

**Western
Pacific
Regional
Fishery
Management
Council**

October 14, 2011

VIA ELECTRONIC FILING AND EMAIL

Lance Smith
Regulatory Branch Chief
Protected Resources Division
National Marine Fisheries Service
Pacific Islands Regional Office
1601 Kapiolani Blvd., Suite 1110
Honolulu, HI 96814
Attn: Proposed False Killer Whale Take Reduction Plan

Re: Proposed False Killer Whale Take Reduction Plan (RIN 0648-BA30)

Dear Lance:

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 False Killer Whale Take Reduction Plan (TRP)¹. The Council has reviewed the proposed rule and the Draft Environmental Assessment, Regulatory Impact Review, and Initial Regulatory Flexibility Analysis (EA/RIR/IRFA). The Council will also receive a presentation at the upcoming meetings of the Scientific and Statistical Committee (SSC; October 17-19, 2011) and Council (October 19-22, 2011), and may submit supplemental comments after the public comment period closes on October 17, 2011, per permission from the Regional Administrator of the Pacific Islands Regional Office.

Overview

The Council is an active member on the False Killer Whale Take Reduction Team (TRT), and its designated member Paul Dalzell or alternate member Asuka Ishizaki attended the four meetings in 2010 and the fifth meeting in July 2011. Through TRT deliberations, the Council was involved throughout the development of the plan and agreed to the consensus draft TRP submitted to NMFS on July 19, 2010. Therefore, our comments focus primarily on the changes made between the draft TRP and the proposed TRP, as well as the draft EA/RIR/IRFA which was developed without TRT input.

Specifically, the Council offers the following comments regarding the proposed TRP:

- 1) Changes made for the proposed TRP undermines the TRT process and agreement reached in July 2010;

¹ See 76 Fed. Reg. 42082 (July 18, 2011).

- 2) Changes to the Southern Exclusion Zone triggers in the proposed rule are inflexible and does not take into account the anticipated PBR change that was acknowledged widely throughout the process; and
- 3) The proposed weak circle hook requirement is unnecessarily restrictive.

In addition, Council's comments regarding the draft EA/RIR/IRFA are outlined as follows:

- 1) Impacts to fishing communities, in particular the smaller operators in the deep-set longline fishery, are underestimated;
- 2) Impacts to wholesalers and retailers are not considered in the analysis; and
- 3) Potential benefits to the non-fishery sector of the social and economic environment are overestimated.

Lastly, the Council provides comment regarding the consistency between the proposed Take Reduction Plan and the Magnuson-Stevens Fishery Management and Conservation Act (MSA).

Proposed Take Reduction Plan

The Council has reviewed the proposed rule on the False Killer Whale Take Reduction Plan and offers the following comments:

Changes made to the TRP between the Consensus Plan and Proposed Plan

The TRT process entailed an ambitious schedule of developing a consensus draft plan within six months of the TRT being convened. The TRT members, each representing a variety of stakeholders from the fishing industry, research, management, federal and local governmental agencies, and conservation organizations deliberated in good faith. In the six months, the TRT reviewed the best available science, considered new and upcoming research, and deliberated on approaches to meet the MMPA goals while minimizing impacts to the fishery. The result was the consensus plan agreed to by all TRT members and submitted to NMFS on the deadline of July 19, 2010. The Council commends the work put in by the TRT, and while some of the recommended measures may not have been preferred measures from our perspective, we were in support of the plan given that it included a number of considerations to minimize impacts to the fishery, allow flexibility for future changes, and was deemed acceptable by industry representatives on the TRT.

The proposed TRP, however, included several changes that diverged from the critical agreements reached by the TRT. NMFS points to several justifications for making these changes. For example, in justifying the proposed measures regarding the triggers for the Southern Exclusion Zone (SEZ), NMFS believes that "the FKWTRT's recommendation for this step is incompatible with the statutory requirement to bring incidental mortality and serious injury (M&SI) below PBR within six months of the plan implementation, and to insignificant levels within 5 years." In justifying the proposal to not include the SEZ reopening criteria in regulations, NMFS notes that they need to "maintain flexibility and consider scenarios not addressed by the criteria developed by the FKWTRT." In relying on these justifications and diverging from the TRT's recommendations on the key components of the Plan, NMFS undermines the TRT process and consensus.

