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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAI‘I

CONSERVATION COUNCIL FOR HAWAI‘I, *et al.*, Plaintiffs, v. NATIONAL MARINE FISHERIES SERVICE, *et al.*, Defendants.	CIVIL NO. 13-00684 SOM RLP PLAINTIFFS CONSERVATION COUNCIL FOR HAWAI‘I, ANIMAL WELFARE INSTITUTE, CENTER FOR BIOLOGICAL DIVERSITY, AND OCEAN MAMMAL INSTITUTE’S AMENDED REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT; CERTIFICATE OF COMPLIANCE; CERTIFICATE OF SERVICE
NATURAL RESOURCES DEFENSE COUNCIL, INC., *et al.*, Plaintiffs, v. NATIONAL MARINE FISHERIES SERVICE, *et al.*, Defendants.	CIVIL NO. 14-00153 SOM RLP (CONSOLIDATED CASE) Hearing: Date: Mar. 3, 2015 Time: 9:00 a.m. Judge: Hon. Susan Oki Mollway Trial Date: None Related to Dkt. No. 44

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I. INTRODUCTION

Defendants want the Navy to benefit from take authorizations that give legal cover in the event significant harm occurs, and, at the same time, ask the Court to relieve NMFS of its duty to ensure authorized take has only negligible impact (MMPA) and does not jeopardize (ESA). Defendants' have-their-take-and-eat-it-too argument stands the statutes on their heads, prioritizing the Navy's harmful activities over protection of marine mammals and listed species, in contravention of congressional intent. See Tennessee Valley Authority v. Hill, 437 U.S. 153, 185 (1978) (ESA embodies "conscious decision by Congress to give endangered species priority over the 'primary missions' of federal agencies"); H.R. Rep. No. 92-707, at 18 (1971), reprinted in 1972 U.S.C.C.A.N. 4144, 4151 (Congress insisted MMPA's "management of the animal populations be carried out with the interests of the animals as the prime consideration"). NMFS's failure to conduct any meaningful analysis to determine whether the take it authorized violates the MMPA's or ESA's standards renders its decisions arbitrary and capricious.

Additionally, Defendants unlawfully rely on an EIS that fails to consider a true "no action" alternative and "alternatives that might be pursued with less environmental harm." Lands Council v. Powell, 395 F.3d 1019, 1027 (9th Cir.

2005). Defendants' disregard for public comments suggesting alternatives involving time-area restrictions further violates NEPA.

II. NMFS VIOLATED THE MMPA

A. Failure To Analyze Effects Of Authorized Take.

Defendants claim that, while NMFS authorized the Navy to kill 155 marine mammals and permanently injure more than 2,000 additional animals, NMFS has no duty to ensure those deaths and injuries would cause only negligible impact because NMFS does not expect them to occur. Essentially, Defendants argue the Navy requested this high level of harm, and NMFS then authorized it, but neither agency really meant it, so the take authorization lacks legal significance. Under Defendants' theory, NMFS could authorize the Navy to kill every marine mammal, as insurance against any eventuality, without considering the ramifications should that harm occur.

Defendants' litigation position disregards the MMPA's plain language. The statute expressly constrains NMFS's authority to authorize incidental take, requiring NMFS to determine that "the total of such taking … will have a negligible impact" on affected marine mammal stocks. 16 U.S.C. § 1371(a)(5)(A)(i)(I) (emphasis added). When the statute refers to "such taking," it

means the incidental taking "the Secretary shall allow" if the requisite showing is made, i.e., authorized take. Id. § 1371(a)(5)(A)(i).

The MMPA's implementing regulations likewise require NMFS to ensure any harm it authorizes will have only negligible impact. Initially, the regulations require the Navy, as applicant, to identify "the number of marine mammals (by species) that may be taken by each type of taking [(i.e., harassment, injury and/or death)], and the number of times such takings by each type of taking are likely to occur." 50 C.F.R. § 216.104(a)(6) (emphasis added); see also id. § 216.104(a)(5). Notably, it was the Navy's application that initially identified the need for permission to kill 155 marine mammals and to permanently injure another 2,000-plus animals. See ECF.66-6:9554-9560.[1]

Having accepted the Navy's application, NMFS was obliged "to determine, based upon the best available scientific evidence," whether the Navy's take request "will have a negligible impact." 50 C.F.R. § 216.104(c); see also id. § 216.104(b)(1); ECF.66-7:9733-9734. The regulations clearly provide that NMFS may authorize requested take only if it would have no more than negligible impact on each affected stock; otherwise, NMFS must deny the request. 50 C.F.R. §

[1] Plaintiffs do not ask the Court to adopt estimates of harm that differ from those the Navy and NMFS jointly developed, based on what NMFS considers "the best available information." ECF.66-19:10249.

