



MARINE MAMMAL COMMISSION

6 May 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 U.S. Fish and Wildlife Service's (FWS) application seeking to renew its authorization under section 101(a)(5)(D) of the Marine Mammal Protection Act to take small numbers of pinnipeds by harassment. The taking would be incidental to various monitoring, research, and enforcement activities within the Eastern Massachusetts National Wildlife Refuge Complex (the Complex) in Massachusetts during a one-year period. The Commission also has reviewed the National Marine Fisheries Service's (NMFS) 30 April 2019 notice (84 Fed. Reg. 18259) announcing receipt of the application and proposing to issue the authorization, subject to certain conditions.

FWS plans to conduct (1) surveys of seabirds, shorebirds, and tiger beetles, (2) reintroduction of rabbits, and (3) enforcement of beach closures at the Monomoy, Nantucket, and Nomans Land Island National Wildlife Refuges within the Complex and various beaches on the Cape Cod National Seashore. A one-day coastal shoreline survey also would be conducted to understand the rate of shoreline change and effects of sea level rise. The majority of activities would occur from 1 April through 30 November¹. Vessel- and research-related sound and the increased presence of humans would be the main sources of marine mammal disturbance.

NMFS preliminarily has determined that, at most, the proposed activities temporarily would modify the behavior of small numbers of gray and harbor seals. 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—

- conducting vessel approaches in a slow and controlled manner, as far away as possible from haul-out sites to prevent or minimize flushing;
- avoiding or proceeding cautiously when operating boats in the direct path of swimming seals;

¹ Enforcement of beach closures could occur year-round to protect seal haul-out sites.

- restricting deployment of cannon nets within 100 m of seals;
- selecting a pathway of approach to research sites that minimizes the number of seals harassed;
- avoiding disturbance of females and pups by either rescheduling surveys, if possible, or refraining from conducting those activities that may cause high-level disturbance (e.g., flushing or long movements over land)²;
- refraining from making unnecessary noise and using hushed voices while near hauled-out seals;
- remaining at least 50 m from seals, when possible;
- monitoring for offshore predators (i.e., great white sharks) and restricting approaches of hauled-out seals if predators are present;
- using qualified observers to monitor and evaluate incidental takes;
- reporting observations of tagged or marked seals to the relevant researcher³;
- reporting unusual species, numbers, and behavior of seals to Northeast Fisheries Science Center;
- reporting injured and dead marine mammals to NMFS and the Greater Atlantic Regional Stranding Coordinator⁴ using NMFS's phased approach and suspending activities, if appropriate; and
- submitting a final monitoring report⁵.

The Commission concurs with NMFS's preliminary finding and recommends that NMFS issue the incidental harassment authorization, subject to the inclusion of the proposed mitigation, monitoring, and reporting measures.

Proposed one-year authorization renewals

NMFS has indicated that it may issue a second one-year⁶ incidental harassment authorization renewal for this and other future authorizations if various criteria are met and after an expedited public comment period of 15 days (see 84 Fed. Reg. 18264 and the proposed authorization for details). 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

² Although this measure was included in the proposed authorization, it was omitted from the *Federal Register* notice. NMFS indicated it would be included in the preamble to the final authorization.

³ The Commission informally noted that FWS would be required to report tagged and marked animals to the relevant researcher in the *Federal Register* notice but that this requirement was missing from the proposed authorization. NMFS indicated it would be included in the final authorization.

⁴ The Commission informally noted that, based on the *Federal Register* notice, injured and dead seals observed on Monomoy Island would be reported to the International Fund for Animal Welfare, while the proposed authorization indicated they would be reported to OPR and GARSC. NMFS indicated the latter was correct and plans to amend the preamble to the final authorization accordingly.

⁵ The Commission informally noted a discrepancy between the information that FWS would be required to collect under the proposed authorization and the information required to be reported. This includes enumerating the numbers of seals taken at each site and during specific activities. NMFS indicated it would include in the final authorization the requirement to collect and report all relevant monitoring data in the monitoring report.

⁶ 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.

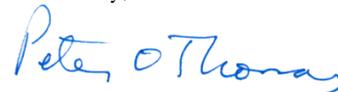
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Commission is concerned that the renewal process proposed in the *Federal Register* notice is inconsistent with the statutory requirements—section 101(a)(5)(D)(iii) clearly states that proposed authorizations are subject to a 30-day comment period—and Congressional expectations regarding the length of the comment period when it passed that provision⁷.

Another potentially significant issue with the proposed 15-day comment period is the burden that it places on reviewers, who will need to review the original authorization and supporting documentation⁸, the draft monitoring report(s), the renewal application or request⁹, 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 deviates 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 refrain from using the proposed renewal process for FWS's authorization. The renewal process should be used sparingly and selectively, by limiting its use only to those proposed incidental harassment authorizations 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.

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

Sincerely,



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

⁷ 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.

⁸ Including the original application, hydroacoustic and marine mammal monitoring plans, take estimation spreadsheets, etc.

⁹ Including any proposed changes or any new information.