were identified as necessary program components. To develop these five program components the Council created the Citizen Science Advisory Panel Pool and appointed members of the advisory panel to serve on Action Teams (sub-panels) to specifically address each of the five program areas—*Volunteers, Data Management, Projects/Topics Management, Finance,* and *Communication/Outreach/Education.*

The Council will hold three webinar meetings for members of the Citizen Science Advisory Panel Action Teams. The webinar meetings are being held to provide an introduction to the Council's Citizen Science program and the process and operation of the Action Teams. The three webinar meetings will cover the same agenda items and are being scheduled to address the availability of Action Team members.

Items to be addressed during these meetings:

1. The Council's Citizen Science Program development
2. Operation and structure of the Action Teams
3. Terms of Reference for each Action Team
4. Schedule of Action Team webinar meetings

Special Accommodations

These meetings are physically accessible to people with disabilities. Requests for auxiliary aids should be directed to the council office (see **ADDRESSES**) 3 days prior to the meeting.

Note: The times and sequence specified in this agenda are subject to change.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: July 3, 2017.

Tracey L. Thompson,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2017–14265 Filed 7–6–17; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XF491

Streamlining Regulatory Processes and Reducing Regulatory Burden

AGENCY: National Marine Fisheries Service (NMFS) and National Ocean Service (NOS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; request for comments.

SUMMARY: As part of ongoing efforts to evaluate and improve our regulations and regulatory processes, NOAA through NMFS and NOS seeks public input on identifying existing regulations that: Eliminate jobs, or inhibit job creation; are outdated, unnecessary, or ineffective; impose costs that exceed benefits; create a serious inconsistency or interfere with regulatory reform initiatives and policies; are inconsistent with the requirements of section 515 of the Treasury and General Government Appropriations Act, 2001; and/or derive from or implement Executive Orders or other Presidential directives that have been subsequently rescinded or substantially modified. NMFS and NOS also seek public comment on the efficiency and effectiveness of current regulatory processes, and specifically, if current regulatory processes can be further streamlined or expedited in a manner consistent with applicable law.

DATES: Comments are due August 21, 2017.

ADDRESSES: You may submit comments on this document, identified by NOAA–NMFS–2017–0067, by either of the following methods:

- *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to *http://www.regulations.gov/#!docketDetail;D=NOAA-NMFS-2017-0067,* click the ''Comment Now!'' icon, complete the required fields, and enter or attach your comments.
- *Mail:* Submit written comments to Kelly Denit, National Marine Fisheries Service, NOAA, Office of Sustainable Fisheries, 1315 East-West Highway, Silver Spring, MD 20910 (mark outside of envelope ''Streamlining Regulatory Processes and Reducing Regulatory Burden'').

Instructions: Comments must be submitted by one of the above methods to ensure that the comments are received, documented, and considered by NMFS and/or NOS. Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered. All comments received are a part of the public record and will generally be posted for public viewing on *www.regulations.gov* without change. All personal identifying information (*e.g.,* name, address, etc.) submitted voluntarily by the sender will be publicly accessible. Do not submit confidential business information, or otherwise sensitive or protected information. NMFS and/or NOS will accept anonymous comments (enter ''N/A'' in the required fields if you wish to remain anonymous).

FOR FURTHER INFORMATION CONTACT: Kelly Denit, (301) 427–8500.

SUPPLEMENTARY INFORMATION:

Background

A series of recent Executive Orders aimed at eliminating, improving, and streamlining current regulations and associated regulatory processes in a variety of areas have been issued. On January 24, 2017, President Trump issued Executive Order (E.O.) 13766, ''Expediting Environmental Reviews and Approvals for High Priority Infrastructure Projects'' (82 FR 8657, January 30, 2017). This E.O. requires infrastructure decisions to be accomplished with maximum efficiency and effectiveness, while also respecting property rights and protecting public safety. Additionally, the E.O. makes it a policy of the executive branch to ''streamline and expedite, in a manner consistent with law, environmental reviews and approvals for all infrastructure projects.''

On January 30, 2017, President Trump issued E.O. 13771, ''Reducing Regulation and Controlling Regulatory Costs'' (82 FR 9339, February 3, 2017). E.O. 13771 provides that ''it is essential to manage the costs associated with the governmental imposition of private expenditures required to comply with Federal regulations.'' Toward that end, E.O. 13771 directs that ''for every one new regulation issued, at least two prior regulations be identified for elimination, and that the cost of planned regulations be prudently managed and controlled through a budgeting process.''

On February 24, 2017, President Trump issued E.O. 13777, ''Enforcing the Regulatory Reform Agenda,'' which established a federal policy ''to alleviate unnecessary regulatory burdens placed on the American people'' (82 FR 12285, March 1, 2017). Among other issues, E.O. 13777 directs Federal agencies to establish a Regulatory Reform Task Force (Task Force), which will ''evaluate existing regulations and make recommendations to the agency head regarding their repeal, replacement, or modification, consistent with applicable law.'' Further, the E.O. directs each Task Force to identify regulations that meet the following criteria: Eliminate jobs, or inhibit job creation; are outdated, unnecessary, or ineffective; impose costs that exceed benefits; create a serious inconsistency or otherwise interfere with regulatory reform initiatives and policies; are inconsistent with the requirements of section 515 of the Treasury and General Government Appropriations Act, 2001; and/or derive from or implement Executive Orders or other Presidential directives that have been subsequently rescinded or substantially modified. Section 3(e) of

E.O. 13777 directs the Task Force to ''seek input and other assistance, as permitted by law, from entities significantly affected by Federal regulations,'' on regulations that meet any of the criteria mentioned above. Through this notice, NMFS and NOS solicit such input from the public to inform NOAA and the Department of Commerce Task Force's evaluation of existing regulations.

On March 28, 2017, President Trump issued E.O. 13783, entitled ''Promoting Energy Independence and Economic Growth'' (82 FR 16093, March 31, 2017). Among other things, E.O. 13783 requires the heads of agencies to review all existing regulations, orders, guidance documents, policies, and any other similar agency actions (collectively, agency actions) that potentially burden the development or use of domestically produced energy resources, with particular attention to oil, natural gas, coal, and nuclear energy resources. Such review does not include agency actions that are mandated by law, necessary for the public interest, and consistent with the policy set forth elsewhere in that Executive Order.

Lastly, on April 28, 2017, President Trump issued E.O. 13795, ''Implementing an America-First Offshore Energy Strategy'' (82 FR 20815, April 28, 2017). Among the requirements of E.O. 13795 is section 10, which calls for a review of NMFS' Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing as follows: ''The Secretary of Commerce shall review NOAA's Technical Memorandum NMFS–OPR–55 of July 2016 (Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing) for consistency with the policy set forth in Section 2 of this order and, after consultation with the appropriate Federal agencies, take all steps permitted by law to rescind or revise that guidance, if appropriate.'' In response, NMFS published a notice in the **Federal Register** requesting comments relating to the review of the Technical Guidance under section 10 of E.O. 13795 (82 FR 24950, May 31, 2017). Therefore, the public does not need to provide comments on this topic in response to this particular notice.

It is important to note the Administration has already requested comment on the review of certain Marine National Monuments and National Marine Sanctuaries via two previous notices. Under Executive Order 13792, ''Review of Designations Under the Antiquities Act'' (signed April 26, 2017), the Department of the Interior is conducting a review of national monuments (See the Department of the Interior's **Federal Register** Notice ''Review of Certain National Monuments Established Since 1996; Notice of Opportunity for Public Comment;'' 82 FR 22016, May 11, 2017). The Department of Commerce is collaborating with the Department of the Interior on this review for marine national monuments, in conjunction with Department of Commerce's review under Executive Order 13795. Pursuant to Executive Order 13795, ''Implementing an America-First Offshore Energy Strategy'' (signed on April 28, 2017), the Department of Commerce is conducting a review of all designations and expansions of national marine sanctuaries and marine national monuments since April 28, 2007 (82 FR 28827, June 26, 2017). Therefore, the public does not need to provide comments on these topics in response to this particular notice.

In accordance with the Administration's Executive Orders cited above, NMFS and NOS invite comment from the public, including entities significantly affected by Federal regulations, as well as State, local, and tribal governments, small businesses, consumers, non-governmental organizations, and trade associations. Since the regulations and processes NMFS and NOS follow under each of the topics identified in the Executive Orders are similar, we are issuing a single request for comment to ensure the public has the opportunity to comment in a coordinated fashion and do not have to respond to multiple requests for comment.

