



MARINE MAMMAL COMMISSION

22 November 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 request submitted by Point Blue Conservation Science's (Point Blue) under section 101(a)(5)(D) of the Marine Mammal Protection Act (MMPA). Point Blue is proposing to take small numbers of marine mammals by harassment incidental to conducting seabird research activities in California during a one-year period. The Commission also has reviewed the National Marine Fisheries Service's (NMFS) 14 November 2019 notice (84 Fed. Reg. 61892) announcing receipt of the application and proposing to issue the authorization, subject to certain conditions.

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. 20055 for details). Specifically, NMFS has indicated that the following conditions *must be met* in order for a renewal to be issued—

- 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.

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.

Point Blue has proposed to conduct the same activities, take the same numbers of marine mammals, and implement the same mitigation, monitoring, and reporting measures as were authorized in its 2018 authorization. Point Blue's monitoring report indicated that all observed takes were within the authorized limits. However, Point Blue's monitoring report provides take numbers based on the calendar year of 1 January through 31 December 2018, while the previous authorization was valid from 7 July 2018 through 6 July 2019. For the 2018 monitoring report, 229 harbor seal takes were reported compared to the 304 takes that were authorized and 37 Steller sea lion takes were reported compared to the 43 takes that were authorized. The majority of those takes occurred within the first six months of the year². Absent monitoring data from 1 December until 6 July 2019, it is unclear whether in fact the numbers of animals taken were within the authorized limits under the previous authorization and whether additional takes should be authorized to ensure the takes are sufficient for the next year of activities.

The Commission also is concerned that Point Blue requested its renewal on 21 August 2019, which does not fulfill NMFS's requirement that a renewal be requested at least *60 days prior to* the expiration of the authorization on 6 July date (see 83 Fed. Reg. 20055, 84 Fed. Reg. 61893, and NMFS's website³). Point Blue would have needed to request its authorization by 7 May to comply with that requirement. NMFS indicated in the *Federal Register* notice that, although Point Blue's request was not received 60 days in advance, issuance of the renewal is still justified, given the effective dates do not extend beyond one year from the expiration of the initial IHA and all of the other qualifications were met (84 Fed. Reg. 61893). A plain reading of NMFS's conditions is that the timeframe under which the renewal would be valid has no bearing on Point Blue meeting the necessary requirements that NMFS has set forth for issuing renewals. Furthermore, NMFS did not include in the 2018 Point Blue authorization⁴ the term and condition that a renewal *can be issued*, as it has for other applicants (e.g., see condition 8 in the 2018 authorization⁵ issued to St. George Reef Lighthouse Preservation Society⁶). The Commission therefore questions NMFS's decision to propose to issue a renewal in the present circumstance.

Given that Point Blue's 2018 incidental harassment authorization did not include the term and condition associated with the possibility that a renewal could be issued, Point Blue did not request a renewal 60 days prior to the authorization's expiration consistent with NMFS's own renewal requirements, and Point Blue did not provide relevant monitoring data⁷ to substantiate that the numbers of animals taken were within the authorized limits of the authorization, the Commission recommends that NMFS deny Point Blue's request to renew its authorization and refrain from issuing any renewal. The Commission further recommends that NMFS refrain from issuing a new incidental harassment authorization until it provides the Commission and the public the necessary information and the full 30-day comment opportunity set forth in section

² 170 of the 229 harbor seal takes and 30 of the 37 Steller sea lion takes occurred before 6 July 2018.

³ <https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-harassment-authorization-renewals>

⁴ <https://www.fisheries.noaa.gov/webdam/download/76895401> This is another example of NMFS omitting necessary information or conditions in its final authorization that were included in the preamble or proposed authorization.

⁵ <https://www.fisheries.noaa.gov/webdam/download/70866836>

⁶ That authorization was issued in February, months prior to issuance of Point Blue's authorization. Thus, an argument cannot be made that terms and conditions regarding renewals were not included in applicable authorizations at the time that Point Blue's authorization was issued.

⁷ From 7 July 2018 through 6 July 2019, which clearly would have been available when it requested its renewal more than a month later and when the *Federal Register* notice published more than four months later.

101(a)(5)(D)(iii) of the MMPA. Rather than processing Point Blue's request as a renewal, NMFS should have processed it using its abbreviated *Federal Register* notice process, which provides essentially the same type of information as a renewal and is used routinely when any of the renewal requirements are not met. The additional 15 days of public comment allowed for under the abbreviated notice process would have been far more efficient than having to republish the authorization for an additional 30 days.

Moreover, NMFS has indicated on its website³ and in various *Federal Register* notices for authorization issuances (84 Fed. Reg. 27290 as one example) that it would contact directly all commenters on the initial authorization by email, phone, or postal service to provide them the opportunity to submit any additional comments on the proposed renewal authorization. The Commission provided comments on Point Blue's incidental harassment authorization as it has on all incidental harassment authorizations for more than a decade, but it has yet to be contacted directly by NMFS regarding any of the proposed renewals, including Point Blue's. In this instance, NMFS failed to both follow its own renewal process and to ensure that the applicant met the necessary requirements for a renewal to be proposed for issuance. Based on those failures and the renewal process being inconsistent with the statutory requirements under section 101(a)(5)(D)(iii) of the MMPA, the Commission recommends that NMFS reconsider issuing renewals for any authorization.

Increasing efficiencies

The Commission appreciates that NMFS has been striving to streamline its authorization process and thereby increase the agency's efficiency for the last few years. Although NMFS's renewal process could achieve efficiencies in the short term, the best way to provide long-term efficiencies—particularly for those activities in which the same or similar activities occur year after year—would be to issue incidental taking authorizations via a rulemaking process rather than one-year authorizations. In the same five-year timeframe that a single final rule would be valid, three incidental harassment authorizations and two authorization renewals would need to be issued. Those processes are unnecessarily burdensome for both NMFS and the action proponent.

Point Blue has been requesting authorization to take marine mammals incidental to its activities for numerous years, and those activities are likely to continue well into the future. NMFS has authorized incidental taking of marine mammals via its rulemaking process for other action proponents (e.g., Sonoma County Water Agency, Monterey Bay National Marine Sanctuary, National Park Service) conducting activities that could similarly disturb hauled-out pinnipeds. Those rulemaking processes do not appear to have been cumbersome for the agency or the action proponent. In the spirit of increasing efficiencies for both NMFS and the action proponent, the Commission recommends that NMFS authorize the incidental taking of marine mammals via a rulemaking rather than individual incidental harassment authorizations and authorization renewals for all future Point Blue activities⁸.

⁸ The Commission notes that NMFS appears to have followed the same recommendation that was made for ongoing activities conducted by the Partnership for Interdisciplinary Studies of Coastal Oceans, as denoted in its advanced notice of proposed rulemaking that published last month (84 Fed. Reg. 55940).

Ms. Jolie Harrison
22 November 2019
Page 4

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