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Dated: September 4, 2009.

**Christopher Cassel,**

*Acting Director, Subsidies Enforcement  
Office, Import Administration.*

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

RIN 0648-XR49

#### **Incidental Takes of Marine Mammals During Specified Activities; Harbor Activities Related to the Delta IV/ Evolved Expendable Launch Vehicle at Vandenberg Air Force Base, CA**

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Notice; issuance of incidental harassment authorization.

**SUMMARY:** In accordance with the provisions of the Marine Mammal Protection Act (MMPA) as amended, notification is hereby given that NMFS has issued an Incidental Harassment Authorization (IHA) to United Launch Alliance (ULA) to take small numbers of marine mammals, by Level B harassment only, incidental to harbor activities related to the Delta IV/Evolved Expendable Launch Vehicle (EELV) at south Vandenberg Air Force Base, CA (VAFB).

**DATES:** This authorization is effective from September 4, 2009, through September 3, 2010.

**ADDRESSES:** A copy of the IHA and the application are available by writing to P. Michael Payne, Chief, Permits, Conservation, and Education Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910-3225, or by telephoning the contact listed here. A copy of the application may be obtained by writing to this address, by telephoning the contact listed here (**FOR FURTHER INFORMATION CONTACT**) or online at: <http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications>.

Documents cited in this notice may be viewed, by appointment, during regular

business hours, at the aforementioned address.

#### **FOR FURTHER INFORMATION CONTACT:**

Jeannine Cody or Candace Nachman, (301) 713-2289 or Monica DeAngelis, NMFS Southwest Region, (562) 980-3232.

#### **SUPPLEMENTARY INFORMATION:**

##### **Background**

Section 101(a)(5)(D) of the MMPA (16 U.S.C. 1371 (a)(5)(D)) directs the Secretary of Commerce (Secretary) to allow, upon request, the incidental, but not intentional, taking of marine mammals, for periods of not more than one year, by United States citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and, if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

Authorization for incidental taking of small numbers of marine mammals shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), and will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses. The authorization must set forth the permissible methods of taking, other means of effecting the least practicable adverse impact on the species or stock and its habitat and monitoring and reporting of such takings. NMFS has defined "negligible impact" in 50 CFR 216.103 as "...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."

Section 101(a)(5)(D) of the MMPA established an expedited process by which citizens of the United States can apply for an authorization to incidentally take small numbers of marine mammals by harassment. Except with respect to certain activities not pertinent here, the MMPA defines "harassment" as:

any act of pursuit, torment, or annoyance which (i) has the potential to injure a marine mammal or marine mammal stock in the wild ["Level A harassment"]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering ["Level B harassment"].

Section 101(a)(5)(D) of the MMPA establishes a 45-day time limit for NMFS' review of an application followed by a 30-day public notice and comment period on any proposed

authorizations for the incidental harassment of small numbers of marine mammals. Not later than 45 days after the close of the public comment period, if the Secretary makes the findings set forth in Section 101(a)(5)(D)(i) of the MMPA, the Secretary shall issue or deny issuance of the authorization with appropriate conditions to meet the requirements of clause 101(a)(5)(D)(ii) of the MMPA.

#### **Summary of Request**

On June 5, 2009, NMFS received an application from ULA requesting an authorization for the harassment of small numbers of Pacific harbor seals (*Phoca vitulina richardsi*) and California sea lions (*Zalophus californianus*) and northern elephant seals (*Mirounga angustirostris*) incidental to harbor activities related to the Delta IV/EELV, including: transport vessel operations, cargo movement activities, harbor maintenance dredging, and kelp habitat mitigation operations. These activities will support Delta IV/EELV launch activities from the Space Launch Complex at VAFB. NMFS outlined the purpose of the program in a previous notice for the proposed IHA (74 FR 32565, July 8, 2009). The activities to be conducted have not changed between the proposed IHA notice and this final notice announcing the issuance of the IHA.

#### **Description of the Specified Activity**

NMFS has issued Incidental Harassment Authorizations (IHAs) to The Boeing Company, now ULA, on May 15, 2002 (67 FR 36151, May 23, 2002), May 20, 2003 (68 FR 36540, June 18, 2003), May 20, 2004 (69 FR 29696, May 25, 2004), May 23, 2005 (70 FR 30697, May 27, 2005), June 20, 2006 (71 FR 36321, June 26, 2006), June 21, 2007 (72 FR 34444, June 22, 2007), and August 19, 2008 (73 FR 49649, August 22, 2008) each for a one-year period. ULA did not conduct any dredging activities between 2003 and 2008, and accordingly, was not required to conduct any monitoring activities.

