



# MARINE MAMMAL COMMISSION

8 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 Duck Point Development II, LLC, (DPD) 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 cruise ship berth and lightering float on Chichagof Island, Alaska. The Commission also has reviewed the National Marine Fisheries Service's (NMFS) 1 May 2019 notice (84 Fed. Reg. 19895) announcing receipt of the application and proposing to issue the authorization, subject to certain conditions.

DPD plans to remove and install piles during construction of a second cruise ship berth and a new lightering float at Cannery Point on Chichagof Island, Alaska. Operators would (1) install and remove 62 30-in temporary steel piles using a vibratory hammer and (2) install 45 24- to 42-in permanent steel piles using a vibratory hammer, impact hammer, and/or down-the-hole drilling<sup>1</sup>. DPD's activities could occur on up to 75 days, weather permitting. It would limit pile-driving and -removal activities to daylight hours from 1 June through 30 November 2019.

NMFS preliminarily has determined that, at most, the proposed activities could cause Level A and B<sup>2</sup> harassment of small numbers of nine species of marine mammals. 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 pile caps or cushions during impact driving;
- ceasing pile-driving and -removal activities if any marine mammal comes within 10 m of the equipment;

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<sup>1</sup> Which is used both for socketing and rock anchoring.

<sup>2</sup> The Commission also informally noted that NMFS estimated 1,932 rather than 1,992 Level B harassment takes for harbor porpoises. NMFS indicated that the original number was a typo and that it would revise the Level B harassment takes accordingly in the final authorization.

- using three to four 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 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<sup>3</sup>; and
- submitting a draft and final monitoring 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-year<sup>4</sup> 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. 18521 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 provision<sup>5</sup>.

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 documentation<sup>6</sup>, the draft monitoring report(s), the renewal application or request<sup>7</sup>, 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

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<sup>3</sup> The Commission informally noted that this standard measure was included in the proposed authorization but was omitted from the *Federal Register* notice. NMFS indicated the measure would be included in the preamble to the final authorization.

<sup>4</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>5</sup> 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.

<sup>6</sup> Including the original application, hydroacoustic and marine mammal monitoring plans, take estimation spreadsheets, etc.

<sup>7</sup> Including any proposed changes or any new information.

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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 DPD'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