

final rule which is published in the Rules section of this **Federal Register**.

Dated: April 8, 2002.

A. Stanley Meiburg,

Acting Regional Administrator, Region 4.

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

50 CFR Part 216

[Docket No. 020326071-2071-01; I.D. 021402D]

RIN 0648-AP83

Taking and Importing Marine Mammals; Taking Bottlenose Dolphins and Spotted Dolphins Incidental to Oil and Gas Structure Removal Activities in the Gulf of Mexico

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

ACTION: Proposed rule.

SUMMARY: NMFS is proposing to issue regulations authorizing and governing the taking of bottlenose and spotted dolphins incidental to the removal of oil and gas drilling and production structures in state waters and on the Outer Continental Shelf (OCS) in the Gulf of Mexico for a period not to exceed 1 year. The incidental taking of small numbers of marine mammals is authorized by the Marine Mammal Protection Act (MMPA), if certain findings are made and regulations are issued that include requirements for monitoring and reporting. These regulations do not authorize the removal of the rigs as such authorization is provided by the Minerals Management Service (MMS) and is not within the jurisdiction of NMFS. Rather, these regulations authorize the unintentional incidental take of marine mammals in connection with such activities and prescribe methods of taking and other means of effecting the least practicable adverse impact on the species and its habitat.

DATES: Comments and information must be received no later than May 6, 2002.

ADDRESSES: Comments on the proposed rule should be addressed to Donna Wieting, Chief, Marine Mammal Conservation Division, Office of Protected Resources, 1315 East-West Highway, Silver Spring, MD 20910-3282. Comments will not be accepted if

submitted via e-mail or Internet. Copies of the Environmental Assessment (EA) for this proposed rule may be obtained by writing to this address or by telephoning the contact listed here (see **FOR FURTHER INFORMATION CONTACT**).

Comments regarding the burden-hour estimate or any other aspect of the collection of information requirement contained in this proposed rule should be sent to the Chief of the Office of Protected Resources, and to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: NOAA Desk Officer, Washington, DC 20503.

FOR FURTHER INFORMATION CONTACT: Simona Perry Roberts, Office of Protected Resources, (301) 713-2322.

SUPPLEMENTARY INFORMATION:

Background

Section 101(a)(5)(A) of the Marine Mammal Protection Act (MMPA) (16 U.S.C. 1361 *et seq.*) directs the Secretary of Commerce to allow, upon request, the incidental, but not intentional taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and regulations governing the taking are issued. Effective January 26, 1996, by Department Delegation Order 10-15, the Secretary of Commerce (Secretary) delegated authority to perform the functions vested in the Secretary as prescribed by the MMPA to the Administrator of the National Oceanic and Atmospheric Administration. On December 17, 1990, under NOAA Administrative Order 205-11, 7.01, the Under Secretary for Oceans and Atmosphere delegated authority to sign material for publication in the **Federal Register** to the Assistant Administrator for Fisheries, NOAA.

Permission for a take shall be granted if the Secretary through NMFS finds, after notice and opportunity for public comment, that the taking will involve only small numbers of marine mammals, will have no more than a negligible impact on the species or stock(s) and will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses. If such findings are warranted, NMFS must prescribe regulations that include permissible methods of taking and other means effecting the least practicable adverse impact on the species and its habitat, and on the availability of the species for subsistence uses, paying particular attention to rookeries, mating grounds and areas of similar significance. The

regulations must include requirements pertaining to the monitoring and reporting of such taking.

On October 12, 1995 (60 FR 53145), NMFS issued regulations governing the taking of bottlenose and spotted dolphins incidental to oil and gas structure removal activities in state waters and on the Outer Continental Shelf (OCS) in the Gulf of Mexico (50 CFR 216.141-148). Under these regulations, operators who removed oil and gas drilling and production structures and related facilities in state and Federal waters of the Gulf of Mexico adjacent to the coasts of Texas, Louisiana, Mississippi, Alabama, and Florida applied for Letters of Authorization to incidentally take bottlenose and spotted dolphins in the course of structure removal activities. On November 13, 2000, these regulations expired and NMFS could no longer issue Letters of Authorization for structure removal activities in the Gulf of Mexico.

