

# MARINE MAMMAL COMMISSION

6 July 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 modification submitted by Virginia Electric and Power Company, d/b/a Dominion Energy Virginia (Dominion) under section 101(a)(5)(D) of the Marine Mammal Protection Act (the MMPA). Dominion is seeking authorization to take small numbers of marine mammals by harassment incidental to high-resolution geophysical (HRG) surveys off the coast of Virginia during a one-year period. The Commission also has reviewed the National Marine Fisheries Service's (NMFS) 17 June 2020 notice (85 Fed. Reg. 36537) requesting comments on its proposal to issue the authorization, subject to certain conditions.

### Background

Dominion is proposing to conduct HRG surveys to characterize a lease area<sup>1</sup> off Virginia and an export cable route, in support of the Coastal Virginia Offshore Wind Commercial (CVOW Commercial) project. The surveys would occur during day and night and would involve the use of up to two vessels concurrently<sup>2</sup>, for approximately 161 days<sup>3</sup>. Sound-generating equipment proposed for use includes sub-bottom profilers (SBPs)<sup>4</sup>, ultra-short baseline (USBL) and global acoustic positioning systems, multibeam echosounders, and side-scan sonars.

NMFS preliminarily has determined that the proposed activities could cause Level B harassment of small numbers of 15 marine mammal species. It also anticipates that any impact on the affected species and stocks would be negligible. NMFS does not anticipate any take of marine mammals by death or serious injury and believes that the potential for disturbance will be at the least practicable level because of the proposed mitigation measures. The proposed mitigation, monitoring, and reporting measures include—

<sup>&</sup>lt;sup>1</sup> Bureau of Ocean Energy Management (BOEM) lease number OCS-A-0483.

<sup>&</sup>lt;sup>2</sup> Operating "at least several kilometers apart."

 $<sup>^{3}</sup>$  149 days in the lease area and 12 days in the export cable corridor.

<sup>&</sup>lt;sup>4</sup> Including parametric, non-parametric (chirp), boomer, and sparker types.

- using one protected species observer (PSO) in the daytime<sup>5</sup> and two PSOs at night to monitor the exclusion zones<sup>6</sup>, a 500-m monitoring zone, and a 200-m buffer zone for 30 minutes before, during, and for 30 minutes after the HRG surveys;
- using standard pre-clearance<sup>7</sup>, ramp-up, delay, and shutdown procedures<sup>8</sup>;
- using shutdown procedures if a species for which authorization has not been granted, or a species for which authorization has been granted but the authorized number of takes is met, approaches or is observed within the 100-m Level B harassment zone;
- using night-vision equipment<sup>9</sup> to detect marine mammals during night-time operations;
- using standard vessel strike avoidance procedures, maintaining minimum separation distances<sup>10</sup>, and monitoring the NMFS North Atlantic right whale reporting systems during all survey activities;
- reporting injured and dead marine mammals to the Office of Protected Resources and the New England/Mid-Atlantic Regional Stranding Coordinator; and
- submitting a draft and final report to NMFS.

## Appropriateness of Level A and B harassment zones

*Background*—The Commission has commented repeatedly on the inappropriateness of Level A and B harassment zones associated with multiple HRG surveys in previous letters (e.g., see its <u>26 June</u> <u>2020<sup>11</sup></u>, <u>12 March 2020<sup>12</sup></u>, <u>18 October 2019<sup>13</sup></u>, <u>23 August 2019<sup>14</sup></u>, <u>6 July 2018<sup>15</sup></u>, <u>13 June 2018<sup>16</sup> letters</u>). However, NMFS continues to include vastly inaccurate Level A harassment zones in its *Federal Register* notices and prohibit applicants from using in-situ measurements of Level B harassment zones. Instead, NMFS has required action proponents to use harassment zones calculated from source levels obtained either from Crocker and Fratantonio (2016) or manufacturer specifications, which has resulted in overestimated Level A and B harassment zones. These and other issues are summarized herein.

