

create any legal or procedural rights enforceable against the United States.

Executive Order 12250

Pursuant to Executive Order 12250, DOJ has the responsibility to “review . . . proposed rules . . . of the Executive agencies” implementing nondiscrimination statutes such as Title VI “in order to identify those which are inadequate, unclear or unnecessarily inconsistent.” 45 FR at 72995. DOJ has reviewed and approved this rule.

Regulatory Flexibility Act

This rule does not require a regulatory flexibility analysis under the Regulatory Flexibility Act (RFA), 5 U.S.C. 603, 604, because, for the reasons described above, no notice of proposed rulemaking is required under 5 U.S.C. 553. *See Or. Trollers Ass’n v. Gutierrez*, 452 F.3d 1104, 1123–24 (9th Cir. 2006) (noting that the RFA does not apply when an agency validly invokes an exception to the public comment requirements of 5 U.S.C. 553). Further, the Foundation’s constituent agencies, in accordance with 5 U.S.C. 605(b), have reviewed these regulations and certify that the rule’s changes will not have a significant economic impact on a substantial number of small entities because these regulatory changes do not impose any new substantive obligations on Federal funding recipients. Rather, the rule amends and clarifies existing regulations that are required by Title VI. Also, the rule brings constituent agencies into compliance with the Equal Protection Clause and harmonizes the scope of the current regulations to conform to the scope of Title VI, which does not prohibit conduct giving rise to unintentional disparate impact. All Federal funding recipients have been and will continue to be bound by existing standards that will remain in place after this rule is effective.

Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1501 *et seq.*, requires agencies to prepare several analytic statements before proposing any rule that may result in annual expenditures of \$100 million by State, local, or Tribal governments, or the private sector. 2 U.S.C. 1532(a). However, UMRA also excludes from its coverage any proposed or final Federal regulation that “establishes or enforces any statutory rights that prohibit discrimination on the basis of race, color, religion, sex, national origin, age, handicap, or disability.” 2 U.S.C. 1503(2). Accordingly, this rule is not subject to the provisions of UMRA.

Congressional Review Act

The Office of Information and Regulatory Affairs has determined that this rule is not a “major rule” as defined by the Congressional Review Act, 5 U.S.C. 804(2).

Paperwork Reduction Act of 1995

Pursuant to the Paperwork Reduction Act, 44 U.S.C. 3501 *et seq.*, agencies must consider whether a rule will create additional burdens related to recordkeeping, paperwork, or information collection. This rule will not impose additional reporting or recordkeeping requirements under the Act.

List of Subjects for 45 CFR Part 1110

Administrative practice and procedure, Civil rights, Equal employment opportunity, Grant programs.

Accordingly, for the reasons set forth above, the NEA (for itself and on behalf of FCAH, for which NEA provides legal counsel), NEH, and IMLS amend part 1110 of title 45 of the Code of Federal Regulations as follows:

PART 1110—NONDISCRIMINATION IN FEDERALLY ASSISTED PROGRAMS

■ 1. The authority citation for part 1110 is revised to read as follows:

Authority: 42 U.S.C. 2000d, 2000d–1, 2000d–7; E.O. 12250, 45 FR 72995; E.O. 14281, 90 FR 17537.

■ 2. Amend § 1110.3 by:

■ a. Removing and reserving paragraph (b)(2);

■ b. Revising paragraph (b)(3); and

■ c. Removing paragraphs (b)(6) and (c)(3).

The revision reads as follows:

§ 1110.3 Discrimination prohibited.

* * * * *

(b) * * *

(3) In determining the site or location of facilities, a recipient or applicant may not make selections with the purpose of excluding individuals from, denying them the benefits of, or subjecting them to discrimination under any program to which this regulation applies, on the grounds of race, color, or national origin; or with the purpose of defeating or substantially impairing the accomplishment of the objectives of the Act or this regulation.

* * * * *

§ 1110.5 [Amended]

■ 3. Amend § 1110.5 by removing paragraphs (e), (f), and (g).

Mary Anne Carter,

Chairman, National Endowment for the Arts.

Michael McDonald,

Senior Deputy Chairman, National Endowment for the Humanities.

Lisa K. Solomonson,

Senior Official Performing the Duties of the Director, Institute of Museum and Library Services.

[FR Doc. 2026–17366 Filed 8–25–26; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 217

[Docket No. 260820–0009]

RIN 0648–BN42

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to the Duckabush Estuary Restoration Project in Washington

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

ACTION: Final rule; notification of issuance of Letter of Authorization.

SUMMARY: NMFS, upon request from the U.S. Army Corps of Engineers (USACE) issues this final rule pursuant to the Marine Mammal Protection Act (MMPA), to govern the taking of marine mammals incidental to the Duckabush Estuary Restoration Project (DERP) in Hood Canal, Washington over 5 years (2027–2032). This final rule, which allows for the issuance of a 5-year letter of authorization (LOA) allowing for the incidental take of marine mammals during the described activities and timeframes, prescribes the permissible methods of taking and other means of effecting the least practicable adverse impact on marine mammal species and their habitat, and establishes requirements pertaining to the monitoring and reporting of such taking.

DATES: Effective from July 9, 2027, through July 8, 2032.

ADDRESSES: Electronic copies of the application and supporting documents, the proposed rule and associated public comments, as well as a list of the references cited in this document, may be obtained online at: <https://www.fisheries.noaa.gov/action/>

incidental-take-authorization-us-army-corps-engineers-duckabush-estuary-restoration-project. In case of problems accessing these documents, please call the contact listed below.

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

SUPPLEMENTARY INFORMATION:

Purpose for Regulatory Action

These regulations, promulgated under the authority of the Marine Mammal Protection Act (MMPA) (16 U.S.C. 1361 *et seq.*), establish a framework for NMFS to authorize the take of marine mammals incidental to construction activities associated with the DERP project in Hood Canal, Washington.

Legal Authority for the Action

The MMPA prohibits the “take” of marine mammals, with certain exceptions. Section 101(a)(5)(A) of the MMPA (16 U.S.C. 1371(a)(5)(A)) directs 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 for up to 5 years if, after notice and public comment, the agency makes certain findings and promulgates regulations that set forth permissible methods of taking pursuant to that activity and other means of effecting the “least practicable adverse impact” on the affected species or stocks and their habitat (see Mitigation section), as well as monitoring and reporting requirements.

Summary of Major Provisions Within the Rule

Following is a summary of the major provisions of this rule regarding USACE’s activities. These provisions include measures requiring:

- Performance of construction work only during daylight hours when visual monitoring of marine mammals can be implemented;
- Gradually increasing time periods dedicated to construction activities each day throughout the day to reduce the risk of potentially startling marine mammals;
- Conducting 30 minutes of pre- and post-activity monitoring associated with pile installation or removal activities;
- Establishment and monitoring by protected species observers (PSOs) of a 300-meter observation zone for all construction activities;
- *Halting construction activity:* (1) if a marine mammal comes within 10 meters of operations of heavy

equipment; or (2) a pup less than one week old comes within 20 meters of where heavy machinery is operating; and

- Not initiating construction activities within 300 meters of a mother-pup pair that is hauled out, or within 100 meters of a mother-pup pair in the water.

Through adaptive management, the regulations will allow NMFS to modify (e.g., remove, revise, or add to) the existing mitigation, monitoring, or reporting measures summarized above and required by the LOA.

Background

The MMPA prohibits the “take” of marine mammals, with certain exceptions. Section 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 promulgated or an incidental harassment authorization is issued.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for taking for subsistence uses (where relevant). If such findings are made, NMFS must prescribe permissible methods of taking; 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 the species or stocks for taking for certain subsistence uses (referred to in shorthand as “mitigation”); and requirements pertaining to the monitoring and reporting of the takings. The definitions of all applicable MMPA statutory terms cited above are included in the relevant sections below and can be found in section 3 of the MMPA (16 U.S.C. 1362) and NMFS regulations at 50 CFR 216.103.

