



# MARINE MAMMAL COMMISSION

16 August 2024

Sarah Malloy, Acting Regional Administrator  
Pacific Islands Regional Office  
National Marine Fisheries Service  
Honolulu, Hawai'i

Dear Ms. Malloy,

The Marine Mammal Commission (the Commission) is concerned that the National Marine Fisheries Service (NMFS) has failed to amend the False Killer Whale Take Reduction Plan (FKWTRP; the Plan) to meet the incidental take reduction mandate of the Marine Mammal Protection Act (MMPA). Specifically, the amended Plan is to be designed to reduce the number of incidental mortalities and serious injuries (MSI) of false killer whales occurring in the Hawai'i Deep-Set Longline Fishery to below the stock's potential biological removal level (PBR) within six months of implementation. Herein, the Commission details its concerns and offers advice on how NMFS should proceed.

## Background

NMFS established the False Killer Whale Take Reduction Team (FKWTRT; the Team) in January 2010.<sup>1</sup> By July of that year, the Team had developed and sent to the Pacific Islands Regional Office (PIRO) a consensus draft take reduction plan (TRP) for the Main Hawaiian Islands Pelagic False Killer Whale Stock.<sup>2</sup> In July 2011, PIRO published a proposed rule to implement the draft plan, and after considering public input, published the final FKWTRP and implementing regulations in December 2012.<sup>3</sup> The plan required the use of gear and handling methods expected to increase the likelihood that hooked false killer whales would escape with relatively minor ("non-serious") injuries. As required by the MMPA,<sup>4</sup> the Team subsequently met regularly to assess the performance of the plan and implementing regulations. By June 2017, it was apparent to the Team and PIRO that the Plan's objectives were not being met – gear requirements and handling guidelines were not functioning as expected.<sup>5</sup> Specifically, the ratio of non-serious to serious injuries had not changed significantly, the overall rate of MSI had not declined significantly, and in only 9 percent of interactions had gear/handling modifications performed as designed.

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<sup>1</sup> 75 Fed. Reg. 2853

<sup>2</sup> The draft plan also addressed the incidental MSI of the Main Hawaiian Islands insular stock of false killer whales, but that stock has not been a focus of the team since 2010, and its MSI is not addressed herein.

<sup>3</sup> 77 Fed. Reg. 71260

<sup>4</sup> MMPA Section 118(f)(7)(E)—[NMFS] and the take reduction team shall meet every 6 months, or at such other intervals as [NMFS] determines are necessary, to monitor the implementation of the final take reduction plan until such time that [NMFS] determines that the objectives of such plan have been met.

<sup>5</sup> Final Key Outcome Memorandum – False Killer Whale Take Reduction Team Meeting Via Teleconference: June 20, 2017. <https://www.fisheries.noaa.gov/national/marine-mammal-protection/false-killer-whale-take-reduction>

Consequently, as required by the MMPA,<sup>6</sup> PIRO reconvened the Team in April 2018.<sup>7</sup> However, the Team was unable to reach consensus on potential amendments to the plan then or during several meetings held over the ensuing 30 months.

### **Continued Lack of Action**

When a Take Reduction Team does not submit a consensus draft amended plan within the MMPA's specified timeframe,<sup>8</sup> the Act directs NMFS to develop an amended plan and implementing regulations, taking into account the advice received from, and the majority/minority views of, the Team, together with public comments.<sup>9</sup> Accordingly, PIRO should have undertaken the development of an amendment on its own by January 2019 and published the proposed amended plan no later than September 2019. Despite this requirement, it appears that PIRO made little or no attempt to develop an amended FKWTRP in 2019, or after the Team ceased its attempts to develop a consensus Plan following its meeting in October 2020 – more than 18 months after NMFS should have taken over development of the amended Plan.

PIRO reconvened the Team again in November 2022 and March 2023 to undertake further efforts to develop a consensus draft amendment to the existing Plan. PIRO leadership emphasized at the outset of the 2022 meeting that if the Team failed at this task, then, as specified by the MMPA, NMFS would be responsible for development of an amendment to the Plan that would meet the requirements of the MMPA.<sup>10</sup> Although the Team did not reach consensus at the 2022 or 2023 meeting, PIRO has yet to publish on its own initiative a proposed amendment and implementing regulations, some 18 months after the conclusion of the March 2023 meeting and nearly 5 years after the original September 2019 deadline for doing so. Several members of the Team recently wrote to NMFS expressing a concern that PIRO has yet to publish a proposed plan amendment following the 2023 meeting.<sup>11</sup> The Commission echoes their concern, and urges NMFS to act immediately to develop and publish a revised Plan.

The apparent lack of action by PIRO is especially concerning given that the rate of incidental MSI of pelagic false killer whales is now substantially higher than it was before implementation of

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<sup>6</sup> MMPA Section 118(f)(7)(F)—[NMFS] shall amend the take reduction plan and implementing regulations as necessary to meet the requirements of this section, in accordance with the procedures in this section for the issuance of such plans and regulations.

<sup>7</sup> Note, the MMPA allows NMFS 30 days to establish a TRT after a final stock assessment is issued identifying a strategic stock subject to incidental take in excess of PBR (Section 118(f)(6)(A), and requires that the team develop a draft plan to address the problem within six months. Process timelines specified for the development of a TRP apply equally to the amendment of a TRP (id.), meaning that NMFS should have convened the team in July 2017, not in April 2018, nine months after the deadline.

<sup>8</sup> Six or eleven months, depending on whether MSI is greater than or less than PBR, respectively (MMPA Sections 118(f)(7)(B)(ii) or (8)(B)(ii), respectively).

