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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

PUBLIC EMPLOYEES FOR)
ENVIRONMENTAL RESPONSIBILITY;)
WILD FISH CONSERVANCY,)
)
Plaintiff,)
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; KEN)
SALAZAR, in his official capacity as the)
Secretary of the Interior; NATIONAL)
MARINE FISHERIES SERVICE; and)
OTTO J. WOLFF, in his official capacity)
as the Acting Secretary of Commerce,)
)
Defendants.)
)

No. 3:08-CV-05552-BHS

PLAINTIFFS' MOTION FOR PARTIAL
SUMMARY JUDGMENT AND
SUPPORTING MEMORANDUM OF
POINTS OF AUTHORITIES

NOTE ON MOTIONS CALENDAR:
May 29, 2009

INTRODUCTION

Plaintiffs Public Employees for Environmental Responsibility (PEER) and Wild Fish
Conservancy hereby move for partial summary judgment on their claim of violation of the
National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.*, Count I of their First

1 Amended Complaint.¹ This case concerns Defendant Navy's conduct of Explosive Ordinance
2 Disposal (EOD) Training in Puget Sound, Washington without compliance with NEPA and the
3 Endangered Species Act (ESA).² These training exercises involve the underwater detonation of
4 explosives in Puget Sound, a biologically rich and sensitive estuary which is home to several
5 endangered and threatened species as well as many other species of animal and plant life. Each
6 explosion results in substantial fish kills and other impacts to the environment, including
7 endangered species. These training exercises have been conducted for decades without issuance
8 of any of the environmental documents required for compliance with NEPA; an environmental
9 impact statement and an alternatives analysis, or an environmental assessment and Finding of No
10 Significant Impact.
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13 The administrative record reveals that the Navy determined as long ago as 2002 that the
14 EOD training exercises required NEPA review. The Navy took some steps toward preparation
15 of environmental documents, but it planned to circumvent the requirements of NEPA by not
16 reviewing the actual EOD training exercises but only mitigation measures or proposed changes
17 to the exercises. The Navy never intended to seriously consider any alternatives to the existing
18 training at Puget Sound in its NEPA reviews. To date, the Navy has not completed any
19 environmental reviews, and yet has continued the training activities, in violation of NEPA.
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22 Plaintiffs respectfully request the Court (1) issue declaratory judgment finding the Navy
23 to be in violation of NEPA; (2) issue injunctive relief requiring the Navy to prepare the analyses
24 required by NEPA for its EOD training exercises, including an environmental impact statement
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27 ¹ PEER intends to file separate motions for summary judgment on the remaining claims, and expressly reserves its
right to do so.

28 ² This motion concerns only the Navy's failure to comply with NEPA and thus does not involve the other
Defendants.

1 and an alternatives analysis; and (3) enjoin the Navy’s EOD training activities until completion
2 of environmental reviews in accordance with NEPA.

3 **STATUTORY AND REGULATORY BACKGROUND**

4 NEPA is the “basic national charter for protection of the environment.” 40 C.F.R. §
5 1500.1(a). NEPA sets forth substantive environmental quality goals for the government and the
6 nation. *See* 42 U.S.C. § 4331. All agencies of the U.S. government are required to include an
7 Environmental Impact Statement (EIS) for every “recommendation or report on proposals for
8 legislation and other major federal actions significantly affecting the quality of the human
9 environment.” 42 U.S.C. § 4332(2)(C). NEPA requires all agencies of the U.S. government to
10 study, develop, and describe appropriate alternatives to the recommended courses of action in
11 any proposal which involves unresolved conflicts concerning alternative uses of available
12 resources. 42 U.S.C. § 4332(2)(E).

15 The Council on Environmental Quality (CEQ) regulations implementing NEPA require
16 that “environmental information is available to public officials and citizens *before* decisions are
17 made and *before* actions are taken.” 40 C.F.R. § 1500.1(b) (emphasis supplied). The NEPA
18 process is to begin “at the earliest possible time to insure that planning and decisions reflect
19 environmental values . . .”. 40 C.F.R. 1501.2. The Navy’s regulations reflect those of CEQ,
20 stating that it is Navy’s policy to “Initiate the NEPA process at the earliest possible time to be an
21 effective decision making tool in the course of identifying a proposed action.” 32 C.F.R. §
22 775.3(a)(1).

25 The CEQ defines “major Federal action” to include new and continuing activities
26 potentially subject to federal control and responsibility. *See* 40 C.F.R. § 1508.18. Whether a
27 federal action is “major” depends on the significance of the impact on the human environment,
28

1 because “major” reinforces, but does not have a meaning independent of, “significantly.” 40
2 C.F.R. § 1508.18; *see also Bunch v. Hodel*, 793 F.2d 129, 135 (6th Cir. 1986).

