

DEPARTMENT OF COMMERCE**National Oceanic and Atmospheric Administration**

RIN 0648–XG822

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Biorka Island Dock Replacement Project

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

ACTION: Notice; issuance of an incidental harassment authorization.

SUMMARY: In accordance with the regulations implementing the Marine Mammal Protection Act (MMPA) as amended, notification is hereby given that we have issued an incidental harassment authorization (IHA) to the Federal Aviation Administration (FAA) to take small numbers of marine mammals, by harassment, incidental to the Biorka dock replacement project in Symonds Bay, Alaska.

DATES: This authorization is effective from May 1, 2019, through April 30, 2020.

FOR FURTHER INFORMATION CONTACT: Shane Guan, Office of Protected Resources, NMFS, (301) 427–8401. Electronic copies of the application and supporting documents, as well as the issued IHA, may be obtained online at: www.nmfs.noaa.gov/pr/permits/incidental/construction.htm. In case of problems accessing these documents, please call the contact listed above.

SUPPLEMENTARY INFORMATION:**Background**

The 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 may be 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 in shorthand as “mitigation”); and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth.

History of Request

On March 31, 2017, NMFS received a request from the FAA for an IHA to take marine mammals incidental to pile driving and removal and down-the-hole (DTH) pile driving in association with the Biorka Island Dock Replacement Project (Project) in Symonds Bay, Alaska. NMFS published a notice of a proposed IHA and request for comments in the **Federal Register** on August 30, 2017 (82 FR 41229). We subsequently published the final notice of our issuance of the IHA on October 31, 2017 (82 FR 50397), making the IHA valid for May 1, 2018 through April 30, 2019. In-water work associated with the project was expected to be completed within the one-year timeframe of the IHA. The specified activities were expected to result in the take, in the form of Level A and Level B harassment, of five species of marine mammals including harbor seal (*Phoca vitulina*), Steller sea lion (*Eumetopias jubatus*), harbor porpoise (*Phocoena phocoena*), killer whale (*Orcinus orca*), and humpback whale (*Megaptera novaeangliae*).

On December 11, 2018, FAA informed NMFS that part of the work on the project would be postponed due to severe weather conditions that created significant logistical challenges; that no work was able to be conducted during the winter season of 2018 and 2019, and that, therefore, not all of the in-water pile driving activities can be completed by the expiration of the 2018 IHA. FAA requested that a new IHA be issued that would be valid from May 1, 2019 through April 30, 2020. There is no modification from the initial project description provided in the FAA’s IHA application, except that only a subset of the activities analyzed in the 2018 IHA remain to be completed. A **Federal Register** notice for the proposed IHA for this action was published on March 7, 2019 (84 FR 8308).

Description of the Proposed Activity

The 2019 IHA covers a subset of the construction associated with the Biorka Island dock replacement project described in the initial **Federal Register** notice (82 FR 41229; August 30, 2017) for the proposed 2018 IHA. The 2017 IHA authorized Level A and B harassment of two species of marine mammals and Level B harassment of seven species of marine mammals (Table 1). FAA requests authorization to harass these same species. Accordingly, the take authorized here (in the form of Level A and Level B harassment) applies to the same stocks, resulting from the same activities. The amount of authorized take is based on marine mammal monitoring during the 2018 IHA, in consideration of the reduced subset of activities (described below).

Detailed Description of the Action

The majority of the planned construction project has been completed, and this proposed IHA would only cover potential marine mammal takes for the remainder of the pile driving activities. Specifically, these are:

- Two (2) 30-inch piles;
 - One has already been installed and just needs to be proofed with an impact hammer;
 - The other will be driven with an impact hammer;
- Four (4) 18-inch batter piles;
- Up to twelve (12) template H-piles (six per dolphin);
 - Includes installation and extraction using a vibratory hammer.

In the **Federal Register** notice for the proposed IHA (84 FR 8308; March 7, 2019), it stated that the proposed activities would be completed in 21 days. FAA subsequently clarified that these activities are expected to be completed in 10–12 working days.

