

MARINE MAMMAL COMMISSION
4340 East-West Highway, Room 700
Bethesda, MD 20814-4447

6 November 2008

Mr. Lyle Laverty
Assistant Secretary for Fish and Wildlife and Parks
Department of the Interior
Attn: Division of Policy and Directives Management (1018-AT50)
U.S. Fish and Wildlife Service
4401 North Fairfax Drive, Suite 222
Arlington, VA 22203

Dear Mr. Laverty:

On 27 October 2008 the Fish and Wildlife Service and the National Marine Fisheries Service published notice in the *Federal Register* that a draft environmental assessment on the proposed modifications to regulations implementing interagency cooperation requirements under section 7 of the Endangered Species Act was available for public review and comment. Because of the unusually short amount of time allowed by the Services for commenting on a document of this type, the Marine Mammal Commission is unable to conduct its usual full review that allows input from all the Commissioners and the members of its Committee of Scientific Advisors on Marine Mammals. As such, the Commission is only able to provide comments on the draft environmental assessment developed independently by its staff. We consider the lack of review by our Commissioners and Committee members to be a significant shortcoming that undermines the Commission's ability to fulfill its responsibilities under the Marine Mammal Protection Act.

In its 14 October 2008 letter commenting on the proposed regulatory changes, which was subject to full review by the Commissioners and Committee members, the Commission stressed the importance of conducting a review of the proposed rule under the National Environmental Policy Act (NEPA) and recommended that a NEPA document be prepared and circulated for public review and comment before taking further action on the regulations. We are pleased that the Services have done so but believe that the timing of the environmental assessment—only weeks after the close of the public comment period on the regulations—is inappropriate. The intent of an environmental assessment is to help inform decision-makers and the public about the possible environmental impacts of important actions by the federal government.

We also believe that preparation of an environmental assessment fails to satisfy NEPA requirements. The changes to the section 7 regulations being proposed by the Services are substantial and could have significant effects on listed endangered and threatened species. We do not agree with the Services' conclusion that the proposed regulatory changes constitute mere "clarifications" of existing law and agency practice that will result in no substantive changes in protection for listed species or that otherwise will have no significant environmental effects. The changes that could result are substantial, and therefore the Service should prepare an environmental impact statement.

For example, as detailed in our October 14 letter, dismissing consideration of the effects of greenhouse gases resulting from federal actions on listed species and their habitat because those effects are somehow too speculative or will not add to the adverse effects anticipated from other

sources is contrary to the requirements of section 7 and inconsistent with the regulation that the cumulative effects of federal and other actions be evaluated in making jeopardy determinations. This sets up the untenable situation where the Fish and Wildlife Service has listed a species (the polar bear) as threatened based on anticipated habitat reduction and degradation resulting from climate change attributable to increases in greenhouse gas levels, but then declines to consider the contribution of federal actions to the problem when making determinations under section 7. Excluding such effects from consideration during consultations could have significant effects on listed species and their habitat and, on that basis alone, the proposed regulations should be considered significant for NEPA purposes as well.

Our October 14 letter also highlighted another example of a proposed regulatory change that could have significant effects on the human environment, that is, the proposed shift in agency responsibilities that would allow action agencies to make certain threshold determinations independent of any consultation with the Services. As we noted, vesting action agencies with such authority increases the risks that erroneous determinations will be made, either because those agencies have conflicting missions or lack the expertise of the Services concerning the potentially affected species. Any erroneous determination that could be avoided by retaining the existing consultation requirements is potentially significant. As the draft environmental assessment notes, action agencies would still be held accountable for meeting the requirements of section 7, and erroneous determinations could be redressed through the Endangered Species Act's citizen suit provisions. Although this is true, we believe that reliance on such remedies in lieu of adequate oversight and participation by the Services in ensuring compliance with the mandates of section 7 itself is a significant change from existing procedures, sufficient to warrant preparation of an environmental impact statement. Not only could listed species and their habitat be subject to otherwise avoidable impacts, but relying on the citizenry to police the determinations made by action agencies could have significant impacts on those entities that are compelled to step into the breach.

We also note that the pace with which these proposed regulatory changes are being pursued by the Services suggests that they are more than cosmetic and clarifying changes. Despite this characterization, the rush to conclude this rulemaking on such an expedited schedule, as reflected by the short comment period on the draft environmental assessment, strongly suggests that the Services see these changes as substantively important enough to warrant implementation as quickly as possible.

Although we believe that the Services should prepare an environmental impact statement to evaluate more fully the potential effects of the regulatory changes being considered, we have a couple of comments specific to the draft environmental assessment. First, the discussions of anticipated environmental consequences in section VI of the document are rather conclusory. For the most part, the Services merely describe each proposed change, followed by the conclusion that it will not result in any environmental consequences, with little or no supporting analysis. Additional explanation to support those conclusions is needed. Second, the alternatives considered in the draft environmental assessment are limited. In essence, the Services examine only two alternatives—

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retaining the existing regulations (the no-action alternative) and implementing the revisions proposed by the Services on 15 August 2008 (the proposed action). Although we have not reviewed all of the comments submitted on the proposed rule, we suspect that many of them suggested wording changes and other alternatives to the specific proposals put forward by the Services. Certainly, the comments submitted by the Commission included such recommendations. It would be appropriate for the Services to analyze the comments received on the proposed rule to identify alternative regulatory constructions and approaches for improving the section 7 regulations and to evaluate those alternatives in the NEPA document along with the Services' proposed action.

Please contact me if you have questions regarding these comments.

Sincerely,



Timothy J. Ragen, Ph.D.
Executive Director

cc: Mr. James H. Lecky