

MARINE MAMMAL COMMISSION  
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BETHESDA, MD 20814

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U.S. Fish and Wildlife Service  
Division of Consultation  
Habitat Conservation Planning, Recovery, and State Grant  
4401 North Fairfax Drive, Room 420  
Arlington, VA 22203

To Whom It May Concern:

The Marine Mammal Commission, in consultation with its Committee of Scientific Advisors on Marine Mammals, has reviewed and offers the following comments on the Fish and Wildlife Service's 2 November 2007 *Federal Register* notice regarding draft recovery crediting guidance for carrying out recovery programs under the Endangered Species Act. We appreciate the Service's intent of developing new tools to improve the recovery of listed endangered and threatened species. However, we believe the draft guidelines are ill-advised and inconsistent with requirements of the Endangered Species Act.

### **RECOMMENDATION**

The Marine Mammal Commission recommends that the Fish and Wildlife Service withdraw the proposed recovery crediting guidance until such time as the Endangered Species Act is amended to provide specific authority for implementing such an approach and a clearer set of guidelines is developed.

### **RATIONALE**

As we understand it, the draft guidelines propose an approach whereby agencies could accrue "recovery credits" for implementing recovery actions identified in a recovery plan or other management document that contribute in some material way to the recovery of a species listed under the Endangered Species Act. Those credits would be stored and later "expended or debited" by the agency to offset the adverse effects of some future action that it may carry out or authorize. Alternatively, accrued credits could be sold or transferred to other agencies or exchanged to offset expected adverse effects of an action by another agency. In all cases, however, the value of applied recovery credits would have to outweigh the expected adverse effects of the action in question. Determinations as to the net benefit of recovery actions presumably would be made by the action agency in consultation with the Fish and Wildlife Service as required under section 7 of the Endangered Species Act. The notice states that such a system would produce a net benefit for the target species and increase the flexibility of federal agencies to accomplish their missions while promoting effective partnerships of federal agencies in recovery actions and meeting requirements of the Endangered Species Act.

In essence, the Endangered Species Act was adopted to provide critically needed care for wildlife species facing a recognized risk of extinction within the foreseeable future. Based on our review of the draft guidance, the Commission believes that the proposed approach is an

inappropriate strategy for addressing the recovery needs of species facing such grave risks. We also believe it is inconsistent with the policies and provisions of the Endangered Species Act. Section 7(a)(2) of the Endangered Species Act directs that—

Each Federal agency shall, in consultation with...the (Fish and Wildlife Service), insure that any action authorized, funded, or carried out by the agency...is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat....” (*Emphasis added*).

We believe this section clearly prohibits any federal agency from authorizing an action that is expected to jeopardize the continued existence of a listed species or result in the adverse modification of critical habitat—even if a particular agency may have taken previous actions that have been demonstrably effective in promoting that species’ recovery. Moreover, we believe it is clear from this section that the only allowed exception to this requirement would be a case in which an exemption is granted by the referenced Committee, which must include the heads of agencies and departments and the President. Thus, based on our interpretation of the section noted above, the Endangered Species Act would have to be amended to authorize federal agencies to use compensatory protection as proposed in the Service’s draft recovery credit scheme as a basis for allowing a federal agency action that is expected to cause any harm to a listed species or its designated critical habitat.

We also are opposed to the concept of selling “recovery credits” accrued by one agency to another agency for use in authorizing the other agency to carry out actions that are expected to adversely affect a species’ recovery or critical habitat. This could prolong a species’ recovery indefinitely and even increase the likelihood of reversing any past progress toward recovery. For example, under the proposed recovery credit guidelines, the Army Corps of Engineers and the South Florida Water Management District presumably could accrue recovery credits for installing devices at floodgates to prevent manatee mortality. If at some point it was determined that those actions resulted in the prevention of 10 manatee deaths a year, they presumably would be given something equivalent to recovery credits for preventing 10 manatee deaths a year. That “credit” could then be sold to another agency seeking to authorize a project predicted to result in something judged equivalent to fewer than 10 manatee deaths a year. Although the agency and the Service might consider this to be a net benefit to the species, it would clearly slow the species’ recovery and undermine the progress achieved by the original action.

More troubling, use of such credits might actually reverse progress toward recovery if the attributed credits are overvalued or the predicted risks from a project to be allowed by using them are underestimated. That is, the merits of any such crediting scheme would depend on the accuracy with which agencies can attribute values to recovery actions and to the risks of potentially harmful proposed actions. Regarding the assignment of recovery credits, we are aware of no recovery programs that have formally evaluated the effectiveness of specific tasks or measures. Indeed, among all the recovery tasks identified in recovery plans for all listed marine mammals, we are aware of no more than a handful of directed studies to evaluate the effectiveness of individual recovery

actions. We therefore doubt that recovery credits can be reliably and adequately attributed to individual actions as contemplated in the draft guidelines. In addition, one need not look far to find proposed project assessments prepared in the past that turned out to have vastly underestimated their adverse effects on wildlife species. As a result, we believe that a credit banking program would introduce an unknown and unacceptable risk of increasing the probability of a species' extinction.

The draft guidelines are vague, with no indication of the offices that would administer them, what procedures would be followed for assigning recovery credits and debits, precisely what information would be required for making those determinations, and whether and how the public and stakeholders would be given opportunities for review and comment. In the absence of such important details, the draft guidelines are too undeveloped to implement even if there were a legal basis for them. Also, the agencies would be required to provide assurances that the use of recovery credits would in no case increase a species' risk of extinction and, as noted above, we do not believe that the agencies can do so with confidence.

Finally, we believe the proposed approach is inconsistent with the explicit purpose of the Endangered Species Act, which is—in part—to conserve the ecosystems upon which endangered and threatened species depend. The draft guidelines provide no context for evaluating the ecosystem implications of the proposed recovery crediting scheme. One interpretation of the guidelines is that ecosystems would become more vulnerable to the adverse effects of human actions if they can be degraded in exchange for what are deemed positive actions benefiting a species. Similar approaches to the conservation of wetlands have too often resulted in the destruction of natural marshes in exchange for newly created marshes that, at best, confer only a portion of the ecological benefits derived from natural ecosystems.

For the above reasons, the Marine Mammal Commission recommends that the Fish and Wildlife Service withdraw the proposed recovery crediting guidance until such time as the Endangered Species Act is amended to provide specific authority for implementing such an approach and a clear set of guidelines is developed.

If you have any questions regarding the above comments and recommendation, please let me know.

Sincerely,



Timothy J. Ragen, Ph.D.  
Executive Director

Cc: H. Dale Hall