

11 at Lubbock in the DTV Table of Allotments. For the reasons set forth in the *Report and Order* referenced below, the Bureau amends FCC regulations to substitute channel 36 for channel 11 at Lubbock.

**DATES:** Effective May 6, 2021.

**FOR FURTHER INFORMATION CONTACT:** Joyce Bernstein, Media Bureau, at (202) 418-1647 or [Joyce.Bernstein@fcc.gov](mailto:Joyce.Bernstein@fcc.gov).

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the Commission's *Report and Order*, MB Docket No. 21-61; RM-11885; DA 21-477, adopted April 26, 2021, and released April 26, 2021. The full text of this document is available for download at <https://www.fcc.gov/edocs>. To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an email to [fcc504@fcc.gov](mailto:fcc504@fcc.gov) or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

The proposed rule was published at 86 FR 12163 on March 2, 2021. Gray filed comments in support of the petition reaffirming its commitment to applying for channel 36. No other comments were received. In support, Gray states that the Commission has recognized that VHF channels have certain propagation characteristics which may cause reception issues for some viewers, and that many of its viewers experience significant difficulty receiving KCBT's signal. Gray also demonstrated that while there is a small terrain limited predicted loss area when comparing the licensed channel 11 and the proposed channel 36 facilities, all but 350 of the persons currently served by KCBT will continue to be well served by at least five other stations, a number which the Commission has recognized as *de minimis*. The Bureau believes the public interest would be served by the channel substitution because it will result in improved service.

This document does not contain information collection requirements subject to the Paperwork Reduction Act of 1995, Public Law 104-13. In addition, therefore, it does not contain any proposed information collection burden "for small business concerns with fewer than 25 employees," pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107-198, *see* 44 U.S.C. 3506(c)(4). Provisions of the Regulatory Flexibility Act of 1980, 5 U.S.C. 601-612, do not apply to this proceeding.

The Commission will send a copy of this *Report and Order* in a report to be sent to Congress and the Government Accountability Office pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A).

## List of Subjects in 47 CFR Part 73

Television.

Federal Communications Commission.

**Thomas Horan,**

*Chief of Staff, Media Bureau.*

## Final Rule

For the reasons discussed in the preamble, the Federal Communications Commission amends 47 CFR part 73 as follows:

## PART 73—RADIO BROADCAST SERVICE

■ 1. The authority citation for part 73 continues to read as follows:

**Authority:** 47 U.S.C. 154, 155, 301, 303, 307, 309, 310, 334, 336, 339.

■ 2. In § 73.622(i), amend the Post-Transition Table of DTV Allotments, under Texas, by revising the entry for Lubbock to read as follows:

### § 73.622 Digital television table of allotments.

* * * * *				
(i) * * *				
Community				Channel No.
* * * * *				
TEXAS				
* * * * *				
Lubbock .....				16, 27, 35, 36, * 39, 40
* * * * *				

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 218

[Docket No. 210421-0084]

RIN 0648-BJ90

### Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to U.S. Navy Construction at Naval Station Norfolk in Norfolk, Virginia

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

**ACTION:** Final rule.

**SUMMARY:** NMFS, upon request of the U.S. Navy (Navy), hereby issues

regulations to govern the unintentional taking of marine mammals incidental to construction activities including marine structure maintenance, pile replacement, and select waterfront improvements at Naval Station Norfolk (NAVSTA Norfolk) over the course of five years (2021–2026). These regulations, which allow for the issuance of a Letter of Authorization (LOA) for the incidental take of marine mammals during the described activities and specified timeframes, prescribe the permissible methods of taking and other means of effecting the least practicable adverse impact on marine mammal species or stocks and their habitat, as well as requirements pertaining to the monitoring and reporting of such taking.

**DATES:** Effective from June 7, 2021 to June 7, 2026.

**ADDRESSES:** A copy of the Navy's application and supporting documents, as well as a list of the references cited in this document, may be obtained online at: <https://www.fisheries.noaa.gov/action/incidental-take-authorization-us-navy-construction-naval-station-norfolk-norfolk-virginia>. In case of problems accessing these documents, please call the contact listed below.

**FOR FURTHER INFORMATION CONTACT:** Leah Davis, Office of Protected Resources, NMFS, (301) 427-8401.

#### SUPPLEMENTARY INFORMATION:

#### Purpose and Need for Regulatory Action

We received an application from the Navy requesting five-year regulations and authorization to take multiple species of marine mammals. This rule establishes a framework under the authority of the MMPA (16 U.S.C. 1361 *et seq.*) to allow for the authorization of take by Level B harassment of marine mammals incidental to the Navy's construction activities, including impact and vibratory pile driving. Please see Background below for definitions of harassment.

#### Legal Authority for the Action

Section 101(a)(5)(A) of the MMPA (16 U.S.C. 1371(a)(5)(A)) directs the Secretary of Commerce 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 five years if, after notice and public comment, the agency makes certain findings and issues 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 the discussion below in the Mitigation Measures section), as well as monitoring and reporting requirements. Section 101(a)(5)(A) of the MMPA and the implementing regulations at 50 CFR part 216, subpart I provide the legal basis for issuing this final rule containing five-year regulations, and for any subsequent LOAs. As directed by this legal authority, this final rule contains mitigation, monitoring, and reporting requirements.

### Summary of Major Provisions Within the Final Rule

Following is a summary of the major provisions of this final rule regarding Navy construction activities. These measures include:

- Required monitoring of the construction areas to detect the presence of marine mammals before beginning construction activities;
- Shutdown of construction activities under certain circumstances to avoid injury of marine mammals; and
- Soft start for impact pile driving to allow marine mammals the opportunity to leave the area prior to beginning impact pile driving at full power.

### Background

Section 101(a)(5)(A) of the MMPA (16 U.S.C. 1361 *et seq.*) 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 if certain findings are made, regulations are issued, and notice is provided to the public.

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 the species or stocks for taking for certain subsistence uses (referred to as “mitigation”); and requirements pertaining to the mitigation, monitoring and reporting of the takings are set forth.

The definitions of all applicable MMPA statutory terms cited above are included in the relevant sections below.

### Summary of Request

In February 2020, NMFS received a request from the Navy for an LOA to take marine mammals incidental to construction activities including marine structure maintenance, pile replacement, and select waterfront improvements at NAVSTA Norfolk. NMFS reviewed the Navy’s application, and the Navy provided an updated version addressing NMFS’ questions and comments on May 22, 2020. The application was deemed adequate and complete and published for public review and comment on June 9, 2020 (85 FR 35267). We did not receive substantive comments on the notice of the receipt of the Navy’s application. We subsequently published a proposed rule in the **Federal Register** on December 21, 2020 (85 FR 83001). Comments received during the public comment period on the proposed regulations are addressed in the Comments and Responses section of this final rule.

The Navy plans to conduct construction activities at NAVSTA Norfolk and nearby facilities off the lower Chesapeake Bay. Among other activities, the planned project will include both vibratory pile driving and removal, and impact pile driving. The use of both vibratory and impact pile driving is expected to produce underwater sound at levels that have the potential to result in harassment of marine mammals. The Navy requested authorization to take a small number of five species of marine mammals by Level B harassment only. Neither the Navy nor NMFS expect serious injury or mortality to result from this activity. The regulations are valid for five years (2021–2026).

### Description of the Specified Activity

The Navy is proposing to conduct construction activities at NAVSTA Norfolk on the Naval Station, and at nearby facilities off the lower Chesapeake Bay. The Navy’s planned activities include pile replacement at the Morale, Welfare and Recreation Marina, and installation of two new floating docks at the V-area. Both areas are located on the Naval Station. The Navy also proposes to conduct maintenance/repair activities at the Naval Station and neighboring Defense Fuel Supply Point Craney Island and Lambert’s Point Deperming Station (see Figure 1 of the proposed rule; 85 FR 83001; December 21, 2020). The Navy has indicated specific projects where

existing needs have been identified, as well as estimates for expected emergent or emergency repairs. The planned project will include both vibratory pile driving and removal, and impact pile driving (hereafter, collectively referred to as “pile driving”) over approximately 574 days over five years (2021–2026), with the greatest amount of work occurring during Year 1 (approximately 208 days). The Navy plans to conduct all work during daylight hours.

A detailed description of the planned construction project is provided in the proposed rule (85 FR 83001; December 21, 2020). Since that time, no changes have been made to the planned activities. Therefore, a detailed description is not provided here. Please refer to the proposed rule for the description of the specific activity.

### Comments and Responses

We published a proposed rule in the **Federal Register** on December 21, 2020 (85 FR 83001). During the 30-day comment period, we received a letter from the Marine Mammal Commission (Commission), and a comment from the general public. Summaries of all substantive comments, and our responses to these comments, are provided here. Please see the comment letter, available online at: <https://www.fisheries.noaa.gov/action/incidental-take-authorization-us-navy-construction-naval-station-norfolk-norfolk-virginia>, for full detail regarding the comments received.

**Comment 1:** The Commission recommended that NMFS re-estimate the numbers of Level B harassment takes of harbor seals based on up to 21 rather than 14 seals potentially being taken on the various days of proposed activities.

**Response:** In the proposed rule, NMFS calculated takes based on haulout data from the CBBT (14 Level B harassment takes per day. See the Estimated Take section of the proposed rule; 85 FR 83001; December 21, 2020). The CBBT is approximately 19 km (kilometers; 12 miles (mi)) from the project site, and the ES haulout is approximately 48 km (30 mi) from the project site. While some seals tagged at ES haulouts entered the Chesapeake Bay (Ampela *et al.* 2019), even if a seal enters the Chesapeake Bay, it does not necessarily enter the project area. The Level B harassment zones are <50 m for all impact pile driving, and given the shoreline, Level B harassment zones during vibratory pile driving would be truncated in many directions. Additionally, some seals move between the CBBT and ES haulout sites (Jones *et al.* 2018); therefore, including seals from

both haulouts could result in double counting of the same animals. Further, the nearby HRBT project began pile installation in September, and no seals have been sighted during five months of construction under the project's Marine Mammal Monitoring and Mitigation Program. Therefore, the best available information indicates that the take estimate included in the proposed rule is already conservative, and it is not appropriate to increase the take estimate as suggested by the Commission. Therefore, NMFS does not concur with the Commission's recommendation and does not adopt it.

*Comment 2:* The Commission recommended that NMFS require the Navy to (1) conduct sound source and sound propagation measurements of vibratory and impact installation of at least 10 high-density polyethylene (HDPE), 10 hollow-core fiberglass, and 3 concrete piles using near-field and far-field hydrophones placed mid-water column and (2) include certain specific elements in its hydroacoustic monitoring report.

The Commission also recommended that NMFS require the Navy to increase the sizes of the shut-down zones and Level B harassment zones if the measured data indicate that the model-estimated zones were underestimated.

*Response:* Since publication of the proposed rule, the Navy has determined that sound source verification (SSV) may not be feasible given budget constraints associated with the individual, small-scale projects planned. Therefore, NMFS did not adopt the Commission's recommendation to require sound source and sound propagation measurements for the number of piles it indicated, and NMFS has removed the SSV requirement from this final rule. However, subject to funding availability, the Navy may conduct a SSV study for pile types other than timber piles (prioritizing composite pile types). As noted in the proposed rule, composite piles may be either HDPE or hollow-core fiberglass; the Navy will not necessarily install both types.

If funding is available for a SSV study, the Navy will develop an acoustic monitoring plan. The acoustic monitoring plan would follow accepted methodologies regarding source level measurements and propagation measurements. NMFS generally agrees with the elements that the Commission has suggested that the Navy report, though the exact reporting requirements would be outlined in an acoustic monitoring plan, which would be available at a later date, and would be

reviewed and approved by NMFS prior to implementation.

If the Navy conducts hydroacoustic monitoring, and the results suggest that the Level A or Level B harassment zones were underestimated in this final rule, NMFS will work with the Navy to update the Level A and Level B harassment zone sizes and the associated shutdown zones, as appropriate.

