



COMMENT ANALYSIS REPORT
Marine Mammals
Advanced Notice of Proposed Rulemaking

FINAL

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Prepared by
U.S. Department of Commerce
National Oceanic and Atmospheric Administration
National Marine Fisheries Service

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1.0 INTRODUCTION

NMFS is considering proposing changes to its implementing regulations, and criteria governing the issuance of permits for scientific research and enhancement activities under section 104 of the Marine Mammal Protection Act (MMPA), and solicited public comment to better inform the process.

The Advance Notice of Proposed Rulemaking (ANPR) was published in the *Federal Register* on September 13, 2007. The public comment period for the proposed rule lasted for 90 days and concluded on December 13, 2007. Regulatory changes being considered by NMFS are found in 50 CFR 216, mostly Subpart D, although comments or recommendations regarding any of the subparts were considered. The sections identified were either followed by recommendations from NMFS on possible alternatives or changes to the current language, or a general solicitation by NMFS to the public for comments pertaining to that section. Any other recommendations received in response to this ANPR regarding regulations at 50 CFR part 216 will also be considered prior to proposed rulemaking.

2.0 BACKGROUND

Permits to take marine mammal species are governed by the MMPA and NMFS implementing regulations at 50 CFR part 216. For threatened and endangered marine mammal species, permits are also governed by the Endangered Species Act (ESA) and 50 CFR part 222. On May 10, 1996, a final rule was published establishing requirements for issuing permits to take, import, or export marine mammals (including endangered and threatened marine mammals) and marine mammal parts under NMFS' jurisdiction for purposes of scientific research and enhancement, photography, and public display (for captures and initial imports), and providing procedures for determining the disposition of rehabilitated stranded marine mammals. The intent of the current ANPR is to streamline and clarify general permitting requirements and requirements for scientific research and enhancement permits, simplify procedures for transferring marine mammal parts, possibly apply the General Authorization (GA) to research activities involving Level A harassment of non-ESA listed marine mammals, and implement a 'permit application cycle' for submitting applications and processing of all marine mammal permits. NMFS intends to write regulations for photography permits and is considering whether this activity should be covered by the GA.

3.0 CLASSIFICATION OF PUBLIC COMMENTS ON THE ADVANCED NOTICE OF PROPOSED RULEMAKING

The analysis of public comments on the ANPR was a multi-stage process that included sorting, classifying and summarizing public comments into categories of summary statements as described in detail below.

3.1 Sorting and Classification

All submissions on the proposed listing were read, reviewed and logged into a database where each was assigned an automatic tracking number (Submission ID). The classification phase was used to divide each submission into a series of substantive comments, each having a unique Comment ID number. The goal of this process was to ensure that each sentence and paragraph in a submission containing substantive content pertinent to the ANPR was entered into the database. Substantive content constituted suggested changes or recommendations on the proposed rulemaking. Coders assigned each substantive comment to one or more issue categories (See Table 1).

Table 1: Issue Categories

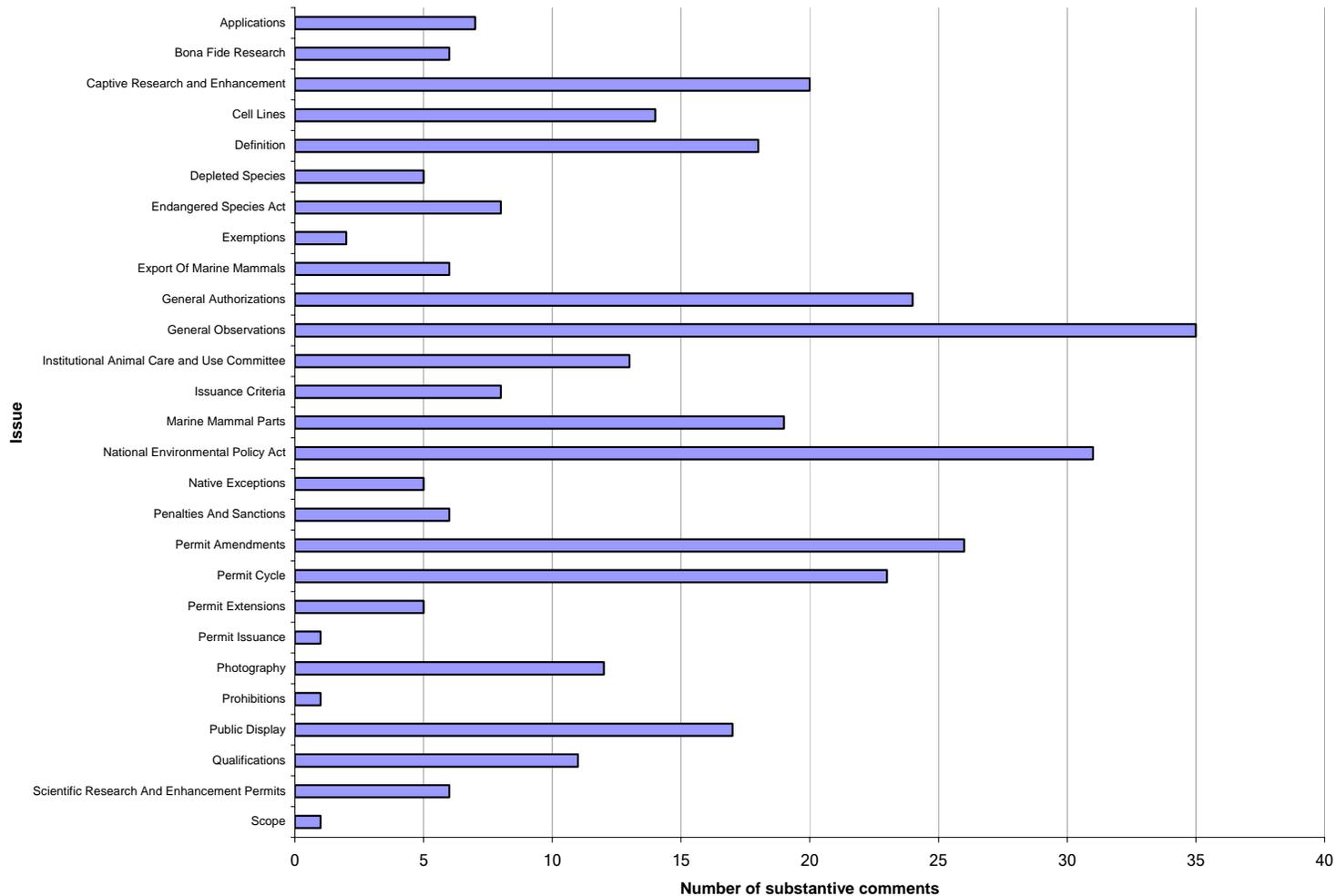
Section	Issue Code	Description
N/A	GEN	General Observations on the proposed rule; changes not covered under any specific section. This code captures statements like "These changes make things more complicated," as well as other subjects not specified in the ANPR, and sections of the regulations on which we did not solicit specific input.
N/A	BONA	Bona Fide Research includes comments on how to determine whether research is "bona fide" through various sections of the regulations.
216.3 and 216.31	DEF	Definitions includes comments on suggested changes to definitions in Regulations Governing the Taking and Importing of Marine Mammals (216.3 and 216.31)
216.14	EXP	Export Of Marine Mammals includes comments regarding NMFS's proposal to add provisions to authorize the export of marine mammals to the regulations under 216.14.
216.15	DEPL	Depleted Species includes comments on regulations for depleted species.
216.16 and 216.17	PROH	Prohibitions includes comments regarding the prohibitions under General Authorizations (Section 216.16) and General Prohibitions (Section 216.17) and where this information should be located in the overall regulations.
216.23	NATV	Native Exceptions includes comments on regulations for Native exceptions for the transfer of marine mammal parts.
216.25	EXEMP	Exemptions includes comments on whether Section 216.25 on exempted marine mammal and marine mammal products should be consolidated with other sections in the regulations.
216.32	SCOPE	Scope includes comments on the scope of Subpart D - Special Exceptions.
216.33	APP	Applications includes comments on permit application submission, review, and decision procedures.
216.33 (c), (d) and (e)	NEPA	National Environmental Policy Act includes comments on NEPA requirements for applications (initial NEPA determination, Federal Register notices and availability of receipt of application and NEPA documents, requirements for NEPA statements in Federal Register notices, documentation/review of permit applications; NEPA and ESA timelines and compliance associated with permits).
216.33(e)	ISS	Permit Issuance includes general comments regarding permit issuance or denial procedures.
216.33(e)(4)	ESA	Endangered Species Act includes comments on regulation of permit applications involving ESA-listed species and the procedures required by Section 10(d) of the ESA and proposed criteria for determining whether an application has been submitted in "good faith".
216.34	CRIT	Issuance Criteria includes general comments on issuance criteria for permits.
216.34	IACUC	Issuance criteria including whether NMFS should require proof of Institutional Animal Care and Use Committee approval as part of the criteria for issuing permits.
216.35	EXTN	Permit Extensions includes comments on permit extensions and the proposal to remove the part in 216.35(b) that provides a one-year extension of the original permit (Section 216.35).
216.35	QUAL	Qualifications includes comments on permit qualifications and NMFS's proposal to specify minimum standards for qualifications or specific criteria by which applicants' qualifications and associated personnel listed on the application could be evaluated.

