

DEPARTMENT OF THE INTERIOR**Fish and Wildlife Service****50 CFR Part 18****RIN 1018-AH92****Marine Mammals; Incidental Take During Specified Activities****AGENCY:** Fish and Wildlife Service, Interior.**ACTION:** Final rule.

SUMMARY: We, the Fish and Wildlife Service (Service), have developed regulations that would authorize the incidental, unintentional take of small numbers of polar bears and Pacific walrus during year-round oil and gas industry (Industry) exploration, development, and production operations in the Beaufort Sea and adjacent northern coast of Alaska. Industry operations for the covered period are similar to and include all activities covered by the 3-year Beaufort Sea incidental take regulations that were effective from March 30, 2000, through March 31, 2003 (65 FR 16828, March 30, 2000).

We find that the total expected takings of polar bear and Pacific walrus during oil and gas industry exploration, development, and production activities will have a negligible impact on these species and no unmitigable adverse impacts on the availability of these species for subsistence use by Alaska Natives. We base this finding on the results of 9 years of monitoring and evaluating interactions between polar bears, Pacific walrus, and Industry, and also on oil spill trajectory models, polar bear density models, and an independent population distribution model that determine the likelihood of impacts to polar bears should an accidental oil release occur.

DATES: This rule is effective November 28, 2003, and remains effective through March 28, 2005.

ADDRESSES: Comments and materials received in response to this action are available for public inspection during normal working hours of 8 a.m. to 4:30 p.m., Monday through Friday, at the Office of Marine Mammals Management, U.S. Fish and Wildlife Service, 1011 E. Tudor Road, Anchorage, AK 99503.

FOR FURTHER INFORMATION CONTACT: Craig Perham, Office of Marine Mammals Management, U.S. Fish and Wildlife Service, 1011 East Tudor Road, Anchorage, AK 99503; telephone 907-786-3810 or 1-800-362-5148; e-mail: craig_perham@fws.gov.

SUPPLEMENTARY INFORMATION:**Background**

Section 1371(a)(5)(A) of the Marine Mammal Protection Act (MMPA) (16 U.S.C. 1361-1407) gives the Secretary of the Interior (Secretary) through the Director of the Service the authority to allow the incidental, but not intentional, taking of small numbers of marine mammals, in response to requests by U.S. citizens (you) (as defined in 50 CFR 18.27(c)) engaged in a specified activity (other than commercial fishing) in a specified geographic region. If regulations allowing such incidental taking are issued, we can issue Letters of Authorization (LOA) to conduct activities under the provisions of these regulations when requested by citizens of the United States.

We are authorizing the incidental taking of polar bears and Pacific walrus based on our final finding using the best scientific evidence available that the total of such taking for the regulatory period will have no more than a negligible impact on these species and will not have an unmitigable adverse impact on the availability of these species for taking for subsistence use by Alaska Natives. These regulations set forth: (1) Permissible methods of taking; (2) the means of effecting the least practicable adverse impact on the species and their habitat and on the availability of the species for subsistence uses; and (3) requirements for monitoring and reporting.

The term "take," as defined by the MMPA, means to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill, any marine mammal. Harassment as defined by the MMPA, as amended in 1994, "means any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild" (the MMPA calls this Level A harassment), "or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering" (the MMPA calls this Level B harassment). As a result of 1986 amendments to the MMPA, we amended 50 CFR 18.27 (*i.e.*, regulations governing small takes of marine mammals incidental to specified activities) with a final rule published on September 29, 1989 (54 FR 40338). Section 18.27(c) included a revised definition of "negligible impact" and a new definition for "unmitigable adverse impact" as follows. 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." Industry conducts activities such as oil and gas exploration, development, and production in marine mammal habitat and, therefore, risks violating the prohibitions on the taking of marine mammals.

Although Industry is under no legal requirement to obtain incidental take authorization, since 1993 Industry has chosen to seek authorization to avoid the uncertainties of taking marine mammals associated with conducting activities in marine mammal habitat.

On November 16, 1993 (58 FR 60402), we issued final regulations to allow the incidental, but not intentional, take of small numbers of polar bears and Pacific walrus when such taking(s) occurred in the course of Industry activities during year-round operations in the area described later in this rule in the section "Description of Geographic Region." The regulations were effective for 18 months. At the same time, the Secretary of the Interior directed us to develop, and then begin implementation of, a polar bear habitat conservation strategy before extending the regulations beyond the initial 18 months for a total 5-year period as allowed by the MMPA. On August 14, 1995, we completed development of and issued our Habitat Conservation Strategy for Polar Bears in Alaska to ensure that the regulations met with the intent of Congress. On August 17, 1995, we issued the final rule and notice of availability of a completed final polar bear habitat conservation strategy (60 FR 42805). We then extended the regulations for an additional 42 months to expire on December 15, 1998.

On August 28, 1997, BP Exploration (Alaska), Inc., submitted a petition for itself and for ARCO Alaska, Inc., Exxon Corporation, and Western Geophysical Company for rulemaking pursuant to section 101(a)(5)(A) of the MMPA, and section 553(e) of the Administrative Procedure Act (APA; 5 U.S.C. 553).