

**DEPARTMENT OF COMMERCE****National Oceanic and Atmospheric Administration****50 CFR Part 218**

RIN 0648-AX86

**Taking of Marine Mammals Incidental to Specified Activities; Taking Marine Mammals Incidental to Training Operations Conducted Within the Gulf of Mexico 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 by the Navy's Atlantic Fleet within the Gulf of Mexico (GOMEX) Range Complex for the period of April 2010 through April 2015. 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 February 17, 2011 through February 17, 2016.

**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:****Availability**

Extensive **SUPPLEMENTARY INFORMATION** was provided in the proposed rule for this activity, which was published in the **Federal Register** on Tuesday, July 14, 2009 (74 FR 33960). 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) 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 for incidental takings may 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."

With respect to military readiness activities, the MMPA defines "harassment" as "(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 October 2, 2008, NMFS received an application from the Navy requesting an authorization for the take of marine mammal species/stocks incidental to the proposed training operations within the GOMEX Range Complex over the course of 5 years. On April 24, 2009, NMFS received additional information and clarification on the Navy's proposed GOMEX Range Complex training activities. These training activities are classified as military readiness activities. The Navy states that these training activities may cause various impacts to marine mammal species in the proposed GOMEX Range Complex Study Area. The Navy requests an authorization to take 17 species of cetaceans annually by Level B harassment, and 1 individual each of pantropical spotted dolphin and spinner dolphin by Level A harassment (injury). However, due to the implementation of the proposed mitigation and monitoring measures, NMFS believes that the actual take would be less than estimated by the Navy.

**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 [(Bombing Exercise (Air-to-Surface) or BOMBEX (A-S), and Small Arms Training (explosive hand grenades)] and vessel movement to, from and within the GOMEX Range Complex Study Area. The narrative description of the action contained in the proposed rule (74 FR 33960; July 14, 2009; pages 33961-33962) has not changed, except that the event duration for Small Arms Training was corrected to "1-2 hours" from "1 hour" in Table 1 of the proposed rule (74 FR 33960; July 14, 2009; page 33962). This change was to correct a typographical error in the proposed rule. Table 1 summarizes the nature and levels of these planned activities.

TABLE 1—LEVEL OF SURFACE WARFARE TRAINING ACTIVITIES PLANNED IN THE GOMEX RANGE COMPLEX PER YEAR

Operation	Platform	System/ordnance	Number of events	Training area	Potential time of day	Event duration
Bombing Exercise (BOMBEX) (Air-to-Surface, At-Sea).	F/A-18 .....	MK-83 [1,000-lb High Explosive (HE) bomb] 415.8 lbs NEW.	1 event (4 bombs in succession).	BOMBEX Hotbox ..	Daytime only .....	1 hour.
Small Arms Training	Maritime Expeditionary Support Group (Various Small Boats).	MK3A2 anti-swimmer grenades (8-oz HE grenade) 0.5 lb NEW.	6 events* (20 live grenades).	UNDET Area E3 ...	Day or night .....	1–2 hours.

\*An individual event can include detonation of up to 10 live grenades, but no more than 20 live grenades will be used per year.

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

Twenty-nine marine mammal species have confirmed or potential occurrence in the GOMEX Study Area. These include 28 cetacean species and 1 sirenian species (DoN, 2007a), which

can be found in Table 2. Although it is possible that any of the 29 species of marine mammals may occur in the Study Area, only 21 of those species are expected to occur regularly in the region. Most cetacean species are in the Study Area year-round (e.g., sperm whales and bottlenose dolphins), while

a few (e.g., fin whales and killer whales) have accidental or transient occurrence in the area. 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 33960; July 14, 2009; pages 33962–33964).

TABLE 2—MARINE MAMMAL SPECIES FOUND IN THE GOMEX 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>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>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>G. macrorhynchus</i> .....	Short-finned pilot whale.	
Order Sirenia		
<i>Trichechus manatus</i> .....	West Indian manatee .....	Endangered.

