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IN THE UNITED STATES DISTRICT COURT

DISTRICT OF HAWAI'I

OCEAN MAMMAL INSTITUTE;) Civil No. _____
ANIMAL WELFARE INSTITUTE;)
KAHEA; CENTER FOR) COMPLAINT FOR DECLARATORY
BIOLOGICAL DIVERSITY; and) JUDGMENT AND INJUNCTIVE
SURFRIDER FOUNDATION KAUA'I) RELIEF; SUMMONS
CHAPTER,)
)
Plaintiffs,)
)
v.)
)
ROBERT M. GATES, Secretary of)
Defense; DONALD C. WINTER,)
Secretary of the Navy; CARLOS M.)
GUTIERREZ, Secretary of Commerce;)
and WILLIAM T. HOGARTH,)
Assistant Administrator for Fisheries of)
the National Marine Fisheries Service,)
National Oceanic and Atmospheric)
Administration,)
)
Defendants.)
_____)

COMPLAINT FOR DECLARATORY JUDGMENT AND
INJUNCTIVE RELIEF

Plaintiffs Ocean Mammal Institute, the Animal Welfare Institute, KAHEA, the Center for Biological Diversity, and Surfrider Foundation Kaua'i Chapter complain of defendants Robert M. Gates, in his official capacity as Secretary of the Department of Defense, Donald C. Winter, in his official capacity as Secretary of the United States Department of the Navy, Carlos M. Gutierrez, in his official capacity as Secretary of the Department of Commerce, and William T. Hogarth in his official capacity as the Assistant Administrator for Fisheries of the National Marine Fisheries Service ("NMFS"), National Oceanic and Atmospheric Administration, as follows:

INTRODUCTION

1. By this Complaint, plaintiffs seek to compel the Navy and NMFS to comply with the National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 et seq., the Endangered Species Act ("ESA"), 16 U.S.C. § 1531, et seq., the Coastal Zone Management Act ("CZMA"), 16 U.S.C. § 1451, et seq., and the National Marine Sanctuaries Act ("NMSA"), 16 U.S.C. § 1431, et seq., prior to commencement of the Navy's proposed undersea warfare exercises, which, among other things, will emit high-intensity, mid-frequency active sonar into biologically diverse waters surrounding the Hawaiian Islands during up to twelve undersea warfare exercises over the next two years.

2. There is no scientific doubt that intense acoustic energy from Navy sonar can kill, injure, or significantly alter the behavior of whales and dolphins. Scientists have documented mass strandings; mortal injuries, including lesions and hemorrhaging in the brains, ears, lungs, and other vital organs; and behavioral changes in numerous marine mammal species following naval sonar training exercises around the world.

3. Now, in the near- and off-shore waters surrounding the Hawaiian Islands, which provide important habitat for at least 27 different marine mammal species, the Navy proposes to deploy, for up to 2,334 hours over the next two years, the same types of sonar systems that caused these often deadly effects. For each proposed exercise, the Navy has predicted that marine mammals will be exposed, up to 6,870 times, to acoustic energy at levels known to cause behavioral impacts, and up to 339 times at levels scientists believe damage hearing. This will result in a predicted 22,598 “takes” over the next two years of Hawai‘i’s marine mammals listed as endangered under the ESA.

4. The Navy failed to take a “hard look” at the known impacts and consequences of its proposed action, as required by NEPA, and has unlawfully issued a Finding of No Significant Impact based on a faulty Environmental Assessment (“EA”) that unlawfully failed to engage the public; overlooks or mischaracterizes foreseeable direct, indirect, and cumulative impacts on marine mammals; fails to adequately consider all alternatives; fails to consider all feasible

mitigation measures; and fails to consider the best available information. The challenged EA closely resembles the only other NEPA document that the Navy has prepared for mid-frequency active sonar training in Hawai‘i. That EA addressed the 2006 biennial Rim of the Pacific (“RIMPAC”) naval exercises, which the United States District Court for the Central District of California, Western Division enjoined in July 2006 due the inadequacy of the EA. Natural Res. Def. Council v. Winter, Case No. CV06-4131-FMC (FMOx).

5. NMFS violated the ESA by failing to use the best available data to determine whether the proposed undersea warfare exercises will jeopardize the continued existence of four endangered whale species that will be affected by the action, and by failing to provide any rational basis for its finding that no jeopardy will occur.

6. The Navy failed to determine whether the proposed undersea warfare exercises are consistent with the policies of the State of Hawai‘i’s Coastal Zone Management Program, in violation of the CZMA.

7. The Navy violated NMSA by failing to consult with the Secretary of Commerce regarding the potential effects its proposed undersea warfare exercises will have on Hawaiian Islands Humpback Whale National Marine Sanctuary resources.

8. For these reasons, as described more fully below, the Navy’s and NMFS’s approval of twelve undersea warfare exercises in Hawai‘i’s waters over

the next two years is arbitrary, capricious, and contrary to law, in violation of the Administrative Procedure Act, 5 U.S.C. §§ 701-06, and the Navy cannot lawfully execute the challenged exercises unless and until it properly complies with NEPA, the ESA, the CZMA, and the NMSA.

JURISDICTION AND VENUE

9. This Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (actions arising under the laws of the United States), 5 U.S.C. § 706 (actions under the Administrative Procedure Act), and 28 U.S.C. § 1361 (actions to compel an officer of the United States to perform his duty). The Court has authority to grant the relief sought pursuant to 28 U.S.C. §§ 2201-02 (power to issue declaratory judgments in cases of actual controversy).

10. Venue is proper in this judicial district under 28 U.S.C. § 1391(e) because this is a civil action in which officers or employees of the United States or an agency thereof are acting in their official capacity or under color of legal authority and a substantial part of the events or omissions giving rise to the claims occurred in this judicial district.

PARTIES

Plaintiffs

11. Plaintiff Ocean Mammal Institute is a non-profit member corporation dedicated to the pursuit of ecologically sensitive scientific research on whales and their interactions with humans, including the study of the impacts of human

activities on humpback whales and the protection of whales and their environment. Ocean Mammal Institute conducts research in Hawai‘i on the impact of vessel traffic on humpback whales and on their social vocalizations; offers college-level educational programs in Hawai‘i on humpback whales; leads educational expeditions in Hawai‘i’s waters to teach about whales and biodiversity; and runs research programs that provide interns with the opportunity to directly observe the impacts of humans on whale behavior and habitat in Hawai‘i’s waters.

12. Members of Ocean Mammal Institute and participants in the programs conducted by Ocean Mammal Institute regularly use and enjoy, and plan to continue using and enjoying, for wildlife viewing, education, and scientific study, the near- and off-shore waters that will be affected by the Navy’s proposed action and the wildlife that inhabits them. Thus, the quality of life maintained in Hawai‘i’s marine environment directly affects Ocean Mammal Institute’s scientific, economic, and conservation interests.

