

MARINE MAMMAL COMMISSION
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17 December 2007

Mr. P. Michael Payne
Chief, Permits Division
Office of Protected Resources
National Marine Fisheries Service
1315 East-West Highway
Silver Spring, MD 20910

Dear Mr. Payne:

The Marine Mammal Commission, in consultation with its Committee of Scientific Advisors on Marine Mammals, has reviewed the Service's 13 September 2007 advance notice of proposed rulemaking (72 FR 52339) seeking public comment on revisions to the Service's implementing regulations at 50 CFR Part 216 governing the issuance of permits for scientific research and enhancement activities involving marine mammals.

Research is our primary means of gathering information about marine mammals and the ecosystems of which they are a part. It is, therefore, essential to our conservation efforts. If implemented effectively, the permitting process should promote research in support of the conservation and management objectives of the Marine Mammal Protection Act, the Endangered Species Act, and related legislation. More specifically, the permitting process provides a mechanism to identify and consider the costs and benefits of research, which should help focus research questions and improve research methods. The process should ensure that research efforts are not unnecessarily duplicative, thereby promoting more effective use of limited research resources. The process should help to ensure research methods are the best available to maximize scientifically valid results. It also should ensure that those methods are as humane as possible. The process also provides a check to ensure that the effects of proposed research, by itself or in combination with other human effects, are not so significant that they (a) place the affected species at excessive risk or, (b) compromise the scientific validity of the results. Finally, the process provides an opportunity for public participation by reviewing and commenting on proposed research.

It is also true, however, that the permitting process imposes costs on those planning to do research. For that reason, the Commission believes that it is incumbent upon the Services and all those involved to make the permitting process not only as effective as possible, but also as efficient as possible. In part, that can be done by avoiding unnecessary research constraints or requirements. A careful examination of the regulations is a good place to start and our recommendations and comments below are aimed at assisting the Service with such an effort. It is also possible and perhaps even likely that further, larger changes may be required to optimize the permitting process. After the rulemaking currently underway, it behooves us all to step back and consider whether further changes are needed to ensure the process is functioning smoothly, equitably, and in a manner that accomplishes permitting objectives with the least burden on the researchers. For example, the difference in processes used by the National Marine Fisheries Service and the Fish and Wildlife Service will not be addressed by the proposed rulemaking, but should be given further consideration. The Commission would be pleased to participate in this larger review process, or even lead it, if necessary.

For the matter presently at hand, the following are the Commission's comments on possible regulatory changes being considered by the Service.

§ 216. Regulations Governing the Taking and Importing of Marine Mammals

The Marine Mammal Commission recommends that the Service propose revisions to this section to incorporate the prohibition on exporting marine mammals, added by the 1994 amendment to the Marine Mammal Protection Act (MMPA). Doing so would bring this section into conformity with the prohibited activities specified in section 102(a) of the Act.

§ 216.3. Definitions

The key determination applicable to scientific research permits is whether the proposed taking is required to further a "bona fide scientific purpose." This term is already defined, both in section 3(22) of the Act and in section 216.3 of the regulations. The existing regulatory definition includes two clarifications not included in the statutory definition. First, it specifies that such research must be carried out by "qualified personnel." Second, it specifies that collecting and maintaining marine mammal parts in a "properly curated, professionally accredited scientific collection" constitutes a bona fide scientific purpose by virtue of contributing to the basic knowledge of marine mammal biology or ecology.

Despite these definitions, determining whether an applicant has satisfactorily demonstrated that proposed research meets the bona fide requirements has proven to be somewhat difficult in practice. However, revising the definition is not the appropriate way to fix the problem. Rather, we suggest that the Service propose changes to the section concerning issuance criteria to explain more clearly how this definition will be applied. Among other things, this would allow the Service to describe who it regards as qualified personnel.

The Service also should describe criteria for institutions that meet the qualifications for maintaining a "properly curated, professionally accredited scientific collection," perhaps by adding a definition of that term. In addition, the Service should consider revising its regulations to clarify that researchers seeking to obtain or use specimens maintained in such a collection will need to obtain separate authorization to transport and possess them.

