



Via U.S. Certified and Electronic Mail

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Re: 60-Day Notice of Intent to Sue: Violations of the Endangered Species Act Regarding Navy Training in the Hawaii-Southern California Training and Testing Study Area

Last week, a military destroyer pulled into a Naval Base in San Diego with two dead endangered fin whales stuck to its hull. The whales—likely a mother and her calf—were apparently killed by a collision with an Australian vessel conducting military training exercises with the U.S. Navy in the Pacific Ocean. The vessel then carried the whales’ bodies back to port seemingly unaware of the collision. This event is a stark, tragic reminder of the harm Navy training activities can have on endangered species.

This event—along with a slew of new information, including the danger large ships and other vessels pose to endangered whales off California, the expansion of the Navy’s activities, and newly designated critical habitat—also trigger the National Marine Fisheries Service (NMFS)’s and the Navy’s duties to reinitiate and complete new consultation on the impacts of Navy training activities in the Hawaii-Southern California Training and Testing (HSTT) Study Area under section 7 of the Endangered Species Act (ESA), 16 U.S.C. § 1536(a)(2). The agencies’ ongoing failure to do so violates the agencies’ procedural and substantive ESA obligations and puts endangered animals already struggling to survive at greater risk.

Accordingly, pursuant to 16 U.S.C. § 1540(g), this letter serves as the Center for Biological Diversity’s 60-day notice of intent to sue NMFS and the Navy for violations of the ESA. If

NMFS and the Navy do not reinitiate consultation within 60 days, the Center may pursue litigation to resolve the matter. In addition to reinitiating consultation, NMFS must also re-examine its determination under the Marine Mammal Protection Act (MMPA), 16 U.S.C. § 1371(a)(5)(A), that the Navy's activities in the HSTT Study Area will have no more than a negligible impact on endangered whales and other marine mammals in the Pacific Ocean, and should supplement its environmental impact statement under the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332(2)(C).

I. LEGAL BACKGROUND

The ESA, MMPA, and NEPA establish strict standards that require NMFS and the Navy to carefully evaluate and/or mitigate the impacts of their actions. They also require the agencies to re-examine the impacts of those actions when certain conditions are met, as is the case with the Navy's activities in the HSTT Study Area. Failure to do so in the face of a relevant triggering event violates various procedural and/or substantive legal obligations and deprives imperiled species of important protections to which they are both legally required and greatly need.

A. The Endangered Species Act

In enacting the ESA, Congress recognized that certain species “have been so depleted in numbers that they are in danger of or threatened with extinction” and that these species are “of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people.”¹ Accordingly, the ESA seeks “to provide a means whereby the ecosystems upon which endangered and threatened species depend may be conserved, [and] to provide a program for the conservation of such . . . species.”² The ESA defines conservation as “the use of all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to [the ESA] are no longer necessary.”³ The ESA is widely considered “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation,” and embodies the “plain intent” of Congress to “halt and reverse the trend toward species extinction, whatever the cost.”⁴

To help achieve these goals, section 9 prohibits any person, including any federal agency, from “taking” an endangered species without proper authorization.⁵ The term “take” is statutorily defined broadly as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.”⁶ The definition of “harm” has been defined broadly by regulation as “an act which actually kills or injures wildlife. Such act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.”⁷

¹ 16 U.S.C. § 1531(a)(2), (3).

² *Id.* § 1531(b).

³ *Id.* § 1532(3).

⁴ *Tenn. Valley Authority v. Hill*, 437 U.S. 153, 180, 184 (1978).

⁵ 16 U.S.C. at § 1538(a)(1)(B).

⁶ *Id.* at § 1532(19).

⁷ 50 C.F.R. § 222.102; *see also Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687 (1995) (upholding same regulatory definition of harm in 50 C.F.R. § 17.3).

Additionally, under section 7(a)(2) of the ESA, all federal agencies must ensure that any action they authorize, fund or carry out is “not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [their designated critical] habitat.”⁸ When an agency determines that its proposed action “may affect listed species or critical habitat” it must engage in formal consultation with the expert federal wildlife agency responsible for the species at issue using “the best scientific and commercial data available.”⁹

As relevant here, formal consultation ends with the issuance of a biological opinion by the consulting branch of NMFS. The biological opinion must explain how the proposed action will affect the ESA-listed species or critical habitat and determine whether jeopardy or adverse modification is likely to occur.¹⁰ If jeopardy or adverse modification is found, the biological opinion shall suggest “reasonable and prudent alternatives” to the proposed action that NMFS believes would avoid the likelihood of jeopardy or adverse modification.¹¹

If NMFS concludes that the action may take listed members of the population, but the action will not jeopardize the population, the agency must produce an incidental take statement (ITS) that specifies the impact of the action, generally by setting a numeric limit on take, and identifying “reasonable and prudent measures” that will minimize the impact of that take, among other requirements.¹² In addition, when the endangered or threatened species to be taken are marine mammals, the take must generally first be authorized pursuant to the MMPA, and the ITS must include any additional measures necessary to comply with the MMPA take authorization.¹³ The take of a listed species in compliance with the terms of a valid ITS is not prohibited under section 9 of the ESA.¹⁴

