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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

GROUND ZERO CENTER FOR NONVIOLENT ACTION, a Washington non-profit corporation; WASHINGTON PHYSICIANS FOR SOCIAL RESPONSIBILITY, a Washington non-profit corporation; and Glen S. MILNER, an individual,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF THE NAVY; Raymond E. MABUS, Jr., in his official capacity as Secretary of the Navy; Roger M. NATSUHARA, in his official capacity as Principal Deputy Assistant Secretary of the Navy; Terry J. BENEDICT, Rear Admiral, in his official capacity as director of Navy Strategic Systems Programs; Pete DAWSON, Captain, in his official capacity as commanding officer of Naval Base Kitsap; and Christine STEVENSON, in her official capacity as project manager at Naval Facilities Engineering Command Northwest.

Defendants.

NO.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

(National Environmental Policy Act)

I. INTRODUCTION

1. The public has a right to know the environmental and safety implications of a \$715 million plan to build a second explosives-handling wharf at the Bangor nuclear submarine

1 base in Kitsap County, Wash. Contrary to the Navy's claim that it cannot fully explain the
2 reasoning for the project nor openly discuss all risks and alternatives, military projects are
3 not exempt from the National Environmental Policy Act (NEPA). Rather, the mandate to
4 fully disclose significant environmental impacts is especially compelling here, where the
5 Navy plans to double its handling of high explosives at an ecologically sensitive site within
6 the heavily populated Puget Sound region.
7

8 The new explosives handling wharf and related trestles and towers would cover an
9 area of water roughly the size of six football fields, and require the drilling of up to 1,250
10 piles in fragile Hood Canal. A transformation of this magnitude should not proceed
11 without the complete candor required by NEPA. Otherwise, the surrounding communities,
12 as well as the many marine mammals, birds, salmon and shellfish which feed in the project
13 area, will be subjected to unknown risks to health and safety. And NEPA's purpose, to
14 ensure that federal decision-makers and the public are fully informed about all reasonable
15 alternatives, will be frustrated.
16

17 2. The plaintiffs bring claims pursuant to NEPA, 42 USC 4321 et seq, and all of its
18 implementing regulations, and the Administrative Procedure Act (APA), 5 USC 702.
19

20 3. Plaintiffs seek a declaratory judgment that the Navy's decision to proceed with the
21 wharf project was arbitrary, capricious, an abuse of discretion and otherwise contrary to
22 law due to inadequate environmental review and clear error of judgment, and that the
23 decision was made without observance of procedure required by law. Plaintiffs also seek
24 relief pending review pursuant to 5 USC 705. Plaintiffs seek to stop construction of all
25 wharf project components until the Navy has fully complied with NEPA, including
26 disclosing documents vital to the environmental review which were withheld from
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1 publication. The relief requested is necessary to preserve the status quo and to forestall
2 irreparable injury. Pursuant to 5 USC 706, plaintiffs seek to compel an adequate
3 environmental review which has been unlawfully withheld. Plaintiffs also will seek an
4 award of costs and attorney fees pursuant to the Equal Access to Justice Act, 28 USC
5 2412.
6

7 II. JURISDICTION AND VENUE

8 4. Jurisdiction is vested in this Court pursuant to 28 USC 1331 based on questions
9 arising under federal law, and pursuant to the APA, 5 USC 702.

10 5. Venue is proper in the Western District of Washington based on 28 USC
11 1391(e)(1). Upon information and belief, at least two defendants, Naval Base Kitsap
12 Captain Pete Dawson and project manager Christine Stevenson, reside within the district.
13 Also, a substantial part of the events or omissions giving rise to the claims took place
14 within the district. The environmental review was managed in Silverdale, Wash., and
15 involved tests, observations and studies of the environment in and around the Bangor
16 submarine base. The planned wharf site is in northern Hood Canal about two miles from
17 Silverdale. Also, all of the plaintiffs, and most of the organizational plaintiffs' members,
18 reside within the Western District of Washington.
19
20

21 6. The place of filing in Tacoma is proper pursuant to Local Rule 5(e) because the
22 action arose in Kitsap County, Wash., where the Bangor base is located and where the
23 environmental review of the wharf project was managed and conducted.
24

