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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
EUREKA DIVISION

INTERTRIBAL SINKYONE  
WILDERNESS COUNCIL, *et al.*,

Plaintiffs,

v.

NATIONAL MARINE FISHERIES  
SERVICE, *et al.*,

Defendants.

No. 1:12-cv-00420 NJV

ORDER RE CROSS MOTIONS  
FOR SUMMARY JUDGMENT  
(Doc. nos. 31, 49.)

\_\_\_\_\_ /  
This is an action pursuant to the Administrative Procedure Act, 5 U.S.C. § 551 *et seq.*, alleging violations of the Endangered Species Act, 16 U.S.C. § 1531 *et seq.* and the Marine Mammal Protection Act, 16 U.S.C. § 1361 *et seq.* The case concerns the National Marine Fisheries Service’s development of five-year regulations authorizing activities by the United States Navy in its Northwest Training Range Complex, a three-year letter of authorization issued pursuant to those regulations, and two biological opinions evaluating the Navy’s activities. The case involves the Navy’s use of sonar while conducting anti-submarine warfare training, and proceeds on cross motions for summary judgment.<sup>1</sup> As set forth below, the court grants in part and denies in part Plaintiffs’ motion for summary judgment, and grants in part and denies in part Defendants’ motion for summary judgment.

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<sup>1</sup>The court granted a motion by Canadian environmental groups to file an amicus brief. (Doc. nos. 42-45, 47, 48, 60.) While the court appreciates the information provided by our concerned neighbors to the north, the amicus brief does not directly address the issues raised by the parties in this case. The court, therefore, will not address the arguments raised by the amici.

1 **THE ENDANGERED SPECIES ACT**

2 The Endangered Species Act (“ESA”) provides for the listing of species as threatened or  
 3 endangered and for the designation of their critical habitat. 16 U.S.C. § 1533. The Secretary of the  
 4 Interior is responsible for listed terrestrial and inland fish species and administers the ESA through  
 5 the U.S. Fish and Wildlife Service (“FWS”). The Secretary of Commerce is responsible for listed  
 6 marine species and administers the ESA through the National Marine Fisheries Service (“NMFS”).  
 7 16 U.S.C. § 1532(15); 50 C.F.R. §§ 17.11, 402.01(b).

8 ESA Section 7(a)(2) directs each agency to insure, in consultation with the FWS or the NMFS  
 9 (“the consulting agency”), that “any action authorized, funded or carried out by such agency . . .  
 10 is not likely to jeopardize the continued existence of” any listed species or to destroy or adversely  
 11 modify critical habitat that has been designated for such species. 16 U.S.C. § 1536(a)(2).  
 12 Consultation is required if the agency proposing action (“the action agency”) determines that the  
 13 proposed action “may affect” listed species or critical habitat. 50 C.F.R. § 402.14(a). If such a  
 14 determination is made, the action agency may pursue either formal or informal consultation. *See id.*  
 15 §§ 402.13-402.14. Formal consultation is required unless the action and consulting agencies concur,  
 16 in writing and after informal consultation, that the proposed action is “not likely to adversely affect”  
 17 listed species or critical habitat, in which case the consultation process is terminated and no further  
 18 action is necessary. *Id.* §§ 402.14(b)(1), 403.13(a).

19 Where adverse effects are likely, the requirement for formal consultation is triggered. *See id.*  
 20 At the conclusion of formal consultation, the consulting agency issues its “biological opinion” as to  
 21 whether the proposed action is likely to jeopardize the continued existence of any listed species or  
 22 destroy or adversely modify critical habitat. *Id.* § 402.14(h). To “jeopardize the continued existence  
 23 of” means “to engage in an action that reasonably would be expected, directly or indirectly, to reduce  
 24 appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing  
 25 the reproduction, numbers, or distribution of that species.” 50 C.F.R. § 402.02. The biological  
 26 opinion must be based on the “best scientific and commercial data available.” 16 U.S.C.  
 27 § 1536(a)(2); 50 C.F.R. §§ 1536(a)(2), 402.14(g)(8).

28

1 “If jeopardy or adverse modification is found, the [consulting agency] shall suggest those  
2 reasonable and prudent alternatives which [it] believes would not violate [ESA Section 7(a)(2)] and  
3 can be taken by the [action] agency or applicant in implementing the agency action.” 16 U.S.C.  
4 § 1536(a)(3)(A). However, where no jeopardy or adverse modification is found, the ESA imposes no  
5 similar requirement on the consulting agency; rather, the proposed action may proceed as planned,  
6 subject to potential restrictions on incidental take described below. *See id.*

7 Section 9 of the ESA generally prohibits the “take” of members of a listed species without  
8 prior authorization from the consulting agency, which in this case is the NMFS. 16 U.S.C.  
9 §§ 1538(A)(B), 1539(a)(1)(B). Under the ESA, the term “take” means “to harass, harm, pursue, hunt,  
10 shoot, wound, kill, trap, capture, or collect, or to attempt to engage in any such conduct.” *Id.* at  
11 § 1532 (19). In 1982, the ESA was amended “to resolve the situation in which a federal agency . . .  
12 has been advised that the proposed action will not violate Section 7(a)(2) of the ESA, but the  
13 proposed action will result in the taking of some species incidental to that action.” H.R.Rep. 97-567,  
14 97<sup>th</sup> Cong., 2<sup>nd</sup> Sess., at 26-27, *reprinted in* 1982 U.S.C. C.A.N. 2807, 2826-27 (May 18, 1982). In  
15 these circumstances, the NMFS must issue an incidental take statement (“ITS”) specifying the  
16 amount or extent of anticipated take, any reasonable and prudent measures the NMFS “considers  
17 necessary or appropriate” to minimize the impact of the take, and mandatory terms and conditions to  
18 implement the reasonable and prudent measures. 16 U.S.C. § 1536(b)(4); 50 C.F.R. § 402.14(i).  
19 “Reasonable and prudent measures, along with the terms and conditions that implement them, cannot  
20 alter the basic design, location, scope, duration, or timing of the action and may involve only minor  
21 changes.” 50 C.F.R. § 402.14(i)(2). The ITS provides an exception to the take prohibition in ESA  
22 Section 9; any take in compliance with the terms and conditions of the ITS is not unlawful. 50 C.F.R.  
23 § 402.14(i)(5).

24 In 1986, the ESA was again amended “to clarify the relationship between” the MMPA and the  
25 ESA. 132 Cong. Rec. S31281, 31295, 1986 WL 789325 (Oct. 16, 1986). As amended, the ESA  
26 provides that when the proposed action will result in the take of ESA-listed marine mammals, the  
27 NMFS may not issue an ITS unless the take has been authorized under MMPA. 16 U.S.C.  
28

1 § 1536(b)(4)(C). The ITS must also incorporate the mitigation measures for ESA-listed marine  
2 mammals prescribed by the MMPA take authorization. *Id.* at § 1536(b)(4)(C)(iii). Thus, Congress  
3 “intended that the decision processes under the [MMPA and ESA] be coordinated and integrated to  
4 the maximum extent possible.” 132 Cong. Rec. at S31295, 1986 WL 789325; 132 Cong. Rec.  
5 S32181, 32185, 1986 WL 788463 (Oct. 16, 1986); 54 Fed. Reg. 40338, 40346 (Sept. 19, 1989)  
6 (preamble to regulations implementing 1986 amendments).

### 7 THE MARINE MAMMAL PROTECTION ACT

8 The Marine Mammal Protection Act (“MMPA”) generally prohibits the “take” of marine  
9 mammals. 16 U.S.C. § 1371(a). Under the MMPA, “take” means “to harass, hunt, capture, collect,  
10 or kill, or attempt to harass, hunt, capture, or kill, any marine mammal.” 16 U.S.C. § 1362(13). For  
11 purposes of military readiness activities, the term “harassment” means:

- 12 (i) any act that injures or has the significant potential to injure a marine mammal or marine  
13 mammal stock in the wild [Level A harassment]; or  
14 (ii) any act that disturbs or is likely to disturb a marine mammal or marine mammal stock in  
15 the wild by causing disruption of natural behavior patterns, including, but not limited to,  
16 migration, surfacing, nursing, breeding, feeding, or sheltering, to a point where such  
17 behavioral patterns are abandoned or significantly altered. [Level B harassment].

18 16 U.S.C. § 1362(18)(B). The Secretary of Commerce, acting through the NMFS, administers the  
19 MMPA with respect to the cetaceans (whales, dolphins and porpoises) and pinnipeds (seals and sea  
20 lions) at issue in this case. *Id.* at § 1362(12)(A)(i).

21 The MMPA allows several exceptions to the general take prohibition. *See id.* at § 1371(a)(1)  
22 - (5). Section 101(a)(5)(A) provides an exception for incidental taking of “small numbers” of marine  
23 mammals from “a specified activity (other than commercial fishing) within a specified geographical  
24 area.” 16 U.S.C. § 1371(a)(5)(A)(i). Upon request, the NMFS “shall allow” such take “during  
25 periods of not more than five consecutive years” if the NMFS determines, after notice and the  
26 opportunity for public comment, that the total take would have a “negligible impact” on the relevant  
27 species or stock and would not have an “unmitigatable adverse impact” on availability for specified  
28 subsistence uses. *Id.* at § 1371(a)(5)(A)(i)(I).

29 In 2003, Congress amended the MMPA to exempt military readiness activities from the  
30 “small numbers” and “specified geographical region” requirements. *Id.* at § 1371(a)(5)(F)(i).

1 Accordingly, the NMFS may authorize take of marine mammals incidental to military readiness  
2 activities for periods of not more than five years if it makes the requisite “negligible impact” and  
3 “unmitigated adverse impact” findings. *Id.* at § 1371(a)(5)(A)(i)(I). “Negligible impact” means “an  
4 impact resulting from the specified activity that cannot be reasonably expected to, and is not  
5 reasonably likely to, adversely affect the species or stock through effect on annual rates of  
6 recruitment or survival.” 50 C.F.R. § 216.103.

7 If the NMFS makes the required findings, it must promulgate regulations specifying  
8 permissible methods of take and other means of effecting the “least practicable adverse impact” on  
9 the affected species or stock and its habitat. 16 U.S.C. § 1371(a)(5)(A)(i)(II). For military readiness  
10 activities, the “least practicable adverse impact” determination “shall include consideration of  
11 personnel safety, practicality of implementation, and impact on the effectiveness of the military  
12 readiness activity.” *Id.* at § 1371(a)(5)(A)(ii).

13 The NMFS’s general regulations implementing the MMPA establish a multi-step process for  
14 issuing take authorizations under Section 101(a)(5)(A), which consists of (1) promulgating specific  
15 regulations governing the take incidental to the specified activities and (2) the issuance of letters of  
16 authorization under those regulations. The NMFS must “begin the public review process by  
17 publishing in the Federal Register . . . [a] notice of receipt of a request for the implementation or  
18 reimplement of regulations governing the incidental taking.” 50 C.F.R. § 216.104(b)(1)(ii).  
19 “NMFS will invite information, suggestions, and comments for a period not to exceed 30 days from  
20 the date of publication in the Federal Register. All information and suggestions will be considered by  
21 the [NMFS] in developing, if appropriate, the most effective regulations governing the issuance of  
22 letters of authorization.” *Id.*

23 These regulations further require that “[a]ny preliminary findings of ‘negligible impact’ and  
24 ‘no unmitigable adverse impact’ . . . be proposed for public comment along with either the  
25 proposed incidental harassment authorization or the proposed regulations for the specific activity.”  
26 *Id.* at § 216.104(c). If the NMFS finds after public review that the requested taking by the specified  
27 activity meets the statutory criteria, the NMFS must promulgate the specific regulations for the  
28 allowed activities setting forth “permissible methods of taking” and “[m]eans of effecting the least

1 practicable adverse impact on the species and its habitat and on the availability of the species for  
 2 subsistence uses.” *Id.* at § 216.105(b). “Regulations will be established based on the best available  
 3 information. As new information is developed, through monitoring, reporting, or research, the  
 4 regulations may be modified, in whole or in part, after notice and opportunity for public review.” *Id.*  
 5 at § 216.105(c).

6 Finally, a “Letter of Authorization . . . is required to conduct activities pursuant to any  
 7 regulations established under § 216.105.” *Id.* at § 216.106(a). “Issuance of a Letter of Authorization  
 8 will be based on a determination that the level of taking will be consistent with the findings made for  
 9 the total taking allowable under the specific regulations.” *Id.* at § 216.106(b). “Letters of  
 10 Authorization will specify the period of validity and any additional terms and conditions appropriate  
 11 for the specific request.” *Id.* at § 216.106(c).

