

Federal Communications Commission.

**Marlene H. Dortch,**

*Secretary.*

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## DEPARTMENT OF COMMERCE

### National Oceanic and Atmospheric Administration

#### 50 CFR Part 216

[Docket No. 060314068-6068-01; I.D. 030905A]

RIN 0648-AT79

#### Taking and Importing Marine Mammals; Taking Marine Mammals Incidental to the Explosive Removal of Offshore Structures in the Gulf of Mexico

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

**ACTION:** Proposed rule.

**SUMMARY:** NMFS has received a request from the Minerals Management Service (MMS), for authorization to “take” by harassment small numbers of marine mammals incidental to explosive severance activities at offshore oil and gas structures in the Gulf of Mexico (GOM) outer continental shelf (OCS). By this document, NMFS is proposing regulations to govern that take. In order to issue Letters of Authorization (LOAs) and final regulations governing the take, NMFS must determine that the total taking will have a negligible impact on the affected species and stocks of marine mammals, will be at the lowest level practicable, and will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses. NMFS invites comment on the application and the proposed rule.

**DATES:** Comments and information must be postmarked no later than May 22, 2006.

**ADDRESSES:** You may submit comments on the application and proposed rule, using the identifier 030905A, by any of the following methods:

- E-mail: [PR1.030905A@noaa.gov](mailto:PR1.030905A@noaa.gov).

Please include the identifier 030905A in the subject line of the message. Comments sent via e-mail, including all attachments, must not exceed a 10-megabyte file size.

- Federal e-Rulemaking Portal: <http://www.regulations.gov>. Follow the instructions for submitting comments.

- Hand-delivery or mailing of paper, disk, or CD-ROM comments should be

addressed to: Stephen L. Leathery, Chief, Permits, Conservation and Education Division, Office of Protected Resources, National Marine Fisheries Service, 1315 East-West Highway, Silver Spring, MD 20910.

A copy of the MMS application, under section 101(a)(5)(A) of the Marine Mammal Protection Act (MMPA), containing a list of references used in this document may be obtained by writing to this address, by telephoning the contact listed under **FOR FURTHER INFORMATION CONTACT**, or at: <http://www.nmfs.noaa.gov/pr/permits/incidental.htm#iha>. A copy of MMS' Programmatic Environmental Assessment (PEA) is available on-line at: <http://www.gomr.mms.gov/homepg/regulate/enviro/nepa/2005-013.pdf>. Documents cited in this proposed rule, that are not available through standard public library access, may be viewed, by appointment, during regular business hours at the mailing address previously specified. To help us process and review comments more efficiently, please use only one method for commenting.

Comments regarding the burden-hour estimate or any other aspect of the collection of information requirement contained in this proposed rule should be sent to NMFS via the means stated above, and to the Office of Information and Regulatory Affairs, Office of Management and Budget (OMB), Attention: NOAA Desk Officer, Washington, DC 20503, [David\\_Rostker@eap.omb.gov](mailto:David_Rostker@eap.omb.gov).

**FOR FURTHER INFORMATION CONTACT:** Kenneth R. Hollingshead, NMFS, at 301-713-2055, ext 128 or [Ken.Hollingshead@noaa.gov](mailto:Ken.Hollingshead@noaa.gov).

#### SUPPLEMENTARY INFORMATION:

##### Background

Sections 101(a)(5)(A) and 101(a)(5)(D) of the MMPA (16 U.S.C. 1361 *et seq.*) direct the Secretary of Commerce (Secretary) to allow, upon request, the incidental, but not intentional taking of 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 are issued.

An authorization will 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, and if the permissible methods of taking and requirements pertaining to the mitigation, monitoring and reporting of such takings are set forth. NMFS has defined “negligible

impact” in 50 CFR 216.103 as “...an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.”

#### Summary of Request

On February 28, 2005, NMFS received an application from MMS (MMS, 2005a) requesting, on behalf of the offshore oil and gas industry, authorization under section 101(a)(5)(A) of the MMPA to take marine mammals by harassment incidental to explosive severance activities at offshore oil and gas structures in the GOM OCS. Except for certain categories of activities not pertinent here, the MMPA defines “harassment” as: any act of pursuit, torment, or annoyance which

(i) has the potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or (ii) has the potential to disturb a marine mammal or marine mammal stock in the wild by causing disruption of behavioral patterns, including, but not limited to, migration, breathing, nursing, breeding, feeding, or sheltering [Level B harassment].

#### Description of the Activity

During exploration, development, and production operations for mineral extraction in the GOM OCS, the seafloor around activity areas becomes the repository of temporary and permanent equipment and structures. In compliance with OCS Lands Act (OCSLA) regulations and MMS guidelines, operators are required to remove or “decommission” seafloor obstructions from their leases within one year of lease termination or after a structure has been deemed obsolete or unusable. To accomplish these removals, a host of activities is required to (1) mobilize necessary equipment and service vessels, (2) prepare the decommissioning targets (e.g., piles, jackets, conductors, bracings, wells, pipelines, etc.), (3) sever the target from the seabed and/or sever it into manageable components, (4) salvage the severed portion(s), and (5) conduct final site-clearance verification work.

There are two primary methodologies used in the GOM for cutting decommissioning targets; nonexplosive and explosive severance. Nonexplosive methods include abrasive cutters (sand and abrasive-water jets), mechanical cutters (e.g., carbide or rotary), diamond wire cutting devices, and cutting facilitated by commercial divers using arc/gas torches. Though relatively time-consuming and potentially harmful to

human health and safety (primarily for diver severances), nonexplosive-severance activities have little or no impact on the marine environment and would not result in an incidental take of marine mammals (MMS, 2005b (PEA)). A description of non-explosive severing tools and methods can be found in MMS, 2005a and MMS, 2005b (section 1.4.7.1)(see **ADDRESSES**).

Explosive-severance activities use specialized charges to achieve target severance. Severance charges can be deployed on multiple targets and detonated nearly-simultaneously (i.e., staggered at an interval of 900 msec) effecting rapid severances. Coupled with safe-handling practices, the reduced "exposure time" and omission of diver cutting also makes explosive severance safer for offshore workers. However, since the underwater detonation of cutting charges generates damaging pressure waves and acoustic energy, explosive-severance activities have the potential to result in an incidental take of nearby marine mammals. For this reason, MMS has requested an incidental take authorization governing explosive-severance activities that could be conducted under OCSLA structure decommissionings.

Decommissioning operations conducted under OCSLA authority can occur on any day of a given year. Operators often schedule most of their decommissionings from June to December (approximately 80 percent) to take advantage of the often calm seas and good weather and the time period when structure installations tend to decrease since both commissioning and decommissioning operations compete for the same management groups, equipment, vessels, and labor force (TSB/CES/LSU, 2004).

Depending upon the target, a complete decommissioning operation may span several days or weeks; however, the explosive-severance activity or "detonation event" for most removal targets (even those with multiple severances) last for only several seconds because of charge staggering. For complex targets or in instances where the initial explosive-severance attempts are unsuccessful, more than one detonation event may be necessary per decommissioning operation. Even though hours or days may pass to allow for necessary mitigation measures and redeployment of new charges, each detonation event would similarly last only for a few seconds.

During the 10 year period from 1994–2003, there were an average of 156 platform decommissionings per year,

with over 60 percent involving explosive-severance activities (see Table 4 in MMS, 2005a). In addition to historical activity averages, many of the older, nominally-producing structures in the mature GOM oil fields are nearing decommissioning age; this will result in an increase in removal operations in future years. Despite advancements in nonexplosive-severance methods and the additional requisite marine protected species mitigations, MMS expects explosive-severance activities to continue in at least 63 percent of all platform removals for the foreseeable future. (See Appendix A of MMS, 2005b) for additional forecasting information).

In addition to platform removals, based upon a review of the historical trends, industry projections, and recent forecast modeling, MMS estimates that between 170 and 273 explosive well-severance activities would occur annually over the next 5 years (see Table 7 in MMS, 2005a).

#### Comments and Responses

On August 24, 2005 (70 FR 49568), NMFS published a notice of receipt of MMS' application for LOAs 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 one set of comments.

The Marine Mammal Commission recommended that NMFS initiate the proposed rulemaking provided it is satisfied that the planned marine mammal and related monitoring programs will be adequate to verify how and over what distances marine mammals may be affected, that only small numbers of marine mammals will be taken, and that the cumulative impacts on the affected species and stocks will be negligible.

