



UNITED STATES DEPARTMENT OF COMMERCE  
National Oceanic and Atmospheric Administration  
NATIONAL MARINE FISHERIES SERVICE  
Silver Spring, MD 20910

DEC 11 2018

## RECORD OF DECISION

### FOR THE ISSUANCE OF AN INCIDENTAL TAKE AUTHORIZATION TO U.S. NAVY FOR TAKE OF MARINE MAMMALS INCIDENTAL TO TRAINING AND TESTING ACTIVITIES IN THE HAWAII-SOUTHERN CALIFORNIA TRAINING AND TESTING STUDY AREA AND ADOPTION OF U.S. NAVY FINAL ENVIRONMENTAL IMPACT STATEMENT/OVERSEAS ENVIRONMENTAL IMPACT STATEMENT

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#### **I. INTRODUCTION AND PURPOSE**

On September 13, 2017, the National Oceanic and Atmospheric Administration's (NOAA) National Marine Fisheries Service (NMFS) received an application from the U.S. Navy (Navy) (which following submission of an amendment was determined to be adequate and complete on October 13, 2017) requesting incidental take of marine mammals in connection with training and testing activities analyzed in the 2018 Final Environmental Impact Statement/Overseas Environmental Impact Statement for Hawaii-Southern California Training and Testing (2018 HSTT FEIS/OEIS). NMFS reviews applications and, if appropriate, issues Incidental Take Authorizations (ITAs) pursuant to the Marine Mammal Protection Act of 1972, as amended (MMPA; 16 U.S.C. 1361 et seq.). In addition, the National Environmental Policy Act (NEPA), 40 Code of Federal Regulations (CFR) Parts 1500-1508, and NOAA policy and procedures<sup>1</sup> require all proposals for major federal actions to be reviewed with respect to their effects on the human environment. Issuance of this ITA under the MMPA is a major federal action triggering NOAA's independent NEPA compliance obligations. When serving as a cooperating agency, NOAA may satisfy its independent NEPA obligations by either preparing a separate NEPA

<sup>1</sup> NOAA Administrative Order (NAO) 216-6A "Compliance with the National Environmental Policy Act, Executive Orders 12114, Environmental Effects Abroad of Major Federal Actions; 11988 and 13690, Floodplain Management; and 11990, Protection of Wetlands" issued April 22, 2016 and the Companion Manual for NAO 216-6A "Policy and Procedures for Implementing the National Environmental Policy Act and Related Authorities" issued January 13, 2017.



analysis for its issuance of an ITA or, if appropriate, by adopting the NEPA analysis prepared by the lead agency. Therefore, the purposes of this document are twofold. First, this document explains NMFS' rationale for its determination to issue an ITA to the Navy for their proposed training and testing activities in the air and sea space off Southern California, around the Hawaiian Islands, and the transit corridor connecting them (herein "HSTT Study Area"). Second, this document explains NMFS' determination to adopt the 2018 HSTT FEIS/OEIS for the NEPA review that is required for our consideration of whether to issue the ITA.

NMFS is issuing regulations and two Letters of Authorization (LOAs) to the Navy, one for training activities and one for testing activities, pursuant to section 101(a)(5)(A) of the MMPA and 50 CFR Part 216<sup>2</sup>. The regulations and LOAs will be valid from December 21, 2018 through December 20, 2023<sup>3</sup> and authorize Level A and B harassment and a small number of takes by serious injury or mortality of marine mammals incidental to the Navy conducting training and testing activities (categorized as military readiness activities) in the HSTT Study Area. As explained in the 2018 HSTT FEIS/OEIS, NMFS' proposed action and the purpose and need for that action are a direct outcome of the Navy's request for MMPA authorization in connection with conducting training and testing activities, including the use of active acoustic sonar systems and other transducers, in-water detonations, air guns, construction activities involving pile removal and installation, and vessels throughout the HSTT Study Area. These activities have the potential to cause marine mammal harassment in the form of injury, temporary threshold shift, or behavioral disruption, or cause serious injury and mortality and, therefore, require authorization from NMFS. An authorization for incidental take is granted if NMFS finds that the take will have a negligible impact on the species or stock(s), and, where relevant, will not have an unmitigable adverse impact on the availability of the species or stock(s) for subsistence uses. In addition, regulations must set forth the permissible methods of take, other means of effecting the least practicable adverse impact on the species or stocks and their habitat, and requirements pertaining to the monitoring and reporting of such take.

## **II. BACKGROUND**

The Navy has been conducting training and testing activities in the Pacific Ocean, in Southern California, Hawaii, and other areas for decades and has prepared multiple environmental impact analyses under NEPA and Executive Order (EO) 12114 for these training and testing activities, including the use of active acoustic sonar systems and explosives, that coincide with their requests for ITAs. As such, the Navy is the lead agency responsible for the development of, and the scope and content of these analyses. NMFS serves as a cooperating agency due to our legal jurisdiction and special expertise and because the scope of the Navy's proposed action and alternatives involve activities that have the potential to impact protected resources, including marine mammals. In addition, NMFS participates substantially and meaningfully throughout the NEPA process with the goal of ensuring that all analyses (previous analyses and the current 2018 HSTT FEIS/OEIS) are sufficient for NMFS to adopt to satisfy its independent NEPA obligation for its decision whether to issue the ITA and subsequent LOAs to the Navy.

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<sup>2</sup> The regulations governing the taking and importing of marine mammals

<sup>3</sup> In August 2018, the MMPA was amended (section 316 of Public Law No. 115-232) to allow incidental take rules for military readiness activities to be issued for up to seven years. Any request for amendment of the ITA would be handled at a later time.

and to evaluate any new information and science relevant to environmental concerns and bearing on the Navy's proposed action. Each of these analyses build upon each other and address the effects of sound on marine species along with other potential impacts to marine mammals and the marine environment from conducting training and testing activities. The Navy's environmental analyses, including those for previous ITAs for training and testing in the Pacific Ocean and other areas, are available on the Navy's At-Sea Environmental Compliance website ([https://www.navfac.navy.mil/products\\_and\\_services/ev/products\\_and\\_services/environmental-planning/at\\_sea\\_compliance.html](https://www.navfac.navy.mil/products_and_services/ev/products_and_services/environmental-planning/at_sea_compliance.html)).

A summary of the environmental analyses associated with NMFS' issuance of this current rule and associated LOAs to the Navy for training and testing activities in the HSTT Study Area is below and additional information and documents, including the 2018 HSTT FEIS/OEIS, are available on the HSTT FEIS/OEIS website (<http://www.hstteis.com>) and NMFS' website (<https://www.fisheries.noaa.gov/action/incidental-take-authorization-us-navy-hawaii-southern-california-training-and-testing-hstt>).

In 2015, the Navy initiated the development of an EIS/OEIS covering training and testing activities across multiple range complexes in the HSTT Study Area in a single document. As with the previous EISs/OEISs, NMFS served as a cooperating agency in the development of this EIS/OEIS. In an October 13, 2016 letter to the Navy, NMFS confirmed that it would participate as a cooperating agency in preparation of the EIS/OEIS, due, in part, to our responsibilities under section 101(a)(5)(A) of the MMPA and section 7 of the Endangered Species Act (ESA). In the 2018 HSTT FEIS/OEIS the Navy included updates to their quantification and estimation of marine mammal takes based on the best available scientific information compiled, interpreted, and synthesized in the 2018 NMFS Revised Technical Guidance for Assessing the Effects of Anthropogenic Sound on Marine Mammal Hearing and the 2017 Phase III Criteria and Thresholds for U.S. Navy Acoustic and Explosive Effects Analysis Technical Report. See Chapter 3, Section 3.7 and Appendices E and F of the 2018 HSTT EIS/OEIS and *Estimated Take of Marine Mammals* section of the final rule for more information. The HSTT FEIS/OEIS was finalized in October 2018. The Navy anticipates finalizing its ROD associated with the HSTT FEIS/OEIS in the near future and before publication of the final MMPA incidental take rule. Based on the available information and science concerning the effects of training and testing activities on marine species at the time, the Navy identified the No Action Alternative as the environmentally preferred alternative and selected Alternative 1 as the preferred alternative. In its capacity as a cooperating agency, NMFS provided the Navy with technical assistance and input regarding the analysis of impacts to several resources, including, but not limited to, critical habitat and threatened and endangered species pursuant to the ESA, marine mammals pursuant to the MMPA, Essential Fish Habitat (EFH) and fishery resources pursuant to the Magnuson-Stevens Fishery Conservation and Management Act (MSFCMA), and National Marine Sanctuaries pursuant to the National Marine Sanctuaries Act (NMSA). The descriptions of effects on marine mammals and estimates of marine mammal acoustic exposures are in Chapter 3, Section 3.7 and Appendices E and F of the 2018 HSTT FEIS/OEIS. Other information and analysis of impacts to protected resources like EFH, are described in Chapters 3, 4, and 6 and Appendices E and F of the 2018 HSTT FEIS/OEIS.