## 12 BACKGROUND

13 The Northwest Training Range Complex (“NWTRC”) includes ranges and airspace that  
 14 extend west 250 nautical miles (463 kilometers) beyond the coast of Northern California, Oregon and  
 15 Washington, and east to Idaho.<sup>2</sup> AR Doc. B.65 at 4622. The offshore area of the NWTRC extends  
 16 from the inland marine waters of Puget Sound in Washington, west to the outer coast of Washington,  
 17 and south to the Lost Coast region of Northern California in Northern Mendocino County. It extends  
 18 from the Strait of San Juan de Fuca in the north, to approximately 50 nautical miles (93 kilometers)  
 19 south of Eureka, California. *Id.*

20 In 2008, the Navy applied to the NMFS for authorization under the MMPA and the ESA to  
 21 incidentally “take” marine mammals during anti-submarine warfare (“ASW”) training exercises to be  
 22 conducted in the NWTRC over a five-year period. The Navy uses various types of active and passive  
 23 sonar during ASW training exercises. Active sonar is used to locate quiet objects (such as quiet  
 24 diesel-electric submarines) and to establish both bearing and range to the detected contact. By  
 25 knowing the speed of sound in water and the time taken for the sound wave to travel to the object and  
 26 back, active sonar systems can quickly calculate direction and distance from the sonar platform to the

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 28 <sup>2</sup>A kilometer is roughly .54 nautical miles. Defendants’ Reply, n. 22. *See Native Village of Point Hope v. Salazar*, 680 F.3d 1123, 1133 (9<sup>th</sup> Cir. 2012) (Technical issues falling squarely within agency’s area of expertise “are accorded great deference by a reviewing court.”).

1 underwater object. AR Doc. B.97 at 7711, AR Doc. B.25 at 1323-24. This case involves the Navy's  
2 use of mid-frequency active sonar. Mid-frequency active sonar has a detection range of up to 10  
3 nautical miles, making it the Navy's primary tool for conducting ASW and ensuring the survivability  
4 of U.S. ships. AR Doc. B.97 at 711-12. Mid-frequency active sonar "is a complex technology, and  
5 sonar operators must undergo extensive training to become proficient in its use." *Winter v. National*  
6 *Resources Defense Council, Inc.*, 555 U.S. 7, 13, 129 S.Ct. 365, 370 (2008). "Sonar reception can be  
7 affected by countless different factors, including the time of day, water density, salinity, currents,  
8 weather conditions, and the contours of the sea floor." *Id.* "The Navy conducts regular training  
9 exercises under realistic conditions to ensure that sonar operators are thoroughly skilled in its use in a  
10 variety of situations." *Id.*; AR Doc. B.97 at 7712.

11 The NWTRC includes an inshore and offshore area, with the offshore area extending west  
12 beyond the coast of Washington, Oregon, and Northern California. AR Doc. B.25 at 1213-14, 1299.  
13 Most of the Navy's ASW training in the NWTRC occurs in an area known as "W-237" off the coast  
14 of northern Washington. AR Doc. B.6 at 41; AR Doc. B.25 at 1214, 1216. The Navy did not seek  
15 incidental take authorization for active sonar training in the inshore portion of the NWTRC, due to  
16 the fact that such training has been discontinued at that location. Thus the specified activities covered  
17 by the MMPA regulations at issue in this case do not include active sonar training in the inshore  
18 portion of the NWTRC. AR Doc. B.6 at 37; AR Doc. B.65 at 4655-56, 4633.

19 Destroyers and frigates that conduct ASW training in the NWTRC are equipped with hull-  
20 mounted mid-frequency active sonar systems. AR Doc. B.97 at 7714. Defendants assert that these  
21 systems are associated with the vast majority of takes authorized under the challenged MMPA  
22 regulations. Defendants' Motion and Opposition, 10:4-5; *see* AR Doc. B.6 at 40. The Navy has  
23 conducted ASW training in the NWTRC for decades using these or similar hull-mounted mid-  
24 frequency active sonar systems. AR Doc. B.97 at 7890; AR Doc. B.25 at 1223; AR Doc. B.65 at  
25 4622.

26 Within the NWTRC, frigates and destroyers do not conduct coordinated major training  
27 exercises in which multiple vessels may be simultaneously engaged in mid-frequency active sonar  
28 use. Instead, a single frigate or destroyer may use mid-frequency active sonar occasionally for short

1 periods of time (1 to 1.5 hours) while transiting through the range. *See* AR Doc. B.6 at 40. These  
2 exercises generally take place more than 50 nautical miles from shore in the offshore portion of the  
3 NWTRC. *Id.* The estimated 1.5 hours of sonar use per transit does not involve continuous sonar  
4 transmission. Rather, the sonar systems transmit intermittent pulses of sound (“pings”) that travel  
5 through the water, reflect off objects and return to a receiver. AR Doc. B.97 at 7714. In general, the  
6 sonar systems used by the Navy may emit 120 active pings per hour (one every thirty seconds), with  
7 each ping lasting approximately one second. *Id.*; *see* AR B.6 at 32.

8         The Navy also uses SQS-62 “sonobuoys” (small, expendable sonar systems) in the NWTRC  
9 that are equipped with mid-frequency active sonar. AR Doc. B.65 at 4625. These sonobuoys are  
10 deployed by aircraft to assist in locating and tracking submarines or ASW targets during an exercise.  
11 AR Doc. B.97 at 7715. The sonobuoys’ mid-frequency active sonar systems operate at significantly  
12 lower source levels than the hull-mounted systems and for far shorter periods of time (12 pings per  
13 use, 30 seconds between pings for modeling purposes). AR Doc. B.6 at 32.

14         In November 2010, the NMFS granted the Navy’s application and issued regulations under  
15 the MMPA governing the take of marine mammals incidental to Navy training in the NWTRC for a  
16 period of five years from November 2010 through November 2015 (“the Final MMPA Rule”). AR  
17 Doc. B.6. The NMFS also engaged in formal consultation pursuant to the ESA Section 7(a)(2). On  
18 June 15, 2010, the NMFS issued the Final Biological Opinion (“the Five Year BiOp”) concluding  
19 that the authorized take and associated training activities are not likely to jeopardize the continued  
20 existence of any species listed as threatened or endangered under the ESA. AR Doc. A.1. In October  
21 2012, the NMFS issued the final Letter of Authorization (“LOA”) under the MMPA regulations,  
22 along with a new Biological Opinion under the ESA (“LOA BiOp”) reaffirming its no jeopardy  
23 conclusion. AR Doc. F.2.

24         Plaintiffs filed this action on January 26, 2012. (Doc. no. 1.) Plaintiffs filed their motion for  
25 summary judgment on December 18, 2012. (Doc. no. 31.) Defendants filed their cross motion for  
26 summary judgment on February 8, 2013. (Doc. no. 49.)

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**LEGAL STANDARD**

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2 Absent a separately-created right of action, the review of a final agency action is governed by  
3 the Administrative Procedure Act (“APA”), 5 U.S.C. § 706(2)(A). No separate right of action exists  
4 under the statutes at issue here, therefore the court will review the case under the APA. Under the  
5 APA, a reviewing court must set aside an agency action that is “arbitrary, capricious, an abuse of  
6 discretion, or otherwise not in accordance with law,” or “without observance of procedure required  
7 by law.” *Id.* at § 706(2)(A) and (C). The standard is “highly deferential, presuming the agency  
8 action to be valid and affirming the agency action if a reasonable basis exists for its decision.”  
9 *Independent Acceptance Co. v. California*, 204 F.3d 1247, 1251 (9<sup>th</sup> Cir. 2000) (internal quotations  
10 omitted). “A reasonable basis exists where the agency considered the relevant factors and articulated  
11 a rational connection between the facts found and the choices made.” *Peck v. Thomas*, 697 F.3d 767,  
12 772 (9<sup>th</sup> Cir. 2012) (citation omitted).

13 There are no disputed facts to be resolved. Instead, the function of the court is to determine  
14 whether the agency properly made the decision it did, based on the evidence in the administrative  
15 record. *See Occidental Eng’g Co. v. INS*, 753 F.2d 766, 769-70 (9<sup>th</sup> Cir. 1985). Summary judgment  
16 is the appropriate mechanism for deciding, under the deferential APA standards and on the basis of  
17 the administrative record, “the legal question of whether the agency could reasonably have found the  
18 facts as it did.” *Id.* at 770. Summary judgment is appropriate when it is demonstrated that there  
19 exists no genuine issue as to any material fact, and that the moving party is entitled to judgment as a  
20 matter of law. Fed.R.Civ.P. 56(c); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157, 90 S.Ct. 1598,  
21 1608 (1970); *Poller v. Columbia Broadcasting System*, 368 U.S. 464, 467, 82 S.Ct. 486, 488 (1962);  
22 *Southern California Gas Co. v. City of Santa Ana*, 336 F.3d 885, 888 (9<sup>th</sup> Cir. 2003).

**DISCUSSION**Use of Best Available Scientific Data

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25 Congress enacted the Endangered Species Act “to provide a means whereby the ecosystems  
26 upon which endangered and threatened species depend may be conserved [and] to provide a program  
27 for the conservation of such endangered species and threatened species.” 16 U.S.C. § 1531(b). The  
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1 ESA requires in Section 7(a)(2) that all federal agencies, in consultation with the NMFS and/or the  
2 U.S. Fish and Wildlife Service, “insure that any action authorized, funded, or carried out by such  
3 agency . . . is not likely to jeopardize the continued existence of any endangered species or  
4 threatened species or result in the destruction or adverse modification of” their critical habitat. 16  
5 U.S.C. § 1536(a)(2). The obligation to “insure” that an action is not likely to jeopardize a species or  
6 destroy or adversely modify its critical habitat requires the agencies to “give the benefit of the doubt”  
7 to endangered or threatened species and to place the burden of risk and uncertainty on the proposed  
8 action. *Sierra Club v. Marsh*, 816 F.2d 1376, 1386 (9<sup>th</sup> Cir. 1987) (holding that risk of uncertainty  
9 “must be borne by the project, not by the endangered species”). In fulfilling their obligation,  
10 agencies must base their decisions on the best scientific and commercial data available. 16 U.S.C.  
11 § 1536(a)(2).

12 In the Five Year BiOp issued in 2010, the NMFS based its estimates of the numbers of marine  
13 mammals exposed to harmful levels of sonar and its analysis of the effects of these exposures on  
14 individuals and populations in part on the assumption that cetaceans did not experience temporary  
15 hearing loss (“TTS”) at sound levels below 195 decibels and did not suffer permanent hearing loss  
16 (“PTS”) at levels below 215 decibels. AR Doc. A.1 at 78, 87, 198, 208-09, 236, 296-97. It carried  
17 these same levels – and the analysis and conclusions based on them – forward in the LOA BiOp issued  
18 in 2012. Plaintiffs contend that in doing so, the NMFS failed to use the best science available in the  
19 LOA BiOp.

20 Specifically, Plaintiffs contend that scientific evidence and analysis developed after the Five  
21 Year BiOp but before the LOA BiOp demonstrate that the previous levels for hearing loss (both  
22 temporary and permanent) were inaccurate and likely underestimate both the number of instances  
23 when mid-frequency sonar will affect marine mammals and the severity of those exposures. Plaintiffs  
24 claim that peer-reviewed studies published in the last four years (and funded in part by the Navy and  
25 the NMFS) demonstrate that marine mammals are harmed by sonar at lower sound levels than  
26 previously thought. They further claim that as a result of incorporating this science into their  
27 modeling of take resulting from Navy sonar activities in Hawaii and Southern California and for the  
28 Navy’s Atlantic Fleet training, the Navy and the NMFS have predicted a significant increase in take of

1 marine mammals and an increase in the harm occurring from the take. Plaintiffs cite as support the  
2 May 2012 Draft Environmental Impact Statement for Hawaii and Southern California Training and  
3 Testing Activities (“DEIS”). *See* Declaration of Stephen D. Mashuda, Exhibits 1 and 2. In that  
4 document, the agencies apply a threshold of 178 decibels for onset of temporary hearing loss and a  
5 threshold for onset of permanent hearing loss of 198 decibels. *Id.* Plaintiffs claim that despite this  
6 new information and its application in other decisionmaking by the agency, the NMFS in the LOA  
7 BiOp continued to rely on the data it utilized in the Five Year BiOp without acknowledging the newer  
8 data.

9 Defendants describe Plaintiffs’ contention as “NMFS should have short-circuited the ongoing  
10 NEPA and MMPA processes for the Atlantic Fleet and Hawaii/Southern California ranges and  
11 employed the proposed thresholds in the October 2012 LOA and BiOp for the NWTRC.” Defendants’  
12 Motion and Opposition, 24:13-15. Defendants claim this contention lacks merit, arguing that the  
13 proposed thresholds described in the Navy’s draft EIS are not “scientific data” within the meaning of  
14 the ESA. Rather, they claim, the proposed thresholds are the product of the Navy’s evaluation,  
15 interpretation, and synthesis of “data from a range of studies and sources.” Defendants’ Motion and  
16 Opposition, 21:16. Further, Defendants assert that the proposed new thresholds were not available for  
17 use in October 2012 because the Navy’s and the NMFS’s evaluation of the thresholds and the public  
18 review process required by NEPA and the MMPA are ongoing and incomplete. *Id.* at 17-19.