The Council argues that sufficient justification could be offered to support the TRT's consensus plan. With respect to the triggers for the SEZ, NMFS could justify that the TRT's recommendation was consistent with the short-term and long-term goals under the MMPA when taking into account that an outdated PBR will be used at the time of implementation and the recent HICEAS II survey results are expected to produce a higher PBR. In regards to the reopening criteria

for the SEZ, NMFS could include the TRT-recommended reopening criteria in the regulations while also including language that allows for the consideration of additional scenarios not considered by the TRT. The lack of support from NMFS on these key components may prove to be counterintuitive to continued discussions of the False Killer Whale TRT as well as any future TRT processes.

In addition to the above general concern regarding the changes made in the proposed plan, the Council offers specific comments on two aspects of the proposed TRP.

Changes to the Southern Exclusion Zone Triggers

One of the changes made was regarding the specifications for closing and reopening the Southern Exclusion Zone (SEZ). In the TRT's consensus plan, the conditions upon which the SEZ would be implemented were carefully crafted to ensure, among other things, the following:

- Allow the trigger to be adjusted based on a flexible trigger calculation method, given that a newly calculated PBR is expected to be published in the near future based on the recent HICEAS II survey; and
- Criteria that must be met for the reopening of the SEZ are specified in detail to make the closure more acceptable to the fishery.

The above conditions were not met in the proposed TRP and were identified by the TRT at the July 2011 meeting as particularly problematic. Given that these conditions were critical components of the agreement struck by the TRT, NMFS' decision to change them in essence reversed the deliberations undertaken by the TRT. In response to the TRT's concerns, NMFS staff indicated that they would consider alternative suggestions for the SEZ trigger calculation if such suggestion were submitted during the proposed rule public comment period². The Council shares the views expressed by other TRT members, and expects to submit alternative suggestions for the trigger calculation in the supplemental letter after our Scientific and Statistical Committee (SSC) has reviewed the proposed rule at the upcoming scheduled October 17-19, 2011. The Council therefore requests that NMFS strongly consider any suggested alternatives that may be included in our supplemental letter prior to the publication of the final rule.

"Weak" Circle Hook Requirement

NMFS proposed to require the use of circle hooks sized 16/0 or less and wire diameter not exceeding 4.0 mm in the deep-set longline fishery. While this measure is based on the TRT recommendation, the results from the weak circle hook trials and consideration for other protected species suggest the measure, as proposed, may result in unnecessary negative impacts.

The weak hook study showed no statistical significance in the target bigeye tuna catch between the 4.5 mm and 4.0 mm hooks, but the trials were conducted during a season when bigeye tuna are typically much smaller compared to that of April-June. Therefore, the study was not able to confirm whether larger bigeye tuna could be retained on the 4.0 mm hooks. In addition, a false killer whale estimated to weigh 1,100-1,200 kg was hooked on a 4.5 mm hook during the trial and was released with no injuries when the hook straightened. Furthermore, deliberations at the July 2011 TRT meeting revealed that the use of 4.5 mm hooks is not as widespread as previously thought, and a TRT member provided information suggesting that the majority of the deep-set longline vessels currently using circle hooks are using hooks with 4.73 or 4.97 mm wire diameter. As such, the Council believes that it is more appropriate to require the use of 4.5 mm wire diameter circle hooks

² See Key Outcomes Memorandum for the False Killer Whale Take Reduction Team Meeting, July 27-29, 2011, Honolulu, Hawaii. Prepared by CONCUR, Inc.

to minimize any potential impact to the longline fishery while still allowing the straightening of hooks by false killer whales.

