

## DEPARTMENT OF THE INTERIOR

## Fish and Wildlife Service

## 50 CFR Part 18

RIN 1018-AF02

## Marine Mammals; Incidental Take During Specified Activities

AGENCY: Fish and Wildlife Service, Interior.

ACTION: Final rule.

**SUMMARY:** The Fish and Wildlife Service hereby issues final regulations to 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. We clarified types of activities covered by this incidental take authority that were identified in our proposed regulations issued on November 17, 1998 (63 FR 63812), and they are essentially identical to activities covered by our original 5-year incidental take regulations effective from December 16, 1993, through December 15, 1998. As allowed by the Marine Mammal Protection Act (Act), these final regulations are effective through January 30, 2000, during which time we will consider new information associated with sub-sea pipelines to evaluate the scope of activities that will be covered in a future rule. It is our intention next year, at a minimum, to propose to extend these regulations for an additional four years for the activities described in this rule. As noted below, these regulations do not address or authorize incidental takes resulting from sub-sea pipeline activities located offshore in the Beaufort Sea.

**DATES:** This rule is effective January 28, 1999 and remains effective through January 30, 2000.

**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:** John Bridges, Office of Marine Mammals Management, Anchorage, Alaska, at 907/786-3800, FAX 907/786-3816, or Internet John\_Bridges@mail.fws.gov.

**SUPPLEMENTARY INFORMATION:****Background**

Section 101(a)(5)(A) of the Act gives the Secretary of the Interior (Secretary) through the Director of the Service the authority to allow, on request by U.S. citizens [as defined in 50 CFR 18.27(c)] engaged in a specified activity (other than commercial fishing) in a specified geographic region the incidental, but not intentional, taking of small numbers of marine mammals. We may grant permission for incidental takes for periods of up to 5 years.

If we find, based on the best scientific evidence available, that the taking of marine mammals 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, we may allow the taking of marine mammals. We then are required to publish regulations that include permissible methods of taking and other means to ensure the least practicable adverse impact on the species and its habitat and on the availability of the species for subsistence uses. These regulations must include requirements for monitoring and reporting. We issue Letters of Authorization (LOA), upon request and receipt of appropriate date, to individual entities to conduct activities pursuant to the regulations.

The term "take" as defined by the Act means to harass, hunt, capture, or kill, or attempt to harass, hunt, capture, or kill any marine mammal.

Harassment as defined by the Act, 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; 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."

As a result of 1986 amendments to the Act, we published a final rule on September 29, 1989, (54 FR 40338), amending 50 CFR 18.27 (i.e., regulations governing small takes of marine mammals incidental to specified activities). The final rule in § 18.27(c) included, among other things, 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."

Oil and gas exploration, development, and production activities conducted in marine mammal habitat risk violating the moratorium on the taking of marine mammals and, therefore, violating the terms of the Act. Although there is no legal requirement for Industry to obtain incidental take authority, they have chosen to seek authorization to avoid the uncertainties of conducting oil and gas industry activities in marine mammal habitat.

On December 17, 1991, BP Exploration (Alaska), Inc. (BPXA), for itself and on behalf of Amerada Hess Corporation, Amoco Production Company, ARCO Alaska, Inc., CGG American Service, Inc., Conoco Inc., Digison Geophysical Corp., Exxon Corporation, GECO Geophysical Co., Halliburton Geophysical Services, Inc., Mobil Oil Corporation, Northern Geophysical of America, Texaco Inc., Unocal Corporation, and Western Geophysical Company, petitioned us to promulgate regulations pursuant to section 101(a)(5) of the Act.

The geographic region defined in Industry's 1991 application included offshore waters beginning at a north/south line at Barrow, Alaska, east to the Canadian border, including all Alaska state waters and OCS waters. The same north/south line at Barrow, extending 25 miles inland and east to the Canning River defined the onshore region. The Arctic National Wildlife Refuge was excluded from Industry's proposal; and it was also excluded from our subsequent final remaking actions in 1993 and 1995, as briefly described in the next paragraph.

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 in the event that such taking(s) occurred in the course of Industry activities during year-round operations in the Beaufort Sea, in Alaskan State waters and Outer Continental Shelf (OCS) waters and the adjacent northern coast of Alaska. The regulations were

issued for a period of 18 months. At the same time, the Secretary of the Interior directed us to develop, then begin implementation of, a polar bear habitat conservation strategy prior to extending the regulations beyond the initial 18 months for a total 5-year period as allowed by the Act. We developed *The Habitat Conservation Strategy for Polar Bears in Alaska* to ensure that the regulations fully met with the intent of the 1973 *International Agreement on the Conservation of Polar Bears*. 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); and we extended the regulations for an additional 42 months to expire on December 15, 1998.

### Summary of the Current Rulemaking Action

On August 28, 1997, BPXA submitted a petition for rulemaking pursuant to section 101(a)(5)(A) of the Act, and section 553(e) of the Administrative Procedure Act (APA). Their request sought regulations to allow the incidental, but not intentional, taking of small numbers of polar bears and Pacific walrus in the event that takings occurred in the course of Industry operations in Arctic Alaska. Specifically, BPXA requested an extension of the incidental take regulations beginning at 50 CFR 18.121 for an additional five-year term from December 16, 1998, through December 15, 2003. However, the petition for new regulations includes two new oil fields (Liberty and Northstar). Plans to develop each field identify need for an offshore gravel island and a buried sub-sea pipeline to transport crude oil to connect with existing facilities. The request was submitted by BPXA for itself and on behalf of ARCO Alaska, Inc., Exxon Corporation, and Western Geophysical Company.

