Researching United States Administrative Law

Fall 2014

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## Why Administrative Law?

<table>
<thead>
<tr>
<th>Statutes</th>
<th>Regulations</th>
</tr>
</thead>
<tbody>
<tr>
<td>Enacted by the legislature</td>
<td>Promulgated by agencies</td>
</tr>
<tr>
<td>Cover broad, general areas</td>
<td>Cover narrow, technical areas</td>
</tr>
<tr>
<td>Authority comes from the Constitution</td>
<td>Authority is delegated by the legislature</td>
</tr>
</tbody>
</table>

Law for technical areas
The Process

- **PROPOSED RULE** (regulation) published in the *administrative register*

- **COMMENT** period

- **FINAL RULE** (regulation) published in the *administrative register* with supplementary information - **CHRONOLOGICAL**

- **FINAL RULE** (regulation) published in the *regulatory code* – **TOPICAL**

- **ENFORCEMENT** may lead to regulatory decisions/orders/rulings
# Federal Agency Rules (Regulations)

<table>
<thead>
<tr>
<th>Chronological</th>
<th>Topical</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Federal Register</strong></td>
<td><strong>Code of Federal Regulations</strong></td>
</tr>
<tr>
<td>- issued daily (every day the government is open)</td>
<td>- divided into subject areas &amp; agencies</td>
</tr>
<tr>
<td>- contains proposed rules (NPRMs), final rules, agency notices, and some presidential documents</td>
<td>- contains final rules</td>
</tr>
<tr>
<td>- good for:</td>
<td>- revised yearly</td>
</tr>
<tr>
<td>- keeping up with what is new</td>
<td>- good for:</td>
</tr>
<tr>
<td>- locating the background of a regulation</td>
<td>- browsing a topical area or a single agency's regulations</td>
</tr>
<tr>
<td></td>
<td>- seeing the whole picture</td>
</tr>
</tbody>
</table>

2 sources of regs: chronological & topical
Example: Navy Incidental “Taking” of Protected Marine Mammals

In 2011, the Navy requested authorization from NMFS to take small numbers of marine mammals by incidental harassment during sonar testing. U.S. law provides that authorization shall be granted if NMFS finds the taking will have negligible impact on the species or stock and will not have an unmitigable adverse impact.
Proposed Rule – Federal Register

FEDERAL REGISTER
Vol. 77 Friday,
No. 4 January 6, 2012

Part II

Department of Commerce
National Oceanic and Atmospheric Administration
50 CFR Part 218
Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to U.S. Navy Operations of Surveillance Towed Array Sensor System Low Frequency Active Sonar; Proposed Rule

Cover of Federal Register
Proposed Rules 1-6-12 Federal Register

DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration

50 CFR Part 218  
[Docket No. 110808485–1534–01]  
RIN 0648–BB14


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 authorization to take marine mammals, by harassment, incidental to conducting operations of Surveillance Towed Array Sensor System (SURTASS) Low Frequency Active (LFA) sensor in areas of the world’s oceans (both the area of “disruption of active and known marine mammals and certain geographic regions”), from August 16, 2012, through August 15, 2013. Pursuant to the Marine Mammal Protection Act (MMPA), NMFS is proposing regulations to take and requests information suggestions, and comments on these proposed regulations.

DATES: Comments and information must be received no later than February 6, 2013.

ADDRESSES: You may submit comments, identified by Docket No. 0648–BB14, by any one of the following methods:


ii) Hard copy or paper: Submit written comments, identified by the Docket No. 0648–BB14, to the Office of Protected Resources, National Marine Fisheries Service, 1315 East Sunrise Highway, Silver Spring, MD 20910.

iii) Hand delivery: Submit comments in person to the Field Office nearest you (see DATES above).

iv) Fax: Submit comments to (404) 662–0890.

v) E-mail: Submit comments to pammtracking@noaa.gov.

vi) Telephonic: Submit comments by telephone to (404) 662–0890 between 9:00 a.m. and 10:00 p.m. ET, Monday–Friday.

NMFS will identify the agency decision maker(s) for all proposed rules received as part of this rulemaking.

FOR FURTHER INFORMATION CONTACT: Anthony Cody, Office of Protected Resources, NMFS, (301) 427–8822.

SUPPLEMENTARY INFORMATION: Availability: The public may obtain an electronic copy of this rulemaking application by writing to the address specified above in ADDRESSES. All comments received are part of the public record and will generally be posted at http://www.regulations.gov without change. All Personal Identifying Information (for example, name, address, etc.) voluntarily supplied by the commenter may be redacted.

NMFS will accept anonymous comments letter via the required fields if you wish to remain anonymous. Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe PDF file format only. If provided, the NMFS process and review comments more efficiently, please use only one method to submit comments.

This rulemaking is governed by the MMPA and the NMFS regulations implementing it.

NMFS has designated “negligible impact” to NMFS for taking marine mammals, as an impact resulting from the specified activity that cannot be reasonably expected, and is not reasonably likely, to adversely affect the species or stock through effects on annual rates of recruitment or survival.

