



DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 216

[Docket No. 240415-0108]

RIN 0648-BK65

Proposed Rule to Modify the Duration of Certain Permits and Letters of Confirmation under the Marine Mammal Protection Act

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS proposes to modify the regulations for Marine Mammal Protection Act (MMPA) section 104 permits, including scientific research, enhancement, photography, and public display permits and Letters of Confirmation (LOCs). The modification would remove the 5-year regulatory limitation on the duration of section 104 permits and LOCs. This would give NMFS the discretion to issue these permits for longer than 5 years where such a duration would be appropriate. This proposed rule would apply only to permits and authorizations issued under section 104 of the MMPA.

DATES: Comments and information must be received no later than [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

ADDRESSES: A plain language summary of this proposed rule is available at <https://www.regulations.gov/docket/NOAA-NMFS-2024-0054>. You may submit comments on this document, identified by NOAA-NMFS-2024-0054, by any of the following methods:

- *Electronic Submission:* Submit all electronic public comments via the Federal e-Rulemaking Portal. Visit <https://www.regulations.gov> and type NOAA-NMFS-

2024-0054 in the Search box. Click on the “Comment” icon, complete the required fields, and enter or attach your comments.

- *Mail:* Submit written comments to Permits and Conservation Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; ATTN: Jolie Harrison, Chief, Permits and Conservation Division.

Instructions: Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on <https://www.regulations.gov> without change. All personal identifying information (*e.g.*, name, address, *etc.*), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter "N/A" in the required fields if you wish to remain anonymous).

FOR FURTHER INFORMATION CONTACT: Sara Young or Carrie Hubbard, Office of Protected Resources, NMFS, (301) 427-8401.

SUPPLEMENTARY INFORMATION:

Authority for Action

Under section 104 of the MMPA (16 U.S.C. 1374), NMFS may issue permits for the take or importation of marine mammals for:

- scientific research (MMPA section 104 (c)(3));
- enhancing the survival or recovery of the species or stock (MMPA section 104 (c)(4));
- public display (MMPA section 104 (c)(2));
- commercial or educational photography (MMPA section 104(c)(6)); and

- scientific research that may result only in taking by Level B harassment under the MMPA's General Authorization provisions (MMPA section 104 (c)(3)). Level B harassment refers to activities that have the potential to disturb but not injure a marine mammal.

The implementing regulations for scientific research, enhancement, public display, and photography permits can be found at 50 CFR 216.31-216.41. The implementing regulations for issuing LOCs under the General Authorization can be found at § 216.45. Applying for an LOC is a simpler and more expedited process than applying for a scientific research permit. An LOC confirms that an applicant's proposed research activities will only result in Level B harassment (*i.e.* activities with the potential to disturb but not injure) and will only target marine mammals that are not endangered or threatened under the Endangered Species Act (ESA). A scientific research permit is required for research on ESA-listed species or for research that involves physical contact with marine mammals.

Background

Section 2 of the MMPA, 16 U.S.C. 1361, provides that it is the Sense of Congress that marine mammals "should be protected and encouraged to develop to the greatest extent feasible commensurate with sound policies of resource management and that the primary objective of their management should be to maintaining the health and stability of the marine ecosystem." Section 2, however, also includes Congress's finding that there is inadequate knowledge of the ecology and population dynamics of marine mammals. Since the MMPA was enacted in 1972, NMFS has issued permits to allow research on marine mammals as well as other permits and authorizations allowing take of marine mammals as specified in section 104.

Take, as defined in section 3 of the MMPA, 16 U.S.C. 1362, and in § 216.3, means to harass, hunt, capture, collect, kill marine mammals, or any attempt to do so.

While the permit types that are the subject of this rule authorize take of marine mammals, the majority of the take authorized under these permits is for harassment of marine mammals or collection of samples rather than lethal take. For example, a typical photography permit authorizes filming of marine mammals by underwater divers or via a drone to collect footage for a documentary series. Most LOCs under the GA are issued to researchers who photograph bottlenose dolphins (*Tursiops truncatus*) to identify individuals and study distribution and social patterns. Some research permits authorize scientists to import marine mammal biological samples to study disease, genetics, prey species, and hormones. Research permits cover a wide variety of projects, such as capturing, sampling, tagging, and releasing seals to find out how deep they dive or remotely biopsy sampling and tagging large whales to study their migrations.

Section 104 permits like those described above authorize activities that promote the goals set out in section 2 of the MMPA. Most permits authorize research on marine mammals, which ultimately benefits the species. As scientists conduct permitted research, they expand our knowledge of the abundance, distribution, and health of these animals. Resource managers then use that best available data to inform their decisions. NMFS also issues permits for commercial and educational photography of non-endangered marine mammals. The final product of these permits might, for example, be a documentary television series that may inspire awe, share conservation messages, and educate the public about marine mammals.

