



# 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 National Marine Fisheries Service's (NMFS) 17 January 2020 notice (85 Fed. Reg. 2988) and the August 2019 application submitted by Hilcorp Alaska, LLC (Hilcorp) and Eni U.S. Operating Co. Inc. (Eni) seeking issuance of regulations under section 101(a)(5)(A) of the Marine Mammal Protection Act (MMPA). The taking would be incidental to the construction, maintenance, and operation of ice roads and ice trails on Alaska's North Slope at Hilcorp's Northstar Production Island (Northstar) and Eni's Spy Island Drill Site (SID) and Ooguruk Drill Site (ODS). The Commission previously submitted comments to NMFS (see the Commission's [8 August 2019 letter](#)) on its notice of receipt of Hilcorp and Eni's application for a letter of authorization (84 Fed. Reg. 32726), which are repeated herein.

## Background

Hilcorp is proposing to construct, maintain, and operate several ice roads and ice trails during the ice-covered season. Construction will take place over approximately six weeks starting in late December, with maintenance and operation of the roads occurring until mid-May. Activities under this proposed rule would occur from February 2020 through February 2025.

NMFS preliminarily has determined that the proposed activities could cause Level B harassment, mortality, and serious injury of marine mammals. NMFS believes that the total taking would have a negligible impact on the species or stocks and that the potential for taking would be at the least practicable level because of the proposed mitigation measures. The proposed mitigation, monitoring, and reporting measures as stipulated in the preamble include—

- initiating ice road construction prior to 1 March to avoid potential crushing of ringed seals in their lairs<sup>1</sup>;
- limiting construction, maintenance, operation, and decommissioning activities to the boundaries of the of the ice road/trail and shoulders;

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<sup>1</sup> This requirement was identified in the preamble and included along with other provisions in Hilcorp's Ice Road and Ice Trail Best Management Practices (BMPs), but was not included in the proposed rule.

- conducting surveys along the ice roads and trails, reporting all ringed seal structures to a designated Environmental Specialist, maintaining a distance of 150 ft from all observed seals and 500 ft from all observed seal structures<sup>2</sup>, and monitoring for seals until any given structure is no longer being actively used;
- reporting injured and dead marine mammals to the NMFS Office of Protected Resources and the Alaska Regional Stranding Coordinator using NMFS's phased reporting approach and suspending activities, if appropriate; and
- submitting an end-of-season report to NMFS within 90 days of decommissioning the ice road/trail.

### **Availability of marine mammals for subsistence use**

Based on the timing and location of the proposed ice road activities and of subsistence hunting in the project area, NMFS preliminarily has determined that the proposed mitigation measures provide the means of effecting the least practicable impact on the availability of marine mammals for subsistence use by Alaska Natives. NMFS noted in the preamble that ringed seals are one of the key subsistence species harvested by Native subsistence users. However, it stated that the proposed construction, maintenance, and operation of ice roads and ice trails “would occur far from any subsistence activities” and would also be separated temporally from subsistence activities.

Hilcorp and Eni submitted plans of cooperation (POCs) to NMFS in July 2019. The POCs included summaries of past meetings with subsistence communities in Utqiagvik and Nuiqsut, the Alaska Eskimo Whaling Commission (AEWC), the North Slope Borough Planning and Wildlife departments, and other North Slope stakeholder groups. Hilcorp's POC also included Ice Road and Ice Trail Best Management Practices (BMPs), elements of which NMFS has included in the mitigation and monitoring sections of the proposed rule.

Hilcorp and Eni indicated in their POCs that the Native communities have not expressed concerns over interactions with seals from the proposed activities. However, it was not clear from either applicant's POC that there was any specific outreach or discussion with ice seal subsistence hunters in Nuiqsut<sup>3</sup> or other North Slope communities of the potential impact on seals or seal hunting from the proposed construction, maintenance, and operation of ice roads and ice trails or the potential effectiveness of the BMPs in minimizing disturbance of seals. Nor was there indication of discussions of the proposed activities or BMPs with the Ice Seal Committee -- NMFS's co-management partner for the conservation and management of ice seals in Alaska<sup>4</sup>. The Commission recommends that NMFS require Hilcorp and Eni to (1) meet with ice seal subsistence hunters in Nuiqsut and other North Slope communities and with members of the Ice Seal Committee to discuss its proposed construction, maintenance, and operation of ice roads and ice trails and its BMPs, and (2) revise its mitigation and monitoring measures as necessary to minimize disturbance of seals and subsistence hunting activities, based on input received.

