that should help them survive the transition to digital television, which will require, during the transition, a doubling of the number of authorized primary full service stations that will otherwise displace numerous low power stations and eliminate a number of these stations. The document considers creation of the Class A service and asks specific questions on issues on which a further record is necessary and appropriate.

70. *Need For and Objectives of the Proposed Rule Changes:* The document in this proceeding is seeking comment on whether and how the Commission should create a Class A service that will give qualifying low power television broadcast stations primary status. This will allow the continued development of locally produced programming aired on these stations to the benefit of the informational and entertainment needs of the audiences they serve notwithstanding the transition to digital broadcast television service.

71. *Legal Basis:* Authority for the actions proposed in this document may be found in sections 4(i), 303 and 307 of the Commissions Act of 1934, as amended, 47 U.S.C. 154(i), 303, 307 and 307.

72. *Reporting, Recordkeeping, and Other Compliance Requirements:* The Commission is not proposing any new or modified reporting, recordkeeping, information collection, or compliance requirements in this proceeding.

73. *Federal Rules that Overlap, Duplicate, or Conflict with the Proposed Rules:* The initiatives and proposed rules raised in this proceeding do not overlap, duplicate or conflict with any other rules.

74. *Description and Estimate of the Number of Small Entities to Which the Rules Would Apply:* Under the RFA, small entities may include small organizations, small businesses, and small governmental jurisdictions. 5 U.S.C. 601(6). The RFA, 5 U.S.C. 601(3), generally defines the term ''small business'' as having the same meaning as the term ''small business concern'' under the Small Business Act, 15 U.S.C. 632. A small business concern is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the Small Business Administration (''SBA''). Pursuant to 5 U.S.C. 601(3), the statutory definition of a small business applies ''unless an agency after consultation with the Office of Advocacy of the SBA and after opportunity for public comment, establishes one or more definitions of such term which are appropriate to the activities of the agency and publishes such definition(s) in the **Federal Register**. There are approximately 2,200 LPTV stations that potentially could be affected by decisions reached it this proceeding. The impact of actions taken in this proceeding on small entities would ultimately depend on the final decisions taken by the Commission and the number of LPTV stations that would qualify and apply for Class A status. However, the impact of the decisions taken in this proceeding on LPTV stations should be a positive one, enabling those qualifying for Class A status to gain a greater degree of security in the continuation of their existence without the potential for continuing displacement during the transition to digital television.

75. *Any Significant Alternatives Minimizing the Impact on Small Entities and Consistent with the Stated Objectives:* This document solicits comment on a variety of alternatives discussed herein. Any significant alternatives presented in the comments will be considered. This proposal will ultimately provide benefits all qualifying low power television stations by facilitating means for them to survive the transition to digital television. We seek comment on the alternatives proposed in this document, on any other alternatives that commenters feel would provide benefits to such stations as they go through the period of transition to digital television, and on whether there is a significant economic impact on any class of small licensees or permittees as a result of any of our proposed approaches.

Initial Paperwork Reduction Act Analysis

76. This document explores the potential creation of a Class A service of television broadcasters. In this Notice of Proposed Rule Making, we solicit comment on the possibility of creating a new application form for LPTV licensees applying for Class A status. As part of our continuing effort to reduce paperwork burdens, we invite the general public and the Office of Management and Budget (''OMB'') to take this opportunity to comment on the information collection contained in the Notice of Proposed Rule Making. Public and agency comments are due at the same time as other comments on this document; OMB comments are due 60 days from the date of publication of this document in the **Federal Register**. Comments should address: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. In addition to filing comments with the Secretary, a copy of any comments on the information collections contained herein should be submitted to Judy Boley, Federal Communications Commission, 445 Twelfth Street, S.W.; 1–C8004., Washington, DC 20554, or via the Internet to jboley@fcc.gov and to Virginia Huth, OMB Desk Officer, 725 17th St., N.W. Room 10236 NEOB, Washington, DC 20503 or via the Internet to VHuth@omb.eop.gov.

77. *Additional Information.* For additional information on this proceeding, please contact Keith Larson, Office of the Bureau Chief, Mass Media Bureau, (202) 418–2600 or Roger Holberg, Policy and Rules Division, Mass Media Bureau, (202) 418–2134.

Federal Communications Commission.

Magalie Roman Salas,

Secretary.

[FR Doc. 99–27530 Filed 10–21–99; 8:45 am]

BILLING CODE 6712–01–P

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 216

[Docket No. 990901241–9247–01; I.D. 123198B]

RIN 0648–AM09

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

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

ACTION: Proposed rule; request for comments.

SUMMARY: NMFS has received a revised application for a Letter of Authorization (LOA) from BP Exploration (Alaska), 900 East Benson Boulevard, Anchorage, AK 99519 (BPXA) to take small numbers of marine mammals incidental to construction and operation of offshore oil and gas platforms at the Northstar development in the Beaufort Sea in state and Federal waters and a petition from

BPXA for regulations governing such take. By this document, NMFS is proposing regulations to govern that take. In order to implement these regulations, NMFS must determine that these takings will have a negligible impact on the affected species and stocks of marine mammals, and will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses. NMFS invites comment on the petition/application, and the regulations.

DATES: Comments and information must be postmarked no later than December 21, 1999. Comments on the collection of information requirement must be received no later than December 21, 1999.

ADDRESSES: Comments should be addressed 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. A copy of the updated application, Technical Monitoring Plan, Biological Opinion and a list of the references used in this document may be obtained by writing to this address 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 preceding individual and to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: NOAA Desk Officer, Washington, D.C. 20503.

A copy of the final environmental impact statement (FEIS) for Northstar may be obtained by contacting the U.S. Army Engineer District, Alaska, Regulatory Branch, P.O. Box 898, Anchorage, AK 99506–0898.

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 Marine Mammal Protection Act (16 U.S.C. 1361 *et seq.*) (MMPA) directs the Secretary of Commerce (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 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 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 platforms 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 the 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. Because of delays in construction during 1999, and in issuing this proposed rule, on October 1, 1999, BPXA updated their application to NMFS. This 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 two offshore oil developments, Northstar and Liberty. These two developments will be the first in the Beaufort Sea that use a subsea pipeline to transport oil to shore and then into the Trans-Alaska Pipeline System. The Northstar Unit is located 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 is scheduled to begin in December 1999, with both island construction and offshore pipeline installation occurring in 2000. The proposed construction activity includes the construction of several ice roads, one from West Dock and the Pt. McIntyre drill site 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 in (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 approximately 90 to 100 barge trips from Prudhoe Bay or Endicott are expected to support construction.

The operational phase will begin with drilling as early as the 4th quarter of 2000, and will continue for 2 years. Power will be supplied by diesel generators. This phase of drilling will temporarily cease in mid-August 2001 to allow installation and start-up of process facilities. Drilling is expected to resume by 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 March 1, 1999 (64 FR 9965), NMFS published an 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, the Alaska Eskimo Whaling Commission (AEWC), the North Slope Borough (NSB), and the Inupiat Community of the Arctic Slope (ICAS). These comments are addressed here.

In addition to the application for regulations, on August 14, 1998, NMFS received an application from BPXA requesting a 1-year authorization for the harassment of small numbers of several species of marine mammals incidental to construction of the Northstar development in the Alaskan Beaufort Sea. This application was submitted by BPXA to ensure that, if construction began during the winter of 1998/99, it would have an authorization to take marine mammals during the lengthy period of time for developing and promulgating rulemaking. This application and NMFS' preliminary determination that the incidental harassment caused by this activity would have no more than a negligible impact on small numbers of marine mammals and not have an unmitigable impact on subsistence needs for these species were published on October 26, 1998 (63 FR 57096), and a 30-day comment period was provided. An Interim Incidental Harassment Authorization (IHA), limited to ice road construction at Northstar was issued to BPXA on March 15, 1999 (64 FR 13778, March 22, 1999). That document noted that comments received on the IHA application would be addressed in a future **Federal Register** document. Because NMFS was notified by BPXA that they would not be proceeding with construction at Northstar during the spring and summer of 1998, NMFS did not issue an IHA to BPXA for the construction of Northstar during 1999. Therefore, this document contains the comments and NMFS' responses to those comments submitted in response to the IHA application (updated where necessary), in addition to those comments received during the ANPR. Because two separate actions are being discussed in this section, dates have been provided in order to clarify which action is under discussion (11/98 refers to comments on the IHA; 3/99 refers to comments on the ANPR).

