

**DEPARTMENT OF COMMERCE****National Oceanic and Atmospheric Administration****50 CFR Part 216**

[Docket No. 071105649-8028-01]

RIN 0648-AW22

**Marine Mammals: Advanced Notice of Proposed Rulemaking**

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

**ACTION:** Advance notice of proposed rulemaking; request for comments.

**SUMMARY:** NMFS is considering proposing changes to its implementing regulations governing the taking of stranded marine mammals under section 109(h), section 112(c), and Title IV of the Marine Mammal Protection Act (MMPA), and is soliciting public comment to better inform the process. The taking of stranded marine mammals and release of rehabilitated marine mammals to the wild is governed by the MMPA and NMFS implementing regulations. NMFS intends to clarify requirements and procedures for responding to stranded marine mammals and for determining the disposition of rehabilitated marine mammals, which includes procedures for the placement of non-releasable animals and for authorizing the retention of releasable rehabilitated marine mammals for scientific research, enhancement, or public display. Any other recommendations received in response to this Advanced Notice of Proposed Rulemaking (ANPR) (see **DATES and ADDRESSES**) will be considered prior to proposed rulemaking.

**DATES:** Written comments must be received at the appropriate address or facsimile (fax) number (see **ADDRESSES**) no later than 5 p.m. local time on March 31, 2008.

**ADDRESSES:** You may submit comments, identified by "RIN 0648-AW22," by any one of the following methods:

- Electronic Submissions: Submit all electronic public comments via the Federal eRulemaking Portal <http://www.regulations.gov>;
- Fax: (301) 427-2525, Attn: Stranding Regulations ANPR
- Mail: Chief, Marine Mammal and Sea Turtle Division, Attn: Stranding Regulations ANPR, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13635, Silver Spring, MD 20910.

Instructions: All comments received are a part of the public record and will generally be posted to <http://www.regulations.gov> without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

NMFS will accept anonymous comments. Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

**FOR FURTHER INFORMATION CONTACT:** Sarah Howlett, Fishery Biologist, Office of Protected Resources, NMFS, at (301) 713-2322, ext. 202.

**SUPPLEMENTARY INFORMATION:** NMFS has the authority, delegated from the Secretary of Commerce, to take stranded marine mammals under section 109(h) of the MMPA (16 U.S.C. 1379) and to establish and manage the Marine Mammal Health and Stranding Response Program (MMHSRP) under Title IV of the MMPA (16 U.S.C. 1421 *et seq.*). Title IV of the MMPA charges the Secretary of Commerce to develop and maintain a marine mammal health and stranding response program with three goals: (1) Facilitate the collection and dissemination of reference data on the health of marine mammals and health trends of marine mammal populations in the wild; (2) correlate the health of marine mammals and marine mammal populations, in the wild, with available data on physical, chemical, and biological environmental parameters; and (3) coordinate effective responses to unusual mortality events by establishing a process in the Department of Commerce in accordance with section 404 of the MMPA.

Under the MMHSRP, NMFS has the authority to: enter into agreements with persons to take marine mammals in response to a stranding (in accordance with section 112(c) of the MMPA); collect information on procedures and practices for rescue and rehabilitation of stranded marine mammals; develop criteria and provide guidance for determining the releasability of a rehabilitated marine mammal to the wild; and collect information on strandings, life history, and reference level data. The National Marine Mammal Stranding Network (Network) is a major component of the MMHSRP. The Network consists of organizations nationwide that respond to stranded cetaceans and pinnipeds (except walrus) on land and within U.S. waters. These organizations are authorized through

Stranding Agreements issued by NMFS under section 112(c) of the MMPA or through section 109(h), which authorizes Federal, state, and local government employees to take marine mammals in the course of their official duties. Organizations involved in the Network include academic institutions, museums, government agencies, Native American tribes and Alaska Native communities, non-profit and for-profit organizations, and individuals.

The regulations in 50 CFR 216.22 implement MMPA sections 109(h)(1)(A) and (B); and 109(h)(3) (16 U.S.C. 1379-Federal Cooperation With States) and were last updated in 1991. NMFS is considering updating § 216.22 to be consistent with the 1994 Amendments to the MMPA, and broadening the scope to include other authorized activities including: MMPA sections 109(h)(1)(C) and 109(h)(2) (16 U.S.C. 1379); section 112(c) (16 U.S.C. 1382-Regulations and Administration); section 403 (16 U.S.C. 1421b-Stranding Response Agreements), and possibly other aspects of Title IV-Marine Mammal Health and Stranding Response, of the MMPA (16 U.S.C. 1421). The regulations in 50 CFR 216.27 implement MMPA section 402(a) (16 U.S.C. 1421a-Determination; Data Collection and Dissemination) and were last updated in 1996. NMFS is considering updating § 216.27 to clarify procedures and requirements for: rehabilitated marine mammal release determinations, which are defined in the draft *Policies and Best Practices for Marine Mammal Stranding Response, Rehabilitation, and Release* (Policies and Best Practices), disposition of non-releasable animals; data and sample collection; euthanasia of stranded marine mammals; and public viewing of marine mammals in rehabilitation.

