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

14 October 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:

The Marine Mammal Commission, in consultation with its Committee of Scientific Advisors on Marine Mammals, has reviewed the 15 August 2008 *Federal Register* notice proposing changes to the regulations governing consultation under section 7 of the Endangered Species Act of 1973 as amended (ESA or the Act). The Commission strongly disagrees with several of the proposed changes and the manner in which the Fish and Wildlife Service and National Marine Fisheries Service (the Services) developed them.

RECOMMENDATIONS

The Marine Mammal Commission recommends that the Fish and Wildlife Service and the National Marine Fisheries Service—

- withdraw the proposed rule, notify all interested agencies (action, consulting, and oversight agencies) of their intent to re-examine the existing regulations, and engage those agencies in an open process to discuss and refine the regulations;
- withhold the proposed regulations until the necessary environmental analyses under the National Environmental Policy Act and the ESA have been completed and made available to the public and decision-makers; and
- consider alternative approaches for evaluating the effects of greenhouse gas emissions and associated climate change rather than excluding them from consideration during section 7 consultation.

If the Services decline to follow the above recommendations, then the Marine Mammal Commission recommends that the Fish and Wildlife Service and the National Marine Fisheries Service —

- retract the portion of the proposed rule that allows action agencies to substitute alternative documents for a well-defined, on-point biological assessment;
- (1) either retract the proposed changes to the definition of "cumulative effects" or provide additional explanation of and justification for those changes, and (2) revise the definition to include the effects of future, non-discretionary federal actions;
- retract their efforts to limit causality by redefining "indirect effects" and retain the existing standards for determining the effects of an action under section 7;

- withdraw the proposed regulatory changes to section 402.03 and make use of the regulatory flexibility already provided under existing section 402.04;
- develop an appropriately scaled strategy to address the effects of climate change;
- retract the revisions to section 402.13 of the proposed rule that would establish explicit deadlines for unilateral termination of informal consultation and seek ways to make the process more efficient without undermining the intent of section 7; and
- retract the proposed revisions to section 402.14 that would allow action agencies to terminate informal consultation unilaterally under proposed section 402.13(b) and instead seek ways to make the process more efficient without undermining the intent of section 7.

RATIONALE

The Commission provides the following rationale for its recommendations.

Notification of and review by interested agencies

Our first concern with the proposed rule is that it erroneously claims that the proposal "was reviewed by the Office of Management and Budget (OMB) and other interested Federal agencies." The Marine Mammal Commission is an interested federal agency. It provides oversight of federal programs concerning marine mammals and makes recommendations to other federal agencies whose actions may affect the conservation and management of marine mammals, including a number of species or stocks that are listed as endangered or threatened. Most recently, the Commission's interest in matters pertinent to endangered and threatened species was illustrated by its report to Congress on "The Biological Viability of the Most Endangered Marine Mammals and the Cost-effectiveness of Recovery Programs." The report highlights deficiencies in marine mammal conservation that stem from ineffective implementation of the ESA, rather than problems with the Act or implementing regulations. Despite the Commission's strong interest in the application of the ESA, it was neither notified of nor consulted regarding the proposed regulatory changes. For that reason, the Marine Mammal Commission recommends that the Services withdraw the proposed rule, notify all interested agencies (action, consulting, and oversight agencies) of their intent to re-examine the existing regulations, and engage those agencies in an open process to discuss and refine the regulations.

Review under the National Environmental Policy Act and the Endangered Species Act

The preamble to the proposed rule indicates that prior to finalizing the proposed regulations the Services intend to conduct an analysis pursuant to the National Environmental Policy Act. The Commission agrees that such an analysis is needed. However, by not preparing the analysis at the proposed rule stage or otherwise explaining the potential effects of the proposed changes on listed species and their habitat, the Services have undercut the public's ability to comment meaningfully on these issues. Because the agencies are proposing substantial changes, the effects of which could be significant, the Commission believes the proposed changes constitute a major federal action that

should have been preceded or accompanied by an environmental impact statement to ensure that the public and decision-makers are fully informed regarding the effects of these changes.

