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significant risk to the well-being of the species or stocks of marine mammals specified in LOAs issued pursuant to §§ 216.106 of this chapter and 217.36, an LOA may be modified without prior notice or opportunity for public comment. Notice would be published in the FEDERAL REGISTER within thirty days of the action.

§ § 217.38–217.39 [Reserved]

Subpart E—Taking and Importing Marine Mammals; Alaska Gasline Development Corporation Liquefied Natural Gas Facilities Construction

SOURCE: 85 FR 50751, Aug. 17, 2020, unless otherwise noted.

EFFECTIVE DATE NOTE: At 85 FR 50751, Aug. 17, 2020, subpart E was added, effective Jan. 1, 2021, through Dec. 31, 2025.

§ 217.40 Specified activity and specified geographical region.

(a) Regulations in this subpart apply only to the Alaska Gasline Development Corporation (AGDC) or successor entities and those persons it authorizes or funds to conduct activities on its behalf for the taking of marine mammals that occurs in the area outlined in paragraph (b) of this section and that occurs incidental to the activities described in paragraph (c) of this section.

(b) The taking of marine mammals by AGDC may be authorized in a Letter of Authorization (LOA) only if it occurs within AGDC's Alaska liquefied natural gas (LNG) facilities' construction areas, which are located between the Beluga Landing shoreline crossing on the north and the Kenai River south of Nikiski on the south in Cook Inlet, Alaska.

(c) The taking of marine mammals during this project is only authorized if it occurs incidental to construction activities associated with the proposed LNG facilities or the Mainline crossing of Cook Inlet.

§ 217.41 Effective dates.

Regulations in this subpart are effective January 1, 2021 through December 31, 2025.

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§ 217.42 Permissible methods of taking.

Under LOAs issued pursuant to §§ 216.106 of this chapter and 217.46, the Holder of the LOAs (hereinafter “AGDC”) may incidentally, but not intentionally, take marine mammals within the area described in § 217.40(b) by Level A harassment and Level B harassment associated with pile driving and pipe laying activities, provided the activity is in compliance with all terms, conditions, and requirements of the regulations in this subpart and the applicable LOAs.

§ 217.43 Prohibitions.

Notwithstanding takings contemplated in § 217.42 and authorized by LOAs issued under §§ 216.106 of this chapter and 217.46, no person in connection with the activities described in § 217.40 may:

(a) Violate, or fail to comply with, the terms, conditions, and requirements of this subpart or a LOA issued under §§ 216.106 of this chapter and 217.46;

(b) Take any marine mammal not specified in such LOAs; and

(c) Take any marine mammal specified in such LOAs in any manner other than as specified.

§ 217.44 Mitigation requirements.

When conducting the activities identified in § 217.40(c), the mitigation measures contained in any LOAs issued under §§ 216.106 of this chapter and 217.46 must be implemented. These mitigation measures must include but are not limited to:

(a) *Time and area restriction.* AGDC must follow the following time and area restrictions.

(1) In-water pile driving must occur only during daylight hours. Times for other construction activities, such as pipe laying, anchor handling, and dredging are not restricted.

(2) Pile driving associated with the Mainline Material Offloading Facility (Mainline MOF) must not occur from June 1 to September 7 (pile driving can occur from September 8 to May 31).

(3) Other than in-water sheet pile driving and pile removal, anchor handling, trenching, pipe laying, and vessel transits related to these activities,

AGDC may not engage in in-water sound-producing activities within 10 miles (16 km) of the mean higher high water (MHHW) line of the Susitna Delta (Beluga River to the Little Susitna River) between April 15 and October 15 which produce sound levels in excess of 120 dB rms re 1µPa @ 1 m.

(b) *Establishment of monitoring and exclusion zones.* (1) For all relevant in-water construction activity, AGDC must designate Level A harassment zones with radial distances as identified in any LOA issued under §§ 216.106 of this chapter and 217.46.

(2) For all relevant in-water construction activity, AGDC must designate Level B harassment zones with radial distances as identified in any LOA issued under §§ 216.106 of this chapter and 217.46.

(3) For all in-water pile driving work, AGDC must implement an exclusion zone for each specific activity as identified in any LOA issued under §§ 216.106 of this chapter and 217.46. If a marine mammal comes within or enters the exclusion zone, AGDC must cease all operations.

(i) For humpback whale and killer whale during in-water pile driving activity, the exclusion zones must be based on the Level A harassment distances, but must not be less than 10 m from the pile.

(ii) For harbor porpoise and harbor seal during in-water pile driving activity, the exclusion zones must be based on the Level A harassment distances up to 1,000 m, but must not be less than 10 m from the pile.