### Potential Impacts to Marine Mammal Species

With respect to the MMPA, NMFS' effects assessment on the consequences of the Navy's proposed activities on marine mammals and their habitat 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 GOMEX Range Complex Study Area); 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 underwater explosive detonations from BOMBEX and Small Arms Training with explosive hand grenades may potentially affect marine mammals (some of which NMFS would not classify as harassment). *See* 74 FR 33960; July 14, 2009; pages 33964–33973. Marine mammals may experience direct physiological effects (such as threshold shift), acoustic masking, impaired communications, stress responses, and behavioral disturbance. The information contained in the Potential Impacts to Marine Mammal Species section regarding BOMBEX and Small Arms Training in the proposed rule has not changed.

On April 20, 2010, explosion and fire on the Mobile Offshore Drilling Unit Deepwater Horizon MC252 approximately 50 miles southeast of the Mississippi Delta led to the BP oil spill, which is the largest oil spill in U.S. history and potentially the second largest in world history. The oil wellhead leaked for 85 days and was capped on July 15, 2010. Impacts of this spill are far reaching, and include environmental, economic, and societal consequences. Wildlife and ecosystems are threatened primarily due to factors

such as petroleum toxicity and oxygen depletion in the water. Marine species that live in the Gulf and in the marshlands surrounding the Gulf are at risk, including marine mammals. As of August 31, 2010, 88 dolphins and 1 whale have been found stranded, including 4 dolphins that were visibly oiled. However, the proposed Navy's GOMEX training exercises are not expected to further impact the physical marine ecosystem due to the nature of the activities.

Below, in the Estimated Take of Marine Mammals Section, NMFS quantifies the potential effects to marine mammals from underwater detonation of explosives. In addition, NMFS relates such effects to the MMPA definitions of Level A and Level B Harassment. NMFS has also considered the effects of mortality on these species, although mortality is neither expected, nor will it be authorized.

### 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 GOMEX Range Complex training activities described in the proposed rule are considered military readiness activities.

NMFS reviewed the Navy's proposed GOMEX Range Complex training activities and the proposed GOMEX 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 (2), (3), and (4) may contribute to this goal).

(2) A reduction in the numbers of marine mammals (total number or number at a 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 (1), 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 (1), 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 (1), 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 (*e.g.*, a buffer zone of a 5,100-yard radius be established and no bombing exercises would be initiated where marine mammals are detected within the buffer 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 effectiveness of the "military-readiness activity."

The Navy's proposed mitigation measures were described in detail in the proposed rule (74 FR 33960; July 14, 2009; pages 33973–33975). The Navy's measures address personnel training, lookout and watchstander responsibilities, operating procedures for training activities using underwater detonations of explosives (Bombing Exercises and Small Arms Training), and mitigation related to vessel traffic. No changes have been made to the mitigation measures described in the proposed rule.

## 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 such as whether marine mammals are adversely affected by the proposed Navy training exercises in the GOM Range Complex.

(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 GOMEX Range Complex Study Area*

The Navy has provided NMFS with a copy of the draft GOMEX Range Complex Monitoring Plan. Additionally, NMFS and the Navy have incorporated a suggestion from the public, which recommended the Navy hold a

workshop in 2011 to discuss the Navy's Monitoring Plans for the multiple range complexes and training exercises in which the Navy would receive ITAs.

The Navy must notify NMFS immediately (or as soon as clearance procedures allow) if the specified activity is thought to have resulted in the mortality or injury of any marine mammals, or in any take of marine mammals not identified in this document.

The Navy must conduct all monitoring and/or research required under the Letter of Authorization, if issued.

With input from NMFS, a summary of the monitoring methods required for use during training events in the GOMEX 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 Navy 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 for marine mammals (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, to the extent practicable, be placed on a Navy platform during the exercises being monitored.

(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. Instead, MMOs should be employed 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 GOMEX Range Complex has been designed as a collection of focused “studies” (described fully in the GOMEX Monitoring Plan) to gather data that will allow the Navy to address the following questions:

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

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

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 GOMEX 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 GOMEX Range Complex proposed rule included an adaptive management component and both NMFS and the Navy believe that a workshop would provide a means for the 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 year of monitoring pursuant to the GOMEX 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 GOMEX Range Complex, the Navy completed the Integrated Comprehensive Monitoring Program (ICMP) Plan at the end of 2009. The ICMP was developed by the Navy, with the 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 Navy, through its ICMP will coordinate the monitoring programs’ progress towards meeting its goals and develop a data management plan. 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 peer-reviewed newly published information.

