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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648-XF319

Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Coast Boulevard Improvements Project, La Jolla, California

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

ACTION: Notice; Issuance of an Incidental Harassment Authorization.

SUMMARY: In accordance with the regulations implementing the Marine Mammal Protection Act (MMPA) as amended, notification is hereby given that NMFS has issued an incidental harassment authorization (IHA) to the City of San Diego to incidentally harass, by Level B harassment only, marine mammals during construction and demolition activities associated with a public parking lot and sidewalk improvements project in La Jolla, California.

DATES: This Authorization is effective from June 1, 2017, through December 14, 2017.

FOR FURTHER INFORMATION CONTACT: Jordan Carduner, Office of Protected Resources, NMFS, (301) 427-8401. Electronic copies of the 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. In case of problems accessing these documents, please call the contact listed above.

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.

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.

The MMPA states that the term “take” means to harass, hunt, capture, kill or attempt to harass, hunt, capture, or kill any marine mammal.

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).

National Environmental Policy Act

To comply with the National Environmental Policy Act of 1969 (NEPA; 42 U.S.C. 4321 *et seq.*) and NOAA Administrative Order (NAO) 216-6A, NMFS must review our proposed action with respect to environmental consequences on the human environment.

Accordingly, NMFS has determined that the issuance of the IHA qualifies to be categorically excluded from further NEPA review. This action is consistent with categories of activities identified in CE B4 of the Companion Manual for NOAA Administrative Order 216-6A, which do not individually or cumulatively have the potential for significant impacts on the quality of the human environment and for which we have not identified any extraordinary circumstances that would preclude this categorical exclusion.

Summary of Request

NMFS received a request from the City of San Diego (City) for an IHA to take marine mammals incidental to Coast Boulevard improvements in La Jolla, California. The City's request was for harassment only and NMFS concurs that mortality is not expected to result from this activity. Therefore, an IHA is appropriate.

The City's application for incidental take authorization was received on December 16, 2016. On March 1, 2017, we deemed the City's application for authorization to be adequate and complete. The planned activity is not expected to exceed one year, hence we do not expect subsequent MMPA incidental harassment authorizations would be issued for this particular activity.

The planned activities include improvements to an existing public parking lot, sidewalk, and landscaping areas located on the bluff tops above Children's Pool, a public beach located in La Jolla, California. Species that are expected to be taken by the planned activity include harbor seal, California sea lion, and northern elephant seal. Take by Level B harassment only is

expected; no injury or mortality of marine mammals is expected to result from the planned activity. This represents the first IHA issued for this activity. The City applied for, and was granted, IHAs in 2013 2014 and 2015 (NMFS 2013; 2014; 2015) for a lifeguard station demolition and construction project at Children’s Pool beach. NMFS published notices in the *Federal Register* announcing the issuance of these IHAs on July 8, 2013 (78 FR 40705), June 6, 2014 (79 FR 32699), and July 13, 2015 (80 FR 39999), respectively. The City also applied for, and was granted, an IHA in 2016 (NMFS 2016) for a sand sampling project at Children’s Pool beach. NMFS published a notice in the *Federal Register* announcing the issuance of the IHA on June 3, 2016 (81FR 35739).

Description of Specified Activity

A detailed description of the planned demolition and construction project is provided in the *Federal Register* notice for the proposed IHA (82 FR 19221, April 26, 2017). Since that time, no changes have been made to the planned activities. Therefore, a detailed description is not provided here. Please refer to that *Federal Register* notice for the description of the specific activity.

Comments and Responses

A notice of NMFS's proposal to issue an IHA to the City was published in the *Federal Register* on April 26, 2017 (82 FR 19221). That notice described, in detail, the City’s activity, the marine mammal species that may be affected by the activity, and the anticipated effects on marine mammals. During the 30-day public comment period, NMFS received one comment letter from the Marine Mammal Commission. The Marine Mammal Commission recommended that NMFS issue the IHA, subject to inclusion of the proposed mitigation, monitoring, and reporting measures.

Description of Marine Mammals in the Area of Specified Activities

Three species are considered to co-occur with the City's planned activities: harbor seals (*Phoca vitulina*), which are, by far, the dominant observed marine mammal in the project area, as well as California sea lions (*Zalophus californianus*) and northern elephant seals (*Mirounga angustirostris*) which also occasionally haul out in the project area, in far lower numbers. A detailed description of the species likely to be affected by the City's planned project, including brief introductions to the species and relevant stocks as well as available information regarding population trends and threats, and information regarding local occurrence, were provided in the *Federal Register* notice for the proposed IHA (82 FR 19221, April 26, 2017); since that time, we are not aware of any changes in the status of these species and stocks; therefore, detailed descriptions are not provided here. Please refer to that *Federal Register* notice for these descriptions. Please also refer to Sections 3 and 4 of the City's IHA application, as well as to NMFS's Stock Assessment Reports (SAR; www.nmfs.noaa.gov/pr/sars/). Additional general information about these species (*e.g.*, physical and behavioral descriptions) may be found on NMFS's web site (www.nmfs.noaa.gov/pr/species/mammals/).

