



# MARINE MAMMAL COMMISSION

10 June 2019

Ms. Jolie Harrison, Chief  
Permits and Conservation Division  
Office of Protected Resources  
National Marine Fisheries Service  
1315 East-West Highway  
Silver Spring, MD 20910-3226

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) 13 May 2019 notice (84 Fed. Reg. 21126) and the letter of authorization (LOA) application submitted by the U.S. Navy (the Navy) seeking the extension of regulations under section 101(a)(5)(A) of the Marine Mammal Protection Act (the MMPA). The taking would be incidental to conducting training and research, development, test, and evaluation (testing) activities within the Atlantic Fleet Training and Testing (AFTT) study area (Phase III activities<sup>1</sup>). The Navy requested to extend its current final rule that authorized such activities from 2023 to 2025<sup>2</sup>. The Commission reviewed and provided recommendations in its [16 April 2018 letter](#) on the proposed rule that governed activities from 2018 to 2023. The Commission will not reiterate those recommendations herein but maintains that the recommendations that NMFS did not incorporate into the final rule are still relevant and pertain to the extension of the final rule and asks that they be reviewed again in the course of considering the extension.

## Background

The Navy's AFTT study area is in the western Atlantic Ocean and encompasses the waters along the east coast of North America, the Gulf of Mexico, portions of the Caribbean Sea, Navy pier-side locations and port transit channels, waters near civilian ports, and various bays, harbors, and inland waters (i.e., lower Chesapeake Bay). The activities would involve the use of low-, mid-<sup>3</sup>, high- and very high-frequency active sonar, weapons systems, explosive and non-explosive practice munitions and ordnance, high-explosive underwater detonations (including ship shock trials), expended materials, vibratory and impact hammers, airguns, electromagnetic devices, high-energy lasers, vessels, underwater vehicles, and aircraft. The Navy would implement mitigation measures that consist of both procedural mitigation measures and designation of mitigation areas.

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<sup>1</sup> NMFS authorized the Navy to conduct similar activities first under the Tactical Training Theater Assessment and Planning (TAP I) LOA applications and second under Phase II LOA applications.

<sup>2</sup> The timeframe during which a letter of authorization issued by NMFS is valid recently was increased from five to seven years based on the John S. McCain National Defense Authorization Act for Fiscal Year 2019 (section 316 of Public Law 115-232).

<sup>3</sup> MFA.

## Beaked whale mortalities

NMFS did not propose to authorize beaked whale<sup>4</sup> mortalities subsequent to MFA sonar use for any of the Navy's Phase III activities. That approach is inconsistent with the tack taken for both TAP I and Phase II activities. For the most recent Phase II final rule for AFTT, NMFS authorized up to 10 beaked whale mortality takes during the five-year period of the final rule<sup>5</sup> (78 Fed. Reg. 73067). NMFS justified authorizing those mortalities by stating that, although NMFS and the Navy do not anticipate any beaked whale strandings to occur and no strandings have ever been reported in AFTT, NMFS cannot conclude with certainty the degree to which mitigation measures would eliminate or reduce the potential for serious injury or mortality (78 Fed. Reg. 73043). That justification is still applicable.

The Commission understands that the number of hull-mounted MFA sonar (MF1/MFK1) hours have decreased slightly from 10,083 hours per year under the Phase II final rule to 9,211 hours under the Phase III final rule for AFTT (78 Fed. Reg. 73065 and 83 Fed. Reg. 57104, respectively). However, the total number of hull-mounted MFA sonar hours that would be authorized to occur under the final rule has increased from 51,230 to 62,074 hours (78 Fed. Reg. 73065 and 84 Fed. Reg. 21135, respectively) and similarly is more than the 47,979 hours that would be authorized under the Phase III final rule extension for the Hawaii-Southern California Training and Testing (HSTT) study area (84 Fed. Reg. 20105 and the associated LOA application for the extension). In addition, the number of major training exercises and integrated/coordinated training exercises that involve multiple ships using hull-mounted sonar also has increased from 190 under the Phase II final rule to 262 under the Phase III final rule for AFTT (78 Fed. Reg. 73014 and 84 Fed. Reg. 2129, respectively). Based on the increase in the total number of hull-mounted MFA sonar hours alone, it would have been prudent for NMFS to authorize beaked whale mortalities. But NMFS did not do so under the current Phase III AFTT final rule and did not propose to do so under the extension to that rule.

NMFS indicated that steep bathymetry, multiple hull-mounted platforms using sonar simultaneously, constricted channels, and strong surface ducts are not all present together in the AFTT Study Area and during the specified activities (83 Fed. Reg. 57116). NMFS specified that it did not authorize beaked whale mortalities in the Phase III final rule for AFTT based on the lack of those factors and the lack of any strandings associated with Navy sonar use in AFTT (83 Fed. Reg. 57116). This does not comport with NMFS's acknowledgement in the Phase III proposed rule that all five of those factors are not necessary for a stranding to occur (83 Fed. Reg. 11012). Although NMFS and the Navy don't expect beaked whale strandings to occur and beaked whale strandings subsequent to MFA sonar have not been reported in AFTT, NMFS's justification for authorizing beaked whale mortalities under TAP I and Phase II final rules is still valid. That is, NMFS still cannot conclude with certainty the degree to which mitigation measures would eliminate or reduce *the potential* for serious injury or mortality. This is especially true for a species that is cryptic and difficult for researchers, let alone Navy lookouts, to observe visually in order to implement

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<sup>4</sup> The Navy notes in its LOA application that six species of beaked whales are present in the western North Atlantic and three occur regularly in the Gulf of Mexico. Section 4.1.2.5 of the LOA application in addition to research funded by the Navy confirms the presence, and in some cases high numbers, of beaked whales in AFTT. See as well the numerous technical reports at <https://www.navy.marin-species-monitoring.us/reporting/atlantic/>.

<sup>5</sup> NMFS authorized even more mortality takes under the TAP I final rules.

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mitigation measures, and while passive acoustic monitoring could readily detect beaked whales, it is not used by the Navy as part of its mitigation measures involving MFA sonar<sup>6</sup>. Given that the potential for beaked whale mortalities cannot be obviated, the Commission recommends that NMFS authorize at least 10 mortality takes of beaked whales subsequent to MFA sonar use in AFTT for the Phase III final rule, consistent with the AFTT Phase II final rule.

Please contact me if you have questions concerning the Commission's recommendation or rationale.

Sincerely,



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

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<sup>6</sup> See the Commission's [16 April 2018 letter](#) detailing its concerns regarding mitigation effectiveness and the need to require passive acoustic monitoring.