Section	Issue Code	Description
216.37	CELL	Cell Lines includes comments on requirements and procedures for governing development, use, distribution or transfer, and prohibited sale of cell lines derived from marine mammal tissue.
216.37	PARTS	Marine Mammal Parts includes comments on regulation of marine mammal parts and requirements for the transfer of parts legally taken from an ESA-listed versus non-listed species including modifications to streamline and govern collection, receipt, import, export, and archiving marine mammal parts suggested by NMFS.
216.39	AMEND	Permit Amendments includes comment on permit amendments and NMFS's proposal to only allow minor permit amendments; Minor amendments would be defined as described in the Advanced Notice of Proposed Rulemaking published on September 13, 2007 (FR 72-52339).
216.40	PEN	Penalties And Sanctions includes comments on penalties and permit sanctions; comments regarding NMFS's proposal to promulgate specific regulations for suspension, revocation, modification, and denial of scientific research or enhancement permits for reasons not related to enforcement actions.
216.41	CAPT	Captive Research and Enhancement includes comments on regulatory protocols, public display and restrictions with respect to animals used in captive research and enhancement, including changes to requirements for incidental public display of research animals, and captive maintenance and incidental display of ESA-listed species to enhancement permits.
216.41	RES	Scientific Research And Enhancement Permits includes general comments on permits for scientific research and enhancement (Section 216.41).
216.42	PHOTO	Photography includes comments on regulations regarding photography including proposed limitations on the number of personnel involved in photographic research in order to eliminate potential problems with permit holders using such authorization for ecotourism.
216.43	PD	Public Display includes comments proposing separate regulations for marine mammals on public display.
216.45	CYCLE	Permit Cycle includes comments on the permit processing cycle and review requirements and NMFS's proposal to place the permit application process on a cycle.
216.45	GA	General Authorizations includes comments on the requirements for General Authorizations (GA) for Level B Harassment for scientific research and on the proposed modifications to GA requirements including the consideration of the status of the stock rather than level of harassment; also includes comments on the potential requirement to clarifying the description of methods specifying the number of marine mammals taken under a permit.

A total of 26 submissions were received on the ANPR, which yielded 328 separate substantive comments from which 27 issue categories were identified. These issues are referenced to the section in 50 CFR 216 where applicable as shown in Table 1 above. Overall, 73% of the comments were received on behalf of organizations, 23% were from individuals and 4% did not indicate their representation.

Categories with the most comments were General Observations with 35; National Environmental Policy Act (Sections 216.33 (c), (d) and (e)) with 32; Permit Amendments (Section 216.39) with 26; General Authorizations (Section 216.45) and Permit Cycle (Section 216.45) drew 23 and 22 respectively. Figure 1 on the next page illustrates the distribution of comments in each issue category.

Figure 1: Issues Raised in Comments on the ANPR



3.2 Statements of Concern

After the initial issue classification, comments expressing similar points are grouped and summarized in a 'statement of concern' (SOC). Depending on the nature of the issue and the breadth of comments received, issue categories usually have more than one SOC. Responses are then written to address each SOC. The 25 issue categories yielded 176 SOCs.

4.0 SUBMISSION INDEX

To assist the public in finding responses to their substantive comments, a submission index was created that lists all submissions alphabetically by the last name of the person or organization, and which SOCs respond to their specific comments. To read responses to their comments, the public would first find their name in Table 2, note which SOCs are listed by their name, and then read those SOCs in Section 5.0.

Table 2: List of Commenters

Name	Organization	SOC
Boogdanian, Dolores	None	DEF 03; DEF 04; GEN 04; GEN 10
Casper, Dave	Long Marine Laboratory, UC Santa Cruz	BONA 06; CAPT 01; CAPT 11; CAPT 12; CAPT 13
Curland, Jim ¹	Defenders of Wildlife	AMEND 05; AMEND 07; IACUC 04; CYCLE 02; DEF 01; GEN 21; GA 04; NEPA 02; PHOTO 02
Davis, Randall ²	Texas A&M University	AMEND 06; CELL 03; CRIT 01; CYCLE 02; ESA 01; GEN 13; IACUC 05; NATV 01; NEPA 06; NEPA 13; PARTS 11; PEN 02; PHOTO 06; QUAL 01
Evans, William ²	University of Notre Dame	AMEND 06; CELL 03; CRIT 01; CYCLE 02; ESA 01; GEN 13; IACUC 05; NATV 01; NEPA 06; NEPA 13; PARTS 11; PEN 02; PHOTO 06; QUAL 01
Gabel, Robert	U.S. Fish and Wildlife Service	GEN 17
Horning, Markus	Marine Mammal Institute	AMEND 08; AMEND 09; AMEND 10; BONA 01; GA 01; GA 02; GEN 08; IACUC 01; IACUC 03; QUAL 01
Lane, Franklin	Sonoran Sea Aquarium	PARTS 02
Lowry, Cindy ¹	OPTI/Earth Island Institute	AMEND 04; CYCLE 02; GA 04; GEN 21; IACUC 04 NEPA 02; PHOTO 02
Mazarro, Lisa	Mystic Aquarium	AMEND 02; AMEND 03; CAPT 09; CAPT 10; CYCLE 02; EXTN 01
McMahen, Sheila ¹	Friends of the Sea Otter	AMEND 05; AMEND 07; CYCLE 02; GA 04; GEN 21; IACUC 04 NEPA 02; PHOTO 02

Name	Organization	SOC
Menard, Marilee	Alliance of Marine Mammal Parks and Aquariums	AMEND 04; CAPT 02; CAPT 14; CAPT 19; CELL 01; CYCLE 01; ESA 01; GA 02; GEN 03; IACUC 04; NEPA 01; PARTS 03; PARTS 06; PARTS 07; PD 01; PD 03; PD 04; PEN 01; QUAL 02; QUAL 03
Millward, Susan	Animal Welfare Institute	AMEND 05; CYCLE 04; GA 04; IACUC 04; NEPA 02; PHOTO 02
Natchigall, Paul E.	University of Hawaii at Manoa	AMEND 01; AMEND 06; CAPT 07; CAPT 08; CYCLE 01; GEN 01; IACUC 03; PHOTO 01
National Marine Sanctuary Program		CYCLE 08; GEN 20; NEPA 12
Novic, Kelly	Save the Manatee Club	AMEND 05; CYCLE 02; DEPL 01; GA 04; GA 06; IACUC 04; NEPA 02; PHOTO 02
Olson, Steven	Association of Zoos and Aquariums	CELL 01; GEN 01; NEPA 01; PD 03; PD 04; PD 06
Ragen, Timothy	Marine Mammal Commission	AMEND 11; AMEND 14; BONA 03; BONA 05; CAPT 16; CAPT 7; CAPT 18; CELL 02; CELL 05; CYCLE 01; CYCLE 04; DEF 01; DEF 07; DEF 08; DEF 09; DEF 13; DEF 14; DEF 15; DEPL 01; ESA 01; EXP 01; EXP 03; GA 04; GA 07; GA 08; GEN 02; GEN 03; GEN 06; GEN 07; GEN 09; GEN 11; GEN 12; GEN 19; GEN 22; IACUC 04; ISS 01; NATV 01; NATV 02; NEPA 07; NEPA 08; NEPA 09; NEPA 11; PARTS 05; PARTS 09; PARTS 10; PEN 04; PEN 05; PHOTO 04; PROH 01; QUAL 02; RES 01; SCOPE 01
Riedel, Monica	Alaska Native Harbor Seal Commission	DEF 01; NATV 01
(Name withheld by request)	Private citizen	AMEND 12; AMEND 13; CYCLE 02; CYCLE 06; EXTN 03
Sakashita, Miyoko	Center for Biological Diversity	CYCLE 03; DEPL 01; GA 03; GA 04; GA 05; NEPA 03
SeaWorld, Inc et al		AMEND 11; APP 04; CELL 01; CYCLE 01; DEF 01; ESA 03; EXP 04; EXP 01; GEN 15; PD 02; PD 03; PD 04; PD 05; PD 07; PHOT 05; QUAL 02
Slaughter, Scott	Center for Regulatory Effectiveness	GEN 16
Solangi, Moby	Institute for Marine Mammal Studies	CAPT 10; CAPT 15; CELL 01; ESA 01; GEN 01; GEN 03; IACUC 02; NEPA 01; PARTS 01; PD 04; PEN 02; PHOTO 06; QUAL 02
Straley, Jan	University of Alaska Southeast	AMEND 11; CYCLE 01; ESA 01; GA 02; GA 06; IACUC 04; IACUC 05 ; NATV 01; NEPA 06; PARTS 07; PARTS 11; PEN 03; PHOTO 03
Wise, John Pierce	University of Southern Maine	CELL 03; CELL 04; CELL 05; CELL 06

Name	Organization	SOC
Yochem, Pamela	Hubbs-Sea World Research Institute	AMEND 11; APP 01; GEN 01; GEN 18; IACUC 02; NEPA 04; PD 04; QUAL 02
Young, Nina	Consortium for Ocean Leadership	AMEND 11; APP 02; BONA 02; CAPT 05; CAPT 06; CAPT 10; CELL 01; CYCLE 02; CYCLE 04; CYCLE 05; CYCLE 07; CYCLE 09; DEF 01; DEF; 5; DEF 06; ESA 01; EXP 01; EXTN 02; EXTN 03; GA 02; GA 05; GEN 01; GEN 03; GEN 05; IACUC 04; NEPA 01; NEPA 04; NEPA 05; PARTS 03; PARTS 04; PARTS 06; PARTS 07; PARTS 08; PEN 02; PHOTO 02; PHOTO 06; QUAL 04; SCOPE 02
Young, Sharon	Humane Society of the United States	AMEND 05; AMEND 15; APP 03; BONA 04; CAPT 03; CAPT 04; CAPT 09; CELL 02; CYCLE 03; DEF 10; DEF 11; DEF 12; DEPL 01; ESA 02; EXEMP 01; EXP 02; GA 03; GA 04; GA 05; GA 07; GEN 06; GEN 11; GEN 14; IACUC 04; NEPA 02; NEPA 07; NEPA 10; PARTS 08 PARTS 09; PEN 04; PHOTO 02; PHOTO 07; QUAL 05

^{1 and 2} joint submissions

5.0 INDEX OF STATEMENTS OF CONCERN

The following index arranges each Statement of Concern by issue category. The section number from 50 CFR 216 is also referenced.