Similarly, the proposed regulations would not alter the ESA standards of jeopardy and destruction or adverse modification of critical habitat, but they would affect the analysis of actions as to whether those standards have been met. To fully inform the public and decision-makers, the Services should include in their environmental analysis an assessment of how these new regulations would affect the listing process and the level of protection given to species at elevated risk of extinction. For example, the Services might have analyzed past protections afforded to endangered and threatened species and how those protections would differ under the proposed regulations. To ensure that the public and decision-makers are afforded the level of information needed to make informed decisions, the Marine Mammal Commission recommends that the Services withhold the proposed regulations until the necessary environmental analyses under the National Environmental Policy Act and the ESA have been completed and made available to the public and decision-makers.

Consultations involving greenhouse gas emissions and climate change

The Commission disagrees with the proposed revision of the section 7 regulations to allow federal agencies to dismiss the possible effects of their actions that result in greenhouse gas emissions. We agree that consulting on each individual action that could contribute incrementally to such emissions would be impractical. Nevertheless, discounting entirely the effects of greenhouse gas emissions for purposes of applying section 7 is inconsistent with the statutory requirements. As recognized by the Fish and Wildlife Service and the Secretary of the Interior in its recent listing of the polar bear, climate change is linked to greenhouse gases, and the resulting loss of sea ice habitat is the primary threat to the species. Unless the projected loss of sea ice habitat is reversed, this factor alone is likely to jeopardize the continued existence of polar bears. Although the Fish and Wildlife Service has yet to designate critical habitat for polar bears, it is required to do so within the next eight months. We anticipate that such a designation will include sea ice habitat that is likely to be destroyed or adversely modified through the continued release of greenhouse gases. Although it may be difficult to trace a particular emission to a particular impact on polar bears or their habitat, the overall impact is clear—the release of greenhouse gases at anticipated levels, including those that result from actions authorized, funded, or carried out by federal agencies, is likely to jeopardize the continued existence of this species and to destroy or adversely modify its habitat. These same factors will be important determinants of the fate of ice seals that are managed by National Marine Fisheries Service. Excluding them during a section 7 consultation would be inconsistent with ESA requirements. Section 7 does not exempt such factors from evaluation just because they involve difficult issues of attribution and causation.

Therefore, the Marine Mammal Commission recommends that the Services consider alternative approaches for evaluating the effects of greenhouse gas emissions and associated climate change rather than excluding them from consideration during section 7 consultation. For example, the Services might establish a threshold that exempts relatively minor emissions, for which a generally applicable "no jeopardy" finding might be appropriate, but that requires consultation on actions or programs involving more significant emissions. Alternatively, the Services could consider

evaluating the effects of large-scale projects individually but group their assessments of smaller actions or programs.

Proposed changes to section 402.02 – Definitions

Biological Assessments: Section 7(c)(1) of the Act requires that, for each agency action[1] for which listed species may be present in the action area, the responsible agency "shall conduct a biological assessment for the purpose of identifying any endangered or threatened species which is likely to be affected by such action." Additional information concerning the requirements for preparing a biological assessment and its contents are provided in section 402.12 of the existing regulations.

The proposed rule would revise the definition of the term "biological assessment" to allow the action agency to provide the consulting agency the required information in the form of documents prepared for other purposes. Although at first glance this seems a reasonable approach, the Commission believes this relaxation of action agency responsibilities will be problematic, particularly when under a short timeline as called for in the proposed section 402.13. Related documentation may provide useful reference information and the existing regulations already require that the action agency provide relevant documentation, including environmental assessments and impact statements. However, the analyses completed in those documents do not necessarily address the section 7 standards explicitly, concisely, or in sufficient detail and may not be an adequate substitute for a more tailored biological assessment.

