

**MODIFICATIONS TO THE  
REGULATIONS GOVERNING THE ISSUANCE OF SCIENTIFIC RESEARCH,  
ENHANCEMENT, AND PUBLIC DISPLAY PERMITS  
PURSUANT TO THE MARINE MAMMAL PROTECTION ACT**

**SCOPING DOCUMENT**

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## **BACKGROUND**

The National Marine Fisheries Service (NMFS) is considering proposing changes to the structure and content of the regulations governing the issuance of permits for scientific research and enhancement activities on cetaceans and pinnipeds (except walrus), and the addition of regulations to permit public display and photography. NMFS has authority, delegated from the Secretary of Commerce, to issue permits for take and import of these species for research and enhancement activities under Section 104 of the Marine Mammal Protection Act (MMPA, 16 U.S.C. 1361 et seq.) and Section 10(a)(1)(A) of the Endangered Species Act (ESA, 16 U.S.C. 1531 et seq.). NMFS implementing regulations can be found at 50 CFR parts 216 and 222.

Issuance of permits by NMFS is also governed by the procedural requirements and provisions of the Administrative Procedure Act (APA) and the National Environmental Policy Act (NEPA). The APA is the law under which federal regulatory agencies, including NMFS, create the rules and regulations necessary to implement and enforce major legislative acts such as the MMPA and ESA. Under the APA, NMFS is required to publish in the *Federal Register* descriptions of rules of procedure, substantive rules of general applicability, and make available to the public statements of policy and interpretation, administrative staff manuals and instructions. NEPA requires Federal agencies to integrate environmental values into their decision making processes by considering the environmental impacts of their proposed actions and reasonable alternatives to those actions. The requirements of NEPA apply to NMFS' decision-making process for issuance of permits. The NOAA Administrative Order No. 216-6 (NAO 216-6), Environmental Review Procedures for Implementing the National Environmental Policy Act, is also an agency guidance document for applying the requirements of NEPA to agency actions, including permit issuance.

NMFS published a proposed rule on October 14, 1993 (58 FR 53320), to consolidate permit regulations that had previously been promulgated under the MMPA, the ESA, and the Fur Seal Act (Acts), governing the take, import, or export of protected marine mammals under the jurisdiction of NMFS for purposes of scientific research, enhancement, and public display. On April 30, 1994, amendments to Sections 102 and 104 of the MMPA (1994 amendments) significantly changed the scope and extent of NMFS permitting authority related to marine mammals on public display. However, NMFS retained authority for permitting the take or import of marine mammals from the wild for the purposes of public display.

A final rule, issued on May 10, 1996, (61 FR 21926) implemented those changes proposed in 1993 not specifically related to care and maintenance of marine mammals on public display. Effective on June 10, 1996, the final rule established basic permit requirements governing the take, import, and export of marine mammals and marine mammal parts for purposes of scientific research, enhancement, photography, and, where captures and initial imports are involved, for public display. The 1996 final rule also provided additional permit criteria specific to scientific research and to enhancement, and established clarified administrative procedures for determining the releasability or other disposition of rehabilitated stranded marine mammals.

NMFS published a proposed rule in 2001 (66 FR 35209; July 3, 2001) to regulate the take and import of marine mammals for public display. Requirements for the issuance of permits, transfer, transport and export of marine mammals, as well as marine mammal inventory reporting requirements related to captive marine mammals were proposed. The rule also proposed to (1) prohibit marine mammal export, (2) provide an opportunity for public comment on the acquisition of a non-releasable beached or stranded animal by a facility that has not previously held marine mammals for public display, (3) require permits for retention of releasable beached or stranded marine mammals, and (4) establish a means for identifying parts taken from public display animals and authorize the importation of parts for medical examination. This rule was not finalized.

In 2007, NMFS published an ANPR (72 FR 52339; Sep. 13, 2007) soliciting comments from the public regarding changes being considered to the NMFS regulations and criteria related to scientific research and enhancement permits under Section 104 of the MMPA. The stated purpose of the 2007 ANPR was to obtain public comment to inform NMFS' efforts to further streamline and clarify general permitting requirements and requirements for scientific research and enhancement permits, simplify procedures for transferring marine mammal parts, consider application of the General Authorization (GA) to research activities involving Level A harassment for non-ESA listed marine mammals, and development of a 'permit application cycle' for application submission and processing of all marine mammal permits. Twenty six commenters submitted 328 substantive comments. Those comments can be found at:

[http://www.nmfs.noaa.gov/pr/pdfs/permits/comments\\_mmpa\\_anpr.pdf](http://www.nmfs.noaa.gov/pr/pdfs/permits/comments_mmpa_anpr.pdf), and are summarized at:

[http://www.nmfs.noaa.gov/pr/pdfs/permits/comment\\_analysis\\_mmpa\\_anpr.pdf](http://www.nmfs.noaa.gov/pr/pdfs/permits/comment_analysis_mmpa_anpr.pdf).

Some commenters stated that the text of the ANPR was too general and suggested that a more detailed ANPR was needed to improve readers' abilities to provide meaningful comments. This scoping document presents further details, including examples of specific language to indicate how the existing regulations could be clarified, existing permitting procedures could be codified, and in some cases presenting possible solutions to persistent unresolved permitting questions. New measures to permit take and import for public display, and to permit commercial photography, are also suggested. NMFS has not selected these or any other measures as a preferred alternative; rather, the draft regulatory language suggests where changes to the permit regulations could be made. Comments received during this scoping period will be used to develop alternatives for analysis in a NEPA review, selection of a preferred alternative, and the development of a proposed rule.

Note that NMFS also published an ANPR (73 FR 5786; January 31, 2008) proposing modifications to the requirements and procedures for responding to stranded marine mammals and for determining the disposition of rehabilitated marine mammals. These regulations, found primarily in 50 CFR §§216.22 and 216.27, implement Sections 109(h) and 112(c) and Title IV of the MMPA (16 U.S.C 1379(h), 1382(c), and 1421). While the stranding regulations are referenced in this scoping document and possible changes in the stranding program have been taken into consideration, future modifications to §§216.22 and 216.27 will be proposed in a separate rulemaking.

The following paragraphs discuss regulatory changes to 50 CFR part 216, primarily within subparts C and D, being considered by NMFS. Draft amendatory regulatory text is also provided to illustrate how revisions would appear. Although many of these possible revisions merely clarify and streamline existing practices, substantial reordering of the regulations and modifications that are responsive to many of the comments received in the 2007 ANPR, as well as modifications and additions not considered earlier, are also described. Comments on the modifications discussed below or further alternatives for consideration related to the subparts pertaining to the permitting process are requested.

## **PUBLIC INVOLVEMENT**

NMFS invites the public to submit comments on the current regulations, the revisions discussed here, other changes that might be considered, and any relevant issues pertaining to the permitting process that might be considered as part of future proposed rulemaking. Be as specific as possible, including providing draft language if appropriate. NMFS does not intend to convene public meetings for this scoping. Comments and recommendations received will be reviewed as part of a proposed rulemaking which will be the next step in the regulatory process.

## **DISCUSSION BY SUBPART**

### **Subpart A – Introduction**

Within the definitions section (§216.3), NMFS is proposing to add definitions for the following acronyms: “APHIS” (Animal and Plant Health Inspection Services); “AWA” (Animal Welfare Act); “CITES” (Convention on International Trade in Endangered Species of Wild Fauna and Flora); and “IACUC” (Institutional Animal Care and Use Committee). We are proposing to delete, as unnecessary, the definition for Regional Director. NMFS is requesting comments on these revised and added definitions, and on whether or not additional revisions to Subpart A may be needed to clarify the marine mammal permitting regulations.

NMFS is also suggesting modifications and additions to the definitions, as discussed here and drafted in regulatory text at the end of this scoping document.

1. Amend the definitions for “Article of handicraft” and “Authentic native articles of handicrafts and clothing” to make the definitions consistent with modifications made in 2005 (70 FR 48321 Aug. 17, 2005) to the U.S. Fish and Wildlife Service regulations for marine mammals under their jurisdiction. FWS modified their definition for subsistence, which includes their description of handicrafts, in response to a judicial finding that the MMPA did not authorize FWS, and by extension NMFS, to restrict the period for which the Alaska native handicraft exemptions apply.

The definition of “article of handicraft” would be modified by deleting the following: “(1) Were commonly produced by Alaskan Natives on or before October 14, 1983” and redesignating items (2) and (3) as (1) and (2). Similarly, the definition of “Authentic native articles of handicrafts and clothing” would be revised by deleting “(a) were commonly produced on or before December 21, 1972” and by redesignating (b) and (c) as (a) and (b).

These amendments respond to a comment received on the 2007 ANPR. An additional commenter recommended combining these two definitions; however we believe the subtle differences in “Article of handicraft”, specific to fur seals under the Fur Seal Act, justify the preservation of two separate definitions.

2. Amend the definition of “Bona fide” by revising the note in (1)(ii) to clarify that maintenance of reference collections is included. This clarification does not address a number of comments received on the 2007 ANPR taking issue with the application of bona fide as a condition for issuing scientific research permits or authorizations. The definition of bona fide comes directly from the MMPA at Section 3 (22), and the requirement that the definition be applied as a condition of research can be found in the MMPA at Section 104 (3)(A) and (C).

3. Amend the definition of “co-investigator” to clarify the requirement that co-investigators possess qualifications equivalent to those of the principal investigator for the activities for which they provide oversight.

4. Add a definition for depleted, as requested by commenters.

5. Add a definition for enhancement that clarifies existing practices related to enhancement and identifies examples of activities that may be authorized under enhancement permits, as requested by commenters.

6. Add a definition for “in good faith” from Section 10(d) of the ESA. Comments received on the 2007 ANPR identified an apparent misunderstanding that NMFS was applying an unnecessary and subjective “in good faith” standard to its

evaluation of research and enhancement permit applications. Addition of this definition to the regulations identifies the ESA statutory requirement for consideration of an applicant's demonstration of good faith, and clarifies that this applies only to applications for research or enhancement on listed species.

7. Amend the definition of "intrusive research" to add specific examples that reflect the types of procedures proposed in permit requests. Additionally, because we are proposing to change the definitions of enhancement and public display to include medical and husbandry procedures, the exception language related to captive animals in the current definition of intrusive research is deleted.

8. Add definitions for "marine mammal part" and "marine mammal product", clarifying the statutory definitions. The definition for "marine mammal product" specifically excludes materials collected for medical treatment and husbandry for captive marine mammals. Tissues or other marine mammal parts used for the development of commercial products would be included.

9. Amend the definition of "public display" to clarify two separate issues that repeatedly arise during consideration of marine mammal permit requests. First, the Congressional report (H. Rep. 439, 103d Cong. 2d. Sess, at 31 (Mar. 21, 1994)) accompanying the 1994 amendments to the MMPA clearly states the intention that the role of NMFS should be confined to issuing permits allowing the initial take or import of marine mammals for public display. A marine mammal held for public display can be transferred for the purposes authorized by the MMPA without further permits. Questions have since arisen regarding whether these rights of transfer include rights to transfer gametes or other parts of captive public display animals without further authorizations. Although the development of captive populations is not explicitly listed within the purposes of the MMPA, Congress recognized the importance of public display facilities in providing ". . . an important educational opportunity to inform the public about the esthetic, recreational, and economic significance of marine mammals and their role in the ocean ecosystem." (S Rep. 220 , 103<sup>rd</sup> Cong. 2d. Sess. at 293 (Jan.25 1994) and see H. Rep. 970, 100<sup>th</sup> Cong. 2d. Sess, at 33 (Sep. 23, 1988) ). Zoos and aquaria consider their role to include establishment and maintenance of healthy captive animal populations; therefore facilities holding marine mammals have developed health care and, in many cases, breeding programs. A successful breeding program reduces the incentive to take marine mammals from wild populations. In recent years, breeding has increasingly been conducted through the transfer of gametes between facilities, rather than the riskier transfer of marine mammals. Just as transferring the marine mammals did not require further permitting; facilities transferring gametes for breeding purposes do not obtain permits. NMFS is considering acknowledging this practice by expanding the public display definition to include husbandry and health care activities necessary to maintain healthy captive populations. Tissues, fluids, or other parts collected from public display animals specifically for research purposes using intrusive procedures, however, would still require a scientific research permit. Also, under this definition and the proposed modified regulations pertaining to parts transfer, parts remaining after an animal has died in captivity can either be kept if the labeling and curation procedures for marine mammal parts collection are followed or parts can be disposed of (destroyed).

The second modification considered for the definition of "public display" clarifies that legally collected parts from marine mammals can be held for educational purposes

and display in educational facilities, including schools, museums, heritage centers, aquaria or zoos. Although take of marine mammals for educational purposes is not specifically authorized by the MMPA, current NMFS regulations authorize the transfer of parts for educational purposes at 216.22(c)(5)(iii) and 216.37(a)(3) and (d). USFWS includes both marine mammals and marine mammal products in their regulations regarding public display of animals under their jurisdiction (50 CFR 18.31). This proposed change is intended to clarify the statutory basis for the use of legally collected marine mammal parts for educational purposes. However, the ESA does not include a provision for public display. Although under Sec. 4(d) of the ESA, regulations can be issued to allow educational display of threatened species, ESA regulations have not been implemented for threatened marine mammals under NMFS jurisdiction.

10. Add a definition for “research institution” consistent with changes suggested in §216.32(d)(2)(i) to clarify that it applies to facilities regulated as research institutions under the APHIS regulations found at 9 CFR Subpart C.

11. Add a definition for “responsible party” to clarify application directions provided in modified measures proposed in §216.32.

12. Amend the definition for “soft parts” to address frequent inquiries about what parts are included. The proposed amendment attempts consistency with the CITES definitions for “parts” and “derivative” as these terms are applied to species protected in international trade. The 2007 ANPR requested and received comments regarding whether or not the use, distribution, transfer or sale of cell lines derived from marine mammal tissues should be regulated. However, given the lack of certainty regarding this developing field and whether or not it will affect marine mammals, we are not proposing measures at this time, nor specifically including or exempting cell lines from the definition of marine mammal parts. We will continue to handle requests on a case by case basis that considers whether a proposed action constitutes a take and is consistent with the purposes of the MMPA.

13. Amend the definition of “subsistence” to allow the transfer of tissues for the purpose of evaluating the contents of edible products for potential effects on human health.

### **Restructuring of Subparts B, C, and D**

Partially in response to comments received on the 2007 ANPR, NMFS is considering consolidating related sections of 50 CFR Part 216 and restructuring subparts B, C, and D to better parallel the structure of the MMPA as it pertains to public display, research, enhancement and photography permits. We are also considering modifying the headings of some sections to make them more descriptive for the ease of the user. This distribution table explains where we are suggesting moving sections, discussed in detail below and laid out in draft regulatory language in the final section of this scoping document. We would like comments on whether readers find this structure and these headings more useful, prefer the original, or have an alternative structure to propose.

