



**BILLING CODE 3510-22-P**

**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**RIN 0648-XG949**

**Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to National Wildlife Refuge Complex Research, Monitoring, and Maintenance Activities in Massachusetts**

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Notice; Issuance of an Incidental Harassment Authorization.

**SUMMARY:** In accordance with the regulations implementing the Marine Mammal Protection Act (MMPA) as amended, notification is hereby given that NMFS has issued an incidental harassment authorization (IHA) to the U.S. Fish and Wildlife Service (USFWS) to incidentally harass, by Level B harassment only, marine mammals during biological research, monitoring, and maintenance activities at the Eastern Massachusetts National Wildlife Refuge Complex (Complex).

**DATES:** This Authorization is effective from June 12, 2019 through June 11, 2020.

**FOR FURTHER INFORMATION CONTACT:** Amy Fowler, Office of Protected Resources, NMFS, (301) 427-8401. Electronic copies of the original application and supporting documents (including NMFS **Federal Register** notices of the original proposed and final authorizations, and the previous IHA), as well as a list of the references cited in this document, may be obtained online at:

<https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act>. In case of problems accessing these documents, please call the contact listed above.

## **SUPPLEMENTARY INFORMATION:**

### **Background**

The MMPA prohibits the “take” of marine mammals, with certain exceptions. Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (as delegated to NMFS) 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 incidental take authorization may be provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for taking for subsistence uses (where relevant). Further, NMFS must prescribe the permissible methods of taking and other “means of effecting the least practicable adverse impact” on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stocks for taking for certain subsistence uses (referred to in shorthand as “mitigation”); and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth.

We will review all comments submitted in response to this notice prior to concluding our NEPA process or making a final decision on the IHA request.

### **History of Request**

On March 16, 2016, NMFS received an application from the USFWS for the taking of two species of marine mammals incidental to research, monitoring, and maintenance activities within the Complex. The USFWS's request was for take of gray seals (*Halichoerus grypus atlantica*) and harbor seals (*Phoca vitulina concolor*) by Level B harassment. A notice of proposed IHA and request for comments was published in the **Federal Register** on January 12, 2017 (82 FR 3738). We subsequently published the final notice of our issuance of the IHA on March 2, 2017 (82 FR 12342) making the IHA valid from April 1, 2017 through March 31, 2018.

On December 5, 2017, NMFS received a request from the USFWS for an IHA for takes of marine mammals incidental to the same research and monitoring activities as the initial IHA. A notice of proposed IHA and request for comments was published in the **Federal Register** on March 6, 2018 (83 FR 9483). We subsequently published the final notice of our issuance of the IHA on May 2, 2018 (83 FR 19236), making the IHA valid from April 1, 2018 through March 31, 2019. That IHA was identical to the initial IHA with the same number of takes authorized and the same mitigation, monitoring, and reporting requirements.

On January 31, 2019, NMFS received a request from the USFWS for an IHA to take gray seals (*Halichoerus grypus atlantica*) and harbor seals (*Phoca vitulina concolor*) by Level B harassment incidental to ongoing annual research and monitoring activities. USFWS had received two previous IHAs (82 FR 12342, March 2, 2017; 83 FR 19236,

May 2, 2018) for these activities. In their 2019 request, the USFWS also requested take of marine mammals incidental to two new activities, New England cottontail introduction and seal haulout protection. The application was determined to be adequate and complete on March 20, 2019. On April 30, 2019, NMFS published its notice of proposed IHA in the **Federal Register** for public comment (84 FR 18259).

### **Description of the Activity and Anticipated Impacts**

The Complex is comprised of eight refuges, including its three coastal refuges: Monomoy NWR, Nantucket NWR, and Nomans Land Island (Nomans) NWR in eastern MA. The USFWS conducts ongoing biological tasks for refuge purposes at the Complex. The previous IHAs covered shorebird and seabird nest monitoring and research, roseate tern staging counts and resighting, red knot stopover study, northeastern beach tiger beetle census, and coastal shoreline change survey at Monomoy, Nantucket, and Nomans NWRs. The USFWS proposes to conduct these same activities under the 2019 IHA. The previous IHAs authorized Level B take of gray seals and harbor seals. NMFS has issued an IHA to harass these same species.

We refer to the notice of proposed IHA (84 FR 18259; April 30, 2019) and documents related to the previously issued IHAs and discuss any new or changed information here. The previous documents include the **Federal Register** notices of the previous proposed IHAs (82 FR 3738, January 12, 2017; 83 FR 9483, March 6, 2018), **Federal Register** notices of issuance of the previous IHAs (82 FR 12342, March 2, 2017; 83 FR 19236, May 2, 2018), and all associated references and documents. We also refer the reader to the USFWS's previous and current applications and monitoring reports

which can be found at <https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-research-and-other-activities>.

#### *Detailed Description of the Action*

A detailed description of the ongoing shorebird and seabird nest monitoring and research, roseate tern staging counts and resighting, red knot stopover study, northeastern beach tiger beetle census, and coastal shoreline change surveys can be found in the previous notices of proposed IHAs (82 FR 3738, January 12, 2017; 83 FR 9483, March 6, 2018). A detailed description of the new activities in the 2019 take request (New England cottontail reintroduction and protection of seal haulout areas) is found in the notice of proposed IHA (84 FR 18259; April 30, 2019).

#### *Description of Marine Mammals*

A description of the marine mammals in the area of the activities is found in these previous documents, which remains applicable to the 2019-2020 IHA. In addition, NMFS has reviewed recent draft Stock Assessment Reports, information on relevant Unusual Mortality Events (UMEs), and recent scientific literature, to evaluate the current status of the affected species.

Since July 2018, elevated numbers of harbor seal and gray seal mortalities have occurred across Maine, New Hampshire, and Massachusetts. This event has been declared a UME. Additionally, seals showing clinical signs of disease have stranded as far south as Virginia, although not in elevated numbers. Therefore, the UME investigation now encompasses all seal strandings from Maine to Virginia. Full or partial necropsy examinations have been conducted on some of the seals and samples have been collected for testing. Based on tests conducted so far, the main pathogen found in the

seals is phocine distemper virus. As of May 31, 2019, the total number of seals included in the UME was 2,435. More information on this UME is available at <https://www.fisheries.noaa.gov/new-england-mid-atlantic/marine-life-distress/2018-2019-pinniped-unusual-mortality-event-along>.

*Potential Effects on Marine Mammals and their Habitat*

A description of the potential effects of the specified activities on marine mammals and their habitat may be found in the documents supporting the previous IHAs, which remains applicable to the issuance of the proposed 2019-2020 IHA. Although there is currently an ongoing UME involving gray and harbor seals, the increased mortality appears to be primarily due to infection with phocine distemper virus. As such, NMFS has determined that no new information affects our original analysis of impacts under the 2018-2019 IHA.

*Estimated Take*

A detailed description of the methods and inputs used to estimate authorized take is found in these previous documents. All estimated take is expected to be in the form of Level B harassment. The methods of estimating take for the 2019-2020 IHA are identical to those used in the 2018-2019 IHA (*i.e.*, by multiplying the maximum number of seals estimated to be present at each location by the number of events at each location that may result in disturbance). Take from the two newly included activities was estimated in the same manner. The total authorized gray seal takes are presented in Table 1.

**Table 1. Estimated Number of Gray Seal Takes (by Level B harassment) Per Activity at Monomoy, Nantucket, and Nomans NWRs.**

Activity	Takes per event	Events per activity	Total takes
----------	-----------------	---------------------	-------------

Shorebird and Seabird Monitoring & Research	1000 (Monomoy) 50 (Nantucket) 10 (Nomans)	34 (Monomoy) 8 (Nantucket) 3 (Nomans)	34,430
Roseate Tern Staging Counts & Resighting	10 (Monomoy) 10 (Nantucket)	6 (Monomoy) 4 (Nantucket)	100
Red Knot Stopover Study	250 (Monomoy) 150 (Cape Cod)	5 (Monomoy) 5 (Cape Cod)	2,000
Northeastern Beach Tiger Beetle Census	750 (Monomoy)	3 (Monomoy)	2,250
Coastal Shoreline Change Survey	500 (Monomoy)	1 (Monomoy)	500
New England Cottontail Introduction	10 (Nomans)	20 (Nomans)	200
Seal Haul Out Protection	25 (Nantucket)	10 (Nantucket)	250
<b>Total takes</b>			<b>39,730</b>

Estimated take of harbor seals was estimated using methods identical to the 2018-2019 IHA (*i.e.*, estimating five percent of gray seal takes). Total authorized takes of gray seals and harbor seals are shown in Table 2.

