

Calvary of New Orleans directed at the staff letter action dismissing the Petition for Rulemaking requesting the reservation of vacant FM Channel 295C3 at Franklin, Louisiana for noncommercial educational use. With this action, the proceeding is terminated.

**FOR FURTHER INFORMATION CONTACT:** Rolanda F. Smith, Media Bureau (202) 418-2180.

**SUPPLEMENTARY INFORMATION:** This is a synopsis of the Commission's *Memorandum Opinion and Order*, adopted June 21, 2006, and released June 23, 2006. The full text of this decision is available for inspection and copying during normal business hours in the FCC Reference Information Center at Portals II, CY-A257, 445 12th Street, SW., Washington, DC. The complete text of this decision may also be purchased from the Commission's copy contractor, Best Copy and Printing, Inc., 445 12th Street, SW., Room CY-B402, Washington, DC 20554, telephone 1-800-378-3160 or <http://www.BCPIWEB.com>. The Commission will not send a copy of this *Memorandum Opinion and Order* pursuant to the Congressional Review Act, *see* 5 U.S.C. 801(a)(1)(A), because the aforementioned petition for reconsideration was denied.

Federal Communications Commission.

**John A. Karousos,**

*Assistant Chief, Audio Division, Media Bureau.*

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 216

[Docket No. 060406098-6169-02; I.D. 020706D]

RIN 0648-AT46

#### Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to Coastal Commercial Fireworks Displays at Monterey Bay National Marine Sanctuary, CA

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

**ACTION:** Final rule.

**SUMMARY:** NMFS, upon application from the Monterey Bay National Marine Sanctuary (MBNMS or the Sanctuary), is

issuing regulations to govern the unintentional takings of small numbers of marine mammals incidental to authorizing professional fireworks displays within the Sanctuary in California waters. Issuance of regulations 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 their availability for subsistence uses. These regulations do not authorize MBNMS to permit fireworks displays. These regulations govern the issuance of "Letters of Authorization" (LOAs) for 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. In addition, NMFS, through this final rule, issues mitigation, reporting and monitoring requirements.

In the proposed rule, NMFS referenced and proposed the continued implementation of a document entitled "MBNMS Fireworks Guidelines" (Guidelines), which was cooperatively developed by the Sanctuary, NMFS, and the U.S. Fish and Wildlife Service and served as a basis for the mitigation measures described in the proposed rule. These Guidelines also included three specific mitigation measures that NMFS has now included in the final rule.

**DATES:** Effective from July 4, 2006 through July 3, 2011.

**ADDRESSES:** A copy of MBNMS' application which contains a list of the references used in this document may be obtained by writing to Steve Leathery, Division of Permits, Conservation, and Education, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910-3226 or by telephoning the contact listed here (**FOR FURTHER INFORMATION CONTACT**). The NMFS Administrative Record will be maintained at the above address.

**FOR FURTHER INFORMATION CONTACT:** Jolie Harrison, Office of Protected Resources, NMFS, (301) 713-2289, ext 166, or Monica DeAngelis, NMFS, Southwest Regional Office, (562) 980-3232.

**SUPPLEMENTARY INFORMATION:**

## Background

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the 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. The Secretary will allow an incidental take if certain findings are made and either regulations are issued or, if the taking is limited to harassment, notice of a proposed authorization is provided to the public for review.

Authorization for incidental takings may be granted if NMFS finds that the taking will have no more than a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses. The permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such taking shall be prescribed.

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"].

## Summary of Request

On May 10, 2002, NMFS received an application from the MBNMS requesting a 1-year Incidental Harassment Authorization (IHA) under section 101(a)(5)(D) and, subsequently, the issuance of regulations governing authorizations for a 5-year period under section 101(a)(5)(A) of the MMPA for the potential harassment of California sea lions (*Zalophus californianus*) and Pacific harbor seals (*Phoca vitulina*) incidental to coastal fireworks displays conducted at MBNMS under Authorizations issued by MBNMS to local governments, civic organizations, and commercial companies. On July 4, 2005, NMFS issued an IHA to MBNMS (70 FR 39235, July 7, 2005) and that IHA expires on July 3, 2006.

## Specified Activities

Since 1993, the MBNMS, a component of NOAA, has processed requests for the professional display of fireworks that affect the Sanctuary. The MBNMS has determined that debris fallout (spent pyrotechnic materials) from fireworks events may constitute a discharge into the Sanctuary and thus violate Sanctuary regulations, unless an Authorization is issued by the Sanctuary. Therefore, sponsors of fireworks displays conducted in the MBNMS are required to obtain Sanctuary Authorization prior to conducting such displays (see 15 CFR 922.132).

