

anticipated nor will any be authorized in the proposed IHA.

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the mitigation and monitoring measures, NMFS found that pile driving conducted by Bluewater during MDCF installation will result in the incidental take of small numbers of marine mammals, by Level B harassment only, and that the total taking from will have a negligible impact on the affected species or stocks. Therefore, issuance of an IHA to Bluewater was warranted.

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

There are no relevant subsistence uses of marine mammals implicated by this action.

#### Endangered Species Act (ESA)

NMFS Protected Resources determined that, based on the implementation of the monitoring and mitigation plan developed by Bluewater, in consultation with NMFS, is not likely to adversely affect listed marine mammal species. NMFS Northeast Region provided concurrence with this determination on September 14, 2010.

#### National Environmental Policy Act (NEPA)

On June 2, 2009, the BOEM issued an EA and associated Finding of No Significant Impact (FONSI) on the *Issuance of Leases for Wind Resource Data Collection on the Outer Continental Shelf Offshore Delaware and New Jersey*. The EA evaluates the impacts to the human environment, including those to marine mammals, from issuing seven leases in the Atlantic OCS for purposes of constructing, operating, and decommissioning a MDCF in each lease block. The MDCF's proposed by Bluewater are included in that analysis. BOEM concluded that the proposed action would not have a significant adverse impact on the human environment. Therefore, preparation of an EIS was not necessary. After independently reviewing BOEM's EA, NMFS determined the EA adequately evaluated impacts to marine mammals anticipated from issuance of the IHA. Accordingly, NMFS adopted BOEM's EA and issued a FONSI. Therefore, the preparation of another EA by NMFS for issuance of an IHA to Bluewater for the specified activity was not warranted.

Dated: September 29, 2010.

**Helen M. Golde,**

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

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#### DEPARTMENT OF COMMERCE

#### National Oceanic and Atmospheric Administration

**RIN 0648-XY30**

#### Takes of Marine Mammals Incidental to Specified Activities; Construction of the Parsons Slough Sill Project

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

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

**SUMMARY:** NMFS has received an application from the NOAA Restoration Center, Southwest Region, for an Incidental Harassment Authorization (IHA) to take marine mammals, by harassment, incidental to the Parsons Slough Sill Project. Pursuant to the Marine Mammal Protection Act (MMPA), NMFS is requesting comments on its proposal to issue an IHA to the NOAA Restoration Center, Southwest Region, to take, by Level B Harassment only, small numbers of harbor seals (*Phoca vitulina richardsi*) during the specified activity.

**DATES:** Comments and information must be received no later than November 4, 2010.

**ADDRESSES:** Comments on the application should be addressed to Michael Payne, Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910. The mailbox address for providing e-mail comments is [PR1.0648-XY30@noaa.gov](mailto:PR1.0648-XY30@noaa.gov). NMFS is not responsible for e-mail comments sent to addresses other than the one provided here. Comments sent via e-mail, including all attachments, must not exceed a 10-megabyte file size.

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

Information or otherwise sensitive or protected information.

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

**FOR FURTHER INFORMATION CONTACT:** Brian D. Hopper or Candace Nachman, Office of Protected Resources, NMFS, (301) 713-2289, or Monica DeAngelis, NMFS Southwest Region, (562) 980-3232.

#### SUPPLEMENTARY INFORMATION:

##### Background

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant), and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth. NMFS has defined "negligible impact" in 50 CFR 216.103 as " \* \* \* an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival."

Section 101(a)(5)(D) of the MMPA established an expedited process by which citizens of the U.S. can apply for an authorization to incidentally take small numbers of marine mammals by harassment. Section 101(a)(5)(D) establishes a 45-day time limit for NMFS review of an application followed by a 30-day public notice and comment period on any proposed authorization published in the **Federal Register** for the incidental harassment of marine mammals. Within 45 days of the

close of the comment period, NMFS must either issue or deny the authorization.

Except with respect to certain activities not pertinent here, the MMPA defines "harassment" as:

Any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].

### Summary of Request

NMFS received an application on August 5, 2010, from the NOAA Restoration Center, Southwest Region, for the taking, by harassment, of marine mammals incidental to the construction of a partially submerged tidal barrier (sill) across the mouth of the Parsons Slough Channel. Parsons Slough is located on the southeast side of the Elkhorn Slough Estuary, which is situated 90 miles (145 km) south of San Francisco and 20 miles (32 km) north of Monterey in Monterey County, California. The application was determined to be complete on August 16, 2010. The sill structure would be constructed of steel sheet piles and would extend 270 ft (82.3 m) across the mouth of Parsons Slough. The sheet pile wall would be supported on two rows of seven end-bearing piles. All sheet pile and end-bearing piles would be driven starting with a vibratory hammer to set the sheets but may require an impact hammer to complete driving. Because pile driving has the potential to expose marine mammals to heightened levels of underwater and ambient noise, it may result in behavioral harassment to marine mammals located in the action area. An authorization under section 101(a)(5)(D) of the MMPA is required. The proposed action will result in the incidental take, by Level B harassment, of Pacific harbor seals (*Phoca vitulina richarsi*). The specified activities are also likely to result in the take by incidental harassment of southern sea otters (*Enhydra lutris*). The U.S. Fish and Wildlife Service (USFWS) has management jurisdiction over southern sea otters. NOAA has applied for and received from USFWS a separate MMPA Section 101(a)(5)(D) authorization for incidental take of sea otters. The potential take of sea otters is not further addressed in this notice.

