



Animal Welfare Institute

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8 May 2026

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National Marine Fisheries Service
Office of Protected Resources
Permits and Conservation Division
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Submitted by email: noaa.pra@noaa.gov

RE: 91 Federal Register 11289, OMB Control Number 0648-0084

Dear Ms. Thomas:

On behalf of the members and supporters of the Animal Welfare Institute (AWI), I am submitting these brief comments on the proposed and continuing information collections on basic requirements for special exception permits and authorizations to take, import, and export marine mammals, threatened and endangered species, and for maintaining a captive marine mammal inventory under Section 104 of the Marine Mammal Protection Act, 16 U.S.C. §§ 1361–1423h, 1374 (MMPA), the Fur Seal Act, 16 U.S.C. §§ 1151-1172 (FSA), and/or Section 10(a)(1)(A) of the Endangered Species Act, 16 U.S.C. §§ 1531-1544, 1539(a)(1)(A) (ESA). This proposed rule seeks to revise the permit application instructions for scientific research and capture and import for public display under the relevant statutory sections, ostensibly to reduce the burden on permit applicants by reducing and streamlining the information requested by these applications.

Overview

Generally, AWI agrees with the proposal to separate “capture” from “import” and, rather than having a public display permit application that covers both actions, to have one permit application for import for public display and another permit application for capture for public display. However, we have some specific concerns regarding the resulting language in the proposed import and capture permit applications, which we have explained below. Our concerns for the proposed import permit application exceed those for the proposed capture (and scientific research) permit application.

AWI finds the proposed text for all three applications less easy to follow or understand than the original language. In an effort to reduce and streamline the amount of information requested, NMFS has taken clear, brief, and separate sentences and combined them into denser, more awkward paragraphs that tend to obfuscate the request. We believe it will actually be more difficult for applicants to understand

how best to respond to the information requests found in these permit applications. Given the reformatting of the proposed instructions, which we think make them less clear, we do not see how these revisions will save time with respect to, e.g., word count or number of pages. We recommend that the agency retain clear, brief, and separate sentences, as much as possible.

We note that all guidance on section length (e.g., “up to 800 characters”) has been removed from the text. We find this change inadvisable—this type of guidance is helpful to the applicant, offering some idea of how long the section should be, but preventing them from spending more time or effort on the section than needed by the agency. We recommend NMFS retain guidance on section length, especially if the goal of the proposed changes is to reduce the burden on applicants. Leaving it entirely up to the applicant to determine section length could result in NMFS receiving applications that are either too short (e.g., abbreviated information) or too long (e.g., unnecessarily verbose or detailed information), which could require both the applicant and the agency to spend additional time on requested revisions. Such extra work should be avoidable if the agency states its desired section length on the form.

We also note that the proposed versions of all three applications have removed the statement “We will not consider your application if you have overdue reports.” We strongly urge NMFS to retain this statement, as it is inconsistent with the applicable laws and regulations for the agency to consider an application from an applicant that has failed in their responsibility to file reports on activities conducted under previous permits. Reports are **not optional**—they are among the “Terms and Conditions” required by permits. See 50 C.F.R. § 216.38, “Reporting,” which states, “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.” Reports are one way for NMFS to ensure that applicants are complying with both the terms of the permit and the legal and regulatory standards that form the bounds within which those animals can be “held.” See *also, e.g.*, NMFS Permit 66229 (Aug. 27, 2020) at p. 11, sec. E, “Reporting,” which states, “Permit Holder must submit incident and annual reports containing the information and in the format specified by the Permits Division.” Pursuant to the terms and conditions of Permit 66229, “The activities authorized herein must occur by the means, in the areas, and for the purposes set forth in the permit application, and as limited by the Terms and Conditions specified in this permit, including appendices. Permit noncompliance constitutes a violation and is grounds for permit modification, suspension, or revocation, and for enforcement action.”

We also do not see this change as one that reduces any burden on the applicant, other than their responsibility to meet a permit’s requirements. This change, which strongly implies that an applicant can be derelict in their reporting responsibilities under previous permits and still apply for a new permit, seems merely to foster non-compliance with permit conditions, which cannot (and should not!) be the intention.

