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Dated: December 8, 2008.

Lyle Laverty,

Assistant Secretary for Fish and Wildlife and Parks.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 216

[Docket No. 0808041027–81574–01]

RIN 0648–AX08

Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to Space Vehicle and Test Flight Activities from Vandenberg Air Force Base (VAFB), California

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS has received a request from the U.S. Air Force (USAF) for authorization for the take of marine mammals, by harassment, incidental to launching space launch vehicles, intercontinental ballistic and small missiles, and aircraft and helicopter operations at VAFB. By this document, NMFS is proposing regulations to govern that take. In order to issue a Letter of Authorization (LOA) and issue final regulations governing the take, NMFS must determine that the taking will have a negligible impact on the species or stocks and will not have an unmitigable adverse impact on the availability of such species or stock for taking for subsistence uses. NMFS must also prescribe the means of effecting the least practicable adverse impact on such species or stock and their habitats.

DATES: Comments and information must be received no later than January 5, 2009.

ADDRESSES: You may submit comments, identified by 0648–AX08, by any one of the following methods:

- Electronic Submissions: Submit all electronic public comments via the Federal eRulemaking Portal: *http://www.regulations.gov*.
- Hand delivery or mailing of paper, disk, or CD-ROM comments should be addressed to P. Michael Payne, Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910–3225.

Instructions: All comments received are a part of the public record and will generally be posted to *http://www.regulations.gov* 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.

NMFS will accept anonymous comments (enter N/A in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

A copy of the application containing a list of references used in this document and the Draft Environmental Assessment (EA) may be obtained by writing to the above address, by telephoning the contact listed under **FOR FURTHER INFORMATION CONTACT**, or on the Internet at: *http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications*. Documents cited in this proposed rule may also be viewed, by appointment, during regular business hours at the above address. To help NMFS process and review comments more efficiently, please use only one method to submit comments.

FOR FURTHER INFORMATION CONTACT: Candace Nachman, Office of Protected Resources, NMFS, (301) 713–2289, ext. 156.

SUPPLEMENTARY INFORMATION:

Background

Sections 101(a)(5)(A) and (D) of the Marine Mammal Protection Act (MMPA; 16 U.S.C. 1361 *et seq*.) direct the Secretary of Commerce (Secretary) 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, notice of a proposed authorization is provided to the public for review.

Authorization for incidental takings may 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 certain subsistence uses, and that the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such taking 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.

The National Defense Authorization Act of 2004 (NDAA) (Public Law 108–136) removed the ''small numbers'' and ''specified geographical region'' limitations and amended the definition of ''harassment'' as it applies to a ''military readiness activity'' to read as follows (Section 3(18)(B) of the MMPA):

> (i) any act that injures or has the significant potential to injure a marine mammal or marine mammal stock in the wild [Level A Harassment]; or (ii) any act that disturbs or is likely to disturb a marine mammal or marine mammal stock in the wild by causing disruption of natural behavioral patterns, including, but not limited to, migration, surfacing, nursing, breeding, feeding, or sheltering, to a point where such behavioral patterns are abandoned or significantly altered [Level B Harassment].

Summary of Request

On March 21, 2008, NMFS received an application from the USAF requesting authorization for the take of four species of marine mammals incidental to space vehicle and test flight activities from VAFB, which would impact pinnipeds on VAFB and the Northern Channel Islands (NCI). NMFS proposes regulations to govern these activities, to be effective from February 7, 2009, through February 6, 2014. These regulations, if implemented, would allow NMFS to issue annual LOAs to the USAF. The current regulations and LOA expire on February 6, 2009. These training activities are classified as military readiness activities. Marine mammals may be exposed to continuous noise due mostly to combustion effects of aircraft and launch vehicles and impulsive noise due to sonic boom effects. The USAF requests authorization to take four pinniped species by Level B Harassment.

Description of the Specified Activity

VAFB (see Figure 1 in the USAF application) is headquarters to the 30th Space Wing (SW), the Air Force Space Command unit that operates VAFB and the Western Range. VAFB operates as a missile test base and aerospace center, supporting west coast space launch activities for the USAF, Department of Defense, National Aeronautics and Space Administration, and commercial contractors. VAFB is the main west coast launch facility for placing commercial, government, and military

satellites into polar orbit on expendable (unmanned) launch vehicles, and for testing and evaluation of intercontinental ballistic missiles (ICBM) and sub-orbital target and interceptor missiles. In addition to space vehicle and missile launch activities at VAFB, there are helicopter and aircraft operations for purposes such as search-and-rescue, delivery of space vehicle components, launch mission support, and security reconnaissance. The USAF expects to launch a maximum of 30 rockets and missiles per year from VAFB.

There are currently six active space launch vehicle (SLV) facilities at VAFB (VAFB, 2007), used to launch satellites into polar orbit. These facilities support the launch programs for space vehicles including the Atlas V, Delta II, Delta IV, Falcon, Minotaur, and Taurus. The Falcon has yet to launch from VAFB and is scheduled for its first launch in August, 2009 (30 SW, 2008a). Details on the vehicle types and the sound exposure levels (SELs) produced by each missile or rocket are described in the following sections.

Atlas V

The Atlas V vehicle is launched from Space Launch Complex (SLC)-3E on south VAFB, the site of the previous Atlas IIAS program. This SLC is approximately 9.9 km (6.2 mi) from the main haul-out area on VAFB, known as Rocky Point (see Figure 2 in the USAF application), which encompasses several smaller haul-outs. SLC–3E is approximately 11.1 km (6.9 mi) from the closest north VAFB haul-out, known as the Spur Road haul-out site (Figure 3 in the application) and 13.5 km (8.4 mi) from the next closest haul-out, the nearby Purisima Point haul-out site (Figure 3 in the application).

The Atlas V is a medium lift vehicle that can be flown in two series of configurations - the Atlas V400 series and the Atlas V500 series. Both series use the Standard Booster as the single body booster. The V400 series accommodates a 4.2 m (13.8 ft) payload fairing and as many as three solid rocket boosters. The V500 series accommodates a 5.4 m (17.7 ft) fairing and as many as five solid rocket boosters. The Atlas V400 series will lift as much as 7,800 kg (17,196 lbs) into geosynchronous transfer orbit or as much as 13,620 kg (30,027 lbs) into low earth orbit. The Atlas V500 series will lift as much as 8,700 kg (19,180 lbs) into geosynchronous transfer orbit or as much as 21,050 kg (46,407 lbs) into low earth orbit. The Atlas V consists of a common booster core (CBC; 3.8 m (12.5 ft) in diameter and 32.5 m (106.6 ft) high) powered by an RD180 engine that burns a liquid propellant fuel consisting of liquid oxygen and RP1 fuel (kerosene). The RD180 engine provides 840,000 lbs of thrust on liftoff. There is a Centaur upper stage (3.1 m (10.2 ft) in diameter and 12.7 m (41.7 ft) high) powered by a liquid oxygen and liquid hydrogen fuel.

The first Atlas V launch occurred on March 13, 2008. Acoustic monitoring was conducted for this launch at VAFB. However, an equipment malfunction during the launch prevented the proper functioning of the digital audio tape (DAT) recorder during the launch. Since acoustic data was only gathered with the sound level meter (SLM), not all metrics were obtained for that launch. The Atlas V launch had an A-weighted SEL (ASEL) of 96.5 dB (MSRS, 2008c). The Atlas V was predicted to create a sonic boom of as much as 7.2 pounds per square foot (psf), impacting the NCI including San Miguel Island (SMI; see Figure 4 in the USAF application). The size of the actual sonic boom would depend on meteorological conditions, which can vary by day and season and with the trajectory of the vehicle. A sonic boom greater than 1 psf was predicted for the initial Atlas V launch, thus acoustic monitoring was performed on SMI. Measurements conducted at Cardwell Point indicated a sonic boom of 1.24 psf with a rise time of 2.4 milliseconds (ms).

Delta II

The Delta II is launched from SLC–2 on north VAFB (see Figure 3 in the USAF application) approximately 2 km (1.2 mi) from the Spur Road harbor seal haul-out site and 2.3 km (1.4 mi) from the Purisima Point haul-out site. The Delta II is a medium-sized launch vehicle approximately 38 m (124.7 ft) tall. The Delta II uses a Rocketdyne RS–27A main liquid propellant engine and additional solid rocket strap-on graphite epoxy motors (GEMs) during liftoff. A total of three, four, or nine GEMs can be attached for added boost during liftoff. When nine GEMs are used, six are ignited at liftoff and three are lit once the rocket is airborne. When three or four GEMs are used they are all ignited at liftoff. The number of GEMs attached to each vehicle will determine the amount of sound power produced by the vehicle.

Eight Delta II launches have been acoustically quantified near the Spur Road harbor seal haul-out site. The Delta II is the second loudest of the SLVs at the Spur Road haul-out site, the Taurus vehicle being the loudest (see Table 2 in the application). The Delta II has an unweighted SEL measurements (based on the six initial acoustically-measured launches) ranging from 126.5 to 128.8 dB and averaging 127.4 dB, as measured by the DAT recorder. The C-weighted SEL (CSEL) ranged from 124.3 to 126.7 dB with an average of 125.4 dB (DAT). The ASEL measurements from both a SLM and the DAT were similar and ranged from 111.8 to 118.2 dB and had an average of 114.5 dB (DAT). The maximum fast A-weighted sound level (Lmax) values ranged from 104.2 to 112.5 dB and averaged 109.5 dB.

