

DEPARTMENT OF COMMERCE**National Oceanic and Atmospheric Administration**

[I.D. 041706A]

Taking of Marine Mammals Incidental to Specified Activities; Construction of the East Span of the San Francisco-Oakland Bay Bridge

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

ACTION: Notice of issuance of an incidental harassment authorization.

SUMMARY: In accordance with provisions of the Marine Mammal Protection Act (MMPA) as amended, notification is hereby given that an Incidental Harassment Authorization (IHA) has been issued to the California Department of Transportation (CALTRANS) to take small numbers of California sea lions, Pacific harbor seals, harbor porpoises, and gray whales, by harassment, incidental to construction of a replacement bridge for the East Span of the San Francisco-Oakland Bay Bridge (SF-OBB) in California.

DATES: This authorization is effective from April 30, 2006, until April 29, 2007.

ADDRESSES: A copy of the application, IHA, and/or a list of references used in this document may be obtained by writing to Steve Leathery, Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910-3225.

FOR FURTHER INFORMATION CONTACT: Shane Guan, NMFS, (301) 713-2289, ext 137, or Monica DeAngelis, NMFS, (562) 980-3232.

SUPPLEMENTARY INFORMATION:**Background**

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce to allow, upon request, the incidental, but not intentional, taking by Level B harassment of small numbers of marine mammals of a species or population stock by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and either regulations are issued or, if the taking is limited to harassment, notice of a proposed authorization is provided to the public for review.

Permission may be granted if NMFS finds that the taking will have no more than 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 and that the permissible methods of taking and requirements pertaining to the monitoring and reporting of such taking are set forth. 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) 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. Within 45 days of the close of the comment period, NMFS must either issue or deny issuance of the authorization.

Summary of Request

On October 17, 2005, CALTRANS submitted a request to NOAA requesting renewal of an IHA for the possible harassment of small numbers of California sea lions (*Zalophus californianus*), Pacific harbor seals (*Phoca vitulina richardsi*), harbor porpoises (*Phocoena phocoena*), and gray whales (*Eschrichtius robustus*) incidental to the construction of a replacement bridge for the East Span of the SF-OBB, in San Francisco Bay (SFB or the Bay), California. An IHA was issued to CALTRANS for this activity on January 3, 2005 and expired on January 3, 2006 (70 FR 2123, January 12, 2005). Background information on the issuance of this IHA was published in the **Federal Register** on January 26, 2006

(71 FR 4352). A detailed description of the SF-OBB project was provided in the **Federal Register** on November 14, 2003 (68 FR 64595), and is not repeated here.

Comments and Responses

A notice of receipt and request for 30-day public comment on the application and proposed authorization was published on January 26, 2006 (71 FR 4352). During the 30-day public comment period, comments were received from the Marine Mammal Commission (the Commission).

Comment 1: The Commission believes NMFS' preliminary determinations are reasonable, provided that the visual monitoring of the safety zone to be conducted prior to and during pile driving operations is adequate to detect all marine mammals within the safety zone. According to CALTRANS, pile driving would occur from 7 a.m. to 7 p.m., visual monitoring in the late afternoon and early evening would be compromised during the winter months.

Response: The Marine Mammal Monitoring Plan developed by CALTRANS in May 2002 notes that marine mammal observers will have night-time infrared (IR) scopes or other tools to conduct monitoring during low light conditions. CALTRANS has indicated that when using the IR scopes the marine mammal safety zone and marine mammals are visible. Please also refer to **Federal Register** notice published on November 14, 2003 (68 FR 64595) for additional information. NMFS will require the use of IR scopes in the IHA.

Comment 2: The Commission continues to believe that, in situations where a temporary threshold shift (TTS) may lead to biologically significant behavioral effects (e.g., an increased risk of natural predation or ship strikes), it should be considered as having the potential for injury (i.e., Level A Harassment).

