



MARINE MAMMAL COMMISSION

25 October 2017

Mr. Timothy J. Van Norman, Chief
Branch of Permits, MS: IA
Division of Management Authority
U.S. Fish and Wildlife Service
5275 Leesburg Pike
Falls Church, Virginia 22041–3803

Re: Permit Issuance No. 14762C
(National Park Service,
Glacier Bay Field Station)

Dear Mr. Van Norman:

On 26 March 2017 the Fish and Wildlife Service (FWS) published a notice in the *Federal Register* (82 Fed. Reg. 24382) that the National Park Service (NPS) had applied for a scientific research permit under the Marine Mammal Protection Act (MMPA) seeking a five-year authorization to take northern sea otters during aerial and ground- and vessel-based surveys. The Marine Mammal Commission (the Commission) submitted comments in a [5 July 2017 letter](#) noting that FWS had advised the Commission that it was considering issuing the permit under the MMPA's "emergency" permit provision (section 104(c)(3)(A)). That provision allows scientific research permits to be issued before the end of the normally required 30-day public comment period if delaying issuance could result in injury to a marine mammal species, stock, or individual, or in the loss of unique research opportunities. The Commission also noted that it had advised FWS informally that it did not believe the criteria for invoking the emergency permit provision had been met. However, FWS had already issued the permit before the Commission commented formally. The Commission also indicated that it would defer deciding whether to comment specifically on the use of the emergency permit provision until it had reviewed FWS's rationale.

On 25 August 2017 FWS published a notice (82 Fed. Reg. 40594) that it had issued permit number 14762C on 1 June 2017 authorizing NPS to conduct aerial surveys of sea otters in Glacier Bay, Alaska. That notice indicated that the permit had been issued before the close of the public comment period because a delay would have resulted in the loss of a unique research opportunity. FWS provided no additional rationale or explanation for its expedited issuance of the permit.

Use of the emergency permit provision

The Commission has previously taken issue with FWS's use of the emergency permit provision of the MMPA, specifically a case that occurred in 2011. That case prompted the Commission to send a [5 July 2011 letter](#) in which we discussed the scope of the emergency permit provision. The Commission will not repeat that discussion here (see the 2011 letter for specifics).

The Commission concluded that the provision regarding the loss of a unique research opportunity applies generally to situations when that opportunity is rare or unexpected. That is, the “uniqueness” of the event should be tied to the unique or at least exceptional presence of the marine mammals (e.g., appearing in an area outside their normal range), the unique or exceptional nature of the behavior of those animals, or a unique or unusual event that is being studied. As with the emergency permit issued by FWS in 2011 to allow it and the U.S. Geological Survey to conduct field work on walrus, there is nothing unique about the research opportunity in this case. In both situations, the animals to be studied occur predictably at the study site year after year. In fact, in both situations, the applicant sought a multi-year permit, reflecting the predictability of the occurrence of the research opportunity.

In issuing this permit, FWS seems to be indicating that the opportunity to survey sea otters in June 2017 was unique because the data to be collected would be unique—i.e., they would differ from data collected at any other time during 2017 and would differ from those collected in subsequent years. Using this logic, virtually every research opportunity could be characterized as being unique. The distribution of marine mammals varies on a daily, or even hourly, basis and observed behavior also varies depending on when the observations are made.

In its 2011 letter, the Commission further noted that the emergency provision “was not intended to be triggered by funding or logistical considerations” or delays in submitting or processing an application. Processing delay appears to be what happened in this instance. In correspondence with FWS, the Branch of Permits explained—

The surname process for publishing any notice in the Federal Register has recently been revised and what, 6 months ago, took approximately one week, now takes approximately 6-7 weeks. The process to clear the Federal Register that includes this application was started on April 14.... Assuming that there are no concerns raised [by the Department of the Interior], the surname process should be completed within the next 3 weeks [by June 8] and the notice can be sent to the Federal Register for publication. With the 30-day comment period, I would estimate that it will be late June before the permit can be issued if we follow the standard procedure. Waiting until that time will result in the loss of a unique research opportunity.

