This content is from the eCFR and is authoritative but unofficial.

Title 50 —Wildlife and Fisheries
Chapter I —United States Fish and Wildlife Service, Department of the Interior
Subchapter B —Taking, Possession, Transportation, Sale, Purchase, Barter, Exportation, and Importation of Wildlife and Plants

Part 18 Marine Mammals
- **Subpart A** Introduction
  - **§ 18.1** Purpose of regulations.
  - **§ 18.2** Scope of regulations.
  - **§ 18.3** Definitions.
- **Subpart B** Prohibitions
  - **§ 18.11** Prohibited taking.
  - **§ 18.12** Prohibited importation.
  - **§ 18.13** Prohibited uses, possession, transportation, and sales.
  - **§ 18.14** Marine mammals taken before the Act.
- **Subpart C** General Exceptions
  - **§ 18.21** Actions permitted by international treaty, convention, or agreement.
  - **§ 18.22** Taking by Federal, State or local government officials.
  - **§ 18.23** Native exemptions.
  - **§ 18.24** Taking incidental to commercial fishing operations.
  - **§ 18.25** Exempted marine mammals or marine mammal products.
  - **§ 18.26** Collection of certain dead marine mammal parts.
  - **§ 18.27** Regulations governing small takes of marine mammals incidental to specified activities.
- **Subpart D** Special Exceptions
  - **§ 18.30** Polar bear sport-hunted trophy import permits.
  - **§ 18.31** Scientific research permits and public display permits.
  - **§ 18.32** Waiver of the moratorium.
  - **§ 18.33** Procedures for issuance of permits and modification, suspension, or revocation thereof.
  - **§ 18.34** Guidelines for use in safely deterring polar bears.
- *Subpart E—Depleted Species or Stocks [Reserved]*
- **Subpart F** Transfer of Management Authority to States
- **Subpart G** Notice and Hearing on Section 103 Regulations
  - **§ 18.70** Basis and purpose.
  - **§ 18.71** Definitions.
  - **§ 18.72** Scope of regulations.

§ 18.73 Burden of proof.
§ 18.74 Notice of hearing.
§ 18.75 Notification by interested persons.
§ 18.76 Presiding officer.
§ 18.77 Direct testimony submitted as written documents.
§ 18.78 Mailing address.
§ 18.79 Inspection and copying of documents.
§ 18.80 Ex parte communications.
§ 18.81 Prehearing conference.
§ 18.82 Prehearing order.
§ 18.83 Determination to cancel the hearing.
§ 18.84 Rebuttal testimony and new issues of fact in prehearing order.
§ 18.85 Waiver of right to participate.
§ 18.86 Conduct of the hearing.
§ 18.87 Direct testimony.
§ 18.88 Cross-examination.
§ 18.89 Oral and written arguments.
§ 18.90 Recommended decision, certification of the transcript and submission of comments on the recommended decision.
§ 18.91 Director's decision.

Subpart H Waiver of Moratorium on Taking and Importation of Individual Marine Mammal Species

§ 18.92 Purpose of regulations.
§ 18.93 Scope of regulations.
§ 18.94 Pacific walrus (Alaska).

Subpart I Nonlethal Taking of Northern Sea Otters Incidental to Pile Driving and Marine Construction in Seward, Sitka, and Kodiak, Alaska

§ 18.100 Specified activities covered by this subpart.
§ 18.101 Specified geographic region where this subpart applies.
§ 18.102 Dates this subpart is in effect.
§ 18.103 Procedure to obtain a Letter of Authorization (LOA).
§ 18.104 How the FWS will evaluate a request for an LOA.
§ 18.105 Authorized take allowed under an LOA.
§ 18.106 Prohibited take under an LOA.
§ 18.107 Mitigation.
§ 18.108 Monitoring.
§ 18.109 Reporting requirements.
§ 18.110 Information collection requirements.

Subparts J- K [Reserved]

Subpart L Nonlethal Taking of Marine Mammals Incidental to Pile Driving and Marine Construction Activities in the Gulf of Alaska
§18.142 Specified activities covered by this subpart.
§ 18.143 Specified geographic region where this subpart applies.
§ 18.144 Dates this subpart is in effect.
§ 18.145 Procedure to obtain a Letter of Authorization (LOA).
§ 18.146 How the Service will evaluate a request for an LOA.
§ 18.147 Authorized take allowed under an LOA.
§ 18.148 Prohibited take under an LOA.
§ 18.149 Mitigation.
§ 18.150 Monitoring.
§ 18.151 Reporting requirements.
§ 18.152 Information collection requirements.

PART 18—MARINE MAMMALS

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

Source: 39 FR 7262, Feb. 25, 1974, unless otherwise noted.

Subpart A—Introduction

§ 18.1 Purpose of regulations.

The regulations contained in this part implement the Marine Mammal Protection Act of 1972 (16 U.S.C. 1361-1407), which among other things, restricts the taking, possession, transportation, selling, offering for sale, and importing of marine mammals.

§ 18.2 Scope of regulations.

(a) This part 18 applies solely to marine mammals and marine mammal products as defined in § 18.3. For regulations under the Act with respect to cetacea (whales and porpoises), pinnipedia, other than walrus (seals and sea lions), see 50 CFR part 216.

(b) The provisions in this part are in addition to, and are not in lieu of, other regulations of this subchapter B which may require a permit or prescribe additional restrictions or conditions for the importation, exportation, and interstate transportation of wildlife. (See also part 13 of this subchapter.)

§ 18.3 Definitions.

In addition to definitions contained in section 3 of the Act and in part 10 of this subchapter, and unless the context requires otherwise, in this part 18:

Act means the Marine Mammal Protection Act of 1972, 86 Stat. 1027, 16 U.S.C. 1361-1407; Pub. L. 92-522.

Alaskan Native means a person defined in the Alaska Native Claims Settlement Act (43 U.S.C. section 1603(b) (85 Stat. 588)) as a citizen of the United States who is of one-fourth degree or more Alaska Indian (including Tsimshian Indians enrolled or not enrolled in the Metlaktla Indian Community), Eskimo, or Aleut blood, or combination thereof. The term includes any Native, as so defined, either or both of whose adoptive parents are not Natives. It also includes, in the absence of proof of a minimum blood quantum, any citizen of the United States who is regarded as an Alaska Native by the Native village or town of which he claims to be a member and whose father or mother is (or, if deceased, was) regarded as Native by any Native village or Native town. Any citizen enrolled by the Secretary pursuant to section 5 of the Alaska Native Claims Settlement Act shall be conclusively presumed to be an Alaskan Native for purposes of this part.

Authentic native articles of handicrafts and clothing means items made by an Indian, Aleut, or Eskimo that

(a) are composed wholly or in some significant respect of natural materials and

(b) are significantly altered from their natural form and are produced, decorated, or fashioned in the exercise of traditional native handicrafts without the use of pantographs, multiple carvers, or similar mass-copying devices. Improved methods of production utilizing modern implements such as sewing machines or modern techniques at a tannery registered pursuant to § 18.23(c) may be used so long as no large-scale mass-production industry results. Traditional native handicrafts include, but are not limited to, weaving, carving, stitching, sewing, lacing, beading, drawing, and painting. The formation of traditional native groups, such as cooperatives, is permitted so long as no large-scale mass production results.

Commercial fishing operation means the lawful harvesting of fish from the marine environment for profit as part of an on-going business enterprise. Such term shall not include sport fishing activities whether or not carried out by charter boat or otherwise, and whether or not the fish so caught are subsequently sold.

Endangered species means a species of marine mammal listed as "endangered" pursuant to the Endangered Species Act of 1973, 87 Stat. 884, Pub. L. 93-205 (see part 17 of this subchapter).

Incidental catch means the taking of a marine mammal

(a) because it is directly interfering with commercial fishing operations, or

(b) as a consequence of the steps used to secure the fish in connection with commercial fishing operations: *Provided, however,* That a marine mammal so taken must immediately be returned to the sea with a minimum of injury; and *Provided, further,* That the taking of a marine mammal which otherwise meets the requirements of this definition shall not be considered as incidental catch of that mammal if it is used subsequently to assist in commercial fishing operations.

Marine mammal means any specimen of the following species, whether alive or dead, and any part thereof, including but not limited to, any raw, dressed, or dyed fur or skin:

Scientific name	Common name	Date listed
Ursus maritimus	Polar bear	Dec. 21, 1972.
Enhydra lutris	Sea otter	Do.

Note: *Common names given may be at variance with local usage.*

Scientific name	Common name	Date listed
Odobenus rosmarus	Walrus	Do.
Dugong dugon	Dugong	Do.
Trichechus manatus	West Indian manatee	Do.
Trichechus inunguis	Amazonian manatee	Do.
Trichechus senegalensis	West African manatee	Do.
Lutra felina	Marine otter	Mar. 29, 1978.

Note: *Common names given may be at variance with local usage.*

Native village or town means any community, association, tribe, band, clan, or group.

Pregnant means pregnant near term.

Subsistence means the use by Alaskan Natives of marine mammals taken by Alaskan Natives for food, clothing, shelter, heating, transportation, and other uses necessary to maintain the life of the taker or for those who depend upon the taker to provide them with such subsistence.

Take means to harass, hunt, capture, collect, or kill, or attempt to harass, hunt, capture, collect, or kill any marine mammal, including, without limitation, any of the following: The collection of dead animals or parts thereof; the restraint or detention of a marine mammal, no matter how temporary; tagging a marine mammal; or the negligent or intentional operation of an aircraft or vessel, or the doing of any other negligent or intentional act which results in the disturbing or molesting of a marine mammal.

Threatened species means a species of marine mammal listed as “threatened” pursuant to the Endangered Species Act of 1973, 87 Stat. 884, Pub. L. 93-205.

Wasteful manner means any taking or method of taking which is likely to result in the killing or injuring of marine mammals beyond those needed for subsistence purposes or for the making of authentic native articles of handicrafts and clothing or which results in the waste of a substantial portion of the marine mammal and includes without limitation the employment of a method of taking which is not likely to assure the capture or killing of a marine mammal, or which is not immediately followed by a reasonable effort to retrieve the marine mammal.

[39 FR 7262, Feb. 25, 1974, as amended at 43 FR 13066, Mar. 29, 1978; 55 FR 14978, Apr. 20, 1990; 70 FR 48323, Aug. 17, 2005]

Subpart B—Prohibitions

§ 18.11 Prohibited taking.

Except as otherwise provided in subpart C, D, or H of this part 18, or part 403, it is unlawful for:

(a) Any person, vessel, or conveyance subject to the jurisdiction of the United States to take any marine mammal on the high seas, or

(b) Any person, vessel, or conveyance to take any marine mammal in waters or on lands under the jurisdiction of the United States.

[39 FR 7262, Feb. 25, 1974, as amended at 51 FR 17981, May 16, 1986]

§ 18.12 Prohibited importation.

(a) Except as otherwise provided in subparts C and D of this part 18, it is unlawful for any person to import any marine mammal or marine mammal product into the United States.

(b) Regardless of whether an importation is otherwise authorized pursuant to subparts C and D of this part 18, it is unlawful for any person to import into the United States any:

(1) Marine mammal:

(i) Taken in violation of the Act, or

(ii) Taken in another country in violation of the laws of that country;

(2) Any marine mammal product if:

(i) The importation into the United States of the marine mammal from which such product is made would be unlawful under paragraph (b)(1) of this section, or

(ii) The sale in commerce of such product in the country of origin of the product is illegal.

(c) Except in accordance with an exception referred to in subpart C and §§ 18.31 and 18.32 of this part, it is unlawful to import into the United States any:

(1) Marine mammal which was pregnant at the time of taking;

(2) Marine mammal which was nursing at the time of taking, or less than 8 months old, whichever occurs later;

(3) Specimen of an endangered or threatened species of marine mammals;

(4) Specimen taken from a depleted species or stock of marine mammals; or

(5) Marine mammal taken in an inhumane manner.

(d) It is unlawful to import into the United States any fish, whether fresh, frozen, or otherwise prepared, if such fish was caught in a manner proscribed by the Secretary of Commerce for persons subject to the jurisdiction of the United States, whether or not any marine mammals were in fact taken incident to the catching of the fish.

§ 18.13 Prohibited uses, possession, transportation, and sales.

Except as otherwise provided in the Act or these regulations, it is unlawful for:

(a) Any person to use any port, harbor, or other place under the jurisdiction of the United States for any purpose in any way connected with a prohibited taking or any unlawful importation of any marine mammal or marine mammal products;

(b) Any person to possess any marine mammal, or product therefrom, taken in violation of the Act or these regulations;

(c) Any person to transport, purchase, sell, or offer to purchase or sell any marine mammal or marine mammal product; or

(d) Any person subject to the jurisdiction of the United States to use in a commercial fishery, any means or method of fishing in contravention of regulations and limitations issued by the Secretary of Commerce for that fishery to achieve the purposes of this Act.

[39 FR 7262, Feb. 25, 1974, as amended at 51 FR 17981, May 16, 1986]

§ 18.14 Marine mammals taken before the Act.

(a) Section 102(e) of the Act provides in effect that the Act shall not apply to any marine mammal taken prior to December 21, 1972, or to any marine mammal product consisting of, or composed in whole or in part of, any marine mammal taken before such date. Such status may be established by submitting to the Director prior to, or at the time of importation, an affidavit containing the following:

(1) The Affiant's name and address;

(2) Identification of the Affiant;

(3) A description of the marine mammals or marine mammal products which the Affiant desires to import;

(4) A statement by the Affiant that to the best of his knowledge and belief, the marine mammals involved in the application were taken prior to December 21, 1972;

(5) A statement by the Affiant in the following language:

> The foregoing is principally based on the attached exhibits which, to the best of my knowledge and belief, are complete, true and correct. I understand that this affidavit is being submitted for the purpose of inducing the Federal Government to permit the importation of _____ under the Marine Mammal Protection Act of 1972 (16 U.S.C. 1361-1407) and regulations promulgated thereunder, and that any false statements may subject me to the criminal penalties of 18 U.S.C. 1001.

(b) Either one of two exhibits shall be attached to such affidavit, and will contain either:

(1) Records or other available evidence showing that the product consists of or is composed in whole or in part of marine mammals taken prior to December 21, 1972. Such records or other evidentiary material must include information on how, when, where, and by whom the animals were taken, what processing has taken place since taking, and the date and location of such processing; or

(2) A statement from a government agency of the country of origin exercising jurisdiction over marine mammals that any and all such mammals from which the products sought to be imported were derived were taken prior to December 21, 1972.

(c) Service agents, or Customs officers, may refuse to clear marine mammals or marine mammal products for importation into the United States, pursuant to § 14.53 of this subchapter, until the importer can demonstrate, by production of the affidavit referred in above or otherwise, that section 102(e) of the Act applies to all affected items.

