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**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 217**

**[Docket No. 160929897-7222-02]**

**RIN 0648-BG37**

**Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to Russian River Estuary Management Activities**

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

**ACTION:** Final rule.

**SUMMARY:** NMFS, upon request from the Sonoma County Water Agency (SCWA), issues these regulations pursuant to the Marine Mammal Protection Act (MMPA) to govern the incidental taking of marine mammals incidental to Russian River estuary management activities in Sonoma County, California, over the course of five years (2017-2022). These regulations, which allow for the issuance of Letters of Authorization (LOA) for the incidental take of marine mammals during the described activities and specified timeframes, prescribe the permissible methods of taking and other means of effecting the least practicable adverse impact on marine mammal species or stocks and their habitat, and establish requirements pertaining to the monitoring and reporting of such taking.

**DATES:** Effective from April 21, 2017, through April 20, 2022.

**ADDRESSES:** A copy of SCWA's application and supporting documents, as well as a list of the references cited in this document, may be obtained online at:

[www.nmfs.noaa.gov/pr/permits/incidental/construction.htm](http://www.nmfs.noaa.gov/pr/permits/incidental/construction.htm). In case of problems accessing these documents, please call the contact listed below (see **FOR FURTHER INFORMATION CONTACT**).

**FOR FURTHER INFORMATION CONTACT:** Ben Laws, Office of Protected Resources, NMFS, (301) 427-8401.

**SUPPLEMENTARY INFORMATION:**

**Purpose and Need for Regulatory Action**

These regulations, issued under the authority of the MMPA (16 U.S.C. 1361 *et seq.*), establish a framework for authorizing the take of marine mammals incidental to SCWA's estuary management activities at the mouth of the Russian River in Sonoma County, CA. SCWA plans to manage the naturally-formed barrier beach at the mouth of the Russian River in order to minimize potential for flooding adjacent to the estuary and to enhance habitat for juvenile salmonids, as well as to conduct biological and physical monitoring of the barrier beach and estuary. Breaching of the naturally-formed barrier beach at the mouth of the Russian River requires the use of heavy equipment and increased human presence, and monitoring in the estuary requires the use of small boats.

We received an application from SCWA requesting five-year regulations and authorization to take multiple species of marine mammals. Take is anticipated to occur by Level B harassment incidental to estuary management activities due to disturbance of hauled pinnipeds. The regulations are valid from 2017 to 2022. Please see "Background" below for definitions of harassment.

*Legal Authority for the Action*

Section 101(a)(5)(A) of the MMPA (16 U.S.C. 1371(a)(5)(A)) directs 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 for up to five years if, after notice and public comment, the agency makes certain findings and issues regulations that set forth permissible methods of taking pursuant to that activity, as well as monitoring and reporting requirements. Section 101(a)(5)(A) of the MMPA and the implementing regulations at 50 CFR part 216, subpart I provide the legal basis for issuing this final rule containing five-year regulations, and for any subsequent Letters of Authorization. As directed by this legal authority, this final rule contains mitigation, monitoring, and reporting requirements.

#### *Summary of Major Provisions within the Final Rule*

The following provides a summary of some of the major provisions within the final rulemaking for SCWA estuary management activities. We have determined that SCWA's adherence to the planned mitigation, monitoring, and reporting measures listed below will achieve the least practicable adverse impact on the affected marine mammals. They include:

- Measures to minimize the number and intensity of incidental takes during sensitive times of year and to minimize the duration of disturbances.
- Measures designed to eliminate startling reactions.
- Eliminating or altering management activities on the beach when pups are present, and setting limits on the frequency and duration of events during pupping season.

#### **Background**

Paragraphs 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1371 (a)(5)(A) and (D)) 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.

An 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.”

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 2, 2016, we received an adequate and complete request from SCWA for authorization to take marine mammals incidental to estuary management activities. On September 20, 2016 (81 FR 64440), we published a notice of receipt of SCWA’s application in the **Federal Register**, requesting comments and information related to the request for 30 days.

We did not receive any comments. SCWA provided a revised draft incorporating minor revisions on November 1, 2016.

SCWA plans to manage the naturally-formed barrier beach at the mouth of the Russian River in order to minimize potential for flooding adjacent to the estuary and to enhance habitat for juvenile salmonids, as well as to conduct biological and physical monitoring of the barrier beach and estuary. Flood control-related breaching of the barrier beach at the mouth of the river may include artificial breaches, as well as construction and maintenance of a lagoon outlet channel. The latter activity, an alternative management technique conducted to mitigate impacts of flood control on rearing habitat for Endangered Species Act (ESA)-listed salmonids, occurs only from May 15 through October 15 (hereafter, the “lagoon management period”). Artificial breaching and monitoring activities may occur at any time during the period of validity of the regulations, which are valid for 5 years, from April 21, 2017, through April 20, 2022.

Breaching of the naturally-formed barrier beach at the mouth of the Russian River requires the use of heavy equipment (*e.g.*, bulldozer, excavator) and increased human presence, and monitoring in the estuary requires the use of small boats. As a result, pinnipeds hauled out on the beach or at peripheral haul-outs in the estuary may exhibit behavioral responses that indicate incidental take by Level B harassment under the MMPA. Species known from the haul-out at the mouth of the Russian River or from peripheral haul-outs, and therefore anticipated to be taken incidental to the specified activity, include the harbor seal (*Phoca vitulina richardii*), California sea lion (*Zalophus californianus*), and northern elephant seal (*Mirounga angustirostris*).

Prior to this request for incidental take regulations and a subsequent LOA, we issued seven consecutive incidental harassment authorizations (IHAs) to SCWA for incidental take

associated with the same ongoing activities. SCWA was first issued an IHA, valid for a period of one year, effective on April 1, 2010 (75 FR 17382; April 6, 2010), and was subsequently issued one-year IHAs for incidental take associated with the same activities, effective on April 21, 2011 (76 FR 23306; April 26, 2011), April 21, 2012 (77 FR 24471; April 24, 2012), April 21, 2013 (78 FR 23746; April 22, 2013), April 21, 2014 (79 FR 20180; April 11, 2014), April 21, 2015 (80 FR 24237; April 30, 2015), and April 21, 2016 (81 FR 22050; April 14, 2016).

### **Description of the Specified Activity**

Additional detail regarding the specified activity was provided in our **Federal Register** notice of proposed rulemaking (81 FR 96415; December 30, 2016) and in past notices cited herein; please see those documents or SCWA's application for more information.

#### *Overview*

The specified activity involves management of the estuary to prevent flooding while preventing adverse modification to critical habitat for ESA-listed salmonids. Requirements related to the ESA are described in further detail below. During the lagoon management period, this involves construction and maintenance of a lagoon outlet channel that would facilitate formation of a perched lagoon. A perched lagoon, which is an estuary closed to tidal influence in which water surface elevation is above mean high tide, would reduce flooding while maintaining beneficial conditions for juvenile salmonids. Additional breaches of the barrier beach may be conducted for the sole purpose of reducing flood risk. SCWA's activity was described in detail in our notice of proposed authorization prior to the 2011 IHA (76 FR 14924; March 18, 2011); please see that document for a detailed description of SCWA's estuary management activities. Aside from minor additions to SCWA's biological and physical estuary monitoring measures, the specified activity remains the same as that described in the 2011 document.

### *Dates and Duration*

The specified activity may occur at any time during the five-year period of validity for these regulations (April 21, 2017 through April 20, 2022), although construction and maintenance of a lagoon outlet channel would occur only during the lagoon management period. In addition, there are certain restrictions placed on SCWA during the harbor seal pupping season. These, as well as periodicity and frequency of the specified activities, are described in further detail below.

