

SOUTHERN ENVIRONMENTAL LAW CENTER

THE CANDLER BUILDING
127 PEACHTREE STREET, SUITE 605
ATLANTA, GA 30303-1800

Telephone 404-521-9900
Facsimile 404-521-9909
selcga@selcga.org

Charlottesville, VA
Chapel Hill, NC
Atlanta, GA

January 20, 2009

Michael Payne
Permits, Conservation, and Education Division
Office of Protected Resources
National Marine Fisheries Services
1315 East-West Highway
Silver Spring, MD 20910-3225

Re: Letter of Authorization for Taking and Importing Marine Mammals: Navy
Undersea Warfare Training Range

Dear Mr. Payne:

On behalf of Defenders of Wildlife, Florida Wildlife Federation, Georgia Conservancy, North Carolina Wildlife Federation, North Carolinians for Responsible Use of Sonar, Ocean Conservancy, Oceana, Pamlico Tar River Foundation, PenderWatch & Conservancy, and South Carolina Coastal Conservation League, the Southern Environmental Law Center submits these comments on the above-referenced request by the United States Navy for authorization to take marine mammals incidental to the operation of the Navy's proposed Undersea Warfare Training Range (USWTR). The organizations appreciate the opportunity to submit comments on the Navy's Request for Authorization. We recognize the Navy's important role in ensuring the safety of the country. We also value the unique marine mammals that will be adversely affected by the USWTR and encourage the Navy's to execute its training goals in a way that protects our important marine life. Given the flaws in the Navy's Request for Authorization outlined herein, including the grave risks that the USWTR poses to the survival of the North Atlantic right whale, we urge NMFS to refuse to allow the incidental take of marine mammals at the USWTR site.

I. OVERVIEW

Congress enacted the Marine Mammal Protection Act (MMPA) in 1972 to "protect marine mammal species and population stocks that are or may be 'in danger of extinction or depletion as a result of man's activities.'" *Florida Marine Contractors v. Williams*, 378 F. Supp.

2d 1353, 1356 (M.D. Fla. 2005)(citations omitted). Under the MMPA’s section 101(a)(5)(A), the Secretary of Commerce may allow the incidental taking of marine mammals if the National Marine Fisheries Service (NMFS) determines the taking will have no more than a “negligible impact” on a species or stock and that the taking will not have “an unmitigable adverse impact on the availability of such species or stock for taking for subsistence uses[.]” See 16 U.S.C. § 1371(a)(5)(A). NMFS prescribes the “permissible methods of taking pursuant to such activity, and other means of affecting the least practicable adverse impact on such species or stock and its habitat.” *Id.* The MMPA’s regulations define “negligible impact” as “an impact resulting from the specified activity that cannot be reasonably expected to, and is not reasonably likely to, adversely affect the species...through effects on the annual rates of recruitment or survival.” 50 C.F.R. § 216.103.

Pursuant to the MMPA, the Navy has sought authorization from NMFS for the incidental taking of marine mammals that will be adversely affected by the USWTR operations. Included in the MMPA’s definition of “take” is “to harass.” 16 U.S.C. § 1362(13). In regards to a military readiness activity such as the USWTR operations, Level A Harassment is “any act that injures or has significant potential to injure a marine mammal.” 16 U.S.C. § 1362(18)(B)(i). Level B Harassment is “any act that disturbs or is likely to disturb...by causing disruption of natural behavioral patterns...to a point that behavioral patterns are abandoned or significantly altered.” 16 U.S.C. § 1362(18)(B)(ii).

The Navy has requested authorization for the take of 20 species of marine mammal incidental to the USWTR operations over a period of five years. Specifically, the Navy requests authorization from NMFS to take individuals of 20 species of marine mammal by Level B Harassment, including one of the most endangered marine mammals in the world, the North Atlantic right whale.

