

**SUPPORTING STATEMENT
APPLICATIONS AND REPORTING REQUIREMENTS FOR INCIDENTAL TAKING
OF MARINE MAMMALS BY SPECIFIED ACTIVITIES UNDER
THE MARINE MAMMAL PROTECTION ACT
OMB CONTROL NO.: 0648-0151**

A. JUSTIFICATION

1. Explain the circumstances that makes the collection of information necessary.

The Marine Mammal Protection Act of 1972 (**MMPA, 16 U.S.C. 1361 et seq.**) imposed, with certain exceptions, a moratorium on the taking of marine mammals. “Taking” means to harass, hunt, capture, or kill, or attempt to harass, hunt, capture or kill any marine mammal and can be either intentional or incidental. Civil or criminal penalties may result from taking a marine mammal without an exemption or authorization.

Section 101(a)(5)(A) of the MMPA directs the Secretary of Commerce to allow, upon request, the taking of small numbers of marine mammals incidental to specified activities under implementing regulations that, among other things, establish the permissible methods of taking, provided the National Marine Fisheries Service (NMFS) can determine that the taking will be small in number, have no more than a negligible impact on marine mammals and will not have an unmitigable adverse impact on the subsistence needs of Alaskan Natives. In supporting legislative reports, the U.S. Congress clearly placed the responsibility for providing the information necessary to make determinations on the activity participants themselves, not on NMFS. After regulations are issued to authorize the taking, those conducting the activity must obtain Letters of Authorization (LOA) and annual reports must be submitted. Procedural regulations outlining the requirements for the submission of requests are contained in **50 CFR 216** Subpart I. Specific regulations governing authorized activities are contained in subsequent subparts to 50 CFR 216. Section 101(a)(5)(A) of the MMPA also requires applicants to monitor and report interactions with marine mammals. This information is necessary to verify the statements made by the applicant, and the determinations made by NMFS. By implementing a system having generic regulations for an activity, and authorizing LOAs under those regulations, paperwork burdens are significantly reduced on those receiving LOAs (if the universe is more than one) since they do not need to duplicate the information necessary to support their activity's marine mammal take.

Section 101(a)(5)(D) of the MMPA provides an expedited process by which citizens of the United States can apply for an authorization to take incidentally, but not intentionally, small numbers of marine mammals by harassment (authorizations under Section 101(a)(5)(A) and (D) cannot be granted to non-U.S. citizens or corporations.) This amendment eliminates the need for applying for regulations, but retains the requirements for applications for the permit (called an Incidental Harassment Authorization (IHA)), monitoring and reporting interactions with marine mammals. Although this does not reduce the paperwork burdens significantly on the activity to provide to NMFS, it expedites NMFS review and approval of the application. Accordingly, IHAs are normally issued within 4 months as opposed to 7-12 months for LOAs.

2. Explain how, by whom, how frequently, and for what purpose the information is to be used. If the information collected will be disseminated to the public, or used to support information that will be disseminated to the public, then explain how the collection complies with all applicable Information Quality Guidelines.

Under this program, the collection of information is the responsibility of the individual, organization or independent scientist petitioning NMFS for either regulations or a "permit" (LOA/IHA) to allow a taking of marine mammal incidental to the activity. The information required to be provided in requests for regulations or authorizations (50 CFR 216.104) is used by NMFS and the general public to evaluate the impacts of the proposed activity on marine mammals and in making the findings and either issuing regulations and LOAs, or IHAs, required by the MMPA. To issue regulations and authorizations to govern the taking, NMFS must (1) find that the taking will (a) be small, (b) not have more than a negligible impact on the species and (c) not have an unmitigable adverse impact on the availability of the species for subsistence uses, (2) prescribe regulations or conditions in the authorization (LOA/IHA) 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, and (3) prescribe regulations or conditions to the Authorization, pertaining to the monitoring and reporting of such taking.

