

1 KRISTEN L. BOYLES (CSB #158450)
STEPHEN D. MASHUDA (WSB #36968)

2 *[Pro Hac Vice Pending]*

3 Earthjustice
705 Second Avenue, Suite 203
Seattle, WA 98104
4 (206) 343-7340 | Phone
(206) 343-1526 | Fax
5 kboyles@earthjustice.org
smashuda@earthjustice.org

6 *Attorneys for Plaintiffs*

7
8 STEPHEN ZAK SMITH (CSB #228913)
Natural Resources Defense Council (NRDC)
9 1314 Second Street
Santa Monica, CA 90401
10 (310) 434-2300 | Phone
(310) 434-2399 | Fax
11 zsmith@nrdc.org

12 *Attorney for Plaintiff NRDC*

13 UNITED STATES DISTRICT COURT
14 FOR THE NORTHERN DISTRICT OF CALIFORNIA
15 AT SAN FRANCISCO

16 INTERTRIBAL SINKYONE WILDERNESS)
17 COUNCIL, CENTER FOR BIOLOGICAL) Civ. No.
18 DIVERSITY, NATURAL RESOURCES DEFENSE)
19 COUNCIL, INC., PEOPLE FOR PUGET SOUND,)
20 FRIENDS OF THE SAN JUANS, and FRIENDS OF) COMPLAINT FOR DECLARATORY
21 THE EARTH) AND INJUNCTIVE RELIEF

22 Plaintiffs,

23 v.

24 NATIONAL MARINE FISHERIES SERVICE, DR.)
25 JANE LUBCHENCO, Administrator, National)
26 Oceanic and Atmospheric Administration, in her)
27 official capacity; and SAMUEL D. RAUCH, Acting)
28 Assistant Administrator, National Marine Fisheries)
Service, in his official capacity,)

Defendants.

COMPLAINT FOR DECLARATORY AND
INJUNCTIVE RELIEF (Civ. No.) -1-

Earthjustice
705 Second Ave., Suite 203
Seattle, WA 98104
(206) 343-7340

INTRODUCTION

1
2 1. This action arises under and asserts violations of the Endangered Species Act
3 (“ESA”), 16 U.S.C. § 1531 et seq., the Marine Mammal Protection Act, (“MMPA”) 16 U.S.C. §
4 1361 et seq., and the Administrative Procedure Act (“APA”), 5 U.S.C. § 551 et seq., in
5 connection with actions by the National Oceanic and Atmospheric Administration’s National
6 Marine Fisheries Service (“NMFS”) in the development of five-year regulations authorizing
7 activities in the Navy’s Northwest Training Range Complex (“NWTRC”), a one-year Letter of
8 Authorization issued pursuant to those regulations, and NMFS’s biological opinions evaluating
9 these actions.¹

10
11 2. The Navy’s NWTRC stretches from the inland marine waters of Puget Sound in
12 Washington, west to the outer coast of Washington, and south to the Lost Coast region of
13 Northern California in Northern Mendocino County. The range extends seaward approximately
14 250 nautical miles (288 miles) and encompasses more than 126,000 square nautical miles of
15 ocean and 34,000 square nautical miles of airspace – an area the size of the entire State of
16 California. These waters are some of the most biologically significant and productive marine
17 areas in the world, home to both abundant and threatened species of marine life, including six
18 endangered whale species (blue, fin, humpback, sei, sperm, and Southern Resident killer
19 whales), threatened Steller sea lions, threatened and endangered salmon, steelhead, and rockfish
20 species, and endangered leatherback sea turtles.

21
22
23
24 ¹ The two biological opinions challenged in this case are NMFS’s “Biological Opinion for the
25 U.S. Navy’s Proposed Training Activities on the Northwest Training Range from June 2010 to
26 June 2015” (Jun. 15, 2010) (“Five-Year BiOp”) and NMFS’s “Biological Opinion for the U.S.
27 Navy’s Proposed Military Readiness Activities on the Northwest Training Range Complex”
28 (Nov. 9, 2011) (“2011 LOA BiOp”).

1 3. Though the Navy has been conducting training exercises in the NWTRC for
2 several decades, it has recently evaluated and sought the required permits for increases in the
3 intensity and tempo of its training activities. The Navy’s activities in this area include surface-
4 to-air gunnery and missile exercises; anti-submarine warfare exercises involving tracking
5 aircraft, sonobouys, and use of surface ship sonar; air-to-surface bombing exercises; and sink
6 exercises. As part of these exercises, the Navy will repeatedly broadcast high-intensity sound
7 waves into a vast stretch of ocean, containing some of the most biologically productive marine
8 habitat in the United States, and take other actions known to kill and injure whales, dolphins,
9 fish, and sea turtles. NMFS and the Navy estimate that the Navy’s use of mid-frequency active
10 sonar (“MFAS”) and other actions will result in approximately 650,000 marine mammal “takes”
11 during the first five-year authorized period of these training activities. According to these
12 agencies, the use of MFAS in particular will harass marine mammals hundreds of thousands of
13 times, disrupting their migration, breathing, nursing, breeding, feeding, and sheltering, and cause
14 temporary hearing loss in species that depend on sound for their reproduction and survival.
15

16 4. The MFAS systems at issue in this action generate extraordinarily loud
17 underwater sound of such intensity that it is capable of flooding thousands of square miles of
18 ocean with dangerous levels of noise pollution. There is no dispute that the Navy’s use of mid-
19 frequency sonar can kill, injure, and disturb many species, especially marine mammals, whose
20 sensitive hearing and reliance on sound for communication and foraging make them particularly
21 vulnerable. According to a 2004 report by the Scientific Committee of the International Whaling
22 Commission – the preeminent international body of scientists studying whale populations –
23 regarding the connection between exposure to mid-frequency sonar and whale mortality, the
24 “evidence is very convincing and appears overwhelming.” Whales and other marine mammals
25

1 are not the only type of sea life affected by active sonar. Intense levels of undersea noise can
2 have significant adverse effects on fish populations, sea turtles, and other marine life.

3 5. NMFS – an agency responsible under the MMPA and ESA for protecting marine
4 mammals and other marine life – has authorized the Navy’s actions without properly assessing
5 impacts on marine mammals or endangered and threatened species and without imposing any
6 meaningful additional protective measures to minimize the impacts to these species as required
7 by federal law. Notwithstanding the enormous size of the range, and NMFS’s acknowledgement
8 that habitat avoidance represents the best available means of reducing sonar impacts on marine
9 mammals, the agency did not limit sonar use in even a single square mile.

10
11 6. NMFS’s unlawful approval of the use of high-intensity MFAS in coastal waters
12 stretching from Washington State to Northern California threatens significant environmental
13 harm to hundreds of thousands of animals and a vast swath of their coastal and marine habitats.
14 Plaintiffs recognize the importance of military readiness and do not seek to halt the Navy’s
15 training exercises. Plaintiffs instead seek a remand compelling NMFS to comply with its duties
16 under the Endangered Species Act and the Marine Mammal Protection Act, ensuring that the
17 Navy conducts and mitigates its activities in a manner that protects these animals and their
18 habitat from harm. Unless this Court compels NMFS to comply with federal law and remands
19 the approvals that are the focus of this action, marine species and their habitat risk irreparable
20 damage that may not be fully understood for years to come.

22 FACTUAL BACKGROUND

23 I. THE NAVY’S SONAR SYSTEMS

24 7. The Navy employs mid-frequency, high-intensity active sonar as an element of its
25 testing and training program for anti-submarine warfare. Active sonar involves the generation of
26 extraordinarily intense sound for the purpose of detecting objects in the marine environment.

1 MFAS systems are conventionally defined as those that emit sound at frequencies between 1 and
2 10 kilohertz (kHz), which is a measure of the frequency of the oscillation of the sound wave (or
3 its “pitch”).

4 8. Navy vessels are widely equipped with hull-mounted mid-frequency sonar
5 systems. MFAS systems are also air-deployed via helicopter and fixed-wing aircraft and are
6 placed on floating platforms known as sonobuoys. The Navy has stated it will use, and NMFS
7 has approved the use of, all such platforms in the NWTRC. Five-Year BiOp at 190-91. Training
8 activities using hull-mounted systems alone will produce up to 108 hours of MFAS per year.
9 Five-Year BiOp at 25-26. This alone represents a 17% increase in the Navy’s use of these
10 MFAS systems in the NWTRC. NMFS and the Navy do not disclose the total additional hours
11 of sonar use from sonobuoys or other MFAS equipment within the training range in either the
12 Five-Year BiOp or the 2011 LOA BiOp, although NMFS indicated that activities involving just
13 one of the Navy’s sonobuoy systems could be up to 60 hours per year. 2011 LOA BiOp at 9.

15 9. In addition to these MFAS systems, the Navy will also use up to 372 hours of
16 high-frequency active sonar from the submarine navigational sonar (42 hours/year), range
17 pingers (150 hours/year), and the uplink from its portable undersea tracking range (150
18 hours/year). 2011 LOA BiOp at 18.

19 10. Some of the MFAS systems the Navy employs are capable of generating sounds
20 in excess of 235 decibels.² For example, during a March 2000 mass stranding of whales in the
21 Bahamas, which a joint NMFS and Navy report concluded was most likely caused by its use of
22

24 ² The decibel scale is like the Richter scale for earthquakes in that it expresses force in
25 logarithmic terms, rising in increasing orders of magnitude from a baseline value. Each ten-
26 decibel rise along the scale corresponds to a ten-fold increase in power: a sound measuring 130
27 dB is ten times more intense than a 120 dB sound, a sound of 140 dB is 100 times more intense,
28 and a sound of 150 dB is 1,000 times more intense.

1 an MFAS system, sound levels generated by the sonar were reported to exceed 235 decibels, and
2 even tens of kilometers away from the source sound levels remained at 160 decibels. Exactly
3 how loud some of these systems operate is not publicly known.

4 II. THE IMPACTS OF SONAR ON MARINE MAMMALS AND OTHER AQUATIC 5 LIFE

6 11. There is no serious scientific dispute that the MFAS systems the Navy will
7 employ in the NWTRC can kill, injure, and disturb marine mammals. In 2004, the Scientific
8 Committee of the International Whaling Commission analyzed the impact of military sonar on
9 beaked whale populations and reported that “[t]he weight of accumulated evidence now
10 associates mid-frequency, military sonar with atypical beaked whale mass strandings. This
11 evidence is very convincing and appears overwhelming.”

