

**DEPARTMENT OF COMMERCE****National Oceanic and Atmospheric Administration****15 CFR Part 902****50 CFR Parts 216 and 222**

[Docket No. 960419116-6116-01; I.D. 122492C]

RIN 0648-AD11

**Marine Mammal Special Exception Permits to Take, Import and Export Marine Mammals; Update of Office of Management and Budget (OMB) Approval Numbers**

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

**ACTION:** Final rule.

**SUMMARY:** This final rule updates and consolidates the regulations for special exception permits to: Take, import, export, or carry out any other otherwise prohibited act involving marine mammals for the purposes of scientific research, enhancing the survival or recovery of a marine mammal species or stock (enhancement), educational and commercial photography, and public display under the Marine Mammal Protection Act of 1972 (MMPA); take, import, export or carry out any other otherwise prohibited act concerning endangered or threatened marine mammals for scientific purposes or enhancement under the Endangered Species Act of 1973 (ESA); and, determine the status and disposition of rehabilitated stranded marine mammals. This rule sets forth revised procedures for these permits in order to make administration of the NMFS marine mammal permit program more efficient, consistent, and predictable.

This rule also updates OMB Paperwork Reduction Act approval numbers for applications and reports for special exception permits.

**EFFECTIVE DATE:** This final rule is effective June 10, 1996.

**ADDRESSES:** National Marine Fisheries Service, (F/PR1), 1315 East-West Highway, Silver Spring, MD 20910.

**FOR FURTHER INFORMATION CONTACT:** Laurel Bryant or Ann Terbush, Permits Division, Office of Protected Resources, 301/713-2289.

**SUPPLEMENTARY INFORMATION:****Purpose**

A proposed rule was published (58 FR 53320, October 14, 1993) to consolidate into a single set of regulations all

permitting requirements under the MMPA, the ESA, and the Fur Seal Act (FSA) to take, import, or export all protected species under the NMFS jurisdiction for purposes of scientific research or enhancement, and public display, and to provide clear procedures for the disposition of rehabilitated stranded marine mammals.

In contrast, this final rule implements only a part of that proposed rule; namely, it establishes basic permit requirements applicable to all permits to take, import and export marine mammals and marine mammal parts for purposes of scientific research and enhancement, photography, and public display (for captures and initial imports) under the MMPA; provides additional permit criteria specific to scientific research and enhancement only; and establishes clarified administrative procedures for determining the releasability or non-releasability of rehabilitated stranded marine mammals and their disposition.

**Scope**

This notice responds to the comments and the final rule incorporates a number of the changes recommended by commenters. In addition, the rule implements certain statutory changes made to the MMPA by the MMPA Amendments of 1994 (1994 Amendments) (Public Law 103-238) enacted on April 30, 1994.

*Photography and public display.* Not included in this final rule are the additional requirements specific to photography or public display established by the 1994 Amendments. The 1994 Amendments included significant changes regarding these activities. Accordingly, NMFS will publish separate proposed rules for public comment for these areas.

*ESA species.* It is important to note that this final rule applies to the issuance of special exception permits under both the MMPA and ESA for species of marine mammals only. However, activities involving species other than marine mammals that are protected under the ESA will continue to require a permit issued under separate ESA regulations.

**History**

*The 1993 proposed rule.* The proposed rule proposed to amend and consolidate permit regulations under the FSA, MMPA and the ESA to facilitate "one-stop shopping" for the issuance of permits to take "protected species" (including species that are depleted under the MMPA, and threatened and endangered under the ESA) for purposes of scientific research,

enhancement and public display. The proposed rule was also designed to establish permit conditions capable of addressing the various circumstances that had evolved over two decades of issuing permits to take marine mammals. For example, although photography of marine mammals in the wild is a common source of research and educational information, the MMPA did not provide an exception for such an activity. The 1993 proposed rule attempted to facilitate research related photography under statutory provisions for bona fide scientific research and enhancement activities, while at the same time guarding against the use of research permits for commercial activities, which had become a growing concern. However, comments received on the proposed rule were critical of these provisions as being too restrictive and bureaucratic. The new authority to issue permits for educational and commercial photography provided by the 1994 Amendments eliminates the need for addressing photography in much detail under scientific research permits.

The proposed rule was originally open for public comment for a 60-day period. A number of focused briefings on the proposed rule were held for a variety of interested parties, including Congress, various groups directly affected by the regulations, and the public. In addition, NMFS held three regional public hearings: Silver Spring, MD on December 3; Oakland, CA on December 6; and Chicago, IL on December 8. A combined total of 53 oral and written testimonies was submitted for the record through the public hearing process. Due to the level of interest expressed, NMFS extended the public comment period for an additional 30 days, closing on January 28, 1994. In addition, a transcribed question and answer session was held with certain representatives of the public display industry at their request. A total of 187 comments were received from individuals and organizations representing the scientific research community, public display industry, and conservation and animal protection interests. A discussion of and response to those comments is detailed below.

*The 1994 Amendments.* The 1994 Amendments substantially revised the MMPA. The statutory changes to the MMPA that impact this final rule include: Statutorily defining the term harassment; providing a General Authorization for bona fide research involving only Level B harassment; waiving the public comment process for research permits to be issued under emergency situations; eliminating the

statutory restriction against duplication of scientific research projects; statutorily providing for the issuance of permits for purposes of educational and commercial photography; and substantial changes to the public display provisions of the Act, eliminating the basis for many of the provisions that had been included in the proposed rule.

*Response to 1993 Comments and Discussion of 1994 Amendments.* Many commenters found the scope and organization of the proposed rule to be confusing, arguing that they had difficulty determining which regulations applied to their expressed interest.

*Organization.* In the proposed rule, each regulatory section was subdivided into four categories: General (i.e., basic requirements applicable to all permits), Public display, Scientific research, and Enhancement. This required a reviewer to identify within each section, both the basic permit requirements and the requirements particular to their area of interest.

In response, these final regulations have been significantly reorganized by removing non-statutory general conditions and reporting requirements from regulatory text; listing requirements basic to all permits in §§ 216.33 through 216.40 (i.e., application procedures, issuance criteria, permit restrictions, conditions, reporting requirements, amendment procedures, and penalties); and providing the additional requirements applicable to each special exception purpose in separately identified sections (i.e., § 216.41 contains the additional requirements for Scientific Research). The table of contents has been revised to include identification of sections reserved for future photography and public display regulations.

A number of comments questioned why the proposed rule would amend the Pribilof Islands and northern fur seal regulations issued under the FSA (part 215). These regulations were included to reduce regulatory burden and confusion by consolidating, under the MMPA, the requirements contained under the FSA regarding the take, transportation, importation, exportation or possession of fur seals or their parts for educational, scientific or exhibition purposes. However, these changes to part 215 were included in the interim final rule for the General Authorization for bona fide scientific research (59 FR 50372 October 3, 1994) and are, therefore, not included with this final rule.

*Disruption as a part of harassment.* The proposed definition of harass drew general criticism over its inclusion of

the term disruption. Commenters argued that, combined with the 1993 proposed appendix of approach guidelines and reporting requirements, inclusion of the term would create too much bureaucratic burden, over-reporting of takes, and stifle scientific research. Commenters also expressed concern that NMFS would not enforce the moratorium on taking against someone unintentionally harassing a marine mammal. Members of the public disrupting sea lions hauled-out at a public wharf were cited as an example. Although commenters did not believe NMFS would institute enforcement actions for such incidents of unintentional harassment, or that it was the intent of Congress to focus on such incidents, they were concerned that NMFS might impose a higher standard on researchers. The 1994 Amendments defined harassment, and it is that definition that is included in this rule (see § 216.3 Definitions).

*Approach guidelines (Appendix B).* In view of the statutory changes defining harassment, and in response to the comments, NMFS has eliminated the Appendix B listing of approach guidelines and will instead refer applicants to the appropriate regional office(s) to receive any approach guidelines developed for the species of marine mammals specific to that region.

*Reporting.* Comments were generally critical of the reporting requirements regarding scientific research, arguing that the detail requested on behavioral responses was excessive, and the amount of data requested could compromise a researcher's "stock-in-trade" by forcing public documentation of data and information before it could be synthesized into published material.

In conjunction with the previous discussion, NMFS points out that a recurring theme throughout the history of issuing permits for the harassment of marine mammals has been the need for objective standards for identifying stressful responses in marine mammals to activities and closeness of approach which harass them. Such standards would prove valuable in facilitating better management practices in the wild and controlling against activities which may be detrimental to individual marine mammals or their stocks. In an effort to maintain this aspect of the reporting requirements while at the same time easing burdens, the reporting requirements have been made more flexible by emphasizing summaries of information and researcher discretion for determining "noteworthy" behavioral responses.

*General take category.* Many comments expressed support for a

general take category allowing for routine, non-invasive harassment for purposes of scientific research, photography and whale watching.

