



## **DEPARTMENT OF COMMERCE**

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

**RTID 0648-XA903**

#### **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; issuance of Renewal incidental harassment authorization (IHA).

**SUMMARY:** In accordance with the regulations implementing the Marine Mammal Protection Act (MMPA), as amended, notification is hereby given that NMFS has issued a Renewal incidental harassment authorization (IHA) to the Chesapeake Tunnel Joint Venture (CTJV) to incidentally harass marine mammals incidental to the Parallel Thimble Shoal Tunnel Project (PTST) in Virginia Beach, Virginia.

**DATES:** This Renewal IHA is valid from March 10, 2021, through March 9, 2022.

**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](https://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, an incidental harassment authorization is issued.

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 initial IHA expires and a Renewal would allow for completion of the activities beyond that described in the **DATES** section of the notice of issuance of the initial IHA, provided all of the following conditions are met:

1. 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).

2. The request for renewal must include the following:

- 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).

- 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.

3. 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.*

### **History of Request**

On March 10, 2020, NMFS issued an IHA to CTJV to take marine mammals incidental to the PTST in Virginia Beach, Virginia (85 FR 16061), effective from March 10, 2020, through March 9, 2021. On December 15, 2020, NMFS received an application for the Renewal of that initial IHA. As described in the application for Renewal, the activities for which incidental take is requested are identical to, and consist of a subset of, those covered in the initial authorization. As required, the applicant also provided a preliminary monitoring report (available online at *www.fisheries.noaa.gov/action/incidental-take-authorization-chesapeake-tunnel-joint-venture-parallel-thimble-shoal-0*) 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**

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 initial 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 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 planned activities. For additional detail, please see the **Federal Register** notice of proposed Renewal IHA (86 FR 8594; February 8, 2021).

#### *Description of Marine Mammals*

A description of the marine mammals in the area of the activities for which take is authorized, 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 (UME), 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 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 sections 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 authorized 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 UMEs, 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 proposed and final initial IHAs (84 FR 64847; November 25, 2019 and 85 FR 16061; March 20, 2020). The source levels and marine mammal occurrence data applicable to this authorization remain unchanged from the initial IHA. 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 Renewal IHA. However, a commenter highlighted a change in the analytical method NMFS now uses specifically to assess the impacts of DTH pile installation that would result in a larger Level B

harassment zone when those activities are conducted. Therefore, because the take numbers developed for most species for which take is authorized involve qualitative elements, because the reduction in total days of work may not result in a substantive decrease in the take number for bottlenose dolphin due to the potentially larger Level B harassment zone under the alternative DTH approach, and because the monitoring results do not suggest take higher than that initially authorized even in consideration of the potentially larger Level B harassment zones (all of which is discussed below in the **Comments and Responses** section), we carry forward the take numbers unchanged for this Renewal IHA. The stocks taken, methods of take, and types of take remain unchanged from the initial IHA, as do the number of takes, which are indicated below in Table 1.

**Table 1. Authorized Take 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 Mitigation, Monitoring and Reporting Measures*

The 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. Further detail regarding the mitigation, monitoring, and reporting requirements prescribed through the IHA can be found in the notice of issuance for the initial IHA (85

FR 16061; March 20, 2020). The following measures are included in this renewal:

#### 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 during pile driving are as follows: 100 meters (m) for harbor porpoise and bottlenose dolphin; 15 m for harbor seal and gray seal. For humpback whale, shutdown distances during pile driving correspond with the estimated Level A harassment zones. 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 30 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 feet (3.3 m) in depth.

#### Monitoring Requirements

The CTJV will be required to station between two and four Protected Species Observers (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 the best possible view if the Level B harassment zone and shutdown zones cannot reasonably be observed by one PSO.