In combination with the 2011 Monitoring Workshop and the adaptive management component of the GOMEX Range Complex rule and the other Navy rules (e.g. VACAPES Range Complex, Jacksonville Range Complex, etc.), the ICMP provides 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 as 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 effort based on maintaining an equal (or commensurate to effects) distribution of monitoring effort across range complexes.

The ICMP identified:

- 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 GOMEX 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

NMFS has included an adaptive management component in the final regulations governing the take of marine mammals incidental to Navy training exercises in the GOMEX Range Complex. 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, if issued.

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

- Results from the Navy's monitoring from the previous year (either from GOMEX 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 GOMEX Range Complex or other locations)
- Results from general marine mammal and sound research (funded by the Navy or otherwise)
- Any verified 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 proposed 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 proposed 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 Measures

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. 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 GOMEX 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 GOMEX 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 GOMEX Range Complex Monitoring Plan shall, at a minimum, provide the same marine mammal observation data required in the major range complex training exercises section

of the Annual GOMEX Range Complex Exercise Report referenced below.

The GOMEX 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 GOMEX 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 GOMEX Range Complex.

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

### *GOMEX 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 GOMEX Range Complex exercises for which annual reports are required (Annual GOMEX Range Complex Exercise Reports and GOMEX Range Complex Monitoring Plan Reports). This report will be submitted at the end of the fourth year of the rule (March 2014), covering activities that have occurred through September 1, 2013.

## Comments and Responses

On July 14, 2009, NMFS published a proposed rule (74 FR 33960) in response to the Navy's request to take marine mammals incidental to military readiness training in the GOMEX Range Complex Study Area and requested comments, information and suggestions concerning the request. During the 30-day public comment period, NMFS received comments from 3 private citizens and from the Marine Mammal Commission (Commission). The comments are summarized and sorted into general topic areas and are addressed below. Full copies of the comment letters may be accessed at <http://www.regulations.gov>.

### *MMPA Concerns*

*Comment 1:* The Commission recommended that NMFS require the

Navy to conduct an external peer review of its marine mammal density estimates, the data upon which those estimates are based, and the manner in which those data were used for that purpose.

*Response:* As discussed in detail in the proposed rule (74 FR 33960; July 14, 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 GOMEX Operation Area (OPAREA) (DoN, 2007).

Density estimates for cetaceans were either modeled using available line-transect survey data or derived using cetacean abundance estimates found in the 2006 NOAA stock assessment reports (SARs) (Waring *et al.*, 2007), which can be viewed at <http://www.nmfs.noaa.gov/pr/sars/species.htm>. The abundance estimates in the stock assessment reports are from Mullin and Fulling (2004).

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 (SST), and chlorophyll *a* (chl *a*) concentration was formulated using generalized additive models (GAMs). 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 Southeast Fisheries Science Center (SEFSC) between 1996 and 2004. Species-specific density estimates derived through spatial modeling were compared with abundance estimates found in the 2006 NOAA SARs 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). 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 the data are collected and used, have already gone through an independent review process.

#### Mitigation Measures

*Comment 2:* 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, the proposed military readiness training operations.

*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 marine mammals; (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 result in 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 exercise's specified exclusion zone in order to prevent marine mammal injury or mortality. In addition, prior to conducting training activities involving underwater explosive detonation, the Navy will be required to monitor the safety zones to ensure the areas are clear of marine mammals. Such monitoring will also be required during the exercise when operationally feasible. These monitoring and mitigation measures are expected to reduce the number of marine mammals exposed to underwater explosions.

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, 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 3:* The Commission recommends that NMFS require the Navy to describe the protocol for stranding network personnel to communicate with the Navy in the event of a stranding that is possibly associated with Navy activities.

