KRISTEN L. BOYLES (CSB #158450)
STEPHEN D. MASHUDA (WSB #36968)
*[Pro Hac Vice Pending]*
Earthjustice
705 Second Avenue, Suite 203
Seattle, WA 98104
(206) 343-7340 | Phone
(206) 343-1526 | Fax
kboyles@earthjustice.org
smashuda@earthjustice.org

*Attorneys for Plaintiffs*

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*

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

| | |
|---|---|
| INTERTRIBAL SINKYONE WILDERNESS COUNCIL, CENTER FOR BIOLOGICAL DIVERSITY, NATURAL RESOURCES DEFENSE COUNCIL, INC., PEOPLE FOR PUGET SOUND, FRIENDS OF THE SAN JUANS, and FRIENDS OF THE EARTH<br><br>Plaintiffs,<br><br>v.<br><br>NATIONAL MARINE FISHERIES SERVICE, DR. JANE LUBCHENCO, Administrator, National Oceanic and Atmospheric Administration, in her official capacity; and SAMUEL D. RAUCH, Acting Assistant Administrator, National Marine Fisheries Service, in his official capacity,<br><br>Defendants. | Civ. No.<br><br>COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF |



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

## INTRODUCTION

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

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

[1] The two biological opinions challenged in this case are NMFS's "Biological Opinion for the U.S. Navy's Proposed Training Activities on the Northwest Training Range from June 2010 to June 2015" (Jun. 15, 2010) ("Five-Year BiOp") and NMFS's "Biological Opinion for the U.S. Navy's Proposed Military Readiness Activities on the Northwest Training Range Complex" (Nov. 9, 2011) ("2011 LOA BiOp").



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

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

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



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

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

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

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

## FACTUAL BACKGROUND

### I. THE NAVY'S SONAR SYSTEMS

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



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

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

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

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

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

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



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

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

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

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

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

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

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



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

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

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

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

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

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



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

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

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

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

14. Reports of whales that strand due to Navy sonar are likely to underestimate the scale of the problem. Many whales may be affected far from shore and remain undiscovered, as most dead whales sink. NMFS recognized this point in a recent stock assessment of a particular species of beaked whales, writing that "injuries or mortalities would rarely be documented, due to the remote nature of many of these activities and the low probability that an injured or dead beaked whale would strand." This fear is echoed by members of the Scientific Committee of the International Whaling Commission, who in 2004 expressed concern that "assessments of stranding events do not account for animals that are severely affected or died but did not strand," 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



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

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

16. Impacts of MFAS on marine mammals is not limited to stranding and death. Marine mammals depend on sound to navigate, find food, locate mates, avoid predators, and communicate with each other. Flooding their habitat with high-intensity noise can interfere with these and other activities and cause:

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

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



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

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

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

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

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

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



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

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

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

## III. THE FIVE-YEAR REGULATIONS

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



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

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

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

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

25. The Five-Year regulations allow the following levels of take from Level B 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 |



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

| | | |
|---|---|---|
| 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).



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

IV. NMFS'S BIOLOGICAL OPINIONS

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

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

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



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

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

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

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

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



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

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

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

33. Beginning in early 2009, the Sinkyone Council contacted both the U.S. Navy and NMFS to express to those agencies its concerns that the impacts of the Navy's expansion of its NWTRC training activities would negatively affect marine species and the Tribes' cultural subsistence practices. Also since early 2009, the Sinkyone Council has made repeated requests to the Navy to enter into formal government-to-government consultation with the Council and its member Tribes with regard to the Navy's plans for increased training activities within the NWTRC. The Council provided comments at two public information meetings with U.S. Navy



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

representatives in Mendocino County (March 31, 2009 and December 16, 2010), and has sent the Navy three letters (April 13, 2009; October 22, 2010; and June 8, 2011). Copies of the first two letters were mailed to NMFS.

34. At the public meetings and in its letters, the Council requested the Navy to conduct formal government-to-government consultation with the Sinkyone Council and with the California Indian Tribes affected by the project. To date, the Sinkyone Council has not received a letter, phone call or any other communication from the Navy in response to the Council's repeated requests for Tribal consultation. Nor has NMFS communicated with the Council regarding Tribal consultation or the other issues of concern the Council has brought to the attention of NMFS through its letters to the Navy. In its response to public comment in its EIS for the project, the Navy states that it has "…met all requirements for tribal consultations." But neither the U.S. Navy nor NMFS have complied with their own Tribal consultation policies that require them to consult regularly and meaningfully with affected Tribes on projects such as the Navy's expanded NWTRC.

