



BILLING CODE 3510-22-P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648-XG949

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to National Wildlife Refuge Complex Research, Monitoring, and Maintenance Activities in Massachusetts

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

ACTION: Notice; proposed issuance of an Incidental Harassment Authorization; request for comments.

SUMMARY: NMFS has received a request from the Eastern Massachusetts (MA) National Wildlife Refuge (NWR) Complex, U.S. Fish and Wildlife Service (USFWS), for authorization to take marine mammals incidental to conducting biological research, monitoring, and maintenance at the Eastern MA NWR Complex (Complex). The USFWS's activities are similar to activities previously analyzed and for which take was authorized by NMFS. Pursuant to the Marine Mammal Protection Act (MMPA), NMFS is requesting comments on its proposal to issue an incidental harassment authorization (IHA) to incidentally take marine mammals during the specified activities. NMFS is also requesting comments on a possible one-year renewal that could be issued under certain circumstances and if all requirements are met, as described in *Request for Public Comments* at the end of this notice. NMFS will consider public comments prior to

making any final decision on the issuance of the requested MMPA authorizations and agency responses will be summarized in the final notice of our decision.

DATES: Comments and information must be received no later than [*insert date 30 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. Physical comments should be sent to 1315 East-West Highway, Silver Spring, MD 20910 and electronic comments should be sent to *ITP.Fowler@noaa.gov*.

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 received electronically, including all attachments, must not exceed a 25-megabyte file size. Attachments to electronic 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: Amy Fowler, Office of Protected Resources, NMFS, (301) 427-8401. Electronic copies of the original application and supporting documents (including NMFS **Federal Register** notices of the original proposed and final authorizations, and the previous IHA), as well as a list of the references cited in this document, may be obtained online at:

<https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act>. In case of problems accessing these documents, please call the contact listed above.

SUPPLEMENTARY INFORMATION:

Background

The 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.

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 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 preliminarily determined that the issuance of the proposed IHA qualifies to be categorically excluded from further NEPA review.

We will review all comments submitted in response to this notice prior to concluding our NEPA process or making a final decision on the IHA request.

History of Request

On March 16, 2016, NMFS received an application from the USFWS for the taking of two species of marine mammals incidental to research, monitoring, and maintenance activities within the Complex. The USFWS's request was for take of gray seals (*Halichoerus grypus atlantica*) and harbor seals (*Phoca vitulina concolor*) by Level B harassment. A notice of proposed IHA and request for comments was published in the **Federal Register** on January 12, 2017 (82 FR 3738). We subsequently published the final notice of our issuance of the IHA on March 2, 2017 (82 FR 12342) making the IHA valid from April 1, 2017 through March 31, 2018.

On December 5, 2017, NMFS received a request from the USFWS for an IHA for takes of marine mammals incidental to the same research and monitoring activities as the initial IHA. A notice of proposed IHA and request for comments was published in the **Federal Register** on March 6, 2018 (83 FR 9483). We subsequently published the final notice of our issuance of the IHA on May 2, 2018 (83 FR 19236), making the IHA valid from April 1, 2018 through March 31, 2019. That IHA was identical to the initial IHA with the same number of takes authorized and the same mitigation, monitoring, and reporting requirements.

On January 31, 2019, NMFS received a request from the USFWS for another IHA to take marine mammals incidental to ongoing annual research and monitoring, and two new activities: New England cottontail introduction and seal haulout protection. The application was determined to be adequate and complete on March 20, 2019. Inclusion of the new activities in the application slightly increases the number of takes requested and some voluntary mitigation measures described by the USFWS in their 2018 monitoring report are incorporated in the proposed mitigation requirements for this authorization. The monitoring and reporting requirements are identical to the previous IHA (described in detail in the **Federal Register** notice of issuance of the previous IHA (83 FR 19236, May 2, 2018)).

