



DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 217

[Docket No. 210519-0111]

RIN 0648-BJ47

Take of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Seabird Research Activities in Central California

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

ACTION: Final rule; notification of issuance.

SUMMARY: NMFS Office of Protected Resources, upon request from Point Blue Conservation Science (Point Blue), NMFS hereby issues regulations and a Letter of Authorization (LOA) to govern the unintentional taking of marine mammals incidental to seabird research activities in central California over the course of five years. 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, as well as requirements pertaining to the monitoring and reporting of such taking.

DATES: Effective from July 1, 2021, through June 30, 2026.

ADDRESSES: 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:

<https://www.fisheries.noaa.gov/permit/incidental-take-authorizations-under-marine->

mammal-protection-act. In case of problems accessing these documents, please call the contact listed below.

FOR FURTHER INFORMATION CONTACT: Amy Fowler, Office of Protected Resources, NMFS, (301) 427-8401.

SUPPLEMENTARY INFORMATION:

Purpose and Need for Regulatory Action

NMFS received an application from Point Blue requesting five-year regulations and authorization to take multiple species of marine mammals. Take would occur by Level B harassment incidental to visual disturbance of pinnipeds during research activities and use of research equipment. Please see **Background** below for definitions of harassment. These regulations establish a framework under the authority of the MMPA (16 U.S.C. 1361 *et seq.*) to allow for the issuance of a LOA for the take of marine mammals incidental to Point Blue's seabird research activities in central California.

Legal Authority for the Proposed 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 and other means of effecting the "least practicable adverse impact" on the affected species or stocks and their habitat (see the discussion below in the *Mitigation* section), 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 rule containing five-year regulations, and for any subsequent Letters of Authorization

(LOAs). As directed by this legal authority, this final rule contains mitigation, monitoring, and reporting requirements.

Summary of Major Provisions within the Regulations

Following is a summary of the major provisions of these regulations regarding Point Blue's seabird research activities. These measures include:

- Required implementation of mitigation to minimize impact to pinnipeds including several measures to approach haulouts cautiously to minimize disturbance, and avoiding surveying when pups are present.
- Required monitoring of the research areas to detect the presence of marine mammals before initiating surveys.

Background

The MMPA prohibits the "take" of marine mammals, with certain exceptions. Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (as delegated to NMFS) 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, regulations are issued, and notice is provided to the public.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for taking for subsistence uses (where relevant). Further, NMFS must prescribe the permissible methods of taking and other "means of effecting the least practicable adverse impact" on the affected species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of the species or stocks for taking for certain subsistence uses (referred to, in shorthand, as "mitigation"); and

requirements pertaining to the mitigation, monitoring and reporting of the takings are set forth.

The definitions of all applicable MMPA statutory terms cited above are included in the relevant sections below.

Summary of Request

On September 17, 2019, NMFS received a request from Point Blue for a proposed rule and LOA to take marine mammals incidental to seabird research activities on the central California coast. We determined the application was adequate and complete on November 26, 2019. Point Blue's request is for take of a small number of California sea lions (*Zalophus californianus*), harbor seals (*Phoca vitulina richardii*), northern elephant seals (*Mirounga angustirostris*), northern fur seals (*Callorhinus ursinus*), Guadalupe fur seals (*Arctocephalus philippii townsendi*), and Steller sea lions (*Eumetopias jubatus*), by Level B harassment only. Neither Point Blue nor NMFS expects serious injury or mortality, or Level A harassment, to result from this activity. On July 24, 2020, NMFS issued a proposed rule in the **Federal Register** (85 FR 44835) soliciting public comments for 30 days. All public comments were considered in developing this final rule.

NMFS previously issued ten Incidental Harassment Authorizations (IHAs) to Point Blue for similar work from 2006 through 2020 (72 FR 71121, December 14, 2007; 73 FR 77011, December 18, 2008; 75 FR 8677, February 19, 2010; 77 FR 73989, December 7, 2012; 78 FR 66686, November 6, 2013; 80 FR 80321, December 24, 2015; 81 FR 34978, June 1, 2016; 82 FR 31759, July 7, 2017; 83 FR 31372, July 5, 2018; 85 FR 9740, February 20, 2020). In addition, NMFS issued an IHA for work from October 1, 2020, through September 30, 2021, during the development of this final rule (85 FR 63258; October 7, 2020). Point Blue complied with all the requirements (*e.g.*, mitigation, monitoring, and reporting) of the previous IHAs and information regarding their

monitoring results may be found in the *Potential Effects of the Specified Activity on Marine Mammals and their Habitat* and *Estimated Take* sections.