3 The CEQ regulations list a number of factors that an agency must consider in deciding
4 whether to prepare an EIS. 40 C.F.R. § 1508.27. If the proposed action is one which does not
5 normally require an EIS, in order to determine whether preparation of a full EIS is necessary, an
6 agency may prepare an environmental assessment (EA). 40 C.F.R. § 1501.4; 1508.9. If the
7 agency determines on the basis of the EA not to prepare an EIS, it must prepare a “finding of no
8 significant impact” (FONSI) and make it available to the public. 40 C.F.R. § 1501.4(e); 1508.13.
9 Agencies must complete some NEPA analysis, either an EA accompanied by a FONSI or an EIS,
10 for any federal action not categorically excluded from NEPA. *See Hale v. Norton*, 476 F.3d 694,
11 700 (9th Cir. 2007). The Ninth Circuit Court of Appeals has unequivocally determined that “[i]f
12 the proposed action does not categorically require the preparation of an EIS, the agency must
13 prepare an EA to determine whether the action will have a significant effect on the
14 environment.” *Kern v. United States Bureau of Land Mgmt.*, 284 F.3d 1062, 1067 (9th Cir.
15 2002).

16 An EIS is required where substantial questions are raised as to whether the proposed
17 agency action *may* have a significant effect on the environment. *Klamath Siskiyou Wildlands*
18 *Ctr. v. Boody*, 468 F.3d 549, 562 (9th Cir. 2006). This is a low standard. *Id.* An important
19 factor in determining whether a federal action may have a significant impact on the environment
20 is whether the proposed action *may* adversely affect species listed as endangered or threatened
21 under the ESA. 40 C.F.R. § 1508.27(b)(9); *see also Klamath-Siskiyou Wildlands Ctr. v. United*
22 *States Forest Serv.*, 373 F.Supp.2d 1069, 1080-81 (E.D.Cal. 2004).

1 Where an EIS is required, after it is complete, the agency is to issue a “record of
2 decision” stating what the decision was, identifying all alternatives considered by the agency in
3 reaching its decision, identifying the factors that were balanced in making the decision, and
4 stating whether all practicable means to avoid or minimize environmental harm have been
5 adopted, and if not, why not. 40 C.F.R. § 1505.2. Until this record of decision is issued, the
6 agency may not take any action that would have an adverse environmental impact or limit the
7 choice of reasonable alternatives. 40 C.F.R. 1506.1(a).
8

9 **STATEMENT OF FACTS**

10 ***The EOD Training Exercises***

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12 1. The Navy has conducted underwater EOD training exercises in Puget Sound at least
13 since the early 1980s.³

14 2. The exercises generally involve training divers to use explosive charges to disable
15 inert “dummy” mines that are either on the sea floor or floating above it.⁴ The exercises have
16 been conducted in three areas of Puget Sound: Crescent Harbor (on Whidbey Island), Port
17 Townsend Bay (near the Naval Magazine, Indian Island) and Bangor in Hood Canal (offshore of
18 Floral Point).⁵
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25 ³ Navy Administrative Record (NAR) Doc. 154, p 1, Jan. 9, 2003 “Environmental Issues with Explosive Ordnance
26 Detonation (EOD) In-Water Training in Puget Sound”. Another Navy communication in the administrative record
27 states that EOD training in Puget Sound has occurred since the 1970’s. NAR Doc. 195, p.3, June 27, 2003 email
28 from Karen Morinaga, Navy to John Wittmann, Navy.

29 ⁴ NAR Doc. 609, p. 3, U.S. Fish and Wildlife Service Biological Opinion dated November 7, 2008 (hereinafter
“FWS BiOp”).

⁵ NAR Doc. 524, p. 3, U.S. National Marine Fisheries Service Biological Opinion dated June 30 2008, (hereinafter
“NMFS BiOp”).

1 3. Sea floor detonations usually occur 1100 to 7200 feet from shore at a depth of 40 to 60
2 feet. Charges range from 2.5 to 20 pounds.⁶ In floating detonations, mines are simulated by
3 floating 55 gallon drums and swimmers are inserted by helicopter or boat to set the charges.⁷

4 4. Navy EOD technicians are required to re-qualify at least monthly in the preparation,
5 placement, and detonation of underwater explosive materials.⁸

6 5. Historically, the Navy conducted an average of 60 and no less than 36 training
7 exercises a year in Puget Sound, *i.e.*, 3 to 5 exercises per month at all locations combined.⁹

8 6. At the time the National Marine Fisheries Service (NMFS) issued its Biological
9 Opinion (BiOp) in June 2008, the Navy represented that it conducted up to 32 annual underwater
10 detonations at Crescent Harbor and up to four in Port Townsend Bay.¹⁰ Floating mine drills at
11 Crescent Harbor were stated by the Navy to occur up to 20 times each year.¹¹ The exercises at
12 Bangor, involving the use of small charges from the hulls of naval vessels, were anticipated to
13 occur four times a year.¹² Thus, as of June 2008, a total of up to 56 exercises per year were
14 occurring and planned to be continued.

15 7. At the time that the Fish and Wildlife Service (FWS) issued its BiOp in November
16 2008, the Navy claimed to have reduced its planned training exercises in Puget Sound to only
17 one location, Crescent Harbor, with a plan for six underwater detonations and four surface
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25 ⁶ *Id.* at 5.

26 ⁷ *Id.* at 5-6.

27 ⁸ Navy Biological Assessment dated 12/28/00, (hereinafter "BA") at 2, attached to Doc. 13 in the NMFS
Administrative Record (NMFS AR).

28 ⁹ *Id.* at 4.

