

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

[RTID 0648–XD121]

**Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to the Port of Nome Modification Project in Nome, Alaska**

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

**ACTION:** Notice; issuance of an incidental harassment authorization.

**SUMMARY:** In accordance with the regulations implementing the Marine Mammal Protection Act (MMPA) as amended, notification is hereby given that NMFS has issued an incidental harassment authorization (IHA) to the U.S. Army Corps of Engineers (USACE) to incidentally harass, by Level B harassment only, marine mammals during construction activities associated with the Port of Nome Modification Project in Nome, Alaska.

**DATES:** This Authorization is effective from May 1, 2024 through April 30, 2025.

**FOR FURTHER INFORMATION CONTACT:** Leah Davis, Office of Protected Resources, NMFS, (301) 427–8401. Electronic copies of the 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/national/marine-mammal-protection/incidental-take-authorizations-construction-activities>. In case of problems accessing these documents, please call the contact listed above.

**SUPPLEMENTARY INFORMATION:****Background**

The MMPA prohibits the “take” of marine mammals, with certain exceptions. Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (as delegated to NMFS) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are proposed or, if the taking is limited to harassment, a notice of a proposed IHA is provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the

taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for taking for subsistence uses (where relevant). Further, NMFS must prescribe the permissible methods of taking and other “means of effecting the least practicable adverse impact” on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of the species or stocks for taking for certain subsistence uses (referred to in shorthand as “mitigation”); and requirements pertaining to the mitigation, monitoring and reporting of 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**

On October 31, 2022, NMFS received a request from USACE for an IHA to take marine mammals incidental to construction activities in Nome, Alaska. Following NMFS’ review of the application, USACE submitted a revised version on February 21, 2023 and a final version on February 23, 2023 that clarified a few minor errors. The application was deemed adequate and complete on March 30, 2023. USACE’s request is for take of 10 species of marine mammals by Level B harassment only. Neither USACE nor NMFS expect serious injury or mortality to result from this activity and, therefore, an IHA is appropriate.

This IHA covers 1 year of a larger project for which USACE intends to request take authorization for subsequent facets of the project. The larger 7-year project involves expansion of the Port of Nome.

**Description of the Specified Activity***Overview*

USACE is planning to modify the Port of Nome in Nome, Alaska to increase capacity and alleviate congestion at existing port facilities. Vibratory and impact pile driving would introduce underwater sounds that may result in take, by Level B harassment, of marine mammals.

A detailed description of the planned construction project is provided in the **Federal Register** notice for the proposed IHA (88 FR 27464, May 2, 2023). Since that time, no changes have been made to the planned construction activities. Therefore, a detailed description is not provided here. Please refer to that **Federal Register** notice for the description of the specific activity.

**Comments and Responses**

A notice of NMFS’ proposal to issue an IHA to USACE was published in the **Federal Register** on May 2, 2023 (88 FR 27464). That notice described, in detail, USACE’s activity, the marine mammal species that may be affected by the activity, and the anticipated effects on marine mammals. During the 30-day public comment period, NMFS received comments from Kawerak, Inc. (the Alaska Native non-profit Tribal consortium for the 20 federally recognized Tribes of the Bering Strait region) and eight members of the general public. Additionally, after the public comment period ended, we received an additional comment from a member of the public. Further, the Arctic Peer Review Panel (PRP), convened by NMFS as required to review the Monitoring Plan (please see the *Monitoring Plan Peer Review* section, below), submitted several recommendations that were beyond the scope of the peer review process and are, therefore, addressed in this public comment section. All relevant, substantive recommendations are responded to here, including the comment submitted after the public comment period ended, and are organized by topic. The comments and recommendations have been posted online at: <https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-construction-activities>. Please see the full comment submissions and the PRP report for full details regarding the recommendations and supporting rationale.

*Effects Analysis*

*Comment 1:* A commenter stated that according to the 2018 Revision to the Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing, it is highly possible that permanent threshold shift (PTS) will occur for all marine mammals except otariid pinnipeds in water, but there are no site-specific data to make that assumption. The commenter further stated that the 2018 guidance seems to suggest that NMFS should have that investigated in order to comply with law.

*Response:* NMFS used the 2018 guidance in determining the potential effects of the Port of Nome construction activities on marine mammals, including the potential for PTS (*i.e.*, take by Level A harassment) to occur; the 2018 guidance directly supports NMFS analysis and conclusions presented here and in the notice of proposed IHA. We note that USACE is

required to implement shutdown zones that extend to or exceed the Level A harassment isopleth for all activities and species, and therefore, take by Level A harassment is not anticipated. Please refer to NMFS' response to Comment 2 regarding site-specific data.

*Comment 2:* A commenter stated that NMFS' proposed method of determining Level A harassment and Level B harassment is not appropriate. The commenter stated that, unfortunately, NMFS is not requiring site-specific acoustical monitoring and has used a practical spreading value of 15 as the transmission loss coefficient to estimate distances to the Level A harassment and Level B harassment isopleths. The commenter stated that it is not clear if NMFS is correct that a default coefficient of 15 applies to the Port of Nome, and that NMFS notes there are no site-specific transmission loss data for the Port of Nome. The commenter stated that NMFS must develop site-specific measurements and calculate Port of Nome-specific data in order to assess distances to Level A harassment and Level B harassment isopleths. The commenter stated that it is possible sound propagation during construction will be directional in ways that are not predicted, as the water depths are shallow at the Port of Nome, and piles may allow sound to propagate horizontally in ways we do not know. The commenter stated that NMFS should assess whether the sounds from sheet pile construction will be attenuated by absorption or if they will be reflected and how sound propagates. Further, the commenter stated that it should be determined if sound propagation will emanate spherically or more linearly and the extent to which sound may harm marine mammals.

The commenter stated that NMFS may be incorrect that the resulting isopleth estimates are typically going to be overestimates. It is not possible for NMFS to assume sound forces will result in an overestimate of potential take by Level A harassment. The commenter stated that assuming sound data parameters is not the best tool to estimate isopleth distances, a more sophisticated modeling method should be used.

The commenter also stated that because NMFS' proposed monitoring and reporting requirements are not site-specific, the proposed monitoring and reporting requirement will not contribute to improved understanding of one or more of the topics listed in the introduction to the Proposed Monitoring and Reporting section of the notice of proposed IHA (88 FR 27464, May 2, 2023).

*Response:* NMFS disagrees with the commenter that its methods for estimating take are not appropriate. As stated in the notice of the proposed IHA (88 FR 27464, May 2, 2023) and reiterated by the commenter, site-specific data for the Port of Nome is not available, given that the project has not yet occurred, and data is not available from previous pile driving at the project site. While the commenter states that NMFS must develop site-specific measurements and calculate Port of Nome-specific data in order to assess distances to Level A harassment and Level B harassment isopleths, NMFS does not find such methods necessary to conduct appropriately accurate and conservative modeling for construction projects, and NMFS does not find such modeling warranted here. However, as recommended by the PRP, the USACE plans to conduct sound field verification (SFV) on a portion of its sheet pile driving activities to gain site-specific information on sound source levels and propagation loss. This final IHA requires USACE to conduct SFV on sheet piles, which comprise the bulk of the pile driving activity. (Please refer to the *Monitoring Plan Peer Review* section of this notice for additional information about incorporation of the PRP's recommendations.) If USACE provides data early in the construction season, NMFS may adjust the shutdown zones and revise the Level A and Level B harassment zones per the provisions of this IHA, as appropriate, and pending review and approval of the results of SFV.

The commenter specifically questions whether the transmission loss coefficient of 15 (practical spreading) is appropriate. Transmission loss is the decrease in acoustic intensity as an acoustic pressure wave propagates out from a source. TL parameters vary with frequency, temperature, sea conditions, current, source and receiver depth, water depth, water chemistry, and bottom composition and topography. The general formula for underwater TL is:

$$TL = B * \text{Log}_{10} (R_1/R_2),$$

where

TL = transmission loss in dB

B = transmission loss coefficient; for practical spreading equals 15

R<sub>1</sub> = the distance of the modeled SPL from the driven pile, and

R<sub>2</sub> = the distance from the driven pile of the initial measurement

This formula does not consider loss due to scattering and absorption, which are conservatively assumed to be zero. The degree to which underwater sound propagates away from a sound source is

dependent on a variety of factors, most notably the water bathymetry and presence or absence of reflective or absorptive conditions including in-water structures and sediments. Spherical spreading occurs in a perfectly unobstructed (free-field) environment not limited by depth or water surface, resulting in a 6 dB reduction in sound level for each doubling of distance from the source (20\*log[range]). Cylindrical spreading occurs in an environment in which sound propagation is bounded by the water surface and sea bottom, resulting in a reduction of 3 dB in sound level for each doubling of distance from the source (10\*log[range]). A practical spreading value of 15 is often used for near-shore conditions, such as the project site, where the expected propagation environment lies between spherical and cylindrical spreading loss conditions. NMFS agrees with the commenter that, when site-specific data exists, and that data is of a reliable quality, it is generally preferable to use the site-specific data to estimate Level A and Level B harassment zones associated with a project at the same location. However, neither NMFS nor the USACE are aware of site-specific data for the location and pile types that the USACE plans to use for this project, and therefore, NMFS continues to find that practical spreading is an appropriate assumption for this project. NMFS recognizes that the Level A and Level B harassment zone isopleths included in the proposed IHA are estimates. The proposed monitoring and reporting requirements are project-specific, and will contribute to improved understanding of one or more of the topics listed in the introduction to the Proposed Monitoring and Reporting section of the notice of proposed IHA (88 FR 27464, May 2, 2023). In addition, as stated previously in this response, this final IHA requires USACE to conduct SFV for sheet piles.

*Comment 3:* A commenter stated that while the size of the ensonified area is proposed, the shape of that area is not. The commenter stated that it is possible that because of absorption or other factors, sound shadows may exist that alter marine mammal behavior. The presence of sound shadows may complicate how marine mammals are exposed to sound and could lead to sound exposures that harm marine mammals in ways not intended. The commenter asserted that there may be phenomena at play at the Port of Nome that contribute to unique sound localizations, and the extent and shape

of the ensonified area should be examined before any IHA is approved.

*Response:* NMFS acknowledges that the Level A harassment and Level B harassment zones portrayed in the notice of the proposed IHA (88 FR 27464, May 2, 2023) and updated in this notice represent our estimates based on the best available science. They are generated using proxy data that NMFS expects to be representative of the sound that will occur as a result of USACE's construction activities. However, as stated in response to Comment 2, site-specific data for this project is not available, and more sophisticated modeling was not conducted, nor required to estimate the impacts to marine mammals.

While NMFS does not explicitly state what the shape of the Level A harassment and Level B harassment zones will be, NMFS expects that the sound will extend approximately to the calculated isopleth to the south and southeast of the project location, with an approximate 10-degree buffer extending from the pile driving site to the north/northwest beyond the causeway, except where the sound hits a hard structure (e.g., shoreline, in-water pier, etc.). Regarding the commenter's concern about sound shadows, a phenomenon in which sound fails to propagate in a certain area, such an effect would be expected to reduce impacts to marine mammals, if it changed impacts at all, as it would ultimately mean that there is an area where sound is unexpectedly lower than anticipated in NMFS' analysis.

*Comment 4:* A commenter stated that NMFS concluded that marine mammals could be exposed to a range of underwater noises ranging from 144.0 dB to 203.0 dB as a result of Port of Nome modifications. The commenter further stated that USACE intends to expose marine mammals to continuous and impulsive noise sources within a range of 120 dB to 160 dB. The commenter stated that those two expected ranges are not the same, and that it appears NMFS is expecting marine mammals to be exposed to sound sources that are well above the minimum ranges of Level B harassment and beyond the upper the levels that the USACE is proposing. The commenter speculated that either USACE may be underestimating sound levels within the ensonified area, or NMFS is "turning its cheek" on sound sources that may exceed 160 dB and not expressly mandating mitigation for sounds sources above 160 dB. The commenter stated that either situation is frustrating and must be reconciled before any IHA is approved.

*Response:* NMFS has attempted to clarify herein what appears to be a misunderstanding about information presented in the notice of the proposed IHA (88 FR 27464, May 2, 2023). Table 5 of the notice of proposed IHA lists sound source levels for the pile driving activities that USACE proposes to conduct. These sound source levels represent the sound associated with a given source at a distance of 10 m from the source. Sound source levels are likely to be different from the received level (i.e., the sound level that an animal actually experiences) given that it is unlikely that an animal would be exactly 10 m from the sound source, particularly given that the IHA requires USACE to shut down during all in-water activities if a marine mammal enters the relevant shut down zone, which in all cases are at least 10 m.

The 120 dB and 160 dB that the commenter references are not intended to represent a range within which USACE would expose marine mammals to noise. Rather, 120 dB represents the sound level above which, for continuous sounds such as vibratory pile driving, NMFS anticipates that exposed marine mammals would be taken by Level B harassment; 160 dB represents the sound level above which, for impulsive sounds such as impact pile driving, NMFS anticipates that exposed marine mammals would be taken by Level B harassment. However, NMFS requires mitigation for both impact and vibratory pile driving, regardless of the sound source level, as described in the Mitigation Measures section herein.

*Comment 5:* The PRP stated that projects that are going to take multiple years should pursue Incidental Take Regulations (ITR) instead of an IHA. Relatedly, commenters stated that because the activity at issue here is likely to last at least 7 years, any potential takes must be authorized through 5-year ITRs rather than a 1-year IHA. The commenters referenced the related recommendation in the PRP report. The commenters stated that breaking the activities into 1-year IHAs masks the magnitude of the impacts and makes it impossible to assess any cumulative impacts that may occur over multiple years of activities. A commenter also stated that ITRs can help bolster public confidence in the management of the species, since they are developed through a collaborative and transparent rulemaking process involving stakeholders and input from experts.

*Response:* There are two types of incidental take authorizations (ITAs): IHAs and Letters of Authorization

(LOA). An IHA is appropriate for activities that will result in harassment only (i.e., injury or disturbance) and is effective for up to 1 year. An LOA (which requires promulgation of ITRs) is required for activities that could result in serious injury or mortality and recommended for activities that are planned for multiple years, even if they will result in harassment only. When a project is planned for multiple years and NMFS learns of the activity in advance of submission of an application for an ITA, NMFS recommends to applicants that they pursue ITRs and an LOA, however, NMFS cannot require an applicant to do so. It is important to note that NMFS invites input from the public, and experts when needed, on both ITRs and IHAs.

#### *Estimated Take*

*Comment 6:* A commenter stated that bowhead whales are a very important subsistence species that occur in the area, and NMFS should consider authorizing one or more takes of bowhead whales. The commenter stated that it has seen bowhead whales numerous times near the Port of Nome during their 50 years of living in Nome, and NMFS should consider the commenter's traditional knowledge on the matter of bowhead whale presence as a matter of fact. The commenter noted that NMFS relied upon USACE personal communication with Charlie Lean in 2019 as a matter of fact regarding spotted seal occurrence. The commenter stated that Mr. Lean is not a traditional knowledge holder with traditional knowledge expertise in marine mammals, and that NMFS should make a similar appeal to the commenter's knowledge as it did for Mr. Lean. The commenter further stated that incorporating the commenter's traditional knowledge is mandated by E.O. 13175 as well as other presidential mandates to include traditional knowledge in decision making, such as the E.O. to establish the Northern Bering Sea Climate Resilience Area and many others.

In a related comment, a commenter stated that bowhead whales are occasionally seen off the coast of Nome by local residents and by subsistence hunters, and recommended that NMFS add bowhead whales to the list on Table 2 of the **Federal Register** notice titled "Marine Mammal Species Likely To Occur Near The Project Area that Might be Taken by USACE's Activities."

*Response:* NMFS thanks the commenter for the traditional ecological knowledge that it has provided regarding bowhead whale presence near the Port of Nome. In consideration of

this information, NMFS has added two takes by Level B harassment of bowhead whale to the final IHA and has added bowhead whale to Table 1 titled “Marine Mammal Species Likely To Occur Near The Project Area that Might be Taken by USACE’s Activities” (equivalent to Table 2 in the notice of proposed IHA (88 FR 27464, May 2, 2023)). In an effort to continue to minimize effects of the project on bowhead whales, even though take is authorized, USACE must shut down the project activity if protected species observers (PSOs) observe a bowhead whale within the Level B harassment zone.

*Comment 7:* A commenter stated that NMFS must propose at least one incidental take each of Cuvier’s beaked whale, Central North Pacific humpback whale, Dall’s porpoise, harbor seal, Pacific white-sided dolphin, sperm whale, Stejneger’s beaked whale, blue whale, Western North Pacific gray whale, North Pacific right whale, sei whale, Northern fur seal because they may occur in the project area especially regarding climate change-related species distribution.

*Response:* NMFS agrees with the commenter that there is evidence of changes in species distribution as a result of climate change. In the notice of the proposed IHA (88 FR 27464, May 2, 2023), NMFS described its consideration of potential occurrence of each of these species and stocks, including their known ranges and lack of occurrence in the project area, and described why it does not anticipate that take of these species and stocks would occur as a result of the Port of Nome Modification Project. NMFS is not aware of, nor has the commenter provided, evidence that the species listed above would be taken by the project. However, NMFS notes that in consideration of traditional ecological knowledge provided by the commenter regarding bowhead whales and the fact that they have been seen many times near the Port of Nome, it has added take of bowhead whale to this final IHA. Please refer to Comment 6 for a full discussion of the commenter’s recommendation regarding bowhead whale.

*Comment 8:* A commenter submitted a photo of a minke whale that the commenter said was taken west of the Port of Nome relatively recently. The commenter, a traditional ecological knowledge holder, stated that minke whales occur regularly near the Port of Nome. The commenter stated that it hopes NMFS revokes or denies the IHA for failure to account for marine mammals in the area.

*Response:* NMFS thanks the commenter for the photo documenting minke whale occurrence in the IHA. NMFS concurs with the commenter that minke whales could occur in the area during the Port of Nome Modification Project, and USACE requested authorization to take minke whales in its IHA application. Therefore, as included in the proposed IHA, this final IHA authorizes USACE to take 12 minke whales by Level B harassment. Please see NMFS’ response to Comment 58 regarding denial of the IHA.

*Comment 9:* A commenter stated that consideration of practicability of the measures for applicant implementation, which may consider such things as cost and impact on operations, is the wrong consideration for this project because the Port of Nome has received national backing including a tremendous amount of financial support. The commenter further stated that practicability should not be considered because the USACE has done a relatively poor job of community engagement and increased their cost share despite decades of public disclosure that the cost share would be 75 percent/25 percent. The commenter further stated that the USACE’s lack of regard must be put in relation to the impact of this project on our community, as well as marine mammals that are increasingly becoming impacted by climate change.

*Response:* As stated in the notice of the proposed IHA (88 FR 27464, May 2, 2023), in order to issue an IHA under section 101(a)(5)(D) 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. NMFS regulations require applicants for ITAs 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)). NMFS must consider these factors in determining mitigation measures that will be required in an IHA.

NMFS agrees with the commenter that community engagement, particularly for projects that occur in areas where subsistence uses of marine mammals also occur, is of particular importance. Please see NMFS’ response to Comment 24, 32, 42, 43, 44, 46, and 49 regarding

the commenter’s concerns about community engagement, Comment 46 regarding concerns about community impacts, and Comment 60 about the Federal cost share for the project.

Regarding the impacts of climate change on marine mammals, inasmuch as they are known for the impacted species, these impacts are considered both in the environmental baseline and the marine mammal impact assessment.

#### Mitigation

*Comment 10:* The PRP stated that since the Level B harassment zones associated with the installation of sheet and fender piles are so large, it suggests that the applicant consider the use of sound attenuation devices by which to decrease the effective size of the zones. Examples of sound attenuation devices to consider include single or double bubble curtains, noise mitigation screens, and hydro sound dampers (nets with air-filled or foam-filled elastic balloons; Bellman 2014; Elmer and Savery 2014). These sound attenuation devices, when properly applied, have been successful at substantially reducing the required monitoring distances. A commenter also noted that the PRP suggested that the applicant consider the use of sound attenuation devices to decrease the effective size of the zones. The commenter stated that no hydro sound dampers, bubble curtains, or noise mitigation screens that could be effective solutions for managing ambient noise levels while promoting sustainable use of aquatic resources are included in the draft IHA.

*Response:* USACE asserts that adding a sound attenuation device is not practicable as it would be costly and logistically challenging and could cause project delays. The construction sequence for the project will likely involve work on multiple sheet pile cells at a time. Construction crews will work on the early construction components at one cell and then move to the next cell while crews continue the next construction stages at the initial cell. Therefore, any delays due to bubble curtain setup or potential malfunction at a cell during pile driving could delay the ability for construction to progress at the cell where the bubble curtain is being deployed and also at multiple cells behind it. Project delays are of particular concern for this project given the limited in-water work window. NMFS concurs, and this final IHA does not require USACE to use bubble curtains or another sound attenuation device.

*Comment 11:* The PRP noted that it may be instructive to look at the use of remote cameras either currently

installed at the Port of Nome and/or installed at other project-specific locations to evaluate their effectiveness at detection of marine mammals. The PRP states that this could be accomplished by comparing detections reported from the analysis of web cameras' footage with detections from visual PSOs for the same field of view. Artificial Intelligence (AI) methods already exist for this type of image processing (e.g., Araujo *et al.* 2022) and the PRP recommends exploring this approach to enable semi-automatic analysis of video. The PRP also stated that the applicant may also consider tethered balloons as a test for deployment of higher elevation—long-range remote cameras (for initial Arctic examples, see Bouffaut *et al.* 2022 and Landrø *et al.* 2022).

In a related comment, a commenter stated that the cameras noted by the PRP for image processing are not sufficient to accurately detect the presence of marine mammals at the Port of Nome or other project-specific locations. The commenter asserts that they are likely to fail at accurately detecting marine mammals, making it difficult to distinguish between marine mammals, debris, other wildlife, and other objects in the footage. Remote cameras are only able to capture a limited field of view and cannot provide continuous coverage of large areas that may need to be monitored for marine mammal populations and their activities. Further, both cameras referenced in the PRP's report are presently not feeding live images and thus are obsolete for monitoring. The commenter stated that from its experience as a marine mammal observer, relying on images captured through cameras can lead to gaps of the areas that are supposed to be observed if PSOs switch their attention back and forth between cameras or their own observations.

*Response:* USACE, with the City of Nome, reviewed the camera systems currently in place at the existing Port. With the exception of the NOAA Weather Camera (<https://www.nomealaska.org/port-nome/page/noaa-weather-camera>), which is fixed and faces the outer harbor entrance, the cameras are on a closed system and are not publicly available. USACE stated that it could provide data downloaded from the NOAA Weather Camera to NMFS to analyze using artificial intelligence to augment the marine mammal observations during Year 1 of construction. However, given that the camera produces fixed images on a 5 minute loop rather than continuous feed, the quality of the camera images, and the fact that the camera is fixed in

a location that PSOs would likely already be able to observe, NMFS does not anticipate that this camera would meaningfully contribute to the detection of marine mammals in the project area. Therefore, and in summary, NMFS is not requiring USACE to utilize the cameras at the Port of Nome to assist in detecting marine mammals, including providing NMFS with downloaded data from the NOAA Weather Camera at the Port.

Regarding tethered balloons, USACE asserted that their use would be impracticable as they are limited in winds >15 knots (kn; 27.8 kilometers/hour (km/h)) as well as in the rain due to reduced visibility and risk of damage to electrical equipment. Further, USACE asserts that they are best suited to clear/shallow water. Given the practicability concerns raised by USACE and that USACE plans to implement passive acoustic monitoring (PAM) for marine mammals (see the *Acoustic Monitoring* section of this notice), NMFS is not requiring use of tethered balloons for deployment of higher elevation- long-range remote cameras.

*Comment 12:* A commenter stated that it concurs with NMFS that shutdowns should occur when marine mammals will be exposed to Level B harassment or Level A harassment. The commenter further stated that Table 10 in the notice of proposed IHA (88 FR 27464, May 2, 2023) does not incorporate site-specific measurements and consequently may be in error. The commenter stated that because construction is not set to begin until at least the year 2024, or perhaps longer with a revised timeline of co-management body establishment, NMFS and the USACE will have time to develop site-specific data to determine appropriate shutdown zones and overcome the challenge of determining the distances to Level A harassment. The commenter stated that until site-specific data can be developed, it is not appropriate to propose shutdown zones.

*Response:* It is important to first clarify that for species for which take by Level B harassment is authorized, NMFS is not requiring USACE to shut down to avoid take by Level B harassment, with the exception of bowhead whale. However, USACE is required to shut down to avoid take by Level B harassment of all species for which take is not authorized and to avoid Level A harassment for all species. All required shutdown zones are equal to or larger than the calculated Level A harassment zones. Regarding site-specific data, please refer to NMFS' response to Comment 2. Please refer to NMFS' response to Comment 45 regarding co-management.

*Comment 13:* A commenter stated that the USACE has proposed to implement a 300 m shutdown zone for dredging, and the commenter strongly urges NMFS to memorialize the shutdown in its IHA, if authorized.

*Response:* NMFS concurs with the commenter and has included a requirement for USACE to shut down dredging operations if a marine mammal comes within 300 m of the operations. This requirement is consistent with that proposed by NMFS in its proposed IHA (88 FR 27464, May 2, 2023).

*Comment 14:* A commenter stated that it concurs that PSOs should monitor the shutdown zones. However, the commenter stated that there are significant problems with the area NMFS has proposed beyond the extent that PSOs can see. Monitoring beyond the shutdown zones should be rethought, re-examined and revised so that PSOs are aware of and communicate the presence of marine mammals in the project areas outside the shutdown zones and thus prepare for a potential cessation of activity should an animal enter the shutdown zone.

*Response:* It is unclear what the commenter means when it stated that there are significant problems with the area NMFS has proposed beyond the extent that PSOs can see. As stated in the Proposed Mitigation section of the notice of the proposed IHA (88 FR 27464, May 2, 2023) and in the Mitigation section of this final IHA, monitoring beyond the shutdown zones enables observers to be aware of and communicate the presence of marine mammals in the project areas outside the shutdown zones and thus prepare for a potential cessation of activity should the animal enter the shutdown zone. NMFS considers this consistent with the commenter's suggestions.

*Comment 15:* A commenter stated that the PSOs must be given the absolute authority to halt construction when it is possible marine mammals could be subject to Level A harassment or if subsistence uses will be threatened. The commenter stated that if PSOs are not given meaningful authority and meaningful involvement in mitigating harassments it is easy to envision a scenario where Level A harassment could occur. The commenter further stated that PSOs must in no way be intimidated in the performance of their duties. In a related comment, a commenter stated that NMFS' PSO requirements are not stringent enough and will allow for harm beyond Level B harassment unless changed. A commenter also recommended that the

USACE shares its plan for how the PSOs will be protected from the pressure to allow continued construction operations amid the presence of marine mammals.

