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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAI'I

CONSERVATION COUNCIL FOR HAWAI'I, a non-profit corporation;)	CIVIL NO.
ANIMAL WELFARE INSTITUTE, a non-profit corporation;)	
CENTER FOR BIOLOGICAL DIVERSITY, a non-profit corporation; and OCEAN MAMMAL INSTITUTE, a non-profit corporation,)	COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF
)	
Plaintiffs,)	
)	
v.)	
)	
NATIONAL MARINE FISHERIES SERVICE; UNITED STATES DEPARTMENT OF COMMERCE; PENNY PRITZKER, Secretary of Commerce,)	
)	
Defendants.)	
)	
)	

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs Conservation Council for Hawai‘i, Animal Welfare Institute, the Center for Biological Diversity, and Ocean Mammal Institute (collectively, “Plaintiffs”) complain of defendants National Marine Fisheries Service (“NMFS”), United States Department of Commerce, and Penny Pritzker, in her official capacity as Secretary of the Department of Commerce, (collectively, “Defendants”) as follows:

INTRODUCTION

1. By this Complaint, Plaintiffs seek to compel NMFS to comply with the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321 et seq., in connection with its promulgation of Five-Year Regulations and its issuance of Letters of Authorization (“LOAs”) under the Marine Mammal Protection Act (“MMPA”), 16 U.S.C. §§ 1361 et seq., authorizing U.S. Navy training and testing activities in the Hawaii-Southern California Training and Testing (“HSTT”) Study Area.

2. The Navy’s HSTT Study Area extends over an area as large as the combined land mass of all fifty of the United States. The HSTT Study Area includes the at-sea portions of: (1) the Hawaii Range Complex, which encompasses approximately 2.7 million square nautical miles of ocean around the major islands of the Hawaiian Islands chain, extending from 16 degrees north latitude to 43 degrees north latitude and from 150 degrees west longitude to the

International Date Line; (2) the Southern California Range Complex, which includes San Diego Bay and encompasses approximately 120,000 square nautical miles of ocean between Dana Point and San Diego, California; (3) the Silver Strand Training Complex, which comprises training areas located on and adjacent to the Silver Strand, a narrow, sandy isthmus separating the San Diego Bay from the Pacific Ocean; (4) pierside locations in San Diego Bay, California and Pearl Harbor, Hawai‘i; and (5) a transit corridor for vessels and aircraft en route between Southern California and Hawai‘i.

3. The waters of the HSTT Study Area include some of the most biologically significant and productive marine areas in the world. They are home to at least forty-three (43) species of marine mammals, including five endangered whale species (blue, fin, humpback, sei and sperm), endangered Hawai‘i insular false killer whales, endangered Hawaiian monk seals, and threatened Guadalupe fur seals.

4. While the Navy has conducted training and testing in the biologically rich HSTT Study Area for decades, it recently announced plans to increase the intensity and scope of its activities. Because of the inherent threat of harm to marine mammals associated with Navy training and testing activities, the Navy sought authorization for its proposed course of action from NMFS, the federal agency responsible under the MMPA for protecting marine mammals.

5. On or about December 13, 2013, NMFS issued a record of decision based on the Navy's August 2013 final Hawaii-Southern California Training and Testing Environmental Impact Statement ("EIS")/Overseas EIS, promulgating Five-Year Regulations and issuing LOAs under the MMPA to authorize the most environmentally destructive of the alternatives the Navy analyzed for training and testing in the HSTT Study Area during the period December 26, 2013, through December 25, 2018.

6. Among other things, NMFS authorized Navy training and testing over the next five years that will emit nearly 60,000 hours of the Navy's most powerful mid-frequency active sonar and over 450,000 hours of other mid-frequency sonar, low-frequency sonar, high-frequency sonar, and other sound sources into the biologically diverse waters of the HSTT Study Area.

7. There is no scientific doubt that intense acoustic energy from Navy sonar and other active sound sources can kill, injure, or significantly alter the behavior of marine mammals, whose sensitive hearing and reliance on sound for communication, foraging, and avoidance of predators make them particularly vulnerable. Scientists have documented mass strandings; mortal injuries, including lesions and hemorrhaging in vital organs; and behavioral changes in numerous marine mammal species following naval sonar training exercises around the world.

8. In addition to the use of sonar and other active acoustic sources, NMFS authorized the Navy to use more than 260,000 explosives in the HSTT Study Area from December 2013 to December 2018.

9. Underwater explosive detonations send shock waves and sound energy through the water that can kill or injure marine mammals. Even where animals escape physical injury, the use of military explosives can significantly alter their behaviors.

10. NMFS determined that, over the next five years, the Navy's use of sonar, other active acoustic sources and explosives for training and testing in the HSTT Study Area will likely result in the deaths of up to 140 marine mammals, cause permanent injury to more than 2,000 additional marine mammals, and inflict additional harm to marine mammals nearly 9.6 million times by disrupting vital behaviors such as migration, nursing, breeding, feeding, and sheltering. NMFS and the Navy concluded that, during the same period, Navy vessels engaged in training or testing in the HSTT Study Area may kill up to fifteen (15) additional large whales, including endangered blue, fin, humpback, sei and sperm whales.

11. Under NEPA, before NMFS authorized the Navy to inflict this harm on protected marine mammals, it was obliged to make its decision based on an EIS that examined a range of alternate courses of action, including alternatives that could be pursued with less environmental damage. NMFS unlawfully failed to comply with this legal mandate.

12. As described more fully below, NMFS's decision to authorize the Navy to proceed with training and testing activities in the HSTT Study Area is arbitrary, capricious, and contrary to law, in violation of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701 et seq. NMFS cannot lawfully promulgate Five-Year Regulations or issue LOAs to authorize the Navy to kill and injure marine mammals in the HSTT Study Area unless and until NMFS fully complies with NEPA.

