



DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648-XD137]

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to In-Water Construction on Bainbridge Island, Washington

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

ACTION: Notice; request for comments on proposed renewal incidental harassment authorization (IHA).

SUMMARY: NMFS received a request from Washington State Department of Transportation (WSDOT) Ferries Division for the renewal of their currently active incidental harassment authorization (IHA) to take marine mammals incidental to the Bainbridge Island Ferry Terminal Overhead Loading Replacement Project on Bainbridge Island, Washington within the Puget Sound. These activities consist of activities that are covered by the current authorization but will not be completed prior to its expiration. Pursuant to the Marine Mammal Protection Act, prior to issuing the currently active IHA, NMFS requested comments on both the proposed IHA and the potential for renewing the initial authorization if certain requirements were satisfied. The renewal requirements have been satisfied, and NMFS is now providing an additional 15-day comment period to allow for any additional comments on the proposed renewal not previously provided during the initial 30-day comment period.

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

ADDRESSES: Comments should be addressed to Jolie Harrison, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service,

and should be submitted via email to *ITP.Wachtendonk@noaa.gov*. 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 below.

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: Rachel Wachtendonk, Office of Protected Resources, NMFS, (301) 427-8401.

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 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 Detailed Description of Specified Activities section of the initial IHA issuance notice is planned or (2) the activities as described in the Description of the Specified Activities and Anticipated Impacts section of the initial IHA issuance 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 1 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); and
 - 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; and
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. 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 IHA renewal) with respect to potential impacts on the human environment.

This action is consistent with categories of activities identified in Categorical Exclusion B4 (incidental take authorizations 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 determined that the issuance of the initial IHA qualified to be categorically excluded from further NEPA review. NMFS has preliminarily determined that the application of this categorical exclusion remains appropriate for this renewal IHA.

History of Request

On September 16, 2022, NMFS issued an IHA to WSDOT to take marine mammals incidental to two in-water construction projects on Bainbridge Island, Washington, in the Puget Sound: the Bainbridge Island Ferry Terminal Overhead Loading Replacement Project and Eagle Harbor Maintenance Facility Slip F Improvement Project (87 FR 58313), effective from September 16, 2022 through September 15, 2023. On February 15, 2023, NMFS received an application for the renewal of that initial IHA. As described in the application for renewal IHA, the activities for which incidental take is requested, consist of activities that are covered by the initial

authorization but will not be completed prior to its expiration. As required, the applicant also provided a preliminary monitoring report which confirms that the applicant has implemented the required mitigation and monitoring, and which also shows that no impacts of a scale or nature not previously analyzed or authorized have occurred as a result of the activities conducted.

Description of the Specified Activities and Anticipated Impacts

The WSDOT construction project consists of the Eagle Harbor Slip F Project (the Eagle Harbor Project) and the Bainbridge Ferry Overhead Loading Replacement Project (the Bainbridge Project). The Bainbridge Project consists of replacing the timber trestle and fixed steel portions of the overhead loading structure. This will require the installation of temporary work platforms, installation of a temporary walkway, installation of a new permanent walkway, the removal of the existing overhead loading walkway, and removal of all temporary work platforms and walkways. The Eagle Harbor Project consists of improving the maintenance efficiency of the facility. This will require replacing the existing gangplank system with a pile supported trestle, replacing the existing pair of timber dolphins with a pair of steel wingwalls and two fixed dolphins, and the removal of the existing timber walkway/trestle, four timber pile dolphins, and a U-float.

In total, the initial Bainbridge Project included the installation and removal of 39 24-inch (in) diameter temporary steel pipe piles, the installation of 26 permanent piles (14 30-in and 12 36-in steel pipe piles), and the removal of 76 12-in timber piles. All temporary and permanent piles would be installed first using a vibratory hammer to within 5 feet (ft; 1.5 meter (m)) of tip elevation, and then driven with an impact hammer to verify bearing capacity. The existing timber piles would be removed using a vibratory hammer. The vibratory and impact installation and vibratory extraction of the piles were expected to take up to 57 days of in-water work. The initial Eagle Harbor Project

expected the installation of a new trestle supported by 9 24-in and 2 36-in steel pipe piles, the installation of the pair of steel wingwalls which would consist of 4 36-in steel reaction piles and 2 36-in fender piles, the installation of two fixed dolphins which would consist of 4 30-in diameter steel reaction piles and 1 36-inch diameter fender pile, and the removal of 186 12-in timber piles and 4 18-in steel piles. The piles supporting the trestle would be installed first using a vibratory hammer to within 5 ft (1.5 m) of tip elevation, and then driven with an impact hammer to verify bearing capacity. The installation of the wingwall and dolphin piles and the removal of the steel and timber piles would use a vibratory hammer only. The vibratory and impact installation and vibratory extraction of the piles was expected to take up to 31 days of in-water work.