13. The members of Ocean Mammal Institute have taken every opportunity to participate in activities directed toward the protection of Hawai‘i’s whales and their habitats, including giving lectures on the impact of ocean noise on whales and other marine life; testifying, on behalf of the Attorney General of the State of Hawai‘i, against the use of parasail and jet skis in humpback whale habitat; encouraging the Hawaiian Islands Humpback Whale National Marine

Sanctuary to develop whale protection plans; voicing their opposition at Hawai‘i State hearings to programs, including the use of active sonar, that adversely affect whales and their habitat; participating in litigation to halt the testing of low-frequency active sonar in Hawai‘i; and providing public comment on NEPA documentation for other Navy anti-submarine warfare training exercises, including the Navy’s 2006 RIMPAC EA.

14. Defendants’ proposed activities will adversely affect Ocean Mammal Institute’s research and organizational interests, as well as its members’ and interns’ ability to study, view, and enjoy the whales and marine habitats thereby impaired.

15. Plaintiff Animal Welfare Institute was established in 1951. Members and constituents of Animal Welfare Institute include researchers, divers, surfers, whale watchers, and ordinary citizens who live in the Hawaiian Islands or travel there specifically because of the presence of diverse whale species and who have long cherished the opportunity to observe, listen to, and study the whales that Hawai‘i uniquely affords.

16. The Animal Welfare Institute is involved in all aspects of protecting these whales, from speaking on their behalf in international fora, such as the International Whaling Commission, educating constituents and members about whales and the threats they face and monitoring domestic legislation and research

that may affect their well-being, to participating in litigation to halt low-frequency active sonar testing in Hawai‘i and providing public comment on environmental documentation for other Navy anti-submarine warfare training exercises in Hawai‘i and elsewhere, such as the Navy’s 2005 draft Overseas Environmental Impact Statement for the Undersea Warfare Training Range and the Navy’s 2006 RIMPAC EA.

17. The proposed exercises will adversely affect the Animal Welfare Institute’s organizational interests, as well as its members’ ability to protect, study, observe, and enjoy Hawai‘i’s marine mammals that will be affected by the Navy’s proposed exercises.

18. Plaintiff KAHEA: The Hawaiian-Environmental Alliance (“KAHEA”) is a tax-exempt, non-profit organization incorporated in Honolulu, Hawai‘i. Since the organization was founded in 2000, KAHEA’s central focus has been protecting sensitive ecosystems, fragile and imperiled biodiversity, and Native Hawaiian cultural rights. Plaintiff KAHEA seeks to protect Hawai‘i’s vulnerable marine ecosystems by ensuring that public officials, such as the defendants, prepare adequate environmental analyses consistent with applicable law, including ensuring full public participation in the process and that sufficient mitigation measures are in place.

19. To achieve these goals, KAHEA provides the general public with educational materials and resource information on environmental issues, including

the Navy's use of high-intensity sonar. These materials include, but are not limited to, reprints of news articles, policy reports, legal briefs, press releases, action alerts, and fact sheets. KAHEA has organized public awareness campaigns on O'ahu regarding the effects of active sonar on marine mammals.

20. KAHEA brings this action on behalf of itself, its extensive network, including Native Hawaiian cultural practitioners, and on behalf of the people of Hawai'i. The interests of KAHEA's network are being, and will be, adversely affected by defendants' actions complained of herein. Defendants' failure to take a hard look at and to properly mitigate harm to Hawai'i's marine mammals is causing, and will cause, aesthetic and recreational harm to KAHEA and its constituents.

21. Plaintiff Center for Biological Diversity (the "Center") is a non-profit corporation dedicated to the preservation, protection, and restoration of biodiversity and preventing the extinction of species, including marine life. Formed in 1989, the Center has over 32,000 members nationwide and maintains offices in Joshua Tree, San Diego, and San Francisco, California; Phoenix and Tucson, Arizona; Silver City, New Mexico; Portland, Oregon; and Washington, D.C.

22. The Center's members and staff have researched, studied, observed, and sought protection for many federally-listed threatened and endangered species that inhabit the Pacific. The Center's members and staff regularly use, and plan to

continue to use, waters of the Pacific Ocean off the West Coast and Hawai‘i for observation, research, aesthetic enjoyment, and other recreational, scientific, and educational activities. The Center’s members and staff derive scientific, recreational, conservation, and aesthetic benefits from observing marine species’ existence in the wild.

23. The Center has advocated on behalf of its members and staff for the protection of marine mammals of Hawai‘i and the Pacific from a wide range of harmful activities such as industrial fisheries, pollution, climate change, and anthropogenic noise. The Center has advocated for the protection of the marine mammals from harmful anthropogenic noise through educational activities, administrative comments and appeals, and litigation. The Center has commented on over a dozen incidental take authorizations, environmental assessments, and environmental impact statements dealing with the effects of sonar, seismic surveys, and industrial noise on marine mammals. The Center has also specifically commented on Navy activities affecting marine mammals near Hawai‘i, such as the 2006 RIMPAC exercises.

24. The Center has a strong interest in and history of working for the protection of marine mammals of Hawai‘i and the Pacific from activities such as those challenged in this Complaint. The Center brings this action on behalf of itself and its adversely affected members.

25. Plaintiff Surfrider Foundation Kaua‘i Chapter (“Surfrider Kaua‘i”) is one of 60 local chapters of the national non-profit corporation Surfrider Foundation. Surfrider Foundation was formed in 1984 with the goal of protecting and conserving the world’s oceans, waves, and beaches through research, education, and activism. Surfrider Foundation has over 50,000 members in the United States, 685 of whom live in Hawai‘i. Surfrider Kaua‘i’s members and staff regularly use, and plan to continue using, the ocean, waves, and beaches of the Hawaiian Islands for recreation, observation, research, aesthetic enjoyment, and other scientific and educational activities.

26. The proposed exercises will adversely affect Surfrider Kaua‘i’s organizational interests, as well as its members’ ability to enjoy, study, and observe Hawai‘i’s marine and coastal resources. Surfrider Kaua‘i brings this action on behalf of itself and its adversely affected members.

Defendants

27. Defendant Robert M. Gates is the Secretary of Defense, and is sued herein in his official capacity. He has the ultimate responsibility to ensure that the Navy’s actions conform to the requirements of our nation’s environmental laws. If ordered by the Court, Secretary Gates has the authority and ability to remedy the harm inflicted by the Navy’s actions.

