

**PART 73—RADIO BROADCAST SERVICES**

1. The authority citation for part 73 continues to read as follows:

**Authority:** 47 U.S.C. 154, 303, 334, 336.

**§ 73.202 [Amended]**

2. Section 73.202(b), the Table of FM Allotments under Oregon, is amended by removing Channel \*252C3 and by adding Channel \*236C3 at Dallas, and adding Channel 253A at Waldport.

Federal Communications Commission.

**John A. Karousos,**

*Assistant Chief, Audio Division, Media Bureau.*

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**DEPARTMENT OF COMMERCE****National Oceanic and Atmospheric Administration****50 CFR Part 216**

[Docket No. 070809454-7459-01]

RIN 0648-AV82

**Marine Mammals; Advance Notice of Proposed Rulemaking**

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Advance notice of proposed rulemaking (ANPR); request for comments.

**SUMMARY:** NMFS is considering proposing changes to its implementing regulations, and criteria governing the issuance of permits for scientific research and enhancement activities under section 104 of the Marine Mammal Protection Act (MMPA), and is soliciting public comment to better inform the process. Permits to take marine mammal species are governed by the MMPA and NMFS implementing regulations at 50 CFR part 216. For threatened and endangered marine mammal species, permits are also governed by the Endangered Species Act (ESA) and 50 CFR part 222. On May 10, 1996, a final rule was published establishing requirements for issuing permits to take, import, or export marine mammals (including endangered and threatened marine mammals) and marine mammal parts under NMFS jurisdiction for purposes of scientific research and enhancement, photography, and public display (for captures and initial imports), and providing procedures for determining

the disposition of rehabilitated stranded marine mammals. NMFS intends to streamline and clarify general permitting requirements and requirements for scientific research and enhancement permits, simplify procedures for transferring marine mammal parts, possibly apply the General Authorization (GA) to research activities involving Level A harassment of non-ESA listed marine mammals, and implement a 'permit application cycle' for application submission and processing of all marine mammal permits. NMFS intends to write regulations for photography permits and is considering whether this activity should be covered by the GA. Any other recommendations received in response to this ANPR regarding regulations at 50 CFR part 216 will be considered prior to proposed rulemaking.

**DATES:** Written comments must be received at the appropriate address or facsimile (fax) number (see **ADDRESSES**) no later than 5 p.m. local time on November 13, 2007.

**ADDRESSES:** Written comments should be sent to: Chief, Permits, Conservation and Education Division, Attn: Permit Regulations ANPR, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910.

Comments may also be submitted by facsimile at (301)427-2521, provided the facsimile is confirmed by hard copy submitted by mail and postmarked no later than the closing date of the comment period.

Comments may also be submitted by e-mail. The mailbox address for providing e-mail comments is *NMFS.Pr1Comments@noaa.gov*. Include in the subject line of the e-mail comment the following document identifier: Permit Regulations ANPR, or The Federal e-Rulemaking Portal: <http://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:** Amy Sloan, Fishery Biologist, Office of Protected Resources, NMFS, at (301) 713-2289.

**SUPPLEMENTARY INFORMATION:** NMFS has authority, delegated from the Secretary of Commerce, to issue permits for research and enhancement activities under Section 104 of the MMPA (16 U.S.C. 1361 *et seq.*) and section 10(a)(1)(A) of the ESA (16 U.S.C. 1531 *et seq.*). Permits to take marine mammal species are governed by the MMPA, ESA, and NMFS implementing regulations at 50 CFR parts 216 and 222. As a Federal agency, issuance of permits by NMFS is also governed by the procedural requirements and provisions of the Administrative Procedure Act

(APA) and the National Environmental Policy Act (NEPA).

The APA is the law under which federal regulatory agencies, including NMFS, create the rules and regulations necessary to implement and enforce major legislative acts such as the MMPA and ESA. Under the APA, NMFS is required to publish in the **Federal Register** descriptions of rules of procedure, substantive rules of general applicability, and make available to the public statements of policy and interpretation, administrative staff manuals and instructions. NEPA requires Federal agencies to integrate environmental values into their decision making processes by considering the environmental impacts of their proposed actions and reasonable alternatives to those actions. The requirements of NEPA apply to NMFS "decision-making process" for issuance of permits. The NOAA Administrative Order No. 216-6 (NAO 216-6), Environmental Review Procedures for Implementing the National Environmental Policy Act, is also an agency guidance document for applying the requirements of NEPA to agency actions, including permit issuance.

