

Biological Opinion's (BiOp) Incidental Take Statement. L-DEO is then required to submit a final report within 30 days after receiving comments from NMFS on the draft report.

Endangered Species Act (ESA)

Pursuant to section 7 of the ESA, NSF has consulted with the NMFS, Office of Protected Resources, Endangered Species Division on this seismic survey. NMFS Headquarters' Office of Protected Resources, Permits, Conservation, and Education Division has also consulted internally pursuant to section 7 of the ESA on the issuance of an IHA under section 101(a)(5)(D) of the MMPA for this activity. On January 13, 2009, NMFS issued a BiOp and concluded that the issuance of an IHA is not likely to jeopardize the continued existence of blue, fin, humpback, sei, and sperm whales; green sea turtles (*Chelonia mydas*); hawksbill sea turtles (*Eretmochelys imbricata*); leatherback sea turtles (*Dermochelys coriacea*); loggerhead sea turtles (*Caretta caretta*); and olive ridley sea turtles (*Lepidochelys olivacea*). The BiOp also concluded that the proposed activities would have no effect on critical habitat, as the Tongan government has no such designation within the action area. Finally, NMFS has incorporated the Relevant Terms and Conditions of the Incidental Take Statement in the BiOp into the IHA.

National Environmental Policy Act (NEPA)

On September 22, 2005 (70 FR 55630), NSF published a notice of intent to prepare a Programmatic Environmental Impact Statement/Overseas Environmental Impact Statement (EIS/OES) to evaluate the potential environmental impacts associated with the use of seismic sources in support of NSF-funded research by U.S. academic scientists. NMFS agreed to be a cooperating agency in the preparation of the EIS/OEIS. This EIS/OEIS has not been completed. Therefore, in order to meet NSF's and NMFS' NEPA requirements for the proposed activity and issuance of an IHA to L-DEO, the NSF has prepared an EA that is specific to the marine geophysical survey conducted by the R/V *Marcus G. Langseth* in the Southwest Pacific Ocean off the coast of Tonga. The NSF has made a Finding of No Significant Impact (FONSI) determination based on information contained within its EA that implementation of the proposed action is not a major Federal action having significant effects on the environment within the meaning of NEPA. NSF determined, therefore, that

an environmental impact statement would not be prepared. On November 25, 2008 (73 FR 71606), NMFS noted that the NSF had prepared an EA for the southwest Pacific Ocean surveys and made this EA available upon request. NMFS has reviewed the information contained in NSF's EA and determined that the NSF EA describes the proposed action alternative, and the potential impacts on marine mammals, endangered species, and other marine life that could be impacted by the preferred alternative and the other alternatives. Accordingly, NMFS adopted the NSF EA under 40 CFR 1506.3 and made its own FONSI. The NMFS FONSI also takes into consideration additional mitigation measures required by the IHA that are not in NSF's EA. Therefore, NMFS has determined that it is not necessary to issue a new EA, supplemental EA or an EIS for the issuance of an IHA to L-DEO for this activity. A copy of the EA and the NMFS FONSI for this activity is available upon request (see **ADDRESSES**).

Determinations

NMFS has determined that the impact of conducting the seismic survey in the southwest Pacific Ocean may result, at worst, in a temporary modification in behavior (Level B harassment) of small numbers of 29 species of cetaceans. Though NMFS believes that take of the requested numbers is unlikely, we still find these numbers small relative to the population sizes. Further, this activity is expected to result in a negligible impact on the affected species or stocks.

The provision requiring that the activity not have an unmitigable adverse impact on the availability of the affected species or stock for subsistence uses is not implicated for this proposed action. There is no subsistence harvest of marine mammals in the proposed research area; therefore, there will be no impact of the activity on the availability of the species or stocks of marine mammals for subsistence uses.

This negligible impact determination is supported by: (1) the likelihood that, given sufficient warning through relatively slow ship speed, marine mammals are expected to move away from a noise source that is annoying prior to it becoming potentially injurious; (2) the fact that marine mammals would have to be closer than 40 m (131 ft) in deep water, when a single airgun is in use from the vessel to be exposed to levels of sound (180 dB) believed to have even a minimal chance of causing TTS; (3) the fact that marine mammals would have to be closer than 950 m (0.5 nm) in deep water, when the full array is in use at

a 9 m (29.5 ft) tow depth from the vessel to be exposed to levels of sound (180 dB) believed to have even a minimal chance of causing TTS; (4) the likelihood that marine mammal detection ability by trained observers is good at those distances from the vessel; (5) the use of PAM, which is effective out to tens of km, will assist in the detection of vocalizing marine mammals at greater distances from the vessel; (6) the incorporation of other required mitigation measures (i.e., ramp-up, power-down, and shutdown); and (7) the limited duration of the seismic survey in the study area (approximately 39 days). As a result, no take by injury or death is anticipated, and the potential for temporary or permanent hearing impairment is very low and will be avoided through the incorporation of the required monitoring and mitigation measures.

While the number of potential incidental harassment takes will depend on the distribution and abundance of marine mammals in the vicinity of the survey activity, the number of potential harassment takings is estimated to be small, relative to the affected species and stock sizes, and has been mitigated to the lowest level practicable through incorporation of the measures mentioned previously in this document.