<sup>&</sup>lt;sup>5</sup> Section 4(b) of the draft authorization states that PSOs must be used at all times during daylight hours on any day in which use of the acoustic source is planned to occur; Section 5(d) of the draft authorization states that visual monitoring must continue until one hour after use of the acoustic source or until 30 minutes past sunset.

<sup>&</sup>lt;sup>6</sup> NMFS specified in the *Federal Register* notice that the exclusion zones were 500 m for North Atlantic right whales, 100 m for other large whales, and 25 m when only the boomer is in use (85 Fed. Reg. 36557). However, condition 4(c) in the draft authorization indicated that the exclusion zones were 500 m for North Atlantic right whales, 100 m for all other marine mammals (not just large whales) except small delphinids (*Delphinus* spp., *Tursiops* spp., *Stenella* spp., and *Lagenorhynchus* spp.), and 25 m when only the boomer is in use. The Commission assumes that the exclusion zones specified in the *Federal Register* notice are the correct ones.

<sup>&</sup>lt;sup>7</sup> For the 500-m exclusion zone for right whales and the 200-m buffer zone for all other marine mammals.

<sup>&</sup>lt;sup>8</sup> Shutdowns would not be required for small delphinids (*Delphinus* spp., *Tursiops* spp., *Stenella* spp., and *Lagenorhynchus* spp.).

<sup>&</sup>lt;sup>9</sup> This requirement was included in the draft authorization but was not specified in the preamble of the *Federal Register* notice.

<sup>&</sup>lt;sup>10</sup> 500 m for right whales, 100 m for all other large whales, and 50 m from all other marine mammals.

<sup>&</sup>lt;sup>11</sup> For Mayflower Energy, LLC's (Mayflower) proposed HRG surveys.

<sup>&</sup>lt;sup>12</sup> For Vineyard Wind, LLC (Vineyard) and Atlantic Shores Offshore Wind, LLC's (Atlantic Shores) proposed HRG surveys.

<sup>&</sup>lt;sup>13</sup> For Skipjack Offshore Energy, LLC's (Skipjack) proposed HRG surveys.

<sup>&</sup>lt;sup>14</sup> For Ørsted Wind Power LLC's (Ørsted) proposed HRG surveys.

<sup>&</sup>lt;sup>15</sup> For Dominion Energy Virginia's (Dominion) proposed HRG surveys.

<sup>&</sup>lt;sup>16</sup> For Ørsted/Bay State Wind's (Bay State Wind) proposed HRG surveys.

*Parameters, assumptions, and methods for estimating Level A and B harassment zones*—There are numerous issues with the parameters, assumptions, and methods used by Dominion, and in turn NMFS, to estimate the Level A and B harassment zones. The issues include, but are not limited to—

