

or organize comments by referencing a Code of Federal Regulations (CFR) part or section number.

c. Explain why you agree or disagree; suggest alternatives and substitute language for your requested changes.

d. Describe any assumptions and provide any technical information and/or data that you used.

e. If you estimate potential costs or burdens, explain how you arrived at your estimate in sufficient detail to allow for it to be reproduced.

f. Provide specific examples to illustrate your concerns, and suggest alternatives.

g. Explain your views as clearly as possible, avoiding the use of profanity or personal threats.

h. Make sure to submit your comments by the comment period deadline identified.

II. Additional Information

For additional information, see the Direct Final Rule which is located in the Rules section of this **Federal Register**. Copies of the request and the EPA's analysis are available electronically at EDOCKET or in hard copy at the above address. (Please telephone Christos Panos at (312) 353-8328 before visiting the Region 5 Office.)

Dated: June 16, 2005.

Margaret Guerriero,

Acting Regional Administrator, Region 5.

[FR Doc. 05-14600 Filed 7-22-05; 8:45 am]

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DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

50 CFR Part 17

Endangered and Threatened Wildlife and Plants; 90-Day Finding on a Petition To List the Gentry Indigo Bush, *Dalea tentaculoides*, as an Endangered Species

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Notice of reopening of public comment period.

SUMMARY: We, the U.S. Fish and Wildlife Service (Service), announce the reopening of the public comment period for the status review initiated by the 90-day finding on a petition to list Gentry indigo bush (*Dalea tentaculoides*). The original public comment period closed on April 4, 2005. This action will allow all interested parties an opportunity to submit information on the status of the species under the Endangered Species Act of 1973, as amended (Act).

DATES: Comments must be submitted directly to the Service (see **ADDRESSES** section) on or before August 4, 2005.

Any comments received after the closing date may not be considered in the 12-month finding for this petition.

ADDRESSES: If you wish to comment, you may submit your comments and materials by any one of several methods:

1. You may submit written comments and information by mail or hand-delivery to Steve Spangle, Field Supervisor, Arizona Ecological Services Field Office, 2321 W. Royal Palm Road, Suite 103, Phoenix, Arizona 85021.

2. Written comments may be sent by facsimile to (602) 242-2513.

3. You may send your comments by electronic mail (e-mail) to Gentrycomments@fws.gov.

All comments and materials received, as well as supporting documentation used in preparation of the 90-day finding, will be available for public inspection, by appointment, during normal business hours at our Arizona Ecological Services Field Office at the above address.

FOR FURTHER INFORMATION CONTACT:

Mima Falk, Arizona Ecological Services, Tucson Suboffice, 201 N. Bonita Ave., Tucson, Arizona 85745 (520) 670-6150 ext. 225).

SUPPLEMENTARY INFORMATION:

Background

On January 7, 2002, we received a petition dated January 2, 2002, requesting that we list the Gentry indigo bush as an endangered species with critical habitat. On January 25, 2005, we made our 90-day administrative finding on the petition to list the Gentry indigo bush under the Act in which we found that the petition presented substantial information indicating that listing the Gentry indigo bush may be warranted (70 FR 5401; February 2, 2005). Therefore, we initiated a status review to determine if listing the species is warranted. The review comment period closed on April 4, 2005.

Pursuant to 50 CFR 424.16(c)(2), we may extend or reopen a comment period upon finding that there is good cause to do so. The original comment period closed before the Gentry indigo bush flowering season. One of the primary characters for this species' identification can only be seen on the flower. We are reopening the comment period in order to accept additional status and survey information obtained after April 4, 2005, that we believe is significant and may affect our determination of the status of the species, and to allow appropriate public comment on these materials. These survey materials include trip

reports and an interim report on surveys in Mexico received after the comment period closed, as well as status survey reports for Sycamore Canyon and the Northern Altar Valley which we anticipate receiving in early July. We deem these considerations as sufficient cause to reopen the comment period.

Public Comments Solicited

Our practice is to make comments, including names and home addresses of respondents, available for public review during regular business hours. Individual respondents may request that we withhold their home address, which we will honor to the extent allowable by law. If you wish us to withhold your name or address, you must state this request prominently at the beginning of your comments. However, we will not consider anonymous comments. To the extent consistent with applicable law, we will make all submissions from organizations or businesses, and from individuals identifying themselves as representatives or officials of organizations or businesses, available for public inspection in their entirety.

Authority

The authority for this action is the Endangered Species Act of 1973 (16 U.S.C. 1531 *et seq.*).

Dated: July 15, 2005.

Marshall P. Jones Jr.,

Acting Director, Fish and Wildlife Service.

[FR Doc. 05-14556 Filed 7-22-05; 8:45 am]

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 216

[Docket No. 050630175-5175-01; I.D. 083104A]

RIN 0648-AS98

Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to Construction and Operation of Offshore Oil and Gas Facilities in the Beaufort Sea

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

ACTION: Proposed rule; request for comments and information.

SUMMARY: NMFS has received a request from BP Exploration (Alaska), 900 East Benson Boulevard, Anchorage, AK 99519 (BP) for renewal of an

authorization to take small numbers of marine mammals incidental to operation of an offshore oil and gas platform at the Northstar facility in the Beaufort Sea in state waters. By this document, NMFS is proposing regulations to govern that take. In order to issue the Letter of Authorization (LOA) and final regulations governing the take, NMFS must determine that the total taking will have a negligible impact on the affected species and stocks of marine mammals, will be at the lowest level practicable, and will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses. NMFS invites comment on the application and the proposed rule.

DATES: Comments and information must be postmarked no later than August 24, 2005.

ADDRESSES: You may submit comments on the application and proposed rule, using the identifier 083104A, by any of the following methods:

E-mail: PR1.083104A@noaa.gov. Please include the identifier 083104A in the subject line of the message. Comments sent via e-mail, including all attachments, must not exceed a 10-megabyte file size.

Federal e-Rulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

Hand-delivery or mailing of paper, disk, or CD-ROM comments should be addressed to: Stephen L. Leathery, Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910-3225.

A copy of the application containing a list of references used in this document may be obtained by writing to this address, by telephoning one of the contacts listed under **FOR FURTHER INFORMATION CONTACT**, or at: http://www.nmfs.noaa.gov/prot_res/PR2/Small_Take/smalltake_info.htm#applications. Documents cited in this proposed rule may also be viewed, by appointment, during regular business hours at this address. To help us process and review comments more efficiently, please use only one method.

Comments regarding the burden-hour estimate or any other aspect of the collection of information requirement contained in this proposed rule should be sent to NMFS via the means stated above, and to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: NOAA Desk Officer,

Washington, DC 20503,
David_Rustker@eap.omb.gov.

FOR FURTHER INFORMATION CONTACT: Kenneth R. Hollingshead, NMFS, 301-713-2055, ext 128 or Brad Smith, NMFS, (907) 271-5006.

