



# MARINE MAMMAL COMMISSION

1 May 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 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 activities at Bremerton and Edmonds ferry terminals. The Commission also has reviewed the National Marine Fisheries Service's (NMFS) 16 April 2018 notice (83 Fed. Reg. 16330) announcing receipt of the application and proposing to issue the authorization, subject to certain conditions.

WSDOT plans to relocate one dolphin structure at both Bremerton and Edmonds ferry terminals. Operators will install up to 12 30- to 36-in steel piles at Bremerton and up to 7 30- to 36-in piles at Edmonds using a vibratory hammer. They also would remove up to seven 36-in steel piles at Bremerton and four 36-in steel piles at Edmonds using a vibratory hammer, direct pull, and/or clamshell bucket. WSDOT expects activities to occur on up to 14 days, weather permitting. Activities would be limited to daylight hours only<sup>1</sup>.

NMFS preliminarily has determined that, at most, the proposed activities could cause Level B harassment of small numbers of 11 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—

- conducting in-situ measurements during installation of the first 36-in pile at Edmonds to confirm the extent of the Level B harassment zone and adjusting that zone, as necessary;
- using only one hammer at a given time;

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<sup>1</sup> To protect salmonids, in-water activities are only allowed to occur from 1 August to 15 February at Bremerton and from 16 July through 15 February at Edmonds.

- ceasing pile-driving and -removal activities if any marine mammal comes within 10 m of the equipment<sup>2</sup>;
- using three to seven<sup>3</sup> 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 soft-start, delay, and shut-down procedures;
- using delay and shut-down procedures, if a species for which authorization has not been granted<sup>2</sup> (including Southern Resident killer whales<sup>4</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<sup>2</sup>;
- 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.

### **In-situ measurements**

WSDOT proposed to conduct in-situ monitoring to determine the range to the Level B harassment zone at Edmonds ferry terminal<sup>5</sup>. However, WSDOT did not propose to collect hydroacoustic measurements near the source<sup>6</sup> to better differentiate the spectral data<sup>7</sup> associated with vibratory installation of 36-in piles. WSDOT's original results showed that the Level A harassment zones for the 36-in piles were smaller than those for 30-in piles for high-frequency cetaceans, despite the broadband source level of the 36-in pile being 3 dB higher than that of 30-in pile. NMFS indicated that examination of the spectra revealed an unusually high decay rate above 2 kHz for pile driving of the 36-in pile, which was probably due to the sediment at the specific pile-driving location<sup>8</sup>. Thus, NMFS used the 30-in pile spectrum to represent installation of the 36-in pile scaled to broadband source level of 177-dB re 1  $\mu$ Pa at 1 m. Given that WSDOT plans to conduct in-situ monitoring during installation of 36-in piles and routinely installs those piles using a vibratory hammer for numerous other projects in Washington, the Commission recommends that NMFS require WSDOT to collect spectral data at the source to verify the spectrum of 36-in piles and adjust the Level A harassment zones as necessary, rather than continue to use the spectrum associated with 30-in piles.

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<sup>2</sup> The Commission informally noted that NMFS did not include these standard measures in the *Federal Register* notice. NMFS clarified that these measures would be included in the final authorization.

<sup>3</sup> The number of observers would be reduced to five if the in-situ measurements indicate that the extent of the Level B harassment zone is less than 15 km at Edmonds.

<sup>4</sup> Including shutting down when killer whales are observed and their stock is unknown. This standard measure also was omitted from the *Federal Register* notice but will be included in the final authorization.

<sup>5</sup> Which extends to 39 km before intersecting land in certain directions. The Level B harassment zone at Bremerton intersects land at a maximum of 7 km from the project site.

<sup>6</sup> Spectral data must be collected at the source, far-field measurements are not appropriate for elucidating relevant spectral data.

<sup>7</sup> One-second sound exposure level power spectral densities.

<sup>8</sup> i.e., where the pile was placed or set at Edmonds ferry terminal.

## **Rounding of take estimates**

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. As the Commission has indicated in previous letters regarding this matter<sup>9</sup>, the issue at hand involves policy rather than mathematical accuracy. NMFS developed draft criteria associated with rounding quite some time ago, but those criteria apparently need additional revisions before NMFS can share them with the Commission. Therefore, the Commission recommends that NMFS promptly revise its draft rounding criteria in order to share them with the Commission expeditiously.

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

NMFS has indicated that it may issue a second one-year<sup>10</sup> incidental harassment authorization renewal for this and other future authorizations. NMFS would issue a 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 the authorized activities beyond the timeframe described in the 'Dates and Duration' section of the notice. 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 presumably concurrent opportunity for public review and comment. NMFS's proposed renewal process would bypass the public notice and comment requirements when it is considering the renewal.

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<sup>9</sup> See the Commission's [29 November 2016 letter](#) detailing this issue.

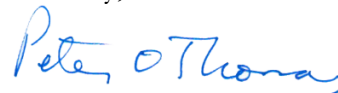
<sup>10</sup> NMFS informed the Commission that the renewal would be issued as a one-time opportunity, after which time a new authorization application would be required. NMFS has yet to specify this in any *Federal Register* notice detailing the new proposed renewal process but should do so.

The Commission further notes that NMFS recently implemented an abbreviated authorization process by publishing the required information<sup>11</sup> via an abbreviated *Federal Register* notice and by referencing the relevant documents. The abbreviated process preserves the full opportunity for public review and comment, does not appear to be unduly burdensome on either the applicant or NMFS, and is much preferred over NMFS's proposed renewal process<sup>12</sup>. Thus, the Commission recommends that NMFS refrain from implementing its proposed renewal process and instead use abbreviated *Federal Register* notices and reference existing documents to streamline the incidental harassment authorization process.

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. 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,

A handwritten signature in blue ink that reads "Peter O. Thomas".

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

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<sup>11</sup> Including any changes to the proposed activities or assumptions made and results from the draft monitoring report.

<sup>12</sup> See the Commission's [30 April 2018 letter](#) detailing this matter.