(d) This section has no application to any marine mammal or marine mammal product intended to be imported pursuant to § 18.21, § 18.31 or § 18.32 of this part.

[39 FR 7262, Feb. 25, 1974, as amended at 51 FR 17981, May 16, 1986]

Subpart C—General Exceptions

§ 18.21 Actions permitted by international treaty, convention, or agreement.

The Act and these regulations shall not apply to the extent that they are inconsistent with the provisions of any international treaty, convention or agreement, or any statute implementing the same, relating to the taking or importation of marine mammals or marine mammal products, which was existent and in force prior to December 21, 1972, and to which the United States was a party. Specifically, the regulations in subpart B of this part and the provisions of the Act shall not apply to activities carried out pursuant to the Interim Convention on the Conservation of North Pacific Fur Seals signed in Washington on February 9, 1957, and the Fur Seal Act of 1966, 16 U.S.C. 1151-1187, as, in each case, from time to time amended.

§ 18.22 Taking by Federal, State or local government officials.

(a) A Federal, State or local government official or employee may take a marine mammal in the course of his duties as an official or employee and no permit shall be required, if such taking:

(1) Is accomplished in a humane manner;

(2) Is for the protection or welfare of such mammal or from the protection of the public health or welfare; and

(3) Includes steps designed to insure return of such mammal, if not killed in the course of such taking, to its natural habitat. In addition, any such official or employee may, incidental to such taking, possess and transport, but not sell or offer for sale, such mammal and use any port, harbor or other place under the jurisdiction of the United States. All steps reasonably practicable under the circumstances shall be taken by any such employee or official to prevent injury or death to the marine mammal as the result of such taking.

(b) Each taking permitted under this section should be included in a written report, to be submitted to the Director every six months, beginning December 31, 1973. Unless otherwise permitted by the Director, the report shall contain a description of:

(1) The animal involved;

(2) The circumstances requiring the taking;

(3) The method of taking;

(4) The name and official position of the State official or employee involved;

(5) The disposition of the animal, including in cases where the animal has been retained in captivity, a description of the place and means of confinement and the measures taken for its maintenance and care; and

(6) Such other information as the Director may require.

The reports shall be mailed to the Director, U.S. Fish and Wildlife Service, U.S. Department of the Interior, Washington, DC 20240.

[39 FR 7262, Feb. 25, 1974, as amended at 51 FR 17981, May 16, 1986]

§ 18.23 Native exemptions.

(a) ***Taking.*** Except as otherwise provided in part 403 of this title, any Indian, Aleut, or Eskimo who resides in Alaska and who dwells on the coast of the North Pacific Ocean or the Arctic Ocean may take any marine mammal without a permit, subject to the restrictions contained in this section, if such taking is:

(1) For subsistence purposes, or

(2) For purposes of creating and selling authentic native articles of handicraft and clothing, and

(3) In each case, not accomplished in a wasteful manner.

(b) ***Restrictions.***

(1) "Except for a transfer to a duly authorized representative of the Regional Director of the U.S. Fish and Wildlife Service for scientific research purposes, no marine mammal taken for subsistence may be sold or otherwise transferred to any person other than an Alaskan Native or delivered, carried, transported, or shipped in interstate or foreign commerce, unless:

(i) It is being sent by an Alaskan Native directly or through a registered agent to a tannery registered under paragraph (c) of this section for the purpose of processing, and will be returned directly or through a registered agent to the Alaskan Native; or

(ii) It is sold or transferred to a registered agent in Alaska for resale or transfer to an Alaskan Native; or

(iii) It is an edible portion and it is sold in an Alaskan Native village or town.

(2) "Except for a transfer to a duly authorized representative of the Regional Director of the U.S. Fish and Wildlife Service for scientific research purposes, no marine mammal taken for purposes of creating and selling authentic Native articles of handicraft and clothing may be sold or otherwise transferred to any person other than an Indian, Aleut or Eskimo, or delivered, carried, transported or shipped in interstate or foreign commerce, unless:

(i) It is being sent by an Indian, Aleut or Eskimo directly or through a registered agent to a tannery registered under paragraph (c) of this section for the purpose of processing, and will be returned directly or through a registered agent to the Indian, Aleut or Eskimo; or

(ii) It is sold or transferred to a registered agent for resale or transfer to an Indian, Aleut, or Eskimo; or

(iii) It has been first transformed into an authentic Native article of handicraft or clothing; or

(iv) It is an edible portion and it is sold

(A) in an Alaskan Native village or town or

(B) to an Alaskan Native for his consumption.

(c) The restriction in paragraph (b) shall not apply to parts or products of the Pacific walrus (*Odobenis rosmarus*) to the extent that the waiver of the moratorium and the approved State/Federal regulations relating to the taking and importation of walrus permits the delivery, sale, transportation or shipment of parts or products of the Pacific walrus in interstate or foreign commerce.

(d) Any tannery, or person who wishes to act as an agent, within the jurisdiction of the United States may apply to the Director for registration as a tannery or an agent which may possess and process marine mammal products for Indians, Aleuts, or Eskimos. The application shall include the following information:

(1) The name and address of the applicant;

(2) A description of the applicant's procedures for receiving, storing, processing, and shipping materials;

(3) A proposal for a system of bookkeeping and/or inventory segregation by which the applicant could maintain accurate records of marine mammals received from Indians, Aleuts, or Eskimos, pursuant to this section;

(4) Such other information as the Director may request;

(5) A certification in the following language:

> I hereby certify that the foregoing information is complete, true, and correct to the best of my knowledge and belief. I understand that this information is submitted for the purpose of obtaining the benefit of an exception under the Marine Mammal Protection Act of 1972 (16 U.S.C. 1361-1407) and regulations promulgated thereunder, and that any false statement may subject me to the criminal penalties of 18 U.S.C. 1001.

(6) The signature of the applicant.

The sufficiency of the application shall be determined by the Director, and in that connection, he may waive any requirement for information, or require any elaboration or further information deemed necessary. The registration of a tannery or other agent shall be subject to the conditions as the Director prescribes, which may include, but are not limited to provisions regarding records, inventory segregation, reports, and inspection. The Director may charge a reasonable fee for such applications, including an appropriate apportionment of overhead and administrative expenses of the Department of Interior.

(e) Notwithstanding the preceding provisions of this section, whenever, under the Act, the Secretary determines any species or stock of marine mammals to be depleted, he may prescribe regulations pursuant to section 103 of the Act upon the taking of such marine mammals by any Indian, Aleut, or Eskimo and, after promulgation of such regulations, all takings of such marine mammals by such person shall conform to such regulations.

(f) ***Marking, tagging, and reporting.***

(1) In addition to definitions contained in the Act, 50 CFR 18.3, and 50 CFR 18.27, in this paragraph (f):

(i) The term “marking and tagging” of marine mammals as specified in section 109(i) of the Act refers to the actual physical attachment of an approved band or other such marking device or technique to the raw or unhandicrafted (including unmarked tanned skins) skin and skull of polar bears, the tusks of walruses, and the skin and skull of sea otters; and

(ii) The term “reporting” means the collection by Service personnel or the Service's authorized local representatives of biological data, harvest data, and other information regarding the effect of taking of marine mammals on populations, the collection of which the Service determines to be necessary for management purposes. Reporting will be done on forms provided by the Service upon presentation for marking, tagging, and reporting purposes of the marine mammal(s) or specified raw or unhandicrafted parts thereof.

(2) Notwithstanding the preceding provisions of this section, but subject to the provisions and conditions contained in this paragraph, no polar bear, walrus, or sea otter, or any parts thereof, taken or collected by an Alaskan Native for subsistence purposes or for purposes of creating and selling authentic Native articles of handicrafts and clothing may be possessed, transported within, or exported from Alaska unless the animal(s), or specified parts thereof, have been reported to, and properly marked and tagged by, Service personnel or the Service's authorized local representative; except:

(i) An Alaskan Native that harvested or participated in the harvest of a polar bear, sea otter, or walrus and who possesses the animal, or any parts thereof, may possess the unmarked, untagged, and unreported animal(s), or parts thereof, for a period of time not to exceed 30 days from the time of taking for the purpose of transporting the specified parts to Service personnel or the Service's local authorized representative for marking, tagging, and reporting;

(ii) Alaskan Natives and registered agents/tanneries may possess the specified unmarked or untagged raw, unhandicrafted, or tanned parts thereof for a period of time not to exceed 180 days from the effective date of this rulemaking for the purpose of transporting to Service personnel or the Service's local authorized representative for marking and tagging if the specified parts thereof were taken or possessed between December 21, 1972, and the effective date of this regulation. There is no reporting requirement for marine mammals, or specified parts thereof, covered by this paragraph.

(3) Those unmarked, untagged, and unreported specified parts of polar bear, walrus, and sea otter, that must be presented to Service personnel or an authorized Service representative for marking, tagging, and reporting are as follows:

(i) Polar bear—skin and skull.

(ii) Walrus—tusks.

(iii) Sea otter—skin and skull.

(4) The locations where Service personnel or the Service's authorized local representative will be available for marking, tagging, and reporting purposes will be announced annually by the Alaska Regional Director. Local persons authorized to act as representatives for marking, tagging, and reporting purposes in the absence of Service personnel will also be announced annually by the Alaska Regional Director.

(5) Marks and tags will be attached or applied to the skins, skulls, and tusks of the marine mammal(s) in such a manner as to maximize their longevity and minimize their adverse effects to the appearance of the specified parts that might result due to hindering the tanning or handicrafting of skins, or the handicrafting of tusks or skulls. If the tag or mark comes off of the specified part the person in possession of the part shall have 30 days to present the part and broken tag or other marking device to the Service or the Service's authorized local representative for remarking or retagging purposes.

(6) Marks and tags for skins, skulls, and tusks will be provided by the Service. They will be numbered for accountability and of such design, construction, and material so as to maximize their durability and longevity on the specified parts.

(7) Data collected pursuant to this paragraph will be reported on forms provided by the Service and maintained in the Service's Regional Office, Anchorage, Alaska. The Service will summarize the data annually and make it publicly available. The data will also be included in the Service's annual report to Congress as set forth in section 103(f) of the Act.

(8) All items of research (e.g., radio collars, satellite transmitters, tags, etc.) that were attached to animals taken by Alaskan Natives must be returned to Service personnel or an authorized Service representative at the time the animal, or specified unhandicrafted parts thereof, are presented for marking, tagging, and reporting. No penalty will be imposed under the Act for a violation of this paragraph. However, penalties may be sought by the Service under other applicable Federal laws governing the possession and use of Federal property.

(9) Pursuant to this paragraph (f), the following specific conditions and provisions apply:

(i) Marking, tagging, and reporting of polar bears or specified parts thereof.

(A) The skin and skull of an animal must accompany each other when presented for marking, tagging, and reporting except that the skin and skull of an animal need not be presented together for marking and tagging purposes if taken between December 21, 1972, and the effective date of this regulation.

(B) Except as provided in paragraph (f)(2)(ii) of this section, the following information must be reported by Alaskan Natives when presenting polar bears, or specified parts thereof, for marking and tagging: sex of animal, date of kill, and location of kill.

(C) Both the skin and the skull will be marked and tagged and a rudimentary pre-molar tooth may be removed from the skull and retained by the Service. The skin must have the sex identifiers, such as vaginal orifice, teats, or penal sheath or baculum, either attached to, or accompanying the skin.

(D) The skull must be skinned out and the skin may be frozen or unfrozen when presented for marking, tagging, and reporting. If the skin is frozen, the sex identifiers, such as vaginal orifice, teats, penal sheath or baculum, must be visible.

(E) Marks and tags must remain affixed to the skin through the tanning process and until the skin has been severed into parts for crafting into handicrafts or for as long as is practical during the handicrafting process.

(ii) Marking, tagging, and reporting of walrus or specified parts thereof.

(A) The paired tusks of the animal(s) must, to the maximum extent practical, accompany each other when presented for marking, tagging, and reporting purposes, except that paired tusks need not be presented together for marking and tagging purposes if taken between December 21, 1972, and the effective date of this regulation.

(B) Except as provided in paragraph (f)(2)(ii) of this section, the following information must be reported by Alaskan Natives when presenting walrus, or specified parts thereof, for marking and tagging: date of take, sex of animal, whether live-killed, floating-dead, or beach-found, and location of the take or location of animal if found floating and dead or beach-found.

(C) Marks and/or tags must remain affixed to the tusks until they have been crafted into a handicraft or for as long as is practical during the handicrafting process.

(iii) Marking, tagging, and reporting of sea otter or specified parts thereof.

(A) The skin and skull of an animal must accompany each other when presented for marking, tagging, and reporting, except that the skin and skull of an animal need not be presented together if taken between December 21, 1972, and the effective date of this regulation.

(B) Except as provided in paragraph (f)(2)(ii) of this section, the following information must be reported by Alaskan Natives when presenting sea otters, or specified parts thereof, for marking and tagging: date of kill, sex of animal, and location of kill.

(C) Both the skin and skull will be marked and tagged and a rudimentary pre-molar tooth may be removed from the skull and retained by the Service. The skin must have the sex identifiers, such as vaginal orifice, teats, or penal sheath or baculum, either attached to, or accompanying the skin.

(D) The skull must be skinned out and the skin may be frozen or unfrozen when presented for marking, tagging, and reporting. If the skin is frozen, the sex identifiers, such as vaginal orifice, teats, or penal sheath or baculum, must be visible.

(E) Marks and tags must remain affixed to the skin through the tanning process and until the skin has been severed into parts for crafting into handicrafts or for as long as is practical during the handicrafting process.

(10) No person may falsify any information required to be set forth on the reporting form when the marine mammal(s), or specified parts thereof, are presented as required by these regulations.

(11) Possession by any person of marine mammal(s), or any parts thereof, in violation of the provisions and conditions of this § 18.23(f) is subject to punishment under the penalties provided for in section 105(a)(1) of the Act.

(12) The information collection requirements contained in this § 18.23(f) have been approved by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.* and assigned clearance number 1018-0066. The information is mandatory in order to have the marine mammal parts "marked and tagged," and thereby made eligible for continued lawful possession. Non-response may result in the Service determining the wildlife to be illegally possessed and subject the individual to penalties under this title.

[39 FR 7262, Feb. 25, 1974, as amended at 40 FR 59444, Dec. 24, 1975; 45 FR 54057, Aug. 14, 1980; 51 FR 17981, May 16, 1986; 53 FR 24283, June 28, 1988]

§ 18.24 Taking incidental to commercial fishing operations.

Persons may take marine mammals incidental to commercial fishing operations until October 21, 1974: *Provided,* That such taking is by means of equipment and techniques prescribed in regulations issued by the Secretary of Commerce. However, any marine mammal taken as an incidental catch may not be retained. It shall be the immediate goal that the incidental kill or incidental serious injury of marine mammals permitted in the course of commercial fishing operations be reduced to insignificant levels approaching a zero mortality and serious injury rate.

