

MARINE MAMMAL COMMISSION
4340 EAST-WEST HIGHWAY, ROOM 905
BETHESDA, MD 20814

30 October 2006

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 28 September 2006 *Federal Register* notice requesting comments on a proposal to issue regulations under section 101(a)(5)(A) of the Marine Mammal Protection Act. The regulations would govern the taking of marine mammals incidental to operation of the U.S. Navy's Surveillance Towed Array Sensor System Low Frequency Active (SURTASS LFA) sonar. The Service is inviting comments on the application and suggestions on the content of possible proposed regulations. The current regulations governing taking incidental to use of the SURTASS LFA sonar will expire on 15 August 2007.

Operational SURTASS LFA systems are currently installed on two Navy vessels. The Navy is planning to deploy a Compact Low Frequency Active (CLFA) sonar system on existing smaller SURTASS Swath-P ships. Accordingly, the Navy is requesting that the new regulations authorize the taking of marine mammals incidental to the use of the LFA and CLFA systems on up to four vessels. The Navy also is requesting that the new regulations establish additional offshore biologically important areas (which would not be exposed to sounds with pressure levels of 180 dB or higher) and authorize an increase in the currently authorized transmission frequency from 330 to 500 Hz to accommodate the frequency specifications of the CLFA system.

RECOMMENDATIONS

The Marine Mammal Commission recommends that—

- the Service publish proposed regulations to govern the taking of marine mammals incidental to the deployment and use of the LFA and CLFA sonar systems;
- all necessary and relevant information from the multiple existing sources describing the proposed actions be consolidated into the proposed rule so that reviewers can more easily determine precisely what is being proposed and assess the potential impacts;
- any regulations proposing to issue an incidental taking authorization for SURTASS LFA operations include information on the specific geographic locations where the sonar is expected to be deployed and the species and numbers of marine mammals that may be taken in each of those locations;

- the existing annual review process for Letters of Authorization be retained in the new regulations but be expanded to accommodate public review and comment; and
- the Service address the requirement of the National Defense Authorization Act of 2004 that personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity be considered in making a “least practicable adverse impact” determination under section 101(a)(5)(i)(II)(aa) in its proposed rule concerning LFA and CLFA activities.

RATIONALE

Based on the information provided in the *Federal Register* notice, the Marine Mammal Commission recommends that the National Marine Fisheries Service publish proposed regulations to govern the taking of marine mammals incidental to the deployment and use of the LFA and CLFA sonar systems. The proposed rule should provide all of the information necessary to enable reviewers to determine whether the issuance of incidental take regulations would be consistent with the requirements of the Marine Mammal Protection Act. Currently, information concerning the proposed activities is set forth in several documents (i.e., the Navy’s current application, the draft Supplemental Environmental Impact Statement, the Service’s 16 July 2002 final rule, and the Navy’s Final Overseas Environmental Impact Statement/Environmental Impact Statement). The Marine Mammal Commission recommends that all necessary and relevant information from these various sources be consolidated into the proposed rule so that reviewers can more easily determine precisely what is being proposed and assess the potential impacts.

The Service and the Navy have determined that the Navy’s SURTASS LFA sonar testing and training operations constitute military readiness activities. As such, these activities are subject to the provisions of the Marine Mammal Protection Act as amended by the National Defense Authorization Act. Although the Service published proposed amendments to its incidental take implementing regulations in June 2004 to reflect the provisions of the National Defense Authorization Act, those regulations have never been finalized. In keeping with the provisions of the Act, the Service proposed to delete the “small numbers” and “specified geographical region” requirements for military readiness activities. However, the Service indicated that applicants would still need to provide information concerning both the specific geographic locations in which military readiness activities will occur and the anticipated estimates of marine mammals to be taken in order for the Service to make the “negligible impact” determination required under section 101(a)(5) of the Marine Mammal Protection Act. Consistent with this guidance, the Marine Mammal Commission recommends that any regulations proposing to issue an incidental taking authorization for SURTASS LFA operations include information concerning the specific geographic locations where the sonar is expected to be deployed and the species and numbers of marine mammals that may be taken in each of those locations.

The Commission recognizes the difficulty that the Navy faces in trying to predict all locations in which LFA or CLFA sonar might be used during a five-year period and in analyzing the potential impacts of sonar use at all of those locations. Under the current incidental take regulations,

Mr. P. Michael Payne
30 October 2006
Page 3

the Navy is required to request annual Letters of Authorization and identify the locations where it intends to operate in the forthcoming year. The annual process also provides an opportunity for additional site-specific analysis, including acoustic modeling, that may be needed. For these same reasons, the Marine Mammal Commission recommends that the annual review process be retained in the new regulations as well. At the same time, however, the Commission is concerned that deferring the submission of site-specific information could undermine the public review and comment process provided under section 101(a)(5) of the Marine Mammal Protection Act. Therefore, the Marine Mammal Commission recommends that, if the National Marine Fisheries Service allows the Navy to defer submission of site-specific information until annual Letters of Authorization are being considered, the Service incorporate mechanisms to accommodate public review at that stage as well.

In its 29 July 2004 letter commenting on the proposed rule to implement the amendments made by the National Defense Authorization Act, the Commission concurred with the Service's proposed changes but recommended that the final rule also address how the Service will meet the requirement that personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity be considered in making a "least practicable adverse impact" determination under section 101(a)(5)(i)(II)(aa). Inasmuch as the Service has not promulgated generally applicable regulations to implement this requirement, the Marine Mammal Commission recommends that the Service address this issue in its proposed rule concerning LFA and CLFA activities.

Please contact me if you or your staff has any questions concerning these comments and recommendations.

Sincerely,



Timothy J. Ragen, Ph.D.
Executive Director