For incidental take applications, the information items requested from applicants are found in 50 CFR 216.104(a), which is attached. Information items (1) and (2) are necessary for NMFS to judge the size, scope and duration of the proposed activity, while items (3) and (4) are necessary to describe the environmental setting of the activity. Information requests (5) through (10) are to ensure that the expected impact from the activity will have no more than a negligible impact on the affected marine mammals, their critical habitat, and, if appropriate, on affected subsistence lifestyles of Alaskan natives. Information item (11) is required to meet the statutory requirement in section 101(a)(5)(A)(ii)(I) to ensure that the taking is effecting the least practicable impact on the species and habitat.

Information item (12) is required to ensure that the activity will not have an unmitigable adverse impact on the subsistence needs for marine mammals in Alaska. This information item ensures that the industry has and will continue to communicate with the appropriate affected Alaskan Native communities. Failure to do so may result in a delay in processing the application due to the longer time period needed to review the activity and ensure the activity would not result in an unmitigable impact on Native subsistence needs for marine mammals. However, if the applicant's activity does not take place in Arctic waters (where Native Alaskan subsistence activities occur), information items (8) and (12) are not applicable and can be ignored. Because the MMPA requires small take authorizations to have an appropriate level of monitoring and reporting, information item (13) requests that this information be provided.

Finally, information item (14) requests information on what plans the applicant may have to conduct research on the impacts on marine mammals from the activity. This information is requested to effectuate legislative intent behind the 1981 Amendments to the MMPA (H. Rept.97-228, p.20) that persons operating under the small take authority engage in appropriate research designed to reduce the incidental take. Often research is undertaken in lieu of monitoring (when monitoring may not be practicable or effective) or when serious unanswered questions on the impacts on marine mammals remain). For "research" undertaken in the Arctic by oil and gas companies, this research is reviewed by a peer review process (required by the MMPA) that can either be independent document review, a workshop, or both.

The information contained in the application is reviewed by NMFS and, is provided to the general public (as required by the MMPA) for a period of 30 days (for IHAs) and 45 days (for regulations/LOAs). NMFS' analysis involved in making the statutory determinations requires detailed information on the activity, the affected marine mammals, and how the activity may affect the animals directly or indirectly through alterations of the habitat. This information meets the "practical utility" of the Paperwork Reduction Act (PRA) as all information is used in the NMFS analyses and for meeting other statutory requirements (e.g., section 7 and/or 10 of the Endangered Species Act and the National Environmental Policy Act (NEPA)). For example, before allowing the taking of ringed seals incidental to winter seismic activities in the Arctic, based in major part upon information provided by the applicant, NMFS prepared an Environmental Assessment under NEPA, that evaluated the available data to determine the area affected by the activity, the usage of the habitat by ringed seals, if ringed seal are displaced, the effects of displacement on the population, how the habitat is altered, and the effects of the alteration on the population. Without a complete application, NMFS would be required to obtain this information, resulting in significant delays in issuing the applicant an authorization.

It should be noted that information contained in a request for an LOA (under regulations) varies by activity. It is used to determine if the applicant falls within the scope of the specific regulations or if the application for an IHA is warranted. Information required concerns the dates, location, methods and level of activity to determine if the specific regulations and the statute cover the potential taking.

As with an application for regulations and LOAs under section 101(a)(5)(A) of the MMPA, information in a request for an IHA under section 101(a)(5)(D) needs to contain both a description of the activity and an assessment of the impacts on marine mammals in the vicinity of the activity. The application for an IHA needs to be as detailed as a request for regulations if the activity will have the same level of impact (or public controversy).

NMFS uses interim (90-day) and annual reports to determine if the activity took place as described in the request for an LOA or IHA, if the monitoring plan submitted was conducted, to determine if the taking of marine mammals was more than that authorized, and to determine if the holder of the LOA or IHA complied with other requirements included in the authorization. For example, in Alaska, regulations and authorizations include requirements for cooperating with the whaling communities to ensure that oil and gas exploratory activities do not reduce the availability of marine mammals for subsistence hunting. Ninety-day and annual reports must include a description of the activity including time, location, and place; a summary of the monitoring program; and an assessment of the effects of the activity on marine mammals including the estimated level of take by species. Although not commonly imposed, additional reporting requirements may be required on a case-by-case basis under activity-specific regulations and authorizations issued under those regulations or an IHA. When interim reports are determined unnecessary to ensure that the activity was having no more than a negligible impact, the requirement for this report is waived in the individual IHA or LOA.

