

Richard A. Smith
Brian A. Knutsen
SMITH & LOWNEY, PLLC
2317 East John Street
Seattle, Washington 98112
(206) 860-2883

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

PUBLIC EMPLOYEES FOR)
ENVIRONMENTAL RESPONSIBILITY;)
WILD FISH CONSERVANCY,)

Plaintiffs,

v.

U.S. DEPARTMENT OF THE NAVY;)
DONALD C. WINTER, in his official)
capacity as Secretary of the Navy; U.S.)
FISH AND WILDLIFE SERVICE; H.)
DALE HALL, in his official capacity as the)
Director or the U.S. Fish and Wildlife)
Service; NATIONAL MARINE)
FISHERIES SERVICE; CARLOS M.)
GUTIERREZ, in his official capacity as the)
Secretary of Commerce,)

Defendants.

COMPLAINT

I. INTRODUCTION

1. Public Employees for Environmental Responsibility (“PEER”) and Wild Fish Conservancy (“Wild Fish”) (collectively, “Plaintiffs”) bring this action under the Administrative Procedure Act, 5 U.S.C. §§ 500 *et seq.* (“APA”), which provides federal judicial review for any person “suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute.” 5 U.S.C. § 702. Plaintiffs are adversely affected by Defendant United States Department of the Navy’s (“Navy”) failure to comply with the requirements of the National Environmental Policy Act, 42 U.S.C. §§ 4321 *et seq.* (“NEPA”), and Defendants U.S. Fish and Wildlife Service’s (“FWS”) and U.S. National Marine Fisheries Service’s (“NMFS”) (collectively, “the Services”) failure to comply with the requirements of the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.* (“ESA”).

2. Plaintiffs bring this action for declaratory and injunctive relief to require the Navy to comply with NEPA, and to enjoin the Navy from continuing to engage in Explosive Ordnance Disposal (“EOD”) training operations in Puget Sound until it comes into compliance with NEPA by producing adequate environmental reviews and/or institutes mitigation measures to sufficiently reduce or eliminate the environmental impacts of its EOD training operations. NEPA requires a federal agency to prepare an Environmental Impact Statement (“EIS”) for all “major federal actions significantly affecting the quality of the human environment,” *prior* to undertaking such actions. 42 U.S.C. § 4332(C).

3. Specifically and upon our best belief and information, for years the Navy has been conducting three (3) to five (5) EOD training operations per month in Puget Sound at three locations: Hood Canal, Port Townsend, and Crescent Harbor. Each training session requires the detonation of a varying amount of powerful explosives in the marine environment, resulting in

1 substantial fish kills and other impacts to the marine environment. The Navy's EOD training
2 operations have continued without issuance of an EIS or a Finding of No Significant Impact
3 ("FONSI"), in direct violation of NEPA.

4 4. Plaintiffs also bring this action to compel the Services to complete their
5 consulting requirements and issue final Biological Opinions ("BiOp") under the ESA. The ESA
6 charges federal agencies with the responsibility of consulting with one or both of the Services to
7 determine whether any action may affect threatened or endangered species or their habitats. 16
8 U.S.C. § 1536(a)(2). Consultation concludes with the Services' issuance of a comprehensive
9 BiOp. Pursuant to the ESA, consultation and the issuance of BiOps are nondiscretionary duties
10 of the Services.
11

12 5. Several threatened and endangered species are found in the EOD training areas,
13 including bull trout, chinook salmon, chum salmon, orcas, and marbled murrelets. The Services
14 have consulted with the Navy on the EOD training operations for over four (4) years without
15 issuing a final BiOp, thereby unlawfully withholding or unreasonably delaying agency action
16 under the APA. 5 U.S.C. § 706. The ESA's implementing regulations require the Services to
17 provide a BiOp as the final step when consulting with an action agency taking any action that
18 may affect threatened or endangered species or their habitats. 50 C.F.R. § 402.14.
19
20

21 **II. JURISDICTION AND VENUE**

22 6. This Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1331 (2008).
23 This Court has jurisdiction over claims of federal actions in violation of NEPA. 42 U.S.C. §
24 4332(C). The several United States District Courts have jurisdiction over all claims arising from
25 the ESA. 16 U.S.C. § 1540(c) (2008). This Court also has federal question jurisdiction under
26
27
28

1 the APA, 5 U.S.C. § 555(b), 702 and 706(1). Declaratory relief is authorized by the Declaratory
2 Judgment Act, 28 U.S.C. § 2201 (2008).

