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Subpart A—Taking Marine Mammals Incidental to Russian River Estuary Management Activities

SOURCE: 87 FR 23120, Apr. 19, 2022, unless otherwise noted.

EFFECTIVE DATE NOTE: At 87 FR 23120, Apr. 19, 2022, subpart A was revised, effective Apr. 21, 2022, through Apr. 20, 2027.

§ 217.1 Specified activity and specified geographical region.

(a) Regulations in this subpart apply only to the Sonoma County Water Agency (SCWA) 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 estuary management activities.

(b) The taking of marine mammals by SCWA may be authorized in a Letter of Authorization (LOA) only if it occurs at Goat Rock State Beach or in the Russian River estuary in California.

§ 217.2 Effective dates.

Regulations in this subpart are effective from April 21, 2022, through April 20, 2027.

§ 217.3 Permissible methods of taking.

(a) Under LOAs issued pursuant to §§ 216.106 of this chapter and 217.7, the Holder of the LOA (hereinafter

“SCWA”) may incidentally, but not intentionally, take marine mammals within the area described in §217.1(b) of this chapter by Level B harassment associated with estuary management activities, provided the activity is in compliance with all terms, conditions, and requirements of the regulations in this subpart and the appropriate LOA.

(b) [Reserved]

§217.4 Prohibitions.

Except for the takings contemplated in §217.3 and authorized by an LOA issued under §§216.106 of this chapter and 217.7, it is unlawful for any person to do any of the following in connection with the activities described in §217.1 of this chapter:

(a) Violate, or fail to comply with, the terms, conditions, and requirements of this subpart or an LOA issued under §§216.106 of this chapter and 217.7;

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

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

(d) Take a marine mammal specified in such LOAs if NMFS determines such taking results in more than a negligible impact on the species or stocks of such marine mammal; or

(e) Take a marine mammal specified in such LOAs if NMFS determines such taking results in an unmitigable adverse impact on the species or stock of such marine mammal for taking for subsistence uses.

§217.5 Mitigation requirements.

When conducting the activities identified in §217.1(a), the mitigation measures contained in any LOA issued under §§216.106 of this chapter and 217.7 must be implemented. These mitigation measures shall include but are not limited to:

(a) General conditions:

(1) A copy of any issued LOA must be in the possession of SCWA, its designees, and work crew personnel operating under the authority of the issued LOA.

(2) If SCWA observes a pup that may be abandoned, it shall contact the National Marine Fisheries Service (NMFS) West Coast Regional Stranding

Coordinator immediately and also report the incident to NMFS Office of Protected Resources within 48 hours. Observers shall not approach or move the pup.

(b) SCWA crews shall cautiously approach the haul-out ahead of heavy equipment.

(c) SCWA staff shall avoid walking or driving equipment through the seal haul-out.

(d) Crews on foot shall make an effort to be seen by seals from a distance.

(e) All work shall be completed as efficiently as possible and with the smallest amount of heavy equipment possible.

(f) Boats operating near river haul-outs during monitoring shall be kept within posted speed limits and driven as far from the haul-outs as safely possible.

(g) SCWA shall implement the following mitigation measures during pupping season (March 15–June 30):

(1) SCWA shall maintain a one week no-work period between water level management events (unless flooding is an immediate threat) to allow for an adequate disturbance recovery period. During the no-work period, equipment must be removed from the beach;

(2) A water level management event may not occur for more than two consecutive days unless flooding threats cannot be controlled.

(3) If a pup less than one week old is on the beach where heavy machinery will be used or on the path used to access the work location, the management action shall be delayed until the pup has left the site or the latest day possible to prevent flooding while still maintaining suitable fish rearing habitat. In the event that a pup remains present on the beach in the presence of flood risk, SCWA shall consult with NMFS and the California Department of Fish and Wildlife to determine the appropriate course of action. SCWA shall determine if pups less than one week old are on the beach prior to a breaching event.

(4) Physical and biological monitoring shall not be conducted if a pup less than one week old is present at the monitoring site or on a path to the site.

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§ 217.6 Requirements for monitoring and reporting.

(a) Monitoring and reporting shall be conducted in accordance with the approved Pinniped Monitoring Plan.

(b) Reporting:

(1) Annual reporting:

(i) SCWA shall submit an annual summary report to NMFS not later than ninety days following the end of a given calendar year. SCWA shall provide a final report within thirty days following resolution of comments on the draft report.

(ii) These reports shall contain, at minimum, the following:

(A) The number of seals taken, by species and age class (if possible);

(B) Behavior prior to and during water level management events;

(C) Start and end time of activity;

(D) Estimated distances between source and seals when disturbance occurs;

(E) Weather conditions (*e.g.*, temperature, wind, etc.);

(F) Haul-out reoccupation time of any seals based on post-activity monitoring;

(G) Tide levels and estuary water surface elevation; and

(H) Seal census from haul-out monitoring.

(2) [Reserved]

(c) Reporting of injured or dead marine mammals:

(1) In the unanticipated event that the activity defined in § 217.1(a) clearly causes the take of a marine mammal in a prohibited manner, SCWA shall immediately cease such activity and report the incident to the Office of Protected Resources (OPR), NMFS and the West Coast Regional Stranding Coordinator, NMFS. Activities shall not resume until NMFS is able to review the circumstances of the prohibited take. NMFS will work with SCWA to determine what measures are necessary to minimize the likelihood of further prohibited take and ensure MMPA compliance. SCWA may not resume their activities until notified by NMFS. The report must include the following information:

(i) Time and date of the incident;

(ii) Description of the incident;

(iii) Environmental conditions;

(iv) Description of all marine mammal observations in the 24 hours preceding the incident;

(v) Species identification or description of the animal(s) involved;

(vi) Fate of the animal(s); and

(vii) Photographs or video footage of the animal(s).

(2) In the event that SCWA discovers an injured or dead marine mammal and determines that the cause of the injury or death is unknown and the death is relatively recent (*e.g.*, in less than a moderate state of decomposition), SCWA shall immediately report the incident to OPR and the West Coast Regional Stranding Coordinator, NMFS. The report must include the information identified in paragraph (c)(1) of this section. Activities may continue while NMFS reviews the circumstances of the incident. NMFS will work with SCWA to determine whether additional mitigation measures or modifications to the activities are appropriate.

(3) In the event that SCWA discovers an injured or dead marine mammal and determines that the injury or death is not associated with or related to the activities defined in § 217.1(a) (*e.g.*, previously wounded animal, carcass with moderate to advanced decomposition, scavenger damage), SCWA shall report the incident to OPR and the West Coast Regional Stranding Coordinator, NMFS, within 24 hours of the discovery. SCWA shall provide photographs or video footage or other documentation of the stranded animal sighting to NMFS.

(4) Pursuant to paragraphs (c)(2–3) of this section, SCWA may use discretion in determining what injuries (*i.e.*, nature and severity) are appropriate for reporting. At minimum, SCWA must report those injuries considered to be serious (*i.e.*, will likely result in death) or that are likely caused by human interaction (*e.g.*, entanglement, gunshot). Also pursuant to sections paragraphs (c)(2–3) of this section, SCWA may use discretion in determining the appropriate vantage point for obtaining photographs of injured/dead marine mammals.

§ 217.7 Letters of Authorization.

(a) To incidentally take marine mammals pursuant to these regulations, SCWA must apply for and obtain an LOA.

(b) An LOA, unless suspended or revoked, may be effective for a period of time not to exceed the expiration date of these regulations.

(c) If an LOA expires prior to the expiration date of these regulations, SCWA may apply for and obtain a renewal of the LOA.

(d) In the event of projected changes to the activity or to mitigation and monitoring measures required by an LOA, SCWA must apply for and obtain a modification of the LOA as described in § 217.8.

(e) The LOA shall set forth:

(1) Permissible methods of incidental taking;

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

(3) Requirements for monitoring and reporting.

(f) Issuance of the LOA shall be based on a determination that the level of taking will be consistent with the findings made for the total taking allowable under these regulations.

(g) Notice of issuance or denial of an LOA shall be published in the FEDERAL REGISTER within 30 days of a determination.

§ 217.8 Renewals and modifications of Letters of Authorization.

(a) An LOA issued under §§ 216.106 of this chapter and 217.7 for the activity identified in § 217.1(a) shall be renewed or modified upon request by the applicant, provided that:

(1) The proposed specified activity and mitigation, monitoring, and reporting measures, as well as the anticipated impacts, are the same as those described and analyzed for these regulations (excluding changes made pursuant to the adaptive management provision in paragraph (c)(1) of this section), and

(2) NMFS determines that the mitigation, monitoring, and reporting measures required by the previous LOA

under these regulations were implemented.

(b) For an LOA modification or renewal requests by the applicant that include changes to the activity or the mitigation, monitoring, or reporting (excluding changes made pursuant to the adaptive management provision in paragraph (c)(1) of this section) that do not change the findings made for the regulations or result in no more than a minor change in the total estimated number of takes (or distribution by species or years), NMFS may publish a notice of proposed LOA in the FEDERAL REGISTER, including the associated analysis of the change, and solicit public comment before issuing the LOA.

(c) An LOA issued under §§ 216.106 of this chapter and 217.7 for the activity identified in § 217.1(a) may be modified by NMFS under the following circumstances:

(1) Adaptive Management—NMFS may modify (including augment) the existing mitigation, monitoring, or reporting measures (after consulting with SCWA regarding the practicability of the modifications) if doing so creates a reasonable likelihood of more effectively accomplishing the goals of the mitigation and monitoring set forth in the preamble for these regulations.

(i) Possible sources of data that could contribute to the decision to modify the mitigation, monitoring, or reporting measures in an LOA:

(A) Results from SCWA's monitoring from the previous year(s).

(B) Results from other marine mammal and/or sound research or studies.

(C) Any information that reveals marine mammals may have been taken in a manner, extent or number not authorized by these regulations or subsequent LOAs.

(ii) If, through adaptive management, the modifications to the mitigation, monitoring, or reporting measures are substantial, NMFS will publish a notice of proposed LOA in the FEDERAL REGISTER and solicit public comment.

(2) Emergencies—If NMFS determines that an emergency exists that poses a 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

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217.7, 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.

§§ 217.9–217.10 [Reserved]

Subpart B [Reserved]

Subpart C—Taking Marine Mammals Incidental to Research and Monitoring in Southern Alaska National Parks

SOURCE: 84 FR 8274, Mar. 7, 2019, unless otherwise noted.

EFFECTIVE DATE NOTE: At 84 FR 8274, Mar. 7, 2019, subpart C was added, effective Mar. 7, 2019, through Feb. 29, 2024.

§ 217.20 Specified activity and specified geographical region.

(a) Regulations in this subpart apply only to the National Park Service (NPS) 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 NPS's research and monitoring activities listed in the Letters of Authorization (LOA).

(b) The taking of marine mammals by NPS may be authorized in an LOA only if it occurs at Glacier Bay National Park (GLBA NP) or in the NPS's Southwest Alaska Inventory and Monitoring Network (SWAN) sites.

§ 217.21 Effective dates.

Regulations in this subpart are effective from March 7, 2019 through February 29, 2024.

§ 217.22 Permissible methods of taking.

Under LOAs issued pursuant to §§ 216.106 of this chapter and 217.26, the Holder of the LOA (hereinafter “NPS”) may incidentally, but not intentionally, take marine mammals within the area described in § 217.20(b) by Level B harassment associated with research and monitoring activities, provided the activity is in compliance with all terms, conditions, and require-

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ments of the regulations in this subpart and the appropriate LOA.

§ 217.23 Prohibitions.

Notwithstanding takings contemplated in § 217.20 and authorized by an LOA issued under §§ 216.106 of this chapter and 217.26, no person in connection with the activities described in § 217.20 may:

(a) Violate, or fail to comply with, the terms, conditions, and requirements of this subpart or an LOA issued under §§ 216.106 of this chapter and 217.26;

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

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

(d) Take a marine mammal specified in such LOAs if NMFS determines such taking results in more than a negligible impact on the species or stocks of such marine mammal; or

(e) Take a marine mammal specified in such LOAs if NMFS determines such taking results in an unmitigable adverse impact on the species or stock of such marine mammal for taking for subsistence uses.

§ 217.24 Mitigation requirements.

When conducting the activities identified in § 217.20(a), the mitigation measures contained in any LOA issued under §§ 216.106 of this chapter and 217.24 must be implemented. These mitigation measures shall include but are not limited to:

(a) *General conditions.* (1) A copy of any issued LOA must be in the possession of NPS, its designees, and additional survey crew personnel operating under the authority of the issued LOA;

(2) Before all surveys, the lead NPS biologist must instruct additional survey crew on appropriate conduct when in the vicinity of hauled-out marine mammals. This training must brief survey personnel on marine mammals (inclusive of identification as needed, e.g., neonates); and

(3) NPS must avoid interaction with any marine mammal species for which take is not authorized (or any species for which authorized take numbers have been met). For humpback, killer,

and beluga whales, NPS must avoid operation of a motor vessel within $\frac{1}{4}$ nautical mile of these cetaceans. If accidentally positioned within $\frac{1}{4}$ nautical mile of these cetaceans, NPS must slow the vessel speed to 10 knots or less and maintain course away from the marine mammal until at least $\frac{1}{4}$ nautical mile of separation exists;

(b) *Glacier Bay gull and climate monitoring.* (1) On an annual basis, NPS may conduct a maximum of five days of gull monitoring for each survey location listed in the LOA;

(2) On an annual basis, the NPS may conduct a maximum of three days of activities related to climate monitoring on Lone Island;

(3) NPS is required to conduct pre-survey monitoring before deciding to access a study site;

(4) Prior to deciding to land onshore, NPS must use high-powered image stabilizing binoculars before approaching at distances of greater than 500 m (1,640 ft) to determine and document the number, species, and location of hauled-out marine mammals;

(5) During pre-survey monitoring, vessels must maintain a distance of 328 to 1,640 ft (100 to 500 m) from the shoreline;

(6) If a harbor seal pup less than one week of age (neonate) is present within or near a study site or a path to a study site, NPS must not access the site nor conduct the study at that time. In addition, if during the activity, a pup less than one week of age is observed, all research activities must conclude for the day;

(7) NPS must maintain a distance of at least 100 m from any Steller sea lion;

(8) NPS must perform controlled and slow ingress to islands where harbor seals are present;

(9) NPS must monitor for offshore predators at the study sites during pre-survey monitoring and must avoid research activities when killer whales (*Orcinus orca*) or other predators are observed within a 1 mile radius; and

(10) NPS must maintain a quiet working atmosphere, avoid loud noises, and must use hushed voices in the presence of hauled-out pinnipeds; and

(c) *SWAN marine bird surveys.* (1) On an annual basis, NPS may conduct one

summer survey at each location listed in the LOA;

(2) On an annual basis, the NPS may conduct one winter survey at each location listed in the LOA;

(3) NPS must maintain a minimum vessel distance of 100 meters from the shoreline at all times while surveying; and

(4) If hauled out Steller sea lions or harbor seals are observed, NPS must maintain the vessel speed and minimum distance. If survey conditions allow, the survey must be attempted from a distance greater than 150 meters.

§ 217.25 Requirements for monitoring and reporting.

NPS is required to conduct marine mammal monitoring during research and monitoring activities. NPS and/or its designees must record the following for the designated monitoring activity:

(a) *Glacier Bay gull and climate monitoring.* (1) Species counts (with numbers of adults/juveniles); and numbers of disturbances, by species and age, according to a three-point scale of intensity;

(2) Information on the weather, including the tidal state and horizontal visibility;

(3) The observer will note the presence of any offshore predators (date, time, number, and species); and

(4) The observer must note unusual behaviors, numbers, or distributions of pinnipeds, such that any potential follow-up research can be conducted by the appropriate personnel; marked or tag-bearing pinnipeds or carcasses, allowing transmittal of the information to appropriate agencies; and any rare or unusual species of marine mammal for agency follow-up. The observer must report that information to NMFS's Alaska Fisheries Science Center and/or the Alaska Department of Fish and Game Marine Mammal Program.

(b) *SWAN marine bird surveying.* (1) Species counts and numbers of type 3, flushing, disturbances;

(2) Information on the weather, including the tidal state and horizontal visibility; and

(3) The observer must note unusual behaviors, numbers, or distributions of

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pinnipeds, such that any potential follow-up research can be conducted by the appropriate personnel; marked or tag-bearing pinnipeds or carcasses, allowing transmittal of the information to appropriate agencies; and any rare or unusual species of marine mammal for agency follow-up. The observer must report that information to NMFS's Alaska Fisheries Science Center and/or the Alaska Department of Fish and Game Marine Mammal Program.

(c) *Annual reporting.* NPS must submit separate annual draft reports for GLBA NP and SWAN on all monitoring conducted within ninety calendar days of the completion of annual research and monitoring activities. Final reports for both GLBA NP and SWAN must be prepared and submitted within thirty days following resolution of comments on each draft report from NMFS. This report must contain:

(1) A summary and table of the dates, times, and weather during all research activities;

(2) Species, number, location, and behavior of any marine mammals observed throughout all monitoring activities;

(3) An estimate of the number (by species) of marine mammals exposed to acoustic or visual stimuli associated with the research activities; and

(4) A description of the implementation and effectiveness of the monitoring and mitigation measures of the Authorization and full documentation of methods, results, and interpretation pertaining to all monitoring.

(d) *Comprehensive reporting.* NPS must submit a comprehensive 5-year report covering all activities conducted under the incidental take regulations at least 90 days prior to expiration of these regulations if new regulations are sought or 90 days after expiration of regulations.

(e) *Reporting of injured or dead marine mammals.* (1) In the unanticipated event that the activity defined in § 219.20(a) clearly causes the take of a marine mammal in a prohibited manner such as an injury (Level A harassment), serious injury, or mortality, NPS must immediately cease the specified activities and report the incident to the Office of Protected Resources, NMFS, and

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the Alaska Regional Stranding Coordinator, NMFS. The report must include the following information:

- (i) Time and date of the incident;
- (ii) Description of the incident;
- (iii) Environmental conditions (e.g., wind speed and direction, Beaufort sea state, cloud cover, and visibility);
- (iv) Description of all marine mammal observations and active sound source use in the 24 hours preceding the incident;
- (v) Species identification or description of the animal(s) involved;
- (vi) Fate of the animal(s); and
- (vii) Photographs or video footage of the animal(s);

(2) Activities must not resume until NMFS is able to review the circumstances of the prohibited take. NMFS will work with NPS to determine what measures are necessary to minimize the likelihood of further prohibited take and ensure MMPA compliance. NPS must not resume their activities until notified by NMFS;

(3) In the event that NPS discovers an injured or dead marine mammal, and the lead observer determines that the cause of the injury or death is unknown and the death is relatively recent (e.g., in less than a moderate state of decomposition), NPS must immediately report the incident to the Office of Protected Resources, NMFS, and the Alaska Stranding Coordinator, NMFS. The report must include the same information identified in paragraph (e)(1) of this section. Activities may continue while NMFS reviews the circumstances of the incident. NMFS will work with NPS to determine whether additional mitigation measures or modifications to the activities are appropriate;

(4) In the event that NPS discovers an injured or dead marine mammal and determines that the injury or death is not associated with or related to the activities defined in § 217.20(a) (e.g., previously wounded animal, carcass with moderate to advanced decomposition, scavenger damage), NPS must report the incident to OPR and the Alaska Stranding Coordinator, NMFS, within 24 hours of the discovery. NPS must provide photographs or video footage or other documentation of the stranded animal sighting to NMFS.

NPS can continue their research activities; and

(5) Pursuant to paragraphs (e)(2) through (4) of this section, NPS may use discretion in determining what injuries (*i.e.*, nature and severity) are appropriate for reporting. At minimum, NPS must report those injuries considered to be serious (*i.e.*, will likely result in death) or that are likely caused by human interaction (e.g., entanglement, gunshot). Also pursuant to paragraphs (e)(3) and (4) of this section, NPS may use discretion in determining the appropriate vantage point for obtaining photographs of injured/dead marine mammals.

§ 217.26 Letters of Authorization.

(a) To incidentally take marine mammals pursuant to these regulations, NPS must apply for and obtain an LOA.

(b) An LOA, unless suspended or revoked, may be effective for a period of time not to exceed the expiration date of these regulations.

(c) If an LOA expires prior to the expiration date of these regulations, NPS may apply for and obtain a renewal of the LOA.

(d) In the event of projected changes to the activity or to mitigation and monitoring measures required by an LOA, NPS must apply for and obtain a modification of the LOA as described in § 217.27.

(e) The LOA shall set forth:

(1) Permissible methods of incidental taking;

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

(3) Requirements for monitoring and reporting.

(f) Issuance of the LOA shall be based on a determination that the level of taking will be consistent with the findings made for the total taking allowable under these regulations.

(g) Notice of issuance or denial of an LOA shall be published in the FEDERAL REGISTER within 30 days of a determination.

§ 217.27 Renewals and modifications of Letters of Authorization.

(a) An LOA issued under §§ 216.106 of this chapter and 217.26 for the activity identified in § 217.20(a) shall be renewed or modified upon request by the applicant, provided that:

(1) The proposed specified activity and mitigation, monitoring, and reporting measures, as well as the anticipated impacts, are the same as those described and analyzed for these regulations (excluding changes made pursuant to the adaptive management provision in paragraph (c)(1) of this section); and

(2) NMFS determines that the mitigation, monitoring, and reporting measures required by the previous LOA under these regulations were implemented.

(b) For an LOA modification or renewal requests by the applicant that include changes to the activity or the mitigation, monitoring, or reporting (excluding changes made pursuant to the adaptive management provision in paragraph (c)(1) of this section) that do not change the findings made for the regulations or result in no more than a minor change in the total estimated number of takes (or distribution by species or years), NMFS may publish a notice of proposed LOA in the FEDERAL REGISTER, including the associated analysis of the change, and solicit public comment before issuing the LOA.

(c) An LOA issued under §§ 216.106 of this chapter and 217.26 for the activity identified in § 217.20(a) may be modified by NMFS under the following circumstances:

(1) *Adaptive management.* NMFS may modify (including augment) the existing mitigation, monitoring, or reporting measures (after consulting with NPS regarding the practicability of the modifications) if doing so creates a reasonable likelihood of more effectively accomplishing the goals of the mitigation and monitoring set forth in the preamble for these regulations.

(i) Possible sources of data that could contribute to the decision to modify the mitigation, monitoring, or reporting measures in an LOA:

(A) Results from NPS's monitoring from the previous year(s).

(B) Results from other marine mammal research or studies.

(C) Any information that reveals marine mammals may have been taken in a manner, extent or number not authorized by these regulations or subsequent LOAs.

(ii) If, through adaptive management, the modifications to the mitigation, monitoring, or reporting measures are substantial, NMFS shall publish a notice of proposed LOA in the FEDERAL REGISTER and solicit public comment.

(2) *Emergencies.* If NMFS determines that an emergency exists that poses a 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 217.26, 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.

§§ 217.28–217.29 [Reserved]

Subpart D—Taking Marine Mammals Incidental to Construction and Operation of the Liberty Drilling and Production Island

SOURCE: 84 FR 70322, Dec. 20, 2019, unless otherwise noted.

EFFECTIVE DATE NOTE: At 84 FR 70322, Dec. 20, 2019, subpart D was added, effective Dec. 1, 2021, through Nov. 30 2026.

§ 217.30 Specified activity and specified geographical region.

(a) Regulations in this subpart apply only to Hilcorp LLC (Hilcorp) and those persons it authorizes or funds to conduct activities on its behalf for the taking of marine mammals that occurs in the areas outlined in paragraph (b) of this section and that occurs incidental to construction, maintenance, and operation of the Liberty Drilling and Production Island (LDPI) and associated infrastructure.

(b) The taking of marine mammals by Hilcorp may be authorized in a Letter of Authorization (LOA) only if it occurs within the Beaufort Sea, Alaska.

§ 217.31 Effective dates.

Regulations in this subpart are effective from December 1, 2021, through November 30, 2026.

§ 217.32 Permissible methods of taking.

Under LOAs issued pursuant to §§216.106 of this chapter and 217.36, the Holder of the LOA (hereinafter “Hilcorp”) may incidentally, but not intentionally, take marine mammals within the area described in §217.30(b) by mortality, serious injury, Level A harassment, or Level B harassment associated with the LDPI construction and operation activities, including associated infrastructure, provided the activities are in compliance with all terms, conditions, and requirements of the regulations in this subpart and the appropriate LOA.

§ 217.33 Prohibitions.

Notwithstanding takings contemplated in §217.32 and authorized by an LOA issued under §§216.106 of this chapter and 217.36, no person in connection with the activities described in §217.30 may:

(a) Violate, or fail to comply with, the terms, conditions, and requirements of this subpart or an LOA issued under §§216.106 of this chapter and 217.36;

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

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

(d) Take a marine mammal specified in such LOAs if the National Marine Fisheries Service (NMFS) determines such taking results in more than a negligible impact on the species or stocks of such marine mammal; or

(e) Take a marine mammal specified in such LOAs if NMFS determines such taking results in an unmitigable adverse impact on the species or stock of such marine mammal for taking for subsistence uses.

§ 217.34 Mitigation requirements.

When conducting the activities identified in §217.30(a), the mitigation measures contained in any LOA issued under §216.106 of this chapter must be

implemented. These mitigation measures shall include but are not limited to:

(a) *General conditions.* (1) Hilcorp must renew, on an annual basis, the Plan of Cooperation (POC), throughout the life of the regulations in this subpart;

(2) A copy of any issued LOA must be in the possession of Hilcorp, its designees, and work crew personnel operating under the authority of the issued LOA;

(3) Hilcorp must conduct briefings for construction and ice road supervisors and crews, and the marine mammal and acoustic monitoring teams prior to the start of annual ice road or LDPI construction, and when new personnel join the work, in order to explain responsibilities, communication procedures, the marine mammal monitoring protocol, and operational procedures;

(4) Hilcorp must allow subsistence hunters to use the LDPI for safe harbor during severe storms, if requested by hunters;

(5) In the unanticipated event of an oil spill during LDPI operational years, Hilcorp must notify NMFS of the spill within 48 hours, regardless of size, and implement measures contained within the Liberty Oil Spill Response Plan; and

(6) Hilcorp must strive to complete pile driving and pipeline installation during the ice-covered season.

(7) Except during takeoff and landing and in emergency situations, aircraft must maintain an altitude of at least 457 m (1,500 ft). If a marine mammal is observed, then a horizontal distance of 305 m (100 ft) of whales or seals will be maintained between the aircraft and the observed marine mammals.

(b) *Ice road construction, maintenance, and operation.* (1) Hilcorp must implement the NMFS-approved Ice Road and Ice Trail Best Management Practices (BMPs) and the Wildlife Action Plan. These documents may be updated as needed throughout the life of the regulations in this subpart, in consultation with NMFS.

(2) Hilcorp must not approach ringed seal structures (i.e., lairs or breathing holes) within 150 m or ringed seals within 50 m.

(c) *Liberty Drilling Production Island construction.* (1) For all pile driving and construction activities involving heavy equipment, Hilcorp must implement a minimum shutdown zone of 10 meters (m) from any marine mammal in water or seals on land. If a marine mammal comes within or is about to enter the shutdown zone, such operations must cease immediately;

(2) For all pile driving activity, Hilcorp shall implement shutdown zones with radial distances as identified in any LOA issued under §§216.106 of this chapter and 217.36. If a marine mammal comes within or is about to enter the shutdown zone, such operations must cease immediately. NMFS may adjust the shutdown zones pending review and approval of an acoustic monitoring report (see §217.35);

(3) Hilcorp must employ NMFS-approved protected species observers (PSOs) and designate monitoring zones with radial distances as identified in any LOA issued under §§216.106 of this chapter and 217.36. NMFS may adjust the monitoring zones pending review and approval of an acoustic monitoring report (see §217.35);

(4) If a bowhead whale or other low frequency cetacean enters the Level A harassment zone, pile or pipe driving must be shut down immediately. If a beluga whale or pinniped enters the Level A harassment zone while pile driving is ongoing, work may continue until the pile is completed (estimated to require approximately 15-20 minutes), but additional pile driving must not be initiated until the animal has left the Level A harassment zone. During this time, PSOs must monitor the animal and record behavior;

(5) If a marine mammal is approaching a Level A harassment zone and pile driving has not commenced, pile driving must be delayed. Pile driving may not commence or resume until either the animal has voluntarily left and been visually confirmed beyond the shutdown zone; 15 minutes have passed without subsequent detections of small cetaceans and pinnipeds; or 30 minutes have passed without subsequent detections of large cetaceans;

(6) If a species for which authorization has not been granted, or a species for which authorization has been

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granted but the authorized takes are met, is observed approaching or within the monitoring zone (which equates to the Level B harassment zone), pile driving and removal activities must shut down immediately using delay and shut-down procedures. Activities must not resume until the animal has been confirmed to have left the area or the observation time period, as indicated in paragraph (c)(5) of this section, has elapsed;

(7) Hilcorp must use soft start techniques when impact pile driving. Soft start requires contractors to provide an initial set of strikes at reduced energy, followed by a thirty-second waiting period, then two subsequent reduced energy strike sets. A soft start must be implemented at the start of each day's impact pile driving and at any time following cessation of impact pile driving for a period of thirty minutes or longer;

(8) All pipe- and pile-driving activities (impact and vibratory) and LDPI support vessel traffic outside the barrier islands must cease by August 1, annually, and not resume until the official end of the hunt or until the quota has been met, whichever occurs first. Hilcorp must coordinate annually with subsistence users on the dates of these hunts; and

(9) Should an ice seal be observed on or near the LDPI by any Hilcorp personnel, during construction or operation, the sighting must be reported to Hilcorp's Environmental Specialist. No construction activity should occur within 10 m of an ice seal and any vehicles used should use precaution and not approach any ice seal within 10 m.

(d) *Vessel restrictions.* When operating vessels, Hilcorp must:

(1) Reduce vessel speed to 5 knots (kn) if a whale is observed within 500 m (1641 feet (ft)) of the vessel and is on a potential collision course with the vessel, or if a vessel is within 275 m (902 ft) of whales, regardless of course relative to the vessel;

(2) Avoid multiple changes in vessel direction;

(3) Not approach within 800 m (2,624 ft) of a North Pacific right whale or within 5.6 km (3 nautical miles) of Steller sea lion rookeries or major haulouts; and

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(4) Avoid North Pacific right whale critical habitat or, if critical habitat cannot be avoided, reduce vessel speed during transit.

§ 217.35 Requirements for monitoring and reporting.

(a) All marine mammal and acoustic monitoring must be conducted in accordance to Hilcorp's Marine Mammal Mitigation and Monitoring Plan (4MP) and Acoustic Monitoring Plan, which includes acoustic monitoring during both the open-water and ice-covered seasons. These plans may be modified throughout the life of the regulations in this subpart upon NMFS review and approval.

(b) Monitoring must be conducted by NMFS-approved PSOs, who must have no other assigned tasks during monitoring periods and be equipped with, at minimum, binoculars and rangefinders. At minimum, two PSOs must be placed on elevated platforms on the island during the open-water season when island construction activities are occurring. These observers will monitor for marine mammals and implement shut-down or delay procedures when applicable through communication with the equipment operator.

(c) One PSO will be placed on the side where construction activities are taking place and the other placed on the opposite side of the LDPI; both observers will be on elevated platforms.

(d) PSOs will rotate duties such that they will observe for no more than 4 hours at a time and no more than 12 hours in a 24-hour period.

(e) An additional island-based PSO will work with an aviation specialist to use an unmanned aircraft system (UAS) to detect marine mammals in the monitoring zones during pile and pipe driving and slope shaping. Should UAS monitoring not be feasible or be deemed ineffective, a boat-based PSO must monitor for marine mammals during pile and pipe driving.

(f) During the open-water season, marine mammal monitoring must take place from 30 minutes prior to initiation of pile and pipe driving activity through 30 minutes post-completion of pile driving activity. Pile driving may

commence when observers have declared the shutdown zone clear of marine mammals. In the event of a delay or shutdown of activity resulting from marine mammals in the shutdown zone, animals must be allowed to remain in the shutdown zone (*i.e.*, must leave of their own volition) and their behavior must be monitored and documented.