The geographic extent of this request was the same as that of our previously issued regulations beginning at 50 CFR 18.121 that were in effect through December 15, 1998, a north/south line at Barrow, Alaska, including all Alaska State waters and OCS waters, and east of that line to the Canadian border; with the onshore region being the same north/south line at Barrow, 25 miles inland and east to the Canning River. The Arctic National Wildlife Refuge was excluded from the proposal.

In response to Industry's 1997 application, on November 17, 1998, we published proposed specific regulations (63 FR 63812) to allow the incidental, unintentional take of polar bears and Pacific walrus in the Beaufort Sea and northern coast of Alaska. The proposed

regulations were to be in effect year-round for a five year period expected to begin at the December 15, 1998, expiration of our incidental take regulations that began at 50 CFR 18.121 for entities conducting oil and gas industry activities. However, information related to sub-sea pipelines is in Draft Environmental Impact Statements and is preliminary. Currently, two Environmental Impact Statements are being finalized; one by the U.S. Army Corps of Engineers for the Northstar Project, and one by the Minerals Management Service (MMS) for the Liberty Project. Once these documents are final, we will be better positioned to make a finding based on the latest scientific and engineering information. Therefore the issuance of these one year final regulations will not address or authorize the incidental take of polar bears and Pacific walrus during construction or operations of sub-sea pipelines in the Beaufort Sea.

These regulations do not permit the actual activities associated with oil and gas exploration, development, and production, but rather allow the incidental, unintentional take of polar bears and Pacific walrus that is associated with the described activities. The Department of the Interior's MMS and the Bureau of Land Management are responsible for permitting activities associated with oil and gas activities in Federal waters and on Federal lands, respectively, and the State of Alaska is responsible for activities on State lands and in State waters.

Concern has been directed at polar bear encounter incidents where human life is in jeopardy. When human activity occurs in polar bear habitat, polar bear/human encounters are possible. However, during more than 25 years of industry activity in this area, only three polar bears have died as a result of industrial activity. Each person operating under these regulations will have polar bear interaction training and knowledge of polar bear interaction plans. We authorize deterrent activities under section 109(h)(1) of the Act, while lethal take is authorized in defense of self or others in accordance with section 101(c) of the Act.

The regulations authorize the incidental take of polar bears and Pacific walrus associated with incidents that occur between Industry and the two species during year-round oil and gas activities that might cause minor disturbances to polar bears or Pacific walrus, especially those incidents that may occur in the absence of any negligence or intentional action by a person carrying out an otherwise lawful activity.

The regulations include requirements for monitoring and reporting, and measures to effect the least practicable adverse impact on these species and their habitat and on the availability of these species for subsistence uses. Oil and gas exploration, development, and production activities in the geographic area applicable to this effort may involve the taking of polar bears and Pacific walrus. However, we have made a finding that the total impact of the takings have a negligible impact on these species and on their availability for subsistence uses. Monitoring reports submitted for each exploration, development, and production activity conducted from 1993-1997 support this finding.

The rule requires a person to obtain a LOA to conduct exploration, development, and production activities pursuant to the regulations. Where there is the likelihood of taking polar bear or walrus when carrying out one or more of these activities, each group or individual conducting an oil and gas industry-related activity may request a LOA. Further, applicants for LOAs must submit a plan to monitor the effects on polar bear and walrus that are present during the authorized activities. Also, applicants for LOAs must identify, in a Plan of Cooperation, measures taken to minimize adverse impacts on the availability of marine mammals for subsistence uses if the activity takes place in or near a traditional subsistence hunting area. Each request for a LOA is evaluated on the specific activity and the specific location, and we condition each LOA for that activity and location if necessary.

### Description of Activity

As allowed by section 101(a)(5)(A) of the Act, this final rule is effective through January 30, 2000. Activities that are covered in this final rule are exploration activities such as geological and geophysical surveys which include: geotechnical site investigation, reflective seismic exploration, vibrator seismic data collection, air gun and water gun seismic data collection, explosive seismic data collection, geological surveys, and drilling operations. The latter include: drill ships, floating drill platforms such as the Kulluk, ice pads, artificial islands, caisson-retained islands, and two types of bottom founded structures: (1) Concrete island drilling system, and (2) single steel drilling caisson. This rule does not authorize incidental take of polar bears or Pacific walrus by activities associated with sub-sea pipelines.

Development and production activities are located on the North Slope along the shores of the Beaufort Sea. This region contains more than 11 separate oil and gas fields. All of the fields lie within the range of polar bears, while those in the offshore/near shore may encounter Pacific walrus on an irregular basis. At present, seven fields are in production: Prudhoe Bay, Kuparuk, Endicott, Lisburne, Milne Point, Niakuk, and Point McIntyre. Additional fields expected to be in production over the next few years are Northstar, Badami, Liberty, Tarn, and Alpine. The Trans-Alaska Pipeline System transports oil from each of the producing fields 800 miles south to Valdez, Alaska.

