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

CONSERVATION COUNCIL FOR)	CIVIL NO. 13-00684 SOM RLP
HAWAI'I, a non-profit corporation;)	
ANIMAL WELFARE INSTITUTE, a)	AMENDED COMPLAINT FOR
non-profit corporation; CENTER FOR)	DECLARATORY AND INJUNCTIVE
BIOLOGICAL DIVERSITY, a non-)	RELIEF; CERTIFICATE OF SERVICE
profit corporation; and OCEAN)	
MAMMAL INSTITUTE, a non-profit)	
corporation,)	
)	
Plaintiffs,)	
)	
v.)	
)	
NATIONAL MARINE FISHERIES)	
SERVICE; UNITED STATES)	
DEPARTMENT OF COMMERCE;)	
PENNY PRITZKER, Secretary of)	
Commerce; UNITED STATES)	
DEPARTMENT OF THE NAVY;)	
UNITED STATES DEPARTMENT OF)	
DEFENSE; CHUCK HAGEL, Secretary)	
of Defense,)	
)	
Defendants.)	
)	

AMENDED 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; Penny Pritzker, in her official capacity as Secretary of the Department of Commerce; United States Department of the Navy; United States Department of Defense; and Chuck Hagel, in his official capacity as the Secretary of the Department of Defense, (collectively, “Defendants”) as follows:

INTRODUCTION

1. By this Complaint, Plaintiffs seek to compel Defendants to comply with the National Environmental Policy Act (“NEPA”), 42 U.S.C. §§ 4321 et seq., the Endangered Species Act (“ESA”), 16 U.S.C. §§ 1531 et seq., and the Marine Mammal Protection Act, (“MMPA”) 16 U.S.C. §§ 1361 et seq., in connection with decisions related to Navy training and testing activities in the Hawaii-Southern California Training and Testing (“HSTT”) Study Area during the period of December 2013 through December 2018.

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. The HSTT Study Area is also home to five species of sea turtles protected under the ESA: leatherback, loggerhead, hawksbill, olive ridley and green turtles. All leatherbacks, loggerheads and hawksbills found in the HSTT Study Area are listed as endangered. The olive ridleys in the Study Area likely belong to the endangered Mexican Pacific Ocean population; all other olive ridley

populations are threatened. Green sea turtles from both endangered and threatened populations are found in the Study Area.

5. 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 animals 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 and under the ESA for protecting endangered and threatened species.

6. 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, finalizing Five-Year Regulations and issuing Letters of Authorization ("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 of December 2013 through December 2018 ("Alternative 2").

7. Because Navy activities in the HSTT Study area are likely to kill and otherwise harm endangered and threatened species, both the Navy and NMFS's Office of Protected Resources - Permits and Conservation Division ("NMFS-Permits Division") consulted NMFS's Office of Protected Resources - Endangered Species Act Interagency Cooperation Division ("NMFS-ESA Interagency

Cooperation Division”) pursuant to section 7 of the ESA, 16 U.S.C. § 1536. On or about December 13, 2013, NMFS-ESA Interagency Cooperation Division issued a biological opinion authorizing the Navy’s activities in the HSTT Study Area, as well as NMFS-Permits Division’s promulgation of MMPA regulations and issuance of LOAs for the Navy’s activities.

8. On or about December 20, 2013, the Navy issued a record of decision based on its August 2013 final HSTT EIS, announcing the Navy’s decision to implement training and testing activities under Alternative 2.

9. 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.

10. 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.

11. 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.

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

13. NMFS and the Navy 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.

14. In its biological opinion, NMFS assessed the impacts on endangered and threatened species. It concluded that, over the next five years, Navy activities in the HSTT Study Area would kill up to seven (7) endangered blue, fin, humpback and/or sei whales and up to twenty (20) imperiled sea turtles. NMFS further determined that the Navy's use of sonar, other active acoustic sources and

explosives would harm 680 endangered or threatened sea turtles by injuring their lungs or gastrointestinal tracts or by inflicting permanent hearing loss, including up to sixty-five (65) sea turtles whose lung injuries from Navy training exercises could prove fatal. NMFS also found that, over the next five years, Navy activities in the HSTT Study Area would disrupt vital behaviors or cause temporary hearing loss of endangered marine mammals on over 127,000 occasions, with imperiled sea turtles temporarily deafened more than 8,000 times.

