



# MARINE MAMMAL COMMISSION

21 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 City of Astoria (the City) under section 101(a)(5)(D) of the Marine Mammal Protection Act. The City is proposing to take small numbers of marine mammals by harassment incidental to bridge replacement in Astoria, Oregon. The Commission also has reviewed the National Marine Fisheries Service's (NMFS) 22 February 2018 notice (83 Fed. Reg. 7680) announcing receipt of the application and proposing to issue the authorization, subject to certain conditions.

The City proposes to replace various bridges at the waterfront in Astoria, Oregon. The project is expected to take two years. Operators would install up to 84 16- to 24-in steel piles using an impact hammer. They would remove (1) 255 12- to 14-in timber piles and 10 16-in steel piles using a vibratory hammer and/or direct pull and (2) 19 concrete footings using a saw and other heavy equipment. The City would limit in-water pile-driving and -removal activities<sup>1</sup> to daylight hours on up to 80 days from 1 November 2018 to 28 February 2019.

NMFS preliminarily has determined that, at most, the proposed activities would temporarily modify the behavior of small numbers of California sea lions, harbor seals, and Steller sea lions. 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—

- using a sound attenuation device (i.e., bubble curtain) during impact driving of piles;
- ceasing demolition activities if any marine mammal comes within 10 m of the equipment;
- using two qualified protected species observers to monitor the Level A and B harassment zones<sup>2</sup> for 30 minutes before, during, and for 30 minutes after the proposed activities;
- using standard soft-start, delay, and shut-down procedures;

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<sup>1</sup> Above-water construction activities could occur in October 2018 and March through April 2019 for a total of 66 days.  
<sup>2</sup> Level A harassment zones would be monitored daily, while Level B harassment zones would be monitored two days of every five-day work week.

- using delay and shut-down procedures, if a species for which authorization has not been granted 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<sup>3</sup>;
- 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

### Take estimates

The Commission reviewed and provided informal comments to NMFS regarding the appropriateness of the method and data used<sup>4</sup> to estimate the numbers of pinniped takes. In short, the numbers of takes were vastly underestimated. Based on those comments, NMFS plans to amend the numbers of pinniped takes by—

- multiplying the haul-out counts by the number of *days* of activities rather than the number of *months* of activities;
- using the (1) average haul-out count<sup>5</sup> for California sea lions from the East Mooring Basin haul-out site, which is adjacent to the project area, rather than from the South Jetty<sup>6</sup> for in-water activities and (2) maximum number of sea lions observed by the City in the water or under the piers along the Astoria waterfront rather than from the South Jetty for above-water activities;
- using the maximum haul-out count<sup>7</sup> for harbor seals from the South Jetty rather than the average count, because data were not readily available from the Desdemona Sands haul-out site adjacent to the project area; and
- using the maximum counts of Steller sea lions at Bonneville and Willamette Dams rather than the average haul-out count from the South Jetty to account for sea lions transiting past or within the project area.

These modifications would increase the numbers of takes from 2,604 to 33,752 for California sea lions, from 108 to 4,560 for harbor seals, and from 3,284 to 5,360 for Steller sea lions. Given that harbor seals and California sea lions are routinely observed in the project area and some take estimates could still be underestimated, the Commission also suggested that NMFS require the City to alert it when any of the actual takes are within 5 percent of the authorized limits for NMFS to determine how best to proceed. NMFS plans to include this requirement in the final authorization<sup>8</sup> as well. The Commission agrees that NMFS should include all the aforementioned modifications

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<sup>3</sup> The Commission informally noted that NMFS did not include this standard measure in the proposed authorization. NMFS indicated it would be included in the final authorization.

<sup>4</sup> The Commission also advised NMFS to contact local state biologists to obtain the relevant data.

<sup>5</sup> Averages of maximum monthly counts in each of the four months that in-water activities could occur across four years of monitoring.

<sup>6</sup> Which is 10 miles from the project area.

<sup>7</sup> The maximum of the averages of maximum monthly counts in each of the four months that in-water activities could occur across 15 years of monitoring.

<sup>8</sup> The City would be keeping a running tally of the numbers of pinniped takes, including extrapolating takes to areas where and times when monitoring would not occur.

and reporting measures in the final incidental harassment authorization.

### **Proposed one-year authorization renewals**

For this and other future authorizations, NMFS has indicated that it may issue a second<sup>9</sup> 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 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

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<sup>9</sup> 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.

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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,

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" in the middle name.

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