

State and county	Location and case No.	Date and name of newspaper where notice was published	Chief executive officer of community	Effective date of modification	Community No.
Tarrant .....	City of Southlake (09-06-0528P).	March 3, 2009, March 10, 2009, <i>Fort Worth Star Telegram</i> .	The Honorable Andy Wambsganss, Mayor, City of Southlake, 1400 Main Street, Suite 270, Southlake, TX 76092.	February 20, 2009 .....	480612
Williamson .....	City of Round Rock (09-06-1098P).	April 2, 2009, April 9, 2009, <i>Round Rock Leader</i> .	The Honorable Alan McGraw, Mayor, City of Round Rock, 221 East Main Street, Round Rock, TX 78664.	August 7, 2009 .....	481048
Williamson .....	Unincorporated areas of Williamson County (09-06-1098P).	April 2, 2009, April 9, 2009, <i>Round Rock Leader</i> .	The Honorable Dan A. Gattis, Williamson County Judge, 710 Main Street, Suite 101, Georgetown, TX 78626.	August 7, 2009 .....	481079
Virginia: Albemarle .....	Unincorporated areas of Albemarle County (08-03-1578P).	April 8, 2009, April 15, 2009, <i>The Daily Progress</i> .	The Honorable David Slutzky, Chairman, Albemarle County Board of Supervisors, 401 McIntire Road, Charlottesville, VA 22902.	August 13, 2009 .....	510006
Fauquier .....	Unincorporated areas of Fauquier County (09-03-0367P).	April 9, 2009, April 16, 2009, <i>Fauquier Times Democrat</i> .	The Honorable R. Holder Trumbo, Jr., Chairman, Fauquier County, 10 Hotel Street, Suite 208, Warrenton, VA 20186.	August 14, 2009 .....	510055
Washington: Pierce	Town of Steilacoom (08-10-0544P).	April 13, 2009, April 20, 2009, <i>The News Tribune</i> .	The Honorable Ron Lucas, Mayor, Town of Steilacoom, 1030 Roe Street, Steilacoom, WA 98388.	March 31, 2009 .....	530146

(Catalog of Federal Domestic Assistance No. 97.022, "Flood Insurance.")

Dated: May 21, 2009.

**Deborah S. Ingram,**

*Acting Deputy Assistant Administrator for Mitigation, Mitigation Directorate, Department of Homeland Security, Federal Emergency Management Agency.*

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**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 216**

[Docket No. 090218189-9910-02]

RIN 0648-AX29

**Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to Missile Launch Activities at San Nicolas Island, CA**

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

**ACTION:** Final rule.

**SUMMARY:** NMFS, upon application from the U.S. Navy (Navy), is issuing regulations to govern the unintentional taking of marine mammals, by harassment, incidental to missile launch operations from San Nicolas Island (SNI), California, for a 5-yr period. The Navy's activities are considered military readiness activities pursuant to the Marine Mammal Protection Act (MMPA), as amended by the National Defense Authorization Act of 2004 (NDAA). These regulations, which allow for the issuance of "Letters of

Authorization" (LOAs) for the incidental take of marine mammals during the described activities and specified time frames, prescribe the permissible methods of taking and other means of effecting the least practicable adverse impact on marine mammal species and their habitat, as well as requirements pertaining to the monitoring and reporting of such taking.

**DATES:** Effective June 2, 2009 through June 2, 2014.

**ADDRESSES:** A copy of the Navy's application, which contains a list of references used in this document, and NMFS' Final Environmental Assessment (EA) and Finding of No Significant Impact (FONSI) may be obtained by writing to P. Michael Payne, Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910-3225, by telephoning the contact listed under **FOR FURTHER INFORMATION CONTACT**, or on the Internet at: <http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications>. Documents cited in this final rule may also be viewed, by appointment, during regular business hours at the above address.

**FOR FURTHER INFORMATION CONTACT:** Candace Nachman, Office of Protected Resources, NMFS, (301) 713-2289, ext. 156, or Monica DeAngelis, Southwest Regional Office, (562) 980-3232.

**SUPPLEMENTARY INFORMATION:**

**Background**

Sections 101(a)(5)(A) and (D) of the Marine Mammal Protection Act (MMPA); 16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (Secretary) to allow, upon request, the incidental, but

not intentional taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, notice of a proposed authorization is provided to the public for review.

Authorization for incidental takings may be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for certain subsistence uses, and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such taking are set forth.

NMFS has defined "negligible impact" in 50 CFR 216.103 as: an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.

The NDAA (Public Law 108-136) removed the "small numbers" and "specified geographical region" limitations and amended the definition of "harassment" as it applies to a "military readiness activity" to read as follows (Section 3(18)(B) of the MMPA):

(i) any act that injures or has the significant potential to injure a marine mammal or marine mammal stock in the wild [Level A Harassment]; or (ii) any act that disturbs or is likely to disturb a marine mammal or marine mammal stock in the wild by causing disruption of natural behavioral patterns, including, but not limited to, migration, surfacing, nursing, breeding, feeding, or sheltering, to a point where such behavioral patterns are abandoned or significantly altered [Level B Harassment].

### Summary of Request

On September 3, 2008, NMFS received an application from the Navy requesting authorization for the take of three species of marine mammals incidental to missile launches conducted by the Naval Air Warfare Center Weapons Division (NAWCWD) from the western part of SNI, which would impact pinnipeds hauled out on the island. Aircraft and helicopter flights between the Point Mugu airfield on the mainland, the airfield on SNI, and the target sites in the Point Mugu Sea Range will be a routine part of a planned launch operation. These activities are classified as military readiness activities. The Navy states that these activities may have both acoustic and non-acoustic effects on pinnipeds. The Navy requested authorization to take three pinniped species by Level B Harassment.

### Measurement of Airborne Sound Levels

The following section is provided to facilitate understanding of airborne and impulsive noise characteristics. In its application, the Navy references both pressure and energy measurements for sound levels. For pressure, the sound pressure level (SPL) is described in terms of decibels (dB) re  $\mu\text{Pa}$ , and for energy, the sound exposure level (SEL) is described in terms of dB re  $\text{Pa}^2 \cdot \text{s}$ . In other words, SEL is the squared instantaneous sound pressure over a specified time interval, where the sound pressure is averaged over 5 percent to 95 percent of the duration of the sound (in this case, one second).

Airborne noise measurements are usually expressed relative to a reference pressure of 20 Pa, which is 26 dB above the underwater sound pressure reference of 1  $\mu\text{Pa}$ . However, the conversion from air to water intensities is more involved than this and is beyond the scope of this document. NMFS recommends interested readers review NOAA's tutorial on this issue: <http://www.pmel.noaa.gov/vents/acoustics/tutorial/tutorial.html>. Also, airborne sounds are often expressed as broadband A-weighted (dBA) or C-weighted (dBC) sound levels. A-weighting refers to frequency-dependent weighting factors applied to sound in accordance with the sensitivity of the human ear to different frequencies. With A-weighting, sound energy at frequencies below 1 kHz and above 6 kHz are de-emphasized and approximates the human ear's response to sounds below 55 dB. C-weighting corresponds to the relative response to the human ear to sound levels above 85 dB. C-weight scaling is useful for

analyses of sounds having predominantly low-frequency sounds, such as sonic booms.

