



Public Employees for Environmental Responsibility

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Certified Mail: Return Receipt Requested

<p>The Honorable Donald C. Winter Secretary of the Navy United States Department of the Navy 1000 Navy Pentagon Washington, D.C. 20350-1000</p>	<p>Robert M. Campagna Program Manager, Environment and Safety United States Department of the Navy Navy Region Northwest 1103 Hunley Rd. Silverdale, Washington 98315</p>
<p>Carlos M. Gutierrez Secretary of Commerce United States Department of Commerce 1401 Constitution Avenue, N.W. Washington, D.C. 20230</p>	<p>Dr. James W. Balsiger Director National Marine Fisheries Service 1315 East West Highway, SSMC3 Silver Spring, MD 20910</p>
<p>Dirk Kempthorne Secretary of the Interior United States Department of the Interior 1849 C Street, N.W., Mail Stop 7229 Washington, D.C. 20240</p>	<p>H. Dale Hall Director United States Fish and Wildlife Service 1849 C Street, N.W. Washington, D.C. 20240</p>

Re: Notice to the United States Navy of its Violation of the Endangered Species Act: Failure to Consult Regarding Impacts of Explosive Ordnance Disposal Training Operations in Puget Sound on Threatened and Endangered Species Pursuant to the Endangered Species Act Section 7(a) at 16 U.S.C. § 1536(a); Commitment of Irreversible and Irrecoverable Resources in Conducting Explosive Ordnance Disposal Training Operations in Violation of the Endangered Species Act Section 7(d) at 16 U.S.C. § 1536(d); Taking of Endangered Species as Prohibited by the Endangered Species Act Section 9(a) at 16 U.S.C. § 1538(a).

The Honorable Donald C. Winter:

On behalf of Public Employees for Environmental Responsibility (“PEER”), 2000 P Street NW #240, Washington D.C. 20036, (202) 265-7337, and Wild Fish Conservancy (“Wild Fish”), P.O. Box 402, Duvall, WA 98019, (425) 788-1167, you are hereby notified that, unless



the violations described herein are remedied within sixty days, we intend to challenge in federal court these actions of the Department of Navy that violate the Endangered Species Act (“ESA”). We ask that you remedy these ongoing violations of the ESA by the Department of the Navy. We are sending this notice pursuant to Section 11(g) of the ESA, 16 U.S.C. § 1540(g) (2008). Nevertheless, we hope that legal action will not be necessary and that we can work with you to bring the Navy’s actions into compliance with the ESA.

The Navy is violating Section 7(a)(2) of the ESA by conducting Explosive Ordnance Disposal (“EOD”) training operations in Puget Sound, which “may affect” ESA-listed species, without having first completed consultation under the ESA. 16 U.S.C. § 1536(a)(2) (2008); 50 C.F.R. § 402.14. Specifically, the Navy has an obligation to ensure that its EOD training operations will not jeopardize threatened and endangered species and to mitigate the harmful effects of these operations. Consultation under Section 7(a)(2) is a necessary first step toward bringing programs like the EOD training operations into compliance with the ESA. The Navy acknowledges these obligations, yet—despite carrying out training operations for several years—has not completed consultation.

The Navy is violating Section 9(a) of the ESA by taking species listed pursuant to Section 4 at 16 U.S.C. § 1533 (2008). Detonating explosive charges is a per se ultra-hazardous activity, and has been documented as adversely affecting marine species. This adverse affect is substantiated by The U.S. Fish and Wildlife Service and the National Marine Fisheries Service (collectively, “the Services”) in, among other things, their joint rejection of the “not likely to adversely affect” determination in the Navy’s Biological Assessment (submitted to the Services in January 2001), and the Services concluded these blasts likely cause thousands of fish mortalities per detonation.

BACKGROUND

The Navy conducts EOD training operations in Puget Sound, a biologically rich estuary that is home to many endangered and threatened species, including chinook and chum salmon, bull trout, marbled murrelets, and orcas. The training operations subject this sensitive marine environment to routine explosions that kill or disturb fish, birds, and marine mammals.

EOD training operations are designed to train and certify divers to dispose of underwater explosives. The Navy conducts these training operations at three locations in Puget Sound: Crescent Harbor (near the Whidbey Island seaplane base); Hood Canal (near the Bangor naval submarine base); and Port Townsend Bay (near the Naval Magazine, Indian Island). The training consists of using explosive charges to destroy or disable inert (dummy) mines. The technicians must locate the dummy mine, place the charge, detonate it, retrieve the debris, and inspect the site. The EOD training operations entail as many as three to five exercises per month. EOD technicians must re-qualify every month in the preparation, placement, and detonation of underwater explosive materials. They use explosives ranging in size from 2.5 to 20 pounds.

