

§217.235

(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);

(iv) Experience or training in the field identification of marine mammals (cetaceans and pinnipeds);

(v) Sufficient training, orientation or experience with vessel operation and pile driving operations to provide for personal safety during observations;

(vi) Writing skills sufficient to prepare a report of observations; and

(vii) 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 needed.

(4) MMOs must be equipped with the following:

(i) Binoculars (10x42 or similar), laser rangefinder, GPS, big eye binoculars and/or spotting scope 20-60 zoom or equivalent; and

(ii) Camera and video capable of recording any necessary take information, including data required in the event of an unauthorized take; and

(5) MMOs shall conduct monitoring as follows:

(i) During all pile driving and removal activities;

(ii) Only during daylight hours from sunrise to sunset when it is possible to visually monitor mammals;

(iii) Scan the waters for 30 minutes before and during all pile driving. If any species for which take is not authorized are observed within the area of potential sound effects during or 30 minutes before pile driving, the MMO(s) will immediately notify the on-site supervisor or inspector, and require that pile driving either not initiate or temporarily cease until the animals have moved outside of the area of potential sound effects;

(iv) If weather or sea conditions restrict the observer's ability to observe, or become unsafe for the monitoring vessel(s) to operate, pile installation shall not begin or shall cease until conditions allow for monitoring to resume;

(v) Trained land-based observers will be placed at the best vantage points practicable. The observers' position(s) will either be from the top of jetty or adjacent barge at the location of the pile activities and from Cape Disappointment Visitors Center during work at North and South Jetty, and Clatsop Spit for work at Jetty A;

(vi) Vessel-based monitoring for marine mammals must be conducted for all pile-driving activities at the North Jetty and two South Jetty offloading facilities. Two vessels may be utilized as necessary to adequately monitor the offshore ensonified zone;

(vii) Any marine mammals listed in §217.236 entering into the Level B harassment zone will be recorded as take by the MMO and listed on the appropriate monitoring forms described below;

(viii) During pedestrian surveys, personnel will avoid as much as possible direct approach towards pinnipeds that are hauled out. If it is absolutely necessary to make movements towards pinnipeds, personnel will approach in a slow and steady manner to reduce the behavioral harassment to the animals as much as possible; and

(ix) Hydroacoustic monitoring shall be performed using methodology described in the November 2016 Addendum containing the Hydroacoustic Monitoring Plan.

(b) *Reporting.* (1) MMOs must use NMFS-approved monitoring forms and shall record the following information when a marine mammal is observed:

(i) Date and time that pile removal and/or installation begins and ends;

(ii) Construction activities occurring during each observation period;

(iii) Weather parameters (*e.g.*, percent cover, visibility);

(iv) Water conditions [*e.g.*, sea state, tidal state (incoming, outgoing, slack, low, and high)];

(v) Species, numbers, and, if possible, sex and age class of marine mammals;

(vi) Marine mammal behavior patterns observed, including bearing and direction of travel, and, if possible, the correlation to SPLs;

(vii) Distance from pile removal and/or installation activities to marine mammals and distance from the marine mammal to the observation point;

(viii) Locations of all marine mammal observations; and

(ix) Other human activity in the area.

(2) [Reserved]

(c) *Annual report.* (1) The Corps shall submit a draft annual report to NMFS Office of Protected Resources covering a given calendar year within 90 days of

the last day of pile driving operations. The annual report shall include summaries of the information described in paragraph (b)(1) of this section.

(2) The Corps shall submit a final annual report to the Office of Protected Resources, NMFS, within 30 days after receiving comments from NMFS on the draft report.

(d) *Notification of dead or injured marine mammals.* (1) In the unanticipated event that the specified activity clearly causes the take of a marine mammal in a manner prohibited by this Authorization, such as an injury, serious injury, or mortality, The Corps shall immediately cease the specified activities and report the incident to the Office of Protected Resources, NMFS, and the West Coast Regional Stranding Coordinator, NMFS.

(i) The report must include the following information:

(A) Time, date, and location (latitude/longitude) of the incident;

(B) Description of the incident;

(C) Environmental conditions (*e.g.*, wind speed and direction, Beaufort sea state, cloud cover, and visibility);

(D) Description of marine mammal observations in the 24 hours preceding the incident;

(E) Species identification or description of the animal(s) involved;

(F) Status of all sound source use in the 24 hours preceding the incident;

(G) Fate of the animal(s); and

(H) Photographs or video footage of the animal(s). Activities shall not resume until NMFS is able to review the circumstances of the prohibited take. NMFS shall work with the Corps to determine what measures are necessary to minimize the likelihood of further prohibited take and ensure MMPA compliance. The Corps may not resume their activities until notified by NMFS.

(ii) In the event that the Corps discovers an injured or dead marine mammal, and the lead MMO determines that the cause of the injury or death is unknown and the death is relatively recent (*e.g.*, in less than a moderate state of decomposition), the Corps shall immediately report the incident to the Office of Protected Resources, NMFS, and the West Coast Regional Stranding Coordinator, NMFS. The report must

include the same information identified in this paragraph (d). If the observed marine mammal is dead, activities may continue while NMFS reviews the circumstances of the incident. If the observed marine mammal is injured, measures described in this paragraph (d) must be implemented. NMFS will work with the Corps to determine whether additional mitigation measures or modifications to the activities are appropriate.

(iii) In the event that the Corps discovers an injured or dead marine mammal, and the lead MMO determines that the injury or death is not associated with or related to the activities authorized in the LOA (*e.g.*, previously wounded animal, carcass with moderate to advanced decomposition, scavenger damage), the Corps shall report the incident to the Office of Protected Resources, NMFS, and the West Coast Regional Stranding Coordinator, NMFS, within 24 hours of the discovery. The Corps shall provide photographs or video footage or other documentation of the stranded animal sighting to NMFS. If the observed marine mammal is dead, activities may continue while NMFS reviews the circumstances of the incident. If the observed marine mammal is injured, measures described in this paragraph (d) must be implemented. In this case, NMFS will notify the Corps when activities may resume.

§217.236 Letters of Authorization.

(a) To incidentally take marine mammals pursuant to these regulations, the Corps must apply for and obtain an LOA.

(b) An LOA, unless suspended or revoked, may be effective for a period of time not to exceed the expiration date of these regulations.

(c) If an LOA expires prior to the expiration date of these regulations, the Corps may apply for and obtain a renewal of the Letter of Authorization.

(d) In the event of projected changes to the activity or to mitigation and monitoring measures required by an LOA, the Corps must apply for and obtain a modification of the Letter of Authorization as described in §217.237.

(e) The LOA shall set forth: