

CLEC serving primarily or exclusively a large institution, or some other high-volume user, qualify for the rural exemption? Alternatively, should the availability of the rural exemption be tied to the number or type of a CLEC's customers? The Bureau also solicits any additional comments that may bear on the appropriate definition or limitation of a rural exemption to benchmark rates for CLEC access service. Specifically, comment is invited on the proposed definitions for a rural exemption submitted, as ex partes in this docket, by the Rural Independent Competitive Alliance and by Sprint Corporation.

**CLEC Access Rates:** The Bureau seeks additional information on how CLEC access rates compare to ILEC rates. For example, should the multi-line business presubscribed interexchange carrier charge (PICC) or other charges be included in ILEC access revenue when comparing incumbents' and competitors' rates for switched access service? Additional specific information is also sought on the level of CLEC access rates. Thus, for example, interested parties are requested to file with the Commission surveys or other data regarding the range of access charges imposed by either CLECs or ILECs.

The Commission has previously conducted an initial regulatory flexibility analysis relating to the issue of CLEC access charges. Pricing Flexibility Order and Notice, 64 FR 51280 (Sept. 22, 1999). The Bureau invites further comment on it at this time. Additionally, the Bureau invites comment on significant alternatives for the reform of CLEC access charges that would: establish different compliance requirements for small entities; clarify, consolidate or simplify compliance requirements for small entities; or exempt small entities from coverage.

#### List of Subjects

##### 47 CFR Part 0

Organization and functions.

##### 47 CFR Part 1

Administrative practice and procedures, Communications common carrier, telecommunications.

##### 47 CFR Part 61

Communications common carriers, Tariffs.

##### 47 CFR Part 69

Communications common carriers, Access charges.

Federal Communications Commission.

**Shirley Suggs,**

*Chief, Publications Group.*

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 216

[Docket No. 0002180448-0295-02; I.D. 013100A]

RIN 0648-AN59

#### 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:** Proposed rule; request for comments.

**SUMMARY:** NMFS has received a request from the U.S. Navy for a Letter of Authorization (LOA) to take a small number of marine mammals incidental to shock testing the USS WINSTON S. CHURCHILL (DDG-81) in the offshore waters of the Atlantic Ocean off either Mayport, FL, or Norfolk, VA or the offshore waters of the Gulf of Mexico off Pascagoula, MS. In order to authorize the take, NMFS must determine that the taking will have no more than a negligible impact on the affected species and stocks of marine mammals and issue regulations governing the take. NMFS proposes regulations to govern the take and invites comment on the application and the proposed regulations.

**DATES:** Comments and information must be postmarked no later than January 26, 2001. Comments will not be accepted if submitted via e-mail or the Internet.

**ADDRESSES:** Address comments to Donna Wieting, Chief, Marine Mammal Conservation Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910-3226. A copy of the application and/or a list of references used in this document may be obtained by writing to this address, or by telephoning the contact listed here (see **FOR FURTHER INFORMATION CONTACT**). A limited number of copies of the Navy's Draft Environmental Impact Statement (DEIS) for conducting the shock trial are also available through this contact. To be

placed on the mailing list for receiving a copy of the Final Environmental Impact Statement (FEIS), please contact Will Sloger, U.S. Navy, at (843) 820-5797.

**FOR FURTHER INFORMATION CONTACT:** Kenneth R. Hollingshead (301) 713-2055, ext. 128.

#### SUPPLEMENTARY INFORMATION:

##### Background

Section 101(a)(5)(A) of the Marine Mammal Protection Act (16 U.S.C. 1361 *et seq.*) (MMPA) directs the Secretary of Commerce (Secretary) to allow, upon request, the incidental, but not intentional, taking of small numbers of marine mammals by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical region if certain findings are made and regulations governing the taking are issued.

Permission may be granted for periods of 5 years or less if the Secretary finds that the taking will have no more than 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 regulations are prescribed setting forth the permissible methods of taking and the requirements pertaining to the monitoring and reporting of such taking.

##### Summary of Request

On January 12, 2000, NMFS received an application for an LOA under section 101(a)(5)(A) of the MMPA from the U.S. Navy to take a small number of marine mammals incidental to shock testing the USS WINSTON S. CHURCHILL in the offshore waters of the Atlantic Ocean off either Mayport, FL, or Norfolk, VA or the offshore waters of the Gulf of Mexico off Pascagoula, MS. A final decision on the location for the shock trial will be made by the Navy, based, in part, on findings and determinations made under the National Environmental Policy Act (NEPA).

Section 2366, Title 10, United States Code (10 U.S.C. 2366) requires realistic survivability testing of a covered weapon system to ensure the vulnerability of that system under combat conditions is known. (In this case, the covered weapon system is the USS WINSTON S. CHURCHILL.) Realistic survivability testing means testing for the vulnerability of the ship in combat by firing munitions likely to be encountered in combat with the ship configured for combat. This testing is commonly referred to as  $\geq$ Live Fire Test & Evaluation  $\geq$ (LFT&E). Realistic testing by firing live ammunition at the ship or detonating a real mine against the ship's

hull, however, could result in the loss of a multi-million dollar Navy asset. Therefore, the Navy has established an approved LFT&E program to complete the vulnerability assessment of ships as required by 10 U.S.C. 2366. The LFT&E program includes three major areas that together provide for a complete and comprehensive evaluation of the survivability of ships in a near miss, underwater explosion environment. These areas are computer modeling and analysis, component testing, and an at-sea ship shock trial. While computer modeling and laboratory testing provide useful information, they cannot substitute for shock testing under realistic, offshore conditions as only the at-sea shock trial can provide the real-time data necessary to fully assess ship survivability.

A shock test 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. 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 USS WINSTON S. CHURCHILL is the third ship in a new Flight of 23 ARLEIGH BURKE (DDG 51)-class guided missile destroyers being acquired by the Navy. (A Flight is a subset of a class of ships to which significant modifications/upgrades have been made.) These ships are referred to as the Flight IIA ships and they represent the largest single upgrade to the original DDG 51-class destroyer.

The USS JOHN PAUL JONES (DDG 53) was shock tested off the coast of California in June 1994 to assess the survivability of the original DDG 51-class destroyer. Flight IIA ships are significantly different from the original DDG 51-class destroyers in their design. Major structural changes include the addition of a helicopter hangar, Vertical Launch System foundation changes, and raising the aft radar arrays. Major equipment changes include the addition of a ship-wide Fiber Optic Data Multiplexing System, a Zonal Electrical Power Distribution System involving the addition of switchboards and load centers throughout the ship, and the widespread use of commercial

equipment in various mission critical systems to reduce the cost of the ships. Typically the lead ship of a new class or major upgrade is shock tested. The USS WINSTON S. CHURCHILL was selected as the shock trial ship because it has additional design changes that will not be included in the first two Flight IIA ships, and therefore, it is more representative of the Flight.

The Navy's proposed action is to conduct a shock trial of the USS WINSTON S. CHURCHILL at an offshore, deep-water location. The ship would be subjected to a series of three-four 4,536 kg (10,000 lb) explosive charge detonations sometime between 1 May and 30 September, 2001. Three detonations are needed to collect adequate data on survivability. A fourth detonation would be conducted by the Navy only if one of the planned three detonations fails to provide technically acceptable data (e.g., due to equipment failure or some other technical problem).

The ship and the explosive charge would be brought closer together with each successive detonation to increase the severity of the shock. This gradation in severity would ensure that the survivability of the ship and its systems is fully assessed and the point at which failure modes begin is accurately determined. It would also reduce the chance of significant damage at the highest severity detonation. The shock trial would be conducted at a rate of one detonation per week to allow time to perform detailed inspections of the ship's systems prior to the ship experiencing the next level of shock intensity.

#### Comments and Responses

On March 3, 2000 (65 FR 11542), NMFS published a notice of receipt of the Navy's application for a small take exemption and requested comments, information and suggestions concerning the request and the structure and content of regulations to govern the take. During the 30-day public comment period, NMFS received comments from the Marine Mammal Commission (MMC), the Humane Society of the United States (HSUS), and the Commonwealth of Virginia (Commonwealth). Because the MMC and the Commonwealth concerns were limited to statements made in the Navy's DEIS for shock testing, and not on the content of the Navy's LOA application, their concerns will be addressed in the Navy's FEIS for shock testing and not in this document.

