

BOP systems must be pressure tested with water.

(1) *Low Pressure Tests.* All BOP system components must be successfully tested to a low pressure between 200 and 300 psi. Any initial pressure equal to or greater than 300 psi must be bled back to a pressure between 200 and 300 psi before starting the test. If the initial pressure exceeds 500 psi, you must bleed back to zero before starting the test.

(2) *High Pressure Tests.* All BOP system components must be successfully tested to the rated working pressure of the BOP equipment, or as otherwise approved by the District Manager. The annular-type BOP must be successfully tested at 70 percent of its rated working pressure or as otherwise approved by the District Manager.

(3) *Other Testing Requirements.* Variable bore pipe rams must be pressure tested against the largest and smallest sizes of tubulars in use (jointed pipe, seamless pipe) in the well.

\* \* \* \* \*

(d) You may conduct a stump test for the BOP system on location. A plan describing the stump test procedures must be included in your Form MMS-124, Application for Permit to Modify, and must be approved by the District Manager.

(e) You must test the coiled tubing connector to a low pressure of 200 to 300 psi, followed by a high pressure test to the rated working pressure of the connector or the expected surface pressure, whichever is less. You must successfully pressure test the dual check valves to the rated working pressure of the connector, the rated working pressure of the dual check valve, expected surface pressure, or the collapse pressure of the coiled tubing, whichever is less.

(f) You must record test pressures during BOP and coiled tubing tests on a pressure chart, or with a digital recorder, unless otherwise approved by the District Manager. The test interval for each BOP system component must be 5 minutes, except for coiled tubing operations, which must include a 10 minute high-pressure test for the coiled tubing string. Your representative at the facility must certify that the charts are correct.

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[FR Doc. 06-2101 Filed 3-6-06; 8:45 am]

BILLING CODE 4310-MR-P

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 216

[Docket No. 050630175-6039-02; I.D. 010305B]

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:** Final rule.

**SUMMARY:** NMFS, upon application from BP Exploration (Alaska), (BP), is issuing regulations to govern the unintentional takings of 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. Issuance of regulations, and Letters of Authorization (LOAs) under these regulations, governing the unintentional incidental takes of marine mammals in connection with particular activities is required by the Marine Mammal Protection Act (MMPA) when the Secretary of Commerce (Secretary), after notice and opportunity for comment, finds, as here, that such takes will have a negligible impact on the species and stocks of marine mammals and will not have an unmitigable adverse impact on the availability of them for subsistence uses. These regulations do not authorize BP's oil development activities as such authorization is not within the jurisdiction of the Secretary. Rather, NMFS' regulations together with Letters of Authorization (LOAs) authorize the unintentional incidental take of marine mammals in connection with this activity and prescribe methods of taking and other means of effecting the least practicable adverse impact on marine mammal species and their habitat, and on the availability of the species for subsistence uses.

**DATES:** Effective from April 6, 2006 through April 6, 2011.

**ADDRESSES:** 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/pr/permits/incidental.htm>

Documents cited in this final rule may also be viewed, by appointment, during regular business hours at this address.

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\\_Rostker@eap.omb.gov](mailto:David_Rostker@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 other means of effecting the least practicable adverse impact 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 last LOA expired on May 25, 2005, when the regulations expired.

On August 30, 2004, BP requested 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. Because the previous regulations have expired, this will require new regulations to be promulgated. 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/pr/permits/incidental.htm>

#### 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 either will be demobilized by barge or kept on the island for potential future well-workover or other drilling activities (BP, 2005). 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 on the 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 several organizations. NMFS responded to those comments on July 25, 2005 (70 FR 42420) in conjunction with issuance of proposed rulemaking on this action. During the 30-day public comment period on the proposed rule, NMFS received comments from BP, the Marine Mammal Commission (Commission), the Minerals Management Service (MMS), 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 one citizen. BP comments are not addressed in this section but are noted elsewhere in this document and referenced as BP (2005). The AEWC notes its appreciation for the work that BP has put into its application, that NMFS has put into the preparation of the draft 5-year regulations and looks forward to continuing its cooperative relationship with both BP and NMFS.

