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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648-XG205

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to the Mukilteo Multimodal Project - Season 3

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

ACTION: Notice; issuance of 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 an incidental harassment authorization (IHA) to the Washington Department of Transportation (WSDOT) Ferries Division (WSF) to incidentally take, by Level A and B harassment, marine mammals during construction activities associated with the Mukilteo Multimodal Project, Puget Sound, Washington.

DATES: This Authorization is effective from October 1, 2018, through September 30, 2019.

FOR FURTHER INFORMATION CONTACT: Jaclyn Daly, Office of Protected Resources, NMFS, (301) 427-8401. Electronic copies of the application, IHA, and supporting documents, as well as a list of the references cited in this document, may be obtained online at:

<https://www.fisheries.noaa.gov/node/23111>. In case of problems accessing these documents, please call the contact listed above.

SUPPLEMENTARY INFORMATION:

Background

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 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 7, 2016, WSDOT submitted a request to NMFS requesting an IHA for the possible harassment of small numbers of marine mammals incidental to construction associated with Phase 2 of the Mukilteo Multimodal Project in Mukilteo, Washington, between August 1, 2017, and July 31, 2018. NMFS issued the requested IHA on August 3, 2017, which covered Phase 2 of the project in its entirety; the IHA expired on July 31, 2018 (82 FR 44164; September 21, 2017). On January 9, 2018, we received a request from WSDOT for a subsequent authorization to take marine mammals incidental to the project because all of the Phase 2 work would not be able to be completed under the existing IHA. A final version of the application, which we deemed adequate and complete, was submitted on March 1, 2018.

On June 28, 2018, NMFS published its proposed IHA in the **Federal Register** for public comment (83 FR 30421). NMFS has issued an IHA to WSDOT for the take, by Level A and B harassment, of 12 species of marine mammals incidental to pile driving and removal associated with the Mukilteo Multimodal Project.

Description of the Specified Activity and Anticipated Impacts

WSDOT operates and maintains 19 ferry terminals and one maintenance facility, all of which are located in Puget Sound or the San Juan Islands (Georgia Basin) (Figure 1-1 in WSDOT's application). The Mukilteo Multimodal Project is a multi-year construction project designed to improve the operations and facilities serving the mainland terminus of the Mukilteo-Clinton ferry route in Washington State. The 2017 IHA covered the installation of 661 piles of various sizes over an estimated 175 days of pile driving and removal (Table 1). WSDOT did not complete all the work; therefore the issued IHA covers take incidental to the installation of the remaining piles (Table 1). 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. NMFS has

issued an IHA to harass these same species and an additional three species based on recent marine mammal monitoring near the project area (Table 2).

We refer to the notice of proposed IHA (83 FR 30421, June 28, 2018) and documents related to the previously issued 2017 IHA and discuss any new or changed information here. Previous documents include the **Federal Register** notice of the proposed 2017 IHA (82 FR 29713; May 10, 2017), **Federal Register** notice of issuance of the 2017 IHA (82 FR 44164, September 21, 2017), and all associated references and documents. We also refer the reader to WSDOT's previous and current applications and monitoring reports. All of these documents may be found at <https://www.fisheries.noaa.gov/node/23111>.

Detailed Description of the Action—A detailed description of the vibratory and impact pile driving and removal activities at the Mukilteo Terminal is found in the aforementioned documents. The location, timing, and nature of the pile driving operations, including the type and size of piles and the methods of pile driving, are identical to those described in the previous notices, except that only a subset of the type and number of piles are to be driven because some of the work was completed under the 2017 IHA. Under the issued IHA (2018-2019), 116 piles would be installed with a vibratory hammer. Of those, sixty-five 24-inch (in) piles would also be proofed with an impact hammer and then removed.

WSDOT anticipates piles equal to or less than 36-in would be installed at a rate of 3 per day for a total of 38 days. Removing the 65 24-in temporary piles may also occur at a rate of 3 pile per day for a total of 22 days. An additional two days is needed to install the 78-in piles and 120-in pile. In total, up to 62 days of pile driving and removal may occur. WSDOT anticipates pile driving and removal could occur over a seven month in-water work window (July 15-February 15).

