

(d) A weighted scoring system appropriate for the circumstances of the individual contract requirement should be developed. In this system, each evaluation factor (e.g., technical, schedule, cost control) is assigned a specific percentage weighting with the cumulative weightings of all factors totaling 100. During the award fee evaluation, each factor is scored from 0–100 according to the ratings defined in 1816.405–275(b). The numerical score for each factor is then multiplied by the weighting for that factor to determine the weighted score. For example, if the technical factor has a weighting of 60 percent and the numerical score for that factor is 80, the weighted technical score is 48 (80 × 60 percent). The weighted scores for each evaluation factor are then added to determine the total award fee score.

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 216

[Docket No. 110121052–1045–02]

RIN 0648–BA67

#### Taking and Importing Marine Mammals: U.S. Navy Training in the Hawaii Range Complex; U.S. Navy Training in the Southern California Range Complex; and U.S. Navy's Atlantic Fleet Active Sonar Training

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.

**ACTION:** Interim final rule; request for comments and issuance of letters of authorization.

**SUMMARY:** In January 2009, pursuant to the Marine Mammal Protection Act (MMPA), NMFS issued three 5-year final regulations to govern the unintentional taking of marine mammals incidental to Navy training and associated activities conducted in the Hawaii Range Complex (HRC), the Southern California Range Complex (SOCAL Range Complex), and the Atlantic Fleet Active Sonar Training (AFAST) Study Area. These regulations, which allow for the issuance of “Letters of Authorization” (LOAs) for the incidental take of marine mammals during the specified activities and described timeframes, prescribe the permissible methods of taking and other

means of effecting the least practicable adverse impact on marine mammal species or stocks and their habitat, as well as requirements pertaining to the monitoring and reporting of such taking.

These rules quantify the specific amounts of individual sound source use that will occur over the course of the 5-year rules, and indicate that marine mammal take may only be authorized in an LOA incidental to the source types and amounts described. Specifically, no language was initially included expressly allowing for deviation from those precise levels of source use if the total number of takes remain within the analyzed and authorized limits. Since the issuance of the 2009 rules, the Navy realized that their evolving training programs, which are linked to real world events, necessitate greater flexibility in the types and amounts of sound sources that they use. In response to this need, when the Navy requested incidental take authorizations for other areas (e.g., the Mariana Islands and the Northwest Training Range Complexes), NMFS included language explicitly allowing for greater flexibility. NMFS has, through this interim final rule, amended the HRC, SOCAL Range Complex, and AFAST regulations to explicitly allow for greater flexibility in the types and amount of sound sources that they use.

NMFS has issued new LOAs for each of these actions, which supersede those issued in January 2011, and which authorize the Navy to take marine mammals incidental to their planned training in 2011, and reflect the greater flexibility addressed in this amendment. The take authorized in these LOAs does not exceed that analyzed and allowed by the original 2009 final rules.

**DATES:** Effective on February 7, 2011. Comments and information must be received no later than March 10, 2011.

**ADDRESSES:** You may submit comments, identified by 0648–BA67, by any one of the following methods:

- *Electronic Submissions:* Submit all electronic public comments via the Federal eRulemaking Portal <http://www.regulations.gov>.
- Hand delivery or mailing of paper, disk, or CD–ROM comments should be addressed to Michael Payne, Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910–3225.

*Instructions:* All comments received are a part of the public record and will generally be posted to <http://www.regulations.gov> without change. All Personal Identifying Information (for

example, name, address, *etc.*) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or otherwise sensitive or protected information.

NMFS will accept anonymous comments (enter N/A in the required fields if you wish to remain anonymous). Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only.

A copy of the Navy's applications, NMFS' Records of Decision (RODs), NMFS' proposed and final rules and subsequent LOAs, and other documents cited herein may be obtained by writing to Michael Payne, Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910–3225 or by telephone via the contact listed here (*see FOR FURTHER INFORMATION CONTACT*).