35. NMFS did not adopt any additional mitigation measures beyond what the Navy included in its application to take marine mammals. NMFS instead noted that it would use the "adaptive management" provisions of the final Five-Year Regulations, 50 C.F.R. § 218.118(d), to consider whether to do so during the term of the regulations if new information impacting its analysis and authorization became available.

JURISDICTION AND VENUE

36. This Court has jurisdiction over this action under 5 U.S.C. §§ 701-706 (Administrative Procedure Act), 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 2201 (declaratory judgment), and 28 U.S.C. § 2202 (injunctive relief). Venue is properly vested in this Court under 28 U.S.C. § 1391(e) because plaintiffs reside in this district and members of the



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

plaintiff organizations reside in this district, and these members and organizations do business here. In addition, a substantial part of the events or omissions giving rise to the claims in this case occurred in this district.

PARTIES

37. The plaintiffs in this action are described below.

A. InterTribal Sinkyone Wilderness Council (the "Council"), a 501(c)(3) non-profit Tribal consortium founded in 1986, is comprised of ten federally recognized Northern California Indian Tribes with ancient and enduring subsistence and other cultural ties to the Sinkyone "Lost" Coast, an ocean and land wilderness region located along the coastlines of Mendocino and Humboldt Counties that begins approximately 200 miles north of San Francisco. The Sinkyone "Lost" Coast region stretches from Rockport to the mouth of the Mattole River and comprises a portion of the aboriginal lands and marine waters that belonged to and were inhabited, utilized and stewarded for millennia by the Sinkyone Tribal Peoples, to whom the Council's member Tribes are ancestrally, culturally and historically related and otherwise connected. The ten Tribes comprising the Sinkyone Council include: Cahto Indian Tribe of the Laytonville Rancheria, Coyote Valley Band of Pomo Indians, Hopland Band of Pomo Indians, Pinoleville Pomo Nation, Potter Valley Tribe, Redwood Valley Rancheria of Pomo Indians, Robinson Rancheria of Pomo Indians, Round Valley Indian Tribes, Scotts Valley Band of Pomo Indians, and Sherwood Valley Rancheria of Pomo Indians. The Council works to re-establish local Tribal stewardship within the Sinkyone region through marine and land conservation, habitat restoration, and traditional resource management. Sinkyone's original Native peoples suffered forced removals and massacres during the mid-1800s to make way for white settlers and the subsequent destruction of the region's old-growth redwood rainforest. The Council established the 3,845-acre InterTribal Sinkyone Wilderness, the first of its kind in the



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

United States, to support and sustain local Tribes' traditional cultural marine and land uses, and to restore and protect both the marine and terrestrial cultural-natural resources and wilderness values of the Sinkyone region for present and future generations of local Tribal peoples. The ancestral territories of the Council's member Tribes include marine and coastal areas that will be adversely impacted by NMFS's approval of the U.S. Navy's actions in the Northwest Training Range Complex.

Members of the Council's Tribes use these affected areas for fishing, for ceremonial purposes and for gathering and harvesting a wide range of living marine organisms that are essential to the Tribes' traditional cultural ways of life. NMFS's approval of the Navy's actions will harm ocean waters adjacent to ecologically sensitive and permanently protected Tribal, State, and Federal wilderness-designated areas along the Sinkyone Coast: the Sinkyone Council's InterTribal Sinkyone Wilderness lands, the California Department of Parks and Recreation's Sinkyone Wilderness State Park, and the federal coastal wilderness portions of the Bureau of Land Management's King Range National Conservation Area. Additionally, the State of California soon will adopt by regulation several Marine Protected Areas (MPAs) in the form of reserves and conservation areas along the Sinkyone Lost Coast, and other locations between Point Arena and the California-Oregon border, that are designed to permanently protect habitats and communities of marine mammal, avian, finfish, invertebrate, and plant species. The impacts to marine life along all of these coastal wilderness and other protected locations from NMFS's approval of the Navy's expanded activities will negatively affect the Sinkyone Council Tribes' traditional cultural and environmental uses and values, including their ceremonial practices, and will be far-reaching and irreversible. These impacts pose serious threats not only to the many forms of marine life that are culturally significant – both historically and contemporarily – to the



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

Tribes, but also to the very survival of the ancient maritime lifeways of North Coast Tribes represented by the Council that continue to rely on the ocean for their subsistence way of life. Appropriate mitigations may help reduce some of these negative cultural and environmental impacts to the Sinkyone Council's member Tribes.

