

**DEPARTMENT OF DEFENSE**

**Department of the Navy**

**Revised Record of Decision for Hawaii Range Complex**

**AGENCY** Department of the Navy, Department of Defense

**ACTION** Notice of Revised Record of Decision

**SUMMARY:** The Department of the Navy (Navy) is announcing its decision to revise the Record of Decision (ROD) issued on June 26, 2008, and published on July 7, 2008 (73 Fed. Reg. 38424) on the Final Environmental Impact Statement (EIS)/Overseas Environmental Impact Statement (OEIS) for the Hawaii Range Complex (HRC). These revisions address the authorizations recently issued by the National Marine Fisheries Service (NMFS) in December, 2008, and January, 2009, under the Marine Mammal Protection Act (MMPA) and the Endangered Species Act (ESA) for the incidental harassment of marine mammals resulting from Navy training and research, development, testing, and evaluation (RDT&E) activities conducted within the HRC for the proposed action presented in Alternative 3. Only the portions of the ROD that are being revised are discussed herein.

**EFFECTIVE DATE:** The Revised ROD is effective February 26, 2009. Except as discussed below, all other provisions of the June 26, 2008 ROD remain in full force and effect.

**FOR FURTHER INFORMATION CONTACT:** Mr. Tom Clements, Pacific Missile Range Facility, P.O. Box 128, Kekaha, Kauai, Hawaii, 96752-0128, telephone number (866) 767-3347.

**INTRODUCTORY STATEMENT:** Pursuant to section 4321 et seq. of Title 42 of the United States Code (National Environmental Policy Act of 1969 [NEPA]); the regulations of the President's Council on Environmental Quality (CEQ) that implement NEPA procedures (40 Code of Federal Regulations [CFR] Parts 1500-1508); DoD Instruction 4715.9, Environmental Planning and Analysis; and the applicable Navy environmental regulations that implement these laws and regulations, the Navy announced on June 26, 2008, its decision to support and conduct current and emerging Navy training and DoD's or other federal agencies' RDT&E activities in the HRC, and upgrade or modernize range complex capabilities to

enhance and sustain training and RDT&E. The Navy considered applicable executive orders, including an analysis of the environmental effects of its actions outside the United States or its territories under the provisions of Executive Order 12114 (*Environmental Effects Abroad of Major Federal Actions*) and the requirements of Executive Order 12898 (*Federal Actions to Address Environmental Justice in Minority Populations and Low Income Populations*).

**1. Scope of the Revisions:** As discussed in the BACKGROUND AND ISSUES section of ROD, at the time of the announcement of its decision on the Final EIS/OEIS, the Navy was awaiting agency action on its July 16, 2007, request (as updated on February 19, 2008, and April 29, 2008) for authorization from NMFS under the MMPA for the incidental harassment of marine mammals resulting from Navy training and RDT&E activities conducted within the HRC. Additionally, the Navy was awaiting agency action from NMFS under the issuance of a Biological Opinion under the Endangered Species Act (ESA) for the proposed action presented in Alternative 3. At the time the ROD was issued, the Navy's compliance with the MMPA was based upon the National Defense Exemption (NDE), which was issued on January 23, 2007, and expired on January 23, 2009. The Navy's compliance with the ESA was based upon NMFS' Preliminary Biological Opinion for the HRC, issued on June 26, 2008, NMFS' Biological Opinion for the 2008 Rim of the Pacific exercise, issued on June 21, 2008 (as amended on June 24, 2008), and NMFS' Biological Opinion for the Undersea Warfare Exercises (USWEX), issued on January 23, 2007 (as amended on September 26, 2007). The COMPLIANCE WITH ENVIRONMENTAL LAW section of the ROD provides a detailed discussion of the consultation process. No additional comments were received since the ROD was issued that require further consideration.