Sonic booms have been measured on SMI from three Delta II launches: the EO–1, Iridium MS–12, and AURA (November 2000, February 2002, and July 2004, respectively). Both the Iridium MS–12 and AURA had two small sonic booms impact the Point Bennett area of SMI. Iridium MS–12 had peak overpressures of 0.47 and 0.64 psf and rise times of 18 and 91 ms, while AURA had peak overpressures of 0.79 and 1.34 psf and rise times of 9.5 and 10.5 ms. The Delta II EO 1 had a single sonic boom with a peak overpressure of 0.4 psf and rise time of .041 ms.

Delta IV

The Delta IV is launched from SLC–6, which is 2.8 km (1.7 mi) north of the main harbor seal haul-out site at South Rocky Point (see Figure 2 in the USAF application). The Delta IV family of launch vehicles consists of five launch vehicle configurations utilizing a CBC first stage (liquid fueled) and zero, two, or four strap on solid rocket GEMs. The Delta IV comes in four medium lift configurations and one heavy lift configuration consisting of multiple CBCs (Table 4 in the application). The Delta IV can carry payloads from 4,210 to 13,130 kg (9,281 to 28,947 lbs) into geosynchronous transfer orbit.

Previously the Athena launch vehicle was launched from SLC–6. The Athena was a much smaller vehicle than the Delta IV but was one of the top three loudest vehicles (Table 1 in the application) at the haul-out, given its close proximity. Because the Delta IV was predicted to be the loudest vehicle at the south VAFB harbor seal haul-out site, it was required that acoustic and biological monitoring be conducted for its first three launches. In addition, harbor seal hearing tests were required before and after each of the first three launches.

The first two Delta IV launches occurred in 2006. Although the Delta IV is larger than the Athena, it was found after its initial launch (NROL–22, June 2006) that the Delta IV had similar noise levels to the Athena vehicle. As measured by the DAT, the unweighted SEL was 127.7 dB, while the CSEL was

122.9 dB, and the ASEL was 106.2 dB (Fillmore *et al.*, 2006). The Lmax was found to be 103.1 dB (Fillmore *et al.*, 2006).

During its second launch (DMSP–17, November 2006), the DAT recorder was located at the VAFB Boathouse (near where the harbor seal hearing tests were performed), rather than at the more usual sound monitoring location of Oil Well Canyon, where an SLM was placed. The DAT measured the unweighted SEL at 131.3 dB, the CSEL at 127.5 dB, and the ASEL at 111.3 dB. The Lmax was measured at 102.6 dB (Thorson *et al.*, 2007).

The Delta IV was predicted to create maximum sonic booms of as much as 7.2 psf for the largest of the medium configurations and 8 to 9 psf for the heavy configuration (Table 4 in the application). The size of the actual sonic boom would depend on meteorological conditions, which can vary by day and season, and with the trajectory of the vehicle. A sonic boom greater than one psf was predicted for the initial Delta IV launch, thus acoustic monitoring was performed on SMI. An equipment malfunction resulted in uncertainty regarding the amplitude of the sonic boom that was recorded for the launch, and the peak overpressure from the boom could have ranged from 0.77 psf to as much as 3.36 psf. The rise time was able to be determined and was measured at 8.7 ms. Because a sonic boom was not predicted for the second Delta IV launch, monitoring was not performed on SMI.

Capture attempts of harbor seals for the initial Delta IV launch were unsuccessful; therefore, no hearing tests were performed on seals for that launch. Capture attempts for the second Delta IV launch were successful, and hearing tests were performed. There was no evidence that the launch noise from the Delta IV DMSP 17 caused a loss in harbor seal hearing acuity. However, given a 2 hr delay in starting the hearing test due to safety constraints, it is possible that a mild temporary threshold shift (TTS) could have been fully recovered by the time the testing was started. Even so, no long-term hearing loss from the Delta IV launch noise was found (Thorson *et al.*, 2007).

The third Delta IV launch is currently scheduled for December, 2010. Appropriate biological and acoustic monitoring, as well as hearing testing, are planned for this launch.

Falcon

The Falcon is the launch vehicle for Space Exploration Technologies (Space X). Space X is a commercial program planning to launch small payloads into low earth orbit from VAFB. While it has not been officially decided (30 SW, 2008a), it is anticipated that Space X will utilize SLC–4E, instead of SLC–3W as originally planned (30 SW, 2008c). The Space X launch vehicle includes the Falcon I SLV, classified as a light-lift vehicle. It is a two-stage liquid oxygen and rocket grade kerosene powered launch vehicle and is 21.3 m (69.9 ft) in length and 1.7 m (5.6 ft) in diameter (Space X, 2007). Beginning in 2009, the Falcon 1e vehicle will also be available. It is also 1.7 m (5.6 ft) in diameter, but will have an extended first stage and will be 26.8 m (87.9 ft) in length (Space X, 2007). The Falcon I has a thrust of 105,500 lbs (in vacuum) and the Falcon 1e has 115,000 lbs (in vacuum) and are capable of delivering approximately 554 kg (1,221 lbs) into sun synchronous low earth orbit (Space X, 2007). The first Falcon launch from VAFB is currently scheduled for August, 2009 (30 SW, 2008a).

Minotaur

The Orbital Suborbital Program launch vehicle, known as Minotaur I, is launched from SLC–8 on south VAFB (see Figure 2 in the USAF application), approximately 2.3 km (1.4 mi) from the south VAFB haul-out sites. The Minotaur I is a four stage, all solid propellant ground launch vehicle (Orbital Sciences Corporation, 2006a). The launch vehicle consists of modified Minuteman II Stage I and Stage II segments, mated with Pegasus upper stages (Orbital Sciences Corporation, 2006a). The Minotaur is a small vehicle, approximately 19.2 m (63 ft) tall (Orbital Sciences Corporation 2006b), with approximately 215,000 lbs of thrust.

Two Minotaur launches were acoustically monitored at VAFB (January 2000 and July 2000). The unweighted SEL measurements varied by 3.5 dB between the two launches and were measured to be 119.4 and 122.9 dB. The CSELs varied less and were measured at 116.6 and 117.9 dB. From the DAT and SLM measurements, the ASEL ranged from 104.9 to 107.0 dB. The launch noise reached an Lmax level of 101.7 and 103.4 dB. No sonic booms of greater than one psf were predicted to impact the NCI for these two launches, nor for a third launch for which only biological monitoring was performed at VAFB given that acoustics had been previously quantified.

Taurus

The Taurus SLV is launched from 576E on north VAFB, approximately 0.5 km (0.3 mi) from the Spur Road harbor seal haul-out site and 2.3 km (1.4 mi) from the Purisima Point haul-out site (see Figure 3 in the USAF application). The standard Taurus is a small launch vehicle, at approximately 24.7 m (81 ft) tall and is launched in two different configurations (Defense Advanced Research Projects Agency (DARPA) and standard) with different first stages providing 500,000 or 400,000 lbs of thrust, respectively. The different vehicle configurations have different thrust characteristics, with the standard configuration providing less thrust than DARPA.

The launch noise from five Taurus launches has been measured near the Spur Road haul-out site. The Taurus is the loudest of the launch vehicles at the Spur Road haul-out site, due to the close proximity of its launch pad to the haul-out site. The unweighted SEL measurements from the four initially measured Taurus vehicles ranged from 135.8 to 136.8 and averaged 136.4 dB. The CSEL measurements were slightly lower as expected, ranging from 133.8 to 134.8 dB and averaged 134.5 dB. The ASEL measurements ranged from 123.5 to 128.9 dB with an average of 126.6 dB (SLM). The Lmax values were measured to range from 118.3 to 122.9 dB and averaged 120.9 dB (SLM). No sonic booms greater than one psf were predicted to impact the NCI for any of the six Taurus launches monitored since 1998.

ICBM and Missile Defense Agency Interceptor and Target Vehicles

There are a variety of small missiles launched from north VAFB, including the Minuteman III and several types of interceptor and target vehicles for the Missile Defense Agency (MDA) program. The Peacekeeper missile program was recently deactivated. Active missile launch facilities (LFs) are spread throughout northern VAFB (see Figure 3 in the application), and are within approximately 1 to 3.9 km (0.6 to 2.4 mi) of the Lion's Head haul-out site, and approximately 11 to 16.5 km (6.8 to 10.3 mi) north of the Spur Road and Purisima Point haul-out sites. In addition to the LFs, Test Pad (TP)-01 is present on north VAFB. Although not currently active or associated with a missile program, MDA may eventually utilize this pad. The trajectories of ICBM and MDA launches are generally westward and therefore do not cause sonic boom impacts on the NCI.

ICBM: The Minuteman III missile is an ICBM developed as part of the U.S. strategic deterrence force. The Minuteman III is launched from an underground silo. It is composed of three rocket motors, and is 18 m (59 ft) in length by 1.7 m (5.6 ft) in diameter with a first stage thrust of 202,600 lbs.

The launch noise from the June 7, 2002, launch from LF–26 (see Figure 3 in the USAF application) was measured at the Lion's Head haul-out site. This LF is approximately 3 km (1.9 mi) away from the haul-out site. The ASEL measurement of the launch noise was 100.6 dB and the Lmax value of 98.2 dB.

The launch noise from the May 24, 2000, launch from LF–09 (Figure 3 in the application) was measured at the Spur Road haul-out site. At a distance of over 15 km from LF–09, the unweighted SEL measurement was 114.7 dB and the CSEL measurement was 111.6 dB. The ASEL measurement was 26 dB down from the unweighted value and was measured at 88.7 dB. The Lmax was measured to be 83.3 dB.