In that regard, NMFS notes that, in accordance with its regulations (50 CFR

216.107(a)(3)), it convenes a scientific peer-review meeting annually to discuss, in addition to other MMPA authorizations, the results of the Northstar monitoring program and suggested improvements to that program. The 2005 peer-review meeting was held on May 10–12, 2005 in Anchorage, AK and included discussion on the Alaska North Slope Borough's (NSB) Science Advisory Committee (SAC) review of the comprehensive report on monitoring conducted at Northstar under the previous regulations (Richardson and Williams [eds], 2004), and the current BP application and monitoring plan, as discussed later in this document.

#### MMPA Concerns

*Comment 1:* The AEWC requested clarification of NMFS using the term "Northstar Oil and Gas Development" in 50 CFR 216.200(a)(1). While the specified geographic region would appear to be "state and/or Federal waters of the Beaufort Sea," the phrase "specified in paragraph (a) of this section" would seem to indicate a localized area around Northstar.

*Response:* The regulations were designed to include all oil and gas development (but not oil exploration) activities within the U.S. Beaufort Sea. The "specified geographic region" designation required by section 101(a)(5)(A) of the MMPA is "state and/or Federal waters of the Beaufort Sea." The applicant that is taking marine mammals in this case is the Northstar Oil and Gas Development project within that region.

*Comment 2:* The Trustees state that the Secretary must consider all past, present, and future activities that may affect a marine mammal species or stock to determine whether proposed operations have a "negligible impact on such species and stock." The Trustees state that NMFS has not evaluated all activities that have occurred and may occur in the Beaufort Sea during the effective term of 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 (including seismic or other geological or geophysical surveys related to a potential "over-the-top" offshore pipeline route) that occurred during the fall bowhead whale migratory season have not been adequately assessed. In the future, seismic surveys may be proposed related to lands in upcoming lease sales in state and Federal offshore waters and

for additional pipeline routes. NMFS must assess the cumulative effects of these disturbances. Similarly, the AEWG states that NMFS must review cumulative effects in its review of Incidental Take applications if the Secretary is to continue to fulfill the statutory requirements of the MMPA.

*Response:* MMPA section 101(a)(5)(A) requires the Secretary to issue an incidental take authorization for a specified activity, provided the requisite findings (including negligible impact) are made. There is nothing in the plain language of the provision or in NMFS' implementing regulations that requires a cumulative effects analysis in connection with issuing an incidental take authorization. We also note the legislative history on this section of the MMPA makes no mention of cumulative effects analyses. To the extent required under the National Environmental Policy Act (NEPA), NMFS considers cumulative impacts when it prepares environmental analyses for marine mammal incidental take applications (see 40 CFR 1508.25(c) and 1508.7). However, while the MMPA does not require an analysis of the impacts from non-related activities, such as seismic, the potential for cumulative impacts by offshore oil development and seismic activity on the subsistence lifestyle of the North Slope residents remains a concern and is being addressed, as appropriate, under NEPA.

For most activities mentioned in the Trustees' comment, discussion was provided in the supporting Final Environmental Impact Statement (FEIS) (Corps, 1999) for Northstar. Where the Corps' FEIS did not address a certain activity and an additional NEPA analysis is warranted, NMFS prepares such documentation. For example, NMFS prepared an Environmental Assessment (EA) for additional seismic surveys in the Beaufort Sea (see 65 FR 21720, April 24, 2000); the National Science Foundation prepared and released for public comment an EA for scientific seismic activities in the Arctic Ocean (see 70 FR 47792, August 15, 2005 wherein NMFS issued a Finding of No Significant Impact); and MMS is currently preparing a Programmatic EA for multiple seismic surveys in the Beaufort and Chukchi seas in 2006. In compliance with the NEPA, these EAs all address cumulative impacts. For the "over-the-top" pipeline survey, that survey was conducted in 2001 under an Incidental Harassment Authorization (IHA) (see 66 FR 42515, August 13, 2001). An analysis conducted under NEPA by NMFS concluded that the activity was Categorically Excluded since it was the only seismic activity

being conducted in the Beaufort Sea that year, that noise-related impacts were adequately addressed in the 2000 EA, and the 2001 survey would have lower impacts on the environment than those previously addressed activities. Future over-the-top surveys remain speculative at this time and do not need to be addressed further. Although impacts from use of a hovercraft, a recent additional mode of transportation at Northstar, have not been specifically analyzed, it replaced other forms of transportation (that were analyzed) that have a greater potential impact on the marine environment.

