

**Pelagic FMP Amendment 18
Final SEIS**

Appendix I

Public Scoping Report

October 4, 2007

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Public Scoping Report

Potential Regulatory Modification for the Hawaii-based Shallow-set Longline Fishery

Draft Supplemental Environmental Impact Statement

Fishery Management Plan for Pelagic Fisheries
of the Western Pacific Region

October 4, 2007

Western Pacific Regional Fishery Management Council
1164 Bishop St., Ste. 1400
Honolulu, HI

Introduction

In February 2007, the Western Pacific Regional Fishery Council (Council) and the National Marine Fisheries Service (NMFS) received a proposal from the Hawaii Longline Association (HLA) requesting an amendment to the Pelagics FMP and related Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1801 *et seq*; MSA) regulations concerning the Hawaii-based shallow-set longline fishery (the fishery). The proposal requests that the WPFMC consider amending the Pelagics Fishery Management Plan of the Western Pacific Region (FMP) to eliminate the existing annual fishing effort limit of 2,120 sets. The HLA proposal is premised on new information obtained since the implementation of the existing shallow-set fishery regime in early 2004 (Gilman and Kobayashi, 2007). The new information indicates a reduction in sea turtle capture rates and in the type of incidental hookings (lightly hooked vs. deeply hooked in the mouth or swallowed) observed during sea turtle interactions with longline gear. Combined sea turtle capture rates have declined by 89 percent in comparison to historical capture rates in the shallow-set fishery. Deep hooking (thought to result in sea turtle mortality) rates have also declined to 15 percent of all loggerhead sea turtle captures and zero percent of leatherback sea turtle captures. Prior to requiring the use of circle hooks and mackerel-type bait in the Hawaii-based longline shallow-set fishery, 51 percent of the sea turtles were believed to have been deeply hooked. No green or olive ridley sea turtles have been incidentally caught in the current Hawaii-based shallow-set fishery.

At its 138th Council meeting (June 2007), the Council recommended that a Environmental Impact Statement (EIS) pursuant to the National Environmental Policy Act (NEPA) be developed to examine the potential for increasing swordfish fishing while not jeopardizing threatened and endangered sea turtle populations. Potential regulatory changes to be analyzed include modifying or eliminating the existing limit on fishing effort; maintaining or eliminating longline “set certificates” that limit the amount of fishing effort in the fishery; retaining or eliminating hard “caps” (limits) on the incidental take of sea turtles, which, if reached, close the fishery for the remainder of the year; time and/or area restrictions; changes in observer coverage; and other management alternatives designed to increase incentives to avoid interactions with sea turtles.

The Council and NMFS are planning to prepare a Supplemental EIS (SEIS) in accordance with NEPA on the federal management of the longline fishery in the western Pacific. The SEIS will supplement the March 30, 2001, Final EIS on the FMP as well as the March 5, 2004, Final SEIS on Management Measures to Implement New Technologies for the Western Pacific Longline Fisheries.

Purpose and Need

The purpose and need for the potential action is for the Hawaii-based shallow-set set longline fleet to increase swordfish effort to achieve optimum yield while not jeopardizing threatened and endangered sea turtle populations.

Preliminary Alternatives

Topic 1- Longline Fishing Effort:

1. No action - keep 2120 set limit;
2. Allow 3,000 sets;
3. Allow 4,000 sets; and
4. Do not limit sets.

Topic 2- Time-Area Closures:

1. No action - no time-area closures;
2. Implement pre-season monthly closure of waters in designated sea turtle "hot spots" based on historical and contemporary sea surface temperature data; and
3. Implement in-season closure of waters based on analysis of sea surface temperature data.

Topic 3- Interaction Hard Cap for Loggerhead and Leatherback Sea Turtles:

1. No action - continue limitations of sea turtle interactions using caps set by NMFS; and
2. Discontinue limitations of sea turtle interactions using caps set by NMFS.

Topic 4- Fishery Participation:

1. No action - keep set certificates; and
2. Remove set certificates.

Topic 5- Assessment Methodology:

1. No action - annual (1 year) cap on interactions with loggerhead and leatherback turtles (numbers of sea turtle interactions to be determined by NMFS); and
2. Multi-year cap on interactions with loggerhead and leatherback turtles (numbers of sea turtle interactions to be determined by NMFS).

Topic 6- Sea Turtle Avoidance Incentives:

1. No action - do not implement individual vessel sea turtle interaction "limits";
2. Individual vessel "limits" for loggerhead and leatherback turtles will be available on an annual basis (calendar or fishing year) to individual vessels. These "limits" will be transferable among vessels; and
3. Any shallow-set vessel in the fleet that interacts with a certain (unspecified at this time) number of sea turtles during the calendar year or fishing year will be precluded from shallow-set fishing for a certain period (unspecified at this time).

Topic 7- Observer Coverage:

1. No action - 100 percent coverage;
2. A reduced level of observer coverage that achieves an appropriate extrapolation of interactions between sea turtles and the fishery;
3. NMFS covers costs for 100 percent coverage at current effort limit (2,120 longline sets), and fishing industry pays for observer costs for additional shallow-set effort beyond current limit; and
4. Fishing industry pays all on-board observer costs associated with monitoring of the Hawaii-based shallow-set longline fishery.

Public Scoping

NMFS and the Council published a Notice of Intent (NOI) to prepare a SEIS in the *Federal Register* on August 21, 2007 (72 FR 46608). The NOI provided: background information on the fishery, the date, time, and location of the public scoping meeting, a draft list of preliminary alternatives, and information on where and when to send public comments. A public scoping meeting was held August 30, 2007, at the Ala Moana Hotel, Honolulu, HI, from 6- 9.m. The NOI also listed the meeting of the Council's Science and Statistical Committee (SSC; September 25-27, 2007; Honolulu, HI) and the 139th Council meeting (October 9-12, 2007; Honolulu, HI) as other venues to provide public comment. Newspaper ads were also placed for the public scoping meeting, SSC, and Council meeting.

August 30, 2007 meeting

Thirteen people attended the meeting at the Ala Moana Hotel. One oral comment was provided and summarized as follows:

Scott Barrows, commenting on behalf of HLA

As acknowledged in the NOI, the EIS is in response to HLA's proposal to increase shallow-set effort in the Hawaii-based longline fishery. HLA will submit written comments on the scoping process and are now commenting to provide context to the public. Currently, about 30 active vessels are targeting swordfish. The fishery is the most rigorously regulated and observed fishery in the world. Results from required sea turtle and seabird mitigations measures in the fishery experience indicate a tremendous success, 90% reductions in turtle and seabird interactions and almost all released alive and healthy. NMFS estimates 3 loggerhead mortalities per year, using mortality rates above those observed. The situation is similar for leatherbacks, and note that the limit for leatherbacks has never been reached. US fisheries, and the Hawaii fishery in particular, are heavily regulated, whereas foreign fleets are not. The Council and HLA and others are working to get other fleets in the Pacific to use mitigation measures such gear and bait combinations that are proven to be effective in reducing the number and severity of sea turtle interactions. If the effort in the fishery is allowed to increase, there will be no discernable impacts on turtle populations, provided mitigation and nesting beach conservation programs are continued. Furthermore, there is a need to promote gear innovations that are effective in reducing sea turtle interactions and transfer technology to foreign fleets, as positive results using such gear have been shown in the Hawaii model swordfish fishery. HLA looks forward to working with the Council and NMFS on these issues.

Written Public Scoping Comments

Letters submitted during the comment period by HLA, Center for Biological Diversity, Ocean Conservancy and Caribbean Conservation Cooperation, and the Pacific Fishery Management Council are included as attachments A, B, C, D, respectively.



Pacific Fishery Management Council

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Donald K. Hansen, Chairman Donald O. McIsaac, Executive Director

September 20, 2007

Mr. William Robinson
Regional Administrator, Pacific Islands Region
National Marine Fisheries Service
1601 Kapiolani Blvd., Suite 1110
Honolulu, HI 96814

Dear Mr. ^{Bill} Robinson,

Re: Scoping Comments on the Hawaii Swordfish Environmental Impact Statement (EIS)

I would like to inform you that at their September 10-14, 2007, meeting, the Pacific Fishery Management Council (Pacific Council) directed its Highly Migratory Species Management Team (HMSMT) to begin developing a range of alternatives for an approvable management regime for a West Coast based shallow-set longline fishery, which would be authorized under the Pacific Council's Fishery Management Plan for U.S. West Coast Fisheries for Highly Migratory Species (HMS FMP). As you know, the Pacific Council submitted the HMS FMP for Secretarial review in 2003, but the provision allowing a shallow-set longline fishery was disapproved based on the results of the Section 7 consultation conducted on the FMP, which found that such a fishery would jeopardize the continued existence of the leatherback sea turtle. Since that time, new fishing gear and methods have been developed that substantially reduce both incidental takes and resulting mortality of sea turtles interacting with shallow-set longline gear. The effectiveness of these gear modifications and methods in reducing sea turtles takes and mortalities has been demonstrated by the model fishery implemented in 2004 by the Western Pacific Fishery Management Council (WPFMC) and the Pacific Islands Regional Office, as discussed in the Notice of Intent your office published in the Federal Register on August 21, 2007 (72 FR 46608).

The Pacific Council action initiates a proposed action to implement a fishery using these gear and methods for vessels based on the West Coast that would use shallow-set gear on the high seas. I am attaching a copy of the motion passed by the Pacific Council outlining the range of alternatives the HMSMT would develop and the proposed timeline for Pacific Council decision making. As you can see, one of the options, which may be combined with other options under consideration, is to pursue joint management efforts with the WPFMC. In the short-term, joint management would be facilitated by coordinated development, evaluation, and review of the Pacific and Western Pacific Councils' proposed actions.

We believe it is important for the subject EIS to take into account the Pacific Council's proposed action and evaluate how proposed changes in the management framework for the Hawaii shallow-set fishery would affect the development of a West Coast fishery. In particular, both proposed actions may be implemented without Section 7 consultations finding either action to cause jeopardy to sea turtles or other species listed under the Endangered Species Act. We are

concerned that the effects of a changed Hawaii fishery, in terms of in the estimated incidental take of sea turtles, would preclude the Pacific Council's proposed action from being approved because of such a fishery's contribution to the overall level of sea turtle takes.