This will be NMFS' third in a series of rulemakings under the MMPA (Hawaii and Southern California were separate rules in the initial rulemaking period, also known as Phase I) for Navy training and testing activities in the HSTT Study Area. NMFS published the first two rules for Phase I effective from January 5, 2009, through January 5, 2014, (74 FR 1456; January 12, 2009) and effective January 14, 2009, through January 14, 2014 (74 FR 3882; January 21, 2009) for Hawaii and Southern California, respectively. The rulemaking for the second rulemaking period, also known as Phase II (combining both Hawaii and Southern California) is applicable from December 24, 2013, through December 24, 2018 (78 FR 78106; December 24, 2013). For this third rulemaking, the Navy is proposing to conduct activities similar to those they have conducted under the previous two rules. Under this third rule, NMFS considered and is authorizing take of individuals of 38 species of marine mammals by Level A and B harassment incidental to training and testing activities from the use of sonar and other transducers, in-water detonations, air guns, and impact pile driving/vibratory extraction. In addition, the Navy will be authorized to take by serious injury or mortality ten individuals of two marine mammal stocks from explosives, and three takes by serious injury or mortality from vessel strikes over the five-year period.

### **III. PROPOSED ACTION AND ALTERNATIVES SUMMARY**

#### **A. Purpose and Need**

The Navy's proposed action to train and test and NMFS' action to issue regulations and associated LOAs to the Navy are considered major federal actions requiring both the Navy and NMFS to analyze the effects of their actions on the human environment pursuant to NEPA and 40 CFR Parts 1500-1508. Thus, the Navy and NMFS (as a cooperating agency) coordinated from the outset and developed the 2018 HSTT FEIS/OEIS to meet each agency's distinct NEPA obligations and support the decision making of both agencies. This included developing explanations pursuant to 40 CFR section 1502.13 regarding the purpose and need for both agencies' proposed actions. Since NMFS' issuance of an ITA under the MMPA is different than the Navy's purpose and need regarding training and testing activities pursuant to 10 U.S.C. section 5062, the FEIS/OIES recognizes NMFS' purpose and need to review and act on the Navy's request for an authorization to take marine mammals incidental to the proposed training and testing activities.

In summary, the Navy's purpose and need for the proposed action is to ensure that the Navy meets its statutory mandates under 10 U.S.C. section 5062, which is to maintain, train, and equip combat-ready naval forces capable of winning wars, deterring aggression, and maintaining freedom of the seas. This mission is achieved in part by conducting training and testing within the HSTT Study Area in accordance with established Navy military readiness requirements. For more information about the purpose and need of the Navy's proposed action, see Chapter 1, Section 1.4 in the 2018 HSTT FEIS/OEIS.

In summary, the purpose of NMFS' action, which is a direct outcome of the Navy's request for authorization to take marine mammals incidental to conducting the training and testing activities in the HSTT Study Area, is to evaluate Navy's application pursuant to section 101(a)(5)(A) of the MMPA and 50 CFR Part 216 and issue an ITA, if appropriate. The need for NMFS' action is to consider the impacts of the Navy's activities on marine mammals and ultimately authorize the

incidental take in compliance with the MMPA if the requirements of section 101(a)(5)(A) are satisfied. NMFS' purpose and need is described in more detail below and is supported by the analysis in the 2018 HSTT FEI/OEIS and NMFS final rule.

The Navy submitted an application to NMFS demonstrating the need and potential eligibility for an ITA under the MMPA, thus NMFS has a corresponding duty to determine whether and how to authorize take of marine mammals incidental to the activities described in the application. The purpose of issuing ITAs is to provide an exception to the take prohibition in the MMPA and to ensure that the action complies with the MMPA and implementing regulations. ITAs may be issued as either: (1) regulations and associated LOAs under section 101(a)(5)(A) of the MMPA or (2) Incidental Harassment Authorizations (IHAs) under section 101(a)(5)(D) of the MMPA. An IHA can be issued only when there is no potential for serious injury or mortality or where any such potential can be negated through required mitigation measures. Because some of the activities under the Navy's proposed action created a potential for lethal takes or takes that may result in serious injury that could lead to mortality, the Navy requested rulemaking and the issuance of LOAs associated with their proposed training and testing activities.

NMFS' purpose is to evaluate the Navy's proposed action pursuant to NMFS' authority under the MMPA, and to make a determination whether to issue incidental take regulations and LOAs, including any conditions needed to comply with the MMPA. To authorize the incidental take of marine mammals, NMFS evaluates the best available scientific information to determine whether the take would have a negligible impact on the affected marine mammal species or stocks and an unmitigable impact on their availability for subsistence uses. NMFS must also prescribe permissible methods of taking, other "means of effecting the least practicable adverse impact" on the affected species or stocks and their habitat, and monitoring and reporting requirements. NMFS cannot issue an ITA unless it can make the required findings. The need for NMFS' action is to consider the impacts of the Navy's activities on marine mammals and meet NMFS' obligations under the MMPA. The 2018 HSTT FEIS/OEIS addresses the environmental impacts associated with NMFS' consideration whether to issue the requested authorization to the Navy for take of marine mammals incidental to the training and testing activities within the HSTT Study Area, including a variety of mitigation measures that were considered during the MMPA authorization process. The analysis of mitigation measures considers benefits to species or stocks and their habitat, and analyzes the practicability and efficacy of each measure. The analysis of mitigation measures was used to support requirements pertaining to mitigation, monitoring, and reporting that would be specified in final MMPA regulations and subsequent LOAs.

## B. Navy Proposed Action

The Navy proposes to conduct training and testing activities in the HSTT Study Area. These training and testing activities include the use of active sonar and explosives at sea off the coasts of Hawaii and Southern California, on the high seas during vessel transit between these areas, in the Temporary Operating Area north and west of the Hawaii Operating Area, and at select Navy pierside and harbor locations. A summary of the Navy's proposed training and testing activities is below and the detailed descriptions are in Chapter 2, Section 2.3 and Appendix A of the 2018 HSTT FEIS/OEIS.

**Proposed Training Activities:** A major training exercise (MTE) comprises several “unit level” range exercises conducted by several units operating together while commanded and controlled by a single commander. These exercises typically employ an exercise scenario developed to train and evaluate the strike group in naval tactical tasks. In a MTE, most of the activities being directed and coordinated by the strike group commander are identical in nature to the activities conducted during individual, crew, and smaller unit level training events. In a MTE, however, these disparate training tasks are conducted in concert, rather than in isolation. Some integrated or coordinated anti-submarine warfare (ASW) exercises are similar in that they are composed of several unit level exercises but are generally on a smaller scale than a MTE, are shorter in duration, use fewer assets, and use fewer hours of hull-mounted sonar per exercise. These coordinated exercises fall under the warfare area called ASW. Three key factors used to identify and group the exercises are the scale of the exercise, duration of the exercise, and amount of hull-mounted sonar hours modeled/used for the exercise. Information on the differences between major ASW training events and smaller integrated/coordinated anti-submarine exercises based on scale, duration, and sonar hours for the purposes of exercise reporting requirements can be found in Chapter 2, Section 2.3 Table 2.3-1 of the 2018 HSTT FEIS/OEIS.

The training activities proposed by the Navy are described in the 2018 HSTT FEIS/OEIS in Chapter 2, Section 2.3 Table 2.3-2, which includes the activity name and short description of the activity, and Appendix A, which includes detailed descriptions of activities.

**Proposed Testing Activities:** The Navy’s research and acquisition community engages in a broad spectrum of testing activities in support of the fleet. These activities include, but are not limited to, basic and applied scientific research and technology development; testing, evaluation, and maintenance of systems (e.g., missiles, radar, and sonar) and platforms (e.g., surface ships, submarines, and aircraft); and acquisition of systems and platforms to support Navy missions and give a technological edge over adversaries. The individual commands within the research and acquisition community included in the 2018 HSTT FEIS/OEIS are Naval Air Systems Command, Naval Sea Systems Command, Office of Naval Research, and Space and Naval Warfare Systems Command.

**Naval Air Systems Command (NAVAIR)** testing activities generally fall in the primary mission areas used by the fleets. NAVAIR activities include, but are not limited to, the testing of new aircraft platforms (e.g., the F-35 Joint Strike Fighter aircraft), weapons, and systems (e.g., newly developed sonobuoys) that will ultimately be integrated into fleet training activities. In addition to the testing of new platforms, weapons, and systems, NAVAIR also conducts lot acceptance testing of weapons and systems, such as sonobuoys. The majority of testing activities conducted by NAVAIR are similar to fleet training activities, and many platforms and systems currently being tested are already being used by the fleet or will ultimately be integrated into fleet training activities. However, some testing activities may be conducted in different locations and in a different manner than similar fleet training activities and, therefore, the analysis for those events and the potential environmental effects may differ. Table 2.3-3 in the 2018 HSTT FEIS/OEIS describes NAVAIR’s proposed testing activities in more detail.