NMFS, after considering public input received on the Navy's request, issued the final programmatic HRC Biological Opinion on December 9, 2008 and the MMPA Final Rule on January 5, 2009 (74 Fed. Reg. 1456-1491). NMFS issued the first annual MMPA letter of authorization (LOA) and the associated ESA Biological Opinion and Incidental Take Statement on January 8, 2009. The MMPA LOA allows for the take of marine mammals incidental to the Navy's use in the HRC of hull-mounted mid-frequency active (MFA) sonar systems, including dipping sonar and sonobuoys, high-frequency active (HFA) sonar as employed by the MK-48 torpedo<sup>1</sup>, and underwater explosives. The issuance of the Biological Opinions, the MMPA Final Rule and first annual LOA do not alter the Navy's

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<sup>1</sup> In coordination with NMFS, the Navy determined in the Final EIS/OEIS that the MK-48 torpedo is the only high frequency source requiring authorization under the MMPA. As discussed in Final EIS/OEIS (Section 4.1.2.4.12.2), the frequency range and characteristics of other high frequency sources would not result in an exposure of marine mammals to sound which NMFS would characterize as harassment.

environmental analysis because NMFS' analyses contained in those documents were anticipated in the Final EIS/OEIS and ROD, which covered the same training and RDT&E activities considered by NMFS.

**2. U.S. Atlantic Fleet and U.S. Pacific Fleet Considerations:** Since the HRC ROD was issued, the Navy also issued RODs for two other range complex/training area EISs/OEISs. Each of these constitute separate actions involving different study areas critical to military readiness activities conducted by naval forces comprising the U.S. Pacific Fleet and U.S. Atlantic Fleet. The Navy's approach to developing alternatives in the Hawaii Range Complex Final EIS/OEIS varies from that discussed in the Atlantic Fleet Active Sonar Training (AFAST) Final EIS/OEIS. The AFAST Final EIS/OEIS considers alternatives based on environmental conditions (e.g., marine mammal occurrence and densities, and topographic, geographic, and bathymetric conditions) which are different from those encountered in the Pacific Fleet Study Areas. Because of the absence of contiguous locations of U.S. Pacific Fleet range complexes (e.g., the HRC, the Mariana Islands Range Complex [MIRC], the Southern California [SOCAL] Range Complex, and the Northwest Training Range Complex), a Strike Group training exercise in the Pacific is generally confined to a single range complex. Furthermore, the study areas are very dissimilar in size. The HRC Study Area consists of approximately 235,000 square nautical miles compared with an AFAST Study Area of about two million square nautical miles.

The AFAST Study Area also has a much larger shallow-water region available because of the wide continental shelf. The U.S. Pacific Fleet Study Areas, in sharp contrast, have very narrow continental shelves, which limit the available shallow-water areas. When coupled with limited air routes into and out of land ranges, Pacific Fleet training is geographically constrained to specific complexes, such as the HRC. The majority of U.S. Atlantic Fleet active sonar activities may overlap on multiple range complexes and the open ocean adjacent to those contiguous range complexes compared to the non-contiguous range complexes on the Pacific Coast. While the Atlantic Fleet also has shore-based support facility requirements for training, they are not concentrated in one geographic area, which provides greater potential for operational flexibility than in the U.S. Pacific Fleet Study Areas. The U.S. Pacific Fleet, in contrast, has range complexes centered on geographically fixed instrumented ranges and high-value, land-based training ranges, which limits its overall training flexibility.

**REVISIONS TO THE RECORD OF DECISION:** The Navy will comply with the additional requirements specified by NMFS in the MMPA Final Rule effective for a period of five years from January 5,

2009, and the ESA Programmatic Biological Opinion of December 9, 2008, effective for a period of five years from December 9, 2008, to December 9, 2013, for the HRC that were not set forth in the Final EIS/OEIS. NMFS published the MMPA Proposed Rule for the HRC on June 23, 2008. NMFS then issued the MMPA Final Rule on January 5, 2009, and the first annual Letter of Authorization (LOA) on January 8, 2009. NMFS also issued the ESA Programmatic Biological Opinion on December, 9, 2008, and the ESA final Biological Opinion and Incidental Take Statement associated with the first annual MMPA LOA on January 8, 2009.