Response: CALTRANS will implement a series of mitigation measures including visual monitoring prior to and during construction, installation of a bubble curtain for in-water pile driving, establishment of safety/buffer zones, and implementing "soft star" hammer strikes. Based on CALTRANS' June 2004 and January 2005 annual monitoring reports, the East Span Project is resulting in only small numbers of pinnipeds being harassed (through October 2005, the biological observers indicated that only one startle behavior of a sea lion was observed as a result of construction). Therefore, NMFS believes that it is not likely that a TTS would occur. In addition, NMFS has addressed the issue

of impact assessment in several previous small take authorizations, and without new scientific documentation on this issue, a detailed response is not warranted here. For reviewers interested in this discussion, refer to the incidental take authorizations for the USS WINSTON S. CHURCHILL shock trial (66 FR 22450, May 4, 2001) and Eglin Air Force Base's Precision Strike Weapon (70 FR 48675, August 19, 2005).

Comment 3: An across-the-board redefinition of TTS from Level A harassment to Level B harassment raises questions both in terms of the activities that involve the potential for repeated TTS harassment and of general cumulative effects. The Commission recommends that NMFS revise its assessment of TTS accordingly.

Response: As NMFS has stated in a previous **Federal Register** notice (68 FR 64595, November 14, 2003) that the reclassification of TTS is irrelevant for this IHA, since mitigation and monitoring requirements under the IHA should prevent TTS. While there have been debates among scientists regarding whether a permanent shift in hearing threshold (PTS) can occur with repeated exposures of TTS, at least one study showed that long-term (4 - 7 years) noise exposure on three experimental pinniped species had caused no change on their underwater hearing thresholds at frequencies of 0.2 - 6.4 kHz (Southall *et al.*, 2005).

Description of the Marine Mammals Potentially Affected by the Activity

General information on the marine mammal species found in California waters can be found in Caretta *et al.* (2004), which is available at the following URL: http://www.nmfs.noaa.gov/pr/PR2/Stock_Assessment_Program/sars.html. Refer to that document for information on these species.

The marine mammals most likely to be found in the SF-OBBS area are the California sea lion, Pacific harbor seal, and harbor porpoise. From December through May gray whales may also be present in the SF-OBBS area. Information on these 4 species was provided in the November 14, 2003 (68 FR 64595) and January 26, 2006 (71 FR 4352) **Federal Register** notices and is not repeated here.

Potential Effects on Marine Mammals and Their Habitat

CALTRANS and NMFS have determined that open-water pile driving, as outlined in the project description, has the potential to result

in a Level B harassment (e.g., disruption of behavioral patterns) of California sea lions, Pacific harbor seals, harbor porpoises, and gray whales that may be swimming, foraging, or resting in the project vicinity while pile driving is being conducted. Pile driving could potentially harass those few pinnipeds that are in the water close to the project site, whether their heads are above or below the surface.

Based on airborne noise levels measured and on-site monitoring conducted during 2004 under the previous IHA, noise levels from the East Span project did not result in the harassment of harbor seals hauled out on Yerba Buena Island (YBI). Also, noise levels from the East Span project are not expected to result in harassment of the sea lions hauled out at Pier 39 as airborne and waterborne sound pressure levels (SPLs) would attenuate to below harassment levels by the time they reach that haul-out site, 5.7 kilometers (3.5 miles) from the project site.

For reasons provided in greater detail in NMFS' November 14, 2003 (68 FR 64595) **Federal Register** notice and in CALTRANS' June 2004 and January 2005 annual monitoring reports, the East Span Project is resulting in only small numbers of pinnipeds being taken by Level B harassment (through October 2005, the biological observers indicated that only one startle behavior of a sea lion was observed as a result of East Span construction) and, therefore, is not expected to result in more than a negligible impact on marine mammal species or stocks and will not have a significant impact on their habitat. Short-term impacts to habitat may include minimal disturbance of the sediment where the channels are dredged for barge access and where individual bridge piers are constructed. Long-term impacts to marine mammal habitat will be limited to the footprint of the piles and the obstruction they will create following installation. However, this impact is not considered significant as the marine mammals can easily swim around the piles of the new bridge, as they currently swim around the existing bridge piers.