### *Specified Geographical Region*

The estuary is located about 97 kilometers (km) (60 miles (mi)) northwest of San Francisco in Sonoma County, near Jenner, California (see Figure 1 of SCWA's application). The Russian River watershed encompasses 3,847 km<sup>2</sup> (1,485 mi<sup>2</sup>) in Sonoma, Mendocino, and Lake Counties. The mouth of the Russian River is located at Goat Rock State Beach (see Figure 2 of SCWA's application); the estuary extends from the mouth upstream approximately 10 to 11 km (6-7 mi) between Austin Creek and the community of Duncans Mills (Heckel and McIver, 1994).

### *Detailed Description of Activities*

Within the Russian River watershed, the U.S. Army Corps of Engineers (Corps), SCWA, and the Mendocino County Russian River Flood Control and Water Conservation Improvement District (District) operate and maintain Federal facilities and conduct activities in addition to the estuary management, including flood control, water diversion and storage, instream flow releases, hydroelectric power generation, channel maintenance, and fish hatchery production. As described in the notice of proposed rulemaking, NMFS issued a 2008 Biological Opinion (BiOp) for Water Supply, Flood Control Operations, and Channel Maintenance conducted by the Corps, SCWA, and the District in the Russian River watershed (NMFS, 2008). This BiOp found that the

activities—including SCWA’s estuary management activities—authorized by the Corps and undertaken by SCWA and the District, if continued in a manner similar to recent historic practices, were likely to jeopardize the continued existence of ESA-listed salmonids and were likely to adversely modify critical habitat. In part, therefore, the BiOp requires SCWA to collaborate with NMFS and modify their estuary water level management in order to reduce marine influence (*i.e.*, high salinity and tidal inflow) and promote a higher water surface elevation in the estuary in order to enhance the quality of rearing habitat for juvenile salmonids. SCWA is also required to 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.

There are three components to SCWA’s ongoing estuary management activities: (1) lagoon outlet channel management, during the lagoon management period only, required to accomplish the dual purposes of flood risk abatement and maintenance of juvenile salmonid habitat; (2) traditional artificial breaching, with the sole objective of flood risk abatement; and (3) physical and biological monitoring in and near the estuary, required under the terms of the BiOp, to understand response to water surface elevation management in the estuary-lagoon system. The latter category (physical and biological monitoring) includes all ancillary beach and/or estuary monitoring activities and will remain the same as in past years and as described in our 2015 notice of proposed authorization (80 FR 14073; March 18, 2015). Please see the previously referenced **Federal Register** notice (76 FR 14924; March 18, 2011) for detailed discussion of lagoon outlet channel management, artificial breaching, and other monitoring activities.

## **Comments and Responses**

We published a notice of proposed rulemaking in the **Federal Register** on December 30, 2016 (81 FR 96415). During the 30-day comment period, we received a letter from the Marine Mammal Commission (Commission) and comments from two private citizens. The Commission recommends that we issue the requested authorization, subject to inclusion of the proposed mitigation and monitoring measures as described in our notice of proposed rulemaking and the application. All measures proposed in the initial **Federal Register** notice are included within the final rule. The comments from the two private citizens are described below.

*Comment 1:* If a project is found to jeopardize a species or adversely modify its critical habitat, NMFS must cease activity until a non-jeopardizing Reasonable and Prudent Alternative (RPA) to the proposed project is in place, in coordination with the Federal action agency and any applicant.

*Response:* Although this is a general comment not specifically relevant to the proposed rulemaking that was the subject of the public comment period, the commenter's statement is correct. We refer readers to NMFS's 2008 BiOp for details of the relevant ESA section 7 consultation described previously in this document.

*Comment 2:* It is important to leave our environment and the Russian River estuary as pristine as possible for future generations. Please keep takes allowed from this region to a minimum.

*Response:* As required by the MMPA, NMFS has prescribed mitigation sufficient to satisfy the MMPA's least practicable adverse impact standard and has determined that the level of incidental taking proposed for authorization meets the MMPA's negligible impact standard.

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

The marine mammal species that may be harassed incidental to estuary management activities are the harbor seal, California sea lion, and the northern elephant seal. We presented a detailed discussion of the status of these stocks and their occurrence in the action area in the notice of the proposed rulemaking (81 FR 96415; December 30, 2016).

Ongoing monthly harbor seal counts at the Jenner haul-out were begun by J. Mortenson in January 1987, with additional nearby haul-outs added to the counts thereafter. In addition, local resident E. Twohy began daily observations of seals and people at the Jenner haul-out in November 1989. These datasets note whether the mouth at the Jenner haul-out was opened or closed at each observation, as well as various other daily and annual patterns of haul-out usage (Mortenson and Twohy, 1994). Recently, SCWA began regular baseline monitoring of the haul-out as a component of its estuary management activity. In the notice of proposed rulemaking, we presented average daily numbers of seals observed at the mouth of the Russian River from 1993-2005 and from 2009-2015 (see Table 1; 81 FR 96415; December 30, 2016).

### **Potential Effects of the Specified Activity on Marine Mammals and Their Habitat**

We provided a detailed discussion of the potential effects of the specified activity on marine mammals in the notice of the proposed rulemaking (81 FR 96415; December 30, 2016). A summary of anticipated effects is provided below.

A significant body of monitoring data exists for pinnipeds at the mouth of the Russian River. In addition, pinnipeds have co-existed with regular estuary management activity for decades, as well as with regular human use activity at the beach, and are likely habituated to human presence and activity. Nevertheless, SCWA's estuary management activities have the potential to disturb pinnipeds present on the beach or at peripheral haul-outs in the estuary. During breaching operations, past monitoring has revealed that some or all of the seals present

typically move or flush from the beach in response to the presence of crew and equipment, although some may remain hauled-out. No stampeding of seals—a potentially dangerous occurrence in which large numbers of animals succumb to mass panic and rush away from a stimulus—has been documented since SCWA developed protocols to prevent such events in 1999. While it is likely impossible to conduct required estuary management activities without provoking some response in hauled-out animals, precautionary mitigation measures, described later in this document, ensure that animals are gradually apprised of human approach. Under these conditions, seals typically exhibit a continuum of responses, beginning with alert movements (*e.g.*, raising the head), which may then escalate to movement away from the stimulus and possible flushing into the water. Flushed seals typically re-occupy the haul-out within minutes to hours of the stimulus. In addition, eight other haul-outs exist nearby that may accommodate flushed seals. In the absence of appropriate mitigation measures, it is possible that pinnipeds could be subject to injury, serious injury, or mortality, likely through stampeding or abandonment of pups.

California sea lions and northern elephant seals, which have been noted only infrequently in the action area, have been observed as being less sensitive to stimulus than harbor seals during monitoring at numerous other sites. For example, monitoring of pinniped disturbance as a result of abalone research in the Channel Islands showed that, while harbor seals flushed at a rate of 69 percent, California sea lions flushed at a rate of only 21 percent. The rate for elephant seals was 0.1 percent (VanBlaricom, 2010). In the event that either of these species is present during management activities, they would be expected to display a minimal reaction to maintenance activities—less than that expected of harbor seals.

Although the Jenner haul-out is not known as a primary pupping beach, pups have been observed during the pupping season; therefore, we have evaluated the potential for injury, serious injury, or mortality to pups. There is a lack of published data regarding pupping at the mouth of the Russian River, but SCWA monitors have observed pups on the beach. No births were observed during recent monitoring, but may be inferred based on signs indicating pupping (*e.g.*, blood spots on the sand, birds consuming possible placental remains). Pup injury or mortality would be most likely to occur in the event of extended separation of a mother and pup, or trampling in a mass movement. As discussed previously, no such movements have been recorded since development of appropriate protocols in 1999. Any California sea lions or northern elephant seals present would be independent juveniles or adults; therefore, analysis of impacts on pups is not relevant for those species.