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Comments not referencing a particular section

Bona Fide Research

- BONA 01** One of the biggest problems with the current process is related to the overall justification for conducting bona fide research. From a scientific perspective, if a project cannot reach the predicted level of significance or sensitivity, this invalidates the justification of the entire project, including the justification for whichever portion of the project has already occurred.
- BONA 02** All scientific research should be included in the current definition of " bona fide scientific research" in 50 C.F.R 213.3 Definitions:, whether it is on or incidentally takes marine mammals. This proposal would require a change to the MMPA, but we agree with the National Academy of Science's 1994 report on "Low-frequency Sound and Marine Mammals" and firmly advocate that all research should be regulated under the same provisions.
- BONA 03** An application can meet the bona fide research requirement under three separate criteria in 50 C.F.R 216.3, and these should be addressed separately in the regulations. To meet any of the statutory standards for bona fide scientific research, the research results must somehow be disseminated to the appropriate audience, such as by publication in a scientific journal. It might be appropriate in making a decision as to whether to issue a scientific research permit to look at the applicant's plans for publishing or otherwise disseminating the research results. However, some research (e.g., long-term ecological research) requires years of data collection before it is suitable for analysis and publication, or other research may be published by scientists or persons whose main interest is outside of marine mammal science.
- BONA 04** Research has generally been considered bona fide if it is publishable. However, not all research that can be done and may be published is necessarily bona fide. If research that will harm or harass marine mammals is not specifically related to a conservation objective, and is largely satisfying an intellectual curiosity about the species, it may not be bona fide even if it is publishable.
- BONA 05** The regulations and permit application instructions should provide additional guidance as to how NMFS determines whether information submitted by an applicant indicates that a bona fide scientific purpose would be furthered. The guidance should be based on objective criteria such that the applicants and others interested in permitting actions know what to expect from decision makers. The three separate criteria for meeting the bona fide research requirement should be addressed separately in the regulations. The applicant should be required to have a plan for disseminating the research results to the scientific community.
- BONA 06** The number of marine mammal rehabilitation facilities which conduct bona fide scientific research is very small. It is these facilities which will, over time, generate the scientific information required by regulatory agencies, such as NMFS, to formulate future policies and regulations for marine mammal rehabilitation and hopefully avoid the current "polarized attitudes".

Comments not referencing a particular section

General Observations

- GEN 01** Disappointment because none of the changes appear to make the process simpler and easier for scientists. If anything, the changes will make things more difficult. Science does not need more restrictions. The Permits Division of OPR is understaffed and resources are urgently needed to add staff to comply with the ESA, MMPA, and NEPA and expedite critical permit applications.
- GEN 02** Just as section 102 originally contained all of the Act's prohibitions, so did Subpart B of the regulations. The exceptions of these prohibitions set forth in the various sections of the Act followed in Subparts C and D. As the Act has evolved and been amended, this arrangement has not been maintained. Therefore, the organization of the Services' regulations is fraught with inconsistencies and could use a general overhaul, although this is not the focus of the current ANPR. Service may wish to consider a more general reorganization at a later date. For permit-related matters, the existing organizational inconsistencies should be corrected as part of the anticipated rulemaking.
- GEN 03** Current scientific research permit regulations are unreasonably cumbersome and time consuming. NMFS' effort to streamline and approve the process is timely and welcome. However, there are concerns that some of the regulations under consideration might cause additional delays and not streamline the process as intended. For example, the differences between NMFS and USFWS in processes is not addressed, but should be. Therefore, there should be a collective and extensive review process.
- GEN 04** Nothing should be changed that would increase the likelihood of marine mammal takes for research of display purposes. Other nations continue to take species for alleged research or educational purposes-but are more likely for commercial or food use-and we must not follow this destructive path.
- GEN 05** NMFS should convene a meeting of current and recent marine mammal researchers and seek their input in revising and streamlining the permit process. By doing this, NMFS will benefit from a collective discussion of those who have experience with the process.
- GEN 06** NMFS should require that each part to be imported has been taken in accordance with the laws of the country of origin and not in violation of the MMPA. Section 216.12(b)(I) should have a new category added that would read "Taken in a manner that would otherwise have violated the MMPA", to clarify that the MMPA does not allow the import of animals that were taken in a manner that, while possibly legal in the exporting country, would not have been legal under the MMPA.
- GEN 07** The permitting process imposes costs on researchers. Therefore NMFS and all others involved must make the process both as effective and efficient as possible by avoiding all unnecessary research constraints or requirements.
- GEN 08** Mortalities during research need to account for natural mortality during the time period in which the research takes place and unexpected mortalities needs to be permitted by NMFS in addition to the expected mortalities from the research.
- GEN 09** Overlap between restrictions described in Section 216.35 (conditions generally applicable to all permits) and Section 216.36 (conditions vary from permit to permit) should likely be consolidated or at least renamed to avoid confusion.
- GEN 10** Regarding 216.22: Officials should be required to limit a "take" to those circumstances when there is an imminent threat to public welfare, particularly if the taking will result in mortality.

Comments not referencing a particular section

General Observations

- GEN 11** NMFS should consider deleting Section 216.44 Applicability/Transition because all permits issued before or shortly after the referenced date (10 June 1996) have expired. Subpart C General Exceptions 216.2 1 “Actions permitted by international treaty, convention, or agreement”. The specific reference to the Fur Seal Act in this section should be deleted. Other relevant treaties may exist such that this specific reference appears to preclude their consideration.
- GEN 12** Cumulative effects of human activities, including research, need to be incorporated into permitting issues. Research itself often imposes an added effect on its target species or habitat. Addressing cumulative impacts will require quantitative data supported by extensive monitoring.
- GEN 13** NMFS should not arbitrarily eliminate items in a permit application without first discussing with the permit applicant those items within the permit proposal that might change the proposed research or result in denial of the permit.
- GEN 14** Opposed to consolidation of Section 216.36 with other sections, as requirements might be lost.
- GEN 15** Many of the regulation changes proposed by NMFS lack specifics and do not describe how any changes to current procedures would be implemented. Subsequently, NMFS should issue a more detailed and specific ANPR to ensure that interested parties are able to meaningfully participate in the process, as required by law. This more detailed ANPR should also eliminate proposed and existing regulations that go beyond the scope of NMFS' jurisdiction.
- GEN 16** We recommend that NMFS change the MMPA permitting regulations by proposing and promulgating reasonable, effective and statutorily-authorized incidental harassment regulations for oil and gas activities in the Gulf of Mexico as soon as possible.
- GEN 17** NMFS should continue to coordinate with other agencies by issuing joint permits and addressing inconsistencies in policies between agencies that may cause confusion for applicants. Further consideration should be given to the development of joint NMFS-USFWS regulations for facilitating the implementation of the MMPA and ESA.
- GEN 18** NMFS OPR office must be staffed with objective personnel who have at least a basic understanding of the MMPA, field and lab research, and marine mammal biology.
- GEN 19** The existing headings could be a source of confusion to applicants and public (i.e., section 216.34 entitled "Issuance Criteria").
- GEN 20** For activities requiring concurrent processing under the NMSA and the MMPA, action agencies and applicants have demonstrated confusion regarding how to facilitate adaptive management in the light of findings made under these two statutes. NMFS might consider including in its regulations clear statements regarding what an applicant must do after receiving an MMPA permit, specifically: the types of data that must be provided on an ongoing basis to allow NOAA to evaluate the status of their permit; how to count the number of animals that have been “taken” under Level A and Level B; and what the process is if permitted take levels are exceeded. Such clarifications in situations involving coincident oversight of mitigation and monitoring activities by multiple NOAA branches would lead to a better understanding (both within NOAA and between NOAA and the MMPA permittees) regarding the specific requirements of the permit and the permittee’s state of compliance at any given time.

Comments not referencing a particular section

General Observations

- GEN 21** We request clarification that these regulations would not apply to marine mammal species under the jurisdiction of the U.S. Fish and Wildlife Service.
- GEN 22** The general provisions in the regulations should explain that more specific criteria are set forth under the sections addressing specific permit types. Cross referencing the sections may be needed in other sections to link the general provisions with those more specific criteria provided under the sections addressing specific permit types.

216.3 Definitions

Definition

- DEF 01** NMFS should clarify the definition of a marine mammal part. For example, a captive born marine mammal is not a marine mammal part, as some activists have claimed. Also, NMFS should clarify whether items produced by a marine mammal (e.g., scat, spew, and ambergris) are parts, and the consequences with regard to items valuable in illicit trade (e.g., ambergris).
- DEF 02** We support changes to the definition of authentic native article of handicraft and clothing in 50 CFR 216.3 by eliminated the date the MMPA became effective (December 21, 1972). In an effort to stay consistent with the regulations that the USFWS has adopted regarding this section, we support this change.
- DEF 03** One particular recommendation would be to modify the definition of “bona fide research” under Section 216.3 to indicate that the research must do more than “likely” add to “basic” scientific knowledge, but would instead add to existing knowledge in a scientifically significant way.
- DEF 04** I also would suggest that “large scale drift net” be defined as something less than 2.5 kilometers in size due to the significant impact these drift nets has on the ocean ecology, and the numbers of mammals and other sea creatures snared.
- DEF 05** We question why (the present) definition (of Intrusive Research) is necessary. Is intrusive research any less important than other forms of research, or more suspect? If there is a reason to define intrusive or invasive actions, it is to identify actions that pose a direct risk of injury. Ocean Leadership rejects the notion that producing a stimulus that may affect behavior belongs in the same category. All research where the animals may sense the research activity pose the same risk of affecting behavior.
- DEF 06** In regard to scientific research activities, recommendations to focus permitting requirements on biologically significant behaviors require that biological significance be carefully defined. The NRC “Committee on Characterizing Biologically Significant Marine Mammal Behavior” recognized that additional scientific research is needed to define biological significance. Nevertheless, clearly defining this standard provides the foundation upon which consideration of alternative regulatory regimes could be undertaken. We recommend that NMFS convene a group of marine mammal scientists, policy-makers, and Hill staff to develop a definition of harassment that is scientifically based, readily interpreted by the agency, and easily enforced.
- DEF 07** NMFS should describe criteria for institutions that meet the qualifications for maintaining a “properly curated, professionally accredited scientific collection”, perhaps by adding a definition of that term.

