

MARINE MAMMAL COMMISSION
4340 East-West Highway, Room 700
Bethesda, MD 20814-4447

13 April 2009

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

Dear Mr. Payne:

The Marine Mammal Commission, in consultation with its Committee of Scientific Advisors on Marine Mammals, has reviewed the National Marine Fisheries Service's 16 March 2009 *Federal Register* notice (74 Fed. Reg. 11052) proposing to issue regulations under section 101(a)(5)(A) of the Marine Mammal Protection Act. The regulations would authorize the U.S. Navy to take marine mammals incidental to military readiness training operations in the Cherry Point Range Complex off the coasts of North and South Carolina from 29 May 2009 through 28 May 2014. The Marine Mammal Commission previously provided comments and recommendations in response to the Service's 8 July 2008 *Federal Register* notice (73 Fed. Reg. 38991) proposing to develop regulations to govern Navy activities in the Cherry Point Range Complex (see 7 August 2008 letter, enclosed and incorporated by reference).

RECOMMENDATIONS

The Service initially provided an exceptionally short public comment period for its proposed rule. To avoid this in the future, the Marine Mammal Commission recommends that the National Marine Fisheries Service adopt a policy to provide a 60-day comment period for all proposed regulations issued under section 101(a)(5)(A), and in no case less than a 45-day comment period, absent a showing of good cause that such a comment period is impractical, unnecessary, or contrary to the public interest, as provided for under section 553(b)(3)(B) of the Administrative Procedure Act.

With regard to the content of the proposed rule, the Marine Mammal Commission recommends that the National Marine Fisheries Service—

- require the Navy to conduct an external peer review of its marine mammal density estimates, including the data upon which those estimates are based and the manner in which those data are collected and used;
- require the Navy to revise its explosive ordnance exposure analysis to provide a more realistic assessment of potential occurrences and outcomes of explosions;
- require the Navy to complete its Integrated Comprehensive Monitoring Program plan and make the plan available to the Commission and other interested parties for review prior to its implementation;
- require the Navy to develop and implement a plan to evaluate the effectiveness of monitoring and mitigation measures before beginning or in conjunction with conducting operations covered by the proposed incidental take authorization;

- reconcile the discrepancy between proposed sections 218.24(e)(3)(i) and 218.24(e)(3)(iii) on the use of marine mammal observers and specify the circumstances under which marine mammal observers would not be required aboard Navy platforms;
- describe, or require the Navy to describe, the alternative measures that the Navy would take to monitor for the presence of marine mammals when marine mammal observers are not being used;
- require the Navy to suspend an activity if a marine mammal is seriously injured or killed and the injury or death could be associated with the activity. Subsequently, the injury or death should be investigated to determine the cause, assess the full impact of the activity, and determine how the activity should be modified to avoid future injuries or deaths;
- require the Navy to halt an activity if a marine mammal species other than those covered by the authorization is observed within the operating area; and
- work with the Navy to develop a database for storing original records of Navy interactions with marine mammals.

RATIONALE

The Commission offers the following rationale for its recommendations.

Public Comment Periods for Proposed Incidental Take Rules

The Service initially provided a 21-day comment period on this proposed rule. When approached by the Commission, the Service agreed to extend the comment period by an additional week. The Commission appreciates having the additional time for review and comment. However, a 30-day comment period is still too short, particularly in light of the length and complexity of the proposed regulations, the application, and the accompanying environmental impact statement. Furthermore, this is not the first time that the Service has established an unreasonably short comment period for the proposed issuance of incidental take regulations under the Marine Mammal Protection Act. The Marine Mammal Commission believes that the Service should adopt a generally applicable minimum comment period for such rulemakings.

Section 553 of the Administrative Procedure Act (5 U.S.C. § 553), which governs informal rulemaking, generally requires public notice and an opportunity for public comment on proposed rules but does not specify a minimum length for such a comment period. In practice, that provision has been interpreted to require a “reasonable” period in which the public can review and comment on a proposed rule. Further guidance is provided in Executive Order 12866, issued in 1993 and amended in 2002 and 2007. Section 6(a)(1) of the Executive Order requires that each agency “provide the public with meaningful participation in the regulatory process.” This is to include a “meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days.”

