

552.223–73 Preservation, Packaging, Packing, Marking and Labeling of Hazardous Materials (Hazmat) For Domestic Shipment

552.238–70 Identification of Electronic Office Equipment Providing Accessibility for the Handicapped

552.238–72 Identification of Products that have Environmental Attributes (End of clause)

5. Amend section 552.223–70 by revising the section heading, date of the clause, and clause to read as follows:

**552.223–70 Preservation, Packaging, Packing, Marking and Labeling of Hazardous Materials (HAZMAT) for Export Shipment.**

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**PRESERVATION, PACKAGING, PACKING, MARKING AND LABELING OF HAZARDOUS MATERIALS (HAZMAT) FOR EXPORT SHIPMENT (DATE)**

(a) Preservation, packaging, packing, marking and labeling of hazardous materials for shipment overseas (includes Hawaii, Puerto Rico and U.S. territories) shall comply with all requirements of the following:

(1) International Maritime Dangerous Goods (IMDG) Code as established by the International Maritime Organization.

(2) Items which qualify for U.S. Department of Transportation Consumer Commodity classifications shall be packaged in accordance with the IMDG Code and dual marked with both Consumer Commodity and IMDG marking and labeling.

(3) Occupational Safety and Health Administration (OSHA) Regulation 29 (CFR) part 1910.1200.

(4) Any preservation, packaging, packing, marking and labeling requirements contained elsewhere in this solicitation.

(b) Preservation, packaging, packing, marking and labeling of overseas hazardous materials via commercial aircraft shall comply with the International Air Transport Association, Dangerous Goods Regulation (IATA).

(c) Preservation, packaging, packing, marking and labeling of HAZMAT military aircraft shipments shall comply with the requirement of AFIM 24–204, Air Force Inter-Service Manual 24–204, Preparing Hazardous Materials For Military Air Shipments.

(d) The test certification data showing compliance with performance-oriented packaging requirements shall be made available to GSA contract administration/management representatives or regulatory inspectors upon request.

(End of clause)

6. Add section 552.223–73 to read as follows:

**552.223–73 Preservation, Packaging, Packing, Marking and Labeling of Hazardous Materials (Hazmat) For Domestic Shipment.**

As prescribed in 523.303(c), insert the following clause:

**PRESERVATION, PACKAGING, PACKING, MARKING AND LABELING**

**OF HAZARDOUS MATERIALS (HAZMAT) FOR DOMESTIC SHIPMENT (DATE)**

(a) Preservation, packaging, packing, marking and labeling of hazardous materials within the continental United States shall comply with all requirements of the following:

(1) U.S. Department of Transportation (DOT) Hazardous Material Regulation 49, CFR parts 171 through 180.

(2) Occupational Safety and Health Administration (OSHA) Regulation 29 CFR part 1910.1200.

(3) All preservation, packaging, packing, marking and labeling requirements contained elsewhere in this solicitation.

(b) Hazardous Material Packages designated for overseas destinations through the GSA Distribution Centers shall comply with the International Maritime Dangerous Goods (IMDG) Code.

(End of clause)

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**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 216**

[Docket No. 090218189–9251–01]

**RIN 0648–AX29**

**Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to Target and Missile Launch Activities at San Nicolas Island, CA**

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

**ACTION:** Proposed rule; request for comments.

**SUMMARY:** NMFS has received a request from the U.S. Navy (Navy) for authorization for the take of marine mammals, by harassment, incidental to vehicle launch operations from San Nicolas Island (SNI), California. By this document, NMFS is proposing regulations to govern that take. In order to issue a Letter of Authorization (LOA) and to issue final regulations governing the take, NMFS must determine that the taking will have a negligible impact on the species or stocks and will not have an unmitigable adverse impact on the availability of such species or stock for taking for subsistence uses. NMFS must also prescribe the means of effecting the least practicable adverse impact on such species or stock and their habitats.

**DATES:** Comments and information must be received no later than April 20, 2009.

**ADDRESSES:** You may submit comments, identified by 0648–AX29, by any one of the following methods:

- *Electronic Submissions:* Submit all electronic public comments via the Federal eRulemaking Portal: <http://www.regulations.gov>.

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

*Instructions:* All comments received are a part of the public record and will generally be posted to <http://www.regulations.gov> without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

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

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

**FOR FURTHER INFORMATION CONTACT:** Candace Nachman, Office of Protected Resources, NMFS, (301) 713–2289, ext. 156, or Monica DeAngelis, Southwest Regional Office, (562) 980–3232.

**SUPPLEMENTARY INFORMATION:**

**Background**

Sections 101(a)(5)(A) and (D) of the Marine Mammal Protection Act (MMPA; 16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (Secretary) to allow, upon request, the incidental, but not intentional taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations

are issued or, if the taking is limited to harassment, notice of a proposed authorization is provided to the public for review.

Authorization for incidental takings may be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for certain subsistence uses, and that the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such taking are set forth.

NMFS has defined "negligible impact" in 50 CFR 216.103 as:

an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.

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

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

### Summary of Request

On September 3, 2008, NMFS received an application from the Navy requesting authorization for the take of three species of marine mammals incidental to vehicle launches conducted by the Naval Air Warfare Center Weapons Division (NAWCWD) from the western part of SNI, which would impact pinnipeds hauled out on the island. Aircraft and helicopter flights between the Point Mugu airfield on the mainland, the airfield on SNI, and the target sites in the Point Mugu Sea Range will be a routine part of a planned launch operation. NMFS proposes regulations to govern these activities, to be effective from April, 2009, through April, 2014. These regulations, if implemented, would allow NMFS to issue annual LOAs to the Navy. These activities are classified as military readiness activities. The Navy states that these activities may have both acoustic and non-acoustic effects on pinnipeds. The Navy requests

authorization to take three pinniped species by Level B Harassment.

### Measurement of Airborne Sound Levels

The following section is provided to facilitate understanding of airborne and impulsive noise characteristics. In its application, the Navy references both pressure and energy measurements for sound levels. For pressure, the sound pressure level (SPL) is described in terms of decibels (dB) re  $\mu\text{Pa}$ , and for energy, the sound exposure level (SEL) is described in terms of dB re  $\mu\text{Pa}^2\cdot\text{s}$ . In other words, SEL is the squared instantaneous sound pressure over a specified time interval, where the sound pressure is averaged over 5 percent to 95 percent of the duration of the sound (in this case, one second).

Airborne noise measurements are usually expressed relative to a reference pressure of 20 Pa, which is 26 dB above the underwater sound pressure reference of 1  $\mu\text{Pa}$ . However, the conversion from air to water intensities is more involved than this and is beyond the scope of this document. NMFS recommends interested readers review NOAA's tutorial on this issue: <http://www.pmel.noaa.gov/vents/acoustics/tutorial/tutorial.html>. Also, airborne sounds are often expressed as broadband A-weighted (dBA) or C-weighted (dBC) sound levels. A-weighting refers to frequency-dependent weighting factors applied to sound in accordance with the sensitivity of the human ear to different frequencies. With A-weighting, sound energy at frequencies below 1 kHz and above 6 kHz are de-emphasized and approximates the human ear's response to sounds below 55 dB. C-weighting corresponds to the relative response to the human ear to sound levels above 85 dB. C-weight scaling is useful for analyses of sounds having predominantly low-frequency sounds, such as sonic booms.

### Description of the Specified Activity

The NAWCWD is the Navy's full-spectrum research, development, test, and evaluation center of excellence for weapons systems associated with air warfare, aircraft weapons integration, missiles and missile subsystems, and assigned airborne electronic warfare systems. NAWCWD is a multi-site organization that includes the Point Mugu Sea Range (Sea Range) and is responsible for environmental compliance for this Sea Range and SNI. NAWCWD plans to continue a launch program for missiles and targets from several launch sites on SNI. The purpose of these launches is to support test and training activities associated

with operations on the Sea Range. Figure 1 in the Navy's application provides a regional site map of the Range and SNI. A more detailed description of the island and proposed launch activities are provided later in the Point Mugu Sea Range Final EIS/OEIS (NAWCWD 2002) and in reports on previous vehicle launch monitoring periods (e.g., Holst *et al.*, 2005a, 2008). The Sea Range is used by the U.S. and allied military services to test and evaluate sea, land, and air weapon systems; to provide realistic training opportunities; and to maintain operational readiness of these forces. Some of the SNI launches are used for practicing defensive drills against the types of weapons simulated by these vehicles. Some launches may be conducted for the related purpose of testing new types of targets, to verify that they are suitable for use as operational targets.

