

**DEPARTMENT OF COMMERCE****National Oceanic and Atmospheric Administration****50 CFR Part 217**

[Docket No. 090206146–91055–02]

RIN 0648–AX32

**Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to the Port of Anchorage Marine Terminal Redevelopment Project, Anchorage, Alaska**

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

**ACTION:** Final rule.

**SUMMARY:** NMFS, upon application from the Port of Anchorage (POA) and the U.S. Department of Transportation Maritime Administration (MARAD), has issued regulations to govern the unintentional taking of marine mammals, by harassment, incidental to Phase II of the POA's Marine Terminal Redevelopment Project (MTRP) for the period July 2009 through July 2014. These regulations, which allow for the issuance of annual "Letters of Authorization" (LOAs) for the incidental take of marine mammals during the described activities and specified time frames, prescribe the permissible methods of taking and other means of effecting the least adverse impact practicable on marine mammal species and their habitat, as well as requirements pertaining to the monitoring and reporting of such taking.

**DATES:** Effective July 15, 2009 and is applicable to the POA and MARAD on July 15, 2009 through July 14, 2014, upon signature of this final rule.

**ADDRESSES:** A copy of the POA/MARAD's application, NMFS' Final Environmental Assessment (EA), Supplemental EA (SEA) and Findings of No Significant Impact (FONSIs) may be obtained by writing to P. Michael Payne, Chief, Permits, Conservation and Education Division, Office of Protected Resource, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910–3225, by telephoning the contact listed under FOR FURTHER INFORMATION CONTACT, or on the Internet at: <http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications>.

Documents cited in this final rule may also be viewed, by appointment, during regular business hours at the above address.

**FOR FURTHER INFORMATION CONTACT:**

Jaclyn Daly, Office of Protected Resources, NMFS, (301) 713–2289, ext. 151.

**SUPPLEMENTARY INFORMATION:****Background**

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

Authorization for incidental takings may be granted for up to 5 years 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 certain subsistence uses, and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such taking 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."

**Summary of Request**

On November 20, 2008, NMFS received an application from the POA/MARAD requesting regulations to take, by Level B harassment only, marine mammals incidental to certain construction activities associated with the MTRP. On January 9, 2009, the POA/MARAD also submitted a Demolition Plan which describes options of dock demolition and impacts to marine mammals from each option. As described in the application marine mammals may be harassed by noise from in-water pile driving. This final rule authorizes the take, by Level B

harassment only, of the following marine mammals which could be present within the action area: Cook Inlet beluga whales (*Delphinapterus leucas*), harbor seals (*Phoca vitulina*), harbor porpoises (*Phocoena phocoena*), and killer whales (*Orcinus orca*).

The proposed rule for this action listed in-water chipping, which would occur under Option 1 in the Demolition Plan, as an additional source of potential harassment; however, NMFS misunderstood specifics of the chipper hammer (i.e., the energy required to operate the hammer) and, upon clarification from the POA/MARAD, has now determined that dock demolition will not result in harassment to marine mammals given the implementation of the required mitigation measures (see Change in Rule Relative to the Proposed Rule).

**Description of the Specified Activity**

According to the application, the MTRP is designed to upgrade and expand the existing POA facilities by removing and replacing aging and obsolete structures and providing additional dock and backland areas, without disruption of maritime service during construction. The POA serves 85 percent of the population within the State of Alaska by providing 90 percent of all consumer goods and is an economic engine for the State of Alaska.

Located within the Municipality of Anchorage on Knik Arm in upper Cook Inlet, the existing 129-acre POA facility is currently operating at or above sustainable practicable capacity for the various types of cargo handled at the facility. In addition, the existing infrastructure and support facilities are substantially past their design life, have degraded to levels of marginal safety, and are in many cases functionally obsolete. The MTRP will replace, upgrade, and expand the current POA facility to address existing needs and projected future needs, allowing the POA to adequately support the economic growth of Anchorage and the State of Alaska through 2025 and beyond. Upon completion, the phased MTRP will add 135 acres of usable land to the current 129 acre POA (total area of 264 acres). The completed marine terminal at the POA will include: seven modern dedicated ship berths; two dedicated barge berths; rail access and intertie to the Alaskan railbelt; roadway improvements; security and lighting improvements; slope stability improvements; drainage improvements; modern shore-side docking facilities; equipment to accommodate cruise passengers, bulk, break-bulk, roll on/roll off (RO-RO) and load on/load off

(LO-LO) cargo, general cargo short-term storage, military queuing and staging, and petroleum, oils, and lubricants (POL) transfer and storage; and additional land area to support expanding military and commercial operations.

In-water construction activities, specifically in-water pile driving, have the potential to harass marine mammals if they are exposed to sound levels at or above certain threshold levels. NMFS considered harassment from other activities (e.g., construction of dikes, discharge, settlement and compaction of fill material, installation of utilities, and paving within a 27-acre intertidal area) during Phase I of the MTRP and during the IHA issuance process and has determined that these activities would not result in take of marine mammals if certain operational procedures and mitigation measures were implemented by the POA. NMFS also considered noise impacts during dock demolition. NMFS concludes that in-water pile driving is the only activity which warrant an MMPA authorization. A complete description of the specified activities and affected environment can be found in the proposed rule **Federal Register** document for this action (74 FR 18493, April 23, 2009).

#### **Change in Rule Relative to the Proposed Rule**

During review of the Demolition Plan, NMFS analyzed three proposed methods presented by the POA/MARAD, including use of a chipping hammer and explosives. Because dock demolition will not occur for over one year, the POA/MARAD needs to retain a reasonable amount of variation in demolition methods to practicably submit bid contracts. NMFS now understands that its interpretation of the energy needed to operate the chipping hammer was inaccurate. The POA/MARAD provided information that the chipping hammer operates at "19 percent of the energy required for a vibratory pile driving hammer." NMFS took this to mean 19 percent less energy (e.g., if the vibratory hammer works at 100 horsepower, the chipping hammer works at 81 horsepower). Based on that interpretation, and given the lack of empirical sound source verification, NMFS implemented monitoring measures identical to vibratory pile driving (i.e., 1,300 m Level B harassment zone isopleth and 200 m safety zone). In fact, the chipping hammer operates at 19 percent of what is required for the vibratory hammer (e.g., using the 100 horsepower example above, the chipper hammer works at 19 horsepower). Given that the chipping

hammers requires 81 percent less energy than the vibratory hammer, NMFS has determined that monitoring the 1,300 m harassment isopleth during in-water chipping (if chosen as the method for demolition) is not necessary, as the 120 dB isopleth from this activity would not extend this far out into Knik Arm. However, NMFS has conservatively retained a 200 m safety zone for this activity. Therefore, given the required shut down mitigation, NMFS does not anticipate takes of marine mammals will occur from this activity. All analysis and proposed mitigation for Options 2 and 3 of the Demolition Plan, as described in the proposed rule, remain accurate.

