



DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RTID 0648-XA832

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to the Parallel Thimble Shoal Tunnel Project in Virginia Beach, Virginia

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

ACTION: Notice; request for comments on proposed Renewal incidental harassment authorization.

SUMMARY: NMFS has received a request from the Chesapeake Tunnel Joint Venture (CTJV) for the Renewal of their currently active incidental harassment authorization (IHA) to take marine mammals incidental to Parallel Thimble Shoal Tunnel Project (PTST) in Virginia Beach, Virginia. These activities are identical to those covered in the current authorization. The project has experienced delays and most of the work covered in the initial IHA will not be completed by the time it expires. Pursuant to the Marine Mammal Protection Act, prior to issuing the currently active IHA, NMFS requested comments on both the proposed IHA and the potential for renewing the initial authorization if certain requirements were satisfied. The Renewal requirements have been satisfied, and NMFS is now providing an additional 15-day comment period to allow for any additional comments on the proposed Renewal not previously provided during the initial 30-day comment period.

DATES: Comments and information must be received no later than *[insert date 15 days after date of publication in the FEDERAL REGISTER]*.

ADDRESSES: Comments should be addressed to Jolie Harrison, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service and should be submitted via email to *ITP.Laws@noaa.gov*.

Instructions: NMFS is not responsible for comments sent by any other method, to any other address or individual, or received after the end of the comment period.

Comments, including all attachments, must not exceed a 25-megabyte file size.

Attachments to comments will be accepted in Microsoft Word or Excel or Adobe PDF file formats only. All comments received are a part of the public record and will generally be posted online at *www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act* without change. All personal identifying information (e.g., name, address) voluntarily submitted by the commenter may be publicly accessible. Do not submit confidential business information or otherwise sensitive or protected information.

FOR FURTHER INFORMATION CONTACT: Ben Laws, Office of Protected Resources, NMFS, (301) 427-8401. Electronic copies of the original application, Renewal request, 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:

www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-construction-activities. In case of problems accessing these documents, please call the contact listed above.

SUPPLEMENTARY INFORMATION:

Background

The Marine Mammal Protection Act (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 is 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 here as “mitigation measures”). Monitoring and reporting of such takings are also required. The meaning of key terms such as “take,” “harassment,” and “negligible impact” can be found in section 3 of the MMPA (16 U.S.C. 1362) and the agency’s regulations at 50 CFR 216.103.

NMFS’ regulations implementing the MMPA at 50 CFR 216.107(e) indicate that IHAs may be renewed for additional periods of time not to exceed one year for each reauthorization. In the notice of proposed IHA for the initial authorization, NMFS described the circumstances under which we would consider issuing a Renewal for this activity, and requested public comment on a potential Renewal under those circumstances. Specifically, on a case-by-case basis, NMFS may issue a one-time, one-year Renewal IHA following notice to the public providing an additional 15 days for public comments when (1) up to another year of identical, or nearly identical, activities as described in the **Description of the Specified Activities and Anticipated Impacts** section of this notice is planned or (2) the activities as described in the **Description of the**

Specified Activities and Anticipated Impacts section of this notice would not be completed by the time the IHA expires and a Renewal would allow for completion of the activities beyond that described in the Dates and Duration section of the notice of proposed IHA for the initial IHA, provided all of the following conditions are met:

- A request for renewal is received no later than 60 days prior to the needed Renewal IHA effective date (recognizing that the Renewal IHA expiration date cannot extend beyond one year from expiration of the initial IHA).

- The request for renewal must include the following:

- (1) An explanation that the activities to be conducted under the requested Renewal IHA are identical to the activities analyzed under the initial IHA, are a subset of the activities, or include changes so minor (*e.g.*, reduction in pile size) that the changes do not affect the previous analyses, mitigation and monitoring requirements, or take estimates (with the exception of reducing the type or amount of take).

