



MARINE MAMMAL COMMISSION

1 November 2018

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 (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 bridge repair in Aberdeen, Washington. The Commission also has reviewed the National Marine Fisheries Service's (NMFS) 19 October 2018 notice (83 Fed. Reg. 53033) announcing receipt of the application and proposing to issue the authorization, subject to certain conditions. The Commission previously provided comments in its [21 August 2017 letter](#) on WSDOT's proposed activities. NMFS issued the final authorization in 2017 for the activities that were to occur in 2018. However, WSDOT delayed conducting the proposed activities for a year and requested that NMFS re-issue the authorization subject to minor modifications to the numbers and types of piles to be installed and removed.

WSDOT plans to repair an area of scour associated with Pier 14 of the US 101 Chehalis River Bridge. Operators will install 18 steel sheet piles, install and remove 6 steel H-piles, and remove 44 14-in timber piles using a vibratory hammer. WSDOT expects activities to occur on up to six days, weather permitting. It would limit activities to daylight hours only, during the timeframe from 15 July 2019 to 15 February 2020.

NMFS preliminarily has determined that, at most, the proposed activities could cause Level B harassment of small numbers of five marine mammal species¹ 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 mitigation, monitoring, and reporting measures include—

- ceasing pile-driving and -removal activities if any marine mammal comes within 10 m of the equipment;

¹ The Commission informally noted that three is the average group size for harbor porpoises in Washington rather than two. NMFS indicated that it would increase the number of Level B harassment takes of harbor porpoises from 12 to 18 in the final authorization.

- using three to four qualified land-based protected species observers (PSOs) to monitor the Level A² and B harassment zones for 30 minutes before, during, and for 30 minutes after the proposed activities;
- using standard delay and shut-down procedures;
- 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 have been met, approaches or is observed within the Level B harassment zone³;
- 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 report.

The Commission concurs with NMFS's preliminary finding and recommends that NMFS issue the incidental harassment authorization, subject to the inclusion of the proposed mitigation, monitoring, and reporting measures⁴.

Proposed one-year authorization renewals

NMFS has indicated that it may issue a second one-year⁵ incidental harassment authorization renewal for this and other future authorizations if various criteria are met (see 83 Fed. Reg. 42489 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) clearly states that proposed authorizations are subject to publication in the *Federal Register* and elsewhere and that there be a presumably concurrent opportunity for public review and comment. NMFS's proposed renewal process would bypass the public notice and comment requirements when it is considering the renewal.

The Commission further notes that NMFS recently implemented an abbreviated authorization process by publishing the required information⁶ via an abbreviated *Federal Register* notice and by referencing the relevant documents. The abbreviated process preserves the full opportunity for public review and comment, does not appear to be unduly burdensome on either the applicant or NMFS, and is much preferred over NMFS's proposed renewal process⁷. Thus, the

² The Commission informally noted that NMFS rounded the shut-down zones for phocids and high-frequency cetaceans down rather than up and that PSOs are not going to be able to distinguish 50 from 51 m, for example. The Commission also inquired whether the estimated zones would cause frequent, and potentially unnecessary, shut downs. NMFS indicated that the zones would not, and the Commission specified that the shut-down zones should have been rounded up accordingly to the next factor of 5. Consequently, NMFS indicated it would revise the shut-down zones from 20 to 25 m for phocids and 50 to 55 m for high-frequency cetaceans in the final authorization.

³ The Commission informally noted that NMFS incorrectly omitted these standard mitigation measures from the proposed authorization. NMFS indicated the measures would be included in the final authorization.

⁴ Including the agreed upon modifications to those measures.

⁵ 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.

⁶ Including any changes to the proposed activities or assumptions made and results from the draft monitoring report.

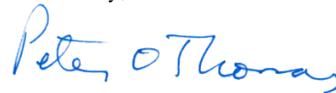
⁷ See the Commission's [30 April 2018 letter](#) detailing this matter.

Ms. Jolie Harrison
1 November 2018
Page 3

Commission recommends that NMFS refrain from implementing its proposed renewal process and instead use abbreviated *Federal Register* notices and reference existing documents to streamline the incidental harassment authorization process. If NMFS adopts the proposed renewal process notwithstanding the Commission's recommendation, the Commission further recommends that NMFS provide the Commission and the public with a legal analysis supporting its conclusion that the process is consistent with the requirements under section 101(a)(5)(D) of the MMPA.

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

Sincerely,



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