25 III. PARTIES

26 A. Plaintiffs

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1 7. The Ground Zero Center for Nonviolent Action (“Ground Zero”) is a non-profit
2 organization located in Poulsbo, Wash. It owns a building and 3.8 acres of land which is
3 directly adjacent to, and shares 330 feet of fence with, Naval Base Kitsap-Bangor. Since
4 1977, Ground Zero has worked to abolish nuclear weapons partly by conducting vigils and
5 other speech activities near the entrance to Bangor. Ground Zero has expressed a goal to
6 convert the base at Bangor to a peace park or other useful community center, and has
7 worked to promote historic preservation of local Cold War facilities including the “White
8 Train” used to ship nuclear weapons. Ground Zero is entitled to and does bring this suit on
9 behalf of more than 1,000 members, including members who live near the project site.
10 Ground Zero members have used - and plan to continue using - the affected area of Hood
11 Canal for boating, fishing, clamming, hiking, bird watching, photography and other
12 recreation.
13
14

15 8. Washington Physicians for Social Responsibility (“WPSR”), based in Seattle, was
16 formed 25 years ago as a Washington non-profit organization dedicated to preventing
17 nuclear war and to stopping and reversing toxic degradation of the environment. It is a
18 chapter of Physicians for Social Responsibility, the United States affiliate of Physicians for
19 the Prevention of Nuclear War, winner of the 1985 Nobel Peace Prize. Guided by the
20 values and expertise of medicine and public health, WPSR’s mission is to protect human
21 life from the gravest health threats by educating and activating the health community and
22 the public, and by advocating for government and societal change. WPSR is entitled to
23 and does bring this suit on behalf of 2,000 members, including members who live in Kitsap
24 County. WPSR members have used, and plan to continue using, the affected area of Hood
25 Canal for kayaking, bicycling and other recreational activities. In addition, members of
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1 WPSR have engaged and plan to continue engaging in protest activities at Bangor. Each
2 year, WPSR members plan an event that involves traveling to the Bangor base by bicycle,
3 car and boat, and spending the day engaged in protest activities including workshops,
4 speakers, outdoor displays and public forums.

5
6 9. Plaintiff Glen S. Milner lives in Lake Forest Park, Wash. Mr. Milner is a member
7 of Ground Zero. He made comments on the draft and final environmental impact
8 statements for the wharf. As a resident of the Puget Sound area for more than 50 years, he
9 has enjoyed fishing, clamming and boating in the area of the planned explosives handling
10 wharf. He plans to visit the project area in northern Hood Canal for recreational boating
11 and fishing in the future. Mr. Milner regularly participates in peaceful demonstrations near
12 the entrance to the Bangor submarine base. He has advocated for historic preservation of
13 the existing explosives handling wharf at Bangor as a Cold War relic, and for historic
14 preservation of the White Train used to ship nuclear weapons to Bangor.

15
16 B. Standing

17
18 10. NEPA regulations protect the recreational, aesthetic, environmental, health, safety
19 and cultural interests of plaintiffs and their members in using and enjoying the natural
20 setting as well as the roads of the Bangor area.

21
22 11. The Navy's decision to proceed with the \$715 million wharf project in violation of
23 NEPA has injured, is injuring and will continue to injure plaintiffs' interests in ensuring an
24 adequate environmental review.

25
26 12. As a result of the challenged actions, the project will cause Mr. Milner and other
27 Ground Zero members to be adversely affected by increased noise at Ground Zero's
28 property adjacent to the Bangor base and increased traffic in the area of the property.

1 Ground Zero members also will suffer an increased risk that a Trident missile accident
2 could cause harm at the Ground Zero property by the base.

3 13. As a result of the challenged actions, WPSR and Ground Zero members will be
4 adversely affected by increased traffic congestion near the Bangor base entrance, where
5 they regularly conduct speech activities. In addition, WPSR and Ground Zero members
6 will experience more stress when visiting the Bangor area due to their awareness of an
7 increased radioactive and explosive hazard arising from the project.

9 14. As a result of the challenged actions, members of Ground Zero and WPSR will
10 suffer reduced aesthetic enjoyment of Hood Canal when kayaking or boating because the
11 project will damage water quality and marine life, introduce a large unattractive structure
12 where there is now open water, and expose water users to excessive noise from pile-
13 driving. Plaintiffs' members also will lose enjoyment of fishing and clamming because the
14 project will destroy habitat and injure fish and shellfish. They will suffer a loss of quiet
15 solitude for hiking and other recreational activities because the project's pile driving will
16 create excessive noise. And plaintiffs' members will suffer curtailed recreational use of
17 the Bangor area due to the aesthetic, noise and water pollution impacts.

