



# MARINE MAMMAL COMMISSION

12 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 Alaska Department of Transportation and Public Facilities (AK DOT) 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 for ferry berth improvements and construction in Tongass Narrows near Ketchikan, Alaska. The Commission also has reviewed the National Marine Fisheries Service's (NMFS) 5 March 2021 notice (86 Fed. Reg. 12918) on its proposal to issue an authorization renewal, subject to certain conditions. The authorization renewal is associated with Phase I of a multi-year project in Tongass Narrows. NMFS issued two back-to-back authorizations to AK DOT for Phase I and II activities. AK DOT's Phase I authorization expired 28 February 2021, with 90 days of Phase I activities yet to be completed.

The Commission provided extensive comments in its [14 August 2019 letter](#) on AK DOT's Phase I and II proposed authorizations and, based on the numerous deficiencies, asserted that neither the Commission nor the public was afforded an opportunity to provide informed and meaningful comments. As such, the Commission recommended that NMFS consult with AK DOT regarding the numerous issues raised and publish revised proposed authorizations prior to issuance of final authorizations. The Commission also recommended that NMFS conduct a more thorough review of the applications and *Federal Register* notices to ensure not only accuracy, completeness, and consistency, but also to ensure that they are based on best available science, prior to submitting them to the *Federal Register* for public comment<sup>1</sup>. This was based on the fact that, at that time, 69 percent of the proposed authorizations or proposed rules<sup>2</sup> included errors in the estimated numbers of Level A and/or B harassment takes and 79 percent included incomplete, incorrect, or inconsistent mitigation, monitoring, or reporting requirements in the proposed authorization or proposed rule. To a lesser degree, but still prevalent, were issues involving incorrect Level A and B harassment thresholds and incorrect extents of the Level A and B harassment zones. Since that time, the vast majority of the proposed authorizations and proposed rules have included and continue to include errors in the

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<sup>1</sup> The Commission has been making this and similar recommendations for more than four years.

<sup>2</sup> Incidental take authorizations were reviewed from June 2018 to June 2019.

thresholds used and extents of the Level A and B harassment zones, which again is an issue for AK DOT's authorization renewal. Additionally, NMFS has not met its basic renewal issuance criteria.

### Renewal criteria

This is the third instance in less than two months that NMFS, in proposing to issue a renewal, has not met its basic issuance criteria for such authorization renewals<sup>3</sup>.

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

1. The renewal request is received no later than 60 days prior to the needed authorization renewal effective date.
  - NMFS indicated in the *Federal Register* notice that AK DOT submitted its renewal request on 28 December 2020 for activities to begin on 1 March 2021. However, the renewal request that was provided to the public on NMFS's website was dated 12 January 2021 and only included the revised Level A harassment zones<sup>4</sup>.
2. The renewal request includes the following:
  - a. 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 renewal request did not include all requisite information but was clear that the changes would affect previous analyses, mitigation and monitoring measures, and take estimates.
      - AK DOT would increase the maximum number of piles to be installed on a given day during impact and vibratory pile driving from three to eight. Thereby, the Level A harassment zones would increase for all species and the shut-down zones would increase for low-frequency (LF) cetaceans, high-frequency (HF) cetaceans, and phocids by up to 85 percent during impact pile driving (see Table 4 at 86 Fed. Reg. 12923 and Table 2 in the final Phase I authorization<sup>5</sup>). Such changes affect the previous mitigation and monitoring requirements. The numbers of Level A harassment takes for HF cetaceans and phocids could be affected because, as acknowledged and noted by AK DOT's contractor, the numbers of takes could be met before the project is complete<sup>4</sup>.
      - When NMFS issued AK DOT's incidental harassment authorizations in winter 2020, it did not consider down-the-hole (DTH) pile installation to be an *impulsive*, continuous source. At that time, NMFS considered DTH pile installation to be a *non-impulsive*, continuous source to which the non-impulsive Level A harassment thresholds and parameters applied (Table 15; 85 Fed. Reg. 691). Thus, NMFS vastly underestimated the Level A harassment zones to be

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<sup>3</sup> See the Commission's [1 March 2021](#) and [16 February 2021](#) letters.

<sup>4</sup> [https://media.fisheries.noaa.gov/2021-03/APP\\_RenIHA\\_AKDOT\\_TongassNarrows\\_Phase1Ren\\_11JAN2021-508.pdf?null=](https://media.fisheries.noaa.gov/2021-03/APP_RenIHA_AKDOT_TongassNarrows_Phase1Ren_11JAN2021-508.pdf?null=).

<sup>5</sup> [https://media.fisheries.noaa.gov/dam-migration/adottongass\\_2020iha\\_issued\\_opr1.pdf](https://media.fisheries.noaa.gov/dam-migration/adottongass_2020iha_issued_opr1.pdf).

no larger than 100 m (see Table 16; 86 Fed. Reg. 691)<sup>6</sup>. Based on a 10-Hz repetition rate and a source level of 164 dB re 1  $\mu\text{Pa}^2\text{-sec}$ <sup>7</sup>, along with the 180 minutes it would take to install each of the three 30-in piles on a given day, the Level A harassment zones would be 2,550 m for LF cetaceans, 3,037 m for HF cetaceans, and 1,364 m for phocids<sup>8</sup>. The appropriately-estimated Level A harassment zones similarly affect the adequacy of the previous mitigation and monitoring measures, as well as potentially the numbers of Level A harassment takes for HF cetaceans and phocids.

