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

Ms. Donna Wieting, Director
Office of Protected Resources
National Marine Fisheries Service
1315 East-West Highway
Silver Spring, MD 20910

Attn: FWS-HQ-ES-2018-0006

Dear Mr. Frazer and Ms. Wieting:

The Marine Mammal Commission (the Commission), in consultation with its Committee of Scientific Advisors on Marine Mammals, has reviewed the 25 July 2018 proposed rule to revise the regulations issued jointly by the U.S. Fish and Wildlife Service (FWS)[1] and the National Marine Fisheries Service (NMFS) that govern the listing of species and the designation of critical habitat under the Endangered Species Act (ESA) (83 Fed. Reg. 35193). The Commission provides the following comments and recommendations based on its review of the proposed rule.

Factors for Listing, Delisting, or Reclassifying Species

Economic Impacts of Listing Decisions

As discussed in the proposed rule, section 4(b)(1)(A) of the ESA mandates that listing decisions be made "solely on the basis of the best scientific and commercial information available after conducting a review of the status of the species." When Congress amended the Act in 1982 to add that language, it explained its intent to clarify that listing decisions were to be made "solely upon biological criteria and to prevent non-biological considerations from affecting such decisions." Specifically, Congress expressed concern that economic ramifications associated with a listing could influence the agency's decision. To help guard against the possibility that the economic or other impacts of a listing could color the agency's listing determination, the Services included a clause in 50 C.F.R. § 424.11(b) specifying that such decisions are to be made "without reference to possible economic or other impacts of such determination." The Services are proposing to delete this clause. In making this proposal, the Services explain that they will continue to make listing decisions based solely on biological considerations, but note that "there may be circumstances where referencing

[1] In this letter, the Commission refers to FWS and NMFS collectively as "the Services."

economic, or other impacts may be informative to the public and state, local, and tribal governments about the potential costs and benefits of implementation…."

The Commission opposes the proposed regulatory change on at least three grounds. First, the Commission believes that, if an economic analysis is prepared evaluating the costs and benefits associated with a potential listing, there is no doubt that it could, at least in some subtle way, influence the agency's decision. This risk is eliminated if any such analyses are deferred until after a listing decision is made. Second, this goes against the goal of regulatory streamlining and efficiency. Although the workload of the two agencies in responding to listing petitions and making listing determinations varies, the Services historically have been pressed to meet the statutory deadlines for these actions. FWS, in particular, has frequently issued findings that a proposed listing action is "warranted but precluded" by other pending listing proposals or has been subject to legal challenges for missing the ESA's deadlines. Given the agencies' limited resources for endangered species programs, it would be misguided to direct effort at preparing potentially complex economic analyses as part of the listing process, when those analyses have no bearing on the listing decisions to be made. These would introduce an additional workload burden on the agencies that would slow the mandatory regulatory reviews. Third, by preparing analyses on the costs and benefits of listing decisions, but not factoring that information into those decisions, the Services are likely to engender antipathy for the listing process and the ESA itself. If the Services believe that these sorts of analyses would be beneficial to the public, it can, and should, pursue them independent of the listing determinations. For the foregoing reasons, the Commission recommends that the Services retain the phrase "without reference to possible economic or other impacts of such determination" in section 424.11(b) of their regulations.

Foreseeable Future

Section 3(19) of the ESA defines a "threatened species" as one "which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range." The Services are proposing to add regulatory guidance on the meaning of the phrase "foreseeable future" in proposed section 424.11(d). The Commission is not convinced that there is a pressing need for this addition, given existing guidance, past agency practice, and pertinent case law (e.g., the finding concerning the polar bear listing cited in the preamble of the proposed rule). However, the Commission agrees, at least in general terms, with the content of the proposed provision. As the Services note, what constitutes the foreseeable future will vary depending on a species' life history (e.g., its generation length) and the threats the species faces. As such, the Commission recommends that the Services continue to make these determinations on a case-by-case basis. The Commission, however, has concerns about the imprecision of the wording used in the proposed provision. For example, it is unclear how the terms "reasonably determine" and "are probable" will be applied in particular cases. Presumably, those terms will be interpreted consistent with past listing decisions and this should be clarified in the final rule. In the case of the polar bear listing, for instance, we would expect that the time frames FWS used for making population projections and for applying climate change models used to assess the primary threat would continue to meet the proposed regulatory standards of reasonableness and probability with respect to what constitutes the foreseeable future.