<b>Distribution Table</b>	
<b>Original Section</b>	<b>New Section</b>
<b>Subpart B</b>	
216.14 Marine mammals taken before the MMPA.	Consolidated with §216.25 and redesignated as: §216.20. Exempted marine mammals and marine mammal products.
216.16 Prohibitions under the General Authorization for Level B harassment for scientific research.	Consolidated within Section 216.13 Prohibited uses, possession, transportation, sales, permits and general authorization.
<b>Subpart C</b>	
216.25 Exempted marine mammals and marine mammal products.	216.20 Exempted marine mammals and marine mammal products. Amended and consolidated with §216.14
216.26 Collection of certain marine mammal parts without prior authorization.	Found within §216.25 How is collection of parts from marine mammals authorized?
	216.26 How is transfer, including import or export, of marine mammal parts or products authorized?
	216.28 What notifications must be provided regarding the status of captive marine mammals?
<b>Subpart D</b>	
216.31 Definitions	All definitions can be found in §§216.3 and 222.102.
216.32. Scope	216.31. Scope.
216.33 Permit application submission, review, and decision procedures	216.32 What are the permit application, submission, review and issuance decision procedures for all special exception permits?
216.34. Issuance criteria	Paragraph (d)(2) of §216.32
216.35 Permit restrictions	216.33 What permit restrictions apply to all types of special exception permits?
216.36 Permit conditions	Paragraphs (k) and (n) of 216.33 What permit restrictions apply to all types of special exception permits?
216.37 Marine mammal parts	216.26 How is transfer, including import or export, of marine mammal parts or products authorized?
26.38 Reporting	216.34 What reports are required of special exception permit holders?
216.39 Permit amendments.	216.35 How are changes made to special exception permits? Authorizations, amendments and extensions.
216.40 Penalties and permit sanctions.	216.36 Penalties and permit sanctions.



216.41 Permits for scientific research and enhancement.	216.38 What are the specific requirements for scientific research permits? 216.40 What are the specific requirements for enhancement permits?
216.42 Photography [Reserved]	216.41 What are the specific requirements for permits for educational or commercial photography?
216.43 Public display [Reserved]	216.37 What are the specific requirements for permits to take or import live marine mammals for public display?
216.44 Applicability/transition	Removed.
216.45 General Authorization for Level B harassment for scientific research	216.39 What are the specific requirements for General Authorization for Scientific Research?
	216.42-216.45 [Reserved]

The table of contents for Subparts B, C and D following this restructuring would read as follows:

## **PART 216 REGULATIONS GOVERNING THE TAKING AND IMPORTING OF MARINE MAMMALS**

### **Subpart B Prohibitions**

- 216.11 Prohibited taking.
- 216.12 Prohibited importation.
- 216.13 Prohibited uses, possession, transportation, sales, permits and general authorization.
- 216.14 [Reserved]
- 216.15 Depleted species.
- 216.16 [Reserved]
- 216.17 General prohibitions.

### **Subpart C General Exceptions**

- 216.20 Exempted marine mammals and marine mammal products.
- 216.21 Actions permitted by international treaty, convention, or agreement.
- 216.22 Taking by State or local government officials.
- 216.23 Native exceptions.
- 216.24 Taking and related acts incidental to commercial fishing operations by tuna purse seine vessels in the eastern tropical Pacific Ocean.
- 216.25 How is collection of parts from marine mammals authorized?
- 216.26 How is transfer, including import or export, of marine mammal parts or products authorized?
- 216.27 Release, non-releasability, and disposition under special exception permits for rehabilitated marine mammals.

216.28 What notifications must be provided regarding the status of captive marine mammals?

**Subpart D\_Special Exceptions**

216.30 [Reserved]

216.31 Scope.

216.32 What are the permit application submission, review, and issuance decision procedures for all special exception permits?

216.33 What permit restrictions apply to all types of special exception permits?

216.34 What reports are required of special exception permit holders?

216.35 How are changes made to special exception permits?

Authorizations, amendments and extensions.

216.36 Penalties and permit sanctions

216.37 What are the specific requirements for permits to take or import live marine mammals for public display?

216.38 What are the specific requirements for scientific research permits?

216.39 What are the specific requirements for the General Authorization for Scientific Research?

216.40 What are the specific requirements for Enhancement Permits?

216.41 What are the specific requirements for permits for educational or commercial photography incidental to scientific research?

216.42 – 216.45 [Reserved]

## **Revisions to Subpart B:**

Subpart B describes those actions that are prohibited by the MMPA. The changes being considered in this section include primarily clarification, restructuring, and consolidation.

### **Subpart B – Prohibitions**

#### **§216.12 Prohibited importation.**

NMFS has drafted language in the regulatory text to improve clarity in paragraphs (a) and (b) of this section. Additionally, in paragraph (c) related to the prohibited importation of listed or depleted species except under the exceptions found in Subparts C and D, NMFS is considering changing the word “specimen” to “marine mammal” to clarify that it pertains to whole marine mammals as well as marine mammal parts. Should these or additional import prohibitions be proposed?

#### **§216.13 Prohibited uses, possession, transportation, sales, and permits.**

NMFS is considering consolidating two sections of the regulations by incorporating the General Authorization prohibitions, (currently found in §216.16) into this section. Additionally, we are considering adding a paragraph (c) to this section prohibiting unauthorized release of captive marine mammals.

#### **§216.14 Marine mammals taken before the MMPA.**

As discussed in the 2007 ANPR, and supported by comments received, NMFS is considering consolidating §216.14 with §216.25, moving this section to §216.20 in Subpart C General Exceptions, and applying §216.25’s broader title, to become “§216.20 Exempted marine mammals and marine mammal products.” In addition to consolidation, we are considering an insertion of export and sale into the pre-Act exemption language and revision of the listed documentation requirements to better reflect actual current practice. The consolidation and amendments being considered are reflected in §216.20 of the example regulatory text found at the end of this scoping document.

We would like comments from the public regarding whether these sections should be consolidated, and whether further changes should be made. For example, should we propose to specifically include or exclude immortalized cell lines originating from marine mammals collected pre-Act, or cell lines originally derived pre-Act, from the description of exempted pre-Act products? Are the draft revisions, different, or additional modifications necessary?

#### **§216.15 Depleted species.**

Responding to comments received on the 2007 ANPR, we are considering modifying this section by referencing the ESA regulations, at §§223.102 and 224.101(b), rather than including the names of marine mammal species, stocks, or distinct population segments listed as endangered or threatened. By definition, as found in Sec. 3(1)(C) of the MMPA, all marine mammal species or stocks listed as threatened or endangered are considered depleted for the purposes of the MMPA. Species, stocks, or distinct

population segments determined to be depleted but not listed under the ESA will continue to be specifically identified in this section.

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

NMFS is considering combining §216.16 with §216.13 as described in the discussion above regarding possible modifications to §216.13.

§216.17 General prohibitions.

No changes to this section were proposed in the 2007 ANPR. Should this section also be consolidated into the revised §216.13?

Do any of the remaining sections in Subpart B require further consideration or clarification?

**Revisions to Subpart C**

In addition to housekeeping changes in Subpart C, NMFS is considering substantial revisions to the regulations regarding the collection and transfer of marine mammal parts. Inquiries regarding the necessity of permits, and the authority under which marine mammal parts can be transferred, are among the most commonly received by NMFS permit office staff. Draft revisions to the regulations regarding marine mammal parts, proposed as new §§216.25 and 216.26, identify all of the instances in which marine mammal parts may be collected and transferred, and reference related regulations when necessary. Additionally in Subpart C, a new section (§216.28 in the draft regulatory text) would consolidate notification and reporting requirements related to the status and disposition of captive marine mammals.

**Subpart C -- General Exceptions**

As discussed above relative to changes in §216.14, a new section, §216.20 is proposed that modifies and consolidates the current §§ 216.14 and 216.25.

§216.23 Native exceptions.

The 2007 ANPR requested comments regarding whether or not this section needed an explicit provision to allow marine mammal parts collected by an Alaskan native for the purposes of, and in the manner required by, the regulations in Subpart C and D to be transferred to a NMFS representative or scientific research permit holder for scientific research purposes. A number of commenters supported this modification. Other commenters supported increasing the native exceptions to allow transfer of specimens without permit requirements if the research or testing were related to subsistence uses. As modified in the draft regulatory language in §216.23(b)(1) and (2), transfer of marine mammal parts would be allowed to a NMFS agent or research permit holder, but the take must be for the purpose of subsistence or the creation of authentic native articles of handicraft and clothing. Under this revision, a subsistence hunter could not be reimbursed for the parts. Is this or a different revision needed in the regulations governing subsistence hunting of marine mammals?

§216.25 Exempted marine mammals and marine mammal products.

We propose consolidating §216.25 with §216.14, as delineated in the draft regulations and described above in the discussion of potential revisions to §216.14 and moving the regulations into a new section, §216.20 Exempted marine mammals and marine mammal products. A new §216.25 is proposed, entitled “How is collection of parts from marine mammals authorized?”

A large proportion of the questions handled by NMFS staff regarding marine mammal permits is the result of confusion about appropriate authorization mechanisms for the collection and transfer of marine mammal parts. Currently, references to parts collection and transfer can be found in numerous sections of the regulations; particularly §§216.22, 216.23, 216.26, 216.37 and 216.41. There are some inconsistencies in both purposes and processes applied in these various regulations. For example, §216.22 allows parts collected from stranded animals to be transferred to appropriately authorized recipients for certain purposes, with a subsequent notification requirement. Authorization can be received in writing from the Regional Administrator if a recipient is qualified and is receiving the parts for the allowed purposes. Lastly, there are loan provisions that are often used for transfers. Section 216.26 allows beachcombers to collect certain parts regardless of purpose as long as they register the parts. Researchers collecting soft parts sloughed off of marine mammals in the wild must register parts as well as state the scientific research or enhancement purposes for the parts they collect. Section 216.37 allows collection under conditions similar to those listed in §216.22.

We propose the creation of clearly distinct sections on parts collection and parts transfer. These sections would consolidate and revise §§216.26 and 216.37, and summarize and cross reference applicable measures in the other sections, making the requirements consistent where possible. Because not all parts collection and transfer alternatives require a special exception permit, these new parts sections have been placed in Subpart C. This will provide a centralized place, identifiable from the table of contents, to direct interested parties to the appropriate process they need to follow for their specific request.

Parts from listed species can only be held under the authority of an ESA permit unless it is a part that was abandoned or forfeited to NMFS enforcement, and is on loan from NMFS (15 CFR 904.509(e)). Additionally, while permits might not always be required to receive transferred marine mammal parts, some researchers include this activity within their research proposal. As a result, a number of differing authorization and transfer alternatives remain in §§216.35 and 216.26 as proposed in the draft revisions to the regulations.

Comments are requested on §§216.25 and 216.26 as drafted in the revised regulations found in this scoping document. Do these revisions sufficiently clarify the requirements to collect or transfer marine mammal parts or are there additional modifications to further consolidate or simplify these measures within the constraints of the MMPA and the ESA?

An alternative proposed in response to the 2007 ANPR included development of a General Authorization process by which any parts legally taken could be transferred without a permit because there would be no take of a live marine mammal and therefore no Level A (or Level B) harassment. However, because the MMPA definition of marine mammal includes “. . . any part of any such marine mammal. . .”, and transfers must be

for the purposes of the Act (public display, scientific research or enhancement), without a statutory amendment, the transfer of marine mammal parts often requires a permit. Transfer of parts from listed marine mammals nearly always requires a permit. Loan agreements for seized or forfeited marine mammal parts are one example of an exception that is sometimes used to authorize transfer for educational purposes. Other authorization options that are simpler than the General Authorization requirements are also available for transfer of parts collected from non-listed stranded marine mammals. Should a process similar to the General Authorization or other alternatives be considered to further simplify the process for parts collection and transfer?

§216.27 Release, non-releasability, and disposition under special exception permits for rehabilitated marine mammals.

Edits to this section are being considered under a different ANPR (73 FR 5786 Jan. 31, 2008). These efforts will be coordinated with changes to be proposed for the permit regulations as rulemaking proceeds further.

216.28 What data and notifications must be provided for the Marine Mammal Inventory?

NMFS is considering adding this new section to codify or consolidate existing procedures implementing the various notification requirements found throughout Sec. 104 of the MMPA related to the sale, purchase, export or transport of captive marine mammals originally taken or imported under a public display permit, and their progeny. Because not all marine mammals held in captivity remain, or are born, under the authority of an active permit, we propose including this section within Subpart C, the General Exceptions subpart. Is it necessary to regulate these reporting and notification requirements for public display activities that do not require a permit? Are there other notifications or reporting requirements that should be included in this section?

## **Revisions to Subpart D**

In addition to reorganizing the regulations, as delineated in the distribution table, NMFS is considering revisions and additions to the special exception permit regulations found in Subpart D. Many of these revisions describe current permitting procedures. A new section would be inserted describing public display permit requirements, and a section would be added to allow permitting of educational or commercial photography that may cause, but not exceed, Level B harassment. NMFS welcomes all comments and alternatives to clarify and improve the marine mammal permit regulations found in Subpart D.

## **Subpart D - Special Exceptions**

### **§216.31 Definitions.**

This Section refers to definitions in §217, a reserved section that no longer contains the NMFS ESA definitions, now found in 50 CFR §222.102. The current ESA definitions are not relevant to the marine mammal permit regulations. We suggest removing this section and simplifying searches for readers by including all the definitions related to MMPA general and special exceptions in §216.3 as proposed by the draft regulations in this scoping document. Should definitions specific to special exception permits be moved to this section?

### **§216.32 Scope.**

We are considering moving this section to §216.31, as shown in the distribution table and draft regulation revisions. In response to comments received on the 2007 ANPR, edits are proposed to clarify that species, rather than parts, are listed under the ESA.

Does the scope need to be modified or clarified in any manner? One commenter suggested the scope of Subpart D should not include progeny of pre-Act marine mammals. Throughout Section 104 of the MMPA, references to reporting requirements related to progeny of captive marine mammals make it clear that the requirements of the MMPA apply to progeny of captive animals as unique individuals. The MMPA includes an exemption at Section 102(e) for marine mammals taken before the effective date of the Act (December 20, 1972), but does not extend this exemption to marine mammals born in captivity after this date. Therefore, we are not considering changing the scope of Section D in this manner at this time.

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

We propose redesignating and revising this section as §216.32 “What are the permit application submission, review, and issuance decision procedures for all special exception permits?” Although there are some procedures specific to each permit type, listed in their specific regulatory sections, general requirements for all permit applications are provided in §216.32 and cross-referenced as needed. The proposed modifications in the section titles would inform applicants that these requirements pertain to all of them. In addition to changing the name of §216.32, edits are made to clarify the regulations and a number of significant changes are proposed, including changes to export procedures.

Export of marine mammal parts. We clarify our procedures related to export of marine mammal parts for scientific research or enhancement. The 1994 amendments to the MMPA added export to the list of prohibited activities found at §102(a)(4) and did not add export to the list of specific activities that could be authorized by the Secretary (MMPA Sec. 103 (a)). However, we believe Congress did not intend to prohibit all export of marine mammal parts. At Section 102(a)(4)(B) of the MMPA, scientific research and enhancement, along with public display, were included within the list of exceptions to the prohibitions (including export), suggesting that these activities would be allowed within the constraints of permits or authorizations issued under Section 104(c). As a result of these inconsistencies, NMFS never removed export from activities authorized under special exception permits, and export of marine mammal parts for scientific research under permits or authorizations for museums and other scientific institutions has occurred.

