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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 217

[Docket No. 161216999-7516-02]

RIN 0648-BG50

Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to Commercial Fireworks Displays at Monterey Bay National Marine Sanctuary

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

ACTION: Final rule.

SUMMARY: NMFS, upon request from the Monterey Bay National Marine Sanctuary (MBNMS or Sanctuary), hereby issues regulations pursuant to the Marine Mammal Protection Act (MMPA) to govern the taking of marine mammals incidental to commercial fireworks displays permitted by the Sanctuary in California, over the course of five years (2017-2022). These regulations, which allow for the issuance of Letters of Authorization (LOA) for the incidental take of marine mammals during the described activities and specified timeframes, prescribe the permissible methods of taking and other means of effecting the least practicable adverse impact on marine mammal species or stocks and their habitat, and establish requirements pertaining to the monitoring and reporting of such taking.

DATES: As of [INSERT DATE OF PUBLICATION IN THE FEDERAL REGISTER], the expiration date of the rule published at 77 FR 31537 on May 29, 2012, is extended from June 28, 2017, to July 3, 2022. This final rule is effective July 4, 2017.

ADDRESSES: A copy of MBNMS's application and supporting documents, as well as a list of the references cited in this document, may be obtained online at:

www.nmfs.noaa.gov/pr/permits/incidental/research.htm. In case of problems accessing these documents, please call the contact listed below (see **FOR FURTHER INFORMATION CONTACT**).

FOR FURTHER INFORMATION CONTACT: Laura McCue, Office of Protected Resources, NMFS, (301) 427-8401.

SUPPLEMENTARY INFORMATION:

Purpose and Need for this Regulatory Action

These regulations, promulgated under the Marine Mammal Protection Act (16 U.S.C. 1361 *et seq.*), establish a framework for authorizing the take of marine mammals incidental to the commercial fireworks displays in four regions within the MBNMS: Half Moon Bay, Santa Cruz/Soquel, Monterey Peninsula, and Cambria. We received an adequate and complete application from the MBNMS on October 18, 2016, requesting 5-year regulations and authorization to take, by Level B harassment, California sea lions (*Zalophus californianus*) and harbor seals (*Phoca vitulina richardii*) incidental to commercial fireworks displays permitted by the MBNMS. Please see *Background* below for definitions of harassment. The Sanctuary's current incidental take authorization regulations expire June 28, 2017. The regulations implemented by this final rule would be valid from July 4, 2017 through July 3, 2022.

Legal Authority for the Regulatory Action

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce to allow, upon request, the incidental but not intentional taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial

fishing) within a specified geographical region for up to five years if, after notice and public comment, the agency makes certain findings and issue regulations that set forth permissible methods of taking pursuant to that activity, as well as monitoring and reporting requirements. Section 101(a)(5)(A) of the MMPA and the implementing regulations at 50 CFR part 216, subpart I provide the legal basis for issuing this final rule containing the five-year regulations and for any subsequent Letters of Authorization (LOAs). As directed by this legal authority, this final rule contains mitigation, monitoring, and reporting requirements.

Summary of Major Provisions within the Regulations

The following provides a summary of some of the major provisions within the rulemaking for MBNMS fireworks in the four display areas. We have determined that MBNMS's adherence to the planned mitigation, monitoring, and reporting measures listed below would achieve the least practicable adverse impact on the affected marine mammals. They include:

- Fireworks will not be authorized during the primary spring breeding season for marine wildlife (March 1 to June 30);
- Up to two shows per year across all four areas can be an hour in length but all other fireworks displays will not exceed thirty minutes in duration;
- Shows will occur across all four areas with an average frequency of less than or equal to once every two months;
- Delay of aerial "salute" effects until five minutes after the commencement of any fireworks display;

- Removal of all plastic and aluminum labels and wrappings from pyrotechnic devices prior to use and required recovery of all fireworks-related debris from the launch site and afflicted beaches; and
- Required monitoring and reporting of marine mammals at the fireworks site prior to and after each display.

Background

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

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

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

The MMPA states that the term “take” means to harass, hunt, capture, kill or attempt to harass, hunt, capture, or kill any marine mammal.

Except with respect to certain activities not pertinent here, the MMPA defines “harassment” as: any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment); or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (Level B harassment).

Summary of Request

On October 18, 2016, NMFS received a complete application from the MBNMS requesting authorization to take, by Level B harassment, two species of marine mammals incidental to commercial fireworks displays conducted under sanctuary authorization permits issued by the MBNMS. On November 10, 2016, we published a notice of receipt of MBNMS’s application in the **Federal Register** (81 FR 78993), and provided a 30-day comment period during which we requested public comments and information related to MBNMS’s request. We did not receive any comments. On March 17, 2017, we published a notice of proposed rulemaking (81 FR 14184), and received 13 comment letters, which were considered in the development of the final rule and are available online at: www.nmfs.noaa.gov/pr/permits/incidental/research.htm.

MBNMS requested authorization for the taking of small numbers of marine mammals incidental to permitting of commercial fireworks displays; such displays produce elevated levels of noise and light that may result in Level B harassment of pinnipeds hauled out in the area. NMFS has issued incidental take authorizations under section 101(a)(5)(A or D) of the MMPA to MBNMS for the specified activity since 2005. NMFS first issued an incidental harassment authorization (IHA) under section 101(a)(5)(D) of the MMPA to MBNMS on July 4, 2005 (70

FR 39235; July 7, 2005), and subsequently issued 5-year regulations governing the annual issuance of LOAs under section 101(a)(5)(A) of the MMPA (71 FR 40928; July 19, 2006). Upon expiration of those regulations, NMFS issued MBNMS an IHA (76 FR 29196; May 20, 2011), and subsequent 5-year regulations and LOA, which expire on June 28, 2017 (77 FR 31537; May 29, 2012). The instant regulations are valid for five years from July 4, 2017 through July 3, 2022.

