



MARINE MAMMAL COMMISSION

11 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 Ketchikan Dock Company (KDC) under section 101(a)(5)(D) of the Marine Mammal Protection Act. KDC is proposing to take small numbers of marine mammals by harassment incidental to a berth expansion project in Ketchikan, Alaska. The Commission also has reviewed the National Marine Fisheries Service's (NMFS) 11 May 2018 notice (83 Fed. Reg. 22009) announcing receipt of the application and proposing to issue the authorization, subject to certain conditions.

KDC proposes to expand berth IV to accommodate larger cruise ships. Operators would install up to 34 30- to 48-in steel temporary or permanent piles using a vibratory, impact hammer, and/or down-the-hole drilling (i.e., socket and anchor drilling). They would remove 28 24- to 36-in steel piles using direct pull or a vibratory hammer. KDC would limit in-water pile-driving and -removal activities to daylight hours on up to 20 days¹ beginning in October 2018.

NMFS preliminarily has determined that, at most, the proposed activities could cause Level A and/or B harassment of small numbers of up to eight 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 proposed mitigation, monitoring, and reporting measures include—

- using a softening material (e.g., high-density polyethylene or ultra-high-molecular-weight polyethylene) during impact and vibratory pile driving;
- using standard soft-start, delay, and shut-down procedures;
- ceasing heavy equipment activities if any marine mammal comes within 10 m of the equipment;
- using two to four qualified protected species observers (PSOs) to monitor the Level A and B harassment zones for 30 minutes before, during, and for 30 minutes after the proposed activities;

¹ The total number of days of activities was increased to 29 days, as specified herein.

- 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 zone²;
- reporting injured and dead marine mammals to the Office of Protected Resources and the Alaska Regional Stranding Coordinator using NMFS's phased approach and suspending activities, if appropriate; and
- submitting a final report

General comments and concerns

In addition to minor errors and missing information in the preamble to and the proposed authorization, the Commission informally noted some further concerns. Those included—

- incorrectly assuming that impact pile driving would involve 50 strikes per day rather than 50 strikes per pile for up to three piles per day, which underestimated the extents of the Level A harassment zones and numbers of Level A harassment takes for harbor seals and harbor porpoises³;
- incorrectly assuming that a pile casing would inhibit sound transmission⁴ during drilling of 30-in anchors into bedrock, which underestimated the numbers of Level B harassment takes for harbor seals and Steller sea lions⁵; and
- incorrectly stipulating the numbers of PSOs⁶ that would be required to monitor for marine mammals during the various activities.

Although NMFS plans to include all related revisions in the final authorization, the Commission notes that these types of issues have been ongoing in NMFS's proposed incidental harassment authorizations. In this instance, these issues should have been addressed either when the original application was reviewed internally by NMFS⁷ or during review of the draft *Federal Register* notice. Therefore, 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*.

² The Commission informally noted that NMFS did not include this standard measure in the proposed incidental harassment authorization language. NMFS indicated it would be included in the final authorization.

³ The extents of the Level A harassment zones were less than half of what they should have been. Thus, the numbers of Level A harassment takes would increase from 6 to 18 for harbor seals and from 5 to 10 for harbor porpoises.

⁴ Sound would be transmitted into the water column via the ground and potentially underneath the casing itself.

⁵ Assuming an additional nine days of activities for anchor drilling increased the number of Level B harassment takes from 120 to 174 for harbor seals and from 200 to 290 for Steller sea lions.

⁶ NMFS clarified that two PSOs would monitor during all impact driving, three PSOs would monitor during all vibratory driving of 24- and 30-in piles, and four PSOs would monitor during all socket and anchor drilling and vibratory driving of 36- and 48-in piles.

⁷ During the early review team meetings.

Proposed one-year authorization renewals

NMFS has indicated that it may issue a second one-year⁸ 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 authorization process by publishing the required information⁹ 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 process¹⁰. 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.

⁸ 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.

⁹ Including any changes to the proposed activities or assumptions made and results from the draft monitoring report.

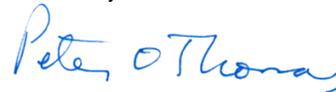
¹⁰ See the Commission’s [30 April 2018 letter](#) detailing this matter.

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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.

Please contact me if you have questions regarding the Commission's recommendations.

Sincerely,



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