



UNITED STATES DEPARTMENT OF COMMERCE  
National Oceanic and Atmospheric Administration  
NATIONAL MARINE FISHERIES SERVICE  
Silver Spring, MD 20910

**Environmental Assessment  
for  
the Issuance of a Public Display Permit  
for Rehabilitated California Sea Lions  
(Permit File No. 15537; Institute for Marine Mammal Studies)**

September 2011

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**Lead Agency:** USDC National Oceanic and Atmospheric Administration  
National Marine Fisheries Service, Office of Protected  
Resources

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**Location:** Permanent Captivity of Releasable California Sea Lions at  
the Institute for Marine Mammal Studies, Gulfport, MS.

**Abstract:** The National Marine Fisheries Service (NMFS) proposes to issue a public display permit to the Institute for Marine Mammal Studies (IMMS) for the take of releasable rehabilitated California sea lions from west coast stranding facilities, pursuant to the Marine Mammal Protection Act of 1972, as amended (MMPA; 16 U.S.C. 1361 *et seq.*). These sea lions would become part of IMMS' inventory of marine mammals and part of IMMS' educational program. The permit would be valid for five years from the date of issuance.



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## CHAPTER 1 PURPOSE OF AND NEED FOR ACTION

### 1.1 DESCRIPTION OF ACTION

In response to receipt of a request from the Institute for Marine Mammal Studies (IMMS), P.O. Box 207, Gulfport, MS 39502 [Dr. Moby Solangi, Responsible Party] (File No. 15537), NMFS proposes to issue a public display permit that authorizes the acquisition of releasable rehabilitated California sea lions (*Zalophus californianus*) over a 5-year period. Six females and two males are requested to be obtained from rehabilitation centers for the purposes of public display at IMMS. This authorization would be granted pursuant to the Marine Mammal Protection Act of 1972, as amended (MMPA; 16 U.S.C. 1361 *et seq.*) and the regulations governing the taking, importing, and exporting of marine mammals (50 CFR 216).

#### 1.1.1 Background

Section 104 of the MMPA allows for issuance of permits to take<sup>1</sup> marine mammals for the purposes of public display. These permits must specify the number and species of animals that can be taken, and designate the manner, period, and locations in which the takes may occur. MMPA regulations promulgated at 50 CFR Part 216 specify criteria to be considered by the Director, Office of Protected Resources (Office Director) in reviewing applications and making a decision regarding issuance of a permit or an amendment to a permit. Specifically, 50 CFR 216.33(c) requires that the Office Director make an initial determination under the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 *et seq.*) as to whether the proposed activity is categorically excluded from further environmental impact review, or whether the preparation of an environmental assessment (EA) or environmental impact statement (EIS) is necessary; and prepare any required EA or EIS if an initial determination is made that the activity proposed is not categorically excluded from such further review. This initial determination must be made prior to publishing notice of receipt of the permit application in the *Federal Register*. Public display permits are in general, categorically excluded from the requirement to prepare an EA or EIS (NOAA Administrative Order (NAO) Series 216-6, May 20, 1999).

In reviewing the application, the NMFS' Office of Protected Resources initially determined that issuance of the proposed permit was consistent with a category of activities that would warrant an EA based on previous permits of the same nature (Animal Training and Research, International, Permit No. 1042-1736; and Mystic Aquarium, Permit No. 10028). IMMS' application was published in the *Federal Register* on May 20, 2010 (75 FR 28239). During the public comment period, comments were received regarding the biological and economic impacts of this action. As a result, NMFS has proceeded with preparation of an EA in order to fully analyze the environmental effects that would result from the issuance of this permit.

#### 1.1.2 Purpose and Need

The primary purpose of the permit is to provide an exemption from the take prohibitions under the MMPA to allow "takes" of marine mammals for the purpose of public display. The need for issuance of the permit is related to NMFS's mandate under the MMPA. Specifically, NMFS has

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<sup>1</sup> Under the MMPA, "take" is defined as to "harass, hunt, capture, kill or collect, or attempt to harass, hunt, capture, kill or collect." [16 U.S.C. 1362(18)(A)]

a responsibility to implement the MMPA for those marine mammal species under its jurisdiction. The MMPA prohibits take of marine mammals with only a few very specific exceptions, including for public display purposes. Permit issuance criteria require that public display activities are consistent with the purposes and policies of the MMPA and will not have a significant adverse impact on the species or stock. NMFS reviewed the proposed action to ensure the proposed activities fulfill these permit issuance criteria.

### 1.2 OTHER EA/EIS THAT INFLUENCE SCOPE OF THIS EA

Two previous permits have been issued for this type of activity within the last six years.

Permit No. 1042-1736 was issued on June 30, 2005, to Animal Training and Research, International. This permit authorized the acquisition of releasable pinnipeds (up to four California sea lions and up to two Pacific harbor seals) for the purposes of public display. This action included an EA. The resulting EA, *Effects of NMFS Permitted Public Display Activities on Rehabilitated California Sea Lions and Pacific Harbor Seals (Permit File No. 1042-1736)*, analyzed the effects of the retention of releasable California sea lions and Pacific harbor seals. A Finding of No Significant Impact (FONSI) was signed by the Assistant Administrator for Fisheries on May 10, 2005, stating that issuance of the proposed permit would not significantly impact the quality of the human environment. This permit was effective until July 1, 2011. No animals were taken under this permit.

Permit No. 10028 was issued on November 24, 2008, to Mystic Aquarium and Institute for Exploration. This permit authorizes the acquisition of releasable rehabilitated pinnipeds for purpose of public display. Up to six females and two males of each of the following species were requested: California sea lion (*Zalophus californianus*), harbor seal (*Phoca vitulina*), gray seal (*Halichoerus grypus*), harp seal (*Phoca groenlandica*) and hooded seal (*Cystophora cristata*). This action included an EA. The resulting EA, *Environmental Assessment on the Effects of Issuance of a Public Display Permit for Rehabilitated Pinnipeds (Permit File No. 10028; Mystic Aquarium)*, analyzed the effects of the retention of the above species of releasable pinnipeds. A FONSI was signed by the Director, Office of Protected Resources on November 18, 2008, stating that issuance of the proposed permit would not significantly impact the quality of the human environment. This permit is effective until November 30, 2013. Two California sea lions have been taken under this permit.

### 1.3 SCOPING SUMMARY

The purpose of scoping is to identify the issues to be addressed and the significant issues related to the proposed action, as well as identify and eliminate from detailed study the issues that are not significant or that have been covered by prior environmental review. An additional purpose of the scoping process is to identify the concerns of the affected public and Federal agencies, states, and Indian tribes. Neither the CEQ regulations implementing the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 *et seq.*) nor NAO 216-6 require that a draft EA be made available for public comment as part of the scoping process.

The MMPA and its implementing regulations governing issuance of special exception permits for scientific research (50 C.F.R. §216.33) require that, upon receipt of a valid and complete application for a new permit, and the determination of the appropriate level of NEPA

documentation, NMFS publish a notice of receipt in the *Federal Register*. The notice summarizes the purpose of the requested permit and invites interested parties to submit written comments concerning the application. Comments received on the application (see Appendix), as summarized in section 1.3.1 below, were considered as part of the scoping for this EA. In addition, the draft EA was made available for public comment and those comments are summarized in section 1.3.3 below.

### *1.3.1 Comments on application*

A Notice of Receipt of the application was published in the *Federal Register*, announcing the availability of the application for public comment (75 FR 28239, May 20, 2010). The application was posted on OPR's website (<http://www.nmfs.noaa.gov/pr/permits/review.htm>) and made available for public review and comment for 30 days. The application was provided to the Marine Mammal Commission and the U.S. Department of Agriculture, Animal and Plant Health Inspection Service (APHIS). In addition, the notice of receipt of the application was forwarded to the MMHSRP and NMFS' Southwest Regional Stranding Coordinator for distribution as appropriate. The comments received are presented in a numerical format below.