(iii) For Cook Inlet beluga whale during in-water pile driving activity, the exclusion zones must be based on the Level B harassment distances.

(iv) A 2,900-m exclusion zone must be established for Cook Inlet beluga whale before pipe laying activity associated with anchor handling can occur.

(v) A minimum of 10-m exclusion zone must be established for in-water construction and heavy machinery not addressed elsewhere in this paragraph (b)(3).

(c) *Monitoring of exclusion zones.* Pile driving must only take place when the exclusion zones are visible and can be adequately monitored. If visibility degrades to where the entire exclusion

zone cannot be effectively monitored during pile driving, AGDC may continue to drive the pile section that was being driven to its target depth, but may not drive additional sections of pile.

(d) *Shutdown measures.* (1) AGDC must deploy protected species observers (PSOs) to monitor marine mammals during in-water pile driving and pipe laying activities.

(2) Monitoring must take place from 30 minutes prior to initiation of pile driving or pipe laying activities through 30 minutes post-completion of pile driving or pipe laying activities.

(i) For pile driving activity, pre-activity monitoring must be conducted for 30 minutes to confirm that the exclusion zone is clear of marine mammals, and pile driving may commence only if observers have declared the exclusion zone clear of marine mammals for that full duration of time. Monitoring must occur throughout the time required to drive a pile. A determination that the exclusion zone is clear must be made during a period of good visibility (*i.e.*, the entire exclusion zone and surrounding waters must be visible to the naked eye).

(ii) If marine mammals are found within the exclusion zone, pile driving of the segment must be delayed until they move out of the area. If a marine mammal is seen above water and then dives below, the contractor must wait 30 minutes for large cetaceans (humpback whale) and 15 minutes for small cetaceans (beluga and killer whales and harbor porpoise) and pinnipeds. If no marine mammals of that species are seen by the observer in that time it can be assumed that the animal has moved beyond the exclusion zone.

(iii) If pile driving of a segment ceases for 30 minutes or more and a marine mammal is sighted within the designated exclusion zone prior to commencement of pile driving, the observer(s) must notify the pile driving operator (or other authorized individual) immediately and continue to monitor the exclusion zone. Operations may not resume until the marine mammal has exited the exclusion zone or 30 minutes have elapsed for large cetaceans or 15 minutes have elapsed

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for small cetaceans and pinnipeds since the last sighting.

(3) If a marine mammal authorized to be taken by Level B harassment enters or approaches the exclusion zone, if a marine mammal not specified in the LOAs enters the Level B harassment zone, or if the take of a marine mammal species or stock has reached the take limits specified in any LOA issued under §§216.106 of this chapter and 217.46 and enters the Level B harassment zone, AGDC must halt all construction activities at that location. If construction is halted or delayed due to the presence of a marine mammal, the activity may not commence or resume until either the animal has voluntarily left and been visually confirmed beyond the shutdown or Level B harassment zone, whichever applicable, or 30 minutes have passed without re-detection of the animal if it is a larger cetacean (humpback whale), or 15 minutes have passed without re-detection of the animal if it is a small cetacean (beluga and killer whales and porpoises) or pinniped.

(e) *Soft start.* (1) AGDC must implement soft start techniques for impact pile driving. AGDC must conduct an initial set of three strikes from the impact hammer at 40 percent energy, followed by a 30-second waiting period, then two subsequent three strike sets with associated 30-seconds waiting periods at the reduced energy.

(2) Soft start must be required for any impact driving, including at the beginning of the day, and at any time following a cessation of impact pile driving of 30 minutes or longer.

(f) *Noise attenuation device.* For pile-driving at the Mainline MOF near the Beluga River, and on the east side of Cook Inlet near Nikiski associated with the liquefaction facility, AGDC must deploy air bubble curtains around piles. If the sound source verification (SSV) measurements indicate that the best-performing bubble curtain configuration provides less than a 2 dB reduction in in-water sound beyond the bubble curtain, use of the bubble curtain may be discontinued.

(g) *Vessel transit.* (1) Operators of vessels must, at all times, avoid approaching within 100 yards of marine mammals. Operators must observe direction

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of travel of marine mammals and attempt to maintain a distance of 100 yards or greater between the animal and the vessel by working to alter vessel course or velocity.

(2) The vessel operator must avoid placing the vessel between members of a group of marine mammals in a way that may cause separation of individuals in the group from other individuals in that group. A group is defined as being three or more whales observed within 500-m of one-another and displaying behaviors of directed or coordinated activity (*e.g.*, migration or group feeding).