As mentioned above, this final rule does not authorize incidental takes of polar bears or Pacific walrus from any sub-sea pipeline activity. While Industry's original August 28, 1997, application briefly discussed its plans to develop the offshore Northstar and Liberty sites and sub-sea pipelines, the actual construction and use of sub-sea pipelines to transport oil is an activity that we did not examine during our prior, 1993 final rulemaking. This precludes us at this time from making any findings about sub-sea pipelines. Upon completion of the two environmental impact statements addressing this new activity, we will reconsider the best available scientific information and reevaluate the scope and duration of a future rulemaking. Therefore, although incidental take from other development and production activities, such as the construction and use of gravel islands and ice roads, is covered by this rule, any incidental take resulting from the construction or use of sub-sea pipelines is not covered by this rule. We have made no decision on the eligibility of sub-sea pipelines to be included in a rulemaking under section 101(a)(5) of the Act, and nothing in this rule or in any LOA issued under this rule should be interpreted as creating an expectation that incidental take authority will be granted for sub-sea pipeline activities at a future date.

Potential sources of incidental take are noise, physical interactions, and permitted and unpermitted discharges (oil spills). Oil and gas well drilling operations will include artificial islands, caisson-retained islands, ice island, bottom-founded structures and ice pads and drill ships.

During the life of the regulations, we anticipate a similar level of activity as during the previous five years, with the addition of a number of new developments as mentioned above. Because of the large number of variables

influencing exploration activity, any predictions as to the exact dates and locations of the operations that will take place over the next year would be highly speculative. However, requests for LOAs must include specific details regarding dates, duration, and geographic locations of proposed activities.

#### Biological Information

Polar bears and Pacific walrus utilize the area as habitat which is vital to their survival, more so for polar bears than the Pacific walrus. The geographic area is the land and water area east of a north/south line through Barrow, Alaska. The onshore area is 25 miles inland and east to the Canning River. The Arctic National Wildlife Refuge is outside of the area. Offshore, the area extends through Alaska State waters and into the OCS waters of the Beaufort Sea from Barrow east to the Canadian border.

#### Pacific Walrus

The Pacific walrus primarily occurs in the waters of the Chukchi Sea along the western coast of Alaska. Most of the population congregates near the ice edge of the Chukchi Sea pack ice during the summer. The primary summer range of the walrus does not extend east of Point Barrow. In the winter, walrus occur in areas where there are polynyas, open leads, or thin ice in which they can create and maintain breathing holes, and major winter concentrations occur in the southeastern Bering Sea. Walrus do occur in the Beaufort Sea but in small numbers. Data from our Marking, Tagging, and Reporting Program show that from 1994 through 1997, 73 walrus were reported killed by Barrow hunters. Tagging certificates shows that nearly all walrus were taken west of Barrow. Based on four years of monitoring Industry's activities in the Beaufort Sea required as a condition to LOAs, only two walrus were observed by on-site monitors.

#### Polar Bear

Polar bears occur only in the Northern Hemisphere, where their distribution is circumpolar, and they live in close association with polar ice. In Alaska, their distribution extends from south of the Bering Strait to the U.S.-Canada border. We estimate the world population at 21,000–28,000, with possibly as many as 5,000 bears in Alaska. The most extensive north-south movements of polar bears occur with the ice in the spring and fall.

Females without dependent cubs breed in the spring and enter maternity dens by late November. Females with

cubs do not mate. An average of two cubs, sometimes one and rarely three, are usually born in December, and the family group emerges from the den in late March or early April. Only pregnant females den for an extended period during the winter. Other polar bears may burrow out depressions to escape harsh winter winds. The average reproduction interval for polar bear is 3–4 years. The maximum reported age of reproduction in Alaska is 18 years. Based on these conditions, a polar bear may produce about ten cubs in her lifetime.

The fur and blubber of the polar bear provide vital protection from the cold air and frigid water. Newly emerged cubs of the year may not have a sufficient layer of blubber to maintain body heat when immersed in water for long periods of time. For this reason, the mother is very protective of the cubs. Cubs abandoned prior to the normal weaning age of 2.5 years likely will not survive.

Ringed seals (*Phoca hispida*) are the primary prey species of the polar bear; occasionally, they hunt bearded seals (*Erignathus barbatus*) and walrus calves. Polar bears scavenge on marine mammal carcasses washed up on shore. They also eat non-food items such as Styrofoam, plastic, car-batteries, anti-freeze, and lubricating fluids.

Polar bears have no natural predators, and they do not appear to be prone to death by diseases or parasites. The most significant source of mortality are humans. Since 1972, with the passage of the Act, only Alaska Natives hunt polar bears in Alaska and use bears for their subsistence needs and manufacture of handicraft and clothing items. The Native harvest occurs without restrictions on sex, age, number, or season, providing takes are non-wasteful. From 1980–1997, the total annual harvest averaged 103 bears. The majority of this harvest (70 percent) came from the Chukchi Sea area.

#### Effects of Oil and Gas Industry Activities on Marine Mammals and on Subsistence Uses

##### Walrus

Oil and gas industry activities such as air and vessel traffic, noise from air traffic, seismic surveys, ice breakers, supply ships and drilling may frighten or displace walrus. However, as previously stated in this document, the primary range of the Pacific walrus is west of Point Barrow and the likelihood of many walrus being in the Beaufort Sea is small. Therefore, it is unlikely that oil and gas industry activities will result in more than a negligible impact

on the species. Likewise, activities during the ice covered periods and the onshore development and production activities should not impact the species.

