

comply with the instructions of the COTP or his/her authorized representative.

Dated: March 26, 2008.

T.V. Skuby,

*Captain, U.S. Coast Guard, Acting
Commander, First Coast Guard District.*

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DEPARTMENT OF VETERANS AFFAIRS

38 CFR Part 53

RIN 2900-AM26

Assistance to States in Hiring and Retaining Nurses at State Veterans Homes

AGENCY: Department of Veterans Affairs.

ACTION: Proposed rule.

SUMMARY: The Department of Veterans Affairs (VA) proposes to establish a mechanism for States to obtain payments from VA to assist a State veterans home in the hiring and retention of nurses for the purpose of reducing nursing shortages at the home. This rule would implement provisions of the Veterans Health Programs Improvement Act of 2004.

DATES: Comments on the proposed rule must be received on or before June 10, 2008.

ADDRESSES: Written comments may be submitted through www.regulations.gov; by mail or hand-delivery to Director, Regulations Management (OOREG), Department of Veterans Affairs, 810 Vermont Ave., NW., Room 1068, Washington, DC 20420; or by fax to (202) 273-9026. Comments should indicate that they are submitted in response to "RIN 2900-AM26- Assistance to States in Hiring and Retaining Nurses at State Veterans Homes." Copies of comments received will be available for public inspection in the Office of Regulation Policy and Management, Room 1063B, between the hours of 8 a.m. and 4:30 p.m., Monday through Friday (except holidays). Please call (202) 461-4902 for an appointment. (This is not a toll-free number.) In addition, during the comment period, comments may be viewed online through the Federal Docket Management System (FDMS) at www.regulations.gov.

FOR FURTHER INFORMATION CONTACT:

Jacquelyn Bean, Chief, State Veterans Home Per Diem Program, at (202) 461-6771, or Christa M. Hojlo, PhD, Director, State Veterans Home Clinical and Survey Oversight, at (202) 461-6779; Veterans Health Administration (114),

Department of Veterans Affairs, 810 Vermont Avenue, NW., Washington, DC 20420. (These are not toll-free numbers.)

SUPPLEMENTARY INFORMATION: This document proposes to establish a new 38 CFR part 53 consisting of regulations captioned "PAYMENTS TO STATES FOR PROGRAMS TO PROMOTE THE HIRING AND RETENTION OF NURSES AT STATE VETERANS HOMES" (referred to below as the proposed regulations). The proposed regulations provide a mechanism for a State to obtain payments from VA to assist a State Veterans Home (SVH) in the hiring and retention of nurses for the purpose of reducing nursing shortages at that home. These regulations would implement provisions in section 201 of the Veterans Health Programs Improvement Act of 2004 (Pub. L. 108-422), which are codified at 38 U.S.C. 1744.

Definitions

Definitions applicable to the proposed regulations are set forth at § 53.02. We included definitions of *nurse*, *State*, *SVH*, and *State representative*.

We propose to define *nurse* to mean an individual who is a registered nurse, a licensed practical nurse, a licensed vocational nurse, or a nursing assistant certified in the State in which payment is made and who is a bedside care giver (e.g., this would not include an individual acting in the capacity of an advance practice nurse, an administrative nurse, or a director of nursing). We also propose that the terms *nurses* and *nursing* shall be construed consistent with this definition. The proposed definition of *nurse* reflects the intent of the law (38 U.S.C. 1744) to reduce shortages of nurses who provide direct bedside care for veterans at least a majority of the time. H. Rep. No. 108-538, at 5 (2004) (law intended to assist State homes "in hiring nurses to care for veterans"). Advance practice nurses, administrative nurses, and directors of nursing generally do not provide direct bedside care, and therefore, would generally not be eligible for participation in the proposed program. We are particularly interested in soliciting comments on the proposed definition of *nurse*.

We propose to define *State* consistent with 38 U.S.C. 101(20) to cover places where an SVH could be located, including the States, Territories, and possessions of the United States; the District of Columbia; and the Commonwealth of Puerto Rico.

Under 38 U.S.C. 1744(b), a State is eligible for nurse hiring and retention payments if it receives per diem payments from VA for domiciliary care,

nursing home care, adult day health care, and hospital care. Accordingly, we propose to define *State Veterans Home*, consistent with VA's per diem programs, to include State facilities approved by VA for the purpose of providing domiciliary, nursing home, adult day health, and hospital care for certain disabled veterans.

