



# MARINE MAMMAL COMMISSION

23 August 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 Port of Kalama (POK) 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 the Kalama Manufacturing and Marine Export Facility on the Columbia River in Washington. The Commission also has reviewed the National Marine Fisheries Service's (NMFS) 14 August 2018 notice (83 Fed. Reg. 40257)<sup>1</sup> announcing receipt of the application and proposing to issue the authorization, subject to certain conditions.

POK plans to construct a new marine terminal for loading methanol on the Columbia River. Operators would install up to 320 24-in concrete piles using an impact hammer and 16 12- or 18-in steel piles using both a vibratory and an impact hammer. They also would install and remove temporary steel piles using a vibratory hammer throughout the project. POK expects activities to take 153 days, weather permitting. It would limit pile-driving and -removal activities to daylight hours only during the timeframe from 1 September to 31 January.

NMFS preliminarily has determined that, at most, the proposed activities temporarily would modify the behavior of small numbers of harbor seals, California sea lions, and Steller sea lions. 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 proposed mitigation, monitoring, and reporting measures include—

- using a sound attenuation device (e.g., bubble curtain) during impact driving of steel piles and implementing performance standards<sup>2</sup> for the bubble curtain;

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<sup>1</sup> The original notice published on 25 July 2018 (83 Fed. Reg. 35220). Based on its omission of instructions regarding public comment in the original notice, NMFS published a revised *Federal Register* notice. At the same time, it incorporated the Commission's informal comments regarding several errors and omissions in the original notice. However, the numbers of PSOs required to monitor for marine mammals during the various activities is still incorrect in the revised proposed authorization. NMFS indicated the final authorization would include the correct information.

<sup>2</sup> Based on POK's biological opinion for listed fish.

- using one to three qualified land-based protected species observers to monitor the Level A and B harassment zones<sup>3</sup> 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 or if a species for which authorization has been granted but the authorized takes have been met, approaches or is observed within the Level A and/or B harassment zone<sup>4</sup>;
- ceasing pile-driving and -removal activities if any marine mammal comes within 10 m of the equipment;
- reporting injured and dead marine mammals to the Office of Protected Resources and West Coast Regional Stranding Coordinator using NMFS's phased approach and suspending activities, if appropriate; and
- submitting a final report.

The Commission concurs with NMFS's preliminary finding and recommends that NMFS issue the incidental harassment authorization, subject to inclusion of the proposed mitigation, monitoring, and reporting measures.

### **Appropriateness of the Level A harassment zones**

To estimate the extents of the Level A harassment zones, POK and ultimately NMFS assumed that pinnipeds would be subjected to only 1 hour of pile driving activities each day. The 1-hour duration was based on a lack of specific haul-out sites in the immediate project area and the assumption that pinnipeds would be transiting through the area and would not be present for a full 8-hour day of pile driving<sup>5</sup>. That assumption may be true for otariids that are transiting the area when going to and from Bonneville Dam. However, that assumption is not necessarily true for harbor seals.

POK's application indicated that harbor seals reside year-round in the Columbia River, and they are observed frequently in the vicinity of the project area. Specifically, they congregate to feed at the mouths of the Kalama and Cowlitz Rivers (approximately 1 mile upstream and 3.5 miles downstream of the project site, respectively) during the winter months. Anecdotal reports indicate that some harbor seals are resident and occur year-round near the mouths of the rivers. Further, shoals near the confluence of the Cowlitz and Columbia Rivers are documented haul-out sites for harbor seals. Thus, POK indicated that harbor seals could be moving through the project area to the mouth of the Kalama or Cowlitz Rivers, could remain in the project area for several days, or could travel back and forth between the two river mouths, passing through the area multiple times. As such, assuming that harbor seals would be subjected to only 1 hour of pile driving per day is not substantiated.

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<sup>3</sup> All Level A harassment zones and the Level B harassment zone for impact pile driving would be monitored on all activity days. However, given that vibratory pile driving or removal would occur on nearly all 153 days, the Level B harassment zone for those activities would be monitored on the first two days of vibratory pile driving or removal and every third day thereafter.

