**The Navy’s Incidental Take of Marine Mammals and Endangered Species**

**in Pacific Northwest Waters: An Analysis**

Prepared by the West Coast Action Alliance

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***For Marine Mammals only; does not include***

***endangered and threatened seabirds, fish, sea turtles or terrestrial species impacted by Navy activities using sonar, explosives, underwater and surface drones, sonobuoys, ships, submarines, aircraft, or troop training on 68 beaches and state parks.***

**Summary:** Marine mammals are protected under the federal Marine Mammal Protection Act and the Endangered Species Act. In general, most marine mammal protection is administered by NOAA’s National Marine Fisheries Service (NMFS), and most terrestrial fish, bird, mammal and other species protection is administered by the US Fish and Wildlife Service (USFWS).

The Navy is increasing its activities by orders of magnitude. For example, a comparison of baseline versus proposed numbers in the Northwest Training and testing Final EIS (the ocean portion of expanding naval activities from Northern California to Southeast Alaska,) shows the following:

72% increase in electronic warfare operations,

244% increase in air combat maneuvers (dogfighting)

400% increase in air-to-surface missile exercises (including Olympic National Marine Sanctuary)

778% increase in number of torpedoes,

3,500% increase in number of sonobuoys,

72% increase in chaff dropped from aircraft,

1,150% increase in drone aircraft,

1,450% increase in expendable devices. These are just a few.

The noise threshold for hearing damage in humans is 85 decibels. For every 10-decibel increase, the intensity of the noise doubles; therefore, a 115-decibel noise, which is what a Growler jet makes when passing overhead at altitude of 1000 feet, is a thousand times louder than the 85-decibel threshold for hearing damage. Navy sonar is capable of at least 235 decibels at the source. This is over 10 trillion times more intense than the 85-decibel threshold. At a distance of 300 miles away from the source, underwater noise can still be 140 decibels. 140 decibels is sufficient to vibrate and rupture internal organs, and has been assessed by the French government as “a weapon to kill people.”

When the Navy published its Northwest Training and Testing EIS (NWTT) on October 2, 2015, it did so without a public comment period and without the necessary endangered species/marine mammal/cultural-historic property consultations with NMFS, the USFWS, and the State of Washington. All three lapses are extraordinary and unprecedented. The NMFS was able to complete its consultation and issue a Letter of Authorization for “take” of marine mammals by early November, but as of April 24, 2016, the USFWS endangered species consultation has not been completed.

This means that seven months after publication of that EIS, a Record of Decision, or formal decision document for the public, has still not been issued by the Navy. This is in part due to the overwhelming public opposition as people begin to realize the impacts. Once the USFWS issues its Biological Opinion and a permit for take of endangered and threatened species, the Navy will sign a Record of Decision and its activities as described in the NWTT EIS will commence. Until then, any activities that “take” endangered and threatened species overseen by USFWS may not be covered by the appropriate federal authorization.

Without notice and using a technicality, the Navy terminated an open consultation on cultural and historic properties with the State of Washington in early November, much to the State’s dismay. Not even a letter from the President’s Advisory Council on Historic Preservation could persuade the Navy to re-open consultation with the State. The Navy was in an exceptional hurry, and ignored multiple legal requirements.

In order to issue the Navy with a Letter of Authorization (LOA) for “taking” marine mammals under the Marine Mammal Protection Act, the National Marine Fisheries Service must determine that the effects of activities will be negligible and not result in an “unmitigable impact on the availability of marine mammal species for taking for subsistence uses.” (The latter refers to the relatively minimal level of Tribal subsistence harvests; this document does not address Tribal treaty rights or Usual and Accustomed Areas.) “Negligible impact” is defined as resulting from an activity that is not “reasonably likely to adversely affect” the species’ ability to reproduce and survive. Whether this means that Navy activities may eventually drive species to the edge of extinction or to Tribal harvest prohibitions is unclear.

“Take” is defined in the Marine Mammal Protection Act (MMPA) as: “to harass, hunt, capture, kill, or attempt to harass, hunt, capture or kill any marine mammal.” It is defined differently and more comprehensively by the Endangered Species Act (ESA): “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect any threatened or endangered species.” A substantial difference between the two laws is that the Endangered Species Act takes a more conservative position on the definition of and differences between “Temporary” and “Permanent” harm; this is what the Navy is attempting to exploit, by removing “Temporary” from the definition of harm in ESA consultations. That would be illegal. We speculate that this may be why the USFWS consultation, which would result in a permit to take threatened and endangered species such as the marbled murrelet, northern spotted owl and bull trout, is still not finished.

