

between available modeled survey geometries (*i.e.*, 2D, 3D NAZ, 3D WAZ, Coil) and the subject zero offset VSP surveys, and the fact that all available acoustic exposure modeling results assume use of a 72 element, 8,000 in<sup>3</sup> array (compared with the 6–12 element, 2,400 in<sup>3</sup> array planned for use by bp), mean that take estimate numbers for this particular survey based on the model

are expected to be significantly conservative.

Taking these considerations together with the fact that the estimated annual killer whale take numbers based on the model are low (less than the average group size) and that the annual survey effort for this LOA is of very brief duration, we conclude that no take of killer whales is likely to occur. Therefore, NMFS has re-issued the LOA

with no authorization for take of killer whales. Authorized take numbers represented in the original notice of issuance are unchanged for all other species (see Table 1 below), and the determination that the taking is of no more than small numbers of marine mammals provided in the notice of issuance (86 FR 38018; July 19, 2021) remains valid.

TABLE 1—TAKE ANALYSIS, ZERO OFFSET VSP LOA

Species	Annual authorized take <sup>1</sup>	Abundance <sup>2</sup>	Percent abundance
Sperm whale .....	198	2,207	9.0
<i>Kogia</i> spp .....	<sup>3</sup> 79	4,373	1.8
Beaked whales .....	1,120	3,768	29.7
Rough-toothed dolphin .....	134	4,853	2.8
Bottlenose dolphin .....	681	176,108	0.4
Clymene dolphin .....	449	11,895	3.8
Atlantic spotted dolphin .....	258	74,785	0.3
Pantropical spotted dolphin .....	2,310	102,361	2.3
Spinner dolphin .....	496	25,114	2.0
Striped dolphin .....	182	5,229	3.5
Fraser's dolphin .....	53	1,665	3.2
Risso's dolphin .....	128	3,764	3.4
Melon-headed whale .....	290	7,003	4.1
Pygmy killer whale .....	64	2,126	3.0
False killer whale .....	96	3,204	3.0
Killer whale .....	0	267	n/a
Short-finned pilot whale .....	77	1,981	3.9

<sup>1</sup> Scalar ratios were not applied in this case due to brief annual survey duration.

<sup>2</sup> Best abundance estimate. For most taxa, the best abundance estimate for purposes of comparison with take estimates is considered here to be the model-predicted abundance (Roberts *et al.*, 2016). For those taxa where a density surface model predicting abundance by month was produced, the maximum mean seasonal abundance was used. For those taxa where abundance is not predicted by month, only mean annual abundance is available. For the killer whale, the larger estimated SAR abundance estimate is used.

<sup>3</sup> Includes 2 annual takes by Level A harassment and 77 annual takes by Level B harassment.

**Authorization**

NMFS has determined that the level of taking for the LOA request is consistent with the findings made for the total taking allowable under the incidental take regulations and that the amount of take authorized under the LOA is of no more than small numbers. NMFS has re-issued the LOA to bp authorizing the take of marine mammals incidental to its zero offset VSP geophysical survey activity, for the reasons described above.

Dated: September 23, 2021.

**Kimberly Damon-Randall,**

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

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**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**RIN 0648-XG584**

**Request for Public Comment Regarding an Administrative Law Judge's Recommended Decision on a Proposed Waiver and Regulations Governing the Taking of Marine Mammals**

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

**ACTION:** Notice; request for comments.

**SUMMARY:** NMFS has proposed to issue a waiver and regulations under the Marine Mammal Protection Act (MMPA) to allow the Makah Indian Tribe to take a limited number of Eastern North Pacific (ENP) gray whales for ceremonial and subsistence purposes. A hearing to consider the proposed waiver and regulations took place on November 14–21, 2019, in Seattle, Washington before

Administrative Law Judge George J. Jordan. On September 23, 2021, Judge Jordan transmitted his recommended decision to NMFS along with the hearing transcript and other required documentation. As required by MMPA regulations, NMFS now requests public comment on the Judge's recommended decision.

**DATES:** Comments must be submitted in writing by October 19, 2021.

**ADDRESSES:** You may submit comments on this document, identified by NOAA–NMFS–2019–0037, by any of the following methods:

- **Electronic Submission:** Submit all electronic public comments via the Federal e-Rulemaking Portal. Go to [www.regulations.gov/docket?D=NOAA-NMFS-2019-0037](http://www.regulations.gov/docket?D=NOAA-NMFS-2019-0037), click the “Comment Now!” icon, complete the required fields, and enter or attach your comments.

- **Mail:** Attn: Grace Ferrara, NMFS West Coast Region, 7600 Sand Point Way NE, Seattle, WA 98115. Include the identifier “NOAA–NMFS–2019–0037” in the comments.

*Instructions:* Comments sent by any other method, to any other address or individual, or received after the end of the comment period, may not be considered by NMFS. All comments received are a part of the public record and will generally be posted for public viewing on [www.regulations.gov](http://www.regulations.gov) without change. All personal identifying information (e.g., name, address, etc.), confidential business information, or otherwise sensitive information submitted voluntarily by the sender will be publicly accessible. NMFS will accept anonymous comments (enter "N/A" in the required fields if you wish to remain anonymous).

