

Compliance with the tolerances is to be determined by measuring only dichlormid (2,2-dichloro-*N,N*-di-2-propenylacetamide).

Commodity	Parts per million
Corn, field, forage .....	0.05
Corn, field, grain .....	0.05
Corn, field, stover .....	0.05
Corn, pop, grain .....	0.05
Corn, pop, stover .....	0.05
Corn, sweet, forage .....	0.05
Corn, sweet, kernel plus cob with husks removed .....	0.05
Corn, sweet, stover .....	0.05

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**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 217**

[Docket No. 100806326-1088-02]

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, AK**

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

**ACTION:** Final rule.

**SUMMARY:** NMFS, upon application from the Alaska Aerospace Corporation (AAC), is issuing regulations to govern the unintentional taking of small numbers of marine mammals incidental to rocket launches from the Kodiak Launch Complex (KLC) on Kodiak Island, AK. Issuance of regulations is required by the Marine Mammal Protection Act (MMPA) when the Secretary of Commerce (Secretary), after notice and opportunity for comment, finds, as here, that such takes will have a negligible impact on the species and stocks of marine mammals and will not have an unmitigable adverse impact on their availability for subsistence uses. These regulations do not authorize the AAC's rocket launch activities; such authorization is not within the jurisdiction of the Secretary. Rather, these regulations govern the issuance of Letters of Authorization (LOAs) for the unintentional and incidental take of marine mammals in connection with

this activity and prescribe methods of taking and other means of effecting the least practicable adverse impact on marine mammal species and their habitat, and on the availability of the species for subsistence uses. In addition, NMFS incorporates reporting and monitoring requirements on these activities.

**DATES:** Effective March 22, 2011 to March 22, 2016.

**ADDRESSES:** A copy of the AAC's application and other related documents may be obtained by writing 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, 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 final rule may also be viewed, by appointment, during regular business hours at the above address.

**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 (16 U.S.C. 1362(18)(A)) 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. A proposed rule was published on December 23, 2010 (75 FR 80773). NMFS received 12 comments on the proposed rule from eight private citizens, the Kodiak Chamber of Commerce, the Kodiak Island Borough Mayor, the City of Kodiak Mayor, and the Marine Mammal Commission (Commission). The majority of the comments supported the proposed rule. These regulations will allow NMFS to issue Letters of Authorization (LOAs) to the AAC over a 5-year period. A full description of the operations is contained in the AAC's application which is available upon request (*see ADDRESSES*) or at: <http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications>.

The AAC conducts space vehicle and missile launches from the KLC, a commercial spaceport that supports civilian and Federal launch customers. The facility occupies 3,717 acres of State-owned lands on the Narrow Cape Peninsula on the eastern side of Kodiak Island, Alaska. The KLC primarily supports launches of small to medium space launch vehicles—which are those used to boost satellites to orbit—ranging in size from the small space-launch Castor 120 motor (used in the Athena, Minotaur IV, Minotaur V, and Taurus I systems) to the under-development medium-lift Taurus II. The KLC is also configured to support launch of the Minuteman I-derived Minotaur I Space Launch System, and to support the launch of long-range ballistic systems such as the Polaris derived A-3 STARS, the Minuteman-derived Minotaur II and III, and the C-4. Launch operations are authorized under license from the Federal Aviation Administration (FAA),

Office of the Associate Administrator for Space Transportation, in accordance with the facility's Environmental Assessment (EA), stipulations in the EA's Finding of No Significant Impact, and in subsequent licenses.

#### Description of the Specified Activity

The AAC anticipates that the KLC can accommodate up to 45 launches, in total, for the effective period of the regulations. Annually, an average of nine but maximum of 12 launches may occur. Most of these vehicles are expected to be of the Minotaur I through V class, including civil versions of the Castor 120 known as the Athena and Taurus I, or smaller target vehicles. The AAC estimates that of the 45 estimated launches from KLC over the 5-year period in consideration, 32 will be of small space-launch and target vehicles of the Castor 120 or smaller size, 10 will be of THAAD or smaller size, and three will be of the medium-lift Taurus II. A summarized description of each class of space launch and smaller launch vehicles was published in the **Federal Register** (75 FR 80774, December 23, 2010) and a full description can be found online (<http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications>) within the AAC's application.

#### Launch Noise

Launch operations are a major source of noise on Kodiak Island, as the operation of launch vehicle engines produce substantial sound pressures. In air, all pressures are referenced to 20 micropascals; therefore all dB levels in this notice are provided re: 20 MicroPa, unless otherwise noted. Generally, four types of noise occur during a launch: (1) Combustion noise; (2) jet noise from interaction of combustion exhaust gases with the atmosphere; (3) combustion noise proper; and (4) sonic booms. Sonic booms are not a concern for pinnipeds on Ugak Island, as sonic booms created by ascending rockets launched from KLC reach the Earth's surface over deep ocean, well past the edge of the Outer Continental Shelf (OCS) (FAA 1996). Spent first-stage motors from space lift missions (*i.e.*, those going to orbit) fall to Earth at least 11, and possibly more than 300, miles down range (well past the edge of the OCS), depending on launch vehicle (U.S. FAA 1996). A complete description of launch noise measured from Ugak Island, including previously launched and recorded space vehicles, can be found in the proposed rule (75 FR 80775, December 23, 2010).

Another component of the AAC's launches includes security overflights.

In the days preceding the launch, these occur approximately 3 times per day based on the long-term average. Flights associated with the launch will not approach occupied pinniped haulouts on Ugak Island by closer than 0.25 mile (0.4 km), and will maintain a vertical distance of 1,000 ft (305 m) from the haulouts when within 0.5 miles (0.8 km), unless indications of human presence or activity warrant closer inspection of the area to assure that national security interests are protected in accordance with law. Over the operational history of these flights, aircraft have been operated within the 0.25-mile limit on two occasions; both involved direct overflight of the Steller sea lion haulout spit, which was unoccupied each time the incursions occurred.