§ 18.25 Exempted marine mammals or marine mammal products.

(a) The provisions of the Act and these regulations shall not apply:

(1) To any marine mammal taken before December 21, 1972, or

(2) To any marine mammal product if the marine mammal portion of such product consists solely of a marine mammal taken before such date.

(b) The prohibitions contained in § 18.12(c) (3) and (4) shall not apply to marine mammals or marine mammal products imported into the United States before the date on which notice is published in the FEDERAL REGISTER of the proposed rulemaking with respect to the designation of the species of stock concerned as depleted or endangered:

(c) Section 18.12(b) shall not apply to articles imported into the United States before the effective date of the foreign law making the taking or sale, as the case may be, of such marine mammals or marine mammal products unlawful.

§ 18.26 Collection of certain dead marine mammal parts.

(a) Any bones, teeth or ivory of any dead marine mammal may be collected from a beach or from land within 1/4 of a mile of the ocean. The term "ocean" includes bays and estuaries.

(b) Marine mammal parts so collected may be retained if registered within 30 days with an agent of the National Marine Fisheries Service, or an agent of the U.S. Fish and Wildlife Service.

(c) Registration shall include

(1) the name of the owner,

(2) a description of the article to be registered and

(3) the date and location of collection.

(d) Title to any marine mammal parts collected under this section is not transferable, unless consented to in writing by the agent referred to in paragraph (b) of this section.

[39 FR 7262, Feb. 25, 1974, as amended at 51 FR 17981, May 16, 1986]

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

(a) ***Purpose of regulations.*** The regulations in this section implement Section 101(a)(5) of the Marine Mammal Protection Act of 1972, as amended, 16 U.S.C. 1371(a)(5), which provides a mechanism for allowing, upon request, during periods of not more than five consecutive years each, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region.

(b) ***Scope of regulations.*** The taking of small numbers of marine mammals under section 101(a)(5) of the Marine Mammal Protection Act may be allowed only if the Director of the Fish and Wildlife Service

(1) finds, based on the best scientific evidence available, that the total taking during the specified time period will have a negligible impact on the species or stock and will not have an unmitigable adverse impact on the availability of the species or stock for subsistence uses;

(2) prescribes regulations setting forth permissible methods of taking and other means of effecting the least practicable adverse impact on the species and its habitat and on the availability of the species for subsistence uses, paying particular attention to rookeries, mating grounds, and areas of similar significance; and

(3) prescribes regulations pertaining to the monitoring and reporting of such taking.

Note: The information collection requirement contained in this § 18.27 has been approved by the Office of Management and Budget under 44 U.S.C. 3501 *et seq.* and assigned clearance No. 1018-0070. The information is being collected to describe the activity proposed and estimate the cumulative impacts of potential takings by all persons conducting the activity. The information will be used to evaluate the application and determine whether to issue Specific Regulations and, subsequently, Letters of Authorization. Response is required to obtain a benefit.
The public reporting burden from this requirement is estimated to vary from 2 to 200 hours per response with an average of 10 hours per response including time for reviewing instructions, gathering and maintaining data, and completing and reviewing applications for specific regulations and Letters of Authorization. Direct comments regarding the burden estimate or any other aspect of this requirement to the Service's Information Collection Clearance Officer at the address provided at 50 CFR 2.1(b).

(c) ***Definitions.*** In addition to definitions contained in the Act and in 50 CFR 18.3 and unless the context otherwise requires, in this section:

Citizens of the United States and *U.S. citizens* mean individual U.S. citizens or any corporation or similar entity if it is organized under the laws of the United States or any governmental unit defined in 16 U.S.C. 1362(13). U.S. Federal, State and local government agencies shall also constitute citizens of the United States for purposes of this section.

Incidental, but not intentional, taking means takings which are infrequent, unavoidable, or accidental. It does not mean that the taking must be unexpected. (Complete definition of take is contained in 50 CFR 18.3.)

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.

Small numbers means a portion of a marine mammal species or stock whose taking would have a negligible impact on that species or stock.

Specified activity means any activity, other than commercial fishing, which takes place in a specified geographical region and potentially involves the taking of small numbers of marine mammals. The specified activity and specified geographical region should be identified so that the anticipated effects on marine mammals will be substantially similar.

Specified geographical region means an area within which a specified activity is conducted and which has similar biogeographic characteristics.

Unmitigable adverse impact means an impact resulting from the specified activity

(1) that is likely to reduce the availability of the species to a level insufficient for a harvest to meet subsistence needs by

(i) causing the marine mammals to abandon or avoid hunting areas,

(ii) directly displacing subsistence users, or

(iii) placing physical barriers between the marine mammals and the subsistence hunters; and

(2) that cannot be sufficiently mitigated by other measures to increase the availability of marine mammals to allow subsistence needs to be met.

(d) ***Submission of requests.***

(1) In order for the Fish and Wildlife Service to consider allowing the taking by U.S citizens of small numbers of marine mammals incidental to a specified activity, a written request must be submitted to the Director, U.S. Fish and Wildlife Service, Department of the Interior, Washington, DC 20240. Requests shall include the following information on the activity as a whole, which includes, but is not limited to, an assessment of total impacts by all persons conducting the activity:

(i) A description of the specific activity or class of activities that can be expected to result in incidental taking of marine mammals;

(ii) The dates and duration of such activity and the specific geographical region where it will occur;

(iii) Based upon the best available scientific information;

(A) An estimate of the species and numbers of marine mammals likely to be taken by age, sex, and reproductive conditions, and the type of taking (e.g., disturbance by sound, injury or death resulting from collision, etc.) and the number of times such taking is likely to occur;

(B) A description of the status, distribution, and seasonal distribution (when applicable) of the affected species or stocks likely to be affected by such activities;

(C) The anticipated impact of the activity upon the species or stocks;

(D) The anticipated impact of the activity on the availability of the species or stocks for subsistence uses;

(iv) The anticipated impact of the activity upon the habitat of the marine mammal populations and the likelihood of restoration of the affected habitat;

(v) The anticipated impact of the loss or modification of the habitat on the marine mammal population involved;

(vi) The availability and feasibility (economic and technological) of equipment, methods, and manner of conducting such activity or other means of effecting the least practicable adverse impact upon the affected species or stocks, their habitat, and, where relevant, on their availability for subsistence uses, paying particular attention to rookeries, mating grounds, and areas of similar significance. (The applicant and those conducting the specified activity and the affected subsistence users are encouraged to develop mutually agreeable mitigating measures that will meet the needs of subsistence users.);

(vii) Suggested means of accomplishing the necessary monitoring and reporting which will result in increased knowledge of the species through an analysis of the level of taking or impacts and suggested means of minimizing burdens by coordinating such reporting requirements with other schemes already applicable to persons conducting such activity; and

(viii) Suggested means of learning of, encouraging, and coordinating research opportunities, plans and activities relating to reducing such incidental taking from such specified activities, and evaluating its effects.

(2) The Director shall determine the adequacy and completeness of a request, and if found to be adequate, will invite information, suggestions, and comments on the preliminary finding of negligible impact and on the proposed specific regulations through notice in the FEDERAL REGISTER, newspapers of general circulation, and appropriate electronic media in the coastal areas that may be affected by such activity. All information and suggestions will be considered by the Fish and Wildlife Service in developing final findings and effective specific regulations.

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

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

(e) ***Specific regulations.***

(1) Specific regulations will be established for each allowed activity which set forth

(i) permissible methods of taking,

(ii) means of effecting the least practicable adverse impact on the species and its habitat and on the availability of the species for subsistence uses, and

(iii) requirements for monitoring and reporting.

(2) Regulations will be established based on the best available scientific information. As new information is developed, through monitoring, reporting, or research, the regulations may be modified, in whole or part, after notice and opportunity for public review.

(f) ***Letters of Authorization.***

(1) A Letter of Authorization, which may be issued only to U.S. citizens, is required to conduct activities pursuant to any specific regulations established. Requests for Letters of Authorization shall be submitted to the Director, U.S. Fish and Wildlife Service, Department of the Interior, Washington, DC 20240. The information to be submitted in a request may be obtained by writing the Director. Once specific regulations are effective, the Service will to the maximum extent possible, process subsequent applications for Letters of Authorization within 30 days after receipt of the application by the Service.

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

(3) Notice of issuance of all Letters of Authorization will be published in the FEDERAL REGISTER within 30 days of issuance.

(4) Letters of Authorization will specify the period of validity and any additional terms and conditions appropriate for the specific request.

(5) Letters of Authorization shall be withdrawn or suspended, either on an individual or class basis, as appropriate, if, after notice and opportunity for public comment, the Director determines:

(i) The regulations prescribed are not being substantially complied with, or

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

(6) The requirement for notice and opportunity for public review in paragraph (f)(5) of this section shall not apply if the Director determines that an emergency exists which poses a significant risk to the well-being of the species or stocks of marine mammals concerned.

(7) A violation of any of the terms and conditions of a Letter of Authorization or of the specific regulations may subject the Holder and/or any individual who is operating under the authority of the Holder's Letter of Authorization to penalties provided in the Marine Mammal Protection Act of 1972 (16 U.S.C. 1361-1407).

[48 FR 31225, July 7, 1983, as amended at 54 FR 40348, Sept. 29, 1989; 55 FR 28765, July 13, 1990; 56 FR 27463, June 14, 1991; 79 FR 43965, July 29, 2014]

Subpart D—Special Exceptions

§ 18.30 Polar bear sport-hunted trophy import permits.

(a) ***Application procedure.*** You, as the hunter or heir of the hunter's estate, must submit an application for a permit to import a trophy of a polar bear taken in Canada to the Division of Management Authority at the address provided at 50 CFR 2.1(b). You must use an official application (Form 3-200) provided by the Service and must include as an attachment all of the following additional information:

(1) Certification that:

(i) You or the deceased hunter took the polar bear as a personal sport-hunted trophy;

(ii) You will use the trophy only for personal display purposes;

(iii) The polar bear was not a pregnant female, a female with dependent nursing cub(s) or a nursing cub (such as in a family group), or a bear in a den or constructing a den when you took it; and

(iv) For a polar bear taken after April 30, 1994, you made sure the gall bladder and its contents were destroyed;

(2) Name and address of the person in the United States receiving the polar bear trophy if other than yourself;

(3) For a polar bear received as an inheritance, documentation to show that you are the legal heir of the decedent who took the trophy;

(4) Proof that you or the decedent legally harvested the polar bear in Canada as shown by one of the following:

(i) A copy of the Northwest Territories (NWT) or Nunavut Territory hunting license and tag number;

(ii) A copy of the Canadian CITES export permit that identifies the polar bear by hunting license and tag number;

(iii) A copy of the NWT or Nunavut Territory export permit; or

(iv) A certification from the Department of Resources, Wildlife, and Economic Development, Northwest Territories, or the Department of Sustainable Development, Nunavut Territory, that you or the decedent legally harvested the polar bear, giving the tag number, location (settlement and population), and season you or the decedent took the bear;

(5) An itemized description of the polar bear parts you wish to import, including size and the sex of the polar bear;

(6) The month and year the polar bear was sport hunted;

(7) The location (nearest settlement or community) where the bear was sport hunted;

(8) For a female bear or a bear of unknown sex that was taken before January 1, 1986, documentary evidence that the bear was not pregnant at the time of take, including, but not limited to, documentation, such as a hunting license or travel itinerary, that shows the bear was not taken in October, November, or December or that shows that the location of the hunt did not include an area that supported maternity dens; and

(9) For a female bear, bear of unknown sex, or male bear that is less than 6 feet in length (from tip of nose to the base of the tail) that was taken prior to the 1996/97 NWT polar bear harvest season, available documentation to show that the bear was not nursing, including, but not limited to, documentation, such as a certification from the NWT, that the bear was not taken while part of a family group.

(b) ***Definitions.*** In addition to the definitions in this paragraph, the definitions in 50 CFR 10.12, 18.3, and 23.3 apply to this section.

(1) ***Sport-hunted trophy*** means a mount, rug or other display item composed of the hide, hair, skull, teeth, baculum, bones, and claws of the specimen which was taken by the applicant or decedent during a sport hunt for personal, noncommercial use and does not include any internal organ of the animal, including the gall bladder. Articles made from the specimen, such as finished or unfinished, worked, manufactured, or handicraft items for use as clothing, curio, ornamentation, jewelry, or as a utilitarian item are not considered trophy items.

(2) ***Management agreement*** means a written agreement between parties that share management responsibilities for a polar bear population which describes what portion of the harvestable quota will be allocated to each party and other measures which may be taken for the conservation of the population, such as harvest seasons, sex ratio of the harvest, and protection of females and cubs.

(c) ***Procedures for issuance of permits and modification, suspension or revocation of permits.*** We, the Service, shall suspend, modify or revoke permits issued under this section:

(1) In accordance with regulations contained in § 18.33; and

(2) If, in consultation with the appropriate authority in Canada, we determine that the sustainability of Canada's polar bear populations is being adversely affected or that sport hunting may be having a detrimental effect on maintaining polar bear populations throughout their range.

(d) ***Issuance criteria.*** In deciding whether to issue an import permit for a sport-hunted trophy, we must determine in addition to the general criteria in part 13 of this subchapter whether:

(1) You previously imported the specimen into the United States without a permit;

(2) The specimen meets the definition of a sport-hunted trophy in paragraph (b) of this section;

(3) You legally harvested the polar bear in Canada;

(4) Canada has a monitored and enforced sport-hunting program consistent with the purposes of the 1973 International Agreement on the Conservation of Polar Bears;

(5) Canada has a sport-hunting program, based on scientifically sound quotas, ensuring the maintenance of the affected population at a sustainable level; and

(6) The export and subsequent import:

(i) Are consistent with the provisions of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) and other international agreements and conventions; and

(ii) Are not likely to contribute to illegal trade in bear parts, including for bears taken after April 30, 1994, that the gall bladder and its contents were destroyed.

