Appendix E Comment Letters Received on the Draft Environmental Impact Statement (EIS)

Comment letters received on the Draft EIS are reproduced on the following pages.

Western
Pacific
Regional
Fishery
Management
Council

October 8, 2004

Bill Robinson
Regional Administrator
National Marine Fisheries Service
Pacific Islands Regional Office
1601 Kapiolani Blvd, Suite 1110
Honolulu, HI 96814

Dear Bill:

Thank you for the opportunity to provide comments on the DEIS for the Council's Pelagic Fisheries Fishery Management Plan, which focuses on squid fishing and seabird-longline interactions. Overall the DEIS provides a useful summary of the issues surrounding squid fishery management and seabird-longline interactions. However, the Council believes that some sections of the DEIS concerned with seabirds are poorly written and analyzed, leading to potentially erroneous conclusions, misleading estimates of seabird takes and incomplete analyses of impacts.

Albatross population trends

Sections 3.6.1.1.2 and 3.6.1.1.3 on the population trends for Blackfooted (BFAL) and Laysan (LAAL) albatrosses contain the same egregious errors resulting from the inappropriate use of regression analyses for nesting abundance data for both these seabirds in the Northwestern Hawaiian Islands (NWHI) . Information on time series of estimates are presented separately for breeding pairs of BFAL at French Frigate Shoals (FFS), Midway Atoll and Laysan Island in Figure 3.6.1-2 and then combined in Figure 3.6.1-3, to which a regression line is fitted. The same type of analysis is conducted for LAAL in figures 3.6.1-4 and 3.6.1-5.

As noted in the figures the individual time series were derived by different methods, direct counts for Midway and FFS and extrapolated plot counts of eggs for Laysan Island. As the figure for BFAL at Laysan Island time series shows, there are wide confidence intervals around these estimates, particularly in the early part of the time series which, being the largest numbers of birds, drives any trend in the data. The Council believes it is statistically and scientifically invalid to simply combine these data and then fit a non-significant regression line ($p > 0.1$) from which a spurious conclusion is drawn about a putative 1% declining trend in the nesting population.

A Council Authorized by the Magnuson Fishery Conservation and Management Act of 1976
1164 BISHOP STREET · SUITE 1400 · HONOLULU · HAWAII 96813 USA · TELEPHONE (808) 522-8220 · FAX (808) 522-8226
www.wpcouncil.org

This error becomes even more egregious for the LAAL data, where the absence of all but five points for Midway Island (Figure 3.6.1-4) means that there are only five aggregate points in total. The regression line fitted to the data shows a declining trend, but it is not statistically significant ($p > 0.1$). The problem is less acute for BFAL where only one aggregate data point is missing but is crucial for the LAAL where only 5 out of 12 data points can be aggregated. In essence this introduces gratuitous degrees of freedom into the analyses and leads to spurious conclusions about population trends, which belie the evidence presented in the time series themselves. For BFAL the data strongly suggest that population is stable, with little year to year variation in nesting abundance, surely an encouraging observation. For LAAL, the time series suggest that nesting abundance demonstrates greater inter-annual variability, which may show declines of up to 50% between years followed by equally impressive increases. Moreover, there appears no attempt to synthesize these observations with those for the Short-tail albatross (STAL) which is clearly showing explosive exponential growth, despite thge fact that its chief nesting site is located within an area of the North Pacific fished intensively by longlines and squid vessels. Moreover, the STAL population increase overlaps with the growth of longline fishing in the Pacific Ocean, which has clearly has not had no retarding effect on this albatross.

It should also be noted that although several efforts to model both the LAAL and BFAL populations are currently underway (supported by the University of Hawaii's Pelagic Fisheries Research Program), no reference is made to these nor any preliminary results incorporated. Moreover, reference to a recent paper on the impacts of longline fishing on BFAL is missing entirely (Rebecca L. Lewison and Larry B. Crowder, Estimating Fishery Bvcatch and Effects on a Vulnerable Seabird Population, Ecological Applications 13(3), fig. 6 at 750 (2003)).

Impacts of the alternatives

The best that can be said about Section 4.5, Impacts to Seabirds, is that it does at least make an attempt at gauging the likely numbers of seabirds that might be caught using different mitigation measures and area of application. That said, there are some serious problems with the analyses, in particular, some numbers appear to be plucked out of the air, while other are not computed when they should be. Page 212 presents interaction rates with both albatrosses combined for shallow and deep sets made by Hawaii longline (HLL) vessels between 1994 and 1999. On page 213 the DEIS provides a worked example to show how with 2,120 shallow swordfish sets, a base line total of 1,300 seabirds would be expected to be caught. The text then goes on to show the impact of night setting on the interactions resulting in a 73-98 % reduction or 26 - 321 albatrosses. Our calculations show the range to be 26 - 351 albatrosses, why is there a discrepancy in the upper bound (1300 x 0.27 = 351)? Moreover, why is there not a worked example to establish a baseline total for deep tuna sets? Such a figure could be readily computed by subtracting 2,120 sets from the recent annual set total for the HLL fishery (14,200 sets), yielding about 12,000 sets, times the interactions rate = 144 takes.

No such estimate is made, and instead we are presented in the last paragraph on page 213 with a scenario where it is assumed that none of the current, highly effective methods that are in place actually work, resulting in 1,300 birds captured by shallow swordfish sets and 500 birds by tuna sets. Where does this 500 bird figure come from? The text gives the impression it was

simply plucked out of the air. The following sections attempt to provide impacts of the various mitigation measure combinations. However, they continue to repeat the canard that in the event that current measures would serve no purpose, almost 2,000 albatross would be captured each year, should no additional measure such as side setting be introduced. This is a very poor piece of work. Quite apart from the sloppy arithmetic and unfounded assumptions, there is no attempt to look at interactions as they occur above 23 deg N latitude as compared to all areas fished by the HLL fleet, as differentiated in virtually all of the DEIS alternatives. Such an analysis is crucial to reaching a cost-effective solution balancing the needs for seabird conservation versus the costs to the HLL fleet, yet it is absent from this DEIS.

Conclusions

NMFS should not publish a final EIS until these issues have been addressed. At present the Council believes that the sections referred to above require a substantial overhaul and re-draft to make them acceptable for publication. Finally, although not strictly part of the comments on the DEIS, the Council would like to request that the Regional Office and the Science Center work with the Council to establish a set of protocols for data requests by staff and contractors. The problem is not one of unwillingness of Center and Region staff to extract information from the database, indeed the Council staff would like to commend the collaboration received from both offices in generating data summaries for the Council meeting. The problem is in how data requests are processed through the two offices and coordination thereof. We would be happy to meet after the Council meeting to discuss how this might be best accomplished. Mahalo!

Sincerely,

Kitty M. Simonds

Kitty M. Simonds
Executive Director

Subject: seabird-squid DEIS
Date: Mon, 11 Oct 2004 13:36:48 -0700
From: Liz Mitchell <emitch@efn.org>
To: DEISseabirdsquid@noaa.gov
CC: nepa.comments@noaa.gov

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

Dear Mr. Robinson:

Thank you for the opportunity to comment on the Draft Environmental Impact Statement (DEIS) relating to seabird interactions with the Hawaii longline fishery (NMFS 2004c). As introduction, I am the moderator for the Seabird Bycatch Project e-mail listserv, owned by the Institute for Fisheries Resources (non-profit arm of the Pacific Coast Federation of Fishermen's Association). I've also worked as a fisheries observer for many years and worked in the Hawaii Longline Observer Program in 1994.

I'm dismayed that the final day for comments regarding this DEIS comes only two days before the Western Pacific Regional Fishery Management Council (WPRFMC) takes final action at the October 12-15 Council meeting on the seabird regulations. I would normally be encouraged at the swift action but the Council's preferred alternative for seabird mitigation in this DEIS is ineffective, as it allows vessels to revert back to the current measures. NMFS' annual seabird report (2003) acknowledges that, "the suspension of swordfish vessels operating north of the Equator and/or other characteristics associated with swordfish style fishing may be the primary influence on low interaction rates of albatrosses with the Hawaii-based pelagic longline fishery and not the required deterrent measures." Key industry representatives co-authored a successful mitigation study (Gilman et al 2003) involving the use of side-setting, which, when used with adequate line weighting (60 grams per branch line) and a "bird curtain", can reduce albatross takes by as much as 100%. As a tax payer funding this study, I am appalled that, even when equipped with multi-year research conclusions, the Council is preferring to ignore it's own science and allow vessels to revert back to prior ineffective, unenforceable measures. What is the point of mitigation research if we're not going to employ the results?

NMFS and the Councils have encouraged the movement of the U.S. longline fishery from the Atlantic to Hawaii, from Hawaii to California and back to Hawaii without coordinating Council jurisdictional implementation of CMs. When closures were implemented for "Hawaii-based" longliners under the WPRFMC jurisdiction (NMFS 2000), NMFS allowed the same vessels to fish the newly closed areas off the U.S. west coast under PFMC jurisdiction without any regulations. This had the effect of cancelling out any CM benefits implemented by the closures/monitoring requirements.

When an observer program was finally mandated for "California-based" swordfish longliners, high albatross and turtle bycatch was documented, just as it was in Hawaii. Still, there were delays for the closure of the "California-based" longline fishery until the expiration of the "Hawaii-based" swordfish longline closure (NMFS 2004a, NMFS 2004b), now allowing them to move back to Hawaii. Meanwhile general permitted U.S. longline fishermen are operating in other areas of the Pacific under WPRFMC jurisdiction (including the Territory of American Samoa, Territory of Guam, Commonwealth of the Northern Mariana Islands and the US possessions of Johnston and Midway Atolls, Kingman Reef and Palmyra, Jarvis, Howland, Baker and Wake Islands) without any monitoring of their impacts on

endangered species.

NMFS has been very busy in the last 5 years dealing with lawsuites (4 in Hawaii and 1 in California) being forced into complying with environmental laws surrounding the management of the "Hawaii-based" and "California-based" swordfish and tuna longline fisheries . The litigation resulted from significant delays in recognizing the damaging impacts on protected species as revealed in five years of observer data, primarily in the swordfish fleet. Public funding directed toward this relatively insignificant fishery have amounted to millions of dollars, not including the public funds involved in the collaboration of NMFS, the Councils and other nations regarding the development of pelagic longline fisheries outside U.S. waters.

Most of the attention in regulation of these fisheries have concerned sea turtle takes. Since there has never been an Environmental Impact Statement completed for the impacts of these fisheries on seabirds and since prior activity of these vessels in both Council jurisdictions have resulted in high albatross takes, NMFS should not reopen the Hawaii-based swordfish fishery until the EIS process is complete and effective seabird mitigation measures are required. The EIS should also include the impacts of the Hawaii-based tuna fishery and general permitted longline fishing of all U.S. longline fleets operating under both Council jurisdictions.

Three research studies have tested the effectiveness of blue-dyed bait, night setting, setting with an underwater chute, strategic offal discharge, side setting and setting with a line shooter (Boggs 2001, McNamara et al 1999, Gilman et al 2003). The single most effective measure found for both tuna and swordfish vessels was the use of side setting (Gilman et al 2003). Yet the Council's "preferred alternative" only implements this measure as an option, allowing vessels to return to the current measures, which are no more than what the fleet has historically practiced (with the exception of offal discharge and blue-dyed bait, which are unenforceable.

Strategic Offal Discharge

Strategic offal has not been proven to be effective as an overall deterrent and there are some continuous studies that correlate the presence of offal with increased seabird abundance and have inferred that this may be directly related to an increase in seabird bycatch (Gilman, et al 2003; C.J.R. Robertson et al 2003, 2004).

Night Setting

The DEIS acknowledges that night setting may not be effective in reducing Laysan albatross takes (NMFS 2004) and yet the Council turns around and implements this as an option for swordfish vessels. Gilman et al (2003) reviewed past experiments with night setting (McNamara 1999; Boggs 2001). Both these studies revealed a reduction in bycatch with this method by 97% and 98% respectively. However, Gilman et al (2003) drew a direct correlation between bird abundance around the vessel and seabird bycatch and neither of the former studies had normalized seabird abundance with bycatch rates (they couldn't because it was impossible to record bird abundance at night). While black-footed albatross are likely to feed during the day (Fernandez and Anderson 2000; Hyrenbach and Dotson 2000), Laysan albatrosses may be both diurnal and nocturnal foragers (Fernandez and Anderson 2000) and they may have enhanced night vision (Melgar 2002).

There is a correlation for both species of visual cues used in foraging (Hyrenbach and Dotson 2000). Swordfish fishing effort is often times concentrated during the full moon, which, unless there is complete cloud coverage, can increase visibility and access of seabirds to baited hooks. Even in dark skies, swordfish fishing employs the use of light sticks which could possibly be a visual cue to albatrosses. In addition, the current regulations stipulate that night setting begin no earlier than one hour

after sunset and finish by sunrise. Yet the USFWS 2000 short-tailed albatross Biological Opinion (USFWS 2000) stipulates that vessels finish setting one hour before sunrise. Albatrosses exhibit increased foraging and feeding activity during twilight hours, so night sets should finish at least one hour before sunrise.