One way to ensure a synchronized outcome would be for both proposals to be coordinated in such a way that a single Section 7 consultation could be conducted covering both proposed actions. Since management of the Hawaii fishery, and any future West Coast fishery, is to a large degree shaped by measures to limit sea turtle takes to a level that does not cause jeopardy, such a joint consultation would allow better coordination of measures, such as take caps based on an Incidental Take Statement, applicable to both proposed actions. To this end we ask that the subject EIS take the Pacific Council's decision making schedule into account as the process moves forward.

The Pacific Council thinks it is important to allow for consideration of a shallow-set longline fishing opportunity for West Coast based vessels managed under the HMS FMP. For this reason, our paramount concern is that the proposed action that is the subject of your scoping announcement be developed in such a way, as to not to preclude such an opportunity.

Sincerely,

A handwritten signature in black ink, appearing to read "D. O. McIsaac", with a long horizontal flourish extending to the right.

D. O. McIsaac, Ph.D.
Executive Director

Enclosure: Agenda Item F.2.d, Supplemental WDFW Motion, September 2007

CRD:ckm

c: Council Members
Ms. Kitty Simonds

MOTION ON HIGH SEAS LIMITED ENTRY LONGLINE FISHERY

The staff white paper (Agenda Item F.2.a, Attachment 1) describes the following alternatives:

1. Status quo – Shallow-set longline fishing seaward of 200 nm and east of 150 deg W longitude allowed by Hawaii-permitted vessels only; landings can occur on the West Coast by Hawaii-permitted vessels.
2. Use management measures, such as take caps or set certificates, rather than license limitation, to limit shallow-set longline effort seaward of 200 nm.
3. Implement a West Coast limited entry program for shallow-set longline fishery seaward of 200 nm subject to regulations, which would include sea turtle protection measures.
4. Implement a West Coast limited entry program for shallow-set longline fishery seaward of 200 nm (same as Alternative 3) and require a drift gillnet permit to participate.
5. Pursue joint management efforts with the Western Pacific Fishery Management Council.

Motion:

1. Adopt a preliminary purpose and need statement as follows:

The proposed action is to implement a limited West Coast-based shallow-set longline fishery to target swordfish on the high seas, which would be subject to conservation and management measures to protect, among other things, listed sea turtles, seabirds, and marine mammals.

2. Adopt Alternatives 1, 3, 4, and 5 described in the staff white paper as a preliminary range of alternatives for further exploration. (Note: Alternative 4 could be a sub-option of Alternative 3—e.g., Alternative 3a.)

Rationale – There are problems with Alternative 2 relative to creating a derby-style fishery and a level of fishing effort that could potentially result in a jeopardy finding under the Endangered Species Act. With regard to Alternative 3, while the majority of drift gillnet permitted vessels are not big enough or configured properly to fish long-distance, the feasibility of Alternative 3 should be further explored. While there may be higher costs associated with Alternative 5, the cooperative nature of this approach also warrants further consideration.

3. The HMSMT and HMSAS could develop sub-options for Alternative 3 with different conservation and management measures.
4. Suggested Process and Timeline:
 - a. March 2008 – Council consider draft range of alternatives for public review and preliminary guidance on qualifying criteria for analysis
 - b. July-Aug 2008 – HMS Management Committee meet with HMSMT and HMSAS to provide further guidance (if needed)
 - c. November 2008 – Council adopt a preferred alternative



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August 31, 2007

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VIA E-MAIL (HILonglineScoping@noaa.gov)

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Regional Administrator
Pacific Islands Region
National Marine Fisheries Service
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Re: Scoping Comments on HI Swordfish SEIS

Dear Bill:

This letter provides the scoping comments of the Hawaii Longline Association (HLA) on the Notice of Intent (NOI) to prepare a Supplemental EIS (SEIS) on the federal management of the shallow-set Hawaii pelagic longline fishery. *See* 72 Fed. Reg 46608 (August 21, 2007).

HLA appreciates the opportunity to provide its comments to the National Marine Fisheries Service (NMFS) and to the Western Pacific Regional Fishery Management Council (WPRFMC). As you are aware, HLA is an organization formed to represent and to advance the interests of individuals and entities involved in the Hawaii-based commercial longline fisheries. HLA both promotes participation by industry and serves as the representative voice for commercial longline fisheries in Pacific Islands Region fishery conservation and management decisions. As acknowledged in the NOI, the environmental impact analysis being undertaken by WPRFMC and NMFS responds to a proposal from HLA to amend the Fishery Management Plan for the Pelagics Fisheries of the Western Pacific Region (Pelagics FMP) and related Magnuson-Stevens Act (MSA) regulations concerning the Hawaii-based commercial shallow-set fishery.

HLA's scoping comments are directed to the range of preliminary alternatives identified in the NOI. NEPA requires preparation of a thoughtful environmental analysis of the probable environmental impacts resulting from a proposed action, and a reasonable range of alternatives, including the no action alternative. NEPA does not mandate particular results, but instead provides the necessary process to ensure environmental consequences of proposed actions are intelligently considered. In this procedural context, NEPA's alternatives requirement ensures that an agency's decision is well-informed by considering the environmental impacts of different

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actions that still meet the purpose and need of the proposed action. Because little or no useful information may be obtained from analysis of actions with similar or identical environmental impacts, or actions that are infeasible, ineffective, or inconsistent with the purpose and need of the proposed project, NEPA does not require detailed analysis of such alternatives.

HLA appreciates the thought that has already gone into the early identification of seven different categories of alternatives for purposes of the NOI. Having assembled such a comprehensive list, we expect the scoping process to inform WPRFMC and NMFS in the selection of those alternatives that merit detailed analysis. Accordingly, HLA's comments below are addressed to which alternatives do, and do not, merit detailed environmental analysis. We sincerely appreciate your consideration of these views.

I. ALTERNATIVES WITH FISHING EFFORT RESTRICTIONS

A wide variety of fishery management regimes have been analyzed in the past, including regimes that place restrictions on the level of fishing effort, the location of where fishing may occur (i.e., area closures) or the time when fishing may occur (i.e., time closures). The NOI identifies two different sets of alternatives that restrict fishing effort through direct set limits ("Shallow-set Fishing Effort Alternatives) or time and area closures (Time-Area Closure Alternatives). Generally, as explained below, HLA supports detailed analysis of different set limits. On the other hand, we do not believe that detailed consideration of time or area closures is warranted due to the absence of scientific evidence demonstrating a conservation benefit and demonstrating the impact of such measures on fishing effort and success.

A. Shallow-set Fishing Effort Alternatives

Any action taken by WPRFMC and NMFS regarding the shallow-set fishery must balance the requirements of the MSA to achieve optimum yield from the Hawaii-based shallow-set fishery, while minimizing bycatch and bycatch mortality, and the requirement of the Endangered Species Act (ESA) to conduct the shallow-set fishery in a manner that is not likely to jeopardize the continued existence of ESA-protected species. In this circumstance, on the one hand, the mandates of the MSA establish a regulatory imperative favoring fishing to achieve optimum yield. On the other hand, the mandates of the ESA establish a cap beyond which fishing effort may not lawfully increase. The cap exists at the point that the combined effects of the baseline status of loggerhead and leatherback sea turtle species, future non-Federal actions, and the



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shallow-set fishery's incidental take levels, are likely to result in jeopardy to these species.¹ There is no regulatory imperative – indeed, the MSA establishes a contrary imperative – to limit fishing effort that is not likely to result in jeopardy to loggerhead and leatherback sea turtles.

HLA supports detailed analysis of alternative set limits in the SEIS. Consideration of a range of fishing effort established through set limits is the only means by which WPRFMC and NMFS may determine whether the proposed action meets the requirements of the ESA. As HLA's proposal makes clear, the analysis of environmental consequences will need to take into account (i) the results of running the Dennis-Holmes model on various levels of fishing effort, (ii) the adverse impact of transferred effects that occur when fishing effort restrictions are imposed, and (iii) the beneficial effects of ongoing sea turtle conservation measures.

B. Time-Area Closures

The NOI also identifies a series of alternative actions involving pre-season closures of sea turtle "hot spots" based upon historical and contemporary sea surface temperature data, in-season closures based upon sea surface temperatures, or no time-area closures, as with the current fishery regime. HLA does not support detailed analysis of these time-area closure alternatives because, at this time, there is no scientific evidence that such time-area closures are necessary, practicable or effective. In particular, we are aware of no data or analyses, let alone peer-reviewed data or analyses, reliably documenting either the conservation benefits to sea turtle species or the impact on shallow-set longline fishing effort and success, from time and area closures linked to sea surface temperature data. Without first obtaining such data, imposition of time-area closures is not scientifically supportable.

¹ The only significant environmental issue associated with a change in fishing effort in the shallow-set fishery is the incidental take of two sea turtle species – loggerhead and leatherback sea turtles. The incidental take of seabirds is an important bycatch issue, but seabird bycatch has already been the subject of separate analysis and adoption of conservation measures. None of the potential alternatives identified in the NOI are intended to address seabird bycatch. The incidental take of marine mammals in the shallow-set fishery is insignificant. The incidental take of false killer whales, which is the basis for listing the combined deep-set and shallow-set longline fisheries as a Category I fishery under the Marine Mammal Protection Act (MMPA) is solely attributable to the deep-set fishery. Again, appropriately, none of the potential alternatives under consideration address alternative regulatory schemes for the benefit of marine mammals.



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HLA supports ongoing efforts by WPRFMC, NMFS and Pacific Islands Fisheries Science Center (PIFSC) to investigate ways of reducing sea turtle bycatch. At some point in the future, there may be data that advances the current theories underlying time-area closures based upon sea surface temperature to the point that the interested parties are able to reliably evaluate the conservation and fishery consequences of such actions. However, at this time, detailed consideration of time area closures as an alternative cannot be informative because the scientific data to perform the necessary detailed analysis of this theory, and accordingly to adopt time-area closures as a regulatory requirement, do not exist. No amount of NEPA analysis will change this circumstance.²

II. ALTERNATIVES THAT HAVE NO ENVIRONMENTAL CONSEQUENCE

In two instances, the NOI identifies ministerial administrative changes as alternatives. Whatever the merit may be of these implementation alternatives, they have no environmental consequence. NEPA imposes a procedural requirement intended to ensure that the environmental impacts of a proposed action are identified and considered. Analysis in detail of alternatives that have no environmental impact serves no NEPA purpose. Accordingly, these potential alternatives should be eliminated from detailed analysis in the SEIS.

