



NEPA Marine Mammal Guidance

Introduction

Pursuant to 23 United States Code 327 and the implementing Memorandum of Understanding (MOU) executed on XX, the Maine Department of Transportation (MaineDOT) has assumed, and the Federal Highway Administration (FHWA) has assigned its responsibilities under the National Environmental Policy Act (NEPA) for highway projects and Local Agency Program (LAP). MaineDOT’s assumption includes all highway projects in Maine with FHWA federal funding or other FHWA federal action. This assumption of FHWA responsibilities or NEPA Assignment includes responsibility for environmental review, interagency consultation, and approval of NEPA actions. MaineDOT will be the Lead Federal Agency for MaineDOT-sponsored highway projects.

The following provides guidance for marine mammals and provides the process for identifying and determining the appropriate level of coordination that is required.

The U.S. Marine Mammal Protection Act (MMPA) (16 USC Chapter 1361-1423h) of 1972 protects populations of marine mammals, including all cetaceans (whales, dolphins, and porpoises), pinnipeds (seals and sea lions), sirenians (manatees and dugongs), sea otters, and polar bears within the waters of the United States. Protection of these species is shared by the National Marine Fisheries Service (NMFS) and the U.S. Fish and Wildlife Service (Service). The Service is responsible for issuing take permits when exceptions to the MMPA are applied.

In the MMPA, “take” means to harass, hunt, capture, or kill; or attempt to harass, hunt, capture, or kill. In 2012, the NMFS released a policy paper for distinguishing Serious from Non-Serious Injury of Marine Mammals. Maine Department of Marine Resources maintains a list of known harbor and gray seal haul-out locations. MaineDOT reviews coastal projects to evaluate the presence of marine mammals (e.g., seal species) habitat and utilizes observations during site visits and anecdotal observations incidentally reported during the public process.

MaineDOT Biologists are responsible for assessing, ensuring compliance, and consulting directly with NMFS under NEPA Assignment. Marine Mammal information is provided to and discussed with the Team Leader.

1.0 Marine Mammal Initial Project Question and Documentation

The following question is required to be answered by the MaineDOT Biologist:

1. Are Marine Mammals Present?

MaineDOT Biologist will work with the Maine Department of Marine Resources and NMFS to assess presence.

A No response concludes the marine mammal assessment. All actions will be processed and documented in MaineDOT’s ProjEx database and MaineDOT’s Environmental CPD e-file.

A Yes response to Question 1 indicates the project will require an assessment regarding incidental harassment of marine mammals as a result of project construction activities (go to 2.0).

2.0 Marine Mammal Coordination, Review, and Approval

The following question is required to be answered by a MaineDOT Biologist:



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2. Is a Marine Mammal Harassment Authorization required?

If MaineDOT construction activities cause harassment, then authorization is required. See chart below.

A No response concludes the marine mammal assessment. All actions will be processed and documented in MaineDOT’s ProjEx database and MaineDOT’s Environmental CPD e-file.

A Yes response to Question 2 indicates the project will require an Incidental Harassment Authorization (IHA) or Letter of Authorization (LOA) application.

Once it has been determined that the proposed project will harass marine mammals protected under the MMPA, the MaineDOT Biologist will conduct early coordination with the National Marine Fisheries Service (NMFS). The MaineDOT Biologist and Team Leader will work with the Project Manager to assess avoidance measures or alternatives to the project, potential permitting requirements, and mitigation for unavoidable impacts. The MaineDOT Biologist will prepare one of the following applications for incidental take:

- Incidental Harassment Authorization (IHA)
- Letter of Authorization (LOA)

If the Project has the potential to:	Then MaineDOT should:
Result in " harassment " only (i.e., injury or disturbance)	Apply for an IHA (effective up to 1 year)
Result in " harassment " only (i.e., injury or disturbance) AND is planned for multiple years	Apply for an LOA (effective up to 5 years)
Result in " serious injury " or mortality	Apply for an LOA (effective up to 5 years)

The documentation must contain enough detailed information to allow for a thorough assessment of the entire duration of the construction activity. Level A Harassment means any act of pursuit, torment, or annoyance that has the potential to injure a marine mammal or marine mammal stock in the wild. Level B Harassment means any act of pursuit, torment, or annoyance that 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 but which does not have the potential to injure a marine mammal or marine mammal stock in the wild. The MaineDOT Environmental Office utilizes previous project applications as guidance template documents.

The MaineDOT Biologist must plan for a 9-month application review and consultation process for IHAs and plan for an 18-month application review and consultation process for LOAs.

An IHA or LOA must be obtained from NMFS prior to the commencement of construction. All documentation will be placed in MaineDOT’s ProjEx database and MaineDOT’s Environmental CPD e-file.

3.0 Marine Mammal Compliance Process

Incidental Harassment Authorization is the primary potential impact on Marine Mammals in Transportation projects. The IHA expires after 1-year, to avoid duplicative and unnecessary document review, MaineDOT



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will develop a plan of action and document the plan in the CPD E-File. NEPA will be approved prior to obtaining an IHA, however, the IHA will be obtained prior to the project advertising.

All MMPA commitments are tracked in ProjEx.

4.0 Links

Marine Mammal Protection Act

<https://www.law.cornell.edu/uscode/text/16/chapter-31>

NOAA Fisheries-Marine Mammal Guidance

<http://www.nmfs.noaa.gov/pr/laws/mmpa/>

National Marine Fisheries Service Policy Directive PD 02-038

[Track-Changes Process for Distinguishing Serious from Non-Serious Injury \(noaa.gov\)](#)

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