**Table 2. Total Estimated Take of Marine Mammals, Relative to Population Size.**

Species	Estimated take	Stock abundance	Percent (comparison of instances of take to stock abundance)
Gray seal	39,730	27,131 <sup>a</sup> (451,131) <sup>b</sup>	146 (8.81)
Harbor seal	1,987	75,834	2.62

<sup>a</sup> Abundance in U.S. waters (Hayes *et al.*, 2018)

<sup>b</sup> Overall Western North Atlantic stock abundance (Hayes *et al.*, 2018)

Based on the stock abundance estimate presented in the 2017 SARS, the take number of gray seals exceeds the number of gray seals in U.S. waters (Table 2).

However, actual take may be slightly less if animals decide to haul out at a different

location for the day or if animals are foraging at the time of the survey activities. The number of individual seals taken is also assumed to be less than the take estimate since these species show high philopatry (Waring *et al.*, 2016; Wood *et al.*, 2011). We expect the take numbers to represent the number of exposures (i.e., instances of take), but assume that the same seals may be behaviorally harassed over multiple days, and the likely number of individual seals that may be harassed would be less. In addition, this project occurs in a small portion of the overall range of the Northwest Atlantic population of gray seals. While there is evidence of haulout site philopatry, resights of tagged and branded animals and satellite tracks of tagged animals show movement of individuals between the United States and Canada (Puryear *et al.*, 2016). The percentage of time that individuals are resident in U.S. waters is unknown (NMFS 2017). Genetic evidence provides a high degree of certainty that the Western North Atlantic stock of gray seals is a single stock (Boskovic *et al.*, 1996; Wood *et al.*, 2011). Thus, although the U.S. stock estimate is only 27,131, the overall stock abundance of animals in United States and Canadian waters is 451,131. The gray seal take estimate for this project represents less than nine percent of the overall Western North Atlantic stock abundance (Table 2) if every separate instance of take were assumed to accrue to a different individual, and because this is not the case, the percentage is likely significantly lower.

#### *Description of Mitigation, Monitoring and Reporting Measures*

The mitigation, monitoring, and reporting measures described here are identical to those included in the **Federal Register** notice announcing the final 2018-2019 IHA (83 FR 19236; May 2, 2018) and apply to all activities described in previous **Federal Register** notices (*i.e.*, 83 FR 9483; March 6, 2018) and the two new activities included in

this document. The discussion of the least practicable adverse impact included in the **Federal Register** notice of final IHA (83 FR 19236; May 2, 2018) remains accurate. The following measures are included in this IHA:

*Time and Frequency*—The USFWS would conduct all proposed activities throughout the course of the year between April 1 and November 30, outside of the seasons of highest seal abundance and pupping at the Complex. Closure of beaches used by seals may occur year-round at Nantucket NWR.

*Vessel Approach and Timing Techniques*—The USFWS must ensure that its vessel approaches to beaches with pinniped haulouts are conducted so as to not disturb marine mammals as most practicable. To the extent possible, the vessel must approach the beaches in a slow and controlled approach, as far away as possibly from haulouts to prevent or minimize flushing. Staff must also avoid or proceed cautiously when operating boats in the direct path of swimming seals that may be present in the area.

*Avoidance of Acoustic Impacts from Cannon Nets*—Cannon nets have a measured source level (SL) of 128 decibels (dB) at one meter (m) (estimated based on a measurement of 98.4 dB at 30 m; L. Niles, pers. comm., December 2016); however, the sound pressure level (SPL) is expected to be less than the thresholds for airborne pinniped disturbance (*e.g.*, 90 dB for harbor seals, and 100 dB for all other pinnipeds) at 80 yards from the source. The USFWS must stay at least 100 m from all pinnipeds if cannon nets are to be used for research purposes.

