

**Executive Order 12866**

This notice has been determined to be not significant for purposes of E.O. 12866.

**Executive Order 13132 (Federalism)**

It has been determined that this notice does not contain policies with Federalism implications as that term is defined in Executive Order 13132.

**Administrative Procedure Act/Regulatory Flexibility Act**

Prior notice and an opportunity for public comment are not required by the Administrative Procedure Act for rules concerning public property, loans, grants, benefits, and contracts. 5 U.S.C. 553(a)(2). Because notice and opportunity for comment are not required pursuant to 5 U.S.C. 553 or any other law, the analytical requirements of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*, are inapplicable. Therefore, a regulatory flexibility analysis is not required and has not been prepared.

**Authority:** 15 U.S.C. 1512 and Executive Order 11625.

**David A. Hinson,**

*National Director, Minority Business Development Agency.*

[FR Doc. E9-26902 Filed 11-10-09; 8:45 am]

**BILLING CODE 3510-21-P**

**DEPARTMENT OF COMMERCE****National Oceanic and Atmospheric Administration**

**RIN 0648-XS71**

**Fisheries of the Exclusive Economic Zone Off Alaska; Recordkeeping and Reporting Requirements; Public Workshops**

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

**ACTION:** Notice of workshop.

**SUMMARY:** NMFS, Alaska Region, and the U.S. Coast Guard, North Pacific Fisheries Training Center, will present a workshop on seaLandings, a consolidated electronic means of reporting production of commercial groundfish to multiple management agencies for Federal and State fisheries off the coast of Alaska, and 2010 recordkeeping and reporting requirements for the Alaska groundfish fisheries and Individual Fishing Quota fisheries.

**DATES:** The workshops will be held on November 18, 2009, 9 a.m. to 5 p.m., Pacific Standard Time.

**ADDRESSES:** The workshop will be held at the Swedish Cultural Center Seattle, WA, 1920 Dexter Ave. N in the Svea Room on the Main Level.

**FOR FURTHER INFORMATION CONTACT:** Patty Britza, 907-586-7376.

**SUPPLEMENTARY INFORMATION:** The workshop will include discussion of seaLandings and 2010 recordkeeping and reporting requirements for Alaska groundfish fisheries and Individual Fishing Quota fisheries and instructions for completing and submitting required reports and logbooks. NMFS will provide a demonstration of the new version of seaLandings for at-sea catcher processors and training on how to submit daily production reports, consolidated landing reports, with and without Individual Fishing Quota, and the maximum retainable amount worksheet.

**Special Accommodations**

These workshops will be physically accessible to people with disabilities. Requests for sign language interpretation or other auxiliary aids should be directed to Patty Britza, 907 586 7376, at least 5 working days prior to the meeting date.

Dated: November 6, 2009.

**James P. Burgess,**

*Acting Director, Office of Sustainable Fisheries, National Marine Fisheries Service.*

[FR Doc. E9-27186 Filed 11-10-09; 8:45 am]

**BILLING CODE 3510-22-S**

**DEPARTMENT OF COMMERCE****National Institute of Standards and Technology****Judges Panel of the Malcolm Baldrige National Quality Award**

**AGENCY:** National Institute of Standards and Technology, Department of Commerce.

**ACTION:** Notice of closed conference call.

**SUMMARY:** Pursuant to the Federal Advisory Committee Act, 5 U.S.C. app. 2, notice is hereby given that the Judges Panel of the Malcolm Baldrige National Quality Award will conduct a conference call on Thursday, December 3, 2009 at 1 p.m. The Judges Panel is composed of twelve members prominent in the fields of quality, innovation, and performance excellence and appointed by the Secretary of Commerce. The purpose of this conference call is to conduct final judging of the 2009 applicants. The conference call will be closed to the public in accordance with Section 552b(c)(4) of Title 5, United States Code.

**DATES:** The conference call will convene December 3, 2009 at 1 p.m. and adjourn at 2 p.m. on December 3, 2009. The entire conference call will be closed.

**ADDRESSES:** None.

**FOR FURTHER INFORMATION CONTACT:** Dr. Harry Hertz, Director, Baldrige National Quality Program, National Institute of Standards and Technology, Gaithersburg, Maryland 20899, telephone number (301) 975-2361.

**SUPPLEMENTARY INFORMATION:** The Assistant Secretary for Administration, with the concurrence of the General Counsel, formally determined on January 8, 2009, that the meeting of the Judges Panel will be closed pursuant to Section 10(d) of the Federal Advisory Committee Act, 5 U.S.C. app. 2, as amended by Section 5(c) of the Government in the Sunshine Act, Public Law 94-409. The meeting, which involves examination of Award applicant data from U.S. companies and other organizations and a discussion of this data as compared to the Award criteria in order to recommend Award recipients, may be closed to the public in accordance with Section 552b(c)(4) of Title 5, United States Code, because the meetings are likely to disclose trade secrets and commercial or financial information obtained from a person which is privileged or confidential.

Dated: November 5, 2009.

**Patrick Gallagher,**

*Deputy Director.*

[FR Doc. E9-27159 Filed 11-10-09; 8:45 am]

**BILLING CODE 3510-13-P**

**DEPARTMENT OF COMMERCE****National Oceanic and Atmospheric Administration**

**RIN 0648-XQ82**

**Takes of Marine Mammals Incidental to Specified Activities; Russian River Estuary Management Activities**

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

**ACTION:** Notice; proposed incidental harassment authorization; request for comments.

**SUMMARY:** NMFS has received an application from the Sonoma County Water Agency (Agency) for an Incidental Harassment Authorization (IHA) to take marine mammals, by harassment, incidental to Russian River Estuary (Estuary) management activities, specifically construction and maintenance of a lagoon outlet channel

to improve rearing habitat for listed salmonid species and artificially breaching the barrier beach at the mouth of the river to minimize potential for flooding, as well as conducting a series of biological and physical monitoring activities. Pursuant to the Marine Mammal Protection Act (MMPA), NMFS is requesting comments on its proposal to issue an IHA to the Agency to incidentally harass, by Level B Harassment only, a small number of harbor seals (*Phoca vitulina richardii*), California sea lions (*Zalophus californianus*), and northern elephant seals (*Mirounga angustirostris*) during the specified activity.

