DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 216

[Docket No. 990901241–0116–02; I.D. 123198B]

RIN 0648–AM09

Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to Construction and Operation of Offshore Oil and Gas Facilities in the Beaufort Sea

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

ACTION: Final rule.

SUMMARY: NMFS, upon application from BP Exploration (Alaska), 900 East Benson Boulevard, Anchorage, AK 99519 (BPXA) issues regulations to govern the unintentional take of a small number of marine mammals incidental to construction and operation of offshore oil and gas facilities at the Northstar development in the Beaufort Sea in state and Federal waters. Issuance of regulations governing unintentional incidental takes in connection with particular activities 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 the availability of them for subsistence uses. These regulations do not authorize BPXA's activity as such authorization is not within the jurisdiction of the Secretary. Rather, these regulations authorize the unintentional incidental take of marine mammals in connection with such activities and prescribe methods of taking and other means of effecting the least practicable adverse impact on the species and its habitat, and on the availability of the species for subsistence uses.

DATES: Effective May 25, 2000, until May 25, 2005.

ADDRESSES: A copy of the updated application, Technical Monitoring Plan, Biological Opinion, Environmental Assessment (EA), and a list of the references used in this document may be obtained by writing to Donna Wieting, Chief, Marine Mammal Conservation Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910–3226, or by telephoning one of the contacts listed here (see **FOR FURTHER INFORMATION CONTACT**).

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 Chief, and to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: NOAA Desk Officer, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Kenneth R. Hollingshead (301) 713–2055, Brad Smith, (907) 271–5006.

SUPPLEMENTARY INFORMATION:

Background

Section 101(a)(5)(A) of the MMPA (16 U.S.C. 1361 *et seq.*) directs the Secretary to allow, upon request, the incidental, but not intentional taking 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 regulations are issued.

Permission may be granted for periods of 5 years or less if the Secretary finds that the taking will have a negligible impact on the species or stock(s) of affected marine mammals, will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses, and if regulations are prescribed setting forth the permissible methods of taking and the requirements pertaining to the monitoring and reporting of such taking.

Summary of Request

On November 30, 1998, NMFS received an application for Letters of Authorization (LOAs) granting an incidental, small take exemption under section 101(a)(5)(A) of the MMPA from BPXA to take marine mammals incidental to construction and operation of offshore oil and gas facilities at the Northstar and Liberty developments in the Beaufort Sea in state and Federal waters. On March 1, 1999 (64 FR 9965), NMFS published an advance notice of proposed rulemaking (ANPR) on BPXA's application and invited interested persons to submit comments, information, and suggestions concerning the application, and the structure and content of regulations if the application is accepted. During the 30-day comment period on that notice, comments were received from the Marine Mammal Commission (MMC), Greenpeace Alaska (Greenpeace), the Alaska Eskimo Whaling Commission (AEWC), the North Slope Borough (NSB), and the Inupiat Community of the Arctic Slope. Those comments were addressed in the preamble to the proposed rule which was published on October 22, 1999 (64 FR 57010).

Because of delays in construction during 1999, and in issuing a proposed rule on this matter, on October 1, 1999, BPXA updated their application to NMFS. Among other things, the revised application removed from this rulemaking a request for a take of marine mammals incidental to construction and operation at Liberty. The revised application is available upon request (see **ADDRESSES**). Following is a brief description of the proposed scope of work for the Northstar project. For more detailed descriptions please refer to the BPXA application.

Description of the Activity

BPXA proposes to produce oil from the Northstar Unit offshore oil development. This development will be the first in the Beaufort Sea that uses a subsea pipeline to transport oil to shore and then into the Trans-Alaska Pipeline System. The Northstar Unit is located on Seal Island between 2 and 8 miles (mi)(3.2 and 12.9 kilometers (km)) offshore from Pt. Storkersen, AK. This unit is adjacent to the Prudhoe Bay industrial complex and is approximately 54 mi (87 km) northeast of Nuiqsut, a Native Alaskan community.

Construction began in December 1999 with the construction of ice roads. Both island construction and offshore pipeline installation is scheduled to occur in 2000. Construction activity includes the construction of several ice roads, one from West Dock and Pt. McIntyre to the Northstar gravel mine, one from the Kuparuk River delta mine site to Seal Island, and one along the pipeline route to Seal Island. The gravel-haul road will have a parallel alternate road to transport service equipment, construction materials and alternate gravel hauling when maintenance or repair of the main ice road is required. In addition to these main ice roads it is expected that three to four access roads will be cleared of snow to allow light vehicle traffic between the pipeline construction activities and the gravel-haul ice road. These on-ice access roads will have the snow cleared regularly, with intermittent flooding to maintain safe traffic conditions.

It is estimated that during the winter approximately 16,800 large-volume haul trips between the onshore mine site and a reload area in the vicinity of Egg Island, and 28,500 lighter dump truck trips from Egg Island to Seal Island will be necessary to transport construction

gravel to Seal Island. An additional 300 truck trips will be necessary to transport concrete-mat slope protection materials to the island.

Construction of a gravel island work surface for drilling and oil production facilities, and the construction and installation of two 10–inch (0.25–m) pipelines, one to transport crude oil and one for gas for field injection, will take place during the winter and into the open water season of 2000, while the transport and installation of the drill rig and associated equipment will occur during the summer, ending around September 1, 2000. The two pipelines will be buried together in a single trench. During the summer barges are expected to make approximately 90 to 100 round-trips from Prudhoe Bay or Endicott to support construction.

The operational phase will begin with drilling as early as the fourth quarter of 2000, and will continue for about 2 years. Power will be supplied by diesel generators. This phase of drilling will temporarily cease in mid-2001 to allow installation and start-up of process facilities. Drilling is expected to resume about November 2001. Drilling will continue until 23 development wells (15 production, 7 gas injection) are drilled. After drilling is completed, only production-related site activities will occur. In order to support operations at Northstar, the proposed operations activity includes the annual construction of an ice road from Pt. McIntyre to the shore crossing of the pipeline and along the pipeline route to Seal Island. Ice roads will be used to resupply needed equipment, parts, foodstuffs, and products, and for hauling wastes back to existing facilities. During the summer, barge trips will be required between West Dock or Endicott and the island for resupply.

Year-round helicopter access to Northstar is planned for movement of personnel, foodstuffs and emergency movement of supplies and equipment. Helicopters will fly at an altitude of at least 1,000 ft (305 m), except for takeoffs, landings, and safe-flight operations.

Comments and Responses

On October 22, 1999 (64 FR 57010), NMFS published a notice of proposed rulemaking on BPXA's application and invited interested persons to submit comments, information, and suggestions concerning the application and proposed rule. During the 60-day comment period on that notice, comments were received from BPXA, the MMC, Greenpeace, the NSB, and the AEWC. Their comments are addressed here.

Activity Concerns

Comment 1: The NSB believes that the Northstar Project area analysis should not be limited to the area immediately adjacent to Seal Island and the pipeline corridor, but expanded to also include the proposed sealift route, and any other route to be used by ocean-going vessels in support of the project, aircraft and vessel paths, and any ice-free corridors to be maintained to facilitate oil spill response.

Response: NMFS agrees that a small number of takings by harassment of marine mammals could occur as a result of these activities, which were addressed in BPXA's application. However, it is NMFS policy that, in most cases, small take authorizations are unnecessary solely for transiting vessels, such as those described in BPXA's application and those providing transportation and supplies to NSB communities, unless the vessel activity has some potential to result in a significant biological response in the marine mammal(s) or affects the subsistence needs of Alaskan communities (*e.g.,* conducting, or in support of seismic, and possibly ice-breaking). In most cases, vessels are presumed not to alter marine mammal behavior sufficient to constitute a taking by harassment. Because barges are expected to travel in inshore waters, where bowheads are less likely to occur, and to travel between Northstar, West Dock, and Barrow and, therefore, have, at most, minimal impact on subsistence whaling by Nuiqsut, and because there is no information that these vessels will have an adverse impact on bowhead whaling at Barrow, NMFS has determined that, based on the record, there will not be an unmitigable adverse impact on bowhead whaling from vessel movement in support of Northstar. If the AEWC determines otherwise, NMFS believes they will make vessel movement a subject of discussion for the Conflict and Avoidance Agreement (C&AA). Under that agreement, BPXA will either agree to cease all vessel traffic between the beginning and end of the fall bowhead subsistence harvest, or limiting vessel traffic during this time period in accordance with the C&AA.

While BPXA would be responsible for maintaining the ice-free channel in order to facilitate oil spill response, the U.S. Army Corps of Engineers (Corps) permit prohibits ice breaking until October 15, meaning that ice-breaking will not occur until after most, if not all of the bowhead migration and subsistence whaling have concluded for the year. Any ice-breaking occurring prior to the end of the bowhead subsistence harvest at Nuiqsut is not considered part of the request by BPXA and, therefore, cannot be authorized for a taking of marine mammals.

An estimate of incidental harassments by aircraft is not necessary because helicopters must remain at a minimum altitude of 1,000 ft (305 m), weather permitting (except when landing or taking off). NMFS understands that other permits require helicopters at Northstar to maintain an altitude of 1,500 ft (457 m). At 1,000–ft altitude and higher, takings of marine mammals are unlikely to occur. At altitudes lower than 1,000 ft (305 m), while seals may make minor behavioral changes to the helicopter noise, these changes are unlikely to alter seal behavior sufficient to constitute a take. Further reducing potential impacts, helicopter traffic will be between shore and Northstar and bowhead and beluga whales are normally found in waters north of Northstar, outside the area of helicopter traffic.

NMFS recognizes however, that helicopter traffic patterns may change in the future when, and if, additional oil development structures are sited. NMFS intends to review the impacts from structure to structure flights when these activities apply for an initial LOA under these regulations. Applicants are encouraged to address this form of taking on marine mammals, especially bowhead whales and the subsistence hunting of this species, when applying for an LOA. Failure to adequately address this issue may result in a delay in processing applications.

MMPA Concerns

Comment 2: Greenpeace states that the artificial segmentation of industrial activities on the North Slope (*e.g.,* seismic, oil exploration, oil development) is not permitted under the MMPA. Later Greenpeace notes that the proposed actions artificially segment the environmental review of Northstar and its impacts, thereby violating the National Environmental Policy Act (NEPA) and the Endangered Species Act (ESA). As a result, Greenpeace requests that its March 10, 1999, comments on the Final Environmental Impact Statement (FEIS) for Northstar, be incorporated by reference.

Response: When Congress implemented the 1981 Amendments to the MMPA, which authorized the Secretary to allow specified activities to obtain an exemption from the MMPA's moratorium on taking without a requirement to waive the moratorium under section 101(a) of the MMPA, it

put certain provisions on when and where the Secretary may grant those exemptions. One requirement was for the activity to be as specific as possible. Congress stated: ''It is the intention of the Committee that both the specified activity and the specified region referred to in section 101(a)(5) be narrowly identified so that the anticipated effects will be substantially similar. Thus, for example, it would not be appropriate for the Secretary to specify an activity as broad and diverse as outer continental shelf oil and gas development. Rather, the particular elements of that activity should be separately specified, as, for example, seismic exploration, or core drilling.'' (H.R. Rep. No. 97–228 at p. 19, 1981). To the extent practicable, NMFS follows this guidance when promulgating regulations under section 101(a)(5) of the MMPA. As discussed throughout this document, NMFS does not believe that its action is in violation of either NEPA or the ESA.

The Corps' draft environmental impact statement (DEIS), FEIS, and the comments that were submitted to the Corps on those documents are considered to be part of NMFS' Record of Decision on this matter.

Comment 3: Greenpeace states that the proposed regulations fail to consider reasonably foreseeable exploration and development activities in the Beaufort Sea on the part of companies other than BPXA. The NSB expressed similar concerns regarding BPXA's application.

Response: NMFS has designed these regulations so that as new oil development units are constructed in the Beaufort Sea, and companies apply for a LOA for the taking of marine mammals, NMFS will need to make a finding that the ''total taking by the activity'' will have no more than a negligible impact on marine mammals and not have an unmitigable adverse impact on subsistence uses of these mammals. NMFS is not required to make these findings beforehand, when future activities remain speculative and impacts on marine mammals have not been fully assessed under NEPA.

NMFS believes that the Corps' FEIS addresses, to the extent possible, the cumulative impacts of past and future impacts on marine mammals and subsistence whaling (see Chapt. 10 of the FEIS). That document notes that ''[T]he potential for future developments to cause or contribute to any deflection of the [bowhead] migration or impact the harvest will depend largely upon the proposed location with respect to the traditional migratory path and traditional harvest areas. Accordingly, proposed future projects will have to be analyzed on a case-by-case basis to determine whether and how they may cause or contribute to any effects on the bowhead migration or subsistence harvest.''