18 15. The plaintiffs' injuries are actual and concrete and would be redressed by the relief
19 sought herein. Plaintiffs have no other adequate remedy at law.

20
21
22 C. Defendants¹

23 16. The Department of the Navy is an agency of the United States as defined by 5 USC
24 701(b)(1). Its stated mission is "to maintain, train and equip combat-ready Naval forces
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¹ This complaint refers to defendants collectively as "the Navy."

1 capable of winning wars, deterring aggression and maintaining freedom of the seas.”² The
2 Department of the Navy was the designated lead agency for the draft, supplemental and
3 final environmental impact statements issued for the wharf project in question.

4
5 17. Raymond E. Mabus, Jr. is the Secretary of the Navy. He is responsible for
6 conducting all affairs of the Department of the Navy, including overseeing construction of
7 Navy facilities such as the second explosives handling wharf at Bangor. Mr. Mabus is
8 sued in his official capacity.

9
10 18. Roger M. Natsuhara is Principal Deputy Assistant Secretary of the Navy. He
11 signed the Record of Decision to proceed with the wharf project. Mr. Natsuhara is sued in
12 his official capacity.

13
14 19. Rear Admiral Terry J. Benedict is the Navy’s director of Strategic Systems
15 Programs. He is responsible for all aspects of research, development, logistics, storage,
16 repair and operational support of the Navy’s Fleet Ballistic Missile Weapon Systems,
17 which include the Trident missile operations at Bangor. He is sued in his official capacity.
18 Strategic Systems Programs is identified as the “action proponent” of the wharf project.

19
20 20. Captain Pete Dawson is commander of Naval Base Kitsap, which includes the
21 Bangor submarine base where the second explosives handling wharf will be built. He is
22 sued in his official capacity. The base supplied information for the environmental review
23 of the wharf project and will host construction and operation of the project.

24
25 21. Christine Stevenson, at Naval Facilities Engineering Command Northwest in
26 Silverdale, Wash., is identified in environmental impact statements for the wharf project as

27
28 ² See <http://www.navy.mil/navydata/organization/org-top.asp>.

1 the “project manager” and a public contact person regarding the project’s environmental
2 review. She is sued in her official capacity.

3
4 IV. FACTUAL BACKGROUND

5 22. Naval Base Kitsap-Bangor (“Bangor”) is located within the populous Puget Sound
6 area just 20 miles west of Seattle, three miles from Silverdale, and two miles from
7 Poulsbo. Bangor occupies five miles of shoreline along the north part of Hood Canal. It is
8 a feeding ground for a wide variety of marine life including whales, seals, sea lions,
9 dolphins, porpoises, great blue herons, marbled murrelets and salmon. The Bangor
10 waterfront includes eelgrass beds which provide habitat for shellfish, and which are used
11 by juvenile salmon for migration and protection from predators. Oyster beds occur along
12 three fourths of the Bangor waterfront.

13
14 23. Bangor’s environment already is stressed. It includes Superfund cleanup sites
15 contaminated by hazardous waste. Two segments of the Bangor waterfront are on the
16 state’s list of impaired waters due to low dissolved oxygen. The site of the planned new
17 Bangor wharf is within an area presently targeted for cleanup and restoration by state and
18 federal agencies. Washington state has an official goal, reflected in RCW 90.71.200, to
19 restore a healthy Puget Sound by the year 2020. The U.S. Environmental Protection
20 Agency has provided \$34 million for the first two years of a six-year, \$192 million effort.³
21 In adopting the 2020 cleanup goal in 2007, the Legislature made the following findings:
22

23 (1) The legislature finds that:

24 (a) Puget Sound, including Hood Canal, and the waters that flow to it are a
25 national treasure and a unique resource. Residents enjoy a way of life
26

27 ³ See <http://www.psp.wa.gov/epafunding.php>.

1 centered around these waters that depends upon clean and healthy marine
2 and freshwater resources.

3 (b) Puget Sound is in serious decline, and Hood Canal is in a serious crisis.
4 This decline is indicated by loss of and damage to critical habit, rapid
5 decline in species populations, increases in aquatic nuisance species,
6 numerous toxics contaminated sites, urbanization and attendant storm water
7 drainage, closure of beaches to shellfish harvest due to disease risks, low-
8 dissolved oxygen levels causing death of marine life, and other phenomena.
9 If left unchecked, these conditions will worsen.

10 24. The Navy originally developed Bangor in 1944 for shipping ammunition during
11 World War II. Bangor became a submarine base in 1977.