Table 1 lists all species with expected potential for occurrence in the project location and summarizes information related to the population or stock, including potential biological removal (PBR), where known. For taxonomy, we follow Committee on Taxonomy (2016). For status of species, we provide information regarding U.S. regulatory status under the MMPA and ESA. Abundance estimates presented here represent the total number of individuals that make up a given stock or the total number estimated within a particular study area. NMFS's stock abundance estimates for most species represent the total estimate of individuals within the geographic area, if known, that comprises that stock. For some species, this geographic area may

extend beyond U.S. waters. PBR, defined by the MMPA as the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population, is considered in concert with known sources of ongoing anthropogenic mortality to assess the population-level effects of the anticipated mortality from a specific project (as described in NMFS’s SARs). While no mortality is anticipated or authorized here, PBR and annual serious injury and mortality are included here as gross indicators of the status of the species and other threats.

All values presented in Table 1 are the most recent available at the time of publication and are available in NMFS’s SARs (e.g., Carretta *et al.*, 2016). Please see the SARs, available at www.nmfs.noaa.gov/pr/sars, for more detailed accounts of these stocks’ status and abundance.

Table 1: Marine Mammal Species Potentially Present in the Project Area.

| Species | Stock | ESA/MMPA status; Strategic (Y/N) ¹ | Stock abundance (CV, N _{min} , most recent abundance survey) ² | PBR ³ | Annual M/SI ⁴ | Relative occurrence in project area; season of occurrence |
|--|---------------------|---|--|------------------|--------------------------|---|
| Order Carnivora – Superfamily Pinnipedia | | | | | | |
| Family Otariidae (eared seals and sea lions) | | | | | | |
| California sea lion | U.S. | -; N | 296,750 (n/a; 153,337; 2011) | 9,200 | 389 | Abundant; year-round |
| Family Phocidae (earless seals) | | | | | | |
| Harbor seal | California | -; N | 30,968 (n/a; 27,348; 2012) | 1,641 | 43 | Rare; year-round |
| Northern elephant seal | California breeding | -; N | 179,000 (n/a; 81,368; 2010) | 4,882 | 8.8 | Rare; year-round |

¹Endangered Species Act (ESA) status: Endangered (E), Threatened (T)/MMPA status: Depleted (D). A dash (-) indicates that the species is not listed under the ESA or designated as depleted under the MMPA. Under the MMPA, a strategic stock is one for which the level of direct human-caused mortality exceeds PBR or which is determined to be declining and likely to be listed under the ESA within the foreseeable future. Any species or stock listed under the ESA is automatically designated under the MMPA as depleted and as a strategic stock.

²NMFS marine mammal stock assessment reports online at: www.nmfs.noaa.gov/pr/sars/. CV is coefficient of variation; N_{min} is the minimum estimate of stock abundance. In some cases, CV is not applicable.

³PBR, defined by the MMPA as the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population size (OSP).

⁴These values, found in NMFS's SARs, represent annual levels of human-caused mortality plus serious injury from all sources combined (e.g., commercial fisheries, ship strike).

Potential Effects of Specified Activities on Marine Mammals and their Habitat

The effects of noise from construction and demolition activities for the planned project have the potential to result in behavioral harassment of marine mammals in the vicinity of the action area. The *Federal Register* notice for the proposed IHA (82 FR 19221, April 26, 2017) included a discussion of the effects of anthropogenic noise on marine mammals and their habitat, therefore that information is not repeated here; please refer to that *Federal Register* notice for further information. The main impact associated with the City's planned project would be temporarily elevated sound levels and the associated direct effects on marine mammals. No instances of hearing threshold shifts, injury, serious injury, or mortality are expected as a result of the planned activities. The project is not expected to result in permanent impacts to habitats used directly by marine mammals, such as haulouts and rookeries, nor is expected to result in impacts to food sources or impacts to substrate.

Estimated Take by Incidental Harassment

This section provides an estimate of the number of incidental takes authorized through this IHA, which informs both NMFS' consideration of whether the number of takes is "small" and the negligible impact determination.

Harassment is the only type of take expected to result from the planned activities. 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).

All authorized takes are expected to be by Level B harassment only, in the form of disruption of behavioral patterns for individual marine mammals resulting from exposure to sounds associated with the planned construction and demolition activities. Based on the nature of the activity, Level A harassment is neither anticipated nor authorized. The death of a marine mammal is also a type of incidental take. However, in the case of the planned project it is unlikely that injurious or lethal takes would occur even in the absence of the planned mitigation and monitoring measures, and no mortality is anticipated or authorized for this activity. The current NMFS thresholds for behavioral harassment of pinnipeds from airborne noise are shown in Table 2.

Table 2: Current NMFS Criteria for Pinniped Harassment Resulting From Exposure to Airborne Sound.

| Species | Level B harassment threshold | Level A harassment threshold |
|------------------------|------------------------------|------------------------------|
| Harbor seals | 90 dB re 20 μ Pa | Not defined |
| Other pinniped species | 100 dB re 20 μ Pa | Not defined |

NMFS currently uses a three-tiered scale to determine whether the response of a pinniped on land to acoustic or visual stimuli is considered an alert, a movement, or a flush. NMFS

considers the behaviors that meet the definitions of both movements and flushes to qualify as behavioral harassment. Thus a pinniped on land is considered by NMFS to have been behaviorally harassed if it moves greater than two times its body length, or if the animal is already moving and changes direction and/or speed, or if the animal flushes from land into the water. Animals that become alert without such movements are not considered harassed. See Table 3 for a summary of the pinniped disturbance scale.

