

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

17 April 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 application submitted by the U.S. Navy under section 101(a)(5)(A) of the Marine Mammal Protection Act. The applicant is seeking authorization to take marine mammals incidental to military readiness training operations in the Mariana Islands Range Complex in the western Pacific Ocean over a five-year period. The Commission also has reviewed the National Marine Fisheries 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 previously provided comments to the Navy on its Draft Environmental Impact Statement/Overseas Environmental Impact Statement (DEIS) evaluating the proposed activities, and we ask that the enclosed 16 March 2009 letter to the Navy be considered by the Service as it contemplates publication of a proposed rule.

## RECOMMENDATION

The Marine Mammal Commission recommends that the National Marine Fisheries Service and the Navy ensure that the contemplated rule and any 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. Further, the Marine Mammal Commission recommends that, if the National Marine Fisheries Service proceeds with publication of a proposed rule to authorize the taking of small numbers of marine mammals incidental to the proposed military training operations, the Service—

- clarify whether authorization is needed to take sperm whales and, if so, specify the numbers that can be taken by Level A and Level B harassment under the authorization;
- 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 the Navy to provide additional details concerning its Integrated Comprehensive Monitoring Program, including an estimated time frame for its implementation;
- require the Navy to develop and implement a plan to evaluate the effectiveness of monitoring and mitigation measures before beginning or in conjunction with conducting operations covered by the proposed incidental take authorization;
- condition any proposed rule to require that the Navy suspend an activity if a marine mammal is seriously injured or killed and the injury or death could be associated with the

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

- require the Navy to submit annual reports providing full documentation of methods, results, and interpretation pertaining to all monitoring tasks and the dates and locations of operations, marine mammal sightings, and estimates of the number and nature of potential takes of marine mammals by harassment or in other ways; and
- work with the Navy to develop a database for storing original records of marine mammal interactions, which will provide a basis for evaluating interaction records over long periods of time and large areas.

## **RATIONALE**

The Service's *Federal Register* notice states that the Navy is requesting authorization to take numbers of 28 species of cetaceans 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, aircraft overflights, exercises using non-explosive practice munitions, use of mid-frequency antisubmarine sonar, and underwater detonations of high-explosive ordnance. In general, the Navy is requesting authorization to take marine mammals only by harassment, although it is requesting authorization to take a total of nine beaked whales from four species and one pantropical spotted dolphin by serious injury or mortality over the five-year period that would be covered by the regulations. The estimated number 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 application (p. 22) requests authorization for the annual harassment of 825 sperm whales by Level B harassment and one sperm whale by Level A harassment due to potential exposure to mid-frequency active or high-frequency active sonar. The application notes, however, that "[s]hould consultation under the ESA conclude that the estimated exposures of sperm whales can be avoided using mitigation measures or that the received sound is not likely to adversely affect sperm whales, authorization for the predicted exposures would not be requested under the MMPA." The Service's *Federal Register* does not indicate that the Navy has requested Level A harassment of sperm whales. This may be an oversight unless the Service has determined, based on consultation under the Endangered Species Act or some other review by the agency, that such taking is unlikely. The Marine Mammal Commission recommends that the Service clarify whether it believes that authorization to take sperm whales is needed and, if so, that it specify the numbers authorized to be taken by Level A and Level B harassment.

### Marine Mammal Density Estimation

The Marine Mammal Commission commends the Navy on its review of the existing literature on marine mammal density, distribution, behavior, and habitat use in this and similar documents. However, as noted in the Commission's comments on the Navy's Mariana Islands Range Complex DEIS, the manner in which the literature is used to form conclusions about density, distribution, behavior, and habitat use has not been subjected to the normal scientific review process. Risk analyses and take estimates depend on the accuracy of the data in the Navy's underlying reports. To ensure that the risk analyses and take estimates are accurate, the Marine Mammal Commission again recommends 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 Commission notes that the Navy is developing an Integrated Comprehensive Monitoring Program plan to monitor, mitigate, and assess the effects of its activities over time. As noted in previous letters regarding the Navy's requests for authorization to take marine mammals incidental to other military readiness activities, the Commission supports this effort. However, the Commission has no basis for evaluating whether the program will be effective until the Navy provides details on this program and describes the manner in which it will be implemented. Therefore, the Marine Mammal Commission recommends that the Service require the Navy to provide additional details concerning its Integrated Comprehensive Monitoring Program, including an estimated time frame for its implementation.

At present, the Navy and Service's estimated performance for the proposed monitoring and mitigation measures may not be realistic (i.e., performance may be lower than assumed). The Navy has not undertaken the measures needed to assess the performance of watchstanders or the effectiveness of other mitigation measures. Similarly, the Service appears to have chosen not to hold the Navy responsible for providing such information. The Commission has repeatedly expressed these concerns in its correspondence regarding other Navy training ranges. Once again, the Marine Mammal Commission recommends that the Service require the Navy to develop and implement a plan to evaluate the effectiveness of monitoring and mitigation measures before beginning or in conjunction with conducting operations covered by the proposed incidental take authorization.

### Lethal Taking and Serious Injury

The Navy is requesting authorization to take nine individuals from four species of beaked whales and one pantropical spotted dolphin by serious injury or mortality over five years incidental to the proposed activities. The Marine Mammal Commission recommends that regulations, if issued, require that the Navy, in conjunction with the Service, investigate any injury or death of these species 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 Navy's activities result in the serious injury or death of any other species of

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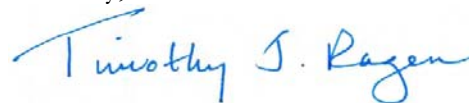
marine mammal, or if a dead or seriously injured marine mammal from any such species is found in the vicinity of the Navy's operations and the death or injury might be attributable to those operations, the Marine Mammal Commission recommends that the Service require these activities to be suspended, pending an investigation and determination that further serious injuries or mortalities are unlikely or until authorization for such taking has been obtained. It should be clear to all interested parties that more information is required to understand the potential effects of sound on marine mammals, and full investigation of such incidents is essential to provide more complete information on potential effects.

#### Reporting and a Long-term Database

The collection, reporting, compiling, and storing of data on marine mammal interactions with Navy operations would provide a source of information that could greatly enhance our understanding of marine mammal ecology (e.g., abundance, distribution, movement patterns) and their vulnerability to various human activities. Further, if the Navy collected similar data during its operations in its other ranges, this information could provide invaluable information about marine mammals throughout U.S. waters. To date, management agencies have been limited in their ability to collect such information. Given the presence of Navy infrastructure (e.g., vessels) and the Navy's level of activity in U.S. waters, such information would be a significant contribution to our understanding of marine mammals and ecosystems. With that in mind, the Marine Mammal Commission recommends that the National Marine Fisheries Service require the Navy to submit annual reports providing full documentation of methods, results, and interpretation pertaining to all monitoring tasks and the dates and locations of operations, marine mammal sightings, and estimates of the number and nature of potential takes of marine mammals by harassment or in other ways. The Marine Mammal Commission also recommends that the Service work with the Navy to develop a database for storing original records of marine mammal interactions, which will provide a basis for evaluating interaction records over long periods and large areas.

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

Enclosure