Under the initial IHA, all work associated with the Eagle Harbor Slip F Project was completed over a 22-day period with use of a vibratory and impact hammer. For the Bainbridge Ferry Terminal Overhead Loading Replacement Project, all project related pile installation activities were completed over a 33-day period with use of a vibratory and impact hammer.

This renewal request is to cover the subset of the activities described for the initial IHA that will not be completed during the effective IHA period. WSDOT plans to remove all 45 12-inch steel pipe and timber piles through vibratory means between September 2023 and September 2024. WSDOT estimates it will take 30 minutes to remove a single pile, with up to 10 piles removed per day.

The likely or possible impacts of the WSDOT's proposed activity on marine mammals could involve both non-acoustic and acoustic stressors and is unchanged from the impacts described in the initial IHA. Potential non-acoustic stressors could result from the physical presence of the equipment, vessels, and personnel; however, any impacts to marine mammals are expected to primarily be acoustic in nature. Acoustic stressors include effects of heavy equipment operation during pile removal. The effects of

underwater noise from the WSDOT's proposed activities have the potential to result in Level B harassment of marine mammals in the action area

Detailed Description of the Activity

A detailed description of the construction activities for which take is proposed here may be found in the notices of the proposed and final IHAs for the initial authorization (87 FR 48623, August 10, 2022; 87 FR 58313, November 16, 2022). As previously mentioned, this request is for a subset of the activities anticipated in the initial IHA that would not be completed prior to its expiration. The location, timing, and nature of the activities, including the types of equipment planned for use, are identical to those described in the previous notice for the initial IHA. WSDOT is requesting a renewal IHA for the vibratory removal of 45 12-in timber and steel pipe piles. The proposed renewal would be effective for a period not exceeding one year from the date of expiration of the initial IHA. The proposed renewal IHA would be effective from September 16, 2023 through September 15, 2024.

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 notice of the proposed IHA for the initial authorization (87 FR 48623, August 10, 2022). 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 which species or stocks have the potential to be affected or the pertinent information in the description of the marine mammals in the area of specified activities contained in the supporting documents for the initial IHA (87 FR 48623, August 10, 2022).

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 the authorization of take is proposed here may be found in the notice of the proposed IHA for the initial authorization (87 FR 48623, August 10, 2022). 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 notices of the proposed and final IHAs for the initial authorization (87 FR 48623, August 10, 2022; 87 FR 58313, November 16, 2022). Specifically, days of operation, area or space within which harassment is likely to occur, and marine mammal occurrence data applicable to this authorization remain unchanged from the initial IHA. Similarly, the stocks taken, methods of take, daily take estimates and types of take remain unchanged from the initial IHA. The number of takes proposed for authorization in this renewal are a subset of the initial authorized takes that represent the amount of activity left to complete. These takes, which reflect the lower number of remaining days of work, are indicated below in Table 1.

Table 1—Proposed Amount of Taking, by Level B Harassment, by Species and Stock and Percent of Take by Stock

Species	Stock	Proposed Take	Percent of Stock
Harbor seal	Washington Northern Inland Waters	60	0.5
California sea lion	U.S.	3	<0.1
Steller sea lion	Eastern	1	<0.1
Killer whale	West Coast Transient	¹ 6	1.7
Harbor porpoise	Washington Inland Waters	9	<0.1

¹Modeled take of 1 increased to typical group size (Ford *et al.* 2013).

