WCAA
West Coast Action Alliance

Olympic Forest Coalition
olympicforest.org

Subject: Unlawful U.S. Navy NWTT Final EIS/OEIS

Date: 13 October 2015

MEMORANDUM

The West Coast Action Alliance is a citizen's support network for members-based organizations and citizen groups on North America's west coast from California to Canada, that seek to be heard on various aspects of the U.S. Navy's controversial militarization of public lands and waters. The Olympic Forest Coalition promotes the protection, conservation and restoration of natural forest and aquatic ecosystems and their processes on the Olympic Peninsula, with a focus on educating members of the public, officials, agencies, and other environmental, community and recreation groups on issues of importance.

We are writing to you out of extreme concern about a deviation from the normal processes under the National Environmental Policy Act (NEPA) and the National Historic Preservation Act (NHPA) that are resulting in foreclosure of the public's ability to consider and evaluate impacts and alternatives.

We begin by first expressing our appreciation for the U.S. Navy's response to our request that a process be initiated by which citizens can sign up to receive email notifications of proposed naval activities that require National Environmental Policy Act (NEPA) or National Historic Preservation Act (NHPA) oversight. We were pleased to learn from Navy Region Northwest's Senior Public Affairs Officer that this subscription service will be functional at some point in the future. It is worth noting, however, that while this service will apparently be available at some point, the 30-day notice of availability began more than 10 days ago, on October 2, and the service is still not functionally available for the public's use. Most other federal agencies have long had such notification systems as standard operating procedure, and several other areas of public accountability by Navy Region Northwest are still in need of improvement before the public can access relevant information to inform their comments as allowed by federal law.

As you know, the U.S. Navy released its Final EIS/OEIS (Environmental Impact Statement/Overseas Environmental Impact Statement) called Northwest Training and Testing, on October 2, 2015. We found the document that day on the project website at: www.NWTTEIS.com.

The Final EIS has been expected, but not the following five disturbing issues that accompany it:

1.) Failure to provide reasonable notice to the public:
The Navy's Notice of Availability for the Northwest Training and Testing (NWTT) EIS was published in local papers several days into what the Navy has labeled a 30-day "wait period." The Notice of Availability merely invites the public to "review" the document. Recently added FAQs on a web site sponsored by the Commander, Pacific Fleet, stated, "While there is technically no comment period, if a new substantive comment was submitted to us, the Navy would consider it before making a decision." Unfortunately, there is no information in any press releases, public notices, or in the EPA Federal Register Notice, which was only three lines long and did not even provide a link to the NWTT web site, on where to send comments or the criteria by which a "substantive" comment would be judged. Although the EPA Notice is listed on the Navy's web site, we could not find a Navy-issued Federal Register Notice. There is also no online access or public electronic email address or physical address to which comments may be sent. This seems rather extraordinary in our experience, given that the Navy has always allowed public comments on Final EIS/OEIS documents in the Pacific, Atlantic, and Gulf of Mexico. Therefore, we submit that it is unprecedented to have a "wait period" instead of a public comment period, until November 2, 2015, when the public's ability to review the documents ends and the Navy begins its 2015 – 2020 operations with

the quick issuance of a Record of Decision. As of October 10, only one individual we know of who requested a hard copy has received this document, with one-third of the allotted 30 days for public review having already passed.

While we appreciate the combined evaluation of multiple testing and training ranges that include the former Northwest Training Range Complex in Northern California, Oregon, Washington, Idaho and Alaska into one large NEPA document called Northwest Training and Testing, the Final EIS for Northwest Training and Testing is four volumes totaling 3,470 pages, not counting the 600-plus pages of Technical Supporting Documents one would also need to read in order to comment intelligently on this matter. To wade through more than 4,000 pages of complex material in search of the latest changes in less than a month is a daunting task for any citizen, federal or state agency, or tribal or elected official, since the Navy does not use strikeouts or otherwise indicate where it has made changes, thus requiring line-by-line comparisons between the Draft EIS and the Final version.