The 1994 Amendments defined harassment and divided such takes into two levels of impact: Level A harassment has the potential to injure, and Level B harassment has only the potential to disturb (§ 216.3 Definitions). Bona fide scientific research projects which do not exceed Level B harassment on species not listed under the ESA are eligible for authorization under the new General Authorization category. This authorization is a streamlined process without public comment for low levels of harassment (Level B). A final rule based on comments received on the interim final rule (59 FR 50372, October 3, 1994) implementing the General Authorization now in effect, will be published separately in the Federal Register. The new permit category to harass marine mammals in the wild for purposes of educational and commercial photography also will allow only Level B harassment. A proposed rule for photography permits will be published in the Federal Register at a later date.

With regard to whale watching, there is no statutory exception provided for observational cruise activities, however, such activities can be conducted carefully without harassing marine mammals. Therefore, NMFS will continue to inform prospective vessel operators of guidelines to follow in an effort to avoid harassment.

*Fees.* A great deal of controversy was generated by NMFS' proposal to increase the fees for processing permits. Comments ranged from perceiving these fees as intentionally punitive against various permitted activities, to detailed suggestions for tiering the fees based on the type of permit, the level of staff review involved, and the financial disposition of the applicant.

In view of the significant changes made to the public display provisions of the statute, the nominal fees associated with scientific research, and a complete absence of any likely consensus on the subject of scientific research fees, NMFS has eliminated the proposed fee structure. This issue may be reconsidered at some time in the future. In the interim, no fee will be charged for these special exception permits.

*Ethics of captivity.* Many comments discussed the ethics of captivity, questioning the practice of holding marine mammals for public display and suggesting that a ban be placed on all captivity.

Since the passage of the MMPA in 1972, Congress has recognized the

public display of marine mammals as an exception to the moratorium on taking. Congress continued to recognize public display in the 1994 Amendments by continuing to provide for this activity in statute, and increasing significantly the authority and discretion of the public display industry over the marine mammals they hold.

*Appendix A and C.* As proposed in 1993, an Appendix A was provided for listing the activities that would require a special exception permit. In addition, an Appendix C provided the application information anticipated for special exception permits. Due to the controversy generated by the proposed scale of fees and the corresponding activities listed in Appendix A, NMFS has eliminated Appendix A. NMFS has also eliminated Appendix C and on request will provide application instructions for each permit category.

*Bona fide scientific research (§ 216.3).* A number of comments were critical of the proposed definition of bona fide scientific research, arguing that it extended unlimited discretion to NMFS for determining what was bona fide. The definition in the 1994 Amendments closely parallels the definition in the proposed rule. In practice, NMFS expects that the definition provides flexibility to an applicant rather than unlimited discretion to the agency.

*Custody (§ 216.3).* In response to comments on the proposed definition, and in consideration of the extensive changes to the public display provisions by the 1994 Amendments, the definition of custody has been simplified.

*Humane (§ 216.3).* Several comments were critical of the proposed definition of humane, arguing that the definitions utilized by the National Institutes of Health or American Veterinary Medicine Association should be adopted instead. In response, NMFS points out that the definition is essentially identical to the definition in the statute.

*Interactive program (§ 216.3).* A number of comments expressed a range of concerns over the definition of interactive program. Some commenters stated that NMFS had no authority over these activities, while others urged the elimination of therapeutic swim programs due to lack of bona fide scientific research criteria. The 1994 Amendments eliminated MMPA's jurisdiction over these public display captive care and maintenance issues, eliminating the need to define interactive program.

*Public display (§ 216.3).* A number of comments criticized the proposed definition of public display for being at odds with the MMPA and in violation

of First Amendment rights by including the requirement for educational and conservation programs as part of the definition. It was suggested that the proposed definition parallel that contained in statute.

There is no definition of public display contained in the statute. Rather, prior to the 1994 Amendments, public display was referred to in the context of issuing a permit for public display to an applicant which offers a program for education or conservation purposes that, based on professionally recognized standards of the public display community, is acceptable to the Secretary of Commerce (Secretary). In keeping with this reference, NMFS included in the proposed rule reference of these programs as part of the definition.

The 1994 Amendments eliminated the requirement that public display education and conservation programs be acceptable to the Secretary. Public display education and conservation programs are now only subject to self-regulation. Accordingly, reference to education and conservation programs has been eliminated from the definition.

*Initial review process (§ 216.33(c)).* A number of comments were critical of the initial review process, arguing that it provided NMFS an opportunity to reject a permit application before receiving the benefit of public comment. The purpose of the initial review is to ensure that an application is appropriate, valid, and complete prior to its publication for public review. Premature publication without benefit of such determination could expose the applicant and agency to unnecessary administrative burdens, delays, and public confusion.

*Adequate EA/EIS information (§ 216.33(c)).* Several comments expressed confusion over the requirement that an applicant submit sufficient information to enable NMFS to determine whether the proposed activity will be categorically excluded from further environmental documentation under the National Environmental Policy Act of 1969 (NEPA).

NEPA applies to federally approved, initiated, or funded activities that impact the human environment. As such, it is necessary to retain this requirement of applicants in order to comply with NEPA. In an effort to provide regulatory "one-stop-shopping", NMFS is making every effort to include up front all requirements and provisions mandated by statute. Compliance with NEPA is a critical component of that process. As in the past, NMFS will make every effort to assist an applicant with NEPA

compliance. Nevertheless, it is the responsibility of the applicant to consider the potential impacts of its proposed activity and provide the necessary information accordingly.

*Marine Mammal Commission's (MMC) failure to comment (§ 216.33(d)).*

Many comments were critical of the provision which would regard the MMC's failure to comment on an application as a recommendation to deny the permit. It was suggested that the failure to comment by the MMC should be regarded as a recommendation to issue, and that recommendations to deny a permit be available for review by the applicant.

NMFS believes it would be inappropriate to default a no-comment to a recommendation status. However, in the same vein, NMFS recognizes the unfairness of defaulting to a denial status. In response, the recommendation to deny has been replaced with "no objection to issuance" (§ 216.33(d)(2)). With regard to comments received from the MMC on permit applications, these are a matter of public record and have always been available to anyone interested in reviewing them.

*Duplication.* Several comments criticized proposed language controlling against unnecessary duplication of scientific research projects, pointing out that duplication is an important aspect of investigating the soundness of a hypothesis. This language was a direct implementation of statutory language which specified scientific research to "not involve unnecessary duplication of research."

The 1994 Amendments struck from the statute the language restricting unnecessary duplication. Therefore, duplication is no longer a regulatory matter except as it relates to whether a proposed activity is bona fide scientific research, and the need to monitor against the cumulative impact of activities with the potential to exceed Level B harassment (§ 216.34(a)(4)).

*Notarized copy (§ 216.35(j)).* A number of comments were critical over the requirement that an original or notarized copy of the special exception permit be in the possession of the permit holder during the time of the authorized special exception activity. This provision was argued as unnecessary and too restrictive. In reconsidering the value of this provision for purposes of enforcement against fraud, NMFS has determined that an original or a copy of an original will satisfy the intent behind this requirement and has revised the provision accordingly.

*Import and export (§ 216.37).* A number of comments were critical of the

provisions for regulating the import and export of marine mammal parts for scientific research, claiming that they were too bureaucratic and would stifle activities such as research and education. In addition, there was concern expressed over lost research opportunities and information due to the prohibition against importing marine mammal parts which resulted from a lethal activity otherwise prohibited under the Act (§ 216.41(c)(1)(v)).

As originally mandated in 1972, the restriction against the import and export of marine mammal parts was designed to prevent the development of commercial markets for marine mammal parts or products derived therefrom. However, the circumstances of bona fide scientific research involving import and export of marine mammal parts are varied, making clarity in regulations difficult. In addition, previously only the export of ESA listed species and parts was prohibited. The 1994 Amendments extended this prohibition to all marine mammals and marine mammal parts, except for the export of living marine mammals for purposes of public display.

In response, NMFS has made every effort to implement the intent of the law without creating undue burden against scientific research activities by ensuring that adequate documentation is provided for a part's acquisition, location and possession. Flexibility has also been provided at the sole discretion of the Office Director regarding importation of parts for bona fide scientific research that may have resulted from prohibited activities. For example, as a general rule it is illegal to import parts that have been taken in violation of domestic and foreign law. However, acknowledging the research value of some of these parts, the Office Director may authorize their importation for bona fide scientific research purposes.

*Major and minor amendments (§ 216.39).* Some confusion was expressed over the need to maintain a distinction between major and minor amendments, suggesting that all amendments be treated as major amendments, thereby reducing the confusion over the two terms. In response, NMFS believes that not all amendments should be required to go through a public review process, and that only those amendments that change elements of a permit which are statutorily highlighted as fundamental permit terms and conditions should be subject to public review (i.e., changes in: the number and species of marine mammals affected; the manner in which

they are taken; the location; and the period of time the permit is valid). Other changes (i.e., minor amendments) are most appropriately addressed on a case-by-case basis between the permit holder and the Office Director without additional opportunity for public comment. Consistent with this policy, comments received, and in keeping with current administration of the program, the process for a hearing on a minor amendment as outlined in the proposed rule has been eliminated from this rule.