- NMFS using inconsistent and non-transparent source levels for the same equipment that operates under the same parameters.
  - NMFS recently used a source level of 179 dB re 1μPa<sub>root-mean-square (rms)</sub> at 1 m for the EdgeTech 216 Chirp (Table 2; 85 Fed. Reg. 31858) operating at 2–16 kHz—that source level was based on the highest measured source level for the EdgeTech 512i Chirp operating at 100-percent power from Crocker and Fratantonio (2016). In this instance, NMFS used a source level of 193 dB re 1 μPa<sub>rms</sub> at 1 m for the EdgeTech 216 Chirp operating at 2–16 kHz, presumably based on manufacturer's specifications.
  - On a similar note, Crocker and Fratantonio (2016) indicated that the source level for the EdgeTech 512i Chirp operating at 100-percent power at 0.7–12 kHz with a 20-msec pulse duration was 179 dB re 1 μPa<sub>rms</sub> at 1 m, not 177 dB re 1 μPa<sub>rms</sub> at 1 m as indicated by NMFS.
  - Dominion's application for its recently authorized construction activities in the CVOW Research Lease Area indicated that the source level for the Sonardyne Ranger 2 (Sonardyne) USBL was 194 dB re 1  $\mu$ Pa<sub>rms</sub> at 1 m based on manufacturer's specifications, while 188 dB re 1  $\mu$ Pa<sub>rms</sub> at 1 m was used for the proposed authorization (Table 1; 85 Fed. Reg. 36540), which also was apparently based on manufacturer's specifications (see footnote 1 in the table). Consistent source levels must be used when equipment is operating under the same parameters or when based on the same information (e.g., Crocker and Fratantonio (2016) and manufacturer's specifications).
- NMFS incorrectly pairing the 241 dB re 1 µPa<sub>rms</sub> at 1 m source level at the primary frequencies of 85–115 kHz with the secondary low frequencies<sup>17</sup> of 2–22 kHz for the Innomar SES-2000 medium 100 parametric (Innomar) SBP. The source levels at the lower frequencies are 35 to more than 50 dB less than the source levels at the primary frequencies (Browning et al. 2009, Qu et al. 2018). Source levels must be paired with the relevant frequencies.
- NMFS incorrectly assuming that the Innomar SBP operates at a repetition rate of 0.5 Hz, or every 2 sec, rather than at 40 Hz and every 0.025 sec, which is consistent with all previous incidental harassment authorizations involving the Innomar SBP (e.g., Table 2 in 85 Fed. Reg. 31858). The pulse duration for the Innomar SBP also ranges from 0.7 to 2 msec rather than 0.7 to 1 msec as described by Dominion. Accurate repetition rates and pulse durations must be used if NMFS intends to estimate associated Level A harassment zones.
- NMFS including various subsea positioning systems (Sonardyne USBL, Evologics 82CR (Evologics), and ixBlue Gaps) in Tables 1 and 5 of the *Federal Register* notice but not providing the relevant Level A and B harassment zones in Table 6<sup>18</sup> and 7, respectively. The Level A and B harassment zones for the three subsea positioning systems are greater than some of the other equipment listed in Tables 6 and 7 of the notice. The relevant Level A and B harassment zones must be specified if NMFS estimated the zones and did not intend to discount the sources.

<sup>&</sup>lt;sup>17</sup> Which generally are termed difference frequencies rather than 'secondary low' frequencies by Innomar.

<sup>&</sup>lt;sup>18</sup> Table 6 also includes Level A harassment zones for otariids that do not occur in the Northwest Atlantic Ocean.

- NMFS inconsistently describing the frequency range of the EdgeTech 4200 dual frequency (EdgeTech) side-scan sonar. In Table 1 of the *Federal Register* notice, NMFS indicated that the operating frequencies of the EdgeTech side-scan sonar were 300 and 600 kHz and, since it operated above 180 kHz, it was not considered in Tables 6 and 7 (see footnotes 2 and 1, respectively). However, NMFS included the EdgeTech side-scan sonar, along with the other sources for which Level A harassment zones were estimated, in Table 5<sup>19</sup> and specified that the weighting factor adjustment was 100 kHz. The appropriate operating frequency of the sources must be used and any source that is discounted must be consistently noted as such throughout the *Federal Register* notices.
- Neither Dominion nor NMFS using NMFS's user spreadsheet for Level B harassment, which resulted in overestimated Level B harassment zones for the subsea positioning systems and the EdgeTech 216 Chirp<sup>20</sup> in Table 7 of the notice. NMFS should be using, or at the very least validating, the Level B harassment zones provided by applicants with its user spreadsheet.

The Level B harassment zones are less than 25 m for all sources, except for the 100-m zone for the GeoMarine Dual 400 Geo-Source sparker 800J (GeoMarine sparker). The Level A harassment zones for the Innomar SBP, however, extend to *3,950 m* for high-frequency (HF) cetaceans<sup>21</sup>—a zone that is both inaccurate based on the presumed parameters and completely unrealistic. Had NMFS assumed the actual 40-Hz repetition rate and 20 msec pulse duration, the Level A harassment zone estimated from NMFS's user spreadsheet would be *more than 316 km*. Both of those zones should prompt NMFS to question whether it is appropriate to be using its user spreadsheet for these types of sources<sup>22</sup>.

