THE HUMANE SOCIETY OF THE UNITED STATES

50th Anniversary
THE HUMANE SOCIETY OF THE UNITED STATES

OFFICERS
David O. Wiebers, M.D.
Chair of the Board
Anita W. Coupe, Esq.
Vice Chair
Wayne Pacelle
President & CEO
G. Thomas Waite III
Treasurer & CFO
Roger A. Kindler, Esq.
General Counsel & Vice President

STAFF VICE PRESIDENTS
Andrew N. Rowan, Ph.D.
Executive Vice President Operations
Patricia A. Forkan
Senior Vice President International Programs & Regions
Martha C. Armstrong
Senior Vice President Domestic Animal Programs
John W. Grandy, Ph.D.
Senior Vice President Wildlife & Habitat Protection
Michael C. Appleby, B.Sc., Ph.D.
Farm Animals & Sustainable Agriculture
Katherine Benedict
Administration, Information Services, & Technology
Nicholas Braden
Communications
Richard M. Clugston, Ph.D.
Higher Education
Randall Lockwood, Ph.D.
Research & Educational Outreach
Steve Putnam
Business Development & Corporate Relations
Robert G. Roop, Ph.D., SPHR
Human Resources & Education Programs
Melissa Seide Rubin, Esq.
Field & Disaster Services
Martin L. Stephens, Ph.D.
Animal Research Issues
Richard W. Swain Jr.
Investigative Services
Gretchen Wyler
Hollywood Office

DIRECTORS
Patricia Maros Asip
Peter A. Bender
Donald W. Cashen, Ph.D.
Anita W. Coupe, Esq.
Judi Friedman
Alice R. Garey
David John Jhirad, Ph.D.
Jennifer Leaning, M.D.
Eugene W. Lorenz
Jack W. Lydman
William F. Mancuso
Patrick L. McDonnell
Judy J. Pell
Joe Ramsey, Esq.
Jeffery O. Rose
James G. Ross, Esq.
Marilyn R. Seyler
Walter J. Stewart, Esq.
John F. Taft
David O. Wiebers, M.D.
K. William Wiseman

John A. Hoyt
Paul G. Irwin
Presidents Emeriti

Murdaugh Stuart Madden, Esq.
Vice President & Senior Counsel

NGO in general consultative status with the Economic and Social Council of the United Nations

Printed on recycled paper

Department of the Interior
Minerals Management Service
Rules Processing Team
381 Elden St. MS-4024
Herndon, Virginia, 20170-4817

3 January 2006

Re: RIN 1010-AD10, Proposed Regulations for Complying with the ESA and MMPA

On behalf of the more than nine million members and constituents of The Humane Society of the United States (The HSUS), I am submitting the following comments on your proposal to clarify regulations regarding the information that the Minerals Management Service (MMS) will require of potential lessees to ensure compliance with the Endangered Species Act (ESA) and the Marine Mammal Protection Act (MMPA). Although we are pleased to see the MMS acknowledge the importance of complete information regarding the potential impacts of leasing activities on protected marine species, we wish to point out some deficiencies in the proposed requirements.

The HSUS agrees that post-activity monitoring for effects is essential. However, we are concerned that there is no requirement in this proposal for applicants to provide information on baseline conditions or to conduct baseline monitoring. Without a complete picture of habitat use prior to the conduct of an activity, it will be impossible to make reasonable statements about the consequence of the action; thus negating the utility of post-activity effects monitoring. For example, if a lessee will be engaging in exploration, construction or extraction activities that generate a significant amount of noise, there is no way to assure that animals were not displaced from important habitat as a result of the activity unless there is some baseline knowledge of the faunal communities that were present prior to the onset of activities.

The MMS held a workshop in New Orleans in 1999 to discuss impacts of oil and gas exploration extraction on protected species in the Gulf of Mexico. Presentations at the meeting, as well as subsequent discussion, focused on the concern that there had been no baseline collected prior to issuing permits for extraction and thus it was not possible to say what marine mammal species were in the Gulf, their abundances, or the areas that might have been in use prior to the start of exploration and extraction activities. That there was a variety of marine mammal species in the Gulf was not at issue; what was at issue was whether

species composition, abundance or habitat use might have been altered subsequent to the issuance of numerous leases along the outer continental shelf.