Description of the Specified Activity

Overview

The MBNMS was designated as the ninth national marine sanctuary (NMS) in the United States on September 18, 1992. Managed by the Office of National Marine Sanctuaries (ONMS) within NOAA, the Sanctuary adjoins 240 nautical miles (nmi) of central California's outer coastline (overlying 25 percent of state coastal waters), and encompasses 4,601 square nmi of ocean waters from mean high tide to an average of 26 nmi offshore between Rocky Point in Marin County and Cambria in San Luis Obispo County. The MBNMS has authorized fireworks displays over Sanctuary waters for many years as part of national and community celebrations (*e.g.*, Independence Day, municipal anniversaries) and to foster public use and enjoyment of the marine environment. In central California, marine venues are the preferred setting for fireworks in order to optimize public access and avoid the fire hazard associated with terrestrial display sites.

Sponsors of fireworks displays conducted in the MBNMS are required to obtain Sanctuary authorization prior to conducting such displays (see 15 CFR 922.132). Since the MBNMS began issuing permits for fireworks discharge in 1993, it has received a total of 102 requests for professional fireworks displays, the majority of which have been associated with large community events such as Independence Day and municipal festivals. MBNMS has

permitted, on average, approximately 5 fireworks displays per year; however, only 2 to 4 displays were hosted annually between 2009 and 2015. However, economic conditions or other factors could result in more requests. Therefore, the MBNMS anticipates authorizing a maximum of 10 fireworks displays, annually, in 4 display areas along 276 mi (444 km) of coastline during the effective period of these regulations.

Per previous IHAs, regulations, and LOAs, the MBNMS has monitored California sea lions and harbor seals at the four regions where fireworks displays are authorized. Based on these and other data combined with the MBNMS's estimated maximum number of annual fireworks displays, MBNMS requested authorization to incidentally harass up to 3,983 California sea lions and 570 harbor seals, annually.

Dates and Duration

The specified activity may occur from July 1 through February 28, annually, for the effective period of the regulations (July 4, 2017 through July 3, 2022). Each display will be limited to 30 minutes in duration with the exception of 2 events per year lasting up to 1 hour each. Events throughout the year will occur with an average frequency of less than or equal to once every two months within each of the four prescribed display areas. The MBNMS does not authorize fireworks from March 1 through June 30, annually, to avoid overlap with primary reproductive periods; therefore, no takes of marine mammals incidental to the specified activity would occur during this moratorium period.

Specific Geographic Region

Pyrotechnic displays within the sanctuary are conducted from a variety of coastal launch sites (*e.g.*, beaches, bluff tops, piers, offshore barges, golf courses). Authorized fireworks displays would be confined to four prescribed areas (with seven total sub-sites) within the

sanctuary, while displays along the remaining 95 percent of sanctuary coastline would be prohibited. These sites were approved for fireworks events based on their proximity to urban areas and pre-existing high human use patterns, seasonal considerations such as the abundance and distribution of marine wildlife, and the acclimation of wildlife to human activities and elevated ambient noise levels in the area.

The four display areas are located, from north to south, at Half Moon Bay, the Santa Cruz/Soquel area, the northeastern Monterey Peninsula (Pacific Grove/ North and South Monterey), and Cambria (Santa Rosa Creek) (see Figure 1 in MBNMS's application). The number of displays is not expected to exceed 10 total events per year across all four areas. Detailed descriptions of each display area are available in the 2006 *Environmental Assessment of the Issuance of a Small Take Regulations and LOAs and the Issuance of National Marine Sanctuary Authorizations for Coastal Commercial Fireworks Displays within Monterey Bay National Marine Sanctuary, CA* (available online at <http://www.nmfs.noaa.gov/pr/permits/incidental/research.htm>). Our notice of proposed rulemaking (82 FR 14184; March 17, 2017) gave a detailed description of each of the display areas. We refer the reader to that document instead of repeating it here.

Comments and Responses

We published a notice of proposed rulemaking in the **Federal Register** on March 17, 2017 (81 FR 14184) and requested comments and information from the public. During the 30-day comment period, we received one letter from the Marine Mammal Commission (Commission); one letter representing Turtle Island Restoration Network, Ocean Defenders Alliance, and Friends of Earth (Three NGOs); and 11 comments from private citizens. The

Commission concurred with NMFS's findings and recommended that NMFS issue the final rule subject to the inclusion of the proposed mitigation, monitoring, and reporting measures.

The comments and our responses are provided here, and the comments have been posted online at: www.nmfs.noaa.gov/pr/permits/incidental/research.htm. Please see the comment letters for the full rationale behind the recommendations we respond to below.

Comment 1: A private citizen expressed concern regarding potential disruption of the natural environment and pollution resulting from a fireworks display.

Response: If appropriate, NMFS authorizes take of marine mammals incidental to specified activities, in this case permitting of fireworks displays. Our analysis included the effects this activity may have on the marine mammals' environment and concluded that effects to the environment would be negligible. Any pollution created by the fireworks displays will be removed through clean-up efforts for up to 2 days following the fireworks display.

Comment 2: A private citizen expressed opposition to any fireworks displays that may cause harm to marine mammals within the MBNMS.

Response: NMFS has a statutory obligation to ensure that the authorization of marine mammal take incidental to specified activities (in this case, fireworks displays) effects the least practicable adverse impact on affected marine mammal species and stocks. NMFS has determined that with the included mitigation measures, the effects to marine mammals will satisfy this requirement.

Comment 3: A private citizen expressed opposition to the authorization of take for fireworks displays because of the impacts to marine mammals and the potential for the seals and sea lions to not return to the haul out, which would impact the humans who go to the MBNMS to see these animals.

Response: NMFS is required to assess the potential impacts to marine mammals pursuant to the requirements of the MMPA as well as to the broader human environment (as a result of our action of issuing a final rule and subsequent Letter of Authorization), pursuant to the requirements of the National Environmental Policy Act. NMFS concluded that even though pinnipeds may temporarily leave the haul out, the animals are likely to return after the fireworks display has ended, and will not be displaced to another area.