Application Concerns

Comment 4: The NSB encourages NMFS to require BPXA to submit a modified petition which contains the level of detail and an organization which will allow for a meaningful review of the potential impacts of proposed Northstar development.

Response: NMFS does not agree that NMFS should reject BPXA's application. On March 1, 1999, NMFS provided duplicate sets of NMFS' ANPR, including BPXA's application, on this action to the NSB. ANPRs are provided in order for the public to provide comments on the adequacy of an applicant's application for an incidental take and on the applicant's activity. The NSB did not provide NMFS with comments during that 30-day public comment period. In addition, as discussed within this document, NMFS believes the NSB does not provide sufficient justification for NMFS to determine that the application did not meet the requirements in § 216.104.

Comment 5: The NSB notes that the application has more the appearance of a summary document than a completed document and is lacking in sufficient detail to allow for a meaningful assessment of whether the proposed activities meet the standards that will permit NMFS to issue the requested LOA.

Response: The MMPA requires NMFS to make its findings 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 intended for subsistence purposes. NMFS is not restricted to the information provided by an applicant when making its findings, recognizing that some biases may be provided in an application. In those cases where the applicant provides the majority of the information for NMFS' findings, and supplementary documentation (*e.g.,* a DEIS or FEIS) is lacking, NMFS holds applicants to a higher standard for determining what is an acceptable application. However, in those cases where supplementary information is available, especially when that information is provided independent of the applicant, NMFS believes that an application need not provide extensive detail that can easily be found elsewhere. In this case, the supplementary information was provided by the Corps in its DEIS and FEIS on this action. The difficulty for the applicant in this action was that it did not have access to the material and analyses provided in the DEIS prior to its release. In addition, as is their right, BPXA is not required to totally agree with the findings in the DEIS/FEIS. As a result, there may be certain distinctions between information contained in the application and that in the DEIS/FEIS. It is the responsibility of NMFS to determine which document, if either, is correct.

Proposed Rule Concerns

Comment 6: BPXA believes the proposed regulations are confusing regarding which portions of the rule address applications or petitions for rulemaking and which portions of the rule address applications for LOAs. BPXA recommends using specific terms consistently to contrast the two steps required to authorize the activity. BPXA suggests utilizing a petition for regulations, and a request for an LOA.

Response: These regulations do not distinguish between applications for LOAs and petitions for rulemaking. While an application for an LOA requires rulemaking, it is a single-step process under these regulations. NMFS believes the commenter has confused these regulations with those in subpart I, which distinguishes between petitions for regulations, applications for LOAs and applications for Incidental Harassment Authorizations (IHAs). Because subpart I is not being amended at this time, BPXA's recommendation cannot be accepted. It should be understood however, that NMFS does not intend to require a dual process for issuing future initial LOAs, that is, rulemaking followed by review of an application for an LOA. NMFS intends the two processes to proceed at the same time.

Comment 7: BPXA presumes that the term ''platform'' in the rulemaking title includes drilling islands. The proposed activity does not involve an offshore oil rig platform but rather a permanent man-made gravel island.

Response: To avoid confusion, NMFS has replaced the term ''platforms'' with ''facilities'' to better describe the various types of oil and gas development activities that can obtain a small take authorization under this rulemaking.

Comment 8: BPXA notes that the term ''Northstar Oil and Gas Development Unit on Seal Island,'' found in § 216.200(a), appears to limit the authorization for taking to the island and not include related activities such

as the pipelines. BPXA recommends dropping the words ''Unit on Seal Island'' from that paragraph.

Response: NMFS agrees and has made the change.

Comment 9: BPXA pointed out that NMFS regulations at § 216.104(a)(12) regarding a Plan of Cooperation (POC) differ from those in these regulations (§ 216.205).

Response: In response to NMFS' proposed regulations (see 60 FR 28379, May 31, 1995) one commenter noted that not all activities required submission of formal POC. As a result, NMFS modified the interim rule (see 61 FR 15884, April 10, 1996) from that originally proposed. However, while in this rulemaking, a POC is viewed as essential, there is no requirement that it be a formal document, separate from the LOA application.

Comment 10: BPXA noted that a POC is different from the C&AA.

Response: NMFS agrees. A POC is a set of information provided to NMFS at the time an applicant requests an LOA for activities in the Arctic. The C&AA is a formal agreement between the activity's participants and the AEWC. NMFS does not play a role in its development or implementation. As a courtesy, NMFS often receives a copy of the C&AA after it is signed.

Comment 11: BPXA recommends that NMFS consider including in the rule a time period by which NMFS must respond to an LOA request with either approval or denial. The applicant should be advised of a decision within a specified time period to avoid ongoing expectations of an LOA being granted or missing an entire season because NMFS approval or denial is not under any time limit.

Response: While NMFS understands the concern, rulemakings cannot be held to specific timelines which may preclude adequate public review and/or limit the decision-making process. Because rulemakings normally will take 8–12 months for completion, NMFS recommends applicants submit complete applications as close as possible to the time that the principal Federal agency releases its NEPA document for public review and comment.

Comment 12: BPXA notes that it submitted its request for an LOA on November 30, 1998, and that this submission fulfills the requirement under § 216.207(d).

Response: NMFS concurs. BPXA submitted its application for an LOA under § 216.104 on November 30, 1998, and a 30-day public comment period commenced on March 1, 1999 (64 FR 9965). Based in part on the comments received by NMFS and delays in both BPXA's construction schedule and NMFS' processing the application, BPXA submitted a revised LOA application on October 1, 1999 (received on October 15, 1999). A 60-day comment period on the revised LOA application began on October 22, 1999 (64 FR 57010). Those review periods satisfy the requirement of § 216.207(d).

LOA Concerns

Comment 13: The AEWC recommends that NMFS provide a minimum of 90 days for public review and comment on any new LOA request for arctic offshore production-related activities.

Response: NMFS believes that a 90-day public comment period is excessive and unnecessary given that new LOAs under these regulations will have several comment periods. First, either the Minerals Management Service or the Corps will provide for review and comment on a document under NEPA, presumably a DEIS, on any oil development in the Beaufort Sea. Such comment periods are a minimum of 45 days, and likely 60 days or longer. Second, NMFS will announce the availability of an application for a small take authorization incidental to the offshore production unit and will offer the public a minimum of 30 days for review of the application. Finally, if NMFS proposes regulations to govern the incidental taking, the public will be offered another comment period of 45–60 days, as was done for the Northstar authorization. Because NMFS' two review periods provide the public with a total of 75 to 90 days, subsequent to, or in conjunction with, the review period for the oil production project itself under NEPA, NMFS does not believe the additional time period is warranted.

It should be recognized however, that NMFS has already published and provided for public comment on BPXA's application for the Liberty oil development project (64 FR 9965, March 1, 1999). Because of a delay in timing for the start of the Liberty project due to NEPA, NMFS expects that BPXA will submit a revised application for Liberty. Because NMFS has already provided public notice on BPXA's application for a small take for the Liberty project, NMFS will not reannounce receipt of the application, but will proceed immediately to the proposed rule stage. As a result, and for this application only, NMFS expects to provide an extended public comment period of 90 days to allow the public adequate time for review both the application and the proposed rule, in lieu of providing another review limited to BPXA's Liberty application.

Comment 14: BPXA believes that a public comment period should not be required for renewal of LOAs under § 216.209(a)(2) only during the petition for regulations. If the activity applied for does not fall within the scope of the existing regulations, then the petition process for new or revised regulations should be followed which includes a public comment period. Having concerns about the adequacy of section 101(a)(5)(A) of the MMPA to provide mitigation measures from the potential adverse impact from oil production, the AEWC and the NSB recommend that NMFS issue an LOA that is either only for construction at Northstar, or is limited to only one year, in order to provide an opportunity to discuss mitigation measures and other protections for oil production activities. In addition, the AEWC requests that the public be granted a minimum of 30 days to review a renewal of an LOA.

Response: NMFS has reviewed the LOA reissuance concerns and notes that it has 3 options: (1) Reissue an LOA annually based upon timely receipt of reports without public comment prior to reissuance, (2) reissue an LOA annually based upon timely reports after a public comment period, or (3) issue an LOA for all or a portion of the 5-year period of validity of the regulations. Because under implementing interim regulations (see § 216.106(e)), NMFS would be required to provide a 30-day public comment period (except in cases where there is a significant risk to impacted marine mammals) prior to withdrawal, or even temporary suspension of, an LOA, for failure to meet any of the requirements of the regulations or the LOA, issuing LOAs for periods greater than one year is generally not acceptable to NMFS. Whether an opportunity for public comment is provided depends entirely on whether NMFS determines that all substantive issues have been addressed satisfactorily during rulemaking. If so, then little would be accomplished by annually revisiting these issues.

In this action however, several issues remain unresolved, the principal ones being the implementation of effective marine mammal mitigation and monitoring during oil production, the peer review of monitoring plans, and the submission of annual POCs. Therefore, NMFS has determined that LOA renewals under this rulemaking will have a requirement for a 30-day public review period, at least in the early years of renewal. However, in order to expedite the LOA renewal process, NMFS will open the review

process to the following issues only: (1) New citable scientific data or information (including Traditional Knowledge) that indicates that the determinations made in this document are in need of reconsideration, (2) comments on the POC, and (3) comments on a proposed monitoring plan. NMFS will give full consideration to all comments submitted within the authorized comment period when making its determination on reissuance. In addition, because of the requirement to submit timely reports with an LOA renewal application, it is expected that there will be only a limited amount of time between the date a request for an LOA renewal is submitted, and the date of expiration of the current LOA. As a result, NMFS will act on a request for an LOA renewal in a timely manner, but is unlikely to extend the public comment period beyond 30 days, unless there are compelling circumstances. In addition, these regulations allow NMFS to waive the public comment period once either multi-year mitigation (including POCs) and monitoring plans have been submitted to NMFS and reviewed by the peer review process described in the LOA and NMFS determines that no significant issues remain substantially unresolved.

Since construction work at Northstar will continue through at least November, 2000, issuance of an LOA limited only to construction has been accepted by NMFS. In the meantime, discussion on appropriate mitigation and monitoring during production can continue. However, to ensure that takings resulting from uncompleted construction work late in 2000 or early 2001, if any, are covered, NMFS has made the LOA valid for a full 12 months, but only for construction.

Comment 15: BPXA suggests that NMFS clarify that § 216.210(a) is intended to apply to the case of a proposed withdrawal of the LOA by NMFS, not by the applicant.

Response: NMFS agrees and has amended § 216.210(a) as recommended.

Take Level Concerns

Comment 16: Greenpeace states that NMFS accepts the applicant's assertion, with no scientific or other basis, that the number of takes of whales during operation and during construction of Northstar will be identical. There is no estimate of take or possible jeopardy from a variety of oil spill scenarios * * * and from the resultant cleanup activities. The NSB believes that it is unacceptable for the petition not to provide any estimate of the potential number of individuals of any subject species which could potentially be taken in the event of an oil spill associated with Northstar.

Response: While not identical, the estimated take levels by incidental harassment are similar. Calculations for incidental take levels by both construction and production are described in detail in the original and revised BPXA applications. NMFS believes that these calculations are based upon the best scientific information available. As a result, NMFS has accepted these take estimates. However, NMFS recognizes that, for reasons explained later in this document, these estimates do not include takes by harassment, injury, or mortality incidental to oil spills.

Comment 17: BPXA noted that the estimated levels of take provided in the preamble to the proposed rule were not updated based upon estimates provided in the September 30, 1999, revised application.

Response: Unfortunately, updates could not be made to the preamble to the proposed rule because the revised application was not received in time to revise the proposed rulemaking without further delaying the release of the proposed rule. However, NMFS has made the appropriate corrections in this document.

Negligible Impact Concerns

Comment 18: The MMC notes that (1) the path of the fall bowhead migration varies substantially from year to year; (2) that in most years comparatively few bowhead whales are likely to pass within 10 km (6.2 mi) of the Northstar site; and, (3) that any changes in swimming speed, direction, or other behavior caused by Northstar activities are unlikely to affect the size or productivity of the bowhead population (or of bowheads to Alaska natives for subsistence purposes). Because the available data are insufficient to be confident that both the population level effects (and the impacts on Native subsistence hunting) would be negligible, the MMC believes it would be more appropriate to base the assessment of possible impacts on the worst case scenario, and considering possible cumulative impacts over the full 15–20 years that production is expected at the Northstar site, rather than basing the assessment on the best available estimate of the average take level over the next 5 years.

Response: NMFS does not agree that it should make an assessment of take levels over the 15–20 year lifetime of the Northstar Unit. Under the MMPA, NMFS must make a determination that the ''total of such taking during each 5-year (or less) period concerned will have a negligible impact on such species or stock and will not have an unmitigable adverse impact on the availability of such species or stock for taking for subsistence purposes * * *.''