NMFS refers the reader to the documents related to the previously issued 2018 IHA for more detailed description of the project activities. These previous documents include the **Federal Register** notice of the issuance of the 2018 IHA for FAA’s Biorka Island dock replacement project (82 FR 50397; October 31, 2017), FAA’s IHA application, the **Federal Register** notice of the proposed IHA (82 FR 41229; August 30, 2017) and all associated references and documents. A detailed description of the proposed vibratory and impact pile driving activities at the dock replacement project is found in these documents. The description remains accurate with the exception of the reduced scope of activity as noted above.

Comments and Responses

A notice of NMFS' proposal to issue an IHA was published in the **Federal Register** on March 7, 2019 (84 FR 8308). During the 30-day public comment period, NMFS received a comment letter from the Marine Mammal Commission (Commission). Specific comments and responses are provided below.

Comment 1: The Commission recommended that NMFS further investigate appropriate timeframes over which sound exposure levels should be accumulated when estimating Level A harassment zones, and recommended that NMFS make this a priority to resolve in the near future. Commission further recommended that NMFS consult with its own and external scientists and acousticians to determine appropriate accumulation times.

Response: NMFS considers this a priority and has recently formed a group to work on the issue of accumulation time.

Comment 2: The Commission recommends that NMFS refrain from implementing its proposed renewal process and instead use abbreviated **Federal Register** notices and reference existing documents to streamline the IHA process. If NMFS adopts the proposed renewal process, the Commission recommends that NMFS provide the Commission and the public a legal analysis supporting its conclusion that the process is consistent with section 101(a)(5)(D) of the MMPA.

Response: The notice of the proposed IHA expressly notifies the public that under certain, limited conditions an applicant could seek a renewal IHA for an additional year. The notice describes the conditions under which such a renewal request could be considered and expressly seeks public comment in the event such a renewal is sought. Additional reference to this solicitation of public comment has recently been added at the beginning of the **Federal Register** notices that consider renewals, requesting input specifically on the possible renewal itself. NMFS appreciates the streamlining achieved by the use of abbreviated **Federal Register** notices and intends to continue using them for proposed IHAs that include minor changes from previously issued IHAs, but which do not satisfy the renewal requirements. However, we believe our method for issuing renewals meets statutory requirements and maximizes efficiency. However, importantly, such renewals will be limited to circumstances where: The activities are identical or nearly identical to those analyzed in the proposed IHA; monitoring does not

indicate impacts that were not previously analyzed and authorized; and, the mitigation and monitoring requirements remain the same, all of which allow the public to comment on the appropriateness and effects of a renewal at the same time the public provides comments on the initial IHA. NMFS has, however, modified the language for future proposed IHAs to clarify that all IHAs, including renewal IHAs, are valid for no more than one year and that the agency will consider only one renewal for a project at this time. In addition, notice of issuance or denial of a renewal IHA will be published in the **Federal Register**, as they are for all IHAs. The option for issuing renewal IHAs has been in NMFS' incidental take regulations since 1996. We will provide any additional information to the Commission and consider posting a description of the renewal process on our website before any renewal is issued utilizing this process.

Description of Anticipated Impacts

Description of Marine Mammals

A description of the marine mammals in the area of the activities is found in the **Federal Register** notice for the original IHA (82 FR 50397; October 31, 2017) and in FAA's IHA application, which remains applicable to the proposed 2019 IHA as well. In addition, NMFS has reviewed recent draft Stock Assessment Reports, information on relevant Unusual Mortality Events, recent scientific literature, and marine mammal monitoring reports during the 2018 IHA. With the exception of the minke whale (see below), there is no new information regarding the species and potential effects from our original analysis of impacts under the 2018 IHA.

One minke whale was observed during in-water construction activity on each of the two days on June 9 and June 10, 2018. The onsite protected species observers documented the whale erroneously as a humpback whale and did not call for shutdown of the activities, which resulted in a total of two exposures of minke whales within the modeled Level B harassment zone. FAA subsequently filed a report to NMFS documenting the incident (FAA, 2018). On both occasions, the whale was observed feeding at a distance 500–1,000 m from the pile, but no evident disturbance was recorded. As a result of these observations, the 2019 IHA authorizes Level B harassment of minke whales (see below).