A. Shallow-set Observer Coverage Alternatives

The current shallow-set management regime requires 100 percent observer coverage. This requirement was imposed by NMFS as a reasonable and prudent measure (RPM) under the ESA. HLA has not proposed, and does not support, modifying this observer requirement. Insofar as HLA is aware, the 100 percent observer coverage requirement is supported by conservation groups, the informed public and regulatory agencies.

The NOI does not suggest that a reduction in observer coverage will be considered, but does identify as alternative actions different funding schemes. Currently, the observer program is funded by NMFS. The NOI proposes to perform detailed environmental analysis on: (i) the current funding approach; (ii) a split of funding between NMFS and the fishery; and (iii) changing to a fishery funded observer program. However, while observer coverage is an

² Nor is there a reasonable basis to delay proceeding with the SEIS. Insofar as we are aware, there is no present way to know when, if ever, peer-reviewed science will demonstrate the viability of the underlying theory, let alone the extent of conservation benefits and fishery effort impacts.



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important conservation measure, the related funding mechanism has no conservation or environmental impact. Accordingly, detailed analysis in the SEIS of who funds the observer program would not inform any decision by WPRFMC or NMFS regarding environmental consequences.

HLA does not intend to be coy. We could not be more opposed to NMFS shifting the cost of its mandatory observer program, whether in whole or in part, to the fishery. Among other problems, the economic consequences of shifting such costs would unreasonably burden the fishery such that it would substantially defeat the purpose and need for HLA's proposal in the first place. However, NEPA does not provide for either a cost/benefit or economic impact analysis. Moreover, under NEPA, there is no requirement for, and there would be no benefit from, detailed environmental analysis of alternative funding schemes that have no environmental consequences.

B. Shallow-set Fishery Participation Alternatives

The NOI identifies an alternative action pursuant to which the existing shallow-set certificate program would be eliminated. HLA is a strong supporter of eliminating the set certificate program; however, this ministerial requirement is not a conservation measure and has no environmental consequence. Because the continuation or elimination of the set certificate program would not have any conservation or environmental impact, detailed analysis in the SEIS would not inform any decision by WPRFMC or NMFS regarding environmental consequences.

The shallow-set certificate program was created in 2004 as a way of rationalizing and implementing the existing 2,210 set limit. The set certificate requirement is not a distinct conservation measure. Rather, it is one of several possible implementation methods for administering the set limit conservation measure. As WPRFMC and NMFS are well aware, in practice, the set certificate program has imposed administrative burdens without any demonstrable benefit. Insofar as we are aware, no one supports continuing the set certificate program. Under HLA's proposal, there would be no set limit and, accordingly, no need for a set certificate program. If the existing set limit is retained, or some other set limit is imposed as a result of this administrative process, WPRFMC and NMFS will have the discretion to implement the set limit through reasonable administrative methods. To the extent public comment may be required or appropriate regarding implementation of a future set limit, such comment should be obtained in response to draft MSA regulations implementing the regulatory aspects of the final decision. However, under NEPA, there is no requirement for, and there would be no benefit from, detailed analysis of alternative administrative implementation schemes that have no environmental consequence and that no interested party supports.



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III. ALTERNATIVES THAT IMPLEMENT THE ESA TAKE LIMIT

The remaining three categories of alternatives address alternative regulatory requirements for implementing ESA-imposed take limits. For the reasons identified below, none of these alternative categories merits detailed analysis in the SEIS.

A. Hard Cap Alternatives

The NOI identifies an alternative pursuant to which the existing hard cap closure for loggerheads and leatherbacks would be discontinued. HLA does not believe that this alternative merits detailed consideration in the SEIS process because there is nothing useful to be gained by analyzing an alternative action that no one favors, and that would eliminate a practicable and effective conservation measure.

Given the many rigorous management measures required of the shallow-set fishery, it is possible to conceive of a wide variety of alternative fishery management regimes that continue, reduce or eliminate existing requirements imposed primarily for the conservation benefit of sea turtles, seabirds and marine mammals. However, HLA does not support reductions in or elimination of practicable conservation measures that have resulted in demonstrable conservation benefits. In the instance of the hard cap, the fishery's experience in 2006 with loggerhead takes resulted in implementation of the hard cap closure thereby ensuring that the fishery did not exceed its incidental take authorization issued by NMFS pursuant to the ESA. Accordingly, the hard cap requirement has served a demonstrable conservation benefit that is consistent with the mandates of the MSA and the ESA, and implementation of the hard cap has been proven practicable. Members of the fishery, including HLA, have not sought to eliminate the hard cap; nor, to HLA's knowledge, is the hard cap opposed by conservation groups, the public or the regulatory community.

In sum, in our view, elimination of hard caps would not be consistent with the purpose and need for the pending proposal. *See* HLA's shallow set proposal at Attachment. A, p. 1 (identifying the objectives of the proposal to include "(1) maintain[ing] conservation and management measures based upon the best available scientific information; . . . and (3) conduct[ing] the shallow-set fishery in a manner that is not likely to jeopardize the continued existence of affected sea turtle or other ESA-listed species." Continuation of the hard caps requirement is a practicable and effective means of ensuring the shallow-set fishery does not exceed its take limits.



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B. Individual Vessel Take Quota Alternatives

The NOI identifies a series of alternatives that would involve establishing individual vessel “quotas” for leatherback and loggerhead sea turtles. Vessels exceeding the established cap or quota would be precluded from further shallow-set fishing during a given year. HLA does not support detailed analysis of vessel quota alternatives because, at this time, there is no scientific evidence that such quota closures are necessary, practicable or effective. In particular, we are aware of no data or analyses, let alone peer-reviewed data or analyses, reliably documenting expected conservation benefits to sea turtle species or the impact on fishing effort and success from the use of vessel sea turtle take quotas.³ Without first obtaining such data, imposition of vessel quotas cannot be scientifically supportable.

We are aware of only one analysis addressing the issue of individual vessel take. See Gilman, et al., *Efficacy and Commercial Viability of Regulations Designed to Reduce Sea Turtle Interactions in the Hawaii-based Longline Swordfish Fishery* (Aug. 2006). Gilman, et al. (2006) looked at data from late 2004, when the shallow-set fishery opened, through March 2006, and also analyzed data from 1994 through 2002 for shallow-set fishing under the prior less rigorous fishery management regime. The study found that there was no statistically significant correlation between swordfish and turtle CPUE (i.e., vessels catching more fish did not capture more turtles, and vessels that captured fewer or no turtles did not catch less fish). Looking across the data for the *past and present* shallow-set fishery, the authors noted that a few vessels had disproportionately high sea turtle catch rates. The authors did not reach any conclusions regarding this data, but rather recommended investigation of this issue in future research.

As mentioned above, HLA is supportive of research that addresses sea turtle conservation and reduction of bycatch. We support NMFS, PIFSC or WPRFMC conducting the research suggested in Gilman, et al. (2006). At some point in the future, after research has been conducted, and scientific findings have been reported and peer reviewed, there may be reliable evidence regarding (i) whether certain vessels disproportionately take sea turtles under the current management regime, (ii) if so, why, and (iii) the effectiveness of fishery management measures to address the problem. However, currently, neither the existence and extent of the

³ In addition to the absence of scientific support for vessel quotas, the novel concept of imposing individual take limits on vessels (i.e., mini-ITS) is of doubtful legality under either the ESA or the MSA.



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problem, if any, have been demonstrated,⁴ nor has there been any investigation of possible alternative management measures, including feasibility and effectiveness of vessel take quotas.⁵

Under the circumstances, while we acknowledge the value of further research into the subject of individual vessel take rates, detailed consideration of individual vessel quotas as an alternative cannot be informative. The scientific data to perform the necessary detailed analysis does not exist. The problem, if any, is, as yet, merely an untested research theory. If there is a problem, the range of possible solutions has neither been identified in theory, nor investigated in the field. Accordingly, the information necessary to analyze the issue, let alone to adopt individual vessel quotas as a regulatory requirement, does not exist. No amount of NEPA analysis will change this circumstance.⁶

⁴ Gilman, et al. (2006) reaches no conclusions regarding disproportionate takes by individual vessels. To the extent Gilman, et al. (2006) considered the issue, the authors principally combined take data collected under two different regulatory management regimes, only one of which is relevant to the present. Moreover, the range of total takes reported by Gilman, et al. (2006) was between zero and four sea turtles per vessel under the current fishery management regime. It is uncertain whether given the short time frames (less than two full years) and rarity of takes, this magnitude of difference is statistically significant, or whether experience in the 2007 fishery supports or undermines the suggestions for research in Gilman, et al. (2006).

⁵ Gilman identified at least eight separate potential operational reasons that might explain differences in vessel take rates. *See* Gilman, et al. (2006) at p. 40-41. If vessel take rates can be linked in future research to operational practices that are unrelated to fishing success rates, we presume that adoption of a requirement limiting or eliminating such practices would be more effective and practicable than individual vessel take quotas. For example, if it was demonstrated that vessels setting particularly shallow gear disproportionately catch loggerheads without any demonstrated increase in fishing rates, it would be more effective and efficient to establish minimum depth levels for shallow-set gear instead of establishing vessel quotas. However, currently, there is no scientific evidence of a problem, let alone the reason(s) for the problem and likely solutions.

⁶ As with time/area closure theories, there is no reasonable basis to delay proceeding with the SEIS pending further research. There is no present way to know when, if ever, the research
(...continued)



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C. Assessment Methodology Alternatives

Finally, the NOI proposes to analyze alternatives that would implement take limits annually, as is now the case, and a multi-year take limit as is now the case with the deep-set fishery. HLA supports consideration of a multi-year take limit by NMFS as part of its § 7 consultation process under the ESA. We expect, as was the case with the deep-set consultation in 2005, that the best available scientific data supports use of a multi-year take limit due to the high degree of inter-annual variation in sea turtle takes. NMFS will surely consider this issue in connection with its upcoming § 7 consultation. However, no purpose would be served by analyzing these alternatives in detail in the SEIS. The differences in the environmental consequences of these two implementation alternatives would be undetectable.