*Comment 1:* The HSUS strongly objects to the Navy's de facto establishment of a physiological sound

pressure level (SPL) definition of Level B (acoustic) harassment under the MMPA. The HSUS considers that temporary threshold shift (TTS) in the hearing of marine mammals subjected to noise from the detonation should be considered Level A harassment (i.e., injury), not Level B. The HSUS believes that cetaceans suffering from TTS could for some time fail to hear approaching boats or predators or fail to detect prey or mates. This, HSUS contends is clearly more than Level B harassment, which is any act that merely has the potential to disturb. The HSUS claims that this determination is precedent-setting.

*Response:* While NMFS agrees the Navy's establishment of an SPL definition for Level B harassment is precedent-setting, NMFS believes that TTS should be considered as Level B harassment. This is fully supported by the science as described in detail in the Navy DEIS and this document, and proceeds logically from the criteria used by the Navy in the FEIS for the USS SEAWOLF shock trial based upon scientific documentation provided in that latter document. In that regard, NMFS recommends reviewers compare the Navy's FEIS for the USS SEAWOLF shock trial and the DEIS for the USS WINSTON CHURCHILL shock trial.

NMFS scientists and other scientists are in general agreement that TTS is not an injury (i.e., does not result in tissue damage), but is a temporary impairment to hearing that may last from a few minutes to a few days, depending upon the level and duration of exposure. The Navy, in its DEIS and small take application, states that TTS could temporarily affect an animal's ability to hear calls, echolocation sounds, and other ambient sounds. That these short-term effects would lead to increased mortality is speculative and, to our knowledge, unsupported scientifically. Lost feeding and mating opportunities is considered by NMFS to be Level B harassment takings if the response is significant for these biologically important activities.

Although science supports that TTS is not an injury (i.e., Level A harassment), because scientists have noted that a range of only 15-20 dB may exist between onset TTS and the onset of a permanent elevation in hearing sensitivity (termed permanent threshold shift (PTS)), which NMFS considers to be an injury (Level A harassment), TTS must be considered to be in the upper portion of the Level B harassment zone (near the lower level of the Level A harassment zone). However, even though TTS is not an injury placing it

in the upper level of the Level B harassment zone is precautionary.

NMFS recommends that commenters review Appendix E of the Navy's DEIS for the scientific basis supporting its determination that TTS is a Level B harassment taking and PTS is Level A harassment and provide NMFS with comments on this determination for consideration during this rulemaking.

*Comment 2:* The HSUS contends that neither the Navy's use of a received level of 182 dB (re 1  $\mu\text{Pa}^2\text{-sec}$ ) as the SPL that will induce TTS, nor that it represents a de facto definition of Level B harassment, has been subject to public notice or public comment prior to this Letter of Authorization (LOA) request.

*Response:* The use of an energy-based TTS-criterion of 182 dB (re 1  $\mu\text{Pa}^2\text{-sec}$ ) has been subject to public review previously. The rulemaking for the USS SEAWOLF shock trial (63 FR 66069, December 1, 1998), resulted in an improvement on the determinations made in regard to the shock trial for the USS JOHN PAUL JONES (59 FR 5111, February 3, 1994). In the USS SEAWOLF shock trial rulemaking NMFS concurred with the Navy's findings that, in terms of mammal hearing, a better measure for determining impacts 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. NMFS determined that, as pulsed sound sources with differing peak pressures could deliver the same energy over a certain time period, the acoustic harassment criterion could be improved over the standard 160 dB (re 1  $\mu\text{Pa}$  @ 1 m) impulse measurement used during shock testing the USS JOHN PAUL JONES and other explosive detonation events. In the USS SEAWOLF rulemaking, NMFS determined that TTS meets the definitions of both Level A and Level B harassment found in the MMPA since, on a cellular level, TTS could be considered a very slight "injury" (i.e., Level A harassment) in the sense of damage to hair cells in the ear and since TTS is a temporary hearing loss, it could also lead to a temporary disruption of behavioral patterns (Level B harassment). Under the 182 dB (re 1  $\mu\text{Pa}^2\text{-sec}$  (energy)) criterion, separate harassment ranges were calculated for odontocetes and mysticetes based on their differing sensitivity to low frequencies.

