



MARINE MAMMAL COMMISSION

14 January 2010

Elsa Haubold, Ph.D.
Section Leader, Species Conservation Planning
Florida Fish and Wildlife Conservation Commission
620 South Meridian Street
Tallahassee, Florida 32399

Dear Dr. Haubold:

The Marine Mammal Commission, in consultation with its Committee of Scientific Advisors on Marine Mammals, has reviewed the Florida Fish and Wildlife Conservation Commission's revised Draft Final Endangered and Threatened Species Listing Process Rule dated 4 January 2010. The revisions are intended to provide a framework for protecting species in Florida that are in need of special conservation attention. In our view, the proposed revisions represent a significant improvement over previous rules governing the management of imperiled species, particularly with regard to criteria and procedures for identifying species that are to be listed and protected under this rule. The Marine Mammal Commission commends the Florida Commission for its efforts to revise these rules, and we support their adoption, subject to the following comments and recommendations.

RECOMMENDATIONS

The Marine Mammal Commission recommends that the Florida Fish and Wildlife Conservation Commission further revise the Draft Final Endangered and Threatened Species Listing Process Rule to—

- ensure that the meaning of the term “harass” in the definition of take encompasses activities likely to disrupt normal behaviors, such as breeding, feeding and sheltering, in ways that could reduce survival or reproduction, and therefore could have population-level effects;
- change the term “endangered species” in the title of section 68A-27.0011 to read “Florida Endangered and Threatened Species”;
- avoid ambiguities in section 68A-27.0012, subsections (2)(a) and (2)(a)1, regarding the point at which a federally designated endangered or threatened species is “scheduled” for removal from the federal list and clarify whether provisions for biological reviews in subsection (2)(c) apply to removals of such species from the state list; and
- add provisions in section 68A-27.0012 to establish appropriate time limits for completing each phase of the listing review process described in subsections (2)(b), (2)(c), and (2)(d).

RATIONALE

The Marine Mammal Commission offers the following rationale for its recommendations.

Defining the Term “Harass”

Section 68A-27.0001 describes the purpose and intent of regulations related to endangered and threatened species. This section states that “protection in this rule shall not prohibit lawful hunting, fishing, or other recreational activities when those activities result in annoyance or disturbance of Florida Endangered and Threatened Species when those activities do not result in a take as defined in 68A-27.001.” As the Marine Mammal Commission understands it, the purpose of this statement is to clarify that the new regulations would not affect the identified activities as long as they cause only minor annoyance or disturbance that do not rise to the level a “take.”

The Commission is concerned, however, that the meaning of “harass” as set forth in the definition of take in section 68A-001 (4) is too narrow. As presently written, the language defines the term “harass” to include only those activities causing annoyance or disturbance that are likely to injure animals by significantly disrupting their normal behavior patterns including, but not limited to, breeding, feeding, or sheltering. Given that activities that actually injure or kill wildlife are already covered under the term “harm,” the definition of the term “harass” presumably is used to cover activities that likely fall short of actually injuring or killing animals but that still have a reasonable likelihood of affecting their survival or reproduction, and thereby causing population-level effects. For example, if otherwise permitted recreational or hunting activities were to involve the use of bright lights on sea turtle nesting beaches, it would not likely injure or kill any sea turtles, but it could produce population-level effects by preventing normal nesting activity. Accordingly, the Commission believes that certain types of annoyance and disturbance may not pose a significant risk of injury or death, but could cause animals to abandon prime habitat, thus undermining recovery and conservation efforts. Including and defining the term “harass” to allow managers to address such circumstances is not only appropriate, but necessary for any program that seeks to ensure recovery of endangered and threatened species that, by definition, already face serious survival challenges. Therefore, the Marine Mammal Commission recommends that the Florida Fish and Wildlife Conservation Commission revise paragraph (4) of section 68A-27.001 in the draft rule to ensure that the meaning of the term “harass” in the definition of take encompasses activities likely to disrupt normal behaviors, such as breeding, feeding and sheltering, in ways that could reduce survival or reproduction, and therefore could have population-level effects.

The Term “Endangered Species”

The term “endangered species” in the title of section 68A-27.0011 (Killing Endangered Species) is not defined in the rule and may be taken to refer to some subset of the Florida endangered and threatened species covered by the rule. Presumably, this is not the intent, and the Marine Mammal Commission therefore recommends that the Florida Fish and Wildlife Commission

revise the draft rule to change the term “endangered species” in the title of section 68A-27.0011 to read “Florida Endangered and Threatened Species.”

Listing and Removing Procedures

Section 68A-27.0012 pertains to procedures for listing and removing species under state regulations. Paragraph (1) of this section notes that species placed on the state list by virtue of their inclusion under the federal Endangered Species Act will not be removed until they undergo a biological status review pursuant to provisions in subsection (2)(c)2. However, subsections (2)(a) and (2)(a)1, taken together, state that “Notwithstanding the provisions contained in this subsection (i.e., those in subsection (2)), these provisions shall not be applied to...Federally-designated Endangered and Threatened species, except when those species are scheduled to be removed from the federal list.” This language is hard to follow and confusing. In addition, it is not clear what is meant by a “species scheduled to be removed from the federal list.” Is it a species for which the Fish and Wildlife Service or National Marine Fisheries Service has published a proposed delisting rule or a final rule? The Marine Mammal Commission recommends that the Florida Fish and Wildlife Conservation Commission modify the language in subsections (2)(a) and (2)(a)1 to clarify the procedures and time frame for removing both state-designated and federally designated endangered or threatened species from the Florida’s list of Endangered and Threatened Species. One possible simplification might be to change subsections (2)(a) and (2)(a)1 to read as follows:

- (2)(a) Except as provided in paragraph (1) above, these procedures shall not apply to:
1. Federally-designated Endangered and Threatened species.

Subsection (2)(b)5 pertains to the review of requests to add or delete a state-designated species and requires that the staff of the Florida Fish and Wildlife Conservation Commission follow the most recent version of IUCN guidelines for using the Red List. Elsewhere, in this statute, however, other review phases that call for using the IUCN guidelines do not specify the need to use “the most recent version.” We suggest that the language be consistent between different subsections, probably by inserting the words “the most recent version” where ever those guidelines are referenced.

Subsections (2)(b), (2)(c), and (2)(d) describe provisions for requesting the addition or removal of state-designated species, determining if a listing is warranted, and conducting a biological status review. These subsections specify time periods for related public review, but they do not specify the time frames for determining if a listing is warranted or conducting a biological review. To avoid the impression that the review process is open-ended with no set completion deadlines, the rules should specify the time allowed for completing each phase of the review process by Florida Fish and Wildlife Conservation Commission staff. To that end, the Marine Mammal Commission recommends that the Florida Fish and Wildlife Conservation Commission revise the proposed rule by adding provisions that establish appropriate time limits for completing each phase of the listing review process described in subsections (2)(b), (2)(c), and (2)(d).

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Finally, subsection (2)(c) is entitled "Determining if listing is warranted." However, its provisions also would be followed for determining if a proposal to remove a species from the state list is warranted. With that in mind, the title of that subsection might be changed to read something like "Determining when changes in listing status are warranted."

I hope these recommendations and comments are helpful. Please contact me if you have any questions.

Sincerely,

A handwritten signature in blue ink that reads "Timothy J. Ragen". The signature is written in a cursive style with a prominent initial 'T'.

Timothy J. Ragen, Ph.D.
Executive Director