



MEMORANDUM FOR: The Record

FROM: Donna S. Wieting
Director, Office of Protected Resources

MAY 30 2017

SUBJECT: Environmental Review for Issuance of an Incidental Harassment Authorization to the SF Bay Water Emergency Transportation Authority for ferry terminal construction

NOAA Administrative Order (NAO) 216-6A, requires all proposed actions to be reviewed with respect to environmental consequences on the human environment. This memorandum addresses the determination that the issuance of an Incidental Harassment Authorization (IHA) to San Francisco (SF) Bay area Water Emergency Transportation Authority (WETA) is adequately assessed in a previous Environmental Assessment (EA) prepared by the National Marine Fisheries Service (NMFS) and that no further National Environmental Policy Act (NEPA) review is required.

Federal Action

NMFS proposes to issue an IHA to WETA pursuant to Section 101(a)(5)(A) of the Marine Mammal Protection Act of 1972, as amended (MMPA; 16 U.S.C. §§ 1631 *et seq.*) and the regulations governing the taking and importing of marine mammals (50 Code of Federal Regulations [CFR] Part 216). The IHA will be valid from June 1, 2017 through May 31, 2018 and authorizes takes, by Level B harassment, of seven species of marine mammals (listed below) incidental to the San Francisco (SF) Ferry Terminal Expansion Project, South Basin Improvements Project (Project) within SF Bay. The IHA prescribes permissible methods of takes and includes mitigation, monitoring and reporting requirements.

- Pacific harbor seal (*Phoca vitulina*)
- California sea lion (*Zalophus californianus*)
- Northern elephant seal (*Mirounga angustirostris*)
- Northern fur seal (*Callorhinus ursinus*)
- Harbor porpoise (*Phocoena phocoena*)
- Gray whale (*Eschrichtius robustus*)
- Bottlenose dolphin (*Tursiops truncatus*)

The incidental take of a marine mammal falls under three categories: Mortality, Serious injury or Harassment (injury and behavioral effects). Harassment, as defined by the MMPA is any act of pursuit, torment, or annoyance that has the potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment) or has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns (Level B harassment). Disruption of behavioral patterns includes, but is not limited to, migration, breathing, nursing, breeding, feeding or sheltering. However, there are exceptions to the prohibition on take under the MMPA that gives NMFS the authority to permit the incidental taking of small numbers of marine mammals by harassment upon request from a U.S. citizen, provided certain determinations are made and statutory and regulatory procedures are met. NMFS criteria for issuing IHAs requires that the taking of marine mammals have a negligible impact on the species or stock(s) and, where relevant, will not have an unmitigable adverse



impact on the availability of the species or stock(s) for subsistence uses. In addition, the IHA must set forth, where applicable, the permissible methods of taking, other means of effecting the least practicable adverse impact on the species or stock and its habitat, and requirements pertaining to the monitoring and reporting of such takings.

Background

WETA is expanding berthing capacity at the Downtown San Francisco Ferry Terminal (Ferry Terminal), located at the San Francisco Ferry Building (Ferry Building), to support existing and future planned water transit services operated on SF Bay by WETA and WETA's emergency operations.

The Downtown SF Ferry Terminal Expansion Project would eventually include phased construction of three new water transit gates and overwater berthing facilities, in addition to supportive landside improvements, such as additional passenger waiting and queuing areas, circulation improvements, and other water transit-related amenities. The new gates and other improvements would be designed to accommodate future planned water transit services between Downtown San Francisco and Antioch, Berkeley, Martinez, Hercules, Redwood City, Richmond, and Treasure Island, as well as emergency operation needs. According to current planning and operating assumptions, WETA will not require all three new gates (Gates A, F, and G) to support existing and new services immediately. As a result, WETA is planning that project construction will be phased. The first phase will include construction of Gates F and G, as well as other related improvements in the South Basin.

A. Applicants Incidental Take Request(s)

- i. Current Request. On March 17, 2017, NMFS received an application from WETA for an incidental take authorization to conduct vibratory and impact pile driving and removal activities at the Ferry Terminal. WETA did not conduct any construction activities last year so that is the reason WETA is requesting a new authorization for the same activities in the same location. We considered the revised request as adequate and complete on March 30, 2017. Based on the application, NMFS published a proposed IHA in the *Federal Register* (FR) on April 13, 2017 (82 FR 17799), which included the following information:
 - Detailed description of the proposed action and an assessment of the potential impacts on marine mammals and the availability of marine mammals for subsistence uses;
 - Proposed mitigation and monitoring measures to avoid and minimize potential adverse impacts to marine mammals and their habitat;
 - Proposed reporting requirements;
 - Preliminary findings under the MMPA;
 - A link to the EA and Finding of No Significant Impact (FONSI) for the IHA published in 2016.
- ii. Previous Request(s). On June 28, 2016, we issued an IHA to WETA authorizing take, by Level B Harassment, of seven species of marine mammals incidental to a

vibratory and impact pile driving and removal activities within the SF Bay from July 1, 2016 through December 31, 2016 (81 FR 43993; July 6, 2016). However construction activities did not occur in 2016.