Description of the Proposed Activity and Anticipated Impacts

The Complex is comprised of eight refuges, including its three coastal refuges: Monomoy NWR, Nantucket NWR, and Nomans Land Island (Nomans) NWR in eastern MA. The USFWS conducts ongoing biological tasks for refuge purposes at the Complex. The previous IHAs covered shorebird and seabird nest monitoring and research, roseate

tern staging counts and resighting, red knot stopover study, northeastern beach tiger beetle census, and coastal shoreline change survey at Monomoy, Nantucket, and Nomans NWRs. The USFWS proposes to conduct these same activities under the proposed 2019 IHA. The previous IHAs authorized Level B take of gray seals and harbor seals. The USFWS requests authorization to harass these same species in this proposed IHA.

To support public review and comment on the IHA that NMFS is proposing to issue here, we refer to the documents related to the previously issued IHAs and discuss any new or changed information here. The previous documents include the **Federal Register** notices of the previous proposed IHAs (82 FR 3738, January 12, 2017; 83 FR 9483, March 6, 2018), **Federal Register** notices of issuance of the previous IHAs (82 FR 12342, March 2, 2017; 83 FR 19236, May 2, 2018), and all associated references and documents. We also refer the reader to the USFWS's previous and current applications and monitoring reports which can be found at <https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-research-and-other-activities>.

Detailed Description of the Action

Differences between the previous IHAs and the proposed IHA are limited to the inclusion of two new activities that may result in Level B harassment of seals. Detailed descriptions of the ongoing shorebird and seabird nest monitoring and research, roseate tern staging counts and resighting, red knot stopover study, northeastern beach tiger beetle census, and coastal shoreline change survey at Monomoy, Nantucket, and Nomans NWRs can be found in the documents listed above. Detailed descriptions of these new activities are provided here.

New England Cottontail Reintroduction – Beginning in 2019, the USFWS expects to spend an average of 20 days on Nomans NWR each year to initiate a New England cottontail reintroduction project. Most of the cottontail work will take place in the island interior (not the shorelines), and will not cause disturbance of seals. However, there will be more trips to and from the island, which could result in slightly more disturbance to seals on the shoreline as the boat approaches the island. The 20 days of activity on the island are expected to occur over approximately 12 trips during the spring, summer, and fall.

Protection of Seal Haulout Areas – Complex staff maintain a year-round closure for seals on the north tip of the Nantucket NWR. Staff use metal and wooden signs, rope or twine, and informational signs to keep vehicles and pedestrians out of these areas. The perimeter of the closed areas sometimes needs to be moved (as seals move) or replaced (as signs are vandalized or lost in coastal storms). Protection of seal haulout areas occurs year-round. Previous authorizations limited research and monitoring activities to April 1 and November 30 of each year, to avoid the gray seal pupping season. The timing of research and monitoring activities proposed by the USFWS would remain identical, but protection of seal haulout areas would be authorized to occur at any time during the year, as necessary.

Description of Marine Mammals

A description of the marine mammals in the area of the activities is found in these previous documents, which remains applicable to the proposed 2019-2020 IHA as well. In addition, NMFS has reviewed recent draft Stock Assessment Reports, information on relevant Unusual Mortality Events, and recent scientific literature, to evaluate the current

status of the affected species.

Since July 2018, elevated numbers of harbor seal and gray seal mortalities have occurred across Maine, New Hampshire, and Massachusetts. This event has been declared an Unusual Mortality Event (UME). Additionally, seals showing clinical signs of disease have stranded as far south as Virginia, although not in elevated numbers. Therefore, the UME investigation now encompasses all seal strandings from Maine to Virginia. Full or partial necropsy examinations have been conducted on some of the seals and samples have been collected for testing. Based on tests conducted so far, the main pathogen found in the seals is phocine distemper virus. As of April 17, 2019, the total number of seals included in the UME was 2,159. More information on this UME is available at <https://www.fisheries.noaa.gov/new-england-mid-atlantic/marine-life-distress/2018-2019-pinniped-unusual-mortality-event-along>.

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 documents supporting the previous IHA, which remains applicable to the issuance of the proposed 2019-2020 IHA. Although there is currently an ongoing UME involving gray and harbor seals, the increased mortality appears to be primarily due to infection with phocine distemper virus. As such, NMFS has preliminarily determined that no new information affects our original analysis of impacts under the 2018-2019 IHA.