**DATES:** Comments and information must be received no later than December 14, 2009.

**ADDRESSES:** Comments on the application should be addressed to Michael Payne, Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910-3225. The mailbox address for providing email comments is [PR1.0648-XQ82@noaa.gov](mailto:PR1.0648-XQ82@noaa.gov). NMFS is not responsible for e-mail comments sent to addresses other than the one provided here. Comments sent via e-mail, including all attachments, must not exceed a 10-megabyte file size.

Instructions: All comments received are a part of the public record and will generally be posted to <http://www.nmfs.noaa.gov/pr/permits/incidental.htm> without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

A copy of the application containing a list of the references used in this document may be obtained by writing to the address specified above, telephoning the contact listed below (see **FOR FURTHER INFORMATION CONTACT**), or visiting the internet at: <http://www.nmfs.noaa.gov/pr/permits/incidental.htm>. Documents cited in this notice may also 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, ext 151.

#### 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 to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

Authorization for incidental takings shall 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 subsistence uses (where relevant), and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such takings 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 Level B harassment as defined below. 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. If authorized, the IHA would be effective for one year from date of issuance.

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

NMFS received an application on July 16, 2009 from the Agency for the taking, by Level B harassment only, of marine mammals incidental to the Agency's Estuary management activities. After receipt of subsequent information, NMFS determined the application

complete on September 22, 2009. These activities include construction and maintenance of a lagoon outlet channel to improve rearing habitat for listed salmon and artificially breaching the barrier beach at the mouth of the river to minimize potential for flooding and a series of biological and physical monitoring activities. The purpose of these activities is to comply with NMFS' Reasonable and Prudent Alternatives (PRAs) outlined in its' Biological Opinion (BiOp) for 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 (NMFS, 2008) addressing ongoing practices and operations at dams and activities related to flood control, water diversion and storage, regulation of flows in the Russian River and Dry Creek, estuary management, hydroelectric power generation, channel maintenance, and fish hatchery production by numerous stakeholders including the Agency. NMFS found current water management practices, including those at the mouth of the Russian River, were jeopardizing the continued existence of some of the steelhead and salmon species and adversely modifying their critical habitat. In response, the Agency is altering its Estuary management approach to include the activities described below.

The Agency's specified activities include construction and maintenance of a lagoon outlet channel, artificial breaching of the barrier beach which forms at the Russian River- Pacific Ocean interface (the location of the Jenner haulout), and monitoring associated with such activities. Due to the necessity of operating heavy equipment (e.g., bulldozers, excavators) to carry out the proposed management activities, pinnipeds hauled out on the beach may be alerted or flush into the water. Therefore, the proposed action may result in Level B harassment to seals and sea lions present on the beach. Monitoring of harbor seals, the primary species located at the haulout, has been conducted by local residents who formed the Stewards Seal Watch Program since 1985, the Agency during breaching events from 1996-2000, and more recently with the aid of Goat Rock State Park volunteer docents. Therefore an extensive data set of harbor seal abundance and presence of other species of pinnipeds is available. Based on these monitoring data and number of

events the Agency expects will be necessary to carry out the proposed management activities, the Agency is requesting authorization to incidentally harass up to 2,861 harbor seals, 16 California sea lions, and 11 northern elephant seals under a one-year IHA. Because these activities would be ongoing beyond one year, NMFS would likely also promulgate subsequent incidental take authorizations in the future.

### Description of the Specified Activity

The Estuary is located about 97 kilometers (km; 60 miles) northwest of San Francisco in Jenner, Sonoma County, California. The Russian River watershed encompasses 3,847 square kilometers (km) (1,485 square miles) in Sonoma, Mendocino, and Lake counties. The Estuary extends from the mouth of the Russian River upstream approximately 10 to 11 km (6 to 7 miles) between Austin Creek and the community of Duncans Mills (Heckel, 1994). The proposed action includes construction and maintenance of a lagoon outlet channel that would facilitate management of a barrier beach (closed sandbar) at the mouth of the Russian River and creation of a perched, summer lagoon to avoid the likelihood of jeopardy to listed steelhead and salmon species and adverse modification of critical habitat, as described in the aforementioned BiOp (NMFS 2008).

Since 1995, the Agency has artificially breached the barrier beach which forms at the mouth of the Russian River, and hence creates a lagoon behind the beach, in accordance with the Russian River Estuary Management Plan recommended in the Heckel (1994) study. The purpose of artificially breaching the barrier beach is to alleviate potential flooding of low-lying properties along the estuary. However, the historic method of artificial sandbar breaching, which is done in response to rising water levels behind the barrier beach, adversely affects the estuary's water quality and depths by transforming a natural deep brackish water lagoon to one that is similar to a shallow tidal marine environment (i.e., high salinity). Salinity stratification contributes to low dissolved oxygen at the bottom in some areas and this shallow, high salinity environment is not conducive to ideal salmonid rearing habitat.

The Agency, along with a suite of other stakeholders including the U.S. Army Corps of Engineers (Corps), formally consulted with the National Marine Fisheries Service (NMFS) under Section 7 of the Endangered Species Act

(ESA) regarding the potential effects of their operations and maintenance activities, including, among other things, the Agency's estuary management program, on federally-listed Central California Coast (CCC) steelhead (*Oncorhynchus mykiss*), CCC coho salmon (*O. kisutch*), and California Coastal (CC) Chinook salmon (*O. tshawytscha*). As a result of this consultation, NMFS issued the BiOp finding that artificially elevated inflows to the Russian River estuary during the low flow season and historic artificial breaching practices have significant adverse effects on the Russian River's estuarine rearing habitat for steelhead, coho, and Chinook salmon and would likely result in jeopardy to listed species and adverse modification or destruction of designated critical habitat. NMFS included RPAs in the BiOp to avoid jeopardy and adverse modification or destruction of critical habitat. These require the Agency to collaborate with NMFS and to modify estuary water level management in order to reduce marine influence (high salinity and tidal inflow) and promote a higher water surface elevation in the estuary (formation of a fresh or brackish lagoon) for purposes of enhancing the quality of rearing habitat for juvenile (age 0+ and 1+) steelhead from May 15th to October 15th (referred to hereafter as the "lagoon management period"). A program of potential, incremental steps are prescribed to accomplish this, including adaptive management of a lagoon outlet channel on the barrier beach. The Agency will monitor the response of water quality, invertebrate production, and salmonids in and near the estuary to water surface elevation management in the estuary-lagoon system. In addition, the Agency would monitor effects of lagoon maintenance and sandbar breaching on pinnipeds and implement mitigation measures to minimize any impact.

