



MARINE MAMMAL COMMISSION

25 November 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. 14603
(Provincetown Center for Coastal Studies)

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 suction-cup tagging 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 400 right whales (of both sexes and all age groups) annually during aerial surveys for purposes of photo-identification and behavioral observation. Of this number, up to 350 whales annually also could be harassed during shipboard surveys during which photo-identification, prey-sampling by net tow and acoustic means, and behavioral observations would be conducted. Of these 350 animals, up to 20 whales annually would be closely approached for attempted suction-cup tagging with D-tags with the goal of successfully tagging 10 individuals. The applicant states that calves and females accompanied by calves would not be tagged. The objectives of the proposed research include monitoring right whale demographics, life history traits, and behavior. The proposed research would be conducted from mid-December through mid-May over a five-year period.

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As discussed in the Commission's 22 October 2009 letter (copy enclosed) regarding permit application No. 14233 from Scott Kraus, Ph.D., requesting authorization to take North Atlantic right whales, the Commission cautions the Service on its decision to revisit the 17 October 2005 notice (70 Fed. Reg. 60285). In that document, the Service indicated its intention to prepare a draft programmatic environmental impact statement to analyze the effects of issuing permits authorizing research on right whales in the Atlantic and Pacific Oceans. The Commission understands that one alternative now being considered by the Service is to prepare a programmatic environmental assessment instead. In the meantime, the Service is considering meeting its obligations under the National Environmental Policy Act by preparing environmental assessments on individual permits.

The Commission is concerned that preparing environmental assessments on individual permits focuses on the impact of individual studies in isolation and does not adequately consider the cumulative effects of all ongoing and proposed research. Under the National Environmental Policy Act, an environmental impact statement generally 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's previous decision to prepare a programmatic environmental impact statement presumably was based on its belief that the authorized research activities, in combination with additional planned research, might cumulatively have a significant impact on right whales or other components of the ecosystem. Although an agency is free to review and revise any previous determination, it must clearly articulate its rationale for a new determination—in this case, 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 approach could result in merely extending the amount of time needed to prepare an environmental impact statement, thereby further delaying potentially important research on this species. Such an interruption in research may serve to delay or even compromise 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 likely recommend that this permit application and others proposing to conduct activities related to the conservation of right whales 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.

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 other factors (e.g., entanglement in fishing gear, ship strikes) that pose serious threats to the survival and

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recovery of 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 application in question.

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

Sincerely,



Timothy J. Ragen, Ph.D.
Executive Director

Enclosure