The MBNMS has issued 67 Authorizations for professional fireworks displays since 1993 (five in 2005) and 5 applications are currently being processed (as of March 2006). Four fireworks display applications have been directed to areas outside the Sanctuary. However, the MBNMS staff projects that as many as 20 coastal displays per year may be conducted in, or adjacent to, MBNMS boundaries in the future. The number of displays will be limited to no more than 20 events per year in four specific areas along 276 mi (444 km) of coastline. Fireworks displays will not exceed 30 minutes (with the exception of up to two displays per year, not to exceed 1 hour) in duration and will occur with an average frequency of less than or equal to once every two months within each of the four prescribed display areas.

Initially, the MBNMS believed that it could minimize potential light, sound, and debris impacts to the Sanctuary and marine mammals through Authorization conditions to limit the location, timing, and composition of professional fireworks events affecting the MBNMS. However, due to observations over the past several years and through consultation with NMFS' Southwest Region, it appears that some fireworks displays resulted in incidental take of marine mammals by Level B harassment. NMFS believes that the nature of the take will be the short-term flushing and evacuation of non-breeding haulout sites by California sea lions and Pacific harbor seals.

A detailed description of the types of effects used in the MBNMS fireworks displays and the areas within the Sanctuary where fireworks will be authorized under this final rule was included in the proposed rule (71 FR 25544, May 1, 2006) and may be found in the application or in MBNMS' 2001 Assessment of Pyrotechnic Displays and Impacts Within the MBNMS, which are

available at: <http://www.nmfs.noaa.gov/pr/permits/incidental.htm>.

## Marine Mammals Potentially Affected by the Activity

Twenty-six species of marine mammals may be found in the Monterey Bay area (see Table 1 in the MBNMS application), however, the only species likely to be harassed by the fireworks displays are the California sea lion and the Pacific harbor seal. Detailed information regarding the status of these species was provided in the proposed rule (71 FR 25544, May 1, 2006) and additional information can be found in Folkens' Guide to the Marine Mammals of the World (2002) and in the NMFS stock assessments on the NMFS website: [http://www.nmfs.noaa.gov/pr/PR2/Stock\\_Assessment\\_Program/individual\\_sars.html](http://www.nmfs.noaa.gov/pr/PR2/Stock_Assessment_Program/individual_sars.html).

## Potential Effects on Marine Mammals

The primary causes of disturbance of marine mammals from fireworks are sound effects and light flashes. A discussion of the potential effects to marine mammals from loud noises, including physical impairment, temporary or permanent hearing threshold shift, and behavioral disturbance was included in the proposed rule (71 FR 25544, May 1, 2006). Also included in the proposed rule was an analysis of non-acoustic effects from fireworks, including chemical residue, debris, and increased boat traffic. The potential effects discussed in the proposed rule are the same as those that would occur under the final rule.

MBNMS staff have been opportunistically monitoring sea lions at the City of Monterey's Fourth of July celebration for more than 10 years. Their general observations may be summarized as follows: sea lions begin leaving the breakwater as soon as the fireworks begin, clear completely off after an aerial salute or quick succession of loud effects, usually begin returning within a few hours of the end of the display, and are present on the breakwater at pre-firework numbers by the following morning.

NMFS anticipates that fireworks will result in short-term behavioral disturbance of pinnipeds in the form of temporary displacement from haulouts in the vicinity of the fireworks. NMFS does not expect these activities to result in the injury of any marine mammals.

## Comments and Responses

On May 1, 2006 (71 FR 25544), NMFS published a notice of proposed rulemaking on MBNMS's request to take marine mammals incidental to

authorizing fireworks in the Sanctuary and requested comments, information and suggestions concerning the request. During the 30-day public comment period, NMFS received one comment from the public.

*Comment:* The commenter both objected to the harassment of marine mammals in the MBNMS and opposed any fireworks displays within or near the Sanctuary. The commenter suggested that a sanctuary should be exactly that – a sanctuary, where animals can be safe and protected from human harassment, including the noise and chemicals involved with fireworks.