If the information is not collected, the incidental taking could not be authorized by NMFS. However, it is made clear to applicants and the public that issuance of regulations LOAs and IHAs are not a permit to conduct the activity, only to incidentally take marine mammals during the course of that activity. Failure to obtain an LOA or IHA does not mean the activity cannot take place, but if a marine mammal is taken (harassed, injured or killed) while conducting that

activity, the operator may be subject to prosecution under the MMPA or vulnerable to third party litigation.

It is anticipated that some of the information collected will be disseminated to the public or used to support publicly disseminated information. As explained in the preceding paragraphs, the information gathered has utility. NMFS will retain control over the information and safeguard it from improper access, modification, and destruction, consistent with National Oceanic and Atmospheric Administration (NOAA) standards for confidentiality, privacy, and electronic information. See response #10 of this Supporting Statement for more information on confidentiality and privacy. The information collection is designed to yield data that meet all applicable information quality guidelines. Prior to dissemination, the information will be subjected to a predissemination review pursuant to section 515 of Public Law 106-554.

3. Describe whether, and to what extent, the collection of information involves the use of automated, electronic, mechanical, or other technological techniques or other forms of information technology.

The application instructions are available for downloading on the [Office of Protected Resources](#) home page. Also, they can be forwarded upon request via E-mail in .PDF format.

Applicants/Permit Holders may submit applications and reports in Word and Adobe formats via e-mail or surface mail. Electronic format allows the public easy access to applications and activity reports as they are posted on the Office of Protected Resources (OPR) Home page for downloading.

4. Describe efforts to identify duplication.

NMFS and the U.S. Fish and Wildlife Service (USFWS), Department of the Interior (USDOI), share responsibilities under the MMPA, with each agency being responsible for different species. Parallel regulations minimize duplication of effort on the part of those applicants "taking" marine mammal species under both agencies' jurisdiction. When marine mammal species under each agency's jurisdiction may be taken by the same activity, applicants can submit a single application to both agencies.

In addition, the Minerals Management Service (MMS) of the USDOI has an overlapping collection with NMFS and the USFWS for reporting impacts on the marine environment from offshore oil and gas activities. This is a large information collection, which mostly does not involve NMFS (or the USFWS). There is a small overlap of collecting responsibilities when (such as in the Arctic) oil companies apply for IHAs or LOAs. When there is an overlap, NMFS and MMS work cooperatively to ensure that there is no duplication. For example, in the Gulf of Mexico, NMFS will complete a final rule this summer (2007) on issuing LOAs for the removal of offshore oil structures. NMFS or its contractors monitor the activity, collect the data and submit the data report to NMFS, MMS and other agencies with responsibilities and interests. MMS does not independently collect the same data. In addition, NMFS is drafting rules for publication later this summer that would regulate the taking of marine mammals by the Gulf of Mexico offshore seismic industry for oil exploration. For this component of the offshore industry, NMFS' monitoring and reporting requirements are likely to be more comprehensive than MMS' and therefore, will supplant the MMS information collection requirement. MMS will continue to collect information on other components of the offshore industry. In both cases,

these rules were requested by MMS and both agencies are working cooperatively to implement a unified mitigation, monitoring and reporting system.

5. If the collection of information involves small businesses or other small entities, describe the methods used to minimize burden.

NMFS does not anticipate small businesses being significantly affected, unless they are involved in an activity that will otherwise have an unauthorized taking of a marine mammal (i.e., they have not applied for a small take authorization). Most potentially affected applicants are identified as university researchers; oil and gas exploration companies, other energy companies, and their contractors. While contractors may be considered small businesses, in many cases they are contracted to supply the information required under this collection, and thereby obtain a benefit. Otherwise, they are unaffected.

In those cases where small businesses might be affected (such as oil rig removal contractors in the Gulf of Mexico), NMFS seeks out a larger entity (such as, in the activities mentioned previously, the American Petroleum Institute or the MMS) to gather the necessary information. Small contractors then need only provide NMFS with minimal information (such as company name and appropriate contact) in order to obtain an LOA.