In addition to the executive orders cited, NMFS and NOS invite comment related to the application of Federal Regulations to marine aquaculture. Currently, the permitting for marine aquaculture is a complicated, multi-agency, multi-step process, and NMFS and NOS seek comment on improvements that can be made by the Department of Commerce within legislative mandates, including suggestions on interagency processes. Information about the role of NMFS, NOS, and other federal agencies in the regulation of marine aquaculture is available online at *http://www.nmfs.noaa.gov/aquaculture/policy/24_regulating_aquaculture.html.*

List of Processes and Regulations for Commenters

NMFS and NOS specifically request comments on existing processes and regulations under the agencies' statutory mandates. NMFS and NOS are broadly seeking comments on any existing Agency regulation the public thinks meet the criteria described in this background section. A brief description of each statute is provided below and examples of regulations the public may choose to comment on are provided in some cases. Additionally, NMFS and NOS request comments on existing processes and regulations for marine aquaculture.

Existing Processes and Regulations Under the Agencies' Statutory Mandates

a. Marine Mammal Protection Act (MMPA), 16 U.S.C. 1361 *et seq.*

- The Marine Mammal Protection Act (MMPA) generally prohibits the ''take'' of marine mammals by U.S. citizens or by any person or vessel in waters under U.S. jurisdiction, with certain exceptions.
- Authorizations under Section 101(a)(5) for the take of marine mammals incidental to certain activities. Sections 101(a)(5)(A) & (D) of the MMPA allow for the authorization of take of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region, provided certain findings are made and appropriate mitigation, monitoring, and reporting requirements are set forth. NMFS has issued regulations implementing standards and procedures for the 101(a)(5) process.

b. Endangered Species Act (ESA), 16 U.S.C. 1531 *et seq.*

- The Endangered Species Act of 1973 (ESA) provides for the conservation of species that are endangered or threatened throughout all or a significant portion of their range, and the conservation of the ecosystems on which they depend.
- Section 7(a)(1) coordination with other Federal agencies to help conserve listed species and the habitats on which they depend. Federal agencies, under section 7(a)(1) of the Endangered Species Act (ESA), must utilize their authorities to carry out programs to conserve threatened and endangered species. NOAA Fisheries assists these agencies with the development of these conservation programs for marine species.
- Section 7(a)(2) consultations (both formal and informal) with Federal agencies on Federal activities which may affect a listed species. For example, NMFS has endeavored to improve this consultation process by increasing the use of programmatic consultations for projects of a similar nature.

c. Magnuson-Stevens Fishery Conservation and Management Act

(Magnuson-Stevens Act), 16 U.S.C. 1801 *et seq.*

• The Magnuson-Stevens Fishery Conservation and Management Act is the primary law governing marine fisheries management in U.S. federal waters. First passed in 1976, the Magnuson-Stevens Act fosters long-term biological and economic sustainability of our nation's marine fisheries out to 200 nautical miles from shore. Key objectives of the Magnuson-Stevens Act are to: Prevent overfishing, rebuild overfished stocks, increase long-term economic and social benefits, and ensure a safe and sustainable supply of seafood.

• Exempted fishing permits (50 CFR 600.745(b)). Exempted fishing permits (EFPs) allow necessary research activities that would normally be prohibited by regulations. They are issued to individuals for the purpose of conducting research or other fishing activities using private (non-research) vessels.

• Consultations (both informal and formal) under Essential Fish Habitat (EFH) provisions. An example of how NMFS has worked to increase the efficiency of EFH consultations is the implementation of programmatic consultations—which reduces the overall number of individual consultations and/or the amount of time EFH consultations take. Programmatic consultations also allow for a more rapid assessment of impacts to relevant species.

d. Federal Power Act, 16 U.S.C. 791 *et seq.*

• Conducting studies for hydropower project licensing and relicensing. A project license applicant must consult and, as appropriate, conduct studies with NMFS and other fish and wildlife agencies. An example of how NMFS could improve the efficiency of studies and consultations under the Federal Power Act is by requesting hydropower project license applicants to conduct the appropriate studies on a watershed basis. By working with relevant Federal and state resource agencies, as well as license applicants, to identify, request, and implement studies on a watershed basis for hydropower project licensing and relicensing processes, the overall time and money spent could be reduced in relation to the current project-by-project process.

e. National Marine Sanctuaries Act (NMSA), 16 U.S.C. 1431 *et seq.*

• Interagency consultations under Section 304(d) of the NMSA. Section 304(d) of the NMSA requires interagency consultation between NOAA and federal agencies taking actions, including authorization of private activities, ''likely to destroy, cause the loss of, or injure a sanctuary resource.'' For example, the Office of National Marine Sanctuaries (ONMS) has worked to integrate the consultation process under the NMSA with other consultation processes under ESA and MMPA, when applicable, for a more efficient and coherent approach to consultation under the NOAA umbrella.

• Program implementation regulations (15 CFR part 922). ONMS regulations prohibit specific kinds of activities, describe and define the boundaries of the designated national marine sanctuaries and set up a system of permits to allow the conduct of certain types of activities.

f. Coastal Zone Management Act (CZMA), 16 U.S.C. 1451 *et seq.*

• Program implementation regulations (15 CFR parts 923 or 930). The CZMA addresses the nation's coastal issues through a voluntary partnership between the federal government and coastal and Great Lakes states and territories to provide the basis for protecting, restoring, and developing our nation's diverse coastal communities, resources, and economies. Currently 34 coastal states participate in the Act and NOAA's CZMA regulations gives states the flexibility to design unique programs that best address their coastal challenges and regulations.

Marine Aquaculture

a. Application of the existing NMFS and NOS processes and regulations listed above to marine aquaculture, including interagency processes and coordination with other federal agencies and states; and

b. Regulation of offshore marine aquaculture in federal waters under the Magnuson-Stevens Act.

Considerations for Commenters

To maximize the usefulness of comments, NMFS and NOS encourage commenters to provide the following information:

a. *Specific reference.* A specific reference to the process or regulation that imposes the burden that the comment discusses. This should be a citation to the Code of Federal Regulations, a guidance document number, or other relevant agency document(s). A specific reference will assist NMFS and/or NOS with identifying the requirement, the original source of the requirement, and relevant documentation that may describe the history and effects of the requirement.

b. *Description of burden.* A description of the burden that the identified process or regulation imposes on businesses, States, tribes, or other affected entities. A comment that describes how the process or regulation impedes efficiency is more useful than a comment that merely asserts that it is burdensome. Comments that reflect experience with the requirement and provide data describing that experience are more credible than comments that are not tied to direct experience. Verifiable, quantifiable data describing burdens are more useful than anecdotal descriptions.

c. *Description of more effective or less burdensome alternative(s).* If the commenter believes that the objective that motivated the process or regulation may be achieved using a more effective alternative, the commenter should describe that alternative in detail. Likewise, if the commenter believes that there is not a more effective alternative or there is not a legitimate objective motivating the requirement, then that should be explained in the comment.

Current Review Processes

Processes associated with the Magnuson-Stevens Act (Act) currently provide opportunities for public review. The Act created eight regional Fishery Management Councils (Councils) responsible for the fisheries that require conservation and management in their region. The Councils are designed to be a stakeholder-driven management body and thus, most of the voting members of a Council are active in or have unique knowledge of the fisheries in their geographic region. Through these Councils, stakeholders provide direct and substantive input into the development and regular modification of fishery management plans and regulations. Councils balance both conservation and management needs for a fishery with the operational needs of fishing businesses. NMFS and the Councils work together to revise or remove regulations identified by stakeholders that are outdated, ineffective, insufficient, or excessively burdensome to the relevant fishery. Therefore, any public comments received on Council regulations will be forwarded to the appropriate Council for consideration.

Additionally, NMFS is reviewing regulations, as required, under section 610 of the Regulatory Flexibility Act (RFA), 5 U.S.C. 601 *et seq.,* which had, or will have, a significant impact on a substantial number of small entities, such as small businesses, small organizations, and small governmental jurisdictions. Per section 610(c) of the RFA, NMFS published a notice in the **Federal Register** listing the regulations currently under review (82 FR 26419, June 7, 2017). Public comments received

on both the RFA section 610 notice and this notice will inform NMFS' regulatory reviews required under relevant Executive Orders, including E.O 13771, ''Reducing Regulation and Controlling Regulatory Costs,'' and E.O. 13777, ''Enforcing the Regulatory Reform Agenda.''