### Lagoon Outlet Channel Management

To comply with the Russian River Biological Opinion, the Agency, in coordination with NMFS, plans to adaptively manage water surface elevations during the lagoon management period (May 15 and October 15) after a barrier beach forms naturally and creates a lagoon. Modifications to the barrier beach would be small departures from the existing beach and channel topography at the time of closure, and the new channel would be similar to the channel configurations resulting from previous breaching practices and consistent with natural processes.

The adaptive lagoon outlet channel management plan seeks to work with natural processes and site conditions to maintain an outlet channel that reduces tidal inflow of saline water into the estuary (PWA, 2009). To avoid tidal inflow and maintain a lagoon system that would not flood properties adjacent to the Estuary, the Agency would create and maintain a shallow, "perched" outlet channel that would not be excavated as deeply, narrowly, or with as steep a gradient as typical artificial breaching pilot channels, which are designed to allow the current velocities to erode a wider and deeper channel and downcut into the barrier beach.

Active management of estuarine/lagoon water levels would commence when oceanside wave action pushes sand landward to form a natural barrier beach across the river's mouth. When this happens, the Agency would monitor lagoon water surface elevation, as river inflow to the newly closed lagoon builds up behind the barrier beach, causing water surface elevation to rise in the lagoon. The goal is to manage lagoon water surface elevations between 4 and 9 ft National Geodetic Vertical Datum (NGVD) 3, which is high enough to enhance fish habitat (NMFS, 2008) while also minimizing flood hazard to low-lying structures adjacent to the Estuary (Heckel, 1994). After the lagoon water surface elevation rises to 3 to 4 ft NGVD, the Agency would begin to manage water levels by excavating a relatively low elevation (bed between 3 and 4 ft NGVD) outlet channel. Water levels would initially be managed at the lower end of this range to reduce the potential for eroding the outlet channel and reopening the mouth to tidal exchange. If experience managing the outlet channel indicates that higher lagoon water levels are feasible, subsequent excavations would approach bed elevations of 7 ft NGVD.

The outlet channel, which is approximately 100–400 feet long, would be excavated and maintained with one or two pieces of heavy machinery (e.g., excavator or bulldozer) to move sand. The outlet channel would be excavated with a bed elevation 0.5 to 1.0 ft below the lagoon water surface elevation along its entire length to allow outflow from the lagoon to pass over the sandbar. The outlet channel would be a notch approximately 2 ft deep by 25 to 100 ft wide cut into the top of the naturally formed barrier beach. The strategy for outlet channel configuration and modifications would be an incremental approach that seeks to minimize the risk of uncontrolled breaching which returns the estuary to tidal conditions. The precise number of excavations would

depend on uncontrollable variables such as seasonal ocean wave conditions (e.g., wave heights and lengths), river inflows, and the success of previous excavations (e.g., the success of selected channel widths and meander patterns) in forming an outlet channel that effectively maintains lagoon water surface elevations. It is predicted that up to three successive outlet channel excavations, at increasingly higher beach elevations, may be necessary, with the result being a “perched” lagoon. The goal is to develop an outlet channel that supports a stable “perched” lagoon with water surface elevations at approximately 7 ft NGVD for several months.

At the start of the management period, when configuring the outlet channel for the first time that year, machinery may operate on up to 4 consecutive working days. As technical staff and maintenance crews gain more experience with implementing the outlet channel and observing its response, it may be possible to reduce the frequency of maintenance during the remainder of the management season, i.e., 1–3 days of intervention typically one to two weeks apart. In consideration of the beach environment, effort would be made to minimize the amount and frequency of mechanical intervention, thereby reducing disturbances to seals and other wildlife, as well as State Park’s visitors on the beach. In addition, activities would be conducted in a manner to effect the least practicable adverse impacts to pinnipeds and their habitat as described in the Mitigation section below (e.g., crews on foot approach first, machinery driven slow on beach, etc.).

#### *Artificial Sandbar Breaching*

The Estuary may close naturally throughout the year as a result of a barrier beach forming across the mouth of the Russian River. The mouth of the Russian River is located at Goat Rock State Beach (California Department of Parks and Recreation). Although closures may occur at anytime of the year, the mouth usually closes during the spring, summer, and fall (Heckel 1994; Merritt Smith Consulting 1997, 1998, 1999, 2000; Sonoma County Water Agency and Merritt Smith Consulting, 2001). Closures result in ponding of the Russian River behind the barrier beach and, as water surface levels rise in the Estuary, flooding may occur. Natural breaching events occur when estuary water surface levels exceed the height of the barrier beach and overtop it, scouring an outlet channel that reconnects the Russian River to the Pacific Ocean.

In addition to natural breaching, the Agency, for decades, has also mechanically breached the sandbar to alleviate potential flooding of low-lying shoreline properties near the town of Jenner. These artificial breaching activities would typically be conducted on outgoing tides to maximize the elevation head difference between the estuary water surface and the ocean. A cut in the barrier beach would be created at a sufficient depth to allow river flows to begin transporting sand to the ocean. The sand would be placed onto the beach adjacent to the pilot channel. After the pilot channel is dug, the last upstream portion of the sandbar would be removed, allowing river water to flow to the ocean. The size of the pilot channel varies depending on the height of the sandbar to be breached, the tide level, and the water surface elevation in the Estuary. A typical channel would be approximately 100 feet long, 25 feet wide, and 6 feet deep. The amount of sand moved would range from less than 100 cubic yards to approximately 1,000 cubic yards.

The Agency anticipates that artificial breaching activities would occur in accordance with the Russian River Biological Opinion and that they would primarily occur from October 16, 2009, to May 14, 2010. However, if estuary water surface elevations rise above 7.0 feet (at the Jenner gage) during the lagoon management period (May 15 through October 15), the Agency would artificially breach the sandbar to alleviate potential flooding, as discussed in the Biological Opinion. The Biological Opinion incidental take statement estimates that the Agency may need to artificially breach the sandbar “twice per year between May 15 and October 15 during the first three years covered by the opinion, and once per year between May 15 and October 15 during years 4–15 covered by this opinion” (NMFS, 2008). Because the IHA is only valid for the first year of this new management strategy, NMFS has analyzed the impacts from the proposed action based on two breaching events during the lagoon management period.

