

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

3 November 2008

Mr. David Bizot
Permits and Consultations Coordinator
Office of National Marine Sanctuaries
National Ocean Service
1305 East-West Highway, SSMC4 #11500
Silver Spring, MD 20910

Dear Mr. Bizot:

The Marine Mammal Commission, in consultation with its Committee of Scientific Advisors on Marine Mammals, has reviewed the National Ocean Service's advance notice of proposed rulemaking published in the *Federal Register* on 26 August 2008 (70 Fed. Reg. 50259) concerning implementation of section 304(d) of the National Marine Sanctuaries Act.

RECOMMENDATIONS

The Marine Mammal Commission recommends that the National Ocean Service (1) proceed with the rulemaking under consideration and (2) review and draw on the regulations at 50 C.F.R. Part 402 that implement the consultation requirement under section 7 of the Endangered Species Act with respect to developing a proposed rule.

RATIONALE

Section 304(d) of the National Marine Sanctuaries Act requires federal agencies to consult with the National Ocean Service on actions that are likely to destroy, cause the loss of, or injure any sanctuary resource and to take steps to avoid such effects. Although not specifically required, the statutory provision suggests that the Service promulgate implementing regulations. The Marine Mammal Commission believes that implementing regulations that specify the procedures to be followed in conducting consultations and elaborate on the standards that will be used to make the required determinations and formulate agency recommendations would be useful. The Marine Mammal Commission therefore recommends that the National Ocean Service proceed with the rulemaking under consideration.

We also note that there are similarities between the consultation requirements under the National Marine Sanctuaries Act and those established under section 7 of the Endangered Species Act. As such, the Marine Mammal Commission recommends that, in developing a proposed rule, the National Ocean Service draw on the regulations at 50 C.F.R. Part 402 that implement the Endangered Species Act requirements. For example, the Service should consider establishing regulatory definitions of the key terms used in consultations under section 304(b), such as "federal agency action," "sanctuary resource," "loss of a sanctuary resource," "injury to a sanctuary resource," "reasonable and prudent alternatives," etc. The Service also may want to establish a parallel to the informal consultation process as a filter for identifying agency actions that require a more rigorous review. Presumably, the Service will want to consider not just the immediate effects

of a proposed action on sanctuary resources but the cumulative effects of that action in combination with other factors affecting sanctuary resources. Here, too, the section 7 regulations should provide a useful precedent.

In addition to seeking general guidance related to the envisioned rulemaking, the Service posed nine specific questions in its advance notice of proposed rulemaking. The Commission's responses to those questions are as follows:

1. *Should the Service allow an agency to conduct a single consultation on a series or class of similar actions and, if so, how might the Service best identify the most appropriate actions for such an alternative?*

If, at the time of consultation, there is sufficient information available concerning the types, scope, and extent of the proposed activities and their likely impact on sanctuary resources, there is no reason that a consultation could not cover a series or class of similar actions. We note, however, that consulting on a series or class of activities, particularly if they occur over an extended period, may entail greater uncertainty concerning whether and when they may actually occur, thereby increasing the likelihood that a consultation will need to be revisited because of new information or changed circumstances. Also, if the Service looks at the cumulative effects of multiple activities on sanctuary resources as part of its consultations, as we suggest above, consulting on classes or series of activities, some of which may occur well after completion of the consultation or might be somewhat speculative, will likely increase the environmental baseline from which actions considered in subsequent consultations are evaluated. This may place impediments in the way of allowing some actions to proceed if their effects on sanctuary resources, in combination with those anticipated to result from actions that have already been subject to consultation, would cumulatively exceed the threshold of allowable impacts. As such, consultations involving series or classes of activities should be allowed only when the activities are sufficiently likely to occur and when the effects can be effectively assessed at the time of consultation.

For classes of similar activities, a preferable approach might be to use a process akin to informal consultations under the Endangered Species Act regulations. If previous consultations have determined that adverse effects from such actions are unlikely, perhaps a less rigorous review is needed in subsequent instances, except when considering the cumulative impacts of repetitive and multiple actions. This would be similar to "tiering" under the National Environmental Policy Act, when an environmental assessment and finding of no significant impact might be sufficient for actions related or similar to those already considered in an environmental impact statement.