## 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.

## Comments and Responses

A notice of NMFS' proposal to issue a Renewal IHA to CTJV was published in the **Federal Register** on February 8, 2021 (86 FR 8594). That notice either described, or referenced descriptions of, the applicant's activity, the marine mammal species that may be affected by the activity, the anticipated effects on marine mammals and their habitat, estimated amount and manner of take, and proposed mitigation, monitoring, and reporting measures. NMFS received comment letters from the Marine Mammal Commission (Commission), Center for Biological Diversity (CBD), and a private citizen. The private citizen expressed general concern regarding ecological effects of the activity and, in particular, potential effects of the activity to fish. We acknowledge the comments and refer the commenter to the notice of proposed IHA for the initial IHA (84 FR 64847), which addresses in detail the potential effects of the activity on marine mammals, including to marine mammal habitat (including prey species such as fish). A summary of the comments and our responses are provided below, and the comment letters are available online at [www.fisheries.noaa.gov/action/incidental-take-authorization-chesapeake-tunnel-joint-venture-parallel-thimble-shoal-0](http://www.fisheries.noaa.gov/action/incidental-take-authorization-chesapeake-tunnel-joint-venture-parallel-thimble-shoal-0).

*Comment:* The Commission recommended that NMFS deny CTJV's request to renew its incidental harassment authorization. The Commission bases its recommendation on its assessment that certain Level B harassment zones were underestimated in the initial IHA.

*Response:* NMFS does not agree with the Commission's recommendation, and does not adopt it. The Commission correctly points out that NMFS' practice with regard to analysis of sound output from DTH pile installation has changed during the interval between issuance of the initial IHA to CTJV and NMFS' receipt of CTJV's request for renewal of that IHA. DTH is an installation technique that is poorly understood from the perspective of sound output characteristics. In this context of data scarcity, NMFS historically considered DTH installation to be a non-impulsive sound source, as it was believed to be essentially a drilling technique. With the availability of some of the first acoustic monitoring data for the DTH technique, NMFS determined that it would be more appropriate to treat DTH as an impulsive sound source, due to the percussive hammering element of the technique, and analyzed the potential effects of marine mammal exposure to noise produced through use of the DTH technique accordingly. This was the approach taken in evaluating the effects of DTH in support of issuance of the initial IHA (85 FR 16061). As additional acoustic monitoring data became available, NMFS evaluated that the DTH technique produces sound with both impulsive and continuous characteristics. Therefore, as referenced by the Commission, NMFS began in 2020 its current practice of treating DTH pile installation as both impulsive (more conservative for the purposes of evaluating Level A harassment) and continuous (more conservative for the purposes of evaluating Level B harassment). NMFS has adopted this approach in the context of significant uncertainty regarding DTH installation source characteristics because it is the most precautionary approach, recognizing that it likely overestimates potential take of marine mammals. This approach ensures that the largest potential ranges to effect for

both Level A and Level B harassment are accounted for in producing a conservative effects analysis.

To reiterate, NMFS has adopted the aforementioned approach on an interim basis in a context of significant uncertainty. Work is ongoing to better understand DTH pile installation and to develop tools to facilitate impact assessments for this activity. However, the apparent certitude with which the Commission treats this topic in making their recommendation is misplaced. NMFS does not agree that the actual Level B harassment zones are likely to be as large as asserted by the Commission. Although NMFS would indeed treat a new application involving DTH pile installation according to the newer, more precautionary analytical approach, it is not inappropriate to carry forward the existing analysis from the initial IHA in support of this renewal.

The purpose of estimating harassment zones is to inform both the development of appropriate numbers of take for authorization and of mitigation and monitoring requirements. Concerns regarding the adequacy of authorized take numbers and of mitigation and monitoring requirements apply in this circumstance only to Level B harassment, as treatment of the source as impulsive results in the same approach to evaluating potential Level A harassment as would be used under the newer method. The initial IHA authorized take for five marine mammal species. Of these five, a density-based approach, in which a density value is applied over some area (*i.e.*, the estimated harassment zone), was taken for only one species. While the size of the harassment zone is one consideration in estimating a potential take number when use of a density value is not possible or is inappropriate, it is not determinative of the take number. Therefore, for the humpback whale, harbor porpoise, harbor seal, and gray seal, NMFS has reviewed all of the applicable information, including that used in lieu of density in determining the take number, and found that it remains appropriate. We note that no individuals of these four species, with the exception of a lone humpback whale observed outside of the

estimated harassment zone, were observed during required monitoring under the initial IHA.

