



MARINE MAMMAL COMMISSION

19 October 2010

Mr. P. Michael Payne, Chief
Permits, Conservation, and Education Division
Office of Protected Resources
National Marine Fisheries Service
1315 East-West Highway, Room 13635
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 *Federal Register* notice (75 Fed. Reg. 58365) regarding revision of the U.S. Navy's letter of authorization for missile launch activities on San Nicolas Island, California. On 3 June 2009 the National Marine Fisheries Service issued a final rule governing the incidental taking by harassment of northern elephant seals, California sea lions, and harbor seals during missile launch activities at San Nicolas Island (74 Fed. Reg. 26580). Additionally, on 21 May 2010 the Service issued a renewal of the U.S. Navy's letter of authorization (75 Fed. Reg. 28587), which is valid until 3 June 2011. Following issuance of that letter of authorization, the Navy submitted a revised monitoring plan for its activities at San Nicolas Island, proposing to discontinue targeted monitoring of northern elephant seals but to continue targeted monitoring of California sea lions and harbor seals. In response, the National Marine Fisheries Service is proposing to issue a revised letter of authorization to replace the current authorization that would incorporate the revised monitoring plan. The Commission previously commented on the Navy's request to revise the monitoring plan (see enclosed 30 July 2010 letter).

RECOMMENDATIONS

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

- initiate such a rulemaking or provide adequate justification to support a determination that rulemaking is not required to amend section 216.155 of the regulations to authorize the Navy to discontinue monitoring the potential effects of launches on elephant seals;
- clarify the intent of section 216.158(a)(1) of its regulations and explain why it does not believe that the Navy should be held to the commitment that there would be no substantial modifications to the monitoring program to be carried out during the 12 months covered by the letter of authorization, particularly when it sought renewal of its letter of authorization just months before submitting the request to change the monitoring requirements;
- provide the Commission and the public with the information necessary to evaluate the conclusion that there has been no displacement of pinnipeds from rookeries and haul-out sites in the areas potentially affected by launch activities; and
- develop and implement a monitoring strategy designed to determine whether there are gaps in the available information for assessing possible long-term effects and, if so, to what extent the cumulative effects of repeated launch activities might be displacing pinnipeds.

RATIONALE

The Commission offers the following rationale for its recommendations.

Regulatory considerations

As noted in the Commission's 30 July 2010 letter, , the current letter of authorization for the Navy's missile launch activities at San Nicolas Island was issued pursuant to regulations promulgated under section 101(a)(5)(A) of the Marine Mammal Protection Act. The applicable regulations are codified at 50 C.F.R. § 216.151 *et seq.*, with the monitoring provisions set forth in section 216.155. The preamble to the final rule indicates that "the Navy will continue its land-based monitoring program to assess effects on the three common pinniped species on SNI [San Nicolas Island]: northern elephant seals, harbor seals, and California sea lions." A plain reading of this statement strongly suggests that the Service has committed to require and the Navy is obliged to continue monitoring for each of the three species covered by the incidental taking authorization. To the extent that monitoring of all three species is an element of the applicable regulations, such a requirement cannot be eliminated by modifying the letter of authorization; it can only be changed by a subsequent rulemaking. Further in this regard, the statute specifies that the requirements pertaining to monitoring be set forth in the regulations. In addition, there is nothing in the Act or its legislative history to suggest that a monitoring program prescribed in such regulations would suffice if it covered some, but not all of the marine mammals included in the incidental taking authorization. In light of the statutory requirements and the regulatory history concerning the Navy's incidental take authorizations for launches at San Nicolas Island, the Commission believes that amending the monitoring plan as proposed by the Navy is appropriately considered in a rulemaking, rather than as a modification to a letter of authorization issued under those regulations. The Commission appreciates the National Marine Fisheries Service's recognition that the proposed changes to the monitoring program are significant enough to warrant an opportunity for the public review and comment. However, it continues to believe that these changes merit modification to the underlying regulations. The Marine Mammal Commission therefore recommends that the National Marine Fisheries Service initiate such a rulemaking or provide adequate justification to support a determination that rulemaking is not required to amend section 216.155 of the regulations to authorize the Navy to discontinue monitoring the potential effects of launches on elephant seals.