**FOR FURTHER INFORMATION CONTACT:** Jolie Harrison, Office of Protected Resources, NMFS, (301) 713–2289, ext. 166.

#### SUPPLEMENTARY INFORMATION:

##### Background

Sections 101(a)(5)(A) and (D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (Secretary) to allow, upon request, the incidental, but not intentional taking of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) during periods of not more than five consecutive years each if certain findings are made and regulations are issued or, if the taking is limited to harassment and of no more than 1 year, to issue a notice of proposed authorization for public review.

Authorization shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses, and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such taking are set forth.

NMFS has defined “negligible impact” in 50 CFR 216.103 as:

An impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.

The National Defense Authorization Act (NDAA) (Pub. L. 108–136) removed the “small numbers” and “specified geographical region” limitations, and

amended the definition of “harassment” as it applies to a “military readiness activity” to read as follows (section 3(18)(B) of the MMPA):

(i) Any act that injures or has the significant potential to injure a marine mammal or marine mammal stock in the wild [Level A Harassment]; or (ii) any act that disturbs or is likely to disturb a marine mammal or marine mammal stock in the wild by causing disruption of natural behavioral patterns, including, but not limited to, migration, surfacing, nursing, breeding, feeding, or sheltering, to a point where such behavioral patterns are abandoned or significantly altered [Level B Harassment].

### Summary of the Modification

On January 12, 2009, NMFS issued 5-year regulations governing the taking of marine mammals incidental to training activities conducted in HRC (74 FR 1455). On January 21, 2009, NMFS issued 5-year regulations governing the taking of marine mammals incidental to training, maintenance, and research, development, testing and evaluation (RDT&E) activities conducted in the SOCAL Range Complex (74 FR 3881). On January 27, 2009, NMFS issued 5-year regulations governing the taking of marine mammals incidental to training, maintenance, and RDT&E activities conducted in the AFAST Study Area (74 FR 4843).

The HRC, SOCAL Range Complex, and AFAST regulations allow for the issuance of LOAs that authorize the incidental take of marine mammals during the specified activities and described timeframes, prescribe the permissible methods of taking and other means of effecting the least practicable adverse impact on marine mammal species or stocks and their habitat, as well as requirements pertaining to the monitoring and reporting of such taking. These regulations were drafted in such a way that the Navy’s specified activities were strictly quantified by the amounts of each type of sound source utilized (*e.g.*, hours, numbers of sonobuoys or explosive exercises) over the course of the 5-year regulations.

After the issuance of the 2009 rules, the Navy realized that their evolving training programs, which are linked to real world events, necessitate greater flexibility in both the types and amounts of sound sources that they use.

Regarding the types of sources for which incidental take is authorized, in some cases the Navy’s HRC, SOCAL Range Complex, and AFAST rules identified the most representative or highest power source to represent a group of known similar sources. Additionally, the Navy regularly modifies or develops new technologies,

which often affect the way that sound sources are similar to, but not exactly the same as, existing sources. In this modification to these three final rules, we have increased the flexibility of the Navy’s takings prescriptions by inserting language that will explicitly allow for authorization of take incidental to the previously identified specified sound sources or “similar sources” (with similar characteristics that do not change any of the underlying analyses) and, in the case of HRC, by adding one specific source type to the authorization, provided that the implementation of these changes in annual LOAs does not result in exceeding the incidental take analyzed and identified in the final rules.

Regarding amounts of sound source use, the three regulations only allow for the authorization of take incidental to a 5-yr maximum amount of use for each specific sound source, even though in most cases our effects analyses do not differentiate the impacts from the majority of the different types of sources. Specifically, although some sonar sources are louder or generate more acoustic energy in a given amount of time, which results in more marine mammal takes, we authorize total takes but do not differentiate between the individual takes that result from one source versus another. In this modification to these three final rules, we increase flexibility by including language that allows for inter-annual variability in the amount of source use identified in each annual LOA (*i.e.*, one year the Navy could use a lot of one source, and little of another, and the next year those amounts could be reversed), provided it does not result in exceeding the total level of incidental take analyzed and identified in the final rules, and the taking does not result in more than a negligible impact on affected species or stocks. Language of this nature was included in final regulations governing the authorization of take incidental to the Navy’s training activities in the Mariana Islands and Northwest Training Range Complexes, which were issued in 2010.

