



MARINE MAMMAL COMMISSION

18 August 2017

Ms. Kelly Denit
Office of Sustainable Fisheries
National Marine Fisheries Service
1315 East-West Highway
Silver Spring, MD 20910

Re: Streamlining Regulatory
Processes and Reducing Regulatory
Burden

Dear Ms. Denit:

The Marine Mammal Commission (the Commission), in consultation with its Committee of Scientific Advisors, has reviewed the National Oceanic and Atmospheric Administration's (NOAA's) 7 July 2017 *Federal Register* Notice (82 Fed. Reg. 31576) concerning ongoing efforts to evaluate and improve regulations and regulatory processes. In preparing these comments, the Commission did not attempt to undertake a comprehensive review of all of the regulations promulgated by NOAA or two of its constituent agencies: the National Marine Fisheries Service (NMFS) and the National Ocean Service (NOS). That is something that NOAA's Regulatory Reform Task Force (Task Force) presumably will be doing under Executive Order 13777. Rather, we are basing these comments on our longstanding involvement in and familiarity with NOAA's regulatory programs, primarily those within the jurisdiction of NMFS under the Marine Mammal Protection Act (MMPA), Magnuson Stevens Act (MSA), and related statutes.

Regulations under the MMPA and MSA address stewardship of the ocean's resources. By the very nature of these resources, in that they belong to no one yet are accessible to all, our activities that affect them require some form of management to prevent a classic "tragedy of the commons." Employment associated with marine ecosystems (e.g., commercial and recreational fishing, nature-oriented tourism) could be affected in the short term by federal regulations, but the *lack* of any such regulations on marine resource use or on other activities that impact these resources could result in a severe decline in employment over the long run if the resources are significantly depleted. History has shown this to often be the case in the absence of regulation.

Many of the regulations issued under the laws mentioned above are statutorily mandated or anticipated by the statutes they are meant to implement. Others, such as incidental take regulations issued under section 101(a)(5) of the MMPA, actually *allow* job-creating activities to go forward that otherwise would be precluded by the Act's take prohibition. There are also several statutory mandates and regulations promulgated by NMFS that set forth the procedures, decision-making standards, and interpretations of statutory provisions that provide the framework for the numerous actions and authorizations conducted by NOAA each year. Without this framework, it is much more likely that agency actions would be successfully challenged, thereby adding additional costs and creating greater uncertainty for the government and the constituencies subject to regulation.

For nearly 50 years, the promulgation of regulations has been subject to a wide range of analyses and guidance that emphasize minimal impact on the regulated public and that ensure an open process that seeks input and review by affected entities. Any attempt to “expedite” this process could result in regulations that are based on incomplete information, and could actually be *more* burdensome to affected stakeholders. The key requirements of regulatory analyses are as follows:

- 1) National Environmental Policy Act: analyses of impacts of regulations on the human environment, including individuals and businesses.
- 2) The Regulatory Flexibility Act: analyses of impacts on small business entities, consideration of regulatory options to reduce this burden, and a 10-year review process to ensure that the regulatory measures are up to date and impose the least possible burden to small businesses ([see 7 June 2017 Federal Register Notice](#)).
- 3) Executive Order 12866: minimize the regulatory burden, obtain input from affected stakeholders, and quantify benefits and costs of proposed regulations.
- 4) Administrative Procedures Act (APA): provide ample public notice and seek comments from all affected stakeholders.

Although the Commission believes that NMFS’s regulations generally are necessary, effective, and beneficial, we bring to your attention one regulation implementing the MMPA that is outdated. In order to issue an incidental take authorization under section 101(a)(5) of the MMPA, NMFS must determine, among other things, that the taking would have a “negligible impact” and that only “small numbers” of marine mammals from the affected species and stocks would be taken. Implementing regulations at 50 C.F.R. § 216.103 define the term “small numbers.” However, reviewing courts (see e.g., *NRDC v. Evans*, 279 F. Supp.2d 1129 (N.D. Cal. 2003)) invalidated that definition, ruling that it impermissibly conflated the small-numbers and negligible-impact requirements. While this definition was invalidated 14 years ago, it remains on the books, creating confusion and requiring NMFS to explain repeatedly in its documents that some other standard applies. The Commission therefore recommends that, as part of its regulatory review, NOAA identify this regulatory definition for revision or elimination.

Because the Commission shares MMPA implementation responsibility with NMFS, we would welcome the opportunity to work with NOAA and its Task Force to review the input it receives from the public concerning regulations under the MMPA and related statutes.

Sincerely,



Rebecca J. Lent, Ph.D.,
Executive Director