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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

NATURAL RESOURCES DEFENSE
COUNCIL, et al.,

Plaintiffs,

v.

PENNY PRITZKER, et al.,

Defendants.

No. C -12-05380 EDL

**ORDER GRANTING IN PART AND
DENYING IN PART PLAINTIFFS'
MOTION FOR SUMMARY JUDGMENT
AND GRANTING IN PART AND
DENYING IN PART DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT**

Plaintiffs, various environmental organizations and concerned individuals, seek injunctive relief against federal officials to limit the United States Navy's peacetime use of a low frequency sonar system for training, testing and routine operations.¹ This technology, Surveillance Towed Array Sensor System ("SURTASS") Low Frequency Active Sonar ("LFA"), sends out intense sonar pulses at low frequencies that travel hundreds of miles in order to timely detect increasingly quiet enemy submarines. The proposed action in the Final Supplemental Environmental Impact Statement ("SEIS") is the Navy's employment of up to four SURTASS LFA sonar systems in the ocean. Based on current operational requirements, routine training, testing and military operations using these sonar systems could occur in the Pacific, Atlantic, and Indian Oceans, as well as the Mediterranean Sea. See SEIS ES-6.

Plaintiffs charge that the National Marine Fisheries Service ("NMFS") improperly

¹ Plaintiffs are Natural Resources Defense Council, Inc.; The Humane Society of the United States; Cetacean Society International; League for Coastal Protection; Ocean Futures Society; Jean-Michel Cousteau; and Michael Stocker. Defendants are Penny Pritzker, Secretary of the United States Department of Commerce; the National Marine Fisheries Service ("NMFS"); the Department of the Navy; Sam Rauch, Acting Assistant Administrator for Fisheries of NMFS; Jane Lubchenco, Administrator of the National Oceanic and Atmospheric Administration ("NOAA"), Ray Mabus, Secretary of the Navy, and Admiral Jonathan Greenert, Chief of Naval Operations.

1 approved use of SURTASS LFA in many of the world's oceans in violation of the Marine Mammal
2 Protection Act ("MMPA"), 16 U.S.C. §§ 1361-1421, the Endangered Species Act ("ESA"), 16
3 U.S.C. §§ 1531-1544, and the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-
4 4370. Plaintiffs claim that these violations will cause irreparable injury by harassing, injuring and
5 killing marine mammals with sensitive hearing and other sea creatures, many of them rare and
6 endangered, including whales, dolphins, seals, sea turtles and salmon. Defendants counter that they
7 have fully complied with the applicable laws. Defendants argue further that enjoining the peacetime
8 use of LFA sonar would harm national security because training and testing are necessary for
9 military readiness, even though they would still be free to use it during wartime or periods of
10 heightened threat.

11 This lawsuit, the third regarding the impact of SURTASS LFA on marine mammals and
12 other sea life, challenges NMFS's Final Rule issued in August 2012 authorizing the Navy's use of
13 LFA sonar in the world's oceans for five years. See Taking and Importing Marine Mammals:
14 Taking Marine Mammals Incidental to U.S. Navy Operations of Surveillance Towed Array Sensor
15 System Low Frequency Active Sonar, 77 Fed. Reg. 50,290 (Aug. 20, 2012). Plaintiffs allege that
16 the 2012 Final Rule fails to ensure adequate protections for marine life and that Defendants have
17 violated their obligations under the MMPA, the NEPA and the ESA to "engage in an informed,
18 reasoned analysis of the LFA's effects on marine life and the best means of mitigating those harmful
19 effects." Mot. at 2.

20 Before the Court are the parties' cross-motions for summary judgment. For the reasons
21 stated in this Order, Plaintiffs' Motion for Summary Judgment is granted in part and denied in part
22 and Defendants' Motion for Summary Judgment is granted in part and denied in part.

23 **Factual Background**

24 The Navy developed SURTASS LFA to improve its ability to detect quiet foreign
25 submarines. See SEIS (NAV10686-11785) 1-2, ES-5 to ES-10, 2-1 to 2-5.² The effectiveness of
26 conventional submarine tracking technology in littoral areas, where future naval conflicts are most
27

28 ² The Navy's administrative record is designated as "NAV____." Documents in the NMFS
administrative record are cited as "AR____."

1 likely to occur, is degraded by high underwater background noise and difficult underwater acoustic
2 propagation conditions. See SEIS 1-11. In these areas, naval forces may only have minutes to
3 respond to hostile submarines. See NAV19928. To provide the reaction time needed to respond to
4 the increased submarine threat and meet its long-range detection needs, the Navy investigated the
5 use of a broad spectrum of acoustic and non-acoustic technologies, and LFA was the only system
6 capable of providing reliable long range detection. See SEIS 1-5, ES-4 to ES-5 (“To meet this
7 long-range submarine detection need, the U.S. Navy has investigated the use of a broad spectrum of
8 acoustic and non-acoustic technologies. These are discussed in Subchapter 1.1.4. Of the
9 technologies evaluated, LFA sonar is the only system capable of meeting the U.S. Navy's long-range
10 ASW detection needs in a variety of weather conditions during the day and night. SURTASS LFA
11 sonar is providing a quantifiable improvement in the Navy's undersea detection capabilities and
12 therefore markedly improving the survivability of U.S. Naval forces in hostile ASW scenarios.”). A
13 Navy ship that employs LFA tows an underwater array of up to eighteen loudspeakers to generate
14 low frequency sound waves that travel hundreds of miles in all directions underwater. See SEIS ES-
15 7 to ES-8.

16 To prepare for all potential threats, the Navy must maintain anti-submarine warfare
17 capabilities through continual training and operations in open-ocean and littoral environments. See
18 SEIS 1-4. Without the SURTASS LFA capability, “the reaction times to enemy submarine threats
19 would be greatly reduced and the effectiveness of close-in, tactical systems to neutralize threats
20 would be seriously, if not fatally, compromised.” SEIS 4-107, ES-23.

21 Marine mammals rely on sound for communicating, navigating, locating and capturing
22 prey, and avoiding predators. See NAV24490. There are many sources of underwater sound,
23 including shipping noise, sonar and other oceanographic communication and research, and natural
24 phenomena such as earthquakes. See NAV17915. Man-made sound can sometimes disturb marine
25 mammals. See id. Potential effects on marine mammals from SURTASS LFA sonar include
26 permanent or temporary hearing loss, behavioral disruption, impaired communication, and non-
27 auditory injuries. See SEIS ES-15. Low-frequency sources at low exposure levels and long
28 distances can silence marine mammals, such as blue whales, significantly alter their calls, or drive

1 them from their habitat. See NAV19305-09 (study of seismic survey that altered blue whale
2 communication).

3 In 1997-1998, the Navy conducted a Low Frequency Sound Scientific Research Program
4 (“LFS SRP” or “SRP”) regarding the immediately observable impacts of LFA technology on large
5 whales. According to Plaintiffs, the SRP was limited in duration, scope and exposure level, and
6 there have been new tagging technologies that have recorded the impacts on baleen whale foraging
7 that the SRP did not detect. See Calambokidis Decl. ¶¶ 4-10. Further, although Plaintiffs point as
8 an example to a recent study from January 2012 that found that humpback whale singing was
9 silenced in the Stellwagen Bank National Marine Sanctuary by an intermittent, low-frequency sensor
10 located 200 km away, this study was published after the Final Rule was published. See AR D27-32.
11 A study from 2000 demonstrated the LFA system's ability to interfere with whale communication
12 and breeding behavior, even at moderate intensities. See NAV28273-76. In addition, harbor
13 porpoises and beaked whales are sensitive to man-made noise. See Weilgart Decl. ¶¶ 13, 16; AR
14 F14510; AR F15537-40. Observed effects of low-frequency sound sources include temporary
15 deafness, widespread habitat displacement, and startle responses in harbor porpoises. See SEIS 4-
16 33; NAV27221-31. Sea turtles have exhibited avoidance, increased swimming and erratic behavior
17 in response to acoustic disturbances. See SEIS 3-29, 4-25 to 4-26. Fish have also proven sensitive
18 to high-intensity sound, with demonstrated effects ranging from widespread displacement to
19 temporary hearing loss. See NAV22556-59; SEIS ES-13, 4-5 to 4-8, 4-14. However, although
20 SURTASS LFA has the potential to disturb, or if not mitigated, injure, marine mammals (see AR
21 347), the Navy has completed over 150 SURTASS LFA missions over nearly eleven years and has
22 not detected any resulting death or injury of any marine mammals. See SEIS 2-10, 4-42, 4-99,
23 4-100. Further, non-injurious, short-term behavioral disturbances observed by the system have
24 consistently been below authorized levels. See AR C51, E68, 69, 71, G848; SEIS ES-20, ES-25-ES-
25 26, 1-20, 2-15, 4-110, 7-24 to 7-25, 7-49, 7-54.

26 **The 2012 Final Rule**

27 This lawsuit challenges the five-year Final Rule published on August 20, 2012 governing
28 the Navy's taking of marine mammals from LFA exercises for the following five years. See Taking

1 and Importing Marine Mammals: Taking Marine Mammals Incidental to U.S. Navy Operations of
2 Surveillance Towed Array Sensor System Low Frequency Active Sonar, 77 Fed. Reg. 50290 (Aug.
3 20, 2012). The 2012 Final Rule allows for the issuance of annual Letters of Authorization ("LOAs")
4 for up to four surveillance vessels. Id. at 50292.

5 The Navy must conduct operations so that no more than 12% of any marine mammal
6 species or stock will be taken annually by Level B harassment, regardless of the number of vessels
7 operating. AR E48, 54; 16 U.S.C. § 1362(18)(D) ("The term "Level B harassment" means . . . in the
8 case of a military readiness activity . . . described in subparagraph (B), harassment described in
9 subparagraph (B)(ii)."); 16 U.S.C. § 1362(18)(B)(ii) ("(B) In the case of a military readiness activity
10 (as defined in section 315(f) of Public Law 107-314; 16 U.S.C. 703 note) . . . the term "harassment"
11 means-- . . . (ii) any act that disturbs or is likely to disturb a marine mammal or marine mammal
12 stock in the wild by causing disruption of natural behavioral patterns, including, but not limited to,
13 migration, surfacing, nursing, breeding, feeding, or sheltering, to a point where such behavioral
14 patterns are abandoned or significantly altered."). NMFS found that the total estimated take would
15 have no more than a negligible impact on marine mammal species or stocks, see AR C50-58, E48-
16 49, 69-71, and that the required mitigation complied with the "least practicable adverse impact"
17 standard, see AR E52, 72. The 2012 Final Rule permits LFA use in about 70-75% of the world's
18 oceans. See 77 Fed. Reg. at 50303. Defendants point to the following as mitigation measures
19 contained in the 2012 Final Rule: (1) designation of Offshore Biologically Important Areas
20 ("OBIA's"); (2) use of a mitigation zone around the LFA source; (3) maintenance of a 12 nautical
21 mile ("nm") coastal exclusion zone; and (4) issuance of Letters of Authorization.

22 **1. Designation of Offshore Biologically Important Areas**

23 Defendants argue that in the 2012 Final Rule, NMFS and the Navy developed a new
24 designation process that addressed the Court's concerns as stated in the Court's orders in prior
25 litigation in 2008. In the 2007 Final Rule, "an area could be designated as an OBIA only if it met a
26 conjunctive test of being an area where: (a) marine mammals congregate in high densities, and (b)
27 for a biologically important purpose." See SEIS 4-71. Under the new designation process, which
28 was disclosed to the public in the August 2011 draft SEIS and was incorporated into the proposed

1 MMPA rule published in January 2012, a specific area falling outside of the 12 nm coastal standoff
2 zone and other non-operational areas is eligible for OBIA designation if the best scientific evidence
3 indicates that the area contains: (1) high densities of marine mammals; (2) known or defined
4 breeding/calving grounds, foraging grounds or migration routes; or (3) small distinct populations of
5 marine mammals with limited distributions. See AR E56; SEIS at 4-71 to 4-73, D-3 to D-4.

6 NMFS used the new screening criteria to review 403 marine protected areas (“MPAs”) in
7 potential LFA operating areas worldwide. See AR E56; SEIS at 4-73. Of the 403 MPAs, NMFS
8 found that approximately 340 were ineligible because they either fell entirely within the 12 nm
9 coastal standoff zone or they partially extended beyond the 12 nm zone, but there were no data
10 indicating that the area outside of the 12 nm zone was biologically important. See AR E56;
11 NAV5878-5940. NMFS reviewed the remaining areas under its screening criteria and identified a
12 preliminary list of twenty-seven OBIA candidates for further review. See AR E56; SEIS 4-73.

13 NMFS convened a panel of eight subject matter experts (“SMEs”) with marine mammal
14 expertise in the Atlantic and Pacific Oceans, the Mediterranean Sea, the Indian Ocean/Southeast
15 Asia, and Offshore Africa/South America. See SEIS 4-71. Five of the eight SMEs were senior
16 NMFS scientists. See SEIS D-100. The SMEs provided analysis that resulted in a total of seventy-
17 three OBIA candidates for further review. See AR E56; SEIS 4-71, 4-73 to 4-79, D-2 to D-6, D-
18 100. NMFS assigned each candidate a score of zero (lowest) to four (highest) based on the quality
19 of the supporting data. See AR E56 to E57; SEIS 4-72, 4-74, D-104. Areas ranked two or higher
20 were eligible for further consideration, resulting in a revised list of forty-five OBIA candidates. See
21 AR E56-57; SEIS at 4-74, D-101 to D-109. Potential OBIA ranking below two lacked sufficient
22 information for evaluation. See AR E56-57.

23 NMFS and the Navy performed an additional screening of the forty-five nominees to
24 eliminate those that qualified solely for species in the mid-to-high frequency hearing groups, as
25 those species have lower sensitivity to the LFA sonar signal, and to conduct a practicability
26 assessment. See AR E57, C49; SEIS 4-74. This additional screening reduced the number of OBIA
27 nominees to twenty-two, one of which was then eliminated due to practicability considerations. See
28 AR C49-50; SEIS 4-80.

1 Plaintiffs argue that the screening for hearing sensitivity resulted in elimination of OBIA's
2 that were proposed for marine mammals other than baleen whales, and in particular, eliminated
3 twenty OBIA's that had been recommended for more than twenty species, as well as the Gully, an
4 OBIA designated in the 2007 rule to protect its small population of bottlenose whales. See SEIS 4-
5 84 to 4-93. NMFS eventually concluded that OBIA's were appropriate for endangered sperm whales
6 even though they are not a baleen species, but stated that no candidate OBIA had been identified.
7 See 77 Fed. Reg. at 50309.

8 After evaluating the public comments and new information, NMFS found that one other
9 area qualified for OBIA designation, resulting in twenty-two OBIA's included in the 2012 Final
10 Rule, fifteen of which are located outside of U.S. waters. See AR E57, 59, 74-77. NMFS identified
11 several other areas that did not qualify as OBIA's, but that warranted further consideration under the
12 adaptive management provisions of the 2012 Final Rule. See AR E51, 57, 59, 61.

13 Plaintiffs point out that, beginning in 2009, four SMEs, all senior NMFS scientists, raised
14 concerns to the Office of Protected Resources ("OPR") about the treatment of ocean regions that
15 were data-poor, that is, for which "data on cetacean distribution or population density are limited or
16 lacking entirely." AR F2189. The OPR is the agency in charge of issuing the Final Rule. In April
17 2010, the four NMFS scientists submitted a White Paper to OPR in which they presented three
18 specific recommendations for designating OBIA's in data-poor regions of the oceans. See AR
19 F2189-93. As the White Paper explained: "When relevant cetacean data are lacking for the
20 appropriate region or spatial scale, it is not acceptable to proceed in the decision making process as
21 if the 'no data' scenario were equivalent to 'zero population density' or 'no biological importance.'" AR
22 F2189. The SMEs also submitted data and information regarding seventy-three proposed
23 OBIA's to NMFS. See SEIS 4-74 & Table 4-25. Many of these were excluded by the criteria for
24 designation of OBIA's used in the process described above.

25 Plaintiffs also note that the Navy had identified several areas of biological importance to
26 sea turtles and fish, including waters near olive ridley sea turtle nesting sites, designated critical
27 habitat for green sturgeon, and restricted habitat for the totoaba, an endangered fish. See AR
28 NAV1715-17, 1723-24. The Navy did not establish OBIA's in those areas. See SEIS 4-71. The

1 Navy also declined requests from NOAA’s Office of National Marine Sanctuaries to extend its
2 seasonal avoidance of several sanctuaries into year-round OBIA coverage for the protection of
3 marine and non-marine mammals, and to enlarge its minimal buffer zone around sanctuary
4 boundaries. See AR F9867-72; F18191-93; F19818-23, F24171-75.

5 **2. Mitigation zone**

6 The 2012 Final Rule requires the Navy to establish a mitigation zone around the LFA
7 source that extends to the point at which the sound level attenuates to 180 decibels (“dB”) (roughly
8 one km from the LFA source), and an additional one km buffer around the mitigation zone, which
9 extends to the point at which the sound level from the LFA sonar source attenuates to approximately
10 175 dB. See AR E58, 74. If a marine mammal is detected within or about to enter the two km
11 mitigation zone, the Navy must delay or suspend LFA sonar operations. See id. The 180 dB
12 threshold is a conservative estimate of the sound level above which an exposed marine mammal
13 could experience physical injury. See AR C51, 58; SEIS ES-12, 1-19, 1-21, 4-43, C3 to C4. Only
14 exposure to sound at levels greater than 180 dB is expected to cause actual injury. See id. Effects
15 from exposures below 180 dB are limited to, at most, short-term, non-injurious behavioral
16 disturbances potentially constituting MMPA Level B behavioral harassment. See AR C51, 57-58.

17 To ensure that marine mammals are detected before they enter the mitigation zone, the
18 2012 Final Rule prescribes visual monitoring, passive acoustic monitoring and active acoustic
19 monitoring using the High Frequency Marine Mammal Monitoring (HF/M3) sonar system, which
20 provides 24-hour, all-weather monitoring for marine mammals within the mitigation zone. With
21 multiple pings, the HF/M3 system has high rates of effectiveness in detecting marine mammals of
22 any size. See NAV19975-76 (2001 FEIS stating that “Analysis and testing of the HF/M3 sonar
23 operating capabilities indicates that this system substantially increases the probability of detecting
24 marine mammals within the LFA mitigation zone, and provides an excellent monitoring capability
25 (particularly for medium-large marine mammals) beyond the LFA mitigation zone, out to 2 to 2.5
26 km.”), 19979-80 (2001 FEIS stating that with multiple pings, the probability of detection for
27 dolphins can approach 100 percent, and the probability of detecting a stationary whale can reach 95
28 percent); AR C57 (“Past results of the HF/M3 sonar system tests provide confirmation that the

1 system has a demonstrated probability of single-ping detection of 95 percent or greater for single
2 marine mammals, 10m in length or larger, and a probability approaching 100 percent for multiple
3 pings for any sized marine mammal.”), E64 (“The HF/M3 active sonar system’s effective detection
4 probability for marine mammals within the SURTASS LFA sonar mitigation zone approaches 100
5 percent, based on multiple pings.”), 71 (“Past results of the HF/M3 sonar system tests provide
6 confirmation that the system has a demonstrated probability of single-ping detection of 95 percent or
7 greater for single marine mammals, 10 m (32.8 ft) in length or larger, and a probability approaching
8 100 percent for multiple pings for any sized marine mammal.”). The HF/M3 system operates
9 continuously, transmitting multiple pings, while the LFA sonar system is deployed. See
10 NAV19975-76, 19979-80.

11 **3. 12 nautical mile coastal exclusion zone**

12 The 2012 Final Rule prohibits the Navy from allowing the sound field created by the
13 SURTASS LFA system to exceed 180 dB within 12 nautical miles (“nm”) of any coastline,
14 including offshore islands, and within a 1 km buffer around any OBIA during the period specified in
15 the rule. See AR E74-77.