Similarly, the period of mother-pup bonding, critical time needed to ensure pup survival and maximize pup health, is not expected to be impacted by estuary management activities. 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 Renouf, 1985; Cottrell *et al.*, 2002; Burns *et al.*, 2005). Lawson and Renouf (1987) investigated harbor seal mother-pup bonding in response to natural and anthropogenic disturbance. In summary, they found that the most critical bonding time is within minutes after birth. Although pupping season is defined as March 15-June 30, the peak of pupping season is typically concluded by mid-May, when the lagoon management period begins. As such, it is expected that most mother-pup bonding would likely be concluded as well. The number of management events during the months of March and April has been relatively low in the past, and the breaching activities occur in a single day over several hours. In addition,

mitigation measures described later in this document further reduce the likelihood of any impacts to pups, whether through injury or mortality or interruption of mother-pup bonding.

In summary, and based on extensive monitoring data, we believe that impacts to hauled-out pinnipeds during estuary management activities would be behavioral harassment of limited duration (*i.e.*, less than one day) and limited intensity (*i.e.*, temporary flushing at most).

Stampeding, and therefore injury or mortality, is not expected—nor has it been documented—in the years since appropriate protocols were established (see “Mitigation” for more details).

Further, the continued, and increasingly heavy (see SCWA’s monitoring reports), use of the haul-out despite decades of breaching events indicates that abandonment of the haul-out is unlikely.

#### *Anticipated Effects on Marine Mammal Habitat*

We provided a detailed discussion of the potential effects of this action on marine mammal habitat in the notice of the proposed IHA (81 FR 96415; December 30, 2016). SCWA’s estuary management activities will result in temporary physical alteration of the Jenner haul-out. With barrier beach closure, seal usage of the beach haul-out declines, and the three nearby river haul-outs may not be available for usage due to rising water surface elevations. Breaching of the barrier beach, subsequent to the temporary habitat disturbance, will likely increase suitability and availability of habitat for pinnipeds. Biological and water quality monitoring will not physically alter pinniped habitat.

In summary, there will be temporary physical alteration of the beach. However, natural opening and closure of the beach results 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 salmonid abundance, ultimately providing more food for seals present within the

action area. Thus, any impacts to marine mammal habitat are not expected to cause significant or long-term consequences for individual marine mammals or their populations.

### **Estimated Take by Incidental Harassment**

Except with respect to certain activities not pertinent here, section 3(18) of 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).”

In accordance with the regulations implemented by this final rule, we plan to issue an LOA to SCWA to take harbor seals, California sea lions, and northern elephant seals, by Level B harassment only, incidental to estuary management activities. These activities, involving increased human presence and the use of heavy equipment and support vehicles, are expected to harass pinnipeds present at the haul-out through disturbance. In addition, monitoring activities prescribed in the BiOp may harass additional animals at the Jenner haul-out and at the three haul-outs located in the estuary (Penny Logs, Patty’s Rock, and Chalanchawi). Estimates of the number of harbor seals, California sea lions, and northern elephant seals that may be harassed by the planned activities is based upon the number of potential events associated with Russian River estuary management activities and the average number of individuals of each species that are present during conditions appropriate to the activity. Monitoring effort at the mouth of the Russian River has shown that the number of seals utilizing the haul-out declines during bar-closed conditions. Methodology of take estimation was discussed in detail in our notice of

proposed rulemaking (81 FR 96415; December 30, 2016). Table 1 details the total number of estimated takes for harbor seals.

California sea lions and northern elephant seals are occasional visitors to the estuary. Based on limited information regarding occurrence of these species at the mouth of the Russian River estuary, we assume there is the potential to encounter one animal of each species per month throughout the year. Lagoon outlet channel activities could potentially occur over six months of the year, artificial breaching activities over eight months, topographic surveys year-round, and biological and physical monitoring in the estuary over eight months. Therefore, we assume that up to 34 incidents of take could occur per year for both the California sea lion and northern elephant seal. Based on past occurrence records, the take authorization for these two species is likely a precautionary overestimate.

**Table 1. Estimated Number of Harbor Seal Takes Resulting from Russian River Estuary Management Activities.**

Number of animals expected to occur <sup>a</sup>	Number of events <sup>b,c</sup>	Potential total number of individual animals that may be taken
Lagoon Outlet Channel Management (May 15 to October 15)		
Implementation: 117 <sup>d</sup>	Implementation: 3	Implementation: 702
Maintenance and Monitoring: May: 80 June: 98 July: 117 Aug: 17 Sept: 30 Oct: 28	Maintenance: May: 1 June-Sept: 4/month Oct: 1	Maintenance: 1,156
	Monitoring: June-Sept: 2/month Oct: 1	Monitoring: 552
		Total: 2,410
Artificial Breaching		
Oct: 28	Oct: 2	Oct: 56
Nov: 32	Nov: 2	Nov: 64
Dec: 59	Dec: 2	Dec: 118
Jan: 49	Jan: 1	Jan: 49
Feb: 75	Feb: 1	Feb: 75
Mar: 133	Mar: 1	Mar: 133
Apr: 99	Apr: 1	Apr: 99
May: 80	May: 2	May: 160
	12 events maximum	Total: 754
Topographic and Geophysical Beach Surveys		
Jan: 99 Feb: 131 Mar: 165	1 topographic survey/month; 100 percent of animals present Jun-Feb; 10 percent of animals	Jan: 99 Feb: 131 Mar: 165

Apr: 141 May: 151 Jun: 164 Jul: 282 Aug: 133 Sep: 62 Oct: 48 Nov: 68 Dec: 98	present Mar-May	Apr: 14 May: 151 Jun: 164 Jul: 282 Aug: 133 Sep: 62 Oct: 48 Nov: 68 Dec: 98 Total: 1,415
Biological and Physical Habitat Monitoring in the Estuary		
1 <sup>e</sup>	113	113
Total	N/A	4,692

<sup>a</sup>For Lagoon Outlet Channel Management and Artificial Breaching, average daily number of animals corresponds with data from Table 2 in our notice of proposed rulemaking. For Topographic and Geophysical Beach Surveys, average daily number of animals corresponds with 2011-15 data from Table 1 in our notice of proposed rulemaking.

<sup>b</sup>For implementation of the lagoon outlet channel, an event is defined as a single, two-day episode. For the remaining activities, an event is defined as a single day on which an activity occurs. Some events may include multiple activities.

<sup>c</sup>Number of events for artificial breaching derived from historical data. The average number of events for each month was rounded up to the nearest whole number; estimated number of events for December was increased from one to two because multiple closures resulting from storm events have occurred in recent years during that month. The total numbers (12) likely represent an overestimate, as the average annual number of events is five.

<sup>d</sup>Although implementation could occur at any time during the lagoon management period, the highest daily average per month from the lagoon management period was used.

<sup>e</sup>Based on past experience, SCWA expects that no more than one seal may be present, and thus would have the potential to be disturbed, in total at the three river haul-outs.

The take numbers described in the preceding text are annual estimates. Therefore, over the course of the 5-year period of validity of the regulations, we will authorize a total of 23,460 incidents of take for harbor seals and 170 such incidents each for the California sea lion and northern elephant seal.