<sup>9</sup> MMPA Section 118(f)(7)(B)(ii)—In the event that the take reduction team does not submit a draft plan to [NMFS] within 6 months, [NMFS] shall, not later than 8 months after the establishment of the team, publish in the Federal Register a proposed take reduction plan and implementing regulations . . . .

<sup>10</sup> Final Key Outcome Memorandum, False Killer Whale Take Reduction Team Meeting, November 7-10, 2022: Honolulu, Hawaii. <https://www.fisheries.noaa.gov/s3/2024-06/FINAL-FKWTRT-KOM-November2022-508.pdf>

<sup>11</sup> 22 July 2024 letter to PIRO from the Center of Biological Diversity, Hawai'i Wildlife Fund, Defenders of Wildlife, and National Resources Defense Council. <https://biologicaldiversity.org/programs/oceans/pdfs/2024-07-22----CBD-HWF-DoW-NRDC-FKWTRP-Letter-to-NMFS.pdf>

the December 2012 plan,<sup>12</sup> and exceeds the stock's Potential Biological Removal (PBR) level.<sup>13</sup> The MSI rate inside the U.S. Exclusive Economic Zone (EEZ) was lower during the first few years after plan implementation,<sup>14</sup> but outside the EEZ it increased so much that the overall rate was slightly greater after plan implementation than before.<sup>15</sup> In subsequent years, the MSI rate outside the EEZ has remained high, while also increasing inside the EEZ. Now, the average overall bycatch rate following implementation is roughly twice what it was during the 10 years prior to implementation.<sup>16</sup>

The Commission understands that PIRO, in furtherance of the requirements of the National Environment Policy Act (NEPA), is analyzing two options that were identified by the Team before developing its own alternatives for a proposed plan amendment. While the Commission appreciates PIRO's desire to obtain additional information before proceeding with rulemaking, the MMPA does not give the agency that latitude. The MMPA states, without qualification, that NMFS “shall develop and implement a take reduction plan” (emphasis added), and specifies the timelines for taking such action<sup>7</sup>. Recent court rulings have clarified that NMFS cannot indefinitely delay achieving compliance with the MMPA's take reduction mandates, including developing take reduction plans or plan amendments within the time limits specified in the MMPA.<sup>17</sup> Further, it is the Commission's understanding that the analyses that have been or are being conducted by NMFS address very few of the potential mitigative measures identified by the Team.

Therefore, the Commission recommends that PIRO immediately develop a proposed amendment to the Plan, and publish proposed implementing regulations, based on the best available information and science. Further, the Commission recommends that PIRO inform the Team of its plan and anticipated timeline for doing so. PIRO also should identify, and share with the Team, the steps it intends to take not only to reduce the rate of incidental MSI of false killer whales to below the stock's PBR within six months of implementation of an amendment to the Plan, and to meet the MMPA's Zero Mortality Rate Goal (ZMRG) within the prescribed timeframe.

In choosing its proposed mitigation measures, the Commission recommends that NMFS use two primary criteria – ‘effectiveness’ and ‘certainty’. ‘Effectiveness’ reflects the maximum degree of reduction in MSI that could be achieved if the measure performs as intended or designed. ‘Certainty’ reflects the confidence that the measure could achieve that level of performance in the fishery. Take reduction teams typically adopt measures that have had some success in other fisheries and/or with other species, or that appear promising logically or based on expert opinion, with an expectation that they will be improved through adaptive management until fully effective. Often, measures appear

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<sup>12</sup> Prior to the implementation of the FKWTRP, MSI due to interactions with deep-set longline gear throughout the fishery averaged 18.2 whales per year (data from 2002-2012). Contrary to expectations that MSI would decrease following implementation, MSI averaged 37.8 whales per year after plan implementation (data from 2013-2021), or 108 percent greater than the pre-implementation level. These MSI estimates were extracted from NMFS's stock assessment reports ([Marine Mammal Stock Assessment Reports by Species/Stock | NOAA Fisheries](#))

<sup>13</sup> The estimated number of mortalities and serious injuries averaged over the last five years of available data (2017-2021) is 42 percent greater than PBR (47 versus 33) (McCracken and Cooper 2023, Oleson et al. 2023).

<sup>14</sup> The estimated number of mortalities and serious injuries inside the EEZ during the four years preceding implementation was 12.53 whales per year, but just 4.75 in the four years following implementation.

<sup>15</sup> The estimated number of mortalities and serious injuries outside the EEZ during the four years preceding implementation was 12.48 whales per year, but nearly double that, 23.1, in the four years following implementation.

<sup>16</sup> An estimated 37.5 versus 18.6 whales per year.

<sup>17</sup> *E.g., Ctr. for Biological Diversity v. Raimondo*, 661 F. Supp. 3d 964 (N.D. Cal. 2023); *Ctr. for Biological Diversity v. Ross*, 480 F. Supp. 3d 236 (D.D.C. 2020).

promising, however, their actual effectiveness may be highly uncertain until tested in the context of the specific fishery being addressed. The Commission recommends that NMFS give the highest priority to the measure with an ‘effectiveness’ sufficient to meet the take reduction mandates of the MMPA, and with the highest degree of ‘certainty’. As noted by the Commission during the 2023 Team meeting, it is likely that limiting effort in the fishery will be the only option that will meet both of these criteria.

The Commission stands ready to consult with NMFS regarding the best options to pursue and is available to discuss its comments and recommendations.

Peter O. Thomas, Ph.D.

Executive Director

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## References

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