16 **4. Letters of authorization process**

17 The 2012 Final Rule requires that the Navy obtain an annual LOA from NMFS for each
18 vessel that plans to conduct routine training, testing, and military operations involving the use of
19 SURTASS LFA. AR E47. Each LOA must specify, among other things, “authorized geographic
20 areas for incidental takings.” AR E60 (“Based on its annual projected operational needs, the Navy
21 will identify the particular geographic areas in which it intends to operate its four SURTASS LFA
22 sonar vessels.”), 69 (“Because it is infeasible to model enough representative sites to cover all
23 potential SURTASS LFA operating areas, the Navy’s application presented 19 modeled sites as
24 examples to provide take estimates for potential operating areas based on the current political
25 climate.”), 78 (“(b) Each Letter of Authorization will set forth: . . . (2) Authorized geographic areas
26 for incidental takings; . . .”). The 2012 Final Rule includes adaptive management provisions that
27 allow NMFS and the Navy to specify additional OBIA’s or other forms of mitigation in annual
28 LOAs, if appropriate, based on new information. See AR E79. The Navy’s LOA applications are

1 posted on NMFS's website, and NMFS must publish notice of issuance of any LOA in the Federal
2 Register. See 50 C.F.R. § 216.106(d). There are four LOAs that expired in August 2013 covering
3 eleven mission areas in the central and western North Pacific Ocean. AR I385-86, 411-12.
4 Additional LOAs were issued in August 2013.

5 **Standard of review**

6 The Court reviews challenges under the MMPA, ESA, NEPA, and APA to ensure that the
7 agency has not acted in a manner that is “arbitrary, capricious, an abuse of discretion, or otherwise
8 not in accordance with law.” Okanogan Highlands Alliance v. Williams, 236 F.3d 468, 471 (9th Cir.
9 2000); 5 U.S.C. § 706. “Normally, an agency rule would be arbitrary and capricious if the agency
10 has relied on factors which Congress has not intended it to consider, entirely failed to consider an
11 important aspect of the problem, offered an explanation for its decision that runs counter to the
12 evidence before the agency, or is so implausible that it could not be ascribed to a difference in view
13 or the product of agency expertise.” Motor Vehicle Manufacturers Association of the United States,
14 Inc. v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 43 (1983). The Court’s role
15 is to:

16 consider whether the [agency’s] decision was based on a consideration of the
17 relevant factors and whether there has been a clear error of judgment. Although
18 this inquiry into the facts is to be searching and careful, the ultimate standard of
19 review is a narrow one. The court is not empowered to substitute its judgment for
20 that of the agency. The final inquiry is whether the Secretary’s action followed
21 the necessary procedural requirements.

22 Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971). “Although our inquiry must
23 be thorough, the standard of review is highly deferential; the agency’s decision is ‘entitled to a
24 presumption of regularity,’” and a court may not “substitute [its] judgment for that of the agency.”
25 San Luis & Delta-Mendota Water Authority v. Jewell, 2014 WL 975130, at *9, __ F.3d __ (9th Cir.
26 Mar. 13, 2014) (quoting Citizens to Preserve Overton, 401 U.S. at 415-16). Moreover, “[w]hen
27 specialists express conflicting views, an agency must have discretion to rely on the reasonable
28 opinions of its own qualified experts even if, as an original matter, a court might find contrary views
more persuasive.” Marsh v. Oregon Natural Resources Council, 490 U.S. 360, 378 (1989).

Where agency action is challenged on the record as arbitrary, capricious, and in violation of the procedures required by law, summary disposition is appropriate. Summary judgment is also appropriate in cases involving the issue of whether an

1 EIS adequately explains environmental consequences of a proposed agency
2 action.

3 Resources Ltd., Inc. v. Robertson, 789 F. Supp. 1529, 1534 (D. Mont. 1991) (citing Northern
4 Spotted Owl v. Hodel, 716 F. Supp. 479 (W.D.Wash.1988) and Methow Valley Citizens Council v.
5 Regional Forester, 833 F.2d 810, 815 (9th Cir.1987)).

6 Discussion

7 I. Marine Mammal Protection Act

8 The Marine Mammal Protection Act (“MMPA”) was enacted in 1972 to prevent the
9 extinction or depletion of marine mammal stocks as a result of man’s activities. See 16 U.S.C.
10 § 1361(1). “[S]uch species and population stocks should not be permitted to diminish beyond the
11 point at which they cease to be a significant functioning element in the ecosystem of which they are
12 a part, and, consistent with this major objective, they should not be permitted to diminish below their
13 optimum sustainable population.” 16 U.S.C. § 1362(2). The MMPA generally prohibits the taking
14 of marine mammals, with certain statutory exceptions. See 16 U.S.C. § 1371(a)(3).

15 “Take” is defined as “to harass, hunt, capture, collect, or kill, or attempt to harass, hunt,
16 capture, collect or kill, any marine mammal.” 50 C.F.R. § 216.3; 16 U.S.C. § 1362(13). The
17 definition of “take” includes any negligent or intentional act which results in disturbing or molesting
18 a marine mammal. 50 C.F.R. § 216.3.

19 The MMPA generally defines “harassment” as “any act of pursuit, torment or annoyance”
20 that:

21 (i) has the potential to injure a marine mammal or marine mammal stock in the
wild; or

22 (ii) has the potential to disturb a marine mammal or marine mammal stock
23 in the wild by causing disruption of behavioral patterns, including but not
limited to, migration, breathing, nursing, breeding, feeding, or sheltering.

24 16 U.S.C. § 1362(18)(A). In 2003, the MMPA was amended to change the definition of
25 “harassment” for purposes of military readiness activities such as those at issue here:

26 (B) In the case of a military readiness activity . . . the term “harassment” means

27 (i) any act that injures or has the *significant* potential to injure a marine mammal or
28 marine mammal stock in the wild; or

1 (ii) any act that disturbs or is likely to disturb a marine mammal or marine mammal
2 stock in the wild by causing disruption of natural behavioral patterns, including, but
3 not limited to, migration, surfacing, nursing, breeding, feeding, or sheltering, *to a*
4 *point where such behavioral patterns are abandoned or significantly altered.*

4 16 U.S.C. § 1362(18)(B) (emphasis added).

5 In general, the MMPA permits citizens of the United States who engage in a specified
6 activity other than commercial fishing within a specified geographical region to petition the
7 Secretary to authorize the incidental, but not intentional, taking of small numbers of marine
8 mammals within that region. See 16 U.S.C. § 1371(a)(5)(A); 16 U.S.C. § 1362(12)(A). Such
9 authorization is limited to a period of not more than five consecutive years. See 16 U.S.C. §
10 1371(a)(5)(A). With respect to military readiness activities, the Secretary shall authorize, for a
11 period of not more than five years, the incidental, but not intentional, taking by any means, including
12 harassment, of marine mammals if the Secretary:

13 (I) finds that the total of such taking during each five-year (or less) period concerned
14 will have a negligible impact on such species or stock and will not have an
15 unmitigable adverse impact on the availability of such species or stock for taking for
16 subsistence uses pursuant to subsection (b) of this section or section 1379(f) of this
17 title . . . and

16 (II) prescribes regulations setting forth--

17 (aa) permissible methods of taking pursuant to such activity, and other means of
18 effecting the least practicable adverse impact on such species or stock and its habitat,
19 paying particular attention to rookeries, mating grounds, and areas of similar
20 significance, and on the availability of such species or stock for subsistence uses; and
21 (bb) requirements pertaining to the monitoring and reporting of such taking.

20 (ii) For a military readiness activity (as defined in section 315(f) of Public Law
21 107-314; 16 U.S.C. 703 note), a determination of “least practicable adverse impact on
22 such species or stock” under clause (i)(II)(aa) shall include consideration of
23 personnel safety, practicality of implementation, and impact on the effectiveness of
24 the military readiness activity. Before making the required determination, the
25 Secretary shall consult with the Department of Defense regarding personnel safety,
26 practicality of implementation, and impact on the effectiveness of the military
27 readiness activity.

25 16 U.S.C. § 1371(a)(5)(A)(i). Thus, the determination of means for achieving the “least practicable
26 adverse impact” from military readiness activities includes consideration of “personnel safety,
27 practicality of implementation, and impact on the effectiveness of the military readiness activity” in
28 consultation with the Department of Defense. See 16 U.S.C. § 1371(a)(5)(A)(ii), (a)(5)(D)(vi).

1 At the hearing, Defendants argued that because the phrase “on such species or stock” is
2 identical in both the negligible impact and the least practicable adverse impact subsections, 16
3 U.S.C. § 1371(a)(5)(A)(i)(I) and (II)(aa), these subsections should be similarly interpreted. There is
4 no dispute that the subsection on negligible impact, 16 U.S.C. § 1371(a)(5)(A)(I), concerns the
5 impact on the population as a whole. Defendants argue that the same language in the subsection on
6 least practicable impact, 16 U.S.C. § 1371(a)(5)(A)(II)(aa), also addresses population level impacts.

7
8 Plaintiffs counter that Defendants’ interpretation would effectively eliminate the mitigation
9 requirement: if the agency finds a negligible impact, the agency is obligated to identify mitigation
10 measures under the least practicable adverse impact prong, but if the least practicable impact
11 standard is the same as the negligible impact standard, then there is no need for mitigation.
12 However, the two standards do not have to be identical just because they both address population
13 level impacts. Even if the impact on the population is negligible under 16 U.S.C. §
14 1371(a)(5)(A)(i)(I), the agency could still impose mitigation that would further reduce the impact on
15 the population to the least practicable under 16 U.S.C. § 1371(a)(5)(A)(i)(II)(aa). Further, the
16 legislative history indicates that Congress envisioned a situation in which the mitigation measures
17 would render the impact negligible when it otherwise would not be. See 132 Cong. Rec. S16292-01,
18 1986 WL 788463 (“It is intended that if the Secretary finds that mitigating measures would render
19 the impact of a proposed activity negligible when it would not otherwise satisfy that requirement,
20 the Secretary shall require such measures by regulation under subparagraph (5)(A)(ii) as a condition
21 of the authorization for any such incidental taking.”).

22 Plaintiffs point out that the legislative history of the MMPA shows that Congress sought to
23 provide the maximum protection for marine mammals. See also Anderson v. Evans, 371 F.3d 475,
24 497 (9th Cir. 2004) (noting conservation purpose of MMPA); 16 U.S.C. § 1361(2) (the major
25 objective of the MMPA is to ensure that marine mammals continue to be “significant functioning
26 element[s] in the ecosystem,” . . . and “[marine mammals] should not be permitted to diminish below
27 their optimum sustainable population.”). The Anderson court stated: “One need only review
28 Congress's carefully selected language to realize that Congress's concern was not merely with

1 survival of marine mammals, though that is of inestimable importance, but more broadly with
2 ensuring that these mammals maintain an ‘optimum sustainable population’ and remain ‘significant
3 functioning elements in the ecosystem.’” 16 U.S.C. § 1361. This congressional intent, however, is
4 consistent with a focus on population level impacts. Moreover, the findings and policies of the
5 MMPA do not direct agencies to address impacts on individual mammals in isolation, as opposed to
6 on species or stock. See 16 U.S.C. § 1361 (“The Congress finds that--(1) certain species and
7 population stocks of marine mammals are, or may be, in danger of extinction or depletion as a result
8 of man's activities; (2) such species and population stocks should not be permitted to diminish
9 beyond the point at which they cease to be a significant functioning element in the ecosystem of
10 which they are a part, and, consistent with this major objective, they should not be permitted to
11 diminish below their optimum sustainable population. . . ; (3) there is inadequate knowledge of the
12 ecology and population dynamics of such marine mammals and of the factors which bear upon their
13 ability to reproduce themselves successfully; (4) negotiations should be undertaken immediately to
14 encourage the development of international arrangements for research on, and conservation of, all
15 marine mammals; . . .”). Therefore, the Court will consider whether there is a negligible impact at
16 the population level and whether the regulations include measures to achieve the least practicable
17 adverse impact on the species and stocks as a whole. Of course, in small populations, harm to a few
18 or even one member can harm the population as a whole.

19 Plaintiffs argue that NMFS’s issuance of the Final Rule violated the MMPA in two ways:
20 (1) by arbitrarily and capriciously adopting mitigation and monitoring measures that fail to ensure
21 that SURTASS LFA has the "least practicable adverse impact" on affected marine mammals; and (2)
22 by failing to ensure that LFA's impacts on marine mammal species and stocks will be negligible.

23 **1. Least Practicable Adverse Impact**

24 As set forth above, the MMPA requires that when an incidental take permit is issued,
25 NMFS must prescribe “permissible methods of taking . . . and other means of effecting the least
26 practicable adverse impact” on marine mammals, and must set “requirements pertaining to the
27 monitoring and reporting of such taking.” 16 U.S.C. § 1371(a)(5)(A)(i)(II)(aa), (bb). Regulations
28 must be based on the “best scientific evidence available.” 50 C.F.R. §§ 216.102(a); 216.105(c)

1 (“The taking of small numbers of marine mammals under section 101(a)(5) (A) through (D) of the
2 Marine Mammal Protection Act may be allowed only if the National Marine Fisheries Service: (a)
3 Finds, based on the best scientific evidence available, that the total taking by the specified activity
4 during the specified time period will have a negligible impact on species or stock of marine
5 mammal(s) and will not have an unmitigable adverse impact on the availability of those species or
6 stocks of marine mammals intended for subsistence uses; . . .”).

7 Defendants argue that the requirement that the evidence be “available” means that NMFS
8 has “no obligation to conduct independent studies,” but may not “disregard[] available scientific
9 evidence that is in some way better than the evidence [NMFS] relies on.” Southwest Center for
10 Biological Diversity v. Babbitt, 215 F.3d 58, 60 (D.C. Cir. 2000). The requirement to adopt
11 measures to ensure the “least practicable adverse impact” on marine mammals is “a stringent
12 standard.” NRDC v. Evans, 279 F. Supp. 2d 1129, 1159 (N.D. Cal. 2003). “Although the agency
13 has some discretion to choose among possible mitigation measures, it cannot exercise that discretion
14 to vitiate this stringent standard.” Id. Plaintiffs argue that Defendants arbitrarily and capriciously
15 failed to ensure that LFA had the least practicable adverse impact on marine mammals because the
16 identification of OBIA was flawed and because the 12 nm coastal exclusion zone is too narrow.

17 **A. Identification of OBIA areas**

18 **i. Data-poor regions**

19 There is no dispute that there are some regions of the ocean for which there is little or no
20 data on the distribution and behavior of marine mammals. See 77 Fed. Reg. at 50301 (“We
21 recognize that baseline data on the distribution and behavior of marine animals are limited for
22 certain areas of the world’s oceans.”); see also SEIS D-14 (NMFS stated that some OBIA
23 recommended by the SMEs will have less information available than those preliminarily identified
24 by NMFS, and therefore, the experts should rely on their professional opinions as well as other
25 sources of information to support their recommendations). Plaintiffs argue that data-poor areas
26 implicate the vast majority of the Navy’s operating area, and that ensuring the least practicable
27 adverse impact in those areas is undoubtedly “an important aspect of the problem” that Defendants
28 arbitrarily and capriciously failed to adequately consider. Motor Vehicles Mfg. Ass’n of Am. v.

1 State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) ("Normally, an agency rule would be
2 arbitrary and capricious if the agency has relied on factors which Congress has not intended it to
3 consider, entirely failed to consider an important aspect of the problem, offered an explanation for
4 its decision that runs counter to the evidence before the agency, or is so implausible that it could not
5 be ascribed to a difference in view or the product of agency expertise."). Plaintiffs argue that
6 Defendants' criteria for identifying OBIA's ignores the problem of data-poor regions and runs afoul
7 of its own experts' opinions by demanding site-specific data that does not exist for most of the
8 world's oceans.

9 Plaintiffs' main argument is that Defendants arbitrarily disregarded the recommendations
10 of their own NMFS experts in the 2010 White Paper: Identifying Areas of Biological Importance to
11 Cetaceans in Data-Poor Regions. The White Paper stated that "management decisions affecting
12 such data-poor regions should not proceed as if cetacean population density were zero or as if those
13 areas were biologically unimportant." AR F2191, 2189. The White Paper concluded that "proven
14 ecological principles" suggest a precautionary approach that will protect three types of areas with
15 OBIA designation or other protections:

- 16 (1) continental shelf waters and waters 100km seaward of the continental slope;
- 17 (2) 100 km around all islands and seamounts that rise within 500 m of the surface;
18 and
- 19 (3) regions of high primary productivity, which are known to correspond to sperm
20 whale distribution.

21 AR F2192. These recommendations stemmed from "a precautionary approach" designed to
22 "minimiz[e] the chances of overlooking biologically important areas." AR F2190-91.

23 Defendants counter that the Final Rule did not arbitrarily or capriciously fail to address the
24 issue of data-poor regions raised in the White Paper. Defendants argue that rather than simply
25 making speculative assumptions about data-poor areas, they employed a multiple-step OBIA
26 designation process to identify key areas of biological importance to marine mammal low-frequency
27 hearing specialists and certain other species because of the presence of one or more of the following:
28 high densities of animals, known breeding/calving grounds, foraging grounds, migration routes, or
small distinct populations with limited distributions. See SEIS 7-34 ("Again, the primary reason for

1 establishing OBIA for SURTASS LFA sonar is to minimize impacts and adverse effects to marine
2 mammals and marine turtles in key areas outside of the 22 km (12 nmi) coastal restriction. . . . Thus,
3 in selecting areas where the Navy will and will not operate SURTASS LFA sonar, both agencies
4 must rely on what is known about marine mammal concentrations and attempt to avoid them,
5 continue to fill knowledge gaps through additional research, and recognize that, by necessity, NMFS
6 is regulating in a dynamic area of science.”); AR E54 (“We designated OBIA based on certain
7 criteria and the best available information we had for marine mammals to determine if any areas met
8 the criteria. In some cases, we designated an OBIA because a species listed under the Endangered
9 Species Act has designated critical habitat, breeds, calves, migrates, or forages in a particular
10 area.”), 56 (“We designate OBIA (based upon qualifying criteria) to protect marine mammals in
11 areas that are biologically important for them. For this process we used the best available data to
12 assess ocean areas greater than 22 km (14 mi; 12 nm) from any shoreline with: (1) High densities of
13 marine mammals; (2) known/defined breeding/calving grounds, foraging grounds, migration routes;
14 or (3) small, distinct populations of marine mammals with limited distributions.”), 58 (“For
15 scenarios in which cetacean distribution or density data are scarce or completely lacking, such as in
16 open ocean areas outside of the United States, our ability to quantitatively or qualitatively validate
17 cetacean-habitat model predictions may be limited or biased. In these situations, model validation
18 must rely on multiple sources of scientific knowledge (including, but not limited to: Personal
19 observations of distribution and density; known migration routes; ecosystem dynamics, such as
20 inter-specific competition; seasonality and environmental regime shifts; live strandings; range
21 expansions or contractions due to changes in population size; and historic whaling data) or
22 indigenous/local knowledge.”), 62 (“Until such time that more robust information becomes available
23 that supports the biological criteria (i.e., marine mammals present in high densities or an area on the
24 slope with known/defined breeding/calving grounds, foraging grounds, migration routes, or an area
25 with small, distinct populations of marine mammals with limited distributions) on the continental
26 slope of the northern Gulf of Mexico, we do not designate this area as an OBIA for SURTASS LFA
27 sonar operations.”).

28 NMFS found that areas containing high densities of animals, known breeding/calving

1 grounds, foraging grounds, migration routes, or small distinct populations with limited distributions
2 warranted special protection beyond that afforded by the monitoring and shutdown requirements and
3 other mitigation measures which applied in all areas, including in data-poor regions. See C51
4 (“NMFS believes that the shutdown in the LFA sonar mitigation and buffer zones, visual
5 monitoring, passive acoustic monitoring, active acoustic monitoring using HF/M3 sonar with ramp-
6 up procedures, and geographic restriction measures proposed will enable the Navy to: (1) Avoid
7 Level A harassment of marine mammals; (2) Minimize the numbers of marine mammals exposed to
8 SURTASS LFA sonar sound associated with TTS; and (3) Minimize the numbers taken specifically
9 during times of important behaviors, such as feeding, migrating, calving or breeding.”); AR E60-61
10 (“Recognizing that many areas throughout the world’s oceans currently have few data to support an
11 OBIA designation at this time, we and the Navy will continue to conduct literature reviews under the
12 adaptive management provision of this regulation.”).