*Response:* The National Marine Sanctuaries Act requires NOAA to facilitate all public and private uses of marine sanctuary resources to the extent compatible with the primary objective of resource protection. National marine sanctuaries are designated for conservation purposes as well as cultural benefits. The Monterey Bay National Marine Sanctuary (MBNMS) spans one quarter of California's coastline and borders several active coastal communities, thus NOAA must regularly manage potential impacts of human activities within the Sanctuary. Marine fireworks displays have been a frequent component of California coastal community celebrations for decades prior to Sanctuary designation. NOAA has assessed the wildlife disturbance factors and chemical impacts of fireworks displays within the MBNMS for several years, and believes that such activities, if properly managed, can be conducted in a manner that will have no more than negligible short-term adverse effects upon the resources of the Sanctuary. NOAA continues to monitor this activity and will adjust current management strategies to safeguard marine resources and qualities should new information reveal that fireworks are harming the marine environment or living resources of the Sanctuary.

## Mitigation

NMFS has collaborated with the MBNMS and USFWS since 2001 to develop conservation measures that minimize fireworks impacts on protected species and the marine environment within the MBNMS by defining the locations, frequency, and conditions under which the MBNMS can authorize marine fireworks displays.

The mitigation measures can be grouped into five broad approaches for managing fireworks displays and will be implemented by the MBNMS:

(1) *Limit displays to certain seasons to safeguard reproductive periods:* This

regulation does not authorize fireworks events between March 1 and June 30 of any year, since this period is the primary reproductive season for many marine species.

(2) *Establish four conditional display areas:* Traditional fireworks display areas within the MBNMS are located adjacent to urban centers where wildlife has often acclimated to human disturbances, such as low-flying aircraft, emergency vehicles, unleashed pets, beach combing, recreational and commercial fishing, surfing, swimming, boating, and personal watercraft operations. This regulation only authorizes fireworks displays in four prescribed areas of the Sanctuary. The conditional display areas (described in detail in the proposed rule, 71 FR 25544, May 1, 2006) are located at Half Moon Bay, the Santa Cruz/Soquel area, the northeastern Monterey Peninsula, and Cambria (Santa Rosa Creek).

(3) *Create a per-annum limit on the number of displays allowed in each display area:* If properly managed, a limited number of fireworks displays conducted in areas already heavily impacted by human activity can occur with sufficient safeguards to prevent any long-term or chronic impacts upon local natural resources. This regulation authorizes no more than 20 displays along the entire Sanctuary coastline in order to prevent cumulative negative environmental effects from fireworks proliferation. Additionally, displays will be authorized at an average frequency equal to or less than 1 every 2 months in each conditional display area.

(4) *Retain Authorization requirements and general and special restrictions for each event:* Fireworks displays will not exceed 30 minutes with the exception of two longer displays per year that will not exceed 1 hour. The Sanctuary will continue to assess displays on a case-by-case basis, using specially developed terms and conditions to address concerns unique to fireworks displays (e.g., restricting the number of aerial "salute" effects used as well as requiring a "ramp-up", wherein "salutes" are not allowed in the first 5 minutes of the display; requiring the removal of plastic and aluminum labels and wrappings; and requiring post-show reporting and cleanup). Such terms and conditions have evolved over 12 years, as the Sanctuary has sought to improve its understanding of the potential impacts that fireworks displays have upon marine wildlife and the environment. The MBNMS will implement general and special restrictions unique to each fireworks event as necessary.

(5) *Institute a 5-year Authorization system for annual displays:* The Sanctuary intends to institute a 5-year Authorization system for fireworks displays that occur annually at fixed locations in a consistent manner, such as municipal Independence Day shows. Authorizations will include special conditions that mitigate negative impacts upon species and habitat from fireworks displays, such as the requirement for authorization holders to clean up debris following each event. Authorizations for fireworks displays will not be valid unless current LOAs have been issued by NMFS for unintentional harassment incidental to the displays.

The above conservation measures are designed to prevent an incremental proliferation of fireworks displays and disturbance throughout the Sanctuary and minimize area of impact by authorizing displays in primary traditional use areas. They also place multiple special conditions on the displays and allow fireworks displays only during seasons that avoid sensitive wildlife breeding cycles. These measures and MBNMS Authorization conditions assure that protected species and habitats are not jeopardized by fireworks activities. They have been well received by local fireworks sponsors who have pledged their cooperation in protecting Sanctuary resources.

#### Monitoring

The Sanctuary shall conduct a visual census of the Monterey Breakwater and Harbor Rocks on July 4–5, 2007, to update annual abundance, demographic response patterns, and departure and return rates for California sea lions and harbor seals relative to the July 4 fireworks display. Data will be collected by an observer aboard a kayak or small boat and from ground stations (where appropriate). The observer will use binoculars, counters, and data sheets to count animals. The pre and post fireworks census data will be analyzed to identify any significant temporal changes in abundance and distribution that might be attributed to impacts from the annual fireworks display. The data will also be added to past research statistics on the abundance and distribution of stocks at Monterey Harbor.

