

NORTHWESTERN HAWAIIAN ISLANDS CORAL REEF ECOSYSTEM RESERVE
RESERVE ADVISORY COUNCIL

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WESPAC

September 8, 2022

John Armor, Director
NOAA Office of National Marine Sanctuaries
1305 East-West Highway, 11th Floor
Silver Spring, MD 20910

Re: RAC recommendations regarding WPRFMC draft fishing regulations for
Sanctuary Designation.

Aloha mai Director Armor,

The Northwestern Hawaiian Islands Coral Reef Ecosystem Reserve (NWHICRER) Advisory Council (RAC) herein provides recommendations for draft fishing regulations for the proposed national marine sanctuary in the Northwestern Hawaiian Islands in response to those provided by the Western Pacific Regional Fishery Management Council (WPRFMC) on March 22, 2022.

These recommendations were drafted by the RAC's Planning, Evaluation, and Sanctuary Designation (PES) subcommittee after thorough analysis of WPRFMC's proposal. They were discussed and deliberated on by the PES subcommittee before being presented to the RAC for consideration at its August 31, 2022 meeting. After thorough discussions, the RAC decided by consensus vote to forward them to ONMS through the Monument and Reserve Superintendent. Please see WPRFMC's March 22nd letter and draft regulations attached, for comparison.

We recognize that the WPRFMC has started revisions with some changes having already been made, and that further modifications may occur at the upcoming Council meeting on September 20–22, 2022. The RAC wishes to acknowledge the collaboration of the WPRFMC and to express our appreciation for the Council's efforts to incorporate our recommendations.

We respectfully request that a copy of this letter and accompanying recommendations be shared with the Western Pacific Regional Fishery Management Council (WPRFMC) and Kitty Simonds, Executive Director of WPRFMC.

Sincerely,


William Ailā (Sep 8, 2022 21:41 HST)

William Ailā Jr., Chair

Enclosed:

(1) WPRFMC letter and draft fishing regulations - March 22, 2022

Non-Government (Voting)

William Ailā, Jr. (Chair)
State of Hawai'i

Linda Paul (Vice Chair)
Conservation

Rick Gaffney (Secretary)
Recreational Fishing

Pelika Andrade
Native Hawaiian

Kalama'ehe Takahashi
Native Hawaiian

Nakoa Goo
Native Hawaiian Alternate

Solomon Pili Kaho'ohalahala
Native Hawaiian Elder

Audrey Newman
Conservation

Samuel 'Ōhiu Gon III
Conservation

Robert Leinau
Conservation Alternate

Doug Fetterly
Conservation Alternate

Thorne Abbott
Conservation Alternate

Don Schug
Research

Haunani Kane
Research

Mark Hixon
Research

Neal Langerman
Research Alternate

William Walsh
Research Alternate

Richard Lee
Ocean-Related Tourism

Paul Badgley
Ocean-Related Tourism Alternate

Bonnie Kahapea-Tanner
Education

Heather Howard
Education Alternate

Judith Cucco
Citizen-at-Large

Kammie Dominique-Tavares
Citizen-at-Large Alternate

Vacant
Commercial Fishing
Commercial Fishing Alternate
Native Hawaiian Elder Alternate

Government (Non-Voting)

Athline Clark
Papahānaumokuākea MNM

Kim Hum
HIIW National Marine Sanctuary

Malia Chow
NOAA Fisheries PIRO

Brandon Jim On
NOAA Office of Law Enforcement

Maile Norman
U.S. Coast Guard

Janice Fukawa
U.S. Department of Defense

Joshua DeMello
WPRFMC

Jared Underwood
U.S. Fish and Wildlife Service

Brian Neilson
Hawaii Division of Aquatic Resources

Kealoha Pisciotto
Office of Hawaiian Affairs

RAC General Findings and Recommendations Regarding the WPRFMC Proposed Fishing Regulations in the letter dated March 22, 2022

