

## Unfunded Mandates Reform

We have determined and certify pursuant to the Unfunded Mandates Reform Act, 2 U.S.C. 1502 et seq., that this rulemaking will not significantly or uniquely affect small governments or produce a Federal mandate of \$100 million or more in any given year. Therefore, this rule does not constitute a significant regulatory action under the Unfunded Mandates Reform Act.

## Civil Justice Reform—Executive Order 12988

In promulgating this rule, we have determined that these regulations meet the applicable standards provided in Sections 3(a) and 3(b)(2) of Executive Order 12988.

## Takings

In accordance with Executive Order 12630, this rule, authorized by the Migratory Bird Treaty Act, does not have significant takings implications and does not affect any constitutionally protected property rights. This rule will

not result in the physical occupancy of property, the physical invasion of property, or the regulatory taking of any property. A takings assessment is not required.

## Federalism Effects

This rule does not have a substantial direct effect on fiscal capacity, change the roles or responsibilities of Federal or State governments, or intrude on State policy or administration. In accordance with Executive Order 13132, this regulation does not have significant federalism effects, nor does it have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

## Government-to-Government Relationship With Tribes

In accordance with the President's memorandum of April 29, 1994, "Government-to-Government Relations with Native American Tribal Governments" (59 FR 22951) and 512 DM 2, we have determined that this rule

has no effects on Federally recognized Indian tribes.

## List of Subjects in 50 CFR Part 20

Exports, Hunting, Imports, Reporting and recordkeeping requirements, Transportation, Wildlife.

■ For the reasons discussed in the preamble, we amend part 20, subchapter B, chapter I of Title 50 of the Code of Federal Regulations as follows:

## PART 20—[AMENDED]

■ 1. The authority citation for part 20 continues to read as follows:

**Authority:** 16 U.S.C. 703–712; 16 U.S.C. 742a–j; Pub. L. 106–108.

■ 2. Section 20.21 is amended by revising paragraph (j) to read as follows:

## § 20.21 What hunting methods are illegal?

\* \* \* \* \*

(j) While possessing loose shot for muzzle loading or shotshells containing other than the following approved shot types.

Approved shot type *	Percent composition by weight	Field testing device **
bismuth-tin .....	97 bismuth, 3 tin .....	HOT*SHOT®. ***
iron (steel) .....	iron and carbon .....	Magnet or HOT*SHOT®.
iron-tungsten .....	any proportion of tungsten, ≥1 iron .....	Magnet or HOT*SHOT®.
iron-tungsten-nickel .....	≥1 iron, any proportion of tungsten, up to 40 nickel.	Magnet or HOT*SHOT®. **
tungsten-bronze .....	51.1 tungsten, 44.4 copper, 3.9 tin, 0.6 iron and 60 tungsten, 35.1 copper, 3.9 tin, 1 iron.	Rare Earth Magnet.
tungsten-iron-copper-nickel .....	40–76 tungsten, 10–37 iron, 9–16 copper, 5–7 nickel.	HOT*SHOT® or Rare Earth Magnet.
tungsten-matrix .....	95.9 tungsten, 4.1 polymer .....	HOT*SHOT®.
tungsten-polymer .....	95.5 tungsten, 4.5 Nylon 6 or 11 .....	HOT*SHOT®.
tungsten-tin-iron .....	any proportions of tungsten and tin, ≥1 iron ...	Magnet or HOT*SHOT®.
tungsten-tin-bismuth .....	any proportions of tungsten, tin, and bismuth.	Rare Earth Magnet.
tungsten-tin-iron-nickel .....	65 tungsten, 21.8 tin, 10.4 iron, 2.8 nickel .....	Magnet.

\* Coatings of copper, nickel, tin, zinc, zinc chloride, and zinc chrome on approved nontoxic shot types also are approved.

\*\* The information in the "Field Testing Device" column is strictly informational, not regulatory.

\*\*\* The "HOT\*SHOT" field testing device is from Stream Systems of Concord, CA.

\* \* \* \* \*

Dated: January 13, 2006.

**Paul Hoffman,**

*Assistant Secretary for Fish and Wildlife and Parks.*

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## DEPARTMENT OF COMMERCE

## National Oceanic and Atmospheric Administration

## 50 CFR Part 216

[Docket No. 011011247–6006–03; I.D. 082701E]

RIN 0648–AP62

## Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to Rocket Launches from Kodiak Island, AK

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

**ACTION:** Final rule.

**SUMMARY:** NMFS, upon application from the Alaska Aerospace Development Corporation (AADC), is issuing regulations to govern the unintentional takings of small numbers of marine mammals incidental to rocket launches from the Kodiak Launch Complex (KLC) on Kodiak Island, AK. Issuance of regulations is required by the Marine Mammal Protection Act (MMPA) when the Secretary of Commerce (Secretary), after notice and opportunity for comment, finds, as here, that such takes will have a negligible impact on the species and stocks of marine mammals and will not have an unmitigable adverse impact on their availability for subsistence uses. These regulations do not authorize AADC's rocket launch activities, as such authorization is not within the jurisdiction of the Secretary.

Rather, these regulations govern the issuance of "Letters of Authorization" (LOAs) for the unintentional incidental take of marine mammals in connection with this activity and prescribe methods of taking and other means of effecting the least practicable adverse impact on marine mammal species and their habitat, and on the availability of the species for subsistence uses. In addition, NMFS incorporates reporting and monitoring requirements.

**DATES:** Effective from February 27, 2006 through February 28, 2011.

A copy of the AADC application which contains a list of the references used in this document may be obtained by writing to Steve Leathery, Division of Permits, Conservation, and Education, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910-3226 or by telephoning the contact listed here (see **FOR FURTHER INFORMATION CONTACT**). The NMFS Administrative Record will be maintained at the above address.

Comments regarding the burden-hour estimate or any other aspect of the collection of information requirement contained in this proposed rule should be sent to NMFS via the means stated above, and to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: NOAA Desk Officer, Washington, DC 20503, [David\\_Rustker@eap.omb.gov](mailto:David_Rustker@eap.omb.gov).

**FOR FURTHER INFORMATION CONTACT:** Jolie Harrison, (301) 713-2289 ext 166, or Brad Smith, (907) 271-3023.

**SUPPLEMENTARY INFORMATION:**

**Background**

Section 101(a)(5)(A) of the MMPA (16 U.S.C. 1361 *et seq.*) directs the Secretary to allow, upon request, the incidental, but not intentional taking of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and regulations are issued.

Authorization may be granted for periods of 5 years or less if the Secretary finds that the total taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses, and regulations are prescribed setting forth the permissible methods of taking, other means of effecting the least practicable adverse impact on the affected species or stocks and their habitats, and the requirements pertaining to the monitoring and reporting of such taking.

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."

Except with respect to categories of activities not pertinent here, the MMPA defines "harassment" as:

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

**Summary of Request**

On July 26, 2001, NMFS received an application from the AADC under section 101(a)(5)(A) of the MMPA for authorization to take, by harassment, Steller sea lions (*Eumetopias jubatus*) incidental to rocket launches from KLC on Kodiak Island, Alaska. A proposed rule was published on October 29, 2004 (69 FR 63114). Comments on the proposed rule received from the Marine Mammal Commission (MMC) recommended NMFS consider also authorizing take of Pacific harbor seals (*Phoca vitulina richardsi*), as they are also found in the vicinity of KLC. After consulting with AADC and reanalyzing the distribution and habits of harbor seals in the area, NMFS has included take of harbor seals in the final rule. These regulations will allow NMFS to issue annual Letters Of Authorization (LOAs) to the AADC. A full description of the operations is contained in the AADC application (AADC, 2001) which is available upon request (see **ADDRESSES**) or at: [http://www.nmfs.noaa.gov/prot\\_res/PR2/Small\\_Take/smalltake\\_info.htm#applications](http://www.nmfs.noaa.gov/prot_res/PR2/Small_Take/smalltake_info.htm#applications).

The KLC is a commercial rocket launch complex owned and operated by the State of Alaska through the AADC. Located wholly on state-owned lands, KLC occupies 43 acres (0.2 km<sup>2</sup>) within a 3,100 acre (12.6 km<sup>2</sup>) parcel on the eastern side of Kodiak Island on the Narrow Cape peninsula. The KLC was designed to accommodate a variety of small, solid rockets including such vehicles as the Minuteman II, Taurus, Conestoga, and Athena (Lockheed Martin Launch Vehicle). The largest vehicle that can be launched from KLC is the Athena-2 (Lockheed Martin Vehicle-2).

Launch operations at the KLC are authorized under license from the

Federal Aviation Administration (FAA), Office of Associate Administrator for Commercial Space Transportation (AST), in accordance with the facility's Environmental Assessment (EA) and stipulations in the EA's Finding of No Significant Impact (FONSI) (see 61 FR 32884, June 25, 1996). These stipulations included a requirement to develop a Natural Resource Management Plan (NRMP) to address monitoring and mitigation activities for protected species in the area. This plan was developed in coordination with NMFS utilizing comparison of anticipated sound pressure levels from rocket motors to be launched from the KLC with documented marine mammal disturbance responses to such noise.