**Naval Sea Systems Command (NAVSEA)** activities are generally aligned with the primary mission areas conducted by the fleets. NAVSEA activities include, but are not limited to, new ship construction, life cycle support, and other weapon system development and testing. Only systems testing at Navy shipyards and piers is included in the 2018 HSTT FEIS/OEIS. Testing activities are conducted throughout the life of a Navy ship, from construction to verification of performance mission capabilities, to deactivation from the fleet. Activities include pierside and at-sea testing of ship systems, including sonar, acoustic countermeasures, radars, torpedoes, weapons, unmanned systems, and radio equipment; tests to determine how the ship performs at sea (sea trials); development and operational test and evaluation programs for new technologies and systems; and testing on all ships and systems that have undergone overhaul or maintenance. Table 2.3-4 of the 2018 HSTT FEIS/OEIS describes NAVSEA's proposed testing activities in more detail.

**The Office of Naval Research (ONR)** provides technology solutions for Navy and Marine Corps needs. The ONR's mission is to plan, foster, and encourage scientific research in recognition of its paramount importance as related to the maintenance of future naval power and the preservation of national security. The ONR manages the Navy's basic, applied, and advanced research to foster transition from science and technology to higher levels of research, development, test, and evaluation. The ONR is also a parent organization for the Naval Research Laboratory, which operates as the Navy's corporate research laboratory and conducts a broad multidisciplinary program of scientific research and advanced technological development. Testing conducted by the Office of Naval Research in the HSTT Study Area includes acoustic and oceanographic research, large displacement unmanned underwater vehicle (innovative naval prototype) research, and emerging mine countermeasure technology research. Table 2.3-5 of the 2018 HSTT FEIS/OEIS describes ONR's proposed testing activities in more detail.

**Space and Naval Warfare Systems Command (SPAWAR)** is the information warfare systems command for the Navy. SPAWAR's mission is to acquire, develop, deliver, and sustain decision superiority for the warfighter. SPAWAR Systems Center Pacific is the research and development part of SPAWAR focused on developing and transitioning technologies in the area of command, control, communications, computers, intelligence, surveillance, and reconnaissance. SPAWAR Systems Center Pacific conducts research, development, test, and evaluation projects to support emerging technologies for intelligence, surveillance, and reconnaissance; anti-terrorism and force protection; mine countermeasures; anti-submarine warfare; oceanographic research; remote sensing; and communications. These activities include, but are not limited to, the testing of surface and subsurface vehicles; intelligence, surveillance, and reconnaissance/information operations sensor systems; underwater surveillance technologies; and underwater communications. Table 2.3-6 of the 2018 HSTT FEIS/OEIS describes SPAWAR's proposed testing activities in more detail.

### C. NMFS Proposed Action

Sections 101(a)(5)(A) and (D) of the MMPA give NMFS the authority to authorize the incidental but not intentional take of small numbers (see explanation at the end of this section regarding the definition of harassment and applicability of small numbers for military readiness activities) of marine mammals, provided certain determinations are made and statutory and regulatory procedures are met. As noted above, to authorize the incidental take of marine mammals, NMFS evaluates the best available scientific information to determine whether the take would have a negligible impact<sup>4</sup> on affected species or stocks and whether the activity would have an unmitigable adverse impact on the availability of the species or stocks for subsistence use (if applicable). NMFS cannot issue authorizations if it would result in more than a negligible impact on marine mammal species or stocks or would result in an unmitigable adverse impact on the species or stocks for subsistence uses. NMFS must also prescribe the permissible methods of take and other means of effecting the least practicable adverse impact on the species or stocks of marine mammals and their habitat, paying particular attention to rookeries, mating grounds, and other areas of similar significance. All ITAs include additional requirements or conditions pertaining to monitoring and reporting.

In 2003 the MMPA was amended through the National Defense Authorization Act for Fiscal Year 2004 (NDAA; Public Law 108-136) to remove the “small numbers” and “specified geographical region” provisions for military readiness activities and amend the definition of “harassment” as applied to, among other things, military readiness activities. Section 3(18)(B) of the MMPA defines “harassment” for military readiness activities and scientific research by or on behalf of the federal government 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].

The NDAA for Fiscal Year 2004 also amended the MMPA for military readiness activities to require that NMFS, when making a determination of “least practicable adverse impact on such species or stock,” consult with the Department of Defense and consider personnel safety, practicality of implementation, and impact on the effectiveness of the military readiness activity.

Additional information about the MMPA, its implementing regulations, and the application process are available on the NMFS website (<https://www.fisheries.noaa.gov/node/23111> and <https://www.fisheries.noaa.gov/topic/laws-policies#marine-mammal-protection-act>).

Since NMFS’ proposed action would authorize take of marine mammals incidental to a subset of the activities analyzed in the 2018 HSTT FEIS/OEIS, these components of the Navy proposed

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<sup>4</sup> NMFS defines “negligible impact” as “an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species or stock through effects on annual rates of recruitment or survival.” (50 CFR section 216.103)



action are the subject of NMFS' proposed action. Therefore, NMFS' proposed action is a direct outcome of the Navy's request for an authorization.

#### D. Alternatives Considered by the Navy

The Navy, in coordination with NMFS, considered and assessed three alternatives in the 2018 HSTT FEIS/OEIS, the action alternatives (Alternatives 1 and 2) and the No Action Alternative. Both action alternatives incorporate a variety of mitigation measures, developed in consultation with NMFS, to minimize adverse impacts to marine species. In addition, the action alternatives were developed to meet both the Navy's purpose and need to train and test and NMFS' independent purpose and need to evaluate the potential impacts of the Navy's activities, determine whether incidental take resulting from the Navy's activities will have a negligible impact on affected marine mammal species and stocks, and to prescribe measures to effect the least practicable adverse impact on marine mammal species or stocks and their habitat, as well as monitoring and reporting requirements.

The **No Action Alternative** considers that the proposed action would not take place (i.e., the proposed training and testing would not occur in the HSTT Study Area). While the Navy identified the No Action Alternative as the environmentally preferable alternative, it fails to meet the Navy's purpose and need of the proposed action.

**Alternative 1 (Preferred Alternative)** reflects a representative year of training and testing to account for the natural fluctuation of training and testing cycles and deployment schedules that generally limit the maximum level of activities from occurring year after year in any 5-year period. Using a representative level of activities rather than maximum level reduces the amount of ship hull-mounted, mid-frequency active sonar estimated to meet requirements. Under Alternative 1, the Navy assumes that some unit-level training and testing would be conducted using synthetic means (e.g., simulators). Additionally, this alternative assumes that some unit-level active sonar training would be completed through other training exercises. Alternative 1 results in lower impacts on marine species compared to Alternative 2. The Navy's entire suite of mitigation measures, including procedural and geographic mitigation measures, would be implemented under Alternative 1.

**Alternative 2** would enable the Navy to meet the highest levels of required training and testing in order to respond to naval opponents. Alternative 2 reflects the maximum number of training and testing activities that could occur within a given year and assumes that the maximum level of activity would occur every year over a 5-year period. This allows for the greatest flexibility for the Navy to maintain readiness when considering potential changes in the national security environment, fluctuations in schedules, and anticipated in-theater demands. The Navy's entire suite of mitigation measures, including procedural and geographic mitigation measures, would be implemented under Alternative 2.

The Navy thoroughly considered four other alternatives (Alternative training and testing locations, Simulated training and testing only, Training and testing without the use of active sonar, Alternatives including geographic mitigation measures within the HSTT Study Area), which were eliminated from further consideration because they did not meet the purpose and

need of the Proposed Action. The explanation of these alternatives and why they were eliminated from further consideration is in Chapter 2, Section 2.4.3 in the 2018 HSTT FEIS/OEIS.

#### E. Alternatives Considered by NMFS

As noted earlier in this ROD, the Navy developed the range of alternatives in coordination with NMFS to include the consideration of a variety of mitigation measures for both action alternatives. However, the alternatives considered by NMFS with respect to the decision for which we are responsible (i.e., whether to issue regulations and subsequent LOAs to the Navy), is based on the activities described in the Navy's application for the incidental take authorization. Therefore, since the Navy selected Alternative 1 as the preferred alternative and this is the action that includes the training and testing activities described in their application, Alternative 1 along with the no action alternative is sufficient for NMFS consideration whether to issue the ITA.

**No Action Alternative:** For NMFS, denial of an ITA constitutes the NMFS No Action Alternative, which is consistent with our statutory obligation under the MMPA to grant or deny incidental take authorization requests and to prescribe mitigation, monitoring, and reporting with any authorizations. Under the No Action Alternative, NMFS would not issue incidental take regulations and subsequent LOAs, and the Navy would not conduct their planned training and testing activities in the HSTT Study Area. The No Action Alternative served as a baseline in the 2018 HSTT FEIS/OEIS against which the impacts of the Navy's Preferred Alternative were compared and contrasted. NMFS considers the No Action Alternative to be environmentally preferable as it would not result in adverse effects to marine resources under NMFS legal jurisdiction and special expertise as a result of the Navy's proposed training and testing activities.

