



MARINE MAMMAL COMMISSION

15 May 2018

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 Point Blue Conservation Science's (Point Blue) application to renew its authorization under section 101(a)(5)(D) of the Marine Mammal Protection Act to take small numbers of marine mammals by harassment. The taking would be incidental to conducting seabird research activities in California during a one-year period. The Commission also has reviewed the National Marine Fisheries Service's (NMFS) 7 May 2018 notice (83 Fed. Reg. 20045) announcing receipt of the application and proposing to issue the authorization, subject to certain conditions.

Point Blue¹ proposes to (1) monitor and census seabird colonies, (2) observe seabird nesting habitat, (3) restore nesting burrows, and (4) resupply a field station². The proposed research activities would occur at various sites on Southeast Farallon Island, on Año Nuevo Island, and at Point Reyes National Seashore. Vessel- and research-related sound and the increased presence of humans would be the main sources of marine mammal disturbance.

NMFS preliminarily has determined that, at most, the proposed activities temporarily would modify the behavior of small numbers of California sea lions, harbor seals, northern elephant seals, and Steller sea lions³. It also anticipates that any impact on the affected species and stocks would be negligible. NMFS does not anticipate any take of marine mammals by death or serious injury and believes that the potential for disturbance will be at the least practicable level because of the proposed mitigation measures. The proposed mitigation, monitoring, and reporting measures include—

¹ Along with Oikonos Ecosystem Knowledge and Point Reyes National Seashore.

² NMFS indicated in the *Federal Register* notice that taking also would be authorized subsequent to conducting pinniped research activities—such activities have not been authorized under an incidental harassment authorization since 2014. Those activities have been included appropriately in Point Blue's scientific research permit. Although the Commission has informally noted that this erroneous information has been included in each notice since 2014, NMFS has yet to fix this error. NMFS has assured the Commission that it will fix it in all future proposed and final authorizations.

³ The Commission pointed out minor mathematical errors in the estimation of the numbers of takes for elephant seals and Steller sea lions, which would result in an increase of 1 take for each species. NMFS indicated that these revised numbers of takes would be included in the final authorization.

- postponing beach landings on Año Nuevo Island until pinnipeds that may be present on the beach have slowly entered the water;
- operating vessels slowly with caution and approaching beaches slowly for all beach landings;
- selecting a pathway of approach to research sites that minimizes the number of marine mammals harassed;
- avoiding visits to sites when (1) pups are present, (2) species for which authorization has not been granted (i.e., northern fur seals or Guadalupe fur seals⁴) are present, or (3) the number of authorized takes for any of the species that are present are met⁵;
- monitoring for offshore predators (i.e., great white sharks and killer whales) and restricting approaches of hauled-out pinnipeds if predators are present;
- keeping voices hushed and bodies low to the ground in sight of pinnipeds;
- conducting seabird observations at North Landing on Southeast Farallon Island from an observation blind that is shielded from the view of hauled-out pinnipeds;
- crawling slowly to access seabird nest boxes on Año Nuevo Island if pinnipeds are within view;
- coordinating research visits to intertidal areas of Southeast Farallon Island to reduce the number of pinniped takes;
- coordinating research goals for Año Nuevo Island to minimize the number of trips to the island;
- coordinating monitoring schedules on Año Nuevo Island so that areas near any pinnipeds would be accessed only once per visit;
- using qualified observers to monitor and evaluate incidental takes;
- reporting observations of unusual behaviors, numbers, or distributions of pinnipeds to NMFS's West Coast Region Office;
- reporting marked or tag-bearing pinnipeds or carcasses or rare or unusual species to NMFS's West Coast Region Office;
- reporting injured and dead marine mammals to NMFS's Office of Protected Resources and West Coast Regional Stranding Coordinator using NMFS's phased approach and suspending activities, if appropriate; and
- submitting a final monitoring report.

The Commission concurs with NMFS's preliminary finding and recommends that NMFS issue the requested incidental harassment authorization, subject to inclusion of the proposed mitigation, monitoring, and reporting measures.

⁴ The Commission informally noted that NMFS did not address in the Federal Register notice that these species can occur in the vicinity of the proposed activities but taking is not expected to occur. NMFS indicated it would include the relevant information in the final authorization.

⁵ The Commission informally noted that NMFS omitted this standard measure from the proposed authorization. NMFS indicated it would include it in the final authorization.

Proposed one-year authorization renewals

NMFS has indicated that it may issue a second one-year⁶ incidental harassment authorization renewal for this and other future authorizations on a case-by-case basis without additional public notice or comment opportunity when (1) another year of identical, or nearly identical activities, as described in the ‘Specified Activities’ section of the *Federal Register* notice is planned or (2) the originally planned activities would not be completed by the time the incidental harassment authorization expires and a renewal would allow for completion of the authorized activities beyond the timeframe described in the ‘Dates and Duration’ section of the notice. NMFS would consider issuing a renewal only if—

- the request for renewal is received no later than 60 days prior to the expiration of the current 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;
- 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.

The Commission agrees that NMFS should take appropriate steps to streamline the authorization process under section 101(a)(5)(D) of the MMPA to the extent possible. However, the Commission is concerned that the renewal process proposed in the *Federal Register* notice is inconsistent with the statutory requirements. Section 101(a)(5)(D) clearly states that proposed authorizations are subject to publication in the *Federal Register* and elsewhere and that there be a presumably concurrent opportunity for public review and comment. NMFS’s proposed renewal process would bypass the public notice and comment requirements when it is considering the renewal.

The Commission further notes that NMFS recently implemented an abbreviated authorization process by publishing the required information⁷ via an abbreviated *Federal Register* notice and by referencing the relevant documents. The abbreviated process preserves the full opportunity for public review and comment, does not appear to be unduly burdensome on either the applicant or NMFS, and is much preferred over NMFS’s proposed renewal process⁸. Thus, the Commission recommends that NMFS refrain from implementing its proposed renewal process and instead use abbreviated *Federal Register* notices and reference existing documents to streamline the incidental harassment authorization process.

⁶ NMFS informed the Commission that the renewal would be issued as a one-time opportunity, after which time a new authorization application would be required. NMFS has yet to specify this in any *Federal Register* notice detailing the new proposed renewal process but should do so.

⁷ Including any changes to the proposed activities or assumptions made and results from the draft monitoring report.

⁸ See the Commission’s 30 April 2018 letter detailing this matter.

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If NMFS believes that its proposed renewal process is consistent with the applicable statutory requirements and intends that process to be generally applicable to all incidental harassment authorizations that meet the specified criteria, it should not seek to adopt such a process through a brief notice at the end of a specific proposed authorization. That process should be adopted through more general procedures, preferably a rulemaking, that provides NMFS's rationale and analysis regarding why it believes the proposed renewal process is consistent with the requirements of section 101(a)(5)(D) of the MMPA and adequate public notice and opportunity for comment. If NMFS adopts the proposed renewal process notwithstanding the Commission's recommendation, the Commission further recommends that NMFS provide it and the public with a legal analysis supporting NMFS's conclusion that such a process is consistent with the requirements under section 101(a)(5)(D) of the MMPA. In addition, if NMFS decides to bypass the notice and comment process in advance of issuing a renewal, it should nevertheless publish notice in the *Federal Register* whenever such a renewal has been issued.

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

Sincerely,



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