19 Plaintiffs cite three peer-reviewed studies to support their argument. They assert Finneran and  
20 Schlundt (2010) demonstrated that higher frequency sounds induced hearing loss at lower exposure  
21 levels and that the previous single numeric threshold for hearing loss (independent of frequency of the  
22 sound) was no longer correct. *See* Second Declaration of Stephen D. Mashuda, Exhibit 3 (James J.  
23 Finneran, *Frequency-dependent and Longitudinal Changes in Noise-induced Hearing Loss in a*  
24 *Bottlenose Dolphin*, 128 J. Acoust. Soc. Am. (2) 567-570 at 657, 568 (2010)). They assert Finneran  
25 and Schlundt (2011) developed new methods to estimate how dolphins and whales perceive the  
26 loudness of received sounds of varying frequencies. *See* Second Declaration of Stephen D. Mashuda,  
27 Exhibit 4 (James J. Finneran, *Subjective Loudness Measurements and Equal Loudness Contours in a*  
28 *Bottlenose Dolphin*, 130 J. Acoust. Soc. Am. (5) at 3124-3136 (2011)). Citing the DEIS from the

1 Hawaii-Southern California Training and Testing Activities, Plaintiffs claim that together, the two  
2 Finneran and Schlundt studies “predict appreciably higher (almost 20 dB) susceptibility” to mid-  
3 frequency sonar for whales with hearing sensitivity to the mid-frequency range and support the  
4 development of new thresholds for whales with hearing sensitive to the mid-frequency range and  
5 support the development of new thresholds that account for this greater susceptibility.” Mashuda  
6 Declaration, Exh. 1 at 3.4-118.

7 Plaintiffs also cite a 2011 study which concluded that beaked whales were more sensitive to  
8 mid-frequency sonar than previously thought. AR Doc. G.13 (Peter L. Tyack, *et al.*, *Beaked Whales*  
9 *Respond to Simulated and Actual Navy Sonar*, [www.plosone.org](http://www.plosone.org), vol. 6, issue 3 (March 2011)). The  
10 authors conclude that the “results do support a lower acoustic threshold of disturbance for beaked  
11 whales than is currently applied in the US.” AR Doc. G.13 at 7. Based on this evidence, the NMFS  
12 and the Navy have elsewhere lowered the thresholds for behavioral assessment of beaked whales.  
13 *See* Mashuda Decl., Exh. 1 at 3.4-126 (Hawaii-Southern California Training and Testing Activities  
14 Draft Environmental Impact Statement summarizing that “there are now statistically strong data  
15 demonstrating that beaked whales tend to avoid . . . actual naval mid-frequency sonar in real anti-  
16 submarine training scenarios . . . [t]he Navy has therefore adopted a 140 dB re 1 $\mu$ Pa sound pressure  
17 level threshold for behavioral effects for all beaked whales”). Beaked whales are not among the ESA-  
18 listed species considered in the LOA BiOp, but Plaintiffs argue that the study should have been  
19 considered in the ESA context for any relevance it may have to assessing impacts on ESA-listed  
20 species. They note that the NMFS and the Navy elsewhere extrapolate data from one species to  
21 another, such as with bluenose dolphin data. Plaintiffs argue that while the NMFS included the  
22 beaked whale study in its list of references in the LOA BiOp, it did not discuss its relevance to its ESA  
23 analysis.<sup>3</sup>

24 Defendants argue that while the Finneran and Schlundt 2010 and 2011 dolphin studies raised  
25 concerns about existing TTS thresholds and “suggest that modification of the mid-frequency cetacean

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27 <sup>3</sup>Plaintiffs also claim that the NMFS did not cite or discuss the beaked whale study in the LOA,  
28 nor did it reassess or change any of its previous take estimates for beaked whales in response to this  
information. Plaintiffs claim that the NMFS’s failure to consider this and other relevant information  
renders the LOA arbitrary and capricious. The court will address this *infra*, in connection with the  
MMPA.

1 auditory weighting function is necessary,” Mashuda Decl., Ex. 1 at 3.4-117, the studies themselves did  
2 not provide modified weighting functions for any of the mid-frequency whale species (sperm whales  
3 and Southern Resident killer whales) or low-frequency whales (blue, fin, humpback, and sei whales)  
4 evaluated in the LOA BiOp. Defendants explain in the draft Hawaii-Southern California Training and  
5 Testing (“HSTT”) and Atlantic Fleet Training and Testing (“AFTT”) draft environmental impact  
6 statements, issued in May 2012, that the Navy used the data from the 2010 and 2011 dolphin studies to  
7 propose new (Type II) weighting functions for various cetaceans, including the six mid- and low-  
8 frequency whales evaluated in the LOA BiOp at issue in this case. *Id.* at 3.4-117- 3.4-120; Ex. 2 at  
9 3.4-102-104. The Navy’s proposed new approach results in new “weighted” TTS and PTS thresholds,  
10 and new frequency-dependent weighting factors that must be applied to the exposed animals received  
11 sound level to determine whether the new TTS or PTS threshold has been exceeded. *Id.* at 3.4-118.  
12 Defendants argue that the 2010 and 2011 dolphin studies are relevant to the six ESA-listed whale  
13 species evaluated in the 2012 LOA BiOp only insofar as the studies support the new Type II weighting  
14 functions proposed by the Navy in the draft AFTT and HSTT EISs. Defendants stress that the studies  
15 themselves make no findings as to the six whales species nor do they propose any new acoustic impact  
16 criteria for those species.

17 Defendants concede that the dolphin studies “raised concerns about existing TTS thresholds  
18 and highlighted the need for new weighting functions that better account for marine mammal  
19 frequency sensitivity.” Defendants’ Reply, 7:18-19. However, they contend that it was consistent  
20 with the “best available data” standard for the NMFS to continue to rely on the existing methodology  
21 pending the development of new frequency-dependent weighting functions for the relevant species.  
22 *Id.* at 7: 21-23. They argue that the Navy’s proposal of new acoustic impact criteria in the May 2012  
23 Draft EISs did not immediately discredit the existing criteria. *Id.* at 8:6-7. Finally, Defendants argue  
24 that the Navy proposed its new weighting functions and acoustic impact criteria in May 2012, five  
25 months before the 2012 LOA and challenged LOA BiOp were issued. As of October 2012, the  
26 NMFS’s expert evaluation and the public review process required under NEPA and the MMPA

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1 were ongoing and incomplete. Thus, argue Defendants, the Navy’s proposed new approach was not  
2 available for use in the October 2012 LOA BiOp.<sup>4</sup>

3 Finally, Defendants argue that Plaintiffs’ assertion that the 2011 beaked whale study suggests a  
4 new behavioral threshold for other species listed under the ESA is unsupported. They note that the  
5 authors found that “beaked whales are particularly sensitive in terms of behavioral responses to  
6 acoustic exposure,” AR Doc. G.13 at 7, and that the study makes no findings or conclusions about any  
7 other species.

8 Plaintiffs have challenged the NMFS’s failure to consider the new information found in the  
9 scientific studies in the LOA BiOp. Plaintiffs do not argue that it is the interpretation of this  
10 information or the adoption of new thresholds in other training ranges that implicates the ESA’s best  
11 available science requirement. Rather, they argue that it is the availability of the underlying new data  
12 and studies themselves that does so. Whether and how the same information may be finally  
13 interpreted and applied in other Navy training ranges is not controlling as to whether the Navy has a  
14 duty under the ESA to consider that information when it permits activities in the Northwest Training  
15 Range Complex.

16 Defendants skirt the question of whether the information found within the scientific studies  
17 falls within the ESA “best available scientific data” standard in regard to the Navy’s planned activities  
18 in the Northwest Training Range Complex. They do not argue that the information meets that  
19 standard for the Hawaii-Southern California and Atlantic areas, but does not meet it for the NWTR.  
20 The court has carefully reviewed the cases cited by Defendants and finds that none of them support the  
21 proposition that the Navy may ignore the “best available data” requirement because it has applied that  
22 data to another, similar project and has not reached a final interpretation of the data in that project.  
23 For example, in *Sierra Club v. Environmental Protection Agency*, 356 F.3d 296, 308 (D.C. Cir. 2004),  
24 the Sierra Club brought a challenge under the Clean Air Act to the EPA’s final actions regarding  
25 ozone control plans for the Washington, D.C. area, arguing in part that the relevant states had failed to

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27 <sup>4</sup>The court required the parties to provide further briefing regarding the relevance of information  
28 provided in a news article about the issuance of final HSTT and AFTT environmental impact statements.  
(Doc. nos. 63, 64, 65.) The court finds that while generally informative, the briefs raise no new issues  
in the present case.

1 incorporate into their plans the latest data regarding baseline emissions and predicting future  
2 emissions from motor vehicles. The EPA explained that it accepted the states' use of the earlier data  
3 because it was the most recent information available at the time the plans were prepared. *Id.* The new  
4 data was not available until one month before the states submitted their plans and long after those  
5 plans had been prepared. *Id.* The EPA further explained that data on emissions factors "are  
6 continually being improved." *Id.* Indeed, the data in question was the sixth incarnation of that set of  
7 information. The court rejected the Sierra Club's argument, holding that "[t]o require states to revise  
8 completed plans every time a new model is announced would lead to significant costs and potentially  
9 endless delays in the approval processes." *Id.* *Sierra Club v. Environmental Protection Agency* is  
10 readily distinguishable from the present case, in which there is no allegation that the data in question is  
11 simply the latest serial revision, and where the data was available years, not months, before the NMFS  
12 issued the LOA BiOp. The NMFS issued its LOA BiOp covering the remaining three years of training  
13 in October 2012 – well after the new data from the 2010 and 2011 dolphin studies was available.

14 *North Carolina Fisheries Ass'n, Inc. v. Gutierrez*, 518 F.Supp.2d 62 (D.D.C. 2007) is similarly  
15 distinguishable. That case involved a challenge to an amendment to a fishery management plan which  
16 imposed tighter restrictions on the harvest of certain fish species. Interpreting the "best available  
17 data" standard under the Magnuson-Stevens Fishery Conservation and Management Act, the court  
18 held that even if the data used to support the amendment was weak, the criticism regarding the  
19 assessments drawn from the data was correct, and the collection methodology was weak, it was  
20 rational for the Secretary to press forward with the amendment. *Id.* at 85. The court found that, "the  
21 Secretary was not obliged to 'sit idly by' when faced with overfishing and overfished stocks simply  
22 because the data available to him may have been less than perfect." *Id.* at 86 (quoting *Nat'l Fisheries*  
23 *Inst., Inc. v. Mosbacher*, 732 F.Supp. 210, 220 (D. D.C. 1990)). Thus, *N.C. Fisheries Ass'n, Inc. v.*  
24 *Gutierrez* addresses the discretion of the Secretary of Commerce to act on imperfect information to  
25 protect fish species. In the instant case, the contention is the opposite – that the NMFS has failed to  
26 address available information potentially applicable to species at risk.

27 After reviewing these cases, the parties' arguments and the administrative record, the court  
28 finds that it was an abuse of discretion in regard to its duty to use the best scientific data available for

1 the NMFS to fail to consider the 2010 and 2011 dolphin studies in the 2012 LOA BiOp. The court  
2 will therefore grant Plaintiffs' motion for summary judgment as to this issue and deny Defendants'  
3 motion for summary judgment as to this issue. The court further finds, however, that Plaintiffs have  
4 not shown that the agency abused its discretion or acted arbitrarily or capriciously or otherwise not in  
5 accordance with law in regard to the 2011 study on beaked whales, a species that is not considered in  
6 the 2012 LOA BiOp. The court will therefore deny Plaintiffs' motion for summary judgment on this  
7 issue and grant Defendants' motion for summary judgment on this issue.

### 8 Incidental Take Statement

9       Within their discussion in their moving papers of the requirement under the ESA that the  
10 NMFS use the best available scientific and commercial information in its biological opinion, Plaintiffs  
11 contend briefly that, "[b]ecause the LOA BiOp fails to address the significant new information on  
12 whale sensitivity to sonar, its estimates of the amount of take in the ITS, like its jeopardy analysis, are  
13 not based on the best scientific and commercial data available. NMFS's failure to accurate[ly] and  
14 adequately quantify take violates the ESA and its implementing regulations and requires a remand."  
15 Plaintiffs' Motion, 20:23.5-25.5.

16       As set forth in detail above,<sup>5</sup> after issuing a no jeopardy biological opinion, the consulting  
17 agency must prepare an ITS if the proposed action will incidentally take members of a listed species  
18 and the take will not violate ESA Section 7(a)(2). *See* 16 U.S.C. § 1536(b)(4). "[A]n ITS is not part  
19 of the jeopardy analysis, but instead provides an exemption from [take] liability under Section 9 of the  
20 ESA." *Center for Biological Diversity v. U.S. Bureau of Land Management*, 746 F.Supp.2d 1055,  
21 1120 (N.D. Cal. 2009), *vacated in part on other grounds*, 2011 WL 337364 (N.D. Cal. Jan. 29, 2011).  
22 When take of listed marine mammals is involved, the NMFS cannot issue an ITS unless the take has  
23 been authorized under MMPA, 16 U.S.C. § 1536(b)(4)(C), and the ITS must incorporate any  
24 mitigation measures prescribed by the MMPA take authorization. 16 U.S.C. § 1536(b)(4)(iii); 50  
25 C.F.R. § 402.14(i)(1)(iii). In this case, the NMFS issued an ITS after rendering its updated no  
26 jeopardy opinion and after the take of ESA-listed marine mammals had been authorized under the  
27 MMPA. AR Doc. F.2d at 276-282. The ITS specifies as reasonable and prudent measures the

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28 <sup>5</sup>*See supra* at 3.

1 mitigation required by the 2012 LOA and MMPA regulations, which the NMFS determined “are an  
2 adequate means of effecting the least practicable adverse impact on marine mammal species or stocks  
3 and their habitat.” AR Doc. 6 at 37.