(g) After island construction is complete but drilling activities are occurring, a PSO will be stationed on the LDPI for approximately 4 weeks during the month of August to monitor for the presence of marine mammals around the island in the monitoring zone.

(1) Marine mammal monitoring during pile driving and removal must be conducted by NMFS-approved PSOs in a manner consistent with the following:

(i) At least one observer must have prior experience working as an observer;

(ii) Other observers may substitute education (degree in biological science or a related field) or training for experience;

(iii) Where a team of three or more observers are required, one observer must be designated as lead observer or monitoring coordinator. The lead observer must have prior experience working as an observer; and

(iv) Hilcorp must submit PSO curricula vitae (CVs) for approval by NMFS prior to the onset of pile driving.

(2) PSOs must have the following additional qualifications:

(i) Ability to conduct field observations and collect data according to assigned protocols;

(ii) Experience or training in the field identification of marine mammals, including the identification of behaviors;

(iii) Sufficient training, orientation, or experience with the construction operation to provide for personal safety during observations;

(iv) 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 implemen-

tation of mitigation (or why mitigation was not implemented when required); and marine mammal behavior; and

(v) 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.

(h) Hilcorp must deploy autonomous sound recorders on the seabed to conduct underwater passive acoustic monitoring in the open-water season the first four years of the project such that island construction activities, including pile driving, and drilling operations are recorded. Acoustic monitoring will be conducted for the purposes of sound source verification to verify distances from noise sources at which underwater sound levels reach thresholds for potential marine mammal harassment.

(i) Hilcorp must submit incident and monitoring reports.

(1) Hilcorp must submit a draft annual marine mammal and acoustic summary report to NMFS not later than 90 days following the end of each calendar year. Hilcorp must provide a final report within 30 days after receipt of NMFS' comments on the draft report. The reports must contain, at a minimum, the following:

(i) Date and time that monitored activity begins or ends;

(ii) Description of construction activities occurring during each observation period;

(iii) Weather parameters (*e.g.*, wind speed, percent cloud cover, visibility);

(iv) Water conditions (*e.g.*, sea state, tide state);

(v) Species, numbers, and, if possible, sex and age class of marine mammals observed;

(vi) Description of any observable marine mammal behavior patterns, including bearing and direction of travel and distance from construction activity;

(vii) Distance from construction activities to marine mammals and distance from the marine mammals to the observation point;

(viii) An extrapolated total take estimate for each species based on the number of marine mammals observed and the extent of the harassment zones

during the applicable construction activities;

(ix) Histograms of the perpendicular distance at which marine mammals were sighted by the PSOs;

(x) Description of implementation of mitigation measures (*e.g.*, shutdown or delay);

(xi) Locations of all marine mammal observations;

(xii) An estimate of the effective strip width of the island-based PSOs and the UAS imagery; and

(xiii) Sightings and locations of marine mammals associated with acoustic detections.

(2) Annually, Hilcorp must submit a report within 90 days of ice road decommissioning. The report must include the following:

(i) Date, time, location of observation;

(ii) Ringed seal characteristics (*i.e.*, adult or pup, behavior (avoidance, resting, etc.));

(iii) Activities occurring during observation, including equipment being used and its purpose, and approximate distance to ringed seal(s);

(iv) Actions taken to mitigate the effects of interaction, emphasizing: which BMPs were successful; which BMPs may need to be improved to reduce interactions with ringed seals; the effectiveness and practicality of implementing BMPs; any issues or concerns regarding implementation of BMPs; and potential effects of interactions based on observation data;

(v) Proposed updates (if any) to the NMFS-approved Wildlife Management Plan(s) or the ice-road BMPs; and

(vi) Reports should be able to be queried for information.

(3) Hilcorp must submit a final 5-year comprehensive summary report to NMFS not later than 90 days following the expiration of this subpart and LOA.

(4) Hilcorp must submit acoustic monitoring reports per the Acoustic Monitoring Plan.

(5) Hilcorp must report on observed injured or dead marine mammals.

(i) In the unanticipated event that the activity defined in § 217.30 clearly causes the take of a marine mammal in a prohibited manner, Hilcorp must immediately cease such activity and report the incident to the Office of Pro-

tected Resources (OPR), NMFS, and to the Alaska Regional Stranding Coordinator, NMFS. Activities must not resume until NMFS is able to review the circumstances of the prohibited take. NMFS will work with Hilcorp to determine what measures are necessary to minimize the likelihood of further prohibited take and ensure Marine Mammal Protection Act (MMPA) compliance. Hilcorp may not resume their activities until notified by NMFS. The report must include the following information:

(A) Time, date, and location (latitude/longitude) of the incident;

(B) Description of the incident;

(C) Environmental conditions (*e.g.*, wind speed and direction, Beaufort sea state, cloud cover, visibility);

(D) Description of all marine mammal observations in the 24 hours preceding the incident;

(E) Species identification or description of the animal(s) involved;

(F) Fate of the animal(s); and

(G) Photographs or video footage of the animal(s). Photographs may be taken once the animal has been moved from the waterfront area.

(H) In the event that Hilcorp discovers an injured or dead marine mammal and determines that the cause of the injury or death is unknown and the death is relatively recent (*e.g.*, in less than a moderate state of decomposition), Hilcorp must immediately report the incident to OPR and the Alaska Regional Stranding Coordinator, NMFS. The report must include the information identified in paragraph (i)(5)(i) of this section. Activities may continue while NMFS reviews the circumstances of the incident. NMFS will work with Hilcorp to determine whether additional mitigation measures or modifications to the activities are appropriate.

(ii) In the event Hilcorp discovers an injured or dead marine mammal and determines that the injury or death is not associated with or related to the activities defined in § 217.30 (*e.g.*, previously wounded animal, carcass with moderate to advanced decomposition, scavenger damage), Hilcorp must report the incident to OPR and the Alaska Regional Stranding Coordinator,

NMFS, within 24 hours of the discovery. Hilcorp must provide photographs or video footage or other documentation of the stranded animal sighting to NMFS. Photographs may be taken once the animal has been moved from the waterfront area.

§ 217.36 Letters of Authorization.

(a) To incidentally take marine mammals pursuant to this subpart, Hilcorp must apply for and obtain an LOA.

(b) An LOA, unless suspended or revoked, may be effective for a period of time not to exceed the expiration date of this subpart.

(c) If an LOA expires prior to the expiration date of this subpart, Hilcorp may apply for and obtain a renewal of the LOA.

(d) In the event of projected changes to the activity or to mitigation and monitoring measures required by an LOA, Hilcorp must apply for and obtain a modification of the LOA as described in § 217.37.

(e) The LOA shall set forth:

(1) Permissible methods of incidental taking;

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

(3) Requirements for monitoring and reporting.

(f) Issuance of the LOA shall be based on a determination that the level of taking will be consistent with the findings made for the total taking allowable under this subpart.

(g) Notice of issuance or denial of an LOA shall be published in the FEDERAL REGISTER within thirty days of a determination.

§ 217.37 Renewals and modifications of Letters of Authorization.

(a) An LOA issued under §§ 216.106 of this chapter and 217.36 for the activity identified in § 217.30(a) shall be renewed or modified upon request by the applicant, provided that:

(1) The proposed specified activity and mitigation, monitoring, and reporting measures, as well as the anticipated impacts, are the same as those described and analyzed for this subpart

(excluding changes made pursuant to the adaptive management provision in paragraph (c)(1) of this section); and

(2) NMFS determines that the mitigation, monitoring, and reporting measures required by the previous LOA under this subpart were implemented.

(b) For LOA modification or renewal requests by the applicant that include changes to the activity or the mitigation, monitoring, or reporting (excluding changes made pursuant to the adaptive management provision in paragraph (c)(1) of this section) that do not change the findings made for this subpart or result in no more than a minor change in the total estimated number of takes (or distribution by species or years), NMFS may publish a notice of proposed LOA in the FEDERAL REGISTER, including the associated analysis of the change, and solicit public comment before issuing the LOA.

(c) An LOA issued under §§ 216.106 of this chapter and 217.36 for the activity identified in § 217.30(a) may be modified by NMFS under the following circumstances:

(1) *Adaptive management.* NMFS may modify (including augment) the existing mitigation, monitoring, or reporting measures (after consulting with Hilcorp regarding the practicability of the modifications) if doing so creates a reasonable likelihood of more effectively accomplishing the goals of the mitigation and monitoring set forth in this subpart.

(i) Possible sources of data that could contribute to the decision to modify the mitigation, monitoring, or reporting measures in an LOA:

(A) Results from Hilcorp's monitoring from the previous year(s).

(B) Results from other marine mammal and/or sound research or studies.

(C) Any information that reveals marine mammals may have been taken in a manner, extent, or number not authorized by this subpart or subsequent LOAs.

(ii) If, through adaptive management, the modifications to the mitigation, monitoring, or reporting measures are substantial, NMFS will publish a notice of proposed LOA in the FEDERAL REGISTER and solicit public comment.

(2) *Emergencies.* If NMFS determines that an emergency exists that poses a

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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;

(iv) PSOs may not exceed 4 consecutive watch hours; must have a minimum two-hour break between watches; and may not exceed a combined watch schedule of more than 12 hours in a 24-hour period;

(v) PSOs must have no other construction-related tasks while conducting monitoring;

(vi) Monitoring must be conducted from 30 minutes prior to commencement of pile driving, throughout the time required to drive a pile, and for 30 minutes following the conclusion of pile driving;

(vii) Monitoring must be conducted from 30 minutes prior to commencement of pipe laying activity, throughout the time of pipe laying, and for 30 minutes following the conclusion of pipe laying for the segment;

(viii) During all observation periods, PSOs must use high-magnification (25X), as well as standard handheld (7X) binoculars, and the naked eye to search continuously for marine mammals;

(ix) Monitoring distances must be measured with range finders. Distances to animals must be based on the best estimate of the PSO, relative to known distances to objects in the vicinity of the PSO; and

(x) Bearings to animals must be determined using a compass.

(4) *Marine mammal monitoring data collection.* PSOs must collect the following information during marine mammal monitoring:

(i) Date and time that monitored activity begins and ends for each day conducted (monitoring period);

(ii) Construction activities occurring during each daily observation period, including how many and what type of piles driven and distances covered during pipe laying;

(iii) Deviation from initial proposal in pile numbers, pile types, average driving times, and pipe laying distances, etc.;

(iv) Weather parameters in each monitoring period (*e.g.*, wind speed, percent cloud cover, visibility);

(v) Water conditions in each monitoring period (*e.g.*, sea state, tide state);

(vi) For each marine mammal sighting:

(A) Species, numbers, and, if possible, sex and age class of marine mammals;

(B) Description of any observable marine mammal behavior patterns, including bearing and direction of travel and distance from pile driving and pipe laying activities, and notable changes in patterns;

(C) Location and distance from pile driving and pipe laying activities to marine mammals and distance from the marine mammals to the observation point; and

(D) Estimated amount of time that the animals remained in the Level A and/or Level B harassment zones;

(vii) Description of implementation of mitigation measures within each monitoring period (*e.g.*, shutdown or delay); and

(viii) Other human activity in the area within each monitoring period.

(b) *Acoustic monitoring.* AGDC must conduct a sound source verification (SSV) in accordance with the requirements in the LOA, at the beginning of the pile driving to characterize the sound levels associated with different pile and hammer types, as well as to establish the marine mammal monitoring and mitigation zones.

(1) A minimum of 2 piles of each type and size must be measured.

(2) The following data, at minimum, shall be collected during acoustic monitoring and reported:

(i) Hydrophone equipment and methods: Recording device, sampling rate, distance from the pile where recordings were made; depth of recording device(s);

(ii) Type of pile being driven and method of driving during recordings; and

(iii) Mean, median, and maximum sound levels (dB re: 1μPa): Cumulative sound exposure level (SEL_{cum}), peak sound pressure level (SPL_{peak}), root mean square sound pressure level (SPL_{rms}), and single-strike sound exposure level (SEL_{s-s}).

(3) An SSV report must be submitted to NMFS within 72 hours after field measurements for approval of the results.

(4) The results of the SSV report may be used to adjust the extent of Level A and Level B harassment zones in-water pile driving.

(c) *Reporting measures*—(1) *Notification*. AGDC must notify NMFS 48 hours prior to the start of each activity in Cook Inlet that may cause harassment of marine mammals. If there is a delay in activity, AGDC must also notify NMFS as soon as practicable.

(2) *Monthly report*. AGDC must submit monthly reports via email to NMFS Office of Protected Resources (OPR) and Alaska Regional Office (AKRO) for all months with project activities by the 15th of the month following the monthly reporting period. The monthly report must contain and summarize the following information:

(i) Dates, times, locations, heading, speed, weather, sea conditions (including Beaufort sea state and wind force), and a list of all in-water sound-producing activities occurring concurrent with marine mammal observations;

(ii) Species, number, location, distance from the vessel, and behavior of all observed marine mammals, as well as associated project activity (e.g., number of power-downs and shut-downs), observed throughout all monitoring activities;

(iii) Observation data in paragraphs (a) and (b) of this section must be provided in digital spreadsheet format that can be queried;

(iv) An estimate of the number of animals (by species) exposed to sound at received levels greater than or equal to either the Level A or Level B harassment thresholds, with a discussion the time spent above those received levels and of any specific behaviors those individuals exhibited;

(v) If the extent of Level B harassment zone is beyond visual observation, AGDC must also include an appropriate adjustment to estimate the total numbers of marine mammals taken based on the portion of the areas that are monitored; and

(vi) A description of the implementation and effectiveness of the terms and conditions of the Biological Opinion's Incidental Take Statement and mitigation and monitoring measures of the LOA.

(3) *Marine mammal tally numbers*. (i) AGDC must keep a tally of the estimated number of marine mammals that are taken, based on the number of marine mammals observed within the

applicable harassment zones, and alert NMFS when the authorized limit is close to being met based on prescribed monitoring measured in the final rule; and

(ii) AGDC must keep a tally of the number of marine mammal that are sighted during the pile driving and pipe laying activities.

(4) *Beluga whale takes*. AGDC must immediately notify NMFS if the number of Cook Inlet beluga estimated as taken (based on observed exposures above thresholds) reaches 80% of the authorized takes in any given calendar year during which take is authorized.

(5) *Annual report*. (i) AGDC must submit a comprehensive annual report to NMFS within 90 calendar days of the cessation of in-water work each year for review. The report must synthesize all sighting data and effort during each activity for each year.

(ii) NMFS will provide comments within 30 days after receiving annual reports, and AGDC must address the comments and submit revisions within 30 days after receiving NMFS comments.

(iii) If no comments are received from the NMFS within 30 days, the annual report is considered completed.

(iv) The report must include the following information:

(A) Summaries of monitoring effort including total hours, observation rate by species and marine mammal distribution through the study period, accounting for sea state and other factors affecting visibility and detectability of marine mammals.

(B) Analyses of the effects of various factors that may have influenced detectability of marine mammals (e.g., sea state, number of observers, fog/glare, and other factors as determined by the PSOs).

(C) Species composition, occurrence, and distribution of marine mammal sightings, including date, water depth, numbers, age/size/gender categories (if determinable), group sizes, and ice cover.

(D) Marine mammal observation data with a digital record of observation data provided in digital spreadsheet format that can be queried.

(E) Summary of implemented mitigation measures (*i.e.*, shutdowns and delays).

(F) Number of marine mammals during periods with and without project activities (and other variables that could affect detectability), such as:

(1) Initial sighting distances versus project activity at the time of sighting;

(2) Closest point of approach versus project activity;

(3) Observed behaviors and types of movements versus project activity;

(4) Numbers of sightings/individuals seen versus project activity;

(5) Distribution around the source vessels versus project activity; and

(6) Numbers of animals detected in the exclusion zone.

(G) Analyses of the effects of project activities on listed marine mammals.

(6) *Final report.* (i) AGDC must provide NMFS, within 90 days of project completion at the end of the five-year period, a report of all parameters listed in the monthly and annual report requirements in paragraph (c) of this section, noting also all operational shutdowns or delays necessitated due to the proximity of marine mammals.

(ii) NMFS will provide comments within 30 days after receiving this report, and AGDC must address the comments and submit revisions within 30 days after receiving NMFS comments.

(iii) If no comments are received from the NMFS within 30 days, the final report is considered as final.

(7) *Reporting of injured or dead marine mammals.* (i) In the unanticipated event that the construction or demolition activities clearly cause the take of a marine mammal in a prohibited manner, such as an injury, serious injury, or mortality, AGDC must immediately cease operations with the potential to impact marine mammals in the vicinity and immediately report the incident to the NMFS Office of Protected Resources, NMFS Alaska Regional Office, and the Alaska Region Stranding Coordinators. The report must include the following information:

(A) Time, date, and location (latitude/longitude) of the incident;

(B) Description of the incident;

(C) Status of all sound source use in the 24 hours preceding the incident;

(D) Environmental conditions (*e.g.*, wind speed and direction, sea state, cloud cover, visibility, and water depth);

(E) Description of marine mammal observations in the 24 hours preceding the incident;

(F) Species identification or description of the animal(s) involved;

(G) The fate of the animal(s); and

(H) Photographs or video footage of the animal (if equipment is available).

(ii) Activities must not resume until NMFS is able to review the circumstances of the prohibited take. NMFS must work with AGDC to determine what is necessary to minimize the likelihood of further prohibited take and ensure Marine Mammal Protection Act (MMPA) compliance. AGDC may not resume its activities until notified by NMFS via letter, email, or telephone.

(iii) In the event that AGDC discovers an injured or dead marine mammal, and the lead PSO determines that the cause of the injury or death is unknown and the death is relatively recent (*i.e.*, in less than a moderate state of decomposition as described in paragraph (c)(7)(iv) of this section), AGDC must immediately report the incident to the NMFS Office of Protected Resources, NMFS Alaska Regional Office, and the Alaska Regional Stranding Coordinators. The report must include the same information identified in paragraph (b)(3)(i) of this section. Activities may continue while NMFS reviews the circumstances of the incident. NMFS will work with AGDC to determine whether modifications in the activities are appropriate.

(iv) In the event that AGDC discovers an injured or dead marine mammal, and the lead PSO determines that the injury or death is not associated with or related to the activities authorized in the LOA (*e.g.*, previously wounded animal, carcass with moderate to advanced decomposition, or scavenger damage), AGDC must report the incident to the NMFS Office of Protected Resources, NMFS Alaska Regional Office, and the Alaska Regional Stranding Coordinators, within 48 hours of the discovery. AGDC must provide photographs or video footage (if available) or other documentation of the stranded

animal sighting to NMFS and the Marine Mammal Stranding Network. AGDC may continue its operations under such a case.

§ 217.46 Letters of Authorization.

(a) To incidentally take marine mammals pursuant to the regulations in this subpart, AGDC must apply for and obtain (LOAs) in accordance with § 216.106 of this chapter for conducting the activity identified in § 217.40(c).

(b) LOAs, unless suspended or revoked, may be effective for a period of time not to extend beyond the expiration date of the regulations in this subpart.

(c) If an LOA(s) expires prior to the expiration date of the regulations in this subpart, AGDC may apply for and obtain a renewal of the LOA(s).

(d) In the event of projected changes to the activity or to mitigation, monitoring, reporting (excluding changes made pursuant to the adaptive management provision of § 217.47(c)(1)) required by an LOA, AGDC must apply for and obtain a modification of LOAs as described in § 217.47.

(e) Each LOA must set forth:

(1) Permissible methods of incidental taking;

(2) Means of effecting the least practicable adverse impact (*i.e.*, mitigation) on the species, their habitat, and the availability of the species for subsistence uses; and

(3) Requirements for monitoring and reporting.

(f) Issuance of the LOA(s) must be based on a determination that the level of taking must be consistent with the findings made for the total taking allowable under the regulations in this subpart.

(g) Notice of issuance or denial of the LOA(s) must be published in the FEDERAL REGISTER within 30 days of a determination.

§ 217.47 Renewals and modifications of Letters of Authorization.

(a) An LOA issued under §§ 216.106 of this chapter and 217.46 for the activity identified in § 217.40(c) must be renewed or modified upon request by the applicant, provided that:

(1) The proposed specified activity and mitigation, monitoring, and re-

porting measures, as well as the anticipated impacts, are the same as those described and analyzed for the regulations in this subpart (excluding changes made pursuant to the adaptive management provision in paragraph (c)(1) of this section); and

(2) NMFS determines that the mitigation, monitoring, and reporting measures required by the previous LOA(s) under the regulations in this subpart were implemented.

(b) For LOA modification or renewal requests by the applicant that include changes to the activity or the mitigation, monitoring, or reporting measures (excluding changes made pursuant to the adaptive management provision in paragraph (c)(1) of this section) that do not change the findings made for the regulations in this subpart or result in no more than a minor change in the total estimated number of takes (or distribution by species or years), NMFS may publish a notice of proposed LOA in the FEDERAL REGISTER, including the associated analysis of the change, and solicit public comment before issuing the LOA.

(c) An LOA issued under §§ 216.106 of this chapter and 217.46 for the activity identified in § 217.40(c) may be modified by NMFS under the following circumstances:

(1) *Adaptive management.* After consulting with AGDC regarding the practicability of the modifications, NMFS may modify (including by adding or removing measures) the existing mitigation, monitoring, or reporting measures if doing so creates a reasonable likelihood of more effectively accomplishing the goals of the mitigation and monitoring set forth in the regulations in this subpart.

(i) Possible sources of data that could contribute to the decision to modify the mitigation, monitoring, or reporting measures in an LOA:

(A) Results from AGDC's monitoring from the previous year(s);

(B) Results from other marine mammal and/or sound research or studies; or

(C) Any information that reveals marine mammals may have been taken in a manner, extent or number not authorized by the regulations in this subpart or subsequent LOAs.

(ii) If, through adaptive management, the modifications to the mitigation, monitoring, or reporting measures are substantial, NMFS must publish a notice of proposed LOA in the FEDERAL REGISTER and solicit public comment.

(2) *Emergencies.* If NMFS determines that an emergency exists that poses a 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 217.46, an LOA may be modified without prior notice or opportunity for public comment. Notice would be published in the FEDERAL REGISTER within 30 days of the action.

§§ 217.48–217.49 [Reserved]

Subpart F—Taking Marine Mammals Incidental to Lighthouse Repair and Tour Operations at Northwest Seal Rock, California

SOURCE: 87 FR 22492, Apr. 15, 2022, unless otherwise noted.

EFFECTIVE DATE NOTE: At 87 FR 22492, Apr. 15, 2022, subpart F was added, effective May 15, 2022, through May 14, 2027.

§ 217.50 Specified activity and specified geographical region.

(a) Regulations in this subpart apply only to the St. George Reef Lighthouse Preservation Society (Society) and those persons it authorizes or funds to conduct activities on its behalf for the taking of marine mammals that occurs in the areas outlined in paragraph (b) of this section and that occurs incidental to lighthouse repair and tour operation activities.

(b) The taking of marine mammals by the Society may be authorized in a Letter of Authorization (LOA) only if it occurs within Pacific Ocean waters in the vicinity of Northwest Seal Rock near Crescent City, California.

§ 217.51 Effective dates.

Regulations in this subpart are effective from May 15, 2022 through May 14, 2027.

§ 217.52 Permissible methods of taking.

Under LOAs issued pursuant to §216.106 of this chapter and §217.56, the Holder of the LOA (hereinafter “Society”) may incidentally, but not intentionally, take marine mammals within the area described in §217.50(b) by Level B harassment associated with lighthouse repair and tour operation activities, provided the activity is in compliance with all terms, conditions, and requirements of the regulations in this subpart and the appropriate LOA.

§ 217.53 Prohibitions.

Except for taking authorized by a LOA issued under §§216.106 and 217.56 of this chapter, it shall be unlawful for any person to do any of the following in connection with the activities described in §217.50:

(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 §217.56;

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

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

(d) Take a marine mammal specified in such LOAs if NMFS determines such taking results in more than a negligible impact on the species or stocks of such marine mammal.

§ 217.54 Mitigation requirements.

When conducting the activities identified in §217.50(a), the mitigation measures contained in any LOA issued under §216.106 of this chapter and §217.56 must be implemented. These mitigation measures shall include but are not limited to:

(a) *General conditions.* (1) A copy of any issued LOA must be in the possession of the Society, supervisory personnel, pilot, protected species observers (PSOs), and any other relevant designees of the Holder operating under the authority of this LOA at all times that activities subject to this LOA are being conducted.

(2) The Society must conduct training between supervisors and crews and the marine mammal monitoring team and relevant Society staff prior to the

start of all trips and when new personnel join the work, so that responsibilities, communication procedures, monitoring protocols, and operational procedures are clearly understood. Visitors to the Station must be instructed to avoid unnecessary noise and not expose themselves visually to pinnipeds around the base of the light-house.

(3) All personnel must avoid direct physical interaction with marine mammals during activity. If a marine mammal comes within 10 m of such activity, operations must cease until the animal leaves of its own accord.

(4) Loud outside activity must be halted upon observation on Northwest Seal Rock (NWSR) of either a species for which incidental take is not authorized or a species for which incidental take has been authorized but the authorized number of takes has been met.

(5) No more than two restoration trips, or 6 days of flight operations, are permitted per month.

(b) *Protocols.* (1) The pilot must ensure that helicopter approach patterns to the NWSR are such that the timing and techniques are least disturbing to marine mammals. To the extent possible, the helicopter must approach NWSR when the tide is too high for marine mammals to haul out on NWSR. The helicopter must avoid rapid and direct approaches to the station by approaching NWSR at a relatively high altitude (*e.g.*, 800–1,000 ft; 244–305 m). Before the final approach, the helicopter must circle lower, and approach from an area where the density of pinnipeds is the lowest. If for any safety reasons (*e.g.*, wind conditions or visibility) such helicopter approach and timing techniques cannot be achieved, the Society must abort the restoration and maintenance session for the day.

(2) Monitoring must be conducted by a trained PSO, who must have no other assigned tasks during monitoring periods. Trained PSOs must be placed at the best vantage point(s) practicable to monitor for marine mammals and implement mitigation procedures when applicable. The Society must adhere to the following additional PSO qualifications:

- (i) Independent PSOs are required;
- (ii) At least one PSO must have prior experience working as an observer;
- (iii) Other observers may substitute education (degree in biological science or related field) or training for experience; and
- (iv) The Society must submit PSO resumes for approval by NMFS prior to beginning any activity subject to these regulations.

(3) The PSO must monitor the project area to the maximum extent possible based on the required monitoring locations and environmental conditions. They must record all observations of marine mammals as described in Section 5 of any LOA, regardless of distance from the activity. A PSO with a high definition camera must be on the first flight to the station each day. For 15 minutes before and after all other takeoffs and landings a PSO must be stationed on the platform of the lantern room gallery, and a PSO must be on the last departing helicopter of the day.

§ 217.55 Requirements for monitoring and reporting.

(a) PSOs must document any behavioral reactions in concert with distance from any project activity.

(b) *Reporting*—(1) *Reporting frequency.*

(i) The Society must submit a quarterly summary report to NMFS not later than 90 days following the end of each work quarter; after the first three quarterly submissions, NMFS will evaluate whether it is appropriate to modify to annual reports, and modify future LOAs as appropriate to indicate annual reporting requirements if so. The Society must provide a final report within 30 days following resolution of comments on each draft report.

(ii) These reports must contain, at minimum, the following:

- (A) Dates and times (begin and end) of all marine mammal monitoring;
- (B) Activities occurring during all marine mammal monitoring (*e.g.*, helicopter takeoffs and landings, construction activities);
- (C) PSO locations during marine mammal monitoring;
- (D) Environmental conditions during monitoring periods (at beginning and

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end of PSO shift and whenever conditions change significantly), including Beaufort sea state and any other relevant weather conditions including cloud cover, fog, sun glare, and overall visibility to the horizon, and estimated observable distance;

(E) Upon each flight, the following information: Name of PSO who sighted the animal(s) and PSO location and activity at time of sighting; time of sighting; identification of the animal(s) (*e.g.*, genus/species, lowest possible taxonomic level, or unidentified), PSO confidence in identification, and the composition of the group if there is a mix of species; distance and bearing of each marine mammal observed relative to the activity for each flight; estimated number of animals (min/max/best estimate); estimated number of animals by cohort (adults, juveniles, neonates, group composition, etc.); and description of any marine mammal behavioral observations (*e.g.*, observed behaviors such as feeding or traveling), including an assessment of behavioral responses thought to have resulted from the activity according to the 3-point scale as defined in the LOA (*e.g.*, no response or changes in behavioral state such as changing direction or flushing);

(F) Number of marine mammals detected, by species; and

(G) Detailed information about any implementation of any mitigation triggered, a description of specific actions that ensued, and resulting changes in behavior of the animal(s), if any.

(2) The Society must submit a comprehensive summary report to NMFS not later than 90 days following the conclusion of marine mammal monitoring efforts described in this subpart.

(c) *Reporting of injured or dead marine mammals.* (1) In the event that personnel involved in the construction activities discover an injured or dead marine mammal, the LOA-holder must immediately report the incident to the Office of Protected Resources (OPR) (*PR.ITP.MonitoringReports@noaa.gov*), NMFS and to West Coast Regional Stranding Coordinator as soon as feasible. If the death or injury was clearly caused by activities specified at §217.50, the Society must immediately cease the specified activities until NMFS is

able to review the circumstances of the incident and determine what, if any, additional measures are appropriate to ensure compliance with the terms of these regulations and LOAs. The LOA-holder must not resume their activities until notified by NMFS. The report must include the following information:

(i) Time, date, and location (latitude/longitude) of the first discovery (and updated location information if known and applicable);

(ii) Species identification (if known) or description of the animal(s) involved;

(iii) Condition of the animal(s) (including carcass condition if the animal is dead);

(iv) Observed behaviors of the animal(s), if alive;

(v) If available, photographs or video footage of the animal(s); and

(vi) General circumstances under which the animal was discovered.

(2) [Reserved]

§217.56 Letters of Authorization.

(a) To incidentally take marine mammals pursuant to these regulations, the Society must apply for and obtain an LOA.

(b) An LOA, unless suspended or revoked, may be effective for a period of time not to exceed the expiration date of these regulations.

(c) If an LOA expires prior to the expiration date of these regulations, the Society may apply for and obtain a renewal of the LOA.

(d) In the event of projected changes to the activity or to mitigation and monitoring measures required by an LOA, the Society must apply for and obtain a modification of the LOA as described in §217.57.

(e) The LOA shall set forth:

(1) Permissible methods of incidental taking;

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

(3) Requirements for monitoring and reporting.

(f) Issuance of the LOA shall be based on a determination that the level of

taking will be consistent with the findings made for the total taking allowable under these regulations.

(g) Notice of issuance or denial of an LOA shall be published in the FEDERAL REGISTER within 30 days of a determination.

§ 217.57 Renewals and modifications of Letters of Authorization.

(a) An LOA issued under § 216.106 of this chapter and § 217.56 for the activity identified in § 217.50(a) shall be renewed or modified upon request by the applicant, provided that:

(1) The proposed specified activity and mitigation, monitoring, and reporting measures, as well as the anticipated impacts, are the same as those described and analyzed for these regulations (excluding changes made pursuant to the adaptive management provision in paragraph (c)(1) of this section); and

(2) NMFS determines that the mitigation, monitoring, and reporting measures required by the previous LOA under these regulations were implemented.

(b) For LOA modification or renewal requests by the applicant that include changes to the activity or the mitigation, monitoring, or reporting (excluding changes made pursuant to the adaptive management provision in paragraph (c)(1) of this section) that do not change the findings made for the regulations or result in no more than a minor change in the total estimated number of takes (or distribution by species or years), NMFS may publish a notice of proposed LOA in the FEDERAL REGISTER, including the associated analysis of the change, and solicit public comment before issuing the LOA.

(c) An LOA issued under §§ 216.106 and 217.56 of this chapter for the activity identified in § 217.50(a) may be modified by NMFS under the following circumstances:

(1) *Adaptive management.* NMFS may modify (including augment) the existing mitigation, monitoring, or reporting measures (after consulting with the Society regarding the practicability of the modifications) if doing so creates a reasonable likelihood of more effectively accomplishing the goals of the

mitigation and monitoring set forth in the preamble for these regulations.