1. Under the National Marine Sanctuaries Act (NMSA), new fishing regulations proposed by WPRFMC may be more restrictive, but not less, than current protections under the presidential proclamations and 50 CFR Part 404.
2. WPRFMC's proposed fishing regulations must comport with the provisions in the two proclamations and the Executive Order currently in effect for the Monument and the Reserve, and not automatically default to Magnuson-Stevens Fishery Conservation and Management Act (MSFCMA) provisions. There are incongruities between language in WPRFMC's document and what is written in presidential proclamations and existing regulations. For example, proclamations are more detailed and/or restrictive than some of the WPRFMC terms.
3. WPRFMC's proposed fishing regulations must also be in accord with the proposed sanctuary goals and objectives (NMSA 304(a)(5) requirement).
4. Fishing regulations in the original monument area under 50 CFR 404 are adequate and do not require further changes. The focus of WPRFMC's new regulations is the Monument Expansion Area. There are inconsistencies among the WPRFMC document's three sections regarding geographical areas of coverage.
5. There are typos, and issues with definitions that need to be corrected. These are described below.

Analysis of WPRFMC's 'Summary of Recommendations' Section (page 2 of the letter)

1. WPRFMC's Commercial Fishing Recommendation

- "Commercial Fishing is prohibited from 50-200 miles within the Papahānaumokuākea Marine National Monument and Monument Expansion Area."

RAC Analysis: WPRFMC's recommendation is consistent with the existing presidential proclamations and regulations. The RAC may have related recommendations to make at a future date.

2. WPRFMC's Commercial Fishing Recommendation

- "Commercial Fishing is allowed by Federal permits with logbook reporting requirements in areas OUTSIDE of Papahānaumokuākea Marine National Monument but within any sanctuary boundaries."

RAC Recommendation: Postpone a discussion and final decision about fishing regulations in areas outside of the monument but within any sanctuary boundaries, until after the draft environmental impact statement (DEIS) for the proposed sanctuary assesses the biological, economic, and sociocultural impacts of a range of alternative boundaries.

3. WPRFMC's Non-Commercial Fishing Recommendation

RAC Analysis: This recommendation is inconsistent with the presidential proclamations, as discussed below.

4. WPRFMC's Native Hawaiian Practices Recommendation

RAC Analysis: This recommendation is inconsistent with presidential proclamations, and existing regulations, as discussed below.

Corrections and Clarifications Needed of WPRFMC's 'Summary of Recommendations' Section

1. Monument Expansion Area name - Change the name for the Monument Expansion Area, throughout the draft regulations. It is incorrectly referred to as the 'NWHI Expansion'. The correct name is the Papahānaumokuākea Marine National Monument Expansion area.
2. Presidential Proclamation 9478 is incorrectly referred to as '9704.'
3. Throughout the document there is unclear and inconsistent language about 'violation of commercial fishing regs.'
4. There is inconsistent language regarding the area to be covered by the WPRFMC regulations. While some portions of the draft refer to the Monument Expansion Area, others refer to both the Monument Expansion Area (2016) and the original Monument boundary (2006). The focus of the new fishing regulations should be the Monument Expansion Area.

RAC Recommendation: A new proposal should include all the above corrections. The RAC recognizes that the WPRFMC has already started incorporating some of these recommendations.

Analysis of Definitions

1. Non-Commercial Fishing

- Presidential Proclamation 9478 states: "Subject to such terms and conditions as the Secretaries deem appropriate, the Secretaries may permit...non-commercial fishing, provided that the fish harvested, either in whole or in part, cannot enter commerce through sale, barter, or trade, and that the resource is managed sustainably."
- The proposed WPRFMC definition of non-commercial fishing is: "Fishing that does not meet the definition of commercial fishing in the Magnuson-Stevens Fishery Conservation and Management Act, and includes, but is not limited to, sustenance, subsistence, traditional indigenous, and recreational fishing."