Stationary drilling structures may affect the movement of walrus. Walrus are attracted to certain activities or repelled from others by noise or smell. In the 1989 drilling season an incident occurred in a Chuckchi Sea operation where a young walrus surfaced in the center hole (moonpool) of the drill ship. A cargo net removed the walrus from the drilling area, after which the walrus left the scene of the incident and was not seen again.

The majority of the population congregates during the summer months (open water season) in the southern region of the Chukchi Sea pack ice between Long Strait and Wrangel Island to the west and Point Barrow, Alaska, to the east. These animals stray or are blown by storms into the proposed regulation area. The remainder of the population, primarily adult males, stay in the Bering Sea, especially along the Anadyr Gulf coast and in several areas in northern Bristol Bay.

In winter, walrus are found in two major regions where open leads, polynyas, or thin ice occur. Generally, one group ranges from the Gulf of Anadyr into the region southwest of St. Lawrence Island, and a second group is found in the southeastern Bering Sea from south of Nunivak Island into northwestern Bristol Bay. No impacts to walrus are expected during winter oil and gas industry activities since the winter range of the Pacific walrus is not within the geographic area covered by these regulations.

Seismic surveys generally take place on solid ice or open water. Since most walrus activity occurs near the ice edge, interactions with walrus and the seismic activity are unlikely.

#### *Subsistence*

Few walrus are harvested in the Beaufort Sea along the northern coast of Alaska. Walrus constitute a small portion of the harvest for the village of Barrow. For the four year period that the current incidental take regulations have been in place and for which data is available, 1994 through 1997, 73 walrus were reported taken by Barrow hunters. Reports indicate that all but one of the 73 walrus were taken west of Point Barrow, outside the limits of the incidental take regulations. Hunters from Nuiqsut and Kaktovik have not reported taking any walrus during this time.

#### *Polar Bear*

Oil and gas exploration, development, and production activities in the Beaufort Sea and adjacent northern coast of Alaska may affect the polar bear. Drill ships and icebreaker activity may be physical obstructions to normal movement. Noise, sights, and smells produced by activities may attract or repel bears. These disruptions may introduce detrimental changes in the bears' natural behavior.

Exploration activities during the open-water season are not likely to impact the movements or natural behavior of the polar bear. Although polar bears have been documented in open water, miles from the ice edge or ice floes, they normally are found near the ice edge. Therefore, it is unlikely that exploration activities in the open-water season will have more than a negligible impact on the polar bear.

Winter oil and gas activities have a greater possibility of having detrimental impacts on the polar bear. Polar bears that continue to move over the ice pack throughout the year are likely to encounter industry activities. Curious polar bears are likely to investigate drill ships and artificial or natural islands where drilling operations occur. Any on-ice activity creates an opportunity for industry/bear interactions.

Offshore drill sites within the pack ice may modify the habitat by creating open water leads down current from the activity. Polar bears are attracted to open water leads which create temporary niches for subadult or non-breeding ringed seals, the primary prey species for the polar bear. Polar bears attracted to these artificial open water leads create possibilities of industry/polar bear encounters.

Polar bear interaction plans are developed for each operation. Industry personnel participate in a polar bear interaction training program while on-site. These training programs and interaction plans insure that the activity and possible interactions have the least detrimental effect on industry personnel and the polar bear. Occasionally, work is performed on ice adjacent to elevated drill ships or platforms. In such cases, well-lighted and open work areas are provided to reduce the likelihood of an encounter with an undetected polar bear.

Winter seismic activity (survey crews) have a potential of disturbing denning females which are sensitive to noise disturbances. Denning females may stop seeking a preferred denning site, or may abandon dens, thereby risking the lives of their offspring. Prior to initiating seismic survey activity, industry

provides us with its proposed survey route. Through satellite observations of radio collared bears, we are able to inform industry of known denning sites, and from knowledge of the geographic area, we can identify areas of probable denning sites. Likewise, cooperative research industry in the development of Forward Looking Infrared Radar shows promise of detecting polar bears in maternity dens. Industry also cooperates with us to alter survey routes to pass within no less than one mile of denning sites. As a result of the ongoing cooperative operating procedures, industry activities avoid known den sites in response to required Letter of Authorization conditions.

#### *Subsistence*

The polar bear is not a primary subsistence species of the villages of Barrow, Nuiqsut, or Kaktovik. Preliminary data from our Marking, Tagging, and Reporting Program indicate that from July 1, 1993, to June 30, 1997, a total of 83 polar bears were reported harvested by the Natives of Barrow, 5 polar bears from the village of Nuiqsut; and 9 polar bears from the village of Kaktovik. Hunting success varies considerably from year-to-year because of variable ice and weather conditions.

Industry works with the local Native groups to achieve a cooperative relationship between oil and gas activities and subsistence activities. It is assumed that oil and gas exploration, development, and production will not have more than a negligible impact on subsistence activities.