### Description of the Specified Activity

The proposed sill structure would be located in the vicinity of the Union

Pacific Railroad bridge, milepost 103.27 Coast Subdivision, which is located at the mouth of the Parsons Slough Complex. The bridge is a 165 ft (50.3 m) long concrete slab girder bridge that spans the Parsons Slough Channel. The overall goal of the proposed action is to reduce tidal scour within the Elkhorn Slough action area in general and the Parsons Slough study area in particular. Within the past 60 years, the proportion of salt marsh habitat and mudflat habitat within the Elkhorn Slough has reversed as a result of tidal erosion and inundation of interior marsh areas. Currently, there are approximately 800 acres (3.2 km<sup>2</sup>) of salt marsh and tidal creeks within Elkhorn Slough, 1,600 acres (6.5 km<sup>2</sup>) of mudflat, and 300 acres (1.2 km<sup>2</sup>) of tidal channels. Modeling efforts predict that an additional 550 acres (2.2 km<sup>2</sup>) of salt marsh would be lost over the next 50 years if tidal erosion in Elkhorn Slough is not addressed. Without intervention, excessive erosion would continue to widen tidal channels and convert salt marsh to mud flat. This would result in a significant loss of habitat function and a decrease in estuarine biodiversity.

In order to reduce tidal scour, the NOAA Restoration Center, Southwest Region, proposes to construct a partially submerged tidal barrier (sill), similar to an underwater wall, across the mouth of Parsons Slough. The sill structure would prevent head cutting (*i.e.*, erosion in a channel caused by an abrupt change in slope) in Elkhorn Slough from migrating upstream into Parsons Slough, would retain sediment that accretes within Parsons Slough, and would reduce the tidal prism of Parsons Slough. This reduction in tidal prism would reduce current velocities between Parsons Slough and the mouth of Elkhorn Slough, thereby reducing tidal scour. The proposed project, which is referred to as the Parsons Slough Project, would also include establishment of artificial reefs to support populations of Olympia oysters (*Ostrea lurida*) in the northeastern part of the Parsons Slough Complex.

As mentioned earlier in this document, the sill structure would be constructed of steel sheet piles that would extend 270 ft (82.3 m) across the mouth of the Parsons Slough Channel. A 100 ft (30 m) wide lower area, located in the center of the structure, would allow water to flow between Parsons Slough and Elkhorn Slough. This portion of the structure would be submerged more than 99 percent of the time. The center of the lower part of the structure would include a notch approximately 25 ft (7.6 m) wide, with the top elevation of the sheet pile in this

notch at an elevation of -5 ft (-1.5 m). The notch would provide for the passage of water at all tide levels and would facilitate the movement of fish and wildlife into and out of Parsons Slough. The top elevation of the sheet pile in the remaining 75 ft (23 m) of the central section of the base structure would be -2 ft (-0.6 m). The remaining portions of the sheet piles to the left and right of the center portion of the structure would have a top elevation of 9.6 ft (3 m).

All in-channel construction activities would be constructed from barges, and no heavy equipment would enter the channels. Most of these construction activities are in-water (*e.g.*, installation of end-bearing piles and sheet piles, placement of rockfill buttress).

Installation of the sheet pile wall would be supported by two rows of seven end-bearing piles, as well as a single row of sheet pile located between the piles. The end-bearing piles would be driven through the soft soils to penetrate 10 ft (3 m) below the top of the dense sandy deposits that underlie the soft soils at an elevation of approximately -80 ft (-24.4 m). Additionally, up to 45 temporary end-bearing piles may be installed in the main channel of Elkhorn Slough at the Kirby Park staging site (approximately 2 mi (3.2 km) from the project site) to facilitate barge docking and loading (if the temporary dock is constructed on pilings, rather than temporary rock-fill). These piles, if necessary, would be removed after construction when the floating dock is disassembled. Pile driving at the staging site is not expected to result in any harbor seal takes. Harbor seals usually occur just beyond the mouth of Elkhorn Slough in the Moss Landing harbor and in the Salinas River channel south of the Moss Landing Bridge, and the lower portion of Elkhorn Slough extending up to Parsons Slough and Rubis Creek. Harbor seals do not typically use the part of the estuary that leads up to Kirby Creek and the nearest occupied areas and haul-out locations (approximately 2 mi (3.2 km) to the south) are beyond the estimated distances to NMFS' current threshold sound levels from pile driving proposed at the Kirby Park staging area (*see* Table 3 and Table 4).

A vibratory hammer would be used to start driving all sheet pile and end-bearing piles, but an impact hammer may be required to complete driving. If an impact hammer is required during construction, cushioning blocks would be used to attenuate the sound. Vibratory hammers clamp onto the sheet pile, therefore, no cushioning blocks

would be used during vibratory pile driving.

TABLE 1—TYPICAL NEAR-SOURCE (10M) UNDERWATER NOISE LEVELS

Type of pile	Driving technique	RMS level
H-Pile .....	Impact Hammer .....	183 dB
H-Pile .....	Vibratory Hammer .....	155 dB
Sheet Pile .....	Impact Hammer .....	175 dB
Sheet Pile .....	Vibratory Hammer .....	160 dB

TABLE 2—AIRBORNE NOISE NEVEL (15 M)

Type of pile	Driving technique	L <sub>max</sub> /rms level
H-Pile .....	Impact Hammer .....	109 dBA
H-Pile .....	Vibratory Hammer .....	95 dBA
Sheet Pile .....	Impact Hammer .....	106 dBA
Sheet Pile .....	Vibratory Hammer .....	97 dBA

The applicant anticipates that construction would last 11 to 15 weeks beginning around November 1, 2010 and ending in February 2011. In-water construction would primarily occur during slack tide. Actual pile driving time during this work window will depend on a number of factors, such as sediments, currents, presence of marine mammals, and equipment maintenance; however, the applicant anticipates that it will take approximately 20 days to install the end-bearing piles and sheet pile during the 11 to 15 weeks of construction. Construction activities at night are also anticipated during this 11 to 15 week period but would not last for more than 5 hrs at a time (duration of a slack tide at night).

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

Two species of marine mammals may be affected by the proposed action: Pacific harbor seals and southern sea otters (*Enhydra lutris*). However, southern sea otters are managed by the U.S. Fish and Wildlife Service and will not be considered further in this proposed IHA notice.

