



# MARINE MAMMAL COMMISSION

24 January 2017

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 July 2015 application from the Texas Parks and Wildlife Department (TPWD) requesting that the National Marine Fisheries Service (NMFS) promulgate regulations under section 101(a)(5)(A) of the Marine Mammal Protection Act (the MMPA) to authorize the taking of bottlenose dolphins incidental to fishery monitoring activities in Texas waters. The Commission also has reviewed the NMFS's 6 January 2017 notice (82 Fed. Reg. 1721) announcing receipt of the application.

TPWD plans to monitor various finfish species to assess their relative abundance and size in various bays throughout coastal Texas waters. TPWD would deploy up to 780 gill nets per year, with 390 deployed in spring and 390 in fall<sup>1</sup>. Gill nets would be set only at night. TPWD is seeking authority to take by entanglement, and possible mortality, up to one bottlenose dolphin per year. Bottlenose dolphins could be taken from any bay, sound, or estuarine (BSE) stock from Laguna Madre to Sabine Lake.

NMFS determined the application received from TPWD on 29 July 2015 to be "adequate and complete" (82 Fed. Reg. 1722), yet it is unclear why NMFS delayed publication of a notice of receipt for nearly 18 months. In any case, the Commission disagrees with NMFS's assessment that the application is either adequate or complete. The application fails to provide the information necessary for NMFS to make the basic determinations under section 101(a)(5)(A) of the MMPA, that the taking will involve only small numbers of marine mammals and have a negligible impact on the affected marine mammal species or stocks. The application is scant on details. For example, the requirements under 50 C.F.R. § 216.104 are only briefly addressed including the sections involving the species and number of marine mammals likely to be in the area and the type of incidental take authorization being requested.

Although the application provides a short discussion of the number of marine mammals that could be taken incidental to the proposed fishery monitoring activities, it provides no discussion of the MMPA's small numbers determination or why it believes that that determination would be met. While the taking of a single animal each year may appear to be a small number, the guidance

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<sup>1</sup> During two 10-week periods starting in mid-April and -September.

provided by NMFS has indicated that the small numbers determination is to be viewed in the context of the size of the affected population(s). The application notes that seven different stocks of bottlenose dolphins could be affected by its activities. Those stocks range in size from 152 animals for the Galveston Bay/East Bay/Trinity Bay stock to a low of 0-2 for the Sabine Lake stock. If one of the animals taken during the proposed five-year authorization were from the Sabine Lake population, it could remove 50 percent or even the entire population and therefore would not be considered a small number under NMFS's interpretation of the small-numbers determination.

Similarly, the application provides virtually no analysis as to why TPWD believes the negligible impact determination would be satisfied. The application indicated that if a dolphin is taken during the next five years, it will probably come from the Copano Bay/Aransas Bay/San Antonio Bay/Redfish Bay/Espiritu Santo Bay (Copano) stock. It then notes that “[s]ince the status of this stock is unknown, or undetermined, it is difficult to determine what impact this take will have and would depend on the sex of the dolphin taken.” Incongruously, and without any further discussion, the application then concludes that “[O]verall, we believe the impact of our activity to be negligible for all seven bay, sound, and estuary stocks found in Texas.” Looking again at the worst-case scenario of removing one or more dolphins from the Sabine Bay stock, there is no scientific basis to conclude that the taking would have a negligible impact on the population. Even for the Copano stock, which numbers 55 animals ( $N_{Best}$ ) and from which taking is considered most likely, the mortality of a single animal would not meet a negligible impact determination.

The application also is inadequate in other respects. It provides little information on mitigation measures. Rather, the application specifies only TPWD's current operating protocol, with the apparent assumption that the manner in which fishery monitoring activities are currently conducted will suffice. However, even if the MMPA's small numbers and negligible impact determinations are met, section 101(a)(5)(A)(i)(II)(aa) requires more—an authorization is to include “means of effecting the least practicable adverse impact on such species or stocks and its habitat....” TPWD's application at a minimum should discuss the measures developed by the bottlenose dolphin take reduction team, including mesh size limitations, time-area closures, net tending, and restrictions on night fishing.

It is incumbent on NMFS, as the regulatory agency, to ensure that the applications provided to the public for comment are adequate and complete prior to publication. And, if an application is inadequate or incomplete, it should be returned to TPWD for revision prior to publication. If TPWD chooses not to revise the application, then NMFS should deny the authorization request. For the reasons discussed herein, the Commission believes TPWD's application is inadequate and incomplete and therefore recommends that NMFS return the current application to TPWD for revision. The Commission further recommends that, if TPWD chooses not to revise the application or fails to submit an adequately revised application, NMFS decline to proceed with publication of proposed incidental take regulations. NMFS has published several fishery-related incidental take applications in recent years, including one for the Southeast Fisheries Science Center. TPWD should be advised to refer to those applications as a guide for ensuring that its revised application is adequate and complete.

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Please contact me if you have questions regarding the Commission's comments and recommendations.

Sincerely,

A handwritten signature in blue ink that reads "Rebecca J. Lent". The signature is written in a cursive style with a large initial "R" and a distinct "Lent" at the end.

Rebecca J. Lent, Ph.D.  
Executive Director