12 12. A group of scientists hired by the Navy to examine the impacts of active sonar on
13 cetaceans came to the same conclusion, writing in 2004 in their report to the Navy that “the
14 evidence of sonar causation is, in our opinion, completely convincing and that therefore there is a
15 serious issue of how best to avoid/minimize future beaching events. ... Given the variety of
16 different beaching events, it is hard to argue that there is some very special confluence of
17 acoustic events that uniquely trigger beaked whale beachings; instead the trauma, whatever its
18 cause, seems to be a robust consequence of mid-frequency ensonification.”

19 13. Naval exercises employing MFAS have definitively caused or been associated
20 with multiple stranding events of whales and other marine mammals around the world. These
21 stranding incidents include, but are not limited to, the following:

22
23 *Greece 1996*—A mass stranding of Cuvier’s beaked whales occurred along the
24 west coast of Greece in 1996 and was correlated, in an analysis appearing in the
25 scientific journal *Nature*, with the movements of an active sonar system operated
26 by NATO. A subsequent NATO investigation found the strandings to be closely
27 timed with the movements of a vessel employing intense mid- and low-frequency
28 active sonar and ruled out all other physical environmental factors as a cause.

1 *Bahamas 2000*—During a U.S. Navy exercise, seventeen marine mammals of
2 four different species stranded along the shores of the channels through which
3 several Navy ships traveled. *Post mortem* examinations, or “necropsies,”
4 overseen by NMFS were performed on some of the whales, and all of the animals
5 examined had hemorrhaging in and around the ears, and other tissues related to
6 sound conduction or production, such as the larynx and auditory fats, had minor
7 to severe damage. A joint task force headed by NMFS and the Navy
8 subsequently concluded that the whale deaths were due to “acoustic or impulse
9 trauma” that was “most likely” caused by the Navy’s MFAS.

10 *Canary Islands 2002*—During a Spanish naval exercise in which U.S. ships
11 participated, at least fourteen whales of three species were found stranded on the
12 nearby islands of Lanzarote and Fuerteventura. Findings published in the
13 scientific journals *Nature* and *Veterinary Pathology* concluded that the whales
14 showed organ damage and other internal injuries consistent with the condition
15 known in human divers as “the bends.” The authors of the study suggest that the
16 injuries were caused either by a direct physiological effect of the mid-frequency
17 sonar, or by a startle response to the sonar that caused the whales to ascend too
18 quickly.

19 *Haro Strait 2003*— During a Navy “swept channel” exercise employing MFAS in
20 United States waters in Washington State’s San Juan Islands, observers on land
21 and in boats saw dozens of porpoises stampeding from the area; a pod of
22 endangered Southern Resident killer whales broke off their feeding behavior and
23 milled in the shallows before fleeing. In the days following this exercise, fourteen
24 harbor porpoises were found beached along nearby shores. A NMFS report
25 analyzing this incident concluded that acoustic trauma could not be ruled out as a
26 cause of death. The report also concluded that harbor porpoises throughout the
27 area were exposed to levels of sound much greater than those known to strongly
28 disrupt their behavior, and that the number of porpoise strandings observed in this
29 period was statistically significantly higher than in other years.

30 *Gulf of Alaska 2004*—Coincident with a joint training exercise conducted by the
31 Navy in the Gulf of Alaska in June 2004, at least six beaked whales stranded on
32 nearby shores. No analysis of the injuries to these whales has yet been released.

33 *Hawaii 2004*—During a major training exercise off Hawaii, called RIMPAC
34 2004, some 150-200 whales from a species that is rarely seen near shore and had
35 never naturally mass-stranded in Hawaii came into Hanalei Bay, on the island of
36 Kaua’i. The whales crowded into the shallow bay waters and milled there for
37 over 28 hours. Though the whales were ultimately assisted into deeper waters by
38 members of a local stranding network, one whale calf was left behind and found
39 dead the next day. NMFS’s investigation of the incident concluded that the
40 Navy’s nearby use of sonar in RIMPAC 2004 was the “plausible, if not likely”
41 cause of the stranding.

1 *North Carolina 2005*—During and just after use of MFAS in an anti-submarine
2 training exercise off of North Carolina, at least thirty-seven whales of three
3 different species stranded and died along North Carolina’s Outer Banks. NMFS
4 investigated the incident and found that the event was highly unusual, being the
5 only mass stranding of offshore species ever to have been reported in the region.
6 NMFS concluded that sonar was a possible cause of the strandings and also ruled
7 out the most common other potential causes, including viral, bacterial, and
8 protozoal infection, direct blunt trauma, and fishery interactions.

9 *Almeria, Spain 2006*—Four Cuvier’s beaked whales stranded on the Almerian
10 coast of southern Spain, with the same suite of bends-like pathologies seen in
11 whales that stranded in the Canary Islands in 2002 and 2004. Investigators are
12 confirming the use of MFAS in the area.

13 *Ionian Sea 2011*—At least ten and possibly dozens of additional Cuvier’s beaked
14 whales stranded or washed ashore dead on the Island of Corfu in Greece and
15 across the Ionian Sea on the Italian coast of Calabria in December 2011. The
16 stranding event coincided in time and space with a major Italian Navy exercise
17 known as “Mare Aperto” in the central-southern Tyrrhenian, Ionian, and southern
18 Adriatic. At least one of the participating ships in this year’s exercise is equipped
19 with active sonar identical to systems used by the U.S. Navy.

20 14. Reports of whales that strand due to Navy sonar are likely to underestimate the
21 scale of the problem. Many whales may be affected far from shore and remain undiscovered, as
22 most dead whales sink. NMFS recognized this point in a recent stock assessment of a particular
23 species of beaked whales, writing that “injuries or mortalities would rarely be documented, due
24 to the remote nature of many of these activities and the low probability that an injured or dead
25 beaked whale would strand.” This fear is echoed by members of the Scientific Committee of the
26 International Whaling Commission, who in 2004 expressed concern that “assessments of
27 stranding events do not account for animals that are severely affected or died but did not strand,”
28 and by a thirty-member expert panel convened by the U.S. Marine Mammal Commission, who
reported on the issue in 2006.

15. There is also strong evidence that sonar causes severe, debilitating, potentially
lethal injuries at sea. In many cases, bodies of dead animals have been recovered in time to give
evidence of physical trauma inflicted by a high-intensity acoustic source, such as hemorrhaging

1 around the brain, ears, and other tissues related to sound conduction. Other animals have
2 suffered from symptoms resembling severe decompression sickness, or “the bends.” Numerous
3 published papers and expert reviews highlight acute bubble growth as an explanation for these
4 injuries, caused perhaps by sonar driving whales to surface too rapidly or to dive too quickly
5 before they can eliminate accumulated nitrogen. Such injuries would harm marine mammals
6 regardless of whether they strand and are discovered.

7 16. Impacts of MFAS on marine mammals is not limited to stranding and death.

8 Marine mammals depend on sound to navigate, find food, locate mates, avoid predators, and
9 communicate with each other. Flooding their habitat with high-intensity noise can interfere with
10 these and other activities and cause:

- 11
- 12 a. temporary or permanent loss of hearing;
 - 13 b. abandonment of habitat;
 - 14 c. disruption of mating, feeding, nursing, and migrating;
 - 15 d. aggressive (or agonistic) behavior, which can result in injury;
 - 16 e. stress, which compromises breeding and may leave animals vulnerable to disease,
parasitism, and other environmental harms;
 - 17 f. masking of biologically meaningful sounds, such as the call of predators; and
 - 18 g. declines in the productivity of prey species, such as fish, whose eggs have been shown to
lose viability on exposure to intense sound.

19 17. Even the Navy’s own analysis of the impacts of MFAS in the NWTRC, which
20 significantly underestimates the impacts, concludes that use of MFAS will cause roughly
21 650,000 “takes” of protected marine mammals over the initial five-year period by exposing them
22 to levels of noise that constitute behavioral harassment or that may cause hearing loss or other
23 physical injury under federal law. This figure includes significant numbers of endangered
24 species such as Southern Resident killer whales, blue whales, sperm whales, and other species
25 whose numbers are already severely depleted. The repeated annual use of MFAS in the same
26 areas, which exposes the same individuals to the impacts of sonar again and again, raises serious

1 concerns about the cumulative impact these actions will have over the initial five-year period and
2 beyond.

3 18. In addition to these harms from MFAS use, other aspects of the Navy's activities
4 can also harass, injure, and kill marine mammals and other marine life. Air-to-Surface Missile
5 Exercises, Surface-to-Surface Missile Exercises, Gunnery Exercises, and Sinking Exercises all
6 can cause acoustic and non-acoustic impacts, and some are similar or identical to military
7 activity that has required authorization and substantial mitigation in the past. The debris
8 produced by these activities alone – some of which is toxic – can impact marine mammals and
9 other ESA-listed species and their habitat.

10 19. In addition to its demonstrated effects on marine mammals, a substantial body of
11 evidence suggests that intense underwater noise, such as active sonar, may be harmful or deadly
12 to other marine wildlife, including fish such as salmon and rockfish.

13 20. High-intensity sound has been shown to reduce the viability of fish eggs and to
14 cause developmental damage in young fish. Intense sound can kill eggs, larvae, and fry outright
15 or retard their growth in ways that may hinder their survival later. It has also been shown to
16 injure the ears and lateral lines necessary for hearing in adult fish. Intense sound may also have
17 harmful resonance impacts on fish with swim bladders, particularly larger pelagic fish such as
18 tuna. Because fish rely on hearing to locate prey and avoid predators, affects to their hearing
19 both impair their ability to find food and increase their vulnerability to predation.

20 21. Nor is physical injury the only effect that ocean noise from MFAS may have on
21 fish. Many fish species are acutely sensitive to sound, and many have been shown to use sound
22 for feeding, mating, avoiding predators, and maintaining the integrity of their schools. In 2006,
23
24
25
26

1 NMFS observed that the use of MFAS could affect the breeding behavior of certain fish species,
2 causing them, for example, to cease their spawning choruses.