Summary of Action

NMFS proposes new regulations governing the incidental take of bottlenose dolphins (*Tursiops truncatus*) and spotted dolphins (*Stenella frontalis* and *S. attenuata*) in water depths equal to or less than 200 meters (m) (656 feet, ft) for a period not to exceed 1 year. If these new regulations are finalized, operators who remove oil and gas drilling and production structures and related facilities in state and Federal waters of the Gulf of Mexico adjacent to the coasts of Texas, Louisiana, Mississippi, Alabama, and Florida could apply for Letters of Authorization to incidentally take bottlenose and spotted dolphins in the course of structure removal activities in water depths equal to or less than 200 m (656 ft).

NMFS received a request from the American Petroleum Institute (API) for regulations similar to those proposed here on October 30, 1989. In their request, API estimated that 670 structures would be removed in the Gulf of Mexico over a 5-year authorization period. While most of the structures were in water less than 30.5 m (100 ft) deep, a few may be in deeper water. A longer range plan estimated that about 5,500 structures will be removed in a 35-year period. The most frequently used procedure of removal is to wash the soil from inside the piling, lower an explosive charge to 15 ft (4.6 m) below the mudline, and detonate the charge, which cuts the piling. On February 12, 2002, API submitted a request to NMFS requesting an interim policy statement to provide the industry with protection

from incidental take liability under the MMPA during the 2002 platform decommissioning and removal season. In response, NMFS has elected to propose these regulations.

The effects of explosives used for removal of oil and gas structures on ESA-listed species under NMFS' purview were analyzed in a previous biological opinion. That opinion concluded that the use of explosives to remove oil and gas structures, accompanied by the use of an observer program and other take minimization measures laid out in the accompanying incidental take statement, was not likely to jeopardize the continued existence of endangered and threatened sea turtles. This proposed regulation to authorize incidental takes of marine mammals would not change the conclusions of the previous biological opinion because the underlying action (including the use of observers and take minimization measures) is the same. No ESA-listed marine mammals are implicated in this action.

While bottlenose and spotted dolphins are not listed as threatened or endangered under the ESA, they are protected under the authority of the MMPA. Therefore, operators removing structures must receive an authorization under the MMPA before a take is allowed. Similar to the case for sea turtles, impacts to dolphins would come from exposure to sound and pressure waves associated with detonating the explosives. API has stated that the most likely form of incidental take as a result of structure removals is harassment from low level sound and pressure waves. However, animals close enough to the detonation could be injured or killed as a result of tissue destruction. In recognition of this, removal operators have employed the mitigation measures for sea turtles to also protect dolphins prior to API's 1989 request to NMFS and since regulations governing the taking of small numbers of bottlenose and spotted dolphins expired in November 2000.

Summary of Proposed Rule

This proposed rule would authorize the incidental taking of bottlenose dolphins and spotted dolphins by U.S. citizens engaged in removing oil and gas drilling and production structures in state and Federal waters equal to or less than 200 m (656 ft) in the Gulf of Mexico adjacent to the coasts of Texas, Louisiana, Mississippi, Alabama, and Florida for a period not to exceed 1-year. This proposed rule requires that all activities be conducted in a manner that minimizes adverse effects on bottlenose dolphins and spotted dolphins and their habitat. Mitigation,

monitoring, and reporting requirements would be consistent with those in place at the time of this proposal for the incidental take of endangered and threatened sea turtles authorized for the same activities under the ESA.