The other term that the Service should consider defining is "enhancing the survival or recovery of a species," which is the second type of permit being covered by the ANPR. Considerable confusion exists about the term "enhancement" because it is used differently under the permit provisions of the MMPA and those of the Endangered Species Act (ESA). In part, this is because only enhancement permits and permits for scientific research are available under the ESA and enhancement permits have become, by necessity, a catch-all provision. Enhancement under the ESA has been interpreted broadly and such permits have been used to authorize a variety of activities, including captive breeding programs, public display, rescue and rehabilitation, and even trophy hunts of listed species.

In contrast, the enhancement permit provision of the MMPA was added in the late 1980s, when the Act already had provisions pertaining to public display, rescue and rehabilitation of stranded marine mammals, and hunting (under the generally applicable waiver provisions). As such, the MMPA provision was crafted much more narrowly than the ESA provision, aimed almost exclusively at management actions designed to enhance the status of depleted marine mammal stocks in the wild. Up until that time, such activities were largely experimental and they had been authorized under scientific research permits. However, the value of some of these activities, such the monk seal head-start program, was becoming clear, and continuing these proven conservation strategies as scientific research activities was no longer considered appropriate.

Because of the difference in the origin and scope of the enhancement permit provisions under the MMPA and the ESA, the Service's regulations should seek to clarify how this term is used under the MMPA. Additional guidance in crafting an appropriate definition can be found in the legislative history of the 1988 amendments and in the enclosed letter from the Commission to the Fish and Wildlife Service commenting on an enhancement permit application seeking authorization of as variety of activities under the two statutes. Among other things, the Service might want to clarify whether enhancement permits are available for all marine mammal species, or only for those facing conservation challenges—i.e., stocks that are listed as threatened or endangered, designated as depleted, or declining and which may become depleted if remedial actions are not taken.

§ 216.14 (Subpart B). Marine Mammals Taken before the MMPA

The Marine Mammal Commission sees no reason to amend this section to specify that exports of pre-MMPA marine mammals and marine mammal parts are allowed. Section 102(e) of the MMPA and section 216.14(a) of the regulations already make it clear that none of the prohibitions apply to marine mammals taken before the effective date of the Act. Moreover, anyone trying to export a pre-Act marine mammal or marine mammal part will either need to demonstrate that the mammal or part was taken before the Act's effective date, or should already have done so to avoid running afoul of the possession prohibition.

§ 216.15. Depleted Species

Section 3(1)(C) of the MMPA establishes that all marine mammals listed under the ESA are automatically considered depleted. To the extent that the Service believes that regulatory clarification is needed, section 216.15 does not seem to be the right place to accomplish this. This provision is merely a list of those marine mammals that have been designated as depleted (although some have subsequently been listed under the ESA). The Service could provide a catch-all provision in this section to provide the necessary clarification. For example, the Service could add a new subsection (a)[bis] reading, "All marine mammals included in the list of endangered or threatened wildlife published under 50 C.F.R. 17.36. Alternatively, for consistency with the definition of "marine mammal" under section 216.3 (i.e., only species under NMFS jurisdiction), the recommended provision could refer to "...those species listed under sections 224.101(b) and 223.102 of the

Service's regulations. Another alternative would be to add a regulatory definition of "depleted" under section 216.3 to accomplish the clarification the Service is considering.

§s 216.16 and 216.17. Prohibitions under the General Authorization and General Prohibitions

The Commission questions the placement of section 216.16 with the general prohibitions provision. Either it should be moved to Subpart D or parallel provisions applicable to scientific research and other types of permits should be appended and moved to Subpart B. Although the regulations include penalties and permit sanctions under section 216.40, the level of specificity is inconsistent with respect to violations of general authorizations versus permits. For example, it is not clear why it is explicitly prohibited to provide false information in a letter of intent for a general authorization, but not in a permit application. Similarly, there is no specific provision prohibiting a person from violating the terms or conditions of a permit, although there is for a general authorization. These inconsistencies should be rectified.

Subpart C. General Exceptions

The Marine Mammal Commission recommends that the Service amend its regulations to accommodate transfers of marine mammal parts from Alaska Natives to holders of scientific research permits without requiring multiple permits, provided that the parts were legally taken for subsistence purposes in accordance with section 101(b) of the MMPA. The Commission believes that this is best accomplished in the permit regulations, rather than in section 216.23. Perhaps the cleanest way to authorize transfers from Alaska Native subsistence hunters to researchers is to have the researcher seeking such specimens identify that source in the application and obtain samples without specifying the individual hunter(s) from whom specimens would be obtained. The applicant would, however, need to specify the type (species, part, size of sample, etc.) and number of samples being sought in the application. If the permit is issued, such samples then could be obtained from hunters without further authorization. The Commission recognizes potential problems with this approach, but believes that they can be overcome. Samples should be obtained either from parts that are not used for subsistence or the creation of handicrafts, or they should be so small that they would not have an appreciable impact on subsistence/handicraft use. If a hunter is to target specific individuals or certain sex/age classes, or is to be compensated for taking animals, then the hunter should be included as an agent under the permit.