As indicated above, these regulatory amendments do not change the analyses of marine mammal impacts conducted in the original final rules. This fact is assured and illustrated through: (1) The Navy’s annual submission of LOA applications for each area, which include take estimates specific to the upcoming the year’s activities (*i.e.*, sound source use); (2) their subsequent annual submission of classified exercise reports, which accurately report the specific amount of use for each sound source over the course of the previous

year; and (3) their annual submission of monitoring reports, which describe observed responses of marine mammals to Navy sound sources collected via visual, passive acoustic, or tagging methods. Together, these submissions allow NMFS to accurately predict and track the Navy’s activities to ensure that both NMFS’ annual LOAs, and the impacts of the Navy’s activities on marine mammals, remain within what is analyzed and allowed by the HRC, SOCAL, and AFAST 5-year regulations.

### Classification

Pursuant to the procedures established to implement section 6 of Executive Order 12866, the Office of Management and Budget has determined that this final rule is not significant.

Pursuant to 5 U.S.C. 553, there is good cause to waive prior notice and an opportunity for public comment on this action, as notice and comment would be impracticable and contrary to the public interest. The 2009 AFAST, SOCAL, and HRC Final Rules established a framework whereby a total number of marine mammals, by species, could be taken incidental to certain military readiness activities during the 5-year period. These rules also enumerated levels of activity for each individual sound source, but did not include language expressly authorizing deviation from those precise levels if the total number of takes remained within authorized limits. Although the Navy used the best available information and professional judgment to estimate the level of individual activities planned for the ranges, evolving unforeseen real world requirements, and the evolving training and readiness tactics and procedures needed to meet those requirements, necessitate annual flexibility to offset increases in some activities from decreases in others. The Navy requires the flexibility to increase the number of hours of use for specific sound sources, and these regulations modify the AFAST, SOCAL, and HRC Final Rules to insert language codifying that flexibility.

The Navy has a compelling need to continue military readiness and testing activities with the specific sound sources at issue without interruption. In 10 U.S.C. 5062, Congress mandated that the Chief of Naval Operations (CNO) man, organize, train, and equip all Naval forces for combat. To accomplish this, naval commands adhere to the Fleet Response Training Plan (FRTP). The FRTP is an arduous sequential training cycle in which unit level training (ULT) and certification is followed by a series of major exercises

that bring together various components so they have the opportunity to train and practice as an integrated whole resulting in Major Combat Operation certification. This certification includes critically important anti-submarine warfare that requires training on the use and deployment of the described systems. Interruption or reduction of the Navy's ability to utilize specific sound sources during this period would significantly disrupt vital sequential training, certification, and testing activities essential to our national security and the safety of our armed forces. Therefore, allowing a public comment period for these rules is impracticable and contrary to the public's interest.

Because the requested modifications would not increase the total level of takes authorized in the 2009 Final Rules, the modifications would result in no increased impact to protected species.

For the same reasons, there is good cause under 5 U.S.C. 553 to waive the 30-day delay in effectiveness.

Because prior notice and opportunity for public comment are not required for this rule by 5 U.S.C. 553, or any other law, the analytical requirements of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* are inapplicable.

**List of Subjects in 50 CFR Part 216**

Exports, Fish, Imports, Incidental take, Indians, Labeling, Marine mammals, Navy, Penalties, Reporting and recordkeeping requirements, Seafood, Sonar, Transportation.

Dated: January 31, 2011.