MDA Interceptor and Target Vehicles: The MDA continues development of various systems and elements, including the Ballistic Missile Defense System (BMDS), the Ground-based Midcourse Defense (GMD) element of BMDS, the Kinetic Energy Interceptor (KEI) element, and the Air-Borne Laser (ABL) element.

The BMDS mission is to defend against threat missiles in each phase or segment of the missile's flight. MDA has been conducting and will continue to conduct BMDS testing at VAFB through 2014 and beyond.

The GMD element is designed to protect the U.S. in the event of a limited ballistic missile attack by destroying the threat missile in the mid-course phase of its flight. During the mid-course phase, which occurs outside the earth's atmosphere for medium and long-range missiles, the missile coasts in a ballistic trajectory. The missiles are comprised of a commercially available, solid propellant booster consisting of two or three stages, and an exo-atmospheric kill vehicle or emulator. A two-stage booster is being added to the current three-stage booster. The Ground Based Interceptor (GBI) was previously approved for launching from VAFB (68 FR 25347, May 12, 2003). GBI flight tests are planned from LF–23. As a scheduled risk mitigation, some limited testing may occur from LF–24 (currently being refurbished for use).

The second element of BMDS, the KEI element, includes development of the KEI booster and its flight tests. MDA anticipates a minimum of three KEI launches per year from 2009 to at least 2012. Candidate launch sites include 576E, TP–01, and LF–06.

The third element of BMDS, the ABL element, is being developed to provide an effective defense to limited ballistic missile threats during the boost segment of an attacking missile's flight. Under the ABL program, there could be as many as 10 launches per year. Launches could occur from LF–06a, which would be a new LF, yet to be constructed, near the current LF–06. Possible launch vehicles could include Black Brant IX, Hera, Terrier/Orion, two-stage Terrier, Liquid Fueled Target System (LFTS), Terrier Lynx, Storm, ARIES, Castor I, Lance, Patriot PAC–2, STRYPI-II, and Hermes.

As a part of BMDS testing, MDA envisions launching a wide variety of target missiles from VAFB northern LFs on westerly trajectories. Table 5 in the USAF application identifies missiles being considered by MDA for use at VAFB. Many of the small missiles under 13 m (42.7 ft), including the Hera, Lance, Patriot As A Target (PAAT), Black Brant, Terrier, SRTYPI II, Castor I, Storm, ARIES and Hermes, in addition to missiles already approved for VAFB (such as Minuteman missiles and the three-stage GBIs), and the new generation of missiles from the MDA, such as the KEI and the GBI two-stage, are to be covered under this application for the five-year programmatic permit because of their launch site's proximity to the Lion's Head harbor seal pupping site that was established in 2002.

The LFTS target missile is a single-stage, short range, ballistic missile with a non-separating payload. The missile is fueled by kerosene, initiator fuel, and an oxidizer (Inhibited Red Fuming Nitric Acid). The Flexible Target Family target missiles include the LV 2 and the LV 3 missiles, which are solid-fueled.

As shown in Table 5 in the application, all of the target and interceptor missiles are smaller than the Minuteman III or Peacekeeper missiles previously or currently launched from VAFB. The MDA notes that the actual heights of the missiles shown in Table 5 will vary depending on the payload and associated electronic packages (e.g., flight termination system) or special modifications. Many of the missile types have interchangeable first or second stage motors; therefore, most may have similar noise characteristics, depending on their configuration. Missiles for which acoustic measurements have previously been made, as well as vehicle size, are included in Table 6 of the application.

The main missile programs and missile types are described herein, but others may be implemented before this permit expires. The USAF would notify NMFS of any new missile programs that would be implemented at VAFB. Completely new types of missiles would be monitored acoustically and biologically, during their first launch, even if the launch occurs outside of the pupping season, using the standard launch monitoring protocol for VAFB. However, configuration changes in existing missiles would only be monitored during the pupping season, as is done for all other missile launches.

The MDA's BMDS test plans, including those involving tests from VAFB, are subject to constant change as the BMDS is being developed through spiral evolution. Therefore, it is difficult for the MDA to predict with accuracy its future launch schedule or number of launches over the next five years. However, due to test resource limitations, the MDA does not envision conducting more than three missile tests per quarter (on average) over the next five years from VAFB, and none of the missiles would be larger than the Minuteman III. This limitation (i.e., one missile per quarter and none being larger than the Minuteman III) can be used to establish the potential impacts posed by the MDA testing at VAFB over the next five years.

In order to compare launch noise from past and current SLVs, as it was received near the north and south VAFB marine mammal haul-out sites, Tables 1 through 3 in the USAF application provide information on the SELs that were measured during previous launch events. Table 1 in the application provides a comparison of SELs as measured at the sound monitoring site by the south VAFB marine mammal haul-out site. Table 2 in the application provides the SELs as measured at the sound monitoring site by the north VAFB Spur Road marine mammal haul-out site. Finally, Table 3 in the application provides the SELs as measured at the sound monitoring site by the north VAFB Lion's Head marine mammal haul-out site.

Aircraft Operations

The VAFB runway, located on north VAFB (see Figure 3 in the application), supports various aircraft operations further described below. Aircraft operations include tower operations, such as take offs and landings (training operations) from the airfield, and range operations, such as overflights and flight tests. Using data from fiscal years (FY) 2003, 2006, and 2007 (FY 2004 and 2005 data are not available), the number of tower operations averaged 12,325 operations per FY, while range operations averaged 502 operations per FY.

Flight Test Operations: VAFB is a limited site for flight testing and evaluation of fixed-wing aircraft. Three approved routes are used that avoid the established pinniped haul-out sites. Aircraft flown through VAFB airspace and supported by 30 SW include, but

are not limited to, B1 and B2 bombers, F–15, F–16, and F–22 fighters, V/X–22, Unmanned Aerial Vehicles, and KC–135 tankers.

Fixed-wing Aircraft Operations: Various fixed-wing aircraft (jet and propeller aircraft) use VAFB for a variety of purposes, including delivery of space or missile vehicle components, launching of space vehicles at high altitude (e.g., the Pegasus), and emergency landings. All aircraft are required to remain outside of the 305–m (1,000–ft) bubble around pinniped rookeries or haul-out sites, except when performing a life-or-death rescue mission, when responding to a security incident, or during an aircraft emergency. There have been no observed impacts to pinnipeds from fixed-wing aircraft operations during launch monitoring or pinniped surveys.

Helicopter Operations: The number of helicopter operations at VAFB decreased in 2008 with the deactivation of the VAFB helicopter squadron. However other squadrons and units continue to use VAFB for purposes which include, but are not limited to, transit through, exercises, and launch mission support. All helicopters are required to remain outside of the 305–m (1,000–ft) bubble around pinniped rookeries or haul-out sites. Exceptions may occur when performing a life-or-death rescue mission, when responding to a security incident, or during an aircraft emergency. There have been no observed impacts to pinnipeds from helicopter operations during launch monitoring or pinniped surveys.

Description of Habitat and Marine Mammals Affected by the Activity

VAFB

VAFB is composed of approximately 99,000 acres of land and approximately 64.4 km (40 mi) of coastline on the coast of central California, within Santa Barbara County (see Figure 1 in the USAF application). The most common marine mammal inhabiting the VAFB coastline is the Pacific harbor seal (*Phoca vitulina richardii*). Harbor seals are local to the area, rarely traveling more than 50 km (31 mi) from the haul-out site. They haul out on small offshore rocks or reefs and sandy or cobblestone cove beaches. There are four main harbor seal haul-out sites on VAFB; three are on north VAFB and one is on south VAFB.

On north VAFB, harbor seals primarily use the offshore rocky area near Spur Road; the Purisima Point reef; and the offshore rocky area of Lion's Head (Figure 3 in the application). The Spur Road and Purisima Point haul-out sites are in the vicinity of the Delta II launch site, SLC–2, and the Taurus launch site, referred to as 576E. The Lion's Head haul-out site is located in the vicinity of the LFs. As many as 110 seals may haul out at Spur Road and as many as 45 seals may haul out at Purisima Point (SRS Technologies, 2003b). Based on monthly counts conducted in 2005 through 2007, only one to two pups were observed at the Spur Road and Purisima Point haul-out sites. As many as 17 seals may haul out at Lion's Head, with as many as three pups (Thorson *et al.*, 2004). These three sites are mostly to completely under water at higher tides (above 1.2 m (3.9 ft)), preventing seals from hauling out at those times.

The main haul-out area on south VAFB, from the VAFB Harbor north to South Rocky Point beach, is comprised of many sand and cobblestone coves and rocky ledges, with most seals found between Harbor Seal Beach and South Rocky Point (approximately 1.5 km (0.9 mi) of coastline; Figure 2 in the application). The raised rocky ledge of Flat Iron Rock provides an area to haul out during most tides (except for very high tides combined with high swells and wind); therefore, this area is used more often and by more seals than any other VAFB haul-out site. Weaned pups, juveniles and some adult females use Weaner Cove, just to the north of Flat Iron Rock, throughout most of the year. During periods of high winds, seals may move from Flat Iron Rock into the more protected Weaner Cove. Peak numbers, as many as 515 seals hauled out at one time (SRS Technologies, 2003b), usually occur at the south VAFB haul-out site in the afternoon (1100 to 1600 Pacific Time), but the number of seals present is also influenced by a combination of high tides and large swells, high temperature, or strong winds (SRS Technologies, 2003b). During the pupping season (March through June), as many as 49 mother-pup pairs can be found hauled out in the area just north of Harbor Seal Beach and at Weaner Cove, making these areas the main pupping sites on VAFB (SRS Technologies, 2003b). During molting (May through July) adult and some juvenile harbor seals primarily use the Flat Iron Rock area, while weaned pups, juveniles and a few adult females use the coves just north and south of Flat Iron Rock (SRS Technologies, 2002).

