FINDING OF NO SIGNIFICANT IMPACT
FOR THE ISSUANCE OF AN INCIDENTAL HARASSMENT AUTHORIZATION TO THE WASHINGTON STATE DEPARTMENT OF TRANSPORTATION TO TAKE MARINE MAMMALS BY HARASSMENT INCIDENTAL TO ORCAS ISLAND AND FRIDAY HARBOR DOLPHIN REPLACEMENT PROJECT IN WASHINGTON STATE

NATIONAL MARINE FISHERIES SERVICE

BACKGROUND

On May 25, 2012, the Washington State Department of Transportation (WSDOT) submitted a request to the National Marine Fisheries Service (NMFS) requesting an incidental harassment authorization (IHA) for the possible harassment of small numbers of 11 marine mammal species incidental to construction associated with the replacement of dolphin structures at the Orcas Island and Friday Harbor ferry terminals in Washington State. On July 20, 2012, WSDOT submitted a revised IHA application with updated information.

In response to a receipt of the request from the WSDOT, NMFS proposes to issue an IHA that authorizes takes by level B harassment of marine mammals in the wild pursuant to section 101(a)(5)(D) of the Marine Mammal Protection Act of 1972, as amended (MMPA; 16 U.S.C. §§ 1631 *et seq.*), and the regulations governing the taking and importing of marine mammals (50 Code of Federal Regulations (CFR) Part 216). NMFS' IHA issuance criteria require that the taking of marine mammals authorized by an IHA will have a negligible impact on the species or stock(s), and, where relevant, will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses. In addition, the IHA must set forth, where applicable, the permissible methods of taking, other means of effecting the least practicable adverse impact on the species or stock and its habitat, and requirements pertaining to the monitoring and reporting of such takings.

In accordance with the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. §§ 4321 *et seq.*), NMFS has prepared a Environmental Assessment (EA) titled, "*Issuance of an Incidental Harassment Authorization to the Washington State Department of Transportation to Take Marine Mammals by Harassment Incidental to Dolphin Replacement Project at Orcas Island and Friday Harbor Ferry Terminals, Washington,*" (hereinafter, the Orcas Island and Friday Harbor EA). NMFS proposes to issue the IHA with mitigation measures, as described in Alternative 2 of the Orcas Island and Friday Harbor EA.

ANALYSIS

National Oceanic and Atmospheric Administration Administrative Order (NAO) 216-6 contains criteria for determining the significance of the impacts of a proposed action. In addition, the Council on Environmental Quality (CEQ) regulations at 40 C.F.R. § 1508.27 state that the significance of an action should be analyzed both in terms of "context" and "intensity." Each criterion listed is relevant to making a finding of no significant impact and has been considered individually, as well as in combination with the others. The significance of this action is analyzed based on the NAO 216-6 criteria and CEQ's context and intensity criteria. These include:

1) **Can the proposed action reasonably be expected to cause substantial damage to the ocean and coastal habitats and/or essential fish habitat as defined under the Magnuson-Stevens Act and identified in Fishery Management Plans (FMP)?**

Response: The proposed action (i.e., issuing an IHA to WSDOT as described in Alternative 2 of the Orcas Island and Friday Harbor EA) cannot reasonably be expected to cause substantial damage to the ocean and coastal habitats and/or essential fish habitat (EFH). The footprint of the new steel dolphins will be more open, allowing fish movement between the piles. The new dolphins will have 20 piles, compared to the existing dolphins, which have 208 tightly clustered piles with no space between them. In addition, the projects will remove 334 tons of creosote-treated wood from the marine environment. Finally, the total mudline footprint of the existing dolphins is 256 ft^2. The total mudline footprint of the new dolphins will be 95 ft2, a reduction of 161 ft^2.