29 ¹⁰ NMFS BiOp at 5.

¹¹ *Id.* p. 6.

¹² *Id.* p. 6-7.

1 detonations of 2.5 pound charges for a one year period between the date of the BiOp and
2 December 2009.¹³

3 8. Each EOD exercise results in killing thousands of fish.¹⁴ NMFS concluded in its
4 BiOp that these exercises result in an annual “take” of species listed under the ESA, consisting of
5 5,094 juvenile and 50 adult Puget Sound Chinook salmon, 1,022 juvenile and 101 adult Hood
6 Canal summer run chum salmon, and 182 juvenile and 20 adult Puget Sound steelhead.¹⁵ FWS’
7 BiOp concluded that “take” of both endangered bull trout and marbled murrelets also results
8 from the EOD training exercises.¹⁶

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10 ***ESA Consultation History***

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12 9. In 1999, NMFS listed two salmon species as threatened under the ESA. 64 Fed. Reg.
13 14308 (March 16, 1999). In response, the Navy prepared a Biological Assessment (BA) dated
14 Dec. 28, 2000, which the Navy found was required under the ESA because the Puget Sound
15 EOD training constituted a “major federal action” in the vicinity of the listed species or their
16 critical habitat.¹⁷ The Navy noted that several other listed species occurred in the area, including
17 other salmonid species, bald eagle, marbled murrelet, Steller sea lion and bull trout.¹⁸

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19 10. Informal consultation under the ESA with both NMFS and FWS proceeded from
20 January 2001 until March 2004, when formal consultation was initiated.¹⁹ Consultation
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23 ¹³ *Id.* p. 3-5.

24 ¹⁴ April 18, 2002 letter to Robert M. Campagna, Assistant Chief of Staff for Environment and Safety, Department of
25 the Navy from Ken Berg, FWS and Steve Landino, NMFS, Exhibit 1 to Plaintiff’s First Amended Complaint. *See*
26 *also*, NAR Doc. 262, p. 16, Draft Environmental Assessment, stating that each explosion would kill several
27 thousand forage fish and other marine fish; NAR Doc. 241, p. 2, June 9, 2004 comments on draft EA by John Miller,
28 Navy, stating: “We have observed several thousand fish killed more than once.”

29 ¹⁵ NMFS BiOp, p. 54.

¹⁶ FWS BiOp, pp. 129-31, 138.

¹⁷ NMFS AR Doc. 13, attachment, BA at 1.

¹⁸ NMFS AR Doc. 13, attachment, BA at 1.

¹⁹ NMFS BiOp, p. 2-3; FWS BiOp, p. 1.

1 continued with NMFS until it issued its BiOp in June 2008 and its September 16, 2008 written
2 concurrence in the Navy's determination that the EOD training exercises are not likely to
3 adversely affect humpback whales and steller sea lions.²⁰ Consultation with FWS was not
4 completed until it issued its BiOp in November 2008. All during this period, the Navy continued
5 its EOD training in Puget Sound.
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7 11. ESA consultations, unlike NEPA reviews, are not subject to public notice or
8 participation. However, in late 2002, PEER learned of the Navy EOD training program in Puget
9 Sound from employees at NMFS and FWS who were participating in the ESA consultations.
10 Prior to PEER's public disclosures about EOD training in Puget Sound, the public was largely
11 unaware of its existence.²¹
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13 *History of NEPA Activities*

14 12. On October 8, 2002, Lea Mitchell, then Washington Director for Plaintiff PEER,
15 wrote to the Robert Campagna, the Navy's Assistant Chief of Staff for Environment and Safety
16 for the Navy Region Northwest, asking whether the Navy had made NEPA determinations
17 concerning the Puget Sound EOD training exercises and, if there were none, asking for NEPA
18 compliance.²²
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24 ²⁰ NMFS AR Doc. 191, Sept. 16, 2008 Letter of Concurrence for Stellar Sea Lions and Humpback Whales from Bob
25 Lohn, Regional Administrator, NMFS Northwest Region, to Dan Hayes, Assistant Chief of Staff for Environment
and Safety, Navy Region Northwest.

26 ²¹ NMFS AR Doc. 42, Sept. 3, 2003 email from Bob Donnelly (NMFS) to Jim Muck and others (FWS), stating that
27 "Fish will die as a result of the Navy training exercises and now that at least some of the public knows the training is
happening it is likely that dead bodies (fish) will be found and reported."

28 ²² NAR Doc. 102, Oct. 8, 2002 letter from Lea Mitchell to Robert M. Campagna.

1 13. On December 18, 2002, Robert Campagna, responded. He stated that at the time the
2 Navy decided that a BA and consultation under the ESA was required, it did not make a
3 determination as to requirements under NEPA. He went on to state that:

4 based on the recent outcome of the Biological Assessment and consultation with
5 [FWS and NMFS] the Navy has decided that the potential impact on the
6 environment from EOD in-water training warrants conducting NEPA.

