



U.S. Fish and Wildlife Service

**Internal Review Process for Authorizing Harassment under
Section 101(a)(5)(D) of the Marine Mammal Protection Act**

June 2016

Marine Mammal Protection Act
Section 101(a)(5)(D) - Incidental Harassment Authorizations

Introduction

Under section 101(a)(5)(D) of the Marine Mammal Protection Act (MMPA), U.S. citizens engaged in a specified activity (other than commercial fishing) may request authorization for the incidental, but not intentional, taking by harassment of small numbers of marine mammals while engaging in that activity. The U.S. Fish and Wildlife Service (Service) may issue these Incidental Harassment Authorizations (IHAs) for periods of not more than 1 year if we find that such harassment will have a negligible impact on such species or stock, and will not have an unmitigable adverse impact on the availability of such species or stock for subsistence uses.

The IHA shall prescribe, where applicable:

- (1) permissible methods of taking by harassment and other means of effecting the least practicable impact on species or stock and its habitat;
- (2) measures deemed necessary to ensure no unmitigable adverse impacts on the availability for subsistence uses; and
- (3) requirements pertaining to the monitoring and reporting of such taking by harassment.

The MMPA requires us to:

- (1) publish proposed authorization in the *Federal Register* within 45 days of receipt of an application for an IHA;
- (2) request public comments for a period of 30 days; and
- (3) issue the IHA within 45 days after the close of the public comment period if the findings we describe above are met.

**Proposed Internal Review Process for Authorizing Harassment under
Section 101(a)(5)(D) of the Marine Mammal Protection Act**

- 1) The field office that has responsibility for the subject marine mammal receives applications and prepares IHAs. Citizens make these requests for specific geographic regions, and the IHA stays in effect for a period of not more than 1 year. The requests must include, but are not limited to (also see 50 CFR 18.27(d)):
 - (a) A description of the specific activity or class of activities that the requester expects to result in incidental taking of marine mammals;
 - (b) The dates and duration of such activity;
 - (c) The specific geographical region where it will occur;

- (d) Based on the best available scientific information:
 - (i) An estimate of the species and numbers of marine mammals likely to be taken by age, sex, and reproductive conditions; the type of incidental taking the requester expects (e.g., disruption of behavior patterns, disturbance by presence, sound, displacement, etc.); and the number of times such taking is likely to occur;
 - (ii) A description of the status, distribution, and seasonal distribution (if applicable) of the species or stock the activity is likely to affect;
 - (iii) The anticipated impact of the activity on the species or stocks;
 - (iv) The anticipated impact of the activity on the availability of the species or stocks for subsistence uses;
 - (e) The anticipated impact of the activity on the habitat of the marine mammal populations and the likelihood of restoration of the affected habitat;
 - (f) The anticipated impact of the loss or modification of the habitat on the marine mammal populations involved;
 - (g) Availability and feasibility (economic and technological) of equipment, methods, and manner of conducting the activity or other means the requester will use to effect the least practicable adverse impact on the affected species or stocks, their habitat, and on their availability for subsistence uses, paying particular attention to rookeries, mating grounds, and areas of similar significance (e.g., means to minimize or avoid harassment);
 - (h) For activities in Alaska, we encourage the applicant and those conducting the specified activity and the affected subsistence users to develop mutually agreeable mitigating measures that will meet the needs of subsistence users (e.g., this may include a plan of cooperation or information that identifies what measures the requester will take or has taken to minimize any adverse effects on the availability of marine mammals for subsistence uses);
 - (i) Suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species through an analysis of the level of taking or impacts, and suggested means of minimizing burdens by coordinating reporting requirements with other schemes that would be applicable to the people conducting the activity (e.g., monitoring plans may include a description of the survey techniques that the requester will use to determine the movement and activity of marine mammals near the activity site(s), including migration and other habitat uses, such as feeding); and
 - (j) The requester's suggested means of learning about, encouraging, and coordinating research opportunities, plans, and activities to reduce incidental take and to evaluate its effects.
- 2) When a field office receives a request, staff must review it to determine the adequacy and completeness of the information provided. If the request is incomplete, field office staff must notify the applicant within 30 days of receiving the initial request that information is lacking. The 120-day timeframe we describe below does not begin until we have received a complete request.