- (2) A preliminary monitoring report showing the results of the required monitoring to date and an explanation showing that the monitoring results do not indicate impacts of a scale or nature not previously analyzed or authorized.

Upon review of the request for Renewal, the status of the affected species or stocks, and any other pertinent information, NMFS determines that there are no more than minor changes in the activities, the mitigation and monitoring measures will remain the same and appropriate, and the findings in the initial IHA remain valid.

An additional public comment period of 15 days (for a total of 45 days), with direct notice by email, phone, or postal service to commenters on the initial IHA, is provided to allow for any additional comments on the proposed Renewal. A description of the Renewal process may be found on our website at:

www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-harassment-authorization-renewals. Any comments received on the potential Renewal, along with

relevant comments on the initial IHA, have been considered in the development of this proposed IHA Renewal, and a summary of agency responses to applicable comments is included in this notice. NMFS will consider any additional public comments prior to making any final decision on the issuance of the requested Renewal, and agency responses will be summarized in the final notice of our decision.

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 Categorical Exclusion B4 (IHAs with no anticipated serious injury or mortality) 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 preliminarily determined that the issuance of the proposed IHA Renewal qualifies to be categorically excluded from further NEPA review.

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 Renewal request.

History of Request

On May 24, 2019, NMFS received a request from the CTJV for an IHA to take marine mammals incidental to pile driving and removal at the Chesapeake Bay Bridge and Tunnel (CBBT) near Virginia Beach, Virginia. The application was deemed adequate and complete on October 11, 2019. The CTJV's request is for take of harbor seal (*Phoca vitulina*), gray seal (*Halichoerus grypus*), bottlenose dolphin (*Tursiops truncatus*), harbor

porpoise (*Phocoena phocoena*) and humpback whale (*Megaptera novaeangliae*) by Level A and Level B harassment. We published a notice of a proposed IHA and request for comments on November 25, 2019 (84 FR 64847) and subsequently published the final notice of our issuance of the IHA on March 20, 2020 (85 FR 16061), effective from March 10, 2020, through March 9, 2021. This IHA was expected to cover one year of an anticipated 5-year project.

On December 15, 2020, NMFS received an application for the Renewal of the initial IHA. As described in the request for the Renewal IHA, the activities for which incidental take is requested are identical to, and consist of a subset of, those covered in the initial authorization. In order to consider an IHA Renewal, NMFS requires the applicant provide a preliminary monitoring report which confirms that the applicant has implemented the required mitigation and monitoring, and which also shows that no impacts of a scale or nature not previously analyzed or authorized have occurred as a result of the activities conducted. NMFS has reviewed CTJV's preliminary monitoring report and has preliminarily determined that CTJV's proposed activities (including mitigation, monitoring, and reporting), estimated incidental take, and anticipated impacts on the affected stocks are the same as those analyzed and authorized through the initial IHA. However, NMFS is requesting comments or additional information that may further inform our proposal to issue an IHA Renewal to CTJV. This IHA Renewal would be valid for a period of one year.

Description of the Specified Activities and Anticipated Impacts

CTJV's planned activities include construction associated with the PTST project. Specifically, the location, timing, and nature of the activities, including the types of equipment planned for use, are identical to those described in the original IHA. The project consists of the construction of a two-lane parallel tunnel to the west of the existing Thimble Shoal Tunnel, connecting Portal Island Nos. 1 and 2 of the CBBT

facility which extends across the mouth of the Chesapeake Bay near Virginia Beach, Virginia. The PTST project will address existing constraints to regional mobility based on current traffic volume along the facility. Planned construction associated with the initial IHA included the driving of 812 piles over 198 days as shown below:

- 180 12-inch timber piles
- 74 36-inch steel pipe piles
- 500 36-inch interlocked pipes
- 58 42-inch steel casings

Of these planned activities, under the initial IHA CTJV installed a total of 76 36-inch pipe piles and installed and removed 58 42-inch steel casings over approximately 64 construction days. Additionally, 52 36-inch interlocking pipe piles have been eliminated from the construction plan. This is due to a design change which increased the elevation of stone placement on the West berm on Portal Island 1, decreasing the number of piles being installed below Mean High Water (MHW). Remaining piles will be installed using impact driving, vibratory driving and drilling with down-the-hole (DTH) hammers. Some piles will be removed via vibratory hammer. Accounting for work conducted under the initial IHA and the planned design change resulting in a reduction in total piles, CTJV plans to drive 684 piles over an estimated 140 days under this proposed Renewal IHA.