216.3 Definitions

Definition

- DEF 08** NMFS should consider defining “enhancing the survival or recovery of a species,” which is the second type of permit being covered by the ANPR. Considerable confusion exists about the term “enhancement” because it is used differently under the permit provisions of the MMPA and those of the Endangered Species Act (ESA). In part, this is because only enhancement permits and permits for scientific research are available under the ESA and enhancement permits have become, by necessity, a catch-all provision. Enhancement under the ESA has been interpreted broadly and such permits have been used to authorize a variety of activities, including captive breeding programs, public display, rescue and rehabilitation, and even trophy hunts of listed species. Among other things, NMFS might want to clarify whether enhancement permits are available for all marine mammal species, or only for those facing conservation challenges, i.e., stocks that are listed as threatened or endangered, designated as depleted, or declining and which may become depleted if remedial actions are not taken.
- DEF 09** NMFS might consider amending its regulations to allow certain transfers of and tests on marine mammals at the initiative of hunters- groups or Alaska Native organizations, provided that the tests are related to the underlying subsistence use. For example, the Service could re-define the term “subsistence” in section 216.3 to include health screening and testing for contaminants from marine mammals to be used for food such that the taking, transfer, and testing would all be covered by section 101(b). A conforming change to section 216.23 authorizing the transfer also would be needed.
- DEF 10** We support consolidating and clarifying definitions in this section to remove redundancy and confusion; e.g., there are separate definitions for “article of handicraft” and “authentic native articles of handicrafts and clothing.” These two terms can probably be combined into one definition that covers all usage of the term “native handicraft” or “authentic native handicraft.”
- DEF 11** The definition of “humane” should be amended. It states that the “methods of taking, import, export or other activity which involves the least possible degree of pain and suffering practicable to the animal involved.” We would like the NMFS to add “stress” to this definition (i.e., “least possible degree of pain, suffering and stress.. .”). The methodologies and techniques for determining stress levels have been steadily improving and the regulations should reflect these scientific advances.
- DEF 12** The definition of pregnant specifies “near term.” We would like to remove those words. Pregnant is pregnant (the dictionary definition reads: “having a fetus or fetuses growing in the uterus”). Modern diagnostics make it possible to detect pregnancy in marine mammals at earlier stages than in the past. Every effort should be made to use modern methods of testing for pregnancy to protect mothers and their progeny from stress and harm resulting from research or transfer. That facilities and/or capture operators are not using these available procedures to detect pregnancy is illustrated by a number of recent instances in which pregnant animals have been transferred, only to give birth soon after arrival at the receiving facility, or the incidental accidental mortality of pregnant females associated with research projects involving the application of satellite tags in survey studies.

216.3 Definitions

Definition

- DEF 13** We do not recommend any specific changes to section 216.31. We believe, however, that absent a compelling reason, all of the regulatory definitions, even those applicable only to permit issues, should be included in a single section, i.e., Sec. 216.3. Currently, Sec. 216.31 merely clarifies the relationship between the definitions used under the MMPA and those applicable under the ESA. This seems to be all that is needed here. We believe, however, that the Service should provide additional guidance, not necessarily in the regulations, by identifying inconsistencies in definitions used to implement the MMPA and ESA, and noting which the Service considers to be the “more restrictive.”
- DEF 14** Identifying the proposed activities that will operate to the disadvantage of a listed species (see Sec 216.33(e)(4) is difficult due, in part, to uncertainty regarding what constitutes a disadvantage under the ESA. Therefore, NMFS should seek to define the term “disadvantage” in its regulations. This could be done in terms of predicted impacts to the decline or recovery of the species. The term “disadvantage” also applies to actions taken under section 103(a) of the MMPA. Thus, the Service may want to use this opportunity to develop a definition of the term that would be generally applicable under both statutes.

216.14 Marine mammals taken before the MMPA

Export Of Marine Mammals

- EXP 01** Section 102(e) of the MMPA and section 216.14 of the regulations make it clear that none of the prohibitions apply to marine mammals taken before the effective date of the Act. Anyone trying to export a pre-Act marine mammal or part will need to demonstrate the part was taken before the Act. Therefore, there is no reason to amend this section to specify that exports of pre-MMPA marine mammals and parts are allowed.
- EXP 02** We support the suggestion to add export to this provision in Sections 216.14(c) Marine mammals taken before the MMPA
- EXP 03** Revise proposed regulations and incorporate the prohibition on exporting marine mammals so that they are in conformity with the prohibited activities specified in section 102(a) of the MMPA.
- EXP 04** NMFS appears to be operating under the misconception that it regulates all aspects of marine mammals in the United States. Despite the lack of authority, this misconception permeates a number of the proposals discussed in the Notice, such as discussions relating to the export of marine mammals as to which the MMPA does not require a permit and allows only limited involvement of NMFS.

216.15 Depleted species

Depleted Species

DEPL 01 NMFS needs to make it clear in the preamble to Section 216.15 Depleted Species, by including an explanation that any species or population stock listed as threatened or endangered under the Endangered Species Act ("ESA") is automatically listed as depleted under the MMPA. This section should also specifically list all depleted species and stocks that are non-ESA listed. NMFS could provide a catch-all provision in this section to provide the necessary clarification. For example, the Service could add a new subsection (a)[bis] reading, "All marine mammals included in the list of endangered or threatened wildlife published under 50 C.F.R. 17.36. Alternatively, for consistency with the definition of "marine mammal" under section 216.3 (i.e., only species under NMFS jurisdiction), the recommended provision could refer to "...those species listed under sections 224.101(b) and 223.102 of the Service's regulations. Another alternative would be to add a regulatory definition of "depleted" under section 216.3 to accomplish the clarification the Service is considering.

216.16 Prohibitions under the General Authorization for Level B harassment for scientific research

Prohibitions

- PROH 01** Section 216.16 should be moved to Subpart D or parallel provisions applicable to scientific research and other types of permits should be appended and moved to Subpart B. Although the regulations include penalties and permit sanctions under section 216.40, the level of specificity is inconsistent with respect to violations of general authorizations versus permits. For example, there is no specific provision prohibiting a person from violating the terms or conditions of a permit, but there is for a general authorization.

216.23 Native exceptions

Native Exceptions

- NATV 01** Any person with an MMPA permit that authorizes the possession of marine mammal parts for bona fide research should be allowed to receive such parts from any Indian, Aleut, or Eskimo who resides on the coast of the North Pacific Ocean or the Arctic Ocean, and which is taken during subsistence hunting in accordance with section 101(b) of the MMPA. The Indian, Aleut, or Eskimo should be allowed to receive reasonable compensation for any additional work, transportation, or shipping costs associated with conveying the parts to the permittee as necessary for the intended research. This may be best accomplished in the permit regulations rather than section 216.3. A hunter should be included as an agent under the permit.
- NATV 02** NMFS should consider amending its regulations to allow certain transfers of and tests on marine mammals at the initiative of hunters' groups or Alaska Native organizations, provided that the tests are related to the underlying subsistence use. For example, the Service could re-define the term "subsistence" in section 216.3 to include health screening and testing for contaminants from marine mammals to be used for food such that the taking, transfer, and testing would all be covered by section 101(b). A conforming change to section 216.23 authorizing the transfer also would be needed.

216.25 Exempted marine mammals and marine mammal products

Exemptions

EXEMP 01 Under Section 216.25 Exempted marine mammals and marine mammal products: Eliminating this section and incorporate its provisions into the relevant sections in Subpart B is appropriate. However, any change or consolidation should not include language that would weaken the current restrictions on exemptions relating to transferred parts.

216.32 Scope

Scope

- SCOPE 01** Section 216.32 Scope: The coverage of this current provision is appropriate. It is recommended that NMFS rewrite subsection (b) to read ". . .and parts from marine mammals listed as threatened or endangered under the ESA" to clarify that it is species, rather than parts, that are the subject of listings.
- SCOPE 02** The provisions of Subpart D, Special Exceptions, to the permitting regulations should not apply to marine mammals or marine mammal parts born in captivity after December 20, 1972.

216.33 Permit application submissions, review, and decision procedures

Applications

- APP 01** NMFS has strayed from their mission and have progressively been requesting additional information from applicants that is not required by the MMPA after applicants have provided legally adequate information to have affirmative decisions made. Applicants often deal with questions that are not applicable to their species, and when they provide the information requested and the permits are finally issued they may contain conditions that effectively prevent applicants from conducting the requested research.
- APP 02** Due to the fact that cost and time are most often limiting factors for researchers, NMFS should work with applicants to reduce the cost and time of preparing the required NEPA and permit application documentation. This should be done by providing background documents, application information, and references on its website.
- APP 03** Under Subpart D Special Exceptions 2 16.33 (b)(2)(iii) Applications to export living marine mammals: NMFS should clarify with specific examples what "comity" might entail (i.e., the relevant foreign agency should provide a written statement specifying that it will afford comity to any permit decision.
- APP 04** Section 2 16.33(b) dealing with "Applications to export living marine mammals eliminated consistent with the fact that the MMPA does not require permits for exports. Even more specifically, the alleged "comity" requirement found (b)(1)(iii) of Section 216.33 is ultra vires to the MMPA and must especially be targeted deletion. That is because, among other reasons, NMFS can not dictate policy governments and has no extraterritorial jurisdiction under the MMPA to enforce requirement. See generally *United States v. Mitchell*, 553 F.2d 996 (5th Cir. 1977). itself recognized in the 2001 proposed rulemaking proceeding: "NMFS has no the animals once they are exported . . ." 66 Fed. Reg. at 35213.

216.33(d) Notice of Receipt and application review

National Environmental Policy Act

- NEPA 01** NMFS proposal to suspend decision on a permit until after the NEPA process is complete suggests the Agency is establishing a two-tier comment process that will considerably lengthen the permit process time for all MMPA permits. We sincerely hope the Agency is instead suggesting that the NEPA and MMPA processes will proceed concurrently thereby improving permit processing or NMFS should retain its current protocol.
- NEPA 02** We oppose the proposal to change current NEPA procedures in the regulations. Compliance with NEPA should occur prior to the public comment period for the permit application. It is important that the public be able to see what information NMFS has considered and what impacts it expects, before commenting. In addition, the application should not be published for comment until and unless all questions are answered regarding the number and demographic of each species; the timing, geographic area, and nature of research; and the justification of sample sizes and research objectives and designs are complete.
- NEPA 03** Any changes to Permit Application Submission (216.33 subsection c) must comply with NEPA. Efforts to streamline permit procedures must not compromise full environmental review vital to decision-making and the public.
- NEPA 04** Actions proposed to streamline the permit process would actually cause further delays by removing the timeline requiring the Agency to respond within 30 days of the close of the comment period, and by eliminating permit amendments and extensions. NAO 216-6 has been misapplied by NMFS staff unqualified to determine whether NEPA applies to permits. This has created substantial delays in processing and harm to research programs.
- NEPA 05** The permit process is opaque and lacks clear guidance as to when other federal statutes such as NEPA and ESA are applicable and when researchers need to submit additional documentation. NMFS first priority should be to streamline the permitting process and secure funding to implement its mandate under NEPA and ESA, as resources are urgently needed to add staff to accommodate these mandates.
- NEPA 06** I support the proposed changes to the NEPA/permitting process. In addition, if a proposed permit for bona fide research requires preparation of an EA or EIS that cannot be completed within 90 days, a provisional permit should be issued (for two years or the time needed to prepare the NEPA document) if the research methods are deemed humane and there is no concern over impact to the species, particularly if the applicant has had previous permits for the same or similar activities.
- NEPA 07** Some of the proposed changes to 216.33 (c) are inconsistent with the ruling in *Jones v Gordon* (792F.2d 821; Ninth Circuit 1986) on how the timeline for taking action on permit applications under the MMPA is to be reconciled with NEPA requirements. We agree that NMFS should publish the initial determination that a permitting action is categorically excluded along with the notice of receipt. The regulations should discuss how NMFS intends to proceed under the MMPA and NEPA if comments on the notice convince the Agency to prepare an EA or EIS. NMFS might want to pursue amending the MMPA to provide greater flexibility for coordinating the MMPA and NEPA reviews.
- NEPA 08** Should NMFS determine that deferring a decision on a permit application is necessary to complete a NEPA document, this should only be done with the applicant's consent and only when an alternative timeframe for completing the action on the permit has been identified.

