



# MARINE MAMMAL COMMISSION

18 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 U.S. Army Corps of Engineers (USACE) 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 repairing the north jetty in Coos Bay, Oregon, during a two-year period. NMFS plans to issue two separate, but consecutive, one-year incidental harassment authorizations, one for activities from 1 September 2020 through 31 August 2021 and the second from 1 July 2022 through 30 June 2023. The Commission also has reviewed the National Marine Fisheries Service's (NMFS) 23 October 2019 notice (84 Fed. Reg. 56781) announcing receipt of the application and proposing to issue the authorization, subject to certain conditions.

USACE plans to remove and install piles during repair of the north jetty. Operators would install up to 24 30-in steel pipe piles and 40 steel Hpile *or* 100 AZ sheet piles using a vibratory hammer under the first authorization. They then would remove all of those piles using a vibratory hammer under the second authorization. USACE's activities could occur on up to 14 days for each authorization. USACE would limit pile-driving and -removal activities to daylight hours from 1 October through 15 February and 1 June through 31 July.

NMFS preliminarily has determined that, at most, the proposed activities could cause Level 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 or three (land- and/or vessel-based) 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 standard 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 West Coast Regional Stranding Coordinator using NMFS's phased approach and suspending activities, if appropriate; and
- submitting a draft and final report.

### 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 and the final authorizations, it notes that to allow full and transparent public review these issues should have been identified and addressed prior to publication of the *Federal Register* notice.

### Harbor seal takes

The Commission believes that NMFS underestimated the number of Level B harassment takes of harbor seals<sup>1</sup>. NMFS used a density derived from the maximum number of seals<sup>2</sup> hauled out at two of the three haul-out sites<sup>3</sup> in the project area, the ensonified areas, and numbers of days of activities. Based on that method, 114 seals could be taken on a per-day basis. Sighting data, however, show that more than 114 animals occur at Clam Island and Pigeon Point in winter (AECOM 2018). In addition, those data do not include haul-out counts from South Slough, which also is within the Level B harassment zones but is just outside of the area where the sightings data were collected. Although sightings data were not obtained from South Slough in winter, Oregon Department of Fish and Wildlife observed 44 harbor seals at that haul-out site in June 2014.

When Level B harassment zones are adjacent to or surround known haul-out sites, NMFS generally uses haul-out counts rather than densities to estimate the numbers of takes. That approach is used, because all of the seals known to haul out at the various sites have the potential to occur in the water and be taken during construction activities on a given day—this is especially true for the three haul-out sites in USACE's project area that are on tidal flats. Using haul-out counts, 167 seals could be taken on a given day based on data from AECOM (2018). If NMFS were to use a density estimate, that estimate should include a haul-out correction factor. Assuming a haul-out correction factor of 1.44 for Umpqua River, Oregon (Huber et al. 2001), the adjusted density estimate would be 16.0 seals/km<sup>2</sup>. Based on the adjusted density estimate, the total number of Level B harassment takes would increase to 2,307<sup>4</sup>, which would equate to 165 takes of harbor seals per day. Unfortunately, neither estimate accounts for seals that could be present at South Slough. And, although USACE plans to conduct its activities in winter, it also could conduct activities in June or July when harbor seals haul out in greater numbers. To account for the greater number of harbor seals that could occur within the Level B harassment zones and to minimize unnecessary delays in

---

<sup>1</sup> Similar to otariids as noted in the Addendum.

<sup>2</sup> 167 seals observed within a 15.05 km<sup>2</sup> area, resulting in a density of 11.1 seals/km<sup>2</sup>.

<sup>3</sup> Clam Island and Pigeon Point.

<sup>4</sup> 1,288 takes during installation/removal of 30-in piles and 1,019 takes during installation/removal of sheet piles.

completing the activities should the authorized takes be met, the Commission recommends that NMFS authorize at least 167 Level B harassment takes of harbor seals on each of the 14 days<sup>5</sup> that the proposed activities could occur for both authorizations.