Line Weighting

In both studies by Boggs (2001) and Gilman, et al (2003), 60 gram weights were attached to branch lines. Yet the current measures insist on 45 gram weights just because it's what the fleet is already using and therefore isn't really a mitigation measure. While it has been acknowledged that tuna fishing generally has less bycatch than swordfish fishing based on the dramatic drop in bycatch after the elimination of swordfish sets in the data, one should consider that the bycatch rates may be underestimated for both fisheries because of drop-offs, predation or the observer not watching every hook.

Current Bycatch Rates are Underestimated

Gilman et al (2003) reported fewer albatrosses brought aboard than observed being caught for both tuna and swordfish sets, indicating that the current bycatch estimates in both fisheries are underestimated. Other studies estimate up to 27% of seabirds caught don't actually come up during hauling (Brothers 1991). Although the Hawaii Longline Observer Program (HLOP) has reported since 1994 that observers watch every hook, this is not the case. Observers take breaks during the hauling of the line and hauling is not stopped during these occasions. In addition, they have fish and sea turtle-related sampling duties that keep them from watching the hooks coming on board. Observers use the reduction in hauling speed as an indication of an organism on the line. However, crew members don't always slow down the hauling if a seabird, or even a turtle, is on the line. If the observer is preoccupied with fish or turtle sampling, the crew could easily cut the line without the observer noticing the catch. Myself and other observers in the HLOP raised this concern with supervisory staff in 1994 but the discussion went no further. I have subsequently questioned observer program staff about this and, to my knowledge, crew members are not yet required to stop hauling the line during observer breaks or while the observer is on deck obtaining biological samples. In addition, seabird bycatch is recorded in three categories-live, dead and injured, with bycatch rates only reflecting the dead specimens. There is no estimate for the survival of injured birds. Most certainly if a wing is broken during hauling the bird will not survive. For these reasons, the bycatch rates in both the tuna and swordfish fisheries could be substantially higher than reported.

Consider overall impacts of this decision Pacific wide

While swordfish fishing as currently practiced has been shown to be highly destructive to seabirds, tuna fishing is more widespread throughout the Pacific and the overall impacts, even with a low bycatch rate per vessel, could actually have substantial impacts Pacific-wide. For this reason, we should strive to implement the most effective measure. Key Council members have high financial stakes both in the swordfish and tuna longline fisheries throughout the Pacific, both nationally and internationally, either through direct fishing activity or in longline gear manufacture and supply. They have also co-authored the latest study on side setting (Gilman et al 2003) so are highly equipped to have a positive influence on other nations' pelagic longline practices. Since NMFS already has fishery advisory relations with other swordfish fishing nations, such as Mexico, Thailand, Japan and Korea, NMFS and the Council have not only an opportunity but a moral obligation to set an example for these fishing nations by implementing proven effective methods (i.e. side setting), making it a requirement wherever these vessels fish.

Respectfully yours,

Elizabeth Ann Mitchell
P.O. Box 933
Eugene, Oregon 97440
Tel: (541) 344-5503
E-mail: emitch@efn.org

Sources:

Boggs, C.H. 2001. Deterring albatrosses from contacting baits during swordfish longline sets. Proceedings on the Symposium on Seabird Bycatch: Trends, Roadblocks and Solutions, Pacific Seabird Group. University of Alaska Seagrant Program. AK-SG-01-01

Brothers, N.P. 1991. Albatross mortality and associated bait loss in the Japanese longline fishery in the Southern Ocean. Biological Conservation 55: 255-268.

Fernandez, P. and D. Anderson. 2000. Nocturnal and diurnal foraging activities of Hawaiian albatrosses detected with a new immersion monitor. Condor (102) 3: 577-584.

Gilman, E., N. Brothers, D. Kobayashi, S. Martin, J. Cook, J. Ray, G. Ching, and B. Woods. 2003. Performance assessment of underwater setting chutes, side setting and blue-dyed bait to minimize seabird mortality in Hawaiian longline tuna and swordfish fisheries. Final Report. National Audubon Society, Hawaii Longline Association, U.S. National Marine Fisheries Service Pacific Islands Research Science Center, U.S. Western Pacific Regional Fishery Management Council.

Hyrenbach, D. and R. Dotson. 2000. Post-breeding movements of male black-footed albatross, Phoebastria nigripes. Marine Ornithology 29: 7-10.

McNamara, B., L. Torre, K.H. Morgan. 1999. Final report: Hawaii longline seabird mortality mitigation project. Report prepared by Garcia and Associates for the Western Pacific Regional Fishery Management Council.

Melgar, C. 2002. Articles on Hawaiian birds and birdwatching and other Pacific wildlife Website: http://www.birdinghawaii.co.uk/XLaysanAlbatross2.htm

National Marine Fisheries Service. 2000. Federal Register. Vol (65), No. (166), August 25, 2000. (Hawaii-based longline restrictions)

NMFS. 2001. Federal Register. Vol 66, No. 237. December 10, 2001. (Emergency Interim Rule to extend the closure of areas to Hawaii-based longliners).

NMFS. 2003. Annual report on seabird interaction and mitigation efforts in the Hawaii-based longline fishery for calender year 2003. NMFS, Pacific Islands Regional Office, Honolulu, Hawaii.

NMFS. 2004a. Federal Register/ March 11, 2004/Volume 69, No. 48. (to close California to swordfish longline fishing 12 April 2004)

NMFS. 2004b. Federal Register. April 2 2004. Volume 69, No. 64. (to reopen Hawaii to swordfish longline fishing)

NMFS. 2004c. Draft Environmental Impact Statement (EIS) for Seabird Interaction Mitigation Methods under the Fishery Management Plan for the Pelagic Fisheries of the Western Pacific Region and Pelagic Squid Fishery Management under the FMP for the Pelagic Fisheries of the Western Pacific Region and the High Seas Fishing Compliance Act.

USFWS. 2000. Biological Opinion for the U.S. Fish and Wildlife Service for

the effects of the Hawaii-based domestic longline fleet on the short-tailed albatross (Phoebastria albatrus). November 2000.

Elizabeth Mitchell
P.O. Box 933
Eugene, Oregon 97440
Tel: 541/344-5503
E-mail: emitch@efn.org

Center for Biological Diversity

protecting and restoring natural ecosystems and imperiled species through science, education, policy and environmental law

VIA ELECTRONIC MAIL

October 11, 2004

William L. Robinson
Regional Administrator
Pacific Islands Regional Office
NOAA Fisheries
Fax: (808) 973-2941
E-mail: DEISseabirdsquid@noaa.gov

Susan A Kennedy
Acting NEPA Coordinator
NOAA
Fax: (301) 713-0585
E-mail: nepa.comments@noaa.gov

RE: Draft Environmental Impact Statement for Seabird Interaction Mitigation Methods under the Fishery Management Plan for the Pelagic Fisheries of the Western Pacific Region and Pelagic Squid Fishery Management under the Fishery Management Plan for the Pelagic Fisheries of the Western Pacific Region and High Seas Fishing Compliance Act.

I am writing on behalf of the Center for Biological Diversity and the Turtle Island Restoration Network regarding the above captioned Draft Environmental Impact Statement ("DEIS") by the National Marine Fisheries Service ("NMFS"). As the DEIS itself acknowledges, "Two disparate actions with unrelated objectives affecting two fisheries currently prosecuted under different authorities are assessed in this document." This statement begs the question as to why these two actions are in fact the subject of a single EIS. While we generally support an integrated ecosystem approach that looks at the cumulative effects of separate actions occurring in the same region or affecting the same resources, NMFS's approach here does even attempt to do any such thing. Instead, for whatever reason, two wholly separate environmental analyses are simply pasted together in a seemingly haphazard manner, rendering the document as a whole, and both of its separate analysis, difficult to follow and at times incoherent. In this instance, the whole is definitely less than the sum of its parts. Ultimately, this cost or labor saving action on NMFS's part runs counter to the intent of the National Environmental Policy Act ("NEPA") (42 U.S.C. § 4321 *et seq.*), that an EIS be readily understandable. In any event, we here provide comments on these two separate actions covered by the DEIS.

Seabird Interactions

We are pleased that NMFS is finally carrying out a legally required NEPA analysis of the impacts of the management of longline fisheries under the Fishery Management Plan for Pelagic Fisheries of the Western Pacific Region ("FMP") on seabirds. However, the primary problem with this analysis is in its timing. NEPA's fundamental purposes are to guarantee that: (1) agencies take a "hard look" at the environmental consequences of their actions <u>before</u> these actions occur by ensuring that the agency has, and carefully considers, detailed information concerning significant environmental impacts; and (2) agencies make the relevant information available to the public so that it may also play a role in

Tucson • Phoenix • Silver City • Idyllwild • San Diego • San Francisco

Brendan Cummings, Staff Attorney
PO Box 493 • Idyllwild, CA • 92549
T: (951) 659-6053 x. 301 • F: (951) 659-2484 •bcummings@biologicaldiversity.org

both the decisionmaking process and the implementation of that decision. *See, e.g.* 40 C.F.R. § 1500.1. In this instance, NMFS has completely reversed this process. NMFS approved the reopening of the swordfish fishery under the FMP in April, 2004 but only released the DEIS in August, 2004. As NMFS has obviously not yet finalized the DEIS, it cannot in any credible way claim that it has complied with NEPA before taking action. As such, NMFS must immediately suspend the swordfish fishery until and unless it completes a lawful NEPA process on the impacts of the fishery on seabirds.

The DEIS describes the Council's preferred alternatives but nowhere in the DEIS is there any clear indication that this is also NMFS's preferred alternative. NMFS's failure to identify a preferred alternative violates NEPA and the CEQ regulations. Assuming the Council's preferred alternative is also NMFS's preferred alternative (likely a valid presumption as NMFS seems entirely beholden to the Council and incapable of independently managing the longline fishery so as to comply with its various legal mandates), we believe that if NMFS adopts this alternative the agency will violate not only NEPA, but also the Migratory Bird Treaty Act ("MBTA")(16 U.S.C. § 706 *et seq*.). The preferred alternative does little if anything to reduce seabird mortality. In fact, all it seems to do is eliminate the requirement for using thawed blue-dyed bait. We believe that NMFS must reject the Council's preferred alternative and instead adopt the most effective combination of measures to reduce seabird mortality. The DEIS acknowledges that the single most effective measure found for both tuna and swordfish vessels was the use of side setting. Side setting at night appears to be even more effective. Yet the DEIS does not even include as an alternative the requirement to use side setting at night for all vessels in the fishery. While, regulations designed to reduce sea turtle mortality require the swordfish fleet to set only at night, no such requirement is in place for the tuna fleet. The failure to even include what NMFS considers the most effective combination of measures as an alternative renders the DEIS fatally deficient under NEPA. Of the alternatives considered in the DEIS, Alternative SB8B, "Use current mitigation measures plus side-setting in all areas" appears to be the most likely to reduce seabird mortality. We suggest that NMFS add the requirement that such fishing only be done at night to this alternative and adopt it via regulations immediately.

As mentioned above, we believe that the fishery as currently authorized is violating 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). The Laysan and black-footed albatross, as well as the various shearwaters and boobies likely killed by the fishery are included in the list of migratory birds protected by the MBTA. 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.), affirmed, 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 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 the treaties, statute and FWS regulations. NMFS however has not obtained, much less applied for such a permit authorizing any take by the longline fishery.

NMFS cannot dispute that the longline fisheries under the Fishery Management Plan for Pelagic Fisheries of the Western Pacific Region kill 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. At a minimum, NMFS must immediately require the use of the best available mitigation measures, such as side setting at night for all longline fishing under the FMP (swordfish or tuna, Hawaii or American Samoa-based) so as to minimize the likelihood of the fisheries killing migratory birds.

In previous comment letters to NMFS and the Pacific and West Pacific Fishery Management Councils we explained how we believe that NMFS's authorization of any pelagic longline fishing in the Pacific violates NMFS's obligation under the ESA to avoid jeopardizing listed species such as the critically endangered leatherback sea turtle and the loggerhead sea turtle. 16 U.S.C. § 1536(a)(2). We maintain that position. Additionally, as described above, since longline fishing as currently practiced also kills numerous seabirds, and is likely driving the black-footed albatross towards eventual extinction, we believe that no pelagic longlining can be legally authorized until and unless NMFS develops and implements measures that are proven to eliminate bycatch of these and other imperiled species. Such an approach is also consistent with the call put out by over 400 scientists and 100 NGOs from 25 nations calling on the U.N. to institute an immediate moratorium on pelagic longline fishing in the Pacific until measures can be put in place that eliminate such bycatch. See www.seaturtles.org.