Comments received on the 2007 ANPR included a recommendation that the 1994 MMPA amendment prohibiting export of marine mammals (a term the MMPA defines as including marine mammal parts) be incorporated into revised regulations. However, the same commenter also requested a revision to specify that the transfer (including export) of marine mammal parts for further research stipulate that parts be used for bona fide research purposes. This indicates that the commenter also did not consider export of parts to be prohibited. Other commenters suggested that only general authorizations, rather than permits, should be required to transfer (including export) legally collected marine mammal parts (including those from listed species) for research or sample analysis, since that transfer would have no effect on the conservation status of the species or stock. A number of commenters, while not expressly discussing export, urged NMFS to simplify the process for transferring parts for research purposes.

Therefore, the draft revisions to the regulations included with this scoping document, in §§216.26(d) and other references in Subpart D, do not prohibit the export of marine mammal parts. Current authorization and permit practices related to export of marine mammals and marine mammal parts are clarified. Additionally, while export of parts from non-listed marine mammals may be authorized under either an MMPA permit or a letter of authorization, the ESA requires a permit to export parts from listed species. NMFS explicitly includes export of listed marine mammal parts for research or enhancement purposes within the activities that can be authorized under a special exception permit. We would like comments from reviewers on these revisions and clarifications.

Comity. NMFS proposes removing the requirements currently found at §216.33(b) regarding applications to export living marine mammals. As currently written, §216.33(b) requires applicants to obtain assurances from foreign governments that application information is accurate, that the government could and would enforce permit conditions, and that the government would allow NMFS to amend, modify, suspend or revoke a permit issued to an entity within their country. Some members of the public display community argue that NMFS has no jurisdiction over export of marine mammals held for public display. NMFS, however, was not relieved of all responsibility for marine mammals once they are held for public display. Inventory compilation requirements found in the MMPA at Sec. 104 (c)(10), as well as requirements that export be allowed only to receiving facilities meeting standards comparable to APHIS



requirements within the United States (MMPA Sec. 104 (c)(9)) clearly identify continued responsibility for monitoring the fate of marine mammals in captivity.

However, NMFS agrees that there is little recourse if foreign governments do not comply with comity assurances. That is, once animals are outside of the United States, NMFS cannot control reporting, tracking, monitoring or enforcement of permit conditions. Given the lack of enforceability, and therefore utility, of this provision, NMFS has decided to remove the comity assurance requirement. Since the MMPA at Sec. 104 (c)(9) allows export of marine mammals only to foreign facilities that meet comparable standards under the MMPA, NMFS proposes codifying the current practice of requiring APHIS assurances of equitable facility standards at §216.28(e) in the draft regulatory language.

NEPA. The 2007 ANPR requested comments regarding whether NMFS should hold the comment period on applications prior to completion of the NEPA review. NMFS Administrative Order 216-6 stipulates that issuance of scientific research, enhancement, photography, and public display permits pursuant to the MMPA and issuance of research permits pursuant to the ESA are generally categorically excluded from the need to prepare further environmental documentation because, as a class, they do not have significant environmental impacts. Commenters on the 2007 ANPR recommended a range of alternatives, including suggestion of a blanket statement that all permits are categorically excluded from NEPA review, and strong opposition to decoupling the NEPA analysis from the permit review process out of concerns that delays would be introduced.

An additional change was also suggested in the 2007 ANPR to reconcile permit issuance, NEPA, and the ESA Section 7 review processes. In order to be consistent with the MMPA at Sec. 104 (d), the current regulations state that "within 30 days of the close of the public comment period the Office Director will issue or deny a special exception permit." NMFS considered revision of this deadline to accommodate the longer period required to comply with NEPA and the ESA for applications for research on listed species, which generally require preparation of an EA or EIS, as well as an ESA Section 7 consultation. Rather than deny the permit 30 days after the close of the comment period as required under the current regulations, we considered deferral of a decision on the permit until 30 days after completion of the environmental review. This change, however, would require an amendment to the MMPA and is therefore not proposed in the draft revision. NMFS will continue to delay issuance of the notice of receipt until all environmental reviews are within 30 days of completion.

Additional changes considered. Application return policies are clarified in §216.32(b)(4) of the draft revisions. The issuance criteria, previously found in §216.34, have been moved to this section and can be found at §216.32(d)(2). Allowance for submission of Institutional Animal Care and Use Committee (IACUC) approval to support a determination that a research institution's proposed activity is humane is suggested in the draft regulations at §216.32(d)(2)(i). NMFS received a number of comments on the 2007 ANPR regarding the perceived duplicative processes related to applying for a permit to conduct research on live animals, and APHIS requirements that research on animals be conducted under the approval of an Institutional Animal Care and Use Committee. Commenters suggested that NMFS should defer to the APHIS process, such that the oversight of an IACUC is sufficient to ensure that proposed research is

humane and bona fide. Researchers not required by APHIS to work under the review of an IACUC expressed concern that this would impose a new requirement on them. NMFS believes that IACUC requirements cannot always fulfill the MMPA mandate that taking be conducted in a humane manner, defined by the MMPA as done with the “least possible degree of pain and suffering practicable.” The Animal Welfare Act does not define humane, leaving room for inconsistency. Additionally, IACUCs are not required to determine whether or not proposed research is bona fide. Therefore, NMFS is considering allowing, but not requiring, the submission of an IACUC evaluation in support of an applicant’s evidence that a proposed activity on marine mammals is humane.

Although many of the changes are not substantial, sufficient modifications are considered throughout this section to merit inclusion of the entire draft revision of the permit application, review and issuance procedures, found at §216.32. Comments are requested on the suggested changes, or on other revisions related to the permit application and issuance process that NMFS should consider.

#### §216.34 Issuance criteria.

The issuance criteria are incorporated into the permit application and issuance procedures section as §216.32(d) in the draft regulatory text.

#### §216.35 Permit restrictions.

We are considering redesignating this section as §216.33, combining it with §216.36 Permit conditions, and amending the title. The revised title would read: “§216.33 What restrictions apply to all types of special exception permits?” A number of insertions for this section are being considered.

In the 2007 ANPR, NMFS recommended limiting permits to five years without the option of a 12-month extension. There was little support for this recommendation; however, commenters suggested a variety of alternatives ranging from a continuation of the one-year extension to a mechanism to allow a five-year extension for permits that do not allow a new take from the wild, such as permits dealing with parts only, or marine mammals already in captivity. A number of proposed changes address the identified concerns. Proposed modifications to §216.26 identify when authorization letters can be used in place of permits to transfer parts, alleviating the need for permits or extensions in many cases. At §216.33(b)(2) in the draft regulatory text, we propose issuing a permit for the lifetime of a marine mammal held for scientific research or enhancement if that animal is determined to be non-releasable and if activities conducted on the marine mammal remain unchanged. While changes in research or enhancement activities on these animals would require new permits, continuation of already permitted activities would not require extensions. Further, in the section of the draft regulations devoted to amendments and extensions, a new measure is proposed that would allow an extension by the Office Director for an ongoing project if issuance is delayed.

Insertions into the section regarding permit restrictions (§216.33) in the draft revisions) include:

- Paragraph (c) requiring imported marine mammals to have been humanely and legally collected;

- Paragraph (e) noting that captive marine mammals from depleted species can only conditionally be involved in public display;
- Specific permit conditions previously found in §216.36 were inserted into this section, at paragraph (k).
- Paragraph (l) related to disposition of marine mammal parts; and
- Paragraph (m) related to reporting requirements for transfer of captive marine mammals.

We are requesting comments on revisions of permit restrictions, including those revisions presented in §216.33 of the draft regulatory text.

#### §216.34.

As described in the distribution table, NMFS is considering combining the existing §§216.35 and 216.36 into §216.33 and incorporating the existing §216.37 into §§216.25 and 216.26. The section on permit reports currently found at §216.38 Reporting, would be redesignated as §216.34 and renamed “§216.34 What reports are required of all special exception permit holders?” The only amendment to this section is insertion of paragraph (b), cross referencing the extensive reporting and notification requirements found in the draft revised §216.28 for captive marine mammals, including those not held under permits.

#### §216.35.

We suggest redesignating §216.39, Permit amendments and amending the title to read: “§216.35 How are changes made to permits and authorizations? Amendments and extensions.” A number of substantial revisions are also being considered, as illustrated by the draft revisions.

The amendment section of the 2007 ANPR drew 29 comments that varied widely. In the ANPR, NMFS proposed allowing only minor amendments to permits because major amendments require a review process similar to a new permit application. Therefore applicants making large changes to their activities essentially apply for a new permit. Fourteen comments received on this issue ranged from support for modification of the regulations to allow only minor amendments, to allowing specific permit modifications in an expedited fashion. Other commenters supported keeping the amendment process as it currently operates. There was broad support for improved distinction between activities that merit minor or major amendment status.

In the draft regulatory text at the end of this scoping document, §216.35(a) proposes the small changes that could be authorized by written permission and would not require a permit amendment. Next, only one class of amendment, which is similar to the current major amendment, is proposed in paragraph (b) for modifications to permit specifications identified in the MMPA at 16 U.S.C 1374(b)(2). Under this option, changes in activities under the permit that will significantly change the number, manner, or location of takes would require an amendment. More substantial changes in a project scope or design would require application for a new permit.

In addition to changing the amendment terminology, NMFS has drafted §216.35(b)(5) restricting the number of amendment requests to only two for any five year permit, including only one in any 12-month period, and none in the first or last 12 months of the effective period of a permit.

Lastly, paragraph (b)(6) of this section continues the current practice of allowing only one 12-month extension for any permit. The suggestion in the 2007 ANPR to eliminate extensions did not receive support from commenters.

#### § 216.36.

As described in the distribution table, §216.40 moves up to be redesignated as “§216.36 Penalties and permit sanctions” after reorganization of preceding sections. The 2007 ANPR proposed the issuance of permit sanction regulations to supplement the provisions of 15 CFR part 904, subpart D. Most commenters did not support the use of permit sanctions for any reasons other than enforcement of permit requirements. One commenter supported regulations allowing permit sanctions in the event of unforeseen risks to marine mammals.

Sanctions unrelated to enforcement of permit conditions are not proposed in the draft regulations. We believe permit holders would voluntarily suspend activities if their research or enhancement efforts caused unforeseen harm, particularly if unauthorized takes occurred. We do propose codifying the enforcement policy, originally published in 40 FR 24948 (June 11, 1975) at §216.36 paragraphs (a) through (c). Paragraph (d) is also inserted, proposing suspensions of permits for failure to submit reports. Comments are requested regarding these additions or other options that should be considered.

#### §216.37.

Draft public display regulations are provided as §216.37 entitled: “What are the specific requirements for permits to take or import live marine mammals for public display?” As shown in the distribution table, §216.43 was originally reserved for public display regulations. However, within the permits section of the MMPA (Section 104 (c)(2)), public display is the first activity described and therefore the regulations specific to public display permits are placed ahead of the sections on scientific research, enhancement and photography permits.

Public display permit regulations were not discussed in the 2007 ANPR; however, we received comments on a number of regulatory issues that affect captive marine mammals regardless of the authority under which those marine mammals were taken, including reporting requirements, disposition or release protocols, display of depleted species, and conduct of intrusive research on captive animals. Commenters suggested clearly dividing public display regulations from scientific research and enhancement permit requirements. While separate public display, research and enhancement permit regulations are presented in this scoping document, some requirements related to captive animals remain interspersed in other sections of the regulations including those governing reporting, scientific research, and enhancement. The display community’s concerns might be better addressed by separating regulations concerning captive, live marine mammals from regulations concerning marine mammals in the wild or marine mammal parts. In this alternative structure, instead of multiple activities being discussed in separate sections organized by permit type, the sections would be organized by activity and the different types of permits required would be discussed within multiple sections. Such a regulatory structure would depart drastically from the layout of the MMPA. Another option would be to continue to group the regulations by permit type parallel to

the structure of the MMPA, but to separate the Agency's application instructions by activity. Comments regarding these options or additional alternatives are requested.

Many commenters believe that research on marine mammals held in public display facilities should be solely under the oversight of APHIS. Current practice, retained in the draft regulations in §216.37(d)(4), includes a permit condition requiring a scientific research permit for intrusive research (as defined and edited in §216.3 of the draft regulations). The MMPA, in Sec. 104 (c), authorizes the issuance of permits for specific purposes. A marine mammal imported or collected for the purpose of public display can be held for the purposes of public display. However, a scientific research or enhancement permit would be required to conduct research or enhancement activities on display animals. Additionally, while the marine mammal can be transferred (including export) without an additional permit for the purpose of display, research, or enhancement (MMPA Sec. 104 (c)(2)(B)(ii)), it can only be transferred to a person that meets the MMPA requirements for that purpose. Therefore, for example, a public display facility holding a marine mammal for the purpose of display, can, without a permit, transfer animals for the purpose of scientific research only to a person meeting the MMPA scientific research requirements which include holding a permit for that research.

Essentially, the draft public display regulations presented in §216.37 reflect current permitting practices. These regulations as drafted apply specifically to marine mammals upon their original collection or import for public display. Permits issued under these regulations would remain effective while the permit holder maintains custody of the marine mammal to be imported or collected. Comments are requested on the development of public display regulations, including comments on the §216.37 of the draft revisions, as well as other options for NMFS to consider.

#### §216.38.

Following the distribution table, §216.41 Permits for scientific research and enhancement is divided into two sections in the draft regulations included within this scoping document. Section 216.38 would include just the research permit regulations under the title "What are the specific requirements for scientific research permits?" In addition to separating the research and enhancement permit regulations, a number of other substantial changes are being considered. NMFS is requesting comments on the draft scientific research permit regulations or alternatives that should be considered while developing a proposed rule.

In §216.38 paragraph (b)(2) of the draft regulations, we propose requiring proof of an IACUC review for research involving live marine mammals, as required by the APHIS regulations found at 9 CFR 2.31.

Comments received from the public display industry argued that research animals, regardless of their listing or depleted status, should not be restricted from public display because the display of research animals promotes conservation education opportunities, accommodates space limitations, and reduces the costs associated with scientific research. Others argued that allowing depleted or listed animals collected under a research permit to be placed on public display circumvents the prohibition against display of depleted marine mammals. Because the MMPA has a specific allowance for public display, NMFS has, to date, maintained separation in what can be authorized under separate types of permits. However, we believe that permit application requirements

sufficiently ensure that depleted marine mammals could not be collected under research and enhancement purposes for the purpose of circumventing the public display restriction. This restriction has inadvertently reduced options for maintenance of unreleasable depleted species in captivity due to strandings, or valid research or enhancement purposes.

In the §216.38(c)(1)(iv), of the draft regulations, we allow depleted species, as well as other marine mammals, to be conditionally displayed while held under a scientific research permit. A similar allowance is maintained under the enhancement permit regulations. Additionally, a section is added to the research permit regulations, at §216.38(c)(2), allowing retention or transfer into permanent custody to a public display facility of non-releasable marine mammals originally collected under a research permit. Comments on these draft regulations, including other alternatives related to the conditional display of marine mammals held under research permits, and disposition of non-releasable research animals, are requested.

Additional changes proposed in this section include insertion of field work notice and review requirements, and photography conditions similar to those within the General Authorization regulations. Also, a permit condition has been added to note that scientific research permits can be sanctioned if the Secretary determines that the research conducted under the permit is not bona fide, a condition of scientific research permits as found in the MMPA at Sec. 104 (c)(3)(A).

#### §216.39

Because the General Authorization is a subset of scientific research activities authorized under the permit regulations, §216.45 has been moved to the end of the scientific research regulations, and has been renamed: “§216.39 What are the specific requirements for the General Authorization for Scientific Research?”