#### Description of Marine Mammals in the Area of the Specified Activity

The AAC's current MMPA regulations (71 FR 4297, January 26, 2006), which are set to expire February 28, 2011, require aerial surveys be conducted before and after each launch to monitor for presence and abundance of marine mammals within the designated 6-mile action area. In compliance with these conditions, the AAC has completed these surveys since 2006. Aerial survey data indicate that Steller sea lions, harbor seals, gray whales (*Eschrichtius robustus*), humpback whales (*Megaptera novaeangliae*), and sea otters (*Enhydra lutris*) occur within the action area. Although potentially present, cetaceans within the action area are not expected to be taken during the specified activities. Airborne noise is generally reflected at the sea surface outside of a 26° cone extending downward from the ascending rocket (Richardson *et al.*, 1995); therefore, little sound energy passes into the sea across the air-water boundary. Submerged animals would have to be directly underneath the rocket to hear it, and given the hypersonic velocity of launch vehicles in the atmosphere, the duration of sounds reaching any cetacean would be discountable. In addition, all spent rocket motors will fall into the open ocean over deep water. Given the very short time a cetacean is at the surface, direct impact from spent motors can be discounted as can any noise related impacts. Based on these reasons, NMFS does not anticipate take of cetaceans incidental to the specified activity; hence, they will not be discussed further. Sea otters are managed by the U.S. Fish and Wildlife Service; therefore no take of sea otters is included in the proposed regulations. As such, this

species is not discussed further in this final rule.

#### Steller Sea Lions

Steller sea lions are designated into two stocks by NMFS. Those west of 144° longitude, which includes the KLC area, are listed as endangered under the ESA. Historically, mature and sub-adult males have used a spit on the northwestern side of Ugak Island as a post-breeding haulout. This spit is located 3.5 miles from the launch pad complex (*see* figure 4 and 5 in the application). The historic occupancy period ranges from June to September (post breeding), with peak reported numbers in the hundreds (Sease 1997; ENRI 1995–1998). However, use has declined in recent times in keeping with general declines seen in the species as a whole. The spit is designated a long-term trend count site by NMFS and has been surveyed once yearly, with June as the target, since the 1990s. Counts since 2000 have generally been zero (*e.g.*, NMFS, 2009; Fritz and Stinchcomb, 2005), which is in line with the counts from all other long-term trend count sites in the Kodiak Archipelago over the same time period. All of these other long-term trend sites are far removed from the 6-mile radius anticipated impact area up range from KLC (*i.e.*, areas opposite to the flight path), in areas not exposed to launch noise. Hence, Steller sea lion abundance has declined throughout the region, not just the area affected by launches, and the losses are likely not a result of or connected with the launches or use of KLC.

Data from AAC's aerial surveys over the past four years also support low use of the haulout. Since 1999, five launches have occurred during the Steller sea lion season. The spit haulout has not been used by Steller sea lions during launch-monitoring surveys since 1999 (ENRI, 2000, R&M, 2007a,b, 2008); however, during recent launch surveys one to several Stellar sea lions have been observed from time-to-time utilizing a supratidal rock on eastern Ugak Island (termed East Ugak Rock) as a haulout. Tables 2 and 4 in the application provide a breakdown of survey results per day. In summary, two to eight sea lions were observed per day on East Ugak Rock during surveys for the FTG-02 launch (R&M, 2006b), and one to five (per day) were observed during the FTX-03 launch (R&M, 2008). In addition, during one aerial survey that was completed outside the June to September timeframe (during the FTG-05 campaign in December 2008), a single Stellar sea lion was observed on East Ugak Rock. East Ugak Rock is

located farther east and to the south of the KLC than Ugak Island; therefore, one can assume launch generated sound levels here are less than those at Ugak Island.

#### Harbor Seals

Harbor seals are the most abundant marine mammal species found within the action area. Harbor seals are not listed as threatened or endangered under the ESA or as depleted under the MMPA. Based on the AAC's aerial survey counts from launch monitoring reports conducted since January 2006, approximately 97% of all observed harbor seals are found on the eastern shore of Ugak Island, approximately 5 miles from the launch pad complex. The eastern shore is backed by high steep cliffs that reach up to 1,000 feet above sea level. These cliffs form a visual and acoustic barrier to rocket operations, and alleviate effects on the species. This conclusion is based on review of sound pressure recordings made at the haulout spit found on the island's northwestern shore, which showed surf and wind-generated sound pressures at sea level were generally in the >70 dBA (SEL) range on the clearest days (Cuccarese *et al.*, 1999, 2000). During inclement weather periods ambient sound pressures at sea level can exceed 100 dBA (SEL). The island's eastern shore is windward to prevailing winds and surf noise is routinely high. Harbor seals located on Ugak Island's northern shore are not as protected from launch noise, and therefore may be harassed incidentally to the AAC's specified activity. However, harbor seal abundance on the northern shores is limited due to the lack of suitable habitat (*i.e.*, few beaches). During 30 aerial surveys conducted by the AAC during six rocket launches from 2006 to 2008, no seals were observed on North Ugak Island on 19 occasions. During surveys when seals were present, average abundance was 25 with a single day count of 125 individuals.

Because physical access to Ugak Island harbor seal haulouts is difficult and dangerous, the only abundance and behavior data of these seals have been derived from aerial surveys conducted by the AAC. Harbor seals generally breed and molt where they haul out, so it is assumed that both of these activities take place on Ugak Island, and young seals have routinely been seen there during launch-related aerial surveys. Pupping in Alaska takes place generally in the May to June time frame; molting occurs generally from June to October. Both periods contain peaks in haulout attendance. Total counts on Ugak Island have increased steadily since the 1990s

from several hundred (ENRI 1995–1998) up to a peak of about 1,500 today (R&M 2007a, 2007b, 2008, 2009).

#### Potential Effects on Marine Mammals

As discussed above, launch operations are a major source of noise on Kodiak Island and can reach Steller sea lion and harbor seal haulouts and rookeries on Ugak Island. Marine mammals produce sounds in various contexts and use sound for various biological functions including, but not limited to: (1) Social interactions; (2) foraging; (3) orientation; and (4) predator detection. Interference with producing or receiving these sounds may result in adverse impacts. Audible distance, or received levels (RLs), will depend on the nature of the sound source, ambient noise conditions, and the sensitivity of the receptor to the sound (Richardson *et al.*, 1995). Type and significance of marine mammal reactions to noise are likely to be dependent on a variety of factors including, but not limited to, the behavioral state (*e.g.*, resting, socializing, *etc.*) of the animal at the time it receives the stimulus, frequency of the sound, distance from the source, and the level of the sound relative to ambient conditions (Southall *et al.*, 2007). In general, marine mammal impacts from loud noise can be characterized as auditory and non-auditory.

#### Potential Auditory Impacts

Auditory impacts consist of injurious (*e.g.*, ruptured ear drums, permanent threshold shift [PTS]) or non-injurious (*e.g.*, temporary threshold shift [TTS]) effects. There are no empirical data for onset of PTS in any marine mammal; therefore, PTS-onset must be estimated from TTS-onset measurements and from the rate of TTS growth with increasing exposure levels above the level eliciting TTS-onset. PTS is presumed to be likely if the hearing threshold is reduced by  $\geq 40$  dB (*i.e.*, 40 dB of TTS).