*Response:* As described in the proposed rule (74 FR 33960; July 14, 2009), the 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. 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). This stranding communication protocol is similar to the protocol the Navy has for its Atlantic Fleet Active Sonar Training (AFAST).

*Comment 4:* 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 Navy's activity. The injury or death should be investigated to determine the cause, assess the full impact of the activity or activities potentially implicated (e.g., the total of animals involved), and determine how the activity should be modified to avoid future injuries or deaths.

*Response:* Though NMFS largely agrees with the principle espoused by 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. NMFS has included a requirement in the final rule that if there is clear evidence that a marine mammal is injured or killed as a result of the Navy's training activities (e.g., instances in which it is clear that munitions' explosions caused the injury or death), the Navy shall suspend its activities immediately and report such 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 activities 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).

*Miscellaneous Issues*

*Comment 5:* Three private citizens expressed general opposition to Navy activities and NMFS' issuance of an MMPA authorization because of the danger of killing marine life.

*Response:* NMFS appreciates the commenters' concern for the marine mammals that live in the area of the proposed activities. However, the MMPA allows individuals to take marine mammals incidental to specified activities if NMFS can make the necessary findings required by law (*i.e.*, negligible impact, unmitigable adverse impact on subsistence users, etc.). As explained throughout this rulemaking, NMFS has made the necessary findings under 16 U.S.C. 1371(a)(5)(A) to support our issuance of the final rule.

**Estimated Take of Marine Mammals**

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 affecting 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 that would be affected in the GOMEX Range Complex Study Area, so this determination is inapplicable for this rulemaking); 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. The subsections of this analysis are discussed in the proposed rule (74 FR 33960; July 14, 2009) and have not changed.

*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 33960; July 14, 2009). No changes have been made to the discussion contained in this section of the proposed rule.

*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 33960; pages 33978–33979). No changes have been made to the modeling methods in the section of that proposed rule.

As noticed in the proposed rule, the Navy's modeling revealed that only eight marine mammal species (very few individuals of each) would be taken by Level A and Level B harassment. However, the Navy stated in its addendum to the LOA application, because of the relatively high abundance of several species (Bryde's whales, Atlantic spotted dolphins, bottlenose dolphins, Clymene dolphins, false killer whales, Fraser's dolphins, killer whales, two species of *Kogia* sp., melon-headed whales, pygmy killer whales, Risso's dolphins, rough-toothed dolphins, short-finned pilot whales, striped dolphins, and several species of beaked whales) in the proposed action area (Waring *et al.*, 2007) and the fact that some of these species aggregate in relatively large groups, the Navy considers that additional takes of these species by Level B behavioral harassment are possible. After reviewing the Navy's request and consulting the most recent stock assessment reports of marine mammals in the proposed action area (Waring *et al.*, 2009), NMFS largely agrees with the Navy except that NMFS considers that the take of Bryde's and killer whales is unlikely due to their rarity in the Study Area. However, NMFS considers that the incidental take by Level B harassment of sperm whale is likely due to this species abundance in the Gulf of Mexico area. Therefore, NMFS has included additional species in our take estimates for the 5-year regulations. Revised estimates of potential takes from the proposed GOMEX Range Complex training activities are summarized in Table 3.

TABLE 3—SUMMARY OF POTENTIAL EXPOSURES FROM EXPLOSIVE ORDNANCE (PER YEAR) FOR MARINE MAMMALS IN THE GOMEX RANGE COMPLEX

Marine mammal species	Level B (non-injury)	Level A (slight lung injury)	Mortality
Sperm whale .....	5	0	0
Atlantic spotted dolphin .....	20	0	0
Beaked whales .....	20	0	0
Bottlenose dolphin .....	30	0	0
Clymene dolphin .....	20	0	0
False killer whale .....	10	0	0
Fraser's dolphin .....	20	0	0
Kogia sp. ....	20	0	0
Melon-headed whale .....	20	0	0
Pantropical spotted dolphin .....	26	1	0
Pygmy killer whale .....	10	0	0
Risso's dolphin .....	30	0	0
Rough-toothed dolphin .....	20	0	0
Short-finned pilot whale .....	20	0	0
Spinner dolphin .....	27	1	0