NMFS indicated that the Level A harassment zone is highly unlikely, particularly since the Level B harassment zone is 0.7 m, and that the calculated Level A harassment zones should not be interpreted literally (85 Fed. Reg. 36554). NMFS further stated that the Level A harassment zones were "provided only as a reference" and "interpreted in context of our qualitative understanding of the risk posed...and in consideration of the proposed mitigation measures" (85 Fed. Reg. 36554). The Commission disagrees. Level A harassment zones are in fact intended to be interpreted literally, particularly for moving sound sources (such as HRG survey equipment) and inaccurate Level A harassment zones should not be provided "as a reference". NMFS's *Federal Register* notices and proposed and final authorizations must be based on best available science and consideration needs to be given as to whether the information contained therein would be precedent-setting. In this instance, denoting the inaccurate and unrealistic Level A harassment zone brings into question both the validity of NMFS's Level A harassment thresholds and the utility of its user spreadsheet, which clearly was not NMFS's intent.

The Commission also notes that, in another recent proposed (85 Fed. Reg. 14903) and final authorization (85 Fed. Reg. 30930)<sup>23</sup>, NMFS had discounted fully some of the HRG sources (i.e.,

<sup>&</sup>lt;sup>19</sup> Table 5 also omitted the upper end of the frequency range of 3 kHz for the Applied Acoustics S-boom (AA boomer) upon which the Level A harassment zones are based in Table 6.

 $<sup>^{20}</sup>$  The Level B harassment zone would be 8.4 rather than 10.2 m.

<sup>&</sup>lt;sup>21</sup> JASCO Applied Sciences (USA) Inc. had previously estimated the Level A harassment zone to be 60 m for HF cetaceans, which itself is an overestimate.

<sup>&</sup>lt;sup>22</sup> While not accounting for absorption or beam width.

<sup>&</sup>lt;sup>23</sup> Issued to Dominion on 21 May 2020.

Innomar SBP and Sonardyne USBL) Dominion indicated it would use. Specifically, NMFS indicated that it had determined the likelihood of HRG surveys resulting in harassment of marine mammals to be so low as to be discountable and therefore HRG surveys were not analyzed further (85 Fed. Reg. 30930). It is unclear why NMFS did not apply the same assumptions and findings, which pertain to the same sources and very same applicant in this instance.

In its <u>26 June 2020 letter</u>, the Commission called attention to the need for NMFS to be consistent and transparent in the manner in which it estimates Level A and B harassment zones for HRG surveys. If NMFS intends to continue to estimate both Level A and B harassment zones associated with HRG surveys, the Commission recommends that NMFS (1) specify the references for all source levels and use consistent source levels for the same equipment that operates under the same parameters amongst the various action proponents, (2) use appropriate pulse durations and repetition rates, (3) pair source levels with the appropriate operating frequencies, and (4) consistently discount sources both within the same Federal Register notice and among the notices. The <u>Commission also recommends</u> that NMFS use its revised user spreadsheet, in-beam source levels, the actual beamwidth, and the maximum water depth in the survey area to estimate the Level B harassment zones for all future proposed authorizations involving HRG sources. Given that the Level A harassment zones estimated by NMFS are wildly inaccurate and NMFS consistently asserts that Level A harassment is 'so low as to be discountable' even when those zones are estimated to be 3,950 m (85 Fed. Reg. 31874) and the shutdown zones don't encompass the full extents of the Level A harassment zones<sup>24</sup>, the Commission questions why NMFS continues to estimate Level A harassment zones for these sources. To maximize efficiencies and ensure that best available science is being used, the Commission recommends that NMFS consult with its acoustic experts<sup>25</sup> to determine how to estimate Level A harassment zones accurately, what Level A harassment zones are actually expected, and whether it is necessary to estimate Level A harassment zones for HRG surveys in general.