Given the distance from the pad area to Ugak Island and the measured sound levels from the Castor 120 (101.4 dB), for the loudest space vehicle used at the KLC, pinniped auditory injury is not anticipated. Further explanation was provided in the proposed rule **Federal Register** notice (75 FR 80777, December 23, 2010). Regarding TTS, although hearing sensitivity was not apparently affected during the ABR testing, that is not to say that TTS did not occur, as seals were tested approximately 2 hours after launch, not immediately following the launch. However, if TTS did occur, hearing was fully recovered within 2 hours. In conclusion, NMFS has

preliminarily determined PTS would not occur in pinnipeds on Ugak Island and TTS, although unlikely, may occur. However, if pinnipeds on Ugak Island experience TTS, full-hearing recovery is expected shortly after exposure.

#### Potential Behavioral Impacts

To comply with their current regulations, the AAC attempted to collect video footage of pinnipeds during launches; however, weather, technical, and accessibility issues prevented video coverage from being obtained. Therefore, no immediate responses of pinnipeds to the AAC's launch noise have been documented. However, as discussed above, VAFB researchers have been investigating the short- and long-term effects of space vehicle launch noise and sonic booms on pinnipeds. As described in NMFS' 2009 EA, the percentage of seals that left the haulout increased as noise level increased up to approximately 100 decibels (dB) A-weighted SEL, after which almost all seals left, although recent data have shown that an increasing percentage of seals may remain on shore. Using time-lapse video photography, VAFB discovered that during four launch events, the seals that reacted but remained on the haulout were all adults. VAFB theorized that adult seals may have habituated to launch stimuli more so than less-experienced younger seals; hence the less-severe reactions. Further information on this research can be found within the proposed rule (75 FR 80777, December 23, 2010).

The behavioral data record for Steller sea lions is small throughout the North Pacific range and typically is focused on reproductive behaviors. In general, studies have shown that responses of pinnipeds on beaches to acoustic disturbance arising from rocket and target missile launches are highly variable. This variability may be due to many factors, including species, age class, and time of year.

The infrequent (approximately nine times per year) and brief (no more than 1 minute as heard from Ugak Island) nature of these sounds that would result from a rocket launch is not expected to alter the population dynamics of Steller sea lions or harbor seals which utilize Ugak Island as a haulout site. If launches occur during the harbor seal pupping period and harbor seals have also chosen to pup on the north beach, it is possible that harbor seal pups could be injured or killed as a result of the adults flushing in response to the rocket noise, or the mother/pup bond could be permanently broken. However, NMFS does not expect harbor seal pup injury

and mortality to occur to a great degree, due to previous research studies that are summarized in the proposed rule (75 FR 80778, December 23, 2010).

Finally, the KLC conducts approximately three security overflights per day in the days preceding a launch. Several studies of both harbor seals and Steller sea lions cited in Richardson *et al.* (2005) suggest that these animals respond significantly less to overflights of both planes and helicopters that occur above 305 m (0.2 mi). NMFS does not anticipate harassment from overflights to occur as they generally remain at least 0.25 miles from a haulout; however, if the pilot or crew notice overt responses from pinnipeds (e.g., flushing) to aircraft, this response will be noted and reported to NMFS in the flight report. Observations made of any animals displaced by a security overflight are reported to the environmental monitoring team for inclusion in their report of monitoring results.

#### Anticipated Effects on Habitat

Solid-fuel rocket boosters will fall into the ocean away from any known or potential haulouts. All sonic booms that reach the earth's surface are expected to occur over open ocean, beyond the OCS. Airborne launch sounds will mostly reflect or refract from the water surface and, except for sounds within a cone of approximately 26 degrees directly below the launch vehicle, will not penetrate into the water column. The sounds that do penetrate will not persist in the water for more than a few seconds. Overall, rocket launch activities from the KLC are not expected to cause any impacts to habitats used by marine mammals, including pinniped haulouts, or to their food sources.

#### Comments and Responses

On December 23, 2010 (75 FR 80773), NMFS published a notice of proposed rulemaking on the AAC's request to take marine mammals incidental to rocket launches at KLC and requested comments, information, and suggestions concerning the request. During the 30-day public comment period, NMFS received comments from eight private citizens, the Kodiak Chamber of Commerce, the Kodiak Island Borough Mayor, the City of Kodiak Mayor, and the Commission. Six of the private citizens—four of them residents of Kodiak, Alaska—and all of the city/borough officials wrote in support of the proposed rule. One private citizen expressed general opposition to anything related to the military. The remaining comments and NMFS' responses are detailed below.

*Comment 1:* The AAC should be required to obtain video footage of the harbor seal reactions to launches from the KLC. Furthermore, NMFS does not provide specific indications of what will be reviewed or potentially modified should the distribution, size, or productivity of either pinniped population be affected from the launches.

*Response:* As explained in the proposed rule, the AAC will be purchasing and placing one remote live-streaming video system to overlook a harbor seal haulout on the eastern side of Ugak Island. The purpose is to monitor for any behavioral reactions of harbor seals to the launches. The language about reviewing monitoring data and potentially modifying mitigation and monitoring requirements is put in place as an adaptive management measure. Data from aerial surveys and camera footage will be reviewed for unusual behavior, injury, or death. Any modifications to the mitigation or monitoring requirements will be determined on a case-by-case basis.

*Comment 2:* The Commission recommends that NMFS include in its final rule all of the applicant's proposed mitigation and monitoring measures, including those described in the preamble of the proposed rule.

*Response:* NMFS has included all of the required mitigation and monitoring measures in the final rule, including those described in the preamble.

*Comment 3:* The Commission recommends that NMFS require the AAC to use a remote video-camera system to monitor harbor seals on the eastern side of Ugak Island during at least five launches. If the cameras detect any disturbance, then the Commission recommends that the applicant and NMFS consult to determine what monitoring adjustments are needed and, if the authorized harbor seal takes are exceeded due to disturbance on the eastern side of the island, the applicant should consult with NMFS to determine if amendments to the regulations or letters of authorization are needed.

*Response:* The use of a remote video-camera system to monitor harbor seals on the eastern side of Ugak Island during at least five launches is a required monitoring measure for the AAC under this rulemaking. If any disturbance to the animals' behavior is detected, the regulations require that the AAC consult with NMFS to determine if any mitigation or monitoring modifications are necessary. Furthermore, if the authorized harbor seal takes are exceeded, the regulations require that the AAC consult with

NMFS to determine if amendments to the regulations or letters of authorization are needed.