**Measurement of Airborne Sound Levels**

The following section is provided to facilitate an understanding of airborne and impulsive noise characteristics. Amplitude is a measure of the pressure of a sound wave that is usually expressed on a logarithmic scale with units of sound level or intensity called the decibel (dB). Sound pressure level (SPL) is described in units of dB re micro-Pascal (micro-Pa); for energy, the sound energy level (SEL), a measure of the cumulative energy in a noise event, is described in terms of dB re micro-Pa<sup>2</sup>-second (dB re micro-Pa<sup>2</sup>-s); and frequency, often referred to as pitch, is described in units of cycles per second or Hertz (Hz). 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.

For airborne noise measurements the convention is to use 20 micro-Pa as the reference pressure, which is the approximate threshold for onset of human hearing and is 26 dB above the underwater sound pressure reference of 1 micro-Pa and is. 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>.

Airborne sounds are also often expressed as broadband A-weighted (dBA) or C-weighted (dBC) sound levels. When frequency levels are made to correspond to human hearing, they are referred to as being A-weighted or A-filtered. 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 is often used in the analysis of high-

amplitude noises like explosions, and corresponds to the relative response to the human ear to sound levels above 85 dB. C-weighting de-emphasizes ear frequency components of less than about 50 Hz. C-weight scaling is also useful for analyses of sounds having predominantly low-frequency sounds, such as sonic booms. For continuous noise like rocket launches, the important variables relevant to assessing auditory impacts or behavioral responses are intensity, frequency spectrum, and duration. In this document, sound levels have been provided with A-weighting.

#### Description of the Activity

To date there have been eight rocket launches from the KLC; however, the KLC facility is licensed to launch up to nine rockets per year. The first two launches used composite vehicles built from several stages taken from a decommissioned USAF Minuteman II launch vehicle, and were part of the U.S. Air Force (USAF) atmospheric interceptor technology (ait) program. The third and the sixth launches (March 2001 and April 2002) were part of the USAF Quick Reaction Launch Vehicle (QRLV) program, and comprised of single stage M-56 motors taken from a decommissioned USAF Minuteman II launch vehicle. The fourth launch (September 2001) was a commercial Lockheed/Martin Athena rocket, which is the largest vehicle to be launched from KLC, and it placed four satellites into polar orbit. The fifth, seventh, and eighth launches (November 2001, December 2004, and February 2005) were Department of Defense (DoD) Strategic Target System (STARS) vehicles and consisted of the first two stages of a decommissioned A-3 missile and an Orbis third stage.

Launches from the KLC are expected to be at high inclination with launch azimuths ranging from 125 to 225 degrees in direction (AADC and AST, 1996). At the easternmost azimuth, launch vehicle paths would pass over the eastern edge of Ugak Island; at the

westernmost azimuth, the vehicle would pass along the southeastern edge of the Kodiak Archipelago. Approximately 70 seconds after launch, a typical launch vehicle would be more than 8 miles (12.5 km) high. Spent first-stage rocket motors and fuel casings would impact the ocean's surface from 11 to 314 n-mi (20 to 582 km) downrange, depending on the launch vehicle (AADC and AST, 1996). Rocket motor sonic booms are predicted to reach the ocean surface over 20 miles (32 km) downrange beyond the outer continental shelf over deep ocean.

Launch operations are a major source of noise on Kodiak Island, as the operation of launch vehicle engines produces significant sound levels. Generally, four types of noise occur during a launch. They are: (1) Combustion noise from launch vehicle chambers; (2) jet noise generated by the interaction of the exhaust jet and the atmosphere; (3) combustion noise from the post-burning of combustion products; and (4) sonic booms. The principal objective of the KLC rocket motor noise monitoring task within the NRMP was to measure A-weighted Sound Energy Levels (ASELs) at the Ugak Island Steller sea lion haulout. A secondary objective was to monitor sound levels on Narrow Cape close to bald eagle and/or Steller's eider nests when present. ASELs were successfully recorded for the first four and the seventh launches from KLC at the Ugak Island Steller sea lion haulout and on Narrow Cape by the University of Alaska Anchorage's Environment and Natural Resources Institute (ENRI). The Ugak Island haulout is located approximately 2 miles (3.2 km) from Narrow Cape and about 3.5 miles (5.6 km) from the KLC launch pad on a narrow sand spit on the north side of the Island. The data gathered were weighted toward frequencies that humans are more sensitive to (1-6 kHz, A-weighted) and showed a wide variation in sound pressures among rocket motors, with the highest levels

being associated with the largest launch vehicle flown. Variations in the KLC sound pressure record are likely due to such variables as engine size, engine bell shape, and local atmospheric conditions. Summaries of the findings for each of the measured rocket launches to date are described below. A complete description of the proposed rocket launches from KLC may be found in AADC's application, which may be viewed at: [http://www.nmfs.noaa.gov/prot\\_res/PR2/Small\\_Take/smalltake\\_info.htm#applications](http://www.nmfs.noaa.gov/prot_res/PR2/Small_Take/smalltake_info.htm#applications). This information is incorporated into this document by reference.

#### ait-1

The first launch from KLC occurred in November 1998, and was the first of the USAF ait program. Sound measurements from the ait-1 launch were collected using two sound level monitors (SLMs) that were deployed 26 hours before launch on Ugak Island at the base of the spit used as a haulout by Steller sea lions. The SLMs were set to highlight sounds exceeding 65 dB, which was done after checking real-time sound levels in the field at each site prior to setting them to record data. If the exceedance levels were set too low, the SLMs would be deluged with data, and if they were set too high the SLMs would miss the event of interest. A digital audio tape (DAT) recorder was used to provide redundancy in recording noise frequencies and was placed about 0.75 mi (1.2 km) from the KLC launch pad.

Recorded sound pressure levels (SPLs) of rocket motor noise for the ait-1 at the Ugak Island haulout site were 78.2 dB re 20 microPa with a peak level of 97 dB (Table 1). The associated ASEL at the Ugak Island haulout was 88.4 dB re 20 microPa<sup>2</sup> s. In addition, the ASEL at the nearest location measured by the DAT recorder was 110 dB for a duration of 59 seconds. The bulk of the sound energy was at low frequencies and generally less than 4000 Hz. Most of the energy was from 100 to 500 Hz.

Table 1. Sound measurements taken by ENRI during launches at KLC. SPL represents the maximum A-weighted sound pressure level, which is the greatest of averages of root mean square instantaneous sound pressure levels during either 125 ms or 1 s period across the whole sound spectrum. The A-weighted sound exposure level (ASEL) is a composite cumulative energy metric comprising amplitude with duration. "A-weighted" refers to frequency-dependent weighting factors applied to the sound accordance with the sensitivity of the human ear to deemphasize sounds below 1 kHz and above 6 kHz.

Launch Vehicle	Location Measured	Duration (second)	ASEL (dB re 20 microPa <sup>2</sup> s)	SPL (dB re 20 microPa)	Avg Freq. (Hertz)	Max Freq. (Hertz)
ait-1	Ugak Island	33	88.4	78.2	100-500	4000
	Narrow Cape	391	113.4	104.9	100-500	4000
ait-2	Ugak Island	30	92.2	81.5	25-1000	2500
	Narrow Cape	34	110.7	103.2	25-1000	2500
QRLV-1	Ugak Island	10.9	80.3	73.3	16-2000	2500
	Narrow Cape	32.2	102.4	95.2	16-2000	2500
Athena	Ugak Island	49.6	101.4	90.8	<2000	10000
	Narrow Cape	44.6	115.4	106.7	<2000	10000
STARS IFT-13C	Narrow Cape	51.6	114.3	105.2		5000

Of the eight noise events recorded above 65 dB at Ugak Island, ENRI determined that two are attributable to helicopter noise and one to the firing of the ait-1 rocket motor. Sounds at the Ugak Island site were above 65 dB for a total of 33 seconds at the time the rocket motor was firing. Due to the isolation of this site, the remainder of the events are most likely attributable to surf or wind action.

#### ait-2

USAF launched a second rocket from KLC on September 15, 1999. Based on experience from the first launch, ENRI set the SLMs to highlight sounds exceeding 70 dB and deployed them about 19 hours before the launch. Sound pressures at Ugak Island were slightly higher for the second launch than for the first launch. Recorded maximum SPLs of rocket motor noise for the ait-2 at the Ugak Island haulout site were 81.5 dB, with a peak level of 101.5 dB, and a corresponding SEL of 92.2 dB. The bulk of the sound energy was at low frequencies and generally less than 2500 Hz. Most of the energy was from 25 to 1000 Hz.

There were 15 noise events above 70 dB within the 19 hours of recording at Ugak Island, all of which can be attributed to helicopter, airplane, or

rocket noise; none coincides with a stampede of Steller sea lions off the Ugak Island haulout 3.5 hours previous to the rocket launch. Sounds at the Ugak Island site were above 70 dB for a total of 30 seconds at the time the rocket motor was firing. Natural background noise levels above 70 dB were almost nonexistent during this launch.

#### QRLV-1

On March 22, 2001, the USAF conducted the third launch from KLC. SLMs set to highlight sounds exceeding 70 dB at the base of the Ugak Island sea lion haulout were again used by ENRI to record sound frequency and intensity, and were deployed 22 hours before the launch. The recorded sound levels at Ugak Island were significantly lower for the QRLV-1 launch than for either of the ait launches. This is likely due to the vehicle being smaller, and possibly to a different trajectory and local atmospheric condition. Recorded maximum SPLs resulting from QRLV rocket motor noise at the Ugak Island haulout site were 73.3 dB, with a peak level of 87.2 dB, and a corresponding SEL of 80.3 dB. The bulk of the sound energy was at low frequencies and generally less than 2500 Hz. Most of the energy was from 16 to 2000 Hz.

