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Submitted via: ITP.Laws@noaa.gov

November 17, 2017

Re: Alaska Fisheries Science Center: Application for a Letter of Authorization to Take Marine Mammals Incidental to Fisheries Research

Dear Ms. Harrison,

On behalf of The Humane Society of the United States and Whale and Dolphin Conservation, we are submitting comments regarding the request from the National Marine Fisheries Service's (NMFS) Alaska Fisheries Science Center (AFSC) for a five year authorization to take small numbers of marine mammals incidental to conducting fisheries research. 81 Fed. Reg. 71709 (Oct. 18, 2016). Our organizations have previously submitted comments on the AFSC's Draft Programmatic Environmental Assessment (DPEA) on fisheries and ecosystem research conducted and funded by the NMFS and on the draft of the application for a letter of authorization (LOA) to take marine mammals in the course of that research which was included in that same Federal Register notice. 81 Fed. Reg. 52830 (Aug. 10, 2016).

While there are some minor differences in the proposed request for an LOA between the August version and the current version¹, the substance of the critique and general analyses in our comments remain the same both for the proposed LOA and the DPEA. We were disappointed to

¹ For example, page numbers may be slightly different because NMFS has inserted some blank pages in this version and the number of harbor seals affected by Level B harassment has changed to an extent in Table 6-12 for both potential average take and requested take over 5 year period (page 124), and minor changes have been made in some species accounts (e.g., harbor seals).

see that there are no substantive changes made to either the LOA or DPEA based on comments that we offered. However, due to the similarity of these documents, we ask that our prior comments (attached) be considered with regard to the AFSC's Application for an LOA.

Sincerely,



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And

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September 9, 2016

Re: Notice of Availability of a Draft Programmatic Environmental Assessment for Fisheries and Ecosystem Research Conducted and Funded by the National Marine Fisheries Service, Alaska Fisheries Science Center

Dear Dr. DeMaster and Ms. Harrison:

On behalf of the members and constituents of The Humane Society of the United States (HSUS) and Whale and Dolphin Conservation (WDC), we offer these comments on the Alaska Fisheries Science Center's (AKFSC) Draft Programmatic Environmental Assessment (DPEA) on fisheries and ecosystem research conducted and funded by the National Marine Fisheries Service (NMFS). 81 Fed. Reg. 52830 (Aug. 10, 2016) and on the application for a letter of authorization (LOA) to take marine mammals in the course of that research. The AKFSC offers four alternatives for comment: Alternative 1- a no-action/status quo alternative similar to past efforts; Alternative 2- the preferred alternative of conducting a new suite of research with mitigation; Alternative 3- a modified alternative with additional mitigation for the new suite of research; and Alternative 4- which is the "no research" alternative.

The status quo alternative appears insufficiently protective of protected species of marine mammals and the "no research" alternative would result in the agency being unable to fulfill other legal mandates, including those of the Magnusson-Stevens Fisheries Conservation Act. Our comments will focus almost exclusively on the second (preferred) and third alternatives that differ in the mitigation required. The comments also focus entirely on marine mammal takes and not take of other taxa. We prefer

alternative 3, which requires additional mitigation, though we find remediable problems with this alternative as well.¹

In general, as stated in the DPEA, we agree that it may be difficult to distinguish between “Level A” harassment, and mortality and serious injury, so we are generally supportive of an approach erring on the side of combining the two when projecting likely impact. Further, we agree that examining a time frame from 2004-2015 is precautionary when assessing take data for surface, mid-water, and bottom trawl as a longer time series may be more representative.² That said, the sparse take data in the record for research activities and acknowledgement in the documents that there is a need to require better crew training in assessing interactions lends support to the possibility that past takes were not always properly or completely documented.

Despite the length of both the DPEA (close to 500 pages) and the supporting documents for the incidental take permit application (Appendix C is an additional 217 pages), we find the sufficiency of impact projections and mitigation inadequate and not always well justified.