3 7. Venue is proper in accordance with 28 U.S.C. § 1391(e) because the EOD
4 training sites are located in this judicial district and the events giving rise to the claims happened
5 and continue to happen in this district.
6

7 **III. PARTIES**

8 8. Plaintiff PEER is a national non-profit organization based in Washington, D.C.
9 with field offices nationwide, including California and the continental Southwest. PEER works
10 with local, state, and federal resource professionals to monitor, advocate, and uphold the
11 environmental laws of the United States. PEER members reside in the State of Washington, and
12 rely on Puget Sound waterways and adjacent land masses for recreational, aesthetic, and
13 economic benefits.
14

15 9. PEER members are harmed by the environmental damage and potential harm to
16 endangered species that is occurring because of the Navy's conduct of EOD training operations
17 in Puget Sound without compliance with NEPA and the ESA. PEER and its members are also
18 unable to acquire basic information necessary to determine health and environmental risks
19 associated with EOD training operations while Defendants fail to fulfill federally mandated
20 environmental and endangered species assessment duties. The Navy's failure to comply with
21 NEPA has also deprived PEER and its members of the opportunity to provide comments on this
22 major federal action. These are all real and cognizable injuries.
23
24

25 10. Plaintiff Wild Fish is a non-profit organization headquartered in Duvall,
26 Washington, which researches and educates the public on the recovery and conservation of
27 regional wild fish ecosystems. Its mission is to study wild fish populations and habitats and
28

1 transform that knowledge into model restoration projects and better land-use, harvest, and
2 hatchery management. The staff and Board of Wild Fish is comprised of scientists, natural-
3 resource managers, educators, business people, and activists who are often consulted for their
4 technical expertise in wild fish ecology. Wild Fish conducts field-based education programs for
5 students and community members in surrounding areas to increase awareness of and appreciation
6 for the natural environment. These programs take place in areas such as the Snoqualmie Valley
7 in King County, and Barn Beach Reserve in Leavenworth's Cascade Mountains territory. King
8 County directly borders Puget Sound waters, and the Cascade Mountain watersheds feed the
9 region with seasonal freshwater.

11
12 11. Wild Fish members rely on Puget Sound for scientific, recreational, aesthetic, and
13 economic benefits. These benefits are undermined by Defendants' prolonged and ongoing EOD
14 training operations, which significantly affect the environment through damage to the nation's
15 second largest estuary and specifically result in harm to wild fish populations, taken without
16 compliance with the ESA and NEPA. Wild Fish and its members are also deprived of
17 information necessary to determine health and environmental risks associated with EOD training
18 operations due to Defendants failure to fulfill federally mandated environmental and endangered
19 species assessment duties. The Navy's failure to comply with NEPA has also deprived Wild
20 Fish and its members of the opportunity to provide comments on this major federal action.
21 These are all real and cognizable injuries.

22
23
24 12. Plaintiffs bring this action on behalf of their members adversely affected by EOD
25 training operations and on their own behalf as organizations whose interests and organizational
26 purposes are adversely affected by Defendants' continuation of EOD training operations without
27 compliance with environmental laws implicated by the Navy's EOD training operations. This
28

1 complaint is filed to compel Defendants to comply with the legally binding duties required by
2 NEPA and the ESA. The processes required under these laws provide PEER, Wild Fish, their
3 members, and the public with vital information about the effects of government actions on the
4 environment and specifically with regard to threatened and endangered species. The reviews
5 mandated by NEPA and the ESA are intended and needed to inform federal agency decision-
6 making concerning actions affecting the environment and threatened and endangered species.
7 NEPA and the ESA require review and consideration of effects on the environment and on
8 endangered species *before* a federal action is initiated. NEPA also provides for public comment
9 on proposed major federal actions and the potential impacts from such actions.
10

11
12 13. The adverse impacts on Plaintiffs and their members are redressable by
13 Defendants' fulfillment of their NEPA and ESA obligations. Enjoining EOD training operations,
14 pending publication of an EIS by the Navy and issuance of a BiOp by the Services or mitigation
15 of the EOD training operations to the point where there is no significant impact on the
16 environment or adverse effect on endangered species, would redress Plaintiffs' and their
17 members' injuries by protecting their use and enjoyment of Puget Sound and preventing further
18 unnecessary damage to the environment and the Nation's natural resources by insuring that the
19 reviews intended to inform agency decision-making mandated by these statutes are carried out.
20

21
22 14. Defendant U.S. Department of the Navy is an agency of the executive branch of
23 the United States Government. Defendant, the Honorable Donald C. Winter, is Secretary, U.S.
24 Department of the Navy. As Secretary, Defendant Winter has ultimate responsibility for the
25 activities of the U.S. Department of the Navy, including those actions complained of herein.
26

27 15. Defendant U.S. Fish and Wildlife Service is an agency of the executive branch of
28 the United States Government and a sub-agency of the United States Department of Interior.
29

1 Defendant H. Dale Hall is Director, U.S. Fish and Wildlife Service. As Director, Defendant Hall
2 has ultimate responsibility for the activities of the U.S. Fish and Wildlife Service, including
3 those actions complained of herein.

4 16. Defendant National Marine Fisheries Service is an agency of the executive branch
5 of the United States Government and a sub-agency of the National Oceanic and Atmospheric
6 Administration, which is a sub-agency of the United States Department of Commerce.
7 Defendant Carlos M. Gutierrez is Secretary, U.S. Department of Commerce. As Secretary,
8 Defendant Gutierrez has ultimate responsibility for the activities of the U.S. National Marine
9 Fisheries Service, including those actions complained of herein.
10
11

12 IV. FACTS

13 17. Puget Sound is a biologically rich estuary that is home to many endangered and
14 threatened species.