### Description of the Specified Activity

The NAWCWD is the Navy's full-spectrum research, development, test, and evaluation center of excellence for weapons systems associated with air warfare, aircraft weapons integration, missiles and missile subsystems, and assigned airborne electronic warfare systems. NAWCWD is a multi-site organization that includes the Point Mugu Sea Range (Sea Range) and is responsible for environmental compliance for this Sea Range and SNI. NAWCWD plans to continue a launch program for missiles from several launch sites on SNI. The purpose of these launches is to support test and training activities associated with operations on the Sea Range. Figure 1 in the Navy's application provides a regional site map of the Range and SNI. A more detailed description of the island and proposed launch activities are provided in the Point Mugu Sea Range Final Environmental Impact Statement/Overseas Environmental Impact Statement (NAWCWD, 2002) and in reports on previous vehicle launch monitoring periods (e.g., Holst *et al.*, 2005a, 2008). The Sea Range is used by the U.S. and allied military services to test and evaluate sea, land, and air weapon systems; to provide realistic training opportunities; and to maintain operational readiness of these forces. Some of the SNI launches are used for practicing defensive drills against the types of weapons simulated by these vehicles. Some launches may be conducted for the related purpose of testing new types of missiles, to verify that they are suitable for operational use.

The vehicles are launched from one of several fixed locations on the western end of SNI and fly generally westward through the Sea Range. Launches are expected to involve supersonic and subsonic vehicles. Some vehicles are launched from the Alpha Launch Complex located 190 m (623.4 ft) above sea level on the west-central part of SNI (see Figure 2 in the Navy's application). The Building 807 Launch Complex, used for most launches of smaller vehicles, as well as some large ones, is at the western end of SNI at approximately 11 m (36 ft) above sea level.

The Navy may launch as many as 200 vehicles from SNI over a 5-yr operations program, with up to 40 launches per year, but this number can vary depending on operational requirements. Launch timing will be

determined by operational, meteorological, and logistical factors. Up to 10 launches per year may occur at night. Nighttime launches will only take place when required by the test objectives, e.g., when testing the Airborne Laser system (ABL). For this system, missiles must be launched at night when the laser is visible. Some launch events involve a single vehicle, while others involve the launch of multiple vehicles either in quick succession or at intervals of a few hours.

The Coyote Supersonic Sea-skimming Target (SSST) is anticipated to be the primary launch vehicle. However, the Navy states that it may become necessary to substitute similar vehicles or different equipment in some cases. While other vehicles may be launched in the future, the largest contemplated in the Navy's application and this **Federal Register** notice is 23,000 kg (50,706 lb). These larger vehicles would be launched up to 3 times per year. A detailed description of the activities to be conducted by the Navy, including details on the types of vehicles to be launched, was included in the proposed rule (74 FR 11891, March 20, 2009) and may also be found in the Navy's application (see **ADDRESSES**). The description of the Coyote SSST has been left in this **Federal Register** document with some added information regarding the Vandal missile (which was formerly the primary launch vehicle) on SNI for comparison of the two missiles.

### Coyote

The Coyote, designated GQM-163A, is an expendable SSST powered by a ducted-rocket ramjet. It has replaced the Vandal, which was used as the primary vehicle during launches from 2001–2005. The Coyote is similar in size and performance to the Vandal. The Vandal was 7.7 m (25.2 ft) in length, not including the booster rocket. It had a diameter of 71 cm (28 in), excluding fins, with a total span of 2.9 m (9.5 ft). The Vandal could reach a maximum speed of Mach 2.125 in sea-skimming mode.

The Coyote is capable of flying at low altitudes (4 m [13 ft] cruise altitude) and supersonic speeds (Mach 2.5) over a flight range of 83 km (51.6 mi). This vehicle is designed to provide a ground launched aerial target system to simulate a supersonic, sea-skimming Anti-Ship Cruise Missile threat. The SSST assembly consists of two primary subsystems: MK 70 solid propellant booster and the GQM-163A target vehicle. The solid-rocket booster is approximately 46 cm (18 in) in diameter and is of the type used to launch the Navy's "Standard" surface-to-air

missile. The GQM-163A target vehicle is 5.5 m (18 ft) long and 36 cm (14 in) in diameter, exclusive of its air intakes. It consists of a solid-fuel Ducted Rocket (DR) ramjet subsystem, Control and Fairing Subassemblies, and the Front End Subsystem (FES). Included in the FES is an explosive destruct system to terminate flight if required.

The Coyote utilizes the Vandal launcher, currently installed at the Alpha Launch Complex on SNI with a Launcher Interface Kit. A modified AQM-37C Aerial Target Test Set is utilized for target checkout, mission programming, verification of the vehicle's ability to perform the entire mission, and homing updates while the vehicle is in flight.

During a typical launch, booster separation occurs approximately 5.5 s after launch and approximately 2.6 km (1.6 mi) downrange, at which time the vehicle has a speed of approximately Mach 2.35 (Orbital Sciences Corp; [www.orbital.com](http://www.orbital.com)). Following booster separation, the GQM-163A's DR ramjet ignites, the vehicle reaches its apogee, and then dives to 5 m (16.4 ft) altitude while maintaining a speed of Mach 2.5. During launches from SNI, the low-altitude phase occurs over water west of the island. The target performs pre-programmed maneuvers during the cruise and terminal phases, as dictated by the loaded mission profile, associated waypoints, and mission requirements. During the terminal phase, the Coyote settles down to an altitude of 4 m (13 ft) and Mach 2.3 until DR burnout.

During 2003–2007, Coyotes were launched from SNI at azimuths of 270–300° and elevation angles of 14–22° (Holst *et al.*, 2005a, 2008). Coyotes produced flat-weighted SPLs (SPL-f) of 125–134 decibels reference 20  $\mu$ Pa (dB re 20  $\mu$ Pa) at distances of 0.8–1.7 km (0.5–1.1 mi) from the three-dimensional (3-D) closest point of approach (CPA) of the vehicle, and 82–93 dB at CPAs of 2.4–3.2 km (1.5–2 mi) (Holst *et al.*, 2005a, 2008). Flat-weighted SELs (SEL-f) ranged from 87 to 119 dB re 20  $\mu$ Pa<sup>2</sup>•s. SELs M-weighted for pinnipeds in air (Mpa) ranged from 60 to 114 dB re 20  $\mu$ Pa<sup>2</sup>•s, and peak pressures ranged from 100 to 144 dB re 20  $\mu$ Pa. The reference sound pressure (20  $\mu$ Pa) used here and throughout the document, is standard for airborne sounds.

