



# MARINE MAMMAL COMMISSION

19 November 2009

Mr. P. Michael Payne, Chief  
Permits, Conservation, and Education Division  
Office of Protected Resources  
National Marine Fisheries Service  
1315 East-West Highway  
Silver Spring, MD 20910-3226

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 20 October 2009 *Federal Register* notice (74 Fed. Reg. 53796) proposing to issue regulations under section 101(a)(5)(A) of the Marine Mammal Protection Act. The regulations would govern the taking of marine mammals during Navy exercises within its Mariana Islands Range Complex in the western Pacific Ocean from March 2010 through February 2015. The Commission previously provided recommendations and comments (17 April 2009 letter, enclosed) on the Service's 18 March 2009 *Federal Register* notice (74 Fed. Reg. 11530) inviting comments on whether it should promulgate regulations to authorize and govern the requested taking. The Commission also provided recommendations and comments (16 March 2009 letter, enclosed) to the Navy on its Draft Environmental Impact Statement/Overseas Environmental Impact Statement evaluating the proposed activities, which we requested that the Service consider as it developed its proposed rule.

## RECOMMENDATION

The Marine Mammal Commission recommends that, if the National Marine Fisheries Service proceeds with publication of a final rule to authorize the taking of small numbers of marine mammals incidental to the proposed military training operations, the Service—

- require that any final rule and Letter of Authorization issued under that rule include all marine mammal species that may be taken by Level A or Level B harassment as a result of the proposed activities. In that regard, the Service and/or the Navy should consult with the Fish and Wildlife Service to determine if authorization also is needed to take dugongs, which, according to the proposed rule, could occur within the Mariana Islands Range Complex;
- require the Navy to conduct an external peer review of its marine mammal density estimates, the data upon which those estimates are based, and the manner in which those data are being used;
- require that a sufficient level of monitoring be conducted during all training activities to ensure that marine mammals are not being taken in unanticipated ways and numbers;
- require that, upon its completion, the plan for the Navy's Integrated Comprehensive Monitoring Program be made available for Commission review and comment;
- advise the Navy and specify in the final rule and Letter of Authorization that any and all data that the Navy collects as part of monitoring and reporting requirements established under

- the authorization are essential for documenting compliance with the requirements of the Marine Mammal Protection Act, the incidental take regulations, and the terms and conditions of the Letter of Authorization and, unless subject to national security restrictions, should be considered as public information;
- require that, in the event of the death or serious injury of a marine mammal during activities associated with any of the training exercises or other activities covered by this authorization, those activities be suspended, pending an investigation and determination that further serious injuries or deaths are unlikely or until authorization for such taking has been obtained;
- require that the Navy, in conjunction with the Service, investigate any injury or death of a marine mammal to determine the cause, assess the full impact of the activity or activities (e.g., the total number of animals involved), and determine how activities should be modified to avoid future injuries or deaths. If the death or serious injury involves a marine mammal not included in the authorization for such takes, the Service should allow the activity to proceed only if it has reviewed the circumstances and determined that additional serious injuries or deaths are unlikely or the Navy has obtained authorization for such taking;
- prior to issuing the final regulations, the Service ensure that it can provide oversight of and response to an uncommon stranding event in the Mariana Islands Range Complex Study Area sufficient to meet in full the monitoring and reporting requirements of the Marine Mammal Protection Act;
- work with the Navy to analyze the cumulative effects of adding LFA sonar to the other activities planned for the Mariana Islands Range Complex before using LFA sonar as a component of the proposed training exercises and, if appropriate, add authorization for the use of LFA to the final rule and Letter of Authorization; and
- limit the authorization to avoid Navy operations within the Marianas Trench Marine National Monument to the extent possible. Further, if the Navy must conduct activities within the Monument, the Service include in the final rule and Letter of Authorization a description of the measures that the Navy will adopt to minimize adverse impacts and to comply with the intent of the presidential proclamation establishing the Monument.