3 22. Like marine mammals, some fish also demonstrate behavioral responses to
4 intense sound. A Norwegian study, for example, documented 45-70% declines in the catch rates
5 for both cod and haddock across an area of nearly 2,000 square miles in the vicinity of a seismic
6 airgun array, a technology that produces intense underwater noise. A similar experiment showed
7 a 52% decline in a rockfish fishery exposed to a single airgun array. Not only can such
8 disruption of normal behavior potentially have widespread effects on the health of individual
9 populations, but the decline in catch rates demonstrated by these studies has direct economic
10 ramifications.

12 III. THE FIVE-YEAR REGULATIONS

13 23. In November 2010, NMFS promulgated a set of Five-Year Regulations, 75 Fed.
14 Reg. 69296 (Nov. 10, 2010) pursuant to the MMPA authorizing the unintentional/incidental take
15 of marine mammals between October 2010 and October 2015 from the Navy's training exercises
16 in the NWTRC (codified at 50 C.F.R. §§ 218.110-.119). The Five-Year Regulations purport to
17 "prescribe the permissible methods of taking and other means of effecting the least practicable
18 adverse impact on marine mammal species or stocks and their habitat, as well as requirements
19 pertaining to the monitoring and reporting of such taking." 75 Fed. Reg. at 69296. Based on
20 NMFS's and the Navy's conclusions that the use of MFAS exercises would be small in number
21 and of short duration, NMFS concluded that the proposed activities were not likely to result in
22 marine mammal strandings or other mortality and would "have minimal effects on marine
23 mammal habitat." *Id.* at 69317.

1 24. NMFS determined that take from use of active sonar would harass a significant
2 number of marine mammals, however, and set limits on both the annual rate and cumulative take
3 that would result. NMFS concluded that

4 modeled annual takes (which must be provided with the annual LOA application)
5 of any individual species may vary but will not ultimately exceed the indicated 5-
6 year total for that species (indicated by Table 6) by more than 10 percent and will
7 not exceed the indicated annual total by more than 25 percent in any given year;
8 and that modeled total yearly take of all species combined may vary but may not
9 exceed the combined amount indicated below in any given year by more than 10
10 percent.

11 Id. at 69318. Based on these conclusions, and “dependent upon the implementation of the
12 mitigation and monitoring measures,” NMFS found that the total taking from sonar and
13 explosives training would have a negligible impact on the affected species or stocks. Id.

14 25. The Five-Year regulations allow the following levels of take from Level B
15 Harassment:

Species	Annual	Total
Humpback whales	15	75
Fin whales	144	720
Blue whales	19	95
Sei whales	1	5
Minke whales	9	45
Gray whales	4	20
Sperm whales	127	635
Killer whales	14	70
Pygmy or dwarf sperm whales	4	20
Mesoplodont beaked whales	15	75
Cuvier’s beaked whales	14	70
Baird’s beaked whales	13	65
Short-finned pilot whales	2	10
Striped dolphins	40	200
Short-beaked common dolphins	1,256	6,280
Risso’s dolphins	100	500
Northern right whale dolphins	741	3,705
Pacific white-sided dolphins	571	2,855

Dall's porpoises	4,752	23,760
Harbor porpoises	119,274	596,370
Northern elephant seals	378	1,890
Pacific harbor seal	586	2,930
California sea lions	286	1,430
Northern fur seal	1,365	6,825
Steller sea lions	120	600

50 C.F.R. § 218.112(c)(4).

26. The Five-Year regulations allow the following levels of take from Level A

Harassment:

Species	Annual	Total
Fin whales	1	5
Sperm whales	1	5
Harbor porpoises	1	5
Dall's porpoises	3	15
Northern right whale dolphins	1	5
Short-beaked common dolphins	2	10
Northern elephant seals	2	10
Pacific harbor seal	1	5
Northern fur seal	1	5

50 C.F.R. § 218.112(c)(5).

27. For military readiness activities, Level A Harassment is defined as “any act that injures or has the significant potential to injure a marine mammal or marine mammal stock in the wild.” 16 U.S.C. §§ 1362(18)(B); 1362(18)(C). Level B Harassment is defined as “any act that disturbs or is likely to disturb a marine mammal or marine mammal stock in the wild by causing disruption of natural behavioral patterns, including but not limited to, migration, surfacing, nursing, breeding, feeding, or sheltering, to a point where such behavioral patterns are abandoned or significantly altered.” 16 U.S.C. §§ 1362(18)(B); 1362(18)(D).

1 IV. NMFS'S BIOLOGICAL OPINIONS

2 28. Because NMFS determined that the Five-Year Regulations "may affect" ESA -
3 listed humpback whales, sei whales, fin whales, blue whales, sperm whales, Southern Resident
4 killer whales, Steller sea lions, and the leatherback sea turtle, the Permit Division of NMFS
5 consulted with NMFS's Endangered Species Division and issued the Five-Year BiOp that
6 purports to evaluate the effects on these listed species. NMFS concluded in the Five-Year BiOp
7 that the Navy's activities were not likely to jeopardize the continued existence of any listed
8 species and were not likely to destroy or adversely modify designated critical habitat. The Five-
9 Year BiOp does not include an Incidental Take Statement ("ITS"), 16 U.S.C. § 1536(b)(4), for
10 the total anticipated take identified in the Five-Year Regulations.
11

12 29. The Five-Year Regulations include a provision for NMFS to issue a yearly Letter
13 of Authorization ("LOA") specifying the amount of take from training actions anticipated for
14 each one-year period. 50 C.F.R §§ 218.116-218.119. NMFS announced its intent to consult on
15 the impacts of this take to listed species and to issue a biological opinion for each of these LOAs
16 and to include an Incidental Take Statement authorizing any incidental take in those annual
17 biological opinions. *Id.* at 69318; Five-Year BiOp at 311.
18

19 30. Pursuant to the Five-Year Regulations, NMFS on November 12, 2010 issued a
20 one-year Letter of Authorization to allow take of marine mammals incidental to the Navy's
21 training activities through November 2011 NMFS issued a second annual LOA on or about
22 November 8, 2011 authorizing the Navy's activities through November 2012. The 2011 LOA
23 allows take of marine mammals protected by both the ESA and MMPA. Because NMFS
24 determined that the issuance of the LOA "may affect" species protected by the ESA, NMFS
25 again consulted internally and issued the 2011 LOA BiOp on November 9, 2011 that concluded
26 that the Navy's actions from November 2011 to November 2012 would not jeopardize the
27

1 continued existence of nor destroy or adversely modify designated critical habitat for any listed
2 species affected by the action.³ NMFS's 2011 LOA BiOp also contained an ITS for the Navy's
3 take of ESA-listed threatened and endangered species for the one-year period.

4 V. PUBLIC CONCERN OVER HARM FROM ACTIVITIES IN NORTHWEST
5 TRAINING RANGE COMPLEX

6 31. The public responded to the Navy's proposed training activities with detailed
7 concern for the impacts of these activities and with overwhelming support for more protective
8 mitigation measures. See 75 Fed. Reg. 69306-69316 (noting over 50,000 comments received on
9 NMFS's proposed Five-Year Regulations and summarizing issues raised). To avoid some of the
10 harmful impacts of the Navy's actions on marine mammals and other imperiled species, many
11 individuals and organizations – including many of the plaintiffs in this case – urged NMFS and
12 the Navy to adopt mitigation measures that would exclude MFAS use and other training
13 activities from biologically sensitive areas completely or at least at certain times of the year.
14 See, e.g., 75 Fed. Reg. at 69307-69316 (summarizing and purporting to respond to comments
15 that urged additional mitigation measures); Letter from Taryn Kiekow to Kimberley Kler (Mar.
16 10, 2009) at 16-22 (included in FEIS, App. H at H-228-231) (comments on Navy's Draft
17 Environmental Impact Statement summarizing ineffectiveness of visual monitoring, urging time
18 and place training restrictions to protect sensitive species or important habitat, and suggesting
19 other measures and research to protect species); Letter from Taryn Kiekow to Michael Payne
20 (April 10, 2009) (scoping comments on NMFS's rulemaking, urging NMFS to identify spatial
21 and temporal exclusions as well as additional operational requirements and adequate monitoring
22 to protect marine life when conducting exercises); Letter from Zak Smith to Michael Payne
23

24 _____
25 ³ NMFS had previously issued a one-year biological opinion addressing the Navy's activities
26 from November 2010 to November 2011. That previous BiOp has expired and has been
superseded by the 2011 LOA BiOp.

1 (August 12, 2009) (comments on NMFS's proposed Five-Year rule, urging more effective
2 mitigation scheme based on geographic and seasonal mitigation); Letter from Zak Smith to Dr.
3 Jane Lubchenco (October 7, 2010) (urging a prohibition on training and testing activities in the
4 Olympic Coast National Marine Sanctuary). More recently, many of the plaintiffs asked the
5 Navy and NMFS to incorporate significant new information contained in a NMFS and Navy
6 funded study, *Beaked Whales Respond to Simulated and Actual Navy Sonar*, into their analysis
7 of MFAS impacts on marine mammals. See Letter from Zak Smith to Michael Payne and
8 Admiral Gary Roughead (May 12, 2011) (discussing Tyack, et al.).
9

10 32. As federal agencies, both NMFS and the U.S. Navy are obligated to conduct
11 government-to-government consultation with federally recognized Indian Tribes. Presidential
12 Executive Order No. 13175, Consultation and Coordination with Indian Tribal Governments, 65
13 Fed. Reg. 67249 (November 6, 2000); Joint Secretarial Order on American Indian Tribal Rights,
14 Federal-Tribal Trust Responsibilities and the Endangered Species Act Issued by Department of
15 the Interior and the Department of Commerce (June 5, 1997); Department of Defense American
16 Indian and Alaska Native Policy (October 20, 1998); Department of the Navy Policy for
17 Consultation with Federally Recognized Indian Tribes (October 11, 2005).
18

19 33. Beginning in early 2009, the Sinkyone Council contacted both the U.S. Navy and
20 NMFS to express to those agencies its concerns that the impacts of the Navy's expansion of its
21 NWTRC training activities would negatively affect marine species and the Tribes' cultural
22 subsistence practices. Also since early 2009, the Sinkyone Council has made repeated requests
23 to the Navy to enter into formal government-to-government consultation with the Council and its
24 member Tribes with regard to the Navy's plans for increased training activities within the
25 NWTRC. The Council provided comments at two public information meetings with U.S. Navy
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1 representatives in Mendocino County (March 31, 2009 and December 16, 2010), and has sent the
2 Navy three letters (April 13, 2009; October 22, 2010; and June 8, 2011). Copies of the first two
3 letters were mailed to NMFS.

