



MARINE MAMMAL COMMISSION

28 August 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. 14097
(Southwest Fisheries Science Center
National Marine Fisheries Service)

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 requesting authorization to (1) take by harassment various species of pinnipeds and cetaceans in the course of estimating abundance, collecting behavioral data, recording vocalizations, and photography; (2) collect biopsy samples from various species of pinnipeds and cetaceans; and (3) conduct tagging studies on selected pinniped and cetacean species. Authorization is also requested to take, salvage, and/or import/export/re-export marine mammal parts, specimens, and biological samples and import/export/re-export salvaged parts or specimens and biological samples collected by other researchers under those researchers' authorizations. The research would be carried out year-round over five years in waters off California, Oregon, Washington, Hawaii, and Alaska and in international waters (primarily the Pacific and Southern Oceans).

RECOMMENDATIONS

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

- defer consideration of any scientific permit application or amendment request submitted from within the agency that involves any invasive procedure or other activity that might harm or materially alter the behavior of the animals under study until an Institutional Animal Care and Use Committee has reviewed the proposed research activities and has found them to be consistent with Animal Welfare Act requirements;
- immediately convene an existing Institutional Animal Care and Use Committee or establish and convene a new committee to review and approve, if appropriate, the procedures included in this application that are invasive or that might harm or materially alter the behavior of the subject species, thereby bringing this applicant and its other science centers into compliance with applicable requirements of the Animal Welfare Act; and
- defer further action on the requested permit until the permit holder demonstrates (1) that it is in compliance with section 2.37 of the Animal and Plant Health Inspection Service's

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Animal Welfare Act regulations requiring the establishment and use of Institutional Animal Care and Use Committees for such research and (2) that the proposed research has been reviewed and approved by such a committee.

RATIONALE

Over the past several years, the Marine Mammal Commission has repeatedly expressed concern that the National Marine Fisheries Service continues to flout the clearly applicable requirements of the Animal Welfare Act, sending a message that it does not take seriously its responsibility to comply with federal regulatory requirements and is comfortable applying a double standard with regard to its review of applications from inside and outside the agency. This is an unacceptable position for any federal agency but especially for the agency responsible for administering the permit program. The Commission has repeatedly recommended that the Service take immediate action to establish Institutional Animal Care and Use Committees to bring its Science Centers into compliance with those requirements, but the Service has not done so. As noted in a 31 July 2009 letter (enclosed and incorporated here by reference), the Service has established one such committee on an interim basis to review research activities related to its Marine Mammal Health and Stranding Response Program. We understand that once a decision was made to establish the interim committee, it was created quite quickly (i.e., in less than a month). Thus, it appears that the Service has the capability to establish and convene a committee expeditiously. It is unclear, therefore, why the Service could not (1) extend that committee's term to enable it to review the research being proposed by this applicant and that proposed in other recent applications and amendment requests submitted by Service scientists or (2) create other interim committees to conduct such reviews. Whatever the reason, the current situation is entirely unacceptable, whether it involves the current application or applications by other Service scientists. Therefore, the Marine Mammal Commission recommends that the National Marine Fisheries Service defer consideration of any scientific permit application or amendment request submitted from within the agency that involves any invasive procedure or other activity that might harm or materially alter the behavior of the animals under study until an Institutional Animal Care and Use Committee has reviewed the proposed research activities and has found them to be consistent with Animal Welfare Act requirements.

The Commission's comments on the subject application are virtually the same as those provided in its 31 July 2009 letter regarding the applicant's request to amend Permit No. 774-1847-03, which expired on 30 June 2009. The requested permit, if issued, would renew authorization for the conduct of research allowed under Permit No. 774-1847-03.

The proposed research includes invasive procedures or activities that might harm or materially alter the behavior of the animals under study. If the Service intends to approve this application at this time, then it has only two options for meeting its obligations under the Animal Welfare Act: to use an existing Institutional Animal Care and Use Committee or convene a new one. With that in mind, the Marine Mammal Commission recommends that the National Marine Fisheries Service immediately convene an existing Institutional Animal Care and Use Committee or

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establish and convene a new committee to review and approve, if appropriate, the procedures included in this application that are invasive or that might harm or materially alter the behavior of the subject species, thereby bringing this applicant into compliance with applicable requirements of the Animal Welfare Act. Alternatively, if the Service intends to shift the responsibility for review back to the applicant, the Marine Mammal Commission recommends that the National Marine Fisheries Service defer further action on the requested permit until the permit holder demonstrates (1) that it is in compliance with section 2.37 of the Animal and Plant Health Inspection Service's Animal Welfare Act regulations requiring the establishment and use of Institutional Animal Care and Use Committees for these types of research and (2) that the proposed research has been reviewed and approved by such a committee.

If the Service decides to issue the requested permit contrary to the Commission's recommendations, we request that the Service provide the Commission with (1) a detailed written explanation as to why it was unable to use the Institutional Animal Care and Use Committee that it has created on an interim basis, establish another interim committee, or use another committee already established within the National Oceanic and Atmospheric Administration to review the proposed research, (2) a report on the status of its actions to establish Institutional Animal Care and Use Committees, including the projected date or dates by which such committees will be in place and are expected to have completed a retroactive review of the research activities currently authorized to be conducted by the Service, or for which authorization is currently pending and for which review by an Institutional Animal Care and Use Committee is required but has not been conducted, and (3) a full explanation as to why action on this request was not deferred until an Institutional Animal Care and Use Committee had reviewed and approved the proposed research. Upon the receipt of this information, the Commission will provide its recommendations regarding the specifics of the permit application under consideration.

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

Sincerely,



Timothy J. Ragen, Ph.D.
Executive Director

Enclosure

Cc: Jane Lubchenco, Ph.D.
Barbara A. Kohn, D.V.M.