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

C. Natural Resources Defense Council, Inc. ("NRDC") is a national environmental advocacy group organized as a New York not-for-profit membership corporation, with offices in San Francisco, New York, Los Angeles, Chicago, Washington, D.C., and Beijing, China. NRDC supports the enforcement of federal environmental laws, including the ESA and the MMPA, and is committed to the protection of marine mammals. Over past decades, NRDC has made significant contributions to marine conservation and science and has advocated for measures to



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

protect cetaceans and other marine life. NRDC has approximately 1.3 million Members and Online Activists, more than 357,000 members nationwide, over 88,000 of whom reside in the states of California, Oregon, and Washington.

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

E. Friends of the San Juans is a non-profit organization founded in 1979 to support local efforts to manage growth and protect the natural beauty and rich wildlife in Washington's San Juan Islands. Using science, policy, law, education, and citizen activism, Friends of the San Juans works to protect, preserve, and restore the land, water, and sea of the San Juan archipelago. Friends of the San Juans' activities include protection of orca whales and other endangered species; marine research and habitat restoration; ecological stewardship and conservation; land



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

use and environmental compliance; community engagement and education. Friends of the San Juans' efforts have produced cleaner, healthier habitats for sensitive species in beaches, parks, and waters; inventories of marine and nearshore habitat to help rebuild depleted salmon stocks; and increased protections for our magnificent orca whales. Members of Friends of the San Juans live, work, and recreate in the San Juan Islands and on the surrounding waters, where they enjoy observing orca whales.

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

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



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

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

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

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

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



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

42. Defendant Acting Assistant Administrator for Fisheries Samuel D. Rauch is the highest-ranking official within NMFS and is sued in his official capacity as the head of the federal agency that issued the biological opinions challenged here, and which administers the provisions of the MMPA, including the Five-Year Regulations challenged in this case.

LEGAL FRAMEWORK

43. Biological opinions issued pursuant to Section 7 of the ESA, including the Five-Year BiOp and the 2011 LOA BiOp, are reviewed under the arbitrary and capricious provision of the Administrative Procedure Act ("APA"), 5 U.S.C. § 706. See, e.g., Bennett v. Spear, 520 U.S. 154, 175 (1997). The APA authorizes this Court to review final agency action and mandates that the Court hold unlawful and set aside such action, findings, and conclusions when they are arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A).

I. ENDANGERED SPECIES ACT CONSULTATION REQUIREMENTS

44. Section 7 of the ESA prohibits federal agency actions that may jeopardize the survival and recovery of a listed species or adversely modify or destroy its critical habitat. "Each federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary . . . to be critical …." 16 U.S.C. § 1536(a)(2). The ESA regulations state that an action causes jeopardy if it "reduce[s] appreciably the likelihood of both the survival and recovery of a listed species in the wild." 50 C.F.R. § 402.02. The effects of an action on a species' prospects of recovery must be addressed specifically as a part of the jeopardy analysis. See Nat'l Wildlife Fed'n. v. NMFS, 524 F.3d 917 (9th Cir. 2008).



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

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

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

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

a. The "environmental baseline," to which the effects of the proposed action will be added. The baseline includes the "past and present impacts of all Federal, State, 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

[4] NMFS has jurisdiction over marine mammals, other marine species, and anadromous fish, such 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.



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

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

b. The direct and indirect as well as interrelated and interdependent actions, effects of the proposed action, id. (definition of "effects of the action"); and

c. Any "future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Federal action subject to consultation," id. (definition of "cumulative effects").

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

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



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

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

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



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

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

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

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

16 U.S.C. § 1536(o)(2).

53. After the consultation process is complete, the agencies may need to reinitiate consultation on the same action if the action is not complete and: 1) the amount or extent of taking specified in the incidental take statement is exceeded; 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 biological opinion; or 4) a new species is listed or critical habitat is designated that may be affected by the identified action. 50 C.F.R. § 402.16.



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

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

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

II. THE MARINE MAMMAL PROTECTION ACT

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

57. For military readiness activities, the MMPA defines "harassment" as "(i) any act that injures or has the significant potential to injure a marine mammal or marine mammal stock in the wild; [Level A Harassment] or (ii) 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 [Level B Harassment]." 16 U.S.C. § 1362(18)(B).



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

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

59. NMFS must issue regulations that prescribe: "**(aa)** 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; and **(bb)** requirements pertaining to the monitoring and reporting of such taking." 16 U.S.C. § 1371 (a)(5)(A)(i)(II)(aa)-(bb).