7 I have commissioned my staff to prepare appropriate NEPA documentation for
8 EOD in-water training in Puget Sound. The NEPA review will provide a rigorous
9 and unbiased analysis of all reasonable alternatives and address mitigation
10 measures developed through the Endangered Species Act consultation process.
11 We will include PEER in the distribution of the completed NEPA environmental
12 documents.²³

13 14. The Commander of the Navy Region Northwest determined that the EOD training
14 warranted NEPA review.²⁴

15 15. On January 31, 2003, a Navy spokesperson told the Whidbey Times News that the
16 Navy had decided to start the NEPA process, but would not suspend the training exercises during
17 the review.²⁵

18 16. At the time the Navy decided to prepare a BA under the ESA in 1999, the Navy also
19 considered asking the contractor to do an environmental assessment. However, a decision was
20 made not to do so.²⁶ The Navy did not consider NEPA compliance again until the issue was
21 raised by PEER in October 2002.²⁷

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²³ NFMS AR Doc. 17, attachment at 2.

26 ²⁴ NAR Doc. 154, p. 1, January 9, 2003 memo re Environmental Issues with EOD In-Water Training in Puget
27 Sound.

28 ²⁵ NAR Doc. 131; *see also*, NAR Doc. 134, pp. 3-5, Seattle Post-Intelligencer article dated Dec. 25, 2002.

29 ²⁶ NAR Doc. 154, p. 1.

²⁷ NAR Doc. 142, January 6, 2003 Memo from Judy Conlow and Robert Compagna, "EOD In-Water Training in the
Puget Sound".

1 17. Navy environmental officials “kicked off” the NEPA process in December 2002, but
2 asserted that the NEPA process could not proceed significantly until FWS and NMFS issued
3 their BiOps.²⁸

4 18. In February 2003, Robert Campagna, a Northwest Navy environmental official,
5 discussed an email from PEER asking for an update on the NEPA process and to be put on a list
6 to be notified of actions under NEPA.²⁹ He states that “I think PEER is making the assumption
7 that we are going to do an EIS which is not the case.”³⁰ His colleague suggests a response to
8 PEER which leaves ambiguous the type of NEPA review, if any, the Navy will conduct.³¹ On
9 February 17, 2002, he sent such a letter to PEER.³²

10 19. The Navy determined to do an EA rather than an EIS.³³

11 20. On October 9, 2003 a meeting was held to initiate the formation of a NEPA team for
12 the EOD activities in Puget Sound.³⁴

13 21. The Navy characterized its intention in the NEPA process as “to provide the proper
14 environmental compliance documents without negatively affecting necessary EOD training
15 operations.”³⁵

16 22. The Navy determined to meet this goal by characterizing the proposed action for the
17 EA not as the EOD training itself, but as the implementation of the “Endangered Species
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23 ²⁸ *Id.*

24 ²⁹ NAR Doc. 169, pp. 1-2, Jan. 30, 2003 email from Lea Mitchell to Robert Campagna.

25 ³⁰ NAR Doc. 169, p. 1, Feb. 3, 2003 email from Robert Campagna to Peter Havens.

26 ³¹ NAR Doc. 169, Jan. 31, 2003 email from Peter Havens to Robert Campagna.

27 ³² NAR Doc. 175, Feb. 27, 2003 letter from Robert Campagna to Lea Mitchell.

28 ³³ NAR Doc. 195, p. 1, July 1 2003 email from Kathy Sounders, Navy NASWI Environmental Director to Robert
29 Campagna and others.

30 ³⁴ NAR Doc. 210, “Environmental Planning EOD Training Operations in Puget Sound Organization Kickoff
31 Meeting”.

32 ³⁵ NAR Doc. 211, Oct. 27, 2003 Draft Minutes, “Scope and ESPP Development Meeting Environmental Planning
33 EOD Operations in Puget Sound.”

1 Protection Plan” (ESPP) which it was proposing as mitigation in connection with its ESA
2 consultation with FWS and NMFS. Navy officials noted that:

3 The advantage of this approach is to avoid jeopardizing EOD training in Puget
4 Sound with the EA required No Action alternative. Therefore, the No Action
5 alternative will be to continue the EOD program without implementing the ESPP.

6 The Navy recognized that this approach might not meet the legal requirements of NEPA, stating
7 that the proposed action was “not in the standard NEPA approach” and “Whether this approach
8 is acceptable to reviewing agencies remains to be seen.”³⁶

9 23. The Navy selected proposed alternatives to discuss in the EA which it had already
10 determined were logistically and financially infeasible and/or did not meet Navy training
11 requirements.³⁷

13 24. The contractor delivered a final draft of the EA on August 18, 2004.³⁸

14 25. The Navy never finalized the draft EA, and later decided to include evaluation of
15 EOD training operations in Puget Sound in the overall Northwest Region Training Range
16 Complex (NWTRC) EIS.³⁹ Apparently, an agreement was reached to include the Puget Sound
17 EOD training in the NWTRC EIS in July 2005.⁴⁰

19 26. In August 2008, after this suit was filed, Navy personnel considered finalizing the
20 2004 EA in order to meet Plaintiffs’ NEPA challenge.⁴¹

22 27. In response, John Mosher, with Navy Environmental, stated that:

23 ³⁶ *Id.*, p.1.

24 ³⁷ NAR Doc. 219, p. 2, Feb. 10, 2004 Draft Minutes of Team Project Status Meeting Environmental Planning EOD
25 Operations In Puget Sound; NAR Doc. 221, pp. 1-2, Feb. 24, 2004 Draft Minutes: Team Project Status Meeting
26 Environmental Planning EOD Operations in Puget Sound.

