



MARINE MAMMAL COMMISSION

8 January 2020

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 (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) 31 December 2019 notice (84 Fed. Reg. 72301) announcing receipt of the application and proposing to issue the authorization, subject to certain conditions. The Commission commented on Point Blue's original request for a renewal in its [22 November 2019 letter](#) that should be reviewed in conjunction with this letter.

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*

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.

- the original determinations under the MMPA remain valid.

Point Blue 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 original monitoring report provided 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 current renewal request, Point Blue provided updated take numbers from 1 January through 6 July 2019. The updated report is inadequate to support NMFS's assertion that it "shows that no impacts of a scale or nature not previously analyzed or authorized have occurred as a result of the activities conducted" (84 Fed. Reg. 72302). Specifics on the numbers of animals taken, including when the taking occurred, where it occurred, the activity that elicited the taking, and the level of responses² were omitted from Point Blue's updated report, which was merely a table of the total number of species-specific takes³. The report includes no information on the type or nature of the impacts. Thus, NMFS's assertion is unfounded.

The Commission is further concerned that NMFS changed its renewal process requirements in response to inadequate handling of Point Blue's original renewal request in November 2019. Point Blue requested a renewal on 21 August 2019, which did not fulfill NMFS's original requirement that a renewal be requested at least *60 days prior to the expiration of the authorization* on 6 July 2019 (see 83 Fed. Reg. 20055, 84 Fed. Reg. 61893). Point Blue would have needed to request its authorization by 7 May to comply with that requirement. NMFS indicated in the *Federal Register* notice for the original renewal request that, although Point Blue's request was not received 60 days in advance, issuance of the renewal was still justified, given the effective dates would 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 original requirements for issuing renewals was that the timeframe under which the renewal would be valid has no bearing on Point Blue meeting the necessary requirements. Furthermore, NMFS did not include the term and condition that a renewal *can be issued* in the original 2018 Point Blue authorization⁴, 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 questioned NMFS's decision to propose to issue a renewal in its November letter.

Since that time, NMFS has revised its requirement that a renewal request must be received no later than *60 days prior to the needed renewal* (84 Fed. Reg. 72302) rather than *60 days prior to the expiration of the authorization*. It is unclear how that requirement is to be applied, particularly in the case of Point Blue—an entity that conducts and has conducted year-round seabird survey activities and for which marine mammal taking has been authorized for more than 12 years. Point Blue's 2018 monitoring report documented the taking of various pinniped species in every month of the year.

² NMFS considers Level 2 and 3 responses Level B harassment takes (see Table 2 in the *Federal Register* notice).

³ <https://www.fisheries.noaa.gov/webdam/download/100382306>

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.

Thus, Point Blue would have *needed its authorization renewal* when the previous authorization expired in July 2019. It is unclear whether Point Blue has ceased conducting its seabird survey activities or whether it has been conducting unauthorized taking of pinnipeds. However, it is clear that NMFS is changing its renewal process on an apparently ad hoc basis when its established requirements are unable to be met. The situation for other applicants has been further confounded by NMFS publishing two other proposed incidental harassment authorizations⁷ simultaneously⁸ with publication of Point Blue's second renewal request. Each of those still includes the original requirement that a request for renewal must be received no later than 60 days *prior to the expiration of the current authorization* (84 Fed. Reg. 72184 and 72321).

Given that (1) Point Blue did not provide adequate monitoring data to substantiate that the nature of the taking was within the limits authorized under its 2018 authorization, (2) Point Blue did not request a renewal *60 days prior to the needed renewal*, and (3) Point Blue's 2018 incidental harassment authorization did not include the term and condition associated with the possibility that a renewal could be issued, a point NMFS has yet to address, the Commission recommends that NMFS deny Point Blue's request to renew its authorization. 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 101(a)(5)(D)(iii) of the MMPA. Rather than processing Point Blue's request as a renewal, the Commission reiterates that NMFS should have processed the original request 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 republishing another proposed renewal.

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

Sincerely,



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

⁷ See the draft authorizations as well <https://www.fisheries.noaa.gov/webdam/download/100337105> and <https://www.fisheries.noaa.gov/webdam/download/100337107>.

⁸ One proposed authorization published the day before and one published on the same day as the Point Blue authorization renewal.