#### *Marine Mammal Concerns*

*Comment 3:* The AEWG appreciates NMFS' clarification that the Alaskan Beaufort Sea is both migratory and feeding habitat. The AEWG would appreciate a formal acknowledgment, or similar statement, of this finding in the preamble to the final rule.

*Response:* As mentioned in response to comment (RTC) 3 in the proposed rule, 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 (east of the Northstar facility) 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 (west of the Northstar facility) during the fall hunt, at least 75 percent had been feeding prior to death. Wursig *et al.* (2002) (in Richardson and Thomson (2002)) found that bowheads in the eastern Beaufort Sea between Flaxman Island (146° W lat.) and Herschel (139° W lat.) Island that feeding was the most common activity in September/early October in most years studied (34 percent overall), followed by traveling (31 percent), socializing (18 percent) and other activities (4 percent). Overall however, the importance of the eastern Beaufort Sea area for late-summer feeding by bowheads varied considerably from year to year. The estimated proportion of time spent feeding during late summer and autumn ranged from 9 to 66 percent in different years (Lowry and Sheffield, 2002). Overall, Richardson and Thomson (2002) indicate that bowheads spent too little time in the eastern Beaufort study area for only a short period in late summer/fall, averaging about 4 days. That, they state, is too little time to allow the average bowhead to consume more than a small fraction

of its annual dietary intake. Assuming that the same results would be valid for the central Beaufort Sea where Northstar is located, NMFS concludes that bowhead whales will feed opportunistically during the fall migration but that no areas of concentrated feeding occur on a multi-year basis within or near the planned area of operations.

#### *Marine Mammal Impact Concerns*

*Comment 4:* The Trustees state that NMFS must evaluate the impacts of the "mystery" noise source associated with Northstar production.

*Response:* The unknown noise source that occurred only during 2003 was evaluated in Richardson and Williams [eds] (2004). That document is part of NMFS' Administrative Record on this action. Additional information can be found in RTC 8 in the proposed rule (70 FR 42520, July 25, 2005).

*Comment 5:* The Trustees state that MMS plans to renew its permitting of the Liberty offshore oil and gas facility. Accordingly, the cumulative effects of Northstar and Liberty facilities during the effective term of the potential regulations must be evaluated.

*Response:* BP is considering its 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. These two documents are part of NMFS' Administrative Record on this action.

*Comment 6:* The Trustees state that, in order for the Secretary to determine that the activity will have a negligible impact on marine mammal species and stocks, the Secretary must consider changes in the regulatory regime governing proposed operations. The Secretary must also use the best scientific information available. In that regard, the Trustees state that 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 spill.

*Response:* On December 21, 2001 (66 FR 65923), NMFS published a notice of issuance of an LOA to BP for oil production activities at Northstar. This document contained an evaluation of the potential for an oil spill to occur at Northstar and for that oil spill to affect bowhead whales and other marine mammals. Based on the information contained in the Northstar FEIS (Corps, 1999), NMFS concluded, at that time, that the potential for an oil spill to occur and affect marine mammals was low. As a result, NMFS determined that the findings of negligible impact on marine mammals from the Northstar facility that was made in the final rule (65 FR 34014, May 25, 2000) were appropriate. NMFS also determined that its finding of no unmitigable adverse impact on bowhead availability for subsistence hunting was appropriate. No information has been provided to, or found by, NMFS to indicate that the earlier decision was not correct and needed reevaluation. The fact that the State of Alaska modified its statutes to define oil discharge plans and relevant regulations is not relevant for the determinations needed to be made by NMFS for this action since well drilling at Northstar has been completed and BP has incorporated the best available technology at Northstar to virtually eliminate the potential for a significant oil spill to occur. This finding is supported by BP documenting and reporting activities at Northstar.

