

written statement as to the substance of a telephone interview, with regard to the merits of an application will be made of record in the application (e.g., the examiner will complete an Interview Summary form PTOL-413 for any interview where a matter of substance has been discussed during the interview). See MPEP § 713.04. Furthermore, any written communication received by the ombudsman regarding the merits of an application will be placed in the application file.

The ombudsman will request that the official send a message back to the ombudsman when the issue has been treated and the participant has been notified of the resolution. In order to gauge the effectiveness of the program, the ombudsman may contact the participant for feedback. It is intended that all issues be considered and treated within ten business days. The ombudsman in each organization will regularly monitor the database to ensure that issues are being treated in a timely manner. In particular, the ombudsman will inquire into instances where five business days have elapsed and there is no indication that the issue has been closed out or is actively in the process of being treated.

The USPTO will evaluate the success of the program by seeking feedback and comments from the participants. The satisfaction level of the participants will be monitored. If a participant is not satisfied with the program, the participant may contact TC 2400 Director, Valencia Martin-Wallace, who is overseeing the Patents Ombudsman Pilot Program. After the one-year period, the USPTO may extend the pilot program with appropriate modifications based on the feedback from the participants, the effectiveness of the pilot program and the availability of resources.

Dated: March 29, 2010.

**David J. Kappos,**

*Under Secretary of Commerce for Intellectual Property and Director of the United States Patent and Trademark Office.*

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

RIN 0648-XQ82

#### Small Takes of Marine Mammals Incidental to Specified Activities; Russian River Estuary Water Level Management Activities, California

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Notice; issuance of incidental harassment authorization.

**SUMMARY:** In accordance with the regulations implementing the Marine Mammal Protection Act (MMPA), notification is hereby given that NMFS has issued an Incidental Harassment Authorization (IHA) to the Sonoma County Water Agency (herein after "Agency") to take small numbers of marine mammals, by Level B harassment, incidental to Russian River Estuary (Estuary) water level management and monitoring activities at the mouth of the Russian River, Jenner, CA.

**DATES:** Effective from April 1, 2010, through March 31, 2011.

**ADDRESSES:** A copy of the IHA, application and Environmental Assessment (EA) prepared for this action are available by writing to Michael Payne, Chief, Permits, Conservation, and Education Division, Office of Protected Resources (OPR), National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910-3225, by telephoning the contact listed here (**FOR FURTHER INFORMATION CONTACT**) or online at: <http://www.nmfs.noaa.gov/pr/permits/incidental.htm>. Documents cited in this notice may be viewed, by appointment, during regular business hours, at the aforementioned address.

**FOR FURTHER INFORMATION CONTACT:** Jaclyn Daly, Office of Protected Resources, NMFS, (301) 713-2289.

#### SUPPLEMENTARY INFORMATION:

##### Background

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (Secretary) to allow, upon request, the incidental, but not intentional, taking of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) if certain findings are made and regulations are issued or, if the taking is limited to harassment, notice of a proposed authorization is provided to the public for review.

Authorization for incidental takings may be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for certain subsistence uses, and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such taking are set forth. NMFS has defined "negligible impact" in 50 CFR 216.103 as: "an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival."

Section 101(a)(5)(D) of the MMPA established an expedited process by which citizens of the United States can apply for an authorization to incidentally take small numbers of marine mammals by harassment. Section 101(a)(5)(D) establishes a 45-day time limit for NMFS review of an application followed by a 30-day public notice and comment period on any proposed authorizations for the incidental harassment of marine mammals. Within 45 days of the close of the comment period, NMFS must either issue or deny the authorization.

Except with respect to certain activities not pertinent here, the MMPA defines "harassment" as any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) 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 [Level B harassment].

##### Summary of Request

On September 22, 2009, NMFS received a complete application from the Agency requesting a one-year IHA to take, by Level B harassment, up to 2,861 harbor seals (*Phoca vitulina richardii*), 16 California sea lions (*Zalophus californianus*), and 11 northern elephant seals (*Mirounga angustirostris*) incidental to estuary water level management events and monitoring activities. The management events involve the use of heavy equipment (e.g., bulldozers, excavators) to either (1) excavate a relatively steep, narrow pilot channel directly through the barrier beach which naturally forms at the mouth of the Russian River (the Agency's current breaching method); or (2) excavate and maintain a stable, relatively low velocity lagoon outlet

channel diagonally across the barrier beach. In addition, physical and biological monitoring mandated by the Biological Opinion referenced below would be conducted within the action area to determine, among other things, water quality dynamics and impacts to harbor seals. The purpose of the water level management events is to reduce flooding risk to low-lying residential properties built along the estuary; however, the lagoon outlet channel is also intended to comply with Reasonable and Prudent Alternative (RPA) 2 prescribed NMFS' 2008 Biological Opinion (BiOp) on Water Supply, Flood Control Operations, and Channel Maintenance conducted by the U.S. Army Corps of Engineers, the Sonoma County Water Agency, and the Mendocino County Russian River Flood Control and Water Conservation Improvement District in the Russian River Watershed. The purpose of the RPA is to preserve beach sands and maintain productive rearing habitat for Pacific salmonids listed as threatened or endangered pursuant to statutes of the Endangered Species Act of 1973, as amended (ESA). All estuary water level management events require the use of heavy equipment (e.g., bulldozers, excavators) on Goat Rock State Beach, the location of a large harbor seal colony. The presence of crew and equipment will result in Level B (behavioral) harassment to the aforementioned species. Pinnipeds hauled out on the beach may become alert, move to another area of the beach or upriver, or flush into the water. Hence, an MMPA authorization is warranted.

#### Specified Activities

On November 12, 2009, NMFS proposed issuance of an IHA to the Agency in the **Federal Register** (74 FR 58248) for the take of marine mammals incidental to Estuary water level management and monitoring activities. A detailed description of the specified activities can be found in that notice, the IHA application, and NMFS' EA. However, since that notice, the Agency has altered its lagoon outlet channel design configuration which will require less consecutive days of work. A summary of the description of each current method (i.e., breaching or lagoon outlet channel creation and maintenance) is provided here.

When ocean waves build up a barrier beach across the river's mouth, the Russian River estuary forms a lagoon that is hydraulically isolated from the marine environment, except for occasional wave overwash. Freshwater inflow from upstream and rain causes

this lagoon to slowly gain in volume and depth. Currently, when water levels rise in this lagoon to a point which threatens flooding (4.5 - 7 ft ), the Agency will mechanically cut a deep, narrow pilot channel through the barrier beach, usually down the middle of the beach. This process, referred to as "breaching," will cause the lagoon to reconnect to the ocean resulting in a tidal system with a nearly marine salinity of 28 parts per thousand as far upstream as the mouth of Sheephouse Creek. This practice also causes the estuary to become very shallow, subject to water quality dynamics that are neither natural nor optimal for the survival of large numbers of small, juvenile ESA-listed salmonids, and results in 10–20 thousand cubic inches of sand to be blown offshore. The size of the resulting pilot channel varies depending on the height of the sand bar to be breached, the tide level, and the elevation of the estuary at the time of breaching. Typically, breaching will result in a pilot channel approximately 100 ft long by 25 ft wide and 6 to 8 ft deep (Corps and Agency 2004, NMFS 2005).