Factors Considered in Delisting Decisions

The Services are proposing to redesignate existing section 424.11(d) as section 424.11(e) and to "clarify" certain elements. Among other things, the provision would be reworked from one that provides policy guidance on the factors to be considered when contemplating a delisting action to one that mandates that a species be delisted if certain criteria are met. In proposing this change, the Services have not clearly identified the interplay between section 424.11(d), which directs the Secretary to take a particular action, and section 424.16(c), which sets forth the procedures to be followed. To make this connection more clearly, the Commission recommends that the introductory clause of proposed section 424.11(e) be revised to read "The Secretary will delist a species if the Secretary, based on the best available scientific and commercial data available, including any information received in accordance with procedures set forth in section 424.15 or section 424.16(c), finds that:". This change will help clarify that the public will continue to have a role in reviewing, commenting on, and providing information concerning proposed delistings.

The first sentence in the preamble's discussion of "*Factors Considered in Delisting Species*" (83 Fed. Reg. 35196) states that the Services will "determine whether a species is a threatened species or an endangered species using the same standards regardless of whether a species is or is not listed at the time of that determination." The Commission agrees that the same criteria should be applied, but notes that there is a heightened evidentiary burden on the agency when seeking to change an existing listing. That is, the agency does not start with a clean slate. Rather, it needs to explain why new information or new analyses support the conclusion that the original determination was wrong or that the status of the species has improved to the point where it is considered recovered.

Criteria for Designating Critical Habitat

Not Prudent Determinations

The Services are proposing significant revisions to section 424.12(a)(1), which identifies situations in which it would not be prudent to designate critical habitat. The Commission agrees with some, but not all of the proposals. The Commission agrees that designation of critical habitat is not prudent when identification of important habitat would potentially increase the degree to which a species is subject to collection, disturbance, or other threats. The Commission also agrees that existing section 424.12(a)(1)(ii), which precludes designation when critical habitat "would not be beneficial to the species," is too vague a criterion and should be deleted.

Proposed section 424(a)(1)(ii) would specify that a critical habitat designation is not prudent when "[t]he present or threatened destruction, modification, or curtailment of a species' habitat or range is not a threat to the species, or threats to the species' habitat stem solely from causes that cannot be addressed through management actions resulting from consultations under section 7(a)(2) of the Act." As with past practices implementing existing section 424(a)(1)(ii), the Services seem to be evaluating the value of a critical habitat designation (and whether or not designation is prudent) solely within the context of section 7 consultations. As discussed in the preamble of the proposed rule, courts have taken a more expansive view of the value of a critical habitat designation. The Commission therefore recommends that the Services expand their analysis of the value of a critical

habitat designation beyond management actions that can be taken under section 7 and revise the proposed regulatory provision accordingly.

In addition, the Commission is concerned about the examples provided in the preamble illustrating how this new provision would operate. The first example is a species that faces a threat from disease and seeks to demonstrate that a critical habitat designation would be prudent only when the species faces a habitat-based threat. This approach fails to recognize that once the primary threat (e.g., disease) has been successfully addressed, the species will still need suitable habitat to support its recovery. It is the critical habitat designation that helps ensure that essential habitat is not destroyed or adversely modified in the interim. If activities are unlikely to modify or adversely modify that habitat, as the Services' analysis suggests, then the administrative burden associated with any section 7 consultations concerning that habitat should be minimal and the Service's concerns about such designations contributing to those burdens are unfounded.

The other example provided by the Services concerns species facing threats from melting glaciers, sea level rise, and reduced snowpack. Presumably, sea ice loss also belongs on this list. It is worth noting that several species of marine mammals have been listed as threatened due to threats associated with climate change and loss of sea ice. Yet, through the proposed rule, the Services seek to exempt themselves and action agencies from having to consider and evaluate how federal actions may be causing or contributing to the predicted and ongoing loss of this essential habitat or to take any remedial action.[2] The Commission therefore recommends that the Services revise the proposed rule to eliminate the exception to the requirement to designate critical habitat in situations where large-scale habitat changes are occurring. If federal actions are not causative factors in adversely modifying or destroying that habitat, this can be, and should be, addressed during consultation, not at the designation stage.

