

(i) The Navy shall respond to NMFS' comments and requests for additional information or clarification on the JAX Range Complex Comprehensive Report, the Annual JAX Range Complex Exercise Report, or the Annual JAX Range Complex Monitoring Plan Report (or the multi-Range Complex Annual Monitoring Plan Report, if that is how the Navy chooses to submit the information) if submitted within 3 months of receipt. These reports will be considered final after the Navy has addressed NMFS' comments or provided the requested information, or three months after the submittal of the draft if NMFS does not comment by then.

(j) In 2011, the Navy shall convene a Monitoring Workshop in which the Monitoring Workshop participants will be asked to review the Navy's Monitoring Plans and monitoring results and make individual recommendations (to the Navy and NMFS) of ways of improving the Monitoring Plans. The recommendations shall be reviewed by the Navy, in consultation with NMFS, and modifications to the Monitoring Plan shall be made, as appropriate.

#### **§ 218.15 Applications for Letters of Authorization.**

To incidentally take marine mammals pursuant to these regulations, the U.S. citizen (as defined by § 216.103 of this chapter) conducting the activity identified in § 218.10(a) (the U.S. Navy) must apply for and obtain either an initial Letter of Authorization in accordance with § 218.16 or a renewal under § 218.17.

#### **§ 218.16 Letters of Authorization.**

(a) A Letter of Authorization, unless suspended or revoked, will be valid for a period of time not to exceed the period of validity of this subpart, but must be renewed annually subject to annual renewal conditions in § 218.17.

(b) Each Letter of Authorization will set forth:

(1) Permissible methods of incidental taking;

(2) Means of effecting the least practicable adverse impact on the species, its habitat, and on the availability of the species for subsistence uses (*i.e.*, mitigation); and

(3) Requirements for mitigation, monitoring and reporting.

(c) Issuance and renewal of the Letter of Authorization will be based on a determination that the total number of marine mammals taken by the activity as a whole will have no more than a negligible impact on the affected species or stock of marine mammal(s).

#### **§ 218.17 Renewal of Letters of Authorization and adaptive management.**

(a) A Letter of Authorization issued under § 216.106 and § 218.16 of this chapter for the activity identified in § 218.10(c) will be renewed annually upon:

(1) Notification to NMFS that the activity described in the application submitted under § 218.15 shall be undertaken and that there will not be a substantial modification to the described work, mitigation or monitoring undertaken during the upcoming 12 months;

(2) Timely receipt of the monitoring reports required under § 218.14; and

(3) A determination by NMFS that the mitigation, monitoring and reporting measures required under § 218.13 and the Letter of Authorization issued under §§ 216.106 and 218.16 of this chapter were undertaken and will be undertaken during the upcoming annual period of validity of a renewed Letter of Authorization.

(b) If a request for a renewal of a Letter of Authorization issued under §§ 216.106 and 218.17 of this chapter indicates that a substantial modification to the described work, mitigation or monitoring undertaken during the upcoming season will occur, NMFS will provide the public a period of 30 days for review and comment on the request. Review and comment on renewals of Letters of Authorization are restricted to:

(1) New cited information and data indicating that the determinations made in this document are in need of reconsideration, and

(2) Proposed changes to the mitigation and monitoring requirements contained in these regulations or in the current Letter of Authorization.

(c) A notice of issuance or denial of a renewal of a Letter of Authorization will be published in the **Federal Register**.

(d) NMFS, in response to new information and in consultation with the Navy, may modify the mitigation or monitoring measures in subsequent LOAs if doing so creates a reasonable likelihood of more effectively accomplishing the goals of mitigation and monitoring set forth in the preamble of these regulations. Below are some of the possible sources of new data that could contribute to the decision to modify the mitigation or monitoring measures:

(1) Results from the Navy's monitoring from the previous year (either from JAX Study Area or other locations).

(2) Findings of the Monitoring Workshop that the Navy will convene in 2011 (§ 218.14(j)).

(3) Compiled results of Navy funded research and development (R&D) studies (presented pursuant to the ICMP (§ 218.14(d))).

(4) Results from specific stranding investigations (either from the JAX Range Complex Study Area or other locations).

(5) Results from general marine mammal and sound research (funded by the Navy (described below) or otherwise).

(6) Any information which reveals that marine mammals may have been taken in a manner, extent or number not authorized by these regulations or subsequent Letters of Authorization.

#### **§ 218.18 Modifications to Letters of Authorization.**

(a) Except as provided in paragraph (b) of this section, no substantive modification (including withdrawal or suspension) to the Letter of Authorization by NMFS, issued pursuant to § 216.106 of this chapter and § 218.16 and subject to the provisions of this subpart shall be made until after notification and an opportunity for public comment has been provided. For purposes of this paragraph, a renewal of a Letter of Authorization under § 218.17, without modification (except for the period of validity), 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 § 218.11(b), a Letter of Authorization issued pursuant to § 216.106 of this chapter and § 218.16 may be substantively modified without prior notification and an opportunity for public comment. Notification will be published in the **Federal Register** within 30 days subsequent to the action.

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## **DEPARTMENT OF COMMERCE**

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

#### **50 CFR Part 218**

#### **RIN 0648-AX10**

### **Taking and Importing Marine Mammals; U.S. Navy Training in the Cherry Point Range Complex**

**AGENCY:** National Marine Fisheries Service (NMFS), National Oceanic and

Atmospheric Administration (NOAA), Commerce.

**ACTION:** Final rule.

**SUMMARY:** NMFS, upon application from the U.S. Navy (Navy), is issuing regulations to govern the unintentional taking of marine mammals incidental to activities conducted at the Cherry Point Range Complex for the period of June 2009 through June 2014. The Navy's activities are considered military readiness activities pursuant to the Marine Mammal Protection Act (MMPA), as amended by the National Defense Authorization Act for Fiscal Year 2004 (NDAA). These regulations, which allow for the issuance of "Letters of Authorization" (LOAs) for the incidental take of marine mammals during the described activities and specified timeframes, prescribe the permissible methods of taking and other means of effecting the least practicable adverse impact on marine mammal species and their habitat, as well as requirements pertaining to the monitoring and reporting of such taking. **DATES:** Effective June 8, 2009 and is applicable to the Navy on June 5, 2009 through June 4, 2014.

**ADDRESSES:** A copy of the Navy's application (which contains a list of the references used in this document), NMFS' Record of Decision (ROD), and other documents cited herein may be obtained by writing to Michael Payne, Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910-3225 or by telephone via the contact listed here (see **FOR FURTHER INFORMATION CONTACT**). Additionally, the Navy's LOA application may be obtained by visiting the Internet at: <http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications>.

**FOR FURTHER INFORMATION CONTACT:** Shane Guan, Office of Protected Resources, NMFS, (301) 713-2289, ext. 137.

**SUPPLEMENTARY INFORMATION:** Extensive Supplementary Information was provided in the proposed rule for this activity, which was published in the **Federal Register** on Monday, March 16, 2009 (74 FR 11052). This information will not be reprinted here in its entirety; rather, all sections from the proposed rule will be represented herein and will contain either a summary of the material presented in the proposed rule or a note referencing the page(s) in the proposed rule where the information may be found. Any information that has changed since the proposed rule was

published will be addressed herein. Additionally, this final rule contains a section that responds to the comments received during the public comment period.

### 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, notice of a proposed authorization is provided to the public for review.

Authorization shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses, and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such taking are set forth. NMFS has defined "negligible impact" in 50 CFR 216.103 as:

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

The National Defense Authorization Act of 2004 (NDAA) (Pub. L. 108-136) removed the "small numbers" and "specified geographical region" limitations and amended the definition of "harassment" as it applies to a "military readiness activity" to read as follows (Section 3(18)(B) of the MMPA):

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

### Summary of Request

On June 5, 2008, NMFS received an application from the Navy requesting authorization for the take of Atlantic spotted dolphin incidental to the proposed training activities in the Cherry Point Range Complex over the course of 5 years. On June 17, 2008, the Navy submitted an Addendum with some modifications and additional

information to its original requests. The activities to be conducted in the Cherry Point Range Complex are classified military readiness activities. The Navy states that these training activities may cause various impacts to marine mammal species in the proposed Cherry Point Range Complex area. The Navy requests an authorization to take two individuals of Atlantic spotted dolphins annually by Level B Harassment. The Navy does not anticipate any Level A harassment (injury). Please refer to the take table on page 6 to the Addendum of the LOA application for detailed information of the potential exposures from explosive ordnance (per year) for marine mammals in the Cherry Point Range Complex. Due to the proposed mitigation and monitoring measures, NMFS does not expect the proposed action would result in any marine mammal mortality. Therefore, no mortality would be authorized for the Navy's Cherry Point Range Complex training activities.

### Description of the Specified Activities

The proposed rule contains a complete description of the Navy's specified activities that are covered by these final regulations, and for which the associated incidental take of marine mammals will be authorized in the related LOAs. The proposed rule describes the nature and number of the training activities. These training activities consist of surface warfare [Missile Exercise (MISSILEX)], mine warfare [Mine Exercise (MINEX)], amphibious warfare [Firing Exercise (FIREX)], and vessel movement to, from and within the Cherry Point Range Complex Study Area. The descriptions of MISSILEX and vessel movement contained in the proposed rule (74 FR 11052; pages 11052-11053) have not changed. The Navy made subsequent modifications to the description of the MINEX and FIREX activities since the proposed rule was published. The purpose of the modifications is to improve clarity and readability. The change in description of the MINEX and FIREX activities has not affected the analyses originally presented in the proposed rule or contained in this final rule. Revised descriptions of MINEX and FIREX follow:

#### Mine Warfare/Mine Exercises

Mine Warfare (MIW) includes the strategic, operational, and tactical use of mines and mine countermeasures (MCM). MIW has two basic subdivisions: (a) Laying mines to degrade the enemy's capabilities to wage land, air, and maritime warfare, and (b) countering enemy-laid mines to

permit friendly maneuver or use of selected land or sea areas (DoN, 2007d).

*MIW training events are of two types: MCM and mine neutralization.*

MCM operations train forces to detect, identify, classify, mark, avoid, and disable (or verify destruction of) underwater mines (bottom or moored) using a variety of methods including air, surface, sub-surface, and ground assets. Mine hunting techniques involve divers, specialized sonar, and unmanned underwater vehicles (UUVs) to locate and classify the mines and then destroy them using one of two methods: Mechanical (explosive cutters) or influence (matching the acoustic, magnetic, or pressure signature of the mine). The MCM systems currently used in Navy Cherry Point Study Area are deployed aboard the MH-53E helicopters. They include mine hunting sonar (AQS-24A), influence mine sweeping systems (MK-105) and mechanical mine sweeping systems (MK-103), none of which result in underwater detonations.

Mine Neutralization Exercises (MINEX) involve the localization, identification, evaluation, rendering safe, and disposal of mines that constitute a threat to ships or personnel. This mission is currently done primarily by Explosive Ordnance Disposal (EOD) divers. They typically deploy from a ship or small boat to relocate and neutralize mines initially located by another source, such as an MCM or coastal minehunter MHC class ship or an MH-53 or MH-60 helicopter. The

EOD divers set an explosive charge on a floating or underwater mine which they initiate remotely after clearing the area. The pressure and energy exerted in the water from the relatively smaller EOD explosive charge causes the mine to explode. These operations in the Navy Cherry Point Study Area involve neutralizing inert training mines with charges of up to 20 lbs Net Explosive Weight (NEW). They will occur only during daylight hours in the locations described in Figure 1 of the LOA application.

In addition to the current MIW systems, the Navy will begin training with new Organic Mine Countermeasures (OMCM) systems in the Navy Cherry Point Study Area as they are introduced into the fleet. The OMCM systems will operate from MH-60S helicopters, including mine hunting sonar (AQS-20); influence mine sweeping towed arrays (Organic Airborne and Surface Influence Sweep [OASIS]); mine hunting laser (Airborne Laser Mine Detection System [ALMDS]) that uses a light imaging detecting and ranging (LIDAR) to detect, localize, and classify near-surface moored/floating mines; and anti-mine ordnance systems (Rapid Airborne Mine Clearance System [RAMICS] and Airborne Mine Neutralization System [AMNS]). No OMCM training events will involve underwater detonations.

*Amphibious Warfare*

Amphibious Warfare (AMW) involves projecting military power ashore with

U.S. Marine Corps (USMC) landing forces supported by naval firepower and logistics. AMW encompasses a broad spectrum of operations involving maneuver from the sea to objectives ashore, ranging from shore assaults, boat raids, ship-to-shore maneuver, shore bombardment and other naval fire support, and air strike and close air support. In the Navy Cherry Point Study Area, the Navy and Marine Corps conduct extensive AMW training, but the only events involving underwater detonation are Firing Exercises (FIREX).

During a FIREX, surface ships use their main battery guns to fire from sea at land targets in support of military forces ashore. The east coast has very limited access to land ranges for shore bombardment. To compensate, Atlantic Fleet cruisers and destroyers can create virtual land masses on their fire control consoles. The ships fire at an array of buoys (Integrated Maritime Portable Acoustic Scoring and Simulation System [IMPASS]) that detect where the rounds landed, thereby allowing the ship to score the accuracy of its gunners. A FIREX (IMPASS) event in the Navy Cherry Point Study Area typically involves up to 70 rounds, 39 of which have high explosive warheads and the rest are inert, and occur only during daylight hours in the locations described in Figure 1 of the LOA application.

TABLE 1—LEVELS OF TRAINING EVENTS INVOLVE EXPLOSIVES PLANNED IN THE CHERRY POINT RANGE COMPLEX PER YEAR

Operation	Platform	System/ordnance	Number of events	Time of day	Event duration
MISSILEX (Air to Surface).	AH-1W Helicopter .....	AGM-114 (Hellfire; 8-lb NEW <sup>1</sup> HE <sup>2</sup> rounds <sup>3</sup> ). TOW <sup>4</sup> Missile (all 15.33 NEW HE rounds) <sup>3</sup> .	6 sorties (6 HE missiles).	Day or Night .....	1 hour.
			8 sorties (8 missiles) ....		1 hour.
MINEX .....	EOD <sup>5</sup> .....	20 lb NEW charges .....	20 events .....	Day .....	8 hours.
FIREX with IMPASS. <sup>6</sup>	CG, DDG <sup>7</sup> .....	5" gun (IMPASS) .....	2 events (78 HE rounds).	Day .....	12 hours.

<sup>1</sup> NEW: Net explosive weight.  
<sup>2</sup> HE: High Explosive.  
<sup>3</sup> Uses stationary or towed surface targets; 1 missile/sortie.  
<sup>4</sup> TOW: Tube-launched, Optically tracked, Wire-guided.  
<sup>5</sup> EOD: Explosive ordnance disposal.  
<sup>6</sup> IMPASS: Integrated Maritime Portable Acoustic Scoring and Simulation System.  
<sup>7</sup> CG: guided missile cruiser; DDG: guided missile destroyer.

