



# MARINE MAMMAL COMMISSION

24 September 2018

Mr. Gary Frazer  
Assistant Director for Endangered Species  
U.S. Fish and Wildlife Service  
MS: BPHC  
5275 Leesburg Pike  
Falls Church, VA 22041-3803

Attn: FWS-HQ-ES-2018-0007

Dear Mr. Frazer:

The Marine Mammal Commission (the Commission), in consultation with its Committee of Scientific Advisors on Marine Mammals, has reviewed the U.S. Fish and Wildlife Service's (FWS) 25 July 2018 proposed rule to revise the regulations establishing prohibitions applicable to threatened species of wildlife and plants (83 Fed. Reg. 35174). The Commission provides the following comments and recommendations based on its review of the proposed rule. Given its role in the conservation of marine mammals, the Commission's comments focus on the proposed regulatory changes related to threatened wildlife (50 C.F.R. § 17.31) rather than those applicable to plants (50 C.F.R. § 17.71).

## **Background**

Section 9(a)(1) of the Endangered Species Act (ESA) sets forth prohibitions applicable to species of fish or wildlife listed as endangered. Among other things, that provision prohibits taking, possessing, selling, receiving, and transporting any endangered species unless authorized elsewhere under the Act (e.g., under a research, enhancement, or incidental taking permit, or by an Alaska Native for subsistence purposes). Those prohibitions do not apply automatically to species listed as threatened. Rather, section 4(d) of the Act directs FWS (and the National Marine Fisheries Service (NMFS)) for species under its jurisdiction) to issue regulations that deemed "necessary and advisable to provide for the conservation of such species." Such regulations may include any and all of the prohibitions applicable to endangered species under section 9(a)(1).

The two agencies have taken opposite starting points in how they approach the adoption of prohibitions under their protective regulations for threatened species. Through its current regulations at 50 C.F.R. § 17.31, FWS has established a baseline under which all of the section 9(a)(1) prohibitions apply by default to wildlife species listed as threatened, unless a special rule promulgated pursuant to section 4(d) of the Act specifies otherwise. In contrast, the approach followed by NMFS is to start with a blank slate, where none of the section 9(a)(1) prohibitions apply by default, but are operative only if included in the 4(d) rule for a particular threatened species. Both of these approaches provide the listing agency with the flexibility to craft a rule that includes some, but not all of the section 9(a)(1) prohibitions, or perhaps even none of those prohibitions if they are not necessary and advisable for the species' conservation. However, the differences in how the two

agencies craft their 4(d) rules, and the philosophical differences those approaches represent, are important ones.

Under the proposed rule, FWS is proposing to switch to the approach taken by NMFS for all new threatened species listings, but to retain its current system for species listed before the effective date of a final rule implementing this change.

### **Reconciling the Practices of FWS and NMFS**

When the practices of FWS and NMFS, the two agencies with primary responsibility for implementing the Marine Mammal Protection Act (MMPA) and the ESA, deviate, the Commission has regularly advocated that the agencies reconcile their differences by adopting consistent policies, interpretations, and regulations, unless there is a compelling reason not to do so. In this case, we agree that there is no good reason for the two agencies to have different regulatory defaults in how the section 9(a)(1) prohibitions are applied to threatened species. We disagree though that FWS should change its regulations to conform to the NMFS practice. Rather, the Commission recommends that FWS abandon this rulemaking and, instead, that NMFS initiate a rulemaking to revise its regulations to conform to FWS's current practice of applying the full panoply of prohibitions unless a species-specific 4(d) rule provides otherwise.

First, the Commission notes that the section 9(a)(1) prohibitions are fairly basic. They apply to activities such as taking, possessing, and engaging in trade involving listed species. For most species, whether endangered or threatened, such prohibitions are appropriate; and when they are not for threatened species, the agencies have the latitude to deviate from them by excluding certain prohibitions from a species-specific 4(d) rule.

Second, in reviewing the threatened animal species listed by FWS<sup>1</sup>, a significant majority do not have a specific 4(d) rule, meaning that in most cases FWS opted to apply the full range of prohibitions available under section 9(a)(1). Because FWS has found the full suite of prohibitions to be appropriate in most instances, it makes sense to continue the current practice of applying all of those prohibitions initially and to scale back as appropriate in specific cases.