SUPPLEMENTARY INFORMATION:

Background

Section 101(a)(5)(A) of the Marine Mammal Protection Act (16 U.S.C. 1361 *et seq.*) (MMPA) directs 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 regulations are issued.

An authorization may be granted for periods of 5 years or less if the Secretary finds that the total taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses, and regulations are prescribed setting forth the permissible methods of taking and the requirements pertaining to the monitoring and reporting of such taking.

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." Except for certain categories of activities not pertinent here, the MMPA defines "harassment" as any act of pursuit, torment, or annoyance which

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

In 1999, BP petitioned NMFS to issue regulations governing the taking of small numbers of whales and seals incidental to oil and gas development and operations in arctic waters of the United States. That petition was submitted pursuant to section 101(a)(5)(A) of the MMPA. Regulations were promulgated by NMFS on 25 May 2000 (65 FR 34014). These regulations authorize the issuance of annual LOAs for the incidental, but not intentional, taking of small numbers of six species of marine mammals in the event that such taking occurred during construction and operation of an oil and gas facility in the Beaufort Sea offshore

from Alaska. The six species are the ringed seal (*Phoca hispida*), bearded seal (*Erignathus barbatus*), spotted seal (*Phoca largha*), bowhead whale (*Balaena mysticetus*), gray whale (*Eschrichtius robustus*), and beluga whale (*Delphinapterus leucas*). To date, LOAs have been issued on September 18, 2000 (65 FR 58265, September 28, 2000), December 14, 2001 (66 FR 65923, December 21, 2001), December 9, 2002 (67 FR 77750, December 19, 2002), December 4, 2003 (68 FR 68874, December 10, 2003) and December 6, 2004 (69 FR 71780, December 10, 2004). The current LOA expired on May 25, 2005, when the current regulations expired.

On August 30, 2004, BP requested a renewal of its authorization to take small numbers of marine mammals incidental to operation of an offshore oil and gas platform at the Northstar facility in the Beaufort Sea in state waters. This will require new regulations. Although injury or mortality is unlikely during routine oil production activities, BP requests that the LOA authorize a small number of incidental, non-intentional, injurious or lethal takes of ringed seals in the unlikely event that they might occur. A copy of this application can be found at: http://www.nmfs.noaa.gov/prot_res/PR2/Small_Take/smalltake_info.htm#applications.

Description of the Activity

BP is currently producing oil from an offshore oil and gas facility in the Northstar Unit. This development is the first in the Beaufort Sea that makes use of a subsea pipeline to transport oil to shore and then into the Trans-Alaska Pipeline System. The Northstar facility was built in State of Alaska waters approximately 6 statute miles (9.6 km) north of Point Storkersen and slightly less than 3 nautical miles (nm; 5.5 km) from the closest barrier island. It is located adjacent to Prudhoe Bay, and is approximately 54 mi (87 km) northeast of Nuiqsut, an Inupiat community. The main facilities associated with Northstar include a gravel island work surface for drilling and oil production facilities, and two pipelines connecting the island to the existing infrastructure at Prudhoe Bay. One pipeline transports crude oil to shore, and the second imports gas from Prudhoe Bay for gas injection and power generation at Northstar. Permanent living quarters and supporting oil production facilities are also located on the island. The construction of Northstar began in early 2000, and continued through 2001. Well drilling began on December 14, 2000 and oil production commenced on October 31, 2001. The well-drilling

program ended in May, 2004 and the drill rig is expected to be demobilized by barge during the 2005 open-water period. Although future drilling is not specifically planned, additional wells or well work-over may be required at some time in the future. Oil production will continue beyond the 5-year period of the requested authorization. A more detailed description of past, present and future activities at Northstar can be found in BP's application and in Williams and Rodrigues (2004). Both documents can be found in the previously mentioned NMFS web-site (see ADDRESSES).

Comments and Responses

On September 23, 2004 (69 FR 56995), NMFS published a notice of receipt of BP's application for an incidental take authorization and requested comments, information and suggestions concerning the request and the structure and content of regulations to govern the take. During the 30-day public comment period, NMFS received comments from the Alaska Eskimo Whaling Commission (AEWC), the Trustees for Alaska (Trustees, on behalf of themselves, the Sierra Club and the Northern Alaska Environmental Center), and the Marine Mammal Commission (Commission).

Marine Mammal Concerns

Comment 1: The AEWEC objects to a statement in BP's application that crew boats and barges supporting Northstar remain well inshore of the main migration corridor, so bowhead whale deflection is unlikely to occur in response to these types of Northstar related vessel traffic. The BP application must acknowledge that vessel traffic has the potential to push the whales far offshore as they migrate westward.

Response: As noted in BP's application, vessels, (principally crew boats), tugs and self-propelled barges were the most important sound sources during all phases of the Northstar operation that were studied by Blackwell and Greene (2004). The presence of boats considerably expanded the distances to which Northstar-related sound was detectable. Propagation loss over distances from a few hundred meters to a few kilometers for vessel sounds was about 15 dB/tenfold change in distance. On some occasions, vessels were detectable on recordings made at the farthest recording station (29 km (18 mi)) from the vessel. On the other hand, monitoring studies done at Northstar since 2000 have shown that any disturbance and displacement effects on seals and whales that do occur are

subtle and quite localized (Richardson and Williams [eds], 2004). These very limited effects would not have biologically significant consequences for many (if any) individual seals and whales, and would have a negligible impact on the affected species or stocks. However, NMFS recognizes that an activity having a negligible impact on bowhead whales may nevertheless result in an unmitigable adverse impact on their availability for subsistence uses if it results in a displacement of those animals during the subsistence hunt and makes their availability insufficient for a harvest to meet subsistence needs. For that reason, BP has proposed that all non-essential boat, hovercraft, barge and air traffic under its management will be scheduled to avoid periods when bowheads are migrating through the area. Whether additional monitoring of BP vessels during the bowhead migration period is needed was addressed during the May 10–12, 2005, peer-review meeting (see Monitoring).

Comment 2: The Trustees state that NMFS must consider all regulatory changes applicable to the proposed operations to determine whether the proposed operations have a negligible impact on species and stocks of marine mammals. Pursuant to this mandate, NMFS must consider changes to the State of Alaska oil discharge prevention and contingency plan regulations that have eliminated certain requirements and will thus increase the duration and amount of discharge in the event of an accidental oil spill.

Response: NMFS is unaware of any recent changes to the State of Alaska's oil discharge prevention and contingency plan that could potentially affect offshore oil and gas operations in a manner not addressed previously by NMFS (see especially 66 FR 65923, December 21, 2001). Therefore, NMFS requests information, during this proposed rule comment period, regarding changes in State of Alaska regulations that might affect its prior determinations.

Comment 3: The AEWEC states that BP's use of the phrase "migratory corridor" dismisses the findings in LGL (2002, Bowhead Whale Feeding in the Eastern Alaskan Beaufort Sea: Update of Scientific and Traditional Information) that bowhead whales both feed and travel during the westward migration.

