



# MARINE MAMMAL COMMISSION

16 July 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 of a new Mukilteo Ferry Terminal in Mukilteo, Washington. This is an ongoing 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) 28 June 2018 notice (83 Fed. Reg. 30421) announcing receipt of the application and proposing to issue the authorization, subject to certain conditions.

WSDOT plans to construct a new Mukilteo Ferry Terminal. Operators will install and/or remove up to 116 steel pipe piles ranging in size from 24- to 120-in to be installed using a vibratory and/or impact hammer. 65 piles would be removed using a vibratory hammer. Only one hammer would be used at any given time. WSDOT expects activities to occur on up to 62 days, weather permitting. It would limit activities to daylight hours only, during the in-water work window of 15 July through 15 February.

NMFS preliminarily has determined that, at most, the proposed activities could cause Level A and/ or B harassment of small numbers of 12 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—

- using a sound attenuation device (e.g., bubble curtain) during impact pile driving<sup>1</sup>;
- conducting in-situ measurements during impact driving of 24-in piles and vibratory driving of 78- and 120-in piles and adjusting the Level A and/or B harassment zones accordingly;
- ceasing pile-driving and -removal activities if any marine mammal comes within 10 m of the equipment;

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<sup>1</sup> And implementing bubble curtain performance measures as required by the U.S. Fish and Wildlife Service to protect birds.

- using three to seven 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 (including Southern Resident killer whales<sup>2</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 final marine mammal<sup>3</sup> and hydroacoustic<sup>4</sup> monitoring reports.

### General issues and concerns

In addition to its informal comments regarding reporting requirements, the Commission noted some typos<sup>5</sup> and analytical errors regarding the number of piles to be installed in a given day and the number of days of activities. NMFS indicated that the proposed activities would occur on 62 rather than 73 days, thus the numbers of Level A and B harassment takes would be amended accordingly. The Commission also informally noted that the full number of Level B harassment takes for both harbor seals and harbor porpoises<sup>6</sup> should be authorized rather than reducing those numbers to 75 and 10 percent, respectively, of the estimated takes. Given that WSDOT's monitoring report from last year's activities provides no details other than the number of animals observed and the number of assumed Level A and B harassment takes<sup>7</sup> and that harbor seals and harbor porpoises are two of the most common species found in the area<sup>8</sup>, the Commission did not believe those reductions were warranted. In addition, the Commission noted that the Level A

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<sup>2</sup> Including shutting down when killer whales are observed and their stock is unknown.

<sup>3</sup> The Commission informally noted that WSDOT's monitoring reports provide scant details and the reporting requirements for WSDOT are not as extensive as for other action proponents (see 83 Fed. Reg. 30144 as an example). NMFS plans to include additional reporting requirements (including reporting the location of the PSOs for each sighting, the extent of zones for each activity, the distances/bearing from the PSO to the animal and from the animal to the source for each sighting, whether mitigation was implemented, etc.) in the final authorization.

<sup>4</sup> The Commission informally noted that WSDOT should report both medians and means for peak and root-mean-square sound pressure levels and single-strike and cumulative sound exposure levels in the final report.

<sup>5</sup> A few other minor typos in table footnotes and the proposed authorization text were noted as well.

<sup>6</sup> Level A harassment takes were increased as well based on the size of the Level A harassment zone relative to the exclusion zone and the possibility that a group of 3 harbor porpoises could occur in the Level A harassment zone on half of the 26 days of pile driving.

<sup>7</sup> Information was not provided on the locations of the PSOs making the observations, the size of the zones observed, the distances from the PSO to the animal and from the animal to the source, etc.

<sup>8</sup> Best available harbor porpoise densities in the areas adjacent to the project site are two of the highest densities in all of Puget Sound (0.75 and 1.72 porpoises/km<sup>2</sup> for East Whidbey and Admiralty Inlet, respectively, based on Smultea et al. (2017); 0.75 porpoises/km<sup>2</sup> was used for the authorization). This species is difficult for PSOs to observe at distances beyond 500 m even in good sighting conditions. Thus, take estimates generally have been and are reported based on extrapolated estimates. Furthermore, the Commission is not aware of NMFS reducing the numbers of estimated harbor porpoise takes for other authorizations in inland waters of Washington.

harassment takes for harbor porpoises were insufficient based on the size of the Level A harassment zone relative to the exclusion zone<sup>9</sup>. NMFS agreed to use the non-reduced take estimate for harbor seals but remained silent on whether it planned to increase the take estimate for harbor porpoises.