28. Defendant Donald C. Winter is being sued in his official capacity as the Secretary of the Navy. Secretary Winter is responsible for, and has control

over, the activities of the Navy. If ordered by the Court, Secretary Winter has the authority and ability to remedy the harm inflicted by the Navy's actions.

29. Defendant Carlos M. Gutierrez is being sued in his official capacity as the Secretary of the Department of Commerce. He has the ultimate responsibility to ensure that NMFS conforms to the requirements of our nation's environmental laws. If ordered by the Court, Secretary Gutierrez has the ultimate authority and ability to remedy the harm inflicted by NMFS's actions.

30. Defendant William T. Hogarth is being sued in his official capacity as the Assistant Administrator for Fisheries of the National Marine Fisheries Service, National Oceanic and Atmospheric Administration. He is responsible for, and has control over, NMFS's activities. If ordered by the Court, Assistant Administrator Hogarth has the authority and ability to remedy the harm inflicted by NMFS's actions.

LEGAL LANDSCAPE

National Environmental Policy Act of 1969

31. The National Environmental Policy Act of 1969 ("NEPA") is an action-forcing statute mandating that all federal agencies take a hard look at the environmental consequences of all "major Federal actions significantly affecting the quality of the human environment," through the preparation of an environmental impact statement ("EIS"). 42 U.S.C. § 4332(2)(C).

32. “Major federal actions” subject to NEPA are those “new and continuing activities” carried out by federal agencies with “effects that may be major and which are potentially subject to Federal control and responsibility.” 40 C.F.R. § 1508.18. “Human environment” includes “the natural and physical environment and the relationship of people with that environment.” 40 C.F.R. § 1508.14.

33. The Council on Environmental Quality (“CEQ”) has promulgated rules implementing NEPA, which apply to all federal agencies, including the Navy and NMFS. 40 C.F.R. pt. 1500. The Navy has also implemented its own NEPA regulations. 32 C.F.R. pt. 775. Under these rules, agencies may analyze “the environmental impacts of the proposed action and alternatives” in an environmental assessment (“EA”), to determine whether a federal action may significantly affect the quality of the human environment, necessitating an EIS. 40 C.F.R. §§ 1501.4, 1508.9(b); see also 32 C.F.R. § 775.2(c).

34. Through the EA, the agency must identify all reasonably foreseeable direct, indirect, and cumulative impacts, then analyze the significance of those impacts in terms of both “context” and “intensity.” 40 C.F.R. §§ 1508.8, 1508.27. The CEQ regulations set forth specific factors that the agency must consider in determining significance, including the “[u]nique characteristics of the geographic area such as proximity to . . . ecologically critical areas”; whether the effects are “likely to be highly controversial,” “highly uncertain or involve unique or

unknown risks,” or precedential; whether cumulative effects are anticipated; “the degree to which an action . . . may cause loss or destruction of significant scientific, cultural, or historical resources”; whether the action may adversely affect endangered or threatened species; or “whether the action threatens a violation of Federal, State, or local law.” 40 C.F.R. § 1508.27(b)(3)-(9).

35. When the federal action may significantly affect the environment, including if any of the significance factors apply or if there are substantial questions regarding the significance of the impacts, the agency must prepare an EIS. If the agency does not anticipate any significant impacts, it may make a “Finding of No Significant Impact” available to the public pursuant to 40 C.F.R. § 1501.4(e).

36. Regardless of whether an EA or an EIS is prepared, the NEPA process must be initiated at the “earliest possible time.” 40 C.F.R. § 1501.2; see also 32 C.F.R. §§ 775.3(a)(1), 775.7. Federal agencies must also “[m]ake diligent efforts to involve the public,” and “[s]olicit appropriate information from the public.” 40 C.F.R. § 1506.6(a), (d). In light of these requirements, the Navy has “clearly recognized” the “importance of public participation in preparing environmental assessments.” 32 C.F.R. § 775.11.

37. The fundamental purpose behind the NEPA process is to ensure that environmental impacts of federal agency actions are scrutinized by the public and government officials before federal actions are carried out, so that the agency can

incorporate the wisdom gained into the action. 40 C.F.R. § 1500.1(b). “The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences, and take actions that protect, restore, and enhance the environment.” 40 C.F.R. § 1500.1(c). Thus, NEPA and its implementing regulations further the national policies to “encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment . . . ; [and] to enrich the understanding of the ecological systems and natural resources important to the Nation.” 42 U.S.C. § 4321.

Endangered Species Act of 1973

38. In enacting the Endangered Species Act of 1973 (“ESA”), Congress recognized the need to protect species that are in danger of extinction and to conserve the ecosystems on which those species depend for survival. All species listed as endangered or threatened by the Secretary of the Interior or the Secretary of Commerce are protected by the ESA, which the Supreme Court has called “the most comprehensive legislation for the preservation of endangered species ever enacted by any nation.” Tennessee Valley Authority v. Hill, 437 U.S. 153, 180 (1978).

39. In furtherance of its broad goals, Congress mandated in Section 2(c) that ““all Federal departments and agencies shall seek to conserve endangered species and threatened species” Id. (quoting 16 U.S.C. § 1531(c)) (emphasis

in TVA v. Hill). “Lest there be any ambiguity as to the meaning of this statutory directive, the Act specifically defined ‘conserve’ as meaning ‘to use and the use of all methods and procedures that are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to this chapter are no longer necessary.’” Id. (quoting 16 U.S.C. § 1532(2) (emphasis in TVA v. Hill.) “The plain intent of Congress in enacting [the ESA] was to halt and reverse the trend toward species extinction, whatever the cost.” Id. at 184.

40. ESA section 7(a)(2) places an affirmative duty on each federal agency, including the Navy, to ensure that its actions, like the proposed undersea warfare exercises, are “not likely to jeopardize the continued existence” of any endangered or threatened species or “result in the destruction or adverse modification of habitat” of those species. 16 U.S.C. § 1536(a)(2).

41. If the agency determines that its actions may adversely affect any endangered or threatened marine mammal species, the agency must formally consult NMFS in making a jeopardy determination. 50 C.F.R. § 402.14. “Jeopardize the continued existence of” is defined as engaging in an action that “reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species.” 50 C.F.R. § 402.02.

42. Once an agency enters into formal consultation, ESA section 7(a)(2) and its implementing regulations require NMFS to formulate a biological opinion, based on the “best scientific and commercial data available,” 50 C.F.R. § 402.14(g)(8), to assist in its determination whether the federal action will jeopardize the continued existence of a listed species, 50 C.F.R. § 402.14. The biological opinion must include a “summary of the information on which the opinion is based”; “detailed discussion of the effects of the action on listed species . . .”; and NMFS’s “opinion on whether the action is likely to jeopardize the continued existence of the species” 50 C.F.R. § 402.14(h).