4 Defendants argue that any claim that the NMFS was required to specify additional reasonable  
5 and prudential measures in the ITS fails for several reasons. First, Defendants argue that the NMFS’s  
6 authority to include any particular measure in the ITS is discretionary. They stress that reasonable and  
7 prudent measures are those “that the [NMFS] considers necessary or appropriate.” 16 U.S.C. §  
8 1536(b)(4)(ii). Second, Defendants argue that Plaintiffs do not identify any additional measures that  
9 the NMFS allegedly should have included that would “involve only minor changes” to the Navy’s  
10 activities. Finally, Defendants argue that Plaintiffs’ remaining arguments regarding mitigation lack  
11 merit, are based largely on speculation and conjecture, and do not support the claim that the NMFS  
12 was required to specify additional reasonable and prudent measures in the ITS.

13 Plaintiffs state that Defendants have responded to an argument that they do not make regarding  
14 reasonable and prudent measures that the NMFS may include in its ITS. They state that their  
15 “challenge to the Incidental Take Statement is that the take numbers are too small to provide any  
16 useful measure or trigger for reinitiation of consultation.” Plaintiffs’ Opposition and Reply, 19:4-5.  
17 Because the court has found that the NMFS abused its discretion in failing to consider the best  
18 scientific information available in its 2012 LOA BiOp, its estimates of the amount of take in the ITS,  
19 like its jeopardy analysis, are not based on the best scientific and commercial data available. The  
20 court finds, therefore, that the NMFS abused its discretion in the issuance of the ITS. The court will  
21 grant Plaintiffs’ motion for summary judgment on this issue and deny Defendants’ motion for  
22 summary judgment on this issue.

### 23 Evaluation of Full Effects of Agency Action

24 The Final Environmental Impact Statement for the action at issue in this case states that  
25 “[t]he proposed naval activities would continue for an indefinite period of time but this EIS/OEIS will  
26 be reviewed every five years for substantive changes and permits will be updated/renewed from

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1 regulatory agencies as necessary.” AR Doc. B.25 at 1213.<sup>6</sup> Despite this description of the proposed  
2 naval activities as indefinite, the NMFS limited its analysis of the effects of the agency action to the  
3 initial five-year period permitted by the MMPA regulations. Plaintiffs contend that by doing so, the  
4 NMFS ignored its duty to evaluate all of the effects of the action in its ESA jeopardy analysis.  
5 Plaintiffs argue that when an action will continue for longer than the initial proposed period, or when  
6 the effects of that action may extend beyond the initial time period, the NMFS is obligated to consider  
7 those longer-term effects in its biological opinion. Defendants dispute this contention, arguing that the  
8 NMFS appropriately defined the relevant “agency action” subject to ESA consultation as the five-year  
9 Final MMPA Rule, the 2012 LOA, and the specified training activities covered by the Final MMPA  
10 Rule and the 2012 LOA. AR Doc. F.2 at 3.

11 The duty to consult under ESA Section 7(a)(2) is triggered by “affirmative agency action.”  
12 *See Cal. Sportfishing Protection Alliance v. F.E.R.C.*, 472 F.3d 593, 595 (9<sup>th</sup> Cir. 2006). In its  
13 biological opinion, the NMFS must identify the “agency action” subject to consultation and “analyze  
14 the effect of the entire agency action.” *Conner v. Burford*, 848 F.2d 1441, 1453 (9<sup>th</sup> Cir. 1988). In the  
15 challenged biological opinions for the NWTRC, the NMFS identified the relevant agency actions as  
16 the five-year Final MMPA Rule, the 2012 LOA, and the specified training activities covered by the  
17 Final MMPA Rule. Defendants defend its decision to do so by arguing as follows: 1) the Navy’s  
18 activities described in the Final MMPA Rule require an MMPA permit because they incidentally take  
19 marine mammals, *see, e.g.*, AR Doc. B.6; 2) an MMPA permit may not extend beyond five years; 3) in  
20 the absence of a national defense exemption, the Navy’s activities cannot continue as specified in the  
21 Final MMPA Rule beyond five years unless the NMFS issues a new take authorization; and 4) the five  
22 year period of the Final MMPA Rules is thus the entire agency action that is permitted under the  
23 MMPA, 16 U.S.C. § 1371(a)(5)(A)(i)(1). Defendants therefore conclude that the term of the “action”  
24 subject to ESA consultation in this case is dictated by the five-year term of the MMPA take  
25 authorization and the covered Navy training activities. Defendants contend that to hold otherwise  
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28 <sup>6</sup>Defendants state in their papers that, “[t]he Navy has trained in the NWTRC for decades using  
largely the same sonar systems in use today.” Defendants’s Motion and Opposition, 1:5-6.

1 would thwart Congress’s intention, cited above, that the decision processes under the MMPA and the  
2 ESA be coordinated and integrated to the maximum extent possible.

3 “‘Action’ means all activities or programs of any kind authorized, funded, or carried out by  
4 Federal agencies in the United States or upon the high seas.” 50 C.F.R. § 402.02. Examples of  
5 actions given in the regulation include “the granting of licenses, contracts, leases, easements, rights-  
6 of-way, permits or grants-in-aid.” 50 C.F.R. § 402.02(c). The meaning of “agency action” is  
7 “determined as matter of law by the Court, not by the agency.” *Greenpeace v. Nat’l Marine Fisheries*  
8 *Service*, 80 F.Supp.2d 1137, 1150 (W.D. Wash. 2000).

9 “There is little doubt that Congress intended to enact a broad definition of agency action in the  
10 ESA.” *Pacific Rivers Council v. Thomas*, 30 F.3d 1050, 1054 (9<sup>th</sup> Cir. 1994). In *Pacific Rivers*, the  
11 Ninth Circuit found that certain Land Resource Management Plans (“LRMPs”) developed by the  
12 United States Forest Service constituted ongoing agency actions throughout their duration, not only at  
13 the time they were adopted or if they were revised or amended in the future. The court explained that,  
14 “[t]he LRMPs are comprehensive management plans governing a multitude of individual projects,  
15 indeed, every individual project planned in both national forests involved in this case is implemented  
16 according to the LRMPs.” *Id.* at 1053. The court concluded that, “because the LRMPs have an  
17 ongoing and long-lasting effect even after adoption, we hold that the LRMPs represent ongoing  
18 agency action.” *Id.* Thus, the court affirmed the district court’s ruling that the Forest Service was  
19 required to consult with the NMFS regarding a species of salmon listed as “threatened” under the ESA  
20 after the LRMPs were adopted. *Id.*

21 Similarly, in *Greenpeace v. Nat’l Marine Fisheries Service*, 80 F.Supp.2d at 1139,  
22 environmental groups brought an action challenging Fishery Management Plans (“FMPs”) for  
23 groundfish fisheries in the Bering Sea and Gulf of Alaska. The FMPs authorized and regulated all  
24 activities involved in fishing in the regulated areas. At issue was the underlying biological opinion,  
25 which was limited to the effect of a single year’s fishing on the endangered Stellar sea lion. The  
26 district court found that the FMPs in their entirety constituted ongoing agency action subject to  
27 consultation under ESA section 7. *Id.* at 1144. Thus although the district court agreed that the  
28 adoption of the FMPs and the authorization of the yearly fishery were separate and discrete agency

1 actions, it rejected the argument that the biological opinion at issue was properly limited to addressing  
2 the authorization of the 1999 fishery only. *Id.* at 1145-46. Rather, the court held, the ESA required a  
3 comprehensive biological opinion coextensive in scope with the FMPs. *Id.* at 1145. The court held  
4 that, “an agency may not unilaterally relieve itself of its full legal obligations under the ESA by  
5 narrowly describing the agency action at issue in a biological opinion.” *Id.* at 1146.

6 In *American Rivers v. U.S. Army Corps of Engineers*, 271 F.Supp.2d 230, 255 (D.D.C. 2003),  
7 environmental groups brought an action alleging that the manner in which the Army Corps of  
8 Engineers operated the dam and reservoir system on the Missouri River and the issuance by the FWS  
9 of a supplemental biological opinion related to that operation violated the ESA. The district court  
10 found that although the FWS was “required to consider the Corps’ proposed action in the context of its  
11 overall management of the Missouri River Basin,” the FWS had considered the effects of the revised  
12 annual operating plan “only in the context of one isolated year.” *Id.* at 254-55. In finding that the  
13 plaintiffs had met their burden of demonstrating a substantial likelihood of succeeding their claim that  
14 the FWS had violated the ESA, the district court explained:

15 Nor can there be any question that the ESA requires that all impacts of agency action – both  
16 present *and* future effects on species – be addressed in the consultation’s jeopardy analysis.  
17 See *Conner v. Burford*, 848 F.2d 1441, 1457-58 (9<sup>th</sup> Cir. 1988), *cert. denied*, 489 U.S. 1012,  
109 S.Ct. 1121, 103 L.Ed.2d 184 (1989) (the ESA “does not permit the incremental-step  
18 approach” of consultation because “biological opinions must be coextensive with the agency  
19 action.”).

20 Moreover, there are significant reasons to reject the segmentation FWS has utilized in  
21 this case. If FWS were allowed to apply such a limited scope of consultation to all agency  
22 activities, any course of agency action could ultimately be divided into multiple small actions,  
23 none of which, in and of themselves, would cause jeopardy. Moreover, such impermissible  
24 segmentation would allow agencies to engage in a series of limited consultations without ever  
25 undertaking a comprehensive assessment of their overall activities on protected species. The  
26 ESA requires more; it “requires that the consulting agency scrutinize the *total scope* of agency  
27 action.” *North Slope Borough v. Andrus*, 486 F.Supp. 332, 353 (D.D.C. 1980), *aff’d in part,*  
28 *rev’d in part on other grounds*, 642 F.2d 589 (D.C.Cir. 1980) (emphasis added).

*American Rivers*, 271 F.Supp.2d at 255 (emphasis in original).

25 Finally, in *Wild Fish Conservancy v. Salazar*, 628 F.3d 513 (9<sup>th</sup> Cir. 2010), the Ninth Circuit  
26 addressed the appeal of an order granting summary judgment to the defendants in a case challenging  
27 the operation and management plan of the Leavenworth National Fish Hatchery. The hatchery was  
28 obligated to consult with the FWS to ensure that its operations were not jeopardizing the continued

1 existence of bull trout, after that species was listed as threatened under the ESA, and also for  
2 authorization for any incidental takings. *Id.* at 519. In its request for consultation submitted to the  
3 FWS, the hatchery defined the agency action as the operation and maintenance of the hatchery from  
4 2006 to 2011. *Id.* In the relevant 2008 Biological Opinion issued by the FWS, it explained that the  
5 hatchery relied on this five-year time period “because it planned two modifications to Hatchery  
6 operations during and soon after that period that would require it to reinitiate formal consultation.” *Id.*

7         The Ninth Circuit concluded that the decision to limit the analysis of the 2008 Biological  
8 Opinion to a five-year term of operations and management was arbitrary and capricious, and that the  
9 FWS committed legal error by limiting the scope of the action to five years. *Id.* at 532. In so doing,  
10 the court discussed at length the importance of the definition of the scope of an action for analysis of  
11 the adequacy of a biological opinion under the ESA. It reviewed its decision in *Conner v. Burford*,  
12 848 F.2d at 1453, in which it had “rejected biological opinions addressing only the first, preliminary  
13 state in a multistage project.” *Wild Fish Conservancy*, 628 F.3d at 521. In that case, the FWS issued  
14 biological opinions for two national forests, before leases for oil and gas exploration were issued. *Id.*  
15 The FWS considered only the effects of the leases themselves, not the affects of the planned  
16 exploration. *Id.* “Instead of comprehensive biological opinions at the leasing stage, the Service  
17 included in the leases stipulations requiring additional environmental consultation prior to any  
18 ‘surface-disturbing activities.’” *Id.* at 522 (quoting *Conner*, 848 F.2d at 1455).

19         The Ninth Circuit explained in *Wild Fish Conservancy* that the limited scope of the biological  
20 opinions in *Conner* violated the FWS’s obligation “to analyze the effect of the entire agency action.”  
21 *Wild Fish Conservancy*, 628 F.3d at 522 (quoting *Conner*, 848 F.2d at 1453). That agency action  
22 including not only leasing, but also “all post-leasing activities through production and abandonment.”  
23 *Wild Fish Conservancy*, 628 F.3d at 522 (quoting *Conner*, 848 F.2d at 1453). Thus, because the FWS  
24 had failed to meet its obligation to “‘prepare, at the leasing stage, a comprehensive biological  
25 opinion’ considering ‘all phases of the agency action,’” the biological opinions were found to be  
26 invalid. *Wild Fish Conservancy*, 628 F.3d at 522 (quoting *Conner*, 848 F.2d at 1454). Turning to the  
27 facts before it in *Wild Fish Conservancy*, the Ninth Circuit rejected the defendants’ argument that  
28 *Conner* was distinguishable because the five-year term of operations and management of the hatchery

1 was the entire agency action. *Wild Fish Conservancy*, 628 F.3d at 522. It stated, “[w]hat the Service’s  
2 argument does not acknowledge is that the Hatchery has been operating for seventy years and is  
3 expected to continue operating into the future. The Hatchery simply made a decision, endorsed by the  
4 Service, to define the action as a five-year term of operations, when it might as easily have chosen a  
5 thirty-year term or a one-year term.” *Id.*

6 Here, Defendants contend that the NMFS rationally limited the biological opinion at issue to  
7 the five-year Final MMPA Rule. They argue that because each five-year period requires a new take  
8 authorization under the MMPA, the each five-year period necessarily constitutes a separate “action”  
9 for the purposes of the ESA. In response to Plaintiffs’ quotation from the Final EIS, Defendants argue  
10 that they have never admitted that the specific activities covered by the MMPA Rule will continue  
11 indefinitely.

