



United States Department of the Interior

U.S. FISH AND WILDLIFE SERVICE
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IN REPLY REFER TO:
FWS/IR11/AFES/MMM

DEC 19 2019

Dr. Peter O. Thomas
Executive Director
Marine Mammal Commission
4340 East-West Highway, Room 700
Bethesda, Maryland 20814-4498

Dear Dr. Thomas:

Thank you for your letter, dated July 24, 2019, providing the U.S. Fish and Wildlife Service (Service) with the Marine Mammal Commission's (Commission) comments and recommendations on the Service's proposed Incidental Harassment Authorization (IHA) (84 FR 32932 July 10, 2019) under section 101(a)(5)(D) of the Marine Mammal Protection Act of 1972, as amended (MMPA), for the incidental take of small numbers of northern sea otters (*Enhydra lutris kenyoni*) near Hoonah, Alaska. The proposed IHA was in response to a petition we received on January 30, 2019, (amended on March 21, 2019) from Duck Point Development II, LLC (DPD) for their Hoonah Berth II Project. We appreciate your thoughtful review, comments, and recommendations.

We issued the IHA on September 23, 2019. As required under section 202(d) of the MMPA we are providing the Commission our responses to your recommendations. We have organized this response below by topic and in the order the recommendations appear in the Commission's July 24th letter. We first provide a summary of each of the Commission's recommendations, followed by our response.

Inconsistencies and errors in the preamble

The Commission recommended that the Service address and correct a number of issues in the final authorizations and more thoroughly review draft notices prior to submitting them to the *Federal Register* for public comment.

The Service responds that submitted applications are incorporated by reference and included in the supporting documents provided for public review on regulations.gov. In each of the instances pointed out by the Commission the parameters used for initial analyses, and resulting estimates of sound isopleth radii and takes, were correct as published. However, the Service recognizes that discrepancies among parameters in the application and authorization documents and those used for analyses present a challenge for reviewers. We will continue to improve our internal review procedures to minimize errors and to clarify where changes are intentional.

Appropriateness of the Level B harassment threshold

The Commission recommended that the Service use the 120- rather than 160 decibels re 1 micropascal (dB re 1 μ Pa) threshold to estimate the extent of the Level B harassment zones and numbers of sea otter takes when non-impulsive, continuous sources are proposed for use (including vibratory pile driving and removal, socket and anchor drilling, etc.). If the Service chooses yet again not to implement the Commission's recommendation, the Commission further recommended that the Service use 141 dB re 1 μ Pa as the Level B harassment threshold for non-impulsive, continuous sources based on monitoring data from the Elkhorn Slough National Estuarine Research Reserve (ESNERR) (2011).

The Service responds that the highest spectral densities for noises generated by vibratory pile driving lie within a range of frequencies at which sea otters have poor hearing ability. In contrast, gray whales (*Eschrichtius robustus*), on which the 120-dB threshold is based, are highly sensitive to sounds within this frequency range. While we do not dispute that sea otters may hear and may react to sounds produced by vibratory pile driving, we maintain that it is unlikely that sea otters' reactions will be equivalent to those of gray whales in terms of the sound levels that elicit reactions equivalent to take by harassment. Thus, we are not applying the 120-dB threshold to sea otters.

The Service disagrees with the Commission's conclusions regarding ESNERR (2011). After considering the Commission's comments and reviewing the monitoring data (ESNERR 2011 and ESNERR unpublished data 2018), we reaffirm our statement that "project-related monitoring of sea otter behavior in areas exposed to underwater sound levels ranging from approximately 135–165 dB during vibratory pile driving (ESNERR 2011) showed no clear pattern of disturbance or avoidance in relation to these levels of underwater sound exposure." As such, we maintain that use of a 160-dB threshold for both impulsive and non-impulsive sounds is consistent with the best available information.

The Commission recommended that the Service take a more active role in the development, review, and implementation of any and all acoustic and behavior thresholds for marine mammal species under its jurisdiction and consult with the NMFS on whether, when, and how the NMFS's current thresholds should be implemented.

