



# MARINE MAMMAL COMMISSION

15 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 Chevron seeking authorization under section 101(a)(5)(D) of the Marine Mammal Protection Act to take small numbers of marine mammals by harassment. The taking would be incidental to construction activities at Chevron's Richmond Refinery Long Wharf in Richmond, California. The Commission also has reviewed the National Marine Fisheries Service's (NMFS) 30 April 2018 notice (83 Fed. Reg. 18802) announcing receipt of the application and proposing to issue the authorization, subject to certain conditions.

Chevron plans to repair and retrofit its wharf during a multi-year project. During this year's activities, operators would install up to 52 14- to 36-in steel or concrete piles using a vibratory and/or impact hammer. They also would remove up to 58 18- to 24-in concrete or timber piles using a vibratory hammer. Chevron expects activities to take up to 28 days, weather permitting. It would limit pile-driving and -removal activities to daylight hours only<sup>1</sup>.

NMFS preliminarily has determined that, at most, the proposed activities could cause Level A and/or B harassment of small numbers of seven marine mammal species. NMFS 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 pile driving and removal<sup>2</sup> and adjusting the Level A and B harassment zones, as necessary;
- using only one hammer at a given time;
- using a sound attenuation device (e.g., pile caps) during impact driving of concrete piles;

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<sup>1</sup> Operators would refrain from installing piles using an impact hammer from December 1 through May 31 to protect listed fish.

<sup>2</sup> On a minimum of two piles of each type, except for 24-in concrete piles for which a minimum of eight piles would be measured.

- ceasing heavy machinery activities if any marine mammal comes within 10 m of the equipment;
- using standard soft-start, delay, and shut-down procedures;
- using two qualified land-based protected species observers to monitor the Level A and B harassment zones for 30 minutes before, during, and for 30 minutes after the proposed activities;
- using delay and shut-down procedures, if a species for which authorization has not been granted (including but not limited to Guadalupe fur seals<sup>3</sup> and humpback whales) or if a species for which authorization has been granted but the authorized number of takes has been met, approaches or is observed within the Level B harassment zone;
- conducting marine mammal baseline observations on one day the week before initiation of activities;
- 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.

### General concerns and comments

The Commission informally noted multiple typographical and other errors and missing information<sup>4</sup> in the preamble text and various tables in the *Federal Register* notice. Those included—

- specifying and using incorrect reference distances associated with vibratory source levels for installation of 14-in steel piles and removal of timber piles, which affected multiple Level A and B harassment zones, associated ensonified areas, and ultimately the numbers of takes for harbor seals, California sea lions, and harbor porpoises;
- incorrectly assuming that only 71 percent of the harbor seals that haul out at Castro Rocks<sup>5</sup> would be present in the water during Chevron's 12-hour work day<sup>6</sup>, which affected the numbers of Level A and B harassment takes;
- incorrectly calculating the numbers of Level B harassment takes for California sea lions and harbor porpoises; and
- not increasing the estimated number of Level A harassment takes to average group size for harbor porpoises (from one to four harbor porpoises, respectively).

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<sup>3</sup> Although NMFS did not discuss this species in the *Federal Register* notice, it did discuss Guadalupe fur seals in another recent notice that also pertains to San Francisco Bay (83 Fed. Reg. 18511). NMFS plans to include in the preamble to the final authorization a discussion of why taking is not expected for Guadalupe fur seals, even though they have occurred in San Francisco Bay in recent years. Similar information should be included in other *Federal Register* notices that pertain to activities occurring in San Francisco Bay.

<sup>4</sup> Including some source level assumptions.

<sup>5</sup> Which is only 650 m north of the project site.

<sup>6</sup> The Commission informally noted that Castro Rocks is inundated with water twice per day and well within or adjacent to the Level B harassment zones. It also noted that root-mean-square sound pressure levels are instantaneous not time-dependent metrics. Thus, all harbor seals at Castro Rocks (mean of 176 harbor seals) could be taken on any given day. NMFS agreed and plans to revise the number of harbor seal takes accordingly.

Based on these issues, numerous errors were present in Tables 5–14. The Commission also noted inconsistencies within the hydroacoustic monitoring plan for various analysis and reporting requirements, the need to ensure hydrophones collect data up to 20 kHz, and the need to require reporting of medians and to calculate linear averages of the means<sup>7</sup>. Although NMFS plans to fix the various omissions, errors, and inconsistencies in the final incidental harassment authorization and final hydroacoustic monitoring plan, these issues should have been discovered and corrected prior to publishing the *Federal Register* notice. Other proposed authorizations published in recent years have had similar issues<sup>8</sup>. And, in this instance, some of the issues<sup>9</sup> could have been addressed when the original application was reviewed internally by NMFS<sup>10</sup>.

This lack of attention to detail is troubling. At some point, these omissions from and errors in *Federal Register* notices become significant enough to undermine the ability of the public to review and comment on proposed authorizations in full confidence that what is provided is accurate and complete. In such cases, NMFS needs to publish corrections to the proposed authorization rather than correcting the omissions and errors when the final authorization is published. To address these issues, the Commission recommends that NMFS review more thoroughly both the applications prior to deeming them complete and its notices prior to submitting them for publication in the *Federal Register*.