Response: Lowry and Sheffield (2002) in Richardson and Thomson [ed]. (2002) concluded that coastal waters of the Alaskan Beaufort Sea should be considered as part of the bowheads' normal summer-fall feeding range. They reported that of the 29 bowheads harvested at Kaktovik between 1986 and

2000 and analyzed for stomach contents, at least 83 percent had been feeding prior to death. Of the 90 bowheads analyzed that had been harvested near Barrow during the fall hunt, at least 75 percent had been feeding prior to death.

Comment 4: The AEWEC questions statements made in BP's application regarding noise propagation and attenuation from the Northstar facility. The AEWEC notes that some industrial noise is audible to marine mammals far beyond 10 km (6.2 mi) and that bowheads are being deflected by sounds from Northstar at much greater distances than "a few kilometers."

Response: In making its determinations on whether the taking of marine mammals is negligible and the activity is not having an unmitigable adverse impact on the availability of bowheads for subsistence, NMFS relies in substantial part on the findings in Richardson and Williams [eds]. (2004). NMFS believes the statements made by BP in its application regarding noise propagation and attenuation are based on 4 years of data collection and assessment of noise impacts on bowhead whales from the Northstar facility and thus represents the best information available.

Concerns on Subsistence

Comment 5: The AEWEC strongly suspects that Northstar noise causes subtle deflections just to the east or just to the west of Seal Island, and when combined with other industrial activity in the Beaufort Sea, including vessel traffic supporting onshore and offshore development, Northstar contributes cumulatively to push the migration route offshore and force the whales out of reach of whaling captains.

Response: A description of the monitoring program conducted by BP since 2000 to assess whether sounds from Northstar might be causing a deflection in the migratory route of bowheads during the fall migration (Richardson and Williams [eds], 2004) can be found on NMFS' homepage:

http://www.nmfs.noaa.gov/prot_res/PR2/Small_Take/smalltake_info.htm#applications. As mentioned, monitoring during the upcoming seasons was addressed at the previously mentioned peer-review monitoring meeting (see response to comment 7 and Monitoring).

However, NMFS must make a determination that the activity for which the take authorization is requested, and not the total impact of all activities taking place in the Beaufort Sea, is not having an unmitigable adverse impact on the subsistence uses

of bowhead whales. Information currently available to NMFS indicates that the AEWC has met its fall bowhead subsistence needs and quota recently (see Table 7 in BP's application for recent bowhead harvest levels). In 2004, the village of Barrow landed 15 bowheads while the villages of Nuiqsut and Kaktovik took 3 each. If this information is not correct, NMFS requests the AEWC provide information on this subject during the public comment period for this proposed rule.

Mitigation Concerns

Comment 6: The AEWC believes that the received sound level at which whales might deflect is completely unrelated to the safety sound level threshold (i.e., Level A harassment zone) set by NMFS. It is critical that BP not make associations between safety criteria for whales and the sound threshold above which whales exhibit avoidance behavior.

Response: BP and NMFS recognize that bowheads react to anthropogenic noise at significantly greater distances than the safety zone required to protect all marine mammals from Level A harassment.

During the previous 5-year rule and LOAs, NMFS and BP were concerned that construction and production sounds from Northstar had the potential to cause Level A harassment of marine mammals. Monitoring since 2000 indicated that the loudest noise levels anticipated at the Northstar facility are from pile driving. The impact pipe driving in June and July 2000 did not produce received levels as high as 180 dB re 1 microPa (rms) at any location in the water. This was attributable to attenuation by the gravel and sheetpile walls (Blackwell *et al.*, 2004). If impact pile driving (or similar activity with loud noise) was planned for areas outside sheetpile walls where sound levels might exceed 180 dB (cetaceans) or 190 dB (seals), monitoring and mitigation (such as shut-down) is proposed to be conducted under the new rule. NMFS proposes to retain this monitoring requirement to mitigate Level A harassment to the lowest level practicable in the proposed 5-year rule.

However, this monitoring program is in addition to the acoustic monitoring program proposed for bowheads during the fall migration, both of which are described later in this document (see Mitigation/Monitoring).

Comment 7: Since the Northstar monitoring report shows that bowheads are deflected by industrial sounds well below NMFS criteria, the AEWC believes that BP should implement supplemental monitoring and mitigation

whenever sounds from Northstar are expected to exceed 100 dB, not when those sounds exceed 180 dB. The peer-review group should be convened to develop the appropriate technique to monitor for marine mammals in the areas that may be affected by high levels of industrial noise.

Response: During the bowhead westward migration period, supplemental monitoring and mitigation measures are implemented by BP to ensure that the effects from Northstar do not have an unmitigable adverse impact on the subsistence needs of the Inupiat communities for bowhead whales. These measures are discussed later in this document (see Monitoring). Implementing additional mitigation and monitoring at 100 dB for species other than bowhead whales is neither warranted nor practical. While this is a subject for further discussion at peer-review meetings, NMFS notes that the 180-dB monitoring takes place year-round for the protection of all marine mammal species from Level A harassment (injury), not from Level B harassment.

Monitoring Concerns

Comment 8: Noise monitoring of Northstar operations detected a "mystery" noise of long duration transmitting a considerable distance away from the island. NMFS must evaluate the impacts of this noise source associated with Northstar production.

Response: An "unknown" underwater sound was detected by a recorder on the seafloor about 550 m (1804 ft) north of Northstar Island. It was not recorded prior to mid-September in 2003, but was recorded about eight times during the period 18–28 September 2003. It was not present during September 2004. This sound, as recorded 550 m (1804 ft) from Northstar, consisted of sustained (40 min to 5.3 hrs) periods at received levels of approximately 125 dB re 1 μ Pa. Most of its energy was below 60 Hz, but it included characteristic broad peaks at frequencies close to 139, 162, 189, 233 and 285 Hz. The directional recorders showed that the sound was coming from the vicinity of Northstar Island. The source was determined not to be a vessel or to be related to flaring activity or to numerous other activities on Northstar Island. Despite much effort by BP, it was not possible to associate this sound with any specific activity on the island.

The unknown sound source was not detectable via similar recorders 6.5–21.5 km (4–13 mi) northeast of the island, except in one instance when the sound included a 130-Hz tone. That tone was detected by four instruments at

distances of 6.5–14.3 km (4–8.9 mi). The measured rate of propagation loss of the tone was 32 dB/tenfold change in distance. Most noise recorded during periods in September 2003, when the underwater sound emanating from Northstar was strongest, was attributable to this sound. As with all sounds produced around Northstar, sounds were monitored for potential impacts to bowheads and other marine mammals. Results of the bowhead monitoring for 2003 can be found in Chapters 7, 8, and 9 in Richardson and Williams [eds]. (2004).

Comment 9: BP must continue to monitor effects from Northstar through 2009 and work with the North Slope Borough (NSB) Science Advisory Committee (NSB SAC) to develop an appropriate and comprehensive monitoring program.