As described in detail in this document, all detonations are monitored by trained biological observers in aircraft and watercraft with mitigation and monitoring established commensurate with the type of detonation and the charge weight. Similar extensive monitoring programs, conducted by trained biological observers, including post-blast monitoring, have not indicated that any marine mammals have been seriously injured or killed by explosive severance activities.

#### Description of Habitat and Marine Mammals Affected by the Activity

The proposed explosive severance activities could occur in all water depths of the offshore areas designated

by MMS as the GOM Central and Western Planning Areas (CPA and WPA) and a portion of the Eastern Planning Area (EPA) offered under Lease Sale 181/189 (see Figure 2 or 3 in MMS, 2005a). Water depths in the areas of the proposed action range from 4 to 3,400 m (13–11,155 ft), with the majority of existing facilities and wells found within the CPA, concentrated on the upper shelf waters (less than 200 m (656 ft) water depth) off of Louisiana. A detailed description of the northern GOM area and its associated marine mammals can be found in the MMS application and PEA and in a number of documents referenced in the application. Detailed information on the marine mammals in the GOM can also be found in the NMFS status of stocks reports (Waring et al., 2004) which are available for downloading or reading at: <http://www.nefsc.noaa.gov/nefsc/publications/tm/tm182/>.

A total of 28 cetacean species and one species of sirenian (West Indian manatee) are known to occur in the GOM. These species are the sperm whale, pygmy sperm whale, dwarf sperm whale, Cuvier's beaked whale, Sowerby's beaked whale (extralimital), Gervais' beaked whale, Blainville's beaked whale, rough-toothed dolphin, bottlenose dolphin, pantropical spotted dolphin, Atlantic spotted dolphin, spinner dolphin, Clymene dolphin, striped dolphin, Fraser's dolphin, Risso's dolphin, melon-headed whale, pygmy killer whale, false killer whale, killer whale, short-finned pilot whale, North Atlantic right whale (extralimital), humpback whale (rare), minke whale (rare), Bryde's whale, sei whale (rare), fin whale (rare), and the blue whale (extralimital).

A description of the status, distribution, and seasonal distribution of the affected species and stocks of marine mammals that might be affected by explosive severance activities is provided in MMS, 2005a.

#### Potential Impacts to Marine Mammals

Underwater explosions are the strongest manmade point sources of sound in the sea (Richardson et al., 1995). The underwater pressure signature of a detonating explosion is composed of an initial shock wave, followed by a succession of oscillating bubble pulses (if the explosion is deep enough not to vent through the surface) (Richardson et al., 1995). The shock wave is a compression wave that expands radially out from the detonation point of an explosion. Although the wave is initially supersonic, it is quickly reduced to a normal acoustic wave. The broadband

source levels of charges weighing 0.5–20 kg (1.1–44 lb) are in the range of 267–280 dB re 1 microPa (at a nominal 1-m distance), with dominant frequencies below 50 Hz (Richardson *et al.*, 1995; CSA, 2004). The following sections discuss the potential impacts of underwater explosions on marine mammals, including mortality, injury, hearing effects, and behavioral effects.

### Mortality or Injury

It has been demonstrated that nearby underwater blasts can injure or kill marine mammals (Richardson *et al.*, 1995). Injuries from high-velocity underwater explosions result from two factors: (1) the very rapid rise time of the shock wave; and (2) the negative pressure wave generated by the collapsing bubble, which is followed by a series of decreasing positive and negative pressure pulses (CSA, 2004). The extent of injury largely depends on the intensity of the shock wave at the receiver (marine mammal) and the size and depth of the animal (Yelverton *et al.*, 1973; Craig, 2001).

The greatest damage occurs at boundaries between tissues of different densities because different velocities are imparted that can lead to their physical disruption; effects are generally greatest at the gas-liquid interface (Landsberg, 2000; CSA, 2004). Gas-containing organs, especially the lungs and gastrointestinal tract, are the most susceptible to this type of damage. Lung injuries (including lacerations and the rupture of the alveoli and blood vessels) can lead to hemorrhage, air embolisms, and breathing difficulties. The lungs and other gas-containing organs (nasal sacs, larynx, pharynx, and trachea) may also be damaged by compression/expansion caused by oscillations of the blast gas bubble (Reidenberg and Laitman, 2003). Intestinal walls can bruise or rupture, which may lead to hemorrhage and the release of gut contents. Less severe injuries include contusions, slight hemorrhaging, and petechia (Yelverton *et al.*, 1973; CSA, 2004). Ears are the organs most sensitive to pressure and, therefore, to injury (Ketten, 2000; CSA, 2004). Severe damage to the ears can include rupture of the tympanic membrane, fracture of the ossicles, cochlear damage, hemorrhage, and cerebrospinal fluid leakage into the middle ear. By themselves, tympanic membrane rupture and blood in the middle ear can result in partial, permanent hearing loss. Permanent hearing loss can also occur when the hair cells are damaged by loud noises (ranging from single, very loud events to chronic exposure).

### Hearing Effects

Mammalian hearing functions over a wide range of sound intensities, or loudness. The sensation of loudness increases approximately as the logarithm of sound intensity (Richardson and Malme, 1993). Sound intensity is usually expressed in decibels (dB), units for expressing the relative intensity of sounds on a logarithmic scale. Because sound pressure is easier to measure than intensity and intensity is proportional to the square of sound pressure, sound pressure level is usually reported in units of decibels relative to a standard reference pressure. Based on the information presented in Richardson *et al.* (1995), the possible behavioral effects of noise from underwater explosions on marine mammals may be categorized as follows:

1. The noise may be too weak to be heard at the location of the animal (i.e., below the local ambient noise level, below the hearing threshold of the animal at the relevant frequencies, or both);
2. The noise may be audible, but not loud enough to elicit an overt behavioral reaction;
3. The noise may elicit behavioral reactions, which may vary from subtle effects on respiration or other behaviors (detectable only statistically) to active avoidance behavior;
4. With repeated exposure, habituation (diminishing responsiveness) to the noise may occur. Continued disturbance effects are most likely with sounds that are highly variable in their characteristics, unpredictable in occurrence, and associated with situations perceived by the animal as threatening;
5. Any anthropogenic noise that is strong enough to be heard has the potential to reduce (mask) the ability of a marine mammal to hear natural sounds at similar frequencies, including calls from conspecifics, and underwater environmental sounds such as surf noise.
6. If mammals remain in an area because it is important for feeding, breeding or some other biologically important purpose even though there is chronic exposure to noise, it is possible that there could be noise-induced physiological stress; this might in turn have negative effects on the well-being or reproduction of the animals involved; and

7. Very strong sounds have the potential to cause temporary or permanent reduction in hearing sensitivity. In terrestrial mammals, and presumably marine mammals, received

sound levels must far exceed the animal's hearing threshold for there to be any temporary threshold shift (TTS) in its hearing ability. For transient sounds, the sound level necessary to cause TTS is inversely related to the duration of the sound exposure. Received sound levels must be even higher for there to be risk of permanent hearing impairment. In addition, intense acoustic or explosive events may cause trauma to tissues associated with organs vital for hearing, sound production, respiration and other functions. This trauma may include minor to severe hemorrhage.

### TTS

The mildest form of hearing damage, TTS, is defined as the temporary elevation of the minimum hearing sensitivity threshold at particular frequency(s) (Kryter, 1985; CSA, 2004). TTS may last from minutes to days. Although few data exist on the effects of underwater sound on marine mammal hearing, in terrestrial mammals, and presumably in marine mammals, received levels must exceed an animal's hearing threshold (i.e., maximum sensitivity) for TTS to occur (Richardson *et al.*, 1995; Kastak *et al.*, 1999; Wartzok and Ketten, 1999).

Most studies involving marine mammals have measured exposure to noise in terms of sound pressure level (SPL), measured in dBrms or dBpeak pressure re 1 microPa. Exposure to underwater sound can also be expressed in terms of energy, also called sound exposure level (SEL), or acoustic energy (measured in dB re 1 microPa<sup>2</sup>-s), which, unlike SPL measurements, considers both intensity and duration of the sound. If TTS is defined as a measurable threshold shift of 6 dB or more (Finneran *et al.*, 2000, 2002), then based on experiments with white whales and bottlenose dolphins, the onset of TTS was associated with an energy level of about 184 dB re 1 microPa<sup>2</sup>-s (CSA, 2004). However, the data are very limited, and Finneran (2003) has noted that they should be interpreted with caution.