In a related comment, a commenter stated that PSOs must be Alaska Native and must be highly trained. Another commenter stated that employing regional PSOs will help provide confidence in the marine mammal disturbance reports issued by the port construction project, and it will offer confidence in the conduct of the port construction overall in reducing impacts to marine mammals. The commenter recommended that regional residents with marine mammal subsistence hunting backgrounds be given hiring preference when employing PSOs and that regional residents be actively recruited for these PSO positions.

*Response:* NMFS agrees that Alaska Native residents with marine mammal subsistence hunting backgrounds hold valuable knowledge and skills that are critical to the effectiveness of a PSO. In the final IHA, NMFS requires at least one PSO to have at least 1 year of prior experience performing the duties of a PSO during construction activity pursuant to a NMFS-issued ITA. Other PSOs may substitute other relevant experience, education (degree in biological science or related field), or training for prior experience performing the duties of a PSO during construction activity pursuant to a NMFS-issued ITA. In the Arctic, in consideration of valuable traditional ecological knowledge that many community members hold, PSOs may also substitute Alaska native traditional knowledge for experience. Regarding hiring preference for regional residents with subsistence hunting backgrounds, NMFS cannot require an IHA-holder to employ certain individuals, though it does require that an applicant request NMFS approval for all PSOs so that NMFS can confirm that they meet the requirements outlined in the IHA. NMFS has passed this recommendation on to the USACE for its consideration, though PSO hiring will not be done by USACE directly; it will be contracted out.

NMFS concurs that PSOs must not be intimidated in the performance of their duties and must have authority to halt construction when a marine mammal is observed entering or within the required shutdown zones (which, for this project, are designed to avoid take by Level A harassment). The IHA includes a requirement that PSOs must be independent of the activity contractor. The intent of this measure is to avoid scenarios similar to what the commenter described in which a PSO could potentially receive pressure to not

implement the requirements of the IHA. While the commenter stated that NMFS' PSO requirements are not stringent enough, it did not provide additional recommendations for making them more stringent beyond those discussed in this comment and response.

*Comment 16:* A commenter stated that NMFS is considering allowing construction to occur 24-hours-per-day. The commenter stated that allowing such would go beyond minimal disturbance to marine mammals and ventures into intentional takings. Despite the long summer day length at Nome's latitude, 24-hour, multi-shift operations must not occur because of the extraordinary impact to Alaska Native people. The commenter further stated that allowing 24 hour-per-day construction will be a significant impact to the human environment. The commenter states that if the IHAs are approved, they must only allow for daylight construction during 12-hour periods.

*Response:* NMFS has issued one IHA for the Port of Nome project. In the commenter's reference to "IHAs", NMFS assumes that the commenter is referring to this IHA and the potential for a renewal IHA, which NMFS discussed in the notice of the proposed IHA (88 FR 27464, May 2, 2023), though such a renewal has not yet been proposed or authorized. In subsequent comments from the commenter that referred to "IHAs", NMFS has clarified the term in the comment summary to refer to one "IHA".

NMFS disagrees with the commenter's assertion that take that may result from 24-hour-per-day construction activities would constitute intentional take, rather than incidental. However, as stated in the notice of proposed IHA (88 FR 27464, May 2, 2023), USACE plans to conduct its activity during daylight hours only, and typically over a 12-hour workday. When needed and due to the long summer day length at Nome's latitude, 24-hour, multi-shift operations may occur. NMFS does not find it appropriate to limit construction to a 12-hour work day, as USACE would still be able to adequately conduct the requirements under the IHA even if 24-hour-per-day work were to occur, as such work would still occur during daylight.

Regarding the commenter's concerns that 24-hour construction would result in significant impacts to the human environment, the commenter did not provide information regarding what such impacts would be. NMFS' MMPA action is limited to the authorization of take of marine mammals and requires that we consider impacts to marine

mammals and their habitat and subsistence uses of marine mammals. NMFS does not have the authority to consider impacts to the human environment beyond these that may result in impacts to marine mammals, their habitat, and subsistence uses. However, USACE's Integrated Feasibility Report and Final Environmental Assessment, available at: <https://www.poa.usace.army.mil/Library/Reports-and-Studies/Port-of-Nome-Modification-Project/>, assess the impact of the construction on the human environment. NMFS has responded to the commenter's concerns that are specific to subsistence uses of marine mammals and engagement with subsistence users in responses in the *Impacts to Subsistence Uses of Marine Mammals* section.

*Comment 17:* The commenter stated that while it is opposed to the Port of Nome project, it generally concurs with NMFS that monitoring must take place from 30 minutes prior to initiation of pile driving activity (*i.e.*, pre-start clearance monitoring) through 30 minutes post-completion of pile driving activity. The commenter stated that because Table 10 [of the proposed IHA (88 FR 27464, May 2, 2023)] was not created using site-specific data, it disagrees that pre-start clearance monitoring must be conducted according to Table 10 [of the proposed IHA] because those distances may be incorrect. The commenter stated that if Table 10 [of the proposed IHA] is revised with site-specific data, the commenter concurs with NMFS that pile driving may commence following 30 minutes of observation when the determination is made that the shutdown zones are clear of marine mammals. The commenter stated that it concurs with NMFS that if a marine mammal is observed entering or within the shutdown zones, pile driving activity must be halted. The commenter stated that it does not concur that a delay should be considered, but suggested that if NMFS were to explain how a delay would be enacted, it might settle confusion. The commenter stated that it does not concur that if pile driving is halted due to the presence of a marine mammal, the activity may not commence or resume until either the animal has voluntarily exited and been visually confirmed beyond the shutdown zone or 15 minutes have passed without re-detection of the animal; the commenter recommended that 30 minutes should pass without re-detection of the animal.

*Response:* NMFS thanks the commenter for its support of the requirement for USACE to conduct

monitoring 30 minutes prior to initiation of pile driving activity through 30 minutes post-completion of pile driving activity and for the requirement for USACE to halt pile driving activity if a marine mammal is observed entering or within the shutdown zone. Please see NMFS' response to Comment 2 regarding the use of site-specific data.

Regarding the commenter's concern about how a delay of pile driving activity would be enacted, NMFS has further explained that process here. In the event that pile driving is underway when a marine mammal is observed entering or within the shutdown zone, pile driving must be halted. In the event that pile driving is not currently underway (e.g., at the beginning of a work day, when a pile is being positioned for driving, etc.) when a marine mammal is observed entering or within the shutdown zone, pile driving must be delayed (i.e., not begin). For both scenarios, pile driving cannot begin (in the case of a delay) or resume (in the case of a halt) until either the animal has voluntarily exited and been visually confirmed beyond the shutdown zone or the required amount of time has passed without re-detection of the animal. NMFS expects that in coastal environments where the water is relatively shallow and therefore, marine mammal dives are generally shorter, 15 minutes is sufficient to conclude that an animal is no longer within the shutdown zone. However, in consideration of the commenter's suggestion, the required amount of time has been conservatively increased from 15 minutes to 30 minutes for all cetaceans. Given the potential for pinnipeds to frequently occur at the site, and the practicability issues that would raise with frequent activity shutdowns, the final IHA requires USACE to wait until 15 minutes have passed without re-detection of the pinnipeds, rather than 30 minutes (unless the animal has voluntarily exited and been visually confirmed beyond the shutdown zone sooner), consistent with the proposed IHA.

*Comment 18:* A commenter stated that it anticipates injury or mortality will occur from anthropogenic sources as a result of construction, as without strong oversight of the IHA through meaningful PSO involvement there is no way to mitigate harassments. The commenter further stated that temporary template piles (Pipe piles  $\leq$ 24-inch (in)), Alternate Temporary template piles (H-piles 14-in), Anchor piles (14-in HP14x89 or similar), Sheet piles (20-in PS31 or similar), and Fender piles (Pipe piles 36-in) will cause a range of

potential noises that could lead to temporary threshold shift (TTS) or PTS injuries. A marine mammal that experiences TTS or PTS injuries may suffer enough or permanent hearing loss that may not allow them to avoid vessels. Consequently, vessel speed restrictions are not a trivial matter and do require consideration in order to avoid killing marine mammals from vessel strikes that may result from TTS or PTS injuries. The commenter further stated that the potential takes are comparable to subsistence harvests, making the potential takes from the proposed IHA not necessarily small if considered from an additive measure of mortality.

*Response:* NMFS disagrees that, and there is no evidence that, injury or mortality could result from the Corps activities. The proposed and final IHA requires USACE to shut down activities if a marine mammal comes within 10 m of the activities in order to avoid direct, physical interaction with a marine mammal. This measure is anticipated to prevent any non-auditory injury or mortality of marine mammals. Regarding auditory injury (PTS (i.e., Level A harassment)), USACE will implement required shutdown zones for all marine mammals, and in all cases, the shutdown zones extend to or exceed the Level A harassment zones. Therefore, mitigation is anticipated to avoid auditory injury as well. (To clarify, TTS is not considered an injury, as it is temporary in nature and an animal's hearing returns to its full ability.) However, NMFS concurs that mitigation for vessel transit is warranted in areas of particular habitat importance, and has added the following measures to this final IHA:

- Vessels must remain at least 460 m (500 yds) from North Pacific right whales and avoid transiting through designated North Pacific right whale critical habitat if practicable (50 CFR 226.215). If traveling through North Pacific right whale critical habitat cannot be avoided, vessels must travel through North Pacific right whale critical habitat at 5 kn (9.3 km/h) or less or at 10 kn (18.5 km/h) or less while PSOs maintain a constant watch for marine mammals from the bridge. Vessel personnel must maintain a log indicating the time and geographic coordinates at which vessels enter and exit North Pacific right whale critical habitat.

- Vessels must not approach within 5.5 km (3 nm) of Steller sea lion rookery sites listed in (50 CFR 224.103(d)).

- Vessels must not approach within 914 m (3,000 ft) of any Steller sea lion haulout or rookery.

- Project vessels operating in Cook Inlet must maintain a distance of at least 1.5 miles (2.4 km) south of the mean lower low water line between the Little Susitna River and Beluga River.

- USACE must time Port of Alaska departures or recalls aligned with the tide periods to avoid navigating at through-water speeds exceeding 4 kn (7.4 km/h), as practicable and as safety allows.

Please see NMFS' response to Comment 15 regarding PSO authority.

*Comment 19:* A commenter stated that NMFS believes without evidence or permit stipulation that there will be pauses in construction. The commenter stated that NMFS believes the pauses will reduce the potential for threshold shift declines. No reduction in the potential for threshold shift declines can occur if NMFS does not require meaningful PSO involvement, mandated pauses, review of pauses for threshold shift declines, and review of the IHA in consultation with subsistence users not subsistence leaders.

*Response:* The inherent nature of pile driving activities includes pauses in sound-producing activities each day. While the actual installation and removal of piles produces sound, contractors must first relocate and position a pile, position equipment, etc., which does not produce meaningful amounts of underwater noise. Therefore, it is reasonable to conclude that construction at the Port of Nome will not produce in-water sound 24 hours per day, and mandating pauses in construction is not warranted. Further, USACE will implement required shutdown zones for all marine mammals, and in all cases, the shutdown zones extend to or exceed the Level A harassment zones, which were calculated using the maximum amount of sound expected to be produced during a 24-hour period. Please see NMFS' response to Comment 15 regarding meaningful PSO involvement. It is unclear what the commenter means when it stated that NMFS should require review of pauses for threshold shift declines. However, of note, it is not possible to determine whether an animal has experienced a threshold shift without measuring the individual animal's hearing before and after exposure to a sound, which is typically done in a laboratory setting. Therefore, determining whether pauses in construction activities have minimized threshold shift in animals exposed to the construction sound is not possible for this project. Please see NMFS' response to Comment 45 regarding review of the IHA in consultation with

subsistence users rather than subsistence leaders.

*Comment 20:* A commenter stated that while it does not support the Port of Nome modifications, it generally concurs with the soft-start procedure required in the IHA. However, the commenter does not agree that a 30-second waiting period, then two subsequent reduced-energy strike sets is appropriate. The commenter stated that 30 seconds is a miniscule time frame and that marine mammals can stay underwater for significantly longer time intervals. The commenter stated that it is possible PSOs would allow a soft start to result in a marine mammal entering the shutdown zone. The commenter stated that it generally concurs that a soft start must 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 commenter stated that PSOs should confirm a suite of marine mammal behaviors to ensure that marine mammals have taken the cue that harmful noise is present and are attempting to flee the area. The commenter further stated that behaviors that will convey that a marine mammal will avoid harmful noise is that if the marine mammal has (1) detected the noise, (2) evaded the noise, which should be documented with position of marine mammal and direction of travel, and (3) lack of presence for at least several minutes. The Port of Nome may exhibit noise characteristics such as attenuation or reflection that may confuse marine mammals and this can only be determined with site-specific data. If an IHA is approved it will be important to take site-specific data into consideration and to ensure that PSOs are sufficiently trained to implement a site-specific procedure.

*Response:* NMFS thanks the commenter for its support of the soft start measure and its implementation at the start of impact pile driving on each day and at any time following cessation of impact pile driving for a period of 30 minutes or longer. Soft-start procedures are used 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. During a soft start for construction activities, NMFS requires a 30-second waiting period between reduced-energy strike sets. In the past, NMFS required a 1-minute waiting period between reduced-energy strike sets. PSOs reported that, in some cases, the 1-minute interval was too long, and marine mammals would leave the area

but would return during the 1-minute quiet period. Therefore, the soft start measure was not accomplishing its intended effect, as marine mammals would not have left the area prior to the hammers operating at full capacity. Therefore, in this final IHA, NMFS continues to require a 30-second waiting period between reduced-energy strike sets during soft starts.

Pile driving may only commence following 30 minutes of observation when the determination is made that the shutdown zones are clear of marine mammals, as stated in measure 4(c) of the IHA. Pile driving may commence when a marine mammal is present beyond the shutdown zones, regardless of whether it has shown the behaviors that the commenter asserts conveys that it will avoid harmful noise. In all cases, the shutdown zones extend to or exceed the Level A harassment zones, so marine mammals are not expected to be exposed to noise that would be considered physically harmful (*i.e.*, cause auditory injury).

Please see NMFS' response to Comment 2 regarding site-specific data. Please see Comment 15, Comment 21, and the *Visual Monitoring* section of this notice regarding PSO training and qualifications.

#### *Monitoring*

*Comment 21:* A commenter stated that NMFS is proposing that "other" PSOs may substitute other relevant experience, education (degree in biological science or related field), or training for prior experience performing the duties of a PSO during construction activity pursuant to a NMFS-issued ITA. The commenter opposes this substitution, as the monitoring tasks are complex, the Plan of Cooperation (POC) may become redrafted as it evolves, and so PSOs must be highly trained and have direct experience. If a PSO can demonstrate a high degree of Alaska Native traditional knowledge and observational experience, it may substitute that as other relevant experience. The proposed IHA does not provide for a comprehensive evaluation process to ensure that personnel substituting other relevant experience, education, or training are completely prepared to adequately perform the duties of a PSO. Substituting other relevant experience, education, or training could lead to confusion among personnel about their roles and responsibilities while performing construction activities pursuant to a NMFS-issued ITA.

*Response:* NMFS continues to find that it is appropriate to allow PSOs to substitute other relevant experience,

education (degree in biological science or related field) or training for experience performing the duties of a PSO during construction activities pursuant to a NMFS-issued ITA. PSOs may also substitute Alaska Native traditional knowledge for experience. (NMFS recognizes that PSOs with traditional knowledge may also have prior experience, and therefore be eligible to serve as the lead PSO.) Allowing substitution of prior experience allows new PSOs to gain experience. The substitution criteria outlined ensure that a PSO is still qualified, despite not having direct experience as a PSO. NMFS agrees that the monitoring tasks can be complex, which is part of the reason that it requires employment of a lead PSO that has prior experience performing the duties of a PSO during construction activities pursuant to a NMFS-issued ITA. Regarding the comment that the proposed IHA does not provide for a comprehensive evaluation process to ensure that personnel substituting other relevant experience, education, or training are completely prepared to adequately perform the duties of a PSO, NMFS ensures that PSOs meet these criteria by requiring advance NMFS approval of every PSO. Substituting other relevant experience, education, or training is not anticipated to result in confusion among personnel about their roles and responsibilities, as the PSO team would have one established lead PSO who or monitoring coordinator when a team of three or more PSOs is required. That lead PSO or monitoring coordinator would be responsible for ensuring that all PSOs understand their roles and responsibilities.

*Comment 22:* A commenter stated that NMFS proposes to require the USACE to employ three PSOs for vibratory driving of temporary template pipe piles, sheet piles, and fender pipe piles, and for all other activities, the USACE will employ one PSO. The commenter stated that it is not convinced reducing PSOs for other activities is appropriate. PSOs will develop information that is vital to community engagement and subsistence users and stationing PSOs away from the Port could cause issues with sightings. The commenter stated that gold dredges operate within the 3.5 km zone and stationing the second and third PSOs 3.5 km to the east and west of the Port of Nome means PSOs will have to differentiate marine mammals with some reduced visibility. 3.5 km is also a significant distance to observe marine mammals without high training requirements, and it is possible PSOs



may miss observations of marine mammals.

*Response:* NMFS generally requires PSO coverage that is commensurate with the impacts of an activity. Of the USACE's planned activities, vibratory pile driving is expected to result in the largest Level B harassment zones. Therefore, given the large zones for that activity, NMFS proposed to require USACE to employ three PSOs during vibratory pile driving of temporary template piles, sheet piles, and fender pipe piles. However, as noted in the Changes from the Proposed IHA to Final IHA section of this notice, given the updated analysis, USACE is not required to have a PSO stationed to the west of the project as initially proposed for vibratory pile driving (*i.e.*, two PSOs are required, rather than three). For impact pile driving and other in-water activities, the Level B harassment zones are much smaller, and therefore, the use of multiple PSOs is not required for adequate monitoring during those activities. NMFS continues to find that one PSO during those activities is appropriate and has required such in the final IHA. For all activities, one PSO will have an unobstructed view of all water within the shutdown zone and will be stationed at or near the project activity. When two PSOs are required, the second PSO will monitor from the shoreline. The monitoring location will be approximately 3.5 km to the east of the Port of Nome. The 3.5 km is solely intended to identify the approximate PSO locations and is not intended to represent the distance that PSOs would be expected to observe marine mammals. NMFS agrees that 3.5 km is generally farther than a PSO would be expected to be able to reliably observe all marine mammals regardless of the PSO's training or experience.

*Comment 23:* A commenter stated that NMFS noted the PRP's full report would be posted on NMFS' website, but it was not. The commenter stated that if NMFS made the peer review report available before the comment deadline it will be possible to make hasty critiques before June 1, 2023 but those comments will not be fully informed. The commenter asserted that the public will still be left with an incredible burden to review reference materials and still face an incredible burden to provide meaningful public comment on extremely complex documents. The comment period for the IHA application began on May 2, 2023, but the PRP report was not made available to the public through the IHA website until May 22, 2023, a little over a week before the end of the public comment period and after some public comments had

already been submitted. The omission of the PRP report for most of the public comment period and error comprise a significant justice barrier for the public and Alaska Native people that are to be impacted by the Port of Nome modifications.

*Response:* NMFS thanks the commenter for the time that it devoted to reviewing and providing comments on the proposed authorization and associated documents. While NMFS is not legally required to post the PRP report for public review, NMFS' intent is to facilitate public comment on the PRP report when possible in the context of the project schedule in order to further enhance public participation in the IHA process. However, doing so is not required and is not always possible. In this instance, NMFS indicated in the notice of the proposed IHA (88 FR 27464, May 2, 2023) that it would post the PRP report on its website and had intended to do so for the full duration of the public comment period. However, as noted by the commenter, NMFS inadvertently left the PRP report off of the website at the start of the public comment period for the proposed IHA. NMFS regrets the error, and it posted the report the same business day that this comment was received (after a weekend submission). Further, NMFS notified the commenter immediately after the report was posted.

*Comment 24:* Commenters asked that the public comment period for the IHA be extended (one suggesting a 6-month extension), to allow Nome-based experts to provide input on the 2023 NMFS Arctic PRP report and for other reasons. The commenter stated that without these Nome-based experts, the PRP lacks legitimacy for failing to include those who have direct local knowledge of the Nome port and its interaction with Norton Sound marine mammals. A commenter specifically recommended that NMFS expand the Arctic PRP to include representatives from Kawerak, Native Village of Solomon, King Island Native Community, Nome Eskimo Community, and Native Village of Council. The commenter further asked that the PRP include Nome-based members of the Ice Seal Committee, Alaska Beluga Whale Committee, and Eskimo Walrus Commission. The commenter also recommended that Gay Sheffield with the University of Alaska Fairbanks Alaska Sea Grant Marine Advisory Program be invited to join the PRP. The commenter stated that without their input, the PRP is basing its review on general knowledge of marine mammals' interactions with construction noise. These Nome-based experts will add legitimacy to the

review through their place-based experience and Traditional Knowledge that is specific to the project's proposed location and subsistence use. The commenter recommended that after these Nome-based experts have contributed to the PRP report, NMFS should re-initiate the public comment process for the IHA. In a related comment, a commenter stated that specialists from Norton Sound, and/or Bering Strait communities should have been represented on the PRP in order to comply with the 2018 technical guidance that recommends such specialists. In another related comment, a commenter stated that not having a traditional knowledge holder on the PRP from Nome impacts equity and fairness considerations for the proposed IHA. In another related comment, a commenter stated that the public was not invited to participate in peer review.

*Response:* The MMPA requires that monitoring plans be independently peer reviewed where the proposed activity may affect the availability of a species or stock for taking for subsistence uses (16 U.S.C. 1371(a)(5)(D)(ii)(III)). Regarding this requirement, NMFS' implementing regulations state that upon receipt of a complete monitoring plan, and at its discretion, NMFS will either submit the plan to members of a PRP for review or within 60 days of receipt of the proposed monitoring plan, schedule a workshop to review the plan (50 CFR 216.108(d)). The scope of the PRP review is limited to review of an applicant's proposed marine mammal monitoring.

NMFS thanks the commenters for the recommendations on individuals from Nome to serve on the PRP. NMFS is unable to extend the public comment period due to the date that USACE has requested the IHA which is based upon its contracting timeline for the project. However, NMFS will consider this input for future project years. USACE anticipates that the Port of Nome project will occur over a period of approximately 7 years and has indicated that they intend to seek additional ITAs from NMFS, and that peer review of the associated monitoring reports will be required in subsequent years. NMFS will ensure that a member of the Nome community is engaged in the peer review process for subsequent years and will solicit input from Kawerak, Inc. regarding recommended individual(s).

Regarding the 2018 technical guidance referenced by the commenter, that document (available at: <https://www.fisheries.noaa.gov/s3/2023-05/TECHMEMOGuidance508.pdf>) provides thresholds for onset of PTS and TTS in marine mammal hearing for all

underwater sound sources. It is intended to be used by NOAA analysts and managers, other federal agencies, and other relevant user groups/stakeholders to better predict how a marine mammal's hearing will respond to sound exposure. The 2018 technical guidance discusses the peer review, and other types of review, that were required and conducted for that guidance document. As a separate matter, NMFS' MMPA implementing regulations describe the peer review requirements (216.108(d)) for monitoring plans developed in support of ITAs where the activity may affect subsistence uses. As described in the notice of the proposed IHA for the Port of Nome Modification Project (May 2, 2023, 88 FR 27464), NMFS has conducted the required peer review for the USACE's monitoring plan.

*Comment 25:* The PRP stated that when operating within the Susitna Delta Exclusion Zone in Cook Inlet, the Monitoring Plan states vessels will travel less than 4 kn (7.4 km/h) for proper monitoring. This PRP stated that this is unrealistic since tidal currents in this area of Cook Inlet can exceed 11 kn. Therefore, a through-water speed limit of 4 kn (7.4 km/h) could mean the vessel is actually moving over ground in a range of -7 (-13 km/h) to +15 kn (27.8 km/h). The PRP recommended the alternative approach of timing the Port of Alaska departures or recalls aligned with the tide periods to avoid navigating at through-water speeds exceeding 4 kn (7.4 km/h).

*Response:* USACE will consider the tide cycles when transiting through Cook Inlet, as long as safe and feasible, in attempt to meet the speed recommendations in the Susitna Delta Exclusion Zone. Therefore, in this final IHA, NMFS has included a requirement for the USACE to time Port of Alaska departures or recalls aligned with the tide periods to avoid navigating at through-water speeds exceeding 4 kn (7.4 km/h), as practicability and safety allow.

*Comment 26:* Commenters stated that the current PRP report does not appear properly vetted. The commenters note that report includes recommendations specific to the Susitna Delta Exclusion Zone in Cook Inlet. The commenters assert that this information in section 1.2.8 is irrelevant to a project proposed for the Port of Nome, and that the inclusion of this section raises questions about the thoroughness and accuracy of the other sections of the document. Further, a commenter stated that the public is made to believe the peer review of the IHA was conducted in accordance with NOAA's Information

Quality Guidelines (IQG), which are designed for "ensuring and maximizing the quality, objectivity, utility, and integrity of information disseminated by the agency". Recommendation 1.2.8 fails all tests for quality, objectivity, utility, and integrity except perhaps for the Susitna River.

*Response:* The commenters are correct that the PRP report includes a recommendation regarding Vessel Speed Reduction in the Susitna Delta Exclusion Zone in Cook Inlet. This recommendation is relevant to the proposed project and demonstrates the PRP's thorough review of the full monitoring report, not just the components of the project that will occur in Nome. As noted in the Detailed Description of the Specified Activity section of the notice of the proposed IHA (May 2, 2023, 88 FR 27464), USACE anticipates approximately 20 round trip vessel trips (*i.e.*, barge, support tugs, fuel, *etc.*) to occur between Nome and Anchorage during Year 1. However, as explained in that section of the notice of proposed IHA (May 2, 2023, 88 FR 27464), vessel transit is unlikely to disrupt behavioral patterns in a manner that would qualify as take, and therefore was not discussed in the remainder of the notice of proposed IHA. USACE intends to conduct mitigation during vessel transit, including in the Susitna Delta, as outlined in its monitoring plan. Therefore, in review of USACE's monitoring plan, the PRP found it appropriate, and NMFS agrees, for it to make a recommendation regarding vessel transit in the Susitna Delta Exclusion Zone. Please see NMFS' response to Comment 25 regarding incorporation of the PRP's recommendation.

*Comment 27:* The PRP recommended that because fender pile installation would result in a Level B harassment zone occurring beyond distances visible to the PSOs, this activity should take place during the time of year that has the lowest density of marine mammals, which likely is mid-summer. A commenter expressed support for this PRP recommendation.