Summary of Request

On April 17, 2024, NMFS received a request from the USACE for regulations and a subsequent LOA to take marine mammals incidental to construction activities related to the DERP in Washington. A revised application was submitted on September 27, 2024. We determined the application was adequate and complete on November

19, 2024. On November 25, 2024, we published a notice of receipt of the USACE’s application in the **Federal Register**, requesting comments and information related to the request for 30 days (89 FR 92907). We received no public comments. On August 15, 2025, we published the proposed rule in the **Federal Register** (90 FR 39346) and requested comments and information from the public. NMFS reviewed the submitted material and considered it for promulgation of these regulations.

Description of the Specified Activities

A detailed description of the USACE’s planned activities are provided in the proposed rule (90 FR 39346, August 15, 2025). Since publication of the proposed rule, the USACE has not made any modifications to their specified activities; therefore, we refer the reader to the proposed rule for a detailed description of the specified activities. Mitigation, monitoring, and reporting measures proposed by the USACE and included in this final rule are also described in detail in the proposed rule and summarized later in this document (please see Mitigation and Monitoring and Reporting). Note that the effective dates of the regulations and LOA in the proposed rule (90 FR 39346) were listed as July 30, 2026, through July 29, 2031.

The project has been delayed by one year due to the inability of the USACE to secure funding during the 2026 budget cycle. Therefore, the applicant requested new effective dates of July 9, 2027, through July 8, 2032. These new effective dates have been authorized by NMFS. The delay of the project by one year (2026 to 2027) and the change in the effective start date by several weeks (July 30 compared to July 9) will not affect any additional species or have any impact on the life cycle of harbor seals. The one-year delay and change of effective start dates during Year 1 of the LOA is not expected to affect our analysis in any way. The species affected, number of animals authorized for take, and mitigation and monitoring requirement remain unchanged.

Additional details on the specified activities are available in the proposed rule (90 FR 39346, August 15, 2025).

Specified Geographic Region

The specified geographic region is Hood Canal in Puget Sound. Details regarding this area can be found in the proposed rule (90 FR 39346, August 15, 2025).

Comments and Responses

During the 30-day comment period, we received a single comment letter from a member of the public that

contained three separate comments. NMFS has reviewed and considered all relevant comments received on the proposed rule and issuance of the LOA. All substantive, relevant comments and our responses are described below.

Comment 1: The commenter wrote that construction activities could negatively impact marine mammals and that even a “small number” of takes could lead to disruptions in feeding, breeding, and migratory patterns, which could have lasting consequences for the population.

Response: Section 101(a)(5)(A) of the MMPA requires NMFS to make a determination that the take incidental to a “specified activity” will have a negligible impact on the affected species or stocks of marine mammals. NMFS’ implementing regulations 50 CFR 216.104(a)(1) require applicants to include in their request a detailed description of the specified activity or class of activities that can be expected to result in incidental taking of marine mammals. NMFS has defined negligible impact 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 (50 CFR 216.103). A negligible impact finding is based on the lack of likely adverse effects on annual rates of recruitment or survival (*i.e.*, population-level effects). An estimate of the number of takes alone is not enough information on which to base an impact determination. In addition to considering estimates of the number of marine mammals that might be “taken” through harassment, NMFS considers other factors, such as the likely nature of any impacts or responses (*e.g.*, intensity, duration), the context of any impacts or responses (*e.g.*, critical reproductive time or location, foraging impacts affecting energetics), as well as effects on habitat, and the likely effectiveness of the mitigation. We also assess the number, intensity, and context of estimated takes by evaluating this information relative to population status. In this instance, NMFS has determined that the USACE’s planned activities will have a negligible impact on harbor seals in the project area.

NMFS is also required to make a small numbers determination. NMFS explains the concept of “small numbers” in recognition that there could also be quantities of individuals taken that would correspond with “medium” and “large” numbers. As such, for an individual incidental take authorization, NMFS considers that one-third of the most appropriate population

abundance number—as compared with the assumed number of individuals taken—is an appropriate limit with regard to “small numbers.” This relative approach is consistent with relevant case law. *See Center for Biological Diversity v. Salazar*, 695 F.3d 893, 907 (9th Cir. 2012) (holding that the U.S. Fish and Wildlife Service reasonably interpreted “small numbers” by analyzing take in relative or proportional terms). As noted above, there is no biological significance associated with “small numbers” and, as such, NMFS appropriately does not consider “conservation status” or other issues related to the status of a species or stock in making its small numbers finding. Instead, these concepts are considered as part of the negligible impact analysis described previously. The USACE requested, and NMFS has authorized, incidental take that amounts to no more than 14.3 percent of the Washington Inland Hood Canal stock of harbor seals, which is less than one-third of the stock’s population abundance.

Comment 2: The commenter stated that the five-year period of incidental takes allowed under an LOA in such a sensitive area raises concerns about the cumulative impact on marine mammal populations. They stated that the risk of compounding negative effects over time—especially in a confined area like Hood Canal—demands a more cautious, conservative approach to project approval, as the ecological consequences of such disruptions may not become evident until it is too late to reverse the damage.

Response: Neither the MMPA nor NMFS’ codified implementing regulations require consideration of other unrelated activities and their impacts on marine mammal populations. The preamble for NMFS’ implementing regulations (54 FR 40338, September 29, 1989) states in response to comments that the impacts from other past and ongoing anthropogenic activities are to be incorporated into the negligible impact analysis via their impacts on the baseline. Consistent with that direction, NMFS has factored into its negligible impact analysis the impacts of other past and ongoing anthropogenic activities via their impacts on the baseline (*e.g.*, as reflected in the density, distribution and status of the species, population size and growth rate, and other relevant stressors). The 1989 final rule for the MMPA implementing regulations also addressed public comments regarding cumulative effects from future, unrelated activities. There, NMFS stated that such effects are not considered in

making findings under MMPA section 101(a)(5) concerning negligible impact.

Comment 3: The commenter stated that an incidental take authorization may overlook the availability of alternatives that could prevent the need for any take of marine mammals and should be designed in such a way that minimizes its impact on wildlife and prioritizes the health of marine ecosystems without resorting to take authorizations. The goal should be to avoid take altogether, not merely to manage or mitigate it after the fact. The commenter further asserted that the precautionary principle demands that we prioritize the protection of vulnerable marine species, especially in ecologically sensitive areas like Hood Canal.

Response: Neither the MMPA nor NMFS’ implementing regulations include discussion or requirements related to a “precautionary principle.” NMFS must process requests for incidental take regulations in a manner consistent with the requirements of section 101(a)(5)(A) of the MMPA, which establishes specific criteria for when incidental take must be authorized. NMFS is not required under the MMPA to avoid take altogether. As described above, NMFS has determined that the planned activities will have a negligible impact on affected species or stocks. Furthermore, NMFS has not overlooked the availability of alternatives. As required under the MMPA, NMFS has prescribed the permissible methods of taking and other “means of effecting the least practicable adverse impact” on the affected species or stocks and their habitat.

The USACE would be unable to conduct their planned construction activities without being in violation of the MMPA if all incidental take of marine mammals was prohibited.

Changes From Proposed to Final Rule

The Level 2 Reaction Code in table 4 of this notice has been revised to include the following language: “Movements in response to the source of disturbance, ranging from short withdrawals at least twice the animal’s body length to longer retreats, or if already moving a change of direction of greater than 90 degrees.” The text has been updated from that in the proposed rule to match the most recent standardized language that is being utilized across all incidental take authorizations that incorporate the Marine Mammal Reaction Code. The Marine Mammal Reaction Code is used to classify the response of an animal to external stimuli. There are no

substantive changes accompanying the language update.

An incorrect value of 13.1 percent of the percentage of stock taken was listed in the Small Numbers section of the proposed rule (90 FR 39346). We are making a technical correction to revise this value to 14.3 percent in the Small Numbers section of this notice and in table 3.