Comment 4: A private citizen expressed support for NMFS's action to authorize take of marine mammals incidental to permitting of fireworks displays because they believe the effects of the fireworks displays are harmful to the marine mammals and the authorization would reduce these impacts.

Response: NMFS agrees that, with the included mitigation measures and monitoring and reporting requirements, the MBNMS will reduce the impact of fireworks displays on individual marine mammals and marine mammal stocks and will effect the least practicable adverse impact.

Comment 5: Two private citizens suggest moving the fireworks display away from the water to reduce impacts to marine mammals.

Response: In central California, marine venues are the preferred setting for fireworks displays in order to optimize public access and avoid the fire hazard associated with terrestrial display sites. From 2017-2022, the permitted fireworks displays would be confined to four prescribed areas, which were approved for fireworks events based on their proximity to urban areas and pre-existing high human use patterns, seasonal considerations such as the abundance and distribution of marine wildlife, and the acclimation of wildlife to human activities and elevated ambient noise levels in the area. NMFS determined that the effects of the fireworks

displays to marine mammals and their habitat would result in no greater than a negligible impact to the affected species or stocks, as required by the MMPA.

Comment 6: A private citizen mentioned that fireworks have not occurred in Monterey Bay for many years and the implementation of the rule would be unnecessary.

Response: The Sanctuary has indicated that economic conditions or other factors could result in more requests for fireworks displays in the future. If fireworks displays were to occur in the authorized locations during the authorized dates, the included mitigation, monitoring, and reporting measures would minimize the effects of the displays to the level of least practicable adverse impact to marine mammals, as required by the MMPA.

Comment 7: Two private citizens asked clarifying questions about the impacts of “taking” a marine mammal.

Response: The MMPA states that the term “take” means to harass, hunt, capture, kill or attempt to harass, hunt, capture, or kill any marine mammal. Except with respect to certain activities not pertinent here, the MMPA defines “harassment” as: any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment); or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (Level B harassment).

NMFS determined that the fireworks displays could be reasonably anticipated to result in the “take” of marine mammals, but that any such take will be limited to Level B harassment in the form of short-term startle responses and localized behavioral changes. NMFS also determined that implementation of the required mitigation measures will effect the least practicable adverse impact on affected marine mammal species and stocks.

Comment 8: One private citizen asked a clarifying question about what happens if there is more than negligible impact, and what alternative solutions are there to protect the marine mammals without compromising our traditions and celebrations.

Response: NMFS determined that the authorized take of marine mammals incidental to fireworks displays will not have more than a negligible impact on any affected marine mammal species or stock. If NMFS determines that the activity were resulting in greater than negligible impacts, any issued authorization may be withdrawn or suspended, as appropriate.

NMFS has included mitigation measures to reduce the impact of the activity on marine mammals, including limiting the number of fireworks displays and the areas in which they may occur within the MBNMS. NMFS believes this reduces the impact to marine mammals and their habitat to the least practicable adverse impact.

Comment 9: Two private citizens expressed concern about the effects of the fireworks display on newborn, young, or pregnant female seals due to the timing of pupping and molting.

Response: Harbor seal pupping season generally occurs between March and April, and pups are weaned within one month. The MBNMS does not permit fireworks displays from March 1 through June 30 specifically to avoid overlap with primary reproductive periods and to minimize impacts on harbor seal pups.

Comment 10: A private citizen asked for a description of the signs/observations of auditory threshold shift.

Response: Marine mammals exposed to high-intensity sound, or to lower-intensity sound for prolonged periods, can experience hearing threshold shift (TS), which is the loss of hearing sensitivity at certain frequency ranges (Finneran, 2015). TS can be permanent (PTS), in which case the loss of hearing sensitivity is not fully recoverable, or temporary (TTS), in which case the

animal's hearing threshold would recover over time (Southall *et al.*, 2007). Generally, the onset of TS is not readily detectable by a visual observer, but must be detected in a laboratory setting, *e.g.*, through collection of behavioral response or auditory evoked potential data. Onset of TTS or PTS in marine mammals as a result of sound exposure varies; however, given the low source levels of fireworks displays, and the onset acoustic thresholds for pinnipeds (NMFS 2016), NMFS determined that TTS and PTS is not likely to occur due to fireworks displays.

Comment 11: A private citizen expressed opposition to relocating whales to captivity for a fireworks display.

Response: In this authorization, NMFS is authorizing take of marine mammals incidental to fireworks displays. NMFS is not authorizing the relocation of any marine mammals, nor is it authorizing any activity related to captive marine mammals, nor are any such activities proposed.

Comment 12: A private citizen is supportive of the fireworks being highly regulated so that we do not harm wildlife, but believes that if any animals are present, the fireworks display should not occur.

Response: The MMPA requires that the take of small numbers of marine mammals incidental to specified activities be allowed, if certain findings can be made and appropriate mitigation measures and monitoring and reporting requirements are prescribed. NMFS's analysis of the likely effects of the fireworks displays on the affected marine mammal stocks concluded that the effects would be negligible and that implementation of the required mitigation measures would effect the least practicable adverse impact. Therefore, it is appropriate to authorize the take of marine mammals incidental to the specified activities.

Comment 13: Three NGOs expressed concern that issuing an incidental take authorization within the MBNMS undermines the protective goal of the sanctuary.

Response: The application was submitted by the MBNMS; therefore, the MBNMS believes that permitting of commercial fireworks displays, subject to restrictions described herein, and the issuance of an incidental take authorization for this activity is consistent with the Sanctuary's mission and goals.

Comment 14: Three NGOs state that past fireworks display contracts did not account for trash left by spectators of the fireworks shows and that litter should be classified as Level B harassment.