It should be noted, however, that annual population trends at any given pinniped haul-out site can be influenced by a myriad of environmental and biological factors, ranging from predation upon pups at distant breeding colonies to fluctuating prey stocks due to El Niño events. These

many variables make it difficult to measure and differentiate the potential impact of a single stimulus on long-term population trends.

The Sanctuary also proposes to conduct one-time acoustic monitoring at the 2007 City of Monterey Fourth of July fireworks display in conjunction with the behavioral monitoring described above. The Sanctuary has contracted SRS Technologies (SRS) to conduct the acoustic monitoring. SRS will use two independent systems to monitor the sound environment and to measure fireworks noise. A TEAC model RD-120T digital audio tape recorder (DAT) recorder, a high quality Bruel and Kjaer type 4193 microphone with a type UC0211 low frequency adapter, and type 2669 pre-amplifier will be used and are specifically tailored for recording the low frequency sound associated with impulsive noise sources like explosives. This system records the noise digitally to tape, which allows for detailed post-launch analysis of the frequency content, and the calculation of many other acoustic metrics. The DAT system will record for just over three hours (longer than the fireworks) and the waveforms will be analyzed using custom routines programmed in MatLab. SRS will also use the Larson-Davis model 820 Type 1 sound level meter (SLM) for the acoustic monitoring. The SLM does not make an actual recording of sound, but measures specific sound events that exceed a pre-set minimum sound level, background noise, and ambient noise and then computes acoustical metrics such as the A-weighted SEL, unweighted SEL, and A-weighted peak. Microphones for both pieces of equipment will be mounted approximately 1.2 m (3.9 ft) above ground on tripods and will be covered by extra large windballs to reduce wind noise. Noise systems will be calibrated in the field prior to recording.

In addition to the comprehensive behavioral and acoustic monitoring to be conducted only at the Monterey Breakwater in 2006, MBNMS will require its applicants to conduct a pre-event census of local marine mammal populations within the fireworks impact area of all the fireworks displays authorized. Each applicant will also be required to conduct post-event monitoring in the fireworks impact area to record injured or dead marine mammals, brown pelicans, and other wildlife.

#### Reporting

MBNMS must submit a draft annual monitoring report to NMFS within 60 days after the conclusion of each calendar year. MBNMS must submit a

final annual monitoring report to the NMFS within 30 days after receiving comments from NMFS on the draft report. If no comments are received from NMFS, the draft report will be considered to be the final report. In addition, the MBNMS will continue to incorporate updated census data from government and academic surveys into its analysis and will make its information available to other marine mammal researchers upon request. Lastly, MBNMS must submit a draft comprehensive monitoring report to NMFS 120 days prior to the expiration of the regulations if renewal is requested, or 120 days after the expiration of the regulations, if renewal is not requested. MBNMS must submit the final comprehensive monitoring report to NMFS within 30 days after receiving comments from NMFS on the draft comprehensive monitoring report. Again, if no comments are received from NMFS, the draft report will be considered to be the final report.

#### **Numbers of Marine Mammals Expected to be Harassed**

As discussed above, the two marine mammal species NMFS believes likely to be taken by Level B harassment incidental to fireworks displays authorized within the Sanctuary are the California sea lion (*Zalophus californianus*) and the Pacific harbor seal (*Phoca vitulina richardsi*), due to the temporary evacuation of usual and accustomed haul-out sites. Both of these species are protected under the MMPA, and neither is listed under the ESA. Numbers of animals that may be taken by Level B harassment are expected to vary due to factors such as tidal state, seasonality, shifting prey stocks, climatic phenomenon (such as El Nino events), and the number, timing, and location of future displays. The estimated take of sea lions and harbor seals was determined by using a synthesis of information, including data gathered by MBNMS biologists at the specific display sites, results of independent surveys conducted in the MBNMS, and population estimates from surveys covering larger geographic areas. More detailed information regarding the estimates of take of sea lions and harbor seals may be found in the application at: <http://www.nmfs.noaa.gov/pr/permits/incidental.htm>.