Description of Proposed Activity

Overview

Point Blue, along with their research partners Oikonos Ecosystem Knowledge and Point Reyes National Seashore, have been conducting seabird research in central California for over 30 years. This research is conducted under cooperative agreements with the U.S. Fish and Wildlife Service (USFWS) in consultation with the Gulf of the Farallones National Marine Sanctuary. Point Blue conducts research activities on Southeast Farallon Island (SEFI), Año Nuevo Island (ANI), and Point Reyes National Seashore (PRNS). Research activities include monitoring and censusing seabird colonies, observing seabird nesting habitat, restoring nesting burrows, and resupplying a field station at SEFI. Research is conducted throughout the year at each of the research sites. Researchers accessing and conducting research activities on the sites may occasionally cause behavioral disturbance (or Level B harassment) of six pinniped species. Point Blue expects that the disturbance to pinnipeds from the research activities will be minimal and will be limited to Level B harassment.

Dates and Duration

Point Blue's research is conducted throughout the year. At SEFI, seabird monitoring sites are visited 1-3 times per day for a maximum of 500 visits per year. Boat landings to re-supply the field station, lasting 1-3 hours, are conducted once every two weeks. At ANI, research is conducted approximately once a week from April-August, with occasional intermittent visits made during the rest of the year. The maximum number of visits per year would be 20. Research at PRNS is conducted year round, with an emphasis during the seabird nesting season, and with occasional intermittent visits the rest of the year. The maximum number of visits per year is 20. A component of the

seabird research involves habitat restoration and monitoring which requires sporadic visits from September-November, the time period between the seabird breeding season and the elephant seal pupping season.

Specific Geographic Region

Point Blue will conduct their research activities within the vicinity of pinniped haul-out sites in the following locations:

- *South Farallon Islands:* The South Farallon Islands consist of SEFI, located at 37°41'54.32" N; 123° 0'8.33" W, and West End Island. The South Farallon Islands have a land area of approximately 120 acres (0.49 square kilometers (km²)) and are part of the Farallon National Wildlife Refuge. The islands are located near the edge of the continental shelf 28 miles (mi) (45.1 km) west of San Francisco, California, and lie within the waters of the Gulf of the Farallones National Marine Sanctuary;
- *Año Nuevo Island:* ANI is located at 37° 6'29.25" N; 122°20'12.20" W, one-quarter mile (402 meters m) offshore of Año Nuevo Point in San Mateo County, California. The island lies within the Monterey Bay National Marine Sanctuary and the Año Nuevo State Marine Conservation Area; and
- *Point Reyes National Seashore:* PRNS is approximately 40 miles (64.3 km) north of San Francisco Bay and also lies within the Gulf of the Farallones National Marine Sanctuary.

Detailed Description of Specific Activity

A detailed description of Point Blue's planned activities was provided in our proposed rule (85 FR 44835; July 24, 2020) and is not repeated here. No changes have been made to the specified activities described therein.

Comments and Responses

We published a proposed rule on July 24, 2020 (85 FR 44835) and requested comments and information from the public. During the 30-day public comment period,

we received a comment letter from the Marine Mammal Commission (Commission). The Commission's comments and our responses are described below. For full detail of the comments and recommendations, please see the comment letter, which is available online at: <https://www.fisheries.noaa.gov/action/incidental-take-authorization-point-blue-conservation-science-seabird-and-pinniped-1>.

Comment 1: Due to an increasing number of Steller sea lions reported at the SEFI research site, the Commission recommended NMFS increase the annual authorized take of Steller sea lions from 65 to 72 per year.

Response: NMFS concurs with the Commission's recommendation and has increased the authorized take of Steller sea lions accordingly in this final rule.

Comment 2: The Commission recommended that NMFS require Point Blue to include raw sightings data with each annual monitoring report and ensure that the reporting requirements align with the required monitoring information to be collected. Additionally, the Commission recommended that NMFS require Point Blue to avoid visits to research sites if the number of takes that has been authorized for a given species is met.

Response: NMFS concurs with the Commission's recommendations and has revised the LOA and regulations accordingly in this final rule.

Changes from Proposed Rule to Final Rule

As described above in response to comments from the Commission, in this final rule NMFS has increased the authorized take of Steller sea lions from 65 to 72 sea lions per year by Level B harassment (see response to *Comment 1*), and has added additional monitoring, reporting, and mitigation requirements (see response to *Comment 2*).

Description of Marine Mammals in the Area of Specified Activities

Sections 3 and 4 of the application summarize available information regarding status and trends, distribution and habitat preferences, and behavior and life history, of

the potentially affected species. Additional information regarding population trends and threats may be found in NMFS's Stock Assessment Reports (SARs; <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments>), and more general information about these species (e.g., physical and behavioral descriptions) may be found on NMFS's website (<https://www.fisheries.noaa.gov/find-species>).