#### *Monitoring of Lagoon Outlet Channel Adaptive Management Plan*

To monitor the effectiveness of the new Estuary management plan, and abide by RPAs in NMFS’ Biological Opinion, the Agency must monitor the response of water quality, invertebrate production, and salmonids in and near the estuary to water surface elevation management in the estuary-lagoon system. In addition, the Agency must monitor the 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. 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 monitoring activities occur in the vicinity of river haul outs and hence, may result in harassment to pinnipeds. A summary of the monitoring tasks and the frequency of their implementation are presented in Table 2 of the application.

#### **Description of Marine Mammals in the Area of the Specified Activity**

Marine mammals present within the action area would be harassed from crews and equipment on the beach during Estuary maintenance and monitoring activities. The primary species inhabiting the Jenner haulout is a portion of the California stock of harbor seals; however, rogue California sea lions and northern elephant seals have also been observed at the harbor seal haulout.

#### *Harbor Seals*

California harbor seals are not listed under the ESA or considered strategic under the Marine MMPA. Based on the most recent harbor seal counts (26,333 in May-July 2004; Lowry *et al.*, 2005) and Hanan’s revised correction factor, the harbor seal population in California is estimated to number 34,233 with a minimum population estimate of 31,600 (Caretta *et al.*, 2005). Counts of harbor seals in California showed a rapid increase from approximately 1972 (when the MMPA was passed) to 1990. Net production rates appeared to decline from 1982 to 1994. Although earlier analyses were equivocal (Hanan, 1996) and there has been no formal determination that the California stock has reached its Optimal Sustainable Population (OSP) level (defined in the MMPA), the decrease in population growth rate has occurred at the same time as a decrease in human-caused mortality and may be an indication that the population is reaching its environmental carrying capacity.

On land, harbor seals haul out on rocky outcrops, mudflats, sandbars and sandy beaches with unrestricted access to water and with minimal human presence. In California, approximately 400–500 harbor seal haul out sites are widely distributed along the mainland and on offshore islands, including intertidal sandbars, rocky shores and beaches (Hanan, 1996). The Russian

River haul out is the largest in Sonoma County, comprising of approximately 18 percent of the harbor seal population found there (M. DeAngelis, pers. comm.). There are also several known haulouts in the Russian River estuary at logs and rock outcroppings in the river. Haulout sites are important as resting sites for harbor seals. Harbor seals feed opportunistically in shallow waters on fish, crustaceans, and cephalopods. Foraging occurs in shallow littoral waters, and common prey items include flounder, sole, hake, codfish, sculpin, anchovy and herring (California Department of Fish and Game, 2005). Harbor seals are typically solitary while foraging, although small groups have been observed.

Although the Jenner haul-out is not a designated pupping beach, Mortenson (1996) observed pups were first seen at the Jenner haulout in late March, with maximum counts in May. In this study, pups were not counted separately from other age-classes at the haulout after August due to the difficulty in discriminating pups from small yearlings (Mortenson, 1996). From August 1989 to July 1991, Hanson (1993) observed that pupping began at the Jenner haulout in mid-April, with a maximum number of pups observed during the first two weeks of May. This corresponds with the peaks observed at Point Reyes, where the first viable pups are born around the first to second week of March and the peak is the last week of April to early May.

As described above, the Jenner haulout has been exclusively monitoring since 1985. Local residents also began monthly seal counts in 1987, with nearby haulouts added to the counts thereafter. The monthly average number of harbor seals recorded by E. Twohy during daily counts of seals at the Jenner haulout from 1993 to 2005 is presented in Table 4a of the application. During these counts, diurnal patterns were discovered and it was noted whether the mouth of the River was open or closed off to the Pacific Ocean. The information that has emerged from these data sets is that the Jenner haulout is atypical in terms of the time of year and time of day that the peak numbers of harbor seals are present.

The numbers of seals at the Jenner haulout peaks in the late winter (February and March); at other harbor seal haulouts, peaks are typically observed during the pupping and molting season (spring and summer; Mortenson and Twohy, 1993). The number of harbor seals significantly declines in August and remains low until November. This trend corresponds to monitoring conducted by the Agency

during breaching events between 1996–2000. The Jenner haulout is also atypical in terms of the time of day seal count peaks are observed. At other harbor seal haulouts, daily peaks are typically observed at mid-afternoon low tides regardless of the season. Although daily harbor seal numbers at the Jenner haulout do peak at midday during the winter (November 16th to March 30th) and in the pupping and molting seasons (April/May and June/July/August, respectively), a midday peak is not observed during the fall (Mortenson and Twohy, 1994). Mortenson and Twohy (1994) identified the peak in harbor seal abundance at the Jenner haulout as occurring in February and March, with high abundance continuing through July. On a daily scale, in general, harbor seal abundance peaks during the morning hours at the Jenner haulout when the barrier beach is closed (Meritt Smith Consulting 1997, 1998, 1999, 2001). However, daily harbor seal numbers peak at midday tides during the winter (November 16– March 30 as defined in Mortenson and Twohy (1994)).

#### *California Sea Lions*

California Sea Lions are not listed under the ESA and is not “depleted” or listed as “strategic” stock under the MMPA. The entire U.S. population has been estimated at 238,000 and growing at a rate of approximately 6.52 percent annually between 1975 and 2005 (Carretta *et al.*, 2007) with an estimated annual growth rate of approximately 6 percent since at least 1975. On land, the sea lions are found resting and breeding in groups of various sizes, and haul out on rocky surfaces and outcroppings and beaches, as well as manmade structures such as jetties and beaches. Sea lions prefer haul out sites and rookeries near abundant food supplies, with easy access to water; although sea lions occasionally travel up rivers and bays in search of food. They feed on fish and cephalopods, including Pacific whiting, rockfish, anchovy, hake, flat-fish, small sharks, squid, and octopus (California Department of Fish and Game, 1990). Although solitary feeders, sea lions often hunt in groups, which can vary in size according to the abundance of prey (California Department of Fish and Game, 1990).