The Service also might consider amending its regulations to allow certain transfers of and tests on marine mammals at the initiative of hunters' groups or Alaska Native organizations, provided that the tests are related to the underlying subsistence use. For example, the Service could re-define the term "subsistence" in section 216.3 to include health screening and testing for contaminants from marine mammals to be used for food such that the taking, transfer, and testing would all be covered by section 101(b). A conforming change to section 216.23 authorizing the transfer also would be needed.

§ 216.25. Exempted Marine Mammals and Marine Mammal Parts

Historically, the Services' marine mammal regulations have been organized to track the corresponding statutory provisions. Just as section 102 originally contained all of the Act's prohibitions, so did Subpart B of the regulations. The exceptions to these prohibitions set forth in the various sections of the Act followed in Subparts C & D. As the Act has evolved and been amended, this arrangement has not been maintained. Some of the prohibitions are now found elsewhere in the regulations (e.g., those related to tuna labeling are contained in Subpart H). Likewise, exceptions to the taking prohibition are found elsewhere in the regulations (e.g., Subpart I et seq.) and even in different parts of the regulations (e.g., Part 229). At the same time, regulations promulgated jointly under the Fur Seal Act of 1966 and the MMPA, but pertaining only to the taking and uses of northern fur seals and the administration of the Pribilof Islands under the Fur Seal Act have been moved and inserted in the middle of Part 216. In short, the organization of the Services' regulations is fraught with inconsistencies in organization. It could use a general overhaul. Such a reorganization and re-writing of the regulations is well beyond the scope of the current ANPR, which we understand to be targeted only at permits for scientific research and species enhancement. Although we suggest that the Service retain their immediate focus on permit-related regulations, the Service may wish to consider a more general reorganization at a later date.

Clearly, various strategies can be used to organize the regulations. On the one hand, certain narrowly drawn prohibitions (e.g., those pertaining to supplying false information in applications) might be usefully placed along with the exception to which they apply. On the other hand, separating all of the prohibitions, exceptions, etc., in separate subparts may be easier for some users of the regulations to follow. The Commission does not have a preference for how the Service organizes the regulations, so long as parallel provisions are treated consistently. For example, the organization of the provisions related to general authorizations should be arranged similarly to those for scientific research permits. For permit-related matters, we encourage the Service to correct the existing organizational inconsistencies as part of the anticipated rulemaking.

§ 216.31. Definitions

The Commission does not recommend any specific changes to this section. We believe, however, that absent a compelling reason, all of the regulatory definitions, even those applicable only to permit issues, should be included in a single section, i.e., § 216.3. Currently, § 216.31 merely clarifies the relationship between the definitions used under the MMPA and those applicable under the ESA. This seems to be all that is needed here. We believe, however, that the Service should provide additional guidance, not necessarily in the regulations, by identifying inconsistencies in definitions used to implement the MMPA and ESA, and noting which the Service considers to be the "more restrictive."

216.32. Scope

The Commission believes that the coverage of this current provision is appropriate. However, the Service may wish to rewrite subsection (b) to read "...and parts from marine mammals listed as threatened or endangered under the ESA" to clarify that it is species, rather than parts, that are the subject of listings.

§ 216.33. Permit application submission, review, and decision procedures

§ 216.33(c). Initial review

Potential conflicts between the requirements of the MMPA permitting provisions and those applicable under the National Environmental Policy Act (NEPA) are not easy to resolve, particularly those related to timing requirements of the two Acts. In *Jones v. Gordon* (792F.2d 821; Ninth Circuit 1986), the Ninth Circuit Court of Appeals provided guidance on how the timeline for taking action on permit applications under section 104(d) of the MMPA is to be reconciled with the requirements for preparing NEPA documents when the generally applicable categorical exclusion does not apply. The existing regulatory provision is consistent with that guidance; the proposed changes are not. Thus, the Marine Mammal Commission recommends that the Service review the ruling in that case and propose only changes to its regulations that are consistent with it. The guidance from the ruling is that the seemingly conflicting timing requirements of the two statutes are best reconciled by delaying publication of the notice of availability of the application until an environmental assessment or environmental impact statement has been prepared. Otherwise, the Service risks running afoul of the explicit timing requirements set forth in the MMPA. The Commission believes that the more informal decision-making process being sought by the Service can be accomplished by making a draft of the application available during any scoping and opportunity for public comment under NEPA.