15 18. The Navy conducts EOD training operations in Puget Sound at three locations:
16 Crescent Harbor (near the Whidbey Island seaplane base); Hood Canal (near the Bangor naval
17 submarine base); and Port Townsend Bay (near the Naval Magazine, Indian Island).
18

19 19. EOD training operations are designed to train and certify divers to dispose of
20 underwater explosives. The training consists of using explosive charges to destroy or disable
21 inert (dummy) mines. The technicians must locate the dummy mine, place the charge, detonate
22 it, retrieve the debris, and inspect the site.
23

24 20. The EOD training operations entail as many as three (3) to five (5) exercises per
25 month. EOD technicians must re-qualify every month in the preparation, placement, and
26 detonation of underwater explosive materials. They use charges ranging in size from 2.5 to 20
27 pounds.
28

1 21. NEPA requires a federal agency to prepare an EIS for all “major federal actions
2 significantly affecting the quality of the human environment,” *prior* to undertaking such actions.
3 42 U.S.C. § 4332(C). The Navy is a federal agency for NEPA purposes. The Navy does not
4 dispute that the EOD training operations are a major federal action that significantly affects the
5 environment.
6

7 22. As of this date, the Navy has not issued an EIS for the EOD training operations.

8 23. The EOD training operations may harm some species listed under the ESA as
9 endangered or threatened, including chinook salmon (*Oncorhynchus tshawytscha*), Hood Canal
10 summer-run chum salmon (*Oncorhynchus keta*), bald eagles (*Haliaeetus leucocephalus*), marbled
11 murrelets (*Brachyramphus marmoratus*), Stellar sea lions (*Eumetopias jubatus*), humpback
12 whales (*Megaptera novaeangliae*), bull trout (*Salvelinus confluentus*), and orca whales (*Orcinus*
13 orca).
14

15 24. On January 8, 2001, the Navy sent a letter in conjunction with a Biological
16 Assessment (“BA”) to FWS and NMFS requesting informal consultation under the ESA. The
17 BA concluded that the training may affect, but was not likely to adversely affect the above-listed
18 species, although it did not consider effects on then-unlisted orcas.
19

20 25. The Services did not concur with the BA’s determination, and unambiguously
21 disputed the Navy’s “not likely to adversely affect” conclusion as to chinook and chum salmon
22 and bull trout in a letter dated April 18, 2002. **Exhibit 1, April 18, 2002 Letter.** The Services
23 stated that they would analyze potential effects on the other species included in the BA when the
24 Navy had provided all requested information.
25

26 26. During a field demonstration of a five-pound charge in 2002, the Services
27 observed approximately 1000 dead fish on the surface of the water after the blast. Although
28

1 most of the dead fish were surf smelt (Hypomesus pretiosus) rather than any listed species, they
2 appeared to have died from ruptures of their swim bladders. Salmon and bull trout also have
3 swim bladders and the Services concluded that they “may be similarly killed by underwater
4 detonations.” **Exhibit 1**, *April 18, 2002 Letter* at 2.

5 27. Scientific literature indicates that less than 20% of the dead fish would typically
6 rise to the surface; therefore the Services concluded that the actual number of fish killed may
7 have been greater than 5000. Because the EOD training operations occurred three (3) to five (5)
8 times per month, and sometimes involved the use of 20-pound charges, the Services reasoned
9 that the number of fish killed per month “may be quite large.” **Exhibit 1**, *April 18, 2002 Letter*
10 at 2.

11 28. The Services concluded that the “proposed action has the potential to adversely
12 affect” chinook and chum salmon and bull trout because it was highly likely that the EOD
13 training operations caused “direct mortality” of these listed species in addition to definitively
14 causing “significant mortality” of their prey species. **Exhibit 1**, *April 18, 2002 Letter* at 1. This
15 is tantamount to the Services determining that the EOD training operations resulted in a
16 significant likelihood of “takings” (as defined by section 3(19) of the ESA, 16 U.S.C. §
17 1532(19)).

18 29. The Services proposed several possible mitigation measures, including
19 conducting the explosions in a lake or rock quarry or in the open ocean; lifting the mine nearer to
20 the surface and surrounding it with a bubble curtain; digging a permanent pit to contain most of
21 the blast energy; restoring nearby habitat; conducting monitoring studies; and limiting explosions
22 to avoid times when listed fish are likely to be present. The Services proposed these strategies be
23 effective for three years while environmental studies were completed.

1 30. Although the Services characterized the EOD training operations as a “proposed
2 action” in the April 18, 2002 letter, the Navy had already been conducting EOD operations for
3 some time and has continued to do so throughout consultation with the Services. *See Exhibit 1,*
4 *April 18, 2002 Letter* at 1.