Potential Effects on Marine Mammals and Their Habitat

A description of the potential effects of the specified activities on marine mammals and their habitat may be found in the **Federal Register** notice for the previous IHA (82 FR 50397; October 31, 2017) and FAA's IHA application, which remains applicable to the issuance of the 2019 IHA.

Estimated Take

A detailed description of the methods and inputs used to estimate authorized take is found in the **Federal Register** notice for the previous IHA (82 FR 50397; October 31, 2017) and FAA's IHA application. The methods of estimating take for the 2019 IHA are based on those used in the 2018 IHA and corrected for certain species to reflect takes in the 2018 activities (see below). Information used to estimate potential takes are updated based on informal consultation with the Marine Mammal Commission, further review of FAA's marine mammal monitoring reports that were made available during the comment period, and the change of the expected in-water activity days from the previous 21 days to 10–12 days. In addition, minke whale takes were added due to sighting of this species in the project area from marine mammal monitoring during the previous activities.

The following provides descriptions on the correction of estimated take numbers for the 2019 IHA based on marine mammal monitoring during the 2018 activities.

Detailed description of the estimated takes for the 2019 IHA is provided below.

Harbor Seal

The 2018 IHA authorized 13 incidents of take by Level A harassment and 350 incidents of take by Level B harassment of harbor seals. Based on the marine mammal monitoring during the 2018 activities, it showed that an average of 15 harbor seals were sighted per day (FAA, 2018). A total of 240 Level B harassment takes of harbor seals occurred in 2018 but no Level A harassment take was observed. For the June 2018 monitoring report, 20 harbor seals were observed hauled out. More harbor seals likely will be hauled out in May/June due to pupping. Using an average of 20 harbor seals to be exposed to in-water pile driving noise that could cause takes, it is estimated that the total takes of harbor seals would be 240 animals for 12 days.

Among these takes, marine mammal monitoring during the 2018 activities

showed that up to 6 seals were within 300 m of the pile on a given day. Assuming that FAA cannot shut down in time for a third of those animals and assuming that 10 days would be delegated to in-water pile driving that have large Level A harassment zones (over 200 m), the estimated Level A harassment of harbor seals will be 20.

The estimated Level B harassment is the 240 total take minus the 20 Level A harassment, which is 220 Level B harassment take.

Killer Whale

Based on various previous monitoring efforts in nearby areas (such as City of Sitka), we expect group size of killer whales to be 8. At the recommendation of the Marine Mammal Commission, we assume takes could occur on 25 percent of the days, the 2019 IHA authorizes a total of 24 Level B harassment takes for killer whales. Marine mammal monitoring during 2018 in-water activity showed 8 Level B harassment takes of killer whales.

Minke Whale

On two occasions minke whales were sighted within the modeled Level B harassment zone during Biorka's 2018 pile driving activity. Take of this species was not authorized in the 2018 IHA. Based on potential occurrence of minke whale in the Biorka project area, the 2019 IHA authorizes 12 Level B harassment takes of minke whales assuming 1 take per day.

Other Species

For other species, the 2018 marine mammal monitoring report showed Level B harassment takes of 26 humpback whales, 0 harbor porpoise, and 11 Steller sea lions. The authorized 2019 takes are based on the same methods and inputs described in the 2018 IHA.

Table 1 provides a summary of the estimated take numbers for the 2019 IHA.

TABLE 1—ESTIMATED MARINE MAMMAL TAKES IN THE 2019 IHA

Species	Authorized take	
	Level A	Level B
Harbor seal	20	220
Steller sea lion	3	60
Harbor porpoise	15	45
Killer whale	0	24
Humpback whale	1	60
Minke whale	0	12

Description of Mitigation, Monitoring and Reporting Measures

The mitigation, monitoring, and reporting measures required in the 2019 IHA are identical to those included in the final 2018 IHA. The following measures are included in this IHA:

- **Establishment of Shutdown Zone**—For all pile driving activities, FAA will establish a shutdown zone. The purpose of a shutdown zone is generally to define an area within which shutdown of activity would occur upon sighting of a marine mammal (or in anticipation of an animal entering the defined area). In this case, shutdown zones are intended to contain areas in which sound pressure levels (SPLs) equal or exceed acoustic injury criteria for some authorized species, based on NMFS' 2018 acoustic technical guidance.