ESA regulations define “[j]eopardize the continued existence of” as “to engage in an action that reasonably would be expected, either directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.”¹⁵ A jeopardy analysis requires the agency to consider the aggregate effect of past and ongoing human activities that affect the current status of the species and its habitat (“environmental baseline”); the indirect and direct effects of the proposed action, including the effects of interrelated and interdependent activities (“effects of the action”); and the effects of future state and private activities that are reasonably certain to occur (“cumulative effects”).¹⁶ NMFS must consider all of these factors in context of the current status of the species and its habitat.¹⁷ Only where NMFS concludes that all of these elements added

⁸ 16 U.S.C. § 1536(a)(2).

⁹ *Id.*; 50 C.F.R. § 402.14(a).

¹⁰ 50 C.F.R. § 402.14(g)(3), (4).

¹¹ 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R. §§ 402.14(h), 402.02.

¹² 16 U.S.C. § 1536(b)(4)(C); *Or. Nat. Res. Council v. Allen*, 476 F.3d 1031, 1033 (9th Cir. 2007).

¹³ 16 U.S.C. § 1543; 50 C.F.R. § 402.14(h)(3).

¹⁴ 16 U.S.C. §§ 1536(b)(4), (o)(2); 50 C.F.R. § 402.14(i)(5).

¹⁵ 50 C.F.R. § 402.02.

¹⁶ *Id.* at §§ 402.14(g), 402.02.

¹⁷ *Id.* at § 402.14(g).

together do not threaten a species' survival and recovery can the agency issue a no-jeopardy opinion.¹⁸

After completion of consultation, if a biological opinion does not satisfy the ESA's standards, the action agency may not rely on it to fulfill its section 7 duties.¹⁹ Furthermore, the action and consulting agencies' ESA duties do not end with the completion of the initial consultation. The agencies must review the ongoing impacts of the action and reinitiate consultation when: (a) the amount or extent of taking specified in the incidental take statement is exceeded; (b) new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered; (c) if the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion; or (d) if a new species is listed or critical habitat designated that may be affected by the identified action.²⁰

When reinitiation is required, "the original opinion loses its validity, as does its accompanying incidental take statement, which then no longer shields the action agency from penalties for takings."²¹ Finally, during the consultation process and until the requirements of section 7(a)(2) are satisfied, section 7(d) provides that an agency "shall not make any irreversible or irretrievable commitment of resources" toward an action that would foreclose "the formulation or implementation of any reasonable and prudent alternative measures."²²

B. The Marine Mammal Protection Act

In enacting the MMPA, Congress found that "certain species and population stocks of marine mammals are, or may be, in danger of extinction or depletion as a result of man's activities."²³ Accordingly, the MMPA seeks to maintain stable, functioning marine ecosystems, to secure and restore healthy marine mammal populations, and to protect individual animals from harm.²⁴ The MMPA also seeks to maintain an "optimum sustainable population" of each marine mammal stock, defined as "the number of animals which will result in the maximum productivity of the population or the species," considering both the carrying capacity of the habitat and ecosystem health.²⁵

To facilitate achieving a species' or stock's optimum sustainable population, NMFS annually assesses the potential biological removal (PBR) level for endangered and threatened marine

¹⁸ See *Pac. Coast Fed'n of Fishermen's Ass'n v. U.S. Bureau of Reclamation*, 426 F.3d 1082, 1093 (9th Cir. 2005) (the proper "analysis is not the proportional share of responsibility the federal agency bears for the decline in the species, but what jeopardy might result from the agency's proposed actions in the present and future human and natural contexts").

¹⁹ See, e.g., *Fla. Key Deer v. Paulison*, 522 F.3d 1133, 1145 (11th Cir. 2008) (action agency must independently ensure that its actions are not likely to cause jeopardy); *Pyramid Lake Paiute Tribe of Indians v. U.S. Dep't of Navy*, 898 F.2d 1410, 1415 (9th Cir. 1990) (same); *Ctr. for Biological Diversity v. BLM*, 422 F. Supp. 2d 1115, 1142 (N.D. Cal. 2006) (rejecting Forest Service's reliance on legally inadequate biological opinion).

²⁰ 50 C.F.R. § 402.16 (2018).

²¹ *Ctr. for Biological Diversity v. BLM*, 698 F.3d 1101, 1108 (9th Cir. 2012).

²² 16 U.S.C. § 1536(d); 50 C.F.R. § 402.09.

²³ 16 U.S.C. § 1361(1).

²⁴ *Id.* §§ 1361(2); 1362(18)(A).

