

(b) The minimum driving range that a passenger automobile using electricity as an alternative fuel must have in order to be treated as a dual fueled automobile pursuant to 49 U.S.C. 32901(c) is 7.5 miles on its nominal storage capacity of electricity when operated on the EPA urban test cycle and 10.2 miles on its nominal storage capacity of electricity when operated on the EPA highway test cycle.

3. Revise § 538.6 to read as follows:

**§ 538.6 Measurement of driving range.**

The driving range of a passenger automobile model type not using electricity as an alternative fuel is determined by multiplying the combined EPA urban/highway fuel economy rating when operating on the alternative fuel, by the nominal usable fuel tank capacity (in gallons), of the fuel tank containing the alternative fuel. The combined EPA urban/highway fuel economy rating is the value determined by the procedures established by the Administrator of the EPA under 49 U.S.C. 32904 and set forth in 40 CFR part 600. The driving range of a passenger automobile model type using electricity as an alternative fuel is determined by operating the vehicle in the electric-only mode of operation through the EPA urban cycle on its nominal storage capacity of electricity and the EPA highway cycle on its nominal storage capacity of electricity. Passenger automobile types using electricity as an alternative fuel that have completed the EPA urban cycle after recharging and the EPA highway cycle after recharging shall be deemed to have met the minimum range requirement.

4. Add § 538.7 to read as follows:

**§ 538.7 Petitions for reduction of minimum driving range.**

(a) A manufacturer of a model type of passenger automobile capable of operating on both electricity and either gasoline or diesel fuel may petition for a reduced minimum driving range for that model type in accordance with paragraphs (b) and (c) of this section.

(b) Each petition shall:

(1) Be addressed to: Administrator, National Highway Traffic Safety Administration, 400 Seventh Street SW, Washington, DC 20590.

(2) Be submitted not later than the beginning of the first model year in which the petitioner seeks to have the model type treated as an electric dual fueled automobile.

(3) Be written in the English language.

(4) State the full name, address, and title of the official responsible for preparing the petition, and the name and address of the petitioner.

(5) Set forth in full data, views, and arguments of the petitioner, including the information and data specified in paragraph (c) of this section, and the calculations and analyses used to develop that information and data. No documents may be incorporated by reference in a petition unless the documents are submitted with the petition.

(6) Specify and segregate any part of the information and data submitted under this section that the petitioner wishes to have withheld from public disclosure in accordance with part 512 of this chapter.

(c) Each petitioner shall include the following information in its petition:

(1) Identification of the model type or types for which a lower driving range is sought under this section.

(2) For each model type identified in accordance with paragraph (c)(1) of this section:

(i) The driving range sought for that model type.

(ii) The number of years for which that driving range is sought.

(iii) A description of the model type, including car line designation, engine displacement and type, electric storage capacity, transmission type, and average fuel economy when operating on:

(A) Electricity; and

(B) Gasoline or diesel fuel.

(iv) An explanation of why the petitioner cannot modify the model type so as to meet the generally applicable minimum range, including the steps taken by the petitioner to improve the minimum range of the vehicle, as well as additional steps that are technologically feasible, but have not been taken. The costs to the petitioner of taking these additional steps shall be included.

(3) A discussion of why granting the petition would be consistent with the following factors:

(i) The purposes of 49 U.S.C. chapter 329, including encouraging the development and widespread use of electricity as a transportation fuel by consumers, and the production of passenger automobiles capable of being operated on both electricity and gasoline/diesel fuel;

(ii) Consumer acceptability;

(iii) Economic practicability;

(iv) Technology;

(v) Environmental impact;

(vi) Safety;

(vii) Driveability; and

(viii) Performance.

(d) If a petition is found not to contain the information required by this section, the petitioner is informed about the areas of insufficiency and advised that the petition will not receive further

consideration until the required information is received.

(e) The Administrator may request the petitioner to provide information in addition to that required by this section.

(f) The Administrator publishes in the **Federal Register** a notice of receipt for each petition containing the information required by this section. Any interested person may submit written comments regarding the petition.

(g) In reaching a determination on a petition submitted under this section, the Administrator takes into account:

(1) The purposes of 49 U.S.C. chapter 329, including encouraging the development and widespread use of alternative fuels as transportation fuels by consumers, and the production of alternative fuel powered motor vehicles;

(2) Consumer acceptability;

(3) Economic practicability;

(4) Technology;

(5) Environmental impact;

(6) Safety;

(7) Driveability; and

(8) Performance.

(h) If the Administrator grants the petition, the petitioner is notified in writing, specifying the reduced minimum driving range, and specifying the model years for which the reduced driving range applies. The Administrator also publishes a notice of the grant of the petition in the **Federal Register** and the reasons for the grant.

(i) If the Administrator denies the petition, the petitioner is notified in writing. The Administrator also publishes a notice of the denial of the petition in the **Federal Register** and the reasons for the denial.

Issued on: November 24, 1998.

**Ricardo Martinez,**

*Administrator.*

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 216

[Docket No. 960318084-8274-04; I.D. 071596C]

RIN 0648-AG55

#### Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to Naval Activities

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

**ACTION:** Final rule.

**SUMMARY:** NMFS, upon application from the U.S. Department of the Navy (U.S. Navy), issues regulations to govern the unintentional take of a small number of marine mammals incidental to shock testing the USS SEAWOLF submarine in the offshore waters of the U.S. Atlantic coast. Issuance of regulations governing unintentional incidental takes in connection with particular activities is required by the Marine Mammal Protection Act (MMPA) when the Secretary of Commerce (Secretary), after notice and opportunity for comment, finds as here, that such takes will have a negligible impact on the species and stocks of marine mammals and will not have an unmitigable adverse impact on the availability of them for subsistence uses. These regulations do not authorize the Navy's proposed activity, such authorization is provided by 10 U.S.C. 2366, and is not within the jurisdiction of the Secretary. Rather, these regulations authorize the unintentional incidental take of marine mammals in connection with such activities and prescribe methods of taking and other means of effecting the least practicable adverse impact on the species and its habitat, and on the availability of the species for subsistence uses.

**DATES:** Effective May 1 through September 30 of any single year between the years 2000 and 2004, inclusive.

**ADDRESSES:** Copies of the application, Biological Opinion, Incidental Take Statement (ITS) and a list of the references used in this document may be obtained by writing to Michael Payne, Chief, Marine Mammal Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910-3226 or by telephoning the contact listed under the section **FOR FURTHER INFORMATION CONTACT**.