2.) Failure to provide adequate comment process:
We believe that this scant and largely inconspicuous notice scheme coupled with the highly restricted space for comments that are limited to what the Navy deems "substantive" by some unidentified measure will severely hamper, if not totally impair, the public's federally protected right to comment before the Navy issues its Record of Decision. While the Navy has not changed its preferred alternative from the Draft EIS, it has also not specified in the Final which alternative it has chosen, yet the Navy has asked NOAA to issue a permit for incidental take of threatened and endangered species prior to issuing a Record of Decision. In addition, the Final EIS is still missing a hazardous materials section like the one found in the 2010 Final Northwest Training Range Complex EIS, despite this being requested in previous public comments. The foreclosure of public comments on the Final EIS is a departure from past practice. Has Navy policy changed? If so, what is the legal basis for this change? Kindly point us to the changed policy, since the notice issued for NWTT actions does not. With such lack of transparency, how can this be considered full public disclosure?

When substantial changes are made to an EIS between Draft and Final stages, as have been made here, a comment period is required to give the public the opportunity to understand and address those changes. Substantial changes *were* made between the Draft and the Supplemental, which had comment periods, and the Navy admits to more changes in the Final. The Navy received 1,054 comments on its Draft version, in 23 different areas of concern, from 316 individuals and groups, plus 9,700 form letters and a petition with approximately 6,000 signatures. This is strong evidence of considerable public interest. Why would the opportunity for public comment on the Final EIS be denied with such an obviously high level of interest by stakeholders and concerned citizens?

By foreclosing public comment and compressing the time allowed for review, it is difficult to understand how anyone could say that the Navy has fully complied with the major environmental law that determines how our government is allowed to proceed with federal actions. We are watchful now because of events in recent history in which the public was excluded. In 2014, the Navy foreclosed public capacity to consider alternatives and to seek redress of objections through legal remedies, by issuing an Environmental Assessment on the Electronic Warfare Range without adequate public notice. As a result of the highly suspect notice scheme employed by Navy NEPA manager John Mosher and his team, not one comment was received from tribes, elected officials, environmental groups, or individual members of the public.

Mr. Mosher's NEPA team failed to post public notices in newspapers directly serving affected communities on the northern and western portions of the Olympic Peninsula. A single small notice was discovered in the Forks, Washington post office in mid-September 2014, several weeks after the shortened 15-day comment period had closed. As a result, no one knew about the EA or its comment period, and no one was able to gain the legal standing that would be necessary to pursue that matter. This led to the thousands upon thousands of public comments, municipal resolutions in opposition, threats of litigation and general outrage against the Navy, for what is widely understood as a scheme to circumvent stakeholder's federally protected right to notice and opportunity to be heard. Yet despite the avalanche of protests, objections, and demands to correct this violation of NEPA, the Navy has

refused to re-open public consultation, instead choosing to proceed with all deliberate speed on multiple assorted plans.

The fact that the lightly-used 327,000-acre Yakima Training Range is only a 9-minute flight from Naval Air Station Whidbey Island, yet was never presented as an alternative to encroaching on public lands and residential communities on the Olympic Peninsula, has further irked the public. Why was the Yakima Training Range disregarded as an alternative to militarizing the Olympic National Park? The flimsy excuses offered of a small saving of time and fuel simply do not justify this proposal for intrusions of jet noise and pollution into the airspace over Olympic National Park, or mobile electronic warfare emitters on the ground in the Olympic National Forest. A World Heritage Site is not an appropriate place to conduct any warfare training.

Once the Navy realized the magnitude of public outrage, Captain Michael Nortier and his staff placed editorials in the same local newspapers that the Navy had previously ignored when publishing notice of the Environmental Assessment. Legitimate fears and objections on the part of the public were ridiculed in multiple opinion pieces by Captain Nortier, as both myths and misinformation. Little more than a year later, the public continues to be systematically excluded from reviewing and commenting in this latest round.

