

DRAFT

**PROPOSED RECOMMENDATIONS FOR
IMPROVING THE SCIENTIFIC RESEARCH
PERMITTING AND INCIDENTAL HARASSMENT
AUTHORIZATION PROCESS**

**SUBMITTED BY THE WORK GROUP ON PERMITTING
AS A STARTING POINT FOR ADVISORY COMMITTEE DISCUSSION**

RECOMMENDATIONS FOR IMPROVING THE SCIENTIFIC RESEARCH PERMITTING AND INCIDENTAL HARASSMENT AUTHORIZATION PROCESS

Introduction

The FACA Panel was created to address acoustic issues and marine mammals and this ad hoc subgroup was formed to more specifically draft recommendations for improving the Scientific Research Permitting and Incidental Harassment Authorization process. While the expertise of the Panel relates mostly to acoustic research on marine mammals or acoustic research that incidentally takes marine mammals, the ad hoc subgroup recognized that many of the problems and recommendations were applicable to the broader marine mammal research community and regulated community. Major concerns are the cost, time, and regulatory expertise needed for a researcher to obtain a permit or authorization to conduct acoustic that could impact marine mammals. Likewise the cost, time, and practicality issues (e.g. case-by-case permitting) may not be appropriate for repetitive activities that do not change significantly over time. In addition, the FACA Panel raised concerns related to the threshold for determining when injury or harassment occurred (Level A or B harassment); the difficulty in complying effectively with the geographic region and small numbers requirements; a general lack of understanding of the permitting process; and the lack of clear guidance as to when compliance with other statutes such as the National Environmental Policy Act or the Endangered Species Act may require additional documentation. Researchers that undertake research on or incidentally take marine mammals are in need of a timely, predictable, and cost-effective permitting or authorization process under the MMPA.

A growing level of caution on this issue has resulted in increased uncertainty, regulatory burden, and costs for researchers, funding agencies and the regulatory agencies that must process such permits or authorizations. Therefore, the basic problem is how do we protect marine mammals with an effective process that does not curtail important research? More vexing is the underlying circular situation of lack of information to make permitting and regulatory decisions. When the regulatory decision is to permit research and research is the source of more information there exists a particular problem. To break out of this situation requires that we more clearly identify the major obstacles and how we can move forward in light of information needs. The following recommendations attempt to meet that goal.

Scope

The scope of these recommendations includes scientific research permits for research on marine mammals that involves the use of sound and Incidental Take and Harassment Authorizations for scientific research that may incidentally take marine mammals by the introduction of sound.

Background

The MMPA and existing regulatory regime includes a number of mechanisms to provide permits and authorizations (all of which provide for public comment and review) for the taking of marine mammals in the course of scientific research:

1. Section 104(c)(3) allows the issuance of a takings permit for scientific research on marine mammals. An expedited process is authorized for harassment that is limited to disturbance.
2. Section 101(a)(5)(A) allows a 5-year authorization to incidentally take marine mammals during a specific activity under regulations establishing mitigation methods, monitoring and reporting.
3. Section 101(a)(5)(D) allows a 1-year authorization to incidentally harass marine mammals during a specific activity that specifies mitigation methods, monitoring and reporting.

Improving the Existing Permitting Process

- NMFS needs to provide funding agencies and researchers with clear guidelines to use in determining whether or not a particular research activity requires NEPA documentation or an application under the MMPA.
 - Rationale: NEPA requires that funding (action) agencies have in place a process to determine whether or not the actions that they propose might have significant environmental impacts. For actions that appear to have the potential for significant impact, the first step in this process normally involves the preparation of an Environmental Assessment (EA) to objectively analyze the possible environmental effects of the proposed action. Key issues are determining when it is necessary to prepare an EA and, in turn, when an MMPA application is required. NMFS should provide clear guidelines that can be used to determine what actions involving underwater sound require preparation of an EA and what type of authorization is required. . . The funding (action) agencies should also review their internal NEPA processes to ensure that they are adequate to fulfill NEPA requirements in a timely and cost-effective way and that they are designed to minimize the burden that needs to be borne by the individual researcher.
- NMFS should work with applicants to reduce the cost and time of preparing the required NEPA and MMPA application documentation.
 - Rationale: Because cost and time are most often limiting factors for researchers, NMFS should work to reduce the cost and time by providing standard background documents, application information, and references available online through its website. Standard biological information such as species descriptions, abundance estimates, and geographic area information could be posted on the web and accessible to applicants to incorporate into their application.