Following the USS SEAWOLF small take rulemaking, NMFS published a notice of issuance of an Incidental Harassment Authorization (IHA) to the U.S. Air Force for taking small numbers of dolphins incidental to explosives

testing at Eglin Air Force Base (63 FR 67669, December 8, 1998). That document noted that NMFS considers harassment of marine mammals to occur (from an explosive-generated shockwave and its acoustic signature) between 5 psi-msec out to a transmission distance where a noise level of 180 dB re 1  $\mu\text{Pa}^2\text{-sec}$ . (It should be noted that the Air Force used a level of 180 dB (re 1  $\mu\text{Pa}^2\text{-sec}$ ), because that was the level it used in its modeling for determining distances for safety zones.) Therefore, the area between those two levels (i.e., 5 psi-msec and 182 dB re 1  $\mu\text{Pa}^2\text{-sec}$ ) was considered as the zone of incidental harassment which would result in a non-injurious physiological response on the part of the mammals.

What is new in the current rulemaking is the Navy's interpretation that TTS should be considered only as Level B harassment and not as both a Level A and Level B harassment. That approach is fully explained in the Navy's DEIS, and especially in Appendix E of that document. NMFS believes that the information contained in the Navy's DEIS is the best scientific information to date on this subject and therefore concurs with the Navy's determination. During this rulemaking, NMFS welcomes comments relating to scientific determinations made on this issue.

*Comment 3:* HSUS is disturbed that NMFS has accepted the Navy's 182 dB criterion for TTS and that this indicates a change in its implementation of the MMPA, since the only previous mention of it was in a response to a comment on a proposed rule for shock testing the USS SEAWOLF.

*Response:* See the previous comment. Using 182 dB as the criterion for determining TTS was an integral part of the rulemaking for the USS SEAWOLF shock trial small take authorization. The Navy provided significant detail in its USS SEAWOLF DEIS and small take application to explain why using the 182 dB criterion was considered an improvement over use of a pressure-induced criterion of 160 dB, used previously for the shock trial of the USS JOHN PAUL JONES (59 FR 5111, February 3, 1994). NMFS subsequently adopted this information as the best scientific information available for assessing harassment impacts on marine mammal stocks from explosions during the shock trial of the USS SEAWOLF.

*Comment 4:* Based on the statement made in the previous two comments, the HSUS believes that this represents a significant change in implementation of the MMPA, and that prior notice and opportunity for public comment should have been given for this change

pursuant to the requirements of section 553(b) of the Administrative Procedures Act (APA) (5 U.S.C. 553(b)). The HSUS states that NMFS' "acceptance" or "concurrence" with the Navy definition falls squarely within the definition of a "rule" in section 552 of the APA. To permit the continued acceptance and subsequent use of this standard is to acquiesce to a continuing violation of the letter and spirit of the APA.

*Response:* Because part of this proposed rulemaking is the criterion NMFS proposes to use to determine levels of harassment and injury incidental to takings of marine mammals by the USS WINSTON CHURCHILL shock trial there is no violation of section 553(b) of the APA. NMFS invites comment on the criterion for assessing impacts from explosives on marine mammals.

*Comment 5:* The HSUS also notes that the Navy is using a received level of 182 dB (re 1  $\mu\text{Pa}^2\text{-sec}$ ) as the SPL that will induce TTS in cetaceans and therefore is the outer SPL for Level B harassment. This SPL is unsubstantiated empirically (i.e., the threshold of hearing in many cetaceans is unknown and certainly the SPL that will induce TTS has never been measured).

*Response:* NMFS clarifies that it and the Navy are using a dual criterion of (1) an energy-based TTS criterion of 182 dB (re 1  $\mu\text{Pa}^2\text{-sec}$ ) in any 1/3 octave band, and (2) 12 psi peak pressure, cited by Ketten (1995) as associated with "a safe outer limit for the 10,000 lb (4,536 kg) charge for minimal, recoverable auditory trauma" (i.e., TTS). The harassment range is the minimum distance at which neither criterion is exceeded. However, the 182 dB energy criterion is usually the determining factor in the calculated ranges (Navy, 1999, Appendix E).

While NMFS agrees that the SPL that would cause TTS in cetaceans by explosives has not been tested empirically on live cetaceans, for reasons explained in the application and in detail in the Navy's DEIS on this action, the Navy has calculated TTS from explosives based upon empirical research on bottlenose dolphins and white whales conducted by Ridgway *et al.* (1997) and Schlundt *et al.* (2000). NMFS believes that this is the best scientific information available to date on this issue. Because Ridgway *et al.* (1997) and Schlundt *et al.* (2000) determined the SPL where TTS first begins (i.e., full recovery of hearing occurred within a few minutes), NMFS believes that establishing a level for TTS at onset of that impairment, is precautionary.

