during night hours, an airplane may be operated clear of clouds if operated in an airport traffic pattern within one-half mile of the runway.

Issued in Washington, DC, on September 25, 1989.

James B. Busey,

Administrator.

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federal register

Friday
September 29, 1989

Part IX

Department of Health and Human Services

Office of Human Development Services

Administration for Native Americans; Availability of Financial Assistance; Notice

DEPARTMENT OF HEALTH AND HUMAN SERVICES

Office of Human Development Services

[Program Announcement No. 13612-902]

Administration for Native Americans; Availability of Financial Assistance

AGENCY: Administration for Native Americans (ANA), Office of Human Development Services (OHDS), HHS.

ACTION: Announcement of availability of competitive financial assistance for Alaskan Native social and economic development projects.

SUMMARY: The Administration for Native Americans announces the anticipated availability of fiscal year 1990 funds for social and economic development projects. Financial assistance provided by ANA is designed to strengthen the self-sufficiency of Alaskan Natives through the support of both social and economic development projects and the strengthening of local governance capabilities.

DATES: The closing dates for receipt of applications are February 2, 1990, and May 18, 1990.

FOR FURTHER INFORMATION CONTACT: Ted George (206) 442-0992 or Robert Kreidler (206) 442-8113, Administration for Native Americans, Office of Human Development Services, Department of Health and Human Services, 2201 6th Avenue, Mail Stop RX-34, Seattle, Washington 98121.

SUPPLEMENTARY INFORMATION

A. Introduction and Program Purpose

The purpose of this program announcement is to announce the anticipated availability of fiscal year 1990 financial assistance to promote self-sufficiency for Alaskan Natives through support of local governance, social and economic development projects. Funds will be awarded under section 803(a) of the Native American Programs Act of 1974, as amended, Public Law 93-644, 88 Stat. 2324, 42 U.S.C. 2991b.

Proposed projects will be reviewed on a competitive basis against the evaluation criteria in this announcement.

The purpose of the financial assistance provided by ANA under the Native American Programs Act (the Act) is to promote social and economic self-sufficiency for American Indians, Alaska Natives, Native Hawaiians, and Native American Pacific Islanders (American Samoan Natives and indigenous peoples of Guam and the Commonwealth of the Northern Mariana Islands).

ANA believes that responsibility for achieving self-sufficiency rests with the governing bodies of Indian tribes and Alaskan Native villages and in the leadership of Native American groups. The development of self-sufficiency requires strengthening governmental responsibilities, economic progress, and improvement of social systems which protect and enhance the health and well-being of individuals, families and communities.

Achievement of self-sufficiency is based on the community's ability to plan, organize, and direct resources in a comprehensive manner to achieve long-range community goals. ANA bases its program and policy initiatives on the following three program goals:

(1) *Governance:* to assist tribal and village governments, Native American institutions, and local leadership to exercise local control and make decisions over their resources;

(2) *Economic Development:* to foster the development of stable, diversified local economies and economic activities which will provide jobs, promote economic well-being, and reduce dependency on public funds and social services; and

(3) *Social Development:* to support local access to, control of, and coordination of services and programs which safeguard the health and well-being of people, and which are essential to a thriving and self-sufficient community.

To accomplish these goals, ANA supports tribal and village governments and other Native American organizations in the development and implementation of community-based, long-term governance and social and economic development strategies (SEDS) aimed at promoting the self-sufficiency of their own communities. This approach is based on two fundamental principles:

(1) The local community and its leadership are responsible for determining their own goals, setting priorities, and planning and implementing programs aimed at achieving those goals; the unique mix of socio-economic, political, and cultural factors involved in each community makes such self-determination necessary; the local community is in the best position to apply its own cultural, political, and socio-economic values in deciding on long-term strategies and programs; and

(2) Economic and social development are interrelated, and development in one area should be balanced with development in the other in order to enhance self-sufficiency. Without a careful balance of the two, the community's development efforts may be jeopardized. Expansion of social services, without providing opportunities for employment and economic development, may lead to greater dependency. Conversely, inadequate social services can seriously impede productivity and economic development.

B. Proposed Projects to be Funded

The fundamental task which Native American communities face is developing enduring social and economic strategies in keeping with local goals, resources, and cultural values. ANA is interested in assisting communities in the implementation of projects that are a part of long-range strategies to achieve social and economic self-sufficiency. ANA expects its applicants to have undertaken a long-range planning process that addresses the community's development and encourages social and economic growth for the community. Such long-range planning must consider the maximum use of available resources, directing those resources at opportunities and addressing issues that hinder progress.

ANA encourages applicants to consider innovative approaches to achieve the specific governance and social and economic goals of the community, and to use non-ANA resources including human, natural, and financial ones to strengthen and broaden the proposed project's impact in the community.

All projects funded by ANA must be completed, self-sustaining, or supported with other than ANA funds at the end of the project period. ANA's funding of specific projects is not for those programs which operate indefinitely or have need for ANA funding on a recurring basis.

Goal 1: Governance

Effective governance is a necessary foundation and condition for social and economic development of Indian tribes, Alaskan Native villages, and Native American groups. Efforts to achieve effective governance include (1) strengthening the effectiveness of tribal and village governments; (2) increasing the ability of tribes, villages and Native American groups and organizations to plan, develop, and administer a comprehensive program supportive of community social and economic self-sufficiency; and (3) increasing awareness of the legal rights and benefits to which Native Americans are entitled, either by virtue of treaties, the

Federal trust relationship, legislative authority, or as citizens of a particular state or of the United States.

Under the governance goal, ANA strongly encourages tribal and village councils and other governing bodies to create, strengthen, improve, and streamline their institutional management in order to develop and implement social and economic development strategies and to improve the day-to-day management of programs. By improving such capabilities, Indian Tribes, Alaskan villages and Native American groups can better define, control, and achieve the goals of their people and promote greater efficiency and effectiveness in the use of available resources.

Goal 2: Economic Development

Economic development is the long-term mobilization and management of economic resources to achieve a diversified economy characterized by widespread distribution of economic resources, services, and benefits; participation of community members in the productive activities and economic investments of the community; and pursuit of economic interests in ways that balance economic gain with social development.

Goal 3: Social Development

Social development is the mobilization and management of resources for the social benefit of community members, and involves the establishment of institutions, systems, and practices that contribute to the social environment desired by the community. This includes the development of, access to, and local control over the institutions that protect the health and welfare of individuals and families, and that preserve the values, language, and culture of the community.

Building on the foundation of strong local governance, ANA supports tribal and village governments' and other Native American organizations' efforts to achieve coordinated and balanced development and implementation of social and economic development strategies. These interrelated strategies should coordinate and direct all resources, Federal and non-Federal, toward locally determined priorities, and affect the community and its members in ways that promote greater economic and social self-sufficiency. In addition, these combined strategies should provide an independent source of revenue to the community which will assist the applicant in decreasing dependency on public funds.

Alaska Initiative

Based on the three ANA goals, in fiscal year 1984, ANA implemented a special Alaska social and economic development initiative. The purpose of this special effort was to provide financial assistance at the village level, or for village-specific projects aimed at improving a village's social and economic development. This program announcement continues to implement this initiative. ANA sees both the nonprofit and for-profit corporations in Alaska as being able to play an important supportive role in assisting individual villages to develop and implement their own locally determined strategies which take advantage of the opportunities afforded to Alaskan Natives under the Alaska Native Claims Settlement Act (ANCSA), Public Law 92–202.

Examples of the types of projects that ANA is seeking to fund include, but are not limited to, projects that will:

Governance

- Initiate a demonstration program at a regional level to allow Native people to become involved in developing strategies to maintain and develop their economic subsistence base.
- Assist villages in developing land use capabilities and skills in the areas of land and natural resource management, resource assessment and development, and studies of the potential impact of land use upon the environment and the subsistence ecology.
- Assist village consortia in the development of tribal constitutions, codes, and court systems.
- Develop agreements between the State and villages that transfer programs, jurisdictions, and/or control to Native entities.
- Strengthen village government control of land management, including land protection.
- Develop tribal courts, adoption codes, and/or related comprehensive children's codes.
- Assist in status clarification for traditional councils.
- Initiate village level mergers between village councils and village corporations.
- Develop Regional IRAs (Indian Reorganization Act of 1934) and village consortia, in order to maximize tribal government resources, i.e., to develop model codes, tribal court systems, governance structures, and organic documents.

Economic Development

- Assist villages to develop businesses and industries which (1) use local materials, (2) create jobs for Alaskan Natives, (3) are capable of high productivity at a small scale of operation, and (4) complement traditional and necessary seasonal activities.
- Substantially increase and strengthen efforts to establish and improve the village and regional infrastructure and the capabilities to develop and manage resources in a highly competitive cash-economy system.
- Assist villages or consortia of villages in developing subsistence compatible industries that will retain local dollars in villages, reducing dependency on State and Federal subsidies.
- Assist in new or expanded Native businesses.
- Assist villages in labor export, i.e., people leaving the local communities for seasonal work and returning to their communities.
- Consider strategies and plans to protect against, monitor, and assist when catastrophic events occur, such as the current oil spill.

Social Development

- Assist villages in developing programs to deliver needed social services.
- Assist in developing training and education programs for those jobs in education, government, and health usually found in local communities; and to work with the various agencies to encourage job replacement of non-Natives by Natives.
- Coordinate land use planning with village corporations and city government.
- Develop local models related to comprehensive planning and delivery of social services.
- Develop new service programs established with ANA funds and funded for continued operation by local communities or the private sector.
- Develop or coordinate activities with State-funded projects, in decreasing the incidences of child abuse and neglect, fetal alcohol syndrome, or Native suicides.
- Assist in obtaining licenses to provide housing or related services for State or local governments.
- Assist villages to determine the viability of a business that could provide relief for caretakers needing respite from demanding care work.

C. Eligible Applicants

The following are eligible to apply for a grant award under this program announcement:

• Current ANA grantees in Alaska funded under section 803(a) of the Native American Programs Act with a project period ending in Fiscal Year 1990 (October 1, 1989–September 30, 1990);

• Alaskan Native villages as defined in the Alaska Native Claims Settlement Act (ANCSA) and/or nonprofit village consortia;

• Nonprofit Alaskan Native Regional Associations in Alaska with village specific projects;

• Nonprofit Native organizations in Alaska with village specific projects; and

• Nonprofit Alaskan Native community entities or tribal governing bodies (IRA or traditional councils) as recognized by the Bureau of Indian Affairs.

Although for-profit Regional Corporations established under ANCSA are not eligible applicants, individual villages and Indian communities are encouraged to use the for-profit corporations as subcontractors and to collaborate with them in joint-venture projects for promoting social and economic self-sufficiency. ANA encourages the for-profit corporations to assist the villages in developing applications and to participate as subcontractors in the project.

This program announcement does not apply to current grantees with multi-year projects when applying for continuation funding for their second or third budget periods.

D. Available Funds

Approximately $1.5 million of financial assistance is expected to be available under this program announcement.

Funding Guidance: ANA plans to award approximately 15–18 grants under this announcement. For individual village projects, the funding level for a budget period of 12 months will be up to $100,000; for regional nonprofit and village consortia, the funding level for a budget period is up to $150,000, commensurate with approved multi-village objectives. This program announcement is being issued in anticipation of appropriation of the necessary funds and is contingent upon that appropriation.

Each applicant is eligible to receive no more than one grant award under this announcement.

E. Multi-Year projects

Applicants may apply for projects of up to 36 months duration. A multi-year project, one extending more than 12 months, affords grantees the opportunity to undertake more complex and in-depth projects than can be completed in one year. Applicants are encouraged to develop multi-year projects. However, applicants should note that a multi-year project is a project on a single theme that requires more than 12 months to complete. It is not a series of unrelated projects presented in chronological order over a three year period. Funding after the first budget period of a multi-year project is non-competitive.

