

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

5 January 2009

Mr. P. Michael Payne
Chief, Permits Division
National Marine Fisheries Service
Office of Protected Resources
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 Service's 19 December 2008 *Federal Register* notice (73 Fed. Reg. 77577) proposing to issue regulations pertaining to the activities of the 30th Space Wing, U.S. Air Force. The regulations would authorize the 30th Space Wing to take small numbers of four pinniped species incidental to space vehicle and test flight activities from Vandenberg Air Force Base, California, between 7 February 2009 and 6 February 2014. The Service previously issued a *Federal Register* notice announcing receipt of this application and requesting comments on its intent to propose regulations to govern the requested taking. The Commission submitted comments on that notice by letter of 19 August 2008, recommending that the Service publish the proposed rule.

RECOMMENDATIONS

With regards to the current proposal, the Marine Mammal Commission recommends that the National Marine Fisheries Service—

- extend the public comment period on the proposed rule for at least an additional 15 days or, alternatively, provide a post-promulgation comment period before the effective date of the rule;
- issue a final rule as proposed, provided that the mitigation and monitoring activities described in the *Federal Register* notice and the application are incorporated into the final rule;
- specify in the final rule that the authorized activities must be suspended, pending review, if there is any indication that the activities covered by the rule are causing marine mammal mortalities or injuries or are affecting the distribution, size, or productivity of the potentially affected pinniped populations;
- require additional acoustic and biological monitoring when new space vehicles or missiles are launched to verify that the actual sound levels and responses of animals are as predicted; and
- require additional public notice and opportunity for comment before authorizing the taking of marine mammals by any new space vehicles or missiles that produce sound levels or frequencies significantly different from those described in this authorization.

RATIONALE

The Service has provided only a 15-day comment period on the proposed rule. We do not believe that this short period satisfies the requirements of the Administrative Procedure Act. Section 553 of that Act generally requires a 30-day comment period on any substantive proposed regulations except for good cause as identified in the rule. In this case, the Service provided no rationale in the proposed rule to justify a truncated public comment period. We also do not believe a 15-day comment period is consistent with Executive Order 12886, section 6(a)(1) of which requires each agency to provide the public with meaningful participation in the regulatory process and specifies that in most cases such participation “should include a comment period of not less than 60 days.” The shortness of the comment period is exacerbated by the fact that it occurs during a time of year with multiple federal holidays and when many people who may wish to comment are preoccupied with other activities. Because federal offices were closed for three days during the holidays, the comment period has been effectively shortened to seven working days. The only basis for shortening the comment period appears to be the fact that it took the Service almost nine months from the receipt of the application to publish a proposed rule, and the Service now finds itself pressed to have new incidental take regulations in place by the date on which the existing regulations expire. In light of these factors, the Marine Mammal Commission recommends that the National Marine Fisheries Service extend the public comment period on the proposed rule for at least an additional 15 days or, alternatively, provide a post-promulgation comment period before the effective date of the rule.

The activities for which the Air Force is seeking an incidental take authorization are largely the same as those covered by the existing regulations and the precursors to those regulations. The applicant began a research program in 1997 to study the effects of noise from space vehicle and missile launches and sonic booms on the behavior, hearing ability, and population dynamics of pinnipeds in the vicinity of Vandenberg Air Force Base and the northern Channel Islands. The Commission expects that the research program will continue under the current scientific research permit extension (Permit No. 859-1680-01) issued to the 30th Space Wing on 10 December 2007 and under future permits that may be issued. As noted in the Commission’s 19 August 2008 comments on this application, the results of the applicant’s research, reporting, and monitoring efforts under the current and previous regulations indicate that the launch operations do not affect the haul-out behavior of harbor seals and other pinniped species and that the animals do not seem to have incurred permanent hearing damage as a result of space vehicle launches. As such, the Marine Mammal Commission recommends that the Service issue the final rule as proposed, provided that the mitigation and monitoring activities described in the *Federal Register* notice and the application are incorporated into the final rule. The Marine Mammal Commission further recommends that the Service specify in the final rule that the authorized activities shall be suspended, pending review, if there is any indication that the activities covered by the rule are causing marine mammal mortalities or injuries or are affecting the distribution, size, or productivity of the potentially affected populations.

The Commission notes that some of the activities included under the authorization request were not included in past authorizations (e.g., launches of the Falcon launch vehicle). Because the

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affected pinnipeds may respond differently to new sources or types of noise, the authorization should require that the 30th Space Wing collect information on the noise produced by, and the reaction of marine mammals to, any new vehicles or missiles. The Marine Mammal Commission therefore recommends that the Service require additional acoustic and biological monitoring when new space vehicles or missiles are launched to verify that the actual sound levels and responses of animals are as predicted. The Commission also notes that the proposed rule raises the possibility that additional missile programs and missile types may be implemented before the requested authorization expires. Although it may be appropriate to include some of these under the anticipated authorization, others may not be sufficiently developed to include in the authorization. To address the possibility of new programs and missile types, the Marine Mammal Commission recommends that the Service require additional public notice and opportunity for comment before authorizing the taking of marine mammals by any new space vehicles or missiles that produce sound levels or frequencies significantly different from those described in this authorization.

Please let me know if you or your staff has questions concerning any of these comments or recommendations.

Sincerely,



Timothy J. Ragen, Ph.D.
Executive Director