4 34. At the public meetings and in its letters, the Council requested the Navy to
5 conduct formal government-to-government consultation with the Sinkyone Council and with the
6 California Indian Tribes affected by the project. To date, the Sinkyone Council has not received
7 a letter, phone call or any other communication from the Navy in response to the Council's
8 repeated requests for Tribal consultation. Nor has NMFS communicated with the Council
9 regarding Tribal consultation or the other issues of concern the Council has brought to the
10 attention of NMFS through its letters to the Navy. In its response to public comment in its EIS
11 for the project, the Navy states that it has "...met all requirements for tribal consultations." But
12 neither the U.S. Navy nor NMFS have complied with their own Tribal consultation policies that
13 require them to consult regularly and meaningfully with affected Tribes on projects such as the
14 Navy's expanded NWTRC.
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16 35. NMFS did not adopt any additional mitigation measures beyond what the Navy
17 included in its application to take marine mammals. NMFS instead noted that it would use the
18 "adaptive management" provisions of the final Five-Year Regulations, 50 C.F.R. § 218.118(d),
19 to consider whether to do so during the term of the regulations if new information impacting its
20 analysis and authorization became available.
21

22 JURISDICTION AND VENUE

23 36. This Court has jurisdiction over this action under 5 U.S.C. §§ 701-706
24 (Administrative Procedure Act), 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 2201
25 (declaratory judgment), and 28 U.S.C. § 2202 (injunctive relief). Venue is properly vested in
26 this Court under 28 U.S.C. § 1391(e) because plaintiffs reside in this district and members of the
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1 plaintiff organizations reside in this district, and these members and organizations do business
2 here. In addition, a substantial part of the events or omissions giving rise to the claims in this
3 case occurred in this district.

4 PARTIES

5 37. The plaintiffs in this action are described below.

6 A. InterTribal Sinkyone Wilderness Council (the “Council”), a 501(c)(3) non-profit
7 Tribal consortium founded in 1986, is comprised of ten federally recognized Northern California
8 Indian Tribes with ancient and enduring subsistence and other cultural ties to the Sinkyone
9 “Lost” Coast, an ocean and land wilderness region located along the coastlines of Mendocino
10 and Humboldt Counties that begins approximately 200 miles north of San Francisco. The
11 Sinkyone “Lost” Coast region stretches from Rockport to the mouth of the Mattole River and
12 comprises a portion of the aboriginal lands and marine waters that belonged to and were
13 inhabited, utilized and stewarded for millennia by the Sinkyone Tribal Peoples, to whom the
14 Council’s member Tribes are ancestrally, culturally and historically related and otherwise
15 connected. The ten Tribes comprising the Sinkyone Council include: Cahto Indian Tribe of the
16 Laytonville Rancheria, Coyote Valley Band of Pomo Indians, Hopland Band of Pomo Indians,
17 Pinoleville Pomo Nation, Potter Valley Tribe, Redwood Valley Rancheria of Pomo
18 Indians, Robinson Rancheria of Pomo Indians, Round Valley Indian Tribes, Scotts Valley Band
19 of Pomo Indians, and Sherwood Valley Rancheria of Pomo Indians. The Council works to re-
20 establish local Tribal stewardship within the Sinkyone region through marine and land
21 conservation, habitat restoration, and traditional resource management. Sinkyone’s original
22 Native peoples suffered forced removals and massacres during the mid-1800s to make way for
23 white settlers and the subsequent destruction of the region’s old-growth redwood rainforest. The
24 Council established the 3,845-acre InterTribal Sinkyone Wilderness, the first of its kind in the
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1 United States, to support and sustain local Tribes' traditional cultural marine and land uses, and
2 to restore and protect both the marine and terrestrial cultural-natural resources and wilderness
3 values of the Sinkyone region for present and future generations of local Tribal peoples. The
4 ancestral territories of the Council's member Tribes include marine and coastal areas that will be
5 adversely impacted by NMFS's approval of the U.S. Navy's actions in the Northwest Training
6 Range Complex.

7 Members of the Council's Tribes use these affected areas for fishing, for ceremonial
8 purposes and for gathering and harvesting a wide range of living marine organisms that are
9 essential to the Tribes' traditional cultural ways of life. NMFS's approval of the Navy's actions
10 will harm ocean waters adjacent to ecologically sensitive and permanently protected Tribal,
11 State, and Federal wilderness-designated areas along the Sinkyone Coast: the Sinkyone
12 Council's InterTribal Sinkyone Wilderness lands, the California Department of Parks and
13 Recreation's Sinkyone Wilderness State Park, and the federal coastal wilderness portions of the
14 Bureau of Land Management's King Range National Conservation Area. Additionally, the State
15 of California soon will adopt by regulation several Marine Protected Areas (MPAs) in the form
16 of reserves and conservation areas along the Sinkyone Lost Coast, and other locations between
17 Point Arena and the California-Oregon border, that are designed to permanently protect habitats
18 and communities of marine mammal, avian, finfish, invertebrate, and plant species. The impacts
19 to marine life along all of these coastal wilderness and other protected locations from NMFS's
20 approval of the Navy's expanded activities will negatively affect the Sinkyone Council Tribes'
21 traditional cultural and environmental uses and values, including their ceremonial practices, and
22 will be far-reaching and irreversible. These impacts pose serious threats not only to the many
23 forms of marine life that are culturally significant – both historically and contemporarily – to the
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1 Tribes, but also to the very survival of the ancient maritime lifeways of North Coast Tribes
2 represented by the Council that continue to rely on the ocean for their subsistence way of life.
3 Appropriate mitigations may help reduce some of these negative cultural and environmental
4 impacts to the Sinkyone Council's member Tribes.

5 B. Center for Biological Diversity (the "Center") is a non-profit corporation with
6 over 40,000 members and offices in Seattle, Washington; Portland, Oregon; San Francisco,
7 California; Tucson, Arizona; and other cities. The Center is dedicated to the preservation,
8 protection, and restoration of biodiversity, native species, and ecosystems. The Center has
9 members that reside throughout Washington, Oregon, and California and who use the areas that
10 serve as habitat for the marine mammals and other wildlife harmed by the Navy's training
11 activities in the NWTRC. Center members and staff include local residents with educational,
12 scientific research, moral, spiritual, and recreational interests in marine mammals and other
13 species impacted by the Navy's training activities in the NWTRC. The Center, its members, and
14 staff have participated in efforts to protect and preserve the these species and their habitat,
15 including gaining ESA protections for killer whales, efforts to reduce ship collisions with whales
16 along the Pacific Coast, as well as other work to reduce noise pollution impacts on marine
17 mammals.
18

19 C. Natural Resources Defense Council, Inc. ("NRDC") is a national environmental
20 advocacy group organized as a New York not-for-profit membership corporation, with offices in
21 San Francisco, New York, Los Angeles, Chicago, Washington, D.C., and Beijing, China. NRDC
22 supports the enforcement of federal environmental laws, including the ESA and the MMPA, and
23 is committed to the protection of marine mammals. Over past decades, NRDC has made
24 significant contributions to marine conservation and science and has advocated for measures to
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1 protect cetaceans and other marine life. NRDC has approximately 1.3 million Members and
2 Online Activists, more than 357,000 members nationwide, over 88,000 of whom reside in the
3 states of California, Oregon, and Washington.

4 D. People for Puget Sound is a non-profit membership organization working to
5 protect and restore the health of the Puget Sound ecosystem. People for Puget Sound conducts
6 educational, advocacy, and hands-on restoration projects aimed at appreciation, protection, and
7 restoration of Puget sound and its Southern Resident killer whales (orca), which frequently
8 migrate from Puget Sound to the outer coastal waters of Washington, Oregon, and
9 California. Because these resident orcas are the top predators of the food web, they serve as an
10 indicator species for the health of the ecosystem. People for Puget Sound's programs include
11 whale-watching and whale-appreciation events including on-water and on-land opportunities,
12 documentary films about the Southern Resident killer whales, and numerous pollution
13 prevention, oil spill prevention, and habitat protection and restoration projects to ensure clean
14 water and healthy prey populations for orcas and other species in Washington's marine
15 waters. People for Puget Sound currently has approximately 10,000 individual members and
16 offices in Seattle and Olympia, Washington. The vast majority of People for Puget Sound's
17 members, board, and staff live around Puget Sound and the Northwest Straits.

19 E. Friends of the San Juans is a non-profit organization founded in 1979 to support
20 local efforts to manage growth and protect the natural beauty and rich wildlife in Washington's
21 San Juan Islands. Using science, policy, law, education, and citizen activism, Friends of the San
22 Juans works to protect, preserve, and restore the land, water, and sea of the San Juan archipelago.
23 Friends of the San Juans' activities include protection of orca whales and other endangered
24 species; marine research and habitat restoration; ecological stewardship and conservation; land
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1 use and environmental compliance; community engagement and education. Friends of the San
2 Juans' efforts have produced cleaner, healthier habitats for sensitive species in beaches, parks,
3 and waters; inventories of marine and nearshore habitat to help rebuild depleted salmon stocks;
4 and increased protections for our magnificent orca whales. Members of Friends of the San Juans
5 live, work, and recreate in the San Juan Islands and on the surrounding waters, where they enjoy
6 observing orca whales.

7 F. Friends of the Earth ("FoE") is a national, nonprofit environmental advocacy
8 organization founded in 1969 and incorporated in the District of Columbia, with its headquarters
9 in Washington, D.C. and an office in San Francisco, California. FoE's mission is to defend the
10 environment and champion a healthy and just world. FoE is the U.S. voice of the world's largest
11 network of environmental groups – Friends of the Earth International – a federation of grassroots
12 groups working in 76 countries on today's most urgent environmental and social issues. FoE's
13 campaigns focus on promoting clean energy and solutions to climate change, keeping toxic and
14 risky technologies out of the food we eat and products we use, and protecting marine ecosystems
15 and the people who live and work near them. FoE has more than 225,000 members and activist
16 nationwide, and over 45,000 of those members and activists reside in Washington State, Oregon,
17 and California.