13 Defendants argue that NMFS considered the White Paper recommendations for data-poor
14 regions, but properly chose a different approach. See League of Wilderness Defenders Blue
15 Mountains Biodiversity Project v. Allen, 615 F.3d 1122, 1131 (9th Cir. 2010) (“Our highest
16 deference is owed to the Forest Service's technical analyses and judgments within its area of
17 expertise, Lands Council, 537 F.3d at 993; nonetheless, our dissenting colleague would have us halt
18 the Forest Service's Project because he does not like the Forest Service's approach to solving the
19 problems addressed. We went en banc to foreclose precisely this type of second-guessing of the
20 Forest Service.”); cf. San Luis & Delta-Mendota Water Authority v. Jewell, 2014 WL 975130, at
21 *17, __ F.3d __ (9th Cir. Mar. 13, 2014) (A court’s “deference to agency determinations is at its
22 greatest when that agency is choosing between various scientific models . . .”). NMFS found that
23 the White Paper recommendations did not meet the criteria established for designating OBIA's,
24 explaining that there had to be “enough information for us to verify that [a specific area] met our
25 defining criteria, because in our view it is not appropriate to designate OBIA's without sufficient
26 scientific justification.” AR E62.

27 Plaintiffs contend that Defendants’ rationale for ignoring its experts’ recommendations for
28 data-poor regions is arbitrary and capricious. Plaintiffs argue that under NMFS’s rules, areas may

1 be designated as OBIA's on the basis of expert opinion, such as the White Paper, and that NMFS
2 erred in not designating OBIA's recommended by the White Paper scientists. AR F2188, 2194
3 (“NMFS’s criteria *include* the use of expert opinion. Based on expert opinion, we expect there to be
4 relatively high densities of cetaceans in all of the areas we have specifically identified or have
5 implicitly identified using general ecological principles.”) (emphasis in original); SEIS D-3 (“NMFS
6 anticipates that the Experts will use peer reviewed literature, technical reports, or his/her own
7 specific expertise and professional experience, along with other data sources to justify their
8 additions, modifications, or deletions to the list of preliminary OBIA Nominees.”).

9 In particular, Plaintiffs argue that Defendants arbitrarily failed to provide a reasonable
10 justification for choosing not to follow the advice in the White Paper, citing Western Watersheds
11 Project v. Kraayenbrink, 632 F.3d 472, 492-93 (9th Cir. 2011) (“Here, the BLM failed to address
12 concerns raised by its own experts, FWS, the EPA, and state agencies. For example, the BLM
13 offered no reasoned analysis whatsoever in support of its conclusion—which *is in direct conflict*
14 *with the conclusion of its own experts* and sister agency, FWS—that there will be no environmental
15 effect caused by both the across-the-board reduction in public involvement in management of
16 grazing on public lands and the elimination of public input into particular management decisions.”)
17 (emphasis added). The White Paper did not recommend specific OBIA's, however, but instead
18 provided guidelines for inferring the presence of areas of biological importance for cetaceans in
19 general. See AR F2191-92 (“For the data-poor scenario, we recommend that general guidelines
20 based on proven ecological principles be used to identify likely areas of biological importance for
21 cetaceans. . . . Management decisions affecting such data-poor regions should not proceed as if
22 cetacean population density were zero or as if those areas were biologically unimportant. To infer
23 cetacean distribution and biological importance in these cases, it is better to rely upon basic
24 ecological principles than to use an analytical model that possibly provides predictions on a finer
25 spatial scale or taxonomic level, but whose predictions cannot be adequately evaluated.”). At the
26 same time, the White Paper acknowledged that the “precautionary” approach that it advanced risked
27 designating OBIA's in areas of “marginal biological importance” that did not meet NMFS’s criteria.
28 AR F2190. Further, while the thrust of the paper favored the precautionary approach, it specifically

1 disclaimed choosing that approach over the alternative “pure” approach that relied solely on more
2 specific local data, resulting in fewer OBIAAs:

3 In other words, it must be decided whether the list of OBIAAs should be
4 comprehensive (based on the precautionary approach) or pure (based on the
5 minimalistic approach). We do not provide an answer to this question here, but we do
6 suggest guidelines for decision making based upon the precautionary approach.

7 AR F2190.

8 NMFS chose the pure approach and explained its decision in the record, including
9 reference to the White Paper and reasons for choosing a different approach. The agency stated that
10 it was not proceeding as if data-poor regions were biologically unimportant, but instead relied on
11 other mitigation measures to protect cetaceans outside of designated OBIAAs. See F18059
12 (commenting on the White Paper: “OBIAAs are but one component of required mitigation measures
13 designed to effect the least practicable adverse impact on marine mammals. For areas with little or
14 no survey data that do not meet our OBIA screening criteria, the final rule provides mitigation and
15 monitoring measures that incorporate precautionary principles for marine mammals. This includes:
16 requiring the Navy to conduct visual, passive acoustic, and active acoustic monitoring for marine
17 mammals; and requiring the Navy to delay/shutdown active SURTASS LFA sonar transmissions
18 when they have detected a marine mammal within 2 km of the vessel by visual, passive acoustic, and
19 active acoustic monitoring protocols.”); AR F2066-67 (further commenting on the White Paper, “If
20 NMFS were to proceed without designating these areas as OBIAAs, there is no assumption that the
21 population density was zero or that the area was biologically unimportant – rather there is
22 insufficient evidence to show that it is specifically of increased importance based on the selection
23 criteria for OBIA for SURTASS LFA at this time.”); E60-61 (Final Rule: “Our process for selecting,
24 assessing, and designating OBIAAs for SURTASS LFA sonar relies on three specific screening
25 criteria for biological importance for marine mammals. . . . That said, we recognize that the
26 ecological processes recommended by the commenters support cetacean habitats and have
27 considered their guidance in reviewing and designating OBIAAs. Information regarding data poor
28 areas is likely to evolve over the five year course of the final rule and beyond, and NMFS will
consider new information to continue identifying OBIAAs for SURTASS LFA sonar operations.”);
AR F18059-60; AR E60-61 (noting that: “The NRDC and several other commenters recommended

1 that we consider the approach of using proxies such as: persistent oceanographic features (e.g., high
2 primary productivity and nutrient enrichment processes); relative densities of non-marine mammal
3 species (i.e., apex predators and fish); all continental shelf waters and waters 100 km (62 mi)
4 seaward of the continental slope; waters within 100 km (62 mi) of all islands and seamounts that rise
5 within 500 meters (1,640 feet) to identify marine mammal hotspots or supplement our OBIA
6 analysis in data-poor regions. Response: OBIA's are but one component of a suite of required
7 mitigation and related monitoring measures designed to effect the least practicable adverse impact
8 on marine mammals.”).

9 Defendant also argues that the best available data standard (50 C.F.R. § 216.102(a)) is met
10 by requiring sufficient evidence that a specific area meets the criteria for the particular species of
11 concern. See Latino Issues Forum v. EPA, 558 F.3d 936, 941 (9th Cir. 2009) (“In particular, where,
12 as here, a court reviews an agency action ‘involv[ing] primarily issues of fact,’ and where ‘analysis
13 of the relevant documents requires a high level of technical expertise,’ we must ‘defer to the
14 informed discretion of the responsible federal agencies.”) (internal citations omitted); Consolidated
15 Salmonid Cases, 791 F. Supp. 2d 802, 821 (E.D. Cal. 2011) (“What constitutes the ‘best’ available
16 science implicates core agency judgment and expertise to which Congress requires the courts to
17 defer; a court should be especially wary of overturning such a determination on review.”). Even
18 though the precautionary approach appears more protective of marine mammals, the Court cannot
19 substitute its judgment for the one chosen by NMFS, especially when the White Paper experts on
20 which Plaintiffs rely declined to answer the question whether the list of OBIA's should be based on
21 the precautionary or the pure approach. See Ocean Advocates v. U.S. Army Corps of Eng'rs, 402
22 F.3d 846, 858 (9th Cir.2005) (“This review is ‘searching and careful,’ but the arbitrary and
23 capricious standard is narrow, and we cannot substitute our own judgment for that of the [agency].”).

24 Turning to specific potential OBIA's, Plaintiffs challenge NMFS’ rejection of an OBIA for
25 established baleen whale habitat around seamounts in the Northwest Pacific Ocean. See, e.g., 77
26 Fed. Reg. at 50306 (citing lack of specific evidence regarding densities and biological uses of area
27 around Emperor Seamount Chain and Shatsky Rise area). The agency also rejected an OBIA for
28 Challenger Bank (located in continental shelf waters off of Bermuda) as not having sufficient

1 scientific justification despite humpback whale observations and three scientific studies noting the
2 area as a possible foraging and migratory site. See 77 Fed. Reg. at 50304. Plaintiffs also state that
3 Defendants ignored OBIA recommendations made by Dr. Guiseppe Notarbartolo di Sciara, the
4 leading expert on Mediterranean marine mammals and former head of the ACCOBAMS³ even
5 though he submitted considerable documentation to support his recommendations and several of the
6 areas recommended as OBIA overlap with areas proposed as cetacean protected areas by the
7 ACCOBAMS Scientific Committee in 2006. See AR F2155-57; Hoyt Decl. ¶ 19 (noting
8 ACCOBAMS-recommended areas in Mediterranean excluded from OBIA protection). In addition,
9 Plaintiffs point to an area in Australia that was identified by expert Rob McCauley as habitat for
10 22,000 humpback whales from late May until October, which NMFS failed to designate as an OBIA.
11 See AR F2230. While these areas could well have been suitable for OBIA under different criteria,
12 Defendants addressed them in the administrative record and the SEIS. See Defs.' MSJ at n.4 (citing
13 administrative record references for each of these recommendations); see, e.g., E56 (Final Rule
14 noting that two OBIA were proposed in Australia, but were found not to meet the criteria).

15 In addition, Plaintiffs argue that NMFS ignored the Fairweather Grounds in Alaska that
16 was recommended as an OBIA by SME Ferguson. See AR F1522. Ferguson noted the longstanding
17 recognition of Fairweather Grounds as a whaling ground, its concentration of food sources for
18 humpback whales, a 2004 NOAA survey of the area, and local fishermen's anecdotal reports. See
19 AR F1522. The record and the SEIS reflect that Defendants also considered this area for a potential
20 OBIA. See SEIS 4-82 (SEIS section on Fairweather Grounds, stating that there was inadequate
21 scientific support for it as an OBIA), D-181 (same), AR F3248 (“After reviewing available data, it
22 was concluded that there are no published, peer-reviewed, or gray literature discussing this area as a
23 specific, important feeding area for humpbacks. Only sighting data was from a single observation of
24 high density of humpbacks during three days in summer of 2004 as part of the SPLASH project. No
25 follow-up surveys done in area. Final SPLASH report did not mention Fairweather Grounds as a
26 foraging area nor recommended it for further study (Calambokidis, et al., 2008).”), 3280 (“No

27 ³ ACCOBAMS stands for: Agreement on the Conservation of Cetaceans of the Black Sea,
28 Mediterranean Sea and continuous Atlantic Area Scientific Committee and president of the European
Cetacean Society.

1 published, peer-reviewed, or gray literature discussing this area [Fairweather Grounds] as a specific,
2 important feeding area for humpback whales.”). The agency concluded that the available data “are
3 not adequate scientific support to warrant setting aside Fairweather Grounds as an LFA OBIA for
4 marine mammals.” SEIS 4-82. In particular, as stated at the hearing, Defendants noted that the
5 evidence supporting the Fairweather Grounds as an OBIA was not sufficient because the NOAA
6 report from 2004 only covered a three day period during which whales were observed, whereas no
7 whales were observed on a return visit. Another report cited as support for the Fairweather Grounds
8 as an OBIA was from 1869, and the anecdotal reports were not persuasive. See Trout Unlimited v.
9 Lohn, 559 F.3d 946, 959 (9th Cir. 2009) (“It is not our role to ask whether we would have given
10 more or less weight to different evidence, were we the agency.”).

11 Above all, Defendants emphasize that “in areas not designated as an OBIA (either because
12 they did not meet the criteria or because there weren’t sufficient data to support the designation), the
13 regulation provides measures that protect marine mammals nevertheless.” AR E58 (“The subject
14 matter experts’ inputs were a crucial component of our selection processes; however, they were only
15 one component. We as the action agency are responsible for the final selection of the SURTASS
16 LFA sonar OBIA’s. Because we independently evaluated the subject matter expert’s input as well as
17 available data/ information for each recommended OBIA, we do not believe that effort bias on the
18 part of the subject matter experts was a factor in our determinations.”). NMFS argues further that as
19 new data becomes available, new OBIA’s can be designated in annual LOAs under the Final Rule’s
20 adaptive management approach. See AR E61 (“Information regarding data poor areas is likely to
21 evolve over the five year course of the final rule and beyond, and NMFS will consider new
22 information to continue identifying OBIA’s for SURTASS LFA sonar operations. Under our adaptive
23 management framework, we will consider these factors along with our selection criteria to consider
24 future modifications to the OBIA list. This provides a mechanism for NMFS and the Navy to modify
25 (or add or delete) mitigation or monitoring measures, as appropriate, based on new information.”);
26 SEIS 7-34 (“The Navy has included within its adaptive management component of the MMPA
27 rulemaking, means to consider, on a case-by-case basis, new/revised peer-reviewed and published
28 scientific data and information from qualified and recognized sources within academia, industry,

1 government, and non-government organizations to determine modifications to the OBIA list, if new
2 scientific data indicate that such modifications would be appropriate. This would include, as
3 appropriate, additional OBIAs.”). As stated in the Court’s 2008 Order, however, the duty to adopt in
4 advance measures to ensure the least practicable adverse impact cannot be met simply by deferring
5 to potential unknown future measures. See Feb. 6, 2008 Order at 15. Therefore, this rationale is not
6 persuasive.

7 Defendants also point out that some Level B take does not necessarily mean that the
8 mitigation measures adopted are inadequate. 50 C.F.R. § 216.102(b); AR C56 (“A negligible impact
9 finding is based on the lack of likely adverse effects on annual rates of recruitment or survival (i.e.,
10 population-level effects). An estimate of the number of Level B harassment takes, alone, is not
11 enough information on which to base an impact determination.”), G706-07 (Level B harassment
12 “occurs at the level of the individual(s) and does not assume any resulting population-level
13 consequences.”). NMFS found that with all of the mitigation measures combined, Level B take
14 would be unlikely to have any population effects. See AR E71 (“In summary, based on these
15 analyses, the past nine years of SURTASS LFA sonar operations, and results from the LFS
16 Scientific Research Program, we do not anticipate that SURTASS LFA sonar operations will likely
17 have adverse effects on annual rates of recruitment or survival (i.e., population-level effects.”), C55
18 (“ Level B (behavioral) harassment occurs at the level of the individual(s) and does not assume any
19 resulting population-level consequences.”), 56-58 (“An estimate of the number of Level B
20 harassment takes, alone, is not enough information on which to base an impact determination.”).
21 The MMPA does not require that each mitigation measure standing alone be sufficient to achieve the
22 least practicable adverse impact, but rather that they do so collectively. See, e.g., AR E50 (“OBIA
23 are but one component of a suite of required mitigation and related monitoring measures designed to
24 effect the least practicable adverse impact on marine mammals. The regulation prescribes mitigation
25 and monitoring measures for SURTASS LFA sonar operations in areas that have persistent
26 oceanographic features and seamounts and island chains that did not meet our OBIA criteria or fall
27 within the 22 km (14 mi; 12 nm) coastal exclusion zone. The Navy is to delay/shutdown active
28 SURTASS LFA sonar transmissions when they detect a marine mammal within the 2-km (1.2-mi;

1 1.1-nm) LFA sonar mitigation and buffer zones around the vessel by visual, passive acoustic, and
2 active acoustic monitoring protocols, effectively ensuring that marine mammals are not exposed to
3 sound levels that exceed 175 dB re: 1 mPa.”).

4 Defendants concluded that their monitoring/shutdown procedure makes it very unlikely
5 that marine mammals, including animals in data-poor regions, would be injured by Level B
6 harassment. See AR E64 (Final Rule: “The HF/M3 active sonar system’s effective detection
7 probability for marine mammals within the SURTASS LFA sonar mitigation zone approaches 100
8 percent, based on multiple pings. Combined with the passive acoustic (estimated 25 percent
9 detection probability) and visual monitoring (estimated nine percent detection probability)
10 requirements, all three systems together have an effective detection probability of at least 99 percent
11 at 1 km (0.62 mi; 0.54 nm) from the vessel. Based upon our review of nine years of data from
12 monitoring reports on previous SURTASS LFA sonar activities (i.e., the best available information),
13 we consider the likelihood of the Navy not detecting a marine mammal within the SURTASS LFA
14 sonar mitigation zone to be extremely small (less than one percent).”), E69-71 (Final Rule: “We do
15 not expect that marine mammals would be injured by SURTASS LFA sonar because a marine
16 mammal should be detected through the three-part monitoring program (visual, passive acoustic and
17 active acoustic monitoring) and the Navy would suspend or delay active transmissions. The
18 probability of detection of a marine mammal by the HF/M3 active sonar system within the
19 SURTASS LFA sonar mitigation zone approaches 100 percent based on multiple pings. . . ”). The
20 HF/M3 system performs a full sweep of the 2 km mitigation zone every 45-60 seconds, and must be
21 ramped up to full operational power at least twenty-five minutes before LFA use begins. See NAV
22 19975; AR C18; E74. The system sweeps the 2 km zone at least twenty-five times before the first
23 LFA transmission is sent, and with five pings, the probability that the system will detect a marine
24 mammal of any size within the 1 km mitigation zone approaches 100 percent. NAV19980 (stating
25 in the 2001 FEIS that with multiple pings, the detection rate approaches 100 percent for most
26 animals). Thus, there is evidence that the HF/M3 system is effective.

27 Nonetheless, it is troubling that the SMEs stated in the White Paper that: “We consider the
28 other forms of mitigation are considerably less effective than specifying OBIAAs.” AR F2195. This

1 statement casts doubt on Defendants’ conclusion that their other mitigation measures fully
2 compensate for any deficiencies in the designation of OBIAAs. At the same time, the SMEs
3 acknowledged that the alternative precautionary approach could result in over-designation of OBIAAs
4 of only “marginal biological importance” to marine mammals. AR F2190. While a close question,
5 given the deferential standard of review, on balance, Defendants have not acted arbitrarily and
6 capriciously regarding data-poor regions.

7 **ii. Protections for previously recognized OBIAAs**

8 Plaintiffs also argue that NMFS reduced or removed OBIA protection from two areas
9 without any reasoned justification: (1) 200-meter isobath off the United States East Coast; and (2)
10 Monterey Bay, Gulf of Farallones, and Cardell Bank National Marine Sanctuaries. These areas were
11 recognized as OBIAAs in 2002 and 2007. Plaintiffs argue that Defendants must “supply a reasoned
12 analysis” for its decision to “change course” and reduce that protection in the current Final Rule.
13 The reasoned analysis standard, however, is not onerous. In FCC v. Fox Television Stations, 556
14 U.S. 502, 515-16 (2009), the Court explained:

15 To be sure, the requirement that an agency provide reasoned explanation for its action
16 would ordinarily demand that it display awareness that it is changing position. An
17 agency may not, for example, depart from a prior policy sub silentio or simply
18 disregard rules that are still on the books. See United States v. Nixon, 418 U.S. 683,
19 696, 94 S.Ct. 3090, 41 L.Ed.2d 1039 (1974). And of course the agency must show
20 that there are good reasons for the new policy. But it need not demonstrate to a court's
21 satisfaction that the reasons for the new policy are better than the reasons for the old
22 one; it suffices that the new policy is permissible under the statute, that there are good
23 reasons for it, and that the agency believes it to be better, which the conscious change
24 of course adequately indicates. This means that the agency need not always provide a
25 more detailed justification than what would suffice for a new policy created on a
26 blank slate. Sometimes it must—when, for example, its new policy rests upon factual
27 findings that contradict those which underlay its prior policy; or when its prior policy
28 has engendered serious reliance interests that must be taken into account. Smiley v.
Citibank (South Dakota), N. A., 517 U.S. 735, 742, 116 S.Ct. 1730, 135 L.Ed.2d 25
(1996). It would be arbitrary or capricious to ignore such matters. In such cases it is
not that further justification is demanded by the mere fact of policy change; but that a
reasoned explanation is needed for disregarding facts and circumstances that underlay
or were engendered by the prior policy.