**Cherry Point Range Complex**

The Cherry Point Range Complex proposed rule contains a description of the Cherry Point Study Area along with

a description of the areas in which certain types of activities will occur. Table 2, included here, summarizes the areas in which explosive events will

occur and their frequency of occurrence. The description of the Cherry Point Range Complex Study Area in the proposed rule has not changed.

TABLE 2—NUMBER OF EVENTS UTILIZING EXPLOSIVE MUNITIONS WITHIN THE CHERRY POINT RANGE COMPLEX

Sub-area*	Ordnance	Winter	Spring	Summer	Fall	Annual totals
16 & 17	MISSILEX					14
16 & 17	Hellfire	1.5	1.5	1.5	1.5	6
16 & 17	TOW	2	2	2	2	8
13 & 14	FIREX with IMPASS					2
4 & 5	5" rounds	.25	.25	.25	.25	1
4 & 5	5" rounds	.25	.25	.25	.25	1
UNDET	MINEX					20
UNDET	20 LB	5	5	5	5	20

\* See Figure 1 of the LOA application for the location of sub-areas.

**Description of Marine Mammals in the Area of the Specified Activities**

There are 33 cetacean species, 4 pinniped species, and 1 sirenian species that have the potential or are confirmed to occur in the Cherry Point Range Complex (DoN, 2008). However, only 34

of those species are expected to occur regularly in the OPAREA, as indicated in Table 3. The remaining species are considered extralimital in the Study Area, indicating there are one or more records of an animal's presence in the Study Area, but it is considered beyond

the normal range of the species. Extralimital species will not be analyzed further in this study. The Description of Marine Mammals in the Area of the Specified Activities section has not changed from what was in the proposed rule (74 FR 11052; pages 11054–11056).

TABLE 3—MARINE MAMMAL SPECIES FOUND IN THE CHERRY POINT RANGE COMPLEX

Family and scientific name	Common name	Federal status
Order Cetacea		
Suborder Mysticeti (baleen whales)		
<i>Eubalaena glacialis</i>	North Atlantic right whale	Endangered.
<i>Megaptera novaeangliae</i>	Humpback whale	Endangered.
<i>Balaenoptera acutorostrata</i>	Minke whale.	
<i>B. brydei</i>	Bryde's whale.	
<i>B. borealis</i>	Sei whale	Endangered.
<i>B. physalus</i>	Fin whale	Endangered.
<i>B. musculus</i>	Blue whale	Endangered.
Suborder Odontoceti (toothed whales)		
<i>Physeter macrocephalus</i>	Sperm whale	Endangered.
<i>Kogia breviceps</i>	Pygmy sperm whale.	
<i>K. sima</i>	Dwarf sperm whale.	
<i>Ziphius cavirostris</i>	Cuvier's beaked whale.	
<i>Mesoplodon minus</i>	True's beaked whale.	
<i>M. europaeus</i>	Gervais' beaked whale.	
<i>M. bidens</i>	Sowerby's beaked whale.	
<i>M. densirostris</i>	Blainville's beaked whale.	
<i>Steno bredanensis</i>	Rough-toothed dolphin.	
<i>Tursiops truncatus</i>	Bottlenose dolphin.	
<i>Stenella attenuata</i>	Pantropical spotted dolphin.	
<i>S. frontalis</i>	Atlantic spotted dolphin.	
<i>S. longirostris</i>	Spinner dolphin.	
<i>S. clymene</i>	Clymene dolphin.	
<i>S. coeruleoalba</i>	Striped dolphin.	
<i>Delphinus delphis</i>	Common dolphin.	
<i>Lagenodephis hosei</i>	Fraser's dolphin.	
<i>Grampus griseus</i>	Risso's dolphin.	
<i>Peponocephala electra</i>	Melon-headed whale.	
<i>Feresa attenuata</i>	Pygmy killer whale.	
<i>Pseudorca crassidens</i>	False killer whale.	
<i>Orcinus orca</i>	Killer whale.	
<i>Globicephala melas</i>	Long-finned pilot whale.	
<i>G. macrorhynchus</i>	Short-finned pilot whale.	
<i>Phocoena phocoena</i>	Harbor porpoise.	
Order Carnivora		
Suborder Pinnipedia (seals, sea lions, walruses)		
<i>Phoca vitulina</i>	Harbor seal	

TABLE 3—MARINE MAMMAL SPECIES FOUND IN THE CHERRY POINT RANGE COMPLEX—Continued

Family and scientific name	Common name	Federal status
Order Sirenia		
<i>Trichechus manatus</i> .....	West Indian manatee .....	Endangered.

**Potential Impacts to Marine Mammal Species**

With respect to the MMPA, NMFS' effects assessment serves four primary purposes: (1) To prescribe the permissible methods of taking (*i.e.*, Level B Harassment (behavioral harassment), Level A Harassment (injury), or mortality, including an identification of the number and types of take that could occur by Level A or B harassment or mortality) and to prescribe other means of effecting the least practicable adverse impact on such species or stock and its habitat (*i.e.*, mitigation); (2) to determine whether the specified activity will have a negligible impact on the affected species or stocks of marine mammals (based on the likelihood that the activity will adversely affect the species or stock through effects on annual rates of recruitment or survival); (3) to determine whether the specified activity will have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (however, there are no subsistence communities in the Cherry Point Range Complex); and (4) to prescribe requirements pertaining to monitoring and reporting.

In the Potential Impacts to Marine Mammal Species section of the proposed rule, NMFS included a qualitative discussion of the different ways that vessel strikes and underwater explosive detonations from MISSILEX, MINEX, and FIREX may potentially affect marine mammals (some of which NMFS would not classify as harassment). See 74 FR 11052, pages 11056–11062. Marine mammals may experience direct physiological effects (such as threshold shift), acoustic masking, impaired communications, stress responses, and behavioral disturbance. The information contained in Potential Impacts to Marine Mammal Species section from the proposed rule has not changed.

Additional analyses on potential impacts to marine mammals from vessel movement within the Cherry Point Range Complex Study Area are added below.

*Vessel Movement*

There are limited data concerning marine mammal behavioral responses to

vessel traffic and vessel noise, and a lack of consensus among scientists with respect to what these responses mean or whether they result in short-term or long-term adverse effects. In those cases where there is a busy shipping lane or where there is large amount of vessel traffic, marine mammals may experience acoustic masking (Hildebrand, 2005) if they are present in the area (*e.g.*, killer whales in Puget Sound; Foote *et al.*, 2004; Holt *et al.*, 2008). In cases where vessels actively approach marine mammals (*e.g.*, whale watching or dolphin watching boats), scientists have documented that animals exhibit altered behavior such as increased swimming speed, erratic movement, and active avoidance behavior (Bursk, 1983; Acevedo, 1991; Baker and MacGibbon, 1991; Trites and Bain, 2000; Williams *et al.*, 2002; Constantine *et al.*, 2003), reduced blow interval (Ritcher *et al.*, 2003), disruption of normal social behaviors (Lusseau, 2003; 2006), and the shift of behavioral activities which may increase energetic costs (Constantine *et al.*, 2003; 2004)). A detailed review of marine mammal reactions to ships and boats is available in Richardson *et al.* (1995). For each of the marine mammals taxonomy groups, Richardson *et al.* (1995) provided the following assessment regarding cetacean reactions to vessel traffic:

*Toothed whales:* “In summary, toothed whales sometimes show no avoidance reaction to vessels, or even approach them. However, avoidance can occur, especially in response to vessels of types used to chase or hunt the animals. This may cause temporary displacement, but we know of no clear evidence that toothed whales have abandoned significant parts of their range because of vessel traffic.”

*Baleen whales:* “When baleen whales receive low-level sounds from distant or stationary vessels, the sounds often seem to be ignored. Some whales approach the sources of these sounds. When vessels approach whales slowly and nonaggressively, whales often exhibit slow and inconspicuous avoidance maneuvers. In response to strong or rapidly changing vessel noise, baleen whales often interrupt their normal behavior and swim rapidly away. Avoidance is especially strong

when a boat heads directly toward the whale.”

It is important to recognize that behavioral responses to stimuli are complex and influenced to varying degrees by a number of factors such as species, behavioral contexts, geographical regions, source characteristics (moving or stationary, speed, direction, *etc.*), prior experience of the animal, and physical status of the animal. For example, studies have shown that beluga whales reacted differently when exposed to vessel noise and traffic. In some cases, naive beluga whales exhibited rapid swimming from ice-breaking vessels up to 80 km away, and showed changes in surfacing, breathing, diving, and group composition in the Canadian high Arctic where vessel traffic is rare (Finley *et al.*, 1990). In other cases, beluga whales were more tolerant of vessels, but differentially responsive by reducing their calling rates, to certain vessels and operating characteristics (especially older animals) in the St. Lawrence River where vessel traffic is common (Blane and Jaakson, 1994). In Bristol Bay, Alaska, beluga whales continued to feed when surrounded by fishing vessels and resisted dispersal even when purposefully harassed (Fish and Vania, 1971).

In reviewing more than 25 years of whale observation data, Watkins (1986) concluded that whale reactions to vessel traffic were “modified by their previous experience and current activity: habituation often occurred rapidly, attention to other stimuli or preoccupation with other activities sometimes overcame their interest or wariness of stimuli.” Watkins noticed that over the years of exposure to ships in the Cape Cod area, minke whales (*Balaenoptera acutorostrata*) changed from frequent positive (such as approaching vessels) interest to generally uninterested reactions; finback whales (*B. physalus*) changed from mostly negative (such as avoidance) to uninterested reactions; right whales (*Eubalaena glacialis*) apparently continued the same variety of responses (negative, uninterested, and positive responses) with little change; and humpbacks (*Megaptera novaeangliae*) dramatically changed from mixed responses that were often negative to

often strongly positive reactions. Watkins (1986) summarized that “whales near shore, even in regions with low vessel traffic, generally have become less wary of boats and their noises, and they have appeared to be less easily disturbed than previously. In particular locations with intense shipping and repeated approaches by boats (such as the whale-watching areas of Stellwagen Bank), more and more whales had P [positive] reactions to familiar vessels, and they also occasionally approached other boats and yachts in the same ways.”

In the case of the Cherry Point Range Complex, naval vessel traffic is expected to be much lower than in areas where there are large shipping lanes and large numbers of fishing vessels and/or recreational vessels. Nevertheless, the proposed action area is well traveled by a variety of commercial and recreational vessels, so marine mammals in the area are expected to be habituated to vessel noise.

As described in the proposed rule, operations involving vessel movements occur intermittently and are variable in duration, ranging from a few hours up to 2 weeks. These operations are widely dispersed throughout the Cherry Point Range Complex OPAREA, which is a vast area encompassing 18,617 square nautical miles (nm<sup>2</sup>) (an area approximately the size of West Virginia). The Navy logs about 950 total vessel days within the Study Area during a typical year. Consequently, the density of ships within the Study Area at any given time is extremely low (*i.e.*, less than 0.005 ships/nm<sup>2</sup>).

Moreover, naval vessels transiting the study area or engaging in the training exercises will not actively or intentionally approach a marine mammal or change speed drastically. Except under certain mitigation measures that protect right whales and other marine mammals from vessel strike, all vessels transit to, from, and within the range complexes will be traveling at speeds generally ranging from 10 to 14 knots.

The final rule contains additional mitigation measures requiring Navy vessels to keep at least 500 yards (460 m) away from any observed whale and at least 200 yards (183 m) from marine mammals other than whales, and avoid approaching animals head-on. Although the radiated sound from the vessels will be audible to marine mammals over a large distance, it is unlikely that animals will respond behaviorally to low-level distant shipping noise as the animals in the area are likely to be habituated to such noises (Nowacek *et al.*, 2004). In light of these facts, NMFS does not

expect the Navy's vessel movements to result in Level B harassment.

#### Acoustic Take Criteria

In the Acoustic Take Criteria section of the proposed rule, NMFS described the development and application of the acoustic criteria for explosive detonations (74 FR 11052; pages 11060–11062). No changes to the modeling have been made except for those outlined in Potential Impacts to Marine Mammal Species section of this document.

#### Mitigation

In order to issue an incidental take authorization (ITA) under Section 101(a)(5)(A) of the MMPA, NMFS must prescribe regulations setting forth the “permissible methods of taking pursuant to such activity, and other means of effecting the least practicable adverse impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance.” The NDAA amended the MMPA as it relates to military readiness activities and the incidental take authorization process such that “least practicable adverse impact” shall include consideration of personnel safety, practicality of implementation, and impact on the effectiveness of the “military readiness activity.” The Cherry Point Range Complex training activities described in this rulemaking are considered military readiness activities.

NMFS reviewed the Navy's proposed Cherry Point Range Complex training activities and the proposed Cherry Point Range Complex mitigation measures presented in the Navy's application to determine whether the activities and mitigation measures were capable of achieving the least practicable adverse effect on marine mammals.

Any mitigation measure prescribed by NMFS should be known to accomplish, have a reasonable likelihood of accomplishing (based on current science), or contribute to the accomplishment of one or more of the general goals listed below:

(1) Avoidance or minimization of injury or death of marine mammals wherever possible (goals b, c, and d may contribute to this goal).

(2) A reduction in the numbers of marine mammals (total number or number at biologically important time or location) exposed to underwater detonations or other activities expected to result in the take of marine mammals (this goal may contribute to a, above, or to reducing harassment takes only).

(3) A reduction in the number of times (total number or number at

biologically important time or location) individuals would be exposed to underwater detonations or other activities expected to result in the take of marine mammals (this goal may contribute to a, above, or to reducing harassment takes only).

(4) A reduction in the intensity of exposures (either total number or number at biologically important time or location) to underwater detonations or other activities expected to result in the take of marine mammals (this goal may contribute to a, above, or to reducing the severity of harassment takes only).

(5) A reduction in adverse effects to marine mammal habitat, paying special attention to the food base, activities that block or limit passage to or from biologically important areas, permanent destruction of habitat, or temporary destruction/disturbance of habitat during a biologically important time.

(6) For monitoring directly related to mitigation—an increase in the probability of detecting marine mammals, thus allowing for more effective implementation of the mitigation (shut-down zone, etc.).

NMFS reviewed the Navy's proposed mitigation measures, which included a careful balancing of the likely benefit of any particular measure to the marine mammals with the likely effect of that measure on personnel safety, practicality of implementation, and impact on the “military-readiness activity.”

The Navy's proposed mitigation measures were described in detail in the proposed rule (74 FR 11052, pages 11066–11069). Slight wording changes have been made to the Personnel Training—Lookouts section as presented in the Proposed Rule (page 76592). Bullet 6 of that section is added to clarify nighttime monitoring, which reads as: “At night, to increase effectiveness, lookouts would not continuously sweep the horizon with their eyes. Instead, lookouts would scan the horizon in a series of movements that would allow their eyes to come to periodic rests as they scan the sector. When visually searching at night, they would look a little to one side and out of the corners of their eyes, paying attention to the things on the outer edges of their field of vision. Lookouts will also have night vision devices available for use.”

