



MARINE MAMMAL COMMISSION

12 March 2018

Mr. Chris Oliver
Assistant Administrator
National Marine Fisheries Service
1315 East-West Highway
Silver Spring, MD 20910-3225

Dear Mr. Oliver:

The Marine Mammal Commission (the Commission), in consultation with its Committee of Scientific Advisors on Marine Mammals, has reviewed the National Marine Fisheries Service's draft waiver of the moratorium on the taking of marine mammals under the Marine Mammal Protection Act (the MMPA). The Commission offers the following comments and recommendations.

Section 20201 of Public Law 115-123 (the Bipartisan Budget Act of 2018) directed the Secretary of Commerce (the Secretary) to issue a waiver of the MMPA moratorium on the taking of marine mammals for three specific Louisiana wetland restoration projects—the Mid-Barataria Sediment Diversion, Mid-Breton Sound Sediment Diversion, and Calcasieu Ship Channel Salinity Control Measures projects, as selected by the 2017 Louisiana Comprehensive Master Plan for a Sustainable Coast. That provision specifies that “[n]o rulemaking, permit, determination, or other condition or limitation shall be required when issuing a waiver pursuant to this section.”

The National Marine Fisheries Service (NMFS) has determined that, although most of the requirements of sections 101(a)(3)(A) and 103 of the MMPA do not apply to issuance of this waiver, it still has an obligation to consult with the Commission before issuing the waiver. This letter provides the results of that consultation. Generally, in commenting on a proposed waiver, the Commission addresses a broad spectrum of issues, including: the best available scientific evidence, consistency with the purposes and policies of the MMPA, whether marine mammal species or stocks will be disadvantaged, etc. However, in this instance, the Secretary has a nondiscretionary duty to issue the waiver notwithstanding such issues, so the Commission's comments are relatively narrow.

Section 20201 includes a finding that the three identified projects are consistent “with the findings and policy declarations in section 2(6) of the Marine Mammal Protection Act...regarding maintaining the health and stability of the marine ecosystem,” which is identified under section 2(6) as the “primary objective” of marine mammal management under the MMPA. It is silent as to whether those projects are consistent with the other purposes and policies set forth in section 2 of the MMPA. Although not an obstacle to issuance of this waiver, it remains unclear whether those projects are consistent with other stated purposes and policies of the MMPA, including maintaining marine mammal species and stocks at optimum sustainable population levels and ensuring that species and stocks do not diminish to the point where they cease to be significant functioning elements in the ecosystems of which they are a part.

In asking for consultation on this waiver, NMFS provided the Commission with draft documents, including a draft waiver. The Commission notes that the draft waiver is silent regarding to whom the waiver is being issued. Is the waiver being issued to the State of Louisiana (the State), the State's Coastal Restoration Protection Authority, some combination of State and Federal agencies involved in the project (including the U.S. Army Corps of Engineers), anyone with any involvement in the projects (including contractors), or some other entity? The Commission recommends that, before issuance, NMFS revise the waiver document to indicate who the waiver recipients are.

As noted above, section 20201 provides that this waiver is not subject to limitations or conditions, as normally would be the case with regulations issued under section 103 or permits issued under section 104 of the MMPA. The statutory provision, however, requires the State of Louisiana, in consultation with the Secretary, "upon issuance of [the] waiver," to take steps to:

- (1) to the extent practicable and consistent with the purposes of the projects, minimize impacts on marine mammal species and population stocks; and
- (2) monitor and evaluate the impacts of the projects on such species and population stocks.

Although these requirements could be interpreted as one-time obligations to be fulfilled at the time the waiver is issued, this would be nonsensical. The waiver must be issued within 120 days of enactment of the Bipartisan Budget Act of 2018, but the projects are still under development and not enough information currently is available to identify the nature and extent of possible adverse impacts on marine mammals, what measures are needed or can be taken to minimize such impacts, or whether such measures are practical. In addition, designing effective monitoring programs for evaluating the impacts of the projects should be an ongoing, iterative process that is being adapted throughout the life of each project. The Commission therefore recommends that NMFS seek agreement with the State or otherwise clarify that the requirements of section 20201(b) are ongoing responsibilities with consultations between the State and NMFS continuing as needed throughout all construction, operations, and maintenance activities.

In order to detect and evaluate the impacts of the projects on marine mammals, monitoring programs must be in place long before construction begins. That is, comprehensive information on the presence, abundance, distribution, health, and behavior of marine mammals, and inter-annual and intra-annual variations, will be needed to assess the impacts on the affected species and stocks once construction and other activities begin. As such, the Commission recommends that consultations between NMFS and the State begin immediately to review ongoing monitoring programs and update and expand them, as necessary, to ensure that essential baseline information is available before construction begins. Further, although not explicitly provided for in the legislation, the Commission encourages NMFS to seek the advice of appropriate outside experts in helping to design effective monitoring programs. As a starting point, NMFS should refer to the Commission's [5 February 2018 letter](#) to the Louisiana Trustee Implementation Group, in which it identified several elements of potential monitoring and adaptive management programs for Barataria Basin including best practices for monitoring marine mammal restoration provided in a 2017 National Academy of Sciences, Engineering, and Medicine report entitled "[Effective Monitoring to Evaluate Ecological Restoration in the Gulf of Mexico](#)" (NASEM 2017).

Mr. Chris Oliver
12 March 2018
Page 3

Kindly contact me if you have any questions concerning the Commission's comments and 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".

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