Liberty Project Concerns

Comment 1: Several commenters noted that because a Draft Environmental Impact Statement (DEIS) has not been released by the Minerals Management Service (MMS), it would be premature to consider proposing regulations to authorize the taking of marine mammals during the construction and operation of the Liberty oil and gas development project.

Response: NMFS agrees. While this **Federal Register** document contains generic regulations for the taking of marine mammals incidental to offshore oil and gas development in the U.S. Beaufort Sea, the only project under consideration in this rulemaking is the Northstar project. NMFS will not issue proposed regulations regarding incidental takes for the Liberty project until after a DEIS has been released by MMS. This document is scheduled to be released either late this year or early next year.

Northstar Concerns

Comment 2: The AEWC (3/99) believes it is not in a position to comment on incidental take regulations relative to Northstar because: (1) the AEWC is unaware of any final determination regarding the proposed subsea pipeline route for Northstar; (2) the bowhead whale subsistence whaling community objects to the proposed pipeline route in Alternative 5 of the FEIS, and that the AEWC will object to the project as a whole, if Alternative 5 is selected, since that alternative will place the subsea pipeline at greater risk of damage from ice and erosion; and (3) the U.S. Army Corps of Engineers (Corps) reports that for present and reasonably foreseeable oil production in the Beaufort Sea, the ''cumulative probability of one or more major oil spills (greater than 1,000 barrels) is 95.2 percent'' over the next 20 years.

Response: While NMFS has preliminarily determined that either alternative 2 or 5 will result in no more than a negligible impact on marine mammals and not have an unmitigable impact on subsistence needs for marine mammals, the Corps chose Alternative 2, not Alternative 5, as the preferred action. For discussion on oil spill impacts, please refer to a discussion on that subject later in this document.

MMPA concerns

Comment 3: The AEWC (3/99) believes that a 30-day comment period is insufficient for proposed regulations on Beaufort Sea oil and gas development and production. Therefore, the AEWC requests that the public comment period for the proposed regulations be no less than 60 days.

Response: NMFS agrees and has extended the normal 45-day comment period for proposed rules for an additional 15 days for these regulations. However, in order to complete rulemaking in a timely manner, and because most issues have been addressed already in the FEIS issued by the Corps under the National Environmental Policy Act (NEPA), an extension beyond 60 days is unlikely to be available.

Comment 4: Greenpeace (11/98) states that BPXA's reliance on harassment and ''take itself'' to displace seals from construction activities violates the spirit and intent of the MMPA. The MMC (3/99) notes that BPXA's petition for rulemaking suggests that regulations and LOAs authorize the intentional hazing (harassment) of whales and seals to reduce the likelihood of their encountering oil if there is an oil spill. The MMC wants to ensure that BPXA recognizes that intentional hazing cannot be authorized under section 101(a)(5)(A) of the MMPA.

Response: Section 101(a)(5)(A) requires NMFS to implement ''regulations setting forth * * * permissible methods of taking pursuant to such activity, and other means of effecting the least practicable adverse impact on such species or stock and its habitat * * *.'' Therefore, if there is an authorization for the incidental harassment of marine mammals, and that incidental harassment takes place, the fact that the marine mammmals do not return to the area is not considered by NMFS to be a violation of the MMPA. In fact, because certain activities (e.g., ice road construction, oil spills) have some potential for serious injury or mortality for marine mammals that remain within the area, NMFS believes that early displacement of these animals would be to the animals' benefit. When mitigation measures that lower the potential for marine mammals to be seriously injured or killed have been identified, those measures, including, when necessary, intentional harassment measures can be authorized under the appropriate provision of the MMPA.

Comment 5: Greenpeace (11/98) contends that NMFS artificially segregated the IHA process. Greenpeace states that the MMPA does not provide for NMFS to issue ''first-year construction'' and later ''construction and operation.''

Response: NMFS disagrees. While the MMPA does not provide for this segregation, it also does not prohibit issuing an IHA in 1 year and then promulgating regulations for a 5-year authorization. Congress implemented the IHA process as an expedited procedure recognizing the time necessary in the Federal Government for the promulgation of regulations. Congress recognized that NMFS must be afforded some procedural flexibility in order to streamline the review of small take authorizations when the taking is limited to incidental harassment(see MMPA Amendments of 1994. H.R. Rep. No. 103–439, at 29–30, 1994). Even under an ideal schedule, regulations could not be implemented within the time period between the release of the DEIS and receipt of a small take application and the proposed time for ice-road construction in early winter, 1998/99. This prompted BPXA's IHA application.

Comment 6: Greenpeace (11/98) contends that, because NMFS' IHA review process took 73 days, instead of the statutory 45 days, NMFS improperly noticed the proposed action in the **Federal Register**.

Response: While there is a statutory requirement for NMFS to publish notice of receipt of an application not later than 45 days after receipt of an application, that process may be delayed due to either the adequacy of the application or meeting certain requirements under the NEPA. In this case, because the supporting NEPA documentation (i.e., the FEIS for this activity would not be released within the statutory 120 days of receipt of an IHA application, and because NMFS determined that it could not issue an IHA to BPXA without this document, NMFS determined that, because of the complexity of the activity, a more detailed review could be undertaken than statutorily allowed by the MMPA.

Comment 7: Greenpeace (3/99) believes that NMFS did not fairly consider Greenpeace's comments on BPXA's application for an interim IHA for Northstar construction.

Response: NMFS gave full consideration to Greenpeace's comments contained in their November 24, 1998, letter when it issued an interim IHA to BPXA on March 15, 1999 (64 FR 13778, March 22, 1999). As mentioned previously, NMFS' review of comments submitted on the 1998 IHA application are addressed in responses in various parts of this document.

Scientific evidence concerns

Comment 8: Greenpeace (3/99) believes that there is an overwhelming lack of scientific evidence supporting the claim that BPXA's construction and operation of the Northstar and Liberty projects pose a negligible impact to marine mammals and do not pose an unmitigable impact on the availability of marine mammals for subsistence uses. Greenpeace believes that the Northstar DEIS and FEIS are inadequate for supporting these claims.

Response: NMFS has reviewed both the DEIS and FEIS prepared by the Corps on the Northstar project and has determined that that document contains the best scientific information (and Traditional Knowledge) available for assessing impacts on marine mammals by the construction and operation of the Northstar project. As noted later in this document, NMFS has preliminarily determined that the best scientific information available indicates that construction and operation of Northstar will have no more than a negligible impact on marine mammals and not have an unmitigable adverse impact on subsistence uses of marine mammals. NMFS will continue to evaluate new information during this rulemaking period and invites reviewers to submit data or references on the potential impacts on marine mammals from oil development on the North Slope.

Small Take Concerns-Ringed Seals

Comment 9: For reasons stated in their letter, including the lack of current reliable figures for ringed seal populations, Greenpeace (11/98) contends that it is impossible for NMFS to meet the negligible impact requirement of the MMPA without current information on the status of the Beaufort Sea ringed seal population.

Response: NMFS uses the best scientific information available when making determinations that marine mammal takings are small, that activities are having no more than a negligible impact on the species or stock(s) of marine mammals and not having an unmitigable adverse impact on the availability of the species or stock(s) of marine mammals for subsistence uses. Hill and DeMaster (1998) indicates that there are no current population estimates available for ringed seals. However, such estimates are not critical when takings are expected to be limited to incidental harassment. Provided the activity itself is not having more than a negligible impact on the population, population fluctuations due, for example, to increasing polar bear populations, global warming and persistent organic pollutants are not critical, but are considered when making determinations on potential biological removal (PBR) levels. However, while there are no current population estimates available, crude population estimates have been made: Kelly (1988) estimated that 1–1.5 million seals occur in Alaskan waters, Frost and Lowry (1984) extrapolated a winter population of 40,000 ringed seals from a mean density estimate of 0.4 seals/km^2 and estimated that the summer population would be 80,000. Amstrup (1995) estimated a population size of 326,500 (208,000 in the pack ice and 118,500 in the shorefast ice).

