



MARINE MAMMAL COMMISSION

18 April 2019

Dr. Mary Cogliano, 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 Application No. MA009526
(Marine Mammal Health and
Stranding Response Program)

Dear Dr. Cogliano:

The Marine Mammal Commission (the 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 MMPA). The National Marine Fisheries Service (NMFS) Office of Protected Resource's (OPR) Marine Mammal Health and Stranding Response Program (MMHSRP) is requesting to renew its permit to (1) incidentally harass manatees, sea otters, walruses, and polar bears while conducting activities on marine mammal species under NMFS's jurisdiction and (2) collect¹, receive, possess, transfer, import, export, analyze, and archive samples from marine mammals under the U.S. Fish and Wildlife Service's (FWS) jurisdiction during a five-year period². MMHSRP is a statutorily mandated program with three Congressionally directed goals of (1) facilitating the collection and dissemination of reference data on the health and health trends of marine mammals in the wild, (2) correlating the health of marine mammals with available data on physical, chemical, and biological environmental parameters, and (3) coordinating effective responses to unusual mortality events.

Application review process

MMHSRP submitted its application to FWS in January 2018, and it was provided to the Commission for informal review in November 2018. The Commission noted numerous deficiencies and inconsistencies in the application in its [19 December 2018 letter](#)³ and recommended that FWS return the application to MMHSRP and ask MMHSRP to follow the 2017 application instructions, address the noted shortcomings, and submit a revised application. The Commission recommended

¹ From dead animals.

² Its previous permit jointly issued by FWS and NMFS authorized similar activities.

³ Including that MMHSRP did not use FWS's most recent (2017) application instructions when it submitted its application.

at the time that, if the application was processed in its present state, it should be denied as not meeting the applicable requirements. The Commission sent a copy of that letter to MMHSRP.

Despite the Commission's recommendation to FWS that MMHSRP be asked to submit a revised application and respond to identified concerns regarding the application it had reviewed, the Commission has received no indication that FWS asked that MMHSRP revise and resubmit its application. The Commission understands that MMHSRP has not revised and resubmitted its application. As stated in previous Commission letters⁴, the Commission poses questions or seeks additional information during its informal reviews when either (1) the applicant has not provided all of the information required under the relevant (i.e., 2017) application instructions or (2) the information provided is not sufficiently complete or clear to support the findings required under the MMPA and FWS's implementing regulations or to recommend appropriate permit conditions for inclusion in furtherance of MMPA section 104(b)(2). The Commission provides its comments with the expectation that FWS will either (1) send the Commission's comments and questions to the applicants and ask that they provide the requested clarifications and additional information to FWS or (2) provide the requested information itself.

General outstanding issues

Numerous deficiencies and inconsistencies remain in MMHSRP's application⁵, which make it difficult for the Commission, or any other reviewer, to evaluate what MMHSRP is proposing. *Some* of those shortcomings include—

- Inconsistencies are evident throughout the application regarding whether incidental harassment of manatees, sea otters, walruses, and polar bears would occur during research *and* emergency response activities—in some instances, both types of activities are listed and in others, only one type of activity is listed, including in the take table.
- Justification should be provided regarding why taking of species under the Endangered Species Act (ESA) is necessary⁶.
- Information regarding the various objectives or hypotheses that could be investigated should be provided, as well as additional justification regarding how MMHSRP's activities meet the *bona fide* research requirement under the MMPA⁷.
- Authorization for at least one unintentional mortality⁸ of a manatee should have been requested given that a manatee was struck by a boat during MMHSRP's activities in 2015⁹—MMHSRP indicated in its annual report discussing those circumstances that it planned to request an 'accidental injury' in its permit renewal¹⁰.

⁴ See its [18 December 2018 letter for USGS](#), [18 December 2018 letter for Dr. Karyn Rode](#), and [27 March 2019 letter for FFWCC](#).

⁵ Which still does not follow the 2017 application instructions.

⁶ See item 6 in the 2017 application instructions.

⁷ Items 18 and 17, respectively, in the 2017 application instructions. Currently, this information is lacking.

⁸ Including euthanasia for humaneness purposes.

⁹ A team searched for the manatee after it was struck and observed that it was alive, but the team could not relocate the animal to determine whether it survived the boat strike and if it did, how seriously it was injured. Such an incident would be counted as a mortality under the permit, not an accidental injury. A mortality is presumed when an animal is injured and its fate cannot be determined.

¹⁰ See items 7c, 26, 27, and 28 in the 2017 application instructions.

- Authorization for incidental capture of manatees and potential capture of sea otters should have been requested based on MMHSRP's acknowledgement in the application that, if an animal is accidentally captured, it would be released immediately¹¹.
- The types and origins of various samples that MMHSRP would possess, import, and/or export should have been specified in all of the relevant sections of the application¹².
- A single row in the take table should not include both incidental harassment activities, which are denoted by 'as warranted'¹³, and collection/possession/import/export of samples, which should be denoted by 'unlimited'¹⁴.
- All co-investigators who will be working under the permit must submit a CV, biosketch, or qualification form in support of the activities they would be authorized to conduct under the permit¹⁵.