*Comment 4:* The Commission recommends that NMFS require appropriate monitoring of Steller sea lions before, during, and after launches to determine if the launches are disturbing the sea lions' use of Ugak Island and possibly discouraging more sea lions from hauling out there.

*Response:* After the first five launches, cameras may be repositioned to monitor Steller sea lions on Ugak Island. Monitoring of Stellers under the previous rule (2006 to 2011) showed one of the following: (1) No sea lions present during a launch; (2) all sea lions present became alert but did not move immediately following a launch; or (3) some sea lions present were flushed into the water temporarily. Attempts will be made by the AAC to capture further sea lion behavioral responses at the time of launch.

*Comment 5:* The Commission recommends that NMFS advise the applicant of the need to consult with the Fish and Wildlife Service regarding the potential incidental take of sea otters.

*Response:* The AAC is aware of the Fish and Wildlife Service's jurisdiction over the incidental take of sea otters.

#### Mitigation

In order to issue an Incidental Take Authorization (ITA) under section 101(a)(5)(A) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to such activity, and other means of effecting the least practicable adverse impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stock for taking for certain subsistence uses.

To minimize impacts on pinnipeds at haulout sites, NMFS is requiring the following mitigation measures: (1) Security overflights associated with the launch will not approach occupied pinniped haulouts on Ugak Island by closer than 0.25 mile (0.4 km), and will maintain a vertical distance of 1,000 ft (305 m) from the haulouts when within 0.5 miles (0.8 km), unless indications of human presence or activity warrant closer inspection of the area to assure that national security interests are protected in accordance with law; (2) the AAC will avoid launches during the harbor seal pupping season (May 15 to June 30), unless constrained by factors including, but not limited to, human safety and national security; and (3) if launch monitoring detects pinniped injury or death, or if long-term trend

counts from quarterly aerial surveys indicate that the distribution, size, or productivity of the potentially affected pinniped populations has been affected due to the specified activity, the launch procedures and the monitoring methods will be reviewed, in cooperation with NMFS, and, if necessary, appropriate changes may be made through modifications to a given LOA, prior to conducting the next launch of the same vehicle under that LOA.

NMFS carefully evaluated the applicant's proposed mitigation measures and considered a range of other measures in the context of ensuring that NMFS prescribes the means of effecting the least practicable adverse impact on the affected marine mammal species and stocks and their habitat. Our evaluation of potential measures included consideration of the following factors in relation to one another: (1) The manner and the degree to which the successful implementation of the measure is expected to minimize adverse impacts to marine mammals; (2) the proven or likely efficacy of the specific measure to minimize adverse impacts as planned; and (3) the practicability of the measure for applicant implementation, including consideration of personnel safety, and practicality of implementation. The required mitigation measures take scientific studies (Richardson *et al.*, 2005) of overflight effects on pinnipeds into consideration. By avoiding launches during the harbor seal pupping season, the AAC will avoid all Level A harassment and mortality, which is only anticipated to occur as a result of pups being trampled or separated from their mothers. Lastly, the adaptive nature of the proposed mitigation measures allow for adjustments to be made if launch monitoring or quarterly aerial surveys indicate that impacts to the distribution, size, or productivity of pinniped populations are occurring.

Based on our evaluation of the applicant's proposed measures, as well as other measures considered by NMFS or recommended by the public during the 30-day comment period, NMFS has determined that the aforementioned mitigation measures provide the means of effecting the least practicable adverse impacts on marine mammals species or stocks and their habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance.

#### Monitoring and Reporting

In order to issue an ITA for an activity, section 101(a)(5)(A) of the MMPA states that NMFS must set forth "requirements pertaining to the

monitoring and reporting of such taking." The MMPA implementing regulations at 50 CFR 216.104(a)(13) indicate that requests for ITAs must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present.

The AAC plans to purchase and place one remote live-streaming video system overlooking one of the harbor seal haulouts on the eastern side of Ugak Island for the first five launches conducted under these regulations to verify the assumption that seals on the eastern side of the island are not affected by launches. Although animals on the northern shore are more likely to be affected by the action, this area is predominantly a rocky reef tidal area where seals haul out opportunistically, either singly or in small numbers on exposed rocks. There is more confidence seals will be visible and able to be monitored on the eastern side of the island. After five launches, AAC and NMFS will reassess the efficiency of the camera system and possibly move it to another location (*e.g.*, the traditional Steller sea lion haulout).

The selected haulout will be viewed either in real time or via "tape" delay for six days using the following schedule where day length permits. The six-day schedule will be roughly centered on the day of launch, with launch day being day three of the monitoring schedule. The video stream will be viewed by professional biologists for 4 hours each day with monitoring centered on the time of launch on launch day, and on low tide on the other days. Detailed information on when monitoring will occur around a launch is provided in the AAC's application. Data collected from the live stream video will include number of animals observed, by age and sex class when possible, behavior (*e.g.*, resting), animal response to launches, and re-occupation time if disturbed.

The video system was developed, tested, and first put into service in Alaska, and has proven itself over many years of operation both in Alaska and around the world. The video system is all weather proven and autonomous, drawing energy from a combination of wind and solar generators. It features a camera that includes a lens that can be focused (zoom and pan) on command and provides live-streaming video that can be made available through Internet access to interested researchers in real time.

The AAC will also carry out quarterly aerial surveys to determine long-term trend counts of Steller sea lions and harbor seals within the action area. Surveys will be flown midday and centered around low tide for optimal seal counts. The aircraft will survey from a distance appropriate to count seals or sea lions, but far enough away to minimize harassment. Data collected will include number of seals or sea lions per haulout, by age class when possible, and if any disturbance behavior is noted from aircraft presence.

In addition to visual monitoring, whenever a new class of rocket is flown from the KLC, a real time sound pressure record will be obtained for documentation purposes and correlated with the behavioral response record. Two sound pressure monitors will be used: one will be placed at the established sound pressure recording location known as Narrow Cape and the other as close as practical to the remote video system.

#### Estimated Take by Incidental Harassment

Except with respect to certain activities not pertinent here, the MMPA (16 U.S.C. 1362(18)(A)) 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].

As described above, Steller sea lions hauled out on Ugak Island may become alert or flush into the water in response to launch noise. Sound exposure levels from the loudest launch may reach approximately 101.4 dBA at the traditional Steller sea lion haulout. Based on this recorded level and the fact that audible launch noise will be very short in duration, sea lions are not expected to incur PTS, and the chance of TTS is unlikely. No injury or mortality of Steller sea lions is anticipated, nor is any authorized. Therefore, NMFS authorizes Steller sea lion take, by Level B harassment only, incidental to launches from KLC.