Mitigation

The following mitigation measures are required under the IHA to reduce impacts to marine mammals to the lowest extent practicable.

Barrier Systems

An air bubble curtain system is required to be used only when driving the permanent open-water piles at Piers E3 - E6 of Skyway and Piers E1 and E2 of the Self-Anchored Suspension (SAS)

span. While the bubble curtain is required specifically as a method to reduce impacts to endangered and threatened fish species in SFB, it may also provide some benefit to marine mammals. The NMFS' Biological Opinion and the California Department of Fish and Game's (CDFG) 2001 Incidental Take Permit also allow for the use of other equally effective methods, such as cofferdams, as an alternative to the air bubble curtain system to attenuate the effects of sound pressure waves on fish during driving of permanent in-Bay piles (NMFS 2001; CDFG, 2001). Piers E-16 through E-7 for both the eastbound and westbound structures of the Skyway will be surrounded by sheet-pile cofferdams, which will be de-watered before the start of pile driving. De-watered cofferdams are generally effective sound attenuation devices. For Piers E3 through E6 of the Skyway and Piers 1 and E2 of the Self-Anchored Suspension span, it is anticipated that cofferdams will not be used; therefore, a bubble curtain will surround the piles.

Sound Attenuation

As a result of the determinations made during the Pile Installation Demonstration Project (PIDP) restrrike and the investigation at the Benicia-Martinez Bridge, NMFS determined in 2003 that CALTRANS must install an air bubble curtain for pile driving for the open-water piles without cofferdams located at the SF-OBBS. This air bubble curtain system consists of concentric layers of perforated aeration pipes stacked vertically and spaced no more than five vertical meters apart in all tide conditions. The minimum number of layers must be in accordance with water depth at the subject pile: 0-5 m = 2 layers (1263 cfm); 5-10 m = 4 layers (2526 cfm); 10-15 m = 7 layers (4420 cfm); 15-20 m = 10 layers (6314 cfm); 20-25 m = 13 layers (8208 cfm). The lowest layer of perforated aeration pipes must be designed to ensure contact at all times and tidal conditions with the mudline without sinking into the bay mud. Pipes in any layer must be arranged in a geometric pattern, which will allow for the pile driving operation to be completely enclosed by bubbles for the full depth of the water column.

To provide a uniform bubble flux, each aeration pipe must have four adjacent rows of air holes along the pipe. Air holes must be 1.6-mm diameter and spaced approximately 20 mm apart. The bubble curtain system will provide a bubble flux of at least two cubic meters per minute, per linear meter of pipeline in each layer. Air holes must be placed in 4 adjacent rows.

The air bubble curtain system must be composed of the following: (1) An air compressor(s), (2) supply lines to deliver the air, (3) distribution manifolds or headers, (4) perforated aeration pipes, and (5) a frame. The frame facilitates transport and placement of the system, keeps the aeration pipes stable, and provides ballast to counteract the buoyancy of the aeration pipes in operation. Meters are required to monitor the operation of the bubble curtain system. Pressure meters will be installed and monitored at all inlets to aeration pipelines and at points of lowest pressure in each branch of the aeration pipeline. If the pressure or flow rate in any meter falls below 90 percent of its operating value, the contractor will cease pile driving operations until the problem is corrected and the system is tested to the satisfaction of the CALTRANS resident engineer.

Establishment of Safety/Buffer Zones

A safety zone is to be established and monitored to include all areas where the underwater SPLs are anticipated to equal or exceed 180 dB re 1 microPa RMS (impulse) for harbor porpoises and gray whales, and 190 dB re 1 microPa RMS (impulse) for pinnipeds, for open water pile driving activities. Prior to commencement of any pile driving, a preliminary 500-m (1,640-ft) radius safety zone for marine mammals will be established around the pile driving site, as it was for the PIDP. Once pile driving begins, either new safety zones can be established for the 500 kJ and 1700 kJ hammers or the 500 m (1,640 ft) safety zone can be retained. If new safety zones are established based on SPL measurements, NMFS requires that each new safety zone be based on the most conservative measurement (i.e., the largest safety zone configuration). SPLs will be recorded at the 500-m (1,640-ft) contour. The safety zone radius for marine mammals will then be enlarged or reduced, depending on the actual recorded SPLs.