²⁵ *Id.* §§ 1361(6), 1362(9).

mammals.²⁶ PBR is defined as the “maximum number of animals . . . that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population.”²⁷

To promote its objectives, the MMPA establishes a general moratorium on the taking of marine mammals,²⁸ expressly prohibits the unauthorized take of a marine mammal by any person,²⁹ and specifically requires NMFS to “prevent the depletion” of marine mammals by incidental take in commercial fisheries.³⁰ Prohibited takings include actions that kill or injure marine mammals and those that disrupt migration, breathing, breeding, or feeding patterns.³¹

A limited exemption for the incidental take of marine mammals for specified activities—including military readiness activities—is provided for by section 101(a)(5) of the MMPA, but only if expressly authorized by NMFS after the agency makes certain findings.³² Specifically, under section 101(a)(5)(A), NMFS can authorize the take of marine mammals incidental to military readiness activities for a period of up to seven years if NMFS first determines such take will have no more than a “negligible impact” on the marine mammal species or stocks to be taken. NMFS has defined “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.”³³

Additionally, NMFS must require mitigation to ensure adverse impact on marine mammals are minimized. Specifically, in issuing an authorization, NMFS must prescribe methods and means of affecting the “least practicable adverse impact” on the species or stock and its habitat.³⁴ NMFS must evaluate mitigation beyond that proposed by the Navy to achieve “the least practicable adverse impact on marine mammal species, stock, and habitat. . . , paying particular attention to rookeries, mating grounds, and areas of similar significance.”³⁵

To ensure adequate protection of marine mammals, section 101(a)(5)(B) also specifies that NMFS “shall withdraw or suspend for a time certain” an incidental take authorization if either the regulations are not being complied with or the permitted taking “is having, or may have, more than a negligible impact on the species or stock concerned.”³⁶

C. The National Environmental Policy Act

NEPA is America’s “basic national charter for protection of the environment.”³⁷ NEPA requires federal agencies to take a “hard look” at the environmental consequences of their actions before

²⁶ *Id.* §§ 1362(19), 1386(a)(6).

²⁷ *Id.* § 1362(20).

²⁸ *Id.* § 1371(a).

²⁹ *Id.* § 1372(a).

³⁰ *Id.* § 1387(f)(1).

³¹ 16 U.S.C. § 1362(13), (18).

³² *Id.* §§ 1387(a)(2); 1371(a)(5)(E).

³³ 50 C.F.R. § 216.103.

³⁴ 16 U.S.C. § 1371(a)(5)(A)(i)(II)(aa).

³⁵ *Id.*; 50 C.F.R. § 216.104(a).

³⁶ 16 U.S.C. § 1371(a)(5)(B).

³⁷ *Ctr. for Biological Diversity v. Bernhardt*, 982 F.3d 723, 734 (9th Cir. 2020) (citation omitted).

taking action.³⁸ In this way, NEPA ensures that federal agencies “will have available, and will carefully consider, detailed information concerning significant environmental impacts” and that such information “will be made available to the larger [public] audience that may play a role in both the decisionmaking process and the implementation of the decision.”³⁹

To this end, NEPA requires federal agencies to prepare a detailed environmental impact statement (EIS) for any “major federal action significantly affecting the quality of the human environment.”⁴⁰ NEPA’s implementing regulations specify factors that must be considered in determining when an action may significantly affect the environment warranting the preparation of an EIS.⁴¹ Specifically, in determining whether an action may have “significant” impacts on the environment, an agency must consider the “context” and “intensity” of the action.⁴² “Context” means that the significance of the project “must be analyzed in several contexts such as society as a whole (human, national), the affected region, the affected interests, and the locality.”⁴³

The intensity of the action is determined by considering the ten factors enumerated in the regulations, including the unique characteristics of the geographic area such as proximity to ecologically critical areas; the degree to which the effects are likely to be highly controversial or involve unique or unknown risks; whether the action is related to other actions with individually insignificant but cumulatively significant impacts; the degree to which the action may cause loss or destruction of significant scientific, cultural or historical resources; and the degree to which the action may adversely affect a species listed under the ESA or its critical habitat, among others.⁴⁴ The presence of even just “one of these factors may be sufficient to require preparation of an EIS in appropriate circumstances.”⁴⁵ If “substantial questions as to whether a project . . . may cause significant degradation of some human environmental factor,” an EIS must be prepared.⁴⁶

In addition, NEPA requires that an EIS “rigorously explore and objectively evaluate all reasonable alternatives” to the proposed action.⁴⁷ This alternatives analysis “is ‘the heart’ of an EIS.”⁴⁸ The purpose of this requirement is to ensure agencies do not undertake projects “without intense consideration of other more ecologically sound courses of action, including shelving the entire project, or of accomplishing the same result by entirely different means.”⁴⁹ Importantly, this evaluation extends to considering more environmentally protective alternatives and

³⁸ *Kleppe v. Sierra Club*, 427 U.S. 390, 410, n. 21 (1976); 40 C.F.R. § 1500.1(a).

³⁹ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989).

⁴⁰ 42 U.S.C. § 4332(2)(C).

⁴¹ See 40 C.F.R. § 1508.27(b).

⁴² *Id.* § 1508.27.