#### **Specified Activities**

*Delta Mariner* off-loading operations and associated cargo movements will occur a maximum of three times per year. The activities will take place within the harbor located within the VAFB, approximately 2.5 miles (mi) (4.02 kilometers (km)) south of Point Arguello, CA and approximately 1 mi (1.61 km) south of the nearest marine mammal pupping site (i.e., Rocky Point).

### Delta Mariner Operations

The *Delta Mariner* is a 312-foot (ft) (95.1-meter (m)) long, 84-ft (25.6-m) wide steel hull ocean-going vessel capable of operating at an 8-ft (2.4-m) draft. The vessel will enter the harbor stern first, during daylight hours at high tide, approaching the wharf at less than 0.75 knot. At least one tugboat will always accompany the *Delta Mariner* during visits to the VAFB harbor. Departure will occur under the same conditions.

Sources of noise from the *Delta Mariner* include ventilating propellers used for maneuvering the vessel into position and a brief sound from the cargo bay door when it becomes disengaged.

### Harbor Maintenance Dredging

To accommodate the *Delta Mariner*, the harbor will need to be dredged, removing up to 5,000 cubic yards of sediment per dredging. Dredging will involve the use of heavy equipment, including a clamshell dredge, dredging crane, a small tug, dredging barge, dump trucks, and a skip loader. ULA estimates that the noise levels emanating from within 50 ft of the dredging and construction equipment would range from 56 to 93 decibels (dB) (A-weighted) (re 20 FPascals at 1-m). Thus, there is the potential that an animal hauled out on the beach or breakwater could hear the dredging activities. Dredge operations, from set-up to tear-down, would continue 24-hours a day for three to five weeks. Sedimentation surveys have shown that initial dredging indicates that maintenance dredging should be required annually or twice per year, depending on the hardware delivery schedule.

A more detailed description of the work proposed for 2009–2010 is contained in the application, which is available upon request (see **ADDRESSES**), and in the Final U.S. Air Force Environmental Assessment for Harbor Activities Associated with the Delta IV Program at Vandenberg Air Force Base (ENSR International, 2001).

### Cargo Movement Activities

The Delta IV/EELV launch vehicle is comprised of a common booster core (CBC) and other mechanical elements. Removal of the CBC from the vessel requires the use of an elevating platform transporter (EPT). ULA measured the EPT's sound levels within 20 ft of the exhaust pipe with the engine running at mid-speed and observed sound levels of 85 dB (re 20 FPascals at 1-m) (Acentech, 1998). The removal procedure requires two short

(approximately 1/3 second) beeps of the horn prior to starting the ignition. The sound level of the EPT horn ranged from 62 to 70 dB A-weighted at 200 ft (60.9 m) away, and 84 to 112 dB A-weighted at 25 ft (7.6 m) away.

For cargo other than the CBC, ULA will use a standard diesel truck tractor to offload containers containing flight hardware items from the *Delta Mariner*. The tractor would generate a sound level of approximately 87 dB A-weighted at 50 ft (15.2 m) while in operational mode. Total docking and cargo movement activities is estimated to last approximately no more than 18 hours in good weather.

A more detailed description of the work proposed for 2008 is contained in the application which is available upon request (see **ADDRESSES**) and in the Final U.S. Air Force Environmental Assessment for Harbor Activities Associated with the Delta IV Program at Vandenberg Air Force Base (ENSR International, 2001).

### Comments and Responses

NMFS published a notice of receipt of the ULA application and proposed IHA in the **Federal Register** on July 8, 2009 (74 FR 32565). During the 30-day public comment period, NMFS received one comment from the public and comments from the Marine Mammal Commission (Commission). Following are the comments from the Commission and the public commenter and NMFS' responses.

*Comment 1:* The Commission recommends that NMFS approve the request provided that all reasonable measures will be taken to ensure the least practicable impact on the subject species and the required mitigation and monitoring activities are carried out as described in the July 8, 2009 **Federal Register** notice and the IHA application.

*Response:* NMFS agrees with the Commission's recommendation, and all monitoring and mitigation measures described in the previous **Federal Register** notices (67 FR 36151, May 23, 2002), (68 FR 36540, June 18, 2003), (69 FR 29696, May 25, 2004), (70 FR 30697, May 27, 2005), (71 FR 36321, June 26, 2006), (72 FR 34444, June 22, 2007), and (73 FR 49649, August 22, 2008) are required in the current IHA.

*Comment 2:* One commenter opposed the project on the grounds that it would cause injury or mortality.