The construction and operation of the Navy’s USWTR is “reasonably likely” to adversely affect marine mammals and, in the case of certain species such as the right whale, will have far more than a “negligible impact.” Despite the Navy’s predictions to the contrary, the various threats posed by the USWTR—such as vessel collisions with marine mammals and damaging acoustic effects of sonar—may result in Level A harassments of right whales and other marine mammals. In the case of the right whale, a Level A Harassment would have a devastating impact on the remaining population of less than 400 individuals, as NMFS has repeatedly acknowledged in its analysis of the right whale population. The predicted Level B harassments of right whales are also extremely problematic, as these harassments may cause right whales to refrain from normal behaviors necessary to successful breeding and survival of mother and calf pairs in the sensitive critical habitat range just outside of the USWTR.

On the whole, the Navy has failed to “carr[y] its burden of proving that the taking sought does not disadvantage the species involved and is consistent with the policies and purposes of the [MMPA].” *Kokechik Fishermens Assoc. v. Secretary of Commerce*, 839 F.2d 795, 800 (D.C. Cir. 1988). Instead, the Request for Authorization is a mere reproduction of the Navy’s Draft Overseas Environmental Impact Statement/Environmental Impact Statement for the Proposed Undersea Warfare Training Range (DEIS). In addition to repeating its flawed assessment of the USWTR’s impacts, the Navy in its Request for Authorization has unexplainably reduced the

DEIS's number of marine mammals that will be harassed by the USWTR operations. *Compare* Request for Authorization at 112 to DEIS 4.3-61. In fact, DEIS harassment estimates for at least eleven species have been reduced in the Request for Authorization. Specifically, the harassment estimates for the endangered right whale decreased from the DEIS's estimated 48 takes to 45 takes and the harassment estimates for the endangered humpback whale have decreased from the DEIS's 108 takes to 99 takes. *Id.*

As noted in our comments provided to the Navy on its DEIS in October of 2008 (attached hereto), the DEIS fails to provide a meaningful assessment of the environmental impacts of the USWTR, fails to assess the significant cumulative impacts of the USWTR, and fails to offer meaningful mitigation measures to compensate for such impacts. These pitfalls are echoed verbatim in the Request for Authorization, continuing the Navy's deficient analysis of the USWTR's potential impacts to marine mammals. For the reasons discussed below and those described at length in our comment letter on the DEIS, we believe the USWTR will have adverse impacts on marine mammals that far exceed the MMPA's "negligible impact" standard for incidental takings.¹ In the case of the endangered right whale, the installation and operation of the USWTR may fatally compromise the existing population and any taking of an individual right whale contravenes the MMPA's stated goal of achieving an "optimum sustainable population." 16 U.S.C. § 1361(6). Accordingly, we request that NMFS deny the requested authorization.

II. Right Whales

One of our primary concerns with the Request for Authorization is the Navy's continued failure to address the USWTR's potentially devastating impact on the North Atlantic right whale. The installation of the USWTR and operations within the Jacksonville OPAREA present a significant risk to the continued existence of the right whale. The Jacksonville OPAREA contains the only known right whale calving grounds in the world. The proposed 470 operations which will take place in the Jacksonville OPAREA, in close proximity to the calving grounds of right whales, may significantly disrupt right whales' "natural behavioral patterns" such as nursing and feeding, and will heighten the risk of vessel strikes and entanglements to a species that cannot sustain any increase in mortality. Given the fragility of the existing small population of right whales, harassment of 45 individual right whales (over 10% of the population) during the course of one year "is not merely negligible." *Natural Resources Defense Council v. Evans*, 364 F. Supp. 2d 1083, 1110 (N.D. Cal. 2003)(expressing the need for strengthening mitigation measures because "harassment of 12% of a very small population, such as the endangered gray whales near Sakhalin Island, could have a serious impact, affecting their reproduction and survival"). Accordingly, we request that NMFS deny the Navy's Request for Authorization so long as the Navy predicts this significant an impact on right whales.

¹ The USWTR presents significant risks to a multitude of marine life not discussed in the Request for Authorization, such as sea turtles and fish inhabiting the Jacksonville OPAREA. For example, the installation of the USWTR may potentially result in habitat loss for several endangered species of sea turtles that brumate in the Jacksonville OPAREA, and the massive amount of debris discarded during USWTR operations pose entanglement risks to sea turtles as well. The attached comment letter on the Navy's DEIS discusses at length these potential effects to marine life and brings to light the Navy's unjustified and speculative reasoning in dismissing USWTR's adverse impacts.