The consulting agency should not be responsible for sifting through what are often large documents (numbering in the hundreds of pages) to find the pertinent information and synthesize it into a meaningful whole. If the needed information and analyses already are available in other documents, then the action agency that prepared and is more familiar with those documents should be more efficient at extracting and synthesizing the necessary information. Also, we note that section 402.12(g) of the existing regulations already allows action agencies to incorporate information from previous biological assessments and other documents into biological assessments for current actions. Although the supplemental information in the *Federal Register* notice indicates that, under its proposed revision, the action agency would identify with specificity where pertinent information is located within the documentation, such a requirement is not included in the proposed regulatory changes.

The resources available to the Services' consulting offices are quite modest, given the existing workload. Shifting the burden of preparing biological assessments from the action agency to the consulting office or otherwise requiring the consulting office to search through other documents

[1] Based on references to "construction" in ESA section 7(c)(1), the Services, under section 402.12 of the existing regulations, have limited the requirement to prepare a biological assessment only to "major construction activities." As such, the biological assessment requirement already is inapplicable to many of the federal actions that are subject to consultation. It should be noted that the proposed change would have no impact on consultations involving these other types of actions.

for the information necessary to conclude a consultation would likely further exacerbate this problem. For these reasons, redirecting action agency responsibilities to the consulting agencies may serve to make the process less efficient rather than more so. Therefore, the Marine Mammal Commission recommends that the Services retract the portion of the proposed rule that allows action agencies to substitute alternative documents for a well-defined, on-point biological assessment.

Cumulative effects: The proposed rule would amend the current definition of "cumulative effects," ostensibly to distinguish them from the "cumulative impact" of an action considered under the National Environmental Policy Act. In the Commission's view, the new definition is not needed and creates confusion regarding such effects. The existing definition already excludes future federal actions "that are reasonably certain to occur within the action area of the federal action subject to consultation," based on the theory that such actions will be subject to their own consultation and need not be considered prospectively. The addition of a new sentence to the definition stating that cumulative effects do not include "future Federal activities that are physically located within the action area of the particular Federal action under consultation" seems merely to restate the existing exclusion. If this is the case, the new sentence is not needed and only serves to add confusion by suggesting that it adds something new to the definition. If, on the other hand, the new sentence is intended to make substantive changes (e.g., by limiting the exclusion to federal action "physically located" in the action area but not those that occur elsewhere and may have effects in the action area), these differences should be explained clearly and a justification for any such changes provided. Presumably, interdependent and interrelated federal actions, even if they occur later in time, would be considered as part of the consultation. This should be clarified in the final rule.

The Commission believes that this rulemaking provides the Services with an opportunity to correct an existing deficiency concerning the 1986 definition of "cumulative effects." As noted above, future federal actions, even those that are reasonably certain to occur, are excluded because they will be subject to later consultation. However, non-discretionary federal actions are not subject to consultation. As such, the effects of future, non-discretionary federal actions should be assessed as part of the cumulative effects analysis. A regulatory change to include these actions in the definition is needed.

For these reasons, the Marine Mammal Commission recommends that the Services (1) either retract the proposed changes to the definition of "cumulative effects" or provide additional explanation of and justification for those changes, and (2) revise the definition to include the effects of future, non-discretionary federal actions.

Effects of the action: The proposed changes to section 7 narrow the standards of causality as they pertain to the indirect effects of an action. First, the proposed changes include the term "essential" to clarify that the Services will use a "but for" test to determine which indirect effects to assess in a section 7 consultation. This proposed amendment is more than a simple clarification; it is a significant substantive change that would narrow the scope of a consultation. Such a narrowing of this standard constitutes an oversimplification of the natural world and has limited applicability to ecological systems where causation is often complex and where it is essential to consider both

individual factors and their collective effects (e.g., multiple risk factors, predisposing risk factors, interacting factors). The proposed changes ignore the fact that both the influence of various causal factors and the severity of effects may be measured along a continuum or in meaningful degrees.

