

1.1(a)-(c); 373–1.1(d) (except (d)(1)(iii)(b), (d)(1)(iii)(c)(6), (d)(1)(iii)(d), (d)(1)(iv)(a) and (b), (d)(1)(x), (d)(1)(xvi) and (xviii)); 373–1.1(e); 373–1.1(h) and (i); 373–1.2; 373–1.3; 373–1.4(a); 373–1.4(g) and (h); 373–1.5(a)(1) (November 15, 1999); 373–1.5(a)(2) (except (a)(2)(iii), (a)(2)(xiii), (a)(2)(xvii) and (xix)); 373–1.5(a)(2)(iii), (a)(2)(xiii), (a)(2)(xix) (January 31, 2000); 373–1.5(a)(3) and (4); 373–1.5(b) and (c); 373–1.5(d) (except (d)(3) and (d)(11)); 373–1.5(d)(11); (January 31, 2000); 373–1.5(e)–(p) (except reserved paragraphs); 373–1.6 (except (c)(1)–(4)); 373–1.7; 373–1.8; 373–1.9 (except (a)(2)(iii), (iv) and (vi)); 373–1.9(a)(2)(iii), (iv) and (vi) (January 31, 2000); and 373–1.10.

Part 373, Subpart 373–2—Final Status Standards for Owners and Operators of Hazardous Waste Treatment, Storage and Disposal Facilities: Sections 373–2.1 through 373–2.4; 373–2.5(a); 373–2.5(b) (except the last sentence in (b)(1)(i)(b) and the entire provision at (b)(1)(vii)); 373–2.5(c) (except (c)(2)(iv), (xi) and (xiii)); 373–2.5(c)(2)(iv) (November 15, 1999); 373–2.5(c)(2)(xi) and (xiii) (January 31, 2000); 373–2.5(d)–(g); 373–2.6; 373–2.7 (except 373–2.7(c)(2)(iv) and (c)(3)(iii)); 373–2.7(c)(2)(iv) (November 15, 1999); 373–2.7(c)(3)(iii) (January 31, 2000); 373–2.8(a)–(e); 373–2.8(f) (except (f)(1)(iii)(b)); 373–2.8(f)(1)(iii)(b) (November 15, 1999); 373–2.8(g); 373–2.8(h)(1) introductory paragraph (January 31, 2000); 373–2.8(h)(1)(i)–(vii); 373–2.8(h)(2) introductory paragraph (January 31, 2000); 373–2.8(h)(2)(i)–(vii); 373–2.8(h)(3)–(6); 373–2.8(h)(7) (except (h)(7)(i) introductory paragraph); 373–2.8(h)(7)(i) introductory paragraph (January 31, 2000); 373–2.8(h)(8)–(10); 373–2.8(i); 373–2.8(j) (except (j)(2), (j)(6)(ii) and (j)(11)–(13)); 373–2.8(j)(2) (January 14, 1995), 373–2.8(j)(6)(ii) (January 14, 1995); and 373–2.8(j)(11)–(13) (January 14, 1995); 373–2.9; 373–2.10 (except last sentence in (g)(4)(i)); 373–2.11; 373–2.12 (except 373–2.12(a)(1), (b)(1)(i)(a), (d), (g)(2) and (h)(1)); 373–2.12(a)(1) (January 31, 1992); 373–2.12(b)(1)(i)(a) (January 31, 2000); 373–2.12(g)(2) (January 31, 1992); 373–2.12(h)(1) (January 31, 2000); 373–2.13; 373–2.14 (except (c)(1)(i)); 373–2.14(c)(1)(i) (January 31, 1992); 373–2.15 (except (a)(2)); 373–2.19; 373–2.23; 373–2.24; and 373–2.27 through 373–2.31.

Part 373, Subpart 373–3—Interim Status Standards Regulations for Owners and Operators of Hazardous Waste Facilities: Sections 373–3.1 (except the phrase “or Subpart 374–2 of this Title” in 373–3.1(a)(6)); 373–3.2 through 373–3.4; 373–3.5 (except last sentence in 373–3.5(b)(1)(i)(b) and (b)(1)(vii)); 373–3.6; 373–3.7 (except (c)(3)(iv)); 373–3.7(c)(3)(iv) (November 15, 1999); 373–3.8 (except (h)(3)); 373–3.8(h)(3) (November 15, 1999); 373–3.9; 373–3.10 (except last sentence in (g)(4)(i)); 373–3.11 through 373–3.13; 373–3.14 (except (i)(5)); 373–3.14(i)(5) (November 15, 1999); 373–3.15 (except (a)(2)); 373–3.16 through 373–3.18; 373–3.23; and 373–3.27 through 373–3.31.