⁴³ *Id.* § 1508.27(a).

⁴⁴ *Id.* § 1508.27(b)(1)–(10).

⁴⁵ *Ocean Advocates v. U.S. Army Corps of Eng’rs*, 402 F.3d 846, 865 (9th Cir. 2005).

⁴⁶ *Idaho Sporting Congress v. Thomas*, 137 F.3d 1146, 1149 (9th Cir. 1998).

⁴⁷ 40 C.F.R. § 1502.14(a).

⁴⁸ *Natural Resources Defense Council v. U.S. Forest Service*, 421 F.3d 797, 813 (9th Cir. 2005).

⁴⁹ *Env’tl Defense Fund, Inc. v. U.S. Army Corps. of Eng’rs*, 492 F.2d 1123, 1135 (5th Cir. 1974); see also, *City of New York v. Dept. of Transp.*, 715 F.2d 732, 743 (2nd Cir. 1983) (NEPA’s requirement for consideration of a range of alternatives is intended to prevent the EIS from becoming “a foreordained formality.”); *Utahns for Better Transportation v. U.S. Dept. of Transp.*, 305 F.3d 1152 (10th Cir. 2002).

mitigation measures.⁵⁰ Indeed, NEPA regulations specifically require that alternatives “include appropriate mitigations measures.”⁵¹

The agency’s NEPA obligations do not end with the preparation of an initial environmental impact statement. In particular, agencies must prepare supplemental environmental impact statements if: “(i) The agency makes substantial changes in the proposed action that are relevant to environmental concerns; or (ii) There are significant new circumstances or information relevant to environmental concerns and bearing on the proposed action or its impacts.”⁵² An agency may also prepare “supplements when the agency determines that the purposes of the Act will be furthered by doing so.”⁵³

II. FACTUAL BACKGROUND

In 2018, NMFS issued regulations authorizing the Navy to take numerous species of marine mammals incidental to the Navy’s testing and training activities in the Pacific Ocean off Hawaii and Southern California (i.e., the HSTT Study Area) over the course of five years beginning in December 2018.⁵⁴ The activities involve the use of low-, mid-, high-, and very high-frequency active sonar, weapons systems, explosive and non-explosive practice munitions and ordnance, high-explosive underwater detonations, expended materials, vibratory and impact hammers, airguns, electromagnetic devices, high-energy lasers, vessels, underwater vehicles, and aircraft.⁵⁵

These activities will harass, injure, and kill animals from a variety of marine mammal species and stocks, including endangered blue, fin, and humpback whales, and endangered Hawaiian monk seals. Harm to marine mammals from these activities include mortality from explosives, permanent and temporary hearing loss, collisions with vessels, and expansive disruption of essential behavioral functions such as calving and foraging.

NMFS and the Navy estimate the training and testing activities will result in thousands of animals suffering permanent hearing loss, lung injuries, or death. Millions of animals will be exposed to temporary injuries and disturbances, with many subjected to multiple harmful exposures. In total, NMFS’s authorization allows the Navy to take marine mammals 12.5 million times from December 2018 through December 2023.

The regulations require the Navy to comply with various mitigation measures, including seasonal restrictions on the use of sonar in the San Diego and 4-Islands Mitigation Areas and a year-round restriction on the use of explosives in the 4-Islands Mitigation Area. The mitigation measures, however, are less extensive than what was previously required. For example, much of the San Diego and Hawaii Mitigation Areas previously benefited from a total ban on sonar, but the 2018 regulations contain only seasonal restrictions.⁵⁶

⁵⁰ See, e.g., *Kootenai Tribe of Idaho v. Veneman*, 313 F.3d 1094, 1122-1123 (9th Cir. 2002) (and cases cited therein).

⁵¹ 40 C.F.R. § 1502.14(e).

⁵² 40 C.F.R. § 1502.9(d)(1).

⁵³ *Id.* § 1502.9(d)(2).

⁵⁴ 83 Fed. Reg. 66,846 (Dec. 27, 2018).

⁵⁵ *Id.*

⁵⁶ See *id.* at 66,952.

And NMFS rejected requiring other mitigation measures, such as requiring vessels used in the Navy's activities to slow to 10 knots or less in certain biologically important areas to reduce the risk of vessel strikes, by downplaying the risk of vessel strikes to endangered whales and other species impacted by the Navy's activities.⁵⁷

In issuing the regulations, NMFS also issued a 2018 biological opinion ("2018 BiOp") that purports to analyze the impacts of the Navy's activities on threatened and endangered species and their critical habitat. Despite the widespread impacts of the Navy's activities, the 2018 BiOp concludes that the Navy's activities will not jeopardize any ESA-listed species nor destroy or adversely modify any designated critical habitat.⁵⁸

