



MARINE MAMMAL COMMISSION

7 November 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 City of Juneau (the City) 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 harbor improvements in Statter Harbor in Auke Bay, Alaska. The Commission also has reviewed the National Marine Fisheries Service's (NMFS) 18 October 2019 notice (84 Fed. Reg. 55920) announcing receipt of the application and proposing to issue the authorization, subject to certain conditions.

The City plans to remove and install piles during harbor improvements in Statter Harbor. This authorization would cover Phase 2 activities—Phase 1 activities that were covered under a previously issued authorization include blasting and dredging activities and began in October 2019. For Phase 2, operators would (1) remove 3 16-in steel pipe piles using a crane or vibratory hammer and (2) install 23 16-in steel pipe piles using a vibratory hammer, impact hammer, and/or down-the-hole hammer. The proposed activities could occur on up to 23 days, weather permitting. Proposed activities would occur from 1 October 2020 through 30 April 2021.

NMFS preliminarily has determined that, at most, the proposed activities could cause Level A and 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 equipment;
- using two (land- and/or vessel-based) 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;
- 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 draft and final report.

Regarding subsistence use, in a previous consultation with Alaska Department of Fish and Game, representatives of the Douglas Indian Association, Sealaska Heritage Institute, and the Central Council of the Tlingit and Haida Indian Tribes of Alaska indicated that the primary concern with construction activities in Statter Harbor was impacts to herring fisheries, not marine mammals. As such, NMFS preliminarily has determined that the taking of affected species or stocks would not have an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence purposes.

General comments

The Commission informally noted a number of issues that were not addressed prior to publication of the *Federal Register* notice (see the Addendum). Although the Commission appreciates that NMFS will resolve them accordingly in the preamble to and the final authorization, it notes that to allow full and transparent public review they should have been identified and addressed prior to publication of the *Federal Register* notice.

Tally of takes

The Commission also inquired whether the City would be keeping a running tally of the observed and extrapolated takes to ensure the authorized takes are not exceeded. NMFS indicated that the City would be keeping a running tally of the observed takes and would report the extrapolated takes in the 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 and maintains that the running tally should include extrapolated takes as well to ensure that authorized takes are not exceeded. For pinnipeds and porpoises, PSOs cannot observe the animals beyond 1 km from the observation platform¹. For Statter Harbor proper, the City would not be able to observe animals, particularly pinnipeds, in the near field beyond 200 m due to the presence of mooring floats, gangways, boat launches, boats, and construction equipment. Mysticetes, on the other hand, are generally observable out to a few kilometers in the far field. Thus, adjusting the takes based on the extent of the Level B harassment zone should be a simple calculation based on the sighting distance and number of PSOs monitoring at a given time, which would be two. This is particularly important in this instance when activities could extend up to 6 hours into darkness² and pinnipeds are prevalent in the harbor itself. As such, the Commission recommends that NMFS

¹ 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.

² Due to practicability and safety concerns and large tidal changes in the area, piles would need to be driven to depth, which may extend into nighttime hours.

ensure that the City keeps a running tally of the total takes, both observed and extrapolated takes, for each species to comply with section 4(g) of the authorization.

Proposed one-year authorization renewals

NMFS has indicated that it may issue a second one-year³ 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. 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 provision⁴.

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 documentation⁵, the draft monitoring report(s), the renewal application or request⁶, 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 the City'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.

Similar to another proposed authorization⁷, if the City is unable to complete Phase 1 activities by 30 September 2020, the renewal authorization for Phase 1 activities would overlap with Phase 2 activities that are set to begin in October 2020. The Commission informally inquired

³ 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.

⁴ 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.

⁵ Including the original application, hydroacoustic and marine mammal monitoring plans, take estimation spreadsheets, etc.

⁶ Including any proposed changes or any new information.

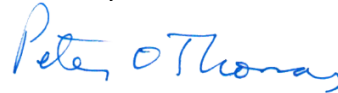
⁷ See the Commission's [14 August 2019 letter](#).