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

A copy of the final environmental impact statement (FEIS) may be obtained from Will Sloger, U.S. Navy, at (803) 820-5797.

**FOR FURTHER INFORMATION CONTACT:** Kenneth R. Hollingshead, NMFS, (301) 713-2055.

**SUPPLEMENTARY INFORMATION:**

## Background

Section 101(a)(5)(A) of the MMPA (16 U.S.C. 1361 *et seq.*) directs NMFS 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) within a specified geographical region if certain findings are made and regulations are issued.

Permission may be granted for a period of 5 years or less if NMFS finds that the taking will have a negligible impact on the species or stock(s) of marine mammals and will not have an unmitigable adverse impact on the availability of these species for subsistence uses and that regulations are prescribed setting forth the permissible methods of taking and the requirements pertaining to the monitoring and reporting of such a taking.

## Summary of Request

On June 7, 1996, NMFS received an application for an incidental, small take exemption under section 101(a)(5)(A) of the MMPA from the U.S. Navy to take marine mammals incidental to shock testing the USS SEAWOLF submarine off the U.S. Atlantic coast in 1997. The USS SEAWOLF is the first of a new class of submarines being acquired by the Navy. In accordance with 10 U.S.C. 2366, each new class of ships constructed for the Navy cannot proceed beyond initial production until realistic survivability testing of the ship and its components are completed. Realistic survivability testing means testing for vulnerability in combat by firing munitions likely to be encountered in combat. This testing and assessment are commonly referred to as "Live Fire Test & Evaluation (LFT&E)." Because realistic testing by detonating torpedoes or mines against a ship's hull could result in the loss of a multi-billion dollar Navy asset, the Navy has established an LFT&E program consisting of computer modeling, component and surrogate testing, and shock testing the entire ship. Together, these components complete the survivability testing as required by 10 U.S.C. 2366.

The shock test component of LFT&E is a series of underwater detonations that propagate a shock wave through a ship's hull under deliberate and controlled conditions. Shock tests simulate near misses from underwater explosions similar to those encountered in combat. Shock testing verifies the accuracy of design specifications for shock testing ships and systems, uncovers weaknesses in shock sensitive components that may compromise the

performance of vital systems, and provides a basis for correcting deficiencies and upgrading ship and component design specifications. While computer modeling and laboratory testing provide useful information, they cannot substitute for shock testing under realistic, offshore conditions. To minimize cost and risk to personnel, the first ship in each new class is shock tested and improvements are applied to later ships of the class.

The Navy proposes to shock test the USS SEAWOLF by detonating a single 4,536-kg (10,000-lb) explosive charge near the submarine once per week over a 5-week period between May 1 and September 30, 2000, off Mayport, FL, although scheduling delays may postpone the detonation into a future year. Detonations would occur 30 m (100 ft) below the ocean surface in a water depth of 152 m (500 ft). The USS SEAWOLF would be underway at a depth of 20 m (65 ft) at the time of the test. For each test, the submarine would move closer to the explosive so the submarine would experience a more severe shock.

The Mayport site is located on the continental shelf off Georgia and northeast Florida. The Mayport site is the U.S. Navy's preferred location for the shock trial because of an observed low abundance of marine mammals at that site. However, because there is still a potential impact to marine mammals, the Navy has requested NMFS to grant an exemption under section 101(a)(5)(A) of the MMPA that would authorize the incidental taking and issue regulations governing the take.

## Comments

On August 2, 1996 (61 FR 40377), NMFS published a proposed rule to issue an incidental small take exemption under the MMPA to take a small number of marine mammals incidental to shock testing the USS SEAWOLF submarine in the offshore waters of the U.S. Atlantic coast in 1997. A correction notice on the proposed regulations was published on August 23, 1996 (61 FR 43517). During the 45-day comment period, NMFS received 5 letters (Marine Mammal Commission (MMC), Humane Society of the United States (HSUS), Defenders of Wildlife (DoW), People for the Ethical Treatment of Animals (PETA) and one private citizen) commenting on the proposed rule. Comments contained in these letters are addressed under the Comments and Responses section. Comments regarding issues other than the contents of the proposed rule have been addressed in the FEIS prepared by the U.S. Navy.

On March 11, 1997, the U.S. Navy submitted a petition to NMFS amending its June 7, 1996, application and requesting a modification to the proposed regulations for an incidental small take exemption under the MMPA to take a small number of marine mammals incidental to shock testing the USS SEAWOLF submarine in the offshore waters of the U.S. Atlantic coast in 1997. The petition states that the U.S. Navy, for reasons unrelated to the environment, will not be able to conduct the shock trial from April 1, 1997, through September 30, 1997, and requests that the period of effectiveness for the regulations and the shock trial be extended until 1999. No modification to the proposed seasonal restriction (which would prohibit any marine mammal takings from October 1 through March 31 at the Norfolk site and from October 1 through April 30 at the Mayport site) to protect marine mammal and sea turtle species is requested. Because section 101(a)(5)(A) of the MMPA provides for small take authorizations to be effective for periods up to 5 years, NMFS believed that granting this request to modify the effective date of the proposed rule was warranted, the requested modification was proposed on April 22, 1997 (62 FR 19553). During the 30-day comment period, no comments were received. Subsequent to that action, the U.S. Navy informed NMFS that the shock test would be delayed until the year 2000 or beyond.

## Comments and Responses

### General Concerns

*Comment 1:* PETA believes that accepting the proposed rule would set a dangerous precedent for other entities to apply for similar legal exceptions and would make a mockery of current measures which are designed to protect marine mammals from harm.

*Response:* NMFS disagrees. The MMPA provides authority under section 101(a)(5)(A) for the taking of small numbers of marine mammals while conducting lawful activities provided the taking is having no more than a negligible impact on marine mammals and provided regulations are prescribed setting forth permissible methods of taking and other means of effecting the least practicable impact on marine mammal species and their habitat. The U.S. Navy first applied for a small take authorization on May 13, 1993, under section 101(a)(5)(A) of the MMPA. That application resulted in a final authorization to incidentally take small numbers of marine mammals during the shock trial of the USS JOHN PAUL JONES in 1994 (59 FR 5111, February 3,

1994). Monitoring that shock trial indicated that no marine mammals were seriously injured or killed and only a few dolphins were potentially harassed. The small take application for the incidental take of marine mammals for the USS SEAWOLF follows, and improves upon, the mitigation and monitoring protocols established during the earlier shock trial.