Estimated Take

A detailed description of the methods and inputs used to estimate authorized take is found in these previous documents. All estimated take is expected to be in the form of

Level B harassment. The methods of estimating take for the proposed 2019-2020 IHA are identical to those used in the 2018-2019 IHA (*i.e.*, by multiplying the maximum number of seals estimated to be present at each location by the number of events at each location that may result in disturbance). Take from the two newly described activities was estimated in the same manner. The total estimated gray seal takes are presented in Table 1.

Table 1. Estimated Number of Gray Seal Takes (by Level B harassment) Per Activity at Monomoy, Nantucket, and Nomans NWRs.

| Activity | Takes per event | Events per activity | Total takes |
|---|---|---|--------------------|
| Shorebird and Seabird Monitoring & Research | 1000 (Monomoy) 50 (Nantucket) 10 (Nomans) | 34 (Monomoy) 8 (Nantucket) 3 (Nomans) | 34,430 |
| Roseate Tern Staging Counts & Resighting | 10 (Monomoy) 10 (Nantucket) | 6 (Monomoy) 4 (Nantucket) | 100 |
| Red Knot Stopover Study | 250 (Monomoy) 150 (Cape Cod) | 5 (Monomoy) 5 (Cape Cod) | 2,000 |
| Northeastern Beach Tiger Beetle Census | 750 (Monomoy) | 3 (Monomoy) | 2,250 |
| Coastal Shoreline Change Survey | 500 (Monomoy) | 1 (Monomoy) | 500 |
| New England Cottontail Introduction | 10 (Nomans) | 20 (Nomans) | 200 |
| Seal Haul Out Protection | 25 (Nantucket) | 10 (Nantucket) | 250 |
| Total takes | | | 39,730 |

Estimated take of harbor seals was estimated using methods identical to the 2018-2019 IHA (*i.e.*, estimating five percent of gray seal takes). Total estimated takes of gray seals and harbor seals are shown in Table 2.

Table 2. Total Estimated Take of Marine Mammals, Relative to Population Size.

| Species | Estimated take | Stock abundance | Percent (comparison of |
|----------------|-----------------------|------------------------|-------------------------------|
|----------------|-----------------------|------------------------|-------------------------------|

| | | | instances of take to stock abundance) |
|-------------|--------|---|--|
| Gray seal | 39,730 | 27,131 ^a (451,131) ^b | 146 (8.81) |
| Harbor seal | 1,987 | 75,834 | 2.62 |

^a Abundance in U.S. waters (Hayes *et al.*, 2018)

^b Overall Western North Atlantic stock abundance (Hayes *et al.*, 2018)

Based on the stock abundance estimate presented in the 2017 SARS, the take number of gray seals exceeds the number of gray seals in U.S. waters (Table 2). However, actual take may be slightly less if animals decide to haul out at a different location for the day or if animals are foraging at the time of the survey activities. The number of individual seals taken is also assumed to be less than the take estimate since these species show high philopatry (Waring *et al.*, 2016; Wood *et al.*, 2011). We expect the take numbers to represent the number of exposures (i.e., instances of take), but assume that the same seals may be behaviorally harassed over multiple days, and the likely number of individual seals that may be harassed would be less. In addition, this project occurs in a small portion of the overall range of the Northwest Atlantic population of gray seals. While there is evidence of haulout site philopatry, resights of tagged and branded animals and satellite tracks of tagged animals show movement of individuals between the United States and Canada (Puryear *et al.*, 2016). The percentage of time that individuals are resident in U.S. waters is unknown (NMFS 2017). Genetic evidence provides a high degree of certainty that the Western North Atlantic stock of gray seals is a single stock (Boskovic *et al.*, 1996; Wood *et al.*, 2011). Thus, although the U.S. stock estimate is only 27,131, the overall stock abundance of animals in United States and Canadian waters is 451,131. The gray seal take estimate for this project represents less

than nine percent of the overall Western North Atlantic stock abundance (Table 2) if every separate instance of take were assumed to accrue to a different individual, and because this is not the case, the percentage is likely significantly lower.