#### *Subsistence Concerns*

*Comment 7:* The AEWG notes that the Open Water Season Conflict Avoidance Agreement is entered among the operator, the AEWG, and local Whaling Captains' Associations. The North Slope Borough is not a party.

*Response:* NMFS has updated this document accordingly.

#### *Monitoring Concerns*

*Comment 8:* The Commission recommends that NMFS consult with the applicant, the MMS, and other industry and government entities, as appropriate, to develop a collaborative long-term Arctic monitoring program.

*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. That report has been reviewed by the SAC. Its findings are discussed later in this document.

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, MMS' 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.

*Comment 9:* The Commission is "concerned about the likely effects of climate change on sea ice in the Arctic and their corresponding effects, by themselves and in conjunction with activities such as the Northstar project, on ringed seals and polar bears and availability to Alaska Natives who depend upon them for subsistence." The Commission recommends that the potential effects of climate change be factored, as appropriate and practical, into long-term monitoring and mitigation programs.

*Response:* NMFS does not believe that the issuance of LOAs to BP for the incidental taking (by harassment) of marine mammals over the next 5 years is the appropriate venue for the study of long-term climate change. NMFS understands that studies on Arctic climate change impacts are being proposed by other federal science agencies.

It should be noted that Northstar and related monitoring includes the collection of data and information on ringed seal and bowhead whale distribution and abundance. Correlation of that information with information on yearly shore-fast ice distribution and

thickness provides some information on short-term climate effects.

*Comment 10:* The AEWG requests NMFS clarify that the Richardson and Williams [eds], 2004 monitoring study on which NMFS relies for its findings is under revision; therefore, NMFS should specify that its findings are provisional pending the results of the reanalysis. While NMFS notes the SAC report in the preamble to the proposed rule, NMFS does not address the SAC's analysis and recommendations. The final rule should recognize the SAC's recommendation for re-analysis and the Open-Water Meeting participants' agreement to those recommendations. Meeting participants also agreed that BP would reduce its survey effort for 2005 so that it could devote resources to the recommended re-analysis.

*Response:* The SAC reviewed Richardson and Williams [eds] (2004) between March 7 and 9, 2005. That review was released by the NSB in April, 2005 and is part of NMFS' Administrative Record for this action. The SAC's opinion, that the conclusions in the Richardson and Williams [eds] report are generally supported by the data presented, is influenced in large part by the general findings that: (1) the impacts from Northstar have likely been minimal, and (2) the production noise from the island is relatively low. The sound measurement data suggest that noise from the island is relatively low, and it appears that the loudest sources are vessel noise, which is apparently most responsible for the observed effects. Concerns were raised by the SAC mostly in regard to data analysis. BP is currently revising the 2004 monitoring report and will submit its final report shortly.

*Comment 11:* As the AEWG notes, the SAC report states that the assumption that bowhead call rates are not influenced by industrial sounds is not supported. Changes in calling behavior can be an indicator of disturbance, whether or not displacement occurs, and can provide important information on potential impacts to subsistence hunting. From the Northstar perspective, this point is especially important in the cumulative effects context.

*Response:* NMFS agrees. The SAC noted that calling behavior within the analysis area was not analyzed. The SAC recommended that calling behavior be analyzed as extensively as possible from the data that has been collected.

*Comment 12:* The AEWG notes that Northstar could contribute cumulatively to push the bowhead migration offshore. In that regard, the AEWG, based on the SAC's recommendations and

deliberations during recent Open Water (Peer-Review) Meetings, is under the impression that BP intends to evaluate noise and bowhead behavior to the east and west of Northstar. This information is essential for an understanding of the initiation and duration of a response. It is also essential to NMFS and other permitting agencies when considering the timing and location of future proposed activities in the vicinity of Northstar (as pointed out by the Corps in the Northstar EIS). The AEWEC noted that NMFS should note the need to analyze Northstar data for impacts on bowhead calling behavior.