Marine Mammal Commission Comments (MMC): The MMC recommended approval of the permit, provided that the National Marine Fisheries Service (NMFS): (1) Require the applicant obtain non-releasable sea lions provided that such animals are available and suitable for the intended purpose; (2) Authorize transfer or retention of animals determined to be releasable only as a secondary option and only if non-releasable animals are not available or are determined to be unsuitable for the applicant's purpose; (3) Require a reasonable (e.g. one-year) waiting period from the date of permit issuance to see if suitable, non-releasable animals become available; (4) Consult with the Animal and Plant Inspection Service (APHIS) to ensure that the applicant's plans and facilities for transport and maintenance of the requested animals, including progeny, are adequate for their health and well-being; (5) Require the applicant to provide written justification explaining the need for a captive breeding program before such a program is authorized; (6) Consult with APHIS to confirm that the probability is extremely low that these animals might be introduced to the Gulf of Mexico, even under extreme weather conditions; and (7) Ensure that the applicant's education program is acceptable and consistent with the policies of the MMPA.

The USDA Animal and Plant Health Inspection Service Comments (APHIS): APHIS recommended denial of the permit at this time based on the following comments on the application: (8) permits of this nature should be issued as take permits; (9) the intent of the stranding program is to rehabilitate and return all appropriate animals to the wild; (10) there is a protocol in place to determine if animals need to be retained in human care for their well-being; (11) APHIS has been approached by multiple parties who question the fitness of the applicant; (12) IMMS seems to be arguing two sides regarding NMFS' authority under the MMPA as related to this application and an unrelated disagreement regarding placement of a stranded dolphin; (13) the Gulfport facility was built with Federal grants to become a stranding and rehabilitation center which is now being used for public display and profit; (14) APHIS is unable to comment on the facility's ability to comply with the AWA – this cannot be done until animals are present in the facility.

Public Comments: A total of seventeen public comments were received on the application. The Alliance of Marine Mammal Parks and Aquariums expressed concerns regarding statements made in the application but did not take a position on issuance. The remaining comments were opposed to issuance of a permit. The following organizations provided comments on this application: Alliance of Marine Mammal Parks and Aquariums (Alliance), Animal Welfare Institute (AWI), Cetacean Society International (CSI), The Humane Society of the United States (HSUS) with Earth Island Institute, The Marine Mammal Center (TMMC), Whale and Dolphin Conservation Society (WDCS), World Society for the Protection of Animals (WSPA). The authors of the publication titled “Rehabilitation and Release of Marine Mammals in the United States: Risks and Benefits” (Moore et al. 2007) submitted comments as a group.

Those in opposition of this permit application raised issues that can be categorized into the following general topic areas: (15) placement of releasable animals into captivity is in violation of the MMPA and NMFS implementing regulations; (16) opposition of the public display of marine mammals; (17) issuance of the permit is precedent setting; (18) IMMS should receive non-releasable sea lions or nuisance animals targeted for lethal removal; (19) stranding facilities should not be “forced” to provide animals to IMMS under the proposed permit; (20) IMMS fails to meet APHIS standards with regards to animal care and maintenance; (21) IMMS does not have an adequate educational program; and (22) implications of the litigation between the applicant and NMFS regarding the custody of a non-releasable bottlenose dolphin.

### *1.3.2 Consideration of Comments on the Application*

The comments received on the application were considered in evaluating this proposed action and potential effects on the human environment. As part of the permit procedure, NMFS provided IMMS with an opportunity to review and respond to the comments, and to provide that response to NMFS for consideration in the permitting decision and this associated NEPA analysis (see Appendix). Additional analysis of the comments can be found in the decision memo for this file.

NMFS has reviewed the comments and IMMS response to those comments. NMFS’ response is organized in accordance with the topic areas laid out in Section 1.3.1.

- (1) IMMS remains on the list to be considered for placement of non-releasable sea lions and will be contacted regarding any animals that may be appropriate for the facility based on their position on the national list and the criteria provided by IMMS.
- (2) Use of the permit only as a secondary option and only if non-releasable animals are not available or are determined to be unsuitable for the applicant’s purpose; IMMS has been on the list to obtain non-releasable sea lions since December of 2009 and NMFS continues to encourage the applicant to also consider other sources of sea lions (i.e. transfer of an already captive animal).
- (3) NMFS has considered the implementation of a waiting period along with permit issuance as Alternative 4 of this EA.
- (4) NMFS has consulted with APHIS and has received confirmation that IMMS is licensed under the Animal Welfare Act (AWA) and has adequate space for the requested number of animals. The permit is conditioned such that transports must be conducted in a humane manner and in accordance with standards set forth in AWA Regulations (9 CFR Sections 3.112-3.118).

- (5) Purview over captive maintenance and care (including captive breeding) is under the jurisdiction of APHIS under the AWA.
- (6) Questions pertaining to contingency planning fall under the purview of APHIS. APHIS has provided comments on this application. In addition, IMMS has provided additional information regarding contingency plans in their response to comments.
- (7) The applicant has documented the conservation/education program of the facility is based on professional recognized standards of the industry, and has provided documentation of the admission policies, and NMFS is satisfied that the applicant meets public display criteria as specified in the MMPA.
- (8) Contrary to APHIS' comments, this application is being processed as a take (i.e. collection) from the wild permit, with the exception that the animals would be coming from rehabilitation facilities as opposed to being taken directly from the wild. As these animals are releasable and would otherwise be returned to the wild, the effects of the action on the animals to be obtained and on the species in general are being evaluated as if the animals were removed from the wild.
- (9) PR1 acknowledges that the release of stranded, rehabilitated animals is one goal of the MMPA and that MMPA section 109(h)(3) states that when feasible, steps shall be taken to return stranded animals to the wild. However, NMFS noted in its 1993 proposed rule that the 109(h) definition of a "feasible" release is interpreted to be those situations where: (1) The release of the marine mammal to the wild is likely to be successful; and (2) the marine mammal to be released is determined by the Assistant Administrator not to be a suitable substitute for a marine mammal . . . for which a permit has been issued for capture from the wild or acquisition from captive stock." 58 FR 53325, October 14, 1993. In addition, section 104 of the MMPA allows for permits to be issued for the take (i.e. capture or import) of "any marine mammal" for public display purposes, without limitation to releasable animals. NMFS's regulations at 50 CFR 216.27(b)(4) provide for the use of both releasable and non-releasable animals for a special exception purpose, e.g. public display. This is further supported by 50 CFR 216.27(c)(1) which refers to the retention of both releasable and non-releasable animals for a special exception purpose (i.e. permits).
- (10) The applicant has indicated that they are not opposed to accepting non-releasable animals that meet their program's objectives. NMFS will continue to encourage IMMS to consider non-releasable animals and to work within the public display community to meet their collection needs. This will include coordination with APHIS during the placement process.
- (11) Regarding the comments about animal care and maintenance history of IMMS and its predecessors, IMMS has not been prosecuted for violations under the AWA, and APHIS has confirmed that IMMS was issued an exhibitor's license to hold marine mammals for public display.
- (12) NMFS acknowledges its jurisdiction over marine mammal rehabilitation facilities and that these facilities are operating as NMFS designated agents under MMPA 112(c) stranding agreements. The court case over the custody of the non-releasable bottlenose dolphin has concluded and does not have any bearing on the issuance of this permit.
- (13) IMMS holds a stranding agreement issued under section 112(c) of the MMPA by NMFS and is authorized to respond to strandings. This does not preclude IMMS from also maintaining marine mammals for permanent public display as long as they continue to meet the MMPA criteria for public display.

(14) NMFS was informed by APHIS that until such time that IMMS has marine mammals at their facility, APHIS is unable to comment on the facility's ability to comply with the AWA (letter of June 21, 2011). NMFS notes that IMMS received two bottlenose dolphins in February of 2011 and has been maintaining these animals in compliance with the AWA.