5 31. In July 2002, the Navy rejected most of the proposed mitigation measures as
6 infeasible or as inconsistent with the training objectives.

7 32. The Navy agreed to some seasonal restrictions on charge sizes during salmon and
8 bull trout juvenile migration and also agreed to look for marine mammals for thirty minutes
9 before explosions and delay detonation if any were spotted. The Navy also indicated a
10 willingness to monitor mortalities caused by the training operations and to carry out restoration
11 projects, provided that funding could be obtained from other sources.

12 33. The Navy has implemented some of the agreed-upon mitigation measures in
13 ensuing years, but Plaintiffs do not know exactly which measures were implemented and to what
14 degree. Plaintiffs also do not know the effect any implemented mitigation measures may have
15 had on the environmental impacts of EOD operations.

16 34. The Services informed the Navy on March 30, 2004 that the Navy had provided
17 the information necessary to initiate formal consultation under ESA Section 7 and that the
18 Services would prepare a BiOp. **Exhibit 2, March 30, 2004 Letter.** The consultation and BiOp
19 concerned: threatened Puget Sound chinook salmon under NMFS jurisdiction; threatened Hood
20 Canal summer-run chum salmon under NMFS jurisdiction; threatened bull trout under FWS
21 jurisdiction; threatened marbled murrelets under FWS jurisdiction; threatened Stellar sea-lions
22 under NMFS jurisdiction; endangered humpback whales under NMFS jurisdiction; and
23 recovered bald eagles under FWS jurisdiction.

1 35. In the March 30, 2004 letter, the Services cited ESA Section 7's timelines of 90
2 days to conclude formal consultation and 45 days to prepare the BiOp, but then stated that
3 "based on the extensive coordination and cooperation with the Navy on this project, the Services
4 expect to complete the biological opinion before the 135 day time frame." **Exhibit 2, March 30,**
5 **2004 Letter** at 2. The Services also reminded the Navy that following the initiation of formal
6 consultation, the ESA required that the Navy abstain from any "irretrievable commitment of
7 resources." *Id.*

9 36. Since initiation of formal consultation on March 30, 2004, the Services have
10 engaged in negotiations with the Navy regarding the scope of the EOD operations which would
11 be the subject of the BiOp. Formal consultation has extended well beyond the 135 days listed in
12 the ESA and cited by the Services in the March 30, 2004 letter.

14 37. Both the Navy and outside consultants have monitored EOD operations at various
15 times during the several years since initiation of formal consultation. Plaintiffs lack information
16 about the specific type and results of those monitoring activities.

18 38. The Navy threatened to remove its Puget Sound BA from ESA consultation in
19 two separate conference calls on August 20, 2007. The first call was between Navy biologists,
20 the Whidbey Island Environmental Affairs Department, and Bob Donnelly of NMFS; the second
21 call was between Navy biologists, the Whidbey Island Environmental Affairs Department, and
22 John Grettenberger of FWS. The Navy stated that if a draft BiOp was not delivered by the end
23 of September 2007, as NMFS had indicated it would be, the Navy would instead include EOD
24 training operations in an EIS for the Northwest Training Range Complex ("NWTRC").

26 39. At some point in late 2007, the Services decided to prepare separate BiOps rather
27 than the long-planned joint BiOp.

1 40. PEER has learned that NMFS completed its own draft BiOp in December of
2 2007. This draft BiOp has not been made public and NMFS has not issued a final BiOp as of
3 this date.

4 41. FWS has not completed any form of BiOp as of this date because it harbors
5 ongoing concerns about significant impacts to species within its jurisdiction, bull trout and
6 marbled murrelets. FWS continues negotiations with the Navy regarding the scope of its EOD
7 training operations.
8

9 42. An Incidental Take Statement (“ITS”) sets forth reasonable and prudent measures
10 to minimize the impact of incidental takes of endangered species, and includes mandatory terms
11 and conditions implementing those measures. 16 U.S.C. §§ 1536(b)(4)(ii) and (iii) (2008).
12

13 43. If the Services conclude in a BiOp that an action is not likely to jeopardize the
14 continued existence of any ESA listed species, or that reasonable and prudent alternatives to the
15 action are not likely to jeopardize the continued existence of any ESA listed species, an ITS must
16 be included within the BiOp. 50 C.F.R. § 402.14(i) (2008).
17

18 44. Because the Services have not issued a BiOp or an ITS, the Navy, on information
19 and belief, has and will continue to violate the ESA for “taking” ESA listed species in
20 connection with its EOD training operations. 16 U.S.C. § 1538.
21

22 **V. CAUSES OF ACTION**

23 ***Count I. The Navy’s Failure to Comply with NEPA***

24 45. Plaintiffs incorporate by reference preceding paragraphs 1-3, 6-7, and 17-38.
25

26 46. NEPA sets forth substantive environmental quality goals for the government and
27 the nation. *See* 42 U.S.C. § 4331. All agencies of the U.S. government are required to include
28

1 an EIS for every “recommendation or report on proposals for legislation and other major federal
2 actions significantly affecting the quality of the human environment.” 42 U.S.C. § 4332(2)(C).

