



## **DEPARTMENT OF COMMERCE**

### **National Oceanic and Atmospheric Administration**

**[RTID 0648-XA880]**

#### **Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Portsmouth Naval Shipyard Dry Dock 1 Modification and Expansion**

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

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

**SUMMARY:** NMFS received a request from the U.S. Navy (Navy) for the renewal of their currently active incidental harassment authorization (IHA) to take marine mammals incidental to Portsmouth Naval Shipyard Dry Dock 1 modification and expansion in Kittery, Maine. These activities are nearly identical to those covered in the current authorization. The project has been delayed and a small portion of the activities covered in the initial IHA have not been completed. The Navy also proposes to drive an additional number of piles for which the installation methods are identical and pile types are nearly identical to those covered in the initial IHA. Pursuant to the Marine Mammal Protection Act, 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 March 6, 2021.

**ADDRESSES:** Comments should be addressed to Jolie Harrison, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service. Written comments should be submitted via email to *ITP.Esch@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 <https://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:** Carter Esch, Office of Protected Resources, NMFS, (301) 427-8421. 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:

<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 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, 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 IHA renewal effective date (recognizing that the r IHA renewal 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); and

- (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](http://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 November 1, 2018, NMFS received a request from the Navy for authorization of the taking, by Level B harassment and Level A harassment, of marine mammals incidental to the modification and expansion of Dry Dock 1 at Portsmouth Naval Shipyard in Kittery, Maine. The specified activity is expected to result in the take of five species of marine mammals (harbor seals (*Phoca vitulina*), gray seals (*Halichoerus*

*grypsus*), harp seals (*Pagophilus groenlandicus*), hooded seals (*Cystophora cristata*), harbor porpoises (*Phocoena phocoena*). A final version of the application, which we deemed adequate and complete, was submitted on March 11, 2019. We published a notice of a proposed IHA (referred to hereafter as the proposed initial IHA) and request for comments on April 4, 2019 (84 FR 13252). After the public comment period, NMFS issued the final IHA on May 16, 2019, effective October 1, 2019, through September 30, 2020 (84 FR 24476), hereafter referred to as the 2019 IHA. On September 30, 2019, the Navy informed NMFS that the project was delayed. None of the work identified in the IHA had occurred and no take of any marine mammals had occurred since the issuance of the IHA. The Navy requested that NMFS modify the effective dates in order to conduct the construction work that was previously analyzed and authorized. On December 3, 2019, NMFS re-issued, with new effective dates, an IHA to the Navy to take marine mammals incidental to modification and expansion of at the Portsmouth Naval Shipyard Dry Dock 1 in Kittery, Maine (84 FR 67261; December 9, 2019), effective from March 1, 2020 through February 28, 2021 (hereafter referred to as the initial IHA).

On January 21, 2021, 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 include a small subset of the activities that are covered by the initial authorization but will not be completed prior to its expiration, as well as a new addition of activity that is nearly identical to that covered in the initial authorization. As required, the applicant also provided a preliminary monitoring report (available at: <https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-construction-activities>) 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.

## **Description of the Specified Activities and Anticipated Impacts**

The Navy's planned activities include installation of temporary dolphin piles for construction of the caisson seat float-in, completion of the caisson seat foundation, and construction of a temporary blast wall. The Navy planned to install the guide dolphin piles in February 2021, prior to the expiration of the initial IHA; however, due to unforeseen delays, these piles are now scheduled to be installed in March 2021. Additionally, the installation of sheet piles to complete the caisson seat foundation is scheduled to conclude on February 25, 2021, although if there are any unanticipated weather or equipment delays, this activity might not be completed prior to the expiration of the initial IHA. Finally, construction of a temporary blast wall was not specifically analyzed in the 2019 IHA, but will involve the installation of a comparatively small number (in relation to the initial IHA) of similar or smaller size steel sheet and pipe piles using installation methods identical to those described in the 2019 IHA. The location and nature of the activities, including the types of equipment planned for use, are nearly identical to those described in the initial IHA.