(15) In response to comments that the issuance of the permit is in violation of the MMPA and NMFS implementing regulations, NMFS has the following response. The MMPA recognizes public display as an exception under the Act and section 104 provides for exceptions to the moratorium to take through special exception permits for scientific research, enhancement, and public display. Section 109(h)(3) of the MMPA requires that steps be taken to return marine mammals taken under section 109(h)(1) to their natural habitat, where feasible. Under MMPA implementing regulations at 50 CFR 216.27(b)(4) and supported by (c)(1), the Office Director may require use of a rehabilitated marine mammal for public display purposes in lieu of animals taken from the wild. NMFS' policy is to require a permit for retaining releasable stranded marine mammals, as an exception to the prohibition of take, since the animals would have otherwise been released to the wild. Therefore, the discussion provided in Chapter 4 analyzes the effects of the proposed action as if animals would be removed from the wild, with the exception of describing and analyzing the effects of capture activities in the wild, since these animals would have already been removed into captivity under separate authority for purposes of rehabilitation. This interpretation of NMFS' implementing regulations is consistent with previous permits issued to take releasable marine mammals (see Section 1.2 above).

(16) As previously mentioned, the public display of marine mammals is an exception provided for under the MMPA, therefore, comments opposed to public display of marine mammals are beyond the scope of this action.

(17) Issuance of the permit would not establish a precedent for future actions or represent a decision in principle about future proposals. Although it is possible that other members of the public display community may wish to request releasable animals for public display purposes, each permit application received is evaluated upon its own merits relative to the criteria established in the MMPA and NMFS' implementing regulations. Issuance of a permit to a specific individual or organization for a given activity does not in any way guarantee or imply that NMFS would authorize other individuals or organizations to conduct the same or a similar activity.

(18) Regarding the placement of non-releasable or nuisance animals, there is no requirement that facilities accept non-releasable or nuisance animals. IMMS has indicated that they are interested in receiving any available non-releasable sea lions that meet their program needs and have explained that the animals targeted for removal at the Bonneville Dam are not appropriate candidates for their facility. The Bonneville Dam animals are adult males coming directly from the wild and IMMS has responded that these animals are too large and aggressive to be easily trained. In addition, IMMS argues that these animals would require special protective mechanisms that are not in place at IMMS and would present a danger to staff and the public at the facility. NMFS continues to encourage IMMS to continue investigating all avenues of animal acquisition.

(19) NMFS also acknowledges its jurisdiction over marine mammal rehabilitation facilities and that these facilities are operating as NMFS designated agents under MMPA 112(c) stranding agreements. PR1 respects the varying philosophies associated with marine mammal rescue and rehabilitation and recognizes that it is not in the best interest of the network for NMFS to instruct or force rehabilitation facilities to make releasable animals available for permanent captivity.



Furthermore, using NMFS as an intermediary for the exchange of information regarding the suitability of sea lions for IMMS' programs would not be an appropriate use of NMFS' authority as it relates to the standing program. It is necessary, therefore, for IMMS to form partnerships with likeminded rehabilitation facilities and is not unlike what was required of permit holders of previous permits for the same action (retention of releasable pinnipeds).

(20) Comments pertaining to animal care and maintenance are beyond the scope of the MMPA and are under the purview of APHIS and the AWA. APHIS has reviewed the application and has confirmed that the applicant holds an exhibitor's license for public display. No other comments were provided regarding compliance under the AWA.

(21) The MMPA requires that education programs be based on professional recognized standards of the public display industry and NMFS is satisfied that the documentation provided by IMMS demonstrates that they meet industry standards.

(22) The court case over the custody of the non-releasable bottlenose dolphin has concluded and does not have any bearing on the issuance of this permit.

### *1.3.3 Comments on the Draft EA*

A Notice of Availability of the draft EA was published in the *Federal Register* on April 11, 2011 (76 FR 19976) and the comment period was open for 30 days. The draft EA was posted online on OPR's website at (<http://www.nmfs.noaa.gov/pr/permits/review.htm>). HSUS and IMMS's attorney was specifically notified of the availability of the draft EA and comment period. In addition, the notice of the draft EA was forwarded to the MMHSRP and NMFS' Southwest Regional Stranding Coordinator for distribution as appropriate. The comment period closed on May 11, 2011. IMMS was provided a copy of the comments received and submitted a response which is included in Appendix.

A total of thirty-seven comments on the Draft EA were received during the public comment period. Thirty-five comments received were in opposition to issuance of a permit and the majority reiterated points raised during the public comment period announcing the availability of the application, as discussed above. The Marine Mammal Commission provided comments on the draft EA which recommended the Service consider the appropriateness of an EIS, in lieu of an EA, based on the Commission's perceived precedent-setting nature of this application and recommended that the Service, in consultation with the Commission, conduct a review of the roles, rights, and responsibilities of the Permits Office, rehabilitation facilities and public display facilities in determining whether, when, and where to place releasable rehabilitated marine mammals and adopt policies to resolve those issues. IMMS provided comments regarding the perceived controversy that would be represented by the incoming comments. All public comments were posted online and IMMS was provided the opportunity to respond to the comments. Topic areas revisited during the EA comment period included the following: (1) opposition to captivity of marine mammals; (2) the value of the described conservation/education program; (3) questions regarding the applicant's qualifications; (4) issuance of the permit would violate section 109(h) of the MMPA and NMFS implementing regulations at 50 CFR 216.27 (purpose of the stranding network); (5) non-releasable animals should be accepted by the applicant; (6) litigation between the applicant and NMFS regarding the custody of a non-releasable bottlenose dolphin; and (7) precedent would cause an increase in requests for releasable sea lions by other facilities.

These issues have been addressed in Section 1.3.2. above.

The following comments were received specifically pertaining to the draft EA: (1) the EA should have been done prior to publication of the Federal Register notice announcing the receipt of the permit application; (2) the draft EA for this permit conflicts with the Final Programmatic Environmental Impact Statement for the Marine Mammal Health and Stranding Response Program (PEIS); (3) the description of the biological environment is deficient in the draft EA; (4) the analysis of the social and economic impacts in the draft EA is inadequate; (5) NMFS failed to consider other reasonable alternatives; (6) the EA does not properly define the purpose and need of the proposed action; (7) an EA is not the appropriate level of analysis for this action and an Environmental Impact Statement is required.

#### *1.3.4 Consideration of Comments on the Draft EA*

NMFS has reviewed the comments received on the draft EA and IMMS' response to those comments. An analysis of the topics not addressed during the notice of receipt of the application follows:

(1) Timing of the EA: Several comments were received regarding NMFS' omission of NEPA language in the Federal Register notice announcing the receipt of the application (75 FR 28239; May 20, 2010). NMFS made an initial determination that an Environmental Assessment was the appropriate level of NEPA analysis based on previous permits of the same nature (retention of releasable marine mammals which would otherwise be returned to the wild) and concurrence for this determination was given by the NMFS NEPA coordinator via email on May 18, 2010. NMFS regulations at 50 CFR 216.33(d)(iv) state that the notice of receipt to be published in the Federal Register include a NEPA statement that an initial determination has been made regarding the appropriate level of NEPA analysis to be conducted. In this case, this statement was inadvertently omitted from the notice of receipt of this application. Including the NEPA language in the notice of availability of the application allows for the public to comment on both the application and the scope of the NEPA documentation simultaneously, which combines two comment periods into one. As a result of the omission of the NEPA language in the notice of receipt, NMFS separated the comment periods for the receipt of the application and the availability of the draft environmental assessment by providing for a different comment period to solicit comment on the draft EA (76 FR 19976; April 11, 2011) which closed on May 11, 2011. Thus, NMFS has satisfied its responsibility for providing the public an opportunity to comment on the scope and content of the draft EA.

