



# MARINE MAMMAL COMMISSION

29 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 Harvest Alaska, LLC (Harvest) under section 101(a)(5)(D) of the Marine Mammal Protection Act (the MMPA). Harvest is seeking authorization to take small numbers of marine mammals by harassment incidental to the installation of pipelines in Cook Inlet, Alaska. The Commission also has reviewed the National Marine Fisheries Service's (NMFS) 27 February 2018 notice (83 Fed. Reg. 8437) requesting comments on its proposal to issue the authorization, subject to certain conditions.

Harvest proposes to install two steel subsea pipelines as part of its Cook Inlet Extension Project. The proposed activities would involve moving subsea obstacles out of the pipeline corridor route, trenching, pulling pipes into place, securing pipelines, repositioning the barge (pulling and deploying anchors), and operating a tug. The activities would begin in April 2018 and would occur for 108 days. All activities would be conducted during daylight hours except for use of the tug, which would operate 24 hours a day.

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

- using platform- and land-based observers<sup>1</sup> to monitor the Level B harassment zone<sup>2</sup> for 30 minutes before, during, and for 30 minutes after the proposed activities<sup>3</sup>;
- delaying any new activity if a marine mammal is observed within the Level B harassment zone;

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<sup>1</sup> NMFS originally proposed that Harvest would use vessel- and platform-based observers. Due to practicality reasons, Harvest will not be able to use vessel-based observers.

<sup>2</sup> 2.2 km.

<sup>3</sup> Including obstacle removal, trenching, pipe pulling, and repositioning the barge.

- using delay and shut-down procedures if a species for which taking has not been authorized, or for which authorized numbers of takes have been met, approaches or is observed within the Level B harassment zone<sup>4</sup>;
- reporting injured and dead marine mammals to the Office of Protected Resources and the Alaska Regional Office Stranding Coordinator using NMFS's phased approach and suspending activities, when appropriate; and
- submitting field and technical reports and a final comprehensive report to NMFS.

The Commission frequently recommends that NMFS defer issuance of any incidental take authorizations for Cook Inlet beluga whales until it has better information on the cause(s) of the ongoing decline and has a reasonable basis for determining that authorizing the incidental taking will not contribute to that decline<sup>5</sup>. In this case, the Commission recognizes that the activities likely will have lesser impacts than other sound-producing activities. Nevertheless, if NMFS decides to issue an incidental take authorization for Cook Inlet beluga whales for the proposed activities, it needs to explain clearly why the activities, in combination with ongoing and other planned activities in Cook Inlet, would affect only a small number of Cook Inlet beluga whales and have no more than a negligible impact on the population.

### **Take estimates**

The Commission provided informal comments to NMFS identifying certain errors in the take estimate calculations and questioning the appropriateness of those estimates and the species for which take authorization was requested. Based on those comments, NMFS revised the density estimates and the estimated numbers of takes in Tables 5 and 6 of the *Federal Register* notice, respectively. Specifically, takes of gray whales were added, and take estimates for beluga whales, humpback whales, harbor seals, harbor porpoises, and Steller sea lions were increased. NMFS proposes to authorize takes of 40 beluga whales, 3 gray whales, 6 humpback whales, 5 killer whales, 10 harbor porpoises<sup>6</sup>, 712 harbor seals, and 6 Steller sea lions.

However, based on aerial surveys of Cook Inlet (Shelden et al. 2013, 2015, 2017) and sightings of marine mammals in the same area and at the same time of year from previous monitoring reports (e.g., Apache Alaska Corporation's 2012 seismic operations), the potential remains for the revised take estimates to be exceeded or prove insufficient. For example, protected species observers sighted at least 36 harbor porpoises within 2.2 km of the seismic source vessel during a three-month period (SAExploration 2012a, b, and c). This suggests that the proposed total take of 10 harbor porpoises for the six months the activities could occur is insufficient. Observers also sighted California sea lions in that same project area.

Harvest would be required to delay or shut down its activities in the event that a species for which authorization has not been granted, 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

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<sup>4</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>5</sup> See the Commission's most recent [13 July 2016](#) letter.

<sup>6</sup> The Commission does note that, based on an error in NMFS's calculation, 13 rather than 10 harbor porpoises are estimated to be taken.

zone. The Commission recognizes that the nature of the proposed activities may preclude implementing delay or shut-down procedures. Thus, it is incumbent on NMFS to ensure that all species for which takes may occur are included in the authorization and that authorized numbers of takes are sufficient. The Commission therefore recommends that NMFS (1) include take authorization for California sea lions and increase the number of authorized takes of harbor porpoises from 10 to at least 72<sup>7</sup> and (2) require Harvest to notify NMFS immediately if the numbers of takes approach the authorized limits for any species.