Squid Fishery

We believe that the DEIS suffers from some of the same flaws with regard to its treatment of the squid fishery as it does with regards to the longline fishery. First and foremost, NMFS is allowing vessels to fish in the high seas pursuant to permits issued under the High Seas Fishing Compliance Act of 1995 ("HSFCA")(16 U.S.C.§ 5501 *et seq.*), prior to completing the required analysis under NEPA and the ESA. While we agree with NMFS that any future permits require such analysis, all current permits also require such analysis and must be suspended until and unless NMFS complies with these statutes. As for the actual management measures proposed in the DEIS, we are fine with the Council's preferred alternative of including the squid fishery in the existing Pelagics FMP. As squid are used as bait by other fisheries under the FMP, as well as comprise an important prey source for target and bycatch species of these fisheries, managing the squid fishery within the Pelagics FMP would allow for a better ecosystem-based management regime for the FMP as a whole. Additionally, until and unless the squid fishery is brought under an FMP, we believe that NMFS should adopt Alternative SQB.2 and cease issuing HSFCA permits for such fishery.

Thank you for the opportunity to comment. If you have any questions or wish to discuss this matter, please contact me at 951-659-6053. Thank you for your concern.

Sincerely,
/s/
Brendan Cummings,
Attorney, CBD

Subject: seabird-squid DEIS
Date: Mon, 11 Oct 2004 18:45:40 -0400
From: "Gerald Winegrad" <gww@abcbirds.org>
Organization: American Bird Conservancy
To: <DEISseabirdsquid@noaa.gov>

These comments are submitted on behalf of American Bird Conservancy in reference to the Draft Environmental Impact Statement for Seabird Interaction Mitigation Methods under the FMP for Pelagic Fisheries of the Western Pacific Region and for Pelagic Squid Fishery Management (DEIS) published by NOAA/NMFS in August 2004. Our comments are limited exclusively to the seabird portion of the DEIS.

The most critical element of our comments:

THE FINAL EIS AND NOAA/NMFS SHOULD ADOPT MANDATORY EFFECTIVE MITIGATION MEASURES FOR THE HAWAII-BASED LONGLINE FISHERY.

We would urge that the final EIS support, and that NOAA/NMFS adopt, mandatory mitigation measures of proven efficacy that would require the following for all Hawaii-based longline vessels, wherever they may fish (above or below 23 degrees N):

1. Use of all current mitigation measures, except that the use of blue-dyed bait be eliminated and the requirement for strategic offal discharge during line setting and haul be eliminated. The requirement for thawed bait should be continued.

2. That discharge of offal be prohibited during line setting.

3. That all vessels employ side setting unless both NMFS and the U.S. Fish and Wildlife Service inspect the vessel with the owner and determine in writing that the vessel is technologically incapable of side setting without significant costs. If a vessel cannot feasiblely side set as determined herein, the vessel would have to use an underwater setting chute or paired streamer lines at all times, plus at least 60 grams of weights at least one meter from each hook, in addition to the other mitigation measures required of all vessels.

4. The side setting be accompanied by requirements for at least 60 grams of weights at least one meter from each hook and for a bird scaring curtain.

The DEIS notes that, under current regulations and under those preferred by the Council, 1,800 albatrosses could be killed annually. The DEIS also notes that:

"Side setting has been shown to virtually eliminate bird capture. Gilman et al. (2003)." The DEIS rates side setting at night as the best possible seabird mitigation/avoidance measures and side setting with line shooters as number 2. Thus, both shallow setting and deep setting fisheries would be able to nearly eliminate all mortality with these two simple measures. The DEIS gives side setting the highest of all Operational ratings and the highest of all Compliance Enforcement ratings of all mitigation measures examined. The DEIS notes that side setting may benefit both seabird populations and fishing efficiency and can be accomplished with small costs up front and zero additional costs after initial changes are made and while fishing. Loss bait is minimized and more targeted fish can be caught.

So, why not require side setting on all Hawaii longline vessels that can technologically and economically use it? Side setting should not be voluntary as proposed by the Council; it is now.

Gerald W. Winegrad, Vice President for Policy
American Bird Conservancy
1834 Jefferson Place, NW
Washington, DC 20036
202-452-1535
VISIT OUR WEB SITE AT <http://www.abcbirds.org>

HawaiiDEISCommentsOct2004.wpd	**Name:** HawaiiDEISCommentsOct2004.wpd **Type:** WordPerfect 11 Document (application/x-unknown-content-type-WP11D **Encoding:** base64 **Download Status:** Not downloaded with message

HawaiiDEISCommentsOct2004.rtf	**Name:** HawaiiDEISCommentsOct2004.rtf **Type:** Winword File (application/msword) **Encoding:** quoted-printable **Download Status:** Not downloaded with message

October 11, 2004

William L. Robinson, Regional Administrator
NMFS Pacific Islands Regional Office (PIRO)
1601 Kapiolani Blvd., Suite 1110
Honolulu, HI 96814- 4700

Re: DEIS on Seabird Interaction Mitigation and Squid Fishery Management

Dear Mr. Robinson:

These comments are submitted on behalf of American Bird Conservancy in reference to the Draft Environmental Impact Statement for Seabird Interaction Mitigation Methods under the FMP for Pelagic Fisheries of the Western Pacific Region and for Pelagic Squid Fishery Management (DEIS) published by NOAA/NMFS in August 2004. Our comments are limited exclusively to the
seabird portion of the DEIS.

ABC is the sole U.S.-based not-for-profit organization dedicated entirely to the conservation of wild birds and their habitats in the Americas. ABC has offices in The Plains, Virginia, and Washington, D.C., and staff in Colorado, Oregon, Missouri, Montana, and Vermont. ABC has more than 300 partner organizations in the Americas primarily through its leadership roles in the North American Bird Conservation Initiative, Partners in Flight, ABC's Bird Conservation Alliance, and ABC's international network. ABC has been actively engaged in the conservation of seabirds, and particularly in the seabird/longline mortality problem.

I. FINAL EIS AND NOAA/NMFS SHOULD ADOPT MANDATORY EFFECTIVE MITIGATION MEASURES FOR THE HAWAII-BASED LONGLINE FISHERY.

A. Recommended Measures.

We would urge that the final EIS support, and that NOAA/NMFS adopt, mandatory mitigation measures of proven efficacy that would require the following for all Hawaii-based longline vessels, wherever they may fish (above or below 23 degrees N):

1. Use of all current mitigation measures, except that the use of blue-dyed bait be eliminated and the requirement for strategic offal discharge during line setting and haul be eliminated. The requirement for thawed bait should be continued.
2. That discharge of offal be prohibited during line setting.
3. That all vessels employ side setting unless both NMFS and the U.S. Fish and Wildlife Service inspect the vessel with the owner and determine in writing that the vessel is technologically incapable of side setting without significant costs. If a vessel cannot feasiblely side set as determined herein, the vessel would have to use an underwater setting chute or paired streamer lines at all times, plus at least 60 grams of weights at least one meter from each hook, in addition to the other mitigation measures required of all vessels.
4. The side setting be accompanied by requirements for at least 60 grams of weights at least one

meter from each hook and for a bird scaring curtain.
Our recommended action is closest to Alternative SB10B in the DEIS, but with significant modifications. The key current requirements that should be kept are the provisions for shallow sets to be made at night, one hour after sunset to sunrise, and to deploy lines by a line setting machine. Of course, the requirements for removing, treating, and reporting hooked birds and for captain and crew to attend a protected species workshop should be continued.

B. Council Choice Maintains Status Quo; 1,800 Albatrosses Could be Killed Annually.
The DEIS notes that under any alternative continuing the status quo of seabird mitigation measures, 1,800 seabirds, nearly all albatrosses, could be killed annually. Even under SB7C, the Council's preference, 1,800 seabirds could be taken if vessels do not voluntarily choose to use side setting or underwater setting chutes. The DEIS suggests that 1,300 seabirds would be killed in the shallow setting fishery; 500 more in the deep set fishery. This mortality is reduced to 10-20 birds with mandated side-setting. Thus, it is imperative that NOAA/NMFS and the final EIS adopt more effective measures as outlined in our recommendations above.

The DEIS notes that it "....is intended to reduce interactions with seabirds in the Hawaii-based longline fishery....the overarching goal is to reduce the potentially harmful effects of fishing by Hawaii-based longline vessels on all seabirds." Our recommendation will come closest to accomplishing the goal of the DEIS to reduce impacts to seabirds, but most importantly to attaining NOAA's goal on bycatch minimization. Also, our recommendation comes closest to complying with Article 7.6.9 of the FAO Code of Conduct for Responsible Fisheries, adopted by all member nations, including the U.S. It provides that states should take appropriate measures to minimize catch of non-target species (both fish and non-fish species) and negative impact on associated or dependent species, in particular endangered species. It further provides that states and regional fisheries management organizations should promote, to the extent practicable, the development and use of selective, environmentally safe and cost effective gear and techniques.

We urge NOAA/NMFS to include in the final EIS provisions for seabird mitigation that will not simply maintain the status quo. Unfortunately, the Western Pacific Fisheries Management Council has supported Alternative SB7C which would eliminate the blue-dyed bait and offal provisions from current regulations, thus keeping the status quo (minus these provisions) and simply allow longline vessels to voluntarily use much more effective measures. These vessels can choose more effective measures now. The adoption of measures that maintain the status quo and simply allow longline vessel owners to choose more effective measures at their leisure, violates the intent and purpose of NOAA to minimize bycatch, the FAO Code of Conduct, the DEIS intent and purpose, the Migratory Bird Treaty Act, and the Endangered Species Act.

C. Re-opening Shallow Setting Fishery Requires Better Conservation Measures.
The DEIS notes that the prohibition on Hawaii-based longline vessels and general longline vessels using longline gear to target swordfish ("shallow-setting") north of the equator was lifted by NMFS by rule on April 2, 2004. As noted in the DEIS, this fishery "....historically had more than an order of magnitude greater seabird interaction rate than the deep-set tuna sector." The

NMFS BA for the proposed rule re-opening the shallow setting fishery noted at page 139 that "Data collected by NMFS observers show that when Hawaii-based longline vessels targeted swordfish the incidental catch of seabirds was far higher than when vessels target tuna (Table 39)." The table indicates a rate that is 51 times greater for vessels targeting swordfish than for tuna vessels. This is attributable to these vessels fishing where the albatrosses forage, particularly for squid And yet, the new regulations failed to adequately address this 51-fold increased potential for seabird mortality and simply continued the inadequate avoidance measures for seabirds that were adopted before the swordfish fishery was closed.

The DEIS finds no evidence to indicate whether the requirements to avoid sea turtle take–the use of a circle hook size 18/0 or larger with a 10 degree offset, combined with mackerel-type bait–will prevent any avian mortality. Seabird mortality could rise to the level that existed before restrictions on the shallow set fishery were imposed in 2000.

The re-opening of this fishery with 2,120 sets allowed, has very serious consequences for albatrosses and potentially other seabirds. The DEIS notes that 2/3 of 164 Hawaii-based longline permitees applied for these shallow setting permits before the May 1, 2004 deadline. ABC and many of our partner organizations had been urging the continued closure of this shallow-setting swordfish fishery to prevent the killing of albatrosses and other seabirds in the Hawaiian longline fishery. In addition, we and our colleagues in national conservation organizations have met with three consecutive Directors of NMFS, various other NOAA/NMFS officials, and sent repeated letters and made repeated phone calls to Western Pacific Regional Fisheries Management Council members and NMFS' Regional PIAO Director about the need for effective regulations in Hawaiian waters to end the killing of albatrosses.

In re-opening the shallow setting fishery for swordfish, NMFS adopted new measures exclusively to deal with sea turtles and refused to adopt more effective seabird avoidance measures to prevent the mortality of albatrosses and shearwaters. The current regulatory regime continued the status quo before the closure of the shallow setting fishery. The U.S. FWS BiOp for Short-tailed Albatross issued November 28, 2000 required night setting, just as under current regulations, for the shallow setting fishery. All of the other seabird mitigation measures stayed the same from the previous BiOp: 45 grams of weight and line setting machines for the deep set fishery, thawed, blue dyed bait and strategic offal discharge for all vessels. As the DEIS notes, even most of these measures simply continued the status quo for these fisheries as most all deep setting vessels used at least 45 grams of weights on lines and used line setting machines. The swordfish fishery typically set at night, although not always one hour after sunset.

Because listed sea turtles spawned the successful litigation that led to the swordfish closure, seabirds were given little focus in re-opening the shallow setting fishery, including an ESA-listed species, thus subjecting seabirds to illegal take under both the Endangered Species Act (ESA) and the Migratory Bird Treaty Act (MBTA). NMFS has begun consultation under section 7 of the ESA with the U.S. Fish and Wildlife Service (FWS) to obtain a new Biological Opinion on the effect of this action on the ESA-listed endangered Short-tailed Albatross.

The final EIS and NOAA/NMFS should adopt measures for seabird mitigation that will not simply maintain the status quo, but that require side setting and other effective mitigation measures that can virtually eliminate albatross mortality if deployed properly.