*Comment 6:* The HSUS requests NMFS deny the Navy's LOA request until such time as the Navy completes a revised DEIS and in fact completes a FEIS.

*Response:* NMFS does not believe that delaying the small take authorization process until completion of NEPA documentation, as suggested by the HSUS, would be appropriate. Both the Council on Environmental Quality regulations (40 CFR 1502.5(d)) and NOAA's NEPA guidelines provide for proposed regulations to accompany a draft NEPA document. As a cooperating agency in the preparation of the DEIS, which NMFS may adopt as its own NEPA document, the Navy's DEIS is the key NEPA document for the NMFS action. Not beginning the small take authorization/regulatory process until completion of NEPA requirements would lead to unnecessary and potentially extensive delays in processing applications, a key problem previously recognized by Congress in 1994, when it amended the MMPA to expedite small take authorizations. However, under NEPA, NMFS may not make final regulations governing the taking of marine mammals, incidental to the shock testing of the USS WINSTON CHURCHILL, effective for at least 30 days after the U.S. Navy releases a FEIS for the shock trial.

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

A description of the U.S. Atlantic and Gulf of Mexico coast environment, its marine life and marine mammal abundance, distribution and habitat can be found in the DEIS on this subject and is not repeated here. Additional information on Atlantic and Gulf coast marine mammals can be found in Waring *et al.* (1999).

#### **Affected Marine Mammals**

A summary of the marine mammal species found in each of the three areas which may be selected by the Navy for shock testing is presented here. A complete list of potentially affected marine mammal species can be found later in this document. For more detail on marine mammal abundance, density and the methods used to obtain this information, reviewers are requested to refer to either the Navy application or the Navy's DEIS.

#### *Mayport, FL*

Up to 29 marine mammal species may be present in the waters off Mayport, FL, including seven mysticetes and 22 odontocetes. Mysticetes are unlikely to occur at Mayport during the May through September time period.

Odontocetes may include the sperm whale, dwarf and pygmy sperm whale, four species of beaked whales, and 15 species of dolphins and porpoises.

#### *Norfolk, VA*

Up to 35 marine mammal species may be present in the waters off Norfolk, VA, including 7 mysticetes, 27 odontocetes, and 1 pinniped. The fin whale is the mysticete most likely to occur in the test area. Odontocetes may include the sperm whale, dwarf and pygmy sperm whale, six species of beaked whales, and 18 species of dolphins and porpoises.

#### *Pascagoula, MS*

Up to 29 marine mammal species may occur in the waters off Pascagoula, MS, including seven mysticetes, 21 odontocetes, and one exotic pinniped. With the exception of Bryde's whale, mysticetes are considered unlikely to occur at Pascagoula. Odontocetes may include the sperm whale, dwarf and pygmy sperm whale, four species of beaked whales, and 14 species of dolphins and porpoises.

#### **Potential Impacts to Marine Mammals**

##### *Mortality and Injury*

Potential impacts on several marine mammal species known to occur in these areas from shock testing include both lethal and non-lethal injury, as well as harassment. Marine mammals may be killed or injured as a result of the explosive blast due to the response of air cavities in the body, such as the lungs and bubbles in the intestines. Effects are more likely to be most severe in near surface waters above the detonation point where the reflected shock wave creates a region of negative pressure called "cavitation." This is a region of near total physical trauma within which no animals would be expected to survive. Based on calculations in Appendix D of the Navy's DEIS, the maximum horizontal extent of the cavitation region is estimated to be 683 meters (m) (2,240 ft). This region would extend from the surface to a maximum depth of about 23 m (77 ft). A second criterion for mortality is the onset of extensive lung hemorrhage. Extensive lung hemorrhage is considered debilitating and potentially fatal. Suffocation caused by lung hemorrhage is likely to be the major cause of marine mammal death from underwater shock waves. The estimated range for the onset of extensive lung hemorrhage to marine mammals varies depending upon the animal's weight, with the smallest mammals having the greatest potential hazard range. The range predicted for a

small marine mammal (e.g., a dolphin calf) is 1.35 kilometers (km) (0.73 nautical miles (nm)) from the detonation point. For estimating the impact from the detonation(s), NMFS and the Navy presume that 100 percent of the marine mammals within this radius would be killed, even though larger mammals may survive their injury from the shock wave.