(i) Possible sources of data that could contribute to the decision to modify the mitigation, monitoring, or reporting measures in an LOA:

(A) Results from the Society's monitoring from the previous year(s).

(B) Results from other marine mammal and/or sound or disturbance research or studies.

(C) Any information that reveals marine mammals may have been taken in a manner, extent or number not authorized by these regulations or subsequent LOAs.

(ii) If, through adaptive management, the modifications to the mitigation, monitoring, or reporting measures are substantial, NMFS will publish a notice of proposed LOA in the FEDERAL REGISTER and solicit public comment.

(2) *Emergencies.* If NMFS determines that an emergency exists that poses a 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 § 217.56, an LOA may be modified without prior notice or opportunity for public comment. Notice would be published in the FEDERAL REGISTER within 30 days of the action.

§§ 217.58–217.59 [Reserved]

Subpart G—Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to U.S. Air Force Launches and Operations at Vandenberg Air Force Base, California

SOURCE: 84 FR 14333, Apr. 10, 2019, unless otherwise noted.

EFFECTIVE DATE NOTE: At 84 FR 14333, Apr. 10, 2019, subpart G was added, effective Apr. 10, 2019, until Apr. 10, 2024.

§ 217.60 Specified activity and specified geographical region.

(a) Regulations in this subpart apply only to the 30th Space Wing, United States Air Force (USAF) and those persons it authorizes to conduct activities on its behalf for the taking of marine mammals that occurs in the areas outlined in paragraph (b) of this section

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and that occurs incidental to rocket and missile launches and aircraft operations.

(b) The taking of marine mammals by the USAF may be authorized in a Letter of Authorization (LOA) only if it occurs from activities originating at Vandenberg Air Force Base.

§ 217.61 Effective dates.

Regulations in this subpart are effective from April 10, 2019, until April 10, 2024.

§ 217.62 Permissible methods of taking.

(a) Under an LOA issued pursuant to §§ 216.106 and 217.60 of this chapter, the Holder of the LOA (herein after “USAF”) may incidentally, but not intentionally, take marine mammals by Level B harassment, within the area described in § 217.60(b), provided the activity is in compliance with all terms, conditions, and requirements of the regulations in this subpart and the appropriate LOA.

§ 217.63 Prohibitions.

Notwithstanding takings contemplated in § 217.62(c) and authorized by an LOA issued under §§ 216.106 and 217.66 of this chapter, no person in connection with the activities described in § 217.60 may:

(a) Violate, or fail to comply with, the terms, conditions, and requirements of this subpart or an LOA issued under §§ 216.106 of this chapter and 217.66;

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

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

(d) Take a marine mammal specified in such LOAs if NMFS determines such taking results in more than a negligible impact on the species or stocks of such marine mammal; or

(e) Take a marine mammal specified in such LOAs if NMFS determines such taking results in an unmitigable adverse impact on the species or stock of such marine mammal for taking for subsistence uses.

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§ 217.64 Mitigation requirements.

When conducting the activities identified in § 217.60(a), the mitigation measures contained in any Letter of Authorization issued under §§ 216.106 of this chapter and 217.66 must be implemented. These mitigation measures include (but are not limited to):

(a) For missile and rocket launches, the USAF must avoid, whenever possible, launches during the harbor seal pupping season of March through June, unless constrained by factors including, but not limited to, human safety, national security, or launch mission objectives.

(b) For rocket launches, the USAF must avoid, whenever possible, launches which are predicted to produce a sonic boom on the Northern Channel Islands from March through June.

(c) Aircraft and helicopter flight paths must maintain a minimum distance of 1,000 feet (ft) (305 meters (m)) from recognized pinniped haulouts and rookeries, whenever possible, except for one area near the VAFB harbor over which aircraft may be flown to within 500 ft of a haulout, and except in emergencies or for real-time security incidents, which may require approaching pinniped haulouts and rookeries closer than 1,000 ft (305 m).

(d) Except for during take-off and landing actions, the following minimum altitudes must be maintained over all known marine mammal haulouts when marine mammals are present: For Class 0–2 UAS, a minimum of 300 ft; for Class 3 UAS, a minimum of 500 ft; and for Class 4 or 5 UAS, a minimum of 1,000 ft.

(e) If post-launch surveys determine that an injurious or lethal take of a marine mammal has occurred, the launch procedure and the monitoring methods must be reviewed, in cooperation with the National Marine Fisheries Service (NMFS), and appropriate changes must be made through modification to a Letter of Authorization, prior to conducting the next launch under that Letter of Authorization.

§ 217.65 Requirements for monitoring and reporting.

(a) To conduct monitoring of rocket launch activities, the USAF must either use video recording, or must designate a qualified on-site individual approved in advance by NMFS, with demonstrated proficiency in the identification of all age and sex classes of both common and uncommon pinniped species found at VAFB and knowledge of approved count methodology and experience in observing pinniped behavior, as specified in the Letter of Authorization, to monitor and document pinniped activity as described below:

(1) For any launches of space launch vehicles or recoveries of the Falcon 9 First Stage occurring from January 1 through July 31, pinniped activity at VAFB must be monitored in the vicinity of the haulout nearest the launch platform, or, in the absence of pinnipeds at that location, at another nearby haulout, for at least 72 hours prior to any planned launch, and continue for a period of time not less than 48 hours subsequent to the launch;

(2) For any launches of new space launch vehicles that have not been monitored during at least 3 previous launches occurring from August 1 through December 31, pinniped activity at VAFB must be monitored in the vicinity of the haulout nearest the launch or landing platform, or, in the absence of pinnipeds at that location, at another nearby haulout, for at least 72 hours prior to any planned launch, and continue for a period of time not less than 48 hours subsequent to launching;

(3) For any launches of existing space launch vehicles that are expected to result in a louder launch noise or sonic boom than previous launches of the same vehicle type occurring from August 1 through December 31, pinniped activity at VAFB must be monitored in the vicinity of the haulout nearest the launch or landing platform, or, in the absence of pinnipeds at that location, at another nearby haulout, for at least 72 hours prior to any planned launch, and continue for a period of time not less than 48 hours subsequent to launching;

(4) For any launches of new types of missiles occurring from August 1

through December 31, pinniped activity at VAFB must be monitored in the vicinity of the haulout nearest the launch or landing platform, or, in the absence of pinnipeds at that location, at another nearby haulout, for at least 72 hours prior to any planned launch, and continue for a period of time not less than 48 hours subsequent to launching;

(5) For any recoveries of the Falcon 9 First Stage occurring from August 1 through December 31 that are predicted to result in a sonic boom of 1.0 pounds per square foot (psf) or above at VAFB, pinniped activity at VAFB must be monitored in the vicinity of the haulout nearest the launch or landing platform, or, in the absence of pinnipeds at that location, at another nearby haulout, for at least 72 hours prior to any planned launch, and continue for a period of time not less than 48 hours subsequent to launching;

(6) For any launches or Falcon 9 First Stage recoveries occurring from January 1 through July 31, follow-up surveys must be conducted within 2 weeks of the launch;

(7) For any launches or Falcon 9 First Stage recoveries, pinniped activity at the Northern Channel Islands must be monitored, if it is determined by modeling that a sonic boom of greater than 2.0 psf is predicted to impact one of the islands between March 1 and July 31, greater than 3.0 psf between August 1 and September 30, and greater than 4.0 psf between October 1 and February 28. Monitoring will be conducted at the haulout site closest to the predicted sonic boom impact area, or, in the absence of pinnipeds at that location, at another nearby haulout;

(8) For any launches or Falcon 9 First Stage recoveries for which marine mammal monitoring is required, acoustic measurements must be made; and

(9) Marine mammal monitoring must include multiple surveys each day that record the species, number of animals, general behavior, presence of pups, age class, gender and reaction to launch noise, sonic booms or other natural or human caused disturbances, in addition to recording environmental conditions

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such as tide, wind speed, air temperature, and swell. Number of marine mammals hauled out must be recorded immediately prior to the launch, unless weather conditions prevent accurate recording or it is technologically infeasible. When flushing behavior is observed, the amount of time for animals to return to the haulout must be recorded.

(10) Marine mammal monitoring of activities that occur during darkness at VAFB must include night video monitoring, when feasible.

(b) The USAF must submit a report to the Administrator, West Coast Region, NMFS, and Office of Protected Resources, NMFS, within 90 days after each launch. This report must contain the following information:

(1) Date(s) and time(s) of the launch;

(2) Design of the monitoring program; and

(3) Results of the monitoring program, including, but not necessarily limited to:

(i) Numbers of pinnipeds present on the haulout prior to commencement of the launch;

(ii) Numbers of pinnipeds that may have been harassed as noted by the number of pinnipeds estimated to have moved in response to the source of disturbance, ranging from short withdrawals at least twice the animal's body length to longer retreats over the beach, or if already moving a change of direction of greater than 90 degree, or, entered the water as a result of launch noise;

(iii) For any marine mammals that entered the water, the length of time they remained off the haulout;

(iv) Description of behavioral modifications by pinnipeds that were likely the result of launch noise or sonic boom; and

(v) Results of acoustic monitoring, including the intensity of any sonic boom (psf) and sound levels in SELs, SPL_{peak} and SPL_{rms} .

(c) If the authorized activity identified in § 217.60(a) is thought to have resulted in the mortality or injury of any marine mammals or in any take of marine mammals not authorized in LOAs, then the USAF must notify the Director, Office of Protected Resources, NMFS, and the stranding coordinator,

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West Coast Region, NMFS, within 48 hours of the discovery of the injured or dead marine mammal or of the take of marine mammals not authorized in an LOA.

(d) An annual report must be submitted on March 1 of each year to the Office of Protected Resources, NMFS.

(e) A final report must be submitted at least 180 days prior to expiration of these regulations to the Office of Protected Resources, NMFS. This report will:

(1) Summarize the activities undertaken and the results reported in all previous reports;

(2) Assess the impacts at each of the major rookeries;

(3) Assess the cumulative impacts on pinnipeds and other marine mammals from the activities specified in § 217.60(a); and

(4) State the date(s), location(s), and findings of any research activities related to monitoring the effects on launch noise, sonic booms, and harbor activities on marine mammal populations.

§ 217.66 Letters of Authorization.

(a) To incidentally take marine mammals pursuant to these regulations, the USAF must apply for and obtain an LOA.

(b) An LOA, unless suspended or revoked, may be effective for a period of time not to exceed the expiration date of these regulations.

(c) If an LOA expires prior to the expiration date of these regulations, the USAF may apply for and obtain a renewal of the LOA.

(d) In the event of projected changes to the activity or to mitigation and monitoring measures required by an LOA, the USAF must apply for and obtain a modification of the LOA as described in § 217.67.

(e) The LOA will set forth:

(1) Permissible methods of incidental taking;

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

(3) Requirements for monitoring and reporting.

(f) Issuance of the LOA shall be based on a determination that the level of taking will be consistent with the findings made for the total taking allowable under these regulations.

(g) Notice of issuance or denial of an LOA shall be published in the FEDERAL REGISTER within 30 days of a determination.

§ 217.67 Renewals and modifications of Letters of Authorization.

(a) An LOA issued under §§216.106 of this chapter and 217.66 for the activity identified in §217.60(a) shall be renewed or modified upon request by the applicant, provided that:

(1) The specified activity and mitigation, monitoring, and reporting measures, as well as the anticipated impacts, are the same as those described and analyzed for these regulations (excluding changes made pursuant to the adaptive management provision in §217.67(c)(1)); and

(2) NMFS determines that the mitigation, monitoring, and reporting measures required by the previous LOA under these regulations were implemented.

(b) For LOA modification or renewal requests by the applicant that include changes to the activity or the mitigation, monitoring, or reporting (excluding changes made pursuant to the adaptive management provision in §217.67(c)(1)) that do not change the findings made for the regulations or result in no more than a minor change in the total estimated number of takes (or distribution by species or years), NMFS may publish a notice of proposed LOA in the FEDERAL REGISTER, including the associated analysis of the change, and solicit public comment before issuing the LOA.

(c) An LOA issued under §§216.106 of this chapter and 217.66 for the activity identified in §217.60(a) may be modified by NMFS under the following circumstances:

(1) Adaptive Management—NMFS may modify (including augment) the existing mitigation, monitoring, or reporting measures (after consulting with the USAF regarding the practicability of the modifications) if doing so creates a reasonable likelihood of more effectively accomplishing the goals of

the mitigation and monitoring set forth in the preamble for these regulations.

(i) Possible sources of data that could contribute to the decision to modify the mitigation, monitoring, or reporting measures in an LOA:

(A) Results from the USAF's monitoring from the previous year(s).

(B) Results from other marine mammal and/or sound research or studies.

(C) Any information that reveals marine mammals may have been taken in a manner, extent or number not authorized by these regulations or subsequent LOAs.

(ii) If, through adaptive management, the modifications to the mitigation, monitoring, or reporting measures are substantial, NMFS will publish a notice of proposed LOA in the FEDERAL REGISTER and solicit public comment.

(2) Emergencies—If NMFS determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals specified in §217.62(c), an LOA may be modified without prior notice or opportunity for public comment. Notice would be published in the FEDERAL REGISTER within 30 days of the action.

§§ 217.68–217.69 [Reserved]

Subpart H [Reserved]

Subpart I—Taking of Marine Mammals Incidental to Naval Explosive Ordnance Disposal School (NEODS) Training Operations

SOURCE: 77 FR 16736, Mar. 22, 2012, unless otherwise noted.

§ 217.80 Specified activity and specified geographical region.

(a) Regulations in this subpart apply only to the incidental taking of those marine mammals specified in paragraph (b) of this section by the United States Air Force, Headquarters 96th Air Base Wing, Eglin Air Force Base, and those persons who engage in activities described in paragraphs (a)(1) through (7) of this section and the area

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set forth in paragraph (b) of this section.

(1) NEODS missions involving underwater detonations of small, live explosive charges adjacent to inert mines in order to disable the mine function,

(2) Live training events occurring eight times annually, averaging one event occurring every 6 to 7 weeks,

(3) Four of the training events involving 5-lb charges, and four events involving 10-lb charges,

(4) Up to 20 5-lb detonations and twenty 10-lb detonations annually, for a total of 40 detonations,

(5) The five charges occurring for each training event shall be detonated individually with a maximum separation time of 20 minutes between each detonation,

(6) Mine shapes and debris shall be recovered and removed from the Gulf of Mexico waters when training is completed, and

(7) Each training team has two days to complete their entire evolution (*i.e.*, detonation of five charges). If operations cannot be completed on the first live demolition day, the second live demolition day shall be utilized to complete the evolution.

(b) The incidental take of marine mammals at Eglin Air Force Base, within the Eglin Military Complex, including three sites in the Eglin Gulf Test and Training Range at property off Santa Rosa Island, Florida, in the northern Gulf of Mexico, under the activity identified in paragraph (a) of this section, is limited to the following species: Atlantic bottlenose dolphins (*Tursiops truncatus*).

(1) The latitude/longitude of corners of W-151 in the Eglin Gulf Test and Training Range are:

- (i) 30.24006° North, -86.808838° West
- (ii) 29.539011° North, -84.995536° West
- (iii) 28.03949° North, -85.000147° West
- (iv) 28.027598° North, -85.199395° West
- (v) 28.505304° North, -86.799043° West

(2) The latitude/longitude of corners of W-151A in the Eglin Gulf Test and Training Range are:

- (i) 30.24006° North, -86.808838° West
- (ii) 30.07499° North, -85.999327° West
- (iii) 29.179968° North, -85.996341° West
- (iv) 29.384439° North, -86.802579° West

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§ 217.81 Effective dates.

Regulations in this subpart are effective from April 23, 2012, through April 24, 2017.

§ 217.82 Permissible methods of taking.

(a) Under Letters of Authorization issued pursuant to § 216.106 of this chapter and § 217.87, the U.S. Department of the Air Force, Headquarters 96th Air Base Wing, Eglin Air Force Base (U.S. Air Force), its contractors, and clients, may incidentally, but not intentionally, take marine mammals by Level B harassment, within the area described in § 217.80, provided the activity is in compliance with all terms, conditions, and requirements of these regulations and the appropriate Letter of Authorization.

(b) The incidental taking of marine mammals is authorized for the species listed in § 217.80(b) and is limited to Level B harassment.

(c) The incidental taking of an average of 10 individuals annually and 50 individuals during the 5-year rule, for Atlantic bottlenose dolphins.

(d) The U.S. Air Force shall suspend NEODS training operations until it obtains additional authorization for the take of marine mammals if:

(1) A marine mammal is injured, seriously injured, or killed during training operations;

(2) The injury, serious injury, or death could be associated with the activities; and

(3) After coordination and concurrence with NMFS, the U.S. Air Force determines that supplementary measures are unlikely to reduce the risk of injury, serious injury or death to a very low level, require the U.S. Air Force to suspend its activities until an authorization for such taking has been obtained.

§ 217.83 Prohibitions.

Notwithstanding takings contemplated in § 217.80 and authorized by a Letter of Authorization issued under §§ 216.106 of this chapter and 217.87, no person in connection with the activities described in § 217.80 may:

(a) Take any marine mammal not specified in § 217.80(b);

(b) Take any marine mammal specified in § 217.80(b) other than by incidental take as specified in § 217.82(a) through (d);

(c) Take a marine mammal specified in § 217.80(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 217.87.

§ 217.84 Mitigation.

(a) The activity identified in § 217.80(a) must be conducted in a manner that minimizes, to the greatest extent practicable, adverse impacts on marine mammals and their habitats. When conducting operations identified in § 217.80(a), the mitigation measures contained in the Letter of Authorization issued under §§ 216.106 of this chapter and 217.87 must be implemented. These mitigation measures include (but are not limited to):

(1) Underwater detonations using timed delay devices will only be conducted during daylight hours. The time of detonation shall be limited to an hour after sunrise and an hour before sunset.

(2) NEODS missions shall be postponed if:

(i) The Beaufort sea state is greater than scale number three. Such a delay would maximize detection of marine mammals.

(ii) Large concentrations of fish, jellyfish, and/or large *Sargassum* rafts are observed within the mitigation-monitoring zone. The delay would continue until the fish, jellyfish, and/or *Sargassum* rafts that cause the postponement are confirmed to be outside the mitigation-monitoring zone.

(3) Time delays longer than 10 minutes will not be used. Initiation of the timer device will not start until the mitigation-monitoring zone is clear of marine mammals for 30 minutes.

(4) A calculated mitigation-monitoring zone will be established around each underwater detonation location based on charge weight and length of time-delay used. When conducting surveys within the mitigation-monitoring

zone radius (but always outside the detonation plume radius/human safety zone) and travel in a circular pattern around the detonation point, surveying the inner (toward the detonation site) and outer (away from the detonation site) areas. For a survey radius of 914.4 meters, the boat will be positioned at 457.2 meters from the detonation point. Similarly, for a survey radius of 1,280.2 meters, boats will be positioned at 640.1 meter distance.

(5) For a survey radius of 914.4 meters, two boats are required. For a radius of 1,280.2 meters, either three boats or two boats/one helicopter are required.

(6) When using two boats, each boat will be positioned on opposite sides of the detonation location, separated by 180 degrees. When using three boats, each boat will be separated by 120 degrees (equidistant from each other).

(7) Two observers in each boat will conduct continuous visual surveys of the mitigation-monitoring zone for the entire duration of the training event, including at least 30 minutes prior to detonation. Observers will search the mitigation-monitoring zone for the presence of marine mammals, and other marine species such as sea turtles, diving birds, large concentrations of fish or jellyfish, and large *Sargassum* mats. The presence of diving birds, fish, jellyfish, and *Sargassum* may indicate an increased likelihood of dolphin presence.

(8) To the extent practicable, boats will maintain 18.5 kilometer per hour search speed. This search speed is expected to ensure adequate coverage of the buffer zone. While weather conditions and sea state may require slower speeds in some instances, 18.5 kilometers per hour is considered a prudent, safe, and executable speed that will allow adequate surveillance. For a 914.4 meter survey zone, a boat traveling at 18.5 kilometers per hour and 457.2 meters from the detonation point would circle the point approximately 3.2 times during a 30 minute survey period. By using two boats, approximately 6.4 circles would be completed in total. Similarly, for a 1,280.2 meter radius, each boat would circle the detonation point approximately 2.3 times

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within 30 minutes, and use of three boats would result in 6.9 total circles.

(9) If available, a U.S. Navy helicopter can be used in lieu of one of the survey boats, so long as safety of flight is not jeopardized. U.S. Navy helicopter pilots are trained to conduct searches for relatively small objects in the water, such as a missing person. A helicopter search pattern is dictated by standard U.S. Navy protocols and accounts for multiple variables, such as size and shape of the search area, size of the object, and environmental conditions, among others.

(10) The mitigation-monitoring zone will be surveyed for 30 minutes prior to detonation and continue for 30 minutes after detonation (concentrated on the area down current of the test site), in order to monitor for marine mammals and other protected species. It is the U.S. Air Force's (on behalf of the U.S. Navy) intent to conduct five successive detonations with a maximum time of 20 minutes between detonations, although a variety of factors can cause a delay of longer than 20 minutes between detonations, although a variety of factors can cause a delay of longer than 20 minutes, including a delay until the following day. Monitoring would continue during the 20 minutes time between detonations, and would serve as both post-detonation monitoring as well as pre-mission monitoring for the next detonation. If the time between detonations is delayed beyond 20 minutes, post-mission monitoring will be conducted for 30 minutes. At the conclusion of the final detonation, post-monitoring will be conducted for 30 minutes.

(11) Other personnel besides designated observers shall also maintain situational awareness of the presence of marine mammals within the mitigation-monitoring zone to the extent practicable given dive safety considerations.

(12) Divers placing the charges on mines will observe the immediate underwater area around the detonation site for marine mammals and other marine species such as diving birds, sea turtles, and Gulf sturgeon, and report sightings to surface observers.

(13) If a marine mammal is sighted within an established mitigation-monitoring

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zone or moving towards it, underwater detonation events will be postponed or suspended until the marine mammal that caused the postponement/suspension of training operations has voluntarily left the area and the area is clear of marine mammals for at least 30 minutes.

(14) If a marine mammal is detected within or about to enter an established mitigation-monitoring zone and subsequently cannot be reacquired, the mission will be postponed or suspended until the last verified location is outside the mitigation-monitoring zone, the animal is moving away from the area, and the area is clear of marine mammals for at least 30 minutes.

(15) Any marine mammal observed after an underwater detonation either injured or exhibiting signs of distress will be reported to Eglin Air Force Base. Eglin Air Force Base will coordinate with other members of marine mammal stranding networks, as appropriate, and report these events to NMFS or U.S. Fish and Wildlife Service. The report will contain date and time of sighting, location, species description, and indications of the animal's status.

(16) Training operations shall be suspended if the conditions of § 217.83(a)–(d) regarding the injury, serious injury, or death of a marine mammal during NEODS training operations are met.

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

(b) [Reserved]

§ 217.85 Requirements for monitoring and reporting.

(a) Holders of Letters of Authorization pursuant to § 216.106 of this chapter and § 217.87 for activities described in § 216.80(a) are 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, Southeast Region, NMFS, by letter or telephone, prior to activities possibly involving the taking of marine mammals. If the authorized activity identified in § 217.80(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 § 217.80(b), then the Holder of the Letter of Authorization must, in addition to complying with the requirements of § 217.82(a)–(d), notify the Director, Office of Protected Resources, NMFS, or designee, by telephone (301–427–8400), within 24 hours of the discovery of the injured or dead animal.

(b) Holders of Letters of Authorization must designate trained, qualified, on-site individuals approved in advance by NMFS, as specified in the Letter of Authorization, to perform the following monitoring requirements:

(1) For NEODS testing, areas to be used in missions shall be visually monitored for marine mammal presence from a surface support vessel prior to detonation of mine neutralization charges. Monitoring shall be conducted 30 minutes before missions to clear the mitigation-monitoring zone. Post-mission monitoring shall also be conducted for 30 minutes after the final detonation (concentrated on the area down current of the test site). If marine mammals are inside the mitigation-monitoring zone, detonations shall be postponed until they have left the area. The observer on the vessel must be equipped with the proper optical equipment and lines of communication in order to recommend the decision to move forward with the mission.

(2) Monitoring shall occur pre-mission (for 30 minutes), throughout the mission, and post-mission (for 30 minutes). Post-mission monitoring shall concentrate on the area down current of the test site.

(3) Survey clearance procedures shall be conducted using best operational methods possible. After the mitigation-monitoring zone is cleared, all dolphins and protected species indicators (e.g., *Sargassum* rafts) shall be avoided to the maximum extent possible.

(4) Clearance procedures shall be re-conducted if dolphins or protected species indicators (e.g., *Sargassum* rafts) are encountered.

(5) After conducting post-mission monitoring, NEODS training operations data as required by Eglin Air Force Base's Natural Resources Section, 96 CEG/CEVSN shall be reported.

Post-mission monitoring shall commence immediately following each detonation and shall be concentrated on the area down current of the test site. If any injured or dead marine mammals are observed, that information will be reported and coordinated with marine animals stranding networks.

(6) An annual summary (coordinated through 96 CEG/CEVSN) of mission observations shall be submitted to: NMFS, Southeast Regional Office, Protected Resources Division, 9721 Executive Center Drive North, St. Petersburg, Florida 33702; and NMFS, Office of Protected Resources, 1315 East West Highway, Silver Spring, Maryland 20910.

(c) Holders of Letters of Authorization must conduct additional monitoring as required under an annual Letter of Authorization.

(d) Holders of Letters of Authorization must submit an annual report summarizing the specified activity as well as monitoring and mitigation data to the Southeast Regional Administrator and Director of the Office of Protected Resources, NMFS, within 90 days after the conclusion of the NEODS training operations. This report must contain the following information:

(1) Date(s), time(s), and location(s) of explosive activities,

(2) Design of the monitoring program,

(3) Results of the monitoring program including, but not necessarily limited to:

(i) Species counts,

(ii) Numbers of observed disturbances,

(iii) Descriptions of the disturbance behaviors before, during, and after explosive activities,

(iv) Bearing and distances,

(v) Observations of unusual behaviors, numbers, or distributions of marine mammals in the activity area shall be reported to NMFS and the U.S. Fish and Wildlife Service so that any potential follow-up observations can be conducted by the appropriate personnel. In addition, observations of tag-bearing marine mammals, sea turtles, and fish carcasses as well as any rare or unusual species of marine mammals and fish shall be reported to

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NMFS and U.S. Fish and Wildlife Service.

(e) An annual report (referred to in §217.85(d)) must be submitted at the time of notification of the renewal of the Letter of Authorization.

(f) A draft comprehensive final report must be submitted at least 180 days prior to expiration of these regulations. This comprehensive technical report shall provide full documentation of methods, results, and interpretation of all monitoring during the first four and a half years of the Letter of Authorization. A revised final comprehensive technical report, including all monitoring results during the entire period of the Letters of Authorization, must be submitted 90 days after the end of the period of effectiveness of the regulations. This report shall summarize the activities undertaken and the results reported in all previous reports.

(g)(1) In the unanticipated event that the specified activity clearly causes the take of a marine mammal in a manner prohibited by a Letter of Authorization, such as an injury, serious injury, or mortality, Eglin Air Force Base will immediately cease the specified activities and immediately report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS at 301–427–8401 and/or by email to Jolie.Harrison@noaa.gov and Howard.Goldstein@noaa.gov, and the NMFS Southeast Region Marine Mammal Stranding Network at 877–433–8299 (Blair.Mase@noaa.gov) and Erin.Fougeres@noaa.gov (Florida Marine Mammal Stranding Hotline at 888–404–3922). The report must include the following information:

- (i) Time, date, and location (latitude/longitude) of the incident;
- (ii) Description of the incident;
- (iii) Status of all noise-generating source use in the 24 hours preceding the incident;
- (iv) Water depth;
- (v) Environmental conditions (e.g., wind speed and direction, Beaufort sea state, cloud cover, and visibility);
- (vi) Description of all marine mammal observations in the 24 hours preceding the incident;
- (vii) Species identification or description of the animal(s) involved;

(viii) Fate of the animal(s); and

(ix) Photographs or video footage of the animal(s) (if equipment is available).

Activities shall not resume until NMFS is able to review the circumstances of the prohibited take. NMFS shall work with Eglin Air Force Base to determine what is necessary to minimize the likelihood of further prohibited take and ensure MMPA compliance. Eglin Air Force Base may not resume their activities until notified by NMFS via letter or email, or telephone.

(2) In the event that Eglin Air Force Base discovers an injured or dead marine mammal, and the lead observer determines that the cause of injury or death is unknown and the death is relatively recent (*i.e.*, less than a moderate state of decomposition as described in the next paragraph), Eglin Air Force Base will immediately report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, at 301–427–8401, and/or by email to Jolie.Harrison@noaa.gov and Howard.Goldstein@noaa.gov and the NMFS Southeast Region Marine Mammal Stranding Network (877–433–8299) and/or by email to the Southeast Regional Stranding Coordinator (Blair.Mase@noaa.gov) and Southeast Regional Stranding Program Administrator (Erin.Fougeres@noaa.gov). The report must include the same information identified in the paragraph above. Activities may continue while NMFS reviews the circumstances of the incident, NMFS will work with Eglin Air Force Base to determine whether modifications in the activities are appropriate.

(3) In the event that Eglin Air Force Base discovers an injured or dead marine mammal, and the lead observer determines that the injury or death is not associated with or related to the activities authorized in the Letter of Authorization (e.g., previously wounded animal, carcass with moderate to advanced decomposition, or scavenger damage), Eglin Air Force Base will report the incident to the Chief of the Permits and Conservation Division, Office of Protected Resources, NMFS, at 301–427–8401, and/or by email to

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Jolie.Harrison@noaa.gov and *Howard.Goldstein@noaa.gov*, and the NMFS Southeast Regional Marine Mammal Stranding Network (877-433-8299), and/or by email to the Southeast Regional Stranding Coordinator (*Blair.Mase@noaa.gov*) and Southeast Regional Stranding Program Administrator (*Erin.Fougeres@noaa.gov*), within 24 hours of discovery. Eglin Air Force Base will provide photographs or video footage (if available) or other documentation of the stranded animals sighting to NMFS and the Marine Mammal Stranding Network.

§ 217.86 Applications for Letters of Authorization.

(a) To incidentally take marine mammals pursuant to these regulations, the U.S. citizen (as defined by § 216.103) conducting the activity identified in § 217.80(a) must apply for and obtain either an initial Letter of Authorization in accordance with § 217.87 or a renewal under § 217.88.

(b) The application must be submitted to NMFS at least 30 days before the activity is scheduled to begin.

(c) Application 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) A description of the activity, the dates of the activity, and the specific location of the activity; and

(3) Plans to monitor the behavior and effects of the activity on marine mammals.

(d) A copy of the Letter of Authorization must be in the possession of the persons conducting activities that may involve incidental takings of marine mammals.

(e) [Reserved]

§ 217.87 Letters of Authorization.

(a) A Letter of Authorization, unless suspended or revoked, shall be valid for a period of time not to exceed the period of validity of this subpart.

(b) The Letter of Authorization shall set forth:

(1) Permissible methods of incidental taking;

(2) Means of effecting the least practicable adverse impact on the species,

its habitat, and on the availability of the species for subsistence uses (*i.e.*, mitigation); and

(3) Requirements for mitigation, monitoring, and reporting.

(c) Issuance and renewal of the Letter of Authorization shall be based on a determination that the total number of marine mammals taken by the activity as a whole shall have no more than a negligible impact on the affected species or stock of marine mammal(s).

§ 217.88 Renewal of Letters of Authorization and adaptive management.

(a) A Letter of Authorization issued under § 216.106 of this chapter and § 217.87 for the activity identified in § 217.80(a) shall be renewed upon a request by the applicant or determination by NMFS and the applicant that modifications are appropriate pursuant to the adaptive management component of these regulations, provided that:

(1) NMFS is notified that the activity described in the application submitted under § 217.86 shall be undertaken and there shall not be a substantial modification to the described work, mitigation or monitoring undertaken during the upcoming 12 months;

(2) NMFS has received, reviewed, and accepted the monitoring reports required under § 217.85(d) and (e) and the Letter of Authorization issued under § 217.87;

(3) NMFS determines that the mitigation, monitoring, and reporting measures required under §§ 217.84 and 217.85 and the Letter of Authorization issued under §§ 216.106 and 217.87 of this chapter, were undertaken and shall be undertaken during the upcoming annual period of validity of a renewed Letter of Authorization; and

(4) NMFS makes the determination required by § 217.87(c).