For bottlenose dolphins, a density-based approach was used in estimating the take number for authorization. Therefore, the size of the harassment zone may be influential on the take number. However, the initial IHA authorized 28,388 incidents of take for bottlenose dolphin, while CTJV reported having observed only 100 dolphins despite completing roughly one-third of the previously planned activity days. Preliminary monitoring data shows marine mammal detections reported from as much as 2.1 km distant from the PSO location, indicating that PSOs were not limiting their observational effort to the estimated Level B harassment zones. In NMFS' judgment, the difference between authorized take and actual dolphin detections indicates that the analysis performed in support of the initial IHA likely overestimated the potential effects of the specified activity on bottlenose dolphin, potential underestimation of certain Level B harassment zones notwithstanding. The authorized take number for bottlenose dolphin provided in the initial IHA is sufficient to provide an adequate basis for analysis of both negligible impact and small numbers and, therefore, the findings made in support of the initial IHA remain valid.

Prescription of appropriate mitigation and monitoring requirements are at NMFS' discretion, within the bounds of the MMPA's requirement to prescribe the means of effecting the "least practicable adverse impact" on the species or stock and its habitat. The Commission's assertion that potential underestimation of certain Level B harassment zones results in application of "inappropriate" monitoring measures, or monitoring measures that are inconsistent with other similar IHAs, is unfounded. The IHA includes requirements to establish monitoring locations and to report, among other things, "[t]he number of marine mammals observed, by species, relative to the pile location..." CTJV is required to report observations of marine mammals at any distance from the pile

driving activity in conjunction with behavioral observations and, therefore, the prescribed monitoring is appropriate regardless of the estimated harassment zone size. The existing monitoring requirements do not constrain or provide inappropriate direction to the applicant or PSO team, and NMFS expects that the information required to be reported will be sufficient to enable an evaluation of whether the authorized taking is having more than a negligible impact on the affected species or stocks.

In making its recommendations, the Commission sets up a false dichotomy between increased efficiency—*i.e.*, issuance of the requested renewal IHA in support of the continuation of a critical infrastructure project—and the protection of marine mammals afforded by the MMPA. As demonstrated herein, both the mandatory satisfaction of statutory requirements and the objective of increased efficiency are appropriately accomplished through issuance of the requested renewal IHA. The criteria for renewal are clearly met, as (1) the request was received in a timely fashion; (2) the activities to be conducted under the authorization renewal are identical to the activities analyzed under the initial IHA; and (3) the preliminary monitoring report does not indicate impacts of a scale or nature not previously analyzed or authorized. Moreover, satisfaction of these criteria and review of other pertinent information, including available information regarding DTH pile installation, indicates that there are no more than minor changes in the activities, that the mitigation and monitoring measures remain the same and appropriate, and that the findings in the initial authorization remain valid. As such, it is appropriate to issue the renewal IHA.

*Comment:* The CBD commented that NMFS should not approve the requested renewal IHA unless NMFS ensures that this and other projects and activities in the area will in aggregate have a negligible impact on marine mammal populations. CBD suggests in particular that the issuance of concurrent incidental take authorizations for two separate construction projects would increase the likelihood of injurious vessel

interactions for humpback whales. CBD also states its opposition to the use of a categorical exclusion under NEPA.

*Response:* NMFS does not agree with CBD's comments. We first address the notion that, under the MMPA, the "aggregate" effects of multiple activities must be evaluated in making a finding of negligible impact in support of issuance of a particular incidental take authorization. Neither the MMPA nor NMFS' codified implementing regulations call for consideration of other unrelated activities and their impacts on populations. The preamble for NMFS' implementing regulations (54 FR 40338; September 29, 1989) states in response to comments that the impacts from other past and ongoing anthropogenic activities are to be incorporated into the negligible impact analysis via their impacts on the baseline. Consistent with that direction, NMFS has factored into its negligible impact analysis the impacts of other past and ongoing anthropogenic activities via their impacts on the baseline, *e.g.*, as reflected in the density/distribution and status of the species, population size and growth rate, and other relevant stressors. The 1989 final rule for the MMPA implementing regulations also addressed public comments regarding cumulative effects from future, unrelated activities. There NMFS stated that such effects are not considered in making findings under section 101(a)(5) concerning negligible impact. In this case, both this renewal IHA as well as the IHA currently in effect and issued in association with the Hampton Roads Bridge Tunnel (HRBT) Expansion Project in Norfolk, Virginia, are appropriately considered an unrelated activity relative to the other. The IHAs are unrelated in the sense that they are discrete actions under section 101(a)(5)(D), issued to discrete applicants.