The effective dates of the regulations and LOA in the proposed rule (90 FR 39346) were listed as July 30, 2026, through July 29, 2031. Because the project has been delayed by one year, we changed the effective dates to July 9, 2027, through July 8, 2032. Since the project was delayed for one year, table 3 in this notice, Authorized Takes by Level B Harassment Annually, covers the years 2027–2030 while table 3 in the proposed notice covered the years 2026 through 2029 (90 FR 39346).

Under the Monitoring and Reporting section of the proposed rule (90 FR

39346), language pertaining to the reporting of dead or injured animals was accidentally omitted. The appropriate language has been included in the Monitoring and Reporting section and regulations in this final rule. This is standard language included in all incidental take authorizations where there is the possibility of observing dead or injured animals and was inadvertently omitted from the proposed rule.

Description of Marine Mammals in the Specified Geographic Region

A single species of marine mammal may be taken by harassment incidental to the USACE's specified activities. A complete description of marine mammals status and trends, life history, habitat use, and threats is included in the USACE's application and NMFS' proposed rule (90 FR 39346). NMFS is not aware of any new relevant information since publication of the

proposed rule. Please refer to the proposed rule for detailed descriptions of marine mammals in the project area.

Table 1 lists all species or stocks for which take is expected and has been authorized by NMFS for this activity and summarizes information related to the population or stock, including regulatory status under the MMPA and Endangered Species Act (ESA) and potential biological removal (PBR), where known. PBR is defined by the MMPA as the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population (as described in NMFS' stock assessment reports). All values presented in table 1 are the most recent available at the time of publication (available online at: <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments>).

TABLE 1—MARINE MAMMAL SPECIES¹ LIKELY TO OCCUR NEAR THE PROJECT AREA THAT MAY BE TAKEN BY USACE'S ACTIVITIES

Common name	Scientific name	Stock	ESA/ MMPA status; strategic (Y/N) ²	Stock abundance (CV, N _{min} , most recent abundance survey) ³	PBR	Annual M/SI ⁴
Order Carnivora—Pinnipedia						
Family Phocidae (earless seals): Harbor Seal	<i>Phoca vitulina</i>	Washington Inland Hood Canal ..	-, -, N	3,363 (0.16, 2,940, 2019) ⁵	88	2

¹ Information on the classification of marine mammal species can be found on the web page for The Society for Marine Mammalogy's Committee on Taxonomy at: <https://marinemammalscience.org/science-and-publications/list-marine-mammal-species-subspecies>.

² 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.

³ NMFS marine mammal SARs online at: <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessment-reports-region>. CV is coefficient of variation; N_{min} is the minimum estimate of stock abundance.

⁴ 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.

⁵ These values were presented in the 2023 Draft Marine Mammal SAR. However, the draft 2023 SAR for the Washington Inland Waters harbor seal stocks, including the Hood Canal stock was not finalized as part of the 2023 Final SAR (89 FR 104989, December 26, 2024) given that the Pearson *et al.* (2024) estimates of abundance and trends remain unpublished at the time of publication. This SAR will be revised in a subsequent cycle when the abundance estimates for these stocks are published. However, this remains the best available information for use in evaluating effects to this stock of harbor seals.

Potential Effects of Specified Activities on Marine Mammals and Their Habitat

The effects of visual and acoustic stimuli generated by the presence and operation of assorted DERP construction equipment as well as the presence of personnel, has the potential to cause Level B harassment of pinnipeds in the DERP project area. The proposed rule included a discussion of the effects of these stimuli from the planned activities on marine mammals and their habitat (90 FR 39346). There is no newly available relevant information that would change our analyses or the results thereof.

Estimated Take of Marine Mammals

This section provides an estimate of the number of incidental takes authorized through the LOA, which will inform NMFS' consideration of "small numbers," the negligible impact determinations, and impacts on subsistence uses.

Harassment is the only type of take expected to result from these activities. Except with respect to certain activities not pertinent here, section 3(18) of the MMPA (16 U.S.C. 1362(18)) 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).

Authorized takes would be by Level B harassment only, in the form of behavioral reactions for individual marine mammals resulting from exposure to visual or acoustic disturbance associated with various construction equipment and personnel or protected species observers (PSOs). Based on the nature of the activity, Level A harassment is neither anticipated nor authorized.

As described previously, no serious injury or mortality is anticipated or authorized for this activity. Below we

describe how the take numbers were estimated.

Acoustic Impacts

There is very limited potential for impacts from underwater noise to result in harassment of pinnipeds. As noted previously, nearly all construction would be land-based. Pile driving within a wetted channel is only planned at a single location among the river channels and other permanently inundated areas in the project area. A vibratory driver will be used to remove bridge piers within the wetted river channel during the demolition of the existing north Highway 101 bridge (see figure 12 in the USACE's application). The USACE, in consultation with NMFS, concluded that the meandering path of the river at this location will adequately prevent direct propagation of underwater noise to the nearest haulout site and, while it is possible that underwater noise from pile-driving could potentially result in take, it is not considered likely and will be adequately addressed through our consideration of the effects of other, more likely causes of disturbance to seals.

All other vibratory and impact pile driving will occur on solid ground and will either occur during low tide or will be isolated from water using the existing Highway 101 causeway, cofferdams, or aquadams, thereby dampening propagation of sound through the substrate. For in-air sounds, NMFS has

established a threshold of received levels above 90 dB re 20 µPa (rms) that could result in behavioral harassment (Level B harassment) of harbor seals. The actual measured in-air Lmax (dBA) at 50 feet (15.24 m) for vibratory and impact pile drivers is 101 dB (FHWA 2017). Noise attenuates as the distance from the source of the noise increases. A general equation shows noise propagation loss as 7.5 dB for each doubling of distance in areas where landscape features and vegetation exist (WSDOT 2020). Additionally, the following equation can be used to determine construction noise levels at a specific distance from the source (WSDOT 2020):

$L_{max} = \text{the Construction } L_{max} \text{ at } 50 \text{ feet (15.24 m)} - 25 * \text{Log}(D/Do)$. In this equation, L_{max} = the highest A-weighted sound level occurring during a noise event during the time that noise is being measured; 50 feet (15.24 m) = the reference measurement distance; and D = the distance from the noise source.

Do = the reference measurement distance (50 feet (15.24 m) in this case). Using this equation, a 101 dB vibratory or impact pile driver will attenuate to 90 dB after 54 m (177 ft). The nearest vibratory pile driving site in the project area is about 265 m (870 ft) from known harbor seal haulout sites at the Duckabush River estuary. Therefore, Level B harassment from airborne noise could only occur if a seal left their

haulout site and proceeded to within 54 m (177 ft) of an active pile driving site.

Marine Mammal Occurrence

In this section we provide information about the occurrence of marine mammals, including abundance or other relevant information which will inform the take calculations.

WDFW conducts regular aerial surveys of hauled out harbor seals in the Hood Canal, typically restricting monitoring to the peak of the pupping period and the window two hours before and after high tides to maximize the number of individuals on land. The USACE utilized unpublished WDFW data from 2021–2023 (USACE, 2024) as well as aerial survey information of hauled out harbor seals at Duckabush River in 2013 and 2014 (Jeffries *et al.* 2014) to estimate harbor seal abundance. Table 2 summarizes the results from both surveys.

From 2021–2023, an average of 86 seals hauled out at the Duckabush River estuary during the pupping season, with a maximum daily count of 130 seals. Harbor seal counts during the molting season peaked at 23 per day although data during this period is limited. Available count data outside of the critical life history periods of pupping and molting season is also limited but indicated scarce usage of Duckabush River estuary haulout sites during the daytime for this period.