We propose to define *State representative* to mean the official who would have authority to sign the application on behalf of the State and would otherwise be the State contact for actions under the regulations.

Decisions and Notifications

Under the proposed regulations, authority would be delegated to the Chief Consultant, Geriatrics and Extended Care, to make all determinations regarding payments. The Chief Consultant would also provide written notice to State representatives concerning approvals, denials, or requests for additional information under the regulations.

General Requirements for Payments

Proposed § 53.11 would provide for payments to a State for an employee incentive program to reduce the shortage of nurses at a SVH if the requirements of proposed § 53.11(a) are met. Except as discussed below, these requirements restate the provisions of 38 U.S.C. 1744.

To be eligible for payments under proposed § 53.11(a)(3), the SVH must have a nursing shortage that is documented by credible evidence, including but not limited to SVH records showing vacancies, SVH records showing overtime use, and reports documenting that nurses are not available in the local area. This is intended to implement the section 1744(e) requirement that an application describe the nursing shortage at the SVH and to ensure that payments are made only when an actual nursing shortage exists.

Under section 1744(c), a State may use VA's payments only to provide funds for an employee incentive scholarship program or other employee incentive program designed to promote the hiring and retention of nurses and reduce a nursing shortage. Consistent with section 1744(c), proposed § 53.11(a)(4) would limit the use of VA's payments to nursing incentives and expressly prohibit using the funds for any other purpose, such as covering all or part of a nurse's standard employee benefits (e.g., salary, health insurance, or retirement plan). Accordingly, under the proposed regulations, an "employee

incentive program” would not include standard employee benefits.

Proposed § 53.11(a)(5) would require the applicant to provide documentation concerning an existing employee incentive program or one that is ready for immediate implementation upon receipt of VA funding. VA would require this information as part of the application process to ensure that the payments are in compliance with the limitations in section 1744(c). VA would not make payments to a State under the proposed regulations if the State is merely considering or developing an incentive program.

Proposed § 53.11(a)(7) would require that an employee incentive program include a mechanism to ensure that any individual receiving payments under the program will work at the SVH as a nurse for a period commensurate with the payments. It would also require States to design such a program, if at all possible, to eliminate any nursing shortage at the SVH within 3 years of VA’s first payment to the State or SVH under the program. These provisions are necessary to ensure that the program is effective in meeting the goal of expeditiously reducing nursing shortages. Given that section 1744(f) specifies that VA funding for SVH nurse employee incentive programs comes from general medical appropriations and given the competition for funding various VA health care activities, it is reasonable to require States to establish effective programs.

Proposed § 53.11(b) would implement the mandate in section 1744(c) that VA take into consideration the need for flexibility and innovation when establishing criteria for receipt of incentive funds. We interpret section 1744(c) as authorizing payment of short-term scholarships for continuing nursing education, sign-on bonuses for nurses, and improvements to working conditions. Ongoing research suggests that innovative improvements to the working conditions in nursing homes can have a significant impact on nurse retention. While creative alternatives are still being developed and researched, some examples of “other improvements to working conditions” include but are not limited to improving the ambiance in the nurse work areas or purchasing handheld devices or software to ease the burden of documentation. These provisions are designed to provide the proper balance between the statutory admonition for VA to use “flexibility and innovation” when considering employee incentive programs and making payments only for those programs that have a likelihood of success in reducing nursing shortages.

In determining whether an employee incentive program is likely to be effective, VA will consider any available information, including the program’s past performance.

Application Requirements

To apply for payments during a fiscal year, a State representative would be required to submit to the Chief Consultant, Geriatrics and Extended Care Service, a completed VA Form 10–0430, including all required documentation and other information necessary for determining whether the applicant is eligible for payments. VA must receive the applicant’s VA Form 10–0430 during the first quarter (October 1–December 31) of the fiscal year in which the VA payments are sought. (**Note:** the Web site given in § 53.20(a) for access to the form will be available upon final publication of this rule.) For example, if the State intends to request payment for fiscal year 2009, the State must submit, and VA must receive, a complete application between October 1, 2008, and December 31, 2008. This submission requirement is intended to ensure that payments and employee incentive activities will occur in the same fiscal year that application was made as required by the provisions of section 1744. Further, for informational purposes, the provisions of proposed § 53.20(a) specify how to obtain VA Form 10–0430. Moreover, consistent with section 1744, the regulations provide that the State must submit a new application for each fiscal year that the State seeks payments under the program.