Sea lions exhibit seasonal migration patterns organized around their breeding patterns. California sea lions breed at large rookeries on the Channel Islands in southern California, and on both sides of the Baja California peninsula, typically from May to August. Females tend to remain close to the rookeries throughout the year, while

males migrate north after the breeding season in the late summer, and then migrate back south to the breeding grounds in the spring (California Department of Fish and Game, 1990). No established rookeries are known north of Point Reyes, California, but large numbers of subadult and non-breeding or post-breeding male California sea lions are found throughout the Pacific Northwest.

During harbor seal counts, solitary California sea lions were occasionally observed between the river mouth and the Jenner visitor's center during bar-open conditions in the Russian River estuary (Merritt Smith Consulting, 1999 and 2000). A single sea lion was hauled out during post-breaching monitoring on September 6, 2000 (Sonoma County Water Agency and Merritt Smith Consulting, 2001).

#### *Northern Elephant Seals*

Northern elephant seals are not listed under the ESA and is not “depleted” or listed as “strategic” stock under the MMPA. Based on the estimated 35,549 pups born in California in 2005, the California stock was approximately 124,000 in 2005 (Carretta *et al.*, 2007). Based on trends in pup counts, northern elephant seal colonies were continuing to grow in California through 2005 (Carretta *et al.*, 2009), but appear to be stable or slowly decreasing in Mexico (Stewart *et al.*, 1994). Northern elephant seals range along the entire California coast (California Department of Fish and Game, 2009). Adult male elephant seals breed with harems of females in from mid-December through March in dense rookeries on the San Miguel Island, Santa Barbara Island, San Nicolas Islands, San Simeon Island, Southeast Farallon Island, Ano Nuevo Island, on the mainland at Ano Nuevo (San Mateo Co.), and the Point Reyes Peninsula (California Department of Fish and Game, 2001). From April to November, they feed at sea or haul out to molt at rookeries.

Censuses of pinnipeds at the mouth of the Russian River have been taken at least semimonthly since 1987. Elephant seals were noted from 1987 to 1991. From 1992–1995, one or two elephant seals were counted during the censuses conducted in May, with occasional records during the fall and winter (Mortenson and Follis, 1997). For the past several years, a single male northern elephant seal has been present at the mouth of the Russian River harbor seal haul out site, during the late winter and spring of each year. The elephant seal was believed to be a juvenile or sub-adult male when it first began using the area as a haul out site. It was

observed harassing harbor seals hauled out at the mouth of the Russian River.

#### Potential Effects on Marine Mammals

In addition to local resident and state park monitoring efforts, the Agency also conducted pinniped monitoring during its artificial breaching activities from 1996–2000. In all five years of monitoring, the number of seals hauled out on the barrier beach was generally low when it was 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). 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.” The mouth of the Russian River is typically open during the winter months, but intermittently closes during the late spring through fall.

The Agency’s pinniped monitoring from 1996 to 2000 focused on the barrier beach artificial breaching activities and its effects on the Jenner haulout. Seal counts and disturbances were recorded from 1 to 2 days prior to breaching, the day of breaching, and the day after breaching (Merritt Smith Consulting, 1997, 1998, 1999, 2000; Sonoma County Water Agency and Merritt Smith Consulting 2001). In each year, the trend observed was that harbor seal numbers were lower when the beach was closed (i.e., the sandbar was present) and increased the day following an artificial breaching event. 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 addition, while seals often alerted to distance sources of disturbance (e.g., the sound of trucks braking on nearby Highway 1), seals primarily fled the haulout as a result of presence of people on or near the beach which is possibly when the beach is closed (i.e., people have access to the beach). The number of seals declined during the day due to disturbances by people on the beach or kayakers/boaters approaching the haulout. Disturbances on the beach typically increased as the morning progressed (greater number of visitors on the beach in the late mornings and early afternoons). Therefore, although the Agency’s operations may harass pinnipeds present on the beach, it is likely many have left due to the presence of people. During actual breaching activities, monitoring has revealed that some or all of the seals

flush from the beach in response to crew on the beach or equipment. In 2000, all seals flushed from the beach; however, more recently, the trend is that not all seals flush and some will remain hauled-out on the beach while the equipment is in operation. Therefore, harbor seals, at most, would flush into the water in response to maintenance activities but may also simply become alert or make small movement across the beach away from equipment and crews. Harbor seals are considered more skidish than other species of pinnipeds; therefore, California sea lions or northern elephant seals, if present, are not expected to display a more adverse reaction to maintenance activities than those of harbor seals. No stampeding has been documented since the Agency began monitoring in 1999 and this reaction is not expected from any pinniped species present on the haulout.

Although the Jenner haulout is not a designated pupping beach, pups have been observed during the pupping season; therefore, NMFS has evaluated the potential for injury or mortality to pups should an management event occur when pups are present. To do so, NMFS has inquired about pups from monitoring data. 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. Under the proposed mitigation, equipment would not enter onto the beach before crews. Stampeding or dead pups have not been observed during monitoring of the Agency’s artificial breaching activities since those events. Implementation of the lagoon outlet channel, as required by NMFS’ Russian River Biological Opinion, has not yet begun, but the potential direct effects on harbor seals and their pups would be expected to be similar to artificial breaching activities as construction methods would be very similar. Any Stellar sea lions or California sea lions on the beach are expected to be juveniles or adults; therefore, there would be no impact to the survival of pups of these species.

The opportunity for mother/pup bonding at the Jenner haulout is not expected to be impacted by implementation of the lagoon outlet channel or artificial breaching activities. The peak of pupping season is likely by mid-May in most years, and implementation of the lagoon outlet channel would begin around May 15th (as required by the Russian River Biological Opinion). By this time, it is expected that “bonding” between mothers and pups would have likely occurred. The number of artificial

breaching activities during the months of March, April and May has been relatively low in the past (see Table 1 of the Agency’s IHA application), and the breaching activities occur in a single day over several hours. Artificial breaching activities are not expected to impact mother/pup bonding.

Based on the extensive monitoring data, NMFS has preliminary determined that impact to pinnipeds on the beach during Estuary management activities would be limited to short-term (i.e., one day or less) behavioral harassment in the form of alertness or flushing. Because crews would approach the beach slowly and cautiously, stampeding, and therefore injury or mortality, is not expected nor is it documented in the years of monitoring data as a result of breaching activities. Further, the lack of evidence of permanent abandonment of the haulout despite the Agency breaching the beach for years indicates long term or permanent abandonment of the haulout is unlikely.