18
19 38. Members of the plaintiff organizations live and recreate throughout the coastal
20 lands and marine areas encompassed by the Navy's NWTRC. They derive cultural, religious,
21 aesthetic, recreational, scientific, inspirational, and educational benefits from the coastal
22 ecosystems affected by the Navy's activities and from the existence of marine mammals and
23 other wildlife in the wild. Plaintiffs and their members observe and study these species, make
24 guided and unguided whale watching and fishing trips, and pursue underwater diving, bird-

1 watching, and photography to observe these species in their native habitats. In addition,
2 members of plaintiff InterTribal Sinkyone Wilderness Council and its member tribes use these
3 affected areas for fishing, for ceremonial purposes, and for gathering and harvesting a wide range
4 of living marine organisms that are essential to the Tribes' traditional cultural ways of life.
5 Plaintiffs derive cultural, religious, aesthetic, recreational, scientific, inspirational, and
6 educational benefits from these activities and have an interest in preserving the opportunity to
7 engage in them in the future. The expectation and understanding that marine wildlife are present
8 and healthy in their native waters is integral to plaintiffs' and their members' use and enjoyment
9 of these waters.

10
11 39. Plaintiffs and their members will suffer irreparable injury to their cultural,
12 religious, aesthetic, recreational, scientific, educational, and conservation interests unless NMFS
13 revisits its decisions authorizing the Navy's training activities without adequate mitigation to
14 protect marine mammals and other species protected by the ESA and MMPA.

15 40. Defendant National Marine Fisheries Service is an agency of the United States
16 Department of Commerce responsible for administering the provisions of the ESA with regard to
17 threatened and endangered marine species, including the biological opinions challenged here,
18 and for administering the provisions of the MMPA, including the Five-Year Regulations
19 challenged in this case.

20
21 41. Defendant NOAA Administrator Dr. Jane Lubchenco is head of NOAA and is
22 sued in her official capacity as the head of the agency with supervisory authority over the
23 conservation and management of threatened and endangered species under the ESA and of
24 marine mammals pursuant to the MMPA.

1 45. Section 7 of the ESA establishes an interagency consultation process to assist
2 federal agencies in complying with their duty to avoid jeopardy to listed species or destruction or
3 adverse modification of critical habitat. Under this process, a federal agency (“action agency”)
4 proposing an action that “may affect” a listed species must prepare and provide to the
5 appropriate expert agency (in this case, NMFS) a “biological assessment” of the effects of the
6 proposed action. 16 U.S.C. § 1536(a)(2); 50 C.F.R. § 402.12; 50 C.F.R. § 402.14(a).⁴ The
7 action agency’s biological assessment must be complete and accurate. Resources Ltd., Inc. v.
8 Robertson, 35 F.3d 1300, 1304-5 (9th Cir. 1993).

9
10 46. For those actions that may adversely affect a species, the expert agency must
11 review all information provided in the action agency’s biological assessment, as well as any
12 other relevant information, to determine whether the proposed action is likely to jeopardize a
13 listed species or destroy or adversely modify its designated critical habitat. 50 C.F.R. §
14 402.14(g). This determination is set forth in a biological opinion. 50 C.F.R. § 402.14(g)(4);
15 50 C.F.R. § 401.14(h)(3); 16 U.S.C. § 1536(b)(3)(A). In fulfilling this consultation process, each
16 agency must use the best scientific data available. 16 U.S.C. § 1536(a)(2).

17 47. In formulating its biological opinion, NMFS must evaluate the “effects of the
18 action,” including the entire action, on the listed species. 50 C.F.R. §§ 402.14(g)(3)-(4); 50
19 C.F.R. § 401.14(h). For each complete action, NMFS must undertake a multi-step jeopardy
20 analysis in which it considers:

- 21
22 a. The “environmental baseline,” to which the effects of the proposed action will be
23 added. The baseline includes the “past and present impacts of all Federal, State,
24 or private actions and other human activities in the action area, the anticipated
impacts of all proposed Federal projects in the action area that have already

25 ⁴ NMFS has jurisdiction over marine mammals, other marine species, and anadromous fish, such
26 as salmon and steelhead, and is the expert agency in this case responsible for issuing a biological
opinion. The U.S. Fish and Wildlife Service has jurisdiction over all other species.

1 undergone formal or early Section 7 consultation, and the impact of State or
2 private actions which are contemporaneous with the consultation in process,” 50
3 C.F.R. § 402.02;

- 4 b. The direct and indirect as well as interrelated and interdependent actions, effects
5 of the proposed action, id. (definition of “effects of the action”); and
6 c. Any “future State or private activities, not involving Federal activities, that are
7 reasonably certain to occur within the action area of the Federal action subject to
8 consultation,” id. (definition of “cumulative effects”).

9 NMFS may not consider the effects of future Federal actions when determining whether a
10 proposed Federal action will jeopardize a listed species. Id.; see also 51 Fed. Reg. 19,933 (June
11 3, 1986) (Interagency Cooperation – Endangered Species Act of 1973, as Amended; Final Rule)
12 (“Since all future Federal actions will at some point be subject to the Section 7 consultation
13 process pursuant to these regulations, their effects on a particular species will be considered at
14 that time and will not be included in the cumulative effects analysis.”). Such future Federal
15 actions also are not properly a part of the environmental baseline.

16 48. For critical habitat, ESA regulations had defined “destruction or adverse
17 modification” as an action that “appreciably diminishes the value of critical habitat for both the
18 survival and recovery of a listed species.” 50 C.F.R. § 402.02. The Ninth Circuit invalidated
19 that definition because it “reads the ‘recovery’ goal out of the adverse modification inquiry.”
20 Gifford Pinchot Task Force v. U.S. Fish & Wildlife Serv., 378 F.3d 1059, 1069 (9th Cir. 2004).
21 No new regulation has issued. NMFS states in the Five-Year and 2011 LOA BiOps that it did
22 not rely on the invalid definition of “destruction or adverse modification”; instead it relied on its
23 own “conservation value” construct that “focuses on the designated area’s ability to contribute to
24 the conservation of the species for which the area was designated.” See Five-Year BiOp at 75,
25 n.2.

1 49. If, based upon an analysis of these factors, NMFS concludes that the proposed
2 action is likely to jeopardize a listed species, or destroy or adversely modify its critical habitat (a
3 “jeopardy biological opinion”), it must identify and describe any Reasonable and Prudent
4 Alternative (“RPA”) to the proposed action that it believes would avoid jeopardy and adverse
5 modification. 16 U.S.C. § 1536(b)(3)(B); 50 C.F.R. § 402.14(h)(3). An RPA may only consist
6 of measures that are within the scope of the action agency’s legal authority and jurisdiction, that
7 can be implemented consistent with the purpose of the proposed action, and that will avoid
8 jeopardizing the continued existence of the listed species. 16 U.S.C. § 1536(b)(3)(A); 50 C.F.R.
9 § 402.02. The effects of an RPA must be analyzed under the same Section 7 framework
10 described above for an action proposed by an action agency. If NMFS believes that there is no
11 reasonable and prudent alternative to the proposed action, its biological opinion must so state.
12 50 C.F.R. § 402.14(h)(3).

14 50. If NMFS reaches a no-jeopardy/no-adverse modification finding for either a
15 proposed action or an RPA, it must also issue an incidental take statement for any take of a listed
16 species that is likely to occur as a consequence of the action. 50 C.F.R. § 402.14(i). Under ESA
17 Section 9, 16 U.S.C. § 1538(a)(1)(B), it is illegal for any person – whether a private or
18 governmental entity – to “take” any endangered species of fish or wildlife listed under the ESA.
19 “Take” is defined to mean harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect,
20 or attempt to engage in such conduct. *Id.* § 1532(19). NMFS has defined “harm” to include
21 “significant habitat modification or degradation which actually kills or injures fish or wildlife by
22 significantly impairing essential behavioral patterns, including breeding, spawning, rearing,
23 migrating, feeding or sheltering.” 50 C.F.R. § 222.102.

1 51. As part of a consultation, NMFS determines whether to authorize the incidental
2 take of listed species through the issuance of an incidental take statement. An incidental take
3 statement may be issued only if the action can proceed without causing jeopardy. 16 U.S.C. §
4 1536(b)(4). An incidental take statement must: (1) specify the extent and impact of the
5 incidental take on the listed species; (2) specify reasonable and prudent measures NMFS
6 considers necessary to minimize that impact; and (3) set forth mandatory terms and conditions.

7 Id.

8 52. An incidental take statement insulates the federal agency from liability for a take
9 of a threatened or endangered species, provided the agency implements the measures required to
10 avoid jeopardy and the statement's terms and conditions. This insulation extends further to any
11 entity receiving a federal permit, license, authorization, or funding subject to, and in compliance
12 with, the statement. The Act provides that:

14 [A]ny taking that is in compliance with the terms and conditions specified in a
15 written statement provided under subsection (b)(4)(iv) of this section shall not be
16 considered to be a prohibited taking of the species concerned.

16 U.S.C. § 1536(o)(2).

17 53. After the consultation process is complete, the agencies may need to reinstate
18 consultation on the same action if the action is not complete and: 1) the amount or extent of
19 taking specified in the incidental take statement is exceeded; 2) new information reveals effects
20 of the action that may affect listed species or critical habitat in a manner or to an extent not
21 previously considered; 3) the identified action is subsequently modified in a manner that causes
22 an effect to the listed species or critical habitat that was not considered in the biological opinion;
23 or 4) a new species is listed or critical habitat is designated that may be affected by the identified
24 action. 50 C.F.R. § 402.16.

1 54. In addition, even after the consultation process is complete and an action agency
2 receives a biological opinion, the action agency has a continuing and independent legal duty to
3 avoid jeopardy to a listed species. 16 U.S.C. § 1536(a)(2). An action agency’s reliance on an
4 inadequate, incomplete, or flawed biological opinion to satisfy its duty to avoid jeopardy is
5 arbitrary and capricious. See, e.g., Stop H-3 Ass’n. v. Dole, 740 F.2d 1442, 1460 (9th Cir.
6 1984); Resources Ltd., 35 F.3d at 1304. The action agency’s substantive duty to avoid jeopardy
7 to listed species and/or adverse modification of their critical habitat remains in effect at all times
8 and regardless of the status of the consultation.