25 Id.

26 During the administrative process, NMFS cautioned that prior OBIAAs might not continue
27 to qualify as biologically important for marine mammals. See AR F1 (internal NOAA email
28 regarding researching OBIAAs: “As you can see, some of the above-mentioned [prior] OBIAAs do not

1 qualify as a true OBIA, but were accepted by the Navy to obtain the approval of the National Marine
2 Sanctuary Program.”). The agency deliberately took a new look at all OBIA. See, e.g., C49 (“As
3 with the previous SURTASS LFA sonar rulemakings, the Navy’s application again proposed
4 establishing offshore biologically important areas, OBIA, for marine mammal protection. In
5 preparation for this rule making, NMFS developed a more systematic process for selecting,
6 assessing and designating OBIA for SURTASS LFA sonar. . . . NMFS used the screening criteria
7 to review 403 existing and potential marine protected areas based on the World Database on
8 Protected Areas (IUCN and UNEP, 2009), Holt (2005), and prior SURTASS LFA sonar OBIA to
9 produce a preliminary list of 27 OBIA nominees.”), F15336 (internal NOAA email regarding OBIA
10 for beaked whales and harbor porpoises: “Although past MMPA rules for LFA sonar have included
11 designated OBIA, a recommendation from the court drove NMFS and the Navy to take a harder
12 look (for the proposed 2012 MMPA rule) at how OBIA are designated to ensure that the process is
13 more systematic and comprehensive than previously used. Therefore, in 2010, new OBIA criteria
14 were designated, preliminary areas were identified by NMFS, and an expert panel was convened to
15 verify the preliminary areas and identify any additional areas they thought appropriate based on the
16 criteria.”).

17 **a. 200-meter isobath on the United States East Coast**

18 Under the previous final rules, the entire 200-meter isobath was protected as a year-round
19 OBIA. See 67 Fed. Reg. 46712, 46787 (July 2002); 72 Fed. Reg. at 46,892 (August 2007). The area
20 is a migration corridor for the North Atlantic right whale, the world’s most endangered large whale
21 species. See 67 Fed. Reg. at 46748, 46750 (“NMFS has established an OBIA for the entire known
22 range for the East Coast population of the North Atlantic right whale.”); 72 Fed. Reg. at 46869
23 (“The area from the coastline to the 200 m (656-ft) isobath of the North American East Coast is
24 protected as an OBIA year-round which protects the North Atlantic right whale migration route and
25 its critical habitat from SPLs greater than 180 dB.”); SEIS D-142 (“Right whales are the world’s
26 most endangered large whale species, and the GSC [Great South Channel on the East Coast] is the
27 principal feeding ground of the western North Atlantic population.”).

28 In the 2012 Final Rule, NMFS replaced the prior OBIA with four smaller OBIA within the

1 200-meter isobath that do not encompass the entire area previously protected. See 77 Fed. Reg. at
2 50308 (“We reviewed the continental shelf area in the northwest Atlantic Ocean (with input from the
3 Navy and subject matter experts) and determined that designating the entire eastern seaboard out to
4 the 200-m (656-ft) isobath did not meet the criteria for a single OBIA. However, several
5 scientifically-supported areas over the continental shelf met the criteria for an OBIA.”); SEIS 4-85
6 (listing OBIA’s in the 200-m isobath), 4-86 (same), 4-92 (same), 4-93 (same). The SEIS recognized
7 that the North Atlantic right whale migrates along the continental shelf, which is within the
8 previously designated OBIA. See SEIS 3-41 (“North Atlantic right whales are found in temperate to
9 subpolar waters of the North Atlantic Ocean (Jefferson et al., 2008). They are most commonly found
10 around coastal and continental shelf waters of the western North Atlantic from Florida to Nova
11 Scotia (Kenney, 2009). From late fall to early spring, right whales breed and give birth in temperate
12 shallow areas, and then migrate into higher latitudes where they feed in coastal waters during the
13 late spring and summer. Right whales have been known to occasionally move offshore into deep
14 water, presumably for feeding (Mate et al., 1997). North Atlantic right whales calve between the
15 northeast coast of Florida and southeastern Georgia and forage in the Bay of Fundy (IFAW, 2001;
16 Vanderlaan et al., 2003).”), C-42 (“Northern right whales are currently found in the northwest
17 Atlantic Ocean and the North Pacific Ocean. In the North Atlantic, they range from the Bay of
18 Fundy area during the summer foraging season. They migrate along the coast and their breeding area
19 is in the shallow waters offshore of Florida and Georgia. It is believed that a portion of the
20 population migrates to an undiscovered location.”).

21 NMFS reviewed this OBIA under the new criteria and determined that, while the entire
22 area did not qualify, four more narrowly defined areas did, each of which was designated as an
23 OBIA. See SEIS 4-92 to 4-93 (listing OBIA’s and stating: “the entire eastern seaboard out to the
24 200-m isobath did not meet the criteria, but . . . certain more defined areas did.”), 7-44 to 7-45
25 (“These include the North Atlantic right whale NE and SE critical habitat areas, which are included
26 as OBIA’s (OBIA’s 3 and 4) and areas of seasonal high marine mammal densities identified as AIA’s
27 [Areas of Increased Awareness] such as the Gulf of Maine, Great South Channel, Georges Bank, and
28 the Roseway Basin, which have been included as OBIA’s (OBIA’s 1, 2, and 3).”); see also SEIS 7-48

1 to 7-49 (“The commenter notes the existence of ‘the North Atlantic right whale migration corridor’
2 in waters <200 meters in depth off the U.S. Atlantic coast. The available sighting data, collected
3 over several decades, are insufficient to represent a specific rational corridor for the North Atlantic
4 right whale off the U.S. Atlantic coast or elsewhere in the North Atlantic Ocean (Kenney, 2012).
5 The winter locations and movements of much of the North Atlantic right whale population are
6 currently unknown.”); AR E-63 (same in Final Rule). The SMEs did not recommend that the entire
7 eastern seaboard be designated as an OBIA. AR F2243-48 (stating the criteria used to designate
8 OBIA), 2275-82 (recommending OBIA for Georges Bank).

9 Plaintiffs note that the selection criteria for OBIA in the 2002 and 2007 Final Rules were
10 more restrictive than in the 2012 Final Rule. 67 Fed. Reg. 46712, 46787 (summarizing 2002 criteria
11 for OBIA); 72 Fed. Reg. 46846, 46869, 46892 (summarizing 2007 criteria for OBIA); SEIS 7-24
12 (“The biological criteria established for this 2012 OBIA] process were less restrictive than was the
13 case for the previous OBIA designation processes used for the 2001 FOEIS/EIS, 2007 FSEIS, 2002
14 Rule, and 2007 Rule, making it more likely that a potential OBIA would be considered/designated,”
15 because a potential OBIA area need only be a migratory route or an area of high density, not both).
16 Thus, Plaintiffs argue that Defendants have not provided a reasoned analysis for why the assessment
17 of decades of whale sightings changed so drastically that Defendants could draw the “exact opposite
18 conclusion than it did in previous rules.” Pls.’ Reply at 6. However, it appears that Defendants
19 instead refined the approach and targeted only the areas of the isobath that would qualify as an
20 OBIA. Plaintiffs point out that in 2008, NMFS reviewed twenty-eight years of sighting data and
21 concluded that 90 percent of sightings occurred within 30 nm of the coast, on the continental shelf.
22 73 Fed. Reg. 60173, 60178 (Oct. 10, 2008) (“An analysis of sightings data from 1972 through 2000
23 from the South Carolina/Georgia border to Connecticut (n = 290) indicated that approximately 83
24 percent of all right whale sightings occurred within 20 nm (37 km) of the coast, and approximately
25 90 percent of all right whale sightings occurred within 30 nm (55.6 km) of the coast.”). However,
26 this evidence does not purport to identify the entire eastern seaboard out to the 200-meter isobath as
27 a known/defined right whale migration route. Defendants point to recent expert evidence that
28 sighting data do not support the 200-meter isobath as a specific migration corridor. Docket No. 37-1

1 (email response from marine scientist Dr. Kenney agreeing with the following statement: “The
2 commenters note the existence of ‘the North Atlantic right whale migration corridor’ in waters <200
3 meters off the U.S. Atlantic coast. The available sighting data, collected over several decades, are
4 insufficient to represent a specific migrational corridor for the North Atlantic right whale off the
5 U.S. Atlantic coast or elsewhere in the North Atlantic Ocean (Kenney, 2012 personal
6 communication). The winter locations and movements of much of the North Atlantic right whale
7 population are currently unknown (Waring et al., 2010).”).

8 Based on the evidence in the record, Defendants reasonably concluded that the four new
9 OBIAAs encompassed all right whale critical habitat. Thus, Defendants did not act arbitrarily and
10 capriciously in reaching that conclusion.

11 **b. California sanctuaries**

12 Plaintiffs argue that Defendants improperly downgraded the protections offered to the
13 Monterey Bay, Gulf of the Farallones and Cordell Bank National Marine Sanctuaries from year-
14 round protections (67 Fed. Reg. at 46787; 72 Fed. Reg. at 46892) to seasonal protections (50 C.F.R.
15 § 218.234(f)(2)(x) (noting protection from June through November); see also AR NAV12055-56
16 (memo from NOAA stating that there are marine mammals in these areas year-round). The record,
17 however, supports the prescribed seasonal restrictions for these marine sanctuaries, as recommended
18 by the regional experts, because the low-frequency species of particular concern use the OBIAAs for
19 feeding during those times. AR F-1490, 1510-12 (stating in NMFS’s initial screening document for
20 OBIAAs for example: “Blue and humpback whale feeding in this area is largely limited to
21 June-November.”); SEIS 4-87 (noting seasonal restriction), D-309 to D-310 (summarizing seasonal
22 considerations). Defendants did not act arbitrarily and capriciously in reaching their conclusion.
23 Plaintiffs believe that Defendants improperly referred to the baleen whale as the “low-frequency
24 species of concern.” Plaintiffs argue that the concerns about the baleen whale were not articulated
25 during the rulemaking process, yet baleen whales include blue whales, humpback whales, gray
26 whales and right whales, all of which were at issue during the rulemaking process.

27 **iii. OBIAAs in the 12 nm zone**

28 NMFS rejected more than 200 potential OBIAAs on the grounds that they were located

1 within the 12-nm coastal exclusion zone, and thus were protected by that zone. See SEIS App. F at
2 p 37-41 (listing potential OBIAAs that are within 22 km (12 nm) of the coastline). Plaintiffs,
3 however, argue that several of the rejected OBIAAs do not fall within the 12-nm zone, and that there
4 are other rejected areas that extend up to the 12-nm limit for which NMFS refused to consider
5 adequate buffer zones. With respect to the buffer zones, Plaintiffs argue that some of the MPAs
6 extend right up to the 12 nm boundary line, and because there is no buffer zone seaward of the 12
7 nm limit, those coastal MPAs received less protection than off-shore OBIAAs, which are protected by
8 a 1 km buffer zone. See 77 Fed. Reg. at 50309 (rejecting recommendation that NMFS identify
9 important near-coastal habitat in order to “establish meaningful buffer zones for these areas.”).
10 NMFS disclosed to the public in the August 2011 draft SEIS and January 2012 proposed rule its
11 findings regarding potential OBIAAs that fell within the 12 nm boundary area or extended partially
12 beyond the area but were found not to be biologically important. Plaintiffs objected to specific areas
13 during the comment period, and NMFS responded to those comments. See AR D-40-41 (NRDC’s
14 comments on Final Rule: “Additionally, the agency incorrectly assumes that certain established or
15 proposed MPAs and recommended OBIAAs are located entirely within 12 nm of shore. For example,
16 the Papahānaumokuākea Marine National Monument was apparently excluded early in the OBIA
17 process on the assumption that it does not extend seaward of that distance, which is incorrect.”); AR
18 E-63 (responding to comment by NRDC that the agency incorrectly assumed that certain proposed
19 OBIAAs were located entirely within 12 nm of shore); SEIS 7-41 to 7-43 (citing NRDC comments:
20 “The agencies have improperly rejected numerous areas on the grounds that they occur entirely
21 within the Navy’s 12nm coastal exclusion zone.”); see also Defs.’ Mot. at n.4.

22 Plaintiffs rely on the declarations from Erich Hoyt, senior research fellow for Whale and
23 Dolphin Conservation and co-director of the Far East Russia Orca Project, to argue that rejection of
24 OBIAAs as being within or close to the 12 nm boundary line was arbitrary and capricious. Hoyt
25 stated that based on his review of the MPAs that were excluded from OBIA designation based on
26 their proximity to the coastline, thirty-six MPAs extended up to the 12 nm boundary. Hoyt Decl. ¶
27 12. Of those thirty-six MPAs, twenty-one extended beyond the 12 nm boundary. Hoyt Decl. ¶ 12.
28 In addition, another fifteen of the MPAs that were improperly excluded as being wholly within the

1 12 nm boundary come directly into contact with the 12 nm boundary line. Hoyt Decl. ¶ 12. For
2 example, based on his comparison of the coordinates of the MPAs and the GIS-generated map of the
3 world's coastlines, the Great Sandy Marine Park in Australia, which is an important habitat for
4 humpback whales and various dolphins, extends beyond the 12 nm boundary line. Hoyt Decl. ¶ 13
5 (citing fourteen more examples of MPAs that are important habitat for baleen whales and other
6 marine mammals that are sensitive to low frequency sound, that extend beyond the 12 nm coastal
7 zone: (1) Chagos Island Marine Protected Area in the UK; (2) Mayotte Marine Park in the Indian
8 Ocean; (3) Primeiras and Segundas Reserve off Mozambique; (4) Berau Marine Protected Area in
9 Indonesia; (5) Cendrawash Bay Marine National Park in Indonesia; (6) Coringa-Herald and Lihou
10 Reef National Nature Reserve in Australia; (7) Pacific Remote Islands Marine National Monument;
11 (8) Iroise Marine Nature Park in France; (9) Islas Marias National Biosphere Reserve in Mexico;
12 (10) Laje de Santos Marine Park in Brazil; (11) Grand Manan Basin Right Whale Conservation Area
13 in Canada; (12) Paracas National Reserve in Peru; (13) Corales del Rosario and San Bernardo
14 National Natural Park in Columbia; and (14) Grays Reef National Marine Sanctuary and Biosphere
15 Reserve in the United States); but see also Supp. Hoyt Decl. ¶ 33 (stating that the Laje de Santos
16 Marine Park and the Corales del Rosario and San Bernardo National Nature Park are entirely within
17 the 12 nm coastal zone).

18 In response to the Hoyt declarations, Defendants' witness Jeannine Cody, Fishery Biologist
19 for NMFS, Office of Protected Resources, Conservation and Permits Division, explained how she
20 determined whether the MPAs should be categorized as OBIAs. For development of the Draft SEIS,
21 Cody used Hoyt's 2005 book regarding MPAs along with other sources as the starting point for
22 gathering the names and locations of cetacean MPAs around the world. Cody Decl. ¶ 5. According
23 to Cody, Hoyt's 2005 book did not contain sufficient information to produce a precise representation
24 of the boundaries of many MPAs. Cody Decl. ¶ 5. To obtain more information about boundaries,
25 Cody used the International Union for Conservation of Nature 2009 World Database on Protected
26 Areas Annual Release dataset. Cody Decl. ¶ 6. The dataset contained boundary information based
27 on latitude/longitude coordinates for many of the MPAs identified in Hoyt's 2005 book. Cody Decl.
28 ¶ 6. Using the dataset, Cody displayed MPA boundaries identified by Hoyt in his 2005 book on

1 Google Earth’s 3-D globe, which allows overlays of spatial information and provides access to high-
2 and low- resolution satellite imagery. Cody Decl. ¶ 6. Cody then used a measuring tool from
3 Google Earth to determine whether any part of the MPA boundary extended beyond 12 nm from the
4 nearest coastline. Cody Decl. ¶ 6. When boundary information for an MPA was not available in the
5 dataset, Cody used alternative approaches to determine whether the MPA extended beyond the 12
6 nm coastal standoff zone. Cody Decl. ¶ 6. At the end of this process, Cody found that 353 of the
7 403 MPAs identified by using Hoyt’s 2005 book and other sources were ineligible as OBIA
8 because they either fell entirely within the 12 nm coastal zone or although they extended partially
9 beyond the zone, Cody was unable to locate any information indicating that any part of the area
10 outside the coastal zone met at least one of the biological criteria to establish biological importance.
11 Cody Decl. ¶ 7. In the draft SEIS, MPAs that were deemed ineligible because even though they
12 extended beyond the 12 nm zone, there was no information about biological importance, were
13 footnoted with the explanation that: “Although there are data to support that this general area meets
14 Criterion 2 [i.e., biological criteria], the preliminary analysis did not include any information that
15 indicates that any part of the biologically important area falls outside of the Navy’s 12 nm standoff
16 zone.” Cody Decl. ¶ 8; see, e.g., NAV5919 (2011 Draft SEIS finding that two potential OBIA did
17 not qualify because they were not outside the 12 nm zone); NAV11413 (2012 Final SEIS stating
18 same). The biological criteria include: (1) high densities of marine mammals; (2) known/defined
19 breeding/calving grounds, foraging grounds or migration routes; or (3) small, distinct populations of
20 marine mammals with limited distributions. AR E-56.

21 Prior to the publication of the Final Rule, Cody conducted analysis of additional MPAs for
22 cetaceans that were included in Hoyt’s 2011 book, which was released after work on the draft SEIS
23 was substantially complete. Cody Decl. ¶ 9. Using the same methods described above, Cody
24 determined that 345 of the MPAs identified in Hoyt’s 2011 book were ineligible for OBIA
25 consideration because they were either entirely within the 12 nm coastal standoff zone or if they
26 extended beyond the zone, there was no information that the area outside the zone was biologically
27 important. Cody Decl. ¶ 11. In response to Hoyt’s declaration regarding MPAs that were rejected
28 even though they are wholly within the 12 nm boundary, Cody also stated that boundary information

1 was available for seven of the fifteen areas identified by Hoyt as being within the 12 nm boundary,
2 but that for another seven areas, boundary data was unavailable but Cody used alternative methods
3 to find the boundaries. Cody Decl. ¶ 12. The last area, Gray’s Reef National Marine Sanctuary and
4 Biosphere Reserve, was reexamined by Cody and found not to qualify as an OBIA. Cody Decl. ¶
5 34.

6 There were, however, shortcomings in Cody’s analysis. For example, the Great Sandy
7 Marine Park in Australia contains Hervey Bay, the only whale management area designated by the
8 Australian government. Cody Decl. ¶ 23. According to Cody, boundary information for the Great
9 Sandy Marine Park was not available in the dataset, so she used boundaries for Hervey Bay to
10 determine whether any part of the Hervey Bay MPA was outside of the 12 nm coastal standoff zone.
11 Cody Decl. ¶ 23. Cody inadvertently failed to mark the Hervey Bay MPA in the draft SEIS as an
12 area that falls outside the 12 nm zone, but stated in her declaration that she determined during
13 development of the draft SEIS that a small portion of the Hervey Bay MPA extended beyond the 12
14 nm coastal zone. Cody Decl. ¶ 24. Hoyt stated that boundary information for the Great Sandy
15 Marine Park were given in Hoyt’s 2011 book and precise information was available. Supp. Hoyt
16 Decl. ¶ 15.

17 Cody also substituted smaller MPA areas for those stated in Hoyt’s research, which caused
18 her to unreasonably underestimate the size of the MPA. For example, Cody stated that there was no
19 boundary information for the Chagos Island MPA, so she used boundary data from Google Earth for
20 the Danger, Cow, Three Brothers, Resurgent and Nelson Islands, and Peros Banhos Atoll MPAs as
21 surrogates as those MPAs fell within the larger Chagos Island MPA. Cody Decl. ¶ 26. Cody
22 concluded that these MPAs fell within the 12 nm coastal zone, and because the area had not been
23 surveyed, the available data did not indicate that any portions of the Chagos Island MPA fell outside
24 the zone. Cody Decl. ¶ 26. In his supplemental declaration, Hoyt notes that his treatise did have
25 boundary information for the Chagos Islands MPA. Supp. Hoyt Decl. ¶ 19 (the Chagos Island MPA
26 has a total area of 246,357 square miles, and encompasses the entire marine EEZ except for 3 nm
27 around Diego Garcia); Ex. AA-1 at 279.