### Permanent Threshold Shift (PTS)

PTS is a permanent decrease in the functional sensitivity of an animal's hearing system at some or all frequencies (CSA, 2004). The principal factors involved in determining whether PTS will occur include sound impulse duration, peak amplitude, and rise time. The criteria are location and species-specific (Ketten, 1995) and are also influenced by the health of the receiver's ear.

At least in terrestrial animals, it has been demonstrated that the received level from a single exposure must be far above the TTS threshold for there to be a risk of PTS (Kryter, 1985; Richardson *et al.*, 1995; CSA, 2004). Sound signals with sharp rise times (e.g., from explosions) produce PTS at lower intensities than do other types of sound (Gisiner, 1998; CSA, 2004).

For explosives, Ketten (1995) estimated that greater than 50-percent PTS would occur at peak pressures of 237–248 dB re 1 microPa and that TTS would occur at peak pressures of 211–220 dB re 1 microPa. The “safe” peak pressure level to avoid physical injury recommended by Ketten (1995) is 100 psi (237 dB re 1 microPa, or about 212 dB re 1 microPa<sup>2</sup>-s). PTS is assumed to occur at received levels 30 dB above TTS-inducing levels. Studies have shown that injuries at this level involve the loss of sensory hair cells (Ahroon *et al.*, 1996; CSA, 2004).

#### Behavioral Effects

Behavioral reactions of marine mammals to sounds such as those produced by underwater explosives are difficult to predict. Whether and how an animal reacts to a given sound depends on factors such as the species, hearing acuity, state of maturity, experience, current activity, reproductive state, time of day, and weather.

Richardson *et al.* (1995) summarized available information on the reported behavioral reactions of marine mammals to underwater explosions. Observations following the use of seal bombs as scare charges indicate that pinnipeds rapidly habituate to and, in general, appear quite tolerant of, noise pulses from explosives. Klima *et al.* (1988) reported that small charges were not consistently effective in moving bottlenose dolphins away from blast sites in the GOM. Since dolphins may be attracted to the fish killed by such a charge, rather than repelled, scare charges are not used in the GOM platform removal program (G. Gitschlag, personal communication, in Richardson *et al.*, 1995).

There are few data on the reactions of baleen whales to underwater explosions. Gray whales were apparently unaffected by 9- to 36-kg (20- to 97-lb) charges used for seismic exploration (Fitch and Young, 1948). However, Gilmore (1978) felt that similar underwater blasts within a few kilometers of the gray whale migration corridor did “sometimes” interrupt migration.

Humpback whales have generally not been observed to exhibit behavioral reactions (including vocal ones) to explosions, even when close enough to

suffer injury (hearing or other) (Payne and McVay, 1971; Ketten *et al.*, 1993; Lien *et al.*, 1993; Ketten, 1995; Todd *et al.*, 1996). In Newfoundland, humpbacks displayed no overt reactions within about 2 km of 200- to 2,000-kg explosions. Whether habituation and/or hearing damage occurred was unknown, but at least two whales were injured (and probably killed) (Ketten *et al.*, 1993). Other humpback whales in Newfoundland, foraging in an area of explosive activity, showed little behavioral reaction to the detonations in terms of decreased residency, overall movements, or general behavior, although orientation ability appeared to be affected (Todd *et al.*, 1996). Todd *et al.* (1996) suggested caution in interpretation of the lack of visible reactions as indication that whales are not affected or harmed by an intense acoustic stimulus; both long- and short-term behavior as well as anatomical evidence should be examined. The researchers interpreted increased entrapment rate of humpback whales in nets as the whales being influenced by the long-term effects of exposure to deleterious levels of sound.

As mentioned previously, Finneran *et al.* (2000) exposed captive bottlenose dolphins and belugas to single, simulated sounds of distant explosions. The broad-band received levels were 155–206 dB; pulse durations were 5.4–13 ms. This was equivalent to a maximum spectral density of 102–142 dB re 1  $\mu\text{Pa}^2/\text{Hz}$  at a 6.1 Hz bandwidth. Although pulse durations differed, the source levels required to induce a behavioral response to the introduced sounds were similar to those found by Ridgway *et al.* (1997) and Schlundt *et al.* (2000).

#### Estimates of Take by Harassment During Explosive Severance Activities in the GOM

The MMS has requested NMFS to issue authorizations, under section 101(a)(5)(A) of the MMPA, to cover any potential take by Level A or Level B harassment for the 28 species of cetaceans listed previously in this document, incidental to the oil and gas industry conducting explosive-severance operations regulated by the MMS. Explosive severance operations have the potential to take marine mammals by contact with shock wave and acoustic energy released from underwater detonations and the resultant injury, hearing damage, and behavioral effects. For this activity, MMS has adopted, without modification, NMFS’ take thresholds and criteria for explosives used in the incidental take authorization for shock

trials for the U.S. Navy’s Winston Churchill (Navy, 2001). While these criteria remain a subject for future discussion and revision (see 69 FR 21816, April 22, 2004, and 70 FR 48675, August 19, 2005), the Winston Churchill criteria (*i.e.*, 12 pounds/in<sup>2</sup> (psi) peak-pressure and 182 dB (re 1 microPa<sup>2</sup>-sec)) have been used by MMS for this activity because these criteria remain conservative. For example, Finneran *et al.* (2003) did not find masked TTS in the single bottlenose dolphin tested at the highest exposure conditions: peak pressure of 207 kPa (30 psi), 228 dB re 1 microPa pk-pk pressure, and 188 dB re 1 microPa<sup>2</sup>-s total energy flux.

The criteria for nonlethal, injurious impacts (Level A harassment) are currently defined as the incidence of 50-percent tympanic-membrane (TM) rupture and the onset of slight lung hemorrhage for a 12.2-kg (27 lb) dolphin calf. Level A harassment take is assumed to occur:

1. At an energy flux density value of 1.17 in-lb/in<sup>2</sup> (which is about 205 dB re 1  $\mu\text{Pa}^2$ -s); and
2. If the peak pressure exceeds 100 psi for an explosive source; *i.e.*, the “safe” peak pressure level to avoid physical injury recommended by Ketten (1995).

The horizontal distance from the explosive to each threshold is determined and the maximum distance at which either is exceeded is considered to be the distance at which Level A harassment would occur (U.S. Dept. Navy, 2001).

NMFS recognizes two levels of noninjurious acoustic impacts (Level B harassment). One criterion for Level B harassment is defined by the onset of TTS. Two thresholds are applied. TTS is assumed to be induced:

1. At received energies greater than 182 dB re 1 microPa<sup>2</sup>-s within any 1/3-octave band; and
2. If, for an explosive source, the peak pressure at the animal exceeds 12 psi.

As with Level A harassment, the horizontal distance to each threshold has been determined and the maximum distance at which either is exceeded is considered the distance at which Level B harassment (TTS) would occur (Navy, 1998 and 2001; CSA, 2004). These distances have been used for estimating conservative zones of impact.

“Sub-TTS” behavioral effects may also be considered to constitute a take by Level B harassment if a marine mammal reacts to an activity in a manner that would affect some behavioral pattern in a biologically significant way. Single, minor reactions (such as startle or “heads-up” alert displays, short-term changes in breathing rates, or modified single dive

sequences) that have no biological context would not qualify as takes (66 FR 22450, May 4, 2001). This would include minor or momentary strictly behavioral responses to single events such as underwater explosions. Since explosive severance activities result in single, almost instantaneous detonations, with no repetitive detonations, NMFS does not believe that marine mammals would be subject to behavioral harassment other than behavioral modifications potentially incurred as a result of TTS.

In order to obtain potential incidental take numbers for explosive severance activities, fundamental modeling components require: (1) predictive modeling of detonation pressure/energy propagation, (2) propagation model verification and utilization, (3) predictive modeling of marine mammal take estimates, and (4) take-estimate calculation. These models and the calculations resulting from those models are explained in detail in MMS, 2005a and MMS, 2005b.

Based on MMS calculations for all explosive-severance monitoring scenarios, Level A harassment takes would be limited to less than one bottlenose dolphin annually and between three and five bottlenose dolphins, one Atlantic spotted, and one pantropical spotted dolphin over the five-year period of these proposed regulations.