Even if the Service believes that it retains flexibility to revise the monitoring requirements without amending the regulations, the Commission questions the timing of the Navy's request to alter the monitoring program so soon after obtaining a new letter of authorization and the timing of the Service's consideration of that request. In this regard, section 216.158(a) of the applicable regulations provides that letters of authorization will be reviewed and renewed annually. Moreover, subsection (a)(1) specifies that the applicant for a letter of authorization must indicate to the Service "that there will not be a substantial modification to the described work, mitigation or monitoring undertaken during the upcoming 12 months." Clearly, if the Navy discontinues monitoring one of the three species covered by the taking authorization, it would be substantially modifying the monitoring program undertaken within the period covered by the current letter of authorization. For that reason, such a change should have been raised in the context of seeking the letter of

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authorization. Thus, the Marine Mammal Commission recommends that the National Marine Fisheries Service clarify the intent of section 216.158(a)(1) of its regulations and explain why it does not believe that the Navy should be held to the commitment that there would be no substantial modifications to the monitoring program to be carried out during the 12 months covered by the letter of authorization, particularly when it sought renewal of its letter of authorization just months before submitting the request to change the monitoring requirements.

Monitoring Measures

The Navy and its contractors have been monitoring elephant seal, harbor seal, and California sea lion responses to launches for a number of years. The monitoring has focused on the immediate response to those launches based on the concern that they may disrupt important biological behaviors (e.g., reproduction, nursing of young) of the pinnipeds near launch sites. The monitoring plan also should be structured to detect any longer-term displacement of pinnipeds near the Navy's launch operations. The Commission therefore recommended in its 30 July 2010 letter that the Navy obtain, analyze, and review the existing information regarding potential displacement of pinnipeds from those rookeries and haul-out sites affected by launch activities.

The National Marine Fisheries Service subsequently reviewed its marine mammal surveys at San Nicolas Island for any indications of decreasing trends in pinniped abundance or changes in distribution since the incidental taking of marine mammals was first authorized in August 2001. The *Federal Register* notice states that the surveys did "not indicate any significant changes in abundance or distribution" and, as such, proposes that "the Navy's revised monitoring plan remain as is." However, the Service did not provide the details regarding the reviewed survey data and analyses. Thus, neither the Commission nor the public can comment on the sufficiency of the data and analyses or on the validity of the Service's conclusions. As such, the Marine Mammal Commission recommends that the National Marine Fisheries Service provide the Commission and the public with the information necessary to evaluate the conclusion that there has been no displacement of pinnipeds from rookeries and haul-out sites in the areas potentially affected by launch activities. Further, the Marine Mammal Commission recommends that, if there are gaps in the available information for assessing possible long-term effects, the Service develop and implement a monitoring strategy designed to determine whether and, if so, to what extent, the cumulative effects of repeated launch activities might be displacing pinnipeds.

Please contact me if you have questions concerning the Commission's comments or recommendations.

Sincerely,



Timothy J. Ragen, Ph.D.
Executive Director

Enclosure



MARINE MAMMAL COMMISSION

30 July 2010

Mr. P. Michael Payne, Chief
Permits, Conservation and Education Division
Office of Protected Resources
National Marine Fisheries Service
1315 East-West Highway, Room 13635
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 U.S. Navy's revised draft marine mammal monitoring plan for missile launch activities on San Nicolas Island, California, during 2010 to 2014. On 3 June 2009 the National Marine Fisheries Service issued a final rule governing the incidental taking by harassment of northern elephant seals, California sea lions, and harbor seals during missile launch activities at San Nicolas Island (74 Fed. Reg. 26580). Additionally, on 21 May 2010 the Service issued a renewal of the U.S. Navy's letter of authorization (75 Fed. Reg. 28587), which will remain valid until 3 June 2011. The applicant now seeks to amend its marine mammal monitoring plan by discontinuing targeted monitoring of northern elephant seals but continuing to focus targeted monitoring on California sea lions and harbor seals.