*In-situ measurements and standardized methods*—The Commission again notes that in-situ measurements of the same sources conducted off the east coast of the United States during previous HRG surveys indicate that the Level B harassment zones are in fact quite small, 27 m or less (e.g., Gardline 2016), for sparkers including the GeoMarine Geo-Source sparker 800J (GeoMarine sparker). In response to the Commission's <u>23 August 2019 letter</u> recommending that NMFS use in-situ measurements, NMFS indicated that discrepancies between in-situ measurements and data from Crocker and Fratantonio (2016) likely were due to the beam pattern of many HRG sources and the fact that measurements likely were taken outside the main lobe of the source (84 Fed. Reg. 52465). The Commission agrees that that issue may exist for some sources, but it does not exist for sparkers that are omnidirectional.

A previously perceived issue with in-situ measurements from a sparker may have resulted from the hydrophone clipping the data in the nearfield, which was discussed by Gardline (2016).

<sup>&</sup>lt;sup>24</sup> The shutdown zones exceed the Level A harassment zones for all functional hearing groups except HF cetaceans. NMFS generally states that HF cetaceans avoid vessels such that Level A harassment is not likely to occur (e.g., 85 Fed. Reg. 31874). It is unclear why that assumption was not included in the *Federal Register* notice for Dominion's proposed activities.

<sup>&</sup>lt;sup>25</sup> Those personnel with expertise and formal training in underwater acoustics and bioacoustics.

Gardline used a high sound pressure level hydrophone to capture the nearfield measurements<sup>26</sup>. Figure D.1 in Gardline  $(2016)^{27}$  shows that the measured sound levels at approximately 140 m were approximately 140 dB re 1 µPa or less and were not affected by hydrophone clipping. The Level B harassment zones were estimated to be 27 m or less for the GeoMarine sparker by Gardline (2016), which is much less than the estimated 100-m Level B harassment zone.

The Commission maintains that many of the in-situ measurement issues<sup>28</sup> could be minimized with proper methodological requirements and signal processing standards, particularly for omnidirectional sources, and that those measurements should be informing any incidental harassment authorizations NMFS intends to issue. To ensure that *in-situ* data are collected and analyzed appropriately, <u>the Commission again recommends</u> that NMFS and BOEM expedite efforts to develop and finalize methodological and signal processing standards for HRG sources. Those standards should be used by action proponents that conduct HRG surveys and that either choose to conduct in-situ measurements to inform an authorization application or are required to conduct measurements to fulfill a lease condition set forth by BOEM.

Applicability of the shutdown zones—As noted previously herein (see footnote 6), the shutdown zones specified by NMFS are inconsistent between the *Federal Register* notice (85 Fed. Reg. 36557) and the draft authorization (condition 4(c)). The Commission assumes that the zones included in the *Federal Register* notice are the correct ones, specifically a 500-m shutdown zone for North Atlantic right whales, a 100-m shutdown zone for other large cetaceans, and a 25-m shutdown zone only when the AA boomer is used. Based on the 500- and 100-m shutdown zones, NMFS discounted the estimated Level B harassment takes for North Atlantic right whales, humpback whales, fin whales, sei whales, sperm whales, and minke whales. <u>The Commission</u> agrees with that approach and <u>recommends</u> that NMFS follow a consistent approach and discount Level B harassment takes for those species in which the shutdown zones are equal to or greater than the Level B harassment zones for *all* draft and final authorizations involving HRG surveys.

