

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

20 January 2009

Mr. P. Michael Payne  
Chief, Permits 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 17 December 2008 proposed rule (73 Fed. Reg. 76578) proposing regulations under section 101(a)(5)(A) of the Marine Mammal Protection Act. The regulations would authorize the U.S. Navy to take six cetacean species incidental to conducting training activities in the Jacksonville Range Complex for a five-year period. Activities covered by the authorization would include surface warfare, mine warfare, amphibious warfare, vessel movement, and small-arms training. The taking of marine mammals incidental to the operation of mid-frequency and other active sonar would not be covered by this authorization.

## RECOMMENDATIONS

The Marine Mammal Commission recommends that the National Marine Fisheries Service—

- defer promulgation of a final rule until it and/or the Navy conducts an independent peer review of the methods used to derive marine mammal density estimates in the NODE report;
- consult with the Navy regarding the possible need to expand the proposed authorization to include additional species that might be taken unexpectedly and a more realistic number of takes for species that occur in groups, including Clymene dolphins, pantropical spotted dolphins, pilot whales, and Risso's dolphins;
- revise section 218.11 of the proposed rule to clarify that the authorized numbers of takes are annual limits that would be applicable over a five-year period; and
- require the Navy to abide by the restrictions specified in the Service's final rule implementing speed restrictions to reduce the risk of ship collisions with right whales (50 C.F.R. § 224.105) in all but emergency situations or where the need for realistic training requires greater speed or maneuverability.

## RATIONALE

The Commission offers the following rationale for those recommendations.

On 11 August 2008 the Marine Mammal Commission provided comments to the Navy on the Draft Environmental Impact Statement/Overseas Environmental Impact Statement prepared by

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the Navy to evaluate its planned training and defense-related research in the Jacksonville Range Complex Operating Area. A copy of that letter is enclosed. Among other things, the Commission noted that the Navy's estimates of risks to marine mammals depended on a regionalized estimate of animal density derived from a 2007 contract report, "Navy OPAREA density estimates (NODE) for the Southeast OPAREAS: VACAPES, CHPT, JAX/CHASN and Southeastern Florida and AUTEK-Andros" (the NODE report). The Commission recommended independent scientific review of the estimation process and deferral of any incidental take authorization under the Marine Mammal Protection Act until such a review had been completed. To our knowledge, no such review has been conducted. Because the estimated risks to marine mammals from the Navy's operations in the Jacksonville Range Complex and other areas in the Atlantic depend so heavily on the conclusions of the NODE report, the Marine Mammal Commission reiterates its recommendation that Service defer promulgation of a final rule until it and/or the Navy can conduct an independent peer review of the methods used to derive marine mammal density estimates in the NODE report.

The Service indicates that 29 marine mammal species are known to or may occur within the Jacksonville Range Complex. Based on species density estimates, environmental parameters (e.g., depth, sea surface temperatures, distance from the shelf break), and proposed mitigation measures, the Navy and the Service concluded that an incidental take authorization is needed for only six of those species—the Atlantic spotted dolphin, bottlenose dolphin, Clymene dolphin, pantropical spotted dolphin, pilot whale, and Risso's dolphin. The Navy has requested, and the Service has proposed, the authorization of a total of 81 takes per year over five years, two of which would be by Level A harassment (injury) and the remainder by Level B harassment (disturbance). Of these, the Service proposes to authorize 58 takes per year of Atlantic spotted dolphins, including both of the requested Level A takes, 15 takes per year of bottlenose dolphins, and the remaining takes distributed among the four other authorized species. The Service concludes that the taking of large whales by ship strikes is possible but that the likelihood of this is very low and that no authorization is needed.

For the most part, the Commission concurs with the Service's conclusions. With the exception of right whales, the anticipated level of taking of marine mammals in the Jacksonville Range Complex is likely to have a negligible impact on the affected species and stocks. That being said, we question whether the proposed authorization would provide the Navy with the needed coverage for all potential takes. By failing to authorize takes for the other 23 species that may occur in the area, the Service is increasing the chance that the Navy's activities will be disrupted unnecessarily if those activities result in any taking of the excluded species. To be clear, the Commission is not encouraging additional takes, but rather a workable authorization that includes all the species that might be taken and that lessens the possibility that Navy operations might be suspended unnecessarily.

Also, the estimated take levels for species that occur in groups or aggregations appear to be unrealistic. The Navy may conduct its operations for several years without taking a member of a schooling species but then, by chance, might take many or all individuals in a group, exceeding authorized take levels. Risso's dolphins, for example, generally travel in groups of a few dozen

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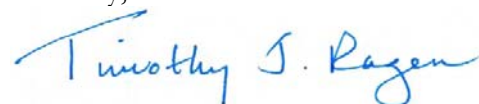
animals. If Navy operations take one Risso's dolphin, then they are likely to take the other individuals in the same group. Thus, the number of proposed takes may be unrealistic, given the life history and gregariousness of some of the species. Here again, the final rule does not allow the Navy any sort of buffer under such circumstances. In fact, the Service's proposed rule recognizes (page 76588) that the detection rate of schools of Atlantic spotted dolphins, bottlenose dolphins, Clymene dolphins, common dolphins, pantropical spotted dolphins, Risso's dolphins, rough-toothed dolphins, and striped dolphins is expected to be relatively high because they occur in large groups. For these reasons, the Marine Mammal Commission recommends that the National Marine Fisheries Service consult with the Navy regarding the possible need to expand the proposed authorization to include additional species that might be taken unexpectedly and a more realistic number of takes for species that occur in groups, including Clymene dolphins, pantropical spotted dolphins, pilot whales, and Risso's dolphins.

Although the preamble to the proposed regulations makes it clear that the numbers of marine mammals that would be authorized are annual limits (see, for example, Table 11), the regulatory provision itself is ambiguous on this point. To avoid any possible confusion, the Marine Mammal Commission recommends that the Service revise section 218.11 of the proposed rule to clarify that the authorized numbers of takes are annual limits that would be applicable over a five-year period.

The proposed mitigation measures include a requirement that vessels proceed at "safe speed" while in transit so that they can avoid collisions with marine mammals or be brought to a stop within an appropriate distance. Nowhere, however, is the term "safe speed" defined. Because of the special need to avoid collisions with right whales, the Marine Mammal Commission recommends that the Service require the Navy to abide by the restrictions specified in the Service's final rule implementing speed restrictions to reduce the risk of ship collisions with right whales (50 C.F.R. § 224.105) in all but emergency situations or where the need for realistic training requires greater speed or maneuverability. For example, the Navy should be able to adhere to the rule's speed limits during all normal vessel transits to and from training sites or other at-sea activities.

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

Sincerely,



Timothy J. Ragen, Ph.D.  
Executive Director

Enclosure