*Comment 2:* Three commenters (HSUS, PETA, citizen) recommended NMFS adopt the no action alternative and not issue a small take authorization to the U.S. Navy.

*Response:* NMFS wishes to make clear that the Navy conducts ship shock tests under the authority of 10 U.S.C. 2366. The Navy does not require NMFS authorization to conduct these tests. However, under the MMPA, the taking of marine mammals is prohibited unless authorized by exemption or permit. Since there is a possibility that marine mammals may be unintentionally taken (harassed, injured or killed) incidental to the ship shock trial, the Navy applied to NMFS for a small take authorization under section 101(a)(5)(A) of the MMPA. Thus, it is the taking of marine mammals incidental to the Navy's ship shock tests that NMFS is authorizing, not the shock trial itself. Unless scientific evidence contradicts NMFS' preliminary determination (61 FR 40377, August 2, 1996) that the ship shock trial is likely to result in only small numbers of marine mammals being taken and that this taking would have no more than a negligible impact on marine mammal stocks (provided the recommended mitigation and monitoring are conducted), a small take authorization is appropriate.

*Comment 3:* DoW questions the need for shock testing with the advent of computer modeling and sophisticated model simulations. With billions of dollars already spent on engineering and design for the vessel, this mode of testing seems dated. If testing is necessary, then DoW recommends the Navy moderate the size of the charge rather than the distance (between the charge and the submarine). DoW also recommends the Navy should investigate the use of "shaped" charges similar to those used for building demolition to direct more of the shockwave towards the vessel and less into the surrounding environment.

*Response:* According to the Navy, data from previous shock tests and wartime experience have been incorporated into computer models which are used to help predict the survivability of SEAWOLF-class submarines. Modeling however, is only one of three components of the

SEAWOLF LFT&E program which together provide the data necessary to assess the SEAWOLF's survivability. The components are computer modeling and analysis, component and surrogate testing, and a shock test of the entire ship. Computer modeling and component testing on machines or in surrogates do not provide adequate information to assess the survivability of the submarine in accordance with 10 U.S.C. 2366. In addition, combat experience has demonstrated that computer models and component testing, while helpful, cannot predict the broad range of complex failure mechanisms which could occur inside sophisticated electronic components or complex mechanical systems.

Unfortunately, smaller charges and shaped charges do not energize the entire submarine at the desired level of shock intensity. According to the Navy, the use of smaller charges would require many more detonations to excite the entire submarine to the desired level.

*Comment 4:* DoW believes NMFS did not provide adequate notice of public meetings and opportunity for hearings. In addition, they believe that the title published in the *Federal Register* was insufficiently detailed to elicit response. A secondary, descriptive title would have been very helpful.

*Response:* The U.S. Navy's proposal to shock test the USS SEAWOLF off the U.S. East Coast has been noted in the *Federal Register* and the following newspapers on at least three occasions: Washington Post, Beaches Leader, Florida Times Union, Southeastern Georgian and Virginian Pilot. NMFS and the Navy first notified the public and held scoping meetings in Silver Spring, MD, Norfolk, VA and Atlantic Beach, FL in March, 1995. These meetings were announced in the above newspapers and in the *Federal Register*. The notice of availability of the draft environmental impact statement (DEIS) was published by the Environmental Protection Agency in the *Federal Register* on June 14, 1996 (61 FR 30233); a copy of the DEIS was mailed to DoW and a number of other interested organizations. The publication of the proposed rule by NMFS on August 2, 1996 (61 FR 40377) announced the schedule for public meetings under the National Environmental Policy Act (NEPA) and the MMPA. The comment period on the DEIS was reopened (61 FR 40204, August 1, 1996) until September 17, 1996 to incorporate the comments expected from these meetings. A widely distributed press release on the Navy proposal was also issued on August 2, 1996, by NOAA, two weeks prior to public hearings in mid-August, 1996.

NOAA press releases are also available to the public through the NOAA Homepage. As a result, NMFS believes the general public has had ample opportunity to review and prepare comments prior to the MMPA/NEPA public meetings and an additional period of time afterwards to submit written comments.

The title of the proposed action published in the *Federal Register* is limited to the title of the codified part (Taking and Importing of Marine Mammals) and the subpart (Taking Marine Mammals Incidental to Naval Activities). Secondary descriptive titles are not authorized by the Office of the Federal Register.

*Comment 5:* DoW finds the site selection for the shock trial to be problematic. They note that the coastal areas in Florida, particularly those within the euphotic zone are some of the most productive biologically. Any detonations of the magnitude described in the notice would therefore not only affect marine mammals, but could have devastating effects on local ecosystems and food chains. This could have profound implications on the eastern recreational and commercial fisheries.

*Response:* The environmental impacts of the shock trial on the Florida east coast ecosystems have been described in the DEIS prepared as part of this action. Readers are encouraged to refer to that document or the recently released FEIS for an analysis of environmental and economic impacts (see ADDRESSES).

*Comment 6:* The MMC recommends that NMFS carefully examine the data, assumptions, and methods used to estimate the numbers of animals that might be killed, injured or harassed to ensure that the estimates appropriately reflect any possible sources of error or bias. Recognizing that if the take is greater than authorized the Navy would be required to stop testing before completion, even though the effects on marine mammal distribution, abundance and productivity would still be negligible, the MMC further recommends that the number of animals authorized to be taken be increased if, after further examination, it is determined that (1) the present estimates do not adequately reflect possible sources of error and bias and (2) the possible effects on the distribution, size, and productivity of the potentially affected species and population stocks would remain negligible.

*Response:* NMFS believes that the U.S. Navy used the best scientific information available in making its assessment of the potential impact on marine mammals from the detonation of

5 explosive charges. In addition to using documented sources (e.g., CETAP, stranding records), the Navy conducted monthly aerial marine mammal surveys of the two preferred geographic areas for a period of 6 months. This survey was repeated at Mayport in 1997. The resulting estimate of the number of marine mammals that might potentially be harassed, injured or killed is provided in Tables 4–5 and 4–6 of the FEIS. It should be noted that the U.S. Navy reviewed this concern as part of its NEPA review, and, for reasons stated in response to Comment 7, these take levels have been modified from the proposed rule and DEIS. A more detailed response to this concern can be found in the FEIS (please refer to comment H4 in Appendix H). Also, a complete description of the methodology used by the Navy, and adopted by NMFS for this exercise, can be found in the FEIS.