(e) ***Additional permit conditions.*** Your permit to import a sport-hunted trophy of a polar bear taken in Canada is subject to the permit conditions outlined in § 18.31(d) and the following additional permit conditions:

(1) You, the permittee, may not import internal organs of the polar bear, including the gall bladder;

(2) After import you may not alter or use the trophy in a manner inconsistent with the definition of a sport-hunted polar bear trophy as given in § 18.30(b);

(3) You may not import a sport-hunted trophy if the polar bear at the time you or the decedent took it was:

(i) A nursing bear or a female with nursing young (*i.e.*, part of a family group);

(ii) A pregnant female; or

(iii) A bear moving into a den or in a den;

(4) You must present to Service personnel at the time of import a valid CITES document from the country of export or re-export;

(5) You must comply with the following import procedures:

(i) Import the sport-hunted trophy through a designated port for wildlife imports (see § 14.12 of this subchapter) during regular business hours, except for full mount trophies that have been granted an exception to designated port permit requirements under § 14.32 of this subchapter;

(ii) Not send the trophy through the international mail; and

(iii) Notify Service personnel at the port at least 48 hours before the import (see § 14.54 of this subchapter) and make arrangements for Service personnel to affix a tag in accordance with paragraph (e)(7) of this section prior to being cleared (see § 14.52 of this subchapter);

(6) You must import all parts of a single trophy at the same time;

(7) The following tagging/marking procedures apply:

(i) Service personnel must affix a permanently locking tag that contains a unique serial number and the common name "polar bear" to the hide which must remain fixed indefinitely to the hide as proof of legal import; and

(ii) Service personnel must permanently mark upon import the parts of the trophy other than the hide, such as the skull and bones, with the hide tag number; and

(8) If the tag comes off the hide, you must within 30 days:

(i) Contact the nearest Service office at a designated port or a Law Enforcement office as given in § 10.22 of this subchapter to schedule a time to present the trophy for retagging;

(ii) Provide as proof that the trophy had been tagged and legally imported a copy of the:

(A) Canceled CITES export permit or re-export certificate;

(B) Canceled U.S. import permit issued under this section; or

(C) Cleared wildlife declaration form (3-177); and

(iii) Present either the broken tag, or if the tag was lost, a signed written explanation of how and when the tag was lost.

(f) ***Duration of permits.*** The permit will be valid for no more than one year from the date of issuance.

(g) ***Fees.***

(1) You must pay the standard permit processing fee as given in § 13.11(4) when filing an application.

(2) You must pay the issuance fee of $1,000 when we notify you the application is approved. We cannot issue an import permit until you pay this fee. We will use the issuance fee to develop and implement cooperative research and management programs for the conservation of polar bears in Alaska and Russia under section 113(d) of the Marine Mammal Protection Act.

(h) ***Scientific review.***

(1) We will undertake a scientific review of the impact of permits issued under this section on the polar bear populations in Canada within 2 years of March 20, 1997.

(i) The review will provide an opportunity for public comment and include a response to the public comment in the final report; and

(ii) We will not issue permits under this section if we determine, based upon scientific review, that the issuance of permits under this section is having a significant adverse impact on the polar bear populations in Canada; and

(2) After the initial review, we may review whether the issuance of permits under this section is having a significant adverse impact on the polar bear populations in Canada annually in light of the best scientific information available. The review must be completed no later than January 31 in any year a review is undertaken.

(i) ***Findings.*** Polar bear sport-hunted trophies may only be imported after issuance of an import permit, and in accordance with the following findings and conditions:

(1) We have determined that the Northwest Territories and Nunavut Territory, Canada, have a monitored and enforced sport-hunting program that meets issuance criteria of paragraphs (d) (4) and (5) of this section for the following populations: Southern Beaufort Sea, Northern Beaufort Sea, Viscount Melville Sound (subject to the lifting of the moratorium in this population), Western Hudson Bay, M'Clintock Channel (only for polar bears lawfully taken on or before May 31, 2000), Lancaster Sound, and Norwegian Bay, and that:

(i) For the Southern Beaufort Sea population, no bears are taken west of the equidistant line of the Beaufort Sea;

(ii) For all populations, females with cubs, cubs, or polar bears moving into denning areas or already in dens are protected from taking by hunting activities; and

(iii) For all populations, management agreements among all management entities with scientifically sound quotas are in place; and

(2) Any sport-hunted trophy taken in the Northwest Territories, Canada, between December 21, 1972, and April 30, 1994, may be issued an import permit when:

(i) From an approved population listed in paragraph (i)(1); and

(ii) The issuance criteria of paragraph (d) (1), (2), (3), and (6) of this section are met.

[62 FR 7329, Feb. 18, 1997, as amended at 64 FR 1539, Jan. 11, 1999; 66 FR 1907, Jan. 10, 2001; 66 FR 50851, Oct. 5, 2001; 79 FR 43965, July 29, 2014]

§ 18.31 Scientific research permits and public display permits.

The Director may, upon receipt of an application and in accordance with the issuance criteria of this section, issue a permit authorizing the taking and importation of marine mammals for scientific research purposes or for public display.

(a) ***Application procedure.*** Applications for permits to take and import marine mammals for scientific research purposes or for public display shall be submitted to the Director. Each such application must contain the general information and certification required by § 13.12(a) of this subchapter plus the following additional information:

(1) A statement of the purpose, date, location and manner of the taking or importation;

(2) A description of the marine mammal or the marine mammal products to be taken or imported, including the species or subspecies involved; the population stock, when known, the number of specimens or products (or the weight thereof, where appropriate); and the anticipated age, size, sex, and condition (*i.e.*, whether pregnant or nursing) of the animals involved;

(3) If the marine mammal is to be taken and transported alive, a complete description of the manner of transportation, care and maintenance, including the type, size, and construction of the container or artificial environment; arrangements for feeding and sanitation; a statement of the applicant's qualifications and previous experience in caring for and handling captive marine mammals and a like statement as to the qualifications of any common carrier or agent to be employed to transport the animal; and a written certification of a licensed veterinarian knowledgeable in the field of marine mammals that he has personally reviewed the arrangements for transporting and maintaining the animals and that in his opinion they are adequate to provide for the well-being of the animal;

(4) If the application is for a scientific research permit, a detailed description of the scientific research project or program in which the marine mammal or marine mammal product is to be used including a copy of the research proposal relating to such program or project and the names and addresses of the sponsor or cooperating institution and the scientists involved;

(5) If the application is for a scientific research permit, and if the marine mammal proposed to be taken or imported is listed as an endangered or threatened species or has been designated by the Secretary as depleted, a detailed justification of the need for such a marine mammal, including a discussion of possible alternatives, whether or not under the control of the applicant; and

(6) If the application is for a public display permit, a detailed description of the proposed use to which the marine mammal or marine mammal product is to be put, including the manner, location, and times of display, whether such display is for profit, an estimate of the numbers and types of persons who it is anticipated will benefit for such display, and whether and to what extent the display is connected with educational or scientific programs. There shall also be included a complete description of the enterprise seeking the display permit and its educational, and scientific qualifications, if any.

(b) ***Review by Marine Mammal Commission.*** Upon receipt of an application the Director shall forward the application to the Marine Mammal Commission together with a request for the recommendations of the Commission and the Committee of Scientific Advisors on Marine Mammals. In order to comply with the time limits provided in these regulations, the Director shall request that such recommendation be submitted within 30 days of receipt of the application by the Commission. If the Commission or the Committee, as the case may be, does not respond within 30 days from the receipt of such application by the Commission, the Director shall advise the Commission in writing that failure to respond within 45 days from original receipt of the application (or such longer time as the Director may establish) shall be considered as a recommendation from the Commission and the Committee that the permit be issued. The Director may also consult with any other person, institution or agency concerning the application.

(c) ***Issuance criteria.*** Permits applied for under this section shall be issued, suspended, modified and revoked pursuant to regulations contained in § 18.33. In determining whether to issue a scientific research permit, the Director shall consider whether the proposed taking or importation will be consistent with the policies and purposes of the Act; and whether the granting of the permit is required to further a bona fide and necessary or desirable scientific purpose, taking into account the benefits anticipated to be derived from the scientific research contemplated and the effect of the purposed taking or importation on the population stock and the marine ecosystem. In determining whether to issue a public display permit, the Director shall consider whether the proposed taking or importation will be consistent with the policies and purposes of the Act; whether a substantial public benefit will be gained from the display contemplated, taking into account the manner of the display and the anticipated audience on the one hand, and the

effect of the proposed taking or importation on the population stocks of the marine mammal in question and the marine ecosystem on the other; and the applicant's qualifications for the proper care and maintenance of the marine mammal or the marine mammal product, and the adequacy of his facilities.

(d) ***Additional permit conditions.*** In addition to the general conditions set forth in part 13 of this subchapter B, permits issued under this section shall be subject to the following conditions:

(1) Any permit issued under these regulations must be in the possession of the person to whom it is issued (or an agent of such person) during:

(i) The time of the authorized taking or importation;

(ii) The period of any transit of such person or agent which is incidental to such taking or importation; and

(iii) Any other time while any marine mammal taken or imported under such permit is in the possession of such person or agent.

(2) A duplicate copy of the issued permit must be physically attached to the container, package, enclosure, or other means of containment, in which the marine mammal is placed for purposes of storage, transit, supervision, or care.

(e) ***Tenure of permits.*** The tenure of permits for scientific research or public display shall be designated on the face of the permit.

§ 18.32 Waiver of the moratorium.

See subpart F (Waiver of the moratorium; State laws and regulations) and subpart G (Notice and Hearing on section 103 Regulations) for procedures regarding waivers of the moratorium in those circumstances where a state provides an acceptable management program for a species or population stock within its jurisdiction.

[40 FR 59442, Dec. 24, 1975]

§ 18.33 Procedures for issuance of permits and modification, suspension, or revocation thereof.

(a) Whenever application for a permit is received by the director which the director deems sufficient, he shall, as soon as practicable, publish a notice thereof in the FEDERAL REGISTER. Such notice shall set forth a summary of the information contained in such application. Any interested party may, within 30 days after the date of publication of such notice, submit to the director his written data or views with respect to the taking or importation proposed in such application and may request a hearing in connection with the action to be taken thereon.

(b) If the request for a hearing is made within the 30-day period referred to in paragraph (a) of this section, or if the director determines that a hearing would otherwise be advisable, the director may, within 60 days after the date of publication of the notice referred to in paragraph (a) of this section, afford to such requesting party or parties an opportunity for a hearing. Such hearing shall also be open to participation by any interested members of the public. Notice of the date, time, and place of such hearing shall be published in the FEDERAL REGISTER not less than 15 days in advance of such hearing. Any interested person may appear in person or through representatives at the hearing and may submit any relevant material, data, views, comments, arguments, or exhibits. A summary record of the hearing shall be kept.

(c) As soon as practicable but not later than 30 days after the close of the hearing (or if no hearing is held, as soon as practicable after the end of the 30 days succeeding publication of the notice referred to in paragraph (a) of this section the director shall issue or deny issuance of the permit. Notice of the decision of the director shall be published in the FEDERAL REGISTER within 10 days after the date of such issuance or denial. Such notice shall include the date of the issuance or denial and indicate where copies of the permit, if issued, may be obtained.

(d) Any permit shall be subject to modification, suspension, or revocation by the director in whole or in part in accordance with these regulations and the terms of such permits. The permittee shall be given written notice by registered mail, return receipt requested, of any proposed modification, suspension, or revocation. Such notice shall specify:

(1) The action proposed to be taken along with a summary of the reasons therefor;

(2) In accordance with 5 U.S.C. 558, the steps which the permittee may take to demonstrate or achieve compliance with all lawful requirements; and

(3) That the permittee is entitled to a hearing thereon if a written request for such a hearing is received by the Director within 10 days after receipt of the aforesaid notice or such other later date as may be specified in the notice to the permittee. The time and place of the hearing, if requested by the permittee, shall be determined by the director and a written notice thereof given to the permittee by registered mail, return receipt requested, not less than 15 days prior to the date of hearing specified. The director may, in his discretion, allow participation at the hearing by interested members of the public. The permittee and other parties participating may submit all relevant material, data, views, comments, arguments, and exhibits at the hearing. A summary record shall be kept of any such hearing.

(e) The Director shall make a decision regarding the proposed modification, suspension, or revocation, as soon as practicable after the close of the hearing, or if no hearing is held, as soon as practicable after the close of the 10 day period during which a hearing could have been requested. Notice of the modification, suspension, or revocation shall be published in the FEDERAL REGISTER within 10 days from the date of the Director's decision. In no event shall the proposed action take effect until notice of the Director's decision is published in the FEDERAL REGISTER.

§ 18.34 Guidelines for use in safely deterring polar bears.

(a) These guidelines are intended for use in safely deterring polar bears in the wild. They provide acceptable types of deterrence actions that any person, or their employee, or their agent, can use to deter a polar bear from damaging private property; or that any person can use to deter a polar bear from endangering personal safety; or that a government employee can use to deter a polar bear from damaging public property, and not cause the serious injury or death of a polar bear. Anyone acting in such a manner and conducting activities that comply with the guidelines in this subpart does not need authorization under the MMPA to conduct such deterrence. Furthermore, actions consistent with these guidelines do not violate the take prohibitions of the MMPA or this part. A Federal, State or local government official or employee may take a polar bear in the course of his duties as an official or employee, as long as such taking is accomplished in accordance with § 18.22 of this part.

(b) There are two types of deterrence measures that a person, or their employee, or their agent could follow to nonlethally deter a polar bear. Each type of measure includes a suite of appropriate actions that the public may use.

(1) ***Passive deterrence measures.*** Passive deterrence measures are those that prevent polar bears from gaining access to property or people. These measures provide for human safety and do not increase the risk of serious injury or death of a polar bear. They include:

(i) ***Rigid fencing.*** Rigid fencing and other fixed barriers such as gates and fence skirting can be used around buildings or areas to limit bears from accessing community or industrial sites and buildings. Fencing areas 5 acres (~2 ha) and smaller can be used to limit human-bear interactions. Industry standard chain-link fencing material can be used. Chain-link fencing can be placed around buildings on pilings as fence skirting to limit access of bears underneath the buildings.

(ii) ***Bear exclusion cages.*** Bear exclusion cages provide a protective shelter for people in areas frequented by bears. Cages erected at building entry and exit points exclude polar bears from the immediate area and allow safe entry and exit for persons gaining access to, or leaving, a building should a polar bear be in the vicinity. Additionally, they provide an opportunity for people exiting a building to conduct a visual scan upon exit. Such a scan is especially important in areas where buildings are constructed above ground level due to permafrost because bears may be resting underneath. These cages can be used at homes or industrial facilities to deter bears as well. Cages can be used in remote areas where bear use is not known, and along bear travel corridors, e.g., within 0.5 mile from coastline, to deter bears from facilities. Cages must be no smaller than 4 ft (width) by 4 ft (length) by 8 ft (height). Bars must be no smaller than 1 inch wide. Distance between bars must be no more than 4 inches clear on stairways and landings or when otherwise attached to a habitable structure; they may be no more than 5 inches clear for use in cages not attached to any habitable structure. A 4-inch distance between the bars would be sufficient to prevent a bear from reaching through, while providing visible space between bars. The ceiling of the cage must be enclosed.