<sup>4</sup> NMFS inadvertently omitted this standard measure from the proposed authorization. NMFS indicated it would be included in the final authorization.

<sup>5</sup> With up to 8 piles installed per day.

In general, Level A harassment zones for impact pile driving are much larger than for vibratory pile driving. POK indicated that impact driving would be necessary for installation of concrete piles and may be necessary for proofing or for a portion of the installation of steel piles, if vibratory installation is insufficient. The Commission agrees with NMFS's assumption that only 1 hour of impact pile driving may be necessary for installation of steel piles, but does not agree that same assumption should apply to installation of concrete piles. POK and NMFS should have assumed that harbor seals could be subjected to impact driving of concrete piles for 8 hours per day rather than 1 hour per day. Based on either the 8-hour per day or 8-piles driven per day scenario, the Level A harassment zones would increase from 40 to 160 m. Such a zone is still less than the estimated extent of the Level A harassment zone for impact driving of steel piles (i.e., 252 m). Further, the Level A harassment zone for vibratory installation should be revised as well if that activity could occur for up to 8 hours per day, which would result in a revised Level A harassment zone of 66 rather than 16 m. Therefore, the Commission recommends that NMFS revise its Level A harassment zones for harbor seals during impact driving of concrete piles and vibratory driving of steel piles based on 8 hours of activities or 8 piles to be driven per day. This approach is consistent with the manner in which NMFS has been estimating the extents of the Level A harassment zones since finalizing its Technical Guidance in 2016.

The Commission believes that NMFS needs to further investigate the appropriate timeframes over which sound exposure levels should be accumulated when estimating the extents of the Level A harassment zones—an issue that was not investigated and resolved prior to NMFS finalizing its Technical Guidance. The Commission recommends that NMFS make this issue a *priority* to resolve in the near future. The Commission understands that NMFS is convening a committee of NMFS scientists and acousticians to address the issue. The Commission believes that committee would benefit greatly from the expertise of external scientists and acousticians as well. As such, the Commission recommends that NMFS consult with both its own<sup>6</sup> and external scientists and acousticians to determine the appropriate accumulation time that action proponents should use to determine the extent of the Level A harassment zones based on the associated  $SEL_{cum}$  thresholds for the various types of sound sources, including stationary sound sources, when simple area x density methods are employed. The Commission continues to contend that estimated swimming speeds and behavior patterns (including residency patterns of species such as harbor seals)<sup>7</sup> of various species should be considered and multiple scenarios should be evaluated using animat modeling to better resolve this issue.

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

Given that much of the information relevant to this proposed authorization for conducting activities at POK had been included and reviewed in previous documents, NMFS published the required information<sup>8</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

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<sup>6</sup> Including staff in the Marine Mammal and Sea Turtle Conservation Division of the Office of Protected Resources and staff in the Office of Science and Technology.

<sup>7</sup> Results from monitoring reports, including animal responses, submitted in support of incidental harassment authorizations issued by NMFS also may inform this matter.

<sup>8</sup> Including any changes to the proposed activities or assumptions made and results from the draft monitoring report.

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

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

NMFS has indicated that it may issue a second one-year<sup>9</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

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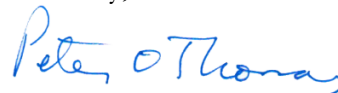
<sup>9</sup> NMFS informed the Commission that the renewal would be issued as a one-time opportunity, after which time a new authorization application would be required. NMFS has yet to specify this in any *Federal Register* notice detailing the new proposed renewal process but should do so.

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>10</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>11</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 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,

A handwritten signature in blue ink that reads "Peter O. Thomas". The signature is written in a cursive style with a large initial "P".

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

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<sup>10</sup> Including any changes to the proposed activities or assumptions made and results from the draft monitoring report.

<sup>11</sup> See the Commission's [30 April 2018 letter](#) detailing this matter.