Table 1 lists all species with expected potential for occurrence at survey sites in California, and summarizes information related to the population or stock, including regulatory status under the MMPA and Endangered Species Act (ESA) and potential biological removal (PBR), where known. For taxonomy, we follow the Committee on Taxonomy (2019). PBR is 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 (as described in NMFS's SARs). While no mortality is anticipated or authorized here, PBR and annual serious injury and mortality from anthropogenic sources are included here as gross indicators of the status of the species and other threats.

Marine mammal abundance estimates presented in this document represent the total number of individuals that make up a given stock or the total number estimated within a particular study or survey 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. All managed stocks in this region are assessed in NMFS's U.S. 2019 Pacific and Alaska Marine Mammal SARs (Carretta *et al.* 2020a; Muto *et al.*, 2020a) and draft U.S. 2020 Pacific and Alaska Marine Mammal SARs (Carretta *et al.*, 2020b; Muto *et al.*, 2020b). All values presented in Table 1 are the most recent available at the time of publication and are available in the 2019 and draft 2020 SARs (available online at:

<https://www.fisheries.noaa.gov/national/marine-mammal-protection/draft-marine-mammal-stock-assessment-reports>).

Table 1 Marine Mammals Potentially Present in the Vicinity of the Study Areas

Common name	Scientific name	Stock	ESA/MMPA status; Strategic (Y/N) ¹	Stock abundance (CV, N _{min} , most recent abundance survey) ²	PBR	Annual M/SI ³
Order Carnivora – Superfamily Pinnipedia						
Family Otariidae (eared seals and sea lions)						
California sea lion	<i>Zalophus californianus</i>	U.S.	-/-; N	257,606 (n/a; 233,515; 2014)	14,011	>320
Steller sea lion	<i>Eumetopias jubatus</i>	Eastern U.S.	-/-; N	43,201 (n/a; 43,201; 2017)	2,592	113
Northern fur seal	<i>Callorhinus ursinus</i>	California	-/-; N	14,050 (n/a; 7,524; 2013)	451	>0.8
		Eastern Pacific	- /D; Y	620,660 (0.2, 525,333, 2016)	11,295	399
Guadalupe fur seal	<i>Arctocephalus philippii townsendi</i>	Mexico to California	T/D; Y	34,187 (n/a; 31,019; 2013)	1,062	>1.2
Family Phocidae (earless seals)						
Harbor seal	<i>Phoca vitulina richardii</i>	California	-/-; N	30,968 (n/a; 27,348; 2012)	1,641	43
Northern elephant seal	<i>Mirounga angustirostris</i>	California	-/-; N	179,000 (n/a; 81,368; 2010)	4,882	8.8

1 - Endangered 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.

2- NMFS marine mammal stock assessment reports online at: <https://www.fisheries.noaa.gov/national/marine-mammal-protection/marine-mammal-stock-assessments>. CV is coefficient of variation; Nmin is the minimum estimate of stock abundance. In some cases, CV is not applicable.

3 - These 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 strikes). Annual M/SI often cannot be determined precisely and is in some cases presented as a minimum value or range. A CV associated with estimated mortality due to commercial fisheries is presented in some cases.

All species that could potentially occur in the survey areas are included in Table

1. All six species temporally and spatially co-occur with the activity to the degree that take is reasonably likely to occur and has been authorized. Detailed descriptions of these species were provided in our proposed rule (85 FR 44835; July 24, 2020) and are not

repeated here. No new information is available. The southern sea otter (*Enhydra lutris nereis*) may be found at SEFI and ANI. However, they are managed by the USFWS and are not considered further in this document.

Potential Effects of Specified Activities on Marine Mammals and their Habitat

We provided discussion of the potential effects of the specified activity on marine mammals and their habitat in our **Federal Register** proposed rule (85 FR 44835; July 24, 2020) and it is not repeated here. The proposed rule included a summary and discussion of the ways that components of the specified activity may impact marine mammals and their habitat. The **Estimated Take** section later in this final rule includes a quantitative analysis of the number of individuals that are expected to be taken by this activity. The **Negligible Impact Analysis and Determination** section considers the content and material referenced therein, as well as the content and material referenced in the **Estimated Take** section and the **Mitigation** section, to draw conclusions regarding the likely impacts of these activities on the reproductive success or survivorship of individuals and how those impacts on individuals are likely to impact marine mammal species or stocks.

Estimated Take

This section provides an estimate of the number of incidental takes authorized by this final rule, and this estimate informs both NMFS' consideration of "small numbers" and the negligible impact determination.

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

Authorized takes would be by Level B harassment only, in the form of disruption of behavioral patterns for individual marine mammals resulting from exposure to researchers. Based on the nature of the activity and required mitigation, no Level A harassment, serious injury, or mortality is anticipated or authorized. As described previously, no mortality is anticipated or authorized for this activity. Below we describe how the take is estimated.