(iii) ***Bear-resistant garbage containers.*** Bear-resistant garbage containers prevent bears from accessing garbage as a food source and limit polar bears from becoming food-conditioned or habituated to people and facilities. The absence of habituation further reduces the potential for bear-human interactions. Bear-resistant garbage cans and garbage bins are manufactured by various companies and in various sizes. Commercially designed residential bear-resistant containers (32-130 gallons) can be used. Two- to 6-cubic yard containers can be specifically designed by commercial vendors as bear-proof containers or have industry-standard lid locks to prohibit bear entry, depending on the need and location. For remote seasonal camps, garbage can be temporarily stored in steel drums secured with locking rings and a gasket, and removed from the site when transportation is available. Larger garbage containers, such as dumpsters or “roll-offs” (20 to 40 cubic yards), can limit bear-human interactions when the containers have bear-proof lids. Lids must be constructed of heavy steel tubing or similarly constructed with heavy expanded metal.

(2) ***Preventive deterrence measures.*** Preventive deterrence measures are those that can dissuade a polar bear from initiating an interaction with property or people. These measures provide for safe human use and do not increase the risk of serious injury or death of a polar bear. These are:

(i) ***Acoustic devices.*** Acoustic deterrent devices may be used to create an auditory disturbance causing polar bears to move away from the affected area. The reasonable use of loud noises, e.g., vehicle engines, automobile sirens or horns, and air-horns, where such auditory stimuli could startle a bear and disrupt its approach to property or people, is authorized. This authorization is limited to deterrent devices with a sound strength of no greater than 140 dB

SPL to be deployed for no more than a 30-second continuous time interval. The use of commercially available air horns or other audible products used as perimeter alarms, which create sounds that fall below this upper limit, is acceptable.

(ii) ***Vehicle or boat deterrence.*** Patrolling the periphery of a compound or encampment using a vehicle, such as a truck or all-terrain vehicle (e.g., a snowmobile or a four wheeler), and deterring, but not chasing, polar bears with engine noise, or by blocking their approach without making a physical contact with the animal, is an acceptable preventive deterrence. Similarly patrolling an area in a small boat using similar methods is acceptable.

(c) The deterrence guidelines are passive or preventive in nature. Any action to deter polar bears that goes beyond these specific measures could result in a taking and, unless otherwise exempted under the MMPA, would require separate authorization. The Service acknowledges that there will be numerous new techniques developed, or new applications of existing techniques, for deterring bears. The Service will work to establish a system for evaluating new bear deterrence applications and techniques and will update this set of guidelines with examples of future approved methods. Deterrence actions (other than the measures described in these guidelines) that do not result in serious injury or death to a polar bear remain permissible for persons identified in section 101(a)(4)(A) of the MMPA. Prior to conducting activities beyond those specifically described in these guidelines, persons should contact the Service's Alaska Regional Office's Marine Mammal Program for further guidance (for the location of the Alaska Regional Office see 50 CFR 2.2(g)).

[75 FR 61637, Oct. 6, 2010]

Subpart E—Depleted Species or Stocks [Reserved]

Subpart F—Transfer of Management Authority to States

Note: Regulations governing the transfer of management authority to States pursuant to section 109 of the Marine Mammal Protection Act for marine mammal species under the jurisdiction of the Secretary of the Interior are found at part 403 of this title.

[48 FR 22456, May 18, 1983]

Subpart G—Notice and Hearing on Section 103 Regulations

Source: 41 FR 5396, Feb. 6, 1976, unless otherwise noted.

§ 18.70 Basis and purpose.

(a) Sections 101(a)(2), 101(a)(3)(A), and 101(b) of the Marine Mammal Protection Act of 1972 (16 U.S.C. 1371(a)(2), 1371(a)(3)(A), and 1371(b)) and these regulations authorize the Director, U.S. Fish and Wildlife Service, to:

(1) Impose regulations governing the taking of marine mammals incidental to commercial fishing operations;

(2) waive the moratorium and adopt regulations with respect to the taking and importing of animals from each species of marine mammals under his jurisdiction; and

(3) prescribe regulations governing the taking of depleted marine mammals by any Indian, Aleut or Eskimo, respectively. In prescribing regulations to carry out the provisions of said sections, the act refers the Director to section 103 (16 U.S.C. 1373). In accordance with section 103(d), regulations must be made on the record after opportunity for an agency hearing on such regulations and, in the case of a waiver, on the determination by the Director to waive the moratorium pursuant to section 101(a)(3)(A) (16 U.S.C. 1371(a)(3)(A)).

(b) [Reserved]

§ 18.71 Definitions.

Definitions shall be the same as in subpart A of this part except as follows:

(a) ***Party*** means for the purposes of this subpart:

(1) The Director or his representative; or

(2) A person who has notified the Director by specified dates of his or her intent to participate in the hearing pursuant to §§ 18.75 and 18.84(b).

(b) ***Presiding officer*** means, for the purposes of this subpart, an administrative law judge of the Office of Hearings and Appeals appointed in accordance with 5 U.S.C. 3105.

(c) ***Witness*** means, for the purposes of this subpart, any person who provides direct testimony on the proposed regulations and waiver. A person may be both a party and a witness.

§ 18.72 Scope of regulations.

The procedural regulations in this subpart govern the practice and procedure in hearings held under section 103(d) of the Act. These hearings will be governed by the provisions of sections 556 and 557 of the Administrative Procedure Act (5 U.S.C. 556 and 557). The regulations shall be construed to secure the just, speedy, and inexpensive determination of all issues raised with respect to any waiver and/or regulation proposed pursuant to section 103(d) of the act in a manner which gives full protection to the rights of all persons affected thereby.

§ 18.73 Burden of proof.

The proponents of the proposed regulations and waiver must demonstrate that any taking or importation of any marine mammal under such proposed regulations and waiver would be consistent with the act.

§ 18.74 Notice of hearing.

(a) A notice of hearing on any proposed regulations shall be published in the FEDERAL REGISTER, together with the Director's proposed determination to waive the moratorium pursuant to section 101(a)(3)(A) (16 U.S.C. 1371(a)(3)(A)), where applicable.

(b) The notice shall state:

(1) The nature of the hearing;

(2) The place and date of the hearing. The date shall not be less than 60 days after publication of notice of the hearing;

(3) The legal authority under which the hearing is to be held;

(4) The proposed regulations and waiver, where applicable, and a summary of the statements required by section 103(d) of the Act (16 U.S.C. 1373(d));

(5) Issues of fact which may be involved in the hearing;

(6) If an Environmental Impact Statement is required, the date of publication of the Statement and the times and place(s) where the Statement and comments thereon may be viewed and copied;

(7) Any written advice received from the Marine Mammal Commission;

(8) The times and place(s) where records and submitted direct testimony will be kept for public inspection, along with appropriate references to any other documents;

(9) The final date for filing with the Director a notice of intent to participate in the hearing pursuant to § 18.75;

(10) The final date for submission of direct testimony on the proposed regulations and waiver, if applicable, and the number of copies required;

(11) The docket number assigned to the case which shall be used in all subsequent proceedings; and

(12) The place and date of the prehearing conference.

§ 18.75 Notification by interested persons.

Any person desiring to participate as a party shall notify the Director, by certified mail, on or before the date specified in the notice of hearing.

§ 18.76 Presiding officer.

(a) Upon publication of the notice of hearing pursuant to § 18.74, the Office of Hearings and Appeals shall appoint a presiding officer pursuant to 5 U.S.C. 3105. No individual who has any conflict of interest, financial or otherwise, shall serve as presiding officer in such proceeding.

(b) The presiding officer, in any proceeding under this subpart, shall have power to:

(1) Change the time and place of the hearing and adjourn the hearing;

(2) Evaluate direct testimony submitted pursuant to these regulations, make a preliminary determination of the issues, conduct a prehearing conference to determine the issues for the hearing agenda, and cause to be published in the FEDERAL REGISTER a final hearing agenda;

(3) Rule upon motions, requests and admissibility of direct testimony;

(4) Administer oaths and affirmations, question witnesses and direct witnesses to testify;

(5) Modify or waive any rule (after notice) when determining no party will be prejudiced;

(6) Receive written comments and hear oral arguments;

(7) Render a recommended decision; and

(8) Do all acts and take all measures, including regulation of media coverage, for the maintenance of order at and the efficient conduct of the proceeding.

(c) In case of the absence of the original presiding officer or his inability to act, the powers and duties to be performed by the original presiding officer under this part in connection with a proceeding may, without abatement of the proceeding, be assigned to any other presiding officer by the Office of Hearings and Appeals unless otherwise ordered by the Director.

(d) The presiding officer shall withdraw from the proceeding upon his own motion or upon the filing of a motion by a party under § 18.76(e) if he deems himself disqualified under recognized canons of judicial ethics.

(e) A presiding officer may be requested to withdraw at any time prior to the recommended decision. If there is filed by a party in good faith a timely and sufficient affidavit alleging the presiding officer's personal bias, malice, conflict of interest or other basis which might result in prejudice to a party, the hearing shall recess. The Director of the Office of Hearings and Appeals shall immediately determine the matter as a part of the record and decision in the proceeding, after making such investigation or holding such hearings, or both, as he may deem appropriate in the circumstances.

§ 18.77 Direct testimony submitted as written documents.

(a) Unless otherwise specified, all direct testimony, including accompanying exhibits, must be submitted to the presiding officer in writing no later than the dates specified in the notice of the hearing (§ 18.74), the prehearing order (§ 18.82), or within 15 days after the conclusion of the prehearing conference (§ 18.84) as the case may be. All direct testimony, referred to in the affidavit and made a part thereof, must be attached to the affidavit. Direct testimony submitted with exhibits must state the issue to which the exhibit relates; if no such statement is made, the presiding officer shall determine the relevance of the exhibit to the issues published in the FEDERAL REGISTER.

(b) The direct testimony submitted shall contain:

(1) A concise statement of the witness' interest in the proceeding and his position regarding the issues presented. If the direct testimony is presented by a witness who is not a party, the witness shall state his relationship to the party; and

(2) Facts that are relevant and material.

(c) The direct testimony may propose issues of fact not defined in the notice of the hearing and the reason(s) why such issues should be considered at the hearing.

(d) Ten copies of all direct testimony must be submitted unless the notice of the hearing otherwise specifies.

(e) Upon receipt, direct testimony shall be assigned a number and stamped with that number and the docket number.

(f) Contemporaneous with the publication of the notice of hearing, the Director's direct testimony in support of the proposed regulations and waiver, where applicable, shall be available for public inspection as specified in the notice of hearing. The Director may submit additional direct testimony during the time periods allowed for submission of such testimony by witnesses.

§ 18.78 Mailing address.

Unless otherwise specified in the notice of hearing, all direct testimony shall be addressed to the Presiding Officer, c/o Director, U.S. Fish and Wildlife Service, Washington, DC 20240. All affidavits and exhibits shall be clearly marked with the docket number of the proceedings.

§ 18.79 Inspection and copying of documents.

Any document in a file pertaining to any hearing authorized by this subpart or any document forming part of the record of such a hearing may be inspected and/or copied in the Office of the Director, U.S. Fish and Wildlife Service, Washington, DC 20240, unless the file is in the care and custody of the presiding officer, in which case he shall notify the parties as to where and when the record may be inspected.

§ 18.80 Ex parte communications.

(a) After notice of a hearing is published in the FEDERAL REGISTER, all communications, whether oral or written, involving any substantive or procedural issue and directed either to the presiding officer or to the Director, Deputy Director or Marine Mammal Coordinator, U.S. Fish and Wildlife Service, without reference to these rules of procedure, shall be deemed ex parte communications and are not to be considered part of the record for decision.

(b) A record of oral conversations shall be made by the above persons who are contacted. All communications shall be available for public viewing at times and place(s) specified in the notice of hearing.

(c) The presiding officer shall not communicate with any party on any fact in issue or on the merits of the matter unless notice and opportunity is given for all parties to participate.

§ 18.81 Prehearing conference.

(a) After an examination of all the direct testimony submitted pursuant to § 18.77, the presiding officer shall make a preliminary determination of issues of fact which may be addressed at the hearing.

(b) The presiding officer's preliminary determination shall be made available at the place or places provided in the notice of the hearing (§ 18.74(b)(8)) at least five days before the prehearing conference is held.

(c) The purpose of the prehearing conference shall be to enable the presiding officer to determine, on the basis of the direct testimony submitted and prehearing discussions:

(1) Whether the presiding officer's preliminary determination of issues of fact for the hearing has omitted any significant issues;

(2) What facts are not in dispute;

(3) Which witnesses may appear at the hearing; and

(4) The nature of the interest of each party and which parties' interests are adverse.

(d) Only parties may participate in the prehearing conference, and a party may appear in person or be represented by counsel.

§ 18.82 Prehearing order.

(a) After the prehearing conference, the presiding officer shall prepare a prehearing order which shall be published in the FEDERAL REGISTER within ten days after the conclusion of the conference. A copy of the prehearing order shall be mailed to all Parties.

(b) The prehearing order shall list:

(1) All the issues which the hearing shall address, the order in which those issues shall be presented, and the direct testimony submitted which bears on the issues; and

(2) a final date for submission of direct testimony on issues of fact not included in the notice of hearing if such issues are presented. The prehearing order may also specify a final date for submission of direct testimony to rebut testimony previously submitted during the time specified in the notice of the hearing.

(c) The presiding officer shall publish with the prehearing order a list of witnesses who may appear at the hearing, a list of parties, the nature of the interest of each party, and which parties interests are adverse on the issues presented.

(d) All parties shall be bound by the prehearing order.

§ 18.83 Determination to cancel the hearing.

(a) If the presiding officer determines that no issues of material fact are presented by the direct testimony submitted prior to the date of the hearing, he may publish in the FEDERAL REGISTER such determination and that on issues of material fact a hearing shall not be held. The presiding officer may provide an opportunity for argument on any issues of law presented by the direct testimony.

(b) Promptly after oral argument, if any, the presiding officer shall make a recommended decision based on the record, which in this case shall consist of the direct testimony and any oral argument presented. He shall transmit to the Director his recommended decision, the record and a certificate stating that the record contains all the written direct testimony. The Director shall then make a final decision in accordance with these regulations (§ 18.91).

§ 18.84 Rebuttal testimony and new issues of fact in prehearing order.

(a) Direct testimony to rebut testimony offered during the time period specified in the notice of hearing may be submitted pursuant to these regulations within fifteen days after the conclusion of the prehearing conference unless the presiding officer otherwise specifies in the prehearing order.

(b) If the prehearing order presents issues not included in the notice of the hearing published pursuant to § 18.74:

(1) Any person interested in participating at the hearing on such issues presented shall notify the Director by certified mail of an intent to participate not later than ten days after publication of the prehearing order. Such person may present direct testimony or cross-examine witnesses only on such issues presented unless he previously notified the Director pursuant to § 18.75; and

(2) Additional written direct testimony concerning such issues may be submitted within the time provided in the prehearing order. Such direct testimony will comply with the requirements of § 18.77.