28 Hoyt cited eight MPAs that extend right up to the 12 nm boundary based on a comparison

1 of GIS mapping of MPA coordinates with the 12 nm boundary line, and are habitat for baleen
2 whales or other low frequency sensitive species. Hoyt Decl. ¶ 14 (the eight MPAs are: (1) Ningaloo
3 Marine Park in Australia; (2) Bunaken National Marine Park in Indonesia; (3) Guanacaste
4 Conservation Area in Costa Rica; (4) Dakhla National Park in Morocco; (5) Conkouati-Douli
5 National Park in the Republic of the Congo; (6) Delta du Saloum National Park and Biosphere
6 Reserve in Senegal; (7) Portland Bight Protected Area in Jamaica; and (8) Tortuguero National Park
7 in Costa Rica). In addition, Hoyt stated that several “iconic” MPAs extend beyond the 12 nm
8 boundary line and are therefore not protected: (1) the Papahānaumokuākea Marine National
9 Monument, an area more than 100,000 square nautical miles in size, encircling the northwestern
10 Hawaiian islands; (2) the Canary Islands exclusion zone in Spain, which prohibits naval mid-
11 frequency sonar training within 50 nautical miles of the islands for the protection of beaked whales;
12 and (3) the Galapagos Marine Resources Reserve and Whale Sanctuary in Ecuador, which runs 40
13 nautical miles from the external borders of the islands. Hoyt Decl. ¶ 15.

14 Hoyt also opined that the 12 nm boundary line is insufficient. He stated that even for the
15 MPAs wholly within the 12 nm coastal zone, the Navy would be permitted to ensonify these areas to
16 the point where the risk of biologically significant effects in cetaceans remained very high. Hoyt
17 Decl. ¶ 16. In particular, according to Hoyt, NMFS stated that the range at which half the marine
18 mammals exposed to LFA transmissions would experience biologically significant impacts can
19 extend from 13.5 to 35 nm from the source. Hoyt Decl. ¶ 16; 72 Fed. Reg. at 46850. Therefore, the
20 12 nm coastal exclusion zone “would not provide adequate protection for MPAs occurring closer to
21 shore, such as the near-coastal portions of U.S. Marine Sanctuaries. Hoyt Decl. ¶ 16. Hoyt argued
22 that this required the establishment of a substantial buffer zone, beyond the 1.1 nm that NMFS has
23 prescribed. Hoyt Decl. ¶ 16.

24 Defendants counter that areas within the 12 nm zone are afforded year-round protection,
25 whether biologically warranted or not, whereas most of the OBIA restrictions are in effect
26 seasonally during times of biological importance. AR E-74 to E-77. Thus, even if a portion of an
27 MPA falls within one km of the 12 nm boundary, the remainder is afforded a year-round buffer in
28 excess of 1 km. Id. Defendants argue that because Plaintiffs have not shown that any coastal MPA

1 approaching the 12 nm boundary qualifies for OBIA designation, they have failed to show that
2 Defendants arbitrarily afford OBIA-eligible coastal MPAs less protection than OBIA's outside the 12
3 nm zone. Further, with respect to Hoyt's "iconic" MPAs, the record shows that Defendants
4 examined those areas and determined that they did not satisfy the OBIA designation criteria. See,
5 e.g., SEIS at 4-78 (table showing that the Canary Islands Cetacean Marine Sanctuary contains a high
6 density of marine mammals, but does not satisfy the other criteria); 7-41 ("The Navy and NMFS
7 concur that the Papahānaumokuākea (Northwestern Hawaiian Islands) Marine National Monument
8 (MNM) boundaries do extend seaward of the 22-km (12-nmi) standoff. Under Presidential
9 Proclamation 8031 of 15 June 2006, Establishment of the Northwestern Hawaiian Islands Marine
10 National Monument, the prohibitions required by this proclamation do not apply to Armed Forces
11 activities and exercises, provided that these activities are carried out in a manner that avoids, to the
12 extent practicable and consistent with operational requirements, adverse impacts on monument
13 resources and qualities. Marine animals present in the operational MNM area are more than
14 adequately protected by the Navy's three-part mitigation monitoring (visual, passive acoustic, and
15 active acoustic), delay/shutdown protocols for LFA transmissions, and geographic restrictions."); 7-
16 47 ("Papahānaumokuākea Marine National Monument (formally Northwestern Hawaiian Islands
17 Marine National Monument)-The monument consists of emergent and submerged lands and waters
18 and is the habitat for the endangered Hawaiian monk seal, which is not an LF-hearing specialist. For
19 this reason, the area did not qualify as an LFA MM OBIA."); 7-46 to 7-47 ("The Galapagos Marine
20 Resources Reserve (MRR) was analyzed with emphasis on the areas around Bartolome and Espanola
21 Islands. Even though blue whales are reported to be present, there is no scientific evidence that these
22 whales occur in these waters in densities higher than any other similar location. Therefore, this area
23 was not recommended as an LFA MM OBIA."); see also SEIS D-55-56; D-154; D-91; D-228. On
24 balance, Defendants did not act arbitrarily or capriciously.

25 **iv. Population density models**

26 Plaintiffs argue that Defendants' failure to use verified population density models to
27 identify OBIA's was arbitrary and capricious in light of NMFS' duties under the MMPA to identify
28 mitigation measures that would result in the least practicable adverse impact for marine mammals

1 and to use the best available science in doing so. See 16 U.S.C. § 1371(a)(5)(i)(II)(aa); 50 C.F.R. §§
2 216.102(a), 215.105(c). In particular, Plaintiffs argue that Defendants failed to use the Barlow
3 model, which was produced by west coast regional scientists. See AR NAV15421-649 (2009
4 article: Predictive Modeling of Cetacean Densities in the Eastern Pacific Ocean setting forth the
5 Barlow method for predictive modeling of cetacean densities). Scientists prepared the Barlow
6 model with the Navy and other users of the marine environment in mind to be used in environmental
7 impact statements. See AR NAV15439. The model provides density maps for more than a dozen
8 marine mammal species, including sperm whales, blue whales, fin whales, and humpback whales,
9 across an area that extends several hundred miles seaward from California through Washington and
10 from the Mexico border to South American and west to Hawaii. See AR NAV15439, 15448, 15556-
11 59, 15623. Plaintiffs state that Defendants used the Barlow model to establish that one recommended
12 OBIA, the Southern California Bight, met the biological criteria for designation as an OBIA as a
13 concentrated area for blue whales, although the OBIA was eventually rejected by the Navy as
14 impracticable. See SEIS 4-80 (analyzing the SoCal Bight area and concluding that it is not
15 practicable to designate as an OBIA); 77 Fed. Reg. at 50301 (“For example, we considered
16 habitat-based density modeling from Barlow et al. (2009) in determining whether an area within the
17 Southern California Bight, including Tanner and Cortes Banks, met our OBIA criteria as an area of
18 blue whale concentration.”).

19 There is no specific statutory requirement that Defendants employ predictive models to
20 map marine mammal densities. See Wash. Crab Producers v. Mosbacher, 924 F.2d 1438, 1448-49
21 (9th Cir. 1990) (rejecting claim (not in an MMPA case) that agency violated best available data
22 standard by failing to use a specific computer model because there was no requirement that the
23 agency do so). In any event, Defendants also point out that they did not ignore the Barlow model.
24 See AR E58 (Final Rule stating: “For example, we considered habitat based density modeling from
25 Barlow et al. (2009) in determining whether an area within the Southern California Bight, including
26 Tanner and Cortes Banks, met our OBIA criteria as an area of blue whale concentration.”), SEIS 7-
27 14 (“An area within the Southern California Bight, specifically an area including Tanner and Cortes
28 Banks (see SEIS/SOEIS Subchapter 4.5.2.3 for boundary information) from June through

1 November, met the criteria as a concentrated area for blue whales based on predictive modeling
2 (Barlow et al., 2009) or as a foraging area based on a 2000-2004 study of blue whale calls (Oleson,
3 et al., 2007).”); D-315 (“The Southern California Bight is a high-density feeding area for a wide
4 variety of cetacean species. The most abundant species is the short-beaked common dolphin,
5 *Delphinus de/phis*. The boundaries of this area are taken approximately as the area where *D. de/phis*
6 density is estimated to be over 1 animal per km-2 (Barlow et al. 2009). High density areas for other
7 species listed above fall within this zone.”). Defendants also note that Barlow and co-author
8 Ferguson participated in the process as SMEs (see SEIS D-100), and that NMFS invited all SMEs to
9 use predictive modeling in developing OBIA recommendations. See AR F1127-28 (“NMFS
10 anticipates that the Experts will use peer reviewed literature, technical reports, or his/her own
11 specific expertise and professional experience, along with other data sources to justify their
12 additions, modifications, or deletions to the list of preliminary OBIA Nominees.”), SEIS D-3 (same).
13 The SMEs who authored the Barlow study indicated that they would use existing modeling results as
14 appropriate, prepared OBIA recommendations in the areas covered by the Barlow study and cited
15 the study in support of one of their recommendations. See AR F1295 (NOAA email regarding
16 OBIA process: “As it turns out, following the introductory phone call, the 2 experts with specific
17 modeling expertise believed that the best use of models for this exercise was to utilize work that had
18 already been done to support their recommendations, for instance, Jay Barlow has done some
19 modeling that he thought would help him make some recommendations related to high density areas
20 for dolphins off the west coast.”), F1510-22 (red line version of NMFS’ Initial Screening Analysis
21 for OBIAs citing Barlow method and other models).

22 Plaintiffs further argue that even when SME Ferguson recommended an OBIA for an area
23 with “particularly high population density” of fin and sperm whales based on density models and
24 line-transect analysis, NMFS arbitrarily rejected it. AR F1517 (recommending OBIA in the
25 Southern Gulf of Mexico for sperm and fin whales, among others); SEIS D-313 (stating that
26 Southern Gulf of Mexico not eligible as OBIA); AR E-74to E-77 (list of OBIAs). Defendants argue
27 that they did not arbitrarily reject an OBIA recommendation from Ferguson because the proposed
28 OBIA was discussed in the administrative process. AR F13723 (2013 NMFS OBIA analysis and

1 conclusion that Southern Gulf of Mexico not eligible for OBIA), SEIS D-313 to D-314 (analysis of
2 the Southern Gulf of Mexico OBIA). Defendants also point out that Plaintiffs have not established
3 that the Barlow model or any other unidentified density model undermines NMFS’s findings
4 regarding any particular OBIA candidate, so there has been no showing that the models were the
5 best available science. See Ecology Ctr. v. Castaneda, 574 F.3d 652, 659-60 (9th Cir. 2009)
6 (“Moreover, WildWest has not cited any scientific studies that indicate the Forest Service's analysis
7 is outdated or flawed.”).

8 Plaintiffs argue that Defendants have used the Barlow model and other density models in
9 regulatory compliance for other Navy training. See AR NAV15444 (Barlow density model paper
10 stating that the Navy has used density modeling), F4896 (NOAA email noting that the Barlow data
11 was incorporated into the St. Andrews database). However, the St. Andrews database did not
12 produce estimates accurate enough to support OBIA's. See AR E-60 (Final Rule noting that:
13 “Density estimates are necessary for the Navy to estimate take. The St. Andrews estimates serve as
14 the least preferred option for calculating take for the Navy’s mid-frequency active sonar training
15 activities. However, for the reasons noted above, this method for estimating density does not
16 produce estimates that are considered robust or accurate enough to support the designation of OBIA's
17 under our criteria and requirements.”). Further, Defendants observe that the Federal Register
18 describes habitat modeling the Navy uses to estimate take, which utilizes uniform density and this is
19 not used to identify particular areas of relative high density that might qualify as OBIA's. 74 Fed.
20 Reg. 4844, 4871. Here, Defendants did not refuse to utilize density models, and on balance,
21 Defendants did not act arbitrarily and capriciously on this issue.

22 **v. Sperm whale OBIA's**

23 Plaintiffs argue that the failure to identify any OBIA's for sperm whales was arbitrary and
24 capricious, especially in light of NMFS’s acknowledgment that “based on vocalizations, anatomy,
25 and other information, sperm whales are likely to be more sensitive in the LFA sonar frequency
26 range than other odontocetes [non-baleen whales] and therefore the distance at which they would
27 hear and potentially respond to the source is likely more similar to [baleen whales].” 77 Fed. Reg. at
28 50309; see also AR F15629 (NOAA email that the agency should “*consider* designating OBIA's for

1 sperm whales if, through the adaptive management process, areas that meet the OBIA criteria are
2 identified.”) (emphasis in original). The Final Rule did not designate any sperm whale OBIA
3 because the agency had “not identified any areas that me[t] the OBIA criteria based solely on sperm
4 whales,” but stated that “should supporting evidence become available,” it will consider designating
5 OBIA for sperm whales . . . through the adaptive management process.” 77 Fed. Reg. at 50309; AR
6 F15629 (“We are comfortable deferring this decision to when and if an area that meets the OBIA
7 criteria for sperm whales is identified. . . .”). Plaintiffs, however, note that NMFS received expert
8 recommendations for numerous OBIA designed to protect sperm whales. See SEIS D230, D238,
9 D240, D244, D249, D250, D254, D259, D290, D300, D306, D313. Plaintiffs argue that these
10 recommendations were eliminated when NMFS decided to limit OBIA protection to baleen whales,
11 even though the vast majority of the recommended sperm whale OBIA were eligible for
12 designation.

13 Defendants agree that sperm whales, which are mid-frequency specialists, are likely to also
14 be sensitive to low-frequency sounds. See AR E-66 (Final Rule stating: “Based on vocalizations,
15 anatomy, and other information, sperm whales are likely to be more sensitive in the LFA sonar
16 frequency range than other odontocetes and therefore the distance at which they would hear and
17 potentially respond to the source is likely more similar to mysticetes. Accordingly, we will consider
18 the designation of OBIA for that species, should supporting information become available.”); F-
19 13737 (email from NOAA scientist: “After reading NRDC's comments and discussing several issues
20 with Dr. Brandon Southall, we decided that it would be appropriate to revisit the consideration of
21 proposed OBIA that include important habitat for sperm whales, beaked whales, or harbor
22 porpoises, which were excluded from consideration prior to the proposed rule because of the hearing
23 sensitivity of these species. The reason for reconsidering sperm whale OBIA is because of their
24 communication, and likely hearing sensitivity, in lower frequencies than other odontocetes and the
25 reason for revisiting beaked whale and harbor porpoise proposed OBIA is because of their
26 acknowledged general sensitivity to sound at lower levels than other species.”). NMFS thus
27 conducted a review of previously-eliminated OBIA candidates to determine whether any OBIA
28 should be designated specifically for the protection of sperm whales, but found that none met the

1 eligibility requirements. See AR F-13683-87 (NOAA reconsideration of OBIA for sperm whales,
2 among other mammals), 13736-37, 13745-90 (2012 NMFS recommended OBIA for sperm whales,
3 beaked whales and harbor porpoises), 15629 (NOAA email: “Regarding the sperm whale issue, we
4 deferred the issue in our previous conversations because the OBIA process did not identify any
5 well-justified recommended OBIA specifically for sperm whales that we would need to consider
6 adding right now.”).

7 Of the OBIA referenced by Plaintiffs, Defendants point out that two of them did not meet
8 the eligibility criteria for sperm or baleen whales. See SEIS D-284 (Continental Slope of the
9 Northern Gulf of Mexico), D-252 (Area around Ischia Island and Regno di Nettuno Marine
10 Protected Area). (Although Defendants cited D-252, that area was not targeted for whales, and
11 instead was for the common dolphin). Three of the remaining areas had already been designated as
12 OBIA with seasonal restrictions for other species that provided de facto protection for sperm
13 whales. See SEIS 4-89 (Ligurian-Corsican-Provencal Basin and Western Pelagos Sanctuary), 7-46
14 (same), D-250 (same), SEIS D-290 (Coastal Waters of Gabon, Congo and Equatorial Guinea), SEIS
15 4-87 (same), D-300 (Coastal Waters off Madagascar) SEIS 4-88 (same). After evaluating the
16 remaining nine areas raised by Plaintiffs, the agency found that they did not meet the eligibility
17 criteria for sperm whales.

18 Plaintiffs argue that the agency did not adequately reevaluate the proposed sperm whale
19 OBIA, but instead found that there was no new evidence to support OBIA. See AR F13685-86 (no
20 new evidence to support OBIA). Plaintiffs contend that this explanation is an improper after-the-
21 fact rationalization because there is nothing the record to show that the agency assessed whether
22 seasonal restrictions were sufficient to protect the sperm whale population. See SEIS 4-89.
23 However, an agency need not address every argument that might be raised in litigation. See Forest
24 Guardians v. US Forest Serv., 329 F.3d 1089, 1099-1100 (9th Cir. 2003) (“An agency's actions need
25 not be perfect; we may only set aside decisions that have no basis in fact, and not those with which
26 we disagree. Thus, even if we were to conclude that the Service could develop a better system of
27 predicting wild ungulate use, or even preventing overgrazing, we are not permitted to substitute our
28 judgment for the agency's.”) (internal citation omitted). Defendants’ conclusion that the mitigation

1 as a whole, including seasonal OBIA, satisfied the least practicable adverse impact standard was
2 not arbitrary and capricious.

3 **vi. Non-low-frequency specialists**

4 Plaintiffs raise the issue of whether Defendants’ decision to eliminate OBIA protections for
5 harbor porpoises and beaked whales was arbitrary and capricious. Plaintiffs note that Defendants
6 initially recommended OBIA for harbor porpoises and beaked whales (see AR F15339), but then
7 removed those protections. See SEIS 4-84 (noting that not all prior OBIA would necessarily be
8 designated as OBIA in the 2012 Final Rule). Plaintiffs argue that Defendants’ explanation that the
9 species’ “ potential response [to LFA] would not support operational limitations across large OBIA
10 areas,” AR E-66, does not comport with the MMPA’s protective standard.

11 Defendants, however, relied on evidence that the frequency of SURTASS LFA is well
12 below the range of best hearing sensitivity for harbor porpoises and beaked whales, so they would
13 need to be substantially closer to the source than a baleen whale to respond to LFA; therefore, the
14 monitoring and shutdown requirements provide effective protection against exposures within 2 km
15 of the LFA source. See AR C49 (Proposed Rule: “The LFA sound source is well below the range of
16 best hearing sensitivity for most MF and HF odontocete hearing specialists. This means, for
17 example, for harbor porpoises, that a sound with frequency less than 1kHz needs to be significantly
18 louder (more than 40dB louder) than a sound in their area of best sensitivity (around 100kHz) in
19 order for them to hear it,”), E65 (Final Rule stating: “We and the Navy both acknowledge the
20 evidence showing that beaked whales and harbor porpoises have responded to a variety of sources
21 (but not SURTASS LFA sonar) at lower received levels than other species respond to those same
22 sources. Even if one assumed that beaked whales or harbor porpoises similarly also respond to
23 SURTASS LFA sonar at lower received levels than other taxa, in light of their very decreased
24 sensitivity to this frequency, the distances at which beaked whales and harbor porpoises can hear
25 LFA sonar sounds (and therefore be expected to respond) are still significantly less than those for
26 low frequency hearing specialist species.”), F15620 (NOAA email regarding beaked whales and
27 harbor porpoises: “My overall take on this is that the physical ranges that these animals could
28 actually hear and be affected by LFA is quite limited and thus I do not believe it is appropriate to

1 designate an entire OBIA based exclusively on these species if they would not be for other
2 species.”), F15628 (NOAA email: “Even if one assumed that beaked whales or harbor porpoises
3 might respond to SURTASS LFA sonar in the same manner and at the same lower received levels
4 (than other taxa) that they respond to other sound sources of different types and frequencies, because
5 of their very decreased sensitivity to this frequency, the distances at which these species can hear
6 LFA sonar sounds, and further be expected to respond, are still significantly smaller than those for
7 LF species.”). Further, Defendants convened a Scientific Advisory Group to evaluate monitoring
8 and research options to increase the understanding of the potential effects of LFA on these species.
9 AR E52 (Final Rule: “Within the first year of the five-year rule, the Navy will convene a Scientific
10 Advisory Group (SAG). Its goal will be to analyze different types of monitoring and research that
11 could increase the understanding of the potential effects of low-frequency active sonar transmissions
12 on beaked whales and/or harbor porpoises.”), E-78 (Final Rule: “Following the Scientific Advisory
13 Group’s (SAG) submission of findings, and assuming the SAG recommends going forward with
14 beaked whale and/ or harbor porpoise monitoring/research, the Navy will either: (1) Draft a plan of
15 action outlining their strategy for implementing the SAG’s recommendations; or (2) Describe in
16 writing why none of the SAG’s recommendations are feasible and meet with NMFS to discuss any
17 other potential options.”). Defendants’ decision on this issue was not arbitrary and capricious.