Impact Assessment

According to DPEA Table 4.2-9, there were only 4 research-related takes of marine mammals from 3 species during the 11 years of data analyzed relating to prior or ongoing AKFSC research, and all takes were in trawl nets. The AKFSC provides several projections of possible Level A takes in the DPEA based on a variety of sources of information within the Gulf of Alaska research area (GOARA), the Bering Sea (BSAIRA) and the Chuckchi/Beaufort Sea (CSBSRA). While the numbers in various tables sum to the total take request, understanding how each was derived was not always clear from the text and charts. DPEA Table 4.2-12 summarizes species and number of marine mammals for which the region is seeking take authorization (similar to LOA Table 6-7, in the DPEA’s Appendix C). However, the permit application provides several different summary charts in LOA Tables 6-2 to 6-7, that are intended to show derivation of the total number of takes requested for various species. For example, DPEA Table 4.2-12 and LOA Table 6-7 reflect the request for 13 takes of eastern Pacific fur seals over a 5 year period; LOA Table 6.4 lists 3 proposed takes of eastern Pacific fur seals in the BSAIRA and GOARA based on analogy to commercial fisheries,³ whereas LOA Table 6-2 shows 5 proposed takes in each of these two areas based on historical research captures.⁴ These takes appear to be summed in LOA Table 6.7, which reflects a

¹ The application also contained a request for Rulemaking and Letters of Authorization (LOA) contained in Appendix C of the application. While the requested LOA has not been published in the Federal Register, it does contain most of the same information as in the DPEA (e.g., fishery descriptions and species accounts). Thus, we request NMFS take into consideration our comments, critiques and suggestions regarding the DPEA when considering the LOA request.

² Appendix C, LOA request at 81.

³ See DPEA App. C, Table 6-4 entitled “Requested Incidental Marine Mammal M&SI/Level A Takes Based on Analogy to Species Taken in Commercial Fisheries”.

⁴ See DPEA App. C, Table 6-2 entitled “Requested Incidental Marine Mammal M&SI/Level A Takes Based on Historical Takes in AFSC Research Trawls.”

request of 13 takes of this species in these two research areas⁵ but this is not easy for readers to follow. The LOA states that “table 6-7 provides a summary for all AFSC requested takes for marine mammals in all gears and research areas as described in sections 6.1.6 through 6.1.8 and Tables 6-2, 6-3, 6-4, 6-5, and 6-6” and this is true, but the structure and discussion in the LOA complicated understanding of the derivation of all numbers. For example, it is not always clear why some takes in commercial fisheries were considered analogous to the Center’s research methodology but others may not have been included. This should be clarified.

In another example, LOA Table 6-4⁶ (aka DPEA Table 4.2-12) lists the species and number of marine mammals for which the region is seeking authorization for Level A takes in the GOARA and BSAIRA. Although using gear types known to interact with marine mammals (e.g., trawl gear and gillnets), for the five year period of the authorization in the vast areas of the GOARA and BSAIRA, only a single take is projected for 14 of the 19 species for which take is requested. However, LOA Table 6-7, which has a very similar name,⁷ shows far greater take authorization being requested. Again, this is confusing to readers and needs clarification.

Some of the projected takes are based on analogy to species taken in commercial fisheries.⁸ However we note that the most recent final Alaska Marine Mammal Stock Assessments (SARs) indicate that fisheries are generally Category 2 or 3, which means that observer coverage is a low priority if, indeed, any is assigned.⁹ Though some observer coverage is mentioned in individual SARs in the region, it is worth noting that Appendix 4 in the SAR for this region has several problems that may, therefore, hinder attempts to accurately reflect takes by analogy to commercial fisheries using similar gear. First, Appendix 4 of the SAR, which reports species taken in various fisheries, has data that are no more recent than 2011 (five years old) so this report is outdated if it is being used by the Center (though, as mentioned above, this may be at odds with reports of takes in individual SARs). Further, this Appendix of the SAR indicates that almost all of the data on species and numbers of takes in Alaskan commercial fisheries are from logbooks and fisher self-reports, and many fisheries are said to have been “never observed” or observed more recently than 2009. NMFS itself has concluded in its prior SARs, and United States Fish and Wildlife Service in current SARs for sea otters, that fisher self-reports are at best a minimum estimate of incidental take as these data are most likely negatively biased.¹⁰ Many