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whether the City's Phase 1 and 2 activities would occur concurrently. The City indicated that the activities would not occur at the same exact time, Phase 1 activities must be completed before Phase 2 activities can begin, but both activities would occur during the same timeframe of the Phase 2 authorization. As such, the Commission recommends that, prior to issuing the currently proposed authorization, NMFS determine whether it can make its determinations regarding small numbers, negligible impact, and unmitigable adverse impact on subsistence use regarding the total taking of each species or stock on the two authorizations combined and if NMFS cannot make those determinations, refrain from issuing a Phase 1 renewal without issuing a coincident one-year delay for the Phase 2 authorization. Absent those determinations or delays, it can appear that NMFS is attempting to circumvent the requirements under section 101(a)(5)(D) 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

Addendum

The Commission informally identified the following issues in the preamble to and draft authorization. NMFS indicated that they would be resolved in the final authorization and *Federal Register* notice for the authorization issuance.

- NMFS omitted from the *Federal Register* notice the source level for impact pile driving based on sound pressure level root-mean-square, which informs the Level B harassment zones.
- Various information in Table 1 of the *Federal Register* notice did not reconcile with the inputs used to estimate the extents of the Level A harassment zones. In addition, NMFS overestimated the Level A harassment zones for vibratory pile removal based on assuming that two piles could be removed per day taking 360 minutes each. Table 1 indicated that three piles would be removed per day taking only 30 minutes each, which resulted in Level A harassment zones that are four times less than those included in Table 6 of the *Federal Register* notice.
- In the marine mammal occurrence portion of the notice, NMFS indicated that 12 harbor seals occur in the inner portions of the harbor but then used 11 harbor seals to inform its Level A harassment take estimates. The Level A harassment takes of harbor seals should be 276 rather than 253.
- NMFS assumed that a pair of Dall's porpoise could enter the Level A harassment zone every fourth day of pile driving. Average group size of Dall's porpoise is four based on Department of the Navy (2017). The Level A harassment takes of Dall's porpoises should be 24 rather than 12.
- NMFS did not delineate the percentage of each stock that would be authorized to be taken in Table 7 of the *Federal Register* notice⁸, which informs its small numbers determinations. Additionally, NMFS noted in various sections of the notice that 6 percent of the humpback whales would be attributed to the Mexico distinct population segment (DPS) but did not indicate where the other 94 percent were attributed. The other 94 percent would be attributed to the Hawaii DPS and should be denoted as such in the appropriate sections and Table 7 of the notice.
- NMFS proposed to require the City to shut down its activities when harbor seals were observed within 100 m of the pile during impact pile driving but also stated that there was a chance that zone would not be free of harbor seals for sufficient time to allow for impact pile driving as harbor seals frequently use the nearby habitat (84 Fed. Reg. 59333). Given that NMFS would authorize up to 12 Level A harassment takes per day, the shut-down zone should be reduced to 25 m to minimize any unnecessary delays and the need for activities to extend into nighttime hours.
- NMFS did not specify in the proposed authorization (1) that work may not begin during nighttime hours, or during periods of low visibility when visual monitoring of marine mammals cannot be conducted, but work can continue into the nighttime hours⁹ if necessary¹⁰, (2) that 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

⁸ Or the small numbers portion of the notice.

⁹ This is due to practicability concerns regarding pile driving during winter.

¹⁰ This measure was specified in the *Federal Register* notice.

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was not visible during the day and at night when monitoring could not occur¹¹, (3) that marine mammal field datasheets must be provided as part of the draft and final monitoring report¹⁰, and (4) the Level A and B harassment zones since some of those exceed the monitoring zones.

Reference

Department of the Navy. 2017. Dive distribution and group size parameters for marine species occurring in the U.S. Navy's Atlantic and Hawaii-Southern California Training and Testing areas. Naval Undersea Warfare Center, Newport, Rhode Island. 114 pages.

¹¹ This measure was not specified in the *Federal Register* notice either.