



MARINE MAMMAL COMMISSION

15 March 2018

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 U.S. Fish and Wildlife Service's (FWS) application seeking to renew its authorization under section 101(a)(5)(D) of the Marine Mammal Protection Act to take small numbers of pinnipeds by harassment. The taking would be incidental to seabird, shorebird, and other monitoring and research activities within the Eastern Massachusetts National Wildlife Refuge Complex (the Complex) in Massachusetts during a one-year period. The Commission also has reviewed the National Marine Fisheries Service's (NMFS) 6 March 2018 notice (83 Fed. Reg. 9483) announcing receipt of the application and proposing to issue the authorization, subject to certain conditions.

FWS plans to conduct surveys of seabirds, shorebirds, and tiger beetles at the Monomoy, Nantucket, and Nomans Land Island National Wildlife Refuges within the Complex and various beaches on the Cape Cod National Seashore. A one-day coastal shoreline survey also would be conducted to understand the rate of shoreline change and effects of sea level rise. The activities would occur from 1 April through 30 November. Vessel- and research-related sound and the increased presence of humans would be the main sources of marine mammal disturbance.

NMFS preliminarily has determined that, at most, the proposed activities temporarily would modify the behavior of small numbers of gray and harbor seals. It also anticipates that any impact on the affected species and stocks would be negligible. NMFS does not anticipate any take of marine mammals by death or serious injury and believes that the potential for disturbance will be at the least practicable level because of the proposed mitigation measures. The mitigation, monitoring, and reporting measures include—

- conducting vessel approaches in a slow and controlled manner, as far away as possible from haul-out sites to prevent or minimize flushing;
- avoiding or proceeding cautiously when operating boats in the direct path of swimming seals;
- restricting deployment of cannon nets within 100 yds of seals;
- selecting a pathway of approach to research sites that minimizes the number of seals harassed;

- avoiding disturbance of females and pups by either rescheduling surveys, if possible, or refraining from conducting those activities that may cause high-level disturbance (e.g., flushing or long movements over land)¹;
- avoiding making unnecessary noise and using hushed voices while near hauled-out seals;
- remaining at least 50 yds from seals, when possible;
- monitoring for offshore predators (i.e., great white sharks) and restricting approaches of hauled-out seals if predators are present;
- using qualified observers to monitor and evaluate incidental takes;
- reporting observations of tagged or marked seals to the relevant researcher;
- reporting unusual species, numbers, and behavior of seals to NMFS's Office of Protected Resources (OPR) and the Greater Atlantic Regional Stranding Coordinator (GARSC)²;
- reporting injured and dead marine mammals to NMFS's OPR and GARSC using NMFS's phased approach and suspending activities, if appropriate; and
- submitting a final monitoring report.

The Commission concurs with NMFS's preliminary finding and recommends that NMFS issue the incidental harassment authorization, subject to the inclusion of the proposed mitigation, monitoring, and reporting measures.

Proposed one-year authorization renewals

For this and other future authorizations, NMFS has indicated that it may issue a second³ one-year incidental harassment authorization renewal on a case-by-case basis without additional public notice when (1) another year of identical, or nearly identical activities, as described in the 'Specified Activities' section of the *Federal Register* notice is planned or (2) the activities would not be completed by the time the incidental harassment authorization expires and a renewal would allow for completion of the authorized activities beyond the timeframe described in the 'Dates and Duration' section of the notice. NMFS would issue a renewal only if—

- the request for renewal was received no later than 60 days prior to the expiration of the current authorization;
- the activities to be conducted either are identical to the previously analyzed and authorized activities or include changes so minor (e.g., reduction in pile size) that they do not affect the previous analyses, take estimates, or mitigation and monitoring requirements;
- a preliminary monitoring report provides the results of the required monitoring to date and those results do not indicate impacts of a scale or nature not previously analyzed or authorized;
- the status of the affected species or stocks and any other pertinent information, including the

¹ Although this measure was included in the previous authorization at the request of the Commission, it was omitted in the proposed authorization. NMFS indicated it would be included in the final authorization.

² NMFS inadvertently omitted portions of this standard measure but clarified that the entire measure would be included in the final authorization.

³ NMFS informed the Commission that the renewal would be issued as a one-time opportunity, after which time a new authorization application would be required. NMFS has yet to specify this in any *Federal Register* notice detailing the new proposed renewal process but should do so.

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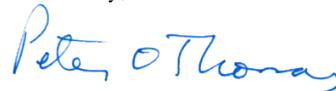
- mitigation and monitoring requirements, remain the same and appropriate; and
- the original determinations under the MMPA remain valid.

The Commission agrees that NMFS should take appropriate steps to streamline the authorization process under section 101(a)(5)(D) of the MMPA to the extent possible. However, the Commission is concerned that the renewal process proposed in the *Federal Register* notice is inconsistent with the statutory requirements. Section 101(a)(5)(D) clearly states that proposed authorizations are subject to publication in the *Federal Register* and elsewhere and an opportunity for public review and comment. NMFS's proposed renewal process would bypass the public notice and comment requirements. Although it is sympathetic to what NMFS is trying to accomplish, the Commission recommends that NMFS refrain from implementing the proposed renewal process.

If NMFS believes that its proposed renewal process is consistent with the applicable statutory requirements and is intended to be generally applicable to all incidental harassment authorizations that meet the specified criteria, it should not seek to adopt such a process through a brief notice at the end of a specific proposed authorization. That process should be adopted through a more general route, preferably a rulemaking, that provides NMFS's rationale and analysis regarding why it believes the proposed renewal process is consistent with the requirements of section 101(a)(5)(D) of the MMPA and adequate public notice and opportunity for comment. If NMFS adopts the proposed renewal process notwithstanding the Commission's recommendation, the Commission further recommends that NMFS provide it and the public with a legal analysis supporting NMFS's conclusion that such a process is consistent with the requirements under section 101(a)(5)(D) of the MMPA. In addition, if NMFS decides to bypass the notice and comment process in advance of issuing a renewal, it should nevertheless publish notice in the *Federal Register* whenever such a renewal has been issued.

Please contact me if you have questions regarding the Commission's recommendation.

Sincerely,



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