NMFS and the Navy have established a dual criteria for determining non-lethal injury: (1) The onset of slight lung hemorrhage, and (2) a 50-percent probability level for eardrum rupture. These are injuries from which animals would be expected to recover on their own. The range predicted for the onset of slight lung hemorrhage is 2.25 km (1.22 nm). The range predicted for 50-percent probability of eardrum rupture varies with the mammal's depth in the water column; the highest value being 2.16 km (1.17 nm) for a mammal at a depth of 335 m (1,100 ft). The criterion with the greater range (onset of slight lung hemorrhage) was used to estimate the number of potential non-lethal injuries. It is presumed that 100 percent of the marine mammals within this radius would be injured.

Some percentage of the animals with eardrum rupture or slight lung hemorrhage could eventually die from their injuries. However, as noted previously, the mortality calculation based on extensive lung hemorrhage presumes that 100 percent of the animals within a radius of 1.35 km (0.73 nm) would be killed. At that range, the probability of eardrum rupture would be less than 50 percent and the threshold for onset of slight lung hemorrhage would be exceeded only in the upper 61 m (200 ft) of the water column (Navy, 2000). While all animals within this radius are assumed to be killed, in reality some are unlikely to be even injured.

Finally, 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.

##### *Incidental Harassment*

TTS has been defined by NMFS as one form of harassment (60 FR 28379, May 31, 1995). TTS is a change in the threshold of hearing (the quietest sound an animal can hear), which could temporarily affect an animal's ability to hear calls, echolocation sounds, and other ambient sounds. As such, it could result in a temporary disruption of behavioral patterns, as specified in the statutory definition of Level B harassment.

Since the small take authorization and Navy's FEIS for the USS SEAWOLF shock trial (63 FR 66069, December 1, 1998), the Navy has conducted an extensive analysis of the scientific literature, producing a good perspective on the physiological effects of TTS as well as its use in human damage risk criteria (DRC) by the Occupational Health and Safety Administration and in the National Institute for Occupational Safety and Health's (NIOSH) Criteria for Recommended Noise Standard (NIOSH, 1998). The best research to date indicates that the distortion and dysfunction of sensory tissue observed during TTS are only temporary and fully reversed upon recovery (i.e., occasional TTS produces no permanent tissue damage to the ear, only the temporary nondestructive impairment of tissue that fully recovers). This type of temporary nondestructive impairment as well as the use of TTS in human DRC are the

scientific basis for no longer considering TTS as Level A harassment. Therefore, NMFS and the Navy concur that an impairment of hearing-related behavior during periods of TTS is the most reliable and meaningful estimate of Level B harassment for explosive detonation events.

Based upon information provided in the Navy's application for a small take authorization and in greater detail in Appendix E of the Navy's DEIS, a dual criterion for Level B acoustic harassment has been developed: (1) an energy-based TTS criterion of 182 dB re 1  $\mu\text{Pa}^2\text{-sec}$  derived from experiments with bottlenose dolphins (Ridgway *et al.*, 1997; Schlundt *et al.*, 2000); 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 (4,536 kg) 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 (re 1  $\mu\text{Pa}^2\text{-sec}$ ) criterion, the Navy calculated separate ranges for odontocetes and mysticetes based on their differing sensitivity to low frequency sounds. For those odontocetes which are "high-frequency specialists," all frequencies greater than or equal to 100 Hz were included. For mysticetes, which are "low-frequency specialists," the frequency range was extended down to 10 Hz. Water depth is also an important factor in calculating harassment ranges. However, regardless of water depth, the Navy chose the highest values for TTS harassment ranges. Expected numbers of marine mammals within these radii (and thereby potentially receiving a TTS harassment impact) were calculated using the mean densities for the species expected in each area, and adjusting those estimates to account for submerged (undetected) individuals. These ranges are as follows:

	<i>Odontocetes</i>	<i>Mysticetes</i>
Mayport	13.3 - 25.2 km (7.2 - 13.6 nm)	24.7 - 27.8 km (13.0 - 15.0 nm)
Norfolk	16.7 - 32.8 km (9.0 - 17.7 nm)	25.9 - 42.6 km (14.0 - 23.0 nm)
Pascagoula	15.9 - 24.6 km (8.6 - 13.3 nm)	22.8 - 29.6 km (12.3 - 16.0 nm)

### Estimated Level of Marine Mammal Takings

While the Navy does not expect that any lethal takes will result from these detonations (because of mitigation measures taken), calculations indicate that the Mayport site has the potential to result in up to 4 mortalities, 6 non-serious injuries, and 2,885 takings by harassment. The Norfolk site has the potential to result in 7 mortalities, 12 non-serious injuries, and 14,640 takings by harassment. The Pascagoula site has the potential to result in up to 3 mortalities, 4 injuries, and 3,132 takings by harassment.