216.104(c), (d); see also 54 Fed. Reg. 40,338, 40,340 (Sept. 29, 1989) (quoting H.R. Rep. No. 92-707, at 18, reprinted in 1972 U.S.C.C.A.N. at 4151) ("the burden is placed upon those seeking permits to show that the taking should be allowed and will not work to the disadvantage of the species or stock of animals involved;" "it is by no means a light burden").

When authorizing incidental taking, NMFS must specify "[p]ermissible methods of taking," including limits, by stock, on numbers of marine mammals that may be harmed. 50 C.F.R. § 216.105(b)(1). Here, NMFS authorized every mortality and permanent injury the Navy requested. ECF.66-19:10255. In authorizing take, NMFS was obliged to use "the best available information" to assess impacts on affected stocks. 50 C.F.R. § 216.105(c). Moreover, NMFS could issue Letters of Authorization only if it determined "the level of taking will be consistent with the findings made for the total taking allowable under the specific regulations," i.e., authorized take levels would cause no more than negligible impact. Id. § 216.106(b) (emphasis added).

The MMPA requires NMFS to assess the effects of the "total taking allowable" because issuing take authorization has profound legal significance. By authorizing lethal and other takes, NMFS is "ensur[ing] MMPA compliance" should they occur. ECF.66-18:10201. That was the Navy's motivation for

requesting high take levels in the first place. See, e.g., ECF.66-6:9555, 9558 ("seeking take authorization in the event a Navy vessel strike does occur"). To ensure MMPA compliance, before authorizing the Navy's requested levels of take, NMFS was obliged, but failed, to determine they would have no more than negligible impact.

While Defendants' lawyers argue the high levels of lethal take the Navy requested are "speculative," Opp. (ECF 68) at 21, NMFS's scientists were not so sanguine, noting the need "to have something in place should the Navy's mortality requests be reached." ECF.66-26:10302; see also id. ("Navy could potentially reach [the] limits" for vessel strike mortalities).[2] Had NMFS concluded, as its lawyers assert, the Navy's application drastically overestimated likely takes, NMFS could have authorized far fewer, making clear that takes beyond those

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[2] The agencies knew the Navy's modeling is not infallible. In 2009, the Navy modeled underwater detonations at Silver Strand Training Complex and concluded "mortality and serious injury are not anticipated." ECF.63-6:3315. Two years later, those very exercises killed four dolphins. ECF.65-6:7454.

Moreover, while Defendants, citing Navy documents, claim there is no evidence sonar has "caused the death of a single marine mammal," Opp. at 14, NMFS concluded "active sonar transmissions" were "a plausible, if not likely contributing factor" to a mass stranding on Kauaʻi implicated in a whale calf's death. ECF.63-2:2432; ECF.66-10:9913; see also ECF.63-2:2431, 2447; ECF.66-10:9912. In other fatal stranding events, NMFS recognizes military sonar as "the most likely causative factor." ECF.63-2:2463; see also ECF.66-10:9910-9912; ECF.63-18:4147-4152.

authorized violate the MMPA. NMFS could not, however, lawfully authorize the Navy to kill fifteen large whales, ten beaked whales and 130 small odontocetes or pinnepeds and to permanently injure over 2,000 additional animals without first ensuring the authorized takes would cause only negligible impact.

Defendants assert NMFS found "any mortalities that do occur up to the maximum authorized levels would have a negligible impact on marine mammal species or stocks," but that critical analysis is entirely absent from the record. Opp. at 17 (emphasis added). Defendants reference hundreds of pages from NMFS's proposed and final rules and the HSTT EIS, but nowhere in those pages does either agency analyze, for each stock, the population-level effects of the deaths NMFS authorized. See Opp. at 10-11.