The following paragraphs provide some possible regulatory changes being considered by NMFS. The changes being considered are found in 50 CFR part 216, most in subpart D, although comments or recommendations regarding any of the subparts will be considered. The sections identified are either followed by recommendations from NMFS on possible alternatives or changes to the current language, or a general solicitation by NMFS to the public for comments pertaining to that section. Several of the regulatory changes would require an amendment or change to the MMPA before implementation could be effective.

**Part 216, Regulations Governing the Taking and Importing of Marine Mammals***Subpart A - Introduction*

NMFS does not have any recommended changes for § 216.1 (Purpose) or 216.2 (Scope). Do either of these sections require further consideration or clarification?

**§ 216.3 Definitions:** Are there existing definitions relevant to the marine mammal permitting process that need clarification? Are there any other definitions that need clarification, or definitions that need to be added to these regulations?

Are there any other sections in Subpart A whose language requires further consideration or clarification?

### Subpart B - Prohibitions

§ 216.14 *Marine mammals taken before the MMPA*: Should we add provisions to authorize export in addition to import under § 216.14 (c)?

§ 216.15 *Depleted species*: Should we clarify that any species or population stock listed as endangered or threatened under the ESA is automatically listed as depleted under the MMPA?

Do any of the remaining sections in Subpart B require further consideration or clarification?

### Subpart C - General Exceptions

Several regulatory changes are being considered by NMFS in this subpart and include, but are not limited to, the following:

§ 216.23 *Native exceptions*: Does NMFS need to clarify sections regarding transfer of marine mammal parts? Do we need to include provisions for authorizing transfers of marine mammal parts for research purposes? If so, be explicit on how this should occur and whether this should be combined with transfers of other marine mammal parts legally taken, or kept under this section.

§ 216.25 *Exempted marine mammals and marine mammal products*: Should this section be consolidated with other sections (e.g., incorporate this § 216.25 into §§ 216.14 and 216.12; remove § 216.25)? Do we then reserve this section (or use another section) for a consolidated parts transfer section (for parts taken legally under §§ 216.22, 216.26, and 216.37) if possible? Subpart C is a substantial component of part 216. Therefore, any comments or recommendations regarding whether the language in other sections in subpart C require further consideration or clarification would be appreciated.

### Subpart D - Special Exceptions

§ 216.31 *Definitions*: Are there any definitions relevant to marine mammal permitting procedures that need to be added?

§ 216.32 *Scope*: Does the scope of this subpart need to be modified or clarified in any manner?

§ 216.33 *Permit application submission, review, and decision procedures*: Generally, NMFS is considering reorganizing and/or consolidating permitting regulation §§ 216.33 (Permit application, submission, review, and decision procedures), 216.34 (Issuance criteria), 216.35 (Permit restrictions), 216.36 (Permit conditions), and 216.41 (Permits for scientific research and enhancement) where possible. We have included some specific recommendations; however any recommendations where regulations

need consolidation or simplification in the following sections, and how this might be achieved, would be considered.

§ 216.33 (c) *Initial review*: NMFS regulations currently require the agency to determine that a proposed permit is categorically excluded from the need to prepare further environmental documentation, or to prepare an environmental assessment (EA) with a finding of no significant impact (FONSI) or a final environmental impact statement (EIS), during initial review of the application and prior to making it available for public comment and review pursuant to § 216.33(d). This sequence precludes public input on the application that may influence NMFS' determination regarding whether the activity requires an EA or EIS. Therefore, NMFS is considering a revision to this section, and the corresponding language at 216.33(d) such that NEPA documentation is not required at the time an application is made available for public review and comment. NMFS Administrative Order 216-6 stipulates that issuance of scientific research, enhancement, photography, and public display permits pursuant to the MMPA and issuance of research permits pursuant to the ESA are, in general, categorically excluded from the need to prepare further environmental documentation because, as a class, they do not have significant environmental impacts. With this recommended change NMFS would continue to evaluate the potential environmental impacts of permits, but could conduct this assessment after the close of the comment period on the application, when comments from the public and other agencies could be considered in that assessment.