43. Section 9 of the ESA prohibits any person, including federal agencies, from “taking” any endangered or threatened species. 16 U.S.C. §§ 1532(13), 1538(a)(1). The term “take” is defined by the ESA to mean “harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in any such conduct.” 16 U.S.C. § 1532(19).

44. When NMFS concludes that a proposed action will not jeopardize any listed species, NMFS may authorize the taking of a listed species incidental to a proposed action. In this case, NMFS must provide in the biological opinion an incidental take statement that specifies, among other things, the amount or extent of “take” that will incidentally occur as a result of the action, “those reasonable and prudent measures that the Director considers necessary or appropriate to minimize such impact,” and non-discretionary terms and conditions designed to implement

those mitigation measures. 50 C.F.R. § 402.14(i)(i),(ii),(iv); see also 16 U.S.C. § 1536(b)(4).

45. An agency’s duties under the ESA to conserve endangered species and to avoid jeopardy are not limited to those efforts that will not interfere with what it deems its “primary mission.” The “pointed omission of the type of qualifying language previously included in endangered species legislation reveals a conscious decision by Congress to give endangered species priority over the ‘primary missions’ of federal agencies.” TVA v. Hill, 437 U.S. at 185. “[The] agencies of Government can no longer plead that they can do nothing about it. They can, and they must. The law is clear.” Id. at 184 (quoting 119 Cong. Rec. 42913 (1973)) (emphasis in TVA v. Hill).

Coastal Zone Management Act of 1972

46. Through the Coastal Zone Management Act of 1972 (“CZMA”), Congress found, among other things, that “[t]he habitat areas of the coastal zone, and the fish, shellfish, other living marine resources, and wildlife therein, are ecologically fragile and consequently extremely vulnerable to destruction by man’s alterations.” 15 U.S.C. § 1451(d). Congress declared a national policy to, among other things, “preserve, protect, develop, and where possible, to restore or enhance, the resources of the Nation’s coastal zone for this and succeeding generations.” 15 U.S.C. § 1452(1). The CZMA also recognizes that the individual states play a key

role in the “protection and use of the land and water resources of the coastal zone. . . .” 15 U.S.C. § 1451(i).

47. To meet its goals, the CZMA requires that “[e]ach federal activity within or outside the coastal zone that affects any land or water use or natural resource of the coastal zone shall be carried out in a manner which is consistent to the maximum extent practicable with the enforceable policies of approved State management programs.” 16 U.S.C. § 1456(c)(1)(A). A state coastal zone management program requirement is practicable unless prohibited by federal law. 15 C.F.R. § 930.32(a)(1).

48. Federal agencies are responsible for determining consistency with the state coastal zone management program policies. The federal agency must, however, “provide State agencies with consistency determinations for all Federal agency activities affecting any coastal use or resource.” 15 C.F.R. § 930.34(a)(1). If there will be no coastal effects, then the federal agency must provide the state with a “negative determination.” 15 C.F.R. § 930.35(a).

49. The CZMA mandate requiring consistency with state coastal zone management programs is not limited to activities that actually occur within the coastal zone. Instead, the standard is whether the federal action “affects any land or water use or natural resource of the coastal zone.” 16 U.S.C. § 1456(c)(1)(A). “Effects include both direct effects which result from the activity and occur at the same time and place as the activity, and indirect (cumulative and secondary) effects

which result from the activity and are later in time or farther removed in distance, but are still reasonably foreseeable.” 15 C.F.R. § 930.11(g). Agencies are required to “broadly construe the effects test to provide State agencies with a consistency determination under § 930.34 and not a negative determination under § 930.35” 15 C.F.R. § 930.33(d).

50. The State of Hawai‘i’s Coastal Zone Management Program (“CZMP”) was approved for CZMA purposes in 1978, following the adoption of Haw. Rev. Stat. chap. 205A. Thus, the Navy’s proposed undersea warfare exercises must be consistent with Hawai‘i’s CZMP. Enforceable objectives and policies include “protect[ing] valuable coastal ecosystems . . . from disruption and minimizing adverse impacts on all coastal ecosystems,” “protect[ing] beaches for public use and recreation,” and “promot[ing] the protection, use, and development of marine and coastal resources to assure their sustainability.” Haw. Rev. Stat. § 205A-2(b)(4), (9), (10).

National Marine Sanctuaries Act of 1972

51. The National Marine Sanctuaries Act of 1972 (“NMSA”) was enacted “to protect, and, where appropriate, restore and enhance natural habitats, populations, and ecological processes” in “areas of the marine environment which are of special national significance. . . .” 16 U.S.C. § 1431(b)(1), (3). NMSA, among other things, encourages federal, state, and international cooperation, *id.* §§ 1435, 1442, prohibits activities that “destroy, cause the loss of, or injure” sanctuary

resources, id. § 1436(1), and enforces its provisions through criminal and civil penalties, id. § 1437.

52. In 1992, recognizing the “national significance and importance” of Hawai‘i’s “diverse marine resources and ecosystems . . . ,” and its essential role in humpback whale reproduction, Congress passed the Hawaiian Islands National Marine Sanctuary Act (“HINMSA”). Oceans Act of 1992, Pub. L. No. 102-587, tit. II, subtit. C, § 2302(1), (8), 106 Stat. 5039, 5056. Through the HINMSA, Congress designated prime humpback whale habitat in the areas between Maui, Moloka‘i, Lāna‘i, and Kaho‘olawe, and areas off the coasts of Kaua‘i, O‘ahu, and Hawai‘i Island as the Hawaiian Island Humpback Whale National Marine Sanctuary (“Sanctuary”). It became “the policy of the United States to protect and preserve humpback whales and their habitat within the Hawaiian Islands marine environment.” Id. at § 2304(a).

53. NMSA requires all federal agencies to consult with the Secretary of Commerce (“Secretary”) at least 45 days prior to approving a federal action, if their actions are “likely to destroy, cause the loss of, or injure any sanctuary resource. . . .” 16 U.S.C. § 1434(d)(1). If the Secretary determines that the proposed action is “likely to destroy, cause the loss of, or injure any sanctuary resource,” then the Secretary must “recommend reasonable and prudent alternatives, which may include conduct of the action elsewhere[.]” Id. at § 1434(d)(2).

54. Although rules promulgated to administer the Sanctuary exempt certain military activities from NMSA consultation requirements, the Navy's proposed undersea warfare exercises are not among those exempt activities.