Observers on boats will survey the safety zone to ensure that no marine mammals are seen within the zone before pile driving of a pile segment begins. If marine mammals are found within the safety zone, pile driving of the segment will be delayed until they move out of the area. If a marine mammal is seen above water and then dives below, the contractor will wait 15 minutes and if no marine mammals are seen by the observer in that time it will be assumed that the animal has moved beyond the safety zone. This 15-minute criterion is based on scientific evidence that harbor seals in San Francisco Bay dive for a mean time of 0.50 minutes to

3.33 minutes (Harvey and Torok, 1994), and the mean diving duration for harbor porpoises ranges from 44 to 103 seconds (Westgate *et al.*, 1995). However, due to the limitations of monitoring from a boat, there can be no assurance that the zone will be devoid of all marine mammals at all times.

Once the pile driving of a segment begins it cannot be stopped until that segment has reached its predetermined depth due to the nature of the sediments underlying the Bay. If pile driving stops and then resumes, it would potentially have to occur for a longer time and at increased energy levels. In sum, this would simply amplify impacts to marine mammals, as they would endure potentially higher SPLs for longer periods of time. Pile segment lengths and wall thickness have been specially designed so that when work is stopped between segments (but not during a single segment), the pile tip is never resting in highly resistant sediment layers. Therefore, because of this operational situation, if seals, sea lions, or harbor porpoises enter the safety zone after pile driving of a segment has begun, pile driving will continue and marine mammal observers will monitor and record marine mammal numbers and behavior. However, if pile driving of a segment ceases for 30 minutes or more and a marine mammal is sighted within the designated safety zone prior to commencement of pile driving, the observer(s) must notify the Resident Engineer (or other authorized individual) immediately and follow the mitigation requirements as outlined previously in this document.

Soft Start

It should be recognized that although marine mammals will be protected from Level A harassment by establishment of an air-bubble curtain and marine mammal observers monitoring a 190-dB safety zone for pinnipeds and 180-dB safety zone for cetaceans, mitigation may not be 100 percent effective at all times in locating marine mammals. Therefore, in order to provide additional protection to marine mammals near the project area by allowing marine mammals to vacate the area prior to receiving a potential injury, CALTRANS will also "soft start" the hammer prior to operating at full capacity. CALTRANS typically implements a "soft start" with several initial hammer strikes at less than full capacity (i.e., approximately 40–60 percent energy levels) with no less than a 1 minute interval between each strike. Similar levels of noise reduction are expected underwater. Therefore, the contractor will initiate hammering of both the 500–

kJ and the 1,700–kJ hammers with this procedure in order to allow pinnipeds or cetaceans in the area to voluntarily move from the area, this should expose fewer animals to loud sounds both underwater and above water noise. This would also ensure that, although not expected, any pinnipeds and cetaceans that are missed during safety zone monitoring will not be injured.

Compliance with Equipment Noise Standards

To mitigate noise levels and, therefore, impacts to California sea lions, Pacific harbor seals, harbor porpoises, and gray whales, all construction equipment will comply with applicable equipment noise standards of the U.S. Environmental Protection Agency, and all construction equipment will have noise control devices no less effective than those provided on the original equipment.

Monitoring

The following monitoring measures are required under the IHA to reduce impacts to marine mammals to the lowest extent practicable.

Visual Observations

The area-wide baseline monitoring and the aerial photo survey to estimate the fraction of pinnipeds that might be missed by visual monitoring have been completed under the current IHA and do not need to be continued.