- **Establishment of Monitoring Zones**—FAA must identify and establish Level A harassment zones. These zones are areas beyond the shutdown zones where animals may be exposed to sound levels that could result in permanent threshold shift (PTS). FAA will also identify and establish Level B harassment disturbance zones which are areas where SPLs equal or exceed 160 dB rms for impact driving and 120 dB rms during vibratory driving. Observation of monitoring zones enables observers to be aware of and communicate the presence of marine mammals in the project area and outside the shutdown zone and thus prepare for potential shutdowns of activity. NMFS has established monitoring protocols described in the previous **Federal Register** notice of issuance (82 FR 50397; October 30, 2017) which are based on the distance and size of the monitoring and shutdown zones. These same protocols are contained in this 2019 IHA.

- **Temporal Restrictions**—Work may only occur during daylight hours, when visual monitoring of marine mammals can be conducted.

- **Soft Start**—The use of a soft-start procedure is believed to provide additional protection to marine mammals by providing warning and/or giving marine mammals a chance to leave the area prior to the hammer operating at full capacity. For impact pile driving, contractors will be required to implement soft start procedures. Soft Start is not required during vibratory pile driving and removal activities.

- **Visual Marine Mammal Observation**—Monitoring must be conducted by qualified marine mammal observers (MMOs), who are trained biologists, with minimum qualifications

described in the **Federal Register** notice of the issuance of the 2018 IHA (82 FR 50397; October 30, 2017). In order to effectively monitor the pile driving monitoring zones, two MMOs must be positioned at the best practical vantage point(s). If waters exceed a sea-state which restricts the observers' ability to make observations within the shutdown zone (e.g., excessive wind or fog), pile installation and removal will cease. Pile driving will not be initiated until the entire shutdown zone is visible. MMOs shall record specific information on the sighting forms as described in the **Federal Register** notice of issuance of the 2018 IHA (82 FR 50379; October 30, 2017). At the conclusion of the in-water construction work, FAA will provide NMFS with a monitoring report which includes summaries of recorded takes and estimates of the number of marine mammals that may have been harassed.

- **Sound source verification**—In the 2018 IHA, NMFS required FAA to conduct sound source verification (SSV) measurements of 2 18-inch and 2 30-inch piles driven using various installation methods (vibratory, impact, and down-the-hole driving (for the 30-inch pile only)). SSV measurements have been conducted for the 18-inch piles and for 30-inch down-the-hole driving during the 2018 activity. The FAA is required to conduct SSV measurements on the 2 30-inch piles. Furthermore, the FAA is required to report SSV data in median root-mean-square sound pressure level (SPLrms), peak SPL (SPLpeak), single strike sound exposure level (SELss), and pulse duration for impact driving, and SEL for vibratory drive.

Determinations

FAA will conduct a subset of the activities covered in the previous 2018 IHA. FAA was not able to complete these activities within the effective dates of the 2018 IHA due to weather-related delays of the project. Potential impacts to marine mammals from these activities were previously analyzed for the issuance of the 2018 IHA. In our **Federal Register** notice for this proposed IHA (84 FR 8308; March 7, 2019), we stated that the potential effects of the specified activity on the marine mammals previously analyzed remain applicable (though of a lower amount), as do NMFS prior determinations. However, although there are no changes to these activities for this IHA, subsequent analysis based on reviews of marine mammal monitoring reports during the 2018 activities prompted us to re-evaluate the take numbers of marine mammals in consultation with the Marine Mammal

Commission. For the Steller sea lion and humpback whale, authorized take numbers decreased from those considered in our notice of this proposed IHA. For harbor seals and killer whales, analysis of the most recent monitoring data led to a conclusion that the take numbers should be increased by a small amount (see "Estimated Take"). These modifications to the authorized take numbers are minor in degree and do not affect our original assessment that the prior analyses and determinations remain applicable. However, review of the same monitoring data has also indicated that authorization of take for minke whale—not previously evaluated—is appropriate as a precaution. The substance of our prior analysis and determinations—in particular, the analysis provided for killer whales—is generally applicable to the effects expected for the minke whale (*i.e.*, a low number of takes, by Level B harassment only, are authorized as a precaution).