#### **Comments and Responses**

On April 23, 2009, NMFS published a notice of proposed rulemaking (74 FR 18493) in the **Federal Register** on the POA/MARAD's request to take marine mammals incidental to the MTRP and requested comments, information, and suggestions concerning the request. NMFS also made a Draft SEA available for public comment. While no comments were received specific to the Draft SEA, one commentor provided comments on the original EA and FONSI issued by NMFS on July 14, 2008. While public comment was sought on the draft version of the SEA, NMFS found this set of comments to be directly relevant to the SEA, in that they primarily raised issues related to the effects of the underlying activity on the distinct population segment (DPS) of Cook Inlet beluga whales which are listed under the ESA. While comments on the prior FONSI are not relevant, as the agency would reach a new finding based on the analysis in this SEA, we summarize the relevant issues raised both on the prior EA and FONSI in the Final SEA as they relate to the scope and content of the analyses under consideration by NMFS.

During the 30-day public comment period, The Humane Society of the United States (HSUS), the Center for Biological Diversity (CBD), and the Marine Mammal Commission (Commission) submitted comments on the proposed regulations. HSUS requests NMFS deny the permit and the Commission recommends that NMFS withdraw the proposed rule and refrain from authorizing the taking of Cook Inlet beluga whales at this time. For the reasons set forth in the proposed rule and this preamble, NMFS believes issuance of the authorization is appropriate. Following are the comments from the Commission and HSUS and NMFS' responses.

*Comment 1:* The Commission disagrees with NMFS' finding that the MTRP will have a negligible impact on Cook Inlet beluga whales given that it will, in summary, result in increased noise and other types of disturbance, habitat degradation and destruction, and various other environmental concerns such as disturbance to potentially harmful bottom sediments from dredging, increased pollution, discharge of ballast water and other impacts associated with increased vessel traffic from an expanded port. In support of its comment, the Commission cites NMFS' final rule listing Cook Inlet beluga whales as endangered, which identifies continued development along upper Cook Inlet and its cumulative impacts on important beluga whale habitat as one of several possible causes for the observed population trends. The Commission suggests that NMFS' population viability analysis in the final rule listing the species indicates the status quo is already jeopardizing the continued existence of the species and says the population will continue to decline, eventually to extinction, if nothing is done to reverse the recent trends. Accordingly, the Commission recommends NMFS refrain from authorizing take of Cook Inlet beluga whales until the Agency has conducted more research to identify the factor(s) contributing to the decline and/or lack of recovery of the population, can discount the factors associated with port construction and use as significant contributors, and determine that, once mitigated, the MTRP will not have more than a negligible impact on beluga whales.

*Response:* Section 4(a) of the ESA requires the Secretary of Commerce (Secretary), after receipt of a petition, to list a specified species, to determine whether any species is endangered or threatened based on any of five specific factors. NMFS' final rule to list Cook Inlet beluga whales as endangered identified, among others, "the present or threatened destruction, modification, or curtailment of its habitat or range" as a factor contributing to the species endangered status. Specifically, NMFS cited oil and gas exploration, development, and production; and industrial activities that discharge or accidentally spill pollutants. NMFS therefore agrees that coastal development projects in Cook Inlet should be closely assessed with respect to beluga whale conservation and recovery.

For this project, NMFS looked at the intensity of habitat destruction and modification and whether this, combined with all aspects of the project,

would have more than a negligible impact on Cook Inlet beluga whales. The thorough assessment of habitat loss and degradation from the MTRP can be found in Chapter 4 of the 2008 EA, which has been incorporated by reference into the 2009 SEA; habitat impacts were also addressed in the **Federal Register** notification of proposed rulemaking for this action. NMFS assessed not only the permanent loss of the proposed 135 acres of filled intertidal and sub-tidal habitat with respect to beluga whale prey, but also hydrodynamic shifts from expanded port completion, and habitat degradation from noise, dredging, and pollution.

As NMFS' 2008 *Conservation Plan for the Cook Inlet Beluga Whale (Delphinapterus leucas)* (herein after "Conservation Plan") states, the primary concern relating to coastal development in Upper Cook Inlet is that it may restrict passage of beluga whales along Knik Arm to important feeding areas. The MTRP footprint is restricted to the eastern side of Knik Arm, with the new dock extending approximately 400 m seaward of the current dock. Sound propagation beyond NMFS Level B harassment thresholds (160dB for impact pile driving and 125 dB for vibratory pile driving) is not expected to extend beyond 300 and 1,300 m, respectively, while that area of Knik Arm extends approximately 4.17 km across and should allow for beluga passage to the primary feeding hotspots (15–17 miles north of the POA), as identified in the Conservation Plan. NMFS considered all available studies investigating behavioral and TTS data on beluga whales, including data from monitoring reports under the POA/MARAD's current IHA, baseline environmental conditions (e.g., ambient sound levels, exposure to anthropogenic activities), and mitigation measures when analyzing the impacts on Cook Inlet beluga whales. Based on captive and field acoustic studies, it is possible that beluga whales may alter their behavior in response to noise from the MTRP; however, to date, the monitoring reports do not indicate short or long term change in behavior or habitat use. Surveys conducted before port construction began indicated that 79 percent of all beluga whales entering Knik Arm utilized waters within the MTRP footprint (Markowitz *et al.* 2005). These surveys are ongoing, and after 5 months of pile driving (July to November), there is no indication of a change in habitat use or restriction of beluga whale passage. Finally, over 90 percent of Knik Arm remains

undeveloped, and where development is prevalent, it is relatively confined to the lower portion of Knik Arm, away from primary beluga whale foraging hotspots.

NMFS began working with the POA/MARAD before the MTRP began and is requiring monitoring and mitigation measures beyond those previously recommended during the USACE's scoping process for issuance of its 404 Permit. In addition, the POA/MARAD has undertaken and continues dedicated fish and marine mammal monitoring studies and is developing an acoustic plan to further investigate beluga whale vocalization patterns in response to construction.

Based on NMFS' analysis of all impacts from the MTRP, as described in the **Federal Register** notices for this project, the 2008 EA, and the 2009 SEA, including analysis of the project design (e.g., limited to one side of Knik Arm), numerous fish surveys, habitat classification and hydrodynamic modeling studies, sediment analysis and beluga health assessments (with respect to contaminants), noise surveys conducted at and around the POA, and the incorporation of mitigation measures contained in these regulations and the POA/MARAD's USACE 404 Permit, NMFS has determined that the MTRP is not reasonably likely to adversely affect Cook Inlet beluga whales through effects on annual rates of recruitment or survival (i.e., negligible impact) and will not have an unmitigable adverse impact on the availability of Cook Inlet beluga whales for taking for subsistence uses should the current moratorium on harvest be lifted. Further, NMFS' SEA and EA, which consider cumulative impacts, resulted in a FONSI for this action.