The budget period for each multi-year project grant will be 12 months. The non-competitive funding for the second and third years will depend upon the grantee's progress in achieving the objectives of the project according to the approved work plan, the availability of Federal funds, and compliance with applicable statutory, regulatory, and grant requirements.

F. Grantee Share of Project

Grantees must provide at least 20 percent of the total approved cost of the project, which may be cash or in-kind contributions. The total approved cost of the project is the sum of the Federal share and the non-Federal share. The method to compute the non-Federal share is shown in the Application Kit. An itemized budget detailing the applicant's non-Federal share and its source must be included in the application. A request for a waiver of the non-Federal share requirement may be submitted in accordance with 45 CFR 1336.50(b)(3) of the Native American Program Regulations.

G. Intergovernmental Review of Federal Programs

This program is not covered by Executive Order 12372.

H. The Application Process

Availability of Application Forms

In order to be considered for a grant under this program announcement, an application must be submitted on the forms supplied and in the manner prescribed by ANA. The application kits containing the necessary forms may be obtained from:

Administration for Native Americans, Office of Human Development Services, DHHS, 2201 6th Avenue, Mail Stop RX–34, Seattle, Washington 98121, Attention: No. 13612–902, (206) 442–0992.

Application Submission

One signed original and two copies of the grant application, including all attachments, must be hand delivered or mailed to:

Department of Health and Human Services, Office of Human Development Services, Discretionary Grants Management Branch, 2201 6th Avenue, Mail Stop RX–31, Seattle, Washington 98121, ATTENTION: ANA 13612–902.

Do Not Submit the Application to Washington, DC.

The application shall be signed by an individual authorized to act for the applicant village or organization and to assume the applicant's obligations under the terms and conditions of the grant award, including Native American Program statutory and regulatory requirements.

Application Consideration

The Commissioner of the Administration for Native Americans determines the final action to be taken with respect to each grant application received under this announcement.

The factors discussed below should be taken into consideration by all applicants:

• Incomplete applications and applications that do not conform to this announcement will not be accepted for review. Applicants will be notified in writing of any such determination by ANA.

• Complete applications that conform to all the requirements of this program announcement are subjected to a competitive review and evaluation process. An independent review panel evaluates each application against the published criteria. The results of this review assist the Commissioner in making final funding decisions.

• The Commissioner's decision takes into account the comments of the ANA staff, State and Federal agencies having performance related information, and other interested parties.

• The Commissioner makes grant awards consistent with the purpose of the Act, all relevant statutory and regulatory requirements, this Program Announcement, and the availability of funds.

• After the Commissioner has made decisions on all applications, unsuccessful applicants will be notified in writing within approximately 120 days of the closing date. Successful applicants are notified through an official Financial Assistance Award (FAA). The award will state the amount of Federal funds awarded, the purpose of the grant, the terms and conditions of the grant award, the effective date of the award, the project period, the budget period, and the amount of the non-Federal matching share requirement.

I. Review Process and Criteria

Applications submitted in a timely manner under this program

announcement will undergo a pre-review to determine:

- That the applicant is eligible in accordance with the Eligible Applicant Section of this announcement;
- That the application proposes project objectives which are responsive to the Program Announcement; and
- That the application materials submitted are sufficient to allow the panel to undertake an in-depth evaluation. All required materials and forms are listed in the Grant Application Checklist in the Application Kit.

Applications which pass the pre-review will be evaluated and rated by an independent review panel on the basis of five evaluation criteria. These criteria are used to evaluate the quality of a proposed project and to determine its likelihood of success. A proposed project should reflect the purposes of ANA's SEDS philosophy and program goals (as described under "Introduction and Program Purpose" of this announcement) and increase the probability of greater self-sufficiency for a specific tribe or Native American community. The five programmatic and management criteria are closely related to each other and are considered in judging the overall quality of an application. Points will be given only to applications which are responsive to this announcement and these criteria. The five evaluation criteria are set forth below:

(1) Long-Range Goals and Available Resources

(15 points)

(a) The application presents long-range goals, within the context of the community's comprehensive social and economic development goals, which the proposed project addresses. (Inclusion of the community's entire development plan is not necessary.)

(b) Available resources (other than ANA) which will assist and be coordinated with the project are described. These resources may be human, natural or financial, and may include other Federal and non-Federal resources.

(2) Organizational Capabilities and Qualifications

(10 points)

Position descriptions or resumes of key personnel, including those of consultants, are included. Position descriptions specifically describe the job and are clearly related to the project. Resumes indicate that the proposed staff are qualified to carry out the project activities. Either a position description or a resume set forth the qualifications that the applicant believes are necessary for overall quality management.

(3) Project Objectives, Approach and Activities (45 points)

The application proposes specific project objectives and activities. The Objective Work Plan includes project objectives and activities for each budget period proposed and demonstrates that these objectives and activities—

- Are measurable and quantifiable;
- Are based on a fully described and locally determined balanced strategy for governance and for social and economic development;
- Clearly address the community's long-range goals;
- Can be accomplished with available or expected resources during the proposed project period;
- Indicate when the objective and major activities under each objective will be accomplished; and
- Specify who will conduct the activities under each objective.

(4) Results or Benefits Expected. (20 points)

The proposed project will result in specific, measurable outcomes for each objective which will clearly contribute to the overall development of the community and its members. The specific information provided on expected outcomes for each objective is the basis upon which the outcomes can be evaluated at the end of each budget year.

(5) Budget (10 points)

There is a budget for each budget period requested. The budget fully explains and justifies the line items in the budget categories in section B of the Budget Information. Sufficient detail is included to facilitate determination of allowability and relevance to the project. The funds requested are commensurate with the scope of the project. For business development projects, the proposal has demonstrated that the expected return on the funds used to develop the project provides a reasonable profit/benefit ratio within a future specified time frame.

J. Guidance to Applicants

The following points are provided to assist applicants in developing a competitive application.

(1) Program Guidance

- ANA reviewers of applications have indicated they are better able to judge the feasibility and practicality of a proposed economic development project when the applicant has utilized a business plan to discuss the project. ANA has included sample business plans in the application kit. It is strongly suggested that an applicant use these as a guide in the development of an application. The more information given a review panel on a proposed business project, the better able it is to evaluate the potential for success.
- Community Coordination: ANA supports the concept that the key to balanced socio-economic development is the local village. ANA encourages native village governments to coordinate their local plans with other village entities, if any, and especially the city government and the village corporation. In addition, villages are encouraged to make maximum use of regional nonprofit resources, including village-to-regional corporation subcontracts.
- ANA does not fund on the basis of need. ANA funds projects presenting the strongest prospects for fulfilling a community's governance, social or economic development.
- In discussing the problems of the community being addressed in the application, sufficient background and/or history of the community concerning these problems should be included so that the suitability of the proposed project will be understood by reviewers.
- The project proposal must clearly identify in measurable terms the expected results of the project and its positive and continuing impact on the community.
- In the ANA Program Narrative, Section A of the application package, "Resources Available to the Proposed Project," the applicant should address any specific financial circumstances which may impact on the project, such as any monetary or land settlements made to the applicant and any restrictions on the use of those settlements. The specific reasons for seeking ANA funds must be explained when the applicant appears to have other resources to support the proposed project and chooses not to use them.
- Supporting documentation, including testimonials from concerned interests other than the applicant, should be used to provide support for the feasibility of the project.

(2) Technical Guidance.

- The application's Form 424 must be signed by the applicant's representative authorized to act with full authority on behalf of the applicant.
- ANA suggests that the pages of the application be numbered sequentially from the first page. This allows for easy reference during the review process. Simple tabbing of the sections of the application is also helpful to the reviewers.

• Two copies of the application plus the original are required.

• Applicants are encouraged to have someone other than the author apply the evaluation criteria and score the application prior to its submission in order to gain a better sense of the application's quality and potential competitiveness.

• For purposes of developing an application, applicants should plan for a project start date approximately 120 days after the closing date under which the application is submitted.

• ANA will not fund essentially identical projects serving the same constituency.

• ANA will accept only one application from any one applicant. If an eligible applicant sends in two applications, the one with the earlier postmark will be accepted for review unless the applicant withdraws the earlier application.

• An application from a Federally recognized Alaska Native tribal entity must be from the governing body.

• The Cover Page (included in the Kit) should be the first page of an application.

• The Approach page (section B of the ANA Program Narrative) for each objective proposed should be of sufficient detail to become a daily or weekly staff guide of responsibilities should the applicant be funded.

• If a profit-making venture is being proposed, profits must be reinvested in the business in order to decrease or eliminate ANA's future participation. Such revenue must be reported as general program income. A decision will be made at the time of grant award regarding appropriate use of program income. (See 45 CFR part 74 and part 92.)

• Applicants proposing multi-year projects must fully describe annual project objectives and activities. Separate Objective Work Plans (OWP) must be presented for each project year and a separate itemized budget of the Federal and non-Federal costs of the project for each budget period must be included.

• Applicants for multi-year projects must justify the entire time-frame of the project (i.e., why the project needs funding for more than one year) and describe the results to be achieved by the end of each budget period of the total project period.

• The applicant should specify the entire project period length on the first page of the Form 424, Block 13, not the length of the first budget period. Should the application's contents propose one length of project period and the Form 424 specify a conflicting length of project period, ANA will consider the project period specified on the Form 424 as governing.

• Line 15a of the 424 should specify the Federal funds requested for the first Budget Period, not the entire project period.

• Village governments or other applicants without established accounting systems must arrange for qualified, acceptable accounting services prior to release of grant funds.

Note. Subpart H, 45 CFR part 74 and subpart C, 45 CFR part 92 address those elements of a generally acceptable accounting system for Federal grantees. The financial management standards in subparts H and C, for example, include:

(1) Accurate, current and complete disclosure;

(2) Records which show source and application of funds;

(3) Effective control and accountability of funds and property;

(4) Comparison of actual and budgeted amounts;

(5) Procedures to minimize time lapsing between transfer and disbursement of funds;

(6) Procedures to determine allowability and allocating of funds;

(7) Accounting records with source documentation;

(8) Periodic audits; and

(9) A follow-up system.

(3) Projects or Activities that generally will not meet the purposes of this Announcement.

• Projects which support a grantee in providing training and/or technical assistance (T/TA) to other tribes or Native American organizations ("third party T/TA"). However, the purchase of T/TA by a grantee for its own use or for its members' use (as in the case of a consortium), where T/TA is necessary to carry out project objectives, is acceptable.

• The development of feasibility studies, business plans, marketing plans or written materials such as manuals that are not an essential part of the applicant's long-range development plan. ANA is not interested in funding "wish lists" of business possibilities. ANA expects evidence of solid investment of time and thought on the part of the applicant to any development of business plans, etc.

• The provision of direct delivery of social services programs or expansion or continuation of existing social service delivery programs.

• Core administrative functions or other activities that essentially support the applicant's ongoing administrative functions. However, ANA will allow villages which do not have governing systems in place to apply for projects for core administrative capacity-building at the village governmental level.

• Project goals which are not responsive to one or more of the three ANA goals (Governance, Economic Development, Social Development).

• Project plans or strategies that do not meet the needs of the local community.

• Proposals from consortia of tribes that are not specific in regard to support from and roles of member tribes.

• Projects which should be supported by other Federal funding sources appropriate and available for the proposed activity.

• Activities that will not be completed by the end of the project period or that will not be self-sustaining at the end of the project period, including projects that will not be supported by other than ANA funds at the end of the project period.

• Lack of demonstrated coordination with non-ANA resources.

• Lack of a justification or explanation for requesting ANA funds, or a lack of discussion of other resources and revenues for use in the project.

• The purchase of real estate (see 45 CFR 1336.50 (e)) or construction (see HDS Grants Administration Manual Ch. 3, § E.).

