



# MARINE MAMMAL COMMISSION

30 October 2009

Mr. P. Michael Payne, Chief  
Permits, Conservation, and Education Division  
Office of Protected Resources  
National Marine Fisheries Service  
1315 East-West Highway  
Silver Spring, MD 20910

Re: Permit Application No. 13430  
(National Marine Mammal Laboratory)

Dear Mr. Payne:

The Marine Mammal Commission, in consultation with its Committee of Scientific Advisors on Marine Mammals, has reviewed the above-referenced permit application with regard to the goals, policies, and requirements of the Marine Mammal Protection Act. The Commission provided comments on the original application on 24 October 2008. However, the application has subsequently been revised and resubmitted to include a request for authorization to conduct research on Steller sea lions and killer whales. Consequently, the Service is soliciting additional review and comment on the revised application.

## RECOMMENDATIONS

The Marine Mammal Commission reiterates its comments and recommendations regarding the original application (see letter of 24 October 2008, enclosed and incorporated here by reference). In that letter, the Commission recommended that the Service defer issuance of the permit until it has determined that the applicant is in compliance with § 2.37 of the Animal and Plant Health Inspection Service's Animal Welfare Act regulations, which requires that certain types of research be reviewed and approved by an Institutional Animal Care and Use Committee. We raise those concerns again with respect to the amended application. Accordingly, the Marine Mammal Commission recommends that the National Marine Fisheries Service—

- deny the requested permit unless the permit applicant demonstrates that the proposed research has been reviewed and approved by an Institutional Animal Care and Use Committee; and
- deny any other scientific permit application or amendment request submitted from within the agency that involves any invasive procedure or other activity that might harm or materially alter the behavior of the animals under study until the applicant demonstrates that such a committee has been established and has found the proposed research to be consistent with Animal Welfare Act requirements.

The Commission also requests that the National Marine Fisheries Service provide the Commission with detailed explanations of the reasons that it has not followed or adopted the Commission's

recommendations concerning the establishment and use of Institutional Animal Care and Use Committees and has not deferred action on permit applications for which such review is required but has not been completed. In general, section 202(d) of the Marine Mammal Protection Act provides 120 days for an official to provide such a response. In this instance, however, it has already been more than 120 days since the Service received the Commission's recommendations concerning Institutional Animal Care and Use Committees and scientific research permits. The Commission therefore requests that such a response be provided within 30 days.

## **RATIONALE**

As noted in its letter of 24 October 2008, the Commission recognizes the value of the research conducted by scientists at the National Marine Mammal Laboratory and supports research that furthers the understanding of the status and trends of the marine mammal stocks included in the original permit application and the revised request. However, this does not absolve the Service of the need to ensure compliance with other applicable laws, including the Animal Welfare Act, when conducting or authorizing research under the Marine Mammal Protection Act. For several years, the Commission has been recommending that the Service take steps to establish Institutional Animal Care and Use Committees as required by the Animal Welfare Act. More recently, the Commission has been recommending that action on permit applications proposing to conduct research that involves any invasive procedure or other activity that might harm or materially alter the behavior of the animals under study be deferred until the applicant demonstrates compliance with these requirements. Although the Service agrees that § 2.37 of the Animal and Plant Health Inspection Service's Animal Welfare Act regulations applies to its research activities, it has yet to take the steps necessary to come into compliance with this provision. Nonetheless, the Service continues to issue permits to its science centers and laboratories despite the failure to conduct the required reviews.

The Commission noted this deficiency in its comments on the original application and recommended that action on this permit be deferred until the applicant submitted evidence that it was in compliance with the Animal Welfare Act requirements pertaining to Institutional Animal Care and Use Committee review. Now, more than a year later, the Service has yet to advise the Commission as to whether it has established the required committee or conducted the required review of the research. The Marine Mammal Commission therefore recommends that, unless the Service demonstrates that the required review by an Institutional Animal Care and Use Committee has been conducted and the research has been approved by the committee, the Service deny the requested permit.

As noted, the Commission has recommended on several occasions that action on permit applications from within the Service be deferred until the applicant demonstrates compliance with the requirements of the Animal Welfare Act and its implementing regulations. Although some of those applications are still pending, in other cases, permits have been issued despite non-compliance with the Animal Welfare Act and their inconsistency with the Commission's recommendations. Section 202(d) of the Marine Mammal Protection Act requires that federal officials that have not followed or adopted any recommendation made by the Commission respond to the Commission

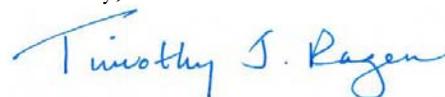
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and provide a “detailed explanation of the reasons why those recommendations were not followed or adopted.” No such response has been provided with respect to the Commission’s recommendations that action be deferred on permit applications submitted by National Marine Fisheries Service scientists until they have demonstrated compliance with the requirements of the Animal Welfare Act to establish and obtain the approval of Institutional Animal Care and Use Committees. The Commission requests that such an explanation be provided and that it address—

- whether the Service agrees that review of such research by an Institutional Animal Care and Use Committee is required under the Animal Welfare Act;
- whether compliance with the requirements of the Animal Welfare Act is one of the issuance criteria established by the Permits Division for scientific research permits under the Marine Mammal Protection Act;
- why the Service believes that it is lawful and/or appropriate to issue scientific research permits to applicants who are not in compliance with the Animal Welfare Act;
- whether applicants from outside the agency have been required to submit documentation of compliance with Institutional Animal Care and Use Committee requirements as a condition of permit review or issuance;
- why the Service has not used the interim Institutional Animal Care and Use Committee established for the Marine Mammal Health and Stranding Response Program or other existing committees (e.g., one established by the National Ocean Service) or has not established other interim committees to review proposals to conduct invasive research, pending the establishment of permanent committees at its science centers;
- what plans the Service has for obtaining reviews by Institutional Animal Care and Use Committees of invasive research by its scientists that it has already authorized but for which no such review has been conducted; and
- absent the benefit of a review and approval of proposed research by an Institutional Animal Care and Use Committee, the criteria that the Service is using to make determinations under section 104(b)(2)(B) that any authorized taking will be humane.

Please contact me if you have any questions concerning these comments and recommendations.

Sincerely,



Timothy J. Ragen, Ph.D.  
Executive Director

Enclosures

cc: Barbara A. Kohn, D.V.M.