The 2018 BiOp includes an ITS for take of ESA-listed species incidental to the Navy's activities. That ITS authorizes thousands of take by harassment and harm each year from impulsive and non-impulsive acoustic stressors of various ESA-listed marine mammals and sea turtles, including blue whales, fin whales, the Western North Pacific distinct population segment (DPS) of gray whales, the Central America and Mexico DPS of humpback whales, sei whales, sperm whales, the Main Hawaiian Islands Insular DPS of false killer whales, Guadalupe fur seals, Hawaiian monk seals, and the Central North Pacific DPS of green sea turtles.⁵⁹

The ITS also authorizes take by mortality from vessel strikes, including one blue whale, two fin whales, one Mexico DPS of humpback whales, one sperm whale, 100 green sea turtles from the Central North Pacific DPS, three green sea turtles from the Eastern Pacific DPS, four hawksbill sea turtles, and two Olive Ridley sea turtles.⁶⁰ NMFS explained that mortality take from vessel strikes was spread over all five years, for an annual average of 0.4 gray whales and fin whales killed by vessel strikes; and an annual average of 0.2 blue whales, Mexico DPS of humpback whales, and sperm whales killed by vessel strikes.⁶¹

The Navy also issued an EIS purporting to analyze the environmental impacts of its training and testing activities in the HSTT Study Area. NMFS was a cooperating agency for the EIS.⁶² The agency's EIS considered only three alternatives in detail: the No Action Alternative under which the Navy's training activities would not occur; Alternative 1 that considered fluctuations in training cycles, testing requirements, and deployment schedules based on global demand and other factors and included the Navy's entire suite of mitigation measures; and Alternative 2 that considered a higher number of training exercises and sonar hours than in Alternative 1 and included the Navy's entire suite of mitigation measures.⁶³ Alternative 1 was the preferred and adopted alternative. None of the Navy's alternatives considered in detail an alternative that would require mandatory speed limits to avoid collisions with endangered whales.

In 2020, following amendments to the MMPA via the National Defense Authorization Act for Fiscal Year 2019 to allow for seven-year authorizations for military readiness activities under the

⁵⁷ *Id.* at 66,882.

⁵⁸ 2018 BiOp at 585.

⁵⁹ *Id.* at 587.

⁶⁰ *Id.*

⁶¹ 83 Fed. Reg. at 66,988.

⁶² *See, e.g.*, 2018 HSTT FEIS at ES-1.

⁶³ *Id.* at ES-5 to ES-7.

MMPA (rather than five years), NMFS granted the Navy's request for an extension of the existing regulations to cover a total of seven years—from December 2018 to December 2025.⁶⁴ The activities and mitigation measures are generally the same as those authorized in 2018. This means that NMFS authorized thousands of more takes of blue whales, fin whales, humpback whales, and other endangered marine mammals each year via harassment and harm from impulsive and non-impulsive acoustic stressors.⁶⁵

The Navy did not request, and NMFS did not authorize, any additional take from vessel strikes than what was already permitted by the 2018 authorization.⁶⁶ NMFS stated that given the potential mortalities from ship strikes would now be spread over seven years rather than five, it was adjusting the authorized annual mortality accordingly—authorizing the death of 0.29 gray whales and fin whales from ship strikes each year; and 0.14 blue whales, Mexico DPS of humpback whales, and sperm whales per year accordingly.⁶⁷

In issuing the 2020 authorization, NMFS again downplayed several risks to endangered marine mammals from the Navy's activities. This includes the risk of vessel strikes related to the Navy's activities. NMFS brushed off comments highlighting the risk of vessel strikes by noting that the multiple lookouts on Navy vessels help avoid such incidents; expressing confidence that in the unlikely event a Navy vessel strikes a whale, it is both detected and reported; and that “[t]here has not been an actual Navy ship strike to a large whale in the HSTT Study Area since 2010.”⁶⁸ The recent military destroyer pulling into a San Diego base with two fin whales dead on its hull following training exercises in the Pacific clearly demonstrate that this is no longer the case and that NMFS's other assumptions are also incorrect.⁶⁹ Scientists believe that the whales, one of which was 65 feet in length and the other about 25 feet in length, are likely a mother and calf.⁷⁰

Despite the new 2020 authorization—and the additional extensive take and other impacts it enables—NMFS did not reinitiate or issue new ESA consultation or prepare a NEPA evaluation. The Navy is operating under the 2018 BiOp and 2018 EIS. Since NMFS issued the 2018 BiOp and EIS, a slew of new information—in addition to the expanded scope of the Navy's activities—indicates that the Navy's activities in the HSTT Study Area are likely affecting ESA-listed species to an extent not previously considered.

This new information includes various studies indicating that whales are increasingly being struck by vessels off California, and that these incidents may be negatively affecting whale recovery. Carretta et al. 2020 found, for example, that in 2018, vessels killed or seriously injured 13 whales in California—the highest number on record number since NMFS began keeping

⁶⁴ 85 Fed. Reg. 41,780 (July 10, 2020).

⁶⁵ *Id.* at 41,781.

⁶⁶ *Id.* at 41,783.

⁶⁷ *Id.*

⁶⁸ *Id.* at 41,807.