Based on the inconsistencies, missing information, and unclear information in MMHSRP's application and the difficulty in determining whether MMHSRP meets permit issuance criteria under the various statutes, the Commission recommends that FWS deny the requested permit and instruct MMHSRP to submit a new application that follows the applicable permit application instructions and addresses the shortcomings identified by the Commission.

Appropriateness of a scientific research permit

MMHSRP's proposed activities are similar to those previously authorized under a scientific research permit issued jointly by FWS and NMFS in 2009. In 2015 NMFS issued a separate research permit authorizing MMHSRP to conduct research on species under NMFS's jurisdiction. Although MMHSRP also submitted a research permit application to FWS approximately five years ago, FWS has not acted upon it until recently. The Commission is concerned that some of the activities previously authorized under the joint research permit no longer would be appropriate given that the requested permit would cover only species under FWS's jurisdiction.

Specifically, MMHSRP is seeking authorization to take manatees, sea otters, walrus, and polar bears incidental to conducting emergency response and research activities *on* species under NMFS's jurisdiction. Since those activities are not directed at taking species under FWS's jurisdiction and do not involve conducting scientific research *on* those species, issuing a scientific research permit under 104(c) of the MMPA for FWS species is not the appropriate vehicle for authorizing such taking. That is, MMHSRP is not conducting research on FWS species and does not meet the bona fide research requirement for the species that would be covered by the requested permit. FWS should have identified this shortcoming and instructed MMHSRP to seek a separate incidental take authorization under section 101(a)(5)(A)—for its research on NMFS species that may take FWS

¹¹ Takes of multiple animals should be requested, see item 7c in the application instructions.

¹² This includes whether the samples originate from (1) live or dead animals, (2) live animals that were collected during permitted research on free-ranging or captive animals, husbandry activities on captive animals, or rehabilitation activities on temporarily captive animals, or (3) dead animals that were collected during permitted research, legal fishing operations, subsistence hunting activities, in a captive setting (research or public display facilities), or in the wild (from dead stranded animals). See Items 12, 13, and 29 in the 2017 application instructions.

¹³ Incidental capture takes and unintentional mortalities should have numbers associated with them. 'As warranted' does not suffice.

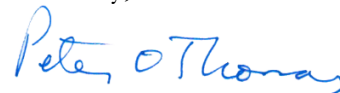
¹⁴ This is specified in items 21 and 29 of the 2017 application instructions.

¹⁵ See item 30 of the 2017 application instructions.

species incidentally—rather than under section 104(c) of the MMPA. This is the same approach NMFS has used when authorizing the incidental taking of ringed seals during polar bear research activities (76 Fed. Reg. 13130). Moreover, section 101(a)(5)(A) allows FWS to issue an incidental take authorization that includes taking by mortality and serious injury¹⁶ in addition to Level A¹⁷ and Level B harassment. Because FWS and NMFS no longer are issuing joint scientific research permits to cover marine mammals under both agencies' jurisdictions, the Commission recommends that FWS direct MMHSRP to (1) resubmit its scientific research permit application to include only those activities that constitute *bona fide* research on marine mammals under FWS's jurisdiction (e.g., the collection, importation, and exportation of samples from those species), using the 2017 application instructions and (2) submit a separate authorization application under section 101(a)(5)(A) of the MMPA for the incidental taking of manatees, sea otters, walruses, and polar bears during the course of conducting emergency response and research activities on marine mammals under NMFS's jurisdiction. Alternatively, MMHSRP can submit those applications on its own volition, prompting FWS to respond.

The Commission remains committed to working with FWS to improve the quality of permit applications and the effectiveness and efficiency of the permitting process. One element of the process should be a commitment from FWS to transmit the Commission's comments and questions from its informal review of applications to applicants and obtain responses that address those comments and questions. Unless this is done, there is no point in the Commission providing informal reviews and the Commission will need to reconsider the practice. Kindly contact me if you have any questions concerning the Commission's comments and recommendations.

Sincerely,



Peter O. Thomas, Ph.D.,
Executive Director

Reference

Runge, M.C., C.A. Sanders-Reed, C.A. Langtimm, J.A. Hostetler, J.A., J. Martin, C.J. Deutsch, L.I. Ward-Geiger, and G.L. Mahon. 2017. Status and threats analysis for the Florida manatee (*Trichechus manatus latirostris*), 2016: U.S. Geological Survey Scientific Investigation Report 2017-5030, Reston, Virginia. 40 pages. <https://doi.org/10.3133/sir20175030>

¹⁶ Authorizing a single manatee mortality during a five-year period likely would not cause more than a negligible impact on a stock that has been increasing and was downlisted to threatened status under the ESA (see Runge et al. 2017 for a review of the stock's status).

¹⁷ Which would cover incidental capture and release of manatees and sea otters from nets that are intended to capture species under NMFS jurisdiction. See, for example, Table 7 in 83 Fed. Reg. 6614 for authorizing such taking.