



MARINE MAMMAL COMMISSION

17 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 Seattle Department of Transportation (SDOT) 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 restoration of Piers 62 and 63 in Seattle, Washington. The Commission also has reviewed the National Marine Fisheries Service's (NMFS) 27 June 2018 notice (83 Fed. Reg. 30120) announcing receipt of the application and proposing to issue the authorization, subject to certain conditions.

SDOT plans to replace Pier 62 and modify Pier 63 in Seattle. Operators will install up to 189 30-in steel pipe piles and remove up to 49 timber piles. Piles would be installed using a vibratory and/or impact hammer and removed using a vibratory hammer or clamshell bucket. Up to two hammers could be used at any given time. SDOT expects activities to take 127 days, weather permitting. It would limit activities to daylight hours only, during the timeframe from 1 August 2018 to 28 February 2019.

NMFS preliminarily has determined that, at most, the proposed activities could cause Level A and/or B harassment of small numbers of 13 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 and implementing performance standards measures for the bubble curtain;
- conducting in-situ measurements during two days each of impact pile driving, vibratory pile driving, and vibratory pile removal and adjusting the Level A and B harassment zones accordingly;
- ceasing pile-driving and -removal activities if any marine mammal comes within 10 m of the equipment;

- using three or four qualified protected species observers (land- and/or vessel-based) to monitor the Level A¹ 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;
- implementing various measures to minimize impacts to Seattle Aquarium's captive marine mammals;
- using delay and shut-down procedures, if a species for which authorization has not been granted² or if a species for which authorization has been granted (including Southern Resident killer whales³) 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, Center for Whale Research, and/or Washington Department of Transportation (WSDOT) and (2) acoustic detection data from the Orca Network on a daily basis during both pile driving and removal⁴;
- 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 and hydroacoustic⁵ monitoring reports.

General issues and concerns

In addition to the informal comments the Commission provided regarding the proposed mitigation and reporting requirements, the Commission noted some analytical errors regarding the extent of the Level B harassment zones, the underlying densities, and take assumptions in the *Federal Register* notice. Those included—

- incorrectly estimating the Level B harassment zone⁶ for removal of 14-in piles to be 1,848 rather than 2,929 m, which would increase the ensonified area from 4.8 to 10.5 km²;
- incorrectly stipulating that the Level B harassment zone for impact installation of 30-in piles was 2,929 m rather than 1,201 m;
- using an outdated density estimate from Jefferson et al. (2016) rather than the recent estimate from Smultea et al. (2017) for harbor porpoises⁷;

¹ The Commission informally noted that four of the exclusion zones were rounded down rather than up in proposed authorization. NMFS indicated that it would increase those four zones in the final authorization.

² The Commission informally noted that this mitigation measure was missing from the proposed authorization. NMFS indicated it would be included in the final authorization.

³ Including shutting down when killer whales are observed and their stock is unknown.

⁴ The Commission requested that the original measures be supplemented and clarified for consistency with measures used by WSDOT. NMFS indicated that these measures would be included in the final authorization.

⁵ The Commission informally noted that SDOT should report medians as well as means for metrics for both impact and vibratory driving/removal and peak sound pressure levels and pulse duration for impact driving in the final report.

⁶ Level B harassment takes of Steller sea lions would increase to 187.

⁷ Level A harassment takes of harbor porpoises would decrease to 25 and Level B harassment takes would decrease to 2,716.

- using an incorrect density estimate of 0.0003 rather than 0.002 whales/km² for minke whales⁸;
- underestimating the potential number of Level A harassment takes for harbor seals⁹; and
- underestimating the potential numbers of Level B harassment takes¹⁰ for elephant seals, common dolphins, and common bottlenose dolphins.

The Commission agrees that NMFS should incorporate all the aforementioned revisions in the final incidental harassment authorization. Therefore, the Commission recommends that NMFS issue the incidental harassment authorization, subject to the inclusion of the various mitigation, monitoring, and reporting measures and the aforementioned revisions.

Although NMFS plans to fix the various omissions and errors in the final incidental harassment authorization, these issues should have been discovered and corrected prior to publishing the *Federal Register* notice. Other recent proposed authorizations published in recent years have had similar issues¹¹. In this instance, the issues should have been addressed when the original application was reviewed during NMFS's early review team meetings or when the draft notice was reviewed prior to publication in the *Federal Register*. Thus, 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*.

Proposed one-year authorization renewals

NMFS has indicated that it may issue a one-year¹² 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;

⁸ Level B harassment takes of minke whales would increase to 10.

⁹ Level A harassment takes of harbor seals would increase to 53.

¹⁰ Level B harassment takes would increase to 2 for elephant seals and 49 each for common dolphins and bottlenose dolphins.

¹¹ For example, see the Commission's [21 May 2018](#), [8 May 2018](#), [2 January 2018](#), and [5 September 2017](#) letters.

¹² In other proposed authorizations (e.g., 83 Fed. Reg. 8456), NMFS clarified that it would issue a *second* one-year authorization, which should have been specified in the proposed 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 proposed renewal process.

- 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 information¹³ 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 process¹⁴. 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.

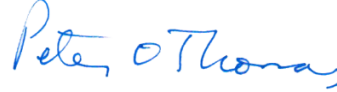
¹³ Including any changes to the proposed activities or assumptions made and results from the draft monitoring report.

¹⁴ 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,



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

References

- Jefferson, T.A., M.A. Smultea, S.S. Courbis, and G.S. Campbell. 2016. Harbor porpoise (*Phocoena phocoena*) recovery in the inland waters of Washington: Estimates of density and abundance from aerial surveys, 2013–2015. *Canadian Journal of Zoology* 94(7):505–515.
- 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.