6. Describe the consequences to the Federal program or policy activities if the collection is not conducted or is conducted less frequently.

Requests for regulations and authorizations are on an as-needed basis. However, by law, regulations can be effective for only a period of 5 years or less. The period of validity for an LOA is determined on a case-by-case basis depending upon the specific activity, usually depending upon the reporting period. IHAs are limited by statute to a period no greater than 1 year.

Without an application, NMFS would be unaware of the applicant's need for an exemption to the MMPA's moratorium on taking marine mammals. Information previously supplied or otherwise available can be referenced and need not be submitted. Documents required by that law can be either used in preparation of a submission for a request for regulations or submitted as supporting documentation depending upon the content of the NEPA documents.

The information needs to be provided by the applicant based on the applicants' knowledge of the activity and its impacts and previous experience. This information, as well as other information available to NMFS, is used in making the findings and issuing the regulations. This ensures that the best available information is used, as required by 50 CFR Part 216. In addition, under the permit provisions of the MMPA, applicants have the burden to demonstrate that the taking of marine mammals will be consistent with the purposes, policies and provisions of the MMPA (see Section 104(d)(3)). In describing the burden of proof requirement, Congress noted in the legislative history that "If the 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 considerations." (H.R. Rep. No. 707, 92nd Cong. (1971)).

A reporting period is tailored to the specific activity, whether seasonal, annual or periodic. A reporting period greater than annual may not ensure adequate monitoring of the activity, and may be viewed as not being responsive to the mandates of Congress as expressed in the MMPA.

Wherever possible, however, multi-year reporting would be authorized. Also, whenever possible, either the 90-day or the annual report is waived; especially if the reports would be duplicative.

7. Explain any special circumstances that require the collection to be conducted in a manner inconsistent with OMB guidelines.

This collection is consistent with Office of Management and Budget (OMB) guidelines.

8. Provide a copy of the PRA Federal Register notice that solicited public comments on the information collection prior to this submission. Summarize the public comments received in response to that notice and describe the actions taken by the agency in response to those comments. Describe the efforts to consult with persons outside the agency to obtain their views on the availability of data, frequency of collection, the clarity of instructions and recordkeeping, disclosure, or reporting format (if any), and on the data elements to be recorded, disclosed, or reported.

NOAA published a request for review and comment on the subject collection of information on September 8, 2000 (65 FR 54500). No comments were received either during or after the 60-day public comment period. NOAA published a second request for review and comment on the subject collection of information on October 20, 2003 (68 FR 5991). One comment was received. This commenter represents approximately 33 percent of the IHA applications represented in Item 12(A)(c) below. The average time for the cited IHA applications was approximately 285 hours, with diminishing time needed corresponding to increasing experience in what analyses are needed. Prior to 2003, this applicant was not a participant in the IHA program. Since the quality and quantity of work done by the Lamont Doherty Earth Observatory is significantly greater than many other applicants (due to litigation threat), NMFS modified the burden estimate for IHA applications for the 2004-2007 period to distinguish between "simple" and "complex" applications and reports. In addition, NMFS received an e-mail from a contractor for the U.S. Navy that, while having PRA requirements that were within the range projected for reports and regulations, it had significantly higher estimates for LOA requests. However, at the time (2003) this contractor was employed by the U.S. Navy, a military activity, and is therefore exempt from the PRA.

Recently, NOAA published a third request for review and comment on the subject collection of information on February 6, 2007 (72 FR 5420). One comment was received. The Center for Regulatory Effectiveness (CRE) raises three issues to which NMFS will respond:

Issue 1. This Information Collection Request (ICR) does not and cannot authorize some information collections that the National Marine Fisheries Service (NMFS) recently imposed in Incidental Take Authorizations (ITA) under the MMPA (16 U.S.C. § 1361 et. seq.). Some of these collections cannot produce accurate and reliable information. Consequently, they flunk the "practical utility" standard of the PRA and they do not meet the Utility and Objectivity/Accuracy/Reliability standards of the Information Quality Act (IQA), 44 U.S.C. § 3516 et seq.

