



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

RECORD OF DECISION

For the Issuance of a Modification to an Incidental Take Authorization to the U.S. Navy for Take of Marine Mammals Incidental to Training and Testing Activities in the Hawaii- Southern California Training and Testing Study Area

Prepared By:

Department of Commerce

National Oceanic and Atmospheric
Administration

National Marine Fisheries Service

Office of Protected Resources

I. INTRODUCTION

NMFS is modifying regulations and two Letters of Authorization (LOAs) issued in 2018 and extended in 2020 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 216¹. The Navy requested a modification in 2022 due to new information regarding U.S. Navy vessel strikes off the coast of Southern California. The Navy is not modifying its training and testing activities. After considering new information regarding all activities, including use of acoustic and explosive sources, NMFS is modifying the 2020 regulations to authorize the take of two additional whales by vessel strike through December 2025. NMFS has prepared a Supplemental Information Report analyzing the rule modification and all new information, and has determined that Navy's 2018 FEIS/OEIS remains a valid assessment of environmental impacts of Navy's training and testing activities, and NMFS issuance of modified regulations and LOAs.

On December 27, 2018, NMFS issued a 5-year final rule governing the taking of marine mammals incidental to Navy training and testing activities conducted in the HSTT Study Area (83 FR 66846; hereafter "2018 HSTT final rule"). NMFS signed a Record of Decision consistent with NEPA regulations on December 11, 2018. NMFS adopted and relied on the Navy's 2018 EIS/OEIS to satisfy its own NEPA requirements.

In August 2018, Congress amended the Marine Mammal Protection Act (MMPA) to allow the issuance of incidental take regulations for up to seven years (from the previous five years) for

¹ The regulations governing the taking and importing of marine mammals



military readiness activities. National Defense Authorization Act for Fiscal Year 2019 (Pub. L. 115-232). Thereafter, the Navy requested and NMFS promulgated in 2020 a final rule to effectively extend the 2018 regulations for an additional two years, or until December 2025. (85 FR 41780). On July 10, 2020, NOAA Fisheries issued a final rule (85 FR 41780) governing the taking of marine mammals incidental to the training and testing activities conducted in the HSTT Study Area over the course of 7 years, effectively extending the effective period from December 20, 2023 to December 20, 2025 (hereafter “2020 HSTT final rule”). In that final rule, NMFS determined that this final rule and the subsequent LOAs would not result in impacts that were not fully considered in the 2018 HSTT FEIS/OEIS. In addition, as indicated in this final rule, the addition of two years of authorized incidental take associated with the same activities conducted in the same geographic area and having the same potential effects on the same species and stocks is not a substantial change to the action, nor are there significant new circumstances or information relevant to environmental concerns or its impacts. Therefore, NMFS determined that the 2018 HSTT FEIS/OEIS and 2018 NMFS ROD remain valid, and there was no need to supplement either document for that rulemaking.

On March 31, 2022, NMFS received an adequate and complete application (2022 Navy application) from the Navy requesting that NMFS modify the existing regulations and LOAs to authorize two additional takes of large whales by serious injury or mortality by vessel strike over the remainder of the HSTT authorization period. The 2020 HSTT regulations (50 CFR part 218, subpart H) and LOAs authorize the take of marine mammals from the Navy's training and testing activities in the HSTT Study Area through December 20, 2025. The 2018 and 2020 regulations authorize the take of three large whales by serious injury or mortality by vessel strike. Therefore, if authorized, two additional takes of large whales by serious injury or mortality by vessel strike would increase the total authorized take to five large whales.

The Navy's 2022 request was based upon new information regarding U.S. Navy vessel strikes off the coast of Southern California. As described in the 2022 Navy application. In 2021 two separate U.S. Navy vessels struck unidentified large whales off the coast of Southern California on two separate occasions, one whale in June 2021 and one whale in July 2021. Separately, a foreign naval vessel struck two fin whales off the coast of Southern California in May 2021. This take was not attributed to the U.S. Navy because the foreign vessel was not engaged in joint activities at the time of the strike. While the Navy's application was pending, the Navy struck one whale in May 2023. This was the third take of a large whale by mortality by the U.S. Navy, which is the number of authorized takes by serious injury or mortality by vessel strike under the 2020 LOA.