§ 216.33(d). Notice of receipt and application review

As with the proposed changes to subsection (c), the Commission believes that some of the proposed changes are inconsistent with the ruling in *Jones v. Gordon*. As such, we recommend that the Service reconsider changing the sequence for publishing the notice of receipt and preparing any necessary NEPA documents. The Commission agrees that the Service should publish a summary of its basis for an initial determination that a permitting action is categorically excluded along with the notice of receipt. The Marine Mammal Commission recommends, however, that the regulations also discuss how it intends to proceed under both the MMPA and NEPA if comments on the notice convince the Service that preparation of an environmental assessment or environmental impact statement is appropriate (e.g., will further consideration of the application be suspended pending preparation of a NEPA document? Will the applicant be asked to withdraw the application pending such preparation? Will the application be denied, requiring re-submittal of the application, etc.?) The Service also might want to pursue amendments to section 104(d) of the MMPA, giving greater flexibility in how the MMPA and NEPA review processes are coordinated.

§ 216.33(e). Issuance or Denial Procedures

Here, too, we believe that the envisioned changes to reconcile the timeline for taking action under the MMPA and NEPA are inconsistent with judicial guidance. Although not an element in *Jones v. Gordon*, using similar logic, it is unlikely that a reviewing court would uphold a reconciliation of the MMPA permitting requirements and the ESA consultation requirements that allowed for extending the time to take final action that exceeded the timeframe specified in section 104(d). The Marine Mammal Commission recommends that the Service consider alternatives that are consistent with the statutory timing requirements. To the extent that deferring a decision is necessary, the Commission believes that this should be done only with an applicant's consent and only when an alternative timeframe for completing action on the permit has been identified.

The Commission also questions the value of publishing a notice in the *Federal Register* announcing the deferral of action on a particular permit application. Preparation and publication of such announcements involve staff time and expenses that might better be directed toward the timely processing of applications.

§ 216.33(e)(4). ESA-Listed Species

The Commission believes that applicants seeking to conduct research on endangered or threatened marine mammals apply for such permits in good faith. We are not convinced that this is a problem meriting additional guidance in the regulations. Nevertheless, the Service needs sufficient flexibility to deny permits to those seeking to use a permit to conduct other activities, such as ecotourism or commercial photography, for which a taking authorization may not otherwise be available. If an application is determined to meet the requirements for constituting bona fide research under the MMPA, or meets the requirements for an MMPA enhancement permit, we believe it should be considered to have been applied for in good faith.

Identifying the proposed activities that will operate to the disadvantage of a listed species is more difficult due, in part, to uncertainty regarding what constitutes a disadvantage. For that reason, the Marine Mammal Commission recommends that the National Marine Fisheries Service seek to define the term “disadvantage” in its regulations. This could be done in terms of predicted impacts to the decline or recovery of the species. For example, any effects expected to delay the species’ recovery to non-endangered or non-threatened status by X% would be considered to be to the disadvantage of the species.

The term “disadvantage” also applies to actions taken under section 103(a) of the MMPA. Thus, the Service may want to use this opportunity to develop a definition of the term that would be generally applicable under both statutes. Because section 103(a) is generally limited to marine mammal stocks that are not depleted (e.g., within their optimum sustainable population range), such a definition would have to consider not only delay in recovery time (for depleted marine mammals and ESA-listed stocks) but also the level of decline that would be acceptable for stocks already at OSP.

§ 216.34. Issuance Criteria

In many ways, this is the most important section of the Service's permit regulations and, as such, the criteria should be as clear as possible. We believe that the regulations and permit application instructions should provide additional guidance as to how the Service determines whether information submitted by an applicant indicates that "the [proposed] taking is required to further a bona fide scientific purpose." The guidance should be based on objective criteria such that the applicants and others interested in permitting actions know what to expect from decision-makers. To identify potential problems of this nature, the Service may wish to review comments from the Commission and others on applications where consistency with the bona fide requirement was questioned.