Section 101(a)(5)(D) of the MMPA requires NMFS to make a determination that the take incidental to a "specified activity" will have a negligible impact on the affected species or stocks of marine mammals. NMFS' implementing regulations require applicants to include in their request a detailed description of the specified activity or

class of activities that can be expected to result in incidental taking of marine mammals. 50 CFR 216.104(a)(1). Thus, the “specified activity” for which incidental take coverage is being sought under section 101(a)(5)(D) is generally defined and described by the applicant. Here, CTJV was the applicant for the initial IHA (as well as this renewal), and we are responding to the specified activity as described in that application (and making the necessary findings on that basis).

Regarding the specific issue of concern in CBD’s comments, we acknowledge CBD’s concern regarding the ongoing UME involving humpback whales, and that a portion of the whales involved in the UME have shown evidence of pre-mortem vessel strike. However, CBD does not offer any evidence that the specified activity here (the PTST project) is likely to result in a vessel strike of a humpback whale, or that the two projects in aggregate (the separate PTST and HRBT projects) would in aggregate result in increased likelihood of vessel strike. Typical marine construction projects involve use of slow-moving vessels, such as tugs towing or pushing barges, or smaller work boats maneuvering in the vicinity of the construction project. These vessel types are not typically associated with vessel strikes resulting in injury or mortality. We acknowledge the data presented by CBD (24 humpback whale strandings in Virginia over 5 years; these represent approximately 16 percent of total humpback whale strandings over the 5-year period), but posit that vessel strike incidents in the area are most likely caused by commercial traffic through the Hampton Roads. For example, during 2018-2019, a significant majority of total vessels exceeding 65 m in length transiting through the Chesapeake Seasonal Management Area (a management area within which speeds for vessels > 65 m in length are to be reduced at certain times of year to reduce strikes of North Atlantic right whales) was by commercial cargo vessels (*e.g.*, container vessels, tankers, bulk cargo; NMFS, 2020). In summary, it is extremely unlikely that construction

project-related vessel traffic would result in a marine mammal strike and CBD provides no evidence to the contrary.

Although there is no evidence to suggest that vessel strike would occur as a result of the specified activity, the UME is a relevant consideration in making a negligible impact determination. We discussed the UME and its effects in the notice of proposed IHA for the initial IHA, and expand that discussion here in response to CBD's comments. The UME does not yet provide cause for concern regarding population-level impacts for humpback whales. Despite the UME, the relevant population of humpback whales (the West Indies breeding population, or distinct population segment (DPS)) remains healthy. Prior to 2016, humpback whales were listed under the ESA as an endangered species worldwide. Following a 2015 global status review (Bettridge *et al.*, 2015), NMFS established 14 DPSs with different listing statuses (81 FR 62259; September 8, 2016) pursuant to the ESA. The West Indies DPS, which consists of the whales whose breeding range includes the Atlantic margin of the Antilles from Cuba to northern Venezuela, and whose feeding range primarily includes the Gulf of Maine, eastern Canada, and western Greenland, was delisted. The status review identified harmful algal blooms, vessel collisions, and fishing gear entanglements as relevant threats for this DPS, but noted that all other threats are considered likely to have no or minor impact on population size or the growth rate of this DPS (Bettridge *et al.*, 2015). As described in Bettridge *et al.* (2015), the West Indies DPS has a substantial population size (*i.e.*, approximately 10,000; Stevick *et al.*, 2003; Smith *et al.*, 1999; Bettridge *et al.*, 2015), and appears to be experiencing consistent growth. In context of this status, the approximately 145 recorded strandings during the UME do not provide concern that the effects of the specified activity would be greater than negligible.