NCI

The Northern Channel Islands (NCI) are located approximately 50 km (31 mi) south of the southern point on VAFB (see Figure 4, inset in the USAF application). Three islands, San Miguel, Santa Cruz, and Santa Rosa, make up the main NCI, with San Miguel Island being the primary site for pinniped rookeries. The NCI are part of the Channel Islands National Park and the Channel Islands National Marine Sanctuary.

San Miguel Island

On SMI, commonly found species of pinnipeds include California sea lions (*Zalophus californianus*), northern elephant seals (*Mirounga angustirostris*), northern fur seals (*Callorhinus ursinus*) and Pacific harbor seals. Guadalupe fur seals (*Arctocephalus townsendi*) and Steller sea lions (*Eumetopias jubatus*) have bred in the past on SMI, but sightings have been rare since the mid–1980's. The main rookeries of sea lions, elephant seals and fur seals are found at Point Bennett on the west end of SMI (see Figure 4 in the USAF application). California sea lions occur at Point Bennett, along the south side of the island, to Cardwell Point, on the east. Northern elephant seals occur at Point Bennett and from Crook Point to Cardwell Point, with small numbers along the north coast. Northern fur seals occur in the Point Bennett area. Harbor seals occur along the north coast and from Crook Point to Cardwell Point.

There are approximately 23,000 California sea lion pups (30 SW, 2008c), over 10,000 elephant seal pups (Lowry, 2002) and over 4,000 fur seal pups born on SMI each year (Carretta *et al.*, 2007). Pacific harbor seals pup on the north and east end of SMI; 2,500 northern elephant seals and several hundred sea lions also pup on the east end of SMI at Cardwell Point (Lowry, 2002). Most sea lions and elephant seals on the south and east end of SMI are non-breeding (juvenile or molting) animals. This area is composed of high cliffs with small sandy coves where several hundred seals haul out. From approximately December through July, pupping and breeding activities overlap between the four main species (see Table 7 in the application and Table 1 here).

Currently, the main impacts to species on SMI are: environmental conditions, food limitations (i.e., El Nino or fisheries interactions), and competition with other pinniped species for breeding space. For all species, adverse impacts to populations occur periodically because of a decrease in the availability of food items due to El Nino events. Commercial fisheries have impacted Steller sea lion and northern fur seal populations (Sydeman and Allen, 1999). Competition among pinniped species is occurring as the growing populations of sea lions and

elephant seals displace less aggressive harbor seals for haul-out space.

TABLE 1. SUMMARY OF THE PUPPING (BIRTHING AND NURSING PERIOD), BREEDING, AND MOLTING SEASONS OF THE FOUR MAIN PINNIPED SPECIES ON SMI.

Species	Pupping Season	Breeding Season	Molting Season
California sea lion	May-July	May-August	August-December
Northern fur seal	May-July	May-July	August-October
Northern elephant seal	December-March	December-March	April-August
Pacific harbor seal	March-May	March-June	May-July

Santa Cruz Island

On Santa Cruz Island the main species of marine mammal inhabiting the island is the harbor seal. California sea lions and northern elephant seals rarely haul out on Santa Cruz Island, except when sick or injured. There are approximately 1,050 harbor seals found on Santa Cruz Island during the spring aerial surveys (Lowry and Carretta, 2003). Based on sonic boom prediction models for previous launches, the majority of sonic booms produced by launches from VAFB do not impact Santa Cruz Island.

Santa Rosa Island

On Santa Rosa Island, the main species of marine mammals inhabiting the island are the harbor seal and the northern elephant seal. In 2001, 1,567 elephant seal pups were born on Santa Rosa (Lowry, 2002). There are approximately 900 harbor seals found on Santa Rosa Island during the spring aerial surveys (Lowry and Carretta, 2003). Some California sea lions pup on Santa Rosa, but it has not been established as a rookery to date. Pinnipeds generally use the west end of the island, adjacent to SMI. Based on sonic boom prediction models for previous launches, the majority of sonic booms produced by launches from VAFB do not impact Santa Rosa Island.

Comments and Responses

On July 25, 2008, NMFS published a notice of receipt of application for an LOA in the **Federal Register** (73 FR 43410) and requested comments and information from the public for 30 days. NMFS received comments from the Marine Mammal Commission (Commission) and one private citizen. The Commission supports NMFS' decision to publish proposed regulations for the specified activities provided that the research, mitigation, and monitoring activities described in the application and the current regulations are incorporated into the rule. NMFS has incorporated the research, mitigation, and monitoring into the proposed rule. The other comment opposed the issuance of an authorization without any specific substantiation for why such an authorization should not be issued. For the reasons set forth in this preamble, NMFS believes issuance of the authorization is appropriate.

Marine Mammals Potentially Affected by the Activity

At both VAFB and the NCI, Pacific harbor seals, California sea lions, and northern elephant seals haul out on beaches throughout the year. Northern fur seals, Steller sea lions, and Guadalupe fur seals have not been reported on VAFB. However, northern fur seals and Guadalupe fur seals can be found on SMI. Northern fur seals are only found on the west end of SMI at Point Bennett and Castle Rock, just offshore of SMI. Each year at SMI, zero to two Guadalupe fur seals are seen generally in the summer (Melin and DeLong, 1999). Steller sea lions have not been sighted on SMI since 1998. This was a single observation of a sub-adult male in the spring prior to the breeding season (Thorson *et al.*, 1999a). Previously, the last observation of a Steller sea lion was made in the mid–1980's.

The USAF has compiled information on the abundance, status, and distribution of the species on VAFB and the NCI from surveys that they have conducted over the last decade and from NMFS Stock Assessment Reports (SARs). This information may be viewed in the USAF's LOA application (see **ADDRESSES**). Additional information is available in the NMFS SARs, which are available at: *http://www.nmfs.noaa.gov/pr/pdfs/sars/po2007.pdf*.

Potential Effects of Specified Activities on Marine Mammals

The activities under these regulations create two types of noise: Continuous (but short-duration) noise, due mostly to combustion effects of aircraft and launch vehicles; and impulsive noise, due to sonic boom effects. Launch operations are the major source of noise on the marine environment from VAFB. The operation of launch vehicle engines produces significant sound levels. Generally, noise is generated from four sources during launches: (1) Combustion noise from launch vehicle chambers; (2) jet noise generated by the interaction of the exhaust jet and the atmosphere; (3) combustion noise from the post-burning of combustion products; and (4) sonic booms. Launch noise levels are highly dependent on the type of first-stage booster and the fuel used to propel the vehicle. Therefore, there is a great similarity in launch noise production within each class size of launch vehicles.

The noise generated by VAFB activities will result in the incidental harassment of pinnipeds, both behaviorally and in terms of physiological (auditory) impacts. The noise and visual disturbances from SLV and missile launches and aircraft and helicopter operations may cause the animals to lift their heads, move towards the water, or enter the water. The following information provides background on marine mammal responses to launch noise that has been gathered under previous LOAs for these activities, as well as a scientific research permit issued to VAFB by NMFS for a research program (Permit No. 859–1680–01) to determine the short and long-term effects of SLV noise and sonic booms on affected marine mammals.

Marine Mammal Response to Launch Noise

Seals may leave the haul-out site and enter the water due to the noise created by launch vehicles during launch operations. The percentage of seals leaving the haul-out increases with noise level up to approximately 100 dB ASEL, after which almost all seals leave, although data have shown that some

percentage of seals have remained on shore during launches. Time-lapse video photography during four launch events revealed that the seals that reacted to the launch noise but did not leave the haul-out were all adults. Because adult seals reacted less strongly than other younger seals, this suggests that adults had possibly experienced other launch disturbances and had habituated to them.

The louder the launch noise, the longer it took for seals to begin returning to the haul-out site and for the numbers to return to pre-launch levels. Seals may begin to return to the haul-out site within 2–55 min of the launch disturbance and the haul-out site usually returned to pre-launch levels within 45–120 min. In two past Athena IKONOS launches with ASELs of 107.3 and 107.8 dB at the closest haul-out site, seals began to haul-out again approximately 16–55 min post-launch (Thorson *et al.*, 1999a; 1999b). In contrast, noise levels from an Atlas launch and several Titan II launches had ASELs ranging from 86.7 to 95.7 dB at the closest haul-out and seals began to return to the haul-out site within 2–8 min post-launch (Thorson and Francine, 1997; Thorson *et al.*, 2000).

The main concern on the NCI from VAFB launch activities is potential impacts from sonic booms created during launches of SLVs from VAFB. During the period of 1997 through 2005, and in 2007 there were no sonic booms above 2 psf recorded on the NCI. Small sonic booms between 1 and 2 psf usually elicit a heads up response or slow movement toward and entering the water, particularly for pups. In 2006, due to an equipment malfunction, there was uncertainty about the peak overpressure from the Delta IV NROL–22 launch, which could have ranged between 0.77 and 3.36 psf. During the 1996 Titan IV K–22 launch, sonic booms of 1 to 9.2 psf reached SMI and caused many sea lions and some elephant seals to enter the water near the loudest sonic boom (Stewart *et al.*, 1996). There were no injuries or mortalities as a result of that sonic boom or the reactions by pinnipeds on SMI.