Response: NMFS analyzed the effects of litter on marine mammals and their habitat and concluded that they are temporary and negligible. In accordance with permits issued by the MBNMS, the entity conducting fireworks displays is required to clean area beaches for up to 2 days following the display. These post-fireworks clean-ups include trash created by the fireworks themselves, as well as trash that may have been created or left by spectators. Therefore, NMFS believes that these impacts will not adversely affect marine mammals or their habitat.

Comment 15: Three NGOs commented that the large crowds that view the fireworks (on land or in vessels) should be considered indirect harassment that may affect marine mammals including pinnipeds and cetaceans.

Response: NMFS's issuance of an LOA to MBNMS is related to the specified activity described by MBNMS in their authorization request (*i.e.*, permitting of fireworks displays), not to other associated impacts that are not permitted by the Sanctuary (*e.g.*, increased human presence). However, NMFS believes that the effects of the increased noise and light associated with the fireworks displays would cause harassment likely to subsume any potential effects of the presence of people on shore.

Comment 16: Three NGOs stated that the 2006 EA is insufficient for activities from 2017 and 2022 and that permits should not be granted unless it is scientifically determined that other marine mammals occupying the area would not be negatively affected.

Response: NMFS determined that the activity proposed (issuance of an incidental take authorization (ITA)) is categorically excluded from the requirement to prepare an environmental assessment or environmental impact statement based on NOAA's Administrative Order 216-6A and the associated companion manual, entitled "Policy and Procedures for Compliance with the National Environmental Protection Act and Related Authorities"

(<http://www.nepa.noaa.gov/docs/NOAA-NAO-216-6A-Companion-Manual-01132017.pdf>).

Specifically, NMFS determined that the proposed activity met the criteria for CE B4 (Issuance of an incidental take authorization (ITA) under section 101(a)(5)(A) of the MMPA for the incidental, but not intentional, take by harassment of marine mammals during specified activities and for which no serious injury or mortality is anticipated) after consideration of the potential effects of the proposed activity as well as evaluation of any extraordinary circumstances. One of the extraordinary circumstances states that the action (issuance of the ITA) cannot result in an adverse effect that is more than negligible or discountable on species protected by National Marine Sanctuaries Act (NMSA). NMFS believes that because the fireworks displays are limited in duration, would not occur on consecutive days at any fireworks site in the sanctuary, and would be subject to mitigation measures proposed by MBNMS – and implemented as a component of NMFS' incidental take authorizations since 2005 – potential impacts would be further reduced. Additionally, no take by injury, serious injury, or mortality is anticipated, and takes by Level B harassment would be at the lowest level practicable due to incorporation of the mitigation measures described previously in this document.

Comment 17: Three NGOs expressed concern about the effects of the fireworks activities on sea otters.

Response: NMFS and USFWS have joint jurisdiction under the MMPA. NMFS's trust species include whales, dolphins, porpoises, seals, and sea lions while the USFWS's trust species include sea otters, walrus, manatees, dugongs, and polar bears. Because sea otters are not under the jurisdiction of NMFS, it would not be appropriate for NMFS to consider potential impacts to the species in making a decision pursuant to the requirements of the MMPA. The MBNMS addressed impacts to sea otters in their application. The USFWS found that MBNMS would be unlikely to take any southern sea otters, and therefore issued neither an incidental take statement under the ESA nor an IHA.

Detailed Description of the Specified Activity

Professional pyrotechnic devices used in fireworks displays can be grouped into three general categories: aerial shells (paper and cardboard spheres or cylinders ranging from 2-12 inch (in) (5-30 centimeter (cm)) in diameter and filled with incendiary materials), low-level comet and multi-shot devices similar to over-the-counter fireworks (*e.g.*, roman candles), and ground-mounted set piece displays that are mostly static in nature. Each display is unique according to the type and number of shells, the pace of the show, the length of the show, the acoustic qualities of the display site, and even the weather and time of day. An average large display will last 20 minutes and include 700 aerial shells and 750 low-level effects. An average smaller display lasts approximately seven minutes and includes 300 aerial shells and 550 low-level effects. A detailed description of these devices was included in our notice of proposed rulemaking (82 FR 14184; March 17, 2017). We refer the reader to that document rather than repeating it here.

Description of Marine Mammals in the Area of the Specified Activity

In our notice of proposed rulemaking (81 FR 14184; March 17, 2017), we reviewed MBNMS's species descriptions – which summarized available information regarding status, trends, and distribution of the potentially affected species – for accuracy and completeness and referred readers to Sections 3 and 4 of MBNMS's application, as well as to NMFS's Stock Assessment Reports (SARs; www.nmfs.noaa.gov/pr/sars/). We also provided information related to all species with expected potential for take within the sanctuary where fireworks displays are planned to occur, summarizing information related to the population or stock. Readers should refer to the notice of proposed rulemaking (81 FR 14184; March 17, 2017) for that information, which is not reprinted here.

The only marine mammals anticipated to be affected by the specified activities and for which incidental take, by Level B harassment only, is authorized are harbor seals and California sea lions and therefore they are the only marine mammals discussed further in this document.

Potential Effects of the Specific Activity on Marine Mammals and Their Habitat

A detailed description of the specified activity on marine mammals was provided in our notice of proposed rulemaking (81 FR 14184; March 17, 2017) and is not repeated here. No changes have been made to the specified activities described therein.

NMFS anticipates that any impacts to species or stocks of marine mammals from fireworks displays within MBNMS will be limited to short-term startle responses and localized behavioral changes. Minor and brief responses, such as short-duration startle or alert reactions are not expected to have effects on annual rates of recruitment or survival, and will not cause injury or mortality to marine mammals. As such, we have determined that the anticipated effects of the specified activity on marine mammals and their habitat are negligible.

Estimated Take by Incidental Harassment

Except with respect to certain activities not pertinent here, the MMPA defines “harassment” as: any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild (Level A harassment); or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering (Level B harassment).