**Alternative 1 (Preferred Alternative):** Under the Navy's Preferred Alternative, NMFS would issue incidental take regulations and LOAs to the Navy for take, by harassment, serious injury, and mortality, of marine mammals during training and testing activities in the HSTT Study Area, taking into account the prescribed methods of take; mitigation measures, including means of effecting the least practicable adverse impact on the species and stocks and their habitat; and monitoring and reporting requirements.

### IV. FINDINGS AND FACTORS CONSIDERED IN THE DECISION

#### A. Findings

As previously indicated, NMFS has a statutory responsibility to independently review and evaluate each request for authorization to incidentally take marine mammals pursuant to section 101(a)(5)(A) or (D) of the MMPA. Review of the environmental consequences to the marine environment is of particular importance for NMFS' evaluation in reaching a decision to issue a final rule and subsequent LOAs. The primary documents underlying NMFS' analysis are the Navy's rulemaking/LOA application, the 2018 HSTT FEIS/OEIS, and the HSTT ESA Biological Opinion.

NMFS reviewed the Navy's ITA request to determine whether the total taking resulting from the Navy training and testing activities would have a negligible impact on the affected species

or stocks of marine mammals within the HSTT Study Area and to prescribe the permissible methods of taking along with requirements pertaining to mitigation, monitoring, and reporting of such takings. NMFS made the requisite findings under the MMPA and addresses these findings in the final rule.

After independent review, NMFS has determined that the analysis in the 2018 HSTT FEIS/OEIS adequately addresses the potential direct, indirect, and cumulative impacts to marine mammals and their habitat resulting from the use of active acoustic sonar systems and other transducers, in-water detonations, air guns, construction activities involving pile removal and installation, and vessels throughout the HSTT Study Area during military readiness training and testing activities, and properly addresses NOAA's comments and input.

In the 2018 HSTT FEIS/OEIS, the Navy analyzed possible cumulative impacts and potential impacts from exposure to active acoustic sources and explosive detonations, as well as impacts from non-acoustic sources such as vessel strike and other consequences associated with proposed training and testing activities. The Navy used their exposure estimates, combined with qualitative scientific information, to conclude that none of the alternatives will result in any adverse population level effects on any of the affected species or stocks. Based on the Navy's estimates of the number of each species of marine mammal that will be exposed to levels of sound, NMFS determined that use of active acoustic sonar systems and other transducers, in-water detonations, air guns, construction activities involving pile removal and installation, and vessels have the potential to result in Level A harassment (PTS and non-auditory injury), Level B harassment by behavioral disruption and TTS, as well as a small number of serious injuries or mortalities due to explosives and ship strikes.

## B. Key Factors

The environmental consequences to the marine environment and protected resources are important to the evaluation leading to the decision to issue any given ITA. In particular, because NMFS' action is specific to authorizing incidental take of marine mammals, the key factors relevant to and considered in the decision to issue an ITA are related to NMFS' statutory mission under the MMPA. In reaching its decision under the MMPA, NMFS took into consideration all of the information submitted by the Navy in its rulemaking/LOA application; the standards for issuing MMPA incidental take authorizations as described above; all of the information, research, and analysis as described in the MMPA proposed and final rules; all information received during the public comment periods; and any other information relevant to the MMPA decision-making process. Key factors and findings NMFS considered in the decision whether to issue regulations and subsequent LOAs are explained below. The detailed explanations about the affected environment and environmental consequences are discussed in the 2018 HSTT FEIS/OEIS, in Chapter 3, within subsections arranged by Resource type, including: Air Quality; Sediments and Water Quality; Vegetation; Invertebrates; Habitats; Fishes; Marine Mammals; Reptiles; Birds; Cultural Resources; Socioeconomic Resources; and Public Health and Safety. Marine Protected Areas are addressed in Chapter 6 (Regulatory Considerations), Section 6.1.2. The section on Marine Mammals (Chapter 3, Section 3.7) and Appendices E and F contain the majority of the analysis that relates to NMFS' action of issuing MMPA incidental take regulations. In addition, Chapter 4 provides an assessment of potential cumulative impacts, including analyzing the potential for cumulatively significant impacts to the marine environment

and marine mammals. Other chapters of the 2018 HSTT FEIS/OEIS contain analyses related to potential impacts on marine mammal habitat and further support NMFS' findings and determinations for issuance of MMPA regulations and LOAs.

Mitigation and Monitoring Requirements: Both agencies are required to review and consider mitigation that minimizes or avoids an impact. Specific to NMFS' statutory obligations under the MMPA, NMFS must consider mitigation measures specific to its proposed action to achieve the least practicable adverse impact on species or stocks and their habitat. The Navy will implement several procedural mitigation measures and geographic mitigation areas as part of conducting their training and testing activities. Furthermore, the 2018 HSTT FEIS/OEIS acknowledges a degree of uncertainty regarding the effects of underwater sound on marine mammals. NMFS provided extensive input during the development of the 2018 HSTT FEIS/OEIS to address these uncertainties, and includes requirements for mitigation, monitoring, and reporting by the Navy in the final rule to manage uncertainty. The Navy Acoustic Effects Model estimates acoustic and explosive effects without taking mitigation into account; therefore, the model overestimates predicted impacts on marine mammals within mitigation zones. To account for mitigation for marine species in the take estimates, the Navy conducts a quantitative assessment of mitigation. The final rule implements continued management to reduce uncertainty by requiring extensive monitoring and reporting by the Navy, including the establishment and implementation of a monitoring plan specific to the HSTT Study Area, an Integrated Comprehensive Monitoring Program, and a Strategic Planning Process. The Navy will update the status of its monitoring program and funded projects through the Navy Marine Species Monitoring Program website (<https://www.navy-marinespeciesmonitoring.us>). The Navy's monitoring program is designed to support NMFS' use of adaptive management throughout rule implementation, as presented in the 2018 HSTT FEIS/OEIS and further explained in the final rule. NMFS and the Navy will meet to discuss the monitoring reports, Navy research and development studies, and current science and discuss whether mitigation or monitoring modifications are appropriate. The use of adaptive management allows NMFS to consider new information to determine (with input from the Navy regarding personnel safety, practicality of implementation, and impact on effectiveness of the Navy's activities) on an annual or biennial basis if mitigation or monitoring measures should be modified. Mitigation measures could be modified if new data suggests that such modifications would have a reasonable likelihood of reducing adverse effects to marine mammals and if the measures are practicable. While not a required component of the final rule, the 2018 HSTT FEIS/OEIS describes the Navy's continuing commitment to marine mammal research, in particular research related to the effects of underwater sound on marine mammals. NMFS will continue to encourage and support the Navy's research efforts. The timeframe for completing research and conducting an assessment of how that research factors into MMPA authorizations, however, does not allow NMFS to wait for the results of the research prior to authorizing the Navy's request for incidental take. Based on the review of the 2018 HSTT FEIS/OEIS, NMFS determined the Navy appropriately acknowledges uncertainty and provides detailed analyses on how existing information is incorporated to assess effects where uncertainties exist, and to address and manage uncertainty via mitigation, monitoring, reporting, and research.

Considering Effects to ESA-listed Marine Mammals and Critical Habitat. The Navy requested formal consultation with NMFS under the ESA on January 5, 2018 for the training and testing activities identified in the HSTT EIS/OEIS and ITA application. On June 27, 2018, NMFS'

Office of Protected Resources Permits and Conservation Division requested initiation of formal consultation with NMFS' Office of Protected Resources ESA Interagency Cooperation Division on the proposed issuance of regulations and associated LOAs. NMFS formally initiated consultation on July 2, 2018 as it was determined the Navy and Office of Protected Resources Permits and Conservation Division had provided sufficient information to initiate formal consultation. On December 10, 2018, NMFS issued a Biological Opinion addressing Navy's proposal to conduct training and testing activities in the HSTT Study Area and the Office of Protected Resources Permits and Conservation Division's issuance of regulations and associated LOAs. The accompanying Incidental Take Statement covers the same period as the MMPA ITA: December 2018 through December 2023. The NMFS Protected Resources Permits and Conservation Division consulted internally on its proposal to issue regulations and LOAs under the MMPA authorizing "take" of marine mammals incidental to Navy's training and testing activities during the same period of time. The Biological Opinion concludes that the proposed regulations and any take associated with activities analyzed in those regulations are not likely to jeopardize the continued existence of any threatened or endangered species, and are not likely to result in the destruction or adverse modification of critical habitat in the HSTT Study Area, during any single year or as a result of the cumulative impacts of annual authorizations. The Biological Opinion includes an explanation of how the results of NMFS' baseline and effects analyses in Biological Opinions relate to those contained in the Cumulative Impacts section (Chapter 4) of the 2018 HSTT FEIS/OEIS. In particular, these analyses consider the effects resulting from interactions of potential stressors, thereby augmenting the cumulative impacts analysis in the 2018 HSTT FEIS/OEIS.