IV. OTHER POTENTIAL ALTERNATIVES: CONSERVATION MEASURES

HLA is a strong supporter of ongoing sea turtle conservation measures targeted to improve the status and prospects for recovery of Pacific loggerhead and leatherback populations. It is essential that these measures be analyzed as part of the proposed action. While HLA does not have any specific concerns regarding the current WPRFMC-sponsored conservation measures, and has no suggestions for alternative conservation measures, we recommend that WPRFMC and NMFS use the NEPA scoping process to explore whether the SEIS should analyze a range of conservation measure alternatives.

In making this suggestion, we are not recommending that the SEIS merely analyze alternative actions with and without conservation measures. Insofar as we are aware, no one would favor elimination of demonstrably beneficial beach conservation measures. Rather, we are suggesting that the scoping process be used to discuss whether there are different or additional conservation measures that should be analyzed in detail in the SEIS as alternative actions. If there are not, then it will be appropriate to state in the SEIS that consideration was given to conservation measures alternatives, but that detailed analysis was not appropriate because additional or different measures were not identified or warranted. For example, if WPRFMC and NMFS determine that the relatively recent sea turtle conservation measures EA remains current and

(...continued)

will be conducted, or when peer-reviewed science may (or may not) demonstrate the viability of the underlying theory, let alone the extent of conservation benefits and fishery effort impacts.



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sufficient, we recommend that the SEIS briefly summarize, incorporate by reference and adopt the findings of the EA.

In sum, as is well-known by all the involved parties, the environmental issue of significance in considering HLA's proposal is the impact of increased fishing effort on loggerhead and leatherback sea turtle survival and recovery. Alternatives that analyze this issue by looking at different levels of fishing effort based upon set limits are appropriate. These alternatives properly frame the one issue of potential environmental significance. For the reasons explained above, the other potential categories of alternatives identified in the NOI do not warrant detailed analysis in the SEIS.⁷

Thank you for considering HLA's comments.

Very truly yours,

Jeffrey W. Leppo

cc: Kitty Simonds, Executive Director WPRFMC
Eric Kingma, NEPA Coordinator WPRFMC
Marcia Hamilton, Economist WPRFMC
Paul Dalzell, Senior Scientist WPRFMC
Irene Kinan, Sea Turtle Coordinator, WPRFMC
Jim Cook, HLA

⁷ In the event that new alternatives not identified in the NOI come under consideration, HLA requests an opportunity to comment on such alternatives.



September 20, 2007

Mr. William L. Robinson
Regional Administrator, Pacific Islands Region
National Marine Fisheries Service
1601 Kapiolani Blvd., Suite 1110
Honolulu, HI 96814

RE: Scoping Comments on HI Swordfish SEIS, 72 Fed. Reg. 46608 (Aug. 21, 2001)

Dear Mr. Robinson:

On behalf of Ocean Conservancy and Caribbean Conservation Corporation and our more than 178,000 combined members and activists worldwide, we submit the following comments in response to the National Marine Fisheries Service's (NMFS) notice of intent (NOI) to prepare a supplemental environmental impact statement (SEIS) for the Hawaii shallow-set swordfish fishery.

As NMFS is well-aware, sea turtles throughout the Pacific are hovering on the brink of extinction due in large part to incidental mortality associated with fishing operations. Fisheries mortality has been especially problematic for Pacific loggerhead and leatherback sea turtles, with nesting population reductions in excess of 80 percent over the last three generations. Both species are protected under the Endangered Species Act (ESA), and the World Conservation Union (IUCN) has listed Pacific loggerheads as "Endangered" and Pacific leatherbacks as "Critically Endangered" on the Red List of Threatened Species. While fisheries mortality is but one in a long list of threats impacting imperiled turtle populations, an evaluation of the relative impact of longline fishing conclude that pelagic longlining is an important source of mortality for sea turtle populations that must be mitigated.¹

As NMFS is also aware, Ocean Conservancy and Caribbean Conservation Corporation have a long history of involvement in working to protect threatened and endangered sea turtles from capture, injury, and death and commercial fisheries. With regard to the Hawaii based shallow set longline fishery in particular, Ocean Conservancy worked to ensure that the fishery operates in a way that does not unduly harm severely depleted Pacific populations of loggerheads and leatherbacks. Beginning in November 1999, a series of court actions governed the management

¹ Crowder, L. B and R.I. Lewison. Putting Longline Bycatch of Sea Turtles into Perspective. 2007. Conservation Biology, Volume 21, No.1, p.79.

of the Hawaii longline fishery, correcting legal errors in the operation of the fishery related to interactions with endangered sea turtles.² NMFS subsequently issued a Biological Opinion pursuant to Section 7 of the ESA which concluded that continued operation of the shallow set fishery would jeopardize the existence of leatherback, loggerhead, and green sea turtles, and amended the FMP to close the Hawaii-based shallow-set longline fishery. When the fishery reopened in 2004, Ocean Conservancy advocated for the use of 18/0 circle hooks and 100% observer coverage, caps on effort and turtle take, and even stronger measures to close the fishery when the cap was reached. In March 2006, the annual hard cap restricting the take of loggerheads to seventeen turtles was reached after the fishery operated for less than three months.³ As of September 17, 2007, fifteen loggerheads have been taken in Hawaii shallow-set longline fishery, only two short of a repeated fishery closure in 2007.

While the number of sea turtle interactions has decreased significantly (89%) since the sea turtle bycatch mitigation measures were imposed on the HI-based swordfish fishery, sea turtle populations remain in critical condition. Given the precarious state of these endangered populations, a continued precautionary management approach is warranted. Indeed, rather than yielding to industry pressure to rollback effective conservation measures, fishery managers should be heeding the latest scientific advice on the highly endangered status of the species and actively investigating strategies to fish more selectively, enhance post-release mortality and gain a greater understanding of these protected resources and their unique ecological niche. Towards that end, we provide the following scoping comments and recommendations on potential regulatory changes to be analyzed in the SEIS:

General NEPA Comments

As an initial matter, Ocean Conservancy and Caribbean Conservation Corporation caution NMFS and the Pacific Council to identify a reasonable and appropriate “purpose and need” for its proposed action when completing its Draft Supplemental Environmental Impact Statement (DSEIS). In 2003, during the reopening of the HI shallow-set longline fishery, Ocean Conservancy commented that the statement of purpose and need for that DEIS were artificially circumscribed and inappropriately limited the range of alternatives considered by the agency. In the current rulemaking process, the purpose and need must, at a minimum, be broad enough to allow consideration of a reasonable range of alternatives. As the swordfish fishery was previously closed due to its adverse impacts on sea turtle populations, it is inappropriate to again call for its expansion without also studying options that would provide more protections for sea turtles.

The alternatives analysis “is the heart of the environmental impact statement.”⁴ It “should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decision maker and the public.” *Id.* Moreover, it should “rigorously explore and objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from detailed study, briefly

² See, e.g., Center for Marine Conservation, et al., v. National Marine Fisheries Service, et al., (Civ. No. 99-00152)(D.Hawaii).

³ 71 Fed. Reg. 14824 (March 24, 2006)

⁴ 40 C.F.R. § 1502.14.

discuss the reasons for their having been eliminated,” § 1502.14(a), and it should “devote substantial treatment to each alternative considered in detail,” 1502.14(b).

We remind the agency of these requirements and implore the agency to move forward with a true analysis of its alternatives and the effects of those alternatives on all aspects of the environment, rather than just charging ahead with the Hawaii Longline Association’s (HLA’s) request to expand fishing opportunities in the Hawaii-based shallow-set longline fishery. NMFS’ legal responsibilities for protecting the marine environment go far beyond the interests of the HLA and the DSEIS must reflect this broad interest in a public and informed decision making process.

Longline Fishing Effort

When the Hawaii shallow-set longline fishery was reopened in 2004, the effort caps presented by the agency were put in place in an effort to create a “model” swordfish fishery that would provide sufficient protections for highly endangered sea turtles. Despite industry complaints, the current cap on effort, which is set at 2120 sets, is not the constraining factor since the fishery has not reached the set limit since the regulations were imposed. Rather, the limit on turtle takes incorporated into the 2004 Biological Opinion’s reasonable and prudent alternative (RPA) necessary to avoid jeopardy to loggerhead and leatherback sea turtles, closed the fishery in 2006.

According to the HLA proposal submitted February 13, 2007, only 2631 shallow sets have been fished since the May 3, 2004 fishery management regulations became effective. Thus, rather than increasing the effort cap, the agency should actually be looking to lower the effort cap to levels consistent with the amount of fishing effort in recent years. The level of turtle take authorized in the 2004 Biological Opinion is based on expected fishing effort related to the annual cap of 2120 shallow sets, and if the turtle take limits rather than the effort limits are being reached consistently, then more turtles are consistently being taken than estimated for the approved level of fishing effort. As noted above, in order for the agency to consider a full range of alternatives as required by NEPA, it should consider a lower effort cap that is more in line with actual fishing effort in recent years.

It is important to note in this discussion, and in further elements of the scoping document, that the process of determining authorized levels of take does not authorize a turtle kill “quota” for the fishery. Rather, the fishery must be analyzed based on expected effort levels to determine whether those levels of effort and expected interaction rates are likely to jeopardize the continued existence of the species. Only if jeopardy is avoided, take incidental to an otherwise lawful activity may then be authorized.

Also on the issue of longline effort, we urge the agency to appropriately study rather than accept blanket assertions about the risk of “transferred effects” if the Hawaii based shallow set fishery takes turtle protective measures. While we are concerned about the transfer of Hawaii effort to other fisheries within the Western Pacific region that do not encourage turtle protective fishing practices, we believe that the industry’s emphasis on “transferred effects” to foreign fleets often goes too far. With the reopening of the shallow set fishery in 2004, we noted that the claims of transferred “market effects” and transferred fishing effort were extremely speculative and unsupported. Indeed, the 2004 DEIS stated, “[n]o specific studies have been completed on this

topic, but it is theorized (and reported anecdotally) that as Hawaii-based longline vessels have vacated their prime swordfishing grounds north of Hawaii, foreign fishing vessels have moved in to fish those areas using shallow-set longline gear.”⁵ Unless further support can be given for this type of statement now, consideration of such effects must be discounted in the analysis of alternatives.