§ 18.85 Waiver of right to participate.

Any person who fails to notify the Director of his intent to participate pursuant to § 18.75 or § 18.84 shall be deemed to have waived his right to participate as a party.

§ 18.86 Conduct of the hearing.

(a) The hearing shall be held at the time and place fixed in the notice of hearing, unless the presiding officer changes the time or place. If a change occurs, the presiding officer shall publish the change in the FEDERAL REGISTER and shall expeditiously notify all parties by telephone or by mail. If the change in time or place of

hearing is made less than five days before the date previously fixed for the hearing, the presiding officer shall also announce, or cause to be announced, the change at the time and place previously fixed for the hearing.

(b) The presiding officer shall, at the commencement of the hearing, introduce into the record the notice of hearing as published in the FEDERAL REGISTER, all subsequent notices published in the FEDERAL REGISTER, the Environmental Impact Statement if it is required and the comments thereon and agency responses to the comments, and a list of all parties. Direct testimony shall then be received with respect to the matters specified in the prehearing order in such order as the presiding officer shall announce. With respect to direct testimony submitted as rebuttal testimony or in response to new issues presented by the prehearing conference, the presiding officer shall determine the relevancy of such testimony.

(c) The hearing shall be publicly conducted and reported verbatim by an official reporter.

(d) If a party objects to the admission or rejection of any direct testimony or to any other ruling of the presiding officer during the hearing, he shall state briefly the grounds of such objection, whereupon an automatic exception will follow if the objection is overruled by the presiding officer. The transcript shall not include argument or debate thereon except as ordered by the presiding officer. The ruling of the presiding officer on any objection shall be a part of the transcript and shall be subject to review at the same time and in the same manner as the Director's final decision. Only objections made before the presiding officer may subsequently be relied upon in the proceedings.

(e) All motions and requests shall be addressed to, and ruled on by, the presiding officer if made prior to his certification of the transcript, or by the Director if made thereafter.

§ 18.87 Direct testimony.

(a) Only direct testimony submitted as provided in these regulations and introduced at the hearing by a witness shall be considered part of the record. Such direct testimony, when written, shall not be read into evidence but shall become a part of the record subject to exclusion of irrelevant and immaterial parts thereof.

(b) The witness introducing direct testimony shall:

(1) State his name, address and occupation;

(2) State qualifications for introducing the direct testimony. If an expert, the witness shall briefly state the scientific or technical training which qualifies him as an expert;

(3) Identify the direct testimony previously submitted in accordance with these regulations; and

(4) Submit to appropriate cross- and direct-examination. Cross-examination shall be by a party whose interests are adverse on the issue presented to the witness if the witness is a party, or to the interests of the party who presented the witness.

(c) A party shall be deemed to have waived the right to introduce direct-testimony if such party fails to present a witness to introduce the direct-testimony.

(d) Official notice may be taken of such matters as are judicially noticed by the courts of the United States. Parties shall be given adequate notice, by the presiding officer, at the hearing, of matters so noticed and shall be given adequate opportunity to show that such facts are inaccurate or are erroneously noticed.

§ 18.88 Cross-examination.

(a) The presiding officer may:

(1) Require the cross-examiner to outline the intended scope of the examination; and

(2) Exclude cross-examination questions that are immaterial, irrelevant or unduly repetitious.

(b) Any party shall be given an opportunity to appear, either in person or through an authorized counsel or representative, to cross-examine witnesses. Before cross-examining a witness, the party or counsel shall state his name, address and occupation. If counsel cross-examines the witness, counsel shall state for the record the authority to act as counsel. Cross-examiners shall be assumed to be familiar with the direct testimony.

(c) Any party or party's counsel who fails to appear at the hearing to cross-examine an “adverse” witness shall be deemed to have waived the right to cross-examine that witness.

(d) Scientific, technical or commercial publications may only be utilized for the limited purposes of impeaching witnesses under cross-examination unless previously submitted and introduced in accordance with these regulations.

§ 18.89 Oral and written arguments.

(a) The presiding officer may, in his discretion, provide for oral argument by parties at the end of the hearing. Such argument, when permitted, may be limited by the presiding officer to the extent necessary for the expeditious disposition of the proceeding.

(b) The presiding officer shall announce at the hearing a reasonable period of time within which any party may file with the presiding officer proposed findings and conclusions and written arguments or briefs, which are based upon the record and citing where practicable the relevant page or pages of the transcript. If a party filing a brief desires the presiding officer to reconsider any objection made by such party to a ruling of the presiding officer, he shall specifically identify such rulings by reference to the pertinent pages of the transcript and shall state his arguments thereon as a part of the brief.

(c) Oral or written arguments shall be limited to issues arising from direct testimony on the record.

§ 18.90 Recommended decision, certification of the transcript and submission of comments on the recommended decision.

(a) Promptly after expiration of the period for receiving written briefs, the presiding officer shall make a recommended decision based on the record and transmit the decision to the Director. The recommended decision shall include:

(1) A statement containing a description of the history of the proceedings;

(2) Findings on the issues of fact with the reasons therefor; and

(3) Rulings on issues of law.

(b) The presiding officer shall also transmit to the Director the transcript of the hearing, the original and all copies of the direct testimony, and written comments. The presiding officer shall attach to the original transcript of the hearing a certificate stating that to the best of his knowledge and belief the transcript is a true transcript of the testimony given at the hearing except in such particulars as are specified.

(c) Upon receipt of the recommended decision, the Director shall send a copy thereof to each party by certified mail and shall publish in the FEDERAL REGISTER a notice of the receipt of the recommended decision by the Director. The notice shall include:

(1) A summary of the recommended decision;

(2) A statement that any interested person may file written comments on the recommended decision with the Director by a specified date;

(3) The time(s) and place(s) where the record of the hearing transmitted to the Director pursuant to paragraph (b) of this section may be inspected by interested persons; and

(4) The time(s) and place(s) where the recommended decision may be inspected and/or copied by interested persons.

(d) Within thirty days after the notice of receipt of the recommended decision has been published in the FEDERAL REGISTER, any interested person may file with the Director any written comments on the recommended decision. All comments, including recommendations from or consultation with the Marine Mammal Commission, must be submitted during the thirty-day period to the Director at the above address.

§ 18.91 Director's decision.

(a) Upon receipt of the recommended decision and transcript and after the thirty-day period for receiving written comments on the recommended decision has passed, the Director shall make a final decision on the proposed regulations and waiver, where applicable. The Director's decision may affirm, modify, or set aside, in whole or in part, the recommended findings, conclusions and decision of the presiding officer. The Director may also remand the hearing record to the presiding officer for a fuller development of the record.

(b) The Director's decision shall include:

(1) A statement containing a description of the history of the proceeding;

(2) Findings on the issues of fact with the reasons therefor;

(3) Rulings on issues of law; and

(4) Any other relevant information which the Director deems appropriate.

(c) The Director's decision shall be published in the FEDERAL REGISTER. If the waiver is approved, the final adopted regulations shall be promulgated with the decision, or as soon thereafter as practicable.

Subpart H—Waiver of Moratorium on Taking and Importation of Individual Marine Mammal Species

Source: 41 FR 14373, Apr. 5, 1976, unless otherwise noted.

§ 18.92 Purpose of regulations.

The regulations contained in this subpart fulfill the requirements of section 103 of the Act for regulations to govern the taking and importation of each species of marine mammal for which the moratorium imposed by section 101 has been waived.

§ 18.93 Scope of regulations.

(a) The provisions in this subpart apply only after (1) the Director has made a decision to waive a moratorium pursuant to section 101(a)(3)(A) of the Act, (2) the opportunity for a hearing required by section 103(d) of the Act has been provided, and (3) the Director has made a determination, in the case of State laws and regulations, to approve such State laws and regulations pursuant to section 109(a)(2) of the Act and subpart F of this part.

(b) The provisions of this subpart, unless specifically stated, apply to all taking and/or importation of each species of marine mammal for which the moratorium has been waived other than takings for scientific research or public display, which are governed by § 18.31 of this part, or takings incidental to commercial fishing operations which are governed by § 18.24.

§ 18.94 Pacific walrus (Alaska).

(a) Pursuant to sections 101(a)(3)(A) 103, and 109 of the Marine Mammal Protection Act of 1972, the moratorium on the hunting and killing of Pacific walrus (*Odobenus rosmarus*) in waters or on lands subject to the jurisdiction of the State of Alaska, the United States, or on the high seas by any person, vessel, or conveyance subject to the jurisdiction of the State of Alaska or the United States, is waived, provided that beginning August 2, 1979 this waiver shall not be effective, and no taking or importation under the waiver shall be allowed, until this section is amended to establish regulations to effectively control taking and otherwise implement the waiver.

(b) [Reserved]

[41 FR 14373, Apr. 5, 1976, as amended at 44 FR 45566, Aug. 2, 1979]

Subpart I—Nonlethal Taking of Northern Sea Otters Incidental to Pile Driving and Marine Construction in Seward, Sitka, and Kodiak, Alaska

Source: 91 FR 14778, Mar. 27, 2026, unless otherwise noted.

Effective Date Note: At 91 FR 14778, Mar. 27, 2026, Subpart I was added, effective Mar. 27, 2026 through Mar. 27, 2031.

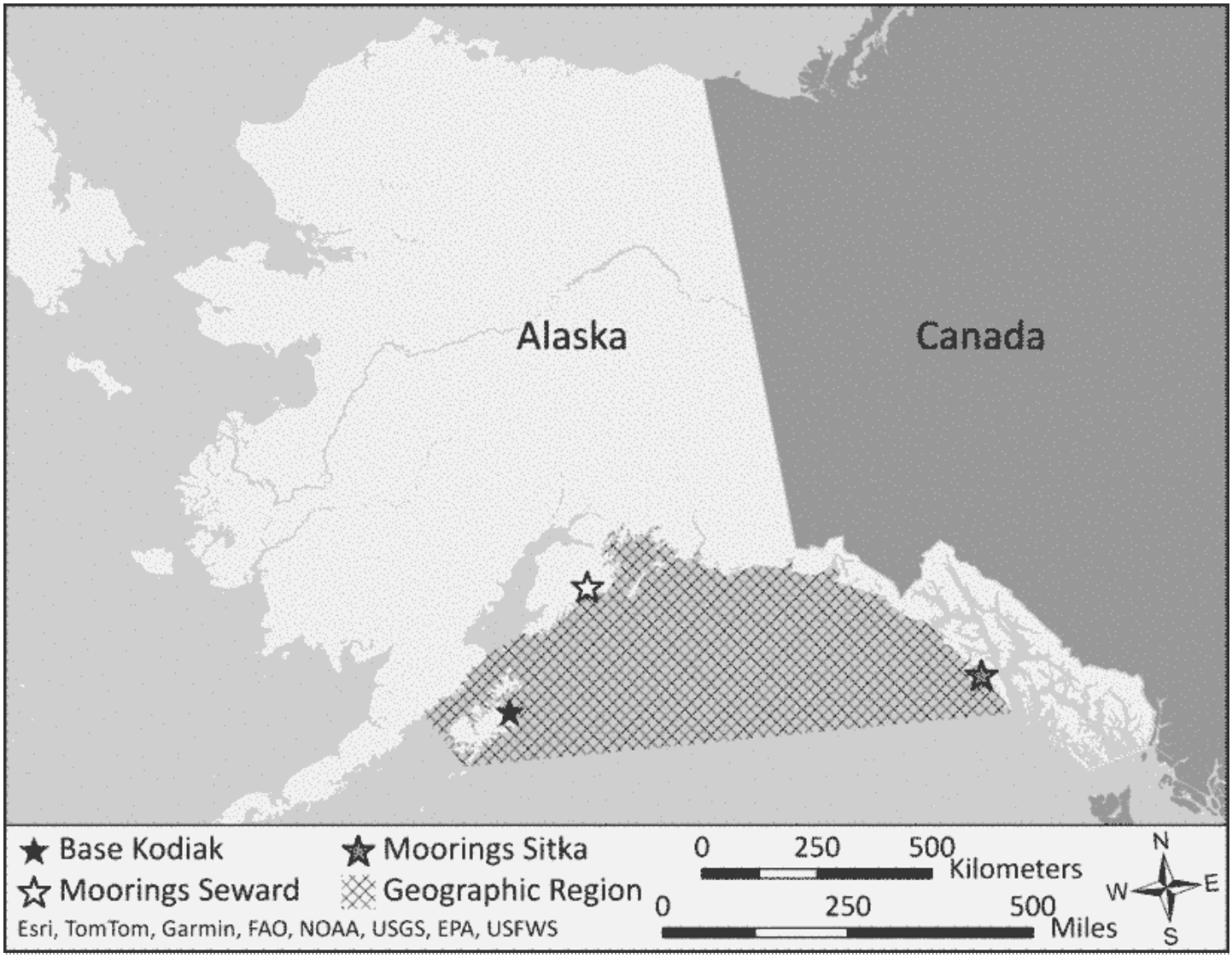
§ 18.100 Specified activities covered by this subpart.

Regulations in this subpart apply to the nonlethal incidental, but not intentional, take, as defined in § 18.3 and under section 3 of the Marine Mammal Protection Act (MMPA; 16 U.S.C. 1371 *et seq.*), of small numbers of northern sea otters (*Enhydra lutris kenyoni;* hereafter "sea otters") by the U.S. Coast Guard (hereafter "USCG" or "the applicant") while engaged in activities associated with or in support of pile driving and marine construction activities in Seward, Sitka, and Kodiak, Alaska. The applicant is a U.S. citizen as defined in § 18.27(c). A Letter of Authorization (LOA) from the U.S. Fish and Wildlife Service (FWS) is required to authorize incidental take that may occur during the specified activities.

§ 18.101 Specified geographic region where this subpart applies.

The specified geographic region for the incidental take regulations (ITR) in this subpart includes Gulf of Alaska coastal waters of three USCG facilities. The specified activities would occur in the waters and intertidal areas of the eastern shore of Resurrection Bay, Alaska, surrounding the new USCG Moorings Seward, the waters and intertidal areas of Sitka Channel, Alaska, surrounding the USCG Moorings Sitka, and the waters and intertidal areas of Womens Bay, Kodiak, Alaska, which surround the USCG Base Kodiak located on the Nyman Peninsula.

Figure 1 to § 18.101—Map of the ITR region including USCG's Moorings Seward, Moorings Sitka, and Base Kodiak in Alaska where the activities covered by this subpart will occur.



§ 18.102 Dates this subpart is in effect.

The regulations in this subpart are effective from March 27, 2026 through March 27, 2031.

§ 18.103 Procedure to obtain a Letter of Authorization (LOA).