Note: If possible, contact the potential requester in advance to explain the process and provide guidance on the documentation required for consideration of an IHA.

- 3) If field office staff find that the request is adequate, they must prepare a draft proposed IHA *Federal Register* notice. To analyze the potential impacts of the proposed action, the notice must include, but is not limited to:
- (a) A complete description of the specified activities, as provided by the requester, for which the authorization would apply;
 - (b) The dates and duration of the activity;
 - (c) The specific geographical region where the activity will occur;
 - (d) Identification of the species or stock that may be incidentally taken;
 - (e) Potential impacts to the species or stock, subsistence harvest, and habitat;
 - (f) Permissible methods of taking by harassment because of the activity, and the terms and conditions to avoid or minimize harassment;
 - (g) Measures the Service determines are necessary to ensure no unmitigable adverse impact on the availability of the species or stock for subsistence use (where applicable); and
 - (h) Requirements pertaining to the monitoring and reporting of take by harassment.

In addition to the information above required for analyzing potential impacts, the *Federal Register* notice for the proposed IHA must also include:

- Estimated take by incidental harassment;
- Findings of negligible impact, small numbers, and impact on subsistence;
- Compliance with the Endangered Species Act (ESA);
- Compliance with the National Environmental Policy Act (NEPA);
- Compliance with government-to-government relations with Native American tribal governments; and
- The preliminary conclusion, i.e., proposal to issue an IHA.

Note: If a proposed activity may affect the availability of a species or stock for taking for subsistence uses, an independent peer review of any proposed monitoring plans or other research proposals must be conducted per section 101(a)(5)(D)(ii)(III) of the MMPA.

- 4) The field office is also responsible for ensuring that the ESA, if applicable, and NEPA compliance are being addressed. Staff must finalize any necessary analyses under these Acts before issuing a final IHA.

Note: If the marine mammal is listed under the ESA, intra-Service section 7 consultation on the potential issuance of an IHA is required. In addition, if a Federal agency authorizes, funds, or carries out the activity, that agency must initiate interagency consultation under section 7 of the ESA.

Note: If the requester provides the necessary NEPA documentation (i.e., an Environmental Assessment or Environmental Impact Statement), we may

consider adopting it, or we may have to prepare a separate NEPA document to comply.

- 5) The field office must give the draft proposed IHA *Federal Register* notice and associated documents (including a *Federal Register* Notice Cover Sheet and Information Memorandum for the Secretary) to the Regional Director's office for review and to obtain the Regional Solicitor's (SOL) surname.

Note: The MMPA requires us to publish the proposed IHA within 45 days of receiving a complete request. See Sample IHA Timeframe ([Exhibit 1](#)) for additional guidance.

- 6) The Regional office sends the draft proposed IHA and associated documents (in Microsoft Word) to the National Marine Mammal Coordinator (NMMC) and the Division of Policy, Performance, and Management Programs (PPM) Federal Register Coordinator in Headquarters (HQ) for review.

Note: PPM prefers to review the draft notice before SOL's input, while the NMMC would prefer to review it after SOL's input.

- 7) The NMMC and PPM will coordinate their review in HQ and provide any edits and comments to both the field and Regional offices for incorporation. After all edits and comments have been addressed, the Regional office gives the proposed IHA and associated documents to the Regional Director for approval and signature.

- 8) The finalized, signed documents (including the proposed IHA *Federal Register* notice, SOL surname, *Federal Register* Notice Cover Sheet, and Information Memorandum for the Secretary) should be uploaded to the Data Tracking System (DTS) in the FR (Federal Register) database and routed to both the NMMC (AES-DRR-BRSG) and PPM (ABHC-PPM) for "appropriate action" (#2).

