



MARINE MAMMAL COMMISSION

20 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 Office of Naval Research's (ONR) request seeking renewal of an incidental harassment authorization under section 101(a)(5)(D) of the Marine Mammal Protection Act to take marine mammals by harassment. The taking would be incidental to conducting research activities¹ in the Beaufort and Chukchi Seas. The Commission also has reviewed the National Marine Fisheries Service's (NMFS) 10 July 2019 notice (85 Fed. Reg. 41560) requesting comments on its proposal to issue an authorization renewal, subject to certain conditions. The Commission has had ongoing concerns regarding ONR's and NMFS's continued use of cut-off distances in conjunction with the Bayesian behavioral response functions, which can be reviewed in the Commission's [22 August 2019](#) and [24 August 2018](#) letters on the two previous authorizations issued to ONR for these activities. ONR's current authorization² is valid from 10 September 2019–9 September 2020.

One-year authorization renewals

In 2018 NMFS indicated that it may issue one-year³ renewals of incidental harassment authorizations for this and other authorizations if certain criteria are met (see 83 Fed. Reg. 20055 for details). 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 needed renewal effective date (recognizing that the renewal expiration date cannot extend beyond one year from expiration of the initial 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;

¹ Activities would be conducted in support of the Stratified Ocean Dynamics of the Arctic Program, Arctic Mobile Observing System Program, Ocean Acoustics Program, and the Naval Research Laboratory.

² Which NMFS has denoted as the 'initial authorization' in its *Federal Register* notice.

³ NMFS has since clarified that a renewal would be issued as a one-time opportunity (e.g., 85 Fed. Reg. 41561).

- 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.

ONR requested its renewal in May 2020, which is more than 60 days before it would be needed when its current authorization expires in September 2020. ONR also indicated that the mitigation and monitoring measures would remain the same (see ONR's one-page renewal request⁴), and NMFS has indicated that the status of the affected species or stocks and other pertinent information has remained unchanged (85 Fed. Reg. 41562). However, ONR has not fulfilled the other conditions that must be met for NMFS to issue a renewal.

Specifically, ONR did not stipulate in its request the type and number of sources that would transmit⁵ in 2020–2021 or how many days of icebreaking could occur in 2020–2021. ONR also did not provide a monitoring report nor did it specify in its request the type and number of sources that were deployed, the number of ice-breaking days that occurred, or the numbers of marine mammals that were estimated to be taken⁶ under the current 2019–2020 authorization. ONR did provide that information in its monitoring report for its 2018–2019 activities⁷. The Commission notes that all necessary information has been provided by other action proponents for recent renewal requests (see the U.S. Navy's renewal request for launch activities at San Nicolas Island⁸ and Chevron's renewal request for construction activities in San Francisco Bay⁹). Absent this most basic information, NMFS cannot judge whether the activities proposed to occur in 2020–2021 are identical to or are a subset of those that were conducted in 2019–2020, whether the estimated numbers of marine mammals taken in 2019–2020 were within the authorized limits¹⁰, and ultimately whether the original determinations would still be valid for the 2020–2021 renewal. As such, the Commission recommends that NMFS deny ONR's request to renew its authorization and refrain from issuing any renewal. Rather than processing ONR's renewal request as submitted, NMFS should have recognized and addressed these shortcomings when the request was received in May and asked ONR to revise it at that time.

The Commission has had concerns with NMFS accepting and publishing renewal requests in instances in which it is clear that action proponents have not met all of the conditions necessary for NMFS to issue a renewal (see the Commission's [22 November 2019](#) and [8 January 2020](#) letters). The Commission also has had ongoing concerns regarding NMFS issuing renewals in general (see the

⁴ <https://www.fisheries.noaa.gov/webdam/download/108283237>.

⁵ Including those deployed under the authorization renewal and those that were deployed previously but would transmit under the renewal.

⁶ Which is based on the number and type of sources deployed and the number of transmission days and the number of ice-breaking days.

⁷ <https://www.fisheries.noaa.gov/webdam/download/108283239>.

⁸ <https://www.fisheries.noaa.gov/webdam/download/107117524> and <https://www.fisheries.noaa.gov/webdam/download/107117526>.

⁹ <https://www.fisheries.noaa.gov/webdam/download/106351997>.

¹⁰ ONR's 2018–2019 monitoring report cannot be used in lieu of the 2019–2020 report, as different sources and transmission days and ice-breaking days were included under the two separate authorizations.

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Commission's [10 February 2020](#) letter). Based on NMFS failing to ensure that the renewal criteria have been met and since the renewal process is inconsistent with the statutory requirements under section 101(a)(5)(D) of the MMPA, 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.

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" in the middle name.

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