Response: NMFS agrees. Recently, the NSB SAC reviewed the findings in Richardson and Williams [eds]. (2004) and has made recommendations for improving future monitoring and data analyses. Representatives from these parties discussed the 2005 proposed monitoring plan at the annual peer-review meeting that was held in Anchorage, AK on May 10–12, 2005. The participants at this meeting agreed that monitoring would continue as outlined in BP's application. BP would acoustically monitor the sound field each September to monitor bowhead whale calls with a larger effort once every 4 years. In addition, BP intends to launch a long term monitoring program integrating Northstar monitoring with BP's long term environmental monitoring program.

Comment 10: The Commission recommends that a rigorous monitoring program sufficient to detect any non-negligible effects be pursued to ensure that the activities are not individually or cumulatively having any population level effects on marine mammals and are not adversely affecting the availability of marine mammals for subsistence uses by Alaska natives.

Response: Under section 101(a)(5)(A) of the MMPA, NMFS must prescribe a monitoring program that the applicant must implement to provide information on marine mammal takings. Swartz and Hofman (1991) note that a monitoring program should also be designed to support (or refute) the finding that the total taking by the activity is not having more than a negligible impact on affected species and stocks of marine mammals, during the period of the rulemaking. This 6-year monitoring program is described in detail in Richardson and Williams [eds] (2004). The results from this study help NMFS

ensure that the activity's impacts on marine mammal species or stocks are, in fact, negligible and are not having an unmitigable adverse impact on their availability for subsistence uses.

In addition to monitoring required of BP, it should be recognized that research and monitoring of Beaufort Sea marine mammals are also conducted by government agencies, or through government agency funding. This includes, for example, the Minerals Management Service's aerial bowhead whale surveys, an annual population assessment survey for bowhead whales, a study on contaminant levels in bowhead whale tissue, and a bowhead whale health assessment study. These latter three studies are funded by or through NMFS. Information on these projects has been provided in the past to the Commission by NMFS. Based on this multi-faceted monitoring program, NMFS has determined that the current and proposed monitoring programs for both open-water and wintertime are adequate to identify impacts on marine mammals, both singly from the project and cumulatively throughout the industry.

National Environmental Policy Act (NEPA) Concerns

Comment 11: The Trustees believe that NMFS has not evaluated all activities that have occurred or may occur in the Beaufort Sea during the effective term of the potential regulations that will add considerable noise disturbance and oil spill risks, including additional seismic exploration and drilling activities, barge traffic, hovercraft traffic, helicopter noise, and other aircraft traffic and noise. Past noise disturbances that occurred during the fall bowhead whale migratory season have not been adequately addressed.

Response: The cumulative effects of Northstar construction and operation (including oil spill risks) along with barge and aircraft traffic noise were addressed in the Corps' Final EIS for Northstar. NMFS was a cooperating agency in the preparation of the Northstar EIS and adopted that EIS as its own on May 18, 2000 (see 65 FR 34014, May 25, 2000) when implementing final regulations for the incidental harassment of marine mammals during construction and operations at Northstar. For this rulemaking, NMFS will review the Corps' Final EIS to ensure that the Corps' document continues to accurately assess the cumulative impacts from activities in the U.S. Beaufort Sea. If it is not adequate, NMFS will consider its options under NEPA. In that regard,

NMFS welcomes relevant information and data on any impacts addressed in the Corps' Final EIS.

Comment 12: The Trustees state that in the future, seismic surveys may be proposed that are related to lands in upcoming lease sales in state and federal waters and for additional offshore pipeline routes. NMFS must assess the cumulative effects of these disturbances.

Response: The impact of seismic surveys on the U.S. Beaufort Sea environment have been addressed in several lease sale NEPA documents, in the Corps' Final EIS for Northstar, and in NMFS' Environmental Assessment (EA) on issuing an Incidental Harassment Authorization (IHA) for Beaufort Sea seismic (NMFS, 1999). However, no seismic surveys have taken place in the U.S. Beaufort Sea since 2000 or 2001 (see 66 FR 42515, August 13, 2001). If new seismic surveys are proposed, NMFS will evaluate these actions as appropriate under the MMPA, NEPA and the Endangered Species Act (ESA).

Comment 13: The Trustees state that the MMS plans to renew its permitting of the Liberty offshore oil and gas facility. Accordingly, cumulative effects of the Northstar and Liberty facilities during the effective term of the potential regulations must be evaluated.

Response: BP is considering options which could lead to developing the Liberty prospect in the Beaufort Sea as a satellite supported by either the existing Endicott or Badami operations. Development of Liberty was first proposed in 1998 as a stand-alone drilling and production facility (see MMS, 2003, Final EIS for the Liberty Development and Production Plan). It was put on hold in 2002 pending further review of project design and economics. A decision has not been made to proceed with developing Liberty, but BP is examining the feasibility of designing and permitting Liberty as a satellite field (BP, 2005).

Both the Northstar and Liberty Final EISs analyzed cumulative effects from oil production.

Comment 14: The AEWEC recommends that NMFS strongly consider the available science on the effects of climate change on shorefast ice as an influence on the location of the bowhead migration from year to year. Bowhead whales tend to migrate closer to shore in warmer, thinner-ice years, and therefore, could come much closer to Northstar than is assumed under recent studies or contemplated in BP's application. Continued monitoring and analysis must account for the probability that any nearshore shift

would bring a greater number of migrating bowheads within the noise disturbance range and could significantly affect the northwesterly heading of the migration (route) to a greater degree than NMFS previously considered.

Response: The period of validity of these proposed regulations and, therefore, the period for making MMPA determinations, is 5 years (2005–2010). Therefore, NMFS believes that the westward migration of bowhead whales in relation to shore-fast ice conditions are expected to vary in a similar degree to what has been noted by BP since 2000.

The best scientific data indicates that, between 1979 and 1997, a period of 18 years of data collection, bowheads came within 10 km (6.2 mi) of the site of the Northstar facility only during 1997 (BPXA, 1999). However, NMFS determined in 2000 (65 FR 34014, May 25, 2000) that, because this close-approach occurred in a recent year, a more reliable estimate of take can be made by presuming that the bowhead take level could occur again once or twice within the next 5 year period. Therefore, NMFS determined that an average annual take by harassment, due to noise from construction and operation at Northstar, as calculated by BP (i.e., 173 (maximum 1,533) per year) would result in a maximum of 717 bowheads annually or approximately 9 percent of the revised 1993 estimated population size of 8,200 (95 percent CI, 7,200–9,400) (Hill and DeMaster, 1999; IWC, 1996). NMFS notes that this harassment will be limited to a deflection in migration and would be considered a taking by Level B harassment. Such a taking would result in small numbers being taken and would have no more than a negligible impact on bowhead whales.

