



# MARINE MAMMAL COMMISSION

31 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 Deepwater Wind New England, LLC (Deepwater Wind) under section 101(a)(5)(D) of the Marine Mammal Protection Act (the MMPA). Deepwater Wind is seeking authorization to take small numbers of marine mammals by harassment incidental to marine site characterization surveys off the coast of Massachusetts, Rhode Island, and New York. The Commission also has reviewed the National Marine Fisheries Service's (NMFS) 4 May 2018 notice (83 Fed. Reg. 19711) requesting comments on its proposal to issue the authorization, subject to certain conditions.

## Background

Deepwater Wind is proposing to conduct high-resolution geophysical (HRG) and geotechnical surveys to obtain baseline seabed and sediment data to support the siting of its wind farm off the coasts of Massachusetts and Rhode Island and along potential cable routes between the lease area and possible landfall locations in Massachusetts, Rhode Island, and New York. The surveys would occur from 15 June through December 31 during the day and at night for up to 200 days. Sub-bottom profilers (both shallow-and medium-penetration types), multi-beam echosounders, and side scan sonar would be used.

NMFS preliminarily has determined that the proposed activities temporarily would modify the behavior of small numbers of 14 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 protected species observers to monitor the exclusion zones 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 procedures<sup>1</sup>;

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<sup>1</sup> The Commission informally noted that clearance times after a delay would be 15 minutes for small cetaceans and pinnipeds and 30 minutes for large whales. NMFS should specify this measure in the final authorization.

- 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 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<sup>2</sup>;
- using passive acoustic monitoring and night-vision equipment (with infrared capabilities) to detect marine mammals during nighttime operations;
- using standard vessel strike avoidance procedures and monitoring<sup>2</sup> 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 a final report to NMFS.

### **General comments and sufficiency of takes**

In addition to minor typographical errors in the *Federal Register* notice, the Commission informally noted that the proposed numbers of takes for some species were lower than expected or were missing altogether. Deepwater Wind conducted HRG surveys in the same general area last year. Based on its monitoring report, common dolphins were the most regularly observed marine mammal species. Deepwater Wind observed 2,677 common dolphins during approximately 144 days of HRG survey activities (Deepwater Wind 2018). Additional animals were observed during the geotechnical portion of the survey. Although Deepwater Wind reported only 346 Level B harassment takes, the species is quite prevalent in the area. As such, the Commission inquired whether the 910 proposed takes were sufficient for the 200 days of planned activities. NMFS indicated that the takes were sufficient, but the Commission is not convinced.

During last year's activities, Deepwater Wind reported the Level B harassment zones to be either 200 or 400 m (Deepwater Wind 2018). This year the Level B harassment zones extend to 447 m. Many, if not the majority, of the common dolphin sightings occurred within 500 m of the source vessel. If Deepwater Wind uses the Dura Spark on the majority of the survey days and comparable numbers of common dolphins are observed, it could exceed the number of allotted Level B harassment takes before the end of the survey. Thus, the Commission recommends that NMFS increase the number of common dolphin takes to ensure that the activities can occur as planned during the entire 200 days.

The Commission also noted that five sperm whales were observed during the HRG surveys last year and two were reported to be taken (Deepwater Wind 2018). NMFS proposed to authorize only one sperm whale take rather than increasing to the average group size, citing that it is very unlikely that groups of sperm whales, which tend to prefer deeper depths, would be encountered during the proposed survey (83 Fed. Reg. 19728). NMFS further indicated that the water depths

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<sup>2</sup> The Commission informally noted that NMFS included this standard measure in the preamble but omitted it from the proposed authorization. NMFS confirmed the measure would be included in the final authorization.

where the survey would occur ranged from 16 to 28 m. That was an error, the water depths of the proposed survey are 26 to 48 m (83 Fed. Reg. 19712). Because last year's survey occurred in water depths of 15 to 52 m (which is comparable to this year's survey), the Commission suggested that the number of sperm whale takes be increased from one to the average group size. NMFS again indicated that the takes were sufficient. The Commission additionally notes that the two sperm whales taken last year were detected within 250 m from the source vessels (Deepwater Wind 2018), well within the proposed Level B harassment zone. As such, the Commission recommends that NMFS increase the number of sperm whale takes from one to the average group size<sup>3</sup>.

In addition, the Commission pointed out that a group of eight Risso's dolphins was observed at 400 m from the source during last year's survey. The vessel had to avoid the animals to prevent unauthorized takes (Deepwater Wind 2018). When the Commission inquired about including take of Risso's dolphins, NMFS indicated that Deepwater Wind did not request take based on its modeling results and NMFS did not think authorization was warranted. The Commission disagrees. As stated in another recent Commission letter<sup>4</sup>, NMFS's reasoning for not revising a take request should not be based on what calculations yield, on what applicants propose, or on past practice. It is NMFS's responsibility to take a step back and determine whether the proposals from applicants are scientifically sound from biological and ecological perspectives and, in this instance, based on previous monitoring results. Therefore, the Commission recommends that NMFS include at least 20 Level B harassment takes<sup>5</sup> of Risso's dolphins based on encountering a group twice during the 200 days of activities. The Commission further recommends that NMFS better evaluate the numbers of Level A and B harassment takes it plans to propose by considering both ecological/biological information and results from previous monitoring reports for all proposed authorizations prior to submitting them for publication in the *Federal Register*.

### **Rounding of take estimates**

The method 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 matter<sup>6</sup>, the issue at hand involves policy rather than mathematical accuracy. The Commission understands that NMFS has nearly completed revising its draft criteria and plans to share them with the Commission in the near term. The Commission recommends that NMFS provide those criteria in a timely manner.

### **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  $\mu$ Pa. However, researchers have observed that various species of marine mammals respond to sound from sources with similar characteristics (including acoustic

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<sup>3</sup> For another recent proposed authorization near Deepwater Wind's project area, NMFS increased the calculated sperm whale takes to five based on average group size (83 Fed. Reg. 22458). Five takes should be sufficient for this authorization as well.

<sup>4</sup> See the Commission's [21 May 2018 letter](#).

<sup>5</sup> Which also includes a buffer in case more individuals are observed this year.

<sup>6</sup> See the Commission's [29 November 2016 letter](#) detailing this issue.

deterrent devices, acoustic harassment devices, pingers, echosounders, and sonars) at received levels below 160 dB re 1  $\mu$ Pa. Previous Commission letters regarding this matter have 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  $\mu$ Pa would be more appropriate than the 160-dB re 1  $\mu$ 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  $\mu$ 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**

NMFS has indicated that it may issue a one-year<sup>7</sup> incidental harassment authorization renewal for this and other future authorizations on a case-by-case basis without additional public notice or comment opportunity 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 originally planned 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 consider issuing a renewal only if—

- the request for renewal is 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

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<sup>7</sup> In another 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 specific details should be included in all *Federal Register* notices that describe the new proposed renewal process.

process would bypass the public notice and comment requirements when it is considering the renewal.

The Commission further notes that NMFS recently implemented an abbreviated authorization process by publishing the required information<sup>8</sup> 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 process<sup>9</sup>. 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 intends that process 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 more general procedures, 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 the Commission and the public with a legal analysis supporting its conclusion that the process is consistent with the requirements under section 101(a)(5)(D) of the MMPA. Furthermore, 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

## Reference

Deepwater Wind. 2018. South Fork Wind Farm COP survey 2017: Protected species observer technical report. 152 pages.

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<sup>8</sup> Including any changes to the proposed activities or assumptions made and results from the draft monitoring report.

<sup>9</sup> See the Commission's [30 April 2018 letter](#) detailing this matter.