



MARINE MAMMAL COMMISSION

21 June 2011

Mr. P. Michael Payne, Chief
Permits, Conservation, and Education Division
Office of Protected Resources
National Marine Fisheries Service
1315 East-West Highway
Silver Spring, MD 20910-3225

Dear Mr. Payne:

The U.S. Geological Survey submitted an application seeking authorization under section 101(a)(5)(D) of the Marine Mammal Protection Act to take small numbers of marine mammals by harassment incidental to a marine geophysical survey to be conducted in the central-western Bering Sea in August 2011. On 8 June 2011 the National Marine Fisheries Service published a *Federal Register* notice announcing receipt of the application and proposing to issue the authorization, subject to certain conditions (76 Fed. Reg. 33246). The staff of the Marine Mammal Commission has conducted a preliminary review of those documents and found errors in the information published by the Service that undermine the ability of the Commission and the public to comment on the proposed incidental harassment authorization in a meaningful way.

Specifically, the *Federal Register* notice contains incorrect information regarding marine mammal occurrence and densities in the survey area and the associated rationale for using those densities to estimate the number of takes expected to occur incidental to conducting the survey. The National Science Foundation sent the Service a revised application with corrected occurrence and density estimates, but the Service had already published the 8 June *Federal Register* notice (with erroneous information and estimates) before it realized that a revised application had been submitted. In addition, the rationale provided by the Service in the 8 June notice for using best density estimates (i.e., effort-weighted mean densities) rather than the maximum densities measured during an individual survey also is incorrect. The text of the *Federal Register* notice indicates that maximum densities were used to estimate takes, but elsewhere (Table 3) best densities are used. Although the applicant's rationale for using best densities is described in the revised application, this is not reflected in the *Federal Register* notice.

The Service has advised the Commission staff that it posted the revised application on its website and plans to republish a revised version of Table 2 with corrected information. However, the Service does not intend to extend the public comment period because it is trying to complete the authorization before the scheduled start of the survey in early August.

The actions taken by the Service to correct the errors in the original *Federal Register* notice are a step in the right direction, but inadequate to meet the requirements of the Marine Mammal Protection Act. Section 101(a)(5)(D)(iii) requires that public comment on an application be requested through a notice published in the *Federal Register*. To the extent that there are errors in that notice that require correction and that impair the public's ability to understand and comment on the requested authorization, those corrections also require publication in the *Federal Register*. Posting the correct information on the Service's Web site without providing "official notice" of the revisions in

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the *Federal Register* is not sufficient. The Service seems to have recognized this in deciding to republish a corrected version of Table 2 in the *Federal Register*. The same remedy is needed to correct and provide public notice of the other significant errors in the original publication. Therefore, the Commission urges the Service to publish another *Federal Register* notice that includes (1) the appropriate occurrence information and densities and (2) the justification for using either the maximum or best densities to calculate the estimated number of takes. This might best be accomplished by publishing fully revised proposed incidental harassment authorization in the *Federal Register* with the corrected information.

The Commission also is concerned about the Service's decision not to extend the comment period beyond the original 30 days. Although section 101(a)(5)(D)(iii) specifies that there is to be a 30-day comment period, implicit in that requirement is the assumption that the information presented in the notice is the information on which the Service is basing its review of the application. To the extent that this is not the case, the clock for accepting public comments should be reset every time that there is a substantive change in the information that the Service is considering and about which commenters should be apprised. The Commission therefore calls upon the Service to allow an additional 30-day comment period once the corrected information is published in the *Federal Register*. To the extent that the Service is unwilling to extend the comment period by a full 30 days, it should consider some alternate extension (e.g., 15 days) that would provide the public with additional time to review and comment on the corrected information, but still enable the Service time to complete its review before the scheduled start of the planned survey.

Please contact me if you have questions about the Commission's recommendations or comments.

Sincerely,



Timothy J. Ragen, Ph.D.
Executive Director

Cc: Eric C. Schwaab, Assistant Administrator for Fisheries
Lois J. Schiffer, General Counsel