### 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. These mitigation and monitoring measures are as follows:

(1) Through pre-detonation aerial surveys, the Navy would select a primary and two secondary test sites within the test area where potentially, marine mammals and sea turtle populations are the lowest, based on the results of aerial surveys conducted one to two days prior to the first detonation;

(2) Pre-detonation aerial monitoring would be conducted on the day of each detonation to evaluate the primary test site and verify that the safety range and buffer zone are free of visually detectable marine mammals and other critical marine life (If marine mammals are detected in the primary test area, the Navy proposes to survey the secondary areas for marine mammals, and may move the shock test to one of the other two sites);

(3) Independent marine mammal biologists and acousticians would 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 4.16 km (2.25 nm), or (c) any large fish school, or flock of seabirds is detected within a safety zone of 1.85 km (1 nm);

(4) The area would be monitored visually (aerial and shipboard monitoring) and acoustically before each test and detonation would not occur 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 detonation would not 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, detonation would 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;

(5) Detonation would not occur 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;

(6) Detonation would not 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

(7) The area would be monitored for 48 hours after each detonation, and for 7 days following the last detonation, to

find, document and track 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 Section 5 of the Navy's DEIS.

### Reporting

Within 120 days of the completion of shock testing, the Navy would submit a final report to NMFS. This report would 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.

### Costs and Benefits

In addition to allowing the Navy to take a small number of marine mammals incidental to conducting the shock trial, this rule would require the Navy to provide NMFS and the public with information on the shock trial's effect on the marine environment, especially on marine mammals. Besides the improved survivability of U.S. armed forces at sea and the Navy's multi-billion dollar ship assets, this rule would result in NMFS and the public being provided this information. NMFS believes that obtaining this information is extremely important because shock trials are not the only explosive noise source in the world's oceans, and the scientific findings resulting from monitoring is likely to be directly applicable to future activities. Also, the mitigation measures for protecting marine mammals, sea turtles and other marine life that would be required by the rule will result in a substantial reduction in impacts on these animals. Without these regulations, these mitigation measures could not be required to be undertaken by the U.S. Navy. Also, the cost to the Navy to comply with the mitigation and monitoring measures that would be required by this rule cannot be fully

determined at this time. NMFS believes that the cost would be approximately \$1 million.

### NEPA

On December 10, 1999 (64 FR 69267), a notice of availability of the Navy DEIS was published. The public comment for that document was extended until March 31, 2000, by notification in the **Federal Register** (65 FR 4236). NMFS is a cooperating agency, as defined by the CEQ (40 CFR 1501.6), in the preparation of this DEIS.

### Endangered Species Act (ESA)

The U.S. Navy requested consultation with NMFS under section 7 of the ESA on this action. In that regard, NMFS concluded consultation with the Navy on this activity on October 10, 2000. If an authorization to incidentally take listed marine mammals is issued under the MMPA for this action, NMFS will complete consultation under the ESA on the regulations and the LOA and issue an Incidental Take Statement under section 7 of the ESA.

### Preliminary Conclusions

Based on the scientific analyses detailed in the ONR DEIS and the Scripp' application, NMFS has preliminarily concluded that the incidental taking of marine mammals resulting from the shock trial of the USS WINSTON CHURCHILL in the offshore waters of the Atlantic Ocean off either Mayport, FL, or Norfolk, VA or the offshore waters of the Gulf of Mexico off Pascagoula, MS would result in only small numbers (as the term is defined in § 216.103) of marine mammals being taken, have no more than a negligible impact on the affected marine mammal stocks or habitats and not have an unmitigable adverse impact on Arctic subsistence uses of marine mammals.