Harbor seals of all age classes hauled out on the northern side of Ugak Island will likely react in a similar manner as Steller sea lions (and may become alert or flush into the water) to launches from KLC. Therefore, harbor seals may be taken by Level B harassment incidental to rocket launch noise. However, during the pupping season (May 15 to June 30),

pups may also be injured, killed, or separated from their mother during a flushing event. Therefore, NMFS authorizes Level A harassment and mortality of harbor seal pups, should launches during the harbor seal pupping season be unavoidable.

As discussed above, security overflights associated with a launch will not closely approach or circle any sea lion or seal haulout site. Therefore, incidental take from this activity is not anticipated. Should the pilot or crew on the plane observe pinnipeds reacting to their presence, the plane will increase altitude and note the number of animals reacting to the plane. This data will be included in the AAC's final marine mammal report.

The AAC estimates that up to 45 launches may occur from the KLC over the course of the 5-year period covered by the proposed rulemaking. Annually, the AAC estimates an average of nine launches will occur. Most of these vehicles are expected to be of the Minotaur I through V class, including civil versions of the Castor 120 known as the Athena and Taurus I or smaller target vehicles. The AAC estimates that no more than one launch will occur over a 4-week period, and it is likely the frequency of launches will be less than this estimate.

Based on aerial survey data, the AAC estimates a maximum of ten Steller sea lions could be present during launches occurring during the Steller sea lion season (the maximum number of animals sighted during a survey of this season has been eight). Any sea lions present during the launches will be adult or juvenile males; therefore, no reproductive processes or pupping will be affected by the specified activities. Assuming that all nine launches (the average number of launches predicted by the AAC) occur during the Steller sea lion season, that all nine launches involve the Castor 120 (the loudest vehicle expected to be flown from KLC over the period to be covered by the proposed regulations), and that there is no habituation to rocket motor effects with experience, then up to 90 takes by harassment could occur per year (ten animals/launch  $\times$  nine launches). However, it is more reasonable to assume that a maximum of four launches per year could occur during the 2-month Steller sea lion season, and that no more than eight Stellers would be present at any given time (the maximum number recorded). Therefore, NMFS authorizes the take, by Level B harassment, of 32 Steller sea lions per year (eight animals  $\times$  four launches).

The total number of harbor seals present on Ugak Island ranges up to

about 1,500, most of which are found on the island's eastern shore where they are sheltered from launch effects by the 1,000-foot tall cliffs that stand between their haulouts and the KLC. Relatively few harbor seals use haulouts on the northern side of the island across from the KLC due to the lack of suitable beaches. No seals were observed on northern haulouts, which consist primarily of isolated rocks, during 19 of 30 marine mammal surveys flown by the AAC from 2006 to 2008. When present, the majority of counts on northern haulouts showed fewer than 25 individuals; however, a one-time high count of about 125 animals on these rocks has been made. Using the conservative and rare high number of 125 as being a representative figure, the AAC estimates that up to 125 individuals might be taken per launch operation. Therefore, NMFS authorizes 1,125 harbor seal (125 seals/launch  $\times$  nine launches/year) takes during launch operations.

The actual number of pups taken by Level A harassment or mortality is difficult to quantify, as age class was not identified during the AAC's previous monitoring efforts (age class distinction will occur under the current monitoring and reporting requirements). Given that seals do not use the northern haulouts in large numbers (as compared to the protected eastern haulouts), the number of pups on the area of the island exposed to launch noise is likely low. Actual numbers will likely be smaller given the low and variable use of the area by harbor seals.

To better determine the potential number of pups on Ugak Island during launches, NMFS consulted with Ms. Kate Wynne, a marine mammal specialist with the Alaska Sea Grant Marine Advisory Program, who has previously flown aerial surveys within the action area. Her data, from the early 1990s, indicates that pup counts on the northern side of Ugak Island averaged approximately 17. Although this data is not recent, it is the best available. NMFS does not anticipate that all pups on a haulout would be injured or killed during a launch and, in fact, many may not be taken by Level A harassment or mortality. However, in the unlikely event injury or mortality occurs, NMFS authorizes 17 harbor seal pup takes by Level A harassment or mortality, annually, incidental to AAC's activities.

#### Previous Activities and Monitoring

As previously discussed, under AAC's current regulations (valid February 27, 2006 through February 28, 2011) and annual LOAs, AAC has been conducting marine mammal monitoring within the

action area before and after launch events to satisfy the monitoring requirements set forth in MMPA authorizations. The objective of monitoring Steller sea lions and Pacific harbor seals is to detect any indications of pinniped disturbance, injury, or mortality resulting from KLC rocket launches at the Ugak Island haulout site. Monitoring requirements included: (1) Conducting fixed-wing aerial surveys at least one day prior to, immediately after, and three days following any launches taking place from June 15 through September 30, weather permitting; (2) installing a remote custom-designed, closed-circuit, weatherproof, time-lapse video camera system at the base of the traditional Steller sea lion haulout before any launch occurring from June 15 through September 30; and (3) making an attempt to place a video camera with zoom lens on the accessible western end of the north-facing shore to record harbor seal behavior on the middle or eastern end of the shore, or on the rocks offshore (recall that the eastern side of Ugak Island—where the majority of seals are—is completely inaccessible to pedestrian or boat traffic due to the high cliffs and violent surf). The regulations also contained noise monitoring requirements; these data are discussed in the *Description of the Specified Activity* section above. The AAC complied with the noise monitoring conditions contained within the regulations and annual LOAs. Further information on the AAC's previous activities and monitoring results can be found within the proposed rule (75 FR 80780, December 23, 2010).

NMFS has shifted its focus from direct Steller sea lion to harbor seal monitoring under these regulations. The AAC will monitor harbor seal reactions to rocket launches during the launch itself via a type of camera system currently used by the Alaska Sea Life Center to monitor haulouts and rookeries. The camera will be placed at a harbor seal pupping location on Ugak Island to better assess the likelihood that harbor seal pups may be abandoned, injured, or killed as a direct result of a rocket launch disturbance. The camera system will be installed and operating if the AAC conducts a launch during the harbor seal pupping season. Unlike the previous system, this camera system does not need to be retrieved to acquire data and battery power is not problematic. Therefore, the AAC can place it at a harbor seal haulout during good weather no matter the number of days before a launch and does not have to be concerned with retrieving it. These factors will likely eliminate the previous

issues with video monitoring designed to detect pinniped reactions at the time of the launch. In addition, the camera system will have a zoom lens for better viewing quality.