For example, NMFS authorized the Navy to kill 130 dolphins over five years from explosives, including twenty-three mortalities annually from the California Coastal bottlenose dolphin stock, seventeen annually from the California/Oregon/Washington offshore bottlenose dolphin stock, eight annually from each of the O'ahu, 4-Islands region, Kaua'i/Ni'ihau and Hawai'i Island bottlenose dolphin stocks, and eight annually from each of the Hawai'i Island, O'ahu/4-Islands and Kaua'i/Ni'ihau spinner dolphin stocks. ECF.66-19:10255; ECF.67-22:12769; ECF.67-23:12786-12787. For each stock, authorized mortality

exceeds the potential biological removal ("PBR") level, which the MMPA defines as "the maximum number of animals, not including natural mortalities, that may be removed from a marine mammal stock while allowing that stock to reach or maintain its optimum sustainable population [('OSP')]." 16 U.S.C. § 1362(20); see also ECF.64-4:4654, 4659, 4782-4785, 4794-4797. Despite the obvious risks of population-level effects from those authorized deaths, neither the HSTT EIS nor NMFS's proposed or final rule contains any analysis of these lethal takes.[3] See Plfs' Memo. (ECF 78) at 11 (noting other species NMFS failed to discuss). Having "entirely failed to consider an important aspect of the problem," NMFS rendered its "negligible impact finding[s] … arbitrary and capricious." Center For Biological Diversity v. Kempthorne, 588 F.3d 701, 710 (9th Cir. 2009).

B. NMFS Violated The MMPA's "Best Available Science" Mandate.

In arguing Plaintiffs waived any challenge to NMFS's failure to justify authorizing take in excess of PBR, Defendants misconstrue Plaintiffs' claim. Plaintiffs do not assert the MMPA "mandate[s] any particular methodology for negligible impact determinations." Plfs' Memo. at 18. Rather, Plaintiffs contend

[3] Instead, the agencies discuss lethal takes of only short-beaked common dolphins, one of the most abundant stocks. See ECF.64-22:5684; ECF.66-10:9944; ECF.66-19:10251-10252.

that, to satisfy the MMPA's requirement to use "the best scientific evidence available," 50 C.F.R. § 216.102(a), NMFS was obliged "to base its decisions on science, not speculation." Plfs' Memo. at 19. Plaintiffs contend:

> Where NMFS has adopted criteria to determine negligible impact, based on PBRs that themselves incorporate "the best scientific information available," the agency must apply those criteria, or some other equally valid scientific methodology.

Id. (quoting 16 U.S.C. § 1386(a); emphasis added).

Plaintiffs provided abundant notice of their claim. In comments on the Navy's MMPA request, Plaintiffs repeatedly alerted NMFS to the lack of "scientifically meaningful analysis" of the requested take levels' population-level effects. ECF.66-9:9770; ECF.66-12:9983, 9991. Plaintiffs' complaint similarly challenges NMFS's failure "to perform any scientifically valid analyses to determine whether the authorized take levels would have only a negligible impact on each of the affected species or stocks." Supplemental Complaint (ECF 41) ¶¶ 147,167.

Plaintiffs do not allege "Congress intended for PBR to limit NMFS's authority to permit take under section 101(a)(5)(A)," as Defendants assert. Opp. at 18-19. Rather, Plaintiffs claim that PBR levels, which NMFS itself establishes, constitute available scientific information NMFS was required to consider in making negligible impact determinations. Particularly given that PBRs incorporate

"the best scientific information available," NMFS could not lawfully ignore them. 16 U.S.C. § 1386(a); see also Kern County Farm Bureau v. Allen, 450 F.3d 1072, 1080 (9th Cir. 2006).[4]

Defendants' claim that PBR has no application outside the fisheries realm cannot be squared with NMFS's past practice. NMFS used PBR to evaluate the Coast Guard's request for lethal take, determining that, because "the loss of even a single northern right whale is significant (i.e., greater than PBR), a negligible impact finding under section 101(a)(5)(A) cannot be made." 61 Fed. Reg. 54,157, 54,158 (Oct. 17, 1996) (emphasis added). MMPA section 101(a)(5)(A) also governs NMFS's issuance of take authorization to the Navy. 16 U.S.C. § 1371(a)(5)(A).

NMFS knew the Navy had requested take that exceeded PBR and that NMFS would have to address that "somehow" in making negligible impact determinations. ECF.66-27:10309; see ECF.66-20:10262-10263 (list of species); see also ECF.67-2:10318-10319; ECF.67-3:10321; cf. 'Īlio'ulaokalani Coalition v.

