



# MARINE MAMMAL COMMISSION

2 November 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 U.S. Coast Guard (USCG) 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 replacement of structures at USCG's Station Monterey in Monterey, California. The incidental harassment authorization would be valid for one year. The Commission also has reviewed the National Marine Fisheries Service's (NMFS) 13 September 2017 notice (82 Fed. Reg. 42986) announcing receipt of the application and proposing to issue the authorization, subject to certain conditions.

## Background

USCG plans to replace various structures at its Monterey Station. USCG was issued an incidental harassment authorization to conduct the proposed activities in 2015, but no work was conducted under that authorization. Operators would remove 17 16- to 18-in PVC-covered timber piles using a vibratory hammer. They also would install 17 14-in steel piles using a vibratory hammer and/or impact hammer. USCG expects pile removal and installation to occur on up to 8 days during daylight hours only.

NMFS preliminarily has determined that, at most, the proposed activities temporarily would modify the behavior of small numbers of seven marine mammal species<sup>1</sup>. 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—

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<sup>1</sup> The *Federal Register* notice included information interchangeably for both West Coast transient and Eastern North Pacific offshore stocks of killer whales. The Commission understands NMFS plans to authorize takes for both stocks based on average group size of each stock. The Commission agrees with that approach given that either stock can occur in Monterey Bay.

- using a sound attenuation device (i.e., bubble curtain and cushion pads) during impact pile driving;
- conducting in-situ source level and sound propagation measurements and adjusting the sizes of the Level A and B harassment zones, as necessary<sup>2</sup>;
- ceasing activities if any marine mammal comes within 10 m of the equipment;
- using ramp-up, delay, and shut-down procedures;
- using NMFS-approved protected species observers (PSOs) to conduct baseline monitoring<sup>3</sup> for two days during the week prior<sup>4</sup> to pile removal and driving;
- using three<sup>5</sup> land-based PSOs to monitor the Level A harassment zones and the nearshore portions of the Level B harassment zones<sup>6</sup> 30 minutes prior to, during, and 30 minutes after pile removal and driving;
- using vessel-based PSOs to monitor the extent of the Level B harassment zones for up to 10 percent of pile-removal and -driving activities<sup>7</sup>;
- using delay and shut-down procedures, if a species for which authorization has not been granted (i.e., humpback whales) or if a species for which authorization has been granted but the authorized takes are met, approaches or is observed within the Level A and/or B harassment zone;
- reporting injured and dead marine mammals to the Office of Protected Resources and the West Coast Regional Stranding Coordinator using NMFS's phased approach and suspending activities, if appropriate; and
- submitting a final report.

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<sup>2</sup> Although specifics were omitted from the application and *Federal Register* notice, NMFS indicated USCG would conduct in-situ monitoring during the installation of five piles and removal of five piles. This would be specified in the final authorization. USCG also is in the process of revising its hydroacoustic monitoring plan based on comments from the Commission and NMFS. Those revisions include ensuring the appropriate thresholds and weighting parameters, hearing ranges, and functional hearing group delineations are used and distances reported accordingly (including for cumulative sound exposure levels), increasing the measurement capabilities from 10 to 20 kHz, ensuring ambient conditions are recorded appropriately (e.g., in continuous 10-minute intervals), ensuring the impulse duration is reported and represents the duration that contains 90% of pulse energy (including using the appropriate recording devices to obtain those measurements), reporting the depth of the 10-m hydrophone, etc.

<sup>3</sup> USCG proposed to conduct baseline monitoring in its application, but NMFS omitted the measure from the *Federal Register* notice.

<sup>4</sup> USCG proposed to conduct baseline monitoring for one day in the week prior to the activities. However, the Commission noted that the previous application proposed, and the previous authorization required, baseline monitoring be conducted for two days in the week prior to the activities. NMFS confirmed two days of baseline monitoring would be included in the final authorization.

<sup>5</sup> The Commission noted that the number of PSOs and their location was not specified in the application or *Federal Register* notice. NMFS indicated USCG would use three PSOs to monitor from the best vantage point available, including the USCG pier, jetty, and adjacent docks within the harbor. Those specifics would be included in the final authorization.