⁶⁹ *See, e.g.*, Michael Chen, Two fin whales found dead under hull of Australian ship at Naval Base San Diego, ABC 10: San Diego, May 11, 2021, <https://www.10news.com/news/local-news/two-fin-whales-found-dead-under-hull-of-australian-ship-at-naval-base-san-diego>.

⁷⁰ *Id.*

records in 1982.⁷¹ Vessel strikes represent the majority of human-caused large whale deaths on the U.S. West Coast from 2014 to 2018, with a total of at least 26 whale deaths, followed by fishery-related entanglements (at 21 deaths).⁷² For fin whales, eight died from vessel strikes during this time, representing the leading cause of human-caused injury and death.⁷³ For both blue whales (three deaths) and humpback whales (13 deaths), vessel strikes are the second leading cause of injury and death after fishery interactions.⁷⁴



Dead fin whale on the bow of a ship, Photo Credit: Alisa Schulman-Janiger.
Source: <https://channelislands.noaa.gov/management/resource/images/strike.jpg>

These reported collisions vastly underestimate actual strikes because many go unseen. Rockwood et al. 2017 created a model that calculated encounter risk, strike risk, and mortality estimates. The results estimated 18 blue whale mortalities due to ship strikes annually, including only the period of July to November when whales are most likely to be present in the U.S. West Coast EEZ.⁷⁵ The authors also estimated that 22 humpback whales and 43 fin whales died per year during this time period.⁷⁶ Given the uncertainty in accounting for whale collision avoidance, they also calculated strike mortality in the case of no avoidance, producing estimates of 40 blue, 48 humpback, and 95 fin whale deaths.⁷⁷ At least one new study indicates that blue whales have a limited ability to avoid collisions with vessels. The study concluded that while whales have some cues to avoid ships, this is true only at close range, under certain oceanographic conditions,

⁷¹ Carretta, James V. et al. 2020. Sources of Human-Related Injury and Mortality for U.S. Pacific West Coast Marine Mammal Stock Assessments, 2014- 2018, U.S. Department of Commerce, NOAA Technical Memorandum NMFS-SWFSC631.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Rockwood, R., et al., 2017. High mortality of blue, humpback and fin whales from modeling of vessel collisions on the U.S. West Coast suggests population impacts and insufficient protection. PLOS ONE 12(8): e0183052.

⁷⁶ *Id.*

⁷⁷ *Id.*

and if the whale is not otherwise distracted by feeding, breeding, or other behaviors.⁷⁸

Updated abundance estimates for humpback whales off Southern California allowed Rockwood and Jahncke 2019 to estimate that humpback mortality from January to April in Southern California alone was 6.5 whales (1.63/month).⁷⁹ When added to the estimated mortality from July to November, this means that the total estimated annual humpback mortality from vessel strikes in California alone is 23.4 deaths (16.9 + 6.5).⁸⁰ This study neither included information for January to April for fin or blue whales, nor estimated humpback mortality in central or Northern California. Thus, even this updated study underestimates whale mortality.

This level of vessel strike is impeding the recovery of endangered whales off California. Indeed, scientists have concluded that “death from vessel collisions may be a significant impediment to population growth and recovery.”⁸¹ For example, the minimum estimate of blue whale abundance is 1,050 whales, which gives a PBR level for U.S. waters of 1.23 whales.⁸² Ship strikes alone exceed the blue whale’s PBR several times over. Additionally, the current stock assessment report for humpback whales off California provides a PBR for U.S. waters of 16.7 whales (which does not properly account for the listing of the Central America and Mexico DPSs under the ESA or the low population size of the endangered Central America humpback whale DPS).⁸³ The estimated humpback whale mortality from vessel strikes is over this PBR level.

In addition, several new scientific studies indicate that other Navy’s activities in the HSTT Study Area may affect listed species to an extent not previously considered. For example, a recent study indicates that noise from Navy aircraft penetrates more deeply into the water than the Navy or NMFS considered in their analyses. According to Kuehne et al. 2020, aircraft noise at 30 meters below the sea surface exceeded noise thresholds that can trigger behavioral responses in marine mammals.⁸⁴ New science also indicates that Navy antisubmarine warfare activities may be associated with several beaked whale strandings in the Pacific.⁸⁵

Several new studies on blue whales indicate that the Navy’s activities may affect the species to an extent not previously considered. For example, a study found that because blue whales migrate to maximize their feeding opportunities throughout the year, they are highly sensitive to environmental changes.⁸⁶ A model of blue whale population showed that the predicted effects of

⁷⁸ Szesciorka, A.R., et al. 2019. A Case Study of a Near Vessel Strike of a Blue Whale: Perceptual Cues and Fine-Scale Aspects of Behavioral Avoidance. *Front. Mar. Sci.*, vol. 6, art. 761, <https://doi.org/10.3389/fmars.2019.00761>.

⁷⁹ Rockwood, C and Jahncke J. 2019. Management recommendations to reduce deadly whale strikes off California. Unpublished report for the National Oceanic and Atmospheric Administration, the United States Coast Guard, and the Maritime Industry. 16 p.