Description of Proposed Mitigation, Monitoring and Reporting Measures

The proposed mitigation, monitoring, and reporting measures included as

requirements in the proposed renewal authorization are identical to those included in the Federal Register notice announcing the issuance of the initial IHA, and the discussion of the least practicable adverse impact included in that document and the notice of the proposed IHA remains accurate. The following measures are proposed for this renewal:

- WSDOT must avoid direct physical interaction with marine mammals during construction activity. If a marine mammal comes within 10 m of such activity, operations must cease and vessels must reduce speed to the minimum level required to maintain steerage and safe working conditions, as necessary to avoid direct physical interaction;
- Pre-start clearance monitoring must be conducted during periods of visibility sufficient for the lead Protected Species Observer (PSO) to determine the shutdown zones clear of marine mammals. Construction may commence when the determination is made;
- Pile driving/removal activity must be halted upon observation of either a species for which incidental take is not authorized or a species for which incidental take has been authorized but the authorized number of takes has been met, entering or within the harassment zone;
- WSDOT will establish and implement the shutdown zones. The purpose of a shutdown zone is generally to define an area within which shutdown of the activity would occur upon sighting of a marine mammal (or in anticipation of an animal entering the defined area). Shutdown zones typically vary based on the activity type and marine mammal hearing group. Since the Level A harassment threshold is under 10 m for all hearing groups, the shutdown zone for all hearing groups will be 10 m;
- WSDOT must also implement shutdown measures for Southern Resident killer whales and humpback whales. If Southern Resident killer whales or humpback whales are sighted within the vicinity of the project areas and are approaching the Level

B harassment zone, WSDOT must shut down the pile driving equipment to avoid possible take of these species. If a killer whale approaches the Level B harassment zone during pile driving, and it is unknown whether it is a Southern Resident killer whale or a transient killer whale, it must be assumed to be a Southern Resident killer whale and WSDOT would implement the shutdown measure. The shutdown zone for Southern Resident killer whales, humpback whales, and other unauthorized species is 2,175 m;

- Prior to the start of pile driving for the day, the PSOs must contact the Orca Network to find out the location of the nearest marine mammal sightings;
- WSDOT must submit a draft report detailing all monitoring within 90 calendar days of the completion of marine mammal monitoring or 60 days prior to the issuance of any subsequent IHA for this project, whichever comes first;
- WSDOT must prepare and submit final report within 30 days following resolution of comments on the draft report from NMFS;
- WSDOT must submit all PSO datasheets and/or raw sighting data (in a separate file from the Final Report referenced immediately above); and
- WSDOT must report injured or dead marine mammals.

Comments and Responses

As noted previously, NMFS published a notice of a proposed IHA (87 FR 48623, August 10, 2022) and solicited public comments on both our proposal to issue the initial IHA for the Bainbridge Island Ferry Terminal Overhead Loading Replacement Project and Eagle Harbor Maintenance Facility Slip F Improvement Project and on the potential for a renewal IHA, should certain requirements be met. During the 30-day public comment period, the United States Geological Survey provided a letter stating that it had no comment. No other comments were received on either the proposal to issue the initial IHA for the WSDOT's construction activities or on the potential for a renewal IHA.

Preliminary Determinations

The proposed renewal request consists of a subset of activities analyzed through the initial authorization described above. In analyzing the effects of the activities for the initial IHA, NMFS determined that the WSDOT's activities would have a negligible impact on the affected species or stocks and that authorized take numbers of each species or stock were small relative to the relevant stocks (*e.g.*, less than one-third the abundance of all stocks). The mitigation measures and monitoring and reporting requirements as described above are identical to the initial IHA.

NMFS has preliminarily concluded that there is no new information suggesting that our analysis or findings should change from those reached for the initial IHA. Based on the information and analysis contained here and in the referenced documents, NMFS has determined the following: (1) the required mitigation measures will effect the least practicable impact on marine mammal species or stocks and their habitat; (2) the authorized takes will have a negligible impact on the affected marine mammal species or stocks; (3) the authorized takes represent small numbers of marine mammals relative to the affected stock abundances; (4) WSDOT'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

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

Proposed Renewal IHA and Request for Public Comment

As a result of these preliminary determinations, NMFS proposes to issue a renewal IHA to WSDOT for conducting Bainbridge Island Ferry Terminal Overhead Loading Replacement Project (the Bainbridge Project) in Bainbridge Island, Washington,

from September 16, 2023 through September 15 2024, provided the previously described mitigation, monitoring, and reporting requirements are incorporated. A draft of the proposed and final initial IHA can be found at <https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act>. 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: July 20, 2023.

Kimberly Damon-Randall,

Director, Office of Protected Resources,

National Marine Fisheries Service.

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