



DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648-XA937]

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; issuance of a renewal incidental harassment authorization.

SUMMARY: In accordance with the regulations implementing the Marine Mammal Protection Act (MMPA) as amended, notification is hereby given that NMFS has issued a renewal incidental harassment authorization (IHA) to the U.S. Navy (Navy) to take small numbers of marine mammals, by harassment, incidental to Portsmouth Naval Shipyard Dry Dock 1 modification and expansion in Kittery, Maine.

DATES: This authorization is effective from the date of issuance through February 27, 2022.

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 1 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 1-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 a notice, 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.

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 taking of five species of marine mammals (harbor seals (*Phoca vitulina*), gray seals (*Halichoerus grypus*), harp seals (*Pagophilus groenlandicus*), hooded seals (*Cystophora cristata*), and harbor porpoises (*Phocoena phocoena*)). A final version of the application, which NMFS deemed adequate and complete, was submitted on March 11, 2019. NMFS 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 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 additional 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 authorized 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 during March and April, 2021, under the renewal IHA. Additionally, the installation of sheet piles to complete the caisson seat foundation was scheduled to conclude on February 25, 2021, although unanticipated delays prevented the completion of this activity 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 to those described in the initial IHA.

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 will 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 wall, 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, this construction activity will be completed under the renewal IHA.

To construct the caisson seat float-in, the Navy will 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 IHA includes the installation of 20, 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 20, 24-in sheet piles using the identical installation methods; the size of the sheet pile included in this authorization 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 IHA is identical in number to that planned for the caisson seat foundation and is also a small subset of the total number (320) of 24-in sheet piles included in the initial IHA.

Finally, the Navy will 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 will 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. The renewal IHA includes nearly identical pile sizes (steel pipe and sheet) and identical installation methods to those described and included in the initial IHA.

A detailed description of the construction activities for which take is authorized 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.

Comments and Responses

A notice of NMFS' proposal to issue a renewal IHA was published in the **Federal Register** on February 22, 2021 (86 FR 10545). During the 15-day public comment period, NMFS received comments from the Marine Mammal Commission (Commission) and a member of the general public. Specific comments and responses are provided below.

Comment 1: The Commission stated that NMFS has not met its basic renewal IHA issuance criteria based, in part, on the fact that the Navy did not submit a renewal request at least 60 days prior to the needed renewal authorization date.

Response: NMFS engaged in extensive communication with the Navy leading up to the Navy's request for a renewal IHA, and so was prepared to process the request despite the fact that it was not received at least 60 days prior to the requested issuance date. Furthermore, while the Navy indicated when they would prefer to have the renewal effective date, they understood that the process typically takes 60 days to complete and that it may not be complete by that date – so the “needed renewal IHA effective date” was the one they requested or as soon thereafter as possible.

Comment 2: The Commission observed that the Navy based its analyses of the proposed activities on the assumption that construction would occur in the month of March, yet the comment period on the proposed renewal IHA did not close until March 6, 2021, thus limiting the number of available construction days in March.

Response: NMFS concurs that the Navy will not be able to complete the proposed construction activities in March, and has revised the construction timeframe to include

the month of April. The number of days on which construction will occur remains the same. This change does not affect NMFS' analysis or findings.

Comment 3: The Commission observed that the Navy's request to increase the size of sheet piles from 24- to 27-in would increase the size of the Level A harassment zone from (1) 13.7 meters (m) to 25.4 m for high-frequency (HF) cetaceans and 5.6 m to 10.4 m for phocids during vibratory pile driving and (2) 1,763 m to 2,056 m for HF cetaceans and 792 m to 924 m for phocids during impact pile driving (see Table 6 at 84 FR 24485 and Table 2 at 86 FR 10548). The Commission identified that the increase in pile would increase the Level B harassment zone from 7.35 kilometers (km) (84 FR 24485) to 13.59 km (Table 2; 86 FR 10548) during vibratory pile driving and 1 km (Table 6; 84 FR 24485) to 2.5 km (Table 3; 86 FR 10548) during impact pile driving. In addition, the Commission noted that the harassment zones included in the renewal IHA have not been adjusted, despite being clipped by land.