Additional context for determining the appropriate length of the comment period for incidental take regulations is provided by section 101(a)(5)(D) of the Marine Mammal Protection Act. That section was added to the Act in 1994 to provide a streamlined process for issuing

incidental take authorization for periods of up to one year when the taking would be by harassment only. The provision specifies that a 30-day comment period is to be provided for all proposed authorizations. The Commission sees no basis for concluding that Congress had any expectation that the comment period might be any shorter for incidental take regulations issued under section 101(a)(5)(A). Because rulemakings under section 101(a)(5)(A) can authorize lethal taking in addition to taking by harassment and can authorize taking for periods of up to five years, and because section 101(a)(5)(D) was enacted to provide a streamlined alternative to rulemaking in certain circumstances, the Commission believes that any comment period of less than 30 days on proposed incidental take regulations fails to satisfy the reasonableness requirement of the Administrative Procedure Act.

After considering the whole of section 101(a)(5), the requirements of the Administrative Procedure Act, and the directives set forth in Executive Order 12866, the Marine Mammal Commission recommends that the Service adopt a policy to provide a 60-day comment period for all proposed regulations issued under section 101(a)(5)(A), and in no case less than a 45-day comment period, absent a showing of good cause that such a comment period is impractical, unnecessary, or contrary to the public interest, as provided for under section 553(b)(3)(B) of the Administrative Procedure Act.

Content of the Proposed Rule

Obtaining Scientific Peer Review of Marine Mammal Density and Distribution Estimates

The Navy's marine mammal density estimates for the southeast operating area are derived from its NODE report (reference DoN 2007c in the DEIS, p. 7-16). The preamble of the proposed rule states that the estimates "were calculated by a team of experts using survey data collected and provided by the NMFS and with expert modeling support provided by CREEM [Centre for Environmental and Ecological Modelling, University of St. Andrews, Scotland]." In its 7 August 2008 letter, the Commission expressed concern that the Navy has not performed any external peer review of the marine mammal density estimates and, particularly, on the manner in which the Navy identifies, integrates, and analyzes large amounts of marine mammal data to generate density estimates. Risk analyses and take estimates depend on the accuracy of the density estimates and, therefore, the manner in which the marine mammal data have been used. To ensure that the density and take estimates are accurate and the risk analyses reliable, the Marine Mammal Commission again recommends that the Service require the Navy to conduct an external peer review of its marine mammal density estimates, including the data upon which those estimates are based and the manner in which those data are collected and used.

Analyzing Exposure to Explosive Ordnance

The Navy analyzes the effects of infrequent explosive events by assuming that those events will be distributed evenly over four seasons, resulting in fractional quarterly totals. As discussed in its 7 August 2008 letter, these discrete events either occur or they do not; they cannot occur in fractions. For that reason, the Commission does not believe that assessing the effect of a 0.25 or 0.5 event per season provides a realistic range of likely outcomes because neither the events nor the densities of marine mammals may be evenly distributed over those seasons. The Marine Mammal

Commission reiterates its recommendation that the Service require the Navy to revise its explosive ordnance exposure analysis to provide a more realistic assessment of potential occurrences and outcomes of explosives.

Verifying Performance of Monitoring and Mitigation Measures

The Service's *Federal Register* notice states that the Navy will be required to complete an Integrated Comprehensive Monitoring Program plan in 2009 to monitor, mitigate, and assess the effects of its activities over time. The Service will require the plan to include (1) a method for setting priorities among monitoring projects and a clear rationale for establishing each project's priority, (2) an annual review conducted jointly by the Navy and Service to evaluate monitoring results, Navy research and development activities, and current science that can be used to determine whether the Navy's mitigation or monitoring methods should be modified, (3) a detailed description of the 2011 review together with a description of how and when the Navy and the Service will use the findings of the workshop, (4) an adaptive management plan, and (5) a method for standardizing data collection for the Cherry Point Range Complex and other range complexes.