3 47. EOD training operations in Puget Sound are major federal actions. The Navy has
4 complete power and discretion to fund and conduct these routine detonations.

5 48. Explosive charges are per se ultra-hazardous activities, patently modifying or
6 degrading the environment. EOD training operations have been documented to cause significant
7 harm and death to aquatic species in Puget Sound. This adverse effect is substantiated by the
8 Services in, among other things, their joint rejection of the “not likely to adversely affect” listed
9 species conclusion in the Navy’s Biological Assessment. The blasts have been found as the
10 proximate cause of thousands of fish mortalities per detonation depending on the size of the
11 charge.
12

13 49. EOD training operations are the subject of public controversy, involving uncertain
14 and significant environmental risks affecting the human environment. Such actions require the
15 production of an EIS to comply with NEPA. The Navy has not prepared an EIS yet it continues
16 to conduct EOD training operations in violation of Section 102(2)(C) of NEPA, 42 U.S.C. §
17 4332(2)(C).
18

19 50. An EIS is required in the initial decisionmaking process before a major federal
20 action is undertaken and before any irreversible or irretrievable commitments of resources.
21

22 51. The Navy continues to violate NEPA by conducting its EOD training operations
23 in Puget Sound without producing a full assessment of environmental impacts as required at
24 section 102(2)(C) of NEPA, 42 U.S.C. § 4332(2)(C).
25

26 52. Section 102(2)(E) of NEPA, 42 U.S.C. § 4332(2)(E) requires all agencies of the
27 U.S. government study, develop, and describe appropriate alternatives to the recommended
28

1 courses of action in any proposal which involves unresolved conflicts concerning alternative uses
2 of available resources.

3 53. There are unresolved conflicts concerning alternative uses of available resources
4 implicated by the Navy's EOD training operations, including but not limited to whether Puget
5 Sound should be preserved to provide habitable conditions for fish and wildlife, including
6 species protected under the ESA, or whether the Navy has carte blanche to use the Sound as
7 military training grounds.
8

9 54. On information and belief, the Navy has not prepared the alternatives analysis
10 required by Section 102(2)(E) of NEPA, 42 U.S.C. § 4332(2)(E), and is therefore in violation of
11 NEPA.
12

13 ***Count II. The Services Unlawfully Withheld and Unreasonably Delayed Agency Action***

14 55. Plaintiffs incorporate by reference preceding paragraphs 1, 4-7, 17-20, and 23-44.

15 56. The Services have a duty to conclude matters presented to them within a
16 reasonable time. 5 U.S.C. § 555(b).
17

18 57. The APA authorizes this Court to compel agency action that is "unlawfully
19 withheld or unreasonably delayed." 5 U.S.C. § 706(1).
20

21 58. The ESA directs the Secretaries of the Interior and Commerce to conclude
22 consultation with respect to agency actions' effects on threatened and endangered species and
23 their habitats within 90 days from initiation, although consultation can be extended to a date
24 agreed to by both the Secretaries and the Navy. 16 U.S.C. § 1536(b)(1)(A).
25

26 59. The Services informed the Navy on March 30, 2004 that the ESA provided for a
27 90-day formal consultation period followed by a 45-day period in which to prepare the BiOp, but
28

1 the Services insisted that they expected to complete the BiOp before the 135 days expired.

2 **Exhibit 2, March 30, 2004 Letter at 2.**

3 60. More than 1,600 days have passed since initiation of formal consultation, and
4 there is still no final comprehensive BiOp issued by the Services, jointly or separately, regarding
5 the Navy's EOD training operations in Puget Sound.
6

7 61. The Services' failure to produce a BiOp within a remotely reasonable amount of
8 time is confounding, especially given the Services' own assurances of a short turnaround based
9 on the extensive coordination and cooperation that had already occurred between the Services
10 and the Navy prior to initiating formal consultation in March 2004. The Services' conduct
11 constitutes agency action unlawfully withheld and unreasonably delayed under the APA.
12

13 **VI. RELIEF REQUESTED**

14 Wherefore, Plaintiffs pray that the Court grant the following relief:

15 62. Issue a declaratory judgment that the Navy has violated NEPA by failing to
16 prepare an EIS and an alternatives analysis, or otherwise comply with NEPA concerning its EOD
17 training operations in Puget Sound.
18

19 63. Issue an injunction prohibiting further Navy EOD training operations, or order
20 significant interim protective measures to prevent harm to threatened and endangered species and
21 their critical habitat, until the Navy satisfactorily fulfills its statutory obligations under NEPA.
22

23 64. Issue a declaratory judgment that the Services have violated the APA by
24 unlawfully withholding and unreasonably delaying action in failing to complete consultation
25 under the ESA and issue final comprehensive BiOps concerning the Navy's EOD training
26 operations in Puget Sound.
27
28

1 65. Issue an injunction against further EOD training operations in Puget Sound, or
2 order significant interim protective measures to prevent harm to threatened and endangered
3 species and their critical habitat, until formal consultation under the ESA is completed and the
4 Navy has brought its EOD training operations into compliance with the ESA.

