



MARINE MAMMAL COMMISSION

28 April 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 application submitted by the U.S. Navy (the Navy) seeking authorization under section 101(a)(5)(D) of the Marine Mammal Protection Act (the MMPA) to take small numbers of California sea lions by harassment. The taking would be incidental to constructing a floating dock in San Diego, California. The Commission also has reviewed the National Marine Fisheries Service's (NMFS) 16 April 2020 notice (85 Fed. Reg. 21179) announcing receipt of the application and proposing to issue the authorization, subject to certain conditions.

The Navy plans to install piles during construction of a floating dry dock at Naval Base San Diego. Operators would install up to (1) 20¹ 24-in steel pipe piles using a vibratory and impact hammer and (2) 56 24-in concrete piles using an impact hammer. The Navy's activities could occur on up to 60² days, weather permitting, during daylight hours only.

NMFS preliminarily has determined that, at most, the proposed activities could cause Level A and B harassment of small numbers of California sea lions³. 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 in-water heavy machinery activities if any marine mammal comes within 10 m of the equipment and reducing vessel speed to the minimum level required to maintain steerage and safe working conditions;
- using soft-start, delay, and shut-down procedures;

¹ The Commission informally noted a discrepancy between two sections of the preamble (85 Fed. Reg. 21180 and 21182) regarding the number of 24-in steel piles to be installed. NMFS confirmed that the Navy would install 20 24-in steel piles rather than 10 piles and 12 piles as noted in the preamble (85 Fed. Reg. 21180 and 21182, respectively).

² Based on the error in the number of 24-in steel piles to be installed, NMFS indicated that the number of days of activities would increase from 50 days as noted in the *Federal Register* notice to 60 days.

³ Based on the increase in the number of days of proposed activities, NMFS indicated that the number of Level B harassment takes would increase from 200 to 240 California sea lions.

- using up to two qualified (one land- and one vessel-based) 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 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 *and* ceasing activities, if appropriate; and
- submitting a draft and final report.

In-water heavy machinery activities

The Commission informally noted that NMFS indicated in the *Federal Register* notice that in-water heavy machinery activities included movement of the barge to the pile location and positioning of the pile on the substrate (85 Fed. Reg. 21194). However, condition 4(a) in the draft authorization specified that in-water heavy machinery activities included use of barge-mounted excavators or dredging as examples. NMFS indicated it would add movement of the barge to the pile location and positioning of the pile on the substrate as examples of in-water heavy machinery activities in condition 4(a) of the final authorization. The Commission agrees that those activities should be included in the standard condition and has informally noted numerous times that in-water heavy machinery activities generally always include movement of a barge to the pile location and positioning of the pile on the substrate, while few activities actually involve barge-mounted excavators and dredging. As such, the Commission recommends that NMFS revise its standard condition for ceasing in-water heavy machinery activities to include, as examples, movement of the barge to the pile location, positioning of the pile on the substrate, use of barge-mounted excavators, and dredging in all draft and final incidental take authorizations.

Number of PSOs

NMFS proposed to require the Navy to use one land-based and one vessel-based PSO⁴ to monitor the extent of the Level A and B harassment zones during vibratory pile driving of 24-in steel piles but would require only a single land-based PSO to monitor during impact pile driving of the same piles. The Level B harassment zone is more than 2.5 km for vibratory pile driving and more than 1.8 km during impact driving of 24-in piles. In both circumstances, California sea lions would not be sighted at the extents of the Level B harassment zones if only one PSO was located at the pile-driving location in the near field. A second vessel-based PSO should monitor the extent of the Level B harassment zone during impact pile driving as well as during vibratory pile driving. Given that impact pile driving of 24-in steel piles would occur after the piles have been driven with the vibratory hammer, it would be practicable for the vessel-based PSO to remain on station and continue to monitor until impact pile driving is finished and the pile is driven to depth⁵. The Commission recommends that NMFS include in condition 5(a) of the final authorization the

⁴ The vessel-based PSO would be stationed at the edge of the Level B harassment zone (85 Fed. Reg. 21195).

⁵ The Navy estimated it would take 10 minutes to install a 24-in pile with a vibratory hammer and 600 strikes to finish the installation with an impact hammer. Thus, there would be little additional cost or loss of time associated with the requirement.

requirement that the Navy use one land-based and one-vessel-based PSO to monitor for marine mammals during both vibratory *and* impact pile driving of 24-in steel piles.

Daylight and periods of low visibility

NMFS indicated that pile installation would occur during daylight hours only in one portion of the *Federal Register* notice (85 Fed. Reg. 21180) and indicated elsewhere in the notice that, though not required, in-water pile driving would only be conducted at least 30 minutes after sunrise and up to 30 minutes before sunset, when visual monitoring of marine mammals can be conducted (85 Fed. Reg. 21194). However, NMFS did not stipulate in the draft authorization that activities must occur during daylight hours only, nor that activities must be conducted during periods of good visibility and, if poor environmental conditions restrict full visibility of the shut-down zone, pile installation must be delayed. Those standard conditions have been included in other recently-issued authorizations⁶ and in other proposed authorizations⁷. It is unclear why NMFS did not include them for the Navy's draft authorization, particularly since the Navy indicated it would abide by the constraints in its monitoring plan and both measures would help to ensure that the Navy is effecting the least practicable adverse impact on the affected species⁸. The Commission recommends that NMFS include (1) in the final authorization the requirements that the Navy conduct pile-driving activities during daylight hours only and, if the entire shut-down zone(s) is not visible, delay or cease pile-driving activities until the zone(s) is visible and (2) standard conditions consistently in all draft and final authorizations involving pile-driving activities.