The National Defense Authorization Act of 2004 (NDAA; Pub. L. 108–136) amended the MMPA by inserting “small numbers” and “specified geographical region” provisions and amended the definition of “harassment” as it applies to a “military readiness activity” as defined in section 108(b) of Public Law 107–214, 10 U.S.C. 2760 noted to read as follows (Section 108(b) of the MMPA).

(i) Any act that has the significant potential to harass a marine mammal or marine mammal stock in the wild;

(ii) Any act that has the significant potential to harass a marine mammal or marine mammal stock in the wild;

(iii) Any act that is likely to disturb a marine mammal or marine mammal stock in the wild by causing perceptible behavioral patterns, including, but not limited to migration, feeding, socializing, or birthing, to a point where such behavioral patterns are permanently or significantly altered;

Summary of Request: On August 17, 2012, NMFS received an application from the U.S. Navy for authorization for the taking of 64 species of marine mammals (90 cetaceans and 24 pinnipeds) by harassment, incidental to operating routine training and testing of the SURTASS LFA sensor system, as well as the RURSSA system. The taking is restricted to maximum of four U.S. Naval ships during military operations in certain areas of the Pacific, Atlantic, and Indian Oceans, and the Mediterranean Sea from August 16, 2012 through August 15, 2013. These routine training and testing and military operations are classified as military readiness activities. The Navy states, and NMFS concurs, that these military readiness activities may incidentally take marine mammals present within the Navy’s operation areas by exposure them to sound levels that exceed the NMFS, NMFS’ criteria.

Authorization shall not be granted if NMFS finds that the taking will have a negligible impact on the species or stock, and will not have an unlikely adverse impact on the availability of the species or stock for subsistence use (where relevant). The authorization must set forth the permissible methods of taking, other means of effecting the least practicable adverse impact on the species or stock and its habitat, and requirements pertaining to the mitigation, monitoring, and reporting of such taking.

NMFS has determined, “negligible impact” to NMFS for taking marine mammals, as an impact resulting from the specified activity that cannot be reasonably expected, and is not reasonably likely, to adversely affect the species or stock through effects on annual rates of recruitment or survival.

The National Defense Authorization Act of 2004 (NDAA; Pub. L. 108–136) amended the MMPA by inserting “small numbers” and “specified geographical region” provisions and amended the definition of “harassment” as it applies to a “military readiness activity” as defined in section 108(b) of Public Law 107–214, 10 U.S.C. 2760 noted to read as follows (Section 108(b) of the MMPA).

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Summary of Request: On August 17, 2012, NMFS received an application from the U.S. Navy for authorization for the taking of 64 species of marine mammals (90 cetaceans and 24 pinnipeds) by harassment, incidental to operating routine training and testing of the SURTASS LFA sensor system, as well as the RURSSA system. The taking is restricted to maximum of four U.S. Naval ships during military operations in certain areas of the Pacific, Atlantic, and Indian Oceans, and the Mediterranean Sea from August 16, 2012 through August 15, 2013. These routine training and testing and military operations are classified as military readiness activities. The Navy states, and NMFS concurs, that these military readiness activities may incidentally take marine mammals present within the Navy’s operation areas by exposure them to sound levels that exceed the NMFS, NMFS’ criteria.

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NMFS has determined, “negligible impact” to NMFS for taking marine mammals, as an impact resulting from the specified activity that cannot be reasonably expected, and is not reasonably likely, to adversely affect the species or stock through effects on annual rates of recruitment or survival.
SUMMARY: NMFS has received a request from the U.S. Navy (Navy) for authorization to take marine mammals, by harassment, incidental to conducting operations of Surveillance Towed Array System (SURTASS) Low Frequency Active (LFA) sonar in areas of the world’s oceans (with the exception of Arctic and Antarctic waters and certain geographic restrictions), from August 16, 2012, through August 15, 2017. Pursuant to the Marine Mammal Protection Act (MMPA), NMFS is proposing regulations to govern that take and requests information, suggestions, and comments on these proposed regulations.

NMFS will accept anonymous comments letter N in the required fields if you wish to remain anonymous. Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or Adobe PDF file formats only. To help NMFS process and review comments more efficiently, please use only one method to submit comments.

For further information contact:海洋鳕, Office of Protected Resources, NMFS, (301) 427-8001.

SUPPLEMENTARY INFORMATION:
Availability:
The public may obtain an electronic copy of the NMFS application by sending a request, with the subject line "2012 Navy SURTASS Application," to: Assistant Regional Administrator for Protected Resources, National Marine Fisheries Service, 1315 East Broadway, Suite 300, Portland, OR 97214. This public may view the document at: http://www.nmfs.noaa.gov/pr/permits/nta/applications/11299-12135.pdf.