⁸⁰ *Id.*

⁸¹ Rockwood, et al. 2017.

⁸² NMFS. 2020. Stock Assessment Report: BLUE WHALE (*Balaenoptera musculus musculus*): Eastern North Pacific Stock at 188.

⁸³ NMFS. 2020. Stock Assessment Report: HUMPBACK WHALE (*Megaptera novaeangliae*): California/Oregon/Washington Stock at 179–80.

⁸⁴ Lauren M. Kuehne and Julian D. Olden. 2020. Military Flights Threaten the Wilderness Soundscapes of the Olympic Peninsula, Washington. *Northwest Science*, Vol. 94, No. 2.

⁸⁵ Simonis, A. et al. 2020. Co-occurrence of beaked whale strandings and naval sonar in the Mariana Islands, Western Pacific. *Proc. R. Soc. B* 287: 20200070; <http://dx.doi.org/10.1098/rspb.2020.0070>.

⁸⁶ Pirota, E., et al. 2019. Anthropogenic disturbance in a changing environment: modelling lifetime reproductive success to predict the consequences of multiple stressors on a migratory population. *Oikos*, 128(9), pp.1340-1357.

anthropogenic disturbance rapidly worsened when they occurred in the context of an environment that was also changing.⁸⁷ The synergistic interactions of environmental change and anthropogenic disturbance caused stronger effects than in isolation.⁸⁸ The authors concluded that “for a wide-ranging species like blue whales, reducing repeated or continuous exposure to a stressor is critical to ensure individuals can compensate for foraging opportunities that are missed.”⁸⁹

Another study found that deep feeding blue whales respond to simulated mid-frequency active sonar.⁹⁰ The study’s results, in combination with additional analytical methods to investigate different aspects of potential responses within and among individuals, provide a comprehensive evaluation of how free-ranging blue whales responded to mid-frequency military sonar.⁹¹ Yet another study that looked at the blue whale’s response to sonar indicated that, while the responses were variable, some whales lost an entire day of energy intake from even brief exposure to sonar.⁹²

Other significant new information bearing on the impacts of the Navy’s activities also exists. This includes information indicating that the Navy is increasingly using unmanned systems, which cannot include the human monitoring NMFS relies on to mitigate and monitor the impacts of the Navy’s activities on marine mammals.⁹³

Additionally, the recent deaths of fin whales from a collision with a military destroyer engaged in training exercises off California mean that the Navy has exceeded the annual authorized take for fin whales from vessel strikes and has already reached the total level of deaths of from vessel strikes across all seven years of Navy activities in the HSTT Study Area.

III. LEGAL VIOLATIONS

NMFS and the Navy are in violation of section 7(a)(2) of the ESA. Section 7(a)(2) requires the agencies to “insure” that their actions are “not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [their designated critical] habitat.”⁹⁴ This substantive duty applies both to NMFS’s permitting, management, and authorization of incidental take by the Navy from its training activities in the HSTT Study Area under the MMPA; and to the Navy’s undertaking of those activities.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Southall, B. et al. 2019. Behavioral responses of individual blue whales (*Balaenoptera musculus*) to mid-frequency military sonar. *Journal of Experimental Biology* 222, jeb190637. doi:10.1242/jeb.190637.

⁹¹ *Id.*

⁹² Pirotta E, et al. 2021. Context-dependent variability in the predicted daily energetic costs of disturbance for blue whales. *Conserv Physiol* 00(00): coaa137; doi:10.1093/conphys/coaa137.

⁹³ Gidget Fuentes, Fleet Exercise Includes Live Missile Shoot as Navy Pairs Crews With Unmanned Systems, USNI News, Apr. 20, 2021, <https://news.usni.org/2021/04/20/fleet-exercise-includes-live-missile-shoot-as-navy-pairs-crews-with-unmanned-systems>; David Axe, The U.S. Navy’s Robotic Missile Strike Was A High-Tech Show—For Lawmakers And Rival Fleets, *Forbes*, Apr. 30, 2021, <https://www.forbes.com/sites/davidaxe/2021/04/30/the-us-navys-robotic-missile-strike-was-a-high-tech-show-for-lawmakers-and-rival-fleets/?sh=9340af76f887>.

⁹⁴ 16 U.S.C. § 1536(a)(2).

A variety of significant new information, the expansion of Naval training activities, meeting or exceeding the ITS for fin whales from vessel strikes, and newly designated critical habitat all trigger NMFS's and the Navy's duty to reinitiate consultation. This new information, expansion of activities, meeting or exceeding the ITS for fin whales, and critical habitat designation also mean that NMFS and the Navy can no longer rely on the existing 2018 BiOp in authorizing and engaging in training activities in the HSTT Study Area.