Tally of takes

Although it is unclear from both the preamble and the draft authorization whether the Navy will keep a running tally of the total Level B harassment takes, including observed and extrapolated takes, it is imperative that the Navy do so to ensure that the takes are within the authorized limits and the authorized numbers of takes are not exceeded to implement effectively condition 4(h) in the draft authorization. The Commission recommends that NMFS ensure that the Navy keeps a running tally of the total takes, based on observed and extrapolated takes, for Level B harassment consistent with condition 4(h) of the final authorization.

Proposed one-year authorization renewals

The Commission has ongoing concerns regarding NMFS's renewal process, which can be reviewed in its [10 February 2020](#) letter. Based on those concerns, the Commission again recommends that NMFS refrain from issuing renewals for any authorization and instead use its abbreviated *Federal Register* notice process, which is similarly expeditious and fulfills NMFS's intent to maximize efficiencies. If NMFS continues to propose to issue renewals, the Commission recommends that it (1) stipulate that a renewal is a *one-time opportunity* (a) in all *Federal Register* notices requesting comments on the possibility of a renewal, (b) on its webpage detailing the renewal

⁶ e.g., see the Chesapeake Tunnel Joint Venture final authorization; <https://www.fisheries.noaa.gov/webdam/download/104970969>.

⁷ e.g., see the Gastineau Historical Channel Society draft authorization; <https://www.fisheries.noaa.gov/webdam/download/105647341>.

⁸ As the Navy did not request Level A harassment takes.

process, and (c) in all draft and final authorizations that include a term and condition for a renewal and, (2) if NMFS declines to adopt this recommendation, explain fully its rationale for not doing so. The second set of recommendations have been included in numerous Commission letters since December 2019 but have yet to be followed. Further, NMFS has not responded to those recommendations in a detailed or accurate manner, despite the directive in section 202(d) of the MMPA that NMFS provide a detailed explanation for not following any of the Commission's recommendations.

In multiple instances, NMFS has cited its response from 2 October 2019 (84 Fed. Reg. 52464)⁹, which published months before the Commission actually made the recommendations and did not address any aspect of those recommendations. In two other recent responses, NMFS indicated that it did not agree with the Commission but rather than provide its rationale for not following the Commission's recommendation in the notice of issuance—as it had for other Commission recommendations and comments submitted by others—NMFS indicated that it would provide a detailed explanation to the Commission of its decision within 120 days, as required by section 202(d) of the MMPA¹⁰. NMFS has failed to meet the statutory deadline, as it has been more than 120 days since the Commission initially made these recommendations. In addition, the Commission is very concerned about NMFS's decision to defer addressing some Commission comments and recommendations until after publication of its decision document. While providing a timely, detailed response separately to the Commission comports with NMFS's obligations under section 202(d) of the MMPA, failing to address the Commission's comments and recommendations in the decision document runs counter to the requirements of the Administrative Procedures Act. The agency is expected to provide a full and sufficient rationale supporting its action at the time the decision is made, which necessitates NMFS addressing *all* substantive comments, whether from the Commission or any other entity, *before* publishing a notice of issuance. That includes all recommendations from the Commission, whether or not they are addressed separately pursuant to section 202(d) of the MMPA. In its most recent response to the Commission's recommendations, NMFS stated that the current verbiage in its notices already ensures that only one renewal will be issued¹¹ and that its website was revised to clarify some of the language involving renewal authorizations¹². As noted in its 10 February 2020 letter¹³ and other previous letters, at no place in NMFS's notices does it explicitly state that renewals are a one-time opportunity nor has NMFS updated its website to include such language¹⁴.

⁹ See 85 Fed. Reg. 5622 from 31 January 2020, 85 Fed. Reg. 16063 from 20 March 2020. NMFS attempted to include the same response in 85 Fed. Reg. 14642 from 13 March 2020 but failed to note the appropriate reference therein.

¹⁰ See 85 Fed. Reg. 19305 from 5 April 2020 and 85 Fed. Reg. 21201 from 16 April 2020.

¹¹ This is the same response NMFS provided in December 2019 (84 Fed. Reg. 68131) that prompted the Commission to revise its recommendation to include the portion that NMFS explain why it will not specify that a renewal is a one-time opportunity in the relevant documents and on the webpage. NMFS has come full circle in its attempts to respond to the Commission's recommendation without actually providing a detailed explanation for not following the recommendation.

¹² See 85 Fed. Reg. 22140 from 21 April 2020.

¹³ And as continues to be the case with NMFS's notices.

¹⁴ Webpage <https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-harassment-authorization-renewals> has not been updated since 31 December 2019 and webpage <https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act> has not been updated since 7 February 2020. Neither webpage includes any reference to a renewal being a one-time opportunity.

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

Sincerely,

A handwritten signature in blue ink that reads "Peter O. Thomas". The signature is written in a cursive style with a large initial "P" and a distinct "O" before the last name.

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