*Lethal take as critically important (§ 216.41(b)(2)).* Several commenters criticized the use of the phrase "critically important research need" as being too ambiguous a requirement for research results involving lethal take. In response, NMFS notes that this language is taken directly from the statute, which remains unchanged by the 1994 Amendments.

*Publication of research results (§ 216.41(c)(1)(ii)).* A number of commenters expressed concern over the requirement that research results be published within a "reasonable period of time", questioning what the agency would define as reasonable. In response, it would be arbitrary and impractical to define in advance what would constitute a reasonable period of time applicable to all circumstances. As such, NMFS has retained this requirement as a necessary characteristic of bona fide scientific research and would argue that by not defining what is reasonable the regulations provide adequate flexibility and deference to the researcher. In addition, Congress also recognized publication and availability of research results as necessary characteristics of bona fide scientific research by including these parameters in the new statutory definition of bona fide research (§ 216.3).

*Personnel experience and direct supervision (§§ 216.35(f)-(g) and 216.41(c)).* A number of comments expressed criticism of the requirements that all personnel conducting permitted activities under the authority of a scientific research permit must be directly supportive of and necessary for the permitted research activity. It was argued that this was a matter of internal personnel management and not an issue of regulatory concern. In addition, several commenters argued against the requirement that activities be conducted under the direct supervision of the principal investigator or a co-investigator, finding this to be too restrictive.

In response, permits are issued based in significant part on the determination that the proposed activity is to be

conducted by qualified individuals capable of accomplishing the activity, in this case bona fide scientific research. Much of that determination is necessarily based on the qualifications of the applicant, principal investigator (PI), co-investigator(s) and any supportive personnel listed to conduct work under the terms of the permit. As such, NMFS has retained this language and would note that discretion over personnel matters is left entirely to the applicant.

Direct supervision over permitted activities by the PI or a co-investigator has been retained by NMFS as a necessary requirement (§ 216.41(c)(1)(iii)). In the past, inexperienced personnel have conducted permitted activities involving the take, import or export of marine mammals without direct supervision and left a project vulnerable to criticism and litigation.

It is important and reasonable to presume that the PI or a co-investigator will be directly involved in the activity authorized under a permit. However, this requirement should in no way be construed as a "draconian effort" to force critical research personnel to supervise the most routine of functions. Rather, it is intended to ensure the integrity of a bona fide research permit and the activities it has authorized. Qualified individuals may be designated in the permit as co-investigators to conduct, or directly supervise the conduct of, the taking, import and export activities authorized under a permit, but the PI is ultimately responsible for all such activities. To ensure that the roles and responsibilities of the PI and co-investigator(s) are clearly understood, definitions for both of these terms have been added (see § 216.3).

*Prohibiting public display of marine mammals held for research (§ 216.41(c)(1)(vi)).* A number of comments expressed concern over restricting the public display of marine mammals held for scientific research. Some comments identified specific instances in which research facilities display their marine mammals as a means of educating the public about the research and receiving donations for financial support of research projects.

As scientific research and public display are recognized by statute as two separate activities, NMFS has retained this restriction as a necessary distinction between these activities. However, in response to concerns over the public viewing of marine mammals involved with research projects, the regulatory exceptions to this restriction clearly provide adequate flexibility to

allow such activities, under appropriate conditions, to occur under a scientific research permit.

**Marketable products** (§ 216.41(c)(1)(vii)). One of the more contentious areas of comment was the prohibition against the commercial sale of products derived from activities conducted under a scientific research permit. Concern was primarily expressed by commercial entities specializing in photographic coverage of research. In addition, many criticized the proposed definition of marketable product as beyond the jurisdiction of NMFS.

The proposed rule was in part driven by increasing reports and concerns about abuse of the scientific research permit system for commercial purposes. Although NMFS recognized the educational and scientific value of photographic coverage of marine mammals in conjunction with research, scientific research permits had, in some instances, been exploited for commercial purposes.

The 1994 Amendments acknowledged the need to provide for photographic activities in a controlled manner by permitting low levels of harassment of marine mammals for the purposes of commercial and educational photography. This new provision eliminated the need for much of the restrictive language included in the proposed rule for scientific research as well as for the need to define marketable product.

**Permit conditions and reporting requirements.** The regulatory text establishes permit-specific conditions and restrictions. By contrast, non-statutory general permit conditions and reporting requirements have been eliminated from the regulatory text. As a general rule, these general conditions and reporting requirements tend to vary given the nature of the permitted activity. Elimination of the permit conditions and reporting requirements provides NMFS with greater flexibility, allowing it to incorporate only those conditions and requirements that are appropriate to the permit. Appropriate general conditions and reporting requirements will be incorporated into the permit itself, and must be adhered to along with all other terms and conditions.

Most of the general conditions and reporting requirements that may be incorporated into a permit issued under this subpart, appear below. Additionally, these conditions and requirements may also be obtained from NMFS upon request (see **ADDRESSES**).

#### Conditions and Reporting Requirements for All Permits Conditions

1. The permit holder shall provide the Director (Regional Director) written notice of the date, time, and port at least one week in advance of any import or export, unless this notice is waived by the Regional Director in writing in advance.

2. The permit holder shall not, in interstate or foreign commerce, deliver, receive, carry, transport, ship, purchase, or sell, or attempt any of the same, any threatened or endangered marine mammal species acquired under this subpart except with the prior approval of the Office Director and subject to any conditions the Office Director may prescribe.

3. Upon request by the Office Director, the permit holder shall allow any employee of NOAA or any other person designated by the Office Director to inspect or observe the permit holder's records, facilities, marine mammals, marine mammal parts, and activities, and shall provide all additional information related to any inspection.

4. If activities authorized under a special exception permit have adverse unforeseen effects on the ecosystem of which marine mammals are a part, the permit holder must suspend permitted activities and notify the Regional Director, and, if marine mammals are involved, the Office Director, of the circumstances and any relevant observations and recommendations. The permit holder shall not continue such permitted activities until specifically authorized by the Regional Director or, if marine mammals are involved, the Office Director.

5. The Permit holder must immediately cease all permitted activities if so required by the Office Director on the basis of new information that demonstrates that the permitted activities may have an adverse effect on individual marine mammals, on the species or stock, or on the marine ecosystem, that was not anticipated at the time of permit issuance. Permitted activities may be resumed by the permit holder only upon specific authorization by the Office Director, and subject to any terms or conditions that the Office Director determines necessary, consistent with the provisions of 216.35.

6. The permit holder shall participate in a cooperative endangered and threatened marine mammal breeding program if requested by the Office Director.

7. When animal-specific information for live import or capture is not available at the time of permit issuance,

the permit holder must request authorization by the Office Director prior to importing or initiating a capture activity for long-term or permanent captive maintenance (i.e., other than short-term capture and release) of a living marine mammal. The permit holder must:

i. Request authorization to import or capture at least 30 days prior to the proposed importation or capture date;

ii. Provide the proposed dates and, for imports, country of origin, port of entry, description of the marine mammals to be imported, and, for captures, the location of the capture and associated taking;

iii. Identify the proposed method, including, but not limited to, a detailed description of the containers/devices to be used and any special care required, modes (i.e., aircraft, truck, other), duration (including any transfer points), and date of transport, and the attending veterinarian, or authorized support personnel of the permit holder knowledgeable in the area of marine mammal care for the species concerned, who will accompany the marine mammal; and

iv. Provide a license and or registration issued by the Animal and Plant Health Inspection Service; a certification, to the satisfaction of the Office Director, that all applicable standards under the Animal Welfare Act will be complied with, and that any violations of those standards have been resolved and any required corrective actions taken, or will be within a period specified by the Office Director; and a certification from the responsible veterinarian that the transport will be conducted in compliance with the applicable standards of the Animal Welfare Act.

#### Reporting

1. **Annual reports.** All permit holders shall file written annual reports with the Office Director. Annual reports shall provide information requested by the Office Director, and shall be filed on the date set forth in the permit. At the discretion of the Office Director, the reporting deadline may coincide with the end of the permit holder's fiscal year or research season.