**Pacific Harbor Seals**

Harbor seals are the most widely distributed pinniped species, occurring on both sides of the northern Pacific and Atlantic Oceans (NMFS, 2005). The Pacific harbor seal ranges from Baja Mexico to the Aleutian Islands and occurs along the entire length of the California coast. In 2005, harbor seal populations in California were estimated at 34,233 and have been growing at an estimated rate of 3.5 percent from 1982 to 1995 (NMFS, 2005). Harbor seals are not listed as depleted under the MMPA or threatened

or endangered under the Endangered Species Act (ESA).

The harbor seal breeding season lasts from March through June each year, with peak births occurring between April and May. Females give birth to one pup each year and mate again shortly after weaning. Harbor seals are not territorial on land but they do maintain spacing between individuals in haul outs.

Harbor seals feed on fish, crustaceans, and some cephalopods. Foraging occurs in shallow littoral waters, and common prey items include flounder, sole, hake, codfish, sculpin, anchovy, and herring. Harbor seals are typically solitary while foraging, although small groups have been observed.

Harbor seals are rarely found in pelagic waters and typically stay within the tidal and intertidal zones. On land, harbor seals haul out on rocky outcrops, mudflats, sandbars, and sandy beaches with unrestricted access to water and with minimal human presence. Harbor seals are non-migratory, but will make short to moderate distance journeys for feeding and breeding, including venturing into estuaries and rivers (CDFG, 2005).

Harbor seals use Elkhorn Slough for hauling out, resting, socializing, foraging, molting, and reproduction. Within the Parsons Slough Complex, there are an estimated 100 harbor seals using the area on a daily basis (Maldini *et al.*, 2009). In Parsons Slough, harbor seals use exposed mudflats to haul-out during low tide. During high tide, harbor seals are absent from Parsons Slough (Maldini *et al.*, 2009). There are five main haul-out areas within the Parsons Slough Complex, two of which are located east and west of the Union Pacific Railroad bridge, respectively (Maldini *et al.*, 2009). Consistent with

harbor seal behavior, abundance on the mudflats is highest during the day and drops after sunset. Harbor seal activity at night is unknown, but researchers speculate that the animals leave Parsons Slough at night to forage in the main channel or Monterey Bay (Maldini *et al.*, 2009). Maldini *et al.* (2009) found that exit times peaked at 5 pm and continued to be high until 8 pm with another smaller peak occurring around 10 pm. Additional information on the Pacific harbor seal can be found in the NMFS Stock Assessment Report (SAR). The 2009 Pacific SAR is available at <http://www.nmfs.noaa.gov/pr/pdfs/sars/po2009.pdf>.

**Potential Effects of the Specified Activity on Marine Mammals**

Sound is a physical phenomenon consisting of minute vibrations that travel through a medium, such as air or water. Sound levels are compared to a reference sound pressure to identify the medium. For air and water, these reference pressures are “re 20 microPa” and “re 1 microPa,” respectively. Sound is generally characterized by several variables, including frequency and sound level. Frequency describes the sound’s pitch and is measured in hertz (Hz) or kilohertz (kHz), while sound level describes the sound’s loudness and is measured in decibels (dB). Sound level increases or decreases exponentially with each dB of change. For example, 10-dB yields a sound level 10 times more intense than 1 dB, while a 20 dB level equates to 100 times more intense, and a 30 dB level is 1,000 times more intense. However, it should be noted that humans perceive a 10 dB increase in sound level as only a doubling of sound loudness, and a 10 dB decrease in sound level as a halving of sound loudness.

Marine mammals use sound for vital life functions, and introducing sound into their environment could disrupt those behaviors. Sound (hearing and vocalization) serves four main functions for marine mammals. These functions include: (1) Providing information about their environment; (2) communication; (3) enabling remote detection of prey; and (4) enabling detection of predators. Noise from pile driving may affect marine mammals at a level which could cause Level B behavioral harassment by disturbing important behavioral patterns of Pacific harbor seals. The distances at which these sounds may be audible depend on the source levels, ambient noise levels, and sensitivity of the receptor (Richardson *et al.*, 1995). Mitigation measures (*see* Proposed Mitigation section later in this document) and the low source level of vibratory pile driving (the main method used to install sheet pile and end-bearing piles in this proposed project) are expected to prevent marine mammals from being exposed to injurious levels of sound.

Pinnipeds produce a wide range of social signals, most occurring at relatively low frequencies (Southall *et al.*, 2007), suggesting hearing is keenest at these frequencies. Pinnipeds communicate acoustically both on land and in the water, suggesting that they possess amphibious hearing and have different hearing capabilities dependent upon the media (air or water). Based on numerous studies, as summarized in Southall *et al.* (2007), pinnipeds are more sensitive to a broader range of sound frequencies in water than in air. In-water, pinnipeds can hear frequencies from 75 Hz to 75 kHz. In air, the lower limit remains at 75 Hz, but the highest audible frequencies are only around 30 kHz (Southall *et al.*, 2007).

### Hearing Impairment

Temporary or permanent hearing impairment is possible when marine mammals are exposed to very loud sounds. Hearing impairment is measured in two forms: Temporary threshold shift (TTS) and permanent threshold shift (PTS). Relationships between TTS and PTS have not been studied in marine mammals, but are assumed to be similar to those in humans and terrestrial mammals. There is no empirical data for onset of PTS in any marine mammal, therefore, PTS-onset must be estimated from TTS-onset measurements and from the rate of TTS growth with increasing exposure levels above those eliciting TTS-onset. NMFS presumes PTS to be likely if the threshold is reduced by  $\geq 40$  dB (*i.e.*, 40 dB of TTS). Due to proposed mitigation

measures and the fact that source levels of the impact and vibratory hammers are below the 190 dB injury threshold used by NMFS for pinniped species, NMFS does not expect that harbor seals will be exposed to levels that could elicit PTS; therefore, it will not be discussed further.