TABLE 3—SUMMARY OF POTENTIAL EXPOSURES FROM EXPLOSIVE ORDNANCE (PER YEAR) FOR MARINE MAMMALS IN THE GOMEX RANGE COMPLEX—Continued

Marine mammal species	Level B (non-injury)	Level A (slight lung injury)	Mortality
Striped dolphin .....	20	0	0

**Effects on Marine Mammal Habitat**

NMFS' GOMEX Range Complex proposed rule included a section that addressed the effects of the Navy's activities on Marine Mammal Habitat (74 FR 33960; July 14, 2009; page 33979). NMFS concluded that the Navy's activities would have minimal effects on marine mammal habitat. No changes have been made to the discussion contained in this section of the proposed rule.

**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.), and 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 GOMEX Range Complex training activities. Taking the above into account, considering the sections

discussed below, and dependent upon the implementation of the proposed mitigation measures, NMFS has determined that Navy training exercises utilizing underwater explosives will have a negligible impact on the affected marine mammal species and stocks present in the GOMEX 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 GOMEX Range Complex training activities was provided in the proposed rule (74 FR 33960; July 14, 2009; pages 33965–33972) and is described in more detail below.

*Behavioral Harassment*

The Navy plans a total of 1 BOMBEX (Air-to-Surface) training event (each lasting for 1 hour) and 6 Small Arms Training (explosive hand grenades) events (each lasting for 1–2 hours) annually. The total training exercises using high explosives proposed by the Navy in the GOMEX Range Complex amount to approximately 13 hours per year. These detonation events are widely dispersed throughout several of the designated sites within the GOMEX 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 GOMEX 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 where the Level B behavioral harassment (*i.e.*, 177 dB re 1 microPa<sup>2</sup>-sec) threshold would propagate, 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 of recruitment or survival.

*TTS*

NMFS and the Navy have estimated that individuals of some species of marine mammals may sustain some level of temporary 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 sound exposure level (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 345–2,863 m from the centers of detonation based on the types of net explosive weight (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 continuous 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 the animal's 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 detonations are extremely brief and the majority of most animals' vocalizations would not be masked. Therefore, masking effects from underwater detonations 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 1 pantropical spotted dolphin and 1 spinner dolphin could experience 50-percent tympanic membrane rupture or slight lung injury (Level A harassment) as a result of the training activities utilizing underwater detonation by BOMBEX in the GOMEX Range Complex Study Area. However, these estimates do not take into consideration the proposed mitigation and monitoring measures. For underwater detonations, the animals have to be within an area between certain injury zones of influence (ZOI) to experience Level A harassment. Such injury ZOI varies from 0.09 km<sup>2</sup> to 4.98 km<sup>2</sup> (or at distances between 169 m to 1,259 m from the center of detonation) depending on the types of munition used and the season of the action. Though it is possible that Navy observers could fail to detect an animal at a distance of more than 1 km (an injury ZOI during BOMBEX, which is planned to have 1 event annually), all injury ZOIs from small arms trainings are smaller than 0.1 km<sup>2</sup> (178 m in radius) and NMFS believes it is unlikely that any marine mammal will be missed by lookouts/watchstanders or MMOs. 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 and the Navy determined that approximately 5 Sperm whales, 20 Atlantic spotted dolphins, 20 beaked whales, 30 bottlenose dolphins, 20

