MARINE MAMMAL COMMISSION
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12 August 2008

Mr. Alan Risenhoover, Director
Office of Sustainable Fisheries
National Marine Fisheries Service
1315 East-West Highway, SSMC 3
Silver Spring, MD 20910

Dear Mr. Risenhoover:

The Marine Mammal Commission, in consultation with its Committee of Scientific Advisors on Marine Mammals, has reviewed the National Marine Fisheries Service's proposed rule (73 Fed. Reg. 27998) regarding environmental review for fishery management actions. The Commission recognizes the challenge inherent in complying with National Environmental Policy Act requirements for actions taken under the Magnuson-Stevens Fishery Conservation and Management Act. The Commission appreciates the Service's efforts to inform decision-makers and protect the environment while attempting to streamline management procedures and avoid unnecessary redundancy and complexity. If used judiciously, categorical exclusions, environmental assessments, integrated fishery and environmental management statements (IFEMSs), and framework implementation procedures all appear to be consistent with that end. Nonetheless, the implementation of these management tools under processes driven by the Magnuson-Stevens Act poses some difficulties, particularly with regard to public involvement in the management process.

RECOMMENDATIONS

To enhance the Service's efforts to integrate requirements of the National Environmental Policy Act and the Magnuson-Stevens Act, the Marine Mammal Commission recommends that the National Marine Fisheries Service—

- establish a minimum comment period of 30 days for scoping notices and for review of draft IFEMSs and provide longer comment periods when there is no compelling reason for such quick review;
- require as standard practice a three-meeting minimum for consideration of proposed actions requiring an IFEMS to ensure public comments are analyzed and incorporated into the draft IFEMS before decisions are made;
- require fishery management councils to submit written responses to the public's comments and questions when transmitting recommendations to the National Marine Fisheries Service to ensure that the public record on their decision-making is complete;
- give full consideration to all public comments during Secretarial review and remove any restrictions on how the Service may act on or respond to those comments due to procedural constraints;
- eliminate the proposed restrictions on public comments on actions initiated by the Service;
- refrain from preemptively ruling out a no-action alternative that might involve no fishing or a reduction in fishing;

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- use no-action alternatives to provide meaningful baselines for evaluating the effects of proposed actions in the context of the broader environmental effects of fishing;
- refrain from categorically exempting experimental fishing permits; and
- describe in its final rule the implications of existing case law for the various elements of the proposed rule and how the timeline of the proposed rule will be integrated with the timeline for section 7 consultations under the Endangered Species Act.

RATIONALE

The rationale for our recommendations is as follows.

Comment periods and responses to comments

The National Environmental Policy Act seeks to ensure that decision-makers responsible for major federal actions are well informed regarding the environmental effects of those actions. The decision-makers are to be informed through several processes, including public review and input into the decision-making process. The essence of public involvement is not simply that the public be allowed to comment, but that those comments be given meaningful consideration in the decision-making process. The Magnuson-Stevens Fishery Conservation and Management Act also mandates an open, public process.

The proposed regulations provide three comment periods on significant management actions, the first during scoping (minimum of 14 days), the second during review of draft IFEMSs (14 to 45 days), and the third during Secretarial consideration of an action proposed by a fishery management council (30 days). The Commission's first concern is the minimum time frame for public comment during scoping and again during review of a draft IFEMS; we consider 14 days to be an inadequate period for reviewing proposed actions and commenting on them in a meaningful way. The Commission's review process itself illustrates the difficulty that the public will have working within such a short time period. In the course of 14 days, staff would have to obtain a copy of the subject material (which often numbers in the hundreds of pages); review the material; prepare a draft letter; circulate that letter to our Committee of Scientific Advisors on Marine Mammals; allow time for their review, deliberation, and input to the Commissioners; adjust the letter based on comments and the decisions of the Commissioners; and submit the letter. That process also assumes that we can devote our full attention to the material as soon as it is available and throughout the review process. Other persons commenting on behalf of an agency or an organization may require the same period of time for review, drafting, oversight and comment, and finalizing comments. Without adequate time for review and preparation of comments, we do not believe that fishery management councils will have the benefit of adequate, well-considered comments. If that is the case, then the environmental protections provided under the National Environmental Policy Act will be compromised, which was not the intent of Congress on this matter. To avoid compromising the public's ability to comment, the Marine Mammal Commission recommends that the National Marine Fisheries Service establish a minimum comment period of 30 days for scoping notices and for review of draft IFEMSs and provide a longer comment period when there is no compelling

reason for such quick review. If shorter periods are essential under certain circumstances (e.g., certain types of emergencies), then those circumstances should be identified in advance (e.g., as part of this rulemaking) so that the public has an opportunity to comment generally on what should constitute an emergency and what should not. Events that are truly emergencies—as opposed to those that are the consequence of inefficient planning, foresight, or management—can then be identified and handled in a proactive or predetermined manner.