What the Navy does in a NEPA process is the public's business. It is our right by law to have a say in the final outcome when the health of our public lands and waters, our wildlife, and our local economies, are at stake, and that right cannot be abrogated through schemes and tactics that prevent the public's absolute right to notice and an opportunity to be heard.

3.) Failure to address functionally connected activities and their cumulative impacts:
The Navy has unlawfully fragmented environmental evaluations of its proposed actions for the Growler aircraft, Electronic Warfare Range, and Northwest Training and Testing. All of these inter-related actions must be included in the NWTT EIS, which must address the combined total impacts of airspace, marine, and land-based actions that are geographically and functionally connected; see, e.g., Intertribal Sinkyone Wilderness Council et al v. National Fisheries Service, (U.S.D.C. Northern District of California, 2013), agency must "analyze the effect of the entire agency action."

We submit that this is required under provisions of NEPA as well as NHPA, because, at a minimum, the proposed actions are geographically and functionally connected. Under NHPA, the Area of Potential Effect must not be compartmentalized into separate zones. The Area of Potential Effect "…is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking." 36 CFR 800.16(d). The Growlers take off from Whidbey Island, fly military training routes to the Olympic Military Operating Area, where they practice electronic warfare, and then fly to the Northwest Training and Testing range for similar activities. Without the Growlers there is no need for the ground-based mobile emitters. Therefore, impacts must be evaluated together, especially when one considers that the Western Washington Region is dealing with additional military proposals such as the Army's helicopter landings in the North Cascades and Southwest Washington, including the Army's plans to fire rockets into South Puget Sound. The Air Force has also submitted a survival school training permit application for Olympic National Forest lands and campgrounds in the Calawah River watershed.

Impacts are cumulative, and evaluations by the Navy on such impacts to date do not reflect this; rather, there has been a wholesale effort to compartmentalize these as separate and distinct matters. They certainly are not. Without the Growlers there is no need for the ground-based mobile emitters. Therefore, impacts must be evaluated together. Effects go far beyond the Growlers doing Fleet Carrier Landing Practice at Outlying Landing Field Whidbey Island. The Area of Potential Effect covers a large span of land and water, from Whidbey to the San Juan Islands, across the Olympic Peninsula and beyond, especially when one considers that the Northwest Training and Testing Range extends from Alaska to Northern California. All of these related activities have been segmented into separate processes that have prevented a holistic look at what is going to happen on and around the Olympic Peninsula and Pacific Northwest, precluding the public from understanding and evaluating the full scope of the Navy's activities. Final NEPA documents with major changes, inadequate consultation on endangered species and historic and

cultural preservation, no public comment period, and no redress for grievances are flagrant violations of both the spirit and the letter of more than one federal law.

At the beginning of this letter we referred to the "controversial militarization of public lands and waters" in western Washington. It is controversial because the sheer level of proposals is unprecedented and the public is intensely frustrated at the wholesale lack of transparency marred with what can only be seen as intentional acts of obfuscation to prevent the public's ability to review and comment on the Navy's proposals. As an example of this, a Biological Opinion from a 2010 EIS that did not cover proposed activities or levels of activities specific to the Olympic Peninsula was retrofitted to the 2014 EA on the Electronic Warfare Range, and yet despite this, the public had no opportunity to be heard on the record in this matter.

4.) Failure to adequately consider impacts to Olympic National Park's World Heritage designation: Appendix K of the Final EIS discusses the World Heritage status of the Olympic National Park and states the following:

"…noise levels associated with military aircraft overflights would result in minor impacts to the soundscape within the Olympic National Park because overflights would only generate noise levels above 105 dBA at higher elevations in areas with limited park visitors. These noise levels would be no more than a total of 4 minutes over a 1-year period."