⁵ See DPEA App. C, Table 6-7 entitled “Requested M&SI/Level A Marine Mammal Takes in the Three AFSC Research Areas by Gear Type”.

⁶ DPEA App. C, Table 6-4 “Requested Incidental Marine Mammal M&SI/Level A Takes Based on Analogy to Species Taken in Commercial Fisheries” (emphasis added).

⁷ DPEA App. C, Table 6-7 “Requested M&SI/Level A Marine Mammal Takes in the Three AFSC Research Areas by Gear Type.”

⁸ Op Cit DPEA App. C, table 6-4.

⁹ Alaska Marine Mammal Stock Assessments. 2015. At:

http://www.nmfs.noaa.gov/pr/sars/pdf/alaska2015_final__corrected_.pdf.

¹⁰ Credle, V. R., D. P. DeMaster, M. M. Merklein, M. B. Hanson, W. A. Karp, and S. M. Fitzgerald (eds.). 1994. NMFS observer programs: minutes and recommendations from a workshop held in Galveston, Texas, November 10-11, 1993. U.S. Dep. Commer., NOAA Tech. Memo. NMFS-OPR-94-1, 96 pp. *Also* see citation to under-reporting in the Sea otter SAR for 2015 (Op cit note 8) *And* NMFS acknowledging self-reporting as negatively biased in 75 Fed Reg.

commercial fisheries with the potential to interact with marine mammals lack independent observer coverage. As a result, information on takes relies on these fishermen self-reporting, which may not be in their self-interest. Relying on self-reporting likely means that the projections of incidental take in the LOA and DPEA that are based on information gleaned from interactions reported by commercial fisheries themselves may be negatively biased.

We also note that there are a number of species for which take is requested but where the NMFS Stock Assessment lists the Potential Biological Removal (PBR) level as “undetermined.”¹¹ Among species for which take is requested, but for which the SARs list PBR as undetermined, are: ringed seals, bearded seals, Pacific white-sided dolphins, three stocks of harbor porpoises, and Dall’s porpoise. Although the requested annual take of each of these stocks is, in many cases, less than a single mortality each year of the 5-year authorization¹²; in the LOA, NMFS is requesting takes of animals for which no PBR is available. As a result, no impact assessment is possible or, if conjectured, none would be reliable given that the abundance estimates for these stocks are outdated and stipulated as “undetermined.” This dynamic is not adequately discussed in the DPEA/LOA. NMFS merely presumes that, for both its own activities and that of commercial fisheries that interact with stocks lacking a PBR, that the number of mortalities is not significant.¹³ For example, harbor porpoises in Southeast Alaska have an undetermined PBR, yet the Center requests two takes of this stock which would be added to the average annual commercial fisheries take of 34 per year.¹⁴ There are similar concerns in the DPEA/LOA for all stocks lacking a PBR and recent abundance and trend information.

Sufficiency of Mitigation

The LOA application summarizes that “[c]urrent mitigation includes using marine mammal watches, a move-on rule to minimize chances for gear to be deployed with marine mammals nearby, and modified net retrieval procedures if marine mammals are sighted while gear is in the water.”¹⁵ In the DPEA, AKFSC states the “Preferred Alternative also includes the same suite of mitigation measures described in the Status Quo.”¹⁶ It acknowledges that the use of these mitigation measures are generally considered “best practices” but even the use of these very basic and minimal strategies would be at the discretion of the ships’ captains and chief scientists on each vessel and “there may be inconsistencies across the range of research surveys conducted and funded by the AFSC in how those judgments are made.”¹⁷ In

12498 [March 16, 2010] (citing Credle and stating “NMFS acknowledges that bycatch reports may be negatively biased when the only sources are self-reports and has noted such bias in previous SARs”).

