



# MARINE MAMMAL COMMISSION

10 June 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 Alaska Department of Transportation and Public Facilities (AK DOT) 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 modifying a ferry terminal in Auke Bay, Alaska. The Commission also has reviewed the National Marine Fisheries Service's (NMFS) 17 May 2019 notice (84 Fed. Reg. 22453) announcing receipt of the application and proposing to issue the authorization, subject to certain conditions.

AK DOT plans to remove and install piles during modification of the Auke Bay Ferry Terminal. Operators would (1) remove 21 20- to 30-in steel pipe piles using a vibratory hammer and (2) install 18 24- to 30-in steel pipe piles using a vibratory and/or impact hammer. AK DOT's activities could occur on up to 27 days, weather permitting. It would limit pile-driving and -removal activities to daylight hours from November 2019 through April 2020.

NMFS preliminarily has determined that, at most, the proposed activities could cause Level A and B harassment of small numbers of seven marine mammal species. 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—

- ceasing pile-driving and -removal activities if any marine mammal comes within 10 m of the equipment;
- using two 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; 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.

### Source levels

The Commission informally noted that the source levels used by NMFS for AK DOT's activities were nearly identical for impact installation of 24- and 30-in piles (see Table 5 in the *Federal Register* notice). That phenomenon is not generally observed, except when one-off measurements are used. Specifically, NMFS used a root-mean-square sound pressure level ( $SPL_{rms}$ ) source level of 190 dB re 1  $\mu Pa$  for 24-in piles and a single-strike sound exposure level ( $SEL_{s-s}$ ) source level of 177 dB re 1  $\mu Pa^2$ -sec based on California Department of Transportation (Caltrans; 2015). Similarly, the  $SPL_{rms}$  source level for 30-in piles was 191 dB re 1  $\mu Pa$ , and the  $SEL_{s-s}$  source level also was 177 dB re 1  $\mu Pa^2$ -sec based on Denes et al. (2016). The Commission agrees that the source level ranges for 24- and 30-in piles overlap<sup>1</sup> but notes that use of the same source level for different-sized piles is an artifact of choosing one-off measurements based on installation of a single pile or only a few piles<sup>2</sup> rather than a true lack of variability in source levels of different pile sizes. Source levels associated with impact installation of steel pipe piles should exhibit increasing trends with increasing diameter of the piles.

The Commission understands that NMFS has compiled source level data for impact installation of various pile types and sizes based on repeated Commission recommendations over the last few years. Those data<sup>3</sup> in fact, follow the expected trend that impact installation of larger piles emit higher source levels. The Commission appreciates the effort that has gone into compiling and analyzing all available source level data and believes the associated summary statistics provide a valuable and necessary resource for standardizing source levels across the various authorizations. As such, the Commission recommends that NMFS conduct any required internal reviews of the source level data and make them available to all NMFS analysts and relevant action proponents for use in the near term.

### 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. 22473 and the proposed authorization for

---

<sup>1</sup> The range of minimum to maximum source levels are 10 dB to more than 30 dB for 24- and 30-in piles.

<sup>2</sup> Which is the case for both Caltrans (2015) and Denes et al. (2016).

<sup>3</sup> Based on means, medians, and 75<sup>th</sup> percentile values of all available source level data.

<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.

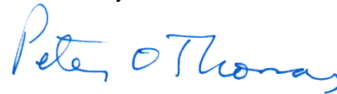
Ms. Jolie Harrison  
10 June 2019  
Page 3

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 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 AK DOT'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

---

<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.

## **References**

- Caltrans. 2015. Technical guidance for assessment and mitigation of the hydroacoustic effects of pile driving on fish. State of California Department of Transportation, Sacramento, California. 532 pages.
- Denes, S.L., A. MacGillivray, and G. Warner. 2016. Alaska DOT hydroacoustic pile driving noise study: Auke Bay monitoring results. JASCO Document 01133, Version 2.0. JASCO Applied Sciences, Victoria, British Columbia. 34 pages.