(2) PEIS: The 2009 Final Programmatic Environmental Impact Statement for the Marine Mammal Health and Stranding Response Program (MMHSRP). The PEIS includes documents describing policies and best practices for marine mammal stranding response, rehabilitation and release programs. Stranding agreements, issued in accordance with NMFS regulations, specify that animals should be evaluated for releasability and released back into their natural habitat within six months of collection if feasible. Therefore, commenters concluded that the draft EA is in conflict with the PEIS. The PEIS evaluated the effect of responding, rehabilitation and releasing stranded marine mammals back into the environment, whereas, this EA is evaluating the effect of retaining a few of these animals in captivity. Therefore, these are separate federal actions with different scopes.

(3) Description of the Biological Environment: A comment was received stating that the description of the biological environment is inadequate. The commenter indicated that the draft EA cites general averages taken from the NMFS Stock Assessment Report (Carretta et al. 2007) without taking into account the wide swings that can occur in growth rates. NEPA requires the use of the best available scientific data when considering the effects of potential activities and as such NMFS has turned to the most recent stock assessment report of this species. The report contains a population range, the conservative estimate being the basis for the PBR for this species. No other part of the biological environment would be affected by the retention of these sea lions.

(4) Social and Economic Impacts: The EA has been amended to take into account the time and financial resources invested by the stranding network members in order to rehabilitate marine mammals with the intent to release them back into the wild. Additional holding of animals, while the applicant reviews animal records, would extend the time in captivity that an animal is subjected to as well as increase the financial expense of caring for that animal beyond its rehabilitation. In addition, impacts related to volunteer staffing and financial donations have been incorporated into the final EA.

(5) Other Alternatives: The Humane Society of the United States (HSUS) questioned NMFS' exploration and evaluation of all reasonable alternatives to the project. HSUS specifically identified several alternatives that they believed should be considered: (a) acquisition of animals that don't fit the specific criteria outlined by IMMS; (b) imposition of additional permit conditions to ensure the animals are treated humanely; and the following recommendations from the Marine Mammal Commission's comments on the application including: (c) require the acquisition of non-releasable animals; (d) require a reasonable (e.g., one-year) waiting period from date of permit issuance to see if suitable, non-releasable animals become available; (e) consult with APHIS to ensure that the applicant can adequately transport and maintain the requested animals.

IMMS has indicated that they are open to accepting non-releasable animals that fit their placement criteria (referring to other alternatives (a) and (c)). It is not a requirement that a facility take a non-releasable animal that does not fit their needs; however, the criteria established by IMMS (unable to accept disabled and problem animals) does limit the number of animals from the non-releasable pool that may be placed at that specific facility. These alternatives are encompassed in the No Action alternative, which would be the denial of the permit, thus limiting the applicant to those animals that are non-releasable and as such do not require a permit for transfer.

Other alternative (d) would require a waiting period before the permit could be acted upon and this alternative has been added to the draft EA for analysis.

Suggested alternatives which relate to the care, transport and maintenance of the animals (namely other alternatives (b) and (e)) are outside of the scope of the MMPA and fall under the purview of APHIS and the AWA. APHIS was consulted regarding this application and APHIS confirms that the applicant holds an exhibitor's license under the AWA to hold marine mammals

for public display purposes. APHIS has provided suggested language for previous permits that relate to transport previously (namely transport plans and health certificates) and those conditions would be incorporated into any resulting permit.

(6) Purpose and Need: HSUS contends that NMFS has used an “unreasonably narrow purpose and need” which rigs the analysis in favor of the applicant and that NMFS is failing to use independent judgment as to the reasons for the proposal. NMFS is preparing this EA in response to an application for a public display permit requested under section 104 of the MMPA. The federal action to be analyzed is the effect of issuance of the requested permit. In response to this application, there are ultimately two outcomes: issue the permit or deny the permit. Other alternatives include limitations or restrictions based on the applicant’s request, but still involve issuance of a permit. Based on the comments received on the EA, Alternatives 2 and 4 have been incorporated into the EA for consideration.

(7) Level of NEPA analysis: Both the Marine Mammal Commission as well as HSUS raised concerns regarding the use of an Environmental Assessment as opposed to an Environmental Impact Statement. NOAA has, through NOAA Administrative Order (NAO) 216-6, established agency procedures for complying with NEPA and the implementing regulations issued by the Council on Environmental Quality. NAO 216-6 6.03f.2(a) specifies that issuance of permits under the MMPA is among a category of actions that are generally exempted (categorically excluded) from further environmental review, except under extraordinary circumstances. When a proposed action that would otherwise be categorically excluded is the subject of public controversy based on potential environmental consequences, has uncertain environmental impacts or unknown risks, establishes a precedent or decision in principle about future proposals, may result in cumulatively significant impacts, or may have an adverse effect upon endangered or threatened species or their habitats, preparation of an EA or EIS is required.

The MMC questions the precedent-setting nature of this and similar permits and suggests that it is a policy decision that may not have been fully analyzed. To the contrary, NMFS noted in its 1993 proposed rule that the 109(h) definition of a “feasible” release is interpreted to be those situations where: (1) The release of the marine mammal to the wild is likely to be successful; and (2) the marine mammal to be released is determined by the Assistant Administrator not to be a suitable substitute for a marine mammal . . . for which a permit has been issued for capture from the wild or acquisition from captive stock.” 58 FR 53325, October 14, 1993. The regulatory language found in the proposed rule is carried over into the final rule (61 FR 21928, May 10, 1996). These permits are processed as collection from the wild permits under section 104 of the MMPA with caveat being that animals would be taken from rehabilitation facilities as opposed to being taken directly from the wild. Policies regarding acquisition of releasable animals through the permitting process have been established via specific permit conditions and restrictions placed on the permit holder.

The HSUS contends that an EIS is required based on the following considerations that the proposed action is:

- A violation of federal laws. HSUS refers to Section 109(h) of the MMPA which states that when feasible, stranded animals be released back to the wild.
  - NMFS contends that the discussion of feasibility is directly above and NMFS’

interpretation has been incorporated into its implementing regulations.

- An abuse of discretion. The HSUS references the applicant's lack of fitness as reason to deny the permit request.
  - NMFS contends that comments alleging poor performance by the applicant in maintaining previous marine mammals have not been substantiated. The applicant maintains a facility that is licensed by APHIS to hold marine mammals and no other comments were given to NMFS by APHIS regarding compliance under the AWA.
- Precedential in effect. The HSUS argues that NMFS has not effectively considered "the extent to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration."
  - NMFS reiterates that each permit is evaluated on its own merits and the environmental consequences of each proposed permit are considered within the scope of all other existing permits and the cumulative effects section of the EA reflects this analysis. As noted in the response to MMC's concerns regarding setting precedent, this option for acquisition of marine mammals was considered in the proposed rule in 1993 and incorporated into a final rule in 1996.
- Significant in cumulative impacts. The CEQ regulations state that the preparation of an EIS is required if the proposed action "is related to other actions with individually insignificant but cumulatively significant impacts," thus considering the "incremental impact of an action when combined with past, present, and reasonably foreseeable future actions." HSUS suggests that NMFS has not adequately studied the potential cumulative impacts of this kind of action.
  - NMFS counters that this analysis is included in the cumulative effects section of the resulting EA.
- Substantial in public controversy. HSUS contends that there is substantial controversy over this proposed action that warrants an EIS analysis. HSUS references the "outpouring of protest" on the application as reason for an EIS – that there is a substantial dispute regarding the nature, size and effect of the proposed action.
  - NMFS responds that the definition of "controversy" in the context of an EA does not refer to the unpopularity of an action, but refers to controversy about the environmental effects of a project (NAO 216-6 6.01b.4). In this case, although the action is unpopular, the environmental effects of the action have not been questioned by the public (the removal of eight individual animals from the population), and, therefore, there is not substantial controversy over environmental effects.

#### *1.4 APPLICABLE LAWS AND NECESSARY FEDERAL PERMITS, LICENSES, AND ENTITLEMENTS*

This section summarizes federal, state, and local permits, licenses, approvals, and consultation requirements necessary to implement the proposed action, as well as who is responsible for obtaining them. Even when it is the applicant's responsibility to obtain such permissions, NMFS is obligated under NEPA to ascertain whether the applicant is seeking other federal, state, or local approvals for their action.

