22 March 2019

Mr. Greg Siekaniec, Regional Director
Alaska Region
U.S. Fish and Wildlife Service
1011 East Tudor Road
Anchorage, Alaska 99503

Dear Mr. Siekaniec:

I am writing to seek an extension of the comment period for the proposed incidental take regulations published in the *Federal Register* by the U.S. Fish and Wildlife Service (FWS) on 19 March 2019 (84 Fed Reg. 10224) concerning oil and gas exploration, development, production, and transportation activities in Cook Inlet[1]. I am writing directly to you rather than submitting this letter only through the public comment portal specified in the *Federal Register* notice because this is a matter of some urgency that requires FWS's immediate attention and response. Inasmuch as the proposed regulations were prepared primarily by staff in the Alaska Region, I am assuming that you are the official charged with determining the appropriate length of the comment period on these regulations. If that is not the case, I trust that you will forward this letter promptly to the appropriate official(s).

The Marine Mammal Commission (the Commission) was surprised that the proposed rule would be subject to only a 15-day comment period with no justification or rationale provided by FWS in the *Federal Register* notice for truncating the comment period in this instance.

The Commission recognizes that neither section 101(a)(5)(A) of the Marine Mammal Protection Act[2] (MMPA) nor section 553 of the Administrative Procedure Act (APA) specifies the required length of the comment period for proposed incidental take regulations. Nevertheless, a common-sense interpretation of the notice and comment requirements of these laws is that the comment period must be sufficiently long to provide interested parties a meaningful opportunity to review the substance of the proposed rule and any supporting documents and to formulate and submit comments.

As a starting point, the Commission notes that, for most rulemakings, a 30-day comment period is deemed sufficient.[3] This time frame is reflected in guidance provided by the Office of the Federal Register—

[1] Activities would be conducted by Hilcorp Alaska, LLC (Hilcorp), Harvest Alaska, LLC (Harvest), and the Alaska Gasline Development Corporation (AGDC).
[2] Likewise, FWS's implementing regulations (50 C.F.R. § 18.27) are silent on this point.
[3] See e.g., *Fleming Companies, Inc.* v. *U.S. Dept. of Agriculture*, 322 F. Supp. 2d 744 (E.D. Tex. 2004).

> In general, agencies will specify a comment period ranging from 30 to 60 days in the "Dates" section of the Federal Register document, but the time period can vary. For complex rulemakings, agencies may provide for longer time periods, such as 180 days or more. Agencies may also use shorter comment periods when that can be justified.

The Administrative Conference of the United States[4] also has weighed in on the question of an appropriate minimum comment period for informal rulemaking under the APA—

> Agencies should set comment periods that consider the competing interests of promoting optimal public participation while ensuring that the rulemaking is conducted efficiently. As a general matter, for "[s]ignificant regulatory action[s]" as defined in Executive Order 12,866, agencies should use a comment period of at least 60 days. For all other rulemakings, they should generally use a comment period of at least 30 days. When agencies, in appropriate circumstances, set shorter comment periods, they are encouraged to provide an appropriate explanation for doing so.

A fair characterization of applicable case law and expert advice from the agencies and offices charged with overseeing implementation of the rulemaking requirements of the APA is that the public comment period for a proposed rule such as this one should be at least 30 days unless the action agency provides a compelling reason for shortening that period. In this instance, FWS has provided no justification whatsoever. Further in this regard, the Commission does not believe that this is an oversight that can be corrected merely by providing such a justification in the final rule. That rationale should be provided as part of the agency's proposed rule and the public afforded an opportunity to comment on its reasonableness and adequacy.

What constitutes a reasonable comment period for purposes of this and other incidental take regulations needs to consider not only the general rulemaking requirements applicable to all agencies under the APA, but any additional guidance provided by the MMPA for these particular types of actions. As noted above, section 101(a)(5)(A) of the MMPA, under which this authorization is being proposed, specifies that the issuance of regulations is required, but does not speak to the minimum length of the comment period. In contrast, section 101(a)(5)(D), which governs the issuance of incidental harassment authorizations, and which requires public notice and comment but not rulemaking, specifically requires a 30-day comment period. One could argue that this shows that Congress wanted to ensure that the public had an adequate opportunity to comment on proposed incidental harassment authorizations, but was less concerned about doing so for incidental take regulations, or at least wanted to provide greater flexibility to the Secretary to adopt a comment period of some other length. A review of the history of section 101(a)(5) and its legislative history[5] suggests that, by not including a specific comment period for incidental take regulations, Congress wanted to provide the Secrtary with flexibility to set comment periods longer than 30 days, but not shorter.

---

[4] The Administrative Conference is the independent federal agency charged with making recommendations to promote efficiency, participation, and fairness in the promulgation of federal regulations.
[5] See, in particular, H.R. Rep. No. 439, 103d Cong., 2d Sess. 29 (1994).