Section 104(b) of the MMPA requires that all permits specify “the period during which the permit is valid.” The MMPA does not limit how long section 104 permits or LOCs can be valid. However, there are regulatory limitations that prevent MMPA section 104 permits and LOCs from being valid longer than 5 years (§§ 216.35 and 216.45, respectively). This proposed rule would remove the 5-year regulatory limitation on the duration of MMPA section 104 permits and LOCs. This would allow NMFS to

issue section 104 permits and LOCs for longer than 5 years, as appropriate. Each permit would have an expiration date, tailored to the specific activities proposed by the applicant, which would be subject to public comment.

Need for the Action

NMFS has been issuing marine mammal permits under section 104 for almost 50 years, and NMFS' implementing regulations have not been updated since 1996. Based on decades of experience with the issuance of these permits and the activities conducted pursuant to them, we believe a change is warranted to allow section 104 permits with durations greater than 5 years, in certain circumstances, as discussed below.

Most MMPA section 104 permits (93 percent of current permits) are scientific research permits, which result in data that informs management and conservation of marine mammal species. Rigorous studies of these long-lived species often require years, even decades, of data collection. Sixty percent of the current scientific research permit holders have had a permit for 20 or more years, meaning four or more permit cycles. Seventeen permit holders have held a permit for more than 40 years. Many researchers have dedicated their careers to conducting longitudinal studies. For example, one research group has been studying the population dynamics of Weddell seals (*Leptonychotes weddellii*) since 1968, while another scientist has been studying dolphins in Florida for over 50 years. NMFS science centers have held MMPA research permits since the creation of the MMPA and continue to hold 13 permits today. The MMPA requires NMFS to compile abundance and distribution data on marine mammals and publish the findings as Stock Assessment Reports. The need for these research activities is expected to continue into the extended future and is an example of why a permit of longer than 5 years in duration may be appropriate. Regardless of the requested duration of research, every application for a permit or authorization would include justification for

the requested duration and all permits and authorizations issued would have expiration dates.

Another potential example of a permit that may merit a longer time period might be for non-releasable marine mammals maintained in permanent care in academic facilities, zoos, and aquariums for research or enhancement purposes for the duration of their lives. Under the proposed change, these permit holders might request a permit for longer than 5 years, and the agency may, in certain circumstances, depending on the specifics of the research or enhancement, issue a permit for a longer term.

Because NMFS has been issuing permits for decades, the effects of specific permitted activities on marine mammals, including particular research techniques, are well known. Most research methodologies have become standardized over time. Permit holders tend to request and use the same techniques year after year because they are effective and create continuity across their long-term data sets. As a result, the impacts of their activities conducted under consecutive permits is expected to be the same or similar. Historically, moreover, research and filming methods, have not raised significant public concern. As required by statute, NMFS gives the public the opportunity to comment on permit applications it processes, via notice in the **Federal Register**.

Substantive comments have been received infrequently over the course of the permit program. Proposed activities are evaluated to ensure they are humane as required by issuance criteria (see *Implementation and Oversight* section). Researchers working under a scientific research permit studying marine mammal parts typically conduct analyses in a laboratory using marine mammal samples without interacting with wild animals.

Researchers working under an LOC and filmmakers working under a commercial photography permit are restricted to activities that only have the potential to disturb (not kill or physically injure) marine mammals. They are not allowed to conduct any activity that has the potential to injure an animal, including any physical contact. Additionally,

most filmmakers and many researchers want to observe and record natural marine mammal behavior. As a result, they can be expected to conduct their activities in a manner that avoids or minimizes any reaction of the animals to the permitted activity.

An additional benefit of removing the 5-year restriction on permits would be to make the MMPA permitting regulations consistent with those of the ESA. Many permits are issued under both the MMPA and ESA because the target species are marine mammals that are listed as threatened or endangered, and thus protected under both statutes. Unlike the current MMPA regulations, the ESA section 10 permit regulations do not limit the number of years an ESA section 10(a)(1)(A) scientific research and enhancement permit may be valid (50 CFR part 222) Consistency between the MMPA and ESA permitting regulations with respect to permit duration would allow NMFS to issue joint MMPA-ESA permits with terms of longer than 5 years, if warranted. NMFS currently issues some 10-year ESA permits for scientific research and enhancement on species such as sawfish, sea turtles, and sturgeon. NMFS cannot currently do the same for permits involving marine mammals because of the 5-year limit on permit duration under the MMPA regulations, even if the research would otherwise qualify for a 10-year permit under the ESA.