**1. Background and Information:** Because the mitigation measures and monitoring and stranding response requirements in the ROD pertaining to the use of active sonar and underwater detonations have been superseded by NMFS' issuance of the MMPA Final Rule and ESA Biological Opinion for the HRC, the Navy is revising the BACKGROUND AND INFORMATION section of the ROD as follows:

**a. By Deleting the BACKGROUND AND ISSUES Section and Inserting as a New BACKGROUND AND ISSUES Section:**

**"BACKGROUND AND ISSUES:** The upgrade and modernization of HRC capabilities to enhance and sustain training and RDT&E activities and the increases in the tempos and frequencies of training events constitute the preferred alternative, as defined in the Final EIS/OEIS published in May 2008. In this setting, "tempo" means intensity and could include more forces or a change in training duration, and "frequency" means the number of training events in a given period. The preferred alternative represents an appropriate balance between the Navy's responsibility and strong commitment to protect the environment and the Navy's mission to train its Sailors, to deter aggression, and to win the nation's wars. The Final EIS/OEIS incorporates the training needs identified in other analyses of the HRC while ensuring compliance with applicable environmental laws, regulations, and executive orders."

**2. Mitigation Measures, Monitoring and Stranding Response:**

The Navy is revising subsections 3a(1)(D) (Mitigation Measures) and 3a(1)(F) (Monitoring and Stranding Response) under the ENVIRONMENTAL IMPACTS section of the ROD as follows:

a. **By Deleting Subsections 3a(1)(D) and (F) and Inserting as a New Subsection 3a(1)(D):**

**"(D) Mitigation Measures, Monitoring, and Stranding Response**

(i) **Mitigation Measures Related to MFA and HFA Sonar:** The Navy will implement the mitigation measures specified by NMFS, including, but not limited to the following summarized measures: training of personnel in lookout/watchstander duties; stationing at least 3 people on watch at all times; stationing at least 2 additional people on watch during ASW exercises when MFA sonar is being used; personnel on lookout and officers on the bridge will have at least one set of binoculars available for each person; on surface vessels equipped with mid-frequency active sonar, pedestal mounted binoculars will be present and in good working order; requiring all personnel engaged in passive acoustic sonar operation to monitor for marine mammal vocalizations; using all available sensor and optical systems, such as night vision goggles during MFA and HFA active sonar activities; using only passive capability of sonobuoys when marine mammals are detected within 200 yards (183 meters); limiting ship or submarine active transmission levels to at least 6 dB below normal operating levels when marine mammals are detected by any means within 1,000 yards (914 meters) of the sonar dome (the bow); limiting ship or submarine active transmission levels to at least 10 dB below normal operating levels when marine mammals are detected by any means within 500 yards (457 meters) of the sonar dome, or ceasing ship or submarine active transmissions when a marine mammal is detected by any means within 200 yards (183 meters) of the sonar dome; if the need for such power-down arises, following power-down requirements as though the system is operating at 235 dB, the normal operating level (i.e., power-down would be to 229 dB); operating sonar at the lowest practicable level, not to exceed 235 dB, except as required to meet tactical training objectives; requiring helicopters to observe or survey the vicinity of an ASW activity for ten minutes before first deployment of active (dipping) sonar in the water; prohibiting dipping sonar within 183 meters (200 yards) of a marine mammal and ceasing pinging if a marine mammal closes to within 200 yards (183 meters) after pinging has begun; coordinating with the local NMFS Stranding Coordinator; and submitting a report containing a discussion of the nature of any observed effects based on both modeled results of real-time events and sightings of marine mammals.

If, after conducting an initial maneuver to avoid close quarters with dolphins, the ship concludes that dolphins are deliberately closing in on the ship to ride the vessel's bow wave, no further mitigation actions would be necessary because dolphins are out of the main transmission axis of the active sonar while in the shallow-wave area of the vessel bow.

The Navy and NMFS explored ways of effecting the least practicable impact to humpback whales from exposure to MFA and HFA sonar. Proficiency in ASW requires that Sailors gain and maintain expert skills and experience in operating MFA and HFA sonar in myriad marine environments. Exclusion zones or restricted areas are impracticable and adversely impact MFA and HFA sonar training fidelity. The HRC, including areas in which humpback whales concentrate, contain unique bathymetric features the Navy needs to ensure Sailors gain critical skills and experience by training in littoral waters.

