



MARINE MAMMAL COMMISSION

9 June 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 application submitted by the U.S. Navy (the Navy) seeking renewal of an incidental harassment authorization under section 101(a)(5)(D) of the Marine Mammal Protection Act. The Navy would take small numbers of pinnipeds by harassment incidental to conducting target and missile launch activities on San Nicolas Island, California. The Commission also has reviewed the National Marine Fisheries Service's (NMFS) 1 June 2020 notice (85 Fed. Reg. 33124) requesting comments on its proposal to issue an authorization renewal, subject to certain conditions.

The Navy would conduct essentially the same activities, take the same number of marine mammals, and implement the same mitigation, monitoring, and reporting measures as were specified in the Navy's 2019 authorization. The Navy's 2019 draft monitoring report from June 2019–March 2020 indicated that all observed takes from last year's activities were within the authorized limits¹. The Commission had numerous concerns with the previous authorizations issued to the Navy, and therefore Commission's [22 May 2019 letter](#) should be reviewed in concert with this letter.

Authorization validity dates

The Commission notes that NMFS's *Federal Register* notice indicated that the Navy's authorization renewal would be valid from 12 June 2020 through 11 June 2021 (85 Fed. Reg. 33128). However, the draft authorization specified in condition 1 that the authorization renewal would be valid from 14 June 2020 to 13 June 2021. Both of the validity dates occur before the public comment period will close on 16 June 2020. As such, the authorization renewal could not be issued *until at least* 17 June 2020, which does not provide NMFS a sufficient amount of time to consider any comments received in a meaningful manner. The Commission recommends that NMFS refrain from

¹ The Commission notes that the monitoring report inadvertently noted that 1,680 California sea lions and 42 harbor seals were taken from June 2019 through March 2020. The Commission notes that the data contained in the report specify that 1,754 California sea lions and 49 harbor seals were estimated to be taken, see section 3.4 and Table 4.1 in the draft monitoring report. The Navy inadvertently inserted 6 rather than 80 in the total take column in Table 4.1 for sea lions at Red Eye West for the 16 December 2019 launch. It is unclear how the Navy estimated 42 harbor seals were taken, as both section 3.4 and Table 4.1 specify that 12 seals were taken on 14 July 2019 and 37 were taken on 12 August 2019.

issuing the Navy's authorization renewal until after the public comment period closes on 16 June 2020 *and* all comments received are considered fully.

One-year authorization renewals

The Commission has ongoing concerns regarding NMFS's renewal process, which can be reviewed in its [10 February 2020](#) letter. Based on those concerns, the Commission again recommends that NMFS refrain from issuing renewals for any authorization and instead use its abbreviated *Federal Register* notice process, which is similarly expeditious and fulfills NMFS's intent to maximize efficiencies. The Commission has further recommended that, if NMFS continues to propose to issue renewals, that it (1) stipulate that a renewal is a *one-time opportunity* (a) in all *Federal Register* notices requesting comments on the possibility of a renewal, (b) on its webpage detailing the renewal process, and (c) in all draft and final authorizations that include a term and condition for a renewal and, (2) if NMFS declines to adopt this recommendation, explain fully its rationale for not doing so.

Although the second set of recommendations has been included in numerous Commission letters since December 2019, NMFS has yet to follow them in a final authorization issuance. NMFS has indicated in response to the Commission's recommendations that it did not agree with the Commission and, therefore, did not adopt the Commission's recommendation[s] and 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 (85 Fed. Reg. 19305). More than 120 days have elapsed since the Commission originally made the recommendations in December 2019 and since its subsequent [23 January 2020 letter](#) to which NMFS indicated it would provide a detailed response within the 120 days. The Commission still awaits a direct response.

However, it now appears based on a *Federal Register* notice that published during the public comment period for the Navy's authorization renewal that NMFS has altered its course and in fact agrees with the Commission (see the 9 June 2020 notice for the City and County of San Francisco's proposed authorization; 85 Fed. Reg. 35292). NMFS stipulated that a renewal is a *one-time opportunity* (a) in its *Federal Register* notice for the City and County of San Francisco's proposed authorization (see 85 Fed. Reg. 35292), (b) on its webpage(s) detailing the renewal process (see the revised webpages²), and (c) in its draft authorization for the City and County of San Francisco (see condition 8³). The Commission expects that this tack will be taken for *all* proposed and final incidental harassment authorizations that include the possibility of a renewal.

Despite this apparent reversal, NMFS's draft authorization for the Navy's renewal includes the possibility of *yet another* one-year renewal (see condition 8 in the draft authorization). This is the very issue that the Commission has been concerned would arise. Assuming inclusion of condition 8 in the Navy's draft authorization was in error, similar to the issues regarding when the authorization renewal would be issued, then the Commission reiterates its previous recommendation that NMFS review applications and *Federal Register* notices more thoroughly prior to submitting them to the *Federal Register* for public comment.

² See <https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act> and <https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-harassment-authorization-renewals>.

³ <https://www.fisheries.noaa.gov/webdam/download/107318912>.

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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