Table 3. Levels of Pinniped Behavioral Disturbance on Land.

| 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 | Flush | All retreats (flushes) to the water. |

Given the many uncertainties in predicting the quantity and types of impacts of sound on marine mammals, it is common practice to estimate how many animals are likely to be present within a particular distance of a given activity, or exposed to a particular level of sound. In practice, depending on the amount of information available to characterize daily and seasonal movement and distribution of affected marine mammals, it can be difficult to distinguish between the number of individuals harassed and the instances of harassment and, when duration of the activity is considered, it can result in a take estimate that overestimates the number of individuals harassed. In particular, for stationary activities such as the planned project, it is more likely that some smaller number of individuals may accrue a number of incidences of harassment

per individual than for each incidence to accrue to a new individual, especially if those individuals display some degree of residency or site fidelity and the impetus to use the site is stronger than the deterrence presented by the harassing activity.

The take calculations presented here rely on the best information currently available for marine mammal populations in the Children's Pool area. Below we describe how the take was estimated for the planned project.

Pacific harbor seal

The take estimate for harbor seal was based on the following steps:

- 1) Estimate the total area in square meters (m^2) of harbor seal haulout habitat available at Children's Pool;
- 2) Estimate the total area of available haulout habitat expected to be ensonified to the airborne Level B harassment threshold for harbor seals (90 decibels (dB) re 20 micropascals (μPa)) based on total haulout area and the percentage of total haulout area expected to be ensonified to the Level B harassment threshold;
- 3) Estimate the daily number of seals exposed to sounds above Level B harassment threshold by multiplying the total area of haulout habitat expected to be ensonified to the Level B threshold by the expected daily number of seals on Children's Pool;
- 4) Estimate the total number of anticipated harbor seals taken over the duration of the project by multiplying the daily number of seals exposed to noise above the Level B harassment threshold by the number of total project days in which project-related sounds may exceed the Level B harassment threshold.

As described above, Children's Pool is designated as a shared-use beach. The beach and surrounding waters are used for swimming, surfing, kayaking, diving, tide pooling, and nature

watching, thus the beach is shared between humans and pinnipeds. To discourage people from harassing pinnipeds hauled out on the beach, a guideline rope, oriented parallel to the water, bisects the beach into upper (western) and lower (eastern) beach areas; people are encouraged to stay on the western side of the guideline rope, allowing seals to use the eastern section of beach that provides access to the water. The City's estimate of available pinniped habitat was based on the total area of the beach between the guideline rope and the mean lower low water line. Thus, the area considered for this analysis to be available as haulout habitat is the total area east of the rope and west of the mean lower low water line, while the area west of the rope is assumed to be unavailable as pinniped habitat (See Figure 5 in the IHA application for the location of the guideline rope, and the area assumed to be available haulout habitat). The City estimated that there are 2,509 m² east of the guideline rope; therefore it is assumed that there is a total of 2,509 m² of available pinniped habitat on Children's Pool (Figure 5 in IHA application).

The City estimated the area of available harbor seal habitat at Children's Pool beach that would be ensonified to the Level B harassment threshold by estimating the distance to the Level B harassment threshold from sounds associated with the planned activities, then calculating the percentage of available haulout habitat at Children's Pool that would be ensonified to that threshold based on the total available habitat and the distance to the Level B harassment threshold.

To estimate the distance to the in-air Level B harassment threshold for harbor seals (90 dB root mean square (rms)) for the planned project, the City first used a spherical spreading loss model, assuming average atmospheric conditions. The spreading loss model predicted that the 90 dB isopleth would be reached at 10 m (33 feet (ft)). However, data from in situ recordings conducted during the lifeguard station project at Children's Pool indicated that peak sound levels

of 90 to 103 dB were recorded at distances of 15 m to 20 m (49 to 66 ft) from the source when the loudest construction equipment (source levels ranging from 100 to 110 dB) was operating. The City estimated that the loudest potential sound sources associated with the planned project would be approximately 110 dB rms (See Table 2 in IHA application), based on manufacturer specifications and previous recordings of similar equipment used during the lifeguard station project at Children's Pool (Hanan & Associates 2014; 2015; 2016). Therefore, the City estimated that for the sound sources expected to result in the largest isopleths (those with SLs estimated at up to 110 dB), the area expected to be ensonified to the in-air Level B harassment threshold for harbor seals (90 dB rms) would extend to approximately 20 m from the sound source. To be conservative, the City used this distance (20 m) based on the data from previous site-specific monitoring, rather than the results of the spherical spreading loss model, to estimate the predicted distance to the in-air Level B harassment threshold for harbor seals.

Based on the estimated distance to the in-air Level B harassment threshold for harbor seals (20 m from the sound source), the City estimated 647 m² of total available harbor seal habitat at Children's Pool beach would be ensonified to the Level B harassment threshold, the City therefore estimated that approximately 25.8 percent (647/2,509) of available harbor seal haulout habitat at Children's Pool beach would be ensonified to the Level B harassment threshold (Figure 5 in IHA application). This information has been used to derive the take estimate only; the entire beach would be observed in order to document potential actual take.