The MMHSRP is currently undergoing a programmatic National Environmental Policy Act review, which includes the finalization and issuance of the Policies and Best Practices. The notice of availability for the Draft Programmatic Environmental Impact Statement (PEIS) was published in the **Federal Register** on March 16, 2007 (72 FR 12610). The Draft PEIS, Policies and Best Practices, and other supporting documents are available on the MMHSRP website: <http://www.nmfs.noaa.gov/pr/health/eis.htm>. The Final PEIS is anticipated in early 2008.

The following paragraphs contain potential regulatory changes being considered by NMFS. The regulatory sections under consideration can be found at 50 CFR 216.3, 216.22, 216.26, and 216.27. The specific parts and subparts are identified below and are either followed by recommendations

from NMFS on possible alternatives or changes to the current language, or a general solicitation by NMFS for public comments pertaining to that section.

In § 216.3, a number of new terms have been introduced into the implementing guidelines, protocols, and policies, and terms may currently be used differently than when they were first defined. New definitions may need to be included or current definitions may need to be revised in order to reflect these changes. For example, the definition of a “stranded marine mammal” may be clarified or expanded. Are there existing definitions relevant to marine mammal strandings that need clarification or expansion? Are there any new definitions pertaining to stranded marine mammals that need to be added to these regulations?

In § 216.22 (a), we are considering expanding this paragraph to include all persons authorized to respond to stranded marine mammals, including Federal, state, and local government employees (government employees) (MMPA section 109(h)(1)) and any non-governmental persons designated under MMPA section 112(c). Should regulations for government employees and 112(c) designated responders be combined in the same section or in separate sections? Should all stranding responders, regardless of whether they are a government employee or a designated responder (authorized by a Stranding Agreement), be required to follow the same procedures for taking stranded marine mammals, including following the same animal handling and treatment, data collection, and reporting requirements? If so, should these regulations provide specific policies or procedures that government employees must follow and specify what these government stranding responders operating under section 109(h) of the MMPA should and should not do, similar to those established in Stranding Agreements for responders designated under MMPA section 112(c)?

NMFS may also clarify that “taking” includes euthanasia, as specified in MMPA section 109(h)(1), and add paragraph § 216.22(a)(4) to further address euthanasia. NMFS proposes to list acceptable humane methods of euthanasia in the regulations, as defined in the draft Policies and Best Practices. Should euthanasia methods be part of NMFS policy and referred to in regulations or should they be specifically included in regulations? Should NMFS add criteria regarding qualifications necessary to obtain authorization to perform euthanasia of a stranded marine mammal and criteria for the use of firearms to accomplish

euthanasia? Any recommendations on the subject of euthanasia will be considered.

In § 216.22(a)(3), NMFS is planning to publish the minimum requirements for stranding responders, defined in the Policies and Best Practices, including: (1) criteria for receiving designation under MMPA section 112(c); (2) criteria for maintaining good standing under section 112(c) designation; (3) standards for maintaining marine mammals in rehabilitation; (4) data collection required under MMPA sections 402(b)(3) (stranding information by NMFS region), 402(b)(4) (other life history and reference level data), and 402(c) (availability of collected stranding data and information); and (5) carcass disposal (acceptable methods and protocols; Federal, state, and local environmental laws and jurisdiction; private land owner considerations, etc.). NMFS may also add provisions for taking and transporting samples from live stranded animals for diagnostic analysis and/or archiving, and criteria and procedures for revoking MMPA section 112(c) agreements.

In § 216.22(b), NMFS may also change the reporting requirements (i.e., information required and frequency of reporting) for government officials and employees to be the same as the reporting requirements for stranding network participants designated under MMPA section 112(c). Section 112(c) agreement holders are required to submit Level A data within 30 days of a stranding event per their Stranding Agreement; NMFS proposes to include this as a regulatory requirement. Level A data includes, but is not limited to, location information, animal disposition, morphological data, whether or not the animal was necropsied, and carcass/specimen disposition. The complete required Level A data can be found on the following website: <http://www.nmfs.noaa.gov/pr/pdfs/health/levela.pdf>. Given the increased number of disease outbreaks observed in marine mammals that have population level effects and the potential for transmission of diseases from marine mammals to humans, NMFS is proposing to incorporate language in this paragraph to require disease reporting or sample submission for specific diseases from all stranding responders (those designated under MMPA sections 109(h) and 112(c)).

In § 216.22 (c), NMFS is considering deleting the word “salvage” and utilizing a term relevant to taking samples from both live and dead stranded animals.

In § 216.22(c)(1), NMFS is considering expanding the purposes of sample collection to include diagnostic purposes, in addition to research, curation, and educational purposes.

In § 216.22(c)(2), NMFS intends to expand the scope of this paragraph to include live animals and modify reporting requirements, including Level A data collection and submission. Is the 30-day reporting requirement and information required adequate? Should special reporting provisions for die-off or disease outbreak events be required?