The MMS should require that any prospective lessee verify that there are data available on marine mammal abundance and distribution in the area of the proposed lease site to allow comparison of pre- and post-activity habitat use by marine mammals. Without a baseline for comparison, any ex post facto plan to conduct impact monitoring would be meaningless.

The proposed change would require applicants to submit a plan for mitigation measures. The HSUS is also concerned that lessees will rely on previous assertions of the effectiveness of mitigation measures without fully considering evidence that questions the efficacy. For example, a mitigation plan that relies on observers posted to watch for marine mammals prior to or during onset of noise generation may not be sufficient. A study by Hain et al. (1999) found that, even with ideal observation conditions, there was only a 33% probability that right whales known to be in the area would be detected. His findings were subsequently confirmed by referencing satellite transmitter data to reports by observers. Hain further found that only 11% of right whales were detected at distances of more than a mile and a half from the observers. It is clear that even trained observers can miss sighting animals.

Furthermore, if the proposed activity involves the use of a mobile vessel, as would likely be the case in seismic surveys and other exploratory activities, there is no assurance that animals will be sighted by the vessel. A study by Butterworth (in Buckland 1993) indicated that the probability of detection [$g_{(0)}$] was directly proportional to the speed of the vessel. Although Butterworth's study was constrained by a limited sample size, Best (1982) summarized the Butterworth study, stating "The chances of all the animals on a survey track line being seen (one of the critical assumptions of line transect theory) are therefore dependent on the speed of the surveying vehicle and the frequency with which the whales surface to breathe. Clearly, the faster the vehicle moves, and the more infrequently the whale surfaces, the greater the chances that not all of the animals on the track line will be detected."

Acoustically sensitive species such as the deep-diving sperm whales and beaked whales commonly remain submerged for long periods of time and thus may not be seen by either vessel-based or aerial observers. Mitigation measures that rely on assurances by observers that animals are not in the area may be insufficient in and of themselves. Additionally, sightings rates for beaked whales may be as low as 2% (Barlow and Gisiner, 2004) We offer this example of the limitations of mitigation plans based on requiring observers as a way of pointing out that, while it is prudent to require a mitigation plan, this may not assure that no harm will result; and mitigation plans that rely on traditional methods may be insufficient. It may be helpful to undertake a programmatic evaluation of various techniques for mitigation to determine a priori the greatest concerns raised by the activity and the most useful combination of mitigation measures rather than relying on applicants to suggest measures ad hoc.

This type of evaluation could take place under the aegis of a programmatic Environmental Impact Statement, one component of which would evaluate likely effects of similar activities, assess potential cumulative impacts from a number of projects taking place along the range of marine mammal species, and identify the most meaningful mitigation measures for similar activities.

In summary, we are pleased to see the MMS adopt rules to mandate post-activity monitoring, but hope that the Service will mandate baseline information to use as a comparison and is conservative in its review and acceptance of monitoring criteria.

Sincerely,

Sharon B. Young
Marine Issues Field Director

References Cited

Barlow, J. and R. Gisiner. 2004. Mitigation and Monitoring. Marine Mammal Commission Beaked Whale Technical Workshop

Buckland, S.T., D.R. Anderson, K.P. Burnham and J.L. Laake. 1993. Distance Sampling. Chapman and Hall, London.

Butterworth, D.S., P.B. Best and M. Basson. 1982. Results of Analysis of Sighting Experiments Carried Out During the 1980/81 Southern Hemisphere Minke Whale Assessment Cruise. Rep. Int. Whal. Commn. 32:819-834.

Hain, J.W.W., S. L. Ellis, R. D. Kenney and C.K. Slay. 1999. Sightability of right whales in coastal waters of the southeastern United States with implications for the aerial monitoring program. Pp. 191 ñ 207 in: Marine Mammal Survey and Assessment Methods, G. W. Garner, S. C. Amstrup, J. L. Laake, B. F. J. Manley, L. L. McDonald and D. G. Robertson, editors. A. A. Balkema: Rotterdam, Netherlands.