



MARINE MAMMAL COMMISSION

18 March 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 City and Borough of Sitka (CBS) 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 repair of the O'Connell Bridge Lightering Float in Sitka, Alaska. The Commission also has reviewed the National Marine Fisheries Service's (NMFS) 1 March 2019 notice (84 Fed. Reg. 7023) announcing receipt of the application and proposing to issue the authorization, subject to certain conditions.

CBS plans to remove and install piles during repair of the float that was damaged during a storm in June 2017. Operators would (1) remove six 16-in steel pipe piles using direct pull and/or a vibratory hammer and (2) install six 16-in steel pipe piles using a vibratory hammer, down-the-hole (DTH) hammer, and/or impact hammer. CBS's activities could occur on up to three days, weather permitting. It would limit pile-driving and -removal activities to daylight hours and to the timeframe of 1 June to 15 March.

NMFS preliminarily has determined that, at most, the proposed activities could cause Level A¹ and B harassment of small numbers of five marine mammal species². NMFS 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—

¹ The Commission informally noted that NMFS used an incorrect reference distance for the source level associated with DTH drilling—NMFS used 1 m rather than 10 m. Thus, the Level A harassment zones were a factor of 10 less than they should have been. NMFS indicated it would increase the Level A harassment zones accordingly for the final authorization.

² Based on the revised Level A harassment zones and the fact that harbor seals are the most common species in the area, the Commission indicated that Level A harassment takes for harbor seals should be included in the authorization. The Commission also informally noted that the proposed numbers of Level B harassment takes for harbor seals and Steller sea lions were low, and lacking altogether for minke whales, based on previous monitoring reports from the Sitka area. As such, NMFS agreed to (1) include 30 Level A harassment takes for harbor seals and 3 Level B harassment takes for minke whales and (2) increase the Level B harassment takes from 18 to 39 for harbor seals and from 24 to 33 for Steller sea lions in the final authorization.

- using direct pull as the primary removal method and, if ineffective, then using a vibratory hammer;
- operating the vibratory hammer at a reduced energy setting (30 to 50 percent of its rated energy)³;
- using a sound attenuation device (i.e., pile caps/cushions) during impact driving of piles;
- ceasing pile-driving and -removal activities if any marine mammal comes within 10 m of the equipment;
- using two qualified protected species observers to monitor the Level A and B harassment zones for 30 minutes before, during, and for 30 minutes after the proposed activities;
- using soft-start, 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 are met, approaches or is observed within the Level A and/or B harassment zone;
- reporting injured and dead marine mammals to the Office of Protected Resources and the Alaska Regional Stranding Coordinator using NMFS's phased approach and suspending activities, if appropriate; and
- submitting a final report.

In addition, CBS consulted with the Alaska Harbor Seal Commission, the Alaska Sea Otter and Steller Sea Lion Commission, and the Sitka Tribe of Alaska. None of the organizations expressed any concerns regarding the impact of proposed activities on marine mammals for subsistence purposes. However, the Sitka Tribe did request that pile removal and driving be restricted from 15 March through 31 May to protect herring, to which CBS agreed. Based on the proposed activities and mitigation measures, NMFS has preliminarily determined that the proposed taking would not have an unmitigable adverse impact on the availability of marine mammals for subsistence use by Alaska Natives. The Commission concurs with NMFS's preliminary findings and recommends that NMFS issue the incidental harassment authorization, subject to the inclusion of the proposed mitigation, monitoring, and reporting measures.

Proposed one-year authorization renewals

NMFS has indicated that it may issue a second one-year⁴ 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

³ The Commission noted that this mitigation measure was not included in the proposed authorization. NMFS indicated it would include the measure in the final authorization.

⁴ 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.

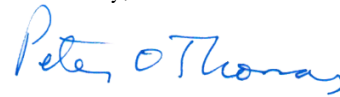
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renewal.

The Commission further notes that NMFS implemented an abbreviated authorization process by publishing the required information⁵ via an abbreviated *Federal Register* notice, referencing the relevant documents, and providing a 30-day public comment period. The abbreviated process preserves the full opportunity for public review and comment for the MMPA's required 30-day period, does not appear to be unduly burdensome on either the applicant or NMFS, and is much preferred over NMFS's proposed renewal process⁶. Thus, the Commission recommends that NMFS refrain from implementing its proposed renewal process and instead use abbreviated *Federal Register* notices, reference existing documents to streamline the incidental harassment authorization process, and provide a 30-day period for the public to comment. 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.

The Commission hopes you find its letter useful. Please contact me if you have questions regarding the Commission's recommendations.

Sincerely,



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

⁵ Including any changes to the proposed activities or assumptions made and results from the draft monitoring report.

⁶ See the Commission's [30 April 2018 letter](#) detailing this matter.