Although there is some uncertainty with respect to Cook Inlet beluga population trends and causes, it does not prevent NMFS from making decisions based on the best information available. The MMPA directs NMFS to issue permits allowing incidental, but not intentional, taking, provided certain findings can be made, and the best available information indicates that the activity under consideration satisfies those conditions.

NMFS thoroughly assessed the best available information, including monitoring reports collected under the IHA, and determined it sufficient to make an informed judgment about the effects of the MTRP on Cook Inlet belugas and the means to mitigate those effects. Nevertheless, there are efforts to improve understanding of the factors affecting recovery. Separating out what may very well be confounding factors

can be extremely difficult. In Cook Inlet, NMFS conducts annual beluga whale aerial abundance surveys and investigates live stranding events and carcasses. Analysis of carcasses, including gross anatomy examinations; skin, tissue, blubber, blood, and organ sampling; and analysis of loads of contaminants, disease, and parasitism, will aid in determining the health of the environment beluga whales utilize and, possibly, the underlying causes of strandings. These and other efforts will continue to allow NMFS a better understanding of the factors limiting Cook Inlet beluga whale recovery.

Specific to the MTRP, the POA/MARAD have overseen extensive pre-construction and present day research in the form of marine mammal surveys and monitoring in order to assess both short term and long term impacts to beluga whales, as described in the proposed rule (73 FR 18493, April 23, 2009). In addition, the POA/MARAD are preparing, with recommendations from NMFS, an acoustic plan to determine a sighting rate correction factor by comparing detection of vocal beluga whales from passive acoustic monitoring (PAM) to the rate of visual observations. In addition, this PAM study will continue to characterize sound levels around the POA during and in the absence of all construction activities. Further, independent acoustic studies have been proposed by Alaska Pacific University and scientists from other organizations to investigate beluga whale vocalizations in response to anthropogenic noise (these studies are independent of the MTRP and are not affiliated with the POA/MARAD). NMFS has determined that the research being conducted by the POA/MARAD is appropriate to determine levels of impacts specific to this project, and will continue to use data from other research to assess beluga whale stressors.

Finally, NMFS disagrees that the status quo is jeopardizing the continued existence of the species. NMFS is mindful of the endangered status of the whales and is committed to promoting their conservation and recovery. In that regard, NMFS conducted its ESA consultation with the POA/MARAD and concluded, based on the best available information, that the MTRP is not likely to jeopardize the continued existence of Cook Inlet beluga whales. The associated incidental take statement contains reasonable and prudent measures to minimize the impact of the incidental take from the MTRP as well as terms and conditions to implement those measures.

*Comment 2:* HSUS commented that it is not clear if marine mammal observers

(which are required under the POA's IHA) noticed subtle startle responses which could be an indication of stress.

*Response:* During all pile driving operations, the POA/MARAD are required to have NMFS approved marine mammal observers on site to inform construction workers of the presence of beluga whales around the POA, implement shut down procedures should a marine mammal enter into designated safety zones, and observe any responses, including subtle ones, of beluga whales when entering the waters around the POA. In addition, an independent marine mammal monitoring team is stationed atop Cairn Point to characterize beluga whale abundance and habitat use around the POA. This independent monitoring team currently consists of Alaska Pacific University graduate students with expertise in marine mammal science, including behavior. All marine mammal monitoring reports, from both teams, have reported zero reactions from beluga whales to POA expansion with the exception of three groups splitting when they approached a barge. These reports also indicate that beluga whales continue to use the waters around the POA for travel and foraging similar to use before construction (monitoring has been occurring since 2004). A summary of these reports can be found in the proposed rule **Federal Register** notice and the SEA prepared for this action.

Quantifying marine mammal stress response is not possible without direct measurements such as those obtained from the collection of blood or feces; however, presence of observable reactions could be one indication that an animal is stressed. Further, NMFS acknowledged in its proposed rule for the proposed action that a stress response which is not associated with an observable reaction may occur. Monitoring reports indicate that beluga whales are not observably reacting to construction activities, including pile driving. While a stress response may be occurring, it is unlikely the degree of stress is one which is prohibiting recovery (i.e., the whales are not fleeing/abandoning high quality habitat).

NMFS has also considered the cumulative impact of multiple past, present, and foreseeable actions in its NEPA documents and has determined that any additional stress from these actions and the proposed action are not likely to result in an impact which could be considered significant due to mitigation measures (e.g., low tide impact pile driving restriction, shut down zones) and the nature of operations (e.g., the intermittent nature of pile driving, pile driving occurs at

one side of Knik Arm which allows for a zone of passage where sound levels are below NMFS harassment threshold levels, etc).

*Comment 3:* The CBD provided comments on the proposed rule which were identical to those submitted during the 30-day comment period on the proposed IHA in 2008. NMFS addressed these comments in the Notice of Issuance for that IHA (73 FR 41318, July 18, 2008). In addition to those responses, NMFS notes that marine mammal monitoring reports collected under the IHA, as described in this document and the proposed rulemaking **Federal Register** notice, suggest that beluga whales are not behaviorally reacting to noise from pile driving nor are longer term changes in habitat use or use frequency obvious. These direct observations of beluga whale reactions to pile driving, and not inference from reactions to icebreaker ships or seismic surveys, support NMFS' determination that the impacts from the MTRP to this species is negligible. NMFS will continue to review POA/MARAD monitoring reports and new literature and reports on the recovery status of Cook Inlet beluga whales in general.

#### **Potential Effects of Specified Activities on Marine Mammals**

The potential effects of the specified activity were fully described in NMFS' Notice of Proposed Rulemaking (74 FR 18493, April 23, 2009) and are summarized here. Noise generated from in-water pile has the potential to result in harassment of the aforementioned species if a marine mammal is present within specified distances during such activities. The specified activities will result in two types of noise: pulsed noise from impact pile driving and non-pulsed noise from vibratory pile driving. Again, NMFS has determined that in-water chipping associated with demolition of the dock will not result in harassment because the chipping hammer works at significantly reduced energy than a vibratory hammer (81 percent less) and the POA/MARAD will continue to shut down if marine mammals enter the 200m safety zone during in-water chipping.

The available scientific literature suggest that introduction of pile driving into the marine environment could result in short term behavioral and/or physiological marine mammal impacts such as: altered headings; increased swimming rates; changes in dive, surfacing, respiration, feeding, and vocalization patterns; masking, and hormonal stress production (Southall *et al.*, 2007); however some field studies also suggest marine mammals do not

observably respond to construction type sounds such as drilling (e.g., Richardson *et al.*, 1990, 1991; Moulton *et al.*, 2005). Observation data on marine mammal responses to pile driving, as required under the POA/MARAD's current IHA, for these activities is summarized in the POA/MARAD's application and NMFS' proposed rulemaking. The potential effects described in the proposed rule are the same as those that would occur under this final rule. In summary, beluga whales are not noticeably reacting to MTRP construction activities and are not utilizing the habitat differently than when compared to pre-in-water pile driving activity. NMFS anticipates that the total taking of marine mammals from the specified activities will have a negligible impact on the affected species or stock of marine mammals, and that the total taking will not have an unmitigable adverse impact on the availability of species or stocks of marine mammals for taking for subsistence uses.