## **RATIONALE**

The Service's *Federal Register* notice states that the Navy is requesting authorization to take 27 cetacean species incidental to underwater detonations and the development, testing, and evaluation of weapons systems, vessels, and aircraft. The activities that would be covered by the authorization include vessel movements and aircraft overflights and use of high-frequency sonar, mid-frequency antisubmarine sonar, non-explosive practice munitions, and underwater detonations of high-explosive ordnance. In addition, the Navy is requesting authorization to take by Level A harassment five sperm whales and five pantropical spotted dolphins and by Level A harassment and/or mortality up to 10 individuals from four species of beaked whales over the five-year period. The estimated numbers of marine mammals that could be taken by harassment is based on the assumption that the Navy will implement the proposed monitoring and mitigation measures.

The proposed rule identifies dugongs among the species that could occur within the Mariana Islands Range Complex but notes that that species is managed by the U.S. Fish and Wildlife Service and not considered in the proposed rule. The Marine Mammal Commission therefore recommends that the National Marine Fisheries Service require that any final rule and Letter of Authorization issued under that rule include all marine mammal species that may be taken by Level A or Level B harassment as a result of the proposed activities. In that regard, the Service and/or the Navy should consult with the Fish and Wildlife Service to determine if authorization also is needed to take dugongs, which, according to the proposed rule, could occur within the Mariana Islands Range Complex.

#### Marine Mammal Density Estimation

In its 17 April 2009 letter, the Commission noted that the Navy, in its applications and related documents, generally has done a commendable job of reviewing the existing literature on marine mammal density, distribution, behavior, and habitat use for the areas under consideration. However, the Commission expressed concern that the manner in which the Navy is using that information to form conclusions about density, distribution, behavior, and habitat use has not been subjected to the normal scientific review process. Because risk analyses and take estimates depend on data accuracy and the manner in which data are used, and because data pertinent to cetacean density, distribution, behavior, and habitat use are limited for the Mariana Islands region, the Marine Mammal Commission reiterates its recommendation that the Service require the Navy to conduct an external peer review of its marine mammal density estimates, the data upon which those estimates are based, and the manner in which those data are being used.

#### Monitoring and Mitigation

The proposed rule states that the Navy has submitted a draft monitoring plan for the Mariana Islands Range Complex consisting of focused “studies” to be conducted during the Navy’s “major training exercises” (e.g., “Valiant Shield” and major nearshore explosive events) to assess the impact of training activities (particularly mid-frequency and high-frequency active sonar and underwater explosives) on marine mammals and the effectiveness of the Navy’s current mitigation practices. The Commission supports these monitoring studies and commends the Navy for undertaking them. The Commission notes, however, that, according to the Navy’s monitoring plan, “major exercises may undergo significant schedule changes in reaction to higher-priority commitments and such changes may limit monitoring opportunities ... [or] extreme weather precludes effective sampling.” The plan further states that, in case of such monitoring delay(s), “monitoring will be re-scheduled to the next available opportunity ... [and] ... may have to be made up in the subsequent year.” Although this is not clear in either the monitoring plan or the proposed rule, the Commission assumes that, if monitoring associated with the focused studies cannot take place during a major training exercise, other standard types of monitoring will be conducted for mitigation and documentation purposes. The Service should clarify this in its final rule and Letter of Authorization. To that end, the Marine Mammal Commission recommends that, in any Letter of Authorization issued under the proposed regulations, the National Marine Fisheries Service require

that a sufficient level of monitoring be conducted during all training activities to ensure that marine mammals are not being taken in unanticipated ways and numbers.

Based on the Service's proposed rule and the Navy's September 2009 Draft Mariana Islands Range Complex Monitoring Plan, by the end of 2009 the Navy will have completed a plan for its Integrated Comprehensive Monitoring Program. The program will systematically coordinate, compile, and assimilate data obtained from all Navy range-specific monitoring plans (including that for the Mariana Islands Range Complex) and Navy-funded research and development studies. The plan for this program will be evaluated annually to assess progress and establish goals for the following year. In addition, the results will be compiled and shared with the Service to enable both agencies to assess and adaptively manage the Navy's monitoring effort. Although the Commission supports the Navy's development of this overarching monitoring program, it does not have the information needed to evaluate whether the program will be effective in meeting its goals. Therefore, the Marine Mammal Commission recommends that the Service require that, upon its completion, the plan for the Navy's Integrated Comprehensive Monitoring Program be made available for Commission review and comment.

