹⁰ <http://www.wpcouncil.org/pelagic/Documents/AnnualReports/2008/2008%20Pelagics%20Annual%20Report.pdf>

¹¹ Other landed species composed of billfish and other pelagic management unit species (such as mahimahi, moonfish, oilfish, pomfret, and ono)

¹² The proposed 2012 LOF notes that Hawaii charter and troll fisheries “often fish at anchored fish aggregation devices (FADs), drifting logs or flotsam, and areas of sharp changes in bottom topography that may aggregate fish.”

NMFS Applies an Arbitrary Standard in Determining Fishery Classifications

NMFS appears to be using an arbitrary standard to incorporate anecdotal reports in determining fishery classifications under the MMPA. In particular, the Council notes inconsistencies in regards to the proposed elevation of Hawaii troll fishery and the proposed addition of “unknown stocks” to the “Western Pacific pelagic” fisheries.

According to the proposed 2012 LOF, there are seven different troll fisheries in the Pacific, and several other fisheries in the Atlantic that presumably include troll fisheries (e.g., “Southeastern U.S. Atlantic, Gulf of Mexico, and Caribbean pelagic hook-and-line/harpoon”). However, the proposed elevation of troll fishery from Category III to Category II only applies to Hawaii’s fishery, and all other troll fisheries are currently listed or proposed to be listed as Category III. If gear type, fishing techniques, and anecdotal reports are sufficient to elevate one fishery from Category III to Category II, then all other troll fisheries in the Pacific and Atlantic, by method of analogy, should also be analyzed for similar elevation. Additionally, where data and anecdotal reports of interactions or potential interactions are available¹³, those fisheries should also be subject to the assumption that some of those interactions would result in serious injury or mortality and be evaluated to determine whether they meet the criteria for a Category II listing. Such consistency across fisheries and regions, however, are not seen in the proposed 2012 LOF.

Further, the 2012 LOF proposes to add a number of “unknown stocks” of whales and dolphins to the Category I high seas “Western Pacific pelagic (HI deep-set component)” fishery and the Category II high seas “Western Pacific pelagic (HI shallow-set component)” fishery. These additions are being proposed on the basis that uncertainty exist “in the stock identification for species of marine mammals taken by this fishery outside of the U.S. EEZ (proposed 2012 LOF)”. However, additions of “unknown stocks” are not made for other high seas fisheries, including the “Atlantic highly migratory species” fishery that has ten different stocks of marine mammals known to be incidentally injured or killed.

The inconsistencies identified above suggest an arbitrary standard applied by NMFS as well as the lack of coordination among different regions of NMFS conducting fishery classification determinations. We request that NMFS review these possible inconsistencies in detail prior to the publication of the final 2012 LOF, and standardize any inconsistent analysis and determination across the regions.

Conclusions

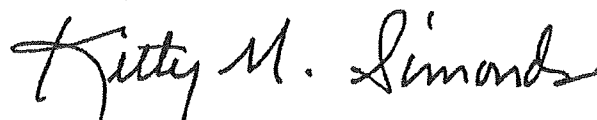
In the Council’s view, available anecdotal reports do not warrant the elevation of the “HI charter vessel” and “HI trolling, rod and reel” from Category III to Category II. NMFS does not provide sufficient justification to meet the regulatory definition of Category II fisheries, and information contained in the proposed 2012 LOF suggest a biologically insignificant level (less than 10% of the PBR) of incidental serious injury and mortality to the Hawaii stock of the Pantropical spotted dolphins. Further, available information show that hookings that result in

¹³ Depredation of mackerel by bottlenose dolphins has occasionally been observed in Florida’s charter and commercial troll fisheries, and one could project that some of those depredation events may result in hookings. An example of observed depredation accounts in Florida’s troll fisheries is found in the following article: Zollett, E.A. and Read, A.J. (2006) Depredation of catch by bottlenose dolphins (*Tursiops truncatus*) in the Florida king mackerel (*Scomberomorus cavalla*) troll fishery. *Fishery Bulletin*, vol.104, no.3: 343-349.

serious injury or mortality of Pantropical spotted dolphins in the Hawaii troll and charter fisheries have never been documented, and that such hookings, should they occur, are extremely rare cases. In addition, the Category II listing of the "HI shallow-set (swordfish target) longline/set line" fishery is no longer warranted, given that observer data and the two-tiered analysis for fishery classification places the fishery in Category III. Finally, the Council has identified several inconsistencies and application of arbitrary standards in the fishery classification determination across the U.S.

The unnecessary and egregious action proposed for the 2012 LOF will irreparably damage the trust between Hawaii's fishermen and NMFS. The Council therefore requests that NMFS review in detail the proposed 2012 LOF against our comments provided here prior to the publication of the final 2012 LOF.

Sincerely,

A handwritten signature in black ink that reads "Kitty M. Simonds". The signature is fluid and cursive, with the first name "Kitty" being more prominent and stylized than the last name "Simonds".

Kitty M. Simonds
Executive Director

Cc: Eric Schwaab, Assistant Administrator, NMFS
Michael Tosatto, Regional Administrator, NMFS Pacific Islands Regional Office
Lisa Van Atta, Assistant Regional Administrator, NMFS Pacific Islands Regional Office