

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

29 October 2008

Navy Facilities Engineering Command, Atlantic Division
Attn.: Code EV22SA
Navy CHPT EIS/OEIS PM
6506 Hampton Blvd.
Norfolk, VA 23508-1278

To whom it may concern:

The Marine Mammal Commission, in consultation with its Committee of Scientific Advisors on Marine Mammals, has reviewed the Draft Environmental Impact Statement/Overseas Environmental Impact Statement (DEIS) submitted by the U.S. Navy. The applicant is seeking comments on the potential environmental consequences arising from military readiness training operations in the Cherry Point Range Complex off the coasts of North and South Carolina from 29 May 2009 through 28 May 2014. The Commission also has reviewed the National Marine Fisheries Service's 8 July 2008 *Federal Register* notice announcing receipt of the Navy's application for an incidental harassment authorization under the Marine Mammal Protection Act. We have appended the Commission's 7 August 2008 letter to the National Marine Fisheries Service on the Navy's application.

The planned training operations would expose various species of marine mammals within the Cherry Point Range Complex to explosive and acoustic effects from underwater detonations and to taking incidental to the development, testing, and evaluation of weapons systems, vessels, and aircraft. The types of ordnance to be used include Hellfire and tube-launched, optically tracked, wire-guided missiles (net explosive weights of 8 and 15.33 lbs, respectively), 20-lb net explosive weight charges, and 5-in guns.

RECOMMENDATION

The Marine Mammal Commission recommends that the Navy—

- working with the National Marine Fisheries Service, take steps to ensure that the contemplated incidental take rule under section 101(a)(5) of the Marine Mammal Protection Act and any letter of authorization issued under that rule cover all marine mammal species that may be taken by Level A or Level B harassment as a result of the proposed activities;
- re-label its so-called “No Action” alternative to indicate that the least level of activity being proposed still exceeds that which has been conducted on the range historically and is therefore neither a true no-action alternative nor an alternative that offers any curtailment or reduction from historical levels of activity. As required by the National Environmental Policy Act (NEPA), the Navy should include and analyze a true no-action alternative even if it believes that selecting that option would result in serious adverse consequences for national security readiness;
- perform an external peer review of its marine mammal density estimates for the Cherry Point operating area (based on the NODE report, reference DoN, 2007c of the subject DEIS);

- revise its analysis of exposure to explosive ordnance to provide a more realistic assessment of potential occurrences and outcomes;
- continue to develop its Integrated Comprehensive Monitoring Program and provide the Commission with additional details regarding the program, including an estimated time frame for its implementation;
- develop and implement a plan to calibrate and verify the performance of monitoring and mitigation measures being proposed to enable the Navy, the National Marine Fisheries Service, and other interested parties to evaluate the reliability of proposed monitoring and mitigation measures;
- in its DEIS, assess alternatives that would require it to suspend an activity if marine mammals are seriously injured or killed and the injuries or deaths could be associated with the activity. Any injury or death should be investigated to determine the cause, assess the full impact of the activity (e.g., the total number of animals involved), and determine how the activity should be modified to avoid future injuries or deaths; and
- in its DEIS, add a requirement for annual reports providing full documentation of methods, results, and interpretation pertaining to all monitoring tasks and the dates and locations of operations, marine mammal sightings, and estimates of the amount and nature of potential takes of marine mammals by harassment or in other ways.

RATIONALE

In concert with its proposed activities in the Cherry Point Range Complex, the Navy is requesting authorization to incidentally take by Level B harassment bottlenose dolphins and Atlantic spotted dolphins. Although the Commission has commented separately to the National Marine Fisheries Service on that requested authorization, some of the same comments and recommendations are included here so that they can be considered by the Navy as part of its review under the National Environmental Policy Act. The DEIS indicates that 30 other cetacean species (including 6 species listed as endangered under the Endangered Species Act) and 1 pinniped species occur predictably in the operating area. The Navy is not requesting authorization to take these other marine mammal species based on low density estimates for them in the area where it proposes to use explosive ordnance. The Navy states that a consultation under the Endangered Species Act has been initiated in support of its request. The Marine Mammal Commission recommends that the Service and the Navy take steps to ensure that the contemplated incidental take rule under section 101(a)(5) of the Marine Mammal Protection Act and any letter of authorization issued under that rule cover all marine mammal species that may be taken by Level A or Level B harassment as a result of the proposed activities.