All anticipated takes would be by Level B harassment, involving temporary changes in behavior such as flushing and cessation of vocalization. Serious injury and mortality are not expected. The risk of injury is considered negligible due to the nature of the specified activity and mitigation measures; therefore, authorization to take marine mammals by Level A harassment was not requested by the MBNMS and such takes will not be authorized by NMFS.

The MBNMS anticipates permitting up to 10 fireworks events annually. Based on previous monitoring data and unpublished aerial survey data from the NMFS Southwest Fisheries Science Center (Lowry 2001, 2012, 2013), the maximum count of marine mammals, by species, was used for each site to identify potential take numbers; therefore, the amount of take is considered conservative. In total, 10 fireworks displays could take up to 3,983 California sea lions and 570 harbor seals, annually. The number of California sea lion takes increased from the proposed rule due to updating the maximum number of observed sea lions at the Santa Cruz/Soquel location from 190 to 363.

Table 1. Estimated Potential Incidental Take per Year by Display Area Based on Data Collected During Previous Monitoring Events.

Display Location	Time of Year	Estimated maximum number of events per year	Maximum number of animals present per event (total)	
			California sea lions	Harbor seals
Half Moon Bay	July	1	100	65
Santa Cruz/Soquel	October	1	363*	5
Santa Cruz/Seacliff State Beach	May	1	5	50
North Monterey Bay	July	1	190	50
South Monterey Bay	January	1	800	60
South Monterey Bay	July	1	1500	60
South Monterey Bay	variable	1	800	60
Pacific Grove	July	1	150	100
Cambria (Public)	July	1	50	60
Cambria (Private)	July	1	25	60
Total		10	3983*	570

*The number of California sea lion takes increased from the proposed rule due to updating the number of observed sea lions at the Santa Cruz/Soquel location from 190 to 363.

Mitigation

In order to issue an ITA under section 101(a)(5)(A) of the MMPA, NMFS must set forth the permissible methods of taking pursuant to such activity and other means of effecting the least practicable adverse impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stock for subsistence uses. NMFS's implementing regulations require applicants for ITAs to include information about the availability and feasibility (economic and technological) of equipment, methods, and manner of conducting such activity or other means of effecting the

least practicable adverse impact upon the affected species or stocks and their habitat (50 CFR 216.104(a)(11)).

The MBNMS and NMFS worked to craft a set of mitigation measures designed to minimize the impacts of fireworks displays on the marine environment, as well as to outline the locations, frequency, and conditions under which the MBNMS would authorize marine fireworks displays. These mitigation measures, which were successfully implemented under previous NMFS-issued ITAs, include four broad approaches for managing fireworks displays. Note previous ITAs allowed for take incidental to 20 fireworks displays per year while this rule anticipates that only 10 firework displays would occur annually.

- Establish a sanctuary-wide seasonal prohibition to safeguard pinniped reproductive periods. Fireworks events would not be authorized between March 1 and June 30 of any year when the primary reproductive season for pinnipeds occurs.
- Establish four conditional display areas and prohibit displays along the remaining 95 percent of sanctuary coastal areas. Display areas are located adjacent to urban centers where wildlife is often subject to frequent human disturbances. Remote areas and areas where professional fireworks have not traditionally been conducted would not be considered for fireworks display approval. The conditional display areas (described in our notice of proposed rulemaking (81 FR 14184; March 17, 2017)) are located at Half Moon Bay, the Santa Cruz/Soquel area, the northeastern Monterey Peninsula, and Cambria (Santa Rosa Creek).
- Displays would be authorized at an average frequency equal to or less than one every 2 months in each area with a total maximum of 10 displays per year across all four areas.
- Fireworks displays would not exceed 30 minutes with the exception of two longer displays per year across all four areas that will not exceed 1 hour.

- Implement a ramp-up period, wherein salutes are not allowed in the first five minutes of the display;
- Conduct a post-show debris cleanup for up to two days whereby all debris from the event is removed.

These mitigation measures are designed to prevent an incremental proliferation of fireworks displays and disturbance throughout the sanctuary and minimize area of impact by confining displays to primary traditional use areas. They also effectively remove fireworks impacts from 95 percent of the Sanctuary's coastal areas, place an annual quota and multiple conditions on the displays authorized within the remaining five percent of the coast, and impose a sanctuary-wide seasonal prohibition on all fireworks displays. These measures were developed to assure the least practicable adverse impact to marine mammals and their habitat.

NMFS has carefully evaluated MBNMS's mitigation measures in the context of ensuring that NMFS prescribes the means of effecting the least practicable adverse impact on the affected marine mammal species and stocks and their habitat. Our evaluation of potential measures included consideration of the following factors in relation to one another: (1) the manner in which, and the degree to which, the successful implementation of the measure is expected to minimize adverse impacts to marine mammals; (2) the proven or likely efficacy of the specific measure to minimize adverse impacts as planned; and (3) the practicability of the measures for applicant implementation.

Based on our evaluation of the applicant's planned measures, as well as other measures considered by NMFS, NMFS has determined that the mitigation measures provide the means of effecting the least practicable adverse impact on marine mammals species or stocks and their

habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance.

Monitoring and Reporting

In order to issue an ITA for an activity, section 101(a)(5)(A) of the MMPA states that NMFS must, where applicable, set forth “requirements pertaining to the monitoring and reporting of such taking.” The MMPA implementing regulations at 50 CFR 216.104(a)(13) indicate that requests for ITAs must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present in the planned action area.