Also, NMFS does not consider it necessary to make a negligible impact determination on the worst case scenario. NMFS believes that using the worst case estimate does not provide a realistic estimate of harassment take levels. NMFS suggests that reviewers note the detailed explanation in the application on how BPXA estimated take levels. The best scientific data indicates that, between 1979 and 1997, a period of 18 years of data collection, bowheads came within 10 km (6.2 mi) of the site of the future Northstar Unit only during 1997 (BPXA, 1999). This being the case, there is simply no need to presume that this migratory deflection would occur during each of the next 5 years. However, NMFS has determined that, because this close-approach did occur in a recent year, a more reliable estimate of take can be made by presuming that this take level could occur again once or twice within the next 5 year period. Therefore, NMFS has determined that an average annual take by harassment, due to noise from construction and operation at Northstar, as calculated by BPXA (i.e., 173 (maximum 1,533) per year) would result in a maximum of 717 bowheads annually or approximately 9 percent of the revised 1993 estimated population size of 8,200 (95 percent CI, 7,200–9,400) (Hill and DeMaster, 1999; IWC, 1996). NMFS notes that this harassment will be limited to a deflection in migration and would be considered a taking by Level B harassment. Such a taking would result in only small numbers being taken and having no more than a negligible impact (both as defined in § 216.103) on bowhead whales.

Finally, NMFS disagrees with the MMC that the available data are insufficient to be confident that both the population level effects (and the impacts on Native subsistence hunting) would be negligible. The take levels under discussion here are limited to harassment due to noise disturbance by construction and later production at the Northstar Unit. The level of noise produced at Northstar is expected to be substantially less than that produced during seismic surveys, and, unlike seismic, Northstar is stationary and located well inshore of the normal migratory path of the bowhead whale. In addition, the bowhead whale population has increased from approximately 4,400 (CV 3,500 to 5,300) (Zeh *et al.*, 1993) in 1978 to

approximately 8,200 in 1993 (Hill and DeMaster, 1999). A population increase of approximately 3.1 percent annually (Raftery *et al.* 1995, NMFS, 1999), coincident with oil exploration and development activity (including seismic), provides evidence that takings due to harassment by noise at Northstar will not have more than a negligible impact on bowhead whales.

However, of more concern to NMFS is the impact, not by Northstar alone, but the cumulative impact in the future by several offshore oil developments and seismic activity on the subsistence lifestyle of the North Slope residents. This is discussed in more detail later in this document.

Comment 19: Greenpeace notes that NMFS fails (1) to adequately consider the impact if the maximum number of bowhead whale takes (1,533 per year for the 5-year period or a total of 7,665 bowheads actually occurs, and (2) to justify its conclusion that the takings at this level would not be expected every year or would not jeopardize the species.

Response: Please refer to the response to previous comment. As noted in the application and in the preamble to the proposed rule, the taking of up to 173 (maximum 1,533/year) is limited to harassment, meaning the taking is for the short-term incidental harassment by noise disturbance, resulting in a short-term behavior change, such as a slight deflection of its westward migration route.

While NMFS recognizes that there is some potential that bowheads (and other marine mammal species) may be harassed, injured or killed due to an oil spill from Northstar, NMFS determined previously, under section 7 of the ESA, that oil and gas development at Northstar would not jeopardize the continued existence of the bowhead whale.

Comment 20: The NSB questions the citation in BPXA's application (i.e., NMFS, 1997), whether NMFS subscribes to the policy regarding a determination of negligible impact where the impact may be more than negligible, but the likelihood of occurrence is minimal, and whether NMFS will continue this policy in regard to future proposed OCS development projects.

Response: The reference cited in the BPXA application is NMFS' **Federal Register** notice of issuance of an IHA to the ARCO Oil Company for oil exploration in Camden Bay, Alaska (see 62 FR 51637, October 2, 1997). In that document, NMFS stated that when making a negligible impact determination, NMFS can find that a negligible impact determination may be appropriate if the probability of occurrence is low, but the potential effects may be significant. This statement has been made by NMFS previously (see 53 FR 8474, March 15, 1988) and can also be found in NMFS' Programmatic EA (NMFS, 1995) for implementation of regulations found at subpart I of this part. In stating this policy for this and other activities, NMFS is following Congressional direction to balance the potential for a significant impact with the likelihood of that event occurring. The specific Congressional direction that justifies balancing probabilities with impacts states: ''If potential effects of a specified activity are conjectural or speculative, a finding of negligible impact may be appropriate. A finding of negligible impact may also be appropriate if the probability of occurrence is low but the potential effects may be significant. In this case, the probability of occurrence of impacts must be balanced with the potential severity of harm to the species or stock when determining negligible impact. In applying this balancing test, the Service will thoroughly evaluate the risks involved and the potential impacts on marine mammal populations. Such determination will be made based on the best available scientific information.'' (132 Cong. Rec. S 16305 (Oct. 15, 1986)).

Comment 21: Greenpeace notes that the available information shows that if there is a major oil spill, the impacts would be severe, and, therefore, NMFS cannot find negligible impact. The risk of a long-term chronic leak, a large spill of 1,000 barrels or more, drill rig blowout and other occurrences exists. Because these events are still possible, BPXA must analyze and incorporate the marine mammal take that would occur.

Response: Keeping in mind the response to the previous comment, NMFS notes that, while a large oil spill, if it occurred, has the potential to have impacts on bowhead whales and other marine mammal species that are more than negligible, the possibility for a large oil spill to occur is believed by NMFS to be minimal. The Corps' FEIS describes in detail calculations it made for the probability for a major oil spill occurring at Northstar. According to that document there is a 1.6–5-percent chance of a major oil spill occurring along the offshore portion of the pipeline over the first 15 years of operation and a 7-percent chance that there would be a major spill due to platform operations over the life of the platform. NMFS accepts these estimates as the best information available.

Additionally, spilled oil would need to occur at a time and/or location where it could intercept bowhead whales or other marine mammal species. The FEIS describes the fate and consequences of having a major oil spill during different seasons of the year. NMFS also considers this information to be the best scientific information available. As a result, NMFS believes that, because the likelihood of a major oil spill occurring and impacting marine mammals is low for the period of these regulations, it is both impractical and speculative to calculate take levels for major oil spills. The low probability of a major oil spill impacting marine mammals also allows NMFS to make a determination that the taking would have no more than a negligible impact on marine mammals in accordance with Congressional direction mentioned previously.

However, NMFS recognizes that in the unlikely event that a major oil spill did occur, the impact has some potential to be more than negligible. As a result, NMFS has determined that, in the event a major oil spill occurs, NMFS will need to reassess immediately its determination in this document that the taking of marine mammals by oil and gas development activities in the Beaufort Sea is having no more than a negligible impact on marine mammals. If, because the takings are projected to exceed the levels used in this document to make a negligible impact finding, NMFS can no longer make a negligible impact determination, NMFS will immediately suspend the LOA issued for the oil development project causing the impact. Because the LOA suspension falls under the emergency determination for LOA suspension under these regulations, NMFS will not provide a 30-day public review period prior to suspension. However, NMFS believes the possibility of this situation occurring is remote.

Comment 22: Greenpeace states that the NMFS assertion of negligible impact on endangered species or stock, despite the fact that no specific prediction will be made about the potential number of bowhead whales that would be taken as a result of an oil spill and cleanup, is arbitrary and capricious, and fails to utilize the best scientific and commercial data available. The conclusion of negligible impact is not supported by any assertion of fact.

Response: Please see the response to the previous two comments. The FEIS discusses the potential for a large oil spill, either through a break in the pipeline or a blowout. As mentioned previously, NMFS adopts this documentation as the best scientific information available. In addition, mitigation measures in place at Northstar, including weekly inspection

overflights of the pipeline (in addition to possibly more frequent flights transporting people and supplies), and incorporation of the LEO spill detection system reduce the potential for chronic leaks to go undetected for long periods of time.

Comment 23: Greenpeace contends that NMFS only cursorily addresses impacts from oil spills and cleanup and fails to analyze the cumulative exposures or the risk to the entire bowhead population from a prolonged disruption of a biologically important behavior or from injury or take over the life of the Northstar project, or due to a catastrophic oil spill.

Response: The MMPA requires NMFS to make a determination that the total of such taking during each 5-year (or less) period concerned will have a negligible impact on the species or stock of marine mammal, not whether the takings will be negligible over the entire 20–30 year lifespan of Northstar. Also, it is not necessary for NMFS to fully describe the impacts and the determinations made in that regard in the preamble to a proposed rule. The concerns raised by Greenpeace were fully addressed by the Corps in its FEIS. Based upon that document, NMFS believes the taking will have no more than a negligible impact (as defined in § 216.103).

Comment 24: Greenpeace states that oil spill trajectory modeling has not been done to support the conclusion of negligible impact, or the conclusion that the impact will be limited because the trajectory will be confined to the shoreline. Also, Greenpeace states that there is no consideration being given of the persistence of oil in the environment when considering level or numbers of take. The toxicity of oil can persist in the environment for more than ten years.

Response: As mentioned previously, NMFS believes that the potential for a large oil spill occurring during the 5-year period of these regulations is remote. Therefore, NMFS believes that the recommended studies or considerations are unnecessary for it to make its negligible impact determination.

Comment 25: Greenpeace states that NMFS has provided no legal justification for authorizing incidental take nor has it utilized the best scientific and commercial data available for any of its conclusions. In the draft regulations, NMFS ignored important scientific information indicating greater oil spill and noise impacts and failed to acknowledge deficiencies in many of the studies BPXA relied on in its application, as noted by Albert (1996, 1997).

Response: NMFS uses the best scientific and commercial information available when making determinations of negligible impact on marine mammal species and no unmitigable adverse impact on species/stocks for subsistence purposes. NMFS believes that this information is contained in the BPXA application, NMFS' biological opinion and the Corps FEIS on Northstar provides this information. Without Greenpeace providing a reference for Albert (1996, 1997) NMFS is unable to respond further to the statement.

Subsistence Concerns

Comment 26: The AEWC notes that the BPXA application estimates the distances from the Northstar Unit to the traditional hunting areas for 3 fall bowhead whale subsistence villages. However, because the bowhead whale moves in a single westward migration, this information is of limited relevance to NMFS' evaluation of potential adverse impacts on subsistence. Adverse impacts to bowhead whales could affect the subsistence hunting of any or all 10 of the villages depending upon the severity and timing of any oil spill and the perceptions by the various villages on how the oil affected the quality of the subsistence product.

Response: While the bowhead whale moves in a single westward migration in the fall, except for the unlikely occurrence of a significant oil spill (greater than 1,000 barrels), wherein all 10 villages' bowhead subsistence harvest may be affected, NMFS believes that the impact on bowhead whales from Northstar will be limited to 3 villages, and in particular Nuiqsut. Nuiqsut has the greatest potential to be impacted by development at Northstar, as its whaling customarily takes place in the vicinity of the island.

In the past, NMFS has requested, without success, information regarding the locations where successful bowhead whale takes occur in the Beaufort Sea. Considering that whalers are provided with GPS receivers, this information should be available. This information could provide scientists with data to make assessments on the impacts from oil and gas production activities on Beaufort Sea subsistence whaling. In the interim, NMFS uses the more general information provided by the applicant.

Based on the information to date, however, NMFS has determined that the potential for a major oil spill to occur, and for that oil to intercept bowhead whales in the migratory corridor, which in turn, could affect the subsistence harvest of all 10 villages, is unlikely.

Comment 27: The NSB notes that one of their primary concerns is the potential for planned (oil development) activities to disrupt fall subsistence whaling by the village of Nuiqsut. NSB believes it is difficult to clearly identify all of the activities associated with construction and operations which are expected to occur during this critical period.

Response: Activities that have some potential to occur during the same period as Nuiqsut subsistence whaling would include any activities scheduled, but not completed, prior to September. These are described in BPXA's application. However, activities that may occur during that time period may be influenced by agreements made during the C&AA negotiations. Based upon previous C&AAs, and recent statements made by BPXA at a stakeholders meeting in Seattle, NMFS presumes that any activity that creates noise, or has the potential to disturb bowheads, either acoustically or visually, either will not take place or will be modified during the fall subsistence hunt for bowheads. However, even without an agreement to curtail activities during this period, NMFS does not believe these activities will create sufficient level of noise to result in an unmitigable adverse affect on subsistence uses of the bowhead.

Comment 28: The AEWC notes that the annual C&AA is not entered into between BPXA and NSB residents, but by the AEWC on behalf of its bowhead whale subsistence hunters.

Response: NMFS concurs and has made the correction in this document.

Mitigation Concerns

Comment 29: The AEWC recommends that NMFS take this opportunity to convene a meeting, or a series of meetings, with the AEWC and other interested parties to (1) address arctic offshore oil production-related impacts to marine mammals and subsistence hunting, and (2) discuss appropriate additional mitigation measures during Northstar oil production.