FACTUAL ALLEGATIONS

Procedural History

55. On February 2, 2007, the Navy published in the Federal Register a notice of its "Finding of No Significant Impact," signed on January 23, 2007, for up to twelve "undersea warfare exercises" that it proposes to conduct between January 2007 and January 2009 throughout the main Hawaiian Islands and its surrounding waters. The Finding of No Significant Impact was accompanied by a Programmatic Environmental Assessment/Overseas Environmental Assessment ("EA/OEA").

56. The Federal Register notice was the public's first introduction to the undersea warfare exercises, as the Navy did not hold public meetings as a part of the NEPA process nor circulate a draft EA or draft Finding of No Significant Impact.

57. NMFS issued a Biological Opinion for the challenged exercises on January 23, 2007 and determined that the undersea warfare exercises are "not likely to jeopardize the continued existence of threatened or endangered species." The same day, NMFS issued an Incidental Take Statement, authorizing the "take"

of endangered whale species (including humpback, sperm, fin, and sei) up to 11,299 times each year.

58. The challenged EA/OEA is the second environmental review that the Navy has prepared for anti-submarine warfare training exercises in Hawai‘i. The first was prepared for RIMPAC 2006 following a mass stranding of up to 200 melon-headed whales in Hanalei Bay, Kaua‘i during RIMPAC 2004. The RIMPAC 2006 supplemental EA was controversial, and triggered an outpouring of public response and a lawsuit that was filed in the United States District Court for the Central District of California, Western Division. NRDC v. Winter, Case No. CV06-4131-DDP(JCx) (June 28, 2006). That suit resulted in a settlement between the parties and increased mitigation measures for RIMPAC 2006 mid-frequency active sonar use. NRDC v. Winter, Case No. CV06-4131-FMC(FMOx) (July, 7 2006).

Overview of the Navy Undersea Warfare Exercises

59. The Navy’s proposed undersea warfare exercises will combine six different Navy and U.S. Marine Corps training activities, which are currently carried out in the Hawaiian Islands separately, into a new, aggregate training activity. West Coast-based Carrier Strike Groups and Expeditionary Strike Groups deploying to the Seventh Fleet Area of Operations (e.g., Japan and Guam) and Hawai‘i home-ported ships, submarines, and aircraft will perform the undersea

warfare exercises four to six times per year. These exercises will be conducted in addition to RIMPAC naval exercises, which will next occur in 2008.

60. Exercises comprising the overall undersea warfare exercises include amphibious exercises, during which marines make amphibious landings from Navy ships at the Pacific Missile Range Facility on Kaua‘i or Marine Corps Training Area Bellows on O‘ahu; air-to-surface gunnery exercises, which involve rotary-wing aircraft equipped with door mounted machine guns engaging in live-fire training on stationary sea targets; air combat maneuvers, where up to 12 aircraft engage in basic fighter maneuvers for up to two hours; and other live-fire training, such as air-to-surface missile/bomb exercises and air-to-ground strike warfare exercises.

61. The keystone of each undersea warfare exercise is the anti-submarine warfare exercise – training focused on detection and engagement of enemy submarines and avoiding detection and engagement by enemy surface ships and submarines. During each anti-submarine warfare exercise, one to five surface ships, one or more helicopters, and P-3 aircraft, each equipped with mid-frequency active sonar, actively search for one or more submarines or training targets. Once located, participants engage in torpedo training.

62. Active sonar sends intense sound energy through the ocean in cycles of pulses, or “pings,” that bounce off objects, like submarines or the seafloor, then return to the source vessel, allowing operators to determine the location of the

object. The bathymetry of the ocean floor and oceanic conditions can affect the intensity of the sonar pings. For example, in certain ocean conditions, surface ducting can occur, which allows sound energy to maintain its intensity over longer distances than it otherwise would. A shallow, rocky seafloor or undersea canyons can also reverberate and intensify sound.

63. During each anti-submarine warfare exercise, Navy strike groups will actively transmit, from multiple sources, sonar at levels exceeding those known to cause whale strandings and deaths, for 139.5 hours (for Expeditionary Strike Groups) to 222 hours (for Carrier Strike Groups) at a time. Sonar sources that will be used include, but are not limited to, hull-mounted surface ship sonar (including the Navy's most powerful system, AN/SQS-53C, which can exceed 235 dB),¹ submarine sonar, sonobouys, dipping sonar (transmitting up to 201 dB), acoustic device countermeasures, torpedoes with autonomous guidance, training targets (submarine simulators), and range sources (emitting signals up to 190 dB).

Impacts of Mid-Frequency Active Sonar on Marine Mammals

¹ Sound wave intensity is commonly expressed as sound pressure level ("SPL"), or the ratio of the average acoustic pressure of the sound source and the impedance of the medium through which the sound wave flows, set on a decibel ("dB") scale, which increases logarithmically. Thus, each 10-decibel rise in intensity represents a tenfold increase in power (e.g., 180 dB is 10 times louder, and 190 dB is 100 times louder, than 170 dB). Throughout this Complaint, SPL is given in dB, measured as the root mean square of the acoustic pressure of the sound source at a one meter distance, in relation to one micro-Pascal (1 μ Pa) (the accepted impedance of underwater sound).

64. Marine mammals have adapted to the darkness of the oceans by evolving sophisticated auditory systems to perceive the environment around them. A whale's keen sense of hearing is vital in every aspect of its life history, including foraging for food, finding mates, bonding with offspring, communicating with other members of their species, navigating through lightless waters, and avoiding predators.

65. Their highly developed ears and heightened reliance on sound also render marine mammals vulnerable to the impacts of anthropogenic noise pollution in general and active sonar in particular. There is no longer any real scientific debate that high-intensity active sonar has serious detrimental impacts on marine mammals. According to NMFS's Biological Opinion at pages 51-52, "[a]coustic exposures have been demonstrated to kill marine mammals, result in physical trauma, and [result in] injury."

66. The best documented impacts of naval sonar on whales and dolphins are mass strandings, which often lead to the death of stranded animals. Strandings have been positively correlated with Navy sonar around the globe, and scientists have developed several theories based on necropsies of stranded animals to explain the phenomenon.

67. Intense sonar sounds may rupture marine mammals' hearing organs. Necropsies following the September 2000 mass stranding event in the Bahamas, in which 17 individuals of four whale species stranded, revealed lesions,

hemorrhaging, and blood clots in and around the ears and brains of the studied whales. The subsequent Joint Interim Report for the Bahamas Marine Mammal Stranding Event of 15-16 March 2000, prepared by the Navy and NMFS, concluded that the Navy's mid-frequency sonar was the "most plausible source of this acoustic or impulse trauma."

