

the current regulations that would apply irrespective of this rulemaking.

### III. Administrative Requirements

#### A. Public Hearing

A public hearing will be held, if requested, to discuss the proposed amendment in accordance with section 307(d)(5) of the Clean Air Act. Persons wishing to make oral presentations should contact EPA at the address given in the ADDRESSES section of this preamble. Oral presentations will be limited to 15 minutes each. Any member of the public may file a written statement with EPA before, during, or within 30 days after the hearing. Written statements should be addressed to the Air Docket Section address given in the ADDRESSES section of this preamble.

A verbatim transcript of the hearing and written statements will be available for public inspection and copying during normal working hours at EPA's Air Docket Section in Washington, DC (see ADDRESSES section of this preamble).

#### B. Docket

The docket is an organized and complete file of all the information considered by EPA in the development of this rulemaking. The docket is a dynamic file, since material is added throughout the rulemaking development. The docketing system is intended to allow members of the public and industries involved to identify and locate documents readily so that they may effectively participate in the rulemaking process. Along with the statement of basis and purpose of the proposed and promulgated test method revisions and EPA responses to significant comments, the contents of the docket, except for interagency review materials, will serve as the record in case of judicial review [Section 307(d)(7)(A)].

#### C. Executive Order 12866 Review

Under Executive Order (E.O.) 12866, the EPA must determine whether the proposed regulatory action is "significant" and therefore, subject to the Office of Management and Budget (OMB) review and the requirements of the Executive Order. The Order defines "significant" regulatory action as one that is likely to lead to a rule that may:

(1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety in State, local, or tribal governments or communities;

(2) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;

(3) Materially alter the budgetary impact of entitlements, grants, user fees or loan programs or the rights and obligations of recipients thereof; or

(4) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

Pursuant to the terms of Executive Order 12866, OMB has determined that this proposed rule is not "significant" because the annual effect on the economy will not exceed \$100 million.

#### D. Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) of 1980 requires the identification of potentially adverse impacts of Federal regulations upon small business entities. The RFA specifically requires the completion of an analysis in those instances where small business impacts are possible. This rulemaking does not impose emission measurement requirements beyond those specified in the current regulations, nor does it change any emission standard. Because this rulemaking imposes no adverse economic impacts, an analysis has not been conducted.

Pursuant to the provision of 5 U.S.C. 605(b), I hereby certify that the promulgated rule will not have an impact on small entities because no additional costs will be incurred.

#### E. Paperwork Reduction Act

This rule does not change any information collection requirements subject to Office of Management and Budget review under the Paperwork Reduction Act of 1980, 44 U.S.C. 3501 *et seq.*

#### F. Statutory Authority

The statutory authority for this proposal is provided by sections 111 and 301(a) of the Clean Air Act, as amended: 42 U.S.C., 7411 and 7601(a).

#### List of Subjects in 40 CFR Part 60

Environmental protection, Administrative practice and procedure, Air pollution control, Aluminum, Ammonium sulfate plants, Batteries, Beverages, Carbon monoxide, Cement industry, Coal, Copper, Dry cleaners, Electric power plants, Fertilizers, Fluoride, Gasoline, Glass and glass products, Grains, Graphic arts industry, Heaters, Household appliances, Insulation, Intergovernmental relations, Iron, Labeling, Lead, Lime, Metallic and nonmetallic mineral processing plants, Metals, Motor vehicles, Natural gas, Nitric acid plants, Nitrogen dioxide,

Paper and paper products industry, Particulate matter, Paving and roofing materials, Petroleum, Phosphate, Plastics materials and synthetics, Polymers, Reporting and recordkeeping requirements, Sewage disposal, Steel, Sulfur oxides, Sulfuric acid plants, Tires, Urethane, Vinyl, Volatile organic compounds, Waste treatment and disposal, Zinc.

Dated: May 22, 1995.

**Carol M. Browner,**  
Administrator.

[FR Doc. 95-13153 Filed 5-30-95; 8:45 am]

BILLING CODE 6560-50-P

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 228

[Docket No. 950504128-5128-01; I.D. 031095A]

RIN 0648-AG80

#### Small Takes of Marine Mammals; Harassment Takings Incidental to Specified Activities

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

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

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**SUMMARY:** The Marine Mammal Protection Act (MMPA) Amendments of 1994 established an expedited process by which citizens of the United States can apply for an authorization to take incidentally, but not intentionally, small numbers of marine mammals by harassment. This proposed rule sets forth the process for applying for and obtaining an authorization; the time limits set by the statute for NMFS review, publication, and public notice and comment on any applications for authorization that would be granted; and the requirements for submission of a plan of cooperation and for scientific peer review of an applicant's monitoring plans (if that activity may affect the availability of a species or stock of marine mammal for taking for subsistence purposes). This rule also proposes changes to the existing regulations to clarify the requirements for obtaining a small take authorization. If implemented, this rule would result in a more streamlined and cost-effective method for obtaining small take by incidental harassment authorizations, without lessening the MMPA's

protection of species and stocks of marine mammals.