This new information includes, as described more fully above: (1) the recent death of two fin whales killed by a military destroyer; (2) new scientific information indicating whale mortality from ship strikes is many factors greater than observed mortality; (3) new scientific information indicating ship strike mortality is negatively impacting whale recovery; (4) new scientific evidence indicating the Navy's aircraft, antisubmarine warfare, and sonar activities may harm blue whales, other endangered whales, and other animals to an extent not previously considered; and (4) the Navy's increasing use of unmanned vessels, which cannot conduct the marine mammal monitoring that depends on human lookouts.

Re-evaluating the risk of ship strikes on the survival and recovery of endangered whales is particularly important considering NMFS's assumption in issuing the MMPA take authorization to the Navy that whale strikes by Navy vessels are unlikely, easily detected and reported in the event they do occur, and that extending the Navy's take authorization by two years would not increase the risk of ship strikes.⁹⁵ The recent incident with fin whales reveals that NMFS's assumptions are incorrect.

Moreover, NMFS's 2020 decision to extend the Navy's take authorization by two additional years (through December 2025) means the Navy's activities will significantly increase the extent of take of—and other impacts to—endangered whales, seals, sea turtles, and other ESA-listed species impacted by the Navy's activities in the HSTT Study Area. The 2018 BiOp did not consider these additional impacts. Additionally, because the proposed action analyzed in the 2018 BiOp is the Navy's activities from December 2018 through December 2023, the ITS covers only this period and the Navy does not appear to have any ESA take authorization for activities from December 2023 through December 2025.

In addition to new information, newly designated critical habitat for the Central America and Mexico DPSs of the humpback whale also trigger the agencies' obligation to reinitiate consultation.⁹⁶ That NMFS excluded waters that directly overlap with the HSTT Study Area from this designation does not dictate otherwise.⁹⁷ This is because the Navy's training activities can still affect the waters that are designated as critical habitat. For example, low-frequency sonar can travel hundreds of miles at intensities strong enough to affect marine mammals.

Furthermore, the ITS in the 2018 BiOp authorizes Navy activities in the HSTT Study Area to kill two fin whales by vessel strikes from December 2018 through December 2023. NMFS explained that it expected this level of mortality meant an annual average of 0.4 fin whales would be killed by vessels each year, and therefore authorized this level of mortality each year.⁹⁸ The recent

⁹⁵ 83 Fed. Reg. at 66,882; 85 Fed. Reg. at 41,783.

⁹⁶ *See, e.g.*, 86 Fed. Reg. 21,082 (Apr. 21, 2021); 50 C.F.R. § 226.227.

⁹⁷ *See* 86 Fed. Reg. at 21,105.

⁹⁸ 83 Fed. Reg. at 66,988; 2018 BiOp at 587.

deaths of two fin whales mean the annual take authorization has been exceeded and the total take authorization across all seven years of activities has already been met. This also means that the Navy no longer has coverage from liability under section 9 for any injury or death of fin whales from collision with a vessel used in Navy training activities in the HSTT Study Area.⁹⁹

Nevertheless, NMFS and the Navy have failed to timely reinitiate and complete the reinitiated consultation regarding the continued implementation and impacts of the Navy's HSTT program on endangered whales in violation of the ESA.¹⁰⁰ Their failure to do so violates the agency's procedural and substantive duties under section 7(a)(2) of the ESA.

In addition to reinitiating consultation, NMFS should also evaluate whether the new information means it must revoke or suspend the MMPA authorization—or require additional mitigation measures—to ensure the Navy's activities have no more than a negligible impact on fin whales and other species or stocks as required by the MMPA.¹⁰¹ That is particularly important considering (1) that deaths of whales from vessel strikes off California are already above PBR; and (2) NMFS's assumption that the Navy's activities would kill or seriously injure no more than 0.4 fin whales (for activities from 2018 through 2023) or 0.29 fin whales (for activities from 2018 through 2025) from vessel strikes per year, and authorized that amount of take on an annual basis.¹⁰² The recent deaths are well-above that level. In conducting such evaluation, NMFS should pay particular attention to whether it should require vessel speed limits in designated critical habitat areas, biologically important areas, or other waters to reduce the instances and risk of injury and death of from vessels strikes. NMFS and the Navy must also evaluate the new information in a supplemental EIS under NEPA and consider an alternative that would require vessels used in Navy training exercises to comply with speed limits of 10 knots or less.

IV. CONCLUSION

For the foregoing reasons, if NMFS and the Navy do not correct these violations of the ESA within 60 days, the Center for Biological Diversity intends to file suit under the ESA's citizen suit provision. We urge the agencies to contact us regarding this letter to discuss options for avoiding litigation over this claim or to provide us with any information we may not have that is relevant to the agencies' ESA consultation duties, NMFS's incidental take regulations, and the Navy's activities. Thank you for your prompt attention to this matter.

Sincerely,

/s/ Kristen Monsell

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⁹⁹ *Id.* §§ 1536(o), 1538(a), (g).

¹⁰⁰ *See* 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.16.

¹⁰¹ *Id.* § 1371(a)(5)(B).

¹⁰² 85 Fed. Reg. at 41,807.