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[4] In adopting regulations implementing the 1986 MMPA amendments, NMFS stated that, to determine negligible impact, it must ensure that "the incidental taking would not prevent the population from attaining or maintaining its OSP." 54 Fed. Reg. at 40,341. Since PBR is defined in terms of OSP, NMFS cannot satisfy its legal duty without taking PBR into account. See 16 U.S.C. § 1362(20).

Rumsfeld, 464 F.3d 1083, 1093 (9th Cir. 2006) (no waiver where agency "had independent knowledge of the very issue that concerns Plaintiffs in this case"). Rather than apply its 1999 criteria, or another scientifically valid methodology, to evaluate whether authorizing take above PBR could be reconciled with a negligible impact finding, NMFS opted to bury the issue to avoid "bring[ing] it up as a major red-flag." ECF.66-27:10309. NMFS's failure to "articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made'" rendered its decision arbitrary and capricious. Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

Acknowledging this fatal flaw in NMFS's decision-making, Defendants' lawyers attempt to cure it. When lawyers begin their sentence with "even if NMFS were to apply the 1999 fisheries criteria here," Opp. at 20, it is a dead giveaway the following discussion contains "[p]ost hoc explanations of agency action by [agency] counsel" that "cannot substitute for the agency's own articulation of the basis for its decision." Arrington v. Daniels, 516 F.3d 1106, 1113 (9th Cir. 2008); see also Motor Vehicle Mfrs. Ass'n, 463 U.S. at 50 ("agency's action must be upheld, if at all, on the basis articulated by the agency itself"). This Court should disregard Defendants' counsel's speculation regarding what NMFS would have

done had it conducted the requisite analysis.[5] NMFS's failure to evaluate the population-level effects of the lethal and other take it authorized renders its negligible impact determinations arbitrary and capricious.

III. NMFS VIOLATED THE ESA

A. Failure To Evaluate Whether Authorized Take Would Cause Jeopardy.

Focusing on the allegedly low level of harm NMFS now predicts will occur, Defendants ignore the legal significance of NMFS's incidental take statement ("ITS") authorizing the Navy to kill up to fifteen endangered whales and countless

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[5] Even if this Court could consider Defendants' counsel's creative writing, it should reject it. In applying its 1999 criteria, NMFS does not consider only "documented" (i.e., observed) "historical take." Opp. at 20. Because observed take reflects only a fraction of actual take, NMFS applies various formulas to observed take to estimate the harm the fishery actually causes. See, e.g., ECF.64-4:4818-4820 (ECF.69-2:13548-13550) (SAR for Hawai'i False Killer Whales).

Likewise, here, NMFS did not conclude observed harm alone reflects the full extent of the impacts of Navy activities. Rather, NMFS considers "the Navy's model results and post-model analysis," developed with NMFS's assistance, as "the best available information." ECF.66-19:10249.

More importantly, as discussed above, NMFS was obliged to assess whether the take levels it authorized would have more than negligible effects. NMFS should have analyzed the population-level effects of authorizing take above PBR, but failed to.

imperiled sea turtles.[6] The ITS "functions as a safe harbor provision," authorizing the Navy to inflict the specified harm with impunity. Arizona Cattle Growers' Ass'n v. U.S. Fish and Wildlife Service, 273 F.3d 1229, 1239 (9th Cir. 2001). The ITS establishes a "trigger" that defines when the Navy has caused "an unacceptable level of incidental take, invalidating the safe harbor provision, and requiring the parties to reinitiate consultation." Id. Because agency action is virtually unchecked until ITS-authorized take is exceeded, the ESA prohibits NMFS from authorizing take unless it concludes that taking "will not violate" the jeopardy prohibition. 16 U.S.C. § 1536(b)(4)(B).