Time/Area Closures

At their April 2007 meeting, the WPFMC’s Pelagics Plan Team (PPT) enumerated a list of outstanding issues that they recommended be investigated prior to amending current suite of management measures in place for the shallow-set longline fishery. Among the concerns they highlighted was the role that changes in the physical oceanography of fishing grounds might play in influencing the rate of interactions between sea turtles and longline vessels. An examination of the oceanographic factors (i.e., sea surface temperature, oceanic fronts or gyres, topography, etc.) related to the occurrence of sea turtles in the region may help identify and characterize important sea turtle foraging habitats and bycatch hotspots. Such information can also inform management decisions regarding appropriate time/area closures and facilitate successful recovery of these critically endangered species.

Studies have also shown that there is substantial temporal and spatial variability with sea turtle bycatch rates. Gear configurations and fishing practices influence this variability as do turtle and vessel movement.⁶ To better understand these variations and develop appropriate and effective bycatch avoidance strategies, the PPT recommended that scientists and fishery managers explore alternatives to adjust the temporal and spatial distribution of swordfish fishing effort in order to avoid turtle takes. Specifically, they asked whether there would be an effect on the temporal distribution of swordfish fishing effort and turtle takes if the start and stop date of the swordfish calendar year were changed. We agree and recommend that these issues be considered and analyzed prior to any regulatory changes.

In the meantime, the proposed time/area closure action alternatives which would impose closures based on sea surface temperature analyses and trends represent a positive first step in developing a better understanding of the relationship between sea turtle/longline interaction rates and oceanographic conditions. Whether closures implemented in-season or pre-season are more appropriate depends largely on the capacity and resources of scientists and fishery managers to make real time adjustments to management and communicate those closures to fishery participants. We believe that time/area closures, used in conjunction with other conservation strategies (i.e., hard caps, observer coverage, effort limits, etc.), are an important tool for fisheries management and the conservation of protected and endangered species. A full range of alternatives for time and area closures should be considered in the DSEIS.

Interaction Hard-Cap for Loggerhead and Leatherback Sea Turtles

⁵ DEIS at 195.

⁶ Crowder, L. B and R.I. Lewison. Putting Longline Bycatch of Sea Turtles into Perspective. Conservation Biology 2007, Volume 21, No.1, p. 81.

The previous biological opinion and DEIS identified hard caps on turtle take as necessary to avoid a jeopardy determination. As such, the swordfish fishery was reopened in 2004 on the conditions of 100% observer coverage and hard caps on turtle takes. In 2006, the fishery was shut down after three months when the loggerhead take limit was reached. Hard caps provide an essential accountability and incentive mechanism and should be a non-negotiable element of the longline management framework. Without such accountability mechanisms, we are likely to enter the treadmill of never-ending consultations, take exceedances, and reinitiations of consultation, without ever truly stopping to determine how we can better manage our fisheries for the protection of endangered species.

Assessment Methodology

In the reopening of the swordfish fishery in 2004, hard caps were considered essential to avoiding a jeopardy determination for both loggerheads and leatherbacks. We believe that calculating takes on a three-year basis would be both unworkable and irrational as it would allow potential take overages to go unaddressed for up to three years at a time. If a hard cap was enforced during the three-year period, it is unclear whether that cap would be for the rest of that year, or for the rest of the three year period. The only turtle protective option here would be to close the fishery for the rest of the three-year period, but we do not find this politically feasible and believe there would be too much pressure to reopen the fishery with claims of economic ruin. For that reason, we believe the precautionary and necessary 1-year cap should be maintained.

Sea Turtle Avoidance Incentives

Bycatch mitigation and sea turtle avoidance is the responsibility of the fishery, therefore individual take statements are neither appropriate nor consistent with the ESA. Whereas the Magnuson-Stevens Fishery Conservation and Management Act (MSA) is intended to “prevent overfishing while achieving...optimum yield,” the ESA requires that actions be “not likely to jeopardize the continued existence” of ESA-listed species. In other words, under the MSA limits serve as mortality targets to be “optimized” while take limits imposed under the ESA are thresholds to be avoided. As such, transferable individual take statements improperly treat sea turtle take limits as quotas to be allocated, traded and optimized among fishery participants. The ESA does not focus on such actions of individual actors, but rather on the federal process that permits those actions. As such, it is the federal fishery authorization process as a whole that is responsible for staying below authorized take levels.

Observer Coverage

The proposed range of alternative inappropriately combines two related but distinct issues which should be evaluated separately. The first issue involves the amount of observer coverage that is necessary to achieve conservation, data collection and enforcement goals. The second issue has to do with who should pay for observer coverage.

Regarding the first issue, 100% observer coverage was a mandatory condition of the fishery being reopened in 2004. Observers play an essential role in data collection and monitoring and

serve as an important deterrent to would-be bad actors. Scientists, industry representatives, and fishery managers alike have raised repeated concerns about certain vessels attempting to circumvent conservation regulations at the expense of the fishery as a whole. Given the history of the fishery and the vulnerability of sea turtles and other bycatch species, fishery managers should require no less than 100% observer coverage.

With regards to the second issue concerning the costs of the observer program, we believe that there should be full cost recovery and that industry should bear the cost of an onboard observer program. Indeed, fish are a public resource and the ability to harvest that resource for profit is a privilege and not an entitlement. In the interest of equity and capacity control, the cost of an onboard observer program should be born by the industry in exchange for the privilege to fish.

Other Issues and Concerns

Analyze and compile data regarding the age composition of sea turtles taken in pelagic longline fisheries. Studies have shown that pelagic longline fisheries negatively influence sea turtle population growth due to the disproportionate impact on older, reproductively valuable age classes.⁷ “Although bycatch rates from individual longline vessels are extremely low, the amount of gear deployed by longline vessels suggests that cumulative bycatch of turtles from older age classes is substantial.”⁸ Indeed, an estimated 200,000 loggerheads and 50,000 were taken as bycatch in pelagic longline fisheries in 2000.⁹ A better understanding of the age composition and the population-level impact of sea turtles taken in pelagic longline fisheries is central to the development of a more comprehensive and effective recovery strategy.

Post-release mortality data. We support efforts to investigate means to understand and reduce post-release mortality of sea turtles caught on longlines. At the same time, we urge fishery managers to focus on minimizing takes since we still do not fully understand the effects of non-fatal captures and the associated health issues that may arise as a result of multiple recapture. The Atlantic longline fishery recently moved to more of a mortality-based approach based largely on unverified and unenforceable assumptions about the amount of gear fishermen would remove from the turtles. With 100% observer coverage, this sort of approach is more tenable, but still unwarranted given the need for a precautionary approach

Investigate additional sea turtle avoidance strategies. Recent studies indicate that the probability of catching sea turtle is greater in a set that follows a set where a turtle was caught.¹⁰ As such, enhanced fleet communication and coordination and protocols to guide individual vessel behavior following interactions with sea turtles, should be developed and evaluated as part of the SEIS process.

⁷ Crouse, D.T., L.G. Crowder, and H. Caswell. 1987. A stage-based population model for loggerhead sea turtles and implications for conservation. *Ecology* 68: 1412-1423; Heppell, S.S. 1998. An application of life history theory and population model analysis to turtle conservation. *Copeia* 1998: 367-375.

⁸ Crowder, L. B and R.I. Lewison. Putting Longline Bycatch of Sea Turtles into Perspective. 2007. *Conservation Biology*, Volume 21, No.1, p.79.

⁹ Lewison, R.L., S.A. Freeman and L.B. Crowder. 2004. Quantifying the effect of fisheries on threatened species: the impact of pelagic longlines on loggerhead and leatherback sea turtles. *Ecology Letters* 7:221-231.

¹⁰ Gilman, A.B., D. Kobayashi, T. Swenarton, N. Brothers, P. Dalzell, I. Kinan-Kelly. Reducing sea turtle interactions in the Hawaii-based longline swordfish fishery. 2007. *Biological Conservation* 139, 19-28.

Evaluate the impact of seabird bycatch mitigation measures on sea turtle capture rates. To avoid the incidental capture of seabirds, the Hawaii shallow-set fishery is required to employ seabird bycatch mitigation measures including blue-dyed bait and night-setting. Whether these seabird avoidance strategies also influence sea turtle interaction rates requires further investigation, however initial observations indicate that while blue-dyed bait does not significantly influence the rate of turtle capture, the night setting requirement may affect turtle capture rates. Of even greater concern is evidence that suggests that some fishing vessels actively conceal turtle interactions from on-board observers by jettisoning them on branch lines. If there is in fact a greater level of turtle take and mortality than is captured by observer records, it is crucial that scientists and fishery managers incorporate that information into their assessments and management evaluations.

Expand the scope of the hard cap provision to include all sea turtles that interact with pelagic longlines. In the 2004 Proposed Rule, NMFS considered two variations on sea turtle interaction limits for the shallow-set fishery: (1) a hard cap option for *all* species that would close the fishery when ITS levels were reached or (2) a no-limit option that would only require reinitiation of consultation when ITS levels were reached.¹¹ While the agency properly rejected the no-limit option because it “might fail to adequately minimize adverse impacts on sea turtles,” it improperly narrowed its protection to only leatherbacks and loggerheads on the asserted justification that a broader hard cap “would likely result in the shallow-set component of the fishery being closed more often than is needed to adequately mitigate adverse impacts on sea turtles.”¹² Rather than provide a justification for limiting the hard cap to leatherbacks and loggerheads, this statement highlights the risk the action agency sees as inherent in operating the fishery and signals the need to invoke the same mechanisms to protect each of these endangered and threatened species. We recommend that SEIS include alternatives that strengthen and apply the same level of protection to *all* species of sea turtles that may interact with pelagic longlines in Hawaii.