Marine Mammal Occurrence and Take Calculation and Estimation

Take estimates are based on take reported by Point Blue in the last five years (Table 2). With the exception of Steller sea lions, Point Blue's requested annual take was calculated as the maximum annual recorded take for each species over the last five years with a 10 percent increase (to account for potential population growth over the course of the five-year authorization), or the authorized take from the most recent IHA, whichever was greater. As stated above, due to the increased presence and reported takes of Steller sea lions at SEFI, the Marine Mammal Commission recommended that in this final rule NMFS increase the authorized take of Steller sea lions from 65 in the proposed rule to 72 takes by Level B harassment per year, and this change has been included in this final rule.

Take of northern fur seals and Guadalupe fur seals has not been authorized in Point Blue's past IHAs. However, the northern fur seal colony in the Farallon Islands is expanding, and northern fur seals are beginning to haul out in areas that are regularly visited by researchers and in areas that are critical for access to the island. There is also some potential for Guadalupe fur seals to be present at the Farallon Islands, though they are not expected to occur as frequently as northern fur seals. Therefore, Point Blue has requested, and NMFS has authorized, 20 annual takes by Level B harassment of northern fur seals and 5 annual takes by Level B harassment of Guadalupe fur seals.

Table 2. Reported Take Observations from Previous IHAs, and Requested Annual Takes by Level B Harassment

Species	Reported take observations for all activities					Authorized takes from most recent IHA	Total requested annual takes by Level B harassment
	2014	2015	2016	2017	2018		
California sea lion	10,048	36,417	23,173	22,752	17,487	32,623	40,059
Northern elephant seal	145	175	119	202	85	239	239
Pacific harbor seal	284	292	175	234	229	304	321
Steller sea lion	59	31	32	35	5	43	65
Northern fur seal	0	0	0	0	0	0	20
Guadalupe fur seal	0	0	0	0	0	0	5

Table 3. Authorized Take by Level B Harassment and Percent of MMPA Stock Taken

Species	Stock	Authorized annual take by Level B harassment	Authorized total take by Level B harassment	Percent of Stock ¹
California sea lion	U.S	40,059	200,295	15.55
Northern elephant seal	California breeding	239	1,195	0.13
Pacific harbor seal	California	321	1,605	1.04
Steller sea lion	Eastern U.S.	72	360	0.83
Northern fur seal ²	California	20	100	0.14
	Eastern Pacific			< 0.01
Guadalupe fur seal	Mexico to California	5	25	0.01

¹Reflects annual take number

²As either stock may occur in the project area, for the purposes of calculating the percentage of the stock impacted, the take is being analyzed as if all authorized takes occurred within each stock

Mitigation

In order to issue regulations and an LOA under Section 101(a)(5)(A) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to the activity, and other means of effecting the least practicable impact on the species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar

significance, and on the availability of the 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 the 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 adverse impact on species or stocks and their habitat, as well as subsistence uses where applicable, we carefully consider 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. This considers the nature of the potential adverse impact being mitigated (likelihood, scope, range). It further considers the likelihood that the measure will be effective if implemented (probability of accomplishing the mitigating result if implemented as planned), the likelihood of effective implementation (probability implemented as planned), and;

(2) The practicability of the measures for applicant implementation, which may consider such things as cost and impact on operations.

To reduce the potential for disturbance from acoustic and visual stimuli associated with survey activities, Point Blue will implement the following mitigation measures:

- Slow approach to beaches for boat landings to avoid stampede, provide animals opportunity to enter water, and avoid vessel strikes;
- Observe a site from a distance, using binoculars if necessary, to detect any marine mammals prior to approach to determine if mitigation is required (*i.e.*, if pinnipeds are present, researchers will approach with caution, walking slowly, quietly, and close to the ground to avoid surprising any hauled-out individuals and to reduce

flushing/stampeding of individuals);

- Avoid pinnipeds along access ways to sites by locating and taking a different access way. Researchers will keep a safe distance from and not approach any marine mammal while conducting research, unless it is absolutely necessary to flush a marine mammal in order to continue conducting research (*i.e.*, if a site cannot be accessed or sampled due to the presence of pinnipeds);
- Avoid visits to sites when pups are present, if the number of takes that have been authorized are met, or if species for which authorization has not been granted are present;
- Monitor for offshore predators and do not approach hauled out pinnipeds if great white sharks (*Carcharodon carcharias*) or killer whales (*Orcinus orca*) are present. If Point Blue and/or its designees see pinniped predators in the area, they must not disturb the pinnipeds until the area is free of predators;
- Keep voices hushed and bodies low to the ground in the visual presence of pinnipeds;
- Conduct seabird observations at North Landing on SEFI in an observation blind, shielded from the view of hauled out pinnipeds;
- Crawl slowly to access seabird nest boxes on ANI if pinnipeds are within view; and
- Coordinate research visits to intertidal areas of SEFI (to reduce potential take) and coordinate research activities for ANI to minimize the number of trips to the island.