JURISDICTION AND VENUE

13. The Court has subject matter jurisdiction over the claims for relief in this action pursuant to 5 U.S.C. §§ 701-706 (actions under the APA); 28 U.S.C. § 1331 (actions arising under the laws of the United States); 28 U.S.C. § 1361 (actions to compel an officer of the United States to perform his duty); and 28 U.S.C. §§ 2201-02 (power to issue declaratory judgments in cases of actual controversy).

14. Venue lies properly in this judicial district by virtue of 28 U.S.C. § 1391(e) because this is a civil action in which officers or employees of the United States or an agency thereof are acting in their official capacity or under color of legal authority, a substantial part of the events or omissions giving rise to the claims occurred in this judicial district, and plaintiff Conservation Council for Hawai'i resides here.

PARTIES

Plaintiffs

15. Plaintiff Conservation Council for Hawai‘i (“CCH”) is a Hawai‘i-based, non-profit citizens’ organization founded in 1950. CCH has approximately 5,800 members in Hawai‘i, the continental United States, and foreign countries. CCH is the Hawai‘i state affiliate of the National Wildlife Federation, a non-profit membership organization with over 4 million members and supporters nationwide.

16. CCH’s mission is to protect native Hawaiian species, including threatened and endangered species, and to restore native Hawaiian ecosystems for future generations. In this capacity, CCH and its members frequently testify at the state legislature on various bills relating to the protection of the environment, testify before administrative agencies on proposed regulations relating to species conservation, communicate with Hawai‘i’s congressional delegation and staff, review and comment on environmental impact statements, support scientific studies and research, engage in field work to survey Hawai‘i’s natural resources, participate in service projects to protect native species and ecosystems, prepare educational materials, including an annual wildlife poster featuring native Hawaiian flora and fauna, and publish a periodic newsletter (*Kolea, News from the Conservation Council for Hawai‘i*) discussing environmental issues in Hawai‘i. This year’s wildlife poster, which CCH distributes free of charge to every public, charter, and private school in Hawai‘i, features the critically endangered Hawaiian

monk seal. Past posters have featured endangered humpback whales and other marine life threatened by Navy activities in the HSTT Study Area.

17. CCH participated in public review of and comment on the HSTT EIS. Among other things, CCH pointed out the HSTT EIS's failure to comply with NEPA's mandate to consider reasonable alternatives that would cause less environmental harm and to evaluate a true "no action" alternative. CCH informed both NMFS and the Navy that the EIS's fatal flaws precluded either agency from relying on the EIS to support decisions related to HSTT activities.

18. CCH and its members have advocated increased protection for marine life, including support for a statewide ban on lay gillnets and establishment of marine protected areas, and have participated in beach clean-ups. CCH has also produced a series of wildlife viewing interpretive signs to help protect whales, dolphins, monk seals, sea turtles, coral reef fishes, and birds.

19. CCH members include wildlife biologists and others who study and enjoy native Hawaiian marine life, including whales and dolphins, monk seals, sea turtles and other marine life. CCH has many members who are Hawai'i residents, including native Hawaiian practitioners, fishers, and gatherers who depend on healthy marine ecosystems. CCH members who live outside Hawai'i regularly visit the islands to enjoy Hawai'i's native wildlife and natural areas. CCH brings this action on behalf of itself and its adversely affected members and staff.

20. Plaintiff Animal Welfare Institute (“AWI”) is a national non-profit charitable organization founded in 1951 and dedicated to reducing animal suffering caused by people. AWI has approximately 31,000 members and supporters worldwide, including members who live in Hawai‘i and Southern California.

21. AWI engages policymakers, scientists, industry, and the public to achieve better treatment of animals everywhere – in the laboratory, on the farm, in commerce, at home, and in the wild. For wild species, AWI advocates for both imperiled and common species.

22. AWI focuses on improving the conservation of protected or imperiled species by opposing human activities that cause harassment and habitat degradation, fragmentation, and destruction. Through advocacy, litigation, legislative efforts, research, and education, AWI acts to safeguard endangered or threatened wild animals and their habitats and to implement humane solutions to human-wildlife conflicts. AWI works with national and local governments and other policymakers to protect animals, often by preventing actions damaging to species and by promoting effective and safe wildlife protection laws and regulations.

23. Members of AWI include researchers, divers, surfers, whale watchers, and other citizens who live in Southern California and the Hawaiian Islands, as well as members who regularly travel there specifically because of the presence of diverse marine species. These members regularly seek out opportunities to

observe, listen to, photograph and study marine wildlife, including marine mammals, in Hawai‘i and Southern California waters.

24. AWI is involved in all aspects of protecting marine wildlife, including cetaceans, in Hawai‘i and Southern California, from speaking and lobbying on their behalf in international forums such as the International Whaling Commission, Convention on Biological Diversity, and Convention on the International Trade in Endangered Species of Wild Fauna and Flora, educating constituents and members about cetaceans and the threats they face and monitoring domestic legislation and research that may affect their well-being, to participating in litigation to curb the U.S. Navy’s use of mid-frequency active sonar in antisubmarine exercises in Hawai‘i waters, participating in at-sea research to assess marine mammal responses to active sonar during U.S. Navy exercises, participating in U.S. Navy and NMFS workshops on ocean noise, and providing public comment on environmental documentation for Navy anti-submarine warfare training exercises. AWI has participated in public review of and comment on the Navy’s 2005 Draft Overseas EIS for the Undersea Warfare Training Range, the Navy’s 2005 Draft Supplemental EIS for its Surveillance Towed Array Sensor System Low Frequency Active Sonar, the Navy’s 2006 environmental assessment for the Rim of the Pacific Exercise (“RIMPAC”), the Navy’s 2006 Draft EIS/Overseas EIS for its Undersea Warfare Training Range, and the Navy’s 2007 Draft EIS/Overseas EIS for the Hawaii Range Complex, among others.