During ESA Section 7 consultation, NMFS concluded that breaching water management practices, when conducted during salmonid smolting and rearing times, was jeopardizing the continued existence of the threatened Central California Coast (CCC) steelhead (*Oncorhynchus mykiss*) Distinct Population Segment (DPS) and adversely modifying critical habitat for CCC steelhead, endangered California Coast coho salmon (*O. kisutch*), and threatened California Coast Chinook salmon (*O. tshawytscha*). As such, NMFS developed and included an RPA in the aforementioned BiOp requiring the Agency to conserve beach sands and maintain a more viable productive rearing habitat (i.e., deeper, freshwater) for Pacific ESA-listed salmonids. To comply with this RPA, the Agency originally proposed creating a shallow, wide outlet channel, which could require up to four days of heavy machinery work to construct. However, in coordination with NMFS, the Agency has re-evaluated the engineering design of this channel and has developed a configuration which will be more similar to current breaching methods; this design will require no more than two consecutive work days and little maintenance. NMFS has included appropriate mitigation measures in the IHA limiting the number of consecutive work days and allowing for adequate seal recovery periods while still controlling flooding and maintaining

vital fish rearing habitat (see Mitigation section below).

The Agency will also conduct physical and biological monitoring to measure changes in the bar and channel elevation, lengths, and widths, as well as flow velocities and observations of the bed structure (to identify bed forms and depth-dependent grain size distribution indicative of armoring) in the channel. The Agency is required by NMFS' 2008 BiOp and other state and federal permits to collect biological, water quality, and physical habitat data in conjunction with estuary management. Fisheries seining and trapping, water quality monitoring, invertebrate/ sediment sampling, and physical habitat measurements require the use of boats and nets in the Estuary. Boating and other RPA-directed monitoring activities occur in the vicinity of river haul outs. Table 2 in the Agency's application describes in detail the monitoring tasks associated with Russian River estuary management plan.

#### Marine Mammals Affected by the Activity

Marine mammals present within the action area will be disturbed by Agency personnel and equipment on the beach during estuary water level management activities. Historic visual monitoring of harbor seals at the Jenner haulout has been conducted by local residents since 1985, the Agency during breaching events from 1996–2000, and more recently by Seal Watch (a monitoring program formed by volunteers of the Stewards of the Coast and Redwoods). Therefore, extensive data sets of pinniped abundance are available. A complete description of marine mammals affected by the proposed action, including monitoring data summaries, may be found in the proposed IHA **Federal Register** notice (74 FR 58248). In summary, harbor seals are the most abundant marine mammal found at the mouth of the Russian River and use the haulout for resting, pupping, and molting. Pupping season is March 15 - June 30. California sea lions and northern elephant seals are occasionally present and therefore also have the potential to be harassed from water level management and monitoring activities.

#### Potential Effects of Specified Activities on Marine Mammals

In addition to Seal Watch and local resident seal census data collection, the Agency conducted extensive monitoring during breaching activities from 1996–2000. In all five years of monitoring, no stampedes were recorded; however, most seals will flush off the beach in

response to approaching personnel. Agency crew walk the beach slowly ahead of heavy machinery to avoid major startle responses. The number of seals hauled out on the barrier beach was generally low when it was closed and then quickly increased once the barrier beach was artificially breached (Merritt Smith Consulting, 1997, 1998, 1999, 2000, Sonoma County Water Agency and Merritt Smith Consulting, 2001). Data from Seal Watch and local residents also indicate that seals are less abundant when the barrier beach is closed. Locals speculate that because people can access the beach more readily when the barrier beach is closed; they disturb the seals causing a decline in abundance. However, according to Heckel (1994), the loss of easy access to the haulout and ready escape to the sea when the river mouth is closed may account for the lower number of harbor seals seen at that time. In any case, there are less seals present when the barrier beach is closed, the time when the Agency will begin a water level management event.

Monitoring data indicate that seals react to Agency crew approaching the beach and their equipment in similar manners as they do to beachgoers, kayakers, and unusually loud local traffic from adjacent Hwy 1 (e.g., motorcycles). That is, seals will become alert, flush into the water, or move some distance down the beach from approaching crew and equipment. Seals generally return to the beach within one hour to one day of equipment leaving the beach. Since monitoring began in 1987, there are records of only two stampedes, both of which occurred prior to 1999 when equipment entered the beach before crews. Since 1999, and under the IHA, personnel will slowly walk the beach ahead of equipment, alleviating the risk of stampeding. Agency personnel conducting physical and biological would also abide by these procedures.

As stated previously, the Agency has altered its specified activity such that the configuration of the lagoon outlet channel is more similar to current breaching methods, resulting in less consecutive work days. NMFS expects the immediate impacts from presence of crew and heavy machinery on the beach to continue to be short-term changes in seal behavior (e.g., alertness, flushing). No long-term impacts to haulout use at the Jenner haulout as been identified from current breaching methods. An analysis of variance (ANOVA) test showed no significant difference in average monthly seal counts between 1993–2002 ( $p = 0.743$ ), despite the Agency breaching the barrier beach

since 1995. However, because machinery would not be on the beach for more than 2 consecutive days, impacts will be minimized.

NMFS has included additional mitigation measures for water level management activities during the pupping season in the final IHA. The measures prevent, to the maximum extent possible, avoiding work if young pups are on the beach, reduce the consecutive number of days equipment may work during this time, and establish a “recovery period” between events (see Mitigation and Monitoring below). For these reasons and those explained in the response to comments below, NMFS has determined that the Agency’s breaching activities, whatever the outlet design, will result in, at most, short-term Level B (behavioral) harassment.

#### Effects on Marine Mammal Habitat

In addition to natural breaching, the Agency has mechanically breached the barrier beach at the mouth of the Russian River since 1995. Prior to 1995, artificial breaching was done by the County of Sonoma Public Works Department and by local citizens. The Jenner haulout is currently the largest harbor seal haulout in Sonoma County despite year-round breaching events. The proposed outlet design during the lagoon management period will deviate from the current design (it will be wider and cut diagonally); however, this change in configuration is not expected to impact pinniped use of the haulout as an opening from the lagoon to the ocean will still be created.

#### Comments and Responses

A notice of receipt and request for public comment on the application and proposed authorization was published on November 12, 2009 (74 FR 58248). During the 30-day public comment period, six members of the public and the Marine Mammal Commission (Commission) provided comments.

*Comment 1:* Based on its review of the application and **Federal Register** notice, the Marine Mammal Commission (Commission) concurs with NMFS’ determination that the proposed activities will result, at most, in the temporary modification of pinniped behavior and will have a negligible impact on the stocks. The Commission’s concurrence is contingent upon implementation of the proposed mitigation and monitoring measures described in the proposed IHA notice.