The estimated daily take of harbor seals was based on the number of harbor seals expected to occur daily in the area ensonified to the Level B harassment threshold. In their IHA application, the City estimated that 200 harbor seals would be present on Children's Pool beach per day, based on literature that reported this number as the maximum number of seals recorded

at Children's Pool (Linder 2011). However, NMFS believes it is more appropriate to use the average number of seals observed on Children's Pool beach, as opposed to the maximum number of seals, to estimate the likely number of takes of harbor seals as a result of the planned project. During 3,376 hourly counts associated with monitoring for IHAs issued for construction and demolition at the lifeguard station at Children's Pool in 2013-14, 2014-15, and 2015-16, there was an average of 54.5 harbor seals (including pups) recorded daily on Children's Pool beach (pers. comm., D. Hanan, Hanan & Associates, to J. Carduner, NMFS, April 04, 2017). We therefore estimated that 55 harbor seals would occur on Children's Pool per day, and used this number to estimate take of harbor seals as a result of the planned project. Based on an estimate of 55 total harbor seals on Children's Pool per day, and an estimated 25.8 percent of total haulout habitat ensouified to the Level B harassment threshold for harbor seals, we estimated that an average of 14.2 (rounded to 15) takes of harbor seals by Level B harassment would occur per day.

The City estimated that the total duration of the project would be 164 days. However, activities involving equipment that could result in sound source levels of 101-110 dB would occur on a maximum of 108 project days (pers. comm., D. Langsford, Tierra Data, to, J. Carduner, NMFS, April 03, 2017). Based on the distance of the project to Children's Pool and previous monitoring reports, we believe it is unlikely that project-related activities with expected source levels at or below 100 dB rms would result in sound exposure levels at or above 90 dB among any pinnipeds at Children's Pool. Planned project-related activities will occur on top of a natural cliff in an area of increasing elevation above the beach, therefore we do not believe visual stimuli from the project will result in behavioral harassment of any marine mammals. Therefore, we do not expect that activities with expected source levels of 100 dB and below will result in

take of marine mammals. Thus, our take estimate is based on the number of days in which source levels associated with the planned project could be between 100 and 110 dB rms. Based on an estimate of 15 takes of harbor seals per day by Level B harassment, over a total of 108 days the project is expected to result in a total of 1,620 takes of harbor seals by Level B harassment. We therefore authorize a total of 1,620 incidental takes of harbor seals by Level B harassment only.

California sea lion

As described above, California sea lions are occasional visitors to Children's Pool. The most reliable estimates of likely California sea lion occurrence in the project area come from monitoring reports associated with IHAs issued previously for demolition and construction of the lifeguard station at Children's Pool. In 2015-16 there were 71 observations of California sea lions on Children's Pool over 209 days of monitoring, for an average of one California sea lion observed on Children's Pool approximately every three days. Based on this ratio, we estimate that a total of 55 observations of California sea lions on Children's Pool during the entire duration of the project (164 days); however as described above we do not think take is likely to occur on days in which source levels are below 100 dB. We expect one take of California sea lion will occur for every 3 days of the project in which source levels are anticipated to be between 101-110 dB (108 total days). We therefore authorize 36 incidental takes of California sea lions by Level B harassment only.

Northern elephant seal

As described above, northern elephant seals are occasional visitors to Children's Pool. The most reliable estimates of likely northern elephant seal occurrence in the project area come from monitoring reports associated with IHAs issued previously for demolition and construction of the lifeguard station at Children's Pool. In 2015-16 there were 26 observations of northern

elephant seals on Children’s Pool over 209 days of monitoring, for an average of one northern elephant seal observed on Children’s Pool approximately every eight days. Based on this ratio, we estimate a total of 20 northern elephant seals will be observed on Children’s Pool during the entire duration of the project (164 days); however as described above we do not think take is likely to occur on days in which source levels are below 100 dB. We expect one northern elephant seal take will occur for every eight days of the project in which source levels are anticipated to be between 101-110 dB (108 total days). We therefore authorize 14 incidental takes of northern elephant seals by Level B harassment only.

Table 4. Summary of Numbers of Marine Mammals Authorized to be Incidentally Taken by the City During the Planned Project.

| Species | Level A takes | Level B takes | Total |
|------------------------|---------------|---------------|-------|
| Harbor seal | 0 | 1,620 | 1,620 |
| California sea lion | 0 | 36 | 36 |
| Northern elephant seal | 0 | 14 | 14 |

Effects of Specified Activities on Subsistence Uses of Marine Mammals

There are no relevant subsistence uses of marine mammals implicated by this action. Therefore, NMFS has determined that the total taking of affected species or stocks will not have an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence purposes.

Mitigation Measures

In order to issue an IHA under section 101(a)(5)(D) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to such activity, and other means of effecting the least practicable 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 (latter not applicable for this action). NMFS regulations require applicants for incidental take authorizations 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)).