Summary of Request:
On August 17, 2012, NMFS received an application from the U.S. Navy, Naval Oceanic and Atmospheric Administration, Office of Protected Resources, National Marine Fisheries Service, 1315 East Broadway, Suite 300, Portland, OR 97214, requesting authorization for the taking of individuals of 66 species of marine mammals (79 cetaceans and 8 pinnipeds) by harassment, incidental to conducting training and testing of the SURTASS LFA sonar system, as well as all ships of the U.S. Navy, during periods of not more than five consecutive years.

These training and testing military operations and maneuvers are classified as military readiness activities. The Navy states, and NMFS concludes, that no military readiness activities may include the taking of marine mammals by harassment, incidental to conducting training and testing of the SURTASS LFA sonar system, as well as all ships of the U.S. Navy, during periods of not more than five consecutive years.

The Navy requests authorization to take individuals of 66 species of marine mammals by Level A harassment, although it discusses level B harassment in this document. Level A harassment will likely be avoided through the implementation of the Navy’s proposed mitigation measures.
NMFS will accept anonymous comments, letter NAM in the field if you wish to remain anonymous. Attachments to electronic comments will be accepted in Microsoft Word, Excel, WordPerfect, or PDF file formats only. To help NMFS process and review comments more efficiently, please use only one method to submit comments.

FOR FURTHER INFORMATION CONTACT: (name and contact information for NMFS) at (phone number).

SUPPLEMENTARY INFORMATION:

Availability

The public may obtain an electronic copy of the NMFS's application by writing to the address specified above this section (see ADDRESSES). Access the contact list above this section (see FOR FURTHER INFORMATION CONTACT). The public may view the document at (web address). NMFS is involved in the development of the NMFS's proposal.

Summary of Request

On August 17, 2011, NMFS received an application from the U.S. Navy requesting authorization for the take of 64 species of marine mammals (70 cetaceans and 24 pinnipeds) incidental to experimental training and testing of the SURTASS LFA sonar system, as well as the experimental training for a maximum of four U.S. Naval ships during military preparations in selected areas of the Pacific, Atlantic, and Indian Oceans. The application was received on August 16, 2012, through August 15, 2013. These activities are classified as military readiness activities. The NMFS, pursuant to the Marine Mammal Protection Act of 1972, as amended (MMPA) as it contains (NMFS) to issue a Letter of Authorization (LOA) for the U.S. Navy for the taking of marine mammals in military readiness activities.

NMFS has determined that there is no significant potential to injure or kill marine mammals in the wild.

Instructions: All comments received are a part of the public record and will generally be posted to http://www.regulations.gov. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or other sensitive or protected information.

ADDRESSES: You may submit comments, identified by 0648–BB14, by any one of the following methods:

- Electronic Submissions: Submit all comments to http://www.regulations.gov.
- Hand delivery or mailing of paper, disk, or CD-ROM comments should be addressed to P. Michael Payne, Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910.

Instructions: All comments received are a part of the public record and will generally be posted to http://www.regulations.gov. All Personal Identifying Information (for example, name, address, etc.) voluntarily submitted by the commenter may be publicly accessible. Do not submit Confidential Business Information or other sensitive or protected information.
Proposed Rules 1-6-12 Federal Register

Background

Sections 101(a)(5)(A) and (D) of the Marine Mammal Protection Act of 1972, as amended (MMPA: 16 U.S.C. 1361 et seq.), direct the Secretary of Commerce (Secretary) to allow, upon request, the incidental, but non-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 during periods of not more than five consecutive years each if certain findings are made and regulations are issued, or if the taking is limited to harassment, a notice of a proposed authorization is provided to the public for review.

Authorization shall be granted if NMFS finds that the taking will have a negligible impact on the species or stock(s), and will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses (where relevant). The authorization must set forth the permissible methods of taking, other means of effecting the least practicable adverse impact on the species or stock and its habitat, and requirements pertaining to the mitigation, monitoring and reporting of taking. NMFS has defined "negligible" as impacting less than 0.5% of an estimated stock in a given year and "unmitigable adverse impact" as having a severe, long-term, or unusual effect, such as prolonging the period of recruitment or survival. The National Defense Authorization Act of 2002 (NDAA: Pub. L. 107-298) amended the MMPA by removing the "small numbers" and "specified geographical region" provisions and added the definition of "harassment" as it applies to a "military readiness activity" (as defined in section 311(b) of Public Law 96-272, 10 U.S.C. 2101) to read as follows (section 311(a)(1) of the MMPA):
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.

Subparts T Through W [Added and Reserved]

2. Subparts T through W are added to part 216 and reserved.

Subpart X is added to part 216 to read as follows:

Subpart X—Taking and Importing of Marine Mammals; Navy Operations of Surveillance Towed Array Sensor System Low Frequency Active (SURTASS LFA) Sonar

Sec.

