

specialized capabilities to accept the transfer of inpatients whose EMC remains unstabilized or any other unintended consequences.

#### *D. Litigation Related to the Applicability of EMTALA to Hospital Inpatients*

There have been several court cases involving the applicability of EMTALA to hospital inpatients. For example, in *Thorton v. Southwest Detroit Hospital*, 895 F.2d 1131, 1134 (6th Cir. 1990), the Sixth Circuit stated that, "once a patient is found to suffer from an [EMC] in the emergency room, she cannot be discharged until the condition is stabilized. \* \* \*" However, other courts have concluded that a hospital's obligations under EMTALA end at the time that a hospital admits an individual to the facility as an inpatient. (See *Bryan v. Rectors and Visitors of the University of Virginia*, 95 F.3d 349 (4th Cir. 1996), *Bryant v. Adventist Health System/West*, 289 F.3d 1162 (9th Cir. 2002), and *Harry v. Marchant*, 291 F.3d 767 (11th Cir. 2002).) In *Lima-Rivera v. UHS of Puerto Rico Inc.*, (D.P.R. No. 04-1798, 2007), the U.S. District Court for the District of Puerto Rico rejected the claim that EMTALA does not apply to inpatients. Most recently in *Moses v. Providence Hospital and Medical Centers Inc.*, 561 F.3d 573 (6th Cir. 2009), the court concluded that a hospital's EMTALA obligations to an individual continue until that individual's EMC is stabilized regardless of the individual's status as an inpatient or outpatient.

#### III. Intention of This Notice

We are aware that there continues to be a range of opinions even at the Circuit Court level on the topic of EMTALA's application to inpatients. There also continues to be various opinions regarding whether EMTALA should apply to situations where a hospital seeks to transfer an individual, admitted as a hospital inpatient after seeking treatment for an EMC, to a hospital with specialized capabilities because the admitted inpatient continued to have an unstabilized EMC that required specialized treatment. Therefore, we are interested in receiving comments that address whether we should revisit the policies that were established in the September 9, 2003 final rule on EMTALA and the August 19, 2008 IPPS final rule, respectively.

We would find it particularly helpful if commenters could submit specific real world examples that demonstrate whether it would be beneficial to revisit the policies articulated in the September 9, 2003 final rule on EMTALA or the August 19, 2008 IPPS final rule. We also

are interested in hearing whether commenters are aware of situations where an individual who presented under EMTALA with an unstable EMC was admitted to the hospital where he or she first presented and was then transferred to another facility, even though the admitting hospital had the capacity and capability to treat that individual's EMC.

We are also interested in receiving information regarding the accuracy of our statement in the August 19, 2008 IPPS final rule that a hospital with specialized capabilities would accept the transfer of an inpatient with an unstabilized EMC absent an EMTALA obligation. Specifically, we would be interested to know if commenters are aware of situations where an individual with an unstabilized EMC was admitted as an inpatient and continued to have an unstabilized EMC requiring the services of a hospital with specialized capabilities that refused to accept the transfer of the individual because current policy does not obligate hospitals with specialized capabilities to do so.

#### IV. Collection of Information Requirements

This document does not impose information collection and recordkeeping requirements. Consequently, it need not be reviewed by the Office of Management and Budget under the authority of the Paperwork Reduction Act of 1995.

#### V. Response to Comments

Because of the large number of public comments we normally receive on **Federal Register** documents, we are not able to acknowledge or respond to them individually. We will consider all comments we receive by the date and time specified in the **DATES** section of this preamble, and, when we proceed with a subsequent document, we will respond to the comments in the preamble to that document.

**Authority:** (Catalog of Federal Domestic Assistance Program No. 93.773, Medicare—Hospital Insurance)

Dated: November 18, 2010.

**Donald M. Berwick,**

*Administrator, Centers for Medicare & Medicaid Services.*

Approved: December 14, 2010.

**Kathleen Sebelius,**

*Secretary, Department of Health and Human Services.*

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## DEPARTMENT OF TRANSPORTATION

### Pipeline and Hazardous Materials Safety Administration

#### 49 CFR Parts 171, 173, 178, and 180

[Docket Number PHMSA-2010-0019 (HM-241)]

RIN 2137-AE58

#### Hazardous Materials: Adoption of ASME Code Section XII and the National Board Inspection Code

**AGENCY:** Pipeline and Hazardous Materials Safety Administration (PHMSA), DOT.

**ACTION:** Advance notice of proposed rulemaking (ANPRM).

**SUMMARY:** PHMSA is considering amending the Hazardous Materials Regulations (HMR) to incorporate the most recent edition of the American Society of Mechanical Engineers' *Boiler and Pressure Vessel Code, Section XII* for the design, construction, and certification of cargo tank motor vehicles, cryogenic portable tanks and multi-unit-tank car tanks (ton tanks). PHMSA is also considering incorporating by reference the National Board of Boiler and Pressure Vessel Inspectors' *National Board Inspection Code* as it applies to the continuing qualification and maintenance of ASME stamped cargo tank motor vehicles, portable tanks, and multi-unit-tank car tanks (ton tanks) constructed to standards in ASME Section VIII or ASME Section XII. In this ANPRM, PHMSA is soliciting comments on the advisability of incorporating the most recent editions of these two standards by reference. We request comments to identify any gaps or inconsistencies between current HMR requirements and these consensus standards. Additionally, we seek input regarding any potential costs, benefits, and burdens associated with compliance with these consensus standards.

**DATES:** Submit comments by March 23, 2011. To the extent possible, PHMSA will consider late-filed comments as we determine whether additional rulemaking is necessary.

**ADDRESSES:** You may submit comments identified by the docket number (PHMSA-2010-0019; HM-241) by any of the following methods:

- Federal eRulemaking Portal: Go to <http://www.regulations.gov>. Follow the online instructions for submitting comments.
- Fax: 1-202-493-2251.
- Mail: Docket Operations, U.S. Department of Transportation, West

Building, Ground Floor, Room W12–140, Routing Symbol M–30, 1200 New Jersey Avenue, SE., Washington, DC 20590.

- **Hand Delivery:** To Docket Operations, Room W12–140 on the ground floor of the West Building, 1200 New Jersey Avenue, SE., Washington, DC 20590, between 9 a.m. and 5 p.m., Monday through Friday, except Federal Holidays.

