



MARINE MAMMAL COMMISSION

31 January 2019

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 White Pass & Yukon Route (WP&YR) 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 at the Railroad Dock in Skagway, Alaska. The Commission also has reviewed the National Marine Fisheries Service's (NMFS) 17 December 2018 notice (83 Fed. Reg. 64541) announcing receipt of the application and proposing to issue the authorization, subject to certain conditions.

WP&YR plans to install and remove piles during installation of mooring dolphins at the Railroad Dock in Skagway. Operators would install up to 14 36-in temporary and 12 42-in permanent steel pipe piles using a vibratory hammer, impact hammer, and/or down-the-hole drill. They would remove the 14 36-in piles using a vibratory hammer. WP&YR's activities could occur on up to 89 days, weather permitting. It would limit pile-driving and -removal activities to daylight hours and expects the activities to occur from 1 February through 30 April 2019.

NMFS preliminarily has determined that, at most, the proposed activities could cause Level A and/or B harassment of small numbers of seven marine mammal species¹. 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 mitigation, monitoring, and reporting measures include—

- conducting in-situ source level and sound propagation measurements² during installation of each pile type and adjusting the sizes of the Level A and B harassment zones, as necessary;

¹ The Commission informally noted that NMFS should have used 2.5 rather than 2 days for the mean frequency of occurrence of killer whales, which would result in 100 rather than 80 Level B harassment takes of killer whales. NMFS plans to include the revised number of Level B harassment takes for killer whales in the final authorization.

² The Commission informally noted a few discrepancies and omissions in WP&YR's hydroacoustic monitoring plan. Those included (1) obtaining measurements during drilling for placement of the 8-in rocket anchors, (2) obtaining and reporting measurements from a minimum of 20 Hz (but ideally 10 Hz) to a maximum of 20 kHz, (3) reporting minimum, maximum, mean, and median cumulative sound exposure levels (cSELs) during impact pile driving, (4)

- 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 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 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 zone;
- 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.

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

Proposed one-year authorization renewals

NMFS has indicated that it may issue a second one-year³ incidental harassment authorization renewal for this and other future authorizations if various criteria are met (see 83 Fed. Reg. 42489 for details). 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 information⁴ 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 process⁵. Thus, the Commission recommends that NMFS refrain from implementing its proposed renewal process and

reporting median root-mean-square sound pressure levels and cSELs during vibratory pile driving and drilling, and (5) reporting the timeframe over which means/medians (e.g., 1-sec, 10-sec, 30-sec, 60-sec averages/medians) are calculated during vibratory pile driving and drilling. NMFS indicated that these discrepancies and omissions would be rectified in the final hydroacoustic monitoring plan.

³ 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.

⁴ Including any changes to the proposed activities or assumptions made and results from the draft monitoring report.

⁵ See the Commission's [30 April 2018 letter](#) detailing this matter.

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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.

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

Sincerely,



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