Description of Removal Activities

The technology most commonly used in the dismantling of platforms includes: bulk explosives, shaped explosive charges, mechanical and abrasive cutters, and underwater arc cutters. The use of bulk explosives has become the industry's standard procedure for severing pilings, well conductors and related supporting structures. When using bulk charges, the inside of the structure's piles are washed out to at least 15 ft (4.6 m) below the sediment floor to allow placement of explosives inside of the structure. Such placement results in a decrease in the impulse and pressure forces released into the water column upon detonation. The sizes of the explosive charges are generally 50 lb (22.7 kg) or less, but can be as much as 200 lb (90.8 kg) when necessary. The use of high velocity shaped charges is reported to have some advantages over bulk explosives and has been used in combination with smaller bulk charges. The cutting action obtained by a shaped charge is accomplished by focusing the explosive energy with a conical metallic liner. A major advantage associated with use of high velocity shaped charges is that a smaller amount of explosive charge is required to sever the structure, which also results in reductions in the impulse and pressure forces released into the water column. Use of mechanical cutters and underwater arc cutters can be successful in some circumstances, and because they do not produce the impulse and pressure forces associated with detonation of explosives, such use does not involve the incidental taking of marine mammals. According to MMS, these methods are, in most instances, more time-consuming, costly and hazardous to divers. Furthermore, if the use of mechanical or arc cutters were to fail before the structure was completely severed, a larger charge may be necessary to remove the structure.

Description of Habitat and Marine Mammals Affected by Oil and Gas Rig Removals

A description of the Gulf of Mexico continental shelf area and the biology and abundance of bottlenose and spotted dolphins in the Gulf of Mexico that are anticipated to be taken by this activity can be found in the EA prepared for previous rulemaking. This

information can also be found in the previous proposed rule for regulations (58 FR 33425, June 17, 1993). To avoid the incidental take of other marine mammal species, NMFS will prohibit the incidental taking of marine mammals in water depths greater than 200 m (656 ft). Copies of the EA and API's 1989 application are available upon request (see ADDRESSES).

Potential Impact of Removal Activities on Bottlenose and Spotted Dolphins

The potential for injury to marine mammals in the vicinity of underwater explosions is associated with gas-containing internal organs, such as the lungs and intestines. The extent of potential injury decreases as: (1) distance of the marine mammal from the explosion increases; (2) size of the marine mammal increases; (3) depth of the explosion and the affected marine mammal decreases; and, (4) size of the explosive charge decreases. In addition, explosive charges confined in structure pilings below the mudline produce shock waves of lower pressure (at a given distance from the explosion) than free-water explosions.

A computer model, developed to predict the distances from which marine mammals would suffer only slight injury from underwater explosions, estimated that a bottlenose dolphin calf would receive only slight injury about 4,000 ft (1,200 m) from a 1,200-lb (544-kg) charge detonated in open water at a depth of 125 ft (38 m). According to API, most structures scheduled for removal in 2002 are located in water less than 100 ft (38 m) deep. In most cases, charges are no greater than 50 lb (22.7 kg) and are confined within the structure piles about 15 ft (4.6 m) below the mudline. Therefore, as explained in detail in the EA, it may be assumed that marine mammals more than 3,000 ft (910 m) from structures to be removed would avoid injury caused by the explosions.

An increase in strandings of bottlenose dolphins in the northwestern Gulf of Mexico occurred in March and April 1986 following the use of explosives to remove oil and gas structures in the area. However, there is no evidence linking the strandings to the removal of the structures. Furthermore, observers at removals of more than 525 structures in the Gulf of Mexico reported no indication of injury or death to bottlenose or spotted dolphins, or any other marine mammal related to these structure removals. According to observer reports required by NMFS during the 5-year duration of the previous regulations' effectiveness,

there were no marine mammal takes associated with removal activities.

The best scientific information available indicates that dolphins cannot hear well in the frequencies emitted by explosive detonations (Richardson *et al.*, 1991), and additional evidence indicates that they may not be able to hear the pulse generated from open-water underwater detonations of explosive charges because of their short duration (ca. 0.05 sec) (Lento, 1992). However, for purposes of this proposed rule, bottlenose and spotted dolphins will be considered to be taken by harassment, as a result of a non-injurious physiological response to the explosion-generated shockwave and potential behavioral impacts. For example, Turl (1993) has suggested that Atlantic bottlenose dolphins may be able to detect low frequency sound by some mechanism other than conventional hearing. In addition, there may be harassment due to tactile stings from the shockwave accompanying detonations. This type of taking has been inferred from studies on humans and seems plausible given studies on dolphin skin sensitivity where researchers (Ridgway, S.H. and D.A. Carter, 1993; 1990) concluded that the most sensitive areas of the dolphin skin (mouth, eyes, snout, melon and blowhole) are about as sensitive as the skin of human lips and fingers. Therefore, even if dolphins are not capable of hearing the acoustic signature of the explosion, physiological or behavioral responses to those detonations may still result.