(b) If either a request for a renewal of a Letter of Authorization issued under § 216.106 of this chapter and § 217.88, or a determination by NMFS and the applicant that modifications are appropriate pursuant to the adaptive management component of these regulations indicates that a substantial modification, as determined by NMFS, to the described work, mitigation or

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monitoring undertaken during the upcoming season shall occur, NMFS shall publish a proposed modification to the Letter of Authorization in the FEDERAL REGISTER and provide the public a period of 30 days for review and comment. Review and comment on renewals or modifications of Letters of Authorization are restricted to:

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

(2) Proposed substantive changes to the mitigation and monitoring requirements contained in these regulations or in the current Letter of Authorization.

(c) A notice of issuance or denial of a renewal of a Letter of Authorization shall be published in the FEDERAL REGISTER.

(d) Adaptive Management—NMFS may modify or augment the existing mitigation or monitoring measures (after consulting with the U.S. Air Force regarding the practicability of the modifications) if doing so creates a reasonable likelihood of more effectively accomplishing the goals of mitigation and monitoring set forth in the preamble of these regulations. Below are some of the possible sources of new data that could contribute to the decision to modify the mitigation or monitoring measures:

(1) Results from the U.S. Air Force's monitoring from the previous year;

(2) Results from marine mammal and sound research; or

(3) Any information which reveals that marine mammals may have been taken in a manner, extent or number not authorized by these regulations or subsequent Letters of Authorization.

§ 217.89 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 § 217.87 of this chapter 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 para-

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graph, a renewal of a Letter of Authorization under § 217.88, 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 § 217.80(b), a Letter of Authorization issued pursuant to § 216.106 of this chapter and § 217.87 of this chapter may be substantively modified without prior notification and an opportunity for public comment. Notification shall be published in the FEDERAL REGISTER within 30 days subsequent to the action.

Subpart J—Taking and Importing Marine Mammals; U.S. Navy's Submarine Base New London Pier Construction

SOURCE: 83 FR 36788, July 31, 2018, unless otherwise noted.

EFFECTIVE DATE NOTE: At 83 FR 36788, July 31, 2018, subpart J was added, effective Mar. 1, 2020, until Feb. 28, 2025.

§ 217.90 Specified activity and specified geographical region.

(a) Regulations in this subpart apply only to the U.S. Navy (Navy) 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 the Navy may be authorized in Letters of Authorization (LOAs) only if it occurs within the Navy Submarine Base New London Study Area, which is located in the towns of Groton and Ledyard in New London County, Connecticut.

(c) The taking of marine mammals by the Navy is only authorized if it occurs incidental to the Navy's conducting in-water pier construction or demolition activities.

§ 217.91 Effective dates and definitions.

Regulations in this subpart are effective March 1, 2020 through February 28, 2025.

§ 217.92 Permissible methods of taking.

Under LOAs issued pursuant to § 216.106 of this chapter and § 217.96, the Holder of the LOAs (hereinafter “Navy”) may incidentally, but not intentionally, take marine mammals within the area described in § 217.90(b) by Level A harassment and Level B harassment associated with in-water pile driving and pile removal activities, provided the activity is in compliance with all terms, conditions, and requirements of the regulations in this subpart and the applicable LOAs.

§ 217.93 Prohibitions.

Notwithstanding takings contemplated in § 217.92 and authorized by LOAs issued under § 216.106 of this chapter and § 217.96, no person in connection with the activities described in § 217.90 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 § 217.96;
- (b) Take any marine mammal not specified in such LOAs;
- (c) Take any marine mammal specified in such LOAs in any manner other than as specified;
- (d) Take a marine mammal specified in such LOAs if NMFS determines such taking results in more than a negligible impact on the species or stocks of such marine mammal; or
- (e) Take a marine mammal specified in such LOAs if NMFS determines such taking results in an unmitigable adverse impact on the availability of such species or stock of marine mammal for taking for subsistence uses.

§ 217.94 Mitigation requirements.

When conducting the activities identified in § 217.90(c), the mitigation measures contained in any LOAs issued under § 216.106 of this chapter and § 217.96 must be implemented. These mitigation measures shall include but are not limited to:

(a) *Time restriction.* In-water construction and demolition work shall occur only during daylight hours.

(b) *Establishment of monitoring and shutdown zones.* (1) For all relevant in-water construction and demolition activity, the Navy shall designate Level A harassment zones with radial distances as identified in any LOA issued under § 216.106 of this chapter and § 217.96.

(2) For all relevant in-water construction and demolition activity, the Navy shall designate Level B harassment zones with radial distances as identified in any LOA issued under § 216.106 of this chapter and § 217.96.

(3) For all in-water construction and demolition activity, the Navy shall implement a minimum shutdown zone of a 10-m radius around the pile. If a marine mammal comes within or approaches the shutdown zone, such operations shall cease.

(c) *Monitoring visibility.* Pile driving shall only take place when the shutdown and Level A zones are visible and can be adequately monitored. If conditions (e.g., fog) prevent the visual detection of marine mammals, activities with the potential to result in Level A harassment shall not be initiated. If such conditions arise after the activity has begun, pile driving or pile removal activities shall be halted if the 10-m shutdown zone is not visible.

(d) *Shutdown measures.* (1) The Navy shall deploy three protected species observers (PSOs) to monitor marine mammals during in-water pile driving and pile removal. One PSO shall be located on land and two shall be located in a boat to monitor the farther locations.

(2) Monitoring shall take place from 15 minutes prior to initiation of pile driving or removal activity through 30 minutes post-completion of pile driving or removal activity. Pre-activity monitoring shall be conducted for 15 minutes to ensure that the shutdown zone is clear of marine mammals, and pile driving or removal may commence when observers have declared the shutdown zone clear of marine mammals. In the event of a delay or shutdown of activity resulting from marine mammals in the shutdown zone, animals

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shall be allowed to remain in the shutdown zone (*i.e.*, must leave of their own volition) and their behavior shall be monitored and documented. Monitoring shall occur throughout the time required to drive or remove a pile. A determination that the shutdown zone is clear must be made during a period of good visibility (*i.e.*, the entire shutdown zone and surrounding waters must be visible to the naked eye).

(3) If a marine mammal approaches or enters the shutdown zone, or 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 § 217.96 and enters the Level B harassment zone, all pile driving or removal activities at that location shall be halted. If pile driving or removal 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 zone or fifteen minutes have passed without re-detection of the animal.

(4) The Navy shall implement shutdown measures if the number of authorized takes for any particular species reaches the limit under the applicable LOA and if such marine mammals are sighted within the vicinity of the project area and are approaching the Level B harassment zone during in-water construction or demolition activities.

(e) *Soft start.* (1) The Navy shall implement soft start techniques for impact pile driving. The Navy shall conduct an initial set of three strikes from the impact hammer at 40 percent energy, followed by a 1-minute waiting period, then two subsequent three strike sets.

(2) Soft start shall 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.

§ 217.95 Requirements for monitoring and reporting.

(a) *Marine mammal monitoring*—(1) *General requirements.* The Navy shall

employ trained protected species observers (PSOs) to conduct marine mammal monitoring for its Submarine Base New London pier construction project. The PSOs shall observe and collect data on marine mammals in and around the project area for 15 minutes before, during, and for 30 minutes after all pile removal and pile installation work. PSOs shall have no other assigned tasks during monitoring periods, and shall be placed at the best vantage point(s) practicable to monitor for marine mammals and implement shutdown or delay procedures when applicable through communication with the equipment operator.

(2) *Protected species observer qualifications.* NMFS-approved PSOs shall meet the following requirements:

(i) Independent observers (*i.e.*, not construction personnel) are required;

(ii) At least one observer must have prior experience working as an observer;

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

(iv) Where a team of three or more observers are required, one observer should be designated as lead observer or monitoring coordinator. The lead observer must have prior experience working as an observer; and

(v) NMFS will require submission and approval of observer CVs.

(3) *Marine mammal monitoring protocols.* (i) The Navy shall conduct briefings between construction supervisors and crews and the PSO team prior to the start of all pile driving activities, and when new personnel join the work, in order to explain responsibilities, communication procedures, marine mammal monitoring protocol, and operational procedures. All personnel working in the project area shall watch the Navy's Marine Species Awareness Training video. An informal guide shall be included with the monitoring plan to aid in identifying species if they are observed in the vicinity of the project area.

(ii) The Navy shall monitor the Level A and Level B harassment zones before, during, and after pile driving activities

for all in-water constructions. The Marine Mammal Monitoring Plan shall include the following procedures:

(A) *PSO location*. PSOs will be primarily located on boats, docks, and piers at the best vantage point(s) in order to properly see the entire shutdown zone(s).

(B) *PSO vantage point*. PSOs will be located at the best vantage point(s) to observe the zone associated with behavioral impact thresholds.

(C) *Observation equipment*. During all observation periods, PSOs will use high-magnification (25X), as well as standard handheld (7X) binoculars, and the naked eye to search continuously for marine mammals.

(D) *Ranging equipment*. Monitoring distances will be measured with range finders. Distances to animals will be based on the best estimate of the PSO, relative to known distances to objects in the vicinity of the PSO.

(E) *Bearing*. Bearings to animals will be determined using a compass.

(F) *Pre-activity monitoring*. The shutdown zone will be monitored for 15 minutes prior to in-water construction/demolition activities. If a marine mammal is present within the 10-m shutdown zone, the activity will be delayed until the animal(s) leaves the shutdown zone. Activity will resume only after the PSO has determined that, through sighting or by waiting 15 minutes, the animal(s) has moved outside the shutdown zone. If a marine mammal is observed approaching the shutdown zone, the PSO who sighted that animal will notify all other PSOs of its presence.

(G) *During activity monitoring*. If a marine mammal is observed entering the Level A or Level B harassment zones outside the 10-m shutdown zone, the pile segment being worked on will be completed without cessation, unless the animal enters or approaches the shutdown zone, at which point all pile driving activities will be halted. If an animal is observed within the shutdown zone during pile driving, then pile driving will be stopped as soon as it is safe to do so. Pile driving can only resume once the animal has left the shutdown zone of its own volition or has not been re-sighted for a period of 15 minutes.

(H) *Post-activity monitoring*. Monitoring of all zones will continue for 30 minutes following the completion of the activity.

(b) *Acoustic monitoring*—(1) *Sound source verification*. (i) The Navy shall conduct pile driving sound source verification for the following types and sizes of piles:

(A) Vibratory and impact installation of at least 5 16-in fiberglass reinforced plastic piles; and

(B) Rock socket drilling of at least 3 30-in and 3 16-in piles.

(ii) Sound source measurements of these piles sound shall be conducted at distances approximately 10 m from the source.

(iii) For vibratory pile driving/removal source level measurements, reports shall include 1-s sound exposure level (SEL), source spectrum, duration of recordings used to derived the SEL, and 24-hour cumulative SEL extrapolated from measurements.

(iv) For impact pile driving source level measurements, report should include peak sound pressure level (SPL_{pk}), root-mean-square SPL (SPL_{rms}), single strike SEL (SEL_{ss}), integration time for SPL_{rms} , SEL_{ss} spectrum, and 24-hour cumulative SEL extrapolated from measurements.

(2) *Level B harassment distance verification*. (i) The Navy shall empirically determine the Level B harassment distance either by extrapolating from in situ measurements conducted at several points between 10 and 500 m from the source, or by direct measurements to locate the distance where the received levels reach 120 dB or below, or at the ambient noise level.

(ii) Level B harassment zones to be empirically verified include:

(A) Rock socket drilling of at least 3 30-in and 3 16-in piles;

(B) Vibratory installation of at least 3 36-in steel piles; and

(C) Vibratory removal of at least 3 24-in concrete and 3 33-in concrete piles.

(iii) For extent of Level B harassment zone verification, the Navy shall report the measured or extrapolated distances where the received levels SPL_{rms} decay to 120-dB or to the ambient noise level, whichever is higher, as well as integration time for such SPL_{rms} .

(3) *Source level calculation.* The sound levels reported should be in median and linear average (*i.e.*, taking averages of sound intensity before converting to dB).

(4) *Sediment type.* The passive acoustic monitoring reports shall also include sediment type where measurements are made.

(c) *Reporting measures*—(1) *Annual reports.* (i) The Navy shall submit an annual report within 90 days after each activity year, starting from the date when the LOA is issued (for the first annual report) or from the date when the previous annual report ended.

(ii) Annual reports shall detail the monitoring protocol, summarize the data recorded during monitoring, and estimate the number of marine mammals that may have been harassed during the period of the report.

(iii) Annual reports shall also include results from acoustic monitoring detailed in paragraph (b) of this section.

(iv) NMFS shall provide comments within 30 days after receiving annual reports, and the Navy shall address the comments and submit revisions within 30 days after receiving NMFS comments. If no comment is received from the NMFS within 30 days, the annual report is considered completed.

(2) *Final report.* (i) The Navy shall submit a comprehensive summary report to NMFS not later than 90 days following the conclusion of marine mammal monitoring efforts described in this subpart.

(ii) The final report shall synthesize all data recorded during marine mammal monitoring, and estimate the number of marine mammals that may have been harassed through the entire project.

(iii) NMFS would provide comments within 30 days after receiving this report, and the Navy shall address the comments and submit revisions within 30 days after receiving NMFS comments. If no comment is received from the NMFS within 30 days, the final report is considered as final.

(3) *Reporting of injured or dead marine mammals.* (i) In the unanticipated event that the construction or demolition activities clearly cause the take of a marine mammal in a prohibited manner, such as an injury, serious injury, or

mortality, the Navy shall immediately cease all operations and immediately report the incident to the NMFS Office of Protected Resources, NMFS, and the Greater Atlantic Region Stranding Coordinators. The report must include the following information:

(A) Time, date, and location (latitude/longitude) of the incident;

(B) Description of the incident;

(C) Status of all sound source use in the 24 hours preceding the incident;

(D) Environmental conditions (*e.g.*, wind speed and direction, sea state, cloud cover, visibility, and water depth);

(E) Description of marine mammal observations in the 24 hours preceding the incident;

(F) Species identification or description of the animal(s) involved;

(G) The fate of the animal(s); and

(H) Photographs or video footage of the animal (if equipment is available).

(ii) Activities shall not resume until NMFS is able to review the circumstances of the prohibited take. NMFS shall work with the Navy to determine what is necessary to minimize the likelihood of further prohibited take and ensure MMPA compliance. The Navy may not resume their activities until notified by NMFS via letter, email, or telephone.

(iii) In the event that the Navy discovers an injured or dead marine mammal, and the lead PSO determines that the cause of the injury or death is unknown and the death is relatively recent (*i.e.*, in less than a moderate state of decomposition as described in the next paragraph), the Navy will immediately report the incident to the NMFS Office of Protected Resources, NMFS, and the Greater Atlantic Regional Stranding Coordinators. The report must include the same information identified in paragraph (c)(3)(i)(A) of this section. Activities may continue while NMFS reviews the circumstances of the incident. NMFS will work with the Navy to determine whether modifications in the activities are appropriate.

(iv) In the event that the Navy discovers an injured or dead marine mammal, and the lead protected species observer determines that the injury or death is not associated with or related

to the activities authorized in the IHA (e.g., previously wounded animal, carcass with moderate to advanced decomposition, or scavenger damage), the Navy shall report the incident to the NMFS Office of Protected Resources, NMFS, and the Greater Atlantic Regional Stranding Coordinators, within 24 hours of the discovery. The Navy shall provide photographs or video footage (if available) or other documentation of the stranded animal sighting to NMFS and the Marine Mammal Stranding Network. The Navy can continue its operations under such a case.

§ 217.96 Letters of Authorization.

(a) To incidentally take marine mammals pursuant to these regulations, the Navy must apply for and obtain LOAs in accordance with § 216.106 of this chapter for conducting the activity identified in § 217.90(c).

(b) LOAs, unless suspended or revoked, may be effective for a period of time not to extend beyond the expiration date of these regulations.

(c) If an LOA expires prior to the expiration date of these regulations, the Navy may apply for and obtain a renewal of the LOAs.

(d) In the event of projected changes to the activity or to mitigation, monitoring, reporting (excluding changes made pursuant to the adaptive management provision of § 217.97(c)(1)) required by an LOA, the Navy must apply for and obtain a modification of LOAs as described in § 217.97.

(e) Each LOA shall set forth:

(1) Permissible methods of incidental taking;

(2) Means of effecting the least practicable adverse impact (i.e., mitigation) on the species, their habitat, and the availability of the species for subsistence uses; and

(3) Requirements for monitoring and reporting.

(f) Issuance of the LOAs shall be based on a determination that the level of taking shall be consistent with the findings made for the total taking allowable under these regulations.

(g) Notice of issuance or denial of the LOAs shall be published in the FEDERAL REGISTER within 30 days of a determination.

§ 217.97 Renewals and modifications of Letters of Authorization.

(a) An LOA issued under § 216.106 of this chapter and § 217.96 for the activity identified in § 217.90(c) shall be renewed or modified upon request by the applicant, provided that:

(1) The proposed specified activity and mitigation, monitoring, and reporting measures, as well as the anticipated impacts, are the same as those described and analyzed for these regulations (excluding changes made pursuant to the adaptive management provision in paragraph (c)(1) of this section); and

(2) NMFS determines that the mitigation, monitoring, and reporting measures required by the previous LOAs under these regulations were implemented.

(b) For LOA modification or renewal requests by the applicant that include changes to the activity or the mitigation, monitoring, or reporting measures (excluding changes made pursuant to the adaptive management provision in paragraph (c)(1) of this section) that do not change the findings made for the regulations or result in no more than a minor change in the total estimated number of takes (or distribution by species or years), NMFS may publish a notice of proposed LOA in the FEDERAL REGISTER, including the associated analysis of the change, and solicit public comment before issuing the LOA.

(c) An LOA issued under § 216.106 of this chapter and § 217.96 for the activity identified in § 217.90(c) may be modified by NMFS under the following circumstances:

(1) *Adaptive management.* After consulting with the Navy regarding the practicability of the modifications, NMFS may modify (including by adding or removing measures) the existing mitigation, monitoring, or reporting measures if doing so creates a reasonable likelihood of more effectively accomplishing the goals of the mitigation and monitoring set forth in the preamble for these regulations.

(i) Possible sources of data that could contribute to the decision to modify the mitigation, monitoring, or reporting measures in an LOA:

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(A) Results from the Navy's monitoring from the previous year(s);

(B) Results from other marine mammal and/or sound research or studies; or

(C) Any information that reveals marine mammals may have been taken in a manner, extent or number not authorized by these regulations or subsequent LOAs.

(ii) If, through adaptive management, the modifications to the mitigation, monitoring, or reporting measures are substantial, NMFS shall publish a notice of proposed LOA in the FEDERAL REGISTER and solicit public comment.

(2) *Emergencies.* If NMFS determines that an emergency exists that poses a 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 § 217.96, 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.

§§ 217.98–217.99 [Reserved]

Subpart K—Taking Marine Mammals Incidental to Rocky Intertidal Monitoring Surveys Along the Oregon and California Coasts

SOURCE: 85 FR 18467, Apr. 2, 2020, unless otherwise noted.

EFFECTIVE DATE NOTE: At 85 FR 18467, Apr. 2, 2020, subpart K was added, effective Apr. 12, 2020, through Apr. 11, 2021. At 85 FR 20201, Apr. 10, 2020, the end date was corrected to Apr. 11, 2025.

§ 217.100 Specified activity and specified geographical region.

(a) Regulations in this subpart apply only to the University of California Santa Cruz's Partnership for Interdisciplinary Studies of Coastal Oceans (UCSC/PISCO) and those persons it authorizes or funds to conduct activities on its behalf for the taking of marine mammals that occurs in the areas outlined in paragraph (b) of this section and that occur incidental to rocky intertidal monitoring research surveys.

(b) The taking of marine mammals by UCSC/PISCO may be authorized in a

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Letter of Authorization (LOA) only if it occurs on the coasts of Oregon or California.

§ 217.101 Effective dates.

Regulations in this subpart are effective from April 12, 2020 through April 11, 2025.

§ 217.102 Permissible methods of taking.

Under LOAs issued pursuant to §§ 216.106 of this chapter and 217.106, the Holder of the LOA (hereinafter “UCSC/PISCO”) may incidentally, but not intentionally, take marine mammals within the area described in § 217.100(b) by Level B harassment associated with rocky intertidal monitoring activities, provided the activity is in compliance with all terms, conditions, and requirements of the regulations in this subpart and the appropriate LOA.

§ 217.103 Prohibitions.

Notwithstanding takings contemplated in § 217.100 and authorized by a LOA issued under §§ 216.106 of this chapter and 217.106, no person in connection with the activities described in § 217.100 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 217.106;

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

(c) Take any marine mammal specified in such LOA in any manner other than as specified in § 217.102;

(d) Take a marine mammal specified in such LOA if NMFS determines such taking results in more than a negligible impact on the species or stocks of such marine mammal; or

(e) Take a marine mammal specified in such LOA if NMFS determines such taking results in an unmitigable adverse impact on the species or stock of such marine mammal for taking for subsistence uses.

§ 217.104 Mitigation requirements.

When conducting the activities identified in § 217.100(a), the mitigation measures contained in any LOA issued under §§ 216.106 of this chapter and 217.106 must be implemented. These

mitigation measures shall include but are not limited to:

(a) *General conditions.* (1) Researchers must observe a site from a distance for at least five minutes, using binoculars if necessary, to detect any marine mammals prior to approach to determine if mitigation is required (*i.e.*, site surveys will not be conducted if other species of pinnipeds are present, researchers will approach with caution, walking slowly, quietly, and close to the ground to avoid surprising any hauled-out individuals and to reduce flushing/stampeding of individuals).

(2) Researchers must avoid pinnipeds along access ways to sites by locating and taking a different access way. Researchers must keep a safe distance from and not approach any marine mammal while conducting research, unless it is absolutely necessary to approach a marine mammal in order to continue conducting research (*i.e.*, if a site cannot be accessed or sampled due to the presence of pinnipeds).

(3) Researchers must avoid making loud noises (*i.e.*, using hushed voices) and keep bodies low to the ground in the visual presence of pinnipeds.

(4) Researchers must monitor the off-shore area for predators (such as killer whales and white sharks) and avoid flushing of pinnipeds when predators are observed in nearshore waters.

(5) Researchers must promptly vacate sites at the conclusion of sampling.

(b) *Pup protection measure.* Intentional approach must not occur if de-

pendent pups are present to avoid mother/pup separation and trampling of pups. Staff shall reschedule work at sites where pups are present, unless other means of accomplishing the work can be done without causing disturbance to mothers and dependent pups.

§ 217.105 Requirements for monitoring and reporting.

(a) *Visual monitoring program.* (1) Standard information recorded must include species counts (with numbers of pups/juveniles when possible) of animals present before approaching, numbers of observed disturbances, and descriptions of the disturbance behaviors during the monitoring surveys, including location, date, and time of the event.

(2) UCSC/PISCO must note observations of:

(i) Unusual behaviors, numbers, or distributions of pinnipeds, such that any potential follow-up research can be conducted by the appropriate personnel;

(ii) Tag-bearing carcasses of pinnipeds, allowing transmittal of the information to appropriate agencies and personnel; and

(iii) Rare or unusual species of marine mammals for agency follow-up.

(3) For consistency, any reactions by pinnipeds to researchers will be recorded according to a three-point scale shown in Table 1 to this paragraph (a)(3). Only observations of disturbance Levels 2 and 3 should be recorded as takes.

TABLE 1 TO PARAGRAPH (a)(3)—LEVELS OF PINNIPED BEHAVIORAL DISTURBANCE

Level	Type of response	Definition
1	Alert	Seal head orientation or brief movement in response to disturbance, which may include turning head towards the disturbance, craning head and neck while holding the body rigid in a u-shaped position, changing from a lying to a sitting position, or brief movement of less than twice the animal's body length.
2	Movement	Movements in response to the source of disturbance, ranging from short withdrawals at least twice the animal's body length to longer retreats over the beach, or if already moving a change of direction of greater than 90 degrees.
3	Flush	All retreats (flushes) to the water.

(4) Information regarding physical and biological conditions pertaining to a site, as well as the date and time that research was conducted are also noted.

(b) *Prohibited take.* (1) If at any time the specified activity clearly causes the take of a marine mammal in a manner prohibited by this subpart or

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LOA, such as an injury (Level A harassment), serious injury, or mortality, UCSC/PISCO shall immediately cease the specified activities and report the incident to the Office of Protected Resources, NMFS, and the West Coast Regional Stranding Coordinator, NMFS. The report must include the following information:

- (i) Time and date of the incident;
- (ii) Description of the incident;
- (iii) Environmental conditions (*e.g.*, wind speed and direction, Beaufort sea state, cloud cover, and visibility);
- (iv) Description of all marine mammal observations in the 24 hours preceding the incident;
- (v) Species identification or description of the animal(s) involved;
- (vi) Fate of the animal(s); and
- (vii) Photographs or video footage of the animal(s) (if equipment is available).

(2) Activities shall not resume until NMFS is able to review the circumstances of the prohibited take. NMFS will work with UCSC/PISCO to determine what measures are necessary to minimize the likelihood of further prohibited take and ensure MMPA compliance. UCSC/PISCO may not resume the activities until notified by NMFS via letter, email, or telephone.

(c) *Notification of dead or injured marine mammals.* (1) In the event that UCSC/PISCO discovers an injured or dead marine mammal and determines that the cause of the injury or death is unknown and the death is relatively recent (*e.g.*, in less than a moderate state of decomposition), UCSC/PISCO shall immediately report the incident to the Office of Protected Resources, NMFS, and the West Coast Regional Stranding Coordinator, NMFS. The report must include the information identified in paragraph (b)(1) of this section. Activities may continue while NMFS reviews the circumstances of the incident. NMFS will work with UCSC/PISCO to determine whether additional mitigation measures or modifications to the activities are appropriate.

(2) In the event that an injured or dead marine mammal is discovered and it is determined that the injury or death is not associated with or related to the activities authorized in this sub-

part and LOA (*e.g.*, previously wounded animal, carcass with moderate to advanced decomposition, or scavenger damage), UCSC/PISCO shall report the incident to the Office of Protected Resources, NMFS, and the West Coast Regional Stranding Coordinator, NMFS, within 24 hours of the discovery. UCSC/PISCO shall provide photographs, video footage (if available), or other documentation of the stranded animal sighting to NMFS and the Marine Mammal Stranding Network. Activities may continue while NMFS reviews the circumstances of the incident.

(d) *Annual report.* (1) A draft annual report shall be submitted to NMFS Office of Protected Resources within 90 days after the conclusion of each annual field season. The final annual report after year five may be included as part of the final report (see paragraph (e) of this section). The report must include a summary of the information gathered pursuant to the monitoring requirements set forth in paragraph (a) of this section and in the LOA.

(2) A final annual report shall be submitted to the Director of the NMFS Office of Protected Resources within 30 days after receiving comments from NMFS on the draft annual report. If no comments are received from NMFS, the draft annual report will be considered the final report.

(e) *Final report.* A draft final report shall be submitted to NMFS Office of Protected Resources within 60 days after the conclusion of the fifth year. A final report shall be submitted to the Director of the NMFS Office of Protected Resources and to the NMFS West Coast Regional Administrator within 30 days after receiving comments from NMFS on the draft final report. If no comments are received from NMFS, the draft final report will be considered the final report.

§ 217.106 Letters of Authorization.

(a) To incidentally take marine mammals pursuant to this subpart, UCSC/PISCO must apply for and obtain an LOA.

(b) An LOA, unless suspended or revoked, may be effective for a period of time not to exceed the expiration date of this subpart.

(c) If an LOA expires prior to the expiration date of this subpart, UCSC/PISCO may apply for and obtain a renewal of the LOA.

(d) In the event of projected changes to the activity or to mitigation and monitoring measures required by an LOA, UCSC/PISCO must apply for and obtain a modification of the LOA as described in §217.107.

(e) The LOA shall set forth:

(1) Permissible methods and numbers of incidental taking;

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

(3) Requirements for monitoring and reporting.

(f) Issuance of the LOA shall be based on a determination that the level of taking will be consistent with the findings made for the total taking allowable under this subpart.

(g) Notice of issuance or denial of an LOA shall be published in the FEDERAL REGISTER within 30 days of a determination.

§217.107 Renewals and modifications of Letters of Authorization.

(a) An LOA issued under §§216.106 of this chapter and 217.106 for the activity identified in §217.100(a) shall be renewed or modified upon request by the applicant, provided that:

(1) The proposed specified activity and mitigation, monitoring, and reporting measures, as well as the anticipated impacts, are the same as those described and analyzed for this subpart (excluding changes made pursuant to the adaptive management provision in paragraph (c)(1) of this section); and

(2) NMFS' Office of Protected Resources determines that the mitigation, monitoring, and reporting measures required by the previous LOA under this subpart were implemented.

(b) For an LOA modification or renewal requests by the applicant that include changes to the activity or the mitigation, monitoring, or reporting (excluding changes made pursuant to the adaptive management provision in paragraph (c)(1) of this section) that do not change the findings made for this subpart or result in no more than a

minor change in the total estimated number of takes (or distribution by species or years), NMFS' Office of Protected Resources may publish a notice of proposed LOA in the FEDERAL REGISTER, including the associated analysis of the change, and solicit public comment before issuing the LOA.

(c) An LOA issued under §§216.106 of this chapter and 217.106 for the activity identified in §217.100(a) may be modified by NMFS' Office of Protected Resources under the following circumstances:

(1) *Adaptive management.* NMFS' Office of Protected Resources may modify (including augment) the existing mitigation, monitoring, or reporting measures (after consulting with UCSC/PISCO regarding the practicability of the modifications) if doing so creates a reasonable likelihood of more effectively accomplishing the goals of the mitigation and monitoring set forth in this subpart.

(i) Possible sources of data that could contribute to the decision to modify the mitigation, monitoring, or reporting measures in an LOA:

(A) Results from UCSC/PISCO's monitoring from the previous year(s).

(B) Results from other marine mammal and/or sound research or studies.

(C) Any information that reveals marine mammals may have been taken in a manner, extent, or number not authorized by this subpart or subsequent LOAs.

(ii) If, through adaptive management, the modifications to the mitigation, monitoring, or reporting measures are substantial, NMFS' Office of Protected Resources will publish a notice of proposed LOA in the FEDERAL REGISTER and solicit public comment.

(2) *Emergencies.* If NMFS' Office of Protected Resources determines that an emergency exists that poses a 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 217.106, 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.

§§ 217.108—217.109 [Reserved]

Subpart L—Taking Marine Mammals Incidental to Conducting Precision Strike Weapon and Air-to-Surface Gunnery Missions at Eglin Gulf Test and Training Range (EGTTR) in the Gulf of Mexico

SOURCE: 79 FR 13588, Mar. 11, 2014, unless otherwise noted.

§ 217.110 Specified activity and specified geographical region.

(a) Regulations in this subpart apply only to the U.S. Air Force for the incidental taking of marine mammals that occurs in the area outlined in paragraph (b) of this section and that occur incidental to the activities described in paragraph (c) of this section.

(b) The taking of marine mammals by the Air Force is only authorized if it occurs within the Eglin Air Force Base Gulf Test and Training Range (as depicted in Figure 1–9 of the Air Force's Request for a Letter of Authorization). The EGTTR is the airspace over the Gulf of Mexico beyond 3 nm from shore that is controlled by Eglin Air Force Base. The specified activities will take place within the boundaries of Warning Area W–151. The inshore and offshore boundaries of W–151 are roughly parallel to the shoreline contour. The shoreward boundary is 3 nm from shore, while the seaward boundary extends approximately 85 to 100 nm offshore, depending on the specific location. W–151 has a surface area of approximately 10,247 nm² (35,145 km²), and includes water depths ranging from approximately 20 to 700 m.