216.230 Specified activity.

216.231 Effective dates. [Reserved]

216.232 Permissible methods of taking.

216.233 Prohibitions.

216.234 Mitigation.

216.235 Requirements for monitoring.

216.236 Requirements for reporting.

216.237 Applications for Letters of Authorization.

216.238 Letters of Authorization.

216.239 Renewal of Letters of Authorization.

216.240 Modifications to Letters of Authorization.

216.241 Adaptive Management.

216.250 Application for Authorization.

216.251 Renewal of Authorization.

216.252 Modifications to Authorization.

216.253 Administrative Action.

Subpart X—Taking and Importing of Marine Mammals; Navy Operations of Surveillance Towed Array Sensor System Low Frequency Active (SURTASS LFA) Sonar

§ 216.230 Specified activity.

Regulations in this subpart apply only to the incidental taking of those marine mammal species specified in paragraph (b) of this section by the U.S. Navy, Department of Defense, while engaged in the operation of no more than four SURTASS LFA sonar systems conducting active sonar operations in areas specified in paragraph (a) of this section. The authorized activities, as specified in a Letter of Authorization issued under §§ 216.100 and 216.238 of this chapter, include the transmission of low frequency sounds from the SURTASS LFA sonar system and the transmission of high frequency sounds from the mitigation sonar described in § 216.234 during routine training and testing as well as during military operations.

(a) The incidental take, by Level A and Level B harassment of marine mammals:

Caribbean monk seal — extinct
Federal Register online at FDsys

http://www.gpo.gov/fdsys
Comments

http://www.regulations.gov
From the proposed rule in the Federal Register:

DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration

50 CFR Part 218
[Docket No. 110808485–1534–01]
RIN 0648–BB14


AGENCY: National Marine Fisheries Service (NMFS), National Oceanic and Atmospheric Administration (NOAA), Commerce.
ACTION: Proposed rule; request for comments.

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0648-BB14
Regulations.gov: Results screen

Featured Result - RIN: 0648-BB14
Taking and Importing Marine Mammals: Taking Marine Mammals Incidental to U.S. Navy Operations of Surveillance Tow

Docket ID: NOAA-NMFS-2012-0002
Agency: NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION (NOAA)
Summary: On August 17, 2011 NMFS received an application from the U.S. Navy requesting NMFS to issue regulations (and subsequent Letters of Authorization) concerning the taking of marine mammals, by Level A and Level B harassment, incidental to the Navy's training, testing, and...

Click here to access the Open Docket Folder.
February 6, 2012

Dear Jeannine Cody,

We are writing to register a (NMFS) decision to allow continued use of the sonar equipment by the U.S. Navy, which would lead to the death of marine mammals. We are informed that the Navy and Marine Mammal Protection Act (MMPA) (http://www.nmfs.noaa.gov/protected-resources/marine-mammals.html) and the Executive Order 12906 mandate that the Navy reduce the use of sonar by using alternative technologies. The Navy seems to take very few steps to reduce the use of their sonar by using alternative technologies. While we encourage the use of the sonar equipment, it should be very occasional use under very strict conditions if at all. Part of the concern is that there exists other means which could be pursued by the Navy, instead of frequent sonar bombardment of the marine environment. Secondly, we are concerned that the Navy has underestimated the full impact that sonar has on marine mammals, particularly those which are also listed under the Endangered Species Act (ESA). Finally, we feel that the NMFS has not met its obligations under the Administrative Procedures Act (APA), to make a decision which is not arbitrary and capricious in nature.

1. There are other technologies which the Navy can and should utilize.

The Navy continues putting its eggs in its sonar basket when there are other new technologies which, while unproven, could be beneficial to both the Navy and marine mammals. Magnetic Anomaly Detectors (MADs) (http://www.carr.com/sc/sonar/magnetic-anomaly-detection.asp), first accessed January 26, 2012, and the new Australian development MGSAFE technology provide alternatives to harmful sonar (http://www.deepmine.co.uk/in-depth/submarine-detection/2009000.article), first accessed January 26, 2012. The MADs are already utilized in some cases by aircraft to detect the magnetic anomalies that submarines create and there is no explanation from the Navy on why these are not more widely utilized. Also, there have been suggestions that in certain cases Forward Looking Infrared (FLIR) can be used to detect submarines especially as they breach the surface, or at least ascend to periscope depth.

Example of a Comment

Jacksonville training in winter affects calving season of North Atlantic Right Whales

http://www.nrdc.org/wildlife/marine/sonar.asp (Accessed Jan. 23, 2012). The LOA application states that the Jacksonville training would occur in the winter, yet the winter months are the time when this area is listed as an OBIA. LOA Application at 11-13. Will the Navy be conducting SURTASS LFA training here during calving months? If yes, what will the impact be on the young whales? The diminished population of North Atlantic Right Whales should not have to compete with the Navy for this area. The proper time to conduct training here would be in the summer months when the whales put we are citizens who are concerned about the welfare of marine mammals and we deserve more from those who should be protecting them.

Thank you for your consideration in this matter. Please keep us informed of the progress of this project and if you have any questions, do not hesitate to contact us at jbacigahupi@kclark.edu, erika@kclark.edu, dgavarie@kclark.edu.