2. *What information should be provided to the Service by agencies on proposed actions other than a description of the action and its potential effect?*

The best parallel for the written statement required under the National Marine Sanctuaries Act is probably the biological assessment required for certain activities under section 7 of the Endangered Species Act. As such, the Service should look at the regulations at 50 C.F.R. § 402.12 for guidance. Among other things, the Service should require agencies to provide information on other actions occurring in or near the sanctuary that may also be affecting sanctuary resources and should explain the rationale for and provide information to support its conclusions about the

potential effects of an agency action on sanctuary resources. In some instances, it might also be appropriate for an agency to describe its plans for monitoring and mitigating the effects of its actions.

3. *What circumstances other than changing a proposed action might require an agency to supplement the statement it provides to the Service and is this something that should be addressed in regulations?*

Again, guidance is provided in the section 7 regulations that include requirements pertaining to reinitiating consultation (50 C.F.R. § 402.16). Presumably the Service will want to re-examine its conclusions based on any material changes, not just those related to changes in the proposed agency action. For example, new scientific information that calls into question the conclusions of the consultation or changes in sanctuary designations might be appropriate triggers for re-examination. This is something that should be addressed in the regulations.

4. *Should regulations identify how consultations should be integrated with other statutory requirements (e.g., NEPA and section 7 consultations)?*

To the extent practicable, the various reviews should be coordinated. However, this may be difficult to accomplish in practice because of the multiple agencies and offices involved and the differences in the applicable standards and the timing requirements of the statutes. It would be worth pursuing this question with those in the National Marine Fisheries Service's Office of Protected Resources for suggestions on how they coordinate the various reviews.

5. *When multiple agencies are involved with a project, should a single lead agency be designated to conduct consultations?*

Whether a single lead agency is preferable is somewhat fact-specific and is a determination that is best made on a case-by-case basis. Nevertheless, the regulations should provide the flexibility to designate and consult with a lead agency. Regulations at 50 C.F.R. § 402.07 provide a useful template.

6. *Would additional information on how to integrate agency consultations with the sanctuary permit process be helpful and appropriate to include in consultation regulations?*

Although we have no specific suggestions on how to integrate these processes, we believe that such guidance would be both useful and appropriate.

7. *If agencies do not adopt the Service's advice and a sanctuary resource is destroyed, lost, or injured, the agency "should prevent and mitigate further damage and restore or replace the sanctuary resource." Would regulations to implement this directive be helpful?*

It seems that regulatory guidance on this point would be particularly helpful. Among other things, the guidance should set forth procedures for notifying the Service of any such occurrence and establish a requirement that the action be suspended immediately, pending consultation and authorization from the Service to proceed, if a sanctuary resource is destroyed, lost, or injured. In addition, the regulations should establish procedures as to who identifies what actions are necessary

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to restore or replace a sanctuary resource and how it is determined that the resource has been sufficiently restored or replaced.

8. *Should regulatory procedures be developed to govern when consultations should be reopened (e.g., because of new information)?*

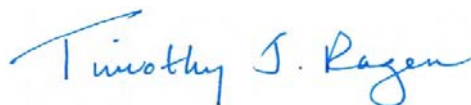
The Service should use this rulemaking opportunity to seek to resolve areas where there are ambiguities concerning the statutory requirements or possible differences of opinion between the Service and the consulting agencies about their implementation. Determining when a consultation should be reopened is one area where the Service and a consulting agency may not see eye to eye. Thus, it would be to everyone's benefit to establish clear rules and criteria for making such determinations. Regulations should be adopted that set forth who will make such determinations, the procedures that will be followed, and the criteria that will be used.

9. *Are there other ideas or points that should be considered?*

Aside from the recommendations and suggestions provided earlier in this letter, the Commission does not have specific suggestions for provisions that should be considered for inclusion in the contemplated regulations.

The Commission looks forward to the opportunity to review and comment on a proposed rule to implement the consultation requirements of 304(d) of the National Marine Sanctuaries Act. Please let me know if you have any questions concerning the Commission's comments.

Sincerely,



Timothy J. Ragen, Ph.D.
Executive Director