Authorization

As a result of these determinations, NMFS has issued an IHA to L-DEO for conducting a marine geophysical survey in the southwest Pacific Ocean in January — February, 2009, provided the previously mentioned mitigation, monitoring, and reporting requirements are incorporated.

Dated: January 13, 2009.

James H. Lecky,

*Director, Office of Protected Resources,
National Marine Fisheries Service.*

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DEPARTMENT OF COMMERCE

National Oceanic and Atmospheric Administration

RIN 0648-XN15

Taking and Importing Marine Mammals; U.S. Navy Training in the Hawaii Range Complex

AGENCY: National Marine Fisheries Service, National Oceanic and Atmospheric Administration, Commerce.

ACTION: Notice; issuance of a letter of authorization.

SUMMARY: In accordance with the Marine Mammal Protection Act (MMPA) and implementing regulations, notification is hereby given that a 1-year letter of authorization (LOA) has been issued to the U.S. Navy (Navy) for the incidental take of marine mammals during training, maintenance, and research, development, testing, and evaluation (RDT&E) activities conducted within the Navy's Hawaii Range Complex (HRC). These activities are considered military readiness activities pursuant to the Marine Mammal Protection Act (MMPA), as amended by the National Defense Authorization Act of 2004 (NDAA).

DATES: Effective January 8, 2009, through January 7, 2010.

ADDRESSES: The LOA and supporting documentation are available by writing to Michael Payne, Chief, Permits, Conservation, and Education Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910-3225, by telephoning one of the contacts listed here (**FOR FURTHER INFORMATION CONTACT**), or online at: <http://www.nmfs.noaa.gov/pr/permits/incidental.htm>.

FOR FURTHER INFORMATION CONTACT: Jolie Harrison, Office of Protected Resources, NMFS.

SUPPLEMENTARY INFORMATION:

Background

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

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

NMFS has defined "negligible impact" in 50 CFR 216.103 as:

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

The NDAA (Public Law 108-136) removed the "small numbers" and "specified geographical region" limitations and amended the definition of "harassment" as it applies to a "military readiness activity" to read as follows (Section 3(18)(B) of the MMPA):

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

Summary of Request

On June 25, 2007, NMFS received an application from the Navy requesting authorization for the take of 24 species of marine mammals incidental to upcoming Navy training activities to be conducted within the HRC, which covers 235,000 nm² around the Main Hawaiian Islands (see map on page 17 of the application), over the course of 5 years. These training activities are classified as military readiness activities. These training activities may incidentally take marine mammals present within the HRC by exposing them to sound from mid-frequency or high frequency active sonar (MFAS/HFAS) or to underwater detonations at levels that NMFS associates with the take of marine mammals. The Navy requested authorization to take individuals of 24 species of marine mammals by Level B Harassment. Further, though they do not anticipate it to occur, the Navy requested authorization to take, by injury or mortality, up to 10 individuals each of 11 species over the course of the 5-year period (bottlenose dolphin, *Kogia* spp., melon-headed whale, pantropical spotted dolphin, pygmy killer whale, short-finned pilot whale, striped dolphin, and Cuvier's, Longman's, and Blainville's beaked whale).

Authorization

On January 5, 2009, NMFS' final rule governing the take of marine mammals incidental to U.S. Navy Training in the Hawaii Range Complex became effective. In accordance with the final rule, NMFS issued an LOA to the Navy on January 8, 2009, authorizing Level B harassment of 24 species of marine mammals and mortality of 11 species of marine mammals incidental to U.S. Navy training, maintenance, and RDT&E activities in the HRC. Issuance of this LOA is based on findings, described in the preamble to the final rule (74 FR

1456, January 12, 2009), that the taking resulting from the activities described in this LOA will have a negligible impact on marine mammal stocks and will not have an unmitigable adverse impact on the availability of the affected marine mammal stock for subsistence uses. The LOA describes the permissible methods of taking and includes requirements pertaining to the mitigation, monitoring and reporting of such taking.

Dated: February 4, 2009.

P. Michael Payne,

Chief, Permits, Conservation, and Recreation, Office of Protected Resources, National Marine Fisheries Service.

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CONSUMER PRODUCT SAFETY COMMISSION

Notice of Stay of Enforcement of Testing and Certification Requirements

AGENCY: Consumer Product Safety Commission.

ACTION: Stay of enforcement.

SUMMARY: This notice announces the decision of the Consumer Product Safety Commission ("CPSC" or "Commission") to stay enforcement of certain provisions of subsection 14(a) of the Consumer Product Safety Act ("CPSA") as amended by section 102(a) of the Consumer Product Safety Improvement Act of 2008 ("CPSIA"), Public Law 110-314. Specifically, the Commission is staying certain of the requirements of paragraphs 14(a)(1), (2), and (3) that otherwise require testing and issuance of certificates of compliance by manufacturers, including importers, of products subject to an applicable consumer product safety rule as defined in the CPSA or similar rule, ban, standard, or regulation under any other Act enforced by the Commission. This stay covers all such requirements with the exception of:

(1) Those where testing and certification was required by subsection 14(a) of the CPSA prior to enactment of the CPSIA; and

(2) Those requirements, when they become effective, applicable to children's product certifications required to be supported by third party testing for which the Commission has issued requirements for acceptance of accreditation of third party testing laboratories to test for:

- Lead paint (effective for products manufactured after December 21, 2008),
- Full-size and non-full size cribs and pacifiers (effective for products manufactured after January 20, 2009),