### Temporary Threshold Shift (TTS)

TTS is the mildest form of hearing impairment that can occur during exposure to a loud sound (Kryter, 1985). While experiencing TTS, the hearing threshold rises, and a sound must be louder in order to be heard. TTS can last from minutes or hours to (in cases of strong TTS) days. For sound exposures at or somewhat above the TTS-onset threshold, hearing sensitivity recovers rapidly after exposure to the noise ends. Few data on sound levels and durations necessary to elicit mild TTS have been obtained for marine mammals. Southall *et al.* (2007) considers a 6 dB TTS (*i.e.*, baseline thresholds are elevated by 6 dB) sufficient to be recognized as an unequivocal deviation and thus a sufficient definition of TTS-onset. Because it is non-injurious, NMFS considers TTS to be Level B harassment that is mediated by physiological effects on the auditory system; however, NMFS does not consider onset TTS to be the lowest level at which Level B harassment may occur.

Sound exposures that elicit TTS in pinnipeds underwater have been measured in harbor seals, California sea lions, and northern elephant seals from broadband or octaveband (OBN) non-pulse noise ranging from approximately 12 minutes to several hours (Kastak and Schusterman, 1996; Finneran *et al.*, 2003; Kastak *et al.*, 1999; Kastak *et al.*, 2005). Collectively, Kastak *et al.* (2005) analyzed these data to indicate that in the harbor seal a TTS of ca. 6 dB occurred with 25 minute exposure to 2.5 kHz OBN with sound pressure level (SPL) of 152 dB re 1 microPa (as summarized in Southall *et al.*, 2007). Underwater TTS experiments involving exposure to pulse noise are limited to a single study. Finneran *et al.* (2003) found no measurable TTS when two California sea lions were exposed to sounds up to 183 dB re 1 microPa (peak-to-peak).

### Behavioral Impacts

The source of underwater noise during construction would be pile driving to install the end-bearing piles and sheet pile tidal barrier. There are limited data available on the effects of non-pulse noise on pinnipeds in-water; however, field and captive studies to date collectively suggest that pinnipeds

do not strongly react to exposure between 90–140 dB re 1 microPa. Jacobs and Terhune (2002) observed wild harbor seal reactions to acoustic harassment devices (AHDs) around nine sites. Seals came within 144.4 ft (44 m) of the active AHD and failed to demonstrate any behavioral response when received SPLs were estimated at 120–130 dB re 1 microPa. In a captive study, a group of seals were collectively subjected to non-pulse sounds (*e.g.*, vibratory pile driving) at 8–16 kHz (Kastelein, 2006). Exposures between 80–107 dB re 1 microPa did not induce strong behavioral responses; however, a single observation at 100–110 dB re 1 microPa indicated an avoidance response at this level. The group returned to baseline conditions following exposure (*i.e.*, no long term impact). Southall *et al.* (2007) notes contextual differences between these two studies, noting that the captive animals were not reinforced with food for remaining in the noise fields, whereas free-ranging subjects may have been more tolerant of exposures because of motivation to return to a safe location or approach enclosures holding prey items. Southall *et al.* (2007) reviewed relevant data from studies involving pinnipeds exposed to pulse noise (*e.g.*, impact pile driving) and concluded that exposures of 150 to 180 dB re 1 microPa generally have limited potential to induce avoidance behavior.

Seals exposed to sound levels that exceed the Level B harassment threshold (120 dB for non-pulse; 160 dB for pulse) may exhibit temporary avoid behavior around the Union Pacific Railroad bridge, which may affect movement of seals under the bridge or inhibit them from resting at haul-out sites near the bridge. The estimated 11–15 weeks required for construction may result in the temporary abandonment of haul-out sites near the bridge and within Parsons Slough. Although harbor seals may temporarily abandon haul out sites, there are an abundance of other haul-out sites in the area. Additionally, the required mitigation measures restrict construction to the non-breeding season to avoid impacts to potentially sensitive mother-pup pairs. In general, ambient noise levels in the area are low; however, animals in the vicinity of the project site have been exposed to various types and levels of anthropogenic noise—from recreational boating, to the 15–20 trains that pass daily over the Union Pacific Railroad bridge. Harbor seals have also been exposed to in-water construction activities at the site and animals are likely tolerant or habituated to

anthropogenic disturbance, including pile driving. For example, in October 2002, the Union Pacific Railroad replaced the existing wooden pile trestle bridge spanning the Parsons Slough Channel with a 165 ft (50.3 m) slab girder bridge. Biological monitors reported that harbor seals were present during construction and came and went from the site without any visible signs of stress or undue harassment (MACTEC Engineering and Consulting, 2003).

Based on these studies and monitoring reports, NMFS has preliminarily determined that harbor seals exposed to sound levels exceeding the Level B harassment threshold (120 dB for non-pulse; 160 dB for pulse) may exhibit temporary avoidance behavior. The most likely impact to harbor seals from the sheet pile and end-bearing pile installation would be temporary disruption of resting patterns because individual harbor seals may abandon haul out sites and leave the area during construction activities. However, the scheduling of construction activities during the non-breeding season will avoid more severe effects such as reduced pup survival due to mother-pup separation and interrupted suckling bouts. Temporary hearing loss is unlikely for those harbor seals that enter into the zone of Level B harassment because source levels from vibratory pile driving are not loud enough to induce TTS. Furthermore, the short duration of impact pile driving and close proximity to the source necessary to induce TTS makes it unlikely that harbor seals would be exposed to source levels loud enough to induce TTS. Permanent hearing loss or other harm is not anticipated due to monitoring and mitigation efforts (described below) and the low source levels of pile driving hammers to be used in this proposed project; however, even without mitigation measures, it is unlikely that harbor seals would experience Level A harassment, serious injury or mortality because of the close proximity to the source necessary to induce these types of impacts and the avoidance behavior expected of harbor seals during pile driving activities.