Legal background

a. Marine Mammal Protection Act (MMPA)

Jointly administered by NMFS and the US Fish and Wildlife Service (USFWS), the MMPA places a moratorium on the take of marine mammals and a ban on the importation into the United States of marine mammals and marine mammal products. 16 U.S.C. § 1371(a); 16 U.S.C. § 1362(8). Section 104 provides exceptions to the moratorium on take, for scientific research, public display, photography for

educational or commercial purposes, or enhancing the survival or recovery of a species or stock, or for importation of polar bear parts (other than internal organs) taken in sport hunts in Canada. 16 U.S.C. § 1374.¹ Under the MMPA, to “take” means to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal. 16 U.S.C. § 1362. Interested persons are required to submit an application to either NMFS or the USFWS, depending on the species involved, in accordance with the MMPA and its implementing regulations at 50 C.F.R. part 216, subpart D and/or 50 C.F.R. Part 18, subpart D.

In addition, the MMPA, at 16 U.S.C. §§ 1382(d)–(e), provides partial authority for FWS regulations for the importation, exportation, and transportation of wildlife at 50 C.F.R. Part 14. See 45 Fed. Reg. 56,673 (Aug. 25, 1980). Such importations must be declared and cleared through an FWS port designated for wildlife (50 C.F.R. § 14.12, although see *id.* at § 14.14) and a Wildlife Declaration Form 3-177 (Declaration for Importation or Exportation of Fish or Wildlife) must be filed with the FWS inspector at the time of importation.

b. Endangered Species Act (ESA)

Also jointly administered by the Secretaries of Commerce and the Interior, the ESA aims to provide a framework to conserve and protect domestic and international endangered and threatened species and their habitats. For federal actions that could adversely affect species listed under the ESA, Section 7 of the law establishes a duty to consult and avoid jeopardizing the continued existence of the species, meaning that federal agencies engage in an interagency consultation process. 16 U.S.C. § 1536(a)(2). For nonfederal actions that could independently affect species listed under the ESA, Section 9 of the law established a prohibition on the take of threatened and endangered species, *id.* at §§ 1538(a)(1)(B), 1538(c), with take being defined as “to harass, harm, pursue, hunt shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” 16 U.S.C. § 1532(19). Under Section 10(a)(1)(A) of the ESA, however, persons may be authorized to take threatened and endangered species for purposes of scientific purposes or enhancing the survival of the species, among other exceptions. 16 U.S.C. § 1539(a)(1)(A). Interested persons are required to submit an application in accordance with the ESA and NMFS’s implementing regulations for threatened and endangered marine species, at 50 C.F.R. part 222. For threatened and endangered wildlife under the jurisdiction of the FWS, 50 C.F.R. Part 17 applies. In addition, the ESA, at 16 U.S.C. §§ 1538(d)–(f) (Prohibited acts), 1540(f) (ESA Penalties and enforcement), provides partial authority for FWS regulations for the importation, exportation, and transportation of wildlife at 50 C.F.R. Part 14, described above. See 45 Fed. Reg. 56,673.

¹ Further, Section 104(c)(2)(A) of the MMPA requires that parties seeking permits for public display to be registered or hold a license under the Animal Welfare Act (AWA), 7 U.S.C. § 2131 et seq. (1966). The AWA is the only federal law in the United States that regulates the treatment of animals in research, exhibition, transport, and by dealers. It sets minimum standards of care that must be provided for animals—including housing, handling, sanitation, food, water, veterinary care and protection from weather extremes. USDA Animal Care, a unit within APHIS, administers the AWA. Importation of live animals into the United States requires a live animal importation permit issued by USDA APHIS Veterinary Services. Per USDA regulations, the animals to be imported must undergo a veterinary examination within 10 days of transport. 9 C.F.R. § 3.112. APHIS has a presence at ports of entry into the United States, and collaborates with U.S. Customs and Border Protection to inspect plant and animal (e.g., agricultural and wildlife) products.

c. Fur Seal Act (FSA)

The FSA seeks to ensure the long-term conservation of the northern fur seal, including the portion of the population that breeds on the Pribilof Islands in the Bering Sea. The Act generally prohibits the harassment, hunting, capturing, and killing (i.e., “take”) of northern fur seals.