TABLE 2—HARBOR SEAL COUNTS AT DUCKABUSH ESTUARY

Date	Year	Pups	Adults	Total count
February 4	2014	0	0	^a 0
March 13	2013	0	0	^a 0
March 21	2013	0	7	^a 7
July 23	2013	0	0	^a 0
August 26	2013	17	60	^a 77
August 27	2013	21	78	^a 99
September 21	2023	3	127	^b 130
September 22	2023	2	94	^b 96
September 28	2021	2	85	^b 87
September 29	2022	4	111	^b 115
October 17	2023	1	3	^a 4
November 6	2013	0	23	^a 23
November 8	2013	0	13	^a 13

Count source: ^a—Jeffries *et al.* (2014),

^b—WDFW (unpublished).

Take Estimation

Here, we describe how the information provided above is synthesized to produce a quantitative estimate of the take that is reasonably likely to occur and which will be authorized by NMFS.

Since there is no previous data on how harbor seals react to construction activities at the Duckabush River

estuary, take rates from an analogous project were utilized to estimate take. The Elkhorn Slough Tidal Marsh Restoration Project in Monterey County, California is a similar wetland restoration project involving land-based construction near harbor seal haulout sites (CDFW 2021). NMFS has issued IHAs for all three phases of this project, all authorizing take by Level B

harassment of harbor seals resulting from similar disturbances as considered here, including the use of haul trucks, dozers, backhoes, loaders, and excavators. The objective of both projects is to restore tidal marshes that have been altered by past land use practices. The Elkhorn Slough project is in the process of restoring 147 wetland acres while the DMMP project will

restore 38 acres. Impacts from both projects include the potential for Level B harassment of harbor seals by visual disturbance and in-air noise.

Due to the limited harbor seal survey data at the Duckabush River estuary, a basic model was used to estimate seal counts throughout the year. Using the survey data from table 3, it was assumed that there is an increase or decrease in the number of seals, as defined by use of a linear function (instead of a block function). This means that every day of the year has a unique number of seals based on a linear relationship between a specific date on which a certain number of seals were actually recorded and the next specific date on which seals were recorded. For example, in table 2, there were 99 total seals (pups and adults) recorded on August 27,

while 130 total seals were recorded on September 21. Using a linear relationship, it was assumed that 100.24 seals were observed on August 28 (one day after the date of recording—August 27 with 99 seals) observation, while 128.76 seals were observed on September 20 (one day before the next actual date of recording—September 20 with 130 seals). This methodology allows each day of the year to have a unique number of assumed seals present. The USACE developed a detailed project schedule which identified the number of workdays expected to occur for each year of the planned activity, ranging from a minimum of 111 days in 2026 to a maximum of 262 days in 2029. The USACE further identified the specific dates of each year that work is planned.

The sum of the number of observed seals associated with each specified work date was then calculated for each year of the authorization. Monitoring reports from the Elkhorn Slough Tidal Marsh Restoration Project showed that nine percent of harbor seals present were recorded as takes in Phase I of the Elkhorn Slough Tidal Marsh Restoration Project while 0.7 percent were recorded as takes in Phase II. Monitoring data from Phase III of the project is not available, so the conservative assumption of nine percent take rate were used to estimate realized take. The sum of the number of assumed seals present calculated for each year, as described previously, was then multiplied by nine percent to provide the calculated annual take estimates shown in table 3.

TABLE 3—AUTHORIZED TAKES BY LEVEL B HARASSMENT ANNUALLY

Year	NMFS stock abundance	Predicted work dates	Predicted work days	Estimated total seals exposed	Estimated take by Level B harassment	Take % of stock
2027	3,363	July 30–December 31	111	4,883	440	13.1
2028		January 1–December 31	261	5,331	480	14.3
2029		January 1–December 31	260	5,310	478	14.2
2030		January 1–November 7	262	5,090	458	13.6

To inform both the negligible impact analysis and the small numbers determination, NMFS assesses the maximum number of takes of marine mammals that could occur within any given year during the effective LOA period. In this calculation, the maximum estimated number of Level B harassment takes in any one year (480 in 2027) is used to yield the highest number of estimated take that could occur in any year (table 3). Table 3 also depicts the number of takes requested by the USACE and authorized by NMFS relative to the abundance of the Hood Canal stock.

Mitigation

In order to issue an LOA under section 101(a)(5)(A) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to the activity, and other means of effecting the least practicable adverse impact on the species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of the species or stock for taking for certain subsistence uses (latter not applicable for this action). NMFS regulations require applicants for incidental take authorizations to include information about the availability and feasibility (economic and technological) of equipment, methods, and manner of

conducting the activity or other means of effecting the least practicable adverse impact upon the affected species or stocks, and their habitat (50 CFR 216.104(a)(11)).

In evaluating how mitigation may or may not be appropriate to ensure the least practicable adverse impact on species or stocks and their habitat, as well as subsistence uses where applicable, NMFS considers two primary factors:

(1) The manner in which, and the degree to which, the successful implementation of the measure(s) is expected to reduce impacts to marine mammals, marine mammal species or stocks, and their habitat. This considers the nature of the potential adverse impact being mitigated (likelihood, scope, range). It further considers the likelihood that the measure will be effective if implemented (probability of accomplishing the mitigating result if implemented as planned), the likelihood of effective implementation (probability implemented as planned); and

(2) The practicability of the measures for applicant implementation, which may consider such things as cost and impact on operations.

The mitigation measures described in the following sections will apply to the USACE construction activities.

The USACE shall conduct training between supervisors and crews, the PSO team, and relevant USACE staff prior to the start of DERP construction so that responsibilities, communication procedures, monitoring protocols, and operational procedures are clearly understood. If new construction personnel are added to the project, the contractor shall ensure that the personnel receive the mandatory training before starting work.

Visual Monitoring

Required monitoring must be conducted by dedicated, trained, NMFS-approved PSO(s). PSOs shall establish and monitor a 300-meter zone around all construction activities. A PSO will be present every day when construction activities occur in or near the DERP area. A 30-minute pre-clearance observation period will occur prior to the start of construction activities. Construction may not start until the work area is cleared by the PSOs. Monitoring will occur until 30 minutes after construction is complete. One or more PSOs will be stationed at location(s) offering the best view of four haulout sites and the project area as described in the USACE’s marine mammal monitoring plan (MMMP).

If environmental conditions deteriorate such that marine mammals within the entire shutdown zone (10 m

will not be visible (*e.g.*, fog, heavy rain), construction must be delayed until the PSO is confident marine mammals within the shutdown zone could be detected.

Pre-Construction Clearance and Ramp-up

A 30-minute pre-clearance observation period must occur prior to the start of ramp-up and construction activities. The USACE must adhere to the following pre-clearance and ramp-up requirements: (i) Construction activities must not be initiated if any marine mammal is within 10 m of planned operations. If a marine mammal is observed within 10 m of planned operations during the 30-minute pre-clearance period, ramp-up must not begin until the animal(s) has been observed exiting the zones or until an additional time period has elapsed with no further sightings; and (ii) Construction activities may not be initiated within 100 meters of a mother-pup pair in the water.

To reduce the risk of potentially startling marine mammals with a sudden intensive sound, the contractor will ramp-up construction activities gradually each day by moving around the project area and starting equipment one at a time.

Shutdown Requirements

For heavy machinery work, if a marine mammal comes within 10 meters of such operations, operations must cease work or will not be initiated until the marine mammal has moved outside the 10-meter buffer. During pupping season (August 1–October 31) construction activities may not be initiated: (1) Within 300 meters of a mom/pup pair that is hauled out, or (2) within 100 meters of a mom/pup pair in the water. If a pup less than 1 week old (neonate) comes within 20 meters of where heavy machinery is working, construction activities in that area must be shut down or delayed until the pup has left the area.

Activities must cease if a marine mammal species for which take was not authorized, or a species for which authorization was granted but the authorized number of takes have been met, is observed by PSOs approaching or within the Level B harassment zone. Activities must not resume until the animal is confirmed to have left the area.

NMFS has determined that the mitigation measures contained within this final rule will provide the 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.