In the 2007 ANPR, NMFS requested comments on a modification to this section that would make the General Authorization (GA) available based on the status of the target stock, rather than strictly based on the level of harassment. This change would make the GA available for all research that may result in Level A or Level B harassment on all non-strategic stocks of MMPA species. Comments were received both supporting and opposing this suggestion. As noted in the 2007 ANPR, a change in the statute (at Sec. 104 (c)(3)(C)), would be required before this change to the regulations could be adopted. The draft regulations in this scoping document do not include this modification.

The changes made to the General Authorization regulations include clarifications and edits that reflect current authorization practices. Paragraph (b)(2) describing the content of the letter of intent and paragraph (d)(2)(ii) summarizing the necessary contents of an annual report have been removed.

#### §216.40.

Penalties and permit sanctions have all been moved to §216.36. Following the redesignations identified in the distribution table, this section now becomes; “§216.40 What are the specific requirements for permits for Enhancement?” Most of the measures identified were extracted from the current enhancement permit regulations found at §216.41 Permits for scientific research and enhancement. A number of clarifications are proposed. Notification and review provisions are inserted, consistent with those in the

research permit and GA regulations. A requirement that film products credit the NMFS permit is inserted. Of most note, regulations regarding public display and provisions for disposition of non-releasable marine mammals originally collected under enhancement permits, are included in §216.40 paragraphs (c)(2)(ii) and (iii). Comments on enhancement permit regulations, including the draft revisions within this scoping document or other alternatives to the current regulations that NMFS should consider in the development of a proposed rule, are requested.

#### §216.41.

NMFS is considering publishing regulations regarding permits for photography for educational or commercial purposes. Draft regulations have been inserted in §216.41. Permits issued under these regulations would authorize activities that may result in only Level B harassment. Commenters on the 2007 ANPR suggested that, because the General Authorization is restricted to activities that could result in only Level B harassment, NMFS consider including regulations governing educational and commercial photography permits within the section on the General Authorization. However, the MMPA, at Sec. 101 (a)(1) and Sec. 104 (c)(6) specifically authorizes the Secretary to issue permits for photography for these purposes. Therefore, we are initially suggesting this separate section. The draft regulations delineate application instructions, limit activities to those identified in the permit, limit the participants to those performing a function necessary to conducting the permitted activity or for training, include notification and review requirements, and require the NMFS permit to be credited on film products. Comments are requested on alternatives that NMFS should consider for proposed rulemaking related to authorizing photography for commercial or educational purposes.

#### §216.44 Applicability/transition

NMFS suggests removing this section in the regulations. This section provided a transition period for intrusive research conducted on captive animals between June 10, 1996 and June 10, 1997, which is no longer relevant.

**Part 216—Draft Regulations Governing The Taking and Importing  
of Marine Mammals**

Subpart A-- Introduction

**1. The authority for part 216 is 16 U.S.C. 1361 et seq., unless otherwise noted.**

**2. Amend §216.3 as follows:**

a. Add definitions for “APHIS”, “AWA”, “CITES”, “Depleted”, “Enhancement”, “IACUC”, “In good faith”, “Marine mammal part”, “Marine mammal product”, “Research institution” and “Responsible party” in alphabetical order.

b. Revise the definition for “Article of handicraft” by removing (1) and redesignating (2) and (3) as (1) and (2).

c. Revise the definition for “Authentic native articles of handicraft and clothing” by removing (a) and redesignating (b) and (c) as (a) and ((b).

d. Revise the definitions of “Bona fide scientific research”, “Co-investigator”, “Intrusive research”, “Public display”, “Soft part”, and “Subsistence.”

e. Remove the definition of “Regional Director”.

**§ 216.3 Definitions**

\* \* \* \* \*

APHIS means Animal and Plant Health Inspection Service, the agency within the United States Department of Agriculture responsible for implementing the Animal Welfare Act.

\* \* \* \* \*

AWA means the Animal Welfare Act, 7 U.S.C. 2131 *et seq.*



Bona fide scientific research: \* \* \* \* \*

(1) \* \* \*

(i) \* \* \*

(ii) Are likely to contribute to the basic knowledge of marine mammal biology or ecology. (Note: This includes, for example, maintenance of archived marine mammal parts in an accredited scientific reference collection); or

\* \* \* \* \*

CITES means the Convention on International Trade in Endangered Species of Wild Fauna and Flora; Treaties and Other International Acts Series 8249.

Co-investigator means the on-site representative of the principal investigator, possessing qualifications equivalent to those of the principal investigator for the activities for which he or she provides oversight.

\* \* \* \* \*

Depleted means any marine mammal species or subspecies listed as endangered or threatened pursuant to the Endangered Species Act of 1973 (87 Stat. 884, Pub. L. 93-205; see part 17 of this title) or a marine mammal species or stock that is below its optimum sustainable population, as defined in 16 U.S.C. 1362 (section 3(1) of the MMPA).

\* \* \* \* \*

Enhancement means those actions taken specifically to maintain or increase distribution or abundance, enhance the health or welfare and/or ensure the survival or recovery of a species, stock, or distinct population segment in the wild that has been or is proposed to be listed as depleted, threatened or endangered, or that is declining. Enhancement

activities include, but are not limited to, captive propagation and release to the wild if required under an ESA recovery or MMPA conservation plan, and translocation to increase survival and distribution. When used in reference to marine mammals in captivity, the provision of health care and normal husbandry practices required to support enhancement activities are included within the scope of this definition.

\* \* \* \* \*

IACUC means the Institutional Animal Care and Use Committee of a research institution, as described in the APHIS regulations found at 9 CFR 2.31.

\* \* \* \* \*

In good faith means an applicant for a permit to conduct research or enhancement on listed species, meeting the requirements of Section 10(d) of the ESA, has demonstrated the ability to act consistently with ESA regulations and to comply with past, present and future permit terms and conditions.

\* \* \* \* \*

Intrusive research means a procedure conducted for bona fide scientific research involving: restraint, handling, tagging, a break in or cutting of the skin or equivalent, insertion of an instrument or material into an orifice, introduction of a substance or object into the animal's immediate environment that is likely either to be ingested or to contact and directly affect animal tissues (e.g., external tags, chemical substances), or a stimulus directed at animals that may involve greater than a Level B risk to the animal's health or welfare or that may have an impact on normal function or behavior.

\* \* \* \* \*

Marine mammal part means any part, including soft and hard parts and marine mammal products as defined in this section, taken from a marine mammal.

Marine mammal product means any item of merchandise (that is, items for trade or sale) which consists, or is composed in whole or in part, of any marine mammal. This does not include materials collected from captive marine mammals and used for medical or husbandry procedures.

\* \* \* \* \*

Public display means an activity that:

(1) Provides opportunities for the public to view living marine mammals at a facility meeting the public display criteria identified in 16 U.S.C. 1374(c)(2)(A) (section 104 (c)(2)(A) of the MMPA). Public display includes health care and normal husbandry practices, including: humane euthanasia, management of captive populations by contraception and artificial insemination, grouping or handling of marine mammals to control survivorship and reproduction, and similar practices to maintain captive populations that are self-sustaining and that possess as much genetic vitality as possible.  
Or;

(2) Provides an opportunity for the public to view parts legally collected from dead marine mammals and properly curated at an educational facility; such as a professionally accredited school, museum, heritage center, aquarium or zoo.

\* \* \* \* \*

Research institution means any organization regulated under APHIS Research Facility regulations, found at 9 CFR subpart C, including any institution, organization or person that uses or intends to use live marine mammals in research, tests or experiments,

that purchases or transports live marine mammals in commerce, or that receives Federal funds for the purpose of carrying out research, tests or experiments on marine mammals, regardless of whether or not the marine mammal is captive.

Responsible party means, when an applicant for a special exception permit is not an individual, the person at the institution, governmental entity, partnership, corporation or other entity who is responsible for supervision of the principal investigator or responsible for, and with the authority to determine the disposition of, marine mammals to be received under a public display permit.

\* \* \* \* \*

Soft part means any marine mammal part that is not a hard part. Ambergris, blood, organs, skin samples, and their constituents, are examples of soft parts. Soft parts do not include spew, urine or fecal material, or synthetically derived DNA that does not include any part of the original template.

\* \* \* \* \*

Subsistence means the use of marine mammals taken by Alaskan Natives for food (which may be tested without a permit to evaluate human health concerns), clothing, shelter, heating, transportation, and other uses necessary to maintain the life of the taker or those who depend upon the taker to provide them with such subsistence.

\* \* \* \* \*

#### Subpart B-Prohibitions

**3. In §216.12, paragraphs (a), (b)(2)(ii), and (c) are revised, new paragraphs (c)(3) and (4) are added, and paragraph (c)(3) is redesignated as paragraph (c)(5) to read as follows:**

§216.12 Prohibited importation.

(a) Except as otherwise provided in §216.13, and subparts C and D of this part 216, it is unlawful for any person to import any marine mammal or marine mammal product into the United States.

(b) \* \* \*

(1) \* \* \*

(i) \* \* \*

(ii) \* \* \*

(2) \* \* \*

(i) \* \* \*

(ii) The sale of such product is illegal in the country of origin.

(c) Except in accordance with the exceptions identified in subparts C and D, it is unlawful to import into the United States any:

(1) \* \* \*

(2) \* \* \*

(3) Marine mammal from a species, stock, or distinct population segment which is listed as endangered or threatened.

(4) Marine mammal from a species or stock which has been designated as depleted; or

(5) \* \* \*

\* \* \* \* \*

**4. In §216.13, the section heading is revised, paragraph (b) is revised, new paragraph (c) is added, paragraphs (c) and (d) are redesignated as paragraphs (d)**

**and (e), redesignated paragraph (e) is revised, and new paragraphs (f) and (g) are added; to read as follows:**

§216.13 Prohibited uses, possession, transportation, sales, permits and general authorization.

\* \* \* \* \*

(b) Any person subject to the jurisdiction of the United States to possess any marine mammal or marine mammal part or product taken in violation of the MMPA or these regulations, or to transport, purchase, sell, export, or offer to purchase, sell, or export any such marine mammal, marine mammal part, or any marine mammal product made from any such mammal.

(c) Any person subject to the jurisdiction of the United States to release into the wild a captive marine mammal, except where the release into the wild of such a marine mammal is authorized specifically under a special exception permit, or pursuant to §216.27 for stranded marine mammals.

(d) \* \* \*

(e) Any person to violate any term, condition, or restriction of any permit or authorization issued by the Secretary.

(f) Any person to submit false information in any document, letter, or permit application provided pursuant to the regulations governing exceptions to the prohibitions, §§216.20 through 216.41.

(g) Any person to violate any permit term, condition, or reporting requirement imposed pursuant to §§216.28, 216.32 through 216.41, as appropriate.

**5. Section 216.14 is removed and reserved, to read as follows:**

§216.14 [Reserved].

**6. In §216.15, the introductory paragraph is revised, paragraphs (a), (b), (g) and (h) are removed and paragraphs (c), (d), (e), (f) and (i) are redesignated as (a), (b), (c), (d) and (e); to read as follows:**

§216.15 Depleted species.

In addition to the list of threatened and endangered species, stocks or distinct population segments, or subspecies of marine mammals listed under §§223.102 and 224.101(b), the following species or population stocks have been designated by the Assistant Administrator as depleted under the provisions of the MMPA.

(a) North Pacific fur seal (*Callorhinus ursinus*), Pribilof Island/Eastern Pacific population.

(b) Bottlenose dolphin (*Tursiops truncatus*), coastal-migratory stock along the U.S. mid-Atlantic coast.

(c) Eastern spinner dolphin (*Stenella longirostris orientalis*).

(d) Northeastern offshore spotted dolphin (*Stenella attenuata*).

(e) AT1 stock of killer whales (*Orcinus orca*). The stock includes all killer whales belonging to the AT1 group of transient killer whales occurring primarily in waters of Prince William Sound, Resurrection Bay, and the Kenai Fjords region of Alaska.

**7. Section 216.16 is removed and reserved.**

§216.16 [Reserved]

Supbart C – General Exceptions

**8. Section 216.20 is added, to read:**

§216.20 Exempted marine mammals and marine mammal products.

As stated in 16 U.S.C. 1372 (e) (section 102(e) of the MMPA), the MMPA does not apply to any marine mammal taken prior to December 21, 1972, or to any marine mammal product consisting of, or composed in whole or in part of, any marine mammal taken before that date. Therefore:

(a) The provisions of the MMPA and these regulations shall not apply:

(1) To any marine mammal taken before December 21, 1972<sup>1</sup>, or

(2) To any marine mammal product if the marine mammal portion of such product consists solely of a marine mammal taken before such date.

(b) The prohibitions contained in §216.12(c)(3) and (4) shall not apply to marine mammals or marine mammal parts or products imported into the United States, exported from the United States, purchased, or possessed before the date on which a notice is published in the Federal Register with respect to the designation of the species or stock as depleted, threatened, or endangered.

(c) Section 216.12(b)(1)(ii) shall not apply to articles imported into the United States, exported from the United States, purchased, or possessed before the effective date of the foreign law making the taking or sale, as the case may be, of such marine mammals or marine mammal products unlawful.

(d) This prior status of any marine mammal or marine mammal product may be established by submitting to the Director, National Marine Fisheries Service prior to, or

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<sup>1</sup> In the context of captive maintenance of marine mammals, the only marine mammals exempted under this section are those that were actually captured or otherwise in captivity before December 21, 1972.



at the time of importation, exportation or commercial sale, an affidavit containing the following:

(1) The Affiant's name and address;

(2) Identification of the Affiant;

(3) A description of the marine mammals or marine mammal products which the Affiant desires to import, export, or sell;

(4) A statement by the Affiant that, to the best of his knowledge and belief, the marine mammals involved in the application were taken prior to December 21, 1972

(5) A statement by the Affiant in the following language:

The foregoing is principally based on the attached exhibits which, to the best of my knowledge and belief, are complete, true and correct. I understand that this affidavit is being submitted for the purpose of requesting the Federal Government to permit the importation, exportation, or commercial sale of--under the Marine Mammal Protection Act of 1972 (16 U.S.C. 1361 through 1407) and regulations promulgated thereunder, and that any false statements may subject me to the criminal penalties of 18 U.S.C. 1001, or to penalties under the Marine Mammal Protection Act of 1972.

(6) Documentation shall be attached to such affidavit consisting of such records or other available evidence showing that the marine mammal or marine mammal product was taken prior to December 21, 1972.

(e) No pre-Act marine mammal or pre-Act marine mammal product may be imported unless the requirements of this section have been fulfilled.

**9. In §216.23, subparagraphs (b)(1)(iii) and , (b)(2)(iv) are revised and**

**(b)(1)(iv) and (b)(2)(v) are added to read as follows:**

§216.23 Native exceptions.

\* \* \* \* \*

(b) Restrictions. (1) No marine mammal taken for subsistence may be sold or otherwise transferred to any person other than an Alaskan Native or delivered, carried, transported, or shipped in interstate commerce, unless:

(i) \* \* \*

(ii) \* \* \*

(iii) It is an edible portion and it is sold in an Alaskan Native village or town; or

(iv) It is a byproduct of the subsistence hunt and is transferred for the purpose of scientific research or enhancement to a duly authorized representative of NMFS or a holder of a scientific research or enhancement permit. These parts are subject to the transfer requirements found in Sec. 216.26 (c).