Similarly, the anticipated impacts are identical in nature (though significantly lower in number) to those described in the initial IHA. Also, NMFS anticipates the take of only two of the five species of marine mammals described in the 2019 IHA (harbor seals and gray seals) by Level A harassment 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:

- Reissued 2019 IHA (84 FR 67261; December 9, 2019);
- 2019 final IHA (84 FR 24476; May 28, 2019);
- 2019 proposed IHA (843 FR 13252; April 4, 2019);
- 2019 IHA application, references cited, and previous public comments

received (available at <https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-construction-activities>).

#### *Detailed Description of the Activity*

The Navy proposes to modify and expand Dry Dock 1 at Portsmouth Naval Shipyard because dimensional limitations currently impede operations and maintenance. To minimize impacts on dry dock operations during construction, the overall project is being constructed in phases. The first element, construction of a superflood basin, is scheduled to occur in six phases; activities associated with first two phases, and one activity from Phase 3 (installation of the caisson seat float-in) were described and analyzed in the 2019 IHA. Phases 1 and 2, planned to be completed under the initial IHA, included site reconnaissance, field measurements, contractor submittals and general mobilization activities (Phase 1), and construction of the southern closure, construction of the caisson seat float-in and foundation, Berth 1 and 11 improvements, Dry Dock 1 utility improvements, and dredging (Phase 2). Schedule delays precluded installation of the caisson seat float-in; therefore, the Navy included this activity in the renewal request.

To construct the caisson seat float-in, the Navy would use vibratory pile driving to install six temporary dolphins, comprised of twelve, 30-inch (in) diameter steel pipe piles (a reduction in size from the 36-in diameter steel pipe piles analyzed for this activity in the 2019 IHA).

To construct the remaining portion of the caisson seat foundation, the renewal request includes the installation of twenty 27-in sheet piles using a combination of vibratory and impact pile driving, as described in the initial IHA. The 2019 IHA analyzed the potential for Level A harassment and Level B harassment from installation of twenty 24-in sheet piles using the identical installation methods; the size of the sheet pile included in the renewal request is slightly larger and the source levels used to model distances to the Level A harassment and Level B harassment isopleths are accordingly

slightly higher (see *Estimated Take* section, Table 1). However, although the sheet pile size is slightly larger, the number of 27-in sheet piles (20) associated with installation of the caisson seat foundation included in the renewal request is identical in number to that planned for the caisson seat foundation and also a small subset of the total number (320) of 24 in sheet piles included in the initial IHA.

Finally, the Navy proposes to construct a temporary blast wall, comprised of 15, 30-in steel pipe piles and 70 25-in sheet piles installed using vibratory pile driving only. This wall would be located within the project area, across the opening of the existing Dry Dock 1 between Berth 1 and Berth 11A and opposite the caisson seat, described in the proposed initial IHA (84 FR 13252; April 4, 2019). For comparison, the initial IHA included vibratory installation of 48, 36-in steel pipe piles and 320 24-in sheet piles. Therefore, the renewal request includes nearly identical pile sizes (steel pipe and sheet) and identical installation method to those described and included in the initial IHA.

A detailed description of the construction activities for which take is proposed here may be found in the **Federal Register** notice of proposed IHA for the 2019 authorization (84 FR 13252; April 4, 2019). As stated above, the location and nature of the pile driving operations, including the type and size of piles and the methods of pile driving, are identical or nearly identical to those analyzed in the 2019 IHA. The proposed IHA renewal would be effective from the date of issuance to February 27, 2022 (*i.e.*, one year after the expiration of the initial IHA), although all construction proposed in the renewal request would be completed between March 1, 2021 and March 31, 2021.

#### *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 2019 authorization (84 FR 13252; April 4, 2019). NMFS has reviewed recent

draft Stock Assessment Reports, information on relevant Unusual Mortality Events, and other scientific literature. NMFS has preliminarily determined that there is no new information that 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 2019 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** notices for the proposed initial IHA (84 FR 13252; April 4, 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** notices for the initial IHA, including the proposed 2019 IHA (84 FR 13252; April 4, 2019) and final 2019 IHA (84 FR 24476; May 28, 2019). Marine mammal occurrence data applicable to this authorization remain unchanged from the previously issued IHA. Similarly, the stocks taken, methods of estimating take, and types of take remain unchanged from the previously issued IHA. As mentioned previously, due to the use of slightly different pile sizes, the source levels included in the renewal request (Table 1) are nearly identical, rather than identical, to those analyzed in the 2019 IHA and included in the initial IHA. In addition, the number of construction days and piles proposed in the Renewal request (Tables 2 and 3) are fewer than those included in the initial IHA. Finally, the proposed maximum ensonified area, or region of influence (ROI), is smaller (0.42 square kilometers (km<sup>2</sup>)) than that

analyzed in the initial IHA (0.85 km<sup>2</sup>) because the completed construction (*e.g.*, southern closure wall and majority of the caisson seat foundation) created additional barriers to sound produced by construction activities.