*Comment 3:* The Commission recommends generally that NMFS require the use of shutdown zones that encompass the extent of the associated Level A harassment zone. Specifically, the Commission recommends that NMFS require the Navy to implement a shutdown zone of 55 m rather than 50 m for low-frequency (LF) cetaceans during impact installation of 24-inch (in) concrete piles.

*Response:* NMFS does not agree with the Commission's rationale for this recommendation. Generally speaking, given the duration component associated with actual occurrence of Level A harassment take, it is not necessary to require a shutdown zone equivalent to the estimated Level A harassment zone to avoid permanent threshold shift (PTS), *i.e.*, Level A harassment take. Regardless, in this case, the proposed 50 m shutdown zone is essentially equivalent to the estimated 52 m Level A harassment zone. Nevertheless, the Navy has agreed to implement the 55 m shutdown zone recommended by the Commission.

*Comment 4:* The Commission recommended that NMFS require the Navy to use at least three PSOs to monitor for marine mammals during vibratory pile installation and removal at Pier 3, Pier 12, and Craney Island and four PSOs for Lambert's Point positioned sufficiently in the far field to monitor the largest extents of the respective Level B harassment zones.

*Response:* NMFS concurs with the Commission's recommendation and has adopted it. This final rule requires the Navy to employ at least three PSOs during vibratory pile driving at Pier 3, Pier 12, and Craney Island, and at least four PSOs during vibratory pile driving at Lambert's Point, though the exact locations are not stipulated. For all other pile driving activities, a minimum of two PSOs will be used, as stated in the proposed rule (85 FR 83001; December 21, 2020).

*Comment 5:* The Commission recommended that NMFS make available to the public for review and comment all monitoring plans, hydroacoustic and marine mammal-related, contemporaneously with any proposed rule or proposed incidental

harassment authorization that NMFS publishes in the **Federal Register**.

*Response:* NMFS agrees that it is important to ensure adequate review of monitoring plans, including hydroacoustic and marine mammal-related monitoring plans, before they are implemented by applicants. NMFS will review the Navy's proposed marine mammal monitoring plan prior to the start of construction, and therefore prior to the implementation of the plan. If funding is available for a SSV study, the Navy will develop an acoustic monitoring plan, and NMFS will review and approve the plan prior to its implementation. It is important to provide the objectives of proposed monitoring for review by the public. However, as is the case here, methodological details follow widely accepted practices and, therefore, it is unnecessary to provide these plans for public review. To do so would necessitate development of standalone plans at an earlier stage than is ideal or, in some cases, possible.

While the Navy initially expected to submit a standalone marine mammal monitoring and mitigation plan in association with the application, it has since indicated that it is unable to do so given restrictions on funding allocation between NEPA and associated analyses/consultations such as this MMPA authorization and separate construction project funding. The construction project funding must be used for further development of site/project-specific monitoring plans at a later stage of project development. All monitoring requirements in the Navy's LOA application, this final rule, and any subsequent LOA(s) will be incorporated into the construction contractor's monitoring plan.

*Comment 6:* The Commission recommended that NMFS include the requirement, which it deems standard, that the Navy conduct pile driving and removal activities during daylight hours only either in section 218.5 of the final rule or in any LOA issued under the final rule.

*Response:* We do not concur with the Commission's recommendations, or with their underlying justification, and did not adopt them. While the Navy has no intention of conducting pile driving activities at night, it is unnecessary to preclude such activity should the need arise (*e.g.*, on an emergency basis or to complete driving of a pile begun during daylight hours, should the construction operator deem it necessary to do so). Further, while acknowledging that prescribed mitigation measures for any specific action (and an associated determination that the prescribed

measures are sufficient to achieve the least practicable adverse impact on the affected species or stocks and their habitat) are subject to review by the Commission and the public, any determination of what measures constitute “standard” mitigation requirements is NMFS’ alone to make. Even in the context of measures that NMFS considers to be “standard” we reserve the flexibility to deviate from such measures, depending on the circumstances of the action. We disagree with the statement that a prohibition on pile driving activity outside of daylight hours would help to ensure that the Navy is effecting the least practicable adverse impact on the affected species, and the Commission does not justify this assertion.

The final rule includes a measure stating that “should environmental conditions deteriorate such that marine mammals within the entire shutdown zone would not be visible (e.g., fog, heavy rain, night), pile driving and removal must be delayed until observers are confident marine mammals within the shutdown zone could be detected,” though this need not preclude pile driving at night with sufficient illumination.

*Comment 7:* The Commission recommends that NMFS revise section 218.6(g)(9) in the final rule to require the Navy to report the number of individuals of each species detected within the Level A and B harassment zones, and estimates of the number of marine mammals taken by Level A and B harassment, by species.

In a related comment, the Commission recommended that, for the final rule, NMFS include requirements in section 218.6(g) that the Navy include in its monitoring report (1) the estimated percentages of the Level B harassment zones that were not visible, (2) an extrapolation of the estimated takes by Level B harassment based on the number of observed exposures within the Level B harassment zones and the percentages of the Level B harassment zones that were not visible (i.e., extrapolated takes), and (3) the total number of Level B harassment takes based on both the observed and extrapolated takes for each species.

*Response:* We do not fully concur with the Commission’s recommendation and do not adopt it as stated. NMFS agrees with the recommendation to require the Navy to report the number of individuals of each species detected within the Level A and Level B harassment zones. Section 218.6(g)(9) in the proposed rule stated that the Navy must report the “number of marine mammals detected within the

harassment zones, by species,” which is effectively the same measure as the Commission’s recommended “number of individuals of each species detected within the Level A and B harassment zones.” Therefore, NMFS did not modify that measure. NMFS does not agree with the recommendation to require the Navy to report estimates of the numbers of marine mammals taken by Level A and Level B harassment. The Commission does not explain why it believes this requirement is necessary, nor does it provide recommendations for methods of generating such estimates in a manner that would lead to credible results. NMFS does not agree that the basic method described in footnote 22 of the Commission’s November 19, 2020 letter should be expected to yield estimates of total take such that readers of the Navy’s report should have confidence that the estimates are reasonable representations of what may have actually occurred.

NMFS does agree that the Navy should report the estimated percentage(s) of the Level B harassment zones that were not visible, and has included this requirement in this final rule (See section 218.6(g)(12)). These pieces of information—numbers of individuals of each species detected within the harassment zones and the estimated percentage(s) of the harassment zones that were not visible—may be used to glean an approximate understanding of whether the Navy may have exceeded the amount of take authorized. Although the Commission does not explain its reasoning for offering these recommendations, NMFS recognizes the basic need to understand whether an IHA-holder may have exceeded its authorized take. The need to accomplish this basic function of reporting does not require that NMFS require applicants to use methods we do not have confidence in to generate estimates of “total take” that cannot be considered reliable.

*Comment 8:* The Commission recommended that NMFS *reinforce* that the Navy must keep a running tally of the total Level B harassment takes, both observed and extrapolated, for each species consistent with section 218.5(a)(10) of the final rule.

*Response:* The LOA will indicate the number of takes authorized for each species. We agree that the Navy must ensure they do not exceed authorized takes, but do not concur with the Commission’s repeated recommendations regarding the need for NMFS to dictate how an applicant does so, including by requiring an applicant to maintain a “running tally” of takes. Regardless of the Commission’s

substitution of the word “reinforce” for the word “ensure,” as compared with its prior recommendations for other actions, compliance with the terms of an issued LOA remains the responsibility of the LOA-holder.

### Changes From Proposed to Final Regulations

As noted by the Commission in its informal comments on the proposed rule, Table 13 in the proposed rule mistakenly indicated an estimate of 20 Level B harassment takes of harbor porpoise over the five-year duration of this rule. NMFS corrected this take estimate to reflect 24 takes over the five-year period, as described in the Estimated Take section of this final rule. NMFS has also adjusted the harbor seal take estimate in this final rule to reflect estimated take of 13.6 harbor seals per day, rather than 14 harbor seals per day included in the proposed rule, also described further in the Estimated Take section.

Regarding mitigation, this final rule requires the Navy to establish a 55 m shutdown zone for LF cetaceans during impact driving of 24-in concrete piles, rather than 50 m included in the proposed rule.

Regarding monitoring, the proposed rule stated that the Navy would conduct SSV for composite piles; however, this final rule does not include a requirement for the Navy to conduct SSV. Please see the *Acoustic Monitoring* section for additional information. This final rule requires the Navy to employ at least three PSOs during vibratory pile driving at Pier 3, Pier 12, and Craney Island, and at least four PSOs during vibratory pile driving at Lambert’s Point, though the exact locations have not been determined. For all other pile driving activities, a minimum of two PSOs will be used, as stated in the proposed rule (85 FR 83001; December 21, 2020). This change is reflected in the Monitoring and Reporting section of this final rule and in section 218.6(b).

Regarding reporting, this final rule requires the Navy to report the estimated percentage of the Level B harassment zone that was not visible.

### Description of Marine Mammals in the Area of Specified Activities

Sections 3 and 4 of the Navy’s application summarize available information regarding status and trends, distribution and habitat preferences, and behavior and life history, of the potentially affected species. Additional information regarding population trends and threats may be found in NMFS’s SARs (<https://www.fisheries.noaa.gov/national/marine-mammal-protection/>

marine-mammal-stock-assessments) and more general information about these species (e.g., physical and behavioral descriptions) may be found on NMFS's website (<https://www.fisheries.noaa.gov/find-species>).

Table 1 lists all species or stocks for which take is expected and may be authorized, 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. For taxonomy, we follow Committee on Taxonomy (2020). 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's SARs). While no mortality is anticipated, nor will mortality be authorized, PBR and annual serious injury and mortality from anthropogenic sources are included here as gross indicators of the status of the species and other threats.

Marine mammal abundance estimates presented in this document represent the total number of individuals that make up a given stock or the total number estimated within a particular study or survey area. NMFS's stock abundance estimates for most species

represent the total estimate of individuals within the geographic area, if known, that comprises that stock. For some species, this geographic area may extend beyond U.S. waters. All managed stocks in this region are assessed in NMFS's U.S. Atlantic and Gulf of Mexico SARs (e.g., Hayes *et al.* 2020). All values presented in Table 1 are the most recent available at the time of publication and are available in the 2019 SARs (Hayes *et al.* 2020) or the 2020 draft SARs, available at <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessment-reports>.

TABLE 1—MARINE MAMMAL SPECIES LIKELY TO OCCUR NEAR THE PROJECT AREA

Common name	Scientific name	Stock	ESA/ MMPA status; strategic (Y/N) <sup>1</sup>	Stock abundance (CV, N <sub>min</sub> , most recent abundance survey) <sup>2</sup>	PBR	Annual M/SI <sup>3</sup>
<b>Order Cetartiodactyla—Cetacea—Superfamily Mysticeti (baleen whales)</b>						
Family Balaenopteridae (rorquals): Humpback whale .....	<i>Megaptera novaeangliae</i> .....	Gulf of Maine .....	-, -; N	1,396 (0; 1,380; see SAR).	22	12.15
<b>Superfamily Odontoceti (toothed whales, dolphins, and porpoises)</b>						
Family Delphinidae: Bottlenose dolphin .....	<i>Tursiops truncatus</i> .....	Western North Atlantic (WNA) Coastal, Northern Migratory. WNA Coastal, Southern Mi- gratory. Northern North Carolina Estu- arine System (NNCES).	-, -; Y -, -; Y -, -; Y	6,639 (0.41; 4,759; 2016). 3,751 (0.06; 2,353; 2011). 823 (0.06; 782; 2017) ...	48 23 7.8	12.2–21.5 0–18.3 7.2–30
Family Phocoenidae (porpoises): Harbor porpoise .....	<i>Phocoena phocoena</i> .....	Gulf of Maine/Bay of Fundy ....	-, -; N	95,543 (0.31; 74,034; 2016).	851	217
<b>Order Carnivora—Superfamily Pinnipedia</b>						
Family Phocidae (earless seals): Harbor seal .....	<i>Phoca vitulina</i> .....	WNA .....	-, N	75,834 (0.15; 66,884, 2012).	2,006	350
Gray seal .....	<i>Halichoerus grypus</i> .....	WNA .....	-, N	27,131 (0.19, 23,158, 2016).	1,359	4,729

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

<sup>2</sup> NMFS marine mammal stock assessment reports online at: <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessment-reports-region>. CV is coefficient of variation; N<sub>min</sub> is the minimum estimate of stock abundance. In some cases, CV is not applicable.