(c) The taking of marine mammals by the Air Force is only authorized if it occurs incidental to the following activities within the designated amounts of use:

(1) The use of the following Precision Strike Weapons (PSWs) for PSW training activities, in the amounts indicated below:

(i) Joint Air-to-Surface Stand-Off Missile (JASSM) AGM–158 A and B—two live shots (single) and 4 inert shots (single) per year;

(ii) Small-diameter bomb (SDB) GBU–39/B—six live shots per year, with two of the shots occurring simultaneously, and 12 inert shots per year, with up to two occurring simultaneously.

(2) The use of the following ordnance for daytime Air-to-Surface (AS) Gunnery training activities, in the amounts indicated below:

(i) 105 mm HE Full Up (FU)—25 missions per year with 30 rounds per mission;

(ii) 40 mm HE—25 missions per year with 64 rounds per mission;

(iii) 25 mm HE—25 mission per year with 560 rounds per mission.

(3) The use of the following ordnance for nighttime Air-to-Surface (AS) Gunnery training activities, in the amounts indicated below:

(i) 105 mm HE Training Round (TR)—45 missions per year with 30 rounds per mission;

(ii) 40 mm HE—45 missions per year with 64 rounds per mission;

(iii) 25 mm HE—45 mission per year with 560 rounds per mission.

§ 217.111 Effective dates.

Regulations in this subpart are effective March 11, 2014 and applicable to Eglin AFB March 5, 2014, through March 4, 2019.

§ 217.112 Permissible methods of taking.

(a) Under a Letter of Authorization issued pursuant to §§ 216.106 and 217.117 of this chapter, the Holder of the Letter of Authorization may incidentally, but not intentionally, take marine mammals by Level A and Level B harassment within the area described in § 217.110(b) of this chapter, provided the activity is in compliance with all terms, conditions, and requirements of this subpart and the appropriate Letter of Authorization.

(b) The activities identified in § 217.110(c) of this chapter must be conducted in a manner that minimizes, to the greatest extent practicable, any adverse impact on marine mammals and their habitat.

(c) The incidental take of marine mammals under the activities identified in §217.110(c) is limited to the following species, by the indicated method of take and the indicated number:

(1) Level B Harassment:

(i) Atlantic bottlenose dolphin (*Tursiops truncatus*)—2,200 (an average of 444 annually);

(ii) Atlantic spotted dolphin (*Stenella frontalis*)—1,765 (an average of 353 annually);

(iii) Pantropical spotted dolphin (*S. attenuate*)—15 (an average of 3 annually);

(iv) Spinner dolphin (*S. longirostris*)—15 (an average of 3 annually);

(v) Dwarf or pygmy sperm whale (*Kogia simus* or *Kogia breviceps*)—10 (an average of 2 annually).

(2) Level A Harassment:

(i) Atlantic bottlenose dolphin (*Tursiops truncatus*)—25 (an average of 5 annually);

(ii) Atlantic spotted dolphin (*Stenella frontalis*)—20 (an average of 4 annually).

§217.113 Prohibitions.

No person in connection with the activities described in §217.110 shall:

(a) Take any marine mammal not specified in §217.112(c);

(b) Take any marine mammal specified in §217.112(c) other than by incidental take as specified in §217.112(c)(1) and (c)(2);

(c) Take a marine mammal specified in §217.112(c) 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 and 217.117 of this chapter.

§217.114 Mitigation.

(a) The activities identified in §217.110(c) must be conducted in a manner that minimizes, to the greatest extent practicable, adverse impacts on marine mammals and their habitats. When conducting operations identified in §217.110(c), the mitigation measures contained in the Letter of Authorization issued under §§216.106 and 217.117 of this chapter must be implemented.

(b) Precision Strike Weapon Missions:

(1) Safety Zones:

(i) For the JASSM, the Air Force must establish and monitor a safety zone for marine mammals with a radius of 2.0 nm (3.7 km) from the center of the detonation and a buffer zone with a radius of 1.0 nm (1.85 km) radius from the outer edge of the safety zone.

(ii) For the SDB, the holder of the Letter of Authorization must establish and monitor a safety zone for marine mammals with a radius of no less than 5 nm (9.3 km) for single bombs and 10 nm (18.5 km) for double bombs and a buffer zone from the outer edge of the safety zone with a radius of at least 2.5 nm (4.6 km) for single bombs and 5 nm (9.3 km) for double bombs.

(2) For PSW missions, the holder of the Letter of Authorization must comply with the monitoring requirements, including pre-mission monitoring, set forth in §217.115(c).

(3) When detonating explosives:

(i) If any marine mammals or sea turtles are observed within the designated safety zone or the buffer zone prescribed in the condition in paragraph (b)(1) of this section or that are on a course that will put them within the safety zone prior to JASSM or SDB launch, the launching must be delayed until all marine mammals are no longer within the designated safety zone.

(ii) If any marine mammals are detected in the buffer zone and subsequently cannot be reacquired, the mission launch will not continue until the next verified location is outside of the safety zone and the animal is moving away from the mission area.

(iii) If large Sargassum rafts or large concentrations of jellyfish are observed within the safety zone, the mission launch will not continue until the Sargassum rafts or jellyfish that caused the postponement are confirmed to be outside of the safety zone due to the current and/or wind moving them out of the mission area.

(iv) If weather and/or sea conditions preclude adequate aerial surveillance for detecting marine mammals or sea turtles, detonation must be delayed until adequate sea conditions exist for aerial surveillance to be undertaken.

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Adequate sea conditions means the sea state does not exceed Beaufort sea state 3.5 (i.e., whitecaps on 33 to 50 percent of surface; 0.6 m (2 ft) to 0.9 m (3 ft) waves), the visibility is 5.6 km (3 nm) or greater, and the ceiling is 305 m (1,000 ft) or greater.

(v) To ensure adequate daylight for pre- and post-detonation monitoring, mission launches may not take place earlier than 2 hours after sunrise, and detonations may not take place later than 2 hours prior to sunset, or whenever darkness or weather conditions will preclude completion of the post-test survey effort described in §217.115.

(vi) If post-detonation surveys determine that a serious injury or lethal take of a marine mammal has occurred, the test procedure and the monitoring methods must be reviewed with the National Marine Fisheries Service and appropriate changes to avoid unauthorized take must be made prior to conducting the next mission detonation.

(vii) Mission launches must be delayed if aerial or vessel monitoring programs described under §217.115 cannot be fully carried out.

(c) Air-to-Surface Gunnery Missions:

(1) Sea State Restrictions:

(i) If daytime weather and/or sea conditions preclude adequate aerial surveillance for detecting marine mammals and other marine life, air-to-surface gunnery exercises must be delayed until adequate sea conditions exist for aerial surveillance to be undertaken. Daytime air-to-surface gunnery exercises will be conducted only when sea surface conditions do not exceed Beaufort sea state 4 (i.e., wind speed 13–18 mph (11–16 knots); wave height 1 m (3.3 ft)), the visibility is 5.6 km (3 nm) or greater, and the ceiling is 305 m (1,000 ft) or greater.

(ii) [Reserved]

(2) Pre-mission and Mission Monitoring:

(i) The aircrews of the air-to-surface gunnery missions will initiate location and surveillance of a suitable firing site immediately after exiting U.S. territorial waters (>12 nm).

(ii) Prior to each firing event, the aircraft crew will conduct a visual and/or instrument survey of the 5-nm (9.3-km) wide prospective target area to lo-

cate any marine mammals that may be present.

(A) The AC-130 gunship will conduct at least two complete orbits at a minimum safe airspeed around a prospective target area at an altitude of approximately 6,000 ft (1,829 m).

(B) If marine mammals are not detected, the AC-130 can then continue orbiting the selected target point as it climbs to the mission testing altitude.

(C) During the low altitude orbits and the climb to testing altitude, aircraft crew will scan the sea surface within the aircraft's orbit circle for the presence of marine mammals.

(D) The AC-130's optical and electronic sensors must be employed for target detection, especially at night when visibility will be poor.

(E) If any marine mammals are detected within the AC-130's orbit circle, either during initial clearance or after commencement of live firing, the mission will be immediately halted and relocated as necessary or suspended until the marine mammal has left the area. If relocated to another target area, the clearance procedures described in paragraph (c)(2)(ii) of this section must be repeated.

(F) If multiple firing events occur within the same flight, these clearance procedures must precede each event.

(iii) If no marine mammals are detected, gunnery exercises may begin with the deployment of MK-25 flares into the center of the designated 5-nm target area.

(3) Operational Mitigation Measures:

(i) Ramp-up air-to-surface gunnery firing activities by beginning with the lowest caliber monition and proceeding to the highest, which means the munitions would be fired in the following order: 25 mm; 40 mm; and 105 mm.

(ii) Air-to-surface gunnery exercises conducted after sunset must use the 105-mm training round instead of the 105-mm full up round.

(iii) One mission per year may be conducted beyond the 200 m isobaths, which is south of a line delineating the shelf break with coordinates of 29°42.73' N, 86°48.27' W and 29°12.73' N, 85°59.88' W (Figure 1-12 in Eglin AFB's LOA application). The single mission beyond the shelf break will occur during daylight hours only.

(4) Post-mission Monitoring:

(i) Aircrews will initiate the post-mission clearance procedures beginning at the operational altitude of approximately 15,000 to 20,000 ft (4572 to 6096 m) elevation, and then initiate a spiraling descent down to an observation altitude of approximately 6,000 ft (1,829 m) elevation. Rates of descent will occur over a 3- to 5-minute time frame.

(ii) If post-detonation surveys determine that an injury or lethal take of a marine mammal has occurred, the test procedure and the monitoring methods must be reviewed with the National Marine Fisheries Service and appropriate changes to avoid unauthorized take must be made, prior to conducting the next air-to-surface gunnery exercise.

§217.115 Requirements for monitoring and reporting.

(a) The Holder of the Letter of Authorization issued pursuant to §§216.106 and 217.117 of this chapter for activities described in §217.110(c) is required to conduct the monitoring and reporting measures specified in this section and §217.114 and any additional monitoring measures contained in the Letter of Authorization.

(b) The Holder of the Letter of Authorization is required to cooperate with the National Marine Fisheries Service, and any other Federal, state or local agency monitoring the impacts of the activity on marine mammals. Unless specified otherwise in the Letter of Authorization, the Holder of the Letter of Authorization must notify the Director, Office of Protected Resources, National Marine Fisheries Service, or designee, by letter or telephone (301-427-8401), at least 2 weeks prior to any modification to the activity identified in §217.110(c) that has the potential to result in the serious injury, mortality or Level A or Level B harassment of a marine mammal that was not identified and addressed previously.

(c) Monitoring Procedures for PSW Missions:

(1) The Holder of this Authorization must:

(i) Designate qualified on-site individual(s) to record the effects of mis-

sion launches on marine mammals that inhabit the northern Gulf of Mexico;

(ii) Have on-site individuals, approved in advance by the National Marine Fisheries Service, to conduct the mitigation, monitoring and reporting activities specified in this subpart and in the Letter of Authorization issued pursuant to §§216.106 and 217.117 of this chapter.

(iii) Conduct aerial surveys to reduce impacts on protected species. The aerial survey/monitoring team will consist of two experienced marine mammal observers, approved in advance by the Southeast Region, National Marine Fisheries Service. The aircraft will also have a data recorder who would be responsible for relaying the location, the species if possible, the direction of movement, and the number of animals sighted.

(iv) Conduct shipboard monitoring to reduce impacts to protected species. Trained observers will conduct monitoring from the highest point possible on each mission or support vessel(s). The observer on the vessel must be equipped with optical equipment with sufficient magnification (e.g., 25x power "Big-Eye" binoculars).

(2) The aerial and shipboard monitoring teams will maintain proper lines of communication to avoid communication deficiencies. The observers from the aerial team and operations vessel will have direct communication with the lead scientist aboard the operations vessel.

(3) Pre-mission Monitoring: Approximately 5 hours prior to the mission, or at daybreak, the appropriate vessel(s) would be on-site in the primary test site near the location of the earliest planned mission point. Observers on-board the vessel will assess the suitability of the test site, based on visual observation of marine mammals and sea turtles, the presence of large Sargassum mats, seabirds and jellyfish aggregations and overall environmental conditions (visibility, sea state, etc.). This information will be relayed to the lead scientist.

(4) Three Hours Prior to Mission:

(i) Approximately three hours prior to the mission launch, aerial monitoring will commence within the test

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site to evaluate the test site for environmental suitability. Evaluation of the entire test site would take approximately 1 to 1.5 hours. The aerial monitoring team will begin monitoring the safety zone and buffer zone around the target area.

(ii) Shipboard observers will monitor the safety and buffer zone, and the lead scientist will enter all marine mammals and sea turtle sightings, including the time of sighting and the direction of travel, into a marine animal tracking and sighting database.

(5) One to 1.5 Hours Prior to Mission Launch:

(i) Depending upon the mission, aerial and shipboard viewers will be instructed to leave the area and remain outside the safety area. The aerial team will report all marine animals spotted and their directions of travel to the lead scientist onboard the vessel.

(ii) The shipboard monitoring team will continue searching the buffer zone for protected species as it leaves the safety zone. The surface vessels will continue to monitor from outside of the safety area until after impact.

(6) Post-mission monitoring:

(i) The vessels will move into the safety zone from outside the safety zone and continue monitoring for at least two hours, concentrating on the area down current of the test site.

(ii) The holder of the Letter of Authorization will closely coordinate mission launches with marine animal stranding networks.

(iii) The monitoring team will document any dead or injured marine mammals or turtles and, if practicable, recover and examine any dead animals.

(d) Monitoring Procedures for A–S Gunnery Missions:

(1) In addition to the monitoring requirements in 217.114(c), the holder of the Letter of Authorization must:

(i) Cooperate with the National Marine Fisheries Service and any other Federal, state or local agency monitoring the impacts of the activity on marine mammals.

(ii) Require aircrews to initiate the post-mission clearance procedures beginning at the operational altitude of approximately 15,000 to 20,000 ft (4572 to 6096 m) elevation, and then initiate a

spiraling descent down to an observation altitude of approximately 6,000 ft (1,829 m) elevation. Rates of descent will occur over a 3- to 5-minute time frame.

(iii) Track their use of the EGTTR for test firing missions and marine mammal observations, through the use of mission reporting forms.

(iv) Coordinate air-to-surface gunnery exercises with future flight activities to provide supplemental post-mission observations of marine mammals in the operations area of the exercise.

(2) [Reserved]

(e) In accordance with provisions in §217.118(b)(2), the Holder of the Letter of Authorization must conduct the research required under the Letter of Authorization.

(f) Reporting:

(1) Unless specified otherwise in the Letter of Authorization, the Holder of the Letter of Authorization must conduct all of the monitoring and reporting required under the LOA and submit an annual report to the Director, Office of Protected Resources, National Marine Fisheries Service by a date certain specified in the LOA. This report must include the following information:

(i) Date and time of each PSW/air-to-surface gunnery exercise;

(ii) A complete description of the pre-exercise and post-exercise activities related to mitigating and monitoring the effects of PSW/air-to-surface gunnery exercises on marine mammal populations;

(iii) Results of the monitoring program, including numbers by species/stock of any marine mammals noted injured or killed as a result of the training exercises and number of marine mammals (by species if possible) that may have been harassed due to presence within the applicable safety zone;

(iv) A detailed assessment of the effectiveness of sensor-based monitoring in detecting marine mammals in the area of air-to-surface gunnery operations; and

(v) Results of coordination with coastal marine mammal stranding networks.

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

§217.116 Applications for Letters of Authorization.

To incidentally take marine mammals pursuant to this subpart, the U.S. citizen (as defined at §216.103 of this chapter) conducting the activities identified in §217.110(c) must apply for and obtain either an initial Letter of Authorization in accordance with §§216.106 and 217.117 of this chapter or a renewal under §217.118.

§217.117 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.

(b) Each Letter of Authorization will set forth:

(1) Permissible methods of incidental taking;

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

(3) Requirements for monitoring and reporting.

(c) Issuance and renewal of the Letter of Authorization will be based on a determination that the total number of marine mammals taken by the activity as a whole will have no more than a negligible impact on the species or stock of affected marine mammals.

§217.118 Renewals and Modifications of Letters of Authorization.

(a) A Letter of Authorization issued under §216.106 and §217.117 of this chapter for the activities identified in §217.110(c) will be renewed or modified upon request of the applicant, provided that:

(1) The proposed specified activity and mitigation, monitoring, and reporting measures, as well as the anticipated impacts, are the same as those

described and analyzed for this subpart (excluding changes made pursuant to adaptive management) and

(2) NMFS determines that the mitigation, monitoring, and reporting measures required by the previous Letter of Authorization under this subpart were implemented.

(b) For Letter of Authorization modifications or renewal requests by the applicant that include changes to the activity or the mitigation, monitoring, or reporting (excluding changes made pursuant to adaptive management) that do not change the findings made for the regulations or result in no more than a minor change in the total estimated number of takes (or distribution by species or years), NMFS may publish a notice of a proposed Letter of Authorization in the FEDERAL REGISTER, including the associate analysis illustrating the change, and solicit public comment before issuing the Letter of Authorization.

(c) A Letter of Authorization issued under §§216.106 and 217.117 of this chapter for the activity identified in §217.110(c) may be modified by NMFS under the following circumstances:

(1) Adaptive Management—NMFS may modify or augment the existing mitigation or monitoring measures (after consulting with the U.S. Air Force regarding the practicability of the modifications) if doing so creates a reasonable likelihood of more effectively accomplishing the goals of mitigation and monitoring. Below are some of the possible sources of new data that could contribute to the decision to modify the mitigation or monitoring measures:

(i) Results from the U.S. Air Force's monitoring from the previous year;

(ii) Results from marine mammal and sound research; or

(iii) Any information which reveals that marine mammals may have been taken in a manner, extent or number not authorized by this subpart or subsequent Letters of Authorization.

(2) Emergencies. If NMFS determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals specified in §217.112(c), a Letter of Authorization issued pursuant to §§216.106

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and 217.117 of this chapter 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.

Subpart M—Taking Marine Mammals Incidental to Seabird Research Activities in Central California

SOURCE: 86 FR 27998, May 25, 2021, unless otherwise noted.

EFFECTIVE DATE NOTE: At 86 FR 27998, May 25, 2021, subpart M was added, effective July 1, 2021, through June 30, 2026.

§ 217.120 Specified activity and specified geographical region.

(a) Regulations in this subpart apply only to the incidental taking of marine mammals during seabird research activities by Point Blue Conservation Science (Point Blue) and those persons it authorizes or funds to conduct activities on its behalf in the areas outlined in paragraph (b) of this section.

(b) The incidental taking of marine mammals by Point Blue may only occur in California on Southeast Farallon Island, Año Nuevo Island, and Point Reyes National Seashore in accordance with a Letter of Authorization (LOA) issued under §§ 216.106 of this chapter and 217.126.

§ 217.121 Effective dates.

Regulations in this subpart are effective from July 1, 2021, through June 30, 2026.

§ 217.122 Permissible methods of taking.

Under LOAs issued pursuant to §§ 216.106 of this chapter and 217.126, the Holder of the LOA (hereinafter “Point Blue”) may incidentally, but not intentionally, take marine mammals within the area described in § 217.120(b) by Level B harassment associated with seabird research activities, provided the activity is in compliance with all terms, conditions, and requirements of the regulations in this subpart and the appropriate LOA.

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§ 217.123 Prohibitions.

Except for the takings contemplated in § 217.120 and authorized by a LOA issued under §§ 216.106 of this chapter and 217.126, it is unlawful for any person to do any of the following in connection with the activities described in § 217.120 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 217.126;

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

(c) Take any marine mammal specified in such LOA in any manner other than as specified in § 217.122;

(d) Take a marine mammal specified in such LOA if NMFS determines such taking results in more than a negligible impact on the species or stocks of such marine mammal; or

(e) Take a marine mammal specified in such LOA if NMFS determines such taking results in an unmitigable adverse impact on the species or stock of such marine mammal for taking for subsistence uses.

§ 217.124 Mitigation requirements.

When conducting the activities identified in § 217.120(a), the mitigation measures contained in any LOA issued under §§ 216.106 of this chapter and 217.126 must be implemented. These mitigation measures shall include but are not limited to the following general conditions:

(a) All persons must slowly approach beaches for boat landings. Boat landings must avoid causing stampede and provide marine mammals with an opportunity to safely enter the water. Vessel strikes are prohibited.

(b) All persons must observe a site from a distance, using binoculars if necessary, to detect any marine mammals prior to approach to determine if mitigation is required (*i.e.*, if pinnipeds are present, researchers must approach with caution, walking slowly, quietly, and close to the ground to avoid surprising any hauled-out marine mammals and to reduce flushing/stampeding of individuals).

(c) All persons must avoid pinnipeds along access ways to sites by locating

and taking a different access way. Researchers must keep a safe distance from and not approach any marine mammal while conducting research, unless it is absolutely necessary to flush a marine mammal in order to continue conducting research (*i.e.*, if a site cannot be accessed or sampled due to the presence of pinnipeds).

(d) All persons must avoid visits to sites when pups are present, if the number of takes that have been authorized are met, or if species for which authorization has not been granted are present.

(e) All persons must monitor for off-shore predators and must not approach hauled out pinnipeds if great white sharks (*Carcharodon carcharias*) or killer whales (*Orcinus orca*) are observed to be present. If Point Blue and/or its designees see pinniped predators in the area, they must not disturb the pinnipeds until the lead biologist determines the area is free of predators based on best professional judgment.

(f) All persons must keep voices hushed and bodies low to the ground in the visual presence of pinnipeds.

(g) All persons must conduct seabird observations at North Landing on Southeast Farallon Island in an observation blind, shielded from the view of hauled out pinnipeds.

(h) All persons must crawl slowly to access seabird nest boxes on Año Nuevo Island if pinnipeds are within view.

(i) Researchers must coordinate research visits to intertidal areas of Southeast Farallon Island and coordinate research activities for Año Nuevo Island to minimize the number of trips to these areas.

§217.125 Requirements for monitoring and reporting.

(a) *Visual monitoring.* When conducting activities under an LOA, Point Blue must conduct a visual monitoring program and record information as required by the LOA and this subpart.

(1) Standard information recorded must include species counts (with age/sex classes noted when possible) of animals present before approaching, numbers of observed disturbances, and descriptions of the disturbance behaviors during the monitoring surveys, includ-

ing location, date, and time of the event.

(2) The lead biologist must serve as an observer to record incidental take.

(3) The lead biologist must record the following:

(i) The date, time, and location (or closest point of ingress) of each visit to the research site;

(ii) Composition of the marine mammals sighted, such as species, sex, and life history stage (*e.g.*, adult, sub-adult, pup);

(iii) The number (by species) of marine mammals observed during the activities;

(iv) Estimated number of marine mammals (by species) that may have been disturbed during the activities, using a three-point scale of disturbance contained in an LOA issued under §§216.106 of this chapter and 217.126. Disturbance Levels 2 and 3 must be recorded as takes;

(v) Behavioral responses or modifications in behaviors that may be attributed to the specific activities and a description of the specific activities occurring during that time (*e.g.*, pedestrian approach, vessel approach);

(vi) Information on the weather, including the tidal state and horizontal visibility; and

(vii) If applicable, note the presence of any offshore predators (date, time, number, and species).

(4) Point Blue must report observations of unusual behaviors, numbers, or distributions of pinnipeds, or of tag-bearing carcasses, to the NMFS West Coast Regional Office.

(b) *Prohibited take.* (1) In the event that personnel discovers an injured or dead marine mammal, Point Blue shall report the incident to the Office of Protected Resources, NMFS, and the West Coast Regional Stranding Coordinator, NMFS as soon as feasible. If the death or injury was caused by Point Blue's activities, Point Blue must immediately cease activities conducted under its LOA until NMFS is able to review the circumstances of the incident and determine what, if any, additional measures are appropriate to ensure compliance with the terms of the LOA. Point Blue must not resume their activities until notified by NMFS. The

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report must include the following information:

(i) Time, date, and location (latitude/longitude) of the first discovery (and updated location information if known and applicable);

(ii) Species identification (if known) or description of the animal(s) involved;

(iii) Condition of the animal(s) (including carcass condition if the animal is dead);

(iv) Observed behaviors of the animal(s), if alive;

(v) If available, photographs or video footage of the animal(s); and

(vi) General circumstances under which the animal was discovered.

(c) *Annual report.* (1) A draft annual report covering the period of January 1 through December 31 of each year must be submitted to NMFS Office of Protected Resources by April 1 of each year. The final annual report after year five may be included as part of the final report (see below). The report must include the information gathered pursuant to the monitoring requirements set forth above and in the LOA at minimum, and must also include raw sightings data.

(2) A final annual report must be submitted to the Director of the NMFS Office of Protected Resources within 30 days after receiving comments from NMFS on the draft annual report. If no comments are received from NMFS, the draft annual report will be considered the final report.

(d) *Final report.* A draft final report must be submitted to NMFS Office of Protected Resources within 60 days after the conclusion of the fifth year. A final report must be submitted to the Director of the NMFS Office of Protected Resources within 30 days after receiving comments from NMFS on the draft final report. If no comments are received from NMFS, the draft final report will be considered the final report.

§217.126 Letters of Authorization.

(a) To incidentally take marine mammals pursuant to these regulations, Point Blue must apply for and obtain an LOA.

(b) An LOA, unless suspended or revoked, may be effective for a period of

time not to exceed the expiration date of these regulations.

(c) If an LOA expires prior to the expiration date of these regulations, Point Blue may apply for and obtain a renewal of the LOA.

(d) In the event of projected changes to the activity or to mitigation and monitoring measures required by an LOA, Point Blue must apply for and obtain a modification of the LOA as described in §217.127.

(e) The LOA shall set forth:

(1) Permissible methods and numbers of incidental taking;

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

(3) Requirements for monitoring and reporting.

(f) Issuance of the LOA shall be based on a determination that the level of taking will be consistent with the findings made for the total taking allowable under these regulations.

(g) Notice of issuance or denial of an LOA shall be published in the FEDERAL REGISTER within thirty days of a determination.

§217.127 Renewals and modifications of Letters of Authorization.

(a) An LOA issued under §§216.106 of this chapter and 217.126 for the activity identified in §217.120(a) shall be renewed or modified upon request by the applicant, provided that:

(1) The proposed specified activity and mitigation, monitoring, and reporting measures, as well as the anticipated impacts, are the same as those described and analyzed for these regulations (excluding changes made pursuant to the adaptive management provision in paragraph (c)(1) of this section), and

(2) NMFS' Office of Protected Resources determines that the mitigation, monitoring, and reporting measures required by the previous LOA under these regulations were implemented.

(b) For an LOA modification or renewal requests by the applicant that includes changes to the activity or the mitigation, monitoring, or reporting (excluding changes made pursuant to

the adaptive management provision in paragraph (c)(1) of this section) that do not change the findings made for the regulations or result in no more than a minor change in the total estimated number of takes (or distribution by species or years), NMFS' Office of Protected Resources may publish a notice of proposed LOA in the FEDERAL REGISTER, including the associated analysis of the change, and solicit public comment before issuing the LOA.

(c) An LOA issued under §§216.106 of this chapter and 217.126 for the activity identified in §217.120(a) may be modified by NMFS' Office of Protected Resources under the following circumstances:

(1) *Adaptive management*—NMFS' Office of Protected Resources may modify (including augment) the existing mitigation, monitoring, or reporting measures (after consulting with Point Blue regarding the practicability of the modifications) if doing so creates a reasonable likelihood of more effectively accomplishing the goals of the mitigation and monitoring set forth in the preamble for these regulations.

(i) Possible sources of data that could contribute to the decision to modify the mitigation, monitoring, or reporting measures in an LOA include:

(A) Results from Point Blue's monitoring from the previous year(s);

(B) Results from other marine mammal and/or sound research or studies; and

(C) Any information that reveals marine mammals may have been taken in a manner, extent or number not authorized by these regulations or subsequent LOAs.

(ii) If, through adaptive management, the modifications to the mitigation, monitoring, or reporting measures are substantial, NMFS' Office of Protected Resources will publish a notice of proposed LOA in the FEDERAL REGISTER and solicit public comment.

(2) *Emergencies*. If NMFS' Office of Protected Resources determines that an emergency exists that poses a 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 217.126, an LOA may be modified without prior notice or opportunity for public com-

ment. Notice would be published in the FEDERAL REGISTER within thirty days of the action.

§§ 217.128–217.129 [Reserved]

Subpart N [Reserved] □

Subpart P—Taking Marine Mammals Incidental to Ice Roads and Ice Trails Construction and Maintenance on Alaska's North Slope

SOURCE: 85 FR 83471, Dec. 22, 2020, unless otherwise noted.

EFFECTIVE DATE NOTE: At 85 FR 83471, Dec. 22, 2020, subpart P was added, effective Dec. 22, 2020, through Nov. 30, 2025

§217.150 Specified activity and specified geographical region.

(a) Regulations in this subpart apply only to Hilcorp Alaska, LLC (Hilcorp) and Eni US Operating Co. Inc. (Eni) and those persons they authorize or fund to conduct activities on their behalf for the taking of marine mammals that occurs in the areas outlined in paragraph (b) of this section and that occurs incidental to construction and maintenance of ice roads and ice trails.

(b) The taking of marine mammals by Hilcorp and Eni may be authorized in two Letters of Authorization (LOAs) only if it occurs on Alaska's North Slope.

§217.151 Effective dates.

Regulations in this subpart are effective from December 22, 2020 through November 30, 2025.

§217.152 Permissible methods of taking.

Under LOAs issued pursuant to §§216.106 of this chapter and 217.156, the Holders of the LOAs (hereinafter "Hilcorp" and "Eni") may incidentally, but not intentionally, take marine mammals within the area described in §217.150(b) by mortality, serious injury, Level A harassment, or Level B harassment associated with ice road and ice trail construction and maintenance activities, provided the activities are in compliance with all terms, conditions, and requirements of

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the regulations in this subpart and the appropriate LOAs.

§ 217.153 Prohibitions.

Notwithstanding takings contemplated in § 217.152 and authorized by the LOAs issued under §§ 216.106 of this chapter and 217.156, no person in connection with the activities described in § 217.150 may:

(a) Violate, or fail to comply with, the terms, conditions, and requirements of this subpart or an LOA issued under §§ 216.106 of this chapter and 217.156;

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

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

(d) Take a marine mammal specified in such LOAs if NMFS determines such taking results in more than a negligible impact on the species or stocks of such marine mammal; or

(e) Take a marine mammal specified in such LOAs if NMFS determines such taking results in an unmitigable adverse impact on the species or stock of such marine mammal for taking for subsistence uses.

§ 217.154 Mitigation requirements.

When conducting the activities identified in § 217.150(a), the mitigation measures contained in any LOA issued under §§ 216.106 of this chapter and 217.156 must be implemented. These mitigation measures shall include but are not limited to:

(a) *General conditions.* (1) Hilcorp and Eni must renew, on an annual basis, the Plans of Cooperation (POCs), throughout the life of the regulations;

(2) Copies of any issued LOAs must be in the possession of Hilcorp and Eni, their designees, and work crew personnel operating under the authority of the issued LOAs; and

(3) Prior to initiation of sea ice road- and ice trail-related activities, project personnel associated with ice road construction, maintenance, use or decommissioning must receive annual training on implementing mitigation and monitoring measures:

(i) Personnel must be advised that interactions with, or approaching, any wildlife is prohibited;

(ii) Annual training must also include reviewing Hilcorp and Eni's Wildlife Management Plan; and

(iii) In addition to the mitigation and monitoring plans, other topics in the training must include:

(A) Ringed seal identification and brief life history;

(B) Physical environment (habitat characteristics and how to potentially identify habitat);

(C) Ringed seal use in the ice road region (timing, location, habitat use, birthing lairs, breathing holes, basking, etc.);

(D) Potential effects of disturbance; and

(E) Importance of lairs, breathing holes and basking to ringed seals.