Monitoring measures prescribed by NMFS should accomplish one or more of the following general goals:

1. An increase in the probability of detecting marine mammals, both within the mitigation zone (thus allowing for more effective implementation of the mitigation) and in general to generate more data to contribute to the analyses mentioned below;
2. An increase in our understanding of how many marine mammals are likely to be exposed to fireworks that we associate with specific adverse effects, such as behavioral harassment;
3. An increase in our understanding of how marine mammals respond to stimuli expected to result in take and how anticipated adverse effects on individuals (in different ways and to varying degrees) may impact the population, species, or stock (specifically through effects on annual rates of recruitment or survival) through any of the following methods:

- Behavioral observations in the presence of stimuli compared to observations in the absence of stimuli (need to be able to accurately predict received level, distance from source, and other pertinent information);
- Physiological measurements in the presence of stimuli compared to observations in the absence of stimuli (need to be able to accurately predict received level, distance from source, and other pertinent information);
- Distribution and/or abundance comparisons in times or areas with concentrated stimuli versus times or areas without stimuli;

4. An increased knowledge of the affected species; and

5. An increase in our understanding of the effectiveness of certain mitigation and monitoring measures.

The MBNMS will conduct a pre-event and post-event census of local marine mammal populations within the fireworks detonation area, including a report identifying if any injured or dead marine mammals are observed during the post-event census. For the pre-event census, counts should be made as close to the start of the display as possible, with at least one count the day before the display and, if possible, another within 30 minutes of the fireworks display. For the post-event census, counts should occur in conjunction with beach clean-ups the day following the fireworks display. NMFS has worked with the MBNMS to develop an observer reporting form so that data are standardized across events. Reported data include number of individuals, by species, observed prior to display; behavioral observations (if observed during display); number of individuals, by species, observed after the fireworks event; any observed injured or dead animal; and fireworks event details (*e.g.*, start and end time).

The MBNMS must submit a draft annual monitoring report to NMFS within 60 days after the conclusion of the calendar year. MBNMS must submit a final annual monitoring report to NMFS within 30 days after receiving comments from NMFS on the draft report. If NMFS has no comments, the draft report will be considered to be the final report. In addition, the MBNMS will continue to make its information available to other marine mammal researchers upon request.

Summary of Previous Monitoring

A detailed description of MBNMS's previous monitoring was provided in our notice of proposed rulemaking (81 FR 14184; March 17, 2017) and is not repeated here. No changes have been made to the specified activities described therein.

Changes to the Proposed Regulations

As a result of clarifying discussions with MBNMS, we made certain changes to the proposed regulations as described here. These changes are considered minor and do not affect any of our preliminary determinations.

NMFS updated the monitoring requirements to state that pre-event census surveys will occur the day before the fireworks display and, if possible, within 30 minutes of the fireworks in order to get a realistic number of marine mammals that may be affected by the authorized activity (*e.g.*, fireworks noise and lights).

NMFS updated the take estimate for California sea lions from 3,810 to 3,983 because the maximum number of sea lion observations at the Santa Cruz/Soquel area were 363 animals, not 190 animals as previously noted in the proposed rule.

Negligible Impact Analysis and Determination

NMFS has defined negligible impact 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 (50 CFR 216.103). A negligible impact finding is based on the lack of likely adverse effects on annual rates of recruitment or survival (*i.e.*, population-level effects). An estimate of the number of takes, alone, is not enough information on which to base an impact determination. In addition to considering the authorized number of marine mammals that might be “taken” through harassment, NMFS considers other factors, such as the likely nature of any responses (*e.g.*, intensity, duration), the context of any responses (*e.g.*, critical reproductive time or location, migration, etc.), as well as effects on habitat, the status of the affected stocks, and the likely effectiveness of the mitigation. Consistent with the 1989 preamble for NMFS’s implementing regulations (54 FR 40338; September 29, 1989), the impacts from other past and ongoing anthropogenic activities are incorporated into these analyses via their impacts on the environmental baseline (*e.g.*, as reflected in the regulatory status of the species, population size and growth rate where known, ongoing sources of human-caused mortality, or ambient noise levels). In making a negligible impact determination, NMFS considers the following:

- (1) The number of anticipated injuries, serious injuries, or mortalities;
- (2) The number, nature, and intensity, and duration of Level B harassment (all relatively limited);
- (3) The context in which the takes occur (*i.e.*, impacts to areas of significance, impacts to local populations, and cumulative impacts when taking into account successive/contemporaneous actions when added to baseline data);
- (4) The status of stock or species of marine mammals (*i.e.*, depleted, not depleted, decreasing, increasing, stable, impact relative to the size of the population);

(5) Impacts on habitat affecting rates of recruitment/survival; and

(6) The effectiveness of monitoring and mitigation measures.

Past monitoring by the MBNMS has identified at most only a short-term behavioral disturbance of animals by fireworks displays, with the causes of disturbance being sound effects and light flashes from exploding fireworks. Any takes would be limited to the temporary incidental harassment of California sea lions and harbor seals due to evacuation of usual and accustomed haul-out sites, for as little as 15 minutes and as much as 15 hours, following any fireworks event. Most animals depart affected haul-out areas at the beginning of the display and return to previous levels of abundance within 4 to 15 hours following the event.

NMFS has determined that the fireworks displays, as described in this document and in MBNMS's application, will result in no more than Level B harassment of small numbers of California sea lions and harbor seals. The effects of coastal fireworks displays are typically limited to short term and localized changes in behavior, including temporary departures from haul-outs to avoid the sight and sound of commercial fireworks. Fireworks displays are limited in duration by MBNMS authorization requirements and would not occur on consecutive days at any fireworks site in the sanctuary. The mitigation measures planned by MBNMS – and implemented as a component of NMFS's incidental take authorizations since 2005 – would further reduce potential impacts. As described previously, these measures ensure that authorized fireworks displays avoid times of importance for breeding, as well as limiting displays to 5 percent of sanctuary coastline that is already heavily used by humans, and generally limiting the overall amount and intensity of activity. No take by injury, serious injury, or mortality is anticipated, and takes by Level B harassment would be at the lowest level practicable due to incorporation of the mitigation measures described previously in this document.

Based on the analysis contained herein of the likely effects of the specified activity on marine mammals and their habitat, and taking into consideration the implementation of the planned monitoring and mitigation measures, NMFS preliminarily finds that the total marine mammal take from the planned activity will have a negligible impact on all affected marine mammal species or stocks.