On January 8, 2001, the Navy sent the Services a Biological Assessment (“BA”) and initiated informal consultation for the EOD training in Puget Sound. *SAIC, Final Biological Assessment, U.S. Navy Explosive Ordnance Disposal (EOD) Operations, Puget Sound, Washington* (Dec. 28, 2000). The BA concluded that the training may affect, but was not likely to adversely affect, Puget Sound chinook salmon (*Oncorhynchus tshawytscha*), Hood Canal summer-run chum salmon (*Oncorhynchus keta*) marbled murrelets (*Brachyramphus marmoratus*), bull trout (*Salvelinus confluentus*), and several other species. *Id.* at 95, 105, 110. The BA did not consider effects of the EOD training on orcas, which had not yet been listed.

By letter dated April 18, 2002 (attached hereto), the Services expressly did not concur with this determination as to chinook and chum salmon and bull trout. *Letter from Ken Berg, Manager, Western Washington Fish and Wildlife Office, FWS, & Steve Landino, Washington Habitat Branch Chief, NMFS, to Robert M. Campagna, Assistant Chief of Staff for Environment and Safety, Department of the Navy* (Apr. 18, 2002) (“April 18, 2002 Letter”). The Services concluded that there was “a high likelihood” that the training caused “direct mortality” of these listed species, in addition to definitively causing “significant mortality” of their prey species. *Id.* at 1. During a field demonstration of a five-pound charge, the Services observed approximately 1000 dead fish on the surface of the water after the blast. *Id.* at 2. Although most of the dead fish were surf smelt (*Hypomesus pretiosus*) rather than any listed species, they appeared to have died from ruptures of their swim bladders. *Id.* Salmon and bull trout also have swim bladders and could therefore be killed by the same mechanism. Furthermore, based on scientific literature indicating that less than 20% of the dead fish would typically rise to the surface, the Services concluded that the actual number of fish killed may have been greater than 5000. *Id.* Because the EOD training operations occurred three-to-five times per month, and sometimes involved the use of 20-pound charges, the Services concluded that the number of fish killed per month “may be quite large.” *Id.*

The Services proposed several possible mitigation measures. These included conducting the explosions in a lake or rock quarry or in the open ocean; lifting the mine nearer to the surface and surrounding it with a bubble curtain; digging a permanent pit to contain most of the blast energy; restoring nearby habitat; conducting monitoring studies; and limiting explosions to avoid times when listed fish are likely to be present. *Id.*

In July 2002, the Navy rejected most of the proposed mitigation measures as infeasible or as inconsistent with the training objectives. *Letter from Robert M. Campagna, Assistant Chief of Staff for Environment and Safety, Department of the Navy, to Ken Berg, Manager, Western Washington Fish and Wildlife Office, FWS & Steve Landino, Washington Habitat Branch Chief, NMFS* (July 5, 2002). However, it agreed to some seasonal restrictions on charge sizes during salmon and bull trout juvenile migration and also agreed to look for marine mammals for thirty minutes before explosions and delay detonation if any were spotted. *Id.* at 3. The Navy also indicated a willingness to monitor mortalities caused by the training operations and to carry out restoration projects, provided that funding could be obtained from other sources. *Id.* at 2. Based on records PEER has received through Freedom of Information Act requests, it appears the Navy

has implemented some of the agreed-upon mitigation measures in ensuing years; however, PEER lacks information about the specific measures implemented and what if any effect they had on impacts to the marine ecosystem.

In March 2004, the Navy began formal consultation with the Services regarding the effects of the EOD training operations on Puget Sound chinook salmon, Hood Canal summer chum salmon, bull trout, marbled murrelets, Steller sea lions (*Eumetopias jubatus*), humpback whales (*Megaptera novaeangliae*), and bald eagles (*Haliaeetus leucocephalus*). *Letter from D. Robert Lohn, Regional Administrator, NOAA Fisheries & Ken Berg, Manager, Western Washington Fish and Wildlife Office, FWS, to Robert M. Campagna, Program Manager, Environment and Safety, Department of the Navy* (Mar. 30, 2004) (attached hereto) The Services stated that “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.” *Id.* at 2. Yet more than four years later, the consultation still has not been completed. Moreover, we are not aware that the Navy has ever initiated consultations regarding the effects of the EOD training operations on orcas, which were listed as endangered in 2005.