Response: The Commission is correct, the Level A and Level B harassment zones have changed as noted, and the changes have been considered in the analysis. The clipped Level B harassment zones were considered in the renewal proposal and are noted in Table 2.

Comment 4: The Commission stated that the numbers of Level A harassment and Level B harassment takes of harbor seals and gray seals have been underestimated and are likely to cause unnecessary delays and shutdowns. Specifically, the Commission noted that, although the Navy did not conduct monitoring in March or April 2020 (because no construction was occurring), a gray seal was observed during only 5 days of monitoring in March 2018 and 6 to more than 10 individual harbor seals were observed routinely in the immediate project area in April 2018, and that both species have been observed well within the Level A harassment zone of 924 m.

Response: In consideration of the monitoring data the Commission cites, as well as the more recent monitoring data collected by the Navy throughout the rest of the year, NMFS has increased the number of authorized takes for harbor seals and gray seals in the renewal IHA by applying the same methods used in the final initial IHA, which considers group size and the maximum number of each species sighted in a single day, resulting in the following increases in take: harbor seals (Level A: 2 to 4; Level B: 29 to 124); gray seals (Level A: 0 to 1; Level B (3 to 31).

Comment 5: The Commission recommended reevaluating the potential for takes of harbor porpoises, harp seals, and hooded seals, which were proposed in the renewal as zero, despite non-zero densities in the Spring.

Response: NMFS concurs and has now applied the methods described in the initial IHA to the one month of work and included authorization of one Level A take and one Level B take for harbor porpoises, one Level B take for harp seals, and one Level B take for hooded seals.

Comment 6: The Commission observed that the mitigation and monitoring measures in the proposed renewal IHA do not wholly reflect those in the initial IHA.

Response: NMFS acknowledges this error and has made corrections in the renewal IHA.

Comment 7: The Commission observed that the Navy indicated in its preliminary monitoring report for the initial IHA that the presence of active construction equipment reduced the Protected Species Observers's (PSO) ability to fully monitor the harassment zones from Berth 2 and, as a result, the Berth 2 observer location was shifted to a barge in September 1, 2020. The Commission stated that, because the extent to which the PSO's ability to monitor effectively from May through August at Berth 2 is unknown, it is unclear whether the full extents of the harassment zones were monitored effectively and, if they were not, the degree to which extrapolation was both necessary and made. As

such, the Commission questioned whether the numbers of reported takes are accurate and within the authorized limits.

Response: NMFS acknowledges the Commission concern and the limitations of some of the Navy's monitoring in the months to date, however, we disagree with any assertion that the take may have exceeded authorized limits. The Navy's preliminary report indicated that, in May, the Level A harassment and Level B harassment zones were completely monitored during 100 percent of in-water construction activities (vibratory pile driving). In June, the only construction activity was approximately 6.5 hours (hrs) of vibratory pile driving, yet PSOs monitored the project area over 316 hrs over 14 days; despite this monitoring effort, no marine mammals were sighted in the project area. In July, approximately 750 hrs of monitoring (37.5 hrs of which overlapped with vibratory pile driving and drilling activities; no impact pile driving occurred in July) occurred over 22 days, during which only 6 harbor seals (and no other marine mammals) were observed. In August, PSOs monitored the project area for 1,000 hrs over 26 days, 84.5 hrs of which overlapped with construction activities, and during which 27 marine mammals sightings were recorded (25 harbor seals, and 2 sightings of an individual gray seal). The total number of marine mammals observations during the entire project (not limited to periods when in-water construction was occurring) was 721 harbor seals (or 658 unique individuals, excluding re-sightings), 47 gray seals (or 34 unique individuals, excluding re-sightings), and 1 harbor porpoise. There were no Level A harassment takes observed for any species, 167 Level B harassment takes for harbor seals, 8 Level B harassment takes for gray seals, and 1 Level B harassment take of an unidentified seal. However, even if every marine mammal observed throughout the entire construction project was considered taken Level B harassment, the Navy still would not have exceeded their take limit.