No-Action Alternative

In this and several prior NEPA documents for its other ranges, the Navy has used the term “no action” to refer to a level of activity on the range consistent with historical use or, as in this DEIS, historical use plus “surge” activities and other increased levels of readiness training. The no-action alternative in the Cherry Point DEIS is contrasted with two alternatives that propose even

greater increases in readiness and technology acquisition and testing activities that pose a risk to the environment, thus providing a choice among three options, all offering more training activity and more environmental risk but no true no-action alternative, reduced action alternative, or even an alternative of continuing at recent historical levels. The DEIS provides no supporting information regarding recent historical levels of activity to verify the Navy's claim that the proposed level of activity does indeed correspond to historical levels. The DEIS also does not provide any quantitative expression of exactly how much more activity the proposed no-action alternative offers relative to past use. The DEIS does not contain an alternative of reduced or no naval readiness activities, and no analysis is offered of the differential environmental and readiness consequences of such an alternative. The Commission supports the Navy's efforts to ensure military readiness and national security. The Commission also understands that the Navy might find any reduction in readiness training and defense technology acquisition and testing undesirable. Nonetheless, the Commission does not believe that the Navy's preferences should preclude consideration of alternatives of reduced training and reduced environmental consequences as required under the National Environmental Policy Act. To follow guidance published by the Council on Environmental Quality, the Navy at least should consider an alternative that does not represent an increase over the current level of activity.

Density Estimation

The Navy's DEIS states that the marine mammal density estimates provided are derived from its report for the southeast operating area (the NODES report, reference DoN 2007c in the DEIS, p. 7-16). Because the risk analysis and take estimates in the DEIS depend on the accuracy of that report, the Marine Mammal Commission recommends that the Navy perform an external peer review of its marine mammal density estimates to ensure their accuracy and consistency with current and best scientific practices. This recommendation is consistent with previous Commission comments and recommendations on Navy operations.

Explosive Ordnance Exposure Analysis

The DEIS analyzes the effects of infrequent explosive events by assuming that those events and their effects will be distributed evenly over four seasons, resulting in fractional annual totals. The Commission does not believe that assessing the effect of 0.25 or 0.5 events per season provides a realistic range of likely outcomes because neither the events nor the densities of marine mammals may be evenly distributed over those seasons. For example, if only two events are conducted per year, each event could be conducted in a different season or both could be conducted in the same season, but in no case would a fractional number of events occur in a given season. Similarly, animal densities may vary as a function of movement and migration patterns. The Navy should be able to provide a more realistic range of likely outcomes when the number of events is so low. The Marine Mammal Commission therefore recommends that the Navy revise its analysis of exposure to explosive ordnance to provide a more realistic assessment of potential occurrences and outcomes.

Monitoring and Mitigation

The Commission notes that the Navy is developing an Integrated Comprehensive Monitoring Program to facilitate the collection and synthesis of data from range-specific monitoring efforts and research and development studies that are fully or partially funded by the Navy. The program will help make the most efficient use of limited resources to address monitoring concerns for a variety of Navy activities. As noted in our previous letters regarding the Navy's requests for authorization to take marine mammals incidental to other military readiness activities, the Commission supports this effort. The Marine Mammal Commission recommends that the Navy continue to develop its Integrated Comprehensive Monitoring Program and provide the Commission with additional details regarding the program, including an estimated time frame for its implementation.

In previous letters on the Navy's military readiness operations, the Commission also has expressed its concern that the performance of the Navy's monitoring and mitigation efforts have yet to be thoroughly evaluated. The existing scientific data all indicate that efforts to monitor the presence or absence of marine mammals often are of limited effectiveness, which raises questions about their utility and reliability. The methods for conducting such performance testing are available and well within the scope of the Navy's capabilities. The Commission believes that the Navy should develop and implement a plan for obtaining performance data to justify its confidence in critical monitoring and mitigation measures, such as watchstander training, the probability of detecting various marine species of concern, and the use of night vision and passive acoustic technology in the Cherry Point Range and other range complexes where military readiness exercises are planned. The Marine Mammal Commission therefore reiterates its recommendation that the Navy develop and implement a plan to calibrate and verify the performance of monitoring and mitigation measures being proposed to enable the Navy, the National Marine Fisheries Service, and other interested parties to evaluate the reliability of proposed monitoring and mitigation measures.

Lethal Taking/Serious Injury

Based on its analyses in the DEIS, the Navy has chosen not to request authorization to take animals by Level A harassment. Absent such a request, the Marine Mammal Commission has recommended that the requested Marine Mammal Protection Act incidental take rule, if issued, require suspension of the associated Navy activity if marine mammals are seriously injured or killed and the injuries or deaths could be associated with the activity. The Marine Mammal Commission recommends that such a limitation and its effects on the proposed activities be recognized and assessed in the alternatives being considered in the DEIS. Any injury or death should be investigated to determine the cause, assess the full impact of the activity (e.g., the total number of animals involved), 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 potential effects.

Naval Facilities Engineering Command, Atlantic
29 October 2008
Page 5

Reporting

The Commission notes that post-event reports have great potential value to the Navy and the National Marine Fisheries Service. The Marine Mammal Commission therefore recommends that in its DEIS the Navy add a requirement for annual reports providing full documentation of methods, results, and interpretation pertaining to all monitoring tasks and the dates and locations of operations, marine mammal sightings, and estimates of the amount and nature of potential takes of marine mammals by harassment or in other ways.

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

Sincerely,

A handwritten signature in black ink that reads "Michael L. Gorkin" followed by a horizontal line and the word "for" written in a cursive style.

Timothy J. Ragen, Ph.D.
Executive Director

Enclosure