THE NAVY VIOLATED ESA § 7(a)(2) BY FAILING TO COMPLETE
CONSULTATION ON PUGET SOUND EOD TRAINING AND BY FAILING TO INSURE
NO JEOPARDY

I. Legal framework

Under ESA Section 7(a)(2), “[e]ach federal agency shall ... insure that any action authorized, funded, or carried out by such agency ... is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species.” 16 U.S.C. § 1536(a)(2). The obligation to “insure” against a likelihood of jeopardy or adverse modification requires the agency to give the benefit of the doubt to endangered species and to place the burden of risk and uncertainty on the proposed action. *See Sierra Club v. Marsh*, 816 F.2d 1376, 1386 (9th Cir. 1987).

Section 7 establishes an interagency consultation process to assist federal agencies in complying with their duties to ensure against jeopardy to listed species and against destruction or adverse modification of critical habitat. An agency must initiate consultation with NMFS or FWS under Section 7 whenever it takes an action that “may affect” a listed species. *See* 50 C.F.R. § 402.14(a) (2008). Regulations implementing Section 7 broadly define the scope of agency actions subject to consultation. *See* 50 C.F.R. § 402.02 (definition of “action”). The Navy, in its BA, recognized that the EOD training is an action that may affect listed species. The Services reached the same conclusion and went further in rejecting the Navy’s “not likely to adversely affect” findings.

The end product of such a consultation is a Biological Opinion in which FWS and/or NMFS determines whether the action will jeopardize the survival of listed species or will

adversely modify the species' critical habitat, and, if so, what reasonable and prudent alternatives are available to avoid such a result. 16 U.S.C. § 1536(b) (2008). The action agency, here the Navy, must then implement any measures necessary to avoid jeopardy to listed species. We also note that The Ninth Circuit in *Pacific Rivers* clarified its earlier decision in *Conner v. Burford*, 848 F.2d 1441 (9th Cir. 1988), rejecting the notion that agency action could be taken – even incrementally – until a comprehensive Biological Opinion was issued by the Services. *Pac. Rivers Council v. Thomas*, 30 F.3d 1050 (9th Cir. 1994).

Section 7(a)(2) of the ESA imposes a substantive duty, in addition to the procedural consultation requirements, that federal agencies “insure” that their actions are “not likely to jeopardize the continued existence of any listed species.” *Defenders of Wildlife v. United States Envtl. Prot. Agency*, 420 F.3d 946, 963-64, 976 (9th Cir. 2006), *rev'd on other grounds*, 127 S.Ct. 2518 (2007); *Pyramid Lake Paiute Tribe of Indians v. United States Dep't of the Navy*, 898 F.2d 1410, 1415 (9th Cir. 1990).

2. *The EOD Training Operations “may affect” threatened and endangered species.*

There is no dispute that the EOD training operations “may affect” several threatened and endangered species. The threshold for a “may affect” determination and required ESA Section 7 consultation is low. *See* 51 Fed. Reg. 19,926, 19,949 (June 3, 1986) (“Any possible effect, whether beneficial, benign, adverse or of an undetermined character, triggers the formal consultation requirement.”). The Navy itself has acknowledged in its BA that the operations “may affect” salmon, bull trout, and marbled murrelets. Furthermore, the Services did not agree with the Navy’s conclusion that the operations were “not likely to adversely affect” these species. “Harm” within the ESA’s definition of “take” includes “significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding or sheltering.” 50 CFR § 17.3 (2008). The United States Supreme Court has validated this characterization in *Babbitt v. Sweet Home Chapter of Cmty. for a Great Or.*, 515 U.S. 687 (1995). Accordingly, the Navy and the Services must engage in formal consultation for the EOD training program.

3. *The Navy has not completed consultation on the EOD Training Operations.*

Although EOD training operations have taken place in Puget Sound for several years, and continue to occur, the Navy has not completed consultation on the effects of these operations on threatened and endangered species. This failure to complete consultation on an action that “may affect” listed species violates the Endangered Species Act.

4. *The Navy fails to insure that EOD Training Operations are not likely to cause jeopardy.*

The Services have rejected the Navy’s conclusion that the EOD training operations are not likely to adversely affect ESA-listed species. The Services have proposed certain mitigation

measures intended to protect such species, which the Navy has largely rejected. By continuing to conduct its EOD training operations in the absence of completed consultation and without appropriate mitigation measures, the Navy is violating section 7(a)(2) of the ESA by failing to ensure that its actions are not likely to jeopardize the continued existence of ESA-listed species.