<sup>3</sup> 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 Mortality/Serious Injury (M/SI) often cannot be determined precisely and is in some cases presented as a minimum value or range. A CV associated with estimated mortality due to commercial fisheries is presented in some cases.

As indicated above, all five species (with seven managed stocks) in Table 1 temporally and spatially co-occur with the activity to the degree that take is reasonably likely to occur, and we may authorize take. While North Atlantic right whales (*Eubalaena glacialis*), minke whales (*Balaenoptera acutorostrata acutorostrata*), and fin whales (*Balaenoptera physalus*) have been documented in the area, the temporal and/or spatial occurrence of these whales is such that take is not expected to occur, and they are not

discussed further beyond the explanation provided here.

Based on sighting data and passive acoustic studies, the North Atlantic right whale could occur off Virginia year-round (DoN 2009; Salisbury *et al.* 2016). They have also been reported seasonally off Virginia during migrations in the spring, fall, and winter (CeTAP 1981, 1982; Niemeyer *et al.* 2008; Kahn *et al.* 2009; McLellan 2011b, 2013; Mallette *et al.* 2016a, 2016b, 2017, 2018a; Palka *et al.* 2017; Cotter 2019). Right whales are known to frequent the

coastal waters of the mouth of the Chesapeake Bay (Knowlton *et al.* 2002) and the area is a seasonal management area (November 1–April 30) mandating reduced ship speeds out to approximately 20 nautical miles (37 km) for the species; however, the project area is further inside the Bay.

North Atlantic right whales have stranded in Virginia, one each in 2001, 2002, 2004, 2005: Three during winter (February and March) and one in summer (September) (Costidis *et al.* 2017, 2019). In January 2018, a dead,

entangled North Atlantic right whale was observed floating over 60 miles (96.6 km) offshore of Virginia Beach (Costidis *et al.* 2019). All North Atlantic right whale strandings in Virginia waters have occurred on ocean-facing beaches along Virginia Beach and the barrier islands seaward of the lower Delmarva Peninsula (Costidis *et al.* 2017). Due to the low occurrence of North Atlantic right whales in the project area, NMFS is not authorizing take of this species.

Fin whales have been sighted off Virginia (Cetacean and Turtle Assessment Program (CeTAP) 1981, 1982; Swingle *et al.* 1993; DoN 2009; Hyrenbach *et al.* 2012; Barco 2013; Mallette *et al.* 2016a, b; Aschettino *et al.* 2018; Engelhaupt *et al.* 2017, 2018; Cotter 2019), and in the Chesapeake Bay (Bailey 1948; CeTAP 1981, 1982; Morgan *et al.* 2002; Barco 2013; Aschettino *et al.* 2018); however, they are not likely to occur in the project area. Sightings have been documented around the Chesapeake Bay Bridge Tunnel (CBBT) during the winter months (CeTAP 1981, 1982; Barco 2013; Aschettino *et al.* 2018).

Eleven fin whale strandings have occurred off Virginia from 1988 to 2016 mostly during the winter months of February and March, followed by a few in the spring and summer months (Costidis *et al.* 2017). Six of the strandings occurred in the Chesapeake Bay (three on eastern shore; three on western shore) with the remaining five occurring on the Atlantic coast (Costidis *et al.* 2017). Documented strandings near the project area have occurred: February 2012, a dead fin whale washed ashore on Oceanview Beach in Norfolk (Swingle *et al.* 2013); December 2017, a live fin whale stranded on a shoal in Newport News and died at the site (Swingle *et al.* 2018); February 2014, a dead fin whale stranded on a sand bar

in Pocomoke Sound near Great Fox Island, Accomack (Swingle *et al.* 2015); and, March 2007, a dead fin whale near Craney Island, in the Elizabeth River, in Norfolk (Barco 2013). Only stranded fin whales have been documented in the project area; no free-swimming fin whales have been observed. Due to the low occurrence of fin whales in the project area, NMFS is not authorizing take of this species.

Minke whales have been sighted off Virginia (CeTAP 1981, 1982; Hyrenbach *et al.* 2012; Barco 2013; Mallette *et al.* 2016a, b; McLellan 2017; Engelhaupt *et al.* 2017, 2018; Cotter 2019), near the CBBT (Aschettino *et al.* 2018), but sightings in the project area are from strandings (Jensen and Silber 2004; Barco 2013; DoN 2009). In August 1994, a ship strike incident involved a minke whale in Hampton Roads (Jensen and Silber 2004; Barco 2013). It was reported that the animal was struck offshore and was carried inshore on the bow of a ship (DoN 2009). Twelve strandings of minke whales have occurred in Virginia waters from 1988 to 2016 (Costidis *et al.* 2017). There have been six minke whale stranding from 2017 through 2020 in Virginia waters. Because all known minke whale occurrences in the project area are due to strandings, NMFS is not authorizing take of this species.

A detailed description of the species likely to be affected by the Navy's project, including brief introductions to the species and relevant stocks as well as available information regarding population trends and threats, and information regarding local occurrence, were provided in the proposed rule (85 FR 83001; December 21, 2020); since that time, we are not aware of any changes in the status of these species and stocks, except that the Gulf of Maine humpback whale stock has been designated as strategic in the 2020 draft SARs; therefore, detailed descriptions

are not provided here. Please refer to the proposed rule for these descriptions (85 FR 83001; December 21, 2020). Please also refer to NMFS' website (<https://www.fisheries.noaa.gov/find-species>) for generalized species accounts.

#### Marine Mammal Hearing

Hearing is the most important sensory modality for marine mammals underwater, and exposure to anthropogenic sound can have deleterious effects. To appropriately assess the potential effects of exposure to sound, it is necessary to understand the frequency ranges marine mammals are able to hear. Current data indicate that not all marine mammal species have equal hearing capabilities (e.g., Richardson *et al.* 1995; Wartok and Ketten, 1999; Au and Hastings, 2008). To reflect this, Southall *et al.* (2007) recommended that marine mammals be divided into functional hearing groups based on directly measured or estimated hearing ranges on the basis of available behavioral response data, audiograms derived using auditory evoked potential techniques, anatomical modeling, and other data. Note that no direct measurements of hearing ability have been successfully completed for mysticetes (*i.e.*, LF cetaceans). Subsequently, NMFS (2018) described generalized hearing ranges for these marine mammal hearing groups. Generalized hearing ranges were chosen based on the approximately 65 decibel (dB) threshold from the normalized composite audiograms, with the exception for lower limits for LF cetaceans where the lower bound was deemed to be biologically implausible and the lower bound from Southall *et al.* (2007) retained. Marine mammal hearing groups and their associated hearing ranges are provided in Table 2.

TABLE 2—MARINE MAMMAL HEARING GROUPS  
(NMFS, 2018)

Hearing group	Generalized hearing range*
Low-frequency (LF) cetaceans (baleen whales) .....	7 Hz to 35 kHz.
Mid-frequency (MF) cetaceans (dolphins, toothed whales, beaked whales, bottlenose whales) .....	150 Hz to 160 kHz.
High-frequency (HF) cetaceans (true porpoises, <i>Kogia</i> , river dolphins, cephalorhynchid, <i>Lagenorhynchus cruciger</i> & <i>L. australis</i> ) .....	275 Hz to 160 kHz.
Phocid pinnipeds (PW) (underwater) (true seals) .....	50 Hz to 86 kHz.
Otariid pinnipeds (OW) (underwater) (sea lions and fur seals) .....	60 Hz to 39 kHz.

\* Represents the generalized hearing range for the entire group as a composite (*i.e.*, all species within the group), where individual species' hearing ranges are typically not as broad. Generalized hearing range chosen based on ~65 dB threshold from normalized composite audiogram, with the exception for lower limits for LF cetaceans (Southall *et al.* 2007) and PW pinniped (approximation).

The pinniped functional hearing group was modified from Southall *et al.* (2007) on the basis of data indicating

that phocid species have consistently demonstrated an extended frequency range of hearing compared to otariids,

especially in the higher frequency range (Hemilä *et al.* 2006; Kastelein *et al.* 2009; Reichmuth and Holt, 2013).

For more detail concerning these groups and associated frequency ranges, please see NMFS (2018) for a review of available information. Five marine mammal species (three cetacean and two phocid pinniped species) have the reasonable potential to co-occur with the planned construction activities. Please refer to Table 1. Of the cetacean species that may be present, one is classified as a LF cetacean (*i.e.*, humpback whale) one is classified as a mid-frequency cetacean (*i.e.*, bottlenose dolphin), and one is classified as a high-frequency cetacean (*i.e.*, harbor porpoise).

#### Potential Effects of Specified Activities on Marine Mammals and Their Habitat

The effects of underwater noise from the Navy's activities have the potential to result in behavioral harassment of marine mammals in the vicinity of the survey area. The proposed rule (85 FR 83001; December 21, 2020) included a discussion of the effects of anthropogenic noise on marine mammals and the potential effects of underwater noise from the Navy's construction activities on marine mammals and their habitat. That information and analysis is incorporated by reference into this final rule and is not repeated here; please refer to the proposed rule (85 FR 83001; December 21, 2020).

The Estimated Take section in this document includes a quantitative analysis of the number of individuals that are expected to be taken by this activity. The Negligible Impact Analysis and Determination section considers the content of this section, the Estimated Take section, and the Mitigation Measures section, to draw conclusions regarding the likely impacts of these activities on the reproductive success or survivorship of individuals and how those impacts on individuals are likely to impact marine mammal species or stocks. We also provided additional description of sound sources in our proposed rule (85 FR 83001; December 21, 2020).

#### Estimated Take

This section provides an estimate of the number of incidental takes that may be authorized, which will inform both NMFS' consideration of "small numbers" and the negligible impact determination.

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 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 disruption of behavioral patterns and potential TTS for individual marine mammals resulting from exposure to pile driving and removal. Based on the nature of the activity and the anticipated effectiveness of the mitigation measures (*i.e.*, shutdown zones) discussed in detail below in the Mitigation Measures section, Level A harassment is neither anticipated nor will be authorized.

As described previously, mortality is neither anticipated nor will be authorized for this activity. Below we describe how the take is estimated.

Generally speaking, we estimate take by considering: (1) Acoustic thresholds above which NMFS believes the best available science indicates marine mammals will be behaviorally harassed or incur some degree of permanent hearing impairment; (2) the area or volume of water that will be ensonified above these levels in a day; (3) the density or occurrence of marine mammals within these ensonified areas; and, (4) the number of days of activities. We note that while these factors can contribute to a basic calculation to provide an initial prediction of takes, additional information that can qualitatively inform take estimates is also sometimes available (*e.g.*, previous monitoring results or average group size). Below, we describe the factors considered here in more detail and present the take estimate.

#### Acoustic Thresholds

NMFS recommends the use of acoustic thresholds that identify the received level of underwater sound above which exposed marine mammals would be reasonably expected to be behaviorally harassed (equated to Level B harassment) or to incur PTS of some degree (equated to Level A harassment).