#### *Oil Spills*

The accidental discharge of oil into the environment during industry activities could result from operational spills during refueling, handling of lubricants and liquid products, and during general maintenance. The spills are small in quantity, generally less than a barrel of oil per incident. Drilling units maintain onboard cleanup equipment and train personnel to handle operational spills. These spills do not pose a threat to polar bear or walrus.

A blowout (i.e., the loss of control during drilling) is a potentially more serious type of spill accident. However, based on data calculated by the MMS, the probability of a major blowout in the Beaufort Sea is extremely low; data compiled by that agency verify that although blowouts occur during exploratory drilling on the OCS, no oil has been spilled. This data set includes all blowouts including those caused by gas or water, as well as oil. All blowouts

do not necessarily result in the release of oil. Sub-sea pipeline oil release probabilities are not included in this data.

Swimming polar bears are directly impacted by contracting oil-contaminated waters. Bears that are fouled by oil may suffer thermoregulatory problems, ingest oil, and exhibit other detrimental effects such as inflammation of the nasal passages or damage to their renal and central nervous system.

We acknowledged that while there is a low probability of oil spills connected with a blowout, the potential negative effects to polar bears or their habitats may be significant. Bears that contact oil are likely to die. We balance the probability of an oil spill with the potential severity of harm to the species or stock when determining negligible impact.

Due to the small number of walrus in the Beaufort Sea area, impacts resulting from oil spills are foreseen as negligible.

#### *Conclusions*

Based on the previous discussion and recent years' monitoring program results, we make the following findings regarding the actions.

#### *Impact on Species*

We find, based on the best scientific information available and the results of four years of monitoring data, the effects of oil and gas related exploration, development, and production activities for the next one year in the Beaufort Sea and adjacent northern coast of Alaska will have a negligible impact on polar bears and Pacific walrus and their habitat and on the availability of these species for subsistence uses if certain conditions are met. Oil and gas activities have occurred in the Beaufort Sea and the adjacent northern coast of Alaska for many years. To date, there has been only one documented case of a lethal take of a polar bear at an exploratory drill site. In the event of a catastrophic spill, we would reassess the impacts to the polar bear and/or walrus populations and reconsider the appropriateness of authorizations for taking through section 101(a)(5)(A) of the Act.

Our finding of "negligible impact" applies to exploration, development, and production related to oil and gas activities, excluding any production activities associated with sub-sea pipelines. The following are generic conditions intended to minimize interference with normal breeding, feeding, and possible migration patterns to ensure that the effects to the species remain negligible. We may expand the

conditions in the LOAs based upon site-specific and species-specific reasons.

(1) These regulations to not authorize intentional taking of polar bear or walrus. When an intentional take (e.g., harassment associated with deterrent activities and/or lethal take) situation arises, we can allow such action under authority of sections 109(h)(1) or 101(c) of the Act.

(2) For the protection of pregnant polar bears during denning activities (selection, birthing, and maturation of cubs) in known and confirmed denning areas, Industry activities will be restricted in specific locations during certain specified times of the year. These restrictions will be applied on a case-by-case basis in response to a request for each LOA. In potential denning areas, pre-activity surveys, as determined by us, may be required to determine the presence or absence of denning activity.

(3) Each activity authorized by a LOA requires a site-specific plan of operation, and a site-specific monitoring and reporting plan. The purpose of the required plans is to ensure that the level of activity and possible takes will be consistent with the finding that the cumulative total of takes will have a negligible impact on polar bear and Pacific walrus, their habitat, and where relevant, on the availability of the species for subsistence uses.

#### *Impact on Subsistence*

Polar bear and Pacific walrus contribute a small amount of the total subsistence harvest for the villages of Barrow, Nuiqsut, and Kaktovik. However, this does not mean that the harvesting of these species is not important to Alaska natives. To ensure that the impact of oil and gas activity on the availability of the species or stock for subsistence uses is negligible, prior to receipt of a LOA, Industry must provide evidence to us that a plan of cooperation has been presented to the subsistence communities, the Eskimo Walrus Commission, the Alaska Nanuuq Commission, and the North Slope Borough. This plan of cooperation will provide the procedures on how Industry will work with the affected Native communities and what actions will be taken to avoid interference with subsistence hunting of polar bear and walrus.

If there is evidence that oil and gas activities will affect, or in the future may affect, the availability of polar bear or walrus for subsistence, we will reevaluate our findings regarding permissible limits of take and the measures required to ensure continued subsistence hunting opportunities.

#### *Monitoring and Reporting*

The purpose of the monitoring program is to determine short-term and direct effects of authorized oil and gas activities on polar bear and walrus in the Beaufort Sea and the adjacent northern coast of Alaska. Plans must identify the methods used to assess the effects on the movements, behavior, and habitat use of polar bear and walrus in response to Industry's activities. Monitoring activities are summarized and reported each year, and reviewed by us. We base each year's monitoring objective on the previous year's monitoring results.

We require an approved plan for monitoring and reporting the effects of oil and gas industry exploration, development, and production activities on polar bear and walrus prior to issuance of a LOA. The applicant must submit an annual monitoring and reporting plan, at least 90 days prior to initiation of proposed activity, for each exploratory activity; and the applicant must submit a final monitoring report to us no later than 90 days after completion of the exploratory activity. Since development and production activities are continuous long-term activities, upon approval, LOAs and their required monitoring and reporting plans will be issued for the life of the activity or until expiration of the regulations, whichever occurs first. We will require that the operator submit development and production activity monitoring results associated with LOAs annually for our review no later than January 15 for the previous activity. We require annual approval of the monitoring results for continued operation under the LOA.