Response: NMFS concurs that a meeting, or a series of meetings, to address mitigation measures that might be adopted by the industry in the event that an oil spill occurs is warranted. In that regard, NMFS hosted a meeting on February 24, 2000, between the AEWC/NSB and the oil industry to start a dialogue to identify monitoring measures for both noise and oil that might be initiated to address both short- and long-term, cumulative impacts. Future meetings are also planned. However, these meetings should not be confused with the peer-review meetings normally held in late spring for the open

water noise monitoring and early fall for on-ice noise monitoring in Seattle, WA.

Comment 30: Greenpeace notes that during the ice covered season, BPXA proposes no mitigation before mid-March, based on the assumption that female ringed seals establish their birth lairs before pupping in late March or April. Noting that ringed seals begin to build lairs as soon as the ice is covered with snow, BPXA must mitigate harassment of ringed seals prior to initiation of any construction activities, regardless of when they commence.

Response: The primary ice roads used during Northstar construction (and later during oil production), must be almost straight-line in order to effectively transport gravel from the mine site to Seal Island and for construction of the pipeline. Once Northstar and the pipeline are constructed, only a single primary offshore road will need to be constructed annually, that one along the pipeline corridor. As a result, there is little mitigation that has been identified that would be practical and effective during the construction of these primary roads in the early part of the winter season. However, secondary ice roads constructed later in the season, are not believed to be confined to a set track and can be constructed to avoid seal structures. As a result, NMFS has imposed mitigation measures in the LOA which requires (1) Using trained dogs to locate seal structures on all ice roads, (2) avoiding seal structures by a minimum of 150 m (492 ft) during construction of any roads other than the gravel and pipeline primary roads, and (3) avoiding, to the greatest extent practicable, disturbance of any located seal structure after March 20.

It should be recognized that mitigation (using trained dogs) conducted this year during primary ice road construction was implemented because BPXA did not have an authorization for harassment under the MMPA, and therefore needed to avoid, to the greatest extent possible, harassing ringed seals. At a workshop later this year, NMFS will assess the value and practicality of using trained dogs as a mitigation measure to locate seal structures on the ice and then halting activity around the structure until either the animal voluntarily vacates the structure or biological observers determine that the structure is unoccupied. Alternatively, NMFS may determine that it is preferable for the ringed seals to be discouraged, by incidental construction noise, from converting breathing holes into seal structures where pups may later be born, and potentially injured or killed at some later time.

Section 101(a)(5)(A)(ii)(I) of the MMPA provides for regulations setting for the permissible methods of taking and other means effecting the least practicable adverse impact on the affected species or stock and its habitat. As ringed seals construct several breathing holes and lairs within its territory, they do not rely on a single structure during the year. Ice roads constructed early in the year will result in some minor harassment as ringed seals abandon certain breathing holes, if the noise is disturbing to them. NMFS believes this may be preferable to avoiding all harassment of ringed seals during ice road construction (how that would be accomplished has not been identified) and then having the newborn pup, who may be more sensitive to noise than an adult, abandon a birthing lair prior weaning, and having that pup succumb to the effects.

Comment 31: Greenpeace notes that BPXA is proposing to have marine mammal monitors conduct watches commencing 30 minutes prior to such noisy activities as impact hammering and offloading during the open water season. Greenpeace states that given frequent and often extended periods of impaired visibility in the Beaufort Sea due to fog and low, or no, light conditions, BPXA should include work restrictions during these times.

Response: NMFS does not agree. BPXA proposed having marine mammal monitors to conduct observations for 8 hours/day for 2–3 days during each major type of construction activity, and during quiet periods before and/or after these activities occur. Monitors must conduct observations a minimum of 30 minutes prior to starting noisier activities. If a marine mammal is observed within an area that might cause Level A harassment (180 dB for cetaceans, 190 dB for pinnipeds), work cannot start until the marine mammal has left the safety zone. NMFS has clarified this requirement in the LOA to require marine mammal monitor(s) be on watch during all daylight hours for any activity that results in a SPL of at least 180 dB at any distance which exceeds the island's land/water interface. This monitoring must begin in daylight at least 30 minutes prior to beginning the activity. Also, the entire safety zone must be visible during the entire pre-activity monitoring time period in order for the activity to begin. This means that noisy activities cannot start, or be restarted after a time period set in the LOA during low visibility and nighttime periods.

As an extra precaution, work is required to cease whenever a marine mammal enters its respective safety zone as noted by an observer. However, while certain work must not start-up until the observer can ensure that the safety zones are free of marine mammals, once that work begins it need not cease simply because weather precludes adequate observation during inclement weather or nighttime. NMFS presumes that anthropogenic noise in the area around Northstar will discourage marine mammal presence if the noise is bothersome to the animals.

Comment 32: Greenpeace was concerned that BPXA proposes to intentionally harass marine mammals as a form of mitigation in the event of an oil spill. Greenpeace believes that NMFS should not approve the intentional use of harassment to reduce the level of serious injury or mortality. Greenpeace notes that regardless of whether this technique constitutes acceptable mitigation (and Greenpeace asserts it does not), it is not practical given the persistence of oil in the environment. There is no information or reasoned analysis of how long intentional harassment will be used as a mitigation strategy during an oil spill and just how much reduction in Level A harassment will be achieved.

Response: The intentional harassment of marine mammals for the health and welfare of the animal is under another provision of the MMPA and not under this section. In the event that a significant oil spill occurred, NMFS and other agencies would determine how best to protect marine mammals from oil.

Comment 33: Greenpeace is concerned that BPXA cites its Oil Discharge Prevention and Contingency Plan (ODPCP) as a mitigation measure for protecting marine mammals. Mitigation should not be assumed until BPXA can reasonably prove its ability to respond and remove oil from the environment.

Response: While NMFS considers the ODPCP to be a mitigation measure to reduce impacts to marine mammals, NMFS also recognizes the inability to respond to an oil spill in the waters surrounding Northstar at certain times and in certain conditions. These constraints to respond in all seasons and weather conditions has been discussed in detail in Chapter 8 of the Corps FEIS.

Comment 34: The MMC recommends that NMFS review the ODPCP to assure that the risk of spills has been estimated appropriately; require modification of the contingency plan if everything feasible has not been done to minimize the risk of spills occurring and impacting marine mammals; and provide for periodic site inspections as part of the long-term monitoring

program to assure that the contingency plan can be implemented as and when necessary. Finally, the MMC recommends that an assessment of the contingency plan and any monitoring requirements be included in any **Federal Register** document published to promulgate final regulations on this action.

Response: NMFS believes that it has neither the expertise to determine the adequacy of the ODPCP, nor the authority under the MMPA to require the ODPCP be modified by BPXA or to place these requirements on Federal or state agencies with such authority. As the MMC noted in its comment, the ODPCP has been approved by the U.S. Department of Transportation, the U.S. Coast Guard, the Minerals Management Service (MMS), and the State of Alaska Department of Environmental Conservation. For its determinations of negligible impact, NMFS relies on the information, including estimates of risk from oil spills, contained in the FEIS.

Monitoring Concerns

Comment 35: The NSB believes that the proposed marine mammal monitoring plan in its present form is inadequate. The plan, and especially the proposal for passive acoustic monitoring of fall migrating bowhead whales, should be revised and made clearer.

Response: BPXA's technical plan for marine mammal and acoustic monitoring during construction of Northstar was submitted to NMFS in May, 1999, as a supplement to its November 1998, petition. That plan was reviewed at the peer review workshop held in Seattle, WA on July 1, 1999, and revised in August 1999, based on the recommendations made during the workshop. The NSB participated in that workshop. NMFS does not believe that it is necessary at this time to request BPXA to revise the plan prior to providing all parties at the workshop an opportunity to respond. Since this plan will be reviewed again later this year, the comments and recommendations made by the NSB will be placed on this year's meeting agenda.

Comment 36: Greenpeace notes that, although NMFS is proposing regulations governing the taking of marine mammals during the construction and operation of Northstar, the accompanying marine mammal monitoring program only applies to project construction. The monitoring program fails to outline a program for monitoring marine mammal takes during Northstar operation.

Response: BPXA's revised monitoring plan as submitted on September 1, 1999, provides detailed description of proposed monitoring during construction. This monitoring had been amended based on comments received during the Arctic Peer Review Workshop held in Seattle, WA on July 1, 1999.

A detailed description of monitoring during Northstar operations was not submitted at the time because that monitoring program would not begin until oil drilling operations began, approximately November 2000. BPXA will submit a monitoring plan for operations in sufficient time for that plan to be reviewed by peers and the general public. NMFS anticipates public review on the monitoring plan during the first year of operations will be conducted during the public comment period on an application for LOA renewal, which will be contingent on submission of an adequate monitoring plan. In the interim, BPXA will continue monitoring impacts as described in the August 20, 1999, Technical Monitoring Plan. As stated in BPXA's application, monitoring during operations will require evaluation based on the results of monitoring during construction and any other information that becomes available in the interim. NMFS intends to continue past practice and have annual submissions of proposed monitoring plans and to have those plans peer reviewed prior to implementation.

Comment 37: Greenpeace believes that specific monitoring requirements should be included in the regulations, not in the LOA.

Response: If specific monitoring conditions are contained in the regulations, modifications to the monitoring would require an amendment to the regulations prior to implementation. This would prevent prompt implementation of revised monitoring based on the annual review process, or in response to an unusual event, as can be done by having specific monitoring conditions contained in an LOA. As a result, NMFS has not adopted this recommendation. However, it should be noted that BPXA must comply with the conditions of the LOA, so it would be responsible for implementing any monitoring identified in the LOA.

Comment 38: Greenpeace states that NMFS cannot assume that the impacts of the Northstar operations on marine mammals will be negligible in the absence of a detailed monitoring program to back up that assertion.

Response: NMFS believes that the results from monitoring are useful to support or refute its determinations that takings are having a negligible impact on affected marine mammal stocks and not having an unmitigable adverse impact on subsistence uses of marine mammals. However, a detailed monitoring program is not a requirement under the MMPA before NMFS can make these determinations; the MMPA requires only that a monitoring program be required under regulations authorizing the taking. For Northstar, NMFS expects that, through the peer review process, a comprehensive monitoring program will be implemented that will provide the necessary information on impacts on marine mammals.

Comment 39: Greenpeace states that BPXA's proposed plan to establish a peer review process as outlined in its monitoring plan is not sufficiently independent to meet the standards of the MMPA. The regulations should require BPXA to submit the monitoring plans well in advance so that NMFS can instigate its own independent peer review, and require that its recommendations be incorporated into the final plans.

Response: The peer review process described in BPXA's Technical Plan for Marine Mammal and Acoustic Monitoring During Construction of BP's Northstar Oil Development in the Alaskan Beaufort Sea, 2000, is the same as NMFS' Arctic Peer Review Workshop held annually in Seattle, WA. Participants in this workshop, and similar workshops held to discuss on-ice monitoring of seals, typically include representatives from industry, the NSB, the AEWC, universities, environmental organizations, and state and Federal government.

It should be understood that independent peer review in this context means a review by other than NMFS, the oil industry and its contractors, and the AEWC/NSB. However, independent peer review is not required for authorizations issued under section 101(a)(5)(A) of the MMPA. While peer review of monitoring plans has been incorporated into these regulations in accordance with findings made at a workshop held in Seattle in 1994 with the AEWC, the oil and gas industry and others, independent peer review is at the discretion of NMFS. On April 9, 1999 (64 FR 17347), NMFS requested nominations for the voluntary participation in the peer review process. Due to a lack of interest expressed by the public in response to this notice, NMFS has decided to reserve use of an independent peer review to matters of significant dispute between the AEWC, NMFS, and/or the Holder of an LOA. In general, specific requirements for independent peer review will be

determined in advance and noted in an LOA.

Comment 40: Both the MMC and BPXA note that the preamble to the proposed rule failed to mention the acoustic monitoring program for bowhead whales described in BPXA's revised application and monitoring plan.

Response: NMFS acknowledges the oversight. BPXA's technical plan for marine mammal and acoustic monitoring during construction at Northstar proposed seven monitoring tasks, not six. These tasks are listed elsewhere in this document.

Comment 41: The MMC recommends that NMFS review past aerial survey data to determine whether the surveys conducted by the MMS are likely to provide sufficient information to assess the utility of the proposed acoustic monitoring and if the MMS' surveys are judged unlikely to provide sufficient data, require that additional surveys be done during the construction phase to document the presumed effectiveness of the acoustic monitoring.

Response: Thank you for this recommendation. As noted in BPXA's application, use of an acoustical monitoring system is planned to be tested in 2000. The purpose of the system is, in part, to assess the feasibility of its use as an alternative to aerial surveys. In addition to MMS surveys, additional aerial surveys for bowheads are conducted in the region to assess impacts from seismic work. This data would also be available for analysis. As a result, the MMC's comments have been forwarded to NMFS scientists and others for consideration. However, NMFS recommends MMC scientists participate in the peer review workshops so that the concerns of the MMC can be addressed more directly.