**Table 1. Summary of in-water pile driving source levels (SL) at 10 m from source**

| Pile Type and Size              | Installation Method | SPL <sub>pk</sub> , dB re 1 μPa | SPL <sub>rms</sub> , dB re 1 μPa | SEL, dB re 1 μPa <sup>2</sup> -s |
|---------------------------------|---------------------|---------------------------------|----------------------------------|----------------------------------|
| 30-inch steel pipe <sup>1</sup> | Vibratory           | NA                              | 167 (175)                        | 167 (175)                        |
| 27-inch sheet pile <sup>2</sup> | Vibratory           | NA                              | 167 (163)                        | 167 (163)                        |
| 27-inch sheet pile <sup>3</sup> | Impact              | 211 (205)                       | 196 (190)                        | 181 (180)                        |
| 25-inch sheet pile <sup>2</sup> | Vibratory           | NA                              | 163 (163)                        | 163 (163)                        |

SPL<sub>pk</sub>, dB re 1 μPa=peak sound pressure level referenced to 1 micropascal; SPL<sub>rms</sub>=root mean square sound pressure level referenced to 1 micropascal; SEL=sound exposure level referenced to 1 micropascal-squared-second; values from 2019 IHA in parentheses: <sup>1</sup>vibratory installation of 36 in steel pile; <sup>2</sup>vibratory installation of 24 in sheet pile; <sup>3</sup>impact installation of 24 in sheet pile

Table 2 includes information for both the subset of activities using vibratory pile driving the Navy will not complete before the current IHA expires (*e.g.*, completion of the caisson seat foundation and installation of the guide dolphins for the caisson seat float-in structure) as well as the newly proposed activity, construction of a temporary blast wall.

**Table 2. Distances and areas of harassment zones, and associated construction activities for vibratory pile driving**

| Section                             | Pile Size (inch (in)) and Count | Total Pile Driving Days | Level A Harassment Injury (PTS Onset)  |   | Behavior Disturbance Level B Harassment                      |
|-------------------------------------|---------------------------------|-------------------------|--|---|--|
|                                     |                                 |                         | High-Frequency Cetaceans 173 dB SEL <sub>cum</sub> <sup>1</sup> Threshold Radial distance/Area | Phocid Pinnipeds 201 dB SEL <sub>cum</sub> Threshold Radial Distance/Area | All Marine Mammals 120 dB RMS Threshold Radial Distance/ROI* |
| Caisson seat foundation             | 27 in steel sheet (20)          | 2                       | 25.4 m/0.001746 km <sup>2</sup>  | 10.4 m/0.000338 km <sup>2</sup>   | 13,594 m/0.42 km <sup>2</sup>                                |
| Guide dolphins for caisson float-in | 30 in steel pipe (12)           | 12                      | 4.8 m/0.000072 km <sup>2</sup>   | 2.0 m/0.000012 km <sup>2</sup>  | 13,594 m/0.42 km <sup>2</sup>                                |
| Temporary blast wall                | 30 in steel pipe (15)           | 8                       | 7.7 m/0.000185 km <sup>2</sup>   | 3.2 m/0.000032 km <sup>2</sup>  | 13,594 m/0.42 km <sup>2</sup>                                |
| Temporary blast wall                | 25 in steel sheet (70)          | 7                       | 22.5 m/0.001378 km <sup>2</sup>  | 9.2 m/0.000264 km <sup>2</sup>  | 13,594 m/0.42 km <sup>2</sup>                                |

\*Region of influence (ROI); potentially ensounded area capped due to landmass and existing Dry Dock 1 structural interception of noise.