#### Anticipated Effects on Habitat

The proposed action requires the placement of about 2,000 yd<sup>3</sup> (1,529 m<sup>3</sup>) of fill (rock and sheet pile), which would result in the permanent loss of approximately 0.75 acres (3,035 m<sup>2</sup>) of subtidal habitat within the project footprint. The expected extent of direct habitat loss is equivalent to approximately 2.3 percent of the subtidal habitat area (32.9 acres (0.13 km<sup>2</sup>)) present within Parsons Slough,

and a fraction of the subtidal habitat within Elkhorn Slough (1,400 acres (5.7 km<sup>2</sup>)). Although the proposed action would permanently alter habitat within the project footprint, harbor seals haul-out in many locations throughout the estuary, and the proposed action is not expected to have any habitat-related effects that could cause significant or long-term consequences for individual harbor seals or their population.

Long-term operation of the proposed sill is expected to result in the conversion of approximately 11 acres (0.04 km<sup>2</sup>) of intertidal mudflat habitat to subtidal habitat. The conversion of intertidal habitat to subtidal habitat will have no adverse effect and possibly a long-term beneficial effect on harbor seals by improving ecological function of the slough, such as higher species diversity, more species abundance, larger fish, and better habitat. Moreover, decrease of mudflat by up to 11 acres (0.04 km<sup>2</sup>) would not cause significant or long-term consequences for individual harbor seals or their population because harbor seals typically use a very small percentage of the potential haul-out sites that currently exist throughout the slough complex. Therefore, the proposed activity is not expected to have any habitat-related effects that could cause significant or long-term consequences for individual harbor seals or their population.

It is unlikely that the sill structure itself, when completed, will result in long-term adverse effects on harbor seal movements through the slough because the sill structure allows for continued access to Parsons Slough by aquatic species, including harbor seals. A 25 ft (7.6 m) long section of the sill will be completely underwater with a minimum of 5 ft (1.5 m) of water above it at all times. On either side of this 25 ft (7.6 m) section will be two 37 ft (11.3 m) sections that will be under 2 ft (.6 m) of water. The remaining 170 ft (51.8 m) of the sill structure will be above water. With respect to increased velocities, the current velocity of water flowing under the bridge is 5.6 ft (1.7 m) per second during ebbing tides and 4.9 ft (1.5 m) per second during flood tides (Moffat and Nichol, 2008). When completed, the sill structure will increase current velocities in the vicinity of the structure. The greatest turbulence would be during spring tides near low tide. For example, the applicant's modeling results indicate that peak velocities at the sill during spring ebb tide would not exceed 10.7 ft (3.3 m) per second, which is much slower than the average wave velocities in Monterey Bay that harbor seals easily navigate on a daily basis. At

- 5 ft (- 1.5 m) elevation, where velocities are anticipated to be higher, velocities on an ebb tide would be less than 5.6 ft (1.7 m) per second approximately 90 percent of the time; velocities would never exceed about 4.5 ft (1.4 m) per second on a flood tide. The sill structure would not alter velocities during slack tide; therefore, conditions at optimal movement times would not change from the baseline conditions. During times of high velocity, the seals may avoid crossing the sill structure. The exception to this may be inexperienced mothers with young pups that could get swept into Parsons Slough. This would not injure pups, but it may result in pups staying in Parsons Slough longer than they would otherwise. Therefore, the proposed activity is not expected to have any habitat-related effects that could cause significant or long-term consequences for individual harbor seals or their population.

Harbor seals and forage fish may occupy the same habitat and harbor seal distributions within the estuary reflect foraging locations to some extent. Noise from pile driving would result in degradation of in-water habitat; however, this impact would be short term and site-specific, and habitat conditions would return to their pre-disturbance state shortly after the cessation of in-water construction activities. In addition, research by Oxman (1995) and Harvey *et al.* (1995) comparing catch rates from trawls conducted in the Slough to species detected in seal scat found that seals primarily feed between Seal Bend and the oceanic nearshore shelf in Monterey Bay. Oxman (1995) also radio-tagged seals and found that they all spend their nights diving within 0.5 to 7 km of shore, most (88 percent) 1.25 km south of the Slough entrance, with the others (12 percent) either 4 km north at the Pajaro Rivermouth, or 7.25 km north at Sunset Beach, Santa Cruz. Therefore, because any habitat disturbance caused by pile driving will be short-term and site specific, and in light of the fact that harbor seals may conduct most foraging in the nearshore oceanic and not at the project site, NMFS does not expect the proposed action to have habitat-related effects on either forage fish populations or harbor seal foraging success that could cause long-term consequences for individual harbor seals or their population.

#### Proposed Mitigation

In order to issue an incidental take authorization (ITA) 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 (where relevant).

The applicant has proposed mitigation measures in their application for reducing impacts to environmental resources. For example, installing end-bearing piles and sheet pile with a vibratory hammer instead of an impact hammer will introduce less sound into the marine environment and prevent marine mammals from being exposed to injurious levels of sound. Some of the following proposed mitigation measures that follow were developed by the NOAA Restoration Center, Southwest Region and accepted by NMFS while others were developed in discussions between the applicant and NMFS' Office of Protected Resources. These proposed mitigation measures are designed to eliminate the potential for injury and reduce Level B harassment of marine mammals.

#### **Establishment of Safety Zones and Shut Down Requirements**

Vibratory pile driving does not result in source levels that are at or above NMFS' harassment threshold for Level A harassment; therefore, shut down zones would not be required for vibratory pile driving. For impact pile driving, the isopleth for the Level A harassment threshold (190 dB re 1 microPa rms) is modeled to be within 10 ft (3 m) of end-bearing piles driven with a impact hammer and 5 ft (1.5 m) of sheet piles driven with an impact hammer; The NOAA Restoration Center, Southwest Region, and NMFS, however, have proposed to delay impact pile driving if a harbor seal comes within 33 ft (10 m) of the pile being driven, which further reduces the risk of Level A harassment. In addition, if an impact hammer is required during construction, cushioning blocks would be used to help attenuate the sound.