Because NMFS expects that ringed seals may be harassed, but not killed as a result of industry activities, knowledge of the species' local density is more important than a reliable estimate of population abundance. There are numerous studies that have documented the density of ringed seals in the Northstar area. ADF&G surveys have shown densities of 0.33 to 0.66 seals/km^2 (0.85 to 1.71 seals/mi^2) (Frost *et al.*, 1997; Corps, 1999) and a 1997 survey in the Northstar area showed an average density of 0.42 ringed seals/km^2 on landfast ice over water depths of 5–20 m (16.4–65.6 ft) (Miller *et al.*, 1998). Virtually no seals were seen where water depths were less than 3 m (9.8 ft)(Miller *et al.*, 1998). The Northstar ringed seal surveys included as part of the monitoring plan will provide up-to-date, site-specific density estimates at Northstar, and can be compared with past density estimates. Because these surveys began in 1997, they will provide a baseline against which results of future seal surveys during and after Northstar construction can be compared.

Although aerial surveys during spring are the standard method for documenting densities and distribution of ringed seals, the densities tend to be underestimated because not all ringed seals are hauled out on the ice at any one time, and aerial surveys may not see all seals hauled out on the ice. These underestimates are taken into account when estimating impacts and levels of take.

Comment 10: Greenpeace (11/98) is concerned about the effects of an increasing polar bear population and anthropogenic and non-anthropogenic impacts on ringed seals.

Response: Because the taking of ringed seals incidental to Northstar activities will be almost exclusively by incidental harassment and no serious injury or mortality is expected as a result of Northstar construction and operation, fluctuating population levels should be of little consequence. Provided the total taking by the activity itself is having no more than a negligible

impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses, the authorization can be granted. It should be noted moreover, that the U.S. Fish and Wildlife Service (USFWS) believes the polar bear population on the North Slope has reached its carrying capacity and that its growth rate will slow or stabilize.

NMFS believes that the research and monitoring underway since 1997, at Northstar and the central Beaufort Sea, including aerial monitoring surveys conducted by both ADF&G and LGL Limited support the scientific evidence that the takings incidental to Northstar construction and operation will be negligible.

Comment 11: Greenpeace (11/98) questions BPXA's statement that ringed seals give birth in their lairs ''starting in late March and nurse their pups for 4–6 weeks.'' This, Greenpeace believes, underestimates the birthing and nursing periods for ringed seals. Ringed seals continue birthing through April and early May, with nursing in subnivean lairs continuing through May and early June. As such, harassment and take of ringed seals will be significantly greater than that which is set forth by BPXA in its application.

Response: NMFS agrees that the BPXA statement could have included more complete information on the life history of ringed seals. NMFS does not agree that the impact will be significantly greater than what is provided in the application because BPXA has timed its operations to avoid, to the greatest extent practicable, harassment during the period when ringed seals are pupping. By constructing the ice roads between December and February, well prior to the ringed seal pupping season, and maintaining and operating those roads during the season, it is unlikely that ringed seals would remain in the vicinity of the ice road corridor and expose themselves and later, their young, to the noise if the female was within an area that was annoying to it.

Comment 12: Greenpeace (11/98) questions BPXA's use of March 20 as the beginning date to require ringed seal surveys in previously undisturbed areas. Greenpeace believes that this fails to protect seals occupying lairs prior to March 20.

Response: Due to the instability of the shorefast ice during mid- to late-March, it is highly unlikely that roads relating to Northstar construction or operation would be constructed after March 20. NMFS reviewed the citation provided by BPXA and noted that the late-March date was for the area of the eastern Beaufort Sea about 60° N, not in the Beaufort Sea at about 70° 30'N. Smith (1988) noted the difference in reproductive timing between his data for a mid-April birthing in the Western Arctic at approximately 72° N and McLaren's mid-March date. Smith (1988) suggests a latitudinal gradient in the time of pupping. If so, NMFS notes that the March 20 date should be conservative. This date was the standard date for operational constraints on the on-ice seismic industry prior to establishment of the small take authorizations in 1982 (see 47 FR 21248, May 18, 1982). If better scientific information is provided that indicates a different start date should be used or that different methods should be implemented, NMFS is willing to consider that information.

Comment 13: Greenpeace (11/98) contends that BPXA's 50 m (164 ft) distance for avoiding any detected ringed seal lairs is insufficient and unsupported if the intent is to avoid any take. If so, then the distance would have to be greater than 3 km (1.86 mi).

Response: While NMFS agrees that at present there is no scientific evidence supporting a distance of 50 m (164 ft) from lairs for avoiding takes of ringed seal pups, there is also little support for a distance as great as 3 km (1.86 mi). As ringed seals departed lairs in response to vibroseis and its associated equipment at a distance up to 644 m (2,113 ft)(Kelly *et al.* 1986), and as Burns and Kelly (1982) suggest that heavy equipment and human activity are the major source of disturbance, not the vibroseis noise itself, NMFS presumes that ice road construction is likely to disturb ringed seals about the same degree as vibroseis. Therefore, ice roads constructed in water (ice and water combined) deeper than 8 ft (2.4 m) should avoid active seal lairs by at least 650 m (2,132 ft) unless a small take authorization has been issued, especially after March 20. However, because ice roads for gravel hauling and pipeline trenching at Northstar cannot deviate greatly from a straight line, NMFS retained the requirement under the Interim IHA issued to BPXA on March 15, 1999, that ice road construction begun after March 20, 1999 avoid ringed seal lairs by 50 m (164 ft), and did not increase that distance as recommended. However, while NMFS believes that it is very unlikely that any new ice roads would be constructed that late in the season in the Beaufort Sea due to the condition of the ice in most years, it is inviting further discussion on this issue during this rulemaking. At this time, NMFS proposes to require all ice roads, except the gravel road and the pipeline road, avoid seal lairs by a minimum of 150 m (492 ft), which is an increase over the 50–m (164 ft) retained in the Interim IHA and is similar to NMFS' requirements for vibroseis surveys.

Marine Mammal Concerns–Bearded Seals

Comment 14: Greenpeace (11/98) believes that (1) given the lack of population data for bearded seals, it is not possible for BPXA to estimate the number of bearded seals that would be taken and (2) given the lack of baseline data on the population of bearded seals, it is impossible for NMFS to determine that the take of these marine mammals would pose a negligible impact.

Response: Using data collected in 1996 and 1997 near Seal Island (Harris *et al.*, 1997, 1998), BPXA calculated estimates of harassment takes that might occur as a result of construction and related activities at Northstar. The calculation method was provided in the BPXA IHA application. Based on this calculation method, BPXA estimates that between 9 and 26 bearded seals might be harassed incidental to Northstar open-water activities. When takes are limited to the incidental harassment of small numbers of marine mammals, a negligible impact determination can be made without recent baseline data (see response to Comment 9).

Marine Mammal Concerns–Spotted Seals

Comment 15: Greenpeace (11/98) states that BPXA's application fails to include any information on the current use of the area by spotted seals, or the potential effects of summer construction activities on the species.

Response: This information was provided in various sections of BPXA's IHA application (and later in the Northstar/Liberty LOA application). For example, information on the status and distribution of spotted seals was provided on page 23 to 25 of the IHA application and information on potential impacts was provided on pages 51 through 55 of that document. However, because most spotted seals are found in the Bering and Chukchi seas, fewer than 5 spotted seals are expected to be exposed to harassment takes during the open water season and none during the hard water (ice) season.

Marine Mammal Concerns-Bowheads

Comment 16: The MMC (3/99) notes that the petition indicates that as many as 1,380 bowhead whales could possibly be taken annually by harassment

incidental to Northstar construction and operation. Although the effects of incidental harassment on the bowhead population may well be negligible, it is not clear why the possible cumulative effects are expected to be negligible or why taking up to 1,380 bowheads annually (6,900 over 5 years) is considered to be a ''small'' number.

Response: NMFS cautions that BPXA's estimate that 1,380 bowhead whales might be harassed incidental to Northstar construction, and later operations, is a maximum take level, not the best estimated take level. The expected average level of take by harassment for bowheads is 173 animals annually (based on the best scientific information that approximately 1.88 percent of the bowhead population will migrate within 10 km (6.2 mi) of the barrier islands) (BPXA, 1998). Only in those years (such as the single year (1997) between 1979 and 1997) when the bowhead migration corridor is close to shore, would BPXA and NMFS expect up to 52 percent of the bowhead population to incur a take by incidental harassment. Takings by Northstar during this event may result in up to 1,380 bowheads being harassed. As takings by harassment at this level would not be expected every year (and might not occur during a 5-year authorization), NMFS believes that the takings (by harassment) should be considered small. Also because most bowheads that would be encountered would be migrating, it is unlikely that a given bowhead would be incidentally harassed on more than one date.

