

EFFECTIVE DATE NOTE: At 82 FR 10306, Feb. 10, 2017, subpart X was added, effective May 1, 2017, through Apr. 30, 2022.

§ 217.230 Specified activity and specified geographical region.

(a) Regulations in this subpart apply only to the U.S. Army Corps of Engineers (Corps) and those persons it authorizes to conduct activities on its behalf for the taking of marine mammals that occurs in the area outlined in paragraph (b) of this section and that occurs incidental to the jetty rehabilitation program.

(b) The taking of marine mammals by the Corps may be authorized in a Letter of Authorization (LOA) only if it occurs within the nearshore marine environment at the Mouth of the Columbia River in Oregon and Washington.

§ 217.231 Effective dates.

Regulations in this subpart are effective May 1, 2017 through April 30, 2022.

§ 217.232 Permissible methods of taking.

Under LOAs issued pursuant to § 216.106 of this chapter and § 217.236, the Holder of the LOA (hereinafter “Corps”) may incidentally, but not intentionally, take marine mammals within the area described in § 217.230(b), provided the activity is in compliance with all terms, conditions, and requirements of the regulations in this subpart and the appropriate LOA.

§ 217.233 Prohibitions.

(a) Notwithstanding takings contemplated in § 217.230 and authorized by an LOA issued under § 216.106 of this chapter and § 217.236, no person in connection with the activities described in § 217.230 may:

- (1) Take any marine mammal not specified in § 217.236;
- (2) Take any marine mammal specified in § 217.236(a) other than by incidental Level B harassment;
- (3) Take a marine mammal specified in § 217.236 if the National Marine Fisheries Service (NMFS) determines such taking results in more than a negligible impact on the species or stocks of such marine mammal;

(4) Take a marine mammal specified in § 217.236 if NMFS determines such taking results in an unmitigable adverse impact on the species or stock of such marine mammal for taking for subsistence uses; or

(5) Violate, or fail to comply with, the terms, conditions, and requirements of this subpart or an LOA issued under § 216.106 of this chapter and § 217.236.

(b) [Reserved]

§ 217.234 Mitigation requirements.

(a) When conducting the activities identified in § 217.130(a), the mitigation measures contained in any LOA issued under § 216.106 of this chapter and § 217.236 must be implemented. These mitigation measures include, but are not limited to:

(1) General conditions:

(i) The Corps shall conduct briefings as necessary between vessel crews, the marine mammal monitoring team, and other relevant personnel prior to the start of all pile driving and removal activity, and when new personnel join the work, in order to explain responsibilities, communication procedures, marine mammal monitoring protocol, and operational procedures;

(ii) Each Marine Mammal Observer (MMO) will maintain a copy of the LOA at their respective monitoring location, as well as a copy in the main construction office;

(iii) Pile activities are limited to the use of a vibratory hammer. Impact hammers are prohibited;

(iv) Pile installation/maintenance/removal activities are limited to the time frame starting May 1 and ending September 30 each season; and

(v) The Corps must notify NMFS' West Coast Regional Office (562-980-3232), at least 24-hours prior to start of activities impacting marine mammals.

(2) [Reserved]

(b) Establishment of Level B harassment zone:

(1) The Corps shall establish Level B behavioral harassment Zone of Influence (ZOI) where received underwater sound pressure levels (SPLs) are higher than 120 dB (rms) re 1 μ Pa for non-pulse sources (*i.e.*, vibratory hammer). The ZOI delineates where Level B harassment would occur; and

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(2) For vibratory driving, the level B harassment area is comprised of a radius between the shutdown zone for a specified species and 7.35 km from driving operations.

(c) Establishment of shutdown zone:

(1) Under LOAs issued pursuant to §216.106 of this chapter and §217.236, the Corps shall establish shutdown zones that are in compliance with all terms, conditions, and requirements of the regulations in this subpart and the appropriate LOA;

(2) For in-water heavy machinery work other than pile driving (using, *e.g.*, standard barges, tug boats, barge-mounted excavators, or clamshell equipment used to place or remove material), operations shall cease if a marine mammal comes within 20 m and vessels shall reduce speed to the minimum level required to maintain steerage and safe working conditions;

(3) If a marine mammal approaches or enters the shutdown zone during the course of vibratory pile driving operations, the activity will be halted and delayed until the animal has voluntarily left and been visually confirmed beyond the shutdown zone or 15 minutes have passed with the animal being resighted;

(4) If a marine mammal is seen above water within or approaching a shutdown zone then dives below, the contractor would wait 15 minutes. If no marine mammals are seen by the observer in that time it will be assumed that the animal has moved beyond the exclusion zone;

(5) If the shutdown zone is obscured by fog or poor lighting conditions, pile driving shall not be initiated until the entire shutdown zone is visible;

(6) Disturbance zones shall be established as described in paragraph (b) of this section, and shall encompass the Level B harassment zones established by LOAs issued pursuant to §216.106 of this chapter and §217.236 provided the activity is in compliance with all terms, conditions, and requirements of the regulations in this subpart and the appropriate LOA. These zones shall be monitored to maximum line-of-sight distance from established vessel- and shore-based monitoring locations. If marine mammals other than those listed in §216.106 and §217.236 are observed

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within the disturbance zone, the observation shall be recorded and communicated as necessary to other MMOs responsible for implementing shutdown/power down requirements and any behaviors documented;

(7) Between May 1 and July 1, the observation of any killer whales within the ZOI shall result in immediate shutdown all of pile installation, removal, or maintenance activities. Pile driving shall not resume until all killer whales have moved outside of the ZOI; and

(8) After July 1, no shutdown is required for Level B killer whale take, but animals must be recorded as Level B take in the monitoring forms described below.

(d) If the allowable number of takes for any marine mammal species in §216.106 of this chapter and §217.236 is exceeded, or if any marine mammal species not listed in §216.236 is exposed to SPLs greater than or equal to 120 dB re 1 μ Pa (rms), the Corps shall immediately shutdown activities involving the use of active sound sources (*e.g.*, vibratory pile driving equipment), record the observation, and notify NMFS Office of Protected Resources.

§217.235 Requirements for monitoring and reporting.

(a) *Monitoring.* (1) Qualified Marine Mammal Observers (MMOs) shall be used for both shore and vessel-based monitoring;

(2) All MMOs must be approved by NMFS;

(3) A qualified MMO is a third-party trained biologist with the following minimum qualifications:

(i) Visual acuity in both eyes (correction is permissible) sufficient to discern moving targets at the water's surface with ability to estimate target size and distance. Use of binoculars or spotting scope may be necessary to correctly identify the target;

(ii) Advanced education in biological science, wildlife management, mammalogy or related fields (Bachelor's degree or higher is preferred);

(iii) Experience and ability to conduct field observations and collect data according to assigned protocols (this may include academic experience);