#### Description of Habitat and Marine Mammals Affected by the Activity

A detailed description of the Channel Islands/southern California Bight ecosystem and its associated marine mammals can be found in several documents (Le Boeuf and Brownell,

1980; Bonnell *et al.*, 1981; Lawson *et al.*, 1980; Stewart, 1985; Stewart and Yochem, 2000; Sydeman and Allen, 1999) and is not repeated here.

Many of the beaches in the Channel Islands provide resting, molting or breeding places for several species of pinnipeds including: northern elephant seals (*Mirounga angustirostris*), harbor seals (*Phoca vitulina*), California sea lions (*Zalophus californianus*), northern fur seals (*Callorhinus ursinus*), Guadalupe fur seals (*Arctocephalus townsendi*), and Steller sea lions (*Eumetopias jubatus*). On SNI, three of these species, northern elephant seals, harbor seals, and California sea lions, can be expected to occur on land in the area of the proposed activity either regularly or in large numbers during certain times of the year.

Northern fur seals, Guadalupe fur seals, and Steller sea lions are far less common on SNI. The northern fur seal is occasionally sighted on SNI in small numbers (Stewart and Yochem, 2000); a single female with a pup was sighted on the island in July 2007 (NAWCWD, 2008). It is also possible that individual Guadalupe fur seals may be sighted on the beaches. The Guadalupe fur seal is an occasional visitor to the Channel Islands, but breeds mainly on Guadalupe Island, Mexico, which is approximately 463 km (288 mi) south of the Sea Range. The last sighting was of a lone individual seen ashore in the summer of 2007 (NAWCWD, 2008). The Steller sea lion was once abundant in these waters, but numbers have declined since 1938. No adult Steller sea lions have been sighted on land in the Channel Islands since 1983 (Stewart *et al.*, 1993c in NMFS 2008). Recently, there have been sightings of two to three Steller sea lions in Southern California along the mainland, but there have still been no recent sightings out on any of the Channel Islands (M. DeAngelis, NMFS, Southwest Regional Office, 2009, pers. comm.). Thus, it is very unlikely that Steller sea lions will be seen on or near SNI beaches.

Additional information on the biology, distribution, and abundance of the marine mammal species likely to be affected by the launch activities on SNI can be found in the Navy's application (see ADDRESSES) and the NMFS Stock Assessment Reports, which can be found at: <http://www.nmfs.noaa.gov/pr/pdfs/sars/po2008.pdf>. Please refer to those documents for information on those species.

#### Comments and Responses

On September 16, 2008, NMFS published a notice of receipt of application for an LOA in the **Federal**

**Register** (73 FR 53408) and requested comments and information from the public for 30 days. NMFS received comments from the Marine Mammal Commission (Commission). NMFS' response to the Commission's comments are addressed in the proposed rule **Federal Register** notice (74 FR 11891, March 20, 2009). On March 20, 2009, NMFS published a notice of proposed rulemaking (74 FR 11891) on the Navy's request to take marine mammals incidental to missile launch activities on SNI and requested comments, information, and suggestions concerning the request. During the 30-day public comment period, NMFS received comments from the Commission and one private citizen. The comment from the private citizen opposed the issuance of an authorization without any specific substantiation for why such an authorization should not be issued. For the reasons set forth in this preamble, NMFS believes issuance of the authorization is appropriate. The following are the comments from the Commission and NMFS' responses.

*Comment 1:* The Commission recommends that NMFS adopt a general policy of providing a 60-day comment period for all proposed regulations issued under section 101(a)(5)(A), and in no case less than a 45-day comment period, absent a showing of good cause that such a comment period is impractical, unnecessary, or contrary to the public interest, as provided for under section 553(b)(3)(B) of the Administrative Procedure Act (APA).

*Response:* When practical, NMFS may provide 45 days for public comment on proposed rulemakings. However, in this particular case, a 30-day comment period was reasonable. The Missile Defense Agency (MDA), a customer of the Navy range at SNI, has proposed to launch a series of four small missile targets beginning as soon as possible after publication of this final rule. These launches are critical steps in a larger development and testing program for the ABL, a new weapon system being developed by MDA as part of its national security mission to improve military readiness and protect homeland security. A delay in implementing the regulations would result in a delay of testing and development of this critical program. (Further explanation is provided in the "Classification" section of this **Federal Register** document.) In all circumstances, NMFS attempts to balance the prevailing conditions with the complexity of the rule when setting a comment period. Additionally, section 553(b)(3)(B) of the APA does not specify a time requirement for comment periods on proposed rulemaking but rather that

notice must be given if good cause exists that a comment period itself is impractical, unnecessary, or contrary to the public interest.

NMFS has been issuing MMPA authorizations to the Navy to conduct these activities on SNI since 2001, which has allowed NMFS to develop relatively standard mitigation and monitoring requirements for these activities, so rarely more than one or two public comments are received. The public was afforded a 30-day comment period to submit information and suggestions on the preparation of proposed regulations beginning on September 16, 2008 with the publication of the notice of receipt of application (73 FR 53408). NMFS received only one comment letter at that time. Only two organizations or members of the public commented on the proposed rule. NMFS did not receive any other requests to extend the comment period. In this particular case, NMFS believes that the 30-day comment period afforded the public on the proposed rulemaking was reasonable.

*Comment 2:* The Commission recommends that NMFS make the Navy's interim report on 2009–2010 monitoring activities (to be submitted in 2010), which is called for under the proposed rule, available to the Commission and others for review and comment before authorizing any changes to the monitoring program.

*Response:* NMFS concurs. NMFS will provide a copy of the Navy's interim report submitted in 2010 to the Commission and others for review and comment before authorizing any changes to the monitoring program.

*Comment 3:* The Commission recommends that NMFS require the Navy to investigate any injury or death of a marine mammal if the animal's death could be associated with the Navy's activities to determine the cause, assess the full impact of the activity, determine how the activity should be modified to avoid future injuries or deaths, and ascertain if additional taking authority is needed.

*Response:* The Navy is not authorized to investigate or handle marine mammal carcasses. This must be done by a member of the Marine Mammal Stranding Network. However, the Navy must notify the NMFS Office of Protected Resources and NMFS Southwest Regional Office within 48 hours of the discovery of an injured or dead marine mammal. Additionally, the Stranding Network must be notified immediately. The regulations also contain a requirement that if an injurious or lethal take of a marine

mammal has occurred, the launch procedure and monitoring methods must be reviewed, in cooperation with NMFS, and, if necessary, appropriate changes will be made to an LOA prior to conducting the next launch of the same vehicle under the LOA. No serious injury or mortality is anticipated as a result of the Navy's activities.