*Level B Harassment for non-explosive sources*—Though significantly driven by

received level, the onset of behavioral disturbance from anthropogenic noise exposure is also informed to varying degrees by other factors related to the source (*e.g.*, frequency, predictability, duty cycle), the environment (*e.g.*, bathymetry), and the receiving animals (hearing, motivation, experience, demography, behavioral context) and can be difficult to predict (Southall *et al.* 2007, Ellison *et al.* 2012). Based on what the available science indicates and the practical need to use a threshold based on a factor that is both predictable and measurable for most activities, NMFS uses a generalized acoustic threshold based on received level to estimate the onset of behavioral harassment. NMFS predicts that marine mammals are likely to be behaviorally harassed in a manner we consider Level B harassment when exposed to underwater anthropogenic noise above received levels of 120 dB re 1  $\mu$ Pa (rms) (microPascal, root mean square) for continuous (*e.g.*, vibratory pile-driving, drilling) and above 160 dB re 1  $\mu$ Pa (rms) for non-explosive impulsive (*e.g.*, seismic airguns) or intermittent (*e.g.*, scientific sonar) sources.

The Navy's construction includes the use of continuous (vibratory pile driving) and impulsive (impact pile driving) sources, and therefore the 120 and 160 dB re 1  $\mu$ Pa (rms) are applicable.

*Level A harassment for non-explosive sources*—NMFS' Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing (Version 2.0) (Technical Guidance, 2018) identifies dual criteria to assess auditory injury (Level A harassment) to five different marine mammal groups (based on hearing sensitivity) as a result of exposure to noise from two different types of sources (impulsive or non-impulsive). The Navy's planned construction includes the use of impulsive (impact pile driving) and non-impulsive (vibratory pile driving) sources.

These thresholds are provided in the table below. The references, analysis, and methodology used in the development of the thresholds are described in NMFS 2018 Technical Guidance, which may be accessed at <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-acoustic-technical-guidance>.

TABLE 3—THRESHOLDS IDENTIFYING THE ONSET OF PERMANENT THRESHOLD SHIFT

Hearing group	PTS onset acoustic thresholds* (received level)	
	Impulsive	Non-impulsive
Low-Frequency (LF) Cetaceans .....	Cell 1: $L_{pk,flat}$ : 219 dB; $L_{E,LF,24h}$ : 183 dB .....	Cell 2: $L_{E,LF,24h}$ : 199 dB.
Mid-Frequency (MF) Cetaceans .....	Cell 3: $L_{pk,flat}$ : 230 dB; $L_{E,MF,24h}$ : 185 dB .....	Cell 4: $L_{E,MF,24h}$ : 198 dB.
High-Frequency (HF) Cetaceans .....	Cell 5: $L_{pk,flat}$ : 202 dB; $L_{E,HF,24h}$ : 155 dB .....	Cell 6: $L_{E,HF,24h}$ : 173 dB.
Phocid Pinnipeds (PW) (Underwater) .....	Cell 7: $L_{pk,flat}$ : 218 dB; $L_{E,PW,24h}$ : 185 dB .....	Cell 8: $L_{E,PW,24h}$ : 201 dB.
Otariid Pinnipeds (OW) (Underwater) .....	Cell 9: $L_{pk,flat}$ : 232 dB; $L_{E,OW,24h}$ : 203 dB .....	Cell 10: $L_{E,OW,24h}$ : 219 dB.

\* Dual metric acoustic thresholds for impulsive sounds: Use whichever results in the largest isopleth for calculating PTS onset. If a non-impulsive sound has the potential of exceeding the peak sound pressure level thresholds associated with impulsive sounds, these thresholds should also be considered.

**Note:** Peak sound pressure ( $L_{pk}$ ) has a reference value of 1  $\mu$ Pa, and cumulative sound exposure level ( $L_E$ ) has a reference value of 1  $\mu$ Pa<sup>2</sup>s. In this Table, thresholds are abbreviated to reflect American National Standards Institute standards (ANSI 2013). However, peak sound pressure is defined by ANSI as incorporating frequency weighting, which is not the intent for this Technical Guidance. Hence, the subscript “flat” is being included to indicate peak sound pressure should be flat weighted or unweighted within the generalized hearing range. The subscript associated with cumulative sound exposure level thresholds indicates the designated marine mammal auditory weighting function (LF, MF, and HF cetaceans, and PW and OW pinnipeds) and that the recommended accumulation period is 24 hours. The cumulative sound exposure level thresholds could be exceeded in a multitude of ways (*i.e.*, varying exposure levels and durations, duty cycle). When possible, it is valuable for action proponents to indicate the conditions under which these acoustic thresholds will be exceeded.

### Ensonified Area

Here, we describe operational and environmental parameters of the activity that will feed into identifying the area ensonified above the acoustic thresholds, which include source levels.

The sound field in the project area is the existing background noise plus additional construction noise from the planned project. Marine mammals are expected to be affected via sound generated by the primary components of the project (*i.e.*, impact pile driving and vibratory pile driving). The largest

calculated Level B harassment zone extends 7.2 km (4.5 mi) from the source (though truncated by land in some directions), with an area of 4.7 km<sup>2</sup> (1.8 mi<sup>2</sup>), as calculated using geographic information system (GIS) data as determined by the transmission loss modeling.

TABLE 4—PROJECT SOUND SOURCE LEVELS

Pile size and type	Installation method	RMS SPL	Peak SPL	SEL	Source
24-in Square Concrete .....	Impact .....	176	189	163	Illingworth and Rodkin, 2017.
16-in Composite .....	Impact .....	165	177	157	Caltrans, 2015. <sup>1</sup>
	Vibratory .....	158			Illingworth and Rodkin, 2017.
12-in Timber .....	Vibratory .....	<sup>2</sup> 158			Illingworth and Rodkin, 2017.

<sup>1</sup> These source levels are from a 12-in timber pile (Table 2–2, page 2–16).

<sup>2</sup> NMFS typically recommends a proxy source level of 152dB RMS SPL for installation and removal of 12-in timber piles; however, the Navy's application included specialized modeling (described below) using 158dB RMS SPL. Given that modeling and that 158dB RMS SPL is a more conservative source level, NMFS concurred with the use of 158dB RMS SPL as the proxy source level for 12-in timber piles.

The Navy contracted the University of Washington, Applied Physics Laboratory (APL) to conduct site-specific acoustic transmission loss

modeling for the project. The APL's full report is included in Appendix B of the Navy's application. NMFS independently reviewed and concurred

with the modeling in the report, and has adopted the resulting isopleths for the project, as included in Table 5.

TABLE 5—LEVEL A AND LEVEL B HARASSMENT ISOPLETHS

Site	Pile size and type	Level A harassment isopleth (m)				Level B harassment isopleth (m) <sup>1</sup>
		LF cetacean	MF cetacean	HF cetacean	Phocid	
Impact Pile Driving						
Pier 3 .....	16-in Composite .....	18	<10m			27
Pier 12 .....	16-in Composite .....	18				24
MWR Marina .....	24-in Concrete .....	52				59
	16-in Composite .....	11				18
V-Area .....	24-in Concrete .....	42				47
	16-in Composite .....	11				17
Craney Island .....	16-in Composite .....	16				21
Lambert's Point .....	16-in Composite .....	19				28
Vibratory Pile Driving						
Pier 3 .....	16-in Composite/12-in Timber .....	<10m				5,615
Pier 12 .....						4,159
MWR Marina .....						469
V-Area .....						382



TABLE 5—LEVEL A AND LEVEL B HARASSMENT ISOPLETHS—Continued

Site	Pile size and type	Level A harassment isopleth (m)				Level B harassment isopleth (m) <sup>1</sup>
		LF cetacean	MF cetacean	HF cetacean	Phocid	
Craney Island .....	16-in Composite/12-in Timber	<10m				3,001 7,161
Lambert's Point .....						

<sup>1</sup> Please refer to Tables 6–5 and 6–6 in the Navy's application for the areas of the Level B harassment zones.

#### Marine Mammal Occurrence and Take Calculation and Estimation

In this section we provide the information about the presence, density, or group dynamics of marine mammals that will inform the take calculations. We describe how the information provided above is brought together to produce a quantitative take estimate.

#### Humpback Whale

Humpback whales occur in the mouth of the Chesapeake Bay and nearshore waters of Virginia during winter and spring months. Most detections during shipboard surveys were of one or two juveniles per sighting. Although two individuals were detected in the vicinity of MPU project activities, there is no evidence that they linger for multiple days. Because no density estimates are available for the species in this area, the Navy estimated one take for every 60 days of pile driving. However, given the potential group size of two, as indicated by the sightings referenced above, NMFS has estimated that two humpback whales may be taken by Level B harassment for every 60 days of pile driving. Therefore, given the number of project days expected in

each year (Table 4), NMFS may authorize a total of 24 takes by Level B harassment of humpback whale over the five-year authorization, with no more than eight takes by Level B harassment in one year.

The largest Level A harassment zone for low-frequency cetaceans extends approximately 52 m from the source during impact pile driving of 24-in concrete piles at the MWR Marina (Table 5). For most activities, the Level A harassment zone is less than 20 m. The Navy is planning to implement a 55-m shutdown zone for humpback whales during impact pile driving of 24-in concrete piles, and shutdown zones that include the entire Level A harassment isopleth for all activities, as indicated in Table 11. Therefore, the Navy did not request, and NMFS will not authorize Level A harassment take of humpback whale.

#### Bottlenose Dolphin

The expected number of bottlenose dolphins in the project area was estimated using inshore seasonal densities provided in Engelhaupt *et al.* (2016) from vessel line-transect surveys near NAVSTA Norfolk and adjacent

areas near Virginia Beach, Virginia, from August 2012 through August 2015 (Engelhaupt *et al.* 2016). To calculate Level B harassment takes of bottlenose dolphin, NMFS used the Chesapeake Bay density of 1.38 dolphins/km<sup>2</sup> (Engelhaupt *et al.* 2016). This density includes sightings inshore of the Chesapeake Bay from NAVSTA Norfolk west to the Thimble Shoals Bridge, and is the most representative density for the project area. NMFS conservatively multiplied the density of 1.38 dolphins/km<sup>2</sup> by the largest Level B harassment zone for each project location (Table 7) and then by the proportional number of estimated pile driving days at each location for each year (Table 6). For example, to calculate Level B harassment takes associated with work at Pier 3 in 2021, NMFS multiplied the density (1.38 dolphins/km<sup>2</sup>) by largest Level B harassment zone for Pier 3 (10.3 km<sup>2</sup>) by the proportional number of pile driving days at Pier 3 in 2021 (24.6) for a total of 350 Level B harassment takes at Pier 3 in 2021. Therefore, NMFS may authorize 7,566 takes by Level B harassment of bottlenose dolphin across all five years, with no more than 2,742 in one year.

TABLE 6—ESTIMATED NUMBER OF PILE DRIVING DAYS AT EACH PROJECT LOCATION

Location <sup>1</sup>	Estimated number of pile driving days (all seasons)	Proportional number of pile driving days <sup>3</sup>				
		2021	2022	2023	2024	2025
Pier 3 .....	68	24.6	10.0	2.1	9.0	22.3
Pier 12 .....	352	127.6	51.5	11.0	46.6	115.3
MWR Marina .....	52	18.8	7.6	1.6	6.9	17.0
V-Area .....	44	15.9	6.4	1.4	5.8	14.4
Craney Island .....	52	18.8	7.6	1.6	6.9	17.0
Lambert's Point .....	8	2.9	1.2	0.3	1.1	2.6
Estimated Total Pile Driving Days per Year .....	<sup>2</sup> 574	208	84	18	76	188
Percentage of Total Pile Driving Days .....		36	15	3	13	33

<sup>1</sup> While the Navy plans to conduct work at additional locations not listed here, these locations are assumed to be representative of the overall project site (ex: all pile driving lumped together at Lambert's Point Depermig Station), as noted in Appendix A of the Navy's application. Pile driving at these additional locations is included in the total number of pile driving days assumed here.

<sup>2</sup> NMFS recognizes that due to rounding, the sum of the estimated number of work days at each location is 576, not 574. However, as mentioned previously, the Navy expects construction to last 574 days across all five years.

<sup>3</sup> The number of pile driving days indicated per year at each location is intended to inform our assessment of both the total and maximum annual taking allowable under the rule. NMFS does not expect that the Navy will conduct exactly the fractional number of days of pile driving indicated for each year in each location.