• The outright purchase of an existing business or a speculative business development investment purpose (capital venture).

ANA will critically evaluate applications within which the acquisition of major capital equipment (whether oil rigs or computers/word processing equipment), franchises, or the payment of management fees are major components of the Federal share of the budget. During negotiation, such expenditures may be deleted from the budget of an otherwise approved application.

ANA will also critically evaluate projects reflecting heavy reliance on use of outside consultants, especially where consultants have prepared the application and have provided a major role for themselves in the proposed project.

K. Due Date for Receipt of Applications

The closing dates for applications submitted in response to this program announcement are February 2, 1990 and May 18, 1990.

L. Receipt of Applications

Applications must either be hand delivered or mailed.

Deadlines. Applications mailed through the U.S. Postal Service or a

commercial delivery service shall be considered as meeting an announced deadline if they are either:

(1) Received on or before the deadline date at the address specified in the Application Submission Section, or

(2) Sent on or before the deadline date and received in time for the ANA independent review. (Applicants are cautioned to request a legibly dated receipt from a commercial carrier or U.S. Postal Service or a legible postmark date from the U.S. Postal Service. Private metered postmarks shall not be acceptable as proof of timely mailing.)

Late applications. Applications which do not meet the criteria in the above paragraph of this section are considered late applications and will be returned to the applicant. Applications will not be held over for the next closing date. ANA shall notify each late applicant that its application will not be considered in the current competition.

Extension of deadlines. ANA may extend the deadline for all applicants because of acts of God such as floods, hurricanes, etc., or when there is a widespread disruption of the mails. However, if ANA does not extend the deadline for all applicants, it may not waive or extend the deadline for any applicant.

(Catalog of Federal Domestic Assistance Program Number 13.612 Native American Programs)

Dated: August 16, 1989.

Dominic J. Mastrapasqua,

Acting Commissioner, Administration for Native Americans.

Approved: September 20, 1989.

Mary Sheila Gall,

Assistant Secretary for Human Development Services.

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federal register

Friday
September 29, 1989

Part X

Department of the Interior
Fish and Wildlife Service

Department of Commerce
National Oceanic and Atmospheric Administration

50 CFR Parts 18, 228, and 402
Incidental Take of Endangered, Threatened and Other Depleted Marine Mammals; Rule

DEPARTMENT OF THE INTERIOR

Fish and Wildlife Service

DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Parts 18, 228, and 402

RIN 1018-AB05

Incidental Take of Endangered, Threatened and Other Depleted Marine Mammals

AGENCIES: Fish and Wildlife Service (FWS), Interior; National Marine Fisheries Service (NMFS), NOAA, Commerce.

ACTION: Final rule.

SUMMARY: Regulations are issued to implement amendments enacted in 1986 to the Marine Mammal Protection Act of 1972 (MMPA) and Endangered Species Act of 1973 (ESA). These amendments provide a mechanism for allowing certain takings of endangered, threatened and other depleted marine mammals incidental to activities other than commercial fishing operations. Previously, the incidental taking of depleted marine mammals was not allowable under the terms of the MMPA. This rule amends existing procedures governing incidental take authorizations.

EFFECTIVE DATE: October 30, 1989.

FOR FURTHER INFORMATION CONTACT: Patricia Montanio, Protected Species Management Division, Office of Protected Resources and Habitat Programs, National Marine Fisheries Service, 1335 East-West Highway, Silver Spring, MD 20910, 301-427-2322, or Robert Peoples, Division of Fish and Wildlife Management Assistance, U.S. Fish and Wildlife Service, Department of the Interior, Mail Stop—820 Arlington Square, 18th and C Streets, NW., Washington, DC 20240, 703-358-1718.

SUPPLEMENTARY INFORMATION: Proposed regulations on the Incidental Take of Endangered, Threatened and Other Depleted Marine Mammals were published on March 15, 1988 (53 FR 8473-8477). The original May 16 close of the comment period was extended until July 5, 1988 (53 FR 17964-17965). More than 20 entities, including conservation groups, Federal, state and local government agencies, private industry and other interested parties commented on the proposed rule. These comments are summarized along with responses in the discussions below.

General Requirements and Processes

FWS and NMFS share responsibilities under the MMPA (16 U.S.C., 1361 *et seq.*) and ESA (16 U.S.C. 1531 *et seq.*). NMFS is responsible for species of the order Cetacea (whales and dolphins) and the suborder Pinnipedia (seals and sea lions) except walrus. FWS is responsible for the dugong, manatees, polar bear, sea and marine otters and walrus. Depending on the animals involved, the term "Service" used in this document may refer to FWS and/or NMFS.

Section 101(a)(5) of the MMPA allows for the taking of marine mammals incidental to non-commercial fishing activities under certain circumstances; Section 7(b)(4) of the ESA allows, under certain circumstances; for the taking of endangered and threatened species incidental to activities that have Federal involvement or control. If a marine mammal species is listed as endangered or threatened under the ESA, the requirements of both the MMPA and ESA must be met before the incidental take can be allowed.

Summary of Amendments

Prior to amendment, section 101(a)(5) of the MMPA applied only to non-depleted species. Under section 3(1)(C) of the MMPA, all endangered and threatened marine mammals are by definition depleted. Since the more restrictive provisions of the MMPA prevail, the ESA provisions alone could not be used to authorize the incidental taking of endangered or threatened marine mammals.

Public Law 99-659, title IV, section 411 (approved November 14, 1986) amended section 101(a)(5) of the MMPA and made conforming changes to sections 7(b)(4) and 7(o) of the ESA. The primary change was to allow the taking of depleted as well as non-depleted species of marine mammals incidental to specified activities (other than commercial fishing operations) under certain conditions. The amendments also changed some of the conditions under which incidental taking can be allowed.

General Comment: One commenter believed that there should not be any taking, hunting or killing of endangered, threatened or depleted species.

Under the 1986 Amendments, Congress provides an exception for the incidental, but not intentional, taking of small numbers of depleted marine mammals under limited circumstances. Although we anticipate most taking to be by harassment only, the amendment is not limited to non-lethal takings.

MMPA—Section 101(a)(5) Process

Under sections 101(a)(5) of the MMPA, the Service can allow the taking of small numbers of marine mammals incidental to a specified activity (other than commercial fishing) within a specified geographical area. For the Service to consider allowing an incidental taking, a written request for specific regulations must be submitted to the Service containing detailed information on the activity as a whole and impacts of the total potential take. The Service will evaluate the impacts resulting from all persons conducting the specified activity, not just the impacts from one entity's activities. If the Service makes certain findings, specific regulations will be issued that, among other things, establish permissible methods of taking and other means of effecting the least practicable adverse impact on the species. After regulations are issued, individual Letters of Authorization must be obtained from the Service by those conducting the activity.

Procedural regulations implementing this provision of the MMPA are found at 50 CFR 18.27 for FWS and at 50 CFR part 228 for NMFS.

Processing time: In the preamble to the proposed rule, the Service advised requestors that the regulatory process for specific regulations can take a year or more. Many commenters believed this to be excessive resulting in unnecessary time and financial costs to applicants and delayed the identification and development of hydrocarbon resources. Further, two commenters believed that the lengthy review process does not account for the urgency of some situations, such as platform removals for safety or reuse purposes, or operational constraints due to weather and ice conditions in Alaska. They argued that Congress intended that the Service act expeditiously on requests.

The Service will complete the process as quickly as possible and will provide the applicant with a proposed schedule, if requested. Although regulations have been issued in as little as six months, the process generally takes longer because of the time necessary to complete the environmental and regulatory reviews and provide an opportunity for public comment on the proposed rule. Therefore, the Service believes one year is a realistic estimate. Knowing the potential time requirements, applicants can plan their activities accordingly. Since the MMPA process can be conducted simultaneously with other requirements, early initiation of the MMPA process will avoid delaying approval and implementation of specific activities. Once regulations are established governing a specific activity, Letters of

Authorization can be issued quickly and can accommodate specific urgencies.

Comment Periods: Under 50 CFR 228.4(b), NMFS publishes a notice of receipt of request for regulations and solicits information. Public comments are also accepted on the proposed findings and regulations. The FWS, on the other hand, does not require publication of a notice of receipt of request and generally solicits comments only on its proposed findings and regulations (50 CFR 18.27(d)(2)). This is the only difference between NMFS and FWS processes, which is relatively minor reflecting standard agency procedures. Some commenters opposed the initial comment period established by NMFS since it is not mandated under the MMPA or Administrative Procedure Act and could delay issuance of final regulations.

The NMFS approach is consistent with its general approach to regulations—providing the public with an advance notice of a rulemaking where possible. The NMFS believes that the first comment period facilitates gathering all available information prior to developing the required regulatory and environmental analyses and publishing a proposed rule. No minimum time for the initial comment period is established in the NMFS regulations. Therefore, in unusual or critical situations, this comment period could be less than the usual 30 days. In addition, drafting the required environmental and regulatory documents could begin during the comment period, resulting in no significant delay to the process.

Application assistance: Commenters suggested that applicants be encouraged to consult with the Service in preparing a request to identify sources of information and to ensure an adequate request.

The Service agrees, but does not believe that this needs to be stated in the regulations. The Service will assist potential applicants by explaining requirements and identifying sources of information. Potential applicants are encouraged to contact the Service and the Service's Regional Offices for assistance.

Completeness of request: One commenter believed that the Service should be required to determine the completeness of a request within 15 days. If found incomplete, the Service would notify the applicant with an explanation of what is required to make the request complete.

The Service will review requests and notify applicants as soon as practicable of any additional information required. However, information needs (such as the feasibility of implementing certain mitigating measures) may become apparent anytime during the regulatory process. Therefore, the Service reserves the option to request additional information when required, rather than just within the first 15 days.

Denial of requests: Some commenters believed that the regulations should require that denials of requests for specific regulations along with the findings in support of that decision be published and made available to the applicant.

The Service agrees and has added new §§18.27(d)(4) and 228.4(d) requiring publication in the **Federal Register** of any decision to deny a request along with the basis for denying the request.

Required information: One commenter believed that the information required in § 18.27(d) (vi), (vii) and (viii) and § 228.4(a) (9), (10) and (11) dealing with suggested means of mitigating and monitoring impacts should be optional, since these discussions would be more productive after the applicant has an opportunity to consult with the Service and subsistence users.

The Service believes the applicant should be required to identify mitigating measures and ways to monitor impacts to assist the Service in developing the most workable regulations. The applicant's detailed knowledge of the proposed activity provides a good basis for such initial proposals. Including these suggestions for comment and further discussion as the process continues will serve to enhance and facilitate the process of developing regulations. Therefore, the Service has retained these questions.

Total impacts: One commenter believed that the current reference to "cumulative" impacts in the information required under §§ 18.27(d) and 228.4 should be deleted.

As used in these sections, cumulative impacts was intended to mean the total impacts resulting from the activity as a whole, not just the impacts resulting from one individual's or company's participation. It was not intended to mean the impacts resulting from the activity in conjunction with unrelated ongoing or projected activities (as the term is used under NEPA). Therefore, the word cumulative has been deleted and the sentence clarified to request information on the "activity as a whole, which includes, but is not limited to, an assessment of total impacts by all persons conducting the activity." (See also "Cumulative Impacts" discussion below.)

Burden of proof: In the preamble to the proposed rule, the Service stated that the applicant has the burden to demonstrate, through the best scientific information available, that only a negligible impact is reasonably likely to occur. Commenters suggested that only the best presently available, readily obtainable information should be required in requests, and that applicants should not be required to conduct research if information gaps exist. Commenters also objected to the applicant having the burden to demonstrate negligible impact, and believed it is the responsibility of the Service.