12 The court finds that to limit review under the ESA to the period of the five-year Final MMPA  
13 Rule ignores the realities of the Navy’s acknowledged long-term, ongoing activities in the NWTRC.  
14 In its Request for Letter of Authorization For The Incidental Harassment Of Marine Mammals  
15 Resulting From Navy Training Activities Conducted Within The Northwest Training Range Complex  
16 dated September 2008, the Navy states that it “believes that risk to marine mammals from sonar  
17 training is low.” AR. Doc. B.6 at 7890. In support of that belief, the Navy asserts that “MFA/HFA  
18 sonar use in the NWTRC is not new given the current hull-mounted sonar employs the same basic  
19 sonar equipment and having [sic] the same output for over approximately 30 years.” *Id.* Further, in  
20 the Final Environmental Impact Statement dated September 2010, the Navy states that “[t]he proposed  
21 naval activities would continue for an indefinite period of time.” AR B.25 at 1213.

22 These realities make this case analogous to those in *Wild Fish Conservancy*. As discussed by  
23 the Ninth Circuit in that case, the shorter the delineation of the scope of an action, the less likely the  
24 NMFS is to find that the action impacts the viability of a threatened (or endangered) species. *Wild*  
25 *Fish Conservancy*, 628 F.3d at 522. That is, a series of short-term analyses can mask the long-term  
26 impact of an agency action. The ESA regulations provide in part that, “[j]eopardize the continued  
27 existence of means to engage in an action that reasonably would be expected, directly or indirectly, to  
28 reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by

1 reducing the reproduction, numbers, or distribution of that species.” 50 C.F.R. § 402.02. As the Ninth  
2 Circuit found, there could be “some impact,” but not an appreciable impact, “in each of several  
3 subdivided periods” of an operation that cumulatively would have “an undeniable impact.” *Id.* at 523.  
4 This is caused in part by the fact that the environmental baseline effectively resets at the beginning of  
5 each period. *Id.* at 523; *see* 50 C.F.R. § 402.02 (“Effects of the action refers to the direct and indirect  
6 effects of an action on the species or critical habitat. . . that will be added to the environmental  
7 baseline.”). The same issues exist here, in that the segmented analysis is inadequate to address long-  
8 term effects of the Navy’s acknowledged continuing activities in the area.

9 Congress intends that the decision processes under the MMPA and the ESA be coordinated  
10 and integrated to the maximum extent possible. The court finds, however, that this intention cannot  
11 lawfully be used as a basis for nullifying Congress’ equally important intention, “to enact a broad  
12 definition of agency action in the ESA.” *Pacific Rivers Council*, 30 F.3d at 1054. Defendants have  
13 cited to the court no authority mandating that the “action” subject to ESA consultation coincide with  
14 the term of the MMPA Rule. It is undisputed that the requirements of both statutes must be adhered to  
15 and individually satisfied. The fact that the decision making under the two statutes may not be  
16 completely integrated in a particular case does not negate the duty to comply with both of them.

17 Under these circumstances, and in light of the case law discussed above, the court finds that it  
18 was an abuse of discretion for the NMFS to define the “agency action” to be reviewed under the ESA  
19 as the five-year period permitted under the MMPA. It is not for the court to dictate how long the term  
20 of the ESA analysis should be in this case. *See Wild Fish Conservancy*, 628 F.3d at 524. It must,  
21 however, be long enough for the NMFS to make a “meaningful determination” of whether the Navy’s  
22 ongoing activities are “likely to jeopardize the continued existence of” any listed species or to destroy  
23 or adversely modify critical habitat designated for such species. The court will grant Plaintiffs’  
24 motion for summary judgment on this issue and deny Defendants’ motion for summary judgment on  
25 this issue.

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1 Reliance on Mitigation Measures

2 Plaintiffs contend that the NMFS improperly based its no jeopardy and no adverse  
3 modification conclusions in its ESA analysis on the mitigation measures required under the Final  
4 MMPA Rule, which they contend are inadequate and ineffectual. Plaintiffs describe these mitigation  
5 measures as consisting “primarily of visually identifying listed species within a very small safety zone  
6 around the Navy’s sonar sources, and making temporary adjustments to training activities to avoid  
7 acute injury of detected individual animals.” Plaintiff’s Motion, 24:8-10. Plaintiffs claim that despite  
8 the acknowledgment in other contexts of the deficiencies of visual detection, the NMFS did not  
9 require any additional mitigation or monitoring measures. Further, they claim that the NMFS did not  
10 consider additional protections for the endangered Southern Resident killer whales. Plaintiffs thus  
11 contend that NMFS’s failure to independently analyze whether visual monitoring would address all of  
12 the impacts of the Navy’s actions – and to require mitigation measures necessary to avoid those  
13 impacts – does not comply with its duties to consider all relevant factors and to base its decisions on  
14 the best available science.

15 Defendants assert that while the LOA BiOp describes the mitigation required under the Final  
16 MMPA Rule, the NMFS did not rely on mitigation measures in conducting its jeopardy analysis and in  
17 reaching its no jeopardy conclusion. Rather, Defendants claim, the NMFS based its analysis on the  
18 Navy’s take estimates and the NMFS’s alternative exposure estimates, neither of which utilizes or  
19 accounts for mitigation. Defendants claim that in its substantive analysis, the NMFS considered  
20 mitigation for the sole purpose of estimating what portion of the Navy’s estimate of killer whales takes  
21 might be ESA-listed Southern Resident killer whales. *See* AR Doc. F.2d at 255. Defendants assert  
22 that the NMFS did not rely on mitigation to avoid all impacts on that or any other species, nor did the  
23 NMFS conclude that but for mitigation, the Navy’s activities would result in jeopardy.

24 The court’s review of the portions of the administrative record cited by the parties supports  
25 Defendants’ claim that the NMFS did not consider mitigation in reaching its no jeopardy conclusion.  
26 In the 2012 LOA BioOp, the NMFS’s analysis of the effects of the Navy’s proposed activities does not  
27 rely on mitigation efforts by the Navy to avoid or lessen impacts on the effected species. *See* AR Doc.  
28 F.2 at 50-52.

1 Plaintiffs recharacterize their contention in their Opposition and Reply, stating that they  
2 “argue[] that NMFS’s ultimate no jeopardy and no adverse modifications conclusions stand or fall  
3 based on the Navy’s entire action, including its standard mitigation measures, which NMFS itself has  
4 found inadequate. Whatever label you put on them – an integral part of the agency action or  
5 mitigation or something else – reliance on these measures was arbitrary and capricious.” Plaintiffs’  
6 Opposition and Reply, 14:8-12. Plaintiffs argue that because the mitigation measures are part of the  
7 proposed action, the NMFS would have failed to consider the entire agency action if it ignored these  
8 measures in its analysis.

9 Plaintiffs cite to the court a single example in which the NMFS considered mitigation in  
10 concluding what effect the Navy’s activities might have on a particular species. This is the instance  
11 acknowledged by Defendants: to estimate what portion of the Navy’s total killer whale take might  
12 represent Southern Resident killer whales. In regard to Southern Resident killer whales, the 2012  
13 Biological Opinion provides:

14 The U.S. Navy estimated that 13 killer whales (NMFS Permits Division estimated 14 killer  
15 whales) might be exposed to active sonar associated with the training activities it proposes to  
16 conduct on the Northwest Training Range Complex and exhibit behavioral responses that  
17 would qualify as “take,” in the form of behavioral harassment, as a result of that exposure.  
18 This estimate did not separate southern resident killer whales from other killer whales distinct  
19 population segments that reside in the action area. Further, this estimate did not account for the  
20 mitigation activities, such as lookouts and watchstanders. Killer whales travel in groups  
21 (average group size is 6.5 animals), have conspicuous coloring, and pronounced dorsal fins  
22 that together increase the likelihood that they would be detected by Navy lookouts.

19 . . .

20 Given that killer whales are likely to be visible to watchstanders<sup>7</sup> and that individuals from the  
21 southern resident killer whale populations are more likely to be found in Puget Sound rather  
22 than off shore areas, we assume that only about 10 percent of the Navy’s estimate of killer  
23 whales exposed to active sonar would be from the southern resident killer whale DPS.  
24 Because the U.S. Navy has chosen to exclude mid-frequency active sonar training in Puget  
25 Sound from the scope of their proposed action, we assume that any southern resident killer  
26 whales that might be exposed to mid-frequency active sonar would not be exposed in Puget  
27 Sound. Therefore, we assume that all of these exposures would occur off the coast of  
28 Washington, Oregon, or northern California.

25 A.R. Doc. F.2 at 246.

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28 <sup>7</sup>“Watchstanders” are Navy lookouts who have completed specialized training in the detection  
of marine mammals in the vicinity of their vessel. A.R. Doc. F.2 at 24.

1 Plaintiffs assert that the argument that mitigation measures need not be 100% effective,  
2 “cannot be seriously applied to Southern Resident killer whales.” Plaintiff’s Opposition and Reply,  
3 16:15-16. Plaintiffs cite a NMFS finding that this population of killer whales is so fragile that, “the  
4 loss of a single individual, or the decrease in the reproductive capacity of a single individual, is likely  
5 to reduce appreciably the likelihood of survival and recovery.” Biological Opinion on the “Effects of  
6 the Pacific Coast Salmon Plan on the Southern Resident Killer Whale (*Orcinus orca*) Distinct  
7 Population Segment” at 56 (May 5, 2009), *see also* “Biological Opinion and Conference Opinion on  
8 the Long-Term Operations of the Central Valley Project and State Water Project” at 573 (June 4,  
9 2009). Plaintiffs also cite emails from NMFS officials discussing the need to give particular  
10 consideration to the effects of the Navy’s action on Southern Resident killer whales. AR Doc. A.23 at  
11 3551 (Southern Resident killer whales “are probably the most vulnerable to the stressors associated  
12 with the proposed action (because of their limited distribution, social ecology, small population size,  
13 and the wide array of stressors they are exposed to) and the most sensitive (because of their hearing  
14 sensitivity.”); AR Doc. A.23 at 3620 (“Given [the Southern Resident killer whales’] status and the  
15 critical habitat, I think it is very important that we carefully consider ways to further reduce  
16 impacts.”). Plaintiffs argue that there are two basic problems with the NMFS’s reliance on visual  
17 mitigation to “prevent harm” to Southern Resident killer whales, because there are two different  
18 “kinds of effects” the Navy must avoid. The first of these effects is direct impact to individual whales,  
19 and the second is the indirect effects that result in the displacement of whales or avoidance behaviors.

20 Plaintiffs argue that relying on watchstanders to spot and identify the whales “is by no means a  
21 guarantee that the Navy will avoid or minimize exposures.” Plaintiffs’ Opposition and Reply, 16:8-10  
22 (citing *National Resources Defense Council, Inc. v. Winter*, 645 F.Supp.2d 841, 850, 854 (C.D. Cal.  
23 2007), *injunction modified by National Resources Defense Council, Inc. v. Winter*, 508 F.3d 885 (9<sup>th</sup>  
24 Cir. 2007)). This standard is not applicable to the present case, as the *Winter* case is distinguishable on  
25 its facts. In *Winter* the Navy found that its proposed use of mid-frequency active sonar off the coast of  
26 Southern California between 2007 and 2009 would not cause a significant impact on the environment.  
27 *Winter*, 645 F.Supp.2d at 846. The Navy therefore concluded that it was not required to prepare an  
28 environmental impact statement under the National Environmental Policy Act. *Id.* In response to the

1 plaintiffs' contentions to the contrary, the district court discussed the adequacy of the Navy's  
2 mitigation measures. In so doing, the district court found that, "[a]n agency may avoid the  
3 requirement to prepare an EIS by adopting mitigation measures sufficient to eliminate any substantial  
4 questions over the potential for significant impact on the environment." *Id.* at 848. The court found,  
5 however, that "[t]he mitigation measures Defendants have proposed in the instant case are far from  
6 sufficient to obviate the need for an EIS." *Id.* at 850.

7 In the present case, the Navy went through formal consultation with the NMFS, which is  
8 required under the ESA when the agency finds that adverse effects to a listed species or critical  
9 habitat are likely. *See* 50 C.F.R. § 402.14 (a)-(b). Thus, the Navy did not claim, as it did in *Winter*,  
10 that its mitigation measures were sufficient to obviate the need for the next level of review. Therefore,  
11 *Winter* provides no authority for the level of efficacy required of the mitigation measures in the  
12 present case.