As a related matter, the Navy's Draft Monitoring Plan for the Mariana Islands Range Complex states that "[a]ll data will be considered "pre-decisional" and proprietary and will be shared among the Navy and NMFS (at a minimum) during the five-year period of the LOA." It is unclear exactly what data the Navy intends to consider pre-decisional and proprietary or whether those pre-decisional data include data from other ranges and exercises. The Service should seek clarification from the Navy on these points. Data obtained during activities conducted pursuant to incidental take regulations and under a Letter of Authorization are essential for documenting compliance with the requirements of the Marine Mammal Protection Act, the incidental take regulations, and the terms and conditions of the Letter of Authorization. Therefore, the Marine Mammal Commission recommends that the National Marine Fisheries Service advise the Navy of this and specify in the final rule and Letter of Authorization that any and all data that the Navy collects as part of monitoring and reporting requirements established under the authorization are considered public information unless access must be limited for national security purposes.

#### Lethal Taking and Serious Injury

The proposed rule requires the Navy to notify the Service immediately, or as soon as clearance procedures allow, if an injured, stranded, or dead marine mammal is found during or shortly after, and in the vicinity of, any Navy training exercise involving mid-frequency active sonar, high-frequency active sonar, or underwater explosive detonations. It appears from the proposed rule and the Service's Draft Stranding Response Plan that the Navy will be required to implement shutdown procedures under the following conditions—

- if an “Uncommon Stranding Event”<sup>1</sup> is reported in the Mariana Islands Range Complex study area during “a major training exercise”<sup>2</sup> and if live cetaceans are involved (i.e., could be exposed to sonar); or
- if the Navy finds an injured or dead marine mammal floating at sea during a major training exercise, in which case it must notify the Service immediately or as soon as operational security considerations allow, and the Service shall advise the Navy whether a modified shutdown is appropriate on a case-by-case basis.

It also appears from the proposed rule that a shutdown will be required if there is evidence that a marine mammal may have been stranded, injured, or killed during underwater detonations, whether or not the detonations are part of a major or non-major training event.

If the Commission’s understanding is correct, it appears that the Service’s proposed shutdown criteria are based on the assumption that if serious injuries or mortalities were to occur, they would occur only during certain exercises (i.e., “major training exercises”) and not during other activities (e.g., unit-level tracking and torpedo antisubmarine warfare exercises—which involve the use of mid-frequency active sonar and occur regularly in the Mariana Islands Range Complex—or even simple vessel transits between areas). The Commission sees no basis for this assumption as it could exclude the need for monitoring and mitigation for the majority of the Navy’s activities in this region. The Commission therefore questions whether such limitations on monitoring and reporting are consistent with the requirements of the Marine Mammal Protection Act. If our understanding is correct, the Service should provide its rationale for making such an assumption and describe how it will ascertain the effects of other Navy activities on marine mammals in the area.

Whether major or not, any training activity should be suspended if it results in the serious injury or death of any species of marine mammal or if a dead or seriously injured marine mammal of any species is found in the vicinity of the Navy’s operations and the death or injury might be attributable to those operations. The Marine Mammal Commission therefore recommends that the regulations, if issued, require that, in the event of the death or serious injury of a marine mammal during activities associated with any of the training exercises or other activities covered by this authorization, those activities be suspended, pending an investigation and determination that further serious injuries or deaths are unlikely or until authorization for such taking has been obtained. The Commission notes that full investigation of such incidents is essential to provide more complete information on potential effects. The Marine Mammal Commission further recommends that the regulations, if issued, require that the Navy, in conjunction with the Service, investigate any injury or

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<sup>1</sup> The Draft Stranding Response Plan defines an “Uncommon Stranding Event” as “Two or more individuals of any cetacean species (not including mother/calf pairs, unless of species of concern listed in next bullet) found dead or live on shore within a two day period and occurring on same shoreline or facing shorelines of different islands; a single individual or mother/calf pair of any of the following marine mammals of concern: beaked whale of any species, *Kogia* sp., Risso’s dolphins, melon-headed whales, pilot whales, humpback whale, sperm whales, blue whales, or sei whales; a group of two or more cetaceans of any species exhibiting indicators of distress.”