We interpret section 1744 as expressing congressional intent to assist States in funding incentive programs for nurses that provide care for veterans by funding up to 50 percent of the cost of an employee incentive program. Accordingly, under § 53.20(b), the State representative would be required to submit to VA evidence that the State has sufficient funding, when combined with the VA payments, to fully operate the employee incentive program through the end of the fiscal year. This is essential to ensure that VA funds would not be unused because they were allocated to a State that is unable to operate its program due to lack of funding. To meet this requirement, the State representative would provide VA a letter from an authorized State official certifying that, if VA were to award payments under this program, the non-VA share of the funds would be, by a date or dates specified in the certification, available to the State for the employee incentive program without further State action to make

such funds available. Additionally, if the certification references a State law that appropriates money for the employee incentive program, a copy of the relevant State law would be submitted with the certification.

In addition, if an application does not contain sufficient information for a determination under the proposed regulations, the State representative would be notified in writing of any additional submission required and would be asked for such additional information. If the State representative fails to respond within 30 calendar days (which may extend beyond December 31) the submission would be deemed abandoned. We expect that the submissions would generally contain all of the required information. However, we believe that such an occasional delay in a submission would not prevent VA from ensuring that payments and employee incentive activities would occur in the same fiscal year that application was made.

Payments

Proposed § 53.30(a) restates the statutory formula at 38 U.S.C. 1744(d) for making payments.

Payments under this program would be made to the States in a lump sum or installments as deemed appropriate by the Chief Consultant, Geriatrics and Extended Care. Payment would be made under § 53.30(c) to the State or, if designated by the State representative, the SVH conducting the employee incentive program. This provides flexibility to cover different types of employee incentive programs while still meeting the needs of employee incentive programs.

Consistent with 38 U.S.C. 1744(c), proposed § 53.30(d) provides that payments made under the regulations for a specific employee incentive program shall be used solely for that purpose.

Annual Report

Proposed § 53.31(a), which would implement section 1744(i), would require any SVH that receives an incentive payment to provide VA a detailed report concerning use of the funds, including an analysis of how effective the incentive program has been on nurse staffing in the SVH.

Proposed § 53.31(b) advises States and SVHs of the requirements of the Single Audit Act of 1984 (see 38 CFR part 41).

Recapture Provisions

Proposed § 53.32 provides that if a State fails to use the funds to assist a SVH to hire and retain nurses through an employee incentive program or

receives payments in excess of the amount allowed under § 53.30, the United States is entitled to recover the amount not used for such purpose or the excess amount received. This is necessary to permit VA to enforce section 1744(c), which authorizes a State to use funds only for an approved employee incentive program and only in accordance with the specified formula.

Notification of Funding Decision

Proposed § 53.41 advises affected States how they will be notified if VA determines that a submission from a State fails to meet the requirements of this part for funding.

Executive Order 12866

Executive Order 12866 directs agencies to assess all costs and benefits of available regulatory alternatives and, when regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts; and equity). The Executive Order classifies a "significant regulatory action," requiring review by the Office of Management and Budget (OMB) unless OMB waives such review, as any regulatory action that is likely to result in a rule that may: (1) Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities; (2) create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; (3) materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (4) raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

The economic, interagency, budgetary, legal, and policy implications of this proposed rule have been examined and it has been determined to be a significant regulatory action under Executive Order 12866.

Unfunded Mandates

The Unfunded Mandates Reform Act requires, at 2 U.S.C. 1532, that agencies prepare an assessment of anticipated costs and benefits before issuing any rule that may result in expenditure by State, local, or tribal governments, in the aggregate, or by the private sector, of \$100 million or more (adjusted annually for inflation) in any given year. This

proposed rule would have no such effect on State, local, or tribal governments, or on the private sector.

Paperwork Reduction Act

OMB assigns a control number for each collection of information it approves. Except for emergency approvals under 44 U.S.C. 3507(j), VA 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.

The proposed rule at §§ 53.11, 53.20, 53.31, and 53.40 contains collections of information under the Paperwork Reduction Act (44 U.S.C. 3501–3521). In notices published in the **Federal Register** on April 2, 2007 (72 FR 15763), and July 27, 2007 (72 FR 35303), we requested public comments on these collections of information. We did not receive any comments. Further, under section 3507(d) of the Act, we are submitting a copy of this rulemaking action to OMB for its review of these collections of information.