*Response:* As described in detail in the **Federal Register** notice of receipt of the application (74 FR 32565, July 8, 2009), no marine mammal will be killed or injured as a result of the operations by ULA. The project would only result Level B behavioral harassment of a

small number of. No take by Level A harassment (injury) or death is anticipated nor authorized from this project.

### Marine Mammals Affected by the Activity

The marine mammal species likely to be harassed incidentally to harbor activities at south VAFB are the Pacific harbor seal, California sea lion, and northern elephant seal, which haul out in the area where these activities are conducted. None of the haul-out areas near these activities are used for breeding, molting, or mating. A more detailed discussion of the status of these stocks and their occurrence at VAFB, as well as other marine mammal species that occur at VAFB, was included in the notice of the proposed IHA (74 FR 32565, July 8, 2009).

### Potential Effects of Activities on Marine Mammals

Acoustic and visual stimuli generated by the use of heavy equipment during the *Delta Mariner* off-loading operations, dredging, and kelp habitat mitigation and the increased presence of personnel, may cause short-term disturbance to harbor seals and California sea lions hauled out on the beach and rocks near south VAFB harbor. This disturbance from acoustic and visual stimuli is the principal means of marine mammal taking associated with these activities. NMFS anticipates that no injury will result from these actions. A discussion of the sound levels produced by the equipment, behavioral reactions of marine mammals to loud noises or looming visual stimuli, and some specific observations of the response of marine mammals to this activity gathered during previous monitoring were presented in the notice of proposed IHA (74 FR 32565, July 8, 2009) and is not repeated here. For a further discussion of anticipated effects of the planned activities on pinnipeds in the area, refer to the application, NMFS' 2005 Environmental Assessment (EA) and ENSR International's 2001 Final EA.

### Numbers of Marine Mammals Expected to be Harassed

ULA estimates that a maximum of 43 harbor seals per day may be hauled out near the south VAFB harbor, with a daily average of 21 seals sighted when tidal conditions were favorable during previous harbor dredging operations. Considering the maximum and average number of seals hauled out per day, assuming that the seals may be seen twice a day, and using a maximum total

of 73 operating days in 2009–2010, NMFS estimates that a maximum of 767 to 1,570 Pacific harbor seals may be subject to Level B harassment out of a total estimated population of 31,600. These numbers are small relative to this population size (2.4 - 5 percent).

During wharf modification activities, a maximum of six California sea lions were seen hauling out in a single day. Based on the above-mentioned calculation, NMFS believes that a maximum of 219 California sea lions may be subject to Level B harassment out of a total estimated population of 238,000. These numbers are small relative to this population size (less than 0.1 percent).

Up to 10 northern elephant seals (because they may be present in nearby waters) may be subject to Level B harassment out of a total estimated population of 124,000 in 2005. These numbers are small relative to this population size (less than 0.01 percent).

#### **Possible Effects of Activities on Marine Mammal Habitat**

ULA does not anticipate any loss or modification to the habitat used by Pacific harbor seals or California sea lions that haul out near the south VAFB harbor. The harbor seal and sea lion haul-out sites near south VAFB harbor are not used as breeding, molting, or mating sites; therefore, it is not expected that the activities in the harbor will have any impact on the ability of Pacific harbor seals or California sea lions in the area to reproduce.

ULA anticipates unavoidable kelp removal during dredging. This habitat modification will not affect the marine mammal habitat. However, ULA will mitigate for the removal of kelp habitat by placing 150 tons of rocky substrate in a sandy area between the breakwater and the mooring dolphins to enhance an existing artificial reef. This type of mitigation was implemented by the U.S. Army Corps of Engineers following the 1984 and 1989 dredging.

The anticipated negative effects of dredging and kelp mitigation (short-term increase in noise and sedimentation) will be short-term and are not expected to result in a loss or modification to the habitat used by Pacific harbor seals, California sea lions, or northern elephant seals that haul out near the south VAFB harbor. Additional details were provided in the notice of proposed IHA (74 FR 32565, July 8, 2009).

#### **Mitigation**

To reduce the potential for disturbance from visual and acoustic stimuli associated with the activities,

ULA and/or its designees will undertake the following marine mammal mitigating measures:

(1) If activities occur during nighttime hours, lighting will be turned on before dusk and left on the entire night to avoid startling pinnipeds at night.

(2) Activities will be initiated before dusk.

(3) Construction noises will be kept constant (i.e., not interrupted by periods of quiet in excess of 30 minutes) while pinnipeds are present.

(4) If activities cease for longer than 30 minutes and pinnipeds are in the area, start-up of activities will include a gradual increase in noise levels.