*Comment 4:* The Commission recommends that NMFS require the Navy to halt an activity if a marine mammal species other than those covered by the authorization is observed within the operating area.

*Response:* This requirement is already part of the general conditions contained in LOAs issued by NMFS. Conditions contained in current and previous LOAs for this and other actions generally state the type of taking that is permitted and also identify the species that are authorized for taking. The condition then goes on to state that the taking by harassment, injury, or death of any other species of marine mammal is prohibited and may result in the modification, suspension or revocation of the LOA. Additionally, the taking of any marine mammal in a manner prohibited under the LOA must be reported to NMFS within 48 hours of the taking. Therefore, if the Navy sighted a marine mammal not covered by the LOA in the area of a launch where taking might occur and still went forward with the launch, then the Navy would be operating in violation of the LOA and the MMPA.

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

As outlined in previous NMFS documents, the effects of noise on marine mammals are highly variable, and can be categorized as follows (based on Richardson *et al.*, 1995):

(1) The noise may be too weak to be heard at the location of the animal (i.e., lower than the prevailing ambient noise level, the hearing threshold of the animal at relevant frequencies, or both);

(2) The noise may be audible but not strong enough to elicit any overt behavioral response;

(3) The noise may elicit reactions of variable conspicuousness and variable relevance to the well being of the marine mammal; these can range from temporary alert responses to active avoidance reactions, such as stampedes into the sea from terrestrial haul-out sites;

(4) Upon repeated exposure, a marine mammal may exhibit diminishing responsiveness (habituation), or disturbance effects may persist; the latter is most likely with sounds that are highly variable in characteristics, infrequent and unpredictable in

occurrence (as are vehicle launches), and associated with situations that a marine mammal perceives as a threat;

(5) Any anthropogenic noise that is strong enough to be heard has the potential to reduce (mask) the ability of a marine mammal to hear natural sounds at similar frequencies, including calls from conspecifics, and underwater environmental sounds such as surf noise;

(6) If mammals remain in an area because it is important for feeding, breeding, or some other biologically important purpose even though there is chronic exposure to noise, it is possible that there could be noise-induced physiological stress; this might in turn have negative effects on the well-being or reproduction of the animals involved; and

(7) Very strong sounds have the potential to cause temporary or permanent reduction in hearing sensitivity. In terrestrial mammals, and presumably marine mammals, received sound levels must far exceed the animal's hearing threshold for there to be any temporary threshold shift (TTS) in its hearing ability. For transient sounds, the sound level necessary to cause TTS is inversely related to the duration of the sound. Received sound levels must be even higher for there to be risk of permanent hearing impairment.

Potential impacts of the planned missile launch operations at SNI on marine mammals involve both acoustic and non-acoustic effects. Acoustic effects relate to sound produced by the engines of all launch vehicles, and, in some cases, their booster rockets. Potential non-acoustic effects could result from the physical presence of personnel during placement of video and acoustical monitoring equipment. However, careful deployment of monitoring equipment is not expected to result in any disturbance to pinnipeds hauled out nearby. Any visual disturbance caused by passage of a vehicle overhead is likely to be minor and brief as the launch vehicles are relatively small and move at great speed. Information regarding behavioral reactions of pinnipeds to launches, hearing impairment of pinnipeds from launches, and non-auditory physiological responses to launches is contained in the Navy's application and the proposed rulemaking (74 FR 11891, March 20, 2009). The potential effects described in the proposed rule are the same as those that would occur under the final rule.

NMFS does not anticipate a significant impact on any of the species or stocks of marine mammals from

missile launches on SNI. While the reactions of the different species are variable and can involve occasional stampedes or other abrupt movements by some individuals, biological impacts of these responses appear to be limited. The responses are not likely to result in significant injury or mortality or long-term negative consequences to individuals or pinniped populations on SNI. Based on measurements of received sound levels during previous launches at SNI (e.g., Holst *et al.*, 2005a,b; 2008), the Navy and NMFS expect that there may be some effects on hearing sensitivity (TTS) for a few of the pinnipeds present, but these effects are expected to be mild and reversible. Although it is possible that some launch sounds as measured close to the launchers may exceed the permanent threshold shift (PTS) criteria, it is unlikely that any pinnipeds would be close enough to the launchers to be exposed to sounds strong enough to cause PTS. Therefore, NMFS anticipates that pinnipeds hauled out during launches on SNI will only incur short-term, minimal Level B harassment.

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

The marine mammal species NMFS believes likely to be taken by Level B harassment incidental to vehicle launch operations from SNI are harbor seals, California sea lions, and northern elephant seals. All of these species are protected under the MMPA, and none are listed under the Endangered Species Act (ESA). Any takes are most likely to result from operational noise as launch vehicles pass near haul-out sites and/or associated visual cues. As noted earlier and in the proposed rule (74 FR 11891, March 20, 2009), sightings of northern fur seals, Steller sea lions, and Guadalupe fur seals have been extremely rare or low on SNI. Therefore, no takes are anticipated for these three species incidental to the proposed activities.

The Navy provisionally estimates that the following numbers of pinnipeds may be taken by Level B harassment annually: 474 elephant seals; 467 harbor seals; and 1,606 California sea lions. The animals affected may be the same individual animals or may be different individuals, depending on site fidelity. Based on the results of the marine mammal monitoring conducted by the Navy during the 2001–2007 launch program, the estimated number of potential Level B harassment takes would actually be less than estimated or previously authorized. The criteria used by the Navy to estimate take numbers for the 2009–2014 program were

developed specifically for the launches identified in the specified activity and are based on monitoring data collected during the 2001–2007 launch program at the same location and involving the same rocket types. Section 7.7 of the Navy's application contains a full description of how they developed their take numbers (see **ADDRESSES**).

With the incorporation of mitigation measures described later in this document, the Navy and NMFS expect that only Level B incidental harassment may occur as a result of the proposed activities and that these events will result in no detectable impact on marine mammal species or stocks or on their habitats.

#### **Potential Effects of Specified Activities on Marine Mammal Habitat**

Impacts on marine mammal habitat are part of the consideration in making a finding of negligible impact on the species and stocks of marine mammals. Habitat includes, but is not necessarily limited to, rookeries, mating grounds, feeding areas, and areas of similar significance. The proposed rule (74 FR 11891, March 20, 2009) contained a full description of the potential effects of the missile launch activities on marine mammal habitat. Only short-term disturbance of marine mammals is expected as a result of the proposed activities. The Navy's launch activity is not expected to cause significant impacts on habitats used by pinnipeds on SNI or on the food sources that these pinnipeds utilize.

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

NMFS has determined that the issuance of an LOA for Navy missile launch activities on SNI would not have an unmitigable adverse impact on the availability of the affected species or stocks for subsistence uses since there are no such uses for these pinniped species in California.