25. Most recently, AWI participated in public review of and comment on both the Navy's HSTT EIS and NMFS's rulemaking under the MMPA to authorize harm to marine mammals associated with the Navy's HSTT activities. Among other things, AWI pointed out the HSTT EIS's failure to comply with NEPA's mandate to consider reasonable alternatives that would cause less environmental harm and to evaluate a true "no action" alternative. AWI informed both NMFS and the Navy that the EIS's fatal flaws precluded either agency from relying on the EIS to support decisions related to HSTT activities.

26. AWI serves as the Pacific Islands representative to the International Ocean Noise Coalition, a partnership of over 150 non-governmental organizations ("NGOs") created to address the need for a global approach to combating human-generated ocean noise. This umbrella organization serves the critical role of relaying information to the United Nations on behalf of the participating NGOs. AWI has consistently represented the International Ocean Noise Coalition at meetings of the United Nations and has provided opening statements on the ocean noise issue at meetings of the United Nations Open-ended Informal Consultative Process on Oceans and the Law of the Sea, the First Global Integrated Marine Assessment of the Regular Process, and the Ad Hoc Open-ended Informal Working Group to study issues relating to the conservation and sustainable use of marine biodiversity beyond areas of national jurisdiction.

27. The Navy training and testing activities that NMFS authorized will adversely affect AWI's organizational interests, as well as its members' ability to protect, study, observe, and enjoy marine mammals and other marine species in Hawai'i and Southern California waters that will be adversely affected by the proposed HSTT activities. AWI brings this action on behalf of itself and its adversely affected members and staff.

28. Plaintiff Center for Biological Diversity (the "Center") is a non-profit corporation with over 40,000 members and offices in Los Angeles, California, San Francisco, California, and other cities. The Center is dedicated to the preservation, protection, and restoration of biodiversity, native species, and ecosystems. The Center has members who reside throughout California and Hawai'i and who use the areas that serve as habitat for the marine mammals and other wildlife harmed by the Navy's training and testing activities in the HSTT Study Area.

29. Center members and staff include local residents with educational, scientific research, aesthetic, spiritual, and recreational interests in marine mammals and other species adversely affected by the Navy's training and testing activities in the HSTT Study Area. For years, the Center, its members, and staff have participated in efforts to protect and preserve these species and their habitat, including efforts to reduce ship collisions with whales and the entanglement of whales in fishing gear along the Pacific Coast, litigation to protect false killer whales, Hawaiian monk seals and sea turtles from harmful interactions

with commercial fishing in the waters off Hawai‘i and California, and litigation to address the harmful effects of Navy activities on marine mammals.

30. The Center participated in public review of and comment on both the Navy’s HSTT EIS and NMFS’s rulemaking under the MMPA to authorize harm to marine mammals associated with the Navy’s HSTT activities. Among other things, the Center pointed out the HSTT EIS’s failure to comply with NEPA’s mandate to consider reasonable alternatives that would cause less environmental harm and to evaluate a true “no action” alternative. The Center informed both NMFS and the Navy that the EIS’s fatal flaws precluded either agency from relying on the EIS to support decisions related to HSTT activities.

31. The Center’s members and staff have researched, studied, observed, and sought protection for many federally-listed threatened and endangered species that inhabit the Pacific, including species that would be harmed by the HSTT activities that NMFS authorized. The Center’s members and staff regularly use, and plan to continue to use, waters of the Pacific Ocean off Southern California and Hawai‘i for observation, research, aesthetic enjoyment, and other recreational, scientific, and educational activities. The Center’s members and staff derive educational, scientific, recreational, conservation, spiritual, and aesthetic benefits from observing marine species in the wild. The Center brings this action on behalf of itself and its adversely affected members and staff.

32. Plaintiff Ocean Mammal Institute (“OMI”) is a non-profit organization dedicated to furthering the protection of marine life and marine ecosystems through ecologically sensitive research on cetaceans and their interactions with humans. OMI’s programs have three goals: (1) to study the impact of human marine activities, including noise pollution, on whales and dolphins; (2) to apply the results of its research to protect marine mammals and their environment; and (3) to allow people to participate fully in OMI’s research in order to educate them about important conservation issues and empower them to act responsibly.

33. In furtherance of its mission, OMI conducts research in Hawai‘i on the impact of vessel traffic and noise on whales and dolphins and on their social vocalizations; offers college-level educational programs in Hawai‘i on cetaceans; leads educational expeditions in Hawai‘i waters to teach about cetaceans and biodiversity; and runs research programs that provide interns with the opportunity to directly observe the impacts of humans on cetacean behavior and habitat in Hawai‘i’s waters.

34. Members of OMI’s staff and participants in OMI’s programs regularly use and enjoy – and plan to continue using and enjoying – for wildlife viewing, education and scientific study the near- and off-shore waters that will be affected by the Navy training and testing activities that NMFS authorized, and the wildlife that inhabits those waters. Thus, the quality of life maintained in Hawai‘i’s marine

environment directly affects OMI's scientific, economic, and conservation interests and its ability to carry out its mission.

35. In the past, OMI and its staff have consistently participated in activities directed toward the protection of Hawai'i's marine mammals and their habitats, including giving lectures on the impact of ocean noise on whales and other marine life; testifying against the use of parasail and jet skis in humpback whale habitat; encouraging the Hawaiian Islands Humpback Whale National Marine Sanctuary to develop whale protection plans; voicing their opposition at hearings in Hawai'i to programs, including the use of active sonar, that adversely affect whales and their habitat; participating in litigation to halt the testing of low-frequency active sonar in Hawai'i; and providing public comment on NEPA documentation for other Navy anti-submarine warfare training exercises, including the Navy's 2006 RIMPAC environmental assessment.