The largest Level A harassment zone for vibratory pile driving and drilling, the only construction activities that occurred in May through July, was only 56.5 m, and was likely fully observable by the PSOs positioned at Berths 2 and 11. Impact pile driving, with the largest associated Level A zones (HF: 1,763 m; phocids: 792 m), was not conducted until August, during which (as mentioned above) PSOs monitored for 1,000 hrs over 26 days, sighting only 27 marine mammals. It is unlikely that limitations in visibility experienced by the observer at positioned at Berth 2 prevented detection of a number of marine mammals that would have surpassed the amount of authorized take. In addition, PSOs were only required to monitor two-thirds of the Level B harassment zone during all construction activities, an effort that was supported by up to three additional PSOs beyond the observer located at Berth 2.

Comment 8: The Commission noted deficiencies in the Navy's hydroacoustic monitoring reports (Appendices D and E of the initial IHA preliminary monitoring report). Specifically, the Commission observed that sound pressure level (SPL) measurements (in decibels (dB) re 1 micro Pascal (μ Pa)) in Appendix D were not reported as root-mean-square (rms), which is the appropriate metric and applies to means, medians, maxima, and minima. In addition, the Commission stated that for continuous, non-impulsive sound (*e.g.*, drilling and vibratory pile driving), those SPLrms measurements are to be made over given intervals (*i.e.*, 1-second intervals) and for impulsive sound (*e.g.*, impact pile driving and percussive hammering of a down-the-hole hammer), those SPLrms measurements are to be based on single strikes, same as the sound exposure level and peak SPL measurements, and a 90-percent energy window. The Commission noted that neither Appendix contains all the required information.

Response: NMFS has contacted the Navy and emphasized the importance of following IHA requirements concerning hydroacoustic monitoring reports. The

Appendices A and D referenced by the Commission are part of the Navy's preliminary hydroacoustic report for the initial IHA; corrections will be made in the final report.

Comment 9: The Commission recommended that NMFS deny the Navy's request to renew its incidental take authorization based on the fact that the criteria have not been met and the other deficiencies noted in their letter.

Response: NMFS does not concur with the Commission's assertions, and has not adopted their recommendation to deny the renewal.

The renewal conditions have been met for this renewal proposal. First, our response to Comment 2, above, addresses the issue the Commission raised regarding the receipt of the application 60 days before it is needed. Regarding the activity proposed, as described above, it is comprised of a small subset of the work covered in the original IHA, with minor changes to the sizes of two types of piles (one larger and one smaller), as well as the addition of a temporary blast wall (installing piles one inch larger than that analyzed in the initial IHA), that do not affect the previous analysis, mitigation or monitoring, or take estimates, which are proportionally commensurate to the take authorized in the initial IHA, based on the one month of work covered. Regarding the preliminary monitoring report, as described in our response to Comment 7, the results do not indicate impacts of a scale or nature not previously analyzed or authorized. Last, upon review of the request for renewal, the status of the affected species or stocks, and the preliminary monitoring report, we have determined that there are no more than minor changes in the activities, the mitigation and monitoring measures will remain nearly the same and appropriate, and the findings in the initial IHA remain valid. Further, the other "deficiencies" the Commission references in their letter have been addressed in our responses to the comments above.

Comment: The Commission recommended that NMFS refrain from implementing its proposed renewal process unless it is consistent with the procedural requirements specified in 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.

Comment: Overall, the proposed plan by the Navy to modify and expand Dry Dock 1 is sufficient, as the plan includes using smaller installation pieces to increase efficiency of operations and maintenance of the dock. However, a deeper look into the current potential impacts on the local marine mammals and their habitat is needed. The plan uses mammal occurrence data from 2 years prior, and so might not accurately reflect the number of mammals in the area during the projected construction period. It also seems that proper precautionary actions might not be fully thought out, as work can continue in poor visibility situations as long as the work started in appropriate conditions, and only requires a break of 15 minutes after sighting a mammal within 10 m of the construction area. In order to lessen the potential for harassment and takes of any present mammals, a more thorough approach to mammal observance and mitigation of potential risks in the form of longer stops and larger shutdown zones may help. It may also be important to mention how the modifications of the dock will improve dock operations and maintenance, as opposed to a plan of no action that leaves the dock as is.

Response: NMFS agrees that it is important to continue updating density estimates using the best available information, and will encourage the Navy to

incorporate more recent observations into density estimates for species that occur in the vicinity of the Portsmouth Naval Shipyard.