Clymene dolphins, 10 false killer whales, 20 Fraser's dolphins, 20 pygmy or dwarf sperm whales, 20 melon-headed whales, 26 pantropical spotted dolphins, 10 pygmy killer whales, 30 Risso's dolphins, 20 rough-toothed dolphins, 27 spinner dolphins, 20 short-finned pilot whales, and 20 striped dolphins could be affected by Level B harassment (TTS and sub-TTS) as a result of the proposed GOMEX Range Complex training activities. These numbers represent approximately 0.30%, 0.07%, 0.81%, 0.30%, 2.57%, 4.42%, 0.88%, 0.08%, 3.10%, 1.89%, 0.75%, 2.79%, 1.36%, and 0.60% of sperm whales, Atlantic spotted dolphins, bottlenose dolphins (Gulf of Mexico oceanic stock), Clymene dolphins, false killer whales, pygmy or dwarf sperm whales, melon-headed whales, pantropical spotted dolphins, pygmy killer whales, Risso's dolphins, rough-toothed dolphins, short-finned pilot whales, spinner dolphins, and striped dolphins, respectively in the vicinity of the proposed GOMEX 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 beaked whales and Fraser's dolphins are unknown in the proposed action area, NMFS has concluded that the take of 20 individuals of beaked whales and Fraser's dolphins by Level B harassment would have a negligible impact because most of its population exists beyond the project area and because they are a widely distributed species in the North Atlantic (Jefferson *et al.*, 1993; Reeves *et al.*, 2002).

In addition, the Level A takes of 1 pantropical spotted dolphin and 1 spinner dolphin represent 0.0029% and 0.0503% of these species, respectively, in the vicinity of the proposed GOMEX Range Complex Study Area (calculation based on NMFS 2007 U.S. Atlantic and Gulf of Mexico Marine Mammal Stock Assessment). Given these very small percentages, NMFS does not expect there to be any long-term adverse effect on the populations of the aforementioned dolphin species. No marine mammals are expected to be killed as a result of these activities.

Additionally, the aforementioned take estimates do not account for the implementation of mitigation measures. With the implementation of mitigation and monitoring measures, NMFS expects that the takes would be reduced further. 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 GOMEX Range Complex training activities will have a negligible impact on the marine mammal species and stocks present in the GOMEX 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 GOMEX 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 ESA-listed marine mammal species that are listed as endangered under the ESA with confirmed or possible occurrence in the GOMEX Range Complex: humpback whale, North Atlantic right whale, fin whale, blue whale, sei whale, and sperm whale.

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 Navy 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 GOMEX EIS. NMFS subsequently adopted the Navy's EIS/OEIS for the purpose of complying with the MMPA.

### **Determination**

Based on the analysis contained herein 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 training exercises utilizing underwater explosives in the GOMEX Range Complex will have a negligible impact on the affected marine mammal 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 GOMEX 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 Office of Management and Budget has determined that this rule is not significant for purposes of Executive Order 12866.

The Chief Counsel for Regulation of the Department of Commerce certified at the proposed rule stage that this action will not have a significant economic impact on a substantial number of small entities. The Navy is the sole entity that will be affected by this rulemaking. It is 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.

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

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

Dated: February 10, 2011.

#### Samuel D. Rauch III,

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

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

#### Subpart D—Taking Marine Mammals Incidental to U.S. Navy Training in the Gulf of Mexico Range Complex

Sec.

- 218.30 Specified activity and specified geographical area and effective dates.
- 218.31 Permissible methods of taking.
- 218.32 Prohibitions.
- 218.33 Mitigation.
- 218.34 Requirements for monitoring and reporting.
- 218.35 Applications for Letters of Authorization.
- 218.36 Letters of Authorization.
- 218.37 Renewal of Letters of Authorization and adaptive management.
- 218.38 Modifications to Letters of Authorization.

#### Subpart D—Taking Marine Mammals Incidental to U.S. Navy Training in the Gulf of Mexico Range Complex

##### § 218.30 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 GOMEX Range Complex Operation Areas (OPAREAs), which is located along the Gulf of Mexico coast of the U.S. described in Figures 1 and 2 of the LOA application and consists of the BOMBEX Hotbox (surface and subsurface waters), located off the Alabama and Florida coast, south of NAS Pensacola, and underwater detonation (UNDET) Area E3 (surface and subsurface waters), located within the territorial waters off Padre Island, Texas, near Corpus Christi NAS.

(1) The northernmost boundary of the BOMBEX Hotbox is located 23 nm (42.6 km) from the coast of the Florida panhandle at latitude 30° N, the eastern boundary is approximately 200 nm (370.4 km) from the coast of the Florida peninsula at longitude 86°48' W.