36. OMI participated in public review of and comment on both the Navy's HSTT EIS and NMFS's rulemaking under the MMPA to authorize harm to marine mammals associated with the Navy's HSTT activities. Among other things, OMI pointed out the HSTT EIS's failure to comply with NEPA's mandate to consider reasonable alternatives that would cause less environmental harm and to evaluate a true "no action" alternative. OMI informed both NMFS and the Navy that the EIS's fatal flaws precluded either agency from relying on the EIS to support decisions related to HSTT activities.

37. By inflicting death, injury and behavioral disruption on the marine mammals found in the HSTT Study Area, the Navy training and testing activities that NMFS authorized will frustrate OMI's mission to protect marine mammals and their environment. By reducing the number of marine mammals in Hawai'i waters available for study, the Navy activities that NMFS authorized will harm OMI's mission to teach students how to do research on cetaceans. Furthermore, by disrupting the migration, feeding, breeding, nursing and other behaviors of those marine mammals that remain in Hawai'i waters, the Navy activities that NMFS authorized will frustrate OMI's mission to conduct research on normal marine mammal behaviors.

38. To prevent the frustration of its organizational mission, OMI has diverted its scarce resources from other efforts in order to promote public awareness of the threats the Navy's proposed training and testing pose to marine mammals in the HSTT Study Area and to urge, during the public review periods on the HSTT EIS and on rulemaking under the MMPA, NMFS and the Navy to protect marine mammals and marine environments by prohibiting, or at least restricting, training and testing in biologically sensitive marine habitats. Having failed to convince NMFS to do so, OMI now diverts limited resources to prosecute this lawsuit, seeking to protect its organizational interests by compelling NMFS to comply with NEPA.

39. Members of the plaintiff organizations live, work, and/or recreate in the marine areas encompassed by the Navy training and testing that NMFS authorized. They derive aesthetic, recreational, scientific, cultural, inspirational and educational benefits from the marine ecosystems affected by these NMFS-authorized activities and from the existence of marine mammals and other wildlife in the wild. Plaintiffs and their members observe and study these species, make guided and unguided whale watching trips, and pursue underwater diving and photography to observe these species in their native habitats. Plaintiffs derive aesthetic, recreational, scientific, cultural, inspirational and educational benefits from these activities and have an interest in preserving the opportunity to engage in them in the future. The expectation and understanding that marine wildlife are present and healthy in their native waters is integral to plaintiffs' and their members' use and enjoyment of these waters.

40. Plaintiffs and their members will suffer irreparable injury to their aesthetic, recreational, scientific, cultural, inspirational and educational interests unless NMFS revisits its decisions authorizing training and testing in the HSTT Study Area based on an EIS that complies fully with NEPA.

Defendants

41. Defendant National Marine Fisheries Service is an agency of the National Oceanic and Atmospheric Administration ("NOAA") of the United States

Department of Commerce, and is sometimes referred to as “NOAA Fisheries.” NMFS is the federal agency responsible for administering MMPA provisions that regulate the Navy’s activities in the HSTT Study Area, including the provisions governing Five-Year Regulations and Letters of Authorization. NMFS is responsible for complying with NEPA in connection with the promulgation of Five-Year Regulations and the issuance of LOAs.

42. Defendant U.S. Department of Commerce is the federal agency with ultimate responsibility for implementing and enforcing compliance with provisions of law that have been violated as alleged in this Complaint.

43. Defendant Penny Pritzker is sued in her official capacity as the Secretary of the Department of Commerce.

LEGAL LANDSCAPE

Marine Mammal Protection Act

44. Congress enacted the Marine Mammal Protection Act out of concern that “certain species and populations stocks of marine mammals are, or may be, in danger of extinction or depletion as a result of man’s activities.” 16 U.S.C. § 1361(1). It declared that “such species and population stocks should not be permitted to diminish beyond the point at which they cease to be a significant functioning element in the ecosystem of which they are a part” Id. § 1361(2). Congress directed that, “[i]n particular, efforts should be made to protect essential

habitats, including the rookeries, mating grounds, and areas of similar significance for each species of marine mammal from the adverse effect of man's actions." Id.

45. To accomplish its goals, the MMPA prohibits the "take" of marine mammals, unless the take falls within certain statutory exceptions. Id. § 1371(a).

Under the MMPA, "take" means "to harass, hunt, capture, collect, or kill, or attempt to harass, hunt, capture, or kill, any marine mammal." Id. § 1362(13).

46. For military readiness activities, the MMPA defines "harassment" as:

- (i) any act that injures or has the significant potential to injure a marine mammal or marine mammal stock in the wild [Level A harassment]; or
- (ii) any act that disturbs or is likely to disturb a marine mammal or marine mammal stock in the wild by causing disruption of natural behavioral patterns, including, but not limited to, migration, surfacing, nursing, breeding, feeding, or sheltering, to a point where such behavioral patterns are abandoned or significantly altered. [Level B harassment].

Id. § 1362(18)(B); see also id. § 1362(18)(C), (D).

47. The Secretary of Commerce, acting through NMFS, administers the MMPA with respect to the cetaceans (whales, dolphins and porpoises) and pinnipeds (seals and sea lions) at issue in this case. Id. § 1362(12)(A)(i).

48. Under MMPA section 101(a)(5)(A), NMFS may authorize the incidental, non-intentional take of marine mammals during periods of up to five consecutive years. Id. § 1371(a)(5)(A)(i)(I). In the case of a military readiness activity, to authorize incidental take, NMFS must determine that "the total of such

taking during each five-year (or less) period concerned will have a negligible impact on such species or stock and will not have an unmitigable adverse impact on the availability of such species or stock for taking for subsistence uses” Id.; see also id. § 1371(a)(5)(F)(i).

