



# MARINE MAMMAL COMMISSION

5 February 2018

Ms. Jolie Harrison, Chief  
Permits and Conservation Division  
Office of Protected Resources  
National Marine Fisheries Service  
1315 East-West Highway  
Silver Spring, MD 20910-3225

Dear Ms. Harrison:

The Marine Mammal Commission (the Commission), in consultation with its Committee of Scientific Advisors on Marine Mammals, has reviewed the application submitted by the Partnership for the Interdisciplinary Study of Coastal Oceans (PISCO) at the University of California Santa Cruz<sup>1</sup> under section 101(a)(5)(D) of the Marine Mammal Protection Act. PISCO is proposing to take small numbers of marine mammals by harassment incidental to conducting rocky intertidal monitoring activities along the California and Oregon coasts. The Commission also has reviewed the National Marine Fisheries Service's (NMFS) 24 January 2018 notice (83 Fed. Reg. 3308) announcing receipt of the application and proposing to issue the authorization, subject to certain conditions.

PISCO proposes to conduct rocky intertidal surveys at numerous sites along the California and Oregon coasts in all months except January, February, and September. The proposed activities are part of a long-term monitoring program that includes (1) surveying for algae and invertebrates, (2) assessing and measuring invertebrates, and (3) measuring tidal height topographically. Research-related sound and the increased presence of humans would be the main sources of marine mammal disturbance.

NMFS preliminarily has determined that, at most, the proposed activities would temporarily modify the behavior of small numbers of California sea lions, harbor seals<sup>2</sup>, and northern elephant seals. It also anticipates that any impact on the affected species and stocks would be negligible. NMFS does not anticipate any take of marine mammals by death or serious injury and believes that the potential for disturbance will be at the least practicable level because of the proposed mitigation measures. The proposed mitigation, monitoring, and reporting measures include—

- rescheduling surveys at sites if other pinniped species (i.e., Steller sea lions, Guadalupe fur seals, and northern fur seals<sup>3</sup>) are present;

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<sup>1</sup> Both of which also work in collaboration with the Multi-Agency Rocky Intertidal Network.

<sup>2</sup> The Commission noted errors in the take calculation for harbor seals based on rounding to the nearest value of 5 and previous monitoring results from 2016 and 2017. NMFS indicated that it would increase the number of harbor seal takes from 203 to 255, which would be included in the final authorization.

<sup>3</sup> Although Steller sea lions were specified in the proposed authorization, the Commission noted that Guadalupe and northern fur seals were absent. NMFS indicated that it would include all three species in the final authorization.

- rescheduling surveys at sites where pups are present, unless the survey can be conducted without disturbing females and dependent pups;
- using binoculars to detect any marine mammals prior to approaching the site and approaching each site with caution (slowly and quietly) to avoid surprising any hauled-out individuals and to reduce stampeding of individuals;
- keeping a safe distance from and not approaching any marine mammal while conducting research, unless it is absolutely necessary;
- avoiding loud noises (i.e., using hushed voices);
- avoiding pinnipeds along access paths to sites by locating and taking a different access path and vacating the area as soon as the survey is completed;
- monitoring the offshore area for predators (i.e., killer whales and white sharks) and avoiding flushing pinnipeds when predators are observed in nearshore waters;
- using qualified observers to monitor and evaluate incidental takes<sup>4</sup>;
- reporting tagged pinniped carcasses to the appropriate personnel;
- reporting rare or unusual species, numbers, or behaviors of marine mammals to NMFS;
- reporting injured and dead marine mammals to NMFS and the West Coast Regional Stranding Coordinator using NMFS's phased approach and suspending activities, if appropriate; and
- submitting a final monitoring report.

The Commission concurs with NMFS's preliminary finding and recommends that NMFS issue the incidental harassment authorization, subject to the inclusion of the proposed mitigation, monitoring, and reporting measures.

### **Proposed one-year authorization renewals**

For this and other future authorizations, NMFS has indicated that it may issue a one-year incidental harassment authorization renewal on a case-by-case basis without additional public notice when (1) another year of identical, or nearly identical activities, as described in the 'Specified Activities' section of the *Federal Register* notice is planned or (2) the activities would not be completed by the time the incidental harassment authorization expires and a renewal would allow for completion of the authorized activities beyond the timeframe described in the 'Dates and Duration' section of the notice. NMFS would issue a renewal only if—

- the request for renewal was received no later than 60 days prior to the expiration of the current authorization;
- the activities to be conducted either are identical to the previously analyzed and authorized activities or include changes so minor (e.g., reduction in pile size) that they do not affect the previous analyses, take estimates, or mitigation and monitoring requirements;
- a preliminary monitoring report provides the results of the required monitoring to date and those results do not indicate impacts of a scale or nature not previously analyzed or

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<sup>4</sup> The Commission noted that NMFS had included an outdated version of the disturbance criteria in the proposed authorization. NMFS indicated that it would include the revised criteria from 2016 in the final authorization. NMFS also will notify PISCO that the criteria have changed and that it should report the numbers of takes accordingly.

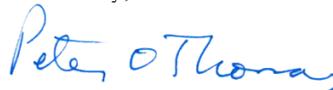
- authorized;
- the status of the affected species or stocks and any other pertinent information, including the mitigation and monitoring requirements, remain the same and appropriate; and
  - the original determinations under the MMPA remain valid.

The Commission agrees that NMFS should take appropriate steps to streamline the authorization process under section 101(a)(5)(D) of the MMPA to the extent possible. However, the Commission is concerned that the renewal process proposed in the *Federal Register* notice is inconsistent with the statutory requirements. Section 101(a)(5)(D) clearly states that such authorizations are to be valid “for periods no more than 1 year” and that proposed authorizations are subject to publication in the *Federal Register* and elsewhere and subject to an opportunity for public review and comment. NMFS has since clarified that it would issue a separate authorization to comply with the one-year limitation under the MMPA and that a renewal would be issued as a one-time opportunity<sup>5</sup>—both of which should have been specified in the *Federal Register* notice. However, NMFS’s proposed renewal process still would bypass the public notice and comment requirements.

Although it is sympathetic to what NMFS is trying to accomplish, the Commission recommends that NMFS refrain from implementing the proposed renewal process. If NMFS believes that its proposed renewal process is consistent with the applicable statutory requirements and is intended to be generally applicable to all incidental harassment authorizations that meet the specified criteria, it should not seek to adopt such a process through a brief notice at the end of a specific proposed authorization. That process should be adopted through a more general route, preferably a rulemaking, that provides adequate public notice and opportunity for comment and NMFS’s rationale and analysis regarding why it believes the proposed renewal process is consistent with the requirements of section 101(a)(5)(D) of the MMPA. If NMFS adopts the proposed renewal process notwithstanding the Commission’s recommendation, the Commission further recommends that NMFS provide it and the public with a legal analysis supporting NMFS’s conclusion that such a process is consistent with the requirements under section 101(a)(5)(D) of the MMPA. In addition, if NMFS decides to bypass the notice and comment process in advance of issuing a renewal, it should nevertheless publish notice in the *Federal Register* whenever such a renewal has been issued.

Please contact me if you have questions regarding the Commission’s recommendations.

Sincerely,



Peter O. Thomas, Ph.D.,  
Executive Director

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<sup>5</sup> After which a new authorization application would be required.