*Response:* The IHA contains all mitigation and monitoring measures identified in the proposed IHA notice and additional mitigation as described

in this notice to further ensure impact to pinnipeds is at the lowest level practical.

*Comment 2:* The Agency provided four comments clarifying text in the **Federal Register** notice pertaining to: (1) to which organization seal monitoring volunteers belong; (2) a correction on CC Chinook salmon and their critical habitat not being part of the NMFS BiOp jeopardy opinion; (3) information on who breached the barrier beach before the Agency was responsible for this activity; and (4) a single sentence structure correction.

*Response:* NMFS has noted the information provided in these comments; however, they do not provide any substantial input which will affect NMFS’ decision making process and therefore will not be discussed further.

*Comment 3:* Four members of public expressed concern with the overall health and general management activities of the entire Russian River ecosystem, including, but not limited to, presence and operation of dams upriver, wastewater issues, water diversion practices upriver, that the Russian River should no longer be considered a “naturally” flowing stream due to these and other man made influences, and the presence of a jetty which was constructed by the U.S. Army Corps of Engineers (Corps) nearly seven decades ago near the mouth of the river. Many comments received requested NFMS to consider impacts to the entire ecosystem from issuance of the IHA, not just marine mammals.

*Response:* An IHA solely authorizes harassment to marine mammals. The permit to actually conduct the activity is distributed by the Corps. For example, if no marine mammals will be harassed by the activity (e.g., no seals were on the beach), the Agency will be able to move forward with the activity and not be in violation of the MMPA. However, because seals are often on the beach, and therefore, there is potential for harassment, an IHA under the MMPA is warranted.

For purposes of issuing an IHA, NMFS must consider the applicant’s specified activities and how those activities impact affected marine mammal species and stocks. The activities specified by the Agency are limited to either breaching the barrier beach (i.e., the current practice of creating a deep, narrow cut in the sandbar resulting in a tidally influenced estuary) or creating a lagoon outlet channel (i.e., excavating a channel across the beach allowing the river to flow to the ocean yet minimizing tidal inflow). Both methods use heavy

equipment (e.g., bulldozer or excavator) to reduce flooding to low lying communities adjacent to the estuary in Jenner, CA; presence of crew and equipment on the beach has the potential to harass pinnipeds. In addition, the Agency will conduct biological and physical monitoring of the estuary which may also result in pinniped harassment. NMFS can not make determinations or regulate, through an IHA, any activities not identified in the application (e.g., upriver management activities) or those by persons other than the applicant (e.g., the Corps).

*Comment 4:* Public comments were received regarding the impact the specified activities will have on non-listed birds and other wildlife and how management activities of the Russian River ecosystem in general (e.g., dams, diversion practices) impair ESA-listed salmon survival. The public considered the specified estuary management activities to be detrimental to these species.

*Response:* The purpose of the IHA is to issue the Agency authorization to harass marine mammals provided that harassment has a negligible impact on the affected species or stock. The IHA process does not analyze impacts or regulate harassment to species other than marine mammals under NMFS' jurisdiction (e.g., ESA-listed salmon) or those species not under NMFS' jurisdiction (e.g., shorebirds). NMFS notes that the purpose of modifying the Agency's current breaching practice is to enhance and conserve ESA-listed salmonids.

*Comment 5:* One commenter implied that modifications to the beach from the Agency's lagoon outlet channel creation and maintenance activities will not be small departures from the existing beach and channel topography, as stated in the proposed IHA notice and Agency's application, and that to say so is, among other things, "undocumented and unsupported."

*Response:* Rather than creating an artificial tidal inlet through the barrier beach by ripping a deep cut through the center of the barrier beach, which happens during current breaching practices, the Agency will maintain river outflow to the sea by constructing a cut which does not allow the lagoon to become tidal; a result consistent with natural processes as observed and documented at unmanaged river mouth estuaries of the California Coast (NMFS 2008). As such, modifications to the barrier beach will indeed be small departures from the existing beach and channel topography at the time of closure.

*Comment 6:* One commenter provided factual information that the Jenner haulout is not only the largest in Sonoma County, as described in the proposed IHA notice and Agency's application, but also the largest north of Drakes Estero in Marin County and the Eel River in Mendocino County. She also included that local residents, Elaine Twohy and Joe Mortenson, Pt. Reyes National Seashore, and NMFS have conducted seal counts in the area. The commenter went on to note the roles of Seal Watch in monitoring the seals at the Jenner haulout.

*Response:* NMFS notes these comments. NMFS has been in contact with Ms. Twohy, Mr. Mortenson, and Seal Watch organizers prior to releasing the proposed IHA notice and consulted with them for data throughout the IHA process. The Agency's application and monitoring plan also notes the roles these people and organizations play in monitoring harbor seals and people at the Jenner haulout and summarizes data collected by the persons mentioned in the comment.

*Comment 7:* One commenter, a Seal Watch volunteer, argued that "stampedes are not as infrequent as stated. In fact they occur often." She justifies this comment with her personal account of watching "total flushing of the haulout due to the presence of people on the beach, kayakers, sail boats, and motor boats approaching too close" and that when Seal Watch is not present, people ignore posted signs warning not to approach too closely. The commenter suggests consulting with Elinor Twohy and her data "will no doubt likewise confirm cases of full abandonment of the haulout."

*Response:* The commenter inappropriately uses the terms "stampede," "flush," and "full abandonment" interchangeably. For example, all seals may flush into the water, resulting in full abandonment; however, that does not mean the seals stampeded (defined here as a sudden rush of a group of panic-stricken animals into the water which has the potential to result in injury). The commenter suggested consulting Ms. Twohy and her data; however, as described in the application and proposed **Federal Register** notice, the Agency and NMFS did indeed solicit data from Seal Watch and Ms. Twohy to determine if stampeding had occurred from the specified activities. No data sets included information on if a stampede or flush was evident. Data included only date, time, etc., environmental conditions, number of seals on the beach (no pups distinguished), number of people on the

beach, and which side of the spit seals were sighted. The Agency; however, did monitor for stampedes and flushing during its breaching events from 1996–2000. No stampedes were recorded. NMFS also consulted with Mr. Mortenson, another local resident who has collected information on seal abundance and behavior at the Jenner and surrounding haulouts since 1987. He indicated that stampedes do not occur in response to anthropogenic disturbance; however, total flushing of all seals on the beach may occur.

Under the IHA, the Agency crew will gradually alert seals to their presence by approaching the breaching site slowly and cautiously on foot ahead of heavy equipment. Crew will also walk the path to the breaching site ahead of the equipment should any seals be hauled out along the way. These mitigation measures have been voluntarily carried out by the Agency and, as shown in the Agency's 1996–2000 monitoring data, are effective at eliminating stampeding. The Agency will continue to monitor seal behavior, including if a stampede occurs, as defined above, and provide that information to NMFS in a report. Based on previous monitoring data and mitigation measures, NMFS does not anticipate stampeding will occur in response to the Agency's specified activities. Further, Level A harassment (injury), serious injury, or mortality is not authorized in the IHA.