### Information Solicited

NMFS requests interested persons to submit comments on the proposed regulations and on the Navy's application for taking marine mammals incidental to conducting the shock trial. NMFS requests that commenters review the Navy's application and not just submit comments based solely on this document.

### Classification

This action has been determined to be not significant for purposes of Executive Order 12866.

The Assistant General Counsel for Legislation and Regulation of the Department of Commerce has certified to the Chief Counsel for Advocacy of the Small Business Administration that this proposed rule, if adopted, would not

have a significant economic impact on a substantial number of small entities since it would apply only to the U.S. Navy and would have no effect, directly or indirectly, on small businesses. It will also affect a small number of contractors providing services related to reporting the impact of the shock trial on marine mammals. Some of the affected contractors may be small businesses, but the number involved would not be substantial. Further, since the monitoring and reporting requirements are what would lead to the need for their services, the economic impact on them would be beneficial. Accordingly, the analytical requirements of the Regulatory Flexibility Act (RFA) do not apply and a regulatory flexibility analysis has not been prepared.

### List of Subjects in 50 CFR Part 216

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

Dated: December 6, 2000.

**William T. Hogarth,**

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

For reasons set forth in the preamble, 50 CFR part 216 is proposed to be 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. Subpart N is revised to read as follows:

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

Sec.

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

- 216.151 Specified activity, geographical region, and incidental take levels.
- 216.152 Effective dates.
- 216.153 Permissible methods of taking; mitigation.
- 216.154 Prohibitions.
- 216.155 Requirements for monitoring and reporting.
- 216.156 Modifications to the Letter of Authorization.

**Subpart N—Taking of Marine Mammals Incidental to Shock Testing the USS WINSTON S. CHURCHILL by Detonation of Conventional Explosives in the Offshore Waters of the U.S. Atlantic Coast**

**§ 216.151 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 or Gulf of Mexico offshore Mayport, FL, Norfolk, VA, or Pascagoula, MS, 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*); Atlantic white-sided dolphin (*Lagenorhynchus acutus*); and harbor seals (*Phoca vitulina*).

(c) The incidental take of marine mammals identified in paragraph (b) of this section is limited to a total of no more than 7 mortalities, 12 injuries, and 14,640 takings by harassment for detonations in the Norfolk, VA area; 4 mortalities, 6 injuries, and 2,885 takings by harassment in the Mayport area; or 3 mortalities, 4 injuries, and 3,132 takings by harassment at the Pascagoula

site, 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.

**§ 216.152 Effective dates.**

Regulations in this subpart are effective from April 1, 2001, through September 30, 2001.

**§ 216.153 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 up to 4 4,536 kg (10,000 lb) conventional explosive charges within the area described in § 216.151(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 the marine mammals are no longer within the safety zone or on a course within the buffer zone that is taking them away from the safety zone.

(2) If a marine mammal listed under the Endangered Species Act is detected within the buffer zone, and subsequently cannot be detected, detonation must not occur until sighting and acoustic teams have searched the area for 2.5 hours.

(3) If a northern right whale is seen, 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;

(4) If weather and/or sea conditions as described in the Letter of Authorization preclude adequate aerial surveillance, detonation must not occur until conditions improve sufficiently for aerial surveillance to be undertaken.

(5) If post-test surveys determine that an injurious or lethal take of a marine mammal has occurred, the test procedure and the monitoring methods

must be reviewed and appropriate changes must be made prior to conducting the next detonation.

**§ 216.154 Prohibitions.**

Notwithstanding takings authorized by § 216.151(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.

**§ 216.155 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 appropriate Regional Director at least 2 weeks prior to activities involving the detonation of explosives in order to satisfy paragraph (f) 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 test area must be surveyed by marine mammal biologists and other trained individuals, and the marine mammal populations monitored, 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 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 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) 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.

(f) In coordination and compliance with appropriate Navy regulations, at its discretion, the National Marine Fisheries Service may place an observer 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.

(g) A final report must be submitted to the Director, Office of Protected Resources, no later than 120 days after completion of shock testing the USS

WINSTON S. CHURCHILL. 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.

**§ 216.156 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 § 216.151(b), or that significantly and detrimentally alters the scheduling of explosives detonation within the area specified in § 216.151(a), the Letter of Authorization issued pursuant to § 216.106 may be substantively modified without prior notice and an opportunity for public comment. Notification will be published in the **Federal Register** subsequent to the action.

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