Preliminary Conclusion

For the reasons discussed above and in an EA prepared for rulemaking, NMFS believes that the proposed activity will likely result in the taking of only small numbers of bottlenose and spotted dolphins by harassment; the total of such taking during a 1-year period will likely have only a negligible impact on these species; and the takings will probably not have an unmitigable adverse impact on the availability of bottlenose and spotted dolphins for subsistence uses.

Classification

This action is not significant for purposes of Executive Order 12866.

The Chief Counsel for Regulation of the Department of Commerce certified to the Chief Counsel for Advocacy of the Small Business Administration, when the original rule was proposed (58 FR 33425, June 17, 1993), that, if adopted, the rule would not have a significant economic impact on a substantial number of small entities within the

meaning of the Regulatory Flexibility Act. In 1994, approximately 10 small businesses were active in removing oil and gas structures in the Gulf of Mexico. These small businesses work under contract to major petroleum companies, which bear the costs of mitigation measures. Moreover, the mitigation measures required by this proposed rule are identical to those already being followed by these small businesses during removal of oil and gas structures to protect endangered and threatened sea turtles and the number of small business remains about the same as in 1994. Because of this classification, a regulatory flexibility analysis was neither required nor prepared. This action does not alter those conclusions. Therefore, the Chief Counsel for Regulation is again certifying that the rule, if adopted, would not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act.

This proposed rule contains collection-of-information requirements subject to the Paperwork Reduction Act. These requirements are identical to those approved during previous rulemaking on the same activity by the Office of Management and Budget (OMB) under section 3504(b) of the Paperwork Reduction Act issued under OMB Control number 0648-0151. Public reporting burden for this collection of information was estimated to average 27.5 hours per response, including the time to review instructions, search existing data sources, gather and maintain the data needed and complete and review the collection of information. Comments regarding the burden-hour estimate or any other aspect of the collection of information requirement, including suggestions for reducing the burden to NMFS and OMB (see **ADDRESSES**) contained in this proposed rule should be sent to the above individual and to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: NOAA Desk Officer, Washington, DC 20503.

National Environmental Policy Act

NMFS' proposed rule to govern the incidental take of bottlenose and spotted dolphins during removal of oil and gas structures in the Gulf of Mexico will not individually or cumulatively have a significant impact on the quality of the human environment. In accordance with section 6.01 of NOAA Administrative Order 216-6 (Environmental Review Procedures for Implementing the National Environmental Policy Act, May 20,

1999), NMFS has analyzed both the context and intensity of this action and determined based on previous environmental assessments that the rule proposed and the proposal to issue 1-year Letters of Authorization to the oil and gas industry will not individually or cumulatively result in a significant impact on the quality of the human environment as defined in 40 CFR 1508.27 and is therefore categorically excluded from further NEPA analysis. As a result of that determination, an environmental impact statement was not been prepared. This action is within the scope of the previous EA and does not alter its conclusions.

This rule does not contain policies with federalism implications as that term is defined in E.O. 13132.

List of Subjects in 50 CFR Part 216

Exports, Fish, Imports, Indians, Labeling, Marine mammals, Penalties, Reporting and record keeping requirements, Seafood, Transportation.

Dated: April 12, 2002.

William T. Hogarth,

Assistant Administrator, National Marine Fisheries Service.

For the reasons set out in the preamble, 50 CFR part 216 is proposed to be added 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.*, unless otherwise noted.

2. Subpart M is added to read as follows:

Subpart M—Taking of Bottlenose Dolphins and Spotted Dolphins Incidental to Oil and Gas Structure Removal Activities

Sec.