*Response:* The SAC believes it is essential to continue monitoring noise 450 m north of Northstar each year during the autumn bowhead migration, using one or more DASARs (Directional Autonomous Seafloor Acoustic Recorder) or other device, providing data in near real-time, if possible. Regardless of the outcome of the reanalysis of previously collected data at Northstar, the SAC recommends that a full acoustical array data collection and analysis (as in 2001 - 2004) should be conducted once every 4 years, with limited monitoring in interim years. This full array may or may not provide the same spatio-temporal coverage as previous years but should be of comparable scope, if not greater. Alternative DASAR arrays might extend further north or cover more east-west range. This recommendation was accepted by the participants at the Beaufort Sea Open Water Peer Review Meeting that was held in Anchorage, AK on May 10–12, 2005.

*Comment 13:* The AEWEC objects to NMFS statements that, because the fall subsistence hunts have been successful in recent years, this demonstrates that there is no impact to the bowhead subsistence hunt from operations at Northstar. The AEWEC notes that there have been many years in which the fall bowhead whale migration has been subject to disturbance, in some cases, substantial. The whaling captains have still succeeded in taking whales because they have looked for ways to hunt in spite of adverse impacts, by using larger boats and GPS locators. This increases risks and dollar cost for the subsistence hunt.

*Response:* When promulgating incidental take regulations and issuing LOAs for the Northstar oil production facility, NMFS must determine that the activity is not having an unmitigable adverse impact on subsistence uses of marine mammals. Unmitigable adverse impact means an impact resulting from the specified activity: (1) that is likely to reduce the availability of the species

to a level insufficient for a harvest to meet subsistence needs by: (i) causing the marine mammals to abandon or avoid hunting areas; (ii) directly displacing subsistence users; or (iii) placing physical barriers between the marine mammals and the subsistence hunters; and (2) that cannot be sufficiently mitigated by other measures to increase the availability of marine mammals to allow subsistence needs to be met (50 CFR 216.103). For the Northstar facility, a Conflict Avoidance Agreement (CAA) has been negotiated between BP, the AEWEC, and the local Whaling Captains' Associations in past years. A signed CAA indicates to NMFS that, while there might be impacts to the subsistence hunt by Northstar, they do not rise to the level of having unmitigable adverse impacts.

*Comment 14:* The AEWEC noted that in the late summer and fall of 2003, tug and barge operations hauled equipment from Camp Lonely to West Dock for two months prior to the bowhead subsistence hunt at Barrow and then during the hunt into October. Bowheads harvested in early September near Cross Island by Nuiqsut hunters were taken relatively near the island within normal hunting distances. However, whales harvested one month later by Barrow hunters--west of both Northstar and the tug and barge operations--appeared to be farther offshore than normal. Based on the fall 2003 observations, it appears that the migration could have been deflected somewhere west of Cross Island and could have remained farther offshore than normal past Pt. Barrow. As a result, NMFS must take account of the possibility that seemingly "small" disturbances, when spread across the bowhead migration route, can lead to a deflection or other disturbance of the bowhead migration.

*Response:* This information is more relevant to the 2005 tug-and-barge IHA (see 70 FR 47809, August 15, 2005). This activity was not associated with the Northstar facility. For this same activity in 2005, the AEWEC signed a CAA with the activity sponsors that indicated this barging would not have an unmitigable adverse impact on the availability of bowheads for subsistence hunting. Implementation of a mitigation measure ceasing barging operations by August 15th and not resuming until later in the fall was determined by NMFS to be an appropriate mitigation measure. In regard to the 2003 barging activity, NMFS did not issue an IHA for this activity and, therefore, does not have any record of timing of the transits and potential impacts that could be assessed by marine mammal monitors. Whether this activity impacted the fall

Barrow hunt or whether other factors (such as storms) played a role is unclear. Without empirical data on distribution of whales during the bowhead hunt, and locations of the harvest, cause-and-effect relationships remain speculative.

#### *Mitigation Concerns*

*Comment 15:* The AEWEC recommends that NMFS clarify that the 180-dB monitoring will be required at any time of the year during which activities emitting these sound levels are proposed.

*Response:* If an activity at Northstar produces sound pressure levels (SPLs) at a level such that SPLs equal to or greater than 180 dB re 1 microPa (rms) extend beyond the island, BP is required to monitor the potential impacts from that activity during any time of the year. However, during the winter, when no cetaceans are in the vicinity of Northstar, monitoring would take place for any activity with an SPL extending beyond the island perimeter at a level of 190 dB or above, the Level A criterion for pinnipeds.

