

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

15 April 2008

Mr. David Cottingham  
Chief, Marine Mammal and Sea Turtle  
Conservation Division  
Office of Protected Resources  
National Marine Fisheries Service  
1315 East-West Highway  
Silver Spring, MD 20910

Dear Mr. Cottingham:

The Marine Mammal Commission, in consultation with its Committee of Scientific Advisors on Marine Mammals, has reviewed the Service's advance notice of proposed rulemaking published in the *Federal Register* on 31 January 2008. In the notice, the Service requests comments on possible changes to its regulations governing the taking of stranded marine mammals under section 109(h), section 112(c), and Title IV of the Marine Mammal Protection Act. According to the notice, the Service intends to clarify, among other things, requirements and procedures for responding to stranded marine mammals and for determining the disposition of rehabilitated marine mammals, which includes procedures for the placement of non-releasable animals and for authorizing the retention of releasable rehabilitated marine mammals for scientific research, enhancement, or public display.

In light of the scope and complexity of the issues identified and the limited background discussion or rationale provided for some of the changes being considered, the Marine Mammal Commission has chosen not to provide comprehensive comments at this time. Rather, the Commission proposes that a working group be established involving the National Marine Fisheries Service, the Fish and Wildlife Service, and the Commission to discuss the various issues that need to be resolved to develop a proposed rule. In the meantime, the Commission offers the following general comments that should be useful, regardless of how the Service chooses to proceed.

First, we are struck by the breadth of issues identified in the *Federal Register* notice that might be covered by the envisioned rulemaking. In addition, many of these issues seem unrelated. For instance, determinations of whether rehabilitated animals are releasable to the wild are independent of the collection, dissemination, and use of parts from stranded marine mammals. The Commission suggests that the Service consider compartmentalizing its envisioned rulemaking so that specific topics can be addressed separately rather than being folded into a single rule aggregating multiple topics.

Second, many aspects of the stranding program involve technical, fact-specific determinations. These include, for instance, determinations on whether to release a rehabilitated marine mammal, allow an animal undergoing rehabilitation to be placed on public display, or euthanize a stranded animal. At least some of these determinations currently are governed by agency policy statements and guidelines, which are, in some instances, quite extensive. The Commission suggests that the Service should continue to rely on such policies and guidelines in making these

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determinations, rather than attempting to incorporate the same level of detail into the regulations. The regulations should focus on procedural aspects (that is, who is authorized to make the determinations, what consultations are required, etc.). This would provide the Service with a clear process, but one with sufficient flexibility to update the substantive criteria as new technologies are developed and techniques are refined without the need for regulatory change.

Third, the Service specifically solicited comments on whether it should consolidate the regulations applicable to federal, state, and local government officials responding to strandings under the authority of section 109(h) of the Marine Mammal Protection Act with those applicable to individuals who participate in the stranding network under a section 112(c) agreement. Although we recognize that the Service may prefer a unified set of requirements applicable to all responders, the Service also needs to recognize the differences in the underlying statutory authorities. Those participants operating under a section 112(c) authorization are subject to whatever requirements and conditions the Service chooses to incorporate in such agreements. In contrast, those operating under section 109(h) have independent authority to take marine mammals in certain instances (i.e., to protect the welfare of the animal, to protect the public health and welfare, or to remove nuisance animals by non-lethal means), and that authority is beyond regulation by the Service. Thus, although the Service can request that state and local officials operating under section 109(h) consult or follow certain procedures (e.g., filing reports), it cannot require compliance as a condition of the authorization. Any regulatory changes being contemplated by the Service need to recognize these differences.

The Commission looks forward to working with the Service as it develops its regulatory proposals. Please contact me if you have any questions concerning this letter.

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