TABLE 7—ANNUAL LEVEL B HARASSMENT TAKES OF BOTTLENOSE DOLPHIN BY PROJECT LOCATION

Location	Largest Level B harassment zone (km <sup>2</sup> )	Level B harassment takes <sup>1</sup>					
		2021	2022	2023	2024	2025	Total
Pier 3 .....	10.3	350.2	141.4	30.3	128.0	316.6	966.6
Pier 12 .....	13.1	2,305.9	931.2	199.6	842.5	2,084.2	6,363.5
MWR Marina .....	0.2	5.2	2.1	0.5	1.9	4.7	14.4
V-Area .....	0.2	4.4	1.8	0.4	1.6	4.0	12.1
Craney Island .....	2.2	57.2	23.1	5.0	20.9	51.7	157.9
Lambert's Point .....	4.7	18.8	7.6	1.6	6.9	17.0	51.9
Total Level B Harassment Takes per Year .....	.....	2,742	1,107	237	1,002	2,478	7,566
Annual Takes as Percentage of Five-Year Total .....	.....	36.2	14.6	3.1	13.2	32.8	.....

<sup>1</sup> Note actual calculations were not rounded at each step as they are shown in Table 6 and Table 7.

The Level A harassment zones for mid-frequency cetaceans extend less than 10 m from the source during all activities (Table 5). Given the small size of the Level A harassment zones, we do not expect Level A harassment take of bottlenose dolphins. Additionally, the Navy is planning to implement a 10 m shutdown zone for bottlenose dolphins during all pile driving and other in-water activities (Table 11), which includes the entire Level A harassment zone for all pile driving activities. Therefore, the Navy did not request, and NMFS will not authorize Level A harassment take of bottlenose dolphin.

#### Harbor Porpoise

Harbor porpoises are known to occur in the coastal waters near Virginia Beach (Hayes *et al.* 2019). Density data for this species within the project vicinity do not exist or were not calculated because sample sizes were too small to produce reliable estimates of density. Harbor porpoise sighting data collected by the U.S. Navy near NAVSTA Norfolk and Virginia Beach from 2012 to 2015 (Engelhaupt *et al.*

2014; 2015; 2016) did not produce enough sightings to calculate densities. One group of two harbor porpoises was seen during spring 2015 (Engelhaupt *et al.* 2016). Elsewhere in their range, harbor porpoises typically occur in groups of two to three individuals (Carretta *et al.* 2001; Smultea *et al.* 2017).

Because there are no density estimates for the species in the MPU project area, the Navy conservatively estimated two takes of harbor porpoise by Level B harassment per 60 pile driving days (Table 4), resulting in 20 takes by Level B harassment across the five year rule, and no more than seven takes by Level B harassment in one year. NMFS corrected this estimate in this final rule to reflect that an estimated two takes of harbor porpoise by Level B harassment per 60 pile driving days results in 24 takes by Level B harassment over the five year duration of the rule, with no more than eight takes by Level B harassment in one year (Table 9). NMFS may authorize 24 takes by Level B harassment of harbor porpoise.

The Level A harassment zones for high-frequency cetaceans extend less than 10 m from the source during all activities (Table 5). Given the small size of the Level A harassment zones, we do not expect take by Level A harassment of harbor porpoise. Additionally, the Navy is planning to implement a 10 m shutdown zone for during pile driving and other in-water activities (Table 11). Therefore, the Navy did not request, and NMFS will not authorize take by Level A harassment of harbor porpoise.

#### Harbor Seal

The expected number of harbor seals in the project area was estimated using systematic, land- and vessel-based survey data for in-water and hauled-out seals collected by the U.S. Navy at the CBBT rock armor and portal islands from 2014 through 2019 (Jones *et al.* 2020). The average daily seal count from the 2014 through 2019 field seasons ranged from 8 to 23, with an average of 13.6 harbor seals across all the field seasons (Table 8).

TABLE 8—HARBOR SEAL COUNTS AT CHESAPEAKE BAY BRIDGE TUNNEL

Field season	"In season" survey days	Total seal count	Average daily seal count	Max daily seal count
2014–2015 .....	11	113	10	33
2015–2016 .....	14	187	13	39
2016–2017 .....	22	308	14	40
2017–2018 .....	15	340	23	45
2018–2019 .....	10	82	8	17
Average .....	.....	.....	13.6	34.8

Source: Jones *et al.* 2020.

The Navy expects, and NMFS concurs, that harbor seals are likely to be present from November to April. In the proposed rule, NMFS calculated take by Level B harassment by

multiplying 14 seals by the number of pile driving days expected in each year if fewer than 183 project days (half of the year) were expected. To account for seasonal occurrence (November to

April), NMFS calculated take based on 183 project days for years which have more than 183 expected project days (2021, 2025). In this final rule, NMFS calculated take in a parallel manner to

that done in the proposed rule, except NMFS estimated 13.6 seals per day, rather than 14 seals per day to produce a more exact take estimate using the average daily seal count from Jones *et al.* (2020). Therefore, NMFS may authorize 7,399 takes by Level B harassment of harbor seals across the five-year duration of this rule, with no more than 2,489 takes by Level B harassment in one year (Table 9).

The Level A harassment zones for phocids extend less than 10 m from the source during all activities (Table 5). Given the small size of the Level A harassment zones, we do not expect take by Level A harassment of harbor seal. Additionally, the Navy is planning to implement a 10 m shutdown zone for during pile driving and other in-water activities (Table 11), which includes the entire Level A harassment zone for all pile driving activities. Therefore, the Navy did not request, and NMFS will not authorize take by Level A harassment of harbor seal.

#### Gray Seal

Very little information is available about the occurrence of gray seals in the Chesapeake Bay and coastal waters. Although the population of the United States may be increasing, there are only a few records at known haulout sites in Virginia used by harbor seals, strandings are rare, and they have not been reported in shipboard surveys. Assuming that they may utilize the Chesapeake Bay waters, the Navy conservatively estimates that one gray seal may be exposed to noise levels above the Level B harassment threshold for every 60 days of vibratory pile driving during the six month period when they are most likely to be present. NMFS concurs, and calculated take based on the number of project days for years which have fewer than 183 project days (half of the year). To account for the expected seasonal presence of gray seals, NMFS calculated take based on 183 project days for years which have

more than 183 expected project days (2021, 2025). Therefore, NMFS may authorize nine takes by Level B harassment of gray seals over the five-year duration of the rule, with no more than three takes by Level B harassment in one year (Table 9).

The Level A harassment zones for phocids extend less than 10 m from the source during all activities (Table 5). Given the small size of the Level A harassment zones and the low occurrence of gray seals in the project area, we do not expect Level A harassment take of gray seal. Additionally, the Navy is planning to implement a 10 m shutdown zone for during pile driving and other in-water activities (Table 11), which includes the entire Level A harassment zone for all pile driving activities. Therefore, the Navy did not request, and NMFS will not authorize take by Level A harassment of gray seal.

TABLE 9—ESTIMATED TAKE BY LEVEL B HARASSMENT, BY SPECIES

Species	2021	2022	2023	2024	2025	Total
Humpback whale .....	8	4	2	4	6	24
Bottlenose dolphin .....	2,742	1,107	237	1,002	2,478	7,566
Harbor porpoise <sup>1</sup> .....	8	4	2	4	6	24
Harbor seal <sup>1</sup> .....	2,489	1,142	245	1,034	2,489	7,399
Gray seal .....	3	1	1	1	3	9

<sup>1</sup> Updated since publication of the proposed rule.

TABLE 10—ESTIMATED TAKE BY LEVEL B HARASSMENT (GREATEST ANNUAL TAKE EXPECTED), BY SPECIES AND STOCK IN COMPARISON TO STOCK ABUNDANCE

Species	Stock	Stock abundance	Level B harassment take	Percent of stock
Humpback Whale .....	Gulf of Maine .....	<sup>b</sup> 12,312	8	0.6
Bottlenose Dolphin .....	WNA Coastal, Northern Migratory <sup>a</sup> .....	6,639	1,353	20.4
	WNA Coastal, Southern Migratory <sup>a</sup> .....	3,751	1,353	36.1
	NNCES <sup>c</sup> .....	823	36	4.4
Harbor Porpoise .....	Gulf of Maine/Bay of Fundy .....	95,543	<sup>e</sup> 8	0.008
Harbor Seal .....	Western North Atlantic .....	75,834	<sup>e</sup> 2,489	<sup>e</sup> 3.3
Gray Seal .....	Western North Atlantic .....	<sup>d</sup> 27,131	3	0.01

<sup>a</sup> Take estimates are weighted based on calculated percentages of population for each distinct stock, assuming animals present would follow same probability of presence in the project area. Please see the Small Numbers section for additional information.

<sup>b</sup> West Indies DPS.

<sup>c</sup> Assumes multiple repeated takes of same individuals from small portion of each stock as well as repeated takes of Chesapeake Bay resident population (size unknown). Please see the Small Numbers section for additional information.

<sup>d</sup> This stock abundance estimate includes only the U.S. portion of this stock. The actual stock abundance, including the Canadian portion of the population, is estimated to be approximately 451,431 animals.

<sup>e</sup> Updated since publication of the proposed rule.

#### Mitigation Measures

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 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, we carefully consider 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, impact on operations, and, in the case of a military readiness activity, personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity.

In addition to the measures described later in this section, the Navy will employ the following mitigation measures:

- For in-water heavy machinery work other than pile driving, if a marine mammal comes within 10 m, operations shall cease and vessels shall reduce speed to the minimum level required to maintain steerage and safe working conditions;

- The Navy will conduct briefings between construction supervisors and crews and the marine mammal monitoring team prior to the start of all pile driving activity and when new personnel join the work, to explain responsibilities, communication procedures, marine mammal monitoring protocol, and operational procedures;

- For those marine mammals for which Level B harassment take has not been requested, in-water pile installation/removal will shut down immediately if such species are observed within or entering the Level B harassment zone; and

- If take reaches the authorized limit for an authorized species, pile installation/removal will shut down immediately if these species approach the Level B harassment zone to avoid additional take.

The following mitigation measures apply to the Navy's in-water construction activities.

**Establishment of Shutdown Zones—**The Navy will establish shutdown zones for all pile driving and removal activities. The purpose of a shutdown zone is generally to define an area within which shutdown of the activity would occur upon sighting of a marine mammal (or in anticipation of an animal entering the defined area). Shutdown zones will vary based on the activity type and marine mammal hearing group (Table 11).

**Protected Species Observers (PSOs)—**The placement of PSOs during all pile driving and removal activities (described in the Monitoring and Reporting section) will ensure that the entire shutdown zone is visible during pile driving and removal. Should environmental conditions deteriorate such that marine mammals within the entire shutdown zone would not be visible (e.g., fog, heavy rain, night), pile driving and removal must be delayed until the PSO is confident marine mammals within the shutdown zone could be detected.

**Monitoring for Level B Harassment—**The Navy will monitor the Level B harassment zones (areas where SPLs are equal to or exceed the 160 dB rms threshold for impact driving and the 120 dB rms threshold during vibratory pile driving) to the extent practicable, and the Level A harassment zones. The Navy will monitor at least a portion of the Level B harassment zone on all pile driving days. Monitoring zones provide utility for observing by establishing monitoring protocols for areas adjacent to the shutdown zones. Monitoring zones enable observers to be aware of and communicate the presence of marine mammals in the project area outside the shutdown zone and thus prepare for a potential cessation of

activity should the animal enter the shutdown zone.

**Pre-activity Monitoring—**Prior to the start of daily in-water construction activity, or whenever a break in pile driving/removal of 30 minutes or longer occurs, PSOs will observe the shutdown and monitoring zones for a period of 30 minutes. The shutdown zone will be considered cleared when a marine mammal has not been observed within the zone for that 30-minute period.