In the 2022 Navy application, the Navy proposed no changes to the nature of the specified activities covered by the 2020 HSTT final rule. The Navy stated that the level of activity within and between years would be consistent with that previously analyzed in the 2020 HSTT final rule, and all activities would be conducted within the same boundaries of the HSTT Study Area identified in the 2020 HSTT final rule. The training and testing activities (*e.g.*, equipment and sources used, exercises conducted) are identical to those described and analyzed in the 2020 HSTT final rule, and the mitigation, monitoring, and reporting measures are similar to those described and analyzed in the 2020 HSTT final rule. The only changes included in the Navy's request are for additional take by serious injury or mortality by vessel strike.

The Navy's request for a modification of the 2020 HSTT Final Rule is connected to 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 was a cooperating agency, and NMFS adopted the 2018 HSTT FEIS/OEIS in its 2018 ROD. 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.). 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.

In addition, the National Environmental Policy Act (NEPA), 40 Code of Federal Regulations (CFR) Parts 1500-1508, and NOAA policy and procedures² 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 analysis for its issuance of an ITA or, if appropriate, by adopting the NEPA analysis prepared by the lead agency. NMFS adopted the 2018 HSTT FEIS/OEIS on December 11, 2018. The purpose of this document is to explain NMFS' rationale for its determination to modify the 2020 HSTT final rule and issue LOAs 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").

As described below, neither NMFS nor the Navy's action have changed significantly, nor does any new information significantly change NMFS' analysis.

NMFS is modifying 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 216³. The regulations and LOAs will be valid through December 20, 2025 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, including five takes of large whales by serious injury or mortality by vessel strike (two additional takes beyond that authorized in the 2018 and 2020 HSTT final rules). Additionally these modified regulations and LOAs will include new and revised measures since publication of the 2018 HSTT EIS/OEIS (see section VII, Conditions-Mitigation, Monitoring, and Reporting, for additional detail). As explained in the 2018 HSTT FEIS/OEIS, NMFS' proposed action and the purpose and need for that action are

² 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.

³ The regulations governing the taking and importing of marine mammals

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 disturbance, or cause serious injury and mortality and, therefore, require authorization from NMFS.

NMFS prepared a SIR to analyze the impacts of the proposed modification and new information, and determined that the analysis in the 2018 HSTT EIS/OEIS remains valid, and there is no need to supplement the document for this modification.

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.

While specific training and testing activities, activity levels, and geographic locations have evolved slightly over the years to meet changing threats to national security or new technology, the overall types of activities and geographic areas in which the Navy conducts training and testing activities have not changed considerably for decades. The primary reasons the Navy prepares new analyses are to support their requests for new ITAs when the previous ones expire and to evaluate any new information and science relevant to environmental concerns and bearing on the Navy's proposed actions. 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 HSTT Study Area, are available on the Navy's website (<http://www.hstteis.com>).

A summary of the environmental analyses associated with NMFS' issuance of this modified 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 NMFS' 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. The Navy compiled, interpreted, and synthesized this information 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 2018 HSTT final rule for more information. The HSTT FEIS/OEIS was finalized in October 2018. The Navy finalized its ROD associated with the HSTT FEIS/OEIS on December 18, 2018. 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 its 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, including vessel strike, 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.

The 2018 HSTT Final Rule was 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. The 2020 HSTT Final Rule replaced the 2018 HSTT Final Rule, effectively extending the effective period by two years. 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 revision of the 2020 HSTT Final Rule, the Navy is proposing to conduct activities similar to those they have conducted under the previous two rules, with no changes to the nature of the specified activities covered by the 2020 HSTT final rule. As described in the 2024 SIR, the final rule is authorizing 5 takes of large whales by serious injury or mortality by vessel strike (three of which were authorized in the 2020 HSTT final rule). The mitigation, monitoring, and reporting measures are similar to those described and analyzed in the 2020 HSTT final rule, and the changes are described in the Findings and Factors Considered in the Decision section of this ROD, below.

III. PROPOSED ACTION AND ALTERNATIVES SUMMARY

A. NMFS 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 impact⁴ 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.

⁴ 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)

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 action are the subject of NMFS' proposed action. Therefore, NMFS' proposed action is a direct outcome of the Navy's request for issuance of modified regulations and LOAs.

The modified regulations and LOAs will authorize the incidental take of marine mammals by Navy when conducting its 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. Detailed descriptions are included in Chapter 2, Section 2.3 and Appendix A of the 2018 HSTT FEIS/OEIS.

B. Purpose and Need

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, including new and revised measures since publication of the 2018 HSTT EIS/OEIS (see Section VII (Conditions- Mitigation, Monitoring, and Reporting)) was used to support requirements pertaining to mitigation, monitoring, and reporting that would be specified in final MMPA regulations and subsequent LOAs.