49. “Negligible impact” means “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.” 50 C.F.R. § 216.103.

50. If NMFS makes the required findings, it must promulgate regulations that prescribe:

- (aa) permissible methods of taking pursuant to such activity, and other means of effecting the least practicable adverse impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stock for subsistence uses; and
- (bb) requirements pertaining to the monitoring and reporting of such taking.

16 U.S.C. § 1371(a)(5)(A)(i)(II).

51. For military readiness activities, NMFS’s “least practicable adverse impact” determination “shall include consideration of personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity,” in consultation with the Department of Defense. Id. § 1371(a)(5)(A)(ii).

52. The MMPA's implementing regulations establish a multi-step process for issuing take authorizations under Section 101(a)(5)(A), which consists of (1) promulgating specific regulations governing the take incidental to the specified activities and (2) the issuance of Letters of Authorization under those regulations.

53. If, after public review, NMFS finds that the requested taking by the specified activity meets the statutory criteria, NMFS must promulgate specific regulations for the allowed activities setting forth "permissible methods of taking" and "[m]eans of effecting the least practicable adverse impact on the species and its habitat and on the availability of the species for subsistence uses." 50 C.F.R. § 216.105(b).

54. An LOA "is required to conduct activities pursuant to any regulations established under § 216.105." Id. § 216.106(a). "Issuance of a Letter of Authorization will be based on a determination that the level of taking will be consistent with the findings made for the total taking allowable under the specific regulations." Id. § 216.106(b). "Letters of Authorization will specify the period of validity and any additional terms and conditions appropriate for the specific request." Id. § 216.106(c).

National Environmental Policy Act

55. The National Environmental Policy Act of 1969 is the "basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). NEPA

procedures seek to “insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken,” so that federal agencies can incorporate the wisdom gained into the action. Id. § 1500.1(b) (emphasis added). “The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.” Id. § 1500.1(c).

56. The Council on Environmental Quality (“CEQ”) has promulgated rules implementing NEPA, which apply to all federal agencies, including NMFS and the Navy. See 40 C.F.R. pt. 1500.

A. Obligation to Prepare Environmental Impact Statements

57. To accomplish its purpose, NEPA requires federal agencies to prepare an environmental impact statement for all “major federal actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C). “Major federal actions” subject to NEPA include both “new and continuing activities” with “effects that may be major and which are potentially subject to Federal control and responsibility.” 40 C.F.R. § 1508.18. The “human environment” includes “the natural and physical environment and the relationship of people with that environment.” Id. § 1508.14.

58. If more than one federal agency is involved in a project, one agency is designated the “lead agency,” with primary responsibility for preparing the EIS. Id. §§ 1501.5, 1508.16. Other federal agencies with jurisdiction by law are “cooperating agencies” and assist with preparation of the EIS. Id. §§ 1501.6, 1508.5. Federal agencies with special expertise with respect to any environmental impact involved in a proposal (or a reasonable alternative thereto) may be cooperating agencies. Id.

59. A cooperating agency may adopt the EIS of a lead agency when, after an independent review of the EIS, the cooperating agency concludes that the EIS is legally adequate. Id. § 1506.3.

60. “The primary purpose of an environmental impact statement is to serve as an action-forcing device to insure that the policies and goals defined in [NEPA] are infused into the ongoing programs and actions of the Federal Government.” Id. § 1502.1. An EIS must “provide full and fair discussion of significant environmental impacts and [must] inform decisionmakers and the public of the reasonable alternatives which would avoid or minimize adverse impacts or enhance the quality of the human environment.” Id.

61. An EIS must discuss, among other things: the environmental impact of the proposed federal action, any adverse and unavoidable environmental effects, any alternatives to the proposed action, and any irreversible and irretrievable

commitment of resources involved in the proposed action. 42 U.S.C. § 4332(2)(C).

62. The alternatives section “is the heart of the environmental impact statement.” 40 C.F.R. § 1502.14. In this section, agencies must “[r]igorously explore and objectively evaluate all reasonable alternatives,” devoting “substantial treatment to each alternative considered in detail . . . so that reviewers may evaluate their comparative merits.” Id. § 1502.14 (a), (b). The core purpose of the alternatives analysis is to “sharply defin[e] the issues and provid[e] a clear basis for choice among options by the decisionmaker and the public.” Id. § 1502.14.

63. NEPA’s implementing regulations specify that an EIS must “[i]nclude the alternative of no action.” Id. § 1502.14(d). The CEQ has explained that analyzing this alternative is mandated to “provide[] a benchmark, enabling decisionmakers to compare the magnitude of environmental effects of the action alternatives.” 46 Fed. Reg. 18,026, 18,027 (Mar. 23, 1981). The CEQ has emphasized that “[i]nclusion of such an analysis in the EIS is necessary to inform the Congress, the public, and the President as intended by NEPA.” Id.

64. Compliance with NEPA’s requirement for federal agencies to consider a range of alternate courses of action is necessary to achieve Congress’ declared purpose to “encourage productive and enjoyable harmony between man and his environment” and “to promote efforts which will prevent or eliminate damage to the environment.” 42 U.S.C. § 4321.

B. Public Involvement in Environmental Impact Statement Process

65. Preparing an EIS provides important opportunities for public involvement in federal agency decision-making, and NEPA commands federal agencies to “[m]ake diligent efforts to involve the public in preparing and implementing their NEPA procedures.” 40 C.F.R. § 1506.6(a).

66. After publishing in the Federal Register a Notice of Intent to prepare an EIS, an agency normally must invite the public to participate in “scoping,” which is “an early and open process for determining the scope of issues to be addressed and for identifying the significant issues related to a proposed action.” Id. § 1501.7.