*Response:* As the PRP suggested, summer is generally when marine mammal densities are expected to be lowest in the project area (Oceana and Kawerak, 2014), though it is reasonable to expect that the densities in a given month would vary from year to year depending on when ice breakup and freeze-up occurs. The planned work will need to occur during the short open-water season, which mostly overlaps the summer season. USACE asserts that fender-pile installation must occur

when necessary and appropriate to meet the construction timeline, given that the planned work will need to occur during the short open-water season, and USACE is attempting to conduct activities which could take the entire duration of the open-water season. The construction timeline is dependent on the contractor's means and methods. Therefore, the recommended requirement to ensure fender piles are installed during a particular time is not practicable. NMFS has not included this as a requirement in the final IHA.

*Comment 28:* A commenter expressed support for the PRP recommendation that USACE consider developing a marine mammal and environmental reporting app or other reporting method that can be accessed directly by community members.

*Response:* As also stated in the *Monitoring Plan Peer Review* section of this notice, while USACE does not have the capability to develop a reporting app, USACE will recommend that the PSO contractor collect data using a reporting app. Regardless of whether the contractor uses a reporting app, the USACE is required to provide the monitoring data in a digital format, and at the latest, USACE must submit this data to NMFS along with the draft report, as required by the IHA. NMFS will post a final version of the report to its website at: <https://www.fisheries.noaa.gov/action/incidental-take-authorization-us-army-corps-engineers-port-nome-modification-project-nome>.

*Comment 29:* A commenter stated that the PRP noted that at the presentation given to the PRP, the USACE included a pre-construction monitoring period of approximately 1 week, but this was not included in the Monitoring Plan. Removing the monitoring period from the monitoring plan could have resulted in a better understanding of marine mammals near the Port and an opportunity to test the potential ensonified area for site-specific data that could inform isopleth distances.

*Response:* The monitoring period that the commenter appears to be referencing was not included in the Monitoring Plan, as noted by the PRP. However, as indicated in the *Monitoring Plan Peer Review* section of this notice, as recommended by the PRP, NMFS is requiring one PSO to monitor for 8 hours per day 1 week before and 1 week after pile driving activities (weather and ice permitting). The PSO that conducts this monitoring is required to meet the same standards as all other project PSOs, as outlined in the *Visual Monitoring* section of this notice. USACE has updated its monitoring plan to reflect this. Please see NMFS'

response to Comment 2 regarding site-specific data.

*Comment 30:* A commenter stated that it seems reasonable that NMFS must incorporate the recommendations in the PRP report when considering the USACE's proposed IHA. The commenter stated that the following comments from the PRP demonstrate that, in its current form, the IHA is inadequate to protect marine mammals:

- Inadequate number of PSOs to monitor the Level A harassment and Level B harassment zones. The PRP report recommended that the lead PSO be deployed at the pile driving site to monitor the shutdown zone and at least one (preferably two) PSOs on each side of the construction zone near the boundary of the Level B harassment zone. This is particularly important for vibratory pile driving activities, where deployment of a PSO on a remote vessel or anchored barge would be necessary to adequately monitor the Level B harassment zones (5.17 km for the 1600 20-in sheet piles, expected to occur over 57 days, and 21.54 km for the 21 36-in fender piles, expected to occur over 2 days). If visual monitoring is not expanded by deployment of additional PSOs, the PRP report recommended high-quality PAM in the far field (to maximize the detection range).

- Inaccurate basis for extrapolation of Level B harassment takes. If the density of marine mammals is different (*i.e.*, higher) in the far field, but the extrapolations are based on what is seen in the near field, the take estimates will be biased.

- Inadequate density data to estimate takes. There is almost no data for this area, especially the near-shore, except for a few days of monitoring conducted by the applicant and summarized in the **Federal Register** notice. The PRP report recommended additional pre- and post-activity monitoring, either directly at the construction site if possible and/or before, during, and after construction activities at a similar "control site" (away from construction activities).

- Verification of the size of harassment zones. Due to the size of the harassment zones, especially during vibratory pile driving, the PRP report recommended in situ measurements of sound produced by pile driving activities instead of relying solely on using the NMFS multi-species pile driving calculator. It also suggested the use of a bubble curtain or other sound attenuation device to reduce the size of the harassment zones.

- Use of the data collected in Year 1 to inform future year applications.

*Response:* NMFS thanks the commenter for its review of the PRP

report. NMFS has incorporated a number of the PRP recommendations included in the report, including several of those recommended by the commenter. Please see the *Monitoring Plan Peer Review* section of the notice of final IHA for a full description of which recommendations have and have not been incorporated, and why. Please see NMFS' response to Comment 10 regarding bubble curtains and other sound attenuation devices.

*Comment 31:* In relation to a PRP recommendation, a commenter stated that to detect marine mammals 2 km or greater away requires considerable skill and adequate visual tools. Weather and sea state are among other variables that could hamper detection beyond 2 km. The commenter recommended that, in order to detect marine mammals, a PSO should be deployed on an offshore static platform (*e.g.*, an anchored barge or vessel) during sheet pile installation activities each day they occur.

*Response:* NMFS concurs that detecting marine mammals requires adequate skills and visual tools and requires that PSOs meet certain qualifications, as described in the *Visual Monitoring* section of this notice. NMFS is not requiring USACE to station PSOs on a static offshore platform given concerns raised by USACE regarding safety and logistics of doing so. However, if, and when, USACE drives fender piles, it must conduct a minimum of one aerial overflight to assist in estimating species presence in the far field during fender pile installation. USACE will conduct two aerial overflights if it determines that it is practicable to do so.

*Comment 32:* A commenter noted that the PRP stated that the peer review should incorporate more time to review the Monitoring Plan, particularly when looking to incorporate feedback from Alaska Native Co-Management Organizations such as the Alaska Eskimo Whaling Commission (AEWC). The commenter further stated that AEWC has no authority over Nome subsistence users and is not the correct co-management organization for the community of Nome, but agreed with the PRP that more time was needed for monitoring plan review.

They state that Nome subsistence users who harvest whales are not under the purview of the AEWC, and no Nome subsistence user is a member of the AEWC. The commenter stated that it objects to the PRP's appeal to the authority of the AEWC. The commenter stated that it does concur that co-management organizations could have been consulted, but only if they have representation from Nome.

A commenter stated that by allowing only a limited time period for peer review of the Monitoring Plan, NMFS failed to take into account the complexities of subsistence uses and other engagements from Alaska Native Co-Management Organizations. The short timetable leaves little room for engagement with Alaska Native Co-Management Organizations of Nome subsistence users.

In a related comment, a commenter expressed discontent at the timing of the proposed IHA, as it is a difficult time of year to assemble hunters in a format that allows for meaningful engagement.

*Response:* Generally speaking, most projects reviewed by a PRP occur on the North Slope of Alaska, which NMFS expects is what prompted the PRP to make a reference to AEWC in this instance. NMFS does not view this statement as an assertion of AEWC having authority over subsistence activities in Nome. Separately, the comment regarding the timing of the PRP review of the monitoring plan is not related to the timing of the public comment period conducted for this proposed IHA, as that comment period is separate from the PRP monitoring plan review period. Unfortunately, NMFS does not control when an applicant submits an IHA application, and NMFS must move forward with processing an IHA when an application is received. Nonetheless, NMFS recognizes that additional time is needed in the IHA process to appropriately address impacts to subsistence uses of marine mammals and recommends that applicants include sufficient lead time when requesting authorization. We are also working to allow more time for PRP review of the monitoring plan, where possible, in the future.

Regarding the commenter concurrence that co-management organizations could have been consulted, but only if they have representation from Nome, please see NMFS' response to Comment 24 and Comment 45.

#### *Reporting*

*Comment 33:* A commenter stated that spotted seals as well as subadult bearded and ringed seals remain in and around the Nome port and harbor area throughout the ice-free season. During late spring and early summer with the reduced sea ice presence, recently weaned ringed and spotted seal pups regularly come ashore to rest in and near the Nome port and harbor. The commenter recommended that if live seal pups are found hauled out on the beach or in the Port within the

construction area, the proper protocol is to contact Kawerak Natural Resources Department Vice President Brandon Ahmasuk, Kawerak Subsistence Program Director Chuck Menadelook, and/or Gay Sheffield with the UAF Alaska Sea Grant Marine Advisory Program. The commenter stated that Sheffield is a NOAA Alaska Marine Mammal Responder and that Sheffield and Ahmasuk are the only two people authorized by NOAA in the Norton Sound region to move live seal pups.

*Response:* In the event that personnel involved in the construction activities discover an injured or dead marine mammal, USACE is required to report the incident to the Office of Protected Resources (OPR), NMFS and to the Alaska regional stranding network via the 24-hour hotline as soon as feasible, rather than to a local stranding agreement holder. The hotline provides continuous coverage throughout Alaska, and reports are collected by a NOAA biologist who would relay the report to the local stranding agreement holder as appropriate. Therefore, NMFS does not find it appropriate to modify this requirement to require direct reporting to the individuals recommended by the commenter.

*Comment 34:* A commenter described an established connection between avian influenza and harmful algal bloom biotoxins in the Northern Bering Sea and marine mammal mortality. The commenter recommended that if dead marine mammals or birds are found on the beach or in the proposed construction area, notify Kawerak Subsistence Program Director Chuck Menadelook and/or Gay Sheffield with the UAF Alaska Sea Grant Marine Advisory Program to ensure that all dead birds and marine mammals are documented, inspected, and sampled.

*Response:* As noted above, in the event that personnel involved in the construction activities discover an injured or dead marine mammal, USACE is required to report the incident to OPR, NMFS and to the Alaska regional stranding network via the 24-hour hotline as soon as feasible, rather than to a local stranding agreement holder. The hotline provides continuous coverage throughout Alaska, and reports are collected by a NOAA biologist who would relay the report to the local stranding agreement holder as appropriate. Therefore, NMFS does not find it appropriate to modify this requirement to require direct reporting to the individuals recommended by the commenter. NMFS does not have authority to require reporting of dead birds; however, it has passed this

comment on to USACE for their consideration regarding birds.

*Comment 35:* A commenter stated that NMFS' proposal to require the USACE to submit a draft report to NMFS within 90 calendar days after the completion of monitoring or 60 calendar days prior to the requested issuance of any subsequent IHA for construction activity, whichever comes first, is not appropriate. The commenter stated that given that USACE has dramatically increased its cost share to fund the Port of Nome Modifications, it should be required to submit a biannual report as well as a report within 30 days after completion. The commenter stated in a subsequent letter that draft reports should be submitted on the first of the month throughout the duration of the project and comments to the draft report should be distributed to the co-management body (see Comment 45) for review. The commenter further recommended that a final report be prepared and submitted within 30 calendar days following receipt of any NMFS and co-management body comments on the draft report.

The commenter stated that it concurs with NMFS that the marine mammal monitoring report should include an overall description of work completed, a narrative regarding marine mammal sightings, and associated PSO data sheets.

*Response:* NMFS thanks the commenter for its support of several of the reporting requirements in the IHA. Further, NMFS agrees with the commenter that more frequent reporting for this project is appropriate, and rather than biannual reports, NMFS is requiring USACE to submit a monthly report. Each monthly report must be submitted by the 15th day of the month following the reporting period. NMFS does not concur with the commenter's recommendation to require USACE to submit its final report within 30 days of completion of the activity. NMFS generally allows applicants 90 days to submit a draft report given the time required to produce a high-quality document. Therefore, as stated in the proposed IHA, the final IHA requires that USACE must submit a draft report within 90 days of completion of monitoring (or 60 calendar days prior to the requested issuance of any subsequent IHA for construction activity at the same location, whichever comes first), and a final report must be prepared and submitted within 30 calendar days following receipt of any NMFS comments on the draft report. If no comments are received from NMFS within 30 calendar days of receipt of the

draft report, the report shall be considered final.

Please see NMFS' response to Comment 45 regarding submission of reports to a co-management body.

*Comment 36:* A commenter stated that NMFS must strengthen oversight of its IHAs, if approved.

*Response:* It is unclear what the commenter means by NMFS strengthening its oversight of the IHAs. However, NMFS notes that the IHA requires USACE to submit a report to NMFS that describes the activities which occurred under the IHA, including the construction activities, marine mammal observations, implementation of mitigation measures, etc. Please see Section 6, Reporting, of the IHA for additional details. Further, as described above in NMFS' response to Comment 35, this final IHA includes a new requirement for USACE to submit monthly reports in addition to the final report. Please refer to NMFS' response to that comment for additional information.

#### *Impacts to Subsistence Uses of Marine Mammals*

*Comment 37:* A commenter stated that it wants to ensure that Nome area subsistence hunters retain access to beluga whale hunting sites, and that in October, at the end of the barge season, Nome subsistence hunters use the end of the causeway as a look-out point for beluga whales. The commenter requested that use of the end of the causeway for subsistence hunting purposes continues.

*Response:* NMFS thanks the commenter for providing information about the importance of the end of the causeway as a look-out point for beluga whale subsistence hunting, and it has updated its analysis to reflect this information. As noted in the Unmitigable Adverse Impact Analysis and Determination section of this notice, in order to issue an IHA, NMFS must find that the specified activity will not have an "unmitigable adverse impact" on the subsistence uses of the affected marine mammal species or stocks by Alaskan natives. NMFS has defined "unmitigable adverse impact" in 50 CFR 216.103 as an impact resulting from the specified activity: (1) That is likely to reduce the availability of the species to a level insufficient for a harvest to meet subsistence needs by: (i) Causing the marine mammals to abandon or avoid hunting areas; (ii) Directly displacing subsistence users; or (iii) Placing physical barriers between the marine mammals and the subsistence hunters; and (2) That cannot be sufficiently mitigated by other

measures to increase the availability of marine mammals to allow subsistence needs to be met. NMFS and USACE discussed this recommendation. Given that the Port is owned and operated by the City of Nome, permission from the City is required to access the causeway. The Port's ability to grant access to the causeway outside of the construction period is constrained by safety concerns when the Port is active, and construction activities at the Port of Nome are expected to increase the time when safety concerns are present. Therefore, during some periods, it may not be possible to grant causeway access to subsistence users. However, when construction activities are not causing safety concerns, the Port anticipates being able to grant causeway access to subsistence users under the same conditions that it would when the Port of Nome Modification Project is not underway.

*Comment 38:* A commenter recommended that NMFS add Pacific walruses to the list on Table 2 of the **Federal Register** notice titled "Marine Mammal Species Likely To Occur Near The Project Area that Might be Taken by USACE's Activities." Further, the commenter stated that if walruses haul out at the Port of Nome, Port authorities should notify U.S. Fish and Wildlife Service (USFWS). If a walrus hauls out at the Port and appears healthy, the commenter requested that the USFWS make it available for harvest.

*Response:* As alluded to by the commenter, Pacific walrus are managed by the USFWS, rather than NMFS. Therefore, as noted in the Description of Marine Mammals in the Area of Specified Activities section of the notice of proposed IHA (May 2, 2023, 88 FR 27464), they are not considered in this document, and NMFS has not included them in Table 1 (equivalent to Table 2 in the notice of proposed IHA (88 FR 27464, May 2, 2023)). NMFS has passed along the commenter's recommendation to make a healthy walrus hauled out at the Port available for harvest to the USACE and USFWS.

*Comment 39:* A commenter stated that local subsistence hunters harvest multiple belugas near Nome annually. However, the Norton Sound beluga whale harvests are not required to be reported by any entity, so there is no accurate documentation of beluga whale harvest in Norton Sound. The commenter stated that the Frost and Suydam (2010) publication's assessment of 0.6 beluga harvested near Nome annually should not be used in the IHA considerations.

*Response:* NMFS thanks the commenter for the additional

information regarding Norton Sound beluga harvest. NMFS has added this additional information to its analysis and has removed Frost and Suydam (2010) from its analysis in the Effects of Specified Activities on Subsistence Uses of Marine Mammals section.

*Comment 40:* A commenter stated that significant spotted, ringed, bearded and ribbon seal hunting occurs throughout the project period, most importantly during the months of May to June. The commenter stated that if contractors and Port of Nome modifications are not inclusive of subsistence hunters then there is the possibility of subsistence user impacts. The commenter stated that it concurs with NMFS on the following: the project could deter target species and their prey from the project area, increasing effort required for a successful hunt in that area; construction may disturb beluga whales, potentially causing them to avoid the project area and reducing their availability to subsistence hunters; and once the project is complete, the increased length at the Port of Nome could impact hunters' ability to access subsistence areas, but not for the reason noted by NMFS. The commenter states that the increased length of the Port will not meaningfully increase the time and fuel required to access marine mammals. Instead, the commenter asserted that the increased length and orientation of the Port poses significant safety considerations for small boats because small subsistence boats will need to navigate stronger currents and ship traffic that will require several maneuvers in and out of the Port if it is modified to the preferred alternative. The commenter stated that NMFS is correct that increased vessel traffic at the Port following construction may create additional obstacles for subsistence vessels to maneuver and may affect marine mammals and their movements. The commenter stated that the impact to subsistence users stresses previous points that the commenter made in a previous comment letter that this project is not eligible for Categorical Exclusion.

*Response:* NMFS thanks the commenter for its additional input about the impacts of the increased length and orientation of the modified Port. However, NMFS' authority under the MMPA to consider impacts of an activity on marine mammals and subsistence uses of marine mammals are limited to consideration of the impacts of the activity for which NMFS is authorizing take (*i.e.*, the construction activities rather than the end result of the construction). Given that the USACE is the proponent of the action itself (*i.e.*,

the Port of Nome modification project), NMFS has passed this comment along to the USACE for its consideration.

Please refer to NMFS' response to Comment 52 regarding the commenter's concerns about eligibility for a Categorical Exclusion and Comments 24, 32, 42, 43, 44, 46, and 49 regarding subsistence user engagement. For information on USACE's Integrated Feasibility Report and Final Environmental Assessment, please refer to <https://www.poa.usace.army.mil/Library/Reports-and-Studies/Port-of-Nome-Modification-Project/>.

*Comment 41:* Commenters noted that the Port of Nome construction project will bring an influx of workers from outside the region into Nome. A commenter recommended that incoming workers attend cultural awareness training from Kawerak Inc.'s Katirvik Cultural Center to better understand the cultural history and practices of the region and its Tribes. In a related comment, a commenter recommended that the USACE convene a working group with Kawerak Inc., Native Village of Solomon, King Island Native Community, Nome Eskimo Community, and Native Village of Council to develop educational materials that lay out behavioral rules and cultural expectations for Port project workers. The commenter requests that the USACE require contractors to adopt these materials and agree to abide by them. Another commenter recommended that NMFS should require anti-racism and decolonization training prior to start of activities, and that if any member of the construction crew is unwilling to participate or does not take the training seriously, it should be grounds for dismissal. In a related comment, a commenter stated that if an IHA is approved, it is imperative that the construction contractor and any of its workers do not devalue equity and environmental justice considerations. Further, a commenter recommended that Port workers be informed that Alaska Natives have the right to customary and traditional harvest of marine mammals in marine waters, including in and around the Port area when subsistence opportunities present themselves.

*Response:* NMFS thanks the commenter for its recommendations. While NMFS cannot require cultural awareness training, anti-racism training, decolonization training, convening of a working group for these purposes, or development of cultural education materials as part of our limited statutory authority here regarding authorization of take of marine mammals, it has passed along these recommendations to

USACE. USACE has indicated that it will coordinate with Tribal Leadership to develop culturally-appropriate information and educational materials for the Port of Nome construction workforce. These materials will include language that states that Alaska Natives have the right to customary and traditional harvest of marine mammals in marine waters, including in and around the Port area when subsistence opportunities present themselves.

*Comment 42:* Commenters raised several concerns and recommendations about distribution of USACE's POC, described below.

- The POC was developed, but was not linked with the **Federal Register** notice. 50 CFR 216.104(a)(12) appears to at least require some sort of link within the **Federal Register** notice to the draft POC.

- The POC was not posted on USACE's website.

- USACE did not adequately disclose details of the POC to the community or present the POC during its May 17, 2023 meeting; the POC was only mentioned in passing.

- USACE's POC was not adequately distributed to Nome's subsistence community in a way that allowed for meaningful engagement.

- USACE should include the Native Village of Solomon and the Native Village of Council in POC.

- More than half (11 of 20) of the recommended organizations to be consulted (Table A-1 of the POC), including the AEW, do not represent the subsistence users of Nome. Nome subsistence users are not represented by the AEW. AEW may have some sway related to bowhead whale presence near the Port of Nome, but they do not represent the interests of Nome subsistence users who have their own concerns about bowhead whale presence. Community organizations that are not directly tied to Nome subsistence users are not surrogates for community engagement in Nome.

- Every Norton Sound-based Tribe and Tribal organization in Table A-1 lacks an identified point of contact, despite the USACE stating in the POC that it has been "coordinating" with these groups on this project since April 2018. Omitting a point of contact signals that the USACE did not make the effort to contact the entity and ask who the document should be shared with. One can assume the document was mailed or emailed to the general addresses listed in the table which is a method for being able to check a box that the information was distributed, while at the same time, likely burying the information at its destination. The POC documents sent to

Kawerak, King Island Native Community, and Nome Eskimo Community cannot be located.

- If NMFS is aware of a statement from the USACE that it notified the underserved community of Nome with the draft POC then that should be published so the public can verify if that occurred. The draft POC has been posted to the NMFS website, but as far as the commenter is aware, it was not distributed to the potentially affected stakeholders, subsistence users, or community groups.

*Response:* NMFS thanks the commenters for the information they provided about how to distribute the POC to effectively engage the community and subsistence hunters. A POC is intended to be a living document that is routinely updated to guide and reflect engagement with subsistence communities to ensure that marine mammal subsistence-related concerns are resolved. NMFS posts an applicant's POC to its website to increase public access to the document, and did so at the start of the public comment period for this proposed Port of Nome Modification Project IHA, though posting the POC is not legally required. While the **Federal Register** document (88 FR 27464, May 2, 2023) did not link directly to the POC document itself, the notice did describe to readers that electronic copies of the application and supporting documents [including the POC], as well as a list of the references cited in this document, may be obtained online at: <https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-construction-activities>.

While an applicant may choose to post the POC to its website also, there is no requirement to do so. However, in response to the commenter's concerns, NMFS has requested that USACE post the POC to its website, and USACE intends to post the POC on its website at: <https://www.poa.usace.army.mil/Library/Reports-and-Studies/Port-of-Nome-Modification-Project/>.

NMFS recognizes that the AEW does not represent subsistence users in Nome. NMFS nor the USACE intend for communication with the AEW to serve as a substitute for communication with subsistence users in Nome. However, in addition to engaging local marine mammal subsistence users, NMFS finds it appropriate to encourage applicants to notify subsistence and community leaders beyond the immediate area in which a project is proposed to occur, as sometimes these groups express concerns about projects beyond those that are immediately offshore from their communities, given the range of species

of interest. Therefore, while the AEW and several other groups that the commenter noted do not represent subsistence users in Nome, NMFS still finds it appropriate to encourage USACE to continue communication with these organizations as well as marine mammal subsistence users in and around Nome.

USACE has updated its POC to include the Native Village of Solomon and the Native Village of Council in POC and to include points of contact for each organization listed, where possible. At the time of publication of the proposed IHA, USACE had not distributed the POC given that the project is still approximately a year away from beginning, though NMFS and USACE had a miscommunication about this which resulted in an incorrect statement in the notice of the proposed IHA (88 FR 27464, May 2, 2023) that suggested the USACE distributed a copy of the POC in October 2022. USACE is required to utilize Kawerak's point of contact list and will include all of the Tribes within the region. However, as stated previously, the POC is intended to be a living document, and NMFS requires USACE to update the POC as additional meetings are planned and executed and to redistribute the POC as new information is added. Further, USACE states that it will notify Tribal Leadership when updates are made to the POC that will be publicly available on USACE's project website, noted above in this response.

At the time of publication of the proposed IHA, it was NMFS' understanding that the draft POC was circulated to the recipients indicated in Table A-1 of the POC. However USACE later clarified that the POC has not yet been distributed. USACE distributed the revised POC on August 28, 2023.

*Comment 43:* Commenters raised concerns about the content of USACE's POC, described below.

- In Table 2-1 of the April 2023 POC, the USACE lists 15 community engagements. In 10 of those community engagements the USACE cannot list any summaries of MMPA subsistence-related concerns, presumably because there are no records. Poor recordkeeping of community engagements raises many flags and flies in the face of meaningful community engagement. A commenter stated that these engagements may not be relied upon to address Nome's subsistence user concerns.

- USACE claims that they have been coordinating with potentially affected communities and subsistence groups about this project since April 2018 according to a POC dated April 2023. Another commenter stated that the

April 2018 Planning Charrette was by invite only and could not have addressed any subsistence related concerns because there was no preferred alternative established yet.

- USACE cannot claim that the draft POC incorporates comments and concerns expressed by Nome subsistence users because the POC was developed in isolation absent community engagement and relied upon a consultant to hammer out the details. Such development flies in the face of equity and environmental justice to the underserved community of Nome.

- The draft POC does not portray any record of meaningful public engagement and is a direct result of the lack of community engagement by the USACE. The commenter stated NMFS is not in the greatest position to issue an IHA because of the deficiencies in the POC and the lack of distribution of the POC to Nome's subsistence community.

- Table 2–4 of the POC, upcoming meetings for future engagement, lists meetings that already occurred, such as the December 12–15, 2022 meeting of the AEWC and the canceled meeting of October 2022. A related comment stated that USACE has not adequately planned for subsistence community engagement, as it has not scheduled such meetings.

- USACE failed to provide information that identifies measures that have been taken and/or will be taken to avoid adverse effects on the availability of marine mammals for subsistence purposes.

- The POC does not identify how the USACE will resolve conflicts with communities.

*Response:* USACE has updated its POC to reflect a more comprehensive record of its community engagement regarding the Port of Nome project to date. USACE stated that consultation with Tribes began early in the Feasibility Study process in 2018, and that process was used to determine the preferred alternative (*i.e.*, USACE began its subsistence engagement process in 2018, prior to establishing a preferred alternative). NMFS recommends that applicants begin engagement on a project as early as possible, and it disagrees with the commenter that beginning engagement prior to identifying the preferred alternative is unhelpful. Regarding the commenter's statement that USACE claims that they have been coordinating with potentially affected communities and subsistence groups about this project since April 2018 according to the POC, it is unclear if the commenter disagrees with that statement, or if it is suggesting that the coordination could not have begun at that time because the POC did not exist.

If the latter, to clarify, the coordination is what is detailed in the POC, and coordination often begins prior to creation of the POC, as there would be little to document in it prior to some coordination having occurred. Therefore, it is reasonable for the POC to have listed coordination that occurred in 2018.