12 25. Bangor is presently the home port for eight Trident submarines and for the Trident
13 II D5 strategic weapons system, which is currently undergoing a “life extension program”
14 designed to upgrade missiles to last through the year 2042. Under that program, all D5
15 missiles must be removed from each submarine, modernized and reinstalled.

16 26. According to publicly available Navy documents, each Trident D5 missile has a net
17 explosive weight equivalent to 155,000 pounds of TNT. Each Trident submarine at
18 Bangor carries up to 24 missiles with a combined net explosive weight of *3.72 million*
19 pounds. Each Trident submarine at Bangor is powered by a nuclear reactor, posing
20 additional environmental considerations.⁴

21 27. Bangor now has one explosives handling wharf which it uses to load and unload
22 Trident missiles.

23 ⁴ Records recently released by the Kitsap County Department of Emergency Management show “Emergency
24 Protection Zones” (EPZ), which represent areas on and around Naval Base Kitsap-Bangor potentially
25 affected by a radiological event on the base. One of the largest EPZ areas extends as far east as the
26 intersection of Highway 3 and NW Finn Hill Road and appears to be related to the location of the present
27 explosives handling wharf and the site of the second explosives handling wharf. One of the records, entitled
28 SOP 2.8A, *Hazardous Materials: Radiological Events*, states that regardless of the type of radiological event,
the first action normally would be deciding whether citizens should evacuate or shelter-in-place to minimize
“their exposure to radiation or potential explosions.” The draft and final impact statements for the second
explosives handling wharf do not discuss how the new wharf would affect or would be affected by this
radiological threat.

1 28. The existing explosives handling wharf at Bangor was built in 1978. According
2 to a 1977 supplement to the final environmental impact statement for developing the
3 Trident submarine base at Bangor:

4 The fuel used in...Trident missiles is explosive and must be treated for
5 safety reasons as conventional ammunition. Consequently, missile-laden
6 Trident submarines generate explosive safety distances or arcs under certain
7 operating conditions. These distances are designed to render the inhabitants
8 of nearby communities, the personnel of Naval shore facilities and adjacent
9 public and private property reasonably safe from injury in the event of an
10 accidental explosion. ...

11 The chances of damaging a missile during an onload/offload operation are
12 small, however, the potential seriousness of such an accident dictates that it
13 be considered as an operational factor.

14 The 1977 supplement said that safety “requires a separation distance of 4,661 feet”
15 between certain locations where Trident submarines would be simultaneously docked.

16 29. A 2009 Navy document states that the existing explosives handling wharf at
17 Bangor is sited to safely handle no more than 3.72 million pounds net explosive weight of
18 Hazard Class 1/Division 1 (mass detonation) munitions – the amount associated with a
19 single Trident submarine carrying 24 D5 missiles.⁵

20 30. A 2009 memo from the commander of Navy Region Northwest, available on the
21 Internet and entitled “Instruction 8023.2A,” provides guidance for handling explosive
22 material at Bangor. Among the listed “obligatory requirements” are: “determining that a

23 ⁵ The document is entitled “Authorized Ammunitions and Explosives Handling Piers, Wharves,
24 Explosives Anchorages, and Red Label/Combat Aircraft Loading Areas Within the Puget Sound Area.” An
25 attachment to the document describes additional explosives allowed at other wharves at Bangor:

- 26 a. The Refit Delta Pier is “sited to handle 1000 pounds NEW of HC/D 1.3 and 1.4 munitions
27 at all berths including the drydock.”
28 b. The Service Pier, and Marginal Wharf South, each are “sited for handling two MK 48
torpedoes or two Tomahawk Land Attack Missiles.”
c. The Keyport/Bangor Dock is “sited for handling up to 200 pounds of HC/D 1.3 and 1.4
materials.”

1 comprehensive emergency plan is in place and routinely exercised for explosives
2 incidents” and “knowing if the command holds any waivers or exemptions for deviations
3 from Department of Defense (DOD) Explosives Safety Policies.”

4
5 31. Thus, although the Navy acknowledges a risk of explosive accidents, there is a
6 process for waiving explosive safety policies.

7 32. Site limits on net explosive weight are based on blast zones or “Explosive Safety
8 Quantity Distance” (ESQD) arcs. The arcs take into account how far away an accidental
9 explosion could cause harm to people or property. They establish the minimum safe
10 distance from one explosive material to another, and the minimum safe distance between
11 explosive materials and buildings or highways and waterways.