Part 374, Subpart 374–1—Standards for the Management of Specific Hazardous Wastes and Specific Types of Hazardous Waste Management Facilities: Sections 374–1.1; 374–1.3; 374–1.6 (except (a)(2)(iii)); 374–1.7; 374–1.8(a)(1); 374–1.8(a)(2) (except the

second sentence “Such used oil \* \* \* of this Title” in (a)(2)(i)); 374–1.8(a)(3); 374–1.8(b)–(d); 374–1.8(e) (except (e)(5)(i)); 374–1.8(e)(5)(i) (January 14, 1995); 374–1.8(f); 374–1.8(g) (except (g)(7)); 374–1.8(g)(7) (January 14, 1995); 374–1.8(h)–(m); and 374–1.13.

Part 374, Subpart 374–3—Standards for Universal Waste: Sections 374–3.1; 374–3.2; 374–3.3; 373–3.4 (except (a)(2)); 373–3.5; 373–3.6; and 374–3.7.

Part 376—Land Disposal Restrictions: Sections 376.1 (except (a)(5), (a)(9), (b)(1)(xi), (e), (f) and (g)(2)(v)); 376.2; 376.3 (except (b), (c) and (d)(2)); 376.4 (except (c)(2) and (e)(1)–(7)); and 376.5.

Appendices: Appendices 19 through 25; Appendices 27 through 30; Appendix 33 (January 31, 1992); Appendix 38; Appendices 40 through 48, Appendix 49 (January 14, 1995) and Appendices 51 through 55.

Copies of the New York regulations that are incorporated by reference are available from West Group, 610 Opperman Drive, Eagan, MN 55123, ATTENTION: D3–10 (Phone #: 1–800–328–9352).

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 216

[Docket No. 020326071–2166–02; I.D. 061402E]

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:** Final rule.

**SUMMARY:** NMFS is issuing 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 18 months. 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 structures 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 their habitat.

**DATES:** Effective August 1, 2002 through February 2, 2004.

**ADDRESSES:** Copies of the Environmental Assessment (EA), proposed rule, and application may be obtained by writing to Donna Wieting, Chief, Marine Mammal Conservation Division, Office of Protected Resources, 1315 East-West Highway, Silver Spring, MD 20910–3282 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 final 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, D.C. 20503.

**FOR FURTHER INFORMATION CONTACT:** Kenneth R. Hollingshead, Office of Protected Resources, (301) 713–2322.

#### SUPPLEMENTARY INFORMATION:

##### Background

Section 101 of the MMPA (16 U.S.C. 1361 *et seq.*) directs the Secretary of Commerce (Secretary) 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 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 (NOAA). 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 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 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 (LOAs) 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 LOAs for structure removal activities in the Gulf of Mexico.

#### Summary of Action

On February 12, 2002, the American Petroleum Institute (API) submitted a request to NMFS requesting an interim policy statement to provide the oil and gas industry with protection from incidental take liability under the MMPA during the 2002 structure decommissioning and removal season. In response, NMFS has elected to promulgate these 18-month regulations.

On April 19, 2002 (67 FR 19373), NMFS proposed 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). With finalization of these new regulations, 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 must apply for LOAs 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 API for regulations similar to those requested originally on October 30, 1989. In that 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. The effects of explosives used for removal of oil and gas structures on species listed under the Endangered Species Act (ESA) that are 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. The conclusions of the previous biological opinion apply to this regulation to authorize incidental takes of marine mammals because the underlying action (including the use of NMFS observers and take minimization measures) is the same. No ESA-listed marine mammals are implicated in this action.

Similar to the case for sea turtles, impacts to bottlenose and spotted dolphins would come primarily from exposure to sound and pressure waves associated with detonating the explosives. The 1995 EA states 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 employed the mitigation measures for sea turtles to also protect dolphins prior to API's 1989 request to NMFS, during the effectiveness period of the regulations, and since the time regulations governing the taking of small numbers of bottlenose and spotted dolphins expired in November 2000.