For discussion on the comment that the Navy would be required to stop testing before completion if the take is greater than authorized, please refer to comment 12.

*Comment 7:* The MMC notes that the Navy has introduced a new criterion—acoustic discomfort—for determining how and how many animals may be harassed by anthropogenic sounds in the marine environment. The MMC therefore recommends that NMFS take such steps as necessary to ensure that (1) the estimates of the numbers of marine mammals that potentially could be taken by harassment are in fact, overestimates, rather than underestimates; and (2) the planned monitoring program is adequate to verify that any disruption of vital behavior is momentary and that no more than the authorized number of animals are harassed.

*Response:* As explained in detail in the FEIS, previous determinations for explosives were based on peak pressure. However, several sources recognize that peak pressure may not be the best basis for predicting the effects of impulsive noise, such as underwater explosives, on marine mammals (e.g., Richardson *et al.* 1995). In terms of mammal hearing, a better measure may be total energy received in 1/3-octave frequency bands (i.e., the approximate filter bandwidth of the hearing system) within the integration time of the ear. As pulsed sound sources with differing peak pressures could deliver the same energy over a certain time period, the acoustic harassment criterion can be improved over the standard 160 dB (re 1  $\mu$ Pa @ 1 m) used previously during shock testing the USS JOHN PAUL JONES and other explosive detonation events.

The 160-dB criterion is based on a behavioral response which may be of questionable biological significance in the context of a *single* acoustic pulse. In the case of a continuous source (e.g., industrial noise) or repeated transient sources (e.g., seismic pulses), avoidance by a marine mammal could result in changes to migration, feeding, or reproduction patterns that could affect the energetics of both individuals and populations. However, in the context of a single, brief pulse from a detonation, a momentary startle response causing an animal to dive or momentarily change course or speed is not likely to affect either the individual or the population. Such a minor response is well within the range of normal behaviors that an animal might exhibit at any time in response to other animals or other environmental stimuli. As a result, NMFS does not normally consider these simple, singular, reflex actions (e.g., alert, startle, dive response to a stimulus) by marine mammals to be sufficient on their own to warrant an incidental harassment authorization. On the other hand, NMFS does not concur with statements made by the Navy in response to a different rulemaking that the term “harassment” in the MMPA should be limited to changes in behavioral patterns of a magnitude that reflect an adverse reaction on the part of the animals such as intense fear or pain or behavior that is likely to harm the animal or its offspring. By statutory definition, the *de minimus* level (for Level B harassment) should be less intrusive on the animal than suggested by the Navy.

Therefore, the information provided in the FEIS supports the Navy’s selection of temporary threshold shift (TTS) as a harassment criterion for shock testing the USS SEAWOLF. NMFS concurs. TTS is being used as a measure of quantifiable harassment, as TTS may also result in behavior reflecting an adverse reaction, and TTS meets the definition of both Level A and Level B harassment definitions found in the MMPA. On a cellular level, TTS could be considered a very slight “injury” in the sense of damage to hair cells in the ear and because TTS is temporary hearing loss, it could lead to a temporary disruption of behavioral patterns as specified in the statutory definition of Level B harassment. For additional information please refer to the FEIS, in particular, Appendix E. Based upon information provided in Appendix E, a dual criterion for acoustic harassment has been developed: (1) an energy-based TTS criterion of 182 dB re 1  $\mu$ Pa<sup>2</sup>-sec derived

from experiments with bottlenose dolphins (Ridgway *et al.* (1997), and (2) 12 lbs/in<sup>2</sup> (psi) peak pressure cited by Ketten (1995) as associated with a "safe outer limit for the 10,000 lb charge for minimal, recoverable auditory trauma" (i.e., TTS). The harassment range therefore is the minimum distance at which neither criterion is exceeded. Using the 182 dB (energy) criterion separate harassment ranges were calculated for odontocetes and mysticetes based on their differing sensitivity to low frequencies. For the Mayport area, the harassment range is predicted to be 15.7 km (8.5 nautical miles (nm)) for odontocetes and 23.5 km (12.7 nm) for mysticetes. Estimated take levels based upon the above criterion for Mayport can be found in Tables 4–5 and 4–6 of the FEIS. For a single detonation at Mayport about 358 marine mammals could be harassed; for five detonations, 1,788 animals could be harassed. Because the U.S. Navy will seek a site for detonation that has the lowest real-time abundance of marine mammals, these numbers should be regarded as upper limits. The species most likely affected at Mayport are the bottlenose dolphin, Risso's dolphin, Atlantic spotted dolphin, and the *Stenella* spp.

NMFS has concerns that focusing monitoring efforts on the possibility that there may be more than a momentary disturbance of one or more marine mammals located either inside or outside the acoustic harassment zone would result in diminished monitoring within the safety zone where, with lowered detection effort, marine mammals might be seriously injured or killed. Because aircraft safety precludes more than one survey aircraft being within the area at any one time (a second aircraft will be held in reserve ashore), and because the survey aircraft will operate (after completion of aerial monitoring) in a circular holding pattern 4.6 km (2.5 nm) from the site to ensure no marine mammals enter the safety zone, there will be limited opportunity to observe marine mammal behavior at the instant of detonation. Furthermore, it is unclear whether stationing an aircraft in the area beyond the acoustic harassment zone would provide meaningful scientific results. Based on current scientific information, the low frequency of the explosive would potentially affect only marine mammals with the ability to detect low frequency sounds, mainly mysticete and sperm whales. Other than sperm whales, these species are not expected off Mayport, FL during the summer. To accommodate MMC concerns however, the Navy plans to locate and monitor any marine

mammals, including behavioral changes, found inside the acoustic harassment zone for a period of 48 hours post-detonation, as detailed in the FEIS.

**Comment 8:** The MMC recommends NMFS (1) consider whether monitoring and comparing marine mammal vocalizations before and after detonation of charges would provide a reasonable means for validating the apparent assumption that any disruption of behavior beyond the "acoustic discomfort" range will be momentary; and (2) if judged reasonable, require that the monitoring program be reviewed accordingly.

**Response:** The Marine Mammal Acoustic Tracking System will be employed during the ship shock trial to acoustically detect marine mammals that are within the safety zone to avoid injury or death of these animals as a result of the detonation. Acoustic monitoring will therefore focus primarily on marine mammals vocalizing within the safety and buffer zone and secondarily on animals outside those zones prior to detonation. Unfortunately, for security reasons, recordings of vocalizing marine mammals after detonation cannot be made, either inside or outside the acoustic harassment zone. Therefore, the suggested experiment cannot be conducted.