The Navy's measures addressing operating procedures for training activities using underwater detonations of explosives and firing exercises, and mitigation related to vessel traffic and the North Atlantic right whale were described in the proposed rule. No

changes have been made to the mitigation measures described in the proposed rule except the following.

In response to a comment from the Marine Mammal Commission, NMFS will require the Navy to suspend its activities immediately if a marine mammal is injured or killed as a result of the proposed Navy training activities (e.g., instances in which it is clear that munitions explosions caused the injury or death), and report such incident to NMFS.

NMFS has determined that these mitigation measures (which include a suite of measures that specifically address vessel transit and the NARW) are adequate means of effecting the least practicable adverse impacts on marine mammal species or stocks and their habitat while also considering personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity.

### Monitoring

In order to issue an ITA for an activity, Section 101(a)(5)(A) of the MMPA states that NMFS must set forth "requirements pertaining to the monitoring and reporting of such taking." The MMPA implementing regulations at 50 CFR 216.104 (a)(13) indicate that requests for LOAs must include the suggested means of accomplishing the necessary monitoring and reporting that will result in increased knowledge of the species and of the level of taking or impacts on populations of marine mammals that are expected to be present.

Monitoring measures prescribed by NMFS should accomplish one or more of the following general goals:

(1) An increase in the probability of detecting marine mammals, both within the safety zone (thus allowing for more effective implementation of the mitigation) and in general to generate more data to contribute to the effects analyses.

(2) An increase in our understanding of how many marine mammals are likely to be exposed to levels of underwater detonations or other stimuli that we associate with specific adverse effects, such as behavioral harassment, temporary threshold shift of hearing sensitivity (TTS), or permanent threshold shift of hearing sensitivity (PTS).

(3) An increase in our understanding of how marine mammals respond (behaviorally or physiologically) to underwater detonations or other stimuli expected to result in take and how anticipated adverse effects on individuals (in different ways and to varying degrees) may impact the population, species, or stock

(specifically through effects on annual rates of recruitment or survival).

(4) An increased knowledge of the affected species.

(5) An increase in our understanding of the effectiveness of certain mitigation and monitoring measures.

(6) A better understanding and record of the manner in which the authorized entity complies with the incidental take authorization.

### Monitoring Plan for the Cherry Point Range Complex Study Area

As NMFS indicated in the proposed rule, the Navy has (with input from NMFS) fleshed out the details of and made improvements to the Cherry Point Range Complex Monitoring Plan. Additionally, NMFS and the Navy have incorporated a suggestion from the public, which recommended the Navy hold a peer review workshop to discuss the Navy's Monitoring Plans for the multiple range complexes and training exercises in which the Navy would receive ITAs (see Monitoring Workshop section). The final Cherry Point Range Complex Monitoring Plan, which is summarized below, may be viewed at <http://www.nmfs.noaa.gov/pr/permits/incidental.htm#applications>. The Navy plans to implement all of the components of the Monitoring Plan; however, only the marine mammal components (not the sea turtle components) will be required by the MMPA regulations and associated LOAs.

A summary of the monitoring methods required for use during training events in the Cherry Point Range Complex are described below. These methods include a combination of individual elements that are designed to allow a comprehensive assessment.

#### I. Vessel or Aerial Surveys:

(A) The Holder of this Authorization shall visually survey a minimum of 1 explosive event per year. If possible, the event surveyed will be one involving multiple detonations. One of the vessel or aerial surveys should involve professionally trained marine mammal observers (MMOs).

(B) When operationally feasible, for specified training events, aerial or vessel surveys shall be used 1–2 days prior to, during (if reasonably safe), and 1–5 days post detonation.

(C) Surveys shall include any specified exclusion zone around a particular detonation point plus 2,000 yards beyond the border of the exclusion zone (i.e., the circumference of the area from the border of the exclusion zone extending 2,000 yards outwards). For vessel-based surveys a passive acoustic system (hydrophone or

towed array) could be used to determine if marine mammals are in the area before and/or after a detonation event.

(D) When conducting a particular survey, the survey team shall collect:

- Location of sighting;
- Species (if not possible, indicate whale, dolphin or pinniped);
- Number of individuals;
- Whether calves were observed;
- Initial detection sensor;
- Length of time observers maintained visual contact with marine mammal;
- Wave height;
- Visibility;
- Whether sighting was before, during, or after detonations/exercise, and how many minutes before or after;
- Distance of marine mammal from actual detonations (or target spot if not yet detonated);
- Observed behavior—Watchstanders will report, in plain language and without trying to categorize in any way, the observed behavior of the animal(s) (such as animal closing to bow ride, paralleling course/speed, floating on surface and not swimming etc.), including speed and direction;
- Resulting mitigation implementation—Indicate whether explosive detonations were delayed, ceased, modified, or not modified due to marine mammal presence and for how long; and
- If observation occurs while explosives are detonating in the water, indicate munitions type in use at time of marine mammal detection (e.g., were the 5-inch guns actually firing when the animals were sighted? Did animals enter an area 2 minutes after a huge explosion went off?).

#### II. Passive Acoustic Monitoring

The Navy is required to conduct passive acoustic monitoring when operationally feasible.

(A) Any time a towed hydrophone array is employed during shipboard surveys the towed array shall be deployed during daylight hours for each of the days the ship is at sea.

(B) The towed hydrophone array shall be used to supplement the ship-based systematic line-transect surveys (particularly for species such as beaked whales that are rarely seen).

#### III. Marine Mammal Observers on Navy Platforms

(A) MMOs selected for aerial or vessel surveys shall be placed on a Navy platform during one of the exercises being monitored per year. The remaining designated exercise(s) shall be monitored by the Navy lookouts/watchstanders.

(B) The MMO must possess expertise in species identification of regional marine mammal species and experience collecting behavioral data.

(C) MMOs shall not be placed aboard Navy platforms for every Navy training event or major exercise, but during specifically identified opportunities deemed appropriate for data collection efforts. The events selected for MMO participation shall take into account safety, logistics, and operational concerns.

(D) MMOs shall observe from the same height above water as the lookouts.

(E) The MMOs shall not be part of the Navy's formal reporting chain of command during their data collection efforts; Navy lookouts shall continue to serve as the primary reporting means within the Navy chain of command for marine mammal sightings. The only exception is that if an animal is observed within the shutdown zone that has not been observed by the lookout, the MMO shall inform the lookout of the sighting, and the lookout shall take the appropriate action through the chain of command.

(F) The MMOs shall collect species identification, behavior, direction of travel relative to the Navy platform, and distance first observed. All MMO sightings shall be conducted according to a standard operating procedure. Information collected by MMOs should be the same as those collected by Navy lookout/watchstanders described above.

The Monitoring Plan for the Cherry Point Range Complex has been designed as a collection of focused "studies" (described fully in the Cherry Point Monitoring Plan) to gather data that will allow the Navy to address the following questions:

(A) What are the behavioral responses of marine mammals and sea turtles that are exposed to explosives?

(B) Is the Navy's suite of mitigation measures effective at avoiding injury and mortality of marine mammals and sea turtles?

Data gathered in these studies will be collected by qualified, professional marine mammal biologists or trained Navy lookouts/watchstanders that are experts in their field. This monitoring plan has been designed to gather data on all species of marine mammals that are observed in the Cherry Point Range Complex study area.

#### *Monitoring Workshop*

During the public comment period on past proposed rules for Navy actions (such as the Hawaii Range Complex (HRC), and Southern California Range Complex (SOCAL) proposed rules),

NMFS received a recommendation that a workshop or panel be convened to solicit input on the monitoring plan from researchers, experts, and other interested parties. The Cherry Point Range Complex proposed rule included an adaptive management component and both NMFS and the Navy believe that a workshop would provide a means for Navy and NMFS to consider input from participants in determining whether (and if so, how) to modify monitoring techniques to more effectively accomplish the goals of monitoring set forth earlier in the document. NMFS and the Navy believe that this workshop concept is valuable in relation to all of the Range Complexes and major training exercise rules and LOAs that NMFS is working on with the Navy at this time. Consequently, NMFS has determined that this single Monitoring Workshop will be included as a component of all of the rules and LOAs that NMFS will be processing for the Navy in the next year or so.

The Navy, with guidance and support from NMFS, will convene a Monitoring Workshop, including marine mammal and acoustic experts as well as other interested parties, in 2011. The Monitoring Workshop participants will review the monitoring results from the previous two years of monitoring pursuant to the Cherry Point Range Complex rule as well as monitoring results from other Navy rules and LOAs (e.g., VACAPES, AFAST, SOCAL, HRC, and other rules). The Monitoring Workshop participants would provide their individual recommendations to the Navy and NMFS on the monitoring plan(s) after also considering the current science (including Navy research and development) and working within the framework of available resources and feasibility of implementation. NMFS and the Navy would then analyze the input from the Monitoring Workshop participants and determine the best way forward from a national perspective. Subsequent to the Monitoring Workshop, modifications would be applied to monitoring plans as appropriate.

#### *Integrated Comprehensive Monitoring Program*

In addition to the site-specific Monitoring Plan for the Cherry Point Range Complex, the Navy will complete the Integrated Comprehensive Monitoring Program (ICMP) Plan by the end of 2009. The ICMP is currently in development by the Navy, with Chief of Naval Operations Environmental Readiness Division (CNO-N45) having the lead. The program does not duplicate the monitoring plans for

individual areas (e.g. AFAST, HRC, SOCAL, VACAPES); instead it is intended to provide the overarching coordination that will support compilation of data from both range-specific monitoring plans as well as Navy funded research and development (R&D) studies. The ICMP will coordinate the monitoring programs' progress towards meeting its goals and develop a data management plan. A program review board is also being considered to provide additional guidance. The ICMP will be evaluated annually to provide a matrix for progress and goals for the following year, and will make recommendations on adaptive management for refinement and analysis of the monitoring methods.

The primary objectives of the ICMP are to:

- Monitor and assess the effects of Navy activities on protected species;
- Ensure that data collected at multiple locations is collected in a manner that allows comparison between and among different geographic locations;
- Assess the efficacy and practicality of the monitoring and mitigation techniques;
- Add to the overall knowledge-base of marine species and the effects of Navy activities on marine species.

The ICMP will be used both as: (1) A planning tool to focus Navy monitoring priorities (pursuant to ESA/MMPA requirements) across Navy Range Complexes and Exercises; and (2) an adaptive management tool, through the consolidation and analysis of the Navy's monitoring and watchstander data, as well as new information from other Navy programs (e.g., R&D), and other appropriate newly published information.

In combination with the 2011 Monitoring Workshop and the adaptive management component of the Cherry Point Range Complex rule and the other Navy rules (e.g. VACAPES Range Complex, Jacksonville Range Complex, etc.), the ICMP could potentially provide a framework for restructuring the monitoring plans and allocating monitoring effort based on the value of particular specific monitoring proposals (in terms of the degree to which results would likely contribute to stated monitoring goals, as well the likely technical success of the monitoring based on a review of past monitoring results) that have been developed through the ICMP framework, instead of allocating based on maintaining an equal (or commensurate to effects) distribution of monitoring effort across range complexes. For example, if careful prioritization and planning through the

ICMP (which would include a review of both past monitoring results and current scientific developments) were to show that a large, intense monitoring effort in Hawaii would likely provide extensive, robust and much-needed data that could be used to understand the effects of sonar throughout different geographical areas, it may be appropriate to have other range complexes dedicate money, resources, or staff to the specific monitoring proposal identified as "high priority" by the Navy and NMFS, in lieu of focusing on smaller, lower priority projects divided throughout their home range complexes.

The ICMP will identify:

- A means by which NMFS and the Navy would jointly consider prior years' monitoring results and advancing science to determine if modifications are needed in mitigation or monitoring measures to better effect the goals laid out in the Mitigation and Monitoring sections of the Cherry Point Range Complex rule.

- Guidelines for prioritizing monitoring projects

- If, as a result of the workshop and similar to the example described in the paragraph above, the Navy and NMFS decide it is appropriate to restructure the monitoring plans for multiple ranges such that they are no longer evenly allocated (by rule), but rather focused on priority monitoring projects that are not necessarily tied to the geographic area addressed in the rule, the ICMP will be modified to include a very clear and unclassified record-keeping system that will allow NMFS and the public to see how each range complex/project is contributing to all of the ongoing monitoring programs (resources, effort, money, *etc.*).

#### Adaptive Management

The final regulations governing the take of marine mammals incidental to Navy's Cherry Point Range Complex exercises contain an adaptive management component. The use of adaptive management will give NMFS the ability to consider new data from different sources to determine (in coordination with the Navy) on an annual basis if mitigation or monitoring measures should be modified or added (or deleted) if new data suggests that such modifications are appropriate (or are not appropriate) for subsequent annual LOAs.

The following are some of the possible sources of applicable data:

- Results from the Navy's monitoring from the previous year (either from Cherry Point Range Complex or other locations).

- Findings of the Workshop that the Navy will convene in 2011 to analyze monitoring results to date, review current science, and recommend modifications, as appropriate to the monitoring protocols to increase monitoring effectiveness.

- Compiled results of Navy funded research and development (R&D) studies (presented pursuant to the ICMP, which is discussed elsewhere in this document).

- Results from specific stranding investigations (either from Cherry Point Range Complex or other locations).

- Results from general marine mammal and sound research (funded by the Navy or otherwise).

- Any information which reveals that marine mammals may have been taken in a manner, extent or number not authorized by these regulations or subsequent Letters of Authorization.

Mitigation measures could be modified or added (or deleted) if new data suggests that such modifications would have (or do not have) a reasonable likelihood of accomplishing the goals of mitigation laid out in this final rule and if the measures are practicable. NMFS would also coordinate with the Navy to modify or add to (or delete) the existing monitoring requirements if the new data suggest that the addition of (or deletion of) a particular measure would more effectively accomplish the goals of monitoring laid out in this final rule. The reporting requirements associated with this rule are designed to provide NMFS with monitoring data from the previous year to allow NMFS to consider the data and issue annual LOAs. NMFS and the Navy will meet annually, prior to LOA issuance, to discuss the monitoring reports, Navy R&D developments, and current science and whether mitigation or monitoring modifications are appropriate.

#### Reporting

In order to issue an ITA for an activity, Section 101(a)(5)(A) of the MMPA states that NMFS must set forth "requirements pertaining to the monitoring and reporting of such taking". Effective reporting is critical to ensure compliance with the terms and conditions of a LOA, and to provide NMFS and the Navy with data of the highest quality based on the required monitoring. As NMFS noted in its proposed rule, additional detail has been added to the reporting requirements since they were outlined in the proposed rule. The updated reporting requirements are all included below. A subset of the information provided in the monitoring reports may

be classified and not releasable to the public.

