



MARINE MAMMAL COMMISSION

25 July 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 renewal request submitted by the Washington State Department of Transportation Ferries Division (WSDOT) 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 activities at the Bremerton ferry terminal. The Commission also has reviewed the National Marine Fisheries Service's (NMFS) 10 July 2019 notice (84 Fed. Reg. 32881) announcing receipt of the application and proposing to issue the authorization, subject to certain conditions.

WSDOT plans to relocate one dolphin¹ at the Bremerton ferry terminal. Operators will install up to 12 30- to 36-in steel piles using a vibratory hammer and remove up to 7 36-in steel piles using a vibratory hammer, direct pull, and/or clamshell bucket. WSDOT expects activities to occur on up to 9 days, weather permitting. Activities would be limited to daylight hours only².

NMFS preliminarily has determined that, at most, the proposed activities could cause Level B harassment of small numbers of 11 marine mammal species or stocks but 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—

- using only one hammer at a given time;
- ceasing pile-driving and -removal activities if any marine mammal comes within 10 m of the equipment;
- using three qualified protected species observers (land- and vessel-based) 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;

¹¹ Which is a man-made marine structure.

² To protect salmonids, in-water activities are only allowed to occur from 1 August to 15 February.

- using delay and shut-down procedures, if a species for which authorization has not been granted² (including Southern Resident killer whales³) or if a species for which authorization has been granted but the authorized takes have been met, approaches or is observed within the Level B harassment zone;
- obtaining both marine mammal (1) sightings data from the Orca Network and/or Center for Whale Research and (2) acoustic detection data from the Orca Network on a daily basis;
- reporting injured and dead marine mammals to NMFS and the West Coast Regional Stranding Coordinator using NMFS's phased approach and suspending activities, if appropriate; and
- submitting a final report⁴.

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

One-year authorization renewals

In 2018 NMFS indicated that it may issue one-year⁵ renewals of incidental harassment authorizations for this and other authorizations if certain criteria are met (see 83 Fed. Reg. 8853 for details). At that time, the Commission encouraged NMFS to take steps to streamline the authorization process under section 101(a)(5)(D) of the MMPA but expressed concerns that the proposed renewal process was contrary to the statutory requirements. The Commission noted that, if a renewal were issued without any additional opportunity for public comment, doing so would be inconsistent with the requirement that proposed authorizations be published in the *Federal Register* and an opportunity for public comment be provided. If, as NMFS had argued, the publication of the original proposed authorization provided sufficient notice of and opportunity to comment on a possible renewal, the Commission explained that this would be tantamount to issuing the authorization for longer than one year, which violates the one-year limit set forth in section 101(a)(5)(D)(i) of the MMPA. NMFS has addressed this issue by publishing abbreviated *Federal Register* notices that reference the relevant documents⁶ and providing a 15-day comment period. NMFS also intends to provide direct notice to those who commented on the original incidental harassment authorization, to ensure that those entities have an opportunity to submit additional comments

³ Including shutting down when killer whales are observed and their stock is unknown.

⁴ Similar to other recent authorizations, the Commission informally noted that estimating the total number of animals taken based on extrapolation was not incorporated in all monitoring reports and that the draft authorization language needed to be revised accordingly. NMFS indicated that it would explicitly require WSDOT to extrapolate the numbers of animals taken to those portions of the harassment zones that are not able to be monitored fully in the final authorization. The Commission also informally noted that some action proponents were not including the marine mammal observational datasheets or raw data as required in authorizations issued in 2017 and 2018 and that specific language requiring those data to be provided had been inadvertently removed from recent authorizations. NMFS must include that requirement in all final authorizations as well.

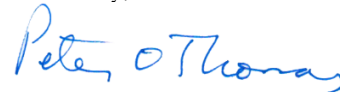
⁵ NMFS informed the Commission that the renewal would be issued as a one-time opportunity, after which time a new authorization application would be required. NMFS has yet to specify this in any *Federal Register* notice detailing the new proposed renewal process but should do so.

⁶ Including any proposed changes to the activities or the findings and information on which the original authorization was based (including any information contained in the draft monitoring report).

The Commission appreciates NMFS's attempt to address the Commission's concerns by providing public notice and an opportunity to comment on the renewal. However, the Commission still questions whether NMFS's revised process fully satisfies the 30-day comment period requirement under section 101(a)(5)(D)(iii) of the MMPA.⁷ Nevertheless, the Commission believes that it is preferable to forgoing a second round of public comment entirely. A potentially significant problem with the proposed 15-day comment period is the potential 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 use the proposed renewal process sparingly and selectively, by limiting its availability to those proposed incidental harassment authorizations for activities 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.

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

Sincerely,



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

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.