(b) *General mitigation measures throughout the Ice Road/Trail Season (December through May).* (1) Ice road/trail speed limits must be no greater than 72.4 km (45 miles) per hour (mph); speed limits must be determined on a case-by-case basis based on environmental, road conditions and ice road/trail longevity considerations;

(2) Following existing safety measures, delineators must mark the roadway in a minimum of 0.4 km (¼-mile) increments on both sides of the ice road to delineate the path of vehicle travel and areas of planned on-ice activities (e.g., emergency response exercises). Following existing safety measures currently used for ice trails, delineators must mark one side of an ice trail a minimum of every 0.4 km (¼ mile). Delineators must be color-coded, following existing safety protocol, to indicate the direction of travel and location of the ice road or trail;

(3) Corners of rig mats, steel plates, and other materials used to bridge sections of hazardous ice, must be clearly marked or mapped using GPS coordinates of the locations; and

(4) Personnel must be instructed to remain in the vehicle and safely continue, if they encounter a ringed seal while driving on the road.

(c) *Additional mitigation measures after March 1st.* In addition to the general mitigation measures listed in § 217.154(b), the following measures must also be implemented after March 1st:

(1) Ice road/trail construction, maintenance and decommissioning must be performed within the boundaries of the road/trail and shoulders, with most work occurring within the driving lane. To the extent practicable and when safety of personnel is ensured, equipment must travel within the driving lane and shoulder areas.

(2) Blading and snow blowing of ice roads must be limited to the previously disturbed ice road/shoulder areas to the extent safe and practicable. Snow must be plowed or blown from the ice road surface.

(3) In the event snow is accumulating on a road within a 50 m (164 ft) radius of an identified downwind seal or seal lair, operational measures must be used to avoid seal impacts, such as pushing snow further down the road before blowing it off the roadway. Vehicles must not stop within 50 m (164 ft) of identified seals or within 150 m (500 ft) of known seal lairs.

(4) To the extent practicable and when safety of personnel is ensured, tracked vehicle operation must be limited to the previously disturbed ice trail areas. When safety requires a new ice trail to be constructed after March 1st, construction activities such as drilling holes in the ice to determine ice quality and thickness, must be conducted only during daylight hours with good visibility.

(5) Ringed seal structures must be avoided by a minimum of 50 m (164 ft) during ice testing and new trail construction.

(6) Once the new ice trail is established, tracked vehicle operation must be limited to the disturbed area to the extent practicable and when safety of personnel is ensured.

(7) If a seal is observed on ice within 50 m (164 ft) of the centerline of the ice road/trail, the following mitigation measures must be implemented:

(i) Construction, maintenance or decommissioning activities associated with ice roads and trails must not occur within 50 m (164 ft) of the observed ringed seal, but may proceed as soon as the ringed seal, of its own accord, moves farther than 50 m (164 ft) distance away from the activities or has not been observed within that area for at least 24 hours; and

(ii) Transport vehicles (*i.e.*, vehicles not associated with construction, maintenance or decommissioning) may continue their route within the designated road/trail without stopping.

§217.155 Requirements for monitoring and reporting.

(a) All marine mammal monitoring must be conducted in accordance with Hilcorp and Eni's Marine Mammal Mitigation and Monitoring Plan (4MP). This plan may be modified throughout the life of the regulations upon NMFS review and approval.

(b) General monitoring measures will be implemented through the entire ice road/trail season including during construction, maintenance, use and decommissioning.

(1) If a ringed seal is observed within 50 m (164 ft) of the center of an ice road or trail, the operator's Environmental Specialist must be immediately notified with the information provided in paragraph (e) of this section.

(i) The Environmental Specialist must relay the seal sighting location information to all ice road personnel and the company's office personnel responsible for wildlife interaction, following notification protocols described in the company-specific Wildlife Management Plan. All other data will be recorded and logged.

(ii) The Environmental Specialist or designated person must monitor the ringed seal to document the animal's location relative to the road/trail. All work that is occurring when the ringed seal is observed and the behavior of the seal during those activities must be documented until the animal is at least 50 m (150 ft) away from the center of the road/trail or is no longer observed.

(2) [Reserved]

(c) Additional monitoring measures after March 1st. In addition to the general monitoring measures listed in §217.155(b), the following measures must also be implemented after March 1st:

(1) If an ice road or trail is being actively used, under daylight conditions with good visibility, a dedicated observer (not the vehicle operator) must conduct a survey along the sea ice road/trail to observe if any ringed seals are within 150 m (500 ft) of the roadway

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corridor. The following survey protocol must be implemented:

(i) Surveys must be conducted every other day during daylight hours;

(ii) Observers for ice road activities must have received the training described in §217.154(a) and understand the applicable sections of the Wildlife Interaction Plan;

(iii) Observers for ice road activities must be capable of detecting, observing and monitoring ringed seal presence and behaviors, and accurately and completely recording data;

(iv) Observers must have no other primary duty than to watch for and report observations related to ringed seals during this survey; and

(v) If weather conditions become unsafe, the observer may be removed from the monitoring activity.

(2) If a ringed seal structure (*i.e.*, breathing hole or lair) is observed within 50 m (150 ft) of the ice road/trail, the location of the structure must be reported to the Environmental Specialist and:

(i) An observer must monitor the structure every 6 hours on the day of the initial sighting to determine whether a ringed seal is present.

(ii) Monitoring for the seal must occur every other day the ice road is being used unless it is determined the structure is not actively being used (*i.e.*, a seal is not sighted at that location during monitoring).

(d) Engaging with subsistence hunters for monitoring recommendations.

(1) Hilcorp and Eni must engage local hunters through the Ice Seal Committee point of contact to gather recommendations on methods for ringed seal detection along sea ice roads/trails within the exposure areas.

(2) Hilcorp and Eni must incorporate these recommendations into Hilcorp and Eni's training materials provided to personnel responsible for monitoring for ringed seals along sea ice roads/trails.

(e) Reporting requirement at the end-of-season.

(1) A final end-of-season report compiling all ringed seal observations must be submitted to NMFS Office of Protected Resources within 90 days of decommissioning the ice roads/trails annually. The report must include:

(i) Date, time, location of observation;

(ii) Ringed seal characteristics (*i.e.*, adult or pup, behavior (avoidance, resting, *etc.*));

(iii) Activities occurring during observation including equipment being used and its purpose, and approximate distance to ringed seal(s);

(iv) Actions taken to mitigate effects of interaction emphasizing:

(A) Which mitigation and/or monitoring measures were successful;

(B) Which mitigation and/or monitoring measures may need to be improved to reduce interactions with ringed seals;

(C) The effectiveness and practicality of implementing mitigation and monitoring measures;

(D) Any issues or concerns regarding implementation of mitigation and/or monitoring measures; and

(E) Potential effects of interactions based on observation data;

(v) Proposed updates (if any) to Wildlife Interaction Plan(s) or Mitigation and Monitoring Measures; and

(vi) The methods used for detection of seals and seal structures with an assessment of their effectiveness.

(2) In the event a seal is killed or seriously injured by ice road/trail activities, Hilcorp or Eni must immediately cease the specified activities and report the incident to the NMFS Office of Protected Resources (301–427–8401) and Alaska Region Stranding Coordinator (877–925–7773). The report must include the following information:

(i) Time and date of the incident;

(ii) Description of the incident;

(iii) Environmental conditions (*e.g.*, cloud over, and visibility);

(iv) Description of all marine mammal observations in the 24 hours preceding the incident;

(v) Species identification or description of the animal(s) involved;

(vi) Fate of the animal(s); and

(vii) Photographs or video footage of the animal(s).

(3) In the event ice road/trail personnel discover a dead or injured seal but the cause of injury or death is unknown or believed not to be related to ice road/trail activities, Hilcorp or Eni must report the incident to the NMFS Office of Protected Resources (301–427–

8401) and Alaska Region Stranding Coordinator (877-925-7773) within 48 hours of discovery.

§217.156 Letters of Authorization.

(a) To incidentally take marine mammals pursuant to these regulations, Hilcorp and Eni must apply for and obtain an LOA.

(b) An LOA, unless suspended or revoked, may be effective for a period of time not to exceed the expiration date of these regulations.

(c) If an LOA expires prior to the expiration date of these regulations, Hilcorp or Eni may apply for and obtain a renewal of the LOA.

(d) In the event of projected changes to the activity or to mitigation and monitoring measures required by an LOA, Hilcorp and Eni must apply for and obtain a modification of the LOA as described in §217.57.

(e) The LOAs shall set forth:

(1) Permissible methods of incidental taking;

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

(3) Requirements for monitoring and reporting.

(f) Issuance of the LOAs shall be based on a determination that the level of taking will be consistent with the findings made for the total taking allowable under these regulations.

(g) Notice of issuance or denial of an LOA shall be published in the FEDERAL REGISTER within 30 days of a determination.

§217.157 Renewals and modifications of Letters of Authorization.

(a) An LOA issued under §§216.106 of this chapter and 217.156 for the activity identified in §217.150(a) shall be renewed or modified upon request by the applicant, provided that:

(1) The proposed specified activity and mitigation, monitoring, and reporting measures, as well as the anticipated impacts, are the same as those described and analyzed for these regulations (excluding changes made pursuant to the adaptive management provision in paragraph (c)(1) of this section); and

(2) NMFS determines that the mitigation, monitoring, and reporting measures required by the previous LOAs under these regulations were implemented.

(b) For LOAs modification or renewal requests by the applicants that include changes to the activity or the mitigation, monitoring, or reporting (excluding changes made pursuant to the adaptive management provision in paragraph (c)(1) of this section) that do not change the findings made for the regulations or result in no more than a minor change in the total estimated number of takes (or distribution by species or years), NMFS may publish a notice of proposed LOAs in the FEDERAL REGISTER, including the associated analysis of the change, and solicit public comment before issuing the LOA.

(c) The LOAs issued under §§216.106 of this chapter and 217.156 for the activity identified in §217.150(a) may be modified by NMFS under the following circumstances:

(1) *Adaptive management.* NMFS may modify (including augment) the existing mitigation, monitoring, or reporting measures (after consulting with Hilcorp or Eni regarding the practicability of the modifications) if doing so creates a reasonable likelihood of more effectively accomplishing the goals of the mitigation and monitoring set forth in the preamble for these regulations.

(i) Possible sources of data that could contribute to the decision to modify the mitigation, monitoring, or reporting measures in an LOA:

(A) Results from Hilcorp or Eni's monitoring from the previous year(s).

(B) Results from other marine mammal and/or sound research or studies.

(C) Any information that reveals marine mammals may have been taken in a manner, extent or number not authorized by these regulations or subsequent LOAs.

(ii) If, through adaptive management, the modifications to the mitigation, monitoring, or reporting measures are substantial, NMFS will publish a notice of proposed LOA in the FEDERAL REGISTER and solicit public comment.

(2) *Emergencies.* If NMFS determines that an emergency exists that poses a

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 217.156, an LOA may be modified without prior notice or opportunity for public comment. Notice would be published in the FEDERAL REGISTER within 30 days of the action.

§§ 217.158—217.159 [Reserved]

Subpart Q—Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to Oil and Gas Activities in Cook Inlet, Alaska.

SOURCE: 84 FR 37502, July 31, 2019, unless otherwise noted.

EFFECTIVE DATE NOTE: At 84 FR 37502, July 31, 2019, subpart Q was added, effective from July 30, 2019, to July 30, 2024.

§ 217.160 Specified activity and specified geographical region.

(a) Regulations in this subpart apply only to Hilcorp Alaska LLC (Hilcorp) 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 Hilcorp may be authorized in Letters of Authorization (LOAs) only if it occurs within the action area defined in Cook Inlet, Alaska.

(c) The taking of marine mammals by Hilcorp is only authorized if it occurs incidental to Hilcorp's oil and gas activities including use of seismic airguns, sub-bottom profiler, vertical seismic profiling, pile driving, conductor pipe driving, and water jets.

§ 217.161 Effective dates.

Regulations in this subpart are effective July 30, 2019, through July 30, 2024.

§ 217.162 Permissible methods of taking.

Under LOAs issued pursuant to §§216.106 of this chapter and 217.166, the Holder of the LOAs (hereinafter “Hilcorp”) may incidentally, but not

intentionally, take marine mammals within the area described in §217.160(b) by Level A harassment and Level B harassment associated with oil and gas activities, provided the activity is in compliance with all terms, conditions, and requirements of the regulations in this subpart and the applicable LOAs.

§ 217.163 Prohibitions.

Notwithstanding takings contemplated in §217.162 and authorized by LOAs issued under §§216.106 of this chapter and 217.166, no person in connection with the activities described in §217.160 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 217.166;

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

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

(d) Take a marine mammal specified in such LOAs if NMFS determines such taking results in more than a negligible impact on the species or stocks of such marine mammal; or

(e) Take a marine mammal specified in such LOAs if NMFS determines such taking results in an unmitigable adverse impact on the availability of such species or stock of marine mammal for taking for subsistence uses.

§ 217.164 Mitigation requirements.

When conducting the activities identified in §217.160(c), the mitigation measures contained in any LOAs issued under §§216.106 of this chapter and 217.166 must be implemented. These mitigation measures must include but are not limited to:

(a) Hilcorp must conduct a sound source verification (SSV) for 3D seismic and sub-bottom profiler use. Results of this SSV must be sent to NMFS and mitigation and monitoring zones may be adjusted based on the results of the SSV.

(b) If any marine mammal species for which take is not authorized are sighted within or entering the relevant zones within which they are exposed to sound above the 120 dB re 1 μ Pa

(rms) threshold for continuous (*e.g.*, vibratory pile-driving, drilling) sources or the 160 dB re 1 μ Pa (rms) threshold for non-explosive impulsive (*e.g.*, seismic airguns) or intermittent (*e.g.*, scientific sonar) sources, Hilcorp must take appropriate action to avoid such exposure (*e.g.*, by altering speed or course or by shutdown of the sound source).

(c) If the allowable number of takes in an LOA listed for any marine mammal species is met or exceeded, Hilcorp must immediately cease survey operations involving the use of active sound source(s), record the observation, and notify NMFS Office of Protected Resources.

(d) Hilcorp must notify NMFS Office of Protected Resources at least 48 hours prior to the start of oil and gas activities each year.

(e) Hilcorp must conduct briefings as necessary between vessel crews, marine mammal monitoring team, and other relevant personnel prior to the start of all survey activity, and when new personnel join the work, in order to explain responsibilities, communication procedures, marine mammal monitoring protocol, and operational procedures.

(f) Hilcorp must establish monitoring and exclusion zones.

(1) For all relevant in-water activity, Hilcorp must implement shutdown zones/exclusion zones (EZs) with radial distances as identified in any LOA issued under §§216.106 of this chapter and 217.166. If a marine mammal is sighted within or entering the EZ, such operations must cease.

(2) For all relevant in-water activity, Hilcorp must designate safety zones for monitoring (SZ) with radial distances as identified in any LOA issued under §§216.106 of this chapter and 217.166 and record and report occurrence of marine mammals within these zones.

(3) For all relevant in-water activity, Hilcorp must implement a minimum EZ of a 10 m radius around the source.

(g) Hilcorp must implement shutdown measures.

(1) Hilcorp must deploy protected species observers (PSO) and PSOs must be posted to monitor marine mammals within the monitoring zones during use

of active acoustic sources and pile driving in water.

(2) Monitoring must begin 15 minutes prior to initiation of stationary source activity and 30 minutes prior to initiation of mobile source activity, occur throughout the time required to complete the activity, and continue through 30 minutes post-completion of the activity. Pre-activity monitoring must be conducted to ensure that the EZ is clear of marine mammals, and activities may only commence once observers have declared the EZ clear of marine mammals. In the event of a delay or shutdown of activity resulting from marine mammals in the EZ, the marine mammals' behavior must be monitored and documented.

(3) A determination that the EZ is clear must be made during a period of good visibility (*i.e.*, the entire EZ must be visible to the naked eye).

(4) If a marine mammal is observed within or entering the EZ, Hilcorp must halt all noise producing activities for which take is authorized at that location. If activity is 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 outside the EZ or the required amount of time (15 for porpoises and pinnipeds, 30 minutes for cetaceans) have passed without re-detection of the animal.

(5) Monitoring must be conducted by trained observers, who must have no other assigned tasks during monitoring periods. Trained observers must be placed at the best vantage point(s) practicable to monitor for marine mammals and implement shutdown or delay procedures when applicable through communication with the equipment operator. Hilcorp must adhere to the following additional observer qualifications:

(i) Hilcorp must use independent, dedicated, trained visual PSOs, meaning that the PSOs must be employed by a third-party observer provider, must not have tasks other than to conduct observational effort, collect data, and communicate with and instruct relevant vessel crew with regard to the presence of protected species and mitigation requirements (including brief alerts regarding maritime hazards),

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and must have successfully completed an approved PSO training course appropriate for their designated task.

(ii) Hilcorp must submit PSO resumes for NMFS review and approval. Resumes must be accompanied by a relevant training course information packet that includes the name and qualifications (*i.e.*, experience, training completed, or educational background) of the instructor(s), the course outline or syllabus, and course reference material as well as a document stating successful completion of the course. NMFS will approve or disapprove PSOs within one week from the time that the necessary information is received by NMFS, after which PSOs meeting the minimum requirements will automatically be considered approved.

(iii) To the maximum extent practicable, the lead PSO must devise the duty schedule such that experienced PSOs are on duty with those PSOs with appropriate training but who have not yet gained relevant experience.

(6) Operations must shut down completely if a beluga whale is sighted within the relevant Level B harassment isopleth.

(h) Hilcorp must implement soft start techniques for impact pile driving.

(1) Hilcorp must conduct an initial set of three strikes from the impact hammer 30 seconds apart, at 40 percent energy, followed by a 1-minute waiting period, then two subsequent three strike sets.

(2) Soft start is required for any impact driving, including at the beginning of the day, after 30 minutes of pre-activity monitoring, and at any time following a cessation of impact pile driving of 30 minutes or longer.

(i) Hilcorp must implement ramp ups for seismic airgun use.

(1) Ramp up must be used at the start of airgun operations, including after a shutdown, and after any period greater than 30 minutes in duration without airgun operations.

(2) The rate of ramp up must be no more than 6 dB per 5-minute period.

(3) Ramp up must begin with the smallest gun in the array that is being used for all airgun array configurations.

(4) During the ramp up, the EZ for the full airgun array must be implemented.

(5) If the complete EZ has not been visible for at least 30 minutes prior to the start of operations, ramp up must not commence.

(6) Ramp up of the airguns must not be initiated if a marine mammal is sighted within or entering the EZ at any time.

(j) Hilcorp must use aircraft for mitigation.

(1) Hilcorp must use aircraft daily to survey the planned seismic survey area prior to the start of seismic surveying. Surveying must not begin unless the aerial flights confirm the planned survey area for that day is clear of beluga whales. If weather conditions make flying before the start of seismic in daylight unsafe, Hilcorp may delay the aerial survey until weather conditions improve and it is safe to fly.

(2) If beluga whales are sighted during flights, start of seismic surveying must be delayed until it is confirmed the area is free of beluga whales.

(k) Hilcorp must implement exclusion zones for beluga whales.

(1) Hilcorp must not operate with noise producing activity 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. Hilcorp must not conduct seismic activity within the Level B isopleth distance of the mouth of the Kasilof River between January 1 and May 31.

(m) Hilcorp must abide by all mitigation measures described in the Biological Opinion for Hilcorp Alaska and Harvest Alaska Oil and Gas Activities, Cook Inlet, Alaska.

§217.165 Requirements for monitoring and reporting.

(a) *Marine mammal monitoring protocols.* Hilcorp must conduct briefings between construction supervisors and crews and the observer team prior to the start of all pile driving and removal activities, and when new personnel join the work. Trained observers must receive a general environmental awareness briefing conducted by Hilcorp staff. At minimum, training

must include identification of marine mammals that may occur in the project vicinity and relevant mitigation and monitoring requirements. All observers must have no other construction-related tasks while conducting monitoring.

(b) *Visibility.* Activities must only commence when the entire exclusion zone (EZ) is visible to the naked eye and can be adequately monitored. If conditions (*e.g.*, fog) prevent the visual detection of marine mammals, activities must not be initiated. For activities other than seismic surveying, activity must be halted in low visibility but vibratory pile driving or removal will be allowed to continue if started in good visibility.

(c) *Monitoring periods.* Monitoring must begin 15 minutes prior to initiation of stationary source activity and 30 minutes prior to initiation of mobile source activity, occur throughout the time required to complete the activity, and continue through 30 minutes post-completion of the activity. Pre-activity monitoring must be conducted to ensure that the EZ is clear of marine mammals, and activities may only commence once observers have declared the EZ clear of marine mammals. In the event of a delay or shutdown of activity resulting from marine mammals in the EZ, the animals' behavior must be monitored and documented.

(d) *Placement of PSOs.* (1) At least one on-duty PSO must be placed on the source vessel (for seismic and geohazard surveys) or drill rig (for pipe driving and VSP).

(2) During seismic surveys a mitigation vessel must be used with at least one on-duty PSO aboard the vessel monitoring for marine mammal occurrence.

(e) *Reporting measures*—(1) *Take limits.* Hilcorp must contact NMFS when they have reached the limit of authorized takes of beluga whale within a year.

(2) *Monthly reports.* Monthly reports must be submitted to NMFS for all months during which in-water seismic activities take place. The monthly report must contain and summarize the following information: Dates, times, locations, heading, speed, weather, sea conditions (including Beaufort sea

state and wind force), and associated activities during all seismic operations and marine mammal sightings; Species, number, location, distance from the vessel, and behavior of any sighted marine mammals, as well as associated seismic activity (number of power-downs and shutdowns), observed throughout all monitoring activities; An estimate of the number (by species) exposed to the seismic activity (based on visual observation) at received levels greater than or equal to the NMFS thresholds discussed above with a discussion of any specific behaviors those individuals exhibited; A description of the implementation and effectiveness of the terms and conditions of the Biological Opinion's Incidental Take Statement (ITS) and mitigation measures of the LOA.

(3) *Annual reports.* (i) Hilcorp must submit an annual report within 90 days after each activity year, starting from the date when the LOA is issued (for the first annual report) or from the date when the previous annual report ended.

(ii) Annual reports will detail the monitoring protocol, summarize the data recorded during monitoring, and estimate the number of marine mammals that may have been harassed during the period of the report.

(iii) NMFS will provide comments within 30 days after receiving annual reports, and Hilcorp must address the comments and submit revisions within 30 days after receiving NMFS comments. If no comment is received from the NMFS within 30 days, the annual report will be considered completed.

(4) *Final report.* (i) Hilcorp must submit a comprehensive summary report to NMFS not later than 90 days following the conclusion of marine mammal monitoring efforts described in this subpart.

(ii) The final report must synthesize all data recorded during marine mammal monitoring, and estimate the number of marine mammals that may have been harassed through the entire project.

(iii) NMFS will provide comments within 30 days after receiving this report, and Hilcorp must address the comments and submit revisions within

30 days after receiving NMFS comments. If no comment is received from the NMFS within 30 days, the final report will be considered as final.

(5) *Reporting of injured or dead marine mammals.* (i) In the event that personnel involved in the survey activities discover an injured or dead marine mammal, Hilcorp must report the incident to the Office of Protected Resources (OPR), NMFS (301–427–8401) and to regional stranding network (877–925–7773) as soon as feasible. The report must include the following information:

(A) Time, date, and location (latitude/longitude) of the first discovery (and updated location information if known and applicable);

(B) Species identification (if known) or description of the animal(s) involved;

(C) Condition of the animal(s) (including carcass condition if the animal is dead);

(D) Observed behaviors of the animal(s), if alive;

(E) If available, photographs or video footage of the animal(s); and

(F) General circumstances under which the animal was discovered.

(ii) In the event of a ship strike of a marine mammal by any vessel involved in the survey activities, Hilcorp must report the incident to OPR, NMFS and to regional stranding networks as soon as feasible. The report must include the following information:

(A) Time, date, and location (latitude/longitude) of the incident;

(B) Species identification (if known) or description of the animal(s) involved;

(C) Vessel's speed during and leading up to the incident;

(D) Vessel's course/heading and what operations were being conducted (if applicable);

(E) Status of all sound sources in use;

(F) Description of avoidance measures/requirements that were in place at the time of the strike and what additional measures were taken, if any, to avoid strike;

(G) Environmental conditions (*e.g.*, wind speed and direction, Beaufort sea state, cloud cover, visibility) immediately preceding the strike;

(H) Estimated size and length of animal that was struck;

(I) Description of the behavior of the marine mammal immediately preceding and following the strike;

(J) If available, description of the presence and behavior of any other marine mammals immediately preceding the strike;

(K) Estimated fate of the animal (*e.g.*, dead, injured but alive, injured and moving, blood or tissue observed in the water, status unknown, disappeared); and

(L) To the extent practicable, photographs or video footage of the animal(s).

(iii) In the event of a live stranding (or near-shore atypical milling) event within 50 km of the survey operations, where the NMFS stranding network is engaged in herding or other interventions to return animals to the water, the Director of OPR, NMFS (or designee) will advise Hilcorp of the need to implement shutdown procedures for all active acoustic sources operating within 50 km of the stranding. Shutdown procedures for live stranding or milling marine mammals include the following:

(A) If at any time, the marine mammal(s) die or are euthanized, or if herding/intervention efforts are stopped, the Director of OPR, NMFS (or designee) will advise Hilcorp that the shutdown around the animals' location is no longer needed.

(B) Otherwise, shutdown procedures must remain in effect until the Director of OPR, NMFS (or designee) determines and advises Hilcorp that all live animals involved have left the area (either of their own volition or following an intervention).

(C) If further observations of the marine mammals indicate the potential for re-stranding, additional coordination with Hilcorp must occur to determine what measures are necessary to minimize that likelihood (*e.g.*, extending the shutdown or moving operations farther away) and Hilcorp must implement those measures as appropriate.

(iv) If NMFS determines that the circumstances of any marine mammal stranding found in the vicinity of the activity suggest investigation of the association with survey activities is

warranted, and an investigation into the stranding is being pursued, NMFS will submit a written request to Hilcorp indicating that the following initial available information must be provided as soon as possible, but no later than 7 business days after the request for information.

(A) Status of all sound source use in the 48 hours preceding the estimated time of stranding and within 50 km of the discovery/notification of the stranding by NMFS; and

(B) If available, description of the behavior of any marine mammal(s) observed preceding (*i.e.*, within 48 hours and 50 km) and immediately after the discovery of the stranding.

(C) In the event that the investigation is still inconclusive, the investigation of the association of the survey activities is still warranted, and the investigation is still being pursued, NMFS may provide additional information requests, in writing, regarding the nature and location of survey operations prior to the time period above.

§217.166 Letters of Authorization.

(a) To incidentally take marine mammals pursuant to these regulations, Hilcorp must apply for and obtain (LOAs) in accordance with §216.106 of this chapter for conducting the activity identified in §217.160(c).

(b) LOAs, unless suspended or revoked, may be effective for a period of time not to extend beyond the expiration date of these regulations.

(c) An LOA application must be submitted to the Director, Office of Protected Resources, NMFS, by March 1st of the year preceding the desired start date.

(d) An LOA application must include the following information:

(1) The date(s), duration, and the area(s) where the activity will occur;

(2) The species and/or stock(s) of marine mammals likely to be found within each area;

(3) The estimated number of takes for each marine mammal stock potentially affected in each area for the period of effectiveness of the Letter of Authorization.

(4) An updated Stakeholder Engagement Plan detailing Hilcorp's meetings with stakeholders and any concerns

raised that relate to marine mammals or subsistence activities.

(e) In the event of projected changes to the activity or to mitigation, monitoring, reporting (excluding changes made pursuant to the adaptive management provision of §217.97(c)(1)) required by an LOA, Hilcorp must apply for and obtain a modification of LOAs as described in §217.167.

(f) Each LOA must set forth:

(1) Permissible methods of incidental taking;

(2) Means of effecting the least practicable adverse impact (*i.e.*, mitigation) on the species, their habitat, and the availability of the species for subsistence uses; and

(3) Requirements for monitoring and reporting.

(g) Issuance of the LOA(s) must be based on a determination that the level of taking must be consistent with the findings made for the total taking allowable under these regulations.

(h) If NMFS determines that the level of taking is resulting or may result in more than a negligible impact on the species or stocks of such marine mammal, the LOA may be modified or suspended after notice and a public comment period.

(i) Notice of issuance or denial of the LOA(s) must be published in the FEDERAL REGISTER within 30 days of a determination.

§217.167 Renewals and modifications of Letters of Authorization and adaptive management.

(a) An LOA issued under §§216.106 of this chapter and 217.166 for the activity identified in §217.160(c) may be renewed or modified upon request by the applicant, provided that the following are met:

(1) Notification to NMFS that the activity described in the application submitted under §217.160(a) will be undertaken and that there will not be a substantial modification to the described work, mitigation or monitoring undertaken during the upcoming or remaining LOA period;

(2) Timely receipt (by the dates indicated) of monitoring reports, as required under §217.165(C)(3);

(3) A determination by the NMFS that the mitigation, monitoring and

reporting measures required under § 217.165(c) and the LOA issued under §§ 216.106 of this chapter and 217.166, were undertaken and are expected to be undertaken during the period of validity of the LOA.

(b) If a request for a renewal of a Letter of Authorization indicates that a substantial modification, as determined by NMFS, 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 as well as the proposed modification to the LOA. Review and comment on renewals of Letters of Authorization are restricted to:

(1) New cited information and data indicating that the original determinations made for the regulations are in need of reconsideration; and

(2) Proposed changes to the mitigation and monitoring requirements contained in these regulations or in the current Letter of Authorization.

(c) A notice of issuance or denial of a renewal of a Letter of Authorization will be published in the FEDERAL REGISTER within 30 days of a determination.

(d) An LOA issued under §§ 216.16 of this chapter and 217.166 for the activity identified in § 217.160 may be modified by NMFS under the following circumstances:

(1) *Adaptive management.* NMFS, in response to new information and in consultation with Hilcorp, may modify the mitigation or monitoring measures in subsequent LOAs if doing so creates a reasonable likelihood of more effectively accomplishing the goals of mitigation and monitoring set forth in the preamble of these regulations.

(i) Possible sources of new data that could contribute to the decision to modify the mitigation or monitoring measures include:

(A) Results from Hilcorp's monitoring from the previous year(s).

(B) Results from marine mammal and/or sound research or studies.

(C) Any information that reveals marine mammals may have been taken in a manner, extent or number not authorized by these regulations or subsequent LOAs.

(ii) If, through adaptive management, the modifications to the mitigation, monitoring, or reporting measures are substantial, NMFS will publish a notice of proposed LOA in the FEDERAL REGISTER and solicit public comment.

(2) *Withdrawal or suspension.* NMFS will withdraw or suspend an LOA if, after notice and opportunity for public comment, NMFS determines these regulations are not being substantially complied with or that the taking allowed is or may be having more than a negligible impact on an affected species or stock specified in § 217.162(b) or an unmitigable adverse impact on the availability of the species or stock for subsistence uses. The requirement for notice and comment will not apply if NMFS determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals. Notice will be published in the FEDERAL REGISTER within 30 days of such action.

§§ 217.168—217.169 [Reserved]

Subpart R—Taking and Importing Marine Mammals Incidental to U.S. Navy Bulkhead Replacement/Repairs at Naval Station Newport in Newport, Rhode Island

SOURCE: 86 FR 71178, Dec. 15, 2021; 87 FR 885, Jan. 7, 2022, unless otherwise noted.

EFFECTIVE DATE NOTE: At 86 FR 71178, Dec. 15, 2021, subpart R was added, effective May 15, 2022, through May 14, 2027. At 87 FR 885, Jan. 7, 2022, subpart R was corrected, effective May 15, 2022, through May 14, 2027.

§ 217.170 Specified activity and geographical region.

(a) Regulations in this subpart apply only to the U.S. Navy (Navy) and those persons it authorizes or funds to conduct activities on its behalf for the taking of marine mammals that occurs in the areas outlined in paragraph (b) of this section and that occurs incidental to construction activities including for bulkhead replacement and repairs at Naval Station (NAVSTA) Newport, Rhode Island.

(b) The taking of marine mammals by the Navy may be authorized in a Letter of Authorization (LOA) only if

it occurs at NAVSTA Newport, Rhode Island.

§ 217.171 Effective dates.

Regulations in this subpart are effective from May 15, 2022, through May 14, 2027.

§ 217.172 Permissible methods of taking.

