

**ALASKA CLEAN WATER ADVOCACY – ALL ONE OCEAN – ANIMAL WELFARE INSTITUTE – AZUL – CALIFORNIA COASTAL PROTECTION NETWORK – CENTER FOR BIOLOGICAL DIVERSITY – CETACEAN SOCIETY INTERNATIONAL – COASTWALK/ CALIFORNIA COASTAL TRAIL ASSOCIATION – CONSERVATION LAW FOUNDATION – DEFENDERS OF WILDLIFE – DOLPHIN CONNECTION – EARTHJUSTICE – ENVIRONMENTAL DEFENSE CENTER – ENVIRONMENTAL INVESTIGATION AGENCY – EYAK PRESERVATION COUNCIL – FRIENDS OF THE EARTH – FRIENDS OF THE SAN JUANS – GREEN VEGANS – GROUP FOR THE EAST END – HEALTHY GULF – HEIRS TO OUR OCEAN – HUMANE SOCIETY LEGISLATIVE FUND – THE HUMANE SOCIETY OF THE UNITED STATES – IN DEFENSE OF ANIMALS – INTERNATIONAL FUND FOR ANIMAL WELFARE – INTERNATIONAL MARINE MAMMAL PROJECT – MARINE MAMMAL ALLIANCE NANTUCKET – MASS AUDUBON –NATURAL RESOURCES DEFENSE COUNCIL – NY4WHALES – OCEAN CONSERVATION RESEARCH – THE OCEAN FOUNDATION – OCEANA – OCEANIC PRESERVATION SOCIETY – ONE HUNDRED MILES – ORCA BEHAVIOR INSTITUTE – ORCA NETWORK – PENINSULA CITIZENS FOR THE PROTECTION OF WHALES – SANCTUARY EDUCATION ADVISORY SPECIALISTS – SAVE OUR WILD SALMON – SAVE THE MANATEE CLUB – SEVEN CIRCLES FOUNDATION – SHARK STEWARDS – SOUTH CAROLINA COASTAL CONSERVATION LEAGUE – SOUTHERN ENVIRONMENTAL LAW CENTER – SURFRIDER FOUNDATION – SYLVIA EARLE ALLIANCE/ MISSION BLUE – TURTLE ISLAND RESTORATION NETWORK – WHALE AND DOLPHIN CONSERVATION – WHALEMAN FOUNDATION – WILD ORCA – WILD OYSTER PROJECT – WILDLIFE CONSERVATION SOCIETY**

**Via [regulations.gov](https://www.regulations.gov)**

May 1, 2019

DoD Office of the Deputy Chief Management Officer  
Directorate for Oversight and Compliance  
Regulatory and Advisory Committee Division  
4800 Mark Center Drive  
Mailbox #24, Suite 08D09  
Alexandria, VA 22350-1700

Re: *Proposed Rule to revise categorical exclusions for Navy actions under the National Environmental Policy Act*

Dear Sir or Madam:

On behalf of the Natural Resources Defense Council (“NRDC”), Alaska Clean Water Advocacy, All One Ocean, Animal Welfare Institute, Azul, California Coastal Protection Network, Center for Biological Diversity, Coastwalk/ California Coastal Trail Association, Cetacean Society International, Conservation Law Foundation, Defenders of Wildlife, Dolphin Connection, Earthjustice, Environmental Defense Center, Environmental Investigation Agency, Eyak Preservation Council, Friends of the Earth, Friends of the San Juans, Green Vegans, Group for the East End, Healthy Gulf, Heirs to Our Ocean, Humane Society Legislative Fund, The Humane

Society of the United States, In Defense of Animals, International Fund for Animal Welfare, International Marine Mammal Project, Marine Mammal Alliance Nantucket, Mass Audubon, NY4WHALES, Ocean Conservation Research, The Ocean Foundation, Oceana, Oceanic Preservation Society, One Hundred Miles, Orca Behavior Institute, Orca Network, Peninsula Citizens for the Protection of Whales, Sanctuary Education Advisory Specialists, Save Our wild Salmon, Save the Manatee Club, Seven Circles Foundation, Shark Stewards, South Carolina Coastal Conservation League, Southern Environmental Law Center, Surfrider Foundation, Sylvia Earle Alliance/ Mission Blue, Turtle Island Restoration Network, Whale and Dolphin Conservation, Whaleman Foundation, Wild Orca, Wild Oyster Project, Wildlife Conservation Society, and our millions of members, activists, and constituents, we are writing to express our profound concern over the Navy's proposed revision of its categorical exclusion policies under the National Environmental Policy Act ("NEPA"). *See* 84 Fed. Reg. 12,170 (Apr. 1, 2019). **Collectively, we represent national and international conservation groups and organizations from every coastal region of the country.**