Stage structure of California sea lions within the Sanctuary varies by location, but generally, the majority are adult and sub-adult males. Weise (2000) reported on the stage structure of California sea lions at two historic fireworks display areas within the MBNMS, and

speculated that juveniles may haul out at the Monterey jetty in large numbers due to a need for a more protected haul-out location. He also reported that most animals on Ano Nuevo Island appeared to be adult males and suggested that the stage structure may vary between mainland haul-out sites and offshore islands and rocks. At all four designated display sites combined, twenty fireworks events per year could disturb an average total of 2,630 California sea lions, with the maximum being 6,170 animals out of a total estimated population of 237,000–244,000. These numbers are small relative to the population size (1.1–2.6 percent).

For harbor seals, an average of 302 and a maximum of 1,065 harbor seals out of a total estimated population of 27,836 could be disturbed within the Sanctuary as a result of twenty fireworks events per year at all four designated display sites combined. These numbers are small relative to the population size (1.1–3.8 percent). Nicholson (2000) studied the stage structure of harbor seals on the northeast Monterey Peninsula (an area with the largest single concentration of animals within the Sanctuary) for two years. For the final spring season of the study, survey numbers equate to a stage structure comprising 38 percent adult females, 15 percent adult males, 34 percent sub-adults, and 13 percent yearlings or juveniles.

With the incorporation of mitigation measures required by this final rule and subsequent LOAs, NMFS and the MBNMS believe that the proposed authorized coastal fireworks displays may result in Level B Harassment of pinnipeds hauled out in the area of the fireworks, with no associated injury resulting. NMFS believes that these activities will have a negligible impact on marine mammal species or stocks and their habitats.

#### **Possible Effects of Activities on Marine Mammal Habitat**

Impacts on marine mammal habitat are part of the consideration in making a finding of negligible impact on the species and stocks of marine mammals. Habitat includes, but is not necessarily limited to, rookeries, mating grounds, feeding areas, and areas of similar significance. The amount of debris and chemical residue resulting from fireworks displays authorized within the MBNMS is determined by the size and contents of the different fireworks, as well as the wind conditions, weather, and other local variations. Special conditions requiring Authorization holders to clean up the affected area after each fireworks display will be

required by the LOAs and Sanctuary Authorizations. No evidence of water quality deterioration has been found in relation to prior MBNMS fireworks displays and the Environmental Assessment for this action discusses the 1992 Walt Disney report, which found that environmental impacts from fireworks decomposition products typically will be negligible in locations that conduct fireworks displays infrequently. Because of the aforementioned mitigation measure and report, NMFS does not expect the debris and residue resulting from authorized fireworks displays to significantly impact marine mammal habitat in the MBNMS.

#### **Possible Effects of Activities on Subsistence Needs**

There are no subsistence uses for Pacific harbor seals in California waters, and thus, there are no anticipated effects on subsistence needs.

#### **ESA**

As mentioned earlier, the Steller sea lion and several species of federally listed cetaceans may be present at MBNMS at different times of the year and could potentially swim through the fireworks impact area during a display. In a 2001 consultation with MBNMS, the Southwest Region, NMFS, concluded that this action is not likely to adversely affect federally listed species under NMFS' jurisdiction. There is no designated critical habitat in the area. This action will not have effects beyond those analyzed in that consultation.

The USFWS is responsible for regulating the take of the southern sea otter, the brown pelican, and the western snowy plover. The MBNMS consulted with the USFWS pursuant to section 7 of the ESA regarding impacts to these species. The USFWS issued a Biological Opinion on June 22, 2005, which concluded that the authorization of fireworks displays, as proposed, is not likely to jeopardize the continued existence of endangered and threatened species within the Sanctuary or to destroy or adversely modify any listed critical habitat. The USFWS further found that MBNMS would be unlikely to take any southern sea otters, and therefore issued neither an incidental take statement under the ESA nor an IHA. The USFWS found that an incidental take of brown pelicans was possible and issued an incidental take statement containing terms and conditions to protect the species. The USFWS concluded that the authorization of fireworks events, as proposed, is not likely to jeopardize the

continued existence of the western snowy plover or destroy or adversely modify critical habitat of the species.

#### National Environmental Policy Act

NOAA prepared a Final Environmental Impact Statement and Master Plan for the MBNMS in June 1992; however, this document did not address the authorization of fireworks within the Sanctuary. In 2006, MBNMS and NMFS jointly prepared a Environmental Assessment (EA) on the Issuance of Regulations Authorizing Incidental Take of Marine Mammals and Issuance of National Marine Sanctuary Authorizations for Coastal Commercial Fireworks Displays within the Monterey Bay National Marine Sanctuary. An associated Finding of No Significant Impact was issued on June 20, 2006.