Comment 42: The MMC, because of perceived uncertainties in the data regarding impacts to ringed seals and polar bears and interactions between these two species, recommends that monitoring of polar bears and polar bear den sites required by regulations and LOAs issued by the U.S. Fish and Wildlife Service (USFWS) will be coordinated with the ringed seal monitoring required by this set of regulations and LOAs.

Response: NMFS is unaware of any evidence that increased interactions between polar bears and ringed seals will occur as a result of construction of ice roads and the reconstruction of Seal Island. To the extent practicable, on-ice monitoring of ringed seals and polar bears has been, and will be, coordinated. NMFS notes that often the same biological observers conducting ringed seal observations are also conducting polar bear observations. In addition, the USFWS has attended on-ice peer review workshops wherein NMFS and others review previous monitoring and upcoming monitoring plans. The MMC concerns expressed here will be reviewed at the next meeting. NMFS recommends that, if the MMC has any suggestions regarding appropriate study designs to determine whether oil and gas activity results in increased interactions between polar bears and ringed seals, they should provide that information to NMFS prior to the next on-ice peer review meeting.

Comment 43: Greenpeace asserts that BPXA's monitoring program relies on ineffective methods for monitoring ringed seals.

Response: To the extent practicable, NMFS follows the guidelines in Swartz and Hofman (1991) when reviewing and making recommendations on monitoring oil and gas activities in Arctic waters. Based on that document, and the results of a workshop held in Seattle in October 1999, BPXA has implemented a monitoring program using dogs to locate ringed seal structures in the ice. However, NMFS notes that using dogs this winter, prior to issuance of an LOA, does not mean that dogs will be required each year that ice roads are constructed. That determination will be based in part on the recommendations of scientists and the value of the information provided by this method of data collection. Generally, in cases where ice roads are constructed early in the year, under an LOA or IHA to take marine mammals, NMFS has questioned the need for dogs to monitor harassment takings. However, in order to protect newborn pups, dogs will be required under an LOA, whenever new, secondary, ice roads are constructed after March 1.

Following Swartz and Hofman (1991), NMFS has determined that the Before-After Control-Impact (BACI) study of ringed seal distribution meets the monitoring requirements for assessing impacts on ringed seals during wintertime construction and operation. This does not mean however, that additional or alternative ringed seal monitoring will not be required in future years under an LOA. Such monitoring may be imposed as a result of future peer review workshops.

Reporting Concerns

Comment 44: The AEWC requests that, when scheduling review periods, NMFS give due consideration to the time of year when that period will occur. Spring bowhead whale subsistence hunting generally is most intense for our communities during April, May, and June. In addition, the annual meetings of the International Whaling Commission, usually are scheduled sometime between early May and mid-July. These meetings last a total of 4 weeks and require intense preparation.

Response: Considering that the fall bowhead whaling season begins around September 1 and continues for several weeks, wherein the AEWC is also not available for reviewing documents and meeting, there is limited time during the year for an annual review.

As proposed previously, an interim report was due 180 days prior to expiration of an LOA. If an LOA expires early in the year, as is expected with the Northstar LOA, then the report would be due 6 months prior to that date, or in late summer of the previous year. Because of the timing, this report obviously could not include an assessment of the activity's impact on bowhead whales and the subsistence harvest that year since the fall migration would only be starting at that time. Therefore, this report would need to contain an assessment of the previous year's impact on bowhead whales, requiring the use of dated information, and putting the data out of synchrony with the actual taking of marine mammals during that LOA period of validity. However, this is realistic considering that it takes 6–7 months to incorporate MMS aerial survey data on bowheads into an analysis of impacts from an oil and gas exploration or development activity.

As a result, because of the importance of having a peer review of both monitoring plans and the results from previous monitoring, NMFS has amended the regulations and is requiring holders of LOAs to provide two interim reports, the first due 90 days after the end of the on-ice season (approximately September 15th for the report), and the second due 90 days after the end of the fall bowhead migration in the Beaufort Sea (approximately February 1st for the report). NMFS will also require a draft comprehensive report by May 1st of the year following the year of validity of the LOA. NMFS recognizes that this means that the first year LOA for Northstar will only have a report on the on-ice monitoring due to NMFS by the time NMFS needs to consider a renewal of the first-year LOA.

Finally, NMFS will require a final comprehensive report on all marine mammal monitoring and research conducted by the holder of its LOAs during the period of these regulations

must be submitted at least 240 days prior to expiration of these regulations or 240 days after the expiration of these regulations, if renewal of the regulations has not been requested.

Comment 45: The NSB believes that the proposed method for project review (two reviews/year, one through the mail) is not adequate. One meeting is needed to review the draft proposal and a second meeting is needed to review the draft report.

Response: NMFS disagrees that a meeting is necessary solely to review BPXA's draft monitoring report(s). For continuity, this report (which is a report on the results of previous years' monitoring programs), is usually reviewed and critiqued at the same time the NSB and others are recommending monitoring measures for the upcoming season. NMFS believes that discussion on the results of previous monitoring at the same time as discussion of the upcoming monitoring plan, facilitates recommendations on appropriate monitoring and/or research.

In addition, recognizing the period of time when NSB residents are not available to meet (discussed previously in this document) and because the NSB, NMFS, and others are already sponsoring and/or participating in three meetings annually on this issue, one for open water monitoring, a second for winter (on-ice) monitoring, and a third to address short- and long-term monitoring for effects from potential oil spills on marine mammals, a fourth meeting limited to discussion on the results of previous year's monitoring is simply not practical at this time.

ESA Concerns

Comment 46: Greenpeace contends that the proposed rule (64 FR 57010, October 22, 1999) violates section 7(a)(2) of the ESA because it fails to insure that actions to approve regulations are not likely to jeopardize the continued existence of endangered species, after required consultation and using the best scientific and commercial data available.

Response: With the issuance of a Biological Opinion (BO) on March 4, 1999, NMFS completed formal consultation with the Corps under section 7 of the ESA for the construction and operation of the Northstar project. The BO, which found that the construction and operation of the Northstar project activity will not jeopardize the continued existence of any species under the jurisdiction of NMFS, was based upon the best scientific and commercial data available. Because issuance of these regulations and an LOA to BPXA for the incidental take of bowhead whales is also considered a Federal action, NMFS has conducted a consultation under section 7 with itself on this action. The finding by NMFS is that an authorization for the taking of bowhead whales incidental to construction and production of the Northstar Unit, under section 101(a)(5)(A) of the MMPA, while it may adversely affect bowhead whales, is not likely to jeopardize its continued existence. If new information is obtained which affect bowhead whales in a manner or to an extent not previously considered, or if the level of incidental take is exceeded, reinitiation of consultation will be undertaken.

Comment 47: Greenpeace also contends that, by proposing the regulation, NMFS has made an irreversible and irretrievable commitment of resources with respect to the Northstar project, which has the effect of foreclosing the formulation or implementation of reasonable and prudent alternative measures which would not violate section 7(a)(2) of the ESA.

Response: NMFS does not agree that it has made an irreversible and irretrievable commitment of resources in conjunction with proposing regulations for the project. NMFS completed its section 7 responsibilities prior to issuance of this final rule.

Comment 48: Greenpeace believes that the proposed rule (64 FR 57010, October 22, 1999) fails to utilize its authorities in furtherance of the purposes of section 7(a)(1) of the ESA by carrying out programs for the conservation of endangered species.

Response: Conservation recommendations under section 7(a)(1) of the ESA were provided by NMFS to the Corps in the Northstar BO. These include: (1) Vessel operations should be scheduled to minimize operations after August 31 of each year in order to reduce potential harassment of migrating bowhead whales, (2) utilize agitation technique for placement of sheetpiling and piling instead of pile-driving whenever practicable, (3) develop and conduct an acoustic monitoring study during construction and initial operation, and (4) conduct or support studies to describe the impact of Northstar on the migrational path of bowhead whales in the Beaufort Sea.

Additional conservation recommendations to reduce impacts on the endangered bowhead whale are contained in these regulations, the BPXA LOA, and the Incidental Take Statement issued to the Corps under section 7(a)(2) of the ESA.

Comment 49: Greenpeace notes that the proposed rule (64 FR 57010, October 22, 1999) states that NMFS has begun consultation under section 7, but that there has been no public release of information concerning the scope of consultation nor of a biological assessment which adequately assess these impacts.

Response: While there is no requirement in the ESA for making that information public, this document notifies the public of the completion of section 7 consultation. Recognizing that impacts on listed species will result from the activity itself, not from the issuance of an authorization for the incidental taking, NMFS has determined that the issuance of 5-year regulations for the Northstar Project, and a 1-year LOA, may affect bowhead whales, the action was unlikely to jeopardize the stock's continued existence. Because Biological Assessments are written at the discretion of the action agency, and because a BO was written previously on the major action (i.e., on construction and operation of Northstar), a new Biological Assessment is not necessary for this action and, therefore, one was not prepared.

Comment 50: There was no incidental take statement in the Northstar BO.

Response: That is correct. Whenever a marine mammal species listed as endangered or threatened under the ESA is involved, section 7(b)(4)(C) of the ESA requires that the taking is also authorized pursuant to section 101(a)(5) of the MMPA. Until the requirements of both the MMPA and ESA are met, an incidental take statement cannot be issued. The issuance of an LOA to BPXA for Northstar will meet the MMPA requirements and an Incidental Take Statement can be, and will be, issued shortly.

Comment 51: Greenpeace states that the proposed rule results in a taking of a protected species in violation of section 9 of the ESA.

Response: The taking of endangered bowhead whales incidental to the construction and operation of the Northstar Unit is not expected to be in violation of section 9 of the ESA. Under the terms of section 7(b)(4) and section 7(o)(2), taking that is incidental to, and not intended as part of, the agency action is not considered to be prohibited taking under the ESA provided that such taking is in compliance with the terms and condition of the Incidental Take Statement. As mentioned previously, the incidental taking of bowhead whales under the ESA will be authorized through an Incidental Take Statement issued under section 7 of the ESA.

Comment 52: The original Northstar BO did not address the quantitative

information submitted by BPXA in its incidental take publication regarding expected level of takes, such as 173–1,533 bowheads annually, or sources of impacts, such as 16,800 large-volume haul trips, 28,500 dump trucks, etc.

Response: The Biological Assessment was first submitted to NMFS by the Corps on May 19, 1998, with supplemental information provided on July 10, 1998. This was prior to BPXA submitting information for an IHA on August 12, 1998 (63 FR 57096, October 26, 1998), or on November 30, 1998, for this action. While NMFS could have included this additional information in its BO, this information was considered preliminary at the time and unnecessary for making a determination on whether or not the activity could jeopardize the bowhead whale's continued existence. Estimates of bowhead whale takes by harassment have been evaluated during this rulemaking and will be incorporated as appropriate into the Incidental Take Statement. NMFS notes however, that the activities mentioned by the commenter will occur during the winter and will not affect bowheads.

Comment 53: Greenpeace believes that NMFS has failed to conduct a North Slope-wide assessment of the impacts to bowhead whales from reasonably foreseeable exploration and development activities in the Beaufort Sea.

Response: NMFS' evaluation of the cumulative effects on bowhead whales, by Beaufort Sea activities, were addressed in part V. of the March 4, 1999, BO.

Description of Habitat and Marine Mammal Affected by the Activity

The DEIS and FEIS prepared for the Northstar development (Corps, 1998, 1999) contains a detailed description of the Beaufort Sea ecosystem and its associated marine mammals. Those documents are part of the record of decision of this rulemaking. A copy of the FEIS is available from the Corps upon request (see **ADDRESSES**).

Marine Mammals

The Beaufort/Chukchi Seas support a diverse assemblage of marine mammals, including bowhead whales (*Balaena mysticetus*), gray whales (*Eschrichtius robustus*), beluga whales (*Delphinapterus leucas*), ringed seals (*Phoca hispida*), spotted seals (*Phoca largha*) and bearded seals (*Erignathus barbatus*). Descriptions of the biology and distribution of these species and of others can be found in several documents (e.g., Hill and DeMaster, 1998) including the BPXA application (BPXA, 1999) and the previously mentioned FEIS. Please refer to those documents for specific information on these species. These documents are part of this rulemaking. In addition to the species mentioned in this paragraph, Pacific walrus (*Odobenus rosmarus*) and polar bears (*Urus maritimus*) also have the potential to be taken. Appropriate applications for taking these species under the MMPA have been submitted to the USFWS by BPXA.