The Commission's second concern with regard to the proposed comment periods pertains to the two-meeting minimum for consideration of a proposed action. If an action is proposed prior to a meeting (i.e., meeting one), it is reasonable that a council could consider that proposal, identify alternatives, and assign responsibilities for drafting an IFEMS. For the council to vote on that action at the next meeting (i.e., meeting two), drafters must complete the draft IFEMS and make it available for public review and comment, and the council must consider those comments prior to voting. Under such circumstances, we do not believe that the public's comments can be fully considered because they cannot, with much assurance, be adequately analyzed and the results incorporated in the draft IFEMS, which is supposed to inform the council. Instead, any council deliberation of public comments (including hearing of oral comments) would require immediate response to those comments without the benefit of their full analysis in the IFEMS. If there were no public comments on a proposed action, then it is reasonable that the council could vote on a proposed action at the second meeting. But proposed actions that require an IFEMS are likely to stimulate public comment so we do not anticipate those situations will be common. Therefore, the Marine Mammal Commission recommends that the Service and councils require as standard practice a three-meeting minimum for consideration of proposed actions requiring an IFEMS to ensure public comments are analyzed and incorporated into the draft IFEMSs before decisions are made.

The Commission also believes that if the councils are to be the main arbiters of public comments on a proposed action, then they must also provide written responses to those comments to explain their conclusions and maintain a full written administrative record. The use of meeting transcripts alone does not ensure that such responses are made or that the public's questions are adequately addressed. If the councils are to be given the authority to make recommendations for proposed actions, then they also ought to be held responsible for providing sufficient response to public input on those actions. For these reasons, the Marine Mammal Commission recommends that the National Marine Fisheries Service require the fishery management councils to submit written responses to the public's comments and questions when transmitting recommendations to the Service to ensure that the public record on their decision-making is complete. Such a requirement seems essential to match the councils' authority and prominence in these proceedings with a corresponding requirement for accountability.

The Commission also is concerned that meaningful public comment could be unduly constrained for the sake of expediency during Secretarial review. The proposed rule suggests that during his or her review, the Secretary will not or need not consider public comments on a proposed rule if those comments are more applicable to consideration of alternatives and council consideration but were not submitted to the council. This constraint seems unreasonable in two regards. First, we do not believe that, if a public comment period on a draft IFEMS under

consideration by a council is limited to as few as 15 days, the public will have had adequate time for comprehensive review. Thus, any useful comments that they may develop after that 15-day period could be excluded on what we consider to be unreasonable procedural grounds. Second, the value of a comment should be judged, first and foremost, on its merit. If the Service is to retain full responsibility and accountability for fishery management actions and ultimate compliance with the National Environmental Policy Act, then it must be responsible for taking into account and responding to all comments received during the process. To exclude potentially valuable or even vital comments on a procedural basis when procedures are excessively constrained will likely lead to errors on the side of timeliness rather than substance. For that reason, the Marine Mammal Commission recommends that the National Marine Fisheries Service give full consideration to all public comments during Secretarial review and remove any restrictions on how the Service may act on or respond to those comments due to procedural constraints.

Finally, we note that the proposed rule would include different regulations for public comments on actions initiated by the councils versus those initiated by the Service. This distinction likely will lead to confusion among the public and, again, unnecessarily constrains its ability to comment and meaningfully participate in the management process simply for procedural reasons. To avoid such confusion and ensure full participation of the public, the Marine Mammal Commission recommends that the Service eliminate the proposed restrictions on public comments on actions initiated by the Service.

Integrated fishery and environmental management statements

The proposed rule indicates that IFEMSs will be similar to environmental impact statements except in the way that they address identification of alternatives, cumulative impacts, and incomplete information. The proposed rule adds the requirement for a cumulative effects analysis to the IFEMS. The Commission supports that addition because the effects of individually insignificant actions may be significant when combined. The proposed rule also provides specific guidance for addressing areas of incomplete information in IFEMSs. The Commission believes that such guidance will be useful in providing a more complete assessment of the strengths, weaknesses, and uncertainties regarding a proposed fishery management action. In contrast, we note that the constrained time periods for public comment also will constrain the preparation of environmental analyses (e.g., EAs, IFEMSs) and could result in analyses that are less comprehensive and useful to decision-makers. Given the intended prominence of these analyses in the decision-making process, the reduced time frames raise questions about the potential to sacrifice quality for expedience.