216.33(d) Notice of Receipt and application review

National Environmental Policy Act

- NEPA 09** Issuance criteria under 216.34 and conditions under 216.41 (e)(4) require that the proposed activities not result in significant adverse impacts to the species or stock. Any activity that satisfies these requirements would therefore qualify for a finding of no significant impact under NEPA and a no jeopardy finding under the ESA. As some of the required analyses for NEPA review and ESA Section 7 Consultations overlap, combining these efforts may facilitate permit processing and eliminate duplicative reviews as long as measures are taken to ensure the new procedures do not undermine the intent of either Act.
- NEPA 10** We are not opposed to deferring decisions on permits when NEPA compliance is required. However, research should not be allowed to proceed until a decision can be made even if a prior permit exists for the activity.
- NEPA 11** Questioning the value of publishing a notice in the Federal Register announcing the deferral of action on a particular permit application. Preparation and publication of such announcements require staff time and expenses that might better be directed toward the timely processing of applications.
- NEPA 12** NMFS should coordinate the NMSA and MMPA permitting processes. The ANPR proposal to defer MMPA permitting decisions until after the conclusion of ESA section 7 consultation (a 135-day process) would not facilitate the development of a single, coordinated set of agency mitigation and monitoring recommendations that meet the requirements of both the MMPA and NMSA. NMFS should consider a process that results in the 45-day NMSA consultation period being coincident with consideration of the MMPA permit.
- NEPA 13** In cases where a permit application requires an EIS or EA , NMFS should issue a provisional permit that covers the time needed to prepare the NEPA document rather than defer a decision.

216.33(e) Issuance or denial procedures

Permit Issuance

- ISS 01** Determining whether an applicant has satisfactorily demonstrated that proposed research meets the bona fide requirements has proven to be somewhat difficult in practice. However, revising the definition is not the appropriate way to fix the problem. Rather, we suggest that NMFS propose changes to the section concerning issuance criteria to explain more clearly how this definition will be applied. Among other things, this would allow NMFS to describe who it regards as qualified personnel.

216.33(e)(4) Consistency determination with Section 10(d) of ESA. "In good faith"

Endangered Species Act

- ESA 01** NMFS should not amend this section or require further documentation because no responsible researcher would apply for a permit in bad faith or for improper purposes. The permit applicant is already required to provide documentation ("Describe the Anticipated Effects of the Proposed Activity") that should be sufficient for NMFS to make the decision on whether the research will "disadvantage" a threatened or endangered species. The applicant is also required to submit their CVs, which provides the experience and expertise of the researcher. No further documentation should be required if the permit is for bona fide research, has been approved by the IACUC, and if the total number of animals to be taken is less than the Potential Biological Removal.
- ESA 02** Applicants who are under investigation for violations of a prior or existing permit should not be considered to be submitting an application "in good faith". The term "disadvantage" must be defined with the precautionary principle in mind. With regard to adverse impacts, no evidence of impact should not be confused with evidence of no impact.
- ESA 03** There are federal laws, including criminal laws, that govern the submission of information to the government. Thus, NMFS should not require any special evidence that an application has been submitted "in good faith".

216.34 Issuance criteria

Issuance Criteria

CRIT 01 Streamlining the scientific permit process is desperately needed, but the examples provided would affect relatively few researchers. What is really needed is for NMFS to concentrate its reviews to species-level effects by comparing the number of research takes to the Potential Biological Removal (PBR) for the species and to rely on IACUC reviews to safeguard the welfare of individual animals. If an applicant's IACUC has approved the procedures and the total number of animals to be taken is less than the PBR, or if no PBR has been established, NMFS should issue a permit to conduct bona fide research under the general authorization within 90 days after receipt of an application. If NMFS can not meet this deadline, a provisional permit (for a duration of two years or the time needed to issue the final permit) should be issued within 90 days after receipt of an application. If an EA, EIS, or other NEPA evaluation is necessary, NMFS should issue a provisional permit for applications that meet the above criteria until the NEPA review is completed.

216.34 Issuance criteria

Institutional Animal Care and Use Committee

IACUC 01 There is support for requiring IACUC approval if it is implemented in a way to reduce the current level of extreme redundancy and duplication of effort between the IACUC and MMPA / ESA permit processes. Using the annual IACUC reviews to automatically amend research permits would also assure that the most current, humane, and appropriate procedures are being used at all times throughout the duration of a permit rather than just those that were identified during the original application, which may have been five or six years earlier.

An efficient, quick amendment process is essential to keep the permit system in compliance with the original intent of the MMPA / ESA (facilitating bona fide and scientifically justified research on marine mammals).

IACUC 02 Congress has not authorized NMFS to demand that an applicant provide proof of IACUC approval prior to issuing a research permit. This requirement would prevent those who do not have an IACUC affiliation from applying for a permit and would be inconsistent with the intent of the MMPA and with U.S. Constitutional guarantees. In the 1994 amendments to the MMPA, Congress made clear that it is APHIS, not NMFS, that has jurisdiction over the care and maintenance of animals

IACUC 03 Marine mammal permits should no longer be required for captive marine mammal research at bona fide research institutions that have established animal care committees. There is an extreme level of redundancy between the IACUC and MMPA/ESA processes, combined with the excessive level of detail requested on specific animal procedures within the MMPA/ESA process. Changes to an Animal Use Protocol should be automatically integrated into the MMPS/ESA permit.

IACUC 04 We support the proposal by NMFS to require proof of IACUC approval of proposed research activities when such review is required pursuant to the Animal Welfare Act. However, approval by an IACUC should not substitute for a proper permit review by NMFS and the public.

IACUC 05 NMFS proposal regarding IACUC is a double standard because those not affiliated with an IACUC would not be required to undergo that process.

216.35 Permit restrictions

Permit Extensions

- EXTN 01** Rather than eliminating permit extensions, NMFS should expand the options include an expedited 5-year extension of a permit in which the major thrust of the permit remains unchanged (and all reporting requirements are current), especially those permits that have no impact on wild populations (parts and captive work only). This would greatly reduce both the applicant and permit office work load.
- EXTN 02** NMFS should implement an automatic extension of permits if a researcher has applied within the appropriate deadline and NMFS cannot issue the next permit before the previous one expires. Because processing permits can take more than one year, this automatic extension process should be flexible, and cross multiple years if required.
- EXTN 03** NMFS should retain the option for extending research permits for one year because it can be of great benefit to researchers and reduces the administrative burden on OPR.

216.35 Permit restrictions

Qualifications

- QUAL 01** NMFS should rely on the applicant's IACUC approval to objectively evaluate their qualifications commensurate with their duties and responsibilities to conduct research humanely and professionally.
- QUAL 02** NMFS should evaluate individual proposals on their merits rather than seek to set uniform standards. We do not believe that much is to be gained by trying to distill the necessary levels of training, education, and experience to perform various research takes into regulatory language rather than conducting such reviews on a case-by-case basis.
- QUAL 03** NMFS should make it clear that any proposed minimum qualifications standards do not apply to professionals at zoological parks and aquariums.
- QUAL 04** Requiring further documentation to meet minimum qualification standards only serves to increase the regulatory burden. The CVs submitted with permit applications should provide NMFS with ample evidence of an individual researcher's experience and expertise.
- QUAL 05** Researchers should be required to submit qualifications for all personnel listed on the permit. Permits should also require that supervisors be on site when research is being conducted to ensure that invasive procedures are in fact "supervised". We note that it is not uncommon that invasive procedures granted under the supervision of a veterinarian often take place when no veterinarian is on site.

216.37 Marine mammal parts

Cell Lines

- CELL 01** New regulations would be excessive and unwarranted. NMFS does not have the statutory authority to regulate any use of cell lines and or gametes within or between zoological parks and aquariums. NMFS cannot currently complete its current mandated responsibilities in a timely manner and there is no justification for additional responsibility.
- CELL 02** Development, transfer, and use of cell lines and/or gametes should be allowed when meeting the requirements for obtaining a scientific research or enhancement permit. We also support having similar regulations pertaining to gametes used by the public display industry and research community in assisted reproductive techniques of captive marine mammals. There is no reason to treat these marine mammal parts differently from any other marine mammal parts. Commercial sale of such products should be prohibited. The Service may want to prohibit sales but allow permit holders to recoup their expenses in developing cell lines or collecting gametes.
- CELL 03** Cell lines, once established, have no effect on marine mammal populations so NMFS should reduce regulatory control and not increase it. Create a new registry process instead of a permitting process for researchers who want to use cell cultures but not create new cell lines. The registry would allow NMFS to track users without long delays, include foreign researchers, currently
- CELL 04** Both primary and immortalized cell lines should be listed specifically as marine mammal parts; however immortalized cell lines should cease to be considered a marine mammal part once they are modified further.
- CELL 05** Permit holders should be allowed to recoup their expenses in developing cell lines or collecting gametes. New regulations should explicitly define allowable cost.
- CELL 06** Tissue for the purposes of developing cell lines should be exempt from CITES permitting.

