



MARINE MAMMAL COMMISSION

11 June 2019

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 Washington State Department of Transportation Ferries Division (WSDOT) seeking authorization 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 reconfiguring the Seattle Ferry Terminal at Colman Dock in Washington. This is a multi-year project, but the incidental harassment authorization would be valid for one year. The Commission also has reviewed the National Marine Fisheries Service's (NMFS) 4 June 2019 notice (84 Fed. Reg. 25757) announcing receipt of the application and proposing to issue the authorization, subject to certain conditions.

WSDOT plans to reconfigure and replace portions of the Seattle Ferry Terminal at Colman Dock. Operators will install and/or remove up to 1,489 steel, timber, and H piles ranging in size from 12- to 36-in. Piles would be installed using a vibratory and/or impact hammer and removed using a vibratory hammer. WSDOT expects activities to take 146 days, weather permitting. It would limit activities to daylight hours only, during the timeframe from 16 July to 15 February to protect salmonids.

NMFS preliminarily has determined that, at most, the proposed activities could cause Level A and B harassment¹ of small numbers of 12 marine mammal species or stocks but 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—

¹ The Commission informally noted that, based on previous monitoring efforts, an average of 18 California sea lions were present on a given day in 2018 rather than 14 sea lions per day based on data from 2017. The Commission also noted that the method to estimate Level A harassment takes for Dall's porpoises was not consistent with the method used for harbor porpoises and harbor seals. Based on these issues, NMFS indicated it would (1) increase the Level B harassment takes of California sea lions from 2,044 to 2,628 and (2) decrease the Level A harassment takes of Dall's porpoises from 71 to 64 and increase the Level B harassment takes of Dall's porpoises from 200 to 208 in the final authorization.

- using a sound attenuation device (i.e., a bubble curtain) during impact driving of 36-in piles²;
- ceasing pile-driving and -removal activities if any marine mammal comes within 10 m of the equipment;
- using three to five qualified protected species observers³ (PSOs; land- and/or vessel-based) to monitor the Level A and B harassment zones⁴ for 30 minutes before, during, and for 30 minutes after the proposed activities;
- using standard soft-start, delay, and shut-down procedures;
- using delay and shut-down procedures, if a species for which authorization has not been granted (including humpback and Southern Resident killer whales⁵) or if a species for which authorization has been granted but the authorized takes have been met, approaches or is observed within the Level B harassment zone;
- obtaining both marine mammal (1) sightings data from the Orca Network and/or Center for Whale Research and (2) acoustic detection data from the Orca Network on a daily basis⁶;
- reporting injured and dead marine mammals to NMFS and the West Coast Regional Stranding Coordinator using NMFS's phased approach and suspending activities, if appropriate; and
- submitting a final report⁷.

Based on NMFS revising the Level A and/or B harassment takes of California sea lions and Dall's porpoises and the various mitigation, monitoring, and reporting measures noted herein, the Commission concurs with NMFS's preliminary findings and recommends that NMFS issue the incidental harassment authorization.

Proposed one-year authorization renewals

NMFS has indicated that it may issue a second one-year⁸ incidental harassment authorization renewal for this and other future authorizations if various criteria are met and after an expedited

² NMFS indicated that this measure was inadvertently omitted from both the *Federal Register* notice and the proposed authorization. It would be included in the final authorization.

³ The Commission informally noted that the various extents of the Level B harassment zones that determine the number of PSOs needed for monitoring were inconsistent in the *Federal Register* notice and proposed authorization. NMFS indicated that the information in the notice was correct and that it would amend the Level B harassment zones in the final authorization accordingly.

⁴ The Commission informally noted that the Level B harassment zones were 8,960 rather than 8,690 m and 2,175 rather than 2,154 m for various pile-driving and -removal scenarios in Table 6 of the *Federal Register* notice and Table 3 of the proposed authorization. NMFS indicated that the correct Level B harassment zones would be included in both the *Federal Register* notice and the final authorization.

⁵ Including shutting down when killer whales are observed and their stock is unknown.

⁶ The Commission informally noted that this measure was included in the *Federal Register* notice but not in the proposed authorization. NMFS indicated the measure would be included in the final authorization.

⁷ The Commission informally noted that, although WSDOT employed numerous PSOs both on land and on ferries during previous activities, it still was unable to monitor 100 percent of the extents of the various zones but did not extrapolate the numbers of takes accordingly. NMFS indicated that it would explicitly require WSDOT to extrapolate the numbers of animals taken to those portions of the harassment zones that are not able to be monitored fully in section 6(a) of the final authorization.

⁸ NMFS informed the Commission that the renewal would be issued as a one-time opportunity, after which time a new authorization application would be required. NMFS has yet to specify this in any *Federal Register* notice detailing the new proposed renewal process but should do so.

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public comment period of 15 days (see 84 Fed. Reg. 25771 and the proposed authorization for details). The Commission agrees that NMFS should take appropriate steps to streamline the authorization process under section 101(a)(5)(D) of the MMPA to the extent possible. However, the Commission is concerned that the renewal process proposed in the *Federal Register* notice is inconsistent with the statutory requirements—section 101(a)(5)(D)(iii) clearly states that proposed authorizations are subject to a 30-day comment period—and Congressional expectations regarding the length of the comment period when it passed that provision⁹.

Another potentially significant issue with the proposed 15-day comment period is the burden that it places on reviewers, who will need to review the original authorization and supporting documentation¹⁰, the draft monitoring report(s), the renewal application or request¹¹, and the proposed authorization and then formulate comments very quickly. Depending on how frequently NMFS invokes the renewal option, how much the proposed renewal or the information on which it is based deviates from the original authorization, and how complicated the activities and the taking authorization is, those who try to comment on all proposed authorizations and renewals, such as the Commission, would be hard pressed to do so within the proposed 15-day comment period. Therefore, the Commission recommends that NMFS refrain from using the proposed renewal process for WSDOT's authorization. The renewal process should be used sparingly and selectively, by limiting its use only to those proposed incidental harassment authorizations that are expected to have the lowest levels of impacts to marine mammals and that require the least complex analyses. Notices for other types of activities should not even include the possibility that a renewal might be issued using the proposed foreshortened 15-day comment period. If NMFS intends to use the renewal process frequently *or* for authorizations that require a more complex review or for which much new information has been generated (e.g., multiple or extensive monitoring reports), the Commission recommends that NMFS provide the Commission and other reviewers the full 30-day comment opportunity set forth in section 101(a)(5)(D)(iii) of the MMPA.

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

Sincerely,



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

⁹ See, for example, the legislative history of section 101(a)(5)(D), which states "...in some instances, a request will be made for an authorization identical to one issued the previous year. In such circumstances, the Committee expects the Secretary to act expeditiously in complying with the notice and comment requirements." (H.R. Rep. No. 439, 103d Cong., 2d Sess. 29 (1994)). The referenced "notice and comment requirements" specify a 30-day comment period.

¹⁰ Including the original application, hydroacoustic and marine mammal monitoring plans, take estimation spreadsheets, etc.

¹¹ Including any proposed changes or any new information.