As you know, NEPA has long been considered the "Magna Carta" of environmental law in the United States.<sup>1</sup> It establishes a national policy to "encourage productive and enjoyable harmony between man and his environment" and "promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man." 42 U.S.C. § 4321. To achieve its broad goals, the statute mandates that "to the fullest extent possible" the "policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with [NEPA]." 42 U.S.C. § 4332. And central to NEPA is its requirement that, before any federal action that "*may* significantly degrade some human environmental factor" can be undertaken, agencies must prepare an environmental impact statement that evaluates impacts and sets forth alternatives to the proposed action. *Steamboaters v. F.E.R.C.*, 759 F.2d 1382, 1392 (9th Cir. 1985) (emphasis in original). A "categorical exclusion" from that requirement applies only to actions that "do not individually or cumulatively have a significant effect" on the environment and, even then, only where "extraordinary circumstances in which a normally excluded action which may have a significant environmental effect" do not exist. 40 C.F.R. § 1508.4.

Current regulation makes clear that the Navy may not apply a categorical exclusion to actions that, *inter alia*, "may [h]ave an adverse effect on Federally listed endangered/threatened species or marine mammals," as "determined in coordination" with the relevant wildlife agency. 32 C.F.R. § 775.6(e)(5). The reason for this is evident: adverse effects on a protected species may "individually or cumulatively" represent a significant impact on the environment. *See* 40 C.F.R. § 1508.27(b)(9) (NEPA regulations, requiring consideration of adverse effects on listed species). Thus, under the Navy's current regulations, if an adverse effect "may" occur, a categorical exclusion "will not be used." 32 C.F.R. § 775.6(e)(5).

Significantly, the Navy's Proposed Rule would eliminate that bar. Instead, it would require only that the Navy decision-maker "consider" whether the action meets or exceeds other thresholds

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<sup>1</sup> R. Lazarus, The National Environmental Policy Act in the U.S. Supreme Court: A reappraisal and a peek behind the curtains, *Georgetown Law Journal* 100: 1507-86 (2012).

applicable to protected species: *i.e.*, whether it “may [h]ave more than a negligible or discountable effect” on species listed under the Endangered Species Act, or “would require issuance of an Incidental Harassment Authorization or Letter of Authorization under the Marine Mammal Protection Act.” 84 Fed. Reg. 12,170, 12,175 (proposed 32 C.F.R. § 775.6(e)(1)(v)). The proposed regulation is explicit that exceedance of these thresholds “does not automatically preclude” application of a categorical exclusion, so long as the decision-maker gives further consideration to the action’s “environmental significance.” *Id.* (proposed 32 C.F.R. § 775.6(e)).

**In practice, this simple revision could radically alter the Navy’s environmental compliance policy for offshore training and testing activities, which include the extensive use of underwater explosives and high-intensity sonar.**

The Navy has long established categorical exclusions for all “routine testing and evaluation” efforts and “routine military training,” which, as defined, include most activities taking place on the Navy’s offshore ranges and operating areas with the exception of carrier and expeditionary group exercises. 32 C.F.R. § 775.6(f)(44), (45).<sup>2</sup> Their use, however, has been limited by the interdiction (described above) on applying exclusions where marine mammals and endangered and threatened species may suffer adverse effects. *See* 32 C.F.R. § 775.6(e)(5). Eliminating that clear prohibition would allow the Navy to use them broadly. On their own terms, the two exclusions apply wherever the Navy has engaged in some prior NEPA analysis and concluded that “no significant impacts” would result. 32 C.F.R. § 775.6(f)(44), (45). And since the Proposed Rule directs the decision-maker to consider the “environmental significance” of an action in determining whether an exclusion applies (proposed 32 C.F.R. § 775.6(e)), the rule as drafted could be read to allow or compel the extensive use of categorical exclusions for the department’s on-range activities, on the grounds that a significance finding has already been made.