## **Analyses and Determinations**

### *Negligible Impact Analysis*

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.” A negligible impact finding is based on the lack of likely adverse effects on annual rates of recruitment or survival (*i.e.*, population-level effects). An estimate of the number of takes alone

is not enough information on which to base an impact determination. In addition to considering estimates of the number of marine mammals that might be “taken” through behavioral harassment, we consider other factors, such as the likely nature of any responses (*e.g.*, intensity, duration), the context of any such responses (*e.g.*, critical reproductive time or location, migration), as well as the number and nature of estimated Level A harassment takes (if any), and effects on habitat. We also assess the number, intensity, and context of estimated takes by evaluating this information relative to population status.

Consistent with the 1989 preamble for NMFS’s implementing regulations (54 FR 40338; September 29, 1989), the impacts from other past and ongoing anthropogenic activities are incorporated into these analyses via their impacts on the environmental baseline (*e.g.*, as reflected in the regulatory status of the species, population size and growth rate where known, sources of human-caused mortality).

Although SCWA’s estuary management activities may disturb pinnipeds hauled out at the mouth of the Russian River, as well as those hauled out at several locations in the estuary during recurring monitoring activities, impacts are occurring to a small, localized group of animals. While these impacts can occur year-round, they occur sporadically and for limited duration (*e.g.*, a maximum of two consecutive days for water level management events). Seals will likely become alert or, at most, flush into the water in reaction to the presence of crews and equipment on the beach. While disturbance may occur during a sensitive time (during the March 15-June 30 pupping season), mitigation measures have been specifically designed to further minimize harm during this period and eliminate the possibility of pup injury or mother-pup separation.

No injury, serious injury, or mortality is anticipated, nor is the planned action likely to result in long-term impacts such as permanent abandonment of the haul-out. Injury, serious injury, or mortality to pinnipeds would likely result from startling animals inhabiting the haul-out into a mass movement, or from extended mother-pup separation as a result of such movement. Long-term impacts to pinniped usage of the haul-out could result from significantly increased presence of humans and equipment on the beach. To avoid these possibilities, we have worked with SCWA to develop the previously described mitigation measures. These are designed to reduce the possibility of startling pinnipeds, by gradually apprising them of the presence of humans and equipment on the beach, and to reduce the possibility of impacts to pups by eliminating or altering management activities on the beach when pups are present, and by setting limits on the frequency and duration of events during pupping season. During the past 15 years of flood control management, implementation of similar mitigation measures has resulted in no known mass movement or stampede events and no known injury, serious injury, or mortality. Over the course of that time, management events have generally been infrequent and of limited duration.

No pinniped stocks for which incidental take will be authorized are listed as threatened or endangered under the ESA or determined to be strategic or depleted under the MMPA. Recent data suggests that harbor seal populations have reached carrying capacity; populations of California sea lions and northern elephant seals in California are also considered healthy.

In summary, and based on extensive monitoring data, we believe that impacts to hauled-out pinnipeds during estuary management activities would be behavioral harassment of limited duration (*i.e.*, less than one day) and limited intensity (*i.e.*, temporary flushing at most). Stamping, and therefore injury or mortality, is not expected—nor has it been documented—in

the years since appropriate protocols were established (see “Mitigation” for more details). Further, the continued, and increasingly heavy use of the haul-out (see figures in SCWA documents) despite decades of breaching events indicates that abandonment of the haul-out is unlikely. 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 planned monitoring and mitigation measures, we find that the total marine mammal take from SCWA’s estuary management activities will have a negligible impact on the affected marine mammal species or stocks.

#### *Small Numbers Analysis*

The number of animals expected to be taken for each species of pinniped can be considered small relative to the population size. There are an estimated 30,968 harbor seals in the California stock, 296,750 California sea lions, and 179,000 northern elephant seals in the California breeding population. Based on extensive monitoring effort specific to the affected haul-out and historical data on the frequency of the specified activity, we plan to authorize annual levels of take, by Level B harassment only, of 4,692 incidents of harassment for harbor seals, 34 incidents of harassment for California sea lions, and 34 incidents of harassment for northern elephant seals, representing 15.2, 0.01, and 0.02 percent of the populations, respectively. However, this represents an overestimate of the number of individuals harassed annually over the duration of the regulations, because these totals represent much smaller numbers of individuals that may be harassed multiple times. 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, we find

that small numbers of marine mammals will be taken relative to the populations of the affected species or stocks.

## **Mitigation**

In order to issue an incidental take authorization (ITA) under section 101(a)(5)(A) 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 subsistence uses.” NMFS’s implementing regulations require applicants for ITAs to include information about the availability and feasibility (economic and technological) of equipment, methods, and manner of conducting such activity or other means of effecting the least practicable adverse impact upon the affected species or stocks and their habitat (50 CFR 216.104(a)(11)).

SCWA will continue the following mitigation measures, as implemented during the previous ITAs, which are designed to minimize impact to affected species and stocks:

- SCWA crews will cautiously approach (*e.g.*, walking slowly with limited arm movement and minimal sound) the haul-out ahead of heavy equipment to minimize the potential for sudden flushes, which may result in a mass movement—a particular concern during pupping season.
- SCWA staff will avoid walking or driving equipment through the seal haul-out.
- Crews on foot will make an effort to be seen by seals from a distance, if possible, rather than appearing suddenly, in order to prevent sudden flushes.
- During breaching events, all monitoring will be conducted from the overlook on the bluff along Highway 1 adjacent to the haul-out in order to minimize potential for harassment.

- A water level management event may not occur for more than two consecutive days unless flooding threats cannot be controlled.

In addition, SCWA will continue the following mitigation measures specific to pupping season (March 15-June 30), as implemented in the previous ITAs:

- SCWA will maintain a one-week no-work period between water level management events (unless flooding is an immediate threat) to allow for an adequate disturbance recovery period. During the no-work period, equipment must be removed from the beach.

- If a pup less than one week old is on the beach where heavy machinery would be used or is on the path used to access the work location, the management action will be delayed until the pup has left the site or until the latest day possible to prevent flooding while still maintaining suitable fish rearing habitat. In the event that a pup remains present on the beach in the presence of flood risk, SCWA will consult with NMFS to determine the appropriate course of action. SCWA will coordinate with the locally established seal monitoring program (Stewards' Seal Watch) to determine if pups less than one week old are on the beach prior to a breaching event.

- Physical and biological monitoring will not be conducted if a pup less than one week old is present at the monitoring site or on a path to the site.

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. All work will be completed as efficiently as possible, with the smallest amount of heavy equipment possible, to minimize disturbance of seals at the haul-out. Boats operating near river haul-outs during monitoring will be kept within posted speed limits and driven as far from the haul-outs as safely possible to minimize flushing seals.

We have carefully evaluated SCWA's planned mitigation measures and considered their effectiveness in past implementation to determine whether they are likely to effect 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; and (3) the practicability of the measure for applicant implementation.

Any mitigation measure(s) we prescribe should be able to accomplish, have a reasonable likelihood of accomplishing (based on current science), or contribute to the accomplishment of one or more of the general goals listed below:

- (1) Avoidance or minimization of injury or death of marine mammals wherever possible (goals 2, 3, and 4 may contribute to this goal).
- (2) A reduction in the number (total number or number at biologically important time or location) of individual marine mammals exposed to stimuli expected to result in incidental take (this goal may contribute to goal 1, above, or to reducing takes by behavioral harassment only).
- (3) A reduction in the number (total number or number at a biologically important time or location) of times any individual marine mammal would be exposed to stimuli expected to result in incidental take (this goal may contribute to goal 1, above, or to reducing takes by behavioral harassment only).

