



MARINE MAMMAL COMMISSION

1 March 2021

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 U.S. Navy (the Navy) seeking renewal of an 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 construction activities in association with modification of a dry dock and berths in Kittery, Maine. The Commission also has reviewed the National Marine Fisheries Service's (NMFS) 22 February 2021 notice (86 Fed. Reg. 10545) on its proposal to issue an authorization renewal, subject to certain conditions.

The authorization renewal is associated with Year 3 of a multi-year project at the Portsmouth Naval Shipyard. The Navy submitted its original application to conduct the various Year 3 pile-driving and -removal activities in 2018. Since that time, NMFS has issued and re-issued the incidental harassment authorization for the proposed activities (86 Fed. Reg. 10546). The Navy's most recent authorization expires on 28 February 2021—the Navy has activities that have yet to be completed, as well as additional activities to conduct. The Commission had extensive comments on all three of the Navy's previous authorizations, see its [6 May 2019](#), [2 January 2018](#), and [30 September 2016](#) letters. In addition to the many concerns noted in previous letters, the Navy requested the authorization renewal to be effective on 1 March (86 Fed. Reg. 10547) and based its analyses on the proposed activities occurring for 29 days in March 2021. The public comment period does not close until 6 March, which would not allow for all activities to be conducted in March. Moreover, NMFS has not met its basic renewal issuance criteria.

Renewal criteria

For an authorization renewal to be issued, NMFS requires that—

- A request for renewal is received no later than 60 days prior to the needed authorization renewal effective date. The Navy submitted its renewal request on 21 January 2021, 39 days before the effective date of 1 March.
- The request for renewal includes the following:
 - An explanation that the activities to be conducted under the proposed authorization renewal are identical to the activities analyzed under the initial authorization, are a subset of the activities, or include changes so minor (e.g., reduction in pile size) that the changes

do not affect the previous analyses, mitigation and monitoring requirements, or take estimates (with the exception of reducing the type or amount of taking). The Navy is requesting to increase the size of piles that could be installed from 24- to 27-in sheet piles.

- The Level A harassment zones would increase from (1) 13.7 m to 25.4 m for high-frequency (HF) cetaceans and 5.6 m to 10.4 m for phocids during vibratory pile driving and (2) 1,763 m to 2,056 m for HF cetaceans and 792 m to 924 m for phocids during impact pile driving (see Table 6 at 84 Fed. Reg. 24485 and Table 2 at 86 Fed. Reg. 10548).
- The increase in pile size would nearly double the Level B harassment zone from 7.35 km (Table 6; 84 Fed. Reg. 24485) to 13.59 km (Table 2; 86 Fed. Reg. 10548) during vibratory pile driving and would more than double the Level B harassment zone from 1 km (Table 6; 84 Fed. Reg. 24485) to 2.5 km (Table 3; 86 Fed. Reg. 10548) during impact pile driving.
- NMFS proposed to authorize only 2 Level A and 29 Level B harassment takes for harbor seals and 3 Level B harassment takes for gray seals. That equates to only one take per day for a species that is routinely observed in the project area and is not sufficient based on previous monitoring efforts for either species. Although the Navy did not conduct monitoring in March or April 2020, a gray seal was observed during only five days of monitoring in March 2018 and 6 to more than 10 individual harbor seals were observed routinely in the immediate project area¹ in April 2018. Both species have been observed well within the Level A harassment zone² of 924 m. The numbers of Level A and B harassment takes of harbor and gray seals have been underestimated and are likely to cause unnecessary delays and shutdowns.
- NMFS did not propose to authorize any takes of harbor porpoises, hooded seals, or harp seals for the authorization renewal, citing that the densities were zero during the proposed construction period of March 2021. The densities are not zero based on those previously used by NMFS for spring, nor has the Navy's monitoring in March been sufficient to estimate revised densities for March (see the Navy's previous three monitoring reports). All three species are expected to be in the area in spring (e.g., 83 Fed. Reg. 3327, 84 Fed. Reg. 13258-13259³). The proposed monitoring zones are insufficient to prohibit taking of harbor porpoises (see Table 3 in the draft authorization⁴). Furthermore, NMFS apparently has not adjusted any of the harassment zones even though some are clipped by land.
- NMFS did not propose to require the Navy to implement the same mitigation and monitoring measures as were included in the current authorization (see the draft⁵ and current⁶ authorizations). For example, conditions 4(a) and 5(b)(iii) of the current authorization are not included in the draft authorization.
- A preliminary monitoring report showing the results of the required monitoring to date and an explanation showing that the monitoring results do not indicate impacts of a scale

¹ This does not account for any extrapolation to the extents of the Level B harassment zones.