#### Comments and Responses on the Proposed Rule

On April 19, 2002 (67 FR 19373), NMFS published for public review and comment the proposed rule to authorize

and govern 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 OCS in the Gulf of Mexico. During the 15-day comment period, NMFS received 5 letters commenting on the proposed rule. Comments contained in those letters are addressed here.

#### Process Concerns

**Comment 1:** The **Federal Register** notice was published April 19, 2002, with only a 17-day comment period. This is hardly adequate time to obtain a copy of, fully analyze the accompanying EA, and research regulations of this complexity. In addition, the prior regulations governing these activities expired November 13, 2000, but API submitted its request for an interim policy statement on February 12, 2002. Considering that the oil and gas industry had already operated for 15 months without regulation, why did NOAA feel compelled to issue the regulations so rapidly? Does the need for these interim regulations really outweigh the public's right to participate fully and fairly in the regulatory process?

**Response:** For this action, NMFS balanced the needs of the requestor (i.e., the API) and their legal obligations under the Outer Continental Shelf Lands Act, the low likelihood that the activities may result in adverse impacts to marine mammals and the fact that this is only a short-term action with the requirement to provide an opportunity for public review and comment. In this case, in over 5 years of monitoring structure removals in the Gulf of Mexico, there has been no evidence of a taking, as defined under the MMPA, of a bottlenose or spotted dolphin. Therefore, NMFS is confident that the impact of structure removals in the Gulf of Mexico on bottlenose and spotted dolphin populations to date has been negligible. Since information on impacts to other species is lacking and monitoring results from deeper Gulf waters do not exist, NMFS decided to implement a regulation that is similar to the previous 5-year regulation (i.e., only authorize the take of bottlenose and spotted dolphins and explosive charges no greater than 50 lbs (22.7 kg)). In order to ensure that this regulation did not go beyond the scope of the current EA, NMFS has added a prohibition on taking marine mammals in water depths of 200 m (656 ft) or greater and additional monitoring requirements in water depths greater than 46 m (150 ft).

### Marine Mammal Impact Concerns

**Comment 2:** There are at least 30 species of marine mammals reported in the Gulf of Mexico that could be present, at least occasionally, in areas where they could be affected by structure removal. Therefore, it is unclear why the rule would authorize the possible incidental taking of only bottlenose dolphins and spotted dolphins. It was recommended that either the rule be changed to authorize the incidental taking of small numbers of any marine mammal that reasonably can be expected to occur in the northern Gulf of Mexico or specifically limiting the incidental take to the two species, noting that taking of any other marine mammal species would constitute a violation of the MMPA.

**Response:** The API in its revised 1991 application requested the incidental take of only bottlenose and spotted dolphins because these two species were the only marine mammal species recorded by NMFS observers during 1983–91 aerial and vessel surveys in the Gulf of Mexico. These surveys, carried out by the NMFS Southeast Fisheries Science Center, indicated that the bottlenose dolphin is the most common marine mammal in these waters, accounting for more than 95 percent of the sightings. The sightings also showed that spotted dolphins were common in the Gulf of Mexico. At that time, NMFS scientists indicated that the probability of marine mammals other than these species being incidentally taken was remote. Therefore, in its issuance of regulations governing the same activity in 1995, NMFS did not consider it necessary to require the applicant to request an authorization for additional species. Moreover, due to aerial surveys just prior to detonation, 48-hr pre-detonation vessel observer coverage and the relatively shallow water depth, it is highly unlikely that any marine mammal of any species would not be observed prior to detonation and that detonation suspended.

Since 1995, NMFS, MMS, and other organizations and universities have conducted additional marine mammal surveys and discovered that the sperm whale (*Physeter macrocephalus*), listed as endangered under the ESA, is a common inhabitant in areas of the northern Gulf of Mexico with water depths greater than 200 m (656 ft). Therefore, to avoid the take of this species or any other marine mammal species, this rule does not authorize the take of any marine mammal in water depths equal to or exceeding 200 m (656 ft). NMFS cannot issue authorizations for the take of sperm whales or any

other marine mammal species, besides bottlenose and spotted dolphins, until industry provides additional information on the impact explosive removals may have on marine mammals inhabiting water depths of 200 m (656 ft) or more and until industry develops a proposal for mitigating and monitoring such impacts. Under this final rule, the incidental take of any marine mammal species in water depths of 200 m (656 ft) or more will be in violation of the MMPA, the regulations, and any LOA issued as a result of this rulemaking.