- NMFS should, when appropriate, look for mechanisms to process and issue collectively NEPA and MMPA application documentations that are either similar by species, region, or activity.
 - Rationale: There may be situations such as Steller sea lion research in Alaska or North Atlantic right whale research in the Northeast where a number of research activities on a particular marine mammal species should be analyzed together and authorization should be coordinated. The same may be true for categories of activities under an Incidental Take or Harassment Authorizations. Processing similar research activities may streamline the process but also carries the risk that a legal challenge on one portion of the permit may stop research associated with other projects under the permit. Furthermore, activities that take place in different oceans and on different species do not lend themselves to this approach so it may not be practical in many cases. Those cases that are practical for acoustic issues should be identified.
- When appropriate NMFS, FWS and other federal agencies should work toward developing programmatic environmental impact statements (EIS) related to marine mammal research and acoustic research.
 - Rationale: The development of an EIS or Environmental Assessment can be costly (between \$400,000 to over a \$1 million per EIS) and consumes considerable staff resources. NMFS has identified several situations that would favor programmatic EIS's, including one on the acoustic criteria, that it plans to develop. Having such programmatic NEPA documents in place can reduce the delay associated with the development of documents for each permit, can provide greater NEPA compliance, which has been a trigger for litigation, and can enhance cumulative impact analysis for those research or incidental take activities.

The risk is that, should the programmatic EIS be delayed in process or be contested in court, all research activities under that programmatic EIS could be delayed, challenged or enjoined. Appropriate use is important. Moreover, even though a programmatic EIS may lack all the specifics regarding every activity covering several years of research, supplemental NEPA documents could be developed containing appropriate project specific species analysis. For instance, NSF cannot predict more than 1 – 2 years out which proposals for research requiring a seismic survey research ship will be funded. The resulting projects are often independent, unrelated to each other, and undertaken throughout the oceans of the world. The programmatic EIS can, however, effectively address the specifics of the ship, the equipment and instrumentation utilized for seismic surveys, intensity and spatial characteristics of sound production, and general aspects of mitigation strategies while a supplement NEPA document can address each project-specific species analysis.

If NMFS, FWS, and other federal agencies are to produce programmatic EIS documents over the long-term with some regularity, Congress should provide additional funds so these agencies can produce the documents. Finally, other agencies should be encouraged to work with NMFS to assess the information requirements needed to develop these documents and the most effective means to produce them.

- Funding agencies, NMFS and researchers should work to achieve better linkages between timing of the permit process (e.g. from time of submission to issuance), securing funding for the research, and scheduling of the research to avoid situations where the research is funded and scheduled but the permit has not been secured.
 - Rationale: It may be difficult to begin the permitting process, prior to securing funding for the research and likewise difficult to secure funding without a permit. This situation is particularly true for acoustic research that may be controversial. Online applications and perhaps changing the permitting system so that permits are submitted and issued according to a particular cycle, may help. In addition, during the scientific planning process preliminary assessments of temporal and spatial marine mammal distribution may be useful for minimizing potential issues. It is still important for researchers to allow for the time necessary for the permitting process to enable agencies and research ship operators (e.g. UNOLS - the University- National Oceanographic Laboratory System) to effectively coordinate complex ship schedules.

- Work towards a more coordinated approach between wildlife agencies.
 - Rationale: Perhaps the most effective immediate approach would be for NMFS and FWS, through an interagency process, to work toward a more comprehensive and coordinated approach to implementation of both the Marine Mammal Protection Act and the Endangered Species Act.