(3) If the vessel approaches within 1.6 km (1 mi) of one or more whales, the vessel operator must take reasonable precautions to avoid potential interaction with the whales by taking one or more of the following actions, as appropriate:

(i) Steering to the rear of whale(s) to avoid causing changes in their direction of travel.

(ii) Maintaining vessel speed of 10 knots (19 km/hr) or less when transiting to minimize the likelihood of lethal vessel strikes.

(iii) Reducing vessel speed to less than 5 knots (9 km/hour) within 274 m (300 yards) of the whale(s).

(4) Project vessels must remain a minimum of 2.8 km (1.5 nm) seaward of the mean lower low water (MLLW) line between the Little Susitna River and –150.80 degrees west longitude to minimize the impacts of vessel sound and avoid strikes on Cook Inlet beluga whales between June 1 and September 7. The Susitna Delta Exclusion Zone is defined as the union of the areas defined by:

(i) A 16-km (10-mile) buffer of the Beluga River thalweg seaward of the mean lower low water (MLLW) line;

(ii) A 16-km (10-mile) buffer of the Little Susitna River thalweg seaward of the MLLW line; and

(iii) A 16-km (10-mile) seaward buffer of the MLLW line between the Beluga River and Little Susitna River.

(iv) The buffer extends landward along the thalweg to include intertidal waters within rivers and streams up to their mean higher high water line (MHHW). The seaward boundary has been simplified so that it is defined by

lines connecting readily discernable landmarks.

(5) For vessels operating in the Susitna Delta Exclusion Zone, the following must be implemented:

(i) All project vessels operating within the designated Susitna Delta area must maintain a speed over ground below 4 knots. PSOs must note the numbers, date, time, coordinates, and proximity to vessels of all belugas observed during operations, and report these observations to NMFS in monthly PSO reports.

(ii) Vessel crew must be trained to monitor for Endangered Species Act (ESA)-listed species prior to and during all vessel movements within the Susitna Delta Exclusion Zone. The vessel crew must report sightings to the PSO team for inclusion in the overall sighting database and reports.

(iii) Vessel operators must not move their vessels when they are unable to adequately observe the 100-m zone around vessels under power (in gear) due to darkness, fog, or other conditions, unless necessary for ensuring human safety.

§ 217.95 Requirements for monitoring and reporting.

(a) *Marine mammal visual monitoring—*
(1) *Protected species observers.* AGDC must employ trained protected species observers (PSO) to conduct marine mammal monitoring for its LNG facilities construction projects.

(i) The PSOs must observe and collect data on marine mammals in and around the project area for 30 minutes before, during, and for 30 minutes after all construction work. PSOs must have no other assigned tasks during monitoring periods, and must be placed at appropriate and safe vantage point(s) practicable to monitor for marine mammals and implement shutdown or delay procedures, when applicable, through communication with the equipment operator.

(ii) [Reserved]

(2) *Protected species observer qualifications.* AGDC must adhere to the following observer qualifications:

(i) Independent PSOs (*i.e.*, not construction personnel) who have no other assigned tasks during monitoring periods must be used;

(ii) Where a team of three or more PSOs are required, a lead observer or monitoring coordinator must be designated. The lead observer must have prior experience working as a marine mammal observer during construction;

(iii) Other PSOs may substitute education (degree in biological science or related field) or training for experience;

(iv) AGDC must submit PSO CVs for approval by NMFS prior to the onset of pile driving;

(v) The PSOs must have the ability to conduct field observations and collect data according to assigned protocols;

(vi) The PSOs must have the experience or training in the field identification of marine mammals, including the identification of behaviors;

(vii) The PSOs must have sufficient training, orientation, or experience with the construction operation to provide for personal safety during observations;

(viii) The PSOs must have writing skills sufficient to prepare a report of observations including but not limited to the number and species of marine mammals observed; dates and times when in-water construction activities were conducted; dates, times, and reason for implementation of mitigation (or why mitigation was not implemented when required); and marine mammal behavior; and

(ix) The PSOs must have the ability to communicate orally, by radio or in person, with project personnel to provide real-time information on marine mammals observed in the area as necessary.

(3) *Marine mammal monitoring protocols.* AGDC must adhere to the following marine mammal monitoring protocols:

(i) For pile driving activities, a minimum of two PSOs must be on duty at all times;

(ii) For pile driving activities, PSOs must be stationed on a bluff with minimum height 500 feet above sea level immediately above the construction site;

(iii) For marine mammal monitoring during pipe laying activities, at least one PSO must be on the barge and on watch;