In evaluating how mitigation may or may not be appropriate to ensure the least practicable impact on species or stocks and their habitat, as well as subsistence uses where applicable, we carefully balance two primary factors: 1) the manner in which, and the degree to which, the successful implementation of the measure(s) is expected to reduce impacts to marine mammals, marine mammal species or stocks, and their habitat – which considers the nature of the potential adverse impact being mitigated (likelihood, scope, range), as well as the likelihood that the measure will be effective if implemented; and the likelihood of effective implementation, and; 2) the practicability of the measures for applicant implementation, which may consider such things as cost, impact on operations, and, in the case of a military readiness activity, personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity.

Any mitigation measure(s) prescribed by NMFS 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 numbers of marine mammals (total number or number at biologically important time or location) exposed to activities expected to result in the take of

marine mammals (this goal may contribute to 1, above, or to reducing harassment takes only) ;

3. A reduction in the number of times (total number or number at biologically important time or location) individuals would be exposed to activities expected to result in the take of marine mammals (this goal may contribute to 1, above, or to reducing harassment takes only) ;

4. A reduction in the intensity of exposures (either total number or number at biologically important time or location) to activities expected to result in the take of marine mammals (this goal may contribute to 1, above, or to reducing the severity of harassment takes only) ;

5. Avoidance or minimization of adverse effects to marine mammal habitat, paying special attention to the food base, activities that block or limit passage to or from biologically important areas, permanent destruction of habitat, or temporary destruction/disturbance of habitat during a biologically important time; and

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.

Mitigation for Marine Mammals and their Habitat

The City proposed several mitigation measures. These measures include the following:

- Moratorium during harbor seal pupping season: Demolition and construction will be prohibited during the Pacific harbor seal pupping season (December 15th to May 15th) and for an additional two weeks to accommodate lactation and weaning of late season pups. Thus construction will be prohibited from December 15th to May 29th. This measure is designed to avoid any potential adverse impacts to pups that may otherwise occur, such as abandonment by mothers as a result of harassment;
- Activities limited to daylight hours only: Construction and demolition will be limited to daylight hours only (7 a.m. to 7 p.m., or 30 minutes before sunset depending on time of

year). This measure is designed to facilitate the ability of MMOs to effectively monitor potential instances of harassment and to accurately document behavioral responses of pinnipeds to project-related activities;

- **Timing constraints for very loud equipment:** To minimize potential impacts to marine mammals, construction and demolition activity involving use of very loud equipment (*e.g.*, jackhammers) will be scheduled during the daily period of lowest pinniped haul-out occurrence, between the hours of 8:30 a.m. to 3:30 p.m., to the maximum extent practical. This measure is designed to minimize the number of pinnipeds exposed to sounds that may result in harassment. Construction and demolition may be extended from 7 a.m. to 7 p.m. (daylight hours only) to help ensure the project is completed in 2017, prior to the moratorium during the harbor seal pupping season starting December 15th, so as to reduce the overall duration of the project; and
- **Marine mammal observers (MMO):** Trained MMOs will be used to detect and document project-related impacts to marine mammals, including any behavioral responses to the project. This measure is designed to facilitate the City's ability to increase the understanding of the effects of the action on marine mammal species and stocks. More information about this measure is contained in the "Monitoring and Reporting" section below.

Based on our evaluation of the applicant's proposed measures, NMFS has determined that the mitigation measures described above provide the means effecting the least practicable impact on the affected 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 IHA 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 authorizations 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 action area. Effective reporting is critical both to compliance as well as ensuring that the most value is obtained from the required monitoring.

Monitoring and reporting requirements prescribed by NMFS should contribute to improved understanding of one or more of the following:

- Occurrence of marine mammal species or stocks in the area in which take is anticipated (*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 marine mammal responses (behavioral or physiological) to acoustic stressors (acute, chronic, or cumulative), other stressors, or cumulative impacts from multiple stressors;
- How anticipated responses to stressors impact either: (1) long-term fitness and survival of individual marine mammals; or (2) populations, species, or stocks;

- Effects on marine mammal habitat (*e.g.*, marine mammal prey species, acoustic habitat, or other important physical components of marine mammal habitat); and
- Mitigation and monitoring effectiveness.

Monitoring

The City has developed a Monitoring Plan specific to the project which establishes protocols for both acoustic and marine mammal monitoring. The objectives of the Monitoring Plan are to observe and document real-time sound levels in the project area, to document observed behavioral responses to project activities, and to record instances of marine mammal harassment. Monitoring will be conducted before, during, and after project activities to evaluate the impacts of the project on marine mammals. The Monitoring Plan can be found in Appendix C of the City's IHA application.

The Monitoring Plan encompasses both acoustic monitoring and marine mammal monitoring. Marine mammal monitoring will be conducted to assess the number and species, behavior, and responses of marine mammals to project-related activities as well as other sources of disturbance, as applicable. Acoustic monitoring will measure in-air sound pressure levels during ambient conditions and during project activities to measure sound levels associated with the project and to determine distances within which Level B acoustic harassment disturbance are expected to occur. More details are provided below.

Acoustic monitoring

Monitors will collect real-time acoustic data of construction activities to determine sound pressure levels (SPL) values during demolition and construction activities, and to determine distances to zones within which SPLs are expected to meet or exceed airborne Level B harassment thresholds for harbor seals and other pinnipeds. Environmental data will also be

collected to provide information on the weather, visibility, sea state, and tide conditions during monitoring surveys.