9 55. The ESA authorizes the Court “to enjoin any person ... who is alleged to be in
10 violation of any provision of this chapter or regulation issued under the authority thereof,” 16
11 U.S.C. § 1504(g), including a violation of Sections 7 and 9.

12 II. THE MARINE MAMMAL PROTECTION ACT

13 56. The MMPA prohibits the taking of marine mammals, unless the take falls within
14 certain statutory exceptions. 16 U.S.C. § 1371(a)(3). “Take” is defined as “to harass, hunt,
15 capture, collect, or kill, or attempt to harass, hunt, capture, collect or kill, any marine mammal.”
16 50 C.F.R. § 216.3; 16 U.S.C. § 1362(13), and includes any negligent or intentional act resulting
17 in disturbing or molesting a marine mammal. 50 C.F.R. § 216.3.

18 57. For military readiness activities, the MMPA defines “harassment” as “(i) any act
19 that injures or has the significant potential to injure a marine mammal or marine mammal stock
20 in the wild; [Level A Harassment] or (ii) any act that disturbs or is likely to disturb a marine
21 mammal or marine mammal stock in the wild by causing disruption of natural behavioral
22 patterns, including, but not limited to, migration, surfacing, nursing, breeding, feeding, or
23 sheltering to a point where such behavioral patterns are abandoned or significantly altered [Level
24 B Harassment].” 16 U.S.C. § 1362(18)(B).

1 58. NMFS may authorize the incidental/non-intentional take of marine mammals for
2 up to five years. 16 U.S.C. §§ 1371(a)(5)(A)(i)(I). To authorize the take, NMFS must determine
3 that “the total of such taking during each five-year (or less) period concerned will have a
4 negligible impact on such species or stock and will not have an unmitigable adverse impact on
5 the availability of such species of stock for taking for subsistence uses” Id.

6 59. NMFS must issue regulations that prescribe: “(aa) permissible methods of taking
7 pursuant to such activity, and other means of effecting the least practicable adverse impact on
8 such species or stock and its habitat, paying particular attention to rookeries, mating grounds,
9 and areas of similar significance, and on the availability of such species or stock for subsistence
10 uses; and (bb) requirements pertaining to the monitoring and reporting of such taking.” 16
11 U.S.C. § 1371 (a)(5)(A)(i)(II)(aa)-(bb).
12

13 60. The MMPA provides that when determining the “means of effecting the least
14 practicable adverse impact” to species for military-readiness activities, such as those on the
15 Navy’s NWTRC, NMFS must consider “personnel safety, practicality of implementation, and
16 impact on the effectiveness of the military readiness activity,” and consult with the Secretary of
17 Defense in doing so. 16 U.S.C. § 1371 (a)(5)(A)(ii).
18

19 61. NMFS’s actions in authorizing take under the MMPA are reviewable under the
20 APA’s arbitrary and capricious standard. 5 U.S.C. § 706.

21 NMFS’S VIOLATIONS OF THE ESA IN THE 5-YEAR AND 2011 LOA BIOPS

22 I. THE FIVE-YEAR BIOP FAILS TO ANALYZE THE EFFECTS OF THE ENTIRE 23 AGENCY ACTION.

24 62. The Navy and NMFS’ Final Environmental Impact Statement (“FEIS”) states that
25 “the purpose of the Proposed Action is to achieve and maintain Fleet readiness using the
26 NWTRC to support current and future training activities. The proposed naval activities would
27

1 continue for an indefinite period of time but this EIS/OEIS will be reviewed every five years for
2 substantive changes and permits will be updated/renewed from regulatory agencies as
3 necessary.” FEIS at 2-16.

4 63. NMFS has a duty to evaluate all of the effects of the action – including those
5 effects that extend beyond the term of the action – in its jeopardy analysis in a biological
6 opinion. Wild Fish Conservancy v. Salazar, 628 F.3d 513, 524-25 (9th Cir. 2010) (stressing that
7 “the term of the analysis should be ... long enough for the Service to make a meaningful
8 determination as to whether the” action will cause jeopardy and holding that “[t]he decision to
9 limit the analysis ... to a five-year term of operations and management was therefore arbitrary
10 and capricious.”).

11 64. The Navy’s training activities on the NWTRC will last for an “indefinite period,”
12 but NMFS has limited its analysis of the effects of the actions to just a five-year period covered
13 by its initial regulations authorizing take under the MMPA. This limited analysis misses effects
14 of the Navy’s action that may accumulate to not only directly affect a species or population, but
15 also may affect long-term habitat use or cause other indirect effects that are ignored in a short-
16 term analysis. As a result of this artificially truncated analysis, “[t]here could be some impact,
17 but not an appreciable impact, in each of several subdivided periods of operation that, in
18 cumulation, have an undeniably appreciable impact.” Wild Fish Conservancy, 628 F.3d at 523.
19

20 65. Moreover, a single large action cannot be divided into smaller actions for
21 purposes of analysis in one or more biological opinions. “The ESA on its face requires that a
22 biological opinion consider the entire agency action,” and that “[t]he biological opinion[] must
23 be coextensive with the agency action.” Conner v. Burford, 848 F.2d 1441, 1455, 1457-58 (9th
24 Cir. 1988); Greenpeace v. NMFS, 80 F. Supp. 2d 1137, 1146 (W.D. Wash. 2000) (“[i]n sum, the
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1 ESA requires a comprehensive biological opinion that addresses the full scope of the agency
2 action[.]”); Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1227 (9th Cir. 1988) (requiring
3 “comprehensive biological opinions.”). Here the agency action includes the Navy’s training
4 activities that will continue for an “indefinite period” past the five-year term of the regulations
5 and will have effects extending beyond just the five-year term of the BiOp. NMFS cannot
6 analyze these effects piecemeal in separate or serial annual biological opinions – it must address
7 “the full scope of the agency action” in the Five-Year BiOp.

8
9 II. NMFS RELIED ON NARROW MITIGATION MEASURES AND FAILED TO
10 CONSIDER OR MITIGATE IMPACTS TO HABITAT SUPPORTING SPECIES’
11 SURVIVAL AND RECOVERY.

12 66. NMFS’s no-jeopardy and no-adverse modification conclusions depend in large
13 part on the Navy’s standard mitigation measures, which one court found to be inadequate and
14 ineffectual. Those measures consist primarily of visually identifying listed species within a very
15 small safety zone around the Navy’s sonar sources, and making temporary adjustments to
16 training activities to avoid acute injury of detected individual animals. These measures rely on
17 watchstanders to identify marine mammals from the ship deck, and require Navy aircraft to
18 report any incidental sightings of marine mammals so long as it is “operationally feasible” and
19 does not “interfere with the accomplishment of primary operational duties.” Five-Year BiOp at
20 60-61.⁵ NMFS acknowledges, however, that observation alone is unlikely to detect the majority
21 of marine mammals. Five-Year BiOp at 210-211 (highlighting limitations of visual detection);
22 see also id. at 210 (stating that NMFS intends to work with the Navy to make this program

23
24 ⁵ The Navy is also required to report any vocalizations or detections that it incidentally collects
25 when using its acoustic systems during sonar training exercises. Id. But these measures and the
26 systems are not designed to detect marine mammals – and there is no requirement that the Navy
perform comprehensive surveys prior to MFAS training. At best, these measures may
incidentally detect marine mammals.

1 effective). Despite acknowledging the shortcomings of visual detection, NMFS did not consider
2 or analyze any additional mitigation or monitoring measures to address these deficiencies in the
3 Navy's primary mitigation tool.

4 67. In addition to these shortcomings, NMFS's reliance on visual detection does not
5 address other harm to species' habitat likely to result from the Navy's actions. NMFS, in both
6 the Five-Year BiOp and the 2011 LOA BiOp, fails to consider whether the location, intensity,
7 duration, or frequency of the Navy's training exercises will impact any species' use of habitat
8 that otherwise supports critical life functions such as feeding, breeding, rearing young, and
9 migration. As its primary reliance on visual monitoring demonstrates, NMFS focused instead on
10 impacts to individuals without regard to where or at what times of the year those impacts would
11 occur. NMFS failed to analyze or consider whether and to what extent repeated training
12 activities in a given area have the potential to displace or otherwise affect listed species by
13 causing them to avoid areas with MFAS use that may be essential to feeding, breeding,
14 migration, calving, rearing, or other functions essential to the survival and recovery of these
15 species. Preserve Our Island v. U.S. Army Corps of Eng'rs, C08-1353RSM, 2009 WL 2511953,
16 at 13 (W.D. Wash. Aug. 13, 2009) (rejecting argument that visual monitoring program would
17 ensure no impacts to orcas from underwater construction project because visual monitoring did
18 not address potential displacement effects).

19
20
21 68. Rather than separately considering what time or place restrictions may be
22 necessary to avoid particularly biologically important or sensitive areas at certain times of the
23 year, NMFS merely carries forward on the Five-Year BiOp and LOA BiOp the mitigation
24 measures the Navy routinely uses as part of the Five-Year Regulations. Five-Year BiOp at 210-
25 211. NMFS's failure to consider or analyze all of the impacts of the Navy's actions – and to
26

1 evaluate or propose mitigation measures necessary to avoid those impacts – does not comply
2 with its duties to consider all relevant factors and to base its decisions on the best available
3 science.

4 III. NMFS FAILS TO ADEQUATELY ANALYZE THE AGGREGATE EFFECTS OF
5 THE ACTION.

6 69. In addition to being arbitrarily limited to a five-year period, NMFS’s analysis of
7 the impacts of the regulations fails to account for or evaluate the aggregate effects and harm that
8 could result to the species even during the limited five-year period. Instead, NMFS concludes
9 that “the training activities the U.S. Navy proposes to conduct on the Northwest Training Range
10 Complex *each year* from June 2010 through June 2015 are not likely to kill or injure endangered
11 or threatened species.” Five-Year BiOp at 287 (emphasis added). NMFS instead merely repeats
12 the Navy’s estimates of the *annual* take (in the form of harassment or temporary hearing loss)
13 from MFAS and underwater detonations for each endangered or threatened marine mammal and
14 concludes that such annual take is not likely to jeopardize the species. See, e.g., Five-Year BiOp
15 at 287, 289 (blue whales); 291 (fin whales); 294-295 (humpback whales); 296-99 (Southern
16 Resident killer whales).