2. **Special reports.** Special reports include but are not limited to:

a. **Live captures.** Where the permit authorizes a capture from the wild, the permit holder shall submit a written live capture report to the Office Director within 30 days of capture. The report shall set forth the time and specific location (i.e., latitude/longitude) of the capture, the number of marine mammals chased or detained incidental to

capture, and any deaths, injuries or complications that arose in connection with capture. For each marine mammal listed, the report must set forth the animal's size, age, sex, and reproductive condition.

b. *Lethal take.* Where a lethal take is authorized under the permit, the permit holder shall submit a written report to the Office Director within 30 days of the authorized lethal take. Where an actual or presumed lethal take occurs inadvertent or incidental to permitted activities, the permit holder shall notify the Office Director within 12 hours of the lethal take, or within 12 hours of return to port if the taking occurred at sea. This lethal take report or notification, as applicable, shall set forth the date, time, location, number, and, to the extent possible, age/size, sex, and reproductive condition of each animal killed. For inadvertent or incidental mortalities, notification shall also include the circumstances accompanying the incident and all actions taken to reduce the potential for future occurrences. A necropsy must be conducted and a report submitted if required by the Office Director.

c. *Initial importation of marine mammal parts.* Within 30 days of the initial importation of any marine mammal part, the permit holder shall submit a written report to the Office Director. The report shall include a description of the part and the unique number assigned to the part.

d. *Transfer, export or re-importation of marine mammal parts.* The permit holder shall provide written notification to the Regional Director within 30 days after any transfer, export, or re-import of a marine mammal part. Notification shall include: A description of the part and unique number; the person to whom the part was transferred, exported or reimported and, if applicable, the recipient's permit number; the purpose of the transfer, export or reimport; and, for transfers, certification that the recipient has agreed to comply with the requirements of § 216.37(a) for subsequent transfers.

e. *Other.* If the permit holder observes an unexpected event that may pose a significant adverse affect upon the health or welfare of a living marine mammal species subject to the permit, or the marine ecosystem of which they are a part, the permit holder shall submit a brief written report to the Office Director describing the circumstances concerned and all relevant observations or recommendations.

#### Additional Scientific Research and Enhancement Conditions and Reporting Requirements

##### *Conditions*

In addition to those conditions detailed above, scientific research and enhancement permits are subject to the following conditions:

1. Unless approved by the Office Director, the PI and co-investigators identified in the permit shall not be changed. A request to change a co-investigator listed under the permit must be submitted by the permit holder and include a description of the activity to be conducted by the proposed co-investigator, the manner in which such activity is a part of the permitted activity, and information regarding the proposed co-investigator equivalent to that required for the PI in an initial application.

2. The transfer and transport of marine mammals held for purposes of scientific research or enhancement must be authorized by NMFS.

##### *Reporting*

In addition to the reporting requirements detailed above, scientific research and enhancement permits are subject to the following reporting requirements:

1. *Annual reports.* For scientific research and enhancement permits, the annual report also shall include the following information:

a. To the extent practicable, for each marine mammal taken, imported, exported, or otherwise affected pursuant to permitted activities: The species, age, size, sex, and reproductive condition of the animal; the date, location, and manner of taking, import, or export; and for tagged animals, the dates each animal was tagged and tracked;

b. For each marine mammal part taken, imported, exported or otherwise affected pursuant to permitted activities, a description of the part and its assigned identification number;

c. The personnel and vessels involved in the conduct of the permitted research or enhancement and their respective functions;

d. For each marine mammal placed on public display: The name and location of the display facility; and the number of days the animal was displayed; and

e. A summary of all research and enhancement activities conducted during the past year.

2. *Final reports.* Scientific research and enhancement permit holders shall submit a final report to the Office Director within 180 days of the last annual report. The final report shall include:

a. A summary of all research or enhancement objectives, hypotheses, and testing (including methodology).

b. A summary of results and the manner in which such results relate to the research or enhancement objectives;

c. Where the authorized take, import, export or other activity involves a species or stock designated, or proposed to be designated, as depleted, endangered or threatened, an assessment of whether and how the scientific research or enhancement activity contributed to the achievement of any recovery objectives established for the species or stock.

d. For scientific research: An indication of where and when the research findings will be published or otherwise made available to the public or scientific community;

e. For enhancement: A description of the manner in which the enhancement program contributed significantly to maintaining or increasing distribution or abundance, enhanced the health or welfare of the species or stock, or was necessary to ensure the survival or recovery of the affected species or stock in the wild; and an assessment of the need for additional enhancement, along with specific recommendations;

f. Where marine mammals designated as depleted, endangered, or threatened are held captive under an enhancement permit, the report shall describe the manner in which the captive maintenance has contributed directly to the survival or recovery of the species or stock; and

g. A description of the disposition of any marine mammal parts, including an identification of the part as required in § 216.37(a)(4) and the manner of disposition.

3. *Special reports.* Information on marine mammals held captive must be submitted for purposes of the Marine Mammal Inventory. Such information includes animal-specific data when animals are initially obtained, and subsequent updates to be submitted for any changes in the captive holding status (i.e., animal identification, sex, estimated or actual birth date, date of acquisition or disposition by the permit holder, source of acquisition including location of the take from the wild if applicable, name of recipient if animal is transferred, notation if animal was acquired as the result of a stranding, date and cause of death, and prior notification of any sale, purchase, export, or transport). At the request of the Office Director, a necropsy report shall be submitted following report of a death.

**Classification**

NMFS prepared an Environmental Assessment (EA) for the 1993 proposed rule and concluded that this final rule will not significantly affect the human environment. Therefore, preparation of an Environmental Impact Statement on this action is not required by section 102(2) of NEPA or its implementing regulations. Copies of the EA remain available on request (see ADDRESSES). NEPA requirements as they pertain to individual permits that may be issued under these proposed regulations will be addressed on a case-by-case basis.

This final rule has been determined to be not significant for purposes of E.O. 12866 and is consistent with the President's Regulatory Reform Initiative to reduce regulatory burden on the public. This rule clarifies current permitting procedures that were found not significant during the proposed stage.

In accordance with the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*), an Initial Regulatory Flexibility Analysis (IRFA) was prepared and NMFS solicited comments in the proposed rule on the economic impacts to small business entities (available upon request (see ADDRESSES)). The IRFA determined that the projected economic impact of the proposed revisions on affected small business entities would be primarily administrative, a combination of paperwork burden costs, permit fees (some of which would be greater than the fees under current permit regulations), and the proposed requirement of a surety bond for the care, maintenance, and disposition of captive marine mammals. NMFS believed that it was unlikely that significant economic impact would result from the requirements of the proposed regulations beyond the economic impacts associated with paperwork requirements, associated permit administration, and similar requirements imposed under existing regulations. However, sufficient financial and economic data was not available for NMFS to conduct an in-depth economic analysis, particularly in regards to the permit fees and surety bond requirement. NMFS sought comments on the anticipated economic effects during the public comment period. The comments submitted in response to this request addressed public display activities exclusively, which have been eliminated from this rule.

Due to statutory changes made by Congress in the 1994 Amendments, significant portions of the proposed rule have been eliminated, including the

collection of permit fees and the proposed requirement for surety bonds. In addition, activities involving the issuance of permits for purposes of public display were significantly reduced by the 1994 Amendments, further reducing any economic impact associated with paperwork costs contained in this final rule.

As a result, the impact of this final rule on small business entities is primarily in the form of paperwork burdens. Paperwork requirements include permit applications and reports, which may be annual, special, and/or final. The projected economic impact on small business entities as a result of the paperwork requirements was estimated in the IRFA as a total of \$123,260 annually for a universe of 462 entities, or about \$267.00 per entity, an amount not significant for purposes of the Regulatory Flexibility Act. Accordingly, the Assistant General Counsel for Legislation and Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this rule would not have a significant economic impact on a substantial number of small entities. As a result, a Final Regulatory Flexibility Analysis was not prepared.

This rule contains collections of information subject to the Paperwork Reduction Act. The collection of this information has been approved by the Office of Management and Budget for special exception permits, OMB Control Number 0648-0084. The public burden for collection of this information is estimated to average 29 hours per response for permit applications and major amendment requests, 3 hours for minor amendments and authorization requests, and an average of 8 hours per response for various reporting requirements that range from 12 hours for scientific research annual reports to 2 hours for necropsies.

Notwithstanding any other provision of law, no person is required to respond to nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act unless that collection of information displays a currently valid OMB Control Number.

NMFS has determined that these final regulations do not directly affect the coastal zone of any state with an approved coastal zone management program.

Under NOAA Administrative Order 205-11, 7.01, dated December 17, 1990, the Under Secretary for Oceans and Atmosphere has delegated to the Assistant Administrator for Fisheries,

NOAA, the authority to sign material for publication in the Federal Register.

**List of Subjects**

*15 CFR Part 902*

Reporting and recordkeeping requirements.

*50 CFR Part 216*

Administrative practice and procedure, Exports, Imports, Indians, Marine mammals, Penalties, Reporting and recordkeeping requirements, Transportation.

*50 CFR Part 222*

Administrative practice and procedure, Endangered and threatened species, Exports, Imports, Reporting and recordkeeping requirements, Transportation.

Dated: May 6, 1996.