*Avoidance of Visual and Acoustic Contact with People*—The USFWS must instruct its members and research staff to avoid making unnecessary noise and not allow themselves to be seen by pinnipeds whenever practicable. USFWS staff must stay at least

50 yards from hauled out pinnipeds, unless it is absolutely necessary to approach seals closer, or potentially flush a seal, in order to continue conducting endangered species conservation work. When disturbance is unavoidable, staff must work quickly and efficiently to minimize the length of disturbance. Researchers and staff must do so by proceeding in a slow and controlled manner, which allows for the seals to slowly flush into the water. Staff must also maintain a quiet working atmosphere, avoiding loud noises, and using hushed voices in the presence of hauled out pinnipeds. Pathways of approach to the desired study or nesting site must be chosen to minimize seal disturbance if an activity event may result in the disturbance of seals. USFWS staff must scan the surrounding waters near the haulouts, and if predators (*i.e.*, sharks) are seen, seals must not be flushed by USFWS staff. The USFWS must avoid disturbance of mothers and pups by either rescheduling surveys, if possible, or refraining from conducting activities that may cause high-level disturbance (*e.g.*, flushing or long movements over land).

*Marine Mammal Monitoring*—The USFWS must monitor seals as project activities are conducted. Monitoring requirements in relation to the USFWS's activities include species counts, numbers of observed disturbances, and descriptions of the disturbance behaviors during the research activities, including location, date, and time of the event for each site and activity. In addition, the USFWS will record observations regarding the number and species of any marine mammals either observed in the water or hauled out. Behavior of seals must be recorded on a three point scale: 1= alert reaction, not considered harassment; 2= moving at least two body lengths, or change in direction greater than 90 degrees; 3= flushing (Table 3). USFWS staff must also record and report all observations of sick, injured, or entangled marine mammals to the Office of Protected

Resources, NMFS, and the Greater Atlantic Regional Stranding Coordinator, NMFS.

Tagged or marked marine mammals must also be recorded and reported to the appropriate research organization or federal agency, as well as any rare or unusual species of marine mammal. Photographs must be taken when possible. This information must be incorporated into a report for NMFS at the end of the season. The USFWS must also coordinate with any university, state, or federal researchers to attain additional data or observations that may be useful for monitoring marine mammal usage at the activity sites.

**Table 3. Disturbance Scale of Pinniped Responses to In-Air Sources to Determine Take.**

<b>Level</b>	<b>Type of Response</b>	<b>Definition</b>
1	Alert	Seal head orientation or brief movement in response to disturbance, which may include turning head towards the disturbance, craning head and neck while holding the body rigid in a u-shaped position, changing from a lying to a sitting position, or brief movement of less than twice the animal's body length.
2*	Movement	Movements in response to the source of disturbance, ranging from short withdrawals at least twice the animal's body length to longer retreats over the beach, or if already moving a change of direction of greater than 90 degrees.
3*	Flush	All retreats (flushes) to the water.

\*Only Levels 2 and 3 are considered take, whereas Level 1 is not.

If at any time injury, serious injury, or mortality of the species for which take is authorized should occur, or if take of any kind of other marine mammal occurs, and such action may be a result of the USFWS's activities, the USFWS must suspend activities and contact NMFS immediately to determine how best to proceed to ensure that another injury or death does not occur and to ensure that the applicant remains in compliance with the MMPA.

*Reporting*—The USFWS must submit a draft report to NMFS Office of Protected Resources no later than 90 days after the conclusion of research and monitoring activities in the 2018 season. The report must include a summary of the information gathered pursuant to the monitoring requirements set forth in the proposed IHA. The USFWS must submit a final report to NMFS within 30 days after receiving comments from NMFS on the draft report. If the USFWS receives no comments from NMFS on the draft report, NMFS will consider the draft report to be the final report. The reporting requirements included in this IHA are identical to those described in the previous IHA (83 FR 19236, May 2, 2018).

### **Comments and Responses**

A notice of NMFS' proposal to issue an IHA was published in the Federal Register on April 30, 2019 (84 FR 18259). During the 30-day public comment period, the Marine Mammal Commission (Commission) submitted a letter, providing comments as described below.

*Comment:* The Commission questioned whether the public notice provisions for IHA Renewals fully satisfy the public notice and comment provision in the MMPA and discussed the potential burden on reviewers of reviewing key documents and developing comments quickly. Additionally, the Commission recommended that NMFS use the IHA Renewal process sparingly and selectively for activities expected to have the lowest levels of impacts to marine mammals and that require less complex analysis.