Regulatory Flexibility Act

The Secretary hereby certifies that this proposed rule would not have a significant economic impact on a substantial number of small entities as they are defined in the Regulatory Flexibility Act, 5 U.S.C. 601–612. The funding for this program would be made by the Federal government. The amount contributed by a SVH to fund an incentive program would be an insignificant amount of the costs for operating the SVH. Therefore, pursuant to 5 U.S.C. 605(b), this proposed rule is exempt from the initial and final regulatory flexibility analysis requirements of sections 603 and 604.

Catalog of Federal Domestic Assistance Numbers

The Catalog of Federal Domestic Assistance numbers and titles for the programs affected by this document are 64.005, Grants to States for the Construction of SVHs; 64.007, Blind Rehabilitation Centers; 64.008, Veterans Domiciliary Care; 64.009, Veterans Medical Care Benefits; 64.010, Veterans Nursing Home Care; 64.011, Veterans Dental Care; 64.012, Veterans Prescription Service; 64.013, Veterans Prosthetic Appliances; 64.014, Veterans State Domiciliary Care; 64.015, Veterans State Nursing Home Care; 64.016, Veterans State Hospital Care; 64.018, Sharing Specialized Medical Resources; 64.019, Veterans Rehabilitation Alcohol and Drug Dependence; 64.022, Veterans Home Based Primary Care; and 64.026, Veterans State Adult Day Health Care.

List of Subjects in 38 CFR Part 53

Administrative practice and procedure, Adult day health care, Alcohol abuse, Alcoholism, Claims, Day care, Dental health, Drug abuse, Foreign relations, Government contracts, Grant programs—health, Grant programs—veterans, Health care, Health facilities, Health professions, Health records, Homeless, Medical and Dental schools, Medical devices, Medical research, Mental health programs, Nursing homes, Philippines, Reporting and record-keeping requirements, Scholarships and fellowships, Travel and transportation expenses, Veterans.

Approved: April 4, 2008.

Gordon H. Mansfield,

Deputy Secretary of Veterans Affairs.

For reasons set forth in the preamble, the Department of Veterans Affairs proposes to amend 38 CFR chapter I by to adding part 53 to read as follows:

PART 53—PAYMENTS TO STATES FOR PROGRAMS TO PROMOTE THE HIRING AND RETENTION OF NURSES AT STATE VETERANS HOMES

- Sec.
- 53.01 Purpose and scope.
 - 53.02 Definitions.
 - 53.10 Decision makers, notifications, and additional information.
 - 53.11 General requirements for payments.
 - 53.20 Application requirements.
 - 53.30 Payments.
 - 53.31 Annual report.
 - 53.32 Recapture provisions.
 - 53.40 Submissions of information and documents.
 - 53.41 Notification of Funding Decision.

Authority: 38 U.S.C. 101, 501, 1744.

§ 53.01 Purpose and scope.

In accordance with the provisions of 38 U.S.C. 1744, this part sets forth the mechanism for a State to obtain payments to assist a State Veterans Home (SVH) in the hiring and retention of nurses for the purpose of reducing nursing shortages at that SVH.

(Authority: 38 U.S.C. 101, 501, 1744).

§ 53.02 Definitions.

For the purpose of this part:
Nurse means an individual who is a registered nurse, a licensed practical nurse, a licensed vocational nurse, or a nursing assistant certified in the State in which payment is made and who is a bedside care giver at least a majority of the time (*e.g.*, this would generally not include an individual acting in the capacity of an advance practice nurse, an administrative nurse, or a director of nursing) (the terms *nurses* and *nursing* shall be construed consistent with this definition).

State means each of the several States, Territories, and possessions of the United States, the District of Columbia, and the Commonwealth of Puerto Rico.

State representative means the official designated in accordance with State authority with responsibility for matters relating to payments under this part.

State Veterans Home (SVH) means a home approved by the Department of Veterans Affairs (VA) which a State established primarily for veterans disabled by age, disease, or otherwise, who by reason of such disability are incapable of earning a living. A SVH may provide domiciliary care, nursing home care, adult day health care, and hospital care. Hospital care may be provided only when the SVH also provides domiciliary and/or nursing home care.

(Authority: 38 U.S.C. 101, 501, 1744).

§ 53.10 Decision makers, notifications, and additional information.

The Chief Consultant, Geriatrics and Extended Care, will make all determinations regarding payments under this part, and will provide written notice to affected State representatives of approvals, denials, or requests for additional information under this part.

(Authority: 38 U.S.C. 101, 501, 1744).