¹¹ These stocks with undetermined PBRs are acknowledged in DPEA Table 4.2-12.

¹² In a number of cases, the 5-year request may be for less than 5 animals from a stock, yielding an annual average death toll of a fraction of an animal—something not biologically possible.

¹³ See e.g., App. C at 44 (LOA conjecturing that, for Pacific white-sided dolphin that lack a PBR or a recent abundance estimate that: “The stock size is sufficiently large that unreported mortalities would not likely be significant,” a statement based on outdated abundance estimates and lack of trend data for the stock).

¹⁴ DPEA Appendix C at 45.

¹⁵ DPEA Appendix C at 92 (emphasis added).

¹⁶ DPEA at 2-35.

¹⁷ DPEA at 3-35

an apparent acknowledgment that past reporting of injuries may not have been complete, the AKFSC states that, in addition to the status quo measures, “[t]he Chief Scientist or other designated scientists will receive training on the types of information needed to make injury determinations.”¹⁸ The region also acknowledges that use of mitigation may not have been adequately communicated in the past and thus proposes to add a suite of training workshops and provide encouragement for communicating with other captains and scientists.¹⁹ It also proposes better crew training and consistency in instructions for avoiding adverse interactions with protected species.²⁰ In other words, other than providing training workshops for some of its scientists and crew, NMFS proposes to make no changes from its status quo and cannot even say with certainty when, or even *if*, status quo measures will be taken, as use of mitigation is discretionary.

The status quo alternative discusses a “move-on rule” for vessels towing gear in which “most research vessels engaged in trawling will have their station in view for 15 minutes or 2 nm prior to reaching the area” and “*many vessels* will inspect the tow path before deploying the trawl gear.”²¹ This stipulation for inspecting the area and moving on if animals are sighted in or near the tow path is not a requirement; it merely reflects what AKFSC says that “many” (but clearly not even most) vessels will do prior to deploying potentially entangling gear. At the very least, NMFS must require that *all vessels* undertake a minimum 15-30 minute visual inspection of the area and move on from the area if animals are in or near the projected tow path.

In non-preferred Alternative 3 (the modified research alternative with additional mitigation), the DPEA indicates that AKFSC is rejecting any requirement for dedicated protected species observers (PSOs) or any alternative technology for detecting marine mammals around the gear.²² The use of dedicated PSOs is said to be impractical, given space constraints on most vessels and AKFSC prefers to provide “formal protected species training for crew already trained in other skills.”²³ However, it is not apparent from the Preferred Alternative 2 that all crew will receive this training; rather, that some undefined portion thereof (deemed “relevant”) will be trained, though it is not clear how relevance will be determined.²⁴ Further, this training may or may not be as thorough as that required of a regular PSO.²⁵ PSOs, used in observer programs, have a very particular skill set that involves being able to identify species, evaluate methodologies, address entanglements, and evaluate the nature of entanglement and injuries. In this DPEA/LOA, the stipulation that there will be “protected species training” is an undefined term that may

¹⁸ DPEA at 2-36.

¹⁹ *Id.*

²⁰ DPEA at 2-36

²¹ DPEA at 2-22 (emphasis added).

²² DPEA at 2-40.

²³ DPEA at 4-141.

²⁴ DPEA at 4-173 stating that preferred “Alternative 2 also includes training requirements for all scientists and *relevant crew members* on protected species protocols.” [emphasis added] It is not clear what is meant by “relevant” crew and it fails to specify what portion of the crew would be trained in the manner of a protected species observer (which is specific and rigorous training).

²⁵ One example of the types of training NMFS provides to fisheries PSOs can be found here: <http://www.nefsc.noaa.gov/fsb/training/>.

simply be fulfilled by being trained in basic species identification and does not appear likely to result in having the equivalent of a PSO aboard.