Table 1. Description of Work Planned, Analyzed, and Completed under the 2017 IHA and Remaining Work Planned for 2018-2019.

Method	Pile Size (in)	Season 2 Planned (2017 IHA)	Season 2 Completed	Season 3 Planned (2018 IHA)	No. of Days	Comment
Vibratory Driving	12	139	134	0	0	Fewer needed, complete
	24	69	4	65 ¹	22	Up to 69 temporary
	24	48	0	26	9	Fewer needed, permanent
	30	40	25	16	5	Permanent
	36	6	0	6	2	Permanent
	78	2	0	2	1	Permanent
	120	1	0	1	1	Permanent
	sheet	90	0	0	0	Design change, not needed
Vibratory Removal	24	69	4	65 ¹	22	Temporary
	30	9	0	0	0	Delayed
	sheet	90	0	0	0	Design change, not needed
Impact Driving	24	69	4	65 ¹	22 ²	Proofed for load-bearing
	30	30	25	0	0	Fewer needed, complete

¹ These 65 piles represent the same 65 temporary 24” piles driven with a vibratory hammer. The temporary piles would be installed, proofed, and removed.

² Impact hammering would be conducted on same day as vibratory pile driving so these are not additional days.

Description of Marine Mammals—A description of the marine mammals in the area of the activities is found in the notice of proposed IHA (83 FR 30421, June 28, 2018). This information remains valid so we do not repeat it here but provide a summary table with marine mammal species and stock details.

Table 2. Species and Stocks Expected to Occur in Project Area.

Common name	Scientific name	Stock	ESA/MMPA status; Strategic (Y/N) ¹	Stock abundance (CV, N _{min} , most recent abundance survey) ²	PBR	Annual M/SI ³
Order Cetartiodactyla – Cetacea – Superfamily Mysticeti (baleen whales)						

Family Eschrichtiidae						
Gray whale	<i>Eschrichtius robustus</i>	Eastern North Pacific	N	20,990 (0.05, 20,125, 2014)	624	132
Family Balaenopteridae (rorquals)						
Humpback whale	<i>Megaptera novaeangliae</i>	California/Oregon/Washington	Y	1,918 (0.03, 1,876, 2017)	11.0	9.2
Minke whale*	<i>Balaenoptera acutorostrata</i>	California/Oregon/Washington	N	636 (0.72, 369, 2016)	3.5	1.3
Superfamily Odontoceti (toothed whales, dolphins, and porpoises)						
Family Delphinidae						
Killer whale	<i>Orcinus orca</i>	Eastern North Pacific Southern Resident	Y	76 (n/a, 76, 2017) ⁴	0	0.14
		West coast transient	N	unk (unk, 243 2013)	2.4	0
Bottlenose dolphin*	<i>Tursiops truncatus</i>	California coastal	N	453 (0.06, 346, 2016)	2.7	≥2
Long-beaked common dolphin*	<i>Delphinus delphis bairdii</i>	California	N	101,305 (0.49, 68,432, 2016)	657	35.4
Family Phocoenidae (porpoises)						
Harbor porpoise	<i>Phocoena</i>	Washington inland waters	N	11,233 (0.37, 8,308, 2016)	66	7.2
Dall's porpoise	<i>Phocoenoides dalli</i>	California/Oregon/Washington	N	25,750 (0.45, 17,954, 2016)	172	0.3
Order Carnivora – Superfamily Pinnipedia						
Family Otariidae (eared seals and sea lions)						
California sea lion	<i>Zalophus californianus</i>	U.S.	N	296,750 (n/a, 153,337, 2014)	9,200	389
Steller sea lion	<i>Eumetopias jubatus</i>	Eastern U.S.	N	52,139 (n/a, 41,638, 2015)	2,498	108
Family Phocidae (earless seals)						
Harbor seal	<i>Phoca vitulina</i>	Washington northern inland waters	N	11,036 (0.15, 1999)	1,641	43
Elephant seal	<i>Mirounga angustirostris</i>	California breeding	N	179,000 (n/a, 81,368, 2014)	2,882	8.8