#### Anticipated Take

The Agency is requesting, and NMFS is proposing, authorization to take harbor seals, California sea lions, and northern elephant seals, by Level B harassment only, incidental to beach based construction work involving the use of excavators and support vehicles and activities required by monitoring set forth in the BiOp. The estimates of the number of Pacific harbor seals, California sea lions, and northern elephant seals that may be harassed by the proposed activities is based upon the number of potential events associated with Russian River estuary management activities (see Table 3 in the application) and the average number of individuals of each species that are present at the Jenner haulout during bar-closed conditions (Table 1).

The numbers of events associated with lagoon outlet channel management are split into two categories: (1) initial channel excavation, which would likely occur between May and September, and (2) maintenance and monitoring of the outlet channel, which would continue until October 15th. The Estuary has not remained closed for extended periods of time (greater than 14 days), particularly in the summer months, since regular counts of pinnipeds at the Jenner haulout began. It is difficult to estimate the numbers of seals that may be hauled out on the barrier beach when the lagoon is formed; however, harbor seals are regularly observed crossing overland from the Pacific Ocean to haul out on the Estuary side of the beach, even in bar-open conditions, so it is anticipated

that seals would continue to use the haulout in bar-closed, lagoon conditions. Based on pinniped monitoring from 1996 to 2000 associated with artificial breaching events, the average number of harbor seals hauled out during barrier beach-closed conditions can be used to estimate the number of individuals that may be harassed by both lagoon outlet channel and artificial breaching activities. Both activities would likely be implemented soon after a beach closure (within 14 days), so the data presented in Table 1 would be reasonable for the take estimates from April to November. Because the lagoon outlet channel implementation dates cannot be determined yet (they are

dependent on when the barrier beach naturally closes after May 15th), the highest average number of harbor seals presented in Table 4b in the application was used to conservatively estimate the number of seals that may be taken during barrier beach-closed conditions and excavation of the lagoon outlet channel (Table 1). For maintenance and monitoring activities associated with the lagoon outlet channel, the average number of harbor seals for each month (see Table 4b in the application) was used. Harbor seal numbers presented in Table 4a in the application were used to estimate take associated with artificial breaching from December to March as this was the best information available for those months and overlapped with

the peak in harbor seal numbers at the Jenner haulout. For biological and physical habitat monitoring activities in the Estuary, it was assumed that pinnipeds may be encountered once per event and flush from a river haulout.

The estimated potential total number of individual animals that may be taken equates to the maximum number of seals of each species anticipated to be encountered per event multiplied by the estimated number of events during the term of the IHA (Table 1). The potential total number of individual animals that may be taken is likely an overestimate because the same seal would likely be taken multiple times throughout the season.

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Table 1. Potential Number of Marine Mammals Taken from Estuary Management Activities.

Species	No. Animals Expected to Occur	No. Take Events <sup>a</sup>	Potential Total Number of Individual Animals that may be Taken <sup>b,c</sup>
<b>Lagoon Outlet Channel Management on the Sandbar (May 15 to October 15)</b>			
Pacific harbor seal	Implementation: 103 <sup>b</sup> Maintenance & Monitoring: May-103; June-100; July-75; Aug-17; Sept-5; Oct-22	Implementation (May- Sept): 4 Maintenance May - 1; June-Sept-4/month; Oct-1 Monitoring (June-Sept-2/month; Oct-1	Implementation: 412 Maintenance.: 913 Monitoring: 416 TOTAL: 1,741
California sea lion (potential to encounter once per month July-Oct)	1	4	4
Northern elephant seal (potential to encounter once per month July-Oct)	1	4	4
<b>Artificial Breaching on the Sandbar (October 16 to May 14)</b>			
Pacific harbor seal	Oct: 22 Nov: 11 Dec: 134 Jan: 142 Feb: 137 Mar: 167 Apr: 173 May: 103	Oct: 2 <sup>c</sup> Nov: 2 Dec: 2 Jan: 1 Feb: 1 Mar: 1 Apr: 1 May: 1 11 events maximum	Oct: 44 Nov: 22 Dec: 268 Jan: 142 Feb: 137 Mar: 167 Apr: 173 May: 103 TOTAL: 1,056
California sea lion (potential to encounter once per month Sept-Apr)	1	8	8
Northern elephant seal (potential to encounter once per month Dec-May)	1	6	6
<b>Biological and Physical Habitat Monitoring in the Estuary</b>			
Pacific harbor seal	1	64	64
California sea lion (potential to encounter once per month Sept-Dec)	1	4	4
Northern elephant seal (potential to encounter in Dec)	1	1	1

<sup>a</sup> For implementation of the lagoon outlet channel, an event is defined as a single, 4-day episode. It is assumed that the same individual seals would be hauled out during a single event. For the remaining activities, an event is defined as a single day on which an activity occurs. Some events may include multiple activities listed in Table 3 in the application.

<sup>b</sup> The estimated potential total number of individual animals that may be taken equates to the maximum number of seals of each species anticipated to be encountered per event multiplied by the estimated number of events during the term of the IHA.

<sup>c</sup> The potential total number of individual animals that may be taken is likely an overestimate because the same seal would likely be taken multiple times throughout the season

<sup>e</sup> The number of events is the monthly average number of artificial breaching events from 1996 to 2008 (Table 1 in the application).



### Anticipated Effects on Habitat

The purposes of the lagoon outlet channel management and artificial breaching activities are to manage the sandbar to improve summer rearing habitat for juvenile salmonids in the Russian River estuary and to minimize potential flood risk to low-lying properties near on the Estuary, respectively. These activities would result in physical alterations of the Jenner haulout but are essential to conserving and recovering endangered salmonid species (which are important prey for pinnipeds). When the barrier beach closes, water surface elevations in the Estuary rise, resulting in an increase in elevation of the beach and flooding of other haulouts in the Russian River. For the summer lagoon outlet channel, elevations would be targeted between 4 and 9 ft NGVD. For artificial breaching activities, the sandbar would be breached when water surface elevations ranged from 4.5 and 7 ft NGVD.

