



# MARINE MAMMAL COMMISSION

4 June 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 reconfiguring the Seattle Ferry Terminal at Colman Dock in Washington. This is a multi-year project, but the incidental harassment authorization would be valid for one year. The Commission also has reviewed the National Marine Fisheries Service's (NMFS) 25 May 2018 notice (83 Fed. Reg. 24279)<sup>1</sup> announcing receipt of the application and proposing to issue the authorization, subject to certain conditions.

WSDOT plans to reconfigure and replace portions of the Seattle Ferry Terminal at Colman Dock. Operators will install and/or remove up to 1,146 steel, timber, and H piles ranging in size from 12- to 108-in. Piles would be installed using a vibratory and/or impact hammer and removed using a vibratory hammer. WSDOT expects activities to take 114 days, weather permitting. It would limit activities to daylight hours only, during the timeframe from 16 July to 15 February to protect salmonids.

NMFS preliminarily has determined that, at most, the proposed activities could cause Level A and 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 proposed mitigation, monitoring, and reporting measures include—

- conducting in-situ measurements to confirm the extent of the Level B harassment zone during installation of the first 36-in pile and amending the zone, if necessary;

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<sup>1</sup> The original notice published on 22 May 2018 (83 Fed. Reg. 23643). Based on informal comments from the Commission and the inadvertent inclusion of takes for humpback whales, NMFS revised and republished the *Federal Register* notice. The Commission's comments noted that NMFS had specified incorrect Level A and B harassment zones, outdated or incorrect density data, and insufficient numbers of Level A and/or B harassment takes and had omitted standard mitigation measures or portions of them. Many of these issues were fixed, but some typographical errors are evident in the revised notice. NMFS indicated all errors would be fixed in the final authorization.

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

### **Extent of the shut-down zones**

In the Commission's informal comments on the original *Federal Register* notice, it noted that a 60-m shut-down zone was quite large for harbor seals, which are routinely observed at the project site. WSDOT has yet to submit its monitoring report from last year's activities to determine at what distances harbor seals were generally observed, but WSDOT did note that a few habituated harbor seals occurred within the larger Level A harassment zone from last year's activities. Thus, WSDOT wanted to reduce the zone to 60 m for this year of activities. The Commission believes that even a reduced 60-m shut-down zone could lead to unnecessary numbers of delays and shut downs.

WSDOT proposes to install or remove up to 1,146 piles during 114 days of activities, equating to 10 piles per day. That schedule is optimistic at best. During last year's activities, WSDOT installed or removed 291 piles during 99 days of activities using two hammers. If WSDOT intends to install or remove 1,146 piles, it would be prudent to minimize the number of unnecessary delays or shut downs during those activities.

NMFS proposed to authorize up to 187 Level A harassment takes for harbor seals. It is unclear why the full number of harbor seal takes per day were attributed to Level A harassment<sup>4</sup> during vibratory/impact installation of 36-in piles and vibratory installation of the single 108-in pile. However, that number of Level A harassment takes should be sufficient<sup>5</sup> not only for those 17 days of activities but also for the additional 44 days of vibratory installation and/or removal of 24- and 30-in piles<sup>6</sup>. As such, the Commission believes a reduced shut-down zone of 15 or 20 m would be

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<sup>2</sup> The Commission informally noted that NMFS incorrectly specified a 30- rather than 15-minute clearance time in the *Federal Register* notice. NMFS indicated the measure would be included in the final authorization.

<sup>3</sup> Including shutting down when killer whales are observed and their stock is unknown.

<sup>4</sup> NMFS assumed 11 takes per day on up to 17 days of activities.

<sup>5</sup> Assuming 30 percent of the takes would occur within the associated Level A harassment zones relative to the extents of the Level B harassment zones.

<sup>6</sup> Which had an estimated Level A harassment zone of 60 m.

sufficient. If, however, WSDOT's monitoring results from last year indicate that a larger number of Level A harassment takes would be necessary during the 61 days of activities, then NMFS should increase the number of takes accordingly. It is difficult for the Commission to provide a more precise estimate absent the relevant data. In any event, NMFS should ensure 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 reduce the shut-down zone from 60 m to 15 m for harbor seals during vibratory installation/removal and/or impact installation of 24-, 30-, 36-, and 108-in piles and increase the number of Level A harassment takes for harbor seals, if necessary.

The Commission has pointed out similar concerns for other recent proposed authorizations<sup>7</sup>. The Commission contends that these types of issues should have been identified and addressed prior to publication of the proposed authorization in the *Federal Register*, specifically when the original application was reviewed internally by NMFS<sup>8</sup>. Therefore, the Commission recommends that NMFS more thoroughly assess the proposed shut-down zones that are to be implemented and the associated numbers of Level A harassment takes requested 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 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. The Commission understands that NMFS has nearly completed revising its draft criteria and plans to share them with the Commission in the near future. 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 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;

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<sup>7</sup> For example, see the Commission's [21 May 2018](#), [8 May 2018](#), [2 April 2018](#), and another [2 April 2018](#) letters.

<sup>8</sup> During the early review team meetings.

<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 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 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 the Commission and the public with a legal analysis supporting its conclusion that the process is consistent with the requirements under section 101(a)(5)(D) of the MMPA. Furthermore, 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.

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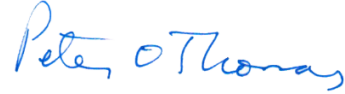
<sup>11</sup> Including any changes to the proposed activities or assumptions made and results from the draft monitoring report.

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

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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" for the middle name.

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