*Comment 16:* The AEWEC notes that even with a safety zone shut-down corresponding to 180 dB, bowhead whales will not be available to subsistence hunters at distances quite far beyond that noise level. Therefore, reference to mitigation of impacts on subsistence by monitoring a safety zone for preventing Level A harassment is inappropriate and misleading.

*Response:* NMFS agrees. BP designed, and NMFS approved, Northstar mitigation measures to: (1) prevent, or mitigate to the greatest extent practicable, hearing impairment or hearing injury to marine mammals; and (2) to ensure that Northstar activities are not having an unmitigable adverse impact on the subsistence harvests of marine mammals. The first goal is accomplished through monitoring safety zones to prevent injury, while the second is implemented through a prohibition on conducting, to the maximum extent practicable, activities that will result in SPLs exceeding 180 dB beyond the confines of the Northstar facility.

#### **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 the NMFS Stock Assessment Report. The Alaska document is available at: <http://>

[www.nmfs.noaa.gov/pr/readingrm/MMSARS/sar2003akfinal.pdf](http://www.nmfs.noaa.gov/pr/readingrm/MMSARS/sar2003akfinal.pdf) 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](http://www.nmfs.noaa.gov/prot_res/PR2/Small_Take/Smalltake_info.htm#applications).

In addition to these six species for which an 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 MMPA Incidental Take application by BP 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 RTCs 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 that would be exposed to recently spilled oil and 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 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 smaller 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 (BP, 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 Michael 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, and NMFS agrees, that 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 CAA/Plan of Cooperation (CAA/Plan) has been negotiated between BP, the AEWC, and the local Whaling Captains' Associations 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 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 will 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  $\geq 180$  or  $\geq 190$  dB re 1  $\mu$ Pa (rms) at locations where whales or seals respectively could be exposed, BP will monitor safety zones corresponding to those levels. Activities producing underwater sound levels  $\geq 180$  or  $\geq 190$  dB re 1  $\mu$ Pa (rms) would be temporarily shut down if whales and seals, respectively, occur within the relevant radii. The purposes of this mitigation measure is to minimize potentially harmful impacts to marine mammals and their habitat. In addition, BP will prohibit, to the maximum extent practicable, activities that will result in SPLs exceeding 180 dB beyond the confines of the Northstar facility during the bowhead subsistence hunt, in order to ensure the availability of marine mammals for subsistence purposes.

#### Monitoring

The monitoring required of 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 will monitor the bowhead migration in 2005 and subsequent years using two 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  $\geq 180$  or  $\geq 190$  dB re 1 microPa (rms) at locations where whales or seals could be exposed, BP will monitor safety zones defined by those levels. The monitoring 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.

#### SAC Review

In accordance with agreements made at NMFS' 2004 scientific peer-review meeting in Anchorage AK, that the

information and data analysis contained in Richardson and Williams [eds] (2004) should undergo a more in-depth scientific analysis and review, in March 2005, the SAC completed its review of this multi-year report on monitoring conducted at Northstar. They also reviewed this document in the context of the current BP application and monitoring plan. That review was released by the NSB in April, 2005 and was the subject of additional discussion at NMFS' 2005 peer-review meeting. It is also part of NMFS' Administrative Record for this action. The SAC concluded that while the effect of Northstar on the distribution of bowheads has not yet been determined, the overall monitoring was carried out well and the analysis approach was reasonable.

However, the SAC was unable to conclude that the effect of Northstar on the distribution of whales has been determined, to the extent that it could be, until some additional analyses have been carried out, using the data previously collected. There are no results that describe how the displacement in the analysis area may affect distribution outside the analysis area. If the analysis is improved so as to provide reasonable determination of displacement within the analysis area, the SAC concludes reasonable predictions of future displacement can be made in the analysis area given measurements of future sound propagation remain at or below current levels.