- It is unclear what the shut-down zones would be for DTH pile installation, but they would not be the same as those originally authorized for the three functional hearing groups<sup>9</sup>. Further, continuing to require that only two protected species observers<sup>10</sup> monitor the shut-down and monitoring zones during DTH pile installation would be insufficient.
- b. 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 or nature not previously analyzed or authorized.
- AK DOT indicated in its preliminary 2020 monitoring report that the numbers of reported marine mammal takes would be extrapolated to the extents of the Level B harassment zones consistent with requirement 6(b)(xii) in the Phase I final authorization. However, it did not include any extrapolated takes.
  - AK DOT did note that, although activities were monitored for only 26 days, it was paying close attention to the number of humpback whale takes. Specifically, if the numbers of takes were to increase beyond two per day, the authorized number could be exceeded. It is unclear whether the monitoring reports indicated that the numbers of takes would be within the authorized limits, particularly if the numbers of observed takes were extrapolated to the extents of the Level B harassment zones and if all of the activities would have occurred.

Since NMFS did not meet its basic renewal issuance criteria and its original analysis regarding DTH pile installation does not constitute best available science, the Commission recommends that NMFS deny AK DOT's request to renew its incidental harassment authorization for Phase I activities.

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<sup>6</sup> The Commission further notes that NMFS included inadequate shut-down zones for HF cetaceans under the Phase I authorization. The incorrectly-estimated Level A harassment zones were 97 m for DTH installation of 30-in piles and 74 m for 24-in piles (see Table 16; 85 Fed. Reg. 691)—NMFS specified the shut-down zones as 60 and 50 m for HF cetaceans, respectively (see Table 2 in the final Phase I authorization and Table 4 in the *Federal Register* notice for the authorization renewal).

<sup>7</sup> Which are consistent with NMFS's recently-proposed authorizations (86 Fed. Reg. 1588). If NMFS were to use a higher repetition rate of 15 Hz as was proposed for an authorization published the day before AK DOT's authorization renewal (Table 7; 86 Fed. Reg. 12647), the Level A harassment zones would be even larger. Similarly, if AK DOT planned to conduct the maximum 9.5 hours of DTH pile installation using multiple DTH drills as specified in Table 18 of the *Federal Register* for AK DOT's final authorization issuances (85 Fed. Reg. 692), the Level A harassment zones would be even larger.

<sup>8</sup> The Level A harassment zones would be much larger than estimated and the proposed shut-down zones also would be larger than estimated for mid-frequency cetaceans and otariids during DTH installation of 30-in piles, as well as for all functional hearing groups for 24-in piles.

<sup>9</sup> 70 m or less depending on the functional hearing group.

<sup>10</sup> One at the project site and one in the far field.

### Authorization renewals in general

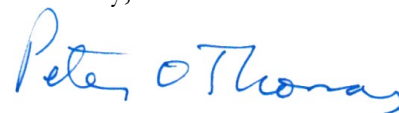
The aforementioned issues regarding how NMFS has implemented its renewal process for AK DOT's authorization, as well as the issues delineated in the Commission's most recent [1 March 2021](#) and [16 February 2021](#) letters, only add to the Commission's ongoing concerns regarding the renewal process. The Commission further notes that NMFS did not abide by one of the basic tenets of its process. NMFS has indicated in various *Federal Register* notices, as well as on its website<sup>11</sup>, that it will provide direct notice of a proposed renewal by email, phone, or postal service (in this order) to persons who commented on the proposed initial authorization, to provide further opportunity to submit any additional comments. NMFS alerted the Commission to other recent authorization renewals but did not do so for AK DOT's renewal.

Moreover, because NMFS issued AK DOT's Phase I and II authorizations back-to-back and did not condition the Phase II authorization to be delayed a year if a renewal is necessary to complete Phase I activities, the agency failed to meet the statutorily-required determinations. NMFS will effectively issue two authorizations for AK DOT to conduct construction activities in the same location(s), in support of the same project, and in the same year<sup>12</sup>, while making both the small numbers and negligible impact determinations based on two discrete, independent authorizations. Rather, NMFS should have made the necessary determinations based on the total number and type of taking for each species or stock for both authorizations combined given that they would be valid at the same time.

It is becoming apparent that, rather than abiding by its own processes and statutory obligations, NMFS is knowingly disregarding its own renewal criteria<sup>13</sup> in an attempt to increase efficiencies. When this has occurred in the past, NMFS has revised its criteria (e.g., how far in advance a renewal must be requested) to ensure they could be met. Based on the last few authorization renewals, no number of revisions to the renewal criteria could accommodate the myriad of issues, while still preserving NMFS's original intent to issue renewals for identical or nearly identical activities (e.g., those with lesser impacts). Since NMFS is incapable or unwilling to abide by its own authorization renewal process or to ensure that its renewal criteria have been met and since authorization renewals do not conform with 101(a)(5)(D)(iii) of the MMPA, the Commission strongly recommends that NMFS formally revoke its authorization renewal process.

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

Sincerely,



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

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<sup>11</sup> <https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-harassment-authorization-renewals>.

<sup>12</sup> Both the Phase I authorization renewal and Phase II authorization will be valid until 28 February 2022.

<sup>13</sup> As well as continue to mischaracterize DTH pile installation.