18 **B. 12 nm coastal exclusion zone**

19 Plaintiffs argue that Defendants arbitrarily and capriciously failed ensure that the LFA had
20 the least practicable impact by neglecting to analyze whether a larger coastal exclusion zone would
21 result in the least practicable adverse impact on marine mammals. Plaintiffs argue that Defendants
22 have improperly failed to consider a larger coastal zone because there is widespread expert opinion
23 that continental shelf waters are likely to be biologically important to marine mammals, even in
24 areas in which there may not be site-specific data to satisfy OPR. AR F2189-93 (SMEs White
25 Paper); SEIS D284 (recommendation for OBIA on Continental Slope of Northern Gulf of Mexico),
26 D343 (recommendation for OBIA on continental shelf of East China Sea); Gutierrez, 2008 WL
27 360852, at *13 (“On balance, while Plaintiffs have not shown at this stage that they are likely to
28 prevail on this issue, they have raised a serious question on the merits as to whether Defendants

1 acted arbitrarily and capriciously in not using a dual criteria that included the distance from the shelf
2 break as well as the coast, at least in those parts of coastal areas where Defendants do not need to
3 operate closer to shore, such as chokepoints. This question is rendered more serious because of the
4 insufficient designation of OBIA's, which might otherwise have helped ensure the least practicable
5 impact on particularly important marine mammal habitats in coastal waters more than 12 nm off
6 shore.”). Defendants argue that they need not have considered a larger coastal exclusion zone
7 because the OBIA process protected coastal areas that were biologically important. Because
8 Defendants did not act arbitrarily and capriciously with respect to analyzing data-poor areas, they
9 did not arbitrarily and capriciously fail to consider a larger coastal exclusion zone.

10 **2. Negligible impact based on best available scientific evidence**

11 NMFS may issue a take permit only if it finds that the authorized taking will have a
12 “negligible impact” on marine mammal species or stock. See 16 U.S.C. § 1371(a)(5)(A), (D). The
13 negligible impact analysis requires consideration of “effects that are ‘reasonably expected’ and
14 ‘reasonably likely,’ but not those effects that are speculative or uncertain.” Center for Biological
15 Diversity, 588 F.3d at 710-11. The analysis must be “based on the best scientific evidence
16 available,” 50 C.F.R. § 216.102(a), and not “speculation or surmise.” Bennett v. Spear, 520 U.S.
17 154, 176 (1997). “What constitutes the ‘best’ available science implicates core agency judgment
18 and expertise to which Congress requires the courts to defer.” In re Consolidated Salmonid Cases,
19 791 F. Supp. 2d 802, 821 (E.D. Cal. 2011). A negligible impact finding is arbitrary and capricious
20 under the MMPA “only if the agency[, inter alia,] ... entirely failed to consider an important aspect
21 of the problem....” See Lands Council, 537 F.3d at 987; cf. Motor Vehicle Mfrs. Ass'n v. State Farm
22 Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983).

23 **A. Reliance on Scientific Research Program (“SRP”)**

24 The SRP was created in the mid-1990's specifically to assess the potential impacts of LFA
25 on marine mammals that are low-frequency hearing specialists. See AR E70 (“The Navy designed
26 the two-year study to assess the potential impacts of SURTASS LFA sonar on the behavior of
27 low-frequency hearing specialists, those species believed to be at (potentially) greatest risk.”), SEIS
28 C-68 to C-74 (analyzing the SRP and stating in general: “In 1997, there was a widespread consensus

1 that cetacean response to LF sound signals needed to be better defined using controlled experiments.
2 In response, the Navy worked with scientists to develop the LFS SRP. The LFS SRP was designed
3 to supplement the data from previous studies.”). NMFS concluded that the results of this study
4 remain valid. See AR E55-56 (citing the SRP in the Final Rule), 68 (“We agree that technologies
5 that produce finer resolution data have advanced since conclusion of the LFA LFS SRP. However,
6 very few active underwater systems/sensors have the benefit of such a directed and extensive
7 research effort as have the LFS SRP. The results of the LFS SRP are still sound.”), 70 (citing the
8 SRP); SEIS 1-20 (“There have been no significant changes to the knowledge or understanding of the
9 potential for SURTASS LFA sonar sound to significantly modify biologically important behavior in
10 marine mammals since the FSEIS. Findings from the Navy-funded Low Frequency Sound Scientific
11 Research Program (LFS SRP) did not reveal any significant change in a biologically important
12 behavior in LF marine mammals, and the risk analysis estimated very low risk. The information in
13 Subchapter 1.4.2.2 of the FOEIS/EIS concerning the LFS SRP remains valid, and the contents are
14 incorporated herein by reference.”), 1-22 (citing the SRP), 7-54 (“Very few active underwater
15 systems/ sensors have the benefit of such a directed and extensive research effort as the 1997-98
16 Low Frequency Sound Scientific Research Program (LFS SRP). While it is true that technologies
17 that produce finer resolution data have advanced since the LFS SRP, the results of the LFS SRP
18 remain valid.”); Clark Decl. ¶¶ 3-8.

19 Plaintiffs argue that Defendants arbitrarily and capriciously failed to consider more recent
20 research showing that underwater sound can affect marine mammals in substantial ways not
21 accounted for by the SRP. For example, Plaintiffs observe that new tagging technology with
22 kinematic and acoustic sensors has allowed researchers to document significant noise impacts on
23 baleen whale feeding that the SRP could not detect. See Calambokidis Decl. ¶¶ 5-8. This
24 Behavioral Research Study (BRS), however, involved mid-frequency sonar, not LFA. Id. Further,
25 the data from the BRS that was available at the time of the Final Rule showed only short-term,
26 small-scale responses. See Clark Decl. ¶¶ 5-7. The BRS data did not undermine the SRP, which
27 also found short-term, small-scale responses to LFA. See Ecology Center, 574 F.3d at 659-60
28 (finding that there was no showing that certain evidence undermined the evidence used by the

1 agency). However, Plaintiffs observe that the SRP did not account for the responses such as direct
2 loss of foraging and elevated stress that were found in the BRS. Supp. Calambokidis Decl. ¶¶ 6, 13.

3 Defendants point out that a January 2012 study entitled, Change in Humpback Whale Song
4 Occurrence in Response to an Acoustic Source 200km Away, documented a change in singing
5 behavior by individual humpback whales (see AR D30 (“Therefore, our data provide clear evidence
6 for the reduction of humpback whale song in response to the reception of OAWRS [Ocean Acoustic
7 Waveguide Remote Sensing] pulses. We interpret this decrease as a change in singing behavior by
8 individual whales.”)), which was also found by the SRP. See AR G697-98 (statement in the ESA
9 Biological Opinion: “In the LFS SRP LFA sonar playback experiment (Phase II), migrating gray
10 whales avoided exposure to LFA sonar signals (source levels of 170 and 178 dB sound pressure
11 level) when the source was placed in the center of their migration corridor. Responses were similar
12 for the 170- dB sound level LFA sonar stimuli and for the 170-dB sound level 1/3rd-octave,
13 band-limited noise with timing and frequency band similar to the LFA sonar stimulus. However,
14 during the LFA sonar playback experiments, in all cases, whales resumed their normal activities
15 within tens of minutes after the initial exposure to the LFA sonar signal.”). The SRP concluded that
16 the behavioral changes in the humpback whales were short-term, and the January 2012 study did not
17 find otherwise. See AR G697-98; SEIS C70-71 (“In summary, the scientific objective of the LFS
18 SRP was to conduct independent field research in the form of controlled experimental tests of how
19 baleen whales responded to SURTASS LFA sonar signals. Taken together, the three phases of the
20 LFS SRP do not support the hypothesis that most baleen whales exposed to RIs near 140 dB re 1
21 IJPa (rms) (SPL) would exhibit disturbance of behavior and avoid the area. These experiments,
22 which exposed baleen whales to RIs ranging from 120 to about 155 dB re 1 IJPa (rms) (SPL),
23 detected only minor, short-term behavioral responses.”). However, the January 2012 study
24 explained that: “due to the differences in behavioral context, location and proximity to the sound
25 source, it is difficult to compare our findings” with a playback experiment using low-frequency
26 active sonar. See AR D31.

27 Plaintiffs also cite additional studies which did not address SURTASS LFA that they
28 believe Defendants should have considered. Defendants did also rely on studies involving other

1 types of underwater noise. SEIS 4-33 (study of temporary loss of hearing in harbor porpoises
2 involving a seismic airgun as a stimulus), 4-34 (study of temporary hearing loss in bottlenose
3 dolphin involving mid-frequency sonar), 4-36 (studies of marine mammals involving noise from
4 commercial shipping and other ambient noise). Plaintiffs argue that these additional studies found,
5 among other things, that low-frequency sound can affect marine mammals far beyond the geographic
6 area where the SRP studied impacts. See AR D27-32 (January 2012 study involving the impact of
7 OAWRS low frequency sound pulses on humpback whales far from the source). One of the studies
8 showed silencing in humpback whales 200 km away from a sound source that Dr. Clark described as
9 “essentially the same as a [SURTASS LFA] sound source.” AR D64 (email from Clark describing
10 the January 2012 study and stating that the OAWRS is essentially the same as SURTASS LFA and
11 lamenting the fact that this experiment took place in right whale critical habitat without consultation
12 with NOAA). However, none of these other studies are sufficiently contrary or superior to the SRP
13 to show that Defendants acted arbitrarily and capriciously. See N.C. Fisheries Ass’n v. Gutierrez,
14 518 F. Supp. 2d 62, 85 (D. D.C. 2007) (“As the D.C. Circuit explained in interpreting statutory
15 language analogous to that of National Standard 2, the agency ‘must utilize the “best scientific ...
16 data available,” not the best scientific data possible.’ Absent some indication that superior or
17 contrary data was available and that the agency ignored such information, a challenge to the agency's
18 collection of and reliance on scientific information will fail.”) (internal citation omitted).

19 **B. Recent data**

20 Plaintiffs argue that Defendants improperly used basin-wide or pelagic abundance
21 estimates in determining the size of much smaller, genetically isolated marine mammal populations,
22 such as those around Hawaii. For example, the SEIS used a population of 3,215 bottlenose dolphins
23 from Hawaiian waters (see SEIS 4-61 (chart showing estimates of percentage of marine mammal
24 stocks potentially affected for SURTASS LFA sonar)), yet recent data from 2009 and 2011 show
25 that there are four island-associated populations of bottlenose dolphins within the main Hawaiian
26 islands that have stock sizes of 102, 147, 153 and 594. See Baird Decl. ¶ 6 (“With regard to
27 bottlenose dolphins, for example, publications in 2009 and 2011 demonstrated the existence of four
28 island-associated populations within the main Hawaiian islands and presented estimates of the

1 abundance of marked animals in each population, as well as the proportion of marked animals in the
2 populations, from which total abundance estimates are easily derived.”). At least seven other
3 species around Hawaii similarly occur in small, resident populations. Id. ¶¶ 7-8 (“In addition, data
4 from photo-identification, satellite tagging and genetic studies have indicated the existence of small
5 island-associated populations of melon-headed whales, Blainville’s beaked whales, Cuvier’s beaked
6 whales, short-finned pilot whales, pantropical spotted dolphins, rough-toothed dolphins, and dwarf
7 sperm whales around one or more of the main Hawaiian Islands. For all of these species, it is likely
8 that NMFS will recognize multiple stocks with the Hawaiian EZZ.”). Plaintiffs argue that
9 Defendants failed to consider this information even though Plaintiffs raised it during the comment
10 period. AR D54-55 (raising the issue of island-associated small populations of several species,
11 including bottlenose dolphins, melon-headed beaked whales and rough-toothed dolphins).

12 The Navy’s marine mammal take estimates used in the SEIS and the 2012 Final Rule were
13 finalized in March 2011. See AR NAV2442 (email noting that the draft SEIS was ready for review
14 and comment), 2560-61 (Draft SEIS dated April 2011 showing estimates of marine mammal stocks).
15 Prior to that time, NMFS had not divided the stock complex of approximately 3,215 animals into
16 separate stocks. AR NAV5729 (2011 Draft SEIS showing one stock for bottlenose dolphins), 17468
17 (2009 NOAA U.S. Pacific Marine Mammal Stock Assessments noting the possibility of five island-
18 associated populations, but stating that: “the limited number of bottlenose dolphin groups sampled in
19 these studies preclude any strong inference regarding stock structure within the Hawaiian EEZ at
20 this time.”). The Navy calculated the percentage of the stock complex as a whole that could
21 potentially experience a Level B behavioral disturbance, which was below the twelve percent annual
22 cap. See AR NAV5549 (chart of post-operational estimates of marine mammal stocks potentially
23 affected by operation of SURTASS LFA sonar in all mission areas for the second LOA, showing
24 that for 3,215 bottlenose dolphins in Hawaii, the percentage of stock affected from 120 to 180 dB
25 was 1.02% and the percentage of stock affected for more than 180dB was 0%), 5562-63 (chart
26 showing estimates of percentage of marine mammal stock potentially affected by SURTASS LFA in
27 a certain area, showing that for 3,215 bottlenose dolphin, the percentage affected at less than 180dB
28 was 0.5087% and was 0% at greater than or equal to 180dB with mitigation), 5810 (same); SEIS 4-

1 61 to 4-62 (same).

2 Only three months after the Navy finalized its take estimates for the SEIS and the Final
3 Rule, however, and a full year before Defendants published the SEIS and even longer before the
4 Final Rule, NMFS published its 2010 Stock Assessment reflecting the division of the bottlenose
5 dolphin population into five separate stocks. The information in the 2010 Stock Assessment may
6 well have been available to Defendants before the June 2011 publication date. The document shows
7 a revised date of January 5, 2011. Defendants concede that both the SEIS and the Final Rule failed
8 to consider these smaller stocks. See AR I42-43; Defs.’ Mot. for Summ. J. at 25.

9 The Navy only addressed the expected impact on each of the smaller stocks in its take
10 estimates in support of the 2012-13 LOA, which set forth separate estimates for each bottlenose
11 stock within the Hawaiian complex. See AR I42-43 (2012 Navy application for LOA stating that
12 there were five island-associated stocks of bottlenose dolphins), 46 (same), 73-76 (2012 chart
13 showing affected stock, showing five stock for bottlenose dolphin and showing that the percentage
14 of stock affected at 120 to 180 dB was 6.05% and 0.76% for 3,178 animals in the same stock but on
15 two different parts of the Hawaiian Islands; 0.08% for 147 animals in stock; 0.03% for 594 animals
16 in stock; 0.27% for 153 animals in stock; and 2.32% for 102 animals in stock, and at over 180dB,
17 0% for all stocks). Based on this data, Defendants found that the impact would be negligible.

18 The LOA process does not replace the public comment process required for the SEIS and
19 Final Rule, nor does it relieve Defendants of the requirement to use the best available data. See
20 Natural Resources Defense Council v. Gutierrez, 2008 WL 360852, at *8 (N.D. Cal. Feb. 6, 2008)
21 (“However, as this Court previously ruled in the earlier case, it is improper for NMFS, the
22 government agency tasked by the MMPA with requiring measures to ensure the least practicable
23 impact on marine mammals when authorizing takes, to shift the burden to members of the public to
24 prove that additional exclusion zones are warranted. See Evans, 279 F. Supp. 2d at 1163.”); Natural
25 Resources Defense Council v. Evans, 279 F. Supp. 2d 1129, 1163-64 (“However, the mere prospect
26 that future LOAs will consider additional information on marine mammal distribution and the Navy
27 may choose to avoid sensitive areas does not relieve NMFS of its specific statutory responsibility in
28 the present to ‘prescribe regulations setting forth . . . means of effecting the least practicable adverse

1 impact on such species or stock and its habitat.’ 16 U.S.C. § 1371(a)(5)(A)(ii)(I).”). Thus,
2 Defendants failed to use the best available data regarding the bottlenose dolphin stock, even though
3 the 2010 Stock Assessment describing separate stock populations was released well before
4 publication of the SEIS and the Final Rule and within a few months of the finalization of the take
5 estimates for them. Defendants were arbitrary and capricious in failing to use the best available
6 recent data.

7 **II. National Environmental Policy Act**

8 The Court reviews claims of violations of NEPA under the APA to ensure that the agency
9 has not acted in a manner that is “arbitrary, capricious, an abuse of discretion, or otherwise not in
10 accordance with law.” Okanogan Highlands Alliance v. Williams, 236 F.3d 468, 471 (9th Cir.
11 2000); 5 U.S.C. § 706. “Normally, an agency rule would be arbitrary and capricious if the agency
12 has relied on factors which Congress has not intended it to consider, entirely failed to consider an
13 important aspect of the problem, offered an explanation for its decision that runs counter to the
14 evidence before the agency, or is so implausible that it could not be ascribed to a difference in view
15 or the product of agency expertise.” Motor Vehicle Manufacturers Association of the United States,
16 Inc. v. State Farm Mutual Automobile Ins. Co., 463 U.S. 29, 43 (1983). The Court’s role is to:

17 consider whether the [agency’s] decision was based on a consideration of the relevant
18 factors and whether there has been a clear error of judgment. [citations omitted].
19 Although this inquiry into the facts is to be searching and careful, the ultimate
20 standard of review is a narrow one. The court is not empowered to substitute its
21 judgment for that of the agency. The final inquiry is whether the Secretary’s action
22 followed the necessary procedural requirements.

21 Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 416 (1971).

22 Courts apply a “rule of reason” standard, which assesses “whether an EIS contains a
23 reasonably thorough discussion of the significant aspects of the probable environmental
24 consequences.” Churchill County v. Norton, 276 F.3d 1060, 1071 (9th Cir. 2001) (quoting Trout
25 Unlimited v. Morton, 509 F.2d 1276, 1283 (9th Cir. 1974)); see also City of Carmel-by-the-Sea v.
26 U.S. Dep’t of Transp., 123 F.3d 1142, 1151 (9th Cir. 1997) (“the National Environmental Policy Act
27 requires a ‘reasonably thorough’ discussion of the environmental consequences in question, not
28 unanimity of opinion, expert or otherwise.”) In making this determination, a court must make a

1 “pragmatic judgment whether the EIS's form, content, and preparation foster both informed
2 decision-making and informed public participation.” Churchill County, 276 F.3d at 1071; City of
3 Carmel, 123 F. 3d at 1150-51. “Once satisfied that a proposing agency has taken a “hard look” at a
4 decision’s environmental consequences, [our] review is at an end.” City of Carmel, 123 F.3d at
5 1151 (quoting Idaho Conservation League v. Mumma, 956 F.2d 1508, 1519 (9th Cir. 1992)). An
6 EIS “provide[s] full and fair discussion of significant environmental impacts and inform[s]
7 decisionmakers and the public of reasonable alternatives which would avoid or minimize adverse
8 impact or enhance the quality of the environment.” See 40 C.F.R. §1502.1.

9 The Navy produced a Record of Decision on its SEIS on August 15, 2012. Plaintiffs argue
10 that Defendants violated NEPA by: (1) failing to consider a reasonable range of alternatives to the
11 proposed deployment of SURTASS LFA and appropriate mitigation measures; (2) relying on
12 outdated data with respect to marine mammals; and (3) failing to take a hard look at LFA's impacts
13 on non-marine mammals.

14 **1. Reasonable alternatives**

15 An EIS must discuss “reasonable alternatives” to the proposed action. See 42 U.S.C.
16 § 4332(2)(C)(iii); City of Carmel, 123 F.3d at 1155. Agencies must “[r]igorously explore and
17 objectively evaluate all reasonable alternatives, and for alternatives which were eliminated from
18 detailed study, briefly discuss the reasons for their having been eliminated.” 40 C.F.R. § 1502.14(a).
19 The “rule of reason” guides the choice of alternatives and the extent to which the EIS must discuss
20 each alternative. City of Carmel, 123 F.3d at 1155 (citing Citizens Against Burlington v. Busey, 938
21 F.2d 190, 195 (D.C. Cir. 1991)). “The [EIS] need not consider an infinite range of alternatives, only
22 reasonable and feasible ones.” City of Carmel, 123 F.3d at 1155; see also Laguna Greenbelt, Inc. v.
23 U.S. Dep’t of Transportation, 42 F.3d 517, 524 (9th Cir. 1994); Seattle Audobon Society v.
24 Moseley, 80 F.3d 1401, 1404 (9th Cir. 1996); League of Wilderness Defenders v. U.S. Forest Serv.,
25 689 F.3d 1060, 1071 (9th Cir. 2012) (“However, ‘the EIS need not consider an infinite range of
26 alternatives, only reasonable or feasible ones.’ An agency need not consider alternatives that ‘extend
27 beyond those reasonably related to the purposes of the project.’”) (internal citations omitted)); 40
28 C.F.R. § 1502.14(a)-(c). The range of alternatives that is deemed reasonable depends upon “the

1 underlying purpose and need to which the agency is responding in proposing the alternatives
2 including the proposed action.” 40 C.F.R. § 1502.13; see also City of Carmel, 123 F.3d at 1155
3 (“The stated goal of a project necessarily dictates the range of reasonable alternatives and an agency
4 cannot define its objectives in unreasonably narrow terms”). A court should uphold “an agency’s
5 definition of objectives so long as the objectives that the agency chooses are reasonable, and we
6 uphold its discussion of alternatives so long as the alternatives are reasonable and the agency
7 discusses them in reasonable detail.” Citizens Against Burlington, 938 F.2d at 195.