15. Under NEPA, before NMFS and the Navy gave the green light to activities that that will inflict such severe harm on protected marine mammals and sea turtles, the agencies were obliged to make their decisions based on an EIS that examines a range of alternate courses of action, including alternatives that could be pursued with less environmental damage. NMFS and the Navy unlawfully failed to comply with this legal mandate.

16. The MMPA and ESA impose additional legal duties on NMFS, the agency entrusted with protecting marine mammals and imperiled species. NMFS was obliged, but failed, to ensure that the Navy's activities in the HSTT Study Area would have only a negligible impact on the affected marine mammal species or stocks and would not reduce appreciably the likelihood of both the survival and recovery of any listed species in the wild.

17. As described more fully below, NMFS's decisions to authorize the Navy to proceed with training and testing activities in the HSTT Study Area and

the Navy's decision to conduct those activities are 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, the MMPA and the ESA. The Navy cannot lawfully decide to conduct destructive training and testing activities in the HSTT Study Area unless and until it fully complies with NEPA.

JURISDICTION AND VENUE

18. 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).

19. 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

20. 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.

21. 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.

22. 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.

23. 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.

24. 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.

25. 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.

26. 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.

27. 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 and 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.

28. 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 and sea turtles, in Hawai‘i and Southern California waters.

29. 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.

30. 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.

31. 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.

32. 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, sea turtles 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.

33. 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, sea turtles and other wildlife harmed by the Navy's training and testing activities in the HSTT Study Area.

34. Center members and staff include local residents with educational, scientific research, aesthetic, spiritual, and recreational interests in marine mammals, sea turtles 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.

35. 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.

36. 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.

37. 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.

38. 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.

39. 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.

40. 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 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.

41. 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.

42. 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.

43. 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 and the Navy to do so, OMI now diverts limited

resources to prosecute this lawsuit, seeking to protect its organizational interests by compelling NMFS and the Navy to comply with NEPA, the ESA and the MMPA.

44. 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 and Navy-conducted activities and from the existence of marine mammals, sea turtles 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.

45. Plaintiffs and their members will suffer irreparable injury to their aesthetic, recreational, scientific, cultural, inspirational and educational interests unless NMFS and the Navy revisit their decisions authorizing training and testing in the HSTT Study Area based on an EIS that complies fully with NEPA and unless NMFS complies fully with the ESA and MMPA prior to authorizing HSTT activities.

Defendants

46. 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 ESA and MMPA provisions that regulate the Navy’s activities in the HSTT Study Area, including the provisions governing biological opinions, Five-Year Regulations and Letters of Authorization. NMFS is responsible for complying with NEPA, the ESA and the MMPA in connection with the promulgation of Five-Year Regulations and the issuance of LOAs and biological opinions.

47. Defendant United States 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.

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

49. Defendant United States Department of the Navy is an agency of the United States Department of Defense. The Navy is responsible for complying with NEPA prior to making decisions regarding training and testing activities in the HSTT Study Area.

50. Defendant United States Department of Defense 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.

51. Defendant Chuck Hagel is sued in his official capacity as the Secretary of the Department of Defense.

LEGAL LANDSCAPE

The Marine Mammal Protection Act

52. 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).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.

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

¹ The MMPA defines the term “population stock” or “stock” as “a group of marine mammals of the same species or smaller taxa in a common special arrangement, that interbreed when mature.” Id. § 1362(11).

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).

54. 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).

55. 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).

56. 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 of stock for taking for subsistence uses” Id.; see also id. § 1371(a)(5)(F)(i).

57. “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.

58. 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).

59. 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).

60. 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.

61. 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).

62. 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).

The National Environmental Policy Act

63. 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).

64. 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

65. 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.

66. 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.

67. 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.

68. “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.

69. 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).

70. 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.

71. 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.

72. 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

73. 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).

74. 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.

75. 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).

76. 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).