Two marine mammals, the ESA-listed Hawaiian monk seal and Main Hawaiian Islands insular false killer whale, have ESA-designated critical habitat within the HSTT Study Area. ESA critical habitat for Hawaiian monk seals was designated in 1986 (51 FR 16047; April 30, 1986) and later revised in 1988 (53 FR 18988; May 26, 1988) and in 2015 (80 FR 50925; August 21, 2015) (NOAA, 2015a). The final rule to revise critical habitat designated 16 occupied areas within the range of the species: ten areas in the Northwestern Hawaiian Islands (NWHI) and six in the main Hawaiian Islands (MHI). Critical habitat for the ESA-listed Main Hawaiian Islands insular false killer whale DPS was finalized in July 2018 (83 FR 35062; July 24, 2018) designating waters from the 45 m depth contour to the 3,200 m depth contour around the main Hawaiian Islands from Niihau east to Hawaii. To account for the existing and new ESA-designated critical habitat as well as the best available information regarding Hawaiian monk seal and Main Hawaiian Islands insular false killer whale occurrence in the HSTT Study Area, the final rule includes Mitigation Areas to reduce impacts to these marine mammals. The Hawaii Island and 4-Islands Region Mitigation Areas reduce potential impacts from mid-frequency active sonar and explosives. Expanding the 4-Islands Region Mitigation Area (which was known in the 2013-2018 rulemaking period as the Humpback Whale Cautionary Area) will assist the Navy in avoiding or reducing impacts on Main Hawaiian Islands insular false killer whales, which have been shown to have high occurrence in this area. The Navy added year-round limitation on explosives to the 4-Islands Region Mitigation Area, which includes a portion of the false killer whale BIA north of Maui and Molokai in the HSTT Study Area. Additionally the Navy will implement a sonar cap for the entire false killer whale BIA adjacent to the island of Hawaii and a portion of the false killer whale BIA north of Maui and Molokai.

Essential Fish Habitat under the Magnuson-Stevens Fishery Conservation and Management Act. The Navy determined that the proposed action could result in adverse effects to Essential Fish Habitat. The Navy's EFH Assessment prepared for the 2013 HSTT EIS/OEIS is still valid because the FEIS/OEIS covers similar activities in the same study area to those analyzed in 2013. The Navy submitted EFH packages to the NMFS Pacific Island and West Coast Region Offices to initiate supplemental EFH consultations on April 17, 2018. For the Hawaii Range Complex, supplemental EFH consultation focused on new activities since the 2013 EFH consultation and any new applicable science not already considered by the Navy. The NMFS Pacific Islands Regional Office responded to the Navy's consultation request on October 11, 2018 and provided a revised (from the original 2013 consultation) conservation recommendation. On October 16, 2018 the Navy responded with the Navy's reasons for not following the recommendation, including the scientific justification for disagreeing with NMFS on the anticipated effects of the action and the measures needed to avoid, minimize, mitigate, or offset such effects. For the Southern California portion of the HSTT Study Area, supplemental EFH consultation was focused on changes in seafloor devices and underwater detonation and changes in "bin" definitions. The consultation with the NMFS West Coast Region Office was completed on October 3, 2018 when NMFS West Coast Region Office agreed that the Navy's proposed conservation measures are sufficient to avoid, minimize, or offset impacts to EFH and did not provide additional EFH conservation recommendations.

Coastal Zone Management Act. In February 2018, the Navy submitted consistency determinations under 15 CFR Part 930 to the California Coastal Commission for proposed actions in California. In their July 2018 findings letter, the California Coastal Commission objected to the Navy's consistency determination based on its determination that the activities as proposed were not consistent to the maximum extent practicable with the marine resources protection policy (Section 30230) of the California Coastal Act, which is one of the enforceable policies under the California Coastal Management Program. In August 2018, the Navy responded to each specific objection raised by the California Coastal Commission. The Navy continued to attempt to resolve the differences with the California Coastal Commission. Unable to resolve the differences, in accordance with 15 CFR Part 930, the Navy informed the Coastal Commission of their decision to proceed over the objection based on the Navy's determinations that the proposed activities are fully consistent with the applicable enforceable policies of the California Coastal Management Program.

In April 2018, the Navy submitted consistency determinations under 15 CFR Part 930 to the State of Hawaii's Office of Planning for proposed actions in Hawaii. The Office of Planning objected in part (to the use of explosives) and proposed two conditional concurrences to the Navy's consistency determination. After considering Hawaii's position and reviewing the underlying law and regulations, the Navy maintains that it is consistent to the maximum extent practicable with Hawaii's enforceable policies under the Hawaii Coastal Zone Management (CZM) Program. In their response, the Navy emphasized its commitment to strict compliance with the ESA and made assurances that the activities proposed in the HSTT FEIS/OEIS are consistent to the maximum extent practicable with the enforceable policies of the Hawaii CZM Program. In compliance with 15 CFR section 930.43(e), the Navy also stated in the letter its decision to proceed over Hawaii's Office of Planning objection to the Navy's consistency determination.

National Marine Sanctuaries Act. Federal agency actions that are likely to injure sanctuary resources are subject to consultation with the Office of National Marine Sanctuaries (ONMS) under section 304(d) of the National Marine Sanctuaries Act (NMSA). There are two national marine sanctuaries in the HSTT Study Area, the Hawaiian Islands Humpback Whale National Marine Sanctuary and the Channel Islands National Marine Sanctuary.

Hawaiian Islands Humpback Whale National Marine Sanctuary: The military activities the Navy proposed to conduct in the Sanctuary fall into classes of activities covered in the 1997 FEIS/Management Plan for the Sanctuary, which under the Sanctuary regulations do not require permits or further consultation under section 304(d) unless the military activity is modified in a manner significantly greater than was considered in a previous consultation. These military activities are also the same classes of activities previously analyzed in the Navy's 2013 HSTT Final EIS/OEIS and for which ONMS found no consultation was required in a letter dated August 16, 2013. The activities have not been modified in a manner significantly greater than those considered in the 2013 HSTT Final EIS/OEIS and, therefore, further consultation by the Navy was not required.

Channel Islands National Marine Sanctuary: Proposed military activities in the Sanctuary are consistent with those activities described in the sanctuary's regulations and in Section 3.5.9 (Department of Defense Activities, preexisting activities) of the 2009 FEIS/Management Plan. The Navy's proposed activities are not significantly modified in such a way that possible adverse effects on Sanctuary resources or qualities are significantly different in manner than previously considered. The training and testing activities currently proposed are also the same classes of activities previously analyzed in the Navy's 2013 HSTT Final EIS/OEIS and for which the ONMS found no consultation was required in a letter dated August 16, 2013. The activities have not been modified in a manner significantly greater than those considered in the 2013 HSTT Final EIS/OEIS; therefore, further consultation by the Navy is not required.

NMFS has likewise determined that it is not required to consult under section 304(d) of the NMSA on its action of reviewing and processing the Navy's request for incidental take authorization. For both the Hawaiian Islands Humpback Whale NMS and the Channel Islands NMS, NMFS is evaluating the same Navy military activities in the same proximity to the sanctuaries for which it has been determined that further consultation by the Navy under section 304(d) is not required. In addition, the MMPA rule already provides all reasonable and prudent mitigation measures such that further consultation would be unlikely to provide additional protections for sanctuary resources.

## V. ENVIRONMENTAL REVIEW SUMMARY AND ADOPTION

The CEQ regulations and NOAA's policy and procedures for implementing NEPA provide for NOAA to adopt another agency's FEIS. Specifically, when NOAA, as a cooperating agency, reviews the lead agency's FEIS and determines that it is sufficient and adequately addressed NOAA's comments and suggestions, NOAA may adopt the FEIS without recirculating it (40 CFR section 1506.3). NOAA's NMFS, as a cooperating agency, as more fully explained in the

2018 HSTT FEIS/OEIS, participated early, substantially, and meaningfully in the NEPA process, including preparation of the DEIS and FEIS, to ensure the FEIS included adequate information and evaluation of the impacts of the Navy's actions to marine resources, including marine mammals. NOAA independently reviewed the 2018 HSTT FEIS/OEIS, and determined that the Navy, as the lead agency for the development of the 2018 HSTT FEIS/OEIS fully and adequately evaluated the direct, indirect, and cumulative impacts of their proposed action and alternatives on marine resources. This evaluation included a detailed review of impacts of the Navy's training and testing activities involving active acoustic sources, explosives, and vessel use on 38 species of marine mammals under NMFS' purview (including nine species listed as threatened or endangered under the ESA), estimates of marine mammal acoustic exposure, and identification of standard monitoring and mitigation measures. As noted, NOAA, via NMFS, served as a cooperating agency in preparation of the 2018 HSTT FEIS/OEIS and was instrumental in providing information related to the occurrence of, impacts to, and mitigation for marine resources over which it exercises legal jurisdiction and has special expertise, including marine mammals. Based on our independent review, NMFS has determined that the 2018 HSTT FEIS/OEIS meets the requirements of 40 CFR Parts 1500-1508 and NOAA policy and procedure and that NMFS' comments and input to the 2018 HSTT FEIS/OEIS were adequately addressed during the NEPA process. Based on our determination of the sufficiency of the 2018 HSTT FEIS/OEIS and the adequacy of its incorporation of our comments and concerns, NMFS, on behalf of NOAA, has decided to adopt the document without the need for recirculation in accordance with 40 CFR section 1506.3.