Sincerely,

Juan Bacinahupi, Erika Hamilton, and Don Gourdie
Comments

http://www.regulations.gov

Register comments about proposed regs at Regulations.gov
Federal Register: Final Rule

50290  Federal Register / Vol. 77

DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration

50 CFR Part 218
[Docket No. 110808485−2148−02]
RIN 0648−BB14


ACTION: Final rule.

SUMMARY: Upon application from the U.S. Navy (Navy), we (the National Marine Fisheries Service) are issuing regulations under the Marine Mammal Protection Act to govern the taking of marine mammals incidental to conducting operations of Surveillance Towed Array Sensor System (SURTASS) Low Frequency Active Sonar System (LFAS) at a maximum of four naval surveillance vessels in areas of the Pacific, Atlantic, and Indian oceans, and the Mediterranean Sea, from the period of August 15, 2012, through August 15, 2017. These regulations allow us to issue Letters of Authorization (LOAs) for the incidental take of marine mammals during the Navy’s specified activities and timeframe, set forth the permissible methods of taking, set forth other aspects of effecting the least practicable adverse impact on marine mammals and their habitat, and set forth requirements pertaining to the means of reporting the incidental take.


ADDRESSES: To obtain an electronic copy of the Navy’s request, which contains a list of the references within, contact the National Marine Fisheries Service, Division of Permits, 1315 East West Highway, Silver Spring, MD 20915; 301/413-2370; Fax: 301/413-2300; Email: permit/ incidental.html@noaa.gov; or telephone the number listed here, follow the link for further information contact.

The Navy released a limited Supplemental Environmental Impact Statement (SEIS) for employment of SURTASS LFAS on June 8, 2012. The public may view the document at http://www.surface-fleet.gov. We participated in the development of this document as a cooperating agency under the Council on Environmental Quality’s regulations implementing the National Environmental Policy Act of 1972.

FOR FURTHER INFORMATION CONTACT: Joanna Cody, Office of Protected Resources, NMFS, 360/ 472−4299.

SUPPLEMENTARY INFORMATION:

Executive Summary

This regulation allows us to issue Letters of Authorization to the Navy (upon their request) for the incidental take of marine mammals during SURTASS LFAS sonar operations. The SURTASS LFAS sonar system is a long-range, low frequency sonar that has both active and passive acoustic components. The Navy will use the system for long-range detection of quiet, hard-to-find submarines. The Navy’s activities are military readiness activities under the Marine Mammal Protection Act of 1972 (as amended; MMPA; 16 U.S.C. 1361 et seq.) as defined by the National Defense Authorization Act for Fiscal Year 2004 (NSA, V 10L 169−169).

This is the third rule for SURTASS LFAS sonar operations under the Marine Mammal Protection Act. This rule, regulations governing take incidental to SURTASS LFAS sonar activities, expires on August 15, 2012. We published the first rule, effective from August 2002 through August 2007, on July 17, 2002 (72 FR 40712), and published the second rule on August 21, 2007 (72 FR 44844).

For this five-year period (August 2012 through August 2017), covered under this regulation, the Navy is proposing to conduct the same types of sonar activities as they have conducted over the past five years.

Purpose and Need for This Regulatory Action

In 2011, we received an application from the Navy requesting approval of the use of SURTASS LFAS sonar operations to support the implementation of military readiness training to protect marine mammals.

• Proposed use of passive acoustic monitoring and active acoustic monitoring during routine training, testing and military operations.

• Proposed use of SURTASS LFAS sonar to support the implementation of mitigation measures to protect marine mammals.

• Required monitoring of ambient noise levels and to incorporate appropriate acoustic noise budget efforts and analysis.

• Proposed use of marine mammals for training and practice.

• Required monitoring of routine training, testing, and military operations.

• Proposed use of marine mammals for training and practice.

• Required monitoring of marine mammal strandings and incidents.

• Required research on the effects of marine mammal strandings and incidents.

Section 101(a)(3)(A) of the MMPA directs the Secretary of Commerce (Secretary) to authorize upon request, the incidental, but non-lethal, taking of marine mammals of a species or population segment of marine mammals who engage in a specified activity rather than commercial fishing with a specified geographical region of after notice and public comment. We make certain findings, and issue the regulations. Under this five-year rule, the Navy will submit an annual application to us for Letters of Authorization for up to four vessels to take marine mammals, incidental to conducting SURTASS LFAS sonar operations.

This regulation establishes a framework to authorize incidental take through our issuing Letters of Authorization to the Navy for SURTASS LFAS sonar operations and contains mitigation, monitoring, and reporting requirements.

Legal Authority for the Regulatory Action

Section 101(a)(3)(A) of the Marine Mammal Protection Act and our implementing regulations at 50 CFR part 216, subpart I provide the legal basis for issuing the five-year regulations and Letters of Authorization.