The lagoon outlet channel would alter the beach by creating a shallow outlet channel that would convey river flow to pass over the sandbar and minimize or eliminate tidal exchange from 1st to October 15th. The gentle slope of the outlet channel would allow seals to travel through the channel, although the shallow depths (0.5 to 2 ft.) would likely not allow for swimming through the channel. Depending on the barrier beach height and the location of the river's thalweg when the beach closes, part of the outlet channel may be constructed in areas where seals typically haul out on the Estuary side. The outlet channel would be maintained from May 15 to October 15, annually. After October 15th, the closed barrier beach would be artificially breached when water surface elevations in the Estuary approach 7.0 feet NGVD as read at the Jenner visitor's center gauge. Artificial breaching activities alter the habitat by creating a pilot channel through the closed sandbar. The location of the pilot channel is dependent on the height and width of the sandbar and the location of the river's thalweg.

Changes in haulout elevation regularly occur with the tides at this site and any habitat that would be impacted by side cast sand would be temporary. Pinnipeds seeking to haul out would still have access to the estuary/lagoon waters and would likely continue to naturally flush into the water during high water surface elevation periods. Therefore, the natural cycle of using the Jenner haulout on a daily basis is not expected to change. Modification of habitat resulting from construction of the lagoon outlet channel or artificial

breaching pilot channel would also be temporary in nature. Harbor seals are regularly observed crossing overland from the Pacific Ocean to haul out on the Estuary side of the beach, even in bar-open conditions, so it is anticipated that seals would continue to use the haulout in bar-closed, lagoon conditions.

In summary, there will be physical alteration of the beach and potential impacts to other, smaller haulouts located up the Russian River. However, the beach opens and closes naturally resulting in the same impacts to habitat; therefore, seals are likely adapted to this cycle. In addition, the increase in rearing habitat quality has the goal of increasing salmon abundance, ultimately providing more food for seals present within the action area.

### Proposed Mitigation

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 Agency has proposed the following mitigation measures designed to minimize impact to affected species and stocks: (1) Agency crews would slowly and cautiously approach the haulout ahead of the heavy equipment to minimize the potential for flushes to result in a stampede, a particular concern during pupping season; (2) Agency staff would avoid walking or driving equipment through the seal haulout; (3) Crews on foot would 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 sandbar; and (4) during breaching events all monitoring would be conducted from the overlook on the bluff along Highway 1 adjacent to the haulout in order to minimize potential for harassment. Personnel on the beach would include up to two equipment operators, three safety team members on the beach (one on each side of the channel observing the equipment operators, and one at the barrier to warn beach visitors away from the activities), and one safety team member at the overlook on Highway 1 above the beach. Occasionally, there would be two or more additional people on the beach (Agency staff or regulatory agency staff) on the beach to observe the activities.

Agency staff would be followed by the equipment, which would then be followed by an Agency vehicle (typically a small pickup truck, the vehicle would be parked at the previously posted signs and barriers on the south side of the excavation location). Equipment would be driven slowly on the beach and care would be taken to minimize the number of shut downs and start ups when the equipment is on the beach. Channel construction and modifications would be initiated during low tide so that after several hours of work, the removal of the final portion of the beach berm occurs near high tide. This would minimize the head difference between the estuary and ocean, reducing the potential for the reconnected channel to scour into a fully tidal inlet.

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 has preliminarily determined that the proposed mitigation measures provide the means of effecting the least practicable adverse impacts on marine mammals species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance.

### Proposed 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) indicate 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.

The applicant has developed the *Russian River Estuary Management Activities Pinniped Monitoring Plan* which describes the proposed monitoring efforts. This Plan can be found on the NMFS website at <http://www.nmfs.noaa.gov/pr/permits/incidental.htm>. In summary, monitoring includes the following:

*Lagoon Outlet Channel and Artificial Breaching Event Monitoring*

Should the mouth close during the lagoon management period (May 15th to October 15th), the Agency would construct a lagoon outlet channel as described above. A one-day pre-outlet channel survey would be made within 1–3 days prior to constructing the outlet channel and the day of construction. Monitoring would also occur on each subsequent day the channel is maintained using heavy equipment for the duration of the outlet channel period (May 15 to October 15). In addition to pre-construction and construction/maintenance days, seal counts would also be conducted twice monthly for the life of the IHA to gain a better understanding about what specific conditions seals may prefer for hauling out at the mouth of the river. This baseline information will provide the Agency with details so that they may plan Estuary management activities around prime seal haulout times in the future. These monthly counts would begin at dawn and continue for 8 hours, if weather permits, and be scheduled to capture a low and high tide each in the morning and afternoon.

During artificial breaching events, half-hour counts of all pinnipeds hauled out on the beach would begin at local dawn the day of the breaching event and continue for approximately five hours. Monitoring may occasionally last longer than five hours when artificial breaching activities occur in late morning or early afternoon. Pinnipeds would be monitored from the overlook on the bluff along Highway 1 adjacent to the haulout.

For all counts, the following information would be recorded in 30 minute intervals from an overlook on a bluff to avoid harassment from the monitoring: (1) seal counts, by species; (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. The method and disturbance behavior would 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. 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, would also be monitored (see Figure 2 in the IHA application for locations of these haulouts).

*Long Term Monitoring*

In addition to monitoring on event days, pinnipeds at the Jenner haulout would be counted twice monthly for the term of the IHA in the same manner as described above. In an attempt to understand if seals from the Jenner haulout are displaced to coastal and river haulouts nearby when the mouth remains closed in the summer, several other haulouts, on the coast and in the Russian River estuary, would be monitored (Figure 2 in application). 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 would be monitored concurrent with monitoring of outlet channel construction and maintenance activities. This would 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 would not provide definitive results that individuals from the Jenner haulout are displaced to the coastal and river haulouts as individual seals would not be marked; however, it would be useful to track general trends in haulout use during lagoon outlet channel excavation and maintenance.

An annual report would be prepared and distributed to the NMFS, California State Parks, and Stewards of the Coasts and Redwoods. The report would also be available to the public on the Agency's website. The annual report would include an executive summary, monitoring methodology, tabulation of estuary management events, summary of monitoring results, and discussion of problems noted and proposed remedial measures.