#### **Negligible Impact and Small Numbers Analysis and Determination**

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." In making a negligible impact determination, NMFS considers (and should explicitly address whenever possible) the following: (1) Number of anticipated mortalities; (2) number and nature of anticipated injuries; (3) number, nature, intensity, and duration of Level B harassment; (4) is the nature of the anticipated takes such that we would expect it to actually impact rates of recruitment or survival; (5) context in which the takes occur; and (6) species or stock status.

In the past few years, the AAC has conducted no more than two launches on an annual basis. Regardless, NMFS has analyzed the specified activity to include disturbance events of up to nine launches per year as they anticipate the capability to carry out more efficient mission turn-around time over the duration of the final regulations. Mortalities and injuries are only authorized for harbor seal pups, and these are not expected due to small and variable harbor seal populations using the northern haulout sites, as well as the nature of pups and the early bonds formed between pups and mothers. Level B harassment of Steller sea lions is possible due to rocket launch noise, but is considered unlikely based on projected sound levels and the short duration of the noise; therefore, rates of sea lion recruitment or survival are not expected to be impacted. Rates of harbor seal recruitment or survival are also not expected to be impacted due to the limited number of mortalities or injuries to harbor seal pups (less than one percent of population). Due to the fact that no sonic booms are audible from Ugak Island, NMFS does not anticipate the potential for PTS to occur and TTS is unlikely, but possible. These assumptions are justified from ABR data collected at and around VAFB from similar launch activities. Further, based on aerial survey data, the harbor seal population on this island is increasing. Given that harbor seals are considered a species that is easily disturbed, their resilience to launch effects suggest any impacts from launches are short-term

and negligible. The amount of take the AAC has requested, and NMFS authorizes, is considered small (less than one percent of Stellers and less than three percent of harbor seals) relative to the estimated stock populations of 41,197 Steller sea lions in the Western U.S. and 44,453 harbor seals in the Gulf of Alaska.

Mitigation measures to reduce noise from launches once in the air are virtually impossible; however, the noise generated on the launch pad during ignition moves through a deep trench (called a flame trench or flame bucket) that diverts the noise/exhaust toward the northwest (away from Ugak Island). The primary method of minimizing impacts to pinnipeds from launch noise is to minimize the number of launches when possible during sensitive times.

In addition, improved monitoring will better enable the AAC and NMFS to determine if impacts from rocket launches are having short-term and long-term impacts on the present day pinniped populations on Ugak Island. The camera system will be able to detect immediate impacts from launch exposure, including the number of pinnipeds flushing at the haulout site, while quarterly aerial surveys will aid in determining long-term trends of pinniped abundance. NMFS conservatively anticipates a small number of pups may be injured or killed during a launch. However, there is no empirical data to prove or disprove this as no video monitoring of seals during the launch has been successful (the one time a video system was placed near the haulout, no seals were observed). As discussed previously, the population of harbor seals on Ugak Island has increased steadily from several hundred in the 1990s (ENRI 1995–1998) to a peak of about 1,500 today (R&M 2007a, 2007b, 2008, 2009). Therefore, NMFS does not believe there will be any long-term impact on the health of the population if pup mortality occurs from launches. The required monitoring measures contained within this notice are specifically designed to, among other things, determine if pup injury or mortality is occurring (*i.e.*, from flushing, separation of mothers and pups, *etc.*) due to rocket launches from the AAC.

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the mitigation and monitoring measures, NMFS finds that space vehicle and missile launches at the KLC will result in the incidental take of small numbers of marine mammals, but that the total

taking will have a negligible impact on the affected species or stocks.

#### **Impact on Availability of Affected Species for Taking for Subsistence Uses**

There are no relevant subsistence uses of marine mammals implicated by this action. Therefore, NMFS has determined that the total taking of affected species or stocks will not have an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence uses.

#### **Endangered Species Act (ESA)**

The Steller sea lion is the only marine mammal species under NMFS' jurisdiction that is listed as endangered under the ESA with confirmed or possible occurrence in the action area. In the 2003 Biological Opinion, NMFS determined that the proposed actions would not result in jeopardy to the affected species or result in adverse modification of critical habitat. In 2005, the AAC, on behalf of the FAA, consulted with NMFS, under Section 7 of the ESA, on the impacts of space vehicle and rocket launches on Steller sea lions. NMFS consulted internally under the ESA on its proposed issuance of the AAC's 2006 MMPA regulations and subsequent LOAs. NMFS also consulted internally on the issuance of the final regulations (effective from March 2011, through February 2016) for this activity under section 101(a)(5)(A) of the MMPA. In a Biological Opinion (BiOp), NMFS Alaska Region concluded that the AAC's activities at the KLC and NMFS' issuance of these regulations are not likely to jeopardize the continued existence of Steller sea lions or destroy or adversely modify any designated critical habitat.

NMFS Alaska Region will also issue BiOps and associated incidental take statements (ITs) to NMFS' Permits, Conservation, and Recreation Division to exempt the take (under the ESA) that NMFS authorizes in the LOAs under the MMPA. Because of the difference between the statutes, it is possible that ESA analysis of the applicant's action could produce a take estimate that is different than the takes requested by the applicant (and analyzed for authorization by NMFS under the MMPA process), despite the fact that the same proposed action (*i.e.*, number and type of launches) was being analyzed under each statute. When this occurs, NMFS staff coordinates to ensure that the most conservative (lowest) number of takes is authorized. For the AAC's activities at the KLC, coordination with the NMFS Alaska Region indicates that they will likely allow for the same

amount of take of Steller sea lions that was requested by the applicant.

The ITS(s) issued for each LOA will contain implementing terms and conditions to minimize the effect of the marine mammal take authorized through the 2011 LOA (and subsequent LOAs in 2012, 2013, 2014, and 2015). With respect to listed marine mammals, the terms and conditions of the ITSs will be incorporated into the LOAs.

#### National Environmental Policy Act (NEPA)

In 1996, the FAA prepared an EA, and subsequently issued a Finding of No Significant Impact (FONSI), for the AAC's proposal to construct and operate a launch site at Narrow Cape on Kodiak Island, Alaska. Since 1998, the AAC has provided monitoring reports related to noise and marine mammal impacts associated with ongoing rocket launches from KLC. After reviewing the new information contained in the monitoring reports, and considering the Commission's comments that impacts to harbor seals should be more comprehensively addressed, NMFS decided that a more current environmental analysis was necessary. In 2005, NMFS prepared an EA and associated FONSI on the Promulgation of Regulations Authorizing Take of Marine Mammals Incidental to Rocket Launches at Kodiak Launch Complex, Alaska, and the Issuance of Subsequent Letters of Authorization. NMFS found that the promulgation of a 5-year rulemaking in 2006 and issuance of subsequent LOAs would not significantly impact the quality of the human environment, and therefore issued a FONSI. Accordingly, preparation of an Environmental Impact Statement or Supplemental Environmental Impact Statement for this action was not necessary. NMFS has determined that because neither the action nor the environmental baseline in the area has changed significantly from that analyzed in previous NEPA documents, further analysis under NEPA is not necessary for issuance of regulations and subsequent LOAs extending into 2016.