NMFS will work with the Navy to develop tables that allow for efficient submission of the information required below.

#### *General Notification of Injured or Dead Marine Mammals*

Navy personnel will ensure that NMFS (regional stranding coordinator) is notified immediately (or as soon as operational security allows) if an injured or dead marine mammal is found during or shortly after, and in the vicinity of, any Navy training exercise utilizing underwater explosive detonations or other activities. The Navy will provide NMFS with species or description of the animal(s), the condition of the animal(s) (including carcass condition if the animal is dead), location, time of first discovery, observed behaviors (if alive), and photo or video (if available).

#### *Annual Cherry Point Range Complex Monitoring Plan Report*

The Navy shall submit a report annually on March 1 describing the implementation and results (through January 1 of the same year) of the Cherry Point Range Complex Monitoring Plan, described above. Data collection methods will be standardized across range complexes to allow for comparison in different geographic locations. Although additional information will also be gathered, the MMOs collecting marine mammal data pursuant to the Cherry Point Range Complex Monitoring Plan shall, at a minimum, provide the same marine mammal observation data required in major range complex training exercises section of the Annual Cherry Point Range Complex Exercise Report referenced below.

The Cherry Point Range Complex Monitoring Plan Report may be provided to NMFS within a larger report that includes the required Monitoring Plan Reports from multiple Range Complexes.

#### *Annual Cherry Point Range Complex Exercise Report*

The Navy is in the process of improving the methods used to track explosives used to provide increased granularity. The Navy will provide the information described below for all of their explosive exercises. Until the Navy is able to report in full the information below, they will provide an annual update on the Navy's explosive tracking methods, including improvements from the previous year.

(i) Total annual number of each type of explosive exercise (of those identified as part of the "specified activity" in this final rule) conducted in the Cherry Point Range Complex.

(ii) Total annual expended/detonated rounds (missiles, bombs, *etc.*) for each explosive type.

#### *Cherry Point Range Complex 5-yr Comprehensive Report*

The Navy shall submit to NMFS a draft report that analyzes and summarizes all of the multi-year marine mammal information gathered during the Cherry Point Range Complex exercises for which annual reports are required (Annual Cherry Point Range Complex Exercise Reports and Cherry Point Range Complex Monitoring Plan Reports). This report will be submitted at the end of the fourth year of the rule (May 2013), covering activities that have occurred through December 1, 2012.

#### **Comments and Responses**

On March 16, 2009, NMFS published a proposed rule (74 FR 11052) in response to the Navy's request to take marine mammals incidental to military readiness training in the Cherry Point Range Complex study area and requested comments, information and suggestions concerning the request. During the 28-day public comment period, NMFS received comments from the Marine Mammal Commission (Commission) and from the Natural Resources Defense Council (on behalf of Cetacean Society International, League for Coastal Protection, Ocean Futures Society, Jean-Michel Cousteau). The comments are summarized and sorted into general topic areas and are addressed below.

#### *MMPA Concerns*

*Comment 1:* Noting that NMFS initially provided a shorter than usual public comment period for the proposed rule for the Cherry Point Range Complex training activities, the Commission recommends that NMFS adopt a policy to provide a 60-day comment period for all proposed regulations issued under section 101(a)(5)(A), and in no case less than a 45-day comment period. The Commission argues that such a short comment period is impractical, unnecessary, or contrary to the public interest, as provided for under section 553(b)(3)(B) of the Administrative Procedure Act (APA). The Commission also argues that it was unreasonable for NMFS to afford any less than 30 days, particularly since Congress requires a 30-day public comment period for incidental harassment authorizations

(IHA) under section 101(a)(5)(D) of the MMPA.

*Response:* There is no prescribed minimum timeframe for public comment on proposed rules in the APA or section 101(a)(5)(A) of MMPA. NMFS routinely strives to ensure that the public is afforded at least a 30-day public comment period on all MMPA rules. However, circumstances may make a shorter comment period necessary and reasonable.

As an initial matter, whenever NMFS develops proposed regulations under the MMPA, the agency is required to first publish a notice of receipt of a request for the implementation of regulations and LOAs governing the incidental taking. This process typically affords the public up to 30 days to comment on a requester's application and provide NMFS with information and suggestions that will be considered in developing MMPA regulations. See 50 CFR 216.104. On July 8, 2008, NMFS published its "Notice; receipt of application for a Letter of Authorization (LOA); request for comments and information" for the Cherry Point Range Complex and solicited input for 30 days (See 73 FR 38991).

The public was also afforded 28 days to comment on the Cherry Point Range Complex proposed rule. NMFS originally provided the public with 21 days because of: (1) The tight deadline of the training activities identified in the Navy's schedule; and (2) the fact that NMFS anticipated even fewer effects to marine mammals as compared to similar activities to be conducted in the Navy's Virginia Capes (VACAPES) and Jacksonville Range Complexes (JAX) (each of which contained a 30-day comment period). NMFS, at the request of the Commission, extended the public comment period by 7 days to allow additional time for comment (74 FR 15419; April 6, 2009). During the public comment period, the Commission was the only entity that provided relevant comments on the Cherry Point Range Complex proposed rule.

Next, the Commission's reference to section 553(b)(3)(B) of the APA is misplaced. The provision to which the Commission cites applies where an agency, for good cause, dispenses with prior opportunity for notice and comment because it has found that to do so would be impracticable, unnecessary, or contrary to the public interest. As NMFS engaged in APA notice and comment rulemaking, the Commission cannot rely on this provision to support its position.

Finally, NMFS recognizes that section 101(a)(5)(D) of the MMPA prescribes a 30-day public comment period on

proposed IHAs. However, this statutory provision is inapplicable as NMFS invoked the rulemaking provision of the MMPA (Section 101(a)(5)(A)), a provision which contains no reference to a minimum timeframe for public comment.

Based on the foregoing, NMFS concluded that the 28-day public comment period was reasonable.

*Comment 2:* The Commission recommends that NMFS require the Navy to conduct an external peer review of its marine mammal density estimates, including the data upon which those estimates are based and the manner in which those data are collected and used.

*Response:* As discussed in detail in the proposed rule (74 FR 11052; March 16, 2009), marine mammal density estimates were based on the most recent data and information on the occurrence, distribution, and density of marine mammals. The updated density estimates presented in this assessment are derived from the Navy OPAREA Density Estimates (NODE) for the Southeast OPAREAs report (DoN, 2007).

Density estimates for cetaceans were derived in one of three ways, in order of preference: (1) Through spatial models using line-transect survey data provided by the NMFS (as discussed below); (2) using abundance estimates from Mullin and Fulling (2003); or (3) based on the cetacean abundance estimates found in the NMFS stock assessment reports (SAR; Waring *et al.*, 2007), which can be viewed at <http://www.nmfs.noaa.gov/pr/sars/species.htm>.

For the model-based approach, density estimates were calculated for each species within areas containing survey effort. A relationship between these density estimates and the associated environmental parameters such as depth, slope, distance from the shelf break, sea surface temperature, and chlorophyll concentration was formulated using generalized additive models. This relationship was then used to generate a two-dimensional density surface for the region by predicting densities in areas where no survey data exist.

The analyses for cetaceans were based on sighting data collected through shipboard surveys conducted by NMFS Northeast Fisheries Science Center (NEFSC) and Southeast Fisheries Science Center (SEFSC) between 1998 and 2005. Species-specific density estimates derived through spatial modeling were compared with abundance estimates found in the most current NMFS SAR to ensure consistency. All spatial models and density estimates were reviewed by and

coordinated with NMFS Science Center technical staff and scientists with the University of St. Andrews, Scotland, Centre for Environmental and Ecological Modeling (CREEM). Draft models and preliminary results were reviewed during a joint workshop attended by Navy, NMFS Science Center, and CREEM representatives. Subsequent revisions and draft reports were reviewed by these same parties.

Therefore, NMFS considers that the density estimates, including the data upon which those estimates are based and the manner in which those are collected and used, has already gone through an independent review process.

*Comment 3:* The Commission recommends that NMFS require the Navy to revise its explosive ordnance analysis to provide a more realistic assessment of potential occurrences and outcomes of explosions. The Commission states that the Navy analyzes the effects of infrequent explosive events by assuming that those events will be distributed evenly over four seasons, resulting in fractional quarterly totals. The Commission points out that these discrete events either occur or they do not; they cannot occur in fractions. For that reason, the Commission states that it does not believe that assessing the effect of a 0.25 or 0.5 event per season provides a realistic range of likely outcomes because neither the events, nor the densities of marine mammals may be evenly distributed over those seasons.

*Response:* NMFS agrees with the Commission that the Navy's training activities, though infrequent, do not occur in fractions. However, since scheduling of these training events is determined by a number of factors, not the least of which includes weather conditions, current surge levels and international events, and requirements of the Fleet Response Training Plan, it is impossible to plan these discrete events for the future 5 years in advance. Therefore, NMFS believes that by assuming that these training activities are evenly distributed over four seasons brings a more realistic view in analyzing the impacts over the years.

#### Monitoring

*Comment 4:* The Commission recommends that NMFS require the Navy to complete its Integrated Comprehensive Monitoring Program plan and make the ICMP Plan available to the Commission and other interested parties for review prior to its implementation.

*Response:* The Navy continues to develop the ICMP Plan and will distribute it to the Commission and

other interested parties once it is finalized. However, NMFS does not believe it would be feasible to complete the ICMP Plan prior to the end of 2009 if a public comment period were afforded. Nevertheless, components of the ICMP Plan have already been factored into a number of MMPA final rules for Navy actions, including the Cherry Point Range Complex, and the Navy is continuing to develop the ICMP in cooperation with NMFS. The components of the ICMP Plan that were considered and incorporated into the final rules include:

- A requirement to monitor Navy training exercises, particularly those involving underwater detonations, for compliance with the terms and conditions of ESA Section 7 consultations or MMPA authorizations;
- A requirement to minimize exposure of protected species from sound pressure levels from underwater detonations that result in harassment;
- A requirement to collect data to support estimating the number of individuals exposed to sound levels above current regulatory thresholds;
- A requirement to assess the efficacy of the Navy's current marine species mitigation;
- A requirement to document trends in species distribution and abundance in Navy training areas through monitoring efforts;
- A requirement to compile data that would improve the Navy and NMFS' knowledge of the potential behavioral and physiological effects to marine species from underwater detonations.

The ICMP Plan will be used both as: (1) A planning tool to focus Navy monitoring priorities (pursuant to ESA/MMPA requirements) across Navy Range Complexes and Exercises; and (2) an adaptive management tool, through the consolidation and analysis of the Navy's monitoring and watchstander (lookout) data, as well as new information from other Navy programs (e.g., research and development), and newly published non-Navy information. The ICMP Plan is described in the Navy's EIS and LOA application.

*Comment 5:* The Commission recommends that NMFS require the Navy to develop and implement a plan to evaluate the effectiveness of monitoring and mitigation measures before beginning or in conjunction with operations covered by the proposed incidental take authorization.

*Response:* NMFS has been working with the Navy throughout the rulemaking process to develop a series of mitigation, monitoring, and reporting protocols. These mitigation, monitoring and reporting measures include, but are

not limited to: (1) The use of trained shipboard lookouts who will conduct marine mammal monitoring to avoid collisions with marine mammals; (2) the use of exclusion zones that avoid exposing marine mammals to levels of sound likely to result in injury or death of marine mammals; (3) several cautionary measures to minimize the likelihood of ship strikes of North Atlantic right whales in certain areas and times of the year; (4) the use of MMOs/lookouts to conduct aerial and vessel-based surveys; and (5) annual monitoring reports and comprehensive reports to provide insights of impacts to marine mammals.

NMFS has evaluated the effectiveness of the measures and has concluded they will achieve the least practicable adverse impact on the affected marine mammal species or stocks and their habitat. For example, operations will be suspended if trained lookouts and/or MMOs detect marine mammals within the vicinity of the exercise, thereby preventing marine mammal injury or mortality (use of specified exclusion zones). In addition, prior to conducting training activities involving underwater explosive detonation, the Navy will be required to carry out monitoring to make sure that the safety zones are clear of marine mammals, and then during the exercise when feasible. These monitoring and mitigation measures will decrease the number of marine mammals exposed to underwater explosions and exposure to intense sounds from the detonations.

Over the course of the 5-year rule, NMFS will evaluate the Navy's training activities annually to validate the effectiveness of the measures. NMFS will, through the established adaptive management process, work with the Navy to determine whether additional mitigation and monitoring measures are necessary. In addition, with the implementation of the ICMP Plan by the end of 2009, and the planned Monitoring Workshop in 2011, NMFS will work with the Navy to further improve its monitoring and mitigation plans for its future activities.

*Comment 6:* The Commission requests that NMFS reconcile the discrepancy between proposed §§ 218.24(e)(3)(i) and 218.24(e)(3)(iii) on the use of marine mammal observers which require the Navy to specify the circumstances under which marine mammal observers would not be required aboard Navy platforms.

*Response:* In the proposed rule § 218.24(e)(3)(i) states "Marine mammal observers (MMOs) shall be placed on a Navy platform during the exercises" and the proposed rule § 218.24(e)(3)(iii) states "MMOs shall not be placed

aboard Navy platforms for every Navy training event or major exercise, but during specifically identified opportunities for data collection efforts. The events selected for MMO participation shall take into account safety, logistics, and operational concerns.”

The language has been revised in § 218.24(c)(3)(i) to read as follows:

“Marine mammal observers (MMOs) who are selected for aerial or vessel surveys shall be placed on a Navy platform during one of the explosives exercises” to make the statement clear.

Regarding the Commission’s request to specify the circumstances under which marine mammal observers would not be required aboard Navy platforms, the Navy states that MMO deployment will be based on a number of factors, the first of which will be to support the data needs of the Cherry Point Monitoring Plan and ICMP. MMO efforts should be focused on monitoring the types of events, in the time and place, needed to support the overall goals of the Cherry point Monitoring Plan and ICMP. Next, MMOs will be deployed when safe to do so and if practicable. Many factors will contribute to a decision to place MMOs on Navy platforms, including logistics and MMO safety. MMOs will not be deployed on an exercise if it could result in a hazard to the MMO or exercise participants or an exercise where placing MMOs onboard Navy platforms would not be practicable. An example of an exercise which may not be practicable for MMO deployment would be Air to Surface MISSILEX where the Navy platform is a helicopter with no available space for an MMO.

*Comment 7:* The Commission requests that NMFS describe, or require the Navy to describe, the alternative measures that the Navy would implement to monitor for the presence of marine mammals when marine mammal observers are not being used.

*Response:* Regardless of whether MMOs are present, the shipboard lookouts would implement the mitigation measures identified in this rule. Shipboard lookouts are trained to detect objects in the water, which includes items ranging from ships, to periscopes, to marine life. Lookout training includes those measures listed in the Personal Training section of the mitigation measures. The specific measures used by lookouts to monitor for the presence of marine mammals are identified in the Navy’s Operating Procedures and Collision Avoidance measures, as well as those measures identified for specific at-sea training events in the Monitoring section of this document.