(2) No marine mammal taken for purposes of creating and selling authentic native articles of handicraft and clothing may be sold or otherwise transferred to any person other than an Indian, Aleut or Eskimo, or delivered, carried, transported or shipped in interstate commerce, unless:

(i) \* \* \*

(ii) \* \* \*

(iii) \* \* \*

(iv) It is an edible portion and sold (A) in an Alaskan Native village or town, or (B) to an Alaskan Native for his consumption; or

(v) It is a byproduct of the subsistence hunt and is transferred for the purpose of scientific research or enhancement to a duly authorized representative of NMFS or a holder of a scientific research or enhancement permit. These parts are subject to the transfer requirements found in Sec. 216.26 (c).

\* \* \* \* \*

**10. Redesignate §216.26 as §216.25 and revise as follows:**

**§216.25 How is collection of parts from marine mammals authorized?**

(a) Authorized collectors: (1) Non-listed species: Marine mammal parts from species, stocks, or distinct population segments that have not been listed as threatened or endangered may be collected:

(i) As described in §216.22(a), by State or local government officials or employees, employees of NMFS, USFWS, or any other Federal agency with conservation, management, or public health responsibilities in marine shoreline areas, or a person authorized under 16 U.S.C. 1382(c) (section 112(c) of the MMPA), collecting specimens in support of marine mammal health and stranding response;

(ii) By a beachcomber collecting any bones, teeth, or ivory from a dead marine mammal found on a beach. The term beach includes bays and estuaries;

(iii) By a researcher collecting sloughed, excreted or naturally discharged materials from a living marine mammal in the wild for bona fide scientific research or enhancement if that collection does not involve harassment or other taking of a living marine mammal in the wild.

(iv) By a person holding live marine mammals for purposes of rehabilitation, public display, or under the authority of a scientific research or enhancement special exception permit, collecting specimens during the course of routine health care and husbandry procedures or for diagnostic purposes after the death of a marine mammal;

(v) By a person holding a special exception permit to conduct research or enhancement pursuant to §§216.38 and 216.40 authorizing the take, import, or other activity involving the collection and possession of a marine mammal part;

(vi) By a NMFS employee or NMFS-designated contractor operating as an observer on a fishing vessel pursuant to §229.7(c)(4)(vi) and (c)(5), collecting parts for scientific research, or enhancement activities; or,

(vi) By an Alaskan native taking a marine mammal for subsistence pursuant to §216.23.

(2) Listed species: Marine mammal parts from a species, stock, or distinct population segment listed as threatened, or endangered may be collected by:

(i) A person authorized under an ESA research or enhancement permit issued pursuant to §222.308 to collect marine mammals or marine mammal parts, who is also;

(A) Authorized to respond to marine mammal strandings as described in §216.22(a); or,

(B) Authorized under a scientific research or enhancement special exception permit as described in §§216.38 and 216.40 to hold listed marine mammals captive, collecting specimens during the course of routine health care and husbandry procedures or for diagnostic purposes after the death of a marine mammal; or,

(C) Authorized under a special exception permit as described in §§216.38 and 216.40 to conduct scientific research or enhancement activities on threatened or endangered species requiring the collection of parts.

(ii) An Alaskan native taking a listed marine mammal for subsistence pursuant to §216.23;

(b) Reporting and registration of parts from stranded marine mammals: (1) Marine mammal parts collected from a stranded marine mammal as described in (a)(1)(i) of this section, must, within 30 days of the collection, be reported in the specimen disposition section of the Marine Mammal Stranding Report for Level A data and submitted in accordance with the appropriate procedures found in §216.22(b) and (c).

(2) A beachcomber collecting materials from a stranded marine mammal as described in (a)(1)(ii) of this section, or a scientific researcher collecting materials in the manner described in (a)(1)(iii) of this section, must, within 30 days of the collection, register the collection of the specimen with the appropriate Regional Office of the National Marine Fisheries Service. The registration must include: (i) The name, address, and any official position of the individual engaged in the taking and collection; and,

(ii) A description of the marine mammal specimen collected including the scientific and common names of the species; and,

(iii) A description of the parts collected; and,

(iv) The date and the location of the taking; and

(v) For sloughed, excreted or discharged materials collected as described in (a)(1)(iii) of this section, a description of the bona fide research that will be conducted using the collected materials.

(vi) Such other information as deemed necessary by the Assistant Administrator or Regional Director.

(c) Identification and curation requirements: (1) Except for those parts collected by Alaskan natives for subsistence purposes, all marine mammal parts collected as described in (a) of this section must;

(i) Be assigned a field identification number or other number unique to each individual animal, which must be marked on or affixed to the marine mammal part or container.

(ii) Be accompanied by documentation of the original collection that demonstrates that the parts were taken legally. Documentation must include the unique number assigned to the source animal. Additional documentation can include parts registration information, marine mammal stranding or inventory form, Regional Director authorization letter, permit, permit report, or CITES documentation, as applicable.

(2) Marine mammal parts collected from stranded marine mammals must be managed according to the requirements found in §216.22.

(d) Disposition: Marine mammal parts retained after collection pursuant to section (a) above must be properly maintained and curated in accordance with professional standards, must be made available at the request of the Office Director for purposes of public display/education, scientific research, or enhancement, or must be

destroyed upon completion of authorized activities if they will not be maintained properly and are not requested by the Office Director.

**11. Redesignate §216.37 as §216.26 and revise as follows:**

§216.26 How is transfer, including import or export, of marine mammal parts or products authorized?

(a) Purposes: Marine mammal parts collected as described in §216.25 and meeting the conditions in paragraph (c) of this section can be transferred for scientific research (including curation in a reference collection in accordance with professional standards), enhancement, rehabilitation, diagnostics, and public display/education.

(b) Authorized recipients:

(1) A laboratory or research facility within the United States conducting analyses that results in destruction of all or part of the the specimen for diagnostic purposes or to otherwise support basic husbandry or medical care of captive or rehabilitating marine mammals. Any remaining sample must be returned to the authorized holder of the specimen; or

(2) A holder of a loan agreement from the NOAA Office of Law Enforcement, the Regional Director for the recipient's location or from the Office Director, for receipt of abandoned or forfeited marine mammal parts as described in 15 CFR 904.509(e); or

(3) Pursuant to 16 U.S.C. 1279(h) (section 109(h) of the MMPA), State or local government officials or employees, employees of NMFS, USFWS, or any other Federal agency with conservation, management or public health responsibilities in marine shoreline areas, or a person authorized to respond to marine mammal strandings pursuant

to 16 U.S.C. 1382(c) (section 112(c) of the MMPA), receiving the parts in a manner consistent with requirements in §216.22; or

(4) A holder of marine mammals in a public display facility licensed or registered by APHIS, and the transfer is for the purposes of husbandry; or

(5) A holder of a scientific research special exception permit pursuant to §216.38 or an enhancement permit pursuant to §216.40, authorizing the take, import, or other activity involving the possession of a marine mammal part of the same species as the subject part; or

(6) A holder of written authorization from the Regional Director for the recipient's location or from the Office Director, to receive marine mammal parts for purposes of scientific research, curation in accordance with professional standards, or, for public display/education in a museum, educational or cultural institution, or an equivalent institution that will ensure that the parts are available to the public for educational purposes.

(c) Conditions of transfer:

(1) The person transferring the part receives no remuneration of any kind for the marine mammal part (this does not preclude legitimate collection, processing and transportation or shipping expenses); and

(2) The marine mammal part is accompanied by documentation of the original take and of any subsequent authorized transfers, pursuant to §216.26(b). Documentation must include the unique number assigned to the individual animal and marked on the specimen or container, and the associated registration information, marine mammal



stranding or inventory forms, Regional or Office Director authorization letters, permit reports, CITES papers, or other documentation of legal collection and transfer; and

(3) The person receiving the marine mammal part agrees that, as a condition of receipt, subsequent transfers may only occur subject to the provisions of paragraph (a) of this section; and

(4) Except for parts collected from captive marine mammals for husbandry or diagnostic purposes, within 30 days after the transfer, the person transferring the marine mammal part verifies the transfer to the appropriate Regional or Office Director, reporting a description of the transferred part and its origins, the person to whom the part was transferred, the purpose of the transfer, documentation that the recipient has agreed to comply with the requirements of paragraph (c) of this section for subsequent transfers, and, if applicable, the recipient's permit number or a copy of the recipient's authorization letter.

(5) Loans: Marine mammal parts may be loaned to an authorized recipient for the purposes of scientific research, enhancement, curation in accordance with professional standards, or public display/education including the conduct of training workshops, and without the agreement and notification required under paragraphs (c)(3) and (4) of this section, if:

(i) A record of the loan is maintained; and

(ii) The purpose of the loan requires destruction of the specimen or the loan is for a period of less than one year. Loans for a period greater than 12 months, including loan extensions or renewals, require notification to the Regional Director under paragraph (c)(4).

(d) Export of marine mammal parts: Marine mammal parts collected as described in paragraph (a) of §216.25, or held after a transfer as described in paragraph (b) of this section, and meeting the conditions in paragraph (c) of this section, may be exported:

(1) For parts from non-ESA listed marine mammals, by:

(i) A person holding parts from non-listed species for public display/education purposes, exporting to an educational institution, museum or cultural institution, or equivalent that demonstrates that the parts will be available to the public for educational purposes, or receiving the parts for bona fide scientific research activities (including curation in accordance with professional standards); or

(ii) A person authorized under a scientific research or enhancement permit pursuant to §§216.38 and 216.40 to export of parts for the purpose of public display to an educational institution, museum or cultural institution, or equivalent that demonstrates that the parts will be available to the public for educational purposes or for the purpose of bona fide scientific research (including maintenance in a properly curated, professionally accredited scientific reference collection).

(2) For parts from marine mammals from species, or distinct population segments listed as threatened or endangered, by a person holding an ESA permit pursuant to §222.308, and an MMPA scientific research or enhancement permit pursuant to §§216.38 and 216.40, authorizing export for bona fide scientific research or for enhancement.

(3) The following requirements apply to all marine mammal parts that are exported for the purposes of public display/education, scientific research or enhancement:

(i) Neither the original holder of the marine mammal parts, nor the recipient, may receive remuneration for the marine mammal part; and

(ii) The unique number described in (c)(1)(i) of §216.25 is marked on or affixed to the marine mammal specimen or container and associated documentation of the original legal take and of any subsequent authorized transfers, pursuant to §216.26(b) accompanies the specimen; and

(iii) The marine mammal part is exported in compliance with all applicable domestic and foreign laws; and

(iv) All exported marine mammal parts from CITES listed species must be accompanied by a CITES export permit, as directed in 50 CFR 23.36; and

(v) The verification requirements of (c)(4) of this section apply to all exports of marine mammal parts. Additionally, the person exporting the marine mammal parts must keep records of the transfer and provide those records to the Office Director upon request.

**12. Add §216.28 to read as follows:**

§216.28 What notifications must be provided regarding the status of captive marine mammals?

Any person with custody of a captive marine mammal originally taken or imported for public display, or held under an MMPA permit to conduct scientific research, or enhancement activities, is required to:

(a) Notify the Office Director within 30 days after the date of birth of progeny of a captive marine mammal.

(b) Notify the Office Director at least 15 days prior to the sale, purchase, export, transfer, or transport for the purpose of public display, scientific research, or enhancement, of any captive marine mammals including progeny; unless

(1) The Office Director authorizes expedited transport of a captive marine mammal in response to a written request, and explanation for the expedited transport, from the person with custody of the marine mammal; or,

(2) The Office Director authorizes immediate transport in the case of an emergency involving imminent and serious jeopardy to the health or welfare of the marine mammal. The person with custody of the marine mammal or their veterinarian must submit a written explanation of the emergency to the Office Director within 24 hours, and notify the Office Director of the final disposition of the marine mammal; or,

(3) For traveling exhibits displaying live marine mammals, the Office Director has approved an alternative notification schedule; or,

(4) For marine mammal transports for outreach events conducted consistently with the purposes for which the marine mammal is held (public display, scientific research or enhancement), the marine mammal will be returned to the original holding facility within 12 hours of departure.

(c) Report immediately by phone or fax to the Office Director notice of any escape or inadvertent release of a marine mammal. Within 6 months of the escape or release, provide the Office Director with the results of all reasonable efforts to recapture the marine mammal.

(d) Review and verify the accuracy of their marine mammal inventory upon the request of the Office Director.

(e) For public display animals, in addition to obtaining a CITES export permit when necessary (for CITES listed species), as directed in 50 CFR §23.36, the following documents must be provided to the Office Director with the notification of export to a foreign facility for the purpose of public display, scientific research or enhancement:

(1) A copy of a letter from APHIS, along with associated documentation, certifying that the recipient foreign facility meets standards comparable to the AWA requirements for U.S. licensees and registrants for maintenance and care of marine mammals in captivity; and

(i) For the purpose of public display, evidence that the recipient foreign facility offers an education or conservation program based on professionally recognized standards and is open to the public on a regularly scheduled basis with access that is not limited or restricted other than through the charge of an admission fee; or

(ii) For the purpose of scientific research, evidence that the export is required to further a bona fide scientific purpose; or

(iii) For the purpose of enhancement, evidence that the export will contribute to the survival or recovery of the species and is consistent with the objectives of applicable conservation or recovery plans.

(2) Exports that do not occur within 1 year of receipt of APHIS certification require submission of a new letter from APHIS.

**13. Revise §216.31 as follows:**

- a. Remove §216.31.
- b. Redesignate §216.32 as §216.31, and revise.

§216.31 Scope.

The regulations of this subpart apply to all marine mammals under NMFS jurisdiction, including those:

- (a) Born in captivity or taken after December 20, 1972; and
- (b) Listed as threatened or endangered under the ESA.

**14. Redesignate 216.33 as 216.32 and revise as follows:**

§216.32 What are the permit application submission, review, and issuance decision procedures for all special exception permits?

In addition to the specific requirements of §§216.37, 216.38, 216.40, and 216.41, as appropriate, the following provisions apply to all special exception permit applications;

(a) Application submission. Persons seeking a special exception permit must submit an application to the Office Director. The application must be signed by the applicant or responsible party, and provide in a properly formatted manner all information necessary to process the application. Written instructions addressing information requirements and formatting may be obtained from the Office Director.

(b) Initial review. (1) NMFS will notify the applicant of receipt of the permit application.

(2) During the initial review, the Office Director will determine:

(i) Whether the proposed activity is for purposes authorized under this subpart.

(ii) Whether the activities proposed are to be conducted consistent with the permit restrictions and permit-specific conditions as described in §216.33.

(iii) Whether the application is complete, containing all information deemed necessary by the Office Director for processing, including whether it contains sufficient

information regarding the environmental impact of the proposed activity to enable the Office Director:

(A) To make an initial determination under the National Environmental Policy Act (NEPA) as to whether the proposed activity is categorically excluded from preparation of further environmental documentation, or whether the preparation of an environmental assessment (EA) or environmental impact statement (EIS) is appropriate or necessary; and

(B) To prepare an EA or EIS if an initial determination is made by the Office Director that the activity proposed is not categorically excluded from such requirements.

(C) To prepare a Biological Opinion, if required, pursuant to the Endangered Species Act, section 7(a).

(3) The Office Director may consult with the Marine Mammal Commission (Commission) and its Committee of Scientific Advisors on Marine Mammals (Committee) in making these initial, and any subsequent, determinations.