5 66. Award Plaintiffs their reasonable litigation expenses, including attorneys fees,
6 expert witness fees, court costs, and other expenses necessary for the preparation and litigation of
7 this case under the Equal Access to Justice Act, 28 U.S.C. §§ 2412 *et seq.*

8 67. Award such additional relief as the court may deem just and proper.

9 RESPECTFULLY SUBMITTED this 28th day of July, 2008.

10 **SMITH & LOWNEY, PLLC**

11 By: s/ Brian A. Knutsen
12 Richard A. Smith, WSBA # 21788
13 Brian A. Knutsen, WSBA # 38806
14 Attorneys for Plaintiffs
15 2317 E. John Street, Seattle, WA 98112
16 Tel: (206) 860-2883; Fax: (206) 860-4187
17 Email: rasmithwa@igc.org; briank@igc.org

18 Public Employees for Environmental Responsibility
19 Paula N. Dinerstein, Senior Counsel
20 Adam E. Draper, Staff Counsel
21 Attorneys for Plaintiffs
22 2000 P Street NW, Suite 240, Washington, D.C. 20036
23 Tel: (202) 265-7337; Fax: (202) 265-4192
24 Email: pdinerstein@peer.org; adraper@peer.org

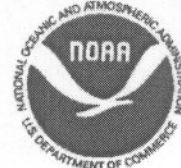
EXHIBIT 1

April 18, 2002 Letter



Fish and Wildlife Service
510 Desmond Drive S.E., Suite 102
Lacey, Washington 98503

United States Department of the Interior
Fish and Wildlife Service
United States Department of Commerce
National Marine Fisheries Service



National Marine Fisheries Service
7600 Sand Point Way N.E.
Lacey, Washington 98503

COPY FOR YOUR
INFORMATION

APR 18 2002

Robert M. Campagna
Assistant Chief of Staff for Environment and Safety
Department of the Navy
Navy Region Northwest
1103 Hunley Rd.
Silverdale, Washington 98315-11030

Re: Biological Assessment; U.S. Navy Explosive Ordnance Disposal Operations; Puget Sound, Washington. (FWS Reference #1-3-01-I-0584)

Dear Mr. Campagna;

The U.S. Fish and Wildlife Service and National Marine Fisheries Service (Services) have reviewed your Biological Assessment (BA), dated January 2001, for the Explosive Ordnance Disposal (EOD) operations conducted at several locations in Puget Sound, Washington. The Department of the Navy determined that the proposed project "may effect, but is not likely to adversely affect," chinook salmon (*Onchorhynchus tshawytscha*), chum salmon (*O. keta*), and bull trout (*Salvelinus confluentus*). The Services do not concur with your determinations. For other species addressed in the BA, the Services will analyze potential effects when all requested information has been received.

The Services believe that the proposed action has the potential to adversely affect chinook salmon, chum salmon, and bull trout because:

1. The proposed action has a high likelihood of causing direct mortality of these listed species.
2. The underwater detonation results in significant mortality of prey species.

Based on our understanding, the proposed action is designed to train and certify divers for deployment into the field with battle groups. We appreciate the importance of this activity, especially the training of personnel in the most realistic setting. In discussions in the field and in meetings with Navy personnel, we have obtained a fairly detailed "picture" of these operations.

As part of the training, explosives are detonated underwater. An unavoidable consequence of these detonations is that many fish are killed. During the field demonstration, using a five-pound charge, we observed approximately 1000 dead fish, mostly surf smelt (*Hypomesus pretiosus*), at the surface shortly after the blast. This is of concern to us for two reasons. First, the fish that were observed have swim bladders and it appeared that the cause of death was rupture of this organ. Chinook salmon, chum salmon, and bull trout all have swim bladders and may be similarly killed by underwater detonations. Based on scientific literature, less than 20 percent of the impacted fish will be seen at the surface, thus the actual number of mortalities may have been greater than 5000 for a five-pound charge. The number of fish killed would be much greater with a 20-pound charge. On average, five, but not less than three, training exercises involving underwater detonation occurs per month. Therefore, the number of fish killed per month, depending on the season, may be quite large.

To address these concerns, we have compiled a list of possible options that might be undertaken to eliminate, or reduce, negative impacts to the listed species:

1. Conduct the actual explosive part of the training in controlled circumstances, underwater, where fish are not present such as a lake or rock quarry.
2. Move the training out into the Strait of Juan de Fuca, or the ocean, about a mile offshore.
3. Lift the mine to near the surface before detonation and surround it with a bubble curtain.
4. Dig a permanent pit in the substrate, for a steel or concrete box-type structure, to contain most of the blast energy.
5. Compensate for the mortalities through restoration of nearby habitat.
6. Conduct studies with the following objectives:
 - a. Monitor to quantify the number and species of mortalities.
 - b. Determine empirically the lethal and sub-lethal distances from the detonation.
 - c. Determine the best, non-harmful way to frighten fish away from the blast area prior to detonation.
7. Implement timing restrictions on explosive detonations to avoid times when listed fish are likely to be present.
8. Some combination of the above, e.g. 5 & 6.

