



MARINE MAMMAL COMMISSION

6 June 2024

Ms. Jolie Harrison, Chief
Permits and Conservation Division
Office of Protected Resources
National Marine Fisheries Service
1315 East-West Highway
Silver Spring, MD 20910-3225

Dear Ms. Harrison:

The Marine Mammal Commission (the Commission), in consultation with its Committee of Scientific Advisors on Marine Mammals, has reviewed the National Marine Fisheries Service's (NMFS) 2 May 2024 proposed rule (89 Fed. Reg. 35769) to modify its implementing regulations for permits (50 C.F.R. §§ 216.31-226.41) and Letters of Confirmation (LOCs; 50 C.F.R. § 216.45) issued under section 104(c) of the Marine Mammal Protection Act (MMPA).

NMFS is proposing to remove the five-year regulatory limitation on the duration of section 104(c) permits and LOCs. This would allow NMFS to issue permits and LOCs for longer than five years. Because section 104(b) of the MMPA requires permits to specify the time period during which they are valid, all permits would still have an expiration date. NMFS indicated in the preamble to the proposed rule that many permit holders conduct the same procedures under multiple consecutive permits, and the impacts of the activities conducted under consecutive permits are expected to be the same or similar (89 Fed. Reg. 35770). As such, NMFS expects issuing longer duration permits to provide the same protections for marine mammals while decreasing the time and effort required for permit holders to reapply for new permits. Additionally, because the Endangered Species Act (ESA) does not specify a maximum duration for permits issued under section 10(a)(1)(A) (50 C.F.R. § 222), the proposed modification would allow NMFS to issue longer duration joint-MMPA-ESA permits.

The Commission supports NMFS's effort to increase efficiency and agrees that the proposed rule would reduce the burden on researchers who apply for multiple consecutive permits. The Commission, however, is concerned that the proposed rule could lead to subjective permit durations and difficulty ensuring that the research procedures align with the most up-to-date NMFS guidance and policies.

Objective criteria for longer duration permits

According to the preamble to the proposed rule, NMFS would be able to issue a permit for longer than five years provided that the proposed duration is justified and appropriate for the applicant's project and objectives, is supported by the applicant's history with previous MMPA

permits¹, has undergone public comment, and meets all statutory and regulatory issuance criteria (89 Fed. Reg. 35771). NMFS also stated that novel or potentially controversial proposed activities may warrant a shorter permit duration. Rather than using its discretion to determine a permit's duration subjectively, the Commission recommends that NMFS develop and consistently apply objective criteria for determining whether a longer duration permit or LOC is “justified and appropriate” and clearly communicate those criteria to permit holders and applicants. Clear criteria specifying when permit holders are eligible for a longer duration permit would ensure consistency in duration determinations, allow researchers to know whether their experience and proposed methods meet the criteria for a longer duration, and improve reviewers' ability to assess whether a longer duration is warranted.

Another tool that NMFS should use to inform when a longer duration permit is appropriate is its finalization and adoption of standard research methods (i.e., standard operating procedures). NMFS indicated nearly a decade ago that it intended to develop standard research methods to improve consistency and increase efficiency in the permitting process. The Commission reviewed and commented on NMFS's draft standard methods for a few individual procedures involving pinnipeds in 2018 and cetaceans as recently as early 2020. NMFS indicated at that time that, rather than providing the Commission individual standard methods for each procedure and taxon as they were completed, the agency planned to draft the remaining standard methods, compile them all into a single draft technical memorandum (tech memo), and then send that document to the Commission for review. NMFS indicated it would develop a timeline for drafting and providing the tech memo to the Commission—however, to date, neither the timeline nor the tech memo has been provided. Therefore, the Commission recommends that NMFS prioritize finalizing its draft research methods and accompanying tech memo and provide the Commission with a timeline for when they will be sent for review.

Opportunity for public comment

In the preamble to the proposed rule, NMFS indicated that it would continue to publish notices in the *Federal Register* for a 30-day public comment period when complete permit applications and requests for major amendments² are received (89 Fed. Reg. 35771). As stated in previous Commission letters³, it is imperative that an application contain accurate, complete, and consistent information, as the final application is intended to inform the public comment period and NMFS's decision whether to issue and how to condition the permit. In the case of longer duration permits, an accurate and complete application is essential for reviewers to determine whether the proposed duration is appropriate and justified. Therefore, the Commission recommends that, prior to publication of any application in the *Federal Register*, NMFS staff review each application in light of the applicable application instructions to ensure that all required information has been included, is

¹ e.g., including whether the permit holder obtained funding, collected data, successfully carried out permitted objectives, and made the results available to the scientific community in a reasonable time period.

² e.g., including requests for the extension of a permit by more than 12 months.

³ For example, see the Commission's [25 July 2023](#) and [26 July 2021](#) letters.

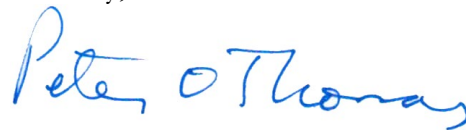
consistent with NMFS's policies, and has been reviewed and deemed sufficient by relevant internal experts⁴.

Compliance with current NMFS guidance and policies

Although the Commission generally supports NMFS's proposal to issue longer duration permits and LOCs, it is not clear how NMFS would ensure that research procedures would remain consistent with the most up-to-date guidance and policies. For example, NMFS is currently in the process of updating its guidance for assessing the effects of anthropogenic sound on marine mammal hearing⁵ and plans to revise its Level B harassment thresholds in the near future. Once the guidance documents have been finalized, it is unclear when or how NMFS would require permit holders to implement the new thresholds, particularly those that inform mitigation or shut-down zones⁶. In anticipation of future revisions, the Commission recommends that NMFS include a general condition in all permits or permit modifications involving active acoustics requiring permit holders to base the Level A and B harassment zones on NMFS's current thresholds at the time field work occurs rather than the thresholds in place when the permit was issued. More broadly, the Commission recommends that NMFS develop a plan to ensure that all future changes affecting research activities⁷ are communicated to longer duration permit holders and incorporated as permit conditions or through permit modifications. NMFS should consider establishing new general conditions for all longer duration permits to address this issue and adopt outreach strategies to inform permit holders whenever relevant changes occur.

The Commission appreciates the opportunity to review NMFS's proposed revisions to its regulations governing permits issued under 104(c) of the MMPA. Please contact me if you have any questions concerning the Commission's recommendations.

Sincerely,



Peter O. Thomas, Ph.D.,
Executive Director

⁴ The completeness and sufficiency of permit applications involving active acoustic studies has been an ongoing issue, as described in the Commission's [25 July 2023](#) letter. Most recently, the permit amendment application for Dr. Adam Pack was published in the *Federal Register* on 24 November 2023. The amendment application, however, was not deemed complete in APPS until 19 December 2023 and was not sent to the Commission for review until 2 May 2024 due to NMFS's ongoing review of the proposed active acoustic procedures. Because the application was not complete when it was published in the *Federal Register*, the public did not have the full 30 days to review the original amendment application and it did not have any opportunity to review the revised application after comments from NMFS's acoustic expert were adequately addressed.

⁵ i.e., underwater and in-air criteria for onset auditory injury and temporary threshold shift.

⁶ Some zones are based on Level A harassment thresholds to mitigate impacts on hearing, while other zones are based on Level B harassment thresholds to mitigate taking of non-target species, age classes, or sexes for which taking has not been authorized.

⁷ Including guidance being developed by NMFS to improve the reasonableness of take estimates and the accuracy of the reported takes for permits and LOCs issued under section 104(c) of the MMPA.