*Comment 8:* One commenter argued that the statement in the proposed IHA notice such as "...although the Agency's operations may harass pinnipeds present on the beach, it is likely many have left due to the presence of people..." is "especially troubling...because it is impossible to unequivocally state that many seals will have left the beach due to the presence of people...and that abandonment/flushing does not happen on a daily basis." She justifies this argument with "When Seal Watch is present, flushing or stampedes from people walking on the beach are pretty much eliminated and at times when Seal Watch is not present (weekdays), people actually observe the posted warning signs, thus flushing of seals does not occur all the time."

*Response:* Comments 7 and 8 were supplied by the same member of the public. Therefore, she has supplied two contrary arguments: (1) stampeding/flushing occurs often because of people on the beach, especially when Seal Watch is not present; and (2) people behave appropriately when Seal Watch is not present which reduces flushing events. She also states that presence of Seal Watch volunteers, when present,

reduce flushing by controlling visitors which contradicts her first argument that people flush the seals off the beach "often."

Despite these contrary arguments, NMFS found that Seal Watch, the Agency, and other local residents who monitor seals at the Jenner haulout agree that the presence of people on the beach often cause seals to flush into the water and that fewer seals are present when the barrier beach is not breached. Therefore, it is not unreasonable to assume that some seals on the beach will be displaced by the public, not by the Agency, before a management event.

As described in the application, the numbers of seals potential taken by the specified activities was based the number of construction events and the average number of harbor seals hauled out prior to artificial breaching events. These counts were taken in the early morning hours, before many people came to the beach, by the Agency from 1996–2000. The approach to calculating take numbers assumed all seals will remain on the beach and did not mathematically account for any that may be flushed by people prior to an event. However, because seals are flushed by visitors on the beach, as described by the commenter, take numbers will likely be lower than those proposed as they will not be available for disturbance by the Agency. NMFS can not regulate beachgoers actions in this IHA; however, encourages Seal Watch and local residents to continue and enhance public education on responsible marine mammal viewing practices.

*Comment 9:* One commenter made available her complete record for the harbor seal site and documentation of disturbance/changes due to "natural (barrier) or man-made activities showing before and after photographs of the disturbance." She also stated that "the hefty influence of natural and man-made interference at the seal site (and rookery) cannot be overridden."

*Response:* The data to which the commenter refers demonstrate that when a barrier beach naturally forms at the mouth of the Russian River, seal abundance on the beach declines. However, after the Agency conducts its breaching activities, seal numbers rapidly increase. This trend has also been confirmed by the Agency who conducted monitoring from 1996–2000. Hence, this data clearly show the actions of the Agency are resulting in more seals hauling out on Goat Rock State Beach. Therefore, based on this data, NMFS has determined that the specified activities, as described in the application, will continue to provide a

resting, pupping, and molting site for harbor seals and potentially other pinniped species.

*Comment 10:* Numerous comments were received regarding the difference in length of time between current breaching practices (1 day) and lagoon outlet channel creation and maintenance (originally proposed as a maximum of 4 days) and its impact on seals. Specifically, one commenter was concerned that because lagoon creation and maintenance has yet to occur, and due to multiple day activity, "comparing the occasional artificial breaching activities, which to date for the most part occur on one day, to four solid days of machinery and personnel on the beach for hours digging the outlet channel is not reasonable, realistic, or an honest comparison. The impacts will in no way be similar." In general, the public was concerned that multiple days of heavy machinery on the beach during the pupping season may result in long-term abandonment of the seals from the Jenner haulout.

*Response:* NMFS disagrees that that impacts to seals from lagoon outlet channel creation and maintenance will in no way be similar to breaching events. As described in the Description of the Specified Activity section above, the source of disturbance from both breaching and lagoon outlet channel creation is the same: presence of crew and operation of heavy equipment such as bulldozers and excavators at or near the Jenner haulout. It is expected for all events, no matter the design of the cut, most seals will flush into the water due to presence of crew and equipment on the beach and return when the Agency has left the site. Some seals may move to other areas of the beach or upriver away from equipment. Seals return within minutes to one day once machinery leaves the beach, as they have done so for years; therefore there is no data to suggest seals will exhibit "long-term abandonment" of the haulout from future water level management events.

Since issuance of the proposed IHA, the Agency, in coordination with NMFS Habitat Conservation Office, has redesigned the outlet channel configuration such that the number of work days is reduced from four to two. In addition, the new design of the cut will likely maintain itself more than the Agency's originally proposed shallow cut, reducing the number of follow-up maintenance days.

NMFS has carefully considered the impact of consecutive work days during the pupping season (March 15 - June 30), as seals may be more sensitive to disturbance during this time. To

determine how many of these two-day events may be appropriate during the pupping season, NMFS referred to the Agency's historic breaching event record vs. seal census data. Since 1996, the Agency has conducted 1–6 events during the pupping season, annually, with five events conducted during May 2008 alone. NMFS received no public comments asserting that the level of breaching activities currently conducted result in long term disturbance to harbor seals, including pups, or in abandonment of the haulout. Such concern would contradict all available census data as seals are clearly continuing to use the haulout. To address potential concerns for disturbance associated with the duration of human activities included in the Agency's request, NMFS has included a mitigation measure into the IHA which limits the Agency to one 2–day water level management event per week during the pupping season. That is, the Agency must separate events, which may be up to 2 days each, by a one-week "recovery period" where no machinery is present on the beach. Given this measure, no more than 4 events may occur within any given month, a trend similar to previous breaching practices.

At the Jenner haulout, seals are continually subjected to anthropogenic disturbance other than that from the Agency (e.g., kayakers, beachgoers) and have not abandoned use of the haulout. These seals appear to demonstrate some degree of tolerance and habituation to anthropogenic disturbance, as described in Richardson et al. (1995). This lack of long-term demonstrable impact to haulout use is among the important factors in supporting NMFS' negligible impact determination.

*Comment 11:* Comments were received expressing concerns that the Jenner haulout is a harbor seal nursery and pupping beach (births have been observed here) and that the Agency's action of creating the lagoon outlet channel beginning May 15th could result in negative impacts on mom/pup relationships and pup mortality. For example, one commenter stated "Mother harbor seals are not adapted to defend offspring from land-based dangers and will flush into the water. Pups suddenly flushed off the beach by these activities at such a young and vulnerable time...is problematic and could result in higher mortality among the pups of the colony" and "disturbance by humans or other sources of harassment can disrupt feeding, reduce milk intake and subsequent weight gain by the pup and ultimately threaten the pup's chance of survival after weaning."