(4) Applications that do not comply with this subpart will be returned by the Office Director to the applicant with explanations, particularly:

(i) For clarifications or revisions, or;

(ii) If incomplete, or:

(iii) If not for NMFS species, or:

(iv) If not for purposes authorized under this subpart, or:

(v) If for activities that cannot be conducted consistent with permit restrictions and conditions described in §216.33.

(c) Notice of receipt and application review. (1) Upon receipt of a complete application pursuant to §216.32(b) and completion of environmental reviews, the Office Director will publish a notice of receipt in the Federal Register. The notice will:

(i) Summarize the application, including:

(A) The purpose of the request;

(B) The species or stocks and number of marine mammals to be taken;

(C) The type and manner of special exception activity proposed;

(D) The location(s) in which the marine mammals will be taken, from which they will be imported, or for marine mammal parts, the location(s) to which they will be exported;

(E) The requested period of the permit; and

(F) The proposed mitigation measures or other permit conditions initially deemed necessary by the Office Director.

(ii) List where the application is available for review.

(iii) Invite interested parties to submit written comments concerning the application within 30 days of the date of notice.

(iv) Include the status of the NEPA review on the permit application: an initial determination that the activity proposed is categorically excluded from the requirement to prepare an EA or EIS; that a draft EA or EIS was prepared and is available for comment concurrent with the application, or; that an EA was prepared resulting in a finding of no significant impact or a final EIS was prepared, and is available for review.

(2) The Office Director will forward a copy of the application to the Marine Mammal Commission for comment. If no comments are received within 45 days (or



such longer time as the Office Director may establish) the Office Director will consider the Commission to have no objection to issuing a permit.

(3) The Office Director may consult with any other person, institution, or agency concerning the application.

(4) Within 30 days of publication of the notice of receipt in the Federal Register, any interested party may submit written comments or may request a public hearing on the application.

(5) If the Office Director deems it advisable, the Office Director may hold a public hearing within 60 days of publication of the notice of receipt in the Federal Register. Notice of the date, time, and place of the public hearing will be published in the Federal Register not less than 15 days in advance of the public hearing. Any interested person may appear in person or through representatives and may submit any relevant material, data, views, or comments. A summary record of the hearing will be kept.

(6) The Office Director may extend the period during which any interested party may submit written comments. Notice of the extension must be published in the Federal Register within 60 days of publication of the notice of receipt in the Federal Register.

(7) The Office Director may require additional information from an applicant during the processing of the application as a result of comments received during the comment period or during preparation of necessary NEPA or ESA analyses.

(d) Issuance or denial procedures: Within 30 days of the close of the public comment period, or, if held, the public hearing, the Office Director will issue or deny a special exception permit.

. (1) The decision to issue or deny a permit will be based upon:

- (i) All relevant issuance criteria set forth in this section;
  - (ii) All issuance criteria, as appropriate, set forth at §§216.37, 216.38, 216.40, and 216.41;
  - (iii) All substantial comments received or views solicited on the permit application; and
  - (iv) Any other information or data that the Office Director deems relevant.
- (2) Permit Issuance Criteria: For the Office Director to issue any special exemption permit under this subpart, the applicant must demonstrate that:
- (i) The proposed activity is humane and does not present any unnecessary risks to the health and welfare of marine mammals. Information supporting this determination, such as IACUC documentation and approval for a proposed research or enhancement activity, may be submitted with the application;
  - (ii) The proposed activity is consistent with all restrictions set forth at §216.33 and any purpose-specific restrictions as appropriate set forth at §§216.37, 216.38, 216.40 and 216.41;
  - (iii) The proposed activity, if it involves endangered or threatened marine mammals, will be conducted consistent with the purposes and policies set forth in section 2 of the ESA;
  - (iv) The proposed activity by itself, or in combination with other activities, will not likely have a significant adverse impact on the species or stock;
  - (v) The applicant's expertise, facilities, and resources are adequate to accomplish successfully the objectives and activities stated in the application, including, for permits involving captive marine mammals, documentation of the applicant's APHIS research

facility registration (9 CFR subpart C) or exhibitor's license (9 CFR subpart A), as appropriate; and

(vi) If a threatened or endangered species will be held captive or transported, the applicant must provide the information required for transport, care and maintenance of listed species found in the ESA regulations at §222.308 (7) and (8).

(vii) Any requested import or export will not likely result in the taking of marine mammals or marine mammal parts beyond those authorized by the permit.

(viii) The planned disposition of any marine mammals or parts requested for collection or importation under a permit is clearly identified and is consistent with the requirements of the Acts.

(ix) The opinions or views of scientists or other persons or organizations knowledgeable of the marine mammals that are the subject of the application or of other matters germane to the application will be considered.

(3) The permit shall be effective upon issuance, as signified by signature of the Office Director. The permit holder must comply with the terms and conditions of the permit and restrictions and relevant regulations under this subpart. Issuance of this permit does not relieve the Holder of the responsibility to obtain other permits, or comply with other Federal, State, local, or international laws or regulations.

(4) Notice of the decision of the Office Director shall be published in the Federal Register within 10 days after the date of permit issuance or denial and shall indicate where copies of the permit, if issued, and relevant supporting documentation may be reviewed or obtained. If the permit issued involves marine mammals listed as

endangered or threatened under the ESA, the notice shall include a finding by the Office Director that the permit:

(i) Was applied for in good faith;

(ii) If exercised, will not operate to the disadvantage of such endangered or threatened species; and

(iii) Is consistent with the purposes and policy set forth in section 2 of the ESA.

(5) If the permit is denied, the Office Director shall provide the applicant with an explanation for the denial.

(6) Under the MMPA, the Office Director may issue a permit for scientific research before the end of the public comment period if delaying issuance could result in injury to a species, stock, or individual, or in loss of unique research opportunities. Note that “unique research opportunity” refers to the characteristics related to the species, stock or individual marine mammal. Although the ESA Section 7 process cannot be waived, the Office Director also may waive the 30-day comment period required under the ESA in an emergency situation where the health or life of an endangered or threatened marine mammal is threatened and no reasonable alternative is available. If a permit is issued under these circumstances, notice of such issuance before the end of the comment period shall be published in the Federal Register within 10 days of issuance.

(7) The applicant or any party opposed to a permit may seek judicial review of the terms and conditions of such permit or of a decision to deny such permit as provided for in 16 U.S.C. 1374 (d)(6). Review may be obtained by filing a petition for review with the appropriate U.S. District Court as provided for by law.

**15. Redesignate §216.33 and revise as follows:**

§216.33 What permit restrictions apply to special exception permits?

In addition to the requirements of §§216.37, 216.38, 216.40, and 216.41, as appropriate, the following restrictions shall apply to all special exemption permits issued under this subpart:

(a) The taking, importation, export, or other permitted activity involving marine mammals and marine mammal parts shall comply with the regulations of this subpart.

(b) The maximum period of any special exception permit is five years unless: (1) A 12-month extension is granted for the reasons described in §216.35(c); or

(2) The Office Director determines that a captive marine mammal originally held for research or enhancement is non-releasable and authorizes the transfer of the marine mammal for public display, scientific research, or enhancement, under permits issued for the life of the marine mammal, or under 16 U.S.C. 1379(h) (section 109(h) of the MMPA) authority for the life of the marine mammal. Marine mammals held permanently for research or enhancement will be restricted to specific research and enhancement activities, as permitted. Modifications to permitted activities require application for and issuance of a permit amendment or a new permit.

(c) Unless otherwise authorized by the Office Director, marine mammals imported or exported under the authority of a permit must be taken, imported or exported in a humane manner, and in compliance with the Acts and any applicable foreign laws. Marine mammals and marine mammal parts imported under the authority of a permit must have been originally collected in a humane manner and in compliance with any applicable foreign laws.

(d) The permit holder shall not take from the wild any marine mammal which at the time of taking is either unweaned, or is a part of a mother-calf/pup pair, unless such take is specifically authorized in the conditions of a scientific research or enhancement permit. Additionally, the permit holder shall not import any marine mammal that is pregnant or lactating at the time of taking or import, or is unweaned or less than eight months old unless such import is specifically authorized in the conditions of the special exception permit.

(e) Depleted marine mammals in captivity will not be trained for performance or included in any aspect of a program involving interaction with the public beyond displays of trained responses required for common health care and husbandry practices or permitted research or enhancement activities.

(f) The permit holder is responsible for all activities of any individual who is operating under the authority of the permit.

(g) Individuals conducting activities authorized under the permit must possess qualifications commensurate with their duties and must be under the on-site supervision of the Principal Investigator or a Co-Investigator.

(h) Persons who require State or Federal licenses to conduct activities authorized under the permit must be duly licensed when undertaking such activities.

(i) Special exception permits are not transferable or assignable to any other person, and a permit holder may not require any direct or indirect compensation from another person in return for requesting authorization for such person to conduct the taking, import, or export activities authorized under the subject permit.

(j) The permit holder or designated agent shall possess a copy of the permit when engaged in a permitted activity, when the marine mammal is in transit incidental to such activity, and whenever marine mammals or marine mammal parts are in the possession of the permit holder or agent. A copy of the permit shall accompany any container, package, enclosure, or other means of containment, in which the marine mammals or marine mammal parts are placed for purposes of transit, supervision, or care. For marine mammals held captive and marine mammal parts in storage, a copy of the permit shall be kept on file in the holding or storage facility.

(k) Specific permit conditions. All permits issued under this subpart shall contain specific terms and conditions, including, but not limited to:

(1) The number and species of marine mammals that are authorized to be taken, imported, exported, or otherwise affected;

(2) The manner in which marine mammals may be taken according to type of take;

(3) The location(s) in which the marine mammals may be taken, from which they may be imported, or to which they may be exported, as applicable, and the port of entry or export;

(4) The period during which the permit is valid.

(l) Disposition of parts. Unless other disposition is specified in a permit, a holder of a special exception permit may retain or transfer marine mammal parts not destroyed or otherwise disposed of during or after a public display/education, scientific research, or enhancement activity, for the purposes and following the procedures identified in §§ 216.25 and 216.26.

(m) Permit holders transferring or transporting (including export) captive marine mammals and their progeny must provide the Office Director with at least 15 days advance notice of the actual date, time, and port of entry for imports of live marine mammals following the reporting requirements described in §216.28(b) and (e).

(n) Other conditions. In addition to the specific conditions imposed pursuant to the statutes and these regulations, the Office Director shall specify other permit conditions deemed appropriate, including but not limited to,

(1) Requirements for annual, final, and special reports;

(2) Roles, responsibilities, and designation of personnel authorized to participate in the permitted activities;

(3) Provisions for modification, suspension, and revocation;

(4) Requirements and procedures for notification, coordination, observers, and inspections;

(5) Terms of acceptance and possession of the permit; and

(6) Measures for avoiding or minimizing adverse impacts of the activity on marine mammals or the environment.

**16. Revise §216.34 as follows:**

a. Redesignate §216.38 as §216.34 and revise.

b. Revise the section heading.

c. Redesignate the introductory paragraph as paragraph (a).

d. Add paragraph (b).

§216.34 What reports are required of special exception permit holders?



(a) Permit holders must submit annual, final, and special reports in accordance with the requirements established in the permit, and any reporting format established by the Office Director.

(b) A person with a special exception permit to take, import, or export marine mammals for captive maintenance for scientific research, enhancement, or public display must follow the applicable reporting and notification requirements under §216.28.

**17. Redesignate §216.39 as §216.35 and revise as follows:**

§216.35 How are changes made to permits? Authorizations, amendments and extensions.

(a) Authorization. (1) Written authorization from the Office Director, but no amendment, is needed to make changes to a special exception permit or Letter of Confirmation if no additional take, import, or export of a marine mammal is requested. Authorization, but not an amendment, is needed for activities including, but not limited to: changes in report due dates; changes in objectives that are still bona fide and do not require a change in methodology, target species, or take level; changes in scientific instruments to incorporate new technology; and changes in tags that use the same or smaller size and the same attachment method. Changes in permits related only to receipt, import, or export of marine mammal parts, where no takes of marine mammals from the wild would occur, also require written authorization but no amendment to the permit. Additionally, written authorization is needed:

(i) To make changes to personnel named in the permit, other than the permit holder, such as adding or removing co-investigators,

(ii) To obtain permission for non-essential personnel to accompany the permit holder, PI, or CI for the purpose of filming, photographing or video or audio recording the permitted activities, and;

(iii) To make changes in number of animals in a facility when births and deaths are reported.

(2) Requests for changes that do not constitute amendments must be submitted by the permit or (for the General Authorization) Letter of Confirmation holder, and must include: purpose and nature of the changes and any additional information required by the Office Director to support authorization of the request.

(3) Changes are effective upon the signature of the Office Director or his designee on the letter of authorization.

(b) Amendment. (1) Special exception permits, including Letters of Confirmation, may be amended by the Office Director to modify specific permit conditions found under §216.33(k) regarding:

(i) The number and species of marine mammals that are authorized to be taken, imported, exported, or otherwise affected;

(ii) The manner in which these marine mammals may be taken, imported, exported, or otherwise affected, including mitigation measures taken to minimize adverse impacts to marine mammals or the environment;

(iii) The location(s) in which the marine mammals may be taken, from which they may be imported, and to which they may be exported if the proposed change represents a change in the stock(s), the distinct population segment, or the species of marine mammal(s) affected.

(2) Amendments may be made to permits and Letters of Confirmation in response to, or independent of, a request from the permit holder. Amendments must be consistent with the Acts and comply with the applicable provisions of this subpart.

(3) Amendment requests and proposals. (i) Requests for an amendment must be submitted following the written application instructions regarding the information and formatting requirements that may be obtained from the Office Director. The application should include:

(A) The purpose and nature of the amendment;

(B) Information necessary to determine whether the amendment satisfies all issuance criteria set forth at §216.32, and, as appropriate, §§216.37 through 216.41.

(C) Any additional information required by the Office Director for purposes of reviewing the proposed amendment.

(ii) If an amendment is proposed by the Office Director, the permit holder will be notified of the proposed amendment, together with an explanation.

(4) Review of proposed amendments. (i) The provisions of §216.32(a),(b),(c) and (d) governing notice of receipt, review and decision shall apply to all proposed amendments.

(ii) Consistent with the procedures for permits in §216.32(d)(3), an amendment to a permit shall be effective upon issuance, as signified by Office Director signature.

Amended Letters of Confirmation are also effective upon issuance.

(5) Not more than one amendment request will be accepted in any 12 month period for any special exception permit or Letter of Confirmation; and not more than two amendments will be made for any 5-year special exception permit or Letter of

Confirmation. The Office Director will not accept requests for or issue amendments in the first or last 12 months of the effective period of a permit or Letter of Confirmation.

(c) Extension. The Office Director may issue one letter extending the duration of a permit or Letter of Confirmation for up to 12 months:

(1) Independent of a request from the permit or Letter of Confirmation holder, if the Office Director determines that additional time is required to process a permit application for an ongoing activity and a complete new application was submitted prior to the expiration date on the original permit and within the time specified by the Office Director for the type of permit; or,

(2) At the request of a permit holder, provided such request is submitted at least 12 months prior to the expiration date of the permit or Letter of Confirmation.

**18. Redesignate §216.40 as §216.36 and revise as follows:**

**§216.36 Penalties and permit sanctions.**

(a) Regarding violations of the MMPA, the ESA, the AWA, (the Acts) the regulations promulgated under these Acts, or permits issued pursuant to the Acts or their regulations:

(1) No permit or Letter of Confirmation shall be issued to any person who is under investigation by State, local or Federal law enforcement personnel or officially charged with a violation until the matter is resolved.