Sound level meters will be used to document SPLs at near-field and far-field locations during all surveys, and to determine the distances to Level B harassment thresholds. Far-field locations will include the western end of the beach, the middle of the guideline rope and the eastern edge of the beach. The total number and locations of the monitoring stations will be determined during each survey based on the location of construction activities and likelihood for sound levels to meet or exceed in-air SPL harassment thresholds in areas where marine mammals are observed at Children's Pool. Refer to Section 3 of the Monitoring Plan for further details on the acoustic monitoring plan.

Marine mammal monitoring

Marine mammal monitoring will be conducted by qualified MMOs to document behavioral responses of marine mammals to the planned project. Monitors will document the behavior of marine mammals, the number and types of responses to disturbance, and the apparent cause of any reactions. Marine mammals displaying behavioral responses to disturbance will be assessed for the apparent cause of disturbance. All responses to stimuli related to the project will be documented; responses that rise to the level of behavioral harassment (Table 4) will be documented as takes.

Marine mammal observations may be made from vantage points on the beach or from overlook areas that provide an unobstructed view of the beach. Monitoring on the beach will be behind the guideline rope to minimize potential disturbance to hauled out marine mammals.

The following data will be collected during the marine mammal monitoring surveys:

- Dates and times of marine mammal observations;

- Location of observations;
- Construction activities occurring during each observation period. Any substantial change in construction activities (especially cessation) during observation periods should be noted;
- Human activity in the area; number of people on the beach, adjacent overlooks, and in the water;
- Counts by species of pinnipeds, and if possible sex and age class;
- Number and type of responses to disturbance, such as alert, flush, vocalization, or other with a description; and
- Apparent cause of reaction.

In the *Federal Register* notice of the proposed IHA (82 FR 19221, April 26, 2017) we proposed that the extent of marine mammal monitoring would depend on recorded sound levels of the activities performed. However, since that time, the City has agreed that marine mammal monitoring will be carried out every day during construction and demolition. Monitoring will include a Pre-Construction Activity Survey, hourly Construction Activity Surveys, and a Post-Construction Activity Survey. Pre-Construction Activity Surveys will include recordings of the times of observations, environmental conditions, and maximum ambient SPLs at the recording location at the top of the bluff adjacent to the project site, and at the three far-field locations, and will occur at least 30 minutes prior to the start of construction activities. Hourly Construction Activity Surveys will record times of observations, environmental conditions, and maximum SPLs at near-field and far-field locations. Post-Construction Activity Surveys will record times of observations, environmental conditions, and maximum ambient SPLs at all monitoring

locations surveyed during the Construction Activity Surveys. Marine mammal monitoring data will be collected, as noted above.

Marine mammal monitoring will be conducted by a qualified marine mammal observer (MMO) with the following minimum qualifications:

- Visual acuity in both eyes (correction is permissible) sufficient for discernment of moving targets at the water's surface, with the ability to estimate target size and distance; use of binoculars may be necessary to correctly identify the target;
- A minimum of a Bachelor's degree in biological science, wildlife management, mammalogy, or related field;
- Experience and ability to conduct field observations and collect data according to assigned protocols (this may include academic experience);
- Experience or training in the field identification of marine mammals, and identification of marine mammal behavior;
- Sufficient training, orientation, or experience with the construction operation to provide for personal safety during observations;
- Ability to communicate orally, by radio or in person, with project personnel to provide real-time information on marine mammals observed in the area, as needed; and
- Writing skills sufficient to prepare a report of observations.

Guadalupe and northern fur seals would be considered extralimital to the project area, however, as fur seals have been occasionally observed in the area, the MMO will ensure that take of fur seals is avoided. In the event that a fur seal or another species of marine mammal for which take is not authorized in the IHA are observed either on the rocks, beach, or in the water at Children's Pool prior to commencement of activities or during project activities, the MMO will

alert the stranding network, as the occurrence of these species would typically indicate a sick/injured animal, and activities will be postponed until coordination with the stranding network is complete (including any potential 24-hour or 48-hour wait/observation period) and the animal either leaves or is collected by the stranding network.

Marine mammal monitoring protocols are described in greater detail in Section 4 of the City's Monitoring Plan.

Reporting

A final monitoring report will include data collected during marine mammal monitoring and acoustic and environmental monitoring as described above. The monitoring report will include a narrative description of project related activities, counts of marine mammals by species, sex and age class, a summary of marine mammal species/count data, a summary of marine mammal responses to project-related disturbance, and responses to other types of disturbances. The monitoring report will also include a discussion of seasonal and daily variations in the abundance of marine mammals at Children's Pool, the relative percentage of marine mammals observed to react to construction activities and their observed reactions, and the number of marine mammals taken as a result of the project based on the criteria shown in Table 3.

A draft report will be submitted to NMFS within 60 calendar days of the completion of acoustic measurements and marine mammal monitoring. The results will be summarized in tabular/graphical forms and include descriptions of acoustic sound levels and marine mammal observations according to type of construction activity and equipment. A final report will be prepared and submitted to NMFS within 30 days following receipt of comments on the draft

report from NMFS. Reporting measures are described in greater detail in Section 6 of the City's Monitoring Plan.

