



MARINE MAMMAL COMMISSION

15 December 2017

Barbara Schroeder, Acting Chief
Marine Mammal and Sea Turtle Conservation Division
Office of Protected Resources
National Marine Fisheries Service
1315 East-West Highway
Silver Spring, MD 20910–3226

Dear Ms. Schroeder:

The Marine Mammal Commission (the Commission) has reviewed the National Marine Fisheries Service's (NMFS) notice (82 Fed. Reg. 52880) regarding its draft national procedural directive (PD) clarifying the process for eligible permit applicants to obtain releasable marine mammals for public display purposes under the Marine Mammal Protection Act (MMPA). Releasable marine mammals are those that have been successfully rehabilitated by the Marine Mammal Health and Stranding Response Program's network of stranding facilities and that have been determined by the rehabilitation facility's attending veterinarian to be candidates for return to the wild. NMFS proposes to stop granting permits for the specific purpose of retaining releasable marine mammals for purposes of public display¹. Applicants would need to apply for and obtain a permit to take (i.e., collect) animals from the wild pursuant to the MMPA.

Section 109(h) of the MMPA, the authority under which virtually all rehabilitated marine mammals are taken, requires the release of rehabilitated marine mammals to their natural habitat, whenever feasible. However, in three previous instances, NMFS has relied on its regulations to allow the NMFS Office of Protected Resources Director to require use of rehabilitated marine mammals for public display purposes in lieu of taking animals from the wild (50 C.F.R. § 216.27(b)(4)). NMFS received numerous public comments in response to those permits asserting that permits to retain releasable marine mammals are in direct contravention to the goals of Title IV and section 109(h) of the MMPA and the specific mandate to return rehabilitated animals to the wild when feasible. Commenters also expressed concerns that the process for assessing the actual impact of a take from the wild was largely circumvented.

The Commission agrees that NMFS's existing practice which allows retention of releasable rehabilitated marine mammals in certain instances is arguably at odds with the requirement set forth in section 109(h)(3) of the MMPA that such animals be returned to their natural habitat when feasible to do so. However, it is not clear that the PD satisfactorily addresses this problem. It only raises the level of scrutiny given to an application, both procedurally and substantively, before deciding to issue a permit that allows (or requires) releasable animals to be retained for purposes of public display, in lieu of capturing animals from the wild. As such, the Commission recommends that NMFS provide additional explanation and a better rationale for finding that either its existing

¹ Non-releasable animals could still be obtained through NMFS's administrative procedures.

practice or the PD is consistent with section 109(h)(3). Among other things, NMFS should clarify how it is defining the term “feasible” in the context of implementing section 109(h)(3)—e.g., does it mean that release can be accomplished, or that release is reasonable or sensible given the entirety of the facts of the particular situation? If NMFS believes that it can authorize the retention of a marine mammal whose release is feasible under that definition, it also should address the interplay between sections 104(c) and 109(h). Specifically, NMFS should explain the basis for concluding that the issuance of a permit under section 104(c) somehow overrides the release mandate under section 109(h).

In the past, the Commission has supported the use of releasable rehabilitated marine mammals in lieu of capturing animals from the wild for purposes of public display when non-releasable marine mammals are not available or are determined to be unsuitable for the applicant’s purpose. The Commission continues to believe that this practice makes sense. Such a policy reduces the potential for adverse impacts associated with capturing additional marine mammals, including incidents of capture myopathy, unintentional mortalities during capture activities, disturbance to other marine mammals that either are captured but not retained or that are present at the capture sites, and disruption of social patterns within the marine mammal groups from which marine mammals are taken. Another possible benefit of using releasable marine mammals in lieu of removing them from the wild would be that it gives greater assurance that a particular animal can adjust to human contact and life in captivity. The facility also might gain economic benefits by avoiding the costs associated with mounting capture operations.

The Commission also agrees that retaining a releasable captive marine mammal that otherwise would rejoin the wild population has impacts similar to removing an animal from that population. The Commission therefore supports NMFS’s proposal to strengthen its analysis of population effects of retaining a releasable marine mammal as part of its permit application review. However, the Commission questions whether similar scrutiny needs to be given to all aspects of a permit authorizing the removal of a marine mammal from the wild, if what the applicant is seeking or what NMFS plans to grant is authority to retain a releasable animal and not to remove animals from the wild population. For instance, it is a waste of the applicant’s time and effort to provide specific information required based on the applicable public display permit application instructions² regarding capture methods, location, personnel, etc., and post-capture care and transport, if no such capture operations will ever be conducted. Likewise, it is waste of time for NMFS, the Commission, and the public to review and evaluate that information if capture from the wild will not occur. The Commission therefore recommends that NMFS clarify whether all of the information identified in its application instructions must be provided if the applicant is seeking a removal permit only as a means to obtain releasable rehabilitated marine mammals and whether all of those details will be reflected in the requirements of the permit.

If the permit contains or incorporates that level of detail, the Commission also questions how closely the specific information for the rehabilitated animals must conform to the constraints of the capture permit. NMFS’s permit application instructions require the applicant to specify the age, size, sex, and reproductive condition of marine mammals that will be taken and, as specifically as possible, the dates and locations of capture activities. If releasable, rehabilitated marine mammals are

² The Commission notes that the old public display application instructions are still posted on NMFS’s website. The application instructions were revised in 2016 and should have been posted on NMFS’s website some time ago.

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used in lieu of removing animals from the wild, it is unclear whether those individuals must have been taken from the same location and be of the sex and ages specified in the permit. If not, it is unclear how much deviation from those parameters would be allowed. To avoid issues with implementing the PD, the Commission recommends that NMFS provide additional guidance on which releasable marine mammals can be used in place of animals authorized to be removed from the wild under the associated public display permit, including the stock (and any sub-structure within that stock) from which animals can be obtained, the locations of capture or rescue, the ages and sexes of the animals, etc., and how closely the releasable marine mammals must meet the specifics of removal from the wild authorized under the capture permit.

The Commission further recommends that the PD be expanded to address the role, rights, and responsibilities of rehabilitation facilities in implementing the policy. The district court in *Institute of Marine Mammal Studies v. NMFS* found that NMFS could not delegate its authority to the rehabilitation facility to determine when releasable marine mammals are sent to a public display facility under its regulations. However, the court did not go so far as to say that the rehabilitation facility has no role in this process, provided that NMFS retains the ultimate decision-making authority. It is unclear whether NMFS would consult the rehabilitation facility and factor any comments it receives into its determination. Also, if a rehabilitation facility is forced to provide a releasable marine mammal to a public display facility, possibly against its wishes, it is unclear whether it would be compensated for its rehabilitation efforts. Rehabilitation facilities often spend considerable time and money rescuing and rehabilitating stranded marine mammals, generally with the expectation that those animals will be returned to the wild whenever possible. If that expectation is unfulfilled because the animals are diverted to a public display facility, it would not be unreasonable for the display facility to reimburse the rehabilitation facility for some or all of those expenses. After all, the animals might not have been available for public display absent those efforts, and the display facility's savings could be considerable by obtaining releasable marine mammals in lieu of capturing them from the wild. Alternatively, NMFS might consider a compensation scheme that does not benefit the specific rehabilitation facility, but that places such monies in a fund that addresses stranding events more generally (e.g., the Marine Mammal Unusual Mortality Event Fund established under section 405 of the MMPA).

The Commission appreciates the opportunity to comment on the PD. Please contact me if you have questions or would like to discuss any of the points the Commission has raised.

Sincerely,



Rebecca J. Lent, Ph.D.
Executive Director