Haul-out Behavior and Population Dynamics

During the scientific research program, haul-out behavior was determined by capturing and attaching radio frequency transmitters to the hind flippers of 41 harbor seals. Twenty-four seals were tagged in the Rocky Point area of south VAFB, and 17 were tagged at Point Conception (control site; see Figure 1 in the USAF application). The tagged seals ranged in age from pups (4 months) through adults. A radio receiver-scanner and electronic data logger were stationed on the cliffs above each haul-out site and recorded the presence of any radio tagged seal every 15 min while the seals are hauled out of the water. The time of arrival, time of departure, and time on shore, could be calculated from the data collected by the telemetry system.

The main influence on the daily haul-out patterns of harbor seals on south VAFB was the time of day ($r^2 = 0.72$; n = 423) rather than tide height ($r^2 = 0.23$; n = 423), as the peak number of seals hauled out occurred daily between 1100 and 1700 hours. Haul-out behavior was also influenced by combinations of high tide and large swell or high temperature and no wind. Either of these combinations may cause seals not to haul out at all or to leave the haul-out site early. Seals remained on shore for 8.1 hr plus or minus 1.6 hr (range 1.2 - 14.7 hr). There was no significant difference in the time of day or duration of hauling out between south VAFB and Point Conception (t-test, P>.05).

Site fidelity, which is defined herein as an individual's continued use of the same haul-out area for at least 6 months, was high at both south VAFB and Point Conception. The mean site fidelity at VAFB was 77 percent (adults 84 percent, juveniles 72 percent, and pups 63 percent), and at Point Conception was 71 percent (adults 81 percent, juveniles 74 percent, and pups 53 percent). The trend of increasing site fidelity with age is common in all harbor seal populations, as young seals cannot compete for haul-out space with adults, and move to other less preferred haul-out sites (Kovacs *et al.*, 1990; Suryan and Harvey, 1998). There have been four juveniles tagged at Point Conception that have moved to VAFB, but no juveniles have moved from VAFB to Point Conception.

The total population of harbor seals at VAFB in 2002 was estimated to be 1,115 (850 on south VAFB and 265 on north VAFB; SRS Technologies, 2003a), using telemetry data to correct for seals that were at sea during the census. A correction factor of 1.7 times the ground count was used. From 2000 through 2007 there were three to seven SLV launches per year (average of 4.4 SLV launches annually), and there appeared to be only short-term disturbance effects to harbor seals as a result of launch noise. The harbor seal population increased from 1997 to 2002 at an annual rate of 12.7 percent; however, the number of total harbor seals on south VAFB was lower in 2007 (356 seals) than 2006 (511 seals). The only decrease in the population during the 1997 to 2002 period occurred during the 1998 El Nino season, when there was a 13.6 percent decrease from the previous year. The number of harbor seal pups observed increased at a rate of 26.7 percent annually through 2003, except during the El Nino events. The number of pups on south VAFB continued to increase from 2004 through 2006 (high of 53 pups) but fell again in 2007 (38 pups). Pup production grew at a rate of 7.9 percent at Point Conception through 2006, except during El Nino events. Point Conception has limited area where females and pups can haul out without being harassed by other seals or exposed to high tides and swells. There are more haul-out areas for females with pups at VAFB; therefore only an El Nino type disturbance, which includes weather and food availability effects, should affect pup production at VAFB.

Auditory Brainstem Response (ABR) Tests

To determine if harbor seals experience changes in their hearing sensitivity as a result of launch noise, ABR testing was conducted on 18 harbor seals for four Titan IV launches, one Taurus launch, and one Delta IV launch.

Following standard ABR testing protocol, the ABR was measured from one ear of each seal using sterile, sub-dermal, stainless steel electrodes. A conventional electrode array was used, and low-level white noise was presented to the non-tested ear to reduce any electrical potentials generated by the non-tested ear. A Bio-logic Systems Corporation evoked potential computer was used to produce the click and an 8 kilohertz (kHz) tone burst stimuli, through standard audiometric headphones. Over 1,000 ABR waveforms were collected and averaged per trial. Initially the stimuli were presented at sound pressure levels (SPL) loud enough to obtain a clean reliable waveform, and then decreased in 10 dB steps until the response was no longer reliably observed. Once response was no longer reliably observed, the stimuli were then increased in 10 dB steps to the original SPL. By obtaining two ABR waveforms at each SPL, it was possible to quantify the variability in the measurements.

Good replicable responses were measured from most of the seals, with waveforms following the expected pattern of an increase in latency and decrease in amplitude of the peaks, as the stimulus level was lowered. One seal had substantial decreased acuity to the 8 kHz tone-burst stimuli prior to the launch. The cause of this hearing loss was unknown but was most likely

congenital or from infection. Another seal had a great deal of variability in waveform latencies in response to identical stimuli. This animal moved repeatedly during testing, which may have reduced the sensitivity of the ABR testing on this animal for both the click and 8 kHz tone burst stimuli. Two of the seals were released after pre-launch testing but prior to the launch of the Titan IV B–34, as the launch was delayed for many days, and five days is the maximum duration permitted to hold the seals for testing.

Detailed analysis of the changes in waveform latency and waveform replication of the ABR measurements for the 14 seals, showed no detectable changes in the seals' hearing sensitivity as a result of exposure to the launch noise. The delayed start (1.75 to 3.5 hr after the launches) for ABR testing allows for the possibility that the seals may have recovered from a TTS before testing began. However, it can be said with confidence that the post-launch tested animals did not have permanent hearing changes due to exposure to the launch noise from the Titan IV, Taurus, or Delta IV SLVs. These results are consistent with previous NMFS conclusions for such activities in its prior rulemakings (63 FR 39055, July 21, 1998; 69 FR 5720, February 6, 2004).

NMFS also notes that stress from long-term cumulative sound exposures can result in physiological effects on reproduction, metabolism, and general health, or on the animals' resistance to disease. However, this is not likely to occur as a result of the activities from VAFB, because of the infrequent nature and short duration of the noise, including the occasional sonic boom. Research indicates that population levels at these haul-out sites have remained constant in recent years, giving support to this conclusion.

The USAF does not anticipate a significant impact on any of the species or stocks of marine mammals from launches from VAFB. For even the largest launch vehicles, such as Delta IV, the launch noises and sonic booms can be expected to cause a startle response and flight to water for those harbor seals, California sea lions and other pinnipeds that are hauled out on the coastline of VAFB and on the NCI. The noise may cause TTS in hearing depending on exposure levels, but no PTS is anticipated.

Numbers of Marine Mammals Estimated to be Taken by Harassment

The marine mammal species NMFS believes likely to be taken by Level B harassment incidental to launch and aircraft and helicopter operations at VAFB are harbor seals, California sea lions, northern elephant seals, and northern fur seals. All of these species are protected under the MMPA, and none are listed under the Endangered Species Act (ESA). Numbers of animals that may be taken by Level B harassment are expected to vary due to factors such as type of SLV, location of the sonic boom, weather conditions (which can influence the size of the sonic boom), the time of day, and the time of year. For this reason, ranges are given for the harassment estimates of marine mammals. Aircraft operations will occur frequently but will avoid pinniped haul-out areas and are unlikely to disturb pinnipeds.

As noted earlier, sightings of Steller sea lions and Guadalupe fur seals have been extremely rare the last few decades or low at VAFB and on the NCI. Therefore, no takes by harassment are anticipated for either of these species incidental to the proposed activities.

Estimated Takes at VAFB

Harbor seals: As many as 600 harbor seals per launch may be taken. Depending on the type of rocket being launched, the time of day, time of the year, weather conditions, tide and swell conditions, the number of seals that may be taken will range between 0 and 600. Launches and aircraft operations may occur at any time of the year so any age classes and gender may be taken.

California sea lions: As many as 200 sea lions per launch may be taken. Sea lions at VAFB are usually juveniles of both sexes and sub-adult males that haul out in the fall during the post breeding dispersal. Births generally do not occur at VAFB, but five pups were observed at VAFB in 2003, an El Nino year, although all were abandoned by their mothers and died within several days of birth. Sick or emaciated weaned pups may also haul out briefly. The number of sea lions that may be taken will range between 0 and 200.

Northern elephant seals: As many as 200 elephant seals per launch may be taken. Weaned elephant seal pups, juveniles, or young adults of both sexes, may occasionally haul out at VAFB for several days to rest or as long as 30 days to molt. Injured or sick seals may also haul out briefly. The number of northern elephant seals that may be taken will range between 0 and 200.

Northern fur seals: There are no reports of northern fur seals at VAFB. Therefore, it is unlikely that any fur seals will be taken.

Estimated Takes on the NCI

Sonic booms created by SLVs may impact marine mammals on the NCI, particularly SMI. Missile launches utilize westward trajectories so do not cause sonic boom impacts to the NCI. The PCBoom sonic boom modeling program will continue to be used to predict the area of sonic boom impact and magnitude of the sonic boom on the NCI based on the launch vehicle, speed, trajectory, and meteorological conditions. Prior to each SLV launch, a predictive sonic boom map of the impact area and magnitude of the sonic boom will be generated. Based on previous monitoring of sonic booms created by SLVs on SMI (Thorson *et al.*, 1999a: 1999b), it is estimated that as much as approximately 25 percent of the marine mammals may be disturbed on SMI (Thorson *et al.*, 1999a; 1999b). Most sonic booms that reach SMI are small (<1 psf), although larger sonic booms are possible, but rarely occur. A conservative take estimate of as much as 25 percent of the animals present is used for each species per launch.