#### Determination

NMFS has determined that the fireworks displays, as described in this document and in the application for regulations and subsequent LOAs, will result in no more than Level B harassment of small numbers of California sea lions and harbor seals. The effects of coastal fireworks displays will be limited to short term and localized changes in behavior, including temporarily vacating haulouts to avoid the sight and sound of commercial fireworks. NMFS has also determined that any takes will have a negligible impact on the affected species and stocks. No take by injury and/or death is anticipated, and harassment takes will be at the lowest level practicable due to incorporation of the mitigation measures mentioned previously in this document. Additionally, the MBNMS fireworks displays will not have an unmitigable adverse impact on the availability of marine mammal stocks for subsistence use, as there are no subsistence uses for California sea lions or Pacific harbor seals in California waters.

#### Classification

The MMPA provides for a moratorium on the take of marine mammals, unless the take is permitted pursuant to certain enumerated exceptions. The Secretary of Commerce may, upon request, allow for the incidental, but not intentional, taking by harassment of small numbers of marine mammals of a species or population stock, if he determines that the harassment will have a negligible impact on such species or population stock and will not have an unmitigable adverse impact on the availability of such species or stock for subsistence uses pursuant to the MMPA. The National Marine Fisheries Service

currently authorizes the Monterey Bay National Marine Sanctuary to take, by level B harassment, certain pinnipeds during the course of fireworks displays held within the Sanctuary. The Sanctuary has been operating under 1-year authorizations for the past year. This final rule would streamline the annual authorization process for a 5-year period. The Sanctuary's current 1-year authorization is set to expire on July 3, 2006. If the final rule is not in effect by that time, the Sanctuary and fireworks display applicants would be prohibited from engaging in fireworks activities for the upcoming July 4 season because they would no longer have an authorization to lawfully take marine mammals and would be liable for marine mammal takes that occur incidental to those activities. Therefore, as this final rule and NMFS's subsequent LOA grant an exemption to the MMPA moratorium on take of marine mammals, the AA for Fisheries finds the 30-day delay in effectiveness does not apply.

The Office of Management and Budget has determined that this final rule is not significant for purposes of Executive Order 12866.

Pursuant to the Regulatory Flexibility Act, the Chief Counsel for Regulation of the Department of Commerce has certified to the Chief Counsel for Advocacy of the Small Business Administration that this rule, if adopted, would not have a significant economic impact on a substantial number of small entities. The Regulatory Flexibility Act requires Federal agencies to prepare an analysis of a rule's impact on small entities whenever the agency is required to publish a notice of proposed rulemaking. However, a Federal agency may certify, pursuant to 5 U.S.C. section 605(b), that the action will not have a significant economic impact on a substantial number of small entities. The MBNMS is the entity that will be affected by this rulemaking, not a small governmental jurisdiction, small organization or small business, as defined by the Regulatory Flexibility Act. Any requirements imposed by a Letter of Authorization issued pursuant to these regulations, and any monitoring or reporting requirements imposed by these regulations, will be applicable only to the MBNMS. The MBNMS is part of the National Oceanic and Atmospheric Administration, National Ocean Service, a Federal agency responsible for managing the national marine sanctuary program. Because this action, if adopted, would directly affect the MBNMS and not a small entity, NMFS concludes the action would not

result in a significant economic impact on a substantial number of small entities.

#### List of Subjects in 50 CFR Part 216

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

Dated: June 22, 2006.

**Jim 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 J is added to part 216 to read as follows:

#### Subpart J—Taking Marine Mammals Incidental to Coastal Commercial Fireworks Displays at Monterey Bay National Marine Sanctuary, California

Sec.

- 216.110 Specified activity and specified geographical region.
- 216.111 Effective dates.
- 216.112 Permissible methods of taking.
- 216.113 Prohibitions.
- 216.114 Mitigation.
- 216.115 Requirements for monitoring and reporting.
- 216.116 Applications for Letters of Authorization.
- 216.117 Letters of Authorization.
- 216.118 Renewal of Letters of Authorization.
- 216.119 Modifications to Letters of Authorization.

#### Subpart J—Taking Marine Mammals Incidental to Coastal Commercial Fireworks Displays at Monterey Bay National Marine Sanctuary, CA

##### § 216.110 Specified activity and specified geographical region.

(a) Regulations in this subpart apply only to the incidental taking of those marine mammal species specified in paragraph (b) of this section by the MBNMS.

(b) The incidental take, by Level B harassment only, of marine mammals under the activity identified in this section is limited to the following species: California sea lions (*Zalophus californianus*) and Pacific harbor seals (*Phoca vitulina*).