Monitoring reports from IHAs issued to the City in 2013, 2014, and 2015 for the lifeguard station construction project at Children's Pool reported that pinniped responses to that project ranged from no response to heads-up alerts, from startle responses to some movements on land, and some movements into the water (Hanan & Associates 2014; 2015; 2016). There were no documented occurrences of Level A takes throughout the three years of monitoring (Hanan & Associates 2014; 2015; 2016). Data from the three years of monitoring indicates no site abandonment by harbor seals a result of the project (Hanan & Associates 2014; 2015; 2016). Monitoring reports from previous IHAs issued to the City for lifeguard tower construction at Children's Pool can be found on our web site at:

www.nmfs.noaa.gov/pr/permits/incidental/construction.htm. The monitoring report from the previous IHA issued to the City for a sand quality study at Children's Pool can be found on our web site at: www.nmfs.noaa.gov/pr/permits/incidental/research.htm.

Negligible Impact Analysis and Determination

NMFS has defined negligible impact 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 (50 CFR 216.103). 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 harassment, NMFS considers other factors, such as the likely

nature of any responses (*e.g.*, intensity, duration), the context of any responses (*e.g.*, critical reproductive time or location, migration), as well as effects on habitat, and the likely effectiveness of the mitigation. 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 this analysis 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, ongoing sources of human-caused mortality, or ambient noise levels).

If a marine mammal responds to a stimulus by changing its behavior (*e.g.*, through relatively minor changes in locomotion direction/speed or vocalization behavior), the response may or may not constitute taking at the individual level, and is unlikely to affect the stock or the species as a whole. However, if a sound source displaces marine mammals from an important feeding or breeding area for a prolonged period, impacts on animals or on the stock or species could potentially be significant (*e.g.*, Lusseau and Bejder 2007; Weilgart 2007).

Although the City's planned activities may disturb pinnipeds hauled out at Children's Pool, any project-related impacts are expected to occur to a small, localized group of marine mammals, in relation to the overall stocks of marine mammals considered here. Pinnipeds will likely become alert or, at most, flush into the water in response to sounds from the planned project. Disturbance is not expected to occur during particularly sensitive times for any marine mammal species, as mitigation measures have been specifically designed to avoid project-related activity during harbor seal pupping season to eliminate the possibility for 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 haulout (Hanan & Associates 2016).

Children's Pool is not known as an important feeding area for harbor seals, but does serve as a harbor seal rookery. Therefore, if displacement of seals or adverse effects to pups were an expected outcome of the planned activity, impacts to the stock could potentially result. However, site abandonment is not expected to occur as a result of the planned project. We base this expectation on results of previous monitoring reports from the three consecutive IHAs issued to the City for construction and demolition of the lifeguard station at Children's Pool. Over three-plus years of consecutive monitoring (2013-2016) there was no site abandonment by harbor seals a result of the project (Hanan & Associates 2014; 2015; 2016). Adverse effects to pups are not expected to occur. The moratorium on project-related activity during the harbor seal pupping season (December 15-May 15) is expected to minimize any potential adverse effects to pups such as mother-pup separation. Takes of harbor seal as a result of the project are expected to be low relative to stock size (approximately five percent). Additionally, as there are an estimated 600 harbor seals using Children's Pool beach during a year (Linder 2011), authorized takes of harbor seals (Table 4) are expected to be repeated incidences of take to a smaller number of individuals, and not individuals taken, as described above. These takes are not expected to interfere with breeding, sheltering or feeding. For the reasons stated above, we do not expect the planned project to affect annual rates of recruitment or survival for harbor seals.

Children's Pool does not represent an important feeding or breeding area for either northern elephant seals or California sea lion, and neither species uses the project location as a pupping site. Takes of both species are expected to be very low relative to the stock sizes (less than one percent of the stock for each species) and no take by Level A harassment is anticipated

to occur as a result of the project for either northern elephant seals or California sea lions. Takes that occur are expected to be in the form of behavioral harassment, specifically changes in direction or possibly flushing to the water. These takes are not expected to interfere with breeding, sheltering or feeding. For the reasons stated above, we do not expect the planned project to affect annual rates of recruitment or survival for northern elephant seals or California sea lions.

In summary and as described above, the following factors primarily support our determination that the impacts resulting from this activity are not expected to adversely affect the species or stock through effects on annual rates of recruitment or survival.

- No mortality is anticipated or authorized.
- No injury is expected. Over the course of 3,376 hourly counts associated with monitoring for IHAs issued to the City for construction and demolition of the lifeguard station at Children's Pool in 2013-14, 2014-15, and 2015-16, no takes by Level A harassment were documented. As the planned project will entail equipment with similar expected sound levels to those that occurred during the lifeguard station project at Children's Pool, but will occur further from the haulout location than the lifeguard station project, we do not expect take by Level A harassment to occur as a result of the planned project.
- Behavioral disturbance – Takes are expected to be in the form of behavioral disturbance only. Based on the sound levels anticipated and based on the monitoring reports from previous IHAs issued for similar activities at the same location, behavioral responses are expected to range from no response to alerts, to movements or changes in direction, to possible movements into the water (flushes). Mitigation as

described above is expected to limit the number and/or severity of behavioral responses, and those that occur are not expected to be severe.