NMFS authorizes takes of marine mammals as requested because mitigation measures are not expected to entirely prevent Level A harassment and Level B harassment of marine mammals. NMFS works with applicants to develop mitigation measures that are sufficiently protective of marine mammals that might be impacted by the project activities, but also practicable for the applicant to implement. For example, the shutdown distances in Table 2 were negotiated between NMFS and the Navy during the development of the 2019 IHA, providing mitigation of potential impacts to marine mammals close to the construction activity while also preventing an impracticable amount of shutdowns (thus facilitating the Navy's objectives). The interruption of pile installation can present potential safety concerns; therefore, the Navy requested the ability to continue construction activities should visibility deteriorate following pre-clearance and consistent monitoring of the area in good visibility. If a shutdown does occur, the Navy's ability to resume construction activity once the marine mammal has voluntarily left the shutdown zone or has not been sighted for 15 minutes assumes that, based on their relatively small size and associated lung capacity, the species likely to occur (*i.e.*, phocids and harbor porpoises) would surface to breathe within that timeframe and would, therefore, be visible to PSOs.

Finally, because dimensional limitations currently impede operations and maintenance of Dry Dock 1, failure to complete the expansion and modification project would limit the Portsmouth Naval Shipyard's ability to service the Navy's *Virginia* class submarines.

Changes from the Proposed IHA to the Final IHA

NMFS has increased total take of harbor porpoises from 0 to 2, harbor seals from 31 to 128, gray seals from 3 to 32, harp seals from 0 to 1, and hooded seals from 0 to 1.

These changes are described in detail in the *Estimated Take* section. In addition, PSO locations have been specified (see **Monitoring Requirements** section).

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 2019 authorization (84 FR 13252; April 4, 2019). NMFS has reviewed the monitoring data from the initial IHA, recent draft Stock Assessment Reports, information on relevant Unusual Mortality Events, and other scientific literature, and has 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 authorized may be found in the **Federal Register** notices for the proposed initial IHA (84 FR 13252; April 4, 2019). NMFS has reviewed the monitoring data from the initial IHA, 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, though minor changes in the take estimates have been made since the proposed renewal based on consideration of public comment. As mentioned previously, due to the use of slightly different pile sizes, the source levels included in renewal IHA (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 in the renewal IHA (Tables 2 and 3) are fewer than those included in the initial IHA. Finally, the maximum ensonified area (after adjusting for interception by land and existing structures), or Region of Influence (ROI), is smaller (0.418 km²) than that analyzed in the initial IHA (0.854 km², also adjusted for interception by land and existing structures at that time) because 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 inch (in)	Installation Method	SPL _{pk} , dB re 1 μPa	SPL _{rms} , dB re 1 μPa	SEL, dB re 1 μPa ² -s
30-in steel pipe ¹	Vibratory	NA	167 (175)	167 (175)
27-in sheet pile ²	Vibratory	NA	167 (163)	167 (163)
27-in sheet pile ³	Impact	211 (205)	196 (190)	181 (180)
25-in sheet pile ²	Vibratory	NA	163 (163)	163 (163)

SPL_{pk}, dB re 1 μPa=peak sound pressure level referenced to 1 micropascal; SPL_{rms}=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: ¹vibratory installation of 36 in steel pile; ²vibratory installation of 24 in sheet pile; ³impact installation of 24 in sheet pile

Table 2 includes information for both the subset of activities using vibratory pile driving the Navy did not complete before the initial IHA expired (*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 new 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)		Level B Harassment Behavioral Disturbance
			High-Frequency Cetaceans 173 dB SEL _{cum} ¹ Threshold Radial distance/Area	Phocid Pinnipeds 201 dB SEL _{cum} 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 ²	10.4 m/0.000338 km ²	13,594 m/0.418 km ²
Guide dolphins for caisson float-in	30-in steel pipe (12)	12	4.8 m/0.000072 km ²	2.0 m/0.000012 km ²	13,594 m/0.418 km ²
Temporary blast wall	30-in steel pipe (15)	8	7.7 m/0.000185 km ²	3.2 m/0.000032 km ²	13,594 m/0.418 km ²
Temporary blast wall	25-in steel sheet (70)	7	22.5 m/0.001378 km ²	9.2 m/0.000264 km ²	13,594 m/0.418 km ²