In § 216.22(c)(3), NMFS recognizes a significant need for a standard method of identifying an animal so that each animal is recorded only once (to avoid “double-counting”) and so that NMFS can ensure that parts and samples will be traced back to the original stranding (or other legal take) for scientific, diagnostic, and management purposes. NMFS intends to develop a specific numbering system that allows responders to assign a unique number in the field which would be used in the Marine Mammal National Database. This numbering system would not replace organizational/institutional numbering systems, but may require responders to add a field to their databases.

In § 216.22(c)(4), Is it acceptable, for example, to use marine mammal tissues in research to develop a commercial vaccine that can be sold, where the vaccine itself is not composed in part or whole of any marine mammal? NMFS intends to clarify the language regarding reimbursement from recipients for services and transportation costs associated with transferring stranded animal samples or parts.

In § 216.22(c)(5), NMFS is considering combining regulations governing the transfer of parts taken under this paragraph with § 216.37 Marine Mammal Parts (May 10, 1996; 61 FR 21937) and having one section of the regulations covering transfers of any marine mammal part legally taken (during scientific research, subsistence harvest, stranding, etc.). NMFS is also considering establishing criteria under which cell cultures and cell lines of tissues collected from stranded marine mammals may be developed, used, or transferred for research, diagnostic, treatment, or archival purposes.

In § 216.22(c)(7), NMFS is proposing to include a provision for allowing Regional Administrators and Office Directors, as well as the Assistant Administrator, to authorize export and re-import of stranded animal parts for diagnostic testing, research, education, and curatorial purposes under these regulations, and combine this paragraph

with parts transfer procedures under § 216.37.

§ 216.22(c)(8), Are there any other exceptions that should be considered (e.g., transferring carcasses for necropsy training workshops)?

§ 216.26, NMFS intends to clarify the scope and procedures within this paragraph, including whether they apply to ESA-listed species and/or how to properly manage parts from endangered species under these circumstances. Should NMFS consolidate § 216.26 with other parts sections to simplify the information and procedures? Is there any other clarification required in this section, such as whether this section would be applicable to a hard part with soft tissue still attached?

In § 216.27, in paragraph (a) Release requirements, NMFS intends to publish regulatory requirements and/or standards for releasing rehabilitated marine mammals to the wild based on the draft Policies and Best Practices. Do any of the administrative procedures need to be clarified or modified, and if so, in what way? NMFS proposes these regulatory requirements to include a standardized health certificate for rehabilitated marine mammals to be completed prior to their release to the wild and retention of these records. What are the necessary components of this health certificate and the appropriate retention time for records?

In § 216.27(b), NMFS may clarify the procedures for making a non-releasable or postponed release determination and provide further guidance on procedures in paragraphs (b)(3)(i) and (ii) regarding making a request to retain or transfer custody of a non-releasable marine mammal, and when euthanasia is appropriate. Any comments on these sections would be appreciated.

In § 216.27(c), NMFS may develop a standardized method for making

disposition decisions, including procedures for the placement of non-releasable animals for public display, research, or enhancement purposes and for informing facilities of the availability of non-releasable marine mammals. How should facilities be notified of the availability of non-releasable animals? How should NMFS determine the placement of marine mammals? This would include decisions on which facility receives the animal and what purpose the animal would be used for (scientific research or public display). Should NMFS have standard criteria to use to determine where to place an animal (e.g., pool size, availability of suitable conspecifics, distance of transport, etc.)? How much flexibility is necessary for these criteria? NMFS may clarify this paragraph to state that a special exemption permit is required to retain a stranded marine mammal that was determined to be releasable to the wild following rehabilitation for scientific research, enhancement, or public display. Any recommendations on how these processes should be implemented and what concerns there are associated with disposition determinations would be appreciated.

In § 216.27(c)(5), Should marine mammals undergoing rehabilitation or pending disposition determination be subject to public viewing? If not, provide justification. If so, under what circumstances and why? And, if so, does NMFS need to clarify the definition of public viewing for animals undergoing rehabilitation to differentiate this from permanently captive animals on public display? Would public viewing of rehabilitating marine mammals have an effect on their chances for survival post-release? NMFS understands the significant public interest in animals undergoing rehabilitation, however public access to

sick or injured animals does carry some risks to the animals and public health. NMFS proposes to provide guidelines or regulations on public access to marine mammals undergoing rehabilitation. What should NMFS include in these guidelines or regulations and how should they be implemented?

In § 216.27(c)(6), Does NMFS need to further define or clarify what activities would qualify as intrusive research on a marine mammal undergoing rehabilitation, based on the definition in § 216.3, or qualify the procedures for making this determination for animals undergoing rehabilitation? Should NMFS require Institutional Animal Care and Use Committee (IACUC) review before intrusive research occurs on animals in rehabilitation?

#### Public Involvement

NMFS invites the public to submit written comments (see DATES and ADDRESSES) on the current regulations, recommended changes to the current regulations and any relevant issues pertaining to stranding response activities for consideration during the future proposed rulemaking. Be as specific as possible when providing draft language. NMFS does not intend to convene public meetings associated with this ANPR. Comments and recommendations received in response to this ANPR will be reviewed as part of a proposed rulemaking, which may be the next step in this regulatory process.

Dated: January 24, 2008.

**Samuel D. Rauch III,**

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

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