The commenter is correct that Table 2–4 lists a December 2022 AEWC meeting that has now occurred. At the time that USACE submitted its draft POC to NMFS, this meeting had not occurred, and USACE intended to attend. USACE has updated the POC and has removed this meeting from Table 2–4. Table 2–4 notes that a meeting initially scheduled for October 2022 was postponed. As of the writing of this notice, this meeting has not been rescheduled. However, USACE is coordinating with the Nome Eskimo Community, King Island Native Community, Village of Solomon, and the Native Village of Council to reschedule the October 2022 meeting. This meeting will be focused on potential project impacts to subsistence uses of marine mammals.

Regarding the comment that USACE failed to provide information that identifies measures that have been taken and/or will be taken to avoid adverse effects on the availability of marine mammals for subsistence purposes, USACE lists its planned measures in section 3 of the POC (Mitigation for Subsistence Uses of Marine Mammals), including that it will coordinate with local subsistence communities and take action to avoid or mitigate impacts to subsistence harvests. Since publication of the proposed IHA, USACE has further updated this list to indicate that it will coordinate with Tribal Leadership to develop culturally-appropriate information and educational materials for the Port of Nome construction workforce.

A POC is intended to guide and reflect engagement with subsistence communities to ensure that marine mammal subsistence-related concerns are resolved. It is not intended to guide resolution of non-subsistence community concerns. Regarding resolution of subsistence-related concerns raised throughout this IHA process, please see responses to Comments 37, 38, 40, 43, 46, 47, and 49. USACE stated in section 3 of the POC (Mitigation for Subsistence Uses of Marine Mammals) that it will continue to coordinate with local subsistence groups throughout the duration of project activities. Without knowing what future conflicts may arise, USACE cannot anticipate exactly how such

conflicts will be resolved. The final IHA requires USACE to coordinate with local subsistence communities, as described in its POC, and to take action to avoid or mitigate impacts to subsistence harvests. Mitigation may include relocating or rescheduling construction activities.

*Comment 44:* A commenter recommended that the USACE establish a constructive relationship with subsistence users before the project begins. The commenter stated that as the POC is currently drafted, it communicates a message of: "We (USACE) plan; you (Tribes and Tribal organizations) cooperate." We want to change that message to: "We (USACE, Tribes, and Tribal organizations) plan; we cooperate." In a related comment, a commenter stated that the USACE failed to meaningfully discuss the proposed IHA in any detail thus far. The commenter stated that it appears that relationship building with the underserved community of Nome will fail unless a dramatic shift is made to the proposed IHA. The commenter asserts that the USACE cannot be depended on to carry out relationship building as required by the MMPA and perhaps other laws with the underserved community of Nome.

*Response:* NMFS agrees that establishing constructive relationships with communities is an important part of conducting effective coordination, including coordinating to avoid impacts to subsistence hunting from the Port of Nome modification activities. As such, NMFS has in some instances required, and in other instances recommended, that USACE implement many of the recommendations provided by commenters on the proposed IHA with regard to engagement with communities on subsistence issues, POC content and distribution, and mitigation measures for subsistence hunting. Please see NMFS' responses to 24, 32, 42, 43, 44, and 49 for additional information. Further, NMFS conducts a 30-day public comment period on all proposed IHAs to allow the public to comment and make recommendations on proposed IHAs.

*Comment 45:* A commenter stated that because USACE's project poses a significant impact to the human environment, (1) NMFS must restrict the IHA's effective dates to May 1, 2024 to July 30, 2024, allow for review, and if approved, renew the IHA to be effective until October 2024, and (2) the IHA must be subject to review and co-management by a body of subsistence users appointed by local Tribes. The commenter stated that the co-management body should be given the

authority to oversee the IHA. It should receive regular weekly reports and be given the authority to revoke the IHA if there are infractions or if it is shown that impacts are not negligible. The commenter also recommended that PSOs be subject to co-management body review and subject to face to face interview by the co-management body. The commenter asserted that NMFS is required to address and allow for co-management via the MMPA in a broad context.

*Response:* Regarding the commenter's recommendation to issue a biannual authorization, NMFS does not find that a biannual authorization is appropriate. In its analysis, NMFS evaluated the impacts of the USACE's planned activities over the duration of a year and appropriately made its findings based on that analysis. Therefore, the effective period of the IHA remains May 1, 2024 through April 30, 2025.

Regarding the commenter's co-management requests, NMFS (through the Secretary of Commerce) is authorized under section 119(a) of the MMPA to enter into agreements with Alaska Native organizations (defined in the MMPA as "a group designated by law or formally chartered which represents or consists of Indians, Aleuts, or Eskimos residing in Alaska") to provide co-management of subsistence use by Alaska Natives. There is nothing in section 119 or section 101(a)(5)(D) to suggest that co-management of an IHA is appropriate.

That said, section 101(a)(5)(D) contains specific requirements for IHAs when subsistence uses of marine mammals may be implicated. This includes, among other things, a finding by NMFS that the taking will not have an unmitigable adverse impact on the availability of marine mammals for taking for subsistence uses, and inclusion of required measures in an IHA to effect the least practicable adverse impact on the availability of the species or stocks for taking for subsistence uses (often referred to in shorthand as mitigation). Section 101(a)(5)(D) also requires IHAs to include monitoring requirements. NMFS regulations for IHAs specify that we may require an IHA-holder in Arctic waters to designate at least one qualified biological observer or another appropriately experienced individual to monitor impacts on marine mammals.

For this IHA, NMFS has required the use of PSOs and has described the necessary qualifications and training for such PSOs. NMFS has recognized the value of Alaska Native traditional knowledge and the IHA allows for PSO candidates to substitute Alaska Native

traditional knowledge for other forms of experience, while acknowledging that PSOs with traditional knowledge may also have prior observer experience, and may be eligible to serve as the lead PSO.

In addition, the IHA includes numerous provisions specifically designed to protect subsistence use of marine mammals. The IHA requires USACE to and meet with local subsistence communities at least once prior to the start of the construction season and provide weekly updates, including contact information for USACE project personnel, during the construction season. Further, USACE must update and redistribute its POC as additional meetings with subsistence communities are planned and executed, and it must clearly describe how all concerns related to subsistence hunting of marine mammals have been addressed.

We also note that much of the project season avoids traditional ice seal harvest windows, which would be expected to avoid impacts to hunting of ice seals during much of the project season. USACE is required to coordinate with local subsistence communities, notify the communities of any changes in the operation, and take action to avoid or mitigate impacts to subsistence harvests.

Finally, NMFS disagrees with the commenter's view that issuance of the IHA will have a significant impact on the human environment, as described in its response to Comment 52.

*Comment 46:* Commenters asserted community engagement efforts from the Port of Nome and USACE have been poor and have not adequately addressed subsistence-related concerns, and they are not confident that the USACE will improve moving forward or comply with required measures. Commenters raised the following related concerns:

- There was never a meeting that could have considered subsistence-level needs or perspectives on how construction might interfere with the ability for subsistence users to access marine resources.

- The City of Nome and USACE cannot be depended on to carry out mitigation, community engagement, develop a meaningful POC, address community impacts to the human environment or subsistence uses, or to carry out the IHA provisions if the IHA is approved.

- The public may not rely upon the USACE to monitor marine mammal harassment consistently during the construction season and maintain communication with subsistence users to employ adaptive measures to mitigate conflict with subsistence activities.

*Response:* NMFS thanks the commenter for the concerns it has raised regarding adequately addressing subsistence-related concerns. While the commenter noted that the USACE met with the PRP prior to the PRP making its recommendations, this was a presentation from USACE specifically about the marine mammal monitoring activities that it intends to conduct in Year 1 under its requested IHA, not human impacts from the project.

NMFS' action is limited to the authorization of take of marine mammals. NMFS does not have the authority to consider community engagement or impacts to the human environment resulting from the activity, other than engagement related to and potential impacts on subsistence uses of marine mammals. The MMPA implementing regulations require that USACE identify subsistence-related concerns that arise in community meetings, as well as how those concerns have been resolved. NMFS recognizes that for meetings earlier in the planning process, notes from these meetings are not always available. However, USACE has updated its POC to reflect a more comprehensive record of its community engagement regarding the Port of Nome project, and the final IHA includes requirements that address many of these concerns, including concerns about disruption to marine mammals and the rights of subsistence users, such as a requirement for USACE to indicate in the educational materials that it develops for the Port of Nome construction workforce that Alaska Natives have the right to customary and traditional harvest of marine mammals in marine waters, including in and around the Port area when subsistence opportunities present themselves. Further, NMFS is requiring the USACE to continue to meet with affected communities both prior to and while conducting the activity to resolve conflicts (e.g., avoid or mitigate impacts) and to notify the communities of any changes in the operation. USACE states that it is coordinating with Nome Eskimo Community, King Island Native Community, Village of Solomon, and the Native Village of Council to reschedule the postponed October 2022 meeting, which will be focused on subsistence-related concerns. The final IHA requires USACE to meet with local subsistence communities at least once prior to the start of the construction season and provide weekly updates, including contact information for USACE project personnel, during the construction season. USACE must update and redistribute the POC as



additional meetings are planned and executed and must ensure that all concerns from the meetings are summarized in the POC. The POC must clearly describe how all concerns related to subsistence hunting of marine mammals have been addressed. Distribution of the POC must include all Tribes within the Nome region as indicated in Kawerak, Inc.'s point of contact list.

Regarding the comments that community engagements must be honored if an IHA is approved, and the USACE must be required to assess that the POC is succeeding by ensuring engagement with the subsistence community, NMFS concurs that USACE must continue to conduct community engagement related to subsistence hunting (see NMFS' response to Comments 24, 32, 42, 43, 44 and 49). However, it is unclear what the commenter is suggesting by assessing whether the POC is succeeding.

Regarding the commenter's concern about USACE and the City of Nome dependably carrying out mitigation, monitoring, and engagement with subsistence users to adaptively mitigate conflicts with subsistence activities, USACE has received numerous previous ITAs from NMFS for which it has implemented the required measures (though USACE has not requested or received an ITA for a project in the Arctic in the recent past). The IHA is a legally-binding document, and there are repercussions should the USACE not comply. Non-compliance could result in the suspension or revocation of the IHA, and should USACE take a marine mammal and not be compliant with the measures required in the final IHA, USACE would be in violation of the MMPA and could be subject to potential enforcement actions. Of note, mitigation measures will be called for by PSOs, which must be independent of the activity contractor (for example, employed by a subcontractor). As such, NMFS anticipates that USACE will successfully implement the requirements in this IHA as well. The final IHA includes required measures for marine mammal monitoring and mitigation as well as coordination with subsistence communities to avoid or mitigate impacts to subsistence harvests, as described above in this response. Please see NMFS' response to Comment 5 regarding IHAs vs ITRs.

*Comment 47:* A commenter expressed concerns about the lack of subsistence features in the feasibility design of the project and actions that the City of Nome has or has not taken that complicate subsistence activities. The commenter stated that there were

numerous Nome subsistence hunters that are hunting bearded seal and walrus and launching from the unimproved beach of the Snake River below Belmont Point. The commenter stated that Nome subsistence hunters are not afforded any improved boat launches, and there are no subsistence features in the feasibility design. Further, the commenter states that the City of Nome has piled snow at the unimproved boat launch that makes it frustrating for subsistence users to even launch their boats. Further, gold miners who come to Nome for the offshore gold mining season displace subsistence users from their traditional boat launch locations at Belmont Point and can crowd out subsistence users. The commenter stated that the City of Nome does not seem to care if subsistence users are displaced, which shows the immense lack of regard the City of Nome has for subsistence users' ability to conduct subsistence activities and shows if the IHA is approved it will impact subsistence users.

In a related comment, a commenter stated that the proposed takings will likely have an unmitigable adverse impact on the availability of marine mammal populations for subsistence uses. Specifically, a commenter stated that the Snake River mouth where the Port of Nome is located is, and always has been, a subsistence use area for Inupiat people, traditionally known as Sanispit. The commenter described the importance of subsistence harvests of marine mammals to Alaska Native peoples and stated that the take of marine mammals with increased development of Port of Nome will be devastating to Alaska Native peoples and their cultures.

*Response:* NMFS thanks the commenters for the detail they provided regarding subsistence hunting in the area as well as existing and potential conflicts with other uses of the area. Regarding the commenter's concern about piling of snow at the unimproved boat launch, while NMFS' authority to consider impacts of an activity on marine mammals and subsistence uses of marine mammals are limited to consideration of the impacts of the activity for which NMFS is authorizing take (*i.e.*, the construction activities rather than the end result of the construction), NMFS has raised this concern to USACE. USACE states that the City of Nome acknowledges this concern, and it will take action to ensure that the current snow removal plans are modified to accommodate a spring vessel launch area at the beach. USACE states that while this location is outside of the project area, the City of

Nome will continue to ensure that subsistence hunters have unfettered beach access to launch their vessels as desired.

Regarding the concern that the takings will have an unmitigable adverse impact, NMFS has strengthened the required measures related to subsistence hunting in the final IHA to ensure that the construction activities covered under the IHA do not have an unmitigable adverse impact on subsistence hunting. The final IHA requires USACE to coordinate with local subsistence communities, notify the communities of any changes in the operation, and take action to avoid or mitigate impacts to subsistence harvests. Further, the final IHA requires USACE to meet with local subsistence communities at least once prior to the start of the construction season and provide weekly updates, including contact information for USACE project personnel, during the construction season. USACE must update and redistribute its POC as additional meetings are planned and executed and must ensure that all concerns from the meetings are summarized in the POC. The POC must clearly describe how all concerns related to subsistence hunting of marine mammals have been addressed. USACE must also indicate in the educational materials that it develops for the Port of Nome construction workforce that Alaska Natives have the right to customary and traditional harvest of marine mammals in marine waters, including in and around the Port area when subsistence opportunities present themselves. These requirements for USACE to enhance its communication with subsistence communities, resolve all concerns related to subsistence hunting of marine mammals, and document the resolution of those concerns, will ensure that the specified activities will not have an "unmitigable adverse impact" on the subsistence uses of the affected marine mammal species or stocks by Alaskan natives.

*Comment 48:* A commenter stated that if an IHA is approved, the USACE should be required to undertake more responsibility than ensuring copies of the IHA are in the possession of the Holder of the Authorization, supervisory construction personnel, lead PSOs, and any other relevant designees of the Holder operating under the authority of the IHA. Every person working for the project must fully understand that disturbances to marine mammals are highly controversial, the current POC is deficient, the USACE's community engagement has been poor to the underserved community of Nome,

and residents of Nome are opposed to the project and concerned about its impact upon the community. Every worker must place a high value on ensuring mandates of the IHA are achieved, PSOs must be allowed to carry out their job. The commenter recommends that a copy of the IHA, if approved, should be placed in *The Nome Nugget* at least once per month that construction is taking place. The lack of proper training for construction supervisors and crews, the monitoring team, and USACE staff prior to the start of activities could lead to a failure to understand their responsibilities and the communication procedures that must be followed. The commenter asserts that this could result in mistakes being made during construction that could cause irreparable harm to marine mammals and the human environment. If there is no adequate understanding of operational procedures of the IHA prior to construction activities, then it is likely that subsistence engagement, which is critical for indigenous people's cultural practices, may be put at risk. Without proper training in advance of construction activities, there is a higher likelihood of mistrust of the process. A lack of training regarding monitoring protocols could prevent adequate discovery and assessment of marine mammal impacts caused by these activities.

*Response:* NMFS concurs with the commenter that it is of utmost importance that all staff involved in the construction project understand their role in complying with the IHA and are properly trained, as that understanding is necessary to ensure that the measures in the IHA are implemented as required. NMFS disagrees with the commenter that every person working for the project should be informed that disturbances to marine mammals are highly controversial or that the current POC is deficient. Individuals responsible for implementing measures in the IHA are responsible for doing so regardless of the level of controversy, and the POC has been updated.

Regarding the commenter's recommendation that every person working for the project must fully understand that USACE's community engagement has been poor to the underserved community of Nome and that the residents of Nome are opposed to the project and concerned about its impact upon the community, NMFS does not have the authority to implement such requirements. Further, NMFS expects USACE to conduct additional engagement with subsistence communities between now and May 2024 when construction is anticipated

to start. NMFS has passed along this comment to USACE for its consideration.

NMFS concurs with the commenter that every worker should place a high value on ensuring that the requirements of the IHA are achieved, though it is not possible to mandate or enforce. NMFS further concurs that PSOs must be allowed to carry out their job. Please see the *Visual Monitoring* section of this notice for additional information on PSO requirements.

NMFS disagrees with the commenter that publishing a copy of the IHA in *The Nome Nugget* at least once per month that construction is taking place is appropriate, as it is the USACE that is responsible for complying with the IHA, rather than the public. In addition, a copy of the final IHA will be continuously available to the public on NMFS' website at: <https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-construction-activities>.

Regarding the commenters' concerns about a lack of training resulting in impacts to subsistence hunting, the final IHA includes a requirement for USACE to coordinate with local subsistence communities to avoid or mitigate impacts to subsistence harvests, as described in USACE's POC. As required by measure 3(d) of the IHA, USACE must ensure that the appropriate staff are adequately trained in order to successfully implement requirements related to engaging with subsistence communities and avoiding impacts to subsistence hunting, as well as all other requirements in the IHA.

*Comment 49:* A commenter recommended that the USACE schedule and hold meetings with the groups listed below, as there have been no POC or IHA-specific meetings, and what little meetings there have been have often been remote. The commenter stated that because community meetings have not taken place specific to the IHA, the USACE has not described the measures the USACE plans to take to minimize adverse effects on marine mammal subsistence use, and consequently, Nome subsistence users have not been able to provide feedback to the USACE or NMFS regarding the proposed IHA in a community engagement setting. The USACE has not described how it will engage with subsistence users which must happen before an IHA is approved.

- The subsistence community;
- Ice Seal Commission (likely meant Committee);
- Alaska Beluga Whale Committee;
- and
- Eskimo Walrus Commission.

*Response:* NMFS concurs that thorough engagement with subsistence users and groups is necessary in order to fully understand the subsistence-related concerns. NMFS further concurs with the commenter that it is appropriate for USACE to conduct meetings with the suggested groups (noting that walrus are under the jurisdiction of the USFWS, not NMFS), and USACE has updated its POC to reflect that it intends to do so and also include them in its POC distribution.

#### *Determinations*

*Comment 50:* A commenter stated that NMFS is proposing to authorize up to 5,718 incidental takes of marine mammals. The commenter further stated that 5,718 takes is by no means small and is comparable to all Alaska Native subsistence harvest of marine mammals across the state. Other commenters stated that the Port of Nome IHA does not comply with the MMPA because it authorizes the taking of more than "small numbers" of marine mammals. The commenters stated that even looking at 1 year of this multi-year project, it is clear that more than "small numbers" of marine mammals will be taken. For example, the IHA authorizes the take of 2,554 bearded seals of the Beringia stock, which is listed as a threatened species under the Endangered Species Act, and for which there is no accurate population estimate. It authorizes the take of 1,275, or approximately 10 percent of the Eastern Bering Sea beluga whale population. These are not small numbers in 1 year, and they certainly would not qualify as small numbers when multiplied by the 7 years that this project is likely to occur.

*Response:* First, of important note, the takes authorized for all species by this IHA are for Level B harassment only, with anticipated reactions in the form of avoidance of the construction area, increased swimming speeds, increased surfacing time, or decreased foraging—no injury, serious injury, or mortality is anticipated or authorized for any species.

As stated in the Small Numbers section of the proposed IHA (88 FR 27464, May 2, 2023) and this final IHA, 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.

As noted in the Changes from the Proposed IHA to Final IHA section of this notice, NMFS has updated the take estimates in this final IHA for bearded seal (995 takes by Level B harassment), ribbon seal (5 takes by Level B harassment), and ringed seal (51 takes by Level B harassment) due to an updated understanding of the year 1 project activities. Further, this final IHA includes two takes by Level B harassment of bowhead whale, as recommended by a commenter (see Comment 6). Our analysis shows that less than one-third of the best available population abundance estimate of each stock could be taken by harassment.

*Comment 51:* Commenters stated that the authorized activities will likely have more than a negligible impact, in part because the public was not invited to participate in peer review, the peer review report was not made available to the public, there will be no site-specific data, and community engagement has been incredibly poor. Commenters also stated that the mitigation measures and monitoring and reporting requirements are inadequate.

*Response:* NMFS disagrees with the assertion that the impacts to marine mammal species and stocks from the Port of Nome modification project will not be negligible. With the exception of that described in the comment summary, commenters have not provided support for this assertion. As described in the Negligible Impact Analysis and Determination section of this final IHA, based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the required monitoring and mitigation measures, NMFS finds that the total marine mammal take from the planned activity will have a negligible impact on all affected marine mammal species or stocks. Please see NMFS' response to Comment 2 regarding site-specific data, Comment 23 regarding the PRP report being inadvertently left off of NMFS' website, Comment 24 regarding participation in the peer review, and Comments 24, 32, 42, 43, 44, and 49 regarding community engagement.

Regarding the assertion that the mitigation, monitoring, and reporting requirements are inadequate, the commenters did not provide support for this assertion nor recommendations for how to improve these requirements. As described in the Mitigation section, NMFS has included adequate measures

to ensure the least practicable adverse impact on marine mammals species and their habitat and subsistence uses, and has also included appropriate monitoring and reporting requirements. Further, as described in the Changes from the Proposed IHA to Final IHA section, additional mitigation, monitoring, and reporting measures have been included in this final rule in consideration of input from the PRP and the public. Therefore, NMFS finds that the mitigation, monitoring, and reporting requirements in this final IHA are appropriate.

#### *National Environmental Policy Act*

*Comment 52:* A commenter stated that the proposed action is not eligible for a Categorical Exclusion because the Port of Nome modifications involve significantly expanding the size of the existing port which the commenter stated has resulted in the destruction of Alaska Native people, place and history. The commenter stated that the proposed construction adds new berths that will require additional utility systems, adds a significant amount of space to the existing port, dramatically changes the function of the Port from low draft to deep draft, would require subsistence users in small boats to navigate large vessel traffic that would have to make several large vessel maneuvers to enter and leave the Port as opposed to the current maneuvers of going straight in and straight out, and may dramatically impact the socio dynamics of the community which could pose impacts to the subsistence use of marine mammals. The Port of Nome modifications pose a significant impact upon the human environment.

*Response:* For information regarding the USACE's NEPA analysis, which analyzes impacts of USACE's underlying action, including expanding the Port, deepening the channel, and increasing vessel traffic, please visit: <https://www.poa.usace.army.mil/Library/Reports-and-Studies/Port-of-Nome-Modification-Project/>.

In determining whether a CE is appropriate for a given ITA, NMFS considers the applicant's specified activity, in this case, in-water construction, and the potential extent and magnitude of the effects of the authorized "takes" of marine mammals associated with that activity along with the extraordinary circumstances listed in the Companion Manual for NOAA Administrative Order 216-6A. The evaluation of whether extraordinary circumstances (if present) have the potential for significant environmental effects is limited to the decision NMFS is responsible for, which is issuance of

an ITA (NMFS' action). While there may be environmental effects associated with the underlying action, such as those raised by the commenter, in the context of NEPA, the potential effects of NMFS' action are limited to those that would occur due to the authorization of incidental take of marine mammals. NMFS has prepared numerous Environmental Assessments (EAs) analyzing the environmental impacts of authorizing take of marine mammals incidental to construction activities such as these, which resulted in Findings of No Significant Impacts. These EAs also address factors in 40 CFR 1508.27 regarding the potential for significant impacts and demonstrate the issuance of ITAs for these types of construction activities do not individually or cumulatively have a significant effect on the human environment. For these reasons, only circumstances which are present and relevant to the issuance of this IHA are evaluated herein, and the use of a CatEx is appropriate for NMFS' action of issuing an ITA for the Port of Nome construction activities.

#### *Other*

*Comment 53:* A commenter raised concerns about whether NMFS has incorporated guidance, policies, and requirements concerning equity, environmental justice, diversity, and engagement of underserved communities as well as barriers to engagement. While some of the specifics are not entirely clear, NMFS' understanding of the comments is that the commenter is concerned about (1) "hasty" USACE and NMFS actions, (2) procedural justice barriers, including the PRP report only being available for a portion of the public comment period, (3) the PRP not including Nome-based specialists, (4) impacts to an underserved and historically discriminated against population (*i.e.*, Alaska Native people), (5) lack of discussion of the proposed action at a May 17, 2023 meeting, (6) lack of relationship building with the community, (7) lack of co-management of the IHAs, (8) lack of resolution to concerns raised to USACE and the City of Nome, and (9) variables of the Port of Nome and the proposed IHA that will dramatically impact community members' liberty, way of life, and culture and traditions. The commenter stated that it is reasonable to conclude that the USACE and NMFS have acted outside of at least E.O. 14091 and perhaps others. The commenter stated that the USACE and NMFS should have asked our community members in an Equity and Environmental Justice

framework what works best for us before any decision was made to move forward. The commenter stated that in order to achieve the inclusion principle and develop the metric of advisory bodies that the Equity and Environmental Justice Strategy suggests, NMFS must reject the draft IHA, and if not, it must radically alter the draft IHA to achieve the inclusion mandate.

*Response:* NMFS does not dictate the timeline of projects implemented by other agencies. However, NMFS disagrees with the commenter that it was hasty in processing this IHA. NMFS conducted a thorough review of Year 1 of USACE's planned project and its potential impacts on marine mammals and has thoughtfully considered appropriate mitigation and monitoring measures for marine mammals and subsistence uses under this IHA, including conducting a monitoring plan peer review as well as soliciting public comments on the proposed IHA. Please refer to NMFS' response to Comment 23 regarding availability of the PRP report during the public comment period.

NMFS thanks the commenter for reviewing its newly published, May 2023 NOAA Fisheries Equity and Environmental Justice Strategy. NMFS fully agrees that it is important to incorporate equity, environmental justice, diversity, and engagement of underserved communities into its actions and processes to the maximum extent possible. The strategy outlines goals and strategies for implementing equity and environmental justice in the agency's work; however, it does not afford NMFS authorities beyond those afforded by the laws discussed therein. NMFS anticipates that USACE will likely request subsequent ITAs for project activities planned beyond Year 1 of the Port of Nome Modification Project. NMFS is considering ways to improve its future engagement with subsistence users during processing of future ITAs to ensure adequate discussion, including potentially meeting with subsistence users in addition to any engagement with subsistence users through future PRPs. NMFS understands the concerns raised regarding short review periods as well as the composition of the PRP, and we are considering ways to improve our process in the future.