However, the utility of the 25-m shutdown zone<sup>29</sup> for the AA boomer is questionable. The Level A harassment zones are 0.2 m for mid-frequency cetaceans and 3.5 m for phocids. If a marine mammal is within 4 m of the source, there is greater chance that the animal will be struck by the vessel than incur a permanent threshold shift. Conversely, the 25-m shutdown zone does not encompass the Level A harassment zone of 54 m for HF cetaceans. Thus, NMFS's 25-m shutdown zone appears arbitrary, as well as unnecessary based on BOEM's lease requirements. BOEM's lease requires that Dominion remain at least 50 m from delphinoid cetaceans and 100 m from non-delphinoid cetaceans and pinnipeds to minimize the possibility of vessel strike (see conditions 4.1.1.5 and 4.1.1.4, respectively in Addendum C of BOEM's lease). Furthermore, BOEM's lease requires that Dominion implement a 200-m shutdown zone for all species except North Atlantic right whales during HRG surveys (see condition 4.3.6.1). If BOEM's lease conditions remain in effect or modified conditions are implemented such that the shutdown zones are equal to or greater than the Level B harassment zones, <u>the Commission recommends</u> that NMFS implement the same

<sup>&</sup>lt;sup>26</sup> Which were used to inform the waveform and to validate the near-field digital signal processing scaling implemented by Gardline (2016; see section 2.3.2).

<sup>&</sup>lt;sup>27</sup> Figure 3.3 in Gardline (2016) and Figure 1 in Gardline (2017) show similar results as well.

<sup>&</sup>lt;sup>28</sup> Including contractors geo-referencing the source relative to the hydrophone, the hydrophone clipping the sound, and signal processing issues.

<sup>&</sup>lt;sup>29</sup> Which does not apply to mysticetes or sperm whales.

approach that it proposed for mysticetes and sperm whales by discounting the Level B harassment takes for the relevant species and, if this approach applies to all species for which NMFS planned to issue an incidental taking authorization, inform Dominion that an incidental taking authorization is not required. However, if BOEM's lease conditions are modified such that the shutdown zones are less than the Level B harassment zones *and* NMFS intends to minimize Level A harassment by requiring Dominion to implement appropriately-sized shutdown zones, the Commission recommends that NMFS require Dominion to implement a shutdown zone of at least 55 m for harbor porpoises based on the 54-m Level A harassment zone estimated by NMFS for the AA boomer.

#### HRG surveys in general

*Many* of the HRG sources<sup>30</sup> have been considered *de minimis* sources<sup>31</sup> by NMFS in other incidental harassment authorizations and rulemakings. Thus, it is unclear why those sources, such as parametric SBPs, continue to be considered in HRG-related authorizations. <u>The Commission recommends</u> that NMFS evaluate the impacts of sound sources consistently across all applications and provide notice in its guidance to applicants and to the public regarding those sources that it has determined to be *de minimis*. <u>The Commission also again recommends</u> that NMFS consider whether, in situations involving HRG surveys<sup>32</sup>, incidental harassment authorizations are necessary given the small size of the Level B harassment zones, the various proposed shutdown requirements, and BOEM's lease-stipulated requirements<sup>33</sup>. Specifically, NMFS should evaluate whether taking needs to be authorized for those sources that *are not* considered *de minimis*<sup>31</sup>, including sparkers<sup>34</sup>, *and* for which implementation of the various mitigation measures should be sufficient to avoid Level B harassment takes.

In addition, the Commission has noted informally and formally various errors and inconsistencies in estimating the extents of the Level A and B harassment zones for numerous incidental harassment authorizations, including those involving HRG surveys. It is apparent that dealing with technical and quantitative aspects of authorizations involving HRG surveys is a challenge for NMFS and time-consuming for both NMFS and the Commission. The Commission questions whether, rather than attempting to focus on activities that at most result in Level B harassment zones of 100 m, NMFS's efforts would be better focused on the actual construction phase of wind development, which has considerably more potential to impact the various marine

<sup>&</sup>lt;sup>30</sup> NMFS mischaracterized a previous recommendation made by the Commission that *all* HRG sources should be considered *de minimis* (84 Fed. Reg. 66159). Some are considered *de minimis*, while others are not. However, the impacts of those sources would be mitigated based on the implementation of shutdown requirements and lease-stipulated exclusion zones.

<sup>&</sup>lt;sup>31</sup> Defined as sources that have low source levels, narrow beams, downward-directed transmission, short pulse lengths, frequencies outside known marine mammal hearing ranges, or some combination of those factors (84 Fed. Reg. 37244). <sup>32</sup> And until it revises its 160-dB re 1 μPa threshold for intermittent, non-impulsive sources.