The dolphin replacement work at Orcas Island and Friday Harbor ferry terminals will result in temporary disturbance to fish species in the close vicinity of the pile driving site, but the elevated sound pressure levels (SPLs) are not expected to reach sufficient magnitude to cause injury to fish from of pile driving, due to that only vibratory pile driving will be conducted. In addition to behavioral disturbance on EFH species, elevated SPLs are also likely to lead to a localized decrease in the abundance of forage fish species for a short-term period (approximately 5 days at Orcas Island ferry terminal and 10 days at Friday Harbor ferry terminal). As primary prey species, forage fish constitute a significant feature of EFH for Pacific salmon, west coast ground fish, and some of the coastal pelagic species.

2) **Can the proposed action be expected to have a substantial impact on biodiversity and/or ecosystem function within the affected area (e.g., benthic productivity, predator-prey relationships, etc.)?**

Response: The proposed action cannot be expected to have a substantial impact on biodiversity and/or ecosystem functions in the vicinity of the proposed dolphin replacement projects at Orcas Island and Friday Harbor ferry terminals because NMFS does not expect the issuance of the IHA to WSDOT to significantly (1) affect the susceptibility of any of the animals found in the vicinity of the project area to predation, (2) alter dietary preferences or foraging behavior, (3) change distribution or abundance of predators or prey, or (4) disturb the behaviors of marine mammals.

The impacts of the action on marine mammals are only related to disturbance of marine mammals from vibratory pile removal and pile driving noise. The construction noise levels would be minimized by limiting pile driving and pile removal to vibratory hammer only. NMFS considers the disturbances from construction noise to be localized and short-term. NMFS expects that these acoustic disturbances would not result in substantial impact to marine mammals or to their role in the ecosystem.

3) **Can the proposed action reasonably be expected to have a substantial adverse impact on public health or safety?**

Response: The proposed action cannot reasonably be expected to have a substantial adverse impact on public health or safety because the authorized activity does not pose a risk to public health or human safety. The Orcas Island and Friday Harbor ferry terminal dolphin replacement project is port terminal construction work that is performed by construction crews in other project areas on a regular basis. All construction debris and demolishing materials will be shipped off site and will be disposed of properly.

4) **Can the proposed action reasonably be expected to adversely affect endangered or threatened species, their critical habitat, marine mammals, or other non-target species?**

Response: The proposed action cannot reasonably be expected to adversely affect endangered or threatened species, their critical habitat, marine mammals, or other non-target species because NMFS Northwest Regional Office has concluded that the issuance of an IHA is: (1) not likely to jeopardize the continued existence of threatened eastern District Population Segment (DPS) Steller sea lions (*Eumetopias jubatus*), Southern Resident killer whales, or humpback whales; and (2) not likely to adversely modify or destroy critical habitat, as the proposed Orcas Island and Friday Harbor ferry terminals dolphin replacement project sites are neither within nor nearby designated critical habitat for Steller sea lions or Southern Resident killer whales.

The proposed issuance of an IHA to WSDOT constitutes an agency action that authorizes an activity that may affect ESA-listed species and, therefore, is subject to section 7 of the ESA. As the effects of the activities on listed marine mammals and salmonids were analyzed during a formal consultation between the FHWA and NMFS, and as the underlying action has not changed from that considered in the consultation, the discussion of effects that are contained in the Biological Opinion and accompanying memo issued to the FHWA on February 13, 2012, pertains also to this action. Therefore, NMFS has determined that issuance of an IHA for this activity would not lead to any effects to listed marine mammal species beyond those that were considered in the consultation on FHWA's action.

5) **Are significant social or economic impacts interrelated with natural or physical environmental effects?**

Response: NMFS does not expect the issuance of an IHA to WSDOT to result in significant social or economic impacts interrelated with natural or physical environmental effects. Effects of the dolphin replacement work at the Orcas Island and Friday Harbor ferry terminals would be limited to the short-term harassment of the marine mammals authorized by the permit. Authorization of the proposed dolphin replacement activities could result in a low level of economic benefit to construction companies performing the work. However, such impacts would likely be negligible and on a regional or local level.