Distribution of the POC is intended to empower subsistence communities by making them aware of upcoming meetings where they can express concerns about a project's potential impacts to subsistence hunting of marine mammals and work with an IHA applicant (in this case, USACE) to resolve those concerns, as well as

sharing what concerns have been raised at previous meetings. Regarding lack of discussion of the proposed action at a May 17, 2023 meeting, please refer to NMFS' response to Comment 42. Regarding lack of relationship building with the community, please refer to NMFS' response to Comment 44. Regarding lack of co-management of the IHAs, please refer to NMFS' response to Comment 45. Regarding lack of resolution to concerns raised to USACE and the City of Nome, please refer to NMFS' response to Comments 46 and 60. Regarding variables of the Port of Nome and the proposed IHA that will dramatically impact community members' liberty, way of life, and culture and traditions, please refer to NMFS' response to Comments 41, 47, and 56. Please see NMFS' response to Comment 23 regarding availability of the PRP report during the public comment period.

Throughout the commenter's letters, including related to some of the concerns raised above, the commenter raised a general concern that USACE will not comply with the requirements of the IHA, including those related to engagement of subsistence communities and protection of subsistence practices. It is important to note that the IHA is a legally-binding document, and should USACE take a marine mammal and not be compliant with the measures required in the final IHA, USACE would be in violation of the MMPA and could be subject to potential enforcement actions.

*Comment 54:* If the proposed IHA is approved it should only be valid from May 1, 2024 until November 1, 2024 which is the likely construction window before freeze up.

*Response:* NMFS thanks the commenter for its recommendation. In its analysis, NMFS evaluated the impacts of the USACE's planned activities over the duration of a year, and appropriately made its findings based on that analysis. Therefore, the effective period of the IHA remains May 1, 2024 through April 30, 2025.

*Comment 55:* A commenter stated that NMFS is proposing that it issue a one-time, 1-year Renewal IHA following notice to the public providing an additional 15 days for public comments when (1) up to another year of identical, or nearly identical activities are planned or (2) the specified activities will not be completed by the time the IHA expires and a Renewal would allow for completion of the activities, provided certain conditions are met. The commenter stated that the proposed one-time Renewal IHA comment period of 15 days provides insufficient time for

the public to review and comment given the complexity of the activities proposed and how they impact marine mammals and the human environment. This violates the public's right to be consulted on activities that could have a significant effect on their livelihoods.

*Response:* NMFS has issued a 1-year IHA with the understanding that USACE can complete the planned work for which the IHA authorizes take within the 1-year period. If and when the USACE requests a renewal, NMFS will make the decision of whether or not to issue it based on current information and the best available science, and in adherence with the renewal criteria described in the notice of the proposed IHA (88 FR 27464, May 2, 2023). NMFS may issue a one-time, 1-year Renewal IHA if upon review of the request for Renewal, the status of the affected species or stocks, and any other pertinent information, NMFS determines that there are no more than minor changes in the activities, the mitigation and monitoring measures will remain the same and appropriate, and the findings in the initial IHA remain valid. The USACE has not requested a renewal at this time and NMFS is not proposing to issue one. While NMFS typically provides a 15-day comment period for renewal IHAs, a renewal covers identical, nearly identical, or a subset of the activities for which take was authorized in the original IHA and commented upon in the original 30-day public comment period.

*Comment 56:* A commenter stated that expansion of the Port of Nome into a deep-water port will not only increase the already disruptive marine traffic, but it will alter the behavior of marine mammals and other species that rely on the Bering Strait for migration, breeding and birthing. Potential effects cannot be known, other than their behavior and patterns will adversely change as a result of the activities authorized here. In related comments, commenters stated that from the perspectives of local community members and emerging local leaders, the Port of Nome modification is a poor development decision that will permanently alter the ecosystem and human footprint leading to devastating changes to both marine species, Alaska Native culture and marine ecosystems.

*Response:* NMFS concurs that Port of Nome modification activities may result in impacts to marine mammals in the form of behavioral disturbance (*i.e.*, take by Level B harassment), and has analyzed those activities for Year 1 of the project herein. Regarding impacts to other species, NMFS does not have

authority over management of those species under the MMPA, and therefore, they are not discussed further. Further, NMFS' authority to consider impacts of an activity on marine mammals are limited to consideration of the impacts of the activity for which NMFS is authorizing take (*i.e.*, the construction activities rather than the end result of the construction). Given that the USACE is the proponent of the action itself (*i.e.*, the overall Port of Nome modification), NMFS has passed this comment along to the USACE for its consideration with regard to impacts of the end result of this project, such as increased vessel traffic, impacts to marine species and ecosystems, and impacts to Alaska Native culture beyond those to subsistence hunting considered herein.

*Comment 57:* Commenters stated that they find it deeply troubling that institutions are allowed a permit to harass protected species to shield themselves from accountability. The commenter stated that for the developers, this is ideal, but as a tribal and community member, this is a tool intentionally created without them to be used against them.

*Response:* The MMPA 101(a)(5)(D) provides for and requires NMFS to process applications for incidental take of marine mammals. If this process, including opportunity for public involvement through comment, results in an issued IHA, that IHA must also incorporate mitigation, monitoring, and reporting requirements, as have been incorporated here, in order to minimize impacts to marine mammals.

*Comment 58:* Commenters recommended that NMFS deny the USACE's IHA application. Commenters stated that free, prior and informed consent is the number one priority in development. The commenters state that their community and outlying communities that will be affected by the Port of Nome project have not given free, prior and informed consent about this development project or the IHA, which does not comply with the MMPA. Further, a commenter stated that USACE has no right to "take" their protected species, as this goes against the MMPA. The commenter stated that they do not agree with non-natives killing, changing behavior and pushing away their much needed resources for survival.

In a related comment, commenters stated that the announcement for the comment period on the proposed IHA was published on May 2, 2023, with a deadline for submission less than a month later on June 1, 2023. The commenters state that for this reason in particular, they suggest that the IHA be

denied and USACE obtain free, prior and informed consent before continuing on with development.

Further, commenters stated that noise pollution and disturbance from deep port development, for a period of at least 7 years, is not the only cause for concern for the auditory health of marine mammals, but the true adverse effects in this narrow and shallow body of water cannot be known. The commenters state that they, once again, strongly advise denial of the IHA and for further research into effects of disturbances in marine ecosystems for endangered marine mammals.

*Response:* The MMPA requires that NMFS issue an ITA, provided the necessary findings are made for the specified activity put forth in the application and appropriate mitigation and monitoring measures are set forth, as described in the Background section of this notice. Please refer to that section for additional information. Such findings have been made, and therefore, NMFS has issued an IHA. Though, of note, neither NMFS nor USACE anticipates that the project activities would result in death of a marine mammal, and take by serious injury or mortality is not authorized.

Regarding community engagement, the final IHA requires USACE to meet with local subsistence communities at least once prior to the start of the construction season and provide weekly updates, including contact information for USACE project personnel, during the construction season. USACE must update and redistribute the POC as additional meetings are planned, and executed and to ensure that all concerns from the meetings are summarized in the POC. The POC must be updated to clearly describe how any concerns related to subsistence hunting of marine mammals raised in these meetings have been addressed. Distribution of the POC must include all Tribes within the Nome region as indicated in Kawerak, Inc.'s point of contact list. Further, USACE is required to coordinate with local subsistence communities, as described in its POC, notify the communities of any changes in the operation, and take action to avoid or mitigate impacts to subsistence harvests.

Regarding the duration of the public comment period, NMFS generally conducts 30-day comment periods on a proposed IHA, and continues to find that a 30-day public comment period was appropriate here.

Regarding the commenter's assertion that the project is not only cause for concern for the auditory health of marine mammals, but the true adverse effects in this narrow and shallow body

of water cannot be known, NMFS does not have authority over impacts of a project other than those on marine mammals, their habitat, and subsistence uses of marine mammals. However, it is important to note that NMFS does not anticipate auditory injury of any marine mammals given that USACE is required to shut down pile driving activities if a marine mammal enters a shutdown zone, which in all cases are equal to or larger than the calculated Level A harassment zones.

*Comment 59:* A commenter stated that the science behind this project is wrong and ignores the potential harm it could cause. The construction would disrupt marine wildlife in the area, as well as local fishing businesses that rely on sustainable practices. The people of Nome depend on justice being served and their livelihoods protected, which the Port of Nome fails to do.

*Response:* The commenter does not provide information supporting the statement that the science is generally wrong. Please refer to NMFS' responses to Comments in the *Effects Analysis* and *Estimated Take* sections regarding particular concerns that the commenter raised about NMFS' assessment of the impacts of the project on marine mammals. NMFS' action is limited to the take of marine mammals. NMFS does not have authority over an action itself (in this case, the Port of Nome Modification Project) or impacts of an action on local businesses. Regarding potential impacts to subsistence users of marine mammals, please see NMFS' responses to Comments 37, 38, 40, 43, 46, 47, and 49.

*Comment 60:* Commenters raised multiple concerns about the Port of Nome project, including:

- Coastal erosion;
- Housing shortages during construction;
- Inadequate funding for the project;
- Inadequate justifications for the project (*e.g.*, national security, port capacity);
- USACE and the City of Nome's lack of tribal engagement;
- Project cost sharing;
- Misleading information that Port of Nome modifications can be recommended according to 33 U.S. Code section 2242—Remote and subsistence harbors authorizations;
- Potential violence against Alaska Native women;
- Flow of the currents around the project;
- Impacts of the project on salmon and birds;
- Destruction of Sitnasuak Native Corporations lands because of an influx of people;

- Dust mitigation; and
- Strain on emergency services.

*Response:* NMFS thanks the commenter for the thorough feedback it has provided on the Port of Nome project. NMFS' action is limited to the authorization of take of marine mammals (or denial of such an authorization). It is not associated with, and does not have authority over the specified activity itself, including, but not limited to, the reason for the project, the project design, *etc.* The MMPA requires that NMFS issue an ITA, provided the necessary findings are made for the specified activity put forth in the application and appropriate mitigation and monitoring measures are set forth, as described in the Background section of this notice. The MMPA nor NMFS' implementing regulations require or allow for NMFS to consider the justification for an applicant's action nor the economic or socioeconomic implications of the project on the surrounding community. Further, NMFS does not have authority over how USACE or the City of Nome engages with Tribes or other members of the community on issues other than those that pertain to impacts on subsistence uses of marine mammals from the activity itself, not the result of the activity (in this case, an expanded Port of Nome). USACE stated that it has held numerous government-to-government consultations and subsequent staff-level consultations throughout the lifespan of this project, as reflected in Table 2–1 of the POC. It further stated that government-to-government meetings cover any range of topics that the Tribes would like to discuss with USACE.

Further, NMFS does not have authority over impacts of an activity on birds nor salmon under section 101(a)(5)(D) of the MMPA (the authority under which this IHA was developed). However, USACE considered impacts from the Port of Nome Modification project on both salmon and birds in its EA. The EA can be accessed at: <https://www.poa.usace.army.mil/Library/Reports-and-Studies/Port-of-Nome-Modification-Project/>. Further, USACE consulted with NMFS pursuant to section 7 of the Endangered Species Act (ESA) for the Port of Nome Modification Project activities, and NMFS also consulted internally on the issuance of this IHA under section 101(a)(5)(D) of the MMPA. However, there are no ESA-listed salmon in the project area.

NMFS has provided these comments to USACE for its consideration.

### Changes From the Proposed IHA to Final IHA

Changes from the proposed to final IHA are summarized here and included, with additional detail where appropriate, in the associated sections in this notice.

Since publication of the proposed IHA, NMFS' understanding of the year 1 project activities slightly changed. USACE will extend the causeway incrementally as part of its Year 1 activities by installing rip rap. The causeway will be extended in advance of pile driving activities, which will occur on the harbor side of the new causeway extension. USACE estimates that the causeway will extend approximately 200 feet (ft; 61 m) beyond the pile driving location at any given time. However, the exact distance will be determined by the construction contractor, and may be as little as 50 ft (15.2 m). As a result of this revised understanding of the activity, NMFS anticipates that the ensonified area will be close to 50 percent smaller. Rather than propagating in all directions from the project site, NMFS anticipates that the sound will propagate south/southeast only. Therefore, NMFS has updated the analysis to reflect that the sound is expected to propagate directly to sea along the causeway to the south/southeast. Further, NMFS has added a 10-degree buffer to the zone toward the north/northwest to conservatively account for the potential that the causeway may not be a full 200 ft (61 m) in advance of pile driving (and therefore, not block the sound from propagating to a small degree toward the north/northwest). Related to this change, USACE is not required to have a PSO stationed to the west of the project as initially proposed.

NMFS made several changes to the estimated take of marine mammals since publication of the proposed IHA. First, as recommended by a public commenter, NMFS added two takes by Level B harassment of bowhead whale to this final IHA. Further, given the change in the understanding of the ensonified area, NMFS has updated the estimated take for stocks with density-based take estimate calculations (instances of take reduced in all cases). Therefore, this final IHA authorizes 995 takes of bearded seal, 5 takes of ribbon seal, and 51 takes of ringed seal.

NMFS made changes to the required mitigation measures in this final IHA as described below. NMFS corrected an error in the shutdown zone for pinnipeds during vibratory driving of sheet piles. This final IHA reflects a shutdown zone of 20 m rather than 30

m. The 20 m shutdown zone still incorporates the full Level A harassment zones for pinnipeds, and therefore, Level A harassment is still not anticipated to result from this activity (or any other activities). Further, in consideration of a public comment, NMFS has updated the activity commencement/recommencement measure in the IHA to require USACE to wait 30 minutes prior to commencement or recommencement of pile driving that is halted or delayed to the presence of a marine mammal (unless the animal has voluntarily exited and been visually confirmed beyond the shutdown zone sooner). Last, the final IHA includes several new measures related to vessel transit.

The notice of proposed IHA stated that USACE provided a draft POC to affected parties in October 2022; however, that statement was in error. USACE later clarified that while it provided a draft to NMFS at that time, it circulated the POC among the listed recipients on August 28, 2023. NMFS has clarified this in the *Mitigation for Subsistence Uses of Marine Mammals or Plan of Cooperation* section of this notice of final IHA. Further, the final IHA clarified an existing requirement to now state that USACE must coordinate with local subsistence communities, notify the communities of any changes in the operation, and take action to avoid or mitigate impacts to subsistence harvests. Further, the final IHA includes a requirement that USACE must meet with local subsistence communities at least once prior to the start of the construction season and provide weekly updates, including contact information for USACE project personnel, during the construction season. USACE must update and redistribute the POC as additional meetings are planned, and executed and to ensure that all concerns from the meetings are summarized in the POC. The POC must clearly describe how all concerns related to subsistence hunting of marine mammals have been addressed. Distribution of the POC must include all Tribes within the Nome region as indicated in Kawerak, Inc.'s point of contact list. Additionally, as recommended by a commenter on the proposed IHA, USACE must indicate in the educational materials that it develops for the Port of Nome construction workforce that Alaska Natives have the right to customary and traditional harvest of marine mammals in marine waters, including in and around the Port area when subsistence opportunities present themselves.

Additionally, NMFS made several changes to the final IHA to incorporate recommendations from the PRP. The

final IHA includes a requirement for USACE to conduct PAM for marine mammals as well as SFV for sheet pile driving. Please see the *Acoustic Monitoring* section of this notice for additional information. Further, the final IHA requires PSOs to rotate every 4 hours and not work more than 12 hours within a 24-hour period. Additionally, one PSO must monitor for 8 hours per day for 1 week before and 1 week after pile driving activities (weather and ice permitting). USACE is also required to conduct a statistical power analysis to estimate the minimum number of sightings or sample size required for pre- and post-monitoring periods in order to detect an effect in marine mammal presence due to the construction disturbance (*i.e.*, whether the pre- and post-monitoring periods were of a sufficient length). As also recommended by the PRP, NMFS is requiring the lead PSO to have at least 1 year of prior experience performing the duties of a PSO during construction activity pursuant to a NMFS-issued ITA, and this PSO must be stationed at the construction site. As recommended for fender pile installation, if, and when, USACE drives fender piles, it must conduct a minimum of one aerial overflight to assist in estimating species presence in the far field during fender

pile installation. USACE will conduct two aerial overflights if it determines that it is practicable to do so.

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

Sections 3 and 4 of the application summarize available information regarding status and trends, distribution and habitat preferences, and behavior and life history of the potentially affected species. NMFS fully considered all of this information, and we refer the reader to these descriptions instead of reprinting the information. Additional information regarding population trends and threats may be found in NMFS' Stock Assessment Reports (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' website (<https://www.fisheries.noaa.gov/find-species>).

Table 1 lists all species or stocks for which take is expected and authorized for this activity, and summarizes information related to the population or stock, including regulatory status under the MMPA and ESA and potential biological removal (PBR), where known. PBR is defined by the MMPA as the maximum number of animals, not

including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population (as described in NMFS' SARs). While no serious injury or mortality is anticipated or proposed to be authorized here, PBR and annual serious injury and mortality from anthropogenic sources are included here as gross indicators of the status of the species or stocks 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' 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' U.S. Alaska SARs (*e.g.*, Muto *et al.* 2022). All values presented in Table 1 are the most recent available at the time of publication (including from the draft 2022 SARs) and are available online at: <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments>.

**TABLE 1—MARINE MAMMAL SPECIES <sup>1</sup> LIKELY TO OCCUR NEAR THE PROJECT AREA THAT MAY BE TAKEN BY USACE'S ACTIVITIES**

Common name	Scientific name	Stock	ESA/ MMPA status; strategic (Y/N) <sup>2</sup>	Stock abundance (CV, N <sub>min</sub> , most recent abundance survey) <sup>3</sup>	PBR	Annual M/SI <sup>4</sup>
<b>Order Artiodactyla—Cetacea—Mysticeti (baleen whales)</b>						
<i>Family Eschrichtiidae:</i> Gray Whale .....	<i>Eschrichtius robustus</i> .....	Eastern N Pacific .....	-, -, N	26,960 (0.05, 25,849, 2016).	801	131
<i>Family Balaenidae:</i> Bowhead whale .....	<i>Balaena mysticetus</i> .....	Western Arctic .....	E, D, Y	14,025 (0.228, 11,603, 2019).	116	56
<i>Family Balaenopteridae</i> (rorquals): Minke Whale .....	<i>Balaenoptera acutorostrata</i> .....	AK .....	-, -, N	N/A (N/A, N/A, N/A) <sup>5</sup> .....	UND	0
<b>Odontoceti (toothed whales, dolphins, and porpoises)</b>						
<i>Family Delphinidae:</i> Killer Whale .....	<i>Orcinus orca</i> .....	Eastern North Pacific Alaska Resident.	-, -, N	1,920 <sup>6</sup> (N/A, 1,920, 2019).	19	1.3
Killer Whale .....	<i>Orcinus orca</i> .....	Eastern North Pacific Gulf of Alaska, Aleutian Islands and Bering Sea Transient.	-, -, N	587 <sup>6</sup> (N/A, 587, 2012) ....	5.9	0.8
<i>Family Monodontidae (white whales):</i> Beluga Whale .....	<i>Delphinapterus leucas</i> .....	Eastern Bering Sea .....	-,-, N	12,269 (0.118, 11,112, 2017).	267	226
<i>Family Phocoenidae (porpoises):</i> Harbor Porpoise .....	<i>Phocoena phocoena</i> .....	Bering Sea .....	-, -, Y	UNK (UNK, N/A, 2008) <sup>7</sup>	UND <sup>7</sup>	0.4
<b>Order Carnivora—Pinnipedia</b>						
<i>Family Otariidae (eared seals and sea lions):</i>						

TABLE 1—MARINE MAMMAL SPECIES <sup>1</sup> LIKELY TO OCCUR NEAR THE PROJECT AREA THAT MAY BE TAKEN BY USACE'S ACTIVITIES—Continued

Common name	Scientific name	Stock	ESA/ MMPA status; strategic (Y/N) <sup>2</sup>	Stock abundance (CV, N <sub>min</sub> , most recent abundance survey) <sup>3</sup>	PBR	Annual M/SI <sup>4</sup>
Steller Sea Lion .....	<i>Eumetopias jubatus</i> .....	Western .....	E, D, Y	52,932 <sup>8</sup> (N/A, 52,932, 2019).	318	254
<i>Family Phocidae (earless seals):</i>						
Bearded Seal .....	<i>Erignathus barbatus</i> .....	Beringia .....	T, D, Y	UND (UND, UND, 2013) <sup>9</sup> .	<sup>9</sup> UND	6,709
Ribbon Seal .....	<i>Histriophoca fasciata</i> .....	Unidentified .....	-, -, N	184,697 (N/A, 163,086, 2013).	9,785	163
Ringed Seal .....	<i>Pusa hispida</i> .....	Arctic .....	T, D, Y	UND (UND, UND, 2013) <sup>10</sup> .	<sup>10</sup> UND	6,459
Spotted Seal .....	<i>Phoca largha</i> .....	Bering .....	-, -, N	461,625 (N/A, 423,237, 2013).	25,394	5,254

<sup>1</sup> Information on the classification of marine mammal species can be found on the web page for The Society for Marine Mammalogy's Committee on Taxonomy (<https://marinemammalscience.org/science-and-publications/list-marine-mammal-species-subspecies/>; Committee on Taxonomy (2022)).

<sup>2</sup> 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>3</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.

<sup>4</sup> These values, found in NMFS' SARs, represent annual levels of human-caused mortality plus serious injury from all sources combined (e.g., commercial fisheries, ship strike). Annual M/SI often cannot be determined precisely and is in some cases presented as a minimum value or range. A CV associated with estimated mortality due to commercial fisheries is presented in some cases.

<sup>5</sup> Reliable population estimates are not available for this stock. Please see Friday *et al.* (2013) and Zerbini *et al.* (2006) for additional information on numbers of minke whales in Alaska.

<sup>6</sup> Nest is based upon counts of individuals identified from photo-ID catalogs.

<sup>7</sup> The best available abundance estimate and N<sub>min</sub> are likely an underestimate for the entire stock because it is based upon a survey that covered only a small portion of the stock's range. PBR for this stock is undetermined due to this estimate being older than 8 years.

<sup>8</sup> Nest is best estimate of counts, which have not been corrected for animals at sea during abundance surveys.

<sup>9</sup> Reliable population estimate for the entire stock not available. PBR is based upon the negatively biased N<sub>min</sub> for bearded seals in the U.S. portion of the stock.

<sup>10</sup> A reliable population estimate for the entire stock is not available. Using a sub-sample of data collected from the U.S. portion of the Bering Sea, an abundance estimate of 171,418 ringed seals has been calculated, but this estimate does not account for availability bias due to seals in the water or in the shore fast ice zone at the time of the survey. The actual number of ringed seals in the U.S. portion of the Bering Sea is likely much higher. Using the N<sub>min</sub> based upon this negatively biased population estimate, the PBR is calculated to be 4,755 seals, although this is also a negatively biased estimate.

As indicated above, all 11 species (with 12 managed stocks) in Table 1 temporally and spatially co-occur with the activity to the degree that take is reasonably likely to occur. All species that could potentially occur in the project area are included in Table 3–1 of USACE's IHA application. While these species could occur in the area, the temporal and/or spatial occurrence of these species is such that take is not expected to occur, and they are not discussed further beyond the explanation provided here. Cuvier's beaked whale, Central North Pacific humpback whale, Dall's porpoise, harbor seal, Pacific white-sided dolphin, sperm whale, Stejneger's beaked whale, blue whale, Western North Pacific gray whale, bowhead whale, North Pacific right whale, sei whale, Northern fur seal could all occur in the project area. We do not anticipate take of Cuvier's beaked whale, Cook Inlet beluga whale, Dall's porpoise, Pacific white-sided dolphin, sperm whale, Stejneger's beaked whale, blue whale, and Western North Pacific gray whale as these species' and stocks' ranges generally do not extend as far north as Nome. While it is possible that beluga whales from the Eastern Chukchi Sea and Beaufort Sea stocks could occur in the project area during the winter, spring, and fall, as both stocks migrate

between the Bering and Beaufort seas (Citta *et al.* 2017), animals from the Beaufort Sea stock depart the Bering Sea in early spring, migrate through the Chukchi Sea and into the Canadian waters of the Beaufort Sea where they remain in the summer and fall, and return to the Bering Sea in late fall (NMFS 2022c; *i.e.*, are generally not expected to occur in the project area during the planned work period). Animals from the Eastern Chukchi Sea stock depart the Bering Sea in late spring and early summer, migrate through the Chukchi Sea and into the western Beaufort Sea where they remain in the summer, and return to the Bering Sea in the fall (NMFS 2022c). Tagging data from Citta *et al.* (2017) found that belugas from the Eastern Chukchi Sea and Beaufort Sea stocks moved into the central and southern Bering Sea during winter months, but did not move into Norton Sound (Citta *et al.* 2017). Therefore, given that both stocks are already unlikely to occur in the project area during most or all of the work period, and the animals in Citta *et al.* (2017) did not enter Norton Sound, animals from these stocks are not anticipated to be taken by project activities. Bowhead whale, North Pacific right whale, sei whale, Northern fur seal, fin whale, Western North Pacific

humpback whale, are considered rare in Nome. While some of the species or stocks listed herein could occur on the vessel transit route, as noted above, we do not anticipate take of marine mammals due to vessel transit.

In addition, the Pacific walrus may be found in Nome, AK. However, Pacific walrus (*Odobenus rosmarus divergens*) are managed by the USFWS and are not considered further in this document.

A detailed description of the of the species likely to be affected by the Port of Nome 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 **Federal Register** notice for the proposed IHA (88 FR 27464, May 2, 2023); since that time, we are not aware of any changes in the status of these species and stocks; therefore, detailed descriptions are not provided here. Please refer to that **Federal Register** notice for these descriptions. 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. Not all marine mammal species have equal hearing capabilities (e.g., Richardson *et al.* 1995; Wartzok and Ketten 1999; Au and Hastings 2008). To reflect this, Southall *et al.* (2007, 2019) recommended that marine

mammals be divided into hearing groups based on directly measured (behavioral or auditory evoked potential techniques) or estimated hearing ranges (behavioral response data, anatomical modeling, *etc.*). Note that no direct measurements of hearing ability have been successfully completed for mysticetes (*i.e.*, low-frequency 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 low-frequency 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.

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

The effects of underwater noise from USACE's construction activities have the potential to result in behavioral harassment of marine mammals in the vicinity of the survey area. The notice of proposed IHA (88 FR 27464, May 2, 2023) included a discussion of the effects of anthropogenic noise on marine mammals and the potential effects of underwater noise from USACE's construction activities on marine mammals and their habitat. That information and analysis is incorporated by reference into this final IHA determination and is not repeated here; please refer to the notice of proposed IHA (88 FR 27464, May 2, 2023).

**Estimated Take of Marine Mammals**

This section provides an estimate of the number of incidental takes authorized through this IHA, which will inform both NMFS' consideration of "small numbers," and the negligible impact determinations.