(4) A reduction in the intensity of exposure to stimuli expected to result in incidental take (this goal may contribute to goal 1, above, or to reducing the severity of behavioral harassment only).

(5) Avoidance or minimization of adverse effects to marine mammal habitat, paying particular attention to the prey base, blockage or limitation of passage to or from biologically important areas, permanent destruction of habitat, or temporary disturbance of habitat during a biologically important time.

(6) For monitoring directly related to mitigation, an increase in the probability of detecting marine mammals, thus allowing for more effective implementation of the mitigation.

Based on our evaluation of SCWA's planned measures and on SCWA's record of management at the mouth of the Russian River including information from monitoring of SCWA's implementation of the mitigation measures as prescribed under the previous ITAs, we have determined that the planned mitigation measures provide the means of effecting the least practicable adverse impact on marine mammal species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance.

### **Monitoring and Reporting**

In order to issue an ITA for an activity, section 101(a)(5)(A) 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 ITAs 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 the proposed action area.

Any monitoring requirement we prescribe should improve our understanding of one or more of the following:

- Occurrence of marine mammal species in action area (*e.g.*, presence, abundance, distribution, density).
- Nature, scope, or context of likely marine mammal exposure to potential stressors/impacts (individual or cumulative, acute or chronic), through better understanding of: (1) action or environment (*e.g.*, source characterization, propagation, ambient noise); (2) affected species (*e.g.*, life history, dive patterns); (3) co-occurrence of marine mammal species with the action; or (4) biological or behavioral context of exposure (*e.g.*, age, calving, or feeding areas).
- Individual responses to acute stressors, or impacts of chronic exposures (behavioral or physiological).
- How anticipated responses to stressors impact either: (1) long-term fitness and survival of an individual; or (2) population, species, or stock.
- Effects on marine mammal habitat and resultant impacts to marine mammals.
- Mitigation and monitoring effectiveness.

SCWA submitted a marine mammal monitoring plan as part of the ITA application. It can be found online at [www.nmfs.noaa.gov/pr/permits/incidental/construction.htm](http://www.nmfs.noaa.gov/pr/permits/incidental/construction.htm). The plan has been successfully implemented by SCWA under previous ITAs. The purpose of this monitoring plan, which is carried out collaboratively with the Stewards of the Coasts and Redwoods (Stewards) organization, is to detect the response of pinnipeds to estuary management activities at the Russian River estuary. SCWA has designed the plan both to satisfy the requirements of the ITA, and to address the following questions of interest:

1. Under what conditions do pinnipeds haul out at the Russian River estuary mouth at Jenner?
2. How do seals at the Jenner haul-out respond to activities associated with the construction and maintenance of the lagoon outlet channel and artificial breaching activities?
3. Does the number of seals at the Jenner haul-out significantly differ from historic averages with formation of a summer (May 15 to October 15) lagoon in the Russian River estuary?
4. Are seals at the Jenner haul-out displaced to nearby river and coastal haul-outs when the mouth remains closed in the summer?

### *Monitoring Measures*

*Baseline Monitoring* – Seals at the Jenner haul-out will be counted for four hours every week, with no more than four baseline surveys each month. Two monitoring events each month will occur in the morning, and two will occur in the afternoon, with an effort to schedule a morning survey at low and high tide each month and an afternoon survey at low and high tide each month. This baseline information will provide SCWA with details that may help to plan estuary management activities in the future to minimize pinniped interaction. Survey protocols are as follows: all seals hauled out on the beach are counted every 30 minutes from the overlook on the bluff along Highway 1 adjacent to the haul-out using spotting scopes. Monitoring may conclude for the day if weather conditions affect visibility (*e.g.*, heavy fog in the afternoon). Depending on how the sandbar is formed, seals may haul out in multiple groups at the mouth. At each 30-minute count, the observer indicates where groups of seals are hauled out on the sandbar and provides a total count for each group. If possible, adults and pups are counted separately.

This primary haul-out is where the majority of seals are found and where pupping occurs, and SCWA’s planned monitoring will allow continued development in understanding the physical and biological factors that influence seal abundance and behavior at the site. In particular, SCWA notes that the planned frequency of surveys will allow them to be able to observe the influence of physical changes that do not persist for more than ten days, like brief periods of barrier beach closures or other environmental changes, and will allow for assessment of how seals respond to barrier beach closures as well as accurate estimation of the number of harbor seal pups born at Jenner each year.

In addition to the census data, disturbances of the haul-out are recorded. The method for recording disturbances follows those in Mortenson (1996). Disturbances will be recorded on a three-point scale that represents an increasing seal response to the disturbance (Table 2). The time, source, and duration of the disturbance, as well as an estimated distance between the source and haul-out, are recorded. It should be noted that only responses falling into Mortenson’s Levels 2 and 3 will be considered as harassment under the MMPA, under the terms of these final regulations.

**Table 2. Seal Response to Disturbance.**

Level	Type of response	Definition
1	Alert	Seal head orientation or brief movement in response to disturbance, which may include turning head towards the disturbance, craning head and neck while holding the body rigid in a u-shaped position, changing from a lying to a sitting position, or brief movement of less than twice the animal’s body length.
2	Movement	Movements in response to the source of disturbance, ranging from short withdrawals at least twice the animal’s body length to longer retreats over the beach, or if already moving a change of direction of greater than 90 degrees.
3	Flight	All retreats (flushes) to the water.

Weather conditions are recorded at the beginning of each census. These include temperature, Beaufort sea state, precipitation/visibility, and wind speed. Tide levels and estuary water surface elevations are correlated to the monitoring start and end times.

In an effort towards understanding possible relationships between use of the Jenner haul-out and nearby coastal and river haul-outs, several other haul-outs on the coast and in the Russian River estuary are monitored as well (see Figure 1 of SCWA's application). Peripheral site monitoring would occur only in the event of an extended period of lagoon conditions (*i.e.*, barrier beach closed with perched outlet channel for three weeks or more). Abundance at these sites has been observed to be generally very low regardless of river mouth condition. These sites are generally very small physically, and are composed of small rocks or outcrops or logs in the river, and therefore could not accommodate significant displacement from the main beach haul-out. Monitoring of peripheral sites under extended lagoon conditions will allow for possible detection of any changed use patterns.

*Estuary Management Event Monitoring, Lagoon Outlet Channel* – Should the mouth of the river close during the lagoon management period, SCWA would construct a lagoon outlet channel as required by the BiOp. Activities associated with the initial construction of the outlet channel, as well as the maintenance of the channel that may be required, would be monitored for disturbances to the seals at the Jenner haul-out.

A one-day pre-event channel survey will be made within one to three days prior to constructing the outlet channel. The haul-out will be monitored on the day the outlet channel is constructed and daily for up to the maximum two days allowed for channel excavation activities. Monitoring will also occur on each day that the outlet channel is maintained using heavy equipment for the duration of the lagoon management period. Monitoring of outlet channel construction and maintenance will correspond with that described above in the "Baseline Monitoring" section, with the exception that management activity monitoring duration will be defined by event duration. On the day of the management event, pinniped monitoring will begin

at least one hour prior to the crew and equipment accessing the beach work area, and will continue through the duration of the event, until at least one hour after the crew and equipment leave the beach.