Response: Incidental Harassment Authorizations (IHAs) were issued to 3 companies for conducting seismic surveys in the Beaufort and Chukchi Seas in 2006. These companies submitted applications with the information items described previously and were issued IHAs. One of the IHA conditions was for observers to monitor areas distant from the seismic vessel to

ensure that no significant impacts to feeding and migrating marine mammals would occur. This condition was not imposed under section 101(a)(5)(D) of the MMPA, but under NEPA as NMFS issued a "mitigated Finding of No Significant Impact" which required certain measures be contained in the IHAs. Without these measures, NMFS would not be in compliance with NEPA and could not issue the IHAs, and no company would have been authorized (by MMS) to conduct seismic in the Arctic in 2006 without imposition of this requirement. In regards to practicality, these zones were successfully monitored in 2006 in the Beaufort Sea and have been proposed by the oil industry for 2007. In the Chukchi Sea, aerial monitoring was not conducted due to (1) litigation and (2) aircraft safety concerns (lack of alternative landing site availability in bad weather). The oil industry, in cooperation with NOAA (Boulder) and the State of Alaska are developing an environmental monitoring program using unmanned aerial vehicles (UAVs) to replace manned aircraft. The oil industry and NOAA are working with the FAA to obtain authorization to use this technology in 2008 or 2009. However, monitoring the activity of the IHA holder is not a part of this Information Collection.

Issue 2: NMFS should more completely identify and describe the information collections it asks OMB to approve, and the public to comment. The general information collection requirements contained in 50 CFR Part 216 are not the same information collections that NMFS requires in ITAs issued to individual applicants.

Response: The application instructions are contained in 50 CFR 216.104 and on our homepage; no additional information is required, although NMFS can request more detailed information be provided if it determines that information is needed to make the required determinations under the MMPA. If that information is not available through the applicant and/or through a literature search, then an IHA may not be issued. The marine mammal observer-monitoring requirement is not an information collection and therefore, does not need to be discussed here. However, marine mammal observations are required by the MMPA to ensure that the impacts to marine mammals and Arctic native subsistence uses of marine mammals are not significant. Without those determinations, an ITA (IHA/LOA) cannot be issued.

Issue 3: NMFS should explain how its ICR Control OMB Control Number 0648-0151 is consistent with the MMS' ICR OMB Control Number 1010-0154. In its Supporting Statement for ICR 1010-0154, MMS justified its ICR by stating: "No other Federal agency has the responsibility for collecting information relative to the impacts of Outer Continental Shelf (OCS) oil and gas exploration, development, and production activities. Similar information does not exist and has not been collected. Respondents will report to MMS, and, in turn, MMS will provide the required information to NMFS and FWS. Therefore, there will be no additional burden to the public."

Response: This issue was addressed in Justification Item 4.

In addition to the above *Federal Register (FR)* notices, the MMPA requires notice and opportunity for public comment on the promulgation of regulations when an application is submitted as part of the request for regulations. The information collection items required in requests for small take authorizations were published in 1982, 1988 and 1995, as proposed rules with an opportunity for public comment. A FR notice requesting comments on the paperwork burden was also published at the proposed (60 FR 28379, May 31, 1995) and interim (61 FR 15884, April 10, 1996) rule stage. No comments were received in response to these PRA collection notices. Lastly, comments on the individual PRA collection is requested whenever NMFS publishes a proposed rule to authorize a taking under section 101(a)(5)(A) of the MMPA.

NMFS publishes approximately two proposed rules under this program annually. Although NMFS anticipates that the Center for Regulatory Effectiveness (CRE) will comment in the future, no PRA related comments have been received in the past.

9. Explain any decisions to provide payment or gift to respondents, other than remuneration of contractors or grantees.

No payments or gifts were provided.

10. Describe any assurance of confidentiality provided to respondents and the basis for the assurance in statute, regulation, or agency policy.

The information collection is a matter of public record and no material of a confidential nature is required.

11. Provide additional justification for any questions of a sensitive nature, such as sexual behavior and attitudes, religious beliefs, and other matters that are commonly considered private.

No sensitive questions are asked.