Comment 17: Greenpeace (11/98) contends that construction activities at Northstar pose a significant threat to the migration of bowhead whales. Any delays in scheduling could result in an even greater number of industrial activities occurring during the fall bowhead migration.

Response: NMFS recognizes that delays in construction scheduling could result in increased harassment takes of bowhead whales. This has been partially recognized by BPXA in their July 26, 1999 letter to NMFS wherein they note that movement of the drilling rig is currently scheduled for September 1, 2000. BPXA has also assured NMFS and the AEWC/NSB that all construction and operational activities at Northstar during the bowhead migration period would be conducted safely and would not interfere with the fall bowhead hunt. As a result, NMFS will need to base its determinations of negligible impact on marine mammals and no unmitigable adverse impact on subsistence uses on statements made by BPXA and analysis of data in the FEIS and BPXA application. If NMFS cannot make a finding of negligible impact (and no unmitigable adverse impact on subsistence uses) determination, then the LOA (if issued) would either not authorize incidental takes during the bowhead migration, or, in coordination with the AEWC/NSB, identify mitigation measures that would allow NMFS to make a negligible impact determination.

Comment 18: Greenpeace (11/98) notes that the DEIS for Northstar describes impacts from pile driving required for installation of island slope protection as ''one of the greatest noise impacts to bowhead whales'' and that data was not presented by BPXA on how far away from the island this sound source could be heard, and even though bowheads aren't yet ''in the vicinity'' they still receive sounds transmitted over long distances. Greenpeace contends that this impact should be analyzed in detail because even a short delay in the schedule could result in this massive sound source taking place during bowhead migration.

Response: BPXA's application describes in detail expected sound pressure levels (SPLs) from pile driving in the Beaufort Sea. According to the application (BPXA, 1998), impact hammering measured at Sandpiper, nearby to Northstar, received sound levels just above the seabottom 1 km (0.6 mi) from Sandpiper Island ranged from 110 to 135 dB re 1 μPa_{RMS}. These transient signals from impact hammering were similar in characteristics to seismic pulses, but considerably weaker; the received levels at 1 km (0.6 mi) range were similar to those from a seismic vessel more than 10 km (6.2 mi) away. Vibratory hammering produced even lower noise levels. To mitigate noise levels from impact hammering, BPXA has adopted NMFS suggestion (found in the March 4, 1999, Biological Opinion), to install sheet piling using agitation methods instead of impact hammering. This work is anticipated to be completed prior to bowhead migration. Therefore, even if island construction continues after bowhead whales appear, these noises would not be expected to significantly affect those bowhead whales in the main bowhead migration corridor.

Comment 19: Greenpeace (11/98) states that industrial noise and other activities interfere with cow-calf bonding, and causes displacement from migratory routes. The energetic costs of noise-related changes in behavior and distribution patterns are potentially significant and will inevitably constitute harassment and take.

Response: Loud industrial noises, such as seismic surveys, in the marine environment have been identified as potentially interfering with cow-calf bonding. However, the best information indicates that this interference would need to occur around the time of birth or shortly thereafter (Gentry, R. pers. comm., 1999). Since bowhead whales are born in the spring in the Bering Sea, and as the spring-time eastern migration through the Beaufort Sea is well offshore of the Northstar site, noise from Northstar is unlikely to interfere with bonding. Changes in marine mammal migration patterns and behavior due to anthropogenic noise constitute Level B harassment. For that reason, BPXA has applied for a small take authorization under section 101(a)(5)(A) of the MMPA.

Comment 20: Greenpeace (11/98) contends that given the lack of studies and information on the effects of construction and heavy equipment activity on artificial islands on cetaceans, NMFS should take the precautionary approach and deny BPXA's request for an IHA until such time as the applicant can present conclusive data that its activities will not harm, harass, or take cetaceans.

Response: BPXA applied for an IHA on the assumption that it will take, by harassment, several species of marine mammals incidental to the construction at Northstar. However, because work on Northstar did not proceed into the open water season of 1999, an IHA to incidentally harass bowhead whales during construction of Northstar was not issued to BPXA in 1999. NMFS believes that both the IHA application and the LOA application provide detailed information on the anticipated impacts on marine mammals from construction at Northstar.

Negligible Impact Concerns

Comment 21: Greenpeace (3/99) believes that BPXA fails to consider the impact of the full array of Northstar and Liberty construction and operation activities on marine mammals. The proposed LOAs and regulations seek to include the impacts of oil spills on marine mammals, and are being proposed at a time when the environmental review of Northstar is incomplete, a final determination on the project has not yet been made, and the public environmental review of Liberty has not progressed beyond the scoping stage. Greenpeace (3/99) believes that incidental takes would not be negligible given BPXA's request that the 5-year regulations include lethal takes of marine mammals caused by oil spills.

Response: Please see our response to comment 1 regarding the Liberty project. Since the time that Greenpeace submitted its letter (3/99), the Corps has completed its environmental review of the Northstar project.

NMFS believes that a small oil leak or spill at either the oil rig or the pipeline would affect only a small number of marine mammals and have no more than a negligible impact on marine mammals and subsistence uses of those marine mammals. However, a large oil spill, although unlikely to occur during the 5-year authorization time period under consideration here, could result in a number of marine mammals being taken, and, if the spill intersects with the bowhead migration corridor during the time of the bowhead migration could have more than a negligible impact on marine mammals and the subsistence uses of that species. Because the probability of a large oil spill occurring during the 5-year period of the authorization that will affect marine mammals is low, NMFS believes that a finding of negligible impact may be appropriate even though the potential effects could be significant. As in this case, NMFS will need to balance the probability of occurrence with the potential severity of harm to the species and stocks of potentially affected marine mammal(s) to determine negligible impact. When applying this balancing test, NMFS needs to evaluate as thoroughly as possible the risks involved and the potential impacts on marine mammal populations. This determination will be made based on the best available scientific information and, if determined to be negligible and an LOA is issued, will be supported or negated later through the required monitoring program. For information on cumulative impacts please refer to response to Comment 29 later in this document.

Coordination Concerns

Comment 22: The MMC (3/99) noted that neither the BPXA petition for regulations nor the **Federal Register** ANPR recognize the possibility that road construction, etc. could attract polar bears and cause ringed seals in the affected areas to be more vulnerable to predation by the bears. The MMC therefore recommends that NMFS consult with the USFWS to determine and, if appropriate, cooperatively specify monitoring requirements for polar bears and ringed seals.

Response: NMFS concurs that coordination with the USFWS on monitoring is warranted. That coordination begins with the release of this document. In addition, the USFWS has been invited to attend peer review workshops wherein NMFS and others review previous monitoring and upcoming monitoring plans.

Subsistence Concerns

Comment 23: The NSB (3/99) requested that if the petition (for regulations) is approved, it should be with strong additional consideration given to tailoring industry operation schedules to respect the whaling season of Nuiqsut, and its subsistence use of Cross Island.

Response: BPXA anticipates that they will coordinate the construction and operation of Northstar with both the AEWC and the NSB, and will successfully conclude a Conflict and Avoidance Agreement (C&AA) with the affected villages. NMFS invites additional comment on its regulations concerning its requirements for making a finding of no unmitigable adverse impact on subsistence uses in § 216.205.

Comment 24: For several stated reasons, Greenpeace (11/98) believes that NMFS' deferral of addressing any unmitigable adverse impacts to the C&AA, a private BPXA-NSB negotiation, results in significant procedural flaws in the IHA process. Greenpeace concludes that the C&AA is an essential element in avoidance of unmitigable adverse impacts on subsistence. The C&AA should be made available for public review prior to issuance of the IHA.