Based on MMS calculations for all explosive-severance scenarios, annual Level B harassment takes would be limited to 148–227 bottlenose dolphins, 35–65 Atlantic spotted dolphins, 33–77 pantropical spotted dolphins, 11–27 Clymene dolphins, 8–12 rough-toothed dolphins, 6–14 striped dolphins, 6–15 melon-headed whales, 4–10 pilot whales, 2–5 spinner dolphins, 1–3 Risso's dolphins, and 1–2 sperm whales. It should be noted that Level A and Level B harassment estimates are made without consideration of the implementation of mitigation measures to protect marine mammals, so actual harassment numbers would likely be lower. Post-activity monitoring conducted by trained biological

observers since about 1989 has not produced any sightings of distressed marine mammals.

### **Mitigation and Monitoring**

Based upon the analysis found in the Structure-Removal PEA (MMS, 2005b), MMS believes that implementation of the mitigation measures listed in this section will prevent the occurrence of any mortality or serious injury to marine mammals.

#### *Charge Criteria*

The charge criteria discussed here (e.g., charge size, detonation staggering, and explosive material) are applicable for all of the explosive-severance scenarios conducted under the proposed action.

#### *Charge Size*

The options available under the multiple explosive-severance scenarios allow for the utilization of any size charge between 0 and 500 lb (226.8 kg). Most often determined in the early planning stages, the final/actual charge weight establishes the specific monitoring scenario that must be adhered to as a condition of an MMPA authorization. Increasing the charge size results in increasing levels of mitigation/monitoring. Using explosives greater than 500 lb (226.8 kg) are not proposed to be authorized for taking marine mammals under the MMPA. Use of explosives greater than 500 lb (226.8 kg) would require additional National Environmental Policy Act (NEPA) analyses, Endangered Species Act (ESA) consultations and an MMPA authorization prior to usage. As a result, no marine mammal takings are proposed to be authorized for charge weights greater than 500 lbs (226.8 kg) under this proposed rule.

#### *Detonation Staggering*

Multiple-charge detonations are proposed to be staggered at an interval of 0.9 sec (900 msec) between blasts to prevent an additive pressure event. For decommissioning purposes, a "multiple-charge detonation" refers to any configuration where more than one

charge is required in a single detonation "event."

#### *Explosive Material*

There are many important properties (i.e., velocity, brisance, specific-energy, etc.) related to the explosive material(s) used in developing severance charges. Material needs vary widely depending upon target characteristics, marine conditions, and charge placement. Since specific material and personnel safety requirements must be established and followed, MMS believes that all decisions on explosive composition, configuration, and usage should be made by the qualified (i.e., licensed and permitted) explosive contractors in accordance with the applicable explosive-related laws and regulations. NMFS concurs, noting that limiting charge size or material may result in incomplete severing possibly requiring even larger charge weight to complete the severing.

#### *Specific Mitigation/Monitoring Requirements*

Explosive severance activities, as described in the MMS application and PEA, have been grouped into five blasting categories (very small, small, standard, large, and specialty). Since the level of detonation pressure and energy is primarily related to the amount of the explosives used, these categories were developed cooperatively by MMS, NMFS and industry explosives experts based upon the specific range of charge weights needed to conduct current and future GOM OCS decommissionings. Depending on the design of the target and other variable marine conditions, the severance charges developed under each of these categories could be designed for use in either a below-mudline (BML) or above mudline (AML) configuration. These factors, combined with an activity location within either the shelf (less than 200 m (656 ft)) or slope (greater than 200 m (656 ft)) species-delineation zone, result in 20 separate explosive-severance monitoring scenarios, as shown in Table 1.

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**Table 1. Blasting Category Parameters and Associated Severance Scenario Numbers (MMS, 2005b)**

Blasting Category	Charge Range	Configuration	Species-Delineation Zone	Scenario
Very-Small	0-10 lb	BML	Shelf (<200 m)	A1
		BML	Slope (>200 m)	A2
	0-5 lb	AML	Shelf (<200 m)	A3
		AML	Slope (>200 m)	A4
Small	>10-20 lb	BML	Shelf (<200 m)	B1
		BML	Slope (>200 m)	B2
	>5-10 lb	AML	Shelf (<200 m)	B3
		AML	Slope (>200 m)	B4
Standard	>20-80 lb	BML	Shelf (<200 m)	C1
		BML	Slope (>200 m)	C2
	>20-80 lb	AML	Shelf (<200 m)	C3
		AML	Slope (>200 m)	C4
Large	>80-200 lb	BML	Shelf (<200 m)	D1
		BML	Slope (>200 m)	D2
	>80-200 lb	AML	Shelf (<200 m)	D3
		AML	Slope (>200 m)	D4
Specialty	>200-500 lb	BML	Shelf (<200 m)	E1
		BML	Slope (>200 m)	E2
	>200-500 lb	AML	Shelf (<200 m)	E3
		AML	Slope (>200 m)	E4

The charge criteria previously listed are proposed to be standard for all decommissionings employing explosive-severance activities. However, depending upon the severance scenario, there are six different types of marine

mammal/sea turtle monitoring surveys that must be conducted before and after all detonation events (sea turtles are included in these proposed mitigation and monitoring activities because NMFS and MMS anticipate that such measures

will also minimize impacts to ESA-listed sea turtles). The specific monitoring requirements, survey times, and impact zone radii for all explosive-severance monitoring scenarios are summarized in Table 2.

**Table 2**  
**Survey and Time Requisite Summary for All Explosive-Severance Scenarios**

<b>B l a s t i n g Category</b>	<b>Impact Zone Radius</b>	<b>Scenario</b>	<b>Pre-Det Surface Survey (min)</b>	<b>Pre-Det Aerial Survey (min)</b>	<b>Pre-Det Acoustic Survey (min)</b>	<b>Post-Det Surface Survey (min)</b>	<b>Post-Det Aerial Survey (min)</b>	<b>Post-Post-Det Aerial Survey (Yes/No)</b>
<b>Very Small</b>	<b>261 m (856 ft)</b>	<b>A1</b>	<b>60</b>	<b>N/A</b>	<b>N/A</b>	<b>30</b>	<b>N/A</b>	<b>No</b>
		<b>A2</b>	<b>90</b>	<b>N/A</b>	<b>N/A</b>	<b>30</b>	<b>N/A</b>	<b>No</b>
	<b>293 m (961 ft)</b>	<b>A3</b>	<b>60</b>	<b>N/A</b>	<b>N/A</b>	<b>30</b>	<b>N/A</b>	<b>No</b>
		<b>A4</b>	<b>90</b>	<b>N/A</b>	<b>N/A</b>	<b>30</b>	<b>N/A</b>	<b>No</b>
<b>Small</b>	<b>373 m (1,224 ft)</b>	<b>B1</b>	<b>90</b>	<b>30</b>	<b>N/A</b>	<b>N/A</b>	<b>30</b>	<b>No</b>
		<b>B2</b>	<b>90</b>	<b>30</b>	<b>N/A</b>	<b>N/A</b>	<b>30</b>	<b>No</b>
	<b>522 m (1,714 ft)</b>	<b>B3</b>	<b>90</b>	<b>30</b>	<b>N/A</b>	<b>N/A</b>	<b>30</b>	<b>No</b>
		<b>B4</b>	<b>90</b>	<b>30</b>	<b>N/A</b>	<b>N/A</b>	<b>30</b>	<b>No</b>
<b>Standard</b>	<b>631 m (2,069 ft)</b>	<b>C1</b>	<b>90</b>	<b>30</b>	<b>N/A</b>	<b>N/A</b>	<b>30</b>	<b>No</b>
		<b>C2</b>	<b>90</b>	<b>30</b>	<b>120</b>	<b>N/A</b>	<b>30</b>	<b>No</b>
	<b>829 m (2,721 ft)</b>	<b>C3</b>	<b>90</b>	<b>45</b>	<b>N/A</b>	<b>N/A</b>	<b>30</b>	<b>No</b>
		<b>C4</b>	<b>90</b>	<b>60</b>	<b>150</b>	<b>N/A</b>	<b>30</b>	<b>Yes</b>
<b>Large</b>	<b>941 m (3,086 ft)</b>	<b>D1</b>	<b>120</b>	<b>45</b>	<b>N/A</b>	<b>N/A</b>	<b>30</b>	<b>No</b>
		<b>D2</b>	<b>120</b>	<b>60</b>	<b>180</b>	<b>N/A</b>	<b>30</b>	<b>Yes</b>
	<b>1,126m (3,693 ft)</b>	<b>D3</b>	<b>120</b>	<b>60</b>	<b>N/A</b>	<b>N/A</b>	<b>30</b>	<b>No</b>
		<b>D4</b>	<b>150</b>	<b>60</b>	<b>210</b>	<b>N/A</b>	<b>30</b>	<b>Yes</b>
<b>Specialty</b>	<b>1,500 m (4,916 ft)</b>	<b>E1</b>	<b>150</b>	<b>90</b>	<b>N/A</b>	<b>N/A</b>	<b>45</b>	<b>No</b>
		<b>E2</b>	<b>180</b>	<b>90</b>	<b>270</b>	<b>N/A</b>	<b>45</b>	<b>Yes</b>
	<b>1,528 m (5,012 ft)</b>	<b>E3</b>	<b>150</b>	<b>90</b>	<b>N/A</b>	<b>N/A</b>	<b>45</b>	<b>No</b>
		<b>E4</b>	<b>180</b>	<b>90</b>	<b>270</b>	<b>N/A</b>	<b>45</b>	<b>Yes</b>