**Instructions:** All submissions must include the agency name and docket number for this notice at the beginning of the comment. Note that all comments received will be posted without change to the docket management system, including any personal information provided.

**Docket:** For access to the dockets to read background documents or comments received, go to <http://www.regulations.gov>, or DOT's Docket Operations Office (see **ADDRESSES**).

**Privacy Act:** Anyone is able to search the electronic form of any written communications and comments received into any of our dockets by the name of the individual submitting the document (or signing the document, if submitted on behalf of an association, business, labor union, etc.). You may review DOT's complete Privacy Act Statement in the **Federal Register** published on April 11, 2000 (65 FR 19477) or you may visit <http://www.regulations.gov>.

**FOR FURTHER INFORMATION CONTACT:** Kurt Eichenlaub or Ben Supko, Standards and Rulemaking Division, (202) 366–8553, or Charles Hochman, Engineering and Research Division, (202) 366–4492, Pipeline and Hazardous Materials Safety Administration, 1200 New Jersey Avenue, SE., Washington, DC 20590.

#### SUPPLEMENTARY INFORMATION:

#### I. Abbreviations and Terms Used in This Document

AI: Authorized Inspector  
 ANSI: American National Standards Institute  
 ASME: American Society of Mechanical Engineers  
 BPVC: Boiler and Pressure Vessel Code  
 CI: Certified Individual  
 CTMV: Cargo Tank Motor Vehicle  
 DCE: Design Certifying Engineer  
 FMCSA: Federal Motor Carrier Safety Administration  
 HMR: Hazardous Materials Regulations (49 CFR Parts 171–180)  
 MAWP: Maximum Allowable Working Pressure  
 NBIC: National Board Inspection Code  
 PHMSA: Pipeline and Hazardous Materials Safety Administration  
 PVMA: Pressure Vessel Manufacturers Association  
 QI: Qualified Inspector  
 RI: Registered Inspector

Section XII: ASME BPVC, Section XII

#### II. Background

The Federal hazardous materials transportation law (49 U.S.C. 5101 *et seq.* (Federal hazmat law)) authorizes the Secretary of Transportation to regulate the safe and secure transportation of hazardous materials in commerce. In accordance with its delegated authority from the Secretary, PHMSA has established hazardous materials safety regulations applicable to packagings used to transport hazardous materials in commerce, including requirements for the design, construction, qualification, maintenance, and repair of bulk packagings such as cargo tanks, portable tanks, and ton tanks.

Under 49 CFR 1.53, PHMSA is delegated the responsibility to enforce the Hazardous Materials Regulations. In addition, under 49 CFR 1.49(s) and 1.73(d), the Federal Railroad Administration and the Federal Motor Carrier Safety Administration (FMCSA) are delegated authority to enforce the Hazardous Materials Regulations (HMR; 49 CFR parts 171–180) with particular emphasis on railroad and highway transportation respectively. PHMSA, FRA and FMCSA work closely with the regulated industry through educational assistance activities and FRA's and FMCSA's compliance and enforcement programs.

General requirements for cargo tank motor vehicles (CTMVs), portable tanks, and ton tanks such as outage and filling limits, are prescribed in § 173.24b. Detailed design and construction requirements that encompass material of construction, structural integrity, closures, openings, inlets and outlets, pressure relief devices, valves and fittings, tests, certification, etc., are specified in 49 CFR part 178, subpart H for portable tanks, subpart J for CTMVs and 49 CFR part 179, subpart E for multi-unit tank car tanks (ton tanks). Requirements applicable to continuing qualification and maintenance encompassing periodic tests and inspections, repairs, modifications, alterations, and conversions are specified in 49 CFR part 180, subpart E for CTMVs, subpart F for ton tanks, and subpart G for portable tanks. Design, construction and qualification of rail tank cars (49 CFR part 179 and part 180, subpart F) and non-specification cargo tanks (*i.e.*, nurse tanks) are not being considered in the ANPRM.

Currently, the HMR incorporate by reference the ASME BPVC, Section VIII, Division I, as part of the standards for the design and construction of cryogenic portable tanks and CTMVs. Section VIII

sets forth detailed criteria for the design, construction, certification, and marking of stationary boilers and pressure vessels. Many factors exerted on stationary tanks such as pressure, temperature changes, and atmospheric conditions are the same as those encountered by transportation tanks. However, Section VIII does not address unique conditions and stresses encountered by tanks in the transportation environment. To address differences between stationary tanks and transportation tanks, the HMR contain additional design and construction requirements to account for conditions and stresses likely to occur in transportation.

#### III. Petitions for Rulemaking

In this ANPRM, PHMSA is considering three petitions for rulemaking from ASME, the National Board, and the Pressure Vessel Manufacturers Association (PVMA).

1. On May 10, 2005, ASME petitioned PHMSA to revise the HMR to incorporate by reference the *ASME Boiler and Pressure Vessel Code, Section XII, Transport Tanks—2004 edition*. Section XII of the BPVC contains requirements for construction and continued service of ASME pressure vessels for the transportation of dangerous goods with design pressures appropriate for the transportation mode and volumes greater than 450 liters (120 gallons) via highway, railway, air, or water. The construction requirements cover materials, design, fabrication, examination, inspection, testing, certification, and over-pressure protection. The requirements for continued service cover inspection, testing, repair, alteration, and recertification of in-service ASME stamped transport tanks. These transport tank requirements include the pressure vessel, appurtenances, and additional components that are covered by Modal Appendices for the specific transport modes and unique service conditions of the specific application. The 2004 edition contains one Modal Appendix for portable tanks carrying cryogenic liquids. The 2007 edition was expanded to include the Modal Appendix for cargo tanks. The 2010 edition was expanded to include the Modal Appendix for ton tanks. [P–1459; Docket No. PHMSA–2005–21351].

2. On February 27, 2006, PVMA petitioned PHMSA to revise the HMR to incorporate by reference the *ASME Boiler and Pressure Vessel Code, Section XII Transport Tanks—2004 edition*. PVMA and several of its member companies participated in the development of Section XII, which

contains design requirements for tanks and pressure vessels that several of its members manufacture. [PHMSA; P-1474; Docket No. PHMSA-2006-24712].