If a marine mammal is observed within the shutdown zone, a soft-start cannot proceed until the animal has left the zone or has not been observed for 15 minutes. When a marine mammal for which Level B harassment take is authorized is present in the Level B harassment zone, activities may begin and Level B harassment take will be recorded. If the entire Level B harassment zone is not visible at the start of construction, pile driving activities can begin. If work ceases for more than 30 minutes, the pre-activity monitoring of the shutdown zones will commence. A determination that the shutdown zone is clear must be made during a period of good visibility (*i.e.*, the entire shutdown zone and surrounding waters must be visible to the naked eye).

**Soft Start—**Soft-start procedures are believed to provide additional protection to marine mammals by providing warning and/or giving marine mammals a chance to leave the area prior to the hammer operating at full capacity. For impact pile driving, contractors will be required to provide an initial set of three strikes from the hammer at reduced energy, followed by a 30-second waiting period. This procedure will be conducted three times before impact pile driving begins. Soft start will be implemented at the start of each day's impact pile driving and at any time following cessation of impact pile driving for a period of 30 minutes or longer.

The Navy does not plan to use a pile driving energy attenuator during construction.

TABLE 11—SHUTDOWN ZONES DURING PILE INSTALLATION AND REMOVAL

Site	Pile size and type	Shutdown zone			
		LF cetacean	MF cetacean	HF cetacean	Phocid
Pier 3 .....	16-in Composite .....	20	10m		
Pier 12 .....	16-in Composite .....	20			
MWR Marina .....	24-in Concrete .....	55			
	16-in Composite .....	20			
V-Area .....	24-in Concrete .....	55	10m		
	16-in Composite .....	20			
Craney Island .....	16-in Composite .....	20			
Lambert's Point .....	16-in Composite .....	20			
Pier 3 .....	16-in Composite/12-in Timber .....				

TABLE 11—SHUTDOWN ZONES DURING PILE INSTALLATION AND REMOVAL—Continued

Site	Pile size and type	Shutdown zone			
		LF cetacean	MF cetacean	HF cetacean	Phocid
Pier 12 MWR Marina V-Area Craney Island Lambert's Point	16-in Composite/12-in Timber	10m			

Based on our evaluation of the Navy's planned measures, as well as other measures considered by NMFS, NMFS has determined that the required mitigation measures provide the means effecting the least practicable 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. NMFS' MMPA implementing regulations further describe the information that an applicant should provide when requesting an authorization (50 CFR 216.104 (a)(13)), including the means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and the level of taking or impacts on populations of marine mammals.

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 action; 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.

The Navy will submit a Marine Mammal Monitoring Plan to NMFS for approval in advance of the start of construction.

#### Visual Monitoring

Marine mammal monitoring during pile driving and removal must be conducted by PSOs meeting NMFS' standards and in a manner consistent with the following:

- Independent PSOs (*i.e.*, not construction personnel) who have no other assigned tasks during monitoring periods must be used;
- 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 education (degree in biological science or related field) or training for experience; and
- Where a team of three or more PSOs is required, a lead observer or monitoring coordinator must be designated. The lead observer must have prior experience working as a marine mammal observer during construction.

PSOs must 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 the number and species of marine mammals observed; dates and times when in-water construction

activities were conducted; dates, times, and reason for implementation of mitigation (or why mitigation was not implemented when required); and 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.

At least three PSOs must be used during vibratory pile driving at Pier 3, Pier 12, and Craney Island, and at least four PSOs during vibratory pile driving at Lambert's Point, as recommended by the Commission in its comments on the proposed rule. For all other pile driving activities, a minimum of two PSOs will be used, as stated in the proposed rule (85 FR 83001; December 21, 2020). Depending on available resources, and depending on the size of the zone associated with the activity, additional PSOs may be utilized as necessary. PSOs will be placed at the best vantage point(s) practicable to monitor for marine mammals and implement shutdown/delay procedures. (See Figure 13–1 of the Navy's application for example representative monitoring locations.)

Monitoring will be conducted 30 minutes before, during, and 30 minutes after pile driving activities. In addition, observers shall record all incidents of marine mammal occurrence, regardless of distance from activity, and shall document any behavioral reactions in concert with distance from piles being driven or removed. Pile driving activities include the time to install or remove a single pile or series of piles, as long as the time elapsed between uses of the pile driving equipment is no more than 30 minutes.

#### Acoustic Monitoring

Since publication of the proposed rule, the Navy has determined that SSV may not be feasible given budget constraints associated with the individual, small-scale projects planned. However, subject to funding availability, the Navy may conduct a SSV study for pile types other than timber piles (prioritizing composite pile types) and would follow accepted methodological standards to achieve

their objectives. The Navy would submit an acoustic monitoring plan to NMFS for approval prior to implementation of the plan. Upon review of the Navy's SSV results, NMFS may update the Level A and Level B harassment zone sizes and the associated shutdown zones, as appropriate.

#### Reporting

The Navy will submit a draft report to NMFS within 45 workdays of the completion of required monitoring for each MPU project. The report will detail the monitoring protocol and summarize the data recorded during monitoring. Specifically, the report must include:

- Dates and times (begin and end) of all marine mammal monitoring;
- Construction activities occurring during each daily observation period, including how many and what type of piles were driven or removed and by what method (*i.e.*, impact or vibratory);
- 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 (if less than the harassment zone distance);
- The number of marine mammals observed, by species, relative to the pile location and if pile driving or removal was occurring at time of sighting;
- Age and sex class, if possible, of all marine mammals observed;
- PSO locations during marine mammal monitoring;
- Distances and bearings of each marine mammal observed to the pile being driven or removed for each sighting (if pile driving or removal was occurring at time of sighting);
- Description of any marine mammal behavior patterns during observation, including direction of travel and estimated time spent within the Level A and Level B harassment zones while the source was active;
- Number of marine mammals detected within the harassment zones, by species;
- Detailed information about any implementation of any mitigation triggered (*e.g.*, shutdowns and delays), a description of specific actions that ensued, and resulting behavior of the animal, if any;
- Description of attempts to distinguish between the number of individual animals taken and the number of incidences of take, such as ability to track groups or individuals; and

- Estimated percentage of the Level B harassment zone that was not visible.

If no comments are received from NMFS within 30 days, the draft report will constitute the final report. If comments are received, a final report addressing NMFS comments must be submitted within 30 days after receipt of comments.

In the event that personnel involved in the construction activities discover an injured or dead marine mammal, the Navy shall report the incident to the Office of Protected Resources (OPR) (301–427–8401), NMFS and to the Greater Atlantic Region New England/Mid-Atlantic Regional Stranding Coordinator as soon as feasible. If the death or injury was clearly caused by the specified activity, the Navy must immediately cease the specified activities until NMFS 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 the authorization. The Navy must not resume their activities until notified by NMFS.

The report must include the following information:

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

#### 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 responses (*e.g.*, intensity,

duration), the context of any responses (*e.g.*, critical reproductive time or location, migration), 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 the 1989 preamble for NMFS's 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 environmental 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).

To avoid repetition, this introductory discussion of our analyses applies to all of the species listed in Table 1, given that many of the anticipated effects of this project on different marine mammal stocks are expected to be relatively similar in nature. Where there are meaningful differences between species or stocks in anticipated individual responses to activities, impact of expected take on the population due to differences in population status, or impacts on habitat, they are described independently in the analysis below.

Pile driving activities associated with the project, as outlined previously, have the potential to disturb or displace marine mammals. Specifically, the specified activities may result in take, in the form of Level B harassment from underwater sounds generated by pile driving. Potential takes could occur if marine mammals are present in zones ensonified above the thresholds for Level B harassment, identified above, while activities are underway.

No serious injury or mortality would be expected even in the absence of the required mitigation measures. For all species other than humpback whale, no Level A harassment is anticipated given the nature of the activities. For humpback whale, no Level A harassment is anticipated due to the required mitigation measures, which we expect the Navy will be able to effectively implement given the small Level A harassment zone sizes and high visibility of humpback whales.

The Navy's planned pile driving activities and associated impacts will occur within a limited portion of the confluence of the Chesapeake Bay area. Localized noise exposures produced by project activities may cause short-term behavioral modifications in affected cetaceans and pinnipeds. However, as described previously, the mitigation and monitoring measures are expected to

further reduce the likelihood of injury as well as reduce behavioral disturbances.

Effects on individuals that are taken by Level B harassment, on the basis of reports in the literature as well as monitoring from other similar activities, will likely be limited to reactions such as increased swimming speeds, increased surfacing time, or decreased foraging (if such activity were occurring) (e.g., Thorson and Reyff 2006). Individual animals, even if taken multiple times, will most likely move away from the sound source and be temporarily displaced from the areas of pile driving, although even this reaction has been observed primarily only in association with impact pile driving. The pile driving activities analyzed here are similar to, or less impactful than, numerous other construction activities conducted along both Atlantic and Pacific coasts, which have taken place with no known long-term adverse consequences from behavioral harassment. Furthermore, many projects similar to this one are also believed to result in multiple takes of individual animals without any documented long-term adverse effects. Level B harassment will be minimized through use of mitigation measures described herein and, if sound produced by project activities is sufficiently disturbing, animals are likely to simply avoid the area while the activity is occurring, particularly as the project is located on a busy waterfront with high amounts of vessel traffic.

As described in the proposed rule (85 FR 83001; December 21, 2020), Unusual Mortality Events (UMEs) have been declared for Northeast pinnipeds (including harbor seal and gray seal) and Atlantic humpback whales. However, we do not expect takes that may be authorized under this rule to exacerbate or compound upon these ongoing UMEs. As noted previously, no injury, serious injury, or mortality is expected or will be authorized, and Level B harassment takes of humpback whale, harbor seal and gray seal will be reduced to the level of least practicable adverse impact through the incorporation of the required mitigation measures. For the WNA stock of gray seal, the estimated stock abundance is 451,431 animals, including the Canadian portion of the stock (estimated 27,131 animals in the U.S. portion of the stock). Given that only 1 to 3 takes by Level B harassment may be authorized for this stock annually, we do not expect this authorization to exacerbate or compound upon the ongoing UME.

With regard to humpback whales, despite the UME, the relevant

population of humpback whales (the West Indies breeding population, or distinct population segment (DPS)) remains healthy. Prior to 2016, humpback whales were listed under the ESA as an endangered species worldwide. Following a 2015 global status review (Bettridge *et al.* 2015), NMFS established 14 DPSs with different listing statuses (81 FR 62259; September 8, 2016) pursuant to the ESA. The West Indies DPS, which consists of the whales whose breeding range includes the Atlantic margin of the Antilles from Cuba to northern Venezuela, and whose feeding range primarily includes the Gulf of Maine, eastern Canada, and western Greenland, was delisted. The status review identified harmful algal blooms, vessel collisions, and fishing gear entanglements as relevant threats for this DPS, but noted that all other threats are considered likely to have no or minor impact on population size or the growth rate of this DPS (Bettridge *et al.* 2015). As described in Bettridge *et al.* (2015), the West Indies DPS has a substantial population size (i.e., 12,312 (95% CI 8,688–15,954) whales in 2004–05 (Bettridge *et al.* 2003)), and appears to be experiencing consistent growth. Further, NMFS will authorize no more than eight takes by Level B harassment annually of humpback whale.

For the WNA stock of harbor seals, the estimated abundance is 75,834 individuals. The estimated M/SI for this stock (350) is well below the PBR (2,006). As such, the Level B harassment takes of harbor seal that may be authorized are not expected to exacerbate or compound upon the ongoing UMEs.

The project is also not expected to have significant adverse effects on affected marine mammals' habitats. The project activities will not modify existing marine mammal habitat for a significant amount of time. The activities may cause some fish to leave the area of disturbance, thus temporarily impacting marine mammals' foraging opportunities in a limited portion of the foraging range; but, because of the short duration of the activities and the relatively small area of the habitat that may be affected (with no known particular importance to marine mammals), the impacts to marine mammal habitat are not expected to cause significant or long-term negative consequences.