The Services are open to any additional suggestions, or actions, that will eliminate or reduce negative impacts to listed species.

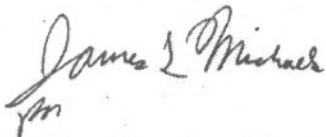
In addition to the above concerns we also hope the consequences of this activity can be minimized through the detonation of fewer explosives (particularly the 20 pound charges) and timing restrictions.

We would appreciate a response as to whether the Department of the Navy is willing to implement any of the above options to assist in completing this consultation. We propose that the Biological Opinion will be for a period of three years while studies currently underway can be completed to better understand the migration patterns and habitat use of bull trout and other

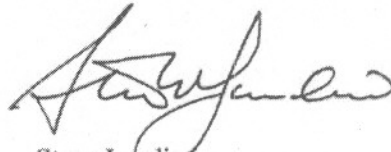
listed fish in northern Puget Sound. Also, if you agree to conduct some, or all, of the above suggested studies the results can be incorporated into future training (and the next Biological Opinion), further reducing negative impacts to listed fish.

If you have any questions, or need further clarification regarding the above options, please contact Bob Donnelly with the National Marine Fisheries Service (206/526-6117) or Yvonne Dettlaff with the U.S. Fish and Wildlife Service (360/753-9582).

Sincerely,



Ken Berg, Manager
Western Washington Fish and Wildlife Office
U.S. Fish and Wildlife Service



Steve Landino,
Washington Habitat Branch Chief
National Marine Fisheries Service

cc: Dept of the Navy, Poulsbow (R. Stoll)
Jamestown S'Klallam Tribe, Sequim
Lower Elwha Klallam Tribe, Port Angeles
Lummi Indian Tribe, Bellingham
Nooksack Tribe, Deming
Port Gamble S'Klallam Tribe, Kingston
Sauk-Suiattle Tribe, Darrington
Skokomish Tribe, Shelton
Stillaguamish Tribe, Arlington
Suquamish Tribe, Suquamish
Swinomish Tribe, LaConner
Tulalip Tribes, Marysville
Upper Skagit Tribe, Sedro Wooley
WDFW, LaConner (R. Johnson, J. Klacen)
Point No Point Treaty Council, Kingston
Skagit System Cooperative, LaConner

EXHIBIT 2

March 30, 2004 Letter



United States Department of Commerce
National Marine Fisheries Service
United States Department of the Interior
Fish and Wildlife Service



National Marine Fisheries Service
510 Desmond Drive S.E., Suite 103
Lacey, Washington 98503

U.S. Fish and Wildlife Service
510 Desmond Drive S.E., Suite 102
Lacey, Washington 98503

NMFS Tracking No: 2001/00063
FWS Reference #: 1-3-01-F-0584

March 30, 2004

Robert M. Campagna, Program Manager
Environment and Safety
Department of the Navy
Navy Region Northwest
1103 Hunley Rd.
Silverdale, Washington 98315-11030

Re: Endangered Species Act Section 7 Consultation and Magnuson-Stevens Fishery
Conservation and Management Act Essential Fish Habitat Consultation for the Navy
EOD training program. 4th Field HUC codes 17110019, Puget Sound; 17110018,
Hood Canal.

Dear Mr. Campagna:

This letter acknowledges the completion of your initiation package for Section 7 consultation with the NOAA's National Marine Fisheries Service (NOAA Fisheries) and the U.S. Fish and Wildlife Service (USFWS) (jointly the Services) under the Endangered Species Act (ESA). The consultation concerns the possible effects of the U.S. Navy's (Navy) Explosive Ordnance Disposal (EOD) Training program on Puget Sound chinook salmon (*Oncorhynchus tshawytscha*), Hood Canal summer chum salmon (*O. keta*), Steller sea lion (*Eumetopias jubatus*), humpback whale (*Megaptera novaeangliae*), bald eagle (*Haliaeetus leucocephalus*), marbled murrelet (*Brachyramphus marmoratus*), and Coastal-Puget Sound bull trout (*Salvelinus confluentus*).

On January 8, 2001, you sent the Services a letter and biological assessment requesting informal consultation for your EOD Training operation. Because of the complexity of the consultation and the effects of the EOD operations on listed species, the Navy and the Services have had extensive coordination on the project and ways to avoid and minimize

project impacts. On October 29, 2001, the Navy conducted a field demonstration at the Crescent Harbor training site. Some of the agencies present included the Services, Washington Department of Fish and Wildlife, Swinomish Tribe, and the Skagit System Cooperative. During the field demonstration the Services requested additional information on impacts of underwater explosions to fish. The Navy sent a BA addendum to the Services providing additional information on effects of EOD Operations on Dungeness crab (*Cancer magister*), fish, and marine mammals on December 18, 2001.