When issuing the 2018 IHA, NMFS found FAA's Biorca Island dock replacement project, in its entirety, would have a negligible impact to species or stocks' rates of recruitment and survival and the amount of taking would be small relative to the population size of such species or stock (less than 15 percent). The 2019 IHA includes identical required mitigation, monitoring, and reporting measures as the 2018 IHA and is applicable to a subset of the activity for which the 2018 IHA was issued. In conclusion, and inclusive of the authorized take numbers that were modified from those provided in our notice of proposed IHA, there is no new information suggesting that our analysis or findings should change. Here, we provide an assessment specific to the minke whale.

When issuing the 2018 IHA, NMFS conducted a thorough analysis on all species for which take was authorized, except minke whales, and found that FAA's Biorca Island dock replacement project, in its entirety, would have a negligible impact to these species or stocks' rates of recruitment and survival and the amount of taking would be small relative to the population size of such species or stock (less than 15 percent).

For the issuance of the 2019 IHA, minke whale is included as well on the basis of the most recent monitoring data. The potential impacts to minke whale are expected to be the same as to other marine mammals of low abundance, such as killer whale. For minke whales, takes that are anticipated and authorized are expected to be limited to

short-term Level B harassment in the form of behavioral modification. Marine mammals present in the vicinity of the action area and taken by Level B harassment would most likely show overt brief disturbance (startle reaction) and avoidance of the area from elevated noise levels during pile driving and pile removal noise.

There are no known important areas for minke whales in the area, such as important feeding, pupping, or other areas.

In summary and as described above, the following factors primarily support our determination that the impacts resulting from this activity are not expected to adversely affect minke whales through effects on annual rates of recruitment or survival:

- No mortality or injury is anticipated or authorized; and

- Behavioral disturbance—only a few minke whales would experience behavioral disturbance from the FAA's Biorca Island dock replacement project. However, as discussed earlier, the area to be affected is small and the duration of the project is short. No other important habitat for minke whales exist in the vicinity of the project area. Therefore, the overall impacts are expected to be insignificant.

The 2019 IHA includes identical required mitigation, monitoring, and reporting measures as the 2018 IHA.

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) FAA's activities will not have an unmitigable adverse impact on taking for subsistence purposes as subsistence activities do not occur in the project area during the project time frame.

National Environmental Policy Act

To comply with the National Environmental Policy Act (NEPA) 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 environmental consequences on the human environment. 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. Accordingly, NMFS has determined that the issuance of the IHA qualifies to be categorically excluded from further NEPA review.

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.

NMFS is authorizing take of two DPSs (*i.e.*, western DPS of Steller sea lions and Mexico DPS of humpback whales), which are listed under the ESA. The Permit and Conservation Division requested initiation of Section 7 consultation with the Alaska Region for the issuance of this IHA. The NMFS Alaska Regional Office Protected Resources Division issued a Biological Opinion in October, 2017 under section 7 of the ESA, on the issuance of an IHA to the FAA under section 101(a)(5)(D) of the MMPA by the NMFS Permits and Conservation Division. The Biological Opinion concluded that the proposed action is not likely to jeopardize the continued existence of western DPS Steller sea lions or Mexico DPS of humpback whales, and is not likely to destroy or adversely modify western DPS Steller sea lion critical habitat.

Authorization

As a result of these determinations, NMFS has issued an IHA to the FAA for conducting FAA's Biorca Island dock replacement project between May 1, 2019, and April 30, 2020, provided the prescribed mitigation, monitoring, and reporting requirements are incorporated.

Dated: April 22, 2019.

Donna S. Wieting,

*Director, Office of Protected Resources,
National Marine Fisheries Service.*

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