Third, by applying all of the endangered species prohibitions to threatened species as the default, as it does now, FWS actually reduces the administrative burden associated with promulgating individual 4(d) rules for each species it lists as threatened. For many species, it can merely rely on the protections provided by the existing section 17.31 regulations.

Fourth, reviewing courts have already approved the presumption underlying the existing provision—that the full suite of prohibitions applicable to endangered species also is “necessary and advisable” for the vast majority of threatened species. If FWS abandons that as the approved default, it may put itself in the position of having to explain why each of the prohibitions that it opts to include in each of the 4(d) rules it promulgates is considered “necessary and advisable.”

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<sup>1</sup> This analysis does not apply to species listed by NMFS as threatened because none of the section 9(a)(1) prohibitions apply to those species unless included specifically in a 4(d) rule.

Fifth, from a philosophical perspective, retaining the existing regulation that applies all of the prohibitions automatically unless there is a reason not to, is more in keeping with the conservation goals of the ESA. By listing a species as threatened, FWS or NMFS has determined that the species is likely to become endangered (i.e., in danger of extinction throughout all or a significant portion of its range) within the foreseeable future, unless something is done to change the species' trajectory and/or to eliminate or reduce the identified threats. In most cases, eliminating unauthorized taking and trade is consistent with the ESA's definition of conservation, which includes "the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point where the measures provided pursuant to [the] Act are no longer necessary." Given the goals of the ESA, it makes sense to err on the side of being more precautionary until enough is known about the conservation needs of a species to determine that some of the available protections and prohibitions are unnecessary in a particular instance.

### **Timing of 4(d) Rules**

Another benefit of application of the full suite of protective measures with the listing of a species is that this ensures needed protections are applied immediately. Although protective regulations under section 4(d) often are published simultaneously with a species' listing as threatened under the ESA, this is not always the case. Sometimes such regulations are issued after publication of a listing rule or deferred indefinitely. In such cases, it would be appropriate for some protections to kick-in automatically pending publication of a 4(d) rule tailored specifically to the species or a formal determination, and opportunity for public review and comment on that determination, that no regulations or prohibitions are necessary or advisable for the conservation of the species. Retaining existing section 17.31, and expanding it to cover species listed as threatened by NMFS<sup>2</sup>, as recommended above, would provide appropriate interim protection to those species pending issuance of a species-specific 4(d) rule or a determination that no such regulations are needed.

### **Protective Regulations for Marine Mammals**

In some cases, FWS has declined to include ESA-based prohibitions in its 4(d) rules because it has relied on the statutory or regulatory schemes already in place under other laws. As an example, the *Federal Register* notice cites the case of the California gnatcatcher (see 83 Fed. Reg. 35175). Another example with which the Commission is more familiar is the polar bear, which FWS listed as threatened in 2008. The 4(d) rule for the polar bear does not include any of the prohibitions available under section 9(a)(1) of the ESA, but rather relies on the similar prohibitions already applicable under the MMPA. In commenting on that 4(d) rule, the Commission noted that, while both the ESA and the MMPA include a prohibition on taking, the two statutes define taking differently, with the ESA definition arguably being more expansive. The Commission also noted that FWS should not rely solely on the protections afforded under the MMPA if those protections, by themselves, have proven insufficient to avoid the situation where a marine mammal species warrants listing under the ESA. Thus, for marine mammals listed as threatened under the ESA, the Commission recommends that FWS supplement those protections already available under the MMPA with additional protections available under section 9(a)(1) of the ESA (through automatic application under section 17.31 or their inclusion in a 4(d) rule) whenever a marine mammal

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<sup>2</sup> This would need to be done independently by NMFS by amending its counterpart regulations at 50 C.F.R. Part 223.

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warrants listing as threatened notwithstanding the conservation efforts being made under the MMPA.

The Commission appreciates the opportunity to comment on this proposed rule. Please contact me if you would like to discuss any the Commission's comments and recommendations.

Sincerely,



Peter O. Thomas, Ph.D.,  
Executive Director

cc: Donna Wieting, Director, Office of Protected Resources, National Marine Fisheries Service