#### *Mitigation*

*Comment 8:* The Commission recommends that NMFS require the Navy to suspend an activity if a marine mammal is seriously injured or killed and the injury or death could be associated with the activity. Subsequently, the injury or death should be investigated to determine the cause, assess the full impact of the activity, and determine how the activity should be modified to avoid future injuries or deaths.

*Response:* Though NMFS largely agrees with the Commission, it should be noted that without detailed examination by an expert, it is usually not feasible to determine the cause of injury or mortality when an injured or dead marine mammal is sighted in the field. Therefore, NMFS has required in its final rule that if there is clear evidence that a marine mammal is injured or killed as a result of the proposed Navy training activities (e.g., instances in which it is clear that munitions explosions caused the injury or death) the Naval activities shall be immediately suspended and the situation immediately reported by the participating unit to the Officer in Charge of the Exercise (OCE), who will follow Navy procedures for reporting the incident to NMFS through the Navy’s chain-of-command.

For any other sighting of injured or dead marine mammals in the vicinity of any Navy training exercises utilizing underwater explosive detonations for which the cause of injury or mortality cannot be immediately determined, the Navy personnel will ensure that NMFS (regional stranding coordinator) is notified immediately (or as soon as operational security allows). The Navy will provide NMFS with species or description of the animal(s), the condition of the animal(s) (including carcass condition if the animal is dead), location, time of first discovery, observed behaviors (if alive), and photo or video (if available).

*Comment 9:* The Commission recommends that NMFS require the Navy to halt an activity if a marine mammal species other than those covered by the authorization is observed within the operating area.

*Response:* The final rule for the proposed Cherry Point Range Complex training activities prohibits the take of marine mammals other than those covered by the authorization. Nevertheless, if a marine mammal is sighted in the operating area outside the zone of influence where it could be harassed, NMFS will not require the Navy to suspend an activity since no

marine mammal would be taken. As explained in this rulemaking, NMFS does not believe species other than those authorized to be taken will occur in the proposed training area because they are extralimital and rare; thus, it is very unlikely the Navy will need to suspend activities for species not covered by these regulations and future LOAs.

#### *Miscellaneous Issues*

*Comment 10:* The Commission recommends that NMFS work with the Navy to develop a database for storing original records of Navy interactions with marine mammals.

*Response:* The Navy is required to document all marine mammal sightings through aerial or vessel based survey by MMOs or Navy lookouts/watchstanders. Those records will be used to determine potential Navy interactions with marine mammals and to assess the impacts on marine mammals that may have resulted from the Navy’s training activities. Currently there is no plan to develop a database for storing original records of Navy interactions with marine mammals due to limited resources. Nevertheless, NMFS will consider the Commission’s recommendation when adequate resources are available to undertake such efforts.

*Comment 11:* The NRDC commented on the proposed rule with its earlier comments on the NMFS’ proposed rule for the Navy’s Atlantic Fleet Active Sonar Training (AFAS) and the Navy’s AFAS DEIS. Specifically, the NRDC states that neither NMFS in its proposed rule nor the Navy in its EIS offers sufficient measures to mitigate the harmful impacts of high intensity sonar. The NRDC further states that NMFS and the Navy’s analysis substantially understates the potential effects of sonar on marine wildlife.

*Response:* NRDC’s comments are inapplicable to the proposed Navy training activities at the Cherry Point Range Complex. The Navy does not intend, as part of its proposed action, to conduct training with MFAS, HFAS, and Improved Extended Echo Ranging (IEER)/Advanced Extended Echo Ranging (AEER). The Navy’s request for a LOA for sonar related training was addressed in the Final Rule and LOA for AFAS which was issued by NMFS on January 22, 2009, and published in the **Federal Register** on February 19, 2009 (74 FR 4844).

#### **Estimated Take of Marine Mammals**

As mentioned previously, with respect to the MMPA, NMFS’ effects assessments serve three primary purposes: (1) To prescribe the

permissible methods of taking (*i.e.*, Level B Harassment (behavioral harassment), Level A Harassment (injury), or mortality, including an identification of the number and types of take that could occur by Level A or B harassment or mortality)) and to prescribe other means of effecting the least practicable adverse impact on such species or stock and its habitat (*i.e.*, mitigation); (2) to determine whether the specified activity will have a negligible impact on the affected species or stocks of marine mammals (based on the likelihood that the activity will adversely affect the species or stock through effects on annual rates of recruitment or survival); (3) to determine whether the specified activity will have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (however, there are no subsistence communities in the Cherry Point Range Complex; thus, there would be no effect on any subsistence user); and (4) to prescribe

requirements pertaining to monitoring and reporting.

In the Estimated Take of Marine Mammals section of the proposed rule, NMFS related the potential effects to marine mammals from underwater detonation of explosives to the MMPA regulatory definitions of Level A and Level B Harassment and assessed the effects to marine mammals that could result from the specific activities that the Navy intends to conduct. These analyses are discussed in the proposed rule (74 FR 11052; pages 11070–11071) and have not changed.

**Take Calculations**

An overview of the Navy’s modeling methods to determine the number of exposures of MMPA-protected species to sound likely to result in mortality, Level A harassment (injury), or Level B harassment is provided in the **Federal Register** notice for the proposed rule (74 FR 11052; pages 11070–11071). No changes have been made to the

modeling methods in the section of the proposed rule.

Exposure of marine mammals based on the Navy’s modeling shows that only two individuals of Atlantic spotted dolphins would be taken by Level B harassment due to the low levels of the proposed training activities. However, after further evaluation, NMFS concluded that because of the relatively high abundance of several species in the action area (Clymene dolphins, pilot whales, minke whales, pantropical spotted dolphins, *Kogia* sp., and several species of beaked whales (Waring *et al.*, 2008) and because some of these species tend to aggregate in relatively large groups, there is a reasonable probability that these species could be taken by Level B behavioral harassment. Therefore, NMFS has included these species in our take estimates for the 5-year regulations. Revised estimates of potential takes from the proposed Cherry Point Range Complex training activities are listed in Table 4.

TABLE 4—SUMMARY OF POTENTIAL TAKES FROM EXPLOSIVE ORDNANCE (PER YEAR) FOR MARINE MAMMALS IN THE CHERRY POINT RANGE COMPLEX

Species	Level B harassment	Level A harassment	Mortality
Minke whale .....	3	0	0
Beaked whales .....	20	0	0
<i>Kogia</i> sp .....	3	0	0
Pilot whale .....	20	0	0
Atlantic spotted dolphin .....	20	0	0
Bottlenose dolphin .....	30	0	0
Clymene dolphin .....	30	0	0
Common dolphin .....	20	0	0
Striped dolphin .....	20	0	0
Pantropical spotted dolphin .....	20	0	0
Risso’s dolphin .....	30	0	0
Atlantic white-sided dolphin .....	20	0	0
Spinner dolphin .....	3	0	0
Fraser’s dolphin .....	3	0	0
Melon-headed whale .....	3	0	0
Pygmy killer whale .....	3	0	0
Killer whale .....	3	0	0

**Effects on Marine Mammal Habitat**

NMFS’ Cherry Point Complex proposed rule included a section that addressed the effects of the Navy’s activities on marine mammal habitat (74 FR 11052, page 11071). Marine mammal habitat and prey species could be affected by the explosive ordnance testing and the sound generated by such activities. Based on the analysis contained in the Navy’s FEIS and the information below, NMFS has determined that the Cherry Point Range Complex training activities will not have adverse or long-term impacts on marine mammal habitat or prey species.

Unless the sound source or explosive detonation is stationary and/or

continuous over a long duration in one area, the effects of underwater detonation and its associated sound are generally considered to have a less severe impact on marine mammal habitat than the physical alteration of the habitat. Marine mammals may be temporarily displaced from areas where Navy training is occurring, but the area will be utilized again after the activities have ceased.

*Effects on Food Resources*

There are currently no well-established thresholds for estimating effects to fish from explosives other than mortality models. Fish that are located in the water column, in proximity to the

source of detonation could be injured, killed, or disturbed by the impulsive sound and could leave the area temporarily. Continental Shelf Inc. (2004) summarized a few studies conducted to determine effects associated with removal of offshore structures (*e.g.*, oil rigs) in the Gulf of Mexico. Their findings revealed that at very close range, underwater explosions are lethal to most fish species regardless of size, shape, or internal anatomy. In most situations, cause of death in fish has been massive organ and tissue damage and internal bleeding. At longer range, species with gas-filled swimbladders (*e.g.*, snapper, cod, and striped bass) are more susceptible than

those without swimbladders (*e.g.*, flounders, eels).

Studies also suggest that larger fish are generally less susceptible to death or injury than small fish. Moreover, elongated forms that are round in cross section are less at risk than deep-bodied forms. Orientation of fish relative to the shock wave may also affect the extent of injury. Open water pelagic fish (*e.g.*, mackerel) seem to be less affected than reef fishes. The results of most studies are dependent upon specific biological, environmental, explosive, and data recording factors.

The huge variation in fish populations, including numbers, species, sizes, and orientation and range from the detonation point, makes it very difficult to accurately predict mortalities at any specific site of detonation. A total of 200 hours explosive detonation events, with each event lasting for 1–12 hours, are widely dispersed in the large Cherry Point study area over the seasons for each year. Most fish species experience a large number of natural mortalities, especially during early life-stages, and any small level of mortality caused by the Cherry Point Range Complex training exercises involving explosives will likely be insignificant to the population as a whole.

Therefore, potential impacts to marine mammal food resources within the Cherry Point Range Complex are expected to be minimal given both the very geographic and spatially limited scope of most Navy at-sea activities including underwater detonations, and the high biological productivity of these resources. No short or long term effects to marine mammal food resources from Navy activities are anticipated within the Cherry Point Range Complex.

#### Analysis and Negligible Impact Determination

Pursuant to NMFS' regulations implementing the MMPA, an applicant is required to estimate the number of animals that will be "taken" by the specified activities (*i.e.*, takes by harassment only, or takes by harassment, injury, and/or death). This estimate informs the analysis that NMFS must perform to determine whether the activity will have a "negligible impact" on the species or stock. Level B (behavioral) harassment occurs at the level of the individual(s) and does not assume any resulting population-level consequences, though there are known avenues through which behavioral disturbance of individuals can result in population-level effects. A negligible impact finding is based on the lack of likely adverse effects on annual rates of recruitment or survival (*i.e.*, population-

level effects). An estimate of the number of Level B harassment takes alone, is not enough information on which to base an impact determination.

In addition to considering estimates of the number of marine mammals that might be "taken" through behavioral harassment, NMFS must consider other factors, such as the likely nature of any responses (their intensity, duration, *etc.*), the context of any responses (critical reproductive time or location, migration, *etc.*), as well as the number and nature of estimated Level A takes, the number of estimated mortalities, and effects on habitat.

The Navy's specified activities have been described based on best estimates of the planned detonation events the Navy would conduct for the proposed Cherry Point Range Complex training activities. The events are generally short in duration, including a total of 14, 1-hour events and 14, 8–12-hour events. Taking the above into account, along with the fact that NMFS anticipates no mortalities and injuries to result from the action, the fact that there are no specific areas of reproductive importance for marine mammals recognized within the Cherry Point Range Complex study area, the sections discussed below, and dependent upon the implementation of the proposed mitigation measures, NMFS has determined that Navy training exercises utilizing underwater detonations will have a negligible impact on the affected marine mammal species and stocks present in the Cherry Point Range Complex Study Area.

NMFS' analysis of potential behavioral harassment, temporary threshold shifts, permanent threshold shifts, injury, and mortality to marine mammals as a result of the Cherry Point Range Complex training activities was provided in the proposed rule (74 FR 11052, pages 11056–11066) and is described in more detail below.

#### Behavioral Harassment

The Navy plans a total of 14 MISSILEX training events (each lasting for 1 hour), 20 MINEX training events (each lasting for 8 hours), and 2 FIREX training events (each lasting for 12 hours) annually. The total training exercises proposed by the Navy in the Cherry Point Range Complex amount to under 200 hours per year. These detonation events are widely dispersed throughout several of the designated sites within the Cherry Point Range Complex Study Area. The probability that detonation events will overlap in time and space with marine mammals is low, particularly given the densities of marine mammals in the Cherry Point

Range Complex Study Area and the implementation of monitoring and mitigation measures. Moreover, NMFS does not expect animals to experience repeated exposures to the same sound source as animals will likely move away from the source after being exposed. In addition, these isolated exposures, when received at distances of Level B behavioral harassment (*i.e.*, 177 dB re 1 microPa<sup>2</sup>-sec), are expected to cause brief startle reactions or short-term behavioral modification by the animals. These brief reactions and behavioral changes are expected to disappear when the exposures cease. Therefore, these levels of received impulse noise from detonation are not expected to affect annual rates or recruitment or survival.

#### TTS

NMFS and the Navy have estimated that individuals of some species of marine mammals may sustain some level of temporarily threshold shift TTS from underwater detonations. TTS can last from a few minutes to days, be of varying degree, and occur across various frequency bandwidths. The TTS sustained by an animal is primarily classified by three characteristics:

- Frequency—Available data (of mid-frequency hearing specialists exposed to mid to high frequency sounds—Southall *et al.*, 2007) suggest that most TTS occurs in the frequency range of the source up to one octave higher than the source (with the maximum TTS at 1/2 octave above).

- Degree of the shift (*i.e.*, how many dB is the sensitivity of the hearing reduced by)—generally, both the degree of TTS and the duration of TTS will be greater if the marine mammal is exposed to a higher level of energy (which would occur when the peak dB level is higher or the duration is longer). Since the impulse from detonation is extremely brief, an animal would have to approach very close to the detonation site to increase the received SEL. The threshold for the onset of TTS for detonations is a dual criteria: 182 dB re 1 microPa<sup>2</sup>-sec or 23 psi, which might be received at distances from 314–1,091 m from the centers of detonation based on the types of NEW involved to receive the SEL that causes TTS compared to similar source level with longer durations (such as sonar signals).

- Duration of TTS (Recovery time)—Of all TTS laboratory studies, some using exposures of almost an hour in duration or up to 217 SEL, almost all recovered within 1 day (or less, often in minutes), though in one study (Finneran *et al.*, 2007), recovery took 4 days.

- Although the degree of TTS depends on the received noise levels

and exposure time, all studies show that TTS is reversible and animals' sensitivity is expected to recover fully in minutes to hours. Therefore, NMFS expects that TTS would not affect annual rates of recruitment or survival.