In response to the commenters' concerns, the Service notes that its "best available scientific evidence" standard used to determine the completeness of a request in the MMPA regulations is similar to the "best available scientific and commercial data" standard that is used in the Section 7 (ESA) consultation regulations. Therefore, the Service intends to use the principles described in the following excerpt from the preamble to the consultation regulations when additional data is needed to complete a request for specific regulations under this final rule:

> A Service request for additonal data will not be used as a vehicle for burdening applicants with unnecessary studies and inordinate delays * * *. As in the *Pittston* case [*Roosevelt Campobello International Park Commission* v. *EPA*, 684 F.2d 1041 (1st Cir. 1982)], these requirements will be limited to readily obtainable data that would assist the Service in formulating its biological opinion [under Section 7(b) of the ESA] * * *. [A]s in *Pittston*, a distinction must be made between requests for special research projects and requests for routine, customary data collection activities.

51 FR 19926, 19952 (June 3, 1986).

Only the best available information needs to be submitted with a request, and conducting research is not a requirement. The Service believes it is the responsibility of the applicant to provide the required information and to demonstrate negligible impact since the applicant is requesting authority to take the marine mammals and is the beneficiary of such authority. The Service will also consider information submitted by other interested parties or otherwise available. If the information submitted by the applicant together with any other information available to the Service is not sufficient to support a negligible impact finding, regulations cannot be issued. In this case, additional studies may be needed to support a negligible impact finding.

It should also be noted that Congress placed a continuing burden on those operating under the authority of Section 101(a)(5) to "engage in appropriate

research designed to reduce the incidental taking of marine mammals pursuant to the specified activity concerned." H.R. Rep. No. 228, 97th Cong., 1st Sess. 20 (1981).

Placing the burden on the applicant to demonstrate negligible impact is consistent with other take authorizations under the MMPA. Under Section 104(d)(3), permit applicants "must demonstrate to the Secretary that the taking * * * will be consistent with the purposes of this Act and the applicable regulations established under section 103 of this title." In the 1971 House Report, Congress explained this basic concept:

> Before any marine mammal may be taken, the appropriate Secretary must first establish general limitations on the taking, and must issue a permit which would allow that taking. In every case, the burden is placed upon those seeking permits to show that the taking should be allowed and will not work to the disadvantage of the species or stock of animals involved. If that burden is not carried—and it is by no means a light burden—the permit may not be issued. The effect of this set of requirements is to insist that the management of the animal populations be carried out with the interests of the animals as the prime consideration.

H.R. Rep. No. 707, 92d Cong., 1st Sess. 18 (1971).

U.S. Citizen: As stated in the preamble to the proposed rule, under section 101(a)(5) of the MMPA only U.S. citizens are eligible to apply for Letters of Authorization. Commenters believed that the definition of U.S. citizens in the regulations is unduly restrictive since it requires that companies or corporations be controlled by U.S. citizens. Commenters pointed out that this is inconsistent with regulatory practice under the Outer Continental Shelf Lands Act (OCSLA) which requires only that the company be organized under the laws of the United States to be considered a U.S. citizen. Commenters believed that Congress intended that all holders of offshore leases be eligible for a small take authorization under the MMPA, and, therefore, the MMPA regulatory definition should be made consistent with the OCSLA definition.

The Service agrees that a change in the definition may be appropriate. However, since this change was not discussed in the proposed rule and is a potentially significant modification, the Service is addressing this issue in a separate proposed rulemaking to avoid delay in publication of this final rule. That proposed rule was published in the Federal Register on August 17, 1989 (54 FR 33949).

Impact on Species or Stock

Before the Service may allow a taking of marine mammals under the authority of section 101(a)(5) of the MMPA, it must find that the total taking expected from the specified activity will have a negligible impact on the species or stock. After a thorough review of the public comments on this issue, the Service adopts its proposed definition of "negligible impact."

Under the Service's regulatory definition, a finding of negligible impact would require that the impact resulting from the specified activity cannot reasonably be expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival. The Service believes that this definition of negligible impact follows congressional intent when enacting Public Law 99-659.

Effects on annual rates of recruitment or survival: Several commenters contended that the proposed definition of negligible impact was too lenient because it suggested that only effects on annual rates of recruitment or survival will be considered. The commenters urged the Service to add back to the definition the standards used to determine negligible impact under the 1981 MMPA Amendments—that the impact from the taking had to be "so small, unimportant, or of so little consequence as to warrant little or no attention." 50 CFR 228.3 (1987) (NMFS regulations); *accord, id.* § 18.27(c) (FWS regulations).

The Service, while sympathetic with the concerns expressed by the commenters, believes that the clear congressional intent behind the 1986 Amendments was to alter the standard for determining negligible impact. In addition, the basic amendment to section 101(a)(5) of the MMPA expanded the coverage of this incidental take provision to depleted as well as non-depleted species, requiring a corresponding change in the approach to assessing negligible impact. To capture the intent of the amendment, the Service has adopted, substantially without change, the definition of negligible impact set out in the Senate's "Section-by-Section Analysis," 132 Cong. Rec. S16305 (Oct. 15, 1986).

Species specific factors/indirect effects: Several commenters noted that the factors analyzed to understand the expected impacts will vary widely from species to species. They also stated that a complete assessment of effects must cover the full range of factors that support recruitment and survival, including an assessment of indirect effects on habitat, behavioral patterns, breeding and feeding, and special management considerations (*e.g.*, impacts on recovery plan objectives or other management initiatives).

The Service agrees with these comments. Although the 1986 Amendments deleted the reference to "habitat" from the determination of negligible impact, the stated reason for this change confirms that the factors indicated by the commenters, such as effects on habitat, remain important in the assessment of negligible impact:

> A minor impact upon a small segment of habitat might be found to be more than negligible under the prior standard, even if it has no impact upon the overall population utilizing the habitat. But it is also the case that populations could be affected a[d]versely by actions that damage rookeries, mating grounds, feeding areas and areas of similar significance. The Secretary shall take those impacts into accounts [*sic*] when making a "negligible impact" determination under section 105(A)(5)(i) [*sic*]. Because these factors are to be taken into account, in making such a determination, subparagraph (a)(2)(A) of this section deletes the phrase "and its habitat" from subparagraph 5(A)(i) [*sic*] of the MMPA.

132 Cong. Rec. S16305 (Oct. 15, 1986). The Service does not believe that it is necessary to amend the regulatory language to reflect the above factors; it is sufficient to note that the Service will consider these factors when determining negligible impact.

Impact on optimum sustainable population (OSP): An OSP determination is not required to make a negligible impact finding. In the preamble of the proposed rule, the Service provided some illustrative examples of how the negligible impact test would be applied depending on whether the particular marine mammal stock was within or below its OSP range. 53 FR 8473, 8474 (Mar. 15, 1988). Citing the management goal of the MMPA—the maintenance or attainment of an OSP level for each population stock of marine mammals (see sections 2(2) and 2(6) of the MMPA)—the Service set out the following general analytical framework for applying the definition of negligible impact:

> If a request for specific regulations under section 101(a)(5) involves potential impacts to a "depleted" population, then a determination of negligible impact can be made only if the permitted activities are not likely to significantly reduce the increase of that population or prevent it from ultimately achieving its OSP; on the other hand, if a "nondepleted" population is involved, then a determination of negligible impact can be made only if the permitted activities are not likely to reduce that population below its OSP.

53 FR at 8474. The Service provided this proposed analytical framework to elicit public comment so that the final rule could more fully explore the application of the negligible impact test. Since these examples attracted a wide spectrum of views on the basic meaning of the 1986 Amendments and negligible impact, the Service will now clarify the analytical approach it will follow in making this essential finding.

Several commenters, citing the complex and controversial nature of the OSP concept, asserted that OSP should not be used as the framework for determining negligible impact, especially since no mention is made in section 101(a)(5) of OSP. Many of the commenters emphasized that Congress intended a simplified process that focused on impacts on annual rates of recruitment or survival rather than on impacts to OSP. One commenter argued that Congress rejected an analytical approach based on OSP by failing to pass H.R. 1027, 99th Cong., 1st Sess. (1985), which would have authorized incidental takes under the MMPA "if the proposed incidental take would not impede the species' ability to eventually attain its optimum sustainable population." H.R. Rept. No. 124, 99th Cong., 1st Sess. 13 (1985).

The Service notes that H.R. 1027 would have provided an exception to the taking prohibitions of both the ESA and the MMPA through the section 7 consultation process. The rulemaking process of section 101(a)(5) of the MMPA would not have been required. The Service believes that the congressional choice of imposing an additional regulatory process before authorizing the incidental taking of listed marine mammals reflected a concern for the need for more safeguards rather than a concern for simplification.

The Service did not intend, however, to imply that a formal determination of OSP was necessary in order to make the negligible impact finding. Section 101(a)(5)(C)(ii) of the MMPA clearly exempts the issuance of specific regulations from compliance with the formal rulemaking requirements of section 103 of the MMPA. The Service's factual examples illustrating a proposed analytical framework for the determination of negligible impact did not involve the formal determination of OSP. The first example involved depleted populations and how impacts to recruitment rates and survival would be treated; an OSP determination was not needed because one need only establish that the total take would not "significantly reduce the increase of that population" and would not prevent ultimate achievement of OSP. This conceptual framework for depleted species focuses on the absence of "significant" reductions to the rate of long-term population increases and the absence of barriers to the attainment of OSP.

In response to several comments, the Service notes that the same analytical framework for depleted species applies to stocks of unknown status, since it is not OSP that is at issue, but rather that the incidental taking would not prevent the population from attaining or maintaining its OSP.

Therefore, an OSP determination is not necessary in making a negligible impact finding. Qualitative judgments will be made on a case-by-case basis on how the anticipated incidental taking will affect the status and population trends of the species or stocks concerned. Many factors are used in this determination, including, but not limited to, the status of the species or stock relative to OSP (if known), whether the recruitment rate for the species or stock is increasing, decreasing, stable or unknown, the size and distribution of the population, and existing impacts and environmental conditions.

Several commenters concurred with the Service's analytical framework for depleted species, with one commenter stressing the need to ensure that a depleted population will increase toward its OSP at an acceptable rate. However, one commenter stated that the Service's approach was not consistent with section 2(2) of the MMPA, which mandates that "[f]urther measures should be immediately taken to replenish any species or population stock which has already diminished below [its OSP]." Two commenters argued that the only way to satisfy these conservation goals of the MMPA is to establish that the level of incidental take has only a negligible impact on the rate of recovery for the species or stock. Contending that a distinction must be made among stocks that are increasing, decreasing, or stable in the level of recruitment, they stated that a negligible impact should involve effects that do not impede a stock from achieving OSP at the same rate and in the same manner that would occur in the absence of the proposed incidental take.

The Service agrees that distinctions need to be made among stocks that are increasing, decreasing, or stable when determining negligible impact. In order to make a negligible impact finding, the proposed incidental take must not prevent a depleted population from increasing toward its OSP at a biologically acceptable rate. Consistent with this view, the Service believes that insignificant reductions in the rate of the population increase (*i.e.*, net recruitment) do not become significant impacts on a depleted stock because the stock would not increase toward its OSP as rapidly as it would in the absence of the incidental take. To adopt the commenters' formulation, one would have to find that the impacts of incidental take have "no effect" on the rate of population growth for a depleted stock; *i.e.*, there would be "no effect" on the stock's "rate of recovery." The statutory standard does not require that the same recovery rate be maintained, rather that no significant effect on annual rates of recruitment or survival occurs. For stable or declining populations, a finding of negligible impact may be more difficult than for increasing populations. Section 101(a)(5) clearly indicates that some level of adverse effects involving the take of depleted marine mammals can be authorized as long as the impact is "negligible."