There were 17 noise events above 70 dB at Ugak Island. With the exception of the rocket launch, all can be related to helicopter noise. Sounds at the Ugak Island site were above 70 dB for a total of 10.9 seconds at the time the rocket motor was firing. Natural background noise levels above 70 dB were almost nonexistent during this launch. Rocket noise measurements for the QRLV-2 rocket launch on April 24, 2002, the sixth rocket launched from KLC, were not recorded, though most likely they would be similar to those measured during the first QRLV launch.

#### Athena

The fourth launch from KLC occurred on September 29, 2001, and involved a commercial Lockheed/Martin Athena, which is the largest vehicle to be launched from KLC. SLMs were again set to highlight sounds exceeding 70 dB and were deployed by ENRI at the Ugak Island haulout four hours before the launch. The recorded sound levels at Ugak Island were significantly higher for the Athena launch than for previous launches, which is likely due to the size of the vehicle. Recorded maximum SPLs resulting from Athena rocket motor noise at the Ugak Island haulout site were 90.8 dB, with a peak level of 115.9 dB, and a corresponding SEL of 101.4

dB. The bulk of the sound energy was at low frequencies and generally less than 2000 Hz.

There were three exceedance events above 70 dB at Ugak Island and Narrow Cape within the four hours of recording, two of which can be attributed to helicopter noise and the other to the rocket launch. Sounds at the Ugak Island site were above 70 dB for 49.6 seconds at the time the rocket motor was firing. Natural background noise levels above 70 dB were nonexistent during this launch.

#### STARS

On November 9, 2001, the Department of Defense launched a STARS vehicle from KLC; however, the rocket was deliberately destroyed over open ocean almost immediately because it lost communication with KLC. The STARS program provides ballistic missile targets to test various sensors and ground-based interceptors. STARS vehicles will include first- and second-stage Polaris A3 boosters and a third-stage Orbus-1 booster. The range of this system is 620 to 3,418 miles (998 to 5500 km).

The seventh launch from KLC, of the STARS IFT 13C, occurred on December 14, 2004. SLMs were set to highlight sounds exceeding 70 dB and were deployed by ENRI only at Narrow Cape (because sea lions were not present at Ugak Island) eight hours before the launch. Narrow Cape is significantly closer to the launch site than Ugak Island. The recorded sound levels at Narrow Cape were higher for this launch than for previous launches, which is likely due to a different trajectory and local atmospheric conditions. Recorded maximum SPLs resulting from rocket motor noise at Narrow Cape were 105.2 dB, with a peak level of 128.8 dB, and a corresponding SEL of 114.3 dB. The bulk of the sound energy was at low frequencies and generally less than 2000 Hz. There were over three hundred exceedance events above 70 dB at Narrow Cape within the eighteen hours of recording, two of which can be attributed to helicopter noise and the other to the rocket launch. With the exception of helicopter noise and the rocket launch, all exceedances at or just above 70 dB can be connected to weather-related noise (wind and rain).

Rocket noise measurements for the STARS IFT 14 rocket launch on February 13, 2005, the eighth rocket launch from KLC, were not recorded, though most likely they would be similar to those measured during the STAR IFT 13C launch.

#### Comments and Responses

On October 29, 2004 (69 FR 63114), NMFS published a notice of proposed rulemaking on AADC's request to take marine mammals incidental to rocket launches at KLC and requested comments, information and suggestions concerning the request. During the 45-day public comment period, NMFS received comments from three members of the public and the MMC. The MMC supports NMFS' intent to implement incidental take regulations for the AADC's activities at KLC provided that the mitigation and monitoring activities described in the AADC application for regulations are incorporated into the proposal.

*Comment 1:* The MMC noted that harbor seals and other marine mammals occur in the vicinity of KLC and recommended that NMFS consider providing additional coverage to the applicant by authorizing take of harbor seals and other marine mammals to reduce the possibility that the applicant may engage in an impermissible taking.

*Response:* After reviewing available information regarding the abundance, distribution, and behavior of marine mammals around KLC and consulting with AADC, NMFS has included authorization for the take of harbor seals in this final rule. NMFS determined, however, that no other marine mammals were likely to be taken by the rocket launches, and, therefore, AADC has not been authorized for the take of any other marine mammal species.

*Comment 2:* The MMC recommended that AADC contact the U.S. Fish and Wildlife Service (USFWS) to determine if authorization for the incidental taking of small numbers of sea otters is needed.

*Response:* AADC is consulting with the USFWS regarding potential take of sea otters.

*Comment 3:* The MMC further recommended that the proposed monitoring program be expanded to determine the effects on harbor seals, sea otters, and other marine mammal species to determine if authorizations for these species are needed or, if authorization to take these species is provided, to verify that the impacts on the affected stocks are negligible.

*Response:* As take of harbor seals is authorized under this rule, comprehensive requirements for the monitoring of harbor seals are now included. Additionally, AADC is required to report sightings of any marine mammals seen during aerial surveys or on videotapes.

*Comment 4:* One commenter expressed strong objections to the rocket launch facility and asserted that it was

damaging to the ecosystem and a waste of money.

*Response:* These regulations do not authorize AADC's rocket launch activities, because such authorization is not within the jurisdiction of the Secretary. Rather, these regulations authorize the unintentional incidental take of marine mammals in connection with this activity and prescribe methods of taking and other means of effecting the least practicable adverse impact on marine mammal species and their habitat, and on the availability of the species for subsistence uses. Thus, the comment is outside of the scope of this rulemaking.

*Comment 5:* Another commenter also objected forcefully to the project (see response to Comment 4, above) and further asserted that there is no reason to allow this killing of marine mammals. This commenter also expressed doubt in the accuracy of the measured noise levels at the site.

*Response:* Section 101(a)(5)(A) of the Marine Mammal Protection Act (MMPA) (16 U.S.C. 1361 *et seq.*) states that the Secretary *shall* allow 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 regulations are issued. NMFS has determined that this activity will take only small numbers of marine mammals, that the taking will have a negligible impact on the affected species or stocks, and that the activity will not have an unmitigable adverse effect on the availability of the species or stock for subsistence uses. NMFS has also set forth permissible methods of taking, means of effecting the least practicable adverse effect on the species or stock, and requirements pertaining to the monitoring and reporting of such taking. Therefore, NMFS has promulgated these regulations and will issue the authorization.

The sound measurements reported from Ugak Island are similar in level to those reported at other launch sites. If information were provided to NMFS that suggested AADC's sound measurements were incorrect, NMFS would investigate. The rule includes the following requirement: "In coordination and compliance with the Alaska Aerospace Development Corporation, the National Marine Fisheries Service may place an observer on Kodiak or Ugak Islands for any marine mammal monitoring activity prior to, during, or after a missile launch to monitor impacts on marine mammals, provided observers are not within the calculated

danger zone of the rocket's flight path during a launch."

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

The KLC is located on the southeast facing tip of a small peninsula on the eastern side of Kodiak Island. The rocket launch site is approximately one mile (1.6 km) from the southeast shore (Narrow Cape). The primary KLC environmental monitoring study area, and area of anticipated effects, was set in September 1996 at a meeting between AADC and representatives of the USFWS, NMFS, the FAA, and ENRI. The area was chosen based on modeled ASELs and includes the lands and waters within a 6-mile (9.7-km) radius extending out from the KLC launchpad. The only marine mammal haulouts within this area are on Ugak Island.

Ugak Island is a triangular-shaped island located about 3.5 miles (5.6 km) southeast of the launch site. The north side of Ugak island culminates in a sandy spit on the west end where most of the sea lions haul out, though some also haul out at the southern tip of the island. The southeastern facing side of the island, where most of the harbor seals haul out, is very rocky, backed by 300-ft (91-m) cliffs (or higher), and is subject to very strong wave action. The west side of the island is steeper than the north side, but not as steep as the east, but does not appear to be used much by either pinniped.

Narrow Cape, Ugak Island, and the adjacent waters within the primary KLC study area provide habitat for sea otters, harbor seals, Steller sea lions (listed as endangered), gray whales, humpback whales (listed as endangered), northern fur seals, northern right whales, and minke whales. Harbor seals and sea otters are common year-round, as are killer whales, Dall's porpoise, and harbor porpoise. Other species of cetaceans that may occur in the area, such as Pacific white-sided dolphins, Risso's dolphins, northern right whale dolphins, pilot whales, Cuvier's beaked whales, Baird's beaked whale, Stegner's beaked whale, sperm whales, fin whales, sei whales and blue whales are rare as they are primarily pelagic (ENRI, 1995-98). General information on harbor seals and other marine mammal species can be found in Angliss and Lodge (2004), which are available at the following URL: [http://www.nmfs.noaa.gov/prot\\_res/PR2/Stock\\_Assessment\\_Program/sars.html](http://www.nmfs.noaa.gov/prot_res/PR2/Stock_Assessment_Program/sars.html). Sea otters (*Enhydra lutris*) are managed by the USFWS. Information on this species may be found at [www.fws.gov](http://www.fws.gov). Please refer to those

documents and the application for further information on these species.