- 216.141 Specified activity and specified geographical region.
- 216.142 Effective dates.
- 216.143 Permissible methods of taking; mitigation.
- 216.144 Prohibitions.
- 216.145 Requirements for monitoring and reporting.
- 216.146 Letters of Authorization.
- 216.147 Renewal of Letters of Authorization.
- 216.148 Modifications to Letters of Authorization.

Subpart M—Taking of Bottlenose Dolphins and Spotted Dolphins Incidental to Oil and Gas Structure Removal Activities

§ 216.141 Specified activity and specified geographical region.

(a) Regulations in this subpart apply only to the incidental taking of marine mammals by U.S. citizens engaged in removing oil and gas drilling and production structures in state waters and on the Outer Continental Shelf in the Gulf of Mexico adjacent to the coasts of Texas, Louisiana, Alabama, Mississippi, and Florida. The incidental, but not intentional, taking of marine mammals by U.S. citizens holding a Letter of Authorization is permitted during the course of severing pilings, well conductors, and related supporting structures, and other activities related to the removal of the oil well structure.

(b) The incidental take of marine mammals under the activity identified in paragraph (a) of this section is limited annually to a total of 200 takings by harassment of bottlenose dolphins (*Tursiops truncatus*) and spotted dolphins (*Stenella frontalis* and *S. attenuata*).

§ 216.142 Effective dates.

Regulations in this subpart are effective from May 1, 2002 through April 31, 2003.

§ 216.143 Permissible methods of taking; mitigation.

(a) The use of the following means in conducting the activities identified in § 216.141 are permissible: Bulk explosives, shaped explosive charges, mechanical or abrasive cutters, and underwater arc cutters.

(b) All activities identified in § 216.141 must be conducted in a manner that minimizes, to the greatest extent practicable, adverse effects on bottlenose dolphins, spotted dolphins, and their habitat. When using explosives, the following mitigation measures must be utilized:

(1)(i) If bottlenose or spotted dolphins are observed within 3,000 ft (910 m) of the platform prior to detonating charges, detonation must be delayed until either the marine mammal(s) are more than 3,000 ft (910 m) from the platform or actions (e.g., operating a vessel in the vicinity of the dolphins to stimulate bow riding, then steering the vessel away from the structure to be removed) are successful in removing them at least 3,000 ft (910 m) from the detonation site;

(ii) Whenever the conditions described in paragraph (b)(1)(i) of this

section occur, the aerial survey required under § 216.145(b)(1) must be repeated prior to detonation of charges if the timing requirements of § 216.145(b)(1) cannot be met.

(2) Detonation of explosives must occur no earlier than 1 hour after sunrise and no later than 1 hour before sunset;

(3) If weather and/or sea conditions preclude adequate aerial, shipboard or subsurface surveillance, detonations must be delayed until conditions improve sufficiently for surveillance to be undertaken; and

(4) Detonations must be staggered by a minimum of 0.9 seconds for each group of charges.

§ 216.144 Prohibitions.

Notwithstanding takings authorized by § 216.143 or by a Letter of Authorization issued under § 216.106, the following activities are prohibited:

(a) The taking of a marine mammal that is other than unintentional, except that the intentional passive herding of dolphins from the vicinity of the platform may be authorized under section 109(h) of the Act as described in a Letter of Authorization;

(b) The violation of, or failure to comply with, the terms, conditions, and requirements of this part or a Letter of Authorization issued or renewed under § 216.106 or § 216.146;

(c) The incidental taking of any marine mammal of a species either not specified in this subpart or whenever the taking authorization for authorized species has been reached;

(d) The use of single explosive charges having an impulse and pressure greater than that generated by a 50-lb (22.7 kg) explosive charge detonated outside the rig piling; and

(e) The taking of a marine mammal in water depths greater than 656 ft (200 m).

§ 216.145 Requirements for monitoring and reporting.

(a) Observer(s) approved by the National Marine Fisheries Service in advance of the detonation must be used to monitor the area around the site prior to, during, and after detonation of charges.

(b)(1) Both before and after each detonation episode, an aerial survey by NMFS-approved observers must be conducted for a period not less than 30 minutes within 1 hour of the detonation episode. To ensure that no marine mammals are within the designated 3,000 ft (910 m) safety zone nor are likely to enter the designated safety zone prior to or at the time of detonation, the pre-detonation survey must encompass all waters within one nautical mile of the structure.