Second, the proposed changes would retain the requirement that an effect must be reasonably certain to occur but would require that such determinations be based on "clear and substantial information." In essence, the requirement of clear and substantial information shifts the burden of proof. Instead of requiring the action agency to demonstrate that its action is not likely to jeopardize listed species or destroy or adversely modify critical habitat, the consultation agency would be required to show that it will. This shift would be contrary to the clear mandate of the ESA. Section 7(a)(2) of the Act requires that "each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary ... to be critical...." This wording clearly places the responsibility for ensuring no effect with the action agency. By shifting the burden of proof to the consulting agency, the proposed regulations promote the faulty "absence of evidence" argument and remove the incentive for the action agency to investigate the nature of effects caused by its actions. The Commission believes that the proposed new standards will diminish the action agencies' sense of responsibility for managing the effects of their actions. For these reasons, the Marine Mammal Commission recommends that the Services retract their efforts to limit causality by redefining "indirect effects" and retain the existing standards for determining the effects of an action under section 7.

Proposed changes to section 402.03 – Applicability

Section 402.03 describes the applicability of the regulations governing interagency cooperation under the ESA. The proposed new language would undoubtedly reduce the number of consultations between action agencies and the Services. However, it does so by giving action agencies new, independent authority to determine whether a proposed action requires a section 7 consultation.

The Services assert in the preamble to the proposed rule that action agency experience since 1986 provides a sufficient basis for relaxing the ESA's requirement for consultation. Although action agencies may be more informed about the Act's requirements than they were when the existing section 7 regulations were promulgated in 1986, and they may be more aware of the ramifications of their determinations, the Commission does not agree with the proposal that action agencies be given the authority to make many of the threshold determinations, absent any consultation with the Services. First, this is inconsistent with the applicable statutory provision, which requires action agencies, "*in consultation with and with the assistance of the [Services]*," (emphasis added) to insure that their actions are not likely to jeopardize listed species or result in the destruction or adverse modification of critical habitat. Making threshold determinations as to whether listed species might be taken as a result of a proposed agency action or whether the action is likely to adversely affect listed species or critical habitat is a fundamental part of the section 7 process and should be made in consultation with the Services. Second, as the Services point out,

action agencies are ultimately responsible for complying with section 7 and, as such, have an incentive to ensure that their determinations regarding adverse effects are well justified. However, the missions of those agencies generally do not focus on protecting and bringing about the recovery of listed species and their determinations can be influenced by competing objectives, such as energy acquisition, economic development, national security, and the priorities of other federal programs. For an action agency, the costs of making an unwarranted decision under the ESA may be deemed relatively small compared to the benefits of undertaking activities directly in line with its mission. This being the case, continued involvement by the Services is essential. The Services have the requisite expertise on endangered and threatened species and their habitat, the mission of carrying out the ESA's requirements independent of conflicting priorities, and the mandate to consult with action agencies and assist them in satisfying the requirements of section 7. By deferring to action agencies and allowing them to make threshold determinations without consultation with or concurrence by the Services, the proposed rule is creating a situation likely to foster increased litigation over section 7 compliance and, thus, increase demands on agency resources to defend against lawsuits.

On a related point, we do not believe that the existing regulations need to be changed to give the action and consultation agencies greater flexibility in meeting their section 7 obligations. Section 402.04 of those regulations allows the agencies to develop counterpart regulations that augment and supersede the standard consultation procedures. Rather than making sweeping changes to the generally applicable regulations and altering the traditional roles of the action and consultation agencies, section 402.04 should be used to make the consultation process more efficient in specific instances where alternative procedures are needed. For that reason, the Marine Mammal Commission recommends that the Services withdraw the proposed regulatory changes to section 402.03 and make use of the regulatory flexibility already provided under existing section 402.04.

Proposed changes to paragraph (a) also would narrow the application of section 7 from actions in which there is discretionary federal involvement or control to actions in which the federal agency has discretionary involvement or control. The intent of this change is not discussed in the preamble to the proposed rule but appears to narrow applicability to a specific agency, which may be appropriate in some circumstances but could otherwise limit or constrain consultations involving multiple agencies. The term "discretionary Federal involvement or control" is broader than the term "the Federal agency" and, depending on circumstances, the Commission believes that broader interpretation will be necessary to insure that federal actions do not jeopardize listed species or destroy or adversely modify their critical habitat.