Changes to the Regulatory Regime for the Permitting Process

- [Within 6 months, NMFS, in consultation with the MMC and FWS, should prepare an analysis of how to improve, strengthen, and streamline the permit process for marine mammal and acoustic research while maintaining protection for marine mammals and achieving the goals of the MMPA. Working within the existing regulatory regime in the MMPA, including recent changes, the analysis would consider: (1) the Ocean Commission recommendations; (2) the recommendations in the various National Research Council reports on sound as they relate to the regulatory regime; and (3) the recommendations from this Advisory Panel; and (4) other appropriate new reports and scientific information. NMFS and FWS must convene a stakeholders group to consider the analysis in development of any proposed revisions to the regulatory regime.
 - Rationale: The Ocean Commission Report has several recommendations related to unclear permitting and review standards, the definition of harassment, and programmatic permitting. The National Research Council reports express concern that the regulatory system discourages research that would benefit conservation of marine mammals and their ecosystems and offers a number of alternative regulatory regimes and/or changes to the existing system. The recommendations of the Ocean Commission and the National Research Council reports apply to a much broader range of activities than scientific research permits and authorizations, however, we believe the recommended analysis should be directed toward the regulatory regime.

Most members of the research community fully endorse the recommendations within Ocean Commission and the NRC reports. They believe these recommendations should be implemented in order to reduce barriers to scientific research and allow important conservation research to move forward without sacrificing marine mammal protection. On the other hand, members of the environmental community, and others, view some of these recommendations as controversial and somewhat vague and believe they could lead to less protections for marine mammals if implemented. This difference of opinion among key stakeholders highlights the need for all interested parties to thoroughly review, evaluate, and seek consensus on the best means to revise the current scientific research regulatory regime to focus regulatory efforts on the most significant problems while at the same time being protective of marine mammal populations.]

- Consider amending the Marine Mammal Protection Act to allow the Incidental Harassment Authorization to be issued for multiple years.
 - Rationale: Amending the MMPA to permit the Incidental Harassment Authorization to be issued for periods of three or five years would

remove the obstacle of having to apply annually for the authorization for activities that occur each year. It also has the added benefit of enabling NMFS to undertake a more thorough analysis of the cumulative impacts of the activity on marine mammal stocks.

Funding, Education, and Technology

- The FACA Panel¹ recommends that Congress continue to provide and the Commerce Department request increased funding for National Marine Fisheries Service's (NMFS) Permit Office.
 - Rationale: FACA members noted that current staff and financial resources are insufficient to thoroughly process, on a timely basis, the large number of scientific research permits and authorizations, incidental harassment authorizations, and incidental take permits currently received by the Permit Office. In the 2005 Fiscal Year budget, the Senate provided to the Office of Protected Resources an increase of \$1 million for permitting functions and for the hiring of additional full time equivalents (staff). Continued funding at this level, at a minimum, is needed to provide the necessary staff resources and to process permit requests and develop NEPA documents related to permits and authorizations. Additional funds at the level of \$2 million a year for five years are needed for contracting out programmatic NEPA documents and hiring short-term contract staff to help develop and finalize NEPA documents.

- The FACA Panel recommends that there be increased funding for both funding agencies and regulatory agencies to comply with NEPA requirements.
 - Rationale: For funding agencies and regulatory agencies the cost of preparing environmental impact statements or environmental assessments associated with the scientific research permits and incidental harassment authorizations is substantial. To fully comply with NEPA, the MMPA, and the ESA, both the funding agencies and regulatory agencies require substantial increases in funding.

- All stakeholders should strive to educate the public about marine mammal and acoustic research.
 - Rationale: There is public controversy associated with some types of marine mammal and acoustic research. Scientists have a responsibility to explain clearly their research and its importance. Particularly in cases where there may be risk to the marine mammals and the science is still uncertain, all interest groups should strive to work together to address the public's concerns and allay controversy. It is also the responsibility of all interest groups to engage in education and outreach that involves a broad

¹ The working group should revisit how to address the issue of federal agencies supporting recommendations for increased federal funding for programs associated with the implementation of the permit system.

array of stakeholders, is coordinated, is fair and balanced representing an array of views, and is scientifically credible and accurate. Stakeholders should develop readily available education and outreach materials (e.g. fact sheets on issues) that are broadly reviewed, supported, and disseminated. Every effort should be made to make certain that whatever is presented as “science” cannot be viewed as propaganda.

- Regulators should work with researchers to devise incentives that can be provided to permittees for reducing their acoustic impacts.
 - Rationale: The research community should be encouraged to employ technologies that would minimize the impact to the marine environment. Such technologies would either place less noise in the ocean or increase the efficiency of sound detection so less sound would have to be used. Regulating and funding agencies and research community should look for incentives to accomplish this objective.