§ 53.11 General requirements for payments.

(a) VA will make payment under this part to a State for an employee incentive program to reduce the shortage of nurses at the SVH, when the following conditions are met:

(1) The State representative applies for payment in accordance with the provisions of § 53.20,

(2) The SVH receives per diem payments from VA under the provisions of 38 U.S.C. 1741 for one or more of the following: adult day health care, domiciliary care, hospital care, or nursing home care,

(3) The SVH has a nursing shortage that is documented by credible evidence, including but not limited to SVH records showing nursing vacancies, SVH records showing nurse overtime use, and reports documenting that nurses are difficult to hire in the local area and difficult to retain as employees at the SVH,

(4) The SVH does not use payments to pay for all or part of a nurse's standard employee benefits, such as salary, health insurance, or retirement plan,

(5) The SVH provides to the Chief Consultant, Geriatrics and Extended Care, documentation establishing that it has an employee incentive program that:

(i) Is likely to be effective in promoting the hiring and retention of nurses for the purpose of reducing nursing shortages at that home, and

(ii) Is in operation or ready for immediate implementation if VA payments are made under this part,

(6) The payment amount applied for by the State is no more than 50 percent of the funding for the employee incentive program during the fiscal year,

(7) The SVH employee incentive program includes a mechanism to ensure that an individual receiving benefits under the program works at the SVH as a nurse for a period commensurate with the benefits provided, and, insofar as possible, the program is designed to eliminate any nursing shortage at the SVH within a 3-year period from the initiation of VA payments,

(8) The SVH, if it received payments under this part during a previous fiscal year, has met the reporting requirements of § 53.31(a) regarding such payments, and

(9) The SVH credits to its employee incentive program any funds refunded to the SVH by an employee because the employee was in breach of an agreement for employee assistance funded with payments made under this part and the SVH credits the amount returned as a non-Federal funding source.

(b) VA intends to allow flexibility and innovation in determining the types of employee incentive programs at SVHs eligible for payments. Programs could include such things as the provision of short-term scholarships for continuing nursing education, sign-on bonuses for nurses, and improvements to working conditions. In determining whether an employee incentive program is likely to be effective, VA will consider any information available, including past performance of the SVH's program funded by payments made under this part.

(Authority: 38 U.S.C. 101, 501, 1744).

§ 53.20 Application requirements.

(a) To apply for payments during a fiscal year, a State representative must submit to VA, in accordance with § 53.40, a completed VA Form 10-0430 and documentation specified by the form (VA Form 10-0430 is available at VA medical centers and on the Internet at <http://www1.va.gov/geriatricsshg/> or may be obtained by notifying the Geriatrics and Extended Care Office (114) at 202-461-6750, VHA Headquarters, 810 Vermont Avenue, NW., Washington, DC 20420. The submission must be made to VA during the first quarter (October 1-December 31) of the fiscal year in which the VA

payments are sought. The State must submit a new application for each fiscal year that the State seeks payments for an incentive program.

(b) As part of the application, the State representative must submit to VA evidence that the State has sufficient funding, when combined with the VA payments, to fully operate its employee incentive program through the end of the fiscal year. To meet this requirement, the State representative must provide to VA a letter from an authorized State official certifying that, if VA were to approve payments under this part, the non-VA share of the funds for the program would be by a date or dates specified in the certification, available for the employee incentive program without further State action to make such funds available. If the certification is based on a State law authorizing funds for the employee incentive program, a copy of the State law must be submitted with the certification.

(c) If an application does not contain sufficient information for a determination under this part, the State representative will be notified in writing of any additional submission required and that the State has 30 calendar days from the date of the notice to submit such additional information or no further action will be taken. If the State representative does not submit all of the required information or demonstrate that he or she has good cause for failing to provide the information within 30 calendar days of the notice (which may extend beyond the first quarter of the Federal fiscal year), then the State applicant will be notified in writing that the application for VA assistance will be deemed withdrawn and no further action will be taken.

(Authority: 38 U.S.C. 101, 501, 1744).

§ 53.30 Payments.

(a) The amount of payments awarded under this part during a fiscal year will be the amount requested by the State and approved by VA in accordance with this part. Payments may not exceed 50 percent of the cost of the employee incentive program for that fiscal year and may not exceed 2 percent of the amount of the total per diem payments estimated by VA to be made to the State for that SVH during that fiscal year for adult day health care, domiciliary care, hospital care, and nursing home care, under 38 U.S.C. 1741.