**Comment 9:** HSUS recommends that post-detonation monitoring continue for a period of time no less than 4 weeks after the final detonation in order to account for animals who may not experience an immediately observable negative impact.

**Response:** NMFS believes that 4-week post-detonation surveys would be an unnecessary imposition on the U.S. Navy that would not provide the public with meaningful information on the impact of explosions on marine mammal populations. First, NMFS believes that any marine mammals that might be killed by a detonation and sink would resurface within 1 week of their demise. Second, marine mammals that are injured might not remain in the same area of the detonations after the shock trial is completed. This would require the U.S. Navy to conduct extensive aerial and ship surveys over a large area of the East Coast to locate injured and deceased marine mammals. Finally, a cause-and-effect relationship between dead marine mammals and the ship shock trial is not likely to be evident by external examination (but see comment 10).

NMFS will require the U.S. Navy to conduct post-detonation surveys for marine mammals a minimum of 48

hours and a maximum of 1 week following each detonation. In addition, the U.S. Navy will be coordinating follow-up investigations with local stranding networks.

**Comment 10:** HSUS recommends that the U.S. Navy fund necropsy efforts of stranding networks for a period of one year in an attempt to account for long-term impacts that result in mortality. HSUS recommends this measure be a required element in the monitoring scheme in 50 CFR 216.165.

**Response:** In the Navy's FEIS, the Navy states that the stranding networks will be requested to forward tissue samples from stranded marine mammals and sea turtles to the Armed Forces Institute of Pathology (AFIP) for analysis. The U.S. Navy will fund necropsy sample analyses by the AFIP for one year following the last detonation. This recommendation has been incorporated as a monitoring requirement under 50 CFR 216.165.

**Comment 11:** The MMC recommends that the Letter of Authorization (LOA) make clear that the authorization is automatically revoked if marine mammals are taken in ways or numbers not authorized. The HSUS recommends that § 216.166(b) be amended to require the LOA be suspended or revoked (without prior notice or opportunity for public comment).

**Response:** Prior to revocation of an LOA, NMFS must satisfy the statutory notice and comment requirement of section 101(a)(5)(B). However, under section 101(a)(5)(C) of the MMPA, the notice and comment requirements do not apply prior to suspending an LOA due to emergency conditions that pose a significant risk to the well-being of the marine mammal stock. While, section 101(a)(5)(B), allows NMFS to withdraw (revoke) or "suspend for a time certain" an LOA, subsequent to notice and comment, section 101(a)(5)(C) does not waive the notice and comment requirement where NMFS seeks to withdraw the authorization. Conditions for suspension or withdrawal of an LOA are described in 50 CFR 216.106 of this part.

**Comment 12:** The HSUS recommends that if the incidental take limits in 50 CFR 216.161(c) are exceeded, or if more than 1 mortality or serious injury of a threatened or endangered species occurs (and this should include all affected sea turtle species as well), then the LOA should be immediately suspended or revoked. The Navy would then have to make its findings governing the SEAWOLF based on the results of the tests conducted at that time.

**Response:** Please see the response to comment 11. The serious injury or death

of even 1 marine mammal listed under the ESA is prohibited by the regulations governing the incidental take of marine mammals during the SEAWOLF shock trial (50 CFR 216.161(c)). However, the serious injury or death of these listed species, or the taking of any marine mammal species after the harassment, injury or mortality quota(s) is (are) reached will not necessarily result in the suspension of the LOA. Suspension of an LOA will occur (1) if NMFS determines that additional takings are having, or may have, a more than negligible impact on the marine mammal stock(s); or (2) all quotas (harassment, injury and death) have been reached. Nevertheless, any taking that is in excess of the respective quota is prohibited and therefore a violation of the MMPA.

The incidental taking of sea turtles is authorized under an ITS as part of a Biological Opinion issued to the U.S. Navy under section 7 of the Endangered Species Act, not under the MMPA. Under that authority, the taking of listed species in excess of the take limits provided in the ITS (including the taking of endangered marine mammals) requires a reinitiation of consultation under section 7. Information on sea turtle incidental take levels can be found in Appendix G of the FEIS.

**Comment 13:** HSUS recommends that 50 CFR 216.163(c) only apply if the take is within the limits specified in 50 CFR 216.161(c).

**Response:** While 50 CFR 216.163 of the proposed rule did not contain a paragraph (c), the incidental take authority provided in § 216.163(a) applies until all the quotas contained in § 216.161(c) are reached provided all other terms, conditions, and requirements of the regulations and LOA are complied with. However, should these quotas be reached, NMFS presumes that should the U.S. Navy decide to continue their shock trial without a marine mammal authorization, the mitigation described in § 216.163(b) would be continued by the U.S. Navy to ensure additional takings did not occur.

**Comment 14:** The MMC recommends that the reporting requirement be revised to require that the results of the monitoring program be provided to NMFS following each of the five tests, rather than 120 days after the last test.

**Response:** NMFS disagrees. Submission of a written report after each test is not warranted because of the potential delay in notifying NMFS of takings, which in turn may result in a delay in the next shock test while NMFS evaluates the data and discusses its findings with the Navy. NMFS intends

to require instead that the U.S. Navy notify NMFS, immediately upon discovery, that a marine mammal has been sighted by the post-detonation monitoring team, that either may have been seriously injured or killed as a result of the detonation, or is determined to have been within the safety zone at the time of detonation. If post-test surveys determine that an injurious or lethal take of a marine mammal has occurred, the test procedure and the monitoring methods will be reviewed with NMFS and appropriate changes must be made, if at all possible, prior to conducting the next detonation.

#### **Description of Habitat and Marine Mammals Affected by Shock Testing the USS SEAWOLF**

A description of the U.S. Atlantic coast environment, its marine life and marine mammal abundance, distribution and habitat can be found in the draft and FEIS on this subject and is not repeated here. Additional information on Atlantic coast marine mammals can be found in Blaylock *et al.* (1995). These documents are available upon request (see ADDRESSES).

