



MARINE MAMMAL COMMISSION

15 October 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 Mr. Jim Erickson 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 dock replacement in Auke Bay, Alaska. The Commission also has reviewed the National Marine Fisheries Service's (NMFS) 25 September 2019 notice¹ (84 Fed. Reg. 50387) announcing receipt of the application and proposing to issue the authorization, subject to certain conditions.

Mr. Erickson plans to remove and install piles during dock replacement at his private moorage facility. Operators would (1) remove six 12- to 16-in timber piles using a vibratory hammer and (2) install six 12.75- to 20-in steel pipe piles using a vibratory hammer, impact hammer, and/or down-the-hole (DTH) hammer. The proposed activities could occur on up to 8 days, weather permitting. It would limit pile-driving and -removal activities to daylight hours in 2020.

NMFS preliminarily has determined that, at most, the proposed activities could cause Level A and/or B harassment of small numbers of eight 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 equipment²;
- using qualified protected species observers (PSOs) to monitor the Level A and B harassment zones for 30 minutes before, during, and for 30 minutes after the proposed activities;

¹ The Commission informally noted multiple typos and omissions in the *Federal Register* notice regarding source levels and inputs for calculating the various Level A harassment zones. NMFS indicated that the preamble to the final authorization would be amended accordingly.

² The Commission noted that the preamble incorrectly specified the shut-down zone as 20 rather than 10 m. NMFS indicated that the preamble to the final authorization would be amended accordingly.

- 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.

General comments

The Commission informally noted the following issues regarding the proposed mitigation, monitoring and reporting measures—

- NMFS incorrectly used a pulse duration of 50 rather than 100 msec³ for estimating the extent of the Level A harassment zones during impact installation of the 12.75-in piles, which resulted in underestimated Level A harassment zones⁴.
- NMFS rounded down rather than up the shut-down zones⁵ for (1) HF cetaceans and phocids during vibratory installation of 12.75-in piles and (2) phocids during impact installation of the 12.75-in piles⁶.
- NMFS rounded down rather than up the monitoring zones⁷ for impact installation of 12.75-in piles and vibratory installation of the 20-in piles.
- NMFS did not specify the number or location of PSOs in the proposed authorization⁸, but specified at least one land-based and one vessel-based PSO would be monitoring in the preamble to the proposed authorization⁹. Mr. Erickson specified that two PSOs would be monitoring during pile removal, three during pile driving, and four during DTH drilling in his marine mammal monitoring plan. The final authorization should specify that at least two PSOs would be monitoring during the activities, one land- and one vessel-based.
- NMFS did not specify in the proposed authorization that (1) pile driving and removal can occur only during daylight hours, (2) if poor environmental conditions restrict full visibility of the shut-down zone(s), pile driving and removal must be delayed until the entire shut-down zone is visible, (3) Level B harassment takes recorded by PSOs must be extrapolated based upon the number of observed takes and the percentage of the Level B harassment zone that was not visible, and (4) marine mammal field datasheets must be provided as part of the draft and final monitoring report.

³ Consistent with NMFS's own guidance.

⁴ The Level A harassment zones should be 60.9 m for low-frequency (LF) cetaceans, 2.2 m for mid-frequency cetaceans, 72.6 m for high-frequency (HF) cetaceans, 32.6 m for phocids, and 2.4 m for otariids.

⁵ That are based on the Level A harassment zones.

⁶ Based on the revised Level A harassment zones, the shut-down zones should be rounded up for LF and HF cetaceans as well.

⁷ That are based on the Level B harassment zones.

⁸ Nor did it reference Mr. Erickson's application or monitoring plan.

⁹ Which NMFS clarified was the requirement to be included in the final authorization.

NMFS indicated that all of the aforementioned issues would be addressed and the preamble to and the final authorization would be amended accordingly. Although the Commission appreciates that NMFS plans to fix these issues, they should have been identified and addressed prior to publication of the *Federal Register* notice. The Commission again recommends that NMFS conduct a more thorough review of the applications and *Federal Register* notices to ensure accuracy, completeness, and consistency prior to submitting them to the *Federal Register* for public comment.

The Commission also inquired whether Mr. Erickson would be keeping a running tally of the extrapolated takes to ensure the authorized takes are not exceeded. NMFS indicated that he would be keeping a running tally of the observed takes and would report the extrapolated takes in the final monitoring report. The Commission does not believe that keeping track of only the observed takes is sufficient when the Level B harassment zones extend to more than 12 km. For pinnipeds and harbor porpoises, PSOs generally cannot observe the animals beyond 1 km from the observation platform¹⁰. Mysticetes and killer whales are generally observable out to a few kilometers. Thus, adjusting the takes based on the extent of the Level B harassment zone should be a simple calculation. As such, the Commission recommends that NMFS ensure that Mr. Erickson keeps a running tally of the total takes for each species to comply with section 4(g) of the authorization.

In addition, the Commission informally noted that the Level A harassment takes were subtracted from the Level B harassment takes but that harbor porpoises and harbor seals could be taken by both types of harassment during the proposed activities. NMFS indicated that it would be revising its authorization language to clarify that animals taken by Level A harassment also could be taken by Level B harassment. The Commission understands that to mean that the number of Level A harassment takes *authorized* could apply to either Level A *or* B harassment and recommends that the final authorization, and future authorizations, specify the language as such.

Source levels

The Commission notes that the source level used by NMFS for impact installation of the 12.75-in pile is from water depths that are less than 5 m in depth (see Table I.2-1. in California Department of Transportation (Caltrans) 2015). Water depths at Mr. Erickson's dock range from approximately 2 to 13 m in depth. Source levels in deeper water are 2 to 6 dB greater than those in shallow water. Unfortunately, Caltrans (2015) does not include data for impact pile driving of 12-in steel pipe piles in deeper water. However, the Commission expects that source levels in water depths greater than 5 m would be greater than those reported in Caltrans (2015).

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 data¹¹ include source level measurements taken in both shallow¹² and deep water. 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. Thus, the

¹⁰ Keeping in mind that that radius also applies to the vessel. Assuming the entire vessel track is observed at a given time is not appropriate.

¹¹ Based on means, medians, and 75th percentile values of all available source level data.

¹² Less than 6 m.

Commission again¹³ recommends that NMFS finish any outstanding internal reviews and make the source level data available to all NMFS analysts and relevant action proponents for use as soon as possible.

Proposed one-year authorization renewals

NMFS has indicated that it may issue a second one-year¹⁴ 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. 50407 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 provision¹⁵.

Another 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 documentation¹⁶, the draft monitoring report(s), the renewal application or request¹⁷, 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 are 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 Mr. Erickson'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 on 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.

¹³ As it did in its [10 June 2019 letter](#).

¹⁴ 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.

¹⁵ 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.

¹⁶ Including the original application, hydroacoustic and marine mammal monitoring plans, take estimation spreadsheets, etc.

¹⁷ Including any proposed changes or any new information.

Ms. Jolie Harrison
To be dated
Page 5

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

Sincerely,

A handwritten signature in blue ink that reads "Peter O. Thomas". The signature is written in a cursive, flowing style.

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

Reference

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.