Finally, comments related to statutory changes will not be considered as part of this notice; however, NMFS and/or NOS will take them into account in the future if needed.

Dated: June 30, 2017.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

[FR Doc. 2017–14167 Filed 7–6–17; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XF522

Mid-Atlantic Fishery Management Council (MAFMC); Meeting

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; public meeting.

SUMMARY: The Mid-Atlantic Fishery Management Council's (MAFMC's) Summer Flounder, Scup, and Black Sea Bass Monitoring Committee (MC) will hold a public meeting.

DATES: The meeting will be held on Monday, July 24, 2017, from 1 p.m. to 5 p.m. For agenda details, see **SUPPLEMENTARY INFORMATION.**

ADDRESSES: The meeting will be held via webinar with a telephone-only connection option. Details on webinar registration and telephone-only connection details will be available at: *http://www.mafmc.org.*

Council address: Mid-Atlantic Fishery Management Council, 800 N. State Street, Suite 201, Dover, DE 19901; telephone: (302) 674–2331; *www.mafmc.org.*

FOR FURTHER INFORMATION CONTACT: Christopher M. Moore, Ph.D., Executive Director, Mid-Atlantic Fishery Management Council, telephone: (302) 526–5255.

SUPPLEMENTARY INFORMATION: The Summer Flounder, Scup, and Black Sea Bass Monitoring Committee will meet from 1 p.m. to 5 p.m. to review and discuss previously implemented 2018 commercial and recreational Annual Catch Limits (ACLs) and Annual Catch Targets (ACTs) for these three species and the Monitoring Committee may also recommend potential 2019 ACLs and ACTs for scup. The Monitoring Committee may consider recommending changes to the implemented 2018 ACLs and ACTs and other management measures as necessary. Meeting materials will be posted to *http://www.mafmc.org/* prior to the meeting.

Although non-emergency issues not contained in this agenda may come before this group for discussion, those issues may not be the subject of formal action during this meeting. Action will be restricted to those issues specifically identified in this notice and any issues arising after publication of this notice that require emergency action under section 305(c) of the Magnuson-Stevens Fishery Conservation and Management Act, provided the public has been notified of the intent to take final action to address the emergency.

Special Accommodations

The meeting is physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to M. Jan Saunders at the Mid-Atlantic Council Office (302) 526–5251 at least 5 days prior to the meeting date.

Authority: 16 U.S.C. 1801 *et seq.*

Dated: July 3, 2017.

Tracey L. Thompson,

Acting Deputy Director, Office of Sustainable Fisheries, National Marine Fisheries Service.

[FR Doc. 2017–14268 Filed 7–6–17; 8:45 am]

BILLING CODE 3510–22–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648–XF250

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Seattle Multimodal Construction Project in Washington State

AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

ACTION: Notice; issuance of an incidental harassment authorization.

SUMMARY: In accordance with the regulations implementing the Marine Mammal Protection Act (MMPA) as amended, notification is hereby given that we have issued an incidental harassment authorization (IHA) to Washington State Department of Transportation (WSDOT) to take small numbers of marine mammals, by harassment, incidental to Seattle Multimodal Construction Project in Washington State.

DATES: This authorization is effective from August 1, 2017, through July 31, 2018.

FOR FURTHER INFORMATION CONTACT: Shane Guan, Office of Protected Resources, NMFS, (301) 427–8401. Electronic copies of the application and supporting documents, as well as the issued IHA, may be obtained online at: *www.nmfs.noaa.gov/pr/permits/incidental/construction.htm.* In case of problems accessing these documents, please call the contact listed above.

SUPPLEMENTARY INFORMATION:

Background

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce to allow, upon request by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified area, the incidental, but not intentional, taking of small numbers of marine mammals, provided that certain findings are made and the necessary prescriptions are established.

The incidental taking of small numbers of marine mammals shall be allowed if NMFS (through authority delegated by the Secretary) finds that the total taking by the specified activity during the specified time period will (i) have a negligible impact on the species or stock(s) and (ii) not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant). Further, the permissible methods of taking, as well as the other means of effecting the least practicable adverse impact on the species or stock and its habitat (*i.e.,* mitigation) must be prescribed. Last, requirements pertaining to the monitoring and reporting of such taking must be set forth.

Where there is the potential for serious injury or death, the allowance of incidental taking requires promulgation of regulations under MMPA section 101(a)(5)(A). Subsequently, a Letter (or Letters) of Authorization may be issued as governed by the prescriptions established in such regulations, provided that the level of taking will be consistent with the findings made for the total taking allowable under the specific regulations. Under MMPA section 101(a)(5)(D), NMFS may authorize incidental taking by harassment only (*i.e.,* no serious injury

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April 26, 2017

The Honorable Wilbur Ross
Secretary
U.S. Department of Commerce
1401 Constitution Ave, NW
Washington, DC 20230

RE: Request for a Regulatory Review of the Department of Commerce/NOAA Regulations Regarding the Western Population of Steller Sea Lions in the North Pacific Region (79 FR 70285, 11/25/14; 68 FR 204, 1/2/03)

Dear Secretary Ross:

I am writing to request, per the requirements of Executive Orders – "Enforcing the Regulatory Reform Agenda" and "Reducing Regulation and Controlling Regulatory Costs," that your Department undertake a full review of regulations administered by the National Marine Fisheries Service (NMFS) to recover the Western population of endangered Steller Sea Lions in the North Pacific.

Such a review I believe is warranted in order to reduce the negative impact Steller sea lion recovery regulations have had over 20 years on the fishing communities in the Aleutians East Borough that I represent. My constituents are largely native Aleuts whose ancestry in the region goes back thousands of years. We are dependent on groundfish, salmon, crab and other area fisheries as the backbone for our jobs and small businesses, funding for local government services via a tax on seafood landed and processed in the Borough, as well as for subsistence protein to feed our families. These regulations have mandated large area closures to trawl fishing for groundfish species throughout the Aleutian Islands which have resulted in negative socioeconomic impacts while arguably providing little benefit to the sea lion populations. The particular elements of the regulations that have been most harmful to the small boat fleet in the Aleutians concern the large 20 nautical mile fishing closures that circle sea lion rookeries and haul-outs. These closed areas have also been a safety concern for my fishing constituents as they push vessels farther from shore than they would otherwise go to fish.

While the Aleutian Islands may be remote geographically and small by population standards, the economic value of our fisheries from a local, state, regional and national impact is large. In 2015 according to NOAA statistics, 467 million pounds of seafood was landed in the Aleutian Islands, with an ex-vessel value of $111 million (this value does not include revenues generated by fish processors and multiplier effects derived from marine services, harbor fees, vessel repair, fishing gear and equipment purchases, etc). NMFS in its economic analyses accompanying its sea lion regulations has never thoroughly or properly determined a specific estimate of their impact on Eastern Aleutian fishing communities, although it acknowledges area closures can have a greater impact on small boat fleets, which are limited in fishing range and distance.

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NMFS first listed Steller sea lions as threatened under the Endangered Species Act (ESA) in 1990 and implemented its first recovery plan in 1992 along with a small number of area closures to fishing for certain groundfish species. In 1997, NMFS determined that there was a genetic distinction between the Western Steller sea lion population (this includes the sea lions that reside in the Aleutian Islands and covers the area from the Eastern Gulf of Alaska all the way to Russia) and the Eastern Steller sea lion population (animals from Southeast Alaska down through Canada all the way to central California).

NMFS listed the Western population as endangered and the Eastern population as threatened. The latter was removed as a listed species in 2013 after significant population growth.

In implementing protection measures for the Western stock, NMFS expanded, both in size and number, the number of closed areas to groundfishing in the Aleutian Islands around rookeries and haul-outs. The rationale for the closures was based on the still-unproven hypothesis that fishing was causing localized depletion of forage species. NMFS argued that localized depletion resulted in higher than average mortality for sea lion pups and young adults which because of their immaturity were unable to range far from rookery and haul areas. This claim flew in the face of NMFS' own fisheries science that showed that the fish species needed by the animals were being harvested at sustainable levels and not overfished in either Bering Sea or Gulf of Alaska. Nonetheless, and even with other information indicating that Western sea lion populations might be negatively affected by killer whale predation, migration, climactic causes, exposure to persistent organic pollutants or other causes, NMFS under the ESA's "precautionary principle" decided to move forward with the expanded area closures that have had such a harmful effect on our fishing fleet.