(2) In accordance with applicable regulations, action will be initiated to suspend the permit or Letter of Confirmation of any person under investigation by State, local, or Federal law enforcement personnel or officially charged with a violation.

(3) No permit or Letter of Confirmation shall be issued if any person named in the permit application or Letter of Intent is under investigation or officially charged with a violation by State, local, or Federal law enforcement personnel until the matter under investigation or the formal charges against such person have been resolved, or the applicant strikes the person's name from the application.

(4) If a permit/Letter of Intent applicant, person working under a permit/Letter of Confirmation, or person included as a participant in permitted/authorized activities has been found guilty of a violation (either through administrative or criminal proceedings), or has disposed of a Notice of Violation by a compromise acceptable to NMFS, FWS, and APHIS (as applicable), NMFS will consider each such case on its merits, taking into consideration the circumstances surrounding the violation and severity of the penalty imposed.

(b) Any person who violates any provision of this subpart or permit or authorization issued thereunder is subject to civil and criminal penalties, permit sanctions and forfeiture as authorized under the Acts, and 15 CFR part 904.

(c) All special exception permits and Letters of Confirmation are subject to suspension, revocation, modification and denial in accordance with the provisions of subpart D of 15 CFR part 904. A special exception permit or Letter of Confirmation may be suspended if the holder fails to submit complete annual or special reports required by the permit. Permission to resume permitted activities will be granted in writing by the Office Director after receipt of a complete report.

(d) Following the provisions of subpart D of 15 CFR part 904 or these regulations, marine mammals held for public display, scientific research or enhancement

are subject to seizure for violation of any permit or Letter of Confirmation conditions, reporting requirements, or under the following circumstances:

(1) The permit application or Letter of Intent included false information or statements of a material nature;

(2) The Office Director, with the concurrence of the Secretary of Agriculture, determines that the holder does not possess, and is not reasonably likely to possess in the near future, a registration or license issued pursuant to the AWA. For purposes of this subparagraph, marine mammals may be subject to seizure upon the expiration, suspension, revocation, or notice of intent to suspend or revoke any registration or license issued by the Secretary of Agriculture.

**19. Add a new section, §216.37, to read as follows:**

§216.37 What are the specific requirements for permits to take or import live marine mammals for public display?

In addition to the requirements under §§216.32 through 216.36 and, if applicable, the CITES import permit requirements found at 50 CFR §23.35, permits for the take or import of live marine mammals for public display are governed by the following requirements:

(a) For each application submitted under this section, the applicant shall be the responsible party, or in the case of imports for loans, when the authority for the marine mammal remains with a foreign entity, the applicant shall be the U.S. facility that will house the marine mammal to be imported.

(b) The applicant must:

(1) Offer an education or conservation program based on professionally recognized standards of the public display community;

(2) Be registered or hold an exhibitor's license issued under the AWA, and comply with all applicable APHIS standards, including those at 9 CFR subpart E;

(3) Maintain facilities for the public display of marine mammals that are open to the public on a regularly scheduled basis with access that is not limited or restricted other than by charging of an admission fee. For the purposes of this paragraph "maintaining" a facility includes leasing, owning, or otherwise controlling the facility where the marine mammal will be kept; and

(4) Demonstrate that any proposed capture of living marine mammals from the wild will present the least practicable effect on wild populations and that any permanent removal from the wild:

(i) Is consistent with any applicable quota established by the Office Director, or;

(ii) Where there is no quota in effect, will not have, by itself or in combination with all other known takes and sources of mortality, a significant direct or indirect adverse effect on the species or stock, as determined on the basis of the best available information on the status of the species or stock and cumulative take for the species or stock;

(5) Demonstrate that the capture of any marine mammal proposed for importation was, or will be, consistent with the MMPA and any applicable foreign laws, as outlined in §216.33.

(c) Permit restrictions. In addition to the general permit restrictions outlined in §216.33, and the reporting and notification requirements found in §216.28, the following

restrictions apply to all special exception permits to take or import marine mammals for public display issued under this section:

(1) Permit holders must comply with the requirements of paragraphs (b)(1) through (3) of this section.

(2) Permit holders may not capture or import a marine mammal for public display that is from a species or stock designated as listed under the ESA.

(3) Permit holders may not transfer or transport captive marine mammals unless:

(i) The recipient facility meets the public display criteria outlined in paragraph (b)(3) of this section or has the appropriate MMPA permits and AWA license or registrations. For export of a public display animal, although an MMPA permit is not required, the exporter or recipient must provide the following documents to the Office Director:

(A) A copy of a letter from APHIS, along with associated documentation, certifying that the recipient foreign facility meets standards comparable to the AWA requirements for U.S. licensees and registrants for maintenance and care of marine mammals for the purposes of public display; and

(B) Evidence that the recipient foreign facility offers an education or conservation program based on professionally recognized standards and is open to the public on a regularly scheduled bases with access that is not limited or restricted other than through the charge of an admission fee.

(ii) The permit holder has met all the marine mammal transfer/transport notification requirements of §216.28(b).



(4) The authorization to capture a marine mammal from the wild or to import a marine mammal shall be valid for a period of time as set forth in the permit. If the capture or import does not occur during the period initially authorized, prior to the expiration date of the permit, the Office Director may extend the authorized period upon the request of the permit holder not to exceed five years.

(d) Permit conditions. In addition to the specific conditions set forth in §216.33(k) and the notification and reporting requirements found in §216.28, all permits to take or import marine mammals for public display issued under this subpart shall contain other conditions deemed appropriate by the Office Director, including, but not limited to:

(1) For a capture from the wild, the permit holder must provide the Office Director with 15 days notice in advance of the actual date(s) and location of the capture authorized by the permit to allow for the presence of an NMFS observer.

(2) The permit holder may hold a marine mammal captured from the wild in a temporary facility, including a facility not licensed by APHIS, for the purpose of acclimation for a period no greater than 6 months provided that the temporary holding facility meets all applicable AWA standards.

(3) For marine mammal traveling exhibits, permit holders must notify the Office Director at least 15 days in advance of each transport from one location to another unless the Office Director has approved an alternative notification schedule.

(4) Intrusive research, as defined in §216.3, may not be conducted on marine mammals held for public display except under a scientific research permit.

(5) The terms and conditions of a public display permit are effective as long as the permit holder maintains custody of the marine mammal authorized to be captured from the wild or imported.

(e) Permit reports. In addition to the appropriate notification and reporting requirements under §216.28, all public display permit holders are subject to the following reporting requirements:

(1) Within 30 days of an import, the permit holder must send written verification to the Office Director of the importation into the United States of any marine mammal identified in the permit including a description of each marine mammal imported, as well as other details listed in the permit and following any reporting format established by the Office Director.

(2) Within 30 days of a capture of a marine mammal from the wild authorized by a special exception permit to take for public display, the permit holder must submit a collection report including a description of each marine mammal retained by the permit holder, as well as other details listed in the permit and following any reporting format established by the Office Director.

(f) Permit sanctions. In addition to the penalties and permit sanctions outlined in §216.36, marine mammals held for public display are subject to seizure for violation of any permit conditions, reporting requirements, or under the following circumstances:

(1) The permit holder does not offer and is not reasonably likely to offer in the near future, a program for education or conservation purposes that is based upon professionally recognized standards of the public display community.

(2) The permit holder does not maintain, and is not reasonably likely to maintain in the near future, facilities for the public display of marine mammals that are open to the public on a regularly scheduled basis, with access not limited or restricted other than the charge of an admission fee.

(3) The Office Director, with the concurrence of the Secretary of Agriculture, determines that the holder does not possess, and is not reasonably likely to possess in the near future, a registration or license issued pursuant to the AWA. For purposes of this subparagraph, marine mammals may be subject to seizure upon the expiration, suspension, revocation, or notice of intent to suspend or revoke any registration or license issued by the Secretary of Agriculture.

**20. Redesignate §216.41 as §216.38 and revise as follows.**

**§216.38 What are the specific requirements for scientific research permits?**

In addition to the requirements under §§216.32 through 216.36, and the applicable reporting requirements in §216.28, permits for scientific research are governed by the following requirements:

(a) Applicant. (1) For each application submitted under this section, the applicant shall be the principal investigator responsible for the overall research activity. If the research activity will involve a periodic change in the principal investigator, or is otherwise controlled by and dependent upon another entity, the applicant may be an institution, governmental entity, or corporation. The application must in that case be signed by the Responsible Party for the institution, governmental entity, or corporation

(2) For any scientific research involving captive maintenance, the application must include supporting documentation from the person responsible for the facility or temporary enclosure.

(b) Issuance criteria. For the Office Director to issue any scientific research permit, the applicant must demonstrate that:

(1) The proposed activity furthers a bona fide scientific purpose.

(2) For research on live marine mammals conducted at or by research institutions, an IACUC has been established, as required by 9 CFR 2.31, to evaluate the applicant's marine mammal research program.

(3) If the lethal taking of marine mammals is proposed:

(i) Non-lethal methods for conducting the research are not feasible; and

(ii) For depleted, endangered, or threatened species, the results will directly benefit that species or stock, or will fulfill a critically important research need.

(4) Any permanent removal of a marine mammal from the wild is consistent with any applicable quota established by the Office Director.

(5) The proposed research will not likely have significant adverse effects on any other component of the marine ecosystem of which the affected species or stock is a part.

(6) For species or stocks designated or proposed to be designated as depleted, or listed or proposed to be listed as endangered or threatened:

(i) The proposed research cannot be accomplished using a species or stock that is not designated or proposed to be designated as depleted, or listed or proposed to be listed as threatened or endangered;

(ii) The proposed research, by itself or in combination with other activities will not likely have a long-term direct or indirect adverse impact on the species or stock;

(iii) The proposed research will either:

(A) Contribute to fulfilling a research need or objective identified in a species recovery or conservation plan, or if there is no conservation or recovery plan in place, a research need or objective identified by the Office Director in stock assessments established under 16 U.S.C. 1386 (section 117 of the MMPA);

(B) Contribute to understanding the basic biology or ecology of the species or stock, or to identifying, evaluating, or resolving conservation problems for the species or stock; or

(C) Contribute significantly to fulfilling an important research need.

(c) Restrictions. (1) The following restrictions apply to all scientific research permits issued under this subpart:

(i) Research activities must be conducted in the manner authorized in the permit.

(ii) Research results shall be published or otherwise made available to the scientific community in a reasonable period of time.

(iii) Personnel involved in research activities shall possess qualifications commensurate with their roles, be reasonable in number and limited to:

(A) Individuals who perform a function directly supportive of and necessary to the permitted research activity;

(iv) Marine mammals, including depleted species, held under a permit for scientific research may only be placed on public display if such activities:

(A) Are incidental to the research activities and have been specifically authorized by the Office Director under the scientific research permit;

(B) Do not interfere with the permitted scientific research; and

(C) Are conducted in a manner consistent with provisions applicable to public display as defined in §216.3 and pursuant to §216.37(b)(1) through (b)(3), unless exceptions are specifically authorized by the Office Director; and

(D) Do not include any interactive program or training for or participation in public performances.

(v) Any activity conducted incidental to the authorized scientific research activity (e.g., educational and commercial photography or other recordings of the research) must not influence the conduct of the research or involve the taking of marine mammals.

(vi) The permit holder or principal investigator must notify the appropriate Regional Director at least two weeks before initiation of field research activities. The Regional Director shall consider this information in efforts to coordinate regional field research activities to minimize adverse impacts on marine mammals in the wild. The permit holder or principal investigator must cooperate with coordination efforts by the Regional Director in this regard.

(vii) If a NMFS review of activities conducted pursuant to the research permit is conducted, the applicant shall:

(A) Allow any employee of NOAA or any other person designated by the Director, Office of Protected Resources to observe research activities; and

(B) Provide any document or other information relating to the scientific research.

(viii) Photographs, videotape, film, or other recordings of permitted research activities that are used in scientific, educational or commercial presentations, publications, or other non-research related activities must identify the permit number or otherwise acknowledge that the activity depicted was conducted under a NMFS permit.

(2) Non-releasable marine mammals. If the Office Director determines that a marine mammal originally held in captive maintenance under a scientific research permit cannot be returned to the wild after research activities are completed, the Office Director may authorize retention or transfer of permanent custody of the marine mammal for public display, scientific research, or enhancement under the appropriate permit or under 16 U.S.C. 1379(h) (section 109(h) of the MMPA) authority.

(i) The holder of the marine mammal must submit a written request for a determination regarding disposition of the marine mammal to the Office Director including the following documentation:

(A) From the attending veterinarian, the basis of any determination that the marine mammal:

(1) Might adversely affect marine mammals in the wild; or to a public display facility authorized to hold the animal under a research or enhancement permit will not train the subject marine mammal for performance or inclusion in any aspect of a program involving interaction with the public beyond displays of trained responses required for common health care and husbandry practices or permitted research activities; and

(2) Consistent with guidelines provided by the Office Director, determine that the marine mammal will not likely be successful in the wild given the physical condition and behavior of the marine mammal;

(B) Documentation demonstrating that the recipient of the marine mammal:

(1) For the purposes of public display, has a facility that complies with the requirements listed in §216.37(b)(1) through (3), and if for the incidental display of depleted species, has authority under 16 U.S.C. 1379(h) (section 109(h) of the MMPA) and for listed species, holds an ESA research or enhancement permit issued pursuant to §222.308; or

(2) For the purposes of scientific research or enhancement, holds an applicable permit, or has submitted a complete application for an amendment or a new permit; and

(C) Certification that the recipient of depleted marine mammals authorized for transfer to a public display facility under a research or enhancement permit will not train the subject marine mammal for performance or inclusion in any aspect of a program involving interaction with the public beyond displays of trained responses required for common health care and husbandry practices or permitted research activities; and

(1) Offers an education or conservation program based on professionally recognized standards of the public display community; and

(2) Is registered or holds an exhibitor's license issued under the Animal Welfare Act (AWA), 7 U.S.C. 2131 et seq., and meets all applicable APHIS standards at 9 CFR subpart E; and

(3) Maintains facilities for the public display of marine mammals that are open to the public on a regularly scheduled basis with access that is not limited or restricted other than charging an admission fee.



(ii) Notwithstanding the provisions of this subparagraph, the Office Director may require the use of non-releasable marine mammals for any activity authorized under subpart D in lieu of animals taken from the wild.

(d) Permit sanctions. In addition to the penalties and permit sanctions outlined in §216.36, scientific research permits are subject to sanctions, and marine mammals held for scientific research are subject to seizure, if the Office Director determines that the research no longer meets the requirements of an MMPA scientific research permit.

**21. Revise §216.39 as follows:**

- a. Redesignate §216.45 as §216.39 and revise.
- b. Revise the Section heading.
- c. Revise paragraph (a)(1)(i)
- d. Revise paragraph (a)(3)
- e. Revise paragraph (b) and (b)(1) and remove paragraph (b)(2).
- f. Redesignate paragraph (b)(3) as (b)(2)
- f. Revise paragraph (d).

§216.39 What are the specific requirements for the General Authorization for Scientific

Research?