¹ Endangered Species Act (ESA) status: Endangered (E), Threatened (T)/MMPA status: Depleted (D). A dash (-) indicates that the species is not listed under the ESA or designated as depleted under the MMPA. Under the MMPA, a strategic stock is one for which the level of direct human-caused mortality exceeds PBR or which is determined to be declining and likely to be listed under the ESA within the foreseeable future. Any species or stock listed under the ESA is automatically designated under the MMPA as depleted and as a strategic stock.

² NMFS marine mammal stock assessment reports online at: www.nmfs.noaa.gov/pr/sars/. CV is coefficient of variation; Nmin is the minimum estimate of stock abundance.

³ These values, found in NMFS's SARs, represent annual levels of human-caused mortality plus serious injury from all sources combined (e.g., commercial fisheries, ship strike). Annual M/SI often cannot be determined precisely and is in some cases presented as a minimum value or range. A CV associated with estimated mortality due to commercial fisheries is presented in some cases.

⁴ SRWK population abundance as of December 31, 2017 according to the Center for Whale Research.

⁵ Harbor seal estimate is based on data that are greater than 8 years old, but this is the best available information for use here.

*Indicates species added.

Harassment Zones – The harassment threshold distances and areas provided in the **Federal**

Register notice of proposed IHA (83 FR 30421, June 28, 2018) remain unchanged. Please refer

to that document documents for details; we provide a summary tables here (Table 3 and 4).

Table 3. Level A harassment Distances Considering Pile Driving Duration per 24 Hours.

Method	Pile Size	Source Level (dB)	Level A (meters)					Level B (m)
			LF ¹	MF ¹	HF ¹	PH ¹	OT ¹	
Vibratory	24	166 rms ²	30.6	2.7	45.3	18.6	1.3	8000 ⁶
	30	174 rms ³	104.5	9.3	154.5	63.5	4.5	8000 ⁶
	36	177 rms ³	165.6	14.7	244.9	100.7	7.1	8700 ⁷
	78	180 rms ⁴	200.3	17.8	296.2	121.8	8.5	20,000 ⁸
	120	180 rms ⁴	126.2	11.2	186.6	76.7	5.4	
Impact	24	178 SEL (single strike)/ 193 rms ⁵	432.1	15.4	514.7	231.2	16.8	1,585

¹ The abbreviation mean: LF= low frequency cetacean, MF = mid-frequency cetacean, HF= high- frequency cetacean, PH = phocid, OT = otariid.

²We assume vibratory removal and vibratory driving the same size pile would result in equal sound levels. Source level for 24” piles is based on direct measurements during the Manette Bridge project (Loughlin, 2010a). ³Source levels for 30-in and 36-in piles is based on direct measurements during the Port Townsend Project (Loughlin, 2010b).

⁴ WSDOT does not have noise data for 78 and 120-in piles; therefore, we used data from Caltrans (2015).

⁵ Single strike SEL and rms values for impact driving 24-in piles is based on direct measurements during pile driving using a bubble curtain (*i.e.*, source levels are attenuated) at the Coupeville Terminal (WSDOT, 2017).

⁶ Measurements during 30” vibratory pile driving at Mukilteo in 2017 indicate pile driving was not detected at range of 7.9 km (Laughlin, 2017a). This equates to 66 km².

⁷ At the Coleman Terminal, vibratory installation of two 36” piles driven simultaneously was not detectable at 8.69 km (5.4 miles) (Laughlin 2017b). This equates to 69 km².

⁸ The calculated Level B zone using a practical spreading loss model is 100,000 m; however, land is reached at a maximum of 20,000 m (Lowell Point on Camano Island). This equates to 107 km².

Table 4. Corresponding Harassment Threshold Ensonified Areas.