77. 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).

The Endangered Species Act

78. In enacting the Endangered Species Act of 1973, Congress recognized the need to protect species that are in danger of extinction and to conserve the ecosystems on which those species depend for survival. All species listed as endangered or threatened by the Secretary of Commerce are protected by the ESA, which the Supreme Court has called “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” Tennessee Valley Authority v. Hill, 437 U.S. 153, 180 (1978) (hereinafter TVA).

79. In furtherance of the ESA’s broad goals, Congress mandated in Section 2(c) that “‘all Federal departments and agencies shall seek to conserve endangered species and threatened species’” Id. (quoting 16 U.S.C. § 1531(c); emphasis omitted). “Lest there be any ambiguity as to the meaning of this statutory directive, the Act specifically defined ‘conserve’ as meaning ‘to use and the use of all methods and procedures that are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant

to this chapter are no longer necessary.” Id. (quoting 16 U.S.C. § 1532(2); emphasis omitted). “The plain intent of Congress in enacting [the ESA] was to halt and reverse the trend toward species extinction, whatever the cost.” Id. at 184.

80. The ESA defines “species” to include “any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature.” 16 U.S.C. § 1532(16).

81. ESA section 7(a)(2) places an affirmative duty on each federal agency, including NMFS and the Navy, to ensure that its actions are “not likely to jeopardize the continued existence” of any endangered or threatened species or “result in the destruction or adverse modification of habitat” of those species. Id. § 1536(a)(2). This duty is not limited to making such efforts as will not interfere with what the agency deems its primary mission. The “pointed omission of the type of qualifying language previously included in endangered species legislation reveals a conscious decision by Congress to give endangered species priority over the ‘primary missions’ of federal agencies.” TVA, 437 U.S. at 185.

82. If a federal agency determines that its actions may adversely affect any endangered or threatened marine species, the agency must formally consult NMFS in making a jeopardy determination. 50 C.F.R. § 402.14. “Jeopardize the continued existence of” is defined as engaging in an action that “reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the

survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.” Id. § 402.02.

83. When NMFS-Permits Division proposes to take an action that may adversely affect any listed marine species, such as promulgating MMPA regulations and issuing LOAs for the Navy activities at issue here, it is considered an “action agency” subject to ESA section 7(a)(2) and must consult NMFS-ESA Interagency Cooperation Division – the “consulting agency” – to assess the risks such action may present to the survival and recovery of those species, and insure the proposed action is not likely to “jeopardize” them within the meaning of the ESA.

84. Once an action agency enters into formal consultation, ESA section 7(a)(2) and its implementing regulations require NMFS to formulate a biological opinion, based on the “best scientific and commercial data available,” to assist in its determination whether the federal action will jeopardize the continued existence of a listed species. Id. § 402.14(g)(8). The biological opinion must include:

- (1) A summary of the information on which the opinion is based;
- (2) A detailed discussion of the effects of the action on listed species ... ; and
- (3) [NMFS’s] opinion on whether the action is likely to jeopardize the continued existence of a listed species ... (a “jeopardy biological opinion”); or, the action is not likely to jeopardize the continued existence of a listed species ... (a “no jeopardy” biological opinion).

Id. § 402.14(h).

85. ESA Section 9 generally prohibits any person, including a federal agency, from “taking” any endangered or threatened animal. 16 U.S.C. §§ 1532(13), 1538(a)(1). The ESA defines the term “take” to mean “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct.” Id. § 1532(19).

86. When NMFS concludes that a federal agency’s proposed action will not jeopardize any listed species, NMFS may include in its biological opinion an incidental take statement that authorizes the taking of listed species incidental to the proposed action. Id. § 1536(b)(4). The incidental take statement must specify, among other things, “the impact, i.e., the amount or extent, of such incidental taking on the species.” 50 C.F.R. § 402.14(i)(1)(i).

87. The incidental take statement’s limit on authorized take plays a critical role in protecting listed species from extinction, establishing a “trigger” that, when reached, results in an unacceptable level of incidental take, requiring the parties to re-initiate consultation to ensure against jeopardy. The ESA’s implementing regulations provide that, “[i]f during the course of the action the amount or extent of incidental taking, as specified [in the incidental take statement], is exceeded, the Federal agency must reinitiate consultation immediately.” Id. § 402.14(i)(4); see also id. § 402.16(a).