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 the species

or stock through effects on annual rates of recruitment or survival:

- No mortality or serious injury is anticipated or will be authorized;
- No Level A harassment take is anticipated or will be authorized;
- The intensity of anticipated takes by Level B harassment is relatively low for all stocks;
- The number of anticipated takes is very low for humpback whale, harbor porpoise, and gray seal;
- The specified activity and associated ensonified areas are very small relative to the overall habitat ranges of all species and do not include habitat areas of special significance (Biologically Important Areas or ESA-designated critical habitat);
- The lack of anticipated significant or long-term negative effects to marine mammal habitat; and
- The presumed efficacy of the mitigation measures in reducing the effects of the specified activity.

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 planned 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 above, only small numbers of incidental take may be authorized under sections 101(a)(5)(A) 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 number of individuals taken 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 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.

The instances of take of humpback whale, harbor porpoise, harbor seal, and gray seal which NMFS expects to authorize, comprises less than one-third of the best available stock abundance (Table 10). The number of animals that we expect to authorize to be taken from these stocks would be considered small relative to the relevant stock's

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

Three bottlenose dolphin stocks could occur in the project area: WNA Coastal Northern Migratory, WNA Coastal Southern Migratory, and NNCES stocks. Therefore, the estimated takes of bottlenose dolphin by Level B harassment would likely be portioned among these stocks. Based on the stocks' respective occurrence in the area, NMFS estimated that there would be 100 takes from the NNCES stock over the five-year period (no more than 36 in one year), with the remaining takes evenly split between the northern and southern migratory coastal stocks. Based on consideration of various factors described below, we have determined the numbers of individuals taken would likely comprise less than one-third of the best available population abundance estimate of either coastal migratory stock.

Both the WNA Coastal Northern Migratory and WNA Coastal Southern Migratory stocks have expansive ranges, and they are the only dolphin stocks thought to make broad-scale, seasonal migrations in coastal waters of the western North Atlantic. Given the large ranges associated with these stocks it is unlikely that large segments of either stock would approach the project area and enter into the Chesapeake Bay. The majority of both stocks are likely to be found widely dispersed across their respective habitat ranges and unlikely to be concentrated in or near the Chesapeake Bay.

Furthermore, the Chesapeake Bay and nearby offshore waters represent the boundaries of the ranges of each of the two coastal stocks during migration. The WNA Coastal Northern Migratory stock occurs during warm water months from coastal Virginia, including the Chesapeake Bay and Long Island, New York. The stock migrates south in late summer and fall. During cold-water months, dolphins may occur in coastal waters from Cape Lookout, North Carolina, to the North Carolina/Virginia. During January–March, the WNA Coastal Southern Migratory stock appears to move as far south as northern Florida. From April to June, the stock moves back north to North Carolina. During the warm water months of July–August, the stock is presumed to occupy coastal waters north of Cape Lookout, North Carolina, to Assateague, Virginia, including the Chesapeake Bay. There is likely some overlap between the northern and southern migratory stocks during spring and fall migrations, but the extent of overlap is unknown.

The Chesapeake Bay and waters offshore of its mouth are located on the periphery of the migratory ranges of both coastal stocks (although during different seasons). Additionally, each of the migratory coastal stocks are likely to be located in the vicinity of the Chesapeake Bay for relatively short timeframes. Given the limited number of animals from each migratory coastal stock likely to be found at the seasonal migratory boundaries of their respective ranges, in combination with the short time periods (~two months) animals might remain at these boundaries, it is reasonable to assume that takes are likely to occur to only a small portion of either of the migratory coastal stocks.

Both migratory coastal stocks likely overlap with the NNCES stock at various times during their seasonal migrations. The NNCES stock is defined as animals that primarily occupy waters of the Pamlico Sound estuarine system (which also includes Core, Roanoke, and Albemarle sounds, and the Neuse River) during warm water months (July–August). Animals from this stock also use coastal waters ( $\leq 1$  km from shore) of North Carolina from Beaufort north to Virginia Beach, Virginia, including the lower Chesapeake Bay. Comparison of dolphin photo-identification data confirmed that limited numbers of individual dolphins observed in Roanoke Sound have also been sighted in the Chesapeake Bay (Young, 2018). Like the migratory coastal dolphin stocks, the NNCES stock covers a large range. The spatial extent of most small and resident bottlenose dolphin populations is on the order of 500 km<sup>2</sup>, while the NNCES stock occupies over 8,000 km<sup>2</sup> (LeBrecque *et al.* 2015). Given this large range, it is again unlikely that a preponderance of animals from the NNCES stock would depart the North Carolina estuarine system and travel to the northern extent of the stock's range. However, recent evidence suggests that there is likely a small resident community of NNCES dolphins of indeterminate size that inhabits the Chesapeake Bay year-round (E. Patterson, NMFS, pers. comm.).

Many of the dolphin observations in the Chesapeake Bay are likely repeated sightings of the same individuals. The Potomac-Chesapeake Dolphin Project has observed over 1,200 unique animals since observations began in 2015. Re-sightings of the same individual can be highly variable. Some dolphins are observed once per year, while others are highly regular with greater than 10 sightings per year (J. Mann, Potomac-Chesapeake Dolphin Project, pers. comm.). Similarly, using available photo-identification data, Engelhaupt *et*

*al.* (2016) determined that specific individuals were often observed in close proximity to their original sighting locations and were observed multiple times in the same season or same year. Ninety-one percent of re-sighted individuals (100 of 110) in the study area were recorded less than 30 km from the initial sighting location. Multiple sightings of the same individual would considerably reduce the number of individual animals that are taken by Level B harassment. Furthermore, the existence of a resident dolphin population in the Bay would increase the percentage of dolphin takes that are actually re-sightings of the same individuals.

In summary and as described above, the following factors primarily support our determination regarding the incidental take of small numbers of the affected stocks of bottlenose dolphin:

- Potential bottlenose dolphin takes in the project area are likely to be allocated among three distinct stocks;
- Bottlenose dolphin stocks in the project area have extensive ranges and it would be unlikely to find a high percentage of any one stock concentrated in a relatively small area such as the project area or the Chesapeake Bay;

- The Chesapeake Bay represents the migratory boundary for each of the specified dolphin stocks and it would be unlikely to find a high percentage of any stock concentrated at such boundaries; and

- Many of the takes would likely be repeats of the same animals and likely from a resident population of the Chesapeake Bay.

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 will 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 would not have an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence purposes.

#### Adaptive Management

The regulations governing the take of marine mammals incidental to Navy maintenance construction activities



contain an adaptive management component.

The reporting requirements associated with this 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 Navy 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 subsequent LOAs.

#### Endangered Species Act

Section 7(a)(2) of the ESA (16 U.S.C. 1531 *et seq.*) requires that each Federal agency insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat. To ensure ESA compliance for the issuance of incidental take authorizations, NMFS consults internally whenever we propose to authorize take for endangered or threatened species.

No incidental take of ESA-listed species is 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

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 our proposed action (*i.e.*, the promulgation of regulations and subsequent issuance of incidental take authorization) and alternatives with respect to potential impacts on the human environment.

This action is consistent with categories of activities identified in

Categorical Exclusion B4 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 this action qualifies to be categorically excluded from further NEPA review.

#### Classification

Pursuant to the procedures established to implement Executive Order 12866, the Office of Management and Budget has determined that this final rule is not significant.

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

This 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. Notwithstanding any other provision of law, no person is required to respond to nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the PRA unless that collection of information displays a currently valid OMB control number. These requirements have been approved by OMB under control number 0648-0151 and include applications for regulations, subsequent LOAs, and reports.

#### List of Subjects in 50 CFR Part 218

Exports, Fish, Imports, Indians, Labeling, Marine mammals, Penalties, Reporting and recordkeeping requirements, Seafood, Transportation.

Dated: April 30, 2021.

**Samuel D. Rauch, III,**

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

For reasons set forth in the preamble, 50 CFR part 218 is amended as follows:

### PART 218—REGULATIONS GOVERNING THE TAKING AND IMPORTING OF MARINE MAMMALS

■ 1. The authority citation for part 218 continues to read as follows:

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

■ 2. Add subpart A to part 218 to read as follows:

#### Subpart A—Taking and Importing Marine Mammals Incidental to U.S. Navy Construction at Naval Station Norfolk in Norfolk, Virginia

Sec.

- 218.1 Specified activity and geographical region.
- 218.2 Effective dates.
- 218.3 Permissible methods of taking.
- 218.4 Prohibitions.
- 218.5 Mitigation requirements.
- 218.6 Requirements for monitoring and reporting.
- 218.7 Letters of Authorization.
- 218.8 Renewals and modifications of Letters of Authorization.
- 218.9 [Reserved]

#### Subpart A—Taking and Importing Marine Mammals Incidental to U.S. Navy Construction at Naval Station Norfolk in Norfolk, Virginia

##### § 218.1 Specified activity and geographical region.

(a) Regulations in this subpart apply only to the U.S. Navy (Navy) and those persons it authorizes or funds to conduct activities on its behalf for the taking of marine mammals that occurs in the areas outlined in paragraph (b) of this section and that occurs incidental to construction activities including marine structure maintenance, pile replacement, and select waterfront improvements at Naval Station (NAVSTA) Norfolk.

(b) The taking of marine mammals by the Navy may be authorized in a Letter of Authorization (LOA) only if it occurs at NAVSTA Norfolk and adjacent Navy facilities.

##### § 218.2 Effective dates.

Regulations in this subpart are effective from June 7, 2021 to June 7, 2026.

##### § 218.3 Permissible methods of taking.

Under an LOA issued pursuant to §§ 216.106 of this chapter and 218.7, the Holder of the LOA (hereinafter “Navy”)

may incidentally, but not intentionally, take marine mammals within the area described in § 218.1(b) by Level B 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.

#### § 218.4 Prohibitions.

(a) Except for the takings contemplated in § 218.3 and authorized by a LOA issued under §§ 216.106 of this chapter and 218.7, it is unlawful for any person to do any of the following in connection with the activities described in § 218.1 may:

(1) Violate, or fail to comply with, the terms, conditions, and requirements of this subpart or a LOA issued under § 216.106 of this chapter and § 218.7;

(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 if 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]

#### § 218.5 Mitigation requirements.

(a) When conducting the activities identified in § 218.20(a), the mitigation measures contained in any LOA issued under §§ 216.106 of this chapter and 218.7 must be implemented. These mitigation measures shall include but are not limited to:

(1) A copy of any issued LOA must be in the possession of the Navy, its designees, and work crew personnel operating under the authority of the issued LOA;

(2) The Navy shall conduct briefings for construction supervisors and crews, the monitoring team, and Navy staff prior to the start of all pile driving activity, and when new personnel join the work, in order to explain responsibilities, communication procedures, the marine mammal monitoring protocol, and operational procedures;

(3) For in-water heavy machinery work other than pile driving, if a marine mammal comes within 10 m, the Navy shall cease operations and reduce vessel speed to the minimum level required to maintain steerage and safe working conditions;

(4) For all pile driving activity, the Navy shall implement a minimum shutdown zone of a 10 m radius around the pile. If a marine mammal comes within or approaches the shutdown zone, such operations shall cease;

(5) For all pile driving activity, the Navy shall implement shutdown zones with radial distances as identified in a LOA issued under §§ 216.106 of this chapter and 218.7. If a marine mammal comes within or approaches the shutdown zone, such operations shall cease;

(6) The Navy shall deploy protected species observers (observers) as indicated in its Marine Mammal Monitoring Plan approved by NMFS;

(7) A minimum of three PSOs shall be stationed at the best vantage points practicable to monitor for marine mammals and implement shutdown/delay procedures during vibratory pile driving at Pier 3, Pier 12, and Craney Island, and at least four PSOs must be stationed at the best vantage points practicable during vibratory pile driving at Lambert's Point. For all other pile driving activities, a minimum of two observers shall be stationed at the best vantage points practicable to monitor for marine mammals and implement shutdown/delay procedures;