68. The same type of trauma to the brain and hearing organs were found, for example, in whales that died in association with mass strandings after North American Treaty Organization ("NATO") sonar exercises off Madeira, Spain in 2000 (10-14 Cuvier's beaked whales stranded) and off the Canary Islands in 2002 (11 of 14 stranded beaked whales died) and 2004 (four beaked whales died).

69. Injuries have not been limited to the hearing organs, and in several cases, lesions and hemorrhaging associated with nitrogen gas emboli were found in the lungs, kidneys, and other organs of dead whales. These findings suggest that loud sonar startles deep-diving whales, causing them to rush to the surface without taking time to release the nitrogen accumulated in their tissues. The whales appear to suffer from decompression sickness, causing embolisms similar to "the bends" in humans, that can kill divers when they rise too fast from the deep.

70. Scientists found evidence of gas and fat emboli in numerous organs indicative of decompression sickness in mass stranding events in, for example, Madeira, Spain in 2000; the Canary Islands in 2002 and 2004; following U.S. naval exercises off North Carolina in 2005 (33 short-fin pilot whales, two dwarf

sperm whales, and one minke whale stranded and died); and in four beaked whales that stranded and died after NATO exercises off Almeria, Spain in 2006.

71. Although there have been a rash of mass strandings correlated with military sonar use around the world in recent years, most injured or dead whales never make it to shore. Instead, most dead whales sink, are carried away by strong currents, are eaten by sharks, or wash up on remote beaches, preventing discovery or study.

72. Moreover, the consequences of sonar impacts on whales include harm that cannot be readily revealed by necropsies. Permanent and temporary threshold shifts, or damage to auditory tissues, can degrade hearing, making it more difficult for whales to detect the vital sounds of nearby prey, predators, mates, or offspring. These calls can also go unheard if they are “masked” by sonar noise occurring at the same time. The loss of sound sensitivity and/or masking can severely and adversely affect survival ability.

73. Sonar can result in serious behavioral disruptions as well. Whales have been known to change their dive patterns or migration routes, and cease foraging, feeding, and communicating in the presence of sonar noise. Interruption in communication may interfere with mother-calf bonding or mating rituals. Whales and dolphins can also become disoriented, making them more susceptible to ship strikes or predator attacks.

74. The mass stranding of up to 200 melon-headed whales in Kaua‘i’s Hanalei Bay during RIMPAC 2004 illustrates one type of behavioral impact. The normally deep-diving whales swam to the shallow bay then “milled” there for over 28 hours, after six U.S. and Japanese naval vessels transiting between O‘ahu and Kaua‘i emitted mid-frequency sonar into their habitat for nine hours. During this period, the whales were prevented from foraging and engaging in other normal activities, likely causing stress and diverting energy reserves from important life functions. One whale calf died.

75. Loud, startling noises and behavioral changes can also induce physiological changes in response to stress, which can divert energy from important functions like growth and reproduction. Stress can also suppress the immune system, leaving whales more susceptible to disease.

76. Another troubling result of the Navy’s sonar use is the potential for habitat abandonment. After the 2000 mass stranding event in the Bahamas, researchers who were engaged in a long-term study of a resident population of Cuvier’s beaked whales in those waters reported a sharp decline in the population as a whole.

Marine Mammals of Hawai‘i

77. Residents of and visitors to Hawai‘i are familiar with the thousands of endangered humpback whales that migrate to Hawai‘i’s waters each year to breed, calve, and nurse their young between November and April. What is less well-

known is that the same tropical waters also provide habitat for at least 26 other species of permanent and migratory marine mammals. Five of these whale species are also listed as endangered under the ESA, including sperm, sei, fin, northern right, and blue whales.

78. Humpbacks, especially nursing mothers and their calves, prefer protected near-shore waters. Other migratory species are found in both shallow and deep waters, including blue, fin, sei, minke, and northern right whales, as are resident Bryde's whales.

79. Hawai'i's dolphin species, including rough-toothed, spotted, spinner, and striped dolphins, also move between shallow and deep waters, feeding at night off-shore, then returning to the bays and lagoons during the day to rest.

80. Other whale populations exclusively live in the deep waters surrounding the Hawaiian Islands, which can reach depths of 3,000 meters often within just a few kilometers of shore. Hawai'i's deep-water species include sperm, pygmy sperm, dwarf sperm, melon-headed, pygmy killer, and false killer whales.

81. The numerous steep-sloping seamounts off the islands also provide important habitat for species such as short-finned pilot whales and Hawai'i's three species of beaked whales: Cuvier's, Blainville's, and Longman's.

82. The threat to Hawai'i's population of marine mammals is real. Although the mechanisms of harm are not clear, it cannot be disputed that marine mammals have been and will continue to be seriously harmed – behaviorally,

physiologically, and even mortally – by the Navy’s proposed use of high-intensity, mid-frequency active sonar.

83. The species known to have been killed or harassed by Navy sonar live in our waters, including Cuvier’s and Blainville’s beaked whales, pygmy and dwarf sperm whales, short-finned pilot whales, melon-headed whales, humpback whales, sperm whales, and dolphins.

84. Hawai‘i’s bathymetry and oceanic conditions are strikingly similar to the environments of prior sonar-linked mass strandings, including the presence of nearby deep water, unusual bathymetry, and potential surface sound ducting conditions. Other factors in common with past mass strandings will also exist during the undersea warfare exercises, including multiple vessels transmitting active sonar over sustained periods.

85. The Navy and NMFS have an affirmative duty under federal law to seriously consider Hawai‘i’s unique environment and the potential impacts of their actions on that environment, incorporate this knowledge into their planning prior to carrying out their actions, and ensure the conservation of endangered species. Because both have failed to do so, their actions are arbitrary and capricious and the undersea warfare exercises cannot be implemented until both agencies come into compliance with the law.

FIRST CLAIM FOR RELIEF

(FAILURE TO PROVIDE PUBLIC NOTICE AND AN OPPORTUNITY TO COMMENT IN VIOLATION OF ADMINISTRATIVE PROCEDURE ACT AND NATIONAL ENVIRONMENTAL POLICY ACT)

86. Plaintiffs reallege and incorporate herein by reference each and every allegation contained in all preceding paragraphs of this Complaint.

87. The Navy is a federal agency that is bound by NEPA and its implementing regulations. The Navy's proposed undersea warfare exercises constitute a "major federal action" for purposes of NEPA because they are new or continuing activities approved, financed, and conducted by the Navy that have known, major effects. The intense public reaction to the RIMPAC 2006 EA, which led to a lawsuit and increased mitigation measures, put the Navy on notice that sonar is a controversial issue of major importance to the people of Hawai'i.