27 ³⁸ NAR Doc. 263, Letter to Kathy Souders, NASWI Environmental Director and John Miller, EFANW Project
28 Director, from Ted Tur, Senior Scientist, SAIC re: Draft EOD ESPP Environmental Assessment and technical
29 analysis Submittal.

³⁹ NAR Doc. 374, June 26, 2007 memo “Environmental Requirements for Explosive Ordnance Disposal (EOD)
Underwater Training.”

⁴⁰ NAR Doc. 544, Aug. 15, 2008 email from Renee Wallis, Navy, to Ronald Tickle, Navy.

⁴¹ NAR Doc. 544, p. 1, Aug. 15, 2008 email from Ronald Tickle to Renee Wallis.

1 The draft EA definitely had some shortcomings as it focused on the Endangered
2 Species Protection Plan and not on the EOD operations themselves. At the time
3 the EA was discontinued and the EIS was kicking in, it was felt that FONSI may
4 not be possible (the agencies were using pretty strong language.)

5 He stated that even if the NMFS and FWS BiOps now supported FONSI, it would not be
6 possible to quickly take the draft EA to final, as major revisions would be needed, and other
7 issues including tribal concerns and additional species being listed under the ESA would have to
8 be considered.⁴²

9 28. In April 2008, a decision was made to relocate the Navy's Explosive Ordnance
10 Disposal (EOD) Mobile Unit Eleven from Whidbey Island in Puget Sound to Imperial Beach,
11 California, effective March 2009.⁴³ The move was expected to be completed in March 2010.⁴⁴
12 In the Draft NWTRC EIS, the time for completion of the move was revised to the fall of 2009.⁴⁵

13 29. For purposes of the NWTRC EIS, the Navy represented that the move is planned to
14 result, beginning in the summer or fall of 2009, in reducing the EOD training operations in Puget
15 Sound from a maximum of 60 events a year to 4 events a year, 2 at Whidbey Island, and one
16 each at Floral Point and Indian Island.⁴⁶

17 30. After EOD Mobile Unit Eleven leaves Puget Sound, shore detonation units will
18 remain in Puget Sound with a need to conduct underwater demolition training.⁴⁷

19 31. The move of EOD Mobile Unit Eleven to the San Diego area was first disclosed to
20 some interested parties outside of the Navy in June 2008.⁴⁸

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⁴² NAR Doc. 545, Aug. 18, 2008 email from John Mosher, Navy Environmental to Renee Wallis and others..

26 ⁴³ NAD Doc. 502, April 21, 2008 memo from Chief of Naval Operations, "Relocation of Explosive Ordnance
Disposal Mobile Unit Eleven".

27 ⁴⁴ NAD Doc. 498, April 9, 2008 email from Jared East of EOD to Ken MacDowell, Navy, and others.

28 ⁴⁵ NWTRC Draft EIS at 2-27, available at <http://www.nwtrangecomplexeis.com/>

29 ⁴⁶ *Id.*

⁴⁷ *Id.*

1 32. On December 29, 2008 a draft of the NWTRC EIS was noticed in the Federal
2 Register.⁴⁹

3 33. The “No Action” alternative considered in the draft NWTRC EIS is the current level
4 of training activities, while the preferred alternative is to increase training activities.⁵⁰ The “No
5 Action” alternative (current training levels) is used as the baseline for assessing the
6 environmental impacts of the other alternatives, which involve increased training.⁵¹

7 34. The Draft NWTRC EIS describes the “No Action” (current) level of EOD training
8 for Puget Sound as consisting of 53 annual exercises – three of less than 2.5 pounds, 45 of 2.5
9 pounds, one of 5 pounds and 4 of 20 pounds.⁵² It notes that after the move of EOD Mobile Unit
10 Eleven is complete, underwater detonation in Puget Sound will decrease from a maximum of 60
11 per year to no more than four per year.⁵³

12 35. The NWTRC EIS was scheduled for completion by the end of 2009.⁵⁴ Recently, the
13 comment period was extended for the third time, until April 13, 2009, 74 Fed. Reg. 11532
14 (March 18, 2009), indicating that the Navy probably received more comments than anticipated,
15 and may be behind schedule in completing the EIS.

16 36. The Navy has completed an EIS for the Southern California (SOCAL) Training
17 Range Complex, where most of the EOD underwater training now occurring in Puget Sound will
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19 ⁴⁸ NAR Doc. 521, p. 1, June 9, 2008 email from Nick Smith, EOS Mobile Unit Eleven to John Mosher, Navy
20 Environmental.

21 ⁴⁹ NAR Doc. 631, 73 Fed. Reg. 79473 (Dec. 29, 2008)./

22 ⁵⁰ NWTRC Draft EIS, ES-9.

23 ⁵¹ *Id.*, p. ES-11.

24 ⁵² *Id.*, p. 2-28.

25 ⁵³ *Id.*, p. 2-27.