#### **Mitigation**

To avoid additional harassment to the pinnipeds on beach haul-out sites and to avoid any possible sensitizing and/or predisposing pinnipeds to greater responsiveness to the sights and sounds of a launch, the Navy will limit activities near the beaches in advance of launches. Existing safety rules for vehicle launches provide a built-in mitigation measure of this type: personnel are not normally allowed near any of the pinniped haul-out beaches that are located close to the flight track on the western end of SNI within several hours prior to launch. Also, because of the presence of colonies of

sensitive seabirds (as well as pinniped haul-out sites) on western SNI, there are already special restrictions on personnel movements near beaches on which pinnipeds haul out. Furthermore, most of these beaches are closed to personnel year-round.

The following mitigation measures have been incorporated into the regulations: (1) The Navy must avoid launch activities during harbor seal pupping season (February through April), unless constrained by factors including, but not limited to, human safety, national security, or for launch trajectory necessary to meet mission objectives; (2) the Navy must limit launch activities during other pinniped pupping seasons, unless constrained by factors including, but not limited to, human safety, national security, or for launch trajectory necessary to meet mission objectives; (3) the Navy must not launch missiles from the Alpha Complex at low elevation (less than 305 m [1,000 ft]) on launch azimuths that pass close to pinniped haul-out site(s) when occupied; (4) the Navy must avoid multiple vehicle launches in quick succession over haul-out sites when occupied, especially when young pups are present, except when required by mission objectives; and (5) the Navy must limit launch activities during nighttime hours, except when required by mission objectives (e.g., up to 10 nighttime launches for ABL testing per year).

Additionally, for 2 hr prior to, during, and approximately 30 mins following each launch, personnel are not allowed near any of the pinniped haul-out beaches that are close to the flight track on the western end of SNI. Lastly, associated fixed-wing and rotary aircraft will maintain an altitude of at least 305 m (1,000 ft) when traveling near beaches on which pinnipeds are hauled out, except in emergencies or for real-time security incidents (e.g., search-and-rescue, fire-fighting, adverse weather conditions), which may require approaching pinniped haul-outs and rookeries closer than 305 m (1,000 ft).

If post-launch surveys determine that an injurious or lethal take of a marine mammal has occurred or there is an indication that the distribution, size, or productivity of the potentially affected pinniped populations has been affected, the launch procedure and the monitoring methods must be reviewed, in cooperation with NMFS, and, if necessary, appropriate changes must be made through modification to an LOA, prior to conducting the next launch of the same vehicle under that LOA.

## Monitoring

As part of its application, the Navy provided a proposed monitoring plan, similar to that adopted for previous Incidental Harassment Authorizations and regulations (see 66 FR 41834, August 9, 2001; 67 FR 56271, September 3, 2002; 68 FR 52132, September 2, 2003), for assessing impacts to marine mammals from missile launch activities from SNI. This monitoring plan is described in detail in the Navy's application (see **ADDRESSES**). The Navy will conduct the following monitoring during the first year under an LOA and the regulations.

### *Land-based Monitoring*

In conjunction with a biological contractor, the Navy will continue its land-based monitoring program to assess effects on the three common pinniped species on SNI: northern elephant seals, harbor seals, and California sea lions. This monitoring will occur at three different sites of varying distance from the launch site before, during, and after each launch. The monitoring will be via autonomous video cameras. Pinniped behavior on the beach will be documented prior to, during, and following the launch. Additionally, new video equipment capable of obtaining video during night launches will be acquired for the ABL program.

During the day of each missile launch, the observer will place three digital video cameras overlooking chosen haul-out sites. Each camera will be set to record a focal subgroup within the haul-out aggregation for a maximum of 4 hr or as permitted by the videotape capacity. Following a launch, video records will be made for up to 1 hr. Observers will return to the observing sites as soon as it is safe to record the numbers and types of pinnipeds that are on the haul-out(s).

Following each launch, all digital recordings will be transferred to DVDs for analysis. A DVD player/computer with high-resolution freeze-frame and jog shuttle will be used to facilitate distance estimation, event timing, and characterization of behavior. Additional details of the field methods and video and data analysis can be found in the Navy's application.

### *Acoustical Measurements*

During each launch, the Navy will obtain calibrated recordings of the levels and characteristics of the received launch sounds. Acoustic data will be acquired using three Autonomous Terrestrial Acoustic Recorders (ATARs) at three different sites of varying

distances from the missile's flight path. ATARs can record sounds for extended periods (dependent on sampling rate) without intervention by a technician, giving them the advantage over traditional digital audio tape recorders should there be prolonged launch delays. To the extent possible, acoustic recording locations will correspond with the sites where video monitoring is taking place. The collection of acoustic data will provide information on the magnitude, characteristics, and duration of sounds that pinnipeds may be exposed to during a launch. In addition, the acoustic data can be combined with the behavioral data collected via the land-based monitoring program to determine if there is a dose-response relationship between received sound levels and pinniped behavioral reactions. Once collected, sound files will be sent to the acoustical contractor for sound analysis. Additional details regarding the installation and calibration of the acoustic instruments and analysis methods are provided in the Navy's application.

### **Reporting**

An interim technical report will be submitted to NMFS 60 days prior to the expiration of each annual LOA issued under these regulations, along with a request for a follow-on annual LOA. This interim technical report will provide full documentation of methods, results, and interpretation pertaining to all monitoring tasks for launches during the period covered by the LOA. However, only preliminary information will be available to be included for any launches during the 60-day period immediately preceding submission of the interim report to NMFS.

If a freshly dead or seriously injured pinniped is found during post-launch monitoring, the incident must be reported within 48 hours to the NMFS Office of Protected Resources and the NMFS Southwest Regional Office.

The 2009–2010 launch monitoring activities will constitute the eighth year of formal, concurrent pinniped and acoustical monitoring during launches from SNI. Following submission in 2010 of the interim report on the first phase of monitoring under an LOA, the Navy and NMFS will discuss the scope for any additional launch monitoring work on SNI subsequent to the first LOA issued under these regulations. Some biological or acoustic parameters may be documented adequately prior to or during the first LOA (2009–2010), and it may not be necessary to continue all aspects of the monitoring work after that period. Prior to making any changes to the monitoring plan for years two

through five of the regulations, NMFS would provide a copy of the Navy's interim report submitted in 2010 to the Commission and others for review and comment. Any modifications to the monitoring program will be documented through publication in the **Federal Register**.

In addition to annual LOA reports, NMFS is requiring the Navy to submit a draft comprehensive final technical report to NMFS 180 days prior to the expiration of the regulations. This technical report will provide full documentation of methods, results, and interpretation of all monitoring tasks for launches during the first four LOAs, plus preliminary information for launches during the first 6 months of the final LOA. A revised comprehensive final technical report, including all monitoring results during the entire period of the LOA will be due 90 days after the end of the period of effectiveness of the regulations.