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

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

## NMFS'S VIOLATIONS OF THE ESA IN THE 5-YEAR AND 2011 LOA BIOPS

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

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



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

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

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

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

65. Moreover, a single large action cannot be divided into smaller actions for purposes of analysis in one or more biological opinions. "The ESA on its face requires that a biological opinion consider the entire agency action," and that "[t]he biological opinion[] must be coextensive with the agency action." Conner v. Burford, 848 F.2d 1441, 1455, 1457-58 (9th Cir. 1988); Greenpeace v. NMFS, 80 F. Supp. 2d 1137, 1146 (W.D. Wash. 2000) ( "[i]n sum, the



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

ESA requires a comprehensive biological opinion that addresses the full scope of the agency action[.]"); Bob Marshall Alliance v. Hodel, 852 F.2d 1223, 1227 (9th Cir. 1988) (requiring "comprehensive biological opinions."). Here the agency action includes the Navy's training activities that will continue for an "indefinite period" past the five-year term of the regulations and will have effects extending beyond just the five-year term of the BiOp. NMFS cannot analyze these effects piecemeal in separate or serial annual biological opinions – it must address "the full scope of the agency action" in the Five-Year BiOp.

## II. NMFS RELIED ON NARROW MITIGATION MEASURES AND FAILED TO CONSIDER OR MITIGATE IMPACTS TO HABITAT SUPPORTING SPECIES' SURVIVAL AND RECOVERY.

66. NMFS's no-jeopardy and no-adverse modification conclusions depend in large part on the Navy's standard mitigation measures, which one court found to be inadequate and ineffectual. Those measures consist primarily of visually identifying listed species within a very small safety zone around the Navy's sonar sources, and making temporary adjustments to training activities to avoid acute injury of detected individual animals. These measures rely on watchstanders to identify marine mammals from the ship deck, and require Navy aircraft to report any incidental sightings of marine mammals so long as it is "operationally feasible" and does not "interfere with the accomplishment of primary operational duties." Five-Year BiOp at 60-61.[5] NMFS acknowledges, however, that observation alone is unlikely to detect the majority of marine mammals. Five-Year BiOp at 210-211 (highlighting limitations of visual detection); see also id. at 210 (stating that NMFS intends to work with the Navy to make this program

[5] The Navy is also required to report any vocalizations or detections that it incidentally collects when using its acoustic systems during sonar training exercises. Id. But these measures and the 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.



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

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

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

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



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

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

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

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

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

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



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

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

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

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

[7] "Effects of the Pacific Coast Salmon Plan on the Southern Resident Killer Whale *(Orcinus orca)* Distinct Population Segment" at 56 (May 5, 2009), available at: https://pcts.nmfs.noaa.gov/pls/pcts-pub/sxn7.pcts_upload.download?p_file=F29889/PFMC_biop_longterm_final_5_05_09_1.pdf; "Biological Opinion and Conference Opinion on the Long-Term Operations of the Central 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.



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

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

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

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



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

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,



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

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

78. NMFS refused to exclude the Navy from using MFAS in the marine sanctuary based on its belief that sonar impacts there are too minimal to justify the effort. The MMPA does not allow NMFS to perform such cost-benefit analyses to determine whether a mitigation measure is worth the investment of the agency's resources. 16 U.S.C. § 1371 (a)(5)(A)(i)(II)(aa).

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

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

80. NMFS similarly failed to determine any means of "effecting the least practicable adverse impact" on harbor porpoises, the species of marine mammal that will suffer over half a million takes as a result of harassment from the Navy's activities. 50 C.F.R. § 218.112(c)(4)(ii)(N).



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

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

82. As Plaintiffs noted in their comments to NMFS, impacts on harbor porpoises would be substantially reduced, and take numbers lowered, by establishing a protection area within waters landward of the 100-meter isobaths, as the vast majority of harbor porpoises are found within this range, and by creating an appropriate buffer zone reflecting the sensitivity of the species. Notwithstanding the concern expressed in public comments, and its recognition that such buffer zones are effective, NMFS failed to establish any mitigation measures for reducing the number or severity of harbor porpoise take, such as limiting sonar training within the harbor porpoises' primary coastal habitat. NMFS's failure to protect harbor porpoises violates the MMPA.

[8] An isobath is an underwater contour line connecting all points having the same depth.



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

CLAIMS FOR RELIEF

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

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

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

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

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



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

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



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

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

THIRD CLAIM FOR RELIEF:

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

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

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



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

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



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

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

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

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully request that the Court:

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

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

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



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

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

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

Respectfully submitted this 25th day of January, 2012.

KRISTEN L. BOYLES (CSB # 158450)
STEPHEN D. MASHUDA (WSB #36968)
*[Pro Hac Vice Application Pending]*
Earthjustice
705 Second Avenue, Suite 203
Seattle, WA 98104
(206) 343-7340
(206) 343-1526 *[FAX]*
kboyles@earthjustice.org
smashuda@earthjustice.org

*Attorneys for Plaintiffs*

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*