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/or TTS for individual marine mammals resulting from exposure to construction activities. Based on the nature of the activity and the anticipated effectiveness of the mitigation measures (*i.e.*, implementation of shutdown zones) discussed in detail below in the Mitigation section, Level A harassment is neither anticipated nor authorized.

As described previously, no serious injury or mortality is anticipated or authorized for this activity. Below we describe how the authorized take numbers are estimated.

For acoustic impacts, 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 potential 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 estimates.

*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*—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 or exposure context (*e.g.*, frequency, predictability, duty cycle, duration of the exposure, signal-to-noise ratio, distance to the source), the environment (*e.g.*, bathymetry, other noises in the area, predators in the area), and the receiving animals (hearing, motivation, experience, demography, life stage, depth) and can be difficult to predict (*e.g.*, Southall *et al.* 2007, 2021; Ellison

et al. 2012). Based on what the available science indicates and the practical need to use a threshold based on a metric that is both predictable and measurable for most activities, NMFS typically uses a generalized acoustic threshold based on received level to estimate the onset of behavioral harassment. NMFS generally predicts that marine mammals are likely to be behaviorally harassed in a manner considered to be Level B harassment when exposed to underwater anthropogenic noise above root-mean-squared pressure received levels (RMS SPL) of 120 dB (referenced to 1 micropascal (re 1 μPa)) for continuous (e.g., vibratory pile-driving) and above RMS SPL 160 dB re 1 μPa for non-explosive impulsive (e.g., seismic airguns) or intermittent (e.g., scientific sonar) sources. Generally speaking, Level B harassment take estimates based

on these behavioral harassment thresholds are expected to include any likely takes by TTS as, in most cases, the likelihood of TTS occurs at distances from the source less than those at which behavioral harassment is likely. TTS of a sufficient degree can manifest as behavioral harassment, as reduced hearing sensitivity and the potential reduced opportunities to detect important signals (conspecific communication, predators, prey) may result in changes in behavior patterns that would not otherwise occur.

USACE’s activity includes the use of continuous (vibratory pile driving) and impulsive (impact pile driving) sources, and therefore the RMS SPL thresholds of 120 and 160 dB re 1 μPa are applicable.

Level A harassment—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). USACE’s planned activity includes the use of impulsive (impact pile driving) and non-impulsive (vibratory pile driving) sources.

These thresholds are provided in the Table 3. 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 μPa, and cumulative sound exposure level ( $L_E$ ) has a reference value of 1 μPa<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 are used in estimating the area ensonified above the acoustic thresholds, including source levels and transmission loss coefficient.

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., pile driving and removal). The maximum (underwater) area ensonified above the thresholds for behavioral harassment referenced above is 752 km<sup>2</sup> (290 mi<sup>2</sup>), and the calculated distance to the farthest behavioral harassment isopleth is approximately 21.5 km (13.4 mi).

The project includes vibratory pile installation and removal and impact

pile driving. Source levels for these activities are based on reviews of measurements of the same or similar types and dimensions of piles available in the literature. Source levels for each pile size and activity are presented in Table 4. Source levels for vibratory installation and removal of piles of the same diameter are assumed to be the same.

TABLE 4—SOUND SOURCE LEVELS FOR PILE DRIVING ACTIVITIES AT 10m

Pile type	Vibratory sound source levels				Impact sound source levels <sup>1</sup>			
	SPL <sub>RMS</sub>	SEL	Peak	Literature source	SPL <sub>RMS</sub>	SEL	Peak	Literature source
Temporary template piles (Pipe piles ≤24-in).	154.0	144.0	Not Available .....	Caltrans (2020) .....	189.0	178.0	203.0	Caltrans (2015).
Alternate Temporary template piles (H-piles 14-in).	150.0	147.0	165.0 .....	Caltrans (2020) .....	178.0	166.0	200.0	Caltrans (2020).
Anchor piles (14-in HP14x89 or similar).	150.0	147.0	165.0 .....	Caltrans (2020) .....	178.0	166.0	200.0	Caltrans (2020).
Sheet piles (20-in PS31 or similar)	160.7	161.1	171.5 .....	PND (2016, 2020) ....	189.0	179.0	205.0	Caltrans (2015).

TABLE 4—SOUND SOURCE LEVELS FOR PILE DRIVING ACTIVITIES AT 10m—Continued

Pile type	Vibratory sound source levels				Impact sound source levels <sup>1</sup>			
	SPL <sub>RMS</sub>	SEL	Peak	Literature source	SPL <sub>RMS</sub>	SEL	Peak	Literature source
Fender piles (Pipe piles 36-in) .....	170.0	159.0	191.0 .....	Caltrans (2015) .....	193.0	183.0	210.0	Caltrans (2015).

<sup>1</sup> USACE anticipates that all piles would be installed/removed using a vibratory hammer. However, if conditions prevent successful installation with a vibratory hammer, USACE would use an impact hammer to complete installation.

Transmission loss (TL) is the decrease in acoustic intensity as an acoustic pressure wave propagates out from a source. TL parameters vary with frequency, temperature, sea conditions, current, source and receiver depth, water depth, water chemistry, and bottom composition and topography. The general formula for underwater

TL is:

$$TL = B * \text{Log}_{10} (R1/R2),$$

where

TL = transmission loss in dB

B = transmission loss coefficient

R1 = the distance of the modeled SPL from the driven pile, and

R2 = the distance from the driven pile of the initial measurement

Absent site-specific acoustical monitoring with differing measured

transmission loss, a practical spreading value of 15 is used as the transmission loss coefficient in the above formula. Site-specific transmission loss data for the Port of Nome are not available; therefore, the default coefficient of 15 is used to determine the distances to the Level A harassment and Level B harassment thresholds.

The ensoufied area associated with Level A harassment is more technically challenging to predict due to the need to account for a duration component. Therefore, NMFS developed an optional User Spreadsheet tool to accompany the Technical Guidance that can be used to relatively simply predict an isopleth distance for use in conjunction with marine mammal density or occurrence to help predict potential takes. We note that because of some of the assumptions

included in the methods underlying this optional tool, we anticipate that the resulting isopleth estimates are typically going to be overestimates of some degree, which may result in an overestimate of potential take by Level A harassment. However, this optional tool offers the best way to estimate isopleth distances when more sophisticated modeling methods are not available or practical. For stationary sources such as pile driving, the optional User Spreadsheet tool predicts the distance at which, if a marine mammal remained at that distance for the duration of the activity, it would be expected to incur PTS. Inputs used in the optional User Spreadsheet tool, and the resulting estimated isopleths, are reported below.

TABLE 5—USER SPREADSHEET INPUTS

[Source levels provided in Table 4]

Pile type	Installation/ removal	Minutes per pile (vibratory) <sup>1</sup>	Strikes per pile (impact) <sup>1</sup>	Piles per day
Temporary template piles (Pipe piles ≤24-in) .....	Installation .....	10 .....	20	20.
	Removal .....	10 .....	.....	20.
(Alternate) Temporary template piles (H-piles 14-in).	Installation .....	10 .....	20	(20).
	Removal .....	(10) .....	.....	(20).
Anchor piles (14-in HP14x89 or similar) .....	Installation .....	10 .....	20	20.
Sheet piles (20-in PS31 or similar) .....	Installation .....	10 (20 per pair) .....	10	28 (14 pairs).
Fender piles (Pipe piles 36-in) .....	Installation .....	10 .....	20	12.

<sup>1</sup> USACE anticipates that all piles would be installed/removed using a vibratory hammer. However, if conditions prevent successful installation with a vibratory hammer, USACE would use an impact hammer to complete installation.

TABLE 6—LEVEL A HARASSMENT AND LEVEL B HARASSMENT ISOPLETHS FROM VIBRATORY AND IMPACT PILE DRIVING

Pile type	Level A harassment isopleths (m)					Level B harassment isopleth (m)
	LF	MF	HF	PW	OW	
<b>Vibratory</b>						
Temporary template piles (Pipe piles ≤24-in) .....	5	<1	7	3	<1	1,848
(Alternate) Temporary template piles (H-piles 14-in) .....	3	<1	4	2	<1	1,000
Anchor piles (14-in HP14x89 or similar) .....	3	<1	4	2	<1	1,000
Sheet piles (20-in PS31 or similar) .....	18	2	27	11	<1	5,168
Fender piles (Pipe piles 36-in) .....	43	4	64	26	2	21,544
<b>Impact</b>						
Temporary template piles (Pipe piles ≤24-in) .....	252	9	300	135	10	858
(Alternate) Temporary template piles (H-piles 14-in) .....	40	1	48	21	2	159
Anchor piles (14-in HP14x89 or similar) .....	40	1	48	21	2	159
Sheet piles (20-in PS31 or similar) .....	231	8	276	124	9	858
Fender piles (Pipe piles 36-in) .....	386	14	459	206	15	1,585

### Marine Mammal Occurrence and Take Calculation and Estimation

In this section we provide information about the occurrence of marine mammals, including density or other relevant information that will inform the take calculations. We describe how the information provided is synthesized to produce a quantitative estimate of the take that is reasonably likely to occur and authorized. A summary of authorized take, including as a percentage of population for each of the species, is shown in Table 8.

#### Bowhead Whale

As stated in the Description of Marine Mammals in the Area of Specified Activities section of the notice of proposed IHA (88 FR 27464, May 2, 2023), NMFS understood bowhead whales were rare in Nome and that take of bowhead whale was unlikely to occur. However, during the public comment period, NMFS received multiple comments from Alaska Natives who hold traditional ecological knowledge about bowhead whales. One commenter stated that bowhead whales are occasionally seen off the coast of Nome by local residents and subsistence hunters. Another commenter stated that it has seen bowhead whales numerous times near the Port of Nome during their 50 years of living in Nome. Therefore, NMFS has authorized two takes of bowhead whale by Level B harassment, though, as described in the Mitigation section, USACE is required to shut down if a PSO observes a bowhead whale in the Level B harassment zone, even though take is authorized.

USACE is required to implement shutdown zones that extend to or exceed the Level A harassment isopleth for all activities. Therefore, especially in combination with the already low frequency of bowhead whales entering the area, implementation of the required shutdown zones is expected to eliminate the potential for take by Level A harassment of bowhead whale. Therefore, NMFS did not authorize take by Level A harassment of bowhead whale.

#### Gray Whale

Various gray whale density and occurrence information is available for the Bering, Chukchi, and Beaufort Seas (e.g., Clarke *et al.* 2020; Ferguson *et al.* 2018a). Ljungblad *et al.* (1982) and Ljungblad and Moore (1983) summarized aerial surveys conducted in the Bering Sea including the waters of Norton Sound in the early 1980s. Both reported gray whales feeding in large numbers in Norton Sound and waters

near St. Lawrence Island. During the Chukchi Sea Environmental Studies Program (CSESP) a large number of gray whales ( $n = 55$ , including 2 calves) were observed feeding in late July approximately 130 km from the Port of Nome (Lomac-MacNair *et al.* 2022).

During the Quintillion subsea fiber optic cable project three sightings of eight total gray whales were detected within 60 km of Nome, four during July and four during November 2016 (Blees *et al.* 2017).

However, NMFS was unable to locate data describing frequency of gray whale occurrence or density within the project area or in Norton Sound more generally. USACE conducted monitoring at the project site on 19 calendar days during 2019 and 2021. USACE did not detect gray whales during that monitoring, but they are known to occur in Norton Sound and have been sighted during previous aerial line-transect surveys in Norton Sound (personal communication; Megan Ferguson, February 21, 2023).

NMFS estimates that a gray whale or group of gray whales may enter the project area periodically throughout the duration of the construction period, averaging one gray whale per week. Therefore, given the limited information in the project area to otherwise inform a take estimate, NMFS authorized 12 takes by Level B harassment of gray whale.

USACE is required to implement shutdown zones that extend to or exceed the Level A harassment isopleth for all activities. Therefore, especially in combination with the already low frequency of gray whales entering the area, implementation of the required shutdown zones is expected to eliminate the potential for take by Level A harassment of gray whale. Therefore, USACE did not request take by Level A harassment of gray whale, nor did NMFS authorize any.

#### Minke Whale

Various minke whale density and occurrence information is available for the Bering, Chukchi, and Beaufort Seas (e.g., Clarke *et al.* 2020; Moore *et al.* 2002). During CSESP surveys (2008–2014), minke whales were observed near the Port of Nome (Lomac-MacNair *et al.* 2022). No minke whales were seen during monitoring efforts at Nome during the 2016 Quintillion subsea fiber optic cable project (Blees *et al.* 2017). NMFS was unable to locate data describing frequency of minke whale occurrence, group size, or density within the project area or in Norton Sound more generally. USACE did not detect minke whales during its 2019 and

2021 monitoring, but they are known to occur in Norton Sound and have been sighted during previous aerial line-transect surveys in Norton Sound (personal communication; Megan Ferguson, February 21, 2023).

NMFS estimates that a minke whale may enter the project area periodically throughout the duration of the construction period, averaging one minke whale per week. Therefore, given the limited information in the project area to otherwise inform a take estimate, NMFS authorized 12 takes by Level B harassment of minke whale.

USACE is planning to implement shutdown zones that extend to or exceed the Level A harassment isopleth for all activities. Therefore, especially in combination with the already low frequency of minke whales entering the area, implementation of the required shutdown zones is expected to eliminate the potential for take by Level A harassment of minke whale. Therefore, USACE did not request take by Level A harassment of minke whale, nor did NMFS authorize any.

#### Killer Whale

Limited information regarding killer whale occurrence in the Nome area is available. Waite *et al.* (2002) estimated 391 (95 percent CI = 171–894) killer whales of all types in the southeastern Bering Sea using line-transect methods and indicates that density of killer whales is also high in this area (.0025 whales per km<sup>2</sup>). During the Quintillion subsea fiber optic cable project, a single killer whale was recorded within 60 km of Nome during July 2016 (Blees *et al.* 2017). USACE did not detect killer whales during its 2019 and 2021 monitoring.

NMFS estimates that 2 groups of 15 killer whales may enter the project area over the duration of the construction period. Therefore, given the limited information in the project area to otherwise inform a take estimate, NMFS conservatively authorized 30 takes by Level B harassment of killer whale (2 groups of 15 animals). NMFS anticipates that these takes could occur to the Eastern North Pacific Alaska Resident stock, the Eastern North Pacific Gulf of Alaska, Aleutian Islands, and Bering Sea Transient stock, or some combination of the two.

USACE is planning to implement shutdown zones that extend to or exceed the Level A harassment isopleth for all activities. Therefore, especially in combination with the already low occurrence of killer whales in the area, implementation of the required shutdown zones is expected to eliminate the potential for take by Level

A harassment of killer whale. Therefore, USACE did not request take by Level A harassment of killer whale, nor did NMFS authorize any.

#### Harbor Porpoise

Moore *et al.* (2002) reported density estimates for harbor porpoise derived from vessel survey data collected on visual line transect surveys for cetaceans in the central–eastern Bering Sea (CEBS) in July and August 1999 and in the southeastern Bering Sea (SEBS) in June and July 2000. Harbor porpoise were seen throughout the coastal (shore to 50 m) and middle shelf (50–100 m) zones in the SEBS with sighting in the coastal zone over four times that of the middle shelf zone. Relatively few harbor porpoise were reported in the CEBS. Density for harbor porpoise in the CEBS was 0.0035 porpoise/km<sup>2</sup> and in the SEBS was 0.012 animals/km<sup>2</sup>. During the Quintillion subsea fiber optic cable project four sightings of 8 total harbor porpoise were recorded within 60 km of Nome, four each during July and August 2016 (Blees *et al.* 2017). USACE detected one harbor porpoise during its 2019 and 2021 monitoring.

Clarke *et al.* (2019) indicated a maximum group size of four harbor porpoise in the Distribution and Relative Abundance of Marine Mammals in the Eastern Chukchi and Western Beaufort Seas, 2018 Annual Report (Clarke *et al.* 2019). NMFS estimates that one group of four harbor porpoise may enter the project area every other week during the construction period. Therefore, given the limited information in the project area to otherwise inform a take estimate, NMFS conservatively authorized 24 takes by Level B harassment of harbor porpoise (1 groups of 4 animals × 6 weeks).

USACE is planning to implement shutdown zones that extend to or exceed the Level A harassment isopleth for all activities, and it did not request take by Level A harassment of harbor porpoise. For some activities (*i.e.*, impact driving of fender piles), the shutdown zones extend farther than PSOs may be able to reliably detect harbor porpoise. However, given the portion of the zone within which PSOs could reliably detect a harbor porpoise, the infrequency of harbor porpoise observations during USACE's 2019 and 2021 monitoring, and harbor porpoise sensitivity to noise, NMFS does not anticipate take by Level A harassment of harbor porpoise, nor did NMFS authorize any.

#### Beluga Whale

Beluga whales use Norton Sound during the entire open-water season, generally moving to southern Bering Sea waters during winter due to high ice concentrations in Norton Sound. During the spring and summer, beluga whales tend to concentrate in the eastern half of the Sound (Oceana and Kawerak 2014), but the whales may be seen migrating in large numbers close to the shoreline near Nome in late autumn (ADFG 2012). Jewett (1997) stated beluga whales “appear nearshore with the onset of herring spawning in early summer and feed on these as well as a wide variety of other fish congregating or migrating nearshore.” They are often seen passing very close to the end of the Nome causeway during the fall migration and have been occasionally spotted within the Nome Outer Basin (USACE personal communication with Charlie Lean, 2019). Large groups of beluga have been observed in fall in front of Cape Nome and near Topkok (Oceana and Kawerak 2014). In 2012, two beluga whales from the Eastern Bering Sea stock were tagged near Nome. Prior to being tagged both were known to range throughout Norton Sound. The first of the two tagged belugas left Norton Sound in early November and the second departed in mid-November (Citta *et al.* 2017). No beluga whales were seen during monitoring efforts at Nome during the 2016 Quintillion subsea fiber optic cable project (Blees *et al.* 2017).

USACE detected 129 beluga whales ( $n = 75$  during September 2019,  $n = 45$  during September 2021, and  $n = 12$  during October 2021) over 154 hours of monitoring on 19 days in 2019 and 2021, making beluga whales the most frequently detected species during that monitoring period. Assuming that USACE would conduct a 12-hour work day on average, the pre-activity monitoring suggests a detection rate of approximately 10 beluga whales per day.

NMFS conservatively estimates that 15 beluga whales may enter the project area per day throughout the construction period. While 15 is higher than the detection rate reported from USACE's 2019 and 2021 monitoring, the monitoring was conducted by one or two PSOs, and therefore, only a fraction of the area that would comprise the Level B harassment zones for this project was observed. Therefore, NMFS conservatively authorized 1,275 takes by Level B harassment of beluga whale (15 animals × 85 days).

USACE is planning to implement shutdown zones that extend to or

exceed the Level A harassment isopleth for all activities. Therefore, implementation of the required shutdown zones is expected to eliminate the potential for take by Level A harassment of beluga whale. Therefore, USACE did not request take by Level A harassment of beluga whale, nor did NMFS authorize any.

#### Steller Sea Lion

USACE did not observe any Steller sea lions during the 2019 and 2021 monitoring. Additional data regarding Steller sea lion occurrence in the Nome area is very limited. However, Steller sea lions are known to occur in the area, and observations suggest that Steller sea lions are becoming common in the northern Bering Sea, including Norton Sound. Sea lions have been detected hauling out in small numbers at Sledge Island, about 22 mi (35.4 km) west of Nome. Their change in range is perhaps attributed to climate-change-driven, northward movement of pelagic fish prey species, such as Pacific cod (USACE personal communication with Gay Sheffield, 2018). Further, during the Quintillion subsea fiber optic cable project in August 2016, a Steller sea lion was detected within 60 km of Nome (Blees *et al.* 2017).

NMFS conservatively estimates that one Steller sea lion may enter the project area per day during the construction period. Therefore, given the limited information in the project area to otherwise inform a take estimate, NMFS conservatively authorized 85 takes by Level B harassment of Steller sea lion (1 animal × 85 days).

USACE is planning to implement shutdown zones that extend to or exceed the Level A harassment isopleth for all activities. Therefore, especially in combination with the already low occurrence of Steller sea lion in the area, implementation of the required shutdown zones is expected to eliminate the potential for take by Level A harassment of Steller sea lion. Therefore, USACE did not request take by Level A harassment of Steller sea lion, nor did NMFS authorize any.

#### Spotted Seal

Most summer and fall concentrations of Norton Sound spotted seals are in the eastern portion of the Sound, where herring and small cod are more abundant. However, spotted seals are regularly seen at the Port of Nome and within the harbor area, especially before or after the busy summer season, sometimes hauled out on the beach or breakwater (USACE personal communication with Charlie Lean, 2019). Since the construction of the new

entrance channel and east breakwater in 2006, the existing Outer Basin at the Port of Nome has become the new river mouth and a sort of artificial lagoon of the Snake River. Seals and other marine mammals tend to congregate there, especially in the autumn (Oceana and Kawerak 2014). During the Quintillion subsea fiber optic cable project, a total of 10 spotted seals were recorded within 60 km of Nome during July and August 2016 (Blees *et al.* 2017).

USACE detected 23 spotted seals during its 2019 and 2021 monitoring, making spotted seals the second most frequently detected species during that monitoring. Assuming that USACE would conduct a 12-hour work day on average, the pre-activity monitoring suggests a detection rate of approximately two spotted seals per day.

NMFS conservatively estimates that 20 spotted seals may enter the project area per day throughout the construction period. While 20 is higher than the detection rate reported from USACE's 2019 and 2021 monitoring, the monitoring was conducted by one or two PSOs, and therefore, only a fraction of the area that would comprise the Level B harassment zones for this

project was observed. Therefore, NMFS conservatively authorized 1,700 takes by Level B harassment of spotted seals (20 animals × 85 days).

USACE is planning to implement shutdown zones that extend to or exceed the Level A harassment isopleth for all activities. Therefore, implementation of the required shutdown zones is expected to eliminate the potential for take by Level A harassment of spotted seal. Therefore, USACE did not request take by Level A harassment of spotted seal, nor did NMFS authorize any.

**Ringed Seal**

Near Nome, ringed seals often occur in the open water offshore from Cape Nome and Safety Sound (Oceana and Kawerak 2014). Surveys conducted in the Bering Sea in the spring of 2012 and 2013 documented numerous ringed seals in both nearshore and offshore habitat extending south of Norton Sound (79 FR 73010, December 9, 2014; Muto *et al.* 2022). During the Quintillion subsea fiber optic cable project two ringed seals were recorded within 60 km of Nome during July 2016 (Blees *et al.* 2017). Braham *et al.* (1984) reported ringed seal densities ranging from 0.005

to 0.017 in the Bering Sea. Bengtson *et al.* (2005) reported ringed seal densities ranging from 1.62 to 1.91 in the Alaskan Chukchi Sea. Aerts *et al.* (2013) report combined ringed and spotted seal densities of 0.011 to 0.091 in the Northeastern Chukchi Sea. USACE did not detect ringed seals during its 2019 and 2021 monitoring.

Neither USACE nor NMFS were able to locate more recent occurrence or density information for ringed seals in or near Norton Sound, beyond that described above. Therefore, USACE estimated the density of ringed seals in the project area to be 0.02 seals/km<sup>2</sup>, slightly higher than the dated, but most local, Braham *et al.* (1984) Bering Sea densities. Unable to locate more recent data for the area, NMFS concurs with this estimate.

To calculate take by Level B harassment of ringed seal, USACE multiplied the estimated density (0.02 animals/km<sup>2</sup>) by the area of the Level B harassment zone for a given activity by the number of days that activity would occur (Table 7). NMFS concurs with this method and conservatively authorized 51 takes by Level B harassment of ringed seal.

**TABLE 7—AREA OF LEVEL B HARASSMENT ZONES AND NUMBER OF DAYS ON WHICH EACH ACTIVITY WOULD OCCUR**

	Temporary template piles	Anchor piles	Sheet piles	Fender piles
Number of Days of Activity .....	<sup>a</sup> 24	2	57	2
Level B Harassment Zone (km <sup>2</sup> ) <sup>b</sup> .....	4.69	1.71	28.09	416.83

<sup>a</sup> Installation and removal.

<sup>b</sup> As described in the Changes from the Proposed IHA to Final IHA section, since publication of the proposed IHA, given the change in NMFS' understanding of the ensonified area since publication of the proposed IHA, NMFS has updated the Level B harassment zone sizes.

USACE is planning to implement shutdown zones that extend to or exceed the Level A harassment isopleth for all activities. Therefore, implementation of the required shutdown zones is expected to eliminate the potential for take by Level A harassment of ringed seal. Therefore, USACE did not request take by Level A harassment of ringed seal, nor did NMFS authorize any.

**Ribbon Seal**

Ribbon seals occur in the Bering Sea from late March to early May. From May to mid-July the ice recedes, and ribbon seals move further north into the Bering Strait and the southern part of the Chukchi Sea (Muto *et al.* 2022). An estimated 6,000–25,000 ribbon seals from the eastern Bering Sea occur in the Chukchi Sea during the spring open-water period (Boveng *et al.* 2017). Braham *et al.* (1984) reported a maximum density of 0.002 seals/km<sup>2</sup>

from 1976 aerial surveys of ribbon seals in the Bering Sea. USACE did not detect ribbon seals during its 2019 and 2021 monitoring.

To calculate take by Level B harassment of ribbon seal, USACE multiplied the estimated density (0.002 animals/km<sup>2</sup>) by the area of the Level B harassment zone for a given activity by the number of days that activity would occur (Table 7). NMFS concurs with this method and conservatively authorized 5 takes by Level B harassment of ribbon seal.

USACE is planning to implement shutdown zones that extend to or exceed the Level A harassment isopleth for all activities. Therefore, especially in combination with the already low occurrence of ribbon seals in the area, implementation of the required shutdown zones is expected to eliminate the potential for take by Level A harassment of ribbon seal. Therefore,

USACE did not request take by Level A harassment of ribbon seal, nor did NMFS authorize any.

**Bearded Seal**

Braham *et al.* (1984) reported bearded seal densities ranging from 0.006 and 0.782 seals per km<sup>2</sup> in the Bering Sea. Bengtson *et al.* (2005) reported bearded seal densities ranging from 0.07 to 0.14 seals/km<sup>2</sup> in the Alaskan Chukchi Sea. In the spring of 2012 and 2013, U.S. and Russian researchers conducted aerial abundance and distribution surveys over the entire ice-covered portions of the Bering Sea (Moreland *et al.* 2013). Conn *et al.* (2014), using a sub-sample of the data collected from the U.S. portion of the Bering Sea in 2012, calculated a posterior mean density estimate using an effective study area of 767,114 km<sup>2</sup> of 0.39 bearded seals/km<sup>2</sup> (95 percent CI 0.32–0.47). Results from 2006 helicopter transect surveys over a 279,880 km<sup>2</sup> subset of the study area

calculated density estimates of 0.22 bearded seals/km<sup>2</sup> (95 percent CI 0.12–0.61; Ver Hoef *et al.* 2013). USACE detected one bearded seal during its 2019 and 2021 monitoring.

