

DEPARTMENT OF COMMERCE**National Oceanic and Atmospheric Administration**

[I.D. 122304A]

Taking of Marine Mammals Incidental to Specified Activities; On-ice Seismic Operations in the Beaufort Sea

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

ACTION: Notice of receipt of application and proposed incidental take authorization; request for comments.

SUMMARY: NMFS has received an application from ConocoPhillips Alaska (CPA) for an Incidental Harassment Authorization (IHA) to take marine mammals, by harassment, incidental to conducting on-ice vibroseis seismic operations from Milne Point to the eastern channel of the Colville River in the U.S. Beaufort Sea to a distance offshore of 2.3 nautical miles (nm)(4.3 kilometers (km)). Under the Marine Mammal Protection Act (MMPA), NMFS is requesting comments on its proposal to issue an authorization to CPA to incidentally take, by harassment, small numbers of two species of pinnipeds for a limited period of time within the next year.

DATES: Comments and information must be received no later than March 10, 2005.

ADDRESSES: Comments on the application should be addressed to Steve Leathery, Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910-3225, or by telephoning one of the contacts listed here. The mailbox address for providing email comments is PR1.122304A@noaa.gov. Please include in the subject line of the e-mail comment the following document identifier: 122304A. Comments sent via e-mail, including all attachments, must not exceed a 10-megabyte file size. A copy of the application containing a list of the references used in this document may be obtained by writing to this address or by telephoning the first contact person listed here and is also available at: http://www.nmfs.noaa.gov/prot_res/PR2/Small_Take/smalltake_info.htm#applications.

FOR FURTHER INFORMATION CONTACT: Kenneth Hollingshead, Office of Protected Resources, NMFS, (301) 713-2289, ext 128 or Brad Smith, Alaska Region, NMFS, (907) 271-5006.

SUPPLEMENTARY INFORMATION:**Background**

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce to allow, upon request, the incidental, but not intentional, taking of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

Permission may be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses, and that the permissible methods of taking and requirements pertaining to the monitoring and reporting of such takings are set forth. NMFS has defined "negligible impact" in 50 CFR 216.103 as "...an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival."

Section 101(a)(5)(D) of the MMPA established an expedited process by which citizens of the United States can apply for an authorization to incidentally take small numbers of marine mammals by harassment. Except for certain categories of activities not pertinent here, the MMPA defines "harassment" as:

any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].

Section 101(a)(5)(D) establishes a 45-day time limit for NMFS review of an application followed by a 30-day public notice and comment period on any proposed authorizations for the incidental harassment of marine mammals. Within 45 days of the close of the comment period, NMFS must either issue or deny issuance of the authorization.

Summary of Request

On November 26, 2004, NMFS received an application from CPA for the taking, by harassment, of two species of marine mammals incidental to conducting an on-ice seismic survey

program. The seismic operations will be conducted from Milne Point to the eastern channel of the Colville River in the Alaskan Beaufort Sea to a distance offshore of 2.3 nm (4.3 km), an area encompassing approximately 51 mi² (132.1 km²). Water depths in most (greater than 95 percent) of the planned survey area are less than 10 ft (3 m).

The purpose of the project is to gather information about the subsurface of the earth by measuring acoustic waves, which are generated on or near the surface. The acoustic waves reflect at boundaries in the earth that are characterized by acoustic impedance contrasts.

Description of the Activity

The seismic surveys use the "reflection" method of data acquisition. Seismic exploration uses a controlled energy source to generate acoustic waves that travel through the earth, including sea ice and water, as well as sub-sea geologic formations, and then uses ground sensors to record the reflected energy transmitted back to the surface. When acoustic energy is generated, compression and shear waves form and travel in and on the earth. The compression and shear waves are affected by the geological formations of the earth as they travel in it and may be reflected, refracted, diffracted or transmitted when they reach a boundary represented by an acoustic impedance contrast. Vibroseis seismic operations use large trucks with vibrators that systematically put variable frequency energy into the earth. At least 1.2 m (4 ft) of sea ice is required to support the various equipment and vehicles used to transport seismic equipment offshore for exploration activities. These ice conditions generally exist from 1 January until 31 May in the Beaufort Sea. Several vehicles are normally associated with a typical vibroseis operation. One or two vehicles with survey crews move ahead of the operation and mark the energy input points. Crews with wheeled vehicles often require trail clearance with bulldozers for adequate access to and within the site. Crews with tracked vehicles are typically limited by heavy snow cover and may require trail clearance beforehand.