Apply bycatch mitigation measures to the Hawaii deep-set long line fishery. Scientists caution that “[e]ven if pelagic longlines are not the largest single source of fisheries-related mortality, longline bycatch is certainly high enough to warrant management action in *all* fleets that encounter vulnerable turtles.”(Emphasis added)¹³ While we commend fishery managers for taking the necessary steps to protect loggerhead turtles through the emergency closure of the shallow-set fishery in 2006, we remain concerned that the current suite of sea turtle bycatch mitigation measures does not extend to the deep-set longline fleet. Although the interaction rate for the deep-set fishery is lower than that for the shallow-set fishery, the high levels of mortality for those turtles that are taken in this expanding fishery is cause for concern. In 2005, more 9.3 million hooks were retrieved in the deep set fishery, as compared with 1.3 million hooks that year in the shallow set fishery. Indeed, predictions of leatherback takes increased from the 2001 Biological Opinion estimate of 8 interactions and 3 mortalities to 18 interactions and 7 mortalities in the 2004 Biological Opinion. Such an increase in the take of a species that NMFS

¹¹ 69 Fed. Reg. 4098, 4102/2 (Jan 28, 2004).

¹² Id.

¹³ Crowder, L. B and R.I. Lewison. Putting Longline Bycatch of Sea Turtles into Perspective. Conservation Biology 2007, Volume 21, No.1, p. 83.

called “critically endangered” and assessed as having “either high risks of extinction in a single human generation...or...a high risk of declining to levels where more precipitous declines become almost certain” is not justifiable.¹⁴

We recommend that the deep-set fishery be required to use large circle hooks to reduce sea turtle interactions and post-release mortality, as the majority of sea turtles perish when captured at depth. In addition, the fishery should eliminate shallower branch lines on its deep-set gear and incorporate new deep setting techniques to reduce sea turtle bycatch. Recent studies which employed a new deep-setting technique using weighted lines to eliminate shallow set hooks (< 100m) in the deep set longline fishery have proven successful at reducing bycatch without jeopardizing bigeye tuna catch rates.¹⁵

Develop a coordinated management framework for pelagic fisheries with the Pacific Fishery Management Council. In 2004, NMFS imposed a moratorium on pelagic longline fishing east of 150 degrees West longitude to guard against jeopardy to loggerheads even after the Pacific Fishery Management Council banned longlining west of 150 degrees West longitude. These far reaching closures demonstrate just how vulnerable sea turtles are to the impacts of longline fishing. The conservation community has repeatedly called for more coordinated management between the Western Pacific and Pacific fishery management councils and a comprehensive evaluation of the impacts of all U.S. longlining in the Pacific on imperiled sea turtle populations, yet these essential steps still have not occurred. The Hawaii and California based fleets fish in the same manner, often in the same area, and catch the same turtles.¹⁶ In addition, the fleets consist of many of the same boats as they have had a history of moving back and forth to avoid the closures to protect sea turtles that have alternated between Hawaii and California in recent years. Indeed, scientists warn that, “[t]he critical issue for an individual turtle is the likelihood of capture across an ocean region, not capture by a particular nation. With multiple fleets deployed the cumulative effects of pelagic longlines across fleets in large ocean regions must be taken into account.”¹⁷

At the same time that fishery managers in the Western Pacific are considering rolling back critical bycatch mitigation measures in their swordfish fleet, fishermen and fishery managers are actively pursuing the establishment of a shallow-set longline fishery off the U.S. west coast. Should both efforts be successful, the likely result would be a net increase in longline fishing effort Pacific-wide and jeopardy determinations for many species of sea turtles. Any proposed changes to the status quo management regime for longlining in Hawaii and along the U.S. west coast, should be well-vetted by both Councils before time and resources are expended. Absent better communication and coordination, pelagic longline fisheries be subject to even greater constraints and the sea turtle recovery efforts may be irreversibly compromised.

¹⁴ 2004 Draft BiOp at 90.

¹⁵ Beverly, S., C. Curran, and M. Musyl, Reducing bycatch with a deep set longline technique in Hawaii’s Tuna Fishery, Presented at the 58th Tuna Conference “Regime shifts and effective management in a pelagic ecosystem,” May 2007.

¹⁶ 2004 Draft BiOp at 90

¹⁷ Crowder, L. B and R.I. Lewison. Putting Longline Bycatch of Sea Turtles into Perspective. Conservation Biology 2007, Volume 21, No.1, p. 81.

Non-Fishery Conservation Measures. Under the ESA, NMFS has a duty to use its authority and all of its programs to provide for the conservation of endangered and threatened species. In light of this statutory command, Ocean Conservancy and Caribbean Conservation Corporation strongly support both domestic and international conservation measures that will help reverse the decline of Pacific sea turtle populations and promote their recovery. Conservation measures may take the form of nesting beach and foraging ground protection, education, and community involvement in conservation, all of which have been endorsed by WPFMC.

It would not, however, be appropriate (or consistent with Section 7(a)(2) of the Endangered Species Act) to consider these conservation measures as offset measures or otherwise justify a higher level of authorized incidental take. Despite strong scientific backing, the ultimate effect of such measures on turtle populations is, at this point, entirely speculative. While we certainly hope that they will result in larger populations of turtles in the future, predictions that larger numbers of nests and eggs will be saved cannot be used to allow takes of *any* existing turtles, let alone mature animals. For example, the recovery of the Kemp's Ridley turtle is the result of decades of conservation of primary nesting habitat in Mexico *and* full implementation of measures to protect these animals from drowning in shrimp trawls. Only by focusing on reducing mortality throughout the range of these species and at all stages of life will NMFS be able to affect recovery.

If current fishing practices continue, scientists predict that the extinction of Pacific leatherback sea turtles within the next 10-30 years is imminent.¹⁸ More selective fishing practices can help avert this alarming decline, but it will depend on efforts at both the national and international level. Whether researching and developing more selective and innovative fishing practices and gear technologies or compelling greater international and regional collaboration, the United States, indeed Hawaii, plays an important leadership role in the global fishing community. As such, we strongly encourage WPFMC and NMFS to lead by example and to develop strong conservation measures that promote ecosystem health and ensure the recovery vulnerable sea turtle populations. We appreciate your consideration of these comments and your efforts to protect threatened and endangered sea turtle populations.

Sincerely,

Meghan Jeans
Pacific Fish Conservation Manager
Ocean Conservancy

Marydele Donnelly
Director of International Policy
Caribbean Conservation Corporation

¹⁸ Nature 405, June 2000

**Via Electronic Mail**

September 20, 2007

Mr. William G. Robinson
Regional Administrator
Pacific Islands Region, NMFS
1601 Kapiolani Blvd., Suite 1110
Honolulu, HI 96814
E-mail: HILonglineScoping@noaa.gov

RE: Scoping Comments on Hawaii Swordfish SEIS.

Dear Mr. Robinson:

The Center for Biological Diversity, Oceana, and Sea Turtle Restoration Project/Turtle Island Restoration Network submit these comments regarding the National Marine Fisheries Service's ("NMFS") notice of intent to prepare a supplemental environmental impact statement ("SEIS") and notice of scoping process regarding the Hawaii-based shallow-set pelagic longline fishery in the western Pacific. 72 Fed. Reg. 46608 (August 21, 2007). We believe that any relaxation of the current restrictions on pelagic longlining will unlawfully harm species protected under the Endangered Species Act ("ESA") (16 U.S.C. § 1531 *et seq.*), the Migratory Bird Treaty Act ("MBTA") (16 U.S.C. § 706 *et seq.*), and Marine Mammal Protection Act ("MMPA") (16 U.S.C. § 1361 *et seq.*). In particular, actions such as increasing the number of allowed shallow-set longline sets, discontinuing caps on sea turtle interactions, and reducing observer coverage would result in increased, unsustainable mortality to the critically endangered Pacific leatherback. While changes in fishing technology have reduced the number of lethal interactions between leatherbacks and shallow-set pelagic longline gear, there is no such thing as a truly "turtle-safe", zero-mortality longline fishery. Given that NMFS has already determined that *any* additional fishery-induced mortality of Pacific leatherback will jeopardize the species' continued existence, we urge that NMFS focus its analysis in the SEIS on alternatives that offer maximum protection to the leatherback as well as other protected species such as loggerhead sea turtles, sea birds, and marine mammals.

Bycatch in Pelagic Longline Fishing

Pelagic longline fishing involves the use of a monofilament line that stretches from 20 to upwards of 60 miles from a vessel and is set to given depth depending on the target species. Attached to the longline are additional lines to which are attached weights and baited hooks. A single longline fishing vessel may deploy several thousand hooks at one time.

In addition to the target species, usually swordfish, tunas, and sharks, longline gear catches non-target and undersized fish, sharks, sea turtles, marine mammals, and seabirds. Sea turtles, marine mammals, and seabirds all get caught on the baited hooks of longlines, or are entangled in the lines, and being air breathers, subsequently drown. Those that do not immediately drown often suffer serious injury, such as hook ingestion, condemning them to a slower death by starvation, internal bleeding, or infection.

Current Measures Are Insufficient to Meet Endangered Species Act Requirements to Protect Endangered Sea Turtles, Therefore NMFS Should Focus Its Efforts on Increasing Protections

Any expansion of shallow-set pelagic longlining effort would likely jeopardize the continued existence of at least two ESA-listed species, the Pacific leatherback and loggerhead sea turtles. Section 2(c) of the ESA establishes that it is "...the policy of Congress that all Federal departments and agencies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this Act." 16 U.S.C. § 1531(c)(1). The ESA defines "conservation" to mean "...the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this Act are no longer necessary." 16 U.S.C. § 1532(3). Similarly, Section 7(a)(1) of the ESA directs that the Secretary review "...other programs administered by him and utilize such programs in furtherance of the purposes of the Act." 16 U.S.C. § 1536(a)(1). Rolling back measures critical to the protection of threatened and endangered species – particularly when available evidence indicates that fishery bycatch poses a serious threat their existence – would violate the ESA's statutory directive to conserve listed species. Indeed, if anything, the ESA requires that NMFS do *more* to ensure that species on the brink, such as the Pacific leatherback, not only continue to survive but recover.

