



relationship between those regulations and applications for permits to take animals from the wild for purposes of public display.

### III. Guidance

#### 3.1 *Authority*

Under section 104 of the MMPA, NMFS has the authority to issue permits to take or import marine mammals for purposes of public display, scientific research, enhancing the survival or recovery of a species or stock, or educational or commercial photography.

Section 109(h) of the MMPA stipulates that in any case in which it is feasible to return a stranded marine mammal to its natural habitat, steps to achieve that result shall be taken.

Under section 402 of the MMPA, the NMFS Marine Mammal Health and Stranding Response Program (MMHSRP) is directed to develop procedures and practices for rescuing and rehabilitating stranded marine mammals, including criteria for determining when a marine mammal undergoing rehabilitation is returnable to the wild.

#### 3.2 *Revised/Amended Process for Permit Applications to Retain Releasable Rehabilitated Marine Mammals for Public Display*

Pursuant to this Procedural Directive, NMFS will no longer accept applications to take releasable marine mammals for public display purposes. Rather, applicants must apply for a section 104(c) permit to take (*i.e.*, capture) marine mammals from the wild for purposes of public display. Permit applicants must address the impacts of the removal of the desired number of animals from the stock or population.

An application for a permit to take marine mammals from the wild for public display purposes will be reviewed in accordance with NMFS' application instructions (OMB No. 0648-0084) and processed in accordance with MMPA permitting regulations (50 C.F.R. Part 216, Subpart D). Upon receipt of a complete application, an initial National Environmental Policy Act (NEPA) determination and notice of the availability of the application to the public will be published in the *Federal Register* for a 30-day public comment period. Concurrently, the application will be forwarded to the Marine Mammal Commission (MMC) and the U.S. Department of Agriculture's Animal and Plant Health Inspection Service (APHIS) for their review and comment. Following the close of the public comment period and any further necessary correspondence with the applicant, NMFS will finalize the NEPA analysis and make a decision to issue or deny the requested permit in accordance with MMPA permit issuance criteria (50 C.F.R. Part 216, Subpart D).

If, after issuance of a permit to take a marine mammal from the wild, the Office Director chooses, in his or her sole discretion, to direct the retention of a releasable marine mammal in lieu of the permitted collection from the wild, then the Office Director will authorize such a transfer under a Letter of Authorization to the permit holder.

NMFS Office of Protected Resources' Permits and Conservation Division will no longer process permit applications from any person seeking specifically to obtain a releasable rehabilitated marine mammal from the MMHSRP for the purpose of public display. Any such applications pending at the time that this Directive is approved, or such applications received thereafter, will be immediately returned to the applicant and the applicant advised to reapply under the standard process for a permit to capture marine mammals from the wild for purposes of public display as described above.

### 3.3 *Additional Background and Rationale*

As mandated by the MMPA, one of the primary goals of the National Marine Mammal Stranding Network<sup>1</sup> is to release back to the wild each stranded marine mammal that can be successfully rehabilitated. These marine mammals that are rescued, rehabilitated, and released back to the wild contribute to maintaining healthy populations.

The MMHSRP has policies and procedures for the Stranding Network, including [Policies and Best Practices - Marine Mammal Stranding Response, Rehabilitation and Release – Standards for Release](#). These Standards for Release provide an evaluative process to determine the feasibility for a stranded marine mammal, following a course of treatment and rehabilitation, to be released back to the wild in accordance with MMPA implementing regulations at 50 C.F.R. § 216.27. After completing a thorough assessment, the attending veterinarian at the rehabilitation facility makes a disposition recommendation for the marine mammal undergoing rehabilitation: Releasable, Conditionally Releasable, or Non-releasable.

The relevant NMFS Regional Office reviews the disposition recommendation (unless such review has been waived<sup>2</sup>) and either concurs or does not concur with the recommendation of the attending veterinarian. For marine mammals deemed non-releasable (*i.e.*, animals deemed unable to survive in the wild or which pose a risk to wild marine mammals, and therefore need permanent human care), [NMFS Procedural Directive 02-308-02](#), published in 2012, outlines the NMFS process for determining permanent disposition, which might include placement in a public display or research facility, pursuant to 50 C.F.R. § 216.27(c).

Due to the high volume and dynamic nature of rehabilitation (*i.e.*, frequent changes in animal health status), the regulation at 50 C.F.R. § 216.27 (a)(2)(i)(A) allows a NMFS Regional Office to waive the requirement of advance notice of releases; this waiver has been granted for certain species of pinnipeds in the West Coast Region. As a result, NMFS has no real-time information regarding releasable marine mammals of these species.

From 2005-2016, NMFS issued three permits authorizing the retention of releasable marine mammals (those that have been cleared for return to the wild) for public display purposes under

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<sup>1</sup>The National Marine Mammal Stranding Network includes members authorized under MMPA sections 109(h) and 112(c) to carry out MMHSRP activities. Network members authorized under MMPA section 112(c) are issued a Stranding Agreement and must adhere to the *Policies and Best Practices* developed by NMFS to carry out MMHSRP mandates.