Similarly, the anticipated impacts are identical to those described in the initial IHA. NMFS anticipates the take of the same five species of marine mammal (harbor seal, gray seal, bottlenose dolphin, harbor porpoise, and humpback whale) by Level A and Level B harassment incidental to underwater noise resulting from construction associated with the proposed activities.

The following documents are referenced in this notice and include important supporting information:

- Initial final IHA (85 FR 16061; March 20, 2020);

- Initial proposed IHA (84 FR 64847; November 25, 2019); and
- 2019 IHA application, references cited, and previous public comments received (available at www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-construction-activities).

Detailed Description of the Activity

The PTST project entails construction of a two-lane parallel tunnel to the west of the existing Thimble Shoal Tunnel. The new parallel two-lane tunnel is 6,350 feet (ft) (1935.5 meter (m)) in overall total length with 5,356 linear ft (1632.5 m) located below MHW. Remaining proposed in-water activities to be covered under this Renewal include the following:

- Mooring dolphins: An estimated 180 12-inch timber piles will be used for construction of the temporary mooring dolphins (120 piles at Portal Island No. 1 and 60 piles at Portal Island No. 2) and will be installed and removed using a vibratory hammer. However, should refusal be encountered prior to design tip elevation when driving with the vibratory hammer an impact hammer will be used to drive the remainder of the pile length. No bubble curtains will be utilized for the installation of the timber piles;
 - Construction of temporary Omega trestle: 28 in-water 36-inch diameter steel pipe piles will be installed at Portal Island 2;
 - Construction of two engineered berms requiring 202 36-inch steel interlocked pipe piles (81 on west side; 121 on east side) for Portal Island 1 and 246 piles of the same size and type (124 piles on west side; 122 on east side) for Portal Island 2.
- Construction methods will include impact pile driving as well as casing advancement by DTH hammer. Interlocked pipe piles will be installed through the use of DTH drilling equipment. Once the pipes are advanced through the rock layer using the DTH technology, they are driven to final grade via traditional impact driving methods; and

- Vibratory installation and removal of 12 36-inch steel pipe piles at Portal Island 1 and 16 piles at Portal Island 2 on both sides of the new tunnel alignment for settlement mitigation, support of excavation, and to facilitate flowable fill placement.

Some in-water construction activities would occur simultaneously. A detailed description of the construction activities for which authorization of take is proposed here may be found in the **Federal Register** notice of proposed IHA for the 2020 authorization (84 FR 64847; November 25, 2019). Location, timing (*e.g.*, seasonality), and nature of the pile driving operations, including the type and size of piles and the methods of pile driving, are identical to those analyzed in the initial IHA. The proposed IHA Renewal would be effective for a period of one year.

Description of Marine Mammals

A description of the marine mammals in the area of the activities for which authorization of take is proposed here, including information on abundance, status, distribution, and hearing, may be found in the **Federal Register** notice for the proposed IHA for the initial authorization (84 FR 64847; November 25, 2019). Updated information regarding stock abundance was provided in the **Federal Register** notice announcing issuance of the initial IHA (85 FR 16061; March 20, 2020). NMFS has reviewed recent draft Stock Assessment Reports, information on relevant Unusual Mortality Events, and other scientific literature. The draft 2020 Stock Assessment Report states that estimated abundance has increased for the Gulf of Maine stock of humpback whales, from 1,380 (CV = 0) to 1,393 (CV = 0.15). NMFS has preliminarily determined that neither this nor any other new information affects which species or stocks have the potential to be affected or the pertinent information in the Description of the Marine Mammals in the Area of Specified Activities contained in the supporting documents for the initial IHA.