17
18 70. Nowhere in the Five-Year BiOp does NMFS disclose – let alone analyze – the
19 cumulative impacts to individuals or to the species of repeated MFAS exposures over the five-
20 year term of the BiOp or whether the aggregate effects of that exposure and other harm to the
21 species would jeopardize any of the listed species. Instead, NMFS has focused only on the
22 amount of take per year, which risks masking effects that may accumulate or could otherwise be
23 significant over the five-year period.

24
25 71. For example, NMFS and the Navy estimate that critically endangered Southern
26 Resident killer whales will be exposed to sonar use at levels that cause “take” from behavioral

1 harassment 102 times per year. Five-Year BiOp at 296-297. They further estimate that two of
2 those exposures will be significant enough to cause temporary hearing loss. Id. See also id. at
3 228-229 (explaining that such hearing loss can last for “minutes, days, or weeks” and that
4 repeated instances of these temporary impacts may cause long-term nerve damage and hearing
5 loss). After disclosing these figures, NMFS does not analyze the cumulative take over the five-
6 year period (510 exposures) or the cumulative impacts of temporary hearing loss (10 instances).⁶
7 These amounts could very well be significant to the species, especially if the cumulative effect of
8 that take is to impair successful breeding by even one individual. In at least two other biological
9 opinions, NMFS has applied a far more precautionary approach to its analysis by emphasizing
10 that the Southern Resident killer whale population is so fragile that NMFS will “scrutinize even
11 small effects on the fitness of individuals that increase the risk of mortality or decrease the
12 chances of successful reproduction.”⁷ NMFS does not articulate or apply a similar precautionary
13 standard or the aggregate effects of this repeated take over a five-year (or any other) period on
14 aspects of the species’ behavior, feeding, or reproduction in the Five-Year BiOp.
15

16 72. Moreover, the ESA and its implementing regulations require NMFS to include an
17 incidental take statement (“ITS”) with any BiOp in which NMFS finds the action will not
18 jeopardize the continued existence of a listed species or result in adverse modification of critical
19

20 ⁶ In addition, NMFS’s take estimates and analyses for Southern Resident killer whales are
21 inconsistent between the Five-Year BiOp and the 2011 LOA BiOp – and even within the 2011
22 LOA BiOp itself, further undermining the rationality of its analysis in these biological opinions.

23 ⁷ “Effects of the Pacific Coast Salmon Plan on the Southern Resident Killer Whale (*Orcinus*
24 *orca*) Distinct Population Segment” at 56 (May 5, 2009), available at:
25 [https://pcts.nmfs.noaa.gov/pls/pcts-
26 pub/sxn7.pcts_upload.download?p_file=F29889/PFMC_biop_longterm_final_5_05_09_1.pdf](https://pcts.nmfs.noaa.gov/pls/pcts-pub/sxn7.pcts_upload.download?p_file=F29889/PFMC_biop_longterm_final_5_05_09_1.pdf);
27 “Biological Opinion and Conference Opinion on the Long-Term Operations of the Central
28 Valley Project and State Water Project” at 573 (June 4, 2009), available at:
[http://swr.nmfs.noaa.gov/ocap/NMFS_Biological_and_
Conference_Opinion_on_the_Long-Term_Operations_of_the_CVP_and_SWP.pdf](http://swr.nmfs.noaa.gov/ocap/NMFS_Biological_and_Conference_Opinion_on_the_Long-Term_Operations_of_the_CVP_and_SWP.pdf).

1 habitat. 16 U.S.C. § 1536(b)(4), (o). The ITS must “[s]pecific[y] the impact, i.e., the amount or
2 extent, of such incidental taking on the species.” 50 C.F.R. § 402.14(i)(1). The agency failed to
3 include an ITS for the take of ESA-listed species that will result from the Navy’s actions over the
4 five-year period. NMFS explained that it did not include an ITS because it would have an
5 opportunity to authorize take in each year’s individual BiOp and because the frequency, duration
6 and intensity of the Navy’s activities may change from year-to-year. Five-Year BiOp at 311.
7 Even where NMFS’s BiOp evaluates a broader programmatic action like the Five-Year
8 Regulations, however, the BiOp must contain an ITS. See NRDC v. Evans, 252 F. Supp. 2d
9 1003, 1049-51 (N.D. Cal. 2002) (rejecting agency’s argument that it could not prepare an ITS for
10 a broad authorization of low-frequency sonar use in Naval training exercises).
11

12 73. The fact that NMFS anticipates that each year’s LOA BiOp will determine
13 whether each year’s individual take causes jeopardy does not solve these problems. Indeed, the
14 2011 LOA BiOp does not contain any analysis of the aggregate effects of the Navy’s actions and
15 the ITS it contains is expressly limited to one year and does not disclose or analyze even the take
16 that occurred in the previous year. See 2011 LOA BiOp at 231. The 2011 LOA BiOp fails even
17 to address significant new information on whale responses to MFAS that questions the adequacy
18 of the threshold NMFS uses to estimate take from behavioral harassment.
19

20 74. The Five-Year BiOp is the appropriate stage to assess such impacts since it
21 establishes the overall scheme and standards for the Navy’s actions, not in individual one-year
22 BiOps. Pacific Rivers Council v. Thomas, 30 F.3d 1050, 1055 (9th Cir. 1994).
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NMFS'S VIOLATIONS OF THE MMPA

I. NMFS VIOLATED THE MMPA BY FAILING TO ADEQUATELY CONSIDER OR DESIGNATE GEOGRAPHIC OR TEMPORAL RESTRICTIONS IN ISSUING THE FIVE- YEAR REGULATIONS.

75. To allow take of marine mammals resulting from military readiness activities, the MMPA requires that “an activity must...have no more than a ‘negligible impact’ on species and stocks [and,] in issuing an authorization, [NMFS] must [] provide for the monitoring and reporting of such takings, and []prescribe methods and means of effecting the ‘least practicable adverse impact’ on species and stock and their habitat. 16 U.S.C. § 1371(a)(5)(A).” Natural Res. Def. Council, Inc. v. Evans, 279 F. Supp. at 1141-42 (as modified by the 2004 amendments to the MMPA).

76. In prescribing the “methods and means of effecting the least practicable adverse impact on such species or stock and its habitat,” the MMPA requires NMFS to pay “particular attention to rookeries, mating grounds, and areas of similar significance.” 16 U.S.C. § 1371(5)(A)(i)(II)(aa). Although NMFS determined that the Navy’s actions would result in hundreds of thousands of marine mammal takes through level A and level B Harassment, and although it admits the efficacy of exclusion zones in protecting marine mammals, the agency failed to determine appropriate seasonal, biological, or geographically-based exclusions to ensure that the Navy’s activities effect the least practicable adverse impact on each of these species.

A. NMFS Failed to Adequately Consider Designating Biologically Significant Marine Areas as Exclusion Zones.

77. The Olympic Coast National Marine Sanctuary, an area protected for its incredible biological richness, provides vital regular foraging habitat for humpback and killer whales, including the endangered Southern Resident killer whale population. Gray whales use the sanctuary during biannual migrations between calving and feeding areas, and a small,

1 possibly distinct, group of gray whales known as “summer resident” use the area for feeding
2 every summer. Noise pollution, such as that from MFAS and other training activities, has the
3 potential to compromise habitat quality for these and other marine mammals, fish, and other
4 wildlife that inhabit the sanctuary. NMFS failed to designate the sanctuary as an exclusion area
5 for sonar training, even though it has recognized avoidance of biologically sensitive areas as a
6 mitigation goal.

7 78. NMFS refused to exclude the Navy from using MFAS in the marine sanctuary
8 based on its belief that sonar impacts there are too minimal to justify the effort. The MMPA
9 does not allow NMFS to perform such cost-benefit analyses to determine whether a mitigation
10 measure is worth the investment of the agency’s resources. 16 U.S.C. § 1371

11 (a)(5)(A)(i)(II)(aa).

12
13 79. There are many other areas along the coast that are of significant importance to
14 these and other species, including, but not limited to, the mouths of the Columbia, Elwha, and
15 Klamath Rivers, and the Lost Coast of Northern California. NMFS similarly failed to adequately
16 assess whether any additional restrictions on the Navy’s training activities in these areas would
17 result in the least practicable impact on marine mammals.

18 B. NMFS Failed to Require Measures Providing Greater Protection to Harbor
19 Porpoises.

20 80. NMFS similarly failed to determine any means of “effecting the least practicable
21 adverse impact” on harbor porpoises, the species of marine mammal that will suffer over half a
22 million takes as a result of harassment from the Navy’s activities. 50 C.F.R. §

23 218.112(c)(4)(ii)(N).

1 81. Waters out to at least the 100-meter isobaths⁸ represent vital habitat for two
2 discrete populations of harbor porpoise, the Oregon/Washington Coast stock and the Northern
3 California/Southern Oregon stock. This species is known for its acute sensitivity to acoustic
4 sources, responding strongly in both lab and field studies to various sources of anthropogenic
5 noise at received pressure levels well below 120 dB. For this reason, in the Five-Year
6 Regulations, NMFS includes in its take estimate any harbor porpoise exposed to sound pressure
7 levels above 120 dB. 75 Fed. Reg. at 69307. Under NMFS's analysis, the offshore populations
8 of approximately 55,000 porpoises in total will be taken nearly 120,000 times *each year*, with
9 thousands of animals potentially harassed on multiple occasions.
10

11 82. As Plaintiffs noted in their comments to NMFS, impacts on harbor porpoises
12 would be substantially reduced, and take numbers lowered, by establishing a protection area
13 within waters landward of the 100-meter isobaths, as the vast majority of harbor porpoises are
14 found within this range, and by creating an appropriate buffer zone reflecting the sensitivity of
15 the species. Notwithstanding the concern expressed in public comments, and its recognition that
16 such buffer zones are effective, NMFS failed to establish any mitigation measures for reducing
17 the number or severity of harbor porpoise take, such as limiting sonar training within the harbor
18 porpoises' primary coastal habitat. NMFS's failure to protect harbor porpoises violates the
19 MMPA.
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26 ⁸ An isobath is an underwater contour line connecting all points having the same depth.