Based on our evaluation of the applicant's proposed measures, and the proven efficacy and practicability of these mitigation measures in previous Point Blue incidental take authorizations, NMFS has determined that the required mitigation measures 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 regulations and an LOA 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 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.

Point Blue will contribute to the knowledge of pinnipeds in California by noting observations of: (1) unusual behaviors, numbers, or distributions of pinnipeds, such that any potential follow-up research can be conducted by the appropriate personnel; (2) tag-bearing pinnipeds or carcasses, allowing transmittal of the information to appropriate agencies and personnel; and (3) rare or unusual species of marine mammals for agency follow-up.

Required monitoring protocols for Point Blue will include the following:

- (1) Record of date, time, and location (or closest point of ingress) of each visit to the research site;
- (2) Composition of the marine mammals sighted, such as species, gender, and life history stage (*e.g.*, adult, sub-adult, pup);
- (3) Information on the numbers (by species) of marine mammals observed during the activities;
- (4) Estimated number of marine mammals (by species) that may have been harassed during the activities;
- (5) Behavioral responses or modifications of behaviors that may be attributed to the specific activities and a description of the specific activities occurring during that time (*e.g.*, pedestrian approach, vessel approach); and
- (6) Information on the weather, including the tidal state and horizontal visibility.

The lead biologist will serve as an observer to record incidental take. For consistency, any reactions by pinnipeds to researchers will be recorded according to a

three-point scale shown in Table 4. Note that only observations of disturbance noted in Levels 2 and 3 should be recorded as takes.

Table 4 -- Levels of Pinniped Behavioral 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*	Flush	All retreats (flushes) to the water.

* Only observations of disturbance Levels 2 and 3 are recorded as takes.

This information will be incorporated into a monitoring report for NMFS. The monitoring report will cover the period from January 1 through December 31 of each year of the authorization. Point Blue will submit annual report data on a calendar year schedule, regardless of the LOA's initiation or expiration dates. This ensures that data from all consecutive months will be collected and, therefore, can be analyzed to estimate authorized take for future incidental take authorizations regardless of the existing authorization's issuance date. Point Blue will submit a draft monitoring report for the activities to NMFS Office of Protected Resources by April 1 of each year. A final report will be prepared and submitted within 30 days following resolution of any comments on the draft report from NMFS. If no comments are received from NMFS, the draft monitoring report will be considered to be the final report. The final annual report after year five may be included as part of the final report (see below).

Point Blue must also report observations of unusual pinniped behaviors, numbers, or distributions and tag-bearing carcasses to the NMFS West Coast Regional Office.

In the event that personnel discovers an injured or dead marine mammal, Point Blue shall report the incident to the NMFS Office of Protected Resources, and the NMFS West Coast Regional Stranding Coordinator as soon as feasible. If the death or injury was clearly caused by Point Blue's activities, Point Blue must immediately cease the specified

activities until NMFS is able to review the circumstances of the incident and determine what, if any, additional measures are appropriate to ensure compliance with the terms of the LOA. Point Blue must not resume their activities until notified by NMFS. The report must include the following information:

- (1) Time, date, and location (latitude/longitude) of the first discovery (and updated location information if known and applicable);
- (2) Species identification (if known) or description of the animal(s) involved;
- (3) Condition of the animal(s) (including carcass condition if the animal is dead);
- (4) Observed behaviors of the animal(s), if alive;
- (5) If available, photographs or video footage of the animal(s); and
- (6) General circumstances under which the animal was discovered.

A draft final report shall be submitted to the NMFS Office of Protected Resources within 60 days after the conclusion of the fifth year. A final report shall be submitted to the Director of the NMFS Office of Protected Resources within 30 days after receiving comments from NMFS on the draft final report. If no comments are received from NMFS, the draft final report will be considered the final report.

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).

To avoid repetition, the discussion of our analyses applies to all the species listed in Table 3, given that the anticipated effects of this activity on these different marine mammal stocks are expected to be similar. For reasons stated previously in this document and based on the following factors, NMFS does not expect Point Blue's specified activities to cause long-term behavioral disturbance that would negatively impact an individual animal's fitness, or result in injury, serious injury, or mortality. Although Point Blue's survey activities may disturb marine mammals, NMFS expects those impacts to occur to localized groups of animals at or near survey sites. Behavioral disturbance would be limited to short-term startle responses and localized behavioral changes due to the short duration (ranging from <15 minutes for visits at most locations up to 2-5 hours from April-August at SEFI) of the research activities. At some locations, where resupply activities occur, visits will occur once every two weeks. Minor and brief responses including short-duration startle reactions, are not likely to constitute disruption of behavioral patterns, such as migration, nursing, breeding, feeding, or sheltering. These short duration disturbances (in many cases animals will return in 30 minutes or less) will generally allow marine mammals to reoccupy haulouts relatively quickly; therefore, these disturbances would not be anticipated to result in long-term disruption of important behaviors. No surveys will occur at or near rookeries as researchers will have limited

access to SEFI, ANI, and PRNS during the pupping season and will not approach sites should pups be observed. Furthermore, breeding animals tend to be concentrated in areas that researchers are not scheduled to visit. Therefore, NMFS does not expect mother and pup separation or crushing of pups during stampedes.