Description of Proposed Mitigation, Monitoring and Reporting Measures

The proposed mitigation, monitoring, and reporting measures proposed here are identical to those included in the **Federal Register** notice announcing the final 2018-2019 IHA (83 FR 19236; May 2, 2018) and apply to all activities described in previous **Federal Register** notices (*i.e.*, 83 FR 9483; March 6, 2018) and the two new activities introduced in this document. The discussion of the least practicable adverse impact included in the **Federal Register** notice of final IHA (83 FR 19236; May 2, 2018) remains accurate. The following measures are proposed for inclusion in this IHA:

Time and Frequency—The USFWS would conduct all proposed activities throughout the course of the year between April 1 and November 30, outside of the seasons of highest seal abundance and pupping at the Complex. Closure of beaches used by seals may occur year-round at Nantucket NWR.

Vessel Approach and Timing Techniques—The USFWS would ensure that its vessel approaches to beaches with pinniped haulouts would be conducted so as to not disturb marine mammals as most practicable. To the extent possible, the vessel would approach the beaches in a slow and controlled approach, as far away as possibly from haulouts to prevent or minimize flushing. Staff would also avoid or proceed cautiously when operating boats in the direct path of swimming seals that may be present in the area.

Avoidance of Acoustic Impacts from Cannon Nets—Cannon nets have a measured

source level (SL) of 128 decibels (dB) at one meter (m) (estimated based on a measurement of 98.4 dB at 30 m; L. Niles, pers. comm., December 2016); however, the sound pressure level (SPL) is expected to be less than the thresholds for airborne pinniped disturbance (e.g., 90 dB for harbor seals, and 100 dB for all other pinnipeds) at 80 yards from the source. The USFWS proposes to stay at least 100 m from all pinnipeds if cannon nets are to be used for research purposes.

Avoidance of Visual and Acoustic Contact with People—The USFWS would instruct its members and research staff to avoid making unnecessary noise and not allow themselves to be seen by pinnipeds whenever practicable. USFWS staff would stay at least 50 yards from hauled out pinnipeds, unless it is absolutely necessary to approach seals closer, or potentially flush a seal, in order to continue conducting endangered species conservation work. When disturbance is unavoidable, staff will work quickly and efficiently to minimize the length of disturbance. Researchers and staff will do so by proceeding in a slow and controlled manner, which allows for the seals to slowly flush into the water. Staff will also maintain a quiet working atmosphere, avoiding loud noises, and using hushed voices in the presence of hauled out pinnipeds. Pathways of approach to the desired study or nesting site will be chosen to minimize seal disturbance if an activity event may result in the disturbance of seals. USFWS staff will scan the surrounding waters near the haulouts, and if predators (i.e., sharks) are seen, seals will not be flushed by USFWS staff.

Marine Mammal Monitoring—The USFWS will monitor seals as project activities are conducted. Proposed monitoring requirements in relation to the USFWS's proposed activities would include species counts, numbers of observed disturbances, and

descriptions of the disturbance behaviors during the research activities, including location, date, and time of the event. In addition, the USFWS would record observations regarding the number and species of any marine mammals either observed in the water or hauled out. Behavior of seals will be recorded on a three point scale: 1= alert reaction, not considered harassment; 2= moving at least two body lengths, or change in direction greater than 90 degrees; 3= flushing (Table 3). USFWS staff would also record and report all observations of sick, injured, or entangled marine mammals on Monomoy NWR to the International Fund for Animal Welfare (IFAW) marine mammal rescue team, and will report to NOAA if injured seals are found at Nantucket NWR and Nomans NWR. Tagged or marked marine mammals will also be recorded and reported to the appropriate research organization or federal agency, as well as any rare or unusual species of marine mammal. Photographs will be taken when possible. This information will be incorporated into a report for NMFS at the end of the season. The USFWS will also coordinate with any university, state, or federal researchers to attain additional data or observations that may be useful for monitoring marine mammal usage at the activity sites.

Table 3. Disturbance Scale of Pinniped Responses to In-Air Sources to Determine Take.

| Level | Type of Response | Definition |
|--------------|-------------------------|--|
| 1 | Alert | Seal head orientation or brief movement in response to disturbance, which may include turning head towards the disturbance, craning head and neck while holding the body rigid in a u-shaped position, changing from a lying to a sitting position, or brief movement of less than twice the animal's body length. |
| 2* | Movement | Movements in response to the source of disturbance, ranging from short withdrawals at least twice the animal's body length to longer retreats over the beach, or if already moving a change of direction of greater than 90 degrees. |
| 3* | Flush | All retreats (flushes) to the water. |

*Only Levels 2 and 3 are considered take, whereas Level 1 is not.