Response: NMFS does not agree. The C&AA is an agreement between two (or more) non-Federal organizations that is not subject to either public or Federal review and is not recognized by the MMPA. As a courtesy, these parties provide a signed copy of the C&AA to NMFS. In order for NMFS to determine that there will not be an unmitigable adverse impact on the availability of marine mammals for taking for subsistence purposes, the application instructions require that the information items specified in § 216.104(a)(11) and (a)(12) must be provided. If commenters, including the NSB, believe the activity will have an adverse impact on subsistence uses that at present is unmitigated, they have the opportunity to comment on these statements in the application. If during the comment period evidence is provided indicating that an unmitigated adverse impact to subsistence needs will result from the activity, a small take authorization may be delayed to resolve this disagreement. If significant comments are not received on this issue, NMFS will review the information and determine whether or not there are any unmitigable adverse impacts prior to issuance of the small take authorization. If, on the other hand, an adverse impact is identified, which may be mitigated, then NMFS can, as here, make it a requirement of the small take authorization that parties continue to meet to resolve these differences. If a C&AA is not signed, NMFS has the option to review each party's concerns, and may, if warranted and under proper procedures, amend or suspend an authorization. NMFS recognizes, however, that receipt of a signed C&AA prior to issuing a small take authorization supports NMFS preliminary determination that the activity will not have an unmitigable adverse impact on subsistence needs.

Comment 25: Greenpeace (11/98) states that BPXA's IHA application fails to consider the impact of its activities on the communities of Point Hope, Point Lay, and Wainwright. These communities rely on migrating subsistence species such as the bowhead whales that pass through the impact zone of Northstar construction activities.

Response: The three mentioned communities hunt bowhead whales in the Chuckchi Sea during the spring migration, not during the fall migration when bowheads might be incidentally harassed by activities at Northstar. Because no bowheads are expected to be seriously injured or killed as a result of construction and operation of the Northstar Unit (thereby depriving those communities of a potential harvest), and because the spring migratory path of bowheads will not be affected by Northstar construction or operation, NMFS has been unable to identify an adverse impact to the subsistence needs of these communities. If these communities believe that the Northstar project will have an unmitigable adverse impact on their subsistence needs, they will have an opportunity by review of this document to express those concerns.

Comment 26: Greenpeace (11/98) supports its opinion (on subsistence impacts) by quoting from the DEIS that BPXA's Northstar proposal would result in ''bowhead whale avoidance response to noise generated at Seal Island and project-related vessel and helicopter noise and activity,'' which the DEIS concludes would be ''significant to subsistence harvesting'' (DEIS page ES–97).

Response: The DEIS and FEIS identify two sources of noise during Northstar construction that have the potential to result in a more than negligible bowhead deflection during the Nuiqsut bowhead subsistence hunt. These are impact hammering and vessel activity. The DEIS identified ocean going tugs as having a potential deflection of

migration patterns at distances ranging from 9.3 mi (15 km) to 25 mi (40 km). If large ships are active at Northstar during the fall bowhead migration, deflection behavior could occur at the western border of Nuiqsut's bowhead harvest area. If bowheads deflected at a distance of 25 mi (40 km), and no bowheads were struck within the eastern range of the Cross Island whaling area, impacts to the fall whale harvest could be significant. The DEIS and FEIS also note however, that bowheads near the western border of Nuiqsut's bowhead harvest area are not expected to be affected by small vessels operating at Seal Island (i.e., Northstar).

Pile driving for the installation of island slope protection would be one of the greatest noise impacts to bowhead whales, if it were to occur during the migration period (Corps, 1998. However, impact pile driving for sheet piling for the island perimeter and docks and for well conductors are scheduled to be completed by the end of July, prior to the initiation of the bowhead whaling season. In addition, impact pile driving has been replaced, where possible, by agitation methods. Therefore, at this time, significant impacts from construction at Northstar during the bowhead migration season are not anticipated.

Comment 27: Greenpeace (11/98) notes that the DEIS (page 10–27) concludes that ''island construction would have a significant effect (i.e., ''cumulative effects of noise on bowhead whale migration routes and resulting effects on subsistence whaling activities are considered significant cumulative impacts'').

Response: It should be noted that this statement has been modified in the FEIS to note that ''significant long-term displacement of bowhead whales is not expected to occur as a result of Northstar operations.''

Cumulative Effects Concerns

Comment 28: Greenpeace (11/98) states that NMFS must consider the impact of climate change on the Arctic marine ecosystem in a cumulative assessment of the impacts of seismic activities on ''protected resources'' in the agency's trust.

Response: NMFS disagrees, noting that long-term cumulative impacts are an issue for discussion under NEPA, not the MMPA. Section 101(a)(5)(A) of the MMPA requires NMFS to make an assessment of the total taking by a specified activity (i.e., oil and gas development) in a specified geographic region during an authorization period. If, among other things, the total taking will not have more than a negligible impact on the affected marine mammal stocks, the authorization would appear to be appropriate. (There is not a similar requirement for assessing total takings for authorizations under section 101(a)(5)(D) of the MMPA). It should be noted however, that seismic activities are the subject of a separate small take authorization process and not a part of BPXA's application.

Comment 29: Greenpeace (3/99) contends that BPXA fails to consider the cumulative impacts of Northstar and Liberty construction and operation that will affect marine mammals, subsistence, and the Arctic marine environment. These impacts include chronic pipeline leaks, oil spills, noise, pollution and other forms of industrial disturbance.

Response: Unlike Comment 28, NMFS views this comment on cumulative impact as meaning the ''total taking'' of marine mammals by the Northstar and Liberty projects. To evaluate expected impacts and to determine whether these takings can be considered negligible and not have an unmitigable adverse impact on subsistence uses, one must first understand the statutory mandates of section 101(a)(5) of the MMPA, and Congressional intent as provided in House Reports. Section 101(a)(5)(A) of the MMPA requires the Secretary to ''find that the total of such taking during each five-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 uses * * *.'' Current NMFS regulations require that '' * * * the total taking by the specified activity during the specified time period will have a negligible impact on the species of stock of marine mammal(s) * * *''

(§ 216.102). NMFS believes that this statement accurately reflects the statutory meaning of the phrase ''such taking during each five-year (or less) period.'' The specified activity is defined in NMFS regulations as ''any activity, other than commercial fishing, that takes place in a specified geographical region and potentially involves the taking of small numbers of marine mammals.'' It was the intent of Congress that ''the specified activity * * * referred to in section 101(a)(5) [should] 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).

When an applicant requests NMFS promulgate a 5-year set of regulations, applicants are required to submit the information requested in § 216.104(a) on their activity as a whole, which includes, but is not necessarily limited to, an assessment of total impacts by all persons conducting the activity (§ 216.105). NMFS believes that BPXA provided the required information since they discussed combined impacts and included incidental take estimates for both Northstar and Liberty projects, but did not include discussion of seismic work, moving exploratory drilling equipment, etc.

Mitigation Concerns

Comment 30: The MMC (3/99) notes that if work is required after March 20 in a previously undisturbed area, a survey will be conducted to determine the presence of ringed seal lairs prior to commencement of activities. However, it does not indicate how the presence of an active, ringed seal lair would influence construction activities, or what mitigation measures would be undertaken. Would the road be rerouted to avoid active ringed seal lairs by some specified distance or will it be routed in the straightest line possible and assume that any pup in a lair within a certain distance will be abandoned and die?

Response: Due to the instability of shorefast ice during that time of the year, it is highly unlikely that any roads relating to Northstar construction or operation would be constructed after March 20. If ice roads are constructed, they would be secondary roads and not the main gravel hauling road and pipeline road, which are not flexible and cannot be rerouted to avoid seal lairs. However, for secondary roads in previously undisturbed areas, NMFS proposes to require these roads to avoid seal lairs by a minimum of 150 m (492 ft), similar to NMFS' requirements on vibroseis surveys.

Comment 31: Greenpeace (11/98) believes that BPXA will not take even the most basic of mitigation measures in ceasing operations during the bowhead migration.

Response: Scheduling has been designed to complete as much of the construction activity prior to the bowhead migration and bowhead subsistence hunting period as possible. Mitigation measures are described in the section entitled ''Proposed Mitigation Measures.'' NMFS will be reviewing BPXA's current schedule for potential impacts on bowhead whales and other

marine mammals during this rulemaking.

Comment 32: Greenpeace (11/98) states that it is impossible to place adequate mitigation measures (i.e., safety zones) into place when there is inadequate knowledge about the impacts of seismic operations on cetaceans' hearing and behavior. Greenpeace believes the precautionary principle requires further research before ''potentially permanent'' damage is incurred.