We address finally CBD's contention that it is not appropriate to categorically exclude the action of issuing the renewal IHA from further analysis under NEPA. A



categorical exclusion (CE) is a category of actions that an agency has determined does not individually or cumulatively have a significant effect on the quality of the human environment, and is appropriately applied for such categories of actions so long as there are no extraordinary circumstances present that would indicate that the effects of the action may be significant. Extraordinary circumstances are situations for which NOAA has determined further NEPA analysis is required because they are circumstances in which a normally excluded action may have significant effects. A determination of whether an action that is normally excluded requires additional evaluation because of extraordinary circumstances focuses on the action's potential effects and considers the significance of those effects in terms of both context (consideration of the affected region, interests, and resources) and intensity (severity of impacts). Potential extraordinary circumstances relevant to this action include (1) adverse effects on species or habitats protected by the MMPA that are not negligible; (2) highly controversial environmental effects; (3) environmental effects that are uncertain, unique, or unknown; and (4) the potential for significant cumulative impacts when the proposed action is combined with other past, present, and reasonably foreseeable future actions.

The relevant NOAA CE associated with issuance of incidental take authorizations is CE B4, "Issuance of incidental harassment authorizations under section 101(a)(5)(A) and (D) of the MMPA for the incidental, but not intentional, take by harassment of marine mammals during specified activities and for which no serious injury or mortality is anticipated." This action falls within CE B4. In determining whether a CE is appropriate for a given incidental take authorization, NMFS considers the applicant's specified activity and the potential extent and magnitude of takes of marine mammals associated with that activity along with the extraordinary circumstances listed in the Companion Manual for NAO 216-6A and summarized above. The evaluation of whether extraordinary circumstances (if present) have the potential for significant environmental

effects is limited to the decision NMFS is responsible for, which is issuance of the incidental take authorization. While there may be environmental effects associated with the underlying action, potential effects of NMFS' action are limited to those that would occur due to the authorization of incidental take of marine mammals. NMFS prepared numerous Environmental Assessments (EAs) analyzing the environmental impacts of the categories of activities encompassed by CE B4 which resulted in Findings of No Significant Impacts (FONSI) and, in particular, numerous EAs prepared in support of issuance of IHAs related to similar construction actions are part of NMFS' administrative record supporting CE B4. These EAs demonstrate the issuance of a given incidental harassment authorization does not affect other aspects of the human environment because the action only affects the marine mammals that are the subject of the incidental harassment authorization. These EAs also addressed factors in 40 CFR 1508.27 regarding the potential for significant impacts and demonstrate the issuance of incidental harassment authorization for the categories of activities encompassed by CE B4 do not individually or cumulatively have a significant effect on the human environment.

In particular, the issuance of a renewal IHA to CTJV is expected to result in minor, short-term behavioral effects to five species and minor auditory injury to four species due to exposure to underwater sound from pile driving and removal activities. Behavioral disturbance and auditory injury are expected to occur intermittently in the vicinity of the PTST project site during the one-year timeframe. Level A and Level B harassment will be reduced through use of mitigation measures described herein. The issuance of this renewal IHA will not result in highly controversial environmental effects or result in environmental effects that are uncertain, unique, or unknown—the paucity of data regarding DTH pile installation notwithstanding—because numerous entities have been engaged in pile driving and removal activities that result in Level A and Level B harassment of marine mammals in the United States. This type of activity is well

documented; prior authorizations and analysis demonstrates issuance of an IHA for this type of action only affects the marine mammals that are the subject of the authorization. Although the lack of data concerning DTH pile installation leads to some uncertainty regarding the most appropriate analytical approach to estimating harassment zones resulting from use of the technique, the potential effects associated with DTH pile installation are the same as those associated with other typical construction techniques. The ongoing humpback whale UME does not constitute an extraordinary circumstance demanding additional analysis under NEPA.

*Comment:* The Commission recommends that NMFS ensure that CTJV is aware of the reporting requirements set forth in section 6(a) of CTJV's 2020 IHA for the draft and final monitoring reports.

*Response:* NMFS concurs with the Commission's recommendation and will ensure that CTJV is aware of all requirements of the 2020 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.

## **Determinations**

The planned construction activities 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 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.

### **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 determined that the issuance of the IHA Renewal qualifies to be categorically excluded from further NEPA review.

### **Renewal**

NMFS has issued a Renewal IHA to CTJV for the take of marine mammals incidental to construction associated with the PTST at Virginia Beach, Virginia, for a period of one year.

Dated: March 11, 2021.

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Donna S. Wieting,  
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National Marine Fisheries Service.