*Response:* NMFS has taken a number of steps to ensure the public has adequate notice, time, and information to be able to comment effectively on IHA Renewals within the limitations of processing IHA applications efficiently. The Federal Register notice for

the proposed IHA (84 FR 18259; April 30, 2019) previously identified the conditions under which a one-year Renewal IHA might be appropriate. This information is presented in the Request for Public Comments section of the initial proposed IHA and thus encourages submission of comments on the potential of a one-year renewal as well as the initial IHA during the 30-day comment period. In addition, when we receive an application for a Renewal IHA, we publish a notice of the proposed IHA Renewal in the Federal Register and provide an additional 15 days for public comment, for a total of 45 days of public comment. We will also directly contact all commenters on the initial IHA by email, phone, or, if the commenter did not provide email or phone information, by postal service to provide them the opportunity to submit any additional comments on the proposed Renewal IHA.

NMFS also strives to ensure the public has access to key information needed to submit comments on a proposed IHA, whether an initial IHA or a Renewal IHA. The agency's web site includes information for all projects under consideration, including the application, references, and other supporting documents. Each Federal Register notice also includes contact information in the event a commenter has questions or cannot find the information they seek.

Regarding the Commission's comment that Renewal IHAs should be limited to certain types of projects, NMFS has explained on its web site and in individual Federal Register notices that Renewal IHAs are appropriate where the continuing activities are identical, nearly identical, or a subset of the activities for which the initial 30-day comment period applied. Where the commenter has likely already reviewed and commented on the initial proposed IHA for these activities, the abbreviated additional

comment period is sufficient for consideration of the results of the preliminary monitoring report and new information (if any) from the past year.

### **Determinations**

The USFWS proposes to conduct research and monitoring activities that are nearly identical to those conducted previously. Take of marine mammals from two new activities has been included in this IHA but the potential impacts to marine mammals from these activities are identical to those previously analyzed for the issuance of the 2018 IHA. Therefore, the potential effects from Level B harassment of marine mammals previously analyzed remain applicable, as do NMFS prior determinations.

When issuing the 2018 IHA, NMFS found the USFWS's activities, in their entirety, would have a negligible impact to species or stocks' rates of recruitment and survival and the amount of taking would be small relative to the population size of such species or stock. This IHA authorizes more takes of seals by Level B harassment than the previously issued IHAs (82 FR 12342, March 2, 2017; 83 FR 19236, May 2, 2018) but the amount of taking is still small relative to the population size of the affected species and stocks (*i.e.*, less than nine percent). The IHA includes identical required mitigation, monitoring, and reporting measures as the 2018 IHA. In conclusion, there is no new information suggesting that our analysis or findings should change.

Based on the information contained here and in the referenced documents, NMFS has determined the following: (1) the required mitigation measures will effect the least practicable impact on marine mammal species or stocks and their habitat; (2) the authorized takes will have a negligible impact on the affected marine mammal species or stocks; (3) the authorized takes represent small numbers of marine mammals relative to

the affected stock abundances; and (4) the USFWS's activities will not have an unmitigable adverse impact on taking for subsistence purposes as no relevant subsistence uses of marine mammals are implicated by this action, and (5) appropriate monitoring and reporting requirements are included.

### **Endangered Species Act (ESA)**

No incidental take of ESA-listed species is proposed for authorization or expected to result from this activity. Therefore, NMFS has determined that formal consultation under section 7 of the ESA is not required for this action.

### **National Environmental Policy Act**

To comply with the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 *et seq.*) and NOAA Administrative Order (NAO) 216-6A, NMFS must review our proposed action (*i.e.*, the issuance of an incidental harassment authorization) with respect to potential impacts on the human environment.

This action is consistent with categories of activities identified in CE B4 of the Companion Manual for NOAA Administrative Order 216-6A, which do not individually or cumulatively have the potential for significant impacts on the quality of the human environment and for which we have not identified any extraordinary circumstances that would preclude this categorical exclusion. Accordingly, NMFS has determined that the issuance of the proposed IHA qualifies to be categorically excluded from further NEPA review.

### **Authorization**

As a result of these determinations, NMFS has issued an IHA to the USFWS for the harassment of small numbers of marine mammals incidental to conducting research

and monitoring activities at the Complex for a period of one year, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated.

**Donna Wieting,**

*Director, Office of Protected Resources,*

*National Marine Fisheries Service.*

[FR Doc. 2019-14457 Filed: 7/5/2019 8:45 am; Publication Date: 7/8/2019]