



MARINE MAMMAL COMMISSION

19 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 application submitted by the Statoil Wind U.S. LLC (Statoil) under section 101(a)(5)(D) of the Marine Mammal Protection Act (the MMPA). Statoil is seeking authorization to take small numbers of marine mammals by harassment incidental to marine site characterization surveys off the coast of New York as part of the Empire Wind Project. The Commission also has reviewed the National Marine Fisheries Service's (NMFS) 22 February 2018 notice (83 Fed. Reg. 7655) requesting comments on its proposal to issue the authorization, subject to certain conditions.

Background

Statoil is proposing to conduct high-resolution geophysical (HRG) and geotechnical surveys to support the siting, design, and deployment of up to three meteorological data buoys approximately 11.5 nmi from Jones Beach, New York. Additionally, one or more cable routes will be established in coastal waters between the lease area and New York, identified as the cable route area. The surveys would begin in March 2018 and would operate during the day and at night for approximately 142 days. Sub-bottom profilers (both shallow-and medium-penetration types) would be used.

NMFS preliminarily has determined that the proposed activities temporarily would modify the behavior of small numbers of 11 marine mammal species. 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 sound source verification measurements and adjusting the Level B harassment zones, as necessary;

- using vessel-based observers to monitor the exclusion zones¹ and the Level B harassment zone² for 30 minutes before, during, and for 30 minutes after the HRG surveys;
- using standard ramp-up and delay procedures;
- using shutdown procedures if a marine mammal is sighted within or approaching the designated exclusion zones, with the exception of bow-riding small delphinids;
- using delay and shut-down procedures, if a species for which authorization has not been granted or if a species for which authorization has been granted but the authorized takes are met, approaches or is observed within the Level A and/or B harassment zone³;
- using passive acoustic monitoring to detect marine mammals during nighttime operations and to evaluate the effectiveness of mitigation measures during daylight hours;
- using standard vessel strike avoidance procedures and monitoring the NMFS North Atlantic right whale reporting systems during all survey activities;
- working with NMFS to shut down and/or alter the survey activities if a Dynamic Management Area is established in the survey area;
- reporting injured and dead marine mammals to the Office of Protected Resources and the Greater Atlantic Regional Fisheries Office Stranding Coordinator using NMFS's phased approach and suspending activities, if appropriate; and
- submitting field and technical reports and a final comprehensive report to NMFS.

Rounding of take estimates

The method NMFS used to estimate the numbers of takes during the proposed activities, which summed fractions of takes for each species across project days, does not account for and negates the intent of NMFS's 24-hour reset policy. As the Commission has indicated in previous letters regarding this matter⁴, the issue at hand involves policy rather than mathematical accuracy. NMFS developed criteria associated with rounding quite some time ago but has yet to share those criteria with the Commission. Therefore, the Commission again recommends that NMFS share the rounding criteria with the Commission in an expeditious manner.

Appropriate threshold for disturbance zone

NMFS has proposed to authorize takes associated with the use of sub-bottom profilers, which NMFS has characterized as impulsive sources relative to the Level B harassment threshold of 160 dB re 1 μ Pa. However, researchers have observed that various species of marine mammals respond to sound from sources with similar characteristics (including acoustic deterrent devices, acoustic harassment devices, pingers, echosounders, and multibeam sonars) at received levels below 160 dB re 1 μ Pa. Previous Commission letters to NMFS regarding the use of sub-bottom profilers (specifically for shallow-penetration sub-bottom profilers or chirps) have pointed out that those sources have temporal and spectral characteristics that suggest a lower, more precautionary Level B

¹ A 50-m exclusion zone would be established for pinnipeds and delphinids (except harbor porpoises), a 100-m exclusion zone for large whales including sperm whales and mysticetes and harbor porpoises, and a 500-m exclusion zone for North Atlantic right whales.

² 1.2 km

³ The Commission informally noted that NMFS did not include this standard measure in the proposed authorization. NMFS indicated it would be included in the final authorization.

⁴ See the Commission's [29 November 2016 letter](#) detailing this issue.

harassment threshold of 120 dB re 1 μ Pa would be more appropriate than the 160-dB re 1 μ Pa threshold used by NMFS until such time that NMFS updates its behavior thresholds.

The Commission remains concerned that NMFS's current behavior thresholds do not reflect the current state of understanding regarding the temporal and spectral characteristics of various sound sources and their impacts on marine mammals. Therefore, the Commission recommends that, until the behavior thresholds are updated, NMFS require applicants to use the 120- rather than 160-dB re 1 μ Pa threshold for acoustic, non-impulsive sources (e.g., sub-bottom profilers/chirps, echosounders, and other sonars including side-scan and fish-finding).

Proposed one-year authorization renewals

For this and other future authorizations, NMFS has indicated that it may issue a one-year incidental harassment authorization renewal⁵ 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 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

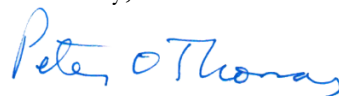
⁵ In another recent proposed authorization (83 Fed. Reg. 8456), NMFS clarified that it would issue a second one-year authorization. However, NMFS has yet to specify whether the renewal would be issued as a one-time opportunity, after which time a new authorization application would be required. These specifics should be included in all *Federal Register* notice that details the new proposed renewal process.

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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 recommendations.

Sincerely,



Peter O. Thomas, Ph.D.
Executive Director