Method	Pile Size	Level A (km ²) ¹			Level B (km ²) ²
		HF	PH	OT	
Vibratory	24	<0.01	<0.01	<0.01	66
	30	<0.01	<0.01		66
	36	0.06	0.06		69
	78	0.01	0.01		107
	120	0.01	0.01		
Impact	24	0.4	0.4		4

¹ Level A harassment areas are provided for species hearing groups for which Level A take is authorized.

² Level B harassment areas are germane to all species.

Estimated Take—A description of the methods used to estimate take anticipated to occur from the project is found in the project’s aforementioned documents. The methods (*i.e.*, equations) and rational for estimating take in the proposed IHA (83 FR 30421, June 28, 2018) for

all species remains unchanged; however, we adjusted the number of days of pile driving factored into the takes estimates in the issued IHA. For harbor porpoise and harbor seals, as described below, we also made additional small adjustments to the final take estimates based on other factors, as recommended in comments made by the Commission (see *Comments and Responses*). Densities presented in the proposed IHA (83 FR 30421, June 28, 2018) remain unchanged (Table 5). For density based estimates, the equation used is *density x area ensonified above the threshold x number of pile driving days* summed across all piles types. For harbor porpoise, we calculated take using the density identified in Table 5. For 24-in and 30-in piles: $0.75 \times 66 \text{ km}^2 \times 58 \text{ days}$ (vibratory installation and removal) equals 2871 animals. For 36-in piles: $0.75 \times 69 \text{ km}^2 \times 2 \text{ days}$ equals 104 animals. For 78-in and 120-in piles: $0.75 \times 107 \text{ km}^2 \times 2 \text{ days} = 161 \text{ animals}$. In total, we calculated 3,136 harbor porpoise could be taken. However, marine mammal monitoring conducted under the 2017 IHA yielded only 85 harbor porpoise sightings of which 28 were taken by harassment. In the notice of proposed IHA (83 FR 30421, June 28, 2018), we proposed authorizing 10 percent of the calculated take (which incorrectly considered an additional two days of pile driving) as the raw calculated take greatly exceeded expected take based on previous marine mammal monitoring efforts around the terminal (*e.g.*, WSDOT, 2018). However, the Commission was concerned this approach may yield an underestimate of potential take. Therefore, we increased the number of takes to 25 percent of the total calculated take for a total of 784 Level B harassment takes. The Commission was also concerned the calculated number of Level A harassment takes using the full density provided in Smultea *et al.* (2017) ($n=7$) would also be an underestimate. Based on the Commission's recommendation to assume one group of three harbor porpoise could be within the Level A harassment area on half of the

pile driving days where the potential for Level A harassment exists, (13 of the 26 days) we issued 39 Level A harassment takes for harbor porpoise.

We repeated these calculations using the approach above for Dall's porpoise, minke whales, humpback whales, gray whales, and Steller sea lions; however, we are not authorizing Level A harassment take for the latter three species as the potential for Level A harassment of these species is discountable due to high visibility of these species, small Level A harassment zones, and implementation of mitigation measures (*e.g.*, shut downs). We considered Dall's porpoise to have the same potential to be taken by Level A harassment as harbor porpoise due to similar size and sightability; therefore, we issued the same amount of Level A take for both species (n=39).

We also used the same method and rationale for estimates utilizing direct counts instead of density estimates as in the proposed IHA (83 FR 30421, June 28, 2018), but again, adjusted the number of days considered. Over 51 days of marine mammal monitoring during the 2017/18 Mukilteo project, 1,525 harbor seals were observed or 30 harbor seals per day. Using the equation *# of animals/day * # of days*, we authorized 1860 Level B harassment takes (30 animals/day * 62 days). As described in the notice of proposed IHA (83 FR 30421, June 28, 2018), we consider five percent of that amount could be animals taken by Level A harassment (n=93). Based on previous marine mammal monitoring data (WSDOT, 2018), we estimated 14 California sea lions per day could be taken on the 62 days of pile driving for a total of 868 Level B harassment takes. As described in the notice of proposed IHA (83 FR 30421, June 28, 2018), we did not authorize Level A harassment because the Level A harassment zones are very small based on one to three hours of pile driving and no California sea lions were taken by Level A harassment under the 2017 IHA. The method used to estimate take for transient killer whales