67. The agency then prepares a draft EIS in accordance with the scope decided on in the public scoping process and circulates the draft EIS for public review. Id. §§ 1502.9(a), 1502.19. The agency must seek public comments on the draft EIS, “affirmatively soliciting comments from those persons or organizations who may be interested or affected.” Id. § 1503.1(a)(4).

68. The agency must “assess and consider comments [on the draft EIS] both individually and collectively” and respond to these comments in the final EIS. Id. § 1503.4(a); see also id. § 1502.9(b). “Possible responses are to”:

- (1) Modify alternatives including the proposed action.
- (2) Develop and evaluate alternatives not previously given serious consideration by the agency.

- (3) Supplement, improve, or modify its analysis.
- (4) Make factual corrections.
- (5) Explain why the comments do not warrant further agency response, citing the sources, authorities, or reasons which support the agency's position

Id. § 1503.4(a).

69. The agency must file the final EIS with the Environmental Protection Agency (“EPA”), which then publishes in the Federal Register a notice of filing.

Id. §§ 1506.9, 1506.10(a). The agency must wait at least thirty days after publication of this notice before making a decision on the proposed action. Id. § 1506.10(b)(2).

FACTUAL BACKGROUND

70. On July 15, 2010, the Navy published in the Federal Register a notice of intent to prepare an EIS for training and testing activities in the HSTT Study Area. The notice identified the purposes of the proposed action as (1) achieving and maintaining Fleet Readiness and (2) allowing the Navy “to attain compliance with applicable environmental authorizations, consultations, and other associated environmental requirements.” The notice invited the public’s input in the scoping process to identify community concerns and local issues to be addressed in the EIS. The notice stated that the Navy would invite NMFS to be a cooperating agency in preparation of the EIS.

71. The public scoping period ended on September 14, 2010. During scoping, a significant number of the participants expressed concerns about impacts to marine mammals, primarily from the use of Navy sonar. In addition, members of the public urged the Navy to ensure that its activities would not harm endangered and threatened marine mammals and other species.

72. In April 2012, the Navy submitted to NMFS an application pursuant to the MMPA requesting two LOAs for the take of thirty-nine (39) marine mammal species incidental to Navy activities to be conducted in the HSTT Study Area from January 2014 through January 2019, one LOA for training activities and another LOA for testing activities. The Navy submitted an addendum in September 2012, at which time NMFS deemed the application complete.

73. For its training activities, the Navy requested from NMFS authorization to kill up to fifty-seven (57) marine mammals, including up to twelve (12) large whale mortalities due to vessel strikes. It also sought permission to injure (Level A harassment) 1,314 marine mammals and to disrupt marine mammals' essential behaviors (Level B harassment) nearly 8.4 million times.

74. For its testing activities, the Navy requested authorization from NMFS to kill up to ninety-eight (98) marine mammals, including up to three (3) large whale mortalities due to vessel strikes. It also sought permission to injure (Level A harassment) 725 marine mammals and to disrupt marine mammals' essential behaviors (Level B harassment) nearly 1.2 million times.

75. The Navy determined that vessels involved in training and testing might strike and kill endangered blue, fin, humpback, sei and sperm whales. The Navy could not say with certainty which species of large whale would be struck and killed and, accordingly, requested from NMFS authorization to kill up to a total of thirteen whales from any one of these endangered species over five years.

76. On May 11, 2012, the Navy announced in the Federal Register the availability of the draft HSTT EIS (“DEIS”) for public review and comment. The public comment period ran through July 10, 2012.

77. The DEIS stated that the HSST EIS is “needed to support the Navy’s request to obtain an incidental take authorization from NMFS” for the next phase of operations and that “[t]he Navy will use this new analysis to support incidental take authorizations under the MMPA.” It identified NMFS as a cooperating agency “because of its expertise and regulatory authority over marine resources” and stated that “this document will serve as NMFS’s NEPA documentation for the rule-making process under the MMPA.”

78. The DEIS considered in detail only three alternatives. First, it analyzed an alternative the Navy labeled the “No Action” alternative. Under this alternative, the Navy would continue baseline training and testing activities and force structure requirements as defined by previously existing Navy environmental planning documents.

79. The DEIS also considered two nearly identical action alternatives. “Alternative 1” consisted of the so-called “No Action” alternative, plus the expansion of the HSTT Study Area boundaries to include areas where Navy training and testing would continue as in the past, but have not been considered in previous environmental analyses. In addition, Alternative 1 included adjustments to training and testing requirements necessary to accommodate (a) the relocation of ships, aircraft, and personnel; (b) planned aircraft, vessels, and weapons systems; and (c) ongoing activities not addressed in previous environmental analyses.

80. The DEIS identified the second action alternative – “Alternative 2” – as the Navy’s preferred alternative. It consisted of Alternative 1, plus (a) the establishment of new range capabilities, as well as modifications of existing capabilities; (b) expansion of the type and increase in the tempo of training and testing; and (c) establishment of additional locations to conduct activities between the range complexes.

81. The DEIS concluded that training and testing activities under either Alternatives 1 and 2 would result in nearly identical harm to marine mammals, with nearly 2.8 million animals killed, injured or otherwise harmed each year. As compared with the “No Action” alternative, either action alternative would more than triple the number of marine mammal takes under the MMPA.

82. There is general consensus in the scientific community that protecting important marine mammal habitat is the most effective measure currently available

to reduce the harmful impacts of military activities on marine mammals. Despite this, the DEIS failed to analyze any alternative that would place biologically important areas off-limits to Navy training and testing.