Section 7(a)(2) of the ESA requires federal agencies to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the adverse modification of habitat of such species . . . determined . . . to be critical" 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). To accomplish this goal, agencies must consult with the delegated agency of the Secretary of Commerce or Interior whenever their actions "may affect" a listed species. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.14(a). Where, as here, NMFS is both the acting agency and the delegated wildlife agency for purposes of many of the listed species in question, different branches of NMFS must undertake internal consultation with each other. Additionally, NMFS must consult with the U.S. Fish and Wildlife Service in impacts to the endangered short-tailed albatross.

At the completion of consultation NMFS issues a Biological Opinion that determines if the agency action is likely to jeopardize the species. If so the opinion must specify a Reasonable and Prudent Alternative ("RPA") that will avoid jeopardy and allow the agency to proceed with the action. 16 U.S.C. § 1536(b). An agency's duty to avoid jeopardy is continuing, and "where discretionary Federal involvement or control over the action has been retained or is authorized by

Mr. William G. Robinson, Regional Administrator
Pacific Islands Region, NMFS
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law,” the agency must in certain circumstances reinitiate formal consultation. 50 C.F.R. § 402.16.

The parameters within which this fishery currently operates, and which NMFS now proposes to reassess, are the product of years of analysis, controversy, and concern over the dire impacts that longlining poses to Pacific leatherbacks and loggerhead sea turtles. In 2001, NMFS determined that the operation of the western Pacific pelagic longline fishery without the current gear and effort restrictions and without 100% observer coverage would jeopardize the continued existence of leatherback, loggerhead, and green sea turtles. NMFS, Biological Opinion on Authorization of Pelagic Fisheries Under the Fishery Management Plan for the Pelagic Fisheries of the Western Pacific Region (2001) at 120-24, 136 (green turtles); 124-29, 136 (leatherbacks); 129-32, 136 (loggerheads). As a result, NMFS prohibited shallow-set longline fishing north of the equator and placed additional restrictions on deep-set longlining, including time-area closures. *Id.* at 138-40.

NMFS reopened the Hawaii-based swordfish fishery in 2004, when it issued a “no jeopardy” biological opinion on impacts to listed sea turtles authorizing the fishery to operate under the constraints listed in the NMFS scoping notice. 72 Fed. Reg. 46608, 46609. Later that year, the U.S. Fish and Wildlife Service issued a “no jeopardy” opinion on the impacts on short-tailed albatross of the shallow-set longline fishing operations permitted under the sea turtle biological opinion. FWS, Biological Opinion on the Effects of the Reopened Shallow-Set Sector of the Hawaii-Based Longline Fishery on the Short-Tailed Albatross (2004) at 65.

NMFS’s scoping notice reports that the incidental capture of sea turtles by the shallow-set longline fishery has declined by 89% compared to historic capture rates, presumably because of the protective measures that have been implemented in recent years.¹ 72 Fed. Reg. 46608, 46609. This decline indicates that those measures have likely been somewhat effective in reducing the fishery’s impact on imperiled turtle species.² It does not, however, indicate that more stringent protective measures are unnecessary or that existing measures are no longer necessary. In fact, available data on the status of sea turtle species, especially the Pacific leatherback, show that strong protective measures have never been more critical to ensuring the species’ survival.

Numbering over 100,000 nesting females as recently as the 1980s, the species is in rapid decline with current estimate of only 2,000-5000 nesting females. Lewison, R. *et al.*, (2004) Quantifying the effects of fisheries on threatened species: the impact of pelagic longlines on loggerhead and leatherback sea turtles, *Ecology Letters* 7:221. In 2000, an article published in the preeminent scientific journal *Nature*, predicted extinction of leatherbacks in the Pacific within decades. Spotila *et al.* (2000), Pacific leatherback turtles face extinction, *Nature* 405:529-

¹ NMFS does not report whether there has been any change during this time period in the number of sea birds and marine mammals seriously injured or killed by the pelagic longline fishery.

² We hope the observed decline in interactions is in fact a result of the gear being more selective rather than an artifact of the simple fact that populations of leatherback and loggerhead sea turtles in the Pacific continue to decline and there are simply few turtles in the water for the fishery to interact with.

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530. The primary cause of the leatherback decline, and the greatest threat to its continued existence, is entanglement and drowning in longline fishing gear. *Id.* The leatherback sea turtle is listed as endangered under the ESA throughout its range.

In its 2001 longline biological opinion, NMFS concluded that the mortality of up to 57 leatherbacks per year in the Hawaii longline fishery would

appreciably reduce the leatherback sea turtles' likelihood of surviving and recovering in the wild, particularly given the status and trend of leatherback turtle populations in the Pacific basin. Based on published estimates of nesting female abundance, leatherback populations have collapsed or have been declining at all major Pacific basin nesting beaches for the last two decades.

NMFS 2001 BiOp at 125.

In another relevant biological opinion concerning the impacts of fishing on Pacific leatherbacks, NMFS found that Pacific leatherback populations have continued their worrisome decline and concluded that

....any additional impacts to the western Pacific leatherback stocks are likely to maintain or exacerbate the decline in these populations. This would further hinder population persistence or attempts at recovery as long as mortalities exceed any possible population growth, which appears to be the current case, appreciably reducing the likelihood that western Pacific leatherback populations will persist. Additional reductions in the likelihood of persistence of western Pacific leatherback stocks are likely to affect the overall persistence of the entire Pacific Ocean leatherback population by reducing genetic diversity and viability, representation of critical life stages, total population abundance, and metapopulation resilience as small sub-populations are extirpated. These effects would be expected to appreciably reduce the likelihood of both the survival and recovery of the Pacific Ocean population of the leatherback sea turtle.

NMFS, Biological Opinion on CA-OR Drift Gillnet Fishery (2000) at 94 (emphasis added).

Given NMFS's acknowledgment that any additional mortality to Pacific leatherbacks threatens the species' very existence, and the fact that even with current protective measures the shallow-set longline fishery continues to take leatherbacks, NMFS may not permit changes to this fishery that will increase the number of leatherbacks harmed or killed by the fishery. To the contrary, the ESA requires that NMFS do more to save these creatures from the brink of extinction and move them towards recovery. *See, e.g., Nat'l Wildlife Fed'n v. NMFS*, 481 F.3d 1224, 1236-38, (9th Cir. 2007) ("jeopardy" includes impacts to recovery as well as survival and NMFS may not permit further impacts to a species already in jeopardy, regardless of whether the activity at issue is the cause of the baseline jeopardy).

Finally, as discussed in the MMPA section below, the current fishery is known to entangle and kill ESA-listed marine mammals. Such take must be authorized under both the ESA and MMPA. At present it is authorized under neither statute. Therefore the fishery, its participants, NMFS, and the Council are operating in knowing violation of these laws and subject to civil and criminal penalty there under. Any expansion of the fishery which would increase the likelihood of such take would similarly be illegal.

Any Expansion of the Hawaii Longline Fishery Would Violate the Marine Mammal Protection Act

The current Hawaii-based pelagic longline fishery hooks, entangles and kills ESA-listed marine mammals as well as numerous non-listed marine mammal species. It must therefore be operated in a manner consistent with the procedural and substantive mandates of the ESA and MMPA or not at all. The pelagic longline fishery is currently operating without any take authorization for ESA-listed marine mammals. Take can be authorized via an Incidental Take Statement issued pursuant to the ESA only if such take is also authorized pursuant to Section 101 of the MMPA. No such take authorization has ever been granted for this fishery. Nevertheless, observer data from the 2001, 2002, and 2004 document entanglement of humpback whales. Take of sperm whales has also been observed. None of this take was authorized under the ESA or the MMPA and therefore occurred in violation of both statutes. Continued operation of the longline fishery, and certainly any changes allowing an increase in effort, violates the provisions of the ESA and MMPA prohibiting such take.

The continued authorization of the pelagic longline fishery and any proposed expansion also violate the unambiguous command of the MMPA that all fisheries "shall reduce incidental mortality and serious injury of marine mammals to insignificant levels approaching a zero mortality and serious injury rate" by April 30, 2001. 16 U.S.C. § 1387(b)(1). NMFS has defined ZMRG by regulation as ten percent of Potential Biological Removal ("PBR"). The pelagic longline fishery's take of marine mammal species remains well above this threshold. For example, in the 2007 Draft Pacific Stock Assessment Reports the fishery was estimated to seriously injure or kill 4.9 false killer whales each year, in excess of a ZMRG level of 0.2 animals per year and above the PBR of 2.4 animals per year. Similarly, take of the short-finned pilot whale is not just above ZMRG, but almost at PBR. Take of humpback whales also remains well above 10% of PBR, thereby exceeding the definition of ZMRG. Because April 30, 2001 has come and gone without the fishery reaching ZMRG, the continued authorization, or any expansion, of the fishery violates the MMPA

Under the MMPA, NMFS must develop and implement a take reduction plan ("TRP") for any strategic marine mammal stock that interacts with a commercial fishery known to cause frequent or occasional incidental mortality and serious injury to marine mammals. 16 U.S.C. § 1387(f)(1). The TRP must aim to reduce incidental mortality and serious injury of marine mammals in both the short- and long-term. The plan must contain measures to reduce incidental mortality and serious injury within six months of its implementation to levels less than the PBR level established for the particular stock under MMPA section 117. The plan must also aim to

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reduce, within five years of implementation, incidental mortality and serious injury of the marine mammal stock to insignificant levels approaching zero. 16 U.S.C. § 1387(f)(2).

Though the Hawaii pelagic longline fishery is known to seriously injure and kill numerous marine mammal species, including at least two strategic stocks, humpback whales and false killer whales, NMFS has yet to convene a take reduction team to develop take reduction plans for any of these species. Data from 2000-02 show that this fishery injured or killed humpback whales, Risso's dolphins, short-finned pilot whales, false killer whales, and spotted, spinner, and common dolphins. NOAA Fisheries Western Pacific Fisheries Bycatch Overview, available at <http://www.nmfs.noaa.gov/bycatch-chart.html>. NMFS must undertake the take reduction planning process, including implementation of measures to *reduce* incidental take, before taking any action that would increase the serious injury or mortality of marine mammals in this fishery.