88. In the case of endangered or threatened marine mammals, NMFS may authorize incidental take under the ESA only if “the taking is authorized pursuant to section 1371(a)(5) of [the MMPA].” 16 U.S.C. § 1536(b)(4)(C).

FACTUAL BACKGROUND

89. 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.

90. 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.

91. 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.

92. 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.

93. 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.

94. 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 (13) whales from any one of these endangered species over five years.

95. 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.

96. 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 and stated that “this document will serve as NMFS’s NEPA documentation for the rule-making process under the MMPA.”

97. 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.

98. 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.

99. 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.

100. 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.

101. 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.

102. 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.

103. 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.

104. 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.

105. 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.

106. On or about September 24, 2012, NMFS received a request from the Navy for consultation pursuant to ESA section 7 regarding proposed training and testing activities to be conducted in the HSTT Study Area over a five-year period.

107. 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.

108. 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.

109. Members of the public also pointed out the Navy's failure to conduct any population viability analyses or other scientifically accepted inquiry to evaluate whether death, injury and other harm at the levels sought would "adversely affect the species or stock through effects on annual rates of recruitment or survival," 50 C.F.R. § 216.103, in violation of the MMPA provision limiting authorized incidental take to only take that "will have a negligible impact." 16 U.S.C. § 1371(a)(5)(A)(i)(I). The commenters emphasized that, before NMFS can lawfully authorize any take, it must perform this detailed analysis for each of the marine mammal species and stocks that would be affected by the Navy's proposed activities.

110. On or about November 5, 2012, NMFS responded to the Navy's request for ESA section 7 consultation, indicating that NMFS had received sufficient information to initiate formal consultation with the Navy. At that time, NMFS determined that its Permits Division's proposed actions to promulgate an MMPA rule regulating the Navy's "take" of marine mammals incidental to proposed HSTT activities and to issue LOAs pursuant to that regulation were inter-

dependent and interrelated with the Navy's proposed actions and, therefore, should be included in the consultation. NMFS concluded, however, that it did not yet have sufficient information on the MMPA regulation or the LOAs to initiate consultation on the Permits Division's actions.

111. 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.

112. 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.

113. 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.”

114. 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.

115. 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.

116. Members of the public also emphasized NMFS's legal duty to perform a detailed analysis for each of the marine mammal species and stocks that would be affected by the Navy's proposed activities to determine whether the incidental death, injury and other harm would "adversely affect the species or stock through effects on annual rates of recruitment or survival." 50 C.F.R. § 216.103. The commenters noted that, without such analyses, NMFS could not comply with its duty to limit incidental take to only take that "will have a negligible impact." 16 U.S.C. § 1371(a)(5)(A)(i)(I).

117. On or about February 26, 2013, NMFS-ESA Interagency Cooperation Division received a request for consultation from NMFS-Permits Division on its proposed issuance of MMPA regulations for Navy training and testing activities in the HSTT Study Area.

118. 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.

119. 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.

120. 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.

121. 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.

122. 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 or to provide any 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.

123. 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.

124. 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.'"

125. 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."

126. 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.

127. 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.

128. 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.

129. 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.

130. Disregarding Plaintiffs' comments, NMFS adopted the Navy's FEIS on December 5, 2013.

131. On or about December 13, 2013, NMFS issued a record of decision based on the fatally flawed 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 of December 2013 through December 2018.

132. On December 24, 2013, NMFS published the Five-Year Regulations in the Federal Register. The regulations state that they are effective from December 24, 2013, through December 24, 2018. 50 C.F.R. § 218.71(a).

133. NMFS's Five-Year Regulations authorize the Navy to kill up to 155 marine mammals, including "130 mortalities applicable to any small odontocete (i.e., dolphin) or pinniped (with the exception of Hawaiian monk seal) species from an impulse source" (i.e., an explosive), "10 beaked whale mortalities" from any Navy activity and "15 large whale injuries or mortalities or serious injuries from vessel strike." *Id.* § 218.72(b)(3). The regulations further authorize the Navy to subject marine mammals in the HSTT Study Area to Level A and Level B Harassment nearly 9.6 million times. *Id.* § 218.72(b)(1).

