



UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
1315 East-West Highway
Silver Spring, Maryland 20910

July 22, 2020

Peter O. Thomas, Ph.D.
Executive Director, Marine Mammal Commission
4340 East-West Highway
Bethesda, MD 20814-4498

Dear Dr. Thomas,

In letters to the National Marine Fisheries Service (NMFS) commenting on multiple proposed Marine Mammal Protection Act (MMPA) Incidental Harassment Authorizations, the Marine Mammal Commission (Commission) has repeatedly commented upon NMFS' Renewal IHA process. NMFS has responded fully to the Commission's comments and recommendations in the Comment Response sections of individual Federal Register notices announcing the issuance of multiple IHAs. However, given the recurring comments from the Commission and the progressive responses provided for several IHAs, in late January 2020 NMFS began indicating its intention to respond comprehensively in one document to the Commission's comments on the Renewal process, which is the purpose of this letter. More specifically, where we have indicated since January 2020 that NMFS would "provide a detailed explanation of its decision within 120 days, as required by section 202(d) of the MMPA," in relation to Renewals, this letter provides that explanation.

While the Commission's recommendations on the topic of the Renewals have included a few specific technical suggestions, fundamentally the Commission's comments reflect an overall objection to NMFS' use of this process. For this reason and to provide context, we reiterate here the reason the agency developed and began implementing this process. NMFS' purpose in providing for Renewal IHAs is two-fold. First and foremost, the efficiencies in dealing with these simple, low-impact projects (which have already been fully described and analyzed in the initial IHA) free up limited staff resources to increase focus on more complex and impactful projects and improve our ability to conserve and protect marine mammals by even better evaluating and utilizing new science, evolving technologies, and potential new mitigation measures. In addition, while the agency has always striven for efficiency in regulatory processes, recent directives call for agencies to put processes in place that reduce regulatory timelines and the regulatory burden on the public. The Renewal process reduces the effort needed by both applicants and NMFS' staff for simple, relatively low impact projects with little to no uncertainty regarding effects that have already been fully analyzed by the agency and considered by the public – with no reduction in protection to marine mammals. Also further supporting the efficiency goals the process provides regulatory certainty for applicants by ensuring that there is a mechanism allowing for the timely and MMPA-

compliant completion of planned work covered under the initial IHA in the event of operational delays late in the effective period, provided the Renewal qualifications are met.

In more recent letters, the Commission's primary recommendation regarding the Renewal process has been that NMFS should more explicitly indicate that Renewals are a one-time opportunity. NMFS had previously indicated that intent, and had at no time taken action to suggest otherwise, but at the specific recommendation of the Commission has recently added the "one-time" language to our website and to our templates for both Federal Register Notices of proposed incidental harassment authorizations and the IHAs themselves.

In addition to the recommendation for NMFS to include the one-time language, all of the Commission's letters now include a general statement reiterating their assertion that the Renewal process is inconsistent with the statutory requirements under section 101(a)(5)(D) of the MMPA and further suggesting that NMFS refrain from issuing renewals for any authorization and instead use its abbreviated Federal Register notice process, which the Commission asserts is similarly expeditious and fulfills NMFS's intent to maximize efficiencies. Commission letters sometimes refer back to previous Commission letters with similar comments, or similar recommendations made by other public commenters. NMFS has responded to these comments previously, but in this letter we respond to all of the points that the Commission has made at various times and explain our rationale for not accepting its recommendation.

First, the Commission asserts that the Renewal process is inconsistent with the statutory requirements contained in section 101(a)(5)(D) of the MMPA, noting that IHAs can be valid for not more than one year and that 30 days for public comment is required. NMFS' IHA Renewal process meets all statutory requirements. All IHAs issued, whether an initial IHA or a Renewal IHA, are valid for a period of not more than one year. And the public has at least 30 days to comment on all proposed IHAs, with a cumulative total of 45 days for IHA Renewals. As the Request for Public Comments section in an initial IHA makes clear, the agency is seeking comment on both the initial proposed IHA and the potential issuance of a one-year Renewal for that project. Because any Renewal (as explained in the Request for Public Comments section) is limited to one year of identical or nearly identical activities in the same location (as described in the Description of Proposed Activity section) or the same activities that were not completed within the one-year period of the initial IHA, reviewers have all the information needed to effectively comment on both the immediate proposed IHA and a possible one-year Renewal, should the IHA holder choose to request one in the coming months.