Safety zone monitoring will be conducted during driving of all open-water, permanent piles without cofferdams and with cofferdams when underwater SPLs reach 180 dB RMS or greater. Monitoring of the pinniped and cetacean safety zones will be conducted by a minimum of three qualified NMFS-approved observers for each safety zone. One three-observer team will be required for the safety zones around each pile driving site, so that multiple teams will be required if pile driving is occurring at multiple locations at the same time. The observers will begin monitoring at least 30 minutes prior to startup of the pile driving. Observers will conduct the monitoring from small boats, as observations from a higher vantage point (such as the SF-OBV) is not practical. Pile driving will not begin until the safety zone is clear of marine mammals. However, as described in the Mitigation section, once pile driving of a segment begins, operations will continue uninterrupted until the segment has reached its predetermined depth. However, if pile driving of a segment ceases for 30 minutes or more and a marine mammal is sighted within the designated safety zone prior to

commencement of pile driving, the observer(s) must notify the Resident Engineer (or other authorized individual) immediately and follow the mitigation requirements outlined previously (see Mitigation). Monitoring will continue through the pile driving period and will end approximately 30 minutes after pile driving has been completed. Biological observations will be made using binoculars during daylight hours. Infrared (IR) scopes will be used during low light condition for marine mammal monitoring.

In addition to monitoring from boats, during open-water pile driving, monitoring at one control site (harbor seal haul-out sites and the waters surrounding such sites not impacted by the East Span Project's pile driving activities, i.e. Mowry Slough) will be designated and monitored for comparison. Monitoring will be conducted twice a week at the control site whenever open-water pile driving is being conducted. Data on all observations will be recorded and will include items such as species, numbers, behavior, details of any observed disturbances, time of observation, location, and weather. The reactions of marine mammals will be recorded based on the following classifications that are consistent with the Richmond Bridge Harbor Seal survey methodology (for information on the Richmond Bridge authorization, see 68 FR 66076, November 25, 2003): (1) No response, (2) head alert (looks toward the source of disturbance), (3) approach water (but not leave), and (4) flush (leaves haul-out site). The number of marine mammals under each disturbance reaction will be recorded, as well as the time when seal re-haul after a flush.

Acoustical Observations

Airborne noise level measurements have been completed and underwater environmental noise levels will continue to be measured as part of the East Span Project. The purpose of the underwater sound monitoring is to establish the safety zone of 190 dB re 1 micro-Pa RMS (impulse) for pinnipeds and the safety zone of 180 dB re 1 micro-Pa RMS (impulse) for cetaceans. Monitoring will be conducted during the driving of the last half (deepest pile segment) for any given open-water pile. One pile in every other pair of pier groups will be monitored. One reference location will be established at a distance of 100 m (328 ft) from the pile driving. Sound measurements will be taken at the reference location at two depths (a depth near the mid-water column and a depth near the bottom of the water column but at least 1 m (3 ft) above the

bottom) during the driving of the last half (deepest pile segment) for any given pile. Two additional in-water spot measurements will be conducted at appropriate depths (near mid water column), generally 500 m (1,640 ft) in two directions either west, east, south or north of the pile driving site will be conducted at the same two depths as the reference location measurements. In cases where such measurements cannot be obtained due to obstruction by land mass, structures or navigational hazards, measurements will be conducted at alternate spot measurement locations. Measurements will be made at other locations either nearer or farther as necessary to establish the approximate distance for the safety zones. Each measuring system shall consist of a hydrophone with an appropriate signal conditioning connected to a sound level meter and an instrument grade digital audiotape recorder (DAT). Overall SPLs shall be measured and reported in the field in dB re 1 micro-Pa RMS (impulse). An infrared range finder will be used to determine distance from the monitoring location to the pile. The recorded data will be analyzed to determine the amplitude, time history and frequency content of the impulse.

Reporting

Under previous IHAs, CALTRANS submitted weekly marine mammal monitoring reports and in January, 2005, CALTRANS submitted its Marine Mammal and Acoustic Monitoring for the Eastbound Structure. This annual report is available by contacting NMFS (see ADDRESSES) or on the Web at <http://biomitigation.org>. A report for the 2005 season will be completed and posted here shortly.