The plain language of section 2(2) does not suggest a more stringent standard. That section indicates a concern for the immediate initiation of steps to replenish a depleted species or stock—a concern which is addressed in the Service's analytical framework since significant reductions in recruitment rates are not considered negligible. Further, section 2(2) does not mandate the immediate taking of all steps to attain an OSP level for all depleted stocks; such a reading of the purposes and policies of the MMPA would displace the clear congressional intent behind section 101(a)(5), which was designed to alleviate conflicts, where the impacts are negligible, between activities (other than commercial fishing) that involve the incidental taking of marine mammals and the strict moratorium against taking.

One commenter suggested that a more appropriate standard for determining negligible impact for a depleted stock would be whether the level of incidental taking is likely to substantially reduce the rate of population growth. By substituting "substantial" for the Service's term "significant," the commenter argues that statistically measurable effects would not necessarily cause an applicant to be ineligible for a take under section 101(a)(5). The commenter further recommended that a level of acceptable take—within the range of 10 to 50 percent of annual recruitment—be prescribed in the regulations.

The Service does not share the commenter's concerns. The absence of substantial reductions in population growth does not automatically correspond with a negligible impact; significant adverse effects, although not substantial in nature, can prevent the Service from finding negligible impact. Further, the Service declines to prescribe acceptable taking levels. Such numerical limits would ignore the significant differences in the status and population dynamics among the various marine mammal stocks and the type of taking (*i.e.*, harassment versus mortality) or other impacts. The determination of negligible impact must take into account the status and the particular biological requirements of the species or stock, as well as the effects of the incidental taking on the rate of recruitment.

The second example presented in the preamble of the proposed rule involved the determination of negligible impact with respect to a non-depleted stock of marine mammals. If a particular stock were known to be within its OSP range, then the Service believes a finding of negligible impact can only be made if the permitted activities are not likely to reduce that stock below its OSP. However, not all takings that do not reduce the population below its OSP would be considered negligible.

The Service's analytical framework for non-depleted stocks recognizes that healthy marine mammal populations that have reached an equilibrium level usually experience fluctuations in population numbers within some normal range due to a variety of environmental and biological factors. Such fluctuations may involve short-term population declines that do not pose a risk to the stocks remaining within the limits of OSP. The Service believes that minimal impacts on a healthy stock caused by incidental taking can still be considered negligible if such taking does not cause the population to fluctuate beyond normal limits. In other words, for a population stock that is at its OSP level, slight impacts on the stock resulting from incidental take do not rise to the level of "adverse effects" on annual rates of recruitment or survival if the population stock is maintained at essentially the same level.

One commenter opposed the Service's approach to non-depleted stocks by arguing that it is too permissive. Contending that the Service's analytical framework could allow a stock to be reduced from 95 to 60 percent of carrying capacity in determining negligible impact, the commenter noted that such a significant population decrease would have to be evaluated through the waiver process in section 101(a)(3) of the MMPA.

The Service agrees that the commenter's extreme example would not be eligible for treatment under the "small take" provisions of section 101(a)(5) of the MMPA; such large takes should be instead considered under the waiver procedures in sections 101(a)(3) and 103 of the MMPA. As explained above, the key factor is the significance of the level of impact on rates of recruitment and survival. Only insignificant impacts on long-term population levels and trends can be treated as negligible.

Several commenters stated that the Service's "dual standard" for assessing negligible impact was inappropriate because Congress intended a uniform system.

The Service's examples in the proposed rule were intended to show how a negligible impact finding might be approached in different situations. This is not a dual standard, but, instead, the illustration of how to apply the rule in contrasting fact situations. Again, the formal determination of OSP is not a prerequisite to issuing specific regulations.

Cumulative impacts: In determining impact, the Service must evaluate the "total taking" expected from the specified activity in a specific geographic area. The estimate of total taking involves the accumulation of impacts from all anticipated activities that are expected to be covered by the specific regulations. In other words, the applicant's anticipated taking from its own activities is only one part of the story; the total takings expected from all persons conducting the activities to be covered by the regulations must be determined.

Several commenters asked that the Service clarify the concept of "total taking" by amending the definition of negligible impact.

The Service declines to do so because it believes that the definition of negligible impact is effective as written since it clearly states the impacts "resulting from the specified activity" as discussed above.

Two commenters asked how to assess the degree of impacts in the situation where, although separate activities by themselves pose negligible impacts, a combination of impacts poses a significant impact on the species or stock.

The Service agrees with the commenters that the impacts of incidental take from successive or contemporaneous activities must be added to the baseline of existing impacts to determine negligible impact. While the impacts of a particular activity may be fairly minor, they may in fact be more than negligible when measured against a baseline that includes a significant existing take of marine mammals from the other activities.

The commenter believed that the regulations should identify an order of priority for various types of taking (*e.g.*, subsistence taking and incidental taking) and describe how allowable takes will be allocated to each type of activity. Another commenter argued that the 1986 Amendments do not estabish a priority system for takings, incidental or intentional.

The Service notes that ongoing authorized activities are factored into the baseline of existing impacts to determine negligible impact of a requested activity. To the extent that subsistence is part of the baseline, subsistence takes are accommodated and allocation between subsistence and incidental taking is not necessary.

Some commenters asked the Service to limit the determination of negligible impact to direct impacts of the specified activity and to exclude cumulative effects resulting from future, unrelated activities.

As discussed previously, the Service must look at both direct and indirect effects, but not the cumulative effects, in making findings under section 101(a)(5) of the MMPA concerning negligible impact. The Service will consider cumulative effects that are reasonably foreseeable when preparing its analysis under the National Environmental Policy Act. Additionally, cumulative effects that are reasonably certain to occur and "effects of the action" will be considered in any necessary consultation under section 7(a)(2) of the ESA. 50 CFR 402.02, 402.14(g) (3), (4) (1987); 51 FR 19926, 19932–33 (June 3, 1986) (preamble discussion in the section 7 regulations). In view of the above, the Service does not believe it is necessary to add a discussion on cumulative effects to the definition of negligible impact.

Impact on individuals: As stated in the preamble of the proposed rule, the negligible impact finding is made with respect to impacts to the marine mammal species or stock and not with respect to impacts to individual animals. Some commenters believed that this should be clearly stated in the regulations, rather than just in the preamble.

The Service declines to add a statement to the regulatory definition of negligible impact because the preamble

discussion and the definition clearly state that only impacts that "adversely affect the species or stock" are considered.

One commenter noted that, in many cases, available scientific information on the size and population dynamics of a particular stock may be inadequate to assess the degree of impacts posed by incidental take. In those cases, the commenter suggested that the Service should assess impacts based upon a consideration of impacts to individual animals.

The Service disagrees. If information is lacking to define a particular population or stock of marine mammal, then impacts resulting from incidental take should be assessed with respect to the species as a whole. *See* 132 Cong. Rec. S16304–05 (Oct. 15, 1986).

Addressing the degree of information needed to assess the impacts of incidental take, one commenter noted that the Service may deny a request for specific regulations only if the record reflects a valid scientific basis for the conclusion that a more than negligible impact would be posed to the overall population.

Although the commenter is correct that the focus should be on impacts to the overall population, the burden will be on both the applicant and the Service to show that information exists in the administrative record to support a negligible impact finding. *See* earlier discussion on "Burden of Proof."

One commenter believed that the use of OSP as described in the preamble to the proposed rule would shift the focus away from consideration of population impacts.

The Service disagrees. As explained earlier, an OSP determination is not required to make a negligible impact finding. The Service will use all available information concerning a population, including its status relative to OSP (if known).

Speculative impacts: A variety of comments were received on the issue of how speculative impacts should be treated in determining negligible impact. Several commenters argued that the regulations should clearly state that speculative or conjectural effects will not be considered in evaluating impacts. One commenter added that negligible impact should be found when the probability of occurrence of an impact is low whereas the potential impact may be significant. However, other commenters, citing the lack of definitive data on the population dynamics of some marine mammal populations, suggested that the Service should err on the side of caution when labeling certain impacts as "speculative" or "conjectural." One commenter stated that the allowance of incidental taking of a depleted species when the impacts of such taking cannot presently be assessed would be in violation of both the MMPA and the ESA.

The Service believes that the discussion regarding speculative impacts in the preamble of the proposed rule accurately interpreted the legislative intent behind the 1986 Amendments:

> If potential effects of a specified activity are conjectural or speculative, a finding of negligible impact may be appropriate. A finding of negligible impact may also be appropriate if the probability of occurrence is low but the potential effects may be significant. In this case, the probability of occurrence of impacts must be balanced with the potential severity of harm to the species or stock when determining negligible impact. In applying this balancing test, the Service will thoroughly evaluate the risks involved and the potential impacts on marine mammal populations. Such determinations will be made based on the best available scientific information.

53 FR at 8474; *accord*, 132 Cong. Rec. S16305 (Oct. 15, 1986). The Service recognizes the tension that exists between development interests and wildlife resource interests when restrictions on development are predicated upon the existence of adverse impacts that are speculative in nature. To resolve these difficult situations, the legislative history of the 1986 Amendments endorsed the use of a balancing approach to weigh the likelihood of occurrence against the severity of the potential impact:

> The degree of certainty of occurrence required in these judgments should be inversely proportional to the resultant harm to the overall population.

132 Cong. Rec. S16305 (Oct. 15, 1986). In applying this balancing test, the Service must, of necessity, evaluate each request for specific regulations on a case-by-case basis.

Impact on Habitat

The amendments deleted the required finding that the specfied activity have only a negligible impact upon the marine mammal habitat. Under the previous standard, a minor impact on a small segment of habitat might be found to be more than negligible and the incidental take prohibited even if the overall impact on the species or stock utilizing the habitat was negligible. Nevertheless, impacts on rookeries, mating grounds, feeding areas and areas of similar significance could have adverse effects on the species or stock. As discussed in the "Impacts on Species or Stock" section above, impacts on habitat are part of the consideration in making the finding of negligible impact on the species or stock. Further, even if the impact is determined to be negligible, specific regulations must include measures to ensure the least practicable adverse impact on the habitat.

Definition: Commenters believed that the definition of negligible impact should specify that impacts on habitat will not be considered unless they have a greater than negligible impact on the marine mammal population as a whole.

The Service believes the definition of negligible impact reflects this and no changes are necessary.

Required information: Since impacts on habitat are considered only in the context of impacts on the species, one commenter believed that the Service should delete the requirement, in a request, for information concerning impacts on habitat (§ § 18.27(d) (iv), (v) and 228.4(a) (7), (8)). Commenters also believed that the information required should be restricted to impacts that can be expected to adversely affect the overall population through effects on rates of recruitment or survival or should be restricted to the impacts on exisiting rookeries, mating grounds, feeding areas, and areas of similar significance.

The Service believes the existing information required should be retained. A description of the impacts on the habitat and the effects of any loss or modification of habitat on the marine mammal populations is needed in the Service's evaluation of negligible impact. If the impacts on habitat are not likely to result in more than a negligible impact on the population, then they will not be a basis for denying a request. However, the Service still has an obligation to require measures to ensure the least practicable adverse impact on the habitat, whether or not it causes more than a negligible impact on the populations, paying particular attention to rookeries, mating grounds, and areas of similar significance.

Relation to critical habitat: Commenters suggested that the preamble clarify that impacts on habitat are considered in the broad biological sense. They stated that effects on critical habitat would be considered in the ESA Section 7 consultation process.

Impacts on the population of the loss or modification of any part of the population's habitat are considered in determining negligible impact. "Critical habitat" is a regulatory determination under the ESA. Section 7 requires that Federal agencies ensure that their activities are not likely to jeopardize the continued existence of endangered or

threatened species or result in the destruction or adverse modification of their critical habitats. Only impacts on those areas designated as critical habitat are considered in the determination of destruction or adverse modification. However, impacts on the species of the loss or modification of any part of habitat is evaluated in the determination of jeopardy.