NMFS has determined the 2018 HSTT FEIS/OEIS to be comprehensive in analyzing the scope of the Navy's training and testing activities over a large geographic area, and that the evaluation of the direct, indirect, and cumulative impacts on the human environment, including the marine environment, is adequate to support NMFS' required evaluation for issuance of MMPA regulations and LOAs. NMFS independently reviewed the 2018 HSTT FEIS/OEIS and concludes that the impacts evaluated therein are substantially the same as the impacts that NMFS must analyze under its proposed action to authorize take of marine mammals incidental to training and testing activities in the HSTT Study Area. The 2018 HSTT FEIS/OEIS also addresses NOAA's required components for adoption because it meets the requirements for an adequate EIS under the CEQ regulations and NOAA policy and procedures and reflects comments and expert input provided by NMFS as a cooperating agency. For example, the 2018 HSTT FEIS/OEIS includes:

- a discussion of the Navy's proposed action and purpose and need for the action and a discussion of the MMPA authorization process necessary to support implementation of the action;
- evaluation of a reasonable range of alternatives to the proposed action, including a no action alternative, and alternatives to mitigate adverse effects to marine mammals;
- a description of the affected environment, including the status of all marine mammal species likely to be affected;
- a description of the environmental impacts of the proposed action and alternatives, including direct, indirect, and cumulative impacts on marine mammals and projected estimates of incidental take;



- identification and evaluation of reasonable mitigation measures to avoid or minimize adverse impacts to marine mammals; and
- a listing of agencies consulted, a listing of agencies and persons who collaborated on preparation of the 2018 HSTT FEIS/OEIS, and to whom copies of the 2018 HSTT FEIS/OEIS were provided.

While the 2018 HSTT FEIS/OEIS provides detailed, sufficient, and adequate information and evaluation of NMFS trust resources to satisfy NMFS' NEPA obligations for issuance of the requested MMPA regulations and LOAs, NMFS also considered information developed through other statutory compliance processes, including the ESA, MMPA, and MSFCMA, to assess the effects of the Navy's activities on those resources. NMFS' determinations in this ROD are informed by those processes.

Per the cooperating agency commitment, the Navy provided NMFS with preliminary versions of the draft and final EIS/OEIS documents for review, and NMFS provided comments in support of the analysis regarding areas of NOAA's subject matter expertise and jurisdiction. NMFS also circulated the draft and final EIS/OEIS documents to relevant NOAA offices and programs, compiled comments received, and submitted them to the Navy. Subsequently, the Navy and NMFS participated in comment resolution meetings, in which the Navy addressed NOAA-related comments or resolved any outstanding issues. In addition, NMFS reviewed the ROD prepared by the Navy. The Navy's ROD clearly states the decision being made and identified Alternative 1 as the preferred alternative, as described in the 2018 HSTT FEIS/OEIS. The Navy also compared and contrasted alternatives, including effects to marine mammals and discussed all practicable means to avoid or minimize harm to marine mammals likely to be caused by Alternative 1 and committed to implementing them during the conduct of training and testing activities.

## **VI. PUBLIC INVOLVEMENT SUMMARY**

During the development of the HSTT EIS/OEIS the public had opportunities to comment on the scope of the EIS/OEIS during the 60-day scoping period starting on November 12, 2015 when the Navy published the Notice of Intent (NOI) to prepare the EIS/OEIS in the *Federal Register* (80 FR 69952). The public also had opportunities to comment on the Draft EIS/OEIS during the 60-day public comment period beginning October 13, 2017 (82 FR 48227) and during the 30-day wait period after publication of the 2018 HSTT FEIS/OEIS on September 26, 2018 (83 FR 54105). The Navy notified the public of the comment periods using letters, postcards, press releases and public service announcements, two project videos, project website subscriber emails, and newspaper advertisements in five newspapers in the HSTT Study Area. The Navy sent stakeholder notification letters to federally and non-federally recognized tribes, federal, state, and local-elected officials, and federal, regional, state, and local agencies. The letters provided a description of the proposed action, address of the project website, duration of the comment period, and information on the public meetings. The Navy held one public scoping meeting in California (San Diego, CA, December 1, 2015) and two public scoping meetings in Hawaii (Lihue, HI, December 3, 2015, and Honolulu, HI, December 5, 2015). During the Draft EIS/OEIS public comment period the Navy held five public meetings: Honolulu, HI (November 6, 2017), Kahului, HI (November 7, 2017), Lihue, HI (November 8, 2017), Hilo, HI (November 9, 2017), and San Diego, CA (November 13, 2017). NMFS participated in public meetings and

assisted the Navy with addressing the public's concerns and comments associated with the analysis of impacts on marine mammals and other marine resources. The details and explanations concerning public involvement and public comments associated with the development of the EIS/OEIS are provided in Chapter 8 of the 2018 HSTT FEIS/OEIS. NMFS will adopt the 2018 HSTT FEIS/OEIS without further public involvement or circulation in accordance with 40 CFR section 1506.3(c) since NMFS was a cooperating agency and is satisfied that the Navy adequately addressed its comments and suggestions.

In addition to the public process described above, NMFS relied on the public process pursuant to the MMPA rulemaking to develop and evaluate environmental information relevant to an analysis under NEPA. On October 20, 2017 (82 FR 48801), NMFS published a notice of receipt (NOR) of the Navy's application in the Federal Register, requesting comments and information related to the Navy's request. On June 26, 2018 NMFS published a notice of the proposed rulemaking (83 FR 29872) to solicit relevant environmental information and provide the public an opportunity to submit comments on the Navy's proposed activities and NMFS' analysis and determinations. In addition, we indicated that we believed it was appropriate to adopt the EIS and provided a link to the Draft EIS/OEIS with the publication of the proposed rule.

During the public comment period for the proposed rule NMFS received comments from the public, the Marine Mammal Commission, the National Park Service, and Non-Governmental Organizations, including the Natural Resource Defense Council and the Center for Biological Diversity. We considered all public comments received in response to the publication of the NOR and the proposed rule and used these comments to inform the analysis under the MMPA and to develop mitigation, monitoring, and other conditions for the final rule and LOAs. NMFS' responses to specific comments can be found in the final rule available for review on NMFS' website (<https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-military-readiness-activities>).

## **VII. CONDITIONS –MITIGATION, MONITORING, AND REPORTING**

NMFS does not authorize the training and testing activities proposed by the Navy, however, NMFS does authorize the incidental take of marine mammals under its jurisdiction in connection with these activities and prescribes the methods of take and other means of effecting the least practicable adverse impact on the species and stocks and their habitats. NMFS' issuance of this final rule and LOAs is thus conditioned upon reporting requirements and the implementation of mitigation and monitoring designed to reduce impacts (number and/or intensity of incidents of take) to marine mammals to the level of least practicable adverse impact. These conditions, summarized below and described in detail in the *Mitigation Measures* and *Monitoring* sections of the final rule, include procedural mitigation measures and mitigation areas as well as monitoring and reporting requirements, and provide that all practicable means to avoid or minimize environmental harm from the alternative selected have been adopted.

Procedural mitigation will be implemented by the Navy whenever and wherever an applicable training or testing activity occurs in the HSTT Study Area. The Navy customizes procedural mitigation for each applicable activity category or stressor. Procedural mitigation includes, but is not limited to, the use of trained Lookouts (protected species observers) to monitor for marine

mammals in mitigation zones, requirements for lookouts to immediately provide notification of sightings to the appropriate watch station, requirements for implementation of powerdown and shutdown mitigation measures (based on activity defined zones), pre- and post-monitoring requirements for explosive events, and measures to reduce the likelihood of ship strikes. Chapter 5 of the 2018 HSTT FEIS/OEIS and the *Mitigation Measures* section in the MMPA final rule include detailed descriptions of mitigation measures for each specified activity in the HSTT Study Area.