3. On July 12, 2007, the National Board of Boiler and Pressure Vessel Inspectors petitioned PHMSA to revise the HMR to incorporate by reference the *National Board Inspection Code—2007 Edition*. The NBIC contains rules for continued service inspections, repairs, and modifications of transport tanks, including methods to be used and criteria for inspections, reports, document control, and inspector duties and responsibilities. The term “inspector” includes Authorized Inspector (AI), Qualified Inspector (QI), Certified Individual (CI) or Registered Inspector (RI) to address all aspects of continued service. The NBIC has updated the 2007 edition with a 2010 addendum. [P-1502; Docket No. PHMSA-2007-28809].

#### IV. ASME BPVC Section XII

ASME is a not-for-profit membership professional organization that enables collaboration, knowledge-sharing, and skill development across all engineering disciplines. ASME is recognized globally for its leadership in providing the engineering community with technical content and a forum for information exchange. Development committees meet regularly to consider revisions to the ASME codes and standards based on safety concerns, technological advances, new data, and changing environmental and industry needs. All meetings are free of charge and open to public participation. ASME subcommittees consider correspondence from the general public in the form of requests for interpretation and revision to existing codes, requests for code cases, and requests to develop new standards.

In 1995, at the request of the Research and Special Programs Administration, PHMSA’s predecessor agency, the ASME Board on Pressure Technology Codes and Standards formed a subcommittee on transport tanks (SC XII) to develop new standards to specifically address transport tanks with active participation by PHMSA. SC XII presides over a main committee, three subgroups identified as: (1) General Requirements, (2) Fabrication and Examination, and (3) Design and Materials. Subsequently, SC XII developed and published in July of 2004 the *ASME BPVC Section XII, Rules for Construction and Continued Service of Transport Tanks* to address pressure vessels that are used in transportation. Section XII is based on the existing and long-established BPVC Section VIII.

Section XII, 2010 edition, consists of ten parts, four modal appendices written to address different tank types, sixteen mandatory appendices, and eight non-mandatory appendices. Transport tanks are divided into categories designed specifically to mirror existing DOT specifications; for example, a DOT 406 cargo tank is a Category 406 tank in Article 1 of Modal Appendix 1. The 2010 edition contains modal appendices for cargo tanks, cryogenic portable tanks, and ton tanks. For the purposes of this notice, PHMSA is considering a proposal to incorporate Section XII, in its entirety, for Category 331, 338, 406, 407, and 412 cargo tanks, cryogenic portable tanks, and ton tanks. PHMSA is seeking comments as to whether Section XII should be proposed for incorporation into the HMR as an alternative or as a replacement for existing HMR requirements for DOT specification CTMVs, cryogenic portable tanks, and ton tanks.

Section VIII applies to construction of new tanks only. Tanks constructed and certified in accordance with Section VIII are marked with a “U” stamp. Section XII applies to new construction and continued service. As defined in Section XII, “continued service” is an all-inclusive term referring to the inspection, testing, repair, alteration, and recertification of transport tanks that have been in service. As stated earlier, Section XII is divided into ten parts. PHMSA is considering incorporating all ten parts, the three modal appendices for specification cargo tanks, cryogenic portable tanks, and ton tanks, and each of the non-mandatory appendices. The ten parts are: TG—GENERAL REQUIREMENTS; TM—MATERIAL REQUIREMENTS; TD—DESIGN REQUIREMENTS; TW—REQUIREMENTS FOR TANKS FABRICATED BY WELDING; TF—FABRICATION REQUIREMENTS; TE—EXAMINATION REQUIREMENTS; TT—TESTING REQUIREMENTS; TR—PRESSURE—RELIEF DEVICES; TS—STAMPING, MARKING, CERTIFICATION, REPORTS, AND RECORDS; and TP—REQUIREMENTS FOR REPAIR, ALTERATION, TESTING, AND INSPECTION FOR CONTINUED SERVICE. Section XII requires newly constructed transport tanks to bear a “T” stamp. The “T” stamp is essentially equivalent to the current “U” stamp required for certain DOT cargo tanks designed and constructed to Section VIII standards, currently incorporated by reference in the HMR. PHMSA is considering whether to adopt Section XII, in its entirety, as a replacement for existing DOT specification tanks, or as

an alternative to the design and construction requirements for DOT specification tanks.

In this ANPRM, PHMSA refers to the 2010 edition of ASME Section XII. However, ASME continues to work on updates to Section XII, and we will consider adoption of the most recent edition if PHMSA proceeds with a notice of proposed rulemaking (NPRM). A copy of Section XII, 2010 edition, is available for review at DOT’s Docket Operations Office (*see ADDRESSES*). The current price of Section XII in hard copy is \$450.

#### V. NBIC

The National Board of Boiler and Pressure Vessel Inspectors was formed in 1921 and is an American National Standards Institute (ANSI) accredited standards development organization. The National Board follows an approved set of standards development procedures (NB-240, National Board Inspection Code Procedures; <http://www.nationalboard.org>) and is subject to regular audits by ANSI.

First published in 1946, the NBIC was established by the National Board to provide rules and guidelines for the repair, alteration, inspection, installation, maintenance, and testing of boilers, pressure vessels, and other pressure retaining items. The NBIC is developed and maintained by a consensus committee comprised of industry experts (the NBIC Committee). The NBIC Committee consists of a main committee, subcommittees, subgroups, and task groups of industry experts and has Federal representation by PHMSA. Participants meet bi-annually to consider revisions to the NBIC based on safety concerns, technological advances, new data, and industry needs. All meetings are free of charge and open to public participation. The NBIC subcommittees consider correspondence from the general public in the form of requests for interpretation and revision of existing standards and requests to develop new standards. The standards-writing subcommittees, subgroups, and task groups are open to participation by representatives of groups that are materially affected by the code. Such groups include manufacturers, repair firms, authorized inspection agencies, and representatives of government agencies. Each year the NBIC Committee updates the NBIC and presents the updates on the National Board’s website for public review in April-May and August-September. Finalized updates are published annually as an addendum.