#### **Construction Timing**

Pile driving is anticipated to occur during an 11 to 15 week period beginning around November 1, 2010 and ending in February 2011. This work window was selected to coincide with the non-pupping season for harbor seals and avoid haul-out site abandonment during pupping season that may result in reduced pup survival due to mother/pup separation and interrupted suckling bouts. The work window also coincides with the U.S. Fish and Wildlife

Department's required construction work window to avoid the peak pupping period for sea otters (75 FR 42121, July 20, 2010). In addition, in-water construction activities such as pile driving will be conducted during high tide when haul-out sites are inaccessible, and harbor seals are largely absent from Parsons Slough (Maldini *et al.*, 2009).

#### **Limited Use of Impact Hammer**

All piles would be installed using a vibratory pile driver unless sufficient depth cannot be reached, at which point an impact hammer may be used. If an impact hammer is required, cushioning blocks would be used as an attenuation device to reduce hydroacoustic sound levels and avoid the potential for injury. These actions would also serve to reduce impacts to harbor seals.

#### **Mitigation Monitoring**

Monitoring during construction of the sill would occur from an observation post adjacent to the Union Pacific railroad bridge as well as from a zodiac. Monitoring would be conducted by qualified, NMFS approved protected species observers (PSOs). On a daily basis, construction monitoring would begin 30 minutes prior to the initiation of construction activities and continue until 30 minutes after construction activities have ceased for the day. The PSO would maintain a log that documents numbers of marine mammals present before, during, and at the end of daily construction activities. In addition, the PSO would record basic weather conditions (ambient temperature, tidal activity, precipitation, wind, horizontal visibility, etc.), as well as marine mammal behavior.

The PSO would have the authority to cease construction if a harbor seal is detected within or approaching the safety zone or if an animal appears injured. Within 30 days of the completion of the sill construction, a report would be completed and submitted to NMFS that would include a summary of the daily log maintained by the PSO during construction. In addition, the report would include an assessment of the number of harbor seals that may have been harassed as a result of pile driving activities, based on direct observation of harbor seals observed in the area.

#### **Soft Start to Pile Driving Activities**

A "soft start" technique would be used at the beginning of each pile installation to allow any harbor seals that may be in the immediate area to leave before the activity reaches its full energy. The soft

start requires contractors to initiate pile driving with a vibratory hammer for 15 seconds at reduced energy followed by a 1-minute waiting period. This procedure would be repeated two additional times. Due to the short duration of impact pile driving (typically lasting between 1 and 10 minutes), the traditional ramp-up requirement does not apply because it would actually increase the duration of noise emitted into the environment, and monitoring should effectively detect harbor seals within or near the proposed impact pile driving shut down zone. If any harbor seals are sighted within or approaching the 33 ft (10 m) shut down zone prior to pile driving, the construction contractor will delay pile-driving until the animal has moved outside and is on a path away from the safety zone or after 15 minutes have elapsed since the last sighting.

NMFS has carefully evaluated the applicant's proposed mitigation measures. NMFS accepted some of the applicant's proposed measures, such as the seasonal timing of construction, suggested additional mitigation measures like the establishment of a 33 ft (10 m) safety zone and hydroacoustic monitoring to measure sound pressure levels from pile driving, and considered a range of other measures in the context of ensuring that NMFS prescribes the means of effecting the least practicable impact on the affected marine mammal species and stocks and their habitat. Our evaluation of potential measures included consideration of the following factors in relation to one another: (1) The manner in which, and the degree to which, the successful implementation of the measure is expected to minimize adverse impacts to marine mammals; (2) the proven or likely efficacy of the specific measure to minimize adverse impacts as planned; and (3) the practicability of the measure for applicant implementation, including consideration of personal safety, and practicality of implementation.

Based on our evaluation of the applicant's proposed measures, as well as other measures developed by NMFS in cooperation with the applicant, NMFS has preliminarily determined that the proposed mitigation measures provide the means of effecting the least practicable impact on marine mammal species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance.

#### **Proposed Monitoring and Reporting**

In order to issue an ITA for an activity, Section 101(a)(5)(D) of the MMPA states that NMFS must, where

applicable, set forth “requirements pertaining to the monitoring and reporting of such taking”. The MMPA implementing regulations at 50 CFR 216.104(a)(13) indicate that requests for ITAs must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present in the proposed action area.

Monitoring during construction of the sill would occur from an observation post adjacent to the Union Pacific railroad bridge as well as from a zodiac. Monitoring would be conducted by qualified, NMFS approved PSOs. On a daily basis, construction monitoring would begin 30 minutes prior to the initiation of construction activities and continue until 30 minutes after construction activities have ceased for the day. The PSO would maintain a log that documents numbers of marine mammals present before, during, and at the end of daily construction activities. In addition, the PSO would record basic weather conditions (ambient temperature, tidal activity, precipitation, wind, horizontal visibility, etc.), as well as marine mammal behavior.

The PSO would have the authority to cease construction if a harbor seal is detected within or approaching the safety zone or if an animal appears injured. Within 30 days of the completion of the sill construction, a report would be completed and submitted to NMFS that would include a summary of the daily log maintained by the PSO during construction. In addition, the report would include an assessment of the number of harbor

seals that may have been harassed as a result of pile driving activities, based on direct observation of harbor seals observed in the area.

**Estimated Take by Incidental Harassment**

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 stock in the wild by causing disruption of behavioral patterns, including but not limited to, migration, breathing, nursing, breeding, feeding, or shelter [Level B harassment].

Based on the NOAA Restoration Center, Southwest Region’s application and subsequent analysis, the impact of the described pile driving operations may result in, at most, short-term modification of behavior by small numbers of harbor seals within the action area. Harbor seals may avoid the area or halt any behaviors (e.g., resting) when exposed to anthropogenic noise. Due to the abundance of suitable resting habitat available in the greater Elkhorn Slough estuary, the short-term displacement of resting harbor seals is not expected to affect the overall fitness of any individual animal.