Monitoring and Reporting

In order to issue an LOA for an activity, section 101(a)(5)(A) of the MMPA states that NMFS must set forth requirements pertaining to the monitoring and reporting of such taking. The MMPA implementing regulations at 50 CFR 216.104(a)(13) require that requests for authorizations include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present while conducting the activities. Effective reporting is critical both to compliance as well as ensuring that the most value is obtained from the required monitoring.

Monitoring and reporting requirements prescribed by NMFS should contribute to improved understanding of one or more of the following:

- Occurrence of marine mammal species or stocks in the area in which take is anticipated (*e.g.*, presence, abundance, distribution, density);
- Nature, scope, or context of likely marine mammal exposure to potential stressors/impacts (individual or cumulative, acute or chronic), through better understanding of: (1) action or environment (*e.g.*, source characterization, propagation, ambient noise); (2) affected species (*e.g.*, life history, dive patterns); (3) co-occurrence of marine mammal species with the activity; or (4) biological or behavioral context of exposure (*e.g.*, age, calving or feeding areas);
- Individual marine mammal responses (behavioral or physiological) to acoustic stressors (acute, chronic, or cumulative), other stressors, or cumulative impacts from multiple stressors;
- How anticipated responses to stressors impact either: (1) long-term fitness and survival of individual marine mammals; or (2) populations, species, or stocks;
- Effects on marine mammal habitat (*e.g.*, marine mammal prey species, acoustic habitat, or other important physical components of marine mammal habitat); and,
- Mitigation and monitoring effectiveness.

Visual Monitoring

PSO monitoring during construction will occur from vantage points along the current Highway 101 elevated causeway that allow monitors to observe any seals

hauling out in the estuary as shown in the Marine Mammal Monitoring Plan. The primary observation locations shall be on the northern Highway 101 bridge and at the head of the existing estuary access path that will become the temporary parking platform. Monitors may also traverse along the Highway 101 causeway to obtain clearer views of approaching or hauled-out seals, such as from the southern Highway 101 bridge or North Parking Area. The observation area for the restoration area shall be accessed by foot and used to provide a vantage point of the construction area and Duckabush River estuary. This observation area includes all restoration areas within 300 meters of harbor seal haulout sites.

The USACE must submit a Marine Mammal Monitoring Plan to NMFS for approval at least 90 days in advance of construction. Marine mammal monitoring must be conducted in accordance with the conditions in this section and the approved Marine Mammal Monitoring Plan. Marine mammal monitoring during construction activities must be conducted by qualified, NMFS approved PSOs, in accordance with the following:

- PSOs must be independent of the activity contractor (for example, employed by a subcontractor) and have no other assigned tasks during monitoring periods.
- At least one PSO must have prior experience performing the duties of a PSO during construction activity pursuant to a NMFS-issued incidental take authorization.
- Other PSOs may substitute other relevant experience, education (degree in biological science or related field), or training for prior experience performing the duties of a PSO during construction activity pursuant to a NMFS-issued incidental take authorization.
- PSOs must be approved by NMFS prior to beginning any activity subject to this rule.

PSOs should have the following additional qualifications:

- Ability to conduct field observations and collect data according to assigned protocols;
- Experience or training in the field identification of marine mammals, including the identification of behaviors;
- Sufficient training, orientation, or experience with the construction operation to provide for personal safety during observations;
- Writing skills sufficient to prepare a report of observations including but not limited to: (1) the number and species of marine mammals observed; (2) dates

and times when in-water construction activities were conducted; (3) dates, times, and reason for implementation of mitigation (or why mitigation was not implemented when required); and (4) marine mammal behavior; and

- Ability to communicate orally, by radio or in person, with project personnel to provide real-time information on marine mammals observed in the area as necessary.

Pre- and Post-Construction Daily Censuses

A census of marine mammals in the project area and the area surrounding the project will be conducted 30 minutes prior to the beginning of construction on monitoring days, and again 30 minutes after the completion of construction activities. Data collected during the pre- and post-construction daily censuses will include:

- Environmental conditions (weather condition, tidal conditions, visibility, cloud cover, air temperature and wind speed);
- Numbers of each marine mammal species spotted;

- Location of each species spotted, including distance from construction activity;
- Status (in water or hauled-out); and
- Behavior.

Hourly Counts

The USACE will conduct hourly counts of animals hauled out and in the water. Data collected will include:

- Numbers of each species;
- Location of species, whether hauled out or in the water; and distance from construction activities;
- Time;
- Tidal conditions;
- Time construction activities start and end;
- Primary construction activities occurring during past hour;
- Any noise or visual disturbance;
- Number of mom/pup pairs and neonates observed; and
- Notable behaviors, including foraging, grooming, resting, aggression, mating activity, and others.

PSOs will take notes including any of the following information to the extent it is feasible to record:

- Age-class;
 - Sex;
 - Unusual activity or signs of stress; and
 - Any other information worth noting.
- PSOs will record reaction observed in relation to construction activities including:
- Tally of each reaction;
 - Time of reaction;
 - Concurrent construction activity (including duration) and assumed cause (whether related to construction activities or not) and observer determination as to the source of disturbance, to the extent possible;
 - Location of animal during initial reaction and distance from the noted disturbance;
 - Direction of movement;
 - Activity before and after disturbance;
 - Status (in water or hauled out) before and after disturbance; and
 - Coded reaction as shown in table 4.

TABLE 4—MARINE MAMMAL REACTION CODES

Level	Type of response	Definition
1	Alert	Head orientation or brief movement in response to disturbance, which may include turning head towards the disturbance, craning head and neck or 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. Alerts would be recorded, but not counted as a 'take'.
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, 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 under the MMPA, whereas Level 1 is not.

Reporting

The USACE must submit a draft monitoring report to NMFS within 90 calendar days of the completion of each construction year. A draft comprehensive 5-year summary report must also be submitted to NMFS within 90 days of the end of the effective period of the LOA. The reports must detail the monitoring protocol and summarize the data recorded during monitoring. Final annual reports and the final comprehensive report must be prepared and submitted within 30 days following resolution of any NMFS comments on the draft report. If no comments are received from NMFS within 30 days of receipt of the draft report, the report must be considered final. If comments are received, a final report addressing NMFS comments must be submitted within 30 days after receipt of comments. The annual and

final marine mammal monitoring reports will include an overall description of work completed, a narrative regarding marine mammal sightings, and associated PSO data sheets. Specifically, the report must include:

- Dates and times (begin and end) of all marine mammal monitoring;
- Construction activities occurring during each daily observation period;
- PSO locations during marine mammal monitoring;
- Environmental conditions during monitoring periods (at beginning and end of PSO shift and whenever conditions change significantly), including Beaufort sea state and any other relevant weather conditions including cloud cover, fog, sun glare, and overall visibility to the horizon, and estimated observable distance;
- Upon observation of a marine mammal, the following information: (1)

name of PSO who sighted the animal(s) and PSO location and activity at time of sighting; (2) time of sighting; (3) identification of the animal(s) (e.g., genus/species, lowest possible taxonomic level, or unidentified); (4) distance and bearing of each marine mammal observed relative to the pile being driven for each sighting (if pile driving was occurring at time of sighting); (5) estimated number of animals (min/max/best estimate); (6) estimated number of animals by cohort (e.g., adults, juveniles, neonates, group composition, etc.); (7) animal's closest point of approach; and (8) description of any marine mammal behavioral observations (e.g., observed behaviors such as feeding or traveling), including an assessment of behavioral responses thought to have resulted from the activity (e.g., no response or changes in behavioral state such as ceasing feeding,

changing direction, flushing, or breaching);

- Number of marine mammals detected within the harassment zones; and
- Detailed information about any implementation of any mitigation triggered (e.g., shutdowns and delays), a description of specific actions that ensued, and resulting changes in behavior of the animal(s), if any.