The Commission strongly supports the development of this proposed plan, which should facilitate the identification and implementation of measures to calibrate and verify the performance of the monitoring and mitigation measures being proposed. The Marine Mammal Commission recommends that the Service require the Navy to complete its Integrated Comprehensive Monitoring Program plan and make the plan available to the Commission and other interested parties for review prior to its implementation.

Although the Commission supports the development of this plan, it remains concerned that the Navy and Service are over-estimating the efficacy of the proposed monitoring and mitigation measures. The Commission also is concerned that Navy has not taken, and the Service has not required the Navy to take, reasonable steps to verify and validate the performance of watchstanders or the effectiveness of other mitigation measures. The Commission has expressed these concerns in previous correspondence regarding the Cherry Point Range Complex and other Navy training ranges. Therefore, the Marine Mammal Commission again recommends that the Service require the Navy to develop and implement a plan to evaluate the effectiveness of monitoring and mitigation measures before beginning or in conjunction with conducting operations covered by the proposed incidental take authorization.

On a related point, section 218.24(e)(3)(i) of the proposed rule provides that, under the proposed Integrated Comprehensive Monitoring Program, "[m]arine mammal observers [MMOs] shall be placed on a Navy platform during the exercises." However, section 218.24(e)(3)(iii) states that "MMOs shall not be placed aboard Navy platforms for every Navy training event or major exercise, but during specifically identified opportunities for data collection efforts. The events selected for MMO participation shall take into account safety, logistics, and operational concerns." Based on these somewhat contradictory provisions, it is not clear whether observers would, in fact, be required for all exercises and, if not, when they would be required. The Marine Mammal Commission therefore recommends that the Service reconcile the discrepancy between proposed

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sections 218.24(e)(3)(i) and 218.24(e)(3)(iii) on the use of marine mammal observers and specify the circumstances under which marine mammal observers would not be required aboard Navy platforms. Further, the Marine Mammal Commission recommends that the Service describe, or require the Navy to describe, the alternative measures that the Navy would take to monitor for the presence of marine mammals when marine mammal observers are not being used.

Responding to Lethal Taking and Serious Injury

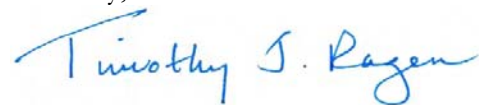
The Navy is not requesting authorization to take marine mammals by serious injury or death. As such, the Marine Mammal Commission recommends that the rule, if issued, require the Navy to suspend an activity if a marine mammal is seriously injured or killed and the injury or death could be associated with the activity. Subsequently, the injury or death should be investigated to determine the cause, assess the full impact of the activity, and determine how the activity should be modified to avoid future injuries or deaths. It should be clear to all interested parties that more information is required to understand the potential effects of sound on marine mammals, and full investigation of such incidents is essential to provide more complete information on these potential effects. Further, the Marine Mammal Commission recommends that the Service require the Navy to halt an activity if a marine mammal species other than those covered by the authorization is observed within the operating area.

Reporting

The proposed rule adequately addresses the Commission's previous recommendation that annual reports be prepared to document in full the methods, results, and interpretation of all monitoring tasks. However, the proposed rule indicates that the ship's logs and records documenting training operations would be retained only for 30 days. Those logs constitute the original records of actions taken and could be of great value to reviewers seeking to verify the Navy's summary reports, understand the nature of the interactions, and devise more effective mitigation measures. This sort of feedback and adaptive management should be standard practice. Maintaining those records for a longer period of time is essential for fully assessing mitigation efforts and potential effects on marine mammals. Therefore, the Marine Mammal Commission recommends that the Service work with the Navy to develop a database for storing original records of Navy interactions with marine mammals. The Commission believes such a database can be developed and used without compromising Navy security requirements.

Please contact me if you have questions concerning any of these comments or recommendations.

Sincerely,



Timothy J. Ragen, Ph.D.
Executive Director

Enclosure