(8) Monitoring shall take place from 30 minutes prior to initiation of pile driving activity through 30 minutes post-completion of pile driving activity. Pre-activity monitoring shall be conducted for 30 minutes to ensure that the shutdown zone is clear of marine mammals, and pile driving may commence when observers have declared the shutdown zone clear of marine mammals. In the event of a delay or shutdown of activity resulting from marine mammals in the shutdown zone, animals shall be allowed to remain in the shutdown zone (*i.e.*, must leave of their own volition) and their behavior shall be monitored and documented. If a marine mammal is observed within the shutdown zone, a soft-start cannot proceed until the animal has left the zone or has not been observed for 15 minutes. Monitoring shall occur throughout the time required to drive a pile. If work ceases for more than 30 minutes, the pre-activity monitoring of the shutdown zones must commence. A determination that the shutdown zone is clear must be made during a period of good visibility (*i.e.*, the entire shutdown zone and surrounding waters must be visible to the naked eye);

(9) If a marine mammal approaches or enters the shutdown zone, all pile driving activities at that location shall be halted. If pile driving is halted or delayed due to the presence of a marine

mammal, the activity may not commence or resume until either the animal has voluntarily left and been visually confirmed beyond the shutdown zone or fifteen minutes have passed without re-detection of the animal;

(10) Pile driving activity must be halted upon observation of either a species for which incidental take is not authorized or a species for which incidental take has been authorized but the authorized number of takes has been met, entering or within the harassment zone;

(11) Should environmental conditions deteriorate such that marine mammals within the entire shutdown zone would not be visible (*e.g.*, fog, heavy rain, night), the Navy shall delay pile driving and removal until observers are confident marine mammals within the shutdown zone could be detected;

(12) Monitoring shall be conducted by trained observers, who shall have no other assigned tasks during monitoring periods. Trained observers shall be placed at the best vantage point(s) practicable to monitor for marine mammals and implement shutdown or delay procedures when applicable through communication with the equipment operator. The Navy shall adhere to the following additional observer qualifications:

(i) Independent observers are required;

(ii) At least one observer must have prior experience working as an observer;

(iii) Other observers may substitute education (degree in biological science or related field) or training for experience;

(iv) Where a team of three or more observers are required, one observer shall be designated as lead observer or monitoring coordinator. The lead observer must have prior experience working as an observer;

(v) Personnel who are engaged in construction activities may not serve as observers.

(13) The Navy shall use soft start techniques for impact pile driving. Soft start for impact drivers requires the Navy and those persons it authorizes or funds to provide an initial set of three strikes at reduced energy, followed by a 30-second waiting period, then two subsequent reduced energy three-strike sets. Soft start shall be implemented at the start of each day's impact pile driving and at any time following cessation of impact pile driving for a period of thirty minutes or longer.

(b) [Reserved]

**§ 218.6 Requirements for monitoring and reporting.**

(a) The Navy shall submit a Marine Mammal Monitoring Plan to NMFS for approval in advance of construction.

(b) The Navy shall deploy at least three PSOs during vibratory pile driving at Pier 3, Pier 12, and Craney Island, and at least four PSOs during vibratory pile driving at Lambert's Point. For all other pile driving activities, the Navy shall deploy a minimum of two PSOs.

(c) Observers shall be trained in marine mammal identification and behaviors. Observers shall have no other construction-related tasks while conducting monitoring.

(d) For all pile driving activities, a minimum of two observers shall be stationed at the active pile driving site or in reasonable proximity in order to monitor the shutdown zone.

(e) The Navy shall monitor the Level B harassment zones (areas where SPLs are equal to or exceed the 160 dB rms threshold for impact driving and the 120 dB rms threshold during vibratory pile driving) to the extent practicable and the shutdown zones. The Navy shall monitor at least a portion of the Level B harassment zone on all pile driving days.

(f) The Navy shall submit a draft monitoring report to NMFS within 45 work days of the completion of required monitoring for each marine structure maintenance, pile replacement, and upgrades project. The report must detail the monitoring protocol and summarize the data recorded during monitoring. If no comments are received from NMFS within 30 days, the draft report will constitute the final report. If comments are received, a final report addressing NMFS comments must be submitted within 30 days after receipt of comments. Specifically, the report must include:

(1) Dates and times (begin and end) of all marine mammal monitoring;

(2) Construction activities occurring during each daily observation period, including how many and what type of piles were driven or removed and by what method (*i.e.*, impact or vibratory);

(3) Environmental conditions during monitoring periods (at beginning and end of observer 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 (if less than the harassment zone distance);

(4) The number of marine mammals observed, by species, relative to the pile location and if pile driving or removal was occurring at time of sighting;

(5) Age and sex class, if possible, of all marine mammals observed;

(6) Observer locations during marine mammal monitoring;

(7) Distances and bearings of each marine mammal observed to the pile being driven or removed for each sighting (if pile driving or removal was occurring at time of sighting);

(8) Description of any marine mammal behavior patterns during observation, including direction of travel and estimated time spent within the Level A and Level B harassment zones while the source was active;

(9) Number of marine mammals detected within the harassment zones, by species;

(10) Detailed information about any implementation of any mitigation triggered (*e.g.*, shutdowns and delays), a description of specific actions that ensued, and resulting behavior of the animal, if any;

(11) Description of attempts to distinguish between the number of individual animals taken and the number of incidences of take, such as ability to track groups or individuals; and

(12) Estimated percentage of the Level B harassment zone that was not visible.

(g) In the event that personnel involved in the construction activities discover an injured or dead marine mammal, the Navy shall report the incident to the Office of Protected Resources (OPR) (301-427-8401), NMFS and to the Greater Atlantic Region New England/Mid-Atlantic Regional Stranding Coordinator as soon as feasible. If the death or injury was clearly caused by the specified activity, the Navy must immediately cease the specified activities until NMFS 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 the authorization. The Navy must not resume their activities until notified by NMFS.

(1) The report must include the following information:

(i) Time, date, and location (latitude/longitude) of the first discovery (and updated location information if known and applicable);

(ii) Species identification (if known) or description of the animal(s) involved;

(iii) Condition of the animal(s) (including carcass condition if the animal is dead);

(iv) Observed behaviors of the animal(s), if alive;

(v) If available, photographs or video footage of the animal(s); and

(vi) General circumstances under which the animal was discovered.

(2) [Reserved]

**§ 218.7 Letters of Authorization.**

(a) To incidentally take marine mammals pursuant to these regulations, the Navy 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 Navy 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 Navy must apply for and obtain a modification of the LOA as described in § 218.8.

(e) The LOA shall 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 shall 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 shall be published in the **Federal Register** within 30 days of a determination.

**§ 218.8 Renewals and modifications of Letters of Authorization.**

(a) An LOA issued under §§ 216.106 of this chapter and 218.7 for the activity identified in § 218.1(a) shall be renewed or modified upon request by the applicant, provided that:

(1) The proposed 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 § 218.7 for the activity identified in § 218.1(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 Navy 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 a LOA:

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

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

(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 will publish a notice of proposed LOA in the **Federal Register** and solicit public comment.

(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 § 218.7, a LOA may be modified without prior notice or opportunity for public comment. Notice would be published in the **Federal Register** within 30 days of the action.

#### § 218.9 [Reserved]

[FR Doc. 2021-09512 Filed 5-5-21; 8:45 am]

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 635

[Docket No. 180117042-8884-02; RTID 0648-XB001]

#### Atlantic Highly Migratory Species; Atlantic Bluefin Tuna Fisheries

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and

Atmospheric Administration (NOAA), Commerce.

**ACTION:** Temporary rule, closure.

**SUMMARY:** NMFS closes the Angling category Gulf of Mexico area incidental trophy fishery for large medium and giant ("trophy" (*i.e.*, measuring 73 inches (185 cm) curved fork length or greater)) Atlantic bluefin tuna (BFT). This action is being taken to prevent further overharvest of the Angling category Gulf of Mexico incidental trophy BFT subquota.

**DATES:** Effective 11:30 p.m., local time, May 4, 2021, through December 31, 2021.

**FOR FURTHER INFORMATION CONTACT:**

Larry Redd, Jr., [larry.redd@noaa.gov](mailto:larry.redd@noaa.gov), 301-427-8503, Nicholas Velseboer, [nicholas.velseboer@noaa.gov](mailto:nicholas.velseboer@noaa.gov), 978-675-2168, or Lauren Latchford, [lauren.latchford@noaa.gov](mailto:lauren.latchford@noaa.gov), 301-427-8503.

**SUPPLEMENTARY INFORMATION:** Atlantic highly migratory species (HMS) fisheries, including BFT fisheries, are managed under the authority of the Atlantic Tunas Convention Act (ATCA; 16 U.S.C. 971 *et seq.*) and the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act; 16 U.S.C. 1801 *et seq.*). The 2006 Consolidated Atlantic HMS Fishery Management Plan (FMP) and its amendments are implemented by regulations at 50 CFR part 635. Section 635.27 divides the U.S. BFT quota recommended by the International Commission for the Conservation of Atlantic Tunas (ICCAT) and as implemented by the United States among the various domestic fishing categories, per the allocations established in the 2006 Consolidated Atlantic HMS FMP and its amendments. NMFS is required under the MSA to provide U.S. fishing vessels with a reasonable opportunity to harvest quotas under relevant international fishery agreements such as the ICCAT Convention, which is implemented domestically pursuant to ATCA.

Under § 635.28(a)(1), NMFS publishes a closure notice with the Office of the Federal Register for publication when a BFT quota (or subquota) is reached or is projected to be reached. Retaining, possessing, or landing BFT under that quota category is prohibited on or after the effective date and time of a closure notice for that category, for the remainder of the fishing year, until the opening of the relevant subsequent quota period or until such date as specified.

#### Angling Category Large Medium and Giant Gulf of Mexico "Trophy" Fishery Closure

The 2021 BFT fishing year, which is managed on a calendar-year basis and subject to an annual calendar-year quota, began January 1, 2021. The Angling category season opened January 1, 2021, and continues through December 31, 2021. The current Angling category quota is 232.4 metric tons (mt), of which 5.3 mt is allocated for the harvest of large medium and giant (trophy) BFT by vessels fishing under the Angling category quota, with 1.8 mt allocated for each of the following areas: North of 39°18' N. lat. (off Great Egg Inlet, NJ); south of 39°18' N. lat. and outside the Gulf of Mexico (the "southern area"); and in the Gulf of Mexico. Per § 635.27(a)(2)(iii), the Gulf of Mexico region includes all waters of the U.S. exclusive economic zone (EEZ) west and north of the boundary stipulated at § 600.105(c). Trophy BFT measure 73 inches (185 cm) curved fork length or greater.

Based on reported landings from the NMFS Automated Catch Reporting System, NMFS has determined that the codified Angling category Gulf of Mexico trophy BFT subquota of 1.8 mt has been reached and exceeded and that a closure of the Gulf of Mexico incidental trophy BFT fishery is warranted. Therefore, retaining, possessing, or landing large medium or giant BFT in the Gulf of Mexico by persons aboard HMS Angling category and the HMS Charter/Headboat permitted vessels (when fishing recreationally) must cease at 11:30 p.m. local time on May 4, 2021. This closure will remain effective through December 31, 2021. This action is intended to prevent further overharvest of the Angling category Gulf of Mexico incidental trophy BFT subquota, and is taken consistent with the regulations at § 635.28(a)(1). NMFS previously closed the 2021 trophy BFT fishery in the southern area on March 1, 2021 (86 FR 12548, March 4, 2021).

If needed, subsequent Angling category adjustments will be published in the **Federal Register**. Information regarding the Angling category fishery for Atlantic tunas, including daily retention limits for BFT measuring 27 inches (68.5 cm) to less than 73 inches and any further Angling category adjustments, is available at [hmspermits.noaa.gov](https://hmspermits.noaa.gov) or by calling (978) 281-9260. HMS Angling category and HMS Charter/Headboat permit holders may catch and release (or tag and release) BFT of all sizes, subject to the requirements of the catch-and-release