Level B behavioral harassment of pinnipeds may occur during the operation of small motorboats. However, exposure to boats and associated engine noise would be brief and would not occur on a frequent basis. Results from studies demonstrate that pinnipeds generally return to their sites and do not permanently abandon haul-out sites after exposure to motorboats (Henry and Hammil 2001; Johnson and Acevedo-Gutierrez 2007). The chance of a vessel strike is very low due to small boat size and slow transit speeds. Researchers will delay ingress into the landing areas until after the pinnipeds enter the water and will cautiously operate vessels at slow speeds.

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 serious injury or mortality, or Level A harassment, is anticipated or authorized;
- There is no activity near rookeries and researchers will avoid areas where pups are present;
- There is likely to be limited impact from boats due to their small size, maneuverability and the requirement to delay ingress until after hauled out pinnipeds have entered the water;
- No impacts to pinniped habitat are anticipated; and
- Only limited behavioral disturbance in the form of short-duration startle reactions is expected, and mitigation requirements employed by researchers

(*e.g.* move slowly, use hushed voices) should further decrease disturbance levels.

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 required monitoring and mitigation measures, NMFS finds that the total marine mammal take from Point Blue's 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 Sections 101(a)(5)(A) of the MMPA for specified activities other than military readiness activities. The MMPA does not define small numbers and so, in practice, where estimated numbers are available, 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. Additionally, other qualitative factors may be considered in the analysis, such as the temporal or spatial scale of the activities.

The annual amount of take NMFS has authorized is less than one-third of any stock's best population estimate (Table 3), which NMFS considers to be small relative to stock abundance. In fact, for all species but California sea lions, the annual take by Level B harassment is less than 2 percent of stock abundance. Additionally, these are all likely conservative estimates because we assume all takes are of different individual animals which is likely not the case considering haulout site fidelity in pinnipeds.

Based on the analysis contained herein of Point Blue's planned activity (including the required 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 would not have an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence purposes.

Adaptive Management

The regulations governing the take of marine mammals incidental to Point Blue's seabird research activities would contain an adaptive management component.

The reporting requirements associated with this 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 Point Blue regarding practicability) on an annual 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.

The following are some of the possible sources of applicable data to be considered through the adaptive management process: (1) results from Point Blue's monitoring from the previous year(s); (2) results from other marine mammal research or studies; and (3) any information that reveals marine mammals may have been taken in a manner, extent or number not authorized by these regulations or subsequent LOAs.

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 (*i.e.*, the issuance of a final rule (and subsequent LOAs)) with respect to potential impacts on the human environment. This action is consistent with

categories of activities identified in Categorical Exclusion B4 (incidental harassment authorizations (IHAs) with no anticipated serious injury or mortality) 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. Accordingly, NMFS has determined that the issuance of the final rule qualifies to be categorically excluded from further NEPA review.

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.

The NMFS Office of Protected Resources is authorizing the incidental take of Guadalupe fur seals which are listed under the ESA. We requested initiation of consultation under section 7 of the ESA with NMFS West Coast Region (WCR) on August 26, 2020, for the issuance of this LOA. On September 2, 2020, NMFS WCR determined our issuance of the LOA to Point Blue was not likely to adversely affect the Guadalupe fur seal or the critical habitat of any ESA-listed species or result in the take of any marine mammals in violation of the ESA.

Classification

Pursuant to the procedures established to implement Executive Order 12866, the Office of Management and Budget has determined that this final 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 has certified to the Chief

Counsel for Advocacy of the Small Business Administration that this action would not have a significant economic impact on a substantial number of small entities. Point Blue is the sole entity that would be subject to the requirements in these regulations, and Point Blue is not a small governmental jurisdiction, small organization, or small business, as defined by the RFA. Because of this certification, a regulatory flexibility analysis is not required and none has been prepared.

This final rule contains a collection-of-information requirement subject to the provisions of the Paperwork Reduction Act (PRA). 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 subject to the requirements of the PRA unless that collection of information 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: May 20, 2021

Samuel D. Rauch III,

*Deputy Assistant Administrator for Regulatory Programs,
National Marine Fisheries Service.*

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

**PART 217 – REGULATIONS GOVERNING THE TAKE OF MARINE
MAMMALS INCIDENTAL TO SPECIFIED ACTIVITIES**

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

Authority: 16 U.S.C. 1361 *et seq.*

2. Add subpart M to read as follows:

**Subpart M – Taking Marine Mammals Incidental to Seabird Research Activities in
Central California**

Sec.

