



MARINE MAMMAL COMMISSION

1 November 2010

Jane Lubchenco, Ph.D.
Undersecretary of Commerce for Oceans and Atmosphere
National Oceanic and Atmospheric Administration
1401 Constitution Avenue NW, Room 5128
Washington, D.C. 20230

Dear Dr. Lubchenco:

The Endangered Species Act (U.S.C. 1531 et seq.) provides vital tools for the protection, recovery, and conservation of species in danger of extinction throughout all or a significant part of their range (i.e., endangered species), species likely to become so endangered in the foreseeable future (i.e., threatened species), and candidate species for listing as endangered or threatened. Section 7 of the Act requires federal agencies to consult with the Secretary of Commerce or the Interior, depending on the species involved, to ensure that any action that they authorize, fund, or carry out, in the United States or upon the high seas, is not likely to jeopardize the continued existence of any listed species or result in the destruction or adverse modification of the species' critical habitat. At the end of such a consultation, the Secretary generally summarizes his or her analysis and conclusions in a biological opinion.

Such consultations bring together at least two kinds of expertise and perspectives regarding the potential effects of a proposed action on listed species and their habitat. The action agency contributes expertise and perspective on the proposed action and possible alternatives, whereas the consulting agency contributes expertise and perspective on potentially affected listed or candidate species and their habitat. Such consultations can be highly controversial because they often pit actions considered central to the action agency's mission against conservation of an endangered species, which is central to the mission of the consulting agency. In some instances, the action and consulting agencies may have divergent views regarding the potential effects of a proposed action on a protected species or its habitat. At such times, it is vital to maintain the integrity of the consultation process and the independence of the consulting agency.

When consulting with other outside agencies, the roles and responsibilities of the National Marine Fisheries Service and Fish and Wildlife Service are clearly delineated with appropriate means for maintaining the integrity of the consultation process. However, as has long been recognized, the roles of the agencies can become less well-defined when either the National Marine Fisheries Service or the Fish and Wildlife Service is both the action agency and the consulting agency—that is, when both aspects of a consultation are internal to a single agency. In such cases, the distinction between action agency responsibilities and consulting agency responsibilities can become blurred unless sufficient safeguards are in place and the agency is particularly diligent to ensure that its dual functions are kept separate.

The situation is further complicated within the National Marine Fisheries Service because responsibility for many activities, including conducting consultations, often is delegated to regional offices. For example, when a regional office consults internally on proposed fisheries actions, the consultation may fall completely under the control of a single person: the Regional Administrator. In

Jane Lubchenco, Ph.D.
1 November 2010
Page 2

such instances, or in any other situation in which there is not sufficient separation between the proponents of an agency action and the part of the agency responsible for conducting the consultation on that action, the integrity and objectivity of the consultation may be compromised or at least called into question.

The Marine Mammal Commission does not believe that it is reasonable or prudent to give a single person, or even closely associated employees within the same chain of command, control over a section 7 consultation and its outcome. That person and his or her close associates cannot adequately represent the interests of the agency in both of its functions—as the action agency and as the independent reviewer of that action responsible for ensuring compliance with the mandates of the Endangered Species Act. The situation is similar to allowing a single attorney simultaneously to represent the views of opposing parties in a legal matter. The Commission also does not believe that the National Marine Fisheries Service has established sufficient policy guidance and institutional safeguards to ensure the independence of both the action and consulting components of an internal section 7 consultation.

As head of the National Oceanic and Atmospheric Administration, you are often expected to resolve potential conflicts between actions proposed in support of economic growth, national security, energy and food acquisition, and so on and the conservation of nature and its declining biological diversity. Section 7 consultations provide an important arena in which those conflicts are resolved, with the clear directive that uncertainties must be resolved in favor of protecting species that are at a high risk of extinction. A reasoned and balanced outcome that satisfies the mandates of section 7 cannot be assured unless the consultation process is held to the highest standards.

For all these reasons, the Marine Mammal Commission recommends that the National Oceanic and Atmospheric Administration review and, as necessary, revise its policies and practices for conducting internal section 7 consultations under the Endangered Species Act in a manner that ensures clear separation between the action and the consulting components. Only then can we all be confident that internal section 7 consultations will be conducted in a manner that serves their intended conservation purpose.

Please contact me if you have questions about this recommendation or if the Commission can provide any assistance regarding review and revision of your section 7 consultation policy.

Sincerely,



Timothy J. Ragen, Ph.D.
Executive Director

Cc: Lois Schiffer
Eric Schwaab