In an attempt to understand whether seals from the Jenner haul-out are displaced to coastal and river haul-outs nearby when management events occur, other nearby haul-outs are monitored concurrently with monitoring of outlet channel construction and maintenance activities. This provides an opportunity to qualitatively assess whether these haul-outs are being used by seals displaced from the Jenner haul-out during lagoon outlet channel excavation and maintenance. This monitoring will not provide definitive results regarding displacement to nearby coastal and river haul-outs, as individual seals are not marked or photo-identified, but is useful in tracking general trends in haul-out use during lagoon outlet channel excavation and maintenance. As volunteers are required to monitor these peripheral haul-outs, haul-out locations may need to be prioritized if there are not enough volunteers available. In that case, priority would be assigned to the nearest haul-outs (North Jenner and Odin Cove), followed by the Russian River estuary haul-outs, and finally the more distant coastal haul-outs.

*Estuary Management Event Monitoring, Artificial Breaching Events* – In accordance with the Russian River BiOp, SCWA may artificially breach the barrier beach outside of the summer lagoon management period, and may conduct a maximum of two such breaching events during the lagoon management period, when estuary water surface elevations rise above seven feet. In that case, NMFS may be consulted regarding potential scheduling of an artificial breaching event to open the barrier beach and reduce flooding risk.

Pinniped response to artificial breaching will be monitored at each such event during the period of validity of these regulations. Monitoring methods will follow the census and

disturbance monitoring protocols described in the “Baseline Monitoring” section, which were also used for the 1996 to 2000 monitoring events (MSC, 1997, 1998, 1999, 2000; SCWA and MSC, 2001). The exception, as for lagoon management events, is that the duration of monitoring is dependent upon the duration of the event. On the day of the management event, pinniped monitoring begins at least one hour before the crew and equipment accesses the beach work area, and monitoring continues through the duration of the event, until at least one hour after the crew and equipment leave the beach.

For all counts, the following information will be recorded in thirty-minute intervals: (1) pinniped counts by species; (2) behavior; (3) time, source and duration of any disturbance; (4) estimated distances between source of disturbance and pinnipeds; (5) weather conditions (*e.g.*, temperature, wind); and (5) tide levels and estuary water surface elevation.

*Monitoring During Pupping Season* – The pupping season is defined as March 15 to June 30. Baseline, lagoon outlet channel, and artificial breaching monitoring during the pupping season will include records of neonate (pups less than one week old) observations.

Characteristics of a neonate pup include: body weight less than 15 kg; thin for their body length; an umbilicus or natal pelage present; wrinkled skin; and awkward or jerky movements on land.

SCWA will coordinate with the Stewards’ Seal Watch monitoring program (Stewards) to determine if pups less than one week old are on the beach prior to a water level management event.

If, during monitoring, observers sight any pup that might be abandoned, SCWA will contact the NMFS stranding response network immediately, and also will report the incident to NMFS’s West Coast Regional Office and Office of Protected Resources within 48 hours.

Observers will not approach or move the pup. Potential indications that a pup may be abandoned

are: (1) no observed contact with adult seals, (2) no movement of the pup, and (3) the pup's attempts to nurse are rebuffed.

*Staffing* – Monitoring is conducted by qualified individuals, which may include professional biologists employed by NMFS or SCWA or volunteers trained by the Stewards. All volunteer monitors are required to attend classroom-style training and field site visits to the haul-outs. Training covers the MMPA and conditions of the ITA, SCWA's pinniped monitoring protocols, pinniped species identification, age class identification (including a specific discussion regarding neonates), recording of count and disturbance observations (including completion of datasheets), and use of equipment. Pinniped identification includes the harbor seal, California sea lion, and northern elephant seal, as well as other pinniped species with potential to occur in the area. Generally, SCWA staff and volunteers collect baseline data on Jenner haul-out use during the twice-monthly monitoring events. A schedule for this monitoring will be established with Stewards once volunteers are available for the monitoring effort. SCWA staff monitors lagoon outlet channel excavation and maintenance activities and artificial breaching events at the Jenner haul-out, with assistance from available Stewards volunteers. Stewards volunteers monitor the coastal and river haul-out locations during lagoon outlet channel excavation and maintenance activities.

Training on the MMPA, pinniped identification, and the conditions of the ITA is held for staff and contractors assigned to estuary management activities. The training includes equipment operators, safety crew members, and surveyors. In addition, prior to beginning each water surface elevation management event, the biologist monitoring the event participates in the onsite safety meeting to discuss the location(s) of pinnipeds at the Jenner haul-out that day and methods of avoiding and minimizing disturbances to the haul-out as outlined in the ITA.

## *Reporting*

SCWA is required to submit an annual report on all activities and marine mammal monitoring results to NMFS within ninety days following the end of the monitoring period.

These reports must contain the following information:

- The number of pinnipeds taken, by species and age class (if possible);
- Behavior prior to and during water level management events;
- Start and end time of activity;
- Estimated distances between source and pinnipeds when disturbance occurs;
- Weather conditions (*e.g.*, temperature, wind, etc.);
- Haul-out reoccupation time of any pinnipeds based on post-activity monitoring;
- Tide levels and estuary water surface elevation; and
- Pinniped census from bi-monthly and nearby haul-out monitoring.

The annual report includes descriptions of monitoring methodology, tabulation of estuary management events, summary of monitoring results, and discussion of problems noted and proposed remedial measures.

SCWA must also submit a comprehensive summary report that includes any future application for renewed regulations and Letters of Authorization.

## *Summary of Previous Monitoring*

SCWA complied with the mitigation and monitoring required under previous authorizations. Prior **Federal Register** notices of proposed yearly authorizations have provided summaries of the monitoring results from 2009-2015; please see those documents for more information. Previous monitoring reports are available online at [www.nmfs.noaa.gov/pr/permits/incidental/construction.htm](http://www.nmfs.noaa.gov/pr/permits/incidental/construction.htm). We also provided a detailed

description of previous monitoring results in the proposed rule for this action (81 FR 96415; December 30, 2016).

### **Adaptive Management**

The regulations governing the take of marine mammals incidental to SCWA estuary management activities contain an adaptive management component.

The reporting requirements associated with this final rule are designed to provide NMFS with monitoring data from the previous year to allow consideration of whether any changes are appropriate. The use of adaptive management allows NMFS to consider new information from different sources to determine (with input from SCWA regarding practicability) on an annual or biennial basis if mitigation or monitoring measures should be modified (including additions or deletions). Mitigation measures could be modified if new data suggests that such modifications would have a reasonable likelihood of reducing adverse effects to marine mammals and if the measures are practicable.

SCWA's monitoring program (see "Monitoring and Reporting") will be managed adaptively. Changes to the monitoring program may be adopted if they are reasonably likely to better accomplish the MMPA monitoring goals described previously or may better answer the specific questions associated with SCWA's monitoring plan.

The following are some of the possible sources of applicable data to be considered through the adaptive management process: (1) results from monitoring reports, as required by MMPA authorizations; (2) results from general marine mammal and sound research; and (3) any information which reveals that marine mammals may have been taken in a manner, extent, or number not authorized by these regulations or subsequent LOAs.

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

There are no relevant subsistence uses of marine mammals implicated by the specified activity. Therefore, we have determined that the total taking of affected species or stocks would not have an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence purposes.

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

No marine mammal species listed under the ESA are expected to be affected by these activities. Therefore, we have determined that section 7 consultation under the ESA is not required.