13 Plaintiffs also rely on *Preserve Our Island v. U.S. Army Corps of Engineers*, No. C08-  
14 1353RSM, 2009 WL 2511953 (W.D. Wash. Aug. 13, 2009), in which the plaintiffs challenged the  
15 issuance of a permit by the Army Corps of Engineers ("the Corps") for the construction of a barge-  
16 loading facility on the shore of Maury Island in Puget Sound. The plaintiffs alleged in part that the  
17 agency actions leading to the issuance of the permit, and the permit itself, violated Section 7(a)(2) of  
18 the ESA. The ESA-listed species that were at issue regarding possible effects of the project were  
19 Puget Sound Chinook, bull trout, and Southern Resident killer whales ("SR Orcas"). *Id.* at \*1. The  
20 Corps' informal ESA consultation with the NMFS resulted in a finding of not likely to affect the SR  
21 Orca or its critical habitat. *Id.* at \*2. The plaintiffs brought an action, part of which was a challenge to  
22 that finding.

23 The court found that it was improper to rely on visual monitoring "as a basis for determining  
24 no adverse effect" on the SR Orca. *Id.* at \*13. It found specifically that, "[d]isplacement of the Orcas  
25 from important feeding areas would itself be an adverse effect, one that the monitoring program does  
26 not address in any way." *Id.* Plaintiffs rely on this statement to argue that, "[h]ere, NMFS relied on  
27 the visual monitoring program in its jeopardy analysis to minimize the numbers and extent of  
28

1 individual Southern Resident killer whales exposed and to minimize any type of harm. Both kinds of  
2 reliance are unjustified.” Plaintiffs’ Opposition and Reply, 18:17-20.

3 In so arguing, Plaintiffs ignore the context of the court’s statement in *Preserve Our Island*. It  
4 was made as a precursor to the court’s conclusion that:

5 the informal consultation process resulted in the arbitrary and capricious issuance of “no  
6 adverse effect” determinations in the face of scientific evidence in record which suggests  
7 specific and serious effects on Chinook and SR Orcas. The Court finds that the Corps violated  
8 the plain meaning and intent of Section 7(a)(2) of the ESA by ignoring or disregarding  
9 evidence that would require formal consultation with the Service. The Court shall grant in part  
10 plaintiff’s motion for summary judgment on the ESA claims and remand to the agency for  
11 formal consultation and the preparation of a Biological Opinion which includes full and  
12 meaningful consideration of the Chinook and SR Orca Recovery Plans.

13 *Preserve Our Island*, 2009 WL 2511953 at \*14. Thus, *Preserve Our Island* involved informal  
14 consultation, which resulted in a finding that the proposed permit was not likely to adversely affect  
15 listed species. Therefore, the agencies did not conduct formal consultation and the NMFS did not  
16 issue a biological opinion.

17 Here, because of the likelihood of adverse effects, the NMFS and the Navy engaged in formal  
18 consultation. As a result, the Navy was not required to find that all adverse effects on listed species  
19 would be avoided. Rather, the NMFS was required to issue a biological opinion evaluating whether  
20 the adverse effects were likely to rise to the level of jeopardy. 16 U.S.C. § 1536(b)(3)(A). Thus,  
21 Plaintiffs are incorrect in asserting that the NMFS was required to “independently analyze whether  
22 visual monitoring would address all of the impacts of the Navy’s actions—and to require mitigation  
23 measures necessary to avoid those impacts.” Plaintiffs’ Opposition and Reply, 18:21-24. That was  
24 not the standard to be met under the ESA.

25 In this case the NMFS found in the Final MMPA Rule that the required mitigation “is likely  
26 effective at avoiding exposure to injurious levels of sound, and does succeed in reducing exposures of  
27 marine mammals (to varying degrees, depending on the species and environmental conditions) to  
28 higher levels of sound that might be associated with more severe behavioral responses.” AR Doc. B.6  
at 45. As Defendants argue, Plaintiffs have not provided any citations to the record demonstrating that  
the Navy’s activities are “reasonably certain” to have effects on killer whales that the NMFS failed to  
consider. See 50 C.F.R. § 402.02 (“indirect effects are those that are caused by the proposed action

1 and are later in time, but still are reasonably certain to occur.”) The court therefore rejects as legally  
2 unsupported Plaintiffs’ contention that reliance on visual mitigation regarding Southern Resident killer  
3 whales was arbitrary or capricious, in regard to either direct or indirect effects of the Navy’s activities.  
4 Finally, because the NMFS reached its no jeopardy conclusion without reliance on the mitigation  
5 measures required under the Final MMPA Rule, consideration of those measures would simply have  
6 further supported the conclusion.

7 Based on the above, the court concludes that Plaintiffs have not met their burden of  
8 demonstrating that the NMFS abused its discretion or acted arbitrarily, capriciously or otherwise not  
9 in accordance with law in regard to the mitigation measures required under the Final MMPA Rule.  
10 Accordingly, the court will deny Plaintiffs’ motion for summary judgment on this issue and grant  
11 Defendants’ motion for summary judgment on this issue.

#### 12 Consideration of Aggregate Effects of the Action

13 An agency’s jeopardy analysis under the ESA, presented in a biological opinion, includes  
14 evaluation of both direct and indirect effects of the action. 50 C.F.R. §§ 402.02, 402.14(g)(3).  
15 “Indirect effects are those that are caused by the proposed action and are later in time, but still are  
16 reasonably likely to occur.” *Id.* at § 402.02. Plaintiffs contend that the NMFS’s analysis of the  
17 impacts of the Navy’s activities failed to consider the cumulative or long-term impacts to ESA-listed  
18 mammals from repeated exposure. Specifically, Plaintiffs contend that, the Five Year BiOp does not  
19 contain an analysis of “the cumulative impacts to individuals or to the species of repeated sonar  
20 exposures over the five-year term of the BiOp or whether the aggregate effects of that exposure and  
21 other harm to the species would jeopardize any listed species.” Plaintiffs’ Motion, 32:12-15.  
22 Plaintiffs argue that instead, the NMFS limited its analysis to the annual impacts of take, which risks  
23 masking effects that may accumulate or could otherwise be significant over the longer time period.

24 Defendants dispute this contention, arguing that in the 2012 LOA BiOp, the NMFS explicitly  
25 evaluated the potential for aggregate effects and rationally concluded that such effects were unlikely.  
26 Defendants provide three main citations to the administrative record. Defendants first cite the 2012  
27 LOA BiOp itself at pages 265-80. AR F.2. This portion of the LOA BiOp begins with Section 5.5,  
28 which is entitled, “Potential for Accumulative Impacts.” *Id.* at 265. While acknowledging that it “did

1 not explicitly discuss the potential accumulative impacts of the annual ‘take’ estimates in our 2010  
2 Programmatic Biological Opinion,” the NMFS states that it “explicitly considered those potential  
3 cumulative impacts as part of our consultation (as demonstrated in the consultation record), and now  
4 explain our assessment in more detail.” AR F.2 at 265. The NMFS explains the conclusions it  
5 reached in regard to impacts or effects that accumulate in the environment, and impacts or effects that  
6 represent the response of individuals, populations or species to that accumulation of stressors or to  
7 sequences of exposure to stressors. *Id.* at 265-66. The NMFS finds that “the vast majority of impacts  
8 expected from sonar exposure and underwater detonations are behavioral in nature, temporary and  
9 comparatively short in duration, relatively infrequent, and not of the type or severity that would be  
10 expected to be additive for the small portion of the stocks and species likely to be exposed either  
11 annually or over the five-year duration of the MMPA regulations.” *Id.* at 266. It states that it did not  
12 expect predicted multiple “takes” “to have any additive, interactive, or synergistic effect on the  
13 individual animals, the population(s) those individuals represent, or the species those population(s)  
14 comprise.” *Id.* Finally, the NMFS states:

15 [w]ith respect to threatened and endangered marine mammals, our conclusion that the  
16 aggregate number of exposures over the five-year duration of the MMPA regulations or the  
17 three-year duration of the LOA is unlikely to result in accumulated adverse impacts that are  
18 likely to jeopardize the continued existence of any of the affected species is also supported by  
19 the negligible impact determination contained in the MMPA rulemaking. [Citation omitted.]  
Our initial conclusion is further supported by the fact that the level of take that has occurred  
thus far under the five-year MMPA regulations (and thus the estimated aggregate level of take)  
is substantially lower than originally anticipated in both the 2010 Programmatic Biological  
Opinion and the MMPA regulations.

20 *Id.* at 267.

21 Defendants next cite a copy of an email dated April 28, 2010. AR Doc. A.4 at 615-16. The  
22 text of the email contains a detailed discussion of conducting a cumulative impact analysis. *Id.*  
23 Finally, Defendants cite a portion of the Federal Register dated July 13, 2009, which contains the  
24 proposed Rule for the five-year regulations authorizing Naval activities in the NWTRC. AR Doc.  
25 B.65 at 4679-80. The pages cited by Defendants contain a discussion of possible effects of the Navy’s  
26 activities on marine mammals, both generally and by species. *Id.* Included in that discussion is a  
27 conclusion regarding the impact the Navy’s activities will have on the stock of each species. *Id.* at  
28 4681-4685.

1 After a detailed review of the parties' entire arguments and the citations therein, along with the  
2 administrative record as a whole, the court finds that Plaintiffs have failed to carry their burden of  
3 demonstrating that the NMFS's evaluation of long-term or cumulative impacts of the Navy's action  
4 was an abuse of discretion or arbitrary, capricious or otherwise not in accordance with law. The  
5 NMFS's analysis is presumed valid, and Plaintiffs' argument that the NMFS has "failed to  
6 demonstrate any explicit analysis of long-term or cumulative impacts of the Navy's training" is  
7 unavailing. Contrary to Plaintiffs' claims, the court finds that the NMFS did comply with its duty to  
8 consider the potential for aggregate or long-term effects of the Navy's action over the term of the Five  
9 Year BiOp and articulated a rational basis for its conclusions. Thus, the court finds that the NMFS did  
10 not fail to act in accordance with law in regard to evaluating the long-term or cumulative impacts of  
11 the Navy's action as it was then defined. The court will deny Plaintiffs' motion for summary  
12 judgment on this issue and grant Defendants' motion for summary judgment on this issue.

### 13 Allowance of Conduct Prohibited by MMPA

14 Plaintiffs contend that the NMFS's Letter of Authorization, the instrument that authorizes the  
15 take of marine mammals, does not accurately reflect the number of takes that will occur in the NWTR  
16 over the next three years. They claim that the LOA allows the Navy to conduct activities that will  
17 result in more takes than analyzed and authorized in the Five Year Regulations. Plaintiffs argue that  
18 such take is prohibited by the MMPA and that the NMFS's authorization is not in accordance with the  
19 law.

20 In support of this contention, Plaintiffs rely on their claim, discussed *supra*, that the NMFS  
21 failed to use the best available scientific information in reviewing the Navy's activities in the NWTR.  
22 Noting that this scientific information was available more than a year before the NMFS finalized its  
23 Rule at issue in this case, Plaintiffs state that the NMFS has not used this information to calculate  
24 exactly how many more marine mammals are being affected by the Navy's use of sonar in the NWTR  
25 than previously thought. They argue that there can be no dispute that the new information shows that  
26 the thresholds for harm are significantly lower than those the NMFS used to estimate the number of  
27 take that will occur. Plaintiffs cite a significant increase in estimated take from Navy sonar activities  
28

1 in Hawaii and Southern California and for the Atlantic Fleet after new thresholds derived from the  
2 information were applied. *See supra* at 10.

3 Plaintiffs also cite and discuss the estimated take of harbor porpoises and beaked whales as  
4 examples of the significance of the new information. Harbor porpoises are more sensitive to sound  
5 than most other marine mammals, resulting in them experiencing more than 91 percent of all take from  
6 the Navy's activities in the NWTR. AR Doc. B.6 at 41, 51. Plaintiffs argue the new information  
7 shows that harbor porpoises will start suffering temporary hearing loss at 152 dB and permanent  
8 hearing loss at 172 dB. Mashuda Decl., Exh. 1 at 3.4-120. The NMFS assumes in the Final MMPA  
9 Rule that the relevant sound levels are 195 dB and 215 dB. AR Doc. B.25 at 1774-75.

10 In regard to beaked whales, Plaintiffs cite the 2011 study discussed above which concluded  
11 that beaked whales are even more sensitive to sonar than previously thought and that the results of the  
12 study "support a lower acoustic threshold of disturbance for beaked whales than is currently applied in  
13 the US." AR Doc. G.13 at 7. Plaintiffs argue that study could not have been clearer, and was  
14 available a year and a half before the NMFS issued the October 12 LOA. Plaintiffs claim that  
15 Defendants ignored this study, failing even to explain why the NMFS decided to continue to rely on  
16 old information. *See Sierra Club v. U.S. E.P.A.*, 671 F.3d 955, 968 (9<sup>th</sup> Cir. 2012) (finding that an  
17 agency's "failure to even consider the new data and to provide an explanation for its choice . . . was  
18 arbitrary and capricious" and that courts "should not silently rubber stamp agency action that is  
19 arbitrary and capricious in its reliance on old data without meaningful comment on the significance of  
20 more current complied data.")