#### Steller Sea Lions

The Steller sea lion is described by two stocks - those west of 144° W. long. listed as endangered under the ESA, and the eastern stock listed as threatened under the ESA. Sea lions hauled out on Ugak Island, the northern spit of which is designated as critical habitat for this species, are of the western stock. The most recent comprehensive estimate (pups and non-pups) of Steller sea lion abundance in Alaska is based on aerial surveys of non-pups in June 2002 and ground based pup counts in June and early July of 2001 and 2002. Data from these surveys represents actual counts at all major rookeries and haulouts. The best available minimum population estimate for the western stock of Steller sea lions is the sum of the total number of non-pups counted in 2002 (26,602) and the number of pups counted in 2001 and 2002 (9,211), which is 34,779 (Angliss and Lodge, 2004). This is considered a minimum estimate because it has not been corrected to account for animals which were at sea during the surveys. Though non-pup numbers increased 5.5-13.7 percent from 2000-2002, the 2002 count was still 5.4 percent below the 1998 count and 36.7 percent below the 1990 count and the long-term, average decline for 1990-02 is 4.3 percent per year (Angliss and Lodge, 2004).

On Ugak Island sea lions haul out primarily on the northern-most sand spit of the island, but also less frequently on the east/south side of the island. These haulouts are occupied primarily from late June to early October. Opportunistic counts of Steller sea lions conducted at Ugak Island every year since 1993 indicate a maximum of over 350 animals in the fall of 1997 and a steady decrease in numbers to less than 40 since 2001 (Kate Wynne, pers. comm, 2005). Two of the 8 launches have occurred during times when sea lions are typically present, during September of 1999, 60-70 sea lions were seen, and during September of 2001, no sea lions were present on the days before and after the launch.

#### Pacific Harbor Seals

Harbor seals live in the Pacific Ocean from Baja California in Mexico northward to the Aleutian Islands of Alaska. The population is not listed as "endangered" or "threatened" under the ESA; nor is this species listed as "depleted" or as a "strategic stock" under the MMPA. Harbor seals are primarily non-migratory and the seals

around KLC are considered part of the Gulf of Alaska stock, which occurs from Cape Suckling to Unimak Pass, including animals throughout the Aleutian Islands. The most recent comprehensive aerial survey of harbor seals in Alaska were conducted in 1994 and 1996. When a correction factor is used to account for animals that were in the water during the counts, a minimum population estimate of this stock of harbor seals is 28,917 (Angliss and Lodge, 2004). The Kodiak Island population is estimated to have increased 7.2 percent annually from 1992-1996 (Angliss and Lodge, 2004) and survey data from 1992-2004 shows an even steeper increase at Ugak Island (Wynne, per. Comm., 2005), though numbers throughout the Gulf of Alaska are still lower than they were in the 1970s and 1980s.

Harbor seals are present on Ugak Island year round. They are found primarily on the east/south side of the island, backed by high, steep cliffs, but they also sometimes haul out on the north side of the island and on the rock croppings on the north and east sides of the island. Harbor seal pupping occurs on both Ugak between the middle of May and June. Yearly harbor seal counts at Ugak Island taken in August since 1992 show a steady increase from approximately 200 animals in 1992 to over 900 in 2004 (Wynne, pers. Comm., 2005). Surveys conducted in 1993 and 1994 found 88 and 96 harbor seal pups, respectively (AADC 1996).

#### Northern Fur Seals

The northern fur seal (*Callorhinus ursinus*) occurs offshore of the KLC site near the continental shelf break from January through April. Because of the distance from the launch site and the fact that they will be swimming through and not stopping (see Cetaceans, below), NMFS believes it unlikely that fur seals will be affected by the launch noise and they will not be addressed further.

#### Cetaceans

As noted, several species of cetaceans occupy the waters around KLC. However, airborne noise is generally reflected at the sea surface outside of a 26° cone extending down from an airborne source (Richardson *et al.*, 1995). Submerged animals would have to be directly under the noise sources before they could hear it, and, approximately 70 seconds after launch, a typical launch vehicle would be more than 8 miles (12.9 km) high. Underwater acoustic transmissions are complex, and affected by the level and frequency of noise, sea state and other surface conditions, and water depth. Given the

specific area, within a specific short time that a cetacean would need to be traveling through surface/or close to surface water to be exposed to rocket noise and the measured rocket sound levels and the attenuation that would occur before the noise reached deeper waters, NMFS believes it unlikely that any cetaceans will be impacted by the rocket noise.

#### Potential Effects of Rocket Launches on Marine Mammals

As outlined in several 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 pinniped (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 pinniped; these can range from temporary alert responses to active avoidance reactions such as stampedes into the sea from terrestrial haulout sites;

(4) Upon repeated exposure, pinnipeds 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 the pinniped perceives as a threat;

(5) Any anthropogenic noise that is strong enough to be heard has the potential to reduce (mask) the ability of pinnipeds to hear natural sounds at similar frequencies, including calls from conspecifics, and 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).

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. In addition, intense acoustic or explosive events may cause trauma to tissues associated with organs vital for hearing, sound production, respiration, and other functions. This trauma may include minor to severe hemorrhage.

Solid rocket boosters from KLC launches will fall into the ocean away from any known or potential haul-out sites and do not pose any measurable threat to marine mammals. Launch noise is expected to occur over the coastal habitats of Narrow Cape and Ugak Island during every launch, while sonic booms will occur approximately 40 nm (74 km) downrange over open ocean, beyond the outer continental shelf, and are unlikely to affect marine mammals. Airborne launch sounds will mostly reflect or refract from the water surface and, except for sounds within a diameter of approximately 26 degrees directly below the launch vehicle, will not penetrate into the water column. The sounds that do penetrate will not persist in the water for more than a few seconds.

The primary sea lion haulout on Ugak Island is a spit facing KLC, and animals at this location would likely hear a rocket launch. Steller sea lions generally occupy this haulout from late summer to the early fall post-breeding period (late June to early October), historically by up to several hundred sea lions. Small numbers of harbor seals may haul out on the eastern end of the shoreline that extends from the spit. Harbor seals and, less frequently sea lions, also haul out on the southeast side of Ugak Island, but this area is sheltered from direct sight of and sound from KLC by a 300-ft (91.4-m) island cliff and, because it receives heavy surf, it already has high ambient noise levels. Because background ambient noise often interferes with or masks the ability of an animal to detect a sound even when that sound is above its absolute hearing threshold (Richardson *et al.*, 1995), it seems unlikely that animals hauled out at this location would hear noise associated with rocket launches from KLC.

#### Past Monitoring Results at KLC

ENRI was tasked under contract to the AADC to conduct environmental monitoring studies for rocket launches from KLC. In addition to collecting rocket noise data on the northern spit of Ugak Island, ENRI conducted aerial surveys over and collected real-time

video footage at the seasonally occupied northern spit haulout site in conjunction with the three KLC launches when Steller sea lions might have been present at the haulout: *ait-1* on November 5, 1998; *ait-2* on September 15, 1999; and Athena on September 29, 2001. The only time Steller sea lions were observed occupying the haulout was during the *ait-2* launch monitoring period. Sixty to seventy animals were on the haulout about 5 hours pre-launch. Due to below freezing temperatures, the video system shut off about 4 hours prior to the *ait-2* launch. The video data show Steller sea lions fighting or sleeping on the haulout, and then suddenly stampeding into the water and milling about immediately offshore. The cause of the stampede is not apparent in the video and no stimulus could be linked to the response (from the noise recordings or otherwise). When, or if, any of the Steller sea lions returned to the haulout before the *ait-2* launch is unknown. Although sea lions may have returned to the rocks and fled the haulout again as a result of rocket noise, a clear-cut stimulus response of sea lion behavior to rocket noise cannot be postulated without video data from the time of the launch. Approximately 1 hour after the rocket was launched, no sea lions were seen hauled out and 50 to 60 sea lions were observed in the water immediately offshore. The day after the launch, 60 to 70 animals were seen hauled out at the same spot. Some of these animals could be the same ones that were flushed from the haulout the day before though they could also be different animals. Though sea lions have been shown to acclimate to disturbance from rocket launches at other spaceports (Thorson and Francine, 1999), it is unlikely that this is the case at KLC considering the infrequency of launches. Alternatively, approximately 280 harbor seals were seen at two locations on the east side of the island (next to the 300-ft (91-m) cliffs) during the aerial survey flown 5 hours pre-launch. During the one hour post-launch aerial overflight, the same number of harbor seals were hauled out at the same locations, which would suggest that they did not flush into the water, which would further suggest that the sound was blocked or masked by the high cliffs and high ambient noise on that side of the island. Though it is possible that the harbor seals were flushed into the water and then quickly hauled out again before the post-flight aerial survey, it seems unlikely considering that harbor seals are typically significantly more sensitive to



noise than sea lions and the sea lions were still in the water.

Unlike at the *ait-2* launch discussed above, no Steller sea lions were present at the Ugak Island haulout during the *ait-1* and Athena launches and it was not possible to relate any behavioral responses to the recorded noise levels. Harbor seals were present at the other two launches, but monitoring was not required and the surveys were not conducted immediately before and after the launch and could not establish a stimulus response to the rocket launch. For all launches, however, launch noises recorded at the haulout site were within the audible ranges of pinnipeds (Richardson *et al.*, 1995) and both Steller sea lions and harbor seals would have heard them had they been present. Further, recorded sound pressures were at, and sometimes above, levels known to occasionally induce startle responses in pinnipeds (Richardson *et al.*, 1995). Rocket launches will present Steller sea lions and harbor seals with novel visual and possibly tactile stimuli as well as unusually loud sounds and bright lights from the burning rocket and white exhaust flume.