² Particularly since the shut-down zone is only 50 m.

³ Harp seals were observed by PSOs in May 2020 as well.

⁴ The Level A harassment zones stipulated in Table 3 apply only to phocids. The zones are much larger for HF cetaceans.

⁵ https://media.fisheries.noaa.gov/2021-02/Navy_draftRenewalIHA_OPR1.pdf?null.

⁶ https://media.fisheries.noaa.gov/dam-migration/navypnsy_re-issuediha2020_opr1.pdf.

or nature not previously analyzed or authorized. The Navy indicated in its preliminary 2020 monitoring report that the presence of active construction equipment reduced the PSO's ability to monitor fully the harassment zones from Berth 2 and, as a result, the Berth 2 observer location was shifted to a barge (Berth 2/Barge) to allow for complete monitoring. That shift did not occur until 1 September 2020. The extent to which the PSO's ability to monitor effectively from May through August at Berth 2 is unknown. Therefore it is unclear whether the full extents of the harassment zones were monitored effectively and, if they were not, the degree to which extrapolation was both necessary and made. As such, it is unclear whether the numbers of reported takes are accurate and within the authorized limits.

It is clear that NMFS should never have proposed to issue an authorization renewal given that the renewal was not requested sufficiently in advance of when it was needed. This is separate from and in addition to the fact that the other renewal issuance criteria cannot be met and based on the other deficiencies noted. Given the agency's failure to meet its own renewal issuance criteria, the Commission recommends that NMFS deny the Navy's request to renew its incidental harassment authorization.

Authorization renewals in general

The aforementioned issues regarding how NMFS has implemented its renewal process for the Navy's authorization adds to the Commission's ongoing concerns regarding the renewal process in general and in specific circumstances (see the Commission's [16 February 2020 letter](#) on another recent authorization renewal). As such, the Commission again recommends that NMFS refrain from issuing a renewal for any authorization unless it is consistent with the procedural requirements specified in section 101(a)(5)(D)(iii) of the MMPA.

NMFS's efforts to maximize efficiencies and issue authorizations expeditiously are superseding its obligations to ensure that the statutorily-required determinations are based on best available science and that all processes abide by the requirements set forth under the MMPA and by the agency itself. The Navy indicated that it was submitting a letter of authorization application for the next four years of activities. If NMFS publishes a proposed rule that has similar deficiencies to those the Commission has highlighted for the previous three incidental harassment authorizations⁷ and this authorization renewal for construction activities at the Portsmouth Naval Shipyard, the Commission will recommend that the proposed rule be denied outright.

⁷ In addition to issues with extents of harassment zones, insufficient take estimates, and inadequate mitigation and monitoring measures, the Commission highlighted deficiencies in the Navy's hydroacoustic monitoring plan (see its [2 January 2018 letter](#)). In the Commission's cursory review of the hydroacoustic monitoring reports (Appendices D and E of the 2020 preliminary monitoring report), the sound pressure level (SPL) measurements were not reported in the appropriate metrics in Appendix D. SPL measurements (in dB re 1 μ Pa) are to be reported as root-mean-square (rms)—this applies to means, medians, maximums, and minimums. For continuous, non-impulsive sound (e.g., drilling and vibratory pile driving), those SPL_{rms} measurements are to be made over given intervals (i.e., 1-second intervals). For impulsive sound (e.g., impact pile driving and percussive hammering of a down-the-hole hammer), those SPL_{rms} measurements are to be based on single strikes, same as the sound exposure level and peak SPL measurements, and a 90-percent energy window. Comparing Appendix D to Appendix E underscores these issues. More importantly, neither report contains all the required information.

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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