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Accounting for similar pre- and post-detonation surveys, the 20 explosive-severance monitoring scenarios correspond roughly with 8 basic mitigation processes that vary only in differences in impact zone ranges and survey times. As noted in Appendix E of MMS, 2005b, these impact zone radii were derived using the "Under-Water Calculator," a verified model that predicts the detonation pressure/energy propagation resulting from underwater

detonations. Time requisites were established by NMFS and MMS scientists, taking into consideration likely marine mammals/sea turtles and their surfacing/diving rates. Because of its complexity, the proposed mitigation/monitoring processes for each of the 20 explosive-severance scenarios is found in MMS, 2005a and is not repeated here. Instead, the proposed mitigation and monitoring summarized in Table 2 can be illustrated by using the Standard

Blasting Category for shelf and slope waters as examples:

*Shelf Waters (<200 m): Scenarios C1 and C3*

An operator proposing shelf-based, explosive-severance activities conducted under the standard blasting category will be limited to 80-lb charge sizes (BML or AML) and will be required to conduct all requisite monitoring during daylight hours out to

the associated impact-zone radii listed here:

- C1 — 631 m (2,069 ft)
- C3 — 829 m (2,721 ft)

#### Required Observers

Generally, two observers who are trained and approved by an instructor with experience as an NMFS Platform Removal Observer Program (PROP) trainer (trained observer) are required to perform marine mammal/sea turtle detection surveys for standard-blasting under shelf water scenarios C1 and C3. If necessary, the site coordinator will determine if additional observers are required to compensate for the complexity of severance activities and/or structure configuration. In addition to meeting all reporting requirements, the trained observers will:

1. Brief affected crew and severance contractors on the monitoring requirements and instruct topsides personnel to immediately report any sighted marine mammal/sea turtles to an observer or designated company representative;
2. Establish an active line of communication (i.e., 2-way radio, visual signals, etc.) with company and blasting personnel; and
3. Devote the entire, uninterrupted survey time to marine mammal/sea turtle monitoring.

#### Pre-Detonation Monitoring

Before severance-charge detonation, the trained observers will conduct a 90-min surface monitoring survey of the impact zone. The monitoring will be conducted from the highest vantage points and other locations which will provide comprehensive surveys of the surrounding area. Once the surface monitoring is complete (i.e., the impact zone determined to be clear of marine mammal/sea turtles), the trained observer(s) will transfer to a helicopter to conduct a 30-min (Scenario C1) or 45-min (Scenario C3) aerial monitoring survey. As per approved guidelines, the helicopter will transverse the impact zone at low speed/altitude in a specified grid pattern. If during the aerial survey a marine mammal/sea turtle is:

1. Not sighted, proceed with the detonation;
2. Sighted outbound and continuously tracked clearing the impact zone, proceed with the detonation after the monitoring time is complete to ensure no reentry;
3. Sighted outbound and the marine mammal/sea turtle track is lost (e.g., the animal dives below the surface),
  - Halt the detonation,
  - Wait 30 min, and
  - Reconduct the 30 min (C1) or 45 min (C3) aerial monitoring survey; or

4. Sighted inbound,
  - Halt the detonation,
  - Wait 30 minutes, and
  - Reconduct the 30-min (C1) or 45-min (C3) aerial monitoring survey.

In the third and fourth scenarios, detonations will not proceed until they satisfy the first or second scenarios after the required aerial resurvey.

#### Post-Detonation Monitoring

After severance charge detonation, the trained observer(s) will conduct a 30-min aerial monitoring survey of the impact zone to look for affected marine mammal/sea turtles. If a marine mammal/sea turtle is found shocked, seriously injured, or dead, the operations will cease and the observer will contact MMS and NMFS' Southeast Regional Office, attempts will be made, under the direction of the trained observer, to collect/resuscitate the animal, and the Southeast Region, NMFS will be contacted for additional instruction. If the animal does not revive, efforts should be made to recover it for necropsy in consultation with the appropriate NMFS' Stranding Coordinator. If no marine mammal/sea turtles are observed to be impacted by the detonation, the trained observer(s) will record all of the necessary information as required in MMS's permit approval letter and guidelines for the preparation of a trip report.

A flowchart of the monitoring process and associated survey times for standard severance-scenarios C1 and C3 is provided in Figure 6 in MMS, 2005a.

#### *Slope Waters (>200 m): Scenarios C2 and C4*

An operator proposing slope-based, explosive-severance activities conducted under the standard blasting category will be limited to 80-lb charge sizes (BML or AML) and conduct all requisite monitoring during daylight hours out to the associated impact-zone radii listed below:

- C2 — 631 m (2,069 ft)
- C4 — 829 m (2,721 ft)

#### Required Observers

Slope water scenarios propose to require a minimum of three trained observers for the coordinated surface, aerial, and acoustic monitoring surveys, therefore, at least two "teams" of observers will be required. The PROP manager or his designee will determine each "team" size depending upon the complexity of severance activities and/or structure configuration. In addition to meeting all reporting requirements, the trained observers would perform the same functions as the observers in the shelf water scenarios C1 and C3.

#### Pre-Detonation Monitoring

Before severance charge detonation, trained observers will begin a 90-min surface monitoring survey and a 120-min (scenario C2) or 150-min (scenario C4) passive-acoustic monitoring survey of the impact zone. The surface monitoring will be conducted in the same manner as the C1 and C3 scenarios. Once the surface monitoring is complete (i.e., the impact zone cleared of marine mammal/sea turtles), the acoustic survey will continue while the trained observer(s) transfer(s) to a helicopter to conduct a 30-min (scenario C2) or 60-min (scenario C4) aerial monitoring survey. As per approved guidelines, the helicopter will transverse the impact zone at low speed/altitude in a specified grid pattern.

The proposed requirements on marine mammal and sea turtle sighting for the C1 and C3 scenarios would apply here except that the wait times and aerial survey times differ (see Table 2).

#### Post-Detonation Monitoring

Scenarios C2 and C4 both would require the same post-detonation monitoring explained for the C1 and C3 scenarios.

Scenario C4 also requires a post-post-detonation aerial monitoring survey to be conducted within 2–7 days after detonation activities conclude. Conducted by helicopter or fixed-wing aircraft, when applicable, observations are to start at the removal site and proceed leeward and outward of wind and current movement. If a marine mammal/sea turtle is found shocked, injured, or dead, the operations will cease and the observer will contact MMS and NMFS' Southeast Regional Office, attempts will be made, under the direction of the trained observer, to collect/resuscitate the animal, and the Southeast Region, NMFS will be contacted for additional instruction. If the animal does not revive, efforts should be made to recover it for necropsy in consultation with the appropriate NMFS' Stranding Coordinator. Any injured or dead marine mammal/sea turtle must be recorded, and if possible, tracked after notifying NMFS. If no marine mammal/sea turtles are observed to be dead, injured, distressed, or shocked during either aerial survey, the trained observers will record all of the necessary information as detailed in MMS's permit approval letter and guidelines for the preparation of a trip report.

A flowchart of the monitoring process and associated survey times for standard



explosive-severance monitoring scenarios C2 and C4 is provided in Figure 7 in MMS, 2005a.