#### **Summary of Potential Impacts**

Potential impacts to the marine mammal species known to occur in these areas from shock testing include both lethal and non-lethal injury, as well as harassment. Death or injury may occur as a result of the explosive blast, and harassment may occur as a result of non-injurious physiological responses to the explosion-generated shockwave and its acoustic signature. The Navy believes it is very unlikely that injury will occur from exposure to the chemical by-products released into the surface waters, and no permanent alteration of marine mammal habitat would occur. While the Navy does not anticipate any lethal takes would result from these detonations, theoretical calculations indicate that the Mayport site has the potential to result in up to 1 lethal take, 5 injurious takes, and 1,788 harassment takes. Detailed descriptions on the definitions of take categories; calculation of ranges for potential mortality, injury, and harassment; incidental take calculations; and impacts on marine mammal habitat can be found in the Navy application and the FEIS, which are available upon request (see ADDRESSES).

#### **Summary of Proposed Mitigation and Monitoring Measures**

The Navy's proposed action includes mitigation and monitoring that would minimize risk to marine mammals and

sea turtles. As recently revised, the Navy would:

- (1) Through pre-detonation aerial surveys, select a test area with potentially, the lowest number of marine mammals and turtles;
- (2) monitor the area visually (aerial and shipboard monitoring) and acoustically before each test and postpone detonation if (a) any marine mammal, sea turtle, large sargassum raft or large concentration of jellyfish is visually detected within a safety zone of 3.7 km (2.0 nm), (b) any marine mammal is acoustically detected within a safety zone of 4.3 km (2.35 nm), or (c) any large fish school, or flock of seabirds is detected within a safety zone of 1.85 km (1 nm);
- (3) monitor the area visually (aerial and shipboard monitoring) and acoustically before each test and postpone detonation if any marine mammal or sea turtle is within a buffer zone of an additional 1.85 km (1.0 nm) buffer zone, unless the marine mammals are on a course within the buffer zone that is taking them away from the 3.7 km (2.0 nm) safety zone, except that no detonation will occur if a listed marine mammal is detected within the buffer zone, and subsequently cannot be detected, until sighting and acoustic teams have searched the area for 2.5 hours (approximately 3 times the typical large whale dive duration). If a northern right whale is seen, the shot will not occur until the animal is positively reacquired outside the buffer zone and at least one additional aerial monitoring of the safety range and buffer zone shows that no other right whales are present;
- (4) delay detonation if the sea state exceeds 3 (i.e., whitecaps on 33 to 50 percent of surface; 0.6 m (2 ft) to 0.9 m (3 ft) waves), or the visibility is not 5.6 km (3 nm) or greater, and the ceiling is not 305 m (1,000 ft) or greater;
- (5) no detonations would occur earlier than 3 hours after sunrise or later than 3 hours prior to sunset to ensure adequate daylight for pre- and post-detonation monitoring; and
- (6) monitor the area for 48 hours after each detonation, and for 7 days following the last detonation, to find and treat any injured animals. If post-detonation monitoring shows that marine mammals or sea turtles were killed or injured as a result of the test, or if any marine mammals or sea turtles were observed in the safety range immediately after a detonation, testing would be halted until procedures for subsequent detonations could be reviewed and changed as necessary.

Detailed descriptions of the measures for mitigation and monitoring the shock

test can be found in the FEIS (chapter 5), which is available upon request (see ADDRESSES).

### Reporting

Within 120 days of the completion of shock testing, the Navy is required to submit a final report to NMFS. This report must include the following information: (1) Date and time of each of the detonations; (2) a detailed description of the pre-test and post-test activities related to mitigating and monitoring the effects of explosives detonation on marine mammals and their populations; (3) the results of the monitoring program, including numbers by species/stock of any marine mammals noted injured or killed as a result of the detonations and numbers that may have been harassed due to undetected presence within the safety zone; and (4) results of coordination with coastal marine mammal/sea turtle stranding networks.

### Changes From the Proposed Rule

NMFS has modified the final rule as follows:

1. The regulations specify that the incidental taking is authorized for the waters off Mayport, FL (i.e., a negligible impact determination has not been made for the Norfolk, VA site).

2. Amended the incidental harassment levels to reflect the change from an acoustic discomfort criterion to one based upon TTS.

3. Harbor seals (*Phoca vitulina*) have been removed from the list of authorized species for taking since it is remote that one would be off the Florida coast in mid-summer.

4. Modified detonation postponement criteria in § 216.163 for certain marine mammals present in the buffer zone based on swimming speeds and dive durations.

5. Modified post-detonation criteria in 50 CFR 216.163(b)(3) to require that if post-test surveys determine that any marine mammals are in the safety range immediately after a detonation, the test procedure and the monitoring methods must be reviewed and appropriate changes must be made prior to conducting the next detonation.

6. Requires the U.S. Navy to conduct during the first detonation, and provide a report on, prior to the second detonation, the attenuation of the sound pressure levels of the HBX1 explosive charge. Based upon the results of this test, the monitoring and safety zones described in the LOA, may be modified accordingly.

7. Reporting requirements have been modified to indicate that reports must be submitted to the Regional

Administrator, NMFS and a new definition for "Administrator, Southeast Region" has been added.

8. A final report on results of necropsies of stranded marine mammals funded by the U.S. Navy is now required to be submitted to NMFS no later than 18 months after completion of shock testing the USS SEAWOLF.

9. Minor, nontechnical, changes have been made to the regulations for clarification and ease of understanding.

### Conclusions

While NMFS believes that detonation of five 4,536-kg (10,000-lb) charges may affect some marine mammals, the latest abundance and seasonal distribution estimates indicate that such taking will have a negligible impact on the populations of marine mammals inhabiting the waters of the U.S. Atlantic Coast. NMFS concurs with the U.S. Navy that impacts can be mitigated by mandating a conservative safety range for marine mammal exclusion, incorporating aerial, shipboard, and acoustic survey monitoring efforts in the program both prior to, and after detonation of explosives, and provided detonations are not conducted whenever marine mammals are either detected within the safety zone, or may enter the safety zone at the time of detonation, or if weather and sea conditions preclude adequate aerial surveillance.

### NEPA

On June 14, 1996 (61 FR 30232), the Environmental Protection Agency noted the availability for public review and comment a DEIS prepared by the U.S. Navy under NEPA on this action. NMFS is a cooperating agency as defined by the Council on Environmental Quality regulations (40 CFR 1501.6) and in this regard submitted comments on the DEIS to the U.S. Navy on October 9, 1996. The U.S. Navy responded to NMFS' concerns on December 11, 1996. NMFS has reviewed the Navy's response and the FEIS and concludes that its comments and suggestions have been satisfactorily addressed. As a result, NMFS hereby adopts the Navy FEIS as its own as provided by 40 CFR 1506.3. Because NMFS' comments have been addressed satisfactorily, NMFS finds that it is unnecessary to either prepare its own NEPA documentation nor to recirculate the Navy FEIS for additional comments.