#### **Numbers of Marine Mammals Estimated to be Taken by Harassment**

The marine mammal species authorized to be taken by Level B harassment incidental to the MTRP are Cook Inlet beluga whales, harbor seals, harbor porpoises, and killer whales. The number of Cook Inlet beluga whales authorized to be harassed each year, under annual LOAs, may vary slightly according to NMFS' annual population estimates (generated from yearly aerial surveys) but will remain within numbers considered small relative to the population size. NMFS anticipates that take numbers will remain around take authorized in the 2008 IHA; 34 whales per year. Take of harbor seals, harbor porpoise, and killer whales are likely to remain constant at 20, 20, and 5 takes per year, all of which are considered small relative to the population sizes for each stock, as described in the proposed rule.

#### **Potential Effects on Marine Mammal Habitat**

The potential effects of the specified activity on marine mammal habitat were also fully described in NMFS' Notice of Proposed Rulemaking (74 FR 18493, April 23, 2009) and are summarized here. Impacts on marine mammal habitat are part of the consideration in making a finding of negligible impact on the species and stocks of marine mammals. Habitat includes, but is not limited to, rookeries, mating grounds, feeding areas, and areas of similar significance. Upon completion, the MTRP will create an additional 135 acres of useable land by filling intertidal

and subtidal habitat, some of which has already been completed. The area to be filled is considered rearing and nursery habitat for numerous marine mammal prey species and NMFS considered the permanent loss and degradation of this habitat in this regard when analyzing for a negligible impact determination. Based on scientific fish and habitat studies conducted around the POA, the design plan of the new port, marine mammal monitoring reports (and NMFS scientists observations of beluga whales feeding around the newly filled backlands area), and the POA/MARAD's U.S. Army Corps of Engineer's 404/10 Permit habitat mitigation, conservation, and restoration requirements, NMFS has determined that marine mammal prey abundance will not be affected to a level which would negatively impact marine mammal food resources.

#### **Potential Effects of Specified Activities on Subsistence Needs**

The potential effects of the specified activity on subsistence needs were also fully described in NMFS' Notice of Proposed Rulemaking (74 FR 18493, April 23, 2009) and are summarized here. Currently, no subsistence hunting of beluga whales is occurring. Traditionally, no subsistence hunting took place within the action area and given the urbanization of Anchorage and the presence of commercial and recreational use of waters near the POA, it is unlikely hunting would actually occur here in the future. Therefore, the MTRP will not have a direct impact on actual hunting location should the hunt occur in the future. In addition, no indirect impacts (i.e., availability of beluga whales reduced due to the MTRP) are anticipated. NMFS, through its project analysis, has determined that any harassment from the MTRP to marine mammals, including Cook Inlet beluga whales, will be short-term and limited to changes in behavior and stress responses. NMFS does not anticipate that the authorized taking of affected species or stocks will result in changes in reproduction, survival, or longevity rates which could decrease population levels, impact habitat or prey abundance to a level which could negatively impact population growth, or result in changes in distribution, as indicated by the first year of monitoring reports under the POA/MARAD's IHA. Therefore, NMFS has determined that the issuance of these regulations will not have an unmitigable adverse impact on the availability of marine mammal stocks for subsistence uses.

#### **Mitigation**

To minimize impacts on marine mammals present within the action area, the POA/MARAD, in collaboration with NMFS, has prepared the following mitigation measures, which are incorporated into these regulations.

##### *Scheduling of Construction Activities During Low Use Period of Beluga Whales Around the POA-Tidal Restrictions*

Tides have been shown to be an important physical characteristic in determining beluga movement within Knik Arm. Most beluga whales are expected to be foraging well north of the POA during the flood and high tide. However, these northern areas are exposed during the ebb and low tide; therefore, animals move south toward Eagle Bay and sometimes as far south as the Knik Arm entrance to avoid being stranded on mudflats. Based on the beluga whale monitoring studies conducted at the POA since 2005, beluga whale sightings often varied significantly with tide height at and around the POA (Funk *et al.*, 2005, Ramos *et al.*, 2005, Markowitz and McGuire, 2007). Beluga whales were most often sighted during the period around low tide and, as the tide flooded, they typically moved into the upper reaches of the Arm. Opportunistic sighting data also support that highest beluga whale use near the POA is around low tide (NMFS, unpubl. data).

Due to this tidally influenced habitat use, impact pile driving, excluding work when the entire pile is out of the water due to shoreline elevation or tidal stage, shall not occur within two hours of either side of each low tide (i.e., from two hours before low tide until two hours after low tide). For example, if low tide is at 1 p.m., impact pile driving will not occur from 11 a.m. to 3 p.m. Vibratory pile driving will be allowed to commence/continue during this time because its characteristics (non-pulse sound type and lower source level) are expected to elicit less overt behavioral reactions.

##### *Establishment of Pile Driving Safety Zones and Shut-down Requirements*

NMFS acknowledges that shut-down of reduced energy vibratory pile driving during the "stabbing" phase of sheet pile installation may not be practicable due to concerns that the sheet pile may break free and result in a safety and navigational hazard. Therefore, the following shut-down requirements apply to all pile driving except during the "stabbing" phase of the installation process.

#### *Safety Zones*

In 2007 and 2008, the POA/MARAD conducted sound studies to obtain reliable estimates of distances for 190 (pinniped Level A (injury) threshold), 180 (cetacean Level A threshold), 160 (impact pile driving Level B harassment threshold) 120 dB (in 2008) and 125 dB (in 2009) (vibratory pile driving Level B harassment threshold) isopleths. There was some discretion between these two studies; therefore, NMFS extrapolated the more conservative isopleths from each study to identify Level B harassment radii. Therefore, based on NMFS' analysis of the acoustic data, the Level A and Level B harassment isopleth distances are 10 m (190 dB); 20 m (180 dB); 350 m (160 dB); and 1,300 m (125dB). Although the 190 and 180 dB isopleths are within 20 m for both types of pile driving, NMFS has established a conservative 200 m mandatory shut-down safety zone which would require the POA to shut-down in-water pile driving or chipping any time a marine mammal enters this zone.

##### *Shut-down for Large Groups*

To reduce the chance of the POA reaching or exceeding authorized take and to minimize harassment to beluga whales, if a group of more than five beluga whales is sighted within the relevant Level B harassment isopleth, shut-down is required.