With the vibroseis technique, activity on the surveyed seismic line begins with the placement of sensors. All sensors are connected to the recording vehicle by multi-pair cable sections. The vibrators move to the beginning of the line and begin recording data. The vibrators begin vibrating in synchrony via a simultaneous radio signal to all vehicles. In a typical survey, each

vibrator will vibrate four times at each location. The entire formation of vibrators subsequently moves forward to the next energy input point (e.g. 67 m, or 220 ft, in most applications) and repeats the process. In a typical 16- to 18-hour day, a surveys will complete 6–16 km (4 to 10 linear miles) in 2–dimensional seismic operations and 24 to 64 km (15 to 40 linear miles) in a 3–dimensional seismic operation.

Description of Habitat and Marine Mammals Affected by the Activity

A detailed description of the Beaufort Sea ecosystem can be found in several documents (Corps of Engineers, 1999; NMFS, 1999; Minerals Management Service (MMS), 1992, 1996, 2001). A detailed description of the seismic survey activities and its associated marine mammals can be found in the CPA application and a number of documents referenced in the CPA application (see ADDRESSES), and is not repeated here. Two marine mammal species are known to occur within the proposed study area and are included in this application: the ringed seal (*Phoca hispida*) and the bearded seal (*Erigonathus barbatus*).

Ringed seals are year-round residents in the Beaufort Sea. The worldwide population is estimated to be between 6 and 7 million seals (Stirling and Calvert 1979). The Alaska stock of the Bering-Chukchi-Beaufort area is estimated at 1 to 1.5 (Frost 1985) or 3.3 to 3.6 million seals (Frost *et al.* 1988). Although there are no recent population estimates in the Beaufort Sea, Bengston *et al.* (2000) estimated ringed seal abundance from Barrow south to Shismaref in a portion of the Chukchi Sea to be 245,048 animals from aerial surveys flow in 1999. The NMFS 2003 Stock Assessment Report (Anglis *et al.*, 2001) states that there are at least that many ringed seals in the Beaufort Sea. Frost *et al.* (1999) reported that observed densities within the area of industrial activity along the Beaufort Sea coast were generally similar between 1985–87 and 1996–98, suggesting that the regional population has been relatively stable during this 13-year period of industrial activity.

During winter and spring, ringed seals inhabit landfast ice and offshore pack ice. Seal densities are highest on stable landfast ice but significant numbers of ringed seals also occur in pack ice (Wiig *et al.*, 1999). Seals congregate at holes and along cracks or deformations in the ice (Frost *et al.*, 1999). Breathing holes are established in landfast ice as the ice forms in autumn and maintained by seals throughout winter. Adult ringed seals maintain an average of 3.4 holes

per seal (Hammill and Smith, 1989). Some holes may be abandoned as winter advances in order for seals to probably conserve energy by maintaining fewer holes (Brueggeman and Grialou, 2001). As snow accumulates, ringed seals excavate lairs in snowdrifts surrounding their breathing holes, which they use for resting and for the birth and nursing of their single pups in late March to May (McLaren, 1958; Smith and Stirling, 1975; Kelly and Quakenbush, 1990). Pups have been observed to enter the water, dive to over 10 m (33 ft), and return to the lair as early as 10 days after birth (Brendan Kelly, pers comm to CPA, June 2002), suggesting pups can survive the cold water temperatures at a very early age. Mating occurs in late April and May. From mid-May through July, ringed seals haul out in the open air at holes and along cracks to bask in the sun and molt. Most on-ice seismic activity occurs from late January through May.

The seasonal distribution of ringed seals in the Beaufort Sea is affected by a number of factors but a consistent pattern of seal use has been documented since aerial survey monitoring began over 20 years ago. Seal densities have historically been substantially lower in the western than the eastern part of the Beaufort Sea (Burns and Kelly, 1982; Kelly, 1988). Frost *et al.* (1999) reported consistently lower ringed seal densities in the western versus eastern sectors they surveyed in the Beaufort Sea during 1996, 1997, and 1998. The relatively low densities appear to be related to shallow water depths in much of the area occurring between the shore and the barrier islands. This area of historically low ringed seal density is the focus of much of the recent on-ice seismic surveys.

