



MARINE MAMMAL COMMISSION

27 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 U.S. Fish and Wildlife Service's (FWS) 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 various monitoring, research, and enforcement activities within the Eastern Massachusetts National Wildlife Refuge Complex (the Complex) in Massachusetts. The Commission also has reviewed the National Marine Fisheries Service's (NMFS) 15 July 2020 notice (85 Fed. Reg. 42832) requesting comments on its proposal to issue an authorization renewal, subject to certain conditions.

FWS proposed to conduct the same activities, take the same (or fewer) numbers of marine mammals¹, and implement the same mitigation, monitoring, and reporting measures as were specified in its 2019 authorization. FWS's 2019–2020 preliminary monitoring report indicated that all observed takes from last year's activities were within the authorized limits.

Monitoring and reporting requirements

FWS did not use NMFS's current disturbance scale, as included in Table 3 of the *Federal Register* notice and as was included in the notices for the previous draft and final authorization (84 Fed. Reg. 18263 and 32418, respectively), to enumerate the number of seals taken in its 2019–2020 preliminary monitoring report. Although NMFS updated its disturbance scale years ago, FWS has not implemented those changes². It also is unclear why NMFS has not included its disturbance scale in any of the authorizations issued to FWS. NMFS has included such information in other authorizations, including the authorization renewal for Point Blue Conservation Science (Point Blue)³ and the final rule for the University of California Santa Cruz's Partnership for

¹ FWS indicated that the total days of activities would likely be reduced as a result of COVID-19 and restrictions on field work.

² For example, the current Level 2 response is denoted by an animal moving at least two body lengths or changing direction more than 90° rather than moving 1 to 3 m as denoted in the old criteria.

³ See conditions 5(c)(i) to (iv) in the final authorization renewal, <https://www.fisheries.noaa.gov/webdam/download/103876692>.

Interdisciplinary Studies of Coastal Oceans⁴.

In addition, the Commission notes that the information FWS was required to collect under section 5(b) and 5(c)(i) to (v) of the previous authorization, and would be required to collect under the current draft authorization renewal, is more comprehensive than the information that FWS is required to report under section 6(b) of the authorizations—this includes NMFS omitting the requirement to report the numbers of seals *taken*⁵ at each site and during specific activities. As such, FWS only reported the numbers of animals *exposed* at each site rather than the numbers *taken* in its 2019–2020 preliminary monitoring report. Similarly, FWS was required to collect data on the age (e.g., pups/juveniles, adults) composition of the animals but was not required to report such information. The Commission informally noted the discrepancies between the information FWS was required to collect vs. report for FWS’s previous authorization (see its [9 May 2019 letter](#)). At that time, NMFS indicated it would include in the final authorization the requirement to collect and report *all* relevant monitoring data in the monitoring report. That did not occur, and NMFS again did not include the appropriate reporting requirements in FWS’s draft authorization renewal. Further, NMFS did not include the requirement for FWS to provide the raw sightings data in the draft authorization renewal. To fulfill the basic monitoring and reporting requirements under section 101(a)(5)(D)(ii)(III) of the MMPA, the Commission recommends that NMFS (1) include its disturbance scale in the final authorization renewal consistent with conditions 5(c)(i) to (iv) in the 2019 authorization renewal for Point Blue and ensure FWS is aware of the changes to the disturbance scale, (2) include all the information that FWS would be required to collect under 5(b) and 5(c)(i) to (v) as specific reporting requirements in section 6(b) of the final authorization renewal, and (3) include the requirement for FWS to provide the raw sightings data in section 6(b) of the final authorization renewal.

One-year authorization renewals

The Commission has raised ongoing concerns regarding NMFS’s renewal process over the past few years⁶. NMFS responded generally to those concerns in just the last few days. The Commission has not yet had time to consider fully whether and how it plans to respond. As such, for purposes of this letter, the Commission recommends that NMFS refrain from issuing a renewal for any authorization unless it is consistent with the procedural requirements specified in section 101(a)(5)(D)(iii) of the MMPA.

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

Sincerely,



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

⁴ See 50 C.F.R. § 217.105(a)(3) and Table 1.

⁵ Level 2 and 3 responses are to be enumerated as takes.

⁶ Some of which can be reviewed in the Commission’s [10 February 2020](#) letter.