§ 216.33(d) *Notice of receipt and application review*: Consistent with the proposed changes to § 216.33(c) regarding NEPA, NMFS proposes to revise the requirements for including a NEPA statement in the notice of receipt of an application. Where NMFS believes a permit would be categorically excluded from the need to prepare further environmental documentation, the notice will so state. If that determination is based on information in an existing EA/FONSI or Final EIS, that document will be referenced in the notice and made available simultaneously with the application. When no previous NEPA documentation relevant to the proposed activity is available, the notice will solicit public input on the appropriate level of NEPA documentation concurrent with review of the application. After the close of the

comment period on the application, NMFS would determine the appropriate level of NEPA documentation for the activity, in consideration of comments received, information presented in the application, and the best available information. NMFS' final NEPA determination on a specific application would be published in the **Federal Register** prior to or concurrent with notice of permit issuance or denial pursuant to § 216.33(e).

§ 216.33(e) *Issuance or denial procedures*: Consistent with MMPA section 104(d), the current regulations state that "within 30 days of the close of the public comment period the Office Director will issue or deny a special exception permit." NMFS is considering revising this section to reconcile the ESA section 7 and NEPA compliance timelines with statutory requirements for when permit decisions must be made relative to the close of the comment period. For example, when NMFS determines, subsequent to the public comment period on an application, that issuance of a proposed permit requires preparation of an EA or EIS, processing of the application cannot be completed within 30 days of the close of the comment period. Under the current regulations, NMFS would have to deny the permit because the appropriate NEPA documentation could not be completed in time to support a decision to issue. Rather than deny such permits, NMFS proposes to defer a decision on the application until the appropriate NEPA documentation is completed. Similarly, when formal consultation is required under section 7 of the ESA, which allows 135 days or more for consultation and completion of a Biological Opinion, processing of the application cannot be completed within 30 days of the close of the comment period. Rather than deny such permits, NMFS proposes to defer a decision on the application until the section 7 consultation is completed. In both cases NMFS would publish a notice in the FR within 30 days of the close of the comment period announcing that a decision on the specific application has been deferred pending completion of the appropriate NEPA and ESA section 7 analyses.

§ 216.33(e)(4): For permits involving marine mammals listed as endangered or threatened under the ESA, NMFS is required to determine whether the permit is consistent with the requirements of section 10(d) of the ESA. NMFS would appreciate comments on how to determine whether an applicant has applied for a permit "in good faith" and whether the permit

“will operate to the disadvantage of such endangered or threatened species.”

*§ 216.34 Issuance criteria:* NMFS would appreciate any recommendations on whether or how this section should be clarified or consolidated with other sections. In support of the applicant's demonstration that the proposed activity is humane, NMFS is considering requiring proof of Institutional Animal Care and Use Committee approval of the proposed activity where such approval would be required pursuant to the Animal Welfare Act. Any comments on this would be appreciated.

*§ 216.35 Permit restrictions:* One consideration by NMFS is to provide for only minor amendments to original permits (see § 216.39), not major vs. minor as currently exists, which would require modifying language in this section. Any proposed change resulting in the need for an increased level of take or risk of adverse impact above those authorized in the original permit would no longer be considered under an amendment, and would require a new permit application. Since the current regulatory process for reviewing and issuing major amendments requires a public comment and review period, the time it takes to issue a major amendment is consistent with the time it takes to process a new application. Amendments would be issued that only covered those activities that are currently consistent with a minor amendment. One exception to this would be that proposed changes in location, species, and numbers where no take is involved (e.g., import of parts or specimens legally acquired by a foreign institution) would be a minor amendment. Similarly, NMFS is considering removing the part in § 216.35(b) that provides for a 1 year extension of the original permit. If this change were implemented neither the life of the original permit nor any subsequent amendment would exceed five years from the effective date of the permit. NMFS would appreciate any comments on this recommendation.

The regulations require individuals conducting permitted activities to possess qualifications commensurate with their duties and responsibilities, or be under the direct supervision of a person with such qualifications. NMFS is seeking input on whether it should promulgate regulations specifying minimum standards for such qualifications or specific criteria by which applicants' qualifications and those of other personnel listed in the application could be evaluated.

*§ 216.36 Permit conditions:* NMFS is considering consolidating this section

with other sections of permit regulations (e.g., § 216.35, Permit restrictions) that also contain conditions pertinent to marine mammal permits. NMFS would appreciate any recommendations on how this might best be achieved.