II. SIDE-SETTING SHOULD BE REQUIRED ON ALL HAWAII LONGLINERS.
Now that the shallow-setting swordfish fishery has been re-opened as a "model" fishery, it is critical that effective seabird avoidance measures be required. The recent research on board Hawaiian longliners documenting the effectiveness of side setting with at least 60 grams of weight at least one meter from each hook, and using a bird scaring curtain is noted in the DEIS. Albatross and other seabird take can be nearly eliminated with these safe, inexpensive measures without deceasing fishing efficiency. Blue-dyed bait is ruled out as an effective, enforceable deterrent. See Gilman, E. et al., *Performance Assessment of Underwater Setting Chutes, Side Setting, and Blue-Dyed bait to Minimize Seabird Mortality in Hawaii Longline Tuna and Swordfish Fisheries*, Final Report, Honolulu, HI (August 2003). Also see Melvin et al., *Solutions to Seabird Bycatch in Alaska's Demersal Longline Fisheries* (October 2000), which conclusively demonstrated that paired streamer lines, when properly deployed, can eliminate all albatross and nearly all other seabird mortality. The researchers in their Report recommended that all Alaskan longliners deploy these paired streamer lines.

Indeed, the DEIS clearly details the benefits of side setting. The DEIS finds that "Side setting has been shown to virtually eliminate bird capture. Gilman et al. (2003)." The DEIS rates side setting at night as the best possible seabird mitigation/avoidance measures and side setting with line shooters as number 2. Thus, both shallow setting and deep setting fisheries would be able to nearly eliminate all mortality with these two simple measures. The DEIS gives side setting the highest of all Operational ratings and the highest of all Compliance Enforcement ratings of all mitigation measures examined. See Table 2.1-2 at page 53. The DEIS notes that side setting may benefit both seabird populations and fishing efficiency and can be accomplished with small costs up front and zero additional costs after initial changes are made and while fishing. Loss bait is minimized and more targeted fish can be caught. Further, several vessels have already voluntarily begun to use side setting and 70% of vessels already deploy 60 gram weights, the rest 45 gram weights.

We support the elimination of the use of blue-dyed bait and the requirement for strategic offal discharge during line setting and haul, but only if the requirement for thawed bait is continued and the discharge of offal is prohibited during line setting. Thawed bait sinks quicker and should be required as it is under current U.S. regulations for CCAMLR waters. Eliminating offal discharge while line setting should minimize the attraction of albatrosses and other seabirds to longline vessels during the critical line setting time. Other nations, including Australia, have adopted such a prohibition. Blue-dyed bait is not an effective deterrent, especially when used on fish. Both the NMFS BA on the re-opening of the shallow setting fishery and the recent research done on board Hawaii longline vessels document this and challenge its efficacy and the ease and practicality of use. See Gilman, E. et al. (2003).

We also support the continuation of the requirements for 100% observer coverage for the shallow setting longline fishery and at least 20% for the deep setting fishery, provided that at least 5% coverage is dedicated primarily to seabird bycatch, as required under the current U.S. FWS BiOp.

The DEIS and NMFS have rejected time and area closures to better protect seabirds. The previous closures of fishing areas were lifted under the new regulations of April 2, 2004. This makes the adoption of the recommended mitigation measures above all the more important. In fact, the DEIS rejects time and area closures because of the effectiveness of available mitigation measures. The final EIS and NMFS should require the adoption of these measures and not simply maintain the status quo.

III. FINAL EIS AND SEABIRD MITIGATION MEASURES NEED TO ADDRESS KILLING OF 10,098 BLACK-FOOTED AND 8,561 LAYSAN ALBATROSSES.

NMFS data documents that Hawaii-based longliners killed 10,098 Black-footed Albatrosses from 1994-2003 and 8,561 Laysan Albatrosses. Very few other birds were killed. Since the closure of the shallow-set swordfish fishery, the numbers of albatrosses killed declined to 65 Black-footed Albatrosses and 51 Laysan Albatrosses (116 total) in 2002, despite an increased numbers of hooks being set in 2002 (27 million hooks set). Observer coverage increased to 25% of hooks set in 2002. Unfortunately, in 2003 the take of albatrosses increased to 111 Black-footed Albatrosses and 114 Laysan Albatrosses (225 total) taken. A record 29.3 million hooks were set from 110 vessels with observer coverage of 22.2%.

This increase occurred prior to the re-opening of the shallow setting swordfish fishery and is cause for concern.

Further, the mortality data from NMFS does not include any adjustments upwards for birds hooked but not counted. In an experiment to test the efficacy of an underwater line chute conducted in the Hawaii-based fishery in March, 2002, Gilman et al. (2002) found that 34% of birds observed to be hooked during the set were not found on the line when the gear was hauled in. In the August 2003 Final Report from Gilman et al., a finding of 28% of birds observed hooked but not recovered was documented. The DEIS does note that NMFS albatross mortality data does not include increased mortality to chicks from a parent's death, or suppressed breeding when one adult dies.

The DEIS should note and address this additional mortality, and the prevention of such mortality needs to be aggressively addressed in adopting final plans for mitigation measures, as recommended above.

IV. DOCUMENTATION OF SERIOUS DECLINES IN LAYSAN ALBATROSSES AND FOCUS ON GLOBAL LISTING OF ALL THREE ALBATROSSES.

The DEIS contains some analyses of the northern hemisphere albatross species affected or potentially affected by Hawaii-based longlines. All three species of these albatross are now at some risk of extinction and longline mortality is the gravest threat to at least two of these species.

The three albatross species are all at risk of mortality from the Hawaii-based longline fisheries, primarily the shallow-setting swordfish fishery. According to the DEIS, over 95% of the world's breeding population of Black-footed Albatross and over 99% of Laysan Albatross breed in the NW Hawaiian Islands and forage in and around the core areas of Hawaiian longline vessels, particularly the swordfish vessels. This makes them even more vulnerable to Hawaii-based longline fisheries.

The DEIS fails to mention the serious population declines in Laysan Albatross, likely due to longline mortality, and this population decline leading to this species being listed as Vulnerable to extinction under the 2003 IUCN Red List of Threatened Species. (see www.redbook.org). In fact, the analyses is totally devoid of the best population data. Under the IUCN listing as Vulnerable to extinction, this recent analyses appears in *Threatened Birds of the World 2004.* CD-ROM. BirdLife International, Cambridge, U.K. (Accessible on the web):

A. Laysan Albatross Population Declines by 32% Over a Decade.
"This species is being listed as threatened for the first time. It is classified as Vulnerable on the basis of a >30% decline over three generations (84 years). The reason for this decline has been attributed to the effects of longline fishing in the North Pacific. Preliminary data suggest that the rate of decline could be more rapid and that therefore this species could warrant a more serious threatened status. This threat is ongoing and is therefore projected into the future.

Range & Population. *Phoebastria immutabilis* is known to breed at 16 sites (nine with populations of greater than 100 pairs), mostly in the Northwestern Hawaiian Islands (**USA**) with fewer than 500 nests in small colonies in **Japan** and **Mexico**. The population is estimated to be *c.*437,000 breeding pairs. The largest colony is at Midway Atoll where 286,662 active nests were counted in 2001. The second largest colony is at Laysan Island where 103,689 pairs were estimated in 2001. Population sizes at monitored colonies increased between 1980 and 1995 but have never reached the densities observed prior to large-scale harvests for feathers in the early 1900s. Recent information has shown a 32% decline during 1992-2002 (3.2% per annum) of birds breeding on the Northwestern Hawaiian Islands where 90% of the global population is found.

Threats. The species is killed in pelagic and demersal longline fisheries in the North Pacific as well as in illegal high seas driftnet operations. Preliminary analyses suggest that pelagic longliners in the North Pacific may kill *c.*10,000 birds (of this species) each year, while demersal longline operations in the Bering and Alaskan Sea kill *c.*700 birds per year.

Targets. *Continue monitoring population trends and demographic parameters. *Conduct further analysis of long term trends to see if a more serious threat status is justified. *Continue satellite-tracking studies to assess temporal and spatial overlap with longline fisheries. *Adopt best-practice mitigating measures in all longline fisheries within the species's range. *Continue and enhance awareness programmes in all longline fleets."

Further supporting this data is a January 8, 2004 FWS-Pacific Islands Office Press Release. While noting a large increase in 2004 breeding Laysan Albatrosses on Midway Island, the FWS notes that:
"The Service conducts complete counts of this species at Midway when possible, and counts or sample densities of nesting birds are taken at French Frigate Shoals and Laysan Island every year. These monitoring sites account for 93 percent of the worldwide breeding population of this species. Between 1992 and 2002, the number of breeding pairs at all three sites combined has declined at an average rate of 3.2 percent per year. This rate represented a cumulative decline in annual breeding attempts of 32 percent over a ten-year period."

The Laysan Albatross is on the 2002 FWS Birds of Conservation Concern List. This means that without additional conservation actions, the birds are likely to become candidates for listing under the Endangered Species Act. The Birds of Conservation Concern list is mandated by Congress under 1988 amendments to the Fish and Wildlife Conservation Act. The North American Waterbird Conservation Plan lists this species as of High Conservation Concern. These latter two listings should be addressed in a final EIS.

B. Black-footed Albatross Population Declines by 1% a Year Over a Decade.
This species has been recently changed to the next to highest international category of Endangered under the 2003 IUCN Red Book. The 2003 IUCN Red List of Threatened Species provides:
"This species has been upgraded to Endangered on the basis of a projected future decline of more than 60% over the next three generations (56 years), taking account of present rates of incidental mortality in longline fisheries in the north Pacific Ocean."

According to the January 8, 2004 FWS Press Release cited above:
" Black-footed Albatrosses currently breed at 12 sites and are estimated to have a world population of about 57,000 breeding pairs. Since 1998, at least 75 percent of the world's breeding population is counted less frequently, but all sites except one have been surveyed at least once since 1991. At Midway, Laysan Island, and French Frigate Shoals, the three sites where the Service conducts annual complete counts of nesting pairs, a 9.8 percent decline in the breeding population was recorded between 1996 and 2001."

According to the peer-reviewed BirdLife International in prep. *Threatened Birds of the World 2004*. CD-ROM. BirdLife International, Cambridge, U.K.:
"Modeling exercises suggest that this species could suffer a 60% decrease over the next three generations, if current bycatch levels in Pacific longline fisheries are not reduced. Monitoring data from three colonies in Hawaii, where over 75% of the world's population nests, suggests that numbers may have decreased by 9.6% from 1992 to 2001. Population models predict that under a moderate bycatch scenario (assumes 10,000 birds are taken Pacific-wide) this species will experience a 60% decrease in numbers over the next three generations if bycatch mortality is not reduced through mitigation measures over this time period. The species disperses widely over the north Pacific Ocean, with occasional records in the Southern Hemisphere.

Targets: *Continue monitoring population trends and demographic parameters. *Continue satellite-tracking studies to assess temporal and spatial overlap with longline fisheries. *Adopt best-practice mitigating measures in all longline fisheries withing the species's range."

Threatened Birds of the World (2000), attributes its listing and decline as "...owing to interaction with longline fisheries for tuna, billfish and groundfish in the North Pacific Ocean where there are few mitigation measures." The North America Waterbird Conservation Plan lists this species as Highly Imperiled, it's most critical ranking. The Black-footed Albatross is also on the 2002 FWS Birds of Conservation Concern List. These references and materials on population declines should be noted in a final EIS.

C. Short-tailed Albatross Endangered and Susceptible to Longlines.
This species has been reduced to ~1,900 animals from over two million in the mid-1800's. It is federally ESA-listed as endangered and globally Red Listed as Vulnerable to extinction.

As noted in BirdLife International's *Threatened Birds of the World*, Cambridge, U.K.
"This species qualifies as Vulnerable because it has a very small population and breeding range, limited to Torishima and the Senkaku Islands. Conservation efforts have resulted in a gradual population increase and an improvement in its threatened status.

Threats. Its historical decline was caused by exploitation. Today, the key threats are mortality caused by fisheries and the instability of soil on its main breeding site. With the majority of the population breeding at a single site, it is vulnerable to natural disasters, such as volcanic eruptions. Introduced predators are a potential threat.

Targets. *Promote measures designed to protect this species from entanglement in fishing nets and prevent mortality from longline fisheries. *Study the possibility of attracting it to breed at former colonies. *Promote conservation measures for the population in the Senkaku Islands. *Determine the at-sea distribution and marine habitat use through satellite telemetry studies."

This endangered bird is known to follow and forage around Hawaiian longline vessels and this is noted in the DEIS. Twelve of these rare birds have been killed since 1993 in the Alaskan longline fishery. An Alaska Draft Supplemental EIS (done by NMFS) mentions that "Recent studies have implicated longline fishing in population declines of albatross species. Longline fishing is considered the most recent and potentially most serious global threat faced by albatrosses and other Procellariiformes."....."Given all of these factors, we believe Alternative 1 [the status quo] to have conditionally significant adverse effects on the short-tailed albatross with respect to take."