**DATES:** Comments must be received no later than July 17, 1995.

**ADDRESSES:** Written comments on the proposed rule should be addressed to Chief, Marine Mammal Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910-3226. A copy of the Environmental Assessment (EA) may be obtained by writing to this address or by telephoning the contact listed below.

Comments regarding the burden-hour estimate or any other aspect of the collection of information requirement contained in this rule should be sent to the above individual and to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: NOAA Desk Officer, Washington, D.C. 20503.

**FOR FURTHER INFORMATION CONTACT:** Kenneth R. Hollingshead, Office of Protected Resources, NMFS, (301) 713-2055.

**SUPPLEMENTARY INFORMATION:**

**Background**

Section 101(a)(5)(A) of the MMPA (16 U.S.C. 1361 *et seq.*), as enacted in 1981, directs the Secretary of Commerce to allow, upon request by U.S. citizens engaged in a specific activity (other than commercial fishing) in a specified geographical region, the incidental, but not intentional, taking of small numbers of marine mammals, if certain findings are made and regulations are issued. Under the MMPA, the term "taking" means to harass, hunt, capture or kill. Pursuant to implementing regulations published on May 18, 1982 (47 FR 21248), permission may be granted for periods up to 5 years if NMFS finds, after notice and opportunity for public comment, that the taking will have a negligible impact on the species or stock(s) of marine mammals and will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses. In addition, NMFS must prescribe activity-specific regulations that include permissible methods of taking and other means effecting the least practicable adverse impact on the species and its habitat, and on the availability of the species for subsistence uses, paying particular attention to rookeries, mating grounds and areas of similar significance. These regulations must include requirements pertaining to the monitoring and reporting of such taking.

In 1986, the MMPA and the Endangered Species Act (16 U.S.C. 1531 *et seq.*) were amended to authorize

incidental takings of depleted, endangered, or threatened marine mammals. Prior to the 1986 amendments, section 101(a)(5) of the MMPA applied only to non-depleted marine mammals. On September 29, 1989 (54 FR 40338), NMFS and the U.S. Fish and Wildlife Service, jointly published regulations expanding the scope of the 1982 regulations to include depleted marine mammals, revising the definition of negligible impact, and adding a new definition for unmitigable adverse impact.

However, concern was expressed by some during Congressional oversight on the MMPA that the regulatory process for authorizing small takes remained lengthy, cumbersome, and with little correlation to the level of interaction between the activity and marine mammals or the degree of potential harm to the species or stock. The net result, these commenters believed, was that scarce Government resources were being misallocated and that compliance with the MMPA was not encouraged because of the length of time necessary to obtain an authorization.

On April 30, 1994, the President signed Public Law 103-238, the Marine Mammal Protection Act Amendments of 1994. One part of this law amended section 101(a)(5) of the MMPA to establish an expedited process by which citizens of the United States can apply for an authorization to incidentally take small numbers of marine mammals by harassment. It established specific time limits for public notice and comment on any requests for authorization which would be granted under this new provision. The legislative history noted however, that in some instances, requests will be made for authorizations identical to ones issued in the previous year. According to the legislative history, in such circumstances Congress expects NMFS to act expeditiously in complying with the notice and comment requirements. There is no need in such a case, the legislative history notes, for NMFS to use the full 120 days allowed. The legislative history also notes that NMFS should use the general rulemaking authority available under section 112 of the MMPA to establish a process for granting authorization in the case of small takes by harassment in the Arctic Ocean (H.R. Rep. No. 439, 103d Cong., 2d Sess. 29, 30 (Mar. 21, 1994)).

**Proposed Action**

NMFS is proposing to modify existing regulations found at 50 CFR part 228, subpart A to include the simplified process for authorizing the incidental taking of small numbers of marine mammals by harassment without the

need to issue specific regulations governing the taking of marine mammals for each and every activity. The proposed rule sets forth: (1) The process for obtaining an authorization; (2) the specific time limits imposed by the statute for NMFS review and publication, and public notice and comment, on any requests for authorization that would be granted under this paragraph; and (3) the requirements for scientific peer review of an applicant's monitoring plans and submission of a plan of cooperation (if the subject activity may affect the availability of a species or stock of marine mammal for taking for subsistence purposes). The proposed rule also incorporates the definition of "harassment" added by statute and would make minor changes to the existing regulations to clarify the requirements for obtaining a small take authorization.