Harbor seals: As many as 200 harbor seals of all age classes and sexes may be taken per launch on the NCI. The number of harbor seals that may be taken will range between 0 and 200.

California sea lions: As many as 5,800 sea lion pups and 2,500 juvenile and adult sea lions of either sex may be taken on the NCI per launch. The number of sea lions that may be taken will range between 0 and 8,300.

Northern elephant seals: As many as 3,000 northern elephant seal pups and 10,000 northern elephant seals of all age classes and sexes may be taken per launch on the NCI. The number of elephant seals that may be taken will range between 0 and 13,000.

Northern fur seals: As many as 300 northern fur seal pups and 1,100 juvenile and adult northern fur seals of both sexes may be taken per launch at SMI. The number of fur seals that may be taken will range between 0 and 1,400.

With the incorporation of mitigation measures proposed later in this document, the USAF and NMFS expect that only Level B incidental harassment may occur as a result of the proposed activities and that these events will result in no detectable impact on marine mammal species or stocks or on their habitats.

Potential Effects of Specified Activities on Marine Mammal Habitat

Impacts on marine mammal habitat are part of the consideration in making a finding of negligible impact on the species and stocks of marine mammals. Habitat includes, but is not necessarily limited to, rookeries, mating grounds, feeding areas, and areas of similar

significance. Only short-term disturbance of marine mammals is expected as a result of the proposed activities. No impacts to marine mammal habitats are anticipated on VAFB or the NCI.

Potential Effects of Specified Activities on Subsistence Needs

NMFS has preliminarily determined that the issuance of an LOA for USAF space vehicle and missile launches and aircraft and helicopter operations at VAFB would not have an unmitigable adverse impact on the availability of the affected species or stocks for subsistence use since there are no such uses for these pinniped species in California.

Mitigation

To minimize impacts on pinnipeds on beach haul-out sites and to avoid any possible sensitizing or predisposing of pinnipeds to greater responsiveness towards the sights and sounds of a launch, the USAF has prepared the following mitigation measures.

All aircraft and helicopter flight paths must maintain a minimum distance of 1,000 ft (305 m) from recognized seal haul-outs and rookeries (e.g., Point Sal, Purisima Point, Rocky Point), except in emergencies or for real-time security incidents (e.g., search-and-rescue, fire-fighting) which may require approaching pinniped haul-outs and rookeries closer than 1,000 ft (305 m). For missile and rocket launches, unless constrained by other factors including, but not limited to, human safety, national security concerns or launch trajectories, holders of LOAs must schedule launches to avoid, whenever possible, launches during the harbor seal pupping season of March through June. NMFS also proposes to expand the requirement so that the USAF must avoid, whenever possible, launches which are predicted to produce a sonic boom on the NCI during harbor seal, elephant seal, California sea lion, and northern fur seal pupping seasons.

If post-launch surveys determine that an injurious or lethal take of a marine mammal has occurred, the launch procedure and the monitoring methods must be reviewed, in cooperation with NMFS, and appropriate changes must be made through modification to an LOA, prior to conducting the next launch of the same vehicle under that LOA.

Monitoring

As part of its application, the USAF provided a monitoring plan, similar to that in the current regulations (50 CFR 216.125), for assessing impacts to marine mammals from rocket and missile launches at VAFB. This monitoring plan is described, in detail, in their application (30 SW, 2008c). The USAF will conduct the following monitoring under the regulations.

The monitoring will be conducted by a NMFS-approved marine mammal biologist experienced in surveying large numbers of marine mammals. Monitoring at the haul-out site closest to the launch facility will commence at least 72 hours prior to the launch and continue until at least 48 hours after the launch.

Monitoring for VAFB

Biological monitoring at VAFB will be conducted for all launches during the harbor seal pupping season, 1 March to 30 June. Acoustic and biological monitoring will be conducted on new space and missile launch vehicles during at least the first launch, whether it occurs within the pupping season or not. Also, the third Delta IV launch will be monitored, and ABR testing of seals in close proximity to the launch is planned. The testing will be authorized under a scientific research permit issued under Section 104 of the MMPA. Such work is currently conducted under Permit No. 859–1680–01, which expires on January 1, 2009. The USAF has submitted an application to NMFS for issuance of a new scientific research permit to continue the ABR tests, as well as other research projects. The ABR tests would be required once NMFS issues the Section 104 research permit. NMFS estimates that the tests would be required for years 2–5 of these proposed regulations.

Monitoring will include multiple surveys each day that record, when possible, the species, number of animals, general behavior, presence of pups, age class, gender, and reaction to launch noise, sonic booms, or other natural or human-caused disturbances. Environmental conditions such as tide, wind speed, air temperature, and swell will also be recorded. Time-lapse photography or video will be used during daylight launches to document the behavior of mother-pup pairs during launch activities. For launches during the harbor seal pupping season (March through June), follow-up surveys will be made within 2 weeks of the launch to ensure that there were no adverse effects on any marine mammals. A report detailing the species, number of animals observed, behavior, reaction to the launch noise, time to return to the haul-out site, any adverse behavior and environmental conditions will be submitted to NMFS within 90 days of the launch.

Monitoring for the NCI

Monitoring will be conducted on the NCI (San Miguel, Santa Cruz, and Santa Rosa Islands) whenever a sonic boom over 1 psf is predicted (using the most current sonic boom modeling programs) to impact one of the Islands. Monitoring will be conducted at the haul-out site closest to the predicted sonic boom impact area. Monitoring will be conducted by a NMFS-approved marine mammal biologist experienced in surveying large numbers of marine mammals. Monitoring will commence at least 72 hours prior to the launch and continue until at least 48 hours after the launch.

Monitoring will include multiple surveys each day that record the species, number of animals, general behavior, presence of pups, age class, gender, and reaction to launch noise, sonic booms, or other natural or human-caused disturbances. Environmental conditions such as tide, wind speed, air temperature, and swell will also be recorded. Due to the large numbers of pinnipeds found on some beaches of SMI, smaller focal groups should be monitored in detail rather than the entire beach population. A general estimate of the entire beach population should be made once a day and their reaction to the launch noise noted. Photography or video will be used during daylight launches to document the behavior of mother-pup pairs or dependent pups during launch activities. During the pupping season of any species affected by a launch, follow-up surveys will be made within 2 weeks of the launch to ensure that there were no adverse effects on any marine mammals. A report detailing the species, number of animals observed, behavior, reaction to the launch noise, time to return to the haul-out site, any adverse behavior and environmental conditions will be submitted to NMFS within 90 days of the launch.

Reporting

A report containing the following information must be submitted to NMFS within 90 days after each launch: (1) Date(s) and time(s) of each launch; (2) date(s), location(s), and preliminary findings of any research activities related to monitoring the effects on launch noise and sonic booms on marine mammal populations; and (3) results of the monitoring programs, including but not necessarily limited to (a) numbers of pinnipeds present on the haul-out prior to commencement of the launch, (b) numbers of pinnipeds that may have been harassed as noted by the number of pinnipeds estimated to have

entered the water as a result of launch noise, (c) the length of time(s) pinnipeds remained off the haul-out or rookery, (d) the numbers of pinniped adults or pups that may have been injured or killed as a result of the launch, and (4) any behavioral modifications by pinnipeds that likely were the result of launch noise or the sonic boom.

If a freshly dead or seriously injured pinniped is found during post-launch monitoring, the incident must be reported within 48 hours to the NMFS Office of Protected Resources and the NMFS Southwest Regional Office.

An annual report must be submitted to NMFS at the time of renewal of the LOA described in § 216.127, that describes any incidental takings under an LOA not reported in the 90–day launch reports, such as the aircraft test program and helicopter operations and any assessments made of their impacts on hauled-out pinnipeds.

A final report must be submitted to NMFS no later than 180 days prior to expiration of these regulations. This report must summarize the findings made in all previous reports and assess both the impacts at each of the major rookeries and the cumulative impact on pinnipeds and any other marine mammals from Vandenberg activities.

ESA

In December, 2003, NMFS determined that these activities are not likely to adversely affect any species or their habitats that are listed as threatened or endangered under the ESA. Therefore, consultation under section 7 of the ESA is not required.

NEPA

The USAF prepared a Final EA and issued a Finding of No Significant Impact (FONSI) in 1997 as part of its application for an incidental take authorization. On March 1, 1999 (64 FR 9925), NMFS adopted this EA as provided for by the Council on Environmental Quality regulations. In 2003, NMFS prepared its own EA and issued a FONSI for the final rule issued in February, 2004. NMFS has prepared a new Draft EA for issuance of regulations and annual LOAs to the USAF for these proposed activities. The Draft EA will be made available for public comment concurrently with these proposed regulations (see **ADDRESSES**). NMFS will either finalize the EA and prepare a FONSI or prepare an Environmental Impact Statement prior to issuance of the final rule.

Coastal Zone Management Act Consistency

The USAF conducts separate consultations with the California Coastal Commission (CCC) for each launch activity, as each one is considered a separate Federal action. Past consultations between the USAF and the CCC have indicated that activities from VAFB similar to those described in this document are consistent to the maximum extent practicable with the enforceable policies of the California Coastal Act (CCA). The USAF is in consultation with the CCC for those launch activities that have not yet been found to be consistent with the CCA. Therefore, NMFS has preliminarily determined that the activities described in this document are consistent to the maximum extent practicable with the enforceable policies of the CCA.