Detailed comments

Scientific Research Permit Application

p. 24 proposed – “We recommend the PI and each CI submit a QF.”

We are uncertain why the requirement to submit a QF (see p. 32 original, “*must* complete a Qualifications Form,” emphasis added) has changed to a mere recommendation. We imagine it is an attempt at reducing the applicant’s time and effort on the application, but given that CVs and resumés do not necessarily contain the information needed by NMFS to determine whether a PI or CI has the necessary qualifications, we think it is most efficient (and thus a lesser burden to the applicant) to offer the applicant a structured and standard way to provide qualification information. The “qualifications, responsibilities, and designation of personnel” are required by the regulations and are thus among the “terms and conditions” of a Section 104(c) special exception permit. *See e.g.* 50 C.F.R. § 216.34(a)(5), “Issuance criteria,” permit applicants are required to demonstrate “[w]hether the applicant’s expertise, facilities, and resources are adequate to accomplish successfully the objectives and activities stated in the application.”

Capture for Public Display Permit Application

p. 3 proposed, under “Project Information” – There is a general request for information here for where the *activities* will occur. Later, under “Project Locations” (p. 9 proposed, item 2), there is a request for the “Latitude and longitude of your *study area*” (emphasis added). Finally, on p. 10 proposed, there is a request for a map clearly showing the location(s) of the *proposed activity*. The original language requested a high-quality map of the *capture location* (p. 3 original). In order to remain in alignment with the permit issuance criteria at 50 C.F.R. § 216.33, we recommend retaining the precise language asking for *capture* location, to ensure the agency is provided the exact location where captures occur, as opposed to a precise location where more general activities *related to* the capture(s) occur.

p. 18 original, “Take Table 2” – This example table has been removed from the proposed capture permit application. We recommend it be retained, as it is quite useful to an applicant to have an example of what a take table should look like (in short, an example table reduces burden, rather than adds to it). We note that the example take table for imports was retained in the proposed import application.

Import for Public Display Permit Application

AWI notes that the requirement for providing an abstract is omitted from the proposed import permit application. We have no strong opinion on this matter, but an abstract can be a helpful section for application reviewers and we note that this requirement is retained for scientific research and capture permit applications.

p. 3 proposed, under “Importing Marine Mammals into the United States,” item 3 – “If available, attach a NOAA Marine Mammal Data Sheet, Species 360 specimen report, or statement from the shipping facility.”

This request has been reworded (see p. 6 original, “please include the following information: ... The animal’s previous transport history (e.g., attach a NOAA Marine Mammal Data Sheet, Species 360 specimen report, or statement from the shipping facility) including dates”) in such a way that it could be left blank. That is, the listed documents are no longer examples (“e.g.”) of how transport information can be provided, but the *only* documents that need be provided to address this information request and *only* if they are available. This is worded in such a way that if these three document types are *not* available, the applicant could provide no transport history information (even if the animal *has* a transport history) and still comply with the application requirements, underpinned by the issuance criteria at, e.g., 50 C.F.R. § 216.34 and § 216.36. This is a sharp departure from the original application and is far more than streamlining—under certain administrative circumstances, it completely removes the requirement for the applicant to provide any sort of transport history information on an animal they seek to import. This would be inappropriate—the original wording should be retained.

p. 4 proposed, item 4 – “Provide documentation that the take and subsequent holding was humane and legal in accordance with the capture country’s laws.”

The proposed language for importing a wild-caught marine mammal reduces the information requested in this item to providing documentation that a take was humane, whereas originally the request was for a *description* of the method of taking, *including* how the take was humane (see p. 6 original, “Describe how the animal was captured and maintained in the country of origin, including how the captures and captive holding were conducted in a humane manner”). This revision is clearly an attempt to streamline the information requested, but it could result in an absurdity—for example, the applicant could provide a simple statement from the country of origin that, e.g., “This take was humane,” with essentially no other information provided describing *how* the take was humane. In short, while this certainly would result in a reduction of effort by the applicant, it would leave NMFS having to take the word of another country’s officials, who may have no understanding of the “humane” standard in the MMPA. The agency could end up with no additional information to confirm that indeed a take was humane. We strongly recommend retaining the original language, to ensure a fuller description of the take method is provided, as required by 16 U.S.C. § 1372 and 50 CFR § 216.12.

p. 4 proposed, item 6a – “Attach a statement from the exporting facility: a. Documenting that the marine mammal to be imported is presently being held in compliance with the laws of the country of exportation”.