#### Reporting Requirements

All explosive-severance activities in the GOM would be mandated to abide by the reporting requirements listed in this section. The information collected will be used by MMS and NMFS to continually assess mitigation effectiveness and the level of marine mammal/sea turtle impacts.

The reporting responsibilities will be undertaken by the NMFS' marine mammal/sea turtle observer for scenarios B1–E4 (Table 2) and the collected data will be prepared and routed in accordance with previously established guidelines for filing times and distribution.

For very-small blasting scenarios A1–A4, the company observer will be responsible for recording the data and preparing a trip report for submittal within 30 days of completion of the severance activities. Trip reports for scenarios A1–A4 will be sent to MMS and NMFS Gulf/Southeast regional offices.

In addition to basic operational data (*i.e.*, area and block, water depth, company/platform information, etc.), the observer reports must contain the following information: (1) Monitoring, (a) Survey Type, (i) pre-detonation, (ii) post-detonation, (iii) surface survey, (iv) aerial survey; (b) Time(s) (initiated/terminated), (c) Marine Conditions (sea state etc.), (2) Observed Marine Protected Species (mammals/sea turtles), (a) Type/number (basic description or species identification (if possible)), (b) Location/orientation, (i) inside/outside impact zone, (ii) inbound/outbound, etc., (c) Any "halted-detonation" details (*i.e.*, waiting periods, re-surveys, etc.), and (d) any "Take-Event" details - actual injury/mortality to marine protected species.

In the event that a marine mammal or sea turtle is shocked, injured, or killed during the severance activities, the observer will report the incident to MMS and NMFS' Southeast Regional Office at the earliest opportunity.

#### Research

To help determine the impact zones for the proposed blasting categories, MMS contracted for development of a model that would estimate shock wave and acoustic energy propagation caused by underwater explosive-severance tools (Dzwilewski and Fenton, 2003). As with most "theoretical" models developed to consider a wide range of parameters under multiple conditions, the contractor suggested that their modeling

results be compared with *in-situ* data from actual explosive-severance activities. Previous *in-situ* research had been performed by the Naval Surface Warfare Center (NSWC) for MMS (Conner, 1990), but uncertainties concerning transducer ranging devalued the sediment-attenuation conclusions. Considering the uncertainties, NMFS provided guidance suggesting that additional *in-situ* data comparison must be conducted.

In November 2002, MMS's Technology Assessment and Research (TAR) Program began working with MMS's GOM Region to modify an existing project designed to develop and test the efficiency of linear shaped charges (Saint-Arnaud *et al.*, 2004; see <http://www.mms.gov/tarprojects/429.htm>). The modifications made it possible to allow BML, *in situ* data measurements to be taken during the final testing on actual OCS targets. While developing the measurement phase of the project, MMS again coordinated with NMFS to address the concerns expressed over the NSWC's range uncertainties, ultimately modifying field procedures to include the use of a sector-scanning sonar in conjunction with reflectors attached to each transducer array string. The testing was conducted, and Annex B of the project's final report (Appendix C of the Structure-Removal Operations PEA; USDOL, MMS, 2004) compares the peak overpressure (psi), impulse (psi-s), and energy flux density (EFD; psi-in) measurements collected from the testing with calculated results from both the UWC and the applicable NSWC similitude equations.

Since the number of targets, charge sizes, and marine conditions were limited, MMS is currently working with both industry and acoustic measurement groups to conduct additional research on targets offering a wider range of parameters. Similar to the TAR project, the research program under development will focus on *in-situ* "targets-of-opportunity" offered by industry. As with previous work, the program will use transducer array assemblies to measure, record, and calculate the peak pressure, impulse, and acoustic energy released into the water column from severance charges. With a greater knowledge of the actual impacts, additional protective and mitigative measures may be possible in the future to address specific concerns of northern GOM marine mammals. In addition, the potential new information on impact-reducing factors (*i.e.*, lower charge weights, increased BML cut depths, experimental mitigation techniques, etc.) will encourage

industry to push research and development of less harmful and more efficient charges.

As a result, NMFS is proposing to request continued research on the actual impacts of explosive severance activities, which includes, but is not limited to, additional *in-situ* acoustic measurement testing on decommissioning targets prior to any additional reauthorization for this activity under section 101(a)(5)(A) of the MMPA.

#### Preliminary Determinations

NMFS has preliminarily determined that impacts to marine mammals from explosive-severance activities conducted under the proposed action will result in the taking (by Level B harassment) of small numbers of marine mammals, and have no more than a negligible impact on affected marine mammal stocks. Projected Level A harassment takes are very unlikely and would be limited to 3 species. No deaths or serious injuries to marine mammals or sea turtles are projected. If any marine mammals are displaced from preferred grounds, it will be for a short period of time (extending no greater than the structure removal activity itself). No critical habitat is involved in structure removal operations. Activities may disrupt behavioral patterns in a few individuals of a few species, but no effect is projected on annual recruitment or survival. With proposed mitigation measures in place, the potential impacts on marine mammals are expected to be negligible and at the lowest level practicable.

#### ESA

Under section 7 of the ESA, MMS has begun consultation on the proposed explosive severance activity. NMFS will also consult on the issuance of regulations and LOAs under section 101(a)(5)(A) of the MMPA for this activity. Consultation will be concluded prior to a determination on the issuance of regulations.

#### NEPA

MMS completed and released its PEA to the public for review on February 28, 2005. That document is available (see ADDRESSES) to the public. NMFS is reviewing the PEA and will either adopt it or prepare its own NEPA document before making a determination on the issuance of regulations and LOAs for this activity.

#### Information Solicited

NMFS requests interested persons to submit comments, information, and suggestions concerning MMS'

application and this proposed rule. NMFS requests commenters also read the MMS application and PEA on this action prior to submitting comments.

#### Classification

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

The Chief Counsel for 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. If implemented, this rule would authorize takings of marine mammals, otherwise prohibited by the MMPA, incidental to the explosive removal of offshore oil and gas structures in the GOM. Most offshore structures are owned by large- and medium-sized oil and gas companies and by definition, are not small businesses. However, this rule may affect a number of contractors providing services related to the demolition of these structures and monitoring marine mammal takes. Some of the affected contractors may be small businesses, but the number involved are very small. Further, since the authorization to incidentally take marine mammals by this activity facilitates structure removal, implementation of this rulemaking action would lead to the need for their services. As a result, the economic impact on them would be beneficial. Because of this certification, a regulatory flexibility analysis is not required and none has been prepared.

Notwithstanding any other provision of law, no person is required to respond to nor shall a person be subject to a penalty for failure to comply with a collection of information subject to the requirements of the Paperwork Reduction Act (PRA) unless that collection of information displays a currently valid OMB control number. This proposed rule contains collection-of-information requirements subject to the provisions of the PRA. These requirements have been approved by OMB under control number 0648-0151, and include applications for LOAs, and reports.

The reporting burden for the approved collections-of-information is estimated to be approximately 3 hours for each company applying for an annual LOA. As in previous years, NMFS expects that approximately 20–30 companies to apply for LOAs annually. These estimates include the time for reviewing instructions, searching existing data sources,

gathering and maintaining the data needed, and completing and reviewing the collection-of-information. Send comments regarding these burden estimates, or any other aspect of this data collection, including suggestions for reducing the burden, to NMFS and OMB (see **ADDRESSES**).

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

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

Dated: March 31, 2006.

**James W. Balsiger,**

*Deputy Assistant Administrator for Regulatory Programs, 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 R is added and reserved.

3. Subpart S is added consisting of §§ 216.210 through 216.218 to read as follows:

#### **Subpart S—Taking of Marine Mammals Incidental to Explosive Severance Activities Conducted During Structure Removal Operations on the Outer Continental Shelf in the U.S. Gulf of Mexico**

Sec.