83. The DEIS incorporated into both action alternatives a single, identical measure to provide limited protection to a portion of only one of the many biologically important areas in the HSTT Study Area: the establishment of a Humpback Whale Cautionary Area in a portion of the Hawaiian Islands Humpback Whale National Marine Sanctuary. Despite the Navy's recognition of the significance of the Hawaiian Islands for humpback whales, the DEIS did not propose to ban training from even this small cautionary area during the few, critical winter months when humpbacks and their calves are present. Rather, both action alternatives would allow training in these important calving areas whenever the commander of the U.S. Pacific Fleet deems it necessary with whatever mitigation, if any, the commander – whose job description does not require any expertise in marine biology – deems appropriate.

84. The Navy eliminated from detailed consideration in the DEIS any alternative that would reduce impacts on marine mammals or sea turtles by placing any other geographic or temporal constraints on training and testing activities within the HSTT Study Area.

85. During the public review period for the DEIS, numerous commenters, including many of the plaintiff groups, objected to the Navy's failure to examine

alternatives that would protect other sensitive marine habitat areas for marine mammals. Using information generated by NOAA's Cetacean Density and Distribution Mapping Working Group ("CetMap") regarding marine mammal "hot spots" in the HSTT Study Area, commenters identified more than a dozen Biologically Important Areas ("BIAs") and urged the Navy to revise its environmental analysis to consider restricting training and testing in at least some of these areas.

86. Members of the public also submitted comments objecting to the Navy's failure to evaluate in the DEIS a true "no action" alternative that evaluated the environmental effects of NMFS's denial of the Navy's requests for incidental take authorization under the MMPA and Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531 et seq.

87. On October 12, 2012, NMFS published in the Federal Register notice of its receipt from the Navy of a request for authorization to take marine mammals incidental to the training and testing activities conducted in the HSTT Study Area from January 2014 through January 2019. NMFS invited the public to provide by November 5, 2012, information, suggestions, and comments on the Navy's application and request.

88. During the comment period, members of the public, including many of the plaintiff groups, highlighted the fatal flaws in the Navy's draft HSTT EIS, which precluded NMFS from relying on the Navy's environmental review to

support permitting decisions under the MMPA. Among other things, the commenters noted the DEIS's failure to consider alternatives that would reduce harm to marine mammals by restricting or prohibiting training and testing activities in sensitive marine habitats, including CetMap's BIAs. They also criticized the DEIS's failure to analyze a true "no action" alternative that evaluated the environmental effects of NMFS's denial of the Navy's requests for incidental take authorization under the MMPA and ESA.

89. On January 31, 2013, NMFS published in the Federal Register its proposal to issue Five-Year Regulations and LOAs to the Navy to take marine mammals incidental to training and testing activities in the HSTT Study Area from January 2014 through January 2019. The proposal noted NMFS's intent to adopt the Navy's final HSTT EIS to meet NMFS's responsibilities under NEPA for issuance of the HSTT regulations and LOAs, if doing so would be adequate and appropriate. The proposal stated that, if the Navy's final HSTT EIS were deemed inadequate, NMFS would supplement the existing analysis to ensure its compliance with NEPA prior to promulgating the final MMPA rule or issuing LOAs.

90. In its proposed rule, NMFS stated that it would authorize every one of the nearly 9.6 million "takes" of marine mammals the Navy had requested, including permission to kill up to 155 marine mammals and permanently injure another 2,039.

91. NMFS's proposed rule noted that NOAA's CetMap is in the process of identifying areas and times where marine mammal species are known to congregate for specific behaviors (such as feeding, breeding/calving, or migration) or to be range-limited (such as small, resident populations). NMFS acknowledged that these BIAs are useful tools for both planning and impact assessments and noted that, "once these BIAs are complete and put on the [CetMap] Web site," NMFS "may need to discuss whether ... additional protective measures [for marine mammals in the HSTT Study Area] might be appropriate."

92. At the time it published its proposed rule, NMFS was aware that CetMap had already completed several BIAs in Hawai'i and put them on its website. NMFS failed, however, to propose any protections for those BIAs, other than the very limited protection for the Humpback Whale Cautionary Area that the Navy had discussed in its DEIS.

93. NMFS invited the public to provide comment on its proposed rule by March 11, 2013. During the comment period, members of the public, including many of the plaintiff groups, alerted NMFS to the fatal flaws in the Navy's draft HSTT EIS, which precluded NMFS from relying on the Navy's environmental review to support permitting decisions under the MMPA. Among other things, the commenters noted the DEIS's failure to consider alternatives that would reduce harm to marine mammals by restricting or prohibiting training and testing activities in sensitive marine habitats, including CetMap's BIAs. They also criticized the

DEIS's failure to analyze a true "no action" alternative that evaluated the environmental effects of NMFS's denial of the Navy's requests for incidental take authorization under the MMPA and ESA.

94. On August 23, 2013, the Navy filed its final HSTT EIS ("FEIS") with EPA. On August 30, 2013, EPA published in the Federal Register a notice of availability of the FEIS. The notice stated that the review period for the FEIS would end on September 30, 2013.

95. The FEIS fails to cure the fatal flaws in the DEIS's alternatives analysis. Like the DEIS, the FEIS evaluates in detail only three alternatives – the so-called "No Action" alternative and two nearly identical action alternatives (Alternatives 1 and 2) – whose descriptions are virtually unchanged from the DEIS. The Navy made only minor adjustments to the annual levels of certain activities under the three alternatives, but the general types and locations of training and testing did not change.

96. The minor adjustments to training and testing did not result in any significant change in the Navy's assessment of the harm to marine mammals that its proposed activities in the HSTT Study Area would inflict. The FEIS concludes that training and testing activities under Alternative 2 – the Navy's preferred alternative – would kill, injure or otherwise harm nearly two million marine mammals each year.

97. Like the DEIS, the FEIS fails to evaluate a range of reasonable alternatives that would reduce impacts on marine mammals by prohibiting or restricting training and testing in various sensitive marine habitat areas. Instead, it merely incorporates into both action alternatives the same limited protections for the Humpback Whale Cautionary Area evaluated in the DEIS.