The vehicles are launched from one of several fixed locations on the western end of SNI and fly generally westward through the Sea Range. Launches are expected to involve supersonic and subsonic vehicles. Some vehicles are launched from the Alpha Launch Complex located 190 m (623.4 ft) above sea level on the west-central part of SNI (see Figure 2 in the Navy's application). The Building 807 Launch Complex, used for most launches of smaller vehicles, as well as some large ones, is at the western end of SNI at approximately 11 m (36 ft) above sea level.

The Navy may launch as many as 200 vehicles from SNI over a 5-yr operations program, with up to 40 launches per year, but this number can vary depending on operational requirements. Launch timing will be determined by operational, meteorological, and logistical factors. Up to 10 launches per year may occur at night. Nighttime launches will only take place when required by the test objectives, e.g., when testing the Airborne Laser system (ABL). For this system, missiles must be launched at night when the laser is visible. Some launch events involve a single vehicle, while others involve the launch of multiple vehicles either in quick succession or at intervals of a few hours.

The Coyote Supersonic Sea-skimming Target (SSST) is anticipated to be the primary launch vehicle. However, the Navy states that it may become necessary to substitute similar vehicles or different equipment in some cases. While other vehicles may be launched in the future, the largest contemplated in the Navy's application and this **Federal Register** notice is 23,000 kg

(50,706 lbs). These larger vehicles would be launched up to 3 times per year. Details on the types of vehicles to be launched are provided in the following subsections.

#### *Coyote*

The Coyote, designated GQM-163A, is an expendable SSST powered by a ducted-rocket ramjet. It has replaced the Vandal, which was used as the primary vehicle during launches from 2001–2005. The Coyote is similar in size and performance to the Vandal.

The Coyote is capable of flying at low altitudes (4 m [13 ft] cruise altitude) and supersonic speeds (Mach 2.5) over a flight range of 83 km (51.6 mi). This vehicle is designed to provide a ground launched aerial target system to simulate a supersonic, sea-skimming Anti-Ship Cruise Missile threat. The SSST assembly consists of two primary subsystems: MK 70 solid propellant booster and the GQM-163A target vehicle. The solid-rocket booster is approximately 46 cm (18 in) in diameter and is of the type used to launch the Navy's "Standard" surface-to-air missile. The GQM-163A target vehicle is 5.5 m (18 ft) long and 36 cm (14 in) in diameter, exclusive of its air intakes. It consists of a solid-fuel Ducted Rocket (DR) ramjet subsystem, Control and Fairing Subassemblies, and the Front End Subsystem (FES). Included in the FES is an explosive destruct system to terminate flight if required.

The Coyote utilizes the Vandal launcher, currently installed at the Alpha Launch Complex on SNI with a Launcher Interface Kit. A modified AQM-37C Aerial Target Test Set is utilized for target checkout, mission programming, verification of the vehicle's ability to perform the entire mission, and homing updates while the vehicle is in flight.

During a typical launch, booster separation occurs approximately 5.5 s after launch and approximately 2.6 km (1.6 mi) downrange, at which time the vehicle has a speed of approximately Mach 2.35 (Orbital Sciences Corp; [www.orbital.com](http://www.orbital.com)). Following booster separation, the GQM-163A's DR ramjet ignites, the vehicle reaches its apogee, and then dives to 5 m (16.4 ft) altitude while maintaining a speed of Mach 2.5. During launches from SNI, the low-altitude phase occurs over water west of the island. The target performs pre-programmed maneuvers during the cruise and terminal phases, as dictated by the loaded mission profile, associated waypoints, and mission requirements. During the terminal phase, the Coyote settles down to an

altitude of 4 m (13 ft) and Mach 2.3 until DR burnout.

During 2003–2007, Coyotes were launched from SNI at azimuths of 270–300° and elevation angles of 14–22° (Holst *et al.*, 2005a, 2008). Coyotes produced flat-weighted SPLs (SPL-f) of 125–134 decibels reference 20  $\mu$ Pa (dB re 20  $\mu$ Pa) at distances of 0.8–1.7 km (0.5–1.1 mi) from the three-dimensional (3-D) closest point of approach (CPA) of the vehicle, and 82–93 dB at CPAs of 2.4–3.2 km (1.5–2 mi) (Holst *et al.*, 2005a, 2008). Flat-weighted SELs (SEL-f) ranged from 87 to 119 dB re 20  $\mu$ Pa<sup>2</sup>•s. SELs M-weighted for pinnipeds in air (Mpa) ranged from 60 to 114 dB re 20  $\mu$ Pa<sup>2</sup>•s, and peak pressures ranged from 100 to 144 dB re 20  $\mu$ Pa. The reference sound pressure (20  $\mu$ Pa) used here and throughout the document, is standard for airborne sounds.

#### *Advanced Gun System (AGS)*

At SNI, a howitzer has been used to launch test missiles, as the AGS is still being developed. The AGS is a gun designed for a new class of Destroyer; it will be used to launch both small missiles and ballistic shells. It is to be a fully integrated gun weapon system, including a 155-mm (2.2-in) gun, integrated control, an automated magazine, and a family of advanced guided and ballistic projectiles, propelling charges, and auxiliary equipment. The operational AGS will have a magazine capacity of 600 to 750 projectiles and associated propelling charges. The regular charge for the gun will replace the booster that is usually associated with a surface-launched missile. The gun gets the missile up to speed, at which point the missile's propulsion takes over. The missile itself is relatively quiet, as it does not have a booster and is fairly small. However, the gun blast is rather strong. Each missile launch is preceded by one (sometimes two) howitzer firings using a slug. The slug is used to verify that the gun barrel is properly seated and aligned.

During 2002–2006, AGS missiles and test slugs were launched from SNI at azimuths of 235–305° and elevation angles of 50–65° (Holst *et al.*, 2005a, 2008). AGS vehicles resulted in SPL-f values of 97–117 dB re 20  $\mu$ Pa, at nearshore sites located 0.75–2 km (0.5–1.2 mi) from the CPA and 125–127 dB at sites located less than 462 m (1,516 ft) from the CPA. SEL-f levels ranged from 90 to 113 dB re 20  $\mu$ Pa<sup>2</sup>•s, and Mpa-weighted SELs ranged from 64 to 103 dB re 20  $\mu$ Pa<sup>2</sup>•s. The peak pressure ranged from 107 to 135 dB re 20  $\mu$ Pa. AGS slugs produced SPL-f values of 100–133 dB re 20  $\mu$ Pa nearshore. SEL-f ranged from 88 to 120 dB re 20  $\mu$ Pa<sup>2</sup>•s,

Mpa-weighted SELs ranged from 62 to 103 dB re 20  $\mu$ Pa<sup>2</sup>•s, and the peak pressures were 104 to 139 dB re 20  $\mu$ Pa.

#### *Rolling Airframe Missile (RAM)*

The Navy/Raytheon RAM is a supersonic, lightweight, quick-reaction missile. This relatively small missile, designated RIM 116, uses the infrared seeker of the Stinger missile and the warhead, rocket motor, and fuse from the Sidewinder missile. It has a high-tech radio-to-infrared frequency guidance system. The RAM is a solid-propellant rocket 12.7 cm (5 in) in diameter and 2.8 m (9.2 ft) long. Its launch weight is 73.5 kg (162 lbs), and operational versions have warheads that weigh 11.4 kg (25 lbs).

At SNI, RAMs are launched from the Building 807 Launch Complex. During 2001–2007, RAMs were launched at an azimuth of 240° and elevation angles of 8–10° (Holst *et al.*, 2005a, 2008). The RAMs resulted in SPL-f up to 126 dB near the launcher and 99 dB at a nearshore site located 1.6 km (1 mi) from the CPA (Holst *et al.*, 2005a, 2008). SEL-f ranged from 84 to 97 dB re 20  $\mu$ Pa<sup>2</sup>•s, and  $\mu$ pa-weighted SELs were 76 to 96 dB re 20  $\mu$ Pa<sup>2</sup>•s. Peak pressure ranged from 104 to 117 dB re 20  $\mu$ Pa.