##### *Shut-down for Calves*

Marine mammal calves could be more susceptible to loud anthropogenic noise than juveniles or adults; therefore, the presence of calves within any harassment isopleth will require shut-down. If a calf is sighted approaching or within any harassment zone, pile driving will cease and not be resumed until the calf is confirmed to be out of the harassment zone and on a path away from such zone. If a calf or the group with a calf is not re-sighted within 15 minutes, pile driving may resume.

##### *Heavy Machinery Shut-downs*

For other in-water heavy machinery operations other than pile driving, if a marine mammal comes within 50 m of operations, they will cease and vessels will slow to a reduced speed while still maintaining control of the vessel and safe working conditions. Such operations include port operated dredges, water based dump-scows (barges capable of discharging material through the bottom), standard barges, tug boats to position and move barges, barge mounted hydraulic excavators or clamshell equipment used to place or remove material.

### *In-water Pile Driving and Chipping Weather Delays*

Adequate visibility is essential to beluga whale monitoring and determining take numbers. In-water pile driving will not occur when weather conditions restrict clear, visible detection of all waters within the Level B harassment zones or 200 m safety zone. Such conditions that can impair sightability and require in-water pile driving delays include, but are not limited to, fog and a rough sea state.

### *Exceedence of Take*

If maximum authorized take is reached or exceeded for the year for any marine mammal species, any marine mammal of that species entering into the Level B harassment isopleths will trigger mandatory shut-down.

### *Use of Impact Pile Driving Hammers*

In-water piles will be driven with a vibratory hammer to the maximum extent possible (i.e., until a desired depth is achieved or to refusal) prior to using an impact hammer.

### *Soft Start to Pile Driving Activities*

A "soft start" technique will be used at the beginning of each pile installation to allow any marine mammal that may be in the immediate area to leave before pile driving reaches full energy. The soft start requires contractors to initiate noise from vibratory hammers for 15 seconds at reduced energy followed by 1-minute waiting period. The procedure will be repeated two additional times. If an impact hammer is used, contractors will be required to provide an initial set of three strikes from the impact hammer at 40 percent energy, followed by a one minute waiting period, then two subsequent 3 strike sets (NMFS, 2003). If any marine mammal is sighted within the 200 m safety zone prior to pile-driving, or during the soft start, the hammer operator (or other authorized individual) will delay pile-driving until the animal has moved outside the 200 m safety zone. Furthermore, if any marine mammal is sighted within or approaching a Level B harassment zone prior to beginning pile driving, operations will be delayed until the animals move outside the zone in order to minimize harassment. Pile-driving will resume only after a qualified observer determines that the marine mammal has moved outside the 200m safety or Level B harassment zone, or after 15 minutes have elapsed since the last sighting of the marine mammal within the safety zone.

### *Demolition Mitigation*

Table 7-1 in the Demolition Plan outlines all mitigation measures for each proposed option as described in the Specified Activities section of this document. Should chipping in-water be the chosen method for demolition (i.e., Option 1), the POA will abide by the safety shut down zone (200 m) established for pile driving. Other mitigation including poor weather delays, large group shut-downs, and calf shut-downs will also be implemented for in-water chipping should animals enter within 200 m of the operating chipping hammer. Marine mammal observers will begin searching for animals 30 minutes prior to the start of all in-water chipping operations.

If Option 2 is chosen, no blasting will occur if a marine mammal is located anywhere within any visible area around the POA. Blasting will be delayed if weather does not allow for adequate sighting conditions. Starting one-half hour prior to each out-of-water blasting event, MMOs at the MTRP site will systematically scan the waters around the port as far as the eye can see, by unaided eyed and high-powered binoculars, for signs of marine mammals. If marine mammals are observed, blasting will be suspended and will not resume until the animal has left the view area or has not been re-sighted for 15 minutes.

For in-water heavy-machinery operations, including dike construction, in-water fill placement, crushing, shearing, marine vessel operation, and steel recovery, a safety zone of 50 m is established. That is, if a marine mammal comes within 50 m of the machinery, operations cease and vessels slow to a reduced speed while still maintaining control of the vessel and safe working conditions to avoid physical injury.

### *Notification of Commencement and Marine Mammal Sightings*

The POA/MARAD shall formally notify the NMFS Permits Division and AKR prior to the seasonal commencement of pile driving and shall provide monthly monitoring reports of all marine mammal sightings once pile driving begins. The POA/MARAD shall continue the formalized marine-mammal sighting and notification procedure for all POA users, visitors, tenants, or contractors prior to and after construction activities. The notification procedure shall clearly identify roles and responsibilities for reporting all marine mammal sightings. The POA/MARAD will forward documentation of all reported marine mammal sightings to the NMFS.

### *Public Outreach*

The POA/MARAD shall maintain whale-notification signage in the waterfront viewing areas near the Ship Creek public boat launch and within the secured port entrance that is visible to all POA users. This signage shall continue to provide information on the beluga whale notification procedures for reporting beluga whale sightings to the NMFS.

### **Marine Mammal Monitoring**

The POA/MARAD will conduct marine mammal monitoring similar to that conducted during the effective dates of their IHA, set to expire July 14, 2009, to assess short-term impacts and ensure long-term, non-negligible impacts are not occurring from the MTRP. The monitoring plan is described, in detail, in their application and in the proposed rulemaking **Federal Register** notice. In summary, the POA/MARAD will conduct the following monitoring under the regulations.

### *Visual Monitoring*

Monitoring for marine mammals will take place concurrent with all pile driving activities and 30 minutes prior to pile driving commencement. One to two trained observer(s) will be placed at the POA at the best vantage point(s) practicable to monitor for marine mammals and will implement shut-down/delay procedures when applicable by calling for shut-down to the hammer operator. The observer(s) will have no other construction related tasks while conducting monitoring. Each observer will be properly trained in marine mammal species detection, identification and distance estimation and will be equipped with binoculars. At the time of each sighting, the pile hammer operator must be immediately notified that there are beluga whales in the area, their location and direction of travel, and if shut-down is necessary.

Prior to the start of seasonal pile driving activities, the POA will require construction supervisors and crews, the marine mammal monitoring team, the acoustical monitoring team (described below), and all MTRP managers to attend a briefing on responsibilities of each party, defining chains of command, discussing communication procedures, providing overview of monitoring purposes, and reviewing operational procedures regarding beluga whales.

In addition to the POA's trained marine mammal observers responsible for monitoring the harassment zones and implementing mitigation measures, an independent beluga whale

monitoring team, consisting of one to two land based observers, shall report on (1) the frequency at which beluga whales are present in the project footprint; (2) habitat use, behavior, and group composition near the POA, and will correlate those data with construction activities; and (3) observed reactions of beluga whales in terms of behavior and movement during each sighting. It is likely that these observers will monitor for beluga whales 8 hours per day/4 days per week but scheduling may change. These observers will work in collaboration with the POA to immediately communicate any presence of beluga whales or other marine mammals in the area prior to or during pile driving. The POA/MARAD will keep this monitoring team informed of all schedules for that day and any changes throughout the day.