Since that decision, well over $100 million in Federal funding has been spent on Steller sea lion research to further ascertain the causes of the decline of the Western stock. These funds have gone to researchers and other experts from Federal and State agencies, academia, and non-profit institutions, yet even with all that expertise, time and money, NMFS seems to be no closer to determining the primary reason for sea lion decline than it was 20 years ago, and yet the fishing area closures remain. The agency continues to cling to its theory of fishing for forage species as a significant cause, although it now concurs that killer whale predation and environmental variability are significant factors as well.

In hopefully assigning your Regulatory Reform Officer (RRO) to examine this issue, I would like to add some additional information regarding the Eastern and no-longer threatened stock of Steller sea lions and how that might be relevant in our case. In its decision to delist the Eastern stock, NMFS noted that its population had been growing steadily at an average rate over 3 percent annually, with populations more than doubling since in the 1970s in Southeast Alaska, Canada, and Oregon. This growth has occurred despite the *absence of area fisheries closures* around known rookeries and haul outs. These coastal areas are fished for species such as salmon, rockfish, whiting, herring, pollock, Pacific cod and squid – all species that also happen to be primary food sources for sea lions. In its analysis of fishing impacts on the prey species of Eastern Steller sea lions, NMFS has concluded that it is not a detrimental factor even though these are active fisheries with significant fishing pressure and, as emphasized above, no closures to fishing around rookeries and haul-outs.

NMFS's recent stock assessments of the Western stock show that sea lion populations are increasing in parts of its range but have declined in the western Aleutians and not increased in the central Aleutians. This finding has occurred despite the fact that there are significant areas in size and number in both regions that are closed to groundfish harvests. Why does NMFS continue to hold to the view that fishing is causing localized depletion of prey species, and thus continued with closed areas in the Aleutians, but sea lion populations have not recovered? And yet conclude it is not an issue for the Eastern stock which is growing in number even with no area closures around rookeries and haul-outs? It is worth noting that the sea lion web site for NMFS's Alaska region also cites eliminating possible human disturbance of rookery and haul out areas as an additional justification for the closed areas. This reason was not put forward as the original justification for those closures at the time, not does it seem to be an issue for the Eastern stock in the more human and vessel populated States of Washington, Oregon and California.

For these reasons, the fishing communities of the eastern Aleutians strongly feel that the Western Steller sea lion rules should be modified to eliminate or reduce the fishing area closures in our region. We stand ready to work with the Department's Regulatory Reform Officer, its Regulatory Reform Task Force, and the National Marine Fisheries Service as part of this process.

Thank you for your consideration of this request.

Sincerely,

Stanley Mack

Stanley Mack, Mayor
Aleutians East Borough

Certain browser plug-ins or extensions, such as Grammarly, may interfere with submitting comments on the comment form. If you have issues, please disable browser plugins and extensions and try submitting your comment again. If you need additional assistance, please contact the Help Desk at 1-877-378-5457.

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Comment from Rick Steiner

The is a Comment on the **National Oceanic and Atmospheric Administration** (NOAA) Notice: Streamlining Regulatory Processes and Reducing Regulatory Burden

For related information, Open Docket Folder

Comment Period Closed
Aug 21 2017, at 11:59 PM ET

ID: NOAA-NMFS-2017-0067-0019
Tracking Number: 1k1-8xve-5kt7

Document Information

Date Posted:
Aug 4, 2017

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Submitter Information

Submitter Name:
Rick Steiner

Comment

I encourage NMFS/NOAA to maintain unaltered all of the marine species and habitat protections currently in effect in Alaska's federal offshore waters. These have been developed with years of methodical, science-based deliberative processes, over various federal administrations, and with robust industry input. They exist for a reason, and should remain intact. In fact, these protections should be made permanent.

The protections in Alaska federal waters that should remain unchanged include, but are not limited to, the following:

Aleutian Islands Coral Habitat Protection Areas;

Aleutian Islands Habitat Conservation Area;

Bowers Ridge Habitat Conservation Zone;

Alaska Seamount Habitat Protection Areas;

Bering Sea Habitat Conservation Area;

Nunivak Island, Etolin Strait, Kuskokwim Bay Habitat Conservation Area;

Walrus Islands federal closures;

Gulf of Alaska Slope Habitat Conservation Area;

Crab, halibut, herring, and salmon "savings areas";

Any/all marine mammal conservation measures, including Steller sea lion critical habitat, North Pacific Right Whale critical habitat, southwestern sea otter critical habitat, etc.;

Any/all seabird conservation measures;

Any/all proposed or existing ESA listings;

Scallop Conservation Areas;

Fisheries by-catch reduction programs;

Skate egg concentration Habitat Areas of Particular Concern;

Pribilof Island Habitat Conservation Area;

Non-pelagic (bottom) trawl closures;

Nearshore Bristol Bay Trawl Closure;

U.S. Arctic fishery closure (on federal waters in the Arctic Management Area).

One NOAA policy (if not a regulation) that should be changed or eliminated is the National Marine Sanctuaries program requirement for local support/consensus in order to consider National Marine Sanctuary nomination or designation in federal waters. Clearly, local voices are important and deserve consideration by NOAA in sanctuary designations in federal waters. But local interests should not have exclusive authority over such federal management decisions in offshore waters and resources. These offshore areas are owned and managed on behalf of all Americans, not solely the adjacent coastal communities. Where the interest of adjacent local communities and the nation overlap, fine. Where they do not, then NOAA must be obliged to act in the national interest. For instance, to date there are no National Marine Sanctuaries or Marine National Monuments in Alaska, due to federal deference to opposition by industrial interests of local communities. This is a significant failure of current NOAA policies, and should be corrected.

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Comment from Angela Wilson

The is a Comment on the **National Oceanic and Atmospheric Administration** (NOAA) Notice: Streamlining Regulatory Processes and Reducing Regulatory Burden

For related information, Open Docket Folder

Comment Period Closed
Aug 21 2017, at 11:59 PM ET

ID: NOAA-NMFS-2017-0067-0045
Tracking Number: 1k1-8y5d-m0q7

Comment

The Alaskan halibut fishery should be regulated by the Alaska Department of Fish and Game and the Alaska Wildlife Troopers. Also, we need more climate change documentation. I would also like NMFS and NOAA to pursue and sue oil companies for spills and leaks in Cook Inlet.

This whole idea to cut environmental regulations to streamline infrastructure projects is a bad idea! We need to be a model example to the rest of the world that Americans do not cut corners. When we do a project we do it right the first time and consider environmental protection necessary not hindering. All this proposal does is sacrifice our future so we may preserve our present over consumption. Furthermore, federal environmental regulations employees thousands of American citizens in good paying jobs with benefits. This proposal sacrifices those quality careers for short term non perm project jobs.

Keep as many environmental regulations as you can, our children will thank us.

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THE STATE of ALASKA
GOVERNOR BILL WALKER

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August 21, 2017

Ms. Kelly Denit, Division Chief
National Marine Fisheries Service
NOAA, Office of Sustainable Fisheries
1315 East-West Highway
Silver Spring, MD 20910

Re: NOAA Streamlining Regulatory Processes and Reducing Regulatory Burden – 82 Federal Register 31576 (7/7/17)

Dear Ms. Denit:

The State of Alaska appreciates our strong working relationship with the staff and leadership of the NOAA Fisheries (NMFS) Alaska Region. We work closely on fisheries, marine mammal, habitat, Endangered Species Act (ESA), and other issues. We have a good history of working together on federal fisheries issues, and we appreciate the steps the Alaska NMFS Protected Resources Division is taking to increase cooperation and coordination on ESA and other issues. While we have a good relationship with our federal counterparts in the Alaska regional office, we provide the following comments to encourage improvements and streamlining to regulations and policies that could reduce redundancies as well as provide opportunities for improved implementation of the ESA.