*Response:* The Agency has conducted one-day breaching events during the pupping season for years with five breaching events occurring in the month of March alone in 2008. Based on the best available monitoring data, although seals have been disturbed by equipment during previous breaching events, no measurable negative impact to seals, including pup mortality or abandonment, has been observed after breaching is complete. In fact, these data suggest seals are more abundant on the beach after the barrier beach is breached than when the barrier beach is closed. Because a lagoon outlet channel will also open the barrier beach, allowing water to flow from the Russian River into the ocean, NMFS does not expect that mothers and pups will not utilize the beach due to the configuration of the channel.

Regarding flushing, harbor seal pups are extremely precocious, swimming and diving immediately after birth and throughout the lactation period, unlike most other phocids which normally enter the sea only after weaning (Lawson and Renouff, 1985; Cottrell *et al.*, 2002; Burns *et al.*, 2005). NMFS recognizes the critical bonding time needed between a harbor seal mom and her pup to ensure pup survival and maximize pup health. Harbor seals pups are weaned from their mother within approximately 4 weeks; however, the most critical bonding time is immediately (minutes) after birth. Lawson and Renouf (1987) conducted an in-depth study to investigate harbor seal mother/pup bonds in response to natural and anthropogenic disturbance. In summary, they found that a mutual bond is developed within 5 minutes of birth and both the mother and pup play a role in maintaining contact with each other. The study showed a bilateral bond, both on land and in the water, and that mothers will often wait for or return to a pup if it did not follow her. Pups would follow or not move away from their mother as she approached. Most notably, mothers demonstrated overt attention to her pup while in the water and during times of disturbance on the nursery. Increased involvement by the mothers in keeping the pairs together during disturbances became obvious as they will wait for, or return to their young if the pups fell behind.

In addition to incidental harassment, harbor seal pups in California have been the subject of countless research studies resulting in direct, intentional harassment. Research activities often include capture and handling of very young pups and separating pups from their mothers for short periods of time. Scientists report

they have disturbed seals during capture, then leave the area within approximately an hour. Seals return to the haul-out site within minutes of the scientists leaving the beach (J. Harvey to M. DeAngelis, pers. comm., Jan. 12), further demonstrating harbor seal pup resilience to disturbance.

Harbor seal mother/pup pairs have a characteristic distribution in the Russian River. There is a continuum, with a gradual, rather than abrupt change in the relative mix of seal age classes along the estuary to the mouth of the river with mom and pups picking out coves upriver, especially north of Haystack Rock, and juveniles and adults being more abundant closer the river mouth (pers. comm., J. Mortenson to M. DeAngelis, December 16). One component of the Agency's monitoring plan is to assess seal numbers at other nearby haulouts to better understand the relationship between upriver haulouts and the Jenner haulout. Because mothers and pups tend to inhabit the upriver haulouts more so than near the mouth of the river, where machinery will work, many pups will not be disturbed by the Agency's action.

Chronic human disturbance may play a role in reduced fitness and survival for any marine or terrestrial animal. Other animals, such as the Pier 39 California sea lions, may be immune or so habituated to people, human presence has little to no noticeable effect on them. Although studies have shown the main factors influencing harbor seal pup birth weight and survival is maternal age and body mass with younger, thinner moms producing more vulnerable pups (Bowen 1993, Coltman, 1998), NMFS considered measures to limit the time machinery is working on the beach to limit repetitive disturbance. As stated above, NMFS has implemented additional mitigation measures which limit the consecutive days machinery may work on the beach (2 days) for an event and establishes a one-week recovery period between events. Further, if a young pup is on the beach where heavy machinery will be used or on the path used to access the breaching location, the event will be delayed until the pup has left the site or the latest day possible to prevent flooding of the low lying residential community while still achieving a lagoon outlet channel. Given that pups are precocious at birth, bonds between mothers and pups are known to form within minutes of birth and other characteristics of mom/pup bonding, and the quick reoccupation time of harbor seals after previous breaching events, NMFS has determined that these mitigation measures will be effective at

avoid disruption any mom/pup bonds. Follow-up seal monitoring at the haulout after event activity will provide documentation of seal reoccupation.

*Comment 12:* Two comments noted when a male elephant seal inhabited the Jenner haulout in 2006 and 2007, it "totally eliminated part of the Jenner colony annual cycle, the winter haulout, and then later the breeding haulout population when he lingered into breeding season." Comments linked impacts from the elephant seal to what will happen if "sustained harassment by earth moving machinery" were to occur. In summary, comments implied that potential impacts to the harbor seal colony should be interpreted from the results of what occurred during the elephant seal occupation and not from what occurs during one day breaching events.

*Response:* NMFS disagrees that impacts from multiple days of heavy machinery use on the beach will equate or be similar to those impacts caused by the occupation of the male northern elephant seal. The elephant seal in question was continually present at the Jenner haulout from December 26, 2005, to April 5, 2006, and again from the first week of January to the first week of May 2007. The elephant seal was aggressive and attempted to mate with harbor seals, pursuing them and killing some, including pups. Agency crew and machinery will disturb nearby animals on the beach; however, they do not present a direct threat as did the elephant seal. Seals and other marine mammals are known to link a stimulus with some degree of known negative consequence and increases responsiveness to that source. For example, seals and whales are known to avoid previously encountered vessels involved in subsistence hunts (Walker, 1949; Ash 1962; Terhune, 1985). Although heavy equipment will initially disturb animals, it is anticipated they will return to the haulout shortly after the Agency has left the beach, as is the trend from previous breaching activities. There is no evidence to suggest long-term abandonment of the haulout would occur from the specified activities.

The commenters are correct that the number of seals on the beach was reduced during the 2007 pupping season due to the presence of the elephant seal; however, seal counts were not reduced during the 2006 pupping season when the elephant seal was present. Moreover, in 2008 (post elephant seal), harbor seal counts were actually higher than counts in 2004 and 2005 (pre elephant seal). For example, Ms. Twohy's data show that during March of 2004 and 2005, the average

monthly seal count was 39 and 42, respectively. In 2006, when the elephant seal was present, the average March count was 75. In 2007, the March average dropped to 1 (no seals were sighted on any day except for one when 33 seals were counted). In 2008, the average March seal count was 135. Therefore, the elephant seal occupation demonstrates harbor seals did not react to the elephant seal in 2006 but left the haulout in 2007. More importantly, the data show evidence of the harbor seals' resilience to chronic sources of disturbance, as evidenced by the reoccupation of the haulout by seals in 2008.

NMFS expects any displacement of seals from the haulout will be limited to the time machinery is working on the beach. As described in the proposed IHA notice and the Agency's application and monitoring plan, seals tend to return to the haulout within one day of breaching activity, an event more closely related to the lagoon outlet channel creation and maintenance than the chronically present, aggressive northern elephant seal. No data is available from nearby coastal haulouts and those upstream to determine if those sites saw an increase in harbor seal abundance. However, due to the reoccupation of the haulout shortly after the northern elephant seal left, it is likely seals were using nearby haulouts. The Agency's monitoring program includes a component in which nearby haulouts will be included in monthly census. NMFS does not consider a redistribution of use from one haulout to another to indicate negative impacts to a population as long as behavior (e.g., social, pupping, molting), fitness, and survival are not affected.