RECOMMENDATIONS

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

- use rulemaking to revise section 216.155 of the regulations to allow the Navy to discontinue monitoring of the potential effects of launches on elephant seals;
- publish a notice of the proposal in the *Federal Register* and provide an opportunity for public review and comment;
- require the U.S. Navy to implement the original monitoring plan for the remaining term of the current letter of authorization;
- consider alternative monitoring schemes only for subsequent letters of authorization and only after rulemaking or other public review procedures;
- require the Navy to consider alternative monitoring schemes for subsequent letters of authorization after completing a rulemaking or other public review procedures; and
- require the Navy to (1) obtain, analyze, and review the existing information regarding potential displacement of pinnipeds from those rookeries and haul-out sites affected by launch activities and (2) if the information is insufficient for that purpose, design and implement the necessary monitoring strategy to determine if, and to what extent, the cumulative effects of launch activities are displacing pinnipeds.

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RATIONALE

Regulatory considerations

The letter of authorization for the Navy's missile launch activities at San Nicolas Island was issued pursuant to regulations promulgated under section 101(a)(5)(A) of the Marine Mammal Protection Act. Section 101(a)(5)(A) requires the Service to prescribe in those regulations "permissible methods of taking ... and other means of effecting the least practicable adverse impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance." Section 101(a)(5)(A) also requires that those regulations prescribe "requirements pertaining to the monitoring and reporting of such taking."

The applicable regulations are codified at 50 C.F.R. § 216.151 *et seq.*, with the monitoring provisions set forth in section 216.155. The monitoring requirements specify that visual land-based monitoring will be used and that three autonomous digital video cameras will be used to monitor haul-out sites during each launch. The regulations do not specify that the cameras will be positioned to document the reactions of each of the three pinniped species likely to be present in the vicinity of the launch site during each launch. However, that is the strong implication contained in the preamble to the final rule, which states that "the Navy will continue its land-based monitoring program to assess effects on the three common pinniped species on SNI [San Nicolas Island]: northern elephant seals, harbor seals, and California sea lions." Under such a reading, the obligation to continue to monitor each of the three species covered by the incidental taking authorization is an element of the regulations and, as such, can only be changed by a subsequent rulemaking. Further in this regard, the statute seems to require that the monitoring requirements set forth in regulations pursuant to section 101(a)(5)(A) include all of the species covered by the taking authorization. It appears that the best interpretation of the statutory and regulatory requirements concerning the Navy's incidental take authorizations for launches at San Nicolas Island supports the conclusion that the monitoring requirements should be set forth by regulation. For that reason, the Commission must question whether a monitoring program would be consistent with that mandate if it did not target all of the species covered by the authorization. The Marine Mammal Commission therefore recommends that the National Marine Fisheries Service use rulemaking to revise section 216.155 of the regulations to allow the Navy to discontinue monitoring of the potential effects of launches on elephant seals.

The discussion in other parts of the preamble to the final rule suggests that the Service has flexibility to revise the monitoring requirements without amending the regulations. For example, the Service indicates that, following submission of the 2010 monitoring report under the initial letter of authorization, it and the Navy will discuss the scope of any additional launch monitoring work under subsequent letters of authorization. The Service also notes that "it may not be necessary to continue all aspects of the monitoring work after [the initial one-year] period." The Service further indicated that "[p]rior to making any changes to the monitoring plan for years two through five," it would provide an opportunity for the Commission and others to review the 2010 monitoring report and comment on any proposed changes. The Commission appreciates the opportunity to comment on the report and the proposed changes to the monitoring protocol. However, it appears that others