Summary of Major Provisions Within the Regulatory Action

The following provides a summary of some of the major provisions within this third rulemaking for SURTASS LFAS sonar.

• Required suspension/slow down of SURTASS LFAS sonar transmissions if a marine mammal enters a 2-kilometer (1.2 miles; km) by 3.4-kilometer (2 miles; mi) ellipsoidal (ell) area surrounding the vessel.

• Required geographic restrictions are designed for the known location of important areas (IBAs) and within 22 km (14 mi) of any coastline, including islands, for SURTASS LFAS sonar operations to protect marine mammals.

• Required monitoring of ambient noise levels.

• Required monitoring of marine mammal strandings and incidents.

• Required monitoring of marine mammal strandings and incidents.

Final rule issued in Federal Register on August 20, 2012.
We provided extensive SUPPLEMENTARY INFORMATION in the Notice of the proposed rule for this activity in the Federal Register on Friday, January 6, 2012 (77 FR 365). We did not reprint all of that information here in its entirety; instead, we represent all sections from the proposed rule in this document and provide either a summary of the material presented in the proposed rule or a note referencing the page(s) in the proposed rule where the public can find the information. We address any information that has changed since the proposed rule in this document.

Additionally, this final rule contains a section that responds to the public comments submitted during the 30-day public comment period and the 15-day extension of the comment period for the proposed rule.

Background

Section 101(a)(5)(A) of the MMPA directs the Secretary to authorize, upon request, the incidental, but not intentional, taking of small numbers of marine mammals of a species or population stock, by U.S. citizens who engage in a specified activity (other than commercial fishing) within a specified geographical area. After notice and public comment, (1) We make certain findings; and (2) we issue regulations. We are required to grant authorization for the incidental taking of marine mammals resulting from the taking activity unless the Secretary finds that the taking will have a negligible impact on the species or stock and will not have an unmitigable adverse impact on the availability of the species or stock for subsistence uses (where relevant). We must also set forth the permissible methods of taking, other means of effecting the least practicable adverse impact on the species or stock and its habitat, and requirements pertaining to the mitigation, monitoring, and reporting.

Accordingly, this regulation, which governs our issuance of Letters of Authorization (LOA) to the Navy, designates: (1) The permissible methods of taking; (2) mitigation measures to minimize adverse impacts to the lowest level practicable on marine mammal species and their habitat; and (3) requirements for monitoring and reporting incidental take.

Federal Register: Final Rule
Comments and Responses

On January 6, 2012, we published a proposed rule (77 FR 842) in response to the Navy’s request to take marine mammals, incidental to conducting SURTASS LFA sonar operations in certain areas of the world’s oceans. We requested comments, information, and suggestions related to the request. During the 30-day public comment period, we received comments from the Marine Mammal Commission (Commission), the Natural Resources Defense Council (NRDC), OceanCare, the Surfrider Foundation, and 22 private citizens. We also received comments that appear to be directed solely at the Navy’s draft 2011 Supplemental

Final Rule Comments Summary

Comments and Responses

On January 6, 2012, we published a proposed rule (77 FR 842) in response to the Navy’s request to take marine mammals, incidental to conducting SURTASS LFA sonar operations in certain areas of the world’s oceans. We requested comments, information, and suggestions related to the request. During the 30-day public comment period, we received comments from the Marine Mammal Commission (Commission), the Natural Resources Defense Council (NRDC), OceanCare, the Surfrider Foundation, and 22 private citizens. We also received comments that appear to be directed solely at the Navy’s draft 2011 Supplemental Environmental Impact Statement (EIS) for SURTASS LFA sonar operations. We addressed the comments here.

Marine Mammal Protection Act

Comment 1: Citing the broad scope of the Navy’s application, the complexity of the proposed rule, and the need for additional time for public comment, the Natural Resources Defense Council requested that we consider extending the public comment period for an additional 15 days.

Response: In response to the request, we extended the public comment period by 15 extra days (77 FR 8771, February 9, 2012).

SURTASS LFA Sonar Activity Concerns

Comment 2: One commenter is concerned that the Navy may not be using the best available sound exposure assessment technologies and noted that the Navy would be using only one sound exposure assessment tool, the EASA-1983 tool, which is not as accurate as other tools. The commenter stated that the EASA-1983 tool is not a reliable method for assessing the impact of SURTASS LFA sonar on marine mammals.

Response: The Navy used the best available sound exposure assessment technologies. The Navy has developed a comprehensive sound exposure assessment tool, the Integrated Acoustic Assessment System (IAAS), that is considered the best available tool for assessing the impact of SURTASS LFA sonar on marine mammals.

SURTASS LFA Sonar Ocean Planning Precautionary (1) No Navy injury; (2) permanent loss of hearing; (3) changes in behavior and prevalence of changes in marine mammals; (4) changes in marine mammal behavior due to exposure to LFA sonar. We also consulted with the Marine Mammal Commission and the National Marine Fisheries Service on the potential effects of SURTASS LFA sonar on marine mammals.