Response: Seismic operations have not been requested for inclusion under either the IHA or the 5-year authorization. The application contains a description of actions BPXA will take to mitigate noise from construction on bowhead whales. While NMFS believes that sufficient information is available (see discussions elsewhere in this document) on the expected impacts of construction and operations at Northstar on marine mammals to make a preliminary determination that the taking will be negligible and not have an unmitigable impact on marine mammals, NMFS agrees that additional information is warranted. This information will be obtained during construction and operation through a monitoring program funded by BPXA.

Monitoring and Reporting Concerns

Comment 33: The MMC (3/99) recommends that NMFS initiate the rulemaking as requested, provided it is satisfied that the planned marine mammals and related monitoring programs will be adequate to verify how and over what distances marine mammals may be affected, that only small numbers of marine mammals are taken, and that the cumulative impacts on the affected species and stocks are negligible.

Response: On July 1, 1999, NMFS scientists and others met in Seattle to discuss the open water monitoring program for construction and operation at Northstar. Based on the recommendations from that peer review workshop, BPXA has made appropriate amendments to the monitoring plan found in its application and in the updated monitoring plan submitted to NMFS on May 6, 1999. A copy of its August, 1999 monitoring plan is available upon request (see **ADDRESSES**)).

While BPXA summarized monitoring plans for on-ice monitoring during that meeting, discussion and evaluation of that portion of BPXA's monitoring plan was set aside for discussion late this year with appropriate seal biologists. The recommendations of the MMC will be provided to reviewers of BPXA's on-ice monitoring plans.

Comment 34: The MMC (3/99) recommends that NMFS specify in the regulations that proposed monitoring plans and the results of the monitoring programs be reviewed annually by NMFS and outside experts to confirm that the monitoring programs are capable of detecting any non-negligible, cumulative population-level effects and that the requirements will be revised as necessary if there is uncertainty in that regard.

Response: NMFS believes that conditions regarding monitoring and peer-review of monitoring plans, and the results, should be requirements under LOAs, not regulations. Under LOAs, requirements, including independent peer review, can be modified more efficiently and timely than is possible under regulations.

Comment 35: The MMC (3/99) noted that BPXA proposes to use a comparison of ''before'' and ''after'' aerial survey data to assess the impact of the offshore developments on ringed seal numbers and distribution. The MMC suggested how those comparisons should be undertaken.

Response: This work, now in its second year of data collection, is discussed in detail in the Technical Plan for Marine Mammal and Acoustic Monitoring during Construction of BPXA's Northstar Oil Development for 1999. A copy of this report is available upon request (see **ADDRESSES**). The MMC recommendation has been forwarded to marine mammal scientists for consideration.

Comment 36: The MMC (3/99) questions whether a visual survey alone will detect even the majority of seal lairs in the vicinity of the proposed activities and therefore ensure that those activities will have the least practical adverse impact possible. If NMFS concurs that the use of dogs puts ringed seals at risk, then alternative methods should be considered to help ensure that the activities have the least practical adverse impacts possible.

Response: NMFS believes that by requiring BPXA to construct ice roads for gravel hauling and pipeline construction as early in the season as practicable, at a time prior to establishment of lairs, impacts have been mitigated to the greatest extent practicable. In addition, NMFS believes that the noise from construction will deter ringed seals from establishing new breathing holes or lairs in the vicinity of ice roads. While dogs under experienced handlers are unlikely to put ringed seals at risk, NMFS recognizes that some disturbance at seal breathing holes and lairs by approaching dogs and humans is likely. As a result, NMFS questions the value of using dogs as a monitoring tool (as opposed to using dogs as a research tool) to determine impacts caused by ice road construction, operation, and maintenance. Alternatively, long term monitoring of ringed seal trends in density have been undertaken by funding under MMS by ADF&G and by BPXA. NMFS believes that this latter monitoring is preferable for the Northstar project, but invites additional comments on the subject.

Comment 37: The MMC (3/99) notes that the petition does not indicate what would be considered a significant difference in the number of abandoned and active holes between the reference (i.e., control) area and the construction area or what would be done if a significant difference is detected. In addition, while the counting bias is likely to be constant, the reduced numbers produced by failing to count inactive sites could affect the ability to show a significant difference in the ratios. The MMC suggests that this potential problem could be alleviated by ground truthing the aerial surveys to calculate a correction factor for abandoned and active holes counted from the air.

Response: NMFS has determined that the on-ice portion of the BPXA monitoring program will need to be the subject of a peer review workshop. This workshop is tentatively scheduled for mid-October. The issues raised by the MMC in this comment and in previous comments will be reviewed at this workshop.

Comment 38: Greenpeace (11/98) concludes that BPXA's IHA application must be denied by NMFS on the basis that it lacks a peer-reviewed monitoring plan based on sound science.

Response: In accordance with section 101(a)(5)(D)(ii) of the MMPA, the authorization (i.e., the IHA), where applicable, is to contain requirements for monitoring and reporting of takings by harassment, including the requirements for the independent peer-review of proposed monitoring plans or other research proposals where the proposed activity may affect the availability of a species or stock for taking for subsistence uses. Because takings authorized during the winter are unlikely to affect the availability of a species or stock of marine mammal for subsistence purposes, the IHA did not need to contain requirements for independent peer review for ice road construction and related on-ice activities. Because the open water portion of the Northstar construction, which has the potential to adversely affect the availability of subsistence uses

of bowhead whales, was not conducted, and because an IHA for that portion of the activity was not issued, peer review of Northstar construction monitoring was neither needed nor conducted under MMPA section 101(a)(5)(D) IHA application. It should be noted that while not required for authorizations issued under section 101(a)(5)(A) of the MMPA, peer review of monitoring plans has been incorporated into these regulations in accordance with findings made at a Seattle workshop held in 1994 with the AEWC, the oil and gas industry and others.

NEPA Concerns

Comment 39: Greenpeace (3/99) contends that the Northstar DEIS and FEIS fail to provide the environmental analysis required by NEPA for incidental takes of marine mammals. Quantitative information regarding estimated harassment and ''take'' provided in BPXA's current petition for regulations was not provided in the DEIS or FEIS for Northstar. Greenpeace also believes that the DEIS and FEIS failed to analyze the environmental impacts of specific activities, such as ice road construction, gravel hauling, island construction, helicopter overflights and other forms of noise and industrial disturbance that are now described in greater detail in BPXA's current petition to NMFS.

Response: NMFS notes that qualitative impacts on marine mammals from the noise from construction, production and other activities and from oil spills were each discussed in separate chapters (Chs. 9 and 8, respectively) of the DEIS and FEIS. Additional discussion on impacts to marine mammals was provided in Chs. 6.5 and 6.9.1.1 of the DEIS and FEIS and impacts on subsistence use impacts was discussed in Chs. 7.2.1 and 7.3 of the DEIS and FEIS. In addition, a detailed description of the activity at Northstar was described in Appendix A. In review, NMFS agrees that the DEIS and FEIS did not provide sufficient information on one part of the project, the construction of ice roads. As a result of that review, an Environmental Assessment (EA) was prepared prior to issuance of the Interim IHA to BPXA on March 15, 1999. After review of the information contained in that EA, in addition to information contained in the DEIS, NMFS determined that neither the proposed action (i.e., issuance of an IHA for taking marine mammals incidental to ice road construction), nor the identified alternatives to that proposed action, would have a significant impact on the human environment.

NMFS believes that these NEPA documents support NMFS' preliminary determination that construction and oil production at Northstar will have no more than a negligible impact on affected marine mammal stocks and will not have an unmitigable adverse impact on the availability of such stocks for taking for subsistence uses.

Comment 40: Greenpeace (3/99) believes the proposed actions artificially segment the environmental review of the Northstar and Liberty projects and their impacts, thereby violating NEPA. Instead of one comprehensive review and analysis of marine mammal harassment and ''take,'' the process has been segmented into separate reviews for an interim IHA, an LOA, and the promulgation of 5-year regulations.

Response: The issue of segmenting the MMPA authorizations has been addressed previously in this document. The concern regarding segmenting under NEPA should be addressed to either the Corps or MMS.

Comment 41: Greenpeace (11/98) states that NMFS cannot rely on the Northstar DEIS for its NEPA compliance because this (IHA) authorization was not identified in the DEIS as one of the agency actions it was intended to cover.