Small Numbers

As noted above, only small numbers of incidental take may be authorized under Section 101(a)(5)(A) of the MMPA for specified activities other than military readiness activities. The MMPA does not define small numbers and so, in practice, NMFS compares the number of individuals taken to the most appropriate estimation of the relevant species or stock size in our determination of whether an authorization is limited to small numbers of marine mammals. Here, NMFS authorizes the take of up to 3,983 California sea lion and 570 harbor seal, annually, incidental to fireworks displays permitted by the MBNMS. As described in the *Description of Marine Mammals in the Area of the Specified Activity* section, the population estimate for the California sea lions is 296,750 individuals while the harbor seal population estimate is 30,968 individuals. Therefore, the taking represents 1.3 and 1.8 percent of each stock, respectively.

Based on the analysis of the planned activity contained herein (including the planned mitigation and monitoring measures) and the anticipated take of marine mammals, NMFS finds that small numbers of marine mammals will be taken relative to the population size of the affected species or stocks.

Unmitigable Adverse Impact Analysis and Determination

There are no relevant subsistence uses of marine mammals implicated by this action. Therefore, NMFS has determined that the total taking of affected species or stocks would not

have an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence purposes.

Adaptive Management

The regulations governing the take of marine mammals incidental to commercial fireworks authorized by the MBNMS would contain an adaptive management component.

The reporting requirements associated with this rule are designed to provide NMFS with monitoring data from the previous year to allow consideration of whether any changes are appropriate. The use of adaptive management allows NMFS to consider new information from different sources to determine (with input from the MBNMS regarding practicability), on an annual or biennial basis, if mitigation or monitoring measures should be modified (including additions or deletions). Mitigation measures could be modified if new data suggests that such modifications would have a reasonable likelihood of reducing adverse effects to marine mammals and if the measures are practicable.

The MBNMS's monitoring program (see *Monitoring and Reporting*) would be managed adaptively. Changes to the proposed monitoring program may be adopted if they are reasonably likely to better accomplish the MMPA monitoring goals described previously or may better answer the specific questions associated with the MBNMS's monitoring plan.

The following are some of the possible sources of applicable data to be considered through the adaptive management process: (1) results from monitoring reports, as required by MMPA authorizations; (2) results from general marine mammal and sound research; and (3) any information which reveals that marine mammals may have been taken in a manner, extent, or number not authorized by these regulations or subsequent LOAs.

Endangered Species Act (ESA)

The MBNMS has not requested, nor is NMFS proposing to authorize, take of marine mammals listed as threatened or endangered under the ESA in these regulations. Therefore, we have determined that section 7 consultation under the ESA is not required.

National Environmental Policy Act

Issuance of an MMPA authorization requires compliance with NEPA. NMFS will pursue categorical exclusion (CE) status under NEPA for this action. As such, we have determined the issuance of the proposed IHA is consistent with categories of activities identified in CE B4 of the Companion Manual for NAO 216-6A and we have not identified any extraordinary circumstances listed in Chapter 4 of the Companion Manual for NAO 216-6A that would preclude this categorical exclusion. NMFS has prepared a CE memorandum for the record.

Classification

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

Pursuant to section 605(b) of the Regulatory Flexibility Act (RFA), the Chief Counsel for Regulation of the Department of Commerce has certified to the Chief Counsel for Advocacy of the Small Business Administration at the proposed rule stage that this rule will not have a significant economic impact on a substantial number of small entities. The factual basis for the certification was published in the proposed rule and is not repeated here. No comments were received regarding this certification. As a result, a regulatory flexibility analysis is not required and none has been 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 (COI) subject to the requirements of the Paperwork Reduction Act (PRA) unless that COI displays a

currently valid OMB control number. This final rule does not contain a COI requirement subject to the provisions of the PRA because the applicant is a Federal agency.

The Assistant Administrator for Fisheries has determined that there is a sufficient basis under the Administrative Procedure Act (APA) to waive the 30-day delay in the effective date of the measures contained in the final rule. Section 553 of the APA provides that the required publication or service of a substantive rule shall be made not less than 30 days before its effective date with certain exceptions, including (1) for a substantive rule that relieves a restriction or (2) when the agency finds and provides good cause for foregoing delayed effectiveness. 5 U.S.C 553(d)(1), (d)(3). Here, the issuance of regulations under section 101(a)(5)(A) of the MMPA is a substantive action that relieves the restriction on MBNMS' taking of marine mammals incidental to commercial fireworks displays. In addition, good cause exists for waiving the delay in effective date because such a delay would result in a suspension of planned Independence Day fireworks displays, thereby disrupting community traditions that have great societal and economic importance, which would be contrary to the public interest. Finally, the MBNMS has informed NMFS that it does not require 30 days to prepare for implementation of the regulations and requests that this final rule take effect on or before July 4, 2017. For these reasons, the subject regulations will be made immediately effective upon publication.

List of Subjects in 50 CFR Part 217

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

Dated: June 8, 2017.

Alan D. Risenhoover,

Acting Deputy Assistant Administrator for Regulatory Programs,

National Marine Fisheries Service.

For reasons set forth in the preamble, NMFS amends 50 CFR part 217 as follows:

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

1. The authority citation for part 217 continues to read as follows:

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

2. Revise subpart B is to read as follows:

Subpart B--Taking of Marine Mammals Incidental to Commercial Fireworks Displays

Sec.

217.11 Specified activity and specified geographical region.

217.12 Effective dates.

217.13 Permissible methods of taking.

217.14 Prohibitions.

217.15 Mitigation requirements.

217.16 Requirements for monitoring and reporting.

217.17 Letters of Authorization.

217.18 Renewals and modifications of Letters of Authorization.

Subpart B--Taking of Marine Mammals Incidental to Commercial Fireworks Displays

§ 217.11 Specified activity and specified geographical region.

(a) Regulations in this subpart apply only to the Monterey Bay National Marine Sanctuary (MBNMS) and those persons it authorizes to display fireworks within the MBNMS for the taking of marine mammals that occurs in the area described in paragraph (b) of this section and that occurs incidental to authorization of commercial fireworks displays.

