



# MARINE MAMMAL COMMISSION

5 July 2011

Mr. Timothy J. Van Norman  
Chief, Branch of Permits  
Division of Management Authority  
U.S. Fish and Wildlife Service  
4401 North Fairfax Drive  
Arlington, VA 22203

Dear Mr. Van Norman:

Thank you for providing the Marine Mammal Commission with an opportunity to review the request from the Fish and Wildlife Service's Region 7 Marine Mammals Management Division for expedited review of its application for authorization to conduct field work to study Pacific walrus. The applicant provided further explanation in support of that request in a 22 June 2011 memorandum to the Branch of Permits. The Commission staff has reviewed those materials but does not believe that they provide an adequate basis for invoking the "emergency" issuance criteria of section 104(c)(3)(A) of the Marine Mammal Protection Act, which allows the Service to issue a scientific research permit before the end of the normal public review and comment period if the delay "could result in injury to a species, stock, or individual, or in loss of unique research opportunities."

The applicant bases its request on several factors. First, the Pacific walrus was recently identified as a candidate species for listing under the Endangered Species Act and asserts that there is an "urgent need for information on population demographics and abundance." Samples from male walrus are needed for these purposes, and a sufficient number of samples can be collected reliably only in Bristol Bay in June and July. Walrus samples also might be collected in conjunction with U.S. Geological Survey cruise in the Bering Strait scheduled to begin on 17 July. Collecting samples in these sea ice habitats is expected to provide the most representative sample of walrus other than adult males. Because collecting samples in sea ice habitats is expensive, the applicant believes that it would be limited to collecting samples at land-based haul outs if its researchers are not able to avail themselves of the opportunity to accompany the Survey on cruise. The applicant believes that this would constitute the loss of a unique research opportunity.

The applicant also notes that if it had to wait three to six months for a permit, it would lose most or all of an entire field season. According to the applicant, funding for this research was provided in the Service's FY2011 budget and cannot be used to collect or analyze samples in 2012. Again, the applicant asserts that this would constitute the loss of a unique research opportunity.

The Commission staff is sympathetic to the points raised by the applicant. There indeed are logistical and funding considerations that argue in favor of issuing a permit as quickly as possible. However, these considerations have to be balanced against the need for faithful implementation of the Act as its drafters intended. In this regard, we do not believe that the factors identified by the

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applicant fit within the limited grounds which pre-issuance public notice and comment can be waived.

The readily available legislative history does not shed much light on the issue. The applicable committee report (H.R. Rpt. 103-439, 103d Cong., 2d Sess.) does not even mention this aspect of the permit-related amendments. In the time available, the Commission has not had a chance to research other legislative materials that might provide evidence of legislative intent, such as floor statements and hearing transcripts. This is something that the Service might want to pursue. However, the Commission staff was involved in contemporaneous discussions with the House committee responsible for drafting those amendments and has insights into the committee's intent based on those discussions.

The first prong of the exception considers whether marine mammal species, stocks, or individuals might be injured if permit issuance is delayed. The focus of this part of the provision is on physical injury or death to marine mammals. It was intended to allow issuance of an expedited permit when needed to authorize research into a specific threat to marine mammals, such as a die-off or emerging disease outbreak.

In this case, the applicant suggests that the Pacific walrus, given its candidate status, might somehow be "injured" if the proposed research is not initiated immediately. For some time the Service has known that it needs better information regarding the demographics and abundance of this stock and it, in fact, has taken steps to design and conduct some of the research necessary to collect that information. The urgency of this situation is linked by the applicant to the recent listing of the Pacific walrus as a candidate species, the implication being that better population data are needed to inform a listing decision. However, in this case, the species was placed on the candidate list only after the Service determined that listing as a threatened species was warranted, but precluded by higher priority listing actions. Thus, the Service already determined that it has sufficient information to proceed with a proposed listing. Moreover, if the plight of the walrus were as urgent as the applicant suggests, it would seem that it should be given higher priority in the listing queue.

The second prong of the exception focuses on whether unique research opportunities would be lost if issuance were delayed. This provision was added to address unique opportunities related to the marine mammals being studied, such as when a marine mammal unexpectedly shows up out of its normal range or the research is directed at studying marine mammal responses to rare or transitory events. That is, the uniqueness of the opportunity should be tied to the presence or behavior of the marine mammals or the event that is being studied. It was not intended to be triggered by funding or logistical considerations.

In this instance, there is nothing unique about the species or the phenomena that the applicant wants to study. The walrus will be in the proposed study areas predictably, year after year. In fact, the Service's application indicates that it wants to sample walrus on a multi-year basis.

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Although unfortunate, we do not believe that the statutory criteria for early issuance have been met in this instance. The only things that makes that makes this research opportunity at all unique are factors unrelated to the marine mammals to be studied, some of which presumably could have been avoided by earlier submission of the application. As such, the Commission is concerned that granting this applicant's request for early issuance will set a bad precedent where other applicant's can claim similar exigencies due to poor planning or lack of foresight.

That being said, the Commission encourages the Branch of Permits and the applicant to consider ways that will allow the proposed research to go forward as quickly as possible following the close of the public comment period. For example, perhaps the researchers can accompany the U.S. Geological Survey team when they depart on 17 July, based on the expectation that a permit can be issued while the cruise is ongoing. However, until a new permit is issued, those researchers would be limited to taking no more that the 150 samples currently authorized under the Survey's permit. As for sampling walruses in Bristol Bay, the opportunity to biopsy the desired number of adult males this year likely will be lost, but this research could possibly be started this year and certainly next year. To the extent that funding for this research might be lost if it is not spent this year, we suggest that the Service approach appropriators to see if they would be willing to convert this annual appropriation into two-year, or even multi-year funding. Alternatively, the Service should consider ways in which this funding can be obligated this year even if the sampling is not completed until next year.

As for its part, the Commission will try to speed up the review process as much as possible by completing its review of the full application and submitting comments to the Branch of Permits before the close of the public comment period. In that way, you and your staff will have had an opportunity to consider and address the Commission's comments prior to the earliest date on which a permit can be issued.

Please let me know if you have any questions concerning these comments.

Sincerely,



Timothy J. Ragen  
Executive Director