<sup>1</sup>SEL<sub>cum</sub>=cumulative sound exposure level

Table 3 provides information for impact driving of sheet piles required to complete construction of the caisson seat foundation.

**Table 3. Distances and areas of harassment zones, and associated construction activities for impact pile driving**

| Section                 | Pile Size (inch(in)) and Count | Total Pile Driving Days | Level A Harassment Injury (PTS Onset)                                     |  | Behavior Disturbance Level B                                 |
|-------------------------|--------------------------------|-------------------------|---|--|--|
|                         |                                |                         | High-Frequency Cetaceans 155 dB SEL <sub>cum</sub> <sup>1</sup> Threshold | Phocid Pinnipeds (Seals) 185 dB SEL <sub>cum</sub> Threshold | All Marine Mammals 160 dB RMS Threshold Radial distance/ROI* |
| Caisson seat foundation | 27 in steel sheet (20)         | 2                       | 2,055.5 m/0.42 km <sup>2</sup>  | 923.5 m/0.40 km <sup>2</sup>                                 | 2,512 m/0.42 km <sup>2</sup>                                 |

\*Region of influence (ROI); potentially ensounded area capped due to landmass and existing Dry Dock 1 structural interception of noise.

<sup>1</sup>SEL<sub>cum</sub>=cumulative sound exposure level

Takes estimated in the renewal request were zero for three of the five species included in the 2019 and initial IHAs (harbor porpoise, hooded seal, and harp seal) because the densities for these species were zero at the specified location during the proposed construction period (March 1, 2021 through March 31, 2021). For the other two species, the number of proposed takes, which are indicated below in Table 4, are less than those authorized in the 2019 IHA (harbor seals: 284 Level A harassment takes, 776 Level B harassment takes; gray seals: 25 Level A harassment takes, 35 Level B harassment takes).

**Table 4. Estimated Take Proposed for Renewal and Proportion of Population Potentially Affected**

| Species     | Estimated Take by Level B harassment | Estimated Take by Level A harassment | Stock             | Abundance of Stock | Percentage of stock potentially affected |
|-------------|--------------------------------------|--------------------------------------|-------------------|--------------------|--|
| Harbor seal | 29                                   | 2                                    | W. North Atlantic | 75,834             | 0.04                                     |
| Gray seal   | 3                                    | 0                                    | W. North Atlantic | 27,131             | 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 2019 IHA (84 FR 24476; May 28, 2019) and initial IHA (84 FR 67261; December 9, 2019), 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 shut down procedures if any marine mammal approaches or enters the shutdown zone for pile driving (10 meters (m) (33 feet (ft)) for vibratory pile driving of steel pipe and sheet piles; 50 m (164 ft) for impact driving of steel pipe and sheet piles). For in-water heavy machinery work other than pile driving (*e.g.* standard barges, barge-mounted cranes, excavators, *etc.*), 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. Trained observers must monitor to implement shutdowns and collect information at each active pile driving location (whether vibratory or impact driving of steel pipe or sheet piles).

Pile driving activities may only be conducted during daylight hours. If the shutdown zone is obscured by fog or poor lighting conditions, pile driving will not be initiated until the entire shutdown zone is visible. Work that has been initiated appropriately in conditions of good visibility may continue during poor visibility. The shutdown zone will be monitored for 30 minutes prior to initiating the start of pile driving, during the activity, and for 30 minutes after activities have ceased. If pinnipeds are present within the shutdown zone prior to pile driving, the start will be delayed until the animals leave the shutdown zone of their own volition, or until 15 minutes elapse without re-sighting the animal(s).

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. The Navy must conduct an initial set of three strikes from the impact hammer at reduced energy, followed by a 30-second waiting period, succeeded by two subsequent three strike sets.

#### Proposed Monitoring Requirements

The Navy will employ trained protected species observers (PSOs) to conduct marine mammal monitoring for its Portsmouth Naval Shipyard modification and expansion project. The purposes of marine mammal monitoring are to implement mitigation measures and learn more about impacts to marine mammals from the Navy's construction activities. The PSOs will be located at the best vantage points (primarily on docks and piers) to observe and collect data on marine mammals in and around the

project area. PSOs will monitor all Level A harassment zones and at least two-thirds of the Level B harassment zones for 30 minutes before, during, and after all pile installation work.