#### Classification

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

Good cause exists to waive the 30-day delay in effectiveness for this rule pursuant to 5 U.S.C. 553(d), because delaying the rule's effectiveness is contrary to the public interest and is unnecessary. While there are no launches specifically scheduled for

March 2011, the U.S. Air Force has told the AAC to be prepared for a potential launch as early as March. Because these launches may be necessary for national security, it is in the public's interest to have these regulations take effect immediately, before the AAC's current regulations expire on February 28, 2011. The AAC has requested a waiver of the 30-day delay in effectiveness for this rule in order to ensure that the rule goes into effect March 1, 2011, the day after the current regulations expire. A launch delay would lead to increased risk for personnel if there is increased handling time for hazardous materials or ordnance that has to be deactivated or offloaded, depending on the stage of launch preparations at the time of delay. Delaying this initial launch could also delay other scheduled launches for the following months. Additionally, the measures contained in this final rule are substantially similar to the measures contained in the five-year rule that expires on February 28, 2011. Accordingly, delaying the effectiveness of these rules is not necessary to provide time to allow the affected entities to come into compliance with the rules. Moreover, this rule does not impose any requirements or obligations on the public. For these reasons, there is good cause to waive the 30-day delay in effectiveness of this rule.

Pursuant to section 605(b) of the Regulatory Flexibility Act (RFA), 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 final rule will not have a significant economic impact on a substantial number of small entities. A description of this final rule and its purpose are found in the preamble to this rule, and are not repeated here. NMFS received no comments or questions regarding this certification. For a copy of the certification, see **ADDRESSES**.

Notwithstanding any other provision of law, no person is required to respond to nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act (PRA) unless that collection of information displays a currently valid OMB control number. This rule contains a collection-of-information requirement subject to the provisions of the PRA. This collection has been approved previously by OMB under section 3504(b) of the PRA issued under OMB control number 0648-0151, which includes applications for LOAs and reports.

#### List of Subjects in 50 CFR Part 217

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

Dated: February 16, 2011.

**Eric C. Schwaab,**

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

For reasons set forth in the preamble, 50 CFR part 217 is amended as follows:

#### PART 217—REGULATIONS GOVERNING THE TAKING AND IMPORTING OF MARINE MAMMALS

■ 1. The authority citation for part 217 continues to read as follows:

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

■ 2. Subpart H is added to read as follows:

#### Subpart H—Taking of Marine Mammals Incidental to Space Vehicle and Missile Launches at Kodiak Launch Complex, Alaska

Sec.

- 217.70 Specified activity and specified geographical region.
- 217.71 Effective dates.
- 217.72 Permissible methods of taking.
- 217.73 Prohibitions.
- 217.74 Mitigation.
- 217.75 Requirements for monitoring and reporting.
- 217.76 Letter of Authorization.
- 217.77 Renewal of a Letter of Authorization and adaptive management.
- 217.78 Modifications to a Letter of Authorization.

#### Subpart H—Taking of Marine Mammals Incidental to Space Vehicle and Missile Launches at Kodiak Launch Complex, Alaska

##### § 217.70 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 U.S. citizens engaged in space vehicle and missile launch activities at the Kodiak Launch Complex on Kodiak Island, Alaska.

(b) The incidental take of marine mammals under the activity identified in paragraph (a) of this section is limited to 32 juvenile and adult Steller sea lions (*Eumetopius jubatus*), 1,125 Pacific harbor seals (*Phoca vitulina*) of all ages, and 17 harbor seal pups.

##### § 217.71 Effective dates.

Regulations in this subpart are effective from March 22, 2011 through March 22, 2016.

##### § 217.72 Permissible methods of taking.

(a) Under a Letter of Authorization issued pursuant to § 216.106 of this



chapter, the Alaska Aerospace Corporation and its contractors may incidentally, but not intentionally, take Steller sea lions and Pacific harbor seals by Level B harassment and harbor seal pups by Level A harassment or mortality in the course of conducting space vehicle and missile launch activities within the area described in § 217.70(a), provided all terms, conditions, and requirements of these regulations and such Letter of Authorization are complied with.

(b) The activities identified in § 217.70(a) must be conducted in a manner that minimizes, to the greatest extent practicable, adverse impacts on marine mammals and their habitat.

#### **§ 217.73 Prohibitions.**

The following activities are prohibited:

(a) The taking of a marine mammal that is other than unintentional.

(b) The violation of, or failure to comply with, the terms, conditions, and requirements of this subpart or a Letter of Authorization issued under § 216.106 of this chapter.

(c) The incidental taking of any marine mammal of a species not specified, or in a manner not authorized, in this subpart.

#### **§ 217.74 Mitigation.**

(a) The activity identified in § 217.70(a) must be conducted in a manner that minimizes, to the greatest extent practicable, adverse impacts on marine mammals and their habitats. When conducting operations identified in § 217.70(a), the mitigation measures contained in the Letter of Authorization issued under §§ 216.106 of this chapter and 217.76 must be implemented. These mitigation measures include (but are not limited to):

(1) Security overflights by helicopter associated with a launch will not approach occupied pinniped haulouts on Ugak Island by closer than 0.25 mile (0.4 km), and will maintain a vertical distance of 1000 ft (305 m) from the haulouts when within 0.5 miles (0.8 km), unless indications of human presence or activity warrant closer inspection of the area to assure that national security interests are protected in accordance with law;

(2) For missile and rocket launches, holders of Letters of Authorization must avoid launches during the harbor seal pupping season of May 15 through June 30, except when launches are necessary for the following purposes: human safety, national security, space vehicle launch trajectory necessary to meet mission objectives, or other purposes related to missile or rocket launches.

(3) All flights by fixed-wing aircraft associated with the marine mammal abundance quarterly surveys must maintain a minimum altitude of 500 ft (152 m) and remain 0.25 miles from recognized seal haulouts.