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

¹SEL_{cum}=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)		Level B Harassment Behavioral Disturbance
			High-Frequency Cetaceans 155 dB SEL _{cum} ¹ Threshold	Phocid Pinnipeds (Seals) 185 dB SEL _{cum} Threshold	All Marine Mammals 160 dB RMS Threshold Radial distance/ROI*
Caisson seat foundation	27-in steel sheet (20)	2	2,055.5 m/0.418 km ²	923.5 m/0.401 km ²	2,512 m/0.418 km ²

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

¹SEL_{cum}=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). For the other two species, the number of estimated takes were as follows: harbor seals, 2 Level A harassment takes, 29 Level B harassment takes; gray seals, 0 Level A harassment takes, 3 Level B harassment takes. However, in consideration of a comment from the Commission, NMFS has determined that it is appropriate to increase the number of harbor seal and gray seal takes. Accordingly, the same methods utilized in the initial IHA (based on consideration of group size, and the maximum number of sightings in a single day for each species under the initial IHA times the number of construction days (31)) have been used to estimate the Level B harassment take that will result from one month of construction activity. Because monitoring did not occur in March or April 2020 (when no construction was occurring), the maximum number of sightings in a single day for each species (harbor seals: 4; gray seals: 1) is based on observations from May 2020. In addition, Level A harassment take for both harbor seals and gray seals has been increased to correspond to the maximum number sightings in a single day in May 2020. NMFS has also authorized one Level B harassment take for both harp seals and hooded seals (per Commission's recommendation in initial IHA to include one take per month per species during timeframe in which they might be expected in the project area). Finally, one Level A harassment and one Level B harassment take are authorized for harbor porpoises, compared to a total of 5 Level A harassment and 12 Level B harassment takes authorized for the entire year of construction activities under the initial IHA.

Table 4. Authorized Take by Level A Harassment and Level B Harassment

Species	Stock	Abundance of Stock	Take by Level A harassment	Take by Level B harassment	Total Takes	Percentage of stock potentially affected
Harbor porpoise	Gulf of Maine/Bay of Fundy	95,543	1	1	2	0.00
Harbor seal	W. North Atlantic	75,834	4	124	128	0.17
Gray seal	W. North Atlantic	27,131 ¹	1	31	32	0.00
Harp seal	W. North Atlantic	Unknown	0	1	1	0.00
Hooded seal	W. North Atlantic	Unknown	0	1	1	0.00

1 - NMFS stock abundance estimate applies to U.S. population only, actual stock abundance is approximately 505,000.

Description of Mitigation, Monitoring and Reporting Measures

The mitigation, monitoring, and reporting measures included as requirements in this authorization are nearly 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 will apply to the Navy's mitigation requirements.

Mitigation Requirements

In summary, mitigation includes implementation of shutdown procedures if any marine mammal approaches or enters the shutdown zone for pile driving (10 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 will 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 marine mammals 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 30 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.

Monitoring Requirements

The Navy will employ trained 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 to observe and collect data on marine mammals in and around the project area. Because construction of the south closure wall is complete (reducing the size and changing the shape of the ensonified area), potential PSO monitoring locations have been revised from the initial IHA to include the following: Berth 2 Operations Barge, Berth 12, Steamship, Prescott Park, Four Tree Island, and Peirce Island. PSOs will monitor the entire ROI (0.418 km²) for 30 minutes before, during, and after all pile installation work. In addition, PSOs will record sightings at any

distance from the construction activity, which may extend beyond the ROI.

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.

Determinations

The construction activities included in the renewal IHA 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 authorized take under the renewal IHA 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, NMSF 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 nearly identical to the initial IHA, with modifications to PSO monitoring locations relative 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 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 are authorized. Therefore, NMFS determined that consultation under section 7 of the ESA was 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 qualifies to be categorically excluded from further NEPA review.

Authorization

As a result of these determinations, NMFS has issued a renewal IHA to the Navy for the taking of marine mammals incidental to 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. The IHA can be found at <https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-construction-activities>.

Dated: March 12, 2021.

Donna S. Wieting,

Director, Office of Protected Resources,

National Marine Fisheries Service.

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