Under an LOA issued pursuant to §§ 216.106 of this chapter and 217.176, the Holder of the LOA (hereinafter “Navy”) may incidentally, but not intentionally, take marine mammals within the area described in § 217.170(b) by harassment associated with bulkhead replacement and repairs construction activities, provided the activity is in compliance with all terms, conditions, and requirements of the regulations in this subpart and the applicable LOA.

§ 217.173 Prohibitions.

(a) Except for the takings contemplated in § 217.172 and authorized by a LOA issued under §§ 216.106 of this chapter and 217.176, it is unlawful for any person to do any of the following in connection with the activities described in § 217.170:

(1) 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 217.176;

(2) Take any marine mammal not specified in such LOA;

(3) Take any marine mammal specified in such LOA in any manner other than as specified;

(4) Take a marine mammal specified in such LOA if NMFS determines such taking results in more than a negligible impact on the species or stocks of such marine mammal; or

(b) [Reserved]

§ 217.174 Mitigation requirements.

(a) When conducting the activities identified in § 217.171(a), the mitigation measures contained in any LOA issued under §§ 216.106 of this chapter and 217.176 must be implemented. These mitigation measures must include but are not limited to:

(1) A copy of any issued LOA must be in the possession of the Navy, supervisory construction personnel, lead

protected species observers (PSOs), and any other relevant designees of the Holder operating under the authority of this LOA at all times that activities subject to this LOA are being conducted.

(2) The Navy will follow mitigation procedures as described in this section. Should environmental conditions deteriorate such that marine mammals within the entire shutdown zone would not be visible (*e.g.*, fog, heavy rain, night), the Holder shall delay pile driving and removal until observers are confident marine mammals within the shutdown zone could be detected.

(3) The Navy will ensure that construction supervisors and crews, the monitoring team, and relevant Navy staff are trained prior to the start of all activities subject to this rule, so that responsibilities, communication procedures, monitoring protocols, and operational procedures are clearly understood. New personnel joining during the project will be trained prior to commencing work.

(4) The Navy, construction supervisors and crews, PSOs, and relevant Navy staff will avoid direct physical interaction with marine mammals during construction activity. If a marine mammal comes within 10 m of such activity, operations will cease and vessels will reduce speed to the minimum level required to maintain steerage and safe working conditions, as necessary, to avoid direct physical interaction.

(5) The Navy will employ PSOs and establish monitoring locations as described in this rule and the Marine Mammal Monitoring Plan. The Navy will monitor the project area to the maximum extent possible based on the required number of PSOs, required monitoring locations, and environmental conditions.

(6) Monitoring will take place from 30 minutes prior to initiation of pile driving activity (*i.e.*, pre-start clearance monitoring) through 30 minutes post-completion of pile driving activity.

(7) If a marine mammal is observed entering or within the shutdown zones indicated in this rule, pile driving activity must be delayed or halted. If pile driving is delayed or halted due to the

presence of a marine mammal, the activity may not commence or resume until either the animal has voluntarily exited and been visually confirmed beyond the shutdown zone or 15 minutes have passed without re-detection of the animal.

(8) The Navy will establish shutdown zones for all pile driving activities. Shutdown zones are limited to 150 m from the point of noise generation. Any remaining area within estimated Level A harassment zones shall be considered part of the “disturbance zone,” *i.e.*, the Level B harassment zone and, where present, the Level A harassment zone (PTS onset) beyond 150 m from the point of noise generation. For activities where the estimated Level A (PTS onset) harassment zones are smaller than 150 m, the disturbance zone shall include the entire region of influence (ROI), *i.e.*, estimated Level A and Level B harassment zones). Work may proceed without cessation while marine mammals are in the disturbance zone and marine mammal behavior within the disturbance zone will be monitored and documented.

(9) The Navy will conduct monitoring to include the area within the Level B harassment zones (areas where SPLs are equal to or exceed the 160 dB rms threshold for impact driving and the 120 dB rms threshold during vibratory pile driving (disturbance zone).

(10) Pre-start clearance monitoring will be conducted during periods of visibility sufficient for the lead PSO to determine that the shutdown zones are clear of marine mammals. Pile driving may commence following 30 minutes of observation when the determination is made that the shutdown zones are clear of marine mammals.

(11) If pile driving is delayed or halted due to the presence of a marine mammal, the activity may not commence or resume until either the animal has voluntarily exited and been visually confirmed beyond the shutdown zone indicated or 15 minutes have passed without re-detection of the animal.

(12) The Navy will use soft start techniques when impact pile driving. Soft start requires contractors to provide an initial set of three strikes from the hammer at reduced energy, followed by

a 30-second waiting period. Then two subsequent reduced-energy strike sets would occur. A soft start will be implemented at the start of each day’s impact pile driving and at any time following cessation of impact pile driving for a period of 30 minutes or longer. Soft start is not required during vibratory pile driving activities.

(13) Pile driving activity must be halted upon observation of either a species entering or within the harassment zone, for which incidental take is not authorized, or a species for which incidental take has been authorized but the authorized number of takes has been met.

(b) [Reserved]

§217.175 Requirements for monitoring and reporting.

(a) Marine Mammal monitoring must be conducted in accordance with the conditions in this section and the Marine Mammal Monitoring Plan. The Navy must submit a Marine Mammal Monitoring Plan to NMFS for approval in advance of construction.

(b) Monitoring must be conducted by qualified, NMFS-approved PSOs, in accordance with the following conditions:

(1) PSOs must be independent (*i.e.*, not construction personnel) and have no other assigned tasks during monitoring periods.

(2) At least one PSO must have prior experience performing the duties of a PSO during construction activity pursuant to a NMFS-issued incidental take authorization.

(3) Other PSOs may substitute other relevant experience, education (degree in biological science or related field), or training for prior experience performing the duties of a PSO during construction activity pursuant to a NMFS-issued incidental take authorization.

(4) Where a team of three or more PSOs is required, a lead observer or monitoring coordinator must be designated. The lead observer must have prior experience performing the duties of a PSO during construction activity pursuant to a NMFS-issued incidental take authorization.

(5) PSOs must be approved by NMFS prior to beginning any activity subject to this LOA.

(c) The Navy will establish the following monitoring locations. For all pile driving activities, a minimum of one PSO will be assigned to each active pile driving location to monitor the shutdown zones. Trained PSOs will be placed at the best vantage point(s) practicable such as on nearby breakwaters, Gould Island, Coddington Point, or Taylor Point. Visual monitoring will be conducted by, at a minimum, by two PSOs. It is assumed that two to three PSOs would be sufficient to monitor the respective ROIs given the abundance of suitable vantage points. Any activity that would result in threshold exceedance at or more than 1,000 m would require a minimum of three PSOs to effectively monitor the entire ROI. However, additional monitors may be added if warranted by site conditions and/or the level of marine mammal activity in the area.

(d) PSOs must record all observations of marine mammals, regardless of distance from the pile being driven, as well as the additional data indicated in the reporting requirements.

(e) Acoustic monitoring will be conducted in accordance with the Acoustic Monitoring Plan. The Navy will conduct hydroacoustic data collection (sound source verification and propagation loss) in accordance with a hydroacoustic monitoring plan that must be approved by NMFS in advance of construction.

(f) The shutdown/disturbances zones may be modified with NMFS' approval following NMFS' acceptance of an acoustic monitoring report.

(g) The Navy will submit a draft monitoring report to NMFS within 90 calendar days of the completion of required monitoring for each portion of the project as well as a comprehensive summary report at the end of the project. The report will detail the monitoring protocol and summarize the data recorded during monitoring. Final annual reports (each portion of the project and comprehensive) must be prepared and submitted within 30 days following resolution of any NMFS comments on the draft report. If no comments are received from NMFS within 30 days of receipt of the draft report, the report must be considered final. If comments are received, a final report

addressing NMFS comments must be submitted within 30 days after receipt of comments.

(h) All draft and final monitoring reports must be submitted to *PR.ITP.MonitoringReports@noaa.gov* and *ITP.Egger@noaa.gov*.

(i) The marine mammal report must contain the informational elements described in the Marine Mammal Monitoring Plan and, at minimum, include:

(1) Dates and times (begin and end) of all marine mammal monitoring;

(2) Construction activities occurring during each daily observation period, including: the number and types of piles were driven or removed and by what method (*i.e.*, impact or vibratory) and the total duration of driving time for each pile (vibratory driving) and number of strikes for each pile (impact driving); and

(3) PSO locations during marine mammal monitoring;

(4) Environmental conditions during monitoring periods (at beginning and end of PSO shift and whenever conditions change significantly), including Beaufort sea state and any other relevant weather conditions including cloud cover, fog, sun glare, and overall visibility to the horizon, and estimated observable distance;

(5) Upon observation of a marine mammal, the following information:

(i) Name of PSO who sighted the animal(s) and PSO location and activity at time of sighting.

(ii) Time of sighting; and

(iii) Identification of the animal (*e.g.*, genus/species, lowest possible taxonomic level, or unidentified), PSO confidence in identification, and the composition of the group if there is a mix of species;

(iv) Distances and location of each marine mammal observed relative to the pile being driven or removed;

(v) Estimated number of animals (min/max/best);

(vi) Estimated number of animals by cohort (adults, juveniles, neonates, group composition etc.);

(vii) Animal's closest point of approach and estimated time spent within the harassment zone; and

(viii) Description of any marine mammal behavioral observations (*e.g.*, observed behaviors such as feeding or

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traveling), including an assessment of behavioral responses thought to have resulted from the activity (*e.g.*, no response or changes in behavioral state such as ceasing feeding, changing direction, flushing, or breaching);

(6) Number of marine mammals detected within the harassment zones, by species;

(7) Detailed information about any implementation of any mitigation triggered (*e.g.*, shutdowns and delays), a description of specific actions that ensued, and resulting of the behavior of the animal, if any;

(8) The Navy will submit all PSO datasheets and/or raw sightings data with the draft reports.

(j) The Navy must report the hydroacoustic data collected as required by a LOA issued under §§ 216.106 of this chapter and 217.176 and as described in the Acoustic Monitoring Plan, and at a minimum, must include:

(1) Hydrophone equipment and methods: recording device, sampling rate, distance (m) from the pile where recordings were made; depth of water and recording device(s);

(2) Type and size of pile being driven, substrate type, method of driving during recordings (*e.g.*, hammer model and energy), and total pile driving duration;

(i) Whether a sound attenuation device is used and, if so, a detailed description of the device used and the duration of its use per pile;

(ii) For impact pile driving (per pile): Number of strikes and strike rate; depth of substrate to penetrate; pulse duration and mean, median, and maximum sound levels (dB re: 1 μ Pa): Root mean square sound pressure level (SPL_{rms}); cumulative sound exposure level (SEL_{cum}), peak sound pressure level (SPL_{peak}), and single-strike sound exposure level (SEL_{s-s});

(iii) For vibratory driving/removal (per pile): Duration of driving per pile; mean, median, and maximum sound levels (dB re: 1 μ Pa): Root mean square sound pressure level (SPL_{rms}), cumulative sound exposure level (SEL_{cum}) (and timeframe over which the sound is averaged); and

(iv) One-third octave band spectrum and power spectral density plot.

(k) In the event that personnel involved in the construction activities discover an injured or dead marine mammal, the Navy must report the incident to NMFS Office of Protected Resources (OPR), NMFS (*PR.ITP.MonitoringReports@noaa.gov* and *ITP.Egger@noaa.gov*) Monitoring) and to the Greater Atlantic Region New England/Mid-Atlantic Stranding Coordinator, as soon as feasible. If the death or injury was clearly caused by the specified activity, the Navy must immediately cease the specified activities until NMFS OPR is able to review the circumstances of the incident and determine what, if any, additional measures are appropriate to ensure compliance with the terms of this rule and the LOA issued under §§216.106 of this chapter and 217.176. The Navy will not resume their activities until notified by NMFS. The report must include the following information:

(1) Time, date, and location (latitude/longitude) of the first discovery (and updated location information if known and applicable);

(2) Species identification (if known) or description of the animal(s) involved;

(3) Condition of the animal(s) (including carcass condition if the animal is dead);

(4) Observed behaviors of the animal(s), if alive;

(5) If available, photographs or video footage of the animal(s); and

(6) General circumstances under which the animal was discovered.

§217.176 Letters of Authorization.

(a) To incidentally take marine mammals pursuant to these regulations, the Navy must apply for and obtain an LOA.

(b) An LOA, unless suspended or revoked, may be effective for a period of time not to exceed the expiration date of these regulations.

(c) If an LOA expires prior to the expiration date of these regulations, the Navy may apply for and obtain a renewal of the LOA.

(d) In the event of projected changes to the activity or to mitigation and monitoring measures required by an

LOA, the Navy must apply for and obtain a modification of the LOA as described in §217.177.

(e) The LOA will set forth the following information:

(1) Permissible methods of incidental taking;

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

(3) Requirements for monitoring and reporting.

(f) Issuance of the LOA will be based on a determination that the level of taking will be consistent with the findings made for the total taking allowable under these regulations.

(g) Notice of issuance or denial of an LOA will be published in the FEDERAL REGISTER within 30 days of a determination.

§217.177 Renewals and modifications of Letters of Authorization.

(a) An LOA issued under §§216.106 of this chapter and 217.176 for the activity identified in §217.170(a) may be renewed or modified upon request by the applicant, provided that:

(1) The specified activity and mitigation, monitoring, and reporting measures, as well as the anticipated impacts, are the same as those described and analyzed for these regulations; and

(2) NMFS determines that the mitigation, monitoring, and reporting measures required by the previous LOA under these regulations were implemented.

(b) For LOA modification or renewal requests by the applicant that include changes to the activity or the mitigation, monitoring, or reporting that do not change the findings made for the regulations or result in no more than a minor change in the total estimated number of takes (or distribution by species or years), NMFS may publish a notice of proposed LOA in the FEDERAL REGISTER, including the associated analysis of the change, and solicit public comment before issuing the LOA.

(c) A LOA issued under §§216.106 of this chapter and 217.176 for the activity identified in §217.170(a) may be modified by NMFS under the following circumstances:

(1) NMFS may modify (including augment) the existing mitigation, monitoring, or reporting measures (after consulting with Navy regarding the practicability of the modifications) if doing so creates a reasonable likelihood of more effectively accomplishing the goals of the mitigation and monitoring set forth in the preamble for these regulations;

(i) Possible sources of data that could contribute to the decision to modify the mitigation, monitoring, or reporting measures in a LOA:

(A) Results from Navy's monitoring from previous years;

(B) Results from other marine mammal and/or sound research or studies; and

(C) Any information that reveals marine mammals may have been taken in a manner, extent or number not authorized by these regulations or subsequent LOAs; and

(ii) If, through adaptive management, the modifications to the mitigation, monitoring, or reporting measures are substantial, NMFS will publish a notice of proposed LOA in the FEDERAL REGISTER and solicit public comment;

(2) If NMFS determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals specified in a LOA issued pursuant to §§216.106 of this chapter and 217.176, a LOA may be modified without prior notice or opportunity for public comment. Notification would be published in the FEDERAL REGISTER within 30 days of the action.

§§217.178–217.179 [Reserved]

Subpart S—Taking Marine Mammals Incidental to Geophysical Survey Activities in the Gulf of Mexico

SOURCE: 86 FR 5444, Jan. 19, 2021, unless otherwise noted.

EFFECTIVE DATE NOTE: At 86 FR 5444, Jan. 19, 2021, subprt S was added, effective Apr. 19, 2021, through Apr. 19, 2026.

§217.180 Specified activity and specified geographical region.

(a) Regulations in this subpart apply only to oil and gas industry operators

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(LOA-holders), and those persons authorized to conduct activities on their behalf, for the taking of marine mammals that occurs in the area outlined in paragraph (b) of this section and that occurs incidental to geophysical survey activities.

(b) The taking of marine mammals by oil and gas industry operators may be authorized in a Letter of Authorization (LOA) only if it occurs within U.S. waters in the Gulf of Mexico, outside the area subject to a Congressional leasing moratorium under the Gulf of Mexico Energy Security Act (GOMESA) (Pub L. 109-432, §104) as of the effective date of these regulations.

§ 217.181 Effective dates.

Regulations in this subpart are effective from April 19, 2021 through April 19, 2026.

§ 217.182 Permissible methods of taking.

Under LOAs issued pursuant to §§216.106 of this chapter and 217.186, LOA-holders may incidentally, but not intentionally, take marine mammals within the area described in §217.180(b) by Level A and Level B harassment associated with geophysical survey activities, provided the activity is in compliance with all terms, conditions, and requirements of the regulations in this subpart and the appropriate LOA.

§ 217.183 Prohibitions.

Notwithstanding takings contemplated in §§217.180 and 217.182, and authorized by a LOA issued under §§216.106 of this chapter and 217.186, no person in connection with the activities described in §217.180 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 217.186;

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

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

(d) Take a marine mammal specified in such LOAs if NMFS determines such taking results in more than a negligible impact on the species or stocks of such marine mammal.

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§ 217.184 Mitigation requirements.

When conducting the activities identified in §217.180, the mitigation measures contained in any LOA issued under §§216.106 of this chapter and 217.186 must be implemented. These mitigation measures shall include but are not limited to:

(a) *General conditions.* (1) A copy of any issued LOA must be in the possession of the LOA-holder, vessel operator, other relevant personnel, the lead protected species observer (PSO), and any other relevant designees operating under the authority of the LOA.

(2) The LOA-holder must instruct relevant vessel personnel with regard to the authority of the protected species monitoring team (PSO team), and must ensure that relevant vessel personnel and PSO team participate in a joint on-board briefing, led by the vessel operator and lead PSO, prior to beginning work to ensure that responsibilities, communication procedures, protected species monitoring protocols, operational procedures, and LOA requirements are clearly understood. This briefing must be repeated when relevant new personnel join the survey operations before work involving those personnel commences.

(3) The acoustic source must be deactivated when not acquiring data or preparing to acquire data, except as necessary for testing. Unnecessary use of the acoustic source must be avoided. For surveys using airgun arrays as the acoustic source, notified operational capacity (*i.e.*, total array volume) (not including redundant backup airguns) must not be exceeded during the survey, except where unavoidable for source testing and calibration purposes. All occasions where activated source volume exceeds notified operational capacity must be communicated to the PSO(s) on duty and fully documented. The lead PSO must be granted access to relevant instrumentation documenting acoustic source power and/or operational volume.

(4) PSOs must be used as specified in this paragraph (a)(4).

(i) LOA-holders must use independent, dedicated, qualified PSOs, meaning that the PSOs must be employed by a third-party observer provider, must have no tasks other than to

conduct observational effort, collect data, and communicate with and instruct relevant vessel crew with regard to the presence of protected species and mitigation requirements (including brief alerts regarding maritime hazards), and must be qualified pursuant to §217.185(a) (except as specified at §217.184(d)(2)(iii-iv)). Acoustic PSOs are required to complete specialized training for operating passive acoustic monitoring (PAM) systems and are encouraged to have familiarity with the vessel on which they will be working. PSOs may act as both acoustic and visual observers (but not simultaneously), so long as they demonstrate that their training and experience are sufficient to perform each task.

(ii) The LOA-holder must submit PSO resumes for NMFS review and approval prior to commencement of the survey (except as specified at §217.184(d)(2)(iii)). Resumes should include dates of training and any prior NMFS approval, as well as dates and description of last experience, and must be accompanied by information documenting successful completion of an acceptable training course. NMFS is allowed one week to approve PSOs from the time that the necessary information is received by NMFS, after which PSOs meeting the minimum requirements will automatically be considered approved.

(iii) At least one visual PSO and two acoustic PSOs (when required) aboard each acoustic source vessel must have a minimum of 90 days at-sea experience working in those roles, respectively, with no more than eighteen months elapsed since the conclusion of the at-sea experience (except as specified at §217.184(d)(2)(iii)). One visual PSO with such experience must be designated as the lead for the entire PSO team. The lead must coordinate duty schedules and roles for the PSO team and serve as the primary point of contact for the vessel operator. (Note that the responsibility of coordinating duty schedules and roles may instead be assigned to a shore-based, third-party monitoring coordinator.) To the maximum extent practicable, the lead PSO must devise the duty schedule such that experienced PSOs are on duty with those PSOs with appropriate training but

who have not yet gained relevant experience.

(b) *Deep penetration surveys.* (1) Deep penetration surveys are defined as surveys using airgun arrays with total volume greater than 1,500 in³.

(2) Visual monitoring must be conducted as specified in this paragraph (b)(2).

(i) During survey operations (*i.e.*, any day on which use of the acoustic source is planned to occur, and whenever the acoustic source is in the water, whether activated or not), a minimum of two PSOs must be on duty and conducting visual observations at all times during daylight hours (*i.e.*, from 30 minutes prior to sunrise through 30 minutes following sunset).

(ii) Visual monitoring must begin not less than 30 minutes prior to ramp-up and must continue until one hour after use of the acoustic source ceases or until 30 minutes past sunset.

(iii) Visual PSOs must coordinate to ensure 360° visual coverage around the vessel from the most appropriate observation posts, and must conduct visual observations using binoculars and the naked eye while free from distractions and in a consistent, systematic, and diligent manner.

(iv) Visual PSOs must immediately communicate all observations of marine mammals to the on-duty acoustic PSO, including any determination by the PSO regarding species identification, distance, and bearing and the degree of confidence in the determination.

(v) Any observations of marine mammals by crew members aboard any vessel associated with the survey must be relayed to the PSO team.

(vi) During good conditions (*e.g.*, daylight hours; Beaufort sea state (BSS) 3 or less), visual PSOs must conduct observations when the acoustic source is not operating for comparison of sighting rates and behavior with and without use of the acoustic source and between acquisition periods, to the maximum extent practicable.

(vii) Visual PSOs may be on watch for a maximum of two consecutive hours followed by a break of at least one hour between watches and may conduct a maximum of 12 hours of observation per 24-hour period. NMFS

may grant an exception for LOA applications that demonstrate such a “two hours on/one hour off” duty cycle is not practicable, in which case visual PSOs will be subject to a maximum of four consecutive hours on watch followed by a break of at least two hours between watches. Combined observational duties (visual and acoustic but not at the same time) must not exceed 12 hours per 24-hour period for any individual PSO.

(3) Acoustic monitoring must be conducted as specified in this paragraph (b)(3).

(i) All source vessels must use a towed PAM system at all times when operating in waters deeper than 100 m, which must be monitored by a minimum of one acoustic PSO beginning at least 30 minutes prior to ramp-up, at all times during use of the acoustic source, and until one hour after use of the acoustic source ceases. “PAM system” refers to calibrated hydrophone arrays with full system redundancy to detect, identify, and estimate distance and bearing to vocalizing cetaceans, coupled with appropriate software to aid monitoring and listening by a PAM operator skilled in bioacoustics analysis and computer system specifications capable of running appropriate software. The PAM system must have at least one calibrated hydrophone (per each deployed hydrophone type and/or set) sufficient for determining whether background noise levels on the towed PAM system are sufficiently low to meet performance expectations. Applicants must provide a PAM plan including description of the hardware and software proposed for use prior to proceeding with any survey where PAM is required.

(ii) Acoustic PSOs must immediately communicate all detections of marine mammals to visual PSOs (when visual PSOs are on duty), including any determination by the PSO regarding species identification, distance, and bearing, and the degree of confidence in the determination.

(iii) Acoustic PSOs may be on watch for a maximum of four consecutive hours followed by a break of at least two hours between watches, and may conduct a maximum of 12 hours of observation per 24-hour period. Combined

observational duties (visual and acoustic but not at the same time) must not exceed 12 hours per 24-hour period for any individual PSO.

(iv) Survey activity may continue for 30 minutes when the PAM system malfunctions or is damaged, while the PAM operator diagnoses the issue. If the diagnosis indicates that the PAM system must be repaired to solve the problem, operations may continue for an additional two hours without acoustic monitoring during daylight hours only under the following conditions:

(A) Sea state is less than or equal to BSS 4;

(B) No marine mammals (excluding delphinids) detected solely by PAM in the applicable exclusion zone in the previous two hours;

(C) NMFS is notified via email as soon as practicable with the time and location in which operations began occurring without an active PAM system; and

(D) Operations with an active acoustic source, but without an operating PAM system, do not exceed a cumulative total of four hours in any 24-hour period.

(4) PSOs must establish and monitor applicable exclusion and buffer zones. These zones must be based upon the radial distance from the edges of the airgun array (rather than being based on the center of the array or around the vessel itself). During use of the acoustic source (*i.e.*, anytime the acoustic source is active, including ramp-up), occurrence of marine mammals within the relevant buffer zone (but outside the exclusion zone) should be communicated to the operator to prepare for the potential shutdown of the acoustic source.

(i) Two exclusion zones are defined, depending on the species and context. A standard exclusion zone encompassing the area at and below the sea surface out to a radius of 500 meters from the edges of the airgun array (0–500 m) is defined. For special circumstances (defined at §217.184(b)(9)(v)), the exclusion zone encompasses an extended distance of 1,500 meters (0–1,500 m).

(ii) During pre-start clearance monitoring (*i.e.*, before ramp-up begins), the buffer zone acts as an extension of the

exclusion zone in that observations of marine mammals within the buffer zone would also preclude airgun operations from beginning (*i.e.*, ramp-up). For all marine mammals (except where superseded by the extended 1,500-m exclusion zone), the buffer zone encompasses the area at and below the sea surface from the edge of the 0–500 meter exclusion zone out to a radius of 1,000 meters from the edges of the airgun array (500–1,000 m). The buffer zone is not applicable when the exclusion zone is greater than 500 meters, *i.e.*, the observational focal zone is not increased beyond 1,500 meters.

(5) A ramp-up procedure, involving a step-wise increase in the number of airguns firing and total active array volume until all operational airguns are activated and the full volume is achieved, is required at all times as part of the activation of the acoustic source. A 30-minute pre-start clearance observation period must occur prior to the start of ramp-up. The LOA-holder must adhere to the following pre-start clearance and ramp-up requirements:

(i) The operator must notify a designated PSO of the planned start of ramp-up as agreed upon with the lead PSO; the notification time should not be less than 60 minutes prior to the planned ramp-up.

(ii) Ramp-ups must be scheduled so as to minimize the time spent with source activated prior to reaching the designated run-in.

(iii) A designated PSO must be notified again immediately prior to initiating ramp-up procedures and the operator must receive confirmation from the PSO to proceed.

(iv) Ramp-up must not be initiated if any marine mammal is within the applicable exclusion or buffer zone. If a marine mammal is observed within the exclusion zone or the buffer zone during the 30-minute pre-start clearance period, ramp-up must not begin until the animal(s) has been observed exiting the zones or until an additional time period has elapsed with no further sightings (15 minutes for small delphinids and 30 minutes for all other species).

(v) Ramp-up must begin by activating a single airgun of the smallest volume in the array and shall continue

in stages by doubling the number of active elements at the commencement of each stage, with each stage of approximately the same duration. Total duration must not be less than 20 minutes. The operator must provide information to the PSO documenting that appropriate procedures were followed.

(vi) Ramp-up must cease and the source shut down upon observation of marine mammals within the applicable exclusion zone. Once ramp-up has begun, observations of marine mammals within the buffer zone do not require shutdown.

(vii) Ramp-up may occur at times of poor visibility, including nighttime, if appropriate acoustic monitoring has occurred with no detections of a marine mammal other than delphinids in the 30 minutes prior to beginning ramp-up. Acoustic source activation may only occur at night where operational planning cannot reasonably avoid such circumstances.

(viii) If the acoustic source is shut down for brief periods (*i.e.*, less than 30 minutes) for reasons other than implementation of prescribed mitigation (*e.g.*, mechanical difficulty), it may be activated again without ramp-up if PSOs have maintained constant visual and/or acoustic observation and no visual or acoustic detections of any marine mammal have occurred within the applicable exclusion zone. For any longer shutdown, pre-start clearance observation and ramp-up are required. For any shutdown at night or in periods of poor visibility (*e.g.*, BSS 4 or greater), ramp-up is required, but if the shutdown period was brief and constant observation maintained, pre-start clearance watch is not required.

(ix) Testing of the acoustic source involving all elements requires ramp-up. Testing limited to individual source elements or strings does not require ramp-up but does require the pre-start clearance observation period.

(6) Shutdowns must be implemented as specified in this paragraph (b)(6).

(i) Any PSO on duty has the authority to delay the start of survey operations or to call for shutdown of the acoustic source pursuant to the requirements of this subpart.

(ii) The operator must establish and maintain clear lines of communication

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directly between PSOs on duty and crew controlling the acoustic source to ensure that shutdown commands are conveyed swiftly while allowing PSOs to maintain watch.

(iii) When both visual and acoustic PSOs are on duty, all detections must be immediately communicated to the remainder of the on-duty PSO team for potential verification of visual observations by the acoustic PSO or of acoustic detections by visual PSOs.

(iv) When the airgun array is active (*i.e.*, anytime one or more airguns is active, including during ramp-up) and (1) a marine mammal appears within or enters the applicable exclusion zone and/or (2) a marine mammal (excluding delphinids) is detected acoustically and localized within the applicable exclusion zone, the acoustic source must be shut down. When shutdown is called for by a PSO, the acoustic source must be immediately deactivated and any dispute resolved only following deactivation.

(v) The extended 1,500-m exclusion zone must be applied upon detection (visual or acoustic) of a baleen whale, sperm whale, beaked whale, or *Kogia* spp. within the zone.

(vi) Shutdown requirements are waived for dolphins of the following genera: *Tursiops*, *Stenella*, *Steno*, and *Lagenodelphis*. If a delphinid is visually detected within the exclusion zone, no shutdown is required unless the PSO confirms the individual to be of a genus other than those listed above, in which case a shutdown is required. Acoustic detection of delphinids does not require shutdown.

(vii) If there is uncertainty regarding identification or localization, PSOs may use best professional judgment in making the decision to call for a shutdown.

(viii) Upon implementation of shutdown, the source may be reactivated after the marine mammal(s) has been observed exiting the applicable exclusion zone or following a 30-minute clearance period with no further detection of the marine mammal(s).

(c) *Shallow penetration surveys.* (1) Shallow penetration surveys are defined as surveys using airgun arrays with total volume equal to or less than

1,500 in³, single airguns, boomers, or equivalent sources.

(2) LOA-holders conducting shallow penetration surveys must follow the requirements defined for deep penetration surveys at §217.184(b), with the following exceptions:

(i) Acoustic monitoring is not required for shallow penetration surveys.

(ii) Ramp-up for small airgun arrays must follow the procedure described above for large airgun arrays, but may occur over an abbreviated period of time. Ramp-up is not required for surveys using only a single airgun. For non-airgun sources, power should be increased as feasible to effect a ramp-up.

(iii) Two exclusion zones are defined, depending on the species and context. A standard exclusion zone encompassing the area at and below the sea surface out to a radius of 100 meters from the edges of the airgun array (if used) or from the acoustic source (0–100 m) is defined. For special circumstances (§217.184(b)(6)(v)), the exclusion zone encompasses an extended distance of 500 meters (0–500 m).

(iv) The buffer zone encompasses the area at and below the sea surface from the edge of the 0–100 meter exclusion zone out to a radius of 200 meters from the edges of the airgun array (if used) or from the acoustic source (100–200 meters). The buffer zone is not applicable when the exclusion zone is greater than 100 meters.

(d) *High-resolution geophysical (HRG) surveys.* (1) HRG surveys are defined as surveys using an electromechanical source that operates at frequencies less than 180 kHz, other than those defined at §217.184(c)(1) (*e.g.*, side-scan sonar, multibeam echosounder, or chirp sub-bottom profiler).

(2) LOA-holders conducting HRG surveys must follow the requirements defined for shallow penetration surveys at §217.184(c), with the following exceptions:

(i) No shutdowns are required for HRG surveys. Pre-start clearance watch is required as defined at §217.184(c), *i.e.*, for a period of 30 minutes and over a 200-m radius from the acoustic source.

(ii) During survey operations (*e.g.*, any day on which use of the acoustic

source is planned to occur, and whenever the acoustic source is in the water, whether activated or not), a minimum of one trained and experienced independent PSO must be on duty and conducting visual observations at all times during daylight hours (*i.e.*, from 30 minutes prior to sunrise through 30 minutes following sunset) when operating in waters deeper than 100 m.