The bearded seal inhabits the Bering, Chukchi, and Beaufort seas (Burns and Frost, 1979). There are no reliable estimates for bearded seals in the Beaufort Sea or in the activity area (Angliss *et al.*, 2001), but numbers are considerably higher in the Bering and Chukchi seas, particularly during winter and early spring. Early estimates of bearded seals in the Bering and Chukchi seas range from 250,000 to 300,000 (Popov, 1976; Burns, 1981). Based on the available data there is no evidence of a decline in the bearded seal population. Bearded seals are generally associated with pack ice and only rarely use shorefast ice (Burns and Harbo, 1972). Bearded seals occasionally have been observed maintaining breathing holes in annual ice and even hauling out from holes used by ringed seals (Mansfield, 1967; Stirling and Smith, 1977). However, since bearded seals are

normally found in broken ice that is unstable for on-ice seismic operation, bearded seals will be rarely encountered during seismic operations.

Additional information on these species is available at: http://www.nmfs.noaa.gov/prot_res/PR2/Stock_Assessment_Program/sars.html.

Potential Effects on Marine Mammals

Incidental take is anticipated to result from short-term disturbances by noise and physical activity associated with on-ice seismic operations. These operations have the potential to disturb and temporarily displace some seals. Pup mortality could occur if any of these animals were nursing and displacement was protracted. However, it is unlikely that a nursing female would abandon her pup given the normal levels of disturbance from the proposed activities, potential predators, and the typical movement patterns of ringed sea pups among different holes. Seals also use as many as four lairs spaced as far as 3437 m (11276 ft) apart. In addition, seals have multiple breathing holes. Pups may use more holes than adults, but the holes are generally closer together. This indicates that adult seals and pups can move away from seismic activities, particularly since the seismic equipment does not remain in any specific area for a prolonged time. Given those considerations, combined with the small proportion of the population potentially disturbed by the proposed activity, impacts are expected to be negligible for the ringed and bearded seal populations.

Not taking into account water depth (i.e., most of the activity area is marginal seal habitat, with over 95 percent of the area less than 3 m (9.8 ft) deep), the estimated number of ringed seals potentially within the 51–mi² (132.1 km²) vibroseis activity area is less than 230 animals. This estimate is based on a density of 1.73 seals per km², which was derived from the most current aerial surveys of the region. Frost and Lowry (1999) reported an observed density of 0.61 ringed seals per km² on the fast ice from aerial surveys conducted in spring 1997 of an area (Sector B2) overlapping the activity area, which is in the range of densities (0.28–0.66) reported for the Northstar development from 1997 to 2001 (Moulton *et al.*, 2001). This value (0.61) was adjusted to account for seals hauled out but not sighted by observers (x 1.22, based on Frost *et al.* (1988)) and seals not hauled out during the surveys (x 2.33, based on Kelly and Quakenbush (1990)) to obtain the 1.73 seal per km². This estimate covered an area from the

coast to about 2–20 miles beyond the activity area; and it assumed that habitat conditions were uniform and, therefore, it was not adjusted for water depth. Since a high proportion (greater than 95 percent) of the activity area is within water less than 3 m (9.8 ft) deep, which Moulton *et al.* (2001) reported for Northstar supported about five times fewer seals (0.12–0.13 seals/km²) than was reported by Frost and Lowry (i.e., 0.61), the actual number of ringed seals is estimated to be about 25 percent of the 230 seals or 58 seals.

In the winter, bearded seals are restricted to cracks, broken ice, and other openings in the ice. On-ice seismic operations avoid those areas for safety reasons. Therefore, any exposure of bearded seals to on-ice seismic operations would be limited to distant and transient exposure. Bearded seals exposed to a distant on-ice seismic operation might dive into the water. An indication of their low numbers is provided by the results of aerial surveys conducted east of the activity area near the Northstar and Liberty project sites. Three to 18 bearded seals were observed in these areas compared to 1,911 to 2,251 ringed seals in the spring (May/June) of 1999 through 2001 (Moulton *et al.*, 2001; Moulton and Elliott, 2000; and Moulton *et al.*, 2000). Similarly only small numbers of bearded seals would be expected to occur in the activity area, where habitat is even less favorable because of the high proportion of shallow water area.