### **ESA**

No species listed under the ESA are expected to be affected by these activities. Therefore, NMFS has determined that a section 7 consultation under the ESA is not required. It should be noted however that SNI is the location to which southern sea otters have been translocated in an attempt to establish a population separate from that in central California. This experimental population may be affected by the missile launch activities at SNI. Sea otters are under the jurisdiction of the U.S. Fish and Wildlife Service (USFWS). Under Public Law 99–625, this experimental population of sea otters is treated as a proposed species for purposes of Section 7 when the action (as here) is defense related. Proposed species require an action agency to confer with NMFS or the USFWS under Section 7 of the ESA when the action is likely to jeopardize the continued existence of the species. The information available for the Navy's activities described in this document or for NMFS' action of promulgating 5-yr regulations and the subsequent issuance of LOAs to the Navy for those activities does not indicate that sea otters are likely to be jeopardized. Therefore, a consultation is not required.

### **National Environmental Policy Act**

NMFS prepared a Draft EA analyzing the potential issuance of regulations and annual LOAs to the Navy for the period 2009–2014 and made it available for public comment concurrently with the proposed rule. NMFS has finalized the EA and issued a FONSI for this action.

Therefore, preparation of an Environmental Impact Statement is not necessary for this action. NMFS' EA and FONSI are available upon request (see ADDRESSES).

### Coastal Zone Management Act Consistency

On February 14, 2001, by a unanimous vote, the California Coastal Commission (CCC) concluded that, with the monitoring and mitigation commitments the Navy has incorporated into their various testing and training activities on the Point Mugu Sea Range, including activities on SNI, and including the commitment to enable continuing CCC staff review of finalized monitoring plans and ongoing monitoring results, the activities are consistent with the marine resources, environmentally sensitive habitat, and water quality policies (Sections 30230, 30240, and 30231) of the California Coastal Act. The activities described in these regulations are analogous to those reviewed by the CCC in 2001.

### National Marine Sanctuaries Act

According to the Navy, except for aircraft and vessel traffic transiting the area, none of the Navy's proposed activities would take place within the Channel Islands National Marine Sanctuary. On December 8, 2008, NMFS consulted with the National Ocean Service's Office of National Marine Sanctuaries (ONMS) regarding NMFS' action of promulgating regulations and issuing LOAs for the Navy activities described in the Navy's application and this document to determine whether or not NMFS' action is likely to destroy, cause the loss of, or injure any sanctuary resources. On December 12, 2008, the ONMS determined that no further consultation with NMFS was required on its proposed action as this action is not likely to destroy, cause the loss of, or injure any national marine sanctuary resources.

### Determinations

Based on the information provided in the Navy's application, NMFS' EA, this document, the public comments submitted on the application and proposed rule, and the Navy's comprehensive report of the activities through 2008, NMFS has determined that missile launch activities and aircraft and helicopter operations from SNI will result in no more than Level B harassment of Pacific harbor seals, California sea lions, and northern elephant seals. The effects of these military readiness activities from SNI will be limited to short term and localized changes in behavior, including

temporarily vacating haul-outs, and possible TTS in the hearing of any pinnipeds that are in close proximity to a launch pad at the time of a launch. NMFS has also determined that any takes will have no more than a negligible impact on the affected species and stocks. No take by injury and/or death is anticipated, and the potential for permanent hearing impairment is unlikely. Harassment takes will be at the lowest level practicable due to incorporation of the mitigation measures mentioned previously in this document. NMFS' regulations for these exercises prescribe the means of effecting the least practicable adverse impact on marine mammals and their habitat and set forth requirements pertaining to the monitoring and reporting of that taking. Additionally, the vehicle launch activities and aircraft and helicopter operations will not have an unmitigable adverse impact on the availability of marine mammal stocks for subsistence use, as there are no subsistence uses of these three pinniped species in California waters.

### Classification

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

Good cause exists to waive the 30-day delay in effectiveness for this rule pursuant to 5 U.S.C. 553(d). The mitigation measures contained in this final rule are substantially similar to the measures contained in the 5-yr rule that expired on October 2, 2008. The MDA, a customer of the Navy range at SNI, has proposed to launch a series of four small missile targets beginning as soon as possible after publication of this final rule. These launches are critical steps in a larger development and testing program for the ABL, a new weapon system being developed by MDA as part of its national security mission to improve military readiness and protect homeland security. A delay in implementing the regulations would result in a delay of testing and development of this critical program. Delay in implementing the regulations would result in unnecessary additional cost to the government related to maintaining the launch facilities, missiles, and personnel in a ready condition. Due to delays in getting critical application materials from the Navy, NMFS could not process the MMPA authorization request any sooner. By waiving the 30-day delay in effectiveness for the final rule, the Navy would be able to minimize conflicts with other testing programs scheduled for SNI, allowing MDA to proceed with

an already tight schedule for testing and development. The NAWCWD is the only entity regulated by this rule. The NAWCWD expressly requested that NMFS issue the rule and regulations and is both willing and able to comply with the requirements of NMFS' final regulations and LOA, as it was during the course of the previous rules and regulations issued to the NAWCWD by NMFS to conduct these activities, within the 30-day window.

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

### Changes from the Proposed Rule

In addition to minor edits to the rule for clarification, NMFS has made the following changes to the rule:

1. The title of the subpart now reads: "Subpart N--Taking Of Marine Mammals Incidental To Missile Launch Activities from San Nicolas Island, CA." The word "target" was removed from the title and other places in the preamble and regulations in order to eliminate confusion, since a target is a type of missile.
2. Modified § 216.150(c) to remove extraneous detail (i.e., the names of the building complexes).
3. Modified § 216.155(a) to include e-mail as a notification method for upcoming activities and that notification should occur at least 1 week prior to activities possibly involving the taking of marine mammals instead of 2 weeks prior. The procedures used by the Navy for finalizing launch schedules usually only allow for notice 1 week prior to the activity instead of 2 weeks prior.
4. Combined § 216.155(d)(1)(ii) and (iii) from the proposed rule since it seemed redundant to include both as separate conditions. Additionally, the time required for video recordings prior to the launch was changed from 2 hrs to 1 hr since it is not practical to have monitoring occur for at least 2 hrs prior to a launch. This is due to the fact that if several delays occur, the tape could run out before the launch happens, and then there would be no recordings taken during and after the launch, or someone would need to get to the recording site

and reset the videotape, which could then lead to additional delays.

5. Modified § 216.155(d)(2)(ii) to clarify when acoustic recordings will be supplemented by the use of radar and telemetry systems.

6. Added § 216.155(e)(2)(iv).

#### List of Subjects in 50 CFR Part 216

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

Dated: May 28, 2009.