#### *Acoustic Monitoring*

The POA/MARAD shall install hydrophones (or employ other effective methodologies to the maximum extent possible) necessary to detect and localize passing whales and to determine the proportion of beluga whales missed from visual surveys. It will also further characterize the acoustical environment around the POA during and in absence of pile driving. This study will be coordinated with NMFS and the independent beluga whale monitoring program to correlate construction and operationally generated noise exposures with beluga whale presence, absence, and any altered behavior observed during construction and operations.

#### **Reporting**

The POA/MARAD are responsible for submitting monthly marine mammal monitoring reports by the 10<sup>th</sup> of the following month that include all marine mammal sightings sheets from the previous month and as summary of pile driving hours, by type, take numbers, and marine mammal reactions, if any. The sighting sheets have been approved by NMFS and require the following details, if able to be determined: group size, group composition (i.e., adult, juvenile, calf); behavior, location at time of first sighting and last sighting; time of day first sighted, time last sighted; approach distance to pile driving hammer; and note if shut-down/delay occurred and for how long. An annual report, as required in 50 CFR 217.205, must be submitted to NMFS at the time of application of renewal of annual LOAs. This report shall summarize all monitoring and taking for that year. A final report must be submitted to NMFS upon application for future

authorization or, if no future authorizations are requested, no later than 90 days post expiration of these regulations. This report must summarize the findings made in all previous reports and assess any short and/or long term impacts to marine mammals at the POA.

#### **ESA**

On October 22, 2008, NMFS published a final rule listing Cook Inlet beluga whales as endangered under the ESA (73 FR 62919). The POA and MARAD, in collaboration with the USACE, have prepared a Biological Assessment and requested Section 7 consultation initiation, as required under the ESA, to continue with the MTRP. Because NMFS' action of issuance of regulations and subsequent LOAs authorizing harassment to marine mammals is a separate federal action, on March 24, 2009, NMFS requested consultation under Section 7 of the ESA. Consultation was initiated on May 11, 2009. On July 13, 2009, NMFS issued a Biological Opinion which concluded that, after review of the current status of the Cook Inlet beluga whale, the environmental baseline for the action area, the biological and physical impacts of the MTRP, and cumulative effects, the MTRP is not likely to jeopardize the continued existence of the Cook Inlet beluga whale.

#### **NEPA**

NMFS has, through NOAA Administrative Order (NAO) 216-6, established agency procedures for complying with NEPA and the implementing regulations issued by the Council on Environmental Quality. In 2008, NMFS prepared an EA on its issuance of incidental take authorizations for the duration of the MTRP. In 2009, NMFS prepared and solicited public comments on a draft SEA for its issuance of such authorizations, including these regulations. NMFS finalized this SEA on July 14, 2009 and has therefore complied with NEPA and its implementing regulations.

#### **Determinations**

Based on the information provided in the POA/MARAD application, NMFS' EA and SEA, this document, the public comments submitted on the application and proposed rule, and the POA/MARAD's comprehensive monitoring reports of the activities through 2009, NMFS has determined that the MTRP, specifically pile driving and dock demolition, will result in no more than Level B harassment of small numbers of

Cook Inlet beluga whales, harbor seals, harbor porpoises, and killer whales. NMFS has determined that the impacts associated with the MTRP will be limited to short term and localized changes in behavior and possibly TTS, masking, and stress hormone production. However, the manner and number of taking will have no more than a negligible impact on the affected species and stocks. No take by serious injury and/or death is anticipated, and the potential for permanent hearing impairment is unlikely. The level of harassment will be at the lowest practicable due to incorporation of the mitigation measures mentioned previously in this document. NMFS' regulations for this project prescribe the means of effecting the least practicable adverse impact on marine mammals and their habitat and set forth requirements pertaining to the monitoring and reporting of that taking. Additionally, the taking of any marine mammal, including Cook Inlet beluga whales, will not have an unmitigable adverse impact on the availability of marine mammal stocks for subsistence use due to the reasons described in this document and the proposed rule.

#### **Classification**

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

Good cause exists to waive the 30-day delay in effectiveness for this final rule pursuant to 5 U.S.C. 553. The MTRP is an ongoing project under construction by the federal government through the USDOT Maritime Administration, with both federal and state/local funding and is currently operating under an IHA and USACE 404 permits. The MARAD and POA have ongoing and extensive mitigation measures in place to protect marine mammals (as required by the current permits) and no time is necessary to develop or initiate the measures required under regulations as final regulations do not constitute substantial changes to the IHA requirements. The construction season in Anchorage is very short and limited by frozen soils, ice in Knik Arm, and lack of daylight in the winter months. A 30-day delay is a significant percentage of the available window to complete in-water projects. The POA and MARAD have indicated that a delay of 30 days would result in immediate and direct costs at minimum of \$65,000 per day and one time sum of \$285,000. In addition, delay costs will accumulate through the rest of the program due to increasing construction costs for follow-on work (e.g., installation of utilities,

installation of dock cap, and paving) that would be rescheduled due to delay in completion of the basic waterfront structure, and, as one of 19 U.S. strategic ports, delay in continuing the 2009 construction at the waterfront negatively impacts military deployment logistics capabilities and costs to and from five Alaskan installations and remote training grounds: Elmendorf AFB, Fort Richardson, Eielson AFB and Ft. Greely. Therefore, delay in operations would also result in direct impacts to military readiness activities. In summary, any delay in the implementation of these regulations would result in both economic loss and national security implication; therefore, these measures will become effective upon signature of the final rule. NMFS could not undertake this action sooner because the applicants did not provide information regarding the MTRP until May 8, 2009; therefore, NMFS was unable to initiate Section 7 consultation until May 11, 2009. NMFS issued the Biological Opinion on July 13, 2009.

At the proposed rule stage, the Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration that this rule, if adopted, would not have a significant economic impact on a substantial number of small entities since it would have no effect, directly or indirectly, on small businesses. Because of this certification, a regulatory flexibility analysis is not required, and none has been prepared.

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

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

Dated: July 14, 2009.

**Samuel D. Rauch III,**

*Deputy Assistant Administrator for Regulatory Programs, National Marine Fisheries Service.*

■ For reasons set forth in the preamble, NMFS amends 50 CFR chapter II by adding part 217 to read as follows:

### **PART 217—REGULATIONS GOVERNING THE TAKE OF MARINE MAMMALS INCIDENTAL TO SPECIFIED ACTIVITIES**

#### **Subparts A–T [Reserved]**

#### **Subpart U—Taking Of Marine Mammals Incidental To The Port of Anchorage Marine Terminal Redevelopment Project**

Sec.