*Comment 13:* One commenter was concerned about the noise from the machinery and the potential for masking impacts. Specifically, "The heavy equipment is to be put into play on 15 May, when the seals are still assembled for breeding, pupping, and nursing. Loud noise from the equipment may mask the call of harbor seal pups that keep them together with their mothers in the Russian River, if they stay. If driven to the sea without their habitual nursery area, maintaining contact between mother and young will depend on hearing the calls of pups over the sound of the surf. Underwater vibrations from the machinery may impact any mating stations of male harbor seals, who display acoustically underwater."

*Response:* First, the commenter is mistaken that the Agency is set to begin work on May 15. The Agency is permitted by the Corps to conduct breaching activities year-round as the

potential for flooding to the low-lying residential community built along the estuary is ever present. In fact, the majority of past breaching events occurred in winter during times of large storms and wave action. Under the IHA, the Agency is also authorized to harass pinnipeds year-round. Census data do not suggest that years of employing heavy equipment on the beach have had a long-term impact on seals at the Jenner haulout. Second, noise from machinery on the beach is not expected to mask communication efforts as harbor seals will likely flush into the water or move down the beach, reducing in-air noise exposure.

NMFS recognizes that males produce underwater vocalizations as a function of communicating social status and fitness, maintaining underwater territories, or as a direct advertisement to females (Nicholson, 1997). Mothers and pups also call to each other. Sound levels in water from land based sources can be elevated by noise entering through the air-water interface or by vibration. However, noise and vibrations from the machinery on the beach are not expected to interfere with underwater communication. NMFS does not have any data available on underwater noise from bulldozers and excavators working on a beach; however, does have information on in-water noise levels from impact pile driving on land adjacent to the water's edge; pile driving has a much higher sound source level than bulldozing. During the Russian River Geyserville emergency bridge repair project, 24-inch diameter steel piles were driven on land adjacent to water. Sound levels were measured 35 m and 70 m from shore and resulted in noise levels approximately 170 and 160dB, respectively. Noise levels in the water off the Jenner haulout are expected to be much lower than these levels and possibly undetectable because (1) heavy equipment will not work directly adjacent to the water's edge; (2) source levels will be less than that of impact pile driving; (3) the surf break presents a natural source of noise, elevating ambient sound levels in water than upriver; and (4) many seals will remain beyond the surf break except when coming ashore; therefore, any social behaviors will occur beyond this distance, further preventing seals from being exposed to any noise which could interfere with these behaviors. For these reasons, NMFS does not expect noise or vibration from equipment to interfere with underwater seal communication.

*Comment 14:* One commenter reiterated a sentence in the **Federal Register** notice which explains that the

Agency's effort to minimize the amount and frequency of mechanical intervention reduces disturbance to seals, other wildlife, and the public. She protests this statement by saying "no clustering of monitoring activities by boat is proposed as a mitigation measure."

*Response:* Vessel based monitoring is not related to how frequent machinery operates on the beach. Further, monitoring is not a mitigation measure, as implied by the commenter. Monitoring is conducted to determine take and, if appropriate, implement mitigation (e.g., shut down). NMFS is not requiring vessel-based monitoring because it will not provide information beyond that able to be collected from land. Observers on land are fully capable of monitoring seals on the beach, perhaps more effectively than by boat. More importantly, vessel presence and movement will contribute a noise source in water, potentially resulting in additional harassment of animals at sea.

*Comment 15:* In general, the public was concerned locals and visitors will see machinery at work on the beach instead of nature.

*Response:* NMFS acknowledges that seals may become alert or flush off the beach in response to Agency personnel and heavy equipment when they are on the beach. However, as demonstrated from previous events, seals will return within hours to one day of machinery leaving the beach. NMFS' responsibility under section 101(a)(5)(D) of the MMPA is to ensure that activities involving incidental harassment to marine mammals are not having more than a negligible impact to that species or stock. NMFS has thoroughly analyzed impacts from the specified activities and taken full consideration of comments received during the public comment period. As such, NMFS has implemented additional mitigation to ensure the Agency's activities will effect the least practical adverse impact to the affected species.

*Comment 15:* A comment was received on behalf of the Russian River Watershed Protection Committee regarding the impact of closing the mouth of the river permanently and creating the lagoon in terms of water quality/pollution and its impact on the seals. The comment stated that there are signs of Ludwigia and other nutrient pollutants in the river and "We wonder how toxicity might accumulate and impact the seals if the Estuary is a full time sink for everything happening upstream. We are very concerned about endocrine disruptors in particular and will like to request studies on those

when the Estuary is permanently closed.”

*Response:* The lagoon will not be a “full time sink” as suggested by the commenter, but will maintain a low-velocity flow into the ocean during the lagoon management period or become completely tidal after an event outside of this period. “Permanent closure” or the creation of “permanently closed conditions” is not part of the specified activities. In fact, the primary purpose of the modification to the Agency’s current breaching practice is to re-establish and maintain continuous river flow to the ocean during fish rearing times. Therefore, a build up of pollutants and any disruption such pollutants may cause to a seal’s endocrine system are not anticipated. Further, the RPA in NMFS’ BiOp requires constant and extensive monitoring of water quality conditions throughout the estuary during the lagoon management period.

*Comment 16:* One commenter argued that there “is no scientific evidence/ proof in the [NMFS’] Biological Opinion that the proposed activities are in fact essential to conserving and recovering endangered salmonid species” and implied that to undertake an activity in an attempt to save fish at the expense of eliminating the harbor seal haulout is not acceptable.

*Response:* For the purpose of issuing an IHA, NMFS must consider the activities as they are proposed. Here, this includes the Agency’s method of implementing an RPA in NMFS’ BiOp in order to protect ESA-listed salmonids from risk of extinction and avoid adverse impact to their critical habitat. For reasons discussed throughout this document, NMFS has found that, due to the implementation of the mitigation measures described herein, the Agency’s estuary management activities on the beach will result in a negligible impact to pinnipeds disturbed by estuary water level management events. Hence, issuance of the IHA is appropriate.

### Mitigation Measures

In order to issue an IHA under Section 101(a)(5)(D) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to such activity, and other means of effecting the least practicable adverse impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stock for taking for certain subsistence uses. The latter does not apply here as no subsistence hunting takes place in California. The following summarizes mitigation and

monitoring measures set forth in the IHA.

#### *Pupping Season (March 15 - June 30)*

The following mitigation measures apply only during the pupping season (March 15 - June 30). Due to the precocious nature of pups at birth, formation of harbor seal mother/pup bonds immediately after birth, and resilience to direct disturbance (Lawson and Renouf, 1987; J. Harvey, pers. comm.), NMFS has determined that by one-week old, pups temporarily disturbed from Agency activities will not incur fitness or survival consequences. As in any IHA, taking a marine mammal in a manner not authorized is prohibited and may result in the modification, suspension or revocation of the authorization.