If at any time injury, serious injury, or mortality of the species for which take is authorized should occur, or if take of any kind of other marine mammal occurs, and such action may be a result of the USFWS's activities, the USFWS would suspend activities and contact NMFS immediately to determine how best to proceed to ensure that another injury or death does not occur and to ensure that the applicant remains in compliance with the MMPA.

Reporting—The USFWS would submit a draft report to NMFS Office of Protected Resources no later than 90 days after the conclusion of research and monitoring activities in the 2018 season. The report will include a summary of the information gathered pursuant to the monitoring requirements set forth in the proposed IHA. The USFWS will submit a final report to NMFS within 30 days after receiving comments from NMFS on the draft report. If the USFWS receives no comments from NMFS on the draft report, NMFS will consider the draft report to be the final report. The reporting requirements proposed to be included in this IHA are identical to those described in the previous IHA (83 FR 19236, May 2, 2018).

Preliminary Determinations

The USFWS proposes to conduct research and monitoring activities that are nearly identical to those conducted previously. Take of marine mammals from two new activities has been proposed for inclusion in this IHA but the potential impacts to marine mammals from these activities are identical to those previously analyzed for the issuance of the 2018 IHA. Therefore, the potential effects from Level B harassment of marine mammals previously analyzed remain applicable, as do NMFS prior determinations.

When issuing the 2018 IHA, NMFS found the USFWS's activities, in their 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. The proposed 2019-2020 IHA would authorize more takes of seals by Level B harassment than the previously issued IHAs (82 FR 12342, March 2, 2017; 83 FR 19236, May 2, 2018) but the amount of taking would still be small relative to the population size of the affected species and stocks (*i.e.*, less than nine percent). The proposed IHA includes identical required mitigation, monitoring, and reporting measures as the 2018 IHA. In conclusion, 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 preliminarily 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 proposed authorized takes will have a negligible impact on the affected marine mammal species or stocks; (3) the proposed authorized takes represent small numbers of marine mammals relative to the affected stock abundances; and (4) the USFWS'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 (ESA)

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 Authorization

As a result of these preliminary determinations, NMFS proposes to issue an IHA to the USFWS for conducting research and monitoring activities at the Complex for a period of one year, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated. A draft of the proposed IHA can be found at <https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine-mammal-protection-act>.

Request for Public Comments

We request comment on our analyses (included in both this document and the referenced documents supporting the 2018 IHA), the proposed authorization, and any other aspect of this notice of Proposed IHA for the proposed research and monitoring project. We also request comment on the potential for renewal of this proposed IHA as described in the paragraph below. Please include with your comments any supporting data or literature citations to help inform our final decision on the request for MMPA authorization.

On a case-by-case basis, NMFS may issue a second one-year IHA with expedited notice and public comment when (1) another year of identical or nearly identical activities as described in the Specified Activities section is planned or (2) the activities would not be completed by the time the IHA expires and a second IHA would allow for completion of the activities beyond that described in the Dates and Duration section, provided all of the following conditions are met:

- A request for renewal is received no later than 60 days prior to expiration of the current IHA;

- The request for renewal must include the following:

(1) An explanation that the activities to be conducted beyond the initial dates either are identical to the previously analyzed activities or include changes so minor (*e.g.*, reduction in pile size) that the changes do not affect the previous analyses, take estimates, or mitigation and monitoring requirements ; and

(2) A preliminary monitoring report showing the results of the required monitoring to date and an explanation showing that the monitoring results do not indicate impacts of a scale or nature not previously analyzed or authorized;

- Upon review of the request for renewal, the status of the affected species or stocks, and any other pertinent information, NMFS determines that there are no more than minor changes in the activities, the mitigation and monitoring measures remain the same and appropriate, and the original findings remain valid.

Dated: April 25, 2019.

Catherine Marzin,

Deputy Director, Office of Protected Resources,

National Marine Fisheries Service.

[FR Doc. 2019-08744 Filed: 4/29/2019 8:45 am; Publication Date: 4/30/2019]