



MARINE MAMMAL COMMISSION

11 May 2011

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 20910-3225

Dear Mr. Payne:

The Marine Mammal Commission, in consultation with its Committee of Scientific Advisors on Marine Mammals, has reviewed the National Marine Fisheries Service's draft environmental assessment for the issuance of a public display permit for the placement of releasable, rehabilitated California sea lions at the Institute for Marine Mammal Studies in Gulfport, Mississippi (76 Fed. Reg. 19976).

RECOMMENDATIONS

The Marine Mammal Commission recommends that the National Marine Fisheries Service consider whether the precedent-setting nature of this and similar permit applications warrants the preparation of an environmental impact statement and, at a minimum, that the Service should expand the discussion in the environmental assessment to explain why it believes that adoption of such a policy is not considered significant. The Marine Mammal Commission further recommends that the National Marine Fisheries Service, in consultation with the Commission and other interested parties, conduct a review of issues related to the roles, rights, and responsibilities of the Permit Office, rehabilitation facilities, and public display facilities in determining whether, when, and where to place releasable, rehabilitated marine mammals and adopt policies to resolve those issues.

RATIONALE

In general, the Commission concurs with the Service's conclusion that placing eight California sea lions at the public display facility, rather than returning the animals to the wild, would not significantly affect the quality of the human environment. As such, preparation of an environmental impact statement on this action normally would not be required. However, applicable regulations (40 C.F.R. § 1508.27) implementing the National Environmental Policy Act direct agencies to consider both the context and intensity of their actions when determining significance and to identify specific factors that should be evaluated. Among those factors is "the degree to which the action may establish a precedent for future actions with significant effects or represents a decision in principle about a future consideration."

It is not entirely clear to what extent the proposed issuance of this particular public display permit would establish a precedent-setting policy regarding the retention of releasable, rehabilitated marine mammals for purposes of public display rather than returning the animals to the wild pursuant to section 109(h)(3) of the Marine Mammal Protection Act. As discussed in the draft environmental assessment, this is the third such document evaluating similar actions. However, as far as the Commission is aware, the Service has yet to prepare an analysis, be it an environmental

assessment or an environmental impact statement, of the adoption of a general policy concerning transfers of releasable, rehabilitated marine mammals to public display facilities for permanent maintenance in captivity. The Commission believes that adoption of such a policy, and the precedent-setting nature of this and similar permit applications, may rise to the level where a broader National Environmental Policy Act review is required. The Marine Mammal Commission therefore recommends that the National Marine Fisheries Service consider whether the precedent- setting nature of this and similar permit applications warrants the preparation of an environmental impact statement. At a minimum, the Service should expand the discussion in the environmental assessment to explain why it believes that adoption of such a policy is not considered significant.

In addition, the analyses in the draft environmental assessment do not explore fully all of the relevant issues for this and similar permits. For example, the discussion of the Marine Mammal Protection Act notes that section 104(c)(2) authorizes the Service to issue permits to take or import marine mammals for purposes of public display. However, nowhere does it discuss section 109(h), the provision under which stranded marine mammals are collected from the wild and maintained at rehabilitation facilities. Section 109(h)(3) allows the Service to authorize facilities to take and treat marine mammals when necessary for the protection and welfare of the animals. However, that provision further directs that “[i]n any case in which it is feasible to return to its natural habitat a marine mammal taken...under circumstances described in this subsection, steps to achieve that result shall be taken.” Although the Commission recognizes the rationale for allowing a display facility to obtain releasable marine mammals from a rehabilitation facility in lieu of collecting animals from the wild, the Service nevertheless should discuss the relationship between the mandates of sections 104 and 109 of the Act. Most notably, the Service should explain its rationale for determining that the permit provisions supersede the clear directive of section 109(h) that all rehabilitated marine mammals be returned to the wild whenever feasible.

If, as appears to be the case, the Service is routinely going to allow the retention of releasable, rehabilitated marine mammals for purposes of public display, it also needs to adopt policies that address the details of such arrangements. The Commission recognizes that most rehabilitation facilities receive authorization from the Service under section 112(c) to capture, care for, and release stranded marine mammals. The Service has considerable latitude regarding how it can and does condition those authorizations. Nevertheless, facilities spend considerable time and money rescuing, feeding, and providing medical attention to stranded and injured marine mammals with the expectation that successfully rehabilitated animals will be returned to the wild. Deviating from this practice raises several questions that the Service has yet to address. Does a facility’s investment in caring for and preparing an animal for release afford it a say in the fate of the animals it rescues? Can the Service force a rehabilitation facility to provide releasable marine mammals to a public display facility against its will? Should the recipient public display facility be required to compensate the rehabilitation facility for some or all of its expenses related to the care and maintenance of animals during rehabilitation?¹

¹ We note in this regard that, by obtaining releasable animals that will have had medical examinations conducted by a rehabilitation facility and, in all likelihood, will be accompanied by a comprehensive medical history, the recipient public display facility likely will realize savings by not having to fund capture activities and health screening that would be required when collecting marine mammals from the wild.

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Questions concerning the degree of discretion that should be accorded to the recipient facility also need to be addressed. Should the display facility have exclusive say regarding which available animals it selects? Can the Service require the recipient facility to accept non-releasable marine mammals in lieu of securing releasable animals or collecting animals from the wild, even if non-releasable animals might not meet all of the specifications set by the display facility? How will the disposition of releasable animals affect the Service's ability to find facilities for non-releasable animals?

Further, if the Service is going to authorize the placement of releasable marine mammals at display facilities, it should address what role, if any, it intends to play in determining where particular animals are placed. Should the Service defer to the discretion of the rehabilitation and recipient facilities to decide which animals go where? Should those public display facilities with the earliest permits be given priority for obtaining animals until their needs are met? Should all permit holders take turns as releasable animals of the desired age classes and sexes become available? In this regard, the Commission notes that demand for releasable marine mammals by public display and other facilities easily could surpass the supply, particularly given the Navy's recent interest in securing similar healthy, trainable animals for national defense purposes under the authority of 10 U.S.C. § 7524.

These questions reflect some of the key issues that the Service needs to resolve if it is going to authorize the transfer to and retention of releasable, rehabilitated marine mammals at public display facilities. It is by no means an exhaustive list. This being the case, the Marine Mammal Commission recommends that the National Marine Fisheries Service, in consultation with the Commission and other interested parties, conduct a review of issues related to the roles, rights, and responsibilities of the Permit Office, rehabilitation facilities, and public display facilities in determining whether, when, and where to place releasable, rehabilitated marine mammals and adopt policies to resolve those issues.

Please contact me if you have questions regarding the Commission's recommendations and comments.

Sincerely,



Timothy J. Ragen, Ph.D.
Executive Director