A. Vessel Collisions

The very existence of the right whale is imperiled by a variety of threats from human activity, and scientists have warned that the likelihood of the species' extinction is imminent. Extreme caution and a variety of measures are urgently needed to ensure the species' survival.² As NMFS has stated, the loss of even one whale from the small existing population from non-natural causes could push the species over the brink of extinction.³ The current status of this species is so tenuous that NMFS has determined the annual allowable removal levels (potential biological removal, or "PBR") for the right whale is **zero**.⁴ As NMFS states in its 2003 Stock Assessment Report, "[t]he total level of human-caused mortality and serious injury is unknown, but reported human-caused mortality and serious injury has been a minimum of 2.07 through 2001." Thus, human-caused harm to right whales since 1994 (when the PBR concept was developed) has consistently exceeded acceptable levels.

NMFS has noted that the greatest known cause of right whale mortality in the western region of the North Atlantic is collision with ships. Of the 50 dead right whales reported since 1986, at least 19 were killed by vessel collisions.⁵ In addition to documented mortalities in this population, many right whales that survive the initial encounter with a vessel suffer serious, chronic injuries that can lead to slow deterioration and eventually disappearance from the population (the carcasses of these chronically injured whales are typically not found as these animals become emaciated and sink when they die). Thus, mortalities caused by ship strikes are likely underestimated. In asserting that the USWTR activities would have a "negligible impact" on the right whale (Request for Authorization at 114), the Navy ignores the best available science on impacts to right whales from ship strikes as well as entanglements and sonar, and unjustifiably dismisses the risks the proposed training range poses to the survival of the species (and potential harms to other marine mammal species).

The MMPA "does not provide for a 'negligible impact' exception to its permitting requirements where incidental takings are not merely a remote possibility but a certainty." *Kokechik Fishermens Assoc.*, 839 F.2d at 802. Although the Request for Authorization explicitly states that "right whales, sperm whales, and gray whales are all hit commonly" and all are present in the Jacksonville OPAREA during at least some portion of the year, the Navy repeatedly asserts a finding of "negligible impact." Request for Authorization at 67. The Navy's conclusion that the likelihood of collisions with whales is "very low" in the Jacksonville OPAREA places undue weight on the notion that trained Naval lookouts will be onboard all vessels and will be able to "detect all objects on the surface of the water, including marine mammals." Request for Authorization at 67. As discussed below, the Navy fails to note the many limitations on the ability to see and avoid collisions, instead repeatedly touting lookouts as an effective means to avoid collisions with whales.

² Kraus, S.D., et al., North Atlantic Right Whales in Crisis, *Science*, July 22, 2005.

³ See NMFS 2003 Stock Assessment Report, available at <http://www.nmfs.noaa.gov/pr/sars/species.htm>.

⁴ NMFS 2007 Stock Assessment Report at 10, available at <http://www.nmfs.noaa.gov/pr/sars/species.htm>.

⁵ Kraus, S.D., et. al, *supra* note 2, at 561. Other threats to the species include fishing gear entanglements, habitat degradation, noise, contaminants, underwater bombing activities, climate and ecosystem change, and commercial exploitation.

B. Entanglements

A glaring omission in the Request for Authorization is any assessment of the adverse impact of the massive amounts of debris that will be disposed of in the ocean during USWTR operations (entanglements are mentioned merely once in the Request for Authorization at 67). Specifically, the Request for Authorization is void of any discussion on the risks of marine mammal entanglement in torpedo control wires, air launch accessories, or parachute lines that remain in the waters of the USWTR after training operations are completed. Scientific evidence suggests that the average rate of serious injuries to right whales caused by entanglements has been increasing in recent years, and that today, entanglements cause from 10% to upwards of 30% of right whale deaths.⁶ The lack of discussion on the risk of entanglements and the absence of any mitigation measures to offset such hazards is indicative of the Navy's speculative and unsupported assertion of "negligible impacts" on right whales.