134. On or about December 13, 2013, NMFS issued two LOAs for take of marine mammals incidental to Navy activities in the HSTT Study Area, one for Navy training exercises and the other for Navy testing activities. Both LOAs state they are “valid for the period December 26, 2013, through December 25, 2018.”

135. The LOA for training exercises authorizes the Navy to kill up to fifty-seven (57) marine mammals during the five years the LOA is in effect.

136. Authorized training-related mortalities include up to thirty-five (35) deaths (seven per year) of small odontocetes or pinnipeds, with the exception of Hawaiian monk seals and Guadalupe fur seals, due to an impulse source. Of these takes, each year, Navy training exercises are permitted to kill up to four (4) animals from any one species of small odontocete or pinniped.

137. NMFS further authorized Navy training exercises to kill up to ten (10) beaked whales (two per year) from any source and to cause up to twelve (12) large whale mortalities (up to four in any given year) from vessel strike.

138. With respect to the large whale mortalities from training-related vessel strikes, NMFS gave the Navy permission each year to kill up to two (2) animals from any one species of endangered blue, fin, gray, humpback, sei or sperm whale.

139. The LOA for training exercises also authorizes the Navy to inflict Level A harassment on over 1,300 marine mammals over five years, and to subject marine mammals to Level B harassment nearly 8.4 million times.

140. In addition to the high levels of take NMFS authorized for Navy training exercises, the LOA for testing activities authorizes the Navy to kill up to ninety-eight (98) more marine mammals over five years.

141. Authorized testing-related mortalities include up to ninety-five (95) deaths (an average of nineteen (19) per year) of small odontocetes or pinnipeds (with the exception of Hawaiian monk seals and Guadalupe fur seals) due to an impulse source. Of these takes, each year, Navy training exercises are permitted to kill up to four (4) animals from the following species or stocks: Hawaii Stock Complex of bottlenose dolphin, Fraser's dolphin, pantropical spotted dolphin, Hawaiian stock of Risso's dolphin, rough-toothed dolphin, spinner dolphin, and Hawaiian stock of striped dolphin. The LOA authorizes Navy testing activities each year to kill up to thirteen (13) animals from the following species or stocks: California/Oregon/Washington State ("CA/OR/WA") offshore stock of bottlenose dolphin, Dall's porpoise, long-beaked common dolphin, northern right whale dolphin, Pacific white-sided dolphin, CA/OR/WA stock of Risso's dolphin, CA/OR/WA stock of short-beaked common dolphin, CA/OR/WA stock of striped dolphin, California sea lion, northern fur seal, harbor seal, and northern elephant seal.

142. NMFS further authorized Navy testing activities to kill up to three (3) large whales (up to two in any given year) from vessel strike. NMFS specified that

Navy testing could not kill more than one (1) animal in any given year from any one (1) species of endangered blue, fin, gray, humpback, sei or sperm whale.

143. The LOA for testing exercises also authorizes the Navy to inflict Level A harassment on 725 marine mammals over five years, and to subject marine mammals to Level B harassment nearly 1.2 million times.

144. Plaintiffs are informed and believe, and on the basis thereof allege, that, prior to authorizing the Navy to kill, injure and harass marine mammals in the HSTT Study Area, NMFS failed to perform any scientifically valid analyses to determine whether the authorized take levels would have only a negligible impact on each of the affected species or stocks. Plaintiffs are further informed and believe, and on the basis thereof allege, that, among other things, NMFS failed to evaluate, for each species or stock for which NMFS authorized mortality, whether the authorized level of mortality would have adverse effects on the annual rates of recruitment of that species or stock or other population-level effects.

