UNITED STATES DEPARTMENT OF COMMERCE
National Oceanic and Atmospheric Administration
NATIONAL MARINE FISHERIES SERVICE
West Coast Region
501 West Ocean Boulevard, Suite 4200

September 6, 2023

Refer to NMFS No: WCRO-2023-02100

Bob Heely Jr.
Commanding Officer
Naval Base San Diego
3455 Senn Road
San Diego, California 92136-5084

Re: Endangered Species Act Section 7(a)(2) Concurrence Letter and Magnuson-Stevens Fishery Conservation and Management Act Essential Fish Habitat Response for the Naval Base San Diego Mole Pier Floating Dry Dock Project

Dear Officer Heely:

This letter responds to your July 26th, 2023 request for concurrence from the National Marine Fisheries Service (NMFS) pursuant to Section 7 of the Endangered Species Act (ESA) for the subject action. Your request qualified for our expedited review and concurrence because it contained all required information on your proposed action and its potential effects to listed species and designated critical habitat.

This response to your request was prepared by NMFS pursuant to section 7(a)(2) of the ESA and implementing regulations at 50 CFR 402. On July 5, 2022, the U.S. District Court for the Northern District of California issued an order vacating the 2019 regulations that were revised or added to 50 CFR part 402 in 2019 ("2019 Regulations," see 84 FR 44976, August 27, 2019) without making a finding on the merits. On September 21, 2022, the U.S. Court of Appeals for the Ninth Circuit granted a temporary stay of the district court's July 5 order. On November 14, 2022, the Northern District of California issued an order granting the government's request for voluntary remand without vacating the 2019 regulations. The District Court issued a slightly amended order two days later on November 16, 2022. As a result, the 2019 regulations remain in effect, and we are applying the 2019 regulations here. For purposes of this consultation and in an abundance of caution, we considered whether the substantive analysis and conclusions articulated in the letter of concurrence would be any different under the pre-2019 regulations. We have determined that our analysis and conclusions would not be any different.

We reviewed the US Navy's (Navy) consultation request document and related materials. Based on our knowledge, expertise, and your action agency's materials, we concur with the action agency's conclusions that the proposed action is not likely to adversely affect the NMFS ESA-listed species and/or designated critical habitat.

This letter underwent pre-dissemination review using standards for utility, integrity, and objectivity in compliance with applicable guidelines issued under the Data Quality Act (section 515 of the Treasury and General Government Appropriations Act for Fiscal Year 2001, Public

Law 106-554). The concurrence letter will be available through NMFS' Environmental Consultation Organizer [https://appscloud.fisheries.noaa.gov/suite/sites/eco/page/home]. A complete record of this consultation is on file at NMFS' Long Beach office.

Reinitiation of consultation is required and shall be requested by the Navy or by NMFS, where discretionary Federal involvement or control over the action has been retained or is authorized by law and (1) the proposed action causes take; (2) new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered; (3) the identified action is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the written concurrence; or (4) a new species is listed or critical habitat designated that may be affected by the identified action (50 CFR 402.16). This concludes the ESA consultation.

NMFS also reviewed the proposed action for potential effects on essential fish habitat (EFH) designated under the Magnuson-Stevens Fishery Conservation and Management Act (MSA), including conservation measures and any determination you made regarding the potential effects of the action. This review was pursuant to section 305(b) of the MSA, implementing regulations at 50 CFR 600.920, and agency guidance for use of the ESA consultation process to complete EFH consultation.

Section 305 (b) of the MSA directs Federal agencies to consult with NMFS on all actions or proposed actions that may adversely affect EFH. Under the MSA, this consultation is intended to promote the conservation of EFH as necessary to support sustainable fisheries and the managed species' contribution to a healthy ecosystem. For the purposes of the MSA, EFH means "those waters and substrate necessary to fish for spawning, breeding, feeding, or growth to maturity", and includes the associated physical, chemical, and biological properties that are used by fish (50 CFR 600.10). Adverse effect means any impact that reduces quality or quantity of EFH, and may include direct or indirect physical, chemical, or biological alteration of the waters or substrate and loss of (or injury to) benthic organisms, prey species and their habitat, and other ecosystem components, if such modifications reduce the quality or quantity of EFH. Adverse effects may result from actions occurring within EFH or outside of it and may include direct, indirect, site-specific or habitat-wide impacts, including individual, cumulative, or synergistic consequences of actions (50 CFR 600.810). Section 305(b) of the MSA also requires NMFS to recommend measures that can be taken by the action agency to conserve EFH. Such recommendations may include measures to avoid, minimize, mitigate, or otherwise offset the adverse effects of the action on EFH (50 CFR 600.0-5(b)).

The proposed project occurs in EFH for various federally managed fish species within the Pacific Coast Groundfish and Coastal Pelagic Species Fishery Management Plans (FMPs). In addition, the project occurs within an estuary and eelgrass habitat, which have been designated as habitat areas of particular concern (HAPCs) for various federally managed fish species within the Pacific Coast Groundfish FMP. Designated HAPC are not afforded any additional regulatory protection under the Magnuson-Stevens Fishery Conservation and Management Act; however, federal projects with potential adverse impacts to HAPC are more carefully scrutinized during the consultation process.

Project related activities that may adversely affect EFH include dredging, disposal of dredge

material, increased coverage from overwater structures, and pile installation and removal. NMFS determined the proposed action would adversely affect EFH as follows: direct removal and/or burial of organisms and habitats, turbidity and/or siltation, contaminant release and uptake, release of oxygen consuming substances, entrainment, noise disturbance, increased shading from overwater structures and alteration to hydrodynamic regimes and physical habitat. Of primary concern to NMFS are the loss of eelgrass habitat, conversion of intertidal and shallow subtidal habitat to moderately deep and deep subtidal habitat (as characterized in the San Diego Bay Integrated Natural Resource Management Plan) to allow the installation and operation of the dry dock. However, the proposed project includes conservation measures to avoid, minimize, or offset those impacts. Specifically, the project proposes to use 0.137 acre of credits from the Navy's San Diego Bay Eelgrass Mitigation Bank to offset the impacts associated with the direct loss of eelgrass habitat, conversion of shallow water habitat to deeper water, and shading impacts. NMFS has reviewed the proposed best management practices and does not object to the proposed compensatory mitigation. Therefore, as long as the proposed conservation measures are implemented, including the compensatory mitigation, we have no additional EFH Conservation Recommendations to provide at this time.

The Navy must reinitiate EFH consultation with NMFS if the proposed action is substantially revised in a way that may adversely affect EFH, or if new information becomes available that affects the basis for NMFS' EFH conservation recommendations (50 CFR 600. 920(l)). This concludes the MSA consultation.

Please direct questions regarding this letter to Jhenevieve Cabasal (jhenevieve.cabasal@noaa.gov) or Cristina Robinson (cristina.robinson@noaa.gov) in the Long Beach office.

Sincerely,

Dan Lawson
Branch Chief
Protected Resources Division

bcc: 151422WCR2023PR00179