An application can meet the bona fide research requirement under three separate criteria, and these should be addressed separately in the regulations. Nonetheless, they share certain common elements. For example, to meet any of the statutory standards for bona fide scientific research, the research results must somehow be disseminated to the appropriate audience. This may be accomplished by publication in a scientific journal or a number of other mechanisms that inform those who assemble and utilize the basic knowledge of marine mammal biology or ecology or who are responsible for marine mammal conservation programs. It may therefore be appropriate in making a decision as to whether to issue a scientific research permit to look at the applicant's plans for publishing or otherwise disseminating the research results and applicant's record of disseminating results through publication or other mechanisms as appropriate as indicators of how likely it is that the information will be made available to the scientific community and/or to resource managers. It must be recognized, however, that some research (e.g., long-term ecological research) requires years of data collection before it is suitable for analysis and publication, other research is conducted by young scientists who are just establishing their publication record, and still other research may be published by scientists or persons whose main interest is outside of marine mammal science. All of these sources may provide highly valuable insights into marine mammal biology, ecology, and conservation, and they should not be precluded from doing so for lack of a publication record.

To assess the potential utility of proposed research, the Service may wish to consider several questions. Is the applicant seeking to resolve novel questions, test new hypotheses, or resolve or confirm disputed results of previous studies? Are the proposed techniques and sample sizes sufficient to yield useful and meaningful results? How likely is it that the research will be or can be carried out as proposed; that is, is the proposal overly ambitious? Are the research techniques proven or experimental? Is the potential contribution to scientific knowledge commensurate with the potential impact on the marine mammal population? These questions must be considered with caution, as the topics being studied, the questions being answered, and the animals and their environment all can have a strong influence on the nature of the research that can be conducted. Good science, by its very nature, often requires that scientists work at the so-called "cutting edge" of our knowledge, which may mean that proposed research often may fall outside the realm of what is

considered standard. Furthermore, the greatest gains in research often are likely to come from research that has a greater uncertainty as to the outcome.

As proposed by the Service in its *Federal Register* notice, the section of the regulations pertaining to issuance of permits for enhancement also should address the requirement that the method of proposed taking be humane (e.g., involves the least possible degree of pain and suffering practicable). The Commission believes that it is appropriate for the Service to require applicants to submit the findings from Institutional Animal Care and Use Committees (IACUCs) when such a review is required under the Animal Welfare Act. Although the Commission does not believe that it would be appropriate for the Service to defer to an IACUC when making a determination of humaneness, the IACUC's findings provide an important starting point for reviewing questions related to humaneness.

§ 216.35. Permit Restrictions

Much of the discussion in the ANPR involves amending permits, which is more appropriately addressed under § 216.39. Consistent with our comments on that section (below), the Commission believes that one-year extensions should be available under a permit amendment where judged appropriate by the Service.

The Commission does not see a need for regulations specifying minimum standards for qualifications of applicants and those conducting activities under a permit. The situations encountered when reviewing permit applications are varied, and we do not see how the qualifications of those participating in authorized activities can be reduced to generally applicable criteria. Some activities, such as administering drugs or anesthetizing animals, may require veterinary training but, in some instances, might be accomplished safely by an experienced marine mammal scientist who is simply consulting with a veterinarian. At the other extreme, some research tasks (e.g., conducting observations) may be appropriately carried out by interested members of the public with a modicum of training and sufficient supervision. We do not believe that much is to be gained by trying to distill the necessary levels of training, education, and experience to perform various research tasks into regulatory language rather than conducting such reviews on a case-by-case basis.

§ 216.36. Permit Conditions

Section 216.35 sets forth conditions that are generally applicable to all permits, whereas section 216.36 largely identifies those conditions or specifications that will vary from permit to permit. The Commission sees some overlap between the types of restrictions set forth in these sections, and the Service may wish to consolidate them or at least rename them to distinguish them more clearly.

§ 216.37. Marine Mammal Parts

The Commission sees a certain logic to the existing regulations concerning marine mammal parts and believes that consolidating sections 216.22, 216.26, and 216.37 might create unnecessary confusion. Section 216.22, for example, flows from section 109(h) of the MMPA, whereas section 216.37 implements the permit provisions of section 104. The underlying statutory requirements differ, so it makes sense for the regulations to differ as well. Section 216.36, which is largely regulatory and pertains to collection of specific types of parts with no prior authorization, probably warrants a separate section.

