

**NATIONAL MARINE FISHERIES SERVICE
ENDANGERED SPECIES ACT SECTION 7
BIOLOGICAL OPINION**

Title: Amended Incidental Take Statement for the Biological Opinion on U.S. Navy Hawaii-Southern California Training and Testing (HSTT) and the National Marine Fisheries Service's Promulgation of Regulations Pursuant to the Marine Mammal Protection Act for the Navy to "Take" Marine Mammals Incidental to Atlantic Fleet Training and Testing

Consultation Conducted By: Endangered Species Act Interagency Cooperation Division, Office of Protected Resources, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, U.S. Department of Commerce

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Permits and Conservation Division, Office of Protected Resources, National Marine Fisheries Service, National Oceanic and Atmospheric Administration, U.S. Department of Commerce

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Approved: 
Donna S. Wieting
Director, Office of Protected Resources

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13 INCIDENTAL TAKE STATEMENT (AMENDED JANUARY 14, 2020)

[NOTE: To ensure the ITS associated with the December 2018 Biological Opinion is consistent with NMFS Permits and Conservation Division consideration to issue revised MMPA regulations and new LOAs to account for a two-year extension of the 2018 (existing five-year) HSTT MMPA regulations, we have prepared this amended ITS to cover the seven-year period.

Section 9 of the ESA and Federal regulations pursuant to section 4(d) of the ESA prohibit the take of endangered and threatened species, respectively, without a special exemption. In the case of threatened species, section 4(d) of the ESA leaves it to the Secretary's discretion whether and to what extent to extend the statutory 9(a) "take" prohibitions, and directs the agency to issue regulations it considers necessary and advisable for the conservation of the species. At the time of this consultation, take prohibitions have not been extended to the threatened oceanic whitetip shark or giant manta ray. However, consistent with *CBD v. Salazar*, 695 F.3d 893 (9th Cir. 2012), we assessed the amount or extent of take to these threatened species that is anticipated incidental to Navy training and testing activities and include this information in the ITS. Inclusion of these species in the ITS serves to assist the action agency with monitoring of take and provides a trigger for reinitiation if levels of estimated take are exceeded.

"Take" is defined as to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture or collect, or to attempt to engage in any such conduct. Harm is further defined by regulation to include significant habitat modification or degradation that results in death or injury to ESA-listed species by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering. NMFS had not yet defined "harass" under the ESA in regulation, but has issued interim guidance on the term "harass," defining it as to "create the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavior patterns which include, but are not limited to, breeding, feeding, or sheltering." We considered NMFS' interim definition of harassment in evaluating whether the proposed activities are likely to result in harassment of ESA-listed species. Incidental take statements serve a number of functions, including providing reinitiation triggers for all anticipated take, providing exemptions from Section 9 liability for prohibited take, and identifying reasonable and prudent measures that will minimize the impact of anticipated incidental take.

Further, when an action will result in incidental take of ESA-listed marine mammals, ESA section 7(b)(4) requires that such taking be authorized under the MMPA Section 101(a)(5) before the Secretary can issue an ITS for ESA-listed marine mammals and that an ITS specify those measures that are necessary to comply with Section 101(a)(5) of the MMPA. Section 7(b)(4) and section 7(o)(2) provide that taking that is incidental to an otherwise lawful agency action is not considered to be prohibited taking under the ESA if that action is performed in compliance with the terms and conditions of this ITS, including those specified as necessary to comply with the MMPA, Section 101(a)(5). Accordingly, the terms of this ITS and the exemption from Section 9 of the ESA become effective only upon the issuance of MMPA

authorization to take the marine mammals identified here. Absent such authorization, this ITS is inoperative for ESA-listed marine mammals.

13.1 Amount or Extent of Take

Section 7 regulations require NMFS to specify the impact of any incidental take of endangered or threatened species; that is, the amount or extent, of such incidental taking on the species (50 C.F.R. §402.14(i)(1)(i)). The amount of take represents the number of individuals that are expected to be taken by actions. Where it is not practical to quantify the number of individuals that are expected to be taken by the action, a surrogate (e.g., similarly affected species or habitat or ecological conditions) may be used to express the amount or extent of anticipated take.