#### *Acoustic Masking or Communication Impairment*

As discussed above, it is also possible that anthropogenic sound could result in masking of marine mammal communication and navigation signals. However, masking only occurs during the time of the signal (and potential secondary arrivals of indirect rays), versus TTS, which occurs continuously for its duration. Impulse sounds from underwater detonation are extremely brief and the majority of most animals' vocalizations would not be masked. Therefore, masking effects from underwater detonation are expected to be minimal and unlikely. If masking or communication impairment were to occur briefly, it would be in the frequency ranges below 100 Hz, which overlaps with some mysticete vocalizations; however, it would likely not mask the entirety of any particular vocalization or communication series because of the short impulse.

#### *PTS, Injury, or Mortality*

The Navy's model estimated that no marine mammal would experience 50 percent tympanic membrane rupture or slight lung injury (Level A harassment) as a result of the training activities utilizing underwater detonation in the Cherry Point Range Complex Study Area. For underwater detonations, the animals have to be within pre-defined zones of influence (ZOI) to experience Level A harassment. The injury zones vary from 0.04 km<sup>2</sup> to 0.185 km<sup>2</sup> (or at distances between 113 m to 243 m from the center of detonation) depending on the types of munitions used and the season of the action. NMFS believes it is unlikely that any marine mammal could be undetected by lookouts/watchstanders or MMOs within such a small area during pre-testing surveys. As discussed previously, the Navy plans to utilize aerial or vessel surveys to detect marine mammals for mitigation implementation and indicated that they are capable of effectively monitoring safety zones.

Based on these assessments, NMFS determined that approximately 3 minke whales, 3 dwarf or pygmy sperm whales, 20 beaked whales, 20 pilot whales, 20 Atlantic spotted dolphins, 30 bottlenose dolphins, 30 Clymene dolphins, 20 common dolphins, 20 striped dolphins, 20 pantropical spotted dolphins, 30 Risso's dolphins, 20

Atlantic white-sided dolphins, 3 spinner dolphins, 3 Fraser's dolphins, 3 melon-headed whales, 3 pygmy killer whales, and 3 killer whales could be affected by Level B harassment (TTS and sub-TTS) per year as a result of the proposed Cherry Point Range Complex training activities. These numbers represent approximately 0.09%, 0.76%, 0.06%, 0.04%, 0.04%, 0.02%, 0.02%, 0.45%, 0.15%, 0.03%, and 0.57% of minke whales, dwarf or pygmy sperm whales, pilot whales, Atlantic spotted dolphins, bottlenose dolphins, common dolphins, striped dolphins, pantropical spotted dolphins, Risso's dolphins, Atlantic white-sided dolphins, and beaked whales, respectively in the vicinity of the proposed Cherry Point Range Complex Study Area (calculation based on NMFS 2007 U.S. Atlantic and Gulf of Mexico Marine Mammal Stock Assessment). Although the population estimates of Clymene dolphins, spinner dolphins, Fraser's dolphins, melon-headed whales, pygmy killer whales, and killer whales are unknown in the proposed action area, NMFS considers the take of 30 individuals of Clymene dolphins and 3 individuals each of other 5 species by Level B harassment would have a negligible impact to these species because most of their population exists beyond the project area and because they are widely distributed species in the North Atlantic (Jefferson *et al.*, 1993; Reeves *et al.*, 2002).

No Level A take or mortality is expected as a result of the proposed Cherry Point Range Complex training activities.

Additionally, these aforementioned take estimates do not consider the implementation of mitigation measures. With the implementation of mitigation and monitoring measures, NMFS expects that the takes would be further reduced. Coupled with the fact that these impacts will likely not occur in areas and times critical to reproduction, NMFS has determined that the total taking over the 5-year period of the regulations and subsequent LOAs from the Navy's Cherry Point Range Complex training activities will have a negligible impact on the marine mammal species and stocks present in the Cherry Point Range Complex Study Area.

#### **Subsistence Harvest of Marine Mammals**

NMFS has determined that the issuance of 5-year regulations and subsequent LOAs (as warranted) for Navy training exercises in the Cherry Point Range Complex would not have an unmitigable adverse impact on the availability of the affected species or

stocks for subsistence use, since there are no such uses in the specified area.

#### *ESA*

There are six marine mammal species, three sea turtle species, and a fish species that are listed as endangered under the ESA with confirmed or possible occurrence in the study area and could be impacted by the proposed action: Humpback whale, North Atlantic right whale, blue whale, fin whale, sei whale, sperm whale, loggerhead sea turtle, leatherback sea turtle, the Kemp's ridley sea turtle, and the shortnose sturgeon.

Pursuant to Section 7 of the ESA, the Navy has consulted with NMFS on this action. NMFS has also consulted internally on the issuance of regulations under section 101(a)(5)(A) of the MMPA for this activity. The Biological Opinion concludes that the proposed training activities are likely to adversely affect but are not likely to jeopardize the continued existence of these threatened and endangered species under NMFS jurisdiction.

#### *NEPA*

NMFS participated as a cooperating agency on the Navy's Final Environmental Impact Statement (FEIS) for the Cherry Point Range Complex. NMFS subsequently adopted the Navy's EIS for the purpose of complying with the MMPA.

#### **Determination**

Based on the analysis contained herein and in the proposed rule (and other related documents) of the likely effects of the specified activity on marine mammals and their habitat and dependent upon the implementation of the mitigation measures, NMFS finds that the total taking from Navy Cherry Point Range Complex training exercises utilizing underwater explosives over the 5 year period will have a negligible impact on the affected species or stocks and will not result in an unmitigable adverse impact on the availability of marine mammal species or stocks for taking for subsistence uses because no subsistence uses exist in the Cherry Point Range Complex study area. NMFS has issued regulations for these exercises that prescribe the means of effecting the least practicable adverse impact on marine mammals and their habitat and set forth requirements pertaining to the monitoring and reporting of that taking.

#### **Classification**

This action does not contain a collection of information requirement

for purposes of the Paperwork Reduction Act.

The Regulatory Flexibility Act (RFA) requires Federal agencies to prepare an analysis of a rule's impact on small entities whenever the agency is required to publish a notice of proposed rulemaking. However, a Federal agency may certify, pursuant to 5 U.S.C. 605(b), that the action will not have a significant economic impact on a substantial number of small entities. The Chief Counsel for Regulation of the Department of Commerce certified at the Proposed Rule stage. The Navy is the entity that will be affected by this rulemaking, not a small governmental jurisdiction, small organization or small business, as defined by the RFA. This rulemaking authorizes the take of marine mammals incidental to a specified activity. The specified activity defined in the final rule includes the use of underwater detonations, which are only used by the U.S. military, during training activities that are only conducted by the U.S. Navy. Additionally, any requirements imposed by a Letter of Authorization issued pursuant to these regulations, and any monitoring or reporting requirements imposed by these regulations, will be applicable only to the Navy. Because this action, if adopted, would directly affect the Navy and not a small entity, NMFS concludes the action would not result in a significant economic impact on a substantial number of small entities.

The Assistant Administrator for Fisheries has determined that there is good cause under the Administrative Procedure Act (5 U.S.C. 553(d)(3)) to waive the 30-day delay in effective date of the measures contained in the final rule. The U.S. Navy has a compelling national policy reason to continue military readiness activities without interruption in its East Coast Operating Areas, *i.e.*, the Cherry Point Range Complex. As discussed below, suspension/interruption of the Navy's ability to train, for even a small number of days, disrupts vital sequential training and certification processes essential to our national security.

In order to meet its national security objectives, the Navy must continually maintain its ability to operate in a challenging at-sea environment, conduct military operations, control strategic maritime transit routes and international straits, and protect sea lines of communications that support international commerce. To meet these objectives, the Navy must continually train. Timely training is critical because individual Navy units and Strike Groups/Amphibious Readiness Groups

(ARG) currently operate in, or need to quickly deploy to high risk geographic areas. In addition, a Strike Group/ARG is built around an aircraft carrier with typically 5,300 personnel on board and an amphibious assault ship that carries a Marine Corps Expeditionary Unit, so failure to adequately train risks thousands of lives.

The training necessary to protect American interests and the lives of sailors and marines is complex. It involves ensuring the warfighter can accurately identify potential threats in a variety of marine environments and conditions, and it involves the coordination of different vessels and aircraft so that the group's capabilities are employed in the most tactically effective manner. As with any complicated coordinated effort, this challenge requires routine practice, as these skills are perishable.

In 10 U.S.C. 5062, Congress mandated that the Chief of Naval Operations (CNO) organize, train, and equip all Naval forces for combat. In response, the Fleet Response Training Plan (FRTP) is a major initiative designed to ensure Naval units receive required training before they deploy. The FRTP is an arduous sequential training cycle in which unit level training (ULT) and combat certification is followed by major exercises that bring together various warfare components so they have the opportunity to practice as an integrated whole and attain certification. Accordingly, any delay in coordinated training creates a significant and unreasonable risk which could result in a unit's and/or Strike Group's inability to train, certify and report as directed to an overseas theater of operations.

A deployment certification exercise is currently scheduled for June 2009 that will encompass areas of the Cherry Point Range Complex. Lack of the appropriate environmental regulatory coverage for even a single day imperils completion of this exercise, and risks deployment certification. Essential ULT also occurs in these OPAREAs. There is limited unit level underway (at-sea) time available in the FRTP to adjust the training dates. These ULT training periods are driven by sequential certification processes for both inport and at-sea training. Scheduling constraints are further complicated by the availability of Afloat Training Groups (ATGs) that are responsible for training all individual units. ATGs have a limited number of trainers available at any given time, and their schedules must also be de-conflicted, compounding the problem if training schedules are not adhered to. Waiver of

the 30-day delay of the effective date of the Final Rule will allow Navy to finalize operational procedures to ensure compliance with required mitigation, monitoring, and reporting requirements, and have MMPA authorization in place prior to Navy's vital June 2009 exercise.

#### List of Subjects in 50 CFR Part 218

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

Dated: June 5, 2009.

**Samuel D. Rauch III,**

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

■ For the reasons set forth in the preamble, 50 CFR part 218 is amended to read as follows:

#### **PART 218—REGULATIONS GOVERNING THE TAKING AND IMPORTING OF MARINE MAMMALS**

■ 1. The authority citation for part 218 continues to read as follows:

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

■ 2. Subpart C is added to part 218 to read as follows:

#### **Subpart C—Taking Marine Mammals Incidental to U.S. Navy Training in the Cherry Point Range Complex**

Sec.

218.20 Specified activity and specified geographical area and effective dates.

218.21 Permissible methods of taking.

218.22 Prohibitions.

218.23 Mitigation.

218.24 Requirements for monitoring and reporting.

218.25 Applications for Letters of Authorization.

218.26 Letters of Authorization.

218.27 Renewal of Letters of Authorization and adaptive management.

218.28 Modifications to Letters of Authorization.

#### **Subpart C—Taking Marine Mammals Incidental to U.S. Navy Training in the Cherry Point Range Complex**

##### **§ 218.20 Specified activity and specified geographical area and effective dates.**

(a) Regulations in this subpart apply only to the U.S. Navy for the taking of marine mammals that occurs in the area outlined in paragraph (b) of this section and that occur incidental to the activities described in paragraph (c) of this section.

(b) The taking of marine mammals by the Navy is only authorized if it occurs within the Cherry Point Range Complex Operation Area (OPAREA), which is

located along the southern east coast of the U.S., as stated in the Navy's letter of authorization application. The coordinates of the Cherry Point Range Complex OPAREA are: 35°30' N, 75°25' W; 34°14' N, 73°57' W; 32°12' N, 76°49' W; 32°20' N, 77°20' W; 33°10' N, 77°31' W; and 34°23'30" N, 77°30' W; then along the 3 nm from and parallel to the shoreline.

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

(1) The detonation of the underwater explosives indicated in paragraph (c)(1)(i) of this section conducted as part of the training events indicated in paragraph (c)(1)(ii) of this section:

(i) Underwater Explosives:  
 (A) AGM-114 (Hellfire missile);  
 (B) Tube-launched Optically tracked Wire-guided (TOW) missile;  
 (C) Mine Neutralization (20 lb NEW charges); and  
 (D) 5" Naval Gunfire.

(ii) Training Exercises:

(A) Mine Neutralization (20 lb NEW charges)—up to 100 exercises over the course of 5 years (an average of 20 per year);

(B) Missile Exercise (MISSILEX) (Air-to-Surface; Hellfire missile)—up to 40 exercises over the course of 5 years (an average of 8 per year);

(C) Missile Exercise (MISSILEX) (Air-to-Surface; TOW)—up to 40 exercises over the course of 5 years (an average of 8 per year); and

(D) FIREX with IMPASS—up to 10 exercises over the course of 5 years (an average of 2 per year).

(2) [Reserved]

(d) Regulations are effective [June 8, 2009] and are applicable to the Navy on June 5, 2009 through June 4, 2014.

#### § 218.21 Permissible methods of taking.

(a) Under Letters of Authorization issued pursuant to §§ 216.106 of this chapter and 218.26, the Holder of the Letter of Authorization may incidentally, but not intentionally, take marine mammals within the area described in § 218.20(b), provided the activity is in compliance with all terms, conditions, and requirements of this Subpart and the appropriate Letter of Authorization.

(b) The activities identified in § 218.20(c) must be conducted in a manner that minimizes, to the greatest extent practicable, any adverse impacts on marine mammals and their habitat.

(c) The incidental take of marine mammals under the activities identified in § 218.20(c) is limited to the following species, by the indicated method of take and the indicated number of times:

(1) Level B Harassment:

(i) Bottlenose dolphin (*Tursiops truncatus*)—150 (an average of 30 annually);

(ii) Pantropical spotted dolphin (*Stenella attenuata*)—100 (an average of 20 annually);

(iii) Clymene dolphin (*S. clymene*)—150 (an average of 30 annually);

(iv) Atlantic spotted dolphin (*S. frontalis*)—100 (an average of 20 annually);

(v) Striped dolphin (*S. coeruleoalba*)—100 (an average of 20 annually);

(vi) Spinner dolphin (*S. longirostris*)—15 (an average of 3 annually);

(vii) Risso's dolphin (*Grampus griseus*)—150 (an average of 30 annually);

(viii) Common dolphin (*Delphinus delphis*)—100 (an average of 20 annually);

(ix) Atlantic white-sided dolphin (*Lagenorhynchus acutus*)—100 (an average of 20 annually);

(x) Pilot whales (*Globicephala* sp.)—100 (an average of 20 annually);

(xi) Dwarf or pygmy sperm whales (*Kogia* sp.)—15 (an average of 3 annually);

(xii) Beaked whales—100 (an average of 20 annually);

(xiii) Fraser's dolphin (*Lagenodelphis hosei*)—15 (an average of 3 annually);

(xiv) Melon-headed whale (*Peponocephala electra*)—15 (an average of 3 annually);

(xv) Pygmy killer whale (*Feresa attenuata*)—15 (an average of 3 annually);

(xvi) Killer whale (*Orcinus orca*)—15 (an average of 3 annually);

(xvii) Minke whales (*Balaenoptera acutorostrata*)—15 (an average of 3 annually).

