



MARINE MAMMAL COMMISSION

19 April 2019

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 Equinor Wind US, LLC¹ (Equinor) seeking renewal of an incidental harassment authorization under section 101(a)(5)(D) of the Marine Mammal Protection Act. Equinor expects to take small numbers of marine mammals by harassment incidental to conducting site characterization surveys off the coast of New York. The Commission also has reviewed the National Marine Fisheries Service's (NMFS) 4 April 2019 notice (84 Fed. Reg. 13246) requesting comments on its proposal to issue an authorization renewal, subject to certain conditions.

Equinor proposes to conduct essentially the same activities, take a reduced number of marine mammals², and implement the same mitigation, monitoring, and reporting measures as were specified in Statoil's 2018 authorization. Equinor's monitoring report indicated that all observed takes from last year's activities were within the authorized limits³. As such, the Commission concurs with NMFS's preliminary determinations and recommends that NMFS issue the requested one-year authorization renewal, subject to inclusion of the proposed mitigation, monitoring, and reporting measures.

One-year authorization renewals

In 2018 NMFS indicated that it may issue one-year⁴ renewals of incidental harassment authorizations for this and other authorizations if certain criteria are met (see 83 Fed. Reg. 8853 for details). Although the Commission encouraged NMFS to take steps to streamline the authorization process under section 101(a)(5)(D) of the MMPA it also expressed concerns that the proposed

¹ Formerly Statoil Wind US, LLC.

² Equinor was able to complete 86 of the proposed 142 survey days (60.5 percent) it planned to carry out in 2018 and has proposed to complete the remaining 56 days (39.5 percent) of activities in 2019. Total proposed takes for which Equinor is seeking authorization in 2019 are based on 39.5 percent of the total takes authorized in 2018.

³ There were no Level B harassment takes reported for the 2018 survey activities. Equinor did not observe marine mammals at any distance during the 86 survey days in 2018.

⁴ NMFS informed the Commission that the renewal would be issued as a one-time opportunity, after which time a new authorization application would be required. NMFS has yet to specify this in any *Federal Register* notice detailing the new proposed renewal process but should do so.

renewal process was contrary to the statutory requirements. The Commission noted that, if a renewal were issued without any additional opportunity for public comment, doing so would be inconsistent with the requirement that proposed authorizations be published in the *Federal Register* and an opportunity for public comment be provided. If, as NMFS had argued, the publication of the original proposed authorization provided sufficient notice of and opportunity to comment on a possible renewal, the Commission explained that this would be tantamount to issuing the authorization for longer than one year, which violates the one-year limit set forth in section 101(a)(5)(D)(i) of the MMPA. NMFS is proposing to address this issue by publishing abbreviated *Federal Register* notices that reference the relevant documents⁵ and providing a 15-day comment period. NMFS also intends to provide direct notice to those who commented on the original incidental harassment authorization, to ensure that those entities have an opportunity to submit additional comments.

The Commission appreciates NMFS's attempt to address the Commission's concerns by providing public notice and an opportunity to comment on the renewal. However, the Commission still questions whether NMFS's revised process fully satisfies the comment period requirement under section 101(a)(5)(D)(iii) of the MMPA or Congressional expectations regarding the length of the comment period when it passed that provision.⁶ Nevertheless, the Commission believes that providing a truncated comment period is preferable to forgoing a second round of public comment entirely. A potentially significant problem with the proposed 15-day comment period is the potential burden that it places on reviewers, who will need to review the original authorization and supporting documentation⁷, the draft monitoring report(s), the renewal application or request⁸, and the proposed authorization and then formulate comments very quickly. Depending on how frequently NMFS invokes the renewal option, how much the proposed renewal or the information on which it is based differs from the original authorization, and how complicated the activities and the taking authorization is, those who try to comment on all proposed authorizations and renewals, such as the Commission, would be hard pressed to do so within the proposed 15-day comment period. Therefore, the Commission recommends that NMFS use the proposed renewal process sparingly and selectively, by limiting its availability to those proposed incidental harassment authorizations for activities that are expected to have the lowest levels of impacts to marine mammals and that require the least complex analyses.

Notices for other types of activities should not even include the possibility that a renewal might be issued using the proposed foreshortened 15-day comment period. If NMFS intends to use the renewal process frequently or for authorizations that require a more complex review or for which much new information has been generated (e.g., multiple or extensive monitoring reports), the Commission recommends that NMFS provide the Commission and other reviewers the full 30-day comment opportunity set forth in section 101(a)(5)(D)(iii) of the MMPA.

⁵ Including any proposed changes to the activities or the findings and information on which the original authorization was based (including any information contained in the draft monitoring report).

⁶ See, for example, the legislative history of section 101(a)(5)(D), which states "...in some instances, a request will be made for an authorization identical to one issued the previous year. In such circumstances, the Committee expects the Secretary to act expeditiously in complying with the notice and comment requirements." (H.R. Rep. No. 439, 103d Cong., 2d Sess. 29 (1994)). The referenced "notice and comment requirements" specify a 30-day comment period.

⁷ Including the original application, hydroacoustic and marine mammal monitoring plans, take estimation spreadsheets, etc.

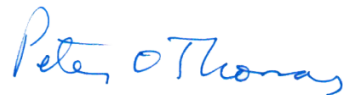
⁸ Including any proposed changes or any new information.

High-resolution geophysical surveys in general

Based on in-situ measurements, the Level A harassment zones for Equinor's activities are non-existent or non-appreciable⁹. The Level B harassment zones similarly are quite small and range from 0 to 37 m. In any event, Equinor is required to implement a 500-, 100- or 50-m exclusion zone for marine mammals, depending on the species and based on conditions stipulated in Addendum C, section 4.4.6.1 of the lease issued by the Bureau of Ocean Energy Management (BOEM)¹⁰. In light of these exclusion zones, the Commission notes that the potential for marine mammals to be taken incidental to conducting the planned survey is very small. As NMFS looks to streamline and improve the efficiency of its authorization process, it should consider whether, in such situations, incidental harassment authorizations are even necessary given the very small size of the Level A and B harassment zones and the added protection afforded by the lease-stipulated exclusion zones.

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

Sincerely,



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

⁹ The Level A harassment zones are 0 m for all functional hearing groups except high-frequency (HF) cetaceans. For HF cetaceans, the zones range from 0 to 3 m. Harbor porpoises do not occur that close to a vessel, thus takes by Level A harassment are not expected to occur.

¹⁰ Renewable Energy Lease Number OCS-A 051, as modified by a waiver granted by BOEM on 27 February 2018.