Potential Effects on Marine Mammals and their Habitat

A description of the potential effects of the specified activity on marine mammals and their habitat for the activities for which take is proposed here may be found in the **Federal Register** notice for the proposed initial IHA (84 FR 64847; November 25, 2019). NMFS has reviewed recent draft Stock Assessment Reports, information on relevant Unusual Mortality Events, and other scientific literature, and determined that neither this nor any other new information affects our initial analysis of impacts on marine mammals and their habitat.

Estimated Take

A detailed description of the methods and inputs used to estimate take for the specified activity are found in the **Federal Register** notice for the proposed and final initial IHAs (84 FR 64847; November 25, 2019 and 85 FR 16061; March 20, 2020). Specifically, the source levels and marine mammal occurrence data applicable to this authorization remain unchanged from the previously issued IHA, with the exception of the small amount of work completed. CTJV conducted approximately 64 days of the planned work and has eliminated a small number of originally planned piles, reducing the approximate total number of operational days for this proposed Renewal IHA. However, because the take numbers developed for most species for which take is proposed for authorization involve qualitative elements and because the reduction in total days would not result in a substantive decrease in the take number for bottlenose dolphin, we carry forward the take numbers unchanged for this proposed Renewal IHA. The stocks taken, methods of take, and types of take remain unchanged from the previously issued IHA, as do the number of takes, which are indicated below in Table 1.

Table 1. Estimated Take Proposed for Authorization and Proportion of Population Potentially Affected

Species	Stock	Level A Takes	Level B Takes	Percentage of Stock
Humpback whale	Gulf of Maine	--	12	0.9
Harbor porpoise	Gulf of Maine/Bay of Fundy	5	7	<0.01

Bottlenose dolphin	WNA Coastal, Northern Migratory	142	14,095	<33*
	WNA Coastal, Southern Migratory	142	14,095	<33*
	NNCES	2	198	24
Harbor seal	Western North Atlantic	1,296	2,124	4.5
Gray seal	Western North Atlantic	1	3	<0.01

Description of Proposed Mitigation, Monitoring and Reporting Measures

The proposed mitigation, monitoring, and reporting measures included as requirements in this authorization are identical to those included in the **Federal Register** notice announcing the issuance of the initial IHA (85 FR 16061; March 20, 2020), and the discussion of the least practicable adverse impact included in that document remains accurate. The following measures are proposed for this renewal:

Proposed Mitigation Requirements

In summary, mitigation includes implementation of shutdown procedures if any marine mammal approaches or enters the established shutdown zones. Shutdown zones for species authorized for take are as follows: 100 meters for harbor porpoise and bottlenose dolphin; 15 meters for harbor seal and gray seal. For humpback whale, shutdown distances correspond with the estimated Level A harassment zones and are dependent on activity type. For in-water heavy machinery work other than pile driving, if a marine mammal comes within 10 m, operations must cease and vessels must reduce speed to the minimum level required to maintain steerage and safe working conditions. One trained observer must monitor to implement shutdowns and collect information at each active pile driving location (whether vibratory or impact driving of steel or concrete piles).

Soft start procedures must be implemented at the start of each day's impact pile driving and at any time following cessation of impact driving for a period of thirty

minutes or longer. Use of an air bubble curtain system will be implemented by the CTJV during impact driving of 36-inch steel piles except in water less than 10 ft in depth.