While there are additional documents submitted with a Renewal request, for a qualifying Renewal these are limited to documentation that NMFS makes available to the public and uses to verify that the activities are identical to those in the initial IHA, are nearly identical such that the changes would have either no effect on impacts to marine mammals or decrease those impacts, or are a subset of activities already analyzed and authorized but not completed under the initial IHA. In

other words, the additional documentation is to confirm that the analysis and determinations for the initial IHA and potential Renewal are consistent with and remain applicable to a proposed Renewal once requested; there are no new activities or effects for NMFS, the Commission, or the public to evaluate. NMFS also confirms, among other things, that the activities will occur in the same location; involve the same species and stocks; provide for continuation of the same mitigation, monitoring, and reporting requirements; and that no new information has been received that would alter the analysis contained in the notice of the initial proposed IHA. The Renewal request also contains a preliminary monitoring report, but the purpose is to verify that effects from the activities do not indicate impacts of a scale or nature not previously analyzed. The additional 15-day public comment period provides the Commission and the public an opportunity to review these few documents, provide any additional pertinent information, and comment on whether they think the criteria for a Renewal have been met. Between the initial 30-day comment period on these same activities and the additional 15 days, the total comment period for a Renewal IHA is 45 days.

In addition to the IHA Renewal process being consistent with all requirements under section 101(a)(5)(D), it is also consistent with Congress' intent for issuance of IHAs to the extent reflected in statements in the legislative history of the MMPA. Through the provision for Renewals in the regulations, description of the process and express invitation to comment on specific potential Renewals in the Request for Public Comments section of each proposed IHA, the description of the process on NMFS' website, further elaboration on the process through responses to comments, posting of substantive documents on the agency's website, and provision of 30 or 45 days for public review and comment on all proposed initial IHAs and Renewals respectively, NMFS has ensured that the public "is invited and encouraged to participate fully in the agency decision-making process."

Second, the Commission argues that the additional 15-day comment period for Renewals places a burden on reviewers who need to review the original authorization and numerous supporting documents and then formulate comments very quickly. NMFS has taken a number of steps to ensure the Commission and the public have adequate notice, time, and information to be able to comment effectively on Renewal IHAs. Federal Register notices for proposed initial IHAs identify the conditions under which a one-year Renewal IHA could be appropriate. This information is presented in the Request for Public Comments section of the initial IHA, which encourages submission of comments on a potential one-year Renewal in addition to the initial IHA during the initial 30-day comment period. With Renewals limited to another year of identical or nearly identical activity in the same location or a subset of the initial activity that was not completed, this information about the Renewal process and the project-specific information provided in the Federal Register notice provides reviewers with the information needed for them to provide information and comment on both the initial IHA and a potential Renewal for the project. Thus reviewers interested in submitting comments on a proposed Renewal during the additional 15-day comment period will have already reviewed the activities, the species and stocks affected, and the mitigation and

monitoring measures, which will not change from the IHA issued, and the anticipated effects of those activities on marine mammals and provided their comments and any information pertinent to a possible Renewal during the initial 30-day comment period. When we receive a request for a Renewal IHA, if the project is appropriate for a Renewal we publish notice of the proposed IHA Renewal in the Federal Register and provide the additional 15 days for public comment to allow review of the additional documents (preliminary monitoring report, Renewal request, and proposed Renewal), which should just confirm that the activities have not changed (or only minor changes), commit to continue the same mitigation and monitoring measures, and document that monitoring does not indicate any impacts of a scale or nature not previously analyzed. In addition, to minimize any burden on reviewers, NMFS directly contacts all commenters on the initial IHA by email, phone, or, if the commenter did not provide email or phone information, by postal service to provide them direct notice about the opportunity to submit any additional comments.