#### *1.4.1 National Environmental Policy Act*

The National Environmental Policy Act (NEPA) was enacted in 1969 and is applicable to all “major” federal actions significantly affecting the quality of the human environment. A major federal action is an activity that is fully or partially funded, regulated, conducted, or approved by a federal agency. NMFS issuance of permits for public display under the MMPA represents approval and regulation of activities. While NEPA does not dictate substantive requirements for permits, licenses, etc., it requires consideration of environmental issues in federal agency planning and decision making. The procedural provisions outlining federal agency responsibilities under NEPA are provided in the Council on Environmental Quality’s implementing regulations (40 CFR Parts 1500-1508).

Procedures for NMFS' compliance with NEPA and the implementing regulations issued by the CEQ are established in NOAA Administrative Order (NAO) 216-6. NAO 216-6 specifies that issuance of permits under the MMPA is among a category of actions that are generally exempted (categorically excluded) from further environmental review, except under extraordinary circumstances. When a proposed action that would otherwise be categorically excluded is the subject of public controversy based on potential environmental consequences, has uncertain environmental impacts or unknown risks, establishes a precedent or decision in principle about future proposals, may result in cumulatively significant impacts, or may have an adverse effect upon endangered or threatened species or their habitats, preparation of an EA or EIS is required.

While issuance of public display permits is typically subject to a categorical exclusion, as described in NAO 216-6, NMFS is preparing an EA for this action to fully analyze the environmental effects that would result from the issuance of this permit in response to the public comments received and consistent with previous permits issued for a similar action (retention of releasable pinnipeds). This EA is prepared in accordance with NEPA, its implementing regulations, and NAO 216-6.

#### *1.4.2 Marine Mammal Protection Act*

The MMPA prohibits take and import of all marine mammals in the U.S. (including territorial seas) with a few exceptions. Permits for take or import of marine mammals for the purpose of public display, issued pursuant to section 104 of the MMPA, are one such exception. These permits must specify the number and species of animals that can be taken, and designate the manner (method, dates, locations, etc.) in which the takes may occur. NMFS has sole jurisdiction for issuance of such permits and authorizations for all species of cetacean, and for all pinnipeds except walrus<sup>2</sup>.

NMFS may issue a public display permit to an applicant who meets the criteria for public display as outlined in section 104(c)(2)(A) of the MMPA. An applicant must further demonstrate to NMFS that the taking will be consistent with the purposes of the MMPA and applicable regulations. NMFS must find that the manner of taking is “humane”<sup>3</sup> as defined in the MMPA. NMFS has promulgated regulations to implement the permit provisions of the MMPA (50 CFR Part 216) and has produced OMB-approved application instructions that prescribe the procedures

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<sup>2</sup> The U.S. Fish and Wildlife Service has jurisdiction for walrus, polar bears, sea otters, and manatees.

<sup>3</sup> The MMPA defines humane in the context of the taking of a marine mammal, as “that method of taking which involves the least possible degree of pain and suffering practicable to the mammal involved.”

(including the form and manner) necessary to apply for permits. All applicants must comply with these regulations and application instructions in addition to the provisions of the MMPA.

MMPA section 109(h)(3) states that when feasible, steps shall be taken to return stranded animals to the wild. However, NMFS noted in its 1993 proposed rule that the 109(h) definition of a “feasible” release is interpreted to be those situations where: (1) The release of the marine mammal to the wild is likely to be successful; and (2) the marine mammal to be released is determined by the Assistant Administrator not to be a suitable substitute for a marine mammal . . . for which a permit has been issued for capture from the wild or acquisition from captive stock.” 58 FR 53325, October 14, 1993. Based on this interpretation, NMFS’s regulations at 50 CFR 216.27(b)(4) and 216.27(c)(1) permit the retention of both releasable and non-releasable animals for a special exception purpose (i.e. permits).

#### *1.4.3 Animal Welfare Act (AWA)*

Under section 104(c)(2)(A)(ii) of the MMPA, applicants for permits for public display must be registered or hold a license issued under the AWA (7 U.S.C. 2131 et seq.). Enforcement of these requirements is under jurisdiction of the U.S. Department of Agriculture’s Animal and Plant Health Inspection Service (APHIS). Regulations promulgated by APHIS under the AWA (9 CFR Subpart E) sets forth standards and certification requirements for the humane handling, care, treatment, and transportation of captive marine mammals. IMMS is licensed as an exhibitor under the AWA (issued by APHIS) and APHIS provided comments on the application.

## CHAPTER 2 ALTERNATIVES INCLUDING THE PROPOSED ACTION

This chapter describes the range of potential actions (alternatives) determined reasonable with respect to achieving the stated objective, as well as alternatives eliminated from detailed study. This chapter also summarizes the expected outputs and any related mitigation of each alternative.

### *2.1 ALTERNATIVE 1 – NO ACTION*

Under the No Action alternative, no permit would be issued for the activities proposed by the applicant. NMFS would not authorize the retention of releasable marine mammals as requested in the permit application; however, non-releasable animals could be obtained through a letter of authorization pursuant to NMFS regulations (50 CFR 216.27).

### *2.2 ALTERNATIVE 2 –ISSUANCE OF PERMIT AS REQUESTED BY THE APPLICANT*

Under Alternative 2, the permit would be issued as requested without mitigating permit conditions regarding implementation of the permit. In this scenario, NMFS would instruct rehabilitation facilities to provide animal records to IMMS in order for animals to be selected from the pool of available releasable sea lions.

### *2.3 ALTERNATIVE 3 – PROPOSED ACTION (ISSUANCE OF PERMIT WITH CONDITIONS)*

Under the Proposed Action alternative, a permit would be issued authorizing the acquisition of animals as proposed in the application, with the caveat that participation by rehabilitation facilities in providing animals to IMMS under the issued permit would be voluntary. In addition, standard conditions for captive public display permits administered by the Permits, Conservation and Education Division (outlined in the Mitigation Measures Section) would be included. Because these animals would be considered releasable and, in the absence of this permit would be returned to the wild, effects of this action on the animals to be obtained and the species in general is similar to a permit issued for a take from the wild. In this case, the IMMS is requesting a permit to retain releasable rehabilitated California sea lions in lieu of taking from the wild in order to minimize the direct and indirect effects of their action on the wild population.

### *2.4 ALTERNATIVE 4 – ISSUANCE OF PERMIT WITH A DELAYED EFFECTIVE DATE*

Under Alternative 4, the permit would be issued; however, the effective date of the permit would be delayed for a period of one calendar year in order for IMMS to seek out sea lions from other sources (i.e. non-releasables or captive breeding). This alternative takes into account the recommendation by the Marine Mammal Commission to delay the effective date of the permit by one year to allow for IMMS to search out sea lions from other sources.

## CHAPTER 3 AFFECTED ENVIRONMENT

This chapter presents baseline information necessary for consideration of the alternatives, and describes the resources that would be affected by the alternatives, as well as environmental components that would affect the alternatives if they were to be implemented. The effects of the alternatives on the environment are discussed in Chapter 4.

The California sea lion is a species protected under the MMPA and is the target species of the permit application. The action area of this permit application covers the IMMS facility in Gulfport, MS and, any partnering rehabilitation centers on the west coast of the U.S. Because the source of the animals has been restricted to those that have been determined to be releasable, but have not yet been returned to the wild, no activities would be authorized to occur outside of the rehabilitation facilities or the IMMS facility. As a result, no area or additional animals in the wild would be affected.

### *3.1 SOCIAL AND ECONOMIC ENVIRONMENT*

The social and economic effects of the Proposed Action mainly involve the effects on the people involved in either the associated rehabilitation of the marine mammals or the subsequent public display at IMMS, as well as industries that support both activities, such as suppliers of equipment needed to maintain marine mammals in captivity. The addition of live California sea lions to be exhibited at IMMS would expand the education program at the facility as well as potentially create some jobs associated with the care of these animals.