In addition, the Commission informally noted that the proposed 35-m exclusion zone for pinnipeds and mid-frequency cetaceans was unnecessarily large during vibratory pile driving (the Level A harassment zones were estimated to be 11 and 2 m, respectively). This could put Chevron in a situation in which it is implementing numerous delays or shut downs for pinnipeds. NMFS agreed to reduce the size of the exclusion zone for those species from 35 to 15 m during vibratory pile driving/removal<sup>11</sup>.

The Commission pointed out similar concerns for other recent proposed authorizations<sup>12</sup>, which included the possibility of numerous delays or shut downs for pinnipeds and/or unnecessarily large exclusion/shut-down zones based on the estimated extents of the Level A harassment zones for certain species. Although NMFS agreed to adjust the size of the exclusion/shut-down zones in most of these instances, these issues should have been identified and addressed prior to publication of the proposed authorization in the *Federal Register*. To ensure both that marine mammals are sufficiently protected from Level A harassment and that activities can be completed within an appropriate timeframe, the Commission recommends that NMFS better evaluate the proposed exclusion/shut-down zones that are to be implemented for each proposed incidental take authorization prior to publication in the *Federal Register*.

### **Rounding of take estimates**

The method used to estimate the numbers of takes during the proposed activities, which

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<sup>7</sup> i.e., averaging the sound intensity/pressure before converting to dB.

<sup>8</sup> For example, see the Commission's [8 May 2018](#), [5 September 2017](#), and [2 January 2018](#) letters.

<sup>9</sup> Other issues should have been discovered during review of the draft *Federal Register* notice.

<sup>10</sup> During NMFS's early review team meetings.

<sup>11</sup> NMFS also plans to reduce the sizes of the exclusion zones for high- and low-frequency cetaceans from 250 and 350 m, respectively, to 35 m during vibratory pile driving/removal.

<sup>12</sup> For example, see the Commission's [8 May 2018](#), [2 April 2018](#), and another [2 April 2018](#) letters.

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 numerous previous letters regarding this matter<sup>13</sup>, the issue at hand involves policy rather than mathematical accuracy. The Commission understands that NMFS has nearly completed revising its draft criteria and plans to share them with the Commission in the near term. The Commission recommends that NMFS provide those criteria in a timely manner.

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

NMFS has indicated that it may issue a one-year<sup>14</sup> incidental harassment authorization renewal for this and other future authorizations 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.

The Commission further notes that NMFS recently implemented an abbreviated

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<sup>13</sup> See the Commission's [29 November 2016 letter](#) detailing this issue.

<sup>14</sup> In another recent proposed authorization (83 Fed. Reg. 8456), NMFS clarified that it would issue a *second* one-year authorization. However, NMFS has yet to specify whether the renewal would be issued as a one-time opportunity, after which time a new authorization application would be required. These specific details should be included in all *Federal Register* notices that describe the new proposed renewal process.

authorization process by publishing the required information<sup>15</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>16</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.

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

The Commission has repeatedly expressed concern over NMFS's failure to provide an adequate opportunity for public comment. The opportunity for public comment provided under section 101(a)(5)(D)(iii) of the MMPA should be a meaningful one that allows NMFS sufficient time to not only solicit public comments, but also to analyze, assess, and respond to those comments and revise, as appropriate, its proposed authorization and rationale in light of those comments. Thus, submittal of the necessary documentation by applicants and processing of applications by NMFS must be timelier, thus avoiding abbreviated timeframes in which NMFS is able to consider the comments received.

In this instance, the public comment period closes on 30 May 2018, two days before Chevron's activities are scheduled to begin. Chevron did not submit its application until 1 February 2018, which reduced the time NMFS had available to review and comment on it, draft the proposed authorization, and ultimately consider public comments before issuing the final authorization. NMFS guidance states that applicants must submit their applications 6 to 9 months in advance of the intended project start date and that some incidental harassment authorizations may take longer to process<sup>17</sup>. Since Chevron's activities are scheduled to begin only a few days after the comment period closes, the Commission is not convinced that NMFS has sufficient time to review the Commission's or the public's comments or to revise the proposed authorization accordingly. Therefore, the Commission recommends that, in the future, NMFS take all steps necessary to ensure

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<sup>15</sup> Including any changes to the proposed activities or assumptions made and results from the draft monitoring report.

<sup>16</sup> See the Commission's 30 April 2018 letter detailing this matter.

<sup>17</sup> <https://www.fisheries.noaa.gov/node/23111>

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that it publishes and finalizes proposed incidental harassment authorizations far enough in advance of the planned start date of the proposed activities to ensure full consideration is given to any and all comments received.

The Commission looks forward to working with NMFS on the various issues raised in this and other related letters. Please contact me if you have questions regarding the Commission's recommendation.

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" before the last name.

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