(b) Payments will be made by lump sum or installment as deemed appropriate by the Chief Consultant, Geriatrics and Extended Care.

(c) Payments will be made to the State or, if designated by the State

representative, the SVH conducting the employee incentive program.

(d) Payments made under this part for a specific employee incentive program shall be used solely for that purpose.

(Authority: 38 U.S.C. 101, 501, 1744).

§ 53.31 Annual report.

(a) A State receiving payment under this part shall provide to VA a report setting forth in detail the use of the funds, including a descriptive analysis of how effective the employee incentive program has been in improving nurse staffing in the SVH. The report shall be provided to VA within 60 days of the close of the Federal fiscal year (September 30) in which payment was made and shall be subject to audit by VA.

(b) A State receiving payment under this part shall also prepare audit reports as required by the Single Audit Act of 1984 (see 38 CFR part 41) and submit them to VA.

(Authority: 38 U.S.C. 101, 501, 1744).

§ 53.32 Recapture provisions.

If a State fails to use the funds provided under this part for the purpose for which payment was made or receives more than is allowed under this part, the United States shall be entitled to recover from the State the amount not used for such purpose or the excess amount received.

(Authority: 38 U.S.C. 101, 501, 1744).

§ 53.40 Submissions of information and documents.

All submissions of information and documents required to be presented to VA must be made to the Chief Consultant, Geriatrics and Extended Care (114), VHA Headquarters, 810 Vermont Avenue, NW., Washington, DC 20420.

(Authority: 38 U.S.C. 101, 501, 1744).

§ 53.41 Notification of Funding Decision.

If the Chief Consultant, Geriatrics and Extended Care, determines that a submission from a State fails to meet the requirements of this part for funding, the Chief Consultant shall provide written notice of the decision and the reasons for the decision.

(Authority: 38 U.S.C. 101, 501, 1744).

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 216

[Docket No. 080220219-8445-02]

RIN 0648-AT77

Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to a U.S. Navy Shock Trial

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

ACTION: Proposed rule; request for comments and information.

SUMMARY: NMFS has received a request from the U.S. Navy (Navy) for an authorization for the taking of marine mammals incidental to conducting a Full Ship Shock Trial (FSST) of the MESA VERDE (LPD 19) in the offshore waters of the Atlantic Ocean off Mayport, FL. By this document, NMFS is proposing regulations to govern that take. In order to issue final regulations governing the take and Letters of Authorization (LOAs) thereunder, NMFS must determine that the total taking will have a negligible impact on the affected species or stocks of marine mammals. NMFS regulations must set forth the permissible methods of take and other means of effecting the least practicable adverse impact on the affected species or stocks of marine mammals and their habitat, as well as monitoring and reporting requirements. NMFS invites comment on the proposed regulations and findings.

DATES: Comments and information must be received by May 12, 2008.

ADDRESSES: You may submit comments on the application and proposed rule, using the identifier 0648-AT77, by any of the following methods:

Electronic Submissions: Submit all electronic public comments via the Federal e-Rulemaking Portal: <http://www.regulations.gov>.

Fax: 301-427-2521 (using the identifier: 0648-AT77).

Mail: paper, disk, or CD-ROM comments should be addressed to: Mr. 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.

Instructions: All comments received are a part of the public record and will generally be posted to <http://www.regulations.gov> without change.

All Personal Identifying Information (for example, name, address, etc) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

NMFS will accept anonymous comments. Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

A copy of the application, containing a list of references used in this document, and other documents cited herein, may be obtained by writing to the above address, by telephoning one of the contacts listed under **FOR FURTHER INFORMATION CONTACT**, or at: <http://www.nmfs.noaa.gov/pr/permits/incidental.htm>.

A copy of the Navy's documents cited in this proposed rule may also be viewed, by appointment, during regular business hours at this address.

FOR FURTHER INFORMATION CONTACT: Ken Hollingshead Office of Protected Resources, NMFS, (301) 713-2289, ext. 128.

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 (Secretary) to allow, upon request, the incidental, but not intentional taking of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) if certain findings are made and regulations are issued or, if the taking is limited to harassment, notice of a proposed authorization is provided to the public for review.

Authorization for incidental takings 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 (where relevant), and if the permissible methods of taking and requirements pertaining to the mitigation, 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."

With respect to military readiness activities, the MMPA defines "harassment" as:

(i) any act that injures or has the significant potential to injure a marine mammal or