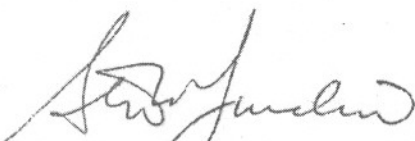
The Services sent a letter on April 18, 2002, stating we did not concur with your "may effect, not likely to adversely affect" determination for chinook salmon, chum salmon, and bull trout. This letter also identified possible options to eliminate, or reduce, negative impacts of the EOD training on listed species. The U.S. Navy identified potential minimization measures in a letter to the Services dated July 5, 2002. Through numerous email, phone contacts and meetings, the Services have requested additional information needed to initiate consultation. The Navy and the Services have also been jointly working on a monitoring plan to determine the number and diversity of species being injured and killed during underwater explosions. A final monitoring plan should be finished in the near future. On March 2, 2004, the Services received the necessary information required to initiate formal consultation. The USFWS is currently evaluating the information related to the marbled murrelet to determine whether we still concur with your "may effect, not likely to adversely affect" determination.

Section 7 allows the Services up to 90 calendar days to conclude formal consultation with your agency and an additional 45 calendar days to prepare our biological opinion (unless we mutually agree to an extension). However, based on the extensive coordination and cooperation with the Navy on this project, the Services expect to complete the biological opinion before the 135 day time frame.

As a reminder, the ESA requires that after initiation of formal consultation, the Federal action agency may not make any irreversible or irretrievable commitment of resources that limits future options. This practice insures agency actions do not preclude the formulation or implementation of reasonable and prudent alternatives that avoid jeopardizing the continued existence of endangered or threatened species or destroying or modifying their critical habitats.

If you have any questions, please contact Bob Donnelly of the NOAA Fisheries' Washington State Branch Office at (206) 526-6117, or at: bob.donnelly@noaa.gov, or Jim Muck of the USFWS's Western Washington Fish and Wildlife Office at (206) 526-4740, or at: jim.muck@noaa.gov.

Sincerely,



D. Robert Lohn
Regional Administrator
NOAA Fisheries



Ken Berg, Manager
U.S. Fish and Wildlife Service
Western Washington Fish and Wildlife Office

cc: Dept. of the Navy, Oak Harbor (John Phillips, Kathy Souders)
Jamestown S'Klallam Tribe, Sequim
Lower Elwha Klallam Tribe, Port Angeles
Lummi Indian Tribe, Bellingham
Nooksack Tribe, Deming
Port Gamble S'Klallam Tribe, Kingston
Sauk-Suiattle Tribe, Darrington
Skokomish Tribe, Shelton
Stillaguamish Tribe, Arlington
Suquamish Tribe, Suquamish
Swinomish Tribe, LaConner
Tulalip Tribes, Marysville
Upper Skagit Tribe, Sedro Wooley
WDFW, LaConner (R. Johnson, J. Klacen)
Point No Point Treaty Council, Kingston
Skagit System Cooperative, LaConner

bc: F/NWR - Davis
F/PR3 - Chief of Endangered Species
WSHO - File Copy
8 WSHO - Chron File
WSHO - Donnelly
WSHO - Sibley (NPS)
File: USFWS (Mary Pitcock)
USFWS: Jim Muck

cc addresses: 16 + 1

Rich Johnson
Julie Klacen
Washington Department of Fish and
Wildlife
P.O. Box 1100
LaConner, WA 98257

Richard Stoll
Senior Natural Resources Specialist
Engineering Field Activity NW
Naval Facilities Engineering Command,
19517
7th Ave. NE
Poulsbow, WA 98370

Larry Wasserman
Skagit System Cooperative
P.O. Box 368, LaConner, WA 98257

Swinomish Tribe
P.O. 817
LaConner, WA 98257

Upper Skagit Tribe
25944 Community Plaza Way
Sedro Wooley, WA 98284

Sauk-Suiattle Tribe
5218 Chief Brown Lane
Darrington, WA 98241

Stillaguamish Tribe
3439 Stoluckquamish Lane
Arlington, WA 98223

Tulalip Tribes
6700 Totem Beach Road
Marysville, WA 98270

Lummi Indian Tribe
2616 Kwina Road
Bellingham, WA 98226

Nooksack Tribe
P.O. Box 157, Deming, WA 98244

Jamestown S'Klallam Tribe
1033 Old Blyn Highway, Sequim, WA
98382

Port Gamble S'Klallam Tribe
31912 Little Boston Road NE
Kingston, WA 98346

Lower Elwha Klallam Tribe
2854 Lower Elwha Road
Port Angeles, WA 98363

Point No Point Treaty Council
7999 NE Salish Lane
Kingston, WA 98346

Suquamish Tribe
P.O. Box 498
Suquamish, WA 98392

Skokomish Tribe
North 80 Tribal Center Road
Shelton, WA 98584