Additionally, the method NMFS used to estimate the numbers of takes expected to occur as a result of the proposed activities, which summed fractions of takes for each species across activity days, does not account for and negates the intent of NMFS's 24-hour reset policy. As the Commission has indicated in previous letters regarding this matter<sup>8</sup>, the issue at hand involves policy choices rather than mathematical accuracy. NMFS developed criteria associated with rounding quite some time ago but has yet to share those criteria with the Commission. Therefore, the Commission once again recommends that NMFS expeditiously share the rounding criteria with the Commission.

### **Monitoring requirements**

During the public comment period, NMFS informed the Commission of a request from Harvest to revise its monitoring requirements. Harvest requested to use land- and platform-based protected species observers instead of vessel-based observers. Harvest requested that modification based on a lack of space on the tug for observers, insufficient accommodations on the barge for observers to sleep, and inadequate viewing height on the barge for observers to monitor effectively for marine mammals. The Commission is concerned about Harvest's proposed revisions for three reasons. Shifting the position of the protected species observers to land- or platform-based stations on the far ends of the Level B harassment zone, rather than having them deployed directly on the tug or the barge<sup>9</sup> in the middle of the harassment zone, would (1) position the observers up to 4.5 km<sup>10</sup> away from the source vessels, making detection and identification of marine mammals in the far-field challenging even in ideal conditions, (2) obstruct the observers' view of any marine mammals that may be present on the far side of the barge, and (3) further obstruct the observers' view by the various project vessels transiting around in the project area. For these reasons, the numbers of marine mammals reported to be taken by Level B harassment could be underestimated.

If space on the tug is indeed unavailable and the barge is insufficient in height, an additional observer should be deployed on an alternate vessel of sufficient height that is positioned on the opposite side of the barge from the land- or platform-based observer. Due to the nature of operations<sup>11</sup>, observers would only be deployed during daylight hours. The Commission therefore recommends that NMFS require Harvest to deploy an additional protected species observer on an alternate vessel located on the opposite side of the Level B harassment zone from the land- or platform-based observer.

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<sup>7</sup> Assuming 12 porpoises could be taken per month during the six-month activity period.

<sup>8</sup> See the Commission's [29 November 2016 letter](#) detailing this issue.

<sup>9</sup> Both of which would be stationary.

<sup>10</sup> Half of the 8.9-km distance between the two proposed monitoring locations.

<sup>11</sup> Although the tug engines would operate for 24 hours, all other activities would operate for no more than 12 hours each day, during daylight hours.

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

For this and other future authorizations, NMFS has indicated that it may issue a second<sup>12</sup> one-year incidental harassment authorization renewal 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 those activities beyond the one-year span of the original authorization. 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 concurrent opportunity for public review and comment. NMFS’s proposed renewal process would bypass the public notice and comment requirements at the point that NMFS is considering the renewal. Although sympathetic to what NMFS is trying to accomplish, the Commission recommends that NMFS refrain from implementing the proposed renewal process unless it is revised to allow for contemporaneous public notice and review.

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.

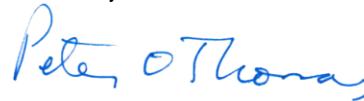
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<sup>12</sup> NMFS informed the Commission that the renewal would be issued as a one-time opportunity, after which time a new authorization application would be required. NMFS has yet to specify this in any *Federal Register* notice detailing the new proposed renewal process but should do so.

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

## References

- SAExploration. 2012a. Protected species monitoring program. Monitoring Report for Apache Alaska Corporation, 3D Cook Inlet seismic program, Cook Inlet, Alaska, May 2012. POA-2010-874, 17 pages.
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- Shelden, K.E.W., D.J. Rugh, K.T. Goetz, C.L. Sims, L. Vate Brattström, J.A. Mocklin, B.A. Mahoney, B.K. Smith, and R.C. Hobbs. 2013. Aerial surveys of beluga whales (*Delphinapterus leucas*) in Cook Inlet, Alaska, June 2005 to 2012. NOAA Technical Memorandum NMFS-AFSC-263, Seattle, Washington, 122 pages.
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