**Eric C. Schwaab,**

*Assistant Administrator for Fisheries, National Marine Fisheries Service.*

For reasons set forth in the preamble, 50 CFR part 216 is amended as follows:

**PART 216—REGULATIONS GOVERNING THE TAKING AND IMPORTING OF MARINE MAMMALS**

■ 1. The authority citation for part 216 continues to read as follows:

**Authority:** 16 U.S.C. 1361 *et seq.*

■ 2. In § 216.170, paragraphs (c) introductory text, (c)(1) introductory text, and (c)(2) introductory text are revised, and paragraphs (c)(1)(vii), (c)(2)(ii)(H), and (d) are added to read as follows:

**§ 216.170 Specified activity and specified geographical region.**

\* \* \* \* \*

(c) The taking of marine mammals by the Navy is only authorized if it occurs incidental to the following activities:

(1) The use of the following mid-frequency active sonar (MFAS) and high frequency active sonar (HFAS) sources, or similar sources, for Navy training activities (estimated amounts below):

\* \* \* \* \*

(vii) AN/SSQ-125 (AEER sonar sonobuoy)—4800 sonobuoys (total, of IEER/EER and AEER combined) over the course of 5 years (an average of 960 per year)

(2) The detonation of the underwater explosives indicated in paragraph (c)(2)(i) of this section, or similar explosives, conducted as part of the training exercises indicated in paragraph (c)(2)(ii) of this section:

(i) \* \* \*

(H) EER/IEER—4800 sonobuoys (total, of EER/IEER and AEER combined) over the course of 5 years (an average of 960 sonobuoy deployments per year)

(d) The taking of marine mammals may be authorized in an LOA for the activities and sources listed in § 216.170(c) should the amounts (*e.g.*, hours, dips, or number of exercises) vary from those estimated in § 216.170(c), provided that the variation does not result in exceeding the amount of take indicated in § 216.172(c).

■ 3. In § 216.171, paragraph (a) is revised to read as follows:

**§ 216.171 Effective dates and definitions.**

(a) Amended regulations are effective February 4, 2011, through January 5, 2014.

\* \* \* \* \*

■ 4. In § 216.240, paragraph (c) introductory text is revised, and paragraph (d) is added to read as follows:

**§ 216.240 Specified activity and specified geographical region**

\* \* \* \* \*

(c) The taking of marine mammals by the Navy is only authorized if it occurs incidental to the use of the following mid-frequency active sonar (MFAS) sources, high frequency active sonar (HFAS) sources, explosive sonobuoys, or similar sources, for Navy training, maintenance, or research, development, testing, and evaluation (RDT&E) (estimated amounts below):

\* \* \* \* \*

(d) The taking of marine mammals may be authorized in an LOA for the activities and sources listed in

§ 216.240(c) should the amounts (*e.g.*, hours, dips, or number of exercises) vary from those estimated in § 216.240(c), provided that the variation does not result in exceeding the amount of take indicated in § 216.242(c).

■ 5. In § 216.241, paragraph (a) is revised to read as follows:

**§ 216.241 Effective dates and definitions.**

(a) Amended regulations are effective February 4, 2011, through January 22, 2014.

\* \* \* \* \*

■ 5. In § 216.270, paragraphs (c) introductory text, (c)(1) introductory text, and (c)(2) introductory text are revised, and paragraph (d) is added to read as follows:

**§ 216.270 Specified activity and specified geographical region.**

\* \* \* \* \*

(c) The taking of marine mammals by the Navy is only authorized if it occurs incidental to the following activities:

(1) The use of the following mid-frequency active sonar (MFAS) and high frequency active sonar (HFAS) sources, or similar sources, for Navy training, maintenance, or research, development, testing, and evaluation (RDT&E) (estimated amounts below):

\* \* \* \* \*

(2) The detonation of the underwater explosives indicated in paragraph (c)(2)(i) of this section, or similar explosives, conducted as part of the training exercises indicated in paragraph (c)(2)(ii) of this section:

\* \* \* \* \*

(d) The taking of marine mammals may be authorized in an LOA for the activities and sources listed in § 216.270(c) should the amounts (*e.g.*, hours, dips, or number of exercises) vary from those estimated in § 216.270(c), provided that the variation does not result in exceeding the amount of take indicated in § 216.272(c).

■ 6. In § 216.271, paragraph (a) is revised to read as follows:

**§ 216.271 Effective dates and definitions.**

(a) Amended regulations are effective February 4, 2011, through January 14, 2014.

\* \* \* \* \*

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