#### *Arrow Self-defense Missile*

The Arrow is a theater missile defense weapon or anti-ballistic missile. It was developed in Israel and is designed to intercept tactical ballistic missiles. It is approximately 6.8 m (22.3 ft) long and 60 cm (23.6 ft) in diameter. It travels at hypersonic speed and has high and low altitude interception capabilities. The Arrow consists of three main components: a phased array radar (known as Green Pine), a fire control center (called Citron Tree), and a high-altitude interceptor missile that contains a powerful fragmentation warhead. It also has two solid propellant stages, including a booster and sustainer. The array radar is capable of detecting incoming missiles at a distance of 500 km (310.7 mi). Once a missile is detected, the fire control center launches the interceptor missile. The interceptor travels at nine times the speed of sound and reaches an altitude of 50 km (31.7 mi) in less than 3 min.

The first test of an Arrow in the U.S. took place at SNI on July 29, 2004. At SNI, Arrows have been launched vertically, near the Alpha Launch Complex from the Miscellaneous Launch Pad (see Figure 2 in the Navy's application), at an azimuth of 285°, crossing the beach at an altitude of 2,134 m (7,001 ft). During these launches, Arrows produced SPL-f of 84–90 dB re 20  $\mu$ Pa at distances of 1.8–2.7

km (1.1–1.7 mi) from the CPA. SEL-f ranged from 96 to 102 dB re  $\mu\text{Pa}^2\bullet\text{s}$ , and Mpa-weighted SELs ranged from 92 to 99 dB re  $20 \mu\text{Pa}^2\bullet\text{s}$ . Peak pressures ranged from 100 to 107 dB re  $\mu\text{Pa}$  (Holst *et al.*, 2005a, 2008).

#### *Terrier-Black Brant*

The Terrier-Black Brant consists of the Terrier Mark 70 booster and the Black Brant rocket. The solid-rocket booster is approximately 46 cm (18 in) in diameter, 394 cm (155 in) long, and weighs 1,038 kg (2,288 lbs). The Black Brant has a diameter of 44 cm (17 in), is 533 cm (209.8 in) long, and weighs 1,265 kg (2,789 lbs). This vehicle reaches an altitude of 203 km (126 mi) and has a range of 264 km (164 mi). Terrier burnout occurs after 6.2 s at an altitude of 3 km (1.9 mi), and Black Brant burnout occurs after 44.5 s at an altitude of 37.7 km (23.4 mi). On SNI, this target will typically be launched vertically from the Building 807 Launch Complex. The Terrier-Black Brant will be launched at night to test the ABL and may be used to support other testing after its initial use for ABL.

#### *Terrier-Lynx*

The Terrier-Lynx is a two-stage unguided, fin-stabilized rocket. The first stage consists of the Terrier Mark 70 booster, and the second stage is the Lynx rocket motor. The Lynx is 36 cm (14 in) in diameter and 279 cm (109.8 in) long. This vehicle reaches an altitude of 84 km (52.2 mi) and has a range of 99 km (61.5 mi). Terrier burnout occurs after 6.2 s at an altitude of 2.3 km (1.4 mi), and Lynx burnout occurs after 58.5 s at 43.5 km (27 mi). On SNI, this target will typically be launched vertically from the Building 807 Launch Complex using the 50k (approximately 23,000 kg or 50,000 lbs) launcher. Terrier-Lynx targets will be launched at night to test the ABL. Both the Terrier-Lynx and Terrier-Black Brant will use the same Terrier Mk 70 booster as the Coyote, so launch sound levels should be similar to those from that vehicle.

#### *Other Vehicle Launches*

The Navy may also launch other vehicles to simulate various types of threat missiles and aircraft, and to test the ABL. For example, on August 23, 2002, a Tactical Tomahawk was launched from Building 807 Launch Complex, and on September 20, 2001, a Terrier-Orion was launched from the Alpha Launch Complex. The Tomahawk produced an SPL-f of 93 dB re  $20 \mu\text{Pa}$ , an SEL-f of 107 dB re  $20 \text{Pa}^2\bullet\text{s}$ , and an Mpa-weighted SEL of 105 dB re  $20 \mu\text{Pa}^2\bullet\text{s}$  at a distance of 539 m (1,768.4

ft) from the CPA; the peak pressure was 111 dB re  $20 \mu\text{Pa}$ . The Terrier-Orion resulted in an SPL-f of 91 dB re  $20 \mu\text{Pa}$ , an SEL-f of 96 dB re  $20 \mu\text{Pa}^2\bullet\text{s}$ , and an Mpa-weighted SEL of 92 dB re  $20 \mu\text{Pa}^2\bullet\text{s}$  at a distance of 2.4 km (1.5 mi) from the CPA; the peak pressure was 104 dB re  $20 \mu\text{Pa}$ . A Falcon was launched from the Alpha Launch Complex on April 6, 2006; it produced an SPL-f of 84 dB re  $20 \mu\text{Pa}$ , an SEL-f of 88 dB re  $20 \mu\text{Pa}$ , and an Mpa-weighted SEL of 82 dB re  $20 \mu\text{Pa}$  at a beach located north of the launch azimuth. Near the launcher, the SPL-f was 128 dB re  $20 \mu\text{Pa}$ , SEL-f was 126 dB re  $20 \mu\text{Pa}$ , and Mpa-weighted SEL was 125 dB re  $20 \mu\text{Pa}$ .

Vehicles of the BQM-34 or BQM-74 type could also be launched. These are small, unmanned aircraft that are launched using jet-assisted take-off (JATO) rocket bottles; they then continue offshore powered by small turbojet engines. The larger of these, the BQM-34, is 7 m (23 ft) long and has a mass of 1,134 kg (2,500 lbs) plus the JATO bottle. The smaller BQM-74 is up to 420 cm (165.4 in) long and has a mass of 250 kg (551 lbs) plus the solid propellant JATO bottles. Burgess and Greene (1998) reported that A weighted SPLs (SPL-A) ranged from 92 dBA re  $20 \text{Pa}$  at a CPA of 370 m to 145 dB at 15 m (49.2 ft) for a launch that occurred on November 18, 1997.

If launches of other vehicle types occur, they would be included within the total of 40 launches anticipated per year. It is possible that launch trajectories could include a wider range of angles than shown on Figure 2 in the Navy's application.

#### *General Launch Operations*

Aircraft and helicopter flights between the Point Mugu airfield on the mainland, the airfield on SNI, and the target sites in the Sea Range will be a routine part of a planned launch operation. These flights generally do not pass at low level over the beaches where pinnipeds are expected to be hauled out.

Movements of personnel are restricted near the launch sites at least several hours prior to a launch for safety reasons. No personnel are allowed on the western end of SNI during launches. Movements of personnel or vehicles near the island's beaches are also restricted at other times of the year for purposes of environmental protection and preservation of cultural resource sites.

#### **Description of Habitat and Marine Mammals Affected by the Activity**

A detailed description of the Channel Islands/southern California Bight

ecosystem and its associated marine mammals can be found in several documents (Le Boeuf and Brownell, 1980; Bonnell *et al.*, 1981; Lawson *et al.*, 1980; Stewart, 1985; Stewart and Yochem, 2000; Sydeman and Allen, 1999) and is not repeated here.

Many of the beaches in the Channel Islands provide resting, molting or breeding places for several species of pinnipeds including: northern elephant seals (*Mirounga angustirostris*), harbor seals (*Phoca vitulina*), California sea lions (*Zalophus californianus*), northern fur seals (*Callorhinus ursinus*), Guadalupe fur seals (*Arctocephalus townsendi*), and Steller sea lions (*Eumetopias jubatus*). On SNI, three of these species, northern elephant seals, harbor seals, and California sea lions, can be expected to occur on land in the area of the proposed activity either regularly or in large numbers during certain times of the year.

Northern fur seals, Guadalupe fur seals, and Steller sea lions are far less common on SNI. The northern fur seal is occasionally sighted on SNI in small numbers (Stewart and Yochem, 2000); a single female with a pup was sighted on the island in July 2007 (NAWCWD, 2008). It is also possible that individual Guadalupe fur seals may be sighted on the beaches. The Guadalupe fur seal is an occasional visitor to the Channel Islands, but breeds mainly on Guadalupe Island, Mexico, which is approximately 463 km (288 mi) south of the Sea Range. The last sighting was of a lone individual seen ashore in the summer of 2007 (NAWCWD, 2008). The Steller sea lion was once abundant in these waters, but numbers have declined since 1938. No adult Steller sea lions have been sighted on land in the Channel Islands since 1983 (Stewart *et al.*, 1993c in NMFS 2008). Thus, it is very unlikely that Steller sea lions will be seen on or near SNI beaches.