C. Alternatives Considered by NMFS

NMFS considered two alternatives for its proposed action, the No Action Alternative and the Action Alternative (issuing the ITA and amending the 2020 rule). The action alternative is based upon issuance of an ITA and amending the 2020 rule for the incidental take of marine mammals for Navy's Alternative 1 analyzed in the 2018 HSTT EIS which still fully represents the Navy's planned action.

No Action Alternative: For NMFS, denial of an ITA, and in this case, denial of a request to issue a modified 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 modified incidental take regulations and subsequent LOAs, Navy would continue to operate under its 2020 Rule and LOAs without any additional authorization of M/SI for vessel strike, and the Navy would not conduct their planned training and testing activities in the HSTT Study Area because Navy would not have any remaining authorized M/SI for vessel strike. 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 and remains a valid baseline for this analysis. 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 NMFS' Preferred Alternative, NMFS would issue modified 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 request for modification of the 2020 rule and LOAs, NMFS' 2024 SIR, the Navy's 2018 and 2020 rulemaking/LOA applications, the 2018 HSTT FEIS/OEIS, and the HSTT 2018 Biological Opinion and 2024 reinitiated Biological and Conference Opinion. Additionally, NMFS relied on memos to the record and discussions with the Navy to supplement those documents.

NMFS reviewed the Navy's ITA modification request to determine whether the total taking resulting from the Navy training and testing activities, including the two additional takes by serious injury or mortality by vessel strike, 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 and consideration of all new best available information documented

in the 2024 SIR, NMFS has determined that the analysis in the 2018 HSTT FEIS/OEIS continues to adequately address the potential direct, indirect, and cumulative impacts to marine mammals and their habitat. Specifically, the Navy's analysis in its 2018 HSTT FEIS/OEIS on the impacts of vessel strikes remains valid after considering new literature and recent military vessel strikes. NMFS has also determined the Navy properly and completely addressed all NMFS comments and input in the modification request and previous FEISs/OEISs.

In the 2018 HSTT FEIS/OEIS, the Navy analyzed 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. The Navy has not modified its training and testing activities in its request for modification of the 2020 Final Rule and LOAs. In this rule modification, NMFS continues to rely on the Navy's 2018 estimates of the number of each species of marine mammal that will be exposed to levels of sound and explosives. The Navy and NMFS have made only minor modifications to the Navy's estimate for the number of marine mammals at risk of serious injury or mortality for vessel strike. After reviewing all new information, in this rule modification 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 vessel strikes.

The Navy also analyzed cumulative impacts in the 2018 HSTT EIS/OEIS. In summary, the aggregate impacts of past, present, and other reasonably foreseeable future actions continue to have significant impacts on some marine mammal species in the Study Area. Sources of cumulative impact are the same as those analyzed in the 2018 HSTT FEIS/OEIS, including bycatch, vessel strikes, and entanglement as the primary stressors, as well as ocean noise from current and future actions such as characterization, construction, and operation of offshore wind energy projects; seismic surveys; and construction, operation, and removal of oil and gas facilities. The action could contribute incremental stressors to individuals, which would further compound effects on a given individual already experiencing stress. However, with the implementation of standard operating procedures reducing the likelihood of overlap in time and space with other stressors and the implementation of mitigation measures reducing the likelihood of impacts, the incremental stressors anticipated from the action are not anticipated to be significant.

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 for the 2018 and 2020 HSTT final rules, and this final rule, NMFS took into consideration all of the information submitted by the

Navy in its rulemaking/LOA applications and memos; 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 modify the 2020 HSTT final rule 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. For this rule modification, NMFS considered all new information in its 2024 SIR and determined that the Navy's assessment of environmental impacts in its 2018 HSTT FEIS/OEIS remains valid.

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, including several new or modified measures, as described in Section VII (Conditions- Mitigation, Monitoring, and Reporting) of this ROD. These mitigation measures would further reduce the impacts to marine mammals than those measures originally included in the 2018 FEIS/OEIS. The changes do not constitute significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts (40 C.F.R. § 1502.9(d)(1), and therefore, analysis in a supplemental EIS is not warranted. 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 (NAEMO) 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 monitoring measures 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. NMFS issued a Biological Opinion on December 10, 2018 concluding that the issuance of the 2018 HSTT final rule and subsequent LOAs are not likely to jeopardize the continued existence of the threatened and endangered species under NMFS' jurisdiction and are not likely to result in the destruction or adverse modification of critical habitat in the HSTT Study Area. The Biological Opinion included 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. Please see the 2018 ROD for a discussion of ESA-listed species, ESA-designated critical habitat, and mitigation designed to benefit ESA-listed species in the HSTT Study Area. The 2018 Biological Opinion included specified conditions under which NMFS would be required to reinstate section 7 consultation. NMFS reviewed these specified conditions for the 2020 HSTT rulemaking and determined that reinstatement of consultation was not warranted. The incidental take statement that accompanied the 2018 Biological Opinion was amended to cover the 7-year period of the 2020 HSTT rule. The 2018 Biological Opinion for this action is available at <https://www.fisheries.noaa.gov/national/marine-mammal-protection/incidental-take-authorizations-military-readiness-activities>.