(5) A NMFS-qualified marine mammal observer will visually monitor the pinnipeds on the beach adjacent to the harbor and on rocks for any flushing or other behaviors as a result of ULA's activities (see Monitoring).

(6) To the extent possible, the *Delta Mariner* and accompanying vessels will enter the harbor only when the tide is too high for harbor seals to haul-out on the rocks. The vessel will reduce speed 1.5 to 2 knots (2.8–3.7 km/hr) once the vessel is within 3 mi (4.83 km) of the harbor. The vessel will enter the harbor stern first, approaching the wharf and mooring dolphins at less than 0.75 knot (1.4 km/hr).

(7) As alternate dredge methods are explored, the dredge contractor may introduce quieter techniques and equipment.

#### **Monitoring**

As part of its 2002 application, Boeing, now ULA, provided a proposed monitoring plan for assessing impacts to harbor seals from the activities at south VAFB harbor and for determining when mitigation measures should be employed. NMFS is requiring the same plan for this IHA.

A NMFS-qualified and VAFB-designated biologically trained observer will monitor the area for pinnipeds during all harbor activities. During nighttime activities, the harbor area will be illuminated, and the monitor will use a night vision scope. Monitoring activities will consist of:

(1) Conducting baseline observation of pinnipeds in the project area prior to initiating project activities.

(2) Conducting and recording observations on pinnipeds in the vicinity of the harbor for the duration of the activity occurring when tides are low enough for pinnipeds to haul out (2 ft, 0.61 m, or less).

(3) Conducting post-construction observations of pinniped haul-outs in the project area to determine whether

animals disturbed by the project activities return to the haul-out.

Monitoring results from previous years of these activities have been reviewed and incorporated into the analysis of potential effects in this document, as well as the take estimates.

#### **Reporting**

ULA will notify NMFS two weeks prior to initiation of each activity. ULA will submit a draft report on all activities, 120 days prior to the expiration of this Authorization if a new Authorization will be requested for 2010–2011, and a final report within 120 days after the expiration of this Authorization, regardless of whether or not a new Authorization will be requested. The report will provide dates, times, durations and locations of specific activities, details of pinniped behavioral observations, and estimates of numbers of affected pinnipeds and impacts (behavioral or other). In addition, the report will include information on the weather, tidal state, horizontal visibility, and composition (species, gender, and age class) and locations of haul-out group(s). In the unanticipated event that any cases of pinniped injury or mortality are judged to result from these activities, ULA or its designee shall cease operations immediately and report the incident to NMFS immediately.

#### **Endangered Species Act (ESA)**

This action will not affect species listed under the ESA that are under the jurisdiction of NMFS. VAFB formally consulted with U.S. Fish and Wildlife Service in 1998 on the possible take of southern sea otters during Boeing's, now ULA, harbor activities at south VAFB. A Biological Opinion was issued in August 2001, which concluded that the EELV Program is not likely to jeopardize the continued existence of the southern sea otter and no injury or mortality is expected. The activities covered by this IHA are analyzed in that Biological Opinion, and this IHA does not modify the action in a manner that was not previously analyzed.

#### **National Environmental Policy Act**

In 2001, the United States Air Force (USAF) prepared an EA for harbor activities associated with the Delta IV Program at VAFB. In 2005, NMFS prepared an EA supplementing the information contained in the USAF EA and issued a Finding of No Significant Impact (FONSI) on the issuance of an IHA for Boeing's, now ULA, harbor activities in accordance with section 6.01 of the National Oceanic and Atmospheric Administration

Administrative Order 216–6 (Environmental Review Procedures for Implementing the National Environmental Policy Act, May 20, 1999). ULA's activities and impacts for 2008–2009 are expected to be within the scope of NMFS' 2005 EA and FONSI.

#### Determinations

NMFS has determined that the impact of harbor activities related to the Delta IV/EELV at VAFB (transport vessel operations, cargo movement activities, harbor maintenance dredging, and kelp habitat mitigation) will result in the Level B Harassment of small numbers of Pacific harbor seals, California sea lions, and northern elephant seals. The effects of ULA's harbor activities are expected to be in the form of short-term and localized behavioral changes, and no take by injury or death is anticipated or authorized. NMFS has further determined that these takes will have a negligible impact on the affected marine mammal species and stocks.

While the number of incidental harassment takes will depend on the distribution and abundance of marine mammals in the vicinity of the activity, the number of potential harassment takings is estimated to be small (less than five percent of any of the estimated population sizes) and has been mitigated to the lowest level practicable through incorporation of the measures mentioned previously in this document.