The following requirement was unintentionally omitted from the proposed rule. It is included here as well as in the regulatory text. In the event that personnel involved in the construction activities discover an injured or dead marine mammal, the USACE must report the incident to the Office of Protected Resources (OPR) and the West Coast regional stranding network as soon as feasible. If the death or injury was clearly caused by the specified activity, the USACE must immediately cease the activities until NMFS OPR is able to review the circumstances of the incident and determine what, if any, additional measures are appropriate to ensure compliance with the terms of this IHA. The USACE must not resume their activities until notified by NMFS. The report must include the following information:

- Time, date, and location (latitude/longitude) of the first discovery (and updated location information if known and applicable);
- Species identification (if known) or description of the animal(s) involved;
- Condition of the animal(s) (including carcass condition if the animal is dead);
- Observed behaviors of the animal(s), if alive;
- If available, photographs or video footage of the animal(s); and
- General circumstances under which the animal was discovered.

Adaptive Management

The regulations governing the take of marine mammals incidental to the USACE's construction activities contain an adaptive management component which was described in detail in the proposed rule and is not repeated here. The reporting requirements associated with this final rule are designed to provide NMFS with monitoring data from completed projects to allow consideration of whether any changes are appropriate. The use of adaptive management allows NMFS to consider new information from different sources to determine (with input from the USACE regarding practicability) on an annual or biennial basis if mitigation or monitoring measures should be

modified (including additions or deletions). Mitigation measures could be modified if new data suggests that such modifications would have a reasonable likelihood of reducing adverse effects to marine mammals and if the measures are practicable.

The following are some of the possible sources of applicable data to be considered through the adaptive management process: (1) results from monitoring reports, as required by MMPA authorizations; (2) results from general marine mammal and sound research; and (3) any information which reveals that marine mammals may have been taken in a manner, extent, or number not authorized by these regulations or LOAs issued pursuant to these regulations.

Negligible Impact Analysis and Determination

NMFS has defined negligible impact 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 (50 CFR 216.103). A negligible impact finding is based on the lack of likely adverse effects on annual rates of recruitment or survival (*i.e.*, population-level effects). An estimate of the number of takes alone is not enough information on which to base an impact determination. In addition to considering estimates of the number of marine mammals that might be "taken" through harassment, NMFS considers other factors, such as the likely nature of any impacts or responses (*e.g.*, intensity, duration), the context of any impacts or responses (*e.g.*, critical reproductive time or location, foraging impacts affecting energetics), as well as effects on habitat, and the likely effectiveness of the mitigation. We also assess the number, intensity, and context of estimated takes by evaluating this information relative to population status. Consistent with NMFS' implementing regulations (54 FR 40338, September 29, 1989), the impacts from other past and ongoing anthropogenic activities are incorporated into this analysis via their impacts on the baseline (*e.g.*, as reflected in the regulatory status of the species, population size and growth rate where known, ongoing sources of human-caused mortality, or ambient noise levels).

The USACE has requested, and NMFS is authorizing take, by Level B harassment, of harbor seals from the Washington Inland Hood Canal stock. No injuries or mortalities are anticipated

to occur as a result of the DERP project and none are authorized. Effects on individuals that are taken by Level B harassment, on the basis of reports in the literature, would likely be localized and limited to reactions such as alerts or movements away from the construction area, including flushing into the water. Most likely, individuals, if affected at all will simply move away from the visual or acoustic stimulus and be temporarily displaced from the areas.

Repeated exposures of individuals to relatively low levels of visual and sound disturbance outside of preferred habitat areas are unlikely to significantly disrupt critical behaviors or result in permanent abandonment of the haulout site. Even repeated Level B harassment of some small subset of the overall stock is unlikely to result in any significant realized decrease in viability for the affected individuals, and thus would not result in any adverse impact to the stock as a whole. Level B harassment will be reduced to the level of least practicable adverse impact through use of mitigation measures described herein. If visual disturbance and low-level sound produced by project activities is sufficiently disturbing, animals are likely to simply avoid the area while the activity is occurring.

No adverse effects to habitat or prey species are anticipated during or after construction has ended since almost the entirety of work will be land-based. There is other suitable habitat nearby where harbor seals could temporarily relocate. The restoration of the marsh habitat will have no adverse effect on marine mammal habitat, but possibly a long-term beneficial effect on habitat and harbor seals by improving ecological function of the slough, including increased prey availability, higher species diversity, larger fish, and improved habitat.

Harbor seals are not listed as threatened or endangered under the ESA and there are no known areas of biological importance in the project area. Furthermore, the population of the Hood Canal stock of harbor seals has been relatively stable over the past three decades (Pearson *et al.* 2024).

Taking into account the planned mitigation measures, effects to marine mammals are generally expected to be restricted to short-term changes in behavior or temporary displacement from haulout sites. There are other haulout areas for pinnipeds to temporarily relocate, and marine mammals are expected to return to the area shortly after activities cease.

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 harbor seals (or any other species) through effects on annual rates of recruitment or survival:

- No serious injury, mortality or Level A harassment is anticipated or authorized;
- Effects of the activities will be limited to localized behavioral changes and temporary displacement;
- Nominal adverse impacts to pinniped habitat are anticipated while improved ecological processes in the estuary will result in positive effects to habitat;
- No biologically important areas have been identified in the project area; and
- Mitigation measures are anticipated to be effective in minimizing the number and severity of takes by Level B harassment, which are expected to be localized.

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the required monitoring and mitigation measures, NMFS finds that the total marine mammal take from the planned activity will have a negligible impact on all affected marine mammal species or stocks.

Small Numbers

As noted previously, only take of small numbers of marine mammals may be authorized under sections 101(a)(5)(A) and (D) of the MMPA for specified activities other than military readiness activities. The MMPA does not define small numbers and so, in practice, where estimated numbers are available, NMFS compares the maximum number of individuals taken in any year to the most appropriate estimation of abundance of the relevant species or stock in our determination of whether an authorization is limited to small numbers of marine mammals. When the predicted maximum annual number of individuals to be taken is fewer than one-third of the species or stock abundance, the take is considered to be of small numbers. Additionally, other qualitative factors may be considered in the analysis, such as the temporal or spatial scale of the activities.

Table 3 in this notice demonstrates the maximum number of Level B harassment events per year. Our analysis shows that no more than 14.3 percent of harbor seals could be taken by Level B harassment. The numbers of animals authorized to be taken for this stock would be considered small relative to the relevant stock's

abundances, even if each estimated taking occurred to a new individual—an extremely unlikely scenario.

Based on the analysis contained herein of the planned activity (including the required mitigation and monitoring measures) and the anticipated take of marine mammals, NMFS finds that small numbers of marine mammals would be taken relative to the population size of the affected species or stocks.

Unmitigable Adverse Impact Analysis and Determination

There are no relevant subsistence uses of the affected marine mammal stocks or species implicated by this action. Therefore, NMFS has determined that the total taking of affected species or stocks will not have an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence purposes.

Endangered Species Act (ESA)

Section 7(a)(2) of the ESA of 1973 (16 U.S.C. 1531 *et seq.*) requires that each Federal agency ensure 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 proposed rules, NMFS consults internally whenever we propose to authorize take for endangered or threatened species.

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

National Environmental Policy Act (NEPA)

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 evaluate the proposed action (*i.e.*, promulgation of regulations and subsequent issuance of a 5-year LOA) and alternatives 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 (IHAs)) with no anticipated serious injury or mortality) of the Companion Manual for NAO 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 final rule qualifies to be categorically excluded from further NEPA review.