#### Steller Sea Lions

The behavioral data record for Steller sea lions is small throughout the North Pacific range and typically is focused on reproductive behaviors. In general, studies have shown that responses of pinnipeds on beaches to acoustic disturbance arising from rocket and target missile launches are highly variable. This variability may be due to many factors, including species, age class, and time of year. Porter (1997) observed Steller sea lions fleeing into the water for a wide variety of reasons such as helicopter overflights, bird flybys, and the presence of nearby humans. He also noted sea lions stampeded into the water that could not be correlated with any observed stimulus. There is also evidence that both time of day and temperature alter the probability of entry into the water (animals are more likely to enter the water when already overheated) (Bowles, 2000). Steller sea lions have been seen to mill about just offshore with their heads up in a heightened state of watchfulness (Porter, 1997) and remain close to the haulout until they sense it is safe to go back ashore (Lockheed Martin Environmental Services, 1999).

Noise generated from aircraft and helicopter activities associated with the launches may provide a potential secondary source of incidental harassment, and the physical presence of aircraft or biologists could also lead

to non-acoustic effects on marine mammals involving visual or other cues. However, other disturbance-related data collected during the *ait-2* study (ENRI, 2000) does not fit well with stimulus response data from other sources. Sea lions are widely thought to be intolerant of helicopter noise (Porter, 1997), yet the animals in question did not appear to respond to multiple exposures of more intense helicopter noise at Ugak Island than that from the rocket (ENRI, 2000). They are also thought to be intolerant of humans on foot, yet a video from the *ait-2* study shows hauled-out sea lions on Ugak Island undisturbed by biologists actively engaged in work within 328 ft (100 m) of them. The Ugak Island haulout is also regularly exposed to disturbances from aircraft and fishing vessels transiting Narrow Strait.

Recent studies (Lawson *et al.*, 2002, and NAWS, 2002) suggest that Level B harassment, as evidenced by beach flushing, will sometimes occur upon exposure to launch sounds with ASEL's of 100 dBA (re 20 micro-Pa<sup>2</sup>-sec) or higher. It is expected that most received noise levels at Ugak Island would be at levels which are likely to cause a temporary disturbance. The infrequent (up to nine times per year) and brief (no more than one minute as heard from Ugak Island) nature of these sounds that would result from a rocket launch would cause masking for not more than a very small fraction of the time during any single launch day and it is unlikely that pinnipeds will become habituated to launch sounds. In addition, the extremely rapid departure of the rockets means that pinnipeds would be exposed to increased sound levels for very short time intervals, and because launches are conducted relatively infrequently, neither physiological stress nor hearing related injuries are likely. Therefore, NMFS anticipates that the effects of rocket launches from KLC would have no significant effects on the abilities of sea lions to hear one another or to detect natural environmental sounds, and would have no more than a negligible impact on Steller sea lion populations.

#### Harbor Seals

An ongoing scientific research program has been conducted since 1997 to determine the long-term cumulative impacts of space vehicle launches on the haul-out behavior, population dynamics and hearing acuity of harbor seals at Vandenberg Air Force Base (VAFB) in California. The response of harbor seals to rocket launch noise depended on the intensity of the noise (dependent on the size of the vehicle and its proximity) and the age of the seal. The percentage of seals leaving the

haul-out increases with noise level up to approximately 100 dB ASEL, after which almost all seals leave, although recent data has shown that an increasing percentage of seals have remained on shore, and those that remain are adults (Thorson *et al.*, 1999). Given the high degree of site fidelity among harbor seals, it is likely that those seals that remained on the haul-out site during rocket launches had previously been exposed to launches; that is, it is possible that adult seals have become acclimated to the launch noise and react differently than the younger inexperienced seals. The louder the launch noise, the longer it took for seals to begin returning to the haulout site and for the numbers to return to pre-launch levels. In two past Athena IKONOS launches with ASELs of 107.3 and 107.8 dB at the closest haulout site, seals began to haulout again approximately 16–55 minutes post-launch (Thorson *et al.*, 1999). In contrast, noise levels from an Atlas launch and several Titan II launches had ASELs ranging from 86.7 to 95.7 dB at the closest haulout, and seals began to return to the haulout within 2–8 minutes post-launch. Seals returned to the haulouts within 2 to 55 minutes of the launch disturbance, and the haulout usually returned to pre-launch levels within 45 to 120 minutes.

In addition to behavioral disturbance, loud sounds may also cause TTS, which is a slight, recoverable loss of hearing. In order to further determine if harbor seals experience any change in their hearing sensitivity as a result of launch noise, researchers conducted Auditory Brainstem Response (ABR) testing on 10 harbor seals prior to, and after, the launches of 3 Titan IV rockets (one of the loudest launch vehicles at the south VAFB haul-out site). Detailed analysis of the changes in waveform latency and waveform replication of the ABR measurements showed that there were no detectable changes in the seals' hearing sensitivity as a result of the launch noise (SRS Technologies, 2001).

The launches at VAFB do not appear to have had long-term effects on the harbor seal population in this area. The total population of harbor seals at VAFB is estimated to be 1,040 animals and has been increasing at an annual rate of 12.6 percent. Since 1997, there have been 5 to 7 space vehicle launches per year and there appears to be only short-term disturbance effects to harbor seals as a result of launch noise (SRS Technologies, 2001). Harbor seals will temporarily leave their haul-out when exposed to launch noise; however they generally return to the haul-out within one hour.



Harbor seals use Ugak Island as a pupping site. Though no launches have as yet taken place during the pupping period at Ugak Island (late May through mid-June), they may at some point in the future. There has been little systematic study of the reactions of pinnipeds to rocket launches or aircraft overflights during pupping periods. Pinnipeds hauled out for pupping or molting are generally the most responsive to aircraft overflights (Richardson *et al.*, 1995). Harbor seals often leave beaches when aircraft fly over and then sometimes haulout at a different site afterwards, which results in permanent separation if pups are unable to follow their mothers into the water. Additionally, very young pups that are pushed into the water as the adults flush may subsequently drown. One study showed more than 10 percent of approximately 2000 pups born on one Alaskan island died as a result of disturbance from low-flying aircraft (Richardson *et al.*, 1995). The same study found that aircraft were more disturbing on calm days, when at low altitudes, and after recent disturbances. Since harbor seals have been shown to flush into the water in response to rocket launch noise of a level similar to that occurring at Ugak Island, one can infer that separation of pups from their mothers could occur if the launch occurred during a pupping period and the harbor seals were using the north side of the island to pup on.

Rocket launches at KLC have associated security overflights that occur an approximate total of 5 to 10 times per day in the days preceding and following the launch. Several studies of both harbor seals and Steller sea lions cited in Richardson *et al.*, 2005, suggest that these animals respond significantly less to overflights of both planes and helicopters that occur above 305 m (0.2 mi). One mitigation requirement included in the rule is that security overflights immediately associated with the launch will not approach occupied pinniped haulouts on Ugak Island by closer than 0.25 mile (0.4 km), and will maintain a vertical distance of 1000 ft (305 m) from the haulouts when within 0.5 miles (0.8 km), unless indications of human presence or activity warrant closer inspection of the area to assure that national security interests are protected in accord with law. Monitoring flights will not approach closer than 0.25 (0.4 km) mile from the island. It is unlikely that either of these overflights will add noticeably to any harassment of pinnipeds surrounding the rocket launches.

Harbor seals primarily use the east side of Ugak Island, though they

sometimes use the north side of the island both for hauling out and for pupping. For several reasons, NMFS believes that the seals using the east side of the island are not likely to be harassed by rocket launch noise: the eastern shoreline faces away from the point the rocket noise is emanating from and is backed up by a 300–500-ft (91.4–152.4 km) cliff; the rough seas hitting rocks make the ambient noise very loud on the eastern shoreline; and data collected during the *ait-2* launch showed that one hour after the launch, when sea lions were swimming immediately off the rocks on the north shore, the harbor seals were still hauled out in the same numbers and at the same locations that they were 5 hours before the launch. NMFS believes that harbor seals hauled out on the north beach may be temporarily behaviorally disturbed and possibly temporarily displaced from their haulouts immediately following rocket launches. If launches occur during the harbor seal pupping period and harbor seals have also chosen to pup on the north beach, it is possible that harbor seal pups could die as a result of the adults flushing in response to the rocket noise. NMFS believes that the proposed action may result in the temporary behavioral disturbance and, less likely, mortality (pups only) of small numbers, in relation to the population numbers (see next section), of harbor seals. NMFS anticipates that these impacts will have no more than a negligible effect on the species stock.