have not been given a similar opportunity to comment, such as would be provided by publication of a notice in the *Federal Register*. At a minimum, this broader notice and opportunity for comment seems to be what is envisioned by the regulations. Specifically, section 216.158(b) of the regulations provides that before making “a substantial modification to the described work, mitigation or monitoring undertaken during the upcoming season,” the Service will provide the public with a 30-day period in which to review and comment on such modification. The Commission views the proposal to drop one of the three covered species from the targeted monitoring effort to be a substantive change. Thus, if the Service decides not to undertake the rulemaking recommended by the Commission before changing the monitoring protocol, the Marine Mammal Commission recommends that the National Marine Fisheries Service publish a notice of the proposal in the *Federal Register* and provide an opportunity for public review and comment.

The Commission also questions the timing of the Navy’s request to alter the monitoring program so soon after obtaining a new letter of authorization. In this regard, section 216.158(a) of the regulations provides that letters of authorization will be reviewed and renewed annually. However, subsection (a)(1) specifies that the applicant for a letter of authorization must indicate to the Service “that there will not be a substantial modification to the described work, mitigation or monitoring undertaken during the upcoming 12 months.” Presumably, the Service obtained an assurance from the Navy prior to issuing the current letter of authorization that it would not seek any such modification until the next letter of authorization is considered. For that reason, the Marine Mammal Commission recommends that the National Marine Fisheries Service require the Navy to implement the original monitoring plan for the remaining term of the current letter of authorization. The Marine Mammal Commission further recommends that the National Marine Fisheries Service require the Navy to consider alternative monitoring schemes only for subsequent letters of authorization and only after completing a rulemaking or other public review procedures.

Monitoring Measures

The Navy and its contractors have been monitoring elephant seal, harbor seal, and California sea lion responses to launches for a number of years. The focus of monitoring has been on the immediate response to those launches based on the concern that they may disrupt important biological behaviors (e.g., reproduction, nursing of young) of the seals near launch sites. In retrospect, however, such launches may have another important effect if, over time, they cause displacement of some portion of the seal populations away from their rookeries and haul-out areas near the launch sites. It is not clear whether this second potential effect has been adequately monitored. Indeed, the Commission itself did not raise this point in its latest letter on this matter (8 September 2009). Nonetheless, this is a reasonable concern and one that should be evaluated to ensure that the launches are not having a significant but cryptic effect.

One approach for assessing such displacement would involve evaluating pinniped distributions and trends at the affected and control sites to determine if some portions of the elephant seal, harbor seal, or California sea lion populations are avoiding the affected rookeries and haul-out areas. In the absence of other scientific information, assessing such displacement might require tagging studies or collection of information on trends in abundance and distribution of the

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species of concern. However, a number of marine mammal researchers have worked in this area for many years and the information needed for such an evaluation likely is available.

Based on this concern, the Commission believes it would be useful and important to obtain and analyze the data needed to evaluate habitat use by the species involved and subject those analyses to peer review. Without the necessary scientific information, analyses, and review, the Commission does not believe that the Navy or the Service can conclude with the necessary confidence that launch activities are not displacing individuals from the affected populations. For that reason, the Marine Mammal Commission recommends that the National Marine Fisheries Service require the Navy to (1) obtain, analyze, and review the existing information regarding potential displacement of pinnipeds from those rookeries and haul-out sites affected by launch activities and (2) if the information is insufficient for that purpose, design and implement the necessary monitoring strategy to determine if, and to what extent, the cumulative effects of launch activities are displacing pinnipeds.

Please contact me if you have questions concerning the Commission's comments or recommendations.

Sincerely,

A handwritten signature in blue ink that reads "Timothy J. Ragen". The signature is written in a cursive style with a large, stylized 'T' and 'R'.

Timothy J. Ragen, Ph.D.
Executive Director