Classification

Executive Order 12866

The Office of Management and Budget (OMB) has determined that this final rule is significant under section 3(f) of Executive Order 12866. USACE's planned activities would support the construction of a new eight-span Highway 101 bridge across the Duckabush estuary. The existing bridge crossing will be removed. The activities would create economic benefits by improving the stream of commerce along Highway 101, which serves as a vital economic lifeline for Washington's Olympic Peninsula, generating hundreds of millions of dollars annually through robust tourism and critical freight and commercial transport. USACE initiated the request for an MMPA incidental take authorization, which suggests that it is relying on NMFS' authorization to proceed with its proposed action. While a MMPA incidental take authorization is not a pre-condition for conducting the proposed action (USACE is ultimately responsible for this decision), it would provide USACE with two key benefits: (1) a legal exemption from the MMPA's general prohibition on the take of marine mammals (assuming USACE complies with the terms and conditions of its authorization); and (2) regulatory certainty because USACE will be fully cognizant of NMFS' expectations in regard to the steps needed to be taken to address risks to marine mammals and how to minimize its legal exposure under the statute. USACE will also incur costs to comply with certain mitigation and monitoring requirements, as required by the MMPA. Despite the additional costs of such measures, the costs related to MMPA compliance during USACE's activities are small compared with expenditures on other aspects of construction and operations, and direct compliance costs of the regulatory requirements are unlikely to result in material impacts to the project.

In addition, cost savings may be generated by the reduced administrative effort required to obtain a LOA under the framework established by a rule compared to what would be required to obtain annual incidental harassment authorizations (IHA) under section 101(a)(5)(D). Absent the rule, to attain

equivalent compliance with the MMPA, USACE would need to apply for IHAs annually over the duration of their activities. Although not monetized, NMFS' analysis indicates that the upfront work associated with the rule (e.g., analyses, modeling, process for obtaining an LOA valid for 5 years) likely saves significant time and money for both NMFS and USACE.

In addition, some degree of benefits can be expected to accrue solely via ecological benefits to marine mammals and other wildlife as a result of this rulemaking. The published literature is clear that healthy populations of marine mammals and other co-existing species benefit regional economies and provide social welfare benefits to people. However, the literature does not provide a basis for quantitatively valuing the cost of anticipated incremental changes in environmental disturbance and marine mammal harassment associated with the rule.

Executive Order 14192

This rule is considered an Executive Order 14192 deregulatory action. The promulgation of incidental take regulations under MMPA section 101(a)(5)(A) of the MMPA allows an otherwise prohibited action (i.e., the taking of marine mammals), which increases flexibility and reduces burden.

Regulatory Flexibility Act (RFA)

Pursuant to section 605(b) of the Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*), the Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration at the proposed rule stage that this rule would not have a significant economic impact on a substantial number of small entities. The USACE is the only entity that will be subject to the requirements in these regulations. The USACE is not a small governmental jurisdiction, small organization, or small business as defined by the RFA. No comments were received that would affect this certification. Therefore, a regulatory flexibility analysis is not required and none has been prepared.

Paperwork Reduction Act (PRA)

This final rule does not contain a collection-of-information requirement subject to the provisions of the Paperwork Reduction Act (PRA) because the applicant is a Federal agency.

List of Subjects in 50 CFR Part 217

Administrative practice and procedure, Endangered and threatened

species, Fish, Fisheries, Marine mammals, Reporting and recordkeeping requirements, Wildlife.

Dated: August 21, 2026.

Samuel D. Rauch III,

Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.

For the reasons set forth in the preamble, NMFS amends 50 CFR part 217 as follows:

PART 217—REGULATIONS GOVERNING THE TAKE OF MARINE MAMMALS INCIDENTAL TO SPECIFIED ACTIVITIES

■ 1. The authority citation for part 217 continues to read as follows:

Authority: 16 U.S.C. 1361 *et seq.*, unless otherwise noted.

■ 2. Add subpart Y to part 217 to read as follows:

Subpart Y—Taking of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to the Duckabush Estuary Restoration Project in Washington

Sec.

217.240	Specified activity and geographical region.
217.241	Effective dates.
217.242	Permissible methods of taking.
217.243	Prohibitions.
217.244	Mitigation requirements.
217.245	Requirements for monitoring and reporting.
217.246	Letters of Authorization.
217.247	Renewals and modifications of Letters of Authorization.
217.248–217.249	[Reserved]

§ 217.240 Specified activity and geographical region.

(a) Regulations in this subpart apply only to the United States Army Corps of Engineers (USACE) and those persons it authorizes or funds to conduct activities on its behalf for the taking of marine mammals that occur in the areas outlined in paragraph (b) of this section and that occur incidental to construction activities, including maintenance and replacement of piles, as designated in the Duckabush Estuary Restoration Project in Washington. Requirements imposed on the USACE pursuant to this subpart must be implemented by those persons it authorizes or funds to conduct activities on its behalf.

(b) The taking of marine mammals by the USACE may be authorized in a Letter of Authorization (LOA) only if it occurs as part of the Duckabush Estuary Restoration Project in Washington.

§ 217.241 Effective dates.

Regulations in this subpart are effective from July 9, 2027 through July 8, 2032.

§ 217.242 Permissible methods of taking.

Under an LOA issued pursuant to §§ 216.106 of this chapter and 217.246 of this chapter, the Holder of the LOA (hereinafter “USACE”) may incidentally, but not intentionally, take marine mammals within the area described in § 217.240 (b) by harassment associated with construction activities, provided the activity is in compliance with all terms, conditions, and requirements of the regulations in this subpart and the applicable LOA.

§ 217.243 Prohibitions.

(a) Except for the takings contemplated in § 217.242 and authorized by an LOA issued under this subpart, it is unlawful for any person to do any of the following in connection with the activities described in § 217.240:

(1) Violate, or fail to comply with, the terms, conditions, and requirements of this subpart or a LOA issued under this subpart;

(2) Take any marine mammal not specified in such LOA;

(3) Take any marine mammal specified in such LOA in any manner other than as specified;

(4) Take a marine mammal specified in such LOA if NMFS determines such taking results in more than a negligible impact on the species or stocks of such marine mammal; or

(5) Take a marine mammal specified in such LOA after NMFS determines such taking results in an unmitigable adverse impact on the species or stock of such marine mammal for taking for subsistence uses.

(b) [Reserved]

§ 217.244 Mitigation requirements.

(a) When conducting the activities identified in § 217.240(a), the mitigation measures contained in any LOA issued under this subpart must be implemented. These mitigation measures include but are not limited to:

(1) A copy of this LOA must be in the possession of the USACE, supervisory construction personnel, lead protected species observers (PSOs), and any other relevant designees of the USACE operating under the authority of this LOA at all times that activities subject to this LOA are being conducted.

(2) The USACE shall conduct training between supervisors and crews, the PSO team, and relevant USACE staff prior to the start of construction activity subject to this rule, so that responsibilities,

communication procedures, monitoring protocols, and operational procedures are clearly understood. New personnel joining during the project must be trained in the aforementioned matters prior to commencing work.

(3) The USACE must employ PSOs and establish monitoring locations as described in the Marine Mammal Monitoring Plan. The USACE must monitor the Project Area to the maximum extent possible based on the required number of PSOs, required monitoring locations, and environmental conditions.

(4) Monitoring must take place from 30 minutes prior to initiation of pile driving activity (*i.e.*, pre-start clearance monitoring) through 30 minutes post-completion of construction activity.

(5) Pre-start clearance monitoring must be conducted during periods of visibility sufficient for the lead PSO to determine that the shutdown zones are clear of marine mammals. Construction activity may commence following 30 minutes of observation when the shutdown zones are clear of marine mammals.

(6) Construction activities must stop if a marine mammal is in a shutdown zone and may not resume until a marine mammal exits the shutdown zone.

(7) If construction activity is delayed or halted due to the presence of a marine mammal, the activity may not commence or resume until the animal has voluntarily exited and has been visually confirmed beyond the shutdown zone.

(8) The USACE must conduct a gradual increase (*i.e.*, ramp-up) to begin construction each day by moving around the project area and starting equipment one at a time, not all at once.

(9) The USACE must avoid direct physical interaction with marine mammals during construction activity. If a marine mammal comes within 10 meters (m) of such activity operations must cease to avoid direct physical interaction and can only resume after the animal has left the 10 m zone.

