



MARINE MAMMAL COMMISSION

2 October 2015

Mr. Dwayne Meadows
Endangered Species Division
F/PR3
Office of Protected Resources
National Marine Fisheries Service
1315 East-West Highway
Silver Spring MD 20910

Re: Proposed rule for designation of experimental populations under ESA

Dear Mr. Meadows:

On 3 August 2015 the National Marine Fisheries Service (NMFS) published a proposed rule (80 Fed. Reg. 45924) to establish definitions and procedures for establishing and/or designating certain populations of species otherwise listed as endangered or threatened as experimental populations; determining whether experimental populations are “essential” or “nonessential”; and implementing protective measures for experimental populations. The Marine Mammal Commission (the Commission) has reviewed the proposed rule with regard to the goals, policies, and requirements of the Marine Mammal Protection Act (the MMPA).

Section 10(j) of the Endangered Species Act (ESA) authorizes the Secretary of Commerce (Secretary) to establish experimental populations of listed species when the Secretary determines that such a population or populations will further the conservation of the species. This provision, added to the ESA in 1982, was designed to provide new administrative flexibility for selectively applying ESA prohibitions to experimental populations of listed species. In general, such populations are treated as though they are threatened species although, as explained in the preamble to the proposed rule, there are some differences pertaining to section 7 consultations and critical habitat designations.

As indicated in the preamble, NMFS has established three experimental populations of listed species (all salmonids) and in those cases has relied on the regulations established by the Fish and Wildlife Service (FWS). NMFS sees a need to adopt its own regulations to interpret and implement the provisions of section 10(j). The Commission agrees with this proposal by NMFS to adopt regulations specific to species under its purview, while striving for consistency with FWS regulations to the extent possible.

As noted in the proposed rule, the new regulations would be patterned largely on the FWS regulations (50 C.F.R. § 17.80 et seq.) published in 1984. NMFS is proposing some deviations from the FWS regulations, but as explained in the preamble, these are either editorial or reflect the statutory requirements as they pertain to species under NMFS’s jurisdiction. The Commission supports NMFS’s efforts to adopt consistent interpretations and procedures across the two agencies and believes that the proposed differences are not significant and are sufficiently explained.

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Although FWS and NMFS have established several experimental populations under section 10(j), that provision has not been used for listed marine mammals. The one instance in which an experimental population of a marine mammal species has been established since enactment of this provision in 1982 was the translocation of California sea otters to San Nicolas Island, and that was governed by separate legislation (Pub. L. 99-625), rather than section 10(j). Thus, there is no track record for judging whether adjustments to the existing FWS regulations and the proposed NMFS regulations, which are based on the FWS regulations, might be useful for marine mammals. Nevertheless, it appears that the proposed regulations provide the necessary framework for establishing experimental populations of marine mammals and that particular considerations relevant to marine mammal species can be addressed when promulgating species-specific regulations under section 222.502 of the proposed regulations. As new challenges arise in the conservation of marine mammals, it will be important to have a broad range of tools available to ensure recovery and maintenance of populations. Therefore, the Marine Mammal Commission supports adoption of the regulations as proposed.

Please contact me if you have any questions concerning the Commission's comments.

Sincerely,

A handwritten signature in blue ink that reads "Rebecca J. Lent". The signature is fluid and cursive, with a long horizontal stroke at the beginning.

Rebecca J. Lent, Ph.D.
Executive Director

cc: Gary Frazer, Assistant Director -- Ecological Services, U.S. Fish and Wildlife Service