<sup>2</sup> In general, 15-day advance written notification from the National Marine Mammal Stranding Network member to the appropriate NMFS Regional Office is required for marine mammals deemed releasable. However, 50 C.F.R. § 216.27 (a)(2)(i)(A) allows the NMFS Regional Administrator to waive this pre-notification in writing in certain circumstances.

section 104 of the MMPA and NMFS' implementing regulations at 50 C.F.R. Part 216. A permit was required for placement of releasable stranded animals (unlike non-releasable stranded animals, which, as described above, may be placed in accordance with the administrative process outlined in NMFS Procedural Directive 02-308-02) because NMFS viewed retention of a releasable marine mammal as a *de facto* take from the wild (*i.e.*, the animal would have otherwise been released and would presumably have contributed to the wild population). These permits were issued based upon NMFS' regulation at 50 C.F.R. § 216.27(b)(4),<sup>3</sup> which states that the NMFS Office of Protected Resources' Office Director may require use of a rehabilitated marine mammal for public display purposes in lieu of animals taken from the wild. The permit applicants were not required to request an *actual* "take" of animals from the wild, as the placement of the releasable animal was considered in lieu of this take.

NMFS received numerous public comments on the three issued permits asserting that permits to retain releasable marine mammals from the stranding network are in direct contradiction to the goals of Title IV and section 109(h) of the MMPA, which provide for rescue and rehabilitation of stranded marine mammals and release to the wild when feasible. On this basis, there was strong opposition to the issuance of such permits by numerous National Marine Mammal Stranding Network members, the marine mammal conservation community, animal welfare organizations, and the general public.

APHIS, among other commenters, asserted that the provision for use of a releasable animal in lieu of animals taken from the wild should only be available once an application for take from the wild has been reviewed and a permit has been issued. Commenters believed the process used for the three permits NMFS issued largely circumvents the appropriate process for what is the functional equivalent of a take from the wild.

After evaluation and reconsideration of this process and as a result of public comments on the three permits issued, NMFS decided it will no longer accept applications for the specific purpose of obtaining releasable marine mammals from the MMHSRP. In the future, any person wishing to obtain animals for public display must submit a permit application to take animals from the wild for that purpose. NMFS will continue to use its administrative placement process under Procedural Directive 02-308-02 for animals deemed non-releasable. In the event NMFS decides to grant a permit to take animals from the wild, the Office Director may, at his or her sole discretion, direct that a releasable rehabilitated marine mammal be substituted for an animal captured from the wild, in accordance with 50 C.F.R. § 216.27.

NMFS determined this approach is more consistent with the statutory provisions governing rehabilitation and release of stranded marine mammals (MMPA section 109(h) and MMPA Title IV), which are separate from the provisions of section 104, which allows the Secretary to issue permits for the take of animals from the wild for purposes of public display.

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<sup>3</sup> 50 C.F.R. § 216.27(b)(4) states: *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.* In addition, 50 C.F.R. § 216.27(c)(1) states: *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.*

As noted above, the purpose of the MMHSRP is to rescue, rehabilitate, and, in accordance with MMPA section 109(h)(3), release to the wild, when feasible, marine mammals that have stranded. In the 1993 preamble to the § 216.27 rehabilitation/release regulations, NMFS stated that release to the wild “is considered to be feasible if: (1) The release of the marine mammal to the wild is likely to be successful; and (2) the marine mammal to be released is determined by the [Assistant Administrator] not to be a suitable substitute for a marine mammal of the same species and characteristics for which a *permit has been issued* [emphasis added] for capture from the wild.”<sup>4</sup> The proposed regulation provided that NMFS may “require that a rehabilitated marine mammal be used as a substitute for a marine mammal of the same species for which a special exception permit *has been issued* . . . to capture from the wild.”<sup>5</sup>

When the regulations were finalized in 1996, 50 C.F.R. § 216.27 was changed, without explanation, to remove the “permit has been issued” provision, and now reads: “Notwithstanding any of the provisions of this section, the Office Director may require the use of a rehabilitated marine mammal for any activity authorized under subpart D in lieu of animals taken from the wild.” NMFS interpreted this to indicate that an actual, issued take-from-the-wild permit was not required to utilize this provision; rather, a specific category of permit, essentially authorizing in advance such a substitution, was permissible. NMFS reasoned that if a permit could be granted for a take from the wild, and it would be arguably more humane to substitute an animal that had already been in human care for at least some length of time, a permit specifically for that purpose could be granted.

NMFS now realizes that such permits can present considerable logistical difficulties (as noted above, NMFS does not always have real-time information on the health and availability of stranded marine mammal in rehabilitation), and are essentially at odds with the mandate of the MMHSRP. Therefore, NMFS will no longer grant permits for the specific purpose of retaining rehabilitated animals deemed releasable back to the wild.

### 3.4 *References*

Marine Mammal Protection Act (MMPA) 16 U.S.C. § 1374 (Section 104)

Marine Mammal Protection Act (MMPA) 16 U.S.C. § 1379 (Section 109)

Marine Mammal Protection Act (MMPA) 16 U.S.C § 1421 (Section 401)

Marine Mammal Protection Act Regulations 50 C.F.R. § 216.27

#### (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

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<sup>4</sup> 58 Fed. Reg. 53325 (October 14, 1993)

<sup>5</sup> *Id.* at 53338

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*

- (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.

Policies and Best Practices - Marine Mammal Stranding Response, Rehabilitation and Release – Standards for Release. NOAA National Marine Fisheries Service, February 2009.

This procedural directive is supported by the references listed in Policy Directive 02-308.