What constitutes a marine mammal part should be clarified. For instance, the regulatory definition under section 216.3 provides no guidance as to whether items produced by marine mammals (e.g., scats and spews or ambergris) are considered to be marine mammal parts subject to the Act's prohibitions. Although at first consideration the answer may seem obvious, the Service should be careful to consider the consequences with regard to items that may be considered valuable in illicit trade (e.g., ambergris).

The Commission believes separate requirements should be retained for using and transferring parts from marine mammals listed under the ESA. The permitting requirements under the two statutes are different, CITES requirements may differ (ESA-listed species are more likely to be placed on Appendix I), and a scientific research permit may be the only alternative for obtaining parts from ESA-listed species, as opposed to other marine mammal species. Because research permits may be used to obtain parts not otherwise available, heightened scrutiny is warranted.

With regard to authorizing the collection, receipt, import, export, and archiving of marine mammal parts for further research, the Commission has recommended that the Service stipulate that the parts be used for a bona fide scientific purpose, although it may not be possible at the outset to articulate precisely how the parts might eventually be used. Likewise, the Commission has recommended that the Service also require that each part to be imported has been taken in accordance with the laws of the country of origin and not in violation of the MMPA. The Marine Mammal Commission recommends that this guidance be reflected in the Service's regulations. The Marine Mammal Commission also recommends that, as a further safeguard, the Service allow marine mammal parts maintained in an authorized collection to be transferred only to those persons covered by the original permit or who possess a separate permit authorizing the possession and use of the parts. Doing so will ensure that subsequent recipients have demonstrated that their activities constitute bona fide research.

With regard to the development, use, and transfer of cell lines and gametes, the Marine Mammal Commission recommends that the National Marine Fisheries Service propose regulations to allow such activities when they meet the requirements for obtaining a scientific research or enhancement permit, but that possible abuses be prevented by prohibiting commercial use of such products. The Service may want to prohibit sales but allow permit holders to recoup their expenses in developing cell lines or collecting gametes.

§ 216.38. Reporting

Some permit-holders may not be satisfying the requirements set forth in this section on a timely basis. If that is the case, then the Service should consider adding possible consequences for failing to file complete and timely reports, including not re-issuing a research permit.

§ 216.39. Permit Amendments

The Commission does not fully understand the Service's proposal to eliminate the opportunity for permit-holders to seek or the Service to consider major amendments to permits. Although many of the procedures for authorizing a major amendment (e.g., public notice and an opportunity for comment) are the same as for issuing a permit, the Commission questions whether an entirely new application need be submitted. Requiring a new application for each major amendment will increase the paperwork burden of both the permit-holder/applicant and the Service, without much substantive gain. Absent a compelling reason for eliminating major amendments, the Marine Mammal Commission recommends that the National Marine Fisheries Service reconsider its proposal.

The Commission believes that the distinction between major versus minor amendments is necessary. The issue at stake is when public review of a proposed change is warranted. Minor amendments should include only those types of changes that are so minor that potentially adverse public comments are highly unlikely or for activities that are so similar to what was previously authorized under the permit that the opportunity for public review and comment can be considered as having already been provided. The Service should continue to consider other activities that have not been subjected to public review (e.g. new procedures, additional species, and increased numbers) to be major amendments.

§ 216.40. Penalties and Permit Sanctions

The Commission agrees that it would be desirable to provide the Service with latitude to modify permits for reasons not related to enforcement actions. It is not clear, however, that this can be accomplished consistent with the existing statutory directive. In this regard, section 104(e)(1) sets forth only three instances when a permit may be modified, suspended, or revoked. Of these, only clause (B), which requires a violation of the terms and conditions of the permit, applies to scientific research and enhancement permits. In this case, the Service may wish to consider a statutory change as a precursor to regulatory changes.

§ 216.41. Permits for Scientific Research and Enhancement

The Commission believes the organization of this section could be improved and recommends that the Service consider several amendments. First, it is not clear why scientific research and enhancement permits are lumped into a single section of the regulations. Authority for these two types of permits is derived from different provisions of the MMPA (section 104(c)(3) and

104(c)(4)) and they are subject to different criteria and requirements. Just as public display permits and photographic permits are placed in separate sections, it would make sense to separate scientific research permits and enhancement permits in the regulations.