The activities authorized would not substantially impact use of the environment or use of natural or depletable resources, such as might be expected from large scale construction or resource extraction activities. Further, issuance of the IHA would not result in inequitable distributions of environmental burdens or access to environmental goods.

NMFS has determined that issuance of the IHA will not adversely affect low-income or minority populations. There will be no impact of the activity on the availability of the species or stocks of marine mammals for subsistence uses, as there are no subsistence uses that take place in the areas affected.

6) **Are the effects on the quality of the human environment likely to be highly controversial?**

Response: The effects of issuing an IHA to WSDOT as described in Alternative 2 of the Orcas Island and Friday Harbor EA on the quality of the human environment are not likely to be highly controversial because: (1) there is no substantial dispute regarding the size, nature, or effect of the proposed action; (2) there is no known scientific controversy over the potential impacts of the

proposed action; and (3) all comments received during the public comment period supported the issuance of the IHA.

To allow other agencies and the public the opportunity to review and comment on the actions, NMFS published a notice of receipt of the WSDOT application and proposed IHA in the *Federal Register* on February 8, 2013 (78 FR 9373). During the 30-day comment period, NMFS received comments from the Marine Mammal Commission (Commission) and Aquatic Research and Monitoring, a private company for whale watching and marine mammal monitoring. None of the comments is considered controversial and all will be addressed in the *Federal Register* notice for the issuance of the IHA.

7) **Can the proposed action reasonably be expected to result in substantial impacts to unique areas, such as historic or cultural resources, park land, prime farmlands, wetlands, wild and scenic rivers, essential fish habitat, or ecologically critical areas?**

Response: The proposed action cannot reasonably be expected to result in substantial impacts to unique areas, such as historic or cultural resources, park land, prime farmlands, wetlands, wild and scenic rivers, essential fish habitat, or ecologically critical areas because none of these are found in the project areas. Similarly, as described in the response to question 1 above, no substantial impacts to EFH, designated critical habitat (DCH) or ecologically critical areas are expected as the dolphin replacement activities would have a limited footprint for a short duration. The natural processes in the environment are expected to fully recover from any impacts resulting from the construction and demolishing activities within the short term.

8) **Are the effects on the human environment likely to be highly uncertain or involve unique or unknown risks?**

Response: The action of issuing an IHA to the WSDOT for the incidental take, by Level B harassment only, of small numbers of marine mammals is not expected to have significant effects on the human environment that would be unique or involve unknown risks because this type of construction work has been performed routinely.

While NMFS' judgments on impact thresholds for marine mammals in the vicinity of the project area are based on limited data, the risks are known and would involve the temporary, minimal harassment of marine mammals. No deaths or injuries to animals have been documented due to past coastal construction activities using vibratory hammer for pile removal or pile driving in general. The most common response to construction noise is for marine mammals to depart the construction area temporarily.

The construction activities associated with the Orcas Island and Friday Harbor ferry terminals dolphin replacement projects are well planned to minimize any impacts to the biological and physical environment of the areas by implementing mitigation and monitoring protocols which ensure the least practicable adverse impact on the affected species or stocks of marine mammals.

9) **Is the proposed action related to other actions with individually insignificant, but cumulatively significant impacts?**

Response: The proposed action is not related to other actions with individually insignificant, but cumulatively significant impacts because it is performed independently from other activities. While the stocks of marine mammals to which the animals in the vicinity of the ferry terminals dolphin replacement sites have the potential to be impacted by other human activities in inland waters in

Washington (i.e., shipping and boating activities development) described in the cumulative impacts analysis in the Orcas Island and Friday Harbor EA, these activities are generally separated both geographically and temporally from the proposed actions in the ferry terminals dolphin replacement sites and are not occurring simultaneously on the same individuals of the population within the action area.

The short-term stresses (separately and cumulatively when added to other stresses the marine mammals in the vicinity of ferry terminals construction sites face in the environment) resulting from the proposed Orcas Island and Friday Harbor dolphin replacement project would be expected to be minimal. Thus, NMFS concluded that the impacts of issuing an IHA to the WSDOT for the incidental take, by Level B harassment only, of small numbers of marine mammals are expected to be no more than minor and short-term.