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

The highest number of Steller sea lions seen at one time on Ugak Island since 1993 is approximately 375 (1997). However, based on both dedicated and opportunistic surveys by one researcher, approximately 160 were seen in 1999 and numbers have decreased since then (Wynne, pers. comm., 2005). Approximately 50 were seen in 2001 and numbers have further decreased since then. Steller sea lions seasonally use the Ugak island sites (the northern spit, and occasionally the southwest tip) as haulout sites from late June to early October. While not logistically optimal for the applicant, the fastest that KLC can prepare the facilities for a new launch right after a launch is 4 weeks, which means that at most it would be logistically possible to have four launches a year within the time that the sea lions are using Ugak Island as a haulout. Based on the maximum number seen and the sea lion trend over the last several years, NMFS anticipates that the most sea lions likely to be

harassed during one launch is 300. This translates to the potential harassment of 1,200 Steller sea lions in one year (assuming different individual sea lions are harassed each launch). However a mitigation measure is required that will limit the number of launches within the time that sea lions are present to three, which lowers the number of potential harassments to 900 animals annually. This is a small number relative to the affected stock.

Harbor seal numbers have steadily increased at Ugak Island since 1992, and just over 900 were counted during the molt in 2004 (Wynne, pers. comm., 2005). The last pupping season counts showed 290 adults and 88 pups in 1993, and 292 adults and 96 pups in 1994. According to local researchers, the primary haulout for harbor seals is on the east side of the island (where NMFS does not believe there are likely to be any effects from the rocket launch noise) and the majority of the seals may be found there. In three days of her 1994 survey, Wynne (2005) found that an average of approximately 25 percent of both adults and pups were hauled out on the north side of the beach. Therefore, NMFS estimates that of a maximum of 900 harbor seals present during any launch, 275 of them may be located on the north side of the island and exposed to the rocket launch noise. Harbor seals are present at Ugak all year, which means that if there were nine launches in one year, a maximum of 2,475 harbor seals could be exposed to the noise and potentially harassed in one year (assuming different individuals were present each launch, else the number is smaller, but some may be harassed more than one time). The harbor seal pupping season runs from mid-May through June. Since it takes a minimum of 4 weeks to prepare for a new launch, it would be logistically possible to have two launches during that time. The highest number of pups seen at Ugak was 96 in 1994. Though numbers of pups have probably increased with the numbers of adults since 1994 (by a factor of three), only a minority of pups (estimated one fourth) will likely be present on the north side of the island and exposed to the noise and potential flushing of adults. One scientist reported that more than 10 percent of 2000 harbor seal pups died on an Alaskan Island following disturbance from exposures to low flying aircrafts (Richardson *et al.*, 1995). NMFS estimates that if 72 pups (highest number seen (in 1996) multiplied by three for population increase and divided by four to account for number exposed on north side of island) were

twice exposed to rocket noise sufficient to flush the adults, up to 20 harbor seal pups (15 percent) might die. However, one required mitigation measure limits AADC to one launch during the pupping season, which lowers the potential mortality of harbor seal pups to 11 annually (55 over the life of the regulations). NMFS believes that a small number (no more than 2,488) of harbor seals may be affected relative to the population estimates.

#### **Effects of Rocket Launches on Subsistence Needs**

There are no subsistence uses of pinniped species in Alaska waters within the KLC primary study area, and, therefore, NMFS anticipates no effects on subsistence needs.

#### **Effects of Rocket Launches on Marine Mammal Habitat**

Solid rocket boosters would fall into the ocean away from any known or potential haulouts and the chances of a cetacean being in the wrong place at the wrong time are discountable. All sonic booms that reach the earth's surface would be expected to be over open ocean beyond the outer continental shelf. Airborne launch sounds would mostly reflect or refract from the water surface and, except for sounds within a diameter of approximately 26 degrees directly below the launch vehicle, would not penetrate into the water column. The sounds that do penetrate would not persist in the water for more than a few seconds. Overall, rocket launch activities from KLC would not be expected to cause any impacts to habitats used by marine mammals, including pinniped haulouts, or to their food sources.

#### **Mitigation**

Under Section 101(a)(5) of the MMPA, adverse impacts are to be reduced to the lowest level practicable. Due to the nature of the rocket launches and the pinnipeds responses, the most obvious way to mitigate for the effects of the rocket launch noise is to minimize the number of launches that the Steller sea lions and harbor seals are exposed to. This sort of mitigation is logistically difficult and impracticable for AADC, as their launch operations are driven by the needs of the agencies and companies that utilize their facilities. However, NMFS and the applicant have worked out a way to reduce the potential Level B Harassment of sea lions by 25 percent and to reduce the potential Level A Harassment or mortality of harbor seal pups by 50 percent.

In their application, AADC asked for authorization to take marine mammals

during nine rocket launches annually. The quickest that the launch pad can be turned around for another launch is four weeks. This means that it would be logistically possible to launch 4 rockets during the season that the Steller sea lions are using Ugak Island, and logistically possible to launch two rockets during the harbor seal pupping season. As a mitigation measure, NMFS has incorporated into the rule and LOAs a requirement that not more than an average of three launches per year could occur within the sea lion season, and not more than an average of one launch per year could occur during the harbor seal pupping season. Therefore, no more than 15 launches would occur within the sea lion season (June 15 - September 30) over the course of the 5-year rule, and no more than 5 launches would occur during the harbor seal pupping season (May 15 - June 30) over the course of the 5-year rule.

Even though the video monitoring of Steller sea lions at Ugak Island indicates they did not flush in response to helicopter or noise recorded during the same time period, the scientific literature shows that pinnipeds will often have an adverse response to low-flying aircraft. AADC typically flies several security overflights in conjunction with a rocket launch. As a result, NMFS has incorporated a mitigation measure wherein the security flights immediately associated with rocket launches would not approach closer than 0.25 mile (0.4 km) to occupied pinniped haulout sites or fly lower than 1000 ft (305 m) when the plane is closer than 0.5 miles (0.8 km) from occupied pinniped sites on Ugak Island unless indications of human presence or activity warrant closer inspection of the area to assure that national security interests are protected in accord with law.

#### **Monitoring**

##### *Marine Mammal Monitoring*

The objective of monitoring Steller sea lions and Pacific harbor seals is to detect any indications of pinniped disturbance, injury, or mortality that results from KLC rocket launches at the Ugak Island haulout site. Monitoring would be conducted on Ugak Island for launches that take place between June 15 and September 30, an observation period that includes the seasonal occupation of the Steller sea lions as well as the molting period of the harbor seals (when their numbers are higher and their responses to disturbance potentially greater). Launches occurring during the harbor seal pupping season (May 15 – June 30) would also be

monitored. All haulout areas on Ugak Island would be monitored before, during, and after launch operations to document and characterize any observed responses. Monitoring would be designed to determine the type of reactions (or injury or mortality) and their relationship to noises associated with rocket launches. Fixed-wing aerial surveys would be flown for any launches taking place from June 15 through September 30 using a minimum flight altitude of 156 m (500 ft) above sea level (ASL) to be flown at low tide or, with consultation, toward evening. The aircraft would come no closer than 0.25 miles (0.4 km) to the haulout. Depending on aircraft availability, one or two NMFS-approved biologist observers would accompany the pilot. Data will be gathered both visually and with a camera having a zoom lens. A total of five surveys would be flown, if weather conditions permit. The first would occur the day prior to a scheduled launch and the second as soon after the launch as possible. Replicate surveys will be flown the following three successive days to determine post-launch haulout-use patterns.

For any launches that occur from June 15 through September 30, a real-time video record will be made of sea lion reactions to launch-related noises. This will be accomplished by the installation of a remote custom-designed, closed-circuit, weatherproof, time-lapse video camera system at the base of the Ugak Island sea lion haulout before a launch, which will be retrieved post-launch. Results of the aerial and video surveys will be compared, providing information on startle effects and durations. In addition, video data will be time-correlated with rocket motor noise measurements to provide objective information on any startle responses or indications of disturbance reactions that may occur resulting from rocket launches. Comparisons will also be made with baseline data assembled by AADC to help gauge any natural trends that may be occurring.

The majority of harbor seals haul out on the eastern side of Ugak Island, which is completely inaccessible to pedestrian or boat traffic due to the high cliffs and violent surf, so it is not possible to set up video recorders there. However, approximately 25 percent of the harbor seals haul out on the eastern end of the north-facing shore of Ugak Island. Though it has not yet been attempted, it may be possible to set up a camera with a zoom lens on the accessible western end of the north-facing shore to record harbor seal behavior on the middle or eastern end

of the shore, or on the rocks off shore. At some time prior to the first launch that occurs between May 15 and June 30, when harbor seals are present (perhaps immediately before or after the camera has already been set up to record sea lions), AADC will test the efficacy of using the camera on the harbor seal haulout and report their findings to NMFS. If successful, the same real-time video and acoustic measurements (see below) will be conducted when launches occur during the harbor seal pupping season as occur when the sea lions are present.

NMFS believes it unlikely that the security overflights immediately preceding and following the rocket launches would result in the harassment of marine mammals. However, when pinnipeds are present at haulouts during security overflights associated with rocket launches, a member of the flight crew will note and record whether pinnipeds appeared to flush as a result of the overflight and estimate a number.

#### *Acoustic Measurements*

Rocket motor noise monitoring would be done concurrently with video monitoring at the Ugak Island haulouts. These data will be synchronized to the video data to document correlations between noise signatures and pinniped responses. Sound intensity and frequency metrics will be recorded before, during, and after a launch by an SLM mounted on a permanent stanchion upon the Ugak Island haulout one day or more before a launch and retrieved within one day post-launch. The SLM will be set to highlight sounds greater than 70 dBA.

#### **Reporting**

In the event that any cases of pinniped injury or mortality are judged to result from launch activities at any time during the period covered by these regulations, this event will be reported to NMFS immediately.