RAC Recommendation:

- Include 'sustenance' fishing, as described and defined in Presidential Proclamation 8031, in the definition of non-commercial fishing. Regulations should stipulate that sustenance fishing in the MEA may occur only during transit.
- The RAC understands that the Native Hawaiian Cultural Working group is drafting an additional letter to the Council in response to its March 22, 2022 letter and draft proposed fishing regulations. The RAC defers to the Native Hawaiian Cultural Working Group regarding whether or not 'subsistence' fishing should be included as a category in the non-commercial fishing definition. The RAC also defers to the Native Hawaiian Cultural Working Group regarding a definition, but reserves the right to comment at a later time.

- Delete ‘traditional indigenous’ fishing from the non-commercial fishing definition. This fishing is not defined in federal or State of Hawaii statutes and is not referenced in Presidential Proclamation 8031 or Presidential Proclamation 9478.
- Delete ‘recreational’ fishing from the non-commercial fishing definition (see following discussion in item 2).

2. Recreational and Charter Fishing

- WPRFMC’s definition of recreational fishing (i.e., fishing for sport or pleasure, including charter fishing) conflicts with the Magnuson-Stevens Fishery Conservation and Management Act definition, which separates charter fishing from recreational fishing.
- Charter fishing is considered a commercial activity under the Jones Act and State of Hawaii laws.
- Allowing recreational/charter fishing would encourage resource extractive activities that currently don’t exist in the MEA.
- Other than at Midway, charter fishing in the monument likely doesn’t make economic sense to vessel operators.
- In the original monument area “recreational activities may not be associated with any for-hire operation or involve any extractive use.”
- Tag-and-release fishing that is conducted for research purposes and utilizes scientifically proven and rigorous methods is already allowed in the monument under a research permit.
- Recreational/charter tag-and-release may result in a high mortality if fish are not handled correctly, and it may result in marked behavioral changes in some species. Both potential effects are not in accord with the sanctuary goals and objectives.

RAC Recommendations: Delete the categories of, and references to, recreational fishing and charter fishing in the proposed fishing regulations.

3. Native Hawaiian Practices

- WPRFMC’s inclusion of “fishing for Native Hawaiian practices” in the definition of non-commercial fishing is inconsistent with Presidential Proclamation 9478, which clearly separates the two regulated activities.
- Moreover, a PMNM Native Hawaiian practices permit category (and definition) is already established under (50 CFR § 404.11(c)(4) and exercise of traditional, customary, cultural, subsistence, spiritual, and religious practices is currently already permitted by the Monument Management Board.

RAC Recommendations: Eliminate the category of, and references to, fishing for Native Hawaiian practices in the proposed fishing regulations.

4. Customary Exchange

- WPRFMC’s definition conflicts with Presidential Proclamation 9478’s prohibition of commercial fishing:
 - Cost recovery through monetary reimbursements is inconsistent with the prohibition on fish entering commerce through sale.
 - Non-market exchange of marine resources between fishers and community residents for goods and/or services is inconsistent with the prohibition on fish entering commerce through barter or trade.

- WPRFMC's characterization of customary exchange fishing as a Native Hawaiian practice is inconsistent with Native Hawaiian practices as described and defined in Presidential Proclamation 8031 and Presidential Proclamation 9478.
- The definition conflicts with statements from the Office of Hawaiian Affairs and Marine Mammal Commission regarding what constitutes a Native Hawaiian practice and a non-commercial fishing activity.

RAC Recommendation: Eliminate the category of, and references to, customary exchange in the proposed fishing regulations.

5. Research Fishing

- WPRFMC's inclusion of research activities in the definition of non-commercial fishing is inconsistent with Presidential Proclamation 9478, which clearly separates the two regulated activities.
- Research fishing is not defined in the proclamations or Magnuson-Stevens Fishery Conservation and Management Act.
- Fishing for research purposes is already allowed under the monument's existing research permit system.

RAC Recommendation: Eliminate the category of, and references to, research fishing in the proposed fishing regulations. We note that WPRFMC has already considered this and has begun incorporating this recommendation.

6. Vessel Monitoring System in Monument Expansion Area

- In the original monument area all vessels (commercial and non-commercial) are required to have an operational vessel monitoring system.
- There also are requirements for notifications upon entry and exit.