Paragraph (b) of the proposed regulations is entirely new. It would allow the action agency to forego consultation on an action "when the direct and indirect effects of an action are not anticipated to result in take and: (1) such action has no effect on a listed species or critical habitat; or (2) such action is an insignificant contributor to any effects on a listed species or critical habitat; or (3) the effects of such an action on a listed species or critical habitat: (i) are not capable of being meaningfully identified or detected in a manner that permits evaluation; or (ii) are wholly beneficial; or (iii) are such that the potential risk of jeopardy to the listed species or adverse modification or destruction of the critical habitat is remote."

Although these changes may seem reasonable based on superficial inspection, closer scrutiny reveals flaws in the logic. First, the new language singles out "take" when the intent of a consultation goes beyond take to consider other types of effects (e.g., effects on critical habitat). Second, the new language fails to describe the standards that would be used to make the new determinations of whether consultation is necessary. If, as proposed in section 402.02, the action agency is no longer required to prepare a biological assessment, then the rationale for concluding that consultation is not required based on these new standards might not be evident or documented in the administrative record. Third, the process would eliminate the involvement and concurrence of the consulting agency, which is called for under section 7(a)(2) of the Act. To be consistent with current regulations and the intent of section 7, the determinations required under the proposed language should be reached in consultation with the consulting (i.e., expert) agency. Fourth, the pertinent issue is not whether an effect can be meaningfully identified or detected in a manner that permits evaluation but instead is whether the action has meaningful effects. Clearly, there are limits to the types of effects that can be detected and evaluated, but it is not clear that the action agency would draw those lines in the same place as the consulting agency and, therefore, the limits should be determined through consultation between the two agencies rather than by the action agency alone. Fifth, the meaning of the term "remote" is not clear and should be defined. Remoteness also should be determined through consultation, as it may mean different things to the action and expert agencies.

Paragraph (c) of this section attempts to limit the scope of consultation further. Importantly, this paragraph could preclude a full evaluation of the effects of an action by excluding potential effects that appear to be insignificant during initial consideration. Here, again, this approach appears inconsistent with existing standards for reviewing cumulative effects, where it is recognized that individually insignificant effects may be cumulatively significant.

In the preamble, the Services explain that the proposed modifications to section 402.03 are primarily directed at excluding consultation on actions that might result in greenhouse gas emissions. The combined effect of the changes is to excuse agencies from their section 7 responsibilities. We have addressed this issue generally above. Here we provide additional comments addressing the six reasons offered by the Services to support this exclusion.

(1) The activity under consideration (the example is tailpipe emissions from a highway project) is not an essential cause because climate change would occur due to other sources. This flawed reasoning effectively lets the responsible agencies and organizations shirk their duties. That is, we cannot hold carbon dioxide-emitting power producers and regulators accountable because cars also emit greenhouse gases, and we cannot hold the automobile industry and regulators responsible because power plants emit greenhouse gases. Likewise, the transportation sector of our economy should not be held accountable because the agricultural sector also contributes, and so on. In essence, the Services contend that, because we are all responsible, no one has to be held accountable.

(2) The effects will occur later in time. In fact, climate changes are occurring now and have been for several years, although the effects are likely to worsen over time. Here, too, this reasoning seeks to make no one accountable for contributing to this problem because much of the impact is

predicted to occur later in time. This reasoning is akin to arguing that we should be able to pollute our land, water, and air now because the carcinogenic effects of such pollution probably won't be realized for years or even decades to come.

(3) The effects are not reasonably certain to occur. In fact, climate changes linked to greenhouse gas emissions are being documented almost daily in our science journals and our daily lives. Furthermore, the fourth report of the Intergovernmental Panel on Climate Change (IPCC) in 2007, for which they received the Nobel Prize, concludes that climate change is unequivocal and that anthropogenic production of greenhouse gases is a primary cause. Besides the observed increases in temperature, the massive reduction in Arctic summer ice in 2007 and again in 2008 is perhaps the most obvious and irrefutable evidence of climate change. Numerous other examples could be cited (e.g., acidification of oceans, melting of glaciers and tundra, redistribution of various flora and fauna, changes in weather patterns).