C. Acoustic Effects

Throughout the Request for Authorization the Navy makes conclusory findings of "negligible impact" without sufficient evidence to support these assertions. Notably, in the Request for Authorization's discussion of acoustic effects of sonar, the Navy acknowledges the paucity of scientific data on the actual acoustic effects of sonar and yet repeatedly determines a "negligible impact." The effects of sonar on marine mammals, and in particular on right whales and their calves, is poorly understood.⁷ Refined information on the impacts of sonar on whales and their likely behavioral responses is critical to understanding, evaluating, and mitigating the likely impacts of sonar. This is particularly true, where, as here, the Navy acknowledges that sonar activities have the potential to cause level B harassment in as many as 45 right whales, and 99 humpback whales. This level of harassment includes the disruption of behavioral patterns including, but not limited to, migration, surfacing, nursing, breeding, feeding, or sheltering to a point where such behavioral patterns are abandoned or significantly altered. Given that this degree of harassment could impact breeding and/or nursing behavior of a significant number of whales, the Navy's conclusion that exposure of right whales to sonar in the Jacksonville OPAREA will result in only "short-term" effects to individuals exposed and will likely not affect rates of recruitment or survival is specious.

The Navy's assessment that Level B harassment may occur, but will have a "negligible impact" on species, appears contrary to the best available science regarding species' survival, which notes that the loss of even two breeding females may ensure the extinction of the species.⁸ The very levels of sound that the Navy relies upon to assess the impacts of sound exposure are questionable. For example, Nowacek, et al. (2004), found that right whales exposed to an

⁶ Knowlton, A.R. and Kraus, S.D., Mortality and Serious Injury on Northern Right Whales (*Eubalaena glacialis*) in the Western North Atlantic Ocean, *Journal of Cetacean Research and Management*, 2001; Johnson, T., Entanglements: The Intertwined Fates of Whales and Fishermen, 2005, at 289. University Press: Gainesville, FL.

⁷ See, e.g., Letter from Noel Holcomb, Georgia Department of Natural Resources to Naval Facilities Engineering Command, March 31, 2008, at 1 [hereinafter Georgia DNR Letter] (noting that the mechanism that produces mortality or morbidity as a result of sonar is uncertain).

⁸ Caswell, H., et al., 1999. Declining survival probability threatens the North Atlantic right whale. *Proceedings of the National Academy of Sciences USA* 96: 3308-3313.

artificial signal from 500-4500 Hz exhibited altered swimming and diving profiles.⁹ These scientists predicted that the signals would likely disrupt feeding behavior at received levels of 133-148 dB re 1µPa, much lower than the Navy's identified threshold for behavioral harassment. Request for Authorization 85-86. As with right whales, the Navy's conclusion that humpback whales will only be subject to 99 Level B harassments and that these harassments will not affect annual rates of recruitment or survival is also circumspect.

The Navy also fails to consider the possibility that whales may be affected by sonar at a significant distance from the source, not just when they are present on the USWTR. Past stranding events demonstrate that even mid-frequency sonar may propagate far enough to cause behavioral modifications in mammals far away from the source, yet the Navy's estimates of harassment levels only report the number of mammals that will be harassed on the USWTR. This limited analysis arbitrarily disregards evidence obtained from a study of other stranding events.

Finally, the Navy fails to consider the potential cumulative impacts from multiple sound exposures. A study jointly conducted by the Navy and NMFS states that research on temporary threshold shifts from multiple sound exposures is being conducted, and cautions that "the precise relationship between TTS onset for comparable SEL values from either single or multiple exposures is unknown."¹⁰ Over time, multiple exposures could lead to impaired hearing abilities, as studies on the effects of sound on terrestrial mammals has shown. Perhaps even more relevant, if feeding behavior is disrupted repeatedly and is combined with other noise events that mask communications among whales or interfere with a whale's navigational abilities, the cumulative effects of multiple sound exposures and disruptions could prove fatal. This is of particular concern with regard to right whales where the loss of even one animal from the small existing population from non-natural causes could push the species over the brink of extinction.¹¹ Considerably more investigation and analysis is warranted before taking further action.

On the whole, the Request for Authorization dangerously dismisses the potential for adverse impacts to the right whale whose continued existence is imperiled by a variety of threats from human activity. The right whale is among the rarest and most endangered of all whales and marine mammal species, and a collection of scientists has warned that the likelihood of the species' extinction is imminent. Extreme caution and a variety of measures are urgently needed to ensure the species' survival,¹² and the Request for Authorization fails to offer such measures or fairly assess the potential impacts from the Navy's proposed actions. Despite the paucity of data and the cautionary notes of expert scientists, the Navy presents its determination of "negligible impact" on right whales and other species with a degree of confidence that cannot be justified.