The maximum hook size of 16/0 is also a concern for other protected species, as smaller circle hooks have higher catch rates of sea turtles and sharks. The TRT's recommendation was to require the use of 14/0-16/0 hooks, based on the common circle hook size currently found in the fishery, not as an intention to specify minimum or maximum hook sizes. There is no evidence that larger circle hooks are more detrimental to false killer whales than 14/0-16/0 hooks. Further, larger circle hooks of the same wire diameter are more likely to straighten than smaller hooks due to the simple mechanics of leverage, providing greater potential for false killer whales to free themselves from the hook. Given the lack of evidence and justification for specifying the maximum hook size of 16/0, the Council requests NMFS to consider removing the maximum hook size specification or consider a minimum hook size requirement instead of the maximum.

NMFS solicited specific comments on the timing for implementing the weak hook requirements. The Council believes that adverse impacts to the fishing industry could be avoided with a delayed implementation of the weak hook requirement as well as a gradual phase-in period would be required over a reasonable period. Such an approach would ensure adequate time for gear suppliers to stock the required hooks after the final rule is published, and for vessels to switch over to weak hooks as part of regular hook replacements resulting from hook loss after each trip and spread the one-time cost per vessel (estimated at \$2,000-\$5,000) over the phase-in period. NMFS should consult with industry representatives to determine a reasonable time frame for the weak hook phase-in prior to the publication of the final rule.

Draft EA/RIR/IRFA

The Council has reviewed the Draft Environmental Assessment, Regulatory Impact Review, and Initial Regulatory Flexibility Analysis (EA/RIR/IRFA) and offers the following comments:

Impacts to Fishing Communities Underestimated

The draft EA concludes that cumulative effects of the preferred alternative would be "slightly negative", with deep-set and shallow-set fisheries incurring costs and have reduced income related to replacement of fishing gear, increased travel time and fuel costs, increased certification requirements, and potential reduced revenue due to reduced catch and fishing effort. The analysis, however, does not consider varying level of impacts by vessel class, and therefore underestimates the potential impacts to the longline fishery.

Of the longline vessels currently active in Hawaii, a substantial number of them can be considered small operators (Figure 1). The highest mean annual catch is about 55 mt, and roughly 50% of the participants in the fishery caught less than half this mean annual volume of bigeye tuna, which is less than 27.5 mt. Some of these smaller longline operators participate in the fishery for the lifestyle, not necessarily for making large profit from their trips. However, the costs of fishing between vessels are similar, depending on vessel size class. The costs of fishing are constantly increasing, especially with the rises in fuel price which now account for 50% of a longline trip as opposed to 30% in the past. Revenues from fish sales have not increased accordingly. The additional costs associated with gear replacement and increased travel distance may therefore be detrimental to this element of the fleet, but such impacts are not sufficiently captured in the EA.