Nowhere in the record does NMFS evaluate the authorized take levels to ensure they would not cause jeopardy. See Motor Vehicle Mfrs. Ass'n, 463 U.S. at 43 (decision is "arbitrary and capricious if the agency … entirely failed to consider an important aspect of the problem"). For endangered whales, Defendants cannot rely on NMFS's negligible impact finding. Despite NMFS's recognition that "[t]he death of a female of any of the large whale species would result in a reduced reproductive capacity of the population or species," the agency never analyzed

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[6] Defendants' litigation position that lethal take is unlikely conflicts with NMFS's BiOp, which states the ITS sets forth "the anticipated take" from Navy activities, including "numeric estimates for each species for which we could develop such estimates." ECF.67-19:12655-12656.

whether the three mortalities per year it authorized would cause population-level harm to any endangered whale stock, including stocks where authorized take exceeds PBR by an order of magnitude. ECF.67-19:12661; see also Plfs' Memo. at 16-17. The record for NMFS's BiOp likewise has a dearth of analysis. Plfs' Memo. at 23-25.[7]

The record is similarly devoid of any assessment of the effects on imperiled sea turtles of the seventeen mortalities per year, plus unlimited deaths from ship strike, that NMFS authorized.[8] The evidence before the Court establishes NMFS has developed population viability analyses ("PVAs") for at least two critically endangered turtle species for which NMFS authorized mortalities: leatherbacks and loggerheads. ECF 45-6 at 74-80, 86-91. Having estimated lethal take from Navy activities, NMFS could have input those values into the PVAs to evaluate jeopardy. See id. at 70-72, 83-85. NMFS's failure to use these available analytic

[7] While Defendants' lawyers deny NMFS had any relevant population viability models, NMFS's BiOp indicates otherwise. See ECF.67-19:12372. NMFS certainly used some model to conclude the loss of a single female from any large whale species would have population-level effects.

[8] There is no record support for Defendants' claim NMFS's jeopardy analysis assumed ship strikes might kill all 123 turtles at risk of permanent threshold shift ("PTS"). Opp. at 29. The ITS expressly states the number of sea turtle mortalities from ship strikes as "[u]nspecified." ECF.67-19:12658, 12660.

tools violates the ESA's "best available science requirement." Consolidated Salmonid Cases, 791 F. Supp. 2d 802, 834 (E.D. Cal. 2011).[9]

Even if no applicable PVAs were available, NMFS was still obliged to conduct a meaningful analysis whether the high levels of authorized lethal take would further jeopardize turtle species teetering on the brink of extinction. Plfs' Memo. at 25-29. NMFS illegally failed "to consider the immediate and long-term effects of the action and 'articulate[ ] a rational connection between the facts found and the conclusions made.'" Wild Fish Conservancy v. Salazar, 628 F.3d 513, 525 (9th Cir. 2010) (citation omitted).

B. NMFS's ITS For Turtle Mortalities From Ship Strikes Is Illegal.

Faced with binding precedent prohibiting NMFS from issuing an ITS that "both define[s] and limit[s] the level of take using the parameters of the project," Oregon Natural Resources Council v. Allen, 476 F.3d 1031, 1039 (9th Cir. 2007), Defendants baldly assert the "numerical take limit for PTS" makes up for the lack of any limit on turtle mortalities from ship strikes. Opp. at 29. The ITS, however,

[9] Plaintiffs do not argue NMFS should have derived mortality estimates from fishery interactions, the issue in Natural Resources Defense Council v. Gutierrez, 2008 WL 360852, at *28-29 (N.D. Cal. Feb. 6, 2008). Gutierrez does not suggest that, when NMFS has estimated mortalities, it can lawfully fail to employ PVAs to evaluate jeopardy merely because those PVAs were developed in a fisheries context.

clearly authorizes ship strike mortalities in addition to the 123 authorized PTS takes. See ECF.67-19:12658, 12660. NMFS expressly authorized "an unspecified number of" ship strike deaths, providing that "[t]ake will be exceeded if the proposed levels of training and testing are exceeded." ECF.67-18:12299. NMFS's issuance of this blank check violates the ESA. Plfs' Memo. at 30-32.

IV. THE COURT SHOULD ADJUDICATE PLAINTIFFS' ESA CLAIMS.

Because NMFS's BiOp is blatantly inadequate, Defendants understandably prefer to get a pass and have this Court decline to adjudicate Plaintiffs' claims. NMFS's decision to revisit its BiOp is, however, no reason to conclude Plaintiffs' claims are "prudentially moot" or to issue a stay. See Hunt v. Imperial Merchant Servs., 560 F.3d 1137, 1142 (9th Cir. 2009) (court "not required to dismiss a live controversy as moot merely because it may become moot in the future").