Summary of public comments & agency response

Comment 4: One commenter stated: “The LOA application states that the Jacksonville training would occur in the winter, yet the winter months are the time when this area is listed as an OBA (LOA Application at 11–13). Will the Navy be conducting SURTASS LFA training here during calving months? If yes, what will the impact be on the young whales? The diminished population of North Atlantic Right Whales should not have to compete with the Navy for this area. The proper time to conduct training here would be in the summer months when the whales

Canadian Coast

Response: First, the Navy’s application states that the Western Atlantic/Jacksonville Operational Area is a potential area for SURTASS LFA sonar operations; it does not state that training would occur in the winter. This area is one of 19 potential sites that they modeled and analyzed during the winter to assess potential impacts to marine mammals for the rule and the Letter of Authorization application process.

We have designated the U.S. Right Whale Seasonal Habitat as an OBA specifically to mitigate effects on North Atlantic right whales and their calves during the winter months. Moreover, because we are also requiring the Navy to implement an additional 1-km (0.62 mi; 0.54 nm) buffer zone seaward of the outer perimeter of this OBA, these mitigation measures ensure that sound
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50 C.F.R. § 218.230 = Title 50, Part 218, Section 230

BUT—we say "section 218.230"

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<table>
<thead>
<tr>
<th>Function</th>
<th>Quasi-Legislative</th>
<th>Quasi-Judicial</th>
</tr>
</thead>
<tbody>
<tr>
<td>Law:</td>
<td>Rules (regulations)</td>
<td>Decisions, etc.</td>
</tr>
<tr>
<td>Where to Look:</td>
<td>FDsys (Federal Digital System)</td>
<td>Varies by agency--check individual websites</td>
</tr>
<tr>
<td></td>
<td><a href="http://www.gpo.gov/fdsys/search/home.action">http://www.gpo.gov/fdsys/search/home.action</a></td>
<td>See also:</td>
</tr>
<tr>
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<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Administrative Decisions (from UVA)</td>
</tr>
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<td></td>
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<tr>
<td></td>
<td></td>
<td>Federal Administrative Law: Agency Decisions &amp; Orders (from ASU)</td>
</tr>
</tbody>
</table>

they enforce the laws they create
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- **COMMENT** period
- **FINAL RULE** (regulation) published in the *administrative register* with supplementary information - **CHRONOLOGICAL**
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<table>
<thead>
<tr>
<th>Dept No.</th>
<th>Department Name</th>
<th>Rule Count</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>Department of State</td>
<td>204</td>
</tr>
<tr>
<td>2</td>
<td>Department of Legal Affairs</td>
<td>64</td>
</tr>
<tr>
<td>3</td>
<td>Department of Banking and Finance</td>
<td>0</td>
</tr>
<tr>
<td>4</td>
<td>Department of Insurance</td>
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<td>Department of Agriculture and Consumer Services</td>
<td>930</td>
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<td>6</td>
<td>Department of Education</td>
<td>1798</td>
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<td>7</td>
<td>Department of Business Regulation</td>
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<tr>
<td>8</td>
<td>Department of Commerce</td>
<td>30</td>
</tr>
<tr>
<td>9</td>
<td>Department of Community Affairs</td>
<td>471</td>
</tr>
<tr>
<td>10</td>
<td>Department of Health and Rehabilitative Services</td>
<td>9</td>
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<tr>
<td>11</td>
<td>Department of Law Enforcement</td>
<td>151</td>
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<td>12</td>
<td>Department of Revenue</td>
<td>736</td>
</tr>
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<td>13</td>
<td>Department of General Services</td>
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<tr>
<td>14</td>
<td>Department of Transportation</td>
<td>301</td>
</tr>
<tr>
<td>15</td>
<td>Department of Highway Safety and Motor Vehicles</td>
<td>417</td>
</tr>
<tr>
<td>16</td>
<td>Department of Natural Resources</td>
<td>9</td>
</tr>
<tr>
<td>17</td>
<td>Department of Environmental Regulation</td>
<td>0</td>
</tr>
<tr>
<td>18</td>
<td>Board of Trustees of Internal Improvement Trust Fund</td>
<td>88</td>
</tr>
<tr>
<td>19</td>
<td>State Board of Administration</td>
<td>172</td>
</tr>
<tr>
<td>20</td>
<td>Department of Citrus</td>
<td>382</td>
</tr>
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<td>Department of Professional Regulation</td>
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</table>
### Rule Chapter: 68C-22

**Chapter Title:** THE FLORIDA MANATEE SANCTUARY ACT

**View Chapter:**

68C-22

### View Individual Rules

Click on the word icon to view the latest rule version. Or click on the rule number to see the detail of the rule.