From 2000–2003 bowhead whales were monitored acoustically to determine the number of whales that might have been exposed to Northstar related sounds. Data from 2001–2003 were useable for this purpose. The results showed that, during the late summer and early autumn of 2001, a small number of bowheads in the southern part of the migration corridor (closest to Northstar) were apparently affected by vessel or Northstar operations. The best estimates of the numbers of bowheads that were apparently "deflected" offshore by ≥ 2 km (1.2 mi) were 19 in 2001, 49 in 2002, and 0 in 2003; these values are all ≤ 0.5 percent of the bowhead population (BP, 2004; McDonald and Richardson, 2004). However, 2003 was considered a

moderate to light ice year, not a heavy ice year.

Scientists believe the relationship through the 1980s is that in moderate-light ice years the whales are closer to shore and in heavy ice years they are farther offshore. The best reference is Moore (2000)(Variability in cetacean distribution and habitat selection in the Alaskan Arctic, Autumn 1982–91. Arctic 53(4):448–460). Based on the relationship described by Moore, global warming would result in “on average” light-ice conditions and whales would be more likely to be closer to shore than farther away. During 2003 and 2004 the bowhead migration corridor has been exceptionally close to shore and the shorefast ice could be described as “light”.

During the eastward (springtime) migration the shore-fast ice margin is approximately 75 km (46.6 mi) from Northstar and no bowheads are expected to be harassed during this time period.

Description of Marine Mammals Affected by the Activity

The following six species of seals and cetaceans can be expected to occur in the region of proposed activity and be affected by the Northstar facility: ringed, spotted and bearded seals, and bowhead, gray and beluga whales. General information on these species can be found in NMFS Stock Assessment Reports. These documents are available at: http://www.nmfs.noaa.gov/prot_res/PR2/Stock_Assessment_Program/sars.html#StockAssessmentReports More detailed information on these six species can be found in BP's application which is available at: http://www.nmfs.noaa.gov/prot_res/PR2/Small_Take/smalltake_info.htm#applications.

In addition to these six species for which a incidental take authorization is sought, other species that may occur rarely in the Alaskan Beaufort Sea include the harbor porpoise (*Phocoena phocoena*), killer whale (*Orcinus orca*), narwhal (*Monodon monoceros*), and hooded seal (*Cystophora cristata*). Because of the rarity of these species in the Beaufort Sea, BP and NMFS do not expect individuals of these species to be exposed to, or affected by, any activities associated with the planned Northstar activities. As a result, BP has not requested these species be included under its incidental take authorization. Two other marine mammal species found in this area, the Pacific walrus (*Odobenus rosmarus*) and polar bear (*Ursus maritimus*), are managed by the U.S. Fish and Wildlife Service

(USFWS). Potential incidental takes of those two species will be the subject of a separate application by BP for an LOA from the USFWS.

Potential Effects on Marine Mammals

The potential impacts of the offshore oil development at Northstar on marine mammals involve both acoustic and non-acoustic effects. Potential non-acoustic effects could result from the physical presence of personnel, structures and equipment. The visual presence of facilities, support vessels, and personnel, and the unlikely occurrence of an oil spill, are potential sources of non-acoustic effects. There is a small chance that a seal pup might be injured or killed by on-ice construction or transportation activities.

Acoustic effects involve sounds produced by activities such as power generation and oil production on Northstar Island, heavy equipment operations on ice, impact hammering, drilling, and camp operations. Some of these sounds were more prevalent during the construction and drilling periods, and sound levels emanating from Northstar are expected to be lower during the ongoing production period. During average ambient conditions, some Northstar-related activities are expected to be audible to marine mammals at distances up to 10 km (5.4 nm) away. However, because of the poor transmission of airborne sounds from the Northstar facility into the water, and their low effective source levels, sounds from production operations are not expected to disturb marine mammals at distances beyond a few kilometers from the Northstar development.

Responses by pinnipeds to noise are highly variable. Responses observed to date by ringed seals during the ice-covered season are limited to short-term behavioral changes in close proximity to activities at Northstar. During the open-water season responses by ringed seals are expected to be even less than during the ice-covered season. A major oil spill is unlikely (please see response to comments 2 and 3 in 66 FR 65923 (December 21, 2001)) for a discussion on potential for an oil spill to affect marine mammals in the Beaufort Sea), but the impact of an oil spill on seals could be lethal to some heavily oiled pups or adults. In the unlikely event of a major spill, the overall impacts to seal populations would be minimal due to the small fraction of those exposed to recently spilled oil that are likely to be seriously affected.

Responses to Northstar activities by migrating and feeding bowhead whales and beluga whales will be short-term and limited in scope due to the typically

small proportion of whales that will migrate near Northstar and the relatively low levels of underwater sounds propagating seaward from the island at most times. Limited deflection effects may occur when vessels are operating for prolonged periods near Northstar. An oil spill is unlikely and it is even less likely to disperse into the main migration corridor for either whale species. The effects of oiling on bowhead and beluga whales are unknown, but could include fouling of baleen and irritation of the eyes, skin, and respiratory tract (if heavily oiled).

Impacts to marine mammal food resources or habitat are not expected from any of the continued drilling or operational activities at Northstar.

Potential Impacts on Subsistence Use of Marine Mammals

Inupiat hunters emphasize that all marine mammals are sensitive to noise, and, therefore, they make as little extraneous noise as possible when hunting. Bowhead whales often show avoidance or other behavioral reactions to strong underwater noise from industrial activities, but often tolerate the weaker noise received when the same activities are occurring farther away. Various studies have provided information about these sound levels and distances (Richardson and Malme, 1993; Richardson *et al.*, 1995a,b; Miller *et al.*, 1999). However, scientific studies done to date have limitations, as discussed in part by Moore and Clarke (1992) and in Minerals Management Service (MMS, 1997). Inupiat whalers believe that some migrating bowheads are diverted by noises at greater distances than have been demonstrated by scientific studies (e.g., Rexford, 1996; MMS, 1997). The whalers have also mentioned that bowheads sometimes seem more skittish and more difficult to approach when industrial activities are underway in the area. There is also concern about the persistence of any deflection of the bowhead migration, and the possibility that sustained deflection might influence subsistence hunting success farther “downstream” during the fall migration.

Underwater sounds associated with drilling and production operations have lower source levels than do the seismic pulses and drillship sounds that have been the main concern of the Inupiat hunters. Sounds from vessels supporting activities at Northstar will attenuate below ambient noise levels at closer distances than do seismic or drillship sounds. Thus, reaction/deflection distances for bowhead whales approaching Northstar are expected to be considerably shorter than those for

whales approaching seismic vessels or drillships (BPXA, 1999).

Recently, there has been concern among Inupiat hunters that barges and other vessels operating within or near the bowhead migration/feeding corridor may deflect whales for an extended period (J.C. George, NSB-DWM, pers. comm to Williams). It has been suggested that, if the headings of migrating bowheads are altered through avoidance of vessels, the whales may subsequently maintain the "affected" heading well past the direct zone of influence of the vessel. This might result in progressively increasing deflection as the whale progresses west. However, crew boats and barges supporting Northstar remain well inshore of the main migration corridor. As a result, BP believes this type of effect is unlikely to occur in response to these types of Northstar-related vessel traffic.