- Important Areas – As described above, there are no important feeding, breeding or pupping areas that will be affected by the planned project for northern elephant seals and California sea lions. For harbor seal, Children’s Pool represents a pupping location. However, as described above, mitigation measures including the moratorium during pupping season (December 15 to May 15) are expected to avoid any potential impacts to pups, such as mother-pup separation. Data from the three years of monitoring suggests that despite documented instances of harassment resulting from the lifeguard station project, there was no site abandonment a result of the project (Hanan & Associates 2014; 2015; 2016). Therefore, the planned project is not expected to negatively affect pups of any species, and is not expected to result in any impacts to annual rates of recruitment or survival.
- Species/Stock scale – As described above, the planned project will impact only a very small percentage of the stocks (approximately five percent for harbor seal, less than one percent for northern elephant seal and California sea lion) and will only impact all marine mammal stocks over a very small portion of their ranges.
- Species/stock status – No marine mammal species for which take is authorized are listed as threatened or endangered under the ESA and no marine mammal stocks for which take is authorized are determined to be strategic or depleted under the MMPA.

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

monitoring and mitigation measures, NMFS finds that the total marine mammal take from the planned activity will have a negligible impact on all affected marine mammal species or stocks.

Small Numbers

As noted above, only small numbers of incidental take may be authorized under Section 101(a)(5)(D) of the MMPA for specified activities other than military readiness activities. The MMPA does not define small numbers and so, in practice, NMFS compares the number of individuals taken to the most appropriate estimation of abundance of the relevant species or stock in our determination of whether an authorization is limited to small numbers of marine mammals.

The numbers of marine mammals authorized to be taken for harbor seal, California sea lion, and northern elephant seal, are considered small relative to the relevant stocks or populations (approximately five percent for harbor seal and less than one percent for northern elephant seal and California sea lion) even if each estimated take occurred to a new individual. However, we believe it is extremely unlikely that each estimated take will occur to a new individual, and more likely that multiple takes will accrue to the same individuals.

As described above, depending on the amount of information available to characterize daily and seasonal movement and distribution of affected marine mammals, it can be difficult to distinguish between the number of individuals harassed and the instances of harassment, and this can result in a take estimate that overestimates the number of individuals harassed. In particular, for stationary activities, such as the planned project, it is more likely that some smaller number of individuals may accrue a number of incidences of harassment per individual than for each incidence to accrue to a new individual. This is especially true for those individuals display some degree of residency or site fidelity and the impetus to use the site is stronger than the deterrence

presented by the harassing activity, as is the case with harbor seals that use Children’s Pool as a haulout.

For the reasons described above, we expect that there will almost certainly be some overlap in individuals present day-to-day at the project site, and the total numbers of authorized takes are expected to occur only within a small portion of the overall regional stocks. Thus while we authorize the instances of incidental take shown in Table 5, we believe that the number of individual marine mammals that will be incidentally taken by the project will be substantially lower than these numbers.

Table 5. Estimated Numbers of Take and Percentages of Marine Mammal Stocks That May Be Taken.

| Species | Level B Take Authorized | Stock Abundance Estimate ¹ | Percentage of Stock or Population |
|------------------------|-------------------------|---------------------------------------|-----------------------------------|
| Harbor seal | 1,620 | 30,968 | 5 percent |
| California sea lion | 36 | 296,750 | <1 percent |
| Northern elephant seal | 14 | 179,000 | <1 percent |

¹NMFS 2015 marine mammal stock assessment reports (Carretta *et al.*, 2016) available online at: www.nmfs.noaa.gov/pr/sars/.

Based on the analysis contained herein of the planned activity (including the mitigation and monitoring measures) and the anticipated take of marine mammals, NMFS finds that small numbers of marine mammals will be taken relative to the population size of the affected species or stocks.

Unmitigable Adverse Impact Analysis and Determination

There are no relevant subsistence uses of the affected marine mammal stocks or species implicated by this action. Therefore, NMFS has determined that the total taking of affected species or stocks will not have an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence purposes.

Endangered Species Act (ESA)

Section 7(a)(2) of the Endangered Species Act of 1973 (ESA: 16 U.S.C. § 1531 *et seq.*) requires that each Federal agency insure that any action it authorizes, funds, or carries out is not likely to jeopardize the continued existence of any endangered or threatened species or result in the destruction or adverse modification of designated critical habitat. To ensure ESA compliance for the issuance of IHAs, NMFS consults internally with our ESA Interagency Cooperation Division whenever we propose to authorize take for endangered or threatened species.

No incidental take of ESA-listed species is authorized or expected to result from this activity. Therefore, NMFS has determined that formal consultation under section 7 of the ESA is not required for this action.

Authorization

NMFS has issued an IHA to the City of San Diego for the take of small numbers of three marine mammal species incidental to conducting demolition and construction activities at Coast Boulevard, La Jolla, California, from June 1, 2017 through December 14, 2017, provided the previously mentioned mitigation, monitoring, and reporting requirements.

Dated: June 23, 2017.

Donna S. Wieting,
Director, Office of Protected Resources,
National Marine Fisheries Service.

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