(iii) When operating in waters shallower than 100 m, LOA-holders must employ one trained visual PSO, who may be a crew member, only for purposes of conducting pre-start clearance monitoring. If PSOs are crew members, *i.e.*, are not independent PSOs, the PSOs are not subject to NMFS' approval. In these circumstances, LOA requests must describe the training that will be provided to crew members filling the role of PSO.

(iv) PSOs are not required during survey operations in which the active acoustic source(s) are deployed on an autonomous underwater vehicle.

(e) *Time-area closure.* From January 1 through May 31, no use of airguns may occur shoreward of the 20-m isobath and between 90–84° W.

(f) *Entanglement avoidance.* To avoid the risk of entanglement, LOA-holders conducting surveys using ocean-bottom nodes or similar gear must:

(1) Use negatively buoyant coated wire-core tether cable;

(2) Retrieve all lines immediately following completion of the survey; and

(3) Attach acoustic pingers directly to the coated tether cable; acoustic releases should not be used.

(g) *Vessel strike avoidance.* LOA-holders must adhere to the following requirements:

(1) Vessel operators and crews must maintain a vigilant watch for all marine mammals and must slow down, stop their vessel, or alter course, as appropriate and regardless of vessel size, to avoid striking any marine mammal. A visual observer aboard the vessel must monitor a vessel strike avoidance zone around the vessel, which shall be defined according to the parameters stated in this subsection. Visual observers monitoring the vessel strike avoidance zone may be third-party ob-

servers (*i.e.*, PSOs) or crew members, but crew members responsible for these duties must be provided sufficient training to distinguish marine mammals from other phenomena and broadly to identify a marine mammal as a baleen whale, sperm whale, or other marine mammal;

(2) Vessel speeds must be reduced to 10 kn or less when mother/calf pairs, pods, or large assemblages of marine mammals are observed near a vessel;

(3) All vessels must maintain a minimum separation distance of 500 m from baleen whales;

(4) All vessels must maintain a minimum separation distance of 100 m from sperm whales;

(5) All vessels must, to the maximum extent practicable, attempt to maintain a minimum separation distance of 50 m from all other marine mammals, with an exception made for those animals that approach the vessel; and

(6) When marine mammals are sighted while a vessel is underway, the vessel must take action as necessary to avoid violating the relevant separation distance, *e.g.*, attempt to remain parallel to the animal's course, avoid excessive speed or abrupt changes in direction until the animal has left the area. If marine mammals are sighted within the relevant separation distance, the vessel must reduce speed and shift the engine to neutral, not engaging the engines until animals are clear of the area. This does not apply to any vessel towing gear or any vessel that is navigationally constrained.

(7) These requirements do not apply in any case where compliance would create an imminent and serious threat to a person or vessel or to the extent that a vessel is restricted in its ability to maneuver and, because of the restriction, cannot comply.

§217.185 Requirements for monitoring and reporting.

(a) *PSO qualifications.* (1) PSOs must successfully complete relevant, acceptable training, including completion of all required coursework and passing (80 percent or greater) a written and/or oral examination developed for the training program.

(2) PSOs must have successfully attained a bachelor's degree from an accredited college or university with a major in one of the natural sciences, a minimum of 30 semester hours or equivalent in the biological sciences, and at least one undergraduate course in math or statistics. The educational requirements may be waived if the PSO has acquired the relevant skills through alternate experience. Requests for such a waiver must be submitted to NMFS and shall include written justification. Requests will be granted or denied (with justification) by NMFS within one week of receipt of submitted information. Alternate experience that may be considered includes, but is not limited to:

- (i) Secondary education and/or experience comparable to PSO duties;
- (ii) Previous work experience conducting academic, commercial, or government-sponsored marine mammal surveys; or
- (iii) Previous work experience as a PSO; the PSO should demonstrate good standing and consistently good performance of PSO duties.

(b) *Equipment.* LOA-holders are required to:

- (i) Provide PSOs with bigeye binoculars (*e.g.*, 25 x 150; 2.7 view angle; individual ocular focus; height control) of appropriate quality solely for PSO use. These must be pedestal-mounted on the deck at the most appropriate vantage point that provides for optimal sea surface observation, PSO safety, and safe operation of the vessel.
- (ii) For each vessel required to use a PAM system, provide a PAM system that has been verified and tested by an experienced acoustic PSO who will be using it during the trip for which monitoring is required;
- (iii) Work with the selected third-party observer provider to ensure PSOs have all equipment (including backup equipment) needed to adequately perform necessary tasks, including accurate determination of distance and bearing to observed marine mammals. (Equipment specified in A. through G. below may be provided by an individual PSO, the third-party observer provider, or the LOA-holder, but the LOA-holder is responsible for ensuring PSOs have the proper equipment required to per-

form the duties specified herein.) Such equipment, at a minimum, must include:

- (A) Reticle binoculars (*e.g.*, 7 x 50) of appropriate quality (at least one per PSO, plus backups);
- (B) Global Positioning Unit (GPS) (plus backup);
- (C) Digital camera with a telephoto lens (the camera or lens should also have an image stabilization system) that is at least 300 mm or equivalent on a full-frame single lens reflex (SLR) (plus backup);
- (D) Compass (plus backup);
- (E) Radios for communication among vessel crew and PSOs (at least one per PSO, plus backups); and
- (F) Any other tools necessary to adequately perform necessary PSO tasks.

(c) *Data collection.* PSOs must use standardized electronic data forms. PSOs must record detailed information about any implementation of mitigation requirements, including the distance of marine mammals to the acoustic source and description of specific actions that ensued, the behavior of the animal(s), any observed changes in behavior before and after implementation of mitigation, and if shutdown was implemented, the length of time before any subsequent ramp-up or activation of the acoustic source. If required mitigation was not implemented, PSOs must record a description of the circumstances. At a minimum, the following information should be recorded:

- (1) Vessel names (source vessel and other vessels associated with survey), vessel size and type, maximum speed capability of vessel, port of origin, and call signs;
- (2) PSO names and affiliations;
- (3) Dates of departures and returns to port with port name;
- (4) Dates of and participants in PSO briefings;
- (5) Dates and times (Greenwich Mean Time) of survey effort and times corresponding with PSO effort;
- (6) Vessel location (latitude/longitude) when survey effort began and ended and vessel location at beginning and end of visual PSO duty shifts;
- (7) Vessel location at 30-second intervals (if software capability allows) or 5-

minute intervals (if location must be manually recorded);

(8) Vessel heading and speed at beginning and end of visual PSO duty shifts and upon any line change;

(9) Environmental conditions while on visual survey (at beginning and end of PSO shift and whenever conditions changed significantly), including Beaufort sea state and any other relevant weather conditions including cloud cover, fog, sun glare, and overall visibility to the horizon;

(10) Vessel location when environmental conditions change significantly;

(11) Factors that may have contributed to impaired observations during each PSO shift change or as needed as environmental conditions change (*e.g.*, vessel traffic, equipment malfunctions);

(12) Survey activity information, such as acoustic source power output while in operation, number and volume of airguns operating in an array, tow depth of an acoustic source, and any other notes of significance (*i.e.*, pre-start clearance, ramp-up, shutdown, testing, shooting, ramp-up completion, end of operations, streamers, etc.); and

(13) Upon visual observation of a marine mammal, the following information:

(i) Watch status (sighting made by PSO on/off effort, opportunistic, crew, alternate vessel/platform);

(ii) PSO who sighted the animal and PSO location (including height above water) at time of sighting;

(iii) Time of sighting;

(iv) Vessel coordinates at time of sighting;

(v) Water depth;

(vi) Direction of vessel's travel (compass direction);

(vii) Speed of the vessel(s) from which the observation was made;

(viii) Direction of animal's travel relative to the vessel;

(ix) Pace of the animal;

(x) Estimated distance to the animal (and method of estimating distance) and its heading relative to vessel at initial sighting;

(xi) Identification of the animal (*e.g.*, genus/species, lowest possible taxonomic level, or unidentified), PSO confidence in identification, and the com-

position of the group if there is a mix of species;

(xii) Estimated number of animals (high/low/best);

(xiii) Estimated number of animals by cohort (adults, juveniles, group composition, etc.);

(xiv) Description (as many distinguishing features as possible of each individual seen, including length, shape, color, pattern, scars or markings, shape and size of dorsal fin, shape of head, and blow characteristics);

(xv) Detailed behavior observations (*e.g.*, number of blows/breaths, number of surfaces, breaching, spyhopping, diving, feeding, traveling; as explicit and detailed as possible; note any observed changes in behavior), including an assessment of behavioral responses to survey activity;

(xvi) Animal's closest point of approach (CPA) and/or closest distance from any element of the acoustic source;

(xvii) Platform activity at time of sighting (*e.g.*, deploying, recovering, testing, shooting, data acquisition, other); and

(xviii) Description of any actions implemented in response to the sighting (*e.g.*, delays, shutdown, ramp-up) and time and location of the action.

(14) Upon acoustic detection of a marine mammal using a PAM system, the following information:

(i) An acoustic encounter identification number, and whether the detection was linked with a visual sighting;

(ii) Date and time when first and last heard;

(iii) Types and nature of sounds heard (*e.g.*, clicks, whistles, creaks, burst pulses, continuous, sporadic, strength of signal); and

(iv) Any additional information recorded such as water depth of the hydrophone array, bearing of the animal to the vessel (if determinable), species or taxonomic group (if determinable), spectrogram screenshot, and any other notable information.

(d) *Reporting.* (1) Annual reporting must be submitted as specified in this paragraph.

(i) LOA-holders must submit a summary report to NMFS on all activities and monitoring results within 90 days

of the completion of the survey or expiration of the LOA, whichever comes sooner, and must include all information described above under §217.185(c). If an issued LOA is valid for greater than one year, the summary report must be submitted on an annual basis.

(ii) The report must describe activities conducted and sightings of marine mammals, must provide full documentation of methods, results, and interpretation pertaining to all monitoring, and must summarize the dates and locations of survey operations and all marine mammal sightings (dates, times, locations, activities, associated survey activities, and information regarding locations where the acoustic source was used). In addition to the report, all raw observational data must be made available to NMFS.

(iii) For operations requiring the use of PAM, the report must include a validation document concerning the use of PAM, which should include necessary noise validation diagrams and demonstrate whether background noise levels on the PAM deployment limited achievement of the planned detection goals. Copies of any vessel self-noise assessment reports must be included with the report.

(iv) The LOA-holder must provide geo-referenced time-stamped vessel tracklines for all time periods in which airguns (full array or single) were operating. Tracklines must include points recording any change in airgun status (*e.g.*, when the airguns began operating, when they were turned off). GIS files must be provided in ESRI shapefile format and include the UTC date and time, latitude in decimal degrees, and longitude in decimal degrees. All coordinates must be referenced to the WGS84 geographic coordinate system.

(v) The draft report must be accompanied by a certification from the lead PSO as to the accuracy of the report, and the lead PSO may submit directly to NMFS a statement concerning implementation and effectiveness of the required mitigation and monitoring.

(vi) A final report must be submitted within 30 days following resolution of any comments on the draft report.

(2) Comprehensive reporting must be submitted as specified in this para-

graph. LOA-holders must contribute to the compilation and analysis of data for inclusion in an annual synthesis report addressing all data collected and reported through annual reporting in each calendar year. The synthesis period shall include all annual reports deemed to be final by NMFS in a given one-year reporting period. The report must be submitted to NMFS within 90 days following the end of a given one-year reporting period.

(e) *Reporting of injured or dead marine mammals.* (1) In the event that personnel involved in the survey activities discover an injured or dead marine mammal, the LOA-holder must report the incident to the Office of Protected Resources (OPR), NMFS and to the Southeast Regional Stranding Network as soon as feasible. The report must include the following information:

(i) Time, date, and location (latitude/longitude) of the first discovery (and updated location information if known and applicable);

(ii) Species identification (if known) or description of the animal(s) involved;

(iii) Condition of the animal(s) (including carcass condition if the animal is dead);

(iv) Observed behaviors of the animal(s), if alive;

(v) If available, photographs or video footage of the animal(s); and

(vi) General circumstances under which the animal was discovered.

(2) In the event of a ship strike of a marine mammal by any vessel involved in the survey activities, the LOA-holder must report the incident to OPR, NMFS and to the Southeast Regional Stranding Network as soon as feasible. The report must include the following information:

(i) Time, date, and location (latitude/longitude) of the incident;

(ii) Species identification (if known) or description of the animal(s) involved;

(iii) Vessel's speed during and leading up to the incident;

(iv) Vessel's course/heading and what operations were being conducted (if applicable);

(v) Status of all sound sources in use;

(vi) Description of avoidance measures/requirements that were in place at

the time of the strike and what additional measures were taken, if any, to avoid strike;

(vii) Environmental conditions (*e.g.*, wind speed and direction, Beaufort sea state, cloud cover, visibility) immediately preceding the strike;

(viii) Estimated size and length of animal that was struck;

(ix) Description of the behavior of the marine mammal immediately preceding and following the strike;

(x) If available, description of the presence and behavior of any other marine mammals immediately preceding the strike;

(xi) Estimated fate of the animal (*e.g.*, dead, injured but alive, injured and moving, blood or tissue observed in the water, status unknown, disappeared); and

(xii) To the extent practicable, photographs or video footage of the animal(s).

(3) For deep penetration surveys, in the event of a live stranding (or near-shore atypical milling) event within 50 km of the survey operations, where the NMFS stranding network is engaged in herding or other interventions to return animals to the water, the Director of OPR, NMFS (or designee) will advise the LOA-holder of the need to implement shutdown procedures for all active acoustic sources operating within 50 km of the stranding. Shutdown procedures for live stranding or milling marine mammals include the following:

(i) If at any time, the marine mammal(s) die or are euthanized, or if herding/intervention efforts are stopped, the Director of OPR, NMFS (or designee) will advise the LOA-holder that the shutdown around the animals' location is no longer needed.

(ii) Otherwise, shutdown procedures will remain in effect until the Director of OPR, NMFS (or designee) determines and advises the LOA-holder that all live animals involved have left the area (either of their own volition or following an intervention).

(iii) If further observations of the marine mammals indicate the potential for re-stranding, additional coordination with the LOA-holder will be required to determine what measures are necessary to minimize that likelihood

(*e.g.*, extending the shutdown or moving operations farther away) and to implement those measures as appropriate.

(4) If NMFS determines that the circumstances of any marine mammal stranding found in the vicinity of the activity suggest investigation of the association with survey activities is warranted, and an investigation into the stranding is being pursued, NMFS will submit a written request to the LOA-holder indicating that the following initial available information must be provided as soon as possible, but no later than 7 business days after the request for information. In the event that the investigation is still inconclusive, the investigation of the association of the survey activities is still warranted, and the investigation is still being pursued, NMFS may provide additional information requests, in writing, regarding the nature and location of survey operations prior to the time period above.

(i) Status of all sound source use in the 48 hours preceding the estimated time of stranding and within 50 km of the discovery/notification of the stranding by NMFS; and

(ii) If available, description of the behavior of any marine mammal(s) observed preceding (*i.e.*, within 48 hours and 50 km) and immediately after the discovery of the stranding.

[86 FR 5444, Jan. 19, 2021; 86 FR 18476, Apr. 9, 2021]

§217.186 Letters of Authorization.

(a) To incidentally take marine mammals pursuant to these regulations, prospective LOA-holders must apply for and obtain an LOA.

(b) An LOA, unless suspended or revoked, may be effective for a period not to exceed the expiration date of these regulations.

(c) In the event of projected changes to the activity or to mitigation and monitoring measures required by an LOA, the LOA-holder must apply for and obtain a modification of the LOA as described in §217.187.

(d) The LOA shall set forth:

(1) Permissible methods of incidental taking;

(2) Means of effecting the least practicable adverse impact (*i.e.*, mitigation)

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on the species or stock and its habitat; and

(3) Requirements for monitoring and reporting.

(e) Issuance of the LOA shall be based on a determination that the level of taking will be consistent with the findings made for the total taking allowable under these regulations and a determination that the amount of take authorized under the LOA is of no more than small numbers.

(f) For LOA issuance, where either (1) the conclusions put forth in an application (*e.g.*, take estimates) are based on analytical methods that differ substantively from those used in the development of the rule, or (2) the proposed activity or anticipated impacts vary substantively in scope or nature from those analyzed for the rule, NMFS may publish a notice of proposed LOA in the FEDERAL REGISTER, including the associated analysis of the differences, and solicit public comment before making a decision regarding issuance of the LOA.

(g) Notice of issuance or denial of an LOA shall be published in the FEDERAL REGISTER within thirty days of a determination.

§217.187 Renewals and modifications of Letters of Authorization (LOA).

(a) An LOA issued under §216.106 of this chapter and §217.186 for the activity identified in §217.180 shall be modified upon request by the applicant, provided that:

(1) The proposed specified activity and mitigation, monitoring, and reporting measures, as well as the anticipated impacts, are the same as those described and analyzed for these regulations (excluding changes made pursuant to the adaptive management provision in paragraph (c)(1) of this section); and

(2) NMFS determines that the mitigation, monitoring, and reporting measures required by the previous LOA under these regulations were implemented.

(b) For LOA modification requests by the applicant that include changes to the activity or the mitigation, monitoring, or reporting (excluding changes made pursuant to the adaptive management provision in paragraph (c)(1)

of this section) that result in more than a minor change in the total estimated number of takes (or distribution by species or years), NMFS may publish a notice of proposed LOA in the FEDERAL REGISTER, including the associated analysis of the change, and solicit public comment before issuing the LOA.

(c) An LOA issued under §216.106 of this chapter and §217.186 for the activity identified in §217.180 may be modified by NMFS under the following circumstances:

(1) NMFS may modify (including adding or removing measures) the existing mitigation, monitoring, or reporting measures (after consulting with the LOA-holder regarding the practicability of the modifications) if doing so is practicable and creates a reasonable likelihood of more effectively accomplishing the goals of the mitigation and monitoring set forth in the preamble for these regulations;

(i) Possible sources of data that could contribute to the decision to modify the mitigation, monitoring, or reporting measures in an LOA:

(A) Results from monitoring from previous years;

(B) Results from other marine mammal and/or sound research or studies; and

(C) Any information that reveals marine mammals may have been taken in a manner, extent or number not authorized by these regulations or subsequent LOAs.

(ii) If, through adaptive management, the modifications to the mitigation, monitoring, or reporting measures are substantial, NMFS will publish a notice of proposed LOA in the FEDERAL REGISTER and solicit public comment.

(2) If NMFS determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals specified in an LOA issued pursuant to §216.106 of this chapter and §217.186, 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.

§§ 217.188–217.189 [Reserved]

Subpart 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

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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 “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

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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 mam-

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mals 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.

Subpart W—Taking and Importing Marine Mammals Incidental to Hampton Roads Connector Partners Construction at Norfolk, Virginia

SOURCE: 86 FR 17490, Apr. 2, 2021, unless otherwise noted.

EFFECTIVE DATE NOTE: At 86 FR 17490, Apr. 2, 2021, subpart W was added, effective Apr. 2, 2021, through Apr. 1, 2026.

§217.210 Specified activity and geographical region.

(a) Regulations in this subpart apply only to the Hampton Roads Connector Partners (HRCP) and those persons it authorizes or funds to conduct activities on its behalf for the taking of marine mammals that occurs in the areas outlined in paragraph (b) of this section and that occurs incidental to construction activities including marine structure maintenance, pile replacement, and select waterfront improvements at the Hampton Roads Bridge Tunnel Expansion Project (HRBT).

(b) The taking of marine mammals by HRCP may be authorized in a Letter of Authorization (LOA) only if it occurs at the Hampton Roads Bridge Tunnel Expansion project location in the James River between Norfolk, VA and Hampton, VA.

§217.211 Effective dates.

Regulations in this subpart are effective from April 2, 2021 through April 2, 2026.

§217.212 Permissible methods of taking.

(a) Under an LOA issued pursuant to §§ 216.106 of this chapter and 217.216, the Holder of the LOA (hereinafter “HRCP”) may incidentally, but not intentionally, take marine mammals within the area described in § 217.210(b) by Level A and Level B harassment associated with construction activities, provided the activity is in compliance with all terms, conditions, and requirements of the regulations in this subpart and the applicable LOA.

(b) [Reserved]

§217.213 Prohibitions.

(a) Except for the takings contemplated in § 217.22 and authorized by an LOA issued under §§ 216.106 of this chapter and 217.216, it is unlawful for any person to do any of the following in connection with the activities described in § 217.210:

(1) 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 217.216;

(2) Take any marine mammal not specified in such LOA;

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(3) Take any marine mammal specified in such LOA in any manner that is not authorized by the LOA; or

(4) Take a marine mammal specified in such LOA if NMFS determines such taking results in more than a negligible impact on the species or stocks of such marine mammal.

(b) [Reserved]

§ 217.214 Mitigation requirements.

(a) When conducting the activities identified in § 217.210(a), the mitigation measures contained in any LOA issued under §§ 216.106 of this chapter and 217.216 must be implemented. These mitigation measures shall include but are not limited to:

(1) A copy of any issued LOA must be in the possession of HRCF, its designees, and work crew personnel operating under the authority of the issued LOA.

(2) HRCF shall conduct briefings for construction supervisors and crews, the monitoring team, and HRCF staff prior to the start of all pile driving activity, and when new personnel join the work, in order to explain responsibilities, communication procedures, the marine mammal monitoring protocol, and operational procedures.

(3) For in-water heavy machinery work other than pile driving, if a marine mammal comes within 10 meters (m), HRCF shall cease operations and reduce vessel speed to the minimum level required to maintain steerage and safe working conditions.

(4) For all pile driving activity, HRCF shall implement a minimum shutdown zone of a 10 m radius around the pile. If a marine mammal comes within or approaches the shutdown zone, such operations shall cease.

(5) For all pile driving activity, HRCF shall implement shutdown zones with radial distances as identified in a LOA issued under §§ 216.106 of this chapter and 217.216. If a marine mammal comes within or approaches the shutdown zone, such operations shall cease.

(6) HRCF shall deploy protected species observers (observers) as indicated in its Marine Mammal Monitoring Plan approved by NMFS.

(7) For all pile driving activities, between one and four observers shall be

stationed at the best vantage points practicable to monitor for marine mammals and implement shutdown/delay procedures.

(8) Monitoring shall take place from 30 minutes prior to initiation of pile driving activity through 30 minutes post-completion of pile driving activity. Pre-activity monitoring shall be conducted for 30 minutes to ensure that the shutdown zone is clear of marine mammals, and pile driving may commence when observers have declared the shutdown zone clear of marine mammals. In the event of a delay or shutdown of activity resulting from marine mammals in the shutdown zone, animals shall be allowed to remain in the shutdown zone (*i.e.*, must leave of their own volition) and their behavior shall be monitored and documented. If a marine mammal is observed within the shutdown zone, a soft-start cannot proceed until the animal has left the zone or has not been observed for 15 minutes. Monitoring shall occur throughout the time required to drive a pile. If in-water pile installation and removal work ceases for more than 30 minutes, the pre-activity monitoring of the shutdown zones must commence. A determination that the shutdown zone is clear must be made during a period of good visibility (*i.e.*, the entire shutdown zone and surrounding waters must be visible to the naked eye).

(9) If a marine mammal approaches or enters the shutdown zone, all pile driving activities at that location shall be halted. In the event of a delay, the activity may not commence or resume until either the animal has voluntarily left and been visually confirmed beyond the shutdown zone or fifteen minutes have passed without re-detection of the animal.

(10) Pile driving activity must be halted upon observation of either a species for which incidental take is not authorized or a species for which incidental take has been authorized but the authorized number of takes has been met, entering or within the harassment zone.

(11) Should environmental conditions deteriorate (*e.g.*, fog, heavy rain) such

that observers are unable to visibly detect marine mammals within the entire shutdown zone then HRCP shall delay pile driving and removal until observers are confident marine mammals within the shutdown zone could be detected.

(12) Monitoring shall be conducted by trained observers, who shall have no other assigned tasks during monitoring periods. Trained observers shall be placed at the best vantage point(s) practicable to monitor for marine mammals and implement shutdown or delay procedures when applicable through communication with the equipment operator. HRCP shall adhere to the following additional observer qualifications:

(i) Independent observers are required;

(ii) At least one observer must have prior experience working as an observer;

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

(iv) Where a team of three or more observers are required, one observer shall be designated as lead observer or monitoring coordinator. The lead observer must have prior experience working as an observer; and

(v) HRCP must submit PSO CVs for approval by NMFS prior to the beginning of pile driving and drilling.

(13) HRCP shall use soft start techniques for impact pile driving. Soft start for impact driving requires HRCP and those persons it authorizes to provide an initial set of three strikes at reduced energy, followed by a thirty-second waiting period, then two subsequent reduced energy three-strike sets. Soft start shall be implemented at the start of each day's impact pile driving and at any time following cessation of impact pile driving for a period of thirty minutes or longer.

(14) HRCP shall employ bubble curtain systems during impact driving of steel piles except under conditions where the water depth is less than 20 feet in depth. Bubble curtains must meet the following requirements:

(i) The bubble curtain must distribute air bubbles around 100 percent

of the piling perimeter for the full depth of the water column.

(ii) The lowest bubble ring must be in contact with the mudline and/or rock bottom for the full circumference of the ring, and the weights attached to the bottom ring shall ensure 100 percent mudline and/or rock bottom contact. No parts of the ring or other objects shall prevent full mudline and/or rock bottom contact.

(iii) The bubble curtain must be operated such that there is proper (equal) balancing of air flow to all bubblers.

(iv) HRCP shall require that construction contractors train personnel in the proper balancing of air flow to the bubblers and corrections to the attenuation device to meet the performance standards specified in an LOA issued under §§ 216.106 of this chapter and § 217.216. This shall occur prior to the initiation of pile driving activities.

(b) [Reserved]

§217.215 Requirements for monitoring and reporting.

(a) HRCP shall submit a Marine Mammal Monitoring Plan to NMFS for approval in advance of construction.

(b) HRCP shall deploy observers as indicated in its approved Marine Mammal Monitoring Plan.

(c) Observers shall be trained in marine mammal identification and behaviors. Observers shall have no other construction-related tasks while conducting monitoring.

(d) HRCP shall monitor the Level B harassment zones and Level A harassment zones extending beyond the designated shutdown zones to the extent practicable.

(e) HRCP shall monitor the shutdown zones during all pile driving and removal activities.

(f) HRCP shall submit a draft annual monitoring report to NMFS within 90 work days of the completion of annual marine mammal monitoring. The report must detail the monitoring protocol and summarize the data recorded during monitoring. If no comments are received from NMFS within 30 days, the draft report will constitute the final report. If comments are received, a final report addressing NMFS comments must be submitted within 30

days after receipt of comments. Specifically, the report must include:

(1) Dates and times (begin and end) of all marine mammal monitoring;

(2) Construction activities occurring during each daily observation period, including how many and what type of piles were driven or removed and by what method (*i.e.*, impact or vibratory);

(3) Environmental conditions during monitoring periods (at beginning and end of PSO shift and whenever conditions change significantly), including Beaufort sea state and any other relevant weather conditions including cloud cover, fog, sun glare, and overall visibility to the horizon, estimated observable distance (if less than the harassment zone distance), and percentages of Level A and Level B harassment zones that are not visible;

(4) The number of marine mammals observed, by species, relative to the pile location and if pile driving or removal was occurring at time of sighting;

(5) Age and sex class, if possible, of all marine mammals observed;

(6) PSO locations during marine mammal monitoring;

(7) Distances and bearings of each marine mammal observed to the pile being driven or removed for each sighting (if pile driving or removal was occurring at time of sighting);

(8) Description of any marine mammal behavior patterns during observation, including direction of travel and estimated time spent within the Level A and Level B harassment zones while the source was active;

(9) Number of marine mammals detected within the harassment zones, by species;

(10) Detailed information about any implementation of any mitigation triggered (*e.g.*, shutdowns and delays), a description of specific actions that ensued, and resulting behavior of the animal, if any; and

(11) Description of attempts to distinguish between the number of individual animals taken and the number of incidences of take, such as ability to track groups or individuals;

(g) In the event that personnel involved in the construction activities discover an injured or dead marine

mammal, HRCF shall report the incident to the Office of Protected Resources (OPR) (301-427-8401), NMFS and to the Greater Atlantic Region New England/Mid-Atlantic Regional Stranding Coordinator as soon as feasible. If the death or injury was clearly caused by the specified activity, HRCF must immediately cease the specified activities until NMFS is able to review the circumstances of the incident and determine what, if any, additional measures are appropriate to ensure compliance with the terms of the authorization. HRCF must not resume their activities until notified by NMFS. The report must include the following information:

(1) Time, date, and location (latitude/longitude) of the first discovery (and updated location information if known and applicable);

(2) Species identification (if known) or description of the animal(s) involved;

(3) Condition of the animal(s) (including carcass condition if the animal is dead);

(4) Observed behaviors of the animal(s), if alive;

(5) If available, photographs or video footage of the animal(s); and

(6) General circumstances under which the animal was discovered.

§217.216 Letters of Authorization.

(a) To incidentally take marine mammals pursuant to these regulations, HRCF must apply for and obtain an LOA.

(b) An LOA, unless suspended or revoked, may be effective for a period of time not to exceed the expiration date of these regulations.

(c) If an LOA expires prior to the expiration date of these regulations, HRCF may apply for and obtain a renewal of the LOA.

(d) In the event of projected changes to the activity or to mitigation and monitoring measures required by an LOA, HRCF must apply for and obtain a modification of the LOA as described in § 217.217.

(e) The LOA shall set forth the following information:

(1) Permissible methods of incidental taking;

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

(3) Requirements for monitoring and reporting.

(f) Issuance of the LOA shall be based on a determination that the level of taking will be consistent with the findings made for the total taking allowable under these regulations.

(g) Notice of issuance or denial of an LOA shall be published in the FEDERAL REGISTER within thirty days of a determination.

§ 217.217 Renewals and modifications of Letters of Authorization.

(a) An LOA issued under §§ 216.106 of this chapter and 217.216 for the activity identified in § 217.210(a) shall be renewed or modified upon request by the applicant, provided that:

(1) The planned specified activity and mitigation, monitoring, and reporting measures, as well as the anticipated impacts, are the same as those described and analyzed for these regulations; and

(2) NMFS determines that the mitigation, monitoring, and reporting measures required by the previous LOA under these regulations were implemented.

(b) For LOA modification or renewal requests by the applicant that include changes to the activity or the mitigation, monitoring, or reporting that do not change the findings made for the regulations or result in no more than a minor change in the total estimated number of takes (or distribution by species or years), NMFS may publish a notice of proposed LOA in the FEDERAL REGISTER, including the associated analysis of the change, and solicit public comment before issuing the LOA.

(c) An LOA issued under §§ 216.106 of this chapter and 217.216 for the activity identified in § 217.210(a) may be modified by NMFS under the following circumstances:

(1) HRCF may modify (including augment) the existing mitigation, monitoring, or reporting measures (after consulting with NMFS regarding the practicability of the modifications) if doing so creates a reasonable likelihood

of more effectively accomplishing the goals of the mitigation and monitoring set forth in the preamble for these regulations;

(i) Possible sources of data that could contribute to the decision to modify the mitigation, monitoring, or reporting measures in a LOA:

(A) Results from HRCF's monitoring from previous years;

(B) Results from other marine mammal and/or sound research or studies; and

(C) Any information that reveals marine mammals may have been taken in a manner, extent or number not authorized by these regulations or subsequent LOAs;

(ii) If, through adaptive management, the modifications to the mitigation, monitoring, or reporting measures are substantial, NMFS will publish a notice of proposed LOA in the FEDERAL REGISTER and solicit public comment.

(2) If NMFS determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals specified in a LOA issued pursuant to §§ 216.106 of this chapter and 217.216, a 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.

§§ 217.218–217.219 [Reserved]

Subpart X [Reserved]

Subparts Z–[Reserved]

PART 218—REGULATIONS GOVERNING THE TAKING AND IMPORTING OF MARINE MAMMALS

Subpart A—Taking and Importing Marine Mammals Incidental to U.S. Navy Construction at Naval Station Norfolk in Norfolk, Virginia

Sec.

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