(a) The applicant must submit the request for an LOA to the FWS Alaska Region, Marine Mammals Management Office (MMM), MS 341, 1011 East Tudor Road, Anchorage, Alaska 99503, at least 30 days prior to the start of the specified activity.

(b) The request for an LOA must comply with the requirements set forth in §§ 18.107 through 18.109 and must include the following information:

(1) An operational plan that describes in detail the activity (*e.g.,* type of project, methods, and types and numbers of equipment and personnel, etc.), the dates and duration of the activity, and the specific locations affected by the activity.

(2) A digital geospatial file of the project footprint.

(3) A site-specific marine mammal monitoring and mitigation plan that specifies the procedures to monitor and mitigate the effects of the activities on sea otters.

(4) Documentation of the applicant's communication with potentially affected subsistence communities surrounding Seward, Sitka, and Kodiak and appropriate subsistence user organizations to discuss the location, timing, and methods of activities and identify and mitigate any potential conflicts with subsistence sea otter hunting activities.

(i) The applicant must specifically inquire of relevant communities and organizations if the activity will interfere with the availability of sea otters for the subsistence use of those groups.

(ii) Documentation must include a summary of any concerns identified by community members and hunter organizations and the applicant's responses to identified concerns.

(iii) A plan of cooperation (POC) may not be required for an LOA request if no concerns are raised during community consultation regarding impacts to subsistence harvest or Alaska Native communities and subsistence user organizations.

(5) A POC, if required, to mitigate potential conflicts between the activity and subsistence hunting.

§ 18.104 How the FWS will evaluate a request for an LOA.

(a) The FWS will evaluate each request for an LOA to determine if the specified activity is consistent with the analysis and findings we made during the rulemaking process for this subpart.

(1) We will determine whether the level of activity identified in the request exceeds the level that we analyzed in estimating the number of animals to be taken and evaluating whether there will be a negligible impact on the species or stock and an unmitigable adverse impact on the availability of the species or stock for subsistence uses.

(2) If the level of activity is greater, we will evaluate the potential impact of this greater level of activity to determine if the potential impact is consistent with our findings. Depending on the results of the evaluation, we may grant the requested authorization, add further conditions, or deny the request for an LOA. An LOA will be limited to a 1-year period or less within the period set forth in § 18.102.

(b) The FWS will make decisions concerning withdrawal or suspension of an LOA (see § 18.27(f)(5) and (6)).

§ 18.105 Authorized take allowed under an LOA.

(a) To incidentally take marine mammals pursuant to the regulations in this subpart, the applicant must apply for and obtain an LOA in accordance with §§ 18.27(f), 18.103, and 18.104.

(b) An LOA issued under this subpart allows for the nonlethal, incidental, but not intentional take by harassment, as defined under section 3 of the MMPA (16 U.S.C. 1362), of sea otters during activities specified in § 18.100 within the Seward, Sitka, and Kodiak ITR region of Alaska described in § 18.101.

(c) Each LOA will set forth:

(1) Permissible methods of incidental take;

(2) Means of effecting the least practicable adverse impact on the species, its habitat, and the availability of the species for subsistence uses; and

(3) Requirements for monitoring and reporting.

(d) Allowable take under these regulations is limited to take by Level B harassment and Level A harassment (as those terms are defined at 16 U.S.C. 1362).

(e) Each LOA will identify terms and conditions for each activity and location.

§ 18.106 Prohibited take under an LOA.

(a) Except as otherwise provided in this subpart, prohibited taking includes the provisions of § 18.11 as well as: intentional take, lethal incidental take of sea otters, and any take that fails to comply with the regulations in this subpart or with the terms and conditions of an LOA.

(b) If specified activities cause unauthorized take, the holder of an LOA must:

(1) Cease activities immediately (or reduce activities to the minimum level necessary to maintain safety);

(2) Report the details of the incident within 24 hours to the FWS's MMM at 907-786-3800 (business hours) or via email at *FW7_MMM_Reports@fws.gov*. If the unauthorized taking results in a sea otter being injured or killed, call the FWS MMM during business hours or the Alaska SeaLife Center in Seward (1-888-774-7325, 24 hours a day);

(3) Provide photographs, video, location information, and any other available documentation related to the unauthorized take of the sea otter(s) to the FWS; and

(4) Suspend further activities until the FWS has reviewed the circumstances, determined whether additional mitigation measures are necessary to avoid further unauthorized taking, and notified the LOA holder that project activities may resume.

§ 18.107 Mitigation.

(a) ***Mitigation measures for all LOAs.*** The applicant, including all personnel operating under the applicant's authority (or "operators," including contractors, subcontractors, and representatives) must undertake the following activities to avoid and minimize take of sea otters by harassment.

(1) Implement policies and procedures to avoid interactions with and minimize to the greatest extent practicable adverse impacts on sea otters, their habitat, and the availability of these marine mammals for subsistence uses.

(2) Develop avoidance and minimization policies and procedures, in cooperation with the FWS, that include temporal or spatial activity restrictions to be used in response to the presence of sea otters engaged in a biologically significant activity (*e.g.,* resting, feeding, hauling out, mating, or nursing).

(3) Cooperate with the FWS's MMM Office and other designated Federal, State, and local agencies to monitor and mitigate the impacts of pile driving and marine construction activities on sea otters.

(4) Allow FWS personnel or the FWS's designated representative to board project vessels or visit project worksites for the purpose of monitoring impacts to sea otters and to subsistence uses of sea otters at any time throughout project activities so long as it is safe to do so.

(5) Designate trained and qualified protected species observers (PSOs) to monitor for the presence of sea otters, initiate mitigation measures, and monitor, record, and report the effects of the activities on sea otters. The applicant is responsible for providing training to PSOs to carry out mitigation and monitoring.

(6) Have an approved mitigation and monitoring plan on file with the FWS MMM and onsite that includes the following information:

(i) The type of activity and where and when the activity will occur (*i.e.,* a summary of the plan of operation);

(ii) Personnel training policies, procedures, and materials;

(iii) Site-specific sea otter interaction risk evaluation and mitigation measures;

(iv) Sea otter avoidance and encounter procedures; and

(v) Sea otter observation and reporting procedures.

(b) ***Mitigation measures for in-water noise-generating work.*** The applicant must carry out the following measures:

(1) Construction activities must be conducted using equipment that generates the lowest practicable levels of in-water noise within the range of frequencies audible to sea otters.

(2) If a sea otter enters or appears likely to enter the shutdown zone, in-water activities must be shut down until either the sea otter has been visually observed outside the shutdown zone or at least 15 minutes have elapsed since the last observation time without redetection of the sea otter.

(i) During in-water activities at Seward, an acoustic shutdown zone of 85 meters (m; 280 feet [ft]) must be enforced during down-the-hole (DTH) drilling of concrete piles, and a shutdown zone of 30 m (99 ft) must be enforced during all other in-water activities.

(ii) During in-water activities at Sitka and Kodiak, regardless of predicted sound levels, a physical interaction shutdown zone of at least 20 m (66 ft) must be enforced.

(3) If the impact driver has been idled for more than 30 minutes, an initial set of three strikes from the impact driver must be delivered (at reduced energy if possible), followed by a 1-minute waiting period. This procedure will be conducted a total of three times before full-powered strikes if practicable. If unsafe working conditions during soft-starts occur (*e.g.,* equipment failure), then the applicant may elect to discontinue soft-starts, and the applicant must notify the FWS if the soft-start procedure is discontinued.

(4) If practicable, a soft-start procedure for vibratory pile-driving activities may be implemented if the vibratory hammer has been idled for more than 30 minutes. During the soft-start procedure, initial noise generation must be limited to 15 seconds (at reduced energy if possible), followed by a 1-minute waiting period. This procedure will be conducted a total of three times before full-powered vibratory pile driving commences. If unsafe working conditions during soft-starts occur (*e.g.,* equipment failure), then the applicant may elect to discontinue soft-starts and the applicant must notify the FWS if the soft-start procedure is discontinued.

(5) In-water activity must be conducted in daylight. If environmental conditions prevent visual detection of sea otters within the shutdown zone, in-water activities must be stopped until visibility is regained.

(6) All in-water work along the shoreline must be conducted during lower tidal conditions when the site is dewatered to the maximum extent practicable.

(7) When practicable, or when required by applicable local, State, or Federal regulations, the applicant must use containment methods (*e.g.,* silt curtains) to isolate areas with high levels of turbidity during DTH drilling and vibroflot column installation.

(c) ***Mitigation measures for vessel operations.*** Vessel operators must take every precaution to avoid harassment of sea otters during vessel operations. The applicant must carry out the following measures:

(1) Vessels must maintain a minimum distance of 500 m (0.3 mile [mi]) from rafts of 10 or more sea otters unless otherwise needed for safety. If a vessel must transit within 500 m (0.3 mi) from rafts of sea otters, the vessel must travel at a reduced speed and maintain the maximum distance practicable between the vessel and raft of sea otters. Vessels must reduce speed and maintain a minimum distance of 100 m (328 ft) from all sea otters unless otherwise needed for safety.

(2) Vessels must not be operated in such a way as to separate members of a group of sea otters (two or more sea otters) from other members of the group, encircle sea otters, or impede movement of sea otters. Vessels must use established navigation channels or commonly recognized vessel traffic corridors and avoid approaching sea otters or impeding sea otter movements when traveling near the shoreline in shallow water (<20 m [<66 ft]) whenever practicable.

(3) When weather conditions require, such as when visibility drops, vessels must adjust speed accordingly to reduce the likelihood of injury to sea otters.

(4) Vessel operators must be provided written guidance for avoiding collisions and minimizing disturbances to sea otters. Guidance will include measures identified in paragraphs (c)(1) through (4) of this section.

(d) ***Mitigation measures for the subsistence use of sea otters.*** Holders of an LOA must conduct their activities in a manner that, to the greatest extent practicable, minimizes adverse impacts on the availability of sea otters for subsistence uses.

(1) ***Community consultation.*** Prior to receipt of an LOA, applicants must consult with potentially affected communities and appropriate subsistence user organizations to discuss potential conflicts with subsistence sea otter hunting caused by the location, timing, and methods of operations and support activities (see § 18.103 for details). If community concerns suggest that the activities may have an adverse impact on the subsistence uses of this species, the applicant must address conflict avoidance issues through a POC as described in paragraph (d)(2) of this section.

(2) ***Plan of cooperation.*** Based on community consultations, the holder of an LOA will be required to modify their POC if directed by the FWS.

(i) The POC must include a description of the procedures by which the holder of the LOA will work and consult with potentially affected subsistence hunters and a description of specific measures that have been or will be taken to avoid or minimize interference with subsistence hunting of sea otters and to ensure continued availability of the species for subsistence use.

(ii) The FWS will review the POC to ensure that any potential adverse effects on the availability of sea otters are minimized. The FWS will reject POCs if they do not provide adequate safeguards to ensure the least practicable adverse impact on the availability of sea otters for subsistence use.

§ 18.108 Monitoring.

(a) Operators shall work with PSOs to apply mitigation measures and shall recognize the authority of PSOs up to and including stopping work, except where doing so poses a significant safety risk to personnel.

(b) Duties of PSOs include watching for and identifying sea otters, recording observation details, documenting presence in any applicable monitoring zone, identifying and documenting potential harassment, and working with operators to implement all appropriate mitigation measures.

(c) A sufficient number of PSOs will be available to meet the following criteria: 100 percent monitoring of shutdown zones during all daytime periods of in-water noise-generating work; a maximum of 4 consecutive hours on watch per PSO; a maximum of 12 hours on watch per day per PSO.

(d) All PSOs will complete a training course designed to familiarize individuals with monitoring and data collection procedures. This training will be completed prior to starting work. A field crew leader with prior experience as a sea otter observer will supervise the PSO team. Initially, new or inexperienced PSOs will be paired with experienced PSOs so that the quality of marine mammal observations and data recording is kept consistent. Resumes for candidate PSOs will be made available for the FWS to review.

(e) The PSOs will be provided with reticule binoculars (7×50 or better), big-eye binoculars or spotting scopes (30×), inclinometers, and range finders. Field guides, instructional handbooks, maps, and a contact list will also be made available.

(f) The PSOs will monitor a pre-clearance zone for 30 minutes prior to the commencement of in-water noise-generating activities and following periods of inactivity of more than 30 minutes to ensure all sea otters are not within the shutdown zone prior to initiating or resuming in-water noise-generating activities.

(g) Observers will collect data using the following procedures:

(1) All data will be recorded onto a field form or database.

(2) Global positioning system data, sea state, tidal state, wind force, visibility, and weather condition will be recorded at the beginning and end of a monitoring period, at least every hour in between, at the change of an observer, and upon observation of sea otters.

(3) Observation records of sea otters will include date; time; the observers' locations; sea otter's heading (if moving); weather condition; visibility; number of sea otters; group composition (adults/juveniles); and the location of the sea otters (or distance and direction from the observer).

(4) Observation records will also include initial behaviors of the sea otters, descriptions of project activities and in-water noise levels being generated, the position of sea otters relative to applicable monitoring and mitigation zones, any mitigation measures applied, and any apparent reactions to the project activities before and after mitigation.

(5) For all sea otters in or near a mitigation zone, observers will record the distance from the sound source to the sea otter upon initial observation, the duration of the encounter, and the distance at last observation in order to monitor cumulative sound exposures.

(6) The PSOs will note any instances of sea otters lingering close to or traveling with vessels for prolonged periods of time.

(7) Monitoring of the shutdown zone must continue for 30 minutes following completion of in-water noise-generating activities.

§ 18.109 Reporting requirements.

(a) Operators must notify the FWS at least 48 hours prior to commencement of activities.

(b) Monthly reports will be submitted to the FWS's MMM for all months during which noise-generating work takes place. The monthly report will contain and summarize the following information: dates, times, weather, and sea conditions (including the Beaufort Scale sea state and wind force conditions) when sea otters were observed; the number, location, distance from the sound source, and behavior of the sea otters; the associated project activities; and a description of the implementation and effectiveness of mitigation measures with a discussion of any specific behaviors the sea otters exhibited in response to mitigation.

(c) A final report will be submitted to the FWS's MMM within 90 days after the expiration of each LOA. The report will include:

(1) A summary of monitoring efforts (hours of monitoring, activities monitored, number of PSOs, and, if requested by the FWS, the daily monitoring logs).

(2) A description of all project activities, any additional work yet to be done, factors influencing visibility and detectability of marine mammals (*e.g.,* sea state, fog, glare, and number of observers), and factors correlated with the presence and distribution of sea otters (*e.g.,* weather, sea state, and project activities).

(3) An estimate will be included of the number of sea otters exposed to noise at received levels greater than or equal to Level A harassment and Level B harassment (based on visual observation).