The SAC's opinion, that the conclusions in the cited BP monitoring report are generally supported by the data presented, is influenced in large part by the general findings that: (1) the impacts from Northstar have likely been minimal, and (2) the production noise from the island is relatively low. The sound measurement data suggest that noise from the island is relatively low, and it appears that the loudest sources are vessel noise, which is apparently most responsible for the observed effects. The SAC's concerns were mostly in regard to the data analysis, such as use of an Industrial Sound Index, that the quantile regression analysis be rerun using different predictors; that auto-correlation of bowhead call distances was not accounted for in fitting the quantile regression. The SAC also noted that aircraft noise was not adequately analyzed.

The SAC noted that a key supposition of the Northstar study was that there was a dose-response relationship underlying the whales' response to the noise from Northstar. Because of the very low levels of steady production

noise from Northstar during the study period, this supposition was not demonstrated. Effects on call behavior, a key focus of the study objectives, were not examined in any depth. The statistical analysis approach was generally well conceived, but some revisions and extensions are strongly suggested. It should also be determined if the statistical approach used is appropriate, if in fact, no dose-response relationship can be established.

On future monitoring, the SAC believes it is essential to continue monitoring noise 450 m (1476.4 ft) north of Northstar each year during the autumn bowhead migration, using one or more DASARs or other device, providing data in near real-time, if possible. Regardless of the outcome of the data reanalysis, the SAC recommends that a full acoustical array data collection and analysis (as in 2001 - 2004) should be conducted once every 4 years, with limited monitoring in interim years. This full array may or may not provide the same spatio-temporal coverage as previous years but should be of comparable scope, if not greater. (Alternative arrays might extend further north or cover more east-west range).

Finally, the SAC recommended placement of one nondirectional hydrophone (plus one or more redundant placements) at a position to be chosen as follows: (a) the location should be one used in 2001-4, and (b) the location should be the one that maximizes the proportion of the migration recorded. This is not a high scientific priority, but may provide useful information.

In addition to this regular schedule, the SAC recommends a full field study and subsequent analysis should be carried out immediately if analysis of the most recent available data indicate it to be necessary.

BP is currently revising the 2004 monitoring report and will submit its final report shortly.

#### Peer-Review Meeting

On May 10, 2005, the Beaufort Sea Open Water Peer-Review Meeting was held in Anchorage, AK to discuss several activities proposed for the Beaufort Sea during 2005. One of the actions was a review of the monitoring plan for the upcoming 5-year period. After presentations by BP and the SAC, the workshop participants agreed that BP should undertake a monitoring program as described in the previous section.

## Reporting

BP will submit annual monitoring reports, with the first report to cover the activities from January, 2006 through October 2006 (i.e., the end of the bowhead migration period), and subsequent reports to cover activities from November of one year through October of the next year. The 2006 report would be due on March 31, 2007. For subsequent years, the annual report (to cover monitoring during a 12-month November-October period) would be submitted on 31 March of the following year.

As detailed in the applicable LOA, an annual report 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 report will also provide details of ringed seal and bowhead whale monitoring, the monitoring of Northstar sound via either the nearshore DASAR (or the DASAR array when that larger-scale monitoring program takes place), 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 will also submit a single comprehensive report on the monitoring results from 2006 to mid-2010 no later than 240 days prior to expiration of the renewed regulations, i.e., by September 2010.

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.

## Determinations

NMFS has 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. Mitigation measures to avoid an unmitigable adverse impact on the availability of bowhead whales for subsistence needs are determined annually during consultations between BP and the bowhead subsistence users. When appropriate, these mitigation measures are incorporated into the annual LOA issued to BP by NMFS. Mitigation measures required by NMFS include a prohibition on new drilling into oil-bearing strata during either open water or spring-time broken ice conditions and limitations on aircraft flights during the bowhead migration. As a result of these mitigation measures and conclusion of an annual CAA, NMFS has determined that there will not be an unmitigable adverse impact on subsistence uses of bowhead whales.

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 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 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 determined that there will not be an unmitigable adverse impact on the availability of marine mammals for subsistence uses.

## 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. NMFS has determined that this rulemaking action will not have effects beyond what was analyzed in 1999 in the Biological Opinion.

#### NEPA

On February 5, 1999 (64 FR 5789), the Environmental Protection Agency 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). As no new scientific information has been obtained since publication of that Final EIS that would change the analyses in that Final EIS, additional NEPA analyses are not warranted.