Impact on Subsistence Uses

The amendments changed the standard used to evaluate the impact on subsistence uses from "negligible impact" to "not having an unmitigable adverse impact." To determine that an unmitigable adverse impact on subsistence uses exists, two elements must be present. First, the impact resulting from the specified activity must be likely to reduce the availability of the species to a level insufficient for a harvest to meet subsistence needs by (1) causing the marine mammals to abandon or avoid hunting areas, (2) directly displacing subsistence users, or (3) placing physical barriers between the marine mammals and subsistence hunters. Second, it must be an impact that cannot be sufficiently mitigated by other measures to increase the availability of marine mammals to allow subsistence needs to be met.

Those conducting the specified activity, the involved Federal agencies, and the affected subsistence users, are encouraged to meet and develop mutually agreeable conditions which satisfy the operational, scientific or other needs of the activity and the requirements of subsistence users.

Unmitigable adverse impact: One commenter suggested that, consistent with the legislative history of the amendments, the definition of "unmitigable adverse impact" should be clarified to specify that an impact must result from the specified activity rather than from environmental or other factors.

The Service agrees that only impacts on subsistence uses resulting from the specific activity should be considered in determining if an unmitigable adverse impact exists. Environmental and other factors not related to the specific activity are evaluated only in determining existing baseline conditions and availability. Since the regulatory definition clearly states that "unmitigable adverse impact" means an impact "resulting from the specified activity," no changes are warranted.

One commenter suggested that mitigation should not require the elimination of an impact. Rather, reducing the impact such that subsistence needs can be met would be sufficient in the commenter's opinion.

The new standard of "unmitigable adverse impact" does not require the elimination of adverse impacts, only mitigation sufficient to meet subsistence requirements. However, the amendments also require that the specific regulations governing an activity include measures to ensure the least practicable adverse impact on the availability of marine mammals for subsistence uses, even if the activity will not otherwise have an unmitigable adverse impact. Hence, any adverse impacts would have to be mitigated to the extent practicable.

Another commenter stated that to reflect congressional intent, the definition of "unmitigable adverse impact" should specify that animals would have to vacate a hunting area rather than just avoid it. In addition, the number of marine mammals that would have to abandon or avoid a hunting area to constitute an adverse impact should be a criterion in the regulations according to the commenter.

The legislative history of the amendments emphasizes the availability of "sufficient numbers" of marine mammals to meet the subsistence needs of the community. In this context, "vacate" was intended to connote both the temporary and permanent absence of marine mammals from subsistence hunting areas. Hence, the terms "abandon" and "avoid" are more precise than "vacate"—abandonment of habitat involves forsaking an area completely, while avoidance includes temporary absence from or bypassing an area.

Specifying the number, proportion, or some other quantification of animals avoiding or abandoning an area that would constitute an adverse impact is difficult. The value assigned such a criterion would vary depending on the specific circumstances, including actual subsistence needs, the extent of the area avoided by the marine mammals, and whether or not animals remain available in other areas. If appropriate and feasible, such a criterion will be established during the development of specific regulations for an activity. Since it may not be possible to establish such a criterion in all instances, it is not required in these regulations.

Cultural subsistence: A commenter suggested that cultural aspects of dependence on marine mammals should be reflected in the definition of subsistence needs in addition to the nutritional and other physical attributes usually associated with this term. This commenter added that since the cultural significance of subsistence harvests is to a great extent specific to individual communities, the impacts of a specified activity on subsistence uses must be assessed locally.

The finding of an unmitigable adverse impact considers the availability of the species for subsistence needs and is not based on cultural considerations. To the extent that opportunities to meet the subsistence needs of the community remain available, however, many of the cultural dimensions of subsistence use would be accommodated. "Availability" provides opportunities for traditional hunts and for the Native community to transmit its hunting-based culture to each new generation. In keeping with the emphasis in the legislative history, the definition of unmitigable adverse impact has been modified to emphasize "availability." Such emphasis will accommodate many of the cultural dimensions of subsistence uses of marine mammals. Although the amendments changed the standard for evaluating impacts on subsistence uses from "negligible impact" to "unmitigable adverse impact," the availability of marine mammals for subsistence harvest remains a central consideration.

Coordination with subsistence users: A commenter suggested the language from the preamble encouraging the agency, applicant and affected subsistence users to agree upon terms and conditions for activities which satisfy their subsistence, operational, scientific and other needs be incorporated into the regulations.

Such coordination could be effective in identifying and achieving consensus regarding subsistence mitigation measures to be incorporated in specific regulations. For instance, though not required under the regulations, affected native interests and applicants could agree that the availability of marine mammals could be achieved by means other than the traditional distribution of the animals. The Service encourages, and as appropriate will participate in, such cooperative ventures. Language has been added to §§ 18.27(d)(1)(vi) and 228.4(9) to encourage, but not require, such coordination.

Mitigating Measures

The preamble of the proposed rule discussed mitigating measures in three contexts. With regard to negligible impact determinations, if the impact of a specified activity would be rendered negligible by mitigating measures when that requirement would not otherwise be satisfied, the Service may make a negligible impact finding subject to successful implementation of those mitigating measures. In evaluating

impacts on subsistence uses of marine mammals, the Service must find that the specified activity will not have an unmitigable adverse impact. Finally, the amendments require that specific regulations governing a specified activity include measures to ensure the least practicable adverse impact on the species and its habitat and on the availability of the species for subsistence uses. Mitigating measures are intended to ensure the availability of enough animals to meet subsistence needs and to minimize impacts on the species or stock and subsistence users.

Support mitigating measures: One commenter endorsed the requirement for mitigating measures to reduce the impact of specific activities on marine mammal populations, habitats and subsistence uses to negligible levels. The commenter suggested that if it is determined that mitigating measures have been or could be effective, those measures should be required in specific regulations and as a condition for issuing any Letter of Authorization.

The Service agrees. The regulations require the inclusion of mitigating measures, as appropriate, in specific regulations and as a condition for issuing Letters of Authorization.

Service's responsibility to identify mitigating measures: A commenter suggested that the Service has the responsibility to identify mitigating measures. While the requester and the Service, in many instances, share responsibility for identifying mitigating measures, the commenter argued that the Service is vested with the ultimate responsibility to search for appropriate mitigating measures before denying a request for specific regulations.

The Service disagrees. Since the applicant is most familiar with the nature and extent of the activity contemplated and has the detailed knowledge of possible alternatives to that activity and the impacts on marine mammals, the applicant is in the best position to identify and assess mitigating measures. In addition, as the primary beneficiary of any incidental take authorization, the applicant should be ultimately responsible for identifying such measures. Nevertheless, the Service will consider all available information in assessing the adequacy and effectiveness of measures to mitigate the adverse impacts of the proposed taking and in developing specific regulations.

Required coordination with applicant: To facilitate coordination, a commenter proposed that requesters be advised of any mitigating measures contained in a proposed rule at least 10 days prior to publication in the **Federal Register**. Under this procedure, if the requester, within 10 days of such notification, finds the mitigating measures to be inappropriate or economically prohibitive, publication may be delayed to communicate these concerns to the Service.

The Service finds it unnecessary to delay the rulemaking process given the requirement for public comment on the proposed rule, including any mitigating measures. In addition, the applicant could always petition for further review.

Letters of Authorization

This rule makes technical modifications to two paragraphs in the existing regulations (50 CFR 18.27(f) and 228.6) related to Letters of Authorization. The changes are intended to make the language in those paragraphs consistent with the new definitions of "negligible impact" and "unmitigable adverse impact" and the use and interpretation of those terms elsewhere in the regulations. Although not discussed in the preamble to the proposed rule, there were several comments related to Letters of Authorization.

Modification of Letters of Authorization: One commenter suggested that the regulations should provide for modification of Letters of Authorization as an alternative to withdrawal or suspension. In particular, it was proposed that these authorization documents should not be suspended unless the Service finds there are no additional or alternative mitigating measures which would alleviate the need for such action.

Current procedures allow the modification of Letters of Authorization to reflect changed conditions through withdrawal and reissuance as long as the incidental take levels or other requirements of the specific regulations are not violated. If Letters of Authorization are withdrawn or suspended on a class basis, a rulemaking to establish new specific regulations can be initiated. In some cases this approach would be preferable since a comprehensive reevaluation would be required on whether the specified activity is still having a negligible impact.

Public comment on emergency withdrawal or suspension of Letters of Authorization: A commenter suggested that the emergency withdrawal or suspension authority in 50 CFR 18.27(f)(6) and 228.6(f) be curtailed by requiring that the Service, based on the best scientific information available, find that there is an immediate and substantial risk to the well-being of the marine mammal populations involved without such emergency action.

Such a finding is, in effect, required under present law and regulations. Moreover, due to the potentially serious consequences of withdrawal or suspension of Letters of Authorization, the Service would make every effort to provide notice and an opportunity where possible for public comment under the provisions of 50 CFR 18.27(f)(5) and 228.6(e). However, if an emergency exists, the Service is required by the provisions of section 101(a)(5)(C)(i) of the MMPA to take appropriate action to protect marine mammals. Hence, the Service must retain authority for emergency withdrawal or suspension to address situations where species or populations would be threatened by lack of prompt action.

ESA—Section 7 Process

As stated above, the regulations governing small takes of marine mammals now include depleted as well as non-depleted marine mammals. Consultation under section 7 of the ESA is also necessary if the issuance of regulations under section 101(a)(5) of the MMPA is a Federal action that involves the incidental taking of endangered or threatened marine mammals. In addition to satisfying the MMPA criteria, incidental take of endangered or threatened species also must comply with section 7 of the ESA.

Under section 7(a)(2) of the ESA, Federal agencies are required to consult with the Service to insure that any action they authorize, fund or carry out is not likely to jeopardize the continued existence of an endangered or threatened species or result in the destruction or adverse modification of critical habitat. Although this consultation is primarily between the Federal agency and the Service, applicants for Federal licenses, permits or funding are encouraged to participate. The Federal agency initiates formal consultation by a written request to the Service that includes detailed information concerning the potential effects of the proposed action. Consultation should be concluded within 90 days.

After consultation, the Service issues its biological opinion which includes an assessment of impacts and its conclusion on whether or not the action is likely to jeopardize the continued existence of endangered or threatened species or result in the destruction or adverse modification of critical habitat. In those cases where the Service concludes that an action (or the

implementation of reasonable and prudent alternative(s)) is not likely to result in jeopardy or adverse modification but may result in the incidental take of endangered or threatened species, the Service includes an incidental take statement in the biological opinion as required by section 7(b)(4). Compliance with the terms and conditions specified in the incidental take statement exempts the Federal agency and any permit or license applicant involved from the taking prohibitions of the ESA up to the level specified in the incidental take statement.

Coordination Between the ESA and MMPA

One of the purposes of the amendments to the MMPA and the ESA was to clarify the relationship between these statutes so that decision processes under each would be coordinated and integrated to the maximum extent practicable. The ESA alone does not provide authority for the incidental take of endangered or threatened marine mammals—the requirements of both the MMPA and ESA must be met. The incidental take statement issued under the authority of the ESA will include terms and conditions with which a Federal agency or applicant must comply. The amendment added a provision to section 7(b)(4) which directs that the provisions of section 101(a)(5) of the MMPA must be completed before the incidental take of endangered or threatened marine mammals is allowed. In addition to the reasonable and prudent measures to minimize the impact of the incidental take, an incidental take statement will include measures which are required to comply with section 101(a)(5) of the MMPA and applicable regulations. The difficulty of coordinating the ESA consultation and MMPA exemption processes is that section 7(b) of the ESA generally requires that consultation be completed within 90 days while the MMPA regulatory process is much longer.