Response: While notice of NMFS' responsibilities under the MMPA were not cited in either the notice of availability of the DEIS (63 FR 28375, May 22, 1998, or the Corps' public notice (SPN 98–3, June 1, 1998)), NMFS permitting requirements under the MMPA and Endangered Species Act (ESA) were cited in tables ES–2 and 1–2 of the DEIS and FEIS. The lack of a detailed description of each of the permit/regulatory actions listed for the several Federal, state and local agencies does not preclude adoption of the Corps'' FEIS for their action(s). Procedures for adoption by cooperating agencies are contained in Council on Environmental Quality (CEQ) regulations in 40 CFR 1506.3(c) which will be followed by NMFS.

Comment 42: Greenpeace (11/98) believes (1) the public should have the benefit of new information and responses to comments contained in the Northstar FEIS, (2) NMFS has relied on information in the DEIS which is incorrect and/or under review and subject to change in the FEIS, and (3) NMFS should deny BPXA's August 12, 1998, request for an IHA and consider a new request for construction and operation based on the FEIS.

Response: NMFS does not believe that delaying commencement of the small take authorization process until completion of NEPA documentation is warranted. Proper procedures under NOAA's NEPA guidelines are for proposed actions to accompany a DEIS or Draft EA. Not beginning the IHA process or the regulatory process until completion of NEPA leads to unnecessary and potentially extensive delays in processing applications, a problem previously recognized by Congress when it amended the MMPA to expedite the small take program. The BPXA IHA application was submitted to NMFS on August 14, 1998, in coordination with the release of the DEIS. There is no mandate for an application from a non-governmental U.S. citizen (as defined in § 216.103) to be in total agreement with a NEPA document in which it was not an active participant. NMFS determined that BPXA's application met the requirements of NMFS' regulations for applications for IHAs. The DEIS and FEIS provide NMFS with information that supports, or in some cases refutes, information found in the application. Therefore, to delay the applicant's activity in order to conduct consecutive public review instead of concurrent review is neither warranted nor required by law. Information provided in the FEIS has been analyzed by NMFS, a cooperating agency in its preparation, to assess impacts of the activity on marine mammals.

Endangered Species Act (ESA) Concerns

Comment 43: Without clarification, Greenpeace (3/99) contends that the LOAs and regulations will result in violations of both the intent and the letter of the ESA. Greenpeace (11/98) believes the requested IHA would violate the ESA because (1) the ESA requires each agency to use the best scientific information available, (2) NMFS acknowledges the conflict between offshore oil and gas development and bowheads, (3) the uncertainty of western science on the impacts of industrial noise on bowheads, and (4) research continues on the reactions of whales to noise created by oil exploration activities.

Response: 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 with the issuance of a Biological Opinion (BO). 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 an LOA to BPXA for the incidental take of bowhead whales is also considered a Federal action, NMFS

has begun consultation on this action. If the finding of NMFS is that the taking of bowhead whales is not likely to adversely affect the bowhead whale stock, prior to completion of rulemaking and if a small take authorization is determined to be appropriate, an Incidental Take Statement will be appended to the BO authorizing the incidental harassment of bowhead whales under the ESA.

Legal concerns

Comment 44: The ICAS (3/99) note that NMFS has failed to consult with ICAS over the LOAs for the take of small numbers of marine mammals by incidental harassment for construction and operation at Northstar and Liberty. ICAS requests that all regulatory activities regarding these LOAs halt. ICAS claims that the Northstar project has demonstrated that insufficient studies have been done to document an accurate picture of the Arctic ocean marine environment sufficient to monitor the LOA or loss due to harassment on the interrelations of the marine environment with subsistence resources in the event of an incidental construction-related oil spill or a catastrophic spill. ICAS has not been provided the necessary time, opportunity or resources to effectively research and comment on regulations pursuant to section 101(a) of the MMPA due to a lack of meaningful contact with NMFS pursuant to parameters consistent with Presidential Executive Orders (i.e., E.O. 13084 (May 14, 1998) and E.O. 12898 (February 11, 1994)).

Response: For many years, NMFS has consulted with the federally-recognized Alaska Native villages of Barrow, Kaktovik and Nuiqsut and the AEWC on the issuance of authorizations for the taking of bowhead whales and other marine mammals incidental to oil and gas exploration in the U.S. Beaufort Sea. In 1978, the ICAS entered into a resolution with the AEWC that provided the latter organization with the authority to enter into agreements with the Federal Government on matters pertaining to the bowhead whale. In turn, the AEWC is responsible for informing the villages of any actions taken by the Federal Government which affect subsistence whaling in Alaska. By letter, NMFS has requested ICAS to update the status of this agreement and has offered to meet with ICAS at its convenience. In the interim, NMFS intends to comply fully with E.O. 13084, Consultation and Coordination With Indian Tribal Governments.

Description of Habitat and Marine Mammal Affected by the Activity

A detailed description of the Beaufort Sea ecosystem and its associated marine mammals can be found in the DEIS and FEIS prepared for the Northstar development (Corps, 1998, 1999). This information is not repeated here but will be considered part of the record of decision for 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 and the previously mentioned FEIS. Please refer to those documents for specific information on these species. By citation, this information is incorporated into this document and into NMFS' decision-making process. 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 ringed seals along the ice road and pipeline construction corridors. BPXA plans to begin winter construction activities in early December, well in advance of female ringed seals establishing birthing lairs beginning in late March. The noise and general human activity will displace female seals away from activity areas that could negatively affect the female and young, if birth lairs were constructed there.

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.

A more detailed description of potential impacts from construction and operational activities on marine mammals can be found in the application. 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.

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 not in the central Beaufort Sea, 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 at this time.

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, some bowhead whales might not be able to avoid oil slicks and could be subject to prolonged contamination. However, the autumn migration past Northstar extends over several weeks and most of the whales travel along routes well north of Northstar. Thus, according to BPXA, only a small minority of the whales are likely to approach patches of spilled oil.

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. This 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. While impacts on regional distribution may occur, impacts on regional population size however, would be expected to be minor.

Estimated Level of Incidental Take

BPXA (1998) estimates that, during the ice-covered period, 62 (maximum 154) ringed seals may be incidentally harassed during construction activities and 43 (maximum 109) ringed seals may be incidentally harassed annually during oil production activities.

BPXA estimates ''takes'' 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 take are estimated using the average density estimate of 0.42 ringed seals/km^2 (Miller et al., 1998). BPXA (1998) cautions however, that these ''take'' estimates may result in an overestimate of the actual numbers of seals that will be ''taken'' because not all seals within these disturbance distances will move from the area.

During the open-water season, BPXA (1998) estimates that 7 (maximum 22) ringed seals, 1 spotted seal, 1–2 bearded seals, 173 (maximum 1,3800) 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. 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. Therefore, BPXA requests that, because a small number of marine mammals might be injured or killed, that these takes 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.

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 the application. This 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.

Noise Impacts

The disturbance and potential displacement of bowhead whales and other marine mammals by sounds from vessel traffic and/or on-island construction activities (e.g., impact hammering) are 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, 1998).

Construction activities and associated vessel and helicopter support are expected to begin in December 1999, and 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, vessel and aircraft traffic near areas of particular concern for whaling will be completed by BPXA before the end of August. No impact hammering is expected to occur during the period when subsistence hunting of migrating bowhead whales is underway.

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). Even those bowheads traveling along the southern edge of the migration corridor will not be able to even hear sounds from Northstar until the whales are well west of the main hunting area. In addition, for reasons unrelated to mitigation for subsistence concerns, drilling activities are expected to temporarily cease during the bowhead whale migration during the first year of drilling activity.

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, 1998). 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 Seal Island. 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 Seal Island.

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 of Northstar construction or production on migrating bowheads are not expected to extend into the area where Nuiqsut hunters usually search for bowheads and therefore is 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 NSB residents. Also, NMFS believes that the monitoring plan proposed 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, 1998). 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, 1998). Thus, it is unlikely that construction activity will have a significant negative impact on Nuiqsut seal hunting.

Oil Spill Impacts

Oil spills might affect the hunt for bowheads (BPXA, 1998). While oil spills from production drilling or pipelines could occur at any time of the year, only if a significant spill occurred during the bowhead hunt 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. 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 (BPXA, 1998). Disturbance associated with reconnaissance and cleanup activities could affect whales and, thus, accessibility of bowheads to hunters. Therefore, in the unlikely event that a major spill occurred during the relatively short fall bowhead whaling season, it is possible that bowhead hunting would be significantly affected. However, the probability of a large oil spill (greater than 1,000 barrels) is estimated to be approximately 3 percent.

