

MARINE MAMMAL COMMISSION
4340 East-West Highway, Room 700
Bethesda, MD 20814-4447

12 February 2009

Mr. P. Michael Payne, Chief
Permits, Conservation and Education Division
Office of Protected Resources
National Marine Fisheries Service
1315 East-West Highway
Silver Spring, MD 20910-3225

Re: Request for Amendment, Permit No. 1058-1733
(Mark Baumgartner, Ph.D.)

Dear Mr. Payne:

The Marine Mammal Commission, in consultation with its Committee of Scientific Advisors on Marine Mammals, has reviewed the above-referenced request for a permit amendment with regard to the goals, policies, and requirements of the Marine Mammal Protection Act. The applicant is seeking amendment of his current permit to authorize the tagging of several species of large whales in the Atlantic, Pacific, and Arctic Oceans. Based on the Commission's review, we offer the following recommendations and comments.

RECOMMENDATIONS

The Marine Mammal Commission recommends that—

- if the National Marine Fisheries Service is planning to reverse its current policy regarding the completion of a programmatic environmental impact statement and the issuance of permits for research on right whales, it move cautiously and with a record of decision that provides clear and adequate justification for doing so.

With regard to the permit amendment request under consideration, the Marine Mammal Commission recommends that the National Marine Fisheries Service—

- defer authorization to take right whales until it has resolved the National Environmental Policy Act issues concerning research on this species;
- approve authorization for activities involving species other than right whales, provided that the researchers take steps to minimize disturbance of the subject animals by exercising caution when approaching animals, particularly mother/calf pairs, and halt an approach if there is evidence that a whale may be injured in an unintended way [some research, such as tagging, may result in some types of anticipated and authorized injury], that mother/calf pairs may be separated for a prolonged period of time, or that a whale is exhibiting a marked change in behavior, such as leaving a feeding or resting area;
- ensure that researchers working under this permit, other permit-holders, and, to the extent possible, other researchers who might be carrying out research on the same species in the

- same areas coordinate their studies and, as possible, share data to avoid unnecessary duplication of research and disturbance of animals;
- ensure that the take tables in permit applications, amendment requests, and issued authorizations (both permits and amendments) clearly indicate the number of animals that may be taken, the ways in which they may be taken, and the number of times that individual animals may be taken in each of those ways; and
 - set the authorized take levels to take into account the estimated size of each stock and the impact that taking a large percentage of the animals in a stock, perhaps multiple times, might have on the stock.

RATIONALE

The applicant's current permit authorizes the taking of humpback, blue, fin, sei, and minke whales in the Southern Ocean and humpback, fin, and sei whales in the North Atlantic Ocean during vessel surveys for photo-identification, behavioral observation, suction-cup tagging, tracking, and by harassment incidental to conducting those activities. The purposes of the research are to examine baleen whale foraging and diving behaviors in the Southern Ocean and to determine the overlap of diving behaviors with the vertical structure of fixed fishing gear in the North Atlantic Ocean. The permit is valid through 31 May 2012.

The permit-holder is requesting that the permit be amended to authorize the taking of up to 135 individual animals (90 approached for photo-identification and suction-cup tagging and 45 for satellite tagging) of each of the following species in each of the following locations: right, blue, and gray whales (eastern stock) in the North Pacific Ocean; bowhead and gray whales in the Arctic Ocean; bowhead whales in the North Atlantic Ocean; and humpback, fin, sei, right, and blue whales in the northwest Atlantic Ocean. The permit-holder also is requesting authorization to harass up to 800 individuals of each of these species in the subject geographic areas incidental to the research activities.

The National Marine Fisheries Service published a notice in the *Federal Register* on 17 October 2005 (70 Fed. Reg. 60285) announcing its intention to prepare a programmatic environmental impact statement to analyze the effects of issuing permits authorizing research on right whales in the Atlantic and Pacific Oceans. In particular, the Service identified the need to evaluate the cumulative impacts of such research and "to assess the likely environmental effects of issuing permits under a range of alternatives characterized by different research methods, mitigation measures, and level of effort, including a range of sample sizes and temporal and geographic scopes of research." The Service also indicated that under its proposed action alternative "no permits would be issued for lower priority research activities until the highest priority tasks were completed or unless there was sufficient information to determine that the cumulative impacts of allowing additional takes for research would not disadvantage or jeopardize the continued existence of the species." Subsequent to publication of that notice, the Service's Permit Office indicated that it would not be issuing additional permits authorizing right whale research until the programmatic environmental impact statement had been completed.