**FOR FURTHER INFORMATION CONTACT:**

Jaclyn Taylor, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910; [jaclyn.taylor@noaa.gov](mailto:jaclyn.taylor@noaa.gov).

**SUPPLEMENTARY INFORMATION:** On February 14, 2005, NMFS received a request from the Makah Indian Tribe for a waiver of the MMPA moratorium on the take of marine mammals to allow for take of ENP gray whales (*Eschrichtius robustus*). The Tribe requested that NMFS authorize a tribal hunt for ENP gray whales in the coastal portion of the Tribe's usual and accustomed fishing area for ceremonial and subsistence purposes and the making and sale of handicrafts. The MMPA imposes a general moratorium on the taking of marine mammals but authorizes the Secretary of Commerce to waive the moratorium and issue regulations governing the take if certain statutory criteria are met.

On April 5, 2019, NMFS published a Notice of Hearing and the associated proposed regulations in the **Federal Register** (84 FR 13639 and 84 FR 13604). Pursuant to an interagency agreement, a Coast Guard Administrative Law Judge was assigned to conduct the hearing and issue a recommended decision in this matter under the procedures set forth at 50 CFR part 228.

On November 14, 2019, Judge George J. Jordan (the presiding officer) commenced the hearing in this matter, which took place over 6 days. Six parties participated in the hearing, including NMFS. The hearing was publicly conducted and reported verbatim by an official reporter. All filings associated with the hearing, including a full transcript of the hearing, have been made available for public viewing and inspection at <https://www.uscg.mil/Resources/Administrative-Law-Judges/Decisions/ALJ-Decisions-2016/NOAA-Formal->

*Rulemaking-Makah-Tribe/*. Information pertaining to this hearing is also available at the NMFS website: <https://www.fisheries.noaa.gov/action/formal-rulemaking-proposed-mmpa-waiver-and-hunt-regulations-governing-gray-whale-hunts-makah>.

Consistent with the regulations governing this proceeding, at the close of the hearing Judge Jordan established a public comment period on the proposed waiver and regulations, including the opportunity to submit written findings and conclusions and written arguments and briefs. NMFS published notice of this public comment period in the **Federal Register** on January 29, 2020 (85 FR 5196). 50 CFR 228.19(b). That comment period ended on March 16, 2020 and the comments submitted are posted at the Federal e-Rulemaking Portal at [www.regulations.gov/docket?D=NOAA-NMFS-2019-0037](http://www.regulations.gov/docket?D=NOAA-NMFS-2019-0037).

On September 23, 2021, the presiding officer transmitted his recommended decision to the NMFS Assistant Administrator for Fisheries, including (1) a statement containing a description of the history of the proceedings; (2) findings on the issues of fact with the reasons therefor; and (3) rulings on issues of law. The recommended decision is also posted on the NMFS website: <https://www.fisheries.noaa.gov/action/formal-rulemaking-proposed-mmpa-waiver-and-hunt-regulations-governing-gray-whale-hunts-makah>.

As required by our regulations at 50 CFR 228.20(c)–(d), NMFS provided copies of the presiding officer's recommended decision to the parties to the hearing and now announces a 20-day period for the parties and other interested persons to submit written comments on the presiding officer's recommended decision. Please note that the recommended decision is being made available for copying and review online only due to the ongoing COVID-19 pandemic. After considering these comments, the Assistant Administrator will issue a final decision on the proposed waiver and regulations. That decision may affirm, modify, or set aside, in whole or in part, the recommended findings, conclusions, and decision of the presiding officer. The Assistant Administrator may also remand the hearing record to the presiding officer for a fuller development of the record. 50 CFR 228.21.

*Authority:* 16 U.S.C. 1371 *et seq.*

Dated: September 24, 2021.

**Samuel D. Rauch, III,**

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

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**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

[RTID 0648–XB457]

**Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to Russian River Estuary Management Activities**

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

**ACTION:** Notice; receipt of application for Letter of Authorization; request for comments and information.

**SUMMARY:** NMFS has received a request from the Sonoma County Water Agency (SCWA) for authorization to take marine mammals incidental to conducting estuary management activities in the Russian River, CA, over the course of five years. Pursuant to regulations implementing the Marine Mammal Protection Act (MMPA), NMFS is announcing receipt of SCWA's request for the development and implementation of regulations governing the incidental taking of marine mammals. NMFS invites the public to provide information, suggestions, and comments on SCWA's application and request.

**DATES:** Comments and information must be received no later than October 29, 2021.

**ADDRESSES:** Comments on the application should be addressed to Jolie Harrison, Chief, Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service and should be sent to [ITP.Laws@noaa.gov](mailto:ITP.Laws@noaa.gov).

*Instructions:* NMFS is not responsible for comments sent by any other method, to any other address or individual, or received after the end of the comment period. Comments received electronically, including all attachments, must not exceed a 25-megabyte file size. All comments received are a part of the public record and will generally be posted online at [www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-construction-](http://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-construction-)