Based on the various adjustments, NMFS plans to revise the numbers of Level A and B harassment takes resulting in an increase in takes<sup>10</sup> for harbor seals, Dall's porpoises<sup>11</sup>, and minke whales<sup>10</sup> and a decrease in takes<sup>12</sup> for California sea lions, transient killer whales, Steller sea lions, and gray whales. The Commission agrees that NMFS should incorporate all the aforementioned revisions in the final incidental harassment authorization, but also contends that NMFS should revise the take estimates for harbor porpoises<sup>13</sup>. Therefore, the Commission recommends that NMFS issue the incidental harassment authorization, subject to (1) inclusion of the various mitigation, monitoring, and reporting measures and the aforementioned revisions for the six marine mammal species noted herein and (2) increasing the take estimates for harbor porpoises to 39 Level A and 3,135 Level B harassment takes.

### **Abbreviated *Federal Register* notices**

Given that much of the information relevant to this proposed authorization for conducting activities at Mukilteo had been included and reviewed in previous documents, NMFS published the required information<sup>14</sup> via an abbreviated *Federal Register* notice referencing those earlier documents. The Commission has opposed NMFS's recent proposal to allow renewals of incidental harassment authorizations without an opportunity for additional public review and comment, as discussed herein. The Commission believes that NMFS's proposed renewal process is inconsistent with the requirements of section 101(a)(5)(D), which limit such authorizations to "periods of not more than 1 year" and, unless subject to public notice and comment opportunities concurrent with consideration of a renewal, would undercut the MMPA's requirements for public involvement. The abbreviated process being followed in this instance preserves the full opportunity for public review and comment. As such, it is preferable to NMFS's proposed renewal process and does not appear to be unduly burdensome on either the applicant or NMFS. Therefore, the Commission recommends that NMFS, in lieu of adopting its proposed renewal process for extending authorizations beyond their original one-year period of validity without providing a new opportunity for public review and comment, use abbreviated *Federal Register* notices and reference existing documents to streamline the incidental harassment authorization process, as is being done in this instance. The abbreviated process clearly meets the public notice and comment requirements of the MMPA and provides the necessary separation between the original and subsequent authorization(s) so that no one can

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<sup>9</sup> The extents of the Level A harassment zones exceed the exclusion zones during impact pile driving and vibratory pile driving of 36- to 120-in piles, equating to 26 days of activities. At a minimum, a group of harbor porpoises could occur in the Level A harassment zone on half of those days.

<sup>10</sup> Resulting in 87 Level A harassment and 1,736 Level B harassment takes for harbor seals, 163 Level B harassment takes for Dall's porpoises, and 8 Level B harassment takes for minke whales.

<sup>11</sup> Apparently there also was a calculation error in the original take estimates for these species.

<sup>12</sup> Resulting in 868 Level B harassment takes for California sea lions, 19 Level B harassment takes for transient killer whales, 154 Level B harassment takes for Steller sea lions, and 2 Level B harassment takes for gray whales.

<sup>13</sup> Assuming a group size of three harbor porpoises, the Level A harassment take estimate would be 39 and the non-reduced Level B harassment take estimate would be 3,135 takes. The revised take estimate based on the correct number of days of activities would be 7 Level A harassment takes and 314 Level B harassment takes.

<sup>14</sup> Including any changes to the proposed activities or assumptions made and results from the draft monitoring report.

credibly contend that NMFS is impermissibly extending an authorization beyond the statutory one-year limit.

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

NMFS indicated that it may issue a second one-year<sup>15</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.

As discussed in the previous section and as has been done in this current instance, NMFS recently implemented an abbreviated authorization process by publishing the required information<sup>16</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>17</sup>. Thus, the Commission recommends that NMFS refrain from implementing its

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<sup>15</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.

<sup>16</sup> Including any changes to the proposed activities or assumptions made and results from the draft monitoring report.

<sup>17</sup> See the Commission’s [30 April 2018 letter](#) detailing this matter.

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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.

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

Sincerely,



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

## Reference

Smultea, M.A., K. Lomac-MacNair, G. Campbell, S.S. Courbis, and T.A. Jefferson. 2017. Aerial surveys of marine mammals conducted in the inland Puget Sound waters of Washington: Summer 2013–Winter 2016. Smultea Environmental Sciences, LLC, Preston, Washington. 100 pages.