\* \* \* \* \*

(a) \* \* \*

(1) \* \* \*

(i) They submit a letter of intent in accordance with the requirements of paragraph (b) of this section, receive confirmation that the General Authorization applies in

accordance with paragraph (c) of this section, and comply with the terms and conditions of paragraph (d) of this section, and

(ii) \* \* \*

(2) \* \* \*

(3) The following types of research activities may qualify for inclusion under the General Authorization: photo-identification studies, behavioral observations, vessel and aerial population surveys, and passive acoustic studies. Activities that do not qualify for inclusion under the General Authorization include, but are not limited to: intrusive research, research on or near pinniped rookeries, and commercial or educational photography.

(b) Letter of Intent. Except as provided under paragraph (a)(1)(ii) of this section, any person intending to take marine mammals in the wild by Level B harassment for purposes of bona fide scientific research under the General Authorization must submit, at least 60 days before commencement of such research, a letter of intent according to the form and manner specified by the Office Director. Written instructions addressing information requirements and formatting may be obtained from the Office Director.

(1) The Letter of Intent must be submitted by the principal investigator or by the Responsible Party. For purposes of this section, the applicant is the individual or entity who is responsible for the overall research project.

(c) \* \* \*

(d) Terms and Conditions. Persons issued Letters of Confirmation in accordance with paragraph (c) of this section are responsible for complying with the following terms

and conditions and such other terms and conditions deemed appropriate and are subject to the sanctions outlined in §216.36.

(1) Activities are limited to those conducted for the purposes, by the means, in the locations, and during the periods of time described in the letter of intent and acknowledged as authorized under the General Authorization in the confirmation letter sent pursuant to paragraph (c) of this section. The Letter of Confirmation holder must also comply with terms and conditions deemed appropriate by the Office Director and stipulated in the Letter of Confirmation, including measures for avoiding or minimizing adverse impacts.

(2) Changes to the Letter of Confirmation may be requested in accordance with §216.35, as appropriate.

(3) Annual reports of activities conducted under the General Authorization must be submitted to the Chief, Permits Division in accordance with the requirements established in the Letter of Confirmation, and any reporting format established by the Office Director, within 90 days of completion of the last field season(s) during the calendar year or, if the research is not conducted during a defined field season, no later than 90 days after the anniversary date of the Letter of Confirmation issued under paragraph (c) of this section.

(4) Activities conducted under the General Authorization may only be conducted under the on-site supervision of the principal investigator named in the Letter of Confirmation, or a Co-Investigator named in the letter of intent and approved by the Office Director in the Letter of Confirmation.

(5) The Letter of Intent holder and principal investigator must notify the appropriate Regional Director, NMFS, in writing at least two weeks before initiation of on-site activities. The Regional Director shall consider this information in efforts to coordinate field research activities to minimize adverse impacts on marine mammals in the wild. The Letter of Intent holder and principal investigator must cooperate with coordination efforts by the Regional Director in this regard.

(6) If research activities result in a taking that exceeds Level B harassment, the holder shall:

(i) Report the taking within 48 hours to the Director, Office of Protected Resources, or his designee as set forth in the letter authorizing research; and

(ii) Temporarily discontinue all field research activities that resulted in the taking. The applicant shall consult with NMFS as to the circumstances surrounding the taking and any precautions necessary to prevent future taking, and agree to amend the research protocol, as deemed necessary by NMFS.

(7) NMFS may review scientific research conducted pursuant to the General Authorization. The applicant must cooperate with any such review and shall:

(i) Allow any employee of NOAA or any other person designated by the Director, Office of Protected Resources to observe research activities; and

(ii) Provide any documents or other information relating to the scientific research.

(8) Photographs, videotape, film, or other recordings of research activities conducted under the General Authorization that are used in scientific, educational or commercial presentations, publications, or other non-research related activities must

identify the permit number or otherwise acknowledge that the activity depicted was conducted under a NMFS permit.

(9) Persons conducting scientific research under authority of the General Authorization may not transfer or assign any authority granted thereunder to any other person.

\* \* \* \* \*

**22. Add §216.40 to read as follows:**

§216.40 What are the specific requirements for Enhancement Permits?

In addition to the requirements under §§216.32 through 216.36, and the applicable reporting requirements in §216.28, permits enhancement are governed by the following requirements:

(a) Applicant. (1) For each application submitted under this section, the applicant shall be the principal investigator responsible for the overall enhancement activity. If the enhancement activity will involve a periodic change in the principal investigator or is otherwise controlled by and dependent upon another entity, the applicant may be an institution, governmental entity, or corporation. The application in that case must be signed by the Responsible Party for the institution, governmental entity, or corporation.

(b) Issuance criteria. For the Office Director to issue an enhancement permit, the applicant must demonstrate that:

(1) Only living marine mammals and marine mammal parts necessary for enhancement of the survival, recovery, or propagation of the affected species or stock will be taken, imported, exported, or otherwise affected under the authority of an enhancement permit. Marine mammal parts would include in this regard clinical

specimens or other biological samples required for the conduct of breeding programs or the diagnosis or treatment of disease.

(2) For research institutions, enhancement activities involving live marine mammals require proof that an IACUC has been established, where required by 9 CFR §2.31, to evaluate the applicant's marine mammal program. IACUC approval for the project can be submitted in support of the application.

(3) Any permanent removal of a marine mammal from the wild is consistent with any applicable quota established by the Office Director and the applicant must indicate why suitable animals cannot be obtained from captive or rehabilitated stock

(4) The activity will likely contribute to maintaining or increasing distribution or abundance necessary for the survival or recovery of the affected species or stock in the wild.

(5) The activity will contribute to:

(i) Objectives identified in an approved conservation plan developed under 16 U.S.C. 1383b(b) (section 115(b) of the MMPA) or recovery plan developed under section 4(f) of the ESA for the species or stock; or

(ii) If there is no conservation or recovery plan, conservation of the species, including fulfilling a critically important research need, or identifying, evaluating or resolving conservation problems for the species or stock.

(6) For an enhancement permit for captive maintenance:

(i) The proposed captive maintenance will likely contribute directly to the survival or recovery of the species or stock in the wild by maintaining a viable gene pool,

increasing productivity, providing necessary biological information, or establishing animal reserves required to support directly these objectives; and

(ii) The expected benefit to the species or stock outweighs the expected benefits of alternatives that do not require removal of marine mammals from the wild.

(c) Restrictions. (1) The following restrictions apply to all enhancement permits issued under this subpart:

(i) Enhancement activities must be conducted in the manner authorized in the permit.

(ii) Enhancement activities must be conducted under the on-site supervision of the principal investigator or a co-investigator identified in the permit.

(iii) Personnel involved in enhancement activities shall possess qualifications commensurate with their roles, be reasonable in number and limited to:

(A) Individuals who perform a function directly supportive of and necessary to the permitted enhancement activity.

(iv) Any marine mammal part imported under the authority of an enhancement permit must not have been obtained as the result of a lethal taking that would be inconsistent with the Acts, unless authorized by the Office Director.

(vi) Any activity conducted incidental to the authorized enhancement activity (e.g., educational and commercial photography) must not influence the conduct of the enhancement activity or involve the taking of marine mammals.

(vi) The permit holder or principal investigator must notify the appropriate Regional Director in writing at least two weeks before initiation of field enhancement activities. The Regional Director shall consider this information in efforts to coordinate

regional field research activities to minimize adverse impacts on marine mammals in the wild. The permit holder must cooperate with coordination efforts by the Regional Director in this regard.

(vii) NMFS may review activities conducted pursuant to the enhancement permit; the applicant must cooperate with any such review or inspection and shall:

(A) Allow any employee of NOAA or any other person designated by the Director, Office of Protected Resources to observe enhancement activities; and

(B) Provide any document or other information relating to the enhancement.

(viii) Photographs, videotape, or other recordings of permitted enhancement activities that are used in professional or commercial presentations, publications, or other non-enhancement related activities must identify the permit number or otherwise acknowledge that the activity depicted was conducted under a NMFS permit.

(2) The following restrictions apply to all enhancement permits authorizing marine mammals or their progeny to be held in captive maintenance:

(i) Any marine mammal or progeny held in captive maintenance under an enhancement permit shall be returned to its natural habitat as soon as feasible, consistent with the terms of the enhancement permit and the objectives of an approved conservation or recovery plan. In accordance with section 10(j) of the ESA, the Office Director may authorize the release of any endangered or threatened marine mammal species outside the current range of its population if the Office Director determines that such release will further the conservation of such species.



(ii) Marine mammals, including those from threatened or endangered species or distinct population segments, held under an enhancement permit may only be placed on public display if such activities:

(A) Have been specifically authorized by the Office Director under the enhancement permit;

(B) Do not interfere with the permitted enhancement activities; and

(C) Are conducted in a manner consistent with provisions applicable to public display as defined in §216.3 and pursuant to §216.37(b)(1) through (b)(3), unless exceptions are specifically authorized by the Office Director; and

(D) Do not include any interactive program or training for or participation in public performances beyond display of trained responses required for common health care and husbandry practices or permitted enhancement activities.

(iii) Non-releasable marine mammals. If the Office Director determines that a marine mammal originally held in captive maintenance under a five-year enhancement permit cannot be returned to the wild after enhancement activities are completed, the Office Director may authorize retention or transfer of permanent custody of the marine mammal for public display, scientific research, or enhancement under the appropriate permit or 16 U.S.C. 1379(h) (section 109(h) of the MMPA) authority. The holder of the marine mammal must submit a written request for a determination regarding disposition of the marine mammal to the Office Director including the following documentation:

(A) From the attending veterinarian, the basis of any determination that the marine mammal:

(1) Might adversely affect marine mammals in the wild; or to a public display facility authorized to hold the animal under a research or enhancement permit will not train the subject marine mammal for performance or inclusion in any aspect of a program involving interaction with the public beyond displays of trained responses required for common healthcare and husbandry practices or permitted research activities; and

(2) Consistent with guidelines provided by the Office Director, determine that the marine mammal will not likely be successful in the wild given the physical condition and behavior of the marine mammal;

(B) Documentation demonstrating that the recipient of the marine mammal:

(1) For the purposes of public display, has a facility that complies with the requirements listed in §216.37(b)(1) through (3), and if for the incidental display of depleted species, has authority under 16 U.S.C. 1379(h) (section 109(h) of the MMPA) and for listed species, holds an ESA research or enhancement permit issued pursuant to §222.308; or

(2) For the purposes of scientific research or enhancement, holds an applicable permit, or has submitted a complete application for an amendment or a new permit; and

(C) Certification that the recipient of depleted marine mammals authorized for transfer to a public display facility authorized to hold the animal under a research or enhancement permit will not train the subject marine mammal for performance or inclusion in any aspect of a program involving interaction with the public beyond displays of trained responses required for common healthcare and husbandry practices or permitted enhancement activities; and

(1) Offers an education or conservation program based on professionally recognized standards of the public display community; and

(2) Is registered or holds an exhibitor's license issued under the Animal Welfare Act (AWA), 7 U.S.C. 2131 et seq., and meets all applicable APHIS standards at 9 CFR subpart E; and

(3) Maintains facilities for the public display of marine mammals that are open to the public on a regularly scheduled basis with access that is not limited or restricted other than charging an admission fee.

(iv) Notwithstanding the provisions of this subparagraph, the Office Director may require the use of nonreleasable depleted marine mammals for any activity authorized under subpart D in lieu of animals taken from the wild.

(d) Permit sanctions. In addition to the penalties and permit sanctions outlined in §216.36, enhancement permits are subject to sanctions, and marine mammals held for enhancement purposes are subject to seizure, if the Office Director determines that activities conducted do not meet the provisions of (b)(4), (5), and (6) of this section.

**23. Add §216.41 as follows:**

§216.41 What are the specific requirements for permits for educational or commercial photography not conducted incidental to a scientific research permit?

(a) General. Permits may be issued for photography or filming of marine mammals in the wild for educational or commercial purposes, provided the activities:

(1) Will involve only Level B harassment;

(2) Are for discrete projects and time frames that will result in specific products identified in the application, such as documentary films, public service announcements, publications or other printed materials;

(3) Do not significantly change the normal behavior of the marine mammals; and,

(4) Do not include scientific research, fundraising, ecotourism, whale watching, or other non-photography commercial activities.

(b) Application submission, review, and decision procedures. Any person seeking a photography permit must submit an application according to the form and manner specified by the Office Director at least 90 days before commencement of such filming. In addition to the requirements under §§216.32 through 216.36, permits for photography are governed by the following requirements:

(1) Applicant. For each application submitted under this section, the applicant shall be the person overseeing the overall filming activity. If the filming activity will involve a periodic change in the principal applicant or is otherwise controlled by and dependent upon another entity, the applicant may be the institution, governmental entity, or corporation. The application in that case must be signed by the Responsible Party for the institution, governmental entity, or corporation.

(2) Application. Written instructions addressing information requirements and formatting for a photography permit may be obtained from the Office Director. For the Office Director to issue any photography permit, the applicant must demonstrate:

(i) That the activity will involve only Level B harassment;

(ii) That the photographic methods are adequate to meet the project objectives;

(iii) That personnel are qualified to carry out the proposed activities;

- (iv) How the products of such activities will be made available to the public;
- (v) That the proposed activity will not have significant adverse effects on any other component of the marine ecosystem of which the affected species or stock is a part;
- (vi) That the proposed filming/images cannot be obtained from stock footage; and
- (vii) That the proposed activity, by itself or in combination with other activities will not likely have a long-term direct or indirect adverse impact on the species or stock.

(c) Terms and Conditions. The following terms and conditions apply to all photography permits issued under this subpart:

- (1) Filming activities must be conducted in the manner authorized in the permit.
- (2) Filming activities must be conducted under the on-site supervision of the principal investigator or a co-investigator identified in the permit.
- (3) Personnel involved in filming activities must possess qualifications commensurate with their roles, and be reasonable in number and limited to:
  - (i) Individuals who perform a function directly supportive of and necessary to the permitted filming activity.
- (4) The permit holder or principal investigator must notify the appropriate Regional Director in writing at least two weeks before initiation of filming activities. The Regional Director shall consider this information in efforts to coordinate regional field activities to minimize adverse impacts on marine mammals in the wild. The permit holder must cooperate with coordination efforts by the Regional Director in this regard.
- (5) NMFS may review activities conducted pursuant to the photography permit; the applicant must cooperate with any such review or inspection and shall:

(i) Allow any employee of NOAA or any other person designated by the Director, Office of Protected Resources to observe filming activities; and

(ii) Provide any document or other information relating to the field activities.

(6) In the event that photographic activities result in a taking that exceeds Level B harassment, the holder shall:

(i) Report the taking within 48 hours to the Director, Office of Protected Resources, or his designee as set forth in the letter authorizing photography; and

(ii) Temporarily discontinue all activities that resulted in the taking. The applicant shall consult with NMFS as to the circumstances surrounding the taking and any precautions necessary to prevent future taking, and agree to amend the photographic protocol, as deemed necessary by NMFS.

(7) End products including photographs, footage, videotape, or other recordings of permitted activities must identify the permit number or otherwise acknowledge that the activity depicted was conducted under a NMFS photography permit.

(8) Photography permits are subject to the sanctions outlined in §216.36.

(9) Annual, final, and special reports of activities conducted under the Photography Permit must be submitted to the Chief, Permits Division in accordance with the requirements established in the permit

**24. Revise the heading for §216.42 to [Reserved]**

**25. Revise the heading for §216.43 to [Reserved]**

**26. Remove and reserve §216.44.**

**27. Reserve §216.45.**