Section 101(a)(5) of the MMPA was originally enacted in 1981 and was limited to the issuance of incidental take regulations. Section 101(a)(5)(D), which authorizes the issuance of incidental harassment authorizations under simplified procedures and for periods not to exceed one year at a time, was added in 1994. At the time that subparagraph (D) was added, Congress was concerned about the time it was taking to issue incidental take authorizations by regulation and created a shorter process for those seeking authorizations to take marine mammals only by harassment and for short durations. Because that process was new and not subject to the notice and comment requirements of section 553 of the APA, Congress saw fit to set forth a specific comment period for those types of authorizations. Congress saw no similar need to specify the appropriate comment period for incidental take regulations issued under section 101(a)(5)(A), given the requirements under the APA and, at that time, with 13 years' experience with the regulatory agencies providing 30 days or longer for public comment in all such instances[6]. If anything, Congress likely did not set forth a specific comment period in section 101(a)(5)(A) as it did in subparagraph (D) because it did not want to foreclose the option of the agencies adopting longer comment periods. It is nonsensical to conclude that Congress would carve out "an expedited process" to fast-track authorizations for relatively low-level impacts (i.e., taking by harassment only) and for shorter durations not to exceed one year, yet establish a more rigorous public comment period than for longer-term, generally more complex authorizations that can include more intrusive types of taking. When section 101(a)(5) is read as a whole, and in the context of its legislative history, it is reasonable to conclude that Congress intended for the Secretary to provide at least as long a comment period for the proposed issuance of incidental take regulations as for incidental harassment authorizations.

In addition, other factors argue in favor of extending the comment period in this instance. Although there is no documentation in the available rulemaking record, the Commission assumes that FWS is proposing a 15-day comment period in order to meet some real[7] or self-imposed issuance deadline. If this is the case, the need for expedited action needs to be viewed in the context of the administrative record as a whole. In this instance, the *Federal Register* notice indicates that the "applicant" submitted the original rulemaking petition on 3 May 2018 and an amended request on 28 June 2018. There are two ways to interpret this history. The first is that FWS did not act diligently, taking over 10 months to complete its review and publish a proposed rule, and is now seeking to compensate for lost time at the expense of providing a full public review and comment period. The other is that FWS has acted diligently but that the proposed action is sufficiently complex that it took several months for the agency to complete its review and develop proposed regulations. Either scenario warrants an extension of the public comment period.

Finally, based on a preliminary review of the proposed rule, the Commission staff has identified several additional factors that weigh in favor of providing commenters more

[6] Based on a quick review of incidental take regulations proposed by the FWS Alaska Region since 2006, FWS has never before established a comment period for incidental take regulations shorter than 30 days. Although we have not had time to do an exhaustive search, we believe that the National Marine Fisheries Service (NMFS) has rarely, if ever done so either.

[7] Here the Commission is referring to some specific deadline imposed by statute or court order. In this case, however, the Commission is aware of no such deadline.

time. First, this rulemaking covers a large number and numerous types of sound-generating activities by three different companies during a five-year period. The fact that the notice of proposed rulemaking is 28 pages in length and the petition exceeds 100 pages and references more than 120 studies and other publications underscores the complexity of the proposed action. Second, it appears that FWS incorrectly calculated several of the proposed zones used to delineate Level A and Level B harassment and used erroneous assumptions and thresholds to determine those zones, resulting in underestimates of both the zones and associated takes of sea otters. The information presented in the petition submitted by the applicant apparently differs from that submitted to NMFS[8] seeking a similar authorization for other marine mammal species. This raises questions as to whether the petition and the proposed rule are based on the best available scientific information, as required by applicable regulations (50 C.F.R. § 18.27(d)(3)). In addition, one of the companies expected to be covered by these regulations provided little or no information concerning its proposed mitigation and monitoring measures and no stakeholder engagement plan, complicating a reviewer's ability to assess whether the applicable statutory requirements would be met.

The Commission believes that it would be impossible for it to review all of the relevant information, formulate adequate comments, and complete its statutorily-mandated consultation[9] on any recommendations it makes, within the 8 business days remaining before comments would be due. As such, the Commission requests that the comment period be extended by at least an additional 15 days. In fact, given the potential problems we have already identified with the proposed rule, a comment period of 45 or 60 days would be more appropriate.

Given the short time frame in which to prepare comments and the need to know as quickly as possible whether the requested extension of the comment period will be granted, the Commission requests that FWS provide it with a response no later than next Tuesday, 26 March 2019.

Sincerely,

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

cc: Andrea Travnicek, Principal Deputy Assistant Secretary for Fish and Wildlife and Parks

[8] The Hilcorp and Harvest petition published on the NMFS website is dated September 2018 and appears to include further revisions of the relevant analyses since the submission of the June 2018 update to FWS. The Commission also was informed by NMFS that it received further revisions in November 2018 from Hilcorp and Harvest, as well as revisions from AGDC in October 2018.

[9] See section 203(c) of the MMPA.