Potential Effects on Marine Mammals

Noise Impacts

Sounds and non-acoustic stimuli will be generated during construction by vehicle traffic, ice-cutting, pipeline construction, offshore trenching, gravel dumping, sheet pile driving, and vessel and helicopter operations. Sounds and non-acoustic stimuli will be generated during oil production operations by generators, drilling, production machinery, gas flaring, camp operations and vessel and helicopter operations. The sounds generated from construction and production operations and associated transportation activities will be detectable underwater and/or in air some distance away from the area of the activity, depending upon the nature of the sound source, ambient noise conditions, and the sensitivity of the receptor. At times, some of these sounds are likely to be strong enough to cause an avoidance or other behavioral disturbance reaction by small numbers of marine mammals or to cause masking of signals important to marine mammals. The type and significance of behavioral reaction is likely to depend on the species and season, and the behavior of the animal at the time of reception of the stimulus, as well as the distance and level of the sound relative to ambient conditions.

In winter and spring, on-ice travel and construction activities will displace some small numbers of ringed seals along the ice road and pipeline construction corridors. BPXA began winter construction activities in mid-December, 1999, well in advance of female ringed seals establishing birthing lairs beginning in the latter half of March. The noise and general human activity may displace female seals away from activity areas and could negatively affect the female and young, if the female remained in the vicinity of the ice road.

During the open-water season, all six species of whales and seals could potentially be exposed to vessel or construction noise and to other stimuli associated with the planned operations. Vessel traffic is known to cause avoidance reactions by whales at certain times (Richardson *et al.*, 1995). Pile driving, helicopter operations, and possibly other activities may also lead to disturbance of small numbers of seals or whales. In addition to disturbance, some limited masking of whale calls or other low-frequency sounds potentially relevant to bowhead whales could occur (Richardson *et al.*, 1995; BPXA, 1999).

A more detailed description of potential impacts from construction and operational activities on marine mammals can be found in BPXA's application (BPXA, 1999) and the Corps' FEIS (Corps, 1999). That information is accepted by NMFS as a summation of the best scientific information available on the impacts of noise on marine mammals in this area. Additional information used by NMFS in this determination can be found in Richardson *et al.* (1995) and the references provided in BPXA's application.

Oil Spill Impacts

For reasons stated in the application, BPXA believes that the effects of oil on seals and whales in the open waters of the Beaufort Sea are likely to be negligible, but there could be effects on whales in areas where both oil and the whales are at least partially confined in leads or at the ice edge. In the spring, bowhead and beluga whales migrate through offshore leads in the ice. However, given the probable alongshore trajectory of oil spilled from Northstar, in relation to the whale migration route through offshore waters, interactions between oil and whales are unlikely in the spring. In the summer, bowheads are normally found in Canadian waters, and beluga whales are found far offshore. As a result, at this time of the year, these species will be unaffected should a spill occur. However, oil that persists in the Beaufort Sea into the fall or winter and is not contained and/or removed may impact bowhead whales.

In the fall, the migration route of bowheads can be close to shore. If bowheads were moving through leads in the pack ice, or were concentrated in nearshore waters, or if the oil migrated seaward of the barrier islands, some bowhead whales might not be able to avoid oil slicks and could be subject to prolonged contamination. However, because the autumn migration of bowhead whales past Northstar extends over several weeks and because most of the whales travel along routes well north of Northstar, according to BPXA, only a small minority of the whales are likely to intercept patches of spilled oil. The effects of oil on these whales have been described in several documents (BPXA, 1999; Corps, 1999; Loughlin *et*

al. (1994), which NMFS reviewed during this rulemaking.

Ringed seals exposed to oil during the winter or early spring could die if exposed to heavy doses of oil for prolonged periods of time. Prolonged exposure could occur if fuel or crude oil was spilled in or reached nearshore waters, was spilled in a lead used by seals, or was spilled under the ice when seals have limited mobility. Individual seals residing in these habitats may not be able to avoid prolonged contamination and some would die. Studies in Prince William Sound indicated a long-term decline of 36 percent in numbers of molting harbor seals located on those haulouts affected by oil from the EXXON VALDEZ spill. In addition, newborn seal pups, if contacted by oil, will likely die from oiling through loss of insulation and resulting hypothermia (BPXA, 1999). Because the number of ringed and bearded seals in the central Beaufort Sea represents a relatively small portion of their total populations, and even large oil spills are not expected to extend over large areas, relatively few ringed and bearded seals would be impacted, and impacts on regional population size would be expected to be minor.

In addition to oil contacting marine mammals, oil spill cleanup activities could increase disturbance effects on either whales or seals, causing temporary disruption and possible displacement effects (MMS, 1996; BPXA, 1999). In the event of a large spill contacting and extensively oiling coastal habitats, the presence of response staff, equipment, and many low-flying aircraft involved in the cleanup will (depending on the time of the spill and cleanup), potentially displace seals and other marine mammals. However, the potential effects on bowhead and beluga whales are expected to be less than those on seals. The whales tend to occur well offshore where cleanup activities (during the open water season) are unlikely to be concentrated (BPXA, 1999). Also, because bowheads are transient and during the majority of the year, absence from the area would lessen the likelihood of impact by cleanup activities.

Estimated Level of Incidental Take

BPXA (1999) estimates that, during the ice-covered period, 91 (maximum 125) ringed seals and 1 (maximum 5) bearded seals potentially may be incidentally harassed during construction activities and 77 (maximum 105) ringed seals and 1 (maximum 5) bearded seals potentially may be incidentally harassed annually during oil production activities. BPXA estimates these takings by harassment during the ice-covered season by assuming that seals within 3.7 km (2.3 mi) of Seal Island, within 1.85 km (1.1 mi) of the pipeline construction corridor and related work areas, and within 0.66 km (0.4 mi) of ice roads will be ''taken'' annually. These anticipated levels of potential take are estimated based on observed densities of seals during recent (1997–1999) BPXA/LGL aerial surveys in the Northstar area during spring (Miller *et al.*, 1998; Link *et al.*, 1999; Moulton and Elliott, 1999) plus correction factors for seals missed by aerial surveyors. NMFS however, concurs with BPXA (1999) that these ''take'' estimates could result in an overestimate of the actual numbers of seals ''taken,'' if all seals within these disturbance distances do not move from the area. It should be noted that NMFS does not consider an animal to be ''taken'' if it simply hears a noise, but does not make a biologically significant response to avoid that noise.

NMFS notes moreover, that BPXA has recently adopted new methods for on-ice monitoring of ringed seals which include the use of dogs to find seal structures. These new methods may result in a better estimate of the numbers of seals actually taken by different industrial activities.

During the open-water season, BPXA (1999) estimates that 7 (maximum 22) ringed seals, 1 spotted seal, 1–5 bearded seals, 173 (maximum 1,533) bowhead whales, less than 5 gray whales, and 6 (maximum 45) beluga whales may be incidentally harassed annually whether from construction or operations. BPXA assumes that seals and beluga whales within 1 km (0.6 mi) radius of Seal Island will be harassed incidental to construction and other activities on the island. Assumed ''take'' radii for bowhead whales are based on the distance at which the received level of construction noise from the island would diminish below 115 dB re 1 μPa. This distance has been estimated as 3.2 km (2 mi).

Although the potential impacts to the several marine mammal species known to occur in these areas is expected to be limited to harassment, a small number of marine mammals may incur lethal and serious injury. Most effects, however, are expected to be limited to temporary changes in behavior or displacement from a relatively small area near the construction site and will involve only small numbers of animals relative to the size of the populations. However, the inadvertent and unavoidable take by injury or mortality of small numbers of ringed seal pups may occur during ice clearing for construction of ice roads. In addition, some injury or mortality of whales or seals may result in the event that an oil spill occurs. As a result, BPXA requested that, because a small number of marine mammals might be injured or killed, that takings by mortality also be covered by the regulations. However, BPXA does not indicate the level of incidental take resulting from an oil spill at Northstar during either the ice-covered period or the open-water period. Because of the unpredictable occurrence, nature, seasonal timing, duration, and size of an oil spill occurring during the 5-year authorization period of these regulations, a specific prediction cannot be made of the estimated number of takes by an oil spill.

According to BPXA, in the unlikely event of a major oil spill at Northstar or from the associated subsea pipeline, numbers of marine mammals killed or injured are expected to be small and the effects on the populations negligible. While NMFS agrees that a major oil spill is unlikely during the 5-year period of these regulations, and believes that it is even less likely that spilled oil will intercept large numbers of marine mammals, NMFS cannot necessarily conclude that the effects on marine mammal populations will be negligible. Depending upon magnitude of the spill, its location and seasonality, an oil spill could have the potential to affect ringed and bearded seals, and/or bowhead and beluga whales. Because of the large population size of ringed seals and bearded seals and the small number of animals in the immediate vicinity of the Northstar facility, and because spilled oil is unlikely to disperse widely and, therefore, affect large numbers of seals, NMFS has determined that the effect on ringed and bearded seals will be negligible, even in the unlikely event that a major oil spill occurred.

Bowhead and beluga whales, however, while potentially less likely to come into contact with spilled oil because of their more prevalent offshore distribution, and potentially less seriously affected when in oiled waters provided their passage is not blocked, may be affected more seriously, if impacted, because of their smaller population sizes. However, based upon the Corps' analysis that there is less than a 10–percent chance of a major oil spill occurring during the 20–30 year lifespan of Northstar, and because NMFS believes that the potential for a major oil spill occurring during the 5-year period of these regulations and intercepting these species would be significantly less than 10 percent (approaching 1 percent), NMFS can

make a determination that the taking of these two species incidental to construction and operation at the Northstar oil production facility will have no more than a negligible impact on them.

Impacts on Subsistence Uses

This section contains a summary on the potential impacts from construction and operational activities on subsistence needs for marine mammals. A more detailed description can be found in BPXA's application. This information, in conjunction with information provided by the AEWC and NSB in their comments, and information provided in the Corps' FEIS, is accepted by NMFS as the best information available to date on the potential effects on the availability of marine mammals for subsistence uses in the Beaufort Sea area. Should new information on the impacts to subsistence harvest of bowhead whales become available that may be contrary to the determination made here, NMFS will consider the information during review of a request for future LOAs and/or their renewal.

Noise Impacts

The disturbance and potential displacement of bowhead whales and other marine mammals by sounds from vessel traffic, on-island construction activities (*e.g.,* impact hammering), and production activities are one of the principle concerns related to subsistence use of the area. The harvest of marine mammals is central to the culture and subsistence economies of the coastal North Slope communities. In particular, if elevated noise levels are displacing migrating bowhead whales farther offshore, this could make the harvest of these whales more difficult and dangerous for hunters. The harvest could also be affected if bowheads become more skittish when exposed to vessel or impact-hammering noise (BPXA, 1999).

Construction activities and associated vessel and helicopter support began in December 1999, and are expected to continue into September or October 2000, depending upon ice conditions. Few bowhead whales approach the Northstar area before the end of August, and subsistence whaling generally does not begin until after September 1 and occurs in areas well east of the construction site. Therefore, a substantial portion of the Northstar development is expected to be completed when no bowhead whales are nearby and when no whaling is underway. Insofar as possible, BPXA expects vessel and aircraft traffic near areas of particular concern for whaling will be completed before the end of August. In addition, BPXA does not expect impact hammering to occur during the period when subsistence hunting of migrating bowhead whales is underway. NMFS expects that construction activities that have the potential to disturb bowheads just prior to, and during the bowhead subsistence hunt, would be subject for discussion and resolution during the C&AA discussions. However, even without an agreement to curtail activities during this period, NMFS does not believe these activities will create sufficient level of noise to result in an unmitigable adverse affect on subsistence uses of the bowhead.

Underwater sounds from drilling and production operations on an artificial gravel island are not very strong, and are not expected to travel more than about 10 km (6.2 mi) from the source. BPXA states that even those bowheads traveling along the southern edge of the migration corridor are not expected to be able to even hear sounds from Northstar until the whales are well west of the main hunting area.

Drilling will begin in the latter part of 2000 but will temporarily cease in mid-2001 to allow installation and start-up of processing facilities. Drilling is expected to resume by November 2001, after the bowhead season, and continue until approximately November, 2002. Drilling is, therefore, unlikely to impact either the bowheads or the subsistence needs for this species, prior to the 2002 bowhead season.

Nuiqsut is the community closest to the area of the proposed activity, and it harvests bowhead whales only during the fall whaling season. In recent years, Nuiqsut whalers typically take zero to four whales each season (BPXA, 1999). Nuiqsut whalers concentrate their efforts on areas north and east of Cross Island, generally in water depths greater than 20 m (65 ft). Cross Island, the principle field camp location for Nuiqsut whalers, is located approximately 28.2 km (17.5 mi) east of the Northstar construction activity area.

Whalers from the village of Kaktovik search for whales east, north, and west of their village. Kaktovik is located approximately 200 km (124.3 mi) east of Northstar. The westernmost reported harvest location was about 21 km (13 mi) west of Kaktovik, near 70°10'N. 144°W. (Kaleak, 1996). That site is approximately 180 km (112 mi) east of Northstar.