The Short-tailed Albatross is clearly vulnerable to longline hooks from Hawaii longline vessels as documented in the 2000 and 2002 FWS BiOp's, and this should be addressed in a final EIS and effective mitigation measures supported and adopted to prevent such mortality.

D. Albatrosses Vulnerable to Population Declines from longline Mortality.
The DEIS notes that albatrosses are an example of a K-selected species. This means they may take 8-10 years to reproduce, have low natural adult mortality, are long-lived, produce few young, are very vulnerable to artificial adult mortality, and would take many years to recover from population declines. This life history needs to be addressed in the final EIS in the context of the thousands of albatrosses killed in Hawaii longline fisheries and also in the context of the cumulative impacts to these species from longline mortality in Alaska and other longline fisheries. The urgency for effective mitigation measures also should be addressed in this discussion.

V. DEIS FAILS TO DISCUSS NECESSITY OF ESA CONSULTATION AND A NEW BIOP BEFORE SHALLOW SET FISHERY RE-OPENED.
The FWS issued a new BiOp in November 2002 after the closure of the swordfish fishery and the adoption of seabird avoidance measures. The BiOp for the tuna longline fishery still noted that: "The expected, adverse effect of the proposed action is mortality of short-tailed Albatrosses.... With respect to the short-tailed albatross, the most important change to the fishery resulting from the sea turtle mitigation measures is this suspension of all swordfish-target or shallow-set longline operations by Hawaii longliners....We have determined that short-tailed albatrosses are

at risk of injury or mortality from Hawaii longline fishing operations ...We estimate that one (1) short-tailed albatross per year may be taken in the Hawaii-based longline fishery, or a total of four over the remaining four-year duration of this consultation."

The FWS noted that:
"This revised estimate for the fishery is substantially less than the incidental take of 2.2 short-tailed albatross per year estimated in the November 2000 Opinion for a fishery that included shallow- as well as deep-set operations." This is because of the much higher rate of seabird take in the shallow-setting swordfish fishery, estimated by NMFS at 51 times greater for vessels targeting swordfish than for tuna vessels. The Short-tailed Albatross is being exposed to even more potential mortality than before with zero changes in seabird mitigation measures.

ESA regulations at 50 CFR §402.16 required reinitiating of formal consultation with the FWS under ESA Section 7 BEFORE re-opening the swordfish fishery. The DEIS fails to mention this, although consultation has now begun. It is now critical that effective seabird avoidance measures be required now that the shallow-setting swordfish fishery has re-opened and that the final EIS include effective measures as the chosen action to be taken. See our recommendations for specific measures above.

VI. NMFS RE-OPENING THE SWORDFISH FISHERY VIOLATES THE MBTA.
The United States recognized the critical importance of internationally coordinated management of migratory birds by ratifying separate bilateral conventions for their conservation with Canada, Mexico Japan, and Russia, collectively, the migratory bird conventions.

The Migratory Bird Treaty Act of 1918 (MBTA), codified as 16 United States Code, Section 703 et seq., implements these conventions in the U.S. and has served as the basic U.S. law governing the protection of avian species. Most bird species in the United States are protected by the Migratory Bird Treaty Act of 1918, including all seabirds killed in the Hawaiian longline fisheries. The U.S. and the other treaty nations are under treaty obligation to protect and conserve migratory birds, including seabirds.

Under the provisions of the MBTA, it is unlawful "by any means or manner to pursue, hunt, take, capture [or] kill" any migratory birds except as permitted by regulations issued by the U.S. Fish and Wildlife Service. The term "take" has been defined by regulation to mean to "pursue, hunt, shoot, wound, kill, trap, capture or collect" any migratory bird. The United States Department of the Interior's FWS is the primary federal agency responsible for the conservation and management of migratory bird resources.

Under the provisions of the MBTA, the unauthorized take of migratory birds is a strict liability criminal offense that does not require knowledge or specific intent on the part of the offender. As such, even when engaged in an otherwise legal activity such as longline fishing where the intent is not to kill or injure migratory birds, violations can occur if bird death or injury results. So, when an accidental oil spill occurs and migratory birds are killed, a federal prosecutor can, and

often will, use the MBTA to prosecute the company responsible for the spill. You need not prove intent or knowledge; only that the defendant spilled the oil and a bird was killed. Any killing of a migratory bird constitutes a taking under the MBTA, even if inadvertent and unintentional. See U.S. v. Moon Lake Electric Association, 45 FSupp 2d 1070 (1999), decided in the U.S. District Court for Colorado and the cases cited therein. As the Court of Appeals for the District of Columbia Circuit (with jurisdiction over NMFS) made clear, this prohibition not only applies to private individuals and corporations but also "prohibits federal agencies from killing or taking migratory birds without a permit from the Interior department." Humane Society of the United States v. Glickman, 217 F.3d 882 (D.C. Cir. 2000).

On July 21, 1998, the Director of the USFWS requested the Interior Solicitor for his opinion on the application of the MBTA to the high seas. On January 19, 2001, the Department of Interior issued a Solicitor's Opinion that the MBTA clearly applies to the full 200-mile EEZ and to U.S. citizens and vessels wherever they may be on the high seas. The Opinion was cited as being "final", was cleared by Justice, but its implementation by the FWS has been delayed. Nonetheless, NMFS is under a statutory duty to prevent the take of any migratory seabird, including the Laysan, Black-footed, and Short-tailed Albatrosses.

The DEIS acknowledges that under any alternative continuing the status quo of seabird mitigation measures, 1,800 seabirds, nearly all albatrosses, could be killed annually. Even under SB7C, the Council's preference, 1,800 seabirds could be taken if vessels do not voluntarily choose to use side setting or underwater setting chutes.

The U.S., including NMFS and the Council, have a statutory duty under the MBTA to assure that longline fisheries they license and permit do not result in the take of migratory seabirds. In Hawaii, as the DEIS notes, this can be achieved best by requiring side-setting, coupled with the other measures recommended above. The final EIS should fully discuss the MBTA, its prohibitions against take, and the necessity for the adoption of mandatory side-setting and other mitigation measures to meet its prohibitions on the take of migratory birds.

In conclusion, we urge that the final EIS and NOAA/NMFS adopt effective mitigation measures that include side-setting for all Hawaii-based longliners with a bird-scaring curtain, 60 gram weights within one meter of each hook, in addition to night setting and line setting machines. Offal discharge during line setting should be prohibited. The strict mandates against unpermitted take of migratory birds under the MBTA should be adhered to, as should compliance with the ESA, and the FAO Code of Conduct and NOAA's policy for minimizing bycatch. This can only be accomplished through the adoption and enforcement of mandatary avoidance measures mentioned above.

Respectfully,

Gerald W. Winegrad
Vice President for Policy

STOEL RIVES LLP
ATTORNEYS AT LAW

600 University Street, Suite 3600
Seattle, Washington 98101
main 206.624.0900
fax 206.386.7500
www.stoel.com

October 11, 2004

VIA ELECTRONIC MAIL

William L. Robinson
Regional Administrator
National Marine Fisheries Service
Pacific Islands Regional Office
1601 Kapiolani Blvd, Suite 1110
Honolulu, HI 96814
Email: DEISseabirdsquid@noaa.gov;

Re: Comments on Draft Environmental Impact Statement; Seabird Interaction Mitigation Methods and Pelagic Squid Fishery Management

Dear ~~Mr. Robinson~~ Bill:

Enclosed please find the Hawaii Longline Association's ("HLA") comments on the National Marine Fisheries Services' ("NMFS") draft Environmental Impact Statement ("DEIS") concerning seabird interaction mitigation methods and pelagic squid fishery management under the Western Pacific Fishery Management Council's ("Council") Pelagic Fishery Management Plan. Also enclosed for your reference are (1) the May, 2004, biological assessment ("BA") prepared by the Western Pacific Fishery management Council and HLA that was submitted to the U.S. Fish and Wildlife Service ("FWS") as part of an Endangered Species Act ("ESA") consultation regarding the effects of Hawaiian pelagic longline fishery on listed short-tailed albatross ("STAL") (*Phoebastria albatrus)*; and (2) the final biological opinion issued by FWS on October 8, 2004, regarding the effects of Hawaiian pelagic longline fishery on listed STAL. HLA appreciates the opportunity to comment on this document, and requests that you include the following comments and enclosures in the administrative record for this proceeding.

As HLA indicated in its verbal testimony provided at the October 7, 2004, public hearing, HLA believes the DEIS provides a useful summary of the issues surrounding seabird interactions occurring in the pelagic longline fishery. However, HLA believes the DEIS contains inaccurate statements regarding the purpose and need for action, and the effects of the Hawaii pelagic longline fishery on seabird species. Further, the DEIS draws unsupported conclusions regarding the status of black-footed ("BFAL") (*Phoebastria nigripes*) and Laysan ("LAL") (*Phoebastria immutabilis*) albatross populations in the vicinity of the Hawaiian Islands. HLA recommends substantial revisions to the DEIS in order to address these issues, and suggests that NMFS coordinate closely with the Council and HLA prior to finalizing this document.

I. Purpose and Need for Action

The DEIS mischaracterizes the purpose and need for action by stating that in 2001, the shallow set component of the fishery "was closed due to excessive takes of endangered and threatened sea turtles." HLA strongly disagrees with the characterization that the swordfish fishery was closed for any legitimate, scientifically defensible reason. This point is evidenced by the fact that NMFS' regulations closing this component of the longline fishery, as well as the underlying biological opinion for the fishery, were overturned by the District Court of Washington D.C. as arbitrary and capricious, and not in accordance with law. *See HLA v. NMFS*, 288 F.Supp 2d 7 (D.D.C. 2003). In response to this litigation, the Council adopted a new proposed action that adopted a suite of sea turtle mitigation measures, and provided for restored tuna and swordfish fisheries. NMFS subsequently consulted over this new proposed action, determined the action would not jeopardize listed turtle species, and enacted new fishery regulations which are currently in place.

HLA recommends that NMFS revise discussions contained in the Purpose and Need Statement and other sections of the DEIS to more accurately explain the background and events leading up to the current proposed action.

II. Status of Seabird Populations

The DEIS paints a picture that BFAL and LAL populations in the vicinity of the Hawaiian Islands are declining at significant levels. Regarding the status of BFAL population, the DEIS states that analyses of breeding pair counts at Midway Atoll, Layasan Island, and French Frigate Shoals suggest that BFAL populations are declining at the rate of about 1 percent annually. DEIS at 101. This statement is not supported by any scientific data contained in the DEIS.

First, as the time series for BFAL population at Laysan Islands shows, wide confidence intervals exist around available breeding pair estimates, particularly in the early part of the time series containing the largest number of birds. These broad confidence intervals suggest a high degree of uncertainty regarding breeding pair counts. Second, breeding pair estimates from Laysan Island were extrapolated from egg counts, whereas counts from French Frigate Shoals and Midway Atoll are based on direct bird observations. These data were then pooled for purposes of determining population trends over time. Pooling such data introduces a number of biases and uncertainties that should be more fully discussed in the DEIS; presently the DEIS does not indicate the potential problems associated with combining arguably unrelated data sets to perform a regression analysis. Finally, regression estimates concerning BFAL breeding pair correlations provided in Figure 3.6.1-3 are not statistically significant, and instead indicate a relatively stable trend in nesting pairs. DEIS at 103. The DEIS fails to discuss the statistical significance of regression results, and merely states that such data "seem to indicate" a reduction in nesting pair abundance over time. The statistical analysis contained in the should be revised, and subjected to review by NMFS scientists or members of the Council's Scientific and Statistical Subcommittee ("SSC").

The same biases and improper extrapolations occur in section of the DEIS addressing the status of LAL populations; however, these biases are exacerbated by the fact that only five data points exist for breeding pair counts at Midway Atoll (Figure 3.6.1-4), and thus, when these and other data points are combined from Laysan Island and French Frigate Shoals, an even less reliable population trend exists (Figure 3.6.1-5). As with the BFAL breeding pair correlation, LAL correlations are likewise statistically not significant; however, the DEIS fails to discuss this fact in any detail. Time series data presented in Figure 3.5.1-4 contradicts the regression analysis, and shows an increasing or stable trend in LAL abundance, particularly when one considers recent date from Midway Atoll where breeding pairs in 2003 were equivalent to those observed in 1992 (about 40,000). DEIS at 105. Again, statistical analyses contained in the DEIS should be reviewed by NMFS scientists or the Council's SSC.

The DEIS fails to discuss how recent increases in STAL populations, a species whose primary nesting range overlaps with BFAL and LAL, comport with purported declines with BFAL and LAL populations. Short-tailed albatross experience many of the same environmental pressures; however, these federally-listed species have been increasing in abundance over the past several years. The DEIS should discuss the significance of this increase, and analyze whether this increase may provide some indication of population status or trends for BFAL and LAL species.