also remained unchanged from the proposed IHA (83 FR 30421, June 28, 2018); however, we adjusted the number of days in the equation and authorized 19 takes of transient killer whales (0.3 whales/km² x 62 days). No change was necessary to the methods, rationale, and amount of take identified in the proposed IHA (83 FR 30421, June 28, 2018) for humpback whales, gray whales, Northern elephant seals, bottlenose dolphins, and long-beaked common dolphins because number of days was not a component of the take estimation process. See Table 6 for all authorized take numbers, by species, and the respective amount of the population that take represents.

Table 6. Authorized Take Amount, per species, Relative to Population Size.

	Level A	Level B	Total Take	% Population
Harbor seal	93	1,860	1953	18
California sea lion	0	868	868	0.3
N. elephant seal	0	7	7	>0.1
Killer whale- transient	0	19	19	8
SSL	0	154	154	0.2
Gray whale	0	2	2	0.02
Humpback whale	0	6	6	0.3
Dall's porpoise	39	163	202	0.8
Harbor porpoise	39	784	823	7.3
Minke whale	0	7	7	1.3
Bottlenose dolphin	0	49	49	10.8
Long-beaked common dolphin	0	49	49	0.04

Description of Mitigation, Monitoring and Reporting Measures—A description of mitigation, monitoring, and reporting measures is found in the previous documents, and we have included additional details based on the Commission's comments (see Comments and Responses section). In summary, mitigation includes use of an unconfined bubble curtain (with operational standards set by the U.S. Fish and Wildlife Service), soft start techniques during impact pile driving in greater than 2 ft of water, a minimum 10 m shut down zone, and species-dependent shut down

zones as described in Table 7. Some of these shut down zones fully encompass the Level A harassment zone; however, for species where we propose Level A take, this might not always be the case.

Table 7. Shut-Down Zones.

Method	Pile Size	Level A (meters)					Level B ¹ (m)	
		LF	MF	HF	PH	OT		
Vibratory	24	35	10	50	20	10	8000	
	30	105	10	150	60		8000	
	36	170	20	200			60	8690
	78	205						20,000
	120	130						20,000
Impact	24	435				20		1585

¹ The Level B harassment shutdown zone applies to only those species for which take is not authorized (e.g., southern resident killer whales) or when take for a given species is exceeded.

Monitoring requirements would be similar to the 2017 IHA requirements (see an updated Marine Mammal Monitoring Plan available at <https://www.fisheries.noaa.gov/node/23111>); however, we have added additional reporting requirements (see Comments and Responses section). The number and location of Protected Species Observers (PSOs) is dependent upon activity and weather conditions and are as follows:

- (i) three land-based PSOs during impact driving of 24-in piles;
- (ii) four land-based and one ferry-based PSOs during 24-, 30-, 36-in steel vibratory driving/removal;
- (iii) five land-based and one ferry-based PSOs during 78- and 120 in steel vibratory driving/removal; and
- (iv) two ferry-based PSOs in addition to land-based PSOs when weather conditions are poor.

In April, 2018, WSDOT submitted a monitoring report for construction that had been completed under the 2017 IHA. WSDOT complied with all mitigation, monitoring, and reporting protocols. Recorded takes were below the number authorized for the corresponding amount of work. The monitoring report can be viewed on NMFS’s website at <https://www.fisheries.noaa.gov/node/23111>.

WSDOT will conduct acoustic monitoring during impact pile driving of 24-in piles per the acoustic monitoring plan submitted for the previous IHA. WSDOT will also conduct acoustic monitoring during vibratory driving 78-in and 120-in piles. Both the impact and vibratory acoustic monitoring plans are available at <https://www.fisheries.noaa.gov/node/23111>.