<table>
<thead>
<tr>
<th>Latest Version</th>
<th>Rule No.</th>
<th>Rule Title</th>
<th>Effective Date</th>
</tr>
</thead>
<tbody>
<tr>
<td>✅</td>
<td>68C-22.001</td>
<td>Scope and Purpose</td>
<td>11/8/2005</td>
</tr>
<tr>
<td></td>
<td>68C-22.002</td>
<td>Definitions</td>
<td>12/23/2003</td>
</tr>
<tr>
<td></td>
<td>68C-22.003</td>
<td>Regulated Activities</td>
<td>5/12/1999</td>
</tr>
<tr>
<td></td>
<td>68C-22.005</td>
<td>Lee County Zones</td>
<td>9/20/2005</td>
</tr>
<tr>
<td></td>
<td>68C-22.006</td>
<td>Brevard County Zones</td>
<td>6/24/2002</td>
</tr>
<tr>
<td></td>
<td>68C-22.007</td>
<td>Indian River County Zones</td>
<td>12/12/2002</td>
</tr>
<tr>
<td></td>
<td>68C-22.008</td>
<td>St. Lucie County Zones</td>
<td>8/16/1994</td>
</tr>
</tbody>
</table>
68C-22.003 Regulated Activities.

(1) General Guidelines and Application Procedures: This rule sets forth criteria pertaining to the regulation of the speed and operation of vessel traffic and other activities which are otherwise prohibited by Chapter 68C-22, F.A.C. Permits for such regulated activities shall be issued only as provided hereunder. Permits shall be issued only upon a finding by the Commission that activities as described in this section will not pose a serious threat to manatees, and that such activities are justified. Determinations of justification of need will be made based on the criteria given under each specific subsection.

Permits shall not be granted for activities within “Motorboats Prohibited” or “No Entry” zones, except as explicitly provided for in this section.

(a) In considering applications for permits under this section, a "serious threat to manatees" exists if, due to the nature, location, or frequency of the activity proposed, its conduct can be reasonably expected to result in either (1) injury or death to manatees, (2) a significant disruption of the manatee’s normal use, behavior or migratory patterns, or (3) disturbance which would lead to or cause destruction of essential manatee habitat. In making its determination, the Commission’s examination will include an evaluation of the following factors:

1. Patterns of manatee use of the area, both seasonal and year round;
2. The number of manatees known or assumed to occur in or seasonally use the area;
3. The manatee mortality trends within the area;
4. The existence of features within the area which are essential to the survival of, or are known to attract, manatees, such as seagrass or other food sources, favorable water depths, and fresh or warm water sources;
5. The cumulative effect of the requested activities in light of other permits previously granted or currently being considered by the Commission and known vessel traffic patterns and densities in the area; and
6. The characteristics of the waterway and of the vessel(s)/motor(s) which would be operated by the applicant.

(b) Applications for permits to conduct activities described in this section should be submitted as far in advance of the requested activities as possible and must be submitted to the Chief of the Office of Environmental Services, Florida Fish and Wildlife Conservation Commission, 620 South Meridian Street, Tallahassee, FL 32399. Information which must be submitted is described in each specific subsection. If an application does not contain sufficient information to enable the Office to evaluate the request, the Office shall request any needed information within thirty (30) days of receipt of the request. The Office shall respond by letter (issuing a permit or denying the request) as quickly as is practical and must respond within ninety (90) days of receipt of all necessary information.

(c) When issuing a permit, the Commission may place conditions on the permit as necessary to protect manatees. Examples of types of conditions which may be specified include seasonal constraints, use of screens or barriers, restrictions on types of permitted activities, restrictions relative to time of day, day of week, or weather conditions when permits are in effect, use of specialized equipment (e.g., propeller guards or jet drivers, speedometers) when feasible and such use would not defeat the purpose of the requested activity, additional water quality precautions, sea grass protection or protection of associated marine life or vegetation, temporary marking or permit display, limitations on intensity of activity, post-activity monitoring, use of manatee observers, and after-activity reports. The specific conditions, if any, are placed on a permit will be dependent on the specifics of the request. Acceptance of the permit shall constitute evidence that the recipient agrees to comply with the conditions set forth in the permit.

(d) The Commission retains the right to modify or rescind a permit should information become available indicating that the permitted activity is likely to create a serious threat to manatees or that the permit (in its current form) is not needed by the recipient. Before a permit is modified or rescinded, the permit holder shall be given an opportunity to discuss with the Commission the reasons for the modification or rescission. Unless an immediate threat to manatees is likely, the Commission shall wait at least thirty (30) days after notifying the permit holder before taking action on the permit. If a single manatee is struck or killed by a vessel operating pursuant to a permit under these provisions, the permit shall be immediately re-evaluated by the Commission to determine if the
Florida Administrative Code

Rule Chapter: 68C-22
Chapter Title: THE FLORIDA MANATEE SANCTUARY ACT

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<tr>
<td></td>
<td>68C-22.003</td>
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<tr>
<td></td>
<td>68C-22.008</td>
<td>St. Lucie County Zones</td>
<td>8/16/1994</td>
</tr>
</tbody>
</table>

Rule number links to rule details
Fla. Admin. Code r. 68C-22.003
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