



MARINE MAMMAL COMMISSION

17 January 2012

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

Mr. Donald Schregardus, DASNE
Department of the Navy
1000 Navy Pentagon, Rm. BF986
Washington, DC 20350-1000

Dear Messrs. Payne and Schregardus:

On 7 and 14 December 2011 the Marine Mammal Commission submitted comments on proposed amendments to letters of authorization issued to the Navy under section 101(a)(5)(A) of the Marine Mammal Protection Act. The 7 December comments pertained to authorizations for taking marine mammals incidental to military training operations conducted in the Virginia Capes, Cherry Point, and Jacksonville Range Complexes. The 14 December comments pertained to the authorization for the Hawaii Range Complex.

The Commission made an error in its comment letters, wishes to apologize to the Service and the Navy for it, and seeks to set the record straight. In essence, the Commission mistakenly concluded that the Navy had failed to comply with the terms and conditions of its past letters of authorization with respect to the use of time-delay firing devices.

On 4 March 2011 the Navy conducted a mine neutralization training exercise off Southern California. The exercise involved a time-delay firing device and likely resulted in the death of five dolphins. The Navy responded quickly and appropriately by evaluating similar training exercises occurring at the Virginia Capes, Cherry Point, and Jacksonville Range Complexes. During that evaluation, the Navy realized that time-delay firing devices were being used at those range complexes and informed the Service that “less than 3% of all MINEX events would not use TDFD [time-delay firing devices].” In June 2011 the National Marine Fisheries Service issued to the Navy new letters of authorization for those three range complexes. The letters explicitly prohibited the use of those devices.

In applications dated June 2011 the Navy requested amendments to allow the use of time-delay firing devices in its exercises at those three range complexes. In its related request for comments, the Service stated that the Navy’s current letters of authorization prohibit the devices. The Commission mistakenly assumed that the “current” letters were those in force on 4 March 2011 when, in fact, the Service had issued new letters in June. As a result of this erroneous assumption, the Commission recommended that the National Marine Fisheries Service and the Navy—

- investigate the underlying cause of the high rate of non-compliance with the respective letters of authorization and determine why it was not detected earlier; and

- jointly review the full scope of the applicable regulations and letters of authorization to ensure that the responsible Navy officials are aware of, understand, and are in compliance with all mitigation, monitoring, and reporting requirements.

Had the Commission reviewed the Navy's 2009 and 2010 letters of authorization for the three range complexes, it should have noticed that they did not specifically prohibit the use of time-delay devices as did the letters issued in June 2011. Recognizing its error, the Commission no longer believes that the Navy failed to comply with the terms and conditions of the applicable letters of authorization. Therefore, the Marine Mammal Commission retracts its recommendations that the Service and the Navy investigate the underlying cause of the alleged non-compliance and the recommendations suggesting a review of compliance with the full scope of the applicable regulations and letters of authorization.

The Commission accepts full responsibility for its error and will endeavor to avoid making similar mistakes in the future. While making no excuses for its error, the Commission requests that the Navy in its applications and the Service in its *Federal Register* notices explicitly describe all aspects of the activities that the Commission and the public should be aware of to make well informed comments. For example, the original applications (i.e., April 2008 for Virginia Capes and Jacksonville Range Complexes and June 2008 for Cherry Point Range Complex) submitted by the Navy made no reference to the use of time-delay devices or to the fact that once charges are set, detonations cannot be stopped. In fact, the applications for those three range complexes all stated that “[t]he initiation of the [mine neutralization] charge is controlled remotely by EOD [Explosive Ordnance Disposal] personnel.” Likewise, there is no indication in either the proposed or final incidental take regulations for those range complexes that time-delay firing devices would be used. In fact, some indicate the opposite. For example, the final rule for the Cherry Point Range Complex states that—

[Explosive Ordnance Disposal (EOD) Divers] typically deploy from a ship or small boat to relocate and neutralize mines initially located by another source, such as an MCM or coastal mine hunter MHC class ship or an MH-53 or MH-60 helicopter. The EOD divers set an explosive charge on a floating or underwater mine which they initiate remotely after clearing the area.

As such, the authorization to use these devices, or to take marine mammals incidental to their use, is not as explicit as it might be. If one takes the view that an application forms an integral part of the authorization, then it follows that the authorization only allows the taking of marine mammals incidental to the activities described in the application unless the applicable regulations or letters of authorization specify otherwise. For this reason, it is important that applicants seeking letters of authorization provide clear, appropriately detailed descriptions of the activities in which they plan to engage. To the extent that there are material changes in the planned activities, that should be brought to the attention of the Service and any needed changes reflected in the applicable regulations or letters of authorization. Although it may not always be clear what level of detail should be provided in an application, this incident has underscored the need for a clear description not only of the weight of the charges that would be used, but also the manner of detonating them.

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For its part, the Commission made an incorrect assumption and, in the future, will make a greater effort to consult with the Service and, as appropriate, the action agency to resolve, or at least better understand, anomalies that it observes before making formal recommendations.

Please contact me if you would like to discuss this matter further. The Commission appreciates the opportunity to work with the Service and Navy on such matters.

Sincerely,

A handwritten signature in blue ink that reads "Timothy J. Ragen". The signature is written in a cursive style with a long horizontal stroke at the beginning.

Timothy J. Ragen, Ph.D.
Executive Director