The following compilation of regulations and policies was prepared in response to the National Oceanic and Atmospheric Administration's request for input on how to improve implementation of regulatory reform initiatives and policies and to identify regulations for repeal, replacement, or modification to relieve unnecessary regulatory burdens on the American people. In addition to regulations, much of the public burden is implemented by federal agencies in the form of agency policy (e.g. Secretarial Orders, Director's Orders, Manuals, Handbooks, and Instruction Memos) and planning decisions, many of which are developed internally without public review or consultation with affected state agencies. Therefore, the following list is not limited to regulations and includes a variety of policy documents and management plans that are equally burdensome in the State of Alaska.

Guided Recreational Fisheries Reporting Requirements

The following regulations specific to saltwater sport fishing guides and businesses are a burden on the charter operators (small businesses) and anglers (consumers).

1. **50 CFR 300.65(d)(2)(i) Retain all logbook data pages showing halibut harvest for 2 years after the end of the fishing year for which the logbook was issued** - Under State of Alaska regulations halibut charter operators are not required to keep logbooks beyond the current year (state regulations do require that guides must present a logbook for inspection when operating). The trip reports that make up the logbook are required to be submitted to the Alaska Department of Fish and Game (ADF&G) on a biweekly basis. ADF&G scans and archives these logbooks. Alaska Statute 16.05.815 authorizes ADF&G to provide logbook data and scans of original logbook pages from the current and previous years to NMFS/NOAA, and ADF&G regularly provides this information upon request to NOAA's Office of Law Enforcement and others, which makes retention of logbooks an unnecessary burden with little tangible benefits. This regulation is also inconsistent with state requirements that only require retention of logbooks for the current year, and therefore the regulation is causing confusion for guides and guide businesses.

    - Recommendation: Remove this unnecessary regulation that imposes a cost without benefit so that a charter operator need only make a logbook available for inspection while operating.

2. **50 CFR 300.65(d)(4)(ii)(A) Charter vessel angler signature requirement and 50 CFR 300.65(d)(4)(ii)(B)(10) Charter vessel guide requirements: Angler signature** – The first regulation requires that each charter vessel angler who retains halibut caught in Commission regulatory area 2C or 3A must acknowledge that his or her name, license number (if required), and number of halibut retained (kept) are recorded correctly by signing the Alaska Department of Fish and Game Saltwater Charter Logbook data sheet on the line that corresponds to the angler's information. The second regulation places a responsibility on the charter vessel guide to ensure the angler complies with the angler signature requirement.

    There are several problems with the angler signature requirement:
    a) The angler signature does not contribute useful data for assessment or management of the fishery.
    b) The requirement is unnecessary as Alaska regulations already require the angler's printed name and Alaska sport fishing license number be recorded in the saltwater charter logbook. This allows verification that angler name and license number are correct. Even without a signature requirement, enforcement can still verify compliance with daily and seasonal bag limits, as well as logbook data, by counting halibut and inspecting logbooks, and currently in IPHC Area 3A by inspecting angler license or Harvest Record Card, at the end of a charter trip.
    c) The regulation is ineffective. The intent of the signature requirement was for the angler to review and affirm that the catch and release of halibut recorded for them was accurate. Unfortunately, the signature requirement is not being followed as intended. Some charter clients are signing the logbook at the start of the trip, before any fishing has begun. In addition, logbook sheets without any halibut harvest have been submitted with angler signatures.

d) The charter captains cannot force a client to sign the logbook, and therefore should not be held responsible for the signature requirement.
e) The requirement is causing additional concerns and challenges for ADF&G as they transition to a more efficient eLogBooks system.

- Recommendation: Remove this unnecessary and ineffective regulation that imposes a cost without benefit.

Endangered Species Act

Working with States

The State of Alaska appreciates the positive efforts made by the NMFS and USFWS in recent years to work more closely with States to implement the Endangered Species Act (ESA), through avenues such as the ESA Joint Task Force (JTF). Alaska urges the Services to continue to improve implementation of the ESA in partnership with States to fully realize the strong role for States envisioned by Congress. We ask the Services to invest in cooperative and collaborative work with States by; a) maintaining the positive momentum generated by the ESA-JTF; and b) basing ESA-JTF initiatives on the principles developed jointly by States through the Association of Fish and Wildlife Agencies.

Critical Habitat Designation

The USFWS, jointly with the National Marine Fisheries Service (NMFS; hereafter "the Service" or "Services") in August 2013 finalized a rule that revised the regulations for impact analyses of critical habitat under the Endangered Species Act (ESA). The Services in 2016 issued two related final rules and one policy to revise other portions of the critical habitat regulations, aiming to clarify the process of designating and protecting critical habitat for a listed species. These four interrelated actions are discussed below.

As issued, the revised rules and policy:

- vastly expand the discretion given to the Secretary;
- minimize input from Alaska and other states;
- work against State interests within designated critical habitat; and
- limit judicial review of Service actions.

The revisions greatly increase the Services' administrative reach in designating critical habitat for listed species and allowing inclusion of areas not occupied by the species at the time of listing. The revised rules allow designations that dilute the ecological importance of habitat that is truly critical for species recovery, yet impose unnecessary regulatory burdens on state, municipal, and private lands, often with little to no conservation benefit to the listed species. The revised rules have the potential to increase the number of adverse modification or destruction findings on non-federal lands due to the overall increased acreage of land designated as critical habitat. This in turn will subject more projects on non-federal land to Section 7 consultation.

1. **Final Rule: Endangered and Threatened Wildlife and Plants; Revisions to the Regulations for Impact Analyses of Critical Habitat (revising a portion of 50 CFR Part 424). 78 Fed. Reg. 53058 (Aug. 28, 2013)**

This rule was revised to clarify 1) the Services process for making economic analysis information available to the public and 2) how the Services will consider the economic and other relevant impacts of critical habitat designations, as well as exclusions from critical habitat. Alaska expressed concerns about the proposed rule in comments submitted on October 16, 2012, and February 6, 2013. In those comments, we took issue with the following provisions:

a) adoption of the "incremental" (or "baseline") approach to economic analysis, which conflicts with the statutory language and legislative intent of ESA Section 4(b)(2);
b) broad Secretarial discretion to determine the scale of economic analysis (similar to the scale of critical habitat designation, discussed above);
c) scope of analysis of "probable" economic impacts, including limiting the analysis to activities subject to Section 7 consultation; and
d) conclusion that the Section 4(b)(2) impact analysis is not judicially reviewable.

Incremental approach:

The Services' adoption of the incremental approach severely limits the scope of economic impacts considered during designation of critical habitat. The burdens imposed by listing the species are considered part of the regulatory "baseline" and are not factored into the economic analysis, which is limited to effects of the critical habitat designation itself. The plain language of Section 4(b)(2) imposes no such limitation on the economic impact analysis. By disregarding impacts that might result from a species listing, versus just those arising from the critical habitat designation, the Services' "incremental analysis" violates the plain language of Section 4(b)(2). This limited analysis also controverts Congress' intent to require a meaningful economic analysis as part of the critical habitat designation. The incremental approach, by definition, disallows an accurate weighing of the total costs and benefits, thereby minimizing impacts considered in the exclusion analysis and likely resulting in fewer exclusions. The agencies must consider *all* economic impacts, not merely incremental impacts, to give full effect to Congress' intent that these impacts play a meaningful role in the Services' critical habitat designation decision. Alaska recommends rejecting the "incremental" or "baseline" approach and instead adopting the "coextensive" approach supported by the Tenth Circuit.

Secretarial discretion:

The Services in this rule afforded themselves such broad discretion that the statutory requirement for analysis of impacts is effectively negated. Following this revision, the Services need only consider a narrow range of incremental administrative costs in the economic impact analysis: those related to Section 7 consultations, at a scale considered "appropriate" by the agency. The agencies also maintain that they have complete discretion to refuse to exclude areas from critical habitat, regardless of the outcome of the exclusion analysis, if they elect to engage in one. To the contrary, in Section 4(b)(2), Congress intended

that the Service perform a mandatory economic analysis when designating critical habitat. *New Mexico Cattle Growers' Ass'n v. FWS*, 248 F. 3d 1277, 1285 (10th Cir. 2001) ("Congress clearly intended that economic factors were to be considered in connection with the CHD."). *See also* H.R. Rep. No. 95-1625, at 17, reprinted in 1978 U.S.C.C.A.N. at 9467 ("Economics and any other relevant impact shall be considered by the Secretary in setting the limits of critical habitat for such a species.").