**Discussion**

*Scope of Incidental Harassment Authorizations*

In the 1994 Amendments to the MMPA, Congress defined the term "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). For the purpose of incidental harassment authorizations, NMFS proposes to limit the use of those authorizations for harassment involving the "potential to injure" to only incidental harassment that may involve non-serious injury. Serious injury for marine mammals, such as permanent hearing or eyesight loss, or severe trauma, could lead fairly quickly to the animal's death. NMFS does not believe that Congress intended to allow "incidental harassment" takings to include injuries that are likely to result in mortality, even where such incidental harassment involves only small numbers of marine mammals. Therefore, if the review of an application for incidental harassment indicates that there is a potential for serious injury or death, NMFS proposes that it would either (1) determine that the potential for serious injury can be negated through mitigation requirements that could be required under the authorization or (2) deny the incidental harassment authorization and require

the applicant to petition for a regulated small take authorization under 50 CFR 228.5. For example, if an application indicates that an acoustic source at its maximum output level has the potential to cause a temporary threshold shift in a marine mammal's hearing ability, that taking would constitute a "harassment" take, since the animal's hearing ability would recover and the section 101(a)(5)(D) application would be appropriate. However, if the acoustic source at its maximum level had the potential to cause a permanent threshold shift in a marine mammal's hearing ability, that activity would be considered to be capable of causing serious injury to a marine mammal and would therefore not be appropriate for an incidental harassment authorization.

#### Applications

New section 101(a)(5)(D)(iii) of the MMPA requires NMFS to publish a proposed authorization not later than 45 days after receiving an application under this subparagraph. However, NMFS does not publish notices, but rather files notices with the Office of the Federal Register (OFR) for publication. Actual publication normally occurs in the **Federal Register** 3 to 4 days after receipt at the OFR. The occurrence of weekends and holidays after the receipt date of the application at NMFS, coupled with the days between delivery of a notice of proposed authorization at the OFR and the actual date of publication in the **Federal Register**, often would compress NMFS' review time to less than 30 working days. As a result, in order for NMFS to accept an incidental harassment application, such application must be complete, accurate (to the extent possible), and address in some detail the information items requested as part of the application. If an application does not provide documentary evidence sufficient for NMFS to make a preliminary determination that the activity is likely to result in only a small take (by harassment) of marine mammals and have no more than a negligible impact on the species or stocks impacted or their habitat, NMFS will return the application as incomplete.

NMFS will make a final determination on the application within 45 days after the close of the public review period and will publish notice of the final disposition in the **Federal Register** within 30 days of issuance of that determination.

Also, since the MMPA limits the comment period for incidental harassment authorizations to a maximum of 30 days and a final decision on the application to 45 days

after the close of the public comment period, NMFS expects that Federal, federally-funded, or federally-permitted applicants will have completed their responsibilities under the National Environmental Policy Act (NEPA) and its implementing regulations (40 CFR parts 1500-1508) prior to submitting an application for an incidental harassment authorization.

#### Monitoring Plans

Consistent with the requirements of the MMPA, NMFS proposes to require applicants to monitor the impact of their activity on marine mammals and to submit monitoring plans for all applications for incidental harassment authorizations under part 228. Without appropriate monitoring, NMFS would be unable to ensure that authorizations over time have only a negligible impact on species or stocks of marine mammals and no unmitigable adverse impact on the availability of species or stocks for taking for subsistence uses. NMFS recognizes however, that in some cases the level of monitoring necessary to ensure that the requirements of this section of the MMPA are met may be low. In such cases, NMFS would strive to seek a balance between the need to ensure, through monitoring, that the activity is not having more than a negligible impact on the marine mammals or on the health and stability of the ecosystem of which marine mammals are a part and the logistical burden of the monitoring requirements on the applicant.

Under these proposed regulations, when applying for an incidental harassment authorization under 50 CFR 228.7, the applicant would be required to include a site-specific plan to monitor the effects on stocks of marine mammals that are expected to be present while conducting activities. This plan, whose adequacy must be approved by NMFS, at a minimum, would have to include information regarding: (1) The survey techniques, and/or other methods to be used, to determine whether the behavior (including, if appropriate, vocalizations) of marine mammals near the activity site is being affected, and (2) how the number of marine mammals affected (i.e., taken by harassment) by the planned activity would be determined, including the expected precision of that estimated number. If requested, NMFS would provide guidelines to applicants for development of site-specific monitoring plans.

#### Requirements for Activities Impacting Arctic Subsistence Needs

Section 101(a)(5)(D)(ii)(III) of the MMPA requires

independent peer review of proposed monitoring plans or other research proposals where the proposed activity may affect the availability of a species or stock for taking for subsistence uses \* \* \*.