This change would provide greater flexibility and efficiency to permit applicants and the agency. Increasing the permit durations would decrease how often researchers have to apply for a permit, thus decreasing the amount of time and effort required in reapplying to continue their research. As shown above, decades of permit data show that researchers tend to apply for multiple permits throughout their career. Lengthening permit duration where appropriate would promote efficiency and lessen the burden on our permit holders, while still providing the same protections for marine mammals as mandated by the MMPA.

Implementation and Oversight

Information Required in Applications

Applications for MMPA section 104 special exception permits and LOCs would be evaluated and processed in the same manner as they are now in accordance with 50 CFR part 216. Applicants would still have to include their proposed start and end dates, as well as a description of the frequency and seasonality of their proposed activities in their application. Currently, applicants for section 104 permits and LOCs can request a time period of 5 years or less. Under the proposed change, applicants may request a permit duration longer than 5 years, which may be more appropriately aligned with the project's goals rather than an arbitrary 5 year duration. The agency may, in its discretion, issue a permit for such a term, provided the proposed duration is justified and appropriate for the applicant's project and objectives, is supported by the applicant's history with previous MMPA permits, has undergone public comment, and meets all statutory and regulatory issuance criteria. All permits and authorizations issued would have expiration dates. While NMFS proposes to remove the 5-year regulatory maximum duration, NMFS expects that there will continue to be projects for which a permit for a terms of 5 years or less will be appropriate. For example, permits such as those for commercial or educational photography are issued for discrete projects that take place at specific times, rarely requiring more than a year or two. Similarly, permits for importation of marine mammals for public display are issued for a singular or discrete action, which would typically warrant a permit of short duration. Thus, the duration of the permit would be determined based on the specific project proposed and the justified duration of that project.

Opportunity for Public Comment

This proposed regulatory change would not remove the public's opportunity to comment on permit applications and any major permit amendments. NMFS would continue to publish notices in the **Federal Register** for a 30-day public comment period

when complete permit applications and requests for major amendments are received consistent with statutory and regulatory requirements (16 U.S.C. 1374 (d) and § 216.33(d), respectively). These notices provide the public an opportunity to comment on the proposed permit duration. NMFS would also continue to solicit comments from the Marine Mammal Commission consistent with § 216.33 (d)(2), and other relevant federal and state agencies in accordance with § 216.33 (d)(3), concurrent with the public comment period. NMFS would continue to consider all public and expert comments on a proposed permit application, including the proposed duration, prior to permit issuance. Substantial public interest in a particular application might warrant a term of 5 years or less, to provide the public with more frequent opportunities to comment. LOCs do not currently require a public comment period and that would not change.

Issuance Criteria

To obtain an MMPA section 104 permit, applicants must meet certain statutory and regulatory issuance criteria. This includes, among other things, the regulatory issuance criteria at § 216.34, which require applicants to demonstrate, for the time period proposed, that the activity is:

- humane and with no unnecessary risks;
- consistent with regulatory restrictions;
- consistent with the purposes and policies of the ESA (if threatened or endangered species are involved);
- not likely to have a significant adverse impact on the species or stock;
- conducted by personnel with expertise and adequate facilities and resources;
- conducted by personnel with adequate resources for marine mammals held captive or transported; and
- that any requested import or export will not likely result in additional taking.

Additional criteria apply for depleted, threatened, and endangered marine mammals.

These criteria would still apply regardless of permit duration.

In addition to the regulatory criteria above, NMFS would also consider whether the applicant has previously held a permit, and if so, whether they have successfully carried out the permitted objectives. For example, for research permits, this may include whether the permit holder obtained funding, collected data, and made the results available to the scientific community in a reasonable period. As explained above (see *Need for Action*), most permits issued under section 104 have not raised substantial public concern, and the impacts of many activities conducted under section 104 permits are well known. If an applicant proposes activities that are considered novel or are likely to be controversial, a shorter permit duration may be warranted.

Agency Oversight

Under the proposed change, permit and LOC holders would still be subject to agency oversight. For example, permit and LOC holders must submit annual reports as required by the regulations at § 216.38 and § 216.45 (d)(2), respectively. This requirement is universal, regardless of how long their permit or LOC is valid. Further, permit holders are required to stop permitted activities and submit incident reports for incidents such as mortalities, exceeding authorized take, and taking protected species that were not authorized. LOC and photography permit holders must temporarily stop authorized research if they exceed Level B harassment. Annual and incident reports allow NMFS to monitor permit and LOC compliance and impacts to protected species and are available to the public. NMFS would maintain its authority for permit or LOC modification, suspension, or revocation. For example, NMFS may determine a permit modification is warranted to add permit restrictions in response to information provided in annual or incident reports.

