



# MARINE MAMMAL COMMISSION

18 January 2018

Ms. Jolie Harrison, Chief  
Permits and Conservation Division  
Office of Protected Resources  
National Marine Fisheries Service  
1315 East-West Highway  
Silver Spring, MD 20910-3225

Dear Ms. Harrison:

The Marine Mammal Commission (the Commission), in consultation with its Committee of Scientific Advisors on Marine Mammals, has reviewed the National Marine Fisheries Service's (NMFS) 27 December 2017 notice (82 Fed. Reg. 61372) and the letter of authorization (LOA) application submitted by the U.S. Air Force (the Air Force) seeking issuance of regulations under section 101(a)(5)(A) of the Marine Mammal Protection Act. The taking would be incidental to conducting testing and training activities at the Eglin Gulf Test and Training Range (EGGTR) in the Gulf of Mexico. The proposed activities would occur from 4 February 2019 to 3 February 2023.

## Background

The Air Force plans to conduct various testing and training at EGGTR off Florida. Aircraft would deploy gunnery rounds, rockets, missiles, and bombs (ranging from a 0.1-lb gunnery round to a 945-lb bomb) at numerous types of targets. Munitions would detonate in the air, at the water's surface, or approximately 3 m below the water's surface. The Air Force would conduct its testing and training activities in waters less than 350 m in depth and at a distance of approximately 111 km from the coast.

NMFS preliminarily has determined that the proposed activities could cause both Level A and B harassment of common bottlenose dolphins and Atlantic spotted dolphins but anticipates that any impact on the affected species and stocks would be negligible. NMFS does not anticipate any take of marine mammals by serious injury or death and believes the proposed mitigation measures provide the means of effecting the least practicable impact on marine mammal species or stocks and their habitat. The proposed mitigation, monitoring, and reporting measures include—

- conducting activities only during daylight hours, except gunnery activities that could occur at night;
- using gunnery rounds with a reduced net explosive weight during gunnery activities that occur at night;
- delaying or rescheduling activities if the Beaufort sea state (BSS) is greater than 4;

- conducting aerial<sup>1</sup>, vessel-based, and/or video monitoring<sup>2</sup> prior to and after the proposed activities;
- using delay and shut-down procedures during all activities;
- using ramp-up procedures during gunnery activities;
- conducting a passive acoustic monitoring study to (1) determine in-situ source levels and received levels from detonations and (2) evaluate marine mammal vocalizations before, during, and after detonations<sup>3</sup> in the EGTTR;
- reporting injured and dead marine mammals to the Office of Protected Resources and the Southeast Regional Office using NMFS's phased approach and suspending activities, if appropriate; and
- submitting draft and final monitoring reports.

### **Mitigation and monitoring measures**

In previous Commission letters regarding the Air Force's activities at EGTTR and at the Navy's Pacific Missile Range Facility<sup>4</sup>, the Commission has recommended that NMFS require the Air Force to determine the effectiveness of its mitigation measures and to supplement those measures with the use of passive acoustic monitoring (PAM) devices. In some instances, the mission area<sup>5</sup> would be determined to be clear of marine mammals at least 30 minutes, and likely longer, before the munitions are detonated. The monitoring vessels and aircraft would move to the periphery of the human safety zone, which the application indicated would be approximately 24 km from the detonation location. In other instances, the mission aircraft would be conducting monitoring for marine mammals. Those aircraft would conduct monitoring during the approximately 15 minutes it takes to conduct two orbits around the mission area<sup>6</sup> at an altitude of up to 6,000 ft<sup>7</sup>. Given those large areas and high altitudes<sup>8</sup>, the Commission does not believe that the Air Force would be able to monitor effectively for marine mammals entering the mortality and injury zones particularly after the mission area has been cleared and during the timeframe prior to detonation (see Table 19 of the *Federal Register* notice for sizes of the relevant zones).

NMFS described multiple limitations regarding the Air Force using PAM for real-time mitigation in the *Federal Register* notice. Those limitations include human safety concerns and the inability to make mission go/no-go decisions in a timely manner. Although NMFS did not expound upon the human safety concerns, it did indicate that the Air Force can't commit to using PAM as a

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<sup>1</sup> Including various optical and electronic sensors, aerostats, and unmanned aerial vehicles.