(1) If a pup less than one week old is on the beach where heavy machinery will be used or on the path used to access the work location, the breaching event will be delayed until the pup has left the site or the latest day possible to prevent flooding while still maintaining an outlet channel. Pups less than one week old should be characterized by being up to 15kg, thin for their body length, or an umbilicus or natal pelage is present.

(2) A water level management event may not occur for more than two consecutive days unless flooding threats can not be controlled.

(3) The Agency must maintain a one week (7 day) “no work” period between water level management events (unless flooding is a threat to the low-lying residential community) to allow for adequate disturbance recovery period. During the “no-work” period, equipment must be removed from the beach.

(4) If a marine mammal observer sights any pup that may be considered abandoned, the Agency will ensure that the NMFS stranding response network is called immediately. The Agency will also ensure that observers do not approach or move the pup.

(5) Physical and biological monitoring of the estuary shall not be conducted if a pup less than one week old is present at the monitoring site or on a path to the site.

#### *Year-round*

The following mitigation measures apply to all breaching events, no matter the time of year.

(6) Agency crews shall slowly and cautiously approach the haulout ahead of the heavy equipment to minimize the potential for flushes to result in a stampede.

(7) Agency staff shall avoid walking or driving equipment through the seal haulout;

(8) Crews on foot will take caution to approach the haulout slowly and to make an effort to be seen by the seals from a distance, if possible, rather than appearing suddenly at the top of the barrier beach; and

(9) Equipment will be driven slowly on the beach and care will be taken to minimize the number of shut downs and start ups when the equipment is on the beach.

(10) Physical and biological monitoring shall be conducted in a manner which results in the least amount of pinniped harassment practical. During monitoring events, Agency personnel shall approach the haulout slowly and cautiously to avoid severe startle responses.

NMFS has carefully evaluated the applicant’s proposed mitigation measures and considered a range of other measures in the context of ensuring that NMFS prescribes the means of affecting the least practicable adverse impact on the affected marine mammal species and stocks and their habitat. Our evaluation of potential measures included consideration of the following factors in relation to one another: (1) the manner in which, and the degree to which, the successful implementation of the measure is expected to minimize adverse impacts to marine mammals, (2) the proven or likely efficacy of the specific measure to minimize adverse impacts as planned; (3) the practicability of the measure for applicant implementation, including consideration of personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity. NMFS finds that the foregoing measures constitute the means of effecting the least practicable impact on harbor seals, California sea lion, and northern elephant seals, paying particular attention impacts on the site value as a rookery, mating ground, and area of similar significance.

### Monitoring and Reporting

In order to issue an ITA for an activity, Section 101(a)(5)(D) of the MMPA states that NMFS must set forth “requirements pertaining to the monitoring and reporting of such taking.” The MMPA implementing regulations at 50 CFR 216.104 (a)(13) require that requests for IHAs must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on

populations of marine mammals that are expected to be present. In addition, 50 CFR 216.107(a)(3) directs NMFS to include in an IHA requirements for monitoring and reporting incidental take.

The Agency's Russian River Estuary Management Activities Pinniped Monitoring Plan describes the monitoring efforts which the Agency has implemented during previous breaching events. NMFS has modified this plan slightly to account for pinniped take numbers. In summary, monitoring includes the following:

#### *Event Monitoring*

The Agency will conduct a pre-water level management event survey one to three days before an event to determine the number of animals on the beach and if any pups are present. If any pups less than one week old are sighted at the breaching site or on a path to the breaching site, breaching activities will be delayed until the pup has left those areas or until flooding is imminent. Monitoring will continue for the duration of the breaching event to determine how many animals have been taken and end one hour after equipment leaves the beach. A post event monitoring survey will also take place the day after an event, weather permitting, to determine seal reoccupation rates. Pinnipeds will be monitored from the overlook on the bluff along Highway 1 adjacent to the haulout with high-powered spotting scopes.

In addition to work days, seal counts will also be conducted twice monthly when no machinery is on the beach to determine if any long term impacts are occurring at the haulout. On these days, seals will be counted in ½ hour increments starting early in the morning (e.g., dawn) and ending eight hours later, weather permitting. This baseline information will also provide the Agency with details so that they may plan estuary management activities around prime seal haulout times in the future. Census days will be scheduled to capture a low and high tide each in the morning and afternoon.

For all counts, the following information will be recorded from an overlook on a bluff to avoid harassment from the monitoring: (1) seal counts, by species and age class, if possible; (2) behavior; (3) time, source and duration of disturbance; (4) estimated distances between source and seals; (5) weather conditions (e.g., temperature, wind, etc.); and (5) tide levels and estuary water surface elevation. Disturbance behavior will be recorded following Mortenson (2006). In summary, Level 1

indicates an alert reaction where the seal may turn its head towards the disturbance; Level 2 involves movement from short distances to many meters but does not enter water; and a Level 3 reaction includes flight or flushing to the water.

#### *Long Term Monitoring*

In addition to monitoring on event days, pinnipeds at the Jenner haulout will be counted twice monthly for the term of the IHA in the same manner as described above. In an attempt to understand possible relationship between use of the Jenner haulout and nearby coastal and river haulouts, several other haulouts in the estuary, which were extensively monitored from 1994–1999, will also be monitored (see Figure 2 in the IHA application for locations of these haulouts). These haulouts include North Jenner and Odin Cove to the north, Pocked Rock, Kabemali, and Rock Point to the south, and Jenner logs, Patty's Rock, and Chalanchawi in the Russian River Estuary. Each of these coastal and river haulouts will be monitored concurrent with monitoring of outlet channel construction and maintenance activities. This will provide an opportunity to qualitatively assess if these haulouts are being used by seals displaced from the Jenner haulout during lagoon outlet channel excavation and maintenance. This monitoring will not provide definitive results that individuals from the Jenner haulout are displaced to the coastal and river haulouts as individual seals will not be marked; however, it will be useful to track general trends in haulout use during lagoon outlet channel excavation and maintenance.

#### *Reporting*

The Agency will submit an annual report to NMFS 90 days after expiration of the IHA. Should the Agency request a future MMPA incidental take authorization, it will include in its request to NMFS a report summarizing all monitoring activities 120 prior to expiration of the IHA to allow NMFS adequate time to assess documented impacts to marine mammals. The report will include an executive summary, monitoring methodology, tabulation of estuary management events, summary of monitoring results, and discussion of problems noted and proposed remedial measures. The report will also be available to the public on the Agency's website (<http://www.scwa.ca.gov/>).

#### *Negligible Impact and Small Numbers Analysis and Determination*

NMFS has defined "negligible impact" in 50 CFR 216.103 as "...an impact

resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival."

In determining whether or not authorized incidental take will have a negligible impact on affected species stocks, NMFS considers a number of criteria regarding the impact of the proposed action including, but not limited to, species status; the number, nature, intensity, and duration of Level B harassment authorized; and the significance of the location for marine mammals where takes will occur.