⁹ See Nowacek, D.P., M.P. Johnson, and P.L. Tyack. 2004. North Atlantic right whales (*Eubalaena glacialis*) ignore ships but respond to alerting stimuli. Proceedings of the Royal Society of London, Series B, Biological Sciences 271:227-31.

¹⁰ NMFS, Office of Protected Resources, Assessment of Acoustic Exposures on Marine Mammals in Conjunction with *USS Shoup* Active Sonar Transmissions in the Eastern Strait of San Juan de Fuca and Haro Strait, Washington, January 21, 2005.

¹¹ See NMFS 2003 Stock Assessment Report, *supra* note 3.

¹² Kraus, et al., *supra* note 2.

III. Cumulative Effects

Assessing the cumulative impacts of the USWTR's installation and operations is a necessary and essential component NMFS' determination of "negligible impact." Similar to its flawed analysis in the DEIS, the Navy's Request for Authorization fails to meaningfully consider the cumulative effects of the USWTR on marine mammals. The Navy's assessment of the USWTR's impacts on marine mammals is deeply flawed—focusing narrowly on the "short-term" nature of the potential adverse environmental impacts, *see* Request for Authorization at 131, and ignoring that cumulative impacts that "can result from individually minor but collectively significant actions taking place over a period of time." 40 C.F.R. § 1508.07. Furthermore, in its repeated nebulous assertion of "short-term" effects, the Navy "provides no information concerning the duration of such temporary impact or the extent of the impact." *Habitat Educ. Ctr., Inc. v. Bosworth*, 381 F. Supp. 2d 842, 853 (E.D. Wis. 2005). Hence, the Navy has provided an inadequate assessment of the impacts on marine mammals and this deficient assessment cannot serve as the basis for NMFS to issue a Letter of Authorization.

Overall, the Request for Authorization fails to assess the potential aggregate impact of USWTR activities occurring over the long-term, and disregards the cumulative impact of USWTR operations in conjunction with other non-Naval activities in the region. The Request for Authorization fails to assess cumulative impact of the myriad activities that will occur on USWTR, including the overall effects of increased vessel traffic, increased underwater sonar activity, and introduction of the thousands of sonobuoys, acoustic device countermeasures, mobile acoustic torpedo targets, parachutes and other materials that will be deployed and abandoned annually in association with sonar and explosives training. In order to meaningfully assess the overall impact of the USWTR operations on marine mammals, the Navy must determine the USWTR operation's aggregate effects. For example, in the Navy's determination of a "negligible impact" on the dwindling right whale population, it must analyze the combined impact of sonar activities and vessel strikes. Unfortunately, the Navy provides no analysis of whether the acoustic effects of sonar heighten the risk of disorientation and consequently increase the risk that a right whale will be unable to avoid a strike by a naval vessel.

Additionally, the Navy fails to provide analysis of the cumulative effects of ongoing activities in the region in conjunction with the planned USTWR operations, such as commercial fishing, shipping, port expansions, mining, and geological exploration. Although each of these activities may not have a serious or lasting negative impact on its own, the combined impacts of these activities and the USTWR operations could have devastating adverse impacts on marine mammal species. Also, despite the fact that the Navy has discussed the potential for mine warfare training and extended echo-ranging systems to be conducted in the USTWR, *see* DEIS 4.8-23 to 26, the Navy has not assessed the potential cumulative impacts that such extended uses would pose to marine life in the area, especially the endangered right whale.