8 First, Plaintiffs argue that the SEIS failed to examine a reasonable range of alternatives
9 because there were only three alternatives: (1) a no action alternative; (2) an alternative that was the
10 same as the 2007 FSEIS Preferred Alternative; and (3) an alternative that was the same as the 2007
11 FSEIS Preferred Alternative, but with a new proposed list of OBIA. See SEIS ES-8 to ES-9. More
12 particularly, Plaintiffs argue that the 2007 Preferred Alternative was flawed for not including a
13 broader set of OBIA, so including it as an alternative was arbitrary. However, an agency need not
14 consider an “infinite range of alternatives” to satisfy NEPA. League of Wilderness Defenders, 689
15 F.3d at 1071.

16 Second, Plaintiffs argue that Defendants’ failure to consider alternatives to the 12 nm
17 coastal exclusion zone violated NEPA for the same reasons that they contend it violated the MMPA.
18 See Idaho Conservation League v. Mumma, 956 F.2d 1508, 1519 (9th Cir. 1992) (“[t]he existence of
19 a viable but unexamined alternative renders an environmental impact statement inadequate.”)
20 (internal citation omitted). Defendants respond that the agency considered additional expanded LFA
21 deployment restriction areas beyond the 12 nm exclusion zone when it considered OBIA. See SEIS
22 § 4.5.6. The SEIS also considered the appropriateness of maintaining the exclusion zone at 12 nm.
23 See SEIS 4-93. NEPA does not require the agency to include these issues as stand-alone
24 alternatives. See Westlands Water Dist. v. U.S. Dep’t of Interior, 376 F.3d 853, 868 (9th Cir. 2004)
25 (“Nor is an agency required to undertake a ‘separate analysis of alternatives which are not
26 significantly distinguishable from alternatives actually considered, or which have substantially
27 similar consequences.’”) (internal citation omitted).

28 Here, the SEIS explained that the 2001 FEIS and the 2007 FSEIS considered numerous

1 alternatives to the proposed deployment of LFA, including acoustic and non-acoustic detection
2 methods, unrestricted LFA operations, monitoring and mitigation for fish, pre-operational surveys,
3 and an extended coastal standoff zone, but found that these methods were either infeasible or failed
4 to meet the purpose and need of the proposed action. See SEIS 2-11, 2-12, 4-105 (“In these
5 documents, numerous potential alternatives have been analyzed including: acoustic and non-acoustic
6 detection methods such as radar, laser, magnetic, infrared, electronic, electric, hydrodynamic,
7 biological technologies, passive sonar and high- or mid-frequency active sonar; monitoring and
8 mitigation for fish; the use of small boats and aircraft for pre-operational surveys; and an extended
9 coastal standoff range of 46 km (25 nmi) vice 22 km (12 nmi). It has been concluded in the
10 FOEIS/EIS (DoN, 2001) and the FSEIS (DoN, 2007a) that none of these potential alternatives met
11 the purpose and need of the proposed action to provide Naval forces with reliable long-range
12 detection and, thus, did not provide adequate reaction time to counter potential threats. Furthermore,
13 they were not considered practical and/or feasible for technical and economic reasons.”), 4-106 (“In
14 previous SURTASS LFA sonar NEPA documents, numerous potential alternatives were analyzed
15 including: acoustic and non-acoustic detection methods such as radar, laser, magnetic, infrared,
16 electronic, electric, hydrodynamic, biological technologies, passive sonar and high- or
17 mid-frequency active sonar; unrestricted SURTASS LFA sonar operations; monitoring and
18 mitigation for fish; the use of small boats and aircraft for pre-operational surveys; and an extended
19 coastal standoff range of 46 km (25 nmi) vice 22 km (12 nmi). Non-acoustic alternative ASW
20 detection technologies that were originally presented in Subchapter 1.2.1 of the 2001 FOEIS/EIS
21 (Don, 2001) were reviewed and updated in Subchapter 1.1.4 of this SEIS/SOEIS reaching the same
22 conclusions. It was concluded in the FOEIS/EIS (DoN, 2001) and the FSEIS (DoN, 2007a) that none
23 of these potential alternatives was capable of accomplishing the Navy's purpose and need nor was
24 considered practical and/or feasible for technical and economic reasons.”). Thus, Defendants
25 considered these issues in the SEIS.

26 Finally, Plaintiffs argue that the SEIS’s mitigation analysis also violates NEPA because the
27 failure to take a hard look at data-poor regions in the OBIA process also constitutes a failure to
28 consider an important aspect of the problem. See Center for Biological Diversity v. U.S. Bureau of

1 Land Mgmt., 698 F.3d 1101, 1109 (9th Cir. 2012) (“An agency action is arbitrary and capricious if
2 the agency has: ‘relied on factors which Congress has not intended it to consider, entirely failed to
3 consider an important aspect of the problem, offered an explanation for its decision that runs counter
4 to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in
5 view or the product of agency expertise.’”) (internal citation omitted). As described above,
6 however, the issue of data-poor regions was examined extensively in the SEIS, which contains
7 numerous mitigation measures in addition to OBIA’s. Defendants have not acted arbitrarily and
8 capriciously on this issue.

9 **2. Data regarding marine mammals**

10 Plaintiffs argue the Navy’s analysis of LFA’s effects on marine mammals is arbitrary
11 because it relied heavily on the outdated SRP study and uses basin-wide, pelagic population
12 numbers that erroneously subsume small, insular populations of marine mammals. As set forth
13 above, Defendants acted arbitrarily and capriciously in failing to use the best available data when
14 they used the basin-wide pelagic numbers for the bottlenose dolphin rather than the more current
15 smaller stocks. The same conclusion applies here. Defendants acted arbitrarily and capriciously in
16 relying on outdated population information.

17 **3. Data regarding non-marine mammals**

18 Plaintiffs argue that in the administrative process, the Navy committed to analyzing OBIA’s
19 for non-mammal marine animals by “taking a ‘further hard look’ at any areas between 22 km (12
20 nm) and continental shelf break that may meet LFA non-[marine mammal] OBIA criteria.” AR
21 NAV805. Plaintiffs argue, however, that the Navy failed to consider OBIA’s in those areas or in any
22 other areas, and arbitrarily mischaracterized the potential impact of LFA on fish and sea turtles as
23 minimal. Compare SEIS 4-71 (LFA impacts to fish and sea turtles will be minimal); 4-71 (noting,
24 for example, that sea turtles would have to be well within the LFA mitigation zone to be affected by
25 the LFA) with SEIS 4-5 to 4-7 (noting that fish can have permanent hearing damage from
26 continuous high intensity sound after at least one hour), 4-25 to 4-26 (LFA may result in temporary
27 deafness, behavioral responses and permanent hearing loss in fish and sea turtles). However, the
28 studies cited by Plaintiffs are inapposite. For example, some studies showing permanent hearing

1 damage to fish resulted from continuous high intensity sound for one hour, not the shorter bursts of
2 low frequency sonar at issue here. In addition, the SEIS acknowledges temporary injury to fish and
3 sea turtles, which is consistent with a finding that damage was minimal. Further, the SEIS states that
4 the Navy considered whether it was appropriate to establish OBIA for species other than marine
5 mammals, “assuming those species occur within the same ocean region and during the same time of
6 year as the SURTASS LFA sonar operation and possess some sensory mechanism that allows it to
7 perceive the LF sounds or possess tissue with sufficient acoustic impedance mismatch to be affected
8 by LF sounds (SEIS 4-70), and concluded that most species would be unaffected and therefore, with
9 the exception of ESA-listed fish and sea turtles, the non-marine mammals were eliminated from
10 OBIA consideration. See, e.g., SEIS 4-71 (“Thus, many organisms would be unaffected, even if
11 they were in areas of LF sound, because they do not have an organ or tissue with acoustic impedance
12 different from water. Based on these factors, virtually all other species were eliminated from further
13 consideration except for listed fish and sea turtles.”).

14 A. Fish

15 Plaintiffs contend that the Navy did not designate any OBIA for fish and did not analyze
16 any other mitigation measures for fish even though there were comments on the Draft SEIS that
17 supported OBIA for non-marine mammals such as fish. See AR NAV7154-58 (comment
18 recommending OBIA designation for particular marine currents and seamounts because they
19 support, among other things, important fish population). In particular, Plaintiffs argue that the SEIS
20 describes studies showing that low-intensity sound can cause hearing loss in fish that lasts for more
21 than two weeks, and that high-intensity sound may result in damage to fish’s sensory hair cells
22 causing permanent hearing loss. See SEIS 4-7 to 4-8 (discussing temporary hearing loss in fish: “In
23 addition to the possibility of causing permanent injury to fish ear sensory hair cells, underwater
24 sound may cause TTS, a temporary and reversible loss of hearing that may last for minutes to
25 days.”); ES-14 (discussing affects on sea turtles, and stating that: “Any masking effects of the sonar
26 would be temporary and not significant.”), 4-14 (Navy funded research in 2007 showing hearing loss
27 in fish lasting 24 to 96 hours after exposure to low-frequency sound). Plaintiffs contend that these
28 studies contradict the conclusion in the SEIS that LFA has “minimal impact on at least the species of

1 fish that have been studied.” SEIS 4-20. However, these studies exposed goldfish and fathead
2 minnows, which are hearing specialists, to sustained high-intensity sound levels, up to three weeks
3 at a time in some cases. NAV35475 (2003 study entitled Noise-Induced Stress Response and
4 Hearing Loss in Goldfish), NAV35496 (2006 study entitled Anatomical and Functional Recovery of
5 the Goldfish Ear Following Noise Exposure, noting that the fish were exposed to white noise for 48
6 hours), NAV38144 (2004 study entitled Effects of Noise Exposure on Click Detection and the
7 Temporal Resolution Ability of the Goldfish Auditory System in which the fish were exposed to
8 white noise for 24 hours). By contrast, LFA signals have an average length of sixty seconds
9 punctuated by no-sound intervals that typically last six to fifteen minutes, so fish would not be
10 subject to sound exposure similar to that in these studies.

11 Other agencies such as NOAA also expressed concern about the potential impact on fish.
12 See, e.g., AR F9894 (NOAA stated that: “The potential environmental consequences (e.g., increased
13 predation by other species, etc.) of fishes experiencing temporary threshold shifts [hearing loss] for
14 24 to 96 hours are not addressed. It seems inappropriate to conclude that impacts are minimal if
15 these consequences are unknown.”). However, NOAA’s statement was made in response to the
16 2007 FSEIS, in reference to whether potential effects of temporary threshold shifts on fish were
17 known.

18 Defendants argue that the record shows that the Navy took a hard look at potential LFA
19 impacts to fish. The SEIS cited five recent studies concluding that sound exposure from LFA, mid-
20 frequency active sonar, and seismic airguns resulted in no fish mortality. SEIS 4-3 to 4-24; AR
21 NAV33586 (2007 study entitled The Effects of High-Intensity, Low-Frequency Active Sonar on
22 Rainbow Trout), NAV24296 (2008 study entitled The Effects of Seismic Airgun Noise on the
23 Hearing Sensitivity of Tropical Reef Fishes at Scott Reef, Western Australia), NAV35506 (2007
24 study entitled The Inner Ears of Northern Canadian Freshwater Fishes Following Exposure to
25 Seismic Airgun Sounds), NAV26172 (2010 study entitled Exposure of Fish to High-Intensity Sonar
26 does not Induce Acute Pathology), NAV24205 2011 study entitled Effects of Mid-Frequency Active
27 Sonar on Hearing in Fish). Two of the studies examined LFA exposure at 193dB and found no
28 damage to either auditory or non-auditory fish tissue. AR NAV33586, NAV26172. Further, the

1 studies found that any hearing loss was small and recovery fairly rapid. Id. Thus, the SEIS
2 concluded that the 2007 FSEIS’s conclusions remained valid and that “no new data contradict any of
3 the assumptions or conclusions” presented therein. SEIS 4-1. Plaintiffs have not shown that
4 Defendants failed to take a hard look at the subject.

5 **B. Sea turtles**

6 Plaintiffs argue that the Navy’s rationale for declining to create OBIA’s or provide other
7 mitigation for sea turtles runs counter to the evidence in the record. For example, the SEIS states
8 that sea turtles “primarily hear low frequency sounds,” and that exposure to low-frequency seismic
9 airguns has caused avoidance, increases in swimming, and erratic behavior. See SEIS 3-29 (“Based
10 on the structure of the inner ear, there is some evidence to suggest that marine turtles primarily hear
11 low frequency sounds, and this hypothesis is supported by the limited amount of physiological data
12 on turtle hearing (e.g., Ketten and Bartol, 2006; Bartol, 2008).”), 4-25 to 4-26 (citing study showing
13 increase in swimming and erratic behavior in sea turtles exposed to seismic airguns). The SEIS,
14 however, explains that the airgun study employed “impulsive signal with a large bandwidth, high
15 energy, and a short duration,” unlike LFA transmissions. SEIS 4-26 (“While the aforementioned
16 studies are of some general interest, it is important to note that airguns used in those studies have an
17 impulsive signal with a large bandwidth, high energy, and a short duration. Therefore, airgun signals
18 cannot be directly compared with SURTASS LFA sonar, since the signal characteristics are very
19 different, and the likelihood of effects on living tissue dissimilar as well.”). The SEIS reasonably
20 concluded that the airgun exposure could not be directly compared to LFA exposure. SEIS 4-26.

21 Plaintiffs also argue that there is no support in the record for the SEIS’s conclusion that
22 because the “majority of sea turtles encountered would probably be transiting in the open ocean
23 from one site to another, the possibility of significant displacement would be unlikely.” SEIS 4-26.
24 However, the SEIS states that sea turtles generally forage, nest and breed in shallow, near-shore
25 continental shelf waters where LFA operations are constrained by the 12 nm coastal standoff zone.
26 See SEIS 4-27. Further, the SEIS concluded that because sea turtles spend “a high percentage of
27 their lives in the upper 100m of the water column, particularly if they are transiting between
28 foraging and nesting grounds in the open ocean,” they would not likely encounter LFA

1 transmissions, which are centered at a nominal depth of 122 m. SEIS ES-14; 4-27.

2 Plaintiffs argue that the SEIS acknowledges the critically endangered status of several sea
3 turtle species, but did not seriously consider any geographic restrictions or mitigation to protect
4 them. See SEIS 3-22 (“All sea turtles are protected under Appendix I of the Convention on
5 International Trade in Endangered Species of Flora and Fauna (CITES), which prohibits
6 international trade to and from signatory countries. Six of the seven sea turtle species are listed
7 under the ESA as threatened and/or endangered .”). Plaintiffs argue that the Navy should have
8 followed through with its plan to analyze OBIA’s for non-mammal species in the areas where the
9 coastal shelf extends beyond 12 nm, because those areas might be important foraging and
10 development ground for sea turtles. AR NAV816 (2010 briefing for Navy regarding SURTASS
11 LFA stating that the Navy will take a further hard look at the non-marine mammal OBIA’s/dual
12 coastal standoff areas), SEIS 3-23 (noting that young turtles swim from shore until they reach the
13 open ocean), & n.8, 4-27 (identifying continental shelf as foraging and development grounds for sea
14 turtles); AR F3172-73 (sea turtle density estimate for the U.S. east coast and Gulf of Mexico); AR
15 NAV12054-55 (Office of National Marine Sanctuaries’ recommendation for protection of five
16 endangered marine turtle species in Florida Keys). Plaintiffs argue that the monitoring protocol is
17 not sufficient mitigation for sea turtles (SEIS 4-27 to 4-28 (describing the monitoring protocol), 4-71
18 (same)) because the protocol may not detect some individual or smaller sea turtles, which would
19 increase their exposure to LFA. AR G688 (“Monitoring measures may not detect some individual or
20 smaller sea turtles, which would increase their risk of exposure to sound pressure levels associated
21 with SURTASS LFA sonar within the mitigation zone (that is, 180 dB) if they encountered
22 SURTASS LFA sonar vessels during sonar transmission.”). But the SEIS found that the visual and
23 acoustic monitoring systems would reduce the potential of turtles entering the LFA area because the
24 monitoring array is positioned at the top of the LFA vertical array so turtles would have to swim
25 through the sonar detection zone before entering the 180 dB mitigation zone, wherein detection
26 would be “highly likely.” SEIS 4-28. Plaintiffs observe that there has only been one reported
27 sighting of a sea turtle between 2003 and 2011, and argue the rare sighting shows that monitoring for
28 sea turtles is ineffective. However, it is unclear whether the very low detection rate stems from

1 inadequate detection or low presence in the relevant area.

2 Plaintiffs point out in their reply brief that the Navy ignored the fact that sea turtles are
3 deep divers and can remain submerged for long periods of time, permitting intense LFA exposure as
4 they resurface. SEIS 3-22 (“Marine turtles are capable of making deep, repetitive dives to search for
5 food and can remain submerged for long periods of time, such as when resting on the ocean
6 bottom.”), 3-27 (“Olive ridley turtles are capable of deep dives, having been recorded diving to 290
7 m (951 ft), although routine feeding dives of 80 to 110 m (262 to 361 ft) are most common
8 (Bjorndal, 1997; Lutcavage and Lutz, 1997). Polovina et al., 2003 reported that olive ridley turtles
9 only remained at the surface for 20% of the time, with about 75% of their dives to 100 m and 10% of
10 total dive time spent at depths of 150 m.”). Defendants acknowledge that some sea turtles are deep
11 divers, but the shallow water depths where sea turtles are most often located, including during
12 routine diving, are principally above the LFA mitigation zone. SEIS 4-27 (“In shallower continental
13 shelf waters, where most foraging grounds are located, even deep-diving turtles, such as the
14 leatherback, make shallower foraging dives, frequently to less than 60 m (197 ft) due to the
15 constrained water depths (Eckert et al., 1996; Hays et al., 2006). Moreover, turtle foraging grounds
16 do not encompass all available continental shelf waters but are typically in restricted areas of the
17 productive shelf and inshore estuarine waters. Thus, most frequently, sea turtles would occur in the
18 water column above the LFA mitigation zone and, thus, would not encounter LFA received levels
19 2:180 dB re 1 IJPa (rms), the threshold at which they are conservatively considered to be injured.”).
20 Defendants argue that deeper diving turtles that pass through the mitigation zone would be detected
21 using the acoustic monitoring system. SEIS 4-27 to 4-28 (“The position of the HF/M3 sonar system
22 above the top of the LFA sonar array means that a sea turtle would have to swim from the surface
23 through the HF/M3 sonar detection zone to enter into the 180-dB LFA mitigation zone, making an
24 acoustic detection of the animal highly likely.”). On balance, Plaintiffs have not shown that the
25 Navy failed to take a hard look at the impacts to sea turtles.

26 **III. Endangered Species Act**

27 The ESA prohibits any person from “taking” species listed as endangered and empowers
28 the United States Fish and Wildlife Service (“FWS”) and NMFS to promulgate regulations

1 prohibiting the taking of any species listed as threatened. 16 U.S.C. §§ 1533, 1538(a)(1)(A)-(B),
2 (G). Actions challenged under the ESA are also reviewed under the “arbitrary and capricious”
3 standard of the APA. See Village of False Pass v. Clark, 733 F.2d 605, 609-10 (9th Cir. 1984).

4 Section 7 of the ESA requires each federal agency, through consultation with NMFS or FWS, to:
5 insure that any action authorized, funded, or carried out by [the] agency . . . is not
6 likely to jeopardize the continued existence of any endangered species or
7 threatened species or result in the destruction or adverse modification of habitat of
such species which is determined by the Secretary [of the Interior or of
Commerce] . . . to be critical.

8
9 16 U.S.C. § 1536(a)(2).