26 ⁵⁴ NAR Doc. 374, June 26, 2007 Memo from Kathy Souders, “Environmental Requirements for Explosive
27 Ordnance Demolition (EOD) Underwater Training; <http://www.nwtrangecomplexeis.com/GetInvolved.aspx>

1 be moving.⁵⁵ The SOCAL EIS also uses the current level of training as the “No Action”
2 baseline.⁵⁶ It evaluates EOD training generally, but does not specifically address the
3 environmental impacts of training which will occur as a result of moving EOD Mobile Unit
4 Eleven from Puget Sound to Imperial Beach in the San Diego area.⁵⁷

5 STANDARD OF REVIEW

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7 An agency’s failure to perform any NEPA analysis is reviewed under the “reasonableness
8 standard.” *Ka Makani ‘O Kohala Ohana, Inc. v. Water Supply Dep’t of, County of Hawai’I*, 295
9 F.3d 955, 959 n.3 (9th Cir. 2002). This standard, less deferential than the arbitrary and
10 capricious standard of the APA, applies because the threshold issue of whether NEPA applies
11 involves predominately legal questions. *NorthCoast Env’tl. Ctr. v. Glickman*, 136 F.3d 660, 667
12 (9th Cir. 1998).
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15 ARGUMENT

16 As is evident from the recitation of the facts, the Navy determined as long ago as 2002
17 that the Puget Sound EOD training activities were subject to NEPA.⁵⁸ The Navy first
18 determined to prepare an EA to determine whether a full EIS was necessary, and then in 2005
19 decided that the activities would be addressed in an EIS.
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21 The Navy’s determination that an EIS is required is fully supported under the standards
22 set out in the CEQ and Navy regulations implementing NEPA. The CEQ regulations require
23 consideration of the location of the activity in unique areas such as wetlands and ecologically
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26 ⁵⁵ See <http://www.socalrangecomplexeis.com/>

27 ⁵⁶ *Id.*; SOCAL Range Complex EIS/OEIS at 2-1, available at
<http://www.socalrangecomplexeis.com/Documents.aspx#EIS>

28 ⁵⁷ SOCAL Range Complex EIS/OEIS, available at <http://www.socalrangecomplexeis.com/Documents.aspx#EIS>

29 ⁵⁸ Whether the Puget Sound EOD training was subject to NEPA long before 2002 need not be decided here.

1 critical areas, which certainly applies to Puget Sound.⁵⁹ The CEQ regulations also require
2 consideration of the potential adverse effect on endangered or threatened species and their
3 habitats. 40 C.F.R. § 1508.27(3) and (9). As noted above, the EOD training activities in Puget
4 Sound occur in an area where several endangered species are present, and the training has been
5 found by NMFS and FWS to result in “take” of several of those species. The Navy NEPA
6 regulations provide that major federal actions subject to evaluation under NEPA include ongoing
7 training activities where the currently occurring environmental effects have not been previously
8 evaluated under NEPA and, among other factors, there is a discovery of an endangered species
9 residing in the area of the activity. 32 C.F.R. § 775.6(c).
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12 Thus, there is really no dispute that NEPA analysis, and in fact a full EIS, is required
13 here. However, the Navy has stood NEPA on its head. While NEPA is intended to inform
14 decisions on actions affecting the environment *before* they are taken, the Navy has carried on an
15 activity with significant environmental impacts for decades before even initiating a NEPA
16 process. Then, even after recognizing that NEPA compliance was required, the Navy has
17 continued the activity for several more years without ever completing the process with a record
18 of decision. Even assuming a full EIS is not required, the Navy has failed to comply with NEPA
19 by making a determination to that effect in an EA and FONSI before conducting or continuing
20 EOD training in Puget Sound.
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23 Proper timing is one of NEPA’s central themes. An assessment must be
24 “prepared early enough so that it can serve practically as an important
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26 ⁵⁹ The FWS BiOp notes that the EOD activities “directly and indirectly affects a major portion on northern Puget
27 Sound basin,” FWS BiOp p. 46, which is home to plankton, invertebrates, fish, birds, mammals and aquatic
28 vegetation, including several endangered species. *Id.* p. 47. The Crescent Harbor area in particular provides
29 important habitat for waterfowl, raptors, migratory birds, and a variety and marine invertebrates and fishes,
including salmonid species. *Id.* p. 55. The health of Puget Sound is the subject of attention from local governments,
research institutions, Tribes, States, state and federal agencies and citizen groups. *Id.* at 46.

1 contribution to the decision-making process and will not be used to rationalize or
2 justify decisions already made.”

3 *Save the Yaak Committee v. Block*, 840 F.2d 714, 718 (9th Cir. 1988), quoting 40 C.F.R. §1502.5.

4 The Supreme Court has explained that NEPA’s EIS requirement:

5 ensures that the agency, in reaching its decision, will have available, and will
6 carefully consider, detailed information concerning significant environmental
7 impacts; it also guarantees that the relevant information will be made available to
8 the larger audience that may also play a role in both the decisionmaking process
9 and the implementation of that decision.

10 Simply by focusing the agency's attention on the environmental consequences of a
11 proposed project, NEPA ensures that important effects will not be overlooked or
12 underestimated only to be discovered after resources have been committed or the
13 die otherwise cast.