The Navy will also implement mitigation measures within certain areas (Mitigation Areas) and/or at times to avoid or minimize potential impacts on marine mammals in areas and/or times where they are known to engage in biologically important behaviors (*i.e.*, for foraging, migration, reproduction), where the disruption of those behaviors would be more likely to result in population-level impact. The *Mitigation Measures* section in the final rule includes detailed descriptions of geographic mitigation measures in the HSTT Study Area. Maps and tables of the mitigation areas can be found in Chapter 5 of the 2018 HSTT FEIS/OEIS. Depending on the area, mitigation will be implemented year-round or seasonally during applicable activities involving active sonar, explosives, and physical disturbance and strike stressors.

Following the publication of the 2013 HSTT MMPA incidental take rule, Navy and NMFS were sued and the resulting settlement agreement in *Conservation Council for Hawaii v. National Marine Fisheries Service*, 97 F. Supp.3d 1210 (D. Haw. 2015), restricted certain Navy activities within specific areas in the HSTT Study Area. These provisional restrictions on activities within the HSTT Study Area were derived pursuant to negotiations with the plaintiffs in that case and were specifically not evaluated or selected based on the type of thorough examination of best available science that occurs through the rulemaking process under the MMPA, or through related analyses conducted under NEPA or the ESA. The agreement did not constitute a concession by the Navy as to the potential impacts of Navy activities on marine mammals or any other marine species, or to the practicability of the measures. The Navy's adoption of restrictions on its HSTT activities as part of a relatively short-term settlement agreement does not mean that those restrictions were necessarily supported by the best available science, likely to reduce impacts to marine mammal species or stocks and their habitat, or practicable from a military readiness standpoint over the longer term in the HSTT Study Area. Accordingly, in the MMPA rulemaking and as required by statute, NMFS analyzed the Navy's activities, impacts, proposed mitigation, and other potential mitigation (including the 2015 settlement agreement measures) pursuant to the "least practicable adverse impact" standard to determine the appropriate mitigation to include in these regulations. Some of the measures included in the 2015 settlement agreement are included in the final rule, while some are not, and other measures that were not included in the 2015 settlement agreement or the 2013 rule are included in the final rule (Table 1).

**Table 1. Summary of geographic mitigation areas previously in effect and those that will be implemented as part of the final rule.**

Litigation Settlement (2015-December 2018)	HSTT Final MMPA Incidental Take Rule (December 2018-2023)
Hawaii	Hawaii

- Area 1-A Hawaii Island (North, South, East) (year-round). (a) Prohibit the use of MFAS for training and testing activities during both MTEs and unit-level training; and (b) prohibit the use of in-water explosives for training and testing activities. Reduces impacts to false killer whales, pygmy killer whales, short-finned pilot whales, bottlenose dolphins, spinner dolphins, Cuvier's beaked whales, and Blainville's beaked whales.
- Area 1-B Hawaii Island (Northwest) (year-round). Limit the use of MFAS for training and testing activities during MTEs to one Rim of the Pacific in 2016, one Rim of the Pacific in 2018, three Undersea Warfare Exercises per calendar year, and one Independent Deployer Certification Exercise per calendar year. Reduces impacts to humpback whales, false killer whales, short-finned pilot whales, melon-headed whales, bottlenose dolphins, spinner dolphins, Cuvier's beaked whales, and Blainville's beaked whales.
- Area 1-C Hawaii Island (West) (year-round). (a) Limit the use of MFAS for training and testing activities during MTEs to one Rim of the Pacific in 2016, one Rim of the Pacific in 2018, three Undersea Warfare Exercises per calendar year, and one Independent Deployer Certification Exercise per calendar year; (b) prohibit the use of MFAS for training and testing activities during unit-level training (excluding unit-level training conducted by participants in an ongoing MTE); and (c) prohibit the use of in-water explosives for training and testing activities. Reduces impacts to humpback whales, false killer whales, dwarf sperm whales, pygmy killer whales, short-finned pilot whales, bottlenose dolphins, spotted dolphins, spinner dolphins, rough toothed dolphins, Cuvier's beaked whales, and Blainville's beaked whales.
- Area 1-D Hawaii Island (Southwest) (year-round). (a) Limit the use of MFAS for training and testing activities during MTEs to one Rim of the Pacific in 2016, one Rim of the Pacific in 2018, three Undersea Warfare Exercises per calendar year, one Independent Deployer Certification Exercise per calendar year, and one Sustainment Exercise per calendar year; (b) prohibit the use of MFAS for training and testing activities during unit-level training (excluding unit-level training conducted by participants in ongoing MTEs ); and (c) prohibit the use of in-water explosives for training and testing activities. Reduces impacts to dwarf sperm
- Hawaii Island Mitigation Area (year-round). Incorporates parts of settlement measures 1-A through 1-E and 2-A through 2-E. Navy will minimize the use of MFAS (MF1 and MF4) and will not use explosives during testing and training. Reduces impacts on ESA-listed false killer whales and monk seals, two species of beaked whales, humpback whales, and other species.
- 4-Islands Region Mitigation Area (November 1 – April 15 for active sonar, year-round for explosives). Incorporates parts of settlement Areas 1-A, 1-B, 1-C, 1-D, 1-E, 2-A, 2-B, and 2-C and humpback reporting area. Navy will not use MFAS (MF1) or explosives in this mitigation area during training and testing. Reduces impacts to humpback whales, ESA-listed false killer whales and monk seals, and some dolphin species.
- Humpback Whale Special Reporting Areas (December 15 – April 15). Incorporates parts of settlement areas 1-B, 1-C, 1-D, 2-A, 2-B, and 2-D, humpback special reporting area and humpback cautionary area. Navy will report the hours of MF1 used in these areas in training and testing activity reports.
- Humpback Whale Awareness Notification Message Area (November – April). Navy will issue a seasonal awareness notification message to alert ships and aircraft operating in the area to the possible presence of concentrations of large whales, including humpback whales.

whales, pygmy killer whales, short-finned pilot whales, bottlenose dolphins, spotted dolphins, spinner dolphins, rough-toothed dolphins, Cuvier's beaked whales, and Blainville's beaked whales.

- Area 1-E and 2-E Hawaii Island (nearshore Northwest) (year-round). Require that all surface vessels use extreme caution and proceed at safe speed so they can take proper and effective action to avoid a collision with any sighted object or disturbance, and can be stopped within a distance appropriate to the prevailing circumstances and conditions. Reduces impacts to dwarf sperm whales, false killer whales, pygmy killer whales, melon-headed whales, bottlenose dolphins, spotted dolphins, spinner dolphins, rough-toothed dolphins, and Blainville's beaked whales.
- Area 2-A (Southeast Oahu, Southwest Molokai, Penguin Bank) (year-round). (a) Prohibit the use of MFAS for training and testing activities during MTEs; (b) prohibit the use of in-water explosives for training and testing activities; and (c) require that all surface vessels use extreme caution and proceed at safe speed so they can take proper and effective action to avoid a collision with any sighted object or disturbance, and can be stopped within a distance appropriate to the prevailing circumstances and conditions. Reduces impacts to humpback whales, false killer whales, bottlenose dolphins, and spinner dolphins.
- Area 2-B (South Molokai, East Maui, Penguin Bank) (year-round). (a) Prohibit the use of in-water explosives for training and testing activities; and (b) require that all surface vessels use extreme caution and proceed at safe speed so they can take proper and effective action to avoid a collision with any sighted object or disturbance, and can be stopped within a distance appropriate to the prevailing circumstances and conditions. Reduces impacts to humpback whales, bottlenose dolphins, spotted dolphins, and spinner dolphins.
- Area 2-C (North Molokai, North Maui) (year-round). (a) Prohibit the use of MFAS for training and testing activities during MTEs; (b) implement a Protective Measure Assessment Protocol measure advising Commanding Officers that the area is false killer whale habitat and that they should avoid using MFAS during unit-level training within the area whenever practicable; and (c) prohibit the use of in-water explosives for training and testing activities (within the overlap of Area 2-B and Area 2-C, the restrictions imposed in Area 2-B