This is the second time NMFS has decided to revise its BiOp in response to Plaintiffs' challenges. The "corrected" BiOp NMFS issued last April failed to cure the fatal flaws in NMFS's analysis. See Plfs' Memo. at 19-32. There is no reason to think that, without this Court's guidance, NMFS, which adamantly refuses to admit error, will get it right the second time. See Sequoia Forestkeeper v. Tidwell, 847 F. Supp. 2d 1217, 1238 (E.D. Cal. 2012) (rejecting dismissal for prudential mootness where "there is no indication that the challenged regulations will

change"). If the Court were to grant Defendants' request, the "challenged action is likely to occur again under the cover of new paperwork." ForestKeeper v. Benson, 2014 WL 4193840, at *7 (E.D. Cal. Aug. 22, 2014).

Defendants' claim that dismissal or a stay would not prejudice Plaintiffs ignores that "Defendants continue to rely on the challenged BiOp[] as if [it] were lawfully enacted," depriving critically imperiled species of vital protection. Natural Resources Defense Council v. Norton, 2007 WL 14283, at *16 (E.D. Cal. Jan. 3, 2007). While Defendants would suffer no hardship should this Court rule, Plaintiffs would be severely prejudiced if denied their day in court. See Lockyer v. Mirant Corp., 398 F.3d 1098, 1112 (9th Cir. 2005) (no hardship from "being required to defend a suit, without more"). Moreover, "[j]udicial economy and the parties' resources will not be conserved by delaying a ruling on the fully briefed … motions for summary judgment." Defenders of Wildlife v. Hall, 2011 WL 1740312, at *1 (D. Mont. May 4, 2011).

V. DEFENDANTS VIOLATED NEPA

A. No True "No Action" Alternative.

In Center for Biological Diversity v. Department of Interior, 623 F.3d 633 (9th Cir. 2010), the Ninth Circuit affirmed "[i]t is black letter law that NEPA requires a comparative analysis of the environmental consequences of the

alternatives before the agency." Id. at 645. That case involved a proposed land exchange with a mining company. While mining would occur regardless of the Bureau of Land Management's decision, the court held the agency unlawfully failed to "make a meaningful comparison of the environmental consequences of Asarco's likely mining operations …with and without the proposed exchange." Id. at 646.

The HSTT EIS similarly fails to compare the impacts of the Navy's preferred alternative with those of NMFS denying the Navy's requests to take protected species, which would require significant modifications to Navy activities to avoid unauthorized harm.[10] "In the absence of such a comparison in the [EIS]," the agencies have "not conducted the 'hard look' that NEPA requires." Id.

Defendants cite several cases in which courts upheld EISs that did not evaluate denial of contract renewals as the "no action" alternative. These cases are inapposite because, in each case, the agencies concluded denial was not an option. See Association of Public Agency Customers v. Bonneville Power Admin., 126 F.3d 1158, 1188 (9th Cir. 1997) (offering no contracts not "viable alternative"); American Rivers v. Federal Energy Regulatory Comm'n, 201 F.3d 1186, 1201 (9th

[10] There is no basis for Defendants' suggestion that denial of take authorizations would preclude all Navy activities.

Cir. 2000) (license denial not reasonable alternative); Pacific Coast Federation of Fishermen's Ass's v. Department of Interior, 929 F. Supp. 2d 1039, 1052 (E.D. Cal. 2013) (statutory duty to renew "at least *some* form of interim contract"); Natural Resources Defense Council v. Hodel, 624 F. Supp. 1045,1054 (D. Nev. 1985) ("no grazing" policy not reasonable alternative). In contrast, NMFS expressly acknowledged that denial of "the Navy's request for an incidental take authorization … constitutes the NEPA-required No-action alternative," but then unlawfully failed to analyze it. ECF.66-24:10290; cf. Northwest Environmental Defense Center v. Army Corps of Engineers, 817 F. Supp. 2d 1290, 1312-13 (D. Or. 2011) (denying requested permit constitutes "no action" alternative).

Even if Defendants properly defined the "no action" alternative as continuing current Navy activities, there is no dispute the EIS excludes some of those activities from the "no action" alternative, lumping them instead into Alternative 1. ECF.65-5:6835-6836 (ECF.69-3:13551). While Defendants dismiss "the excluded areas and activities" as "a small subset of those used to define the no action alternative," there is no way to assess Defendants' claim because the EIS nowhere separately analyzes the excluded areas' and activities' impacts. Opp. at 35. Defendants' failure "to depict accurately the [Navy's] 'present course of

action' … violated NEPA." Conservation Northwest v. Rey, 674 F. Supp. 2d 1232, 1247 (W.D. Wash. 2009) (citation omitted).

