



# MARINE MAMMAL COMMISSION

16 May 2017

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 Washington State Department of Transportation Ferries Division (WSDOT) seeking authorization under section 101(a)(5)(D) of the Marine Mammal Protection Act (the MMPA) to take small numbers of marine mammals by harassment. The taking would be incidental to construction of a new Mukilteo Ferry Terminal in Mukilteo, Washington. This is an ongoing multi-year project, but the incidental harassment authorization would be valid for one year. The Commission also has reviewed the National Marine Fisheries Service's (NMFS) 10 May 2017 notice (82 Fed. Reg. 21793) announcing receipt of the application and proposing to issue the authorization, subject to certain conditions.

WSDOT plans to construct a new Mukilteo Ferry Terminal. Operators will install and/or remove up to 658 piles ranging in size from 12-in H piles to 36-in steel pipe piles. Piles would be installed using a vibratory and/or impact hammer and removed using a vibratory hammer. Operators also would drill up to two 78-in and one 120-in steel shafts. Only one hammer would be used at any given time. WSDOT expects activities to occur on up to 175 days, weather permitting. It would limit activities to daylight hours only, during the timeframe from 1 August 2017 to 15 February 2018.

NMFS preliminarily has determined that, at most, the proposed activities could cause Level A and B harassment of small numbers of nine marine mammal species or stocks but anticipates that any impact on the affected species and stocks would be negligible. NMFS also 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—

- using a sound attenuation device (e.g., bubble curtain or dewatered cofferdam) during impact pile driving;
- conducting in-situ measurements during drilling of the 78- and 120-in steel shafts and adjusting the Level B harassment zones accordingly<sup>1</sup>;

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<sup>1</sup> Based on a request from the Commission, WSDOT agreed to conduct these measurements. NMFS plans to include this measure in the final authorization.

- ceasing pile-driving and -removal activities if any marine mammal comes within 10 m of the equipment;
- using two to seven qualified protected species observers (land- and/or vessel-based) to monitor the Level A and B harassment zones for 30 minutes before, during, and for 30 minutes after the proposed activities;
- using standard<sup>2</sup> soft-start, delay, and shut-down procedures;
- using delay and shut-down procedures, if a species for which authorization has not been granted (including Southern Resident killer whales<sup>3</sup>) or if a species for which authorization has been granted but the authorized takes have been met, approaches or is observed within the Level B harassment zone;
- obtaining both marine mammal (1) sightings data from the Orca Network and/or Center for Whale Research and (2) acoustic detection data from the Orca Network on a daily basis;
- reporting injured and dead marine mammals to NMFS and the West Coast Regional Stranding Coordinator using NMFS's phased approach and suspending activities, if appropriate; and
- submitting a final report.

The Commission understands based on discussions with NMFS that there are some issues<sup>4</sup> associated with the extent of the Level A and B harassment zones and the associated numbers of marine mammal takes as described in the *Federal Register* notice. In its review of the notice, the Commission noted some typos and analytical errors in the estimation of some of the Level A and B harassment zones. NMFS has since indicated that it plans to revise the associated Level A and B harassment zones accordingly—some of which have increased in size. In addition, when re-estimating the ensonified areas for Level B harassment, WSDOT realized an error in its calculation that resulted in a decrease in size of the ensonified areas and a reduction in takes from 323 to 320 for Steller sea lions<sup>5</sup>, from 45 to 44 for gray whales, from 6,698 to 6,650 for harbor porpoises, and from 417 to 414 for Dall's porpoises. The Commission agrees that NMFS should incorporate all the aforementioned revisions in the final incidental harassment authorization. Further, the Commission recommends that NMFS issue the incidental harassment authorization, subject to the inclusion of the proposed mitigation, monitoring, and reporting measures.

### **Rounding of take estimates**

As the Commission indicated in previous letters regarding this matter<sup>6</sup>, the method NMFS used to estimate the numbers of takes during the proposed activities, which summed fractions of takes for each species across project days, does not account for and negates the intent of NMFS's 24-hour reset policy. The issue at hand involves policy rather than mathematical accuracy. The Commission understands NMFS has developed criteria associated with rounding that it had recently

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<sup>2</sup> NMFS informed the Commission that it incorrectly omitted from the *Federal Register* notice the standard 15-minute clearance time for small cetaceans and pinnipeds and 30-minute clearance time for medium-sized and large cetaceans, which would be clarified in the final authorization.

<sup>3</sup> Including shutting down when killer whales are observed and their stock is unknown.

<sup>4</sup> The Commission also highlighted some other typos and instances of missing information in the *Federal Register* notice, which NMFS indicated it would revise and include in the final authorization.

<sup>5</sup> Table 6 of the *Federal Register* notice incorrectly states 232 not 323 takes.

<sup>6</sup> See the Commission's [29 November 2016 letter](#) detailing this issue.

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planned to share with the Commission. The Commission looks forward to reviewing those criteria and resolving this matter in the near future.

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

Sincerely,

A handwritten signature in blue ink that reads "Rebecca J. Lent". The signature is written in a cursive style with a large initial "R" and a distinct "Lent" at the end.

Rebecca J. Lent, Ph.D.,  
Executive Director