**Comment 3:** Information needed to complete 5-year regulations for the removal of oil and gas structures in the Gulf of Mexico at all water depths should be collected as soon as possible. Such information needs include scientific studies assessing the habitat requirements, behaviors, fecundity, and species diversity of deep-water marine mammal stocks. If this information is not provided to NMFS as quickly as possible, new 5-year regulations may not be developed before the proposed 1-year rule expires.

**Response:** It is NMFS' understanding that MMS and industry representatives are working together to address all information needs in order to complete NEPA documentation and to request promulgation of MMPA regulations in a timely manner.

### Effective Dates Concerns

**Comment 4:** Expand the time frame of the rule's effective dates to more than 1 year.

**Response:** To encourage the timely submission of new documentation under the National Environmental Policy Act (NEPA) and a new petition for regulations, NMFS originally proposed that this rule only be effective for 1 year. NMFS has been informed by MMS (on behalf of the oil industry) that the assessments and analyses are presently underway but that a new application under section 101(a)(5)(A) of the MMPA, along with supporting NEPA documentation, can not be submitted earlier than the spring of 2003. In order to avoid another lapse in the regulation's period of effectiveness and to ensure maximum public review and comment during the regulatory review process (the NMFS regulatory process normally takes 8 to 12 months with a minimum of 75 days for public review), an expiration date in 12 months from the date of this rule's effectiveness does not allow enough time for the next rule-making process to be completed before this current rule expires, unless the rule-making process is expedited. As input from the environmental science and advocacy communities will play a

large role in developing these new, comprehensive 5-year regulations, NMFS does not want to undertake expedited rulemaking since that would preclude adequate public review.

### Activity Concerns

**Comment 5:** In the proposed rule, the Supplementary Information section titled "Description of Removal Activities" states that "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." While this statement may be true in many instances, it may not be so for all structure removals. For example, an exploratory well can have a well casing that opens near the sea floor. An explosive bulk charge set off within the tubular would have the shock wave and acoustic energy directed upward since it is the path of least resistance, unlike setting off an explosive charge within a piling that goes to the sea surface.

**Response:** As discussed in NMFS' 1995 EA on issuance of regulations on the taking of bottlenose and spotted dolphins by the explosive removal of offshore structures, Connor (1990) indicated that peak shock overpressures from explosives detonated within the jacket were significantly lower than occurred in free field. His results can be summarized as follows: (1) detonation below the mud line with the pile top below the water surface provides approximately a 50 percent reduction in peak pressure compared to an open field detonation of the same size; (2) detonation below the mud line with the pile top above the water surface provides approximately a 75 percent reduction in peak pressure compared to an open field detonation of the same size; and (3) explosive pressures generally were difficult to detect at the 300' gauge station, indicating the radius of lethal pressures is limited where explosives are contained within a piling.

### Monitoring, Mitigation, and Reporting

**Comment 6:** Change the rule to prohibit detonation of explosives when, for any reason, adequate monitoring cannot be done to ensure, with a high degree of certainty, that there are no marine mammals within the area where tissue damage or hearing damage could occur.

**Response:** The regulations prohibit detonations whenever the pre-detonation aerial survey monitoring requirements cannot be conducted within the time

frame specified in the regulations, to limit detonations to a daylight time period, and to delay any detonations when monitoring activities are not possible.

**Comment 7:** Section 216.143 (Permissible Methods of Taking; mitigation) of the proposed rule does not specify that explosives must be set off within a tubular or below the mudline. Are the regulations intended to permit the use of explosives outside a tubular or above the mudline or are they intended to defer to MMS regulations governing structure removals?

**Response:** The designated 3,000-ft (910-m) marine mammal safety zone for this final rule reflects a “worst-case” explosion outside a tubular and above the mudline. In addition, this safety zone for marine mammals reflects the safety range determined to be appropriate for sea turtles in a biological opinion under section 7 of the ESA. Therefore, since NMFS has adopted this precautionary approach to handle all explosion scenarios for 50-lb (22.7-kg) explosive charges, the expectation is that oil and gas companies and their respective demolition contractors must follow MMS regulations governing placement of explosives during structure removals throughout the effective dates of this regulation.