And,

"There is no evidence that noise or air emissions would result in rainforest depletion. The Proposed Action and alternatives would not result in changes that would alter the complex and varied ecosystems."

These claims are contradicted by the work of bioacousticians who measure sound signatures in ecosystems before and after impacts from noise, and by a May 18, 2015 letter from Dr. Kishore Rao, Director of UNESCO's World Heritage Center, to the US Ambassador to the United Nations. (See letter attached.) In it Dr. Rao expressed concerns "…regarding the potential impact of this project to wildlife as well as to humans and also highlight the probable effects of increased noise pollution within and in close proximity to the World Heritage property." He goes on to say, "IUCN has reviewed the U.S. Navy's Environmental Assessment report (September 2014), and notes that the report does not include a chapter on the impact of this project on the Outstanding Universal Value of the property. IUCN further notes that a part of this proposed Military Operations Area falls within the boundaries of the World Heritage property and recommends the State Party to conduct a full environmental and social impact assessment of activities in and outside the property, which may have potential effects on the overall Outstanding Universal Value."

The Navy's no impact claims are also contradicted by Park Service employees and visitors who have taken photos of low-flying Growler jets.

In addition, Congressman Derek Kilmer requested several months ago that the Navy undertake a sound study under the auspices of the Federal Interagency Committee on Aviation Noise (FICAN), but the Navy failed to do so. Instead, it reconstituted an older study using data from Prowler jets, which are no longer being flown, to justify no significant impacts on the soundscapes of Olympic National Park in the Final NWTT EIS/OEIS. The Navy insists that Growlers are 30 percent less noisy than the Prowlers they replaced, but an independent professional sound study has concluded that they are far noisier. This disparity is precisely why Congressman Kilmer requested the FICAN study. To disregard such a reasonable request on behalf of the public from a sitting United States Congressman vividly demonstrates the Navy's intransigence.

It is obvious that Appendix K is merely a cursory and self-serving summary rather than an honest evaluation. We submit that that the conclusion of no significant impact is specious and without merit because (1) World Heritage status is granted by UNESCO only to places with exceptional, unique and special qualities, (2) UNESCO's letter

clearly contradicts the Navy's conclusion, which shows no evidence of consultation with UNESCO or its cadre of scientists, and (3) the Navy has systematically failed to evaluate cumulative or related effects.

5. Failure to wait until completion Final EIS and Record of Decision before initiating actions:
While the Navy has not changed its preferred alternative from the Draft EIS, it has not specified in the Final which alternative it has chosen, yet it has already applied to NOAA for a permit for incidental take of threatened and endangered species based on a decision not yet made or lawfully reached.

Also, neither the Fish and Wildlife Service nor the Washington Department of Archaeology and Historic Preservation are mentioned as cooperating agencies in public notices for the release of the Northwest Training and Testing EIS. No Biological Opinion from the FWS, and no Section 106 determination from the State Historic Preservation Officer accompany the Final EIS. Section 7 of the Endangered Species Act and Section 106 of the National Historic Preservation Act require that a thorough analysis of impacts to threatened and endangered species, and to historic and cultural properties, respectively, be released to the public before a major federal action commences. Since neither report is available, we conclude that neither has been completed at this time, and that the Final NWTT EIS has been released without them. The Navy has not indicated that it will give the public any opportunity to evaluate impacts described in those two reports, or even evaluate the impacts itself, before signing a Record of Decision.

A Biological Opinion is for the purpose of providing the most recent information and analyses available from expert state and federal biologists using the most up to date scientific literature and data. A determination by the State Historic Preservation Officer is meant to help the public evaluate impacts to cultural and historic sites. The Fish and Wildlife Service published a positive 90-day finding on April 10, 2015, on reclassification of the Northern Spotted Owl from threatened to endangered. The Washington Department of Fish and Wildlife published a report in 2015 concluding that the threatened Marbled Murrelet population has been declining at a rate of 5 percent per year. It is notable that numerous Tribes commented on the Draft EIS expressing concerns about potential impacts. The obvious impropriety of signing a Record of Decision without a Biological Opinion or a Section 106 Determination notwithstanding, how can the public properly inform itself and provide comment? Further, on what legal basis can the Navy sign a Record of Decision without knowing the impacts?