1 CLAIMS FOR RELIEF

2 FIRST CLAIM FOR RELIEF:
3 NMFS'S FAILURE TO CONSIDER THE ENTIRE AGENCY ACTION VIOLATES THE ESA
4 AND APA

5 83. Section 7 of the ESA, 16 U.S.C. § 1536(a)(2), requires NMFS to analyze the
6 effects of the entire agency action, not just those that may occur within an artificially-defined
7 time frame. Wild Fish Conservancy v. Salazar, 628 F.3d at 524-25. Biological opinions must
8 also be coextensive with the agency action; NMFS may not segment a single agency action into
9 multiple or serial portions and analyze the effects piecemeal. Conner v. Burford, 848 F.2d at
10 1457-58; Greenpeace v. NMFS, 80 F. Supp. 2d at 1146.

11 84. In the Five-Year BiOp, NMFS improperly and artificially limited the scope of its
12 analysis to only the first five years of an admittedly indefinite, multi-year action. Similarly, in
13 the 2011 LOA BiOp, NMFS considers only the effects of the Navy's activities over the course of
14 a single year and fails to look beyond that one-year period.

15 85. Neither the Five-Year BiOp nor the 2011 LOA BiOp analyze the entire agency
16 action and, consequently, NMFS has failed to make a rational or legal determination of whether
17 the action will avoid jeopardy and adverse modification of critical habitat. In so doing, NMFS
18 has failed to analyze the effects of the entire agency action in violation of the ESA and its
19 implementing regulations, and arbitrarily masked the accumulated effects of the Navy's training
20 actions on listed species.

21 86. NMFS's conclusion in the Five-Year BiOp and the 2011 LOA BiOp that the
22 Navy's training actions are not likely to jeopardize any listed species or destroy or adversely
23 modify their critical habitat lacks a rational basis and violates the requirements of Section 7 of
24 the ESA, 16 U.S.C. § 1536(a)(2), its implementing regulations, and is arbitrary, capricious, and
25 not in accordance with law, 5 U.S.C. § 706(2)(A).
26

SECOND CLAIM FOR RELIEF:

NMFS'S RELIANCE ON INADEQUATE MITIGATION MEASURES FAILS TO UTILIZE THE BEST AVAILABLE SCIENCE AND VIOLATES THE ESA AND APA

87. Both the Five-Year BiOp and 2011 LOA BiOp find that the Navy's activities will harm hundreds of listed species. To address this harm, NMFS relies almost entirely on mitigation measures that depend on visual monitoring and detection of marine mammals before or during training exercises. NMFS admits in the Five-Year BiOp that visual detection is unreliable under even the best of conditions, and is rendered nearly ineffective in nighttime operations or in periods of bad weather or rough seas. Despite acknowledging the limited utility of visual monitoring, NMFS failed to analyze or require any additional mitigation measures to protect listed species.

88. Moreover, ESA-listed marine mammals use the action area for essential behaviors like feeding, breeding, rearing young, and migration. Continued or repeated exercises in these habitats can cause marine mammals to avoid areas that may be critical to supporting one or more of these essential behaviors. NMFS did not require any mitigation measures to address these and other potential long-term impacts to habitat and the species' use of that habitat. Instead, the mitigation measures in the Five-Year BiOp and 2011 LOA BiOp focus almost entirely on visual monitoring and other methods to reduce direct and acute take of marine mammals within the immediate vicinity of the sonar array. Measures designed to mitigate direct take do not address any physical impacts to the species' habitat, nor do they address or mitigate the likelihood that marine mammals will begin to avoid habitat that is used for training exercises or suffer decrements in breeding and foraging.

89. NMFS's failure to address the limited effectiveness of the proposed visual monitoring program and to consider any additional measures to mitigate the full range of the

1 impacts from the Navy’s activities in the Five-Year BiOp and the 2011 LOA BiOp, and its
2 failure to consider significant new information in the 2011 LOA BiOp, violates the ESA’s
3 requirement that NMFS use the best scientific and commercial data available in its analysis, 16
4 U.S.C. § 1536(a)(2), and is arbitrary, capricious, and not in accordance with law, 5 U.S.C. §
5 706(2)(A).

6
7 **THIRD CLAIM FOR RELIEF:**

8 **NMFS’S FAILURE TO ANALYZE THE AGGREGATE EFFECTS OF THE ACTION IN THE**
9 **FIVE-YEAR BIOP AND THE 2011 LOA BIOP VIOLATES THE ESA AND APA**

10 90. The Five-Year BiOp and the 2011 LOA BiOp fail to actually evaluate whether the
11 proposed action, when combined with the effects of the environmental baseline and cumulative
12 effects from Navy training and other activities taking place in the region, and in light of the
13 current status of the species, is likely to jeopardize the survival and recovery of the species as
14 required by the ESA and its implementing regulations. 16 U.S.C. § 1536; 50 C.F.R. § 402.14(g).
15 NMFS’s failure to perform the statutorily required analysis of the effects of the proposed action
16 includes, but is not limited to, the failure to properly describe, identify or analyze the full, multi-
17 year effects of the action, including the effects of the aggregate amount of harm or take per year
18 over any time frame. Instead, NMFS analyzes the impacts of only the annual rate of harm and
19 take from the Navy’s activities, and fails to consider the aggregate effects of take or harm from
20 the action on the species or their habitat over the five-year period.

21 91. NMFS’s failure to consider the aggregate effects of the action violates ESA
22 Section 7, 16 U.S.C. § 1536(a)(2) and its implementing regulations, 50 C.F.R. §§ 402.02, .14,
23 and is arbitrary, capricious, and not in accordance with law, 5 U.S.C. § 706(2)(A).

FOURTH CLAIM FOR RELIEF:

NMFS'S FAILURE TO INCLUDE AN INCIDENTAL TAKE STATEMENT IN THE FIVE-YEAR BIOP VIOLATES THE ESA AND APA

92. If NMFS concludes in a BiOp that an action is likely to cause take of protected species, but is not likely to jeopardize the continued existence of the species, NMFS must include an ITS authorizing that take. 16 U.S.C. § 1536(b)(4); 16 U.S.C. § 1536(o)(2); 50 C.F.R. § 402.14(i).

93. The Five-Year BiOp concludes that the Navy's activities in the NWTRC will cause take of hundreds of threatened and endangered marine mammals, but does not include an ITS.

94. NMFS's failure to develop and include an ITS for the take it estimates from the Navy's actions over the next five years violates Section 7 of the ESA, 16 U.S.C. § 1536(b)(4); 16 U.S.C. § 1536(o)(2), and its implementing regulations, 50 C.F.R. § 402.14(i), and is arbitrary, capricious, and not in accordance with law, 5 U.S.C. § 706(2)(A).

FIFTH CLAIM FOR RELIEF:

NMFS'S FAILURE TO PRESCRIBE ADEQUATE MITIGATION IN ITS FIVE-YEAR REGULATIONS VIOLATES THE MMPA AND APA

95. The MMPA allows NMFS to authorize take of marine mammals from military readiness activities only if it issues regulations that prescribe "permissible methods of taking pursuant to such activity, and other means of effecting the least practicable adverse impact on such species or stock and its habitat, paying particular attention to rookeries, mating grounds, and areas of similar significance, and on the availability of such species or stock for subsistence uses." 16 U.S.C. § 1371 (a)(5)(A)(i)(II)(aa).

96. NMFS arbitrarily rejected designation of the Olympic Coast National Marine Sanctuary, or any other biologically important area along the coast as an exclusion zone that

1 would be either wholly or seasonally off-limits to training exercises to protect marine mammals
2 or their habitat. NMFS also arbitrarily rejected taking any action to reduce the impact of the
3 Navy's activities on harbor porpoises – the species most heavily impacted by the Navy's
4 activities.

5 97. NMFS's failure in the Five-Year Regulations to rationally consider or designate
6 any geographic or seasonal restrictions, or to require any other additional measures to protect
7 marine mammals or their habitat, violates the MMPA's requirement that NMFS prescribe the
8 means of effecting the least practicable impact on marine mammals, 16 U.S.C. § 1371
9 (a)(5)(A)(i)(II)(aa), and is arbitrary, capricious, and not in accordance with law, 5 U.S.C. §
10 706(2)(A).
11

12 PRAYER FOR RELIEF

13 WHEREFORE, plaintiffs respectfully request that the Court:

14 1. Adjudge and declare that NMFS has violated ESA section 7 and its implementing
15 regulations by making a no-jeopardy/no-adverse modification finding in the Five-Year BiOp and
16 the 2011 LOA BiOp and issuing an incidental take statement in the 2011 LOA BiOp that is
17 arbitrary, capricious, an abuse of discretion, and otherwise not in accordance with law;

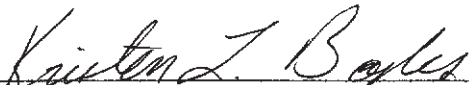
18 2. Adjudge and declare that NMFS has violated the MMPA in the Five-Year
19 Regulations by failing to determine and prescribe measures that would have the least practicable
20 adverse impact on marine mammals and that the Five-Year Regulations are therefore arbitrary,
21 capricious, an abuse of discretion, and otherwise not in accordance with law;

22 3. Remand the Five-Year BiOp, the 2011 LOA BiOp, and the Five-Year Regulations
23 to NMFS to reinitiate consultation with the Navy in order to prepare biological opinions and
24 five-year regulations for the NWTRC and any related actions that comply with the requirements
25 of the ESA and the MMPA, on a schedule to be set by the Court;
26

1 4. Award plaintiffs their reasonable fees, costs, expenses, and disbursements,
2 including attorneys fees, associated with this litigation; and,

3 5. Grant plaintiffs such further and additional relief as the Court may deem just and
4 proper.

5 Respectfully submitted this 25th day of January, 2012.

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9 KRISTEN L. BOYLES (CSB # 158450)
10 STEPHEN D. MASHUDA (WSB #36968)
11 [Pro Hac Vice Application Pending]
12 Earthjustice
13 705 Second Avenue, Suite 203
14 Seattle, WA 98104
15 (206) 343-7340
16 (206) 343-1526 [FAX]
17 kboyles@earthjustice.org
18 smashuda@earthjustice.org

19 *Attorneys for Plaintiffs*

20
21
22
23
24
25
26
27
28
STEPHEN ZAK SMITH (CSB #228913)
Natural Resources Defense Council (NRDC)
1314 Second Street
Santa Monica, CA 90401
(310) 434-2300 | Phone
(310) 434-2399 | Fax
zsmith@nrdc.org

Attorney for Plaintiff NRDC