216.37 Marine mammal parts

Marine Mammal Parts

- PARTS 01** NMFS should be able to assume that marine mammal parts taken from animals resident at scientific or public display facilities are taken from legally held animals.
- PARTS 02** Current regulations should be modified to make it easier for educational institutions to legally permit donations of bio-facts that do not have a paper trail. These bio-facts, and the original animal, would serve a better purpose educating the public than being stored in a warehouse.
- PARTS 03** We propose the establishment of one General Authorization or permit that would enable researchers, without additional permitting, to transfer marine mammal parts and products from marine mammals which are 1) already dead or 2) resident in scientific research or public display facilities. This general permit, coupled with appropriate record-keeping requirements that demonstrate parts were taken legally, should be sufficient to fulfill the MMPA's purpose as well as streamline the permitting process.
- PARTS 04** NMFS should clarify and consolidate this section with other sections (216.22 and 216.26) involving the transfer of legally taken parts, so that the same regulations would apply to the transfer of any marine mammal part that was already legally taken under the MMPA and/or ESA.
- PARTS 05** Consolidating sections 216.22, 216.26, and 216.37 might create unnecessary confusion. Section 216.22 flows from section 109(h) of the MMPA, whereas section 216.37 implements the permit provisions of section 104. The underlying statutory requirements differ, so it makes sense for the regulations to differ as well. Section 216.36, which is largely regulatory and pertains to the collection of specific parts with no prior authorization, probably warrants a separate section.
- PARTS 06** Banking tissues for later analysis is vital to furthering the understanding of marine mammal health and conservation, and is specifically provided for under Title IV of the MMPA and as such should satisfy the bona fide scientific purpose requirement.
- PARTS 07** NMFS should establish one General Authorization under which researchers can, without further permitting, transfer marine mammal parts/products that are already dead or resident in scientific research or public display facilities. The MMPA's purpose of including parts/products within the definition of marine mammals was to protect species in the wild from illegal trafficking of parts/products. However, that purpose is not applicable to parts/products of animals that are deceased or are no longer in the wild. Once a marine mammal is taken, the use of its parts/products have no bearing on the conservation status of the species or stock. A General Authorization should be sufficient to fulfill the MMPA's purposes and streamline the permitting process for scientific research.
- PARTS 08** Provisions should be established for facilitating the initial collection of marine mammal parts by institutions for eventual use for research purposes. Standardized documentation and reporting requirements should be developed to ensure that the parts are taken legally and humanely, and should be clear and easy to use.
- PARTS 09** Marine mammal parts that are maintained in an authorized collection should only be transferred to the original permit holders or those who possess a separate permit authorizing the possession and use of parts. This will help NMFS make sure that any use of marine mammal parts is for bona fide scientific purposes. Specimen collection involving harassment or invasive methods should only be permitted when there is a clearly defined and bona fide purpose for collecting them.

216.37 Marine mammal parts

Marine Mammal Parts

- PARTS 10** Separate requirements should be retained for using and transferring parts from marine mammals listed under the ESA. The permitting requirements under the two statutes are different, CITES requirements may differ, and a scientific research permit may be the only alternative for obtaining parts from ESA-listed species, as opposed to other marine mammal species. Because research permits may be used to obtain parts not otherwise available, heightened scrutiny is warranted.
- PARTS 11** Section 216.25 should be retained as written even if it is consolidated in another section.

216.39 Permit amendments

Permit Amendments

- AMEND 01** Researchers should be able to add animals that are bred in captivity to existing research programs without undergoing new permit reviews. The addition of captive-bred animals should be considered a minor amendment to an existing permit.
- AMEND 02** Change the definition of a minor amendment to: "any change in parts, number, location, species, or any change in captive animal research where there is no take or effect to wild populations." This should include transferring, importing and exporting ESA-listed captive animals that are in permanent captivity.
- AMEND 03** The requirements for transferring, importing, and exporting ESA-listed captive animals should be changed so that the facility the animal is being transferred to or from would need to show only that the animals were collected in a humane manner, that the facility has passed APHIS or other required inspections, and that any research required under the permit the animal is held under is continued. The transfer policy should be similar to the 15 day notification required for moving non-listed animals. If this is done then the number of major amendments being submitted should substantially decrease. Perhaps with this scenario eliminating major amendments would be acceptable.
- AMEND 04** NMFS should continue to distinguish between major and minor amendments and to allow one year extensions of existing permits. An expedited process for minor amendments and permit extensions benefits researchers and reduces the administrative burden on OPR.
- AMEND 05** There is support for the proposal to eliminate major amendments with the provision that minor amendments should be limited to those that do not put more animals or more species at risk and those that would not place an animal at greater risk of harassment or harm. Minor amendments should be carefully defined to only include trivial changes such as adding the number or names of qualified personnel, altering a start date by two weeks or less, or allowing filming and photography of the research. The public should be allowed to comment on any amendments to procedures used, the number of takes requested cumulatively or per animal, different sexes and/or ages of animals, additional locations of activity, different time(s) of year of activity, or new species.
- AMEND 06** Reasonable people may disagree about what constitutes an "increased level of take or risk of adverse impact". How is NMFS going to decide whether a proposed change in a research program should be considered a major or minor amendment? Suggestions include: 1) Formulate objective guidelines with input from experienced physiologists, veterinarians and animal care specialists, especially for experimental protocols that do not increase the number of species, total number of animals, or the location of research. 2) Allow veterinarians to decide on the safety/additional risk of any changes to experimental protocol within an existing permit. 3) Changes in the number of animals or their geographical location should be considered minor amendments if the total number of animals is less than the PBR or if no PBR has been established. 4) The Office Director should have the discretion to decide whether a given request constitutes a major or minor amendment and should be able to grant such minor amendments without a new permit application.
- AMEND 07** NMFS should not change the way it handles review of amendments. The public should be able to comment on minor as well as major amendments.

216.39 Permit amendments

Permit Amendments

- AMEND 08** An efficient, quick amendment process is essential to keep the permit system in compliance with the original intent of the MMPA / ESA (facilitating bona fide and scientifically justified research on marine mammals). Researchers can not always anticipate how much variation there will be in various parameters under investigation, which affects the calculation of sample sizes that are requested to test a given hypothesis. NMFS should recognize that it is vital to the validity of already permitted research to be able to update sample sizes as needed based on variability data from ongoing research. In order to ensure that research already in progress has the best chance to yield results with the level of significance or sensitivity as originally intended, NMFS should incorporate some kind of automatic sample size adjustments into research permits so that, if they are needed and justified by updated power analyses, the research may continue without the paperwork burden and long delays caused by major amendment or new permit review periods. This could be accomplished by incorporating a 50% buffer for sample sizes specified in the permits and allowing automatic sample size adjustments within this buffer if updated power testing can support the need. NMFS can assess whether species-level effects occur based on the upper limit of the sample size buffer.
- AMEND 09** Unintentional mortalities (UMs) are currently permitted per year and on a cumulative basis for a permit, up to a given number. If no UMs occur, or if fewer UMs occur than permitted, it would seem that permit amendments that increase the risk of mortalities in the remaining years of a permit should be permissible without affecting the overall risk assessment, and such changes – including revised sample sizes – should be possible as minor amendments, or even automatically if properly justified and authorized by IACUCs.
- AMEND 10** Another important consideration is the level of risk associated with adding a procedure to an existing project by way of a permit amendment, even if there is an increase in risk, as compared to the additional risk to the species if the procedure has to be carried out as a new project. Often a given procedure carried out as a new project would provide greater risk, as certain activities (e.g. captures, anesthesia) would have to be repeated, which would seem to be contrary to the intent of the MMPA / ESA in minimizing risk to the species. However, allowing major changes only by way of new applications would result in a timeline that might preclude anything but a new project route.
- AMEND 11** NMFS' proposal to eliminate major amendments and to eliminate the option to extend an existing permit for up to one year would be antithetical to the stated intent to streamline the permitting process and would lead to a significant increase in the number of permit applications on an already overburdened permit staff. Amendments to research permits, including major amendments, are often necessary to secure the permit in a timely manner to allow the research to continue. They are a form of streamlining that already exists in the permitting process and they provide NMFS with necessary flexibility. If NMFS eliminates the distinction between major and minor permit amendments, it likely means that all amendments will be treated as major amendments, effectively requiring that the applicant go through a new permit application process.

216.39 Permit amendments

Permit Amendments

- AMEND 12** A review of what is considered major and minor amendments is warranted but the whole process should not have to be started over again if you need to make a major amendment to your existing permit. Researchers should be able to continue their projects and just have the proposed change be reviewed. The time period for a new permit is a lengthy process and could cause a significant impact in funding and data collection.
- AMEND 13** Clarification of language is need. Location, species, numbers of take and how they relate to a minor amendment in sections 261.35 and 216.39 is unclear. For example, Section 216.35 it says that in cases where location, species and numbers where not take is involved it would be considered a minor amendments. In section 216.39 it states that a minor amendment would not be warranted if an increase in the number of species is effected (not what it said in 216.35) or a change in location at take (not what it says in 216.35).
- AMEND 14** Maintaining the distinction between major versus minor amendments is necessary. The issue at stake is when public review of a proposed change is warranted. Although many of the procedures for authorizing a major amendment (e.g., public notice and an opportunity for comment) are the same as for issuing a new permit, requiring a new application for each major amendment will increase the paperwork burden of both the permit-holder/applicant and NMFS without much substantive gain. Absent a compelling reason for eliminating major amendments, NMFS should reconsider its proposal.
- AMEND 15** Changes made to an existing permit by the Office Director, in the absence of a request by the permit holder, should only be made for the purpose of imposing additional mitigation or restriction on the research activities. The Office Director should not permit changes to, or additional, research without a request from the permit holder or in the absence of public comment.