145. On or about December 13, 2013, NMFS-ESA Interagency Cooperation Division issued its final biological opinion regarding (1) the Navy's training and testing activities in the HSTT Study Area from December 2013 through December 2018, (2) NMFS-Permits Division's promulgation of MMPA regulations for marine mammal take incidental to the Navy's activities in the HSTT Study Area from December 2013 through December 2018, and (3) NMFS-Permits Division's issuance of two LOAs under those regulations for marine

mammal take incidental to the Navy's activities in the HSTT Study Area from December 2013 through December 2018.

146. In its biological opinion, NMFS concluded that ship strikes are known to injure and kill sea turtles and that listed sea turtles are vulnerable to being struck by Navy vessels during HSTT activities. NMFS failed, however, to quantify the number of turtles that the Navy's activities in the HSTT Study Area are likely to injure or kill. Plaintiffs are informed and believe, and on the basis thereof allege, that NMFS failed to factor injuries and mortalities from vessel strike into its calculation of the number of sea turtle takes associated with Navy training and testing activities or into its analysis whether those activities would jeopardize endangered or threatened sea turtles.

147. NMFS's biological opinion does quantify the number of listed sea turtles that would be killed and injured due to the Navy's explosives and other impulsive acoustic stressors. It found that the most severe harm would be inflicted on green, hawksbill, loggerhead, olive ridley, and leatherback turtles in the Hawaii Range Complex and Transit Corridor areas of the HSTT Study Area. Because NMFS determined that information regarding the abundance and distribution of these five sea turtle species was not sufficient to allow estimated exposures by species, the biological opinion combined all of the species into a single category termed "Pacific Sea Turtles" and assessed take of green, hawksbill, loggerhead, leatherback, and olive ridley turtles as a group.

148. The biological opinion states that, each year, Navy training exercises would kill four (4) Pacific sea turtles, inflict lung injury on another thirteen (13), and cause permanent hearing loss to twenty-one (21) turtles and temporary hearing loss to nearly 1,000 more. NMFS further determined that Navy testing activities would cause permanent hearing loss, gastrointestinal tract injury or lung injury to five (5) Pacific sea turtles.

149. NMFS concluded that “sea turtles that experience even a slight lung injury may not recover from such injury and would be expected to die as a result of that injury.” The deaths resulting from lung injury are in addition to the four (4) turtles NMFS determined would be killed each year as a result of underwater explosions.

150. The biological opinion contains an incidental take statement authorizing all of the takes that NMFS concluded would result from Navy training exercises in the HSTT Study Area against any of the Pacific sea turtle species. The incidental take statement does not impose any limit on the number of takes – whether direct mortality or indirect mortality through lung injury – that the Navy may annually inflict on each turtle species. Plaintiffs are informed and believe, and on the basis thereof allege, that NMFS failed to conduct any scientifically valid analyses to determine whether take at the authorized levels would jeopardize any of the listed turtle species.

151. Despite NMFS's conclusion that Navy testing activities in the HSTT Study Area may cause lung injury to five (5) Pacific sea turtles, resulting in their deaths, the biological opinion does not authorize Navy testing activities to cause any harm through lung injury. Instead, the incidental take statement allows only five (5) instances of permanent hearing loss to turtles from testing activities, which NMFS concluded would not reduce the animals' survival or reproductive potential. Plaintiffs are informed and believe, and on the basis thereof allege, that NMFS failed to factor potential lung injuries into its analysis of whether Navy testing activities would jeopardize endangered or threatened sea turtles.

152. The biological opinion's incidental take statement also authorizes injury or mortality to endangered blue, fin, humpback and sei whales due to vessel strike. NMFS authorized Navy training exercises to injure or kill one (1) of any of the aforementioned whale species per year, not to exceed three (3) of any combination of these species over five years. NMFS also authorized Navy testing activities to injure or kill the same whale species, allowing incidental take of two (2) of any whale species per year, not to exceed four (4) of any combination of species over five years.

153. Plaintiffs are informed and believe, and on the basis thereof allege, that NMFS failed to conduct any scientifically valid analyses to determine whether take at the authorized levels would jeopardize endangered blue, fin, humpback or sei whales.

154. NMFS's incidental take statement authorizes Navy testing exercises to inflict more incidental take of endangered blue, fin, humpback and sei whales than NMFS authorized pursuant to the MMPA.