Proposed Monitoring Requirements

The CTJV will be required to station between two and four PSOs at locations offering the best available views of the monitoring zones. At least two PSOs will be required to monitor before, during, and after the pile-driving and -removal activities. At least one PSO must be located in close proximity to each pile driving rig during active operation of single or multiple, concurrent driving devices. At least one additional PSO is required at each active driving rig or other location providing best possible view if the Level B harassment zone and shutdown zones cannot reasonably be observed by one PSO.

Proposed Reporting Requirements

A draft report will be submitted to NMFS within 90 days of the completion of marine mammal monitoring, or 60 days prior to the requested date of issuance of any future IHA for projects at the same location, whichever comes first. The report will include marine mammal observations pre-activity, during-activity, and post-activity during pile driving days (and associated PSO data sheets), and will also provide descriptions of any behavioral responses to construction activities by marine mammals and a complete description of all mitigation shutdowns and the results of those actions and an extrapolated total take estimate based on the number of marine mammals observed during the course of construction. A final report must be submitted within 30 days following resolution of comments on the draft report.

Public Comments

As noted previously, NMFS published a notice of a proposed IHA (84 FR 64847; November 25, 2019) and solicited public comments on both our proposal to issue the

initial IHA for CTJV's construction activities and on the potential for a Renewal IHA, should certain requirements be met.

All public comments were addressed in the notice announcing the issuance of the initial IHA (85 FR 16061; March 20, 2020). Below, we describe how we have addressed, with updated information where appropriate, any comments received that specifically pertain to the Renewal of the initial IHA.

Comment: The Marine Mammal Commission expressed continuing concern with NMFS' use of the Renewal process.

Response: In prior responses to comments about IHA Renewals (*e.g.*, 84 FR 52464; October 02, 2019 and 85 FR 53342; August 28, 2020), NMFS has explained how the Renewal process, as implemented, is consistent with the statutory requirements contained in section 101(a)(5)(D) of the MMPA, provides additional efficiencies beyond the use of abbreviated notices, and, further, promotes NMFS' goals of improving conservation of marine mammals and increasing efficiency in the MMPA compliance process. Therefore, we intend to continue implementing the Renewal process.

Preliminary Determinations

The construction activities proposed by CTJV are identical to (and a subset of) those analyzed in the initial IHA, as are the method of taking and the effects of the action. The planned number of days of activity will be slightly reduced given the completion of a small portion of the originally planned work. The potential effects of CTJV's activities are limited to Level A and Level B harassment in the form of auditory injury and behavioral disturbance. In analyzing the effects of the activities in the initial IHA, NMFS determined that CTJV's activities would have a negligible impact on the affected species or stocks and that the authorized take numbers of each species or stock were small relative to the relevant stocks (*e.g.*, less than one-third of the abundance of all stocks).

The mitigation measures and monitoring and reporting requirements as described above are identical to the initial IHA.

NMFS has preliminarily concluded that there is no new information suggesting that our analysis or findings should change from those reached for the initial IHA. Based on the information and analysis 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; (4) CTJV'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

Section 7(a)(2) of the Endangered Species Act of 1973 (ESA: 16 U.S.C. 1531 *et seq.*) requires that each Federal agency insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat. No incidental take of ESA-listed marine mammal species is expected to result from this activity, and none would be authorized. Therefore, NMFS has determined that consultation under section 7 of the ESA is not required for this action.

Proposed Renewal IHA and Request for Public Comment

As a result of these preliminary determinations, NMFS proposes to issue a Renewal IHA to CTJV for conducting in-water construction activities associated with the PTST in Virginia Beach, Virginia, from the date of issuance for a period of one year, provided the previously described mitigation, monitoring, and reporting requirements are

incorporated. A draft of the proposed and final initial IHA can be found at www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-construction-activities. We request comment on our analyses, the proposed Renewal IHA, and any other aspect of this notice. Please include with your comments any supporting data or literature citations to help inform our final decision on the request for MMPA authorization.

Dated: February 2, 2021.

Donna S. Wieting,
Director, Office of Protected Resources,
National Marine Fisheries Service.

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