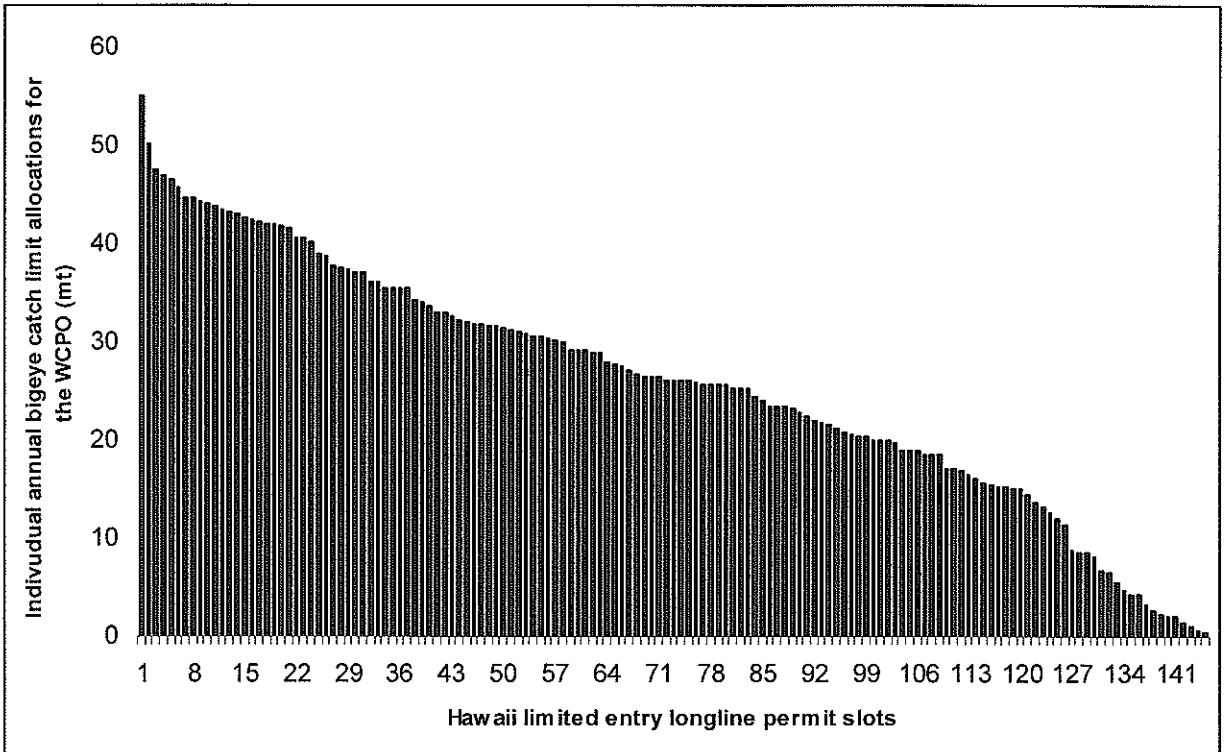


Figure 1. Mean annual bigeye catch by the Hawaii limited entry longline permit holders between 2005 and 2009

Moreover, management measures from other regulations are also having a strong negative influence on the fishery. The current management of bigeye catches in the Western and Central Pacific Ocean (WCPO) limits the Hawaii longline fleet to 3763 mt annually, or about 87% of recent historical annual catches. Last year the fishery was forced to cease fishing in the WCPO for about 40 days (November 22 to December 31) with lower bigeye landings during the closure and higher fishing costs in December. Although there were higher market prices for high quality tuna, these were poor compensation for fishermen who had to endure tying up their vessels for the closed season, or fishing in unfamiliar grounds in the Eastern Pacific Ocean. An economic study by NMFS PIFSC estimated total industry losses of between \$2.1-\$3.7 million and reduction in household income between \$0.7-\$1.0 million. These are substantial numbers when we consider that the majority of the fishery are single vessel small businesses.

Impacts to Wholesalers and Retailers Not Considered

Throughout the draft EA/RIR/IRFA, NMFS considers a number of potentially affected groups, including the Hawaii-based longline fishery, fishing equipment suppliers, and seafood consumers. However, NMFS failed to consider wholesalers and retailers that are the critical link between the fishery and seafood consumers in the analysis. As noted under Section 3.3.3.2.5 of the draft EA/RIR/IRFA, nearly all of the Hawaii-based longline catch is sold at the United Fishing Agency auction, at which point the catch are sold to wholesalers and retailers. The Draft EA/RIR/IRFA estimates that the Hawaii longline landings in 2008 were nearly 26.7 million pounds with revenue of \$71.9 million, suggesting that revenue derived by wholesalers and retailers once the catch moves through the local and export markets would be much greater.

However, the analysis conducted by NMFS does not consider these multiplier effects and thus may have underestimated the impacts of the preferred alternative. Given that the preferred alternative would result in “potential adverse effects to the deep-set longline fishery related to reduced catch and fishing effort if costs rise to the extent that fishing effort declines³”, there may also be potential adverse effects to the wholesalers and retailers dependent on the local supply of tuna and other species caught by the deep-set longline fishery.