88. Plaintiffs are informed and believe, and on the basis thereof allege that the Navy did not make diligent efforts to involve the public, nor solicit any information from the public, with respect to its proposed undersea warfare exercises. The Navy has violated NEPA and its implementing regulations by precluding meaningful public participation in the NEPA process for its proposed undersea warfare exercises.

89. The Navy's adoption of a Finding of No Significant Impact for the challenged undersea warfare exercises without first involving the public or otherwise providing an opportunity for public comment constitutes final agency

action that adversely affects and aggrieves plaintiffs. Therefore, under the Administrative Procedure Act (“APA”), the Navy’s adoption of a Finding of No Significant Impact for the challenged exercises is “arbitrary and capricious,” an “abuse of discretion,” “not in accordance with law,” and “without observance of procedure required by law.” 5 U.S.C. § 706(a)(A), (D).

SECOND CLAIM FOR RELIEF

(FAILURE TO PREPARE AN ENVIRONMENTAL IMPACT STATEMENT IN VIOLATION OF ADMINISTRATIVE PROCEDURE ACT AND NATIONAL ENVIRONMENTAL POLICY ACT)

90. Plaintiffs reallege and incorporate herein by reference each and every allegation contained in all preceding paragraphs of this Complaint.

91. The Navy’s approval and conduct of its undersea warfare exercises in Hawai‘i’s waters is a “major federal action significantly affecting the quality of the human environment” for NEPA purposes. Several factors set forth in NEPA’s implementing regulations lead to the conclusion that the impacts of the undersea warfare exercises will be “significant,” any one of which necessitates the preparation of an EIS, including, but not limited to: (1) Hawai‘i’s marine environment is of ecological importance; (2) the project is controversial; (3) defendants recognize that adverse impacts on endangered fin, humpback, sei, and sperm whales are likely; (4) uncertainty exists about the consequences and intensity of the impacts on marine mammals; (5) the programmatic EA/OEA will

likely be precedential; (6) cumulative impacts are likely to exist from past and future exercises and other sources of anthropogenic noise; (7) the exercises could result in the loss of significant scientific and cultural resources; and (8) the action threatens a violation of ESA, CZMA, NMSA, and other federal, state, and local environmental laws.

92. The Navy has violated NEPA by failing to analyze the significance of the impacts that it acknowledges will occur as a result of the twelve undersea warfare exercises it has approved to conduct in Hawai'i and its surrounding waters between January 2007 and January 2009. The Navy has further violated NEPA by adopting a Finding of No Significant Impact for those exercises and by failing to prepare an EIS for those exercises.

93. The Navy's adoption of a Finding of No Significant Impact for the challenged exercises constitutes final agency action that adversely affects and aggrieves plaintiffs. Therefore, under the APA, the Navy's adoption of a Finding of No Significant Impact for the challenged exercises is "arbitrary and capricious," an "abuse of discretion," "not in accordance with law," and "without observance of procedure required by law." 5 U.S.C. § 706(a)(A), (D).

THIRD CLAIM FOR RELIEF

(ISSUANCE OF AN INADEQUATE ENVIRONMENTAL ASSESSMENT IN VIOLATION OF ADMINISTRATIVE PROCEDURE ACT AND NATIONAL ENVIRONMENTAL POLICY ACT)

94. Plaintiffs reallege and incorporate herein by reference each and every allegation contained in all preceding paragraphs of this Complaint.

95. The Navy constitutes a federal agency that is bound by NEPA and its implementing regulations.

96. The Navy has violated NEPA and its implementing regulations by preparing an EA that fails to provide “high quality information” that will “help public officials make decisions that are based on an understanding of environmental consequences, and take action that protect, restore, and enhance the environment.” 40 C.F.R. § 1500.1(a) and (c).

97. The Navy failed to rigorously explore and objectively evaluate all reasonable alternatives. The only alternatives the Navy considered were either performing all exercises precisely as the Navy proposed them, as a group, or performing all exercises precisely as the Navy proposed them, individually.

98. The Navy failed to take a hard look at all reasonably foreseeable direct, indirect, and cumulative impacts. While the Navy identified an estimated probability of direct impacts, such as threshold shift and behavioral changes, it improperly ignored or dismissed without any analysis the consequences of these impacts, which include, but are not limited to, death, stranding, hearing loss,

masking, altered diving habits, stress, reduced growth rates, and changes in communication, social organization, foraging, migration, mating, and reproduction.

99. The Navy failed to take a hard look at the cumulative impacts of the proposed undersea warfare exercises, including the effects of multiple sources emitting high-intensity sonar pings from multiple directions in concentrated locations during each exercise; the effects of multiple exercises occurring throughout the course of each year; the added impacts of RIMPAC exercises, which will blast mid-frequency active sonar into the same marine habitats in 2008; and the combined effects of other anthropogenic noise, including, but not limited to, Navy and commercial ship traffic.

100. The Navy failed to provide high-quality information and to ensure professional and scientific integrity by failing to consider all relevant studies regarding the effects of sonar on marine life. Moreover, the Navy failed to provide any rational basis for its conclusions, including, but not limited to, downplaying the significance of prior stranding events in Hawai‘i linked to Navy sonar, applying 173 dB as the behavioral impact threshold, and finding that the exercises will have no significant impact.

101. The Navy has failed to consider feasible mitigation measures, including but not limited to, excluding coastal zones and areas of concentrated and/or sensitive whale populations, seasonal limitations, reliable monitoring methods, and protective chokepoint procedures. Instead of implementing more

protective measures in light of scientific evidence linking military mid-frequency sonar use to strandings around the world, the Navy improperly proposes to eliminate measures to which it previously committed during RIMPAC 2006.

102. The Navy's issuance of a Finding of No Significant Impact based on an inadequate EA constitutes final agency action that adversely affects and aggrieves plaintiffs. Therefore, under the APA, the Navy's failure to prepare an adequate EA based on the requirements of NEPA and its implementing regulations is "arbitrary and capricious," an "abuse of discretion," "not in accordance with law," and "without observance of procedure required by law." 5 U.S.C. § 706(a)(A), (D).

FOURTH CLAIM FOR RELIEF

(ISSUANCE OF AN INADEQUATE BIOLOGICAL OPINION IN VIOLATION OF ADMINISTRATIVE PROCEDURE ACT AND ENDANGERED SPECIES ACT)

103. Plaintiffs reallege and incorporate herein by reference each and every allegation contained in all preceding paragraphs of this Complaint.

104. The Navy's proposed undersea warfare exercises are "action[s] authorized, funded, or carried out" by a federal agency under the ESA. As such, formal consultation with NMFS was required by ESA section 7(a)(2), and NMFS determined through a Biological Opinion that the proposed undersea warfare exercises may adversely affect, but are not likely to jeopardize the continued existence of endangered humpback, sperm, sei, and fins whales.