216.40 Penalties and permit sanctions

Penalties And Sanctions

- PEN 01** Current NMFS regulations under 216.40 are sufficient. This section would apply to all permits, including public display, and we are concerned about the legal basis for revoking, etc. a permit if such action is not related to enforcement issues, statutory changes, or changes in the regulations.
- PEN 02** This section is too vague to evaluate, but is frightening in its implications. There should be no basis for revoking a validly-issued permit other than enforcement. If the permittee is operating within the terms of the permit, it is unclear why NMFS would revoke that permit. It appears to implement a policy of arbitrary decisions by NMFS with no recourse on the part of researchers. This policy, if implemented, needs to be intensely reviewed by the scientific community and should serve the purpose of promoting science, not impeding it. NMFS is requested to clarify the new reasons it envisions for revoking a permit.
- PEN 03** NMFS Office of Protected Resources (OPR) should not be in the position of determining a penalty for a permit violation. OPR should be thinking about how scientific research can benefit the understanding of marine mammals in U.S. waters and should be helping researchers acquire the necessary permits to achieve this goal, not deciding which penalty will occur if some aspect of a permit is violated.
- PEN 04** The Service should have the latitude to modify permits for reasons not related to enforcement actions, but it is not clear that this can be accomplished consistent with the existing statutory directive. In this regard, section 104(e)(l) sets forth only three instances when a permit may be modified, suspended, or revoked. Of these, only clause (B), which requires a violation of the terms and conditions of the permit, applies to scientific research and enhancement permits. In this case, NMFS may wish to consider a statutory changes as a precursor to regulatory changes.
- PEN 05** NMFS should consider possible consequences (including not re-issuing a research permit) for permit holders that fail to file complete and timely reports.

216.41 Permits for scientific research and enhancement

Captive Research and Enhancement

- CAPT 01** Current debate as to whether stranded animals should be rehabilitated and some resources offer a review of the many issues surrounding the permitting of stranded animals and should be included when considering permitting regulations.
- CAPT 02** The current restrictions on the public display of research animals are costly, burdensome, and illogical. The public learns about these animals and cares about their conservation in large part because of public display at these facilities. Restricting the learning opportunities provided by viewing these animals is counter to the purposes and intent of the MMPA.
- CAPT 03** Section 216.35 (e) Permit Restrictions: Release of captive marine mammals to the wild should also be permitted for welfare or veterinary reasons and if it does not pose a risk to wild populations. This option should be bounded by requiring a permit and/or only after consultation with and permission of NMFS, but it should not be precluded by allowing such release only for scientific research or enhancement purposes.
- CAPT 04** We do not support addition of 216.41 (c)(3) that would allow continued maintenance in captivity of animals acquired under an enhancement permit when such enhancement activities have been completed or are not able to be carried out and animals cannot be returned to the wild. This appears to be a mode to acquire “novel” exhibit animals. Instead, such animals should be held in research facilities or otherwise in a manner that will not allow anyone to profit commercially from its captivity.
- CAPT 05** If a captive animal is to be returned to the wild, NMFS should adhere to its release criteria that have been developed under Title IV of the MMPA.
- CAPT 06** Once an animal is in a laboratory (captivity), jurisdiction for enforcement should be given to the Animal Welfare Act and dictated by the IACUCs. NMFS should no longer be involved in deciding what constitutes intrusive research, since laboratory research is not NMFS area of expertise.
- CAPT 07** The bureaucratic mechanisms that control research with captive born animals in laboratories continues to be duplicative with IACUCs and more complicated than necessary.
- CAPT 08** All animals should not have to be returned to the wild. It is reasonable to keep formerly stranded animals in captive research or public display facilities no matter what the ESA-listing status of those animals may be.
- CAPT 09** For most institutions it is necessary to maintain research animals on public display due to limited space. Current rules allow for display of animals held under Research and Enhancement Permits only when necessary to meet research objectives of if authorized by the Office Director. The proposed rule would allow for long term captive maintenance and public display of ESA-listed species originally obtained under a Research and Enhancement Permit, which is an excellent idea.
- CAPT 10** We agree that requiring an appropriate education program and making the animals available to research (within the means of the institution) is a must; however, we do not feel that NMFS should have jurisdiction over an institution's educational programming.
- CAPT 11** The ability to conduct research on stranded animals may be revised during the impending renewal of the NMFS national stranding protocol. Research on stranded animals provides an invaluable contribution to the body of knowledge on marine mammals and should continue. This is an issue that should be addressed at this time.

216.41 Permits for scientific research and enhancement

Captive Research and Enhancement

- CAPT 12** Rehabilitation facilities that conduct bona fide scientific research should have some special permitting status that allows them to conduct opportunistic research on stranded animals without the delays inherent in the normal research permit process (and/or be dependent upon the national stranding permit held by Teri Rowles), and that allows them to have some autonomy in determining the release criteria on a case by case basis depending upon research need.
- CAPT 13** National stranding centers should be created where long term resident stranded animals can be used in scientific research, free from the pressures of public display, to generate the science necessary to resolve many of the important issues surrounding marine mammals. Some species are much too valuable to public display facilities to be transferred to dedicated research facilities.
- CAPT 14** The existing regulations impose unnecessary burdens on the Agency and the public display community. The regulations need to be changed to reflect the fact that non-releasable, stranded and beached animals under the ESA that have been taken in by public display facilities, often at NMFS' request, were not intentionally removed from the wild. The permitting process for these special case animals should be streamlined to ease the regulatory burden and to facilitate their use in research programs that contribute to the Agency's management of populations in the wild.
- CAPT 15** Research on animals already removed from the wild cannot be to the disadvantage of animals in the wild since the research does not involve, or affect, the wild populations. The regulatory changes proposed in the ANPR should make a clear distinction between research activities occurring in the wild and research activities with permanently captive animals.
- CAPT 16** The Service indicates that it is considering proposing changes to the provisions of section 216.41(c)(l)(vi), but it is not clear what those changes would be. The Federal Register notice suggests that the Service is considering adding requirements concerning the public display of marine mammals maintained in captivity for purposes of scientific research (e.g., allowing such displays only when necessary to achieve the research objectives and only when authorized by the Office of the Director). However, these requirements already exist under section 216.41(c)(l)(vi)(A). It is not clear whether the Service is considering revising the regulations to eliminate these requirements. If so, the current restrictions are appropriate, with the possible exception of allowing incidental public display when it will not have any adverse effects on the research being conducted, even if such display is not "necessary" for achieving the research objectives.
- CAPT 17** NMFS should be very cautious in considering new regulations involving the long term maintenance and public display of marine mammals obtained under scientific research and enhancements permits once the authorized activities have been completed. There are two countervailing concerns here. The first is that animals may be taken from the wild population for the immediate purpose of research and the long-term purpose of display. This may disadvantage the wild population if it is sufficiently small that the removal affects population productivity. The second is that animals brought into captivity only for the purpose of research but then returned into the wild may pose a new risk to the wild population if they carry diseases from the captive setting to the wild. In all cases, we believe that the primary concern should be the protection of the wild population.

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Captive Research and Enhancement

- CAPT 18** Currently, public display permits may not be issued for depleted marine mammals. The proposal being contemplated by the Service would provide a way around this prohibition that could be subject to abuse and, again, certain safeguards are needed. For example, applicants should be required to indicate at the outset whether permanent maintenance in captivity is contemplated and, if not, what steps might be taken to facilitate eventual release of the animals back into the wild, and how the applicant will ensure that the release poses no significant risk to the wild population. If permanent maintenance is anticipated, the Service should consider not authorizing the placement of the animals in captivity in the first place if the proposed research or enhancement activities are not essential to the conservation of the affected species or place the species at heightened risk.
- CAPT 19** The ANPR suggests that the public display of non-releasable ESA-listed marine mammals originally obtained under a research permit can occur only if NMFS approves the educational program established by the facility. However, in 1994, Congress enacted amendments to the MMPA specifically prohibiting NMFS from exercising control over the nature and content of educational programming at public display facilities. The ANPR appears to conflict with the language and intent of the MMPA.

216.41 Permits for scientific research and enhancement

Scientific Research And Enhancement Permits

RES 01 It is not clear why scientific research and enhancement permits are lumped into a single section of the regulations. Authority for these two types of permits is derived from different provisions of the MMPA (section 104(c)(3) and 104(c)(4)) and they are subject to different criteria and requirements. Just as public display permits and photographic permits are placed in separate sections, it would make sense to separate scientific research permits and enhancement permits in the regulations. It would make more sense to link scientific research permits with the regulations pertaining to the general authorization for scientific research (section 216.45) than with enhancement permits. This could be done either by considering these two types of authorizations in the same section of the regulations or in sequential sections.

216.42 Photography (Reserved)

Photography

- PHOTO 01** Restrictions on photography by the marine mammal protection act regulations seems to me to hedge on freedom of speech and expression. I have visitors to my research facility and I urge them to take all of the photos that they would like. Given the public is necessarily restricted from interacting with marine mammals, it bothers me to place any restrictions on photography.
- PHOTO 02** Section 216.42 Photography: We agree that the NMFS should limit the number of personnel that may be included under a permit for photography. Permits should not be misused to promote ecotourism. Similarly, directed photographic research should not be conducted from commercial vessels (e.g., whale watch boats, kayak flotillas, parasail operations) or from craft engaged in commerce at that time. Researchers should not be able to use photographic research permits aboard commercial vessels in order to gain the company a competitive advantage over a competitor who does not have a permitted researcher aboard.
- PHOTO 03** There should be a provision in all permits for photo-identification of any species so this can occur on ecotourism vessels (similar to what is, or was, allowed in the Gulf of Maine). Researchers should be allowed to take photographs on ecotourism vessels. This would reduce the impact to the animal by only having one vessel in the area (rather than an ecotourism vessel and a researcher vessel) near a marine mammal and further the scientific knowledge about the species by collaborating with industry (and educating the public).
- PHOTO 04** NMFS should promulgate regulations to implement the provisions of MMPA section 104(c)(6), which pertain to permits authorizing the taking of marine mammals for the purposes of educational or commercial photography. Those regulations should include provisions that limit the potential for ecotourism being conducted under such permits. We are concerned, however, with the suggestion that such permits might be issued using procedures akin to those applicable to the general authorization. Under section 104(c)(6), photography permits, although limited to taking by Level B harassment, are full-fledged permits subject to public notice and comment requirements of the Act.
- PHOTO 05** Section 216.45. The first relates to the proposal to "clarify" that any activity conducted incidental to the research, such as commercial or educational filming or photography, would require prior written approval from NMFS and that such activities would be subject to the same conditions as those in Sec. 216.41(c)(1)(vii) for scientific research and enhancement permits. NMFS has no apparent authority for requiring that photography and filming be permitted activities absent an instance where such photography and filming in itself would rise to the level of a "take" of a regulated marine mammal. There is no legitimate purpose under the MMPA for such requirements. Adding this language and adding another layer of unnecessary and unauthorized regulation to the permitting process is inappropriate.
- PHOTO 06** Researchers use digital images or video for documenting their project activities, teaching and giving presentations. Valid permits to conduct bona fide research, including captive research, should include permission to use photography and video as long as no additional take is required. Research permits should also include authorization sell images and video to magazines or video production companies that educate the public about wildlife so long as the images and videos were taken incidental to bona fide research.