Potential effects on subsistence could result from direct actions of oil development upon the biological resources or from associated changes in human behavior. For example, the perception that marine mammals might be contaminated or "tainted" by an oil spill could affect subsistence patterns whether or not many mammals are actually contaminated. The BP application discusses both aspects in greater detail.

A Conflict Avoidance Agreement/Plan of Cooperation (CAA/Plan) has been negotiated between BP, the AEWC, and the North Slope Borough in past years, and discussions regarding future agreements are on-going. A new Plan will address concerns relating to the subsistence harvest of marine mammals in the region surrounding Northstar.

Mitigation

Mitigation proposed by BP includes avoidance of seal lairs by 100 m (328 ft), if new activities occur on the floating sea ice after 20 March. In addition, BP proposes to mitigate potential acoustic effects that might occur due to exposure of whales or seals to strong pulsed sounds. If BP needs to conduct an activity capable of producing underwater sound with levels ≥ 180 or ≥ 190 dB re 1 μ Pa (rms) at locations where whales or seals could be exposed, BP proposes to monitor safety zones corresponding to those levels. Activities producing underwater sound levels ≥ 180 or ≥ 190 dB re 1 μ Pa (rms) would be temporarily shut down if whales and seals, respectively, occur within the relevant radii. The purposes of these mitigation measures are to minimize potentially harmful impacts to marine mammals and their habitat, and to

ensure the availability of marine mammals for subsistence purposes.

Monitoring

The monitoring proposed by BP includes some research components to be implemented annually and others to be implemented on a contingency basis. Basking and swimming ringed seals will be counted annually by Northstar personnel in a systematic fashion to document the long-term stability of ringed seal abundance and habitat use near Northstar. BP proposes to monitor the bowhead migration in 2005 and subsequent years using two Directional Autonomous Seafloor Acoustic Recorders (DASARs) to record near-island sounds and two to record whale calls. If BP needs to conduct an activity capable of producing underwater sound with levels ≥ 180 or ≥ 190 dB re 1 μ Pa (rms) at locations where whales or seals could be exposed, BP proposes to monitor safety zones defined by those levels. The monitoring proposed would be used in estimating the numbers of marine mammals that may potentially be disturbed (i.e., taken by Level B harassment), incidental to operations of Northstar.

Reporting

BP proposes to submit annual monitoring reports, with the first report to cover the activities from May (or the effective date of these regulations) through October 2005 (i.e., the bowhead migration period), and subsequent reports to cover activities from November of one year through October of the next year. BP proposes that the 2005 report would be due on March 31, 2006. For subsequent years, it is proposed that the annual report (to cover monitoring during a 12-month November-October period) would be submitted on 31 March of the following year.

The annual reports will provide summaries of BP's Northstar activities. These summaries will include the following: dates and locations of ice-road construction, on-ice activities, vessel/hovercraft operations, oil spills, emergency training, and major repair or maintenance activities thought to alter the variability or composition of sounds in a way that might have detectable effects on ringed seals or bowhead whales. The annual reports will also provide details of ringed seal and bowhead whale monitoring, the monitoring of Northstar sound via the nearshore DASAR, estimates of the numbers of marine mammals exposed to project activities, descriptions of any observed reactions, and documentation concerning any apparent effects on

accessibility of marine mammals to subsistence hunters.

BP also proposes to submit a single comprehensive report on the monitoring results from 2005 to mid-2009 no later than 240 days prior to expiration of the renewed regulations, i.e., by September 2009.

If specific mitigation is required for activities on the sea ice initiated after 20 March (requiring searches with dogs for lairs), or during the operation of strong sound sources (requiring visual observations and shut-down), then a preliminary summary of the activity, method of monitoring, and preliminary results will be submitted within 90 days after the cessation of that activity. The complete description of methods, results and discussion will be submitted as part of the annual report.

Any observations concerning possible injuries, mortality, or an unusual marine mammal mortality event will be transmitted to NMFS within 48 hours.

Preliminary Determinations

NMFS has preliminarily determined that the impact of operation of the Northstar facility in the U.S. Beaufort Sea will result in no more than a temporary modification in behavior by certain species of cetaceans and pinnipeds. During the ice-covered season, pinnipeds close to the island may be subject to incidental harassment due to the localized displacement from construction of ice roads, from transportation activities on those roads, and from oil production-related activities at Northstar. As cetaceans will not be in the area during the ice-covered season, they will not be affected.

During the open-water season, the principal operations-related noise activities will be impact hammering, helicopter traffic, vessel traffic, and other general production activity on Seal Island. Sounds from production activities on the island are not expected to be detectable more than about 5–10 km (3.1–6.2 mi) offshore of the island. Helicopter traffic will be limited to nearshore areas between the mainland and the island and is unlikely to approach or disturb whales. Barge traffic will be located mainly inshore of the whales and will involve vessels moving slowly, in a straight line, and at constant speed. Little disturbance or displacement of whales by vessel traffic is expected. While behavioral modifications may be made by these species to avoid the resultant noise, this behavioral change is expected to have no more than a negligible impact on the animals.

The number of potential incidental harassment takes will depend on the

distribution and abundance of marine mammals (which vary annually due to variable ice conditions and other factors) in the area of operations. However, because the activity is in shallow waters inshore of the main migration/feeding corridor for bowhead whales and far inshore of the main migration corridor for belugas, the number of potential harassment takings of these species and stocks is estimated to be small. The results of intensive studies and analyses to date (Williams *et al.*, 2004) suggest that the biological effects of Northstar on ringed seals are minor (resulting from short distance displacement of breathing holes and haul-out sites), limited to the area of physical ice disturbance around the island and small in number. In addition, no take by injury or death of any marine mammal is anticipated, and the potential for temporary (or permanent) hearing impairment will be avoided through the incorporation of the mitigation measures mentioned in this document. No rookeries, areas of concentrated mating or feeding, or other areas of special significance for marine mammals occur within or near the planned area of operations.

Because most of the bowhead whales are east of the Northstar area in the Canadian Beaufort Sea until late August/early September, activities at Northstar are not expected to impact subsistence hunting of bowhead whales prior to that date. Appropriate mitigation measures to avoid an unmitigable adverse impact on the availability of bowhead whales for subsistence needs will be the subject of consultation between BP and subsistence users.

Also, while production at Northstar has some potential to influence seal hunting activities by residents of Nuiqsut, because (1) the peak sealing season is during the winter months, (2) the main summer sealing is off the Colville Delta, and (3) the zone of influence from Northstar on seals is fairly small, NMFS believes that Northstar oil production will not have an unmitigable adverse impact on the availability of these stocks for subsistence uses.