- 217.120 Specified activity and specified geographical region.
- 217.121 Effective dates.
- 217.122 Permissible methods of taking.
- 217.123 Prohibitions.
- 217.124 Mitigation requirements.
- 217.125 Requirements for monitoring and reporting.
- 217.126 Letters of Authorization.
- 217.127 Renewals and modifications of Letters of Authorization.
- 217.128 – 217.129 [Reserved]

**Subpart M – Taking Marine Mammals Incidental to Seabird Research Activities in
Central California**

§ 217.120 Specified activity and specified geographical region.

(a) Regulations in this subpart apply only to the incidental taking of marine mammals during seabird research activities by Point Blue Conservation Science (Point Blue) and those persons it authorizes or funds to conduct activities on its behalf in the areas outlined in paragraph (b) of this section.

(b) The incidental taking of marine mammals by Point Blue may only occur in California on Southeast Farallon Island, Año Nuevo Island, and Point Reyes National Seashore in accordance with a Letter of Authorization (LOA) issued under §§ 216.106 of this chapter and 217.126.

§ 217.121 Effective dates.

Regulations in this subpart are effective from July 1, 2021, through June 30, 2026.

§ 217.122 Permissible methods of taking.

Under LOAs issued pursuant to §§ 216.106 of this chapter and 217.126, the Holder of the LOA (hereinafter “Point Blue”) may incidentally, but not intentionally, take marine mammals within the area described in § 217.120(b) by Level B harassment associated with seabird research activities, provided the activity is in compliance with all terms, conditions, and requirements of the regulations in this subpart and the appropriate LOA.

§ 217.123 Prohibitions.

Except for the takings contemplated in § 217.120 and authorized by a LOA issued under §§ 216.106 of this chapter and 217.126, it is unlawful for any person to do any of the following in connection with the activities described in § 217.120 may:

(a) Violate, or fail to comply with, the terms, conditions, and requirements of this subpart or a LOA issued under §§ 216.106 of this chapter and 217.126;

(b) Take any marine mammal not specified in such LOA;

(c) Take any marine mammal specified in such LOA in any manner other than as specified in § 217.122;

(d) Take a marine mammal specified in such LOA 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 LOA 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.

§ 217.124 Mitigation requirements.

When conducting the activities identified in § 217.120(a), the mitigation measures contained in any LOA issued under §§ 216.106 of this chapter and 217.126 must be

implemented. These mitigation measures shall include but are not limited to the following general conditions:

(a) All persons must slowly approach beaches for boat landings. Boat landings must avoid causing stampede and provide marine mammals with an opportunity to safely enter the water. Vessel strikes are prohibited.

(b) All persons must observe a site from a distance, using binoculars if necessary, to detect any marine mammals prior to approach to determine if mitigation is required (*i.e.*, if pinnipeds are present, researchers must approach with caution, walking slowly, quietly, and close to the ground to avoid surprising any hauled-out marine mammals and to reduce flushing/stampeding of individuals).

(c) All persons must avoid pinnipeds along access ways to sites by locating and taking a different access way. Researchers must keep a safe distance from and not approach any marine mammal while conducting research, unless it is absolutely necessary to flush a marine mammal in order to continue conducting research (*i.e.*, if a site cannot be accessed or sampled due to the presence of pinnipeds).

(d) All persons must avoid visits to sites when pups are present, if the number of takes that have been authorized are met, or if species for which authorization has not been granted are present.

(e) All persons must monitor for offshore predators and must not approach hauled out pinnipeds if great white sharks (*Carcharodon carcharias*) or killer whales (*Orcinus orca*) are observed to be present. If Point Blue and/or its designees see pinniped predators in the area, they must not disturb the pinnipeds until the lead biologist determines the area is free of predators based on best professional judgment.

(f) All persons must keep voices hushed and bodies low to the ground in the visual presence of pinnipeds.

(g) All persons must conduct seabird observations at North Landing on Southeast

Farallon Island in an observation blind, shielded from the view of hauled out pinnipeds.

(h) All persons must crawl slowly to access seabird nest boxes on Año Nuevo Island if pinnipeds are within view.

(i) Researchers must coordinate research visits to intertidal areas of Southeast Farallon Island and coordinate research activities for Año Nuevo Island to minimize the number of trips to these areas.

§ 217.125 Requirements for monitoring and reporting.

(a) *Visual monitoring.* When conducting activities under an LOA, Point Blue must conduct a visual monitoring program and record information as required by the LOA and this subpart.

