



MARINE MAMMAL COMMISSION

22 October 2009

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

Re: Permit Application No. 14233
(Scott Kraus, Ph.D.)

Dear Mr. Payne:

The Marine Mammal 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 applicant is seeking authorization to take by harassment North Atlantic right whales during aerial and vessel surveys and biopsy sampling activities over a five-year period. Based on its review, the Commission offers the following recommendations and comments.

RECOMMENDATIONS

The Marine Mammal Commission recommends that—

- if the National Marine Fisheries Service is planning to review or revise its decision to prepare a programmatic environmental impact statement on the issuance of permits for research on right whales, it move cautiously and with a record of decision that provides clear and adequate justification for doing so; and
- the Service defer issuance of this permit and similar authorizations to take right whales until it has resolved the National Environmental Policy Act issues concerning research on this species.

RATIONALE

The applicant is requesting authorization to harass up to 450 right whales (of both sexes and all age groups) annually during close approach for photography and collection of fecal samples and to biopsy-sample up to 50 of that number annually, including calves determined to be at least two weeks of age. The applicant states that individual whales could be approached up to 10 times annually. The applicant also is requesting authorization to import and export up to 50 biological samples per year, including samples and tissues collected from dead right whales in other parts of the world, to use in control and comparative studies. The purpose of the research is to determine trends in demographic parameters and anthropogenic impacts on the species.

The National Marine Fisheries Service published a notice in the *Federal Register* on 17 October 2005 (70 Fed. Reg. 60285) announcing its intent to prepare a programmatic environmental impact statement to analyze the effects of issuing permits authorizing research on right whales in the Atlantic and Pacific Oceans. In particular, the Service identified the need to evaluate the cumulative effects of such research and “to assess the likely environmental effects of issuing permits under a range of alternatives characterized by different research methods, mitigation measures, and level of effort, including a range of sample sizes and temporal and geographic scopes of research.” The Service also indicated that under its proposed action alternative “no permits would be issued for lower priority research activities until the highest priority tasks were completed or unless there was sufficient information to determine that the cumulative impacts of allowing additional takes for research would not disadvantage or jeopardize the continued existence of the species.” Subsequent to publication of that notice, the Service’s Permit Office indicated that it would not be issuing additional permits authorizing right whale research until the programmatic environmental impact statement had been completed. However, because the Service has yet to prepare the planned environmental impact statement, some types of research have been inordinately delayed.

The Commission has been advised that the Service now is considering revisiting its decision to prepare a draft programmatic environmental impact statement. One alternative under review is to prepare a programmatic environmental assessment instead. In the meantime, the Service apparently plans to meet its obligations under the National Environmental Policy Act by preparing environmental assessments on individual permits.

The National Environmental Policy Act requires the preparation of certain documents and analyses to examine the environmental effects of major federal actions. Generally, an environmental impact statement is required if the proposed action has or might have a significant impact on the human environment. An environmental assessment is sufficient to document an agency’s determination that the action will not have a significant impact (i.e., it forms the basis of a finding of no significant impact). In the case of right whale research, the Service presumably thought that the various activities that had been authorized, in combination with other planned research, might cumulatively be having a significant impact on right whales or other components of the environment or it would not have published its intent to prepare an environmental impact statement. This is not to say that the agency cannot revise its previous determination, but, in doing so, it must clearly articulate its rationale for a new determination that the impact of ongoing and planned research will not be significant. An environmental assessment is the appropriate document for making such a determination and will either result in the issuance of a finding of no significant impact or, if no such finding can be made, a determination that an environmental impact statement is necessary. Unless an agency is fairly certain that it will be able to substantiate a finding of no significant impact, this may be a risky course of action, merely extending the amount of time needed to prepare an environmental impact statement, thereby further delaying potentially important research.

The Commission is concerned about the interruption of potentially important research on this species, which is in need of strong protection measures that may not be implemented unless they are supported by research results. The interruption in research undermines this process and

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therefore may be delaying or even compromising recovery efforts. Were it not for the lack of a well-founded analysis under the National Environmental Policy Act, especially of potential cumulative effects, the Commission would almost certainly recommend that this permit application be approved. To get research and recovery actions back on track for this highly endangered species, the Service needs to resolve this matter in a thorough but expedited manner that also meets the requirements of the National Environmental Policy Act.

The Commission also is concerned about the interim approach being considered by the Service to prepare an environmental assessment for each permit under review. The Commission does not see how the Service can adequately evaluate the cumulative effects of proposed research if it looks only at the impact of individual studies in isolation. The Commission also does not see how the Service can make informed decisions regarding the relative priority of potentially competing projects if it has not established a framework for evaluating their value in meeting recovery goals and their contribution to cumulative effects. If the Service decides to authorize this and other research activities on right whales before completing a programmatic environmental analysis, it must provide a well-reasoned rationale for now believing that the cumulative effects of these multiple research activities will not be significant and that such effects can be assessed adequately by considering permits on a case-by-case basis.

Accordingly, the Marine Mammal Commission recommends that, if the National Marine Fisheries Service is planning to review or revise its decision to prepare a programmatic environmental impact statement on the issuance of permits for research on right whales, it move cautiously and with a record of decision that provides clear and adequate justification for doing so. In particular, the record of decision should carefully document how the Service assessed the potential cumulative effects of ongoing and planned research projects in combination with the other factors (i.e., entanglement in fishing gear, ship strikes) that are affecting right whales. Further, the Marine Mammal Commission recommends that the Service defer issuance of this permit and similar authorizations to take right whales until it has resolved the National Environmental Policy Act issues concerning research on this species.

Upon resolution of this issue by the Service, the Commission will provide specific comments and recommendations on the subject application.

Please contact me if you have any questions concerning these recommendations and comments.

Sincerely,



Timothy J. Ragen, Ph.D.
Executive Director