Data from monitoring activities would be analyzed, summarized, and reported to NMFS within 90 calendar days following cessation of field activities for each launch. The report would include the timing and nature (vehicle type, azimuth, measured sound data) of launch operations as well as the times of the monitoring flights. The report would include sea lion and harbor seal counts (separated into adult and pup), as well as observations of any other marine mammals seen during monitoring or security overflights. The report will summarize behavioral observations in relation to recorded, or other known, stimuli (launches or aircraft), and estimate the number of the

affected animals and the nature of their reactions. The report will include a summary of the acoustic measurements. The report will include a copy of all videotapes containing sea lion and harbor seal footage, and selected illustrative 35mm pictures, cross-referenced to the appropriate launches and acoustic measurements. AADC would also include this information in its Annual Environmental Monitoring and Natural Resources Management Report.

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

In addition to annual interim technical reports, NMFS is requiring AADC to submit a draft comprehensive technical report to NMFS 180 days prior to the expiration of the regulations. This draft technical report would provide full documentation of methods, results, and interpretation of all monitoring tasks for launches during the first four LOA's, plus preliminary information for launches during the first 6 months of the final LOA. AADC will incorporate NMFS recommendations on the draft report and submit a final comprehensive technical report within 60 days of the expiration of the regulations.

#### **National Environmental Policy Act (NEPA)**

The FAA prepared an Environmental Assessment (EA) and subsequently issued a Finding of No Significant Impact (FONSI) for AADC's proposal to construct and operate a launch site at Narrow Cape on Kodiak Island, Alaska. Since 1998, AADC has provided monitoring reports related to noise and marine mammal impacts associated with ongoing rocket launches from KLC. After reviewing the new information contained in the monitoring reports and considering the MMC's comments that impacts to harbor seals should be more comprehensively addressed, NMFS decided that a more current environmental analysis was necessary. In 2005, NMFS prepared an EA on the Promulgation of Regulations Authorizing Take of Marine Mammals Incidental to Rocket Launches at Kodiak

Launch Complex, Alaska, and the Issuance of Subsequent Letters of Authorization. NMFS found that the promulgation of a 5-yr Rule and issuance of LOAs will not significantly impact the quality of the human environment and issued a Finding of No Significant Impact (FONSI). Accordingly, preparation of an Environmental Impact Statement or Supplemental Environmental Impact Statement for this action was not necessary.

#### **Endangered Species Act (ESA)**

The endangered Steller sea lion is the only federally listed marine mammal under NMFS' jurisdiction that is likely to be adversely affected by the proposed action. Ugak Island also contains designated critical habitat for the Steller sea lion. The FAA and NMFS have consulted with the Endangered Species Division of the NMFS Alaska Region. A Biological Opinion (BO) issued in November, 2003 found that the proposed action is not likely to jeopardize the continued existence of listed species nor result in the destruction or adverse modification of critical habitat.

The northern sea otter, federally listed as threatened under the ESA, may be found in the KLC area throughout the year. The northern sea otter is within the jurisdiction of the USFWS, which is responsible for issuing authorizations and incidental take statements for takes of this species. AADC is currently in consultation with USFWS regarding the sea otter.

Steller's eider, federally listed threatened and under the jurisdiction of the USFWS, is found in the vicinity of the KLC. Following several years of recommended monitoring of both Steller's eiders and bald eagles (not federally listed in Alaska), the USFWS concurred with AADC's conclusion that the rocket launches at AADC have no effect on either of these species.

#### **Classification**

This action has been determined to be not significant for purposes of Executive Order 12866.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration at the proposed rule stage that this rule would not have a significant economic impact on a substantial number of small entities. The rule would apply only to AADC, and would have no effect, directly or indirectly, on small businesses. The rule may affect a small number of contractors providing services related to reporting the impact

of the activity on marine mammals, some of whom may be small businesses, but the number involved would not be substantial. Because of this certification, a regulatory flexibility analysis is not required, and none was prepared. No comments concerning this certification were prepared.

Notwithstanding any other provision of law, no person is required to respond to nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act (PRA) unless that collection of information displays a currently valid Office of Management and Budget (OMB) control number. This proposed rule contains collection-of-information requirements subject to the provisions of the PRA. This collection has been approved previously by OMB under section 3504(b) of the PRA issued under OMB control number 0648-0151, and includes applications for LOAs and reports.

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

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

■ 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. Subparts R, S, and T are added and reserved.

■ 3. Subpart U is added to read as follows:

#### Subpart U—Taking of Marine Mammals Incidental to Rocket Launches from the Kodiak Launch Complex, Kodiak Island, AK

Sec.

- 216.230 Specified activity and specified geographical region.
- 216.231 Effective dates.
- 216.232 Permissible methods of taking.
- 216.233 Prohibitions.
- 216.234 Mitigation, monitoring and reporting.
- 216.235 Letter of Authorization.
- 216.236 Renewal of a Letter of Authorization.
- 216.237 Modifications to a Letter of Authorization.

#### Subpart U—Taking of Marine Mammals Incidental to Rocket Launches from the Kodiak Launch Complex, Kodiak Island, AK

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

(a) Regulations in this subpart apply only to the incidental taking of marine mammals specified in paragraph (b) of this section by U.S. citizens engaged in rocket launch activities (up to nine launches per year) at the Kodiak Launch Complex on Kodiak Island, Alaska.

(b) The incidental take of marine mammals under the activity identified in paragraph (a) of this section is limited to Steller sea lions (*Eumetopius jubatus*) and Pacific harbor seals (*Phoca vitulina richardsi*).

##### § 216.231 Effective dates.

Regulations in this subpart are effective from February 27, 2006 through February 28, 2011.

##### § 216.232 Permissible methods of taking.

(a) Under a Letter of Authorization issued pursuant to § 216.106, the Alaska Aerospace Development Corporation and its contractors, may incidentally, but not intentionally, take Steller sea lions by Level B harassment, take adult Pacific harbor seals by Level B harassment, and take harbor seal pups by Level B or Level A harassment or mortality, in the course of conducting missile launch activities within the area described in § 216.230(a), provided all terms, conditions, and requirements of these regulations and such Letter of Authorization are complied with.

(b) The activities identified in § 216.230(a) must be conducted in a manner that minimizes, to the greatest extent practicable, adverse impacts on marine mammals and their habitat.

##### § 216.233 Prohibitions.

The following activities are prohibited:

(a) The taking of a marine mammal that is other than unintentional.

(b) The violation of, or failure to comply with, the terms, conditions, and requirements of this subpart or a Letter of Authorization issued under § 216.106.

(c) The incidental taking of any marine mammal of a species not specified, or in a manner not authorized, in this subpart.

##### § 216.234 Mitigation, monitoring and reporting.

(a) No more than five launches may occur between May 15 and June 30 within the 5-year period, and no more than 15 launches may occur between

June 15 and September 30 within the 5-year period.

(b) The holder of the Letter of Authorization must implement the following measures for all launches occurring from June through October:

(1) Conduct five replicate fixed-wing aerial surveys of all hauled out Steller sea lions and harbor seals at Ugak Island, each flown at low tide (weather permitting), using a minimum flight altitude of 500 feet (152 meters) above sea level, with an approach no closer than 0.25 mi (0.40 km) to the haulout, and conducted a day prior to, directly following, and for three consecutive days after a launch.

(2) At least one biologist observer will accompany the pilot during all aerial surveys.

(3) Data gathered during aerial surveys will be gathered visually and through the use of a camera with a zoom lens.

(4) A real-time video record of Steller sea lion reactions to launch noise will be made using a video camera system placed upon the Ugak Island haulout before a scheduled launch and then retrieved after the launch.

(5) Sound intensities and frequencies of rocket motor noise will be recorded before, during, and after a launch by a sound level monitor mounted upon the Ugak Island haulout and set to highlight sounds greater than 70 dBA. Monitors will be installed one day or more before a launch and retrieved within one day post-launch.

(c) A trial effort to obtain real-time video records of harbor seals hauled out at the eastern end of the northern side of the island and their reactions to launch noise will be made as soon as practicable. A brief report summarizing the efficacy of this monitoring effort should be included in the standard monitoring reports for that launch and year. If valuable data may be gathered using this method, real-time video records of harbor seals reactions to launch noise will be made before launches scheduled between May 15 and June 30, and between June 30 and September 30 if the equipment is not being used to record Steller sea lions, and then retrieved after the launches.

(d) Security flights immediately associated with rocket launches may not approach closer than 0.25 mile (0.4 km) to occupied pinniped haulout sites on Ugak Island or fly lower than 1000 ft (305 m) when the plane is closer than 0.5 miles (0.8 km) from occupied pinniped sites on Ugak Island unless indications of human presence or activity warrant closer inspection of the area to assure that national security

interests are protected in accordance with the law.

(e) When pinnipeds are present at haulouts during security overflights associated with rocket launches, and when practicable, a member of the flight crew will note and record whether pinnipeds appeared to flush as a result of the overflight and estimate a number.

(f) 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. The holder must notify the NMFS Alaska Assistant Regional Administrator for Protected Resources and to the NMFS Division of Permits, Conservation, and Education, Office of Protected Resources at least 2 weeks prior to commencing monitoring activities.

(g) Activities related to the monitoring described in paragraph (a) of this section or in the Letter of Authorization may be conducted without a separate scientific research permit.