(2) [Reserved]

#### § 218.22 Prohibitions.

Notwithstanding takings contemplated in § 218.21 and authorized by a Letter of Authorization issued under §§ 216.106 of this chapter and 218.26, no person in connection with the activities described in § 218.20 may:

(a) Take any marine mammal not specified in § 218.21(c);

(b) Take any marine mammal specified in § 218.21(c) other than by incidental take as specified in § 218.21(b)(1) and (2);

(c) Take a marine mammal specified in § 218.21(c) if such taking results in more than a negligible impact on the species or stocks of such marine mammal; or

(d) Violate, or fail to comply with, the terms, conditions, and requirements of

this Subpart or a Letter of Authorization issued under §§ 216.106 of this chapter and 218.26.

#### § 218.23 Mitigation.

(a) When conducting training activities identified in § 218.20(c), the mitigation measures contained in the Letters of Authorization issued under §§ 216.106 of this chapter and 218.26 must be implemented. These mitigation measures include, but are not limited to:

(1) *General Maritime Measures*:

(i) Personnel Training—Lookouts:

(A) All bridge personnel, Commanding Officers, Executive Officers, officers standing watch on the bridge, maritime patrol aircraft aircrews, and Mine Warfare (MIW) helicopter crews shall complete Marine Species Awareness Training (MSAT).

(B) Navy lookouts shall undertake extensive training to qualify as a watchstander in accordance with the Lookout Training Handbook (NAVEDTRA 12968-D).

(C) Lookout training shall include on-the-job instruction under the supervision of a qualified, experienced watchstander. Following successful completion of this supervised training period, lookouts shall complete the Personal Qualification Standard Program, certifying that they have demonstrated the necessary skills (such as detection and reporting of partially submerged objects).

(D) Lookouts shall be trained in the most effective means to ensure quick and effective communication within the command structure to facilitate implementation of protective measures if marine species are spotted.

(E) Surface lookouts shall scan the water from the ship to the horizon and be responsible for all contacts in their sector. In searching the assigned sector, the lookout shall always start at the forward part of the sector and search aft (toward the back). To search and scan, the lookout shall hold the binoculars steady so the horizon is in the top third of the field of vision and direct the eyes just below the horizon. The lookout shall scan for approximately five seconds in as many small steps as possible across the field seen through the binoculars. They shall search the entire sector in approximately five-degree steps, pausing between steps for approximately five seconds to scan the field of view. At the end of the sector search, the glasses shall be lowered to allow the eyes to rest for a few seconds, and then the lookout shall search back across the sector with the naked eye.

(F) At night, lookouts shall scan the horizon in a series of movements that would allow their eyes to come to

periodic rests as they scan the sector. When visually searching at night, they shall look a little to one side and out of the corners of their eyes, paying attention to the things on the outer edges of their field of vision. Lookouts shall also have night vision devices available for use.

(ii) Operating Procedures and Collision Avoidance:

(A) Prior to major exercises, a Letter of Instruction, Mitigation Measures Message or Environmental Annex to the Operational Order shall be issued to further disseminate the personnel training requirement and general marine species mitigation measures.

(B) Commanding Officers shall make use of marine species detection cues and information to limit interaction with marine species to the maximum extent possible consistent with safety of the ship.

(C) While underway, surface vessels shall have at least two lookouts with binoculars; surfaced submarines shall have at least one lookout with binoculars. Lookouts already posted for safety of navigation and man-overboard precautions may be used to fill this requirement. As part of their regular duties, lookouts shall watch for and report to the OOD the presence of marine mammals.

(D) Personnel on lookout shall employ visual search procedures employing a scanning method in accordance with the Lookout Training Handbook (NAVEDTRA 12968-D).

(E) After sunset and prior to sunrise, lookouts shall employ Night Lookouts Techniques in accordance with the Lookout Training Handbook (NAVEDTRA 12968-D).

(F) While in transit, naval vessels shall be alert at all times, use extreme caution, and proceed at a "safe speed" (the minimum speed at which mission goals or safety will not be compromised) so that the vessel can take proper and effective action to avoid a collision with any marine animal and can be stopped within a distance appropriate to the prevailing circumstances and conditions.

(G) When marine mammals have been sighted in the area, Navy vessels shall increase vigilance and implement measures to avoid collisions with marine mammals and avoid activities that might result in close interaction of naval assets and marine mammals. Such measures shall include changing speed and/or course direction and would be dictated by environmental and other conditions (e.g., safety or weather).

(H) Naval vessels shall maneuver to keep at least 500 yds (460 m) away from any observed whale and avoid

approaching whales head-on. This requirement does not apply if a vessel's safety is threatened, such as when change of course will create an imminent and serious threat to a person, vessel, or aircraft, and to the extent vessels are restricted in their ability to maneuver. Vessels shall take reasonable steps to alert other vessels in the vicinity of the whale.

(I) Where feasible and consistent with mission and safety, vessels shall avoid closing to within 200-yd (183 m) of marine mammals other than whales (whales addressed above).

(J) Navy aircraft participating in exercises at sea shall conduct and maintain, when operationally feasible and safe, surveillance for marine species of concern as long as it does not violate safety constraints or interfere with the accomplishment of primary operational duties. Marine mammal detections shall be immediately reported to assigned Aircraft Control Unit for further dissemination to ships in the vicinity of the marine species as appropriate where it is reasonable to conclude that the course of the ship will likely result in a closing of the distance to the detected marine mammal.

(K) All vessels shall maintain logs and records documenting training operations should they be required for event reconstruction purposes. Logs and records shall be kept for a period of 30 days following completion of a major training exercise.

(2) Coordination and Reporting Requirements. (i) The Navy shall coordinate with the local NMFS Stranding Coordinator for any unusual marine mammal behavior and any stranding, beached live/dead, or floating marine mammals that may occur at any time during training activities or within 24 hours after completion of training activities.

(ii) The Navy shall follow internal chain of command reporting procedures as promulgated through Navy instructions and orders.

(3) Mitigation Measures Applicable to Vessel Transit in the Mid-Atlantic during North Atlantic Right Whale Migration: The mitigation measures apply to all Navy vessel transits, including those vessels that would transit to and from East Coast ports and the Cherry Point OPAREA.

(i) Mid-Atlantic, Offshore of the Eastern United States:

(A) All Navy vessels are required to use extreme caution and operate at a slow, safe speed (at a speed that does not compromise safety of navigation) consistent with mission and safety during the months indicated below and within a 37 km (20 NM) arc (except as

noted) of the specified associated reference points:

(1) South and East of Block Island (37 km (20 NM) seaward of line between 41–4.49° N. lat. 071–51.15° W. long. and 41–18.58° N. lat. 070–50.23° W. long): Sept-Oct and Mar-Apr.

(2) New York/New Jersey (40–30.64° N. lat. 073–57.76° W. long.): Sep-Oct and Feb-Apr.

(3) Delaware Bay (Philadelphia) (38–52.13° N. lat. 075–1.93° W. long.): Oct-Dec and Feb-Mar.

(4) Chesapeake Bay (Hampton Roads and Baltimore) (37–1.11° N. lat. 075–57.56° W. long.): Nov-Dec and Feb-Apr.

(5) North Carolina (34–41.54° N. lat. 076–40.20° W. long.): Dec-Apr.

(6) South Carolina (33–11.84° N. lat. 079–8.99° W. long. and 32–43.39° N. lat. 079–48.72° W. long.): Oct-Apr.

(B) During the months indicated in paragraph (a)(3)(i)(A) of this section, Navy vessels shall practice increased vigilance with respect to avoidance of vessel-whale interactions along the mid-Atlantic coast, including transits to and from any mid-Atlantic ports not specifically identified in paragraph (a)(3)(i)(A) of this section.

(C) All surface units transiting within 56 km (30 NM) of the coast in the mid-Atlantic shall ensure at least two watchstanders are posted, including at least one lookout who has completed required MSAT training.

(D) Navy vessels shall not knowingly approach any whale head on and shall maneuver to keep at least 457 m (1,500 ft) away from any observed whale, consistent with vessel safety.

(ii) Southeast Atlantic, Offshore of the Eastern United States—for the purposes of the measures below (paragraphs (a)(3)(ii)(A) & (B) of this section), the "southeast" encompasses sea space from Charleston, South Carolina, southward to Sebastian Inlet, Florida, and from the coast seaward to 148 km (80 NM) from shore. North Atlantic right whale critical habitat is the area from 31–15° N. lat. to 30–15° N. lat. extending from the coast out to 28 km (15 NM), and the area from 28–00° N. lat. to 30–15° N. lat. from the coast out to 9 km (5 NM). All mitigation measures described here that apply to the critical habitat apply from November 15–April 15 and also apply to an associated area of concern which extends 9 km (5 NM) seaward of the designated critical habitat boundaries.

(A) Prior to transiting or training in the critical habitat or associated area of concern (AAOC), ships shall contact Fleet Area Control and Surveillance Facility, Jacksonville, to obtain latest whale sighting and other information needed to make informed decisions

regarding safe speed (the minimum speed at which mission goals or safety will not be compromised) and path of intended movement. Subs shall contact Commander, Submarine Group Ten for similar information.

(B) The following specific mitigation measures apply to activities occurring within the North Atlantic right whale critical habitat and an associated area of concern which extends 9 km (5 NM) seaward of the designated critical habitat boundaries:

(1) When transiting within the critical habitat or associated area of concern, vessels shall exercise extreme caution and proceed at a slow safe speed. The speed shall be the slowest safe speed that is consistent with mission, training and operations.

(2) Speed reductions (adjustments) are required when a whale is sighted by a vessel or when the vessel is within 9 km (5 NM) of a reported new sighting less than 12 hours old. Circumstances could arise where, in order to avoid North Atlantic right whale(s), speed reductions could mean vessels must reduce speed to a minimum at which it can safely keep on course or vessels could come to an all stop.

(3) Vessels shall avoid head-on approaches to North Atlantic right whale(s) and shall maneuver to maintain at least 457 m (500 yd) of separation from any observed whale if deemed safe to do so. These requirements do not apply if a vessel's safety is threatened, such as when a change of course would create an imminent and serious threat to a person, vessel, or aircraft, and to the extent vessels are restricted in the ability to maneuver.

(4) During the North Atlantic right whale calving season, north-south transits through the critical habitat are prohibited.

(5) Ships, surfaced subs, and aircraft shall report any whale sightings to Fleet Area Control and Surveillance Facility, Jacksonville, by the quickest and most practicable means. The sighting report shall include the time, latitude/longitude, direction of movement and number and description of whale (i.e., adult/calf).

(6) Naval vessel operations in the North Atlantic right whale critical habitat and AAOC during the calving season shall be undertaken during daylight and periods of good visibility, to the extent practicable and consistent with mission, training, and operation. When operating in the critical habitat and AAOC at night or during periods of poor visibility, vessels shall operate as if in the vicinity of a recently reported NARW sighting.

(iii) Northeast Atlantic, Offshore of the Eastern United States:

(A) Prior to transiting the Great South Channel or Cape Cod Bay critical habitat areas, ships shall obtain the latest North Atlantic right whale sightings and other information needed to make informed decisions regarding safe speed (the minimum speed at which mission goals or safety will not be compromised). The Great South Channel critical habitat is defined by the following coordinates: 41–00° N. lat., 69–05° W. long.; 41–45° N. lat., 69–45° W. long.; 42–10° N. lat., 68–31° W. long.; 41–38° N. lat., 68–13° W. long. The Cape Cod Bay critical habitat is defined by the following coordinates: 42–04.8° N. lat., 70–10° W. long.; 42–12° N. lat., 70–15° W. long.; 42–12° N. lat., 70–30° W. long.; 41–46.8° N. lat., 70–30° W. long.

(B) Ships, surfaced subs, and aircraft shall report any North Atlantic right whale sightings (if the whale is identifiable as a right whale) off the northeastern U.S. to Patrol and Reconnaissance Wing (COMPATRECONWING). The report shall include the time of sighting, lat/long, direction of movement (if apparent) and number and description of the whale(s).

(C) Vessels or aircraft that observe whale carcasses shall record the location and time of the sighting and report this information as soon as possible to the cognizant regional environmental coordinator. All whale strikes must be reported. This report shall include the date, time, and location of the strike; vessel course and speed; operations being conducted by the vessel; weather conditions, visibility, and sea state; description of the whale; narrative of incident; and indication of whether photos/videos of the whale were taken. Navy personnel are encouraged to take photos of the whale whenever possible.

(D) Specific mitigation measures related to activities occurring within the critical habitat include the following:

(1) Vessels shall avoid head-on approaches to North Atlantic right whale(s) and shall maneuver to maintain at least 457 m (500 yd) of separation from any observed whale if deemed safe to do so. These requirements do not apply if a vessel's safety is threatened, such as when change of course would create an imminent and serious threat to person, vessel, or aircraft, and to the extent vessels are restricted in the ability to maneuver.

(2) When transiting within the critical habitat or associated area of concern, vessels shall use extreme caution and operate at a safe speed (the minimum

speed at which mission goals or safety will not be compromised) so as to be able to avoid collisions with North Atlantic right whales and other marine mammals, and stop within a distance appropriate to the circumstances and conditions.

(3) Speed reductions (adjustments) are required when a whale is sighted by a vessel or when the vessel is within 9 km (5 NM) of a reported new sighting less than one week old.

(4) Ships transiting in the Cape Cod Bay and Great South Channel critical habitats shall obtain information on recent whale sightings in the vicinity of the critical habitat. Any vessel operating in the vicinity of a North Atlantic right whale shall consider additional speed reductions as per Rule 6 of International Navigational Rules.

(4) Mitigation Measures for Specific At-sea Training Events—If a marine mammal is killed as a result of the proposed Navy training activities (e.g., instances in which it is clear that munitions explosions caused the death), the Navy shall suspend its activities immediately and report the incident to NMFS.

(i) Firing Exercise (FIREX) Using the Integrated Maritime Portable Acoustic Scoring System (IMPASS) (5-in Explosive Rounds)

(A) This activity shall only occur in Areas 4/5 and 13/14, as specified in the Navy's LOA application, in the Cherry Point Range Complex.

(B) Pre-exercise monitoring of the target area shall be conducted with "Big Eyes" prior to the event, during deployment of the IMPASS sonobuoy array, and during return to the firing position. Ships shall maintain lookouts dedicated to visually searching for marine mammals 180° along the ship track line and 360° at each buoy drop-off location.

(C) "Big Eyes" on the ship shall be used to monitor a 600-yd (548-m) buffer zone for marine mammals during naval-gunfire events.

(D) Ships shall not fire on the target if any marine mammals are detected within or approaching the 600-yd (548-m) buffer zone. If marine mammals are present, operations must be suspended. Visual observation shall occur for approximately 45 min, or until the animal has been observed to have cleared the area and is heading away from the buffer zone. At such time as animals have cleared the area and are heading away from the buffer zone, the Navy may begin or resume operations.