III. Effects of Alternatives on Seabird Species

Under the No Action alternative, and subsequent alternatives, the DEIS reaches the conclusion that seabird deterrents currently required by regulation are not effective, and that the total incidental capture of seabirds in the longline fishery will be about 1,800 per year. The DEIS makes no attempt to assess the potential additive benefits of multiple seabird deterrents, nor does the DEIS explain why it is reasonable to assume that currently-required measures are not effective when existing information indicates the contrary.

The conclusions and assumptions contained in the DEIS regarding potential seabird interactions in the longline fishery ignore a variety of relevant scientific data, including data regarding the efficacy of night setting in the swordfish fishery – data used by FWS to estimate potential take of STAL in its biological opinion. Further, the DEIS ignores existing information from the tuna fishery that indicates that existing seabird deterrents have been about 73 percent effective in reducing take of seabirds in this fishery. *See WESPAC and HLA, Biological Assessment of the Pelagics New Technology Regulatory Amendment* (May, 2004). The DEIS likewise ignores available scientific studies that support currently-employed seabird deterrents, instead focusing on one study of limited scope and duration that suggests side-setting may reduce seabird interactions further.

The highly biased, and unsupported discussion of existing seabird deterrents does not reflect a reasonable or rationale assessment of environmental impacts. The No Action Alternative and related sections of the DEIS should be revised to include an evaluation of the scientific merits of each individual seabird deterrent both currently required by regulation, and those that may potentially be adopted, such as side-setting. The DEIS should likewise evaluate the individual and additive benefits of currently-required seabird deterrents, and estimate seabird

interactions in the fishery based upon available scientific information. Failing to do so will result in a highly biased, and inaccurate assessment of alternatives.

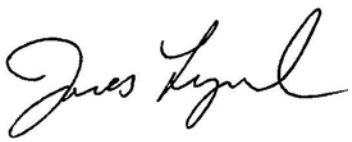
IV. Conclusions

As indicated above, HLA believes that the DEIS suffers from a number of defects, including (1) a biased and unsupported analysis of the status of albatross populations; (2) a lack of detailed analysis regarding the efficacy of existing seabird deterrents; and (3) a lack of any detailed analysis regarding the amount of seabird bycatch likely to occur in the longline fishery as a result of implementing one or more required seabird deterrents. The DEIS' failure to provide a detailed, scientifically- supported assessment of these key issues violates NMFS' obligation under the National Environmental Policy Act to take a "hard look" at the potential environmental effects of various seabird mitigation alternatives. Discussions contained in the DEIS likewise undermine the considerable progress made by the Council and HLA to proactively address seabird issues in the longline fishery in collaboration with environmental groups and the Services.

HLA recommends that NMFS convene a workgroup consisting of Council staff and HLA representatives to discuss these comments and related information in greater detail. Council staff possess considerable expertise regarding issues raised in this comment letter, and NMFS should work closely with Council staff to insure the DEIS is revised in a manner to comport with all applicable legal requirements.

Please feel free to contact me at (206) 386-7610 if you have any questions regarding these comments or the enclosed documents.

Sincerely,



James M. Lynch
Attorney for HLA

Enclosures

Cc: Kitty Simonds, WESPAC
Paul Dalzell, WESPAC
Marcia Hamilton, WESPAC
Susan A. Kennedy, NMFS (Email: nepa.comments@noaa.gov)

EPA
REGION 9
http://www.epa.gov/region09

REGION 9 CROSS MEDIA DIVISION

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX

CROSS MEDIA DIVISION
75 Hawthorne St., San Francisco, CA 94105
Office: (415) 947-8704 Fax: (415) 947-8026

Date: 10/12/04

TO: TOM GRAHAM
Fax #: (808)973-2941

FROM: SUMMER ALLEN
Fax #: (415)947-8026

Subject: SEABIRD INTERACTION/PELAGIC SQUID DEIS

Number of pages including cover sheet: 5

Comments:

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION IX
75 Hawthorne Street
San Francisco, CA 94105-3901

October 12, 2004

William Robinson
Regional Administrator
National Marine Fisheries Service
Pacific Islands Regional Office
1601 Kapiolani Boulevard., Suite 1110
Honolulu, HI 96814

Subject: Seabird Interaction Mitigation Methods and Pelagic Squid Fishery Management Draft Environmental Impact Statement (Draft EIS) [CEQ # 040405]

Dear Mr. Graham:

The Environmental Protection Agency (EPA) has reviewed the document referenced above. Our review and comments are pursuant to the National Environmental Policy Act (NEPA), Council on Environmental Quality (CEQ) regulations (40 CFR Parts 1500-1508), and Section 309 of the Clean Air Act. Our detailed comments are enclosed.

We have rated this Draft EIR/EIS as Environmental Concerns, Insufficient Information (EC-2) (see enclosed "Summary of Rating Definitions"). This document addresses two separate actions under the Fishery Management Plan (FMP) for the Pelagic Fisheries of the Western Pacific Region and the High Seas Fishing Compliance Act. The actions are intended to reduce interactions with seabirds in the Hawaii-based longline fishery and manage the U.S. high seas squid jigging fishery (squid fishery). Because these actions are analyzed separately, our comments are action-specific.

EPA has reviewed and commented on many related management plans such as the Draft and Final EISs for the FMP for the Pelagic Fisheries of the Western Pacific Region (2001). Many of our comments have been incorporated into the final decisions. There have been multiple National Marine Fisheries Service (NMFS) and U.S. Fish and Wildlife Service (FWS) species assessments, consultations, and associated litigation surrounding the management of these fisheries. In particular, the shallow-set swordfish fishery north of the equator, was temporarily closed in 2001, due to interactions with sea turtles. While we commend the

comprehensive, ecosystem-based approach taken by NMFS to analyze and improve the fishery, we are concerned with the potential environmental impacts of the actions as proposed and the lack of supporting information.

The U.S. high seas squid jigging fishery has not been previously evaluated under NEPA. Therefore, it is important to include the information needed to make an informed decision. The history associated with the management of the emerging squid fishery in the U.S. should be described in more detail, as well as future management plans. We recognize the significant challenges in managing a complex international resource such as the squid fishery. However, baseline environmental information should be provided to accurately describe the existing conditions of the fisheries in the region and the potential for impacts to protected species.

In addition, we are concerned that the Preferred Alternative for seabird interaction mitigation does not seem to incorporate the results of effectiveness studies that have been completed regarding various mitigation measures. Side-setting, in particular could reduce incidental catch of seabirds by 99-100 percent, in addition to having operational benefits (Draft EIS, page 214). While we recognize the need to provide flexibility for shallow-set longline fishers, we recommend that NMFS evaluate the implementation of an alternative with less potential for environmental impacts, such as Alternative SB10B. This would require side-setting, except when technically infeasible.

We appreciate the opportunity to review this Draft EIS. Please send two copies of the Final EIS to this office (mailcode: CMD-2) when it is released for public review. If you have any questions, please call Summer Allen, the lead reviewer for this project, at (415) 972-3847.

Sincerely,

Lisa B. Hanf

Lisa B. Hanf, Manager
Federal Activities Office

MI# 004441
Enclosures:
EPA's Detailed Comments
Summary of Rating Definitions

cc: Holly Freifeld, U.S. Fish and Wildlife Service

EPA DETAILED COMMENTS ON THE DRAFT ENVIRONMENTAL IMPACT STATEMENT FOR SEABIRD INTERACTION MITIGATION METHODS AND PELAGIC SQUID FISHERY MANAGEMENT, OCTOBER 12, 2004

Seabird Interaction Mitigation Measures Alternatives

EPA recognizes the lack of available information regarding short-tailed albatrosses and notes that no observations were made specifically for this species. However, we also note the success rate of methods such as side-setting to reduce impacts to seabirds when compared to other mitigation measures. For example, the Draft EIS estimates that if all vessels in the Hawaii longline fishery switched to the side-setting seabird deterrent method, 10 to 20 birds might be captured per year. However, if all fisherman used an underwater setting chute, about 338 birds per year would be captured, and 1,743 birds for shallow-setting vessels. Current measures could lead to the catch of 1,800 birds per year (page 216). Due to these results, it seems appropriate to consider an alternative with less potential for environmental impacts.

The Preferred Alternative for swordfish vessels incorporates current mitigation measures (with the exception of thawed blue-dyed bait) or one of the following: side-setting, underwater setting chute, or a tori line. For implementation on tuna vessels, it incorporates the same measures when fishing north of 23° N latitude. While all of these measures have utility, the decision to abandon the use of blue-dyed bait is not discussed in detail.

Recommendations:

As the purpose of this action is to reduce the adverse effects on interactions with seabirds in the Hawaii-based longline fishery (Executive Summary, page 1), NMFS should consider an alternative that would require mitigation measures with a higher success rate, such as mandatory side-setting, when feasible (Alternative SB10). The Final EIS should discuss the discontinuation of the use of blue-dyed bait if discontinuation is part of the alternative that is carried forward. In particular, this should be discussed in light of the fact that blue-dyed bait was a mitigation commitment in the Pelagic Fisheries FMP Record of Decision (ROD).

U.S. Squid Fishery Context

EPA recognizes that the squid fishery is a developing area of the economy in the U.S. Exclusive Economic Zone (EEZ). However, we would like to see more information regarding the effects of this fishery on the affected resources. While there is some discussion of the impacts of the proposed action on marine mammals and seabirds, supporting data is not included. The discussion of the management plan and associated alternatives for the squid fishery is confusing and the specific implementation of these measures is not clear. The feasibility of implementing many of these alternatives should be assessed. In particular, alternatives including international monitoring should be evaluated in the context of multiple, fragmented forums that

exist for fisheries management in the Pacific. In addition, it is not apparent whether there has been an experimental fishery to determine effects on the target species and protected species, or if this is planned for the near future.

management of the squid fishery, the background, and the context of the associated fisheries. NMFS should consider incorporating an experimental fishery into the proposed plan to determine target and protected species impacts, before implementing the project as proposed. If an experimental fishery is not feasible, the justification should be included in the Final EIS as well as data collection measures that would allow population and environmental monitoring on a consistent basis. This is particularly important in that the shallow-set swordfish fishery was reestablished in 2003 and the effects of sea turtle mitigation measures on seabirds, has not been assessed (Draft EIS, Executive Summary, page i.) Additional commitments may be needed to protect this fishery once it is well-established.

Associated Plans

As stated previously, this document follows a series of Fishery Management Plans (FMPs), Amendments, and Endangered Species Act consultations. While the Draft EIS describes the current mitigation measures that are incorporated into the most recent alternatives, there is no information regarding the applicability of previous requirements from the Record of Decision (ROD) for the Pelagic Fisheries FMP. The Draft EIS acknowledges that other NEPA documentation will follow for related issues in the fishery. Amendments may need to be considered if the results of Pelagic Management Unit Species (PMUS) stock assessments show population declines. EPA notes that NMFS expects a more recent Biological Opinion for short-tailed albatrosses with the next week.

Recommendations:

The Final EIS should include information regarding the feasibility of including additional mitigation measures that were evaluated in the 2001 Pelagic Fisheries FMP ROD. The Final EIS should document and assure compliance with all terms of the Short-tailed Albatross Biological Opinion issued by FWS in November 2002 for the tuna sector of the Hawaii-based longline fishery and associated amendments. When the forthcoming Biological Opinion on the effects of the swordfish sector of the fishery on short-tailed albatrosses is issued, it should be incorporated into the alternative selected in the Final EIS as well as the mitigation measures included in the ROD.

United States Department of the Interior

OFFICE OF THE SECRETARY
Office of Environmental Policy and Compliance
1111 Jackson Street, Suite 520
Oakland, CA 94607

October 15, 2004

ER: 04/0681

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

Subject: Review of the Draft Environmental Impact Statement on Seabird Interaction Mitigation Methods under the Fishery Management Plan for Pelagic Fisheries of the Western Pacific Region and on Pelagic Squid Fishery Management under the Fishery Management Plan for Pelagic Fisheries of the Western Pacific Region and the High Seas Fishing Compliance Act (**ER04/0681**)

Dear Mr. Robinson,

Thank you for the opportunity to review the subject document.

The proposed action involves implementation of new seabird deterrent strategies in the Hawaii-based pelagic longline fishery to avoid or minimize interaction between longline gear and seabirds, thereby reducing seabird injury or mortality.

A second action identified in the Draft Environmental Impact Statement (DEIS) involves implementation of certain regulatory features to manage a high seas squid jigging fishery in accordance with the High Seas Fishing Compliance Act (HSFCA).

Regulation of longline fishing and squid fishing activities that may occur throughout the Exclusive Economic Zones and adjacent to the territorial waters of the State of Hawaii, the territories of American Samoa and Guam, and the Commonwealth of the Northern Mariana Islands (CNMI) is proposed. The DEIS analyzes, among other things, various proposed alternatives for management of harvest activities and environmental impacts they may have upon protected species and their habitat.