Additional information on the biology, distribution, and abundance of the marine mammal species likely to be affected by the launch activities on SNI can be found in the Navy's application (see ADDRESSES) and the NMFS Stock Assessment Reports, which can be found at: <http://www.nmfs.noaa.gov/pr/pdfs/sars/po2007.pdf>. Please refer to those documents for information on those species.

#### **Comments and Responses**

On September 16, 2008, NMFS published a notice of receipt of application for an LOA in the **Federal Register** (73 FR 53408) and requested comments and information from the public for 30 days. NMFS received comments from the Marine Mammal

Commission (Commission). The Commission supports NMFS' decision to publish proposed regulations for the specified activities provided that appropriate and effective mitigation and monitoring activities are incorporated into the regulations. NMFS has included mitigation and monitoring measures into this proposed rule and has preliminarily determined that these measures will ensure the least practicable adverse impact on the species or stocks and their habitats.

#### Potential Effects of Specified Activities on Marine Mammals

As outlined in previous NMFS documents, the effects of noise on marine mammals are highly variable, and can be categorized as follows (based on Richardson *et al.*, 1995):

(1) The noise may be too weak to be heard at the location of the animal (i.e., lower than the prevailing ambient noise level, the hearing threshold of the animal at relevant frequencies, or both);

(2) The noise may be audible but not strong enough to elicit any overt behavioral response;

(3) The noise may elicit reactions of variable conspicuousness and variable relevance to the well being of the marine mammal; these can range from temporary alert responses to active avoidance reactions, such as stampedes into the sea from terrestrial haul-out sites;

(4) Upon repeated exposure, a marine mammal may exhibit diminishing responsiveness (habituation), or disturbance effects may persist; the latter is most likely with sounds that are highly variable in characteristics, infrequent and unpredictable in occurrence (as are vehicle launches), and associated with situations that a marine mammal perceives as a threat;

(5) Any anthropogenic noise that is strong enough to be heard has the potential to reduce (mask) the ability of a marine mammal to hear natural sounds at similar frequencies, including calls from conspecifics, and underwater environmental sounds such as surf noise;

(6) If mammals remain in an area because it is important for feeding, breeding, or some other biologically important purpose even though there is chronic exposure to noise, it is possible that there could be noise-induced physiological stress; this might in turn have negative effects on the well-being or reproduction of the animals involved; and

(7) Very strong sounds have the potential to cause temporary or permanent reduction in hearing sensitivity. In terrestrial mammals, and

presumably marine mammals, received sound levels must far exceed the animal's hearing threshold for there to be any temporary threshold shift (TTS) in its hearing ability. For transient sounds, the sound level necessary to cause TTS is inversely related to the duration of the sound. Received sound levels must be even higher for there to be risk of permanent hearing impairment.

Potential impacts of the planned vehicle launch operations at SNI on marine mammals involve both acoustic and non-acoustic effects. Acoustic effects relate to sound produced by the engines of all launch vehicles, and, in some cases, their booster rockets. Potential non-acoustic effects could result from the physical presence of personnel during placement of video and acoustical monitoring equipment. However, careful deployment of monitoring equipment is not expected to result in any disturbance to pinnipeds hauled out nearby. Any visual disturbance caused by passage of a vehicle overhead is likely to be minor and brief as the launch vehicles are relatively small and move at great speed.

#### Behavioral Reactions of Pinnipeds to Vehicle Launches

Noises with sudden onset or high amplitude relative to the ambient noise level may elicit a behavioral response from pinnipeds resting on shore. Some pinnipeds tolerate high sound levels without reacting strongly, whereas others may react strongly when sound levels are lower. Available literature describing behavioral responses of pinnipeds to the types of sound recorded near haul-out sites on SNI indicates variability in the responses (see Figure 25 in the Navy's application). Responses can range from momentary startle reactions to animals fleeing into the water or otherwise away from their resting sites (i.e., stampede). Studies of pinnipeds during vehicle launch events have demonstrated that different pinniped species, and even different individuals in the same haul-out group, can exhibit a range of response from alert to stampede. An acoustic stimulus with sudden onset (such as a sonic boom) may be analogous to a looming visual stimulus (Hayes and Saif, 1967), which can be especially effective in eliciting flight or other responses (Berrens *et al.*, 1988). Vehicle launches are unlike many other forms of disturbance because of their sudden sound onsets, high peak levels in some cases, and short durations (Cummings, 1993). Strong launch sounds are typically detectable near the

beaches at western SNI for no more than a few seconds per launch (Holst *et al.*, 2005a, 2008).

Holst *et al.* (2005a, 2008) summarize the systematic monitoring results from SNI from mid-2001 through 2007. In particular, northern elephant seals seem very tolerant of acoustic disturbances (Stewart, 1981b; Holst *et al.*, 2008). In contrast, harbor seals are more easily disturbed. Based on SNI launch monitoring results from 2001 to 2007, most pinnipeds, especially northern elephant seals, would be expected to exhibit no more than short-term alert or startle responses (Holst *et al.*, 2005a, 2008). Any localized displacement would be of short duration; although some harbor seals may leave their haul-out site until the following low tide. However, Holst and Lawson (2002) noted that numbers occupying haul-out sites on the next day were similar to pre-launch numbers.

The most common type of reaction to vehicle launches at SNI is expected to be a momentary "alert" response. Previous observations indicate that elephant seals, in particular, will rarely if ever show more than a momentary alert reaction (Stewart, 1981b; Stewart *et al.*, 1994b; Holst *et al.*, 2005a, b; 2008) even when exposed to noise levels or types that caused nearby harbor seals and California sea lions to flee the haul-out sites.

Video recordings of pinnipeds around the periphery of western SNI during launches on SNI in 2001-2007 have shown that some pinnipeds react to a nearby launch by moving into the water or along the shoreline (Holst *et al.*, 2005a, b; 2008). Pinniped behavioral responses to launch sounds were usually brief and of low magnitude, especially for northern elephant seals. California sea lions (especially pups and juveniles) exhibited more reaction than elephant seals. Harbor seals were the most responsive of the three species.

Northern elephant seals exhibited little reaction to launch sounds (Holst *et al.*, 2005a, b; 2008). Most individuals merely raised their heads briefly upon hearing the launch sounds and then quickly returned to their previous activity pattern (usually sleeping). During some launches, a small proportion of northern elephant seals moved a short distance on the beach, away from their resting site, but settled within minutes.

Responses of California sea lions to the launches varied by individual and age group (Holst *et al.*, 2005a, b; 2008). Some exhibited brief startle responses and increased vigilance for a short period after each launch. Others, particularly pups that were previously

playing in groups along the margin of the haul-outs, appeared to react more vigorously. A greater proportion of hauled-out sea lions typically responded and/or entered the water when launch sounds were louder (Holst *et al.*, 2005a, b; 2008). Adult sea lions already hauled out would mill about on the beach for a short period before settling, whereas those in the shallow water near the beach did not come ashore like the aforementioned pups.

During the majority of launches at SNI, most harbor seals left their haul-out sites on rocky ledges to enter the water and did not return during the duration of the video-recording period (which sometimes extended up to several hours after the launch ended) (Holst *et al.*, 2005a, b; 2008). During monitoring the day following a launch, harbor seals were usually hauled out again at these sites (Holst and Lawson, 2002).

The type of vehicle being launched is also important in determining the nature and extent of pinniped reactions to launch sounds. Holst *et al.* (2008) showed that significantly more California sea lions responded during Coyote launches than during other vehicle launches. AGS launches caused the fewest reactions. Elephant seals showed significantly less reaction during launches involving vehicles other than Vandals (Holst *et al.*, 2008). The BQM-34 and especially the BQM-74 subsonic drone vehicles that may be launched from SNI are smaller and less noisy than Coyotes. Launches of BQM-34 drones from Point Mugu have not normally resulted in harbor seals leaving their haul out area at the mouth of Mugu Lagoon approximately 3.2 km (2 mi) to the side of the launch track (Lawson *et al.*, 1998).

In addition to noise, the night launches will also emit light. Haul-out beaches near Building 807 Launch Complex in particular may be affected by light during ABL launches. No additional responses to the light, above and beyond those that are elicited by the launch sounds are anticipated. Continuation of the proposed launch monitoring program (see the "Monitoring" section later in this document) will enable further documentation of pinniped responses to various launch vehicles with different acoustic characteristics and to nighttime launches.