*§ 216.37 Marine mammal parts:* This section of the regulations is the subject of much confusion in interpretation and implementation. This section is similar to the transfer requirements in § 216.22. NMFS is interested in clarifying and consolidating this section with other sections (§§ 216.22 and 216.26) involving the transfer of parts legally taken, such that the same provisions would apply to the subsequent transfer of any marine mammal part that was already legally taken under the MMPA and/or ESA. Should there be different requirements for the transfer of parts legally taken from an ESA-listed versus a non ESA-listed marine mammal? Does there need to be any clarification on how to apply or receive authorization for a transfer, and for determining who can be authorized to receive marine mammal parts and what documentation is required? Are the reporting requirements adequate and necessary, and should they be modified in any way? Does the language in § 216.37(d) regarding export and re-import need to be clarified, and if so, how?

NMFS seeks recommendations for developing regulatory language to streamline and govern the issuance of research permits involving collection, receipt, import, export, and archiving marine mammal parts for future opportunistic research. Currently marine mammal parts taken or obtained under permit may be transferred to another person pursuant to this section of the regulations, but there is no mechanism for facilitating the initial collection of marine mammal parts by institutions for eventual use for research purposes where the bona fide criteria required in section 104(c)(3) of the MMPA cannot be met for each and every part obtained by the institution. We are considering establishing guidelines in this section for determining when such activities would satisfy the bona fide scientific purpose requirement when the purpose of the initial receipt of the part may be unknown. We are also considering establishing standardized documentation and reporting requirements for permits involving marine mammal parts to demonstrate that the parts are taken legally and in a humane manner and that all requirements for applicable domestic and foreign laws have been met regarding importation and exportation.

NMFS is also considering adding to this section requirements and procedures governing the development, use, distribution or transfer, and prohibited sale of cell lines derived from marine mammal tissues. We are also considering similar regulations pertaining to gametes used by the public display industry and research community in assisted reproductive techniques of captive marine mammals. Any recommendations or comments on these topics would be appreciated.

*§ 216.39 Permit amendments:* One consideration already mentioned (in § 216.35) is to provide for only one amendment type, not major vs. minor. This would require consolidating this section considerably. Under this change the language in this section would be consistent with the following:

(a) General. Special exception permits may be amended by the Office Director. Amendments may be made to permits in response to, or independent of, a request from the permit holder. Amendments must be consistent with the Acts and comply with the applicable provisions of this subpart. Special exception permits may be amended by the Office Director without need for further public review or comment.

(1) An amendment means any change to the permit specific conditions under Sec. 216.36(a) provided that the amendment does not result in any of the following:

- (i) An increase in the number and species of marine mammals that are authorized to be taken, imported, exported, or otherwise affected;
- (ii) A change in the manner in which these marine mammals may be taken, imported, exported, or otherwise affected, where such change would result in an increased level of take or risk of adverse impact; and
- (iii) A change in the location(s) in which the marine mammals may be taken, from which they may be imported, and to which they may be exported, as applicable.

(2) A request involving changes to the location, species, and number of marine mammal parts or specimens received, imported, or exported, where no take is involved, would qualify as an amendment.

(b) Amendment requests and proposals.

(1) Requests by a permit holder for an amendment must be submitted in writing and include the following:

- (i) The purpose and nature of the amendment;
- (ii) Information, not previously submitted as part of the permit application or subsequent reports, necessary to determine whether the

amendment satisfies all issuance criteria set forth at Sec. 216.34, and, as appropriate, Sec. 216.41, Sec. 216.42, and Sec. 216.43.

(iii) Any additional information required by the Office Director for purposes of reviewing the proposed amendment.

(2) If an amendment is proposed by the Office Director, the permit holder will be notified of the proposed amendment, together with an explanation.

(c) Review of proposed amendments.

(i) After reviewing all appropriate information, the Office Director will provide the permit holder with written notice of the decision on a proposed or requested amendment, together with an explanation for the decision.

(ii) An amendment will be effective upon a final decision by the Office Director.

*§ 216.40 Penalties and permit sanctions:* NMFS is considering specifying criteria and procedures for the suspension, revocation, modification, and denial of scientific research or enhancement permits, in addition to, but consistent with, the provisions of subpart D of 15 CFR part 904. For example, NMFS is considering promulgating specific regulations for suspension, revocation, modification, and denial of scientific research and enhancement permits for reasons not related to enforcement actions.