#### **Discussion of Comments on the Proposed Rule**

The proposed rule, and request for comments was published in the **Federal Register** (63 FR 63812) on November 17, 1998. The closing date for comments was December 11, 1998. We received 228 comments and the following primary issues were raised by the majority of the commenters.

*Comment:* Commenters believed that the Service should prepare a full Environmental Impact Statement (EIS).

*Response:* Through the preparation of an Environmental Assessment (EA), we found that the final rule will not significantly affect the quality of the human environment, thereby resulting in a "Finding Of No Significant Impact (FONSI)." Therefore, in accordance with the national Environmental Policy Act, no EIS is required. The Service's analysis in the Final EA found that

these regulations, which exclude sub-sea pipelines, would not have a significant impact on a species or stock. A one year final rule anticipates that the two Final EIS's, Northstar and Liberty, will provide us with additional information for reconsideration of the scope and duration of the regulations.

*Comment:* Commenters were concerned about allowing incidental take associated with sub-sea pipelines stating that sub-sea pipelines are an unprecedented expansion into the Beaufort Sea.

*Response:* We made the decision to issue one year regulations. Information in two Draft Environmental Impact Statements on the effect of oil spilled from sub-sea pipelines on polar bears is preliminary. After the Environmental Impact Statements are final, we will consider the best available scientific information and reevaluate the scope and duration of a future rulemaking. Incidental take resulting from the construction or operation of sub-sea pipelines is not covered by this rule.

*Comment:* Commenters stated that the regulations should exclude the Beaufort Sea area offshore of the Arctic National Wildlife Refuge and the refuge itself.

*Response:* The Arctic National Wildlife Refuge is excluded from this rulemaking. Also Lease Sale 170 does not allow further oil and gas leasing in the Outer Continental Shelf area offshore of the Arctic National Wildlife Refuge. However, some oil and gas industry activity may occur in this area due to existing leases. The area from the coast to 3 miles out is State of Alaska waters. A State of Alaska lease sale is planned for this area in the future. By regulations being implemented, we will have more access to oil and gas operations off the coast of the refuge to monitor and mitigate potential impacts through the Letter of Authorization process.

*Comment:* Commenters stated that the regulations should increase the level of protection in Important Habitat Areas designated in our Habitat Conservation Strategy for Polar Bears in Alaska.

*Response:* Important habitat areas are presently protected through the Letter of Authorization process. LOAs are conditioned to insure the safety of polar bear denning activities.

*Comment:* Commenters stated that the comment period was too short.

*Response:* The length of the comment period was derived in consideration of the then approaching expiration on December 15, 1998, of incidental take regulations beginning at 50 CFR 18.121 that have governed Industry operations in the Beaufort Sea since December 1993, and we received extensive public

input. These new regulations allow activities that are identical to the regulations that Industry has operated under for the past five years. Also, this final rule is issued for only one year. No later than the end of this one year period, we will conduct another rulemaking process with full public review.

#### Required Determinations

We have prepared an Environmental Assessment (EA) in conjunction with this rulemaking and concluded in a Finding of No Significant Impact (FONSI) 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. For a copy of the EA and FONSI, contact the person in Alaska identified above in the section entitled, **FOR FURTHER INFORMATION CONTACT.**

This rulemaking is not a significant rule and was not subject to OMB review under Executive Order 12866.

We have determined that this rule is not a major rule under 5 U.S.C. 804(2), the Small Business Regulatory Enforcement Fairness Act. The regulations are not likely to result in: (1) An annual effect on the economy of \$100 million or more. Expenses will be related, but not necessarily limited, to development of applications for regulations and LOAs, to monitoring, record keeping, and reporting activities conducted during industry oil and gas operations, development of polar bear interaction plans, and coordination with Alaska Natives to minimize effects of operations on subsistence hunting.

Compliance with the rule is not expected to result in additional costs to Industry that it has not already been subjected to for the previous five years. Realistically, these costs are minimal in comparison to those related to actual oil and gas exploration, development, and production operations. The actual costs to Industry to develop the petition for promulgation of regulations and LOA requests probably does not exceed \$500,000 per year, far short of the \$100 million "major rule" threshold that would require preparation of a regulatory impact analysis. It should be pointed out that without specific regulations and LOAs, the cost to Industry resulting from lost profits, relinquishing leases earlier than expected, and writing off bonus payments against current income; and the cost to American society resulting from lost royalties and tax payments might be substantial if incidental takes were to occur and legal challenges succeeded in long-term stoppages of oil

and gas operations on Federal and State lands and waters. Such stoppages are unlikely, but if any cessation of activities did occur, they likely would be short-term and would not have an annual effect on the economy surpassing \$100 million. On the contrary, the most likely regulatory scenario finds a rule imposing relatively minor costs. Such a rule would be unlikely to force firms to cease operations. As is presently the case, profits would accrue to Industry; royalties and taxes would accrue to the Government; and the rule would have little or no impact on decisions by Industry to relinquish tracts and write off bonus payments; (2) a major increase in costs or prices for consumers, individual industries, or government agencies; or (3) significant adverse effects on competition, employment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic or export markets.

