



March 10, 2020

The Honorable Mary Neumayr
Chairman
Council on Environmental Quality
730 Jackson Place, NW
Washington, DC 20503

Submitted Electronically via <https://www.regulations.gov/docket?D=CEQ-2019-0003>

RE: Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act

Dear Chairman Neumayr:

In response to the Council on Environmental Quality's ("CEQ") request for comments on proposed revisions to the regulations for implementing the procedural provisions of the National Environmental Policy Act, the National Ocean Policy Coalition ("Coalition") is pleased to provide comments and suggestions regarding additional opportunities to reduce paperwork and delays, facilitate more efficient, effective, and timely environmental reviews, improve interagency coordination, enhance transparency, and support agency decision-making in the context of the Marine Mammal Protection Act ("MMPA").

The Coalition is an organization of diverse interests representing sectors and entities that support the development and implementation of sound, balanced ocean policies that recognize and enhance the critical role that our oceans, coastal areas, and marine and terrestrial ecosystems play in our nation's economy, national security, culture, health, and well-being while conserving the natural resources and marine habitat of our ocean and coastal regions for current and future generations.

The Coalition's recommendations that follow highlight opportunities for administrative actions by federal agencies -- with CEQ oversight and assistance when needed -- and are aligned with ongoing federal efforts to streamline and improve decision-making¹ and consistent with the MMPA's policy that marine mammals "should be protected and encouraged to develop to the greatest extent feasible commensurate with sound policies of resource management..."²

¹ See e.g., Proposed Rule on the Update to the Regulations Implementing the Procedural Provisions of the National Environmental Policy Act, 85 FR 1684 (Jan. 10, 2020), Presidential Memorandum on Ocean Mapping of the United States Exclusive Economic Zone and the Shoreline and Nearshore of Alaska, 84 FR 64699 (Nov. 22, 2019), Executive Order Regarding the Ocean Policy to Advance the Economic, Security, and Environmental Interests of the United States, 83 FR 29431 (June 19, 2018), Executive Order on Establishing Discipline and Accountability in the Environmental Review and Permitting Process for Infrastructure, 82 FR 40463 (Aug. 24, 2017), Executive Order on Implementing an America-First Offshore Energy Strategy, 82 FR 20815 (May 3, 2017), and Executive Order on Improving Performance of Federal Permitting and Review of Infrastructure Projects, 77 FR 18887 (Mar. 28, 2012).

² 16 U.S.C. § 1361.

Streamlining MMPA Application and Review Processes

Under current practice, entities seeking to obtain MMPA authorizations oftentimes must submit multiple applications to various federal agencies when the proposed underlying activity spans the jurisdiction of multiple entities. In the case of 5-year Incidental Take Regulations, authorization holders must again initiate and navigate the same application and review process when seeking a renewal, even when the underlying activity has not substantially changed.

In such instances, existing protocols require entities seeking to engage in commercial or academic research activities that require MMPA authorizations to expend additional time and resources that could otherwise be allocated toward productive uses that support the Blue Economy and greater understanding of the ocean. ***To help alleviate these unnecessary burdens, the Coalition recommends that the MMPA application and renewal process be reformed by:***

- Allowing applicants to submit a common application to multiple federal agencies including the National Marine Fisheries Service (“NMFS”) when seeking an authorization for MMPA-regulated activities that also require approvals under a separate regulatory authority; and
- Developing and implementing a simple, straightforward process for renewing 5-year Incidental Take Regulations for activities that are not substantially changing.

As to MMPA application reviews, the process has often been mired in lengthy delays, not consistently applied to user groups conducting similar survey types, and presented questions about whether the purposes of the MMPA and its “best scientific evidence available” standard are being adhered to throughout the course of decision-making. ***To ensure that requests for MMPA authorizations are being processed in a timely and scientifically-sound manner that is consistent with the MMPA and existing federal policy, the Coalition recommends that the review process be reformed by:***

- Establishing an efficient, consistent, and predictable framework for NMFS and other relevant agencies to ensure that MMPA application reviews proceed in a timely manner, are grounded in sound scientific reasoning, consistently applied across survey types, feature the intra/inter-governmental coordination necessary to support an efficient process, and afford applicants the certainty needed to plan and conduct their operations;
- Setting specific, matching timelines for decisions involving multiple agencies for all activities (e.g. MMPA authorizations at NMFS and related permits at the Bureau of Ocean Energy Management (“BOEM”));
- Developing criteria for categorical “no take” determination for certain clearly delineated activities;
- Clarifying that there is no overriding policy in the MMPA that requires implementing agencies to err on the side of conservation when making MMPA decisions based upon uncertain or incomplete data, that the best available science standard should be implemented in a manner that avoids overzealous regulation and unintentional economic impacts, and that decisions be based on most likely, not worst-case, outcomes; and
- Providing CEQ oversight of any interagency working groups established to foster improved and timely coordination between agencies.

Lastly, ongoing MMPA proceedings such as the issuance of Incidental Take Regulations Governing Geophysical Surveys on the Outer Continental Shelf of the Gulf of Mexico and the related Biological Opinion and BOEM environmental review should be completed in a manner that will ensure use and

application of best available science, due regard for interagency feedback, and a process that will ensure timely review and processing of future permitting requests under the final rule.

Ensuring a Level Playing Field

Regrettably, entities seeking MMPA authorizations have been subjected to differing mitigation requirements even in instances where the underlying activities utilize the same type of technologies. Furthermore, MMPA reviews to date have raised concerns that analysis of potential impacts from proposed activities have extended beyond the bounds of impacts on marine mammals. Additionally, through representation by both individual companies and trade associations, regulated industries have been denied access to significant deliberations and documents in cases where a federal agency was deemed the “applicant” for purposes of the MMPA authorization request.

Therefore, the Coalition recommends that the following actions be taken to ensure a more equitable and transparent MMPA process:

- Achieve consistency in MMPA authorizations, particularly in required mitigation measures, where permitted activities use similar technology;
- Clarify that an MMPA authorization only addresses incidental take, not other effects of the underlying activity; and
- Clarify that an applicant for an MMPA authorization, or the industry regulated under an incidental take regulation, are “applicants” for purposes of Endangered Species Act Section 7 consultations.

Lastly, as noted above, while effective coordination within and among federal agencies is critical to ensuring timely and efficient MMPA decision-making, such coordination and consistency does not always occur. As one example, although the MMPA specifically provides for safe deterrence of marine mammals to prevent damage to gear, catch, private or public property, or threats to personal safety or the safety of others,³ authorization to engage in nonlethal deterrence mechanisms has been uneven across NMFS regions.

Specific concerns have been raised about the lack of approved mechanisms in the Gulf of Mexico and potential threats and impacts to fishermen, charterboat operators/customers, and marine mammals as a result, particularly in light of increased, close encounters between fishermen and dolphins. ***In furtherance of the health and safety of marine mammals and those in their vicinity, the Coalition recommends that NMFS take action to ensure that safe deterrents are available in all regions.***

Thank you for your consideration of these recommendations, and please contact me at jack.belcher@oceanpolicy.com with any questions.

Sincerely,



Jack Belcher
Managing Director

³ 16 U.S.C. § 1371.