The National Defense Authorization Act amended (translate: weakened) the Marine Mammal Protection Act by removing language about limitations to “small numbers” and “specified geographical regions,” and it amended the definition of “harassment” when applied to a “military readiness activity” to read as follows:

(i) any act that injures or has the significant potential to injure a marine mammal or marine mammal stock in the wild [Level A Harassment]; or

(ii) any act that disturbs or is likely to disturb a marine mammal or marine mammal stock in the wild by causing disruption of natural behavioral patterns, including, but not limited to, migration, surfacing, nursing, breeding, feeding, or sheltering, to a point where such behavioral patterns are abandoned or significantly altered [Level B Harassment]. (Section 3(18)(B) of the MMPA)

**In a nutshell,** Level B harassment allows the Navy to disturb and drive marine mammals away from normal patterns of migration and behavior; Level A harassment allows the Navy to physically injure, and to some extent, kill marine mammals. The problem with Level A harassment is in documenting injuries or deaths; frequent mass strandings have occurred days after naval activity in an area, but in nearly every case the Navy disavows being the cause. They do not allow federal wildlife agency experts aboard their ships because of security concerns about civilians; however, civilian fitness instructors are found on many Navy ships. None of the mitigation measures require the Navy to tow hydrophones to listen for marine mammals before commencing exercises; the Navy’s technology for observing whether marine mammals are present is the same that has been used since the 17th century: two lookouts.

**The Numbers:** In the area comprising the Northwest Training and Testing Range (NWTT) that includes offshore waters from Northern California to Southeast Alaska but excludes the Gulf of Alaska, the Navy will be allowed to take 25 species of marine mammals by Level B harassment and 5 species of marine mammals by Level A harassment. For reasons not well understood by the public, the National Marine Fisheries Service divided the take numbers into Navy “Training” and “Testing” activities. We have added them up so that the totality of the impacts are apparent. ***When you consider, for example, that the best estimate for the number of gray whales in the eastern North Pacific is 21,000, and that they migrate up and down the West Coast from Alaska to Mexico, but that the numbers of takes allowed to the Navy in the areas of the Pacific where gray whales might be found is 60,610, it becomes clear that multiple harassment incidents to the same animals throughout their range are not only anticipated but allowed.***

Here are the marine mammal take totals (levels A+B) for the NWTT only:

**Species groups: Training + Testing = NWTT take totals:**

Whales (toothed and baleen) 13,006 + 5,915 = 18,921

Dolphins and porpoises 491,320 + 352,145 = 843,465

Seals and sea lions 29,263 + 335,275 = 364,538

**Total takes, NWTT: 1,226, 924**

**Where are the NWTT takes happening?**

Coastal waters of California, Oregon and Washington: 575,258

Washington inland waters (Puget Sound, Hood Canal): 343,310

Southeast Alaska: 10,950

Eastern North Pacific (offshore) 21,996

**To reflect that multiple takes may occur to the same animal, the following other regions of the North Pacific should also be considered:**

*Gulf of Alaska:*

Whales: 148,025

Dolphins and Porpoises: 1,144.025

Seals and Sea Lions: 836,915

**Total takes, Gulf of Alaska 2,128,965**

*Hawaii-Southern California* *Training + Testing = number of takes*

Whales: 966,732 95,775 = 1,062,507

Dolphins and porpoises: 6,526,162 990,044 = 7,516,206

Seals and sea lions 783,779 91,785 = 875,564

**Total takes, Hawaii-Southern California: 9,454,277**

*Marianas Islands, western Pacific (testing and training combined)*

Whales: 297,855

Dolphins: 95,185

**Total takes, Marianas Islands: 393,040**

**Total takes listed in EIS documents for 4 regions: 11,976,282**

*Note: some discrepancies exist in numbers depending on how they are calculated. The file called “Takes by Species” shows 11,862.623 takes if added species-by-species.*

These totals do not include takes for smaller projects such as underwater detonation exercises and/or pile-driving and construction at San Diego, Port Angeles, Bremerton, Everett, Kitsap, or Whidbey Island, nor does it include impacts from sonar and other acoustic devices at the Keyport Range Complex Expansion, or any impacts brushed over in dozens of Environmental Assessments that split the projects into smaller pieces so they don’t rise to the threshold of a full-blown EIS.

Sources:

National Marine Fisheries Service Record of Decision on its Letter of Authorization to the Navy to take marine mammals:

<http://www.nmfs.noaa.gov/pr/permits/incidental/military/navynwtt_2015loa_rod2.pdf>

Species numbers from NMFS Letters of Authorization for NWTT EIS here: <http://www.nmfs.noaa.gov/pr/permits/incidental/military/navynwtt_2015loa_issued_training.pdf> and <http://www.nmfs.noaa.gov/pr/permits/incidental/military/navynwtt_2015loa_issued_testing.pdf>

Also: <http://www.nmfs.noaa.gov/pr/pdfs/fr/fr76-27915.pdf>

NOTE: Navy has submitted a revised application for takes in the Gulf of Alaska; more species will be added: <http://www.nmfs.noaa.gov/pr/permits/incidental/military/navy_2015_goaapp_finaljan2015.pdf>