217.200 Specified activities and specified geographical region.

217.201 Effective dates.

217.202 Permissible methods of taking.

217.203 Prohibitions.

217.204 Mitigation.

217.205 Requirements for monitoring and reporting.

217.206 Applications for Letters of Authorization.

217.207 Letters of Authorization.

217.208 Renewal of Letters of Authorization.

217.209 Modifications of Letters of Authorization.

**Authority:** 16 U.S.C. 1361 *et seq.*, unless otherwise noted.

#### **Subparts A through T [Reserved]**

#### **Subpart U—Taking Of Marine Mammals Incidental To The Port of Anchorage Marine Terminal Redevelopment Project**

##### **§ 217.200 Specified activities and specified geographical region.**

(a) Regulations in this subpart apply only to the incidental taking of those marine mammals specified in § 217.202(b) by the Port of Anchorage and the U.S. Department of Transportation Maritime Administration (MARAD), and those persons it authorizes to engage in construction activities associated with the Port of Anchorage Marine Terminal Redevelopment Project, specifically in-water pile driving, at the Port of Anchorage, Alaska.

(b) [Reserved]

##### **§ 217.201 Effective dates.**

Regulations in this subpart are effective from July 15, 2009, through July 14, 2014.

##### **§ 217.202 Permissible methods of taking.**

(a) Under Letters of Authorization issued pursuant to § 216.106 of this chapter and § 217.207, the Port of Anchorage and MARAD, and persons under their authority, may incidentally, but not intentionally, take marine mammals by harassment, within the area described in § 217.200, provided the activity is in compliance with all terms, conditions, and requirements of these regulations and the appropriate Letter of Authorization.

(b) The taking of marine mammals under a Letter of Authorization is limited to the incidental take, by Level B harassment only, of the following species under the activities identified in § 217.200(a): Cook Inlet beluga whales (*Delphinapterus leucas*), harbor seals (*Phoca vitulina*), harbor porpoises (*Phocoena phocoena*), and killer whales (*Orcinus orca*).

(c) The taking by injury or death of the species listed in paragraph (b) of this section or the taking by Level B harassment, injury or death of any other

marine mammal species is prohibited and may result in the modification, suspension, or revocation of a Letter of Authorization.

##### **§ 217.203 Prohibitions.**

Notwithstanding takings contemplated in § 217.202(b) and authorized by a Letter of Authorization issued under § 216.106 of this chapter and § 217.207, no person in connection with the activities described in § 217.200 may:

(a) Take any marine mammal not specified in § 217.202(b);

(b) Take any marine mammal specified in § 217.202(b) other than by incidental, unintentional Level B harassment;

(c) Take a marine mammal specified in § 217.202(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 this subpart or a Letter of Authorization issued under § 216.106 of this chapter and § 217.207.

##### **§ 217.204 Mitigation.**

(a) When conducting operations identified in § 217.200(a), the mitigation measures contained in the Letter of Authorization, issued under § 216.106 of this chapter and § 217.207, must be implemented. These mitigation measures are:

(1) Through monitoring described under § 217.205, the Holder of a Letter of Authorization will ensure that no marine mammal is subjected to a sound pressure levels of 190 or 180 dB re: 1 microPa or greater for pinnipeds and cetaceans, respectively. If a marine mammal is detected within or approaching a distance 200 m from in-water pile driving or in-water chipping, operations shall be immediately delayed or suspended until the marine mammal moves outside these designated zones or the animal is not detected within 15 minutes of the last sighting.

(2) If a marine mammal is detected within or approaching the Level B harassment zone designated for impact pile driving (350 m) prior to in-water impact pile driving, operations shall not commence until the animal moves outside this zone or it is not detected within 15 minutes of the last sighting.

(3) If a marine mammal is detected within or approaching the Level B harassment zone designated for vibratory pile driving (1,300 m) prior to in-water vibratory pile driving, operations shall not commence until the marine mammal moves outside this

zone or it is not detected within 15 minutes of the last sighting.

(4) A "soft start" technique shall be used at the beginning of each day's in-water pile driving activities or if pile driving has ceased for more than one hour to allow any marine mammal that may be in the immediate area to leave before piling driving reaches full energy. For vibratory hammers, the soft start requires the holder of the Letter of Authorization to initiate noise from the hammers for 15 seconds at reduced energy followed by 1-minute waiting period and repeat the procedure two additional times. If an impact hammer is used, the soft start requires an initial set of three strikes from the impact hammer at 40 percent energy, followed by a one minute waiting period, then two subsequent 3 strike sets.

(5) In-water pile driving or chipping shall not occur when conditions restrict clear, visible detection of all waters within the appropriate harassment zones or the 200 m safety zone. Such conditions that can impair sightability include, but are not limited to, fog and rough sea state.

(6) In-water piles will be driven with a vibratory hammer to the maximum extent possible (i.e., until a desired depth is achieved or to refusal) prior to using an impact hammer.

(7) In-water impact pile driving shall not occur during the period from two hours before low tide until two hours after low tide.

(8) The following measures apply to all in-water pile driving, except during the "stabbing" phase, and all in-water chipping associated with demolition of the existing dock:

(i) No in-water pile driving (impact or vibratory) or chipping shall occur if any marine mammal is located within 200m of the hammer in any direction. If any marine mammal is sighted within or approaching this 200m safety zone, pile-driving or chipping must be suspended until the animal has moved outside the 200m safety zone or the animal is not resighted within 15 minutes.

(ii) If a group of more than 5 beluga whales is sighted within the Level B harassment isopleths, in-water pile driving shall be suspended. If the group is not re-sighted within 15 minutes, pile driving may resume.

(iii) If a beluga whale calf or group with a calf is sighted within or approaching a harassment zone, in-water pile driving shall cease and shall not be resumed until the calf or group is confirmed to be outside of the harassment zone and moving along a trajectory away from such zone. If the calf or group with a calf is not re-

sighted within 15 minutes, pile driving may resume.

(9) If maximum authorized take is reached or exceeded for a particular species, any marine mammal of that species entering into the harassment or safety isopleths will trigger mandatory in-water pile driving shut down.

(10) For Port of Anchorage operated in-water heavy machinery work other than pile driving or chipping (i.e., dredging, dump scowles, tug boats used to move barges, barge mounted hydraulic excavators, or clamshell equipment used to place or remove material), if a marine mammal comes within 50 m, those operations will cease and vessels will reduce to the slowest speed practicable while still maintaining control of the vessel and safe working conditions.

(11) In the event the Port of Anchorage conducts out-of-water blasting, detonation of charges will be delayed if a marine mammal is detected anywhere within a visible distance from the detonation site.