The table below lists the anticipated take from training and testing activities by species and the interrelated and interdependent actions of issuance of a seven-year regulation¹ and LOAs by NMFS' Permits Division to authorize take of marine mammals pursuant to the MMPA.

¹ On December 21, 2018, NMFS' Permits and Conservation Division issued a five-year final rule governing the taking of marine mammals incidental to Navy training and testing activities conducted in the HSTT Study Area (2018 HSTT Final Rule; 83 FR 66846). Previously on August 13, 2018, and towards the end of the time period in which NMFS was processing the Navy's request for the 2018 HSTT regulations, the 2019 National Defense Authorization Act (NDAA) amended the MMPA for military readiness activities to allow incidental take regulations to be issued for up to seven years instead of the previous five years. On March 11, 2019 the Navy submitted an application requesting that NMFS extend the 2018 HSTT regulations and associated LOAs such that they would cover take incidental to seven years of training and testing activities instead of five, extending the expiration date from December 20, 2023 to December 20, 2025. On September 13, 2019, NMFS published a proposed seven-year rule under the MMPA that would effectively extend the 2018 HSTT regulations for an additional two years (84 FR 48388).

Table 101. The number of lethal and non-lethal takes of threatened and endangered marine mammals and sea turtles likely to occur annually (except in the case of mortality and non-lethal injury from vessel strike) as a result of the proposed Navy training and testing activities in the action area.

ESA-Listed Species	Impulsive and Non-Impulsive Acoustic Stressors				Vessel Strike*	
	Harassment (TTS / Behavioral)	Harm (PTS)	Harm (Slight Lung Injury)	Mortality	Mortality (over every 7 year period)	Harm: non-lethal injuries (over every 7 year period)
Marine Mammals						
Blue Whale	1,229 / 806	1	-	-	1	-
Fin Whale	1,417 / 856	1	-	-	2	-
Gray Whale – Western North Pacific DPS	4 / 2	-	-	-	-	-
Humpback Whale – Mexico DPS	920 / 198	1	-	-	1	-
Humpback Whale – Central America DPS	594 / 282	-	-	-	-	-
Sei Whale	173 / 73	0	-	-	-	-
Sperm Whale	86 / 4,903	0	-	-	1	-
False Killer Whale – Main Hawaiian Islands Insular DPS	17 / 572	0	-	-	-	-
Guadalupe Fur Seal	15 / 1,442	0	-	-	-	-
Hawaiian Monk Seal	62 / 143	1	-	-	-	-
Sea Turtles						
Green Sea Turtle – Central North Pacific DPS	20 / 1,831	7	1	-	140	47
Green Sea Turtle – Eastern Pacific DPS	-	-	-	-	5	2
Hawksbill Sea Turtle	0 / 21	-	-	-	6	2
Olive Ridley Sea Turtle	0 / 96	-	-	-	3	1
Loggerhead Sea Turtle – North Pacific DPS	0 / 182	-	-	-	-	-
Leatherback Sea Turtle	0 / 193	-	-	-	-	-

**The numbers presented for marine mammals and sea turtles for vessel strike represent total exempted over a seven-year period.*

When it is not possible or practicable to specify the amount or extent of take, a surrogate may be used if we: describe the causal link between the surrogate and take of the listed species, explain why it is not practical to express the amount or extent of anticipated take or to monitor take-related impacts in terms of individuals of the listed species, and set a clear standard for determining when the level of anticipated take has been exceeded. 50 C.F.R. 402.14(g)(7). As described previously in Section 9.2.3 **Error! Reference source not found.**, due to the lack of available density and abundance information in the action area for ESA-listed fishes, it is not possible, nor would it be an accurate representation of potential effects, to express the amount of anticipated take (i.e., in the form of mortality, injury, TTS, and behavioral disruption) of ESA-listed fish species (Southern California DPS steelhead, Eastern Pacific DPS scalloped hammerhead shark, oceanic whitetip shark, giant manta ray) or to monitor take-related impacts in terms of individuals of these species. Therefore, the surrogate for the incidental take of ESA-listed fishes is the distance to reach effects in the water column that correlates with injury and sub-injury from explosives in those areas occupied by fishes (See Section 9.2.3.1).