98. In the portion of the FEIS containing responses to public comments on the DEIS, the Navy failed to address each of the sensitive marine habitat areas that public comments proposed for protection and then provide sources, authorities or reasons to justify the Navy's refusal to analyze any alternative that would limit training or testing in that area. Instead, the Navy created a straw man that characterized the comments as calling for a blanket ban on all training and testing in any marine mammal habitat and a requirement that the Navy limit its activities to only a severely constrained set of abyssal waters and surveyed offshore habitats. The Navy's conclusion that avoiding all marine species habitats and placing most ocean waters off-limits was not a reasonable alternative did not justify its refusal to evaluate in the FEIS a range of alternatives that place restrictions on training and testing in at least some sensitive marine habitats.

99. Ignoring that the FEIS purports to support both "reauthorization of incidental takes of marine mammals under the MMPA and Section 7 consultation under the ESA," the Navy failed to analyze in the FEIS a true "no action"

alternative that evaluates the environmental effects of NMFS's denial of the Navy's requests for incidental take authorization under the MMPA and ESA.

100. In response to public comments criticizing its failure to analyze a true "no action" alternative, the Navy baldly asserts in the FEIS that it was justified in considering the "no action" alternative "in terms of 'continuing with the present course of action until that action is changed.'"

101. Even if the Navy's position were legally justified, the FEIS's "No Action" alternative does not, in fact, take the requisite hard look at the impacts associated with the full suite of the Navy's current activities in the HSTT Study Area. As the FEIS concedes, what it calls the "No Action" alternative includes only "those training and testing activities and events as set forth in previously completed Navy environmental planning documents." It excludes analysis of several "areas where Navy training and testing would continue as in the past, but were not considered in previous environmental analyses."

102. Areas excluded from the scope of the FEIS's so-called "No Action" alternative include the portion of the Study Area to the west of the 179th meridian, the open ocean transit corridor between Southern California and Hawai'i, Navy piers and shipyards located in Hawai'i and Southern California, and San Diego Bay. Training and testing— including the use of active sonar and explosives — currently take place in these excluded areas. The impacts associated with those

training and testing activities were excluded from the FEIS's analysis of its "No Action" alternative.

103. On September 20, 2013, the Navy filed with the EPA a corrected version of the FEIS that included eleven (11) pages to one of the appendices, which the Navy had omitted from its August 23, 2013 filing. None of these additional pages cured the flaws in the FEIS discussed above.

104. On September 27, 2013, the Navy published in the Federal Register a notice that it had issued the corrected FEIS and that the public review period was extended to October 28, 2013.

105. During the public review period on the Final EIS, Plaintiffs submitted comments to both NMFS and the Navy highlighting the fatal flaws in the FEIS's alternatives analysis, as well as the Navy's failure to satisfy its obligation under NEPA to respond in the FEIS to comments on the DEIS. Plaintiffs urged the Navy to withdraw the FEIS and circulate for public review and comment a revised analysis that complies fully with NEPA. Plaintiffs noted that, in the meantime, neither the Navy nor NMFS may lawfully rely on the FEIS to support any decision regarding the proposed training and testing activities in the HSTT Study Area.

106. Disregarding Plaintiffs' comments, on or about December 13, 2013, NMFS adopted the Navy's FEIS and issued a record of decision based on the FEIS. In its record of decision, NMFS decided to finalize Five-Year Regulations and LOAs authorizing marine mammal take associated with the most

environmentally destructive of the alternatives the Navy analyzed for training and testing in the HSTT Study Area during the period December 26, 2013, through December 25, 2018.

CLAIM FOR RELIEF

(VIOLATION OF NATIONAL ENVIRONMENTAL POLICY ACT AND ADMINISTRATIVE PROCEDURE ACT)

107. Plaintiffs reallege and incorporate herein by reference each and every allegation contained in all preceding paragraphs of this Complaint.

108. NEPA requires that an EIS analyze both the “no action” alternative as well as reasonable alternatives to a proposed action. Despite having been urged to do so by Plaintiffs, the Navy failed and refused to analyze in its FEIS a true “no action” alternative or to give detailed consideration to a range of reasonable alternatives that would reduce impacts on marine mammals by prohibiting or restricting training and testing in sensitive marine habitats. The FEIS’s deficient alternatives analysis violates NEPA.

109. NEPA requires that federal agencies preparing a final EIS respond in the final statement to public comments on the draft statement by one or more of the following means:

- (1) Modify alternatives including the proposed action[;]
- (2) Develop and evaluate alternatives not previously given serious consideration by the agency[;]

- (3) Supplement, improve, or modify its analysis[;]
- (4) Make factual corrections[; or]
- (5) Explain why the comments do not warrant further agency response, citing the sources, authorities, or reasons which support the agency's position

40 C.F.R. § 1503.4(a). The Navy failed to comply with this mandate in responding to public comments identifying flaws in the DEIS. The FEIS's deficient responses to public comments violate NEPA.

110. NMFS's adoption of the Navy's legally deficient FEIS and reliance on that FEIS to issue its Record of Decision, Five-Year Regulations and Letters of Authorization regarding Navy training and testing in the HSTT Study Area during the period December 26, 2013, through December 25, 2018, were arbitrary, capricious, an abuse of discretion, not in accordance with law, and/or without observance of procedure required by law within the meaning of the APA, 5 U.S.C. § 706(2).

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court:

1. Enter a declaratory judgment that Defendants have violated and are violating the National Environmental Policy Act and Administrative Procedure Act by adopting and relying on a legally deficient EIS to issue the Record of Decision, Five-Year Regulations and Letters of Authorization regarding Navy training and