EISs must "present the environmental impacts of the proposals and the alternatives," including the "no action" alternative, "in comparative form, … providing a clear basis for choice among options by the decisionmaker and the public." 40 C.F.R. § 1502.14. Whether "no action" is defined as denying the Navy's take requests or continuing current activities, the HSTT EIS's failure to evaluate a true "no action" alternative deprived both Defendants and the public of the required "benchmark … to compare the magnitude of environmental effects of the action alternatives." 46 Fed. Reg. 18,026, 18,027 (Mar. 23, 1981).

B. No Analysis of Alternatives With Less Environmental Harm.

Defendants admit "the potential for more severe harm is greater when marine mammals are in close proximity to Navy sonar, explosives, and vessels." ECF 57 ¶ 38. Considering alternatives that restrict Navy activities in biologically important areas is, therefore, vital to NEPA's purpose: "to require disclosure of relevant environmental considerations that were given a 'hard look' by the agency, and thereby to permit informed public comment on proposed action and any choices or alternatives that might be pursued with less environmental harm." Lands Council, 395 F.3d at 1027. Analyzing such alternatives would provide vital

information about "how much [biologically important areas] have been used [by the Navy] in the past and might be used in the future so that can be balanced against the potential reduction value of limiting activities in that area." ECF.64-15:5086. While Defendants' EIS discusses why it is not feasible to prohibit Navy activities in all biologically sensitive areas, it fails to address limiting activities in at least some sensitive areas to reduce harm. Plfs' Memo. at 40-44.

Conclusory statements by Navy "subject matter experts" that less harmful alternatives were infeasible, ECF.64-20:5263, cannot substitute for NEPA's mandated "hard look." Klamath-Siskiyou Wilderness Center v. Bureau of Land Managment, 387 F.3d 989, 996 (9th Cir. 2004) (NEPA documents "contain[ing] only narratives of expert opinions" inadequate). Since "public scrutiny [is] essential to implementing NEPA," 40 C.F.R. § 1500.1(b), "NEPA requires that the public receive the underlying … data from which [an agency] expert derived her opinion." Idaho Sporting Cong. v. Thomas, 137 F.3d 1146, 1150 (9th Cir. 1998).[11]

[11] The internal agency documents Defendants cite confirm they never gave serious thought to "what they COULD do to effect reduced impacts in [sensitive] areas," as NEPA requires. ECF.64-15:5071; see also ECF.63-8:3370-3371, 3383-3384 (considering only total ban on Navy activities in all biologically important areas or during certain months). Defendants' conclusion that "many [biologically important] areas" are important for training by necessity implies some are not. ECF.63-8:3370.

Defendants' cavalier dismissal of time-area restrictions that Plaintiffs and others suggested ignores that "NEPA's public comment procedures are at the heart of the NEPA review process." California v. Block, 690 F.2d 753, 770 (9th Cir. 1982). Plaintiffs are not "asking this Court to substitute [their] preferences for [Defendants'] expert judgment." Opp. at 37. Rather, the issue is Defendants' failure to comply with NEPA's command to respond to public comments by either "evaluat[ing] alternatives not previously given serious consideration" or "explain[ing] why the comments do not warrant further agency response." 40 C.F.R. § 1503.4(a)(2), (5).

Having refused to evaluate alternatives the public suggested, Defendants were obliged to "cit[e] the sources, authorities, or reasons which support the agency's position" that any limitation on Navy activities in any biologically important area is infeasible. Id. § 1503.4(a)(5). Defendants failed to do so, unlawfully "insulat[ing the agencies'] decision-making process from public scrutiny." Block, 690 F.2d at 771-72; see Plfs' Memo. at 40-43.

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DATED: Honolulu, Hawai‘i, January 23, 2015.

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CERTIFICATE OF COMPLIANCE

Pursuant to Local Rule 7.5(e), I certify that the foregoing brief is set in a proportionally spaced 14-point font (Times New Roman) and contains 4,498 words, exclusive of the caption, tables, and signature block. I have relied upon Microsoft Word to determine the word count.

DATED: Honolulu, Hawai‘i, January 23, 2015.

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