The Department of the Interior (Department) offers the following comments.

GENERAL COMMENTS

The DEIS contains a considerable amount of information relative to the first action concerning seabird deterrent strategies, and the Department concurs that the proposed action is well described and the alternatives analysis is thorough. However, we believe the DEIS is deficient in its description of the high seas squid fishery that is proposed to operate within the vicinity of the Hawaiian archipelago.

We believe the DEIS does not adequately assess potential squid fishery bycatch-related impacts to protected species (*e.g.*, sea turtles, marine mammals, and seabirds).

Therefore, we recommend the DEIS be revised in the Final Environmental Impact Statement (FEIS) to include: (1) a more complete discussion of the squid fishery proposed to occur within the vicinity of the Hawaiian archipelago, (2) an impact assessment based on a commitment to avoid and minimize project-related impacts, and (3) proposed mitigation measures that minimize unavoidable impacts and compensate for significant unavoidable impacts.

The objective of the seabird management action analyzed in the DEIS is stated to be "the cost-effective further reduction of the potentially harmful effects of fishing by Hawaii-based longline vessels on the short-tailed albatross, but the overarching goal is to reduce the potentially harmful effects of fishing by Hawaii-based longline vessels on all seabirds" (DEIS p. v). The Department's comments on the analysis of this management action are framed in the context of this stated goal.

<u>The Fishery Council's preliminary preferred alternative (SB7C)</u>: We do not support this alternative, which includes a menu listing four seabird deterrent options for the shallow-set fishery wherever it operates and four deterrent options for the tuna fishery when operating north of 23 degrees North latitude (23°N).

Each of these lists includes the use of tori lines and the underwater setting chute, which are seabird deterrents determined by the analysis to: (1) be less effective than either the current required measures or the deployment of fishing lines by side-setting, and/or (2) have significant operational drawbacks and/or are expensive, unenforceable, or not easily available. We are also concerned that neither list includes the use of thawed, blue-dyed bait or strategic offal discard.

For the short-tailed albatross, therefore, these lists of options do not meet the terms and conditions of current biological opinions (USFWS 2000 and USFWS 2001) on the effects of the Hawaii-based longline fishery on this endangered species. We suggest that you consult with the U.S. Fish and Wildlife Service (Service) Honolulu field office to correct this deficiency in the analysis.

<u>Side-setting and Alternative SB10B</u>: Based on available information, and as described in the DEIS (*e.g.*, see pp. iii, 49-50, 59, 214, 228-229), deployment of fishing lines by side-setting is the most promising deterrent that has been tested in the Hawaii-based longline fishery, and this measure meets other important criteria as well as effectiveness.

It appears from this information that it is relatively easy to deploy lines by side-setting, and it requires only a relatively small, one-time investment to refit a vessel for side-setting. Deployment of line by side-setting is less dependent on crew behavior than most other deterrents, increases efficiency by moving gear deployment to the same location on the boat where gear retrieval takes place, and allows compliance enforcement to take place dockside, because vessels are highly unlikely to refit for stern-setting while at sea.

The primary concern expressed about side-setting is that the use of 60 gram weights on monofilament line poses an element of danger to crew (if, for example, the leader snaps). Nevertheless, as stated on page 49 of the DEIS, "it is estimated that about 70 percent of the vessels currently fishing in Hawaii already use 60 gram weighted swivels[,]" and so this aspect of the side-setting specifications is not new or unusual.

The Department finds that deployment of fishing lines by side-setting may be (1) a reasonable and prudent means of minimizing the risk of incidental take of the short-tailed albatross and a potential replacement for some or all of the currently required deterrent measures, and (2) an efficient means of reducing injury and mortality of other seabirds, notably the black-footed and Laysan albatrosses, in the operations of the Hawaii-based longline fishery.

We understand that side-setting may be physically impossible on a few vessels in the Hawaii-based longline fleet, because of the boats' designs, although we do not know whether NMFS has determined how many vessels fall into this category. In these cases, under Alternative SB10B, the current suite of required seabird deterrents would remain in place, perhaps with some modifications (*e.g.*, for strategic offal discards, as described below under SPECIFIC COMMENTS).

Available information about effectiveness of seabird deterrents in Hawaii-based longline fishery is based almost entirely on five experimental studies that varied greatly in sample sizes, methodology, and the deterrents tested.

In general, we do not dispute the assessment in the DEIS of the relative effectiveness of these deterrents based on results of these studies, but we emphasize that to date we have little information about the performance of any of these deterrents over time and under normal (*i.e.*, uncontrolled) range of commercial fishery conditions. It is critical that the best deterrents known to be implemented are monitored closely to assess performance in the commercial fishery and to support permit modifications as necessary.

Therefore, we recommend that a side-setting requirement as described under Alternative SB10B, employing specifications described in Gilman *et al.* (2003), be implemented for one or two seasons and monitored in detail in an adaptive management component to answer questions including, but not restricted to, the following:

- Do albatrosses learn to approach longline vessels broadside while they are underway and while fishing lines are being deployed by side-setting?

- Do a vessel's heading and speed with respect to wind direction and speed influence the ability of birds to approach and make attempts to grab bait during side-setting?
- Is side-setting consistently effective with variations in gear type, bird abundance, location, and season?

We hope that deployment of lines by side-setting will prove to be a highly effective means of reducing seabird interaction with the Hawaii-based longline fishery over time and across the fishery, with or without modifications based on lessons learned during initial implementation.

Limiting required use of seabird deterrents north of 23°N: We do not know of any biological justification for limiting required use of seabird deterrents (and hence the effort to reduce seabird takes) in the Hawaii-based longline fishery to a particular geographic subset of the area where the fishery operates.

Data collected at sea by National Marine Fisheries Service (NMFS) observers aboard Hawaii-based longline vessels indicate that Laysan and black-footed albatrosses do occur south of 23°N (see maps on DEIS p. 120) and that fishery interactions with albatrosses occur south of 23°N (see maps on DEIS p. 126 and 130-131).

In addition, the DEIS does not offer any specific rationale for the alternatives that limit required deterrent use to north of 23°N other than that albatrosses are "concentrated" to the north (*e.g.*, DEIS p. 210).

We agree that observer data indicate that albatross abundance attenuates with decreasing latitude in the area where the fishery operates, and we agree that the short-tailed albatross has not been observed in Hawaii south of Kauai. In 2000, Both NMFS and the Fishery Council accepted the southernmost sighting of the short-tailed albatross as a logical limit for terms and conditions in the Service's 2000 biological opinion, to minimize the incidental take of this endangered species.

The same logic should apply here. Given the goal of this management action is "to reduce the potentially harmful effects of fishing by Hawaii-based longline vessels on all seabirds" (DEIS p. v), and Laysan and black-footed albatrosses are the species that most commonly interact with Hawaii-based longline operations, the use of seabird deterrents should be required as far south as the southernmost observation of albatrosses.

The Department understands that quantitative comparisons of albatross interaction rates with latitude are forthcoming from NMFS, but such analyses will not make self-evident any reasons for not mitigating seabird interactions south of 23°N – especially when no seabird deterrent method is known to be 100 percent effective under normal fishery conditions. In light of NMFS' stated overarching goal for the seabird management action under analysis, and because NMFS documents interactions between the fishery and albatrosses south of 23°N, we cannot support any of the alternatives that include this geographic limitation.

SPECIFIC COMMENTS

p. v. – Issues to be Resolved, third paragraph: "Adequate abundance data for nonbreeding and subadult seabirds is lacking, inhibiting conclusions about long-term population trends."

The Department does not believe that resolving the long-term population trend questions of the species' biology would change the necessity of reducing or eliminating incidental take of albatrosses in commercial fisheries. We do agree, though, that the revised FEIS should discuss alternatives which include data acquisition and which will improve our understanding of the demography and population trends in Laysan and black-footed albatrosses (and several data analysis and modeling efforts are currently underway to address this need);

p. v. – Areas of Controversy, second paragraph: "Use of the black-footed albatross as a proxy in modeling the short-tailed albatross population has been criticized in the scientific literature as inappropriate."

The short-tailed albatross population has been modeled using data on short-tailed albatrosses (*e.g.*, Sievert 2004), not black-footed albatrosses. However, the Service has used data on black-footed albatross takes in the fishery and the total black-footed albatross population in our biological opinions as proxy information for estimating the incidental take of the short-tailed albatross by the fishery. The Endangered Species Act (ESA) Section 7 Consultation Handbook recommends the practice of using documented effects of an action on appropriate surrogate species to estimate the effects on a listed species that is rare or on which the effect of the action is otherwise difficult to detect (Service and NMFS 1998).

The Department believes that the black-footed albatross is an appropriate surrogate species to use for estimating the effects of the longline fishery on the rare and endangered short-tailed albatross.

p. 1. – 1.1, Statement of Purpose and Need for the Action, Paragraph 4, Sentence 1: The DEIS states: "Two disparate actions with unrelated objectives affecting two fisheries currently prosecuted under different authorities are assessed in this document." Please clarify this sentence by using deliberate statements. We suggest this type of clarification: "The DEIS evaluates two proposed actions relative to the Pelagics Fishery Management Plan (FMP). The first action pertains to seabird interactions with the Hawaii long-line fleet; the second action pertains to the management of the high seas squid fishery." We recommend the DEIS be revised to clearly state the proposed actions.

p. 3. – 1.2, Pelagic Fisheries Management in the Region, Paragraph 4, Sentence 1: The DEIS states: "The Pelagics FMP establishes policies for fisheries for pelagic management unit species (PMUS) within or landing catches in ports in the EEZ of the United States

surrounding the State of Hawaii, the Territories of American Samoa and Guam, the Commonwealth of the Northern Marianas Islands (CNMI), and several islands and atolls that are U.S. possessions under direct Federal jurisdiction (collectively referred to as the Pacific Remote Island Areas, or PRIAs)." These possessions include Howland Island National Wildlife Refuge (NWR), Baker Island NWR, Jarvis Island NWR, Palmyra Island NWR, Kingman Reef NWR, and Johnston Island NWR. The Department recommends the DEIS identify these possessions as NWRs, under the jurisdiction of the Department's U.S. Fish and Wildlife Service. Wake Atoll is jointly administered by the Department of the Interior's Office of Insular Affairs and the Department of Defense.

p. 5. – Paragraphs 1 & 2. Please insert a line between the first and second paragraphs.

p. 5. – 1.2.2., The Magnuson-Stevens Act and The Fishery Management Council, Paragraph 2, Sentence 1: The DEIS states: "Using the tools provided by the MSA, NOAA Fisheries assesses and predicts the status of fish stocks, ensures compliance with fisheries regulations and works to reduce wasteful fishing practices." Due to variability in the current science of fisheries stock assessments, we recommend this sentence in the DEIS be revised to: "Using the tools provided by the MSA, NOAA Fisheries assesses and attempts to predict the status of fish stocks, ensures compliance with fisheries regulations and works to reduce wasteful fishing practices."

p. 12. – 1.2.4.3, ESA Section 7 Requirements, Paragraph 2, Sentence 3: The DEIS states: "For sea turtles, NOAA Fisheries must be consulted; for seabirds, the USFWS [Service] is the lead agency." To clarify, NOAA Fisheries and the Service share dual responsibility for consultations on sea turtles under section 7 of the ESA. Therefore, we recommend the FEIS state "For sea turtles, NOAA Fisheries should be contacted when the action affects sea turtles in the ocean and the USFWS should be contacted when the action affects sea turtles on land (i.e., nests); for seabirds, the USFWS is the lead agency."

p. 13. - 1.2.4.3, ESA Section 7 Requirements, Paragraph 3, Sentence 1: The DEIS states: "In recent years, consultations between NMFS and the USFWS pursuant to section 7 of the ESA have produced BiOps that have shaped the management regime for fisheries conducted under the Pelagics FMP." The interchangeable use of "NOAA Fisheries" and "National Marine Fisheries Service" is very confusing for the reader. Please revise the FEIS using one name and acronym for this agency throughout the document for consistency purposes.

p. 44-50. – 2.1.1., Potential Methods to Reduce Longline-Seabird Interactions and Their Consequences: The Department generally agrees with the evaluation of individual deterrent methods presented in this section (see exceptions in the comments below), and summarized in Table 2.1-2 on p. 53. Unfortunately we do not believe this reasoned evaluation is translated accordingly in the preliminary preferred alternative, which includes as options deterrents that have the least favorable ratings for effectiveness, operational efficiency, cost, and compliance enforcement.