*§ 216.41 Permits for scientific research and enhancement:* Should NMFS attempt to streamline, clarify and consolidate this large section with existing general permitting requirements? If so, any specific language toward that end would be considered. One change we are considering is the requirements for public display of marine mammals held under a scientific research permit in § 216.41(c)(1)(vi)(A) such that marine mammals may be on display if necessary to address the research objectives or if authorized by the Office Director, in addition to the existing requirements in § 216.41(c)(1)(vi)(B) and (C). We would appreciate any comments on if this should be changed. We are also considering adding a new section, § 216.41(c)(3), to authorize via an enhancement permit the long-term captive maintenance and incidental public display of ESA-listed species originally obtained under a research or enhancement permit when such activities have been completed or are not able to be carried out and the animals cannot be returned to the wild. Such permits would require that an appropriate educational program is established and approved by Office

Director and that the animals are made available for research or enhancement activities at the request of the Office Director. In addition, if we implemented the General Authorization changes (see § 216.45), then those changes would also apply to this section for non-strategic marine mammals.

*§ 216.42 Photography [Reserved]:* NMFS may propose regulations similar to those for the General Authorization (§ 216.45). We are also considering limiting the number of personnel that may be involved in order to eliminate potential problems with permit holders using such authorization for ecotourism, since the MMPA does not provide exemptions for harassment of marine mammals via ecotourism permits. Any specific recommendations as to what these regulations should or should not include would be considered.

*§ 216.45 General Authorization for Level B harassment for scientific research:* NMFS is considering modifications to this section that would make General Authorizations (GAs) available based on the status of the target stock, rather than strictly based on the level of harassment. The recommended change would make a GA available for all Level A and Level B research on all non-strategic stocks of MMPA species. A GA would also be available for stocks defined as strategic under the MMPA, but only for Level B research activities. Under this suggested change a GA would not be appropriate for Level A research on ESA listed species, or depleted and strategic stocks under the MMPA. A number of paragraphs throughout this section would have to change as a result of this recommendation. This change, prior to implementation, would require a similar change in section 104(c)(3)(C) of the MMPA.

Regardless of whether changes are made to allow the GA to apply to level A harassment, NMFS proposes to modify this section to clarify that the description of methods in the letter of intent must specify the number of marine mammals, by species or stock, that would be taken, including a justification for such sample sizes.

NMFS is also considering revising the terms and conditions of the GA regulations to clarify that any activity conducted incidental to the research, such as commercial or educational filming or photography, would require prior written approval from NMFS, and such activities would be subject to the same conditions as those specified at § 216.41(c)(1)(vii) for scientific research and enhancement permits, i.e., the conduct of such incidental activities must not involve any taking of marine

mammals beyond what is necessary to conduct the research.

*Other considerations:* NMFS is also considering adding new sections to the regulations. One such consideration would place the permit application and amendment process on a cycle. One option would be to accept permit applications and amendment requests quarterly (i.e., during any one of four three-month cycles per year). Applicants would have firmly established deadlines (made known through FR notification, mailings, and web site) to assist them in planning the submission of their application relative to the proposed start of their research. Another option would be to accept applications and amendments only twice a year, during one of two six-month cycles.

One possible disadvantage for applicants under either alternative is that if a submission deadline were missed an applicant would have to wait three (option 1) to six (option 2) additional months for their permit. Applicants are used to requesting amendments at any time. They too would be affected by this modification and a request for an amendment could only happen once a permit cycle. However, a permit cycle ultimately makes receipt of permits predictable and helps researchers plan the submission of their applications with respect to proposed initiation of their work.

For applications to conduct research on non-ESA listed species, NMFS would aim for an average processing time of 90 days such that processing an application submitted by the deadline for one cycle could be completed by the end of the next cycle (three months later). Another advantage to this is that the average processing time of applications involving ESA-listed marine mammal species would likely be reduced because we would be able to conduct batched consultations and analyses under the ESA and NEPA. In cases where programmatic NEPA documents and corresponding ESA section 7 consultations have been completed, an average processing time of 90 to 120 days could be possible for those research activities covered by the documents.

#### Public Involvement

NMFS invites the public to submit comments on the current regulations, recommended changes to the current regulations that might be considered in a new set of proposed regulations, and any relevant issues pertaining to the permitting process that might be considered as part of future proposed

rulemaking. Be as specific as possible including providing draft language if appropriate. NMFS does not intend to convene public meetings under this ANPR. Comments and

recommendations received under this ANPR will be reviewed as part of a proposed rulemaking which will be the next step in this regulatory process.

Dated: September 7, 2007.

**Samuel D. Rauch III,**

*Deputy Assistant Administrator for  
Regulatory Programs, National Marine  
Fisheries Service.*

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