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.

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.

Proposed Mitigation Measures

Several mitigation measures have been proposed by BPXA to reduce harassment takes to the lowest level practicable. These include:

(1) BPXA will begin winter construction activities in December, well in advance of female ringed seals establishing the birthing lair in late March in order to displace seals away from activities that could negatively affect the female and young.

(2) If construction activities are initiated in previously undisturbed areas after March 20, BPXA will survey the area(s) to identify and avoid ringed seal lairs by a minimum of 150 m (492 ft).

(3) BPXA will establish and monitor a 190 dB re 1 μPa safety range for seals around the island for those construction activities with SPLs that exceed that level.

(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 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).

Proposed Monitoring Measures

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

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.

The monitoring plan will be subject to review by NMFS biologists and revised appropriately prior to implementation. Independent peer review on the on-ice portion of the plan will be conducted this fall in Seattle. The open-water season monitoring plan has been reviewed by scientists and others attending the annual open-water peer-review workshop held in Seattle on July 1, 1999. A revised monitoring plan was submitted to NMFS on August 27, 1999. A copy of the revised monitoring plan is available upon request (see **ADDRESSES**).

Proposed Reporting Measures

NMFS proposes to require BPXA to provide two reports annually to NMFS within 90 days of completion of each phase of the activity. The first report would be due 90 days after either the ice roads are no longer usable or spring aerial surveys are completed, whichever is later. The second report would be 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 will provide summaries of 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 would be submitted to NMFS by April 1 of each year. The final technical report would contain a full description of the methods, results, and interpretation of all monitoring tasks. The draft final report will be subject to peer review before being finalized by BPXA.

Preliminary Conclusions

Northstar Construction

NMFS has preliminarily 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 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 activity on Seal Island. Sheet-pile driving is expected to be completed prior to whales being present in the area. Sounds from construction 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 proposed 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 during the season of operations.

Because bowhead whales are east of the construction 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 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 will not have an unmitigable adverse impact on the availability of these stocks for subsistence uses.

Endangered Species Act (ESA)

NMFS concluded consultation with the Corps on this activity on March 4, 1999. If an authorization to incidentally take listed marine mammals is issued under the MMPA, NMFS will complete consultation under the ESA on the regulations and the LOA and issue an Incidental Take Statement under section 7 of the ESA. A copy of the BO resulting from this consultation is available upon request (see **ADDRESSES**).

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. A copy of the FEIS is available upon request (see **ADDRESSES**).

NMFS is a cooperating agency, as defined by the CEQ regulations (40 CFR 1501.6), on the preparation of this document. The FEIS on this activity, which supplements information contained in the BPXA application, is considered part of NMFS' record of decision on this matter. Preliminarily, it also meets NOAA's NEPA responsibilities for determining whether the activity proposed for receiving a small take authorization is having a negligible impact on affected marine mammal stocks and not having an unmitigable adverse impact on subsistence needs. Based upon a review of the FEIS and the comments received during this rulemaking, NMFS will either (1) adopt the Corps FEIS, (2) amend the Corps FEIS to incorporate relevant comments, suggestions and information, or (3) prepare supplemental NEPA documentation.

Classification

This action has been determined by the Office of Management and Budget to be significant for purposes of E.O. 12866.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this proposed rule, if adopted, will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act. If implemented, this 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 proposed 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 an 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**).

Information Solicited

NMFS requests interested persons to submit comments, information, and suggestions concerning the BPXA request and the content of the proposed regulations to authorize the taking. All commenters are requested to review the application prior to submitting comments and not submit comments solely on this **Federal Register** document.

List of Subjects in 50 CFR Part 216

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

Dated: October 15, 1999.

Andrew A. Rosenberg,

Deputy Assistant Administrator for Fisheries, National Marine Fisheries Service.

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

PART 216—REGULATIONS GOVERNING THE 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.*, unless otherwise noted.

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 Platforms 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 Platforms 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 Unit on Seal Island; 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 January 1, 2000, through December 31, 2004.

§ 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 these regulations 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

these regulations 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 activities possibly 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) The Holder of the Letter of Authorization must submit an interim report to the Director, Office of Protected Resources, National Marine Fisheries Service, no later than 180 days prior to expiration of the Letter of Authorization. This report must contain all information required by the Letter of Authorization.

(e) A final comprehensive report must be submitted to the National Marine Fisheries Sevice at least 240 days prior to expiration of these regulations.

§ 216.207 Applications for Letters of Authorization.

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

(b) The application for a 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 Letters of Authorization must include all information items identified in § 216.104(a).

(d) NMFS will review an application for a 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.

(e) Upon receipt of a complete application, 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 a 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 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, 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 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 period of 30 days for review and comment on the request.

(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 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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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 216

[Docket No. 990927266–9266–01; I.D. 072699A]

RIN 0648–AM62

Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to Navy Operations of Surveillance Towed Array Sensor System Low Frequency Active Sonar

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

ACTION: Advance Notice of Proposed Rulemaking; request for comment and information.

SUMMARY: NMFS has received a request for a Letter of Authorization (LOA) from the U.S. Navy for the take of small numbers of marine mammals by harassment incidental to Navy operations of Surveillance Towed Array Sensor System (SURTASS) Low Frequency Active (LFA) Sonar. In order to issue an LOA, NMFS must promulgate regulations and determine that these takings will have a negligible impact on the affected species and stocks of marine mammals and will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses. NMFS invites comment on the application, and suggestions on the content of the regulations.

DATES: Comments and information must be postmarked no later than November 22, 1999.

ADDRESSES: Comments should be addressed 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. A copy of the application may be obtained by writing to this address or by telephoning one of the contacts listed here (see FOR FURTHER INFORMATION CONTACT). A copy of the draft environmental impact statement (DEIS) for SURTASS LFA sonar may be obtained by contacting Mr. J.S. Johnson, SURTASS-LFA Sonar Program Manager, 901 North Stewart Street, Suit 708, Arlington, VA 22203. Comments on the DEIS will be accepted at this address until October 28, 1999.

FOR FURTHER INFORMATION CONTACT: Kenneth R. Hollingshead (301) 713–2055, ext. 128.

SUPPLEMENTARY INFORMATION:

Background

Section 101(a)(5)(A) of the Marine Mammal Protection Act (MMPA) (16 U.S.C. 1361 *et seq.*) directs the Secretary of Commerce (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 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 August 12, 1999, NMFS received an application from the U.S. Navy requesting a small take exemption under section 101(a)(5)(A) of the MMPA for the taking of marine mammals by harassment incidental to operation of the SURTASS LFA sonar for a period of time not to exceed 5 years, beginning in FY 2000. SURTASS LFA sonar will operate a maximum of 4 ship systems in the ten geographic operating regions in which SURTASS LFA sonar could potentially operate. There would be a maximum of four SURTASS LFA sonar systems with a nominal maximum of two systems at sea at any one time.

Description of the Activity

The SURTASS LFA sonar system is a long-range, low frequency (between 100 and 500 Hertz) sonar that has both active and passive components. It does not rely on detection of noise generated by the target. The active component of the system is a set of low frequency (LF) acoustic transmitting source elements (called projectors) suspended from a cable from underneath a ship. The projectors are devices that produce the active sound or pulse.

The typical SURTASS LFA sonar signal is not a constant tone, but rather a transmission of various waveforms that vary in frequency and duration. A complete sequence of sound transmissions is referred to as a ''ping'' and can last for as short as 6 seconds (sec) to as long as 100 sec. The time between pings is typically from 6 to 15 minutes. Average duty cycle (ratio of sound ''on'' time to total time) can be controlled but is less than 20 percent; typical duty cycle is between 10 and 20 percent.

The passive or listening component of the system is SURTASS, which detects returning echoes from submerged objects, such as submarines, through the use of hydrophones. The hydrophones are mounted on a horizontal array that is towed behind the ship. The SURTASS LFA sonar ship maintains a minimum speed of 5.6 km/hr (3.0 knots).

The Navy anticipates that a nominal, or typical SURTASS LFA sonar deployment schedule for a single vessel would involve about 270 days/year at sea (underway). A typical at-sea mission would occur over a 30-day period, made up of two 9-day exercise segments. Active sonar operations could be conducted up to 20 hrs during an exercise day, although the system would actually be transmitting for only a