The 2018 Biological Opinion reinstatement clause (2), states that formal consultation should be reinstated if "new information reveals effects of the agency action that may affect ESA-listed species or critical habitat in a manner or to an extent not previously considered." Given the new information regarding the recent occurrence of large whale strikes by naval vessels in the southern California portion of the HSTT Study Area, as described herein, the Navy reinstated

consultation with NMFS pursuant to section 7 of the ESA for HSTT Study Area activities, and NMFS also reinitiated consultation internally on the issuance of these revised regulations and LOAs under section 101(a)(5)(A) of the MMPA.

NMFS issued a reinitiated Biological and Conference Opinion on June 3, 2024 concluding that the issuance of the 2024 HSTT final rule and subsequent LOAs are not likely to jeopardize the continued existence of the threatened and endangered species under NMFS' jurisdiction and are not likely to result in the destruction or adverse modification of designated critical habitat in the HSTT Study Area. The opinion is available at <https://doi.org/10.25923/7y9x-vw84>.

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. The Navy's action has not changed and no new information affects the basis for NMFS's conservation recommendations; therefore, supplemental EFH consultation is not warranted.

Coastal Zone Management Act. The 2018 HSTT ROD included a discussion of the Navy's engagement with the California Coastal Commission and State of Hawaii's Office of Planning. NMFS refers the reader to that document for additional detail.

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. The Navy described its consultation in the 2018 EIS/OEIS, summarized as follows:

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 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 in 2018 and 2020.

NMFS 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 modification of the 2020 HSTT final rule and LOAs, as there is a low probability of the additional authorized take of large whales would occur in Channel Islands or Hawaiian Islands Humpback Whale national marine sanctuaries. NMFS described the proposed changes to ONMS in an email on January 16, 2024, and further discussed the changes with ONMS in a February 8, 2024 meeting. ONMS stated in a February 8, 2024 email following the meeting that it has no concerns as to NMFS' assessment that there is a low probability of the additional authorized take of large whales occurring in Channel Islands or Hawaiian Islands Humpback Whale national marine sanctuaries.

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. The 2018 HSTT ROD describes NMFS' engagement as a cooperating agency, including reviews of the 2018 HSTT FEIS/OEIS, and the determination of the sufficiency of the 2018 HSTT FEIS/OEIS and the adequacy of its incorporation of our comments and concerns. The 2018 HSTT ROD further describes that NMFS, on behalf of NOAA, adopted the 2018 HSTT FEIS/OEIS. For additional information on the environmental reviews and adoption, please refer to the 2018 HSTT ROD. As described in the 2024 SIR, NMFS determined that the 2018 HSTT FEIS/OEIS remains valid, as does NMFS' decision in 2018 to adopt the Navy's EIS/OEIS.

VI. PUBLIC INVOLVEMENT SUMMARY

The 2018 HSTT ROD describes the public involvement during the development of the HSTT EIS/OEIS as well as the public process pursuant to the 2018 HSTT final rule that NMFS used to develop and evaluate environmental information relevant to an analysis under NEPA. NMFS refers the reader to the 2018 HSTT ROD for additional detail.

NMFS again provided notice and comment opportunities when it issued the 2020 HSTT final rule and LOAs extending the duration of the ITA an additional two years (84 FR 20105, May 8, 2019; 84 FR 48388, September 13, 2019; 85 FR 41780, July 10, 2020). The public was provided an opportunity to comment on NMFS' determination that supplementation of the 2018 FEIS was not necessary for the 2020 HSTT final rule.

On June 1, 2022 (87 FR 33113), 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 for a modification of the 2020 HSTT final rule and LOAs to authorize two additional takes of large whales by serious injury or mortality by vessel strike. On October 3, 2023 NMFS published a notice of the proposed rulemaking (88 FR 68290) to solicit relevant environmental information and provide the public an opportunity to submit comments on the proposed extension and NMFS' analysis and determinations.