<sup>2</sup> The Draft Stranding Response Plan defines a Major Training Exercise as Joint Expeditionary Exercise – 1 event annually, 10 days per event; Joint Multi-strike Group Exercise – 1 event annually, 10 days per event; Marine Air Ground Task Force (amphibious) – up to 4 events annually, 10 days per event.

death of a marine mammal to determine the cause, assess the full impact of the activity or activities (e.g., the total number of animals involved), and determine how activities should be modified to avoid future injuries or deaths. If the death or serious injury involves a marine mammal not included in the authorization for such takes, the Service should allow the activity to proceed only if the Service has reviewed the circumstances and determined that additional serious injuries or deaths are unlikely or the Navy has obtained authorization for such taking.

The Service's Draft Stranding Response Plan for the Mariana Islands Range Complex Study Area, which will be incorporated by reference in the final rule, states that "in the Mariana Islands, available stranding response staff and resources are '*exceedingly limited*'" [emphasis added]. The draft plan states that it "sets forth an ideal NMFS response; however, due to the limited resources, it will not always be possible for NMFS to proceed with all of the indicated objectives." For example, the plan states that "[t]he NMFS regional stranding network will respond to reports of stranded marine mammals in areas where there is geographic coverage by the stranding network, *when feasible*" [emphasis added]. Given the stated limitations and uncertainties regarding the regional stranding network's ability to respond to reports of dead or seriously injured marine mammals found in the vicinity of the Navy's operations, the Commission must question whether the proposed stranding response plan is adequate. The Marine Mammal Commission recommends that, prior to issuing the final regulations, the Service ensure that it can provide oversight of and response to an uncommon stranding event in the Mariana Islands Range Complex Study Area sufficient to meet in full the monitoring and reporting requirements of the Marine Mammal Protection Act.

#### Proposed Use of Low-Frequency Active Sonar

The Service's proposed rule states that, over five years, the Navy plans to conduct three multi-strike group exercises in the Mariana Islands Range Complex Study Area that would include a low-frequency active (LFA) sonar component, but that authorization to take marine mammals incidental to the use of LFA will not be provided under the rule or Letter of Authorization. The Service notes that it has previously analyzed the environmental impacts of the SURTASS LFA system, including the potential for synergistic and cumulative effects with mid-frequency active sonar operation, in a series of Navy environmental impact statements and a 2009 biological opinion, and that it has previously authorized the take of marine mammals incidental to the operation of LFA in the Mariana Islands Range Complex and elsewhere. It is not clear to the Commission how the Navy and Service could analyze the potential cumulative effects of LFA sonar and other activities without a full description of the activities to be conducted under the Mariana Islands Range Complex Study Area or how analyses conducted in previous years could incorporate the latest information on marine mammals in the action area or affected environment. The Marine Mammal Commission therefore recommends that the Service work with the Navy to analyze the cumulative effects of adding LFA sonar to the other activities planned for the Mariana Islands Range Complex before using LFA sonar as a component of the proposed training exercises and, if appropriate, add authorization for the use of LFA to the final rule and Letter of Authorization.

Mr. P. Michael Payne  
19 November 2009  
Page 7

Marianas Trench Marine National Monument

The proposed rule states that a portion of the Mariana Islands Range Complex lies within the Marianas Trench Marine National Monument, and that any of the activities identified under the proposed action could take place within areas included in the Monument where they overlap. The presidential proclamation establishing the Monument indicates that the prohibitions required by the proclamation shall not apply to activities and exercises of the Armed Forces, but it also indicates that the Armed Forces shall ensure, by the adoption of appropriate measures not impairing operations or operational capabilities, that its vessels and aircraft act in a manner consistent, so far as is reasonable and practicable, with the proclamation. The proposed rule does not, but should, describe the measures that the Navy proposes to take to comply with the proclamation. Given the biological and geological significance of the Monument, the Commission believes that it is incumbent on the Service and the Navy to take all measures practicable to minimize potential adverse impacts on the area and its species. The Marine Mammal Commission therefore recommends that the Service limit the authorization to avoid Navy operations within the Marianas Trench Marine National Monument to the extent possible. Further, the Marine Mammal Commission recommends that, if the Navy must conduct activities within the Monument, the Service include in the final rule and Letter of Authorization a description of the measures that the Navy will adopt to minimize adverse impacts and to comply with the intent of the presidential proclamation establishing the Monument.

Please contact me if you or your staff has questions about any of our comments or recommendations.

Sincerely,



Timothy J. Ragen, Ph.D.  
Executive Director

Enclosures