(10) If a pup less than one week old comes within 20 m of where heavy machinery is working, operations must cease and can only resume after the animal has left the 20 m zone.

(11) During pupping season (August 1 through October 31), construction activities may not be initiated within 300 m of a mom/pup pair that is hauled out or within 100 m of a mom/pup pair in the water.

(b) [Reserved]

§ 217.245 Requirements for monitoring and reporting.

(a) The USACE must submit a Marine Mammal Monitoring Plan to NMFS for approval at least 90 days in advance of construction. Marine mammal monitoring must be conducted in accordance with the conditions in this section and the approved Marine Mammal Monitoring Plan.

(b) Monitoring must be conducted by qualified, NMFS-approved PSOs, in accordance with the following conditions:

(1) PSOs must be independent of the activity contractor (for example, employed by a subcontractor) and have no other assigned tasks during monitoring periods.

(2) At least one PSO must have prior experience performing the duties of a PSO during construction activity pursuant to a NMFS-issued incidental take authorization.

(3) Other PSOs may substitute other relevant experience, education (*i.e.*, degree in biological science or related field), or training for prior experience performing the duties of a PSO during construction activity pursuant to a NMFS-issued incidental take authorization.

(4) PSOs must record all observations of marine mammals as described in the Marine Mammal Monitoring Plan, regardless of distance from the pile being driven. PSOs shall document any behavioral reactions in concert with distance from piles being driven or removed.

(c) A census of marine mammals in the project area and the area surrounding the project must be conducted 30 minutes prior to the beginning of any construction day, and again 30 minutes after the completion of construction activities. Data collected during the pre-and post-construction daily censuses must include:

(1) Environmental conditions (weather condition, tidal conditions, visibility, cloud cover, air temperature and wind speed);

(2) Numbers of each marine mammal species spotted;

(3) Location of each species spotted, including distance from construction activity;

(4) Status (in water or hauled-out); and

(5) Behavior.

(d) The USACE must conduct hourly counts of animals hauled out and in the water. Data collected must include:

(1) Numbers of each species;

(2) Location of species; whether hauled-out or in the water; and distance from construction activities;

(3) Time;

(4) Tidal conditions;

(5) Time construction activities start and end;

(6) Primary construction activities occurring during past hour;

(7) Any noise or visual disturbance;

(8) Number of mom/pup pairs and neonates observed; and

(9) Notable behaviors, including foraging, grooming, resting, aggression, mating activity, and others.

(e) The USACE must note any of the following information to the extent it is feasible to record:

(1) Age-class;

(2) Sex;

(3) Unusual activity or signs of stress; and

(4) Any other information worth noting.

(f) The USACE must record reaction observed in relation to construction activities including:

(1) Tally of each reaction;

(2) Time of reaction;

(3) Concurrent construction activity (including duration) and assumed cause (whether related to construction activities or not) and whether observer feels the disturbance was visual or acoustic;

(4) Location of animal during initial reaction and distance from the noted disturbance;

(5) Direction of movement;

(6) Activity before and after disturbance;

(7) Status (in water or hauled out) before and after disturbance; and

(8) Coded reaction of Level 1—Alert; Level 2—Movement, or Level 3—Flush as defined in the Preamble.

(g) The USACE must submit a draft monitoring report to NMFS within 90 calendar days of the completion of each construction year. A draft comprehensive 5-year summary report must also be submitted to NMFS within 90 days of the end of the project. The reports must detail the monitoring protocol and summarize the data recorded during monitoring. Final annual reports and the final comprehensive report must be prepared and submitted within 30 days following resolution of any NMFS comments on the draft report. If no comments are received from NMFS within 30 days of receipt of the draft report, the report must be considered final. If comments are received, a final report addressing NMFS comments must be submitted within 30 days after receipt of comments. The reports must contain the informational elements described at minimum below including:

(1) Information collected in § 247.245 (c) through (f).

(2) All PSO datasheets and/or raw sightings data in electronic format.

(h) In the event that personnel involved in the construction activities discover an injured or dead marine mammal, the USACE must report the incident to the Office of Protected Resources (OPR) and the West Coast regional stranding network as soon as feasible. If the death or injury was clearly caused by the specified activity, the USACE must immediately cease the activities until NMFS OPR is able to review the circumstances of the incident and determine what, if any, additional measures are appropriate to ensure compliance with the terms of this IHA. The USACE must not resume their activities until notified by NMFS. The report must include the following information:

- (1) Time, date, and location (latitude/longitude) of the first discovery (and updated location information if known and applicable);
- (2) Species identification (if known) or description of the animal(s) involved;
- (3) Condition of the animal(s) (including carcass condition if the animal is dead);
- (4) Observed behaviors of the animal(s), if alive;
- (5) If available, photographs or video footage of the animal(s); and
- (6) General circumstances under which the animal was discovered.

§ 217.246 Letters of Authorization.

(a) To incidentally take marine mammals pursuant to these regulations, the USACE must apply for and obtain an LOA.

(b) An LOA, unless suspended or revoked, may be effective for a period of time not to exceed the expiration date of these regulations.

(c) If an LOA expires prior to the expiration date of these regulations, the USACE may apply for and obtain a renewal of the LOA.

(d) In the event of projected changes to the activity or to mitigation and monitoring measures required by an LOA, the USACE must apply for and

obtain a modification of the LOA as described in § 217.247.

(e) The LOA must set forth the following information:

- (1) Permissible methods of incidental taking;
- (2) Means of effecting the least practicable adverse impact (*i.e.*, mitigation) on the species, its habitat, and on the availability of the species for subsistence uses; and
- (3) Requirements for monitoring and reporting.

(f) Issuance of the LOA must be based on a determination that the level of taking will be consistent with the findings made for the total taking allowable under these regulations.

(g) Notice of issuance or denial of an LOA must be published in the **Federal Register** within 30 days of a determination.

§ 217.247 Renewals and modifications of Letters of Authorization.

(a) An LOA issued under § 216.106 of this chapter and § 217.246 for the activity identified in § 217.240(a) may be renewed or modified upon request by the applicant, provided that:

- (1) The specified activity and mitigation, monitoring, and reporting measures, as well as the anticipated impacts, are the same as those described and analyzed for these regulations; and
- (2) NMFS determines that the mitigation, monitoring, and reporting measures required by the previous LOA under these regulations were implemented.

(b) For LOA modification or renewal requests by the applicant that include changes to the activity or the mitigation, monitoring, or reporting that do not change the findings made for the regulations or result in no more than a minor change in the total estimated number of takes (or distribution by species or years), NMFS may publish a notice of proposed LOA in the **Federal Register**, including the associated analysis of the change, and solicit public comment before issuing the LOA.

(c) An LOA issued under §§ 216.106 of this chapter and 217.246 for the activity identified in § 217.240 (a) may be modified by NMFS under the following circumstances:

(1) NMFS may modify (including augment) the existing mitigation, monitoring, or reporting measures (after consulting with USACE regarding the practicability of the modifications) if doing so creates a reasonable likelihood of more effectively accomplishing the goals of the mitigation and monitoring set forth in the preamble for these regulations;

(i) Possible sources of data that could contribute to the decision to modify the mitigation, monitoring, or reporting measures in an LOA:

(A) Results from USACE's monitoring from previous years;

(B) Results from other marine mammal and/or sound research or studies; and

(C) Any information that reveals marine mammals may have been taken in a manner, extent or number not authorized by these regulations or subsequent LOAs; and

(ii) If, through adaptive management, the modifications to the mitigation, monitoring, or reporting measures are substantial, NMFS must publish a notice of proposed LOA in the **Federal Register** and solicit public comment; and

(2) If NMFS determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals specified in a LOA issued pursuant to § 216.106 of this chapter and § 217.246, a LOA may be modified without prior notice or opportunity for public comment. Notification would be published in the **Federal Register** within 30 days of the action.

§§ 217.248–217.249 [Reserved]

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