Section XII requires all alterations and repairs to the pressure vessel of a

transport tank to be performed in accordance with the NBIC and requires an inspection to be performed by a National Board inspector. The NBIC Committee established a task group to develop requirements for continued service, repair, and alteration of Section XII transport tanks. The task group includes PHMSA and industry representatives. The Committee's efforts culminated in the issuance of two new supplements. The first is Supplement 6, "Continued Service and Inspection of DOT Transport Tanks." This appears in Section 6, "Supplements" of Part 2, "Inspection." This document describes inspection of in service transport tanks. The second is Supplement 6, "Repair, Alteration, and Modification of DOT Transport Tanks." This appears in Section 6, "Repairs and Alterations—Supplements" of Part 3—"Repair." This document contains general requirements that apply to welding, repairs, alterations, modifications, examinations, etc. made to DOT transport tanks used for the transportation of hazardous materials. These supplements also specify the type of inspection to be performed and establish the criteria for inspections, reports, document maintenance, and inspector duties and responsibilities. The criteria are generally based on requirements in Part 180 of the HMR.

PHMSA is considering whether to adopt the NBIC for alterations, repairs and inspections performed on ASME stamped portable tanks, specification cargo tanks, and ton tanks used for the transportation of hazardous materials. In this ANPRM, we refer to the 2007 edition of the NBIC and the 2010 addendum. However, the National Board continues to work on updates to the NBIC, and PHMSA will consider adoption of the most recent edition if we proceed with an NPRM. A copy of the 2007 edition of the NBIC is available for review at DOT's Docket Operations Office (see **ADDRESSES** appearing earlier in this notice). The current cost of the complete NBIC set is \$150 for the hard copy and \$395 for the electronic format.

## VI. Voluntary Consensus Standards

The ASME BPVC and the NBIC are international voluntary consensus standards. The National Technology Transfer and Advancement Act of 1995, Public Law 104–113, requires agencies to use technical standards that are developed or adopted by voluntary consensus standards bodies unless the use of such a standard is inconsistent with applicable law or is otherwise impractical. Public Law 104–113 requires Federal agencies to use industry consensus standards to the

extent practical; it does not require Federal agencies to endorse a standard in its entirety. The law does not prohibit an agency from generally adopting a voluntary consensus standard while taking exception to specific portions of the standard if those provisions are deemed to be "inconsistent with applicable law or otherwise impractical." Taking specific exceptions furthers the Congressional intent of Federal reliance on voluntary consensus standards because it allows the adoption of substantial portions of consensus standards without the need to reject the standards in their entirety because of limited provisions that are not acceptable to the agency. It has been PHMSA's practice to review new editions and addenda of the ASME BPVC and NBIC and periodically update § 171.7 to incorporate newer editions and addenda by reference. New editions of the subject codes are issued every three years; addenda to the editions are issued yearly except in years when a new edition is issued. The BPVC was last incorporated by reference into the regulations under Docket No. RSPA–99–6213 (HM–218) (August 18, 2000; 65 FR 50450). In that final rule, § 171.7 was revised to incorporate by reference the 1998 edition of Sections II (Parts A and B), V, VIII (Division I) and IX, of the BPVC. The NBIC 1992 Edition was incorporated by reference under Docket HM–183C (November 3, 1994; 59 FR 55162).

## VII. Current HMR, Section XII, and NBIC Requirements

### A. Design and Construction of Cryogenic Portable Tanks

Sections 178.274 and 178.277 of the HMR contain requirements for the design, construction, certification, inspection, and testing of UN portable tanks intended for the transportation of refrigerated liquefied gases. The HMR requires that the shells and welds of these portable tanks must be designed, constructed, certified, inspected, tested and stamped in accordance with Section VIII of the BPVC. BPVC Section XII includes rules for the design, construction, certification, inspection, and testing of cryogenic portable tanks that address conditions and stresses unique to the transportation of cryogenic portable tanks. However, Section XII differs from the HMR with respect to design margins for cryogenic portable tanks (*i.e.*, 3.5:1 rather than 4.0:1). The 3.5:1 design margin is based upon successful experience with vessels designed to the Code rules, improved materials and fabrication practices, new and more sophisticated design methods,

toughness requirements, and nondestructive examination technology. PHMSA believes that adopting this new design margin by incorporating Section XII in the HMR would update current regulations in recognition of the technological enhancements referred to above, maintain an equivalent level of safety to existing regulations, and relieve unnecessary economic burden to manufacturers and users of cryogenic portable tanks by allowing for the design and construction of thinner walled tanks. Therefore, PHMSA is considering whether to permit the design, construction, certification, inspection, and testing of UN portable tanks intended for the transportation of refrigerated liquefied gases in accordance with Section XII.

### B. Design and Construction of CTMVs: Identified Differences Between HMR and Section XII Requirements

Sections 178.337–178.348 of the current HMR contain requirements for the design, construction, certification, inspection, and testing of CTMVs intended for the transportation of hazardous materials. CTMVs conforming to the MC 331, MC 338, and DOT 407 specifications with a maximum allowable working pressure (MAWP) greater than 35 psig or designed to be loaded by vacuum, and to the DOT 412 specification with a MAWP greater than 15 psig must be designed, constructed, and certified in accordance with Section VIII, Division 1 of the 1998 ASME Code. As defined in § 173.320, the term "*constructed and certified in accordance with the ASME Code*" means a cargo tank is constructed and stamped in accordance with the ASME Codes and is inspected and certified by an AI. CTMVs conforming to the DOT 406, and the lower pressure DOT 407 and 412 specifications must be constructed in accordance with the ASME Code. The term "*constructed in accordance with the ASME Code*" means a cargo tank is constructed in accordance with Section VIII, Division 1 of the ASME Codes with authorized exceptions and is inspected and certified by a RI. The manufacturer of the cargo tank or CTMV must hold a current ASME Certificate for use of the ASME "U" stamp but the tank is not required to be ASME stamped. Under Section XII, all newly manufactured cryogenic portable tanks and specification CTMVs constructed in accordance with the Code must be stamped with a "T" stamp.

The Section XII requirements were harmonized with the HMR requirements to the extent practicable. During the development of Section XII, the SC XII

committees addressed various cargo tank concerns that industry brought to the attention of PHMSA and FMCSA, over the past several years.