**Samuel D. Rauch III,**

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

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

#### PART 216—REGULATIONS GOVERNING THE TAKING AND IMPORTING OF MARINE MAMMALS

■ 1. The authority citation for part 216 continues to read as follows:

**Authority:** 16 U.S.C. 1361 *et seq.*

■ 2. Subpart N, consisting of §§ 216.150 through 216.159, is added to part 216 to read as follows:

#### Subpart N—Taking Of Marine Mammals Incidental To Missile Launch Activities from San Nicolas Island, CA

Sec.

- 216.150 Specified activity and specified geographical region.
- 216.151 Effective dates.
- 216.152 Permissible methods of taking.
- 216.153 Prohibitions.
- 216.154 Mitigation.
- 216.155 Requirements for monitoring and reporting.
- 216.156 Applications for Letters of Authorization.
- 216.157 Letters of Authorization.
- 216.158 Renewal of Letters of Authorization.
- 216.159 Modifications of Letters of Authorization.

#### Subpart N—Taking Of Marine Mammals Incidental To Missile Launch Activities from San Nicolas Island, CA

##### § 216.150 Specified activity and specified geographical region.

(a) This subpart applies only to the incidental taking of marine mammals specified in paragraph (b) of this section by the Naval Air Warfare Center Weapons Division, U.S. Navy, and those persons it authorizes to engage in missile launch activities and associated aircraft and helicopter operations at the Naval Air Warfare Center Weapons Division facilities on San Nicolas Island, California.

(b) The incidental take of marine mammals under the activity identified in paragraph (a) of this section is limited to the following species: northern elephant seals (*Mirounga angustirostris*), harbor seals (*Phoca vitulina*), and California sea lions (*Zalophus californianus*).

(c) This Authorization is valid only for activities associated with the launching of a total of 40 Coyote (or similar sized and smaller) missiles per year from San Nicolas Island, California.

##### § 216.151 Effective dates.

This subpart is effective June 2, 2009 through June 2, 2014.

##### § 216.152 Permissible methods of taking.

(a) Under Letters of Authorization issued pursuant to §§ 216.106 and 216.157, the U.S. Navy, its contractors, and clients, may incidentally, but not intentionally, take marine mammals by harassment, within the area described in § 216.150, provided the activity is in compliance with all terms, conditions, and requirements of the regulations in this subpart and the appropriate Letter of Authorization.

(b) The taking of marine mammals is authorized for the species listed in § 216.150(b) and is limited to Level B Harassment.

##### § 216.153 Prohibitions.

Notwithstanding takings contemplated in § 216.150 and authorized by a Letter of Authorization issued under §§ 216.106 and 216.157, no person in connection with the activities described in § 216.150 may:

- (a) Take any marine mammal not specified in § 216.150(b);
- (b) Take any marine mammal specified in § 216.150(b) other than by incidental, unintentional harassment, as discussed in § 216.152;
- (c) Take a marine mammal specified in § 216.150(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 and 216.157.

##### § 216.154 Mitigation.

(a) The activity identified in § 216.150 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 § 216.150(c), the mitigation measures contained in the Letter of Authorization issued under §§ 216.106 and 216.157 must be implemented. These mitigation

measures include (but are not limited to):

(1) The holder of the Letter of Authorization must prohibit personnel from entering pinniped haul-out sites below the missile's predicted flight path for 2 hours prior to planned missile launches.

(2) The holder of the Letter of Authorization must avoid launch activities during harbor seal pupping season (February through April), unless constrained by factors including, but not limited to, human safety, national security, or for launch trajectory necessary to meet mission objectives.

(3) The holder of the Letter of Authorization must limit launch activities during other pinniped pupping seasons, unless constrained by factors including, but not limited to, human safety, national security, or for launch trajectory necessary to meet mission objectives.

(4) The holder of the Letter of Authorization must not launch missiles from the Alpha Complex at low elevation (less than 1,000 feet (305 m)) on launch azimuths that pass close to pinniped haul-out sites when occupied.

(5) The holder of the Letter of Authorization must avoid launching multiple missiles in quick succession over haul-out sites, especially when young pups are present, except when required by mission objectives.

(6) The holder of the Letter of Authorization must limit launch activities during nighttime hours, except when required by mission objectives.

(7) Aircraft and helicopter flight paths must maintain a minimum altitude of 1,000 feet (305 m) from pinniped haul-outs and rookeries, except in emergencies or for real-time security incidents (e.g., search-and-rescue, fire-fighting, adverse weather conditions), which may require approaching pinniped haul-outs and rookeries closer than 1,000 feet (305 m).

(8) If post-launch surveys determine that an injurious or lethal take of a marine mammal has occurred or there is an indication that the distribution, size, or productivity of the potentially affected pinniped populations has been affected, the launch procedure and the monitoring methods must be reviewed, in cooperation with NMFS, and, if necessary, appropriate changes must be made through modification to a Letter of Authorization, prior to conducting the next launch of the same vehicle under that Letter of Authorization.

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

(b) [Reserved]

**§ 216.155 Requirements for monitoring and reporting.**

(a) Holders of Letters of Authorization issued pursuant to §§ 216.106 and 216.157 for activities described in § 216.150 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, Southwest Region, NMFS, by letter, e-mail, or telephone, at least 1 week prior to activities possibly involving the taking of marine mammals. If the authorized activity identified in § 216.150 is thought to have resulted in the mortality or injury of any marine mammals or in any take of marine mammals not identified in § 216.150(b), then the Holder of the Letter of Authorization must notify the Director, Office of Protected Resources, NMFS, or designee, by telephone (301-713-2289), and the Administrator, Southwest Region, NMFS, or designee, by telephone (562-980-3232), within 48 hours of the discovery of the injured or dead animal.

(b) The National Marine Fisheries Service must be informed immediately of any changes or deletions to any portions of the proposed monitoring plan submitted, in accordance with the Letter of Authorization.

(c) The holder of the Letter of Authorization must designate biologically trained, on-site individual(s), approved in advance by the National Marine Fisheries Service, to record the effects of the launch activities and the resulting noise on pinnipeds.

(d) The holder of the Letter of Authorization must implement the following monitoring measures:

(1) *Visual Land-Based Monitoring.* (i) Prior to each missile launch, an observer(s) will place 3 autonomous digital video cameras overlooking chosen haul-out sites located varying distances from the missile launch site. Each video camera will be set to record a focal subgroup within the larger haul-out aggregation for a maximum of 4 hours or as permitted by the videotape capacity.

(ii) Systematic visual observations, by those individuals, described in paragraph (c) of this section, on pinniped presence and activity will be conducted and recorded in a field logbook or recorded on digital video for subsequent analysis for no less than 1 hour prior to the estimated launch time and for up to 1 hour immediately following each missile launch.