A comprehensive cumulative impacts analysis is particularly critical for endangered species such as the right whale, a species at the brink of extinction due to the cumulative effects of a variety of human activities: entanglement with fishing gear and other debris, noise from commercial shipping and underwater bombing, contaminants, and habitat degradation. The impact from right whales' long-term exposure to Navy sonar could worsen when combined with

the expected substantial increase of vessel traffic in the region. In the DEIS the Navy admits that the “number of large ships is predicted to double over the next two to three decades,” *see* DEIS at 4.8-12, and, yet, the Navy does not consider the substantial increase in underwater noise from increase maritime traffic. In order for NMFS execute its duties consistent with the mandates of the MMPA requiring management that “maintain[s] the optimum sustainable population,” NMFS cannot grant the Letter of Authorization without a fuller analysis of the aggregate impact of USWTR-related activities and other activities occurring in the region on the survival of the right whale. 16 U.S.C. § 1361(60)

Finally, the Request for Authorization fails to assess the cumulative acoustic effects on right whales that annually migrate to the right whale calving grounds and who may be repeatedly exposed to the Navy sonar. The Navy concludes right whale exposure to the activities within the Jacksonville OPAREA would result in short-term effects and would “likely not affect annual rates of recruitment or survival.” Request for Authorization at 131. By describing the acoustic effect on right whales as short-term, the Request for Authorization fails to consider the right whales’ extended stays in and repeated migration to the calving grounds and surrounding areas. Right whales spend four to five months each year in the federally designated critical habitat off the coast of Georgia. In doing so, the Navy fails to consider the incremental impact of continued exposure to Navy sonar. Given the fragile existence of right whales and the vital importance of avoiding any disruption to the breeding and calving activities of right whales, it is incumbent on the Navy to analyze the cumulative effects of Navy sonar on right whales specifically during the four to five months of calving.

IV. Mitigation

As part of the issuance of a take permit, the MMPA requires the Secretary to prescribe methods and means of “effecting the least practicable adverse impact on such species of stock.” 16 U.S.C. § 1371(a)(5)(A)(i)(II). The inadequate mitigation measures discussed in the Request for Authorization demand that, should NMFS issue any Letter of Authorization (which we do not think can be issued as presently proposed), NMFS impose stringent regulations as a condition to the take permit. In the Request for Authorization, the Navy sets forth the same deficient mitigation measures as those discussed in the DEIS. The measures proposed are of speculative value, and the Navy makes no attempt to document their potential for success. The Navy’s most relied upon mitigation measure—placing observers at the bow of ships—reveals an utter lack of any meaningful mitigation proposal. Despite a lengthy discussion of the Navy lookout training and the operating procedures for detecting marine species, the Navy fails to recognize the severe limits of an observer’s ability to detect whales; indeed, an observer can detect whales at a very limited geographic distance.

The limited effectiveness of using lookouts is widely documented, and the Navy’s unsupported reliance on lookouts as the predominant means to avoiding collisions with whales is belied by NMFS’s own recent statements regarding the effectiveness of such lookouts in spotting right whales:

The ability of posted lookouts . . . to detect whales is limited by the difficulty of: (1) Observing animals in low/no light conditions (e.g., night); (2) observing animals in sea states greater than Beaufort 3-4;

and (3) observing whales beneath the surface (where they spend most of their time). **Right whales rarely break the surface and their backs are black or dark grey, making them difficult to spot even under ideal conditions.**

See 73 Fed. Reg. 60173, 60182 (Oct. 10, 2008) (emphasis added). The State of Georgia's Department of Natural Resources has similarly pointed out the flaws in the Navy's reliance on lookouts, noting that "[r]ight whales spend the majority of their time subsurface, making them difficult to detect visually."¹³ Likewise, in comments on the 2005 DEIS, the Florida Fish and Wildlife Conservation Commission pointed out that "[t]he amount of dive time in conjunction with weather/visibility issues . . . will limit the ability of observers to detect marine mammals" and that right whales can be more difficult to spot from a ship than other cetaceans because they lack a dorsal fin.¹⁴ NMFS cannot issue a Letter of Authorization which relies primarily on observers to mitigate the very real risks of harm from sonar and ship strikes in the face of this widespread recognition (and indeed, recognition by NMFS) that observers are ineffective.

The Navy also fails to consider the possibility of strikes by sub-surface submarines during transit and/or operations. The Request for Authorization never mentions strikes by submarines as a source of possible impacts to whales or explains how these potential strikes will be minimized in the absence of lookouts. Considering the grave consequences of one right whale strike, the mitigation measures offered by the Navy are deficient and render the take levels predicted by the Navy in its Request for Authorization arbitrary and meaningless.