We recommend that the least environmentally practicable alternative currently identified in the DEIS be selected as the preliminary preferred alternative in the FEIS, based on the results of the evaluation presented in the DEIS.

p. 44. – 2.1.1.1, Blue-dyed and Thawed Bait: The relative merits of thawed bait were not considered in this section or anywhere in the DEIS. We agree that the scant data on the effectiveness of blue-dyed fin fish bait in the Hawaii-based fishery is equivocal (see McNamara *et al.* 1999 and Gilman *et al.* 2003). Furthermore, dye trials in New Zealand indicated that pilchards and sanma, both of which fall under the definition of "mackerel-type baits" that are or may be used in the Hawaii-based fishery, hold dye less well than squid bait (G. Lydon, New Zealand SeaFIC, pers. comm. 2004), which now is prohibited in this fishery. Thawed bait, however, probably has some deterrent effect in that it sinks faster than frozen bait (E. Gilman, Blue Ocean Institute, pers. comm. 2004).

Given the likely positive deterrent effect of thawed bait, and the unclear but perhaps neutral or positive deterrent effect of blue dye, the Department does not support dispensing with the "thawed, blue-dyed bait" in the Hawaii-based longline fishery, unless a demonstrably more effective deterrent, such as side-setting, is required in its place. We recommend in the FEIS, as in Alternative SB10B, thawed bait be retained as a useful seabird deterrent in the Hawaii-based fishery and that blue-dyed bait be retained as a seabird deterrent as well, at least until more definitive information about the effectiveness of blue-dyed fin-fish bait in this fishery is obtained.

p. 44-45. – 2.1.1.2, Strategic Offal Discard: The DEIS suggests here and elsewhere that a potential liability of this method is that it may attract seabirds that otherwise would not approach longline vessels, and seabirds may thus become habituated to seeking food at specific vessels that discard offal. Swordfish caught by Hawaii-based longline vessels are gutted and have their heads and tails removed on deck prior to being frozen, and blood and bits of flesh are washed into the ocean (Sean Martin, Hawaii Longline Association, pers. comm. 2004).

Swordfish-target vessels thus attract albatrosses, which have a well-developed sense of smell, regardless of whether strategic offal discard is practiced or not, and probably attract them at a greater rate than tuna-target vessels (tuna are only minimally dressed prior to freezing). Swordfish longline fishing typically takes place farther north than most tuna longline fishing, in areas where concentrations of albatrosses are greatest, but tuna-target vessels also do encounter and interact with seabirds. Therefore, strategic offal discard may be an important seabird deterrent for swordfish vessels, and to a lesser extent for tuna vessels, *when seabirds are present*.

The Department does not support dispensing with this deterrent in the Hawaii-based longline fishery unless another more effective deterrent is put in its place, but suggest that the requirement be modified such that strategic offal discard be practiced when seabirds are present during the setting or haulback of longline gear.

p. 47. – 2.1.1.6, Towed Deterrent: Tori lines (paired or single streamer lines) have been determined to be a highly effective seabird deterrent in Alaska-based hook-and-line fisheries, and use of tori lines is required on most vessels in those fisheries (USFWS 2003). The effectiveness of tori lines varies among fisheries, however, and is dependent on fishery-specific research and on precise design specifications and implementation (*e.g.*, see Melvin *et al.*, in press; Kim Rivera, NMFS, personal communication, 2004). The results of experimental tests in the Hawaii-based fishery indicated that tori lines were not as effective as other seabird deterrent measures (McNamara *et al.* 1999, Boggs 2001; see DEIS Table 2.1-1, p. 51), and these studies did not lead to consideration of tori lines for inclusion in the terms and conditions of the first Service biological opinion to minimize the incidental take of the endangered short-tailed albatross by the Hawaii-based longline fishery (USFWS 2000).

Therefore, the Department recommends that tori lines not be included as an optional seabird deterrent in the Hawaii-based longline fishery (as indicated for shallow-setting vessels in Alternative SB7C), unless they are used in addition to other more effective deterrents such as night setting, and/or a line shooting machine with weighted branchlines.

p. 48. – 2.1.1.7, Night Setting: We agree that data from experiments indicate night setting is an effective deterrent, but caution that its effectiveness is highly variable and may be influenced by the amount of deck lighting used, the ambient light (*e.g.*, as affected by moon phase, cloud cover, and timing of the set with respect to sunset), and perhaps by the use of light sticks. Experimental tests of night setting have not been controlled for light variables (other than sunset) and, similar to most other deterrents, night setting implemented in the fishery have not been monitored long enough to yield data with which to assess its performance over time and in response to a range of normal fishing conditions.

Therefore, the Department recommends the discussion of operational characteristics in the FEIS acknowledge these deficiencies in our knowledge about the effectiveness of night setting.

The DEIS (p. 48) cites a 93 percent reduction in albatross contacts with gear during night-setting when compared with setting during the day, without deterrents, and a 98 percent reduction in captures of albatrosses when night-setting. The reduction rates cited here and in Table 2.1-1 for night-setting apparently are for Boggs' data as "normalized for bird abundance" by Gilman *et al.* (2003), a process for which no methods or formulae are provided or cited either in the DEIS or in Gilman *et al.* (2003).

The citation in the DEIS for the night-setting reduction rates of Boggs' 2002 experiments is "Boggs 2003," but there is no corresponding reference in the "Literature Cited" list, or any other reference for these experiments. The citation for these "normalized" rates probably should be "Gilman *et al.* 2003." The reduction in contact rates (compared with the daytime setting control) found by Boggs (2002) for night setting *without blue-dyed*

squid bait were 84 percent (black-footed albatross) and 83 percent (Laysan albatross). The Department recommends these original data be used and cited in the FEIS.

p. 54. – 2.1.2, Combinations of Methods for Reduction of Longline-Seabird Interactions, Combination 1: Blue-dyed and thawed bait with strategic offal discard: The blue-dye trials were conducted by Greg Lydon of the New Zealand Seafood Industry, and the appropriate citation for this work is: "Greg Lydon, New Zealand SeaFIC, personal communication, 2004."

p. 58. – 2.1.2, Combinations of Methods for Reduction of Longline-Seabird Interactions, Summary: It is stated that, "[i]n general, combinations involving side-setting faired [*sic*] best, but every combination had liabilities of one sort or another." We note that none of the liabilities relate to side-setting per se, but instead relate to the other methods in the combination, or to conflicts presented by the combination itself, and we recommend that the statement quoted above be qualified accordingly in the FEIS.

p. 59-69. – 2.1.2, Combinations of Methods for Reduction of Longline-Seabird Interactions, Summary, and 2.1.3, Alternatives for Reduction of Seabird Interactions in the Hawaii-based Longline Fishery Including a Preliminary Preferred Alternative: Three general conclusions about the possible deterrent combinations are offered on p. 59: (1) side-setting appears to be the single best deterrent measure, (2) the currently required measures provide a good default package of deterrents for vessels that are physically not able to deploy line by side-setting, and (3) blue-dyed bait and strategic offal discards should be eliminated from the currently required deterrents.

We strongly agree with the first conclusion and agree generally with the second conclusion, based on the available data. The Department does not agree with the third conclusion (as described above, under "Blue-dyed and Thawed Bait" and "Strategic Offal Discard"). The first two conclusions lead logically to Alternative SB10B, and not Alternative SB7C, the preliminary preferred alternative.

The longline fishery based in Hawaii has hosted ground-breaking research on seabird deterrents. The information generated by this research can lead to the testing and adoption of effective seabird deterrent methods by non-U.S. longline fisheries operating in the North Pacific. In order for this to happen, however, fishery managers need to apply the results of this research and help to facilitate the use of these deterrents in the Hawaii-based fishery.

We also recommend that logbooks be required to record interactions with protected species. Therefore, taking into consideration the comments offered above under Side setting and Alternative SB10B (DEIS), the Department recommends the adoption of Alternative SB10B as the preferred alternative.

Pg. 72. – 2.2.1, Alternatives for Management of the Squid Jigging Fishery under the MSA, Paragraph 2, Sentence 2: The DEIS states "Replace HSFCA logbooks currently used with logbooks specifically designed for squid harvesting, and require operators of

squid vessels permitted under the HSFCA to also include any EEZ fishing activities in this logbook." It is unclear whether the proposed action would require fishers to use logbooks in international waters, as well as the EEZ.

Also, it is not clear whether the logbooks are designed to record accidental impacts to protected species (*e.g.*, seabirds, sea turtles or marine mammals) as a result of squid fishing-related operations. We recommend the FEIS discuss efforts to document bycatch events, should squid fishery operations result in injuries or mortalities to protected species, within the EEZ and in international waters.

Pg. 91. – 3.4.5, Bycatch in the Squid Jigging Fishery, Paragraph 3, Sentence 6: The DEIS states: "Because of the bright lights used on the vessels, there have been concerns about birds becoming disoriented." This statement is not preceded with a thorough description of the squid fishery, proposed to occur within the vicinity of the Hawaiian archipelago. Therefore, it is problematic for the Department to evaluate the degree to which lighting, or other sources of disturbance could negatively impact protected species. We recommend the FEIS discuss potential squid fishing-related lighting disturbances and affects to seabirds.

Pg. 173. – Jigging: A description of squid fishing techniques and gear types would assist the reader to better understand the alternatives analyses discussion and we recommend that a good description of these techniques and gear types be included in Chapter One of the FEIS.

SUMMARY COMMENTS

In summary, the Department believes the DEIS is deficient in its analyses of potential squid fishing-related impacts to protected species (*e.g.*, sea turtles, marine mammals, and seabirds). The FEIS should be revised to provide improved analyses of alternatives and potential impacts, and be based on a clear commitment to avoid unnecessary impacts, minimize unavoidable impacts, and compensate for significant unavoidable impacts.

The results of the analyses of potential seabird deterrents and combinations of deterrents for use in the Hawaii-based longline fishery as presented in the DEIS indicate that side-setting is the most effective and practicable deterrent.

The Department is concerned that the preliminary preferred alternative does not reflect this conclusion. Moreover, this alternative includes two deterrents, tori lines and the underwater setting chute, that are shown by the analysis to be less effective and/or less practicable than side-setting, and it includes a geographic limitation on the required use of seabird deterrents in the tuna fishery.

The preliminary preferred alternative does not correspond with NMFS' stated overarching goal for this management action. We recommend that the preferred alternative reflect NMFS' stated goals and the results of the analysis in the FEIS. Please address our comments to the FEIS accordingly.

Thank you for our opportunity to review this project.

Sincerely,

Patricia Sanderson Port
Regional Environmental Officer

cc:
Director, OEPC, DC
Director, Fish and Wildlife Service
Director, National Park Service
Director, Geological Survey

Attachment

References Cited:

Boggs, C.H. 2001. Deterring albatrosses from contacting baits during swordfish longline sets. Pages 79-94 in Proceedings – Seabird bycatch: trends, roadblocks, and solutions. University of Alaska Sea Grant AK-SG-01-01.

_____. 2002. Annual report on the Hawaii longline fishing experiments to reduce sea turtle bycatch under ESA Section 10 permit 1303 (November 30, 2002). Honolulu Laboratory, Southwest Fisheries Science Center, National Marine Fisheries Service, Honolulu, Hawaii. 22 pp.

Gilman, E., N. Brothers, D. R. Kobayashi, S. Martin, J. Cook, J. Ray, G. Ching, and B. Woods. 2003. Performance assessment of underwater setting chutes, side-setting, and blue-dyed bait to minimize seabird mortality in Hawaii longline tuna and swordfish fisheries. Final Report. National Audubon Society, Hawaii Longline Association, U.S. National Marine Fisheries Service Pacific Islands Science Center, U.S. Western Pacific Regional Fisheries Management Council, Honolulu, HI, USA. 42 pp.

McNamara, B., L. Torre, and G. Ka`aiali`i. 1999. Final report: Hawaiian longline seabird mortality mitigation project. Prepared by Garcia and Associates, Inc., for Western Pacific Regional Fisheries Management Council, Honolulu, HI, September 1999. 93pp. + appendices.

Melvin, E.F., B. Sullivan, G. Robertson, B. Wienecke. In press. A review of the effectiveness of streamer lines as a seabird by-catch mitigation technique in longline fisheries and CCAMLR streamer line requirements. CCAMLR Science 11 (2004).

Sievert, P. R. 2004. A simulation model for the growth of short-tailed albatross populations on Torishima and the Senkaku Islands. Unpublished Excel model developed for the USFWS Short-tailed Albatross Recovery Team (program and output available upon request).

U.S. Fish and Wildlife Service (USFWS). 2000. Biological Opinion of the U.S. Fish and Wildlife Service on the Effects of the Hawaii-based Domestic Longline Fleet on the Short-tailed Albatross (*Phoebastria albatrus*).

_____. 2003. Endangered Species Act Formal Consultation addressing the effects of the Total Allowable Catch (TAC)-setting process for the Gulf of Alaska and Bering Sea/Aleutian Island Groundfish Fisheries on the endangered short-tailed albatross (*Phoebastria albatrus*) and threatened Steller's eider (*Polysticta stelleri*)

_____ and National Marine Fisheries Service (NMFS). 1998. Consultation Handbook: Procedures for conducting consultation and conference activities under section 7 of the Endangered Species Act.