<sup>&</sup>lt;sup>33</sup> In this case, Dominion indicated in its application that it would use night-vision, infrared, and PAM technologies to mitigate takes during nighttime operations and periods of low visibility (e.g., fog) based on requirements in BOEM's lease.

<sup>&</sup>lt;sup>34</sup> The Commission notes that the Level B harassment zone for the boomer was 22 m and less than 10 m for all of the other sources proposed for use. All such zones are less than the 25-m distance that NMFS assumed would not have the potential to result in marine mammal harassment in Dominion's proposed and final authorization from earlier this year (85 Fed. Reg. 14903 and 30930, respectively).

mammal species. Regardless, NMFS must conduct more thorough reviews of future *Federal Register* notices and draft and final authorizations to minimize inaccuracies and inconsistencies and ensure transparency for the public.

#### Mitigation, monitoring, and reporting requirements

Recent authorizations<sup>35</sup>, including this one, have proposed a change in NMFS's longstanding requirement that action proponents *immediately* report to NMFS any unauthorized injury or mortality, including when caused by a vessel strike, and cease operations until they have consulted with NMFS. In this case, NMFS has not specified that Mayflower must cease operations until it has consulted with NMFS. In response to previous comments by the Commission regarding this apparent change, NMFS indicated that it does not agree that a blanket requirement for project activities to cease would be practicable for a vessel that is operating on the open water, and it is unclear what mitigation benefit would result from such a requirement in the event of a vessel strike (or presumably other injury; 85 Fed. Reg. 26944). In response, the Commission suggests that an evaluation of the circumstances associated with the injury or mortality would prove helpful in developing additional mitigation measures. For example, if the injury or mortality were to occur while the vessel was transiting at higher speeds, NMFS might require that the operator implement lower speeds during transit. If the injury or mortality were to involve a dolphin, NMFS might no longer allow operators to continue operations if delphinids are present. The rationale for ceasing operations until the circumstances of the unauthorized taking can be reviewed is to determine whether additional mitigation measures should be taken to minimize the likelihood of additional prohibited takes. The Commission therefore recommends that NMFS require Mayflower to report as soon as possible and cease project activities immediately in the event of an unauthorized injury or mortality of a marine mammal, including from a vessel strike, until NMFS's Office of Protected Resources and the New England/Mid-Atlantic Regional Stranding Coordinator determine whether additional measures are necessary to minimize the potential for additional unauthorized takes.

#### Proposed one-year authorization renewals

In this instance and consistent with previous Commission recommendations, NMFS stipulated that a renewal is a *one-time opportunity* (a) in the *Federal Register* notice (see 85 Fed. Reg. 36562), (b) on its webpage(s) detailing the renewal process (see the revised webpages<sup>36</sup>), and (c) in its draft authorization for the Dominion (see condition 8<sup>37</sup>). Although the Commission expects that this tack will be taken for *all* proposed and final incidental harassment authorizations that include the possibility of a renewal, it still has ongoing concerns regarding NMFS's renewal process. Those concerns can be reviewed in its <u>10 February 2020</u> letter. As such, <u>the Commission again</u> 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.

<sup>&</sup>lt;sup>35</sup> See final issuance notices for HRG surveys for Atlantic Shores (85 Fed. Reg. 21201), Vineyard Wind (85 Fed. Reg. 26944), and Dominion (85 Fed. Reg. 30936), and the proposed issuance notice for an HRG survey for Mayflower (85 Fed. Reg. 31879).

<sup>&</sup>lt;sup>36</sup> See <u>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.
<sup>37</sup> <u>https://www.fisheries.noaa.gov/webdam/download/107318912</u>.</u>

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

Sincerely,

Peter o Thomas

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

cc: Amy Scholik-Schlomer, NMFS Stan Labak, BOEM

#### References

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