Gary Matlock,

*Program Management Officer, National Marine Fisheries Service.*

For reasons set out in the preamble, 15 CFR chapter IX and, under the authority of 16 U.S.C. 1361 *et seq.*, 50 CFR chapter II are amended as follows:

**15 CFR CHAPTER IX**

**PART 902—NOAA INFORMATION COLLECTION REQUIREMENTS UNDER THE PAPERWORK REDUCTION ACT: OMB CONTROL NUMBERS**

1. The authority citation for part 902 continues to read as follows:

Authority: 44 U.S.C. 3501 *et seq.*

2. In § 902.1, paragraph (b) the table is amended by removing in the left column under 50 CFR, the entries "216.24(d)", "216.31", and "222.23", and in the right column, in corresponding positions, the control numbers; and by adding, in numerical order, the following entries to read as follows:

**§ 902.1 OMB control numbers assigned pursuant to the Paperwork Reduction Act.**

\* \* \* \* \*  
(b) \* \* \*

CFR part or section where the information collection requirement is located	Current OMB control number (all numbers begin with 0648-)
50 CFR:	
* * * * *	* * * * *
216.24(d) .....	-0099 and -0217
* * * * *	* * * * *
216.27 .....	-0084
216.37 .....	-0084



CFR part or section where the information collection requirement is located	Current OMB control number (all numbers begin with 0648-)
216.38 .....	-0084
216.39 .....	-0084
216.41 .....	-0084
* * *	* * *

**50 CFR CHAPTER II**

**PART 216—REGULATIONS GOVERNING THE TAKING AND IMPORTING OF MARINE MAMMALS**

3. The authority citation for part 216 continues to read as follows:

Authority: 16 U.S.C. 1361 *et seq.*, unless otherwise noted.

4. In § 216.3, definitions for “Co-investigator”, “Custody”, “Facility”, “Humane”, “Intrusive research”, “Principal investigator”, “Public display”, and “Rehabilitation” are added in alphabetical order, and the definition of “Soft part” is revised to read as follows:

**§ 216.3 Definitions.**

\* \* \* \* \*

*Co-investigator* means the on-site representative of a principal investigator.

\* \* \* \* \*

*Custody* means holding a live marine mammal pursuant to the conditional authority granted under the MMPA, and the responsibility therein for captive maintenance of the marine mammal.

\* \* \* \* \*

*Facility* means, in the context specific to captive marine mammals,: (1) One or more permanent primary enclosures used to hold marine mammals captive (i.e., pools, lagoons) and associated infrastructure (i.e., equipment and supplies necessary for the care and maintenance of marine mammals) where these enclosures are either located within the boundaries of a single contiguous parcel of land and water, or are grouped together within the same general area within which enclosure-to-enclosure transport is expected to be completed in less than one hour; or

(2) A traveling display/exhibit, where the enclosure(s) and associated infrastructure is transported together with the marine mammals.

\* \* \* \* \*

*Humane* means the method of taking, import, export, or other activity which involves the least possible degree of pain and suffering practicable to the animal involved.

\* \* \* \* \*

*Intrusive research* means a procedure conducted for bona fide scientific research involving: A break in or cutting of the skin or equivalent, insertion of an instrument or material into an orifice, introduction of a substance or object into the animal’s immediate environment that is likely either to be ingested or to contact and directly affect animal tissues (i.e., chemical substances), or a stimulus directed at animals that may involve a risk to health or welfare or that may have an impact on normal function or behavior (i.e., audio broadcasts directed at animals that may affect behavior). For captive animals, this definition does not include:

(1) A procedure conducted by the professional staff of the holding facility or an attending veterinarian for purposes of animal husbandry, care, maintenance, or treatment, or a routine medical procedure that, in the reasonable judgment of the attending veterinarian, would not constitute a risk to the health or welfare of the captive animal; or

(2) A procedure involving either the introduction of a substance or object (i.e., as described in this definition) or a stimulus directed at animals that, in the reasonable judgment of the attending veterinarian, would not involve a risk to the health or welfare of the captive animal.

\* \* \* \* \*

*Principal investigator* means the individual primarily responsible for the taking, importation, export, and any related activities conducted under a permit issued for scientific research or enhancement purposes.

*Public display* means an activity that provides opportunities for the public to view living marine mammals at a facility holding marine mammals captive.

\* \* \* \* \*

*Rehabilitation* means treatment of beached and stranded marine mammals taken under section 109(h)(1) of the MMPA or imported under section 109(h)(2) of the MMPA, with the intent of restoring the marine mammal’s health and, if necessary, behavioral patterns.

\* \* \* \* \*

*Soft part* means any marine mammal part that is not a hard part. Soft parts do not include urine or fecal material.

\* \* \* \* \*

5. In § 216.13, the section heading is revised and paragraph (d) is added to read as follows:

**§ 216.13 Prohibited uses, possession, transportation, sales, and permits.**

\* \* \* \* \*

(d) Any person to violate any term, condition, or restriction of any permit issued by the Secretary.

6. In § 216.26, the section heading and paragraphs (b), (c), and (d) are revised and the introductory text to the section and paragraph (e) are added to read as follows:

**§ 216.26 Collection of certain marine mammal parts without prior authorization.**

Notwithstanding any other provision of this subpart:

\* \* \* \* \*

(b) Notwithstanding the provisions of subpart D, soft parts that are sloughed, excreted, or discharged naturally by a living marine mammal in the wild may be collected or imported for bona fide scientific research and enhancement, provided that collection does not involve the taking of a living marine mammal in the wild.

(c) Any marine mammal part collected under paragraph (a) of this section or any marine mammal part collected and imported under paragraph (b) of this section must be registered and identified, and may be transferred or otherwise possessed, in accordance with § 216.22(c). In registering a marine mammal part collected or imported under paragraph (b) of this section, the person who collected or imported the part must also state the scientific research or enhancement purpose for which the part was collected or imported.

(d) No person may purchase, sell or trade for commercial purposes any marine mammal part collected or imported under this section.

(e) The export of parts collected without prior authorization under paragraph (b) of this section may occur if consistent with the provisions at § 216.37(d) under subpart D.

7. In subpart C, § 216.27 is added to read as follows:

**§ 216.27 Release, non-releasability, and disposition under special exception permits for rehabilitated marine mammals.**

(a) *Release requirements.* (1) Any marine mammal held for rehabilitation must be released within six months of capture or import unless the attending veterinarian determines that:

(i) The marine mammal might adversely affect marine mammals in the wild;

(ii) Release of the marine mammal to the wild will not likely be successful given the physical condition and behavior of the marine mammal; or

(iii) More time is needed to determine whether the release of the marine mammal to the wild will likely be successful. Releasability must be



reevaluated at intervals of no less than six months until 24 months from capture or import, at which time there will be a rebuttable presumption that release into the wild is not feasible.

(2) The custodian of the rehabilitated marine mammal shall provide written notification prior to any release into the wild.

(i) Notification shall be provided to:

(A) The NMFS Regional Director at least 15 days in advance of releasing any beached or stranded marine mammal, unless advance notice is waived in writing by the Regional Director; or

(B) The Office Director at least 30 days in advance of releasing any imported marine mammal.

(ii) Notification shall include the following:

(A) A description of the marine mammal, including its physical condition and estimated age;

(B) The date and location of release; and

(C) The method and duration of transport prior to release.

(3) The Regional Director, or the Office Director as appropriate, may:

(i) Require additional information prior to any release;

(ii) Change the date or location of release, or the method or duration of transport prior to release;

(iii) Impose additional conditions to improve the likelihood of success or to monitor the success of the release; or

(iv) Require other disposition of the marine mammal.

(4) All marine mammals must be released near wild populations of the same species, and stock if known, unless a waiver is granted by the Regional Director or the Office Director.

(5) All marine mammals released must be tagged or marked in a manner acceptable to the Regional Director or the Office Director. The tag number or description of the marking must be reported to the Regional Director or Office Director following release.

(b) *Non-releasability and postponed determinations.* (1) The attending veterinarian shall provide the Regional Director or Office Director with a written report setting forth the basis of any determination under paragraphs (a)(1)(i) through (iii) of this section.

(2) Upon receipt of a report under paragraph (b)(1) of this section, the Regional Director or Office Director, in their sole discretion, may:

(i) Order the release of the marine mammal;

(ii) Order continued rehabilitation for an additional 6 months; or

(iii) Order other disposition as authorized.

(3) No later than 30 days after a marine mammal is determined

unreleasable in accordance with paragraphs (a)(1)(i) through (iii) of this section, the person with authorized custody must:

(i) Request authorization to retain or transfer custody of the marine mammal in accordance with paragraph (c) of this section, or;

(ii) Humanely euthanize the marine mammal or arrange any other disposition of the marine mammal authorized by the Regional Director or Office Director.

(4) Notwithstanding any of the provisions of this section, the Office Director may require use of a rehabilitated marine mammal for any activity authorized under subpart D in lieu of animals taken from the wild.

(5) Any rehabilitated beached or stranded marine mammal placed on public display following a non-releasability determination under paragraph (a)(1) of this section and pending disposition under paragraph (c) of this section, or any marine mammal imported for medical treatment otherwise unavailable and placed on public display pending disposition after such medical treatment is concluded, must be held in captive maintenance consistent with all requirements for public display.

(c) *Disposition for a special exception purpose.* (1) Upon receipt of an authorization request made under paragraph (b)(3)(i) of this section, or release notification under (a)(2), the Office Director may authorize the retention or transfer of custody of the marine mammal for a special exception purpose authorized under subpart D.