10 To ensure compliance with this requirement, the ESA prescribes a three-step consultation
11 process in which the agency with jurisdiction over the species evaluates the nature and extent of
12 jeopardy to the species. Under this process, the Navy first inquires of NMFS whether any threatened
13 or endangered species are present in the area of the proposed action. See Thomas v. Peterson, 753
14 F.2d 754, 763 (9th Cir. 1985); 16 U.S.C. § 1536(c)(1). Next, if the answer is affirmative, the Navy
15 prepares a biological assessment to determine whether the species is likely to be affected by the
16 action. See Thomas, 753 F.2d at 763; 16 U.S.C. § 1536(c)(1). Third, if NMFS determines, based on
17 the biological assessment, that the action the Navy proposes to take is likely to affect a threatened or
18 endangered species, the two agencies must engage in formal consultation. Id. Alternatively, if
19 NMFS determines that the action the Navy proposed to take would not likely adversely affect a
20 protected species, NMFS could attempt informal consultation. Id.

21 Formal consultation results in a biological opinion from NMFS which states a conclusion
22 as to whether the proposed action is likely to jeopardize the continued existence of a listed species or
23 result in destruction or adverse modification of critical habitat. 50 C.F.R. § 402.14. If the biological
24 opinion concludes that the proposed action would jeopardize the species or adversely affect critical
25 habitat, then the proposed action may not go forward unless NMFS can suggest an alternative to
26 avoid the adverse impact. Id.; 16 U.S.C. § 1536(b)(3)(A). If the biological opinion concludes that
27 the proposed action will not violate the Act, NMFS may still require mitigation measures. See
28 Thomas, 753 F.2d at 763; 16 U.S.C. § 1536(b)(4)(ii)-(iii).

The ESA provides that “each agency shall use the best scientific and commercial data

1 available.” 16 U.S.C. § 1536(a)(2). A biological opinion “may be invalid if it fails to use the best
2 available scientific information as required by 16 U.S.C. § 1536(a)(2).” Pac. Coast Fed'n of
3 Fishermen's Ass'n, v. Nat'l Marine Fisheries Serv., 265 F.3d 1028, 1034 (9th Cir.2001). To the
4 extent that there is any uncertainty as to what constitutes the best available scientific information,
5 Congress intended “to give the benefit of the doubt to the species.” Conner v. Burford, 848 F.2d
6 1441, 1454 (9th Cir.1988) (quoting H.R. Conf. Rep. No. 96-697, 1st Sess. 12, reprinted in 1979
7 U.S.C.C.A.N. 2572, 2576). While a reviewing court must show deference to the reasonable
8 decisions of an agency, such deference is “warranted only when the agency utilizes, rather than
9 ignores, the analysis of its experts.” Ctr. for Biological Diversity v. Bureau of Land Mgmt, 422 F.
10 Supp. 2d 1115, 1127 (N.D. Cal. 2006) (quoting Ctr. for Biological Diversity v. Lohn, 296 F.Supp.2d
11 1223, 1239 (W.D.Wash. 2003)).

12 NMFS issued its “no jeopardy” Biological Opinion for the Final Rule on August 13, 2012.
13 See AR G423. Plaintiffs argue that the opinion violates ESA's requirement to use the best available
14 science for the same reasons that the Final Rule and the SEIS violate MMPA and NEPA. For
15 example, Plaintiffs argue that with respect to marine mammals, NMFS ignored more recent studies
16 in relying on the SRP to analyze LFA's effects on marine mammals (see AR G689, 696-97 (relying
17 primarily on the SRP and related studies)), and failed to account for small, insular marine mammal
18 populations (see AR G677-89 (analyzing all affected species). Plaintiffs also argue that the
19 conclusion in the biological opinion that LFA will not adversely impact ESA-listed sea turtles and
20 fish rests on the same flawed analysis as the SEIS.

21 For the same reasons set forth above, Defendants violated the ESA by failing to use the
22 best available recent data regarding bottlenose dolphin stocks, but not in other respects.

23 **Extra-record evidence**

24 “Judicial review of an agency decision typically focuses on the administrative record in
25 existence at the time of the decision and does not encompass any part of the record that is made
26 initially in the reviewing court.” Southwest Center for Biological Diversity v. U.S. Forest Service,
27 100 F.3d 1443, 1450 (9th Cir. 1996). The Court may only consider extra-record materials: (1) if
28 necessary to determine “whether the agency has considered all relevant factors and has explained its

1 decision,” (2) “when the agency has relied on documents not in the record,” or (3) “when
2 supplementing the record is necessary to explain technical terms or complex subject matter.” Extra-
3 record documents may also be admitted “when plaintiffs make a showing of agency bad faith.” Id.
4 These exceptions are narrowly construed. The Lands Council v. Powell, 395 F.3d 1019, 1030 (9th
5 Cir. 2005) (“These limited exceptions operate to identify and plug holes in the administrative record.
6 Though widely accepted, these exceptions are narrowly construed and applied.”). Moreover,
7 “consideration of the evidence to determine the correctness or wisdom of the agency’s decision is
8 not permitted, even if the court has also examined the administrative record.” Arasco, Inc. v. EPA,
9 616 F.2d 1153, 1160 (9th Cir. 1980) (“If the reviewing court finds it necessary to go outside the
10 administrative record, it should consider evidence relevant to the substantive merits of the agency
11 action only for background information, as in Bunker Hill, or for the limited purposes of
12 ascertaining whether the agency considered all the relevant factors or fully explicated its course of
13 conduct or grounds of decision. If the court determines that the agency's course of inquiry was
14 insufficient or inadequate, it should remand the matter to the agency for further consideration and
15 not compensate for the agency's dereliction by undertaking its own inquiry into the merits.”)
16 (internal citation omitted). The relevant factors analysis allows for consideration of extra-record
17 testimony from Plaintiff, as well as from the agency. See Earth Island Institute v. USFS, 442 F.3d
18 1147, 1161-62 (9th Cir. 2006) (affirming admission of plaintiff’s extra-record expert declarations in
19 the district court and stating that the declarations were properly before the appellate court because
20 they were “necessary to determine whether the agency has considered all relevant factors and has
21 explained its decision.”) (internal citation omitted).

22 Agency action, including designation and certification of an administrative record, is
23 entitled to a “presumption of regularity.” See McCrary v. Gutierrez, 495 F.Supp.2d 1038, 1041
24 (N.D. Cal. 2007) (citing Bar MK Ranches v. Yuetter, 994 F.2d 735, 739–40 (10th Cir. 1993) (while
25 the agency “may not unilaterally determine what constitutes the administrative record” the courts
26 “assume[] the agency properly designated the [AR] absent clear evidence to the contrary”)); see
27 also Ctr. for Native Ecosystems v. Salazar, 711 F.Supp.2d 1267, 1274 (D. Colo. 2010). The party
28 seeking supplementation bears the burden of overcoming this presumption by “clear evidence.” See

1 Bar MK Ranches, 994 F.2d at 740; Glasser v. NMFS, 2008 WL 114913, *1 (W.D. Wash. Jan.10,
2 2008); In re Delta Smelt Consolidated Cases, 2010 WL 2520946, *2 (E.D. Cal. 2010). Here, each
3 party has filed several extra-record declarations in support of their motions, to which the opposing
4 party has objected.

5 **1. Plaintiffs' objections to Defendants' extra-record evidence**

6 In their combined cross-motion for summary judgment and opposition to Plaintiffs' motion
7 for summary judgment, Defendant filed four extra-record declarations. Plaintiffs object to two of
8 them: (1) the Cody Declaration; and (2) the Clark Declaration.

9 **A. Cody declaration**

10 Jeannine Cody is a Fishery Biologist for NMFS, Office of Protected Resources,
11 Conservation and Permits Division. Cody Decl. ¶ 1. Part of her responsibilities include reviewing,
12 analyzing and processing requests for authorizations to take marine mammals incidental to specified
13 activities pursuant to the MMPA. Cody Decl. ¶ 1. Among other things, Cody was the principal
14 program analyst for and a primary drafter of the OBIA analysis for the SURTASS LFA sonar Draft
15 Supplemental Environmental Impact Statements and Final Supplemental Environmental Impact
16 Statements, for which NMFS was a cooperating agency. Cody Decl. ¶ 2. She was extensively
17 involved in, and has extensive personal knowledge about, the process NMFS used for designating
18 OBIA's contained in the Final Rule. Cody Decl. ¶ 2.

19 Cody explained the process used for identifying OBIA's. Cody Decl. ¶¶ 5-11. She
20 explained that, among other things, to be eligible for OBIA consideration and designation, an area
21 had to be located more than 12 nautical miles from any coastline, including offshore islands. Cody
22 Decl. ¶ 3. This criteria reflected the fact that the coastal standoff zone already prohibited the Navy
23 from allowing the LFA sonar sound pressure levels to exceed 180 decibels within 12 nm of any
24 coastline, including offshore islands and emergent land masses. Cody Decl. ¶ 3. In addition, a
25 potential OBIA had to meet at least one of the biological criteria to establish biological importance.
26 Cody Decl. ¶ 3. The remainder of Cody's declaration counters the statements made by Plaintiffs'
27 expert, Eric Hoyt, in his declaration stating that fifteen MPAs were improperly deemed ineligible for
28 OBIA designation based on the erroneous finding that they fell entirely within the 12 nm coastal

1 standoff zone. Cody Decl. ¶ 4.

2 At the end of the identification process, Cody determined that approximately 353 of the
3 403 areas identified as potential OBIA's by Hoyt in his book in 2005 were ineligible for OBIA
4 designation because they fell entirely within the 12 nm coastal standoff zone or even if the area
5 extended beyond the 12 nm coastal standoff zone, Cody could not find any information indicating
6 that any part outside the coastal standoff zone met at least one of the biological criteria used to
7 establish biological importance. Cody Decl. ¶ 7. Cody determined that 345 of the MPAs identified
8 by Hoyt in his book in 2011 were ineligible for OBIA consideration for the same reasons. Cody
9 Decl. ¶ 11. Cody also examined each of the fifteen potential OBIA areas that Hoyt stated in his
10 declaration were improperly rejected as OBIA's. Cody Decl. ¶¶ 13-34.

11 Plaintiffs object to the Cody declaration on the ground that it presents impermissible post-
12 hoc rationalizations for the agency actions at issue in this case. See Alvarado Community Hosp. v.
13 Shalala, 155 F.3d 1115, 1124 (9th Cir. 1998) ("A district court may go outside the administrative
14 record for the purposes of background information or 'for the limited purposes of ascertaining
15 whether the agency considered all the relevant factors or fully explicated its course of conduct or
16 grounds of decision.' Of course, explanatory materials cannot be used to offer new rationalizations
17 for agency action.") (internal citations omitted). Plaintiffs argue that the Cody declaration relies on
18 numerous studies that are not in the administrative record or that post-date (or immediately pre-date)
19 the Final Rule. See, e.g., Cody Decl. ¶ 17. Finally, Plaintiffs argue that evidence of agency
20 explanations that does not appear in the record and was not disclosed to the public should not be
21 considered by the Court. See Earth Island Inst. v. US Forest Serv., 442 F.3d 1147, 1160, 1167 (9th
22 Cir. 2006) (stating that if data was concealed, then the agency could be found to have abused its
23 discretion).

24 The Cody declaration was properly offered to explain the OBIA designation process that
25 took place well before the Final Rule and to rebut paragraphs 11-13 of the Hoyt declaration
26 submitted by Plaintiffs, in which Hoyt identifies fifteen areas that allegedly extend beyond the 12
27 nm coastal standoff zone and are allegedly important biological habitat. The Cody declaration is
28 therefore not stricken as a whole, but its references to documents that immediately pre-date or post-

1 date the Final Rule are stricken. See Ctr. For Biological Diversity v. US Fish and Wildlife Serv.,
2 450 F.3d 930, 943 (9th Cir. 2006) (holding that a party may not use “post-decision information as a
3 new rationalization either for sustaining or attacking the Agency’s decision.”); see also Sierra Club
4 v. Kimbell, 595 F. Supp. 2d 1021, 1038 (D. Minn. 2009) (“it is not reasonable to expect the [agency]
5 to revise its work yet again on the basis of data that became available only a few months before the
6 FEIS was issued.”).

7 **B. Clark declaration**

8 Christopher Clark is the I.P. Johnson Director of the Bioacoustics Research Program at the
9 Cornell Laboratory of Ornithology, which, among other things, develops equipment used by
10 scientists around the world to study communication by animals, including cetaceans. Clark Decl. ¶
11 1, and n.1. He is also the Senior Scientist in the Department of Neurobiology and Behavior at
12 Cornell University. Clark Decl. ¶ 1.

13 Clark’s declaration responds to several statements made in the declaration filed by
14 Plaintiffs’ expert John Calambokidis. For example, Calambokidis stated that the lack of response
15 data to LFA for blue whales constitutes a major shortcoming of the research conducted to date,
16 including the SRP on which the agency relied. Clark Decl. ¶ 4. Clark explains that data for the blue
17 whales and other cetaceans is sparse, but that there is no evidence to support a hypothesis that the
18 relatively minor blue whale responses observed during the SRP could lead to a biologically
19 significant impact or that SURTASS LFA is having any impact on blue whales. Clark Decl. ¶ 5.
20 Clark also disagrees that the lack of data is significant. Clark Decl. ¶ 5. Clark states that the
21 observations from research on mid-frequency sonar do not justify a conclusion that blue whales
22 should have a stronger response to LFA than MFA. Clark Decl. ¶ 7.

23 Clark responds to statements made in the Weilgart declaration and the studies on which
24 those statements were based. For example, Weilgart testified that SURTASS LFA would have a
25 significant impact on sperm whales, but Clark disagrees with that conclusion. Clark Decl. ¶ 10.
26 Clark notes that the Bowles survey on which Weilgart relies was designed to evaluate whether
27 marine mammals responded to a synthetic low-frequency underwater sound with a relatively loud
28 source level, which was used during a five-day project evaluating the feasibility of using sound to

1 measure ocean temperature. Clark Decl. ¶ 11. Clark notes that the survey itself stated that: “There
2 was little chance that a statistically useful sample of observations could be obtained before, during
3 and after transmissions in such a short period.” Clark Decl. ¶ 11. Clark states that to conclude as
4 Weilgart does that sperm whale individuals and/or populations would be negatively impacted by
5 SURTASS LFA is a “huge leap that is not supported by the best available science or logic.” Clark
6 Decl. ¶ 15. Plaintiffs’ request to strike the Clark declaration is denied because the declaration is a
7 response to the Weilgart and Calambokidis declarations.

8 **2. Defendants’ objections to Plaintiffs’ supplemental declarations**

9 In connection with their objections to Defendants’ extra-record declarations of Cody and
10 Clark, Plaintiffs have submitted three supplemental declarations from Hoyt, Weilgart and
11 Calambokidis. Plaintiffs argue that the declarations are admissible because they respond to the
12 Cody and Clark declarations, and because they address issues that were raised in the original
13 Weilgart, Hoyt and Calambokidis declarations. Plaintiffs also argue that the supplemental
14 declarations are admissible to show harm. Defendants do not object to the supplemental
15 Calambokidis declaration, but argue that portions of Plaintiffs’ supplemental Hoyt and Weilgart
16 declarations should be stricken.

17 **A. Supplemental Hoyt declaration**

18 Defendants argue that paragraphs 25-31 of the supplemental Hoyt declaration should be
19 stricken. Those paragraphs detail six areas that were identified in the FSEIS as having been
20 eliminated from consideration for protections as OBIAAs because they fell within the 12 nm coastal
21 exclusion, but which Hoyt found to touch or almost touch the 12 nm line based on a review of the
22 GIS coordinates, and where low-frequency specialists or sperm whales exist. Hoyt Decl. ¶¶ 25-31.
23 This portion of the Hoyt declaration does not appear to respond to anything in the Cody or Clark
24 declarations. For example, the six areas were not mentioned in the Cody declaration. Thus,
25 paragraphs 25-31 of the supplemental Hoyt declaration are stricken.

26 **B. Supplemental Weilgart declaration**

27 Defendants argue that paragraphs 9-10 of the supplemental Weilgart declaration should be
28 stricken. Those paragraphs address Weilgart’s belief that seasonal OBIAAs are insufficient to protect

1 whales and the Barlow predictive modeling identified high densities of blue and sperm whales in
2 certain areas. Plaintiffs argue that paragraph nine of the Weilgart declaration responds to
3 Defendants' after-the-fact explanation that seasonal OBIAs provide adequate protection for sperm
4 whales exist. Plaintiffs argue that paragraph ten responds to Defendants' contention that Plaintiffs
5 did not demonstrate that a specific density model is better than the information on which Defendants
6 relied.

7 However, the Cody or Clark declarations do not address sperm whales in seasonal OBIA's,
8 and in fact, the Clark declaration does not mention OBIA's. Further, paragraph ten is additional
9 argument about density models that does not respond to anything in the Clark or Cody declarations.
10 Thus, paragraphs nine and ten of the supplemental Weilgart declaration are stricken.

11 **3. Plaintiffs' further objections to Defendants' supplemental declarations**

12 Defendants submitted additional supplemental declarations from Cody and Clark, which
13 they argue are admissible because they respond to the supplemental declarations of Hoyt, Weilgart
14 and Calambokidis, and because they address Plaintiffs' allegations of harm. Further, Defendants
15 argue that the LOAs attached to the supplemental Cody declaration are offered to show that the
16 objections raised in the initial Hoyt declaration are moot.

17 Plaintiffs argue that the supplemental Cody declaration offers post-decision explanations
18 for the agencies' actions, which are not admissible. See Alvarado Cmty. Hosp. v. Shalala, 155 F.3d
19 1115, 1124 (9th Cir. 1998). However, to the extent that the supplemental Cody and Clark
20 declarations respond to the supplemental Hoyt, Weilgart and Calambokidis declarations, they are
21 admissible.

22 **4. Plaintiffs' Motion to File Additional Declarations**

23 On November 1, 2013, Plaintiffs filed a motion to file additional declarations to support
24 Plaintiffs' standing to seek injunctive relief. "To satisfy Article III's standing requirements, a
25 plaintiff must show (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and
26 (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the
27 challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the
28 injury will be redressed by a favorable decision." Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.

1 (TOC), Inc., 528 U.S. 167, 180–81 (2000) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555,
2 560–61 (1992)). Plaintiffs in environmental cases need not demonstrate injury for each area covered
3 by the agency action to establish standing. In Salix v. U.S. Forest Serv., 2013 WL 2099811, at *4
4 (D. Mont. May 16, 2013), the court considered whether the plaintiffs had standing under ESA to
5 challenge the Northern Rockies Lynx Amendment, a “programmatic plan amendment[]” to the land
6 and resource management plans of 18 National Forests in the Northern Rocky Mountains analysis
7 area. Salix, 2013 WL 2099811, at *1. The Salix court relied on Ninth Circuit authority on standing
8 to hold:

9 Under Sierra Forest Legacy [v. Sherman], 646 F.3d 1161, 1179 (9th Cir. 2011)] and
10 Pacific Rivers [Council v. United States Forest Service], 689 F.3d 1012 (9th
11 Cir.2012)], plaintiffs may challenge a programmatic regulation that affects multiple
12 forests so long as they allege a particularized injury in a specific area that is affected
13 by the regulation and that will be subject to an agency action that relies on the
14 regulation. It is not necessary for plaintiffs to assert a separate claim challenging the
15 project or for plaintiffs to assert a particularized injury for every forest subject to the
16 regulation.

17 Salix, 2013 WL 2099811, at *4.

18 In this motion, Plaintiffs propose filing five additional declarations to further demonstrate
19 membership interests in all marine regions subject to the LOAs. Although these declarations are not
20 strictly necessary to establish standing, Defendants have not shown that they would be prejudiced by
21 the filing of these declarations, which are substantially similar to Plaintiffs’ previous declarations
22 supporting standing. The additional declarations provide relevant additional evidence of Plaintiffs’
23 interests in the regions affected by the August 2013 LOAs. In addition, there has been no showing
24 that Plaintiffs unduly delayed in obtaining these declarations. Therefore, there is good cause to grant
25 Plaintiffs’ motion to file additional declarations. See Civil L.R. 7-3(d).

26 **Conclusion**

27 Accordingly, Plaintiffs’ Motion for Summary Judgment is granted in part and denied in
28 part and Defendants’ Motion for Summary Judgment is granted in part and denied in part. This
matter is set for a case management conference on April 14, 2014 at 3:00 p.m. Prior to the case
management conference, the parties shall meet and confer and file a joint case management
conference statement no later than April 7, 2014.

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IT IS SO ORDERED.

Dated: March 17, 2014



ELIZABETH D. LAPORTE
United States Chief Magistrate Judge