



DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

[RTID 0648-XD372]

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to BNSF Railway Bridge Heavy Maintenance Project in King County, Washington.

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

ACTION: Notice; issuance of incidental harassment authorization.

SUMMARY: NMFS has received a request from BNSF Railway (BNSF) for the reissuance of two consecutive, previously issued incidental harassment authorizations (IHA) with the only change being effective dates. The initial IHAs authorized take of seven species of marine mammals, by Level A and Level B harassment, incidental to construction.

DATES: The authorizations are effective from September 28, 2023 to July 15, 2024 for Year 1 and July 16, 2024 to July 15, 2025 for Year 2.

ADDRESSES: An electronic copy of the final IHAs previously issued to the BNSF, the initial application, and the **Federal Register** notices proposing and issuing the initial IHAs may be obtained by visiting <https://www.fisheries.noaa.gov/action/incidental-take-authorization-bnsf-railway-railway-bridge-heavy-maintenance-project-king>. In case of problems accessing these documents, please call the contact listed below (see **FOR FURTHER INFORMATION CONTACT**).

FOR FURTHER INFORMATION CONTACT: Robert Pauline, Office of Protected Resources, NMFS, (301) 427-8401.

SUPPLEMENTARY INFORMATION:

Background

Sections 101(a)(5)(A) and (D) of the Marine Mammal Protection Act (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 authorization is provided to the public for review.

An authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant), and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth.

NMFS has defined “negligible impact” in 50 CFR 216.103 as an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.

The MMPA states that the term “take” means to harass, hunt, capture, kill or attempt to harass, hunt, capture, or kill any marine mammal.

Except with respect to certain activities not pertinent here, the MMPA defines “harassment” as any act of pursuit, torment, or annoyance, which (i) has the potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment); or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (Level B harassment).

Summary of Request

On April 15, 2022, NMFS published final notice of our issuance of two consecutive IHAs authorizing take of marine mammals incidental to the Bridge 6.3 Heavy Maintenance Project in King County, Washington (87 FR 22506; April 15, 2022). The effective dates of the IHAs were

from July 16, 2022 to July 15, 2023 for Year 1 and from July 16, 2023 to July 15, 2024 for Year 2. On August 3, 2023, BNSF informed NMFS that the project would be delayed by one year and requested a reissuance of the initial IHAs. None of the work identified in the initial IHAs (e.g., pile driving and removal) has occurred. Therefore, reissuance of the two consecutive IHAs is appropriate. The initial IHAs authorized take of seven species of marine mammals, by Level A and Level B harassment, incidental to construction (87 FR 22506; April 15, 2022). The Year 1 Authorization was effective from July 16, 2022 to July 15, 2023. The Year 2 Authorization was effective from July 16, 2023 to July 15, 2024. BNSF has requested a subsequent reissuance of the IHAs. The reissued Year 1 IHA will be effective from the date September 28, 2023 to July 15, 2024 and the reissued Year 2 IHA will be effective from July 16, 2024 to July 15, 2025. The scope of the activities and anticipated effects remain the same, authorized take numbers are not changed, and the required mitigation, monitoring, and reporting remains the same as included in the initial IHAs. NMFS is, therefore, reissuing a two identical IHAs to cover the incidental take analyzed and authorized in the initial IHAs.

Summary of Specified Activity and Anticipated Impacts

The planned activities (including mitigation, monitoring, and reporting), authorized incidental take, and anticipated impacts on the affected stocks are the same as those analyzed and authorized through the previously issued initial IHAs.

The purpose of BNSF's Railway Bridge 6.3 Heavy Maintenance Project is to extend the service life of the existing structure by replacing several components of the existing movable span. The location, timing, and nature of the activities, including the types of equipment planned for use, are identical to those described in the initial IHAs. The mitigation and monitoring are also as prescribed in the initial IHAs.

Species that are expected to be taken by the planned activity include minke whale (*Balaenoptera acutorostrata*), common bottlenose dolphin (*Tursiops truncatus*), long-beaked common dolphin (*Delphinus capensis*), harbor porpoise (*Phocoena phocoena*), California sea

lion (*Zalophus californianus*), Steller sea lion (*Eumetopias jubatus*) and harbor seal (*Phoca vitulina*). A description of the methods and inputs used to estimate take anticipated to occur and, ultimately, the take that was authorized is found in the documents referenced below. The data inputs and methods of estimating take are identical to those used in the initial IHAs. NMFS has reviewed recent Stock Assessment Reports, information on relevant Unusual Mortality Events, and recent scientific literature, and determined that no new information affects our original analysis of impacts or take estimate under the initial IHAs.

We refer to the documents related to the previously issued IHAs, which include the **Federal Register** notice of the issuance of the initial IHAs (87 FR 22506; April 15, 2022) for BNSF's construction work (87 FR 22506; April 15, 2022), BNSF's application, the **Federal Register** notice of the proposed IHAs (87 FR4844; January 31, 2022), and all associated references and documents.

Determinations

BNSF will conduct activities as analyzed in the initial IHAs. As described above, the number of authorized takes of the same species and stocks of marine mammals are identical to the numbers that were found to meet the negligible impact and small numbers standards and authorized under the initial IHA and no new information has emerged that would change those findings. The two consecutive, reissued IHAs include identical required mitigation, monitoring, and reporting measures as the initial IHAs, and there is no new information suggesting that our analysis or findings should change.

Based on the information 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; and (4)

BNSF'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.

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 with respect to environmental consequences on the human environment.

Accordingly, NMFS has determined that the reissuance of the IHAs qualifies to be categorically excluded from further NEPA review. This action is consistent with categories of activities identified in CE B4 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. Because the only change to the IHAs are the effective dates, the CE on record for issuance of the initial IHAs applies to this action.

Endangered Species Act (ESA)

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, in this case with the Alaska Regional Office, whenever we propose to authorize take for endangered or threatened species.

However, no incidental take of ESA-listed species is authorized 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.

Authorization

NMFS has issued two consecutive IHAs to BNSF for in-water construction activities associated with the specified activity from the date of issuance to July 15, 2024 for Year 1 and from July 16, 2024 to July 15, 2025 for year 2. All previously described mitigation, monitoring, and reporting requirements from the initial IHAs are incorporated.

Dated: October 2, 2023.

Kimberly Damon-Randall,

Director, Office of Protected Resources,

National Marine Fisheries Service.

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