Whalers from the village of Barrow search for bowhead whales much further from the Northstar area, greater than 250 km (>175 mi) west.

While the effects on migrating bowheads from noise created by Northstar construction or production are not expected to extend into the area where Nuiqsut hunters usually search for bowheads and, therefore, are not expected to affect the accessibility of bowhead whales to hunters, it is recognized that it is difficult to determine the maximum distance at which reactions occur (Moore and Clark, 1992). As a result, in order to avoid any unmitigable adverse impact on subsistence needs and to reduce potential interference with the hunt, the timing of various construction activities at Northstar as well as barge and aircraft traffic in the Cross Island area will be addressed in a C&AA between BPXA and the AEWC on behalf of its bowhead whale subsistence hunters. Also, NMFS believes that the September 1999, Technical Monitoring Plan that will be implemented by BPXA will provide information that will help resolve uncertainties about the effects of construction noise on the accessibility of bowheads to hunters.

While Northstar activity has some potential to influence subsistence seal hunting activities, the most important sealing area for Nuiqsut hunters is off the Colville delta, extending as far west as Fish Creek and as far east as Pingok Island (BPXA, 1999). Pingok Island is about 24 km (15 mi) west of Northstar. The peak season for seal hunting is during the summer months, but some hunting is conducted on the landfast ice in late spring. In summer, boat crews hunt ringed, spotted and bearded seals (BPXA, 1999). Thus, it is unlikely that construction activity will have a significant negative impact on Nuiqsut seal hunting.

Oil Spill Impacts

Oil spills have the potential to affect the hunt for bowhead whales. While oil spills from production drilling or pipelines could occur at any time of the year, NMFS believes that only if a significant spill occurred just prior to or during the subsistence bowhead hunt and spread into offshore waters would a reduction in the availability of bowhead whales for subsistence uses be possible. While unlikely, oil spills could extend into the bowhead hunting area under certain wind and current conditions. BPXA (1999) states that even in the event of a major spill, it is unlikely that more than a small number of those bowheads encountered by hunters would be contaminated by oil. However, disturbance associated with reconnaissance and cleanup activities could affect bowhead whales and, thus, accessibility of bowheads to hunters. As

a result, in the unlikely event that a major oil spill occurred during the relatively short fall bowhead whaling season, it is possible that bowhead whale hunting could be significantly affected. Moreover, even with no more than a negligible impact on those marine mammals that would be subject to subsistence hunting, individuals and communities as a whole, may perceive that the whale or seal meat or products are tainted or somehow unfit to eat or use. This could further impact subsistence hunting of these animals. However, NMFS believes that because (1) the probability of a large oil spill is less than 10 percent over the 20–30 years of Northstar operations, (2) bowhead whales in the vicinity of Northstar and hunted only in the months of September and October, limiting exposure time, (3) only under certain wind and sea conditions would it be likely that oil would reach the bowhead subsistence hunting area, (4) there will be an oil spill response program in effect that will be as effective as possible in Arctic waters, and (5) other mitigation measures have been suggested in the event that oil did contact bowheads, NMFS has determined that the construction and operation at Northstar is unlikely to result in an unmitigable adverse impact on subsistence uses of marine mammals during the period of these regulations. However, NMFS will continue to assess this determination as monitoring and mitigation measures are incorporated and improved through experience and as additional offshore developments are proposed. NMFS may revise or clarify its determinations during these rulemakings.

Impacts on Habitat

Invertebrates and fish, the nutritional basis for those whales and seals found in the Beaufort Sea, may be affected by construction and operation of the Northstar project. Fish may react to noise from Northstar with reactions being quite variable and dependent upon species, life history stage, behavior, and the sound characteristics of the water. Invertebrates are not known to be affected by noise. Benthic invertebrates would be affected by island and pipeline construction and overburden placement on the seabottom. Fish may be temporarily or permanently displaced by the island. These local, short-term effects are unlikely to have an impact on marine mammal feeding, except on a very local scale.

In the event of a large oil spill, fish and zooplankton in open offshore waters are unlikely to be seriously affected. Fish and zooplankton in shallow nearshore waters could sustain heavy mortality if an oil spill were to remain within an area for several days or longer. These affected nearshore areas may then be unavailable for use as feeding habitat for seals and whales. However, because these seals and whales are mobile, and bowhead feeding is uncommon along the coast near Northstar, effects would be minor during the open water season. In winter, effects of an oil spill on ringed seal food supply and habitat would be locally significant in the shallow nearshore waters in the immediate vicinity of the spill and oil slick. However, effects overall would be negligible.

Mitigation Measures

Several mitigation measures were proposed by BPXA to reduce harassment takes to the lowest level practicable and have been adopted, with modification, by NMFS. Additional measures may be added or modified in LOAs. Presently identified measures include:

(1) BPXA will begin winter construction activities in December. This will eliminate contact with lairs that are actively used as birthing lairs. Because it is still necessary to determine the number of structures impacted by winter construction, BPXA will survey the area(s) using trained dogs, to identify and avoid ringed seal structures by a minimum of 150 m (492 ft), if practicable.

(2) Other than work done on the primary ice roads, if construction activities are initiated in undisturbed areas BPXA will survey the area(s), using trained dogs, in order to identify and avoid ringed seal structures by a minimum of 150 m (492 ft); after March 20, activities should avoid, to the greatest extent practicable, disturbance of any located seal structure.

(3) During the open water season, BPXA will establish and monitor, during the daytime, a 190 dB re 1 μPa safety range for seals around the island for those construction activities with SPLs that exceed that level. Establishing the safety range will require the collection and analysis of sound attenuation in the waters of the Northstar site.

(4) While whales are unlikely to approach the island during impact hammering or other noisy activities, a 180 dB re 1 μPa safety zone will be established and monitored during daylight hours around the island.

(5) If any marine mammals are observed within their respective safety range, operations will cease until such time as the observed marine mammals have left the safety zone.

(6) Project scheduling indicates that impact hammering will not occur during the period for subsistence hunting of westward migrating bowhead whale.

(7) Helicopter flights to support Northstar construction will be limited to a corridor from Seal Island to the mainland, and, except when limited by weather, will maintain a minimum altitude of 1,000 ft (305 m).

(8) Drilling activities will temporarily cease during the bowhead whale migration during the first year of drilling activity (*i.e.,* September, 2001).

Monitoring Measures

A detailed description of BPXA's proposed monitoring program for implementation during the construction phase at Northstar can be found in both the revised BPXA application (BPXA, 1999) and revised Technical Monitoring Plan (LGL, LGL and Greeneridge, 1999). The open-water season portion of BPXA's May 6, 1999, monitoring plan was reviewed by scientists and others attending the annual open-water peer-review workshop held in Seattle on July 1, 1999. The Technical Monitoring Plan was revised to incorporate recommendations made during this meeting and submitted to NMFS on September 1, 1999. This document was provided to the public during the comment period on the proposed rule. Peer review on the on-ice portion of the plan was conducted on October 14–15, 1999. Recommendations from that workshop were incorporated into work conducted this past winter and will be incorporated, as appropriate, into future monitoring plans. A copy of the September 1, 1999, revised monitoring plan is available upon request (see **ADDRESSES**). Peer review of technical plans for monitoring during production activities will be conducted at future peer review meetings.

A summary of marine mammal monitoring that will be conducted during Northstar construction this year is provided here.

Monitoring will employ both marine mammal observations and acoustic measurements and recordings. During the open-water period, monitoring will consist of (1) acoustic measurements of sounds produced by construction activities through boat-based hydrophones, sonobuoys deployed by boat, and autonomous seafloor acoustic recorders; (2) observations of marine mammals (primarily seals) from an elevated platform on Seal Island, which will be made during periods with and without construction underway; and, (3)

acoustic monitoring of the bowhead whale migration. Additional monitoring may be required by NMFS through the peer review workshops.

During the ice-covered season, BPXA proposes to continue an ongoing (since the spring, 1997) Before-After/Control-Impact Study on the distribution and abundance of ringed seals in relation to development of the offshore oil and gas resources in the central Beaufort Sea. Collection and analysis of data before and after construction is expected to provide a reliable method for assessing the impact of oil and gas activities on ringed seal distribution in the Northstar construction area. Other winter/spring monitoring will include (1) on-ice searches for ringed seal lairs in areas where construction starts in the mid-March through April period, (2) assessment of abandonment rates for seal holes, and (3) acoustic measurements of sounds and vibrations from construction. Additional monitoring may be required by NMFS through the peer review workshops.

NMFS expects that the technical monitoring plan for production will be submitted to NMFS later this year and subject to review by NMFS biologists and revised appropriately prior to implementation.

Reporting Measures

BPXA is required to provide two reports annually to NMFS. The first report is due 90 days after either the ice roads are no longer usable or spring aerial surveys are completed, whichever is later. The second report is required to be forwarded to NMFS 90 days after the formation of ice in the central Alaskan Beaufort Sea prevents water access to Northstar. These reports must include the dates and locations of construction activities, details of marine mammal sightings, estimates of the amount and nature of marine mammal takes, and any apparent effects on accessibility of marine mammals to subsistence hunters.

A draft final technical report must be submitted to NMFS by April 1 of each year. The final technical report must fully describe the methods and results of all monitoring tasks and a complete analysis of the data. The draft final report will be subject to peer review before being finalized by BPXA.

Determinations

NMFS has determined that the impact of construction and operation of the Northstar project in the U.S. Beaufort Sea will result in no more than a temporary modification in behavior by certain species of cetaceans and pinnipeds. During the ice-covered season, pinnipeds close to the island may be subject to incidental harassment due to the localized displacement from construction of ice roads, from transportation activities on those roads, and from construction and production activities at Northstar. As cetaceans will not be in the area during the ice-covered season, they will not be affected.

During the open-water season, the principal construction- and operations-related noise activities will be impact hammering, helicopter traffic, vessel traffic, and other general construction/production activity on Seal Island. Sheet-pile driving is expected to be completed prior to whales being present in the area. Sounds from construction/production activities on the island are not expected to be detectable more than about 5–10 km (3.1–6.2 mi) offshore of the island. Disturbance to bowhead or beluga whales by on-island activities will be limited to an area substantially less than that distance. Helicopter traffic will be limited to nearshore areas between the mainland and the island and is unlikely to approach or disturb whales. Barge traffic will be located mainly inshore of the whales and will involve vessels moving slowly, in a straight line, and at constant speed. Little disturbance or displacement of whales by vessel traffic is expected. While behavioral modifications may be made by these species to avoid the resultant noise, this behavioral change is expected to have no more than a negligible impact on the animals.

While the number of potential incidental harassment takes will depend on the distribution and abundance of marine mammals (which vary annually due to variable ice conditions and other factors) in the area of operations, because the activity is in shallow waters inshore of the main migration corridor for bowhead whales and far inshore of the main migration corridor for belugas, the number of potential harassment takings is estimated to be small. In addition, no take by injury and/or death is anticipated, and the potential for temporary or permanent hearing impairment will be avoided through the incorporation of the mitigation measures mentioned in this document. No rookeries, areas of concentrated mating or feeding, or other areas of special significance for marine mammals occur within or near the planned area of operations.

Because bowhead whales are east of the construction/production area in the Canadian Beaufort Sea until late August/early September, activities at Northstar are not expected to impact subsistence hunting of bowhead whales prior to that date. Appropriate mitigation measures to avoid an unmitigable adverse impact on the availability of bowhead whales for subsistence needs will be the subject of consultation between BPXA and subsistence users.

Also, while construction/production at Northstar has some potential to influence seal hunting activities by residents of Nuiqsut, because (1) the peak sealing season is during the winter months, (2) the main summer sealing is off the Colville Delta, and (3) the zone of influence from Northstar on beluga and seals is fairly small, NMFS believes that Northstar construction/production will not have an unmitigable adverse impact on the availability of these stocks for subsistence uses.

NMFS has determined that the potential for an offshore oil spill occurring is low (less than 10 percent over 20–30 years (Corps, 1999)) and the potential for that oil intercepting whales or seals is even lower (about 1.2 percent (Corps, 1999)). Because of this low potential and because of the seasonality of bowheads, NMFS has determined that the taking of marine mammals incidental to construction and operation at the Northstar oil production facility will have no more than a negligible impact on them. In addition, because there will be an oil spill response program in effect that will be as effective as possible in Arctic waters, and because other mitigation measures have been suggested in the event that oil did contact bowheads, NMFS has determined that there will not be an unmitigable adverse impact on subsistence uses of marine mammals.

Changes to the Proposed Rule

In addition to the modifications made to the proposed rule as a result of comments discussed previously and corrections of minor typographical errors, the following amendments have been made to the document.

Section 216.207 has been amended to clarify that this paragraph is intended only for the initial submission of an application for an LOA, not for subsequent renewals.

Section 216.209(a)(2) has been amended to note the time needed for receipt of the monitoring reports required under 216.205.