With regard to the rehabilitation facilities, the time and financial resources already invested by the stranding network members into releasable marine mammals is being considered. Additional holding of animals, while the applicant reviews animal records, would extend the time in captivity that an animal is subjected to as well as increase the financial expense of caring for that animal beyond its rehabilitation. In addition, comments were received expressing concern that volunteer support and financial donations would be negatively impacted should facilities be required to provide releasable animals for public display purposes. In consideration of these concerns, this EA analyses the effects of both issuing the permit as requested by the applicant (Alternative 2) and issuing a permit which relies on the applicant to seek out cooperating stranding partners (Alternative 3).

### 3.2 PHYSICAL ENVIRONMENT

The action area is limited to rehabilitation facilities from where the animals will be selected and the IMMS facility in Gulfport, MS, where the animals will be maintained permanently. No area in the wild would be affected. Therefore, no unique areas, such as historic or cultural resources, park land, prime farmlands, wetlands, wild and scenic rivers, essential fish habitat, or critical habitat, will be affected through the issuance of this permit.

### 3.3 BIOLOGICAL ENVIRONMENT

The biological environment is limited to the species being taken (i.e. California sea lions, *Zalophus californianus*), and specifically those animals that will be retained from the standing program for permanent captivity for public display purposes. No non-target species will be taken as the proposed activities will not be occurring in the wild. Information regarding the population status of California sea lions was obtained from the NMFS Stock Assessment Report (Carretta et al. 2007).

The U.S. stock of California sea lions is generally increasing and currently estimated to be 238,000 animals producing approximately 55,519 pups annually at a maximum population growth rate of 6.52 (corrected for El Nino years). The minimum stock size is conservatively estimated at 141,842 sea lions, resulting in a Potential Biological Removal<sup>4</sup> (PBR) of 8,511 animals. Review of the populations trends indicate that in 1997 California sea lions reached their Maximum Net Productivity Level of 39,800 pups per year. The generalized logistical growth model has further suggested that the carrying capacity for this species may have been reached at 46,800 pups per year. The declaration of the carrying capacity needs to be verified over the course of time; however, agreement remains that the current California sea lion population is stable and growing. This species is not listed under the ESA or as “depleted” under the MMPA. Although there is some uncertainty regarding the extent of mortality associated with the California set gillnet fishery, California sea lions are not considered a “strategic” stock under the MMPA given that the total human-caused mortality is still likely to remain below PBR.

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<sup>4</sup> Potential Biological Removal (PBR) Level: defined by the MMPA as “the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population.”

## CHAPTER 4 ENVIRONMENTAL CONSEQUENCES

This chapter represents the scientific and analytic basis for comparison of the direct, indirect, and cumulative effects of the alternatives. Regulations for implementing the provisions of NEPA require consideration of both the context and intensity of a proposed action (40 CFR Parts 1500-1508).

### *4.1 EFFECTS OF ALTERNATIVE 1: No Action*

If this permit is not issued, the subject animals would be released to the wild according to the Marine Mammal Health and Stranding Response Program's release guidelines. There are three potential outcomes of release; as discussed in section 4.2 below: (1) the animal survives and contributes to increasing the species' population, (2) the animal does not survive and is removed from the population, or (3) the animal restrands and release is reconsidered for the animal.

Under the no action alternative, IMMS would not be precluded from requesting and obtaining non-releasable pinnipeds through the stranding network as authorized in applicable regulations (50 CFR 216.27(b) and (c)). The regulations allow for non-releasable marine mammals (not listed under the ESA) to be placed into permanent captivity with a letter of authorization. These animals would be determined to be unfit for release by the appropriate NMFS Regional Office and the decision would be made to place these animals into permanent captivity. IMMS has indicated that they are interested in exploring this option and is on the list to be considered for placement.

From the perspective of IMMS, denial of this permit would delay and potentially prevent the organization from establishing a captive collection of sea lions and participating in the public display of this species. IMMS has indicated that they have been in consultation with existing public display facilities and no animals are currently available from this source. IMMS's request is for animals that would be weaned pups or juveniles, and that are estimated to be two (2) years or less in age. The selection criteria outlined by IMMS is based on age, size, sex, behavior, and their veterinarian's medical evaluation of the animal. Non-releasable animals will be considered if they are animals that are considered restranders and do not appear to be debilitated or have a medical history that would indicate such condition. Disabled or impaired animals, including those that are blind, cannot walk or swim normally, or are otherwise not healthy and/or have illnesses or conditions that may affect their long-term health would not be considered for placement. Therefore, the majority of non-releasable animals are not acceptable for placement at IMMS for their stated purposes.

### *4.2 EFFECTS OF ALTERNATIVE 2: Issue permit as requested by the applicant*

Public display of marine mammals is identified as an exception under Section 104 of the MMPA and is a purpose for which permits may be issued. The regulations at 50 CFR 216.27 allow for the disposition of rehabilitated marine mammals under special exception permits. Specifically, section 216.27(b)(4) gives the Office Director the option of authorizing the acquisition of any rehabilitated marine mammal regardless of its ability to be released, in place of authorizing a take (collection) from the wild for scientific research, enhancement, or public display purposes. NMFS is satisfied that the applicant meets the public display criteria as specified in the MMPA.

California sea lions are not species listed as endangered or threatened under the ESA. Nor are they considered strategic stocks or listed as depleted under the MMPA. Data from stock assessments suggest that California sea lion populations are healthy. The animals under consideration would be obtained from NMFS' Marine Mammal Health and Stranding Response Program. These animals would have been removed from the wild by stranding, and rescued and rehabilitation under the authority of Sections 109(h) and/or 112(c) of the MMPA and, thus, would be identified as those animals in need of human assistance in the form of rehabilitation at the time of stranding. There would be no indirect takes or harassment associated with issuance of this permit and only those animals selected for permanent captivity would be directly impacted. In absence of this permit, these animals would be released back to the wild. Although survivorship of rehabilitated and released animals is unknown, these animals might potentially contribute as reproductive members of the population and as such the effects of this action on the animals to be obtained and the species in general should be considered similar to a take from the wild. In this case, the method of collection is not relevant as the original take has already occurred both by the stranding, and then the rescue under the authority given to the stranding network; it is the effects of removing those animals from the population (i.e. not released) that are the subject of in this document. NMFS concludes that there would be no significant, or even measurable, direct or indirect effects on the populations of this species due to the retention of these animals because (1) the number of animals requested is low compared to the overall population numbers, and (2) the action would not result in any incidental harassment of wild animals.

There would be minimal adverse effects on the subject animals from the proposed activities, i.e. permanent retention in captivity. These animals would be maintained in accordance with AWA standards under the purview of APHIS. Because these animals would be in permanent captivity, they would be monitored daily by husbandry staff and the attending veterinarian would be notified of any medical or husbandry concerns. This permit would only authorize the acquisition of the releasable rehabilitated pinnipeds into a public display facility, specifically IMMS. The care and maintenance of these animals once acquired would be under the sole jurisdiction of APHIS, pursuant to the AWA. The social and economic impact of the addition of live California sea lions to be exhibited at IMMS would include expanding the education program at the facility as well as potentially create some jobs associated with the care of these animals. However, such positive impacts would be considered negligible on a national or regional (state) level.