We have also determined that this final rule will not have a significant economic effect on a substantial number of small entities under the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* Oil companies and their contractors, conducting exploration, development, and production activities in Alaska have been identified as the only likely applicants under the regulations. These potential applicants have not been identified as small businesses. The analysis for this rule is available from the person in Alaska identified above in the section entitled, **FOR FURTHER INFORMATION CONTACT.**

This final rule is not expected to have a potential takings implication under Executive Order 12630 because it would authorize incidental, but not intentional, take of polar bear and walrus by oil and gas industry companies and thereby exempt them from civil and criminal liability. The final rule also does not contain policies with Federalism implications sufficient to warrant preparation of a Federalism Assessment under Executive Order 12612.

The Solicitor's Office has determined that these regulations meet the applicable standards provided in sections 3(a) and 3(b)(2) of Executive Order 12988.

The reinstatement of authority (under OMB Number 1018-0070) to collect information contained in this rule was submitted to the OMB for approval under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*). On April 1, 1998, we published a notice in the **Federal Register** with a 60-day comment period

announcing to the public its intention to seek OMB approval for the collection of information associated with this rulemaking. On September 22, 1998, we published a **Federal Register** notice with 30-day comment period announcing to the public that this collection of information had been submitted to the OMB for reinstatement. On October 24, 1998, the OMB granted approval of our request for reinstatement of this information collection requirement.

The Administrative Procedure Act, 5 U.S.C. 553(d), generally requires that the effective date of a final rule not be less than 30 days from publication date of the rule. Section 553(d)(1) provides that the 30 day period may be waived if the rule grants or recognizes an exemption or relieves a restriction. Since this rule relieves certain restrictions concerning take of marine mammals, and the previous exemption has expired, the Service has determined that this final rule should be made effective upon the date of publication.

#### List of Subjects in 50 CFR Part 18

Administrative practice and procedure, Alaska, Imports, Indians, Marine mammals, Oil and gas exploration, Reporting and record keeping requirements, Transportation.

For the reasons set forth in the preamble, the Service amends part 18, subchapter B of Chapter I, Title 50 of the Code of Federal Regulations as set forth below:

#### PART 18—MARINE MAMMALS

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

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

2. Revise subpart J to read as follows:

##### Subpart J—Taking of Marine Mammals Incidental to Oil and Gas Exploration, Development and Production Activities in the Beaufort Sea and Adjacent Northern Coast of Alaska

- 18.121 What specified activities does this rule cover?  
 18.122 In what specified geographic region does this rule apply?  
 18.123 When is this rule effective?  
 18.124 How do I obtain a Letter of Authorization?  
 18.125 What criteria do we use to evaluate Letter of Authorization requests?  
 18.126 What does my Letter of Authorization allow?  
 18.127 What activities are prohibited?  
 18.128 What are the monitoring and reporting requirements?  
 18.129 What are the information collection requirements?

##### Subpart J—Taking of Marine Mammals Incidental to Oil and Gas Exploration, Development and Production Activities in the Beaufort Sea and Adjacent Northern Coast of Alaska

###### § 18.121 What specified activities does this rule cover?

Regulations in this subpart apply to the incidental, but not intentional, take of polar bear and Pacific walrus by U.S. citizens (as defined in § 18.27(c)) engaged in oil and gas exploration, development, and production activities in the Beaufort Sea and adjacent northern coast of Alaska. These regulations do not apply to the incidental, unintentional take of polar bear and Pacific walrus resulting from sub-sea pipelines offshore in the Beaufort Sea, and subsequent production and transport of oil through sub-sea pipelines to tie in with onshore facilities. These regulations and any authorizations under these regulations do not constitute approval of future sub-sea pipeline construction and operation activities.

###### 18.122 In what specified geographic region does this rule apply?

This rule applies to the specified geographic area defined by a North/South line at Barrow, Alaska, and includes all Alaska coastal areas, State waters, and Outer Continental Shelf waters east of that line to the Canadian border and an area 25 miles inland from Barrow on the west to the Canning River on the east. The Arctic National Wildlife Refuge is excluded from this rule.

###### § 18.123 When is this rule effective?

Regulations in this subpart are effective January 28, 1999 through January 30, 2000, for year-round oil and gas exploration, development, and production activities.

###### § 18.124 How do I obtain a Letter of Authorization?

(a) You must be a U.S. citizen as defined in § 18.27(c) of this part.  
 (b) If you are conducting an oil and gas exploration, development, or production activity in the geographic area described in § 18.122 that may take a polar bear or Pacific walrus in execution of those activities, you should apply for a Letter of Authorization for each exploration activity or a Letter of Authorization for each development and production area. You must submit the application for authorization to our Alaska Regional Director at least 90 days prior to the start of the proposed activity.

(c) Your application for a Letter of Authorization must include the following information:

(1) A description of the activity, the dates and duration, the specific location and the estimated area affected by that activity;

(2) A site-specific plan to monitor the behavior and effects of the activity on polar bear and Pacific walrus that are present during the on-going activities. Our Alaska Regional Director must approve your plan which identifies the survey techniques that determine the actions of the polar bear and Pacific walrus in response to the on-going activity. Your monitoring program must document the actions of these marine mammals and estimate the actual level of take. The monitoring requirements will vary depending on the activity, the location, and the time.