### Endangered Species Act (ESA)

NMFS has consulted with the Navy under section 7 of the ESA for this shock trial. As the required mitigation measures, as well as monitoring, will be

conducted as described, the shock trial is expected to provide adequate protection for listed species. As a result, NMFS has determined that the activity, while not likely to jeopardize the continued existence of those endangered or threatened species under the jurisdiction of NMFS, may adversely affect certain sea turtle species. A copy of the Biological Opinion and Incidental Take Statement resulting from this consultation is available upon request (see ADDRESSES).

### Classification

This action has been determined to be not significant for purposes of E.O. 12866.

The Assistant General Counsel for Legislation and Regulation of the Department of Commerce certified to the Small Business Administration, when this rule was proposed, that, if adopted, this rule would not have a significant economic impact on a substantial number of small entities as described in the Regulatory Flexibility Act. If implemented, this rule will affect only the U.S. Navy, and an undetermined number of contractors providing services related to the shock trial, including the monitoring of impacts on marine mammals. Although the U.S. Navy, by definition, is not a small business, some of the affected contractors may be small businesses. The economic impact on these small businesses is dependent upon the award of contracts for such services. The economic impact cannot be determined with certainty, but will either be beneficial or have no effect, directly or indirectly, on small businesses. As such, a regulatory flexibility analysis is not required.

This rule contains collection-of-information requirements subject to the provisions of the Paperwork Reduction Act (PRA). This collection has been approved previously by OMB under section 3504(b) of the PRA. The control number used by OMB is 0648-0151. Notwithstanding any other provision of law, no person is required to respond to nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the PRA unless that collection of information displays a currently valid OMB control number.

The reporting burden for this collection is estimated to be approximately 80 hours, including the time for gathering and maintaining the data needed, and completing and reviewing the collection of information. It does not include time for monitoring the activity by observers. Send comments regarding these reporting



burden estimates or any other aspect of the collections of information, including suggestions for reducing the burdens, to NMFS and OMB (see ADDRESSES)

A list of the references used in this document may be obtained from NMFS (see ADDRESSES).

#### List of Subjects in 50 CFR Part 216

Administrative practice and procedure, Imports, Indians, Marine mammals, Penalties, Reporting and recordkeeping requirements, Transportation.

Dated: November 23, 1998.

**Andrew A. Rosenberg,**

Deputy Assistant Administrator for Fisheries,  
National Marine Fisheries Service.

For reasons set forth in the preamble, 50 CFR part 216 is amended as follows:

#### PART 216—REGULATIONS GOVERNING THE TAKING AND IMPORTING OF MARINE MAMMALS

1. The authority citation for part 216 continues to read as follows:

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

2. In § 216.3, a new definition for “Administrator, Southeast Region” is added in alphabetical order to read as follows:

##### § 216.3 Definitions.

\* \* \* \* \*

*Administrator, Southeast Region* means Administrator, Southeast Region, National Marine Fisheries Service, 9721 Executive Center Drive, St. Petersburg, FL 33702-2432.

\* \* \* \* \*

3. Subpart O is added to read as follows:

#### Subpart O—Taking of Marine Mammals Incidental to Shock Testing the USS SEAWOLF by Detonation of Conventional Explosives in the Offshore Waters of the U.S. Atlantic Coast

Sec.

216.161 Specified activity, geographical region and incidental take levels.

216.162 Effective dates.

216.163 Permissible methods of taking; mitigation.

216.164 Prohibitions.

216.165 Requirements for monitoring and reporting.

216.166 Modifications to the Letter of Authorization.

216.167—216.169 [Reserved]

#### Subpart O—Taking of Marine Mammals Incidental to Shock Testing the USS SEAWOLF by Detonation of Conventional Explosives in the Offshore Waters of the U.S. Atlantic Coast

##### § 216.161 Specified activity, geographical region, and incidental take levels.

(a) Regulations in this subpart apply only to the incidental taking of marine mammals specified in paragraph (b) of this section by U.S. citizens engaged in the detonation of conventional military explosives within the waters of the U.S. Atlantic Coast offshore Mayport, FL for the purpose of shock testing the USS SEAWOLF.

(b) The incidental take of marine mammals under the activity identified in paragraph (a) of this section is limited to the following species: Blue whale (*Balaenoptera musculus*); fin whale (*B. physalus*); sei whale (*B. borealis*); Bryde's whale (*B. edeni*); minke whale (*B. acutorostrata*); humpback whale (*Megaptera novaeangliae*); northern right whale (*Eubalaena glacialis*); sperm whale (*Physeter macrocephalus*); dwarf sperm whale (*Kogia simus*); pygmy sperm whale (*K. breviceps*); pilot whales (*Globicephala melas*, *G. macrorhynchus*); Atlantic spotted dolphin (*Stenella frontalis*); Pantropical spotted dolphin (*S. attenuata*); striped dolphin (*Stenella coeruleoalba*); spinner dolphin (*S. longirostris*); Clymene dolphin (*S. clymene*); bottlenose dolphin (*Tursiops truncatus*); Risso's dolphin (*Grampus griseus*); rough-toothed dolphin (*Steno bredanensis*); killer whale (*Orcinus orca*); false killer whale (*Pseudorca crassidens*); pygmy killer whale (*Feresa attenuata*); Fraser's dolphin (*Lagenodelphis hosei*); harbor porpoise (*Phocoena phocoena*); melon-headed whale (*Peponocephala electra*); northern bottlenose whale (*Hyperoodon ampullatus*); Cuvier's beaked whale (*Ziphius cavirostris*); Blainville's beaked whale (*Mesoplodon densirostris*); Gervais' beaked whale (*M. europaeus*); Sowerby's beaked whale (*M. bidens*); True's beaked whale (*M. mirus*); common dolphin (*Delphinus delphis*); and Atlantic white-sided dolphin (*Lagenorhynchus acutus*).

(c) The incidental take of marine mammals identified in paragraph (b) of this section is limited to a total of 1 mortality, 5 injuries and 1,788 harassment takes for detonations in the area described in paragraph (a) of this section, except that the taking by serious injury or mortality for species listed in paragraph (b) of this section that are also listed as threatened or endangered under § 17.11 of this title, is prohibited.