12
13 33. According to a December 29, 1999 letter to Mr. Milner from Lt. A. K. Minami,
14 legal officer at Bangor:

15 The large ESQD arc from the Explosives Handling Wharf is based on a
16 worse case simultaneous detonation of 24 missile motors (3,720,000 pound
17 net explosive weight (NEW)). ESQD arcs are based solely on the NEW of
18 the missile motor propellant.... The K-18 arc (Intraline) is the distance that
explosive operating buildings (buildings where explosives are handled)
need to be from each other to prevent sympathetic detonation.

19 34. According to a July 11, 1993 Strategic Systems Program operational directive (No.
20 61119) released under the Freedom of Information Act, the Department of Defense
21 Explosive Safety Board “reaffirmed” in 1987 that explosives handling wharves at Bangor
22 have a “grandfathered” minimum separation at a “K-11” level. According to the directive,
23 the Department of Defense changed safety standards to require a larger K-18 arc “for
24 similar situations,” but because that change happened after the Bangor wharves were sited,
25 the smaller safety arc was considered grandfathered in at the Bangor waterfront.
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V. EXPLOSIVES HANDLING PLANS

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2 35. The Navy plans to build a second explosives handling wharf immediately south of
3 the existing wharf at Bangor, and plans to use both wharves to support Trident operations.

4
5 36. Page M-137 of the final environmental impact statement for the second wharf says:

6 The proposed second EHW would be sited by Naval Ordnance Safety and
7 Security Activity (NOSSA) and Department of Defense Explosive Safety
8 Board (DDESB) to allow a single missile handling operation to take place
9 at the same time a handling operation is taking place in the existing EHW.
Accordingly, the full capability of both EHWs would be available to the
TRIDENT mission.

10 37. Thus, the project provides for a doubling of the explosive handling activity that
11 may occur at any given time. And missiles could be loaded or unloaded simultaneously at
12 two wharves in close proximity, instead of only at one wharf as in the past.

13 38. The precise distance between the planned new wharf and original explosives
14 handling wharf was not stated in the environmental review, but will be less than 2,400
15 feet.⁶ That is less than the K-18 arc distance that Navy documents said would ordinarily
16 be required to prevent sympathetic detonation of one wharf due to an explosion at the other
17 wharf. The distance between the existing and planned explosive handling wharves would
18 be based on a single missile exploding, rather than on the worst case of all 24 of a Trident
19 submarine's missiles detonating.
20

21 39. According to publicly available Navy documents, because there would not be a "K-
22 18 arc" (minimum safe distance) to protect one wharf from a worst-case explosion at the
23 other wharf, a "fragmentation barrier" between the wharves is required.
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26 ⁶ Page 3.21-4 of the final impact statement says that the planned new wharf will be 2,400 feet from
27 the Marginal Wharf and even closer to the existing explosives handling wharf. Thus, the new and
28 old explosives handling wharves will be less than 2,400 feet apart.

1 40. The Navy has said that it plans to remove the existing fragmentation barrier at
2 Bangor as part of the pile replacement program for the existing wharf.

3 41. In response to a recent Freedom of Information Act request by Mr. Milner, the
4 Navy said there were no plans to replace the fragmentation barrier.
5

6 42. The new wharf will lack both a K-18 distance from the old wharf and a
7 fragmentation barrier between the wharves, posing a risk of “sympathetic detonation” in
8 case there is an accident at one wharf. However, this risk is not discussed publicly in the
9 draft or final impact statements for the wharf project.

10 VI. ENVIRONMENTAL REVIEW

11 43. The Navy published a final environmental impact statement for the second
12 explosives handling wharf on March 30, 2012, and invited the public to comment on it
13 until April 30, 2012.
14

15 44. On May 18, 2012, the Navy issued a Record of Decision constituting final agency
16 action on the wharf project. The decision said the “Navy has decided to implement the
17 preferred alternative, Alternative 1, Combined Trestle, Large Pile Wharf” because it is
18 “environmentally preferable” and “will fully implement the Navy’s purpose and need to
19 support future program requirements for TRIDENT submarines homeported at” Bangor.
20

21 A. The Project Will Create *Excess* Capacity – Providing More “Operational
22 Days” Than are Needed for Trident Explosives Handling Operations.