Consequently, no significant effects on individual bearded seals or their population are expected, and the number of individuals that might be temporarily disturbed would be very low.

Potential Effects on Subsistence

Residents of the village of Nuiqsut are the primary subsistence users in the activity area. The subsistence harvest during winter and spring is primarily ringed seals, but during the open-water period both ringed and bearded seals are taken. Nuiqsut hunters may hunt year round; however, most of the harvest has been in open water instead of the more difficult hunting of seals at holes and lairs (McLaren, 1958; Nelson, 1969). The most important area for Nuiqsut hunters is off the Colville River Delta, between Fish Creek and Pingok Island, which corresponds to approximately the eastern half to the activity area. Seal hunting occurs in this area by snow machine before spring break-up and by boat during summer. Subsistence patterns may be reflected through the harvest data collected in 1992, when Nuiqsut hunters harvested 22 of 24

ringed seals and all 16 bearded seals during the open water season from July to October (Fuller and George, 1997). Harvest data for 1994 and 1995 show 17 of 23 ringed seals were taken from June to August, while there was no record of bearded seals being harvested during these years (Brower and Opie, 1997). Only a small number of ringed seals was harvested during the winter to early spring period, which corresponds to the time of the proposed on-ice seismic operations.

Based on harvest patterns and other factors, on-ice seismic operations in the activity area are not expected to have an unmitigable adverse impact on subsistence uses of ringed and bearded seals because:

- (1) Operations would end before the spring ice breakup, after which subsistence hunters harvest most of their seals.
- (2) Operations would temporarily displace relatively few seals, since most of the habitat in the activity area is marginal to poor and supports relatively low densities of seals during winter. Displaced seals would likely move a short distance and remain in the area for potential harvest by native hunters (Frost and Lowry, 1988; Kelly *et al.*, 1988).
- (3) The area where seismic operations would be conducted is small compared to the large Beaufort Sea subsistence hunting area associated with the extremely wide distribution of ringed seals.

(4) To the maximum extent practicable, offshore vibroseis activities in Harrison Bay would progress in a westward direction and from deeper water shoreward to minimize disturbance to any subsistence hunting that may occur during seismic operations. If subsistence hunting occurred during winter, it would primarily be in the eastern half of Harrison Bay.

In order to ensure the least practicable adverse impact on the species and the subsistence use of ringed seals, all activities will be conducted as far as practicable from any observed ringed seal structure, and crews will be required to avoid hunters and the locations of any seals being hunted in the activity area, whenever possible. Finally, the applicant will consult with subsistence hunters of Nuiqsut and provide the community, the North Slope Borough, and the Inupiat Community of the North Slope with information about its planned activities (timing and extent) before initiating any on-ice seismic activities.

Mitigation and Monitoring

The following mitigation measures are proposed for the subject surveys: (1) All activities will be conducted as far as practicable from any observed ringed or bearded seal lair and no energy source will be placed over a ringed or bearded seal lair; (2) only vibrator-type energy-source equipment shown to have similar or lesser effects will be used; and (3) CPA will provide training for the seismic crews so they can recognize potential areas of ringed seal lairs and adjust the seismic operations accordingly.

Ringed seal pupping occurs in ice lairs from late March to mid-to-late April (Smith and Hammill, 1981). Prior to commencing on-ice seismic surveys in mid-March, a survey using experienced field personnel and trained dogs will be conducted along the planned on-ice seismic transmission routes in areas where water depths exceed 3 m (9.8 ft) to identify and determine the status of potential seal structures along the planned on-ice transit routes. The seal structure survey will be conducted before selection of precise transit routes to ensure that seals, particularly pups, are not injured by equipment. The locations of all seal structures will be recorded by Global Positioning System (GPS), staked, and flagged with surveyor's tape. Surveys will be conducted 150 m (492 ft) to each side of the transit routes. Actual width of route may vary depending on wind speed and direction, which strongly influence the efficiency and effectiveness of dogs locating seal structures. Few, if any, seals inhabit ice-covered waters shallower than 3 m (9.8 ft) due to water freezing to the bottom or poor prey availability caused by the limited amount of ice-free water.