(4) A description of changes in sea otter behavior resulting from project activities and any specific behaviors of interest.

(5) A discussion of the mitigation measures implemented during project activities and their observed effectiveness for minimizing impacts to sea otters. Sea otter observation records will be provided to the FWS in the form of electronic database or spreadsheet files.

(d) All reports must be submitted by email to *FW7_MMM_Reports@fws.gov*.

(e) Injured, dead, or distressed sea otters that are not associated with project activities (*e.g.,* animals known to be from outside the project area, previously wounded animals, or carcasses with moderate to advanced decomposition or scavenger damage) must be reported to the FWS within 24 hours of the discovery to either the FWS's MMM (907-786-3800, business hours); or the Alaska SeaLife Center in Seward (1-888-774-7325, 24 hours a day); or both. Photographs, video, location information, or any other available documentation must be provided to the FWS.

(f) Operators must notify the FWS upon project completion or end of the work season.

§ 18.110 Information collection requirements.

The Office of Management and Budget (OMB) has approved the information collection requirements contained in this part and assigned OMB Control Number 1018-0205. Federal agencies may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. Direct comments regarding the burden estimate or any other aspect of the information collection to the FWS Information Collection Clearance Officer at the address provided at 50 CFR 2.1(b).

Subparts J- K [Reserved]

Subpart L—Nonlethal Taking of Marine Mammals Incidental to Pile Driving and Marine Construction Activities in the Gulf of Alaska

Source: 88 FR 24127, Apr. 19, 2023, unless otherwise noted.

Effective Date Note: At 88 FR 24127, Apr. 19, 2023, Subpart L was added, effective May 19, 2023, through May 19, 2028.

§18.142 Specified activities covered by this subpart.

Regulations in this subpart apply to the nonlethal incidental, but not intentional, take, as defined in § 18.3 and under section 3 of the Marine Mammal Protection Act (16 U.S.C. 1371 *et seq.*), of small numbers of northern sea otters (*Enhydra lutris kenyoni;* hereafter "sea otters") by the U.S. Coast Guard (hereafter "USCG" or "the applicant") while engaged in activities associated with or in support of marine construction activities in the Gulf of Alaska. The applicant is a U.S. citizen as defined in § 18.27(c).

§ 18.143 Specified geographic region where this subpart applies.

(a) The specified geographic region encompasses areas within 2 kilometers (km) (~1.25 miles (mi)) of eight USCG facilities within the USCG Civil Engineering Unit, Juneau Area of Responsibility. These facilities are: Base Kodiak, Moorings Seward, Moorings Valdez, Moorings Cordova, Moorings Sitka, Station Juneau, Moorings Petersburg, and Base Ketchikan.

(b) The geographic area of the incidental take regulations (ITRs) in this subpart includes all Alaska State waters within the areas listed in paragraph (a) of this section as well as all adjacent rivers, estuaries, and coastal lands where sea otters may occur.

§ 18.144 Dates this subpart is in effect.

Regulations in this subpart are effective from May 19, 2023, until May 19, 2028.

§ 18.145 Procedure to obtain a Letter of Authorization (LOA).

(a) The applicant must submit the request for authorization to the U.S. Fish and Wildlife Service (Service) Alaska Region Marine Mammals Management Office (MMM), MS 341, 1011 East Tudor Road, Anchorage, Alaska, 99503, or by email at *r7mmmregulatory@fws.gov,* at least 30 days prior to the start of the planned activity.

(b) The request for an LOA must comply with the requirements set forth in §§ 18.149 through 18.151 and must include the following information:

(1) An operational plan for the activity;

(2) A digital geospatial file of the project footprint, including sound isopleths;

(3) A site-specific marine mammal monitoring and mitigation plan that specifies the procedures to monitor and mitigate the effects of the activities on sea otters; and

(4) When appropriate, a plan of cooperation, which is a documented plan that describes measures to mitigate potential conflicts between planned project activities and subsistence hunting.

§ 18.146 How the Service will evaluate a request for an LOA.

(a) The Service will evaluate each request for an LOA to determine if the proposed activity is consistent with the analysis and findings made for the regulations in this subpart. Depending on the results of the evaluation, we may issue the LOA, add further conditions, or deny the LOA.

(b) Once issued, the Service may withdraw or suspend an LOA if the project activity is modified in a way that undermines the results of the previous evaluation, if the conditions of the regulations in this subpart are not being substantially complied with, or if the taking allowed is or may be having more than a negligible impact on the affected stock of sea otters or an unmitigable adverse impact on the availability of sea otters for subsistence uses.

(c) The Service will make decisions concerning withdrawals of an LOA, either on an individual or class basis, only after notice and opportunity for public comment in accordance with § 18.27(f)(5). The requirement for notice and public comment will not apply should we determine that an emergency exists that poses a significant risk to the well-being of the species or stocks of sea otters.

§ 18.147 Authorized take allowed under an LOA.

(a) To incidentally take sea otters pursuant to the regulations in this subpart, the USCG must apply for and obtain an LOA in accordance with §§ 18.27(f) and 18.145. The applicant is a U.S. citizen as defined in § 18.27(c).

(b) An LOA allows for the nonlethal, incidental, but not intentional take by harassment of sea otters during activities specified in § 18.142 within the Gulf of Alaska ITR region described in § 18.143.

(c) Each LOA will set forth:

(1) Permissible methods of incidental take;

(2) Means of effecting the least practicable adverse impact (*i.e.,* mitigation) on the species, its habitat, and the availability of the species for subsistence uses; and

(3) Requirements for monitoring and reporting.

(d) Issuance of the LOA(s) must be based on a determination that the level of take will be consistent with the findings made for the total allowable take under the regulations in this subpart.

§ 18.148 Prohibited take under an LOA.

(a) Except as otherwise provided in this subpart, prohibited taking is described in § 18.11 as well as: intentional take, lethal incidental take of sea otters, and any take that fails to comply with this subpart or with the terms and conditions of an LOA.

(b) If project activities cause unauthorized take, the applicant must take the following actions:

(1) Cease activities immediately (or reduce activities to the minimum level necessary to maintain safety) and report the details of the incident to the Service MMM at 1-800-362-5148 (business hours) within 48 hours; and

(2) Suspend further activities until the Service has reviewed the circumstances, determined whether additional mitigation measures are necessary to avoid further unauthorized taking, and notified the applicant that project activities may resume.

§ 18.149 Mitigation.

(a) ***Mitigation measures for all LOAs.*** The applicant, including all personnel operating under the applicant's authority (or "operators," including contractors, subcontractors, and representatives) must undertake the following activities to avoid and minimize take of sea otters by harassment.

(1) Implement policies and procedures to avoid interactions with and minimize to the greatest extent practicable adverse impacts on sea otters, their habitat, and the availability of these marine mammals for subsistence uses.

(2) Develop avoidance and minimization policies and procedures, in cooperation with the Service, that include temporal or spatial activity restrictions to be used in response to the presence of sea otters engaged in a biologically significant activity (*e.g.,* resting, feeding, hauling out, mating, or nursing).

(3) Cooperate with the Service's MMM Office and other designated Federal, State, and local agencies to monitor and mitigate the impacts of pile driving and marine construction activities on sea otters.

(4) Allow Service personnel or the Service's designated representative to board project vessels or visit project worksites for the purpose of monitoring impacts to sea otters and subsistence uses of sea otters at any time throughout project activities so long as it is safe to do so.

(5) Designate trained and qualified protected species observers (PSOs) to monitor for the presence of sea otters, initiate mitigation measures, and monitor, record, and report the effects of the activities on sea otters. The applicant is responsible for providing training to PSOs to carry out mitigation and monitoring.

(6) Have an approved mitigation and monitoring plan on file with the Service MMM and onsite that includes the following information:

(i) The type of activity and where and when the activity will occur (*i.e.,* a summary of the plan of operation);

(ii) Personnel training policies, procedures, and materials;

(iii) Site-specific sea otter interaction risk evaluation and mitigation measures;

(iv) Sea otter avoidance and encounter procedures; and

(v) Sea otter observation and reporting procedures.

(b) ***Mitigation measures for in-water noise-generating work.*** The applicant must carry out the following measures:

(1) Construction activities must be conducted using equipment that generates the lowest practicable levels of underwater sound within the range of frequencies audible to sea otters.

(2) During all pile-installation activities, regardless of predicted sound levels, a physical interaction shutdown zone of 20 meters (m) (66 feet (ft)) must be enforced. If a sea otter enters the shutdown zone, in-water activities must be delayed until either the animal has been visually observed outside the shutdown zone or 15 minutes have elapsed since the last observation time without redetection of the animal.

(3) If the impact driver has been idled for more than 30 minutes, an initial set of three strikes from the impact driver must be delivered at reduced energy, followed by a 1-minute waiting period, before full-powered proofing strikes.

(4) In-water activity must be conducted in daylight. If environmental conditions prevent visual detection of sea otters within the shutdown zone, in-water activities must be stopped until visibility is regained.

(5) All in-water work along the shoreline must be conducted during low tide when the site is dewatered to the maximum extent practicable.

(6) When an impact hammer is used, noise-dampening block cushions or pile caps will be placed between the hammer and pile.

(c) ***Mitigation measures for vessel operations.*** Vessel operators must take every precaution to avoid harassment of sea otters when a vessel is operating near these animals. The applicant must carry out the following measures:

(1) Vessels must remain at least 500 m (1,640 ft) from rafts of sea otters unless safety is a factor. Vessels must reduce speed and maintain a distance of 100 m (328 ft) from all sea otters unless safety is a factor.

(2) Vessels must not be operated in such a way as to separate members of a group of sea otters from other members of the group and must avoid alongshore travel in shallow water (<20 m (~66 ft)) whenever practicable.

(3) When weather conditions require, such as when visibility drops, vessels must adjust speed accordingly to avoid the likelihood of injury to sea otters.

(4) Vessel operators must be provided written guidance for avoiding collisions and minimizing disturbances to sea otters. Guidance will include measures identified in paragraph (c) of this section.

§ 18.150 Monitoring.

(a) Operators must work with PSOs to apply mitigation measures and must recognize the authority of PSOs, up to and including stopping work, except where doing so poses a significant safety risk to personnel.

(b) Duties of PSOs include watching for and identifying sea otters, recording observation details, documenting presence in any applicable monitoring zone, identifying and documenting potential harassment, and working with operators to implement all appropriate mitigation measures.

(c) A sufficient number of PSOs will be available to meet the following criteria: 100 percent monitoring of exclusion zones during all daytime periods of underwater noise-generating work; a maximum of 4 consecutive hours on watch per PSO; a maximum of approximately 12 hours on watch per day per PSO.

(d) All PSOs will complete a training course designed to familiarize individuals with monitoring and data collection procedures. A field crew leader with prior experience as a sea otter observer will supervise the PSO team. Initially, new or inexperienced PSOs will be paired with experienced PSOs so that the quality of marine mammal observations and data recording is kept consistent. Resumes for candidate PSOs will be made available for the Service to review.

(e) Observers will be provided with reticule binoculars (10×42), big-eye binoculars or spotting scopes (30×), inclinometers, and range finders. Field guides, instructional handbooks, maps, and a contact list will also be made available.

(f) Observers will collect data using the following procedures:

(1) All data will be recorded onto a field form or database.

(2) Global positioning system data, sea state, wind force, and weather will be collected at the beginning and end of a monitoring period, every hour in between, at the change of an observer, and upon sightings of sea otters.

(3) Observation records of sea otters will include date; time; the observer's locations, heading, and speed (if moving); weather; visibility; number of animals; group size and composition (adults/juveniles); and the location of the animals (or distance and direction from the observer).

(4) Observation records will also include initial behaviors of the sea otters, descriptions of project activities and underwater sound levels being generated, the position of sea otters relative to applicable monitoring and mitigation zones, any mitigation measures applied, and any apparent reactions to the project activities before and after mitigation.

(5) For all sea otters in or near a mitigation zone, observers will record the distance from the vessel to the sea otter upon initial observation, the duration of the encounter, and the distance at last observation in order to monitor cumulative sound exposures.

(6) Observers will note any instances of animals lingering close to or traveling with vessels for prolonged periods of time.

§ 18.151 Reporting requirements.

(a) Operators must notify the Service at least 48 hours prior to commencement of activities.

(b) Monthly reports will be submitted to the Service MMM for all months during which noise-generating work takes place. The monthly report will contain and summarize the following information: dates, times, weather, and sea conditions (including the Beaufort Scale's sea state and wind force conditions) when sea otters were sighted; the number, location, distance from the sound source, and behavior of the sea otters; the associated project activities; and a description of the implementation and effectiveness of mitigation measures with a discussion of any specific behaviors the sea otters exhibited in response to mitigation.

(c) A final report will be submitted to the Service within 90 days after the expiration of each LOA. It will include the following:

(1) A summary of monitoring efforts (hours of monitoring, activities monitored, number of PSOs, and, if requested by the Service, the daily monitoring logs).

(2) A description of all project activities, along with any additional work yet to be done. Factors influencing visibility and detectability of marine mammals (*e.g.,* sea state, number of observers, and fog and glare) will be discussed.

(3) A description of the factors affecting the presence and distribution of sea otters (*e.g.,* weather, sea state, and project activities). An estimate will be included of the number of sea otters exposed to noise at received levels greater than or equal to 160 dB_{RMS} re: 1 μPa (decibels root-mean squared referenced to 1 microPascal) (based on visual observation).

(4) A description of changes in sea otter behavior resulting from project activities and any specific behaviors of interest.

(5) A discussion of the mitigation measures implemented during project activities and their observed effectiveness for minimizing impacts to sea otters. Sea otter observation records will be provided to the Service in the form of electronic database or spreadsheet files.

(d) All reports must be submitted by email to *fw7_mmm_reports@fws.gov*.

(e) Injured, dead, or distressed sea otters that are not associated with project activities (*e.g.,* animals known to be from outside the project area, previously wounded animals, or carcasses with moderate to advanced decomposition or scavenger damage) must be reported to the Service within 24 hours of the discovery to either the Service MMM (1-800-362-5148, business hours); or the Alaska SeaLife Center in Seward (1-888-774-7325, 24 hours a day); or both. Photographs, video, location information, or any other available documentation must be provided to the Service.

(f) Operators must notify the Service upon project completion or end of the work season.

§ 18.152 Information collection requirements.

The Office of Management and Budget (OMB) has approved the information collection requirements contained in this subpart and assigned OMB Control Number 1018-0202. Federal agencies may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid OMB control number. Direct comments regarding the burden estimate or any other aspect of the information collection to the Service's Information Collection Clearance Officer at the address provided at 50 CFR 2.1(b).

[88 FR 24127, Apr. 19, 2023, as amended at 90 FR 27432, June 26, 2025]