Scope of analysis:

Section 4(b) does not contain any language limiting the analysis to just those activities requiring Section 7 consultation. Contrary to the analysis in the DOI 2008 memorandum on which the Services rely, designating critical habitat that includes private or state-owned lands does have economic and other impacts, regardless of whether activities on such property would implicate Section 7. In particular, the designation of property as critical habitat creates a cloud of uncertainty for the owner as to what actions may be taken on that property. Investment in development is less likely to occur on property designated as critical habitat than upon property with no such regulatory impairment. Likewise, an owner of property designated as critical habitat may decline to take any action with respect to the property out of concerns over potential Section 9 liability. Additional economic impacts such as these are "probable" and should be considered by the Services, regardless of whether Section 7 consultation would be implicated.

Judicial review:

The Services maintain that the decision not to exclude areas from critical habitat is entirely unreviewable. Pursuant to the Administrative Procedure Act (APA), however, an agency *must* respond to "significant comments" that, "if adopted, would require a change in the agency's proposed rule." The Services' failure to provide a meaningful response to a request made by the public or other entity during the designation rulemaking process, such as providing findings regarding the relative costs and benefits of including the area as part of the final designation, would be arbitrary, capricious, and in violation of law. Similarly, if a state or other entity requested that a certain area be excluded from critical habitat but the Service does not exclude the requested area, the agency must respond meaningfully in the final designation by explaining its decision not to exclude the area. Even if the Service rejects a request to exclude an area from critical habitat but provides an explanation for its decision, the agency's decision would be subject to APA review.

Legislative clarification:

In addition, Alaska recommends the statute be revised consistent with the following highlighted changes:

> 4(b)(2) The Secretary shall designate critical habitat, and make revisions thereto, under subsection (a)(3) on the basis of the best scientific data available and after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying any particular area as critical habitat.

Economic impacts considered shall include impacts to local governments, states and state agencies, and commercial impacts to individuals and business entities. The Secretary's economic assessment shall fully account for administrative costs, delay costs of projects, and uncertainty and risk likely to result from the critical habitat designation. These impacts shall include reasonable direct and indirect costs and may not be limited to merely the incremental cost to the Services in administering the Act. The Secretary shall ~~may~~ exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits of specifying such area as part of the critical habitat, unless he determines, based on the best scientific and commercial data available, that the failure to designate such area as critical habitat will result in the extinction of the species concerned. The decision by the Secretary to exclude or not exclude any area shall be subject to judicial review.

2. **Final Rule: Listing Endangered and Threatened Species and Designating Critical Habitat; Implementing Changes to the Regulations for Designating Critical Habitat (revising portions of 50 C.F.R. § 424). 81 Fed. Reg. 7413–40 (Feb. 11, 2016)**

This rule defines the physical and biological features considered by the Services when designating lands as critical habitat. The revised rule allows the Services to designate as critical habitat areas that are currently not occupied by the listed species or are considered peripheral or potential future habitat. Alaska maintains that the Service's interpretation is inconsistent with the plain language and intent of the statute to designate as critical habitat to those areas within the species' current range in which essential physical or biological features **are present *at the time of listing***. Section 5(A)(ii) does allow the Secretary to include "specific areas" of unoccupied habitat determined to be "essential for the conservation of the species," a provision that is an exception rather than the rule. But the Services in this revision greatly expand that authority, in the name of climate change, to include in critical habitat areas that clearly do not presently support the species or the essential physical and biological features. The possibility or likelihood of shifting climate regimes and changing habitat conditions is more appropriately addressed during 5-year status reviews and the critical habitat revision process, 16 U.S.C. § 1533(a)(3)(A)(ii) (the Services "may, from time-to-time thereafter as appropriate, revise such designation"), not by attempting to base current designations on unknown and speculative future conditions.

The rule gives the Services unbounded discretion to determine the scale at which critical habitat should be designated for a listed species. The Service can then justify designating critical habitat areas that are larger than necessary, especially where data on physical or biological features is unavailable at a smaller scale that is more relevant to the essential habitat needs of the species. Excessively large designations, such as for polar bear critical habitat, does little to help the species yet unnecessarily burden individuals, states, local governments, and Native organizations due to enhanced permitting and mitigation actions that are then required under other laws such as the Clean Water Act. The increase in costs and permitting time periods is a great concern, especially for currently abundant species listed solely on the basis of potential climate-change effects 100 years into the future.

The revised rule also makes no allowance for consultation with affected states prior to critical habitat designation, as directed in Section 7(a)(2) and as repeatedly requested by Alaska.

Recommendations:

i. Critical habitat designations must be based not just on the best available scientific information, but on information that has been a) objectively evaluated and b) judiciously applied to designate that specific area within a species' range that is genuinely *essential* for conservation of the species.

ii. Designation of critical habitat should be made "to the maximum extent prudent and determinable" (as provided by ESA Section 4(a)(3)(A)), not when, at the Secretary's discretion, designation is deemed "appropriate."

iii. The ESA provides for 5-year status reviews and a process for revision of critical habitat designations. 16 U.S.C. §§ 1533(c)(2)(A), (a)(3)(B). The appropriate process to revise critical habitat to address shifting habitat patterns is to base revisions on observed changes in habitat conditions and species, not on speculative future conditions that result in designating ever-larger areas. The Services should commit to periodically reevaluate critical habitat designations, particularly for species listed based on habitat threats associated with climate change.

iv. The definition of "geographical area occupied by the species" should be revised as follows:

Geographical area occupied by the species. The species' range, or an area a species regularly or consistently inhabits and that the Secretary can identify and delineate. ~~An area which may generally be delineated around species' occurrences, as determined by the Secretary (i.e., range).~~ Such areas may include those portions of the range ~~areas~~ used throughout all or part of the species' life cycle ~~even if not used on a regular basis~~ (e.g., migratory corridors and seasonal habitats), ~~and habitats used periodically,~~ but not areas used solely by vagrant or dispersing individuals).

v. The scale of a critical habitat designation should not be left to the Secretary's absolute discretion. Critical habitat should instead be selected and justified at a scale that is a) relevant to the habitat needs of the species (individual territories, etc.), and b) fine enough to demonstrate that the physical or biological features are actually found in each "specific area" of occupied habitat, as required by ESA Section 3(5)(A). Alaska recommends the following revised language for Section 424.12(b):

1. The Secretary will identify, at a scale consistent with the geographical extent of the physical or biological features essential to the species' conservation ~~at a scale determined by the Secretary to be~~

~~appropriate~~, specific areas within the geographical area occupied by the species for consideration as critical habitat.

2. (2) The Secretary will identify, at a scale consistent with the geographical extent of the physical or biological features essential to the species' conservation ~~at a scale determined by the Secretary to be appropriate~~, specific areas outside the geographical area occupied by the species that are essential for its conservation, considering the life history, status, and conservation needs of the species.

Alaska also recommends **adding a new Section 424.12(c)** that requires that designation will be made after consultation with the affected States, as described in the proposed regulatory language below:

§ 424.12 Criteria for designating critical habitat

(c) In designating any area as critical habitat, the Secretary shall consult with affected States (those in which the proposed critical habitat is located or those that may be affected by the designation of the habitat) prior to completing the designation, and the fact of and findings of such consultation shall be addressed in the final rulemaking for the designation.

3. **Final Rule: Interagency Cooperation—Endangered Species Act of 1973, as Amended; Definition of Destruction or Adverse Modification of Critical Habitat (revising 50 C.F.R. § 402.02). 81 Fed. Reg. 7214–26 (Feb. 11, 2016)**

This rule amends the definition of "destruction or adverse modification of critical habitat," parts of which were invalidated by rulings in the Fifth and Ninth Circuits. The revised definition reads as follows:

> *Destruction or adverse modification* means a direct or indirect alteration that appreciably diminishes the value of critical habitat for the conservation of a listed species. Such alterations may include, but are not limited to, those that alter the physical or biological features essential to the conservation of a species or that preclude or significantly delay development of such features.

As with the revised rule on designation of critical habitat, which expands the Secretary's authority to designate critical habitat in areas not currently occupied by the species, the revised definition expands the scope of Section 7 consultation by the Service regarding alterations to designated critical habitat that would "preclude or significantly delay development" of essential physical or biological features. This provision would allow the Services to evaluate the effects of a proposed project on habitat features that do not presently—and may never—exist. This approach is clearly beyond the intended reach of the statute, which envisions protecting essential habitat features that **are present at the time of listing**. Thus, the revised rule imposes unnecessary regulatory burdens on non-federal landowners.