Current NMFS practice regarding in-water exposure of marine mammals to anthropogenic noise is that in order to avoid the potential for injury of marine mammals (e.g., PTS), pinnipeds should not be exposed to impulsive sounds of 190 dB rms or above. This level is considered precautionary as it is likely that more intense sounds would be required before injury would actually

occur (Southall et al., 2007). Potential for behavioral harassment (Level B) is considered to have occurred when marine mammals are exposed to sounds at or above 160 dB rms for impulse sounds (e.g., impact pile driving) and 120 dB rms for non-pulse noise (e.g., vibratory pile driving), but below the thresholds mentioned above. These levels are considered to be precautionary.

Current NMFS practice regarding in-air exposure of pinnipeds to noise generated from human activity is that the onset of Level B harassment for harbor seals is 90 dB rms re 20 microPa. In-air noise calculations from using an impact pile driver predict that noise levels will reach 90 dB rms re 20 microPa within 600 ft (183 m) for end-bearing piles and 450 ft (137 m) for sheet piles. For installation using a vibratory hammer, noise levels will reach 90 dB rms within 100 ft (30 m) of the end-bearing pile and 120 ft (36.6 m) for sheet pile. Harbor seals are known to haul-out on the mudflats 200 ft (61 m) east of the work site and 680 ft (207 m) west of the work site, therefore, in-air noise may contribute to harassment for the proposed action.

Estimated distances to NMFS’ current threshold sound levels from pile driving during the Parsons Slough Sill Project are presented in Table 3. These estimates are based on the worst case scenario of driving the H-piles and sheet piles but would be carried over for all pile driving. Note that despite short distances to the Level A harassment isopleth, the NOAA Restoration Center, Southwest Region, has proposed to implement a 10 m safety zone until empirical pile driving measurements can be made and distances to this threshold isopleths can be verified.

TABLE 3—UNDERWATER DISTANCES TO NMFS HARASSMENT THRESHOLD LEVELS DURING PILE DRIVING [dB re: 1µPa rms]

Pile type	Hammer type	Sound levels (rms)		
		190 dB	160 dB	120 dB
H-Piles	Impact	3 m (10 ft)	227 m (745 ft)	n/a
H-Piles	Vibratory	0	n/a	1,140 m (3,740 ft)
Sheet Pile	Impact	1.5 m (5 ft)	75 m (245 ft)	n/a
Sheet Pile	Vibratory	0	n/a	2,256 m (7,400 ft)

TABLE 4—AIRBORNE DISTANCES TO NMFS HARASSMENT THRESHOLD LEVELS DURING PILE DRIVING

[dB re: 20 $\mu$ Pa rms]

Pile type	Hammer type	Sound level (rms)
		90 dB
H-Piles .....	Impact .....	600 m
H-Piles .....	Vibratory .....	100 m
Sheet Pile .....	Impact .....	450 m
Sheet Pile .....	Vibratory .....	120 m

It is difficult to estimate the number of harbor seals that could be affected by the installation of end-bearing piles and sheet pile because the animals only venture in the project areas to haul-out during the day when the tide is low. In-water construction will occur near several haul-out sites and, although the construction activities are planned to take place during slack tide (some of which will be on either side of high tide, when harbor seals are less likely to be present), there may still be animals exposed to sound from pile driving even if the number of individual harbor seals expected to be encountered is very low. These individuals would mostly likely be adult males and females as well as juveniles. The NOAA Restoration Center, Southwest Region requests, and NMFS proposes, authorization to take 2,000 individual harbor seals incidental to pile driving activities over the course of the proposed action (November 1, 2010 through February 28, 2011). This is a estimate based on the average number of harbor seals that occupy Parsons Slough during the day (100) multiplied by the total number of days the applicant expects pile driving activities to occur (20 days). NMFS considers this to be an over-estimate for the following reasons: (1) As mentioned above, haul-out sites are inaccessible to harbor seals during high tide and NMFS would not expect harbor seals to be affected by pile driving activities during the days/times when pile driving and high tide events co-occur; (2) harbor seals are likely absent from Parsons Slough at night when they are likely foraging in Monterey Bay and will not be exposed to sound generated during pile driving that is proposed to take place in the evening hours (no more than 5 hrs at a time); and, (3) based on previous survey effort conducted in Parsons Slough, harbor seals would move out of the disturbance area when construction activities are initiated and move west (downstream) towards Seal Bend until the end of construction.

#### Negligible Impact and Small Numbers Analysis and Preliminary Determination

The regulations implementing the MMPA found at 50 CFR 216.103 define “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. In making a negligible impact determination, NMFS considers a variety of factors, including but not limited to: (1) The number of anticipated mortalities (none of which would be authorized here); (2) the number and nature of anticipated injuries (none of which would be authorized here); and (3) the number, nature, and duration of Level B harassment, and the context in which the takes occur (e.g., will the takes occur in an area or time of significance for harbor seals, are takes occurring to a small, localized population?).

As described above, harbor seals would not be exposed to activities or sound levels which would result in injury (e.g., PTS), serious injury, or mortality. Takes will be limited to Level B behavioral harassment. Pile driving would take place in the relatively shallow estuarine waters of Elkhorn Slough and affect harbor seals that belong to a stock that occurs throughout California. Although two harbor seal haul-outs are located within 300–400 ft of the action area (waters around the Union Pacific Railroad bridge), the Parsons Slough Complex is not considered to be an important habitat for harbor seals compared to other sites in the area (e.g. Seal Bend). NMFS has preliminarily determined that no injuries or mortalities are anticipated to occur as a result of the proposed action, and none are proposed to be authorized. In addition, harbor seals in the area are not expected to incur hearing impairment (i.e., TTS or PTS) or non-auditory physiological effects. Although it is possible for some individual harbor seals to be exposed to sounds from pile driving activities more than once, the extent of these multi-exposures are expected to be limited by the constant movement of harbor seals in and out of Elkhorn Slough and the timing of in-water construction to coincide with periods when the animals are less likely to be present.