The Navy also bases mitigation measures on the use of passive acoustic sonar as an augmenting measure of detecting marine mammals underwater. The Navy states that "all personnel engaged in passive acoustic sonar operation would monitor for marine mammal vocalizations and report the detection...to the appropriate watch station for dissemination and appropriate action." Request for Authorization at 145. Yet the Navy lacks any evidence that passive listening is a reliable means of detecting nearby marine life. First, the Request for Authorization omits any discussion on the vocalizing behavior of right whales, and it fails to recognize that "little is known about the vocalization or diving behavior of right whales on migration or on the calving grounds."¹⁵ Second, the Request for Authorization does not discuss the effectiveness of passive listening during USWTR operations when personnel are engaged in the USWTR operations. In fact, the Navy expressly contradicts its proffered use of passive acoustic sonar as a means of mitigation, stating that Navy personnel's "primary duty is accomplishment of the exercise goals, and they should not be burdened with additional duties unrelated to that task." Request for Authorization at 151-152. If Naval personnel cannot be burdened with additional duties during training exercises, such personnel certainly cannot effectively serve as lookouts or monitor passive listening devices as part of the Navy's proffered mitigation plans. Finally, as NMFS has acknowledged, sonar devices are limited by "[d]etection ranges that are inadequate to provide mariners sufficient time to react...[and] resolution

¹³ *See* Georgia DNR Letter, *supra* note 7, at 2.

¹⁴ *See* Letter from Mary Anne Poole, Florida Fish and Wildlife Commission to Naval Facilities Engineering Command Atlantic, January 26, 2006, at 2-3 [hereinafter Florida Fish and Wildlife Letter].

¹⁵ *See* Florida Fish and Wildlife Letter, at 3.

inadequate to differentiate objects such as whales from other objects in the water.” 73 Fed. Reg. 60173, 60182 (Oct. 10, 2008).

The risk of vessel strikes within the right whale critical habitat and surrounding area is heightened by the USWTR operations. Furthermore, the adverse impact of a whale strike—far exceeding a “negligible impact”—is magnified by the current imperiled state of the small existing right whale population. As mentioned above, the loss of even one animal from the population from non-natural causes could push the species over the brink of extinction.¹⁶ Despite no overlap between the Jacksonville OPAREA and the right whale critical habitat, the Jacksonville OPAREA presents a significant risk to the right whales in the critical habitat. Vessels transiting to and from the home ports and the Jacksonville OPAREA will invariably cross through the right whale critical habitat. Yet the Navy neither specifies nor estimates the number of vessels associated with the USWTR operations that will transit through the critical habitat. Nor does the Navy provide an assessment of the impact of increased vessel traffic from the 470 annual exercises it plans to undertake on the critical habitat just outside of the Jacksonville OPAREA.

The Request for Authorization continues the Navy’s “‘perfunctory description’ or ‘mere listing’ of mitigating measures, without supporting analytical data.” *National Parks & Conservation Association v. Babbitt*, 241 F.3d 722, 734 (9th Cir. 2001). The plain fact that the Navy provided NMFS with the exact same set of deficient mitigation measures after receiving a substantial amount of comments on the DEIS reflects a repeated disregard for the USWTR’s potential impacts on marine mammals. Despite NMFS’ request that that exempt federal agencies, such as the Navy, voluntarily observe a 10-knot speed limit in areas of right whale presence, the Navy eschews the recommended 10-knot speed. Instead, the Navy states that when transiting within the critical habitat the “speed would be the slowest safe speed that is consistent with mission, training, and operations.” Request for Authorization at 148. The Navy’s failure to propose a 10-knot speed limit for vessels in transit to the training range from King’s Bay and Mayport flies in the face of the best available science regarding the avoidance of right whale ship strikes and NMFS’s request that federal vessels observe a 10-knot limit whenever possible.