105. NMFS's Biological Opinion violates the ESA and the APA because it is not based on the "best scientific and commercial data," and NMFS's conclusions are contrary to the evidence provided in the Biological Opinion, and are not supported by analysis of that evidence.

106. NMFS has further violated the ESA by issuing an Incidental Take Statement that fails to specify the impact of the incidental takings, fails to specify reasonable and prudent measures to minimize that impact, and fails to specify meaningful terms and conditions to implement those mitigation measures. As the expert consultant agency, NMFS is responsible for the protection of marine mammals, yet instead of setting forth specific mitigation measures, NMFS improperly shifted its responsibility to the Navy to develop and implement mitigation measures at the Navy's discretion.

107. NMFS's issuance of a Biological Opinion and Incidental Take Statement that fail to meet its obligations under the ESA and its implementing regulations constitutes final agency action that adversely affects and aggrieves plaintiffs. Therefore, under the APA, NMFS's failure to prepare a legally adequate Biological Opinion and Incidental Take Statement is "arbitrary and capricious," an "abuse of discretion," "not in accordance with law," and "without observance of procedure required by law." 5 U.S.C. § 706(a)(A), (D).

FIFTH CLAIM FOR RELIEF

(FAILURE TO CONSULT WITH THE HAWAI'I STATE COASTAL ZONE MANAGEMENT PROGRAM FOR UNDERSEA WARFARE EXERCISES IN VIOLATION OF ADMINISTRATIVE PROCEDURE ACT AND COASTAL ZONE MANAGEMENT ACT)

108. Plaintiffs reallege and incorporate herein by reference each and every allegation contained in all preceding paragraphs of this Complaint.

109. The Navy's proposed undersea warfare exercises are federal activities that have foreseeable effects on the natural resources of the coastal zone. Hawai'i's Coastal Zone Management Program ("CZMP") was approved in 1977 and its policies set forth in Haw. Rev. Stat. chap. 205A are enforceable for purposes of the CZMA.

110. Plaintiffs are informed and believe, and on the basis thereof allege that the Navy has unlawfully failed to submit a determination to the CZMP that the Navy's exercises are consistent with the CZMA and the enforceable policies of the CZMP, and in fact they are not consistent.

111. The Navy's approval and conduct of its proposed undersea warfare exercises without a consistency determination pursuant to the CZMA and its implementing regulations constitutes final agency action that adversely affects and aggrieves plaintiffs. Therefore, under the APA, the Navy's failure to provide the state coastal zone management program with a consistency determination is "arbitrary and capricious," an "abuse of discretion," "not in accordance with law,"

and “without observance of procedure required by law.” 5 U.S.C. § 706(a)(A),
(D).

SIXTH CLAIM FOR RELIEF

(FAILURE TO CONSULT WITH THE SECRETARY OF COMMERCE FOR UNDERSEA WARFARE EXERCISES IN VIOLATION OF ADMINISTRATIVE PROCEDURE ACT AND NATIONAL MARINE SANCTUARIES ACT)

112. Plaintiffs reallege and incorporate herein by reference each and every allegation contained in all preceding paragraphs of this Complaint.

113. The Navy’s proposed undersea warfare exercises are “federal agency actions internal or external to a national marine sanctuary . . . that are likely to destroy, cause the loss of, or injure . . .” sanctuary resources. 16 U.S.C. § 1434(d). The Navy proposes to engage in undersea warfare exercises inside and outside of the Hawaiian Islands Humpback Whale National Marine Sanctuary (“Sanctuary”), and these exercises will likely destroy, cause the loss of, or injure humpback whales and their habitat.

114. The Navy did not engage in the consolidated undersea warfare exercises described in the EA/OEA prior to or at the time the Sanctuary rules were promulgated and did not include the proposed undersea warfare exercises in the Sanctuary Final EIS.

115. Plaintiffs are informed and believe, and on the basis thereof allege that the Navy has unlawfully failed to determine whether all of its undersea warfare exercises are likely to destroy, cause the loss of, or injure any sanctuary resource

and have unlawfully failed to consult with the Secretary of Commerce regarding the potential effects its proposed undersea warfare exercises will have on sanctuary resources.

116. The Navy's approval and conduct of its proposed undersea warfare exercises without consultation pursuant to NMSA, HINMSA, and implementing regulations constitutes final agency action that adversely affects and aggrieves plaintiffs. Therefore, under the APA, the Navy's failure to consult with the Secretary of Commerce is "arbitrary and capricious," an "abuse of discretion," "not in accordance with law," and "without observance of procedure required by law." 5 U.S.C. § 706(a)(A), (D).

PRAYER FOR RELIEF

WHEREFORE, plaintiffs respectfully request that the Court:

1. Enter a declaratory judgment that:
 - (a) The Navy has violated and is violating the National Environmental Policy Act and the Administrative Procedure Act by failing to allow meaningful public participation in the NEPA process for the challenged exercises;
 - (b) The Navy has violated and is violating the National Environmental Policy Act and the Administrative Procedure Act by failing to prepare an environmental impact statement for the challenged exercises;

(c) The Navy has violated and is violating the National Environmental Policy Act and the Administrative Procedure Act by preparing an inadequate environmental assessment for the challenged exercises;

(d) NMFS has violated and is violating the Endangered Species Act and the Administrative Procedure Act by failing to prepare an adequate Biological Opinion and Incidental Take Statement for the challenged Navy exercises;

(e) The Navy has violated and is violating the Coastal Zone Management Act and the Administrative Procedure Act by failing to provide the state Coastal Zone Management Program with a consistency determination; and

(f) The Navy has violated and is violating the National Marine Sanctuaries Act and the Administrative Procedure Act by failing to consult with the Secretary of Commerce regarding the potential effects its proposed undersea warfare exercises will have on Hawaiian Islands Humpback Whale National Marine Sanctuary resources.

2. Issue an order vacating NMFS's January 23, 2007 Biological Opinion.

3. Issue an order vacating the Navy's February 2, 2007 Finding of No Significant Impact.

4. Enter appropriate injunctive relief to:

(a) Ensure that Navy and NMFS defendants comply with NEPA, ESA, CZMA, NMSA, and APA;

and

(b) Enjoin the United States and its subdivisions, officials, agents, and contractors from using mid-frequency active sonar during or in association with the challenged exercises unless and until that use is in full compliance with federal law, including NEPA, ESA, CZMA, NMSA, and APA.

5. Award plaintiffs the costs of this litigation, including reasonable attorney's fees; and

6. Provide such other relief as may be just and proper.

DATED: Honolulu, Hawai'i, May 16, 2007.

Respectfully submitted,

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