B. Previous Environmental Assessment

NMFS' issuance of an IHA is considered a major federal action under NEPA, therefore, the Office of Protected Resources (OPR) prepared an EA¹ for the initial incidental take request in accordance with NEPA and the Council on Environmental Quality (CEQ) regulations in 40 CFR §§ 1500-1508. The analysis in the Final EA addressed the potential impacts to the human environment and natural resources. The range of alternatives included the No Action alternative (not issuing an IHA and the Preferred Alternative (the issuance of an IHA)). NMFS analyzed direct, indirect and cumulative impacts and based the scope of its proposed action and alternatives on the relevant requirements in section 101(a)(5)(A) of the MMPA. Based on the findings under the MMPA for WETA's proposed activities and the conclusions in the Final EA, NMFS determined that no significant impacts to the human environment would occur from issuing an IHA and signed a FONSI on June 28, 2016. The 2016 NEPA documents are available for review at www.nmfs.noaa.gov/pr/permits/incidental/construction.htm.

Findings and Conclusions

A. Environmental Review

After reviewing and considering (1) the application, (2) public comments received for the proposed IHA, (3) and the 2016 EA and FONSI, NMFS determined issuing an IHA to WETA falls within the scope of the analysis in the 2016 Final EA/FONSI. There are no changes to NMFS' proposed action and alternatives for the IHA renewal and there were no changes to the affected environment or impacts to resources. No new significant circumstances or information relevant to environmental concerns associated with the IHA renewal were identified during the environmental review or the public comment period for this IHA. WETA is proposing to conduct the in-water construction activities in the same location (Enclosure 1) and in the same manner or methods previously authorized under the IHAs issued in 2016. There were no new species for which take has been authorized and the monitoring and mitigation requirements have remained the same. However, on August 4, 2016, NMFS released its Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing (Guidance). The Guidance established new thresholds for predicting auditory injury, which equates to Level A harassment under the MMPA. WETA used the Guidance when determining the injury (Level A) zones, and although zones were larger than Level A zones in their 2016 application, no Level A takes are being requested or authorized, and this does not affect our initial analysis.

¹*Environmental Assessment to the San Francisco Bay Area Water Emergency Transportation Authority for the San Francisco Ferry Terminal Expansion Project, South Basin Improvements Project in San Francisco Bay, CA.*

B. MMPA Findings

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant), and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth. NMFS defined "negligible impact" in 50 CFR 216.103 as "...an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival."

An estimate of the number of Level B harassment takes, alone, is not enough information on which to base an impact determination. In addition to considering estimates of the number of marine mammals that might be "taken" through behavioral harassment, NMFS must consider other factors, such as the likely nature of any responses (their intensity, duration, etc.), the context of any responses (critical reproductive time or location, feeding, migration, etc.), as well as the number and nature of estimated Level A harassment takes, the number of estimated mortalities, effects on habitat, and the status of the species.

No injury, serious injury or mortality is anticipated to occur as a result of WETA's activities and none are authorized. NMFS and WETA estimate that up to seven marine mammals could be exposed to Level B harassment (behavioral harassment).

The potential for these outcomes is minimized through the construction method and the implementation of the planned mitigation measures. Specifically, vibratory hammers will be the primary method of installation (impact driving is included only as a contingency). Impact pile driving produces short, sharp pulses with higher peak levels and much sharper rise time to reach those peaks. If impact driving is necessary, implementation of soft start and shutdown zones significantly reduces any possibility of injury. Given sufficient "notice" through use of soft start (for impact driving), marine mammals are expected to move away from a sound source that is annoying prior to it becoming potentially injurious. WETA will also employ the use of 12-inch-thick wood cushion block on impact hammers, and a bubble curtain as sound attenuation devices. Environmental conditions in San Francisco Ferry Terminal mean that marine mammal detection ability by trained observers is high, enabling a high rate of success in implementation of shutdowns to avoid injury.

WETA's proposed activities are localized and of relatively short duration (a maximum of 106 days for pile driving and removal in the first year). The entire project area is limited to the Ferry Terminal area and its immediate surroundings. These localized and short-term noise exposures may cause short-term behavioral modifications in harbor seals, Northern fur seals, Northern elephant seals, California sea lions, harbor porpoises, bottlenose dolphins, and gray whales. Moreover, the proposed mitigation and monitoring measures are expected to reduce the likelihood of injury and behavior exposures. Additionally, no important feeding and/or

reproductive areas for marine mammals are known to be within the ensonified area during the construction time frame.

The project also is not expected to have significant adverse effects on affected marine mammals' habitat. The project activities would not modify existing marine mammal habitat for a significant amount of time. The activities may cause some fish to leave the area of disturbance, thus temporarily impacting marine mammals' foraging opportunities in a limited portion of the foraging range; but, because of the short duration of the activities and the relatively small area of the habitat that may be affected, the impacts to marine mammal habitat are not expected to cause significant or long-term negative consequences.

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the proposed monitoring and mitigation measures, NMFS determined that the total marine mammal takes from WETA's ferry terminal construction activities will have a negligible impact on the affected marine mammal species or stocks.

There are no relevant subsistence uses of marine mammals implicated by this action. Therefore, NMFS has determined that the total taking of affected species or stocks would not have an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence purposes.

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review. Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the mitigation and monitoring measures, which are expected to reduce the number of marine mammals potentially affected by the action, NMFS finds that small numbers of marine mammals will be taken relative to the populations of the affected species or stocks.

In view of the information presented in this document, OPR determined issuing another IHA to WETA would not result in significant adverse effects, individually or cumulatively, on the human environment. As such, this IHA renewal does not require the preparation of a Supplemental EA.