(1) Standard information recorded must include species counts (with age/sex classes noted when possible) of animals present before approaching, numbers of observed disturbances, and descriptions of the disturbance behaviors during the monitoring surveys, including location, date, and time of the event.

(2) The lead biologist must serve as an observer to record incidental take.

(3) The lead biologist must record the following:

(i) The date, time, and location (or closest point of ingress) of each visit to the research site;

(ii) Composition of the marine mammals sighted, such as species, sex, and life history stage (*e.g.*, adult, sub-adult, pup);

(iii) The number (by species) of marine mammals observed during the activities;

(iv) Estimated number of marine mammals (by species) that may have been disturbed during the activities, using a three-point scale of disturbance contained in an LOA issued under §§ 216.106 of this chapter and 217.126. Disturbance Levels 2 and 3 must be recorded as takes;

(v) Behavioral responses or modifications in behaviors that may be attributed to

the specific activities and a description of the specific activities occurring during that time (e.g., pedestrian approach, vessel approach);

(vi) Information on the weather, including the tidal state and horizontal visibility;

and

(vii) If applicable, note the presence of any offshore predators (date, time, number, and species).

(4) Point Blue must report observations of unusual behaviors, numbers, or distributions of pinnipeds, or of tag-bearing carcasses, to the NMFS West Coast Regional Office.

(b) *Prohibited take.* (1) In the event that personnel discovers an injured or dead marine mammal, Point Blue shall report the incident to the Office of Protected Resources, NMFS, and the West Coast Regional Stranding Coordinator, NMFS as soon as feasible. If the death or injury was caused by Point Blue's activities, Point Blue must immediately cease activities conducted under its LOA until NMFS is able to review the circumstances of the incident and determine what, if any, additional measures are appropriate to ensure compliance with the terms of the LOA. Point Blue must not resume their activities until notified by NMFS. The report must include the following information:

(i) Time, date, and location (latitude/longitude) of the first discovery (and updated location information if known and applicable);

(ii) Species identification (if known) or description of the animal(s) involved;

(iii) Condition of the animal(s) (including carcass condition if the animal is dead);

(iv) Observed behaviors of the animal(s), if alive;

(v) If available, photographs or video footage of the animal(s); and

(vi) General circumstances under which the animal was discovered.

(c) *Annual report.* (1) A draft annual report covering the period of January 1

through December 31 of each year must be submitted to NMFS Office of Protected Resources by April 1 of each year. The final annual report after year five may be included as part of the final report (see below). The report must include the information gathered pursuant to the monitoring requirements set forth above and in the LOA at minimum, and must also include raw sightings data.

(2) A final annual report must be submitted to the Director of the NMFS Office of Protected Resources within 30 days after receiving comments from NMFS on the draft annual report. If no comments are received from NMFS, the draft annual report will be considered the final report.

(d) *Final report.* A draft final report must be submitted to NMFS Office of Protected Resources within 60 days after the conclusion of the fifth year. A final report must be submitted to the Director of the NMFS Office of Protected Resources within 30 days after receiving comments from NMFS on the draft final report. If no comments are received from NMFS, the draft final report will be considered the final report.

§ 217.126 Letters of Authorization.

(a) To incidentally take marine mammals pursuant to these regulations, Point Blue 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 these regulations.

(c) If an LOA expires prior to the expiration date of these regulations, Point Blue 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, Point Blue must apply for and obtain a modification of the LOA as described in § 217.127.

(e) The LOA shall set forth:

(1) Permissible methods and numbers 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 these regulations.

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

§ 217.127 Renewals and modifications of Letters of Authorization.

(a) An LOA issued under §§ 216.106 of this chapter and 217.126 for the activity identified in § 217.120(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 these regulations (excluding changes made pursuant to the adaptive management provision in paragraph (c)(1) of this section), and

(2) NMFS' Office of Protected Resources determines that the mitigation, monitoring, and reporting measures required by the previous LOA under these regulations were implemented.

(b) For an LOA modification or renewal requests by the applicant that includes 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' Office of Protected Resources 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 of this chapter and 217.126 for the activity identified in § 217.120(a) may be modified by NMFS' Office of Protected Resources under the following circumstances:

(1) *Adaptive management*—NMFS' Office of Protected Resources may modify (including augment) the existing mitigation, monitoring, or reporting measures (after consulting with Point Blue regarding the practicability of the modifications) if doing so creates a reasonable likelihood of more effectively accomplishing the goals of the mitigation and monitoring set forth in the preamble for these regulations.

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

(A) Results from Point Blue's monitoring from the previous year(s);

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

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

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

(2) *Emergencies*. If NMFS' Office of Protected Resources 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 of this chapter and 217.126, 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.

§§ 217.128 – 217.129 [Reserved]