To minimize potential conflicts among user groups over whether a proposed Monitoring Plan (Plan) is adequate for determining the effects of the proposed activity on stocks of marine mammals, the applicant would be required to submit a draft Plan either along with an incidental harassment application or no later than 120 days prior to the date an incidental harassment authorization is expected to be issued. Upon receipt of the draft Plan, NMFS would establish an independent peer-review panel to critique the Plan and, if appropriate, to provide NMFS and the applicant with suggestions for improvement of monitoring. It is anticipated that the applicant would consider any comments and recommendations made by the panel or NMFS prior to submitting a final proposed Plan to NMFS. This final plan should be submitted a minimum of 30 days prior to the date an incidental harassment authorization is expected to be issued.

As an example of a peer-reviewed process, applicants involved in oil and gas exploration activities in the Beaufort Sea cooperate with NMFS and North Slope residents and usually a workshop is scheduled to peer-review their Plan. That procedure is likely to continue under this rule. For this activity, the workshop normally includes 6-10 experts in the fields of population ecology, survey design, acoustics, and marine mammal behavior. Panelists are selected by NMFS, in consultation with the Marine Mammal Commission (MMC), the Alaskan Eskimo Whaling Commission (AEWC) and/or other Alaskan native organizations as appropriate, and the applicant. Selected panelists are experts who are not currently employed or contracted by either the affected Alaskan native organization or the applicant. Normally, the workshop is chaired by either a NMFS or MMC employee and minutes from the workshop are prepared within 2 weeks by a rapporteur, assigned to assist the Chair, and made available to the general public upon request.

If a plan proposes to continue, without significant modification, the approved plan from the previous year, the Assistant Administrator for Fisheries, NOAA (AA) may waive the requirement for peer-review. This determination would be announced in either the proposed authorization notice for an incidental harassment authorization or the notice of issuance

of an annual Letter of Authorization (LOA) under 50 CFR 228.6 and would be made available to the general public.

Also, when applying for either an incidental harassment authorization or an LOA, for an activity that has the potential to affect the availability of a species or stock of marine mammal for taking by subsistence uses, the applicant would also be required to submit a plan of cooperation that identifies what measures have been taken and would be taken to minimize the adverse effects on the availability of marine mammals for subsistence users. This cooperation plan would have to include: (1) A statement that the applicant has notified and met with the affected subsistence communities to discuss proposed activities and to resolve potential conflicts regarding siting, timing and methods of operation; (2) a description of what measures the applicant has taken and would take to ensure that activities would not interfere with subsistence hunting; and (3) a statement that the applicant would continue to meet with the affected communities up to and during the activities to resolve conflicts and notify the native communities of any changes in plans or operation.

#### *Reporting*

Consistent with the MMPA, NMFS proposes to require the holder of an incidental harassment authorization to submit a report to the AA within 90 days of completion of any activities or 120 days prior to expiration of the incidental harassment authorization, whichever is earlier. This report would include information on the dates and types of activities, dates and locations of any monitoring activities, and results of the monitoring activities (e.g., estimate of actual number of animals taken by species by take-type and a description of any observed changes in behavior attributable to the exploratory activities).

Monitoring reports would be reviewed by the AA and if determined to be incomplete or inaccurate, would be returned to the holder of the authorization with an explanation of why the report is being returned. If the authorization holder disagrees with the findings of the AA, the holder would have an opportunity to request an independent peer review of the report. A failure to submit a complete report may result in a delay in processing subsequent authorization requests.

#### **Other Regulatory Amendments**

In this rule, NMFS is also proposing to amend existing regulations to streamline and clarify the process for

issuing regulations and/or LOAs. In addition, NMFS is proposing to require any Federal agencies that apply for authorization under this part to provide to the AA, as part of the application process, any documentation such as agency has prepared under NEPA. Any delay in submission of appropriate NEPA documentation could cause a delay in small take authorization under these regulations. Private entities either funded or permitted by Federal agencies for the applied activity would need to submit NEPA documentation prepared by the funding agency with their small take application. Private organizations not funded by Federal agencies would need to provide sufficient information in their application for NMFS to perform an appropriate NEPA analysis. Applicants would be expected to give consideration to, and fully discuss, alternatives to their activity that would involve a lesser impact on marine mammals or their habitat, including seasonal or diel alternatives. Agencies could formally provide a NEPA document as part of their application at the following junctures: (1) At any time subsequent to publication and release of a final environmental impact statement or analysis, provided the document reflected the situation as described in the small take application and had undergone public review and comment; or (2) upon notification in the **Federal Register** that the document is available for public review.

Agencies requesting NMFS to be a "cooperating agency" as defined in Council on Environmental Quality regulations (40 CFR 1501.6) would have to notify the AA in writing a minimum of 18 months prior to expected initiation of the proposed activity in order for NMFS to assess program commitments and research requirements (if any), for cooperating in the joint completion of the NEPA document. Although NMFS would make every attempt to cooperate with other agencies, it cannot guarantee its ability to cooperate with agencies not meeting this criterion.