At the request of PHMSA, ASME supplemented its original petition for rulemaking with information identifying particular differences between Section XII and the HMR requirements. PHMSA encourages commenters to review and comment on these and any other differences between ASME Section XII and the HMR that are relevant to this endeavor. In addition, the Docket for this ANPRM includes several reports containing research, analysis, and evaluation of various technical standards that have been adopted in ASME Section XII.

#### 1. 3.5 Design Margin in Lieu of 4.0 for All Vessels

Improvements to Section VIII Division 1 Code rules over the past 50 years, successful experience with vessels designed to the Code rules, improved materials and fabrication practices, new and more sophisticated design methods, toughness requirements, and nondestructive examination technology have led to a reduced design margin in Section VIII, Division 1. In 1999, ASME adopted a design margin of 3.5 on ultimate tensile strength in lieu of the value of 4.0 that had existed since the 1940s. In Section XII, ASME adopted the new design margin after careful consideration and deliberations of the technical facts previously mentioned as well as other factors that influence transportation safety.

The new design margins may have a significant effect on newly constructed transport tanks. For those tanks where the minimum thicknesses are controlled by pressure, they may be thinner/lighter than those constructed using a design margin of 4.0. PHMSA has issued several special permits allowing a 3.5:1 design margin. PHMSA has reviewed the incident data for these tanks and has not identified any incidents that would indicate a reduction in safety. PHMSA is soliciting comments on potential safety and economic impacts of adopting the new Section XII requirement allowing a 3.5:1 design margin.

#### 2. Special Materials Testing and Fabrication Requirements for MC 331 Tanks

Section XII Modal Appendix 1—"Cargo Tanks" discontinues certain obsolete requirements for construction of MC 331 cargo tanks that are still required in §§ 178.337-2 and 178.337-4. This revision modernizes material specification designations and eliminates obsolete material

specifications. It also eliminates certain obsolete material impact test requirements, especially for quenched and tempered materials. PHMSA has issued several special permits allowing the use of the newer material specifications in the ASME Code for construction and repair. A review of historical incident data shows an acceptable safety history with no reported incidents. PHMSA is soliciting comments on the safety and economic impacts of adopting the new Section XII requirements for the testing and fabrication of special materials for construction and repair of MC 331 cargo tanks.

#### 3. Standardization of Allowable Peak Secondary Stresses for MC 331 Cargo Tanks

The requirements in Modal Appendix 1-3.5.5 and 1-3.5.1(a)(1)(b) standardize the allowable peak secondary stress levels resulting from short interval, non-persistent loads to that permitted for lading surge loads for MC 331 cargo tanks by § 178.337-3(d). See also 1-3.5.5 & 1-3.5.6 and footnote 1. The Appendix also aligns the MC 331 cargo tank design with the design standard of the DOT 400-series cargo tanks for short interval peak loads. PHMSA-sponsored research and guidance, and understanding of current ASME requirements, provide the basis for consideration of this revision. PHMSA solicits comments on the safety and economic impacts of adopting the Section XII requirement for allowable peak secondary stresses for MC 331 cargo tanks.

#### 4. Rational Design of Non-circular Tanks

Rational design under Appendix VIII of Section XII leads to shell and head thicknesses of up to 15% less than what tank manufacturers currently use. Such a difference results in a tank with at least 2% more payload capacity. Co-operative research and development efforts by PHMSA, ASME, and industry have served as the technical basis for incorporation of the rational design method in Section XII. PHMSA is soliciting comments on the safety and economic impacts of incorporating the Section XII rational design method for non-circular tanks.

#### 5. Non Mandatory Appendix C—Specified Minimum Thicknesses

Non-mandatory Appendix C contains data reports that specify minimum allowed thickness for pressure parts instead of nominal thickness and corrosion allowance currently specified. PHMSA is soliciting comments on the safety and economic impacts of using minimum allowed thickness for

pressure parts instead of nominal thickness and corrosion allowance.

#### C. Continued Service of CTMVs, Portable Tanks, and Ton Tanks: Roles of Inspectors HMR

Part 180 of the HMR specifies continued service requirements for DOT and UN portable tanks and DOT specification and certain non-specification CTMVs. Specific requirements for the qualification, maintenance, repair, and testing of packagings are located in 49 CFR Part 180: Subpart E for CTMVs, Subpart F for ton tanks, and Subpart G for portable tanks. Incorporation of Section XII and the NBIC for continued service requirements for these ASME stamped bulk packagings could impact the roles and responsibilities of persons who perform tests, inspections, modifications, alterations, and repairs. PHMSA is soliciting comments on how the continued service requirements and the role of inspectors should be addressed in the HMR if Section XII and the NBIC are incorporated by reference.

To ensure that DOT specification cargo tanks are designed, constructed, and maintained in accordance with the applicable specification, the HMR require that each person who certifies CTMV design, construction, repair, or testing meet certain minimum qualifications. The qualification criteria are based on the function performed. Professionals who meet the qualifications set forth in the HMR for DCE, AI, and RI perform continued service functions.

The HMR require the use of a DCE to certify each specification cargo tank or CTMV design type, including its required accident damage protection; the design of a modified, stretched, or rebarrelled CTMV; or mounting of a cargo tank on a motor vehicle chassis involving welding on the cargo tank head or shell or any change or modification of the methods of attachment. A DCE as defined in § 171.8 means a person registered with the Department in accordance with subpart F of part 107 of the HMR who has the knowledge and ability to perform stress analysis of pressure vessels and otherwise determine whether a cargo tank design and construction meets the applicable DOT specification. A DCE must fulfill the knowledge and ability requirements by meeting any one of the following qualifications: (1) Have an engineering degree and one year of work experience in cargo tank structural or mechanical design; (2) be currently registered as a professional engineer by appropriate authority of a State of the United States or a Province of Canada;

or (3) have at least three years' experience in performing the duties of a DCE prior to September 1, 1991.

Additionally, the HMR require the use of an AI to certify cargo tanks constructed and certified in accordance with the ASME Code, as discussed earlier in this notice under "B. Design and Construction of CTMVs: Identified Differences Between HMR and Section XII Requirements." An AI is defined in § 171.8 to mean an Inspector who is currently commissioned by the National Board of Boiler and Pressure Vessel Inspectors and employed as an Inspector by an Authorized Inspection Agency. Also, this section defines an Authorized Inspection Agency to mean: (1) A jurisdiction which has adopted and administers one or more sections of the ASME Boiler and Pressure Vessel Code as a legal requirement and has a representative serving as a member of the ASME Conference Committee; or (2) an insurance company which has been licensed or registered by the appropriate authority of a State of the United States or a Province of Canada to underwrite boiler and pressure vessel insurance in such State or Province.