(4) If launch monitoring or quarterly aerial surveys indicate that the distribution, size, or productivity of the potentially affected pinniped populations has been affected due to the specified activity, the launch procedures and the monitoring methods will be reviewed, in cooperation with NMFS, and, if necessary, appropriate changes may be made through modifications to a given LOA, prior to conducting the next launch of the same vehicle under that LOA.

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

(b) [Reserved]

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

(a) Holders of Letters of Authorization issued pursuant to §§ 216.106 of this chapter and 217.76 for activities described in § 217.70(a) 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, Alaska Region, NMFS, by letter, e-mail or telephone, prior to each launch. If the authorized activity identified in § 217.70(a) is thought to have resulted in the take of marine mammals not identified in § 217.70(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), within 48 hours of the discovery of the take.

(b) Holders of Letters of Authorization must designate qualified protected species observers, approved in advance by NMFS, as specified in the Letter of Authorization, to:

(1) Deploy for AAC a remote camera system designed to detect pinniped responses to rocket launches for at least the first five launches conducted under these regulations. AAC will conduct visual monitoring for at least 2 hours before, during, and 2 hours after launch;

(2) Ensure a remote camera system will be in place and operating in a location which allows visual monitoring of a harbor seal rookery, if a launch during the harbor seal pupping season cannot be avoided;

(3) Relocate the camera system to or re-aim the camera system on another haulout to be chosen in cooperation

with NMFS after the first five launches with harbor seals present;

(4) Review and log pinniped presence, behavior, and re-occupation time data from the visual footage obtained from the remote camera system and report results to NMFS within 90 days post launch;

(5) Obtain, whenever a new class of rocket is flown from the Kodiak Launch Complex, a real-time sound pressure and sound exposure record for documentation purposes and to correlate with the behavioral response record. Two monitors shall be used: one shall be placed at the established recording location known as Narrow Cape, and the other as close as practical to the remote video system;

(6) Conduct quarterly aerial surveys, ideally during midday coinciding with low tide, to obtain data on pinniped presence, abundance, and behavior within the action area to determine long-term trends in pinniped haulout use. Results of these quarterly surveys will be reported once as part of the year-end summary report that will accompany the request for a new LOA.

(c) Holders of Letters of Authorization must conduct additional monitoring as required under an annual Letter of Authorization.

(d) Holders of Letters of Authorization must submit a report to the Alaska Region Administrator, NMFS, within 90 days after each launch. This report must contain the following information:

(1) Date(s) and time(s) of the launch;

(2) Location of camera system and acoustic recorders (if used);

(3) Design of the monitoring program and a description of how data is stored and analyzed; and

(4) Results of the monitoring program, including, but not necessarily limited to:

(i) Numbers of pinnipeds, by species and age class (if possible), present on the haulout prior to commencement of the launch;

(ii) Numbers of pinnipeds, by species and age class (if possible), that may have been harassed, including the number that entered the water as a result of launch noise;

(iii) The length of time pinnipeds remained off the haulout during post-launch monitoring;

(iv) Number of harbor seal pups that may have been injured or killed as a result of the launch; and

(v) Other behavioral modifications by pinnipeds that were likely the result of launch noise.

(5) Results of sound pressure and sound exposure level monitoring will be reported in flat weighted, A-weighted, and peak measurements.

(e) An annual report must be submitted at the time of request for a renewal of the Letter of Authorization; it will include results of the aerial quarterly trend counts of pinnipeds at Ugak Island.

(f) A final report must be submitted at least 90 days prior to expiration of these regulations if new regulations are sought or 180 days after expiration of regulations. This report will:

(1) Summarize the activities undertaken and the results reported in all previous reports;

(2) Assess the impacts of launch activities on pinnipeds within the action area, including potential for pup injury and mortality; and

(3) Assess the cumulative impacts on pinnipeds and other marine mammals from multiple rocket launches.

#### **§ 217.76 Letter of Authorization.**

(a) A Letter of Authorization, unless suspended or revoked, will be valid for a period of time specified in the Letter of Authorization, but a Letter of Authorization may not be valid beyond the effective period of the regulations.

(b) A Letter of Authorization with a period of validity less than the effective period of the regulations in this subpart may be renewed subject to renewal conditions in § 217.76.

(c) A Letter of Authorization will set forth:

(1) The number of marine mammals, by species and age class, authorized to be taken;

(2) Permissible methods of incidental taking;

(3) Specified geographical region;

(4) Means of effecting the least practicable adverse impact on the species of marine mammals authorized for taking and its habitat; and

(5) Requirements for monitoring and reporting incidental takes.

(d) Issuance of a Letter of Authorization will be based on a determination that the total taking by the activity as a whole will have no more than a negligible impact on the affected species or stocks of marine mammal(s).

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

#### **§ 217.77 Renewal of a Letter of Authorization and adaptive management.**

(a) A Letter of Authorization issued under § 216.106 of this chapter and § 217.76 for the activity identified in § 217.70(a) will be renewed annually upon:

(1) Notification to NMFS that the activity described in the application for a Letter of Authorization submitted under § 217.76 will be undertaken and that there will not be a substantial modification to the described activity, mitigation, or monitoring undertaken during the upcoming season;

(2) Timely receipt of and acceptance by NMFS of the monitoring reports required under § 217.75;

(3) A determination by NMFS that the mitigation, monitoring, and reporting measures required under §§ 217.74 and 217.75 and the Letter of Authorization were undertaken and will be undertaken during the upcoming period of validity of a renewed Letter of Authorization; and

(4) A determination that the number of marine mammals taken by the activity will have no more than a negligible impact on the affected species or stocks of marine mammal(s), and that the level of taking will be consistent with the findings made for the total taking allowable under these regulations.

(b) If a request for a renewal of a Letter of Authorization issued under §§ 216.106 and 216.128 of this chapter 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 to 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** within 30 days of a determination.

(d) NMFS, in response to new information and in consultation with the AAC, may modify the mitigation or monitoring measures in subsequent LOAs if doing so creates a reasonable likelihood of more effectively accomplishing the goals of mitigation or monitoring set forth in the preamble of these regulations. Below are some of the possible sources of new data that could contribute to the decision to modify the mitigation or monitoring measures:

(1) Results from the AAC's monitoring from the previous year.

(2) Results from general marine mammal and sound research.

#### **§ 217.78 Modifications to a Letter of Authorization.**

(a) Except as provided in paragraph (b) of this section, no substantive modification (including withdrawal or suspension) to a Letter of Authorization issued pursuant to the provisions of this subpart shall be made by NMFS until after notification and an opportunity for public comment has been provided. A renewal of a Letter of Authorization under § 217.77 without modification 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 § 217.70(b), a Letter of Authorization 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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