<p>and Area 2-C both apply). Reduces impacts to false killer whales, bottlenose dolphins, and spinner dolphins.</p> <ul style="list-style-type: none"> <li>● <u>Area 2-D (Southeast Oahu, Northwest Molokai) (year-round)</u>. Prohibit the use of in-water explosives for training and testing activities. Reduces impacts to false killer whales, bottlenose dolphins, and spinner dolphins.</li> </ul>	
<p><b>Southern California</b></p> <ul style="list-style-type: none"> <li>● <u>Area 3-A (San Diego Arc, coastal) (June 1 - October 31)</u>. (a) Prohibit the use of MFAS for training and testing activities during MTEs and unit-level training; and (b) require that all surface vessels use extreme caution and proceed at safe speed so they can take proper and effective action to avoid a collision with any sighted object or disturbance, and can be stopped within a distance appropriate to the prevailing circumstances and conditions. Reduces impacts to blue and gray whales.</li> <li>● <u>Area 3-B (San Diego Arc, coastal) (June 1 - October 31)</u>. (a) Prohibit the use of MFAS for training and testing activities during MTEs and unit-level training, except for system checks; (b) implement a seasonal Protective Measure Assessment Protocol measure advising Commanding Officers that the area is blue whale habitat and that they should avoid conducting system checks within the area whenever practicable; and (c) require that all surface vessels use extreme caution and proceed at safe speed so they can take proper and effective action to avoid a collision with any sighted object or disturbance, and can be stopped within a distance appropriate to the prevailing circumstances and conditions. Reduces impacts to blue and gray whales.</li> <li>● <u>Area 3-C (Santa Monica Bay to Long Beach, coastal) (November 1 - May 20)</u>. Require that all surface vessels use extreme caution and proceed at safe speed so they can take proper and effective action to avoid a collision with any sighted object or disturbance, and can be stopped within a distance appropriate to the prevailing circumstances and conditions. Reduces impacts to blue and gray whales.</li> <li>● <u>Area 4-A (East of San Nicholas Island) (year-round)</u>. (a) Prohibit the use of MFAS for training and testing activities during MTEs and unit-level training; and (b) prohibit the use of in-water explosives for training and testing activities. Reduces impacts to blue and gray whales.</li> <li>● <u>Area 4-B (east of Santa Catalina Island) (year-round)</u>. Prohibit the use of MFAS for training and testing</li> </ul>	<p><b>Southern California</b></p> <ul style="list-style-type: none"> <li>● <u>San Diego Arc, San Nicolas Island, and Santa Monica/Long Beach Mitigation Areas (June 1 – October 31)</u>. Incorporates parts of settlement areas 3-A, 3-B, 3-C, 4-A, 4-B, 4-C, and 4-D. Navy will minimize the use of MFAS (MF1), will not conduct more than 200 hours total cumulatively between the three Mitigation Areas during training and testing. Within the San Diego Arc Mitigation Area, Navy will not use explosives during large-caliber gunnery, torpedo, bombing, and missile activities during testing and training. Within the San Nicolas Island Mitigation Area Navy will not use explosives during mine warfare, large-caliber gunnery, torpedo, bombing and missile activities during training. Within the Santa Monica/Long Beach Mitigation Area, Navy will not use explosives during mine warfare, large-caliber gunnery, torpedo, bombing, and missile (including 2.75” rockets) activities during training and testing. Reduces impacts primarily to blue whales, but also gray and fin whales.</li> <li>● <u>Santa Barbara Island Mitigation Area (year-round)</u>. Incorporates parts of settlement areas 4A, Channel Island NMS. Navy will not use MFAS (MF1) and explosives in small-, medium-, and large-caliber gunnery, torpedo, bombing, and missile activities during unit-level training or MTEs. Reduces impacts to numerous marine mammal species that use the Channel Islands NMS and partially overlap areas for blue whales and gray whales.</li> </ul>

<p>activities during MTEs and unit-level training. Reduces impacts to gray whales.</p> <ul style="list-style-type: none"> <li>● <u>Area 4-C (Tanner-Cortes Bank) (June 1- October 31).</u> Require that all surface vessels use extreme caution and proceed at safe speed so they can take proper and effective action to avoid a collision with any sighted object or disturbance, and can be stopped within a distance appropriate to the prevailing circumstances and conditions. Reduces impacts to blue and gray whales.</li> <li>● <u>Area 4-D (south of 4-A) (year-round).</u> Require all surface vessels to use extreme caution and proceed at a safe speed so they can take proper and effective action to avoid a collision with any sighted object or disturbance, and can be stopped within a distance appropriate to the prevailing circumstances and conditions. Reduces impacts to gray whales.</li> </ul>	<ul style="list-style-type: none"> <li>● <u>Blue Whale (June – October), Gray Whale (November – March), and Fin Whale (November – May) Awareness Notification Message Areas.</u> Navy will issue a seasonal awareness notification message to alert ships and aircraft operating in the area to the possible presence of concentrations of large whales, particularly blue, gray, and fin whales.</li> </ul>
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Since the proposed rule, NMFS and the Navy reached agreement on additional mitigation measures. The Navy will implement pre- and post-event observation of the mitigation zone for all in-water explosive events in the HSTT Study Area. The Navy will limit explosives in the HSTT Study Area portions of the Santa Monica Bay to Long Beach and San Nicolas Island biologically important areas (BIAs) referred to as the Santa Monica/Long Beach and San Nicolas Island Mitigation Areas, respectively. The Navy will limit surface ship sonar in the HSTT Study Area portions of the Santa Monica Bay to Long Beach and San Nicolas Island Mitigation Areas and will not exceed 200 hours of mid-frequency active sonar (MFAS) sensor MF1 during June through October cumulatively within the San Diego Arc, Santa Monica/Long Beach, and San Nicolas Island Mitigation Areas. The Navy will also add a year-round limitation on explosives to the 4-Islands Region Mitigation Area, which includes a portion of the false killer whale BIA north of Maui and Molokai in the HSTT Study Area. The Navy will implement a sonar cap for the entire false killer whale BIA adjacent to the island of Hawaii and a portion of the false killer whale BIA north of Maui and Molokai. The Navy has agreed to issue notification messages to increase operator awareness of the presence of marine mammals. The Navy will review WhaleWatch, a program coordinated by NMFS’ West Coast Region as an additional information source to inform the drafting of a seasonal awareness message to alert vessels in the area to the possible presence of concentrations of large whales, including blue, gray, or fin whales in SOCAL.

The Navy will submit annual training and testing activity reports and incident reports. In its annual training and testing activity reports, the Navy will describe the level of training and testing conducted during the reporting period (*e.g.*, the location and total hours and counts of active sonar hours and in-water explosives used). For major training exercises, the reports will include information on each individual marine mammal sighting related to mitigation implementation. If they occur, the Navy will report incidents involving marine mammal vessel strikes, observed injuries or mortalities to marine mammals during training or testing, and observed injuries or mortalities to marine mammals or ESA-listed species after the use of explosives. The Navy will also implement a Notification and Reporting Plan for dead, live stranded, or marine mammals struck by a vessel. The Navy will also report total hours and

counts of active sonar and in-water explosives used in some geographic mitigation areas in its annual training and testing activity reports submitted to NMFS.

NMFS and the Navy have developed a robust monitoring plan to improve our understanding of marine mammals in the HSTT Study Area and the potential environmental impacts of Navy training and testing activities. NMFS and the Navy will use the information contained within monitoring, research, activity, and incident reports when evaluating the effectiveness and practicability of mitigation measures. Additional information on the monitoring plan can be found in the *Monitoring* section of the final rule. In addition to the requirements established in the final rule, NMFS will meet annually with the Navy to discuss the required monitoring reports, Navy research and development efforts, and current science as well as whether mitigation or monitoring modifications are appropriate. This use of adaptive management via the MMPA process will allow NMFS to consider new data from different sources to determine (in coordination with the Navy) on an annual basis if mitigation or monitoring measures should be modified or added if new data suggests that such modifications are appropriate.

### **VIII. DECISIONS AND CONCLUSIONS**

Based on the information presented herein along with the Navy's LOA application (as updated) and analysis in the 2018 HSTT FEIS/OEIS prepared by the Navy, NMFS' decision is to issue regulations and two five-year LOAs (one for training activities and one for testing activities) to the Navy, consistent with the Navy's Preferred Alternative (Alternative 1). Since the issuance of an authorization would allow for the taking of marine mammals, consistent with provisions under the MMPA and incidental to the Navy's lawful activities, NMFS, in accordance with 40 CFR section 1506.3 is adopting this FEIS/OEIS associated with the decision to grant Navy's request for authorization pursuant to section 101(a)(5)(A) of the MMPA.

Through participating as a cooperating agency during the development of the 2018 HSTT FEIS/OEIS, NMFS considered the goals and objectives of the NMFS proposed action and determined the Navy analyzed a reasonable range of alternatives that adequately addresses the scope of NMFS' proposed action. Furthermore, NMFS analyzed the associated environmental consequences of the identified alternatives and the mitigation and monitoring measures required under the final rule and LOAs. Taking all these factors into account, the actions conducted under the preferred alternative effectively meet NMFS' mandates under the MMPA and ESA while minimizing potential environmental impacts from the proposed action. For the foregoing reasons, this ROD documents NMFS' decision to adopt the 2018 HSTT FEIS/OEIS to support its NEPA obligations for issuance of MMPA incidental take regulations and LOAs. It also satisfies the requirements of 40 CFR section 1505.2 by identifying the alternatives considered in



the 2018 HSTT FEIS/OEIS, and addressing that all practicable means to avoid or minimize environmental harm from implementation of the selected alternative were adopted.

Signed:  \_\_\_\_\_

DEC 11 2018  
Date: \_\_\_\_\_

Alan D. Risenhoover,  
Acting Deputy Assistant Administrator for Regulatory Programs,  
National Marine Fisheries Service.