(2) The Office Director will first consider requests from a person authorized to hold the marine mammal for rehabilitation. The Office Director may authorize such person to retain or transfer custody of the marine mammal for scientific research, enhancement, or public display purposes.

(3) The Office Director may authorize retention or transfer of custody of the marine mammal only if:

(i) Documentation has been submitted to the Office Director that the person retaining the subject animal or the person receiving custody of the subject animal by transfer, hereinafter referred to as the recipient, complies with public display requirements of 16 U.S.C.

1374(c)(2)(A) or, for purposes of scientific research and enhancement, holds an applicable permit, or an application for such a special exception permit under § 216.33 or a request for a major amendment under § 216.39 has been submitted to the Office Director and has been found complete;

(ii) The recipient agrees to hold the marine mammal in conformance with all applicable requirements and standards; and

(iii) The recipient acknowledges that the marine mammal is subject to seizure by the Office Director:

(A) If, at any time pending issuance of the major amendment or permit, the Office Director determines that seizure is necessary in the interest of the health or welfare of the marine mammal;

(B) If the major amendment or permit is denied; or

(C) If the recipient is issued a notice of violation and assessment, or is subject to permit sanctions, in accordance with 15 CFR part 904.

(4) There shall be no remuneration associated with any transfer, provided that, the transferee may reimburse the transferor for any and all costs associated with the rehabilitation and transport of the marine mammal.

(5) Marine mammals undergoing rehabilitation or pending disposition under this section shall not be subject to public display, unless such activities are specifically authorized by the Regional Director or the Office Director, and conducted consistent with the requirements applicable to public display. Such marine mammals shall not be trained for performance or be included in any aspect of a program involving interaction with the public; and

(6) Marine mammals undergoing rehabilitation shall not be subject to intrusive research, unless such activities are specifically authorized by the Office Director in consultation with the Marine Mammal Commission and its Committee of Scientific Advisors on Marine Mammals, and are conducted pursuant to a scientific research permit.

(d) *Reporting.* In addition to the report required under § 216.22(b), the person authorized to hold marine mammals for rehabilitation must submit reports to the Regional Director or Office Director regarding release or other disposition. These reports must be provided in the form and frequency specified by the Regional Director or Office Director.

8. In subpart D, §§ 216.31 through 216.34 are revised; §§ 216.35 through 216.44 are added; and § 216.30 and §§ 216.46 through 216.49 are added and reserved to read as follows:

#### **Subpart D—Special Exception Permits**

216.30 [Reserved]

216.31 Definitions.

216.32 Scope.

216.33 Permit application submission, review, and decision procedures.

216.34 Issuance criteria.

216.35 Permit restrictions.

216.36 Permit conditions.

- 216.37 Marine mammal parts.
- 216.38 Reporting.
- 216.39 Permit amendments.
- 216.40 Penalties and permit sanctions.
- 216.41 Permits for scientific research and enhancement.
- 216.42 Photography. [Reserved]
- 216.43 Public display. [Reserved]
- 216.44 Applicability/transition.
- 216.45 General authorization.
- 216.46–216.49 [Reserved]

**§ 216.30 [Reserved]**

**§ 216.31 Definitions.**

For the purpose of this subpart, the definitions set forth in 50 CFR part 217 shall apply to all threatened and endangered marine mammals, unless a more restrictive definition exists under the MMPA or part 216.

**§ 216.32 Scope.**

The regulations of this subpart apply to:

- (a) All marine mammals and marine mammal parts taken or born in captivity after December 20, 1972; and
- (b) All marine mammals and marine mammal parts that are listed as threatened or endangered under the ESA.

**§ 216.33 Permit application submission, review, and decision procedures.**

(a) *Application submission.* Persons seeking a special exemption permit under this subpart must submit an application to the Office Director. The application must be signed by the applicant, and provide in a properly formatted manner all information necessary to process the application. Written instructions addressing information requirements and formatting may be obtained from the Office Director upon request.

(b) *Applications to export living marine mammals.* For applicants seeking a special exception permit to export living marine mammals, the application must:

(1) Be submitted through the Convention on International Trade in Endangered Fauna and Flora management authority of the foreign government or, if different, the appropriate agency or agencies of the foreign government that exercises oversight over marine mammals.

(2) Include a certification from the foreign government that:

- (i) The information set forth in the application is accurate;
- (ii) The laws and regulations of the foreign government involved allow enforcement of the terms and conditions of the permit, and that the foreign government will enforce all terms and conditions; and

(iii) The foreign government involved will afford comity to any permit amendment, modification, suspension or revocation decision.

(c) *Initial review.* (1) NMFS will notify the applicant of receipt of the application.

(2) During the initial review, the Office Director will determine:

- (i) Whether the application is complete.
- (ii) Whether the proposed activity is for purposes authorized under this subpart.
- (iii) If the proposed activity is for enhancement purposes, whether the species or stock identified in the application is in need of enhancement for its survival or recovery and whether the proposed activity will likely succeed in its objectives.

(iv) Whether the activities proposed are to be conducted consistent with the permit restrictions and permit specific conditions as described in § 216.35 and § 216.36(a).

(v) Whether sufficient information is included regarding the environmental impact of the proposed activity to enable the Office Director:

(A) To make an initial determination under the National Environmental Policy Act (NEPA) as to whether the proposed activity is categorically excluded from preparation of further environmental documentation, or whether the preparation of an environmental assessment (EA) or environmental impact statement (EIS) is appropriate or necessary; and

(B) To prepare an EA or EIS if an initial determination is made by the Office Director that the activity proposed is not categorically excluded from such requirements.

(3) The Office Director may consult with the Marine Mammal Commission (Commission) and its Committee of Scientific Advisors on Marine Mammals (Committee) in making these initial, and any subsequent, determinations.

(4) Incomplete applications will be returned with explanation. If the applicant fails to resubmit a complete application or correct the identified deficiencies within 60 days, the application will be deemed withdrawn. Applications that propose activities inconsistent with this subpart will be returned with explanation, and will not be considered further.

(d) *Notice of receipt and application review.* (1) Upon receipt of a valid, complete application, and the preparation of any NEPA documentation that has been determined initially to be required, the Office Director will publish a notice of

receipt in the Federal Register. The notice will:

- (i) Summarize the application, including:
  - (A) The purpose of the request;
  - (B) The species and number of marine mammals;
  - (C) The type and manner of special exception activity proposed;
  - (D) The location(s) in which the marine mammals will be taken, from which they will be imported, or to which they will be exported; and
  - (E) The requested period of the permit.

(ii) List where the application is available for review.

(iii) Invite interested parties to submit written comments concerning the application within 30 days of the date of the notice.

(iv) Include a NEPA statement that an initial determination has been made that the activity proposed is categorically excluded from the requirement to prepare an EA or EIS, that an EA was prepared resulting in a finding of no significant impact, or that a final EIS has been prepared and is available for review.

(2) The Office Director will forward a copy of the complete application to the Commission for comment. If no comments are received within 45 days (or such longer time as the Office Director may establish) the Office Director will consider the Commission to have no objection to issuing a permit.

(3) The Office Director may consult with any other person, institution, or agency concerning the application.

(4) Within 30 days of publication of the notice of receipt in the Federal Register, any interested party may submit written comments or may request a public hearing on the application.

(5) If the Office Director deems it advisable, the Office Director may hold a public hearing within 60 days of publication of the notice of receipt in the Federal Register. Notice of the date, time, and place of the public hearing will be published in the Federal Register not less than 15 days in advance of the public hearing. Any interested person may appear in person or through representatives and may submit any relevant material, data, views, or comments. A summary record of the hearing will be kept.

(6) The Office Director may extend the period during which any interested party may submit written comments. Notice of the extension must be published in the Federal Register within 60 days of publication of the notice of receipt in the Federal Register.

(7) If, after publishing a notice of receipt, the Office Director determines on the basis of new information that an EA or EIS must be prepared, the Office Director must deny the permit unless an EA is prepared with a finding of no significant impact. If a permit is denied under these circumstances the application may be resubmitted with information sufficient to prepare an EA or EIS, and will be processed as a new application.

(e) *Issuance or denial procedures.* (1) Within 30 days of the close of the public hearing or, if no public hearing is held, within 30 days of the close of the public comment period, the Office Director will issue or deny a special exception permit.

(2) The decision to issue or deny a permit will be based upon:

(i) All relevant issuance criteria set forth at § 216.34;

(ii) All purpose-specific issuance criteria as appropriate set forth at § 216.41, § 216.42, and § 216.43;

(iii) All comments received or views solicited on the permit application; and

(iv) Any other information or data that the Office Director deems relevant.

(3) If the permit is issued, upon receipt, the holder must date and sign the permit, and return a copy of the original to the Office Director. The permit shall be effective upon the permit holder's signing of the permit. In signing the permit, the holder:

(i) Agrees to abide by all terms and conditions set forth in the permit, and all restrictions and relevant regulations under this subpart; and

(ii) Acknowledges that the authority to conduct certain activities specified in the permit is conditional and subject to authorization by the Office Director.