<sup>2</sup> In some instances, video monitoring can occur during the activities as well. The Air Force clarified that when video monitoring is used on the various platforms for collecting data associated with the mission, it also would be used to monitor for marine mammals.

<sup>3</sup> Although discussed in the Air Force's application, this portion of the study was not discussed in the preamble to or the proposed rule. NMFS indicated it would be included in the final rule.

<sup>4</sup> See the Commission's [16 May 2017](#) and [3 June 2013](#) letters as examples.

<sup>5</sup> With a zone of impact (ZOI) radius of up to 5 km.

<sup>6</sup> With a monitoring radius of up to 9.3 km.

<sup>7</sup> The aircraft then would ascend to its operational altitude of up to 20,000 ft.

<sup>8</sup> NMFS acknowledges that, even with the additional video monitoring and potential additional aerial platforms, the entire ZOI may not be visible for the entire mission duration. The Commission notes that monitoring capabilities would be further diminished in BSSs up to 4, particularly for video monitoring of targets that are located 3.7 km from the cameras.

mitigation measure until it is confident that its rudimentary PAM study is successfully implemented and until it gains a better understanding of PAM capabilities to develop mission-appropriate procedures for implementing go/no-go decisions in a timely manner (82 Fed. Reg. 61402). The Commission appreciates that the Air Force appears to be willing to explore using PAM capabilities for mitigation implementation but is disappointed that those capabilities have not been investigated in a more timely manner. The Commission has been recommending that the Air Force's mitigation measures be supplemented with PAM since 2010 and has discussed this issue at length with NMFS over the years. The Commission contends that fulfilling the monitoring requirements under section 101(a)(5) of the MMPA, in this case the PAM study, should be made a priority in addition to developing real-time mitigation capability via PAM. For these reasons, the Commission again recommends that NMFS compel the Air Force to prioritize (1) completing both aspects of its PAM study and (2) further investigating ways to supplement its mitigation measures<sup>9</sup> with the use of real-time PAM devices.

### **Adequate opportunity to consider public comments**

The Commission has expressed concern that for some proposed incidental take authorizations NMFS has truncated the public comment period or the time available for it to review comments in order to meet a pre-determined issuance deadline. In this instance, the public comment period for the proposed rule closes on 26 January 2018. NMFS has informed the Commission that the Air Force requested to have the letter of authorization in place the first week of February. That leaves approximately one week for NMFS to review, consider, and respond to the comments received, revise the proposed rule as appropriate, issue the final rule, and then issue the letter of authorization. The Commission is not convinced a week is sufficient to consider public comments under a rulemaking, let alone finalize the rule and the letter of authorization. In fact, the timeline posted on NMFS's website<sup>10</sup> anticipates that this process (along with associated reviews under the National Environmental Policy Act and the Endangered Species Act, if applicable) generally will take 3 to 6 months.

The Commission continues to believe that the opportunity for public comment provided under section 101(a)(5)(D)(iii) of the MMPA should be a meaningful one that allows NMFS sufficient time to not only solicit public comments, but also to analyze, assess, and respond to those comments and, as appropriate, revise its proposed authorization or proposed rule in light of those comments. Therefore, the Commission recommends that NMFS (1) take the time necessary to meet all of its rulemaking responsibilities for this authorization and all future ones, including full review and consideration of comments and (2) for future incidental harassment authorizations and proposed rules that underpin any letter of authorization, publish the required *Federal Register* notices sufficiently in advance of the planned start date of the proposed activities to enable it to fully consider and respond to all comments received prior to issuing an authorization.

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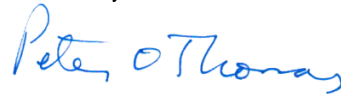
<sup>9</sup> Delaying various activities if vocalizing animals are localized within the relevant mortality or injury zones.

<sup>10</sup> <http://www.nmfs.noaa.gov/pr/permits/incidental/>

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The Commission trusts you will find its letter helpful. Please contact me if you have questions regarding the Commission's comments and recommendations.

Sincerely,

A handwritten signature in blue ink that reads "Peter O. Thomas". The signature is written in a cursive style with a large initial "P" and "T".

Peter O. Thomas, Ph.D.,  
Executive Director