The Service responds that we will continue to work with our partners, including the U.S. Geological Survey and the NMFS, to obtain the best scientific information concerning potential effects of anthropogenic sound on marine mammal species under our jurisdiction.

Appropriateness of the Level B harassment takes

The Commission recommended that the Service authorize 1,230 Level B harassment takes of sea otters subsequent to DPD's proposed pile-driving, pile-removal, and drilling activities rather than 1,380 Level B harassment takes that include general vessel use.

The Service responds that Level B harassment is defined in the MMPA as “causing disruption of natural behavioral patterns, including, but not limited to, migration, surfacing, nursing, breeding, feeding, or sheltering, to a point where such behavioral patterns are abandoned or significantly altered”. While sound source levels and isopleths have provided a useful proxy for predicting behavioral responses for the purposes of estimation of takes associated with most activities, sea otter reactions to kayaks, which produce minimal sound, indicate that the presence of a vessel can exert influence on otter behavior beyond currently employed noise thresholds (Benham 2006; Gunvalson 2011). Given that the monitoring skiff would be operated 1) 12 hours per day on every day of operations, 2) beyond the immediate area of construction activity in which sea otters might become habituated to presence of vessels, personnel, and equipment, and 3) in an irregular pattern, the Service felt that the likelihood of an encounter at a distance sufficiently close to elicit a behavioral response warranted attribution of take to this activity.

Mitigation and monitoring measures

The Commission recommended that FWS include in its Federal Register notices details regarding all mitigation and monitoring measures that each applicant would be required to implement for all future proposed incidental harassment authorizations and proposed rules.

The Service responds that applicants’ Marine Mammal Monitoring and Mitigation Plans are among supporting documents incorporated by reference in to *Federal Register* notices and provided online for review. We will endeavor to ensure that required mitigation and monitoring measures are clearly stated.

The Commission recommended that the Service require the operators to notify either the Service or the Alaska Sea Life Center (1) immediately if a sea otter is injured or killed during any of the proposed activities, and (2) within 24 hours of observing an injured, dead, or distressed sea otter that the observer determined is not associated with project activities.

The Service responds that both applicants have committed to notifying the Alaska Sea Life Center and the Service (1) immediately if a sea otter is injured or killed during any of the proposed activities and, (2) within 24 hours of observing an injured, dead, or distressed sea otter that the observer determined is not associated with project activities.

General inefficiencies

The Commission recommended that, in the future, the Service (1) take all necessary steps to ensure that it publishes and finalizes proposed incidental take authorizations before the planned start date of the proposed activities and (2) publish any necessary correction to a proposed authorization, including applications that are withdrawn, in the Federal Register in a timely manner. If the Service is unable to adhere to the statutory time frames for processing incidental take authorizations on a routine basis, the Commission contends that additional resources or systematic changes to the office(s) handling those authorizations are needed.

Dr. Peter O. Thomas

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The Service responds that we recognize the importance of meeting service standards and will continue to strive to process and publish authorizations in a timely manner.

Once again, we appreciate your comments and recommendations and we look forward to our continued collaborations on marine mammal conservation and management activities. Should you have any questions or concerns please do not hesitate to contact Supervisory Wildlife Biologist, Mr. Christopher Putnam at 907-786-3844 or via email at christopher_putnam@fws.gov.

Sincerely,

A handwritten signature in blue ink, appearing to read "Putnam", with a long horizontal flourish extending to the right.

Chief, Marine Mammals Management

References

- Benham D.B. 2006. A Multidisciplinary Approach to Investigating and Managing the Disturbance of Southern Sea Otters (*Enhydra lutris nereis*) by Recreational Activities. Thesis submitted to the University of Nottingham, for the Degree of Doctor of Philosophy, 2006. p. 1-369.
- ESNERR. 2011. Parsons Slough project: 30 day post construction report. Castroville, California. 60 pages.
- Gunvalson M.M. 2011. Reducing Disturbances to Marine Mammals by Kayakers in the Monterey Bay. Thesis submitted to San José State University or the Degree of Master of Science, 2011. P. 1-77.