Under the 2006 IHA, coordination with NMFS will occur on a weekly basis, or more often as necessary. During periods with open-water pile driving activity, weekly monitoring reports will be made available to NMFS and the public at <http://biomitigation.org>. These weekly reports will include a summary of the previous week's monitoring activities and an estimate of the number of seals and sea lions that may have been taken by Level B harassment as a result of pile driving activities.

In addition, CALTRANS will provide NMFS' Southwest Regional Administrator with a draft final report within 90 days after completion of the westbound Skyway contract and 90 days after completion of the Suspension Span foundations contract. This report should detail the monitoring protocol, summarize the data recorded during monitoring, and estimate the number of marine mammals that may have been

harassed due to pile driving. If comments are received from the Regional Administrator on the draft final report, a final report must be submitted to NMFS within 30 days thereafter. If no comments are received from NMFS, the draft final report will be considered to be the final report.

National Environmental Policy Act (NEPA)

In November, 2003, NMFS prepared an Environmental Assessment (EA) and, on November 4, 2003, made a Finding of No Significant Impact (FONSI). A review of the renewal of this IHA has determined that the findings and determinations made in the 2003 EA/FONSI continue to accurately address the impacts on the human environment through the taking of marine mammals by the CALTRANS project. Therefore, preparation of an environmental impact statement on this action is not required by section 102(2) of the NEPA or its implementing regulations. A copy of the EA and FONSI are available upon request (see ADDRESSES).

Endangered Species Act (ESA)

On October 30, 2001, NMFS completed consultation under section 7 of the ESA with the Federal Highway Administration (FHWA) on the CALTRANS' construction of a replacement bridge for the East Span of the SF-OBB in California. The finding contained in the Biological Opinion was that the proposed action at the East Span of the SF-OBB is not likely to jeopardize the continued existence of listed anadromous salmonids, or result in the destruction or adverse modification of designated critical habitat for these species. Listed marine mammals are not expected to be in the area of the action and thus would not be affected. The issuance of this IHA to CALTRANS constitutes an agency action that authorizes an activity that may affect ESA-listed species and, therefore, is subject to section 7 of the ESA. Moreover, as the effects of the activities on listed salmonids were analyzed during a formal consultation between the FHWA and NMFS, and as the underlying action has not changed from that considered in the consultation, the discussion of effects that are contained in the Biological Opinion issued to the FHWA on October 30, 2001, pertains also to this action. In conclusion, NMFS has determined that issuance of an IHA for this activity does not lead to any effects to listed species apart from those that were considered in the consultation on FHWA's action.

Determinations

For the reasons discussed in this document and in previously identified supporting documents, NMFS has determined that the impact of pile driving and other activities associated with construction of the East Span Project may result in the Level B harassment of small numbers of California sea lions, Pacific harbor seals, harbor porpoises, and potentially gray whales that inhabit or visit SFB in general and the vicinity of the SF-OB in particular. While behavioral modifications, including temporarily vacating the area around the construction site, may be made by these species to avoid the resultant visual and acoustic disturbance, the availability of alternate areas within SFB and haul-out sites (including pupping sites) and feeding areas within the Bay has led NMFS to determine that this action will have a negligible impact on California sea lions, Pacific harbor seals, harbor porpoises, and gray whale populations along the California coast.

In addition, no take by Level A harassment (injury) or death is anticipated or authorized and Level B harassment takes should be at the lowest level practicable due to incorporation of the mitigation measures mentioned previously in this document.

Authorization

For the reasons previously discussed, NMFS has issued an IHA for a 1-year period to take small numbers of harbor seals, California sea lions, harbor porpoises, and gray whales, by Level B harassment incidental to construction of a replacement bridge for the East Span of the San Francisco-Oakland Bay Bridge in California, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated. NMFS has determined that the activity would result in the harassment of only small numbers of harbor seals, California sea lions, harbor porpoises, and possibly gray whales and will have no more than a negligible impact on these marine mammal stocks.

Dated: April 27, 2006.