216.210 Specified activity and specified geographical region.

216.211 Effective dates.

216.212 Permissible methods of taking.

216.213 Prohibitions.

216.214 Definitions, terms, and criteria.

216.215 Mitigation.

216.216 Requirements for monitoring and reporting.

216.217 Letters of Authorization.

216.218 Renewal of, and modifications to, Letters of Authorization.

#### **Subpart S—Taking of Marine Mammals Incidental to Explosive Severance Activities Conducted During Structure Removal Operations on the Outer Continental Shelf in the U.S. Gulf of Mexico**

##### **§ 216.210 Specified activity and specified geographical region.**

(a) Regulations in this subpart apply only to the incidental taking of those marine mammal species specified in paragraph (b) of this section by U.S. citizens engaged in explosive severance activities conducted during offshore oil

and gas structure removal activities in areas within state and/or Federal waters in the U.S. Gulf of Mexico adjacent to the coasts of Texas, Mississippi, Louisiana, Alabama, and Florida. The incidental, but not intentional, taking of marine mammals by U.S. citizens holding a Letter of Authorization issued under §§ 216.106 and 216.217 is permitted during the course of severing pilings, well conductors, and related supporting structures, and other activities related to the removal of the oil and gas structure.

(b) The incidental take of marine mammals under the activity identified in paragraph (a) of this section is limited annually to a total of 1 bottlenose dolphin by Level A harassment and 457 marine mammals by Level B harassment, limited to the following species: sperm whale, pygmy sperm whale, dwarf sperm whale, Cuvier's beaked whale, Sowerby's beaked whale, Gervais' beaked whale, Blainville's beaked whale, rough-toothed dolphin, bottlenose dolphin, pantropical spotted dolphin, Atlantic spotted dolphin, spinner dolphin, Clymene dolphin, striped dolphin, Fraser's dolphin, Risso's dolphin, melon-headed whale, pygmy killer whale, false killer whale, killer whale, short-finned pilot whale, North Atlantic right whale, humpback whale, minke whale, Bryde's whale, sei whale, fin whale, and blue whale.

##### **§ 216.211 Effective dates.**

Regulations in this subpart are effective from July 15, 2006 through July 14, 2011.

##### **§ 216.212 Permissible methods of taking.**

The Holder of a Letter of Authorization issued pursuant to §§ 216.106 and 216.217, may incidentally, but not intentionally, take marine mammals by harassment within the area described in § 216.210(a), provided the activity is in compliance with all terms, conditions, and requirements of these regulations and the appropriate Letter of Authorization.

##### **§ 216.213 Prohibitions.**

Notwithstanding takings authorized by a Letter of Authorization issued under §§ 216.106 and 216.217, no person in connection with the activities described in § 216.210(a) shall:

(a) Take any marine mammal not specified in § 216.210(b);

(b) Take any marine mammal specified in § 216.210(b) in a manner or amount greater than described therein;

(c) Take a marine mammal specified in § 216.210(b) if such taking results in more than a negligible impact on the

species or stocks of such marine mammal;

(d) Violate, or fail to comply with, the terms, conditions, and requirements of these regulations or a Letter of Authorization issued under § 216.217;

(e) Take a marine mammal in violation of these regulations by using a charge with a weight greater than 500 lbs (227 kg);

(f) Take a marine mammal when conditions preclude conducting mitigation and monitoring requirements of these regulations or a Letter of Authorization.

**§ 216.214 Definitions, terms, and criteria.**

(a) *Definitions.* (1) *Below-mud-line or BML* means that the explosives are detonated below the water-mud interface, either inside or outside a pipe, other structure or cable.

(2) *Above-mud-line or AML* means that the explosives are detonated in the water column either inside or outside a pipe, other structure or cable.

(3) *Multiple charge detonation* means any explosive configuration where more than one charge is required in a single detonation event.

(4) *Scenario* means an alpha-numeric designation provided to describe charge size, activity location, and target design

employed in order to apply appropriate marine mammal monitoring measures.

(b) *Terms.* (1) *Impact zone (required for all scenarios).* The impact zone means the area (i.e., a horizontal radius around a decommissioning target) in which a marine mammal could be affected by the pressure and or acoustic energy released during the detonation of an explosive-severance charge.

(2) *Predetonation survey (required for all scenarios).* A predetonation (pre-det) survey means any marine mammal monitoring survey (e.g., surface, aerial, or acoustic) conducted prior to the detonation of any explosive severance tool.

(3) *Postdetonation survey (required for all scenarios).* A postdetonation (post-det) survey means any marine mammal monitoring survey (e.g., surface, aerial, or post-post-det aerial) conducted after the detonation event occurs.

(4) *Waiting period (required for all scenarios).* Variable by scenario, the waiting period refers to the time in which detonation operations must hold before the requisite monitoring survey(s) can be reconducted.

(5) *Company observer (for scenarios A1–A4 only).* Trained company observers are authorized to perform

marine mammal detection surveys for “very-small” blasting scenarios A1–A4.

(6) *Trained observer (for scenarios B1–E4).* Trained observers are observers trained and approved by an instructor with experience as a NMFS Platform Removal Observer Program trainer. Trained observers are required to perform marine mammal detection surveys for all detonation scenarios with the exception of scenarios A1–A4. Two observers will be assigned to each operation for detection survey duties. However, because mitigation-scenarios C2, C4, D2, D4, E2, and E4 require a minimum of three observers for the simultaneous surface, aerial, and acoustic surveys, at least two “teams” of observers will be required.

(c) *Blasting category parameters and associated severance scenarios.* To determine the appropriate marine mammal mitigation and monitoring requirements in §§ 216.217 and 216.218, holders of Letters of Authorization under this subpart must determine, from this table, the appropriate explosive severance scenario to follow for the blasting category, biological zone, and charge configuration for their activity.

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Blasting Category	Charge Range	Configuration	Impact Zone Radius (ft.)	Species-Delineation Zone	Scenario
Very-Small	0-10 lb	BML	856	Shelf (<200 m)	A1
		BML	856	Slope (>200 m)	A2
	0-5 lb	AML	961	Shelf (<200 m)	A3
		AML	961	Slope (>200 m)	A4
Small	>10-20 lb	BML	1224	Shelf (<200 m)	B1
		BML	1224	Slope (>200 m)	B2
	>5-20 lb	AML	1714	Shelf (<200 m)	B3
		AML	1714	Slope (>200 m)	B4
Standard	>20-80 lb	BML	2069	Shelf (<200 m)	C1
		BML	2069	Slope (>200 m)	C2
	>20-80 lb	AML	2721	Shelf (<200 m)	C3
		AML	2721	Slope (>200 m)	C4
Large	>80-200 lb	BML	3086	Shelf (<200 m)	D1
		BML	3086	Slope (>200 m)	D2
	>80-200 lb	AML	3693	Shelf (<200 m)	D3
		AML	3693	Slope (>200 m)	D4
Specialty	>200-500 lb	BML	4916	Shelf (<200 m)	E1
		BML	4916	Slope (>200 m)	E2
	>200-500 lb	AML	5012	Shelf (<200 m)	E3
		AML	5012	Slope (>200 m)	E4

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**§ 216.215 Mitigation.**

The activity identified in § 216.210(a) must be conducted in a manner that minimizes, to the greatest extent practicable, adverse impacts on marine mammals and their habitats. When conducting operations identified in § 216.210(a), all mitigation measures contained in the Letter of Authorization issued under §§ 216.106 and 216.217 must be implemented. Any mitigation measures proposed to be contained in a Letter of Authorization that are not specified in this subpart, or not considered an emergency requirement under § 216.218(d), will first be subject to public notice and comment through publication in the **Federal Register**, as provided by § 216.218(c). When using explosives, the following mitigation measures must be carried out:

(a)(1) If marine mammals are observed within (or about to enter) the relevant marine mammal impact zone identified in § 216.214 (c) column 4 for the relevant charge range and configuration (i.e., BML or AML) for the activity, detonation must be delayed until the

marine mammal(s) are outside that zone;

(2) Required pre-detonation surveys must begin no earlier than 1 hour after sunrise and detonations must not occur if the post-detonation survey cannot be concluded prior to 1 hour before sunset;

(3) Whenever weather and/or sea conditions preclude adequate aerial, shipboard or subsurface marine mammal monitoring as determined by the trained observer, detonations must be delayed until conditions improve sufficiently for marine mammal monitoring to be undertaken or resumed;

(4) Whenever the weather and sea conditions prevent implementation of the aerial survey monitoring required under

§ 216.216(c)(2), the aerial survey must be repeated prior to detonation of charges; and

(5) Multiple charge detonations must be staggered at an interval of 0.9 sec (900 msec) between blasts.

(b) If a marine mammal/sea turtle is found shocked, injured, or dead, the explosive severance activity will immediately cease and the holder of the Letter of Authorization, designee or the lead observer will contact the Minerals Management Service and the Regional Administrator, National Marine Fisheries Service' Southeast Regional Office, or designee at the earliest opportunity.