#### *National Environmental Policy Act*

The general regulations in subpart A would implement section 101(a)(5)(D) of the MMPA, as added by the 1994 Amendments, by providing a mechanism to authorize the incidental, but not intentional, taking by harassment of small numbers of marine mammals by U.S. citizens engaged in a specified activity in a specified geographic region. Also included are proposed amendments to the existing subpart A. The AA has determined, based upon an EA prepared for this action under NEPA, that

implementation of these general regulations would not have a significant impact on the human environment. As a result of this determination, an environmental impact statement is not required. A copy of the EA is available upon request (see **ADDRESSES**).

In addition, while each proposed incidental harassment authorization will be reviewed independently to determine its impact on the human environment, NMFS believes that, because the finding required for incidental harassment authorizations is that the taking (by harassment) have a negligible impact on marine mammals and their habitat, the majority of the authorizations should be "categorically excluded" (as defined in 40 CFR 1508.4) from the preparation of either environmental impact statements or environmental assessments under NEPA and section 6.02.c.3(i) of NOAA Administrative Order 216-6 for Environmental Review Procedures (published August 6, 1991).

#### **Classification**

This action has been determined to be not significant for purposes of E.O. 12866.

The Assistant General Counsel for Legislation and Regulation of the Department of Commerce certified to the Small Business Administration that this proposed rule, if adopted, would not have a significant economic impact on a substantial number of small entities since it would simply establish an expedited process for the review and issuance of authorizations for the incidental taking of small numbers of marine mammals by harassment while conducting activities (other than commercial fishing) in and near marine waters. Without these authorizations, the taking of marine mammals, even by harassment, is prohibited.

This proposed rule does not contain policies with federalism implications sufficient to warrant preparation of a federalism assessment under E.O. 12612.

This proposed rule contains collection-of-information requirements subject to the provisions of the Paperwork Reduction Act. Although this collection has been approved previously by the Office of Management and Budget (OMB) under OMB control number 0648-0151, because of new collection requirements for activities taking place in Arctic waters, this rule is being resubmitted to OMB for review and approval. The average reporting burden for this collection is estimated to be approximately 252 hours per activity (range 96-563 hours depending upon complexity), including the time for

gathering and maintaining the data needed, and completing and reviewing the collection of information including annual reports.

#### List of Subjects in 50 CFR Part 228

Marine mammals, Reporting and recordkeeping requirements.

Dated: May 23, 1995.

**Richard H. Schaefer,**

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

For reasons set out in the preamble, 50 CFR part 228 is proposed to be amended as follows:

#### PART 228—REGULATIONS GOVERNING SMALL TAKES OF MARINE MAMMALS INCIDENTAL TO SPECIFIED ACTIVITIES

1. The authority citation for part 228 continues to read as follows:

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

2. Subpart A is revised to read as follows:

##### Subpart A—General

Sec.

228.1 Purpose.

228.2 Scope.

228.3 Definitions.

228.4 Submission of requests.

228.5 Specific regulations.

228.6 Letter of authorization.

228.7 Incidental harassment authorization.

228.8 Requirements for monitoring and reporting under incidental harassment authorizations.

##### Subpart A—General

###### § 228.1 Purpose.

The regulations in this part implement section 101(a)(5)(A) through (D) of the Marine Mammal Protection Act of 1972, as amended (16 U.S.C. 1371(a)(5)), which provides a mechanism for allowing, 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 geographic region.

###### § 228.2 Scope.

The taking of small numbers of marine mammals under section 101(a)(5) of the Marine Mammal Protection Act may be allowed only if the National Marine Fisheries Service:

(a) Finds, based on the best scientific evidence available, that the total taking by the specified activity during the specified time period will have a negligible impact on species or stock of marine mammal(s) and will not have an

unmitigable adverse impact on the availability of those species or stocks of marine mammals intended for subsistence uses;

(b) Prescribes either regulations under § 228.5, or requirements and conditions contained within an incidental harassment authorization issued under § 228.7, setting forth permissible methods of taking and other means of effecting the least practicable adverse impact on the species or stock of marine mammal and its habitat and on the availability of the species or stock of marine mammal for subsistence uses, paying particular attention to rookeries, mating grounds, and areas of similar significance; and

(c) Prescribes either regulations or requirements and conditions contained within an incidental harassment authorization, as appropriate, pertaining to the monitoring and reporting of such taking. The specific regulations governing certain specified activities are contained in subsequent subparts to this part.

###### § 228.3 Definitions.

In addition to definitions contained in the Act, and unless the context otherwise requires, in this part 228:

*Act* means the Marine Mammal Protection Act of 1972, as amended, 16 U.S.C. 1361 *et seq.*

*Assistant Administrator* means the Assistant Administrator for Fisheries, NOAA, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910-3226.