NMFS has preliminarily determined that the potential for an offshore oil spill occurring is low (less than 10 percent over 20–30 years (Corps, 1999)) and the potential for that oil intercepting whales or seals is even lower (about 1.2 percent (Corps, 1999)). In addition, there will be an oil spill response program in effect that will be as effective as possible in Arctic waters. Accordingly, and because of the seasonality of bowheads, NMFS has preliminarily determined that the

taking of marine mammals incidental to operations at the Northstar oil production facility will have no more than a negligible impact on them. Also, NMFS has preliminarily determined that there will not be an unmitigable adverse impact on subsistence uses of marine mammals.

ESA

On March 4, 1999, NMFS concluded consultation with the Corps on permitting the construction and operation at the Northstar site. The finding of that consultation was that construction and operation at Northstar is not likely to jeopardize the continued existence of the bowhead whale stock. No critical habitat has been designated for this species; therefore, none will be affected. Because issuance of a small take authorization to BPXA under section 101(a)(5) of the MMPA is a Federal action, NMFS has section 7 responsibilities for this action. Preliminarily, NMFS has determined that this rulemaking action is not different from that analyzed in 1999 in the Biological Opinion. Prior to issuing the final rule, if NMFS determines that there are no impacts on listed species different from the analysis in the 1999 Biological Opinion, NMFS will issue an Incidental Take Statement under section 7 of the ESA at the time it issues an LOA for this activity.

NEPA

On June 12, 1998 (63 FR 32207), the Environmental Protection Agency (EPA) noted the availability for public review and comment a Draft EIS prepared by the Corps under NEPA on Beaufort Sea oil and gas development at Northstar. Comments on that document were accepted by the Corps until August 31, 1998 (63 FR 43699, August 14, 1998). On February 5, 1999 (64 FR 5789), EPA noted the availability for public review and comment of a Final EIS prepared by the Corps under NEPA on Beaufort Sea oil and gas development at Northstar. Comments on that document were accepted by the Corps until March 8, 1999. Based upon a review of the Final EIS, the comments received on the Draft EIS and Final EIS, and the comments received during the previous rulemaking, on May 18, 2000, NMFS adopted the Corps Final EIS and determined that it is not necessary to prepare supplemental NEPA documentation (see 65 FR 34014, May 25, 2000).

Request for Information

NMFS requests interested persons to submit comments, information, and suggestions concerning BP's application

and proposed regulations on the taking of marine mammals incidental to construction and operation of an offshore oil and gas facility in the U.S. Beaufort Sea. The proposed regulations re-promulgate those formerly codified at §§ 216.200 through 216.210 (expired on May 25, 2005), but contain new effective dates in § 216.201; makes minor changes for clarity to § 216.204 (the word “possible” is removed and the word “practicable” is inserted in its place), § 216.207 (the first sentence of paragraph (d) is revised by removing the superfluous phrase “, in accordance with Administrative Procedure Act requirements,”) and § 216.210 (the first sentence of paragraph (a) is revised by removing the phrase “In addition to complying with the provisions in §§ 216.106 and 216.208,”); and modifies the monitoring and reporting requirements in § 216.206 as noted in this document's preamble.

Prior to submitting comments, NMFS recommends reviewers of this document read the responses to comments made previously (see 65 FR 34014, May 25, 2000; and 66 FR 65923, December 21, 2001), for the previous rulemaking and LOAs as NMFS does not intend to address these issues further without the submission of additional scientific information or policy considerations.

Classification

This action has been determined to be not significant for purposes of Executive Order 12866.

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 since it would have no effect, directly or indirectly, on small businesses. It may affect a small number of contractors providing services related to reporting the impact of the activity on marine mammals, some of whom may be small businesses, but the number involved would not be substantial. Further, since the monitoring and reporting requirements are what would lead to the need for their services, the economic impact on them would be beneficial. Because of this certification, a regulatory flexibility analysis is not required and none has been prepared.

Notwithstanding any other provision of law, no person is required to respond to nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act (PRA) unless that

collection of information displays a currently valid OMB control number. This proposed rule contains collection-of-information requirements subject to the provisions of the PRA. These requirements have been approved by OMB under control number 0648-0151, and include applications for LOAs, and reports.

The reporting burden for the approved collections-of-information is estimated to be approximately 80 hours for the annual applications for an LOA, a total of 80 hours each for the winter monitoring program reports and a total of 120-360 hours for the interim and final annual open-water reports (increasing complexity in the analysis of multi-year monitoring programs in the latter years of that program requires additional time to complete). These estimates include the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection-of-information. Send comments regarding these burden estimates, or any other aspect of this data collection, including suggestions for reducing the burden, to NMFS and OMB (see **ADDRESSES**).

List of Subjects in 50 CFR Part 216

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

Dated: July 19, 2005.

James W. Balsiger,

Deputy Assistant Administrator for Regulatory Programs, 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 TAKING AND IMPORTING OF MARINE MAMMALS

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

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

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

Subpart R—Taking of Marine Mammals Incidental to Construction and Operation of Offshore Oil and Gas Facilities in the U.S. Beaufort Sea

Sec.

- 216.200 Specified activity and specified geographical region.
- 216.201 Effective dates.
- 216.202 Permissible methods of taking.
- 216.203 Prohibitions.
- 216.204 Mitigation.
- 216.205 Measures to ensure availability of species for subsistence uses.

- 216.206 Requirements for monitoring and reporting.
- 216.207 Applications for Letters of Authorization.
- 216.208 Letters of Authorization.
- 216.209 Renewal of Letters of Authorization.
- 216.210 Modifications to Letters of Authorization.

Subpart R—Taking of Marine Mammals Incidental to Construction and Operation of Offshore Oil and Gas Facilities in the U.S. Beaufort Sea

§ 216.200 Specified activity and specified geographical region.

Regulations in this subpart apply only to the incidental taking of those marine mammal species specified in paragraph (b) of this section by U.S. citizens engaged in oil and gas development activities in areas within state and/or Federal waters in the U.S. Beaufort Sea specified in paragraph (a) of this section. The authorized activities as specified in a Letter of Authorization issued under §§ 216.106 and 216.208 include, but may not be limited to, site construction, including ice road and pipeline construction, vessel and helicopter activity; and oil production activities, including ice road construction, and vessel and helicopter activity, but excluding seismic operations.

(a)(1) Northstar Oil and Gas Development; and

(2) [Reserved]

(b) The incidental take by harassment, injury or mortality of marine mammals under the activity identified in this section is limited to the following species: bowhead whale (*Balaena mysticetus*), gray whale (*Eschrichtius robustus*), beluga whale (*Delphinapterus leucas*), ringed seal (*Phoca hispida*), spotted seal (*Phoca largha*) and bearded seal (*Erignathus barbatus*).

§ 216.201 Effective dates.

Regulations in this subpart are effective from September 1, 2005 through August 31, 2010.

§ 216.202 Permissible methods of taking.