(2) The UNDET Area E3 is a defined surface and subsurface area located in the waters south of Corpus Christi NAS and offshore of Padre Island, Texas. The westernmost boundary is located 7.5 nm (13.9 km) from the coast of Padre Island at 97°9'33" W and 27°24'26" N at the Westernmost corner. It lies entirely within the territorial waters (0 to 12 nm, or 0 to 22.2 km) of the U.S. and the majority of it lies within Texas state waters (0 to 9 nm, or 0 to 16.7 km). It is a very shallow water training area with depths ranging from 20 to 26 m.

(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 identified in paragraph (c)(1)(i) of this section conducted as part of the training events identified in paragraph (c)(1)(ii) of this section:

(i) Underwater Explosives:  
(A) MK-83 (1,000 lb High Explosive bomb);  
(B) MK3A2 anti-swimmer concussion grenades (0.5 lbs NEW).

(ii) Training Events:  
(A) BOMBEX (Air-to-Surface)—up to 5 events over the course of 5 years (an average of 1 event per year, with 4 bombs in succession for each event);  
(B) Small Arms Training with MK3A2 anti-swimmer concussion grenades—up to 30 events over the course of 5 years (an average of 6 events per year, with up to 10 live grenades authorized per event, but no more than 20 live grenades will be used per year).

(2) [Reserved]  
(d) Regulations are effective February 17, 2011 through February 17, 2016.

##### § 218.31 Permissible methods of taking.

(a) Under Letters of Authorization issued pursuant to §§ 216.106 of this chapter and 218.36, the Holder of the Letter of Authorization may incidentally take marine mammals within the area described in § 218.30(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 § 218.30(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 § 218.30(c) is limited to the following species, by the indicated method of take and the indicated number of times:

- (1) Level B Harassment:
  - (i) Sperm whale (*Physeter macrocephalus*)—25 (an average of 5 annually);
  - (ii) Beaked whales—100 (an average of 20 annually);
  - (iii) Bottlenose dolphin (*Tursiops truncatus*)—150 (an average of 30 annually);
  - (iv) Pantropical spotted dolphin (*Stenella attenuata*)—130 (an average of 26 annually);
  - (v) Clymene dolphin (*S. clymene*)—100 (an average of 20 annually);
  - (vi) Atlantic spotted dolphin (*S. frontalis*)—100 (an average of 20 annually);
  - (vii) Spinner dolphin (*S. longirostris*)—135 (an average of 27 annually);

(viii) Striped dolphin (*S. coerulealba*)—100 (an average of 20 annually);

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

(x) Melon-headed whales (*Peponocephala electra*)—100 (an average of 20 annually);

(xi) False killer whale (*Pseudorca crassidens*)—50 (an average of 10 annually);

(xii) Fraser's dolphin (*Lagenodelphis hosei*)—100 (an average of 20 annually);

(xiii) Pygmy or dwarf sperm whales (*Kogia* sp.)—100 (an average of 20 annually);

(xiv) Pygmy killer whale (*Ferresa attenuata*)—50 (an average of 10 annually);

(xv) Rough-toothed dolphin (*Steno bredanensis*)—100 (an average of 20 annually);

(xvi) Short-finned pilot whale (*Globicephala macrorhynchus*)—100 (an average of 20 annually).

(2) Level A Harassment (injury):

(i) Pantropical spotted dolphin—5 (an average of 1 annually);

(ii) Spinner dolphin—5 (an average of 1 annually);

#### § 218.32 Prohibitions.

Notwithstanding takings contemplated in § 218.31 and authorized by a Letter of Authorization issued under § 216.106 of this chapter and § 218.36, no person in connection with the activities described in § 218.30 may:

(a) Take any marine mammal not specified in § 218.31(c);

(b) Take any marine mammal specified in § 218.31(c) other than by incidental take as specified in § 218.31(c)(1) and (2);

(c) Take a marine mammal specified in § 218.31(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 § 218.36.