**§ 216.111 Effective dates.**

Regulations in this subpart are effective from July 4, 2006, through July 3, 2011.

**§ 216.112 Permissible methods of taking.**

(a) Under Letters of Authorization issued pursuant to §§ 216.106 and 216.117, the Holder of the Letter of Authorization (i.e. the Superintendent of MBNMS) may incidentally, but not intentionally, take marine mammals by Level B harassment only, within the area described in § 216.110(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 § 216.110(a) must be conducted in a manner that minimizes, to the greatest extent practicable, any adverse impacts on marine mammals and their habitat.

(c) The taking of marine mammals is authorized for the species listed in § 216.110(b) and is limited to the Level B Harassment of no more than 6,170 California sea lions and 1,065 harbor seals annually.

**§ 216.113 Prohibitions.**

Notwithstanding takings contemplated in § 216.110 and authorized by a Letter of Authorization issued under §§ 216.106 and 216.117, no person in connection with the activities described in § 216.110 may:

(a) Take any marine mammal not specified in § 216.110(b);

(b) Take any marine mammal specified in § 216.110(b) other than by incidental, unintentional Level B harassment;

(c) Take a marine mammal specified in § 216.110(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 and 216.117.

**§ 216.114 Mitigation.**

(a) The activity identified in § 216.110(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 § 216.110(a), all the mitigation measures contained in the Letter of Authorization issued under §§ 216.106 and 216.117 must be implemented, including but not limited to:

(1) Limiting the location of the authorized fireworks displays to the four specifically prescribed areas at Half

Moon Bay, the Santa Cruz/Soquel area, the northeastern Monterey Peninsula, and Cambria (Santa Rosa Creek);

(2) Limiting the total frequency of authorized fireworks displays to no more than 20 total displays per year and the average frequency to no more than one fireworks display every two months in each of the four conditional display areas;

(3) Limiting the duration of authorized individual fireworks displays to no longer than 30 minutes each, with the exception of two longer shows not to exceed 1 hour;

(4) Prohibiting fireworks displays at MBNMS between March 1 and June 30 of any year; and

(5) Implementing the following special conditions for fireworks when authorizing fireworks displays at the MBNMS:

(i) Delay of aerial "salute" effects until five minutes after the commencement of any fireworks display.

(ii) Removal of all plastic labels and wrappings from pyrotechnic devices prior to use.

(iii) Required recovery of all fireworks related debris from the launch site and affected beaches on the evening of the display and again on the morning after.

(b) The mitigation measures that the individuals conducting the fireworks are responsible for shall be included as a requirement in any Authorization the MBNMS issues to the individuals.

**§ 216.115 Requirements for monitoring and reporting.**

(a) The Holder of the Letter of Authorization issued pursuant to §§ 216.106 and 216.117 for activities described in § 216.110(a) is required to cooperate with the National Marine Fisheries Service (NMFS), and any other Federal, state or local agency monitoring the impacts of the activity on marine mammals. The Holder of the Letter of Authorization must notify the Director, Office of Protected Resources, National Marine Fisheries Service, or designee, by telephone (301-713-2289), within 48 hours if the authorized activity identified in § 216.110(a) is thought to have resulted in the mortality or injury of any marine mammals, or in any take of marine mammals not identified in § 216.110(b).

(b) The Holder of the Letter of Authorization must conduct all monitoring and/or research required under the Letter of Authorization including, but not limited to:

(1) A one-time comprehensive pinniped census at the City of Monterey Fourth of July Celebration in 2007;

(2) A one-time acoustic measurement of the Monterey Fourth of July Celebration in 2007;

(3) Counts of pinnipeds in the impact area prior to all displays at all locations; and

(4) Reporting to NMFS of all marine mammal injury or mortality encountered during debris cleanup the morning after every fireworks display authorized by the Sanctuary.

(c) Unless specified otherwise in the Letter of Authorization, the Holder of the Letter of Authorization must submit a draft annual monitoring report to the Director, Office of Protected Resources, NMFS, no later than 60 days after the conclusion of each calendar year. This report must contain:

(1) An estimate of the number of marine mammals disturbed by the authorized activities,

(2) Results of the monitoring required in § 216.115 (b) and (c) and any additional information required by the Letter of Authorization. A final annual monitoring report must be submitted to the NMFS within 30 days after receiving comments from NMFS on the draft report. If no comments are received from NMFS, the draft report will be considered to be the final annual monitoring report.