(iii) Documentation, both via autonomous video camera and human observer, will consist of:

- (A) Numbers and sexes of each age class in focal subgroups;
- (B) Description and timing of launch activities or other disruptive event(s);
- (C) Movements of pinnipeds, including number and proportion moving, direction and distance moved, and pace of movement;
- (D) Description of reactions;
- (E) Minimum distances between interacting and reacting pinnipeds;
- (F) Study location;
- (G) Local time;
- (H) Substratum type;
- (I) Substratum slope;
- (J) Weather condition;
- (K) Horizontal visibility; and
- (L) Tide state.

(2) *Acoustic Monitoring.* (i) During all missile launches, calibrated recordings of the levels and characteristics of the received launch sounds will be obtained from 3 different locations of varying distances from the missile's flight path. To the extent practicable, these acoustic recording locations will correspond with the haul-out sites where video monitoring is done.

(ii) Acoustic recordings will be supplemented by the use of radar and telemetry systems to obtain the trajectory of missiles in three dimensions, whenever data coverage allows.

(iii) Acoustic equipment used to record launch sounds will be suitable for collecting a wide range of parameters, including the magnitude, characteristics, and duration of each missile.

(e) The holder of the Letter of Authorization must implement the following reporting requirements:

(1) For each missile launch, the lead contractor or lead observer for the holder of the Letter of Authorization must provide a status report to the National Marine Fisheries Service, Southwest Regional Office, providing reporting items found under the Letter of Authorization, unless other arrangements for monitoring are agreed in writing.

(2) An initial report must be submitted to the Office of Protected Resources, and the Southwest Regional Office at least 60 days prior to the expiration of each annual Letter of Authorization. This report must contain the following information:

- (i) Timing and nature of launch operations;
- (ii) Summary of pinniped behavioral observations;
- (iii) Estimate of the amount and nature of all takes by harassment or by other means; and

(iv) Evidence of compliance with mitigation measures.

(3) A draft comprehensive technical report will be submitted to the Office of Protected Resources and Southwest Regional Office, National Marine Fisheries Service, 180 days prior to the expiration of the regulations in this subpart, providing full documentation of the methods, results, and interpretation of all monitoring tasks for launches to date plus preliminary information for missile launches during the first 6 months of the final Letter of Authorization.

(4) A revised final comprehensive technical report, including all monitoring results during the entire period of the Letter of Authorization will be due 90 days after the end of the period of effectiveness of the regulations in this subpart.

(5) Both the 60-day and final reports will be subject to review and comment by the National Marine Fisheries Service. Any recommendations made by the National Marine Fisheries Service must be addressed in the final comprehensive report prior to acceptance by the National Marine Fisheries Service.

(f) Activities related to the monitoring described in paragraphs (c) and (d) of this section, or in the Letter of Authorization issued under §§ 216.106 and 216.157, including the retention of marine mammals, may be conducted without the need for a separate scientific research permit.

(g) In coordination and compliance with appropriate Navy regulations, at its discretion, the National Marine Fisheries Service may place an observer on San Nicolas Island for any activity involved in marine mammal monitoring either prior to, during, or after a missile launch in order to monitor the impact on marine mammals.

**§ 216.156 Applications for Letters of Authorization.**

(a) To incidentally take marine mammals pursuant to the regulations contained in this subpart, the U.S. citizen (as defined by § 216.103) conducting the activity identified in § 216.150 (Naval Air Warfare Center Weapons Division, U.S. Navy) must apply for and obtain either an initial Letter of Authorization in accordance with § 216.157 or a renewal under § 216.158.

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

(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) 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 pinnipeds.

#### **§ 216.157 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 § 216.158.

(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 (i.e., mitigation); and

(3) Requirements for mitigation, 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 affected species or stock of marine mammal(s).

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

(a) A Letter of Authorization issued under §§ 216.106 and 216.157 for the activity identified in § 216.150 will be renewed annually upon:

(1) Notification to NMFS that the activity described in the application submitted under § 216.156 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 § 216.155(e), and the Letter of Authorization issued under § 216.157, which has been reviewed and accepted by NMFS; and

(3) A determination by NMFS that the mitigation, monitoring and reporting measures required under §§ 216.154 and 216.155 and the Letter of Authorization issued under §§ 216.106 and 216.157, were undertaken and will be undertaken during the upcoming annual period of validity of a renewed Letter of Authorization.

(b) If a request for a renewal of a Letter of Authorization issued under

§ 216.106 and 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. Review and comment on renewals 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 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**.

#### **§ 216.159 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 and 216.157 and subject to the provisions of this subpart shall be made until after notification and an opportunity for public comment has been provided. For purposes of this paragraph, a renewal of a Letter of Authorization under § 216.158, without modification (except for the period of validity), is not considered a substantive modification.

(b) If the Assistant Administrator determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals specified in § 216.150(b), a Letter of Authorization issued pursuant to §§ 216.106 and 216.157 may be substantively modified without prior notification and an opportunity for public comment. Notification will be published in the **Federal Register** within 30 days subsequent to the action. [FR Doc. E9-12948 Filed 6-2-09; 8:45 am]

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## **DEPARTMENT OF COMMERCE**

### **National Oceanic and Atmospheric Administration**

#### **50 CFR Part 648**

[Docket No.070817467-8554-02]

RIN 0648-XP59

#### **Magnuson-Stevens Fishery Conservation and Management Act Provisions; Fisheries of the Northeastern United States; Atlantic Sea Scallop Fishery; Closure of the Elephant Trunk Scallop Access Area to General Category Scallop Vessels**

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

**ACTION:** Temporary rule; closure.

**SUMMARY:** NMFS announces that the Elephant Trunk Scallop Access Area (ETAA) is closed effective 0001, June 1, 2009, to general category scallop vessels for the remainder of the 2009 fishing year. This action is based on the determination that allowing the ETAA to remain open when the Quarter II LAGC IFQ fishery opens on June 1, 2009, will result in an overrun of trip and catch quotas for that access area. This action is being taken to prevent the allocation of general category trips in the ETAA from being exceeded during the 2009 fishing year, in accordance with the regulations implementing Framework 19 to the Atlantic Sea Scallop Fishery Management Plan (FMP) and the Magnuson-Stevens Fishery Conservation and Management Act.

**DATES:** The closure of the ETAA to all general category scallop vessels is effective 0001, June 1, 2009, through February 28, 2010.

**FOR FURTHER INFORMATION CONTACT:** Don Frei, Fishery Management Specialist, (978) 281-9221, fax (978) 281-9135.

**SUPPLEMENTARY INFORMATION:** Regulations governing fishing activity in the Sea Scallop Access Areas are found at §§ 648.59 and 648.60. Regulations specifically governing general category scallop vessel operations in the ETAA are specified at § 648.59(e)(4)(ii). These regulations authorize vessels issued a valid general category scallop permit to fish in the ETAA under specific conditions, including a total of 1,964 trips that may be taken by general category vessels during the 2009 fishing year. The regulations at § 648.59(e)(4)(ii) require the ETAA to be closed to general category scallop vessels once the