#### § 218.33 Mitigation.

(a) When conducting training activities identified in § 218.30(c), the mitigation measures contained in the Letter of Authorization issued under § 216.106 of this chapter and § 218.36 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 & 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 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 for Specific At-sea Training Events—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 death), the Navy shall suspend its activities immediately and report such incident to NMFS.

(i) Air-to-Surface At-Sea Bombing Exercises (1,000-lbs explosive bombs):

(A) This activity shall only occur in W-155A/B (hot box) area of the GOMEX Range Complex OPAREA.

(B) Aircraft shall visually survey the target and buffer zone for marine mammals prior to and during the exercise. The survey of the impact area shall be made by flying at 1,500 ft (457 m) altitude or lower, if safe to do so, and at the slowest safe speed. Release of ordnance through cloud cover is prohibited; aircraft must be able to actually see ordnance impact areas.

(C) A buffer zone of a 5,100-yard (4,663-m) radius shall be established around the intended target zone. The exercises shall be conducted only if the buffer zone is clear of marine mammals.

(D) At-sea BOMBEXs using live ordnance shall occur during daylight hours only.

(ii) Small Arms Training—Explosive hand grenades (such as the MK3A2 grenades):

(A) Lookouts shall visually survey for marine mammals prior to and during exercise.

(B) A 200-yd (182-m) radius buffer zone shall be established around the intended target. The exercises shall be conducted only if the buffer zone is clear of marine mammals.

(b) [Reserved]

**§ 218.34 Requirements for monitoring and reporting.**

(a) The Holder of the Letter of Authorization issued pursuant to § 216.106 of this chapter and § 218.36 for activities described in § 218.30(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 § 218.30(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 § 218.31(c).

(c) The Navy must conduct all monitoring and required reporting under the Letter of Authorization, including abiding by the GOMEX 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. One of the vessel or aerial surveys should involve professional 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 § 218.34(c)(1), MMOs who are selected for aerial or vessel surveys shall, to the extent practicable, be placed on a Navy platform during the exercises being monitored.

(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. Instead, MMOs should be employed 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 the survey team described in § 218.34(c)(1)(iv).

(d) 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).

(e) Annual GOMEX 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 GOMEX 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 GOMEX Range Complex

Monitoring Plan shall, at a minimum, provide the same marine mammal observation data required in § 218.34(c)(1)(iv). The GOMEX Range Complex Monitoring Plan Report may be provided to NMFS within a larger report that includes the required Monitoring Plan Reports from GOMEX Range Complex and multiple range complexes.

(f) Annual GOMEX 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 GOMEX Range Complex.

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

(g) GOMEX 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 GOMEX Range Complex exercises for which annual reports are required (Annual GOMEX Range Complex Exercise Reports and GOMEX Range Complex Monitoring Plan Reports). This report shall be submitted at the end of the fourth year of the rule (February 2015), covering activities that have occurred through August 1, 2014.

(h) The Navy shall respond to NMFS comments and requests for additional information or clarification on the GOMEX Range Complex Comprehensive Report, the Annual GOMEX Range Complex Exercise Report, or the Annual GOMEX 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.

(i) 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.

#### **§ 218.35 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 § 218.30(a) (the U.S. Navy) must apply for and obtain either an initial Letter of Authorization in accordance with § 218.36 or a renewal under § 218.37.

#### **§ 218.36 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 § 218.37.

(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).

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

(a) A Letter of Authorization issued under §§ 216.106 and 218.36 of this chapter for the activity identified in § 218.30(c) will be renewed annually upon:

(1) Notification to NMFS that the activity described in the application submitted under § 218.35 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 § 218.34; and

(3) A determination by the NMFS that the mitigation, monitoring and reporting measures required under § 218.33 and the Letter of Authorization issued under §§ 216.106 and 218.36 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 218.37 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 GOMEX Study Area or other locations).

(2) Findings of the Monitoring Workshop that the Navy will convene in 2011 (§ 218.34(j)).

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

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

(5) 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.

**§ 218.38 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 218.36 of this chapter 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 § 218.37, 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 § 218.30(b), a Letter of Authorization issued pursuant to §§ 216.106 and 218.36 of this chapter 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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