The Commission understands that the Service now intends to reverse that decision and resume issuing permits authorizing research on right whales before the completion of the programmatic environmental impact statement. Until the Service completes the programmatic statement, it plans to prepare environmental assessments on the potential impacts of issuing individual permits. The Commission does not see how the Service can adequately evaluate the cumulative effects of proposed research if it looks only at the impacts of individual studies in isolation. The Commission also does not see how the Service can make informed decisions regarding the relative priority of potentially competing projects if it has not established a framework for evaluating their contribution to cumulative effects. If the Service decides to authorize this and other research activities on right whales before completing a programmatic environmental impact statement, it must provide a well-reasoned rationale for doing so.

Accordingly, the Marine Mammal Commission recommends that, if the National Marine Fisheries Service is planning to reverse its current policy regarding the completion of a programmatic environmental impact statement and the issuance of permits for research on right whales, it move cautiously and with a record of decision that provides clear and adequate justification for doing so. In particular, the record of decision should clearly document how the Service assessed the potential cumulative impacts of ongoing and planned research projects in combination with the other factors (i.e., entanglement in fishing gear, ship strikes) that are affecting right whales.

With regard to the specific permit amendment request under consideration, the Marine Mammal Commission recommends that the Service defer authorization to take right whales until it has resolved the National Environmental Policy Act issues concerning research on this species. The Marine Mammal Commission further recommends that the Service approve authorization for activities involving species other than right whales, provided that the researchers take steps to minimize disturbance of the subject animals by exercising caution when approaching animals, particularly mother/calf pairs, and halt an approach if there is evidence that a whale may be injured in an unintended way [some research, such as tagging, may result in some types of anticipated and authorized injury], that mother/calf pairs may be separated for a prolonged period of time, or that a whale is exhibiting a marked change in behavior, such as leaving a feeding or resting area.

Further, the Marine Mammal Commission recommends that the Service ensure that researchers working under this permit, other permit-holders, and, to the extent possible, other researchers who might be carrying out research on the same species in the same areas coordinate their studies and, as possible, share data to avoid unnecessary duplication of research and disturbance of animals. In this regard, the Commission notes that some of the research will take place in waters beyond the jurisdiction of the United States, where researchers from other countries also might be carrying out studies. The Commission is concerned about the potential for overlapping studies by multiple researchers to have cumulative adverse impacts on certain stocks (e.g., bowhead whales in the Atlantic Ocean). Thus, although some of this research is not subject to review or oversight, the Commission encourages the Service and U.S. researchers to pursue coordination with all researchers operating in a given area and on a given population stock. The

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Scientific Committee of the International Whaling Commission might provide an appropriate forum for pursuing such coordination.

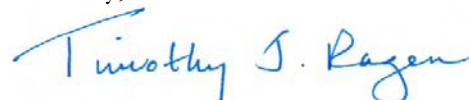
Finally, the application for the currently authorized activities and the original permit itself refer to the number of “takes” requested and authorized rather than to the number of animals for which authorization is being requested or issued. The Service’s new on-line application system (Authorizations and Permits for Protected Species) defines “Expected Take” as representing “...the number of animals you expect to take or import, annually.” The number of takes being requested/authorized and the number of animals requested/authorized to be taken may differ depending on the research being conducted. The Marine Mammal Commission recommends that, for purposes of clarity, the Service ensure that the take tables in permit applications, amendment requests, and authorizations (both permits and amendments) clearly indicate the number of animals that may be taken, the ways in which they may be taken, and the number of times that individual animals may be taken in each of those ways. For purposes of its review of this permit amendment, the Commission has interpreted the requested increase in numbers to apply to the number of animals for which taking authorization is being sought and not to the number of takings of those animals. If necessary, this should be confirmed with the applicant and steps should be taken to ascertain or estimate the number of times that any individuals might be taken.

For some stocks (e.g., right whales and some bowhead stocks) the number of takes being requested (up to 800) exceeds the number of animals in the population. This makes no sense and adds confusion as to whether the permit-holder is referring to the number of individual whales that might be harassed in the course of carrying out the proposed research or the total number of times that whales from a given stock might collectively be harassed. Consistent with the previous recommendation, the Marine Mammal Commission further recommends that the numbers of takes authorized under the permit be set to take into account the estimated size of each stock and the impact that taking a large percentage of the animals, perhaps multiple times, might have on the stock.

The Commission believes that the activities for which it has recommended approval are consistent with the purposes and policies of the Marine Mammal Protection Act.

Please contact me if you have any questions concerning these recommendations and comments.

Sincerely,



Timothy J. Ragen, Ph.D.
Executive Director