(E) Post-exercise monitoring of the entire target area shall take place with "Big Eyes" and the naked eye during the

retrieval of the IMPASS sonobuoy array following each firing exercise.

(F) The naval gunfire shall take place during daylight hours only.

(G) FIREX with IMPASS shall only be used in Beaufort Sea State three (3) or less.

(H) The visibility must be such that the fall of shot is visible from the firing ship during the exercise.

(I) No firing shall occur if marine mammals are detected within 70 yd (64 m) of the vessel.

(ii) Air-to-Surface Missile Exercises (Explosive):

(A) Aircraft shall initially survey the intended ordnance impact area for marine mammals.

(B) During the actual firing of the weapon, the aircraft involved must be able to observe the intended ordnance impact area to ensure the area is free of marine mammals transiting the range.

(C) Visual inspection of the target area shall be made by flying at 1,500 ft (457 m) altitude or lower, if safe to do so, and at slowest safe speed.

(D) Explosive ordnance shall not be targeted to impact within 1,800 yd (1,646 m) of sighted marine mammals.

(iii) Mine Neutralization Training Involving Underwater Detonations (up to and including 20-lb charges):

(A) This activity shall only occur in W-15 of the Cherry Point Range Complex.

(B) Observers shall survey the Zone of Influence (ZOI), a 700 yd (640 m) radius from detonation location for marine mammals from all participating vessels during the entire operation. A survey of the ZOI (minimum of 3 parallel tracklines 219 yd [200 m] apart) using support craft shall be conducted at the detonation location 30 minutes prior through 30 minutes post detonation. Aerial survey support shall be utilized whenever operationally feasible.

(C) Detonation operations shall be conducted during daylight hours only.

(D) If a marine mammal is sighted within the ZOI, the animal shall be allowed to leave of its own volition. The Navy shall suspend detonation exercises and ensure the area is clear of marine mammals for a full 30 minutes prior to detonation.

(E) Divers placing the charges on mines and dive support vessel personnel shall survey the area for marine mammals and shall report any sightings to the surface observers. These animals shall be allowed to leave of their own volition and the ZOI shall be clear of marine mammals for 30 minutes prior to detonation.

(F) No detonations shall take place within 3.2 nm (6 km) of an estuarine inlet.

(G) No detonations shall take place within 1.6 nm (3 km) of shoreline.

(H) Personnel shall record any protected species observations during the exercise as well as measures taken if species are detected within the ZOI.

#### **§218.24 Requirements for monitoring and reporting.**

(a) The Holder of the Letter of Authorization issued pursuant to § 216.106 of this chapter and § 218.26 for activities described in § 218.20(c) is required to cooperate with the NMFS when monitoring the impacts of the activity on marine mammals.

(b) The Holder of the Authorization must notify NMFS immediately (or as soon as clearance procedures allow) if the specified activity identified in § 218.20(c) is thought to have resulted in the mortality or serious injury of any marine mammals, or in any take of marine mammals not identified in § 218.21(c).

(c) The Navy must conduct all monitoring and required reporting under the Letter of Authorization, including abiding by the Cherry Point Range Complex Monitoring Plan, which is incorporated herein by reference, and which requires the Navy to implement, at a minimum, the monitoring activities summarized below.

(1) Vessel or aerial surveys.

(i) The Holder of this Authorization shall visually survey a minimum of 1 explosive event per year. If possible, the event surveyed shall be one involving multiple detonations. One of the vessel or aerial surveys should involve professionally trained marine mammal observers (MMOs). If it is impossible to conduct the required surveys due to lack of training exercises, the missed annual survey requirement shall roll into the subsequent year to ensure that the appropriate number of surveys (i.e., total of five) occurs over the 5-year period of effectiveness of this subject.

(ii) When operationally feasible, for specified training events, aerial or vessel surveys shall be used 1–2 days prior to, during (if reasonably safe), and 1–5 days post detonation.

(iii) Surveys shall include any specified exclusion zone around a particular detonation point plus 2,000 yards beyond the border of the exclusion zone (i.e., the circumference of the area from the border of the exclusion zone extending 2,000 yards outwards). For vessel based surveys, a passive acoustic system (hydrophone or towed array) could be used to determine if marine mammals are in the area before and/or after a detonation event.

(iv) When conducting a particular survey, the survey team shall collect:

(A) Location of sighting;

(B) Species (if not possible, indicate whale, dolphin or pinniped);

(C) Number of individuals;

(D) Whether calves were observed;

(E) Initial detection sensor;

(F) Length of time observers

maintained visual contact with marine mammal;

(G) Wave height;

(H) Visibility;

(I) Whether sighting was before, during, or after detonations/exercise, and how many minutes before or after;

(J) Distance of marine mammal from actual detonations (or target spot if not yet detonated);

(K) Observed behavior—Watchstanders shall report, in plain language and without trying to categorize in any way, the observed behavior of the animal(s) (such as animal closing to bow ride, paralleling course/speed, floating on surface and not swimming etc.), including speed and direction;

(L) Resulting mitigation implementation—Indicate whether explosive detonations were delayed, ceased, modified, or not modified due to marine mammal presence and for how long; and

(M) If observation occurs while explosives are detonating in the water, indicate munitions type in use at time of marine mammal detection.

(2) Passive acoustic monitoring—the Navy shall conduct passive acoustic monitoring when operationally feasible.

(i) Any time a towed hydrophone array is employed during shipboard surveys, the towed array shall be deployed during daylight hours for each of the days the ship is at sea.

(ii) The towed hydrophone array shall be used to supplement the ship-based systematic line-transect surveys (particularly for species such as beaked whales that are rarely seen).

(iii) The array should have the capability of detecting low frequency vocalizations (<1,000 Hz) for baleen whales and relatively high frequency (up to 30 kHz) for odontocetes. The use of two simultaneously deployed arrays can also allow more accurate localization and determination of diving patterns.

(3) Marine mammal observers on Navy platforms:

(i) As required in § 218.24(c)(1), MMOs who are selected for aerial or vessel surveys shall be placed on a Navy platform during one of the explosive exercises being monitored per year, the other designated exercise shall be monitored by the Navy lookouts/watchstanders.

(ii) The MMO must possess expertise in species identification of regional

marine mammal species and experience collecting behavioral data.

(iii) MMOs shall not be placed aboard Navy platforms for every Navy training event or major exercise, but during specifically identified opportunities deemed appropriate for data collection efforts. The events selected for MMO participation shall take into account safety, logistics, and operational concerns.

(iv) MMOs shall observe from the same height above water as the lookouts.

(v) The MMOs shall not be part of the Navy's formal reporting chain of command during their data collection efforts; Navy lookouts shall continue to serve as the primary reporting means within the Navy chain of command for marine mammal sightings. The only exception is that if an animal is observed within the shutdown zone that has not been observed by the lookout, the MMO shall inform the lookout of the sighting and the lookout shall take the appropriate action through the chain of command.

(vi) The MMOs shall collect species identification, behavior, direction of travel relative to the Navy platform, and distance first observed. Information collected by MMOs should be the same as those collected by Navy lookout/watchstanders described in § 218.24(c)(1)(iv).

(d) The Navy shall complete an Integrated Comprehensive Monitoring Program (ICMP) Plan in 2009. This planning and adaptive management tool shall include:

(1) A method for prioritizing monitoring projects that clearly describes the characteristics of a proposal that factor into its priority.

(2) A method for annually reviewing, with NMFS, monitoring results, Navy R&D, and current science to use for potential modification of mitigation or monitoring methods.

(3) A detailed description of the Monitoring Workshop to be convened in 2011 and how and when Navy/NMFS will subsequently utilize the findings of the Monitoring Workshop to potentially modify subsequent monitoring and mitigation.

(4) An adaptive management plan,

(5) A method for standardizing data collection for Cherry Point Range Complex and across range complexes,

(e) General Notification of Injured or Dead Marine Mammals—Navy personnel shall ensure that NMFS (regional stranding coordinator) is notified immediately (or as soon as clearance procedures allow) if an injured or dead marine mammal is found during or shortly after, and in the

vicinity of, any Navy training exercise utilizing underwater explosive detonations. The Navy shall provide NMFS with species or description of the animal(s), the condition of the animal(s) (including carcass condition if the animal is dead), location, time of first discovery, observed behaviors (if alive), and photo or video (if available).

(f) Annual Cherry Point Range Complex Monitoring Plan Report—The Navy shall submit a report annually on March 1 describing the implementation and results (through January 1 of the same year) of the Cherry Point Range Complex Monitoring Plan. Data collection methods shall be standardized across range complexes to allow for comparison in different geographic locations. Although additional information will also be gathered, the MMOs collecting marine mammal data pursuant to the Cherry Point Range Complex Monitoring Plan shall, at a minimum, provide the same marine mammal observation data required in the data required in § 218.24(g). The Cherry Point Range Complex Monitoring Plan Report may be provided to NMFS within a larger report that includes the required Monitoring Plan Reports from Cherry Point Range Complex and multiple range complexes.

(g) Annual Cherry Point Range Complex Exercise Report—The Navy shall provide the information described below for all of their explosive exercises. Until the Navy is able to report in full the information below, they shall provide an annual update on the Navy's explosive tracking methods, including improvements from the previous year.

(1) Total annual number of each type of explosive exercise (of those identified as part of the "specified activity" in this final rule) conducted in the Cherry Point Range Complex.

(2) Total annual expended/detonated rounds (missiles, bombs, etc.) for each explosive type.

(h) Cherry Point Range Complex 5-yr Comprehensive Report—The Navy shall submit to NMFS a draft report that analyzes and summarizes all of the multi-year marine mammal information gathered during the Cherry Point Range Complex exercises for which annual reports are required (Annual Cherry Point Range Complex Exercise Reports and Cherry Point Range Complex Monitoring Plan Reports). This report shall be submitted at the end of the fourth year of the rule (May 2013), covering activities that have occurred through December 1, 2012.

(i) The Navy shall respond to NMFS comments and requests for additional

information or clarification on the Cherry Point Range Complex Comprehensive Report, the Annual Cherry Point Range Complex Exercise Report, or the Annual Cherry Point Range Complex Monitoring Plan Report (or the multi-Range Complex Annual Monitoring Plan Report, if that is how the Navy chooses to submit the information) if submitted within 3 months of receipt. These reports will be considered final after the Navy has addressed NMFS' comments or provided the requested information, or three months after the submittal of the draft if NMFS does not comment by then.

(j) In 2011, the Navy shall convene a Monitoring Workshop in which the Monitoring Workshop participants will be asked to review the Navy's Monitoring Plans and monitoring results and make individual recommendations (to the Navy and NMFS) of ways of improving the Monitoring Plans. The recommendations shall be reviewed by the Navy, in consultation with NMFS, and modifications to the Monitoring Plan shall be made, as appropriate.

#### **§ 218.25 Applications for Letters of Authorization.**

To incidentally take marine mammals pursuant to these regulations, the U.S. citizen (as defined by § 216.103 of this chapter) conducting the activity identified in § 218.20(a) (the U.S. Navy) must apply for and obtain either an initial Letter of Authorization in accordance with § 218.26 or a renewal under § 218.27.

#### **§ 218.26 Letters of Authorization.**

(a) A Letter of Authorization, unless suspended or revoked, will be valid for a period of time not to exceed the period of validity of this subpart, but must be renewed annually subject to annual renewal conditions in § 218.27.

(b) Each Letter of Authorization will set forth:

(1) Permissible methods of incidental taking;

(2) Means of effecting the least practicable adverse impact on the species, its habitat, and on the availability of the species for subsistence uses (*i.e.*, mitigation); and

(3) Requirements for mitigation, monitoring and reporting.

(c) Issuance and renewal of the Letter of Authorization will be based on a determination that the total number of marine mammals taken by the activity as a whole will have no more than a negligible impact on the affected species or stock of marine mammal(s).

**§ 218.27 Renewal of Letters of Authorization and Adaptive Management.**

(a) A Letter of Authorization issued under § 216.106 and § 218.26 of this chapter for the activity identified in § 218.20(c) will be renewed annually upon:

(1) Notification to NMFS that the activity described in the application submitted under § 218.25 shall be undertaken and that there will not be a substantial modification to the described work, mitigation or monitoring undertaken during the upcoming 12 months;

(2) Timely receipt of the monitoring reports required under § 218.24; and

(3) A determination by the NMFS that the mitigation, monitoring and reporting measures required under § 218.23 and the Letter of Authorization issued under §§ 216.106 and 218.26 of this chapter, were undertaken and will be undertaken during the upcoming annual period of validity of a renewed Letter of Authorization.

(b) If a request for a renewal of a Letter of Authorization issued under §§ 216.106 and 218.27 of this chapter indicates that a substantial modification to the described work, mitigation or monitoring undertaken during the upcoming season will occur, the NMFS will provide the public a period of 30 days for review and comment on the request. Review and comment on renewals of Letters of Authorization are restricted to:

(1) New cited information and data indicating that the determinations made

in this document are in need of reconsideration, and

(2) Proposed changes to the mitigation and monitoring requirements contained in these regulations or in the current Letter of Authorization.

(c) A notice of issuance or denial of a renewal of a Letter of Authorization will be published in the **Federal Register**.

(d) NMFS, in response to new information and in consultation with the Navy, may modify the mitigation or monitoring measures in subsequent LOAs if doing so creates a reasonable likelihood of more effectively accomplishing the goals of mitigation and monitoring set forth in the preamble of these regulations. Below are some of the possible sources of new data that could contribute to the decision to modify the mitigation or monitoring measures:

(1) Results from the Navy's monitoring from the previous year (either from Cherry Point Study Area or other locations).

(2) Findings of the Monitoring Workshop that the Navy will convene in 2011 (§ 218.24(j)).

(3) Compiled results of Navy funded research and development (R&D) studies (presented pursuant to the ICMP (§ 218.24(d))).

(4) Results from specific stranding investigations (either from the Cherry Point Range Complex Study Area or other locations).

(5) Results from general marine mammal and sound research (funded by

the Navy (described below) or otherwise).

(6) Any information which reveals that marine mammals may have been taken in a manner, extent or number not authorized by these regulations or subsequent Letters of Authorization.

**§ 218.28 Modifications to Letters of Authorization.**

(a) Except as provided in paragraph (b) of this section, no substantive modification (including withdrawal or suspension) to the Letter of Authorization by NMFS, issued pursuant to §§ 216.106 and 218.26 and subject to the provisions of this subpart shall be made until after notification and an opportunity for public comment has been provided. For purposes of this paragraph, a renewal of a Letter of Authorization under § 218.27, without modification (except for the period of validity), 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 § 218.20(b), a Letter of Authorization issued pursuant to §§ 216.106 and 218.26 may be substantively modified without prior notification and an opportunity for public comment. Notification will be published in the **Federal Register** within 30 days subsequent to the action.

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