14 *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). Obviously this cannot
15 occur if the agency commits itself to and conducts the activity before completion of the NEPA
16 review. *See also*, 40 C.F.R. § 1506.1, prohibiting the agency from taking any action that would
17 have an adverse environmental impact or limit the choice of reasonable alternatives prior to
18 completion of the NEPA process with a record of decision.

19 At various points, the Navy justified its failure to complete its NEPA review with the fact
20 that NMFS and FWS had not completed their ESA BiOps. While the CEQ regulations
21 encourage preparation of a draft EIS concurrently with reviews under the ESA, 40 C.F.R. §
22 1502.25(a), this does not mean that an agency is excused from complying with NEPA *before* it
23 conducts an activity merely because other agencies have not completed their reviews under other
24 statutes. In fact, the ESA also prohibits going forward with an activity that may affect an
25 endangered species before consultation is complete. *E.g., Pacific Rivers Council v. Thomas*, 30
26 F.3d 1050, 1056-57 (9th Cir. 1994). Thus, waiting for the completion of the BiOps is not a legal
27 justification for continuing the EOD training activity without completion of NEPA reviews.

1 At this point the ESA consultation is complete. However, ESA consultations and the
2 issuance of the BiOps do not excuse or take the place of NEPA review. The purposes of the two
3 statutes are different and “there is no substitute in the Endangered Species Act for the public
4 comment commanded by NEPA.” *Portland Audubon Soc’y v. Lujan*, 795 F. Supp. 1489, 1509
5 (D. Or. 1992), *aff’d*, 998 F.2d 705 (9th Cir. 1993).

7 Even if the Navy had finalized the 2004 draft EA or the 2008 draft EIS at this point,
8 an agency does not satisfy NEPA by ignoring the statute at the critical stage,
9 committing resources to development, and eventually completing an EIS--
10 however lengthy and exhaustive--that simply asserts that the fundamental
11 decision to develop has already been made.

12 *Pit River Tribe v. United States Forest Service*, 469 F.3d 768, 786-87 (9th Cir. 2006). It is
13 apparent from the record that the Navy has never had any intention of doing anything other than
14 justify its decision to conduct EOD training activities in its NEPA reviews. In neither the draft
15 EA nor the draft NWTRC EIS does the Navy seriously consider alternatives to the existing
16 training. Instead, it posits the existing training as the status quo “No Action” alternative and
17 compares it with training with mitigation (in the case of the draft EA) or increased training (in
18 the case of the draft NWTRC EIS).⁶⁰ Navy personnel frankly described their approach to the
19 NEPA process as “to provide the proper environmental compliance documents without
20 negatively affecting necessary EOD training operations.”⁶¹

22 But most important and relevant at this stage is that the Navy simply has not completed
23 any environmental review which could amount to compliance with NEPA, and yet it continues
24

25
26 ⁶⁰ The Draft NWTRC EIS posits less EOD training in Puget Sound in the increased training alternative because of
27 the move of EOD Mobile Unit Eleven to the San Diego area. However, it does not appear that the increased training
28 that will occur in San Diego as a result of the move has been specifically addressed in any EIS or other NEPA
29 document. *See* Statement of Facts, # 36, above.

⁶¹ NAR Doc. 211, Draft Minutes of Oct. 27, 2003 meeting to introduce the NEPA team to the EOD representatives.

1 its training exercises. While there may be fewer exercises in the Puget Sound area in the future,
2 there has been no environmental review of however many there will be, nor any finding that the
3 reduced number of exercises would not require environmental review. Nor has there been an
4 analysis of the environmental impacts of the move of EOD Mobile Unit Eleven to the San Diego
5 area or of the environmental impacts of its activities there. The Navy cannot engage in a shell
6 game avoiding analysis of environmental impacts simply by moving some of the activities to
7 another location.

9 Where there has been no environmental review as required by NEPA, the court's role is
10 to set aside the agency action, *i.e.* enjoin EOD training activities until NEPA compliance is
11 achieved. *E.g. Save the Yaak*, 840 F.2d at 717; *Pit River Tribe*, 469 F.3d at 781.

13 **PLAINTIFFS HAVE STANDING TO BRING THIS CLAIM**

14 Plaintiffs satisfy the standing requirements of Article III of the Constitution because 1)
15 they have suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or
16 imminent, not conjectural or hypothetical; 2) the injury is fairly traceable to the challenged
17 actions of the defendant; and 3) it is likely, as opposed to merely speculative, that the injury will
18 be redressed by a favorable decision. *See Friends of the Earth, Inc. v. Laidlaw Envtl. Servs.*
19 *(TOC), Inc.*, 528 U.S. 167, 180-81 (2000).