(4) Certain contributors (the highway example used in the notice) are insignificant. Here, too, the reasoning seems to be that if enough of us are contributing to the problem, and our individual effects are small, then no one should be held accountable for the overall effect. This is equivalent to arguing that a particular act is acceptable if everyone does it.

(5) The effects of the action cannot be meaningfully identified or detected in a manner that permits evaluation. Here, too, the reasoning is faulty. If, in the highway example, scientists know the proposed length of a highway, how many cars will use the highway, and their emissions per mile, then they can calculate the total emissions expected as a result of highway construction. That number could then be put in context with emissions from other activities or other regions. The relationship between various types and quantities of emissions and climate change is becoming clearer over time.

(6) The potential risk of jeopardy to listed species or habitat is remote. Although this may be true in some cases, it is not in others. The best example is the recent listing of the polar bear. In that case, the Fish and Wildlife Service found that the continued existence of the species is threatened by habitat loss resulting from climate change. It should be evident that we cannot protect and conserve listed species and their habitat, indeed the environment itself, if we simply parse our actions into small enough units such that no one is accountable for any of them individually.

As a society we commonly impose restrictions on our activities because their combined effects are deemed unacceptable. Indeed, the arguments put forth for avoiding agency responsibility for addressing climate change are the same types of arguments that are used against a suite of activities that have been deemed unacceptable and that have been addressed by society through various regulatory measures (littering, speeding, burning of wood stoves, building in certain areas, dumping garbage, disposing toxic substances, mining minerals, drilling for oil, cutting forests, and so on). We do not see a rational justification for excluding the sources of climate change from the same scrutiny and management as other activities that pose a threat to society or the environment. For these reasons, the Marine Mammal Commission recommends that the Services develop an appropriately scaled strategy to address the effects of climate change.

Proposed changes to section 402.13 – Informal consultation

Revisions to section 402.13 would limit informal consultation to a 60- to 120-day period after which consultation can be unilaterally terminated by the action agency. These changes are inappropriate because the consulting Service does not have control of all variables during the consultation period, and a consultation could be terminated simply because of delays in correspondence between agencies. In the worst cases, an action agency could avoid a complete consultation simply by creating delays of its own (e.g., by failing to provide all of the information needed by the consulting agency). Such an approach places too much control in the hands of action agencies and has the potential to undermine the requirement for informed decision-making regarding the effects of proposed actions. Furthermore, this approach appears inconsistent with the statutory requirements of the ESA (section 7(b)(3)(A)) because it fails to produce the required consultation document from the Service, resulting in an incomplete administrative record. As suggested in the GAO report cited by the Service in their notice, a more effective approach would be to review the management of consulting agencies to identify inefficiencies and make the needed corrections, including providing them with adequate resources to meet their consultation responsibilities. Therefore, the Marine Mammal Commission recommends that the Service retract the revisions to section 402.13 of the proposed rule that would establish explicit deadlines for unilateral termination of informal consultation and seek ways to make the process more efficient without undermining the intent of section 7.

Proposed changes to section 402.14 – Formal consultation

The same concerns apply to the proposed revisions of section 402.14. In this case, the action agency could make a determination that a proposed action is not likely to adversely affect any listed species or critical habitat without concurrence of the consulting agency if informal consultation was terminated under section 402.13(b) of the proposed new regulations. These changes place greater emphasis on process efficiency than on effectiveness and are inconsistent with the intent of section 7 of the ESA. Here again, the Marine Mammal Commission recommends that the Services retract the proposed revisions to section 402.14 that would allow action agencies to terminate informal consultation unilaterally under proposed section 402.13(b) and instead seek ways to make the process more efficient without undermining the intent of section 7.

Please contact me if you have questions regarding our recommendations and comments.

Sincerely,

Timothy J. Ragen

Timothy J. Ragen, Ph.D.
Executive Director

cc: Mr. James H. Lecky