Second, the Commission believes that it would make more sense to link scientific research permits with the regulations pertaining to the general authorization for scientific research (section 216.45) than with enhancement permits. This could be done either by considering these two types of authorizations in the same section of the regulations or in sequential sections.

Third, some of the existing headings of the regulations could be a source of confusion to applicants and the public. For instance, section 216.34 is entitled "issuance criteria," but contains only criteria generally applicable to all permit types. The regulations specific to scientific research permits and enhancement permits set forth more specific issuance criteria. Depending on whether and how the regulations are ultimately restructured and amended, previous comments from the Commission on issuance criteria might be more applicable to this section. At a minimum, the general provisions should explain that more specific criteria are set forth under the sections addressing specific permit types. Similar cross-references may be needed in other sections to link the general provisions with those under the sections concerning specific permit types.

The Service indicates that it is considering proposing changes to the provisions of section 216.41(c)(1)(vi), but it is not clear what those changes would be. The *Federal Register* notice suggests that the Service is considering adding requirements concerning the public display of marine mammals maintained in captivity for purposes of scientific research (e.g., allowing such displays only when necessary to achieve the research objectives and only when authorized by the Office of the Director). However, these requirements already exist under section 216.41(c)(1)(vi)(A). It is not clear whether the Service is considering revising the regulations to eliminate these requirements. If so, the Commission believes that the current restrictions are appropriate, with the possible exception of allowing incidental public display when it will not have any adverse effects on the research being conducted, even if such display is not "necessary" for achieving the research objective.

The Commission believes that the Service should be very cautious in considering new regulations involving the long-term maintenance and public display of marine mammals obtained under scientific research and enhancements permits once the authorized activities have been completed. There are two countervailing concerns here. The first is that animals may be taken from the wild population for the immediate purpose of research and the long-term purpose of display. This may disadvantage the wild population if it is sufficiently small that the removal affects population productivity. The second is that animals brought into captivity only for the purpose of research but then returned into the wild may pose a new risk to the wild population if they carry diseases from the captive setting to the wild. In all cases, we believe that the primary concern should be the protection of the wild population.

Currently, public display permits may not be issued for depleted marine mammals. The proposal being contemplated by the Service would provide a way around this prohibition that could

be subject to abuse and, again, certain safeguards are needed. For example, applicants should be required to indicate at the outset whether permanent maintenance in captivity is contemplated and, if not, what steps might be taken to facilitate eventual release of the animals back into the wild, and how the applicant will ensure that the release poses no significant risk to the wild population. If permanent maintenance is anticipated, the Service should consider not authorizing the placement of the animals in captivity in the first place if the proposed research or enhancement activities are not essential to the conservation of the affected species or place the species at heightened risk.

§ 216.42. Photography

The Commission agrees that the Service should promulgate regulations to implement the provisions of MMPA section 104(c)(6), which pertain to permits authorizing the taking of marine mammals for the purposes of educational or commercial photography. We also agree that those regulations should include provisions that limit the potential for ecotourism being conducted under such permits. We are concerned, however, with the suggestion that such permits might be issued using procedures akin to those applicable to the general authorization. Under section 104(c)(6), photography permits, although limited to taking by Level B harassment, are full-fledged permits subject to public notice and comment requirements of the Act.

§ 216.44. Applicability/Transition

The Service should consider deleting this section because all permits issued before or shortly after the referenced date (10 June 1996) have expired.

§ 216.45. General Authorization

As noted above, we believe that it would make sense to group the regulations pertaining to the general authorization with those concerning scientific research permits. Among other things, this may eliminate the need to repeat some of the regulatory provisions, such as the conditions set forth in section 216.41(c)(1)(vii), which the Service is considering making applicable to general authorization.

We do not agree with the Service's suggestion that the general authorization be expanded to cover research that involves taking by Level A harassment. First, as indicated in the *Federal Register* notice, this would require a statutory change. Regulatory rulemaking cannot be used to amend the Act. Second, we have substantive concerns about the proposed expansion of the general authorization. In essence, this authorization provides a shortcut around some of the procedures applicable to research permits, including the opportunity for prior public notice and opportunity for public comment. Those that crafted the MMPA recognized the value of public participation in decisions involving the authorization of taking of marine mammals. Only in limited situations, such as the general authorization (which currently applies only to relatively benign activities), have exceptions been made. The Commission does not believe that allowing taking by Level A

harassment, which includes the potential for injury of marine mammals and marine mammal stocks, should be authorized without public involvement and opportunity to comment.