(3) A polar bear awareness and interaction plan if the activity is on ice or in an area of active ice movement. For the protection of human life and welfare, each employee on site must complete a basic polar bear encounter training course.

(4) A Plan of Cooperation to mitigate potential conflicts between the proposed activity and subsistence hunting. This Plan of Cooperation must identify measures to minimize adverse effects on the availability of polar bear and Pacific walrus for subsistence uses if the activity takes place in or near a traditional subsistence hunting area. You should contact affected subsistence communities to discuss potential conflicts with the location, timing, and methods of proposed operations. You must make reasonable efforts to assure that Industry activities do not interfere with subsistence hunting or that adverse effects on the availability of polar bear or Pacific walrus are properly mitigated.

(d) We will evaluate each request for a Letter of Authorization based on the specific activity and the specific geographic location. Each Letter of Authorization will identify allowable conditions or methods that are specific to the activity and location.

###### § 18.125 What criteria do we use to evaluate Letter of Authorization requests?

When you request a Letter of Authorization, we will determine whether the level of activity identified in the request exceeds that considered by us in making a finding of negligible impact on the species and a finding of no unmitigable adverse impact on the availability of the species for subsistence. If the level of activity is greater, we will re-evaluate our findings to determine if those findings continue to be appropriate based on the greater level of activity. Depending on the results of the evaluation, we may allow the authorization to stand as is, add

further conditions, or withdraw the authorization.

**§ 18.126 What does my Letter of Authorization allow?**

(a) Depending on your application for incidental take authority, your Letter of Authorization (see § 18.124) allows the incidental, but not intentional, take of polar bear and Pacific walrus when you are carrying out one or more of the following activities:

- (1) Conducting geological and geophysical surveys;
- (2) Drilling exploratory wells and associated activities;
- (3) Developing oil fields and associated activities; and
- (4) Drilling production wells and performing production support operations, except the construction and operation of sub-sea pipelines.

(b) You must conduct methods and activities identified in your Letter of Authorization in a manner that minimizes to the greatest extent practicable adverse impacts on polar bear and Pacific walrus, their habitat, and on the availability of these marine mammals for subsistence uses.

**§ 18.127 What activities are prohibited?**

(a) You may not intentionally take polar bear or Pacific walrus under these regulations. Under section 109(h)(1) and section 101(c) of the Marine Mammal Protection Act, we may authorize intentional take (e.g., harassment associated with deterrent activities, and taking in defense of self or others).

(b) Letters of Authorization prohibit any take that fails to comply with the terms and conditions of these specific regulations.

(c) This rule does not authorize the incidental take of polar bear and Pacific walrus during sub-sea pipeline activities.

(d) In accordance with § 18.27(f) of this part, we will make decisions

concerning withdrawals of Letters of Authorization, either on an individual or class basis, only after notice and opportunity for public comment. This requirement for notice and public comment will not apply if we determine that an emergency exists which poses a significant risk to the well-being of the species or stocks of polar bear or Pacific walrus.

**§ 18.128 What are the monitoring and reporting requirements?**

(a) We require holders of Letters of Authorization to cooperate with us and other designated Federal, State, or local agencies to monitor the impacts of oil and gas exploration, development, and production activities on polar bear and Pacific walrus.

(b) Holders of Letters of Authorization must designate a qualified individual or individuals to observe, record, and report on the effects of their activities on polar bear and Pacific Walrus.

(c) We may choose to place an observer on site of the activity, on board drill ships, drill rigs, aircraft, icebreakers, or other support vessels or vehicles to monitor the impacts of your activity on polar bear and Pacific walrus.

(d) For exploratory activities, holders of a Letter of Authorization must submit a report to our Alaska Regional Director within 90 days after completion of activities. For development and production activities, holders of a Letter of Authorization must submit a report to our Alaska Regional Director by January 15 for the preceding year's activities. Reports must include, at a minimum, the following information.

- (1) Dates and times of activity;
- (2) Dates and locations of polar bear or Pacific walrus activity as related to the monitoring activity; and
- (3) Results of the monitoring activities including an estimate of the level of take.

**§ 18.129 What are the information collection requirements?**

(a) The collection of information contained in this subpart has been approved by the Office of Management and Budget under the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*) and assigned clearance number 1018-0070. We need to collect the information in order to describe the proposed activity and estimate the impacts of potential takings by all persons conducting the activity. We will use the information to evaluate the application and determine whether to issue specific regulations, and, subsequently, Letters of Authorization.

(b) For the initial year, we estimate your burden to be 200 hours to develop an application requesting us to promulgate incidental take regulations. For the initial year and annually thereafter when you conduct operations under this rule, we estimate an 8 hour burden per Letter of Authorization, a 4 hour burden for monitoring, and an 8 hour burden per monitoring report. You must respond to this information collection request to obtain a benefit pursuant to Section 101(a)(5) of the Marine Mammal Protection Act. You should 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 224 ARLSQ, 1849 C Street, NW., Washington, DC 20240, and the Office of Management and Budget, Paperwork Reduction Project (1018-0070), Washington, DC 20503.

Dated: January 22, 1999.

**Nancy K. Hayes,**

*Acting Assistant Secretary for Fish and Wildlife and Parks.*

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