To calculate take by Level B harassment of bearded seal, USACE multiplied the estimated density (0.39 animals/km<sup>2</sup>) by the area of the Level B

harassment zone for a given activity by the number of days that activity would occur (Table 7). NMFS concurs with this method and conservatively authorized 995 takes by Level B harassment of bearded seal.

USACE is planning to implement shutdown zones that extend to or exceed the Level A harassment isopleth

for all activities. Therefore, implementation of the required shutdown zones is expected to eliminate the potential for take by Level A harassment of bearded seal. Therefore, USACE did not request take by Level A harassment of bearded seal, nor did NMFS authorize any.

TABLE 8—AUTHORIZED TAKE AND AUTHORIZED TAKE AS A PERCENTAGE OF STOCK ABUNDANCE

Species	Stock	Authorized take (Level B harassment only)	Stock abundance	Authorized take as a percentage of stock abundance
Bearded Seal	Beringia	<sup>a</sup> 995	N/A	N/A
Ribbon Seal	Unidentified	<sup>a</sup> 5	184,697	<1
Ringed Seal	Arctic	<sup>a</sup> 51	N/A	N/A
Spotted Seal	Bering	1,700	461,625	<1
Steller sea lion	Western	85	<sup>b</sup> 52,932	<1
Beluga whale	Eastern Bering Sea	1,275	12,269	10
Harbor Porpoise	Bering Sea	24	N/A	N/A
Killer Whale	Eastern North Pacific Alaska Resident	30	<sup>c</sup> 1,920	2
	Eastern North Pacific Gulf of Alaska, Aleutian Islands and Bering Sea Transient.		<sup>c</sup> 587	5
	Alaska	12	N/A	N/A
Minke Whale	Alaska	12	N/A	N/A
Gray Whale	Eastern North Pacific	12	26,960	<1
Bowhead Whale	Western Arctic	2	14,025	<1

N/A = Not applicable.

<sup>a</sup> Given the change in the understanding of the ensonified area described in the Changes from the Proposed IHA to Final IHA section, NMFS has updated the estimated take for stocks with density-based take estimate calculations (instances of take reduced in all cases).

<sup>b</sup> Nest is best estimate of counts, which have not been corrected for animals at sea during abundance surveys.

<sup>c</sup> Nest is based upon counts of individuals identified from photo-ID catalogs.

**Effects of Specified Activities on Subsistence Uses of Marine Mammals**

The availability of the affected marine mammal stocks or species for subsistence uses may be impacted by this activity. The subsistence uses that may be affected and the potential impacts of the activity on those uses are described below. Measures included in this IHA to reduce the impacts of the activity on subsistence uses are described in the Mitigation section. Last, the information from this section and the Mitigation section is analyzed to determine whether the necessary findings may be made in the Unmitigable Adverse Impact Analysis and Determination section.

Nome Census Area residents harvested 195.9 pounds of marine mammal per capita in 2017 (McKinley Research Group, 2022). The Snake River mouth where the Port of Nome is located is a subsistence use area for Inupiaq people, traditionally known as Sanispit, as described by a commenter on the proposed IHA. Some subsistence hunters launch their boats from the unimproved beach of the Snake River below Belmont Point, as also described by a commenter on the proposed IHA. During open-water months (May through October) species in the area

harvested for subsistence uses include beluga whale, ice seals (ringed seal, bearded seal, ribbon seal, and spotted seal), and Steller sea lion.

Eastern Bering Sea belugas are an important nutritional and cultural resource to Alaska Natives and are harvested by more than 20 communities in Norton Sound and the Yukon (Ferguson *et al.* 2018b). The Eastern Bering Sea stock of beluga whales are harvested by nine Norton Sound communities (Elim, Golovin, Koyuk, Nome/Council, Saint Michael, Shaktoolik, Stebbins, Unalakleet, and White Mountain; NSB 2022). In its comment letter on the proposed IHA, Kawerak, Inc., noted that “local subsistence hunters harvest multiple belugas near Nome annually. However, the Norton Sound beluga whale harvests are not required to be reported by any entity, so there is no accurate documentation of beluga whale harvest in Norton Sound.” Nome hunters harvest beluga on the west side of Cape Nome, all the way from Cape Nome to Nome, and from Nome west to Sledge Island (Oceana and Kawerak 2014). Beluga subsistence areas between spring and fall are documented between Cape Nome to Cape Darby and around the east coastline of Norton Sound to

Stewart Island (Oceana and Kawerak 2014). While beluga whales have been traditionally hunted in Norton Sound project impacts are not expected to reach traditional harvest areas. However, as described in a comment on the proposed IHA (88 FR 27464, May 2, 2023), the Port of Nome causeway is an important lookout point for subsistence hunting of beluga whales in October, at the end of the barge season.

Ice seals are also hunted within the Norton Sound region. Georgette *et al.* (1998) summarizes a subsistence survey of six Norton Sound-Bering Strait communities (Mainland coastal: Brevig Mission, Golovin, Shaktoolik, and Stebbins; Offshore: Savoonga and Gambell) between 1996 and 1997 and reports seals taken for subsistence in all months, with seasonal peaks in spring (May-June) and fall (September-October). (A commenter on the proposed IHA (88 FR 27464, May 2, 2023) noted that May- June is of particular importance.) Bearded seals, preferred for their large size and quality of meat, were harvested by all communities, but Gambell had the highest harvest rate of any community. Bearded seals are typically harvested in early summer as they migrate northward. Spotted seals, valued for

their skins, are reported in large numbers during ice-free months (Georgette *et al.* 1998). Spotted seals occur closer to shore, allowing for easier harvesting than bearded seals or walrus, which occur further from shore and for a shorter window as they migrate north more quickly (Oceana and Kawerak 2014). Ringed seals, the most abundant and accessible, were harvested in all months and taken in higher numbers than other species from the mainland coastal communities. Ribbon seals are harvested less often than other seals because their distribution does not overlap with most hunting areas and their taste is not preferred (Oceana and Kawerak 2014).

Steller sea lions are rarely harvested in Norton Sound. During the 1996–1997 survey, no Steller sea lion harvest was reported, however, hunters in Gambell, Savoonga, and Brevig Mission reported they do hunt for them occasionally (Georgette *et al.* 1998). Additionally, only 20 Steller sea lions were reported taken between 1992 and 1998 (NMFS 2008; Wolf and Mishler 1999; Wolf and Hutchinson-Scarborough 1999).

Project activities mostly avoid traditional ice seal harvest windows (noted above) and are generally not expected to negatively impact hunting of seals. However, as noted above, some seal hunting does occur throughout the project period. The project could deter target species and their prey from the project area, increasing effort required for a successful hunt in that area. Construction may also disturb beluga whales, potentially causing them to avoid the project area and reducing their availability to subsistence hunters as well. Additionally, once the project is

complete, the increased length and infrastructure at the Port of Nome could impact hunters' ability to access subsistence areas by increasing the time and fuel needed to exit the harbor, and increased vessel traffic at the Port following construction may introduce larger obstacles for subsistence vessels to maneuver and may affect marine mammals and their movements.

**Mitigation**

In order to issue an IHA under section 101(a)(5)(D) 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. NMFS regulations require applicants for ITAs to include information about the availability and feasibility (economic and technological) of equipment, methods, and manner of conducting the activity or other means of effecting the least practicable adverse impact upon the affected species or stocks, and their habitat (50 CFR 216.104(a)(11)).

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

(1) The manner in which, and the degree to which, the successful implementation of the measure(s) is expected to reduce impacts to marine mammals, marine mammal species or

stocks, and their habitat, as well as subsistence uses. This considers the nature of the potential adverse impact being mitigated (likelihood, scope, range). It further considers the likelihood that the measure will be effective if implemented (probability of accomplishing the mitigating result if implemented as planned), the likelihood of effective implementation (probability implemented as planned), and;

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

*Mitigation for Marine Mammals and Their Habitat*

**Shutdown Zones**—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). Construction supervisors and crews, PSOs, and relevant USACE staff must avoid direct physical interaction with marine mammals during construction activity. If a marine mammal comes within 10 meters of such activity, operations must cease and vessels must reduce speed to the minimum level required to maintain steerage and safe working conditions, as necessary to avoid direct physical interaction. Further, USACE must implement activity-specific shutdown zones as described in Table 9. Additionally, USACE is required to shut down if a PSO observes a bowhead whale in the Level B harassment zone, even though take is authorized.

TABLE 9—REQUIRED SHUTDOWN ZONES

Pile type	Pile driving method	Shutdown zone (m)	
		Cetaceans	Pinnipeds
Temporary template piles (Pipe piles ≤24-in)	Vibratory	10	10
	Impact	300	150
(Alternate) Temporary template piles (H-piles 14-in)	Vibratory	10	10
	Impact	300	150
Anchor piles (14-in HP14x89 or similar)	Vibratory	10	10
	Impact	300	150
Sheet piles (20-in PS31 or similar)	Vibratory	30	20
	Impact	300	150
Fender piles (Pipe piles 36-in)	Vibratory	70	30
	Impact	500	210
Dredging <sup>a</sup>		300	300

<sup>a</sup> As noted previous, take of marine mammals is not anticipated to occur due to dredging. However, USACE will implement a shutdown zone of 300 m for all marine mammals during dredging.

**Protected Species Observers**—The placement of PSOs during all construction activities (described in the

Monitoring and Reporting section) would ensure that the entire shutdown zone is visible. USACE will employ two

PSOs for vibratory driving of temporary template pipe piles, sheet piles, and fender pipe piles, and for impact pile



driving of fender piles. For all other activities, USACE will employ one PSO.

*Pre and Post-Activity Monitoring*—Monitoring must take place from 30 minutes prior to initiation of pile driving activity (*i.e.*, pre-start clearance monitoring) through 30 minutes post-completion of pile driving activity. Pre-start clearance monitoring must be conducted during periods of visibility sufficient for the lead PSO to determine that the shutdown zones indicated in Table 9 are clear of marine mammals. Pile driving may commence following 30 minutes of observation when the determination is made that the shutdown zones are clear of marine mammals. If a marine mammal is observed entering or within the shutdown zones, pile driving activity must be delayed or halted. If pile driving is delayed or halted due to the presence of a marine mammal, the activity may not commence or resume until either the animal has voluntarily exited and been visually confirmed beyond the shutdown zone or 15 minutes (for pinnipeds) or 30 minutes (for cetaceans) have passed without re-detection of the animal. If a marine mammal for which take by Level B harassment is authorized is present in the Level B harassment zone, activities would begin and Level B harassment take would be recorded.

*Monitoring for Level B Harassment*—PSOs would monitor the shutdown zones and beyond to the extent that PSOs can see. Monitoring beyond the shutdown zones enables observers to be aware of and communicate the presence of marine mammals in the project areas outside the shutdown zones and thus prepare for a potential cessation of activity should the animal enter the shutdown zone.

*Soft Start*—Soft-start procedures are used 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, soft start requires contractors to provide an initial set of three strikes at reduced energy, followed by a 30-second waiting period, then two subsequent reduced-energy strike sets. A soft start must 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.

*Vessel Transit*—Vessels must remain at least 460 m (500 yds) from North Pacific right whales and avoid transiting through designated North Pacific right whale critical habitat if practicable (50 CFR 226.215). If traveling through North Pacific right whale critical habitat

cannot be avoided, vessels must travel through North Pacific right whale critical habitat at 5 kn (9.3 km/h) or less or at 10 kn (18.5 km/h) or less while PSOs maintain a constant watch for marine mammals from the bridge. Vessel personnel must maintain a log indicating the time and geographic coordinates at which vessels enter and exit North Pacific right whale critical habitat. Further,

- Vessels must not approach within 5.5 km (3 nmi) of Steller sea lion rookery sites listed in (50 CFR 224.103(d)).
- Vessels must not approach within 914 m (3,000 ft) of any Steller sea lion haulout or rookery.
- Project vessels operating in Cook Inlet must maintain a distance of at least 1.5 miles (2.4 km) south of the mean lower low water line between the Little Susitna River and Beluga River.

*Mitigation for Subsistence Uses of Marine Mammals or Plan of Cooperation*

Regulations at 50 CFR 216.104(a)(12) further require IHA applicants conducting activities in or near a traditional Arctic subsistence hunting area and/or that may affect the availability of a species or stock of marine mammals for Arctic subsistence uses to provide a POC or information that identifies what measures have been taken and/or will be taken to minimize adverse effects on the availability of marine mammals for subsistence purposes. A plan must include the following:

- A statement that the applicant has notified and provided the affected subsistence community with a draft POC;
- A schedule for meeting with the affected subsistence communities to discuss proposed activities and to resolve potential conflicts regarding any aspects of either the operation or the POC;
- A description of what measures the applicant has taken and/or will take to ensure that proposed activities will not interfere with subsistence whaling or sealing; and
- What plans the applicant has to continue to meet with the affected communities, both prior to and while conducting the activity, to resolve conflicts and to notify the communities of any changes in the operation.

The notice of proposed IHA stated that USACE provided a draft POC to affected parties in October 2022; however, that statement was in error. USACE later clarified that while it provided a draft to NMFS at that time, it circulated the POC among the listed

recipients on August 28, 2023. The POC includes a description of the project, community outreach that has already been conducted, and project mitigation measures for subsistence uses of marine mammals. USACE will continue to meet with the potentially affected communities and subsistence groups to discuss the project, its potential effects on subsistence, and planned mitigation measures. Prior to the start of construction, USACE will provide notice to the communities of upcoming construction and timing updates using local radio stations, posted flyers, or other appropriate methods to ensure communities are aware of the construction activities. The IHA requires USACE to meet with local subsistence communities at least once prior to the start of the construction season and provide weekly updates, including contact information for USACE project personnel, during the construction season.

USACE must update and redistribute its POC as additional meetings are planned, and executed and must ensure that all concerns from the meetings are summarized in the POC. The POC must clearly describe how all concerns related to subsistence hunting of marine mammals have been addressed. Distribution of the POC must include all Tribes within the Nome region as indicated in Kawerak, Inc.'s point of contact list.

In addition to the coordination described above to avoid or mitigate impacts to subsistence harvests of beluga whale and Steller sea lion, much of the project season avoids traditional ice seal harvest windows, which would be expected to avoid impacts to hunting of ice seals during much of the project season. USACE is required to coordinate with local subsistence communities, notify the communities of any changes in the operation, and take action to avoid or mitigate impacts to subsistence harvests. USACE is also required to indicate in the educational materials that it develops for the Port of Nome construction workforce that Alaska Natives have the right to customary and traditional harvest of marine mammals in marine waters, including in and around the Port area when subsistence opportunities present themselves.

Based on our evaluation of USACE's planned measures, as well as other measures considered by NMFS, NMFS has determined that the required mitigation measures provide the means of 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, and on the

availability of such species or stock for subsistence uses.

### Monitoring and Reporting

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

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

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

### Visual Monitoring

Marine mammal monitoring must be conducted in accordance with the Marine Mammal Monitoring Plan, dated February 2023. Marine mammal

monitoring during pile driving and removal must be conducted by NMFS-approved PSOs in a manner consistent with the following:

- PSOs must be independent of the activity contractor (for example, employed by a subcontractor) and have no other assigned tasks during monitoring periods;
- At least one PSO must have prior experience performing the duties of a PSO during construction activities pursuant to a NMFS-issued ITA;
- Other PSOs may substitute other relevant experience, education (degree in biological science or related field) or training for experience performing the duties of a PSO during construction activities pursuant to a NMFS-issued ITA. PSOs may also substitute Alaska Native traditional knowledge for experience. (NMFS recognizes that PSOs with traditional knowledge may also have prior experience, and therefore be eligible to serve as the lead PSO.);
- Where a team of three or more PSOs is required, a lead observer or monitoring coordinator must be designated. The lead observer must have at least 1 year of prior experience performing the duties of a PSO during construction activity pursuant to a NMFS-issued ITA; and
- PSOs must be approved by NMFS prior to beginning any activity subject to this IHA.

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.

USACE will station two PSOs for vibratory driving of temporary template pipe piles, sheet piles, and fender pipe piles, and for impact pile driving of

fender piles. For all other activities, USACE will employ one PSO. One PSO will have an unobstructed view of all water within the shutdown zone and will be stationed at or near the project activity. The remaining PSO, when applicable, will observe as much of the Level B harassment zone as possible and will monitor from the shoreline approximately 3.5 km to the east of the Port of Nome. While the exact monitoring stations have not yet been determined, USACE provided potential locations in Figure A–1 (Appendix A) of its Marine Mammal Monitoring and Mitigation Plan. USACE must employ a sufficient number of PSOs to allow them to rotate every 4 hours and not work more than 12 hours within a 24-hour period.

Monitoring would be conducted 30 minutes before, during, and 30 minutes after all in water construction activities. In addition, PSOs would record all incidents of marine mammal occurrence, regardless of distance from activity, and would 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. In addition to on-the-ground monitoring, if USACE drives fender piles, it must conduct a minimum of one aerial overflight to assist in estimating species presence in the far field during fender pile installation. USACE will conduct two aerial overflights if it determines that it is practicable to do so.

In addition to monitoring during construction, one PSO must monitor for 8 hours per day for 1 week before and 1 week after pile driving activities (weather and ice permitting). Further, USACE must conduct a statistical power analysis to estimate the minimum number of sightings or sample size required for pre- and post-monitoring periods in order to detect an effect in marine mammal presence due to the construction disturbance (*i.e.*, whether the pre- and post-monitoring periods were of a sufficient length).

### Acoustic Monitoring

USACE intends to conduct a sound field verification (SFV) study to confirm the sound source levels, transmission loss coefficient, and size of the Level A and Level B harassment zones associated with sheet pile driving. They intend to request a modification to the associated Level A harassment, Level B harassment, and shutdown zones, if appropriate, based on the results of the

SFV study. If NMFS approves the results of the SFV study, we will modify the zone sizes based on the approved data. Additionally, USACE intends to conduct PAM to record marine mammal vocalizations for 1 week prior to construction, during construction, and for 1 week after construction. USACE is required to submit an acoustic monitoring plan for NMFS approval prior to the start of acoustic monitoring. Acoustic monitoring report requirements are listed in the *Reporting* section, below.

#### Reporting

USACE would submit a draft annual report to NMFS within 90 calendar days of the completion of monitoring or 60 calendar days prior to the requested issuance of any subsequent IHA for construction activity at the same location, whichever comes first. The marine mammal monitoring report would include an overall description of work completed, a narrative regarding marine mammal sightings, and associated PSO data sheets. Specifically, the report would include:

- Dates and times (begin and end) of all marine mammal monitoring;
- Construction activities occurring during each daily observation period, including:

(1) The number and type of piles that were driven and the method (*e.g.*, impact, vibratory, down-the-hole); and (2) Total duration of driving time for each pile (vibratory driving) and number of strikes for each pile (impact driving).

- PSO locations during marine mammal monitoring;
- Environmental conditions during monitoring periods (at beginning and end of PSO shift and whenever conditions change significantly), including Beaufort sea state and any other relevant weather conditions including cloud cover, fog, sun glare, and overall visibility to the horizon, and estimated observable distance;
- Upon observation of a marine mammal, the following information: (1) Name of PSO who sighted the animal(s) and PSO location and activity at time of sighting; (2) Time of sighting; (3) Identification of the animal(s) (*e.g.*, genus/species, lowest possible taxonomic level, or unidentified), PSO confidence in identification, and the composition of the group if there is a mix of species; (4) Distance and location of each observed marine mammal relative to the pile being driven for each sighting; (5) Estimated number of animals (min/max/best estimate); (6) Estimated number of animals by cohort (adults, juveniles, neonates, group

composition, *etc.*); (7) Animal's closest point of approach and estimated time spent within the harassment zone; (8) Description of any marine mammal behavioral observations (*e.g.*, observed behaviors such as feeding or traveling), including an assessment of behavioral responses thought to have resulted from the activity (*e.g.*, no response or changes in behavioral state such as ceasing feeding, changing direction, flushing, or breaching);

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

A final report must be prepared and submitted within 30 calendar days following receipt of any NMFS comments on the draft report. If no comments are received from NMFS within 30 calendar days of receipt of the draft report, the report shall be considered final.

Additionally, USACE must submit monthly reports on all monitoring conducted under this IHA. The monthly reports must include the same information described above for the annual report and must be submitted by the 15th day of the month following the reporting period.

USACE must also submit an acoustic monitoring report within 90 calendar days of the completion of monitoring or 60 calendar days prior to the requested issuance of any subsequent IHA for construction activity at the same location, whichever comes first. The acoustic monitoring report must include the following, at a minimum:

- Hydrophone equipment and methods: recording devices, sampling rate, sensitivity of the PAM equipment, locations of the hydrophones, duty cycle, distance (m) from the pile where recordings were made, depth of recording devices, depth of water in area of recording devices;
- Type and size of pile being driven, substrate type, method of driving during recordings;
- Mean, median, and maximum received sound levels: root mean square sound pressure level (SPLrms) in 1-sec segments, peak sound pressure level (SPLpeak), cumulative sound exposure level (SELcum), duration to install each pile;
- Duration per pile measured, one-third octave band spectrum, power spectral density plot;
- Estimated source levels referenced to 10m, transmission loss coefficients,

and estimated Level A and Level B harassment isopleths; and

- Number of acoustic detections, by species and operation mode (including no activity periods as the "undisturbed" condition).

In the event that personnel involved in the construction activities discover an injured or dead marine mammal, the Holder must report the incident to OPR, NMFS (*PR.ITP.MonitoringReports@noaa.gov* and *itp.davis@noaa.gov*) and to the Alaska regional stranding network (877-925-7773) as soon as feasible. If the death or injury was clearly caused by the specified activity, the Holder must immediately cease the activities until NMFS OPR is able to review the circumstances of the incident and determine what, if any, additional measures are appropriate to ensure compliance with the terms of this IHA. The Holder must not resume their activities until notified by NMFS.

The report must include the following information:

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

#### Monitoring Plan Peer Review

The MMPA requires that monitoring plans be independently peer reviewed where the proposed activity may affect the availability of a species or stock for taking for subsistence uses (16 U.S.C. 1371(a)(5)(D)(ii)(III)). Regarding this requirement, NMFS' implementing regulations state that upon receipt of a complete monitoring plan, and at its discretion, NMFS will either submit the plan to members of a PRP for review or within 60 days of receipt of the proposed monitoring plan, schedule a workshop to review the plan (50 CFR 216.108(d)).

NMFS established an independent PRP to review USACE's Monitoring Plan for the Port of Nome Modification Project. NMFS provided the PRP with a copy of USACE's monitoring plan and provided them with a list of considerations to guide their discussion of the monitoring plan. The PRP met in March 2023 and provided a final report to NMFS containing recommendations for USACE's monitoring plan on April

5, 2023. The PRP's primary recommendations and comments are summarized and addressed below. The PRP's full report is posted on NMFS' website at: <https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-construction-activities>.

#### Recommendation 1.2

During its presentation, USACE identified monitoring objectives; the PRP recommended that USACE state those objectives in its monitoring plan. The PRP also recommended that USACE include a chronogram showing the estimated periods for all activities that would require monitoring, including dredging, armor stone installation, pile driving of each category (temporary, anchor, sheet, fender, pile removal, filling, and compacting cells), and construction-related vessel transits, and also describe whether concurrent activities are expected to affect the estimated mitigation zone sizes and associated monitoring requirements. USACE has updated its monitoring plan to include its objectives (to increase knowledge of (1) Marine mammal species that occur in the project area, (2) potential impacts to populations of marine mammals expected to occur, and (3) movement and activity of marine mammals) and a statement that clarifies that it does not plan to conduct concurrent activities that would affect the estimated harassment and/or shutdown zone sizes. Activities that may occur concurrently with pile driving are rock placement, dredging, and vessel transit (low, negligible source levels). USACE has updated the monitoring plan to describe this. However USACE did not include a chronogram in the updated monitoring plan, as it anticipates that its schedule could have minor changes depending on the contractor selected and the construction progression.

#### Recommendation 1.2.1

The PRP made several recommendations related to the number, experience, and location of PSOs. It recommended a minimum of two PSOs on duty per PSO location at all times, with a sufficient number of PSOs to allow for rotation of PSOs every 4 hours. It also recommended that PSOs be deployed on each side of the construction zone to monitor the Level B harassment zone, as indicated in the Monitoring Plan. The PRP also recommended that the lead PSO have at least 1 year of prior PSO experience, preferably on projects located within Alaska. The lead PSO would be stationed directly at the construction

site and would be responsible for monitoring the Level A shutdown zone and for communications with the construction site manager when mitigation measures are necessary. The lead PSO would also oversee and coordinate the other PSOs. Last, it recommended that the monitoring plan state that PSOs will be rotated in 4-hour shifts and individual PSOs will not work more than 12 hours per day.

As recommended, NMFS is requiring that USACE employ a sufficient number of PSOs to allow them to rotate every 4 hours and not work more than 12 hours within a 24-hour period, and USACE has updated its monitoring plan to reflect this. USACE states that it will be able to station only one PSO per relevant monitoring location, as two PSOs would be impracticable given the additional costs and logistical challenges that would result. Given the practicability concerns raised by USACE, and the fact that NMFS anticipates that one PSO per monitoring location would be sufficient, NMFS is continuing to require that USACE station one PSO per relevant monitoring location at all times (rather than two recommended by the PRP).

As noted above in the Changes from the Proposed IHA to Final IHA section, since publication of the proposed IHA, NMFS has updated the analysis to reflect that the sound is expected to propagate directly to sea along the causeway to the south/southeast, with a 10-degree buffer to the north/northwest. While the PRP expressed support for deploying PSOs on each side of the construction zone to monitor the Level B harassment zone, as indicated in the monitoring plan, given that sound is not expected to propagate through most of the area north/northwest of the causeway, USACE no longer plans to station a PSO at the north PSO location that it had initially proposed in its monitoring plan which the PRP reviewed. For in-water activities where the Level B harassment zone extends less than 1,000 m from the construction site, USACE must station a PSO at the construction site only. During activities where the Level B harassment zones extend beyond 1,000 m, a PSO must be stationed at the construction site and also at the monitoring location to the east of the construction site.

As recommended, NMFS is requiring the lead PSO to have at least 1 year of prior experience performing the duties of a PSO during construction activity pursuant to a NMFS-issued ITA, and this PSO must be stationed at the construction site. The Lead PSO will be responsible for monitoring the shutdown zones and communicating the

need to implement mitigation measures directly to the construction site manager (or designee).

