

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

28 May 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 seeking authorization to take marine mammals incidental to military readiness training operations in the Gulf of Mexico Range Complex in the northern Gulf of Mexico over a five-year period. The Commission also has reviewed the National Marine Fisheries Service's 28 April 2009 *Federal Register* notice (74 Fed. Reg. 19206) inviting comments on whether to 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 February 2009 letter to the Navy be considered by the Service as it contemplates a proposed rule.

RECOMMENDATION

The Marine Mammal Commission recommends that, if the National Marine Fisheries Service decides to publish a proposed rule to authorize the taking of marine mammals incidental to the proposed military training operations, the Service—

- (1) correct the discrepancy between its *Federal Register* notice and the Navy's application addendum regarding the numbers of animals requested to be taken incidental to the proposed activities; and
- (2) 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 were used for that purpose;
 - provide additional details concerning its Integrated Comprehensive Monitoring Program, including an estimated time frame for its implementation;
 - 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;
 - implement a minimum 60-minute waiting period when deep-diving species (e.g., sperm and beaked whales) or species that cannot be identified by watchstanders are observed within or are about to enter a safety zone;
 - 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 injury or death should be investigated 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; and

- work with the National Marine Fisheries Service 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 planned training operations would expose 18 cetacean species that occur in or near the Navy's Gulf of Mexico Range Complex to pressures from underwater detonations and to taking incidental to surface warfare training events involving the use of explosive ordnance, including air-to-surface bombing exercises and surface-to-surface gunnery exercises that occur at sea.

Species and Numbers of Animals Requested

Citing the table on page 6-17 of the Navy's application, the Service's *Federal Register* notice states that the applicant is requesting authorization to take nine species of cetaceans annually by Level B harassment (i.e., temporary threshold shift and/or behavioral disturbance) and one pantropical spotted and one spinner dolphin by Level A harassment (i.e., injury from permanent threshold shift). However, Table 23A on page 7 of the Navy's addendum to its application indicates that the Navy is requesting authorization to take 18 species of cetaceans—16 by level B harassment and 2 (one pantropical spotted and one spinner dolphin) by Level A harassment. The Marine Mammal Commission recommends that the Service correct this discrepancy before issuing the proposed rule.

Marine Mammal Density Estimation

Although the Navy has done an admirable job of reviewing the existing literature on marine mammal density, distribution, behavior, and habitat use in the documents it has prepared for this and similar authorization requests, the Marine Mammal Commission continues to be concerned that the manner in which the information is being used to form conclusions has not been subjected to the normal scientific review process. As the Commission has noted in letters regarding other Navy requests for authorization to take marine mammals incidental to military readiness activities, 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 National Marine Fisheries 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 application states that the Navy is developing an Integrated Comprehensive Monitoring Program to monitor, mitigate, and assess the effects of its activities over time. As noted in Commission letters regarding other Navy authorization requests, it supports this effort. However, the Commission has no basis for evaluating whether the program will be effective until the Navy describes this program and the manner in which it will be implemented. Thus, a more detailed description is needed. Therefore, the Marine Mammal Commission recommends that the National Marine Fisheries Service require the Navy to provide additional details concerning its Integrated Comprehensive Monitoring Program, including an estimated time frame for its implementation.

As a related matter, the Commission continues to be concerned that, at present, the Navy and Service's estimated performance for the proposed monitoring and mitigation measures may not be realistic (i.e., the actual performance may be lower than anticipated). The Navy's application states that one of the primary goals of its Integrated Comprehensive Monitoring Program is to assess the effectiveness of its marine species mitigation efforts. However, as we have noted in previous letters, the Integrated Comprehensive Monitoring Program will be useful for determining and minimizing impacts only if the various monitoring and mitigation measures incorporated therein are, in fact, effective (i.e., their performance has been tested and validated). The Commission believes that (1) the implied efficacy of the Navy's monitoring and mitigation measures is currently over-estimated; (2) absent an evaluation by the Navy of its monitoring and mitigation measures, an level of uncertainty will continue to exist about the effects of those activities, and (3) the Navy is fully capable of conducting the required testing and validation. In the April 2009 addendum to the application, the Navy states that it will include in its annual reports to the Service an evaluation (based on data gathered during all military training exercises) of the effectiveness of mitigation measures designed to avoid exposing marine mammals to mid-frequency sonar and will identify the specific observations that support any conclusions it reaches about the effectiveness of the mitigation. The Commission supports these efforts, and the Marine Mammal Commission reiterates its recommendation that the National Marine Fisheries 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.

The Commission further notes that the Navy's DEIS for the proposed activities states that the Navy has extended the waiting period from 30 to 45 minutes when deep-diving species (e.g., sperm and beaked whales) or species that cannot be identified by watchstanders are observed within or are about to enter a safety zone. Although this is a step in the right direction, the Marine Mammal Commission continues to recommend that the Navy be required to implement a 60-minute waiting period to better ensure the safety of deep-diving species.

Lethal Taking and Serious Injury

The Navy is requesting authorization to take one pantropical spotted dolphin and one spinner dolphin by serious injury (i.e., permanent threshold shift). The Marine Mammal Commission

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recommends that the rule, if issued, require suspension of the Navy's activities if a marine mammal is seriously injured or killed and the injury or death could be associated with those activities. The injury or death should be investigated 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. Full investigation of such incidents is essential to provide information on potential effects of sound on marine mammals.

Reporting and a Long-term Database

In its addendum to the application, the Navy states that, as part of its reporting program, it will submit an annual monitoring plan report and an annual exercise report containing information on (a) each military training exercise, (b) individual marine mammal sightings, and (c) the effectiveness of mitigation measures. The Navy also states that data collected under the Gulf of Mexico Range Complex monitoring plan will be added to the Navy's analysis of monitoring data from other Navy range complexes via the Integrated Comprehensive Monitoring Program framework.

The Commission is pleased that this information will be provided to the Service. As the Commission has noted in past letters regarding the Navy's activities, the collection, reporting, compiling, and storing of data on marine mammal interactions with Navy operations could greatly enhance our understanding of marine mammals (e.g., abundance, distribution, movement patterns, and their vulnerability to various human activities). Further, the Navy's collection of similar data during its operations in its other ranges 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 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.

Please contact me if you or your staff has questions about any of our 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 prominent initial "T".

Timothy J. Ragen, Ph.D.
Executive Director

Enclosure