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

In determining whether or not authorized incidental take will have a

negligible impact on affected species stocks, as defined in Background section above, NMFS considers a number of criteria regarding the impact of the proposed action including the number, nature, intensity, and duration of Level B harassment takes will occur. Specific to the proposed action, NMFS has preliminarily determined that, although the Agency's Estuary Management Activities will impact a majority of pinnipeds at the Jenner haulout during construction and maintenance of the lagoon outlet channel and sandbar breaching events, as well as recurring monitoring activities, impacts are occurring to small, localized population. Further, no mortality or injury is anticipated, nor will the proposed action result in long-term impacts such as permanent abandonment of the haulout. This is evident from continued use of the haulout despite the sandbar being artificially breached for years and monitoring data indicating the seals generally return to the haulout within one day. Seals will likely become alert or flush into the water when crews and equipment come on to the beach. Further, breaching the sandbar leads to an increase in seal abundance on the beach, likely due to fact that humans can not access the haulout when the sandbar is breached, thereby limited additional disturbance. In addition, the lagoon management plan may provide ideal rearing habitat for listed steelhead and thereby increasing the availability of this species as prey for the seals.

No pinniped stocks which may be found within the action area is listed as threatened or endangered under the ESA or listed as depleted under the MMPA. Harbor seal populations are theorized to have reached the environment's carrying capacity and populations of California sea lions and northern elephant seals are also considered healthy. The low level, acute disturbance to pinnipeds at the Jenner haulout from the proposed action is not anticipated to have more than a negligible impact to the affected species and stocks. To ensure minimal disturbance, crews will, along with other minimization measures described above, approach the beach slowly and cautiously before heavy equipment to reduce chance of stampeding and will also reduce the frequency and stager days of Estuary maintenance and breaching events minimizing continued disturbance.

Marine mammal species and stocks affected by the proposed activities are not listed as threatened or endangered under the ESA or as depleted under the MMPA. The proposed number of animals taken for each species of

pinnipeds can be considered small relative to the population size. As described in the species description section above, the latest stock assessments estimate there are 34,233 harbor seals (which may have reached OSP levels), 238,000 California sea lions (increasing at approximately 6.5 percent per year), and 124,000 northern elephant seals (also increasing in number in the U.S.). The applicant has requested, based on numerous monitoring data specific to the affected haulout, that 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) may be taken each year. However, because it is not possible to identify individual animals over the course of the year from the proposed monitoring (seals would have to be tagged and observed closely to do so), these numbers represents the total number of seals observed harassed during monitoring, not individuals. Therefore, an even smaller percentage of individuals from each population are likely to be taken from the proposed activities.

Based on the analysis contained herein of 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 preliminarily finds that Estuary management activities will result in the incidental take of small numbers of marine mammals and that the total taking from will have a negligible impact on the affected species or stocks.

#### **Impact on Availability of Affected Species for Taking for Subsistence Uses**

There are no relevant subsistence uses of marine mammals implicated by this action as none are present within the action area.

#### **Endangered Species Act (ESA)**

There are no ESA listed marine mammals found in the action area; however, there are listed salmon and steelhead species present. The Agency and the U.S. Army Corps of Engineers (Corps) consulted with NMFS under Section 7 of the Endangered Species Act (ESA) regarding the potential effects of their operations and maintenance activities, including the Agency's estuary management program, on federally-listed steelhead, coho salmon, and Chinook salmon that resulted in the likelihood of jeopardy and adverse modification of critical habitat. As a result of this consultation, the NMFS

issued the Russian River Biological Opinion (NMFS, 2008) finding that artificially elevated inflows to the Estuary during the low flow season (May through October) and historic artificial breaching practices have significant adverse effects on the Russian River's estuarine rearing habitat for steelhead, coho salmon, and Chinook salmon. The BiOp's RPA 2 requires the Agency to collaborate with NMFS and to modify Estuary water level management in order to reduce marine influence (high salinity and tidal inflow) and promote a higher water surface elevation in the estuary (i.e., formation of a fresh or brackish lagoon) for purposes of enhancing the quality of rearing habitat for juvenile (age 0+ and 1+) steelhead from May 15th to October 15th (lagoon management period), hence the need for the proposed action. The BiOp fully considered the effects to listed species in the action area in drawing the conclusion that Estuary management activities conducted in accordance with RPAs would not result in jeopardy to any species or cause the modification or destruction of designated critical habitat. Any potential take of listed species associated with Estuary management activities is permissible if conducted in accordance with the Incidental Take Statement in the BiOp. Again, no listed marine mammals would be affected by the action.

#### **National Environmental Policy Act (NEPA)**

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 is preparing 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. Upon completion, this EA will be available on the NMFS website listed in the beginning of this document.

#### **Preliminary Determination**

The applicant has submitted a complete application for incidental take of pinnipeds for specified activities in a specified geographic region for a period not to exceed one year. NMFS has preliminarily determined that the specified activities would result in short-term, Level B harassment to pinnipeds located within the action area

during construction and maintenance of the lagoon outlet channel and during sandbar breaching events. Reactions are anticipated to be limited to alertness, movement, or flushing in response to crew or equipment presence. Seals are expected to return to the beach within one day, as shown in the Agency's five years of monitoring data. Due to the proposed mitigation measures (e.g., crews approaching on foot slowly and cautiously), stampeding is unlikely and therefore mortality, a concern during the pupping season, is not expected. All Estuary management activities will be monitored by NMFS approved MMOs; thereby, documenting the number of pinnipeds, nature of disturbance, and number of level of take during each event. For these reasons, NMFS has preliminarily determined that the specified activity would result in the take of small numbers of marine mammal species or stocks, would result in a negligible impact on the affected species and stocks, and would not have an unmitigable adverse impact on the availability of such species or stock for taking for subsistence uses as there are no such uses for these pinniped species in California.

Dated: November 2, 2009.

**James H. Lecky,**

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

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## **COMMODITY FUTURES TRADING COMMISSION**

**Notice of Intent To Undertake a Determination Whether the Mid-C Financial Peak Contract; Mid-C Financial Peak Daily Contract; Mid-C Financial Off-Peak Contract; and Mid-C Financial Off-Peak Daily Contract, Offered for Trading on the IntercontinentalExchange, Inc., Perform a Significant Price Discovery Function**

**AGENCY:** Commodity Futures Trading Commission.

**ACTION:** Reopening comment period.

**SUMMARY:** The Commodity Futures Trading Commission ("Commission") is reopening the comment period for interested parties to comment on the Commission's Notice of Intent to consider whether the Mid-C Financial Peak Contract, Mid-C Financial Peak Daily Contract, Mid-C Financial Off-Peak Contract, and Mid-C Financial Off-Peak Daily Contract offered for trading on the IntercontinentalExchange, Inc.