

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

20 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

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 March 2009 *Federal Register* notice (74 Fed. Reg. 11899) proposing to issue regulations under section 101(a)(5)(A) of the Marine Mammal Protection Act. The regulations would authorize the U.S. Navy, Naval Air Weapons Station, to take three species of marine mammals by Level B harassment incidental to target and missile launch activities in the vicinity of San Nicolas Island, California, over five years. The Marine Mammal Commission previously provided comments in response to the Service's 16 September 2008 *Federal Register* notice (73 Fed. Reg. 53408) that it was considering development of regulations to govern Navy activities at San Nicolas Island (see 10 October 2008 letter, enclosed and incorporated by reference).

RECOMMENDATIONS

The Marine Mammal Commission recommends that the National Marine Fisheries Service adopt a general policy of providing a 60-day comment period for all proposed regulations issued under section 101(a)(5)(A), and in no case less than a 45-day comment period, absent a showing of good cause that such a comment period is impractical, unnecessary, or contrary to the public interest, as provided for under section 553(b)(3)(B) of the Administrative Procedure Act.

With regard to the content of the proposed rule, the Marine Mammal Commission recommends that the National Marine Fisheries Service—

- make the Navy's interim report on 2010 monitoring activities, which is called for under the proposed rule, available to the Marine Mammal Commission and others for review and comment before authorizing any changes to the monitoring program;
- require the Navy to investigate any injury or death of a marine mammal if the animal's death could be associated with the Navy's activities to determine the cause, assess the full impact of the activity, determine how the activity should be modified to avoid future injuries or deaths, and ascertain if additional taking authority is needed; and
- require the Navy to halt an activity if a marine mammal species other than those covered by the authorization is observed within the operating area.

RATIONALE

The Commission offers the following rationale for its recommendations.

Public Comment Periods for Proposed Incidental Take Rules

It has become fairly standard for the Service to provide a comment period of only 30 days, or less, on proposed rules to authorize the incidental taking of marine mammals under section 101(a)(5)(A) of the Marine Mammal Protection Act. This has become increasingly problematic as the number and frequency of requests have grown, the complexity and geographic scope of some requests have expanded, and the size of applications and related materials has increased. For example, the Commission and other interested parties are currently reviewing three separate incidental take requests from the Navy—the Naval Air Weapons Station, the Cherry Point Range Complex, and the Mariana Islands Range Complex. Combined, these three applications and associated materials comprise more than 700 pages (not including documents prepared under the National Environmental Policy Act, which run hundreds of pages more), include a considerable range of naval operations, and involve diverse assemblages of marine mammals occupying very different ecosystems. In short, it is becoming increasingly difficult for reviewers to examine and digest the volume of material presented, evaluate the information with regard to the applicable statutory standards, conduct and coordinate necessary in-house consultation, and formulate comments and recommendations within the prescribed time frames.

As recommended in its recent comment letter on proposed incidental take regulations for the Cherry Point Range Complex, the Marine Mammal Commission believes that the Service should adopt a generally applicable minimum comment period for proposed rulemakings. In fact, Executive Order 12866 requires that agencies provide a “meaningful opportunity to comment on any proposed regulation, which in most cases should include a comment period of not less than 60 days.” As a point of comparison, agencies are statutorily mandated to provide a minimum 30-day comment period for incidental harassment authorizations under section 101(a)(5)(D). Rulemakings to promulgate incidental take regulations are generally more complex, can authorize lethal taking, and remain in force longer than incidental harassment authorizations. Accordingly, the Marine Mammal Commission recommends that the National Marine Fisheries Service adopt a policy to provide a 60-day comment period for all proposed regulations issued under section 101(a)(5)(A), and in no case less than a 45-day comment period, absent a showing of good cause that such a comment period is impractical, unnecessary, or contrary to the public interest, as provided for under section 553(b)(3)(B) of the Administrative Procedure Act.

Content of the Proposed Rule

In its 10 October 2008 letter, the Commission recommended that the Service publish proposed regulations to authorize the taking of marine mammals incidental to the Navy’s activities at San Nicolas Island, provided that appropriate and effective mitigation and monitoring measures are incorporated in the regulations. The Commission supports the mitigation and monitoring

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measures set forth in the proposed rule, particularly the Navy's proposal to use new equipment that will enable it to obtain video during night launches for the airborne laser system.

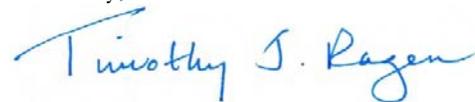
The preamble to the proposed rule notes that the proposed 2009–2010 launch program will involve the eighth year of formal visual and acoustic monitoring of Navy launches from San Nicolas Island. According to the discussion in the preamble, in 2010 the Navy will submit an interim report on the first phase of monitoring under the proposed regulations. Based on that review, the Service and the Navy intend to determine whether some biological or acoustic parameters have been sufficiently documented to support discontinuing some aspects of the monitoring program. Because monitoring of such parameters is of direct interest to the Commission and to the public, and directly relevant to the question of whether potentially adverse effects occur and are detected, the Marine Mammal Commission recommends that the Service make this report available to the Commission and others for review and comment before authorizing any changes to the monitoring program.

Responding to Lethal Taking and Serious Injury

The Marine Mammal Commission recommends that the rule, if issued, require the Navy to investigate any injury or death that appears to be related to the proposed activities, to determine the cause, assess the full impact of the activity, and determine how the activity should be modified to avoid future injuries or deaths. 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 these potential effects and to determine if authorization for taking other than by Level B harassment is needed. Further, the Navy has requested to take three species of marine mammals only, but this area is rich with marine mammals, including both cetaceans and pinnipeds. As that is the case, the Marine Mammal Commission recommends that the National Marine Fisheries Service require the Navy to halt an activity if a marine mammal species other than those covered by the authorization is observed within the operating area or inadvertently taken.

Please contact me if you have questions concerning any of these comments or recommendations.

Sincerely,



Timothy J. Ragen, Ph.D.
Executive Director

Enclosure