### **National Environmental Policy Act**

In compliance with the National Environmental Policy Act (NEPA) 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, we prepared an Environmental Assessment (EA) to consider the direct, indirect and cumulative effects to the human environment resulting from issuance of the original IHA to SCWA for the specified activities and found that it would not result in any significant impacts to the human environment. We signed a Finding of No Significant Impact (FONSI) on March 30, 2010. We have reviewed SWCA's application for incidental take regulations and an associated LOA for ongoing estuary management activities and the 2016 monitoring report. Based on that review, we have determined that the action follows closely the ITAs issued and implemented in 2010-2016, and does not present any substantial changes, or significant new circumstances or information relevant to environmental concerns which would require a supplement to the 2010 EA or preparation of a new NEPA document. Therefore, we have determined that a new or supplemental EA or Environmental Impact Statement is unnecessary, and we rely on the existing

EA and FONSI for this action. The 2010 EA and FONSI for this action are available for review at [www.nmfs.noaa.gov/pr/permits/incidental/construction.htm](http://www.nmfs.noaa.gov/pr/permits/incidental/construction.htm).

### **Classification**

Pursuant to the procedures established to implement Executive Order 12866, the Office of Management and Budget has determined that this rule is not significant.

Pursuant to section 605(b) of the Regulatory Flexibility Act (RFA), the Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration at the proposed rule stage that this rule will not have a significant economic impact on a substantial number of small entities. The factual basis for the certification was published in the proposed rule and is not repeated here. No comments were received regarding this certification. As a result, a regulatory flexibility analysis is not required and none has been prepared.

Notwithstanding any other provision of law, no person is required to respond to nor shall a person be subject to a penalty for failure to comply with a collection of information (COI) subject to the requirements of the Paperwork Reduction Act (PRA) unless that COI displays a currently valid OMB control number. These requirements have been approved by OMB under control number 0648-0151 and include applications for regulations, subsequent LOAs, and reports.

**List of Subjects in 50 CFR Part 217**

Exports, Fish, Imports, Indians, Labeling, Marine mammals, Penalties, Reporting and recordkeeping requirements, Seafood, Transportation.

Dated: March 8, 2017.

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Alan D. Risenhoover,

Acting Deputy Assistant Administrator for Regulatory Programs,

National Marine Fisheries Service.

For reasons set forth in the preamble, NMFS amends 50 CFR part 217 as follows:

**PART 217 – REGULATIONS GOVERNING THE TAKING AND IMPORTING OF  
MARINE MAMMALS**

1. The authority citation for part 217 continues to read as follows:

**Authority:** 16 U.S.C. 1361 *et seq.*, unless otherwise noted.

2. Add subpart A to part 217 to read as follows:

**Subpart A – Taking Marine Mammals Incidental to Russian River Estuary Management  
Activities**

Sec.

217.1 Specified activity and specified geographical region.

217.2 Effective dates.

217.3 Permissible methods of taking.

217.4 Prohibitions.

217.5 Mitigation requirements.

217.6 Requirements for monitoring and reporting.

217.7 Letters of Authorization.

217.8 Renewals and modifications of Letters of Authorization.

217.9–217.10 [Reserved]

**Subpart A – Taking Marine Mammals Incidental to Russian River Estuary Management  
Activities**

**§ 217.1 Specified activity and specified geographical region.**

(a) Regulations in this subpart apply only to the Sonoma County Water Agency (SCWA) and those persons it authorizes or funds to conduct activities on its behalf for the taking of

marine mammals that occurs in the area outlined in paragraph (b) of this section and that occurs incidental to estuary management activities.

(b) The taking of marine mammals by SCWA may be authorized in a Letter of Authorization (LOA) only if it occurs at Goat Rock State Beach or in the Russian River estuary in California.

**§ 217.2 Effective dates.**

Regulations in this subpart are effective from April 21, 2017, through April 20, 2022.

**§ 217.3 Permissible methods of taking.**

Under LOAs issued pursuant to §§ 216.106 and 217.7 of this chapter, the Holder of the LOA (hereinafter “SCWA”) may incidentally, but not intentionally, take marine mammals within the area described in § 217.1(b) by Level B harassment associated with estuary management activities, provided the activity is in compliance with all terms, conditions, and requirements of the regulations in this subpart and the appropriate LOA.

**§ 217.4 Prohibitions.**

Notwithstanding takings contemplated in § 217.1 and authorized by an LOA issued under §§ 216.106 and 217.7 of this chapter, no person in connection with the activities described in § 217.1 may:

- (a) Violate, or fail to comply with, the terms, conditions, and requirements of this subpart or an LOA issued under §§ 216.106 and 217.7 of this chapter;
- (b) Take any marine mammal not specified in such LOAs;
- (c) Take any marine mammal specified in such LOAs in any manner other than as specified;

(d) Take a marine mammal specified in such LOAs if NMFS determines such taking results in more than a negligible impact on the species or stocks of such marine mammal; or

(e) Take a marine mammal specified in such LOAs if NMFS determines such taking results in an unmitigable adverse impact on the species or stock of such marine mammal for taking for subsistence uses.

### **§ 217.5 Mitigation requirements.**

When conducting the activities identified in § 217.1(a) of this chapter, the mitigation measures contained in any LOA issued under §§ 216.106 and 217.7 of this chapter must be implemented. These mitigation measures shall include but are not limited to:

(a) *General conditions.* (1) A copy of any issued LOA must be in the possession of SCWA, its designees, and work crew personnel operating under the authority of the issued LOA; and

(2) If SCWA observes a pup that may be abandoned, it shall contact the National Marine Fisheries Service (NMFS) West Coast Regional Stranding Coordinator immediately and also report the incident to NMFS Office of Protected Resources within 48 hours. Observers shall not approach or move the pup.

(b) SCWA crews shall cautiously approach the haul-out ahead of heavy equipment.

(c) SCWA staff shall avoid walking or driving equipment through the seal haul-out.

(d) Crews on foot shall make an effort to be seen by seals from a distance.

(e) During breaching events, all monitoring shall be conducted from the overlook on the bluff along Highway 1 adjacent to the haul-out.

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

(g) All work shall be completed as efficiently as possible and with the smallest amount of heavy equipment possible.

(h) Boats operating near river haul-outs during monitoring shall be kept within posted speed limits and driven as far from the haul-outs as safely possible.

(i) SCWA shall implement the following mitigation measures during pupping season (March 15-June 30):

(1) SCWA shall maintain a one week no-work period between water level management events (unless flooding is an immediate threat) to allow for an adequate disturbance recovery period. During the no-work period, equipment must be removed from the beach.

(2) 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 management action shall be delayed until the pup has left the site or the latest day possible to prevent flooding while still maintaining suitable fish rearing habitat. In the event that a pup remains present on the beach in the presence of flood risk, SCWA shall consult with NMFS and the California Department of Fish and Wildlife to determine the appropriate course of action. SCWA shall coordinate with the locally established seal monitoring program (Stewards of the Coast and Redwoods) to determine if pups less than one week old are on the beach prior to a breaching event.

(3) Physical and biological monitoring 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.

#### **§ 217.6 Requirements for monitoring and reporting.**

(a) Monitoring and reporting shall be conducted in accordance with the approved Pinniped Monitoring Plan.

(b) Baseline monitoring shall be conducted each week, with two events per month

occurring in the morning and two per month in the afternoon. These censuses shall continue for four hours, weather permitting; the census days shall be chosen to ensure that monitoring encompasses a low and high tide each in the morning and afternoon. All seals hauled out on the beach shall be counted every 30 minutes from the overlook on the bluff along Highway 1 adjacent to the haul-out using high-powered spotting scopes. Observers shall indicate where groups of seals are hauled out on the sandbar and provide a total count for each group. If possible, adults and pups shall be counted separately.

(c) Peripheral coastal haul-outs shall be visited concurrently with baseline monitoring in the event that a lagoon outlet channel is implemented and maintained for a prolonged period of over 21 days.