Delay of section 7 process: One commenter stated that the preamble implied that initiation of section 7 consultation would be delayed until the MMPA process was well underway. They stated that the processes should be conducted simultaneously and that the ESA process should begin immediately upon submission of the MMPA request.

Because of the timing discrepancy between the two processes reflecting procedural differences maintained by Congress, the MMPA section 101(a)(5) process cannot be completed as expeditiously as the ESA process. However, the legislative history offers options on how to handle the timing discrepancies between the two Acts, two of which were summarized in the preamble to the proposed rule. The first is to consider initiating the MMPA section 101(a)(5) process in advance of the ESA section 7 process. In this way, the MMPA requirements can be incorporated into the ESA incidental take statement when the biological opinion is issued and subsequent revisions would not be necessary. Another option is to have the Federal agency and the Service agree to extend the consultation under section 7(b)(1)(A) to accommodate completion of the section 101(a)(5) regulations. The consent of any permit or license applicant is required for an extension of more than 60 days. An additional option involves early consultation under section 7(a)(3) of the ESA. Under this approach, a preliminary biological opinion could be issued on the prospective agency action. When the section 101(a)(5) process is completed, the biological opinion would be reviewed and the ESA section 7(b)(4) incidental take statement amended or added, as appropriate. These, or similar options, will be available to the agency and the applicant as appropriate.

Issuance of incidental take statements: One commenter pointed out the different approaches taken by NMFS and FWS in how they handle the incidental take statements included in the biological opinion, and urged that these regulations established a consistent policy. Another commenter argued that the ESA biological opinion should be completed within the required time limits and the incidental take statement added to the opinion upon completion of the MMPA process.

The Service agrees with these comments and, therefore, in the future, neither agency will issue an incidental take statement in the biological opinion if consultation is completed before the section 101(a)(5) regulations are issued. The biological opinion will later be amended to include the incidental take statement.

One commenter said that section 7 of the ESA requires the timely issuance of biological opinions and incidental take statements.

The Service agrees and will continue to issue biological opinions within the section 7 timeframe. However, the portion of the incidental take statement dealing with marine mammals will be added to the biological opinion after the MMPA requirements have been satisfied.

Section 7(o) of the ESA

Section 7(o) of the ESA, as amended, specifies that any taking in compliance with the terms and conditions of an incidental take statement is not a prohibited taking under the ESA. No other ESA permit or authorization is required of the Federal agency or applicant in carrying out the action if the incidental take statement applies and if the action complies with the terms and conditions of that statement. The biological opinion plus the incidental take statement operate as an exemption under section 7(o)(2) of the ESA. The new § 402.14(i)(5) clarifies this provision.

Private actions: In the preamble to the proposed rule, the Service cited the following example concerning private actions. Section 10(a) of the ESA allows the Service to issue permits for the taking of endangered species incidental to an otherwise lawful non-Federal action within the United States and its territorial sea, subject to certain conditions. In 1982, Congress added this provision to allow incidental taking associated with private actions that are not subject to the section 7 consultation process.

If an endangered or threatened marine mammal may be taken incidentally to a private action, regulations under section 101(a)(5) of the MMPA would be required. Consultation under section 7 of the ESA would be conducted since issuance of the MMPA regulations is a Federal action. The incidental take statement issued with the biological opinion would address taking concerns under the ESA, and a section 10 permit would not be required.

Two commenters disagreed with this interpretation, contending that it would allow wholly non-Federal activities to be relieved of section 10 requirements (except for the necessity of obtaining MMPA incidental taking authority), most notably the conservation plan obligations.

This implies that private activities are subject to stricter protection standards than activities with Federal involvement. This contention misconstrues the purpose and effect of section 10 provisions relating to private actions. These provisions were added by Congress to allow persons engaged in activities with no discretionary Federal involvement the same access to ESA exemptions and provisions as those engaged in activities requiring Federal approval or scrutiny. There is no indication in the ESA or its legislative history that Congress intended to set up substantially different or stricter protection standards for private

activities by requiring a conservation plan. In commenting on the standards to be used in granting section 10 permits for private activities, the House Report states the following:

> The [S]ecretary would base his determination on whether or not to grant the permit under the same standard as found in section 7(a)(2) of the Act, that is, whether or not the taking would jeopardize the continued existence of the species. To issue the permit, the Secretary would also have to find that the taking would be incidental to another activity and that the applicant would minimize the taking to the maximum extent practicable.

H.R. Rep. No. 567, 97th Cong., 2nd Sess. 31 (1982).

Section 7 and section 10 are designed to achieve the same objectives through different procedural means. The conservation plan requirement is the means for ensuring effective and timely Federal involvement in an otherwise private activity. For those activities already subject to such involvement through regulations or permits, there is no need for a separate conservation plan. Under both sections 7 and 10, the endangered and threatened species are afforded the same level of protection.

To require a separate section 10 permit in addition to section 101(a)(5) regulations and a section 7 consultation would serve only to increase the administrative burden on the applicant and the government with no corresponding benefit to endangered or threatened marine species.

Exceeding Take Limits

One commenter suggested that the regulations should specify what will happen when an incidental take level is exceeded, and that this be the same for all incidental take authorizations under both the MMPA and ESA.

The Service agrees that provisions for addressing excessive incidental take should be consistent for authorizations under MMPA regulations and ESA incidental take statements. The MMPA and ESA incidental take processes are similar in that when an incidental take authorization is exceeded, the activity must be reevaluated. However, if the activity continued during such a reevaluation, then any resultant taking would be subject to penalties under the ESA and/or the MMPA.

Under section 7 of the ESA, consultation must be reinitiated immediately by the Federal agency if the incidental take level is exceeded (*see* 50 CFR § 402.14(i)(4)). Exceeding the level of anticipated taking does not, by itself, require the stopping of an ongoing action during reinitiation of consultation. However, any further taking resulting from the activity would be illegal under the ESA. If formal consultation is reinitiated, section 7(d) of the ESA again takes effect. That provision prohibits the Federal agency or applicant from making any irreversible or irretrievable commitment of resources which has the effect of foreclosing the formulation or implementation of any reasonable or prudent alternatives which would avoid violating section 7(s)(2).

The parallel language in section 101(a)(5) of the MMPA requires withdrawal or suspension of Letters of Authorization either on an individual or class basis if, after notice and public comment, it is found that the impact of the authorized incidental take is more than negligible (*see* 50 CFR 18.27(f)(5) and 228.6(e)). The Southern Sea Otter Translocation Project, an issue raised by the commenter, involves a fundamentally different situation in that it is an experimental effort authorized by a special statute and by a scientific research permit.

Sea Otter Management Zone

In 1986, Public Law 99–625 was passed by Congress to govern the translocation of southern sea otters for research and recovery purposes. The FWS has established an experimental population of sea otters around San Nicolas Island, Ventura County, California.

One commenter stated that these regulations should not apply to activities within the management zone for the experimental population of the sea otter.

There are two zones established by the translocation project. The first area is the translocation zone around San Nicolas Island that has a baseline at the 15-fathom isobath with the boundaries extending 10 to 15 nautical miles from the baseline. The second zone surrounds the translocation zone and is an otter-free or management zone, encompassing all marine waters subject to U.S. jurisdiction from Point Conception south.

Within the translocation zone, except for defense-related actions and actions initiated prior to the passage of Public Law 99–625, the consultation provisions of section 7(a)(2) of the ESA and the provisions of the MMPA apply. Within the management zone, unless the proposed action may affect the "parent population" (see 50 CFR 17.84(d)(1)(iv), the provisions of section 7(a)(2) of the ESA and the restrictions on incidental taking under the MMPA do not apply. However, the section 7(a)(4) requirement to confer applies to Federal activities within the management zone and to defense-related activities in either zone.

Regulatory Changes

These regulations amend 50 CFR parts 18, 228 and 402 to implement the 1986 Amendments to section 101(a)(5) of the MMPA and sections 7(b)(4) and 7(o) of the ESA. Basic processes for authorizing incidental take under both ESA and MMPA remain the same; the primary changes are (1) allowing the incidental take of depleted marine mammals, and (2) changing the findings that must be made to allow a take.

Authority citation: Commenters noted that the authority citation for 50 CFR part 228 should be 16 U.S.C. 1371(a)(5), rather than the entire MMPA, since the criteria to be considered are entirely within section 101(a)(5).

The Service disagrees. Although the criteria are all contained within section 101(a)(5), the enforcement and penalty provisions of the MMPA also apply to activities conducted under section 101(a)(5).

Classification

The Department of the Interior, as lead agency, has prepared an environmental assessment on this rule. On the basis of this assessment, it has been determined that this is not a major Federal action significantly affecting the quality of the human environment within the meaning of section 102(2)(C) of the National Environmental Policy Act of 1969 (NEPA). Therefore, an environmental impact statement need not be prepared. The regulations are procedural and, by themselves, do not authorize the taking of depleted marine mammals. Issuance of specific regulations under section 101(a)(5) of the MMPA allowing a taking would require compliance with NEPA, including the preparation of a separate environmental assessment or impact statement if required.

NEPA compliance: One commenter believed that the issuance of specific regulations allowing an incidental take should not require the preparation of a separate environmental assessment or impact statement. It was stated that given the thresholds of negligible impact on a species or stock and no unmitigable adverse impact on subsistence users, requests under section 101(a)(5) would appear to qualify for categorical exclusion treatment under the Council for Environmental Quality's regulations, and the Service should amend its NEPA regulations accordingly.

Since the Service must analyze the proposal for specific regulations to make the determination that the proposal has only a negligible impact on a species or stock and does not have an unmitigable

adverse impact on subsistence users, the NEPA process will be used to facilitate those determinations. The issuance of specific regulations allowing incidental take would normally only require the preparation of an environmental assessment. Thus, the Service does not believe a categorical exclusion is warranted or that its NEPA regulations need to be amended.

It has been determined that these regulations do not constitute a major rule as defined in Executive Order 12291. The Department of the Interior has certified under the terms of the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*) that the regulations will not have a significant economic impact on a substantial number of small entities. The amendments of rules governing the take of small numbers of marine mammals incidental to specified activities will have little, if any, economic effect. Direct costs will be those associated with subsequent preparation of applications for "Specific Regulations" and "Letters of Authorization." However, those costs are not likely to approach the $100 million annual threshold for these rules to be considered a major rule in accordance with E.O. 12291. As most of the applicants under the revised rule, as at present, are likely to be oil and gas corporations and their contractors, they would not be considered small entities under the Regulatory Flexibility Act.

The regulations in 50 CFR parts 18 and 228 contain a collection of information requirement subject to Office of Management and Budget (OMB) clearance under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). The information collection requirement in 50 CFR 18.27 is approved under OMB control number 1018–0070 and the information requirement in 50 CFR part 228 is approved under OMB control number 0648–0151. Public reporting burden for this collection of information is estimated to average 80 hours per response, including the time for reviewing instructions, searching existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information. Send comments regarding this burden estimate or any other aspect of this collection of information, including suggestions for reducing this burden, to the Office of Protected Resources and Habitat Programs, National Marine Fisheries Service, 1335 East-West Highway, Silver Spring, MD 20910; the Information Collection Clearance Officer, U.S. Fish and Wildlife Service, Department of the Interior, Mail Stop—220 ARLSQ, 18th and C Streets, NW., Washington, DC 20240; and to the Paperwork Reduction Project, Office of Information and Regulatory Affairs, Office of Management and Budget, Washington, DC 20503.

The amendment of part 402 does not contain information collection requirements requiring OMB approval under the Paperwork Reduction Act.

The analyses under NEPA, E.O. 12291 and the Regulatory Flexibility Act are available for review (see **FOR FURTHER INFORMATION CONTACT**).

The primary authors of this final rule are Robert Peoples, Nancy Sweeney, and Michael Young, Department of the Interior, and Patricia Montanio and Gene Martin, Department of Commerce.