National Marine Sanctuaries Act

NMFS has preliminarily determined that this action is not likely to destroy, cause the loss of, or injure any national marine sanctuary resources. NMFS will conclude any necessary consultation with the National Ocean Service's Office of National Marine Sanctuaries prior to issuance of the final rule.

Preliminary Determinations

NMFS has preliminarily determined that the launching of SLVs, ICBMs, and small missiles and aircraft and helicopter operations at VAFB, as described in this document and in the application for regulations and subsequent LOAs, will result in no more than Level B harassment of harbor seals, California sea lions, northern elephant seals, and northern fur seals. The effects of these military readiness activities from VAFB will be limited to short term and localized changes in behavior, including temporarily vacating haul-outs, and possible TTS in the hearing of any pinnipeds that are in close proximity to a launch pad at the time of a launch. NMFS has also preliminarily determined that any takes will have no more than a negligible impact on the affected species and stocks. No take by injury and/or death is anticipated, and the potential for permanent hearing impairment is unlikely. Harassment takes will be at the lowest level practicable due to incorporation of the mitigation measures mentioned previously in this document. NMFS has proposed regulations for these exercises that prescribe the means of affecting the least practicable adverse impact on marine mammals and their habitat and set forth requirements pertaining to the monitoring and reporting of that taking. Additionally, the launch activities and aircraft and helicopter operations will not have an unmitigable adverse impact on the availability of marine mammal stocks for subsistence use, as there are no subsistence uses of these four pinniped species in California waters.

Classification

Pursuant to the procedures established to implement section 6 of Executive Order 12866, the Office of Management and Budget has determined that this proposed rule is not significant.

Pursuant to section 605(b) of the Regulatory Flexibility Act, 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 proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. The 30th SW, USAF, is the entity that will be affected by this rulemaking, not a small governmental jurisdiction, small organization or small business, as defined by the Regulatory Flexibility Act. As a result, NMFS concludes the action would not result in a significant economic impact on a substantial number of small entities.

List of Subjects in 50 CFR Part 216

Exports, Fish, Imports, Indians, Labeling, Marine mammals, Penalties, Reporting and recordkeeping requirements, Seafood, Transportation.

Dated: December 15, 2008.

John Oliver,

Deputy Assistant Administrator for Operations, National Marine Fisheries Service.

For reasons set forth in the preamble, 50 CFR part 216 is proposed to be amended as follows:

PART 216—REGULATIONS GOVERNING THE TAKE OF MARINE MAMMALS INCIDENTAL TO SPECIFIED ACTIVITIES

1. The authority citation for part 216 continues to read as follows:

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

2. Subpart K is added to part 216 to read as follows:

Subpart K—Taking Of Marine Mammals Incidental To Space Vehicle And Test Flight Activities

Sec.

Subpart K—Taking Of Marine Mammals Incidental To Space Vehicle And Test Flight Activities

§ 216.120 Specified activity and specified geographical region.

(a) Regulations in this subpart apply only to the incidental taking of those marine mammals specified in paragraph (b) of this section by the 30th Space Wing, United States Air Force, and those persons it authorizes to engage in:

(1) Launching up to 30 space and missiles vehicles each year from Vandenberg Air Force Base, for a total of up to 150 missiles and rockets over the 5–year period of these regulations,

(2) Launching up to 20 rockets each year from Vandenberg Air Force Base, for a total of up to 100 rocket launches over the 5–year period of these regulations,

(3) Aircraft flight test operations, and

(4) Helicopter operations from Vandenberg Air Force Base.

(b) The incidental take of marine mammals on Vandenberg Air Force Base and in waters off southern California, under the activity identified in paragraph (a) of this section, is limited to the following species: Harbor seals (*Phoca vitulina*); California sea lions (*Zalophus californianus*); northern elephant seals (*Mirounga angustirostris*); and northern fur seals (*Callorhinus ursinus*).

§ 216.121 Effective dates.

Regulations in this subpart are effective from February 7, 2009, through February 6, 2014.

§ 216.122 Permissible methods of taking.

(a) Under Letters of Authorization issued pursuant to § 216.106 and 216.127, the 30th Space Wing, U.S. Air Force, its contractors, and clients, may incidentally, but not intentionally, take marine mammals by harassment, within the area described in § 216.120, provided the activity is in compliance with all terms, conditions, and requirements of these regulations and the appropriate Letter of Authorization.

(b) The taking of marine mammals is authorized for the species listed in § 216.120(b) and is limited to Level B Harassment.

§ 216.123 Prohibitions.

Notwithstanding takings contemplated in § 216.120 and authorized by a Letter of Authorization issued under §§ 216.106 and 216.127, no person in connection with the activities described in § 216.120 may:

(a) Take any marine mammal not specified in § 216.120(b);

(b) Take any marine mammal specified in § 216.120(b) other than by incidental, unintentional harassment;

(c) Take a marine mammal specified in § 216.120(b) if such taking results in more than a negligible impact on the species or stocks of such marine mammal; or

(d) Violate, or fail to comply with, the terms, conditions, and requirements of this subpart or a Letter of Authorization issued under §§ 216.106 and 216.127.

§ 216.124 Mitigation.

(a) The activity identified in § 216.120(a) must be conducted in a manner that minimizes, to the greatest extent practicable, adverse impacts on marine mammals and their habitats. When conducting operations identified in § 216.120(a), the mitigation measures contained in the Letter of Authorization issued under §§ 216.106 and 216.127 must be implemented. These mitigation measures include (but are not limited to):

(1) All aircraft and helicopter flight paths must maintain a minimum distance of 1,000 ft (305 m) from recognized seal haul-outs and rookeries (e.g., Point Sal, Purisima Point, Rocky Point), except in emergencies or for real-time security incidents (e.g., search-and-rescue, fire-fighting), which may require approaching pinniped haul-outs and rookeries closer than 1,000 ft (305 m).

(2) For missile and rocket launches, holders of Letters of Authorization must avoid, whenever possible, launches during the harbor seal pupping season of March through June, unless constrained by factors including, but not limited to, human safety, national security, or for space vehicle launch trajectory necessary to meet mission objectives.

(3) Vandenberg Air Force Base must avoid, whenever possible, launches which are predicted to produce a sonic boom on the Northern Channel Islands during harbor seal, elephant seal, California sea lion, and northern fur seal pupping seasons of March through June.

(4) If post-launch surveys determine that an injurious or lethal take of a marine mammal has occurred, the launch procedure and the monitoring methods must be reviewed, in cooperation with the National Marine Fisheries Service (NMFS), and appropriate changes must be made through modification to a Letter of Authorization, prior to conducting the next launch under that Letter of Authorization.

(5) Additional mitigation measures as contained in a Letter of Authorization.

(b) [Reserved]

§ 216.125 Requirements for monitoring and reporting.

(a) Holders of Letters of Authorization issued pursuant to §§ 216.106 and 216.127 for activities described in § 216.120(a) are required to cooperate with NMFS, and any other Federal, state or local agency with authority to monitor the impacts of the activity on marine mammals. Unless specified otherwise in the Letter of Authorization, the Holder of the Letter of Authorization must notify the Administrator, Southwest Region, NMFS, by letter or telephone, at least 2 weeks prior to activities possibly involving the taking of marine mammals. If the authorized activity identified in § 216.120(a) is thought to have resulted in the mortality or injury of any marine mammals or in any take of marine mammals not identified in § 216.120(b), then the Holder of the Letter of Authorization must notify the Director, Office of Protected Resources, NMFS, or designee, by telephone (301–713–2289), within 48 hours of the discovery of the injured or dead animal.

(b) Holders of Letters of Authorization must designate qualified, on-site individuals approved in advance by NMFS, as specified in the Letter of Authorization, to:

(1) Conduct observations on harbor seal, elephant seal, and sea lion activity in the vicinity of the rookery nearest the launch platform or, in the absence of pinnipeds at that location, at another nearby haul-out, for at least 72 hours prior to any planned launch occurring during the harbor seal pupping season (1 March through 30 June) and continue for a period of time not less than 48 hours subsequent to launching.

(2) For launches during the harbor seal pupping season (March through June), conduct follow-up surveys within 2 weeks of the launch to ensure that there were no adverse effects on any marine mammals,

(3) Monitor haul-out sites on the Northern Channel Islands, if it is determined by modeling that a sonic boom of greater than 1 psf could occur in those areas (this determination will be made in consultation with NMFS),

(4) Investigate the potential for spontaneous abortion, disruption of effective female-neonate bonding, and other reproductive dysfunction,

(5) Supplement observations on Vandenberg and on the Northern Channel Islands with video-recording of mother-pup seal responses for daylight launches during the pupping season,

(6) Conduct acoustic measurements of those launch vehicles that have not had sound pressure level measurements made previously, and

(7) Include multiple surveys each day that surveys are required that record the species, number of animals, general behavior, presence of pups, age class, gender and reaction to launch noise, sonic booms or other natural or human caused disturbances, in addition to recording environmental conditions such as tide, wind speed, air temperature, and swell.

(c) Holders of Letters of Authorization must conduct additional monitoring as required under an annual Letter of Authorization.