None of the marine mammal species authorized to be taken in the IHA are listed as endangered or threatened under the ESA or depleted under the MMPA. For reasons provided in greater detail in NMFS' November 12, 2009 (74 FR 58248), **Federal Register** notice, water level management activities could result in the harassment of approximately 2,861 harbor seals (approximately 8 percent of the population), 16 California sea lions (approximately 0.006 percent of the population), and 11 northern elephant seals (0.008 percent of the population). The take numbers authorized in the IHA are based on seal census data (an average of monthly counts) collected by the Agency immediately prior to breaching events conducted from 1996–2000. These monthly averages were then multiplied by the number of anticipated events needed during each month. The number of marine mammals authorized to be taken incidental to the Agency's water level management activities is considered small when compared to the population sizes of the affected stocks (34,233; 238,000; and 124,000, respectively).

As stated above, the duration and intensity of harassment, as well as the significance of the habitat where take will occur, are also important factors in NMFS' negligible impact determination. Due to the monitoring efforts by the Agency and local seal watching group, there is an extensive data set on harbor seal abundance, behavior, and use of the Jenner haulout. As described in the Agency's application, NMFS proposed **Federal Register** notice for this action, and above, harbor seals demonstrate short-term changes in behavior (e.g., alertness, flushing) in response to Agency breaching events. However, seals reoccupy the beach shortly after the Agency leaves the beach. Seals continue to use the Jenner haulout despite daily sources of anthropogenic disturbance from beach visitors and intermittent disturbance from Agency breaching events. There is no significant

difference in average monthly seal counts since 1993 and harbor seals continue to use the haulout site as a nursery. There is also no data demonstrating stampedes occur at the Jenner haulout, thus the potential for injury, serious injury or mortality to pups from this action is unlikely. Finally, the fact that harbor seals pups are precocious at birth and form strong bonds with mom immediately after birth further supports the finding that mom/pup bonds will not be jeopardized due to Agency activities. Monitoring data suggest that previous breaching events have not been the cause of pup abandonment. For these reasons, and the mitigation measures set forth in the IHA, NMFS has determined that no Level A harassment (injury), serious injury or mortality will occur due to Agency activities.

NMFS compared the Agency's previously documented action of breaching the sandbar during one day events intermittently since 1995 to the possible impacts from limited 2-days events. As described above, under the IHA, the Agency would be required to maintain a one-week recovery period between management events, something that had not been implemented before. Although the management event may last 2 days instead of one, NMFS has determined that because seals reoccupy the beach soon after equipment leaves the beach, seals show short- and long-term resilience to chronic disturbance (e.g., daily exposure to non-Agency related human disturbance, the case of the northern elephant seal occupation), and the mitigation and monitoring measures set forth in the IHA, the short-term Level B harassment caused by the Agency's water level management activities will have a negligible impact on harbor seals. California sea lions and northern elephant seals are only occasionally sighted at the haulout, are usually solitary, and do not use the haulout for significant behaviors (e.g., mating); therefore, the short-term Level B harassment caused by the Agency's water level management activities will also have a negligible impact on these species.

Based on the analysis contained herein on the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the mitigation and monitoring measures, NMFS finds that the Agency's water level management events will result in the incidental take of small numbers of marine mammals, by Level B harassment only, and that the total taking will have a negligible impact on the affected species or stocks. There are

no relevant subsistence uses of marine mammals implicated by this action; therefore, no impacts to subsistence use will occur.

#### Endangered Species Act

No ESA-listed marine mammals are known to be present within the action area; therefore, ESA consultation is not required to issue an MMPA authorization for the proposed action. However, as described above and in the proposed IHA notice, the purpose of the modified outlet channel design during the lagoon management period is an RPA in NMFS' BiOp on the Agency's Estuary Management Activities for ESA-listed salmonids.

#### National Environmental Policy Act

In compliance with the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), as implemented by the regulations published by the Council on Environmental Quality (40 CFR parts 1500–1508), and NOAA Administrative Order 216–6, NMFS has prepared an Environmental Assessment (EA) to consider the direct, indirect and cumulative effects to pinnipeds and other applicable environmental resources resulting from issuance of a one-year IHA and the potential issuance of additional authorization for incidental harassment for the ongoing project. NMFS' EA is separate from but relies upon and incorporates the Corps' 2005 EA prepared for permitting the Agency's breaching activities.

#### Determination

Based on the description of the specified activity, review of monitoring data, and the required mitigation and monitoring measures described herein, NMFS has determined that the Agency's artificial breaching activities will have a negligible impact on affected pinniped species or stocks and will not have an adverse impact on their habitat. Subsistence use of marine mammals in California does not occur; therefore use of marine mammals for subsistence will not be affected.

As such, NMFS has issued the Agency a one-year IHA. The issuance of this IHA is contingent upon adherence to the previously mentioned mitigation, monitoring, and reporting requirements.

Dated: March 30, 2010.

**James H. Lecky,**

*Director, Office of Protected Resources,  
National Marine Fisheries Service.*

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**BILLING CODE 3510-22-S**

## CONSUMER PRODUCT SAFETY COMMISSION

### Agency Information Collection Activities; Submission for Office of Management and Budget Review; Comment Request; Follow-Up Activities for Product-Related Injuries

**AGENCY:** Consumer Product Safety Commission.

**ACTION:** Notice.

**SUMMARY:** The Consumer Product Safety Commission (CPSC) is announcing that a proposed collection of information has been submitted to the Office of Management and Budget (OMB) for review and clearance under the Paperwork Reduction Act of 1995.

**DATES:** Fax written comments on the collection of information by May 6, 2010.

**ADDRESSES:** To ensure that comments on the information collection are received, OMB recommends that written comments be faxed to the Office of Information and Regulatory Affairs, OMB, Attn: CPSC Desk Officer, FAX: 202-395-6974, or e-mailed to [oir\\_submission@omb.eop.gov](mailto:oir_submission@omb.eop.gov). Written comments should be captioned "Product-Related Injuries." All comments should be identified with the OMB control number 3041-0029. In addition, written comments should also be submitted by mail/hand delivery/courier (for paper, disk, or CD-ROM submissions), preferably in five copies, to: Office of the Secretary, Consumer Product Safety Commission, Room 502, 4330 East-West Highway, Bethesda, MD 20814; telephone (301) 504-7923.

**FOR FURTHER INFORMATION CONTACT:** Linda L. Glatz, Division of Policy and Planning, Office of Information Technology, Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814, (301) 504-7671. [lglatz@cpsc.gov](mailto:lglatz@cpsc.gov).

**SUPPLEMENTARY INFORMATION:** In compliance with 44 U.S.C. 3507, the CPSC has submitted the following proposed collection of information to OMB for review and clearance. Follow-up Activities for Product-Related Injuries (OMB Control Number 3041-0029—Extension).

Section 5(a) of the Consumer Product Safety Act, 15 U.S.C. 2054(a), requires the Commission to collect information related to the causes and prevention of death, injury, and illness associated with consumer products. That section also requires the Commission to conduct continuing studies and investigations of deaths, injuries, diseases, other health impairments, and