Since the launches are relatively infrequent, and of such brief duration, it is unlikely that pinnipeds near the launch sites will become habituated to the sounds. Additionally, the infrequent launches (up to 40 per year, of which some will be of small vehicles) will cause masking for no more than a very

small fraction of the time during any single day (i.e., usually less than 2 s and rarely more than 5 s during a single launch). NMFs believes that these occasional brief episodes of masking will have minimal effects on the abilities of pinnipeds to hear one another or to detect natural environmental sounds that may be relevant to the animals.

It is possible that launch-induced stampedes could have adverse impacts on individual pinnipeds on the west end of SNI. However, during vehicle launches in 2001–2007, there was no evidence of launch-related injuries or deaths (Holst *et al.*, 2005a, b; 2008). On several occasions, harbor seals and California sea lion adults moved over pups as the animals moved in response to the launches, but the pups did not appear to be injured (Holst *et al.*, 2005a, 2008). Given the large numbers of pinnipeds giving birth on SNI, it is expected that injuries and deaths will occur as a result of natural causes. For example, during the 1997–98 El Nino event, pup mortality reached almost 90 percent for northern fur seals at nearby San Miguel Island, and some adults may have died as well (Melin *et al.*, 2005). Pup mortality also increased during this period for California sea lions.

Indirect evidence that launches have not caused significant, if any, mortality comes from the fact that populations of northern elephant seals and especially California sea lions on SNI are growing rapidly despite similar launches for many years. Harbor seal numbers have remained stable, but new harbor seal haul-out sites have been established at locations directly under and near the launch tracks of vehicles (see Figure 9 in the Navy's application).

#### *Hearing Impairment of Pinnipeds from Vehicle Launches*

Although it is possible that some pinnipeds (particularly harbor seals) may incur TTS (and possibly, although highly unlikely, even slight permanent threshold shift (PTS)) during launches from SNI, hearing impairment has not been shown for pinniped species exposed to launch sounds. Thorson *et al.* (1998, 1999) used measurements of auditory brainstem response to demonstrate that harbor seals did not exhibit loss in hearing sensitivity following launches of large vehicles at Vandenberg Air Force Base (VAFB), California.

There are few published data on TTS thresholds for pinnipeds in air exposed to impulsive or brief non-impulsive sounds. J. Francine, quoted in 66 FR 41837 (August 9, 2001), has mentioned evidence of mild TTS in captive

California sea lions exposed to a 0.3–s transient sound with an SEL of 135 dBA re 20  $\mu\text{Pa}^2\cdot\text{s}$  (see also Bowles *et al.*, 1999). However, mild TTS may occur in harbor seals exposed to SELs lower than 135 dB SEL (A. Bowles, pers. comm., 2003 in NAWCWD, 2008). Data indicate that the TTS threshold on an SEL basis may actually be around 129–131 dB re 20  $\mu\text{Pa}^2\cdot\text{s}$  for harbor seals, within their frequency range of good hearing (Kastak *et al.*, 2004; Southall *et al.*, 2007). The same research teams have found that the TTS thresholds of California sea lions and elephant seals exposed to strong sounds are higher as compared to the harbor seal (Kastak *et al.*, 2005; see Table 5 in the Navy's application). Based on these studies and other available data, Southall *et al.* (2007) propose that single impulsive sounds, such as those from a sonic boom, may induce mild TTS if the received peak pressure is approximately 143 dB re 20  $\mu\text{Pa}$  (peak) or if received frequency weighting appropriate for pinnipeds in air (Mpa-weighted) SEL is approximately 129 dB re 20  $\mu\text{Pa}^2\cdot\text{s}$ . Those levels apply specifically to harbor seals; those levels are not expected to elicit TTS in elephant seals or California sea lions (Southall *et al.*, 2007). Less is known about levels that may cause PTS, but in order to elicit PTS, a single sound pulse would probably need to exceed the TTS threshold by at least 15 dB or more, on an SEL basis (Southall *et al.*, 2007; see Table 5 in the application).

Available evidence from launch monitoring at SNI in 2001–2007 suggests that only a small minority (if any) of the pinnipeds at SNI are exposed to levels of launch sounds that could elicit TTS or even PTS (see Holst *et al.*, 2008). The assumed TTS threshold for the species with the most sensitive hearing (harbor seal) is 129–131 dB re 20  $\mu\text{Pa}^2\cdot\text{s}$  (Mpa-weighted), with higher values applying to other species (see Table 5 in the application). The measured SEL values near pinniped beaches during vehicle launches at SNI during 2001–2007 were less than 129 dB re 20  $\mu\text{Pa}^2\cdot\text{s}$  (A- or Mpa-weighted). In fact, few if any pinnipeds were exposed to SELs greater than 122 dB re 20  $\mu\text{Pa}^2\cdot\text{s}$  on an Mpa-weighted basis and greater than 118 dBA, even on beaches near Building 807 Launch Complex (Holst *et al.*, 2008). Sounds at these levels are not expected to cause TTS or PTS. However, small numbers of northern elephant seals and California sea lions may have been exposed to peak pressures as high as 150 dB re 20  $\mu\text{Pa}$  when Vandals flying over the beach created a sonic boom. That peak-pressure level would not be expected to elicit PTS in elephant

seals or California sea lions, but might be near the minimum level that could elicit PTS in harbor seals if any harbor seals at SNI had been exposed to such high levels (which apparently did not occur; see Holst *et al.*, 2008). Harbor seals were not hauled out on beaches where such high sound levels were measured, and they do not haul out near the Building 807 Launch Complex. However, it is possible that some harbor seals, and perhaps elephant seals and California sea lions, did incur TTS during launches at SNI, as peak-pressure levels at haul-out sites sometimes reached greater than or equal to 143 dB re 20  $\mu$ Pa when a sonic boom occurred. In the event that TTS did occur, it would typically be mild and reversible.

#### *Non-auditory Physiological Responses to Vehicle Launches*

Wolski (1999) examined the physiological responses of pinnipeds to simulated sonic booms. He noted that harbor seals responded with bradycardia, reduced movement, and brief apneas (indicative of an orienting response). Northern elephant seals responded similarly, and the response of California sea lions was variable. Perry *et al.* (2002) examined the effects of sonic booms from Concorde aircraft on harbor seals and gray seals (*Halichoerus grypus*). The authors noted that observed effects on heart rate were generally minor and not statistically significant; gray seal heart rates showed no change in response to booms, whereas harbor seals showed slightly elevated heart rates.

Humans and terrestrial mammals subjected to prolonged exposure to noise can sometimes show physiological stress. However, even in well-studied human and terrestrial mammal populations, noise-induced stress is not easily demonstrated. There have been no studies to determine whether noise-induced stress occurs in pinnipeds. If noise-induced stress does occur in marine mammals, it is expected to occur primarily in those exposed to chronic or frequent noise. It is very unlikely that it would occur in animals exposed to only a few, very brief noise events over the course of a year, as would be the case with these proposed activities.

#### *Summary of Potential Effects on Marine Mammals*

Vehicle launches are characterized by sudden sound onsets, moderate to high peak sound levels (depending on the type of vehicle and distance), and short sound duration. Effects of vehicle launches on some pinnipeds in the Channel Islands have been studied. In

most cases, where pinnipeds have been exposed to the sounds of large vehicle launches (such as the Titan IV from VAFB), animals did not flush into the sea unless the sound level to which they were exposed was relatively high or of an unusual duration or quality (e.g., the explosion of a Titan IV). Similarly, at SNI, the proportion of responding California sea lions and elephant seals to vehicle launches are significantly higher with increasing SELs; harbor seal reactions to launch sounds are more variable.

Thus, responses of pinnipeds on beaches to acoustic disturbance arising from launches are highly variable. In addition, some species (such as harbor seals) are more reactive when hauled out than are other species (e.g., northern elephant seals). Responsiveness also varies with time of year and age class, with juvenile pinnipeds being more likely to react strongly and leave the haul-out site. While the reactions are variable and can involve occasional stampedes or other abrupt movements by some individuals, biological impacts of these responses appear to be limited. The responses are not likely to result in significant injury or mortality or long-term negative consequences to individuals or pinniped populations on SNI.

Based on measurements of received sound levels during previous launches at SNI (e.g., Holst *et al.*, 2005a,b; 2008), the Navy and NMFS expect that there may be some effects on hearing sensitivity (TTS) for a few of the pinnipeds present, but these effects are expected to be mild and reversible. Although it is possible that some launch sounds as measured close to the launchers may exceed the PTS criteria, it is unlikely that any pinnipeds would be close enough to the launchers to be exposed to sounds strong enough to cause PTS. Therefore, NMFS anticipates that pinnipeds hauled out during launches on SNI will only incur short-term, minimal Level B harassment.