21 Plaintiffs rely on *Kokechik Fishermen's Ass'n v. Sec'y of Commerce*, 839 F.2d 795, 800 (D.C.  
22 Cir. 1988), wherein the court analyzed whether it was legal for the Secretary of Commerce to "issue a  
23 permit allowing incidental taking of one protected marine mammal species knowing that other  
24 protected marine mammal species will be taken as well," but excluding them from the permit for the  
25 activity. In holding that the Secretary does not have the authority to issue a permit under the MMPA  
26 that authorized less than the actual take caused by the permitted activity, the court tied its decision to  
27 the regulatory scheme of the MMPA, which:

28 effects a moratorium on the taking of marine mammals. Congress decided to undertake this  
decisive action because it was greatly concerned about the maintenance of healthy populations

1 of all species of marine mammals within the ecosystems they inhabit. Exceptions to this  
2 moratorium clearly evidence a concern with the relationship between the activity engaged in  
3 and its effect on marine mammals and their ecosystem. It is the duty of the Secretary to take a  
4 systematic view of an activity's effect on marine mammals. A view that the permit process  
functions merely to determine which takes will be exempted from civil penalties is inconsistent  
with this duty because it allows – subject to the civil penalty price–illegal taking of other  
protected marine mammals.

5 *Id.* at 801-02. The District of Columbia Circuit affirmed the decision of the district court preliminarily  
6 enjoining the Secretary of Commerce from issuing a permit to a group of commercial fishermen. *Id.* at  
7 802-03. Plaintiffs argue that similarly, the NMFS's LOA allows an activity that it knows, based on  
8 the best available science, will result in more protected marine mammals being taken and harmed  
9 more severely than authorized by the Final MMPA Rule and the LOA itself. They conclude that, as  
10 with the LOA BiOp, the agency's failure to use this information to issue a letter of authorization that  
11 complies with the MMPA is a violation that justifies remand.

12 In response to Plaintiffs' basic contention that the LOA does not accurately reflect the number  
13 of takes that will occur in the NWTR, Defendants rely on their previously stated arguments addressing  
14 the ESA's best available scientific information standard. The court has rejected those arguments.<sup>8</sup>  
15 Defendants directly address Plaintiffs' argument regarding the 2011 beaked whale study, first asking  
16 the court not to consider it because it was raised for the first time in the Opposition and Reply.  
17 Because of the unique situation of the briefing of this APA case, in which the parties have filed briefs  
18 serving simultaneously as oppositions and replies, Defendants have had the opportunity to respond to  
19 Plaintiffs' argument. Accordingly, the court will address it.

20 Defendants argue that Plaintiffs' claim that the NMFS ignored the 2011 beaked whale study or  
21 that the study invalidates the LOA's authorization of beaked whales, lacks merit. They state that the  
22 NMFS and the Navy conduct annual "adaptive management meeting for multiple MMPA rules  
23 governing Navy sonar testing and training." Defendants' Reply, 11: 8-9. They claim that during their  
24 October 2011 meeting, the NMFS and the Navy "considered the 2011 study and rationally determined  
25 that it did not provide a basis for prescribing any additional mitigation or monitoring." In support of  
26 this claim, Defendants cite the Stone Declaration, Exhibit A at 10. That page of Exhibit A includes  
27 the minutes from a discussion of the 2011 beaked whale study. The minutes record that the NMFS

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28 <sup>8</sup>*See supra* at 14-15.

1 “does not have a current recommendation,” while the Navy opined that “right now there is probably  
2 not enough data to statistically support this analysis.” *Id.*

3 Defendants also argue that if Plaintiffs believe that the 2011 study requires a modification of  
4 the methodology used in the Final MMPA Rule to quantify beaked whale take, Plaintiffs’ remedy is to  
5 petition the NMFS for an amendment of that Rule, not to challenge the LOA issued under the Rule.  
6 They argue that a letter of authorization is not the proper vehicle for amending the methodology used  
7 to quantify take in the controlling regulation. They note that the issuance of a letter of authorization is  
8 based on the NMFS’s determination that “the level of taking will be consistent with the findings made  
9 for the total allowable taking under the [governing] regulations.” 50 C.F.R. § 216.106(a). Thus, they  
10 argue that the regulation itself must be modified, “after notice and opportunity for public review.” *See*  
11 5 U.S.C. § 553(e) (requiring agencies to “give an interested person the right to petition for the  
12 issuance, amendment, or repeal of a rule”).

13 Defendants assert that Plaintiffs have not petitioned the NMFS for an amendment of the Final  
14 MMPA Rule at issue here. They speculate that this is because Plaintiffs know that the NMFS is  
15 already engaged in two rulemakings, in part to determine whether the 2011 study warrants a change in  
16 the method for estimating beaked whale behavior. These two studies involve the Atlantic Fleet and  
17 the Hawaii and Southern California Range Complexes. *See* 78 Fed. Reg. at 7105 (proposed five-year  
18 MMPA regulations for the Atlantic Fleet); 78 Fed. Reg. 6978, 7015 (proposed MMPA regulations for  
19 Hawaii and Southern California range complexes). Defendants also assert that the Final MMPA Rule  
20 for the NWTRC expires in November 2015, and the Navy has already initiated the NEPA process to  
21 support an application for new MMPA take regulations. *See* 77 Fed. Reg. 11497 (Feb. 27, 2012).  
22 Defendants assert that “[a]ny new beaked whale take threshold the NMFS may adopt at the conclusion  
23 of the ongoing rulemakings for the Atlantic Fleet and the Hawaii - Southern California range  
24 complexes may be incorporated into the Navy’s application and any new MMPA take authorization  
25 for the NWTRC.” Defendants’ Reply, 10:28-3.

26 The court finds that the NMFS’s present work in rulemakings involving the Atlantic Fleet and  
27 the Hawaii and Southern California Range Complex does not address the issue of its compliance with  
28 the MMPA in issuing the LOA for the NWTRC. Nor is the issue addressed by the fact that any new

1 beaked whale take threshold the NMFS may adopt for the Atlantic Fleet and the Hawaii and Southern  
2 California Range Complex may be incorporated into any new MMPA take authorization for the  
3 NWTRC when the Final MMPA Rule for the NWTRC expires in November 2015, just over two years  
4 from now.

5       However, based on the parties' arguments, its review of the administrative record, and its  
6 above analysis of Plaintiffs' claim that the NMFS failed to use the best available scientific information  
7 available, the court finds that Plaintiffs have failed to carry their burden of demonstrating that the  
8 NMFS abused its discretion or acted arbitrarily or capriciously or otherwise not in accordance with  
9 law in issuing the LOA. As Defendants argue, a letter of authorization issued under the MMPA must  
10 be consistent with the regulations issued for the particular activity. *See* 50 C.F.R. § 216.106(a). Here,  
11 the regulations in question are found in the Final MMPA Rule governing the take of marine mammals  
12 from November 2010 through November 2015. Plaintiffs do not claim that the LOA is inconsistent  
13 with the Final MMPA Rule. Further, the case Plaintiffs rely on, *Kokechik Fisherman*, addresses the  
14 issuance of a five year permit equivalent to the Final MMPA Rule, not to the LOA which Plaintiffs  
15 challenge. Thus, it does not address the precise issue presented here. Therefore the court will deny  
16 Plaintiffs' motion for summary judgment on this issue and grant Defendants' motion for summary  
17 judgment on this issue.

18 Meaningful Mitigation Measures within the Olympic Coast National Marine Sanctuary

19       Plaintiffs contend that in issuing the Final MMPA Rule regarding the NWTRC, the NMFS did  
20 not comply with the statutory requirement under the MMPA that it "set forth permissible methods of  
21 taking pursuant to such activity, and other means of effecting the least practicable adverse impact on  
22 such species or stock and its habitat." 16 U.S.C. § 1371(a)(5)(A)(i)(II)(aa). In establishing the "least  
23 practicable adverse impact" standard, Congress has required that "[i]n particular, efforts should be  
24 made to protect essential habitats, including the rookeries, mating grounds, and areas of similar  
25 significance for each species of marine mammal from the adverse effect of man's actions." *Id.* at  
26 § 1361. Plaintiffs claim that the Defendants' standard mitigation measures are ineffective at  
27 preventing marine mammal take, yet the Final MMPA Rule does not identify any areas within the  
28 Navy's 122,000 square nautical mile range where sonar training could be excluded or subject to

1 additional mitigation or procedural checks that would reduce harm to marine mammals. Plaintiffs  
2 contend that the NMFS's failure to identify and prescribe such measures was arbitrary and capricious.

3       They argue that this is particularly true in regard to the Olympic Coast National Marine  
4 Sanctuary. Plaintiffs allege that the record shows that the NMFS failed to adequately consider  
5 mitigation that could reduce impacts to the whales and dolphins in the Sanctuary, which they allege  
6 provides important foraging habitat for endangered marine mammal species including the Southern  
7 Resident killer whales in the spring and humpback whales in the summer. Plaintiffs claim that the  
8 Final MMPA Rule and LOA allow the Navy to conduct training in and around the Sanctuary  
9 regardless of the season, and thus nothing bars the Navy from concentrating training there during  
10 times of seasonal importance to marine mammals. Plaintiffs claim that the NMFS failed to analyze the  
11 benefit of precluding the use of sonobuoys in the Sanctuary, and of precluding the use of hull-mounted  
12 sonar in portions of the Sanctuary where the Navy conducts the majority of its in-transit activities.  
13 They also dispute Defendants' characterization of the size of the impacted portion of the Sanctuary as  
14 "small."

15       Congress has decreed that, "[f]or a military readiness activity . . . a determination of 'least  
16 practicable adverse impact on such species or stock' . . . shall include consideration of personnel  
17 safety, practicality of implementation, and impact on the effectiveness of the military readiness  
18 activity." 16 U.S.C. § 1371(a)(5)(A)(ii). Defendants claim that the "NMFS must perform 'a careful  
19 balancing of the likely benefit of any particular measure to the marine mammals with the likely effect  
20 of that measure on personnel safety, practicality of implementation, and impact on the effectiveness of  
21 the military-readiness activity.' AR Doc. B.6 at 37, 40." Defendants further claim that "Congress  
22 required this balancing when military readiness activities are involved to ensure that "the use of  
23 mitigation and monitoring measures would be focused on the biologically significant impacts on  
24 marine mammals.' H.R. Conf.Rep. 108-354, 108<sup>th</sup> Cong. 1<sup>st</sup> Sess., *reprinted in* 2004 U.S.C.C.A.N.  
25 1407, 1447 (Nov. 7, 2003)." Finally, they claim that after performing the requisite balancing, the  
26 NMFS prescribed the mitigation program in the Final MMPA Rule, which is incorporated into the  
27 2012 LOA and ITS.

28

1 Defendants contend specifically that because the Navy conducts most of its in-transit ASW  
2 training more than 50 nautical miles from shore, there is only a relatively small area within the  
3 Sanctuary in which limited ASW training might occur. *See* AR Doc. B.6 at 41-42, AR Doc. B.25 at  
4 1556. Further, they argue, the total number of authorized ASW training hours (108 per year) is  
5 “relatively minor,” and the exercises consist of a single vessel using sonar for approximately 1.5  
6 hours. *See* AR Doc. B.6 at 42-43. In response to Plaintiffs’ concerns about Southern Resident Killer  
7 Whales, humpback whales and gray whales, Defendants argue that only a “small number” of total  
8 takes have been authorized, all in the form of Level B harassment, *id.*, and all three species would  
9 likely be detected by Navy lookouts before entering the 1,000 yard power-down zone, further reducing  
10 the already low potential for adverse effects. *See* AR Doc. B.25 at 1821-25; AR Doc. B at 4681-83;  
11 AR Doc. F2 at 255; AR Doc. B.2d at 1868. Defendants state that, considering all of these factors, the  
12 NMFS determined that prohibiting sonar use in the sanctuary “was not likely to yield a significant  
13 biological benefit for the affected marine mammal species or stock.” Defendants’ Motion and  
14 Opposition, 44:4-5 (citing AR Doc. B.6 at 42-43, 45).

15 Defendants assert that the NMFS further determined that the Navy needs flexibility to train  
16 adequately in a variety of conditions, which may require some ASW training in the outer reaches of  
17 the Sanctuary. AR Doc. B.6 at 41-42. Defendants also assert that the Navy requires “a considerable  
18 amount of planning, education, and subsequent attention to establish and implement protective areas.”  
19 Defendants’ Motion and Opposition, 44:9-10 (citing AR Doc. B.6 at 42; AR Doc. B.25 at 2173-75).  
20 Defendants state that the NMFS therefore “determined that the limited potential biological benefits of  
21 establishing a permanent or seasonal closure in the sanctuary were outweighed by practicability  
22 considerations and the impact on training effectiveness.” *Id.* at 44:11-13 (citing AR Doc. B.25 at  
23 2173-75, 2179-80). In response to Plaintiffs’ concerns that nothing prohibits the Navy from  
24 concentrating all of its ASW training in the Sanctuary during the time of alleged importance for  
25 marine mammals, Defendants repeat their contention that the NMFS determined that the permanent or  
26 seasonal closures proposed by Plaintiffs would not avoid any biologically significant impacts on  
27 marine mammals.