THE NAVY VIOLATED ESA § 9(a) BY TAKING LISTED SPECIES

1. *Legal framework*

Even if the Services determine that the action does not jeopardize listed species, the process is not complete. The ESA prohibits any person from “taking” species listed as endangered. 16 U.S.C. § 1538(a) (2008). FWS has by regulation extended the take prohibition to threatened species, 50 C.F.R. § 17.31 (2008); and NMFS has extended it to threatened salmon, 70 Fed. Reg. at 37,194-96. Thus it would be illegal to incidentally take bull trout, salmon, marbled murrelets, or orcas even after the issuance of a no-jeopardy Biological Opinion. For this reason, even if FWS and/or NMFS issue no-jeopardy Biological Opinions, they must also issue an ITS that authorizes the otherwise illegal incidental take of threatened and endangered species for the Navy to continue its EOD training operations. An ITS sets forth reasonable and prudent measures to minimize the impact of the incidental taking, 16 U.S.C. § 1536(b)(4)(ii) (2008), and includes mandatory terms and conditions implementing those measures. 16 U.S.C. § 1536(b)(4)(iii) (2008). The Navy would need to comply with such measures to be insulated from ESA take liability.

The term “take” is defined as an act that serves to “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect” listed species, even encompassing attempts to perform such acts regardless of success. 16 U.S.C. § 1532(19) (2008). Exceptions to the takings prohibition of Section 9(a) may only be granted by the Secretary of the Interior when anticipated takings are “incidental” to the proposed agency action and are “not likely to jeopardize the continued existence” of listed species. 16 U.S.C. § 1536(b)(4)(B). FWS regulations mandate that such a determination by the Secretary be included, in the form of an ITS, within a comprehensive Biological Opinion. 50 C.F.R. § 402.14(i).

2. *The Navy has taken listed species without an ITS*

The Services supply action agencies with an ITS by issuing a Biological Opinion. The Opinion must include an ITS if the Services determine that the action is not likely to jeopardize listed species, or that reasonable and prudent alternatives exist that would prevent jeopardy, and that any resulting incidental take will not violate section 7(a)(2) of the ESA. *Id.* To our knowledge, the Services have not issued final Biological Opinions on this matter, therefore no valid ITS is in force. We are also unaware of an exemption being granted to the Navy for the EOD training operations under either section 7(h) or 7(j) of the ESA. 16 U.S.C. §§ 1536(h) and (j). EOD training operations have been documented to harm aquatic species in Puget Sound, and these explosions patently modify or degrade the environment. The Services’ found that

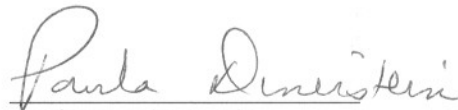
threatened chinook and chum salmon and bull trout, as well as their prey species, were extremely likely to be adversely affected (i.e. direct and significant mortality). April 18, 2002 Letter at 1. Moreover, proof of actual listed species mortality, whether by remains floating on the surface or other means, is not necessary to corroborate a claim of § 9(a) violation. This habitat modification, qualifying as harm prohibited by the ESA in § 9(a), is inflicted in conjunction with impairing essential behavioral patterns by killing prey species in great numbers. Moreover, the FWS has recently expressed concerns about significant impacts to marbled murrelets from the EOD operations. Therefore the EOD operations have and continue to unlawfully “take” ESA-listed species.

CONCLUSION

It has been clear for several years that the EOD training operations have adverse impacts on threatened and endangered species in Puget Sound. What has not been clear is the full scope of those impacts and what must be done to minimize those impacts through changes in operations or mitigation. Our goals in sending this letter are to avoid jeopardy to threatened and endangered species, to minimize the harm to these imperiled species, and to ensure that the Navy implements adequate mitigation. We do not want to hinder important military training operations, but merely seek to ensure that the explosions will not harm species that are already struggling to survive.

The long-overdue completion of formal consultation on the Puget Sound EOD training operations is the first step to ascertain the magnitude of the impacts of ordnance detonations on listed species, which is essential to the development of a sound mitigation strategy. In the absence of a completed consultation, these operations continue to cause harm to listed species and habitat without an adequate understanding of the extent of that harm or ways to minimize it. We seek to work with the Navy to ensure the completion of consultation and the implementation of appropriate mitigation. If you have any questions, please do not hesitate to call me at (202) 265-7337.

Sincerely,



Paula N. Dinerstein
Senior Counsel



Adam E. Draper
Staff Counsel

Page 8

cc: Kurt Beardslee, Executive Director, Wild Fish Conservancy
Richard A. Smith and Brian A. Knutsen, Smith & Lowney, PLLC