With regard to alternatives, the Commission has two main concerns. The first pertains to the no-action alternative that, depending on circumstances, can be defined as continuing with an ongoing action (i.e., maintaining status quo) or actually taking no action (i.e., ceasing the action). The proposed rule indicates that this alternative is used solely for the purpose of providing a baseline and that truly taking "no action" will not be contemplated. Although this may be appropriate in many or even the majority of cases, actually ceasing an action may also be an appropriate consideration under certain circumstances. Councils and the Service often are attempting to maintain a precarious balance between competing fishery interests and complicating environmental considerations (e.g.,

where stocks are overfished or habitat is being degraded by fishing), and in those cases a true no-action or no-fishing alternative may be entirely reasonable. The Commission considers the exclusion of such a no-action alternative to be an unnecessary constraint on the decision-making process that may preclude the most beneficial management course based on a careful weighing of the costs and benefits of a proposed action. All proposed actions need not be taken, and it would be unjustly prejudicial to assume that the environmental costs cannot outweigh the benefits of a proposed action. If the process works as intended, fishery management considerations should be weighed against various environmental costs, and decision-makers should refrain from forming conclusions until the necessary analyses are completed. For these reasons, the Marine Mammal Commission recommends that the councils and the National Marine Fisheries Service refrain from preemptively ruling out a no-action alternative that might actually involve no fishing or a reduction in fishing.

The second concern regarding the no-action alternative is that it provides an accurate baseline for consideration by decision-makers. A description of the incremental effect of fishing based on a single action may not be sufficient under a number of scenarios. One would be that the full effects of fishing (i.e., in the absence of the proposed action) have not been sufficiently described elsewhere. A second would be that a full description has been provided in the past but new information subsequently has become available that has not been evaluated or taken into account in an environmental analysis. Tiering of analyses and incorporation of previous analyses by reference are both reasonable strategies as long as those tiered or incorporated analyses are complete with respect to the full effects known at the time they were completed and new information gathered after those analyses were completed has been taken into account in subsequent analyses. Properly structured, a management framework should provide decision-makers with not only a description of the incremental effects of an action but also a clear understanding of the broader environmental effects of fishing that is necessary to evaluate a proposed action in context. To that end, the Marine Mammal Commission recommends that the National Marine Fisheries Service and the councils use no-action alternatives to provide meaningful baselines for evaluating the effects of proposed actions in the context of the broader environmental effects of fishing.

Categorical exclusions

The Commission believes that categorical exclusions reasonably can be invoked in a number of circumstances where there is a high level of confidence that a proposed action, particularly one that is a relatively routine function of the management cycle, will not result in meaningful consequences for the human environment. The management framework incorporated in this proposed rule may help identify such circumstances and, by doing so, reduce the amount of unnecessary analysis and delay in management procedures.

However, the identification of a categorical exclusion cannot be taken lightly, and we believe the example used in the proposed rule illustrates a situation where adequate consideration was not given to the use of a categorical exclusion. The proposed rule indicates that an exclusion might be used for experimental fishing when the amount of fish to be taken has already been accounted for in fishery quotas. The Commission disagrees that a categorical exclusion is appropriate in such instances because the effects of an experimental fishery may extend well beyond the amount or

biomass of fish caught. For example, the experimental fishery may occur in sensitive areas where it could cause habitat destruction or at sensitive periods in the year where it might result in the removal of undersized fish or have other effects that might vary seasonally. Similarly, it could involve the use of fishing gear that is prone to entangle or otherwise interact with non-target species including other fish species, invertebrates, seabirds, and marine mammals. For these reasons, the Marine Mammal Commission recommends that the National Marine Fisheries Service refrain from categorically exempting experimental fishing permits.

Other considerations

Finally, the Commission raises two additional issues that are not addressed in the proposed rule but that the Service should consider as it develops its final rule. The first is the extent to which the proposed rule is consistent with the extensive case law on the implementation and interpretation of the National Environmental Policy Act, particularly with respect to fisheries management. In this regard, the procedures and terminology introduced in the proposed rule might create uncertainty and spawn litigation. A description of the proposed changes in the context of that case law would be helpful, and we encourage the Service to use existing terminology and link the new process as closely as possible to the traditional review under the National Environmental Policy Act.

The second issue is how the Service will integrate the timeline set forth in the proposed rule with the timeline for section 7 consultations under the Endangered Species Act whenever a proposed action may affect a listed species or its habitat. For these reasons, the Marine Mammal Commission recommends that the National Marine Fisheries Service describe in its final rule the implications of existing case law for the various elements of the proposed rule and how the timeline of the proposed rule will be integrated with the timeline for section 7 consultations under the Endangered Species Act.

Please contact me if you have any questions regarding our recommendations or rationale.

Sincerely,

Timothy J. Ragen

Timothy J. Ragen, Ph.D.
Executive Director