The provision requiring that the activity not have an unmitigable adverse impact on the availability of the affected species or stock for subsistence uses is not implicated by this action.

Northern fur seals, Guadalupe fur seals, and Steller sea lions are unlikely to be found in the area and, therefore, will not be affected. No rookeries, mating grounds, areas of concentrated feeding, or other areas of special significance for marine mammals occur within or near south VAFB harbor.

#### Authorization

As a result of these determinations, NMFS has issued an IHA to ULA to take marine mammals, by Level B harassment, incidental to conducting harbor activities at VAFB for a one-year period, provided that the previously mentioned mitigation, monitoring, and reporting requirements are incorporated.

Dated: September 4, 2009.

**James H. Lecky,**

*Director, Office of Protected Resources,  
National Marine Fisheries Service.*

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**BILLING CODE 3510–22–S**

## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

**RIN 0648–XR52**

#### Marine Mammals; File No. 14534

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Notice; receipt of application.

**SUMMARY:** Notice is hereby given that Ned Cyr, Director, NOAA Office of Science and Technology, Silver Spring, MD, has applied in due form for a permit to conduct research on marine mammals in the Pacific Ocean.

**DATES:** Written, telefaxed, or e-mail comments must be received on or before October 13, 2009.

**ADDRESSES:** The application and related documents are available for review by selecting "Records Open for Public Comment" from the Features box on the Applications and Permits for Protected Species (APPS) home page, <https://apps.nmfs.noaa.gov>, and then selecting File No. 14534 from the list of available applications.

These documents are also available upon written request or by appointment in the following office(s):

Permits, Conservation and Education Division, Office of Protected Resources, NMFS, 1315 East-West Highway, Room 13705, Silver Spring, MD 20910; phone (301)713–2289; fax (301)713–0376; and Southwest Region, NMFS, 501 West Ocean Blvd., Suite 4200, Long Beach, CA 90802–4213; phone (562)980–4001; fax (562)980–4018.

Written comments on this application should be submitted to the Chief, Permits, Conservation and Education Division, at the address listed above. Comments may also be submitted by facsimile to (301)713–0376, or by email to NMFS.Pr1Comments@noaa.gov. Please include the File No. in the subject line of the email comment.

Those individuals requesting a public hearing should submit a written request to the Chief, Permits, Conservation and Education Division at the address listed above. The request should set forth the specific reasons why a hearing on this application would be appropriate.

**FOR FURTHER INFORMATION CONTACT:** Tammy Adams or Carrie Hubard, (301)713–2289.

**SUPPLEMENTARY INFORMATION:** The subject permit is requested under the authority of the Marine Mammal Protection Act of 1972, as amended (MMPA; 16 U.S.C. 1361 *et seq.*), the

regulations governing the taking and importing of marine mammals (50 CFR part 216), the Endangered Species Act of 1973, as amended (ESA; 16 U.S.C. 1531 *et seq.*), and the regulations governing the taking, importing, and exporting of endangered and threatened species (50 CFR 222–226).

The applicant requests a five-year permit to conduct a research program involving studies of sound production, diving and other behavior, and responses to sound of marine mammals, including endangered species. The results would be integrated with related studies and directly contribute to conservation management for sound producers and regulatory agencies by identifying characteristics of target species that are critical for passive monitoring, detection, and/or density estimation and by demonstrating how specific sounds, including simulated military sonar, may evoke behavioral responses in marine mammals. The experimental design involves temporarily attaching individual recording tags to measure vocalization, behavior, and physiological parameters as well as sound exposure. Behavior will be measured before, during, and after carefully controlled exposures of sound in conventional playback experiments. Tagged subjects will be exposed to received sound levels up to 180 dB re: 1μPa. This study will involve various activities that could take animals by harassment, including close approaches, attachment of tags, and sound exposure. Small fragments of sloughed skin, which often remain attached to retrieved tags, would be used for genetic analyses. Target species include beaked whales and other odontocetes, key baleen whales, and pinniped species for whom such data have not been previously obtained; other marine species may be incidentally impacted. Please refer to the tables in the application for the numbers of marine mammals, by species and stock, that are proposed for this permit. The research will be focused in the waters within the U.S. Navy's Southern California Range Complex, and primarily near the vicinity of San Clemente Island.

The applicant also submitted a draft environmental assessment (EA) prepared under the National Environmental Policy Act of 1969 (42 U.S.C. 4321 *et seq.*), to examine whether significant environmental impacts could result from issuance of the proposed scientific research permit and conduct of the research. The draft EA is available for review and comment simultaneous with the scientific research permit application.