The HMR require the use of an RI to certify specification cargo tank motor vehicle construction, assembly, or repair of a tank "constructed in accordance with the ASME Code." Section 171.8 defines the RI as a person registered with the Department in accordance with subpart F of part 107 of the HMR who has the knowledge and ability to determine whether a cargo tank conforms to the applicable DOT specification. The RI must have: (1) An engineering degree and one year of work experience relating to the testing and inspection of cargo tanks; (2) an associate degree in engineering and two years of work experience relating to the testing and inspection of cargo tanks; (3) a high school diploma (or General Equivalency Diploma) and three years of work experience relating to the testing and inspection of cargo tanks; or (4) at least three years of experience performing the duties of an RI prior to September 1, 1991. The RI must be familiar with DOT specification cargo tanks and trained and experienced in use of the inspection and testing equipment used. While there are narrow exceptions that permit persons who do not qualify as RIs to perform select inspections and tests (see § 180.409(b), (c), and (d)), in general, a cargo tank constructed in accordance with a DOT specification for which a qualification test or inspection is due, may not be filled and offered for transportation or transported until the test or inspection

has been successfully completed by the RI.

#### Section XII

Section XII requires all alterations and repairs to the pressure vessel of a transport tank to be performed in accordance with the NBIC and requires an inspection to be performed by a National Board inspector. The inspector, depending on the class designation of the transport tank, must be an *Authorized Inspector (AI)*, *Qualified Inspector (QI)*, or *Certified Individual (CI)*.

Under Section XII, an AI is defined as an inspector regularly employed by an ASME-accredited Authorized Inspection Agency (AIA), who has been qualified to ASME-developed criteria to perform inspections under the rules of any jurisdiction that has adopted the ASME Code. The AI may not be in the employ of the manufacturer. The AIA's and supervisor's duties and qualifications and AI's qualifications are as required in the latest edition and addenda of ASME QAI-1, Qualifications for Authorized Inspection. Under ASME QAI-1, An Authorized Inspector must hold a valid Certificate of Competency (where required), as defined in National Board Rules for Commissioned Inspectors, and a valid National Board Commission with an "A" endorsement. The inspector must have satisfactory expertise, experience, and background for the inspection of boilers and pressure vessels and demonstrate the ability to perform shop and field (on-site) inspections to the satisfaction of the AIA. The inspector must have knowledge of applicable sections of the ASME Code, Quality Control Programs, and requirements for the maintenance and retention of in-transit and permanent records. Finally, the inspector must receive a passing grade on an examination given by the National Board that evaluates the individual's knowledge of, and familiarity with, the ASME Code, and comply with the National Board's rules for commissioned inspectors.

A QI is defined as an inspector regularly employed by an ASME Qualified Inspection Organization (QIO) who has been qualified to ASME-developed criteria by a written examination, to perform inspections under the rules of any jurisdiction that has adopted the ASME Code. The QI may not be in the employ of the manufacturer. The QIO's and supervisor's duties and qualifications and the QI's qualifications are as required in the latest edition and addenda of ASME QAI-1, Qualifications for Authorized Inspection. Under ASME

QAI-1, a Qualified Inspector must hold a valid Certificate of Competency (where required), as defined in National Board Rules for Commissioned Inspectors, and a valid National Board certification as a Qualified Inspector. The inspector must have satisfactory expertise, experience, and background for the inspection of boilers and pressure vessels and demonstrate the ability to perform shop and field (on-site) inspections to the satisfaction of the QIA. The inspector must have knowledge of applicable sections of the ASME Code, Quality Control Programs, and requirements for the maintenance and retention of in-transit and permanent records. Finally, the inspector must receive a passing grade on an examination given by the National Board that evaluates the individual's knowledge of, and familiarity with, the ASME Code. The Qualified Inspector must comply with the National Board's rules for qualified inspectors.

A CI is defined as an individual certified by an ASME accredited organization authorized to use ASME marks, as either a full-time or part-time employee or contractor to the ASME certificate holder. The CI is neither an AI nor a QI and must be certified and qualified to perform inspections by the CI's employer. The CI may be in the employ of the manufacturer or assembler. Minimum qualifications include: (a) Knowledge of the requirements of Section XII for application of the appropriate Code Symbol stamp; (b) Knowledge of the Manufacturer's or Assembler's Quality System Program; and (c) Training commensurate with the scope, complexity, or special nature of the activities to which oversight is to be provided. A record must be maintained and certified by the manufacturer or assembler, containing objective evidence of the qualifications of the CI and training provided the CI's qualifications and duties are as required in the latest edition and addenda of ASME QAI-1, Qualifications for Authorized Inspection.

Additionally, for continued service, Users may perform inspections and tests if no rerating, repairs, or alterations requiring welding are performed. Users may perform continued service inspections, including repairs and alterations if the User possesses a valid National Board Owner/User Certificate of Authorization. Inspectors employed by the Owner/User may perform continued service inspections, including repairs and alterations if the individual possesses a National Board Owner/User commission.

Section XII assigns transport tanks to three separate classes depending on the design of the tank. Each class includes transport tank designs that generally correspond to existing DOT specifications. The NBIC inspection

requirements correspond to the class of transport tank as assigned in the Section XII Modal Appendices. In the table below, PHMSA lists each class of transport tank to be constructed or repaired and the type of inspector

required to perform the inspection. Currently there are no specifications in Section XII for Class 2 tanks. However, Class 2 tanks are expected to be added in future editions.