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

(a) Holders of Letters of Authorization issued for activities described in § 216.210(a) are 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.

(b) Holders of Letters of Authorization must fully comply with the relevant mitigation and monitoring program for the explosive-severance activity that corresponds to the blast scenario in § 216.216(e).

(c) Holders of Letters of Authorization must ensure that the following

monitoring programs are conducted as appropriate for the required monitoring scenario.

(1) *Surface monitoring survey.* Surface monitoring surveys must be conducted for all scenarios for the period of time that corresponds to the appropriate explosive severance scenario. Surface monitoring surveys are to be conducted from the highest vantage point available on the structure being removed or proximal surface vessels (i.e., crewboats, derrick barges, etc.). Surface surveys are restricted to daylight hours only, and the monitoring will cease upon inclement weather or when the lead observer determines that marine conditions are not adequate for visual observations.

(2) *Aerial monitoring survey.* Aerial surveys are required for all explosive severance scenarios except monitoring scenarios A1–A4. Aerial monitoring surveys are to be conducted from helicopters running standard low-altitude search patterns over the extent of the potential impact area that corresponds to the appropriate explosive severance scenario. Aerial surveys will be restricted to daylight hours only, and cannot begin until the requisite surface monitoring survey has been completed. Aerial surveys will cease upon onset of inclement weather or when marine conditions are not adequate for visual observations as determined by the lead observer, or when the pilot/removal supervisor determines that helicopter operations must be suspended.

(3) *Acoustic monitoring survey.* Acoustic monitoring surveys are required to be conducted on all Standard, Large, and Specialty blasting scenarios conducted at slope ( $\leq 200$  m (656 ft)) locations (i.e., scenarios C2, C4, D2, D4, E2, and E4). Persons conducting acoustic surveys will be required to use NMFS-approved passive acoustic monitoring devices and technicians. Acoustic surveys will be run concurrent with requisite pre-detonation surveys; beginning with the surface observations and concluded at the finish of the aerial surveys when the detonation(s) is allowed to proceed.

(4) *Post-detonation surface monitoring survey.* A 30-minute post-detonation surface survey must be conducted by the trained observer for scenarios A1 - A4 immediately upon conclusion of the detonation.

(5) *Post-detonation aerial monitoring survey.* For scenarios B1–D4, a 30-minute aerial survey must be conducted immediately upon conclusion of the detonation. For scenarios E1–E4, a 45-minute aerial survey must be conducted immediately upon conclusion of the detonation.

(6) *Post-post-detonation aerial monitoring survey.* Post- post-detonation aerial monitoring surveys must be conducted for scenarios C4, D2, D4, E2 and E4 within 2–7 days after detonation activities conclude, by either helicopter or fixed-wing aircraft. Observations are to start at the removal site and proceed leeward and outward of wind and current movement. Any injured or dead

marine mammals will be noted in the survey report, and if possible, tracked and collected after notifying the National Marine Fisheries Service within the time requirements stated in § 216.216(f).

(7) If unforeseen conditions or events occur during an explosive severance operation that may necessitate additional monitoring not specified in this paragraph, the lead biological observer will contact the appropriate National Marine Fisheries Service and Minerals Management Service personnel as detailed in the Letter of Authorization for additional guidance.

(d) Holders of Letters of Authorization must conduct all monitoring and/or research required under the Letter of Authorization. Any monitoring or research measures proposed to be contained in a Letter of Authorization that are not specified in this subpart or not considered an emergency requirement under § 216.218(d), will first be subject to public notice and comment through publication in the **Federal Register**, as provided by § 216.218(c).

(e) The following table summarizes the required survey mode and duration for all blasting scenarios of marine mammal impact zones for implementation of surface and aerial monitoring requirements depending upon charge weight and severance scenario.

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Blasting Category	Impact Zone Radius	Scenario	Pre-Det Surface Survey (min)	Pre-Det Aerial Survey (min)	Pre-Det Acoustic Survey (min)	Post-Det Surface Survey (min)	Post-Det Aerial Survey (min)	Post-Post-Det Aerial Survey (Yes/No)
Very-Small	261 m (856 ft)	A1	60	N/A	N/A	30	N/A	No
		A2	90	N/A	N/A	30	N/A	No
	293 m (961 ft)	A3	60	N/A	N/A	30	N/A	No
		A4	90	N/A	N/A	30	N/A	No
Small	373 m (1,224 ft)	B1	90	30	N/A	N/A	30	No
		B2	90	30	N/A	N/A	30	No
	522 m (1,714 ft)	B3	90	30	N/A	N/A	30	No
		B4	90	30	N/A	N/A	30	No
Standard	631 m (2,069 ft)	C1	90	30	N/A	N/A	30	No
		C2	90	30	120	N/A	30	No
	829 m (2,721 ft)	C3	90	45	N/A	N/A	30	No
		C4	90	60	150	N/A	30	Yes
Large	941 m (3,086 ft)	D1	120	45	N/A	N/A	30	No
		D2	120	60	180	N/A	30	Yes
	1,126m (3,693ft)	D3	120	60	N/A	N/A	30	No
		D4	150	60	210	N/A	30	Yes
Specialty	1,500 m (4,916 ft)	E1	150	90	N/A	N/A	45	No
		E2	180	90	270	N/A	45	Yes
	1,528 m (5,012 ft)	E3	150	90	N/A	N/A	45	No
		E4	180	90	270	N/A	45	Yes

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(f) *Reporting* (1) A report summarizing the results of structure removal activities, mitigation measures, monitoring efforts, and other information as required by a Letter of Authorization, must be submitted to the Director, Office of Protected Resources, within 30 days of completion of the removal activity.

(2) The National Marine Fisheries Service will accept the trained observer report as the activity report if all requirements for reporting contained in the Letter of Authorization are provided to that observer before the observer's report is submitted.

(3) If a marine mammal/sea turtle is found shocked, injured, or dead, the Holder of the Letter of Authorization, or designee, must report the incident to the National Marine Fisheries Service' Southeast Regional Office, at the earliest opportunity.

**§ 216.217 Letters of Authorization.**

(a) To incidentally take marine mammal species listed in § 216.210(b) pursuant to these regulations, each company or contractor responsible for

the removal of the structure or an industry-related seafloor obstruction in the area specified in § 216.210(a) must apply for and obtain either a Letter of Authorization in accordance with § 216.106 or a renewal under § 216.218(a).

(b) An application for a Letter of Authorization must be submitted to the National Marine Fisheries Service at least 30 days before the explosive removal activity is scheduled to begin.

(c) Issuance and renewal of a Letter of Authorization will be based on a determination that the number of cetaceans taken annually by the activity will be small, that the total number of marine mammals taken by the activity as a whole will have no more than a negligible impact on the species or stock of affected marine mammal(s), and will not have an unmitigable adverse impact on the availability of species or stocks of marine mammals for taking for subsistence uses.

(d) A Letter of Authorization, unless suspended, revoked or not renewed, will be valid for a period of time not to

exceed the period of validity of this subpart, but may be renewed annually subject to annual renewal conditions in § 216.218(a).

(e) A copy of the Letter of Authorization must be in the possession of the persons conducting activities that may involve incidental takings of marine mammals.

(f) Notice of issuance or denial of a Letter of Authorization will be published in the **Federal Register** within 30 days of a determination.

**§ 216.218 Renewal of, and modifications to, Letters of Authorization.**

(a) A Letter of Authorization issued under § 216.106 for the activity identified in § 216.210(a) will be renewed annually upon:

(1) Timely receipt of the report(s) required under § 216.216(f), which have been reviewed by the Assistant Administrator and determined to be acceptable; and

(2) A determination that the mitigation measures required under § 216.215 and the Letter of Authorization have been undertaken.

(b) Notice of issuance of a renewal of the Letter of Authorization will be published in the **Federal Register** within 30 days of a determination.

(c) 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. For purposes of this paragraph, renewal of a Letter of Authorization under

§ 216.218, without modification other than an effective date change, is not considered a substantive modification.

(d) 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 § 216.210(b), the

Letter of Authorization issued pursuant to § 216.106, or renewed pursuant to this paragraph may be substantively modified without prior notice and an opportunity for public comment, pursuant to the Administrative Procedure Act. A notice will be published in the **Federal Register** subsequent to the action.

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