Under Alternative 3, the AKFSC also rejects the idea of using marine mammal excluders on nets even if they were to “prove practicable.”²⁶ We believe that this should be required in nets where it may be practicable.

When referencing the proposed takes in table 6-7, the application for an LOA stipulates that “additional mitigation measures *may be* implemented if take far exceeds the maximum number estimated per year, such that it appears that the total estimated take over the five-year authorization period may be exceeded.”²⁷ The meaning of the term “far exceeds” is not clear but should have been better quantified. For example, if the authorization in the LOA was for a single mortality/serious injury of a species in the five year period (0.4 per year), and a single mortality was observed in the first year, would that be considered to have already “far exceeded” the authorization, or would it require a second take in a subsequent year to have “far” exceeded the request? This very subjective terminology should be clarified. Further, it appears that additional mitigation is not required’ rather, it will simply be considered. Even in the event that the take amounts to double the authorization (e.g., two mortalities in five years), which would, in our view, “far exceed” the authorization, imposition of additional mitigation is discretionary (i.e., the documents state it *may be* implemented). In addition, the decision to undertake additional mitigation is apparently left up to the discretion of either the vessel operator or staff in the region, but the means by which a decision that take “far exceeds” the authorization and/or decision-making regarding choice of additional mitigation is not adequately discussed in the LOA or DPEA. For example, would new mitigation measures be chosen from among the measures rejected in Alternative 4 (including measures such as no night operations or use of excluder devices)? Or would the added mitigation simply involve “more of” a measure already listed in the preferred alternative (such as simply assigning an extra crew member as an observer)? It is important to define the level of take that would trigger the need to re-evaluate the sufficiency of the mitigation measures and to specify the requirement for, and nature of, additional measures that would or could be taken in the event that take “far exceeds” the authorization, since the additional mitigation in Alternative 3 was rejected as impractical.

We also want to note that, in describing the areas and/or fisheries with interactions with marine mammals, Appendix C of the DPEA stipulates that acoustic pingers are used in research gillnets at Little Port Walter, stating that “underwater pingers (10 kHz, 132 dB) are used on these gillnets in the inner bay around hatchery net pens to prevent interactions and tangling of local harbor seals.”²⁸ This statement, intended as reassurance, seems disingenuous at best and leads one to question the rigor with which mitigation is evaluated. A publication of the AKFSC itself notes that “[p]ingers have generally proven to be ineffective in deterring seals and sea lions” and goes on to say that their use may serve as a

²⁶ DPEA at 2-41.

²⁷ DPEA App. C at 85 (emphasis added).

²⁸ DPEA Appendix C at 88.

“dinner bell” and actually attract pinnipeds to the gear.²⁹ It would seem that pingers would *not* be an effective strategy as is claimed for this use but, if indeed the use of pingers *is* deterring seals, this should warrant a publication in scientific literature. Barring a unique success in this situation, it would seem pingers are not effective and/or take is not being reported and this leads reviewers to question the rigor with which take and mitigation success are being monitored.

Conclusion

As summarized above, we are largely concerned that take projections may be under-estimated and have only highlighted a few examples of what appear to be consistent problems throughout the document. We are also concerned that the AKFSC has not defined key terms such as “far exceed” when considering the need for added mitigation in the event of take, and much in the monitoring and mitigation planning appears discretionary. Further, the status quo mitigation measures may be insufficient and the means by which new mitigation measures could be added is not clear.

Sincerely,



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²⁹ See page 10 in E. Petras. 2003. “A Review of Marine Mammal Deterrents and Their Possible Applications to Limit Killer Whale (*Orcinus orca*) Predation on Steller Sea Lions (*Eumetopias jubatus*)” AFSC Processed Report 2003-02 at: <http://www.afsc.noaa.gov/Publications/ProcRpt/PR%202003-02.pdf>.