The level of take, while anticipated to be negligible, will be assessed by conducting a second seal structure survey shortly after the end of the seismic surveys. A single on-ice survey will be conducted by biologists on snow machines using a GPS to relocate and determine the status of seal structures located during the initial survey. The status (active vs. inactive) of each structure will be determined to assess the level of incidental take by seismic operations. The number of active seal structures abandoned between the initial survey and the final survey will be the basis for enumerating harassment takes. If dogs are not available for the initial survey, takings will be determined by using observed densities of seals on ice reported by Moulton *et al.* (2001) for the Northstar development, which is approximately 24 nm (46 km)

from the eastern edge of the proposed activity area.

CPA will also continue to work with NMFS, other Federal agencies, the State of Alaska, Native communities of Barrow and Nuiqsut, and the Inupiat Community of the Arctic Slope (ICAS) to assess measures to further minimize any impact from seismic activity. A Plan of Cooperation will be developed between CPA and Nuiqsut to ensure that seismic activities do not interfere with subsistence harvest of ringed or bearded seals.

In the event that seismic surveys can be completed in that portion of the activity area with water depths greater than or equal to 3 m (9.8 ft) before mid-March, no field surveys would be conducted of seal structures. Under this scenario, surveys would be completed before pups are born and disturbance would be negligible. Therefore, take estimates would be determined for only that portion of the activity area exposed to seismic surveys after mid-March, which would be in water depths of 3 m (9.8 ft) or less. Take for this area would be estimated by using the observed density (13/100 km²) reported by Moulton *et al.* (2001) for water depths between 0 to 3 m (0 to 9.8 ft) in the Northstar project area, which is the only source of a density estimate stratified by water depth for the Beaufort Sea. This would be an overestimation requiring a substantial downward adjustment to reflect the actual take of seals using lairs, since few if any of the structures in these water depths would be used for birthing, and Moulton *et al.* (2001) estimate includes all seals.

This monitoring program was reviewed at the fall 2002 on-ice meeting sponsored by NMFS' National Marine Mammal Laboratory in Seattle and found acceptable.

Reporting

An annual report must be submitted to NMFS within 90 days of completing the year's activities.

Endangered Species Act (ESA)

NMFS has determined that no species listed as threatened or endangered under the ESA will be affected by issuing an incidental harassment authorization under section 101(a)(5)(D) of the MMPA to CPA for this on-ice seismic survey.

National Environmental Policy Act (NEPA)

The information provided in Environmental Assessments (EAs) prepared in 1993 and 1998 for winter seismic activities led NOAA to conclude that implementation of either the

preferred alternative or other alternatives identified in the EA would not have a significant impact on the human environment. Therefore, an Environmental Impact Statement was not prepared. The proposed action discussed in this document is not substantially different from the 1992 and 1998 actions, and a reference search has indicated that no significant new scientific information or analyses have been developed in the past several years that would warrant new NEPA documentation. Accordingly, this action is categorically excluded from further review under NOAA Administrative Order 216-6.

Preliminary Conclusions

The anticipated impact of winter seismic activities on the species or stock of ringed and bearded seals is expected to be negligible for the following reasons:

(1) The activity area supports a small proportion (≤ 1 percent) of the ringed and bearded seal populations in the Beaufort Sea.

(2) Most of the winter-run seismic lines will be on ice over shallow water where ringed seals are absent or present in very low abundance. Over 90 percent of the activity area is near shore and/or in water less than 3 m (9.8 ft) deep, which is generally considered poor seal habitat. Moulton *et al.* (2001) reported that only 6 percent of 660 ringed seals observed on ice in the Northstar project area were in water between 0 to 3 m (0 to 9.8 ft) deep.

(3) For reasons of safety and because of normal operational constraints, seismic operators will avoid moderate and large pressure ridges, where seal and pupping lairs are likely to be most numerous.

(4) Many of the on-ice seismic lines and connecting ice roads will be laid out and explored during January and February, when many ringed seals are still transient, and considerably before the spring pupping season.

(5) The sounds from energy produced by vibrators used during on-ice seismic programs typically are at frequencies well below those used by ringed seals to communicate (1000 Hz). Thus, ringed seal hearing is not likely to be very good at those frequencies and seismic sounds are not likely to have strong masking effects on ringed seal calls. This effect is further moderated by the quiet intervals between seismic energy transmissions.