**Comment 8:** Section 216.145(e)(Requirements for Monitoring and Reporting) specifies using 328 ft (100 m) or greater as the water depth for use of passive acoustic detection. It would be useful to have a supporting explanation of the criteria.

**Response:** Passive acoustic detection is recognized by NMFS as a potentially valuable tool in monitoring the presence or absence of marine mammals prior to removal activities and is, therefore, being required when operationally practicable. The water depth chosen is based on discussions with MMS officials and is intended for deeper waters where divers cannot be deployed and remotely operated vehicles (ROVs) are also being used. This added monitoring requirement should help authorization holders better detect the presence of marine mammal species other than bottlenose and spotted dolphins in deeper waters, and thus ensure that they are not in violation of the MMPA. If ROVs are being used simultaneously this may also allow for verification of species identity and/or estimates of the number of animals present.

**Comment 9:** Section 216.145(b)(3) (Requirements for Monitoring and Reporting) makes reference to a required, 48-hour pre-detonation period. Although this 48-hour period has been

a standard part of the platform-removal monitoring protocol in the past, it is not described anywhere else in the section.

**Response:** The observers required by this rulemaking are the same observers required under the Section 7 Biological Opinion’s Incidental Take Statement (ITS). That ITS requires observations be conducted no less than 48 hours prior to detonation. This rulemaking therefore ensures consistency with that Opinion.

#### *Environmental Concerns*

**Comment 10:** Hazardous substances may be deposited and accumulate in sediments around production structures. If disturbed and resuspended in the water column, these materials may enter the marine food web and be biomagnified in dolphins and other top carnivores.

**Response:** Impacts resulting from resuspension of bottom sediments include increased water turbidity and mobilization of sediments containing hydrocarbon extraction waste (drill mud, cuttings, etc.) in the water column. The magnitude and extent of any turbidity increases would depend upon the hydrographic parameters of the area, nature and duration of the activity, and size and composition of the bottom material (MMS, 1987). Resuspension of bottom sediments, and solid, liquid, and gaseous discharges would be generated by removal and transportation operations.

Increased turbidity would temporarily impact photic processes at the removal site and reduce primary productivity. The potential effects of mobilizing sediments with the drilling and production wastes could also impact the localized marine environment, depending on the quantities of sediment disturbed, the remaining constituents from the drilling and development operations, local, hydrographic effects, and the biota of the immediate area (MMS, 1984 in MMS, 1987). Several sources indicate that the overall impacts to water quality from resuspension of hydrocarbon extraction wastes is expected to be temporary and limited in scope to the immediate, localized structure-removal sites. Also, because of the temporary nature of resuspension, impacts to marine mammals or their habitat are unlikely in an 18-month period.

#### **Changes from the Proposed Rule**

The following modifications have been made to the proposed rule:

1. The effective dates of the regulations have been changed to be effective for 18 months.
2. Since divers are ineffective at depths exceeding 150 ft (46 m), the requirement for monitoring with ROVs

is changed from a water depth of 492 ft (150 m) to 150 ft (46 m) or greater.

3. Based on several comments, references to “rigs” or “platforms” have been changed to “structures” to clarify that there are a variety of offshore structures that may be removed using explosives that need to be included under this regulation.

4. In section 216.145(e), marine mammals are “detected” by the passive acoustic device, not “sighted.”

5. Section 216.147 (Renewal of LOAs) is deleted since the regulations will be in effect for 18 months thereby eliminating the requirement for annual renewal.

#### **Summary of Rule**

This final rule authorizes 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 water depths equal to or less than 200 m (656 ft) in depth in the Gulf of Mexico adjacent to the coasts of Texas, Louisiana, Mississippi, Alabama, and Florida for a period not to exceed 18 months. This final rule requires that all activities be conducted in a manner that minimizes adverse effects on bottlenose 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 structures 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 most commonly 50 lb (22.7 kg) or less, but they can be as much as 200 lb (90.8 kg) when necessary. This final rule and the implementing standard Biological Opinion however, only authorize the use of 50 lb (22.7 kg) or less explosive charges. 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. However, not all 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. For example, an exploratory well can have a well casing that opens near the sea floor. An explosive bulk charge set off within the tubular would have the shock wave and acoustic energy directed upward since it is the path of least resistance, unlike setting off an explosive charge within a piling that goes to the sea surface.