Comments and Responses

A notice of NMFS' proposal to issue an IHA was published in the **Federal Register** on June 28, 2018 (83 FR 30421). During the 30-day public comment period, the Marine Mammal Commission (Commission) submitted a letter, providing comments as described below.

Comment 1: The Commission recommends that NMFS issue the IHA, subject to inclusion of modified mitigation, monitoring and reporting measures. Specifically, the Commission recommended WSDOT submit more detailed marine mammal monitoring reports that include observer location, the extent of zones for each activity, the distances/bearing from the PSO to the animal and from the animal to the source for each sighting, whether mitigation was implemented. The Commission also suggested the acoustic monitoring report should include both medians and means for peak and root-mean-square sound pressure levels and single-strike and cumulative sound exposure levels.

NMFS Response: NMFS has included the Commission's recommended marine mammal monitoring and acoustic monitoring data in the IHA.

Comment 2: The Commission recommends increasing the amount of take authorized for harbor porpoises to 39 Level A takes and 3,135 Level B takes. The premise for this comment is that the estimated density of harbor porpoise of 0.75 (Smultea *et al.*, 2017) should be used to calculate Level B harassment takes in absence of considering the amount of harbor porpoise takes identified during marine mammal monitoring the previous work year. During informal

discussion prior to submitting their letter, the Commission indicated that previous monitoring should not be considered because the Level B harassment area is large and some harbor porpoise could have been missed during monitoring. In contrast, the Commission recommended the estimated harbor porpoise density (Smultea *et al.*, 2017) not be used to estimate Level A harassment take but should be increased to consider a group of three harbor porpoise entering the Level A harassment zone on half of the days pile driving would occur (*i.e.*, 31 out of 62 days).

NMFS Response: As described in the notice of proposed IHA (83 FR 30421, June 28, 2018), marine mammal monitoring conducted under the 2017 IHA yielded 85 harbor porpoise sightings of which 28 were taken by harassment (*i.e.*, observed within the harassment zones during pile work). Further, during informal correspondence with the Commission on this matter, NMFS indicated WSDOT employed no fewer than five PSOs during pile driving with additional PSOs placed on vessels under various circumstances (*e.g.*, inclement weather, impact pile driving). The PSOs were stationed, per the IHA, in various locations at and around the harassment zones. Therefore, there was good observer coverage of the harassment area and the likelihood of harbor porpoise being undetected was low. Considering the number of piles driven under this IHA is less than last year's IHA, to use the density of harbor porpoise reported in Smultea *et al.* (2017) without consideration of these monitoring data would be a gross overestimate of take.

In the proposed IHA (83 FR 30421, June 28, 2018), NMFS calculated the number of harbor porpoise potentially taken by Level B harassment using the Smultea *et al.* (2017) density (*i.e.*, 0.75 harbor porpoise) but then reduced the resulting take to 10 percent of that number in consideration of the previous marine mammal monitoring results. While NMFS continues to believe a reduction factor is appropriate, we have modified it to 25 percent of the original

calculation given the concerns of the Commission. As a result, and in consideration of the corrected number of pile driving days (reduced from 65 days to 62 days for Level B harassment), NMFS has issued 784 Level B harassment takes (see *Estimated Take* section for more details on these calculations). In the proposed IHA (83 FR 30421, June 28, 2018), we also used density to estimate the number of harbor porpoise potentially taken by Level A harassment but did not apply a correction factor due to the low results (n= 7). Although the potential for Level A harassment of harbor porpoise is low, we accepted the Commission's recommendation and adjusted take numbers to reflect group size in lieu of using density, authorizing 39 Level A harassment takes (see *Estimated Take* section).

Comment 3: The Commission recommended NMFS modify the number of takes of marine mammals based on agreements made during informal correspondence. Specially, the Commission reiterated NMFS commitment to not use a reduction factor for harbor seals and correct the number of pile driving days used in the take estimates.