RAC Recommendation: Include similar requirements in the proposed fishing regulations for the MEA. For domestic vessels under the United States flag, or foreign flagged, when applying for a permit.



**Western
Pacific
Regional
Fishery
Management
Council**

March 22, 2022

John Armor
Director
Office of National Marine Sanctuaries
National Ocean Service
1305 East-West Highway
Silver Spring, MD 20910

Dear John,

Thank you for your November 19, 2021 letter transmitting the National Marine Sanctuaries Act (NMSA) 304(a)(5) package and request for fishing regulations in the proposed national marine sanctuary for the Northwestern Hawaiian Islands. The Western Pacific Regional Fishery Management Council met virtually on March 22-24, 2022 and discussed the Council's options for developing fishing regulations in the proposed sanctuary. After discussion and comments, **the Council agreed to develop fishing regulations for the proposed NWHI sanctuary and directed staff to respond to the Office of National Marine Sanctuaries 304(a)(5) package request with preliminarily preferred options for permitting and reporting requirements for commercial (outside current monument boundaries), non-commercial, Native Hawaiian practices, and research fishing in the sanctuary boundaries.**

The Council was concerned that the boundaries for the sanctuary are unknown at this time and that sanctuary fishing regulations could extend beyond the current Papahānaumokuākea and Monument Expansion Area boundaries. This is reflected in the Council's proposed fishing regulations that include commercial fishing permits for areas outside of the current monument boundaries but within the proposed sanctuary. Also included are opportunities for non-commercial fishing, fishing for research, and native Hawaiian fishing practices. Please see the summary of fishing recommendations and preliminary draft fishing regulations enclosed.

The Council will also be working in parallel to develop fishing alternatives for the NWHI area in the Exclusive Economic Zone through an amendment to the Hawaii Archipelago Fishery Ecosystem Plan in accordance with Presidential Proclamation 9478 as well as the NMSA 304(a)(5) request. We hope that these efforts to develop sanctuary regulations and Magnuson-Stevens Act regulations will be seamless and provide minimal impact on the fishing community in Hawaii. If you have any questions or concerns, please contact me at the Council Office at (808) 522-8220.

Sincerely

Kitty M. Simonds
Executive Director

Encl: (1) Summary of fishing regulations
(2) Preliminary draft fishing regulations

cc: Kristina Kekuewa, Regional Director-Pacific Islands Region



WESTERN
PACIFIC
REGIONAL
FISHERY
MANAGEMENT
COUNCIL

Summary of Recommendations for Fishing Regulations in the Proposed NWHI National Marine Sanctuary

March 25, 2022

Council Decision

Under the National Marine Sanctuaries Act, Section 304(a)(5) provides an opportunity for regional fishery management councils to develop fishing regulations for a proposed national marine sanctuary. The request for fishing regulations for a proposed NWHI National Marine Sanctuary was provided on November 19, 2021 in a letter from the Office of National Marine Sanctuaries (ONMS) to the Western Pacific Regional Fishery Management Council (Council). The following fishing regulations were agreed to by the Council at its 190th Meeting held on March 22-25, 2022.

These recommendations pertain to the proposed NWHI National Marine Sanctuary only. The Council will consider separate fishing regulations under the Hawaii Archipelago Fishery Ecosystem Plan at a later date and in concert with sanctuary designation activities.

Due to the unknown nature of the proposed sanctuary boundaries, the Council provided recommendations for potential areas within the proposed sanctuary. Should the proposed sanctuary remain within the boundaries of Papahānaumokuākea and the Monument Expansion Area, fishing regulations outside those boundaries would not be necessary.