List of Subjects

50 CFR Part 18

Administrative practice and procedure, Alaska, Exports, Imports, Intergovernmental relations, Marine mammals, Transportation.

50 CFR Part 228

Administrative practice and procedure, Marine mammals, Outer continental shelf oil and gas exploration.

50 CFR Part 402

Endangered and threatened wildlife, Fish, Intergovernmental relations, Plants (agriculture).

Regulation Promulgation

Accordingly, the Service amends 50 CFR parts 18, 228 and 402 as shown below.

PART 18—MARINE MAMMALS

1. The authority citation for 50 CFR part 18 is revised to read as follows:

Authority: 16 U.S.C. 1461 *et seq.*

2. In § 18.27, paragraph (a) is amended by removing the words "Pub. L. 97–58" and "non-depleted"; paragraph (b), including the note following that paragraph, is revised; in paragraph (c), the definition of "negligible impact" is revised, the definition of "specified activity" is amended by removing the word "non-depleted" wherever it occurs, and a new definition for "unmitigable adverse impact" is added in alphabetical order; paragraph (d) is amended by removing the word "non-depleted" wherever it appears; the second sentence of the introductory text to paragraph (d)(1) is revised; a sentence is added to the end of paragraph (d)(1)(vi); a new paragraph (d)(4) is added; and paragraphs (d)(3), (e)(1), (f)(2), and (f)(5)(ii) are revised, to read as follows:

§ 18.27 Regulations governing small takes of marine mammals incidental to specified activities.

* * * * *

(b) *Scope of Regulations.* The taking of small numbers of marine mammals under section 101(a)(5) of the Marine Mammal Protection Act may be allowed only if the Director of the Fish and Wildlife Service (1) finds, based on the best scientific evidence available, that the total taking during the specified time period will have a negligible impact on the species or stock and will not have an unmitigable adverse impact on the availability of the species or stock for subsistence uses; (2) prescribes regulations setting forth permissible methods of taking and other means of effecting the least practicable adverse impact on the species and its habitat and on the availability of the species for subsistence uses, paying particular attention to rookeries, mating grounds, and areas of similar significance; and (3) prescribes regulations pertaining to the monitoring and reporting of such taking.

Note: The information collection requirement contained in this § 18.27 has been approved by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.* and assigned clearance No. 1018–0070. The information is being collected to describe the activity proposed and estimate the cumulative impacts of potential takings by all persons conducting the activity. The information will be used to evaluate the application and determine whether to issue Specific Regulations and, subsequently, Letters of Authorization. Response is required to obtain a benefit.

The public reporting burden from this requirement is estimated to vary from 2 to 200 hours per response with an average of 10 hours per response including time for reviewing instructions, gathering and maintaining data, and completing and reviewing applications for specific regulations and Letters of Authorization. Direct comments regarding the burden estimate or any other aspect of this requirement to the Information Collection Clearance Officer, U.S. Fish and Wildlife Service, Department of the Interior, Mail Stop—220 ARLSQ, 18th and C Streets NW., Washington, DC 20240, and the Office of Management and Budget, Paperwork Reduction Project (Clearance No. 1018–0070), Washington, DC 20503.

(c) * * *

"Negligible impact" is 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.

"Unmitigable adverse impact" means an impact resulting from the specified activity (1) that is likely to reduce the

availability of the species to a level insufficient for a harvest to meet subsistence needs by (i) causing the marine mammals to abandon or avoid hunting areas, (ii) directly displacing subsistence users, or (iii) placing physical barriers between the marine mammals and the subsistence hunters; and (2) that cannot be sufficiently mitigated by other measures to increase the availability of marine mammals to allow subsistence needs to be met.

(d) * * *

(1) * * * Requests shall include the following information on the activity as a whole, which includes, but is not limited to, an assessment of total impacts by all persons conducting the activity:

* * * * *

(vi) * * * (The applicant and those conducting the specified activity and the affected subsistence users are encouraged to develop mutually agreeable mitigating measures that will meet the needs of subsistence users.);

* * * * *

(3) The Director shall evaluate each request to determine, based on the best available scientific evidence, whether the total taking will have a negligible impact on the species or stock and, where appropriate, will not have an unmitigable adverse impact on the availability of such species or stock for subsistence uses. If the Director finds that mitigating measures would render the impact of the specified activity negligible when it would not otherwise satisfy that requirement, the Director may make a finding of negligible impact subject to such mitigating measures being successfully implemented. Any preliminary findings of "negligible impact" and "no unmitigable adverse impact" shall be proposed for public comment along with the proposed specific regulations.

(4) If the Director cannot make a finding that the total taking will have a negligible impact in the species or stock or will not have an unmitigable adverse impact on the availability of such species or stock for subsistence uses, the Director shall publish in the **Federal Register** the negative finding along with the basis for denying the request.

(e) * * *

(1) Specific regulations will be established for each allowed activity which set forth (i) permissible methods of taking, (ii) means of effecting the least practicable adverse impact on the species and its habitat and on the availability of the species for subsistence uses, and (iii) requirements for monitoring and reporting.

* * * * *

(f) * * *

(2) Issuance of a Letter of Authorization will be based on a determination that the level of taking will be consistent with the findings made for the total taking allowable under the specific regulations.

* * * * *

(5) * * *

(ii) The taking allowed is having, or may have, more than a negligible impact on the species or stock, or where relevant, an unmitigable adverse impact on the availability of the species or stock for subsistence uses.

* * * * *

PART 228—REGULATIONS GOVERNING SMALL TAKES OF MARINE MAMMALS INCIDENTAL TO SPECIFIED ACTIVITIES

3. The authority citation for 50 CFR part 228 is revised to read as follows:

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

§ 228.1 [Amended]

4. Section 228.1 is amended by removing the words "Pub. L. 97–58" and "non-depleted."

5. Section 228.2 is revised to read as follows:

§ 228.2 Scope.

The taking of small numbers of marine mammals under section 101(a)(5) of the Marine Mammal Protection Act may be allowed only if the National Marine Fisheries Service (a) finds, based on the best scientific evidence available, that the total taking during the specified time period will have a negligible impact on the species or stock and will not have an unmitigable adverse impact on the availability of the species or stock for subsistence uses; (b) prescribes regulations setting forth permissible methods of taking and other means of effecting the least practicable adverse impact on the species and its habitat and on the availability of the species for subsistence uses, paying particular attention to rookeries, mating grounds, and areas of similar significance; and (c) prescribes regulations pertaining to the monitoring and reporting of such taking. The specific regulations governing specified activities are contained in subsequent subparts to this part 228.

6. In § 228.3, the definition of "negligible impact" is revised; the definition of "specified activity" is amended by removing the word "non-depleted" wherever it occurs; and a new definition for "unmitigable adverse impact" is added in alphabetical order, to read as follows:

§ 228.3 Definitions.

* * * * *

"Negligible impact" is 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.

* * * * *

"Unmitigable adverse impact" means an impact resulting from the specified activity (1) that is likely to reduce the availability of the species to a level insufficient for a harvest to meet subsistence needs by (i) causing the marine mammals to abandon or avoid hunting areas, (ii) directly displacing subsistence users, or (iii) placing physical barriers between the marine mammals and the subsistence hunters; and (2) that cannot be sufficiently mitigated by other measures to increase the availability of marine mammals to allow subsistence needs to be met.

7. In § 228.4, paragraph (a)(1) is amended by removing the word "non-depleted"; the second sentence of paragraph (a) introductory text is revised; a sentence is added to the end of paragraph (a)(9); paragraph (c) is revised; and a new paragraph (d) is added, to read as follows:

§ 228.4 Submission of requests.

(a) * * * Requests shall include the following information on the activity as a whole, which includes, but is not limited to, an assessment of total impacts by all persons conducting the activity:

* * * * *

(9) * * * (The applicant and those conducting the specified activity and the affected subsistence users are encouraged to develop mutually agreeable mitigating measures that will meet the needs of subsistence users.);

* * * * *

(c) The Assistant Administrator shall evaluate each request to determine, based on the best available scientific evidence, whether the total taking will have a negligible impact on the species or stock and, where appropriate, will not have an unmitigable adverse impact on the availability of such species or stock for subsistence uses. If the Assistant Administrator finds that mitigating measures would render the impact of the specified activity negligible when it would not otherwise satisfy that requirement, the Assistant Administrator may make a finding of negligible impact subject to such mitigating measures being successfully implemented. Any preliminary findings

of "negligible impact" and "no unmitigable adverse impact" shall be proposed for public comment along with the proposed specific regulations.

(d) If the Assistant Administrator cannot make a finding that the total taking will have a negligible impact on the species or stock or will not have an unmitigable adverse impact on the availability of such species or stock for subsistence uses, the Assistant Administrator shall publish in the **Federal Register** the negative finding along with the basis for denying the request.

8. In § 228.5, paragraph (a) is revised to read as follows:

§ 228.5 Specific regulations.

(a) Specific regulations will be established for each allowed activity which set forth (1) permissible methods of taking, (2) means of effecting the least practicable adverse impact on the species and its habitat and on the availability of the species for subsistence uses, and (3) requirements for monitoring and reporting.

* * * * *

9. In § 228.6, paragraphs (b) and (e)(2) are revised to read as follows:

§ 228.6 Letters of Authorization.

* * * * *

(b) Issuance of a Letter of Authorization will be based on a determination that the level of taking will be consistent with the findings made for the total taking allowable under the specific regulations.

* * * * *

(e) * * *

(2) the taking allowed is having, or may have, more than a negligible impact on the species or stock, or, where relevant, an unmitigable adverse impact on the availability of the species or stock for subsistence uses.

* * * * *

PART 402—INTERAGENCY COOPERATION—ENDANGERED SPECIES ACT OF 1973, AS AMENDED

10. The authority citation for part 402 continues to read as follows:

Authority: 16 U.S.C. 1531 *et seq.*

11. In § 402.14, paragraph (i)(1) is revised, the second sentence of paragraph (i)(3) is revised, and a new paragraph (i)(5) is added, to read as follows:

§ 402.14 Formal consultation.

* * * * *

(i) * * *

(1) In those cases where the Service concludes that an action (or the implementation of any reasonable and prudent alternatives) and the resultant incidental take of listed species will not violate section 7(a)(2), and, in the case of marine mammals, where the taking is authorized pursuant to section 101(a)(5) of the Marine Mammal Protection Act of 1972, the Service will provide with the biological opinion a statement concerning incidental take that:

(i) Specifies the impact, i.e., the amount or extent, of such incidental taking on the species;

(ii) Specifies those reasonable and prudent measures that the Director considers necessary or appropriate to minimize such impact;

(iii) In the case of marine mammals, specifies those measures that are necessary to comply with section 101(a)(5) of the Marine Mammal Protection Act of 1972 and applicable regulations with regard to such taking;

(iv) Sets forth the terms and conditions (including, but not limited to, reporting requirements) that must be complied with by the Federal agency or any applicant to implement the measures specified under paragraph (i)(1)(ii) and (i)(1)(iii) of this section; and

(v) Specifies the procedures to be used to handle or dispose of any individuals of a species actually taken.

* * * * *

(3) * * * The reporting requirements will be established in accordance with 50 CFR 13.45 and 18.27 for FWS and 50 CFR 220.45 and 228.5 for NMFS.

* * * * *

(5) Any taking which is subject to a statement as specified in paragraph (i)(1) of this section and which is in compliance with the terms and conditions of that statement is not a prohibited taking under the Act, and no other authorization or permit under the Act is required.

* * * * *

Dated: July 10, 1989.

Susan Recce Lamson,

Assistant Secretary for Fish and Wildlife and Parks, Department of the Interior.

Dated: August 8, 1989.

James W. Brennan,

Assistant Administrator for Fisheries, National Oceanic and Atmospheric Administration.

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