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

(b) [Reserved]

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

(a) The Holder of a Letter of Authorization issued pursuant to § 216.106 of this chapter and § 217.207, for activities described in § 217.200(a) is required to cooperate with NMFS, and any other Federal, state or local agency with authority to monitor the impacts of the activity on marine mammals. Unless specified otherwise in the Letter of Authorization, the Holder of the Letter of Authorization must notify the Administrator, Alaska Region, NMFS, by letter, e-mail, or telephone, at least 2 weeks prior to commencement of seasonal activities and dock demolition possibly involving the taking of marine mammals. If the activity identified in § 217.200(a) is thought to have resulted in the mortality or injury of any marine mammals or in any take of marine mammals not identified in § 217.202(b), the Holder of the Letter of Authorization must notify the Director, Office of Protected Resources, NMFS, or designee, by e-mail or telephone (301-713-2289), within 24 hours of the discovery of the injured or dead animal.

(b) The Holder of a Letters of Authorization must designate qualified, on-site marine mammal observers (MMOs), approved in advance by NMFS, as specified in the Letter of Authorization, to:

(1) Conduct visual marine mammal monitoring at the Port of Anchorage

beginning 30 minutes prior to and during all in-water pile driving or chipping and out-of-water blasting.

(2) Record the following information on NMFS-approved marine mammal sighting sheets whenever a marine mammal is detected:

(i) Date and time of initial sighting to end of sighting, tidal stage, and weather conditions (including Beaufort Sea State);

(ii) Species, number, group composition, initial and closest distance to pile driving hammer, and behavior (e.g., activity, group cohesiveness, direction and speed of travel, etc.) of animals throughout duration of sighting;

(iii) Any discrete behavioral reactions to in-water work;

(iv) The number (by species) of marine mammals that have been taken;

(v) Pile driving, chipping, or out of water blasting activities occurring at the time of sighting and if and why shut down was or was not implemented.

(3) Employ a scientific marine mammal monitoring team separate from the on-site MMOs to characterize beluga whale abundance, movements, behavior, and habitat use around the Port of Anchorage and observe, analyze, and document potential changes in behavior in response to in-water construction work. This monitoring team is not required to be present during all in-water pile driving operations but will continue monitoring one-year post in-water construction. The on-site MMOs and this marine mammal monitoring team shall remain in contact to alert each other to marine mammal presence when both teams are working.

(c) The Holder of a Letter of Authorization must conduct additional monitoring as required under an annual Letter of Authorization.

(d) The Holder of a Letter of Authorization shall submit a monthly report to NMFS' Headquarters Permits, Education and Conservation Division and the Alaska Region, Anchorage for all months in-water pile driving or chipping takes place. This report must contain the information listed in paragraph (b)(2) of this section.

(e) An annual report must be submitted at the time of application for renewal of a Letter of Authorization. This report will summarize all in-water construction activities and marine mammal monitoring from January 1–December 31, annually, and any discernable short or long term impacts from the Marine Terminal Expansion Project.

(f) A final report must be submitted to NMFS upon application for a subsequent incidental take

authorization or, if no future authorization is requested, no later than 90 days post expiration of these regulations. This report will:

- (1) Summarize the activities undertaken and the results reported in all previous reports;
- (2) Assess the impacts to marine mammals from the port expansion project; and
- (3) Assess the cumulative impacts on marine mammals.

#### **§ 217.206 Applications for Letters of Authorization.**

(a) To incidentally take marine mammals pursuant to these regulations, the U.S. citizen (as defined by § 216.103 of this chapter) conducting the activity identified in § 217.200(a) (the Port of Anchorage and MARAD) must apply for and obtain either an initial Letter of Authorization in accordance with § 217.207 or a renewal under § 217.208.

(b) The application must be submitted to NMFS at least 60 days before the expiration of the initial or current Letter of Authorization.

(c) Applications for a Letter of Authorization and for renewals of Letters of Authorization must include the following:

- (1) Name of the U.S. citizen requesting the authorization,
- (2) The date(s), duration, and the specified geographic region where the activities specified in § 217.200 will occur; and
- (3) The most current population estimate of Cook Inlet beluga whales and the estimated percentage of marine mammal populations potentially affected for the 12-month period of effectiveness of the Letter of Authorization;

(4) A summary of take levels, monitoring efforts and findings at the Port of Anchorage to date.

(d) The National Marine Fisheries Service will review an application for a Letter of Authorization in accordance with this section and, if adequate and complete, issue a Letter of Authorization.

#### **§ 217.207 Letters of Authorization.**

(a) A Letter of Authorization, unless suspended or revoked, 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 § 217.208.

(b) Each Letter of Authorization will set forth:

- (1) Permissible methods of incidental taking; and
- (2) Requirements for mitigation, monitoring and reporting, including, but not limited to, means of effecting the least practicable adverse impact on the species, its habitat, and on the availability of the species for subsistence uses.

(c) Issuance of a Letter of Authorization will be based on the determination that the number of marine mammals taken during the period the Letter of Authorization is valid will be small, that the total taking of marine mammals by the activities specified in § 217.200(a) will have no more than a negligible impact on the species or stock of affected marine mammal(s), and that the total taking will not have an unmitigable adverse impact on the availability of species or stocks of marine mammals for subsistence uses.

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

#### **§ 217.208 Renewal of Letters of Authorization.**

(a) A Letter of Authorization issued under § 216.106 of this chapter and § 217.207 for the activity identified in § 217.200(a) will be renewed annually upon:

(1) Notification to NMFS that the activity described in the application submitted under § 217.206 will be undertaken and that there will not be a substantial modification to the described work, mitigation or monitoring undertaken during the upcoming 12 months;

(2) Timely receipt of the monitoring reports required under § 217.205(d) and (e), and the Letter of Authorization issued under § 217.207, which has been reviewed and accepted by NMFS; and

(3) A determination by NMFS that the mitigation, monitoring and reporting measures required under §§ 217.204 and 217.205 and the Letter of Authorization issued under § 216.106 of this chapter and § 217.207, were undertaken and will be undertaken during the upcoming annual period of validity of a renewed Letter of Authorization; and

(4) A determination by NMFS that the number of marine mammals taken during the period of the Letter of Authorization will be small, that the total taking of marine mammals by the activities specified in § 217.200(a) will have no more than a negligible impact on the species or stock of affected marine mammal(s), and that the total taking will not have an unmitigable adverse impact on the availability of species or stocks of marine mammals for subsistence uses.

(b) If a request for a renewal of a Letter of Authorization issued under § 216.106 of this chapter and this section indicates that a substantial modification to the described work, mitigation or monitoring undertaken during the upcoming season will occur, NMFS will provide the public a period of 30 days for review and comment on the request.

(c) 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.

#### **§ 217.209 Modifications of Letters of Authorization.**

(a) Except as provided in paragraph (b) of this section, no substantive modification (including withdrawal or suspension) to the Letter of Authorization by NMFS, issued pursuant to § 216.106 of this chapter and § 217.207 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 § 217.208, 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 § 217.202(b), a Letter of Authorization issued pursuant to § 216.106 of this chapter and § 217.207 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.

[FR Doc. E9-17185 Filed 7-15-09; 4:15 pm]

BILLING CODE 3510-22-S