#### Proposed Reporting Requirements

The Navy must provide NMFS with a draft monitoring report within 90 calendar days of the expiration of the IHA, or within conclusion of the construction work, whichever comes first. This report must detail the monitoring protocol, summarize the data recorded during monitoring, and estimate the number of marine mammals that may have been harassed. If comments are received from NMFS on the draft report within 30 days, a final report shall be submitted to NMFS within 30 days thereafter. If no comments are received from NMFS within 30 days after receipt of the draft report, the draft report will be considered final.

In the unanticipated event that the construction activities clearly cause the take of a marine mammal in a manner prohibited by this Authorization, such as an injury, serious injury, or mortality (Level A take), the Navy shall immediately cease all operations and immediately report the incident to the NMFS Office of Protected Resources and the NMFS Greater Atlantic Coast Region Stranding Coordinator. The report must include the following information:

1. Time, date, and location (latitude and longitude) of the incident;
2. Description of the incident;
3. Status of all sound sources used in the 24 hours preceding the incident;
4. Environmental conditions (wind speed, wind direction, sea state, cloud cover, visibility, water depth);
5. Description of the marine mammal observations in the 24 hours preceding the incident;
6. Species identification or description of the animal(s) involved;

7. The fate of the animal(s); and
8. Photographs or video footage of the animal(s), if equipment is available.

Activities shall not resume until NMFS is able to review the circumstances of the prohibited take. NMFS will work with the Navy to determine what is necessary to minimize the likelihood of further prohibited take and ensure MMPA compliance. The Navy may not resume their activities until notified by NMFS via letter, email, or telephone.

In the event that the Navy discovers an injured or dead marine mammal, and the marine mammal observer determines that the cause of injury or death is unknown and the death is relatively recent (less than a moderate state of decomposition), the Navy will immediately report the incident to the NMFS Office of Protected Resources, and the NMFS Greater Atlantic Coast Region Stranding Coordinator. The report must include the same information identified above. Activities may continue while NMFS reviews the circumstances of the incident. NMFS will work with the Navy to determine whether modifications in the activities are appropriate.

In the event that the Navy discovers an injured or dead marine mammal, and the marine mammal observer determines that the injury or death is not associated with or related to the activities authorized in the IHA (previously wounded animal, carcass with moderate to advanced decomposition, or scavenger damage), the Navy shall report the incident to the NMFS Office of Protected Resources, and the NMFS Greater Atlantic Coast Region Stranding Coordinator within 24 hours of the discovery. The Navy shall provide photographs or video footage (if available) or other documentation of the stranded animal(s) to NMFS Office of Protected Resources, and the NMFS Greater Atlantic Coast Region Stranding Coordinator. The Navy may continue its operations under such a case.

## **Public Comments**

As noted previously, NMFS published a notice of a proposed 2019 IHA (84 FR 13252; April 4, 2019) and solicited public comments on both our proposal to issue the 2019 IHA for the Navy's construction activities and on the potential for an IHA renewal, should certain requirements be met.

All public comments were addressed in the notice announcing the issuance of the initial IHA (84 FR 24476; May 28, 2019). 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 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 IHA process. If NMFS adopts the proposed renewal process, the Commission recommends that NMFS provide the Commission and the public a legal analysis supporting its conclusion that the process is consistent with section 101(a)(5)(D) of the MMPA.

*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 the Navy are identical or nearly identical to those analyzed in the initial IHA, as are the method of taking and the effects of the action (though the amount of proposed authorized take is notably lower). The potential effects of the Navy's activities are limited to Level A harassment and Level B harassment

in the form of auditory injury and behavioral disturbance. In analyzing the effects of the activities in the 2019 IHA, NMFS determined that the Navy'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 percent 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 affect 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) the Navy'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. To ensure ESA compliance for the issuance of IHAs, NMFS consults internally whenever we propose to authorize take for endangered or threatened species. 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 IHA renewal to the Navy for conducting in-water construction activities associated with the modification and expansion of Portsmouth Naval Shipyard Dry Dock 1 from the date of issuance through February 27, 2022, provided the previously described mitigation, monitoring, and reporting requirements are incorporated. A draft of the proposed and final 2019 IHA can be found at <https://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 17, 2021.

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