(d) A draft comprehensive monitoring 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, NMFS at least 120 days prior to expiration of these regulations or 120 days after the expiration of these regulations if renewal of the regulations will not be requested. A final comprehensive monitoring report must be submitted to the NMFS within 30 days after receiving comments from NMFS on the draft report. If no comments are received from NMFS, the draft report will be considered to be the final comprehensive monitoring report.

**§ 216.116 Applications for Letters of Authorization.**

To incidentally take marine mammals pursuant to these regulations, the U.S. citizen (as defined by § 216.103) conducting the activity identified in § 216.110(a) must apply for and obtain either an initial Letter of Authorization in accordance with §§ 216.117 or a renewal under § 216.118.

**§ 216.117 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, subject to

annual renewal pursuant to the conditions in § 216.118.

(b) Each Letter of Authorization will set forth:

(1) Permissible methods of incidental taking;

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

(3) Requirements for mitigation, monitoring and reporting.

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

(d) The U.S. Citizen, i.e., the MBNMS, operating under an LOA must clearly describe in any Sanctuary Authorizations issued to the individuals conducting fireworks displays, any requirements of the LOA for which the individuals conducting fireworks are responsible.

#### **§ 216.118 Renewal of Letters of Authorization.**

(a) A Letter of Authorization issued under § 216.106 and § 216.117 for the activity identified in § 216.110(a) will be renewed annually upon:

(1) Notification to NMFS that the activity described in the application submitted under § 216.116 will be undertaken and that there will not be a substantial modification to the described work, mitigation or monitoring undertaken during the upcoming 12 months;

(2) Timely receipt of the monitoring reports required under § 216.115(b), and the Letter of Authorization issued under § 216.117, which has been reviewed and accepted by NMFS; and

(3) A determination by the NMFS that the mitigation, monitoring and reporting measures required under § 216.114 and the Letter of Authorization issued under §§ 216.106 and 216.117, 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 216.118 indicates that a substantial modification to the described work, mitigation or monitoring undertaken during the upcoming season will occur, the NMFS will provide the public a period of 30 days for review and comment on the request. Review and comment on renewals of Letters of Authorization are restricted to:

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

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

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

#### **§ 216.119 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 NMFS, issued pursuant to §§ 216.106 and 216.117 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 § 216.118, 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 § 216.110(b), a Letter of Authorization issued pursuant to §§ 216.106 and 216.117 may be substantively modified without prior notification and an opportunity for public comment. Notification will be published in the **Federal Register** within 30 days subsequent to the action.

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## **DEPARTMENT OF COMMERCE**

### **National Oceanic and Atmospheric Administration**

#### **50 CFR Part 679**

**[Docket No. 060216045-6045-01; I.D. 071306C]**

#### **Fisheries of the Exclusive Economic Zone Off Alaska; Yellowfin Sole in the Bering Sea and Aleutian Islands Management Area**

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

**ACTION:** Modification of a closure.

**SUMMARY:** NMFS is reopening directed fishing for yellowfin sole in the Bering Sea and Aleutian Islands management

area (BSAI). This action is necessary to fully use the 2006 total allowable catch (TAC) of yellowfin sole in the BSAI.

**DATES:** Effective 1200 hrs, Alaska local time (A.l.t.), July 19, 2006, through 2400 hrs, A.l.t., December 31, 2006.

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

**SUPPLEMENTARY INFORMATION:** NMFS manages the groundfish fishery in the BSAI according to the Fishery Management Plan for Groundfish of the Bering Sea and Aleutian Islands Management Area (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.

NMFS closed the directed fishery for yellowfin sole in the BSAI under § 679.20(d)(1)(iii) on June 19, 2006 (71 FR 35835, June 22, 2006).

NMFS has determined that 1,502 metric tons of yellowfin sole remain in the directed fishing allowance in the BSAI. Therefore, in accordance with § 679.25(a)(1)(i), (a)(2)(i)(C) and (a)(2)(iii)(D), NMFS is terminating the previous closure and is reopening directed fishing for yellowfin sole by vessels using trawl gear in the BSAI.

#### **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 opening of yellowfin sole in the BSAI. NMFS was unable to publish a notice providing time for public comment because the most recent, relevant data only became available as of July 11, 2006.

The AA also finds good cause to waive the 30-day delay in the effective date of this action under 5 U.S.C. 553(d)(3). This finding is based upon the reasons provided above for waiver of prior notice and opportunity for public comment.

This action is required by § 679.25 and is exempt from review under Executive Order 12866.