Third, the Commission has stated that the renewal process should be used sparingly and selectively, by limiting its use only to those proposed incidental harassment authorizations that are expected to have the lowest levels of impacts to marine mammals and that require the least complex analyses. As described in the Federal Register notices for proposed IHAs and on NMFS' website where information on all MMPA incidental take authorization processes is provided, requests for Renewal IHAs are appropriate only in limited and well-defined circumstances. NMFS does not anticipate many projects that would meet all the criteria for a Renewal. Nonetheless, information about the Renewal process and the opportunity to comment on a potential Renewal is included in every notice of a proposed IHA because NMFS cannot predetermine who may seek or qualify for a Renewal. Under section 101(a)(5)(D), it is up to an applicant to request incidental harassment authorization; NMFS includes information about the potential Renewal process in all proposed IHAs because it is at least initially up to the applicant to decide whether they want to seek qualification for a Renewal IHA. NMFS has also explained that the possibility of a Renewal must be included in the notice of the initial proposed IHA for the agency to consider a Renewal request, for the purpose of providing adequate opportunity for public comment on the appropriateness of, and any information pertinent to, a Renewal during the initial 30-day comment period. Where the commenter has likely already reviewed and commented on the initial proposed IHA and a potential Renewal for these same activities during that initial comment period – activities by the same IHA holder in the same geographic area – the abbreviated additional comment period is sufficient for consideration of the results of the preliminary monitoring report and new information (if any) from the past months.

Last, regarding the recommendation to use abbreviated notices, we agree that they are a useful tool by which to increase efficiency in conjunction with the use of Renewals, but we disagree that their use alone would equally fulfill NMFS' goal to maximize efficiency and provide regulatory certainty for applicants, with no reduction in protections for marine mammals. The Renewal process, with its narrowly described qualifying actions, specific issuance criteria, and additional 15-day comment period, allows for NMFS to broadly commit to a 60-day processing time. This commitment, which

would not be possible in the absence of this narrow definition (which nonetheless captures a significant portion of applicants' needs) and the 15-day additional comment period, provides both a meaningfully shortened processing time *and* regulatory certainty for planning purposes. Increasing the comment period for Renewals to 30 days would increase processing time by 25% and is unnecessary, given the legal sufficiency of the process as it stands, as described above, and no additional protections for marine mammals that would result. NMFS uses abbreviated notices when proposed actions do not qualify for Renewals, but still allow for reliance upon previous documentation and analyses. These abbreviated notice projects, which deviate from the narrow qualifications of a Renewal, require some additional time for the analyst to appropriately review the small changes from the initial IHA and further necessitate the 30-day public review required for a new IHA. NMFS has evaluated the use of both the Renewal and abbreviated notice processes, as well as the associated workload for each, and determined that using both of these processes provides maximum efficiency for the agency and applicants, regulatory certainty, and appropriate protections for marine mammals consistent with the statutory standards. Using the abbreviated notice process, however, is unnecessary and unwarranted for projects that meet the narrow qualifications for a Renewal IHA.

We appreciate the Commission's input on the Renewal process and have provided certain clarifications about the process based on that input. Nonetheless, the agency has evaluated the information provided, from the Commission and other entities, and has determined that the Renewal process is consistent with the statutory requirements of the MMPA and promotes NMFS' goals of improving conservation of marine mammals and increasing efficiency in the MMPA compliance process. Therefore, we intend to continue implementing the Renewal process. We are happy to discuss this further as needed, but respectfully request that the Commission cease including comments that NMFS has already responded to about the Renewal process in its comment letters for specific projects.

Thank you, and please contact me if you have any questions,

Sincerely,

Jolie Harrison
Chief, Permits and Conservation Division
Office of Protected Resources
National Marine Fisheries Service