##### § 216.162 Effective dates.

Regulations in this subpart are effective May 1 through September 30 of any single year between the years 2000 and 2004, inclusive.

##### § 216.163 Permissible methods of taking; mitigation.

(a) Under a Letter of Authorization issued pursuant to § 216.106, the U.S. Navy may incidentally, but not intentionally, take marine mammals by harassment, injury or mortality in the course detonating five 4,536 kg (10,000 lb) conventional explosive charges within the area described in § 216.161(a), provided all terms, conditions, and requirements of these regulations and such Letter of Authorization are complied with.

(b) The activity identified in paragraph (a) of this section must be conducted in a manner that minimizes, to the greatest extent possible, adverse impacts on marine mammals and their habitat. When detonating explosives, the following mitigation measures must be utilized:

(1) If marine mammals are observed within the designated safety zone prescribed in the Letter of Authorization, or within the buffer zone prescribed in the Letter of Authorization and on a course that will put them within the safety zone prior to detonation, detonation must be delayed until marine mammals are either no longer within the safety zone or are on a course within the buffer zone that is taking them away from the safety zone, except that no detonation will occur if a marine mammal listed as threatened or endangered under § 17.11 of this title is detected within the buffer zone and subsequently cannot be detected until such time as sighting and acoustic teams have searched the area for 2.5 hours (approximately 3 times the typical large whale dive duration). If a northern right whale is seen within the safety or buffer zone, detonation must not occur until the animal is positively reacquired outside the buffer zone and at least one additional aerial monitoring of the safety range and buffer zone shows that no other right whales are present.

(2) If weather and/or sea conditions as described in the Letter of Authorization preclude adequate aerial surveillance, detonation must be delayed until conditions improve sufficiently for aerial surveillance to be undertaken.

(3) If post-test surveys determine that an injurious or lethal take of a marine mammal has occurred, or if any marine mammals are observed in the safety range immediately after a detonation, the test procedure and the monitoring methods must be reviewed by NMFS in



consultation with the Navy and appropriate changes made prior to conducting the next detonation.

#### **§ 216.164 Prohibitions.**

Notwithstanding takings authorized by § 216.161(b) and by a Letter of Authorization issued under § 216.106, the following activities are prohibited:

- (a) The taking of a marine mammal that is other than unintentional.
- (b) The violation of, or failure to comply with, the terms, conditions, and requirements of this part or a Letter of Authorization issued under § 216.106.
- (c) The incidental taking of any marine mammal of a species not specified in this subpart.

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

(a) The holder of the Letter of Authorization is required to cooperate with the National Marine Fisheries Service and any other Federal, state or local agency monitoring the impacts of the activity on marine mammals. The holder must notify the Administrator, Southeast Region at least 2 weeks prior to activities involving the detonation of explosives in order to satisfy paragraph (g) of this section.

(b) The holder of the Letter of Authorization must designate qualified on-site individuals, as specified in the Letter of Authorization, to record the effects of explosives detonation on marine mammals that inhabit the Atlantic Ocean test area.

(c) The Atlantic Ocean test area must be surveyed by marine mammal biologists and other trained individuals, and the marine mammal populations monitored, approximately 3 weeks prior to detonation, 48–72 hours prior to a scheduled detonation, on the day of detonation, and for a period of time specified in the Letter of Authorization after each detonation. Monitoring shall include, but not necessarily be limited to, aerial, shipboard, and acoustic surveillance sufficient to ensure that no marine mammals are within the designated safety zone nor are likely to enter the designated safety zone

immediately prior to, or at the time of, detonation.

(d) Under the direction of a certified marine mammal veterinarian, examination and recovery of any dead or injured marine mammals will be conducted. Necropsies will be performed and tissue samples taken from any dead animals. After completion of the necropsy, animals not retained for shoreside examination will be tagged and returned to the sea. The occurrence of live marine mammals will also be documented.

(e) The holder of the Letter of Authorization is required to measure during the first detonation, and provide a report on, prior to the second detonation, the attenuation of the sound pressure levels of the HBX1 explosive charge. Measurements must be made at a number of distances from the detonation sufficient to verify the model predictions for the 3.7 km (2 nm) safety zone. Based upon the results of this test, the monitoring and safety zones described in the Letter of Authorization, may be modified accordingly.

(f) Activities related to the monitoring described in paragraphs (c) and (d) of this section, or in the Letter of Authorization issued under § 216.106, including the retention of marine mammals, may be conducted without the need for a separate scientific research permit. The use of retained marine mammals for scientific research other than shoreside examination must be authorized pursuant to subpart D of this part.

(g) In coordination and compliance with appropriate Navy regulations, at its discretion, the National Marine Fisheries Service may place observer(s) on any ship or aircraft involved in marine mammal reconnaissance, or monitoring either prior to, during, or after explosives detonation in order to monitor the impact on marine mammals.

(h) A final report must be submitted to the Administrator, Southeast Region, no later than 120 days after completion of shock testing the USS SEAWOLF. This report must contain the following information:

(1) Date and time of all detonations conducted under the Letter of Authorization.

(2) A description of all pre-detonation and post-detonation activities related to mitigating and monitoring the effects of explosives detonation on marine mammal populations.

(3) Results of the monitoring program, including numbers by species/stock of any marine mammals noted injured or killed as a result of the detonation and numbers that may have been harassed due to presence within the designated safety zone.

(4) Results of coordination with coastal marine mammal/sea turtle stranding networks.

(i) A final report on results of necropsies of stranded marine mammals funded by the U.S. Navy must be submitted to the Director, Office of Protected Resources, no later than 18 months after completion of shock testing the USS SEAWOLF.

#### **§ 216.166 Modifications to the Letter of Authorization.**

(a) In addition to complying with the provisions of § 216.106, except as provided in paragraph (b) of this section, no substantive modification, including withdrawal or suspension, to the Letter of Authorization issued pursuant to § 216.106 and subject to the provisions of this subpart shall be made until after notice and an opportunity for public comment.

(b) If the Assistant Administrator determines that an emergency exists that poses a significant risk to the well-being of the species or stocks of marine mammals specified in § 216.161(b), or that significantly and detrimentally alters the scheduling of explosives detonation within the area specified in § 216.161(a), the Letter of Authorization issued pursuant to § 216.106 may be substantively modified without prior notice and an opportunity for public comment. A notice will be published in the **Federal Register** subsequent to the action.

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