(4) Notice of the decision of the Office Director shall be published in the Federal Register within 10 days after the date of permit issuance or denial and shall indicate where copies of the permit, if issued, may be reviewed or obtained. If the permit issued involves marine mammals listed as endangered or threatened under the ESA, the notice shall include a finding by the Office Director that the permit:

(i) Was applied for in good faith;

(ii) If exercised, will not operate to the disadvantage of such endangered or threatened species; and

(iii) Is consistent with the purposes and policy set forth in section 2 of the ESA.

(5) If the permit is denied, the Office Director shall provide the applicant with an explanation for the denial.

(6) Under the MMPA, the Office Director may issue a permit for scientific research before the end of the

public comment period if delaying issuance could result in injury to a species, stock, or individual, or in loss of unique research opportunities. The Office Director also may waive the 30-day comment period required under the ESA in an emergency situation where the health or life of an endangered or threatened marine mammal is threatened and no reasonable alternative is available. If a permit is issued under these circumstances, notice of such issuance before the end of the comment period shall be published in the Federal Register within 10 days of issuance.

(7) The applicant or any party opposed to a permit may seek judicial review of the terms and conditions of such permit or of a decision to deny such permit. Review may be obtained by filing a petition for review with the appropriate U.S. District Court as provided for by law.

#### § 216.34 Issuance criteria.

(a) For the Office Director to issue any permit under this subpart, the applicant must demonstrate that:

(1) The proposed activity is humane and does not present any unnecessary risks to the health and welfare of marine mammals;

(2) The proposed activity is consistent with all restrictions set forth at § 216.35 and any purpose-specific restrictions as appropriate set forth at § 216.41, § 216.42, and § 216.43;

(3) The proposed activity, if it involves endangered or threatened marine mammals, will be conducted consistent with the purposes and policies set forth in section 2 of the ESA;

(4) The proposed activity by itself or in combination with other activities, will not likely have a significant adverse impact on the species or stock;

(5) Whether the applicant's expertise, facilities, and resources are adequate to accomplish successfully the objectives and activities stated in the application;

(6) If a live animal will be held captive or transported, the applicant's qualifications, facilities, and resources are adequate for the proper care and maintenance of the marine mammal; and

(7) Any requested import or export will not likely result in the taking of marine mammals or marine mammal parts beyond those authorized by the permit.

(b) The opinions or views of scientists or other persons or organizations knowledgeable of the marine mammals that are the subject of the application or of other matters germane to the application will be considered.

#### § 216.35 Permit restrictions.

The following restrictions shall apply to all permits issued under this subpart:

(a) The taking, importation, export, or other permitted activity involving marine mammals and marine mammal parts shall comply with the regulations of this subpart.

(b) The maximum period of any special exception permit issued, or any major amendment granted, is five years from the effective date of the permit or major amendment. In accordance with the provisions of § 216.39, the period of a permit may be extended by a minor amendment up to 12 months beyond that established in the original permit.

(c) Except as provided for in § 216.41(c)(1)(v), marine mammals or marine mammal parts imported under the authority of a permit must be taken or imported in a humane manner, and in compliance with the Acts and any applicable foreign law. Importation of marine mammals and marine mammal parts is subject to the provisions of 50 CFR part 14.

(d) The permit holder shall not take from the wild any marine mammal which at the time of taking is either unweaned or less than eight months old, or is a part of a mother-calf/pup pair, unless such take is specifically authorized in the conditions of the special exception permit. Additionally, the permit holder shall not import any marine mammal that is pregnant or lactating at the time of taking or import, or is unweaned or less than eight months old unless such import is specifically authorized in the conditions of the special exception permit.

(e) Captive marine mammals shall not be released into the wild unless specifically authorized by the Office Director under a scientific research or enhancement permit.

(f) The permit holder is responsible for all activities of any individual who is operating under the authority of the permit;

(g) Individuals conducting activities authorized under the permit must possess qualifications commensurate with their duties and responsibilities, or must be under the direct supervision of a person with such qualifications;

(h) Persons who require state or Federal licenses to conduct activities authorized under the permit must be duly licensed when undertaking such activities;

(i) Special exception permits are not transferable or assignable to any other person, and a permit holder may not require any direct or indirect compensation from another person in return for requesting authorization for such person to conduct the taking,

import, or export activities authorized under the subject permit;

(j) The permit holder or designated agent shall possess a copy of the permit when engaged in a permitted activity, when the marine mammal is in transit incidental to such activity, and whenever marine mammals or marine mammal parts are in the possession of the permit holder or agent. A copy of the permit shall be affixed to any container, package, enclosure, or other means of containment, in which the marine mammals or marine mammal parts are placed for purposes of transit, supervision, or care. For marine mammals held captive and marine mammal parts in storage, a copy of the permit shall be kept on file in the holding or storage facility.

#### § 216.36 Permit conditions.

(a) *Specific conditions.* (1) Permits issued under this subpart shall contain specific terms and conditions deemed appropriate by the Office Director, including, but not limited to:

(i) The number and species of marine mammals that are authorized to be taken, imported, exported, or otherwise affected;

(ii) The manner in which marine mammals may be taken according to type of take;

(iii) The location(s) in which the marine mammals may be taken, from which they may be imported, or to which they may be exported, as applicable, and, for endangered or threatened marine mammal species to be imported or exported, the port of entry or export;

(iv) The period during which the permit is valid.

(2) [Reserved]

(b) *Other conditions.* In addition to the specific conditions imposed pursuant to paragraph (a) of this section, the Office Director shall specify any other permit conditions deemed appropriate.

#### § 216.37 Marine mammal parts.

With respect to marine mammal parts acquired by take or import authorized under a permit issued under this subpart:

(a) Marine mammal parts are transferrable if:

(1) The person transferring the part receives no remuneration of any kind for the marine mammal part;

(2) The person receiving the marine mammal part is:

(i) An employee of NMFS, the U.S. Fish and Wildlife Service, or any other governmental agency with conservation and management responsibilities, who receives the part in the course of their official duties;

(ii) A holder of a special exception permit which authorizes the take, import, or other activity involving the possession of a marine mammal part of the same species as the subject part; or

(iii) In the case of marine mammal parts from a species that is not depleted, endangered or threatened, a person who is authorized under section 112(c) of the MMPA and subpart C of this part to take or import marine mammals or marine mammal parts;

(iv) Any other person specifically authorized by the Regional Director, consistent with the requirements of paragraphs (a)(1) and (a)(3) through (6) of this section.

(3) The marine mammal part is transferred for the purpose of scientific research, maintenance in a properly curated, professionally accredited scientific collection, or education, provided that, for transfers for educational purposes, the recipient is a museum, educational institution or equivalent that will ensure that the part is available to the public as part of an educational program;

(4) A unique number assigned by the permit holder is marked on or affixed to the marine mammal part or container;

(5) The person receiving the marine mammal part agrees that, as a condition of receipt, subsequent transfers may only occur subject to the provisions of paragraph (a) of this section; and

(6) Within 30 days after the transfer, the person transferring the marine mammal part notifies the Regional Director of the transfer, including a description of the part, the person to whom the part was transferred, the purpose of the transfer, certification that the recipient has agreed to comply with the requirements of paragraph (a) of this section for subsequent transfers, and, if applicable, the recipient's permit number.

(b) Marine mammal parts may be loaned to another person for a purpose described in paragraph (a)(3) of this section and without the agreement and notification required under paragraphs (a)(5) and (6) of this section, if:

(1) A record of the loan is maintained; and

(2) The loan is for not more than one year. Loans for a period greater than 12 months, including loan extensions or renewals, require notification of the Regional Director under paragraph (a)(6).

(c) Unless other disposition is specified in the permit, a holder of a special exception permit may retain marine mammal parts not destroyed or otherwise disposed of during or after a scientific research or enhancement

activity, if such marine mammal parts are:

(1) Maintained as part of a properly curated, professionally accredited collection; or

(2) Made available for purposes of scientific research or enhancement at the request of the Office Director.

(d) Marine mammal parts may be exported and subsequently reimported by a permit holder or subsequent authorized recipient, for the purpose of scientific research, maintenance in a properly curated, professionally accredited scientific collection, or education, provided that:

(1) The permit holder or other person receives no remuneration for the marine mammal part;

(2) A unique number assigned by the permit holder is marked on or affixed to the marine mammal specimen or container;

(3) The marine mammal part is exported or reimported in compliance with all applicable domestic and foreign laws;

(4) If exported or reimported for educational purposes, the recipient is a museum, educational institution, or equivalent that will ensure that the part is available to the public as part of an educational program; and

(5) Special reports are submitted within 30 days after both export and reimport as required by the Office Director under § 216.38.

#### § 216.38 Reporting.

All permit holders must submit annual, final, and special reports in accordance with the requirements established in the permit, and any reporting format established by the Office Director.

#### § 216.39 Permit amendments.

(a) *General.* Special exception permits may be amended by the Office Director. Major and minor 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.