(h) In coordination and compliance with the Alaska Aerospace Development Corporation, the National Marine Fisheries Service may place an observer on Kodiak or Ugak Islands for any marine mammal monitoring activity prior to, during, or after a missile launch to monitor impacts on marine mammals, provided observers are not within the calculated danger zone of the rocket's flight path during a launch.

(i) The holder of the Letter of Authorization must comply with any other applicable state or federal permits, regulations, and environmental monitoring agreements set up with other agencies.

(j) The National Marine Fisheries Service must be informed immediately of any proposed changes or deletions to any portions of the monitoring requirements.

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

(1) If indications of injurious or lethal take are recorded, the NMFS Alaska Assistant Regional Administrator for Protected Resources and the NMFS Division of Permits, Conservation, and Education, Office of Protected Resources, or their designees, will be contacted within 48 hours. In consultation with the National Marine Fisheries Service, launch procedure, mitigation measures, and monitoring methods must be reviewed and appropriate changes made prior to the next launch.

(2) Data from monitoring activities will be reported to the National Marine

Fisheries Service within 90 days following cessation of field activities for each launch. After the trial effort to videotape harbor seals at the eastern end of the north side of Ugak island, a summary of the effectiveness of the videotaping will be included in the associated launch report.

(3) An interim technical report must be submitted to the NMFS Alaska Assistant Regional Administrator for Protected Resources and to the NMFS Division of Permits, Conservation, and Education, Office of Protected Resources 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 and monitoring flights;

(ii) A summary of marine mammal behavioral observations in relation to recorded acoustic stimuli and other known visual or audio stimuli;

(iii) An estimate of the amount and nature of all takes.

(iv) A copy of all videotapes containing sea lion and harbor seal footage, and selected illustrative 35 mm or digital pictures, cross-referenced to the appropriate launches and acoustic measurements.

(4) A draft comprehensive technical report will be submitted to the NMFS Alaska Assistant Regional Administrator for Protected Resources and to the NMFS Division of Permits, Conservation, and Education, Office of Protected Resources, 180 days prior to the expiration of these regulations with full documentation of the methods, results, and interpretation of all monitoring tasks for launches during all expired Letters of Authorization, plus preliminary information for launches during the first 6 months of the final Letter of Authorization.

(5) 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 these regulations.

(6) The interim and draft comprehensive technical 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 technical report prior to acceptance by the National Marine Fisheries Service.

#### **§ 216.235 Letter of Authorization.**

(a) A Letter of Authorization, unless suspended or revoked, will be valid for a period of time specified in the Letter of Authorization, but a Letter of

Authorization may not be valid beyond the effective period of the regulations.

(b) A Letter of Authorization will set forth:

(1) Species of marine mammals authorized to be taken;

(2) Permissible methods of incidental taking;

(3) Specified geographical region;

(4) Means of effecting the least practicable adverse impact on the species of marine mammals authorized for taking and its habitat; and

(5) Requirements for monitoring and reporting incidental takes.

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

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

#### **§ 216.236 Renewal of a Letter of Authorization.**

(a) A Letter of Authorization for the activity identified in § 216.230(a) will be renewed upon:

(1) Notification to the National Marine Fisheries Service that the activity described in the application for a Letter of Authorization submitted under § 216.235 will be undertaken and that there will not be a substantial modification to the described activity, mitigation or monitoring undertaken during the upcoming season;

(2) Timely receipt of and acceptance by the National Marine Fisheries Service of the monitoring reports required under § 216.234;

(3) A determination by the National Marine Fisheries Service that the mitigation, monitoring and reporting measures required under §§ 216.232 and 216.234 and the Letter of Authorization were undertaken and will be undertaken during the upcoming period of validity of a renewed Letter of Authorization; and

(4) A determination that the number of marine mammals taken by the activity will be small and that the total taking by the activity will have no more than a negligible impact on the affected species or stocks of marine mammal(s), and that the level of taking will be consistent with the findings made for the total taking allowable under these regulations.

(b) 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.

**§ 216.237 Modifications to a Letter of Authorization.**

(a) Except as provided in paragraph (b) of this section, no substantive modification (including withdrawal or suspension) to a Letter of Authorization issued pursuant to the provisions of this subpart shall be made by the National Marine Fisheries Service until after notification and an opportunity for public comment has been provided. A renewal of a Letter of Authorization under § 216.236 without modification 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 § 216.230(b), a Letter of Authorization may be substantively modified without prior notification and an opportunity for public comment. Notification will be published in the **Federal Register** within 30 days of the action.

Dated: January 19, 2006.

**John Oliver,**

*Deputy Assistant Administrator for Operations, National Marine Fisheries Service.*

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**BILLING CODE 3510-22-S**

**DEPARTMENT OF COMMERCE**

**National Oceanic and Atmospheric Administration**

**50 CFR Part 635**

[I.D. 011906B]

**Atlantic Highly Migratory Species; Atlantic Bluefin Tuna Fisheries**

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

**ACTION:** Temporary rule; inseason retention limit adjustment.

**SUMMARY:** NMFS has determined that the Atlantic bluefin tuna (BFT) General category daily retention limit for the final three restricted fishing days (RFD) should be adjusted. These General category RFDs are being waived to provide reasonable opportunity for utilization of the coastwide General category BFT quota. Therefore, NMFS waives the final three RFDs scheduled for January 2006, and increases the daily retention limit from zero to two large medium or giant BFT on these previously designated RFDs.

**DATES:** Effective dates for BFT daily retention limits are provided in Table 1 under **SUPPLEMENTARY INFORMATION**.

**FOR FURTHER INFORMATION CONTACT:** Brad McHale, 978-281-9260.

**SUPPLEMENTARY INFORMATION:**

Regulations implemented under the authority of the Atlantic Tunas Convention Act (16 U.S.C. 971 *et seq.*) and the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act; 16 U.S.C. 1801 *et seq.*) governing the harvest of BFT by persons and vessels subject to U.S. jurisdiction are found at 50 CFR part 635. The 2005 General category BFT fishing season began on June 1, 2005, and ends January 31, 2006. The final initial 2005 BFT specifications and General category effort controls (June 7, 2005; 70 FR 33033) established the following RFD schedule for the 2005 fishing year: All Fridays, Saturdays, and Sundays from November 18, 2005, through January 31, 2006, and Thursday, November 24, 2005, inclusive, provided quota remained available and the fishery was open. RFDs are intended to extend the General category BFT fishery late into the southern Atlantic season. NMFS has determined that the BFT General category daily retention limit for the final three RFDs should be adjusted as described in Table 1 to provide reasonable opportunity to utilize the coastwide General category BFT quota.

**TABLE 1.—EFFECTIVE DATES FOR RETENTION LIMIT ADJUSTMENTS**

Permit Category	Effective Dates	Area	BFT Size Class Limit
Atlantic tunas General and HMS Charter/Headboat (while fishing commercially).	January 27, 28, and 29, 2006.	All	Two BFT per vessel per day/trip, measuring 73 inches (185 cm) CFL or larger.

**Adjustment of General Category Daily Retention Limits**

Under 50 CFR 635.23(a)(4), NMFS may increase or decrease the General category daily retention limit of large medium and giant BFT over a range from zero (on RFDs) to a maximum of three per vessel to allow for maximum utilization of the quota for BFT. NMFS has taken multiple actions during the 2005 fishing year in an attempt to allow for maximum utilization of the General category BFT quota. On September 28, 2005 (70 FR 56595), NMFS adjusted the commercial daily BFT retention limit (on non-RFDs), in all areas, for those vessels fishing under the General category quota, to two large medium or giant BFT, measuring 73 inches (185 cm) or greater curved fork length (CFL), per vessel per day/trip, effective through January 31, 2006, inclusive, provided quota remained available and the

fishery remained open. On November 9, 2005 (70 FR 67929), NMFS waived the previously designated RFDs for the month of November; on December 16, 2005 (70 FR 74712), NMFS waived designated RFDs for December 16–18, inclusive; on January 4, 2006 (71 FR 273), NMFS waived designated RFDs for December 31, 2005, and January 1, 2006, inclusive; on January 9, 2006 (71 FR 1395), NMFS waived RFDs for January 7, 8, 13, 14, and 15, 2006; and on January 20, 2006 (71 FR 3245), NMFS waived the designated RFDs for January 20, 21, and 22, 2006. The daily retention limit for all the above dates was adjusted to two large medium or giant BFT to provide reasonable opportunity to harvest the coastwide quota.

On December 7, 2005 (70 FR 72724), NMFS adjusted the General category quota by conducting a 200 mt inseason quota transfer to the Reserve category, resulting in an adjusted General

category quota of 708.3 mt. This action was taken to account for any potential overharvests that may occur in the Angling category during the 2005 fishing year (June 1, 2005 through May 31, 2006) and to ensure that U.S. BFT harvest is consistent with international and domestic mandates.

Catch rates in the BFT General category fishery have generally been low, the average catch rate for December 2005 and January 2006 is approximately 3.0 mt/day. Based on a review of dealer reports, daily landing trends, available quota, weather conditions, and the availability of BFT on the fishing grounds, NMFS has determined that waiving the final three RFDs established for January 27, 28, and 29, 2006, and increasing the General category daily BFT retention limit on those RFDs is warranted to assist the fishery in accessing the available quota. Therefore, NMFS adjusts the General category