



MARINE MAMMAL COMMISSION

24 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 renewal application submitted by the San Francisco Bay Area Water Emergency Transportation Authority (SF WETA) under section 101(a)(5)(D) of the Marine Mammal Protection Act. SF WETA is proposing to take small numbers of marine mammals by harassment incidental to ferry terminal expansion and renovations in San Francisco, California. The Commission also has reviewed the National Marine Fisheries Service's (NMFS) 9 May 2019 notice (84 Fed. Reg. 20336) requesting comments on its proposal to issue an authorization renewal, subject to certain conditions.

SF WETA proposes to conduct the same activities, take reduced numbers of marine mammals, and implement the same mitigation, monitoring, and reporting measures as were authorized in its 2018 authorization. SF WETA's monitoring report indicated that all observed takes from last year's activities were within the authorized limits. 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-year¹ renewals of incidental harassment authorizations for this and other authorizations if certain criteria are met (see 83 Fed. Reg. 18533 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 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

¹ 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.

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 documents² 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 provision³. 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 documentation⁴, the draft monitoring report(s), the renewal application or request⁵, 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.

² 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).

³ 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.

⁴ Including the original application, hydroacoustic and marine mammal monitoring plans, take estimation spreadsheets, etc.

⁵ Including any proposed changes or any new information.

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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 large initial "P" and a distinct "O" before the last name.

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