Proposed Fishing Regulations

The following are recommendations for fishing regulations in the proposed NWHI national marine sanctuary:

Commercial Fishing

- Commercial Fishing is prohibited from 0-200 miles within the Papahānaumokuākea Marine National Monument and Monument Expansion Area.
- Commercial Fishing is allowed by Federal permits with logbook reporting requirements in areas OUTSIDE of Papahānaumokuākea Marine National Monument but within any sanctuary boundaries

Non-commercial Fishing

- Non-commercial fishing is defined as fishing that does not meet the definition of commercial fishing in the Magnuson-Stevens Fishery Conservation and Management Act, and includes, but is not limited to, sustenance, subsistence, traditional indigenous, and recreational fishing (50 CFR 665.12).
- Non-commercial fishing is allowed by Federal permits with logbook reporting requirements in all areas of the NWHI national marine sanctuary.
- Research fishing is included in the definition of non-commercial fishing and shall be allowed in the sanctuary by federal permits with logbook reporting requirements.

Native Hawaiian Practices

- Fishing for Native Hawaiian practices is included in the definition of non-commercial fishing (as defined in 50 CFR 665.12) and shall be allowed by Federal permits with logbook reporting requirements in all areas of the NWHI national marine sanctuary.
- Customary Exchange, the non-market exchange of marine resources between fishermen and community residents for goods, and/or services for cultural, social, or religious reasons, shall be allowed by Federal permits with logbook reporting requirements in all areas of the NWHI national marine sanctuary. The inclusion of cost recovery through monetary reimbursements and other means for actual trip expenses, including but not limited to ice, bait, fuel, or food, that may be necessary to participate in fisheries in the western Pacific should be discussed in public for its appropriateness within the proposed sanctuary.

Preliminary Draft Fishing Regulations

Note: These proposed regulations may create regulatory uncertainty with respect to the applicability of existing NWHI bottomfish and NWHI lobster and precious coral permits. Regulatory clarity would be needed during the Council process for amending the Hawaii FEP.

*Changes highlighted in yellow

1. The authority for 50 CFR part 665 continues to read as follows:

Authority: 16 U.S.C. 1801 et seq.

2. In § 665.12, add the definition of “Northwestern Hawaiian Islands Monument Expansion Area” in alphabetical order to read as follows:

§ 665.12 Definitions

* * *

Northwestern Hawaiian Islands Monument Expansion Area means area 50-200 nm of the EEZ around the Northwestern Hawaiian Islands

3. In § 665.13, revise paragraphs (f)(2) and add paragraph (f)(2)(xiv); to read as follows:

§ 665.13 Permits and fees

* * * * *

(f) Fees.

* * *

(2) PIRO will charge a non-refundable processing fee for each application (including transfer and renewal) for each permit listed in paragraphs (f)(2)(i) through (f)(2)(xiii) of this section. The amount of the fee is calculated in accordance with the procedures of the NOAA Finance Handbook for determining the administrative costs incurred in processing the permit. The fee may not exceed such costs. The appropriate fee is specified with each application form and must accompany each application. Failure to pay the fee will preclude the issuance, transfer, or renewal of any of the following permits:

* * *

(xiv) Northwestern Hawaiian Islands non-commercial permit

4. In § 665.14, revise paragraph (b)(1)(i) and (b)(2)(i) to read as follows:

§ 665.14 Reporting and recordkeeping

(b) Fishing record forms

(1) Applicability.

- (i) Paper records. The operator of a fishing vessel subject to the requirements of § 665.124, § 665.142, § 665.162, § 665.203(a)(2), § 665.242, § 665.262, § 665.404, § 665.424, § 665.442, § 665.462, § 665.603, § 665.624, § 665.642, § 665.662, § 665.801, § 665.905, § 665.935, ~~or~~ § 665.965 or § 665.XX or must maintain on board the vessel an accurate and complete record of catch, effort, and other data on paper report forms provided by the Regional Administrator, or electronically as specified and approved by the Regional Administrator, except as required in

paragraph (b)(1)(ii) of this section or as allowed in paragraph (b)(1)(iv) of this section.

* * *

- (iii) Recording. The vessel operator must record on paper or electronically all information specified by the Regional Administrator within 24 hours after the completion of each fishing day. The information recorded must be signed and dated, or otherwise authenticated, in the manner determined by the Regional Administrator, and be submitted or transmitted via an approved method as specified by the Regional Administrator, and as required by this section.