NMFS Response: As indicated during informal correspondence with the Commission, NMFS has revised the number of takes in a manner consistent with the methods identified in the Commission's letter.

Comment 4: The Commission requested clarification regarding certain issues associated with NMFS' notice that one-year renewals could be issued in certain limited circumstances and expressed concern that the process would bypass the public notice and comment requirements. The Commission also suggested that NMFS should discuss the possibility of renewals through a more general route, such as a rulemaking, instead of notice in a specific authorization. The Commission further recommended that if NMFS did not pursue a more general route, that the agency provide the Commission and the public with a legal analysis supporting our conclusion

that this process is consistent with the requirements of section 101(a)(5)(D) of the MMPA. The Commission also noted that NMFS had recently begun utilizing abbreviated notices, referencing relevant documents, to solicit public input and suggested that NMFS use these notices and solicit review in lieu of the renewal process.

NMFS Response: The process of issuing a renewal IHA does not bypass the public notice and comment requirements of the MMPA. The notice of the proposed IHA (83 FR 30421, June 28, 2018) 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 FR notices that consider renewals, requesting input specifically on the possible renewal itself. NMFS appreciates the streamlining achieved by the use of abbreviated FR 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.

Importantly, such renewals would 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 would consider

only one renewal for a project at this time. In addition, notice of issuance or denial of a renewal IHA would be published in the **Federal Register**, as they are for all IHAs. The option for issuing renewal IHAs has been in NMFS's 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.

Negligible Impact Analysis and Determination

WSDOT proposes to conduct a subset of activities identical to those covered in the previous 2017 IHA. We have included take for three new species noting these are precautionary as these species are not common in the action area and these species were not observed during previous construction. We also believe the potential behavioral reactions and effects on the cetacean species previously analyzed is applicable to these species, if not to some lesser extent due to lower probability of occurrence.

When issuing the 2017 IHA, NMFS found Phase 2 of the Mukilteo Multimodal 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). As described above, the number of estimated takes of the same stocks are less than takes authorized in the 2017 IHA and the anticipated impacts from the project are similar to those previously analyzed. The amount of take for the additional three species is also small (less than 11 percent of each stock). In conclusion, there is no new information suggesting that our analysis or findings should change.

In this year's IHA, we have also included more mitigation with respect to operating the bubble curtains (to ensure effectiveness; thereby, potentially reducing impact pile driving received levels), and required WSDOT to report more details pertaining to monitoring (*see*

Mitigation, Monitoring, and Reporting section). WSDOT will also conduct vibratory pile driving acoustic monitoring which will allow for verification of estimated source levels.

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) 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.

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, in this case with the West Coast Region Protected Resources Division Office, whenever we propose to authorize take for endangered or threatened species.

The only species listed under the ESA with the potential to be present in the action area is the Mexico Distinct Population Segment (DPS) of humpback whales. The effects of this proposed Federal action were adequately analyzed in NMFS' Biological Opinion for the Mukilteo Multimodal Project, Snohomish, Washington, dated August 1, 2017, which concluded that issuance of an IHA would not jeopardize the continued existence of any endangered or threatened species or destroy or adversely modify any designated critical habitat. NMFS West

Coast Region has confirmed the Incidental Take Statement (ITS) issued in 2017 is applicable for the IHA. That ITS authorizes the take of six humpback whales from the Mexico DPS.

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 (incidental harassment 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 has determined that issuance of the IHA qualifies to be categorically excluded from further NEPA review. We have reviewed all comments submitted in response to the proposed IHA **Federal Register** notice (83 FR 30421, June 28, 2018) prior to concluding our NEPA process and making a final decision on the IHA request.

Authorization

As a result of these determinations, NMFS has issued an IHA to WSDOT for the harassment of small numbers of marine mammals incidental to construction activities related to the Mukilteo Multimodal Project, Puget Sound, Washington, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated.

Dated: August 23, 2018.

Cathryn E. Tortorici,

Acting Director, Office of Protected Resources,

National Marine Fisheries Service.

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