22 For claims brought under NEPA, the "concrete interest" test requires a "geographic
23 nexus" between the individual asserting the claim and the location suffering an environmental
24 impact. *Ashley Creek Phosphate Co. v. Norton*, 420 F.3d 934, 938 (9th Cir. 2005). Accordingly,
25 plaintiffs who use the area threatened by a proposed action have little difficulty establishing a
26 concrete interest. *Id.*

1 Mr. Jamie Glasgow, a member and employee of Wild Fish Conservancy, lives
2 approximately one mile from Puget Sound, has lived in the area for the last 6 years, and sees
3 Puget Sound on a daily basis. **Exhibit 1**, *Decl. of Jamie Glasgow*, ¶¶ 1, 5 (“Glasgow Decl.”).
4 Mr. Glasgow enjoys viewing and recreating on and around Puget Sound, including in locations
5 near where the Navy has conducted its EOD training. *Id.* at ¶¶ 6-8. Mr. Glasgow enjoys the
6 aesthetic beauty of Puget Sound and the wild life that depend on it. *Id.* at ¶¶ 5, 7, 8. Mr.
7 Glasgow’s use and enjoyment of Puget Sound and the area around it is harmed by the violations
8 alleged in this matter, and by his reasonable concerns of the harm caused by defendants’
9 conduct, and the plaintiffs are therefore injured in fact. *See Ocean Advocates v. United States*
10 *Army Corps of Eng’rs*, 402 F.3d 846, 860 (9th Cir. 2005) (a showing of an increased risk of harm
11 based on a violation of a statute is sufficient to show the injury is not conjectural or
12 hypothetical); *and see Ecological Rights Found. v. Pac. Lumber Co.*, 230 F.3d 1141, 1147 (9th
13 Cir. 2000) (injury in fact is established if an individual adequately shows that he has an aesthetic
14 or recreational interest in a particular place or animal, and that that interest is impaired by
15 defendant’s conduct).

16
17
18
19 The Navy’s failure to comply with the procedures of NEPA deprived plaintiffs and their
20 members, including Mr. Glasgow, of information required to be generated and made available to
21 the public, and of the opportunity to provide comments on the proposed action. *See Exhibit 1*,
22 *Glasgow Decl.*, ¶ 11. Such procedural violations constitute cognizable injury for standing
23 purposes. *See Citizens for Better Forestry v. United States Dep’t of Agric.*, 341 F.3d 961, 970-75
24 (9th Cir. 2003).

25
26
27 Once a plaintiff has established an injury in fact, the causation and redressability
28 standards under NEPA are relaxed. *Cantrell v. City of Long Beach*, 241 F.3d 674, 682 (9th Cir.

1 2001). The injuries complained of are fairly traceable to the actions of the Navy, and therefore
2 causation is established. The issue in the causation inquiry is whether the alleged injury can be
3 traced to the defendants' challenged conduct, rather than that of some other actor not before the
4 Court. *Ecological Rights Found.*, 230 F.3d at 1152. Here, Mr. Glasgow is injured by the Navy's
5 violations of NEPA—there is no attenuated chain of conjecture—and causation therefore exits.
6
7 *Id.*; and see **Exhibit 1**, *Glasgow Decl.* at ¶ 11.

8 The injuries complained of are redressable by an order from this Court requiring the
9 Navy to prepare an EIS. See *Ocean Advocates*, 402 F.3d at 860-61. A plaintiff who asserts a
10 government agency's failure to comply with NEPA need not show that proper environmental
11 analysis would result in a different outcome—it suffices that the agency's decision *could* be
12 influenced by the environmental considerations contemplated by NEPA. *Id.*; and see *Pit River*
13 *Tribe v. United States Forest Serv.*, 469 F.3d 768, 779 (9th Cir. 2006) (members must show only
14 that they have a procedural right that, if exercised, *could* protect their concrete interests).. If the
15 Navy had complied with NEPA and considered a sufficient range of alternatives, it may have
16 chosen a different one.
17

18
19 An association has representational standing to bring suit on behalf of its members if the
20 members would otherwise have standing to sue in their own right, the interests at stake are
21 germane to the organization's purpose, and neither the claim asserted nor the relief requested
22 requires participation of the individual members. *Citizens of Better Forestry*, 341 F.3d at 976.
23 Here, it has been shown that a member of Wild Fish Conservancy, Mr. Glasgow, would have
24 standing to bring the claims asserted. The Wild Fish Conservancy is a non-profit organization
25 dedicated to the preservation and recovery of Washington's native fish species and the
26 ecosystems upon which those species depend, interests that are directly related to the claims
27
28

1 asserted herein. **Exhibit 1**, *Glasgow Decl.* at ¶ 4.⁶² The claims and relief involved do not
2 require the individual participation of the plaintiffs' members.

3 **CONCLUSION**

4 Accordingly, Plaintiffs respectfully request that this Motion for Partial Summary
5 Judgment be granted and that the Court (1) issue declaratory judgment finding the Navy to be in
6 violation of NEPA; (2) issue injunctive relief requiring the Navy to prepare an EIS and
7 alternatives analysis for the EOD training exercises; and (3) enjoin the Navy's EOD training
8 activities until completion of environmental reviews in accordance with NEPA.
9

10 RESPECTFULLY SUBMITTED, this 5th day of May, 2009.

11
12
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27
28 ⁶² Similarly, Wild Fish Conservancy meets the lenient "zone of interests" test for prudential standing, because the
objective of NEPA is environmental protection, which is aligned with plaintiffs' interests. *See Ocean Advocates*,
402 F.2d at 861; and **Exhibit 1**, *Glasgow Decl.*, ¶ 4.

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on May 5, 2009, I electronically filed the foregoing with the Clerk of
3 the Court using the CM/ECF System which will send notification of such filing to the following:

4
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