*Citizens of the United States* and *U.S. citizens* mean individual U.S. citizens or any corporation or similar entity if it is organized under the laws of the United States or any governmental unit defined in 16 U.S.C. 1362(13). U.S. Federal, state and local government agencies shall also constitute citizens of the United States for purposes of this part.

*Harassment* means any act of pursuit, torment, or annoyance that:

(1) Has the potential to injure a marine mammal or marine mammal stock in the wild; or

(2) 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.

*Incidental harassment, incidental taking* and *incidental, but not intentional, taking* all mean an accidental taking. This does not mean that the taking is unexpected, but rather it includes those takings which are infrequent, unavoidable or accidental. (A complete definition of take is contained in § 216.3 of this chapter).

*Negligible impact* is 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.

*Small numbers* means a portion of a marine mammal species or stock whose taking would have a negligible impact on that species or stock.

*Specified activity* means any activity, other than commercial fishing, that takes place in a specified geographical region and potentially involves the taking of small numbers of marine mammals.

*Specified geographical region* means an area within which a specified activity is conducted and that has certain biogeographic characteristics.

*Unmitigable adverse impact* means an impact resulting from the specified activity:

(1) That is likely to reduce the availability of the species to a level insufficient for a harvest to meet subsistence needs by:

(i) Causing the marine mammals to abandon or avoid hunting areas;

(ii) Directly displacing subsistence users; or

(iii) Placing physical barriers between the marine mammals and the subsistence hunters; and

(2) That cannot be sufficiently mitigated by other measures to increase the availability of marine mammals to allow subsistence needs to be met.

###### § 228.4 Submission of requests.

(a) In order for the National Marine Fisheries Service to consider authorizing the taking by U.S. citizens of small numbers of marine mammals incidental to a specified activity (other than commercial fishing), or to make a finding that an incidental take is unlikely to occur, a written request must be submitted to the Assistant Administrator. All requests must include the following information for their activity:

(1) A detailed description of the specific activity or class of activities that can be expected to result in incidental taking of marine mammals;

(2) The specific date(s) and duration of such activity and the specific geographical region where it will occur;

(3) The species and numbers of marine mammals likely to be found within the activity area and those marine mammals that may be taken by the activity by age, sex, and reproductive condition;

(4) A description of the status, distribution, and seasonal distribution (when applicable) of the affected species or stocks of marine mammals likely to be affected by such activities;

(5) The type of incidental taking authorization that is being requested (i.e., takes by harassment only; takes by harassment, injury and/or death), the method of incidental taking (e.g., disturbance by anthropogenic noise such as construction, seismic activities, or ship traffic; serious injury or death resulting from explosives or collisions between marine mammals and ships), and the number of times such taking is likely to occur;

(6) The anticipated impact of the activity upon the species or stock of marine mammal;

(7) The anticipated impact of the activity on the availability of the species or stocks of marine mammals for subsistence uses;

(8) The anticipated impact of the activity upon the habitat and food sources of the marine mammal populations, and the likelihood of restoration of the affected habitat or food sources;

(9) The anticipated impact of the loss or modification of the habitat or food sources on the marine mammal populations involved;

(10) The availability and feasibility (economic and technological) of equipment, methods, and manner of conducting such activity or other means of effecting the least practicable adverse impact upon the affected species or stocks, their habitat, and on their availability for subsistence uses, paying particular attention to rookeries, mating grounds, and areas of similar significance.

(11) Where the proposed activity would take place in or near a traditional subsistence hunting area and/or may affect the availability of a species or stock of marine mammal for subsistence uses, the applicant must submit a plan of cooperation that identifies what measures have been taken and will be taken to minimize any adverse effects on the availability of marine mammals for subsistence uses. A plan must include the following:

(i) A statement that the applicant has notified and met with the affected subsistence communities to discuss proposed activities and to resolve potential conflicts regarding any aspects of the operation;

(ii) A description of what measures the applicant has taken and will take to ensure that proposed activities will not interfere with subsistence whaling or sealing; and

(iii) What plans the applicant has to continue to meet with the affected communities, both prior to and while conducting the activity, to resolve conflicts and to notify the communities of any changes in the operation.

(12) The suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species, the level of taking or impacts on populations of marine mammals that are expected to be present while conducting activities and suggested means of minimizing burdens by coordinating such reporting requirements with other schemes already applicable to persons conducting such activity. Monitoring plans should include a description of the survey techniques that would be used to determine the movement and activity of marine mammals near the activity site(s) including migration and other habitat uses, such as feeding. Guidelines for developing a site-specific monitoring plan may be obtained by writing to the Assistant Administrator.

(13) Suggested means of learning of, encouraging, and coordinating research opportunities, plans, and activities relating to reducing such incidental taking and evaluating its effects.