<sup>6</sup> The Commission informally noted typos and errors regarding the source levels specified in the *Federal Register* notice. The effectiveness of the sound attenuation device also was reduced from 10 to 5 dB. The adjusted source levels decreased the zones for both Level A and B harassment but did not change the numbers of proposed takes. NMFS indicated it would include the revised information in the final authorization.

<sup>7</sup> The Commission noted that this measure was included in the previous authorization but was missing from the proposed authorization. NMFS indicated the measure would be included in the final authorization.

### **Mitigation and monitoring measures**

The Commission noted multiple missing<sup>8</sup> or inconsistent mitigation and monitoring measures in NMFS's proposed authorization for USCG, which NMFS has since indicated it would include for the final authorization. In this instance, many of the measures were included in the previous authorization for activities in 2015 but were omitted from the proposed authorization. It would have been prudent for NMFS to review the mitigation and monitoring measures required in the previous authorization when it was drafting the proposed authorization.

In addition, USCG's hydroacoustic monitoring plan has not been updated since 2013. The acoustic thresholds, various metrics, and methods have changed since that time. The Commission firmly believes that NMFS should conduct a technical review of such plans prior to publishing any proposed authorization in the *Federal Register*. This has been a recurrent issue in a few recent authorizations. Thus, the Commission recommends that, *prior to* publishing any future authorizations in the *Federal Register*, NMFS (1) review previous incidental harassment authorizations for the same or similar activities that have occurred in the same area<sup>9</sup> and include the appropriate mitigation and monitoring measures accordingly<sup>10</sup> and (2) ensure the hydroacoustic monitoring plans are reviewed by analysts who have the relevant technical expertise and any issues that arise during that review are resolved.

### **Rounding of take estimates**

As the Commission has indicated in previous letters regarding this matter<sup>11</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 Commission notes that, although NMFS developed criteria associated with rounding that it had planned to share with the Commission a few months ago, it has yet to do so. Therefore, the Commission again recommends that NMFS share the rounding criteria with the Commission so that this matter can be resolved expeditiously.

### **Adequate opportunity to consider public comments**

Although USCG's application was received<sup>12</sup> on 10 February 2017 (82 Fed. Reg. 42987), NMFS did not publish the proposed incidental harassment authorization for public review until 13 September. NMFS provided the statutorily required 30-day public comment period, but the comment period closes only one day before USCG's activities were originally scheduled to begin. In two other recently proposed authorizations, the public comment period closed either after the activities were scheduled to begin (82 Fed. Reg. 42307) or on the same day the activities were scheduled to begin (82 Fed. Reg. 45117). Timelier processing of applications and earlier publication of *Federal Register* notices is needed and is something that NMFS should be able to accomplish, especially for routine applications, such as the one submitted by USCG<sup>13</sup>.

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<sup>8</sup> Which were included in USCG's application.

<sup>9</sup> Previous monitoring reports and previous Commission letters should be reviewed as well.

<sup>10</sup> This also would apply to density and/or take estimates.

<sup>11</sup> See the Commission's [29 November 2016 letter](#) detailing this issue.

<sup>12</sup> And apparently revised in July 2017.

<sup>13</sup> Which sought a new authorization for previously authorized activities.

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The opportunity for public comment provided under section 101(a)(5)(D)(iii) of the MMPA should be a meaningful one. It should allow for sufficient time to not only solicit public comments, but also analyze, assess, and respond to those comments and revise, as appropriate, its proposed authorization and rationale in light of those comments. Congress anticipated that it could take up to 45 days to review and consider public comments before issuing a final authorization. Therefore, the Commission recommends that, in the future, NMFS take all steps necessary to ensure that it publishes and finalizes proposed incidental harassment authorizations sufficiently before the planned start date of the proposed activities to ensure full consideration is given to the comments received.

Thank you for the opportunity to provide comments on USCG's application. Please contact me if you have questions regarding the Commission's recommendations.

Sincerely,



Rebecca J. Lent, Ph.D.  
Executive Director