



MARINE MAMMAL COMMISSION

18 February 2020

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 request submitted by the City and Borough of Juneau (CBJ) seeking to modify its authorization issued 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 conducting a waterfront improvement project in Juneau, Alaska. The Commission also has reviewed the National Marine Fisheries Service's (NMFS) 7 February 2020 notice (85 Fed. Reg. 7289) announcing receipt of the modification request. The Commission commented on the original authorization in its [13 March 2019 letter](#). The authorization is valid from 15 July 2019 through 14 July 2020.

Background

Prior to the start of CBJ's activities, it conducted marine mammal surveys at the Juneau waterfront during a seven-day period in November 2019. CBJ determined that there were significantly greater numbers of harbor seals present in the immediate vicinity of the project site than previously estimated¹ and that the presence of the seals would preclude it from conducting impact pile driving based on the 130-m shut-down zone. As such, CBJ proposed to decrease the shut-down zone from 130 to 25 m and increase the number of Level A harassment takes of harbor seals from 72 to 324². The Commission agrees with that approach and has recommended informally and formally that action proponents implement the same tack for numerous other authorizations. However, the Commission is concerned that the number of Level B harassment takes may not be sufficient.

¹ NMFS did not propose to include Level A harassment takes of harbor seals for the original authorization. Because CBJ indicated that a small number of resident harbor seals (n=2) occurred regularly near the cruise ship berths, the Commission informally insisted that Level A harassment takes of harbor seals be included in the final authorization. NMFS agreed to include Level A harassment takes of up to 4 harbor seals on each of the 18 days that impact pile driving could occur.

² Based on the average sightings per day of 18 harbor seals within 130 m of the pile-driving site and 18 days of impact pile-driving activities.

Level B harassment takes

CBJ estimated that 3,526 harbor seal takes could occur based on the number of seals observed hauled out at one of two haul-out sites³ in the project area and the 82 days that activities could occur. NMFS reduced that number by the 324 Level A harassment takes, resulting in 3,202 Level B harassment takes. As noted, CBJ observed more seals than expected at the project site in fall 2019. CBJ's observations ranged from 9 sightings of 6 individuals to 87 sightings of 74 individuals *within* 130 m of the project site. CBJ's observations were conducted from 3.3 to 9.5 hours on a given day, with an average hourly sighting rate of 3 seals per hour. If CBJ works an average of 8 hours per day, it could observe up to 24 seals within 130 m of the project site—that is more than half of the number of Level B harassment takes⁴ that were estimated to occur within the Level B harassment zone that extends to 2 km. The number of Level B harassment takes will be even greater when CBJ extrapolates the number of observed takes to the extents of the Level B harassment zones⁵.

In addition, many of CBJ's sightings were resightings of individuals. Keeping track of individuals in the 130-m Level A harassment zone is difficult, let alone attempting to track individuals that are in the Level B harassment zone, enter the Level A harassment zone, and then transit back through the Level B harassment zone. The Commission remains unconvinced that the PSOs will be able to track individual harbor seals in the far field to ensure double counting does not occur. Thus, the Level B harassment takes should not have been reduced by the number of Level A harassment takes.

More concerning is that CBJ did not conduct observations or provide the number of harbor seals that haul out at haul-out site CF07A, which is one of the Marine Mammal Laboratory's (MML) recognized haul-out sites and is closer to the project area. It is unclear if more or fewer seals haul out at CF07A than CF10A, but it is apparent that more than 43 harbor seals would be in the area. In other previous authorizations, NMFS has estimated the number of harbor seals that could potentially be taken based on the number of animals known to occur at a haul-out site(s)⁶ and the number of days of activities. In instances when the same animals are taken day after day, NMFS has authorized the number of individuals that could be taken and number of instances of takes, rather than the total number of takes (84 Fed. Reg. 68136). Thus, NMFS has been able to determine that only a small number of animals would be taken. To ensure that CBJ is able to complete its activities and not exceed the number of authorized takes, the Commission recommends that NMFS (1) consult with MML to determine how many harbor seals haul out at haul-out sites CF07A and CF10A, (2) if the number of seals observed by MML at CF10A is greater than 43, authorize that number of Level B harassment takes plus the number of seals observed at CF07A⁷ but, if the number of seals observed by MML at CF10A is less than 43, authorize 43 takes plus the number of

³ Forty-one harbor seals were observed at CF10A, observations were not made at the closer haul-out site, CF07A. CBJ also included two resident harbor seals observed at the cruise ship berth, for an estimate of 43 seals in the project area.

⁴ The unadjusted Level B harassment takes were estimated to be 43.

⁵ Which are 1,000 m, 1,585 m, and 2,000 m.

⁶ Including at MML-recognized harbor seal haul-out sites, see the Commission's [10 February 2020 letter](#).

⁷ If 50 seals were observed at CF10A and 20 were observed at CF07A, 70 Level B harassment takes should be authorized on each of the 82 days of activities.

seals observed at CF07A⁸, and (3) refrain from reducing the Level B harassment takes by the Level A harassment takes.

Authorization end date

The Commission notes that, if CBJ has yet to begin its activities, the end date of the authorization should be extended to ensure that CBJ can finish the project. CBJ indicated that activities would occur on 82 days. Based on an end date of 14 July 2020 and the fact that the modified authorization could not be issued until at least 10 March, there remains little room for weather delays, equipment failure, or other issues. As such, the Commission recommends that, if CBJ has yet to begin the activities covered by the current authorization, NMFS extend the end date of the authorization to ensure that CBJ can complete its activities without having to request an additional authorization or authorization renewal. If CBJ has yet to begin its activities, the authorization could be modified based on the issues delineated herein and reissued for one year from the date of issuance⁹.

Mitigation and reporting measures

The *Federal Register* notice indicated that the all other mitigation, monitoring, and reporting measures would remain unchanged. The Commission agrees that those measures should be retained but informally noted that the standard mitigation measure to delay or cease pile-driving and -removal activities, if the entire shut-down zone(s) is not visible due to darkness, fog, or heavy rain, was omitted from section 4 of the final authorization. The Commission also noted that the requirements to (1) extrapolate the Level B harassment takes based on the number of observed takes and the percentage of the Level B harassment zone that is not visible and (2) include the marine mammal PSO observational datasheets or raw data in the final report were omitted in section 6(a) of the final authorization. NMFS indicated that the mitigation measure and reporting requirements would be included in the modified final authorization. The Commission appreciates NMFS including the noted mitigation measure and reporting requirements but further recommends that NMFS ensure that CBJ keeps a running tally of the total Level A and B harassment takes¹⁰, given the prevalence of harbor seals in the project area and to fulfill condition 4(f) in the authorization.

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

⁸ If 42 seals were observed at CF10A and 20 were observed at CF07A, 63 Level B harassment takes should be authorized on each of the 82 days of activities.

⁹ NMFS has on multiple occasions reissued authorizations when activities have not been able to begin due to various types of delays and thus would not be able to be completed by the end of the authorization expiration date (e.g., 85 Fed. Reg. 3646).

¹⁰ Based on observed and extrapolated takes.