(b)(1) The Assistant Administrator shall determine the adequacy and completeness of a request, and, if determined to be adequate, complete, and in full compliance with the Act and other existing laws and regulations (in particular, the National Environmental Policy Act and the Endangered Species Act), will begin the public review process by publishing in the **Federal Register** either:

(i) A proposed incidental harassment authorization; or

(ii) A notice of receipt of a request for the promulgation or repromulgation of regulations governing the incidental taking.

(2) Through notice in the **Federal Register**, newspapers of general circulation, and appropriate electronic media in the coastal areas that may be affected by such activity, NMFS will invite information, suggestions, and comments for a period not to exceed 30 days from the date of publication in the **Federal Register**. All information and suggestions will be considered by the National Marine Fisheries Service in developing, if appropriate, the most effective regulations governing the issuance of letters of authorization or conditions governing the issuance of an incidental harassment authorization.

(3) Applications that are determined to be incomplete, or inappropriate for the type of taking requested, will be returned to the applicant with an explanation of why the application is being returned.

(c) The Assistant Administrator shall evaluate each request to determine, based upon the best available scientific evidence, whether the taking by the

specified activity within the specified geographic region will have a negligible impact on the species or stock and, where appropriate, will not have an unmitigable adverse impact on the availability of such species or stock for subsistence uses. If the Assistant Administrator finds that the mitigating measures would render the impact of the specified activity negligible when it would not otherwise satisfy that requirement, the Assistant Administrator may make a finding of negligible impact subject to such mitigating measures being successfully implemented. Any preliminary findings of "negligible impact" and "no unmitigable adverse impact" shall be proposed for public comment along with either the proposed incidental harassment authorization or the proposed regulations for the specific activity.

(d) If, subsequent to the public review period, the Assistant Administrator finds that the taking by the specified activity would have more than a negligible impact on the species or stock of marine mammal or would have an unmitigable adverse impact on the availability of such species or stock for subsistence uses, the Assistant Administrator shall publish in the **Federal Register** the negative finding along with the basis for denying the request.

#### § 228.5 Specific regulations.

(a) For all petitions for regulations under this paragraph, applicants must provide the information requested in § 228.4(a) on their activity as a whole, which includes, but is not necessarily limited to, an assessment of total impacts by all persons conducting the activity.

(b) For allowed activities that may result in incidental takings of small numbers of marine mammals by harassment, serious injury, death or combination thereof, specific regulations shall be established for each allowed activity which set forth:

(1) Permissible methods of taking;

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

(3) Requirements for monitoring and reporting, including requirements for the independent peer-review of proposed monitoring plans where the proposed activity may affect the availability of a species or stock for taking for subsistence uses.

(c) Regulations will be established based on the best available information. As new information is developed,

through monitoring, reporting, or research, the regulations may be modified, in whole or in part, after notice and opportunity for public review.

**§ 228.6 Letter of authorization.**

(a) A Letter of Authorization, which may be issued only to U.S. citizens, is required to conduct activities pursuant to any regulations established under § 228.5. Requests for letters of authorization shall be submitted to the Assistant Administrator. The information to be submitted in a request will be specified in the regulations authorizing the incidental take or may be obtained by writing to the Assistant Administrator.

(b) Issuance of a Letter of Authorization will be based on a determination that the level of taking will be consistent with the findings made for the total taking allowable under the specific regulations.

(c) Letters of Authorization will specify the period of validity and any additional terms and conditions appropriate for the specific request.

(d) Notice of issuance of all Letters of Authorization will be published in the **Federal Register** within 30 days of issuance.

(e) Letters of Authorization shall be withdrawn or suspended, either on an individual or class basis, as appropriate, if, after notice and opportunity for public comment, the Assistant Administrator determines that:

- (1) The regulations prescribed are not being substantially complied with; or
- (2) The taking allowed is having, or may have, more than a negligible impact on the species or stock, or where relevant, an unmitigable adverse impact on the availability of the species or stock for subsistence uses.

(f) The requirement for notice and opportunity for public review in § 228.6(e) shall not apply if the Assistant Administrator determines that an emergency exists that poses a significant risk to the wellbeing of the species or stocks of marine mammals concerned.

(g) A violation of any of the terms and conditions of a Letter of Authorization or of the specific regulations shall subject the Holder and/or any individual who is operating under the authority of the Holder's Letter of Authorization to penalties provided in the Act.

**§ 228.7 Incidental harassment authorization.**

(a) Except for activities that have the potential to result in serious injuries (that may be authorized under § 228.5),

following a 30-day public review period, incidental harassment authorizations may be issued to allowed activities that may result in only the incidental harassment of a small number of marine mammals. Each such incidental harassment authorization shall set forth:

(1) Permissible methods of taking by harassment;

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

(3) Requirements for monitoring and reporting, including requirements for the independent peer-review of proposed monitoring plans where the proposed activity may affect the availability of a species or stock for taking for subsistence uses.