Moreover, not only does the Navy continue to offer insufficient mitigation measures in its Request for Authorization, but excludes important measures included in the DEIS. Notably, the Request for Authorization excludes the DEIS’s important mitigation measure that cable installation for the Jacksonville OPAREA will not occur during the right whale calving season. *See* DEIS at 6-22. Related to this mitigation measure deletion is the Navy’s failure to elaborate on how collisions with right whales (or other whale species that are present) will be minimized during the construction period, when presumably many ships and pieces of construction equipment will be transiting the critical habitat and operating to bury cable in the areas surrounding the critical habitat. These exclusions ignore the density of whales within the critical habitat and the gravity of a right whale mortality caused by a vessel strike.

Another notable and unexplained digression from the already deficient mitigation measures set forth in the DEIS is the Navy’s reduction of safety zones around naval vessels. This crucial mitigation measures is intended to prevent marine mammals’ exposure to sonar

¹⁶ *See* NMFS 2003 Stock Assessment Report, *supra* note 3.

during training operations. The DEIS proposed that “[w]hen marine mammals are detected...within 1,828 m (6,000 ft) of the sonar dome (the bow), the ship or submarine would limit active transmission levels to at least 6 decibels (dB) below normal operating levels.” See DEIS at 6-7. The Request for Authorization decreases this “safety zone” significantly, requiring shutdown not at the originally proposed 1,828 meters, but instead at 914 meters. Request for Authorization at 145.

V. Level A Harassment

For the reasons described above, it is likely that certain impacts on marine mammals from the USWTR may fall within the category of Level A Harassment. In other words, considering the relatively common occurrence of vessel collisions with whales and the real potential for entanglements in debris discarded on the training range, there may well be USWTR impacts that will “injure[] or ha[ve the] significant potential to injure a marine mammal.” 16 U.S.C. § 1362(18)(B)(i). As described above, it is widely documented that vessel collisions and entanglements frequently lead to marine mammal mortalities. Considering the risks of injury or death from ship strikes and entanglements, the Navy wrongly estimates that its activities will only likely cause Level B harassments. We urge NMFS to consider the potential for incidental takings that go beyond the Level B Harassment authorization requested by the Navy, and to require the Navy to present a more realistic picture of the harm that may result from the USWTR operations as presently proposed.

VI. Least Practicable Adverse Impact

In light of the USWTR’s significant adverse impacts to marine mammals located in the Jacksonville OPAREA, a Letter of Authorization allowing incidental takings could threaten the very existence of certain marine mammal species unless adequate mitigation measures are required by NMFS. In accordance with the MMPA’s requirements, should NMFS authorize the USWTR as proposed (which we again strongly discourage), NMFS must establish stringent “means of effecting the least practicable adverse impact on such species.” 16 U.S.C. § 1371(a)(5)(A)(i)(II). The endangered status of marine mammals necessitates a comprehensive set of mitigation measures based on sound scientific reasoning and analyses, and that addresses the wide array of potential adverse effects, both short-term and cumulative. As part of this process, NMFS must “pay[] particular attention to rookeries, mating grounds, and areas of similar.” *Id.* In order to ensure adequate protection of the endangered right whale whose only known calving ground lies within the Jacksonville OPAREA, NMFS must impose mitigation measures intended to protect the right whale calving grounds and the critical habitat. Specifically, at a bare minimum, NMFS must restrict USWTR activities to exclude operations during the right whale calving season.

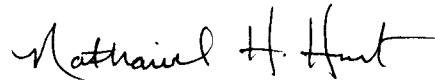
VII. Conclusion

In sum, we believe the USWTR will have significant adverse impacts that exceed the MMPA’s “negligible impact” standard for incidental takings. The Navy’s Request for Authorization presents an incomplete analysis of the USWTR’s potential adverse impacts to marine mammals, and fails to provide any assurances that the USWTR will not affect the long

term viability of certain populations of marine mammals. If the USWTR is implemented as proposed, not only will individual marine mammals incur varying levels of harassment but the very existence of species such as the endangered right whale will be in jeopardy. We urge NMFS to fully scrutinize the many shortcomings in the Navy's impact analysis and proposed mitigation measures and to deny the Letter of Authorization.

Thank you for your consideration of our comments. We would be happy to discuss with you any questions you might have.

Sincerely,

A handwritten signature in black ink that reads "Nathaniel H. Hunt". The signature is written in a cursive style with a prominent initial "N" and a long horizontal stroke at the end.

Nathaniel H. Hunt
Catherine M. Wannamaker