#### 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 certified to the Chief Counsel for Advocacy of the Small Business Administration at the proposed rule stage, that this 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. The factual basis for this certification is found in the proposed rule. No comments were received on that certification or the economic impacts of this rule. As a result, no final regulatory flexibility analysis was 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 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: March 1, 2006.

**James W. Balsiger,**

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

■ For reasons set forth in the preamble, 50 CFR part 216 is 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 Level A harassment, Level B harassment 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 April 6, 2006 through April 6, 2011.

##### § 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 Level A and Level B harassment 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 contemplated in § 216.200 and authorized 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 Level A or Level B harassment 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 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 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 § 216.209.

- (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 and accepted by the National Marine Fisheries Service, and of 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.

[FR Doc. 06-2136 Filed 3-6-06; 8:45 am]

**BILLING CODE 3510-22-S**

**DEPARTMENT OF COMMERCE****National Oceanic and Atmospheric Administration****50 CFR Part 679**

[Docket No. 060216044-6044-01; I.D. 030106A]

**Fisheries of the Exclusive Economic Zone Off Alaska; Pacific Cod by Vessels Catching Pacific Cod for Processing by the Inshore Component in the Western Regulatory Area of the Gulf of Alaska**

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

**ACTION:** Temporary rule; closure.

**SUMMARY:** NMFS is prohibiting directed fishing for Pacific cod by vessels catching Pacific cod for processing by the inshore component in the Western Regulatory Area of the Gulf of Alaska (GOA). This action is necessary to prevent exceeding the 2006 total allowable catch (TAC) of Pacific cod apportioned to vessels catching Pacific cod for processing by the inshore component of the Western Regulatory Area of the GOA.

**DATES:** Effective 1200 hrs, Alaska local time (A.l.t.), March 2, 2006, until 1200 hrs, A.l.t., September 1, 2006.

**FOR FURTHER INFORMATION CONTACT:** Josh Keaton, 907-586-7228.

**SUPPLEMENTARY INFORMATION:** NMFS manages the groundfish fishery in the GOA exclusive economic zone according to the Fishery Management Plan for Groundfish of the Gulf of Alaska (FMP) prepared by the North Pacific Fishery Management Council

under authority of the Magnuson-Stevens Fishery Conservation and Management Act. Regulations governing fishing by U.S. vessels in accordance with the FMP appear at subpart H of 50 CFR part 600 and 50 CFR part 679.

The A season allocation of the 2006 TAC of Pacific cod apportioned to vessels catching Pacific cod for processing by the inshore component of the Western Regulatory Area of the GOA is 10,876 metric tons (mt) as established by the 2006 and 2007 harvest specifications for groundfish of the GOA, to be published in the **Federal Register** in early March of 2006.

In accordance with § 679.20(d)(1)(i), the Administrator, Alaska Region, NMFS (Regional Administrator), has determined that the 2006 TAC of Pacific cod apportioned to vessels catching Pacific cod for processing by the inshore component of the Western Regulatory Area of the GOA will soon be reached. Therefore, the Regional Administrator is establishing a directed fishing allowance of 10,776 mt, and is setting aside the remaining 100 mt as bycatch to support other anticipated groundfish fisheries. In accordance with § 679.20(d)(1)(iii), the Regional Administrator finds that this directed fishing allowance has been reached. Consequently, NMFS is prohibiting directed fishing for Pacific cod by vessels catching Pacific cod for processing by the inshore component in the Western Regulatory Area of the GOA.

After the effective date of this closure the maximum retainable amounts at § 679.20(e) and (f) apply at any time during a trip.

**Classification**

This action responds to the best available information recently obtained from the fishery. The Assistant Administrator for Fisheries, NOAA (AA), finds good cause to waive the requirement to provide prior notice and opportunity for public comment pursuant to the authority set forth at 5 U.S.C. 553(b)(B) as such requirement is impracticable and contrary to the public interest. This requirement is impracticable and contrary to the public interest as it would prevent NMFS from responding to the most recent fisheries data in a timely fashion and would delay the closure of Pacific cod apportioned to vessels catching Pacific cod for processing by the inshore component of the Western Regulatory Area of the GOA. NMFS was unable to publish a notice providing time for