Proposed section 424(a)(1)(iii) would specify that designating critical habitat is not prudent when the species occurs primarily outside the United States and areas within the jurisdiction of the United States provide no more than negligible conservation value. If the areas within the United States provide only negligible conservation value, it is difficult to see how such an area would fit within the statutory definition of critical habitat, which requires, among other things, that the area include physical or biological features "essential to the conservation of the species." Given that such areas would unlikely qualify as critical habitat, there is no need to determine whether designation is prudent or not. As such, the Commission recommends that the Services omit this provision from the final rule.

Proposed section 424(a)(1)(iv) would provide that a designation is not prudent when no areas meet the definition of critical habitat. The Commission does not think that such a regulation is necessary and recommends the Services omit it from the final rule. If no habitat meets the statutory definition, then, under the statutory provisions, there is nothing to designate, whether or not it is prudent to do so. In addition, if they retain this provision, it would be helpful if the Services provided examples of situations in which no habitat would meet the definition. It seems that every

[2] Although such evaluations would take place within the context of a consultation under section 7 of the ESA, the obligation under section 7 to insure that federal actions are not likely to destroy or adversely modify critical habitat is triggered by the designation of that habitat.

species (at least species in the wild) requires some habitat with essential physical or biological features to persist and recover.

Designating Unoccupied Areas

The definition of "critical habitat" in section 3(5)(A) of the ESA includes "specific areas outside the geographical area occupied by the species at the time it is listed…, upon a determination by the Secretary that such areas are essential for the conservation of the species." As noted in the proposed rule, a prior regulatory provision limited designations of critical habitat outside the range occupied by the species to situations in which a designation limited to the species' present range would be inadequate to ensure its conservation. The Services deleted that regulation in 2016.

The proposed rule seeks to reinstate the earlier regulation in part. It would require the Services first to evaluate whether occupied areas are sufficient to meet the conservation needs of the species. Like the former rule, it would allow unoccupied areas to be designated as critical habitat if the occupied areas are insufficient to ensure the conservation of the species. It also would allow unoccupied areas to be designated if limiting the designation to occupied areas "would result in less efficient conservation for the species." Proposed section 424.12(b)(2) would clarify that "efficient conservation" refers to situations where the conservation is effective, societal conflicts are minimized, and resources expended are commensurate with the benefit to the species.

The Commission agrees that there are situations where designating critical habitat outside the current range of a species is appropriate. For example, a listed species may occupy only a small portion of its historical range and range expansion may be necessary to achieve recovery of the species. The Commission also agrees that designating habitat beyond a species' current range should not be limited to situations where that is an option of last resort. It makes sense to target the areas with the highest conservation value, whether or not the species currently occupies those areas. Nevertheless, the proposed regulatory language raises some concerns. Yes, the Services should endeavor to reduce societal conflicts related to critical habitat designations, if it can be done in a way that does not compromise species conservation. Nevertheless, the Commission is concerned that, under the proposed rule, the Services may seek to offset the exclusion of essential habitat within the occupied range of a species from a designation because of concerns about potential conflicts, by substituting areas outside that range, which may be presumed (speculatively) to have equivalent value. This is a concern because species do not always react to the availability of seemingly suitable habitat in the ways that scientists and managers expect them to. Take, for example, the southern sea otter, which despite the availability of what appears to be appropriate habitat at both ends of its range along central California, has been slow to move into and reoccupy those areas. Range expansion might be proceeding more quickly were it not for increased threats faced by otters at the edges of their range (e.g., from shark attacks). This example illustrates that we cannot always predict the threats a species will face as it moves into unoccupied areas or the extent to which such threats will affect species conservation. This being the case, the Commission recommends that the Services use the proposed offset authority sparingly and only in cases in which they have (1) sufficient information to determine accurately the conservation value of both the occupied area(s) that would be excluded from the designation and the unoccupied habitat that would be included in its stead and (2) adequate monitoring programs to assess whether their predictions of the value of the unoccupied

area are correct.[3] In cases where the Services overestimated the conservation value of unoccupied areas when designating critical habitat, the regulations should require that they review the original designation promptly and revise it as appropriate.

Thank you for the opportunity to comment on the Services' proposed regulatory changes. Please contact me if you would like to discuss any the Commission's comments and recommendations.

Sincerely,

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

[3] That is, are animals moving into and using the unoccupied habitat at the rate and in the ways predicted by the Services and are those areas having the expected contribution to the species' recovery.