10) Is the proposed action likely to adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or cause loss or destruction of significant scientific, cultural or historical resources?

Response: The issuance of an IHA is not expected to adversely affect districts, sites, highways, structures, or objects listed in or eligible for listing in the National Register of Historic Places or cause loss or destruction of significant scientific, cultural or historical resources either because such resources do not exist within the project area or are not expected to be adversely affected. In particular, the Orcas Island and Friday Harbor ferry terminals are not considered significant scientific, cultural or historical resources, nor are them listed in the National Register of Historic Places.

11) Can the proposed action reasonably be expected to result in the introduction or spread of a non-indigenous species?

Response: The issuance of an IHA cannot reasonably be expected to lead to the introduction or spread of any non-indigenous species into the environment because the activities associated with the proposed project are not likely to introduce or spread any non-indigenous species.

12) Is the proposed action likely to establish a precedent for future actions with significant effects or does it represent a decision in principle about a future consideration?

Response: The issuance of an IHA is not expected to set a precedent for future actions with significant effects nor represent a decision in principle regarding future considerations. The issuance of an IHA to take marine mammals incidental to in-water construction activities in the coastal environment is a routine process under the MMPA. To ensure compliance with statutory and regulatory standards, NMFS' actions under section 101(a)(5)(D) of the MMPA must be considered individually and be based on the best available information, which is continuously evolving. Issuance of an IHA to a specific individual or organization for a given activity does not guarantee or imply that NMFS will authorize others to conduct similar activities. Subsequent requests for incidental take authorizations would be evaluated upon their own merits relative to the criteria established in the MMPA, ESA, and NMFS implementing regulations on a case-by-case basis.

These two projects have no unique aspects that would suggest it would be a precedent for any future actions. For these reasons, the issuance of an IHA to the WSDOT to conduct the dolphin replacement project is not precedent setting.

13) Can the proposed action reasonably be expected to violate any Federal, State, or local law or requirements imposed for the protection of the environment?

Response: The issuance of an IHA would not violate any federal, state, or local laws for environmental protection. NMFS has fulfilled its section 7 responsibilities under the ESA (see response to Question 4). The WSDOT has fulfilled its responsibilities under MMPA for this action and the IHA currently contains language stating that the applicant is required to obtain any state and local permits necessary to carry out the action which would remain in effect upon issuance of the proposed amendment.

14) Can the proposed action reasonably be expected to result in cumulative adverse effects that could have a substantial effect on the target species or non-target species?

Response: The issuance of an IHA is not expected to result in any significant cumulative adverse effects that could have a substantial effect on target or non-target species because the minor and short-term stresses (separately and cumulatively when added to other stresses experienced by the marine mammals in the vicinity of the ferry terminals construction sites) resulting from the ferry terminals dolphin replacement project would be expected to be minimal.

DETERMINATION

In view of the information presented in this document and the analysis contained in the supporting Final Environmental Assessment titled, "*Issuance of an Incidental Harassment Authorization to the Washington State Department of Transportation to Take Marine Mammals by Harassment Incidental to Dolphin Replacement Project at Orcas Island and Friday Harbor Ferry Terminals, Washington,*" prepared by NMFS, it is hereby determined that the issuance of an IHA for the take, by harassment, of small numbers of marine mammals incidental to the WSDOT's Orcas Island and Friday Harbor ferry terminal dolphin replacement project in Washington State, will not significantly impact the quality of the human environment, as described in this document and in the Orcas Island and Friday Harbor EA.

In addition, all beneficial and adverse impacts of the action have been addressed to reach the conclusion of no significant impacts. Accordingly, preparation of an Environmental Impact Statement for this action is not necessary. The EA, thereby, provides a supporting analysis for this FONSI.

APR 16 2013

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Date