



MARINE MAMMAL COMMISSION

7 March 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 the application submitted by the St. George Reef Lighthouse Preservation Society (the Society) under section 101(a)(5)(D) of the Marine Mammal Protection Act (the MMPA). The Society is seeking authorization to take small numbers of pinnipeds by harassment incidental to aircraft operations and restoration and maintenance activities at the St. George Reef Light Station on Northwest Seal Rock off the coast of Crescent City, California. The Commission also has reviewed the National Marine Fisheries Service's (NMFS) 1 March 2018 notice (83 Fed. Reg. 8841) requesting comments on its proposal to issue the authorization, subject to certain conditions.

The Society proposes to conduct aircraft operations and restoration¹ and maintenance activities at the St. George Reef Light Station. The proposed activities would be conducted no more than once per month², with each work session lasting no more than three days. Pinnipeds could be harassed incidental to helicopter landings/takeoffs, sound generated during restoration and maintenance activities, and human presence.

NMFS preliminarily has determined that, at most, the proposed activities temporarily would modify the behavior of small numbers of Steller sea lions, California sea lions, harbor seals, and northern fur seals. 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 mitigation, monitoring, and reporting measures include—

- limiting the frequency of activities to once per month for up to three days;
- restricting activities from 1 May to 31 October to minimize disturbance during the pinniped pupping season;
- limiting, to the extent possible, the timing of helicopter approaches to high-tide periods to minimize disturbance of hauled-out pinnipeds;

¹ Public tours also could occur during restoration activities, but only on Sundays and after restoration activities have begun.

² November through April.

- approaching the station at a relatively high altitude (e.g., 244–305 m) and circling/approaching at a lower altitude from the area where the density of pinnipeds is the least;
- instructing personnel to avoid making unnecessary sound, stay out of sight of pinnipeds hauled out at the base of the lighthouse, and keep the door closed to the lower platform where pinnipeds haul out;
- using a (1) NMFS-approved biologist on the first flight of each day of activities to document marine mammal presence and (2) skilled photographer to take photographs of the haul-out sites at altitudes above 300 m before the initial helicopter landing and after the last helicopter landing for a before-and-after comparison for biologists to judge the effects of the three-day work session on pinnipeds;
- reporting rare or unusual species, numbers, or behaviors of marine mammals to NMFS³;
- reporting injured and dead marine mammals to NMFS and the West Coast Regional Stranding Coordinator using NMFS’s phased reporting approach and suspending activities, if appropriate;
- reporting tagged pinniped carcasses to the appropriate personnel³; and
- submitting a final monitoring report to NMFS.

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

Proposed one-year authorization renewals

For this and other future authorizations, NMFS has indicated that it may issue a second⁴ one-year incidental harassment authorization renewal on a case-by-case basis without additional public notice 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 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 issue a renewal only if—

- the request for renewal was 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

³ Although these measures were included in the preamble, NMFS inadvertently omitted them from the proposed incidental harassment authorization language. NMFS clarified that the measures would be included in the final authorization.

⁴ 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.

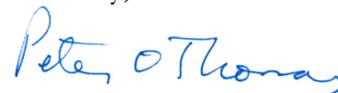
- authorized;
- the status of the affected species or stocks and any other pertinent information, including the mitigation and monitoring requirements, remain the same and appropriate; and
 - the original determinations under the MMPA remain valid.

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 an opportunity for public review and comment. NMFS's proposed renewal process would bypass the public notice and comment requirements. Although it is sympathetic to what NMFS is trying to accomplish, the Commission recommends that NMFS refrain from implementing the proposed renewal process.

If NMFS believes that its proposed renewal process is consistent with the applicable statutory requirements and is intended 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 a more general route, 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