Our concern about expanding the scope of the general authorization is heightened by proposals made by the Administration and others to amend the definition of the term “harassment” under the MMPA. Care needs to be taken such that possible amendments to that definition and proposed changes to the scope of the general authorization are considered in tandem. It would be inappropriate to broaden the general authorization to include Level A harassment and at the same time limit what constitutes Level A harassment to takings that have significant effects.

As an alternative, the Marine Mammal Commission recommends that the National Marine Fisheries Service consider seeking amendments to the MMPA and/or ESA that would streamline the process for authorizing the taking of marine mammals listed as threatened or endangered by Level B harassment for scientific purposes. This would make the general authorization applicable to a broader suite of species but would keep it focused on the types of activities that are not of major concern (e.g., photo-identification, population surveys, etc.).

Other Considerations

The Service indicates that it is contemplating adding provisions to the regulations that would limit opportunities for submitting applications to certain times of the year (e.g. quarterly or semi-annually). Our first impression is that such a proposal could impose hardships on some applicants and would no doubt be less convenient for applicants than the current system. Has the Service done any sort of analysis to demonstrate that the alternatives being considered actually are likely to result in smoother processing and timelier agency action? Absent such analysis, it is difficult for the Commission to take a more definitive position on these proposals. It seems that these alternatives have the potential to swamp the Permit Office with a number of applications at certain, albeit predictable, times that will require the same types of back-and-forth with applicants to obtain missing pieces of information and/or clarifications of what is being proposed. Furthermore, different types of research may be appropriate at different times of year, and any limits on applications would complicate preparations for researchers, particularly those whose activities might not coincide with the majority of studies. What might be more useful is making it clearer to applicants what information is required, and why, so that there is a greater likelihood that applications are considered complete at the outset.

Combining analysis under National Environmental Policy Act (NEPA) and section 7 consultations under the ESA may facilitate the processing of permit applications and should be considered as long as measures are taken to ensure that the new procedures do not undermine the intent of either Act. It is our understanding that complying with the requirements of these statutes is often a significant source of delay in taking action on an application. In some respects, the analysis required under the Service’s permit regulations and those under these other statutes are overlapping. For instance, the issuance criteria under section 216.34 require the proposed activities be not likely, by themselves or in combination with other activities, to have a significant adverse impact on the

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affected species or stocks. For scientific research and enhancement activities, section 216.41(b)(4) requires the Service to find that the proposed activities “will not likely have significant adverse effects on any other components of the marine ecosystem” Any activity that satisfies these requirements arguably would qualify for a finding of no significant impact under NEPA, and a no jeopardy finding under section 7 of the ESA. As such, we do not understand why separate, sequential analysis under the three Acts, as is currently the case, should be required. The Marine Mammal Commission therefore recommends that the National Marine Fisheries Service consider ways of revising the regulations to eliminate the need for separate and somewhat duplicative reviews.

Finally, and in some respects most importantly, the larger community involved in permitting issues has still not resolved the concern about cumulative effects of human activities, including research. Although research generally is intended to provide information that should promote more effective conservation efforts, by its very nature it sometimes imposes an added effect on the target species or its habitat. We believe that addressing the cumulative effects issue will require quantitative approaches supported by extensive monitoring and data collection. Although we do not believe that the marine mammal science community is prepared to describe the needed studies to understand such effects, moving in that direction is essential if we are to achieve our conservation goals. In the face of such uncertainty, we believe it is necessary to raise the level of precaution in authorizing studies that may have effects that add to or interact with the effects of other human activities, including other research. We do not see a mechanism for addressing this concern in regulations at this point, but we do wish to emphasize the need to move forward on this topic. The Commission is planning to sponsor an initial workshop on this topic in 2008, and we will contact you as our planning develops.

As noted at the beginning of this letter, we appreciate the fact that you are evaluating the permit regulations to improve the permitting process. We hope that the above comments and recommendations are helpful. If we can be of further assistance in this process, please don't hesitate to contact me.

Sincerely,



Timothy J. Ragen, Ph.D.
Executive Director

Enclosure