Potential Benefits to the Non-Fishery Sector of the Social and Economic Environment Overestimated

The draft EA/RIR/IRFA assigns unduly positive effects of the preferred alternative to non-fishery sectors, such as recreation and tourism and passive users. For example, in section 4.3.2.5 of the document, NMFS states there may be “positive indirect effects of the Preferred Alternative on wildlife viewing recreation if the FKWTRP results in increased abundance of false killer whales or other wildlife that may be viewed by recreationists or tourists.” This statement is unsubstantiated and risible, considering that primary target species for marine wildlife viewing in Hawaii are humpback whales, spinner dolphins, and green sea turtles. False killer whales are not targeted for commercial wildlife watch tours given their relatively low density, and are unlikely to become a viable target for such activity within the timeframe considered for this analysis. More importantly, the primary stock interacting with the deep-set longline fishery is the pelagic stock, which does not occur within the nearshore areas utilized by wildlife watch tour boats. It is therefore unlikely that any benefit to wildlife watching would be realized from the implementation of the TRP. Further, the inclusion of such potential benefits in the draft EA/RIR/IRFA demonstrates the lack of knowledge and understanding for Hawaii’s tourism industry by the document preparers.

The draft EA/RIR/IRFA also attributes “direct and indirect beneficial quality of life effects on groups that value the false killer whale, including recreationists and tourists, wildlife viewers, scientists and educators, and members of present and future generations of the general public⁴.” While such benefits may occur, the general lack of knowledge of false killer whales by the general public would suggest that the benefits would be restricted to a small fraction of the population, and thereby having negligible effect. Moreover, should such beneficial quality of life be considered in the analysis, NMFS should equally consider direct and indirect reduced effect of quality of life on groups that participate in longline fishery for the lifestyle (i.e., smaller vessel participants as outlined above), general public who value Hawaii’s fisheries, and seafood who value the availability of quality local fresh tuna. As written, NMFS’ attribution of beneficial quality of life effects without considering similar negative effects has resulted in a biased and unbalanced analysis.

Consistency with the Magnuson-Stevens Fishery Management and Conservation Act

Through the TRT process, the Council representative on the Team directed a question to NMFS how a regulation implemented pursuant to the TRP would affect the existing fishery management plans implemented under the Magnuson-Stevens Fishery Management and Conservation Act (MSA), and whether the fishery management plans would need to be updated should a regulation be proposed pursuant to the TRP. However, no clear response was provided to the TRT or to the Council.

The proposed TRP includes regulatory measures that will add gear requirements to 50 CFR 665.813 and revising the MHI longline fishing prohibited area boundaries in 50 CFR 665.806(c).

³ See p. 129, Draft EA/RIR/IRFA

⁴ See Table 4.7 on p.143, Draft EA/RIR/IRFA

Regulations under 50 CFR 665 are those pertaining to fisheries in the Western Pacific managed under Fishery Ecosystem Plans (FEPs) prepared by the Western Pacific Fishery Management Council under the MSA. NMFS has not made clear in its proposed rule whether the addition of new regulatory measures under 50 CFR 665 as a result of the TRP implementation results in inconsistency between the regulations and the FEP, and if the FEP will require an amendment to resolve the inconsistency.

A clear direction from NMFS on this issue is critical, since it may require the Council to amend its Pelagics Fisheries Ecosystem Plan (PFEP). This incurs additional administrative burden on Council resources which we know from previous experience amending the PFEP to implement longline-seabird mitigation measures and to close and re-open the swordfish longline segment of the fishery. The Council therefore requests that NMFS provide clarification on this issue.

Conclusions

As outlined above, the Council has serious concerns regarding the changes made to the TRP between the draft consensus plan and the proposed plan. Some key conditions upon which the draft plan came to consensus were compromised, and the proposed plan thereby undermined the TRT process. Moreover, impacts to the fishing industry as well as associated wholesalers and retailers are underestimated in the draft EA/RIR/IRFA, while potential benefits to the non-fishery sector are overestimated. Lastly, consistency of the TRP with MSA is not clear, and the Council requests that NMFS provide clarification on this issue.

Please feel free to contact Asuka Ishizaki, Protected Species Coordinator at (808) 522-8224 if you have any questions concerning the comments.

Sincerely,



Kitty M. Simonds
Executive Director

Cc: Michael Tosatto, Regional Administrator, NMFS Pacific Islands Regional Office
Manuel Duenas, Chair, Western Pacific Regional Fishery Management Council
Sean Martin, President, Hawaii Longline Association
Ryan Steen, Stoel Rives LLP