

## 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 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.

Permission may 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 subsistence uses and that the permissible methods of taking and requirements pertaining to the 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."

Subsection 101(a)(5)(D) of the MMPA established an expedited process by which citizens of the United States can apply for an authorization to incidentally take small numbers of marine mammals by harassment. Under Section 3(18)(A), 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; 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.

The term "Level A harassment" means harassment described in subparagraph (A)(i). The term "Level B harassment" means harassment described in subparagraph (A)(ii).

Subsection 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 authorizations for the incidental harassment of small numbers of marine mammals. Within 45 days of the close of the comment period, NMFS must either issue or deny issuance of the authorization.

## Summary of Request

On January 9, 2003, NMFS received a letter from Glenn R. VanBlaricom,

Ph.D., Washington Cooperative Fish and Wildlife Research Unit, requesting an IHA for the possible harassment of small numbers of California sea lions (*Zalophus californianus*), Pacific harbor seals (*Phoca vitulina*), and northern elephant seals (*Mirounga angustirostris*) incidental to research surveys performed for the purpose of assessing trends over time in black abalone populations at permanent study sites. Population trend data for black abalone populations are important and needed for several reasons. First, the reintroduction of sea otters to SNI since 1987 raises the possibility of conflict between sea otter conservation and abalone populations because abalones are often significant prey for sea otters. Second, the appearance of a novel exotic disease, abalone withering syndrome, at SNI in 1992, has resulted in dramatically increased rates of abalone mortality at the island. Third, California populations of black abalones have been recently designated as a candidate species for listing pursuant to the Endangered Species Act of 1973 (ESA) (as amended). The concern is that the combined effects of sea otter predation and abalone withering syndrome, following several decades during which black abalones may have been over-harvested in commercial and recreational fisheries, may cause reduction of black abalone populations to the point where risk of extinction increases. Long-term abalone population trend data from SNI is needed to determine if drastic population declines continue, and if extinction risk becomes high.

## Specified Activities

Additional information of the work proposed is contained in the application, which is available upon request (see ADDRESSES).

## Comments and Responses

On June 25, 2003 (68 FR 37799) NMFS published a notice of receipt of application, with a 30-day comment period. That notice described the activity and anticipated effects on marine mammals. That information is not repeated here. During the 30-day comment period, comments were received from the Marine Mammal Commission (Commission).

*Comment 1:* The Commission concurs with NMFS' preliminary determination that, given the mitigation measures proposed by the applicant, the short-term impact of the subject research will result in no more than the temporary modification of behavior by California sea lions, Pacific harbor seals, and northern elephant seals. It is not clear,

however, based on the information in NMFS' **Federal Register** notice and the application, whether sea otters could be disturbed by the proposed research, and, if so, whether a separate authorization is being sought from the Fish and Wildlife Service to cover such taking.

*Response:* Sea otters are not expected ashore during the time periods when the research activities would be conducted. If sea otters are sighted ashore during the abalone research, then the IHA holder (Dr. VanBlaricom) would follow similar procedures in place for other listed marine mammals. As a result of this requirement in the IHA, NMFS determines that the activity will not affect California sea otters.

*Comment 2:* The Commission believes that NMFS' preliminary determinations are reasonable, provided NMFS is satisfied that the proposed monitoring program is sufficient to detect the effects of the proposed research activities, including any mortality and/or serious injury that results from startle responses, or stampedes. NMFS' **Federal Register** notice states that no takings by injury and/or death are anticipated as a result of the proposed activities. The Commission notes, however, that while the proposed mitigation measures are expected to reduce the possibility of injury or death of animals, the potential for such taking remains. Consequently, the Commission recommends that any authorization issued to the applicant specify that, if a mortality or serious injury of a marine mammal occurs which appears to be related to the abalone research, further research activities be suspended while NMFS determines whether steps can be taken to avoid further injuries or mortalities or until such taking can be authorized by regulations promulgated under section 101(a)(5)(A) of the MMPA.

*Response:* In almost all cases, shoreline habitats near the abalone study sites are gently sloping sandy beaches or horizontal sandstone platforms with unimpeded and non-hazardous access to the water. If disturbed, hauled animals may move toward the water without risk of encountering significant hazards. In these circumstances, the risk of serious injury or death to hauled animals is very low.

One exception to the low risk of marine mammal injury or mortality associated with abalone research would be if disturbances occur during breeding season, as it is possible that mothers and dependent pups may become separated. If separated pairs don't reunite fairly quickly, risks of mortality to pups may