This wording and formatting change appears to be streamlining, but it changes the information request from one where the applicant should provide a statement from the facility of origin *and*, to the extent practicable, documentation that the holding is legal (see p. 6 original, “Attach a statement from the exporting facility and, to the extent practicable, documentation concerning whether the marine mammal to be imported is presently being held in compliance with the laws of the country of exportation”) to one where a statement from the facility is sufficient. This is a subtle and inappropriate shift in how much *independent* information the applicant should provide. We recommend retaining the original language, in accordance with 16 U.S.C. § 1372 and 50 CFR § 216.12.

Under “Transport” (called “Transport Questions” in the proposed document), the requirement for a contingency plan in the case of adverse responses found in the original document (see p. 9 original) is omitted in the proposed document. The need for a contingency plan is essential during a transport and should be retained.

Under “Project Supplemental Information,” the language emphasizing that the applicant cannot import animals from a depleted stock (see p. 9 original) is missing in the proposed document. This legal requirement must be retained—it does not add to the applicant’s burden but is a timely reminder of the law. 16 U.S.C. § 1372(b)(3). In addition, the entire section on “Mortalities” (see p. 10 original) is missing from the proposed document—this is completely inappropriate, as mortalities most certainly can occur during an import. Even an applicant may realize this and would fill out this section, but would *not* if the section is not even included in the application. AWI imagines the section was deleted because very few applicants are of the opinion that mortalities are possible during importation and thus were not responding to this section, but nevertheless mortalities can occur during imports and the proposed application for imports should retain the section on mortalities.

p. 4, under “Effects and Mitigation” – The only remaining item under this section in the proposed document is “Humane determination.” The original application has a series of information requests, some of which are specific to captures, but several of which are applicable to imports (explicitly stated as such—see pp. 10–13 original). This is streamlining indeed. AWI recommends that NMFS reconsider the omission of essentially this entire section and determine if some of the original information requests should in fact be retained.

Conclusion

By and large, the changes proposed for scientific research and capture permit applications are minimal. Information provided to the agency will continue to be sufficient to make measured and effective decisions regarding such applications. We imagine the light touch on these applications was because such actions tend to affect marine mammals in the wild, more than those in captivity, meaning their impact on conservation of these species is typically obvious and direct.

However, the proposed import permit application revisions are far more numerous and, concomitantly, our concerns are more numerous. It seems to us that the proposed changes to the import permit application make applying not only less onerous but far less informative for the agency, which means NMFS would likely be provided insufficient information to make an effective decision about requested imports. We are concerned that the zoo and aquarium community has lobbied to make these changes and the rationale might be that import for public display has fewer (or the community might even argue no) impacts on wild populations/conservation and thus providing markedly reduced information to the agency is acceptable. However, AWI would argue that there are always indirect impacts on wild populations of species when there is trade in those species, even those already in captivity. Ensuring that the trade in wild-caught and captive-born marine mammals is not contributing to a negative impact on the species—as well as not contributing to inhumane treatment of individuals—must continue to be the guiding principle of the information collection for requested imports.

We strongly urge NMFS to reconsider some of the proposed changes to the import permit application. The omission of any information on possible mortalities during import and of most of the original section on effects and mitigation should in particular be revisited and reconsidered.

Thank you for your consideration of our comments on this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Naomi Rose", with a long horizontal flourish extending to the right.

Naomi A. Rose, PhD
Senior Scientist, Marine Mammal Biology
Marine Wildlife Program

A handwritten signature in black ink, appearing to read "Georgia V. Hancock", with a long horizontal flourish extending to the right.

Georgia V. Hancock, Esq
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