NMFS's scoping notice does not report the numbers of marine mammals that have been seriously injured or killed in recent years by this fishery, nor is this information available on its website. NMFS must consider data on marine mammal bycatch both before and since the current protective measures were put into place, and must determine whether these numbers represent permissible levels of take under the MMPA. If current fishing operations result in levels of incidental take at or above PBR or ZMRG (which all available evidence indicates they do), NMFS may not alter the fishery requirements in such a way as to increase serious injury or mortality of the affected marine mammal stocks.

The Existing Hawaii-Based Pelagic Longline Fishery Violates the Migratory Bird Treaty Act

Even without any relaxation of protective measures, the current Hawaii-based pelagic longline fishery operates in violation of the MBTA. Section 2 of the MBTA provides that "it shall be unlawful at any time, *by any means or in any manner,*" to, among many other prohibited actions, "pursue, hunt, take, capture, [or] kill" any migratory bird included in the terms of the treaties. 16 U.S.C. § 703 (emphasis added). The term "take" is defined as to "pursue, hunt, shoot, wound, kill, trap, capture, or collect." 50 C.F.R. § 10.12 (1997). A number of species included in the list of migratory birds protected by the MBTA are taken in the Hawaii-based pelagic longline fishery, including Laysan's albatross and black-footed albatross. See 50 C.F.R. § 10.13 (list of protected migratory birds). The MBTA imposes strict liability for killing migratory birds, without regard to whether the harm was intended. Its scope extends to harm occurring "by any means or in any manner," and is not limited to, for example, poaching. See *e.g.*, *U.S. v. Moon Lake Electric Association*, 45 F. Supp. 2d 1070 (1999) and cases cited therein. Indeed, the federal government itself has successfully prosecuted under the MBTA's criminal provisions those who have unintentionally killed migratory birds. *E.g.*, *U.S. v. Corbin Farm Service*, 444 F. Supp. 510, 532-534 (E. D. Cal. 1978), *aff'd*, 578 F.2d 259 (9th Cir. 1978); *U.S. v. FMC Corp.*, 572 F.2d 902 (2nd Cir. 1978). The MBTA applies to federal agencies such as NMFS as well as private persons. See *Humane Society v. Glickman*, No. 98-1510, 1999 U.S. Dist. LEXIS 19759 (D.D.C. July 6, 1999), *affirmed*, *Humane Society v. Glickman*, 217 F.3d

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882, 885 (D.C. Cir. 2000) (“There is no exemption in § 703 for farmers, or golf course superintendents, or ornithologists, or airport officials, or state officers, or federal agencies.”).

Following *Glickman*, FWS issued Director’s Order No. 131, confirming that it is FWS’s position that the MBTA applies equally to federal and non-federal entities, and that “take of migratory birds by Federal agencies is prohibited unless authorized pursuant to regulations promulgated under the MBTA.” MBTA Section 3 authorizes the Secretary of the Interior to “determine when, to what extent, if at all, and by what means, it is compatible with the terms of the conventions to allow hunting, take, capture, [or] killing . . . of any such bird.” 16 U.S.C. § 704. FWS may issue a permit allowing the take of migratory birds if consistent with applicable treaties, the statute, and FWS regulations. However, NMFS has not even applied for, much less obtained, such a permit authorizing any take by the Hawaii-based pelagic longline.

NMFS cannot dispute that this fishery kills birds protected under the MBTA. We believe that until such take is permitted, NMFS cannot lawfully allow any fishing that is likely to result in death of such species. NMFS’s contention that “the MBTA applies only in nearshore waters, i.e., from the shoreline seaward to three nautical miles offshore” does not withstand legal scrutiny. 70 Fed. Reg. 75075, 75076 (December 19, 2005) (response to comments on measures to reduce bycatch of sea birds in Hawaii pelagic longline fishery). As NMFS is or should be aware, a 2001 Interior Solicitor’s Opinion concluded that the MBTA does, in fact, apply in the U.S. EEZ. Therefore, NMFS must obtain a permit in order to bring the fishery into compliance with the MBTA before allowing *any* fishing that would result in the take of MBTA-listed sea birds. In addition, in the context of this scoping process, NMFS should focus on alternatives that will decrease bycatch of migratory birds.

NMFS Should Focus Its NEPA Analysis on Alternatives That Offer Greater Protection to Listed Species

NMFS’s scoping notice lists a number of alternatives to be considered in its SEIS on the Hawaii-based shallow-set pelagic longline fishery. 72 Fed. Reg. at 46609. Most of these alternatives relate either to maintaining the status quo (i.e., current restrictions) or implementing less stringent requirements. However, NMFS must also consider alternatives that are *more* protective than the current management regime. This is particularly crucial in light of several factors: (1) the continued take of Pacific leatherback and loggerhead sea turtles and the species concomitant decline; (2) NMFS’s authorization of this fishery in violation of MBTA requirements; and (3) NMFS’s failure to convene a take reduction team for marine mammal species affected by this fishery.

Foremost among the protective alternatives NMFS should consider is an immediate moratorium on pelagic longline fishing in the Pacific until measures can be implemented that effectively protect the leatherback. Over 1,000 scientists from more than 100 countries and 300 non-governmental organizations from 62 countries have already called upon the U.N. to institute such a moratorium. See <http://www.seaturtles.org/pdf/master.UNscientistltr10.FINAL.pdf> (scientist petition); <http://www.seaturtles.org/pdf/master.NGOltr.FINAL.pdf> (NGO petition).

This alternative clearly has scientific support and, at a minimum, should be given careful consideration.

We offer specific comments on each category of alternatives offered by NMFS below.

1. *Longline Fishing Effort*

At a minimum, NMFS must not exceed the current limit on longline fishing effort of 2,120 sets per year. In light of the fishery's impacts to the critically endangered Pacific leatherback and loggerhead sea turtles, NMFS should consider *lowering* this effort limit or eliminating longline fishing altogether until methods are found to entirely eliminate incidental harm to leatherback and loggerhead sea turtles. Alternatives that would increase or even remove the effort limit are inconsistent with ESA, MBTA, and MMPA requirements.

2. *Time-Area Closures*

Implementation of time-area closures based on sea surface temperature data or a combination of sea surface temperature data and turtle distribution data hold some promise of offering increased protection for these species. These alternatives deserve careful analysis. NMFS should also consider data on seabird and marine mammal distribution, as well as data concerning the location of seabird and marine mammal interactions with the longline fishery to determine whether time area closures would benefit these species as well.

3. *Interaction Hard Cap for Loggerhead and Leatherback Sea Turtles*

NMFS should maintain an interaction hard cap for loggerhead and leatherback sea turtles. Removing these caps would cripple NMFS's ability to ensure even minimal protection for these species. Rather than abandoning these caps, NMFS should consider lowering these caps to reflect the imperiled status and declining population trend of both species. Similar caps should be placed on marine mammals and seabird.

4. *Fishery Participation*

As with the interaction hard caps, set certificates provide an important means for NMFS to track longline fishing effort and enforce applicable limits. Set certificates should be maintained.

5. *Assessment Methodology*

NMFS should maintain an annual cap on fishery interactions with loggerhead and leatherback turtles. Instituting a multi-year cap may allow increased take of turtles in the immediate future, while allowing fewer takes in subsequent years. The Pacific leatherback population cannot sustain even a temporary increase in take, which would likely result both in the direct removal of nesting females from the population as well as the removal of their

reproductive potential. NMFS should focus its analysis on ways to eliminate fishery interactions with leatherbacks in all years.

6. *Sea Turtle Avoidance Incentive*

Transferable individual vessel limits for interactions with loggerhead and leatherback sea turtles, as well as individual vessel limits that, if exceeded, would preclude the vessel from fishing for a certain fishing period could offer increased protection if the programs were properly structured. NMFS should examine these alternatives carefully to ensure, for example, that the number of permissible sea turtle interactions allocated to each vessel result in greater cumulative protection to the turtles rather than greater cumulative permitted interactions. In addition, NMFS should consider the feasibility of effectively tracking individual vessel limits, sea turtle interactions, and transfers.

7. *Observer Coverage*

NMFS should maintain 100% observer coverage. Complete observer coverage will be especially vital if NMFS chooses to issue individual vessel limits for turtle interactions, as there is no other way to verify that a vessel has or has not met its limit. Observer data is also critical to enforcing limits on overall fishery turtle takes, effort, and any time-area closures that NMFS implements in the future. Accurate and complete data on loggerhead and Pacific leatherback data is absolutely essential if NMFS is to fulfill its duty to ensure that the fishery does not threaten the survival and recovery of these species.

With regard to the cost of observer coverage, we believe it is appropriate that the fishing industry pay all on-board observer costs associated with monitoring this fishery. The fishing industry benefits from the harvest of a common resource (swordfish) and, in doing so, causes incidental harm to other common resources (sea turtles, seabirds, and marine mammals). Observer coverage has allowed the fishery to keep operating and benefiting from these resources. Therefore, the industry should pay for observer coverage as part of the cost of exploiting the common resource.

Conclusion

In assessing alternatives for managing the Hawaii-based shallow-set pelagic longline fishery, NMFS must give careful consideration and appropriate weight to alternatives that will provide more protection to species protected under the ESA, MMPA, and MBTA. While current restrictions on this fishery have decreased its direct impact on sea turtles, the fishery remains a grave threat to the Pacific leatherback and loggerhead and its true impact on marine birds and mammals remains largely unknown. This lack of knowledge stems in part from NMFS's failure to secure a permit for the fishery under the MBTA and to convene a take reduction team to minimize marine mammal take under the MMPA. Put plainly, the current pelagic longline fishery violates the law. The fishery may not expand or operate under relaxed restrictions when the current management does not even meet applicable legal requirements.

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Moreover, the ESA requires that NMFS accord the highest priority to protecting endangered species like the Pacific leatherback. NMFS may not allow the pelagic longline fishery to operate in a manner that deepens the leatherback's jeopardy, even if that means prohibiting longline fishing altogether. We therefore urge that NMFS consider placing a moratorium on longline fishing in the Pacific until such time as it finds and demonstrates fishing technologies that do not result in injury or death of leatherbacks.

Sincerely,



Andrea A. Treece
Center for Biological Diversity