(6) There has been no major displacement of seals away from on-ice seismic operations (Frost and Lowry, 1988). Further confirmation of this lack of major response to industrial activity

is illustrated by the fact that there has been no major displacement of seals near the Northstar Project. Studies at Northstar have shown a continued presence of ringed seals throughout winter and creation of new seal structures (Williams *et al.*, 2001).

(7) Although seals may abandon structures near seismic activity, studies have not demonstrated a cause and effect relationship between abandonment and seismic activity or biologically significant impact on ringed seals. Studies by Williams *et al.* (2001), Kelley *et al.* (1986, 1988) and Kelly and Quakenbush (1990) have shown that abandonment of holes and lairs and establishment or re-occupancy of new ones is an ongoing natural occurrence, with or without human presence. Link *et al.* (1999) compared ringed seal densities between areas with and without vibroseis activity and found densities were highly variable within each area and inconsistent between areas (densities were lower for 5 days, equal for 1 day, and higher for 1 day in vibroseis area), suggesting other factors beyond the seismic activity likely influenced seal use patterns.

Consequently, a wide variety of natural factors influence patterns of seal use including time of day, weather, season, ice deformation, ice thickness, accumulation of snow, food availability and predators as well as ring seal behavior and population dynamics.

In winter, bearded seals are restricted to cracks, broken ice, and other openings in the ice. On-ice seismic operations avoid those areas for safety reasons. Therefore, any exposure of bearded seals to on-ice seismic operations would be limited to distant and transient exposure. Bearded seals exposed to a distant on-ice seismic operation might dive into the water. Consequently, no significant effects on individual bearded seals or their population are expected, and the number of individuals that might be temporarily disturbed would be very low.

As a result, CPA believes the effects of on-ice seismic are expected to be limited to short-term and localized behavioral changes involving relatively small numbers of seals. NMFS has preliminarily determined, based on information in the application and supporting documents, that these changes in behavior will have no more than a negligible impact on the affected species or stocks of ringed and bearded seals. Also, the potential effects of the proposed on-ice seismic operations during 2005 are unlikely to result in more than small numbers of seals being affected and will not have an

unmitigable adverse impact on subsistence uses of these two species.

Proposed Authorization

NMFS proposes to issue an IHA to CPA for conducting seismic surveys from Milne Point to the eastern channel of the Colville River in the U.S. Beaufort Sea, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated. NMFS has preliminarily determined that the proposed activity would result in the harassment of small numbers of marine mammals; would have no more than a negligible impact on the affected marine mammal stocks; and would not have an unmitigable adverse impact on the availability of species or stocks for subsistence uses.

Information Solicited

NMFS requests interested persons to submit comments and information concerning this request (see **ADDRESSES**).

Dated: February 2, 2005

Laurie K. Allen,

*Director, Office of Protected Resources,
National Marine Fisheries Service.*

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COMMODITY FUTURES TRADING COMMISSION

In the Matter of the New York Mercantile Exchange, Inc. Petition To Extend Interpretation Pursuant to Section 1a(12)(C) of the Commodity Exchange Act

AGENCY: Commodity Futures Trading Commission.

ACTION: Order.

SUMMARY: On February 4, 2003, in response to a petition from the New York Mercantile Exchange, Inc. ("NYMEX" or "Exchange") the Commodity Futures Trading Commission ("Commission"), issued an order¹ pursuant to Section 1a(12)(C) of the Commodity Exchange Act ("Act"). The order provides that, subject to certain conditions, Exchange floor brokers and floor traders (collectively referred to hereafter as "floor members") who are registered with the Commission, when acting in a proprietary trading capacity, shall be deemed to be "eligible contract participants" as that term is defined in Section 1a(12) of the Act. The order (hereafter the "original order" or the "ECP Order") is effective for a two-year

period and thus will expire on February 4, 2005.

On January 19, 2005, the Exchange petitioned the Commission to extend the original order for a further one-year period. Based on a review of all the relevant facts and circumstances, including its review of a report required as a condition of the original order, detailing the experiences of the Exchange, its floor members and its clearing members under that order, the Commission has determined to grant the Exchange's petition.