TRANSPORT TANK CLASSES UNDER ASME SECTION XII, 2010 EDITION

Class	Current specification in HMR	Type of inspector
Class 1 .....	UN cryogenic portable tanks (See § 178.277); DOT 407 MAWP > 35 psi (See § 178.347); DOT 412 MAWP > 15 psi (See § 178.348); MC 338 (See § 178.338); MC 331 (See § 178.337); DOT 106A and 110AW (See § 179.300).	Authorized Inspector
Class 2 .....	.....	Qualified Inspector , or Authorized Inspector
Class 3 .....	DOT 406 (See § 178.346); DOT 407 MAWP ≤ 35 psi (See § 178.347); DOT 412 MAWP ≤ 15 psi (See § 178.348).	Certified Individual, Authorized Inspector, or Qualified Inspector

Repairs and alterations must be performed by organizations holding a valid National Board “TR” certificate of Authorization and in possession of the appropriate National Board Code symbol stamp. Alternatively, organizations employing Owner/User/ Inspectors and in possession of a valid Owner/User Certificate of Authorization issued by the National Board may repair and perform alterations on transport tanks owned and operated by the Owner/User Certificate of Authorization holder.

The periodic inspection and test frequencies for cargo tanks are specified in Modal Appendix 1 of Section XII. Periodic inspection and test frequencies for cryogenic portable tanks are specified in Modal Appendix 3 of Section XII. The periodic inspection and test frequencies are consistent with those specified currently in the HMR for cargo tanks and portable tanks.

**VIII. Questions**

PHMSA asks commenters to provide data and information on the following issues:

*A. Cargo Tanks*

1. Are there substantial differences between the construction and continued service requirements of the HMR and the ASME BPVC Section XII for cargo tanks? If so, what are the potential costs, burdens, or safety problems associated with incorporating Section XII and the NBIC for the construction and continued service of these tanks?

2. For existing cargo tanks designed, constructed and stamped with the ASME BPVC Section VIII “U” stamp, are there substantial differences between the continued service requirements of the HMR and the most recent edition of the NBIC? If so, what are the potential

costs and burdens associated with incorporating the NBIC for existing “U” stamped bulk packagings?

3. Should PHMSA adopt through incorporation by reference the ASME BPVC Section XII and the most recent edition of the NBIC for construction and continued service of cargo tanks? If so, which existing requirements of the HMR should be replaced with references to these consensus standards?

4. Would incorporation of the ASME BPVC Section XII and the NBIC for construction and continued service of cargo tanks positively affect transportation safety, and/or reduce industry costs?

5. If PHMSA incorporates Section XII and the NBIC for the construction and continued service of cargo tanks, how long of a transition period would be needed to train employees to use these consensus standards? What are the associated costs of training?

6. Are the ASME BPVC Section XII and the NBIC rules of construction and continued service of cargo tanks consistent with current HMR requirements? If not, should PHMSA consider general adoption of the consensus standards while taking exception to specific portions of the standards?

7. Are there any potential compliance issues related to incorporating by reference Section XII and the newest edition of the NBIC in the HMR for the construction and continued service of cargo tanks?

*B. Cryogenic Portable Tanks*

1. Are there substantial differences between the construction and continued service requirements of the HMR and the ASME BPVC Section XII for cryogenic portable tanks? If so, what are the potential costs, burdens, or safety

problems associated with incorporating Section XII and the NBIC for the construction and continued service of these tanks?

2. For existing cryogenic portable tanks designed, constructed and stamped (“U” stamp) in accordance with ASME BPVC Section VIII, are there substantial differences between the continued service requirements of the HMR and the most recent edition of the NBIC? If so, what are the potential costs and burdens associated with incorporating the latest edition of the NBIC?

3. Should PHMSA adopt through incorporation by reference the ASME BPVC Section XII and the most recent edition of the NBIC for construction and continued service of cryogenic portable tanks? If so, which existing requirements of the HMR should be replaced with references to these consensus standards?

4. Would incorporation of the ASME BPVC Section XII and the latest edition of the NBIC for construction and continued service of cryogenic portable tanks positively affect transportation safety, and/or reduce industry costs?

5. If PHMSA incorporates Section XII and the NBIC for the construction and continued service of cryogenic portable tanks, how long of a transition period would be needed to train employees to use these consensus standards? What are the associated costs of training?

6. Are the ASME BPVC Section XII and the NBIC rules of construction and continued service of cryogenic portable tanks consistent with current HMR requirements? If not, should PHMSA consider general adoption of the consensus standards while taking exception to specific portions of the standards?

7. Are there any potential compliance issues related to incorporating by reference Section XII and the newest edition of the NBIC in the HMR for the construction and continued service of cryogenic portable tanks?

### C. Multi-Unit Tank Car Tanks (Ton Tanks)

1. Are there substantial differences between the construction and continued service requirements of the HMR and the ASME BPVC Section XII for multi-unit tank car tanks? If so, what are the potential costs, burdens, or safety problems associated with incorporating Section XII and the NBIC for the construction and continued service of these tanks?

2. For existing multi-unit tank car tanks designed and constructed in accordance with the HMR, are there substantial differences between current continued service requirements and the NBIC? If so, what are the potential costs and burdens associated with incorporating the latest edition of the NBIC?

3. Should PHMSA adopt through incorporation by reference the ASME BPVC Section XII and the most recent edition of the NBIC for construction and continued service of multi-unit tank car tanks? If so, which existing requirements of the HMR should be replaced with references to these consensus standards?

4. Would incorporation of the ASME BPVC Section XII and the latest edition of the NBIC for construction and continued service of multi-unit tank car tanks positively affect transportation safety, and/or reduce industry costs?

5. Are the ASME BPVC Section XII and the NBIC rules of construction and continued service of multi-unit tank car tanks consistent with current HMR requirements? If not, should PHMSA consider general adoption of the consensus standards while taking exception to specific portions of the standards?

6. Are there any potential compliance issues related to incorporating by reference Section XII and the the newest edition of the NBIC in the HMR for the construction and continued service of multi-unit tank car tanks?

### IX. Additional Issues

PHMSA will base any future proposal for changes on the suggestions and comments provided by interested parties and our own initiatives. Additionally, any proposals would include the analyses required under the following statutes and executive orders in the event we determine that rulemaking is appropriate:

#### A. Executive Order 12866 and DOT Regulatory Policies and Procedures

Executive Order (E.O.) 12866 requires agencies to regulate in the “most cost-effective manner,” to make a “reasoned determination that the benefits of the intended regulation justify its costs,” and to develop regulations that “impose the least burden on society.” We therefore request comments, including specific data if possible, concerning the costs and benefits that may be associated with revisions to the HMR based on the issues presented in this notice. A rule that is considered significant under E.O. 12866 must be reviewed and cleared by the Office of Management and Budget before it can be issued.