For any amendment to a permit, or change to an LOC, the agency would reexamine the NEPA analysis based on information provided in the amendment request, taking into consideration information in annual and incident reports and in published literature. Likewise, if ESA listed species are involved and the action is covered under an ESA section 7 consultation and, for example, a new species is listed or critical habitat is designated, NMFS would review the new information to determine if consultation needs to be reinitiated in accordance with 50 CFR 402.16. If these analyses produce new information that would warrant a change to a permit or permits, NMFS retains the ability to amend permits to add permit conditions, such as mitigation measures to minimize impacts to protected species, as described in § 216.36(b).

Amendments to Extend the Permit or LOC Duration

For amendments that extend the duration of individual permits or LOCs, the process would work as it does now under the regulations, but without the 5-year limit. Any extension of a permit by more than 12 months would still be considered a major amendment requiring public comment. Permit holders may continue to request a minor amendment to extend the duration of their permit up to 1 year, if justified. The agency would continue to publish in the **Federal Register** notices of receipt of requests for major amendments for a 30-day public comment period, and notices of issuance of minor amendments extending a permit up to 1 year.

Classification

Pursuant to the procedures established to implement Executive Order 12866, the Office of Management and Budget has determined that this proposed rule is not significant.

Pursuant to section 605(b) of the Regulatory Flexibility Act (RFA), the Chief Counsel for Regulation of the Department of Commerce has certified to the Chief Counsel for Advocacy of the Small Business Administration that this proposed rule, if

adopted, would not have a significant economic impact on a substantial number of small entities. Permit and LOC applicants including individuals, academic institutions, business or other for-profit organizations, not-for-profit institutions, and government organizations are the only entities that would be subject to the requirements in these proposed regulations. The number of small governmental jurisdictions, small organizations, or small businesses affected is approximately less than 150 entities total, and less than 35 annually. The change in duration of permits would not affect the cost to these small entities, as it would require the same amount of time and resources to apply for a 5-year permit as it would to apply for a permit of a longer duration. Overall, this rule may reduce the costs to these entities because they would spend less time applying for permits. For example, the estimated number of burden hours to complete a scientific research permit application is 50 hours, with an estimated average hourly rate of \$32.58. Thus, an applicant for a scientific research permit would spend approximately \$3,258 and 100 hours to apply for two consecutive 5-year research permits. If the duration limit for special exception permits is removed, the number of burden hours and costs to apply for a scientific research permit could be reduced to approximately \$1,629 and 50 hours for a 10-year permit, if issued. A longer duration permit would save additional costs. An applicant for a General Authorization LOC would spend approximately 10 hours and \$325.80 to complete a 5-year LOC application, which if issued for a longer period, would reduce that cost. Because of this, a regulatory flexibility analysis is not required, and none has been prepared.

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 (PRA) unless that collection of information displays a currently valid OMB control number. This

proposed rule contains collection-of-information requirements subject to the provisions of the PRA.¹ No changes to the reporting requirements or to the information collection instrument is required as a result of this regulatory change, other than removing the 5-year duration restriction.

List of Subjects in 50 CFR Part 216

Regulations governing the taking and importing of marine mammals.

Dated: April 24, 2024.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs,

National Marine Fisheries Service.

For reasons set forth in the preamble, 50 CFR Part 216 is proposed to be amended as follows:

PART 216 – REGULATIONS GOVERNING THE TAKING AND IMPORTING OF MARINE MAMMALS

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

Authority: 16 U.S.C. 1361 *et seq.*

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2. In § 216.35, revise paragraph (b) to read as follows:

§ 216.35 Permit restrictions.

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¹ The information collection is currently approved by OMB under control no. 0648-0084, *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 MMPA, the Fur Seal Act, and/or section 10(a)(1)(A) of the Endangered Species Act.*

(b) Special exception permits expire on the date specified in the permit, unless limited or extended in duration by the Director in accordance with § 216.36 and § 216.39.

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3. In § 216.45, revise paragraph (b)(2)(iv) and paragraph (d)(3) to read as follows:

§ 216.45 General Authorization for Level B harassment for scientific research.

* * * * *

(b)* * *

(2)* * *

(iv) The period of time over which the research project or program will be conducted (*i.e.*, the requested period of the LOC), including the field season(s) for the research, if applicable;

* * * * *

(d)* * *

(3) Authorization to conduct research under the General Authorization is for the period(s) of time identified in the letter of confirmation issued under paragraph (c) of this section, unless limited or extended by the Director, or modified, suspended, or revoked in accordance with paragraph (e) of this section;

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