(a) Under Letters of Authorization issued pursuant to §§ 216.106 and 216.208, the Holder of the Letter of Authorization may incidentally, but not intentionally, take marine mammals by harassment, injury, and mortality within the area described in § 216.200(a), provided the activity is in compliance with all terms, conditions, and requirements of these regulations and the appropriate Letter of Authorization.

(b) The activities identified in § 216.200 must be conducted in a manner that minimizes, to the greatest

extent practicable, any adverse impacts on marine mammals, their habitat, and on the availability of marine mammals for subsistence uses.

§ 216.203 Prohibitions.

Notwithstanding takings authorized by § 216.200 and by a Letter of Authorization issued under §§ 216.106 and 216.208, no person in connection with the activities described in § 216.200 shall:

(a) Take any marine mammal not specified in § 216.200(b);

(b) Take any marine mammal specified in § 216.200(b) other than by incidental, unintentional harassment, injury or mortality;

(c) Take a marine mammal specified in § 216.200(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 these regulations or a Letter of Authorization issued under § 216.106.

§ 216.204 Mitigation.

The activity identified in § 216.200(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 § 216.200, the mitigation measures contained in the Letter of Authorization issued under §§ 216.106 and 216.208 must be utilized.

§ 216.205 Measures to ensure availability of species for subsistence uses.

When applying for a Letter of Authorization pursuant to § 216.207, or a renewal of a Letter of Authorization pursuant to § 216.209, the applicant must submit a Plan of Cooperation that identifies what measures have been taken and/or will be taken to minimize any adverse effects on the availability of marine mammals for subsistence uses. A plan must include the following:

(a) A statement that the applicant has notified and met with the affected subsistence communities to discuss proposed activities and to resolve potential conflicts regarding timing and methods of operation;

(b) A description of what measures the applicant has taken and/or will take to ensure that oil development activities will not interfere with subsistence whaling or sealing;

(c) What plans the applicant has to continue to meet with the affected communities to notify the communities of any changes in operation.

§ 216.206 Requirements for monitoring and reporting.

(a) Holders of Letters of Authorization issued pursuant to §§ 216.106 and 216.208 for activities described in § 216.200 are required to cooperate with the National Marine Fisheries Service, and any other Federal, state or local agency monitoring 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, Alaska Region, National Marine Fisheries Service, or his/her designee, by letter or telephone, at least 2 weeks prior to initiating new activities potentially involving the taking of marine mammals.

(b) Holders of Letters of Authorization must designate qualified on-site individuals, approved in advance by the National Marine Fisheries Service, to conduct the mitigation, monitoring and reporting activities specified in the Letter of Authorization issued pursuant to § 216.106 and § 216.208.

(c) Holders of Letters of Authorization must conduct all monitoring and/or research required under the Letter of Authorization.

(d) Unless specified otherwise in the Letter of Authorization, the Holder of that Letter of Authorization must submit an annual report to the Director, Office of Protected Resources, National Marine Fisheries Service, no later than March 31 of the year following the conclusion of the previous open water monitoring season. This report must contain all information required by the Letter of Authorization.

(e) A final annual comprehensive report must be submitted within the time period specified in the governing Letter of Authorization.

(f) A final comprehensive report on all marine mammal monitoring and research conducted during the period of these regulations must be submitted to the Director, Office of Protected Resources, National Marine Fisheries Service at least 240 days prior to expiration of these regulations or 240 days after the expiration of these regulations if renewal of the regulations will not be requested.

§ 216.207 Applications for Letters of Authorization.

(a) To incidentally take bowhead whales and other marine mammals pursuant to these regulations, the U.S. citizen (see definition at § 216.103) conducting the activity identified in § 216.200, must apply for and obtain either an initial Letter of Authorization in accordance with §§ 216.106 and 216.208, or a renewal under § 216.209.

(b) The application for an initial Letter of Authorization must be submitted to the National Marine Fisheries Service at least 180 days before the activity is scheduled to begin.

(c) Applications for initial Letters of Authorization must include all information items identified in § 216.104(a).

(d) NMFS will review an application for an initial Letter of Authorization in accordance with § 216.104(b) and, if adequate and complete, will publish a notice of receipt of a request for incidental taking and a proposed amendment to § 216.200(a). In conjunction with amending § 216.200(a), the National Marine Fisheries Service will provide a minimum of 45 days for public comment on the application for an initial Letter of Authorization.

(e) Upon receipt of a complete application for an initial Letter of Authorization, and at its discretion, the National Marine Fisheries Service may submit the monitoring plan to members of a peer review panel for review and/or schedule a workshop to review the plan. Unless specified in the Letter of Authorization, the applicant must submit a final monitoring plan to the Assistant Administrator prior to the issuance of an initial Letter of Authorization.

§ 216.208 Letters of Authorization.

(a) A Letter of Authorization, unless suspended, revoked or not renewed, 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 § 216.209.

(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; and

(3) Requirements for monitoring and reporting, including any requirements for the independent peer-review of proposed monitoring plans.

(c) Issuance and renewal of each Letter of Authorization will be based on a determination that the number of marine mammals taken by the activity will be small, that the total number of marine mammals taken by the activity as a whole will have no more than a negligible impact on the species or stock of affected marine mammal(s), and will not have an unmitigable adverse impact on the availability of species or stocks

of marine mammals for taking for subsistence uses.

(d) Notice of issuance or denial of a Letter of Authorization will be published in the **Federal Register** within 30 days of a determination.

§ 216.209 Renewal of Letters of Authorization.

(a) A Letter of Authorization issued under § 216.106 and § 216.208 for the activity identified in § 216.200 will be renewed annually upon:

(1) Notification to the National Marine Fisheries Service that the activity described in the application submitted under

§ 216.207 will be undertaken and that there will not be a substantial modification to the described work, mitigation or monitoring undertaken during the upcoming season;

(2) Timely receipt of the monitoring reports required under § 216.205, and the Letter of Authorization issued under § 216.208, which have been reviewed by the National Marine Fisheries Service and determined to be acceptable, and the Plan of Cooperation required under § 216.205; and

(3) A determination by the National Marine Fisheries Service that the mitigation, monitoring and reporting measures required under § 216.204 and the Letter of Authorization issued under §§ 216.106 and 216.208, 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 216.208 indicates that a substantial modification to the described work, mitigation or monitoring undertaken during the upcoming season will occur, the National Marine Fisheries Service will provide the public a minimum 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 that indicates that the determinations made in this document are in need of reconsideration,

(2) The Plan of Cooperation, and

(3) The proposed monitoring plan.

(c) A notice of issuance or denial of a Renewal of a Letter of Authorization will be published in the **Federal Register** within 30 days of a determination.

§ 216.210 Modifications to 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 the National Marine Fisheries Service, issued pursuant to §§ 216.106 and 216.208 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 § 216.209, 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 § 216.200(b), a

Letter of Authorization issued pursuant to §§ 216.106 and 216.208 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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