Note: For activities in Alaska, the Regional office should also coordinate with the Senior Advisor to the Secretary on Alaska Affairs.

- 9) PPM coordinates processing of the IHA through the Director's office to the Department, and will notify the NMMC, field office, and Regional office when the Department's Chief of Staff clears the notice for transmittal to the Office of the Federal Register for publication.

- 10) The Regional office must send the following to the Office of the Federal Register:

- three original signed hard copies of the *Federal Register* notice,
- a disk that contains an electronic file (Word document) of the *Federal Register* notice, and
- a letter to certify that the disk contains a true copy of the original signed document (see 202 FW 7 for clearance procedures and templates).

Note: Be sure the signing official's name and title are typed below the signature line of the Federal Register document (on both the hard copy and the disk version). Also be sure to include at least four lines of notice text above the signature block on the final page of the notice, even if you have to do a page break. Be sure to write an identifying name on the disk and the cover jacket.

First & Last Name,
Regional Director, X Region

Date

- 11) We must make the proposed IHA available to the public for inspection and comment through publication in the *Federal Register*, newspapers of general circulation, and appropriate electronic media, and to all locally affected communities for a 30-day period.
- 12) At the end of the 30-day public comment period, the Regional office, with input from the field office, must determine within 45 days whether or not to issue a final IHA (for a period of no more than 1 year) based on:
 - (a) Information provided in the application;
 - (b) Information provided in comments received (if we receive substantive comments that we use to change the proposed IHA, it may be necessary to publish a new, revised proposed IHA in the *Federal Register* for public comment);
 - (c) A finding that the potential incidental take will result in no more than harassment of marine mammals; and
 - (d) A finding that the harassment in the specific geographic region during the period requested will (1) have no more than a negligible impact on the species or stock, and (2) will not have an unmitigable adverse impact on the availability of the species or stock for taking for subsistence uses, where applicable.

Note: Be sure that any comments you receive are addressed in the administrative record for the action.

Reminder: Under section 202(d) of the MMPA, we must respond to any recommendations the Marine Mammal Commission makes within 120 days of receiving them.

- 13) If the Regional office agrees that any potential harassment will have no more than a "negligible impact" on the species or stock and will have "no unmitigable adverse impact" on the availability of the species or stock for subsistence uses, the field office must provide a final IHA to the Regional office, which becomes effective when the Regional Director signs it. The final IHA must include, but is not limited to:
 - (a) The information in [number 3 above](#) and any changes based on public review;
 - (b) A statement to clarify that a person conducting the activity for which we have granted the authorization under the IHA is not subject to the penalties of the MMPA for taking by harassment that occurs in compliance with the authorization; and

(c) A statement that the Service must modify, suspend, or revoke an authorization if we find that the provisions of the IHA are not being met or if new information indicates the activity is resulting in greater harassment, is resulting in more than negligible impacts, or is having an unmitigable adverse impact on subsistence use.

14) The Regional office must send a copy of the final IHA and associated documents (e.g., NEPA EA or EIS and required ESA documents) to the NMMC.

ADDITIONAL NOTES:

Information Collection Authorization:

Information collection approval by the Office of Management and Budget (OMB) under the Paperwork Reduction Act (PRA) is required according to 5 CFR 1320.3(c) as follows:

"Collection of information means, except as provided in §1320.4, the obtaining, causing to be obtained, soliciting, or requiring the disclosure to an agency, third parties or the public of information by or for an agency by means of identical questions posed to, or identical reporting, recordkeeping, or disclosure requirements imposed on, ten or more persons, whether such collection of information is mandatory, voluntary, or required to obtain or retain a benefit. "Collection of information" includes any requirement or request for persons to obtain, maintain, retain, report, or publicly disclose information. As used in this Part, "collection of information" refers to the act of collecting or disclosing information, to the information to be collected or disclosed, to a plan and/or an instrument calling for the collection or disclosure of information, or any of these, as appropriate."