#### Recommendation 1.2.2

The PRP stated that the number and location of the PSOs, as proposed, is not expected to provide adequate monitoring of the Level B harassment zones for vibratory pile driving of 20-in sheet piles (Level B harassment isopleth = 5.17 km) and 36-in fender piles (Level B harassment isopleth = 21.54 km). The PRP stated that inadequate monitoring of the Level B harassment zone for these two pile driving activities would not allow for an accurate estimation of total takes due to these activities, nor would it increase our understanding of the effects of these activities on marine mammals.

The PRP raised concerns about the applicant's planned method for extrapolating takes within 2 km of the pile driving activity. The PRP recommend that the applicant implement additional monitoring measures to assist in the detection of marine mammals in the far-field (*i.e.*, at Level B harassment zone distances that are greater than 2 km) for an amount of time that will allow for a scientifically-defensible method of extrapolation. For observations during sheet pile installation, the PRP recommended deploying a PSO on an offshore static platform (*e.g.*, an anchored barge or a vessel) at a distance of ~3 km from the source each day of pile driving. For observations during fender pile installation, the PRP recommended an aerial overflight with a plane sufficient for visual marine mammal monitoring be flown prior to the start of pile driving activities each day (estimated 2 days total in year one) to determine species present in the area for that day. The PRP noted that an alternative option would be equipping the offshore static platform with a series of remote live cameras located at a distance of ~5 km to detect marine mammals that may occur in the far field by a PSO operator on land. The PRP recognized that fender piles will be driven for a total of 2 days over the entire season one, however, due to the dimensions of the Level B harassment zone requiring aerial observations, the PRP recommended that this activity be concentrated in as few days as possible throughout the season to minimize the temporal footprint of this acoustic disturbance and to reduce the cost of the aerial support.

Regarding the sheet pile recommendation, the USACE raised concerns regarding the safety and logistics of requiring PSOs to be stationed on a static offshore platform.

Specifically, USACE states that use of such a platform would likely require multiple shift changes per day using a small vessel. This would include at-sea (*i.e.*, vessel-to-vessel) personnel transfers which are considered high risk. Quickly changing weather conditions and appropriate amenities (*e.g.*, shelter, toilet facilities) pose additional risks and logistical challenges when considering an anchored, barge-type platform. Additionally, this would require a stand-by vessel for transportation in the event of emergency (weather, personnel health, *etc.*). Therefore, NMFS is not requiring the USACE to implement this measure. As recommended for fender pile installation, if, and when, USACE drives fender piles, it must conduct a minimum of one aerial overflight to assist in estimating species presence in the far field during fender pile installation. USACE will conduct two aerial overflights if it determines that it is practicable to do so.

Regarding concentration of the fender pile installation into as few days as possible, NMFS acknowledges that doing so would maximize the usefulness of the aerial surveys that would occur on 2 days of fender pile installation. However, in terms of impacts to marine mammals, given the short overall duration of the fender pile work, NMFS is unaware of data that support the idea that it is better to have these activities concentrated into a couple or few days versus shorter blocks of driving spread over more days. As such, and given that USACE asserts that fender-pile installation must occur when necessary and appropriate to meet the construction timeline, which is dependent on the contractor's means and methods, such a requirement is not practicable, and NMFS has not included this as a requirement in the final IHA.

#### Recommendation 1.2.3

The PRP stated that assuming the applicant will expand visual observations based on the previous recommendation, PAM is not recommended. However, if the applicant will not be expanding visual observations, the PRP strongly recommended the use of archival PAM to remedy the ineffective monitoring in the far-field and to evaluate whether the level of acoustic detections in the far-field of the disturbance area is equivalent to the level of visual detections in the near-field. The PRP states that one PAM station at ~3 km would be needed for the pile sheet installation, and at least 3 PAM stations would be needed for the fender pile installation, at distances of ~5 km, ~10

km, and ~15 km from the source. The PRP stated that recognizing a potential negative bias due to false absence when animals are not vocally active, as well as the detection range dependent on the sensitivity of the equipment, it is important to highlight here that when considering PAM efforts, high quality instrumentation should be selected to maximize detection range and deployment duration.

As recommended, NMFS is requiring USACE to conduct archival PAM for the duration of the project to monitor the far-field. USACE must deploy the PAM equipment 1 week before pile driving begins and collect the equipment 1 week after pile driving activities conclude, as feasible considering logistics and timing of ice break-up and freeze-up. USACE must use the data collected from the PAM to estimate marine mammal occurrence in the far-field, and must compare the acoustic detections in the far-field to the visual detections in the near-field in its annual monitoring report. USACE must conduct the acoustic monitoring in accordance with a NMFS-approved acoustic monitoring plan which will outline the planned instrumentation. Given that the plan has not yet been developed, the exact locations of the PAM equipment have not yet been determined. However, USACE will consider the PRP's recommended locations in development of its plan, and NMFS will consider the PRP's recommended locations in its review of the plan.

#### Recommendation 1.2.4

The PRP recommended the collection of marine mammal data in the construction area, including the far-field (out to at least 5 km), prior to and after pile driving activities. The PRP stated that these data should be collected by PSOs with experience identifying marine mammals, preferably from Nome or elsewhere in the Bering Sea region. The PRP suggested that data could be collected by sub-sampling throughout the day, in smaller blocks of time (such as 2 hours every day at the same location). The PRP recommended that the applicant consider developing a marine mammal and environmental reporting app or other reporting method by community members. Having a user-friendly app would make reporting of sightings easier, faster, and more reliable, and would further our knowledge of the effects of construction-related disturbance (by comparison of pre, during, and after construction periods), and marine mammal occurrence in this region during all seasons.

The PRP noted that the presentation given at the meeting included a pre-construction monitoring period of approximately 1 week, but this was not included in the Monitoring Plan. The PRP encouraged pre-construction monitoring of at least 1 week (or more if possible) and recommended that it be included in the Monitoring Plan.

The PRP stated that it was encouraged to note that the applicant has collected marine mammal sightings data in this area in recent years, which it will attempt to utilize for the current project for the purpose of establishing a baseline understanding of marine mammal occurrence in the area under pre-construction conditions (undisturbed) and, for the longer term, whether spatial displacement of marine mammals has occurred as a result of the project-related activities. NMFS concurs with the PRP that this pre-activity monitoring is commendable.

Regarding pre and post-activity monitoring, as recommended, NMFS is requiring one PSO to monitor for 8 hours per day 1 week before and 1 week after pile driving activities (weather and ice permitting) to correlate with the PAM data collection described above. USACE has updated its monitoring plan to reflect this. The PSO that conducts this monitoring is required to meet the same standards as all other project PSOs, as outlined in the *Visual Monitoring* section of this notice.

While USACE does not have the capability to develop a reporting app, USACE will recommend that the PSO contractor collect data using a reporting app. Regardless of whether the contractor uses a reporting app, the USACE is required to provide the monitoring data in a digital format, and at the latest, USACE must submit this data to NMFS along with the draft report, as required by the IHA.

#### Recommendation 1.2.5

The PRP recommended that to estimate actual takes within the observed portion of the Level B harassment zone, the applicant develop a method for estimating animals that may have been missed by PSOs using correction factors to account for species-specific detection probabilities ( $f(0)$  and  $g(0)$ ), where possible.

NMFS recognizes the value of the PRP recommendation and is working on the development of a simple method that could be used by applicants to help estimate animals that may be missed by PSOs in consideration of species-specific factors.

#### Recommendation 1.2.6

To ensure that modeled distances are applicable to this project, the PRP suggested that the applicant either (1) obtain already-collected data for empirical propagation loss analysis obtained in other studies in this same region and either confirm or replace the practical spreading loss (15 logR) with a more precise empirical-based propagation loss in the calculation of the isopleth distances, or (2) conduct sound field verification (SFV) measurements to determine the project-specific propagation loss for a representative number of piles (particularly sheet piles as these would be the bulk of the pile driving activity).

Regarding the recommendation to obtain already-collected data for empirical propagation loss analysis obtained in other studies in this same region, NMFS concurs that when it is available, site-specific propagation loss data is the most appropriate data to use in calculating isopleth distances. However, NMFS and USACE are unaware of data at the Port of Nome site, and given the numerous factors that affect propagation loss, NMFS does not find it appropriate to incorporate propagation loss data from other sites in the region. Therefore, the calculations of the Level A and Level B harassment zones in this final IHA continue to use practical spreading loss (15 logR).

As recommended, NMFS is requiring USACE to conduct SFV measurements of sheet pile installation to determine project-specific propagation loss. USACE intends to conduct this SFV early in the sheet pile driving process, though sheet pile driving may not occur early in the construction season, depending on the contractor and construction progress. If USACE provides data early in the construction season, NMFS may adjust the shutdown zones and revise the Level A and Level B harassment zones, as appropriate, and pending review and approval of the results of SFV. USACE is required to submit an acoustic monitoring plan for NMFS approval prior to the start of acoustic monitoring. Acoustic monitoring report requirements are listed in the *Reporting* section of this notice.

#### Recommendations 1.2.7, 1.2.8, 1.2.9

These recommendations were mitigation-focused, rather than monitoring-focused. Therefore, NMFS has responded to these recommendations as public comments. Please see Comments 9, 25, and 27 in the Comments and Responses section of this notice.

#### Recommendation 1.2.10

The PRP made several recommendations about reporting. Because this is planned as a multi-year project, the PRP recommended that the applicant include a section in its final report with recommendations for future year monitoring improvements based on lessons learned during the first year of construction activities. Further, the PRP stated that if PAM is used in this first year, the details of the acoustic monitoring should also be included in the 90-day report. The PRP also requested that it receive a copy of the 90-day report when submitted by the applicant for an initial review and for use in subsequent Monitoring Plan peer reviews.

NMFS concurs that, given that this IHA is for Year 1 of a multi-year project, it is appropriate for USACE to include in its final marine mammal monitoring report recommendations for improvements to monitoring activities in future years based on lessons learned during Year 1 monitoring, and has included this requirement in the reporting. Regarding acoustic monitoring results, NMFS concurs with the PRP that results from PAM for marine mammals as well as the SFV should be included in a report submitted within 90 days of completion of the monitoring; however NMFS typically requires, and has required here, for acoustic monitoring results to be submitted in a separate report from the marine mammal monitoring report.

NMFS agrees that it is appropriate for the PRP to receive a copy of the final report for the project to review and use in subsequent Monitoring Plan peer reviews. The final IHA requires that the Holder submit its draft report(s) on all monitoring conducted under the IHA within 90 calendar days of the completion of monitoring or 60 calendar days prior to the requested issuance of any subsequent IHA for construction activity at the same location, whichever comes first. A final report must be prepared and submitted within 30 calendar days following receipt of any NMFS comments on the draft report. Given that NMFS sometimes has comments on reports that result in significant changes, NMFS will provide the PRP a copy of the final, approved report, rather than the draft of the final report.

#### Recommendation 2.2.1

The PRP stated that it may be instructive to look at the use of remote cameras either currently installed at the Port of Nome and/or installed at other project-specific locations to evaluate

their effectiveness at detection of marine mammals. This could be accomplished by comparing detections reported from the analysis of web cameras' footage with detections from visual PSOs for the same field of view. The PRP stated that Artificial Intelligence (AI) methods already exist for this type of image processing (e.g., Araújo *et al.* 2022) and the PRP recommends exploring this approach to enable semi-automatic analysis of video. The PRP noted that the Port of Nome has a live camera, and the Federal Aviation Administration has live cameras. The PRP stated that the applicant may also consider tethered balloons as a test for deployment of higher elevation—long-range remote cameras (for initial Arctic examples, see Bouffaut *et al.* 2022 and Landrø *et al.* 2022).

NMFS has responded to this recommendation in its response to a related public comment. Please see Comment 11 in the Comments and Responses section of this notice.

#### Recommendation 2.2.2

The PRP acknowledged that NMFS has very little control over when an applicant submits the application, but recommended that the peer review incorporate more time to review the Monitoring Plan, particularly when looking to incorporate feedback from Alaska Native Co-Management Organizations such as the AEWC.

NMFS recognizes the PRP's challenges associated with reviewing an application within the available timeframe given the submission date of applications. NMFS continues to endeavor to improve this process and will inform the PRP of its progress.

#### Recommendation 2.2.3

This recommendation was outside of the scope of the Monitoring Plan peer review. Therefore, NMFS has responded to this recommendation as a public comment. Please see Comment 5 in the Comments and Responses section of this notice.

#### Recommendation 2.2.4

The PRP recommends that NMFS provide the 90-day report to the PRP for review. This will allow for continued improvements to monitoring plans, particularly for these multi-year projects. In addition, the PRP would like to receive NMFS' comments on the PRP's recommendations at the 90-day report schedule. This will allow the PRP to better understand NMFS' perspective and create transparency.

As recommended and stated in response to Recommendation 1.2.10, NMFS will provide the PRP a copy of

the final, approved report, rather than the draft of the final report. NMFS concurs with the PRP's request to receive NMFS' comments on the PRP's recommendations, and will provide a clear list of which recommendations that were and were not incorporated into this final IHA when it provides the PRP with a copy of the applicant's final report.

#### Recommendation 3.2

The PRP noted that it has provided recommendations for NMFS consideration in past years that are not included as part of this report, but may be applicable, such as the *Incidental Harassment Authorization Applications for the US Arctic: General Report and Recommendations (May 4, 2017)*.

NMFS thanks the PRP for the recommendations that it has provided in the past, including those that are broad recommendations for improving the PRP process. In the last few years, NMFS has been working to incorporate these recommendations where possible, including those from the May 2017 report referenced by the PRP, and will continue to work with the PRP to improve the PRP process.

The PRP stated that a currently omitted effect of the disturbance generated by the construction activities is spatial displacement. This effect has been well documented in many other construction projects, including pile driving operations (e.g., Weilgart 2007, Anderwald *et al.* 2013). In order to increase our understanding of impacts and to use the best available science, marine mammal presence needs to be monitored before, during, and after the disturbance period (Green 1979). The data collected during the three periods is then compared to identify a potential reduction in presence during the disturbance period. A statistical power analysis is required to determine the efficiency of the pre- and post-monitoring duration. Power can be calculated and reported to comment on the confidence one might have in the conclusions drawn from the results of a study. The PRP stated that in this case, a statistical power analysis will be useful to estimate the minimum number of sightings or sample size required for the pre- and post-monitoring periods in order to detect an effect in marine mammal presence due to the construction disturbance.

The PRP stated that should this analysis suggest that the pre/post periods of observations are too long to be incorporated into the scheduling of the construction season, then an alternative approach should be considered. The PRP suggested the

alternative of conducting monitoring at a control site concurrently with the monitoring at the construction area, *i.e.*, a similar coastal location in the region but outside the zone of disturbance by the activities. The comparison of the observations between control and disturbed sites will determine whether the disturbance is impacting the presence and marine mammal diversity. In addition to the comparison among periods, an important consideration is any ongoing disturbance in the area independent of the construction. The PRP stated that for example, in the case of the Port of Nome, shipping in and out of the Port might potentially displace marine mammals away. Therefore, the study design should consider the collection of vessel traffic information as an additional variable to the analysis, to control for confounding effects.

Plenty of literature on disturbance effects studies exist for marine mammals and other taxa where the pre/post and control sampling methods are tested and described. The PRP recommends that future applicants review this literature to implement a solid sampling scheme to allow evaluation of any spatial displacement effects in addition to takes by Level B harassment.

As recommended and stated above, NMFS is requiring one PSO to monitor for 8 hours per day 1 week before and 1 week after pile driving activities (weather and ice permitting) to correlate with the PAM data collection described above. Further, NMFS is requiring USACE to conduct a statistical power analysis to estimate the minimum number of sightings or sample size required for the pre- and post-monitoring periods in order to detect an effect in marine mammal presence due to the construction disturbance (*i.e.*, whether the pre- and post-monitoring periods were of a sufficient length). USACE will include the results of this analysis in its "lessons learned" in the final marine mammal monitoring report, including whether an alternative approach such as that recommended by the PRP would be appropriate for future project years.

NMFS appreciates the recommendation that applicants review the broad body of literature that could help design a solid sampling scheme to evaluate spatial displacement effects. However, the identification of specifically recommended study designs would be more helpful, and we plan to hold off suggesting this to applicants until we have had an opportunity to discuss further with the PRP.

#### Negligible Impact Analysis and Determination

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

To avoid repetition, the majority of our analysis applies to all the species listed in Table 8, 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, or groups of species, 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 and removal 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 from pile driving and removal. Potential takes could occur if individuals of these species are present

in zones ensonified above the thresholds for Level B harassment, identified above, when these activities are underway.

The takes by Level B harassment would be due to potential behavioral disturbance. No mortality or serious injury is anticipated given the nature of the activity, and no Level A harassment is anticipated due to USACE's construction method and planned mitigation measures (see Mitigation section).

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, would 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; HDR, Inc. 2012; Lerma 2014; ABR 2016). Most likely, individuals would simply move away from the sound source and be temporarily displaced from the areas of pile driving and removal, although even this reaction has been observed primarily only in association with impact pile driving, which USACE does not plan to conduct except in scenarios where it is required to successfully advance a pile. 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 expected to occur over just 85 in-water pile driving days.

The project is also not expected to have significant adverse effects on affected marine mammals' habitats. The project activities would 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. We do not expect pile driving activities to have significant consequences to marine invertebrate populations. Given the short duration of the activities and the relatively small area of the habitat that may be affected, the impacts to marine mammal habitat, including fish and invertebrates, are not expected to cause significant or long-term negative consequences.

The project area overlaps a biologically important area (BIA) identified as important for feeding by Eastern Bering Sea belugas (Brower *et al.* 2023). The BIA that overlaps the project area is active May through November, which overlaps USACE's planned work period (May to October). The BIA is considered to be of moderate importance, has moderately certain

boundaries, and moderate data to support the identification of the BIA. The BIA was identified as having dynamic spatiotemporal variability. Regardless of the exact boundary of the BIA, the portion of the BIA that overlaps the project area would be extremely small in comparison to the full BIA. Further, the majority of the southeastern half of Norton Sound is separately identified as a "child" of the BIA that overlaps the project area. The child encompasses an especially high-density area where belugas congregate to feed and is considered to be of higher importance than the parent BIA. The child BIA does not overlap the project area, indicating that animals in the Nome area would have available, high quality feeding habitat during the project period without necessarily being disturbed by the construction. Therefore, take of beluga whales using the parent BIA, given both the scope and nature of the anticipated impacts of pile driving exposure, is not anticipated to impact reproduction or survivorship of any individuals.

The project area also overlaps ESA-designated critical habitat for both ringed seals and bearded seals. As described in the Description of Marine Mammals in the Area of Specified Activities section above, for both ringed seals and bearded seals, two of the three essential features identified for conservation of the species are related to sea ice. Given that USACE's project is anticipated to occur in the open water season, impacts from the project on sea ice habitat are not anticipated. The third essential feature for both ringed and bearded seals is primary prey sources to support the species. While the project activities could impact ringed seal and bearded seal foraging activities in critical habitat that overlaps the project area, the overlap between these areas is extremely small in comparison to the full ESA-designated critical habitat for each species, which includes most of the waters within the U.S. EEZ.

As previously described, a UME has been declared for gray whales. However, we do not expect the takes authorized herein to exacerbate the ongoing UME. No injury, serious injury, or mortality of gray whales is expected or authorized, and take by Level B harassment is limited (14 takes over the duration of the authorization). As such, the authorized take by Level B harassment of gray whale would not exacerbate or compound upon the ongoing UME.

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 any of the

species or stocks through effects on annual rates of recruitment or survival:

- No injury, serious injury, or mortality is anticipated or authorized;
- The anticipated incidents of Level B harassment would consist of, at worst, temporary modifications in behavior that would not result in fitness impacts to individuals;
- The area impacted by the specified activity is very small relative to the overall habitat ranges of all species;
- While impacts would occur within areas that are important for feeding for multiple stocks, because of the small footprint of the activity relative to the area of these important use areas, and the scope and nature of the anticipated impacts of pile driving exposure, we do not expect impacts to the reproduction or survival of any individuals.

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

#### Small Numbers

As noted previously, only take of small numbers of marine mammals may be authorized under sections 101(a)(5)(A) and (D) of the MMPA for specified activities other than military readiness activities. The MMPA does not define small numbers and so, in practice, where estimated numbers are available, NMFS compares the 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 authorized number of instances of take for each species or stock is included in Table 8. Our analysis shows that less than one-third of the best available population abundance estimate of each stock could be taken by harassment. The number of animals authorized to be taken for all 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.

A lack of an accepted stock abundance value for the Alaska stock of minke whale did not allow for the calculation of an expected percentage of the population that would be affected. The most relevant estimate of partial stock abundance is 1,233 minke whales in coastal waters of the Alaska Peninsula and Aleutian Islands (Zerbini *et al.* 2006). Given 12 authorized takes by Level B harassment for the stock, comparison to the best estimate of stock abundance shows, at most, 1 percent of the stock would be expected to be impacted.

For the Bering Sea stock of harbor porpoise, the most reliable abundance estimate is 5,713, a corrected estimate from a 2008 survey. However, this survey covered only a small portion of the stock's range, and therefore, is considered to be an underestimate for the entire stock (Muto *et al.* 2022). Given the authorized 24 takes by Level B harassment for the stock, comparison to the abundance estimate, which is only a portion of the Bering Sea Stock, shows that, at most, less than one percent of the stock would be expected to be impacted.

For the Alaska stock of bearded seals, a lack of an accepted stock abundance value did not allow for the calculation of an expected percentage of the population that would be affected. As noted in the 2021 Alaska SAR (Muto *et al.* 2022), an abundance estimate is currently only available for the portion of bearded seals in the Bering Sea (Conn *et al.* 2014). The current abundance estimate for the Bering Sea is 301,836 bearded seals. Given the authorized 995 takes by Level B harassment for the stock, comparison to the Bering Sea estimate, which is only a portion of the Alaska Stock (also includes animals in the Chukchi and Beaufort Seas), shows that, at most, less than one percent of the stock would be expected to be impacted.

The Alaska stock of ringed seals also lack an accepted stock abundance value, and therefore, we were not able to calculate an expected percentage of the population that may be affected by USACE's project. As noted in the 2021 Alaska SAR (Muto *et al.* 2022), the abundance estimate available, 171,418 animals, is only a partial estimate of the Bering Sea portion of the population (Conn *et al.* 2014). As noted in the SAR, this estimate does not include animals in the shorefast ice zone, and the authors did not account for availability bias. Muto *et al.* (2022) expect that the Bering Sea portion of the population is actually much higher. Given the

authorized 51 takes by Level B harassment for the stock, comparison to the Bering Sea partial estimate, which is only a portion of the Alaska Stock (also includes animals in the Chukchi and Beaufort Seas), shows that, at most, less than one percent of the stock would be expected to be impacted.

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

#### **Unmitigable Adverse Impact Analysis and Determination**

In order to issue an IHA, NMFS must find that the specified activity will not have an "unmitigable adverse impact" on the subsistence uses of the affected marine mammal species or stocks by Alaskan natives. NMFS has defined "unmitigable adverse impact" in 50 CFR 216.103 as an impact resulting from the specified activity: (1) That is likely to reduce the availability of the species to a level insufficient for a harvest to meet subsistence needs by: (i) Causing the marine mammals to abandon or avoid hunting areas; (ii) Directly displacing subsistence users; or (iii) Placing physical barriers between the marine mammals and the subsistence hunters; and (2) That cannot be sufficiently mitigated by other measures to increase the availability of marine mammals to allow subsistence needs to be met.

Given the nature of the activity, and the required mitigation measures, injury, serious injury, and mortality of marine mammals is not expected to occur. Impacts to marine mammals would include limited, temporary behavioral disturbances of marine mammals. As described above, the required mitigation measures, such as implementation of shutdown zones, are expected to reduce the frequency and severity of takes of marine mammals.

Project impacts are generally not expected to reach traditional beluga harvest areas, and much of the project season avoids traditional ice seal harvest windows. While some hunting continues throughout the summer, we do not anticipate that there would be impacts to seals that would make them unavailable for subsistence hunters.

During the public comment period on the proposed IHA (88 FR 27464, May 2, 2023), NMFS received comments about potential impacts of the project on subsistence hunting of marine mammals. As a result of public comments, NMFS has strengthened the

required measures related to subsistence hunting in the final IHA to ensure that the project activities do not have an unmitigable adverse impact on subsistence hunting. The final IHA requires USACE to coordinate with local subsistence communities, notify the communities of any changes in the operation, and take action to avoid or mitigate impacts to subsistence harvests. Further, the final IHA requires USACE to meet with local subsistence communities at least once prior to the start of the construction season and weekly during the construction season. USACE must update and redistribute its POC as additional meetings are planned and executed and must ensure that all concerns from the meetings are summarized in the POC. The POC must clearly describe how all concerns related to subsistence hunting of marine mammals have been addressed.

Based on the description of the specified activity, the measures described to minimize adverse effects on the availability of marine mammals for subsistence purposes, and the required mitigation and monitoring measures, NMFS has determined that there will not be an unmitigable adverse impact on subsistence uses from USACE's authorized activities.

#### **Endangered Species Act**

Section 7(a)(2) of the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*) requires that each Federal agency insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat. To ensure ESA compliance for the issuance of IHAs, NMFS OPR consults internally whenever we propose to authorize take for endangered or threatened species, in this case with the Alaska Regional Office.

Three marine mammal species, Steller sea lion (Western DPS), ringed seal (Arctic subspecies), and bearded seal (Beringia DPS), occur in the project area and are listed as threatened or endangered under the ESA. The NMFS Alaska Regional Office issued a Biological Opinion under section 7 of the ESA on the issuance of an IHA to the USACE under section 101(a)(5)(D) of the MMPA by NMFS OPR. The Biological Opinion concluded that the action is not likely to jeopardize the continued existence of these species, and is not likely to destroy or adversely modify their critical habitat.

**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 ITA) and alternatives with respect to potential impacts on the human environment. This action is consistent with categories of activities identified in Categorical Exclusion B4 (IHAs with no anticipated serious injury or mortality)

of the Companion Manual for NAO 216–6A, which do not individually or cumulatively have the potential for significant impacts on the quality of the human environment and for which we have not identified any extraordinary circumstances that would preclude this categorical exclusion. Accordingly, NMFS has determined that the issuance of this IHA qualifies to be categorically excluded from further NEPA review.

**Authorization**

NMFS has issued an IHA to the USACE for the potential harassment of

small numbers of 11 marine mammal species incidental to the Port of Nome Modification project in Nome, Alaska, that includes the previously explained mitigation, monitoring and reporting requirements.

Dated: August 30, 2023.

**Catherine Marzin,**

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

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