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<sup>2</sup> The preamble and proposed rule refer to seal avoidance distances in feet, whereas previously proposed rules and the applicants' best management practices referred to distances in meters; additional comments are provided herein regarding this inconsistency.

<sup>3</sup> The community most likely to be affected by the proposed ice road construction activities.

<sup>4</sup> <https://www.fisheries.noaa.gov/alaska/marine-mammal-protection/co-management-marine-mammals-alaska>

## Take estimation

To estimate Level B harassment takes for each of the marine mammal species expected to occur in a project area, NMFS generally multiplies the seasonal density of each marine mammal by the size of the area expected to exceed the Level B harassment threshold for each day during that season. NMFS then multiplies that ‘daily’ take estimate for each season by the number of days that activities are expected to occur each season and then sums ‘seasonal’ take estimates across all seasons. In this case, however, NMFS estimated takes of ringed seals for each season by multiplying the seasonal density for ringed seals by a ‘total area of exposure’ for each season<sup>5</sup> rather than estimating the area expected to be exposed each day<sup>6</sup> and then multiplying that by the number of days of activity each season. The approach proposed by NMFS assumes that seals in the exposure area would be taken only once each season during construction, maintenance, and operation of ice roads and ice trails, even though those activities are expected to occur over multiple days<sup>7</sup>. The take of ringed seals each season is therefore underestimated because it represents a single take of each of the seals expected to occur each season in the exposure area, rather than multiple takes of the same or different seals on successive days of activities each season<sup>8</sup>.

In addition, the proposed rule did not include any estimated takes of bearded or spotted seals. Although expected to occur less frequently than ringed seals, bearded and spotted seals overwinter in the Beaufort Sea and may occur in the proposed project areas. Similar activities involving the construction, maintenance, and operation of ice roads and ice trails being conducted by Hilcorp at its Liberty Drilling and Production Island (LDPI) included authorized takes of bearded and spotted seals<sup>9</sup>.

It is incumbent on NMFS to ensure that all species for which takes may occur are included in the authorization and that authorized numbers of takes are sufficient. Therefore, the Commission recommends that NMFS revise the numbers of Level B harassment takes for ringed seals using inputs for the estimated length of road or trail to be constructed or maintained each day and the number of days each season that construction, maintenance, and operation of ice roads and ice trails are expected to occur. The Commission further recommends that NMFS include Level B harassment takes of bearded and spotted seals in the final rule using the same take estimation method.

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<sup>5</sup> Calculated by multiplying the total width of the exposure area extending beyond each side of the road (170 m on each side, for a total of 340 m) by the sum of the total length of all of the roads and trails proposed for construction, maintenance, and operation (Table 5). For the Eni Spy Island Drillsite (SID) roads, the width of the exposure area is 420 m instead of 340 m, due to the proposed construction of an ice trail that parallels the road.

<sup>6</sup> Calculated as the length of road to be constructed, maintained, and operated each day multiplied by the width of the exposure area extending beyond each side of the road.

<sup>7</sup> The actual number of days that construction, maintenance, and operation of ice roads and ice trails are expected to occur was not indicated.

<sup>8</sup> MMC could not estimate total takes of ringed seals from the information provided in the preamble because neither the length of road(s) expected to be constructed, operated, or maintained each day per season nor the total number of days of activity per season was indicated.