James H. Lecky,

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

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CONSUMER PRODUCT SAFETY COMMISSION

[CPSC Docket No. 06-C0003]

West Bend Housewares, LLC, a Limited Liability Corporation, Provisional Acceptance of a Settlement Agreement and Order

AGENCY: Consumer Product Safety Commission.

ACTION: Notice.

SUMMARY: It is the policy of the Commission to publish settlements which it provisionally accepts under the Consumer Product Safety Act in the **Federal Register** in accordance with the terms of 16 CFR 1118.20(e). Published below is a provisionally-accepted Settlement Agreement with West Bend Housewares, LLC, a Limited Liability Corporation, containing a civil penalty of \$100,000,000.

DATES: Any interested person may ask the Commission not to accept this agreement or otherwise comment on its contents by filing a written request with the Office of the Secretary by May 23, 2006.

ADDRESSES: Persons wishing to comment on this Settlement Agreement should send written comments to Comment 06-C0003, Office of the Secretary, Consumer Product Safety Commission, Washington, DC 20207.

FOR FURTHER INFORMATION CONTACT: Dennis C. Kacoyanis, Trial Attorney, Office of Compliance, Consumer Product Safety Commission, Washington, DC 20207; telephone (301) 504-7587.

SUPPLEMENTARY INFORMATION: The text of the Agreement and Order appears below.

Dated: May 2, 2006.

Todd A. Stevenson,
Secretary.

I. Settlement Agreement and Order

1. This Settlement Agreement is made by and between the staff ("the staff") of the U.S. Consumer Product Safety Commission ("the Commission") and West Bend Housewares, LLC ("West Bend"), a limited liability corporation, in accordance with 16 CFR 1118.20 of the Commission's Procedures for Investigations, Inspections, and Inquires under the Consumer Product Safety Act ("CPSA"). This Settlement Agreement and the incorporated Order settle the staff's allegations set forth below.

II. The Parties

2. The Commission is an independent Federal regulatory agency responsible for the enforcement of the Consumer

Product Safety Act, 15 U.S.C. 2051-2084.

3. West Bend is a limited liability corporation organized and existing under the laws of the State of Delaware with its principal corporate offices located at 2845 Wingate Street, West Bend, WI 53095. West Bend is a subsidiary of Focus Products Group, LLC of Vernon Hills, IL. West Bend is a manufacturer and internet retailer of small electrical appliances.

III. Allegations of the Staff

4. Between August 2004 and February 2005, West Bend manufactured and sold nationwide approximately 14,322 10-Cut Automatic Coffeemakers, Item 56870 and Replacement Carafes, Item No. 5815.

5. The 10-Cup Automatic Coffeemakers and the Replacement Carafes are "consumer products" and West Bend is a "manufacturer" and "retailer" of "consumer products," which are "distributed in commerce" as those terms are defined in sections 3(a)(1), (4), (6), (11), and (12) of the CPSA, 15 U.S.C. 2052(a)(1), (4), (6), (11), and (12).

6. The 10-Cup Automatic Coffeemaker, Item No. 56870 is a programmable automatic coffeemaker with a glass carafe that has a plastic black handle. The 10-Cup Replacement Carafe, Item No. 5815 was distributed as a replacement carafe for the 10-Cup Automatic Coffeemaker, Item No. 56870. The carafe's handle can unexpectedly loosen or break, resulting in the carafe falling. If this should occur, consumers may sustain burn injuries from hot coffee or lacerations from broken glass.

7. In October and November 2004, West Bend received several reports from consumers alleging failures of carafe handles. On or about November 30, 2004, West Bend's Product Safety Committee ("safety committee") met and decided to monitor the carafe failures and to have consumers return the broken handles for further evaluation.

8. In December 2004, West Bend acquired a couple of samples of broken handles for evaluation. A brief evaluation of these handles revealed a problem with the plastic material and/or the processing. West Bend asked the foreign manufacturer to investigate the breakage problem and to make the necessary corrections.

9. On or about February 2, 2005, the foreign manufacturer advised West Bend that the materials used in the handles was "not so good." At that time, West Bend retained an outside plastics expert who found that the material used in the broken handle did not meet West