Recommendations**:**

i. Rescind the rule and revise the wording consistent with court findings and with the statute. In particular, the overreaching phrase "preclude or significantly delay development" should be struck, because it requires the Services to speculate regarding potential future conditions that are currently not present in a habitat.

ii. In conducting Section 7 reviews, the Services should concurrently determine and disclose the current "value of critical habitat for the conservation of a species" within the designated habitat. For this purpose, the Services should coordinate with States to develop unambiguous and objective criteria by which to a) evaluate an area's conservation value and b) by which States and the public can evaluate and comment on the Service's determination of value. Indeed, the information the Services expect to consider in the analysis of an area's conservation value is the very information that should inform a critical habitat designation in the first place.

iii. The Services should require the determination of the conservation value of a particular habitat unit for all critical habitat designations. To do otherwise would allow the Services to engage in a *de facto* modification of a critical habitat designation during Section 7 consultations, by determining the conservation value after the critical habitat designation process has been completed—likely to the surprise of consulting parties. This *de facto* approach would also impermissibly preclude the opportunity for public review and comment on the Services' determination of the conservation value of designated critical habitat units and would inject increased regulatory uncertainty into the Section 7 process. Documented changes in the conservation value of habitat should be addressed in periodic re-evaluations of the designation (e.g., during 5-year status reviews) rather than during Section 7 consultations.

4. **Policy: Policy Regarding Implementation of Section 4(b)(2) of the Endangered Species Act (announcing a final policy on exclusions from critical habitat under the Endangered Species Act). 81 Fed. Reg. 7226 (Feb. 11, 2016)**

The final Policy explains the criteria used by the Services to determine whether to exclude areas from critical habitat (81 Fed. Reg. 7226). This policy was issued to "complement" revisions to 50 C.F.R. 424.19, modifying the process and standards for implementing ESA Section 4(b)(2), issued on August 28, 2013 (78 FR 53058; see above). Alaska takes issue with the following elements:

1) the considerable expansion of the Services' discretion in implementing this section;
2) the Services' disavowal of any applicable standards to the Services' exercise of its discretion to exclude areas from critical habitat designation; and
3) the lack of adequate consideration given under the Policy to State interests and conservation efforts.

Section 4(b)(2) consists of two sentences: the first mandates that the Secretary designate critical habitat "on the basis of the best scientific data available *and* after taking into consideration the economic impact, the impact on national security, and any other relevant impact, of specifying *any particular area* as critical habitat" (emphasis added). The second sentence allows the Secretary to "exclude any area from critical habitat if he determines that the benefits of such exclusion outweigh the benefits" of including the area as part of the critical habitat.

According to the Policy, the second sentence "outlines a separate, discretionary process by which the Secretar[y] *may elect* to determine whether to exclude an area from the designation, by performing an exclusion analysis." 81 FR 7227(emphasis added). Based on the word "may" in the second sentence, the Policy heavily emphasizes the discretionary nature of the decision to conduct an exclusion analysis, and the policy outlines "specific categories of information that [the Services] 'often consider' when [they] enter into the discretionary 4(b)(2) exclusion analysis . . . ." *Id.*

Although the Services acknowledge the mandate in the first sentence of 4(b)(2) to consider economic and other impacts, they decline to commit to considering those impacts in the exclusion analysis, discussed in the second sentence, which they maintain is itself discretionary. Instead, the Services in this Policy urge that the Secretary has unbounded discretion to determine:

a) whether to engage in an exclusion analysis;
b) which factors to consider as benefits of inclusion and exclusion;
c) what weight to assign those factors; and
d) whether to exclude an area based on an analysis—*if* the Secretary decides to engage in an analysis.

Given the extensive discretion already afforded by courts to Service expertise, the expansion of discretion in this instance is concerning, particularly where the Services intend to rely on speculative future conditions and possible occupation of critical habitat. The Services not only seek to expand critical habitat into unoccupied areas that may develop habitat features, but also seek to opt out of the impact analyses ordered by Congress.

Congress required (i.e., "The Secretary *shall* designate critical habitat . . .") the Services to look not only at the best scientific data available, but *also* to consider economic and other relevant impacts (i.e., "*and* after taking into consideration the economic . . . and any other relevant impact, of specifying *any particular area* as critical habitat."). Consideration of economic impacts was added in the 1982 ESA amendments, and economics may only be considered as part of designating critical habitat, not listing decisions. Given the obvious potential for economic impacts to states and private individuals from designation of critical habitat, common sense suggests that the reason Congress, in the first sentence, directed that economic and other impacts "shall" be considered was *to inform* the "benefits" analysis discussed in the second sentence.[1] The Services' very narrow interpretation of this section

[1] The Services appear to accept this interpretation:

ignores this common sense interpretation and adds Secretarial discretion where Congress did not intend it. Although we agree that the Secretary does have discretion on whether ultimately to exclude an area, the exclusion analysis leading to that decision must be a mandatory exercise; to find otherwise renders meaningless the required consideration of "economic . . . and any other relevant impacts" in the first sentence.

Further, the Policy ignores the comments of Alaska and other states reminding the Services of the strong role for states envisioned by Congress in ESA implementation. The ESA's language on that point is plain, and the Services recently updated an interagency policy that promotes using the expertise of and collaborating with State agencies on listing and critical habitat designations. Because of its potential for substantial economic effects on state interests and economies, designation of critical habitat, including evaluation of possible exclusions, is one of the most important ESA processes for states to fully participate in.

In this vein, the Policy fails to adequately address Alaska's concern that the Services decline to give "great weight" to State conservation programs as they do for Tribal conservation programs. The deference due to States derives from different authorities than that due to Tribes (e.g., S.O. 3206). The deference, collaboration, and cooperation due to States instead derive from the ESA itself, as an expression of Congressional intent.

The Policy also fails to address Alaska's concerns that the Services apply different standards to evaluate State or private conservation plans that do not closely follow the ESA model (e.g., plans such as HCAs, CCAAs, and SHAs, designed specifically to benefit listed or candidate species). States commonly establish wildlife conservation regimes based on an ecosystem, versus individual species, approach; this is particularly true for Alaska, where many ecosystems are largely intact. The Services should not discount programs because they are not tailored solely for the benefit of one species. The Services instead should develop evaluation criteria that can be applied to all types of plans, including state plans and programs.

Recommendations: (*see also* related Recommendations for 1., above)**:**

i. The Services should broaden their interpretation of Section 4(b)(2) to *require* a) consideration of economic and other impacts as well as b) an exclusion analysis based on those impacts, after which the Secretary may exercise due discretion on whether to exclude an area from designated critical habitat. The Service in the final designation must discuss the mandatory exclusion analysis and present its rationale for excluding or failing to exclude an area requested by States.

An economic analysis serves *to inform* the relevant Service's consideration of the economic impact of a critical habitat designation. That consideration is mandatory under the first sentence of section 4(b)(2) of the Act. That consideration, in turn, informs the Service's decision as to whether to undertake the discretionary exclusion analysis under the second sentence of section 4(b)(2) of the Act, and, if the Service chooses to do so, the ultimate outcome of that exclusion analysis.

78 Fed. Reg. 53067 (August 28, 2013)(emphasis added). Alaska disagrees that the exclusion analysis is itself discretionary.

ii. The Services should revise the Policy to: (1) provide states the same special considerations provided to tribal and national and homeland security lands and requests for exclusions; and (2) commit to give "great weight" to state conservation plans, whether or not those plans have been subject to the Services' review, based on their effectiveness at conserving species. Alaska proposes that the policy be revised to include a separate identification of the States' role in the critical habitat designation process **and include the following specific language:**

> In light of the important role provided for States by the Act in the critical habitat designation process, when we undertake a discretionary exclusion analysis we will always consider exclusions requested by States under section 4(b)(2) of the Act prior to finalizing a designation of critical habitat and will give great weight to State concerns and State conservation plans in analyzing the benefits of exclusion.

iii. When evaluating areas for possible exclusion, the Services should carefully consider the conservation benefits provided by State conservation programs and refuges, critical habitat areas, and wildlife sanctuaries that directly *or* indirectly benefit a listed or candidate species. The Services' primary consideration should be how such programs or plans provide conservation benefits to listed or candidate species. After consideration of all State conservation programs, species-specific or broadly implemented, the conservation benefits of such areas should weigh heavily against designation of the area as critical habitat, and weigh heavily in favor of exclusion.