Activity Levels as Indicators of Take for Marine Mammals, Sea Turtles, and Fishes

As discussed in this opinion, the estimated take of ESA-listed sea turtles and marine mammals from acoustic stressors is based on Navy modeling, which represents the best available means of numerically quantifying take. As the level of modeled sonar or explosive use increases, the level of take is likely to increase as well. For non-lethal take from acoustic sources specified above, feasible monitoring techniques for detecting and calculating actual take at the scale of HSTT activities do not exist. We are not aware of any other feasible or available means of determining when estimated take levels may be exceeded. Therefore, we must rely on Navy modeling, and the link between sonar or explosive use and the level of take, to determine when anticipated take levels have been exceeded. As such, we established a term and condition of this Incidental Take Statement that requires the Navy to report to NMFS any exceedance of activity specified in the preceding opinion and in the final MMPA rule before the exceedance occurs if operational security considerations allow, or as soon as operational security considerations allow after the relevant activity is conducted. Exceedance of an activity level will require the Navy to reinstate consultation.

The estimated take of ESA-listed sea turtles from ship strike is based on available strandings information and the relative proportion of all vessel activity (e.g., commercial fishing vessels, non-fishing commercial vessels, recreational boats, cargo ships, ferries, cruise ships, and military vessels) within different portions of the action area attributed to Navy vessel activity. Feasible monitoring techniques for detecting and calculating actual sea turtle take (either lethal or nonlethal) from either civilian or Navy ship strike do not exist. It should be noted that the ratio of Navy vessels in the action area is significantly less than civilian vessels and boats. Furthermore, even if minor changes to Navy vessel quantities occur, the corresponding overall vessel activity levels remain relatively the same for the foreseeable future based on scheduling needs, deployment cycles, and other logistic considerations (e.g., fuel allocation, personnel availability,

etc.). As described in the preceding paragraph, the Navy already reports annual sonar and explosive use to NMFS as a surrogate for authorized annual take as well as an indicator for overall Navy activity levels including vessel movements. Therefore, we can equate annual reporting of Navy activities (sonar, explosives) as a reasonable metric to evaluate if sea turtle ship strike has likely been exceeded. If annual Navy use of sonar and explosives fall below those levels considered in this opinion, then we can reasonably assume Navy vessel activity was also within the same level as analyzed and that sea turtle ship strike risk has not changed.

For ESA-listed fish species, it is not possible, nor would it be an accurate representation of potential effects, to express the amount of anticipated take of ESA-listed fish species or to monitor take-related impacts in terms of individuals of these species due to the lack of data on fish abundance in the action area. As the level of Navy explosive use increases, the level of take of ESA-listed fishes is likely to increase as well. Feasible monitoring techniques for detecting and calculating actual take of ESA-listed fishes at the scale of HSTT activities do not exist. We are not aware of any other feasible or available means of determining when estimated take levels may be exceeded. Therefore, we must rely on Navy activity levels, and the link between explosive use and the level of take, to determine when anticipated take levels have been exceeded. As such, we established a term and condition of this Incidental Take Statement that requires the Navy to report to NMFS any exceedance of explosive activity use specified in the preceding opinion before the exceedance occurs if operational security considerations allow, or as soon as operational security considerations allow after the relevant activity is conducted. Exceedance of an activity level will require the Navy to reinitiate consultation.

13.2 Effects of the Take

In this opinion, NMFS determined that the amount or extent of anticipated take, coupled with other effects of the proposed action, is not likely to jeopardize the continued existence or recovery of any ESA-listed species or result in the destruction or adverse modification of designated critical habitat.

13.3 Reasonable and Prudent Measures

Section 7(b)(4) of the ESA requires that when a proposed agency action is found to be consistent with section 7(a)(2) of the ESA and the proposed action may incidentally take individuals of ESA-listed species, NMFS will issue a statement that specifies the impact of any incidental taking of endangered or threatened species. To minimize such impacts, reasonable and prudent measures, and term and conditions to implement the measures, must be provided. Only incidental take resulting from the agency actions and any specified reasonable and prudent measures and terms and conditions identified in the ITS are exempt from the taking prohibition of section 9(a), pursuant to section 7(o) of the ESA.

