

Marine Mammal Commission
4340 East-West Highway, Room 700
Bethesda, MD 20814-4447

4 April 2008

Mr. Alan Risenhoover
Director, Office of Sustainable Fisheries
National Marine Fisheries Service
1315 East-West Highway, SSMC3
Silver Spring, MD 20910

Dear Mr. Risenhoover:

The Marine Mammal Commission, in consultation with its Committee of Scientific Advisors on Marine Mammals, has reviewed the National Marine Fisheries Service's proposed rule published in the *Federal Register* on 21 December 2007 to amend the agency's regulations concerning experimental fishing permits, exempted fishing permits, and scientific research activities under the Magnuson-Stevens Fishery Conservation and Management Act (MSA). The Commission offers the following comments and recommendations on the proposed rule.

RECOMMENDATIONS

The Marine Mammal Commission recommends that the National Marine Fisheries Service—

- revise the proposed regulations to clarify that exempted fishing permits will not be issued to authorize fishing activities that are inconsistent with the requirements of take reduction plans adopted under the Marine Mammal Protection Act, regardless of the statute under which implementing regulations have been issued, and
- with regard to proposed changes to section 600.745(b)(3)(i) of its regulations, not delete reference to its intent to issue an experimental fishing permit, but rather indicate that the Service will include a preliminary or proposed finding in its notice.

RATIONALE

The Marine Mammal Commission is pleased that the proposed rule recognizes in several places the need for those conducting fisheries research or activities under experimental or exempted fishing permits to comply with other resource laws, such as the Marine Mammal Protection Act (MMPA) and the Endangered Species Act (ESA). We agree that it is appropriate for those conducting such activities to provide information to the Service concerning the anticipated impact on marine mammals and listed species and for the Service's Regional Administrator or Director to withhold issuance of a letter of acknowledgement until any necessary authorizations under those Acts have been obtained. Although possibly anticipated by the Service, it is not clear that the agency's Office of Protected Resources would be consulted by the regional officials in making such determinations. Inasmuch as it is that office that is responsible for issuing incidental taking

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authorizations under the MMPA and ESA, the final rule should indicate clearly that the Office of Protected Resources will be consulted in determining whether authorizations under those statutes are needed.

The incidental taking of marine mammals is or can be authorized under the MMPA using various provisions, most notably section 118 for taking incidental to commercial fishing operations and section 101(a)(5) for taking incidental to other types of activities. Some, but not all of the activities that might be authorized under the proposed regulations constitute commercial fishing operations and would be covered under section 118 of the MMPA. To avoid possible confusion, the Service should consider using this rulemaking as an opportunity to clarify which types of activities are considered commercial fishing operations for purposes of the MMPA (e.g., compensation fishing) and which are not (e.g., scientific research).

Section 118 of the MMPA requires, among other things, that the Service develop and implement take reduction plans to reduce the incidental mortality and serious injury of marine mammals from a strategic stock, initially to below the stock's potential biological removal level and ultimately to insignificant levels approaching a zero rate. To achieve those goals, the Service is authorized to promulgate regulations to implement the plans. Such regulations may establish fishery-specific limits on incidental mortality and serious injury of marine mammals, restrict fisheries by time or area, require the use of certain gear or fishing techniques, or include other provisions to achieve the objectives of a take reduction plan. However, regulatory measures to reduce the taking of marine mammals incidental to commercial fishing operations are not always adopted under the MMPA; they sometimes are implemented as fishery management measures under the MSA. This being the case, the Marine Mammal Commission recommends that the proposed regulations be revised to clarify that exempted fishing permits will not be issued to authorize fishing activities that are inconsistent with the requirements of take reduction plans adopted under the MMPA, regardless of the statute under which implementing regulations have been issued.

As described in the preamble to the proposed rule, the Service is proposing to revise section 600.745(b)(3)(i) of its regulations to remove the phrase "...and the intent of NMFS to issue an EFP." The Service believes that this is appropriate because a decision on whether to issue an exempted fishing permit should be made only after public notice and comment. The Commission agrees that a final determination must be deferred until after public comments have been considered. Nevertheless, based on our experience with similar types of authorizations under the MMPA, we believe that the public review process is strengthened if the Service includes a preliminary finding in its notice and describes the basis for that initial finding and the terms and conditions it is considering for inclusion in the authorization, should it be issued. This provides reviewers with a better basis for reviewing the proposal, identifying the key issues, and targeting their comments accordingly. As such, the Marine Mammal Commission recommends that, with regard to proposed changes to section 600.745(b)(3)(i) of its regulations, the Service not delete reference to its intent, but rather indicate that the Service will include a preliminary or proposed finding in its notices.

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Please contact me if you would like to discuss these comments and recommendations.

Sincerely,

A handwritten signature in blue ink that reads "Timothy J. Ragen". The signature is written in a cursive style with a prominent initial 'T'.

Timothy J. Ragen, Ph.D.
Executive Director