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1 The citations Defendants provide for their claim that the NMFS must perform a careful  
2 “balancing,” AR Doc. B.6 at 37 and 40, are to the Final MMPA Rule for the Navy training activities  
3 within the NWTRC. AR Doc. B.6. That document does contain the language quoted by Defendants.<sup>9</sup>  
4 The statute itself, Section 1371(a)(5)(A)(ii), however, makes no reference to “balancing” benefits and  
5 effects. The basis for the NMFS’s assertion that “NMFS must perform a careful balancing” and  
6 Defendants’ assertion that “Congress required this balancing” is therefore unclear. The House  
7 Conference Report cited by Defendants (“the Report”) does not “require” any balancing to be done by  
8 the NMFS. Rather, the balancing is described in the Report as built into the proposed changes in the  
9 statute. The Report states in part:

10 the conferees agreed to eliminate the requirements for “specific geographic region,” and  
11 “specific geographical region,” and “small numbers,” terms that have proven more valuable as  
12 a basis for litigation than affording legitimate or demonstrable protection to marine mammals.  
Such changes would ensure a credible and flexible regulatory process that properly balances  
the equities associated with military readiness and maritime species protection.

13 *See* 2004 U.S.C.C.A.N. 1407, 1447 (Nov. 7, 2003). This language refers to the 2003 amendment to  
14 the MMPA to exempt military readiness activities from the “small numbers” and “specified  
15 geographical region” requirements of the MMPA. *Id.* at § 1371(a)(5)(F)(i).

16 The Report further provides: “[t]he conferees intend that the changes in the definition of  
17 ‘harassment,’ as well as changes in the incidental take permit process, would not eliminate the existing  
18 requirements for mitigation and monitoring. (16 U.S.C. § 1371(a)(5)). Instead, the use of mitigation  
19 and monitoring would be focused on the biologically significant impacts on marine mammals.” *Id.*  
20 Thus, in referencing the definitions of harassment set forth in 16 U.S.C. § 1362(18)(B), the Report  
21 does not set forth a new standard. Rather, it explains on the intended effects of those Congressionally-  
22 mandated definitions.

23 Here, Defendants argue that the NMFS properly rejected the closures suggested by Plaintiffs in  
24 part based on the conclusion that doing so “was not likely to yield a significant biological benefit for  
25

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26 <sup>9</sup>“NMFS reviewed the proposed NWTRC activities and the proposed NWTRC mitigation  
27 measures as described in the Navy’s LOA application to determine if they would result in the least  
28 practicable adverse effect on marine mammals, which includes a careful balancing of the likely benefit  
of any particular measure to the marine mammals with the likely effect of that measure on personnel  
safety, practicality of implementation, and the impact on the effectiveness of the ‘military readiness  
activity.’” AR B.6 at 37.

1 the affected marine mammal species or stock.” For the NMFS to make its decision on that basis  
2 would be for it to give double weight to that consideration, because it is already built into the statutory  
3 framework.

4 To the extent that Plaintiffs base their contention on the claim that the mitigation measures as a  
5 whole prescribed by the NMFS are ineffective, the court has addressed and rejected that claim  
6 above.<sup>10</sup> The more specific contention now raised by Plaintiffs is that the NMFS acted arbitrarily and  
7 capriciously in failing to identify specific areas or prescribe additional mitigation measures in  
8 connection with the requirement that “efforts should be made to protect essential habitats, including  
9 the rookeries, mating grounds, and areas of similar significance for each species of marine mammal  
10 from the adverse effect of man’s actions.” 16 U.S.C. § 1361.

11 The issue of sonar use in the Sanctuary is discussed as follows in the Final MMPA Rule:

12 *Comment 3:* NRDC and several other commentors recommended that NMFS provide  
13 additional protection for marine mammals from the use of sonar within the OCNMS [Olympic  
14 Coast National Marine Sanctuary], by specifically prohibiting sonar usage in the OCNMS, or  
15 at a minimum, limiting the exercises taking place with [sic] the OCNMS by requiring final  
16 approval from the Pacific Fleet command, or using other means to minimize sonar use. In  
17 support of this recommendation, NRDC notes the seasonal use of the area by migrating gray  
18 whales, summer resident gray whales that use the area for feeding, and Southern Resident  
19 killer whales (SRKW) that use the area for part of the year.

20 *Response:* The OCNMS is contained within the NWTRC and the delineation of the edge of the  
21 OCNMS essentially follows the edge of the 100-m isobath. The Navy will not deploy the  
22 PUTR within the OCNMS.<sup>11</sup> Otherwise, please see NMFS’ response to comment 2, above. Of  
23 additional note, because of the seasonal nature of the use of the area by some of the species  
24 that the cementers mention, those species potential exposure to MFAS is likely an even smaller  
25 portion of the total hours, as some of the hours of operation will occur in months that they are  
26 not present.

AR Doc. B.6 at 6.

21 Comment 2 is described as a recommendation that the NMFS establish a protection area for  
22 northwest harbor porpoise landward of the 100-m isobath, along with a adjacent buffer zone. AR B.6  
23 at 41. The NMFS’ response to comment 2 provides in part as follows:

24 The Navy conducts about 99 percent of their MFAS activities in the W-237 area, which  
25 extends out approximately 200 nm from the coast of the northern half of Washington . . . .  
26 Within the W-237, the 100-m isobath extends out from the coast approximately 40 nm at some

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27 <sup>10</sup>See *supra*, 23-28.

28 <sup>11</sup>The PUTR is the portable undersea training range. AR B.6 at 40. Approximately ten percent  
of the surface hull-mounted MFAS is conducted in conjunction with its use. *Id.*

1 points, and up to 80 nm in the northern portion near the Strait of Juan De Fuca. As noted  
 2 above in the introduction to this section, the Navy has conducted, and plans to conduct, the  
 3 majority of their in-transit MFAS activities beyond 50 nm from shore, and has operated MFAS  
 4 between 12 and 50 nm from shore infrequently in the past. As mentioned above, the PUTR  
 5 is designed to be used in depths of 300-1200 ft., so it is unlikely that it will be used within  
 6 the 100-m isobath. Based on this operational plan, there is only a relatively small area within  
 7 the 100-m isobath in which the Navy would potentially operate MFAS, and this is only a very  
 8 small percentage of the entire W-237 area that is available and in which the Navy typically  
 9 operates MFAS. In order to adequately train, however, the Navy needs to train within a wide  
 10 range of bathymetric conditions (*i.e.*, proximity to certain resources such as airfields), so it is  
 11 unlikely that they would completely avoid the 100-m isobath.

12 In short, based on their general operating plans, the overall size of the area available  
 13 for training and the fact that they only plan to operate 108 hours of surface hull-mounted sonar  
 14 total annually (but need to operate in a variety of conditions, including depths other than within  
 15 the 100-m isobath), it is likely that only a relatively small subset of the 108 hours of MFAS  
 16 will be operated within the 100-m isobath, but these hours are needed for operational  
 17 flexibility.

18 Lastly, NRDC notes that the vast majority of the total takes in the NWTRC are of  
 19 harbor porpoises. This is correct; of the approximately 130,000 total annual authorized takes  
 20 in the NWTRC, 119,000 are of harbor porpoises. This is because harbor porpoises are  
 21 considered more sensitive to sound than many other marine mammals and any exposure about  
 22 a received level of 120 dB is considered a take. However, of the total number of harbor  
 23 porpoise takes, approximately 85 percent are anticipated to occur at a received level between  
 24 120 and 140 dB, from which we would expect a comparatively less response. Additionally,  
 25 only approximately 0.5 percent of these takes would result from exposure above a received  
 26 level of 160 dB, which is still far below received levels associated with injurious takes. In  
 27 short, there are more takes of harbor porpoises because they are more sensitive to sound.  
 28 However, because we use a step function to define their predicted response, instead of a dose  
 curve as we do for other marine mammal species, a large portion of the takes will likely consist  
 of the minimum response that we would still consider a take.

AR Doc. B.6 at 41-42.

Finally, Comment 5 is described as a recommendation that the NMFS establish a seasonal  
 protection area in certain canyons and banks on the NWTRC that represent important foraging habitat;  
 particularly for humpback whales during their feeding season from June to October. AR B.6 at 42. In  
 response, the NMFS states in part as follows:

The Navy plans to conduct approximately 108 hours of surface hull-mounted MFAS  
 use in the NWTRC annually. Allowing for the fact that it is not all planned in the months of  
 June-October, and not all planned in any one of the specific areas noted in the comment, only a  
 small number of hours of sonar are likely to occur in any of the specific areas recommended  
 for protection by the commentors.

Generally speaking, because of the small numbers of hours that the Navy may be  
 conducting MFAS sonar training, the short duration of the exercises, the use of only one single  
 hull-mounted sonar vessel, and the huge area over which training is conducted, the  
 impracticability of designating additional protective areas identified by the commentors  
 outweighs the likely benefit. It requires a considerable amount of planning, education, and  
 subsequent attention by the Navy to establish and implement protective areas. Furthermore,  
 the Navy only anticipates taking a small number of the species for which the protected areas

1 would be established, by Level B Harassment (15 humpback whales, 14 killer whales, and 4  
2 gray whales), with the exception of harbor porpoises (discussed in comment response 2).  
3 Considering the density of marine mammals and the likelihood of encountering them in any  
4 location during the course of a 1.5. hour period we cannot predict with sufficient certainty that  
5 avoiding these areas would necessarily result in a decrease of takes.

6 AR Doc. B.6 42-43.

7 After reviewing these excerpts from the Final MMPA Rule, the court finds that Plaintiffs have  
8 not carried their burden of demonstrating that the NMFS abused its discretion or acted arbitrarily,  
9 capriciously or otherwise not in accordance with law in regard to the requirement under 16 U.S.C.  
10 § 1361 that efforts should be made to protect essential habitats. The NMFS's responses to the above  
11 comments demonstrates a rational basis for the agency's decision on this issue. The court takes  
12 judicial notice of the physical location of the Sanctuary, based on the information provided by  
13 Defendants. See <http://sanctuaries.noaa.gov/science/condition/ocmns/history.html> (the Sanctuary  
14 extends seaward "40 to 72 kilometers (25 to 45 miles)" off the coast). The court therefore is  
15 unpersuaded that Defendants have mischaracterized the size of the impacted portion of the Sanctuary.  
16 Accordingly, the court will deny Plaintiffs' motion for summary judgment as to this issue, and grant  
17 Defendants' motion for summary judgment as to this issue.

#### 18 CONCLUSION

19 In light of the foregoing, IT IS HEREBY ORDERED as follows:

- 20 1) Plaintiffs' motion for summary judgment is GRANTED and Defendants' motion for summary  
21 judgment is DENIED as to the NMFS's compliance with the requirement under the ESA that  
22 agencies base their decisions on the best scientific data available in the issuance of the 2012  
23 Letter of Authorization Biological Opinion as to the 2010 and 2011 dolphin studies.
- 24 2) Plaintiffs' motion for summary judgment is DENIED and Defendants' motion for summary  
25 judgment is GRANTED as to the NMFS's compliance with the requirement under the ESA  
26 that agencies base their decisions on the best scientific data available in the issuance of the  
27 2012 Letter of Authorization Biological Opinion as to the beaked whale study.
- 28 3) Plaintiffs' motion for summary judgment is GRANTED and Defendants' motion for summary  
judgment is DENIED as to the issue of compliance with the best available scientific data  
standard in issuance of the Incidental Take Statement.

- 1 4) Plaintiffs' motion for summary judgment is GRANTED and Defendants' motion for summary  
2 judgment is DENIED as to the issue of compliance with the requirement under the ESA that  
3 the NMFS analyze the effect of the entire agency action.
- 4 5) Plaintiffs' motion for summary judgment is DENIED and Defendants' motion for summary  
5 judgment is GRANTED as to the issue of the NMFS improperly relying on mitigation  
6 measures required under the Final MMPA Rule in reaching its no jeopardy conclusion under  
7 the ESA or otherwise acting in a manner not in accordance with law in regard to the mitigation  
8 measures required under the Final MMPA Rule.
- 9 6) Plaintiff's motion for summary judgment is DENIED and Defendants' motion for summary  
10 judgment is GRANTED as to the issue of compliance with the requirement under the ESA that  
11 an agency's jeopardy analysis include evaluation of both direct and indirect effects of the  
12 action.
- 13 7) Plaintiffs' motion for summary judgment is DENIED and Defendants' motion for summary  
14 judgment is GRANTED as to the issue of a violation of the MMPA based on the issuance of  
15 the 2012 Letter of Authorization.
- 16 8) Plaintiffs' motion for summary judgment is DENIED and Defendants' motion for summary  
17 judgment is GRANTED as to the issue of compliance with requirement under the MMPA that  
18 the agency set forth means of effecting the least practicable adverse impact on marine mammal  
19 species or stock and its habitat.

#### 20 REMEDY

21 Plaintiffs state expressly that in recognition of the importance of military readiness, they do not  
22 ask for injunctive relief. Instead, they ask the court to remand the NMFS's Five-Year Regulations, its  
23 2012 Letter of Authorization, and biological opinions to the NMFS to require the agency to comply  
24 with the requirements of the ESA and the MMPA within eight months of the order of the court.

25 In response, Defendants have requested an opportunity to submit a supplemental brief  
26 addressing the appropriate scope and duration of any remand.

27  
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1           Accordingly, Defendants are HEREBY GRANTED twenty (20) days to file a supplemental  
2 brief regarding the appropriate scope and duration of the remand to be ordered in this case. Plaintiffs  
3 are GRANTED ten (10) days after the filing of Defendants' brief to file a response.

4 **IT IS SO ORDERED.**

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6 Dated: September 25, 2013



NANDOR J. VADAS  
United States Magistrate Judge

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