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 Structure 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 not authorize the incidental taking of marine mammals in water depths greater than 200 m (656 ft) or the use of explosive charges greater than 50 lb (22.7 kg). Copies of the EA and API's 1989 and revised 1991 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 generally 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 final rule, bottlenose and spotted dolphins are 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.

#### Conclusion

For the reasons discussed above and in an EA prepared for previous similar rulemaking, NMFS believes that this activity will likely result in the taking of only small numbers of bottlenose and spotted dolphins by harassment; the total of such taking during an 18-month period will likely have only a negligible impact on these species; and the takings will 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. This action imposes the same requirements and thus does not alter those conclusions. Therefore, the Chief

Counsel for Regulation is again certifying that this final rule will not have a significant economic impact on a substantial number of small entities within the meaning of the Regulatory Flexibility Act.

Notwithstanding any other provision of law, no person is required to respond to nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act (PRA) unless that collection of information displays a currently valid OMB control number. This final 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 final 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, D.C. 20503.

Section 553(d) of Title 5 of the U.S.C. requires that the publication of a substantive rule shall be made not less than 30 days before its effective date unless the rule grants or recognizes an exemption or relieves a restriction. Until these regulations are effective, the oil and gas industry can not be issued LOAs authorizing takings incidental to their operations. This places the operators in a position of potentially violating the MMPA should their activities result in a take of a marine mammal. Therefore, the Assistant Administrator for Fisheries, NOAA finds that the waiver of the 30-day delayed effectiveness date relieves a restriction pursuant to 5 U.S.C. 553(d)(1).

This final rule does not contain policies with federalism implications as that term is defined in Executive Order 13132.

## NEPA

In accordance with NOAA Administrative Order 216-6 (Environmental Review Procedures for Implementing the National Environmental Policy Act, May 20, 1999), NMFS has determined that this action is categorically excluded from further environmental review. This determination is based on the 1995 EA for the 5-year small take regulations for the same activities, which resulted in a Finding of No Significant Impact, and the absence of any marine mammal takes during the reporting period for those regulations.

## List of Subjects in 50 CFR Part 216

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

Dated: July 26, 2002.

**Rebecca Lent,**

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

For the reasons set out in the preamble, 50 CFR part 216 is amended to read 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 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.

Effective August 1, 2002 through February 2, 2004.

#### § 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 structure prior to detonating charges, detonation must be delayed until either the marine mammal(s) are more than 3,000 ft (910 m) from the structure 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.

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

(3) If weather 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 § 216.141 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 structure 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 structure 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, a 30-minute or more aerial survey by NMFS-approved observers must be conducted within 1 hour of the detonation episode. To ensure that no marine mammals are within the designated 3,000 ft (941 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 marine mammal survey, either by divers or remotely operated vehicles that are dedicated to marine mammals and sea turtles, of the site has been successfully conducted with 24 hours of the detonation event. The aerial or vessel survey must concentrate down-current from the structure.

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

(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 structure (detonation) sites for bottlenose or spotted dolphins and if marine mammals are sighted to inform either the NMFS-approved observer or the agent of the holder of the Letter of Authorization immediately upon surfacing.

(d) In water depths of 150 ft (46 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, the ROV operator must inform either the NMFS-approved 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 detected by the acoustic 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 structure.

(2) NMFS will accept the NMFS-approved 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 this subpart, each company operating or that operated an oil or gas structure in the geographical area described in § 216.141, and that is responsible for abandonment or removal of the structure, 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 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.

(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 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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## **DEPARTMENT OF COMMERCE**

### **National Oceanic and Atmospheric Administration**

#### **50 CFR Part 660**

[Docket No. 020430101-2101-01; I.D. 072402D]

### **Fisheries Off West Coast States and in the Western Pacific; West Coast Salmon Fisheries; Inseason Action 4 - Adjustment of the Commercial Fishery from the U.S.-Canada Border to Cape Falcon, OR**

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

**ACTION:** Adjustment; request for comments.

**SUMMARY:** NMFS announces that the commercial fishery for all salmon except coho in the area from the U.S.-Canada Border to Cape Falcon, OR, was modified to reopen on July 12 and close at midnight, July 22, 2002, with a vessel limit of 400 chinook salmon for the 11-day open period. The Northwest Regional Administrator, NMFS (Regional Administrator), determined that available catch and effort data indicated that these management measures should