



MARINE MAMMAL COMMISSION

11 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 U.S. Navy (the Navy) 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 repair of a bulkhead at Naval Station Mayport, Florida. The Commission also has reviewed the National Marine Fisheries Service's (NMFS) 21 May 2019 notice (84 Fed. Reg. 23024) announcing receipt of the application and proposing to issue the authorization, subject to certain conditions.

The Navy plans to install piles during repair of a bulkhead at the South Quay wall at Naval Station Mayport. Operators would install 240 24-in steel sheet piles using a vibratory and/or impact hammer. The Navy's activities could occur on up to 35 days, weather permitting. It would limit pile-driving and -removal activities to daylight hours from February 2020 to February 2021.

NMFS preliminarily has determined that, at most, the proposed activities could cause Level B harassment of small numbers of 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—

- ceasing pile-driving and -removal activities if any marine mammal comes within 15 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 Southeast Fisheries Science Center's Stranding Coordinator using NMFS's phased approach and suspending activities, if appropriate; and
- submitting a final report¹.

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.

Sufficiency of takes

The Commission informally noted that the proposed number of Level B harassment takes of bottlenose dolphins was insufficient based on previous monitoring efforts at Naval Station Mayport. Previous monitoring reports indicated that on average 1.8 to 4.3² dolphins *were taken* per day within the turning basin (Department of the Navy 2016 and 2018a and b), while NMFS proposed to authorize only 1.7 takes per day³ for the same area. Those same monitoring reports indicated that many more dolphins and multiple groups of dolphins *were observed* per day. Although the Navy estimated that it would conduct pile driving intermittently throughout the day for a total of 45 minutes, previous activities also were estimated to occur intermittently but for less total time (e.g., 10, 12, and 24 minutes). Thus, the number of Level B harassment takes for the proposed authorization were underestimated based on the dolphins' known presence in the turning basin, including during pile-driving activities, and the potential to take more dolphins than in previous years.

In responses to the Commission's concerns, NMFS indicated that it plans to increase the number of bottlenose dolphin takes to 2 per day, equating to 70 total takes. The Commission is not convinced that 70 takes are sufficient, particularly since more animals have been reported to be taken on a given day and multiple groups have been observed within the turning basin throughout a given day (Department of the Navy 2016 and 2018a and b). The Commission strongly believes that NMFS should authorize a sufficient number of takes at the outset to preclude the possibility of a request from the Navy for a mid-authorization increase. And, while the Commission understands that the Navy could (1) cease activities if the authorized takes are met and a dolphin approaches or occurs within the Level B harassment zone or (2) choose to cease activities proactively if a large group of dolphins enters the turning basin, such shut downs could prolong the number of days needed to complete the pile-driving activities.

Moreover, the Commission sees no reason that NMFS cannot increase the number of takes given that NMFS stated that it was unlikely that all takes would occur to new individuals within Jacksonville Estuarine System stock⁴ and that it also was unlikely that all takes would occur to that single stock. NMFS further stated that bottlenose dolphins belonging to estuarine stocks exhibit

¹ The Commission informally noted that the reporting requirements in the proposed authorization were insufficient and should be consistent with section 6(a)(i) to (xi) of the Navy's final 2019 authorization for activities at the Portsmouth Naval Shipyard. NMFS indicated it would include the applicable reporting requirements in the final authorization for Naval Station Mayport.

² All of which occurred well within the turning basin in 2015.

³ NMFS used an area x density method to estimate that 58 dolphins could be taken during the 35 days of activities.

⁴ The smallest stock of the three that could possibly be affected.

high site fidelity, resulting in a higher likelihood of repeated exposure (84 Fed. Reg. 23036). Thus, NMFS should be able to make its small numbers determination even with an increase in the number of bottlenose dolphin takes, since NMFS's rationale in the preamble would still apply. For these reasons, the Commission recommends that NMFS increase the number of Level B harassment takes to 140 based on the potential to take two groups of dolphins⁵ on each of the 35 days of proposed activities.

Proposed one-year authorization renewals

NMFS has indicated that it may issue a second one-year⁶ 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. 23036 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 provision⁷.

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 documentation⁸, the draft monitoring report(s), the renewal application or request⁹, 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 the Navy'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

⁵ Median group size was two based on Department of the Navy (2016 and 2018a). Department of the Navy 2018b did not include the raw sightings data, only summary data.

⁶ 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.

⁷ 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.

⁸ Including the original application, hydroacoustic and marine mammal monitoring plans, take estimation spreadsheets, etc.

⁹ Including any proposed changes or any new information.

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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

References

- Department of the Navy. 2016. Wharf Charlie Two at Naval Station Mayport: Marine mammal observer report covering the period of 8 September 2015 to 7 September 2016. 34 pages.
- Department of the Navy. 2018a. Wharf Bravo recapitalization at Naval Station Mayport: Marine mammal observer report covering the period of 13 March 2017 to 12 January 2018. 84 pages.
- Department of the Navy. 2018b. Wharf Bravo recapitalization at Naval Station Mayport: Marine mammal observer report covering the period of 16 April 2018 to 2 July 2018. 7 pages.