Accordingly, subject to certain conditions as set forth in this order, NYMEX floor members, when acting for their own accounts, are permitted to continue to enter into certain specified over-the-counter ("OTC") transactions in exempt commodities pursuant to Section 2(h)(1) of the Act. In order to participate, the floor member must have its OTC trades guaranteed by, and cleared at NYMEX by, an Exchange clearing member that is registered with the Commission as a futures commission merchant ("FCM") and that meets certain minimum working capital requirements. This order is effective for a one-year period commencing on the expiration date of the original order.

DATES: This order is effective on February 4, 2005.

FOR FURTHER INFORMATION CONTACT:

Donald H Heitman, Senior Special Counsel, Division of Market Oversight, Commodity Futures Trading Commission, Three Lafayette Center, 1155 21st Street, NW., Washington, DC 20581. Telephone: 202-418-5041. E-mail: dheitman@cftc.gov.

SUPPLEMENTARY INFORMATION:

I. Statutory Background

Section 1a(12) of the Act, as amended by the Commodity Futures Modernization Act of 2000 ("CFMA"), Public Law 106-554, which was signed into law on December 21, 2000, defines the term "eligible contract participant" ("ECP") by listing those entities and individuals considered to be ECPs.²

² Included generally in Section 1a(12) as ECPs are: financial institutions; insurance companies and investment companies subject to regulation; commodity pools and employee benefit plans subject to regulation and asset requirements; other entities subject to asset requirements or whose obligations are guaranteed by an ECP that meets a net worth requirement; governmental entities; brokers, dealers, and FCMs subject to regulation and organized as other than natural persons or proprietorships; brokers, dealers, and FCMs subject to regulation and organized as natural persons or proprietorships subject to total asset requirements or whose obligations are guaranteed by an ECP that meets a net worth requirement; floor brokers or floor traders subject to regulation in connection with transactions that take place on or through the

Under Sections 2(d)(1), 2(g), and 2(h)(1) of the Act, OTC transactions³ entered into by ECPs in an "excluded commodity" or an "exempt commodity," as those terms are defined by the Act,⁴ are exempt from all but certain requirements of the Act.⁵ Floor brokers and floor traders are explicitly included in the ECP definition only to the extent that the floor broker or floor trader acts "in connection with any transaction that takes place on or through the facilities of a registered entity or an exempt board of trade, or any affiliate thereof, on which such person regularly trades."⁶

The Act, however, gives the Commission discretion to expand the ECP category as it deems appropriate. Specifically, Section 1a(12)(C) provides that the list of entities defined as ECPs shall include "any other person that the Commission determines to be eligible in light of the financial or other qualifications of the person."

II. The Original NYMEX Petition

A. Introduction

By letter dated May 23, 2002, NYMEX submitted a petition seeking a Commission interpretation pursuant to

facilities of a registered entity or an exempt board of trade; individuals subject to total asset requirements; an investment adviser or commodity trading advisor acting as an investment manager or fiduciary for another ECP; and any other person that the Commission deems eligible in light of the financial or other qualifications of the person.

³ For these purposes, OTC transactions are transactions that are not executed on a trading facility. As defined in Section 1a(33)(A) of the Act, the term "trading facility" generally means "a person or group of persons that constitutes, maintains, or provides a physical or electronic facility or system in which multiple participants have the ability to execute or trade agreements, contracts, or transactions by accepting bids and offers made by other participants that are open to multiple participants in the facility or system."

⁴ Section 1a(14) defines the term "exempt commodity" to mean a commodity that is not an excluded commodity or an agricultural commodity. Section 1a(13) defines the term "excluded commodity" to mean, among other things, an interest rate, exchange rate, currency, credit risk or measure, debt instrument, measure of inflation, or other macroeconomic index or measure. Although the term "agricultural commodity" is not defined in the Act, Section 1a(4) enumerates a non-exclusive list of several agricultural-based commodities and products. The broadest types of commodities that fall into the exempt category are energy and metals products.

⁵ OTC transactions in excluded commodities entered into by ECPs pursuant to Section 2(d)(1) are generally not subject to any provision of the Act. OTC transactions in exempt or excluded commodities that are individually negotiated by ECPs pursuant to Section 2(g) are also generally not subject to any provision of the Act. OTC transactions in exempt commodities entered into by ECPs pursuant to Section 2(h)(1) are generally not subject to any provision of the Act other than anti-manipulation provisions and anti-fraud provisions in certain situations.

⁶ Section 1a(12)(A)(x) of the Act.

¹ 68 FR 5621 (February 4, 2003).