(1) A "major amendment" means any change to the permit specific conditions under § 216.36(a) regarding:

(i) The number and species of marine mammals that are authorized to be taken, imported, exported, or otherwise affected;

(ii) The manner in which these marine mammals may be taken, imported, exported, or otherwise affected, if the proposed change may result in an increased level of take or risk of adverse impact;

(iii) 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; and

(iv) The duration of the permit, if the proposed extension would extend the duration of the permit more than 12 months beyond that established in the original permit.

(2) A "minor amendment" means any amendment that does not constitute a major 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 § 216.34, and, as appropriate, § 216.41, § 216.42, and § 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.*

(1) *Major amendments.* The provisions of § 216.33(d) and (e) governing notice of receipt, review and decision shall apply to all proposed major amendments.

(2) *Minor 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) If the minor amendment extends the duration of the permit 12 months or less from that established in the original permit, notice of the minor amendment will be published in the Federal Register within 10 days from the date of the Office Director's decision.

(iii) A minor amendment will be effective upon a final decision by the Office Director.

#### § 216.40 Penalties and permit sanctions.

(a) Any person who violates any provision of this subpart or permit issued thereunder is subject to civil and criminal penalties, permit sanctions and forfeiture as authorized under the Acts, and 15 CFR part 904.

(b) All special exception permits are subject to suspension, revocation,

modification and denial in accordance with the provisions of subpart D of 15 CFR part 904.

#### § 216.41 Permits for scientific research and enhancement.

In addition to the requirements under § 216.33 through § 216.38, permits for scientific research and enhancement are governed by the following requirements:

(a) *Applicant.* (1) For each application submitted under this section, the applicant shall be the principal investigator responsible for the overall research or enhancement activity. If the research or enhancement activity will involve a periodic change in the principal investigator or is otherwise controlled by and dependent upon another entity, the applicant may be the institution, governmental entity, or corporation responsible for supervision of the principal investigator.

(2) For any scientific research involving captive maintenance, the application must include supporting documentation from the person responsible for the facility or other temporary enclosure.

(b) *Issuance Criteria.* For the Office Director to issue any scientific research or enhancement permit, the applicant must demonstrate that:

(1) The proposed activity furthers a bona fide scientific or enhancement purpose;

(2) If the lethal taking of marine mammals is proposed:

(i) Non-lethal methods for conducting the research are not feasible; and

(ii) For depleted, endangered, or threatened species, the results will directly benefit that species or stock, or will fulfill a critically important research need.

(3) Any permanent removal of a marine mammal from the wild is consistent with any applicable quota established by the Office Director.

(4) The proposed research will not likely have significant adverse effects on any other component of the marine ecosystem of which the affected species or stock is a part.

(5) For species or stocks designated or proposed to be designated as depleted, or listed or proposed to be listed as endangered or threatened:

(i) The proposed research cannot be accomplished using a species or stock that is not designated or proposed to be designated as depleted, or listed or proposed to be listed as threatened or endangered;

(ii) The proposed research, by itself or in combination with other activities will not likely have a long-term direct or indirect adverse impact on the species or stock;

(iii) The proposed research will either:

(A) Contribute to fulfilling a research need or objective identified in a species recovery or conservation plan, or if there is no conservation or recovery plan in place, a research need or objective identified by the Office Director in stock assessments established under section 117 of the MMPA;

(B) Contribute significantly to understanding the basic biology or ecology of the species or stock, or to identifying, evaluating, or resolving conservation problems for the species or stock; or

(C) Contribute significantly to fulfilling a critically important research need.

(6) For proposed enhancement activities:

(i) Only living marine mammals and marine mammal parts necessary for enhancement of the survival, recovery, or propagation of the affected species or stock may be taken, imported, exported, or otherwise affected under the authority of an enhancement permit. Marine mammal parts would include in this regard clinical specimens or other biological samples required for the conduct of breeding programs or the diagnosis or treatment of disease.

(ii) The activity will likely contribute significantly to maintaining or increasing distribution or abundance, enhancing the health or welfare of the species or stock, or ensuring the survival or recovery of the affected species or stock in the wild.

(iii) The activity is consistent with:

(A) An approved conservation plan developed under section 115(b) of the MMPA or recovery plan developed under section 4(f) of the ESA for the species or stock; or

(B) If there is no conservation or recovery plan, with the Office Director's evaluation of the actions required to enhance the survival or recovery of the species or stock in light of the factors that would be addressed in a conservation or recovery plan.

(iv) An enhancement permit may authorize the captive maintenance of a marine mammal from a threatened, endangered, or depleted species or stock only if the Office Director determines that:

(A) The proposed captive maintenance will likely contribute directly to the survival or recovery of the species or stock by maintaining a viable gene pool, increasing productivity, providing necessary biological information, or establishing animal reserves required to support directly these objectives; and

(B) The expected benefit to the species or stock outweighs the expected benefits of alternatives that do not require removal of marine mammals from the wild.

(v) The Office Director may authorize the public display of marine mammals held under the authority of an enhancement permit only if:

(A) The public display is incidental to the authorized captive maintenance;

(B) The public display will not interfere with the attainment of the survival or recovery objectives;

(C) The marine mammals will be held consistent with all requirements and standards that are applicable to marine mammals held under the authority of the Acts and the Animal Welfare Act, unless the Office Director determines that an exception is necessary to implement an essential enhancement activity; and

(D) The marine mammals will be excluded from any interactive program and will not be trained for performance.

(vi) The Office Director may authorize non-intrusive scientific research to be conducted while a marine mammal is held under the authority of an enhancement permit, only if such scientific research:

(A) Is incidental to the permitted enhancement activities; and

(B) Will not interfere with the attainment of the survival or recovery objectives.

(c) *Restrictions.* (1) The following restrictions apply to all scientific research permits issued under this subpart:

(i) Research activities must be conducted in the manner authorized in the permit.

(ii) Research results shall be published or otherwise made available to the scientific community in a reasonable period of time.

(iii) Research activities must be conducted under the direct supervision of the principal investigator or a co-investigator identified in the permit.

(iv) Personnel involved in research activities shall be reasonable in number and limited to:

(A) Individuals who perform a function directly supportive of and necessary to the permitted research activity; and

(B) Support personnel included for the purpose of training or as backup personnel for persons described in paragraph (c)(1)(iv)(A).

(v) Any marine mammal part imported under the authority of a scientific research permit must not have been obtained as the result of a lethal taking that would be inconsistent with the Acts, unless authorized by the Office Director.

(vi) Marine mammals held under a permit for scientific research shall not be placed on public display, included in an interactive program or activity, or trained for performance unless such activities:

(A) Are necessary to address scientific research objectives and have been specifically authorized by the Office Director under the scientific research permit; and

(B) Are conducted incidental to and do not in any way interfere with the permitted scientific research; and

(C) Are conducted in a manner consistent with provisions applicable to public display, unless exceptions are specifically authorized by the Office Director.

(vii) Any activity conducted incidental to the authorized scientific research activity must not involve any taking of marine mammals beyond what is necessary to conduct the research (i.e., educational and commercial photography).

(2) Any marine mammal or progeny held in captive maintenance under an enhancement permit shall be returned to its natural habitat as soon as feasible, consistent with the terms of the enhancement permit and the objectives of an approved conservation or recovery plan. In accordance with section 10(j) of the ESA, the Office Director may authorize the release of any population of an endangered or threatened species outside the current range of such species if the Office Director determines that such release will further the conservation of such species.

**§ 216.42 Photography. [Reserved]**

**§ 216.43 Public display. [Reserved]**

**§ 216.44 Applicability/transition.**

(a) *General.* The regulations of this subpart are applicable to all persons, including persons holding permits or other authorizing documents issued before June 10, 1996, by NMFS for the take, import, export, or conduct of any otherwise prohibited activity involving a marine mammal or marine mammal part for special exception purposes.

(b) *Scientific research.* Any intrusive research as defined in § 216.3, initiated after June 10, 1996, must be authorized under a scientific research permit. Intrusive research authorized by the Office Director to be conducted on captive marine mammals held for public display purposes prior to June 10, 1996, must be authorized under a scientific research permit one year after June 10, 1996.

\* \* \* \* \*

**§§ 216.46–216.49 [Reserved]**

## **PART 222—ENDANGERED FISH OR WILDLIFE**

9. The authority citation for part 222 is revised to read as follows:

Authority: 16 U.S.C. 1531 *et seq.*

10. In § 222.23, the first sentence in paragraph (b) is revised to read as follows:

**§ 222.23 Permits for scientific purposes or to enhance the propagation or survival of the affected endangered species.**

\* \* \* \* \*

(b) *Application procedures.* To obtain such a permit, an application must be made to the Director in accordance with this subpart, except for marine mammal permits which shall be issued in accordance with the provisions of part 216, subpart D of this chapter, and sea turtle permits which shall be issued in accordance with part 220, subpart E of this chapter.

\* \* \* \* \*

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