ESA

On March 4, 1999, NMFS concluded consultation with the Corps on permitting the construction and operation at the Northstar site. The finding of that consultation was that construction and operation at Northstar is not likely to jeopardize the continued existence of the bowhead whale stock.

No critical habitat has been designated for this species; therefore, none will be affected. Because issuance of a small take authorization to BPXA under section 101(a)(5) of the MMPA is a Federal action, NMFS has completed section 7 consultation on this action. The finding of this consultation was that the issuance of the authorization was unlikely to adversely affect the bowhead whale.

NEPA

On June 12, 1998 (63 FR 32207), the Environmental Protection Agency (EPA) noted the availability for public review and comment a DEIS prepared by the Corps under NEPA on Beaufort Sea oil and gas development at Northstar. Comments on that document were accepted by the Corps until August 31, 1998 (63 FR 43699, August 14, 1998). On February 5, 1999 (64 FR 5789), EPA noted the availability for public review and comment, a FEIS prepared by the Corps under NEPA on Beaufort Sea oil and gas development at Northstar. Comments on that document were accepted by the Corps until March 8, 1999. For information on obtaining a copy of the FEIS, please contact the Corps (see **ADDRESSES**). Based upon a review of the FEIS, the comments received on the DEIS and FEIS, and the comments received during this rulemaking, NMFS has adopted the Corps FEIS and has determined that it is not necessary to prepare supplemental NEPA documentation.

Classification

This action has been determined to be significant for purposes of Executive Order 12866.

Until these regulations are effective, BPXA cannot be issued an LOA authorizing takings incidental to construction and operation at Northstar. Therefore, since these regulations relieve a restriction on BPXA, the prohibitions on the issuance of an LOA, are not subject to a 30-day delay in effective date under 5 U.S.C. 553(d)(1).

The Chief Counsel for Regulation of the Department of Commerce certified, at the proposed rule stage, 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 within the meaning of the Regulatory Flexibility Act. This final rule will affect only one or two large oil producing companies which, by definition, are not small businesses. It will also affect a small number of contractors providing services related to monitoring the impact of oil development in the Beaufort Sea on marine mammals. Some of the affected contractors may be small businesses, but the number involved would not be substantial. Further, since the monitoring requirement is what would lead to the need for their services, the economic impact on them would be beneficial. For all the above reasons, a regulatory flexibility analysis is not required.

This final rule contains collection-of-information requirements subject to the provisions of the Paperwork Reduction Act (PRA). These requirements have been approved by OMB under control number 0648–0151, and include an application for an LOA, an interim report, and a final report. Other information requirements in the rule are not subject to the PRA since they apply only to a single entity and, therefore, are not contained in a rule of general applicability.

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 PRA unless that collection of information displays a currently valid OMB control number.

The reporting burden for the approved collections-of-information are estimated to be approximately 3 hours for an application for a LOA, and 80 hours each for interim and final reports. These estimates include the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection-of-information. Send comments regarding these burden estimates, or any other aspect of this data collection, including suggestions for reducing the burden, to NMFS and OMB (see **ADDRESSES**).

List of Subjects in 50 CFR Part 216

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

Dated: May 18, 2000.

Penelope D. Dalton,

Assistant Administrator for Fisheries, National Marine Fisheries Service.

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

PART 216—REGULATIONS GOVERNING THE TAKING AND IMPORTING OF MARINE MAMMALS

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

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

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

Subpart R—Taking of Marine Mammals Incidental to Construction and Operation of Offshore Oil and Gas Facilities in the U.S. Beaufort Sea

Sec.

216.200 Specified activity and specified geographical region.
216.201 Effective dates.
216.202 Permissible methods of taking.
216.203 Prohibitions.
216.204 Mitigation.
216.205 Measures to ensure availability of species for subsistence uses.
216.206 Requirements for monitoring and reporting.
216.207 Applications for Letters of Authorization.
216.208 Letters of Authorization.
216.209 Renewal of Letters of Authorization.
216.210 Modifications to Letters of Authorization.

Subpart R—Taking of Marine Mammals Incidental to Construction and Operation of Offshore Oil and Gas Facilities in the U.S. Beaufort Sea

§ 216.200 Specified activity and specified geographical region.

Regulations in this subpart apply only to the incidental taking of those marine mammal species specified in paragraph (b) of this section by U.S. citizens engaged in oil and gas development activities in areas within state and/or Federal waters in the U.S. Beaufort Sea specified in paragraph (a) of this section. The authorized activities as specified in a Letter of Authorization issued under §§ 216.106 and 216.208 include, but may not be limited to, site construction, including ice road and pipeline construction, vessel and helicopter activity; and oil production activities, including ice road construction, and vessel and helicopter activity, but excluding seismic operations.

(a)(1) Northstar Oil and Gas Development; and

(2) [Reserved]

(b) The incidental take by harassment, injury or mortality of marine mammals under the activity identified in this section is limited to the following species: bowhead whale (*Balaena mysticetus*), gray whale (*Eschrichtius robustus*), beluga whale (*Delphinapterus leucas*), ringed seal (*Phoca hispida*), spotted seal (*Phoca largha*) and bearded seal (*Erignathus barbatus*).

§ 216.201 Effective dates.

Regulations in this subpart are effective from May 25, 2000, until May 25, 2005.

§ 216.202 Permissible methods of taking.

(a) Under Letters of Authorization issued pursuant to §§ 216.106 and 216.208, the Holder of the Letter of Authorization may incidentally, but not intentionally, take marine mammals by harassment, injury, and mortality within the area described in § 216.200(a), provided the activity is in compliance with all terms, conditions, and requirements of the regulations in this subpart and the appropriate Letter of Authorization.

(b) The activities identified in § 216.200 must be conducted in a manner that minimizes, to the greatest extent practicable, any adverse impacts on marine mammals, their habitat, and on the availability of marine mammals for subsistence uses.

§ 216.203 Prohibitions.

Notwithstanding takings authorized by § 216.200 and by a Letter of Authorization issued under §§ 216.106 and 216.208, no person in connection with the activities described in § 216.200 shall:

(a) Take any marine mammal not specified in § 216.200(b);

(b) Take any marine mammal specified in § 216.200(b) other than by incidental, unintentional harassment, injury or mortality;

(c) Take a marine mammal specified in § 216.200(b) if such taking results in more than a negligible impact on the species or stocks of such marine mammal; or

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

§ 216.204 Mitigation.

The activity identified in § 216.200(a) must be conducted in a manner that minimizes, to the greatest extent possible, adverse impacts on marine mammals and their habitats. When conducting operations identified in § 216.200, the mitigation measures contained in the Letter of Authorization issued under §§ 216.106 and 216.208 must be utilized.

§ 216.205 Measures to ensure availability of species for subsistence uses.

When applying for a Letter of Authorization pursuant to § 216.207, or a renewal of a Letter of Authorization pursuant to § 216.209, the applicant must submit a Plan of Cooperation that identifies what measures have been taken and/or will be taken to minimize any adverse effects on the availability of marine mammals for subsistence uses. A plan must include the following:

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

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

(c) What plans the applicant has to continue to meet with the affected communities to notify the communities of any changes in operation.

§ 216.206 Requirements for monitoring and reporting.

(a) Holders of Letters of Authorization issued pursuant to §§ 216.106 and 216.208 for activities described in § 216.200 are required to cooperate with the National Marine Fisheries Service, and any other Federal, state or local agency monitoring 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, National Marine Fisheries Service, or his/her designee, by letter or telephone, at least 2 weeks prior to initiating new activities potentially involving the taking of marine mammals.

(b) Holders of Letters of Authorization must designate qualified on-site individuals, approved in advance by the National Marine Fisheries Service, to conduct the mitigation, monitoring and reporting activities specified in the Letter of Authorization issued pursuant to § 216.106 and § 216.208.

(c) Holders of Letters of Authorization must conduct all monitoring and/or research required under the Letter of Authorization.

(d) Unless specified otherwise in the Letter of Authorization, the Holder of that Letter of Authorization must submit interim reports to the Director, Office of Protected Resources, National Marine Fisheries Service, no later than 90 days after completion of the winter monitoring season (approximately September 15th), and 90 days after the open water monitoring season (approximately February 1st). This report must contain all information required by the Letter of Authorization.

(e) A draft annual comprehensive report must be submitted by May 1st of the year following the issuance of a LOA;

(f) A final annual comprehensive report must be submitted within the time period specified in the governing Letter of Authorization.

(g) A final comprehensive report on all marine mammal monitoring and research conducted during the effective period of the regulations in this subpart must be submitted to the Director, Office of Protected Resources, National Marine Fisheries Service at least 240 days prior to expiration of these regulations or 240 days after the expiration of these regulations if renewal of the regulations will not be requested.

§ 216.207 Applications for Letters of Authorization.

(a) To incidentally take bowhead whales and other marine mammals pursuant to the regulations in this subpart, the U.S. citizen (see definition at § 216.103) conducting the activity identified in § 216.200, must apply for and obtain either an initial Letter of Authorization in accordance with §§ 216.106 and 216.208, or a renewal under § 216.209.

(b) The application for an initial Letter of Authorization must be submitted to the National Marine Fisheries Service at least 180 days before the activity is scheduled to begin.

(c) Applications for initial Letters of Authorization must include all information items identified in § 216.104(a).

(d) NMFS will review an application for an initial Letter of Authorization in accordance with § 216.104(b) and, if adequate and complete, will publish a notice of receipt of a request for incidental taking and, in accordance with Administrative Procedure Act requirements, a proposed amendment to § 216.200(a). In conjunction with amending § 216.200(a), the National Marine Fisheries Service will provide a minimum of 45 days for public comment on the application for an initial Letter of Authorization.

(e) Upon receipt of a complete application for an initial Letter of Authorization, and at its discretion, the National Marine Fisheries Service may submit the monitoring plan to members of a peer review panel for review and/or schedule a workshop to review the plan. Unless specified in the Letter of Authorization, the applicant must submit a final monitoring plan to the Assistant Administrator prior to the issuance of an initial Letter of Authorization.

§ 216.208 Letters of Authorization.

(a) A Letter of Authorization, unless suspended, revoked or not renewed, will be valid for a period of time not to exceed the period of validity of this subpart, but must be renewed annually

subject to annual renewal conditions in § 216.209.

(b) Each Letter of Authorization will set forth:

(1) Permissible methods of incidental taking;

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

(3) Requirements for monitoring and reporting, including any requirements for the independent peer-review of proposed monitoring plans.

(c) Issuance and renewal of each Letter of Authorization will be based on a determination that the number of marine mammals taken by the activity will be small, that the total number of marine mammals taken by the activity as a whole will have no more than a negligible impact on the species or stock of affected marine mammal(s), and will not have an unmitigable adverse impact on the availability of species or stocks of marine mammals for taking for subsistence uses.

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

§ 216.209 Renewal of Letters of Authorization.

(a) A Letter of Authorization issued under § 216.106 and § 216.208 for the activity identified in § 216.200 will be renewed annually upon:

(1) Notification to the National Marine Fisheries Service that the activity described in the application submitted under § 216.207 will be undertaken and that there will not be a substantial modification to the described work, mitigation or monitoring undertaken during the upcoming season;

(2) Timely receipt of the monitoring reports required under § 216.205, and the Letter of Authorization issued under § 216.208, which have been reviewed by the National Marine Fisheries Service and determined to be acceptable, and the Plan of Cooperation required under § 216.205; and

(3) A determination by the National Marine Fisheries Service that the mitigation, monitoring and reporting measures required under § 216.204 and the Letter of Authorization issued under §§ 216.106 and 216.208, were undertaken and will be undertaken during the upcoming annual period of validity of a renewed Letter of Authorization.

(b) If a request for a renewal of a Letter of Authorization issued under §§ 216.106 and 216.208 indicates that a substantial modification to the described work, mitigation or monitoring undertaken during the upcoming season will occur, the National Marine Fisheries Service will provide the public a minimum of 30 days for review and comment on the request. Review and comment on renewals of Letters of Authorization are restricted to:

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

(2) The Plan of Cooperation, and

(3) The proposed monitoring plan.

(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.

§ 216.210 Modifications to Letters of Authorization.

(a) In addition to complying with the provisions of §§ 216.106 and 216.208, except as provided in paragraph (b) of this section, no substantive modification (including withdrawal or suspension) to the Letter of Authorization by the National Marine Fisheries Service, issued pursuant to §§ 216.106 and 216.208 and subject to the provisions of this subpart shall be made until after notification and an opportunity for public comment has been provided. For purposes of this paragraph, a renewal of a Letter of Authorization under § 216.209, without modification (except for the period of validity), is not considered a substantive modification.

(b) If the Assistant Administrator determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals specified in § 216.200(b), a Letter of Authorization issued pursuant to §§ 216.106 and 216.208 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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