For this procedure for authorizing IHAs, if we anticipate 10 or more people may request authorization within any 12-month period, we have to go through the information collection authorization process.

OMB Review:

Because issuance of IHAs is not a rulemaking, OMB does not have to review them.

Timeframe:

Section 101(a)(5)(D) of the MMPA is an expedited (within 120 days) process for authorizing incidental take of a small number of marine mammals in a specified geographic region if there is no potential for serious injury or mortality, or the potential for serious injury or mortality can be negated through mitigation requirements. To comply with the 120-day requirement, we have up to 45 days from receipt of a complete request to publish the draft IHA for public comment. The public comment period is 30 days. We then have up to 45 days to prepare a final IHA. Regions should create an internal timeframe to meet the required 120-day review process timeline for the IHA (see *Sample IHA Timeframe* ([Exhibit 1](#)) for additional guidance).

Effective Date:

The effective date of the IHA is the date the Regional Director signs the authorization. An IHA cannot exceed 1 year. However, we can reissue an IHA upon request following the review and public comment process outlined previously in this document.

Notice of Issuance:

We are not required to publish a Notice of Issuance of the final IHA; however, we should maintain responses to comments in an administrative record for each IHA issued. In addition, in the interest of enhanced public relations, the Regional or field office may choose to provide notice and other relevant information via their Web site, other appropriate electronic media, or newspapers of general circulation.

Exhibit 1: Sample IHA Timeframe

120-Day Proposed Timeframe for IHA

45 days: Publish proposed IHA
 30 days: Public comment permit
 45 days: Issue final IHA

A request received on January 1 would be due May 5, i.e., 120 days from receipt, assuming the request is complete. A sample timeframe is provided below:

ACTION	TIMEFRAME (work days)	DATE REC'D	DATE COMPLETED	DAY
Complete proposal received	--	--	--	0
FO prepares & submits draft proposed IHA FR notice (and associated documents) to RO for review and to obtain SOL surname; and to NMMC & PPM for advance review	10 days (2 weeks)	01/06/2014	01/17/2014	12
RO coordinates review of draft proposed IHA FR with NMMC & obtains SOL surname ¹	4 days (< 1 week)	01/21/2014	01/24/2014	19
Proposed IHA FR signed by RD and uploaded to DTS	1 day	01/27/2014	01/28/2014	23
Routed through PPM and NMMC for processing	3 days	01/29/2014	01/31/2014	26
Reviewed & surnamed by DD	1 day	02/03/2014	02/04/2014	30
Reviewed & surnamed by AS/FWP	1 day	02/05/2014	02/06/2014	32
DOI clears information	2 days	02/07/2014	02/11/2014	37
RD submits to OFR	1 day	02/12/2014	02/13/2014	39
OFR publishes notice	3 days	02/14/2014	02/19/2014	45
Comment period	30 days	03/12/2014	03/21/2014	75
FO/RO prepares final IHA	20 days	03/24/2014	04/18/2014	103
RD signs final IHA	1 day	04/21/2014	04/22/2014	107
IHA effective dates	0 day	04/22/2014	04/22/2015	107

¹Note: For activities in Alaska, the Regional Office should also coordinate with the Senior Advisor to the Secretary on Alaska Affairs.

Acronym key:

AS/FWP - Assistant Secretary for Fish & Wildlife & Parks
 DD - Deputy Director, Fish & Wildlife Service
 DOI - Department of the Interior
 DTS - Data Tracking System
 FO - Field Office
 FR - Federal Register
 IHA - Incidental Harassment Authorization
 NMMC - National Marine Mammal Coordinator
 OFR - Office of the Federal Register
 PPM - Division of Policy, Performance, and Management Programs
 RD - Regional Director, Fish & Wildlife Service
 RO - Regional Office
 SOL - Solicitor