(b) Issuance of an incidental harassment authorization will be based on a determination that the number of marine mammals taken by harassment will be small, will have a negligible impact on the species or stock of marine mammal(s), and will not have an unmitigable adverse impact on the availability of species or stocks for taking for subsistence uses.

(c) An incidental harassment authorization will be either issued or denied within 45 days after the close of the public review period.

(d) Notice of issuance or denial of an incidental harassment authorization will be published in the **Federal Register** within 30 days of issuance of a determination.

(e) Incidental harassment authorizations will be valid for 1 year.

(f) An incidental harassment authorization shall be modified, withdrawn, or suspended, if, after notice and opportunity for public comment, the Assistant Administrator determines that:

- (1) The conditions and requirements prescribed in the authorization are not being substantially complied with, or
- (2) The authorized taking, either individually or in combination with other authorizations, is having, or may have, more than a negligible impact on the species or stock, or, where relevant, an unmitigable adverse impact on the availability of the species or stock for subsistence uses.

(g) The requirement for notice and opportunity for public review in § 228.7(f) shall not apply 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 concerned.

(h) A violation of any of the terms and conditions of an incidental harassment

authorization shall subject the Holder and/or any individual who is operating under the authority of the Holder's Incidental Harassment Authorization to penalties provided in the Act.

**§ 228.8 Requirements for monitoring and reporting under incidental harassment authorizations.**

(a) Holders of an incidental harassment authorization and their employees, agents, and designees must cooperate with the National Marine Fisheries Service and other designated Federal, state, or local agencies to monitor the impacts of their activity on marine mammals. Unless stated otherwise within an incidental harassment authorization, the Holder of an incidental harassment authorization must notify the appropriate Regional Director, National Marine Fisheries Service, of any activities that may involve a take by incidental harassment at least 14 calendar days prior to commencement of the activity.

(b) Holders of incidental harassment authorizations may be required by their authorization to designate at least one qualified biological observer or another appropriately experienced individual to observe and record the effects of activities on marine mammals. The number of observers required for monitoring the impact of the activity on marine mammals will be specified in the incidental harassment authorization. If required, the observer(s) must be approved in advance by the National Marine Fisheries Service.

(c) The monitoring program must, if appropriate, document the effects (including acoustical) on marine mammals and document or estimate the actual level of take. The requirements for monitoring plans, as specified in the incidental harassment authorization, may vary depending on the activity, the location, and the time.

(d) Where the proposed activity may affect the availability of a species or stock of marine mammal for taking for subsistence purposes, proposed monitoring plans or other research proposals must be independently peer reviewed prior to final approval of the applicant's submission of a request for an incidental harassment authorization under this subpart. In order to complete the peer-review process within the time frames mandated by the Act for an incidental harassment authorization, a proposed monitoring plan submitted under this paragraph must be submitted to the Assistant Administrator no later than the date of submission of the application for an incidental harassment authorization. Upon receipt of a complete monitoring plan, and at its

discretion, the National Marine Fisheries Service will either submit the plan to members of a peer-review panel for review or within 60 days of receipt of the proposed monitoring plan, schedule a workshop to review the plan. The applicant must submit a final monitoring plan to the Assistant Administrator prior to the issuance of an incidental harassment authorization.

(e) At its discretion, the National Marine Fisheries Service may place an observer on board vessels, platforms, aircraft, etc., to monitor the impact of activities on marine mammals.

(f) *Reporting.* (1) The holder of an incidental harassment authorization must submit a report to the Assistant Administrator within either 90 days of completion of any activities or 120 days

prior to expiration of the incidental harassment authorization, whichever is earlier. This report must include the following information:

(i) Dates and type(s) of activity;  
(ii) Dates and location(s) of any activities related to monitoring the effects on marine mammals; and  
(iii) Results of the monitoring activities, including an estimate of the actual level and type of take, species name and numbers of each species observed, direction of movement of species, and any observed changes or modifications in behavior.

(2) Monitoring reports will be reviewed by the Assistant Administrator and, if determined to be incomplete or inaccurate, will be returned to the holder of the authorization with an

explanation of why the report is being returned. If the authorization holder disagrees with the findings of the Assistant Administrator, the holder may request an independent peer review of the report. Failure to submit a complete and accurate report may result in a delay in processing future authorization requests.

(g) Results of any behavioral, feeding, or population studies, that are conducted supplemental to the monitoring program, should be made available to the National Marine Fisheries Service before applying for an incidental harassment authorization for the following year.

[FR Doc. 95-13265 Filed 5-30-95; 8:45 am]

BILLING CODE 3510-22-F