Reasonable and prudent measures are nondiscretionary measures to minimize the amount or extent of incidental take (50 C.F.R. §402.02). The reasonable and prudent measures and terms

and conditions are specified as required by 50 C.F.R. 402.14 (i)(1)(ii) and (iv) to document the incidental take by the proposed action and minimize the impact of that take on ESA-listed species. The reasonable and prudent measures are nondiscretionary, and must be undertaken by the Navy and NMFS' Permits Division so that they become binding conditions for the exemption in section 7(o)(2) to apply.

NMFS has determined the following reasonable and prudent measures described below are necessary and appropriate to minimize the impacts of incidental take of threatened and endangered species during the proposed action:

1. The Navy and NMFS Permits Division shall minimize effects to ESA-listed marine mammals, sea turtles, and fishes from the use of active sonar, explosives, and vessels during training and testing activities. This includes adherence to the mitigation measures specified in the final MMPA rule and LOA.
2. The Navy and NMFS Permits Division shall monitor and report to NMFS' Office of Protected Resources ESA Interagency Cooperation Division on impacts to ESA-listed marine mammals, sea turtles, and fishes from the use of sonar and other transducers, explosives, and vessels during training and testing activities. This includes adherence to the monitoring and reporting measures specified in the final MMPA rule and LOA.

13.4 Terms and Conditions

To be exempt from the prohibitions of section 9 of the ESA, the Navy and NMFS Permits Division must comply with the following terms and conditions, which implement the Reasonable and Prudent Measures described above. These include the take minimization, monitoring and reporting measures required by the section 7 regulations (50 C.F.R. §402.14(i)). These terms and conditions are non-discretionary. If the Navy or NMFS Permits Division fail to ensure compliance with these terms and conditions and their implementing reasonable and prudent measures, the protective coverage of section 7(o)(2) may lapse.

- 1) The following terms and conditions implement reasonable and prudent measure 1:
 - a) The Navy shall implement all mitigation measures as specified in the final MMPA rule and LOA (2018 HSTT Final Rule; 83 FR 66846).
 - b) NMFS Permits Division shall ensure that all mitigation measures as prescribed in the final rule and LOA of this opinion are implemented by the U.S. Navy.
 - c) The Navy shall continue technical assistance/adaptive management efforts with NMFS to help inform future consultations on Navy training and testing in the action area. Adaptive management discussions should include review of Navy's exercise and monitoring reports, review of ESA section 7 reinitiation triggers (described in Section 15), and

potential new measures to increase mitigation effectiveness (e.g., thermal detection of protected species).

- 2) The following terms and conditions implement reasonable and prudent measure 2:
 - a) The Navy shall monitor training and testing activities and submit reports annually to NMFS Permits Division and NMFS ESA Interagency Cooperation Division including the location and total hours and counts of active sonar hours and in-water explosives used, and an assessment if activities conducted in the action area exceeded levels of training and testing analyzed in this opinion annually and over the seven-year period of the MMPA regulations and LOAs.
 - b) NMFS Permits Division shall review the reports submitted by the Navy described above in 2(a). Within two months of receipt of each Navy report, NMFS Permits Division will submit written documentation to NMFS ESA Interagency Cooperation Division assessing if Navy activities conducted in the action area exceeded levels of training and testing analyzed in this opinion annually and over the seven-year period of the MMPA regulations and LOAs.
 - c) The Navy and NMFS Permits Division shall report to the NMFS ESA Interagency Cooperation Division all observed injury or mortality of any ESA-listed species resulting from the proposed training and testing activities within the action area. The Navy shall report when enough data are available to determine if the dead or seriously injured ESA-listed species may be attributable to these activities, including but not limited to, the use of explosives and vessel strike.
 - d) In the event that Navy personnel (uniformed military, civilian, or contractors while conducting Navy work) discover a live or dead stranded marine mammal or sea turtle within the action area or on Navy property, the Navy shall report the incident to NMFS immediately or as soon as operational security considerations allow.
 - e) If NMFS personnel determine that the circumstances of any of the strandings reported in 2(d) suggest investigation of the associated of Navy activities is warranted (see stranding and notification document for example circumstances), and an investigation into the stranding is being pursued, NMFS personnel will submit a written request to the Navy asking that they provide the status of all sound sources and explosive use in the 48 hours preceding and within 50 km (27 NM) of the discovery/notification of the stranding by NMFS, or estimated time of stranding. Navy will submit this information as soon as possible, but no later than seven (7) business days after the request.