The Navy’s proposed rule, if interpreted broadly in this way, would be illegal.

*First*, it is inconsistent with the requirements of the Marine Mammal Protection Act, which requires periodic review of activities that take marine mammals. As Congress recognized in enacting this landmark statute, marine mammals are extraordinarily difficult to monitor in the wild, to the point where they may suffer grievous harm before we are able to detect it.<sup>3</sup> A 2007 NOAA study confirmed this Congressional concern, finding that we are unlikely to detect even a catastrophic collapse for most marine mammal populations off the United States.<sup>4</sup> And NMFS’

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<sup>2</sup> The Proposed Rule would assign new paragraph numbers to these categorical exclusions, but would otherwise retain them to the letter. *See* 84 Fed. Reg. 12,170, 12,177 (proposed 32 C.F.R. § 775.6(f)(43), (44)).

<sup>3</sup> 16 U.S.C. § 1361(3); Report of the House Committee on Merchant Marines and Fisheries, *reprinted in* 1972 U.S. Code Cong. & Admin. News 4148.

<sup>4</sup> Taylor, B.L., M. Martinez, T. Gerrodette, J. Barlow, and Y.N. Hrovat, Lessons from monitoring trends in abundance of marine mammals, *Marine Mammal Science* 23(1): 157-175 (2007).

most recent guidelines for marine mammal stock assessments hold that what data we do have on population abundance degrades and becomes unreliable after eight years.<sup>5</sup> For these reasons, the Act requires that the Defense Department obtain authorization from the wildlife agencies at intervals no greater than every seven years (five years for other parties) for training, testing, and other military readiness activities. 16 U.S.C. § 1371(a)(A)(ii). Congress affirmed the importance of this periodic review only last year, when it rejected a Navy legislative proposal that would have exempted the department from this requirement provided that its activities were similar to those that the wildlife agencies had previously authorized—the same terms that the Navy’s proposed rule would apply here to NEPA.<sup>6</sup>

Eliminating periodic review under NEPA is incompatible with the Marine Mammal Protection Act. As noted above, Congress intended regular environmental review and authorization of federal activities on these species, given their cultural, economic, and ecological importance and the need for consistent oversight. For more than a decade, the environmental impact statement has played a central role in the Navy’s compliance with these authorization requirements, producing the analyses on which authorization is based. *See passim, e.g.*, 83 Fed. Reg. 57,076, 57,078-57,213 (NMFS’ final notice of take authorization for Atlantic Fleet training and testing, referencing the related Navy impact statement more than 80 times). Just as scientific information on marine mammal distribution and abundance is constantly evolving, so, too, is scientific information on the impacts of ocean noise on marine mammals and other species—so much so that the Navy’s environmental impact statements have fundamentally changed in virtually every aspect of their impact and alternatives analyses, from behavioral impact thresholds to mitigation considerations, over the course of each authorization cycle. Furthermore, authorization under the Marine Mammal Protection Act is a distinct agency action that establishes separate obligations for NEPA compliance on the part of the wildlife agencies (*Conservation Council for Hawaii v. NMFS*, 97 F. Supp. 3d 1210, 1236-37 (D. Hawaii 2015)), which, rightly, do not have categorical exclusions for military training and testing. Broad application of these categorical exclusions, which the Navy’s proposal would allow, does not comport with the Act.

*Second*, the activities covered by categorical exclusions (44) and (45) plainly do not qualify for categorical exclusions because, contrary to NEPA regulations, they “individually or cumulatively have a significant effect” on the environment. *See* 40 C.F.R. § 1508.4. Off the east coast, from New England to the Gulf of Mexico, the Navy is currently authorized to use tens of thousands of hours of high-intensity active sonar—which is harmful to marine mammals—and detonate some 47,000 explosives underwater each year. 83 Fed. Reg. 57,076 (Nov. 14, 2018). Similar levels of

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<sup>5</sup> Moore, J.E., and R. Merrick, eds., *Guidelines for assessing marine mammal stocks: Report of the GAMMS III Workshop*, Feb. 15-18 (2011) (NOAA Tech. Memo. NMFS-OPR-47).