<sup>9</sup> 84 Fed. Reg. 70312

## **Mitigation, monitoring, and reporting measures**

The proposed rule and Hilcorp's BMPs both state that measures will be taken to prevent disturbance of ringed seals within 150 ft and ringed seal structures within 500 ft. Those distances are inconsistent with section 217.34(b)(2) of the recent LDPI final rule<sup>10</sup> pertaining to ice road construction, maintenance, and operation, which states that "Hilcorp must not approach ringed seal structures (i.e., lairs or breathing holes) within 150 m or ringed seals within 50 m." The Commission recommends that NMFS revise the units used in sections 217.154(c)(3), (5), and (7)(i), and sections 217.155(c) of the proposed rule to reference avoidance of seals within *50 m* and avoidance of seal structures within *150 m*, for consistency with other recent rulemaking regarding avoidance of seals and seal structures during construction, maintenance, and operation of ice roads and trails on the North Slope.

Section 217.154(c)(7) of the proposed rule states also that "if a ringed seal is observed within 150 ft of the center of an ice road or trail, the operator's Environmental Specialist will be notified." Considering that the width of at least one of the ice roads was indicated as 49 m (160 ft)<sup>11</sup>, this requirement should instead be based on the distance seals are observed from the edge of the ice road or trail rather than the center. The Commission therefore recommends that NMFS revise sections 217.154(c)(7) and 217.155(c)(ii) to require that the operator's Environmental Specialist be notified if a ringed seal is observed within *50 m* of the *closest edge* of an ice road or trail.

Finally, it is unclear how ringed seal and ringed seal structures will be detected. Detection techniques have commonly involved the use of specially trained dogs to detect structures (Kelly 2005), or having trained Protected Species Observers (PSOs) or local hunters scout the area in advance of road construction or vehicle traffic. Thermal imaging may also aid in the detection of seals or seal structures. The Hilcorp POC included several statements indicating that subsistence advisors would be hired to avoid seal lairs. Yet the requirement to use subsistence advisors, trained PSOs, or thermal imaging for the detection of seals and seal structures was not included in the proposed rule. The Commission recommends that NMFS require Hilcorp and Eni to (1) consult with local hunters regarding the best techniques for detecting seals and seal structures with a minimum of disturbance, (2) involve local hunters in the training of observers for ice road activities, and (3) include in the final reports the methods used for detection of seals and seal structures with an assessment of their effectiveness.

## **Independent peer review of proposed mitigation and monitoring measures**

Authorization to take ringed seals incidental to construction and maintenance of ice roads and ice trails has been included in previous rulemakings, most recently in December 2019 (84 Fed. Reg. 70274). Monitoring plans associated with those previously proposed rules were subject to NMFS's independent peer review prior to the issuance of a Letter of Authorization, in accordance with NMFS regulations at 50 C.F.R. 216.108(d) for activities that may affect the availability of a marine mammal species or stock for taking for subsistence purposes. However, Hilcorp and Eni's monitoring plan has not yet gone through the peer review process. The Commission recommended that NMFS initiate a peer review of the proposed mitigation and monitoring measures in its

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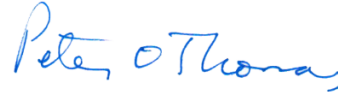
<sup>10</sup> 84 Fed. Reg. 70323

<sup>11</sup> 85 Fed. Reg. 2995

[8 August 2019 letter](#), but based on the lack of action on that recommendation before the proposed rule was published, it does not appear that NMFS plans to do so. As noted previously, it does not appear from review of Hilcorp and Eni's POCs that the potential impacts of construction and maintenance of ice roads and trails on the availability of marine mammals for taking for subsistence use was discussed specifically in meetings with affected North Slope communities, nor was there a discussion of the effectiveness of the BMPs. Given that the proposed taking of ringed seals by Hilcorp and Eni has the potential to affect their availability for taking for subsistence purposes, the Commission again recommends that NMFS initiate a peer review of the proposed mitigation and monitoring plan in accordance with 50 C.F.R. 216.108(d).

Please contact me if you have questions regarding the Commission's recommendations.

Sincerely,



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

## Reference

Kelly, B.P. 2005. Correction factor for ringed seal surveys in northern Alaska: Final report. OCS Study MMS 2005-006. 32 pages.