5. **Clarification of ESA Section 3(5)(C); 16 U.S.C. §1532(5(A)(C)**

The State of Alaska requests clarification on the Service's interpretation of this section, which provides that "[e]xcept in those circumstances determined by the Secretary, critical habitat shall not include the entire geographical area which can be occupied by the threatened or endangered species." This provision seems to be intended to allow for protection of the entire occupied range for a species, such as an endemic plant, that occur only in a small area, which may require special management in its entirety. Yet the Services have designated or proposed critical habitat for wide-ranging species (e.g., polar bear, ringed seal) that encompasses virtually the entire range of the species.

Overly large critical habitat designations dilute the conservation value of habitats that are genuinely critical to species conservation, while increasing the regulatory burden on entities that seek to use or develop areas within the designated critical habitat. This creates a serious inconsistency of adding regulatory costs and burden that not only exceed benefits but actually diminish the conservation value of the critical habitat designation.

Expansive designations of critical habitat decrease the potential of a destruction or adverse modification finding, because such a finding is based on "appreciably diminish[ing] the conservation value of critical habitat for a listed species." The conservation value of critical habitat is based on the whole of critical habitat. Therefore, the larger the designation the less likely a habitat alteration will cross the threshold of diminishing the conservation value of the entire critical habitat designation.

Large critical habitat designations increase regulatory burden by adding a permitting layer and costs to permitting activities in a designated area. The additional costs include lengthening the time to attain all necessary permit approvals, work associated with evaluating potential impacts to critical habitat, and the potential for higher mitigation costs for habitat impacts based on the additional value agencies place on "critical" habitat.

The Services should clarify that critical habitat designations must not include most or even a large proportion of the habitat used by wide-ranging species.

6. **Definition and Application of "Foreseeable future"**

The phrase "foreseeable future" is found in the definition of "threatened species," which means "any species which is likely to become an endangered species within the foreseeable future in all or a significant portion of its range," 16 U.S.C. §1533(20), but is otherwise not defined. The Services' interpretation of "foreseeable future" has been inconsistent and has led to listings of species before they decline or become depleted, especially for climate change-based listings. This practice preempts state management authority for wildlife populations that are not depleted at the time of listing. The Service's approach has four primary flaws:

1) Lack of full assessment of uncertainty in variables under consideration.
2) Lack of a science-based or mathematical framework for considering what is "foreseeable." Whether a threat is "foreseeable" should be considered in terms of probability or forecasting theory, with a specified policy regarding a probability threshold that should be considered "foreseeable" (e.g., an event is foreseeable when one can reasonably expect the result 8 times out of 10).
3) Failure to fully consider any limitations on predictability (i.e., barriers beyond which forecasting methods cannot reliably predict).
4) Foreseeability should not be defined for each threat alone, but for the combination of a) the foreseeability of a *threat* along with b) the foreseeability of the *biological response* to that threat.

Recommendations:

i. One solution within the current statutory framework would be to establish a **joint Service policy or a regulation** that:
   a. Defines foreseeable future in terms of a forecast probability that is significantly different from a coin flip (e.g., one can reasonably expect the result 8 times out of 10);
   b. Provides a framework to fully consider and discuss all sources of uncertainty in listing decisions, including additive and multiplicative effects of non-independent and independent sources; and
   c. Identifies any potential limitations on predictability (e.g., random events or errors that compound or limit the ability to make accurate predictions).

ii. While outside the purview of this comment period, potential statutory changes to address the issue include the following:
   a. Replace "within the foreseeable future" in the threatened species definition with a reasonable specified time frame – e.g., "within 15 years."
   b. Provide that species cannot be listed unless they are depleted (defined as a fraction of carrying capacity or abundance, for example).
   c. Include language to constrain the foreseeable future analysis to 1-3 generations for long-lived species.
   d. Define "foreseeable future" to mean the result can be predicted the majority of the time.
   e. Require an explanation of how the agency fully considered uncertainty in the calculus of the foreseeable future, both for threats and for projected biological responses to threats.

Overlap between MMPA and ESA

The Marine Mammal Protection Act (MMPA) and the Endangered Species Act (ESA) are similar in several ways. Congress enacted the Marine MMPA in 1972 to prohibit the "take" of all marine mammals in U.S. waters and by U.S. citizens on the high seas because of concerns that some marine mammal species or stocks may be in danger of depletion or extinction as a result of human activities. Congress enacted the ESA the following year to conserve and recover endangered and threatened species, also primarily through restrictions on take.

The two statutes provide comprehensive protection against unauthorized take of covered species, employing almost identical definitions of "take."[2] Both statutes were amended to provide for exceptions to take prohibitions through similar "incidental take" permitting processes. Both statutes provide for a recovery process: a Conservation Plan, under the MMPA, and a Recovery Plan, under the ESA. The principal difference between protections under the MMPA and ESA is the mandatory designation of critical habitat under the ESA, which adds an additional regulatory process by requiring agencies to engage in "Section 7" consultation for projects with a federal nexus.

Marine mammals such as polar bears, bearded seals, and ringed seals are for the most part not "depleted" in the common sense. Therefore, required processes such as defining objective criteria for "recovery" under the ESA or implementing conservation actions to maintain an Optimum Sustainable Population under the MMPA are nonsensical and duplicative. For the polar bear, for example, to fulfill both the ESA requirement for a Recovery Plan along with the

[2] "Take" is defined under the MMPA as "to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal" (16 U.S.C. 1362) and
further defined by regulation (50 CFR 216.3) as "to harass, hunt, capture, collect, or kill, or attempt to harass, hunt, capture, collect, or kill any marine mammal. Under the ESA, "take" is defined as "to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct."

MMPA requirement for a Conservation Plan, the USFWS produced a "Conservation Management Plan." In that plan, the Service acknowledged that the ESA was not designed to, or an appropriate vehicle to, address habitat loss due to climate change.

Thus, when a marine mammal species—previously protected only under the MMPA—is listed under the ESA, the two statutes create overlapping and uncoordinated requirements. Most problematic is the situation, unique to Alaska, where currently abundant and widespread marine mammal species are listed under the ESA on the basis of habitat loss in the future due to climate change. In that situation, several MMPA provisions, such as maintaining an "optimum sustainable population" level, are simply unworkable or not scientifically ascertainable.

Conflicts in implementation can be even greater in the permitting context. For example, when a marine mammal species is listed as "threatened" or "endangered" under the ESA, provisions from *both* the MMPA and ESA are triggered to evaluate and authorize incidental take, resulting in uncoordinated regulatory overlap. Under the MMPA, an incidental harassment authorization (IHA) or Letter of Authorization (LOA) is used to authorize incidental take. Similarly, an incidental take statement (ITS) can also be authorized under the ESA. Generally, an IHA/LOA is required to obtain an ITS – since both outline the conditions for authorizing take of species in a project -- but the ITS is also a critical component of Section 7 consultation, meaning it is required for multiple permits and activities beyond those that require an IHA/LOA. The delays and regulatory burden created by interaction between the two statutes is substantial.

Further, listing of a marine mammal species under the ESA automatically triggers "depleted" and "strategic stock" designations under the MMPA. Provisions for "depleted" status under the MMPA then apply, such as maintaining an Optimal Sustainable Population and developing a Conservation Plan. These requirements overlap with similar provisions of the ESA, such as developing a Recovery Plan. Thus, if a marine mammal, protected from take since 1972 under the MMPA, becomes listed and protected from take under the ESA, overlapping requirements for conservation and recovery become applicable, making compliance redundant. Additional requirements, such as Section 7 consultation, make compliance even more challenging.

Recommendations:

i. USFWS and NMFS should, in coordination with affected States, convene a joint working group to evaluate the areas of overlap between the MMPA and ESA. The working group should develop a joint policy or statutory process to minimize overlapping regulatory requirements for species that are protected by both the MMPA and ESA.

ii. The ESA should be modified to provide for species that may be of conservation concern due to projected future habitat loss due to climate change. Options may include a separate ESA category for climate-concern species, with accompanying monitoring and recovery planning requirements.

The State of Alaska appreciates your consideration of these comments and we look forward to additional opportunities for meaningful dialogue on these priorities. If you have any questions, feel free to contact my office at 907-465-6141 or dfg.commissioner@alaska.gov.

Respectfully,

Sam Cotten
Commissioner