Recognizing the significance of the Hawaiian Islands for humpback whales, the Navy in the Final EIS/OEIS (Section 6.1.3.2) designated a Humpback Whale Cautionary Area which consisted of a 5-km buffer zone that has been identified as having one of the highest concentrations of humpback whales during the critical winter months. The MMPA Final Rule incorporates without amendment or modification the Humpback Whale Cautionary Area as described in the Final EIS/OEIS: an area extending 5 kilometers from a line drawn from Kaunakakai on the Island of Molokai to Kaena Point on the Island of Lanai; and an area extending 5 kilometers from a line drawn from Kaunolu on the Island of Lanai to the most Northeastern point on the Island of Kahoolawe; and within a line drawn from Kanapou Bay on the Island of Kahoolawe to Kanahena Point on the Island of Maui and a line drawn from Cape Halawa on the Island of Molokai to Lipoa Point on the Island of Maui, excluding the existing submarine operating area.

MFA sonar training exercises in the Humpback Whale Cautionary Area will require a much higher level of clearance than is normal practice in planning and conducting MFA sonar training. Should national security needs require MFA sonar training and testing in the cautionary area between the dates of December 15 and April 15, it shall be personally authorized by the Commander, U.S. Pacific Fleet (CPF). CPF shall base such authorization on the unique characteristics of the area from a military readiness perspective, taking into account the importance of the area for humpback whales. Approval at this level for this type of activity is extraordinary. CPF is a four-star Admiral and the highest ranking officer in the United States Pacific Fleet. This case-by-case authorization cannot be delegated and represents the Navy's commitment to fully consider mission requirements in light of the Navy's commitment to environmental stewardship. Further, CPF will provide specific

direction on required mitigation prior to operational units transiting to and training in the cautionary area using MFA sonar. This process will ensure that decisions to train using MFA sonar in this area are made at the highest level in the Pacific Fleet, heighten awareness of humpback activities in the cautionary area, and serve to reemphasize that mitigation measures required by this ROD are to be scrupulously followed. The Navy will provide NMFS with advance notification of any such MFA sonar training and testing activities in the cautionary area.

(ii) Mitigation Measures Related to Underwater

Detonations: As required by NMFS, the Navy will implement various mitigation measures during exercises where decommissioned Navy ships are used as targets (sinking exercises). These measures include the following: all weapons firing shall be conducted during the period 1 hour after official sunrise to 30 minutes before official sunset; extensive range clearance operations prior to commencement of the exercise; establishment of an exclusion zone with a radius of 1.0 nautical mile (1.85 kilometers) around each target, and an additional buffer of 0.5 nautical mile (0.93 kilometer); surveillance of a safety zone, which extends out an additional 0.5 nautical mile (0.93 kilometer); surveillance over-flights when feasible within the exclusion zone that optimizes the surface area of the water observed; training of Navy personnel in visual surveillance; monitoring of the exclusion zone by passive acoustic means when assets are available; aerial surveillance of the exclusion and safety zones commencing two hours prior to the first firing; delaying firing if a marine mammal is observed within the exclusion zone until the animal is re-sighted outside the exclusion zone, or 30 minutes has elapsed; resurveying of the exclusion zone if there are breaks in the exercise of 30 minutes or more; and final surveillance of the exclusion zone upon sinking of the vessel for two hours, or until sunset to verify that no marine mammals were harmed; where practicable, conducting the exercises in sea states that are ideal for marine mammal sighting.

During Gunnery Exercises, Missile Exercises, and Bombing Exercises, the Navy will employ those mitigation measures identified above pertaining to range clearance procedures. In the unlikely event that any marine mammals are observed to be harmed in the area, a detailed description of the animal shall be documented, the location noted, and if possible, photos taken, and the information provided to NMFS.