#### B. Executive Order 13132

E.O. 13132 requires agencies to assure meaningful and timely input by state and local officials in the development of regulatory policies that may have a substantial, direct effect on the states, on the relationship between the national government and the states, or on the distribution of power and responsibilities among the various levels of government. Incorporation of new consensus standards by reference in the HMR may impact state and local CTMV enforcement programs. Potential impacts include the cost of purchasing the consensus standards and training employees in the use of the consensus standards. We invite state and local governments with an interest in this rulemaking to comment on any effect that revisions to the HMR to address the issues outlined in this notice may cause.

#### C. Executive Order 13175

E.O. 13175 requires agencies to assure meaningful and timely input from Indian tribal government representatives in the development of rules that “significantly or uniquely affect” Indian communities and that impose “substantial and direct compliance costs” on such communities. We invite Indian tribal governments to provide comments if they believe there will be an impact.

#### D. Regulatory Flexibility Act, Executive Order 13272, and DOT Policies and Procedures

Under the Regulatory Flexibility Act of 1980 (5 U.S.C. 601 *et seq.*), we must consider whether a proposed rule would have a significant economic impact on a substantial number of small entities. “Small entities” include small businesses, not-for-profit organizations that are independently owned and operated and are not dominant in their fields, and governmental jurisdictions

with populations under 50,000. If you believe that revisions to the HMR to address the issues discussed in this notice would have a significant economic impact on small entities, please provide information on such impacts.

Any future proposed rule would be developed in accordance with Executive Order 13272 (“Proper Consideration of Small Entities in Agency Rulemaking”) and DOT’s procedures and policies to promote compliance with the Regulatory Flexibility Act to ensure that potential impacts on small entities of a regulatory action are properly considered.

#### E. Paperwork Reduction Act

Section 1320.8(d), Title 5, Code of Federal Regulations requires that PHMSA provide interested members of the public and affected agencies an opportunity to comment on information collection and recordkeeping requests. It is possible that new or revised information collection requirements could occur as a result of any future rulemaking action.

#### F. Environmental Assessment

The National Environmental Policy Act, 42 U.S.C. 4321–4375, requires federal agencies to analyze proposed actions to determine whether the action will have a significant impact on the human environment. The Council on Environmental Quality (CEQ) regulations order federal agencies to conduct an environmental review considering (1) the need for the proposed action, (2) alternatives to the proposed action, (3) probable environmental impacts of the proposed action and alternatives, and (4) the agencies and persons consulted during the consideration process. 40 CFR § 1508.9(b). PHMSA welcomes any data or information related to environmental impacts that may result from a future rulemaking addressing the issues discussed in this notice.

#### G. International Trade Analysis

The Trade Agreements Act of 1979 (Pub. L. 96–39), as amended by the Uruguay Round Agreements Act (Pub. L. 103–465), prohibits Federal agencies from establishing any standards or engaging in related activities that create unnecessary obstacles to the foreign commerce of the United States. For purposes of these requirements, Federal agencies may participate in the establishment of international standards, so long as the standards have a legitimate domestic objective, such as providing for safety, and do not operate to exclude imports that meet this



objective. The statute also requires consideration of international standards and, where appropriate, that they be the basis for U.S. standards. PHMSA participates in the establishment of international standards in order to protect the safety of the American public, and we would assess the effects of any rule to ensure that it does not exclude imports that meet this objective. Accordingly, any proposals would be consistent with PHMSA's obligations under the Trade Agreement Act, as amended.

#### *H. Statutory/Legal Authority for This Rulemaking*

49 U.S.C. 5103(b) authorizes the Secretary of Transportation to prescribe regulations for the safe transportation, including security, of hazardous materials in intrastate, interstate, and foreign commerce.

#### *I. Regulation Identifier Number (RIN)*

A regulation identifier number (RIN) is assigned to each regulatory action listed in the Unified Agenda of Federal Regulations. The Regulatory Information Service Center publishes the Unified Agenda in April and October of each year. The RIN contained in the heading of this document can be used to cross-reference this action with the Unified Agenda.

Issued in Washington, DC, on December 17, 2010 under authority delegated in 49 CFR part 106.

**Magdy El-Sibaie,**

*Associate Administrator for Hazardous Materials Safety.*

[FR Doc. 2010-32231 Filed 12-22-10; 8:45 am]

**BILLING CODE 4910-60-P**

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 217

[Docket No. 100806326-0374-01]

RIN 0648-AY99

#### **Takes of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Space Vehicle and Missile Launch Operations at Kodiak Launch Complex, Alaska**

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

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

**SUMMARY:** NMFS has received an application, pursuant to the Marine Mammal Protection Act (MMPA), from the Alaska Aerospace Corporation (AAC) for authorization to take small numbers of marine mammals incidental to launching space launch vehicles, long-range ballistic target missiles, and other smaller missile systems at the Kodiak Launch Complex (KLC) for the period of February 2011 through February 2016. Pursuant to the MMPA, NMFS is requesting comments on its proposal to issue regulations and subsequent Letters of Authorization (LOAs) to AAC to incidentally harass Steller sea lions (*Eumetopias jubatus*) and harbor seals (*Phoca vitulina*) during the specified activity.

**DATES:** Comments and information must be received no later than January 24, 2011.

**ADDRESSES:** You may submit comments, identified by 0648-AY99, 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 Environmental Assessments (EAs) related to this action 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:** Michelle Magliocca, Office of Protected Resources, NMFS, (301) 713-2289, ext 123.

#### **SUPPLEMENTARY INFORMATION:**

##### **Background**

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

Authorization for incidental takings shall be granted if NMFS finds that the taking will have a negligible impact on the identified species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant), and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth in the regulations. 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 with respect to certain 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 June 4, 2010, NMFS received a complete application for regulations from AAC for the taking of small numbers of marine mammals incidental to launching space launch vehicles, long-range ballistic target missiles, and other smaller missile systems at the KLC. Noise from space vehicles and missile launches may result in the behavioral (Level B) harassment of hauled-out Steller sea lions and harbor seals and injury (Level A harassment) or