(d) During estuary management events, monitoring shall occur on all days that activity is occurring using the same protocols as described for baseline monitoring, with the difference that monitoring shall begin at least one hour prior to the crew and equipment accessing the beach work area and continue through the duration of the event, until at least one hour after the crew and equipment leave the beach. In addition, a one-day pre-event survey of the area shall be made within one to three days of the event and a one-day post-event survey shall be made after the event, weather permitting.

(e) For all monitoring, the following information shall be recorded in 30-minute intervals:

(1) Pinniped counts by species;

(2) Behavior;

(3) Time, source and duration of any disturbance, with takes incidental to SCWA actions recorded only for responses involving movement away from the disturbance or responses of greater intensity (*e.g.*, not for alerts);

- (4) Estimated distances between source of disturbance and pinnipeds;
- (5) Weather conditions (*e.g.*, temperature, percent cloud cover, and wind speed); and
- (6) Tide levels and estuary water surface elevation.

(f) *Reporting--(1) Annual reporting.* (i) SCWA shall submit an annual summary report to NMFS not later than ninety days following the end of the reporting period established in any LOA issued under § 217.7. SCWA shall provide a final report within thirty days following resolution of comments on the draft report.

(ii) These reports shall contain, at minimum, the following:

- (A) The number of seals taken, by species and age class (if possible);
- (B) Behavior prior to and during water level management events;
- (C) Start and end time of activity;
- (D) Estimated distances between source and seals when disturbance occurs;
- (E) Weather conditions (*e.g.*, temperature, wind, etc.);
- (F) Haul-out reoccupation time of any seals based on post-activity monitoring;
- (G) Tide levels and estuary water surface elevation;
- (H) Seal census from bi-monthly and nearby haul-out monitoring; and
- (I) Specific conclusions that may be drawn from the data in relation to the four questions

of interest in SCWA's Pinniped Monitoring Plan, if possible.

(2) SCWA shall submit a comprehensive summary report to NMFS in conjunction with any future submitted request for incidental take authorization.

(g) *Reporting of injured or dead marine mammals.* (1) In the unanticipated event that the activity defined in § 217.1(a) clearly causes the take of a marine mammal in a prohibited manner, SCWA shall immediately cease such activity and report the incident to the Office of Protected

Resources (OPR), NMFS and the West Coast Regional Stranding Coordinator, NMFS. Activities shall not resume until NMFS is able to review the circumstances of the prohibited take. NMFS will work with SCWA to determine what measures are necessary to minimize the likelihood of further prohibited take and ensure MMPA compliance. SCWA may not resume their activities until notified by NMFS. The report must include the following information:

- (i) Time and date of the incident;
- (ii) Description of the incident;
- (iii) Environmental conditions;
- (iv) Description of all marine mammal observations in the 24 hours preceding the incident;
- (v) Species identification or description of the animal(s) involved;
- (vi) Fate of the animal(s); and
- (vii) Photographs or video footage of the animal(s).

(2) In the event that SCWA discovers an injured or dead marine mammal and determines that the cause of the injury or death is unknown and the death is relatively recent (*e.g.*, in less than a moderate state of decomposition), SCWA shall immediately report the incident to OPR and the West Coast Regional Stranding Coordinator, NMFS. The report must include the information identified in paragraph (g)(1) of this section. Activities may continue while NMFS reviews the circumstances of the incident. NMFS will work with SCWA to determine whether additional mitigation measures or modifications to the activities are appropriate.

(3) In the event that SCWA discovers an injured or dead marine mammal and determines that the injury or death is not associated with or related to the activities defined in § 217.1(a) (*e.g.*, previously wounded animal, carcass with moderate to advanced decomposition, scavenger

damage), SCWA shall report the incident to OPR and the West Coast Regional Stranding Coordinator, NMFS, within 24 hours of the discovery. SCWA shall provide photographs or video footage or other documentation of the stranded animal sighting to NMFS.

(4) Pursuant to paragraphs (g)(2) and (3) of this section, SCWA may use discretion in determining what injuries (*i.e.*, nature and severity) are appropriate for reporting. At minimum, SCWA must report those injuries considered to be serious (*i.e.*, will likely result in death) or that are likely caused by human interaction (*e.g.*, entanglement, gunshot). Also pursuant to sections paragraphs (g)(2) and (3) of this section, SCWA may use discretion in determining the appropriate vantage point for obtaining photographs of injured/dead marine mammals.

#### **§ 217.7 Letters of Authorization.**

(a) To incidentally take marine mammals pursuant to the regulations in this subpart, SCWA must apply for and obtain an LOA.

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

(c) If an LOA expires prior to the expiration date of the regulations in this subpart, SCWA may apply for and obtain a renewal of the LOA.

(d) In the event of projected changes to the activity or to mitigation and monitoring measures required by an LOA, SCWA must apply for and obtain a modification of the LOA as described in § 217.8.

(e) The LOA shall set forth:

(1) Permissible methods of incidental taking;

(2) Means of effecting the least practicable adverse impact (*i.e.*, mitigation) on the species, its habitat, and on the availability of the species for subsistence uses; and

(3) Requirements for monitoring and reporting.

(f) Issuance of the LOA shall be based on a determination that the level of taking will be consistent with the findings made for the total taking allowable under the regulations in this subpart.

(g) Notice of issuance or denial of an LOA shall be published in the **Federal Register** within 30 days of a determination.

**§ 217.8 Renewals and modifications of Letters of Authorization.**

(a) An LOA issued under §§ 216.106 and 217.7 of this chapter for the activity identified in § 217.1(a) shall be renewed or modified upon request by the applicant, provided that:

(1) The proposed specified activity and mitigation, monitoring, and reporting measures, as well as the anticipated impacts, are the same as those described and analyzed for the regulations in this subpart (excluding changes made pursuant to the adaptive management provision in paragraph (c)(1) of this section); and

(2) NMFS determines that the mitigation, monitoring, and reporting measures required by the previous LOA under the regulations in this subpart were implemented.

(b) For an LOA modification or renewal requests by the applicant that include changes to the activity or the mitigation, monitoring, or reporting (excluding changes made pursuant to the adaptive management provision in paragraph (c)(1) of this section) that do not change the findings made for the regulations or result in no more than a minor change in the total estimated number of takes (or distribution by species or years), NMFS may publish a notice of proposed LOA in the **Federal Register**, including the associated analysis of the change, and solicit public comment before issuing the LOA.

(c) An LOA issued under §§ 216.106 and 217.7 of this chapter for the activity identified

in § 217.1(a) may be modified by NMFS under the following circumstances:

(1) *Adaptive management.* NMFS may modify (including augment) the existing mitigation, monitoring, or reporting measures (after consulting with SCWA regarding the practicability of the modifications) if doing so creates a reasonable likelihood of more effectively accomplishing the goals of the mitigation and monitoring.

(i) Possible sources of data that could contribute to the decision to modify the mitigation, monitoring, or reporting measures in an LOA are:

(A) Results from SCWA's monitoring from the previous year(s).

(B) Results from other marine mammal and/or sound research or studies.

(C) Any information that reveals marine mammals may have been taken in a manner, extent or number not authorized by the regulations in this subpart or subsequent LOAs.

(ii) If, through adaptive management, the modifications to the mitigation, monitoring, or reporting measures are substantial, NMFS will publish a notice of proposed LOA in the **Federal Register** and solicit public comment.

(2) *Emergencies.* If NMFS determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals specified in LOAs issued pursuant to §§ 216.106 and 217.7 of this chapter, an LOA may be modified without prior notice or opportunity for public comment. Notice would be published in the **Federal Register** within thirty days of the action.

**§§ 217.9–217.10 [Reserved]**

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