In addition, the Final EIS is still missing a hazardous materials section like the one found in the 2010 Final Northwest Training Range Complex EIS, despite this being requested in previous public comments. The foreclosure of public comments on the Final EIS is a departure from past practice. Has Navy policy changed? If so, what is the legal basis for this change? With such lack of transparency, how can this be considered full public disclosure?

What the Navy does in a NEPA process is the public's business. Our right by law to have a say in the final outcome when the health of our public lands and waters, our wildlife, and our local economies, are at stake, cannot be abrogated.

Because impacts from all of these related activities have been segmented into separate processes that have prevented a more holistic look at what is going to happen on and around the Olympic Peninsula and beyond, it has been impossible for the public to understand and evaluate the full scope of the Navy's activities. Final NEPA documents with major changes, inadequate consultation on endangered species and historic and cultural preservation, no public comment period, and no redress for grievances are flagrant violations of both the spirit as well as the letter of more than one federal law.

Because irregularities in regulatory process have prevented the public, and, at times, federal and state agencies from evaluating the true scope of impacts, ethical and legal questions about the Navy's conduct abound and are the subject of ongoing discussions throughout the Olympic Peninsula and the Puget Sound Region. Hidden notices, comment periods that have been shortened or otherwise wholly eliminated, and last-minute publication of key documents coupled with an absolute disregard for NEPA's prohibitions on segmentation presents a clear and

present danger that the Navy is hastily proceeding with plans that have yet to be properly fettered through federally mandated processes. The Navy brand has already taken an enormous hit because of the tactics that its agents at Naval Air Station Whidbey Island, particularly John Mosher and Michael Nortier, have pursued rather than acting as the "good neighbors" they portray themselves and the Navy to be.

To avoid further deepening this crisis and the legal challenges that will most assuredly follow, we the undersigned no longer request but rather demand that the Navy follow its own policies as well as the law. Specifically, we propose the following action items be undertaken immediately:

Issue notice immediately that the 30 day "waiting period" posted on October 2, 2015 is suspended until such time as wildlife agencies have the opportunity to complete their work in compliance with the Endangered Species Act and other statutory requirements.

Provide any and all information and materials requested by state and federal agencies to undertake a thorough review of this matter.

Grant mitigation requests by these agencies; so far none suggested to date have sounded unreasonable by any measure.

Refrain from signing the Record of Decision until the Navy and the public have had adequate time to review the Biological Opinion, the Section 106 determination from the State Historic Preservation Officer, and the sound study by the Federal Interagency Committee on Aviation Noise (FICAN) that was requested several months ago by Congressman Kilmer.

Refrain from proceeding with activities under a Letter of Authorization from the National Marine Fisheries Service for incidental take of listed species until a preferred alternative has been identified and the public has had time to review and comment on it.

Should the Fish and Wildlife Service's Biological Opinion contain new information or require further evaluation, mitigation, or alteration of activity in order to protect or prevent harm to threatened and endangered species, the Navy must refrain from proceeding with its proposed activity until such matters have been addressed and fully disclosed to the public.

Respond to this letter and to the public with details of what the Navy is doing with regard to consultation with, and a determination from, the State Historic Preservation Officer, under Section 106 of the National Historic Preservation Act.

Publish a comprehensive report identifying every change made in the Final EIS and then re-initiate a public comment period lasting 60 days in order to give adequate opportunity to review and comment on this Northwest Training and Testing Final EIS.

Thank you for your consideration of our concerns. We look forward to receiving a reply from your office.