### **Tallying of takes**

The Commission inquired whether USACE would be keeping a running tally of the observed and extrapolated takes to ensure that the authorized takes are not exceeded. NMFS indicated that USACE would be keeping a tally of observed takes only. The Commission understands that in general NMFS would not be requiring any action proponent to keep a running tally of observed and extrapolated takes *unless* the activity is explicitly at risk of exceeding small numbers or negligible impact or a consultation under the Endangered Species Act (ESA) has included that requirement as a term and condition in the incidental take statement.

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 11 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 platform<sup>6</sup>. 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. This is particularly important in this instance because the Level B harassment zone encompasses three of the largest harbor seal haul-out sites<sup>7</sup> in Coos Bay.

Absent a requirement to keep a running tally of observed and extrapolated takes, it is unclear how an action proponent can fulfill the condition under every authorization that the numbers of authorized takes for Level B harassment are not exceeded. That condition applies to all action proponents that request authorization for incidental taking, not just those that are at risk of exceeding small numbers or having more than a negligible impact or that must consult under the ESA. Furthermore, keeping a running tally of the total takes is neither impracticable nor onerous and fulfills the basic tenet upon which the authorization is predicated. As such, the Commission recommends that NMFS ensure that USACE keep a running tally of the total takes, both observed and extrapolated takes, for each species to comply with section 4(f) of both authorizations.

### **Proposed one-year authorization renewals**

NMFS has indicated that it may issue a second one-year<sup>8</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. 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*

---

<sup>5</sup> 2,338 takes.

<sup>6</sup> 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.

<sup>7</sup> Clam Island, Pigeon Point, and South Slough.

<sup>8</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  
18 November 2019  
Page 4

*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>9</sup>.

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 documentation<sup>10</sup>, the draft monitoring report(s), the renewal application or request<sup>11</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 USACE'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>9</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>10</sup> Including the original application, hydroacoustic and marine mammal monitoring plans, take estimation spreadsheets, etc.

<sup>11</sup> Including any proposed changes or any new information.

## References

- AECOM. 2018. Jordan Cove marine mammal surveys field report: December 2018. Los Angeles, California. 17 pages.
- Huber, H.R., S.J. Jeffries, R.F. Brown, R.L. DeLong, and G. VanBlaricom. 2001. Correcting aerial survey counts of harbor seals (*Phoca vitulina richardsi*) in Washington and Oregon. *Marine Mammal Science* 17(2):276–293.

## 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 authorizations and *Federal Register* notice for the authorization issuances.

- NMFS underestimated the numbers of Level B harassment takes of California sea lions and Steller sea lions and vastly overestimated the number of takes of elephant seals based on previous sightings data and expected occurrence in the project area. California sea lions were the most frequently sighted otariid, with up to two California sea lions observed twice during surveys in recent years (AECOM 2017 and 2018). Steller sea lions were observed less frequently and as single animals, while elephant seals were never observed in the project area (AECOM 2017 and 2018). Considering previous sightings data and incorporating a small amount of conservativeness, the Level B harassment takes of California sea lions should increase from 14 to 42 and from 14 to 28 for Steller sea lions for each authorization. The Level B harassment takes of elephant seals should decrease from 437 to 14 for each authorization.
- To estimate densities, NMFS used an abundance estimate from 2011 for both harbor porpoises and gray whales and assumed constant growth rates through 2019. NMFS should have adjusted the abundance estimates by the growth rates through 2020 and 2022 for each authorization, respectively. Due to low relative densities and rounding, the numbers of Level B harassment takes remain unchanged for both authorizations.
- NMFS did not specify in the *Federal Register* notice or either proposed authorization that (1) 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 during the day and at night when monitoring could not occur and (2) marine mammal field datasheets must be provided as part of the draft and final monitoring report.

## References

AECOM. 2017. Jordan Cove marine mammal surveys field report: May 2017. Los Angeles, California. 16 pages.

AECOM. 2018. Jordan Cove marine mammal surveys field report: December 2018. Los Angeles, California. 17 pages.