



MARINE MAMMAL COMMISSION

4 May 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 Garden State Offshore Energy, LLC (GSOE) under section 101(a)(5)(D) of the Marine Mammal Protection Act (the MMPA). GSOE is seeking authorization to take small numbers of marine mammals by harassment incidental to marine site characterization surveys off the coast of Delaware as part of the Skipjack Wind Project. The Commission also has reviewed the National Marine Fisheries Service's (NMFS) 4 April 2018 notice (83 Fed. Reg. 14417) requesting comments on its proposal to issue the authorization, subject to certain conditions.

Background

GSOE is proposing to conduct high-resolution geophysical (HRG) and geotechnical surveys to obtain baseline seabed and sediment data to support the siting of the Skipjack wind farm within the Bureau of Ocean Energy Management (BOEM) Delaware Wind Energy Area off Rehoboth Beach, Delaware. Additionally, one or more cable routes would be established in coastal waters between the lease area and potential landfall locations in Maryland and Delaware. The surveys would occur between 15 May and 31 December 2018 and would operate during the day and at night for up to 72 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 15 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 proposed mitigation, monitoring, and reporting measures include—

- using vessel-based observers to monitor the exclusion zones¹ and the Level B harassment zone for 30 minutes before, during, and for 30 minutes after the HRG surveys;
- using standard ramp-up and delay procedures²;
- using shutdown procedures if a marine mammal is sighted within or approaching the designated exclusion zones;
- 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 number of takes are met, approaches or is observed within the Level A and/or B harassment zone;
- using passive acoustic monitoring and night-vision equipment (with infrared capabilities) 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 matter³, the issue at hand involves policy rather than mathematical accuracy. NMFS developed draft criteria associated with rounding quite some time ago, but those criteria apparently need additional revisions before NMFS can share them with the Commission. Therefore, the Commission again recommends that NMFS promptly revise its draft rounding criteria and share them with the Commission expeditiously.

Appropriate threshold for the Level B harassment zone

NMFS has proposed to authorize takes associated with the use of sub-bottom profilers/chirps, 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 regarding this matter have

¹ The proposed exclusion zones, referenced in section 4(c) of the Proposed Authorization, are greater than the estimated Level A harassment zones. The Commission informally noted a few errors in the estimation of the extents of the Level A harassment zones, which led to reductions in two of those estimates and a slight increase in another. NMFS plans to include the revised Level A harassment zones, as well as the underlying assumptions, in the final authorization.

² NMFS has clarified that clearance times after a shutdown would be 15 minutes for small cetaceans and pinnipeds and 30 minutes for large whales.

³ See the Commission's [29 November 2016 letter](#) detailing this issue.

pointed out that those sources have temporal and spectral characteristics that suggest a lower, more precautionary Level B 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 renewal⁴ 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 that there be a presumably concurrent opportunity for public review and comment. NMFS's proposed renewal process would bypass the public notice and comment requirements when it is considering the renewal.

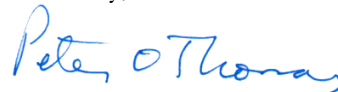
⁴ In another recent proposed authorization (83 Fed. Reg. 8456), NMFS clarified that it would issue a *second* one-year authorization. However, NMFS has yet to specify whether the renewal would be issued as a one-time opportunity, after which time a new authorization application would be required. These specifics should be included in a *Federal Register* notice that details the new proposed renewal process.

The Commission further notes that NMFS recently implemented an abbreviated authorization process by publishing the required information⁵ via an abbreviated *Federal Register* notice and by referencing the relevant documents. The abbreviated process preserves the full opportunity for public review and comment, does not appear to be unduly burdensome on either the applicant or NMFS, and is much preferred over NMFS's proposed renewal process⁶. Thus, the Commission recommends that NMFS refrain from implementing its proposed renewal process and instead use abbreviated *Federal Register* notices and reference existing documents to streamline the incidental harassment authorization 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 recommendations.

Sincerely,

A handwritten signature in blue ink that reads "Peter O. Thomas". The signature is written in a cursive style with a clear, legible font.

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

⁵ Including any changes to the proposed activities or assumptions made and results from the draft monitoring report.

⁶ See the Commission's [30 April 2018 letter](#) detailing this matter.