12. Provide an estimate in hours of burden of the collection of information.

A. Due principally to increased volume of applications for incidental take authorizations, the total annual burden hours is currently estimated at 20,456 hours, as shown in Table 1. The complexity of the information required in applications or reports varies greatly due to the following: (a) level of controversy over the activity, (b) level and type of incidental take of marine mammals, and (c) level of unresolved questions involving activity's long-term impact on marine mammals, habitat and/or subsistence needs for marine mammals. The lower the level of concern over each of the three items, the lower the information burden on the applicant.

B. Total labor cost to the applicants is approximately \$9,940: cost of "handling" 142 applications/reports annually at 1 hour each at \$35 hr X 2.0 overhead.

13. Provide an estimate of the total annual cost burden to the respondents or recordkeepers resulting from the collection (excluding the value of the burden hours in #12 above).

There are no identified costs associated with capital and start-up components. All costs are associated with staff and contractor preparation of applications and reports. However, the U.S. Navy has implemented a data base program called Living Marine Resources Information System (LMRIS) to expedite information for preparing applications under this program and to assess activity program impacts under the National Environmental Policy Act, the Endangered Species Act and Executive Order (EO) 12114. This database is available to non-government organizations in addition to the U.S. Government. At this time, all data inputs to the LMRIS system are provided by NMFS. Also, private consulting firms have designed, implemented and are contracting out computer software programs to assist applicants in estimating marine mammal take levels needed as part of LOA/IHA applications. One of the companies is a small business that is benefiting from marketing its product; a second is not a small business, but is a large, international consulting firm.

Costs associated with providing the applications and reports, such as data entry, copying, filing, and mailing are accounted for under the contractor overhead charges but cannot be extracted in detail without contacting affected individuals and companies. Total cost of shipping via special handling (U.S. Mail, Priority Shipping) is estimated at \$1,360.50.

14. Provide estimates of annualized cost to the Federal Government.

Total cost to the Government next year and beyond is expected to be approximately \$337,500 for 3 Full Time Employee (FTE)s (1 PB-4 and 1 PB-3 in Hdqtrs.; 1 contractor X 1.5 (overhead and printing)).

15. Explain reasons for any program changes or adjustments reported in Items 13 or 14 of the OMB 83-I.

An increase in total collection hours over previous estimate has been modified for several reasons: (1) an increase in the number of applicants for regulations and IHAs; (2) an increase in the reporting burden for certain activities and (3) an increase in time spent responding to the questions in the application instructions. The increase in the number of applicants and in burden hours are not due to a change in the requirements but instead due to increased public interest and oversight, and the threat of litigation by non-governmental entities.

The increase in costs is not a true increase: these costs had not been separated out from contractor costs, previously.

16. For collections of information whose results will be published, outline the plans for tabulation, and publication.

There are no plans for the government to publish the data. However, at times the information contained in annual reports have been extracted, reanalyzed and published in peer-reviewed journals by scientists employed by the applicants for LOAs/IHAs.

17. If seeking approval to not display the expiration date for OMB approval of the information collection, explain the reasons why display would be inappropriate.

There are no plans not to display the expiration date provided by OMB.

18. Explain each exception to the certification statement identified in Item 19 of OMB 83-I.

No exceptions to the certification statement are required

B. COLLECTIONS OF INFORMATION EMPLOYING STATISTICAL METHODS

The information collection described in this request does not employ statistical methods (except in order to estimate marine mammal incidental take levels, which reduces monitoring costs on the applicants).

TABLE I.

Subpart I

General Implementing Regulations for Incidental Takes

| Information collection | Average responses per year (non-federal) | Hours per response | Total hours per year |
|-------------------------------|---|---------------------------|-----------------------------|
| Petition for Regulations | 2 | 483 | 966 |
| LOA application - simple | 30 | 3 | 90 |
| LOA application - complex | 8 | 120 | 960 |
| LOA reports - simple | 30 | 20 | 600 |
| LOA reports - complex | 8 | 285 | 2280 |
| IHA application - simple | 12 | 160 | 1920 |
| IHA application - complex | 20 | 285 | 5700 |
| IHA reports - simple | 12 | 120 | 1440 |
| IHA reports - complex | 20 | 325 | 6500 |
| TOTALS | 142 | | 20,456 |