While the Commission agrees that it would have been unfortunate to lose the opportunity to conduct aerial surveys of sea otters in June 2017, it cannot agree that this would have constituted the loss of a unique research opportunity for purposes of invoking the emergency permit provision under section 104(c)(3)(A). The Commission therefore recommends that, in the future, FWS refrain from using the emergency permit provision in ways that were not contemplated by Congress. Specifically, FWS should not use the “unique research opportunity” prong of the emergency permit provision to authorize activities that are predictable and could have been anticipated in advance, such that the normal permit procedures, with proper planning, foresight, and processing, could have been used. Using the emergency permit provision in this way is not only inconsistent with Congressional intent, but sets a bad precedent where many research opportunities could be characterized as unique simply because the precise circumstances with respect to the presence of marine mammals and their behavior at a particular place and time will not recur.

Public notice and procedures

Based on correspondence with FWS, it was clear that the agency was contemplating issuing this permit on an emergency basis before the publication of the *Federal Register* notice announcing availability of the application for public review and comment. Yet, the notice was silent concerning FWS's intentions. As reflected in the notice of issuance published on 25 August, the permit was issued on 1 June. The notice of issuance referenced the relevant statutory provision and provided a conclusory statement that early issuance was necessary to avoid the loss of a unique research opportunity. However, it offered no further explanation of what that opportunity was, why it was considered unique, or why that opportunity could not have been foreseen sufficiently in advance to use the normal issuance procedures.

Although the Commission was apprised of FWS's intention to use emergency procedures and had an opportunity to comment informally, this same courtesy was not provided to the public. Someone interested in the research would have been unaware that comments should be submitted early in the comment period to have any influence on the permit and would not even have been apprised that the permit had been issued until well after the 2017 survey had been completed. Section 104(d)(5) of the MMPA specifies that notice of issuance or denial of a permit is to be published in the *Federal Register* within 10 days of the agency's decision. In this case, publication of the notice took 12 weeks.

To correct these issues, the Commission recommends that, in the future, FWS (1) as possible, indicate in its initial notice of an application that it is considering using emergency issuance procedures and provide the rationale for invoking those procedures and (2) provide a more thorough rationale for its use of emergency procedures in the notice of issuance. The Commission further recommends that, in the case of emergency permits under the MMPA, FWS make a concerted effort to provide public notice as quickly as possible, using both its website and the *Federal Register*. For emergency permits in Alaska, we also recommend that you contact as soon as possible, the appropriate Alaska Native marine mammal co-management organization. In no case should the notice that an emergency permit has been issued under the MMPA be published in the *Federal Register* beyond the statutorily mandated 10-day period.

The differences in the notice of the application and the notice of issuance also create some confusion. NPS sought authority for conducting both aerial and vessel- and ground-based surveys for a period of five years. According to the notice of issuance, the permit authorized only aerial surveys. The period of validity is not given in the notice—i.e., was it issued for five years, as requested, or for a shorter period? Presumably, it covered only the period when the purportedly lost unique research opportunity existed and only until FWS could complete the normal issuance procedures for the remaining duration of the permit. FWS should make it clear to the public exactly what was and was not authorized under the issued permit and for what duration. It should also indicate how it intends to complete consideration of the activities included in the original application that were not covered by that permit.

Perception of bias

As far as the Commission is aware, FWS has issued emergency permits under section 104(c)(3)(A) of the MMPA only twice due to the potential loss of unique research opportunities. As

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discussed in this and the 2011 letter, the use of this provision was questionable in both instances. The Commission further notes that in each instance, FWS seemed to be trying to accommodate the research programs of the Department of the Interior. It is unclear whether any other researchers might have faced similar situations, but were either not apprised of the emergency procedures or told that they were inapplicable. The Commission is not suggesting any impropriety, but cautions FWS against the possibility that the public could perceive some favoritism in the use of the emergency provision.

Please contact me if you have any questions concerning the Commission's comments and recommendation.

Sincerely,

A handwritten signature in blue ink that reads "Rebecca J. Lent". The signature is written in a cursive style with a large initial "R".

Rebecca J. Lent, Ph.D.,
Executive Director