Alternative 2 would result in an issued permit based on the application as requested by the applicant, which includes requiring rehabilitation facilities to participate in providing animal records for IMMS to use to select animals for their program. This scenario is opposed by commenters, including active stranding members, due to the potential for losing financial donations as well as volunteer support which is critical to the economic survival of these facilities. This potential decrease in resources would impact the ability of the stranding member to respond to beached and stranded animals, provide necessary care to the animals, and could lead to the failure of the stranding member. This, in turn, would reduce the number of animals that could be rescued and rehabilitated, as well as increasing the geographic area a stranding member would be responsible for should a fellow member close their doors. In addition, many rehabilitation facilities believe that the retention of releasable sea lions for public display purposes to be a violation of their individual missions as stranding network members. NMFS

respects the varying philosophies associated with marine mammal rescue and rehabilitation and recognizes that it is not in the best interest of the network for NMFS to instruct or force rehabilitation facilities to make releasable animals available for permanent captivity. Furthermore, using NMFS as an intermediary for the exchange of information regarding the suitability of sea lions for IMMS' programs would be a highly ineffective way to exercise the permit. For these reasons, this alternative has been rejected in favor of Alternative 3, the Proposed Action.

#### *4.3 EFFECTS OF ALTERNATIVE 3: Issue permit with conditions*

The effects of Alternative 3, the Proposed Action, are very similar to those identified in Alternative 2, above. Public display is a recognized exception under the MMMPA and permits may be issued for that purpose. NMFS has regulations that pertain to the disposition of rehabilitated marine mammals (50 CFR 216.27), specifically, section 216.27(b)(4) that gives the Office Director the option of authorizing the acquisition of any rehabilitated marine mammal regardless of its ability to be released, in place of authorizing a take (collection) from the wild for scientific research, enhancement, or public display purposes.

As mentioned previously, California sea lions are not a species listed as endangered or threatened under the ESA, nor are they considered strategic stocks or listed as depleted under the MMPA. California sea lion populations are healthy and there would be no indirect takes or harassment of wild marine mammals as a result of issuance of this permit. As discussed in the previous alternative, even though these animals are releasable to the wild, the retention of eight sea lions would not result significant, or even measurable, direct or indirect effects this species population.

The retained animals would be maintained in captivity in accordance with AWA standards under the purview of APHIS and this permit would only authorize the acquisition of the releasable rehabilitated pinnipeds. The care and maintenance of these animals once acquired would be under the sole jurisdiction of APHIS, pursuant to the AWA.

The only difference between Alternative 2 and Alternative 3 would be the clarification in the cover letter which would require IMMS to seek out rehabilitation facilities as partners as opposed to having NMFS require facilities to participate in the use of the issued permit. The permit would not contain any language regarding the requirement for stranding members to participate, nor would NMFS issue any directive to the stranding members to provide information or animals to the permit holder. Several commenters argued that forcing rehabilitation facilities to provide animals for this permit could indirectly cause economic hardship through a loss of donors and volunteer support to those facilities. This support by the community is what allows rehabilitation centers to function. NMFS is sensitive to the concerns expressed by rehabilitation facilities and believes that the most effective manner of managing this permit is for direct communication and cooperation between IMMS and its partnering rehabilitation facilities. Therefore, no rehabilitation facility will be required to provide information on its rehabilitating collection or provide animals to IMMS for permanent captivity under this alternative. Alternative 3 would allow stranding network members, in partnership with IMMS, to determine the potential for loss of donors, volunteer support, or other adverse effects, and to find ways to eliminate or reduce those effects. NMFS therefore concludes that

Alternative 3 would have a negligible effect on the stranding networks members, less than Alternative 2 would by requiring participation of rehabilitation centers in the permitted activities. The consideration of social and economic concerns, while still meeting the objectives identified by the permit, led to the conclusion that Alternative 3 was the preferred alternative in this case.

#### *4.4 EFFECTS OF ALTERNATIVE 4: Issue permit with a delayed effective date*

The effects of Alternative 4 are similar to the effects described for Alternative 3. The only additional difference would be the effective date of the permit. The Marine Mammal Commission suggested a one year delay before the effective date of the permit. Within this time, IMMS could continue seeking out non-releasable animals or acquire animals from other marine mammal facilities. IMMS has been positioned to receive a non-releasable sea lion since December of 2009. Since IMMS does not currently maintain sea lions, it has been necessary to try and identify two animals that meet IMMS criteria that are simultaneously available in order to be in compliance with AWA regulations (i.e. social species may not be maintained as solitary animals). IMMS has indicated that they have sought out other public display facilities as partners and there are no available sea lions for acquisition.

The MMPA does not require that certain amount of effort be expended on alternatives before applying for a permit to take marine mammals from the wild. IMMS continues to be on the list to accept non-releasable animals and, once IMMS has two animals in place IMMS will be eligible to be considered for placement of single animals as they are deemed to be non-releasable. NMFS will continue to encourage IMMS to work with other public display facilities to acquire sea lions. Like the non-releasable sea lions, the availability of sea lions in public display facilities fluctuates over time as animals are born and die.

For the purposes of this EA, the effects would likely not change under this alternative; they would only be delayed. IMMS has been on the waiting list for non-releasable sea lions for approximately 19 months and while they have been steadily moving up the list, IMMS' criteria for acceptance of a sea lion (unable to accept disabled and problem animals) further restricts the likelihood that appropriate animals will become available. The Marine Mammal Commission's letter regarding a delayed effective date is in their response to the notice of receipt of the application (75 FR 28239; May 20, 2010) is dated July 8, 2010. As such during the processing of this application over a year has passed without IMMS acquiring a non-releasable sea lion or a sea lion from another domestic public display facility. It is possible that acquisition of sea lions from another source may reduce the number of releasable animals that may be acquired by IMMS and this could result in the return of a few sea lions to the wild; however, this effect would be negligible and insignificant to the population. Therefore, this alternative was not selected.

#### *4.5 SUMMARY OF COMPLIANCE WITH APPLICABLE LAWS, NECESSARY FEDERAL PERMITS, LICENSES, AND ENTITLEMENTS*

As summarized below, NMFS has determined that the proposed action is consistent with the purposes, policies, and applicable requirements of the MMPA and NMFS regulations.

#### 4.5.1 *Marine Mammal Protection Act*

The applicant submitted an application which included responses to all applicable questions in the application instructions and provided clarifications as requested in response to reviewers. The proposed action is consistent with applicable issuance criteria in the MMPA and NMFS implementing regulations. In accordance with section 104(c)(2)(A) of the MMPA, NMFS has determined that IMMS: (1) offers a program for education or conservation purposes that is based on professionally recognized standards of the public display community, (2) holds a license issued under 7 U.S.C. 2131 *et seq.*, and (3) maintains facilities for public display of marine mammals that are open to the public on a regularly scheduled basis with access not limited or restricted other than by charging an admission fee.

The permit would contain standard terms and conditions stipulated in the MMPA and NMFS's regulations. As required by the MMPA, the permit would specify: (1) the effective date of the permit; (2) the number and kinds (species and stock) of marine mammals that may be taken; (3) the location and manner in which they may be taken; and (4) other terms and conditions deemed appropriate. Other terms and conditions deemed appropriate relate to acquisition and disposition of marine mammals and reporting to ensure permit compliance. In addition, the permit would require IMMS to continue to meet the three public display criteria as outlined in section 104(c)(2)(A) of the MMPA: 1) offer a program for education or conservation purposes that is based on professionally recognized standards of the public display community, 2) hold a license issued under 7 U.S.C. 2131 *et seq.*, and 3) maintain facilities for the public display of marine mammals that are open to the public on a regularly scheduled basis with access not limited or restricted other than by charging an admission fee. The permit also is consistent with NMFS's interpretation of section 109(h) and its regulations set forth at 50 CFR 216.27(b)(4) and 216.27(c)(1), which permit the retention of both releasable and non-releasable animals for a special exception purpose (e.g., permits for public display).

#### 4.5.2 *Animal Welfare Act*

The submitted application was forwarded to APHIS for an evaluation of the activities as they pertain to the AWA. APHIS reviewed the application and confirmed that the facility has met the APHIS requirements for licensure as a public display facility and they do hold such a license. Until the facility acquires public display animals, APHIS was unable to comment on the facility's ability to comply with the AWA – this cannot be done until applicable animals are present in the facility. NMFS is satisfied that the applicant meets the requirement as stated in section 104(c)(2)(A)(ii) of the MMPA - applicants for permits for public display must be registered or hold a license issued under the Animal Welfare Act (7 U.S.C. 2131 *et seq.*).