<sup>6</sup> U.S. Navy, *Exempting military readiness activities from the five-year limitation in the Marine Mammal Protection Act of 1972* (Navy legislative proposal to Congressional Armed Services Committees, for inclusion in National Defense Authorization Act for Fiscal Year 2019). Instead of accepting the Navy’s proposal, Congress extended the periodic review requirement for military readiness activities from five to seven years. National Defense Authorization Act for Fiscal Year 2019 at § 316, 16 U.S.C. § 1371(a)(A)(ii).

training and testing activity take place off Southern California and Hawaii (83 Fed. Reg. 66,846 (Dec. 27, 2018)); and additional training occurs off the Pacific Northwest, from California to Washington, in the Gulf of Alaska, and around the Mariana Islands. 80 Fed. Reg. 73,556 (Nov. 24, 2015); 82 Fed. Reg. 19,530 (Apr. 27, 2017); 80 Fed. Reg. 46,112 (Aug. 3, 2015). Despite the great extent of this activity, the vast majority of it, excepting only the major group exercises referenced above, falls into the categories of “routine testing and evaluation” and “routine training” that the new regulation attempts to exclude from further NEPA analysis.

During its most recent cycle of environmental review, which covered a period of five years, the Navy estimated that it would kill more than 250 whales and other marine mammals; cause permanent injury, including lung and hearing damage, in another 6,000; and disrupt foraging and other vital behavior, to the point of having significant biological effects in whales and other species, more than 30 million times. *See, e.g.*, 78 Fed. Reg. 73,009 (Dec. 4, 2013) (training and testing in Atlantic Fleet study area; 78 Fed. Reg. 78,106 (Dec. 24, 2013) (training and testing in the Hawaii-Southern California study area).

These actions plainly meet the “significance” threshold for purposes of NEPA compliance, as they present unique and unknown risks, have adverse effects on endangered and threatened species and their habitat, take place in ecologically critical areas, are considered highly controversial due to their grounding in rapidly evolving science, are related to other actions with cumulatively significant effects, and threaten violations of other federal laws imposed for the protection of the environment, including the Marine Mammal Protection Act, Endangered Species Act, Coastal Zone Management Act, and National Marine Sanctuaries Act. 40 C.F.R. § 1508.27(b)(3)-(5), (7), (9)-(10). Consistent with this, courts have repeatedly found against the Navy’s claims that environmental impact statements are not required for these activities and against the Navy’s assertions that the impact statements it has prepared, which typically reach a conclusion of no significant impacts, are legally adequate. *See, e.g., NRDC v. Winter*, 518 F.3d 658, 687-93 (9th Cir. 2008), *partly rev’d on other grounds*, 555 U.S. 7 (2008); *Ocean Mammal Institute v. Gates*, 546 F.Supp.2d 960, 977-80 (D. Hawaii 2008); *Conservation Council*, 97 F. Supp. 3d at 1235-38. It strains all credulity to assert that the Navy’s offshore training and testing activities “do not individually or cumulatively have a significant effect” on the environment, as required for the establishment of categorical exclusions. 40 C.F.R. § 1508.4.

In short, our organizations strongly object to the Navy’s proposed regulation on both policy and legal grounds. Interpreted broadly, the rule risks the health of marine mammal populations in every region of the country, and does so at a moment when several marine mammal populations—including southern resident orcas off Washington State and North Atlantic right whales off the east coast—are in serious decline. It is inconsistent with the plain terms of NEPA, with the best available science on the Navy’s impacts on marine mammals, with previous court rulings on the environmental significance of the Navy’s training and testing activities, and with the necessity of periodic environmental review under the Marine Mammal Protection Act, which, again, Congress affirmed only last year in rejecting an analogous Navy proposal.

We urge the department either to eliminate paragraphs (44) and (45) in its existing list of categorical exclusions, or to stipulate that these exclusions will not apply to activities that require


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a “take” authorization under the Marine Mammal Protection Act or that may affect endangered or threatened species under the Endangered Species Act.

Very truly yours,

A handwritten signature in black ink, appearing to read "Michael Jasny". The signature is fluid and cursive, with a large, stylized initial "M" and a long, sweeping tail.

Michael Jasny  
Director, Marine Mammal Protection  
NRDC