As previously mentioned Pacific harbor seals are not listed as depleted under the MMPA or threatened or endangered under the Endangered Species Act (ESA). Although populations of Pacific harbor seals were

greatly depleted by the end of the 19th century due to commercial hunting, the population has increased dramatically during the last half of the 20th century and appears to be stabilizing at what may be their carrying capacity (Caretta *et al.*, 2009). The amount of take the NOAA Restoration Center, Southwest Region, has requested, and NMFS proposes to authorize is considered small (less than 6 percent) relative to the estimated population of 34,233 Pacific harbor seals.

Pacific harbor seals may be temporarily impacted by pile driving noise. However, these animals are expected to avoid the area, thereby reducing exposure and impacts. In addition, although the sill project is expected to take 11 to 15 weeks to complete, the installation of end-bearing piles and sheet pile would only occur for approximately 20 days. Further, the Union Pacific Railroad bridge that is located in the vicinity of the project site has approximately 15–20 trains passing over it each day and harbor seals haul-out on the mud flats located on either side of the bridge. As mentioned earlier, during a previous project at this site involving pile driving, harbor seals were observed to be present during construction and reportedly entered and exited the area without any visible signs of stress or undue harassment (MACTEC Engineering and Consulting 2003). Therefore, animals are likely tolerant or habituated to anthropogenic disturbance, including pile driving. Finally, breeding and pupping occur outside of the proposed work window; therefore, no disruption to reproductive behavior is anticipated. There is no anticipated effect on annual rates of recruitment or survival of the affect harbor seal population.

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the mitigation and monitoring measures, NMFS preliminarily determines that the Parsons Slough sill project will result in the incidental take of small numbers of marine mammals, by Level B harassment only, and that the total taking from the Parsons Slough project will have a negligible impact on the affected species or stocks.

#### Impact on Availability of Affected Species or Stock for Taking for Subsistence Uses

There are no relevant subsistence uses of marine mammals implicated by this action.



**Endangered Species Act (ESA)**

No ESA-listed species under NMFS' jurisdiction are expected to be affected by these activities. Therefore, NMFS has determined that a section 7 consultation for issuance of the proposed IHA under the ESA is not required.

**National Environmental Policy Act (NEPA)**

Pursuant to NEPA, the general impacts associated with the design and construction phases of the proposed action are described in the Community-Based Restoration Program (CRP) Programmatic Environmental Assessment (PEA) and the Supplemental Programmatic Environmental Assessment (SPEA), which were prepared by the NOAA Restoration Center, Southwest Region. The NOAA Restoration Center, Southwest Region, will complete a Targeted Supplemental Environmental Assessment (TSEA) to include all project-specific impacts not described in the CRP PEA/SPEA. If it is adequate, NMFS will consider adopting it. If not, NMFS would prepare an independent EA. A copy of NOAA's EA can be obtained by going to the NMFS Web site listed in the beginning of this document. This analysis will be completed prior to the issuance or denial of this proposed IHA. The public is invited to provide comments on the potential effects to marine mammals disclosed in this notice as well as NOAA's EA. NMFS will consider public comments as it completes its NEPA analysis and decides whether or not to prepare a Finding of No Significant Impact should NMFS decide to issue a final IHA.

**Proposed Authorization**

As a result of these preliminary determinations, NMFS proposes to authorize the take of marine mammals incidental to the Parsons Slough project, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated.

Dated: September 29, 2010.

**Helen M. Golde,**

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

[FR Doc. 2010-24986 Filed 10-4-10; 8:45 am]

**BILLING CODE 3510-22-P**

**CONSUMER PRODUCT SAFETY COMMISSION****Sunshine Act Meetings**

**TIME AND DATE:** Wednesday, October 6, 2010; 10 a.m.–11 a.m.

**PLACE:** Hearing Room 420, Bethesda Towers, 4330 East West Highway, Bethesda, Maryland.

**STATUS:** Closed to the Public.

**Matter To Be Considered***Compliance Status Report*

The Commission staff will brief the Commission on the status of compliance matters. For a recorded message containing the latest agenda information, call (301) 504-7948.

**FOR MORE INFORMATION CONTACT:** Todd A. Stevenson, Office of the Secretary, U.S. Consumer Product Safety Commission, 4330 East West Highway, Bethesda, MD 20814, (301) 504-7923.

Dated: September 29, 2010.

**Todd A. Stevenson,**  
*Secretary.*

[FR Doc. 2010-25174 Filed 10-1-10; 4:15 pm]

**BILLING CODE 6355-01-P**

**DEPARTMENT OF DEFENSE****Office of the Secretary**

[Transmittal Nos. 10-47, 10-48, and 10-51]

**36(b)(1) Arms Sales Notifications**

**AGENCY:** Defense Security Cooperation Agency, DoD.

**ACTION:** Notice.

**SUMMARY:** The Department of Defense is publishing the unclassified text of three section 36(b)(1) arms sales notifications to fulfill the requirements of section 155 of Public Law 104-164, dated 21 July 1996.

**FOR FURTHER INFORMATION CONTACT:** Ms. B. English, DSCA/DBO/CFM, (703) 601-3740.

**SUPPLEMENTARY INFORMATION:** The following are copies of letters to the Speaker of the House of Representatives, Transmittals 10-20, 10-23, and 10-42 with associated attachments.

Dated: September 29, 2010.

**Mitchell S. Bryman,**

*Alternate OSD Federal Register Liaison Officer, Department of Defense.*

**Transmittal No. 10-47**

The following is a copy of a letter to the Speaker of the House of Representatives, Transmittal 10-47 with attached transmittal and policy justification.

**BILLING CODE 5001-06-P**