



MARINE MAMMAL COMMISSION

14 May 2020

Ms. Donna Wieting, Director
Office of Protected Resources
National Marine Fisheries Service
1315 East-West Highway
Silver Spring, MD 20910-3225

Dear Ms. Wieting:

The Marine Mammal Commission (the Commission), after consulting with its Committee of Scientific Advisors on Marine Mammals, is writing to express concerns regarding the lack of responses from the National Marine Fisheries Service (NMFS) to some recommendations included in recent Commission letters and the adequacy and timeliness of some of NMFS's responses. The Marine Mammal Protection Act (MMPA) requires that all federal officials respond to Commission recommendations in a timely manner. Specifically, section 202(d) of the MMPA requires that NMFS (or any other federal agency or official), respond within 120 days after receiving a Commission recommendation, and that if any recommendation is not followed or adopted, provide the Commission with "a detailed explanation of the reasons why those recommendations were not followed or adopted."¹

The Commission has pointed out in numerous recent letters² on proposed incidental take authorizations that NMFS has not been responding adequately or in a timely manner to the Commission's recommendations, including some that were made in mid-2019. This lack of adequate response has been increasing and has not been limited to one or two topics. Rather, it has been more systemic and includes a variety of technical, procedural, and legal recommendations. It also has taken a variety of forms, as illustrated in the following examples.

In multiple instances, NMFS has failed to respond directly to particular recommendations but instead has cited unrelated responses to recommendations that predate the Commission making the recommendation at hand.

In another instance, NMFS's recent response (85 Fed. Reg. 21400) to a number of Commission recommendations involving adjusting multiple takes estimates was that "NMFS thanks the Commission for its recommendation, but does not concur. A complete rationale for the

¹ Although the language of section 202(d) of the MMPA anticipates that separate responses will be transmitted directly to the Commission (recommendations not followed "shall be referred to the Commission..."), the Commission has, as an administrative courtesy and at its discretion, been willing to accept explanations provided in other ways (e.g., in *Federal Register* notices or other decision documents), provided that they otherwise meet the requirements of section 202(d).

² See, for example the Commission's [29 April 2020 letter](#) on Lamont-Doherty Earth Observatory's geophysical survey in the Pacific Ocean, its [12 March 2020 letter](#) on Atlantic Shores' geophysical survey in the Atlantic Ocean, and its [21 January 2020 letter](#) on the National Science Foundation's geophysical survey in the Amundsen Sea.

authorized take numbers is included in the Estimated Take section, below.” Such a simple statement that the agency does not concur with the Commission’s recommendation(s) does not meet the statutory standard; in fact, it fails to provide any explanation at all. Although NMFS provided a general explanation in the *Federal Register* notice for its authorized take numbers, it did not respond directly to the Commission’s recommendations or explain why they were not followed.

In at least four other instances, NMFS stated in its notice of issuance that it did not agree with the Commission’s position. Rather than provide its rationale for not following the Commission’s recommendation in the notice—as it had for the Commission’s other recommendations and comments submitted by others—it indicated that it would provide a detailed explanation to the Commission of its decision within 120 days, as required by section 202(d) of the MMPA. Although the promise of a future response within the 120-day period, once fulfilled, would meet the requirements of section 202(d) of the MMPA, NMFS has other obligations to respond to comments concurrent with its decision-making process as noted below.

Both section 101(a)(5)(A) through its rulemaking requirement and section 101(a)(5)(D) of the MMPA require public notice and opportunity for comment as part of the agency’s decision-making process. Implicit in those requirements is the expectation that the agency will review, consider, and respond to the comments that it receives. Moreover, under the Administrative Procedure Act, an agency is expected to provide a full and sufficient rationale supporting its action at the time a decision is made. This necessitates addressing all substantive comments, including the Commission’s, *before* publishing a notice of issuance and regardless of whether Commission recommendations subsequently are addressed separately pursuant to section 202(d) of the MMPA.

In other instances, NMFS has omitted any reference to some Commission recommendations, combined recommendations without responding to each one, thanked the Commission for its recommendation without indicating whether it was followed or adopted, or mischaracterized Commission recommendations in such a way that the resulting responses were not pertinent.

In yet another instance, NMFS deferred responses by indicating its intention to engage the Commission separately on the issues. A commitment to engage with the Commission on issues is welcomed, but it does not satisfy NMFS’s obligation to provide the Commission with detailed explanations in writing for why any recommendation has not been followed³. While NMFS has indicated its intention to engage with the Commission on these issues, it has yet to do so⁴.

While occasional issues of lack of response can be expected, the recent number and trend of concerns has led the Commission to raise the issue of inadequacy of NMFS’s responses more frequently in its letters on specific authorizations and now, more generally, with you. NMFS recently responded to this concern by indicating that it—

³ In accordance with section 202(c) of the MMPA, the Commission’s recommendations are matters of public record. For that reason, they are always transmitted formally in writing. The expectation under the MMPA is that agency responses thereto likewise will be made in writing, as part of the public record.

⁴ Similarly, NMFS has stated in some *Federal Register* notices that it has advised the Commission of certain policies or guidance, when it has not.

disagrees with the Commission's underlying allegation that we have not provided the necessary responses, as required by the MMPA. Section 202(d) requires NMFS to provide detailed explanations of the reasons why recommendations are not adopted within 120 days, however it does not provide the Commission with the authority to assess the adequacy of NMFS's response, and NMFS believes that the explanations provided are sufficient. (85 Fed. Reg. 21201 and 26944)

The Commission understands that NMFS will not always agree with all of the Commission's recommendations. Congress anticipated that this might be the case in enacting section 202(d) of the MMPA while also seeking to require agency accountability when it deviates from those recommendations. It must also be noted that such responses serve a constructive purpose in providing a basis for further discussion to advance the issues at hand. Toward that end, the Commission expects that NMFS will provide sufficiently detailed responses that address the full scope of the Commission's recommendations and rationale, be they based on policy, legal mandates, or science. Given that this is a requirement under Title II of the MMPA, authority to assess the adequacy of agency responses lies with the Commission.

As such, in order for NMFS to implement fully its responsibilities under section 202(d) of the MMPA, the Commission requests and recommends that, *for all authorizations and rulemakings* under section 101(a)(5), NMFS provide separate, detailed explanations within the statutory time limit for not following or adopting any Commission recommendation. This would be in addition to any separate explanation or responses to comments required by and provided for under section 101(a)(5) and the Administrative Procedure Act.

Commission letters and the recommendations they contain are informed by the collective expertise of the Commissioners and the Commission's Committee of Scientific Advisors on Marine Mammals. Although input is considered from all, in the end, the letters come from and represent the views of the Commissioners. While the Commission hopes that all of its recommendations will be followed by the recipient agencies and officials, when they are not, the Commission expects a thoughtful and complete explanation which demonstrates that its recommendations were carefully reviewed and considered.

Thanks very much for your consideration. I look forward to discussing this matter with you further.

Sincerely,



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