



MARINE MAMMAL COMMISSION

6 May 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 the Santa Cruz Port District (SC Port District) 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 replacing a seawall in Santa Cruz, California. The Commission also has reviewed the National Marine Fisheries Service's (NMFS) 8 April 2019 notice (84 Fed. Reg. 13892) announcing receipt of the application and proposing to issue the authorization, subject to certain conditions.

SC Port District plans to remove and install piles during replacement of a seawall at Aldo's Restaurant in Santa Cruz harbor. Operators would (1) remove 4 16-in timber piles using a vibratory hammer and (2) install 90 sheet piles using a vibratory and/or impact hammer. SC Port District's activities could occur on up to 17 days, weather permitting. It would limit pile-driving and -removal activities to daylight hours from 15 June through 1 November 2019.

NMFS preliminarily has determined that, at most, the proposed activities could cause Level A¹ and B² harassment of small numbers of harbor seals, California sea lions, harbor porpoises, and common bottlenose dolphins. 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—

¹ Due to the prevalence of harbor seals and California sea lions in the Santa Cruz harbor, the Commission informally noted that NMFS should (1) authorize Level A harassment takes for California sea lions in case the PSOs cannot shut down pile-driving activities before the animals occur in the zone associated with impact pile driving and (2) increase the Level A harassment takes for harbor seals due to the extent of the Level A harassment zone for impact pile driving encompassing the entire harbor and those areas immediately beyond the harbor. The Commission suggested including one California sea lion take per day and increasing from 3 to 23 harbor seal takes per day, in addition to the Level B harassment takes proposed for authorization. NMFS agreed and indicated that the revised Level A harassment takes would be included in the final authorization accordingly.

² The Commission also informally noted that NMFS used 8 rather than 9 days to estimate the Level B harassment takes for cetaceans. NMFS indicated it would increase the Level B harassment takes from 16 to 18 for harbor porpoises and from 64 to 72 for bottlenose dolphins in the final authorization.

- ceasing pile-driving and -removal activities if any marine mammal comes within 10 m of the equipment³;
- using two qualified protected species observers to monitor the Level A and B harassment zones⁴ for 30 minutes before, during, and for 30 minutes after the proposed activities;
- using 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 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 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-year⁵ incidental harassment authorization renewal for this and other future authorizations if various criteria are met and after an expedited public comment period of 15 days (see 84 Fed. Reg. 13906 and the proposed authorization 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)(iii) clearly states that proposed authorizations are subject to a 30-day comment period—and Congressional expectations regarding the length of the comment period when it passed that provision⁶.

Another potentially significant issue with the proposed 15-day comment period is the burden that it places on reviewers, who will need to review the original authorization and supporting

³ The Commission informally noted that NMFS omitted this standard measure from the *Federal Register* notice and proposed incidental harassment authorization. NMFS indicated that the measure would be included in the final authorization.

⁴ To minimize unnecessary shut downs, the Commission informally noted that the shut-down zones should be reduced for certain activities to be more consistent with the activity-specific Level A harassment zones. The Commission indicated that the shut-down zones should be reduced to 10 m during vibratory removal of timber piles for all species, 15 m during vibratory pile driving of sheet piles for pinnipeds (the same zones should be increased from 25 to 30 m for harbor porpoises), and 25 m during impact driving of sheet piles for pinnipeds. NMFS indicated it would revise the shut-down zones to be activity-specific in the final authorization.

⁵ 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.

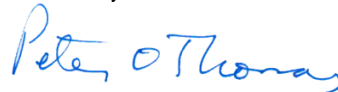
⁶ See, for example, the legislative history of section 101(a)(5)(D), which states "...in some instances, a request will be made for an authorization identical to one issued the previous year. In such circumstances, the Committee expects the Secretary to act expeditiously in complying with the notice and comment requirements." (H.R. Rep. No. 439, 103d Cong., 2d Sess. 29 (1994)). The referenced "notice and comment requirements" specify a 30-day comment period.

Ms. Jolie Harrison
6 May 2019
Page 3

documentation⁷, the draft monitoring report(s), the renewal application or request⁸, and the proposed authorization and then formulate comments very quickly. Depending on how frequently NMFS invokes the renewal option, how much the proposed renewal or the information on which it is based deviates from the original authorization, and how complicated the activities and the taking authorization is, those who try to comment on all proposed authorizations and renewals, such as the Commission, would be hard pressed to do so within the proposed 15-day comment period. Therefore, the Commission recommends that NMFS refrain from using the proposed renewal process for SC Port District's authorization. The renewal process should be used sparingly and selectively, by limiting its use only to those proposed incidental harassment authorizations that are expected to have the lowest levels of impacts to marine mammals and that require the least complex analyses. Notices for other types of activities should not even include the possibility that a renewal might be issued using the proposed foreshortened 15-day comment period. If NMFS intends to use the renewal process frequently *or* for authorizations that require a more complex review or for which much new information has been generated (e.g., multiple or extensive monitoring reports), the Commission recommends that NMFS provide the Commission and other reviewers the full 30-day comment opportunity set forth in section 101(a)(5)(D)(iii) of the MMPA.

The Commission hopes you find its letter useful. Please contact me if you have questions regarding the Commission's recommendations.

Sincerely,



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

⁷ Including the original application, hydroacoustic and marine mammal monitoring plans, take estimation spreadsheets, etc.

⁸ Including any proposed changes or any new information.