#### 4.6 *COMPARISON OF ALTERNATIVES*

The Proposed Action would allow for the retention of releasable California sea lions in permanent captivity, and if all requested takes were to be used, would result in a small number of sea lions that would not be released to the wild after rehabilitation that is calculated to be less than 0.1% of the allowable PBR associated with this species. The potential for adverse impacts on the human environment is not appreciably greater under the Proposed Action than under the No Action alternative.

#### *4.7 MITIGATION MEASURES*

Even though the effects of this action on the animals to be obtained and the species in general have been evaluated as a take from the wild permit, the resulting permit issued under any of the alternatives would not authorize any direct takes of animals living in the wild. The source of available animals would be restricted to those animals that have been rescued and rehabilitated by the Marine Mammal Health and Stranding Response Program. Target animals would be selected from individuals that have been medically cleared for release back to the wild, but have not been released. Taking these releasable animals while being maintained at the rehabilitation facility will prevent unintentional harassment of non-target animals that might normally occur if the target animals were taken directly from the wild. After undergoing rehabilitation, all animals rescued by the Stranding Network are evaluated for release according to the “Policies and Best Practices for Marine Mammal Stranding Response, Rehabilitation, and Release”. The conditions that would be included in the permit are summarized below:

- The Office Director must approve the retention of an animal for the purpose of this permit in consultation with the attending veterinarian and the NMFS Regional Administrator.
- The Office Director must be consulted regarding the disposition of any animal obtained under this permit that is deemed unsuitable for public display purposes.
- The Permit Holder must submit acquisition reports (Marine Mammal Data Sheet) and disposition reports (NOAA Form 89-878 and Marine Mammal Transfer/Transport Notification form).
- The marine mammals must be taken and transported in a humane manner and in accordance with standards set forth in Animal Welfare Act (AWA) regulations (9 CFR Sections 3.112-3.118).
- Animals may not be released into the wild except under a separate scientific research permit or in accordance with the stranding regulations, as determined by the Office Director.

#### *4.8 UNAVOIDABLE ADVERSE EFFECTS*

Despite all precautions, there are potential adverse effects that may occur including death during transport or a premature death while in captivity. However, as specified in Chapter 4, the adverse effects of captivity would be minimal. These animals would be maintained in accordance with AWA standards under the purview of APHIS, and would be monitored daily by husbandry staff and the attending veterinarian would be notified of any medical or husbandry concerns. The mitigation measures imposed by permit conditions are intended to reduce, to the maximum extent practical, the potential for adverse effects of the proposed action on the targeted species, as well as the individual animals that may be taken.

#### *4.9 CUMULATIVE EFFECTS*

An environmental assessment must consider cumulative effects when determining whether an action significantly affects environmental quality. The cumulative impact is the impact on the environment, which results from the incremental impact of the action, when added to other past, present, and reasonably foreseeable future actions, regardless of what agency (Federal or non-Federal) or person undertakes such other actions. Significance cannot be avoided if it is reasonable to anticipate a cumulatively significant impact on the environment.

There is currently one active permit which authorizes the retention of rehabilitated marine mammals for public display purposes (described above in Section 1.2). Under this permit, two releasable stranded California sea lions have been transferred from rehabilitation status to permanent captivity as public display animals (remaining takes authorized under this permit equals three California sea lions). The potential remains that other marine mammal public display facilities may explore the option of receiving a similar permit. However, each permit application received is evaluated on its own merits relative to the criteria established in the MMPA and NMFS' implementing regulations. There are currently no permits for the direct collection of animals from the wild for public display. The animals under consideration for this permit are animals that would be considered releasable and would have the potential to contribute to future population growth. However, the number of animals requested to be transferred into permanent captivity would result in negligible impact when compared to the current status of the populations (a total of 11 animals including the existing permit). The proposed permit would not authorize any directed takes from the wild; therefore, there would be no indirect takes associated the proposed activities. Thus, the cumulative impacts that would result from issuance of this permit would be considered insignificant to the species and the environment.

Information regarding the status of threats to California sea lions was obtained from the NMFS Stock Assessment Report (Carretta et al. 2007). California sea lions are killed incidentally in set and drift gillnet fisheries. Minimum total annual takes from all fisheries is 159 sea lions. Many entanglements are likely unreported or undetected, thus this represents a minimum number of sea lions taken in the fisheries. Entanglements in gillnet and other man-made debris have been observed at rookeries and haulouts. Of those animals hauled out between 0.08% to 0.35% of those animals are observed being entangled. However, the mortality rates associated with these types of entanglements are unknown. In addition, mortalities associated with other human interactions (e.g. gunshot wounds, boat collisions, entrainment in power plants) must be considered. Reports indicate that between 2000 and 2004, 360 animals were taken via shooting, collision or entrainment. In addition, the states of Washington, Oregon and Idaho were authorized in 2008 to lethally remove California sea lions from the Columbia River, specifically at the Bonneville Dam. Although this authorization is no longer in place, the number of animals identified for removal (approximately 100 individuals) and those actively removed between 2008 and 2011 (approximately 37 sea lions) when compared to the overall population estimates and PBR is not significant. There is currently an application pending for a new section 120 lethal removal permit at the Bonneville Dam. Subsistence hunts of California sea lions are rare and current estimates of annual take are between zero and two animals. Harmful algal blooms (domoic acid) have fluctuated over time and future mortalities may be expected to occur, however, at this time the population is stable enough to absorb the losses. While there are threats to California sea lions, the population has likely reached carrying capacity of 46,800 pups per year with a PBR of 8,511 animals – a number that is unlikely to be reached combining all sources of human-caused mortality, including the proposed action.



## **CHAPTER 5 LIST OF PREPARERS AND AGENCIES CONSULTED**

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### **LITERATURE CITED**

Carretta, J.V., K.A. Forney, M.S. Lowry, J. Barlow, J. Baker, B. Hanson, and M.M. Muto. 2007. U.S. Pacific Marine Mammal Stock Assessments: 2007. U.S. Department of Commerce, NOAA Technical Memorandum, NMFS-SWFSC-414. 320 p.

Moore, M., G. Early, K. Touhey, S. Barco, F. Gulland, and R. Wells. 2007. Rehabilitation and Release of Marine Mammals in the United States: Risks and Benefits. *Marine Mammal Science*. Vo. 23(4) 731-750.

NMFS, 2005. Environmental Assessment on the Effects of NMFS Permitted Public Display Activities on Rehabilitated California Sea Lions and Pacific Harbor Seals (Permit File No. 1042-1736). Silver Spring, MD.

NMFS, 2008. Environmental Assessment on the Effects of Issuance of a Public Display Permit for Rehabilitated Pinnipeds (Permit File No. 10028; Mystic Aquarium). Silver Spring, MD.

## **INDEX OF COMMENTS RECEIVED**

(comments are attached as an Appendix)

### **ON THE APPLICATION**

Regina Asmutis-Silvia and Courtney S. Vail, Whale and Dolphin Conservation Society  
Laura Bottaro, former Oklahoma City Zoo employee  
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Paula M. Carrigan, former employee of Marine Animal Productions  
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Terri Miles, former employee of Marine Animal Productions  
Susan Millward, Animal Welfare Institute  
Michael Moore, Frances Gulland, Susan Barco, Kathleen Touhey Moore, Randall Wells and  
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Timothy J. Ragen, Ph.D., The Marine Mammal Commission  
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Joseph Stevens, former employee of Marine Animal Productions  
William W. Rossiter, Cetacean Society International  
Karen Vale, World Society for the Protection of Animals  
Sharon B. Young, The Humane Society of the United States

### **ON THE DRAFT EA**

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Regina Asmutis-Silvia, Whale and Dolphin Conservation Society  
Sushima Bhateley, Public  
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