#### **Numbers of Marine Mammals Estimated to be Taken by Harassment**

The marine mammal species NMFS believes likely to be taken by Level B harassment incidental to vehicle launch operations from SNI are harbor seals, California sea lions, and northern elephant seals. All of these species are protected under the MMPA, and none are listed under the Endangered Species Act (ESA). Any takes are most likely to result from operational noise as launch vehicles pass near haul-out sites and/or associated visual cues. As noted earlier, sightings of northern fur seals, Steller sea lions, and Guadalupe fur seals have

been extremely rare or low on SNI. Therefore, no takes by harassment are anticipated for these three species incidental to the proposed activities.

The Navy provisionally estimates that the following numbers of pinnipeds may be taken by Level B harassment annually: 474 elephant seals; 467 harbor seals; and 1,606 California sea lions. The animals affected may be the same individual animals or may be different individuals, depending on site fidelity. Based on the results of the marine mammal monitoring conducted by the Navy during the 2001–2007 launch program, the estimated number of potential Level B harassment takes would actually be less than estimated or previously authorized. The criteria used by the Navy to estimate take numbers for the 2009–2014 program were developed specifically for the launches identified in the specified activity and are based on monitoring data collected during the 2001–2007 launch program at the same location and involving the same rocket types. Section 7.7 of the Navy's application contains a full description of how they developed their take numbers (see **ADDRESSES**).

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

#### **Potential Effects of Specified Activities on Marine Mammal Habitat**

Impacts on marine mammal habitat are part of the consideration in making a finding of negligible impact on the species and stocks of marine mammals. Habitat includes, but is not necessarily limited to, rookeries, mating grounds, feeding areas, and areas of similar significance. Harbor seals, California sea lions, and northern elephant seals use various beaches around SNI as places to rest, molt, and breed. These beaches consist of sand (e.g., Red Eye Beach), rock ledges (e.g., Phoca Reef), and rocky cobble (e.g., Vizcaino Beach). Pinnipeds continue to use beaches around the western end of SNI, and indeed are expanding their use of some beaches despite ongoing launch activities for many years. Thus, periodic launches do not prevent pinnipeds from using beaches.

Pinnipeds do not feed when hauled out on these beaches, and the airborne launch sounds will not persist in the water near the island for more than a few seconds. Therefore, it is not expected that the launch activities will

have any impact on the food or feeding success of these pinnipeds.

Boosters from vehicles (e.g., JATO bottles for BQM drone vehicles) may be jettisoned shortly after launch and fall on the island but not on the beaches. Fuel contained in these boosters is consumed rapidly and completely, so there would be no risk of contamination even in the very unlikely event that a booster did land on a beach. Overall, the proposed vehicle launch activity is not expected to cause significant impacts on habitats used by pinnipeds on SNI or on the food sources that these pinnipeds utilize.

#### Potential Effects of Specified Activities on Subsistence Needs

NMFS has preliminarily determined that the issuance of an LOA for Navy target and missile launch activities on SNI would not have an unmitigable adverse impact on the availability of the affected species or stocks for subsistence uses since there are no such uses for these pinniped species in California.

#### Mitigation

To avoid additional harassment to the pinnipeds on beach haul-out sites and to avoid any possible sensitizing and/or predisposing pinnipeds to greater responsiveness to the sights and sounds of a launch, the Navy will limit activities near the beaches in advance of launches. Existing safety rules for vehicle launches provide a built-in mitigation measure of this type: personnel are not normally allowed near any of the pinniped haul-out beaches that are located close to the flight track on the western end of SNI within several hours prior to launch. Also, because of the presence of colonies of sensitive seabirds (as well as pinniped haul-out sites) on western SNI, there are already special restrictions on personnel movements near beaches on which pinnipeds haul out. Furthermore, most of these beaches are closed to personnel year-round.

The following mitigation measures have been incorporated into the proposed regulations: (1) The Navy must avoid, whenever possible, launch activities during harbor seal pupping season (February to April), unless constrained by factors including, but not limited to, human safety, national security, or for vehicle launch trajectory necessary to meet mission objectives; (2) the Navy must limit, whenever possible, launch activities during other pinniped pupping seasons, unless constrained by factors including, but not limited to, human safety, national security, or for vehicle launch trajectory necessary to meet mission objectives; (3) the Navy

must not launch vehicles from the Alpha Complex at low elevation (less than 305 m [1,000 ft]) on launch azimuths that pass close to pinniped haul-out site(s) when occupied; (4) the Navy must avoid, where practicable, multiple vehicle launches in quick succession over haul-out sites when occupied, especially when young pups are present; and (5) the Navy must limit launch activities during nighttime hours, except when required by the test objectives (e.g., up to 10 nighttime launches for ABL testing per year).

Additionally, during and for some time following each launch, personnel are not allowed near any of the pinniped haul-out beaches that are close to the flight track on the western end of SNI. Lastly, prior to and after launch operations, associated fixed-wing and rotary aircraft will maintain an altitude of at least 305 m (1,000 ft) when traveling near beaches on which pinnipeds are hauled out, except in emergencies or for real-time security incidents (e.g., search-and-rescue, fire-fighting), which may require approaching pinniped haul-outs and rookeries closer than 305 m (1,000 ft).

If post-launch surveys determine that an injurious or lethal take of a marine mammal has occurred or there is an indication that the distribution, size, or productivity of the potentially affected pinniped populations has been affected, the launch procedure and the monitoring methods must be reviewed, in cooperation with NMFS, and, if necessary, appropriate changes must be made through modification to an LOA, prior to conducting the next launch of the same vehicle under that LOA.

#### Monitoring

As part of its application, the Navy provided a proposed monitoring plan, similar to that adopted for previous Incidental Harassment Authorizations and regulations (see 66 FR 41834, August 9, 2001; 67 FR 56271, September 3, 2002; 68 FR 52132, September 2, 2003), for assessing impacts to marine mammals from target and missile launch activities from SNI. This monitoring plan is described in detail in the Navy's application (see **ADDRESSES**).

The Navy proposes to conduct the following monitoring during the first year under an LOA and regulations.

##### *Land-based Monitoring*

In conjunction with a biological contractor, the Navy will continue its land-based monitoring program to assess effects on the three common pinniped species on SNI: northern elephant seals, harbor seals, and California sea lions. This monitoring

will occur at three different sites of varying distance from the launch site before, during, and after each launch. The monitoring would be via autonomous video cameras. Pinniped behavior on the beach will be documented prior to, during, and following the launch. Additionally, new video equipment capable of obtaining video during night launches will be acquired for the ABL program.

During the day of each missile launch, the observer would place three digital video cameras overlooking chosen haul-out sites. Each camera would be set to record a focal subgroup within the haul-out aggregation for a maximum of 4 hr or as permitted by the videotape capacity. Following a launch, video records will be made for up to 1 hr. Observers will return to the observing sites as soon as it is safe to record the numbers and types of pinnipeds that are on the haul-out(s).

Following each launch, all digital recordings will be transferred to DVDs for analysis. A DVD player/computer with high-resolution freeze-frame and jog shuttle will be used to facilitate distance estimation, event timing, and characterization of behavior. Additional details of the field methods and video and data analysis can be found in the Navy's application.

##### *Acoustical Measurements*

During each launch, the Navy would obtain calibrated recordings of the levels and characteristics of the received launch sounds. Acoustic data would be acquired using three Autonomous Terrestrial Acoustic Recorders (ATAR) at three different sites of varying distances from the target's flight path. ATARs can record sounds for extended periods (dependent on sampling rate) without intervention by a technician, giving them the advantage over traditional digital audio tape recorders should there be prolonged launch delays. To the extent possible, acoustic recording locations would correspond with the sites where video monitoring is taking place. The collection of acoustic data would provide information on the magnitude, characteristics, and duration of sounds that pinnipeds may be exposed to during a launch. In addition, the acoustic data can be combined with the behavioral data collected via the land-based monitoring program to determine if there is a dose-response relationship between received sound levels and pinniped behavioral reactions. Once collected, sound files will be sent to the acoustical contractor for sound analysis. Additional details regarding the installation and calibration of the acoustic instruments

and analysis methods are provided in the Navy's application.

### Reporting

An interim technical report is proposed to be submitted to NMFS 60 days prior to the expiration of each annual LOA issued under these regulations, along with a request for a follow-on annual LOA. This interim technical report will provide full documentation of methods, results, and interpretation pertaining to all monitoring tasks for launches during the period covered by the LOA. However, only preliminary information would be available to be included for any launches during the 60-day period immediately preceding submission of the interim report to NMFS.