(iii) Monitoring and Stranding Response: The Navy will implement the reporting and monitoring requirements as well as the research and conservation measures of the MMPA Final Rule and the ESA Biological Opinion, and any additional such

requirements in the annual MMPA LOAs and ESA Incidental Take Statements. Reports required by the MMPA Final Rule and ESA Biological Opinion include an Annual HRC Monitoring Plan Report, an Annual HRC Exercise Report, Sonar Exercise Notification, a HRC Comprehensive 5-Year Report, and a Comprehensive National ASW Report. The Navy will also implement an Integrated Comprehensive Monitoring Plan in 2009."

**3. Compliance with Environmental Law:** The Navy is revising subsections 1 ("Marine Mammal Protection Act") and 2a ("Endangered Species Act: NMFS") under the COMPLIANCE WITH ENVIRONMENTAL LAW section of the ROD as follows:

**a. By Deleting Subsection 1 and 2a and Inserting as New Subsections 1 and 2a:**

**"1. Marine Mammal Protection Act:** In support of the proposed action, on July 13, 2007, the Navy applied for an authorization pursuant to Section 101(a)(5)(A) of the MMPA. On July 26, 2007, NMFS deemed the Navy's request adequate and complete. After the application was reviewed by NMFS, a Notice of Receipt of Application was published in the Federal Register. Publication of the Notice of Receipt of Application initiated the 30-day public comment period, during which anyone could obtain a copy of the application by contacting NMFS. NMFS, after considering public comments, issued the MMPA Final Rule on January 5, 2009 (74 Fed. Reg. 1456).

## **2. Endangered Species Act**

**a. NMFS:** As part of the environmental compliance documentation for the Final EIS/OEIS, and as an MMPA permit applicant, the Navy entered into early consultation procedures with NMFS regarding the potential effects on ESA-listed species from the conduct of the activities outlined in the Final EIS/OEIS. In accordance with 50 CFR § 402.11, after reviewing the current status of the endangered blue whale, fin whale, humpback whale, sei whale, sperm whale, Hawaiian monk seal, green sea turtle, leatherback sea turtle, loggerhead sea turtle, and Pacific ridley sea turtle, the environmental baseline for the action area, the effects of the proposed research program, and the cumulative effects, prior to the issuance of this ROD, NMFS issued a Preliminary Biological Opinion on June 26, 2008, concluding that the Navy's proposal to conduct major training exercises, unit-level and intermediate-level training activities, and RDT&E activities in the HRC each year for a five-year period beginning in January, 2009, are likely to adversely affect but are not likely to jeopardize the continued existence of these



threatened and endangered species under NMFS's jurisdiction. Critical habitat for listed species that has been designated for green, hawksbill, and leatherback sea turtles, and other listed species is outside of the area of the proposed activities and would not be affected by those activities. The ROD was supported by the preliminary Biological Opinion for the HRC. Subsequent to the June 26, 2008, issuance of the ROD, NMFS issued a programmatic Biological Opinion on December 9, 2008, and an annual Biological Opinion and associated Incidental Take Statement on January 8, 2009, for the HRC that covers all training and RDT&E activities as analyzed in the Final EIS/OEIS, the Navy's testing and training with MFA and HFA sonar and in-water explosives on the HRC."

**CONCLUSIONS:** After carefully considering the information associated with the above revisions, as well as the factors, analysis, and information supporting the ROD, I affirm my earlier decision that the Preferred Alternative best meets the requirements for the Navy training and DoD's or other federal agencies' RDT&E activities. The Preferred Alternative would best avoid increases in potential effects to marine mammals above baseline levels of MFA and HFA sonar hours associated with ASW training in the HRC, while still allowing the Navy and other federal agencies to meet future non-ASW training and RDT&E mission objectives. In addition to the specific mitigation measures identified in these revisions to the ROD, the Department of Navy will continue to review its operational procedures and coordinate with other federal, state, and local entities as necessary to determine if any additional mitigation measures are necessary, feasible and practicable.

2-26-09

Date



BJ Penn

Assistant Secretary  
of the Navy  
(Installations and Environment)