(b) The taking of marine mammals by MBNMS may be authorized in a Letter of Authorization (LOA) only if it occurs in the MBNMS.

§ 217.12 Effective dates.

Regulations in this subpart are effective from July 4, 2017, through July 3, 2022.

§ 217.13 Permissible methods of taking.

(a) Under LOAs issued pursuant to § 216.106 of this chapter and § 217.17, the Holder of the LOA (hereinafter “MBNMS”) may incidentally, but not intentionally, take California sea lions (*Eumatopias jubatus*) and harbor seals (*Phoca vitulina*) within the area described in § 217.11(b), provided the activity is in compliance with all terms, conditions, and requirements of the regulations in this subpart and the appropriate LOA.

(b) [Reserved]

§ 217.14 Prohibitions.

Notwithstanding takings contemplated in § 217.11 and authorized by an LOA issued under § 216.106 of this chapter and § 217.17, no person in connection with the activities described in § 217.11 may:

- (a) Violate, or fail to comply with, the terms, conditions, and requirements of this subpart or an LOA issued under § 216.106 of this chapter and § 217.17;
- (b) Take any marine mammal not specified in such LOAs;

- (c) Take any marine mammal specified in such LOAs other than by incidental, unintentional Level B harassment;
- (d) Take a marine mammal specified in such LOAs if such taking results in more than a negligible impact on the species or stocks of such marine mammal; or
- (e) Take a marine mammal specified in such LOAs if NMFS determines such taking results in an unmitigable adverse impact on the availability of such species or stocks for taking for subsistence purposes.

§ 217.15 Mitigation requirements.

(a) When conducting the activities identified in § 217.11(a), the mitigation measures contained in any LOA issued under § 216.106 of this chapter and § 217.17 must be implemented.

These mitigation measures include but are not limited to:

- (1) Limiting the location of the authorized fireworks displays to the four specifically designated areas at Half Moon Bay, the Santa Cruz/Soquel area, the northeastern Monterey Breakwater, and Cambria (Santa Rosa Creek);
- (2) Limiting the frequency of authorized fireworks displays to no more than an average frequency of less than or equal to once every two months in each of the four prescribed areas;
- (3) Limiting the duration of authorized individual fireworks displays to no longer than 30 minutes each, with the exception of two longer shows per year across all four areas not to exceed 1 hour;
- (4) Prohibiting fireworks displays at MBNMS between March 1 and June 30 of any year; and
- (5) Continuing to implement authorization requirements and general and special restrictions for each event, as determined by MBNMS. Standard requirements include, but are

not limited to, the use of a ramp-up period, wherein salutes are not allowed in the first five minutes of the display; the removal of plastic and aluminum labels and wrappings from fireworks; and post-show reporting and cleanup. MBNMS shall continue to assess displays and restrict the number of aerial salute effects on a case-by-case basis, and shall implement general and special restrictions unique to each fireworks event as necessary.

(b) [Reserved]

§ 217.16 Requirements for monitoring and reporting.

(a) MBNMS is responsible for ensuring that all monitoring required under an LOA is conducted appropriately, including, but not limited to:

(1) Counts of pinnipeds in the impact area prior to and after all displays. For the pre-event census, counts should be made as close to the start of the display as possible, with at least one conducted the day before the display and, if possible, another within 30 minutes of the fireworks display. For the post-census, counts should occur in conjunction with beach clean-ups the day following the fireworks display; and

(2) Reporting to NMFS of all marine mammal injury, serious injury, or mortality encountered during debris cleanup the morning after each fireworks display.

(b) Unless specified otherwise in the LOA, MBNMS must submit a draft annual monitoring report to the Director, Office of Protected Resources, NMFS, no later than 60 days after the conclusion of each calendar year. This report must contain:

(1) An estimate of the number of marine mammals disturbed by the authorized activities; and

(2) Results of the monitoring required in paragraph (a) of this section, and any additional information required by the LOA. A final annual monitoring report must be submitted to NMFS

within 30 days after receiving comments from NMFS on the draft report. If no comments are received from NMFS, the draft report will be considered to be the final annual monitoring report.

(c) A draft comprehensive monitoring report on all marine mammal monitoring conducted during the period of these regulations must be submitted to the Director, Office of Protected Resources, NMFS at least 120 days prior to expiration of these regulations. A final comprehensive monitoring report must be submitted to the NMFS within 30 days after receiving comments from NMFS on the draft report. If no comments are received from NMFS, the draft report will be considered to be the final comprehensive monitoring report.

§ 217.17 Letters of Authorization.

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

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

(c) In the event of projected changes to the activity or to mitigation and monitoring measures required by an LOA, the MBNMS must apply for and obtain a modification of the LOA as described in § 217.18.

(d) The LOA shall set forth:

- (1) The number of marine mammals, by species, authorized to be taken;
- (2) Permissible methods of incidental taking;
- (3) Means of effecting the least practicable adverse impact (*i.e.*, mitigation) on the species, its habitat, and on the availability of the species for subsistence uses; and
- (4) Requirements for monitoring and reporting.

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

(f) Notice of issuance or denial of an LOA shall be published in the **Federal Register** within 30 days of a determination.

§ 217.18 Renewals and modifications of Letters of Authorization.

(a) An LOA issued under § 216.106 of this chapter and § 217.17 for the activity identified in § 217.11(a) shall be renewed or modified upon request by the applicant, provided that:

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

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

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

(c) An LOA issued under §§ 217.106 and 217.17 for the activity identified in § 217.11(a) may be modified by NMFS under the following circumstances:

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

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

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

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

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

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

(2) *Emergencies.* If NMFS determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals specified in an LOA issued pursuant to § 216.106 of this chapter and § 217.17, an LOA may be modified without prior notice or opportunity for public comment. The Notice would be published in the **Federal Register** within 30 days of the action.

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