(d) Holders of Letters of Authorization must submit a report to the Southwest Administrator, NMFS, within 90 days after each launch. This report must contain the following information:

(1) Date(s) and time(s) of the launch,

(2) Design of the monitoring program, and

(3) Results of the monitoring program, including, but not necessarily limited to:

(i) Numbers of pinnipeds present on the haul-out prior to commencement of the launch,

(ii) Numbers of pinnipeds that may have been harassed as noted by the number of pinnipeds estimated to have entered the water as a result of launch noise,

(iii) The length of time pinnipeds remained off the haul-out or rookery,

(iv) Numbers of pinniped adults, juveniles or pups that may have been injured or killed as a result of the launch, and

(v) Behavioral modifications by pinnipeds that were likely the result of launch noise or the sonic boom.

(e) An annual report must be submitted at the time of renewal of the Letter of Authorization.

(f) A final report must be submitted at least 180 days prior to expiration of these regulations. This report will:

(1) Summarize the activities undertaken and the results reported in all previous reports,

(2) Assess the impacts at each of the major rookeries,

(3) Assess the cumulative impacts on pinnipeds and other marine mammals from Vandenberg activities, and

(4) State the date(s), location(s), and findings of any research activities related to monitoring the effects on launch noise and sonic booms on marine mammal populations.

§ 216.126 Applications for Letters of Authorization.

(a) To incidentally take marine mammals pursuant to these regulations, the U.S. citizen (as defined by § 216.103) conducting the activity identified in § 216.120(a) (30th Space Wing, U.S. Air Force) must apply for and obtain either an initial Letter of Authorization in accordance with § 216.127 or a renewal under § 216.128.

(b) The application must be submitted to NMFS at least 30 days before the activity is scheduled to begin.

(c) Applications for a Letter of Authorization and for renewals of Letters of Authorization must include the following:

(1) Name of the U.S. citizen requesting the authorization,

(2) A description of the activity, the dates of the activity, and the specific location of the activity, and

(3) Plans to monitor the behavior and effects of the activity on marine mammals.

(d) A copy of the Letter of Authorization must be in the possession of the persons conducting activities that may involve incidental takings of pinnipeds.

§ 216.127 Letters of Authorization.

(a) A Letter of Authorization, unless suspended or revoked, will be valid for a period of time not to exceed the period of validity of this subpart, but must be renewed annually subject to annual renewal conditions in § 216.128.

(b) Each Letter of Authorization will set forth:

(1) Permissible methods of incidental taking;

(2) Means of effecting the least practicable adverse impact on the species, its habitat, and on the availability of the species for subsistence uses (i.e., mitigation); and

(3) Requirements for mitigation, monitoring and reporting.

(c) Issuance and renewal of the Letter of Authorization will be based on a determination that the total number of marine mammals taken by the activity as a whole will have no more than a negligible impact on the affected species or stock of marine mammal(s).

§ 216.128 Renewal of Letters of Authorization.

(a) A Letter of Authorization issued under § 216.106 and § 216.127 for the activity identified in § 216.120(a) will be renewed annually upon:

(1) Notification to NMFS that the activity described in the application submitted under § 216.126 will be undertaken and that there will not be a substantial modification to the described work, mitigation or monitoring undertaken during the upcoming 12 months;

(2) Timely receipt of the monitoring reports required under § 216.125(d) and (e), and the Letter of Authorization issued under § 216.127, which has been reviewed and accepted by NMFS; and

(3) A determination by NMFS that the mitigation, monitoring and reporting measures required under §§ 216.124 and 216.125 and the Letter of Authorization issued under §§ 216.106 and 216.127, were undertaken and will be undertaken during the upcoming annual period of validity of a renewed Letter of Authorization.

(b) If a request for a renewal of a Letter of Authorization issued under §§ 216.106 and 216.128 indicates that a substantial modification to the described work, mitigation or monitoring undertaken during the upcoming season will occur, NMFS will provide the public a period of 30 days for review and comment on the request. Review and comment on renewals of Letters of Authorization are restricted to:

(1) New cited information and data indicating that the determinations made in this document are in need of reconsideration, and

(2) Proposed changes to the mitigation and monitoring requirements contained in these regulations or in the current Letter of Authorization.

(c) A notice of issuance or denial of a renewal of a Letter of Authorization will be published in the **Federal Register**.

§ 216.129 Modifications of Letters of Authorization.

(a) Except as provided in paragraph (b) of this section, no substantive modification (including withdrawal or suspension) to the Letter of Authorization by NMFS, issued pursuant to §§ 216.106 and 216.127 and subject to the provisions of this subpart shall be made until after notification and an opportunity for public comment has been provided. For purposes of this paragraph, a renewal of a Letter of Authorization under § 216.128, without modification (except for the period of validity), is not considered a substantive modification.

(b) If the Assistant Administrator determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals specified in§ 216.120(b), a Letter of Authorization issued pursuant to §§ 216.106 and 216.127 may be substantively modified without prior notification and an opportunity for public comment. Notification will be

published in the **Federal Register** within 30 days subsequent to the action.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 660

[Docket No. 080226308–81499–01]

RIN 0648–AW50

Fisheries Off West Coast States; Highly Migratory Species Fisheries

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS issues a proposed rule to initiate collection of a permit fee for vessel owners participating in commercial and charter recreational fishing for highly migratory species (HMS) in the Exclusive Economic Zone (EEZ) off the West Coast of California, Oregon, and Washington. The HMS permits are issued under implementing regulations for the Fishery Management Plan for U.S. West Coast Fisheries for Highly Migratory Species (HMS FMP).

DATES: Comments must be received by January 20, 2009.

ADDRESSES: You may submit comments, identified by 0648–AW50, by any one of the following methods:

- Electronic Submissions: Submit all electronic public comments via the Federal eRulemaking Portal *http://www.regulations.gov*
- Fax: 562–980–4047, Attn: Chris Fanning, Permits Coordinator.
- Mail: Rodney R. McInnis, Regional Administrator, Southwest Region, NMFS, 501 West Ocean Blvd., Suite 4200, Long Beach, CA 90802 4213.

Instructions: All comments received are a part of the public record and will generally be posted to *http://www.regulations.gov* 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. NMFS will accept anonymous comments (enter N/A in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

Written comments regarding the burden-hour estimates or other aspects of the collection-of-information requirements contained in this proposed rule may be submitted to Rodney R. McInnis at the address listed above and by e-mail to *David__Rostker@omb.eop.gov*, or fax to (202) 395–7285.

FOR FURTHER INFORMATION CONTACT: Chris Fanning, Permits Coordinator, Sustainable Fisheries Division, NMFS, 562–980–4198.

SUPPLEMENTARY INFORMATION: On April 7, 2004, NMFS published a final rule to implement the HMS FMP (69 FR 18444) that included mandatory permit requirements at 50 CFR 660.707. At the time, there was no cost passed on to the vessel owners for the preparation and issuance of the permit. NMFS now proposes to charge an administrative fee for the recovery of HMS permit processing and issuance expenses. NMFS initiates rulemaking for this action pursuant to procedures established at 50 CFR 660.717(d) of the implementing regulations for the HMS FMP.

This proposed rule would specify that an application for an HMS permit, including the renewal of an existing permit, would include a fee payable by the vessel owner. The fee amount required will be determined in accordance with the NOAA Finance Handbook available at (*http://www.corporateservices.noaa.gov/~finance/FinanceHandbook.htm*) and specified on the application form. The fee amount is expected to be approximately $30-$40 at this time.

Background

Section 303(b)(1) of the Magnuson-Stevens Fishery Conservation and Management Act (MSA), 16 U.S.C. 1853(b)(1), authorizes the inclusion of a requirement for permit fees in fishery management plans. Section 304(d) of the MSA specifies that such fees may not exceed the administrative costs of issuing the permits. Historically, only some fishery management plans have authorized the collection of permit fees, resulting in a set of inconsistent permit fee policies around the country. NMFS has issued a policy directive (No. 30–120, effective January 3, 2005 and renewed in 2007) to establish a more consistent agency permit program that recovers the expense of permit processing and issuance for all permits issued by NMFS to the extent authorized by law. Policy directive No. 30–120 is available at: *http://www.nmfs.noaa.gov/directives/*.

In this case, the original Fishery Management Plan for U.S. West Coast Fisheries for Highly Migratory Species, as approved by NOAA in 2004, already included authority to collect permit fees. NMFS proposes to exercise this authority through this rulemaking.

Classification

NMFS has determined that this proposed rule is consistent with the HMS FMP and preliminarily determined that this proposed rule is consistent with the Magnuson-Stevens Fishery Conservation and Management Act and other applicable laws, subject to public review and comment.

Information collection requirements for HMS Permits have been previously approved by OMB under the Southwest Region Family of Forms (OMB Control Number 0648–0204). This approval is valid through April 30, 2010. An amendment to this approved collection of information has been submitted and is undergoing review by OMB. The amendment would incorporate the permit fee collection component of this proposed rule, if finalized. Public reporting burden for the payment of HMS permit fees is estimated to average 5 minutes or less per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection information.

Public comment is sought regarding: whether this proposed collection of information is necessary for the proper performance of the functions of the agency, including whether the information shall have practical utility; the accuracy of the burden estimate; ways to enhance the quality, utility, and clarity of the information to be collected; and ways to minimize the burden of the collection of information, including through the use of automated collection techniques or other forms of information technology. Send comments on these or any other aspects of the collection of information to NMFS Southwest Region at the **ADDRESSES** above, and by e-mail to *David__Rostker@omb.eop.gov* or fax to (202) 395–7285.

Notwithstanding any other provision of the law, no person is required to respond to, and no person shall be subject to 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.

This proposed rule has been determined to be significant for purposes of Executive Order 12866.