(2) *Timeliness of submission.*

(i) If fishing was authorized under a permit pursuant to § 665.142, § 665.162, § 665.242, § 665.262, § 665.404, § 665.442, § 665.462, 665.662, ~~or § 665.801~~, or § 665.XX, and if the logbook information was not submitted to NMFS electronically within 24 hours of the end of each fishing day while the vessel was at sea, the vessel operator must submit the original logbook information for each day of the fishing trip to the Regional Administrator within 72 hours of the end of each fishing trip, except as allowed in paragraph (b)(2)(iii) of this section.

5. In 50 CFR part 665, add subpart J to read as follows:

**Subpart J – Northwestern Hawaiian Islands Monument Expansion Area
Sec.**

665.970 Scope and purpose. The regulations in this subpart codify certain provisions of the Proclamation, and govern the administration of fishing in the Monument. Nothing in these regulations shall be deemed to diminish or enlarge the jurisdiction of the State of Hawaii.

665.971 Boundaries. The Monument Expansion Area includes the following:

(a) the waters and submerged lands of the area offshore of the Northwestern Hawaiian Islands. The shoreward boundary of the Monument Expansion Area is 50 nm. The seaward boundary of the Monument Expansion Area is 200 nm.

665.972 Definitions. The following definitions are used in this subpart:

Management unit species or MUS means the Hawaii Archipelago management unit species as defined in §665.201, 665.241, and 665.261, and the pelagic management unit species as defined in § 665.800.

Monument Expansion Area means the submerged lands and, where applicable, waters of the NWHI as defined in § 665.971.

Proclamation means Presidential Proclamation 9704 of September 13, 2016, “Monument Expansion Area.”

665.973 Prohibitions. In addition to the general prohibitions specified in § 600.725 of this part, and § 665.15 and subpart D of this chapter, the following activities are prohibited in

the Monument Expansion Area and, thus, unlawful for a person to conduct or cause to be conducted.

- (a) Commercial fishing in violation of §665.974(a).
- (b) Non-commercial fishing, except as authorized under permit and pursuant to the procedures and criteria established in §665.975.
- (c) Transferring a permit in violation of § 665.975(d).
- (d) Commercial fishing outside of the Monument Expansion Area and non-commercial fishing within the Monument Expansion Area on the same trip in violation of § 665.974(c).

665.974. Regulated activities.

- (a) Commercial fishing is prohibited in the Monument Expansion Area
- (b) Non-commercial fishing is prohibited in the Monument Expansion Area, except as authorized under permit and pursuant to the procedures and criteria established in § 665.975.
- (c) Commercial fishing outside the Monument Expansion Area and non-commercial fishing within the Monument Expansion Area during the same trip is prohibited.

665.975 Fishing permit procedures and criteria.

- (a) Northwestern Hawaiian Islands non-commercial permit.
 - (1) Applicability. Both the owner and operator of a vessel used to non-commercially fish for, take, retain, or possess MUS in the Monument Expansion Area must have a permit issued under this section, and the permit must be registered for use with that vessel.
 - (2) Eligibility criteria. A permit issued under this section may be issued only to a community resident of Hawaii.
 - (3) Terms and conditions.
 - (i) Customary exchange of fish harvested within the Monument Expansion Area under a non-commercial permit is allowed, except that customary exchange by fishermen engaged in recreational fishing is prohibited. Customary exchange of fish harvested under a non-commercial fishing permit in the Monument Expansion Area may include family and friends of residents of Hawaii fishing communities.
 - (ii) Monetary reimbursement under customary exchange shall not exceed actual fishing trip expenses related to ice, bait, fuel, or food.

665.976 International law.

These regulations shall be applied in accordance with international law. No restrictions shall apply to or be enforced against a person who is not a citizen, national, or resident alien of the United States (including foreign flag vessels) unless in accordance with international law.