155. On or about December 20, 2013, the Navy issued its own record of decision based on the FEIS, deciding to implement the most environmentally destructive alternative the FEIS analyzed (Alternative 2).

FIRST CLAIM FOR RELIEF

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

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

157. 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.

158. 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.

159. 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 of December 2013 through December 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).

160. The Navy's reliance on the legally deficient FEIS to issue its record of decision to proceed with Navy training and testing in the HSTT Study Area during the period of December 2013 through December 2018, was 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).

SECOND CLAIM FOR RELIEF

(VIOLATIONS OF MARINE MAMMAL PROTECTION
ACT AND ADMINISTRATIVE PROCEDURE ACT)

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

162. NMFS's Five-Year Regulations and Letters of Authorization regarding Navy training and testing in the HSTT Study Area are 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), for reasons including but not limited to those alleged hereinafter

163. The MMPA authorizes NMFS to allow incidental take of marine mammals only if it "finds that the total of such taking during each five-year ... period concerned will have a negligible impact" on the affected species or stock. 16 U.S.C. § 1371(a)(5)(A)(i)(I).

164. In promulgating Five-Year Regulations and issuing Letters of Authorization regarding Navy training and testing in the HSTT Study Area, NMFS ignored relevant factors. Moreover, despite having been urged to do so by Plaintiffs, NMFS failed to conduct any scientifically valid analyses to determine whether take at the authorized levels would have more than a negligible impact on each of the affected marine mammal species or stocks.

THIRD CLAIM FOR RELIEF

(VIOLATIONS OF ENDANGERED SPECIES
ACT AND ADMINISTRATIVE PROCEDURE ACT)

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

166. The biological opinion defendant NMFS prepared to assess the impacts of Navy activities in the HSTT Study Area and related MMPA permitting decisions upon threatened and endangered species is 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), for reasons including but not limited to those alleged hereinafter.

167. The biological opinion's conclusion that Navy training and testing activities in the HSTT Study Area, in combination with the environmental baseline and cumulative effects, would not jeopardize listed species is not based upon the best scientific and commercial data available. NMFS ignored relevant factors and failed to conduct any scientifically valid analyses to determine whether take at the authorized levels would jeopardize any listed species, in violation of 16 U.S.C. § 1536.

168. The biological opinion's incidental take statement authorizes Navy testing exercises in the HSTT Study Area to inflict more incidental take of

endangered blue, fin, humpback and sei whales than NMFS authorized pursuant to the MMPA, in violation of 16 U.S.C. § 1536(b)(4)(C).

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that the Court:

1. Enter a declaratory judgment that:
 - a. NMFS has violated and is violating the National Environmental Policy Act and Administrative Procedure Act by adopting and relying on a legally deficient EIS 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 of December 2013 through December 2018;
 - b. The Navy has violated and is violating the National Environmental Policy Act and Administrative Procedure Act by failing to prepare a legally adequate EIS and by relying on a legally deficient EIS to issue its record of decision for the challenged Navy training and testing activities;
 - c. NMFS has violated and is violating the Marine Mammal Protection Act and Administrative Procedure Act by failing to prepare legally adequate Five-Year Regulations and Letters of

Authorization for the challenged Navy training and testing activities;

- d. NMFS has violated and is violating the Endangered Species Act and Administrative Procedure Act by failing to prepare a legally adequate biological opinion and incidental take statement for the challenged Navy training and testing activities;

2. Vacate and set aside NMFS's biological opinion, record of decision, Five-Year Regulations and Letters of Authorization for the challenged Navy training and testing activities.

3. Vacate and set aside the Navy's record of decision for the challenged Navy training and testing activities.

4. Issue any appropriate injunctive relief.

5. Award Plaintiffs the costs of this litigation, including reasonable attorney's fees; and

6. Grant Plaintiffs such further and additional relief as the Court may deem just and proper.

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DATED: Honolulu, Hawai'i, January 15, 2014.

EARTHJUSTICE
850 Richards Street, Suite 400
Honolulu, Hawai'i 96813

By: /s/ David L. Henkin
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