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

The proposed 2009–2010 launch monitoring activities will constitute the eighth year of formal, concurrent pinniped and acoustical monitoring during launches from SNI. Following submission in 2010 of the interim report on the first phase of monitoring under an LOA, the Navy believes that it would be appropriate for the Navy and NMFS to discuss the scope for any additional launch monitoring work on SNI subsequent to the first LOA issued under these regulations. In particular, some biological or acoustic parameters may be documented adequately prior to or during the first LOA (2009–2010), and it may not be necessary to continue all aspects of the monitoring work after that period.

In addition to annual LOA reports, NMFS proposes to require the Navy to submit a draft comprehensive final technical report to NMFS 180 days prior to the expiration of the regulations. This technical report will provide full documentation of methods, results, and interpretation of all monitoring tasks for launches during the first four LOAs, plus preliminary information for launches during the first 6 months of the final LOA. A revised final technical report, including all monitoring results during the entire period of the Letter of Authorization will be due 90 days after the end of the period of effectiveness of the regulations.

### ESA

No species listed under the ESA are expected to be affected by these activities. Therefore, NMFS has determined that a section 7 consultation under the ESA is not required. It should

be noted however that SNI is the location to which southern sea otters have been translocated in an attempt to establish a population separate from that in central California. This experimental population may be affected by the target and missile launch activities at SNI. Sea otters are under the jurisdiction of the U.S. Fish and Wildlife Service (USFWS). Under Public Law 99–625, this experimental population of sea otters is treated as a proposed species for purposes of Section 7 when the action (as here) is defense related. Proposed species require an action agency to confer with NMFS or the USFWS under Section 7 of the ESA when the action is likely to jeopardize the continued existence of the species. The information available for the Navy's proposed activities described in this document or for NMFS' proposed action of promulgating 5-yr regulations and the subsequent issuance of LOAs to the Navy for those activities does not indicate that sea otters are likely to be jeopardized. Therefore, a consultation is not required.

### National Environmental Policy Act

NMFS has prepared a Draft EA analyzing the potential issuance of regulations and annual LOAs to the Navy for these proposed activities. The Draft EA will be made available for public comment concurrently with these proposed regulations (see **ADDRESSES**). NMFS will either finalize the EA and prepare a Finding of No Significant Impact or prepare an Environmental Impact Statement prior to issuance of the final rule.

### Coastal Zone Management Act Consistency

On February 14, 2001, by a unanimous vote, the California Coastal Commission (CCC) concluded that, with the monitoring and mitigation commitments the Navy has incorporated into their various testing and training activities on the Point Mugu Sea Range, including activities on SNI, and including the commitment to enable continuing CCC staff review of finalized monitoring plans and ongoing monitoring results, the activities are consistent with the marine resources, environmentally sensitive habitat, and water quality policies (Sections 30230, 30240, and 30231) of the California Coastal Act (CCA). Since the activities described in these proposed regulations are analogous to those reviewed by the CCC in 2001, NMFS has determined that the activities described in this document are consistent to the

maximum extent practicable with the enforceable policies of the CCA.

### National Marine Sanctuaries Act

According to the Navy, except for aircraft and vessel traffic transiting the area, none of the Navy's proposed activities would take place within the Channel Islands National Marine Sanctuary. On December 8, 2008, NMFS contacted the National Ocean Service's Office of National Marine Sanctuaries (ONMS) regarding NMFS' action of promulgating regulations and issuing LOAs for the Navy activities described in the Navy's application and this document to determine whether or not NMFS' action is likely to destroy, cause the loss of, or injure any sanctuary resources. On December 12, 2008, the ONMS determined that no further consultation with NMFS was required on its proposed action as this action is not likely to destroy, cause the loss of, or injure any national marine sanctuary resources.

### Preliminary Determinations

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

**Information Sought**

NMFS requests interested persons to submit comments, information, and suggestions concerning the request and the content of the proposed regulations to authorize the taking (see **ADDRESSES**). Prior to submitting comments, NMFS recommends readers review NMFS' responses to comments made previously (see 66 FR 41834, August 9, 2001; 67 FR 56271, September 3, 2002; 68 FR 24905, May 9, 2003; 68 FR 52132, September 2, 2003) for this action.

**Classification**

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

Pursuant to section 605(b) of the Regulatory Flexibility Act, the Chief Counsel for Regulation of the Department of Commerce has certified to the Chief Counsel for Advocacy of the Small Business Administration that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities. The NAWCWD, U.S. Navy, is the only entity that will be affected by this rulemaking, not a small governmental jurisdiction, small organization or small business, as defined by the Regulatory Flexibility Act. As a result, NMFS concludes the action would not result in a significant economic impact on a substantial number of small entities.

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

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

Dated: March 16, 2009.

**John Oliver,**

*Deputy Assistant Administrator for Operations, National Marine Fisheries Service.*

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

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

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

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

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

**Subpart N—Taking Of Marine Mammals Incidental To Target and Missile Launch Activities from San Nicolas Island, CA**  
Sec.

216.150 Specified activity and specified geographical region.

- 216.151 Effective dates.
- 216.152 Permissible methods of taking.
- 216.153 Prohibitions.
- 216.154 Mitigation.
- 216.155 Requirements for monitoring and reporting.
- 216.156 Applications for Letters of Authorization.
- 216.157 Letters of Authorization.
- 216.158 Renewal of Letters of Authorization.
- 216.159 Modifications of Letters of Authorization.

**Subpart N—Taking Of Marine Mammals Incidental To Target and Missile Launch Activities from San Nicolas Island, CA**

**§ 216.150 Specified activity and specified geographical region.**

(a) Regulations in this subpart apply only to the incidental taking of marine mammals specified in paragraph (b) of this section by the Naval Air Warfare Center Weapons Division, U.S. Navy, and those persons it authorizes to engage in target missile launch activities and associated aircraft and helicopter operations at the Naval Air Warfare Center Weapons Division facilities on San Nicolas Island, California.

(b) The incidental take of marine mammals under the activity identified in paragraph (a) of this section is limited to the following species: northern elephant seals (*Mirounga angustirostris*), harbor seals (*Phoca vitulina*), and California sea lions (*Zalophus californianus*).

(c) This Authorization is valid only for activities associated with the launching of a total of 40 Coyote (or similar sized) vehicles from Alpha Launch Complex and smaller missiles and targets from Building 807 on San Nicolas Island, California.

**§ 216.151 Effective dates.**

Regulations in this subpart become effective upon issuance of the final rule.

**§ 216.152 Permissible methods of taking.**

(a) Under Letters of Authorization issued pursuant to §§ 216.106 and 216.157, the U.S. Navy, its contractors, and clients, may incidentally, but not intentionally, take marine mammals by harassment, within the area described in § 216.150, provided the activity is in compliance with all terms, conditions, and requirements of the regulations in this subpart and the appropriate Letter of Authorization.

(b) The taking of marine mammals is authorized for the species listed in § 216.150(b) and is limited to Level B Harassment.

**§ 216.153 Prohibitions.**

Notwithstanding takings contemplated in § 216.150 and authorized by a Letter of Authorization

issued under §§ 216.106 and 216.157, no person in connection with the activities described in § 216.150 may:

(a) Take any marine mammal not specified in § 216.150(b);

(b) Take any marine mammal specified in § 216.150(b) other than by incidental, unintentional harassment;

(c) Take a marine mammal specified in § 216.150(b) if such taking results in more than a negligible impact on the species or stocks of such marine mammal; or

(d) Violate, or fail to comply with, the terms, conditions, and requirements of this subpart or a Letter of Authorization issued under §§ 216.106 and 216.157.

**§ 216.154 Mitigation.**

(a) The activity identified in § 216.150 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 § 216.150(c), the mitigation measures contained in the Letter of Authorization issued under §§ 216.106 and 216.157 must be implemented. These mitigation measures include (but are not limited to):

(1) The holder of the Letter of Authorization must prohibit personnel from entering pinniped haul-out sites below the missile's predicted flight path for 2 hours prior to planned missile launches.

(2) The holder of the Letter of Authorization must avoid, whenever possible, launch activities during harbor seal pupping season (February to April), unless constrained by factors including, but not limited to, human safety, national security, or for vehicle launch trajectory necessary to meet mission objectives.

