



MARINE MAMMAL COMMISSION

27 June 2011

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 26 May 2011 interim final rule (75 Fed. Reg. 30552) amending regulations governing the taking of marine mammals incidental to military training operations conducted in the Virginia Capes and Jacksonville Range Complexes issued under section 101(a)(5)(A) of the Marine Mammal Protection Act. Those regulations authorize the taking of marine mammals by Level A and B harassment and by accidental mortality during the five-year period from June 2009 to June 2014. The Service requested comments on the interim final rule after-the-fact.

RECOMMENDATION

The Marine Mammal Commission recommends that the National Marine Fisheries Service take all steps possible to avoid invoking the good cause exception for future rulemakings under similar circumstances.

RATIONALE

The Navy is authorized to take marine mammals incidental to specified military training operations off the east coast of the United States. All takes occur incidental to the development, testing, and evaluation of weapons systems, underwater detonations, and the operation of vessels and aircraft. The activities covered by the regulations include the use of explosive and non-explosive practice munitions and high-explosive underwater detonations. The current regulations quantify the specific number of training activities and locations involving underwater detonations that would occur during the 5-year period and specify that marine mammal takes are authorized only in a letter of authorization and when incidental to the types and numbers of training activities and explosives and at the locations described therein. The original regulations did not expressly allow for deviation from these precise types and numbers of training activities and explosives, even if the total number of takes remained within the analyzed and authorized limits. Since issuance of those regulations, the Navy realized that their evolving training programs necessitate greater flexibility in the types and numbers of training activities and explosives. To increase flexibility, the Service modified the language in the regulations to allow for inter-annual variability in the types and numbers of training activities and explosives that can be authorized in each annual letter of authorization, provided it does not result in exceeding the originally authorized number of takes incidental to the activities and the taking does not result in more than a negligible impact on the affected species or stocks. This

more flexible language also was included in subsequently issued regulations authorizing takes of marine mammals at other Navy Range Complexes.

The National Marine Fisheries Service amended the applicable incidental take regulations on an interim basis without prior public notice or opportunity for public comment. As noted by the Service, the Administrative Procedure Act allows for a waiver of prior notice and comment when the agency finds “for good cause” that these procedures are “impracticable, unnecessary, or contrary to the public interest” (5 U.S.C. § 553(b)(3)(B)). In this case, the Service determined that delaying changes to the regulations and delaying the effective date of those changes were both impracticable and contrary to the public interest because the Navy has “a compelling need to continue its currently on-going military readiness and testing activities with the specific sound sources at issue without interruption.”

The good cause exception has been interpreted very narrowly by the courts (see, e.g., *Union of Concerned Scientists v. Nuclear Regulatory Commission*, 711 F.2d 370, 382 (D.C. Cir.1983)) and generally it is limited to emergency situations. In this case, the Navy identified the difficulty with the 2009 regulations shortly after those regulations were promulgated. In fact, the Navy began seeking more flexible regulations along the lines of those provided in the interim final rule no later than 19 October 2010, the publication date for the proposed incidental take regulations for the Gulf of Alaska Temporary Maritime Activities Area. Furthermore, in this particular instance, the Navy requested changes to the regulations for the Virginia Capes and Jacksonville Range Complexes on 19 January 2011, more than four months before publication of the interim final rule by the Service. The Commission does not doubt that there is an important public interest in having a well-prepared military. Nevertheless, it seems that with sufficient foresight on the part of the agencies and quicker processing of the Navy’s amendment request once it was received, it would have been possible to avoid the emergency situation that prompted the Service to invoke the good cause exception. Providing a full opportunity for the public to participate in the rulemaking process before regulatory changes are adopted also furthers an important public interest, one that should not be abridged lightly. It is not clear what steps can be taken to remedy this situation in this particular case because the rule is already in place and comments are being accepted. However, for future rulemakings, the Marine Mammal Commission recommends that the Service take all steps possible to avoid invoking the good cause exception under similar circumstances.

In addition, it would be useful for the Service to provide a more thorough explanation of its basis for invoking the good cause exception. In its *Federal Register* notice, the Service suggests that Navy training exercises would have been interrupted (i.e., halted) absent the issuance of the interim final rule. However, those exercises could have continued in accordance with the terms of the 2009 rule and a new letter of authorization issued thereunder. Thus, the Service should have compared what activities the Navy could have conducted under the original rule against those allowed under the revised rule and explained why allowing that difference to persist for an additional two or three months (i.e., the time that providing a public comment period and allowing a 30-day post-amendment cooling off period would have taken) meets the requirements of the good cause exception. This should be discussed in the final rule.

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

Sincerely,

A handwritten signature in cursive script that reads "Michael L. Gordin" followed by a small "for" written in the same style.

Timothy J. Ragen, Ph.D.
Executive Director