In the 2023 HSTT proposed rule, we indicated that the Navy and NMFS as a cooperating agency had made a preliminary determination that each of the proposed rules and any subsequent LOAs would not result in significant impacts that were not fully considered in the 2018 HSTT FEIS/OEIS. We stated in the proposed rule that, as indicated, the Navy had made no substantial changes to the activities nor were there significant new circumstances or information relevant to environmental concerns or their impacts. We indicated that NMFS would make a final NEPA determination prior to a decision whether to issue a final rule.

During the public comment period for the 2023 proposed rule, NMFS received comments from a non-governmental organization and private citizens. NMFS 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 2023 HSTT 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>). Of note, one public comment suggested that NMFS and the Navy must supplement the EIS prior to issuing a new final rule. NMFS' 2024 SIR and final rule adequately explain NMFS's analysis of its action and the conclusion that supplementation is not necessary.

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 vessel 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 final rule includes several new and revised mitigation measures beyond that included in the 2018 HSTT FEIS/OEIS, as described below.

- Navy personnel must issue real-time notifications to Navy vessels of large whale aggregations (four or more whales) within 1 nmi (1.9 km) of a Navy vessel in a select area of SOCAL;
- Navy personnel must send alerts to Navy vessels of increased risk of strike following any reported Navy vessel strike in the HSTT Study Area;
- Navy personnel must re-title the spring blue whale message (released in June; see the 2018 HSTT ROD) to a large whale awareness message inclusive of typical spring-summer large whales in southern California (mainly blue, fin, and humpback whales). Furthermore, rather than tying the message release to a specific month, the message would be for a period based on predicted oceanographic conditions for a given year;
- For vessel movement, the 2020 HSTT final rule (85 FR 41780; July 10, 2020) required that “when underway, Navy personnel must observe the mitigation zone for marine mammals; if marine mammals are observed, Navy personnel must maneuver to maintain distance.” This measure has been updated to state that reducing speed may be an appropriate way to maneuver.

These mitigation measures would further reduce the impacts to marine mammals than those measures originally included in the 2018 FEIS/OEIS. The changes do not constitute significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts (40 C.F.R. § 1502.9(d)(1), and therefore, analysis in a supplemental EIS is not warranted.

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 impacts. 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. NMFS discussed with the Navy the potential for including additional restrictions in mitigation areas beyond those restrictions and areas included in the 2020 HSTT final rule (including in consideration of new biologically important areas (Calambokidis et al. 2024 and Kratofil et al. 2023)) and determined that they would be impracticable given overlap with critical Navy training areas in the HRC and SOCAL, including areas around the Channel Islands in SOCAL.

The Navy will submit annual training and testing activity reports and incident reports. Reporting measures are substantively the same as those required in the 2020 Final Rule and LOAs, with some modifications. 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.

The following reporting measures are new or revised. The Navy's annual training and testing activity reports must include information that tracks the Navy's implementation of a new SOCAL large whale aggregation real-time reporting mitigation measure. The report must also include a confirmation that foreign military use of sonar and explosives, when such militaries are participating in a U.S. Navy-led exercise or event, combined with the U.S. Navy's use of sonar and explosives, would not cause exceedance of the analyzed levels (within each NAEMO modeled sonar and explosive bin) used for estimating predicted impacts, which formed the basis of the acoustic impacts effects analysis used to estimate take in this final rule. The Navy must also report changes in its lookout policies to NMFS as soon as practicable after a change is made.

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 and analysis in the 2018 HSTT FEIS/OEIS prepared by the Navy, NMFS' decision is to issue modified regulations and two revised seven-year LOAs (one for training activities and one for testing activities) to the Navy. While NMFS is making a new federal agency decision in modifying the 2020 regulations, the Navy's action is not modified and is consistent with the Navy's Preferred Alternative (Alternative 1). As noted above, in 2018, NMFS adopted the 2018 HSTT FEIS/OEIS, consistent with provisions under the MMPA and incidental to the Navy's lawful activities, associated with the decision to grant Navy's request for authorization pursuant to section 101(a)(5)(A) of the MMPA. NMFS has analyzed new information as documented in NMFS' 2024 SIR and determined that the environmental impacts summarized in the Navy's 2018 FEIS/OEIS remain valid for this action.

Through participating as a cooperating agency during the development of the 2018 HSTT FEIS/OEIS, NMFS considered the purpose and need 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 as well as new information, 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 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.

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Samuel D. Rauch III,
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