216.42 Photography (Reserved)

Photography

PHOTO 07 If photography permits are to be granted under a General Authorization, they should not pertain to species listed under the ESA and NMFS must assure that the need for photography is bona fide and non-duplicative.

216.43 Public Display

Public Display

- PD 01** NMFS should amend regulations to clearly establish that public display regulations do not require information on stock assessments when animals have been bred in a zoo, aquarium, or similar facility. Transport of these animals does not have any adverse affect on the original wild stock or population, thus rendering the data irrelevant. Similar language should also be inserted into any proposed regulations for research and enhancement purposes.
- PD 02** NMFS should promulgate a regulation that clearly states that a "humane" take, which was pursuant to the laws of foreign country and sanctioned, is sufficient proof that the take was consistent with the requirements for purposes of import under the MMPA. Acceptable proof should be CITES or other permits issued by a foreign government.
- PD 03** It appears that NMFS is trying to establish regulatory protocols for scientific research of marine mammals at public display facilities. NMFS should clarify that no permit is necessary if the research is being conducted with marine mammals currently exhibited in zoological parks and aquariums. Research with marine mammals in zoological parks and aquariums is under the purview of the US Department of Agriculture (USDA), Animal and Plant Health Inspection Service ("APHIS") pursuant to their authority over the care and maintenance of marine mammals at public display and other facilities. Additionally, research with these animals is vetted by the Institutional Animal Care and Use Committee ("IACUC") of the research facility initiating the study and/or the facility at which the research will be performed. The MMPA does not authorize or require oversight or permitting by NMFS in these instances. It makes much more sense to have research peers within an IACUC evaluate the research and examine it in research categories dictated under the AWA. To keep NMFS involved in deciding questions like "what research is intrusive" makes no sense when laboratory research is not NMFS's area of expertise.
- PD 04** Sections of the MMPA that were intended to cover public display permits have been applied to research permits and vice versa. The changes proposed in this ANPR, aimed at scientific and enhancement activities, will have unintended consequences for the public display community. Although the ANPR states repeatedly that any proposed rulemaking will be limited to permits for scientific research and enhancement activities, many of the changes suggested in the ANPR are to sections of the regulations that also apply to public display. Even where that is not the case, regulatory amendments adopted by the Agency with respect to scientific research and enhancement permits may establish precedents to be followed later with respect to public display. The ANPR should be rewritten to explicitly deal with this issue. NMFS should issue separate and distinct regulations for public display facilities.
- PD 05** NMFS should amend regulations to clearly establish that public display regulations do not require information on stock assessments (including stock of species found in foreign waters/territories-NMFS has no jurisdiction over foreign waters) when animals have been bred in a zoo, aquarium, or similar facility. Regulations should be amended to state that transport (even from a foreign facility) of these animals does not have any adverse impact (including indirect effects) on the original wild stock or population and will not result in takings beyond those authorized by permit (see Sections 216.34(a)(4) and (7)).

216.43 Public Display

Public Display

- PD 06** NMFS should prepare a separate public display ANPR which discusses: 1) where the information gaps are and what the Agency has done to close those gaps, 2) what the recurring problems are - why the Agency perceives these as problems (specific incidents), and 3) the potential solutions to those problems (including cost/benefit analyses). Then, respondents could support or oppose these preliminary findings based on their own additional information - scientific or professionally observed. Under this scenario, respondents would have an opportunity to comment on both the perceived regulatory problems and the proposed solutions.
- PD 07** Many of the regulation changes proposed are attempts by NMFS to over-reach and improperly extend its jurisdiction and authority. In general, NMFS appears to be operating under the misconception that it regulates all aspects of marine mammals in the US and that once an animal comes under its jurisdiction for a take or import, it remains under its jurisdiction indefinitely regardless of the activity involved. However, there is no statutory support for this overarching approach. More specifically, the "1994 Amendments" unequivocally established that NMFS has no role in the care, maintenance, and general oversight of marine mammals once they leave the wild and enter into the US. Therefore, any activities by public display facilities in dealing with breeding, for example, are beyond the scope of regulation by NMFS and should be separate from the scientific research/enhancement permit regulations.

216.45 General Authorization for Level B harassment for scientific research

Permit Cycle

- CYCLE 01** Placing permit applications and amendments on a cycle is inherently a bad idea and could jeopardize field studies or research. Each permit application is different and requires different timelines for resolving issues. Further, some research needs and opportunities cannot be planned or anticipated. An alternative to specific filing times could be to use NEPA templates, programmatic EISs or clearer application requirements so that there is a greater likelihood that applications are considered complete from the beginning.
- CYCLE 02** A quarterly permit cycle would be acceptable, but a 6 month cycle is not often enough. Although, minor amendments should be accepted at any time. There should be some "guarantee" of timing approval and implementation of the permits and a researcher with a permit in hand should not have to wait the same amount of time as someone requesting a new permit.
- CYCLE 03** A semi-annual permit cycle would be acceptable and would ensure that researchers apply well in advance (likely generating better planned proposals) and that NMFS has adequate review time. A scheduled permit cycle would allow for regular schedule or review for outside commenters and prevent the long-standing problem of applicants waiting until the last minute to file and then complain that permit review is cutting into the field season.
- CYCLE 04** To achieve a better linkage between timing of the permit process, securing funding for the research, and scheduling of the ships and other resources required for the research, permits must be issued within a certain deadline after submission. Presently, there is no requirement for timely processing.
- CYCLE 05** If NMFS can demonstrate that placing the permit process on a cycle would: 1) meet its NEPA requirements; 2) reduce processing time; 3) process similar permits together; and 4) guarantee processing of permits within 90-120 days then the quarterly submission cycle might be worth further exploration.
- CYCLE 06** While establishing time cycles for submitting new permits may be acceptable, researchers who already have a permit should not have to wait for review of amendment requests. Amendments should be reviewed at any time.
- CYCLE 07** NMFS should implement programmatic permitting for activities that affect marine mammals wherever possible. More resource intensive case-by-case permitting should be reserved for unique activities or where circumstances indicate a greater likelihood of harm to marine mammals. Alternatively, NMFS should, when appropriate, look for mechanisms to process and issue collectively, NEPA and permit application documentations that are either similar by species, region, or activity. Processing similar research activities may streamline the process, but it also carries the risk that a legal challenge on one portion of the permit may stop research associated with other projects under the permit. Furthermore, activities that take place in different oceans and on different species do not lend themselves to this approach so it may not be practical in many cases. Those cases for which this approach may be practical should be identified and discussed in the proposed rule.

216.45 General Authorization for Level B harassment for scientific research

Permit Cycle

- CYCLE 08** Accepting permit applications on a quarterly or bi-annual schedule may be advantageous. However, NMFS should ensure the new procedures include sufficient time to coordinate with other agencies that also have requisites for permit applicants. For example, the National Marine Sanctuary Program requires permits, mitigation and/or monitoring for some activities but is not currently subject to a specific processing schedule.
- CYCLE 09** Our major concerns are the cost, time, and regulatory expertise needed for a marine mammal researcher to obtain a permit to conduct research on marine mammals. Likewise the cost, time, and practicality issues (e.g. case- by-case permitting) may not be appropriate for repetitive activities that do not change significantly over time.

216.45 General Authorization for Level B harassment for scientific research

General Authorizations

- GA 01** Photography is a vital quantitative research tool and it is recommended that photography be fully exempt from any permitting requirements for all species including ESA listed species, providing no harassment occurs. If it is possible to collect images without harassing animals, or without the possibility of harassing animals, then no permit should be required, and no GA would even be applicable. If harassment occurs or may occur, then photography of all species (including ESA listed species) should be covered under the GA for bona fide research.
- GA 02** We support the proposal to make General Authorizations available for Level A and Level B non-strategic marine mammal stocks and believe this will expedite the permit process. We also support the issuance of a General Authorization, and the associated amendment to Section 104(c)(3)(C) of the MMPA, for marine mammals defined as strategic by the MMPA.
- GA 03** Current scientific research permit regulations can be clearer and NMFS' effort to streamline is a step in the right direction. However, there are concerns that some of the revisions under consideration might adversely impact some animals. For example, changing Level A harassment to be permitted under the General Authorization is not supported. Moreover, any revisions to the MMPA that would facilitate changes to regulations governing scientific research are also not supported.
- GA 04** We oppose making General Authorizations available based on stock status rather than the level of harassment. This change would increase the scope of activities NMFS can permit and potentially harm non-ESA listed species or other 'strategic' stocks. It would also mean that there would be no opportunity for the public review and comment before potentially harmful permits are granted, which is unacceptable.
- GA 05** We support the proposal to clarify that the description of methods in the letter of intent must specify the number of marine mammals, by species or stock, that would be taken and include a justification for sample size. NMFS has an obligation to insure that sample sizes are robust, but not excessive, to adequately test the hypothesis. However, we caution NMFS against requiring so much information that a General Authorization becomes equivalent to a research permit.
- GA 06** Written approval should be required from NMFS prior to any activity incidental to research such as commercial or educational filming or photography.
- GA 07** Care must be taken with the proposal to amend the definition of "harassment" under the MMPA such that the definition of the term and proposed changes to the scope of General Authorizations are considered in tandem. It is inappropriate to broaden the General Authorization to include Level A harassment while at the same time limit what constitutes Level A harassment to takings that have significant effects.
- GA 08** NMFS should consider streamlining the permitting process by amending the MMPA and/or ESA for Level B harassment for authorizations involving takes of marine mammals listed as threatened or endangered. This option would make the General Authorization applicable to more species while focusing on the types of activities that are not of major concern (e.g., photo identification, population surveys, etc.)

For further information contact:
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