(2) A second post-detonation aerial or vessel survey of the detonation site must be conducted no earlier than 48 hours and no later than 1 week after the oil and gas structure is removed, unless a systematic underwater survey, either by divers or remotely-operated vehicles, dedicated to marine mammals and sea turtles, of the site has been conducted within 24 hours of the detonation event. The aerial or vessel survey must concentrate down-current from the structure.

(3) The NMFS observer may waive post-detonation monitoring described in subparagraph (b)(2) of this section provided no marine mammals were sighted during either the required 48 hour pre-detonation monitoring period or during the pre-detonation aerial survey.

(c) During all diving operations (working dives as required in the course of the removals), divers must be instructed to scan the subsurface areas surrounding the platform (detonation) sites for bottlenose or spotted dolphins and if marine mammals are sighted to inform either the U.S. government observer or the agent of the holder of the Letter of Authorization immediately upon surfacing.

(d) In water depths of 492 ft (150 m) or greater, or in cases where divers are not deployed in the course of normal removal operations, a remotely operated vehicle (ROV) must be deployed prior to detonation to scan areas below structures. If marine mammals are sighted by the ROV operator must inform either the U.S. government observer or the agent of the holder of the Letter of Authorization immediately.

(e) In water depths of 328 ft (100 m) or greater, passive acoustic detection must be employed prior to detonation. If marine mammals are sighted by the acoustic detection device, the operator must inform either the U.S. government observer or the agent of the holder of the Letter of Authorization immediately.

(f)(1) A report summarizing the results of structure removal activities, mitigation measures, monitoring efforts, and other information as required by a Letter of Authorization, must be submitted to the Regional Administrator, NMFS, Southeast Region, 9721 Executive Center Drive N, St. Petersburg, FL 33702 within 30 calendar days of completion of the removal of the rig.

(2) NMFS will accept the U.S. government observer report as the activity report if all requirements for

reporting contained in the Letter of Authorization are provided to that observer before the observer's report is complete.

§ 216.146 Letters of Authorization.

(a) To incidentally take bottlenose and spotted dolphins pursuant to these regulations, each company operating or which operated an oil or gas structure in the geographical area described in § 216.141, and which is responsible for abandonment or removal of the platform, must apply for and obtain a Letter of Authorization in accordance with § 216.106.

(b) A copy of the Letter of Authorization must be in the possession of the persons conducting activities that may involve incidental takings of bottlenose and spotted dolphins.

§ 216.147 Renewal of Letters of Authorization.

(a) A Letter of Authorization issued under § 216.106 for the activity identified in § 216.141 will be renewed annually upon:

(1) Timely receipt of the reports required under § 216.145(d), which have been reviewed by the Assistant Administrator and determined to be acceptable;

(2) A determination that the maximum incidental take authorizations in § 216.141(b) will not be exceeded; and

(3) A determination that the mitigation measures required under § 216.143(b) and the Letter of Authorization have been undertaken.

(b) If a species' annual authorization is exceeded, the Assistant Administrator will review the documentation submitted with the annual report required under § 216.145(d), to determine that the taking is not having more than a negligible impact on the species or stock involved.

(c) Notice of issuance of a renewal of the Letter of Authorization will be published in the **Federal Register**.

§ 216.148 Modifications to Letters of Authorization.

(a) In addition to complying with the provisions of § 216.106, except as

provided in paragraph (b) of this section, no substantive modification, including withdrawal or suspension, to the Letter of Authorization issued pursuant to § 216.106 and subject to the provisions of this subpart shall be made until after notice and an opportunity for public comment. For purposes of this paragraph, renewal of a Letter of Authorization under § 216.147, without modification, is not considered a substantive modification.

(b) If the Assistant Administrator determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals specified in § 216.141(b), the Letter of Authorization issued pursuant to § 216.106, or renewed pursuant to this section may be substantively modified without prior notice and an opportunity for public comment. A notice will be published in the **Federal Register** subsequent to the action.

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