(3) The holder of the Letter of Authorization must limit, whenever possible, launch activities during other pinniped pupping seasons, unless constrained by factors including, but not limited to, human safety, national security, or for vehicle launch trajectory necessary to meet mission objectives.

(4) The holder of the Letter of Authorization must not launch vehicles from the Alpha Complex at low elevation (less than 1,000 feet (305 m)) on launch azimuths that pass close to pinniped haul-out sites when occupied.

(5) The holder of the Letter of Authorization must avoid, where practicable, launching multiple target missiles in quick succession over haul-

out sites, especially when young pups are present.

(6) The holder of the Letter of Authorization must limit launch activities during nighttime hours, except when required by the test objectives.

(7) Aircraft and helicopter flight paths must maintain a minimum altitude of 1,000 feet (305 m) from pinniped haul-outs and rookeries, except in emergencies or for real-time security incidents (e.g., search-and-rescue, fire-fighting), which may require approaching pinniped haul-outs and rookeries closer than 1,000 feet (305 m).

(8) If post-launch surveys determine that an injurious or lethal take of a marine mammal has occurred or there is an indication that the distribution, size, or productivity of the potentially affected pinniped populations has been affected, the launch procedure and the monitoring methods must be reviewed, in cooperation with NMFS, and, if necessary, appropriate changes must be made through modification to a Letter of Authorization, prior to conducting the next launch of the same vehicle under that Letter of Authorization.

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

(b) [Reserved]

#### **§ 216.155 Requirements for monitoring and reporting.**

(a) Holders of Letters of Authorization issued pursuant to §§ 216.106 and 216.157 for activities described in § 216.150 are required to cooperate with NMFS, and any other Federal, state or local agency with authority to monitor the impacts of the activity on marine mammals. Unless specified otherwise in the Letter of Authorization, the Holder of the Letter of Authorization must notify the Administrator, Southwest Region, NMFS, by letter or telephone, at least 2 weeks prior to activities possibly involving the taking of marine mammals. If the authorized activity identified in § 216.150 is thought to have resulted in the mortality or injury of any marine mammals or in any take of marine mammals not identified in § 216.150(b), then the Holder of the Letter of Authorization must notify the Director, Office of Protected Resources, NMFS, or designee, by telephone (301-713-2289), and the Administrator, Southwest Region, NMFS, or designee, by telephone (562-980-3232), within 48 hours of the discovery of the injured or dead animal.

(b) The National Marine Fisheries Service must be informed immediately of any changes or deletions to any portions of the proposed monitoring plan submitted, in accordance with the Letter of Authorization.

(c) The holder of the Letter of Authorization must designate biologically trained, on-site individual(s), approved in advance by the National Marine Fisheries Service, to record the effects of the launch activities and the resulting noise on pinnipeds.

(d) The holder of the Letter of Authorization must implement the following monitoring measures:

(1) *Visual Land-Based Monitoring.* (i) Prior to each missile launch, an observer(s) will place 3 autonomous digital video cameras overlooking chosen haul-out sites located varying distances from the missile launch site. Each video camera will be set to record a focal subgroup within the larger haul-out aggregation for a maximum of 4 hours or as permitted by the videotape capacity.

(ii) Systematic visual observations, by those individuals, described in paragraph (c) of this section, on pinniped presence and activity will be conducted and recorded in a field logbook a minimum of 2 hours prior to the estimated launch time and for no less than 1 hour immediately following the launch of Coyote and similar types of target missiles.

(iii) Systematic visual observations, by those individuals, described in paragraph (c) of this section, on pinniped presence and activity will be conducted and recorded in a field logbook a minimum of 2 hours prior to launch, during launch, and for no less than 1 hour after the launch of the BQM-34, BQM-74, Tomahawk, RAM target and similar types of missiles.

(iv) Documentation, both via autonomous video camera and human observer, will consist of:

(A) Numbers and sexes of each age class in focal subgroups;

(B) Description and timing of launch activities or other disruptive event(s);

(C) Movements of pinnipeds, including number and proportion moving, direction and distance moved, and pace of movement;

(D) Description of reactions;

(E) Minimum distances between interacting and reacting pinnipeds;

(F) Study location;

(G) Local time;

(H) Substratum type;

(I) Substratum slope;

(J) Weather condition;

(K) Horizontal visibility; and

(L) Tide state.

(2) *Acoustic Monitoring.* (i) During all target missile launches, calibrated recordings of the levels and characteristics of the received launch sounds will be obtained from 3 different locations of varying distances from the

target missile's flight path. To the extent practicable, these acoustic recording locations will correspond with the haul-out sites where video and human observer monitoring is done.

(ii) Acoustic recordings will be supplemented by the use of radar and telemetry systems to obtain the trajectory of target missiles in three dimensions.

(iii) Acoustic equipment used to record launch sounds will be suitable for collecting a wide range of parameters, including the magnitude, characteristics, and duration of each target missile.

(e) The holder of the Letter of Authorization must implement the following reporting requirements:

(1) For each target missile launch, the lead contractor or lead observer for the holder of the Letter of Authorization must provide a status report to the National Marine Fisheries Service, Southwest Regional Office, providing reporting items found under the Letter of Authorization, unless other arrangements for monitoring are agreed in writing.

(2) An initial report must be submitted to the Office of Protected Resources, and the Southwest Regional Office at least 60 days prior to the expiration of each annual Letter of Authorization. This report must contain the following information:

(i) Timing and nature of launch operations;

(ii) Summary of pinniped behavioral observations;

(iii) Estimate of the amount and nature of all takes by harassment or by other means.

(3) A draft comprehensive technical report will be submitted to the Office of Protected Resources and Southwest Regional Office, National Marine Fisheries Service, 180 days prior to the expiration of the regulations in this subpart, providing full documentation of the methods, results, and interpretation of all monitoring tasks for launches to date plus preliminary information for missile launches during the first 6 months of the final Letter of Authorization.

(4) A revised final technical report, including all monitoring results during the entire period of the Letter of Authorization will be due 90 days after the end of the period of effectiveness of the regulations in this subpart.

(5) Both the 60-day and final reports will be subject to review and comment by the National Marine Fisheries Service. Any recommendations made by the National Marine Fisheries Service must be addressed in the final comprehensive report prior to

acceptance by the National Marine Fisheries Service.

(f) Activities related to the monitoring described in paragraphs (c) and (d) of this section, or in the Letter of Authorization issued under §§ 216.106 and 216.157, including the retention of marine mammals, may be conducted without the need for a separate scientific research permit.

(g) In coordination and compliance with appropriate Navy regulations, at its discretion, the National Marine Fisheries Service may place an observer on San Nicolas Island for any activity involved in marine mammal monitoring either prior to, during, or after a missile launch in order to monitor the impact on marine mammals.

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

(a) To incidentally take marine mammals pursuant to the regulations contained in this subpart, the U.S. citizen (as defined by § 216.103) conducting the activity identified in § 216.150 (Naval Air Warfare Center Weapons Division, U.S. Navy) must apply for and obtain either an initial Letter of Authorization in accordance with § 216.157 or a renewal under § 216.158.

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

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

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

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

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

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

**§ 216.157 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 § 216.158.

(b) Each Letter of Authorization will set forth:

(1) Permissible methods of incidental taking;

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

(3) Requirements for mitigation, monitoring and reporting.

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

**§ 216.158 Renewal of Letters of Authorization.**

(a) A Letter of Authorization issued under § 216.106 and § 216.157 for the activity identified in § 216.150 will be renewed annually upon:

(1) Notification to NMFS that the activity described in the application submitted under § 216.156 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 § 216.155 (e), and the Letter of Authorization issued under § 216.157, which has been reviewed and accepted by NMFS; and

(3) A determination by NMFS that the mitigation, monitoring and reporting measures required under §§ 216.154 and 216.155 and the Letter of Authorization issued under §§ 216.106 and 216.157, 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 216.158 indicates that a substantial modification to the described work, mitigation or monitoring undertaken during the upcoming season will occur, NMFS will provide the public a period of 30 days for review and comment on the request. Review and comment on renewals of Letters of Authorization are restricted to:

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

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

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

**§ 216.159 Modifications of Letters of Authorization.**

(a) Except as provided in paragraph (b) of this section, no substantive modification (including withdrawal or suspension) to the Letter of Authorization by NMFS, issued pursuant to §§ 216.106 and 216.157 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 § 216.158, 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 § 216.150(b), a Letter of Authorization issued pursuant to §§ 216.106 and 216.157 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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