23 45. According to the final impact statement, due to the Trident life extension program
24 and the need for an aging weapon system to receive longer and more frequent
25 maintenance, it is necessary to increase explosive handling capacity at Bangor from 200 to
26 400 “operational days” per year.
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1 46. An “operational day” is said to be “any day which supports fleet and missile
2 requirements.” The draft and final impact statements do not explain how it is possible to
3 have more “operational days” than calendar days per year.

4 47. The Navy says the existing Bangor explosives wharf currently provides only 200
5 operational days per year due to required maintenance and a pile replacement program
6 which is expected to last until 2024. Once the pile replacement program is finished in
7 2024, the existing wharf will provide 300 operational days per year.

9 48. The planned second wharf will be designed to add 300 operational days per year to
10 explosives handling capacity at the Bangor waterfront. When adding the 300 days
11 provided by the new wharf to the 200 to 300 days provided by the old wharf, the two
12 wharves together will provide for 500 to 600 operational days per year.

14 49. The Record of Decision acknowledges that “there will be an excess of operational
15 days with two EHWs,” because the two wharves will provide 500 to 600 operational days
16 per year, and only 400 operational days per year is needed to meet Trident system needs.

17 B. So-called Alternatives Varied Only in Physical Design Features.

18 50. The Navy examined six “alternatives” in the draft and final environmental impact
19 statements for the second wharf. Under the rejected “no action” alternative, the Navy
20 would have continued relying on only one explosives handling wharf. All five action
21 alternatives involved building a second wharf, large enough to provide 300 additional
22 operating days per year, “immediately south of” the existing explosives wharf at Bangor.

24 51. The five action alternatives varied only in design (combined v. separate trestles,
25 large v. conventional pile size, and floating v. pile-supported), not in capacity or function.
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1 52. The final impact statement's discussion of "alternatives" consisted mostly of a
2 description of "common components" present in all five action alternatives.⁷

3 53. The analyzed alternatives did not include building a new explosives handling
4 facility at a Navy base other than Bangor. The nation has one other Trident submarine
5 base located in Kings Bay, Georgia. Page M-317 of the final impact statement said a new
6 explosives handling wharf would have less potential to impact protected species at Kings
7 Bay than at Bangor, while asserting without explanation that impacts at Kings Bay would
8 be "generally similar" overall. The Kings Bay location was not analyzed in detail as an
9 alternative to Bangor, and the impact statement did not explain reasons for rejecting it.

10 54. The impact statements also did not examine environmental impacts of building the
11 second wharf at alternative sites within the Bangor base. All five action alternatives
12 assumed a new wharf would be built at Bangor in close proximity to the existing wharf.
13 Page 2-29 of the final impact statement says:

14
15
16 The proposed location for the EHW-2 is the only available location along
17 the Bangor waterfront that ensures designated restricted areas remain within
18 Navy property boundaries and required separation distances between
19 facilities are maintained.... Therefore, all alternatives are located in the
same project area.

20 ⁷According to the final impact statement, common components of the action alternatives included:
21 a. the main wharf will be located 600 feet offshore at a site in close proximity to the existing
22 explosives handling wharf;
23 b. over-water development will include six large lightning protection towers, heavy duty
24 cranes, power utility booms, floating platforms and pile-supported access trestles connecting the
25 wharf to the shore;
26 c. a concrete abutment at the face of the shore cliff where the trestle comes ashore will be 10
27 feet high and up to 230 feet long;
28 d. Tang Road will be extended to connect to the new trestle, and the extension would feature
a security fence up to 170 feet long;
e. a new access road will be built across a wetland;
f. five buildings near the new wharf will be demolished due to NOSSA and Department of
Defense Explosive Safety Board requirements for safe distances from missile handling operations,
and "approximately" 15 other structures near the new wharf will be modified; and
g. the wharf will meet seismic design criteria for a "worst case scenario" earthquake.

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55. The draft and final impact statements did not examine environmental impacts of building a missile-handling facility on land instead of in the water. Page 2-31 of the final impact statement says a land-based facility was ruled out, and not examined in detail, partly because it would not meet explosive safety requirements. The impact statement does not acknowledge that the preferred alternative – a water-based facility – relies on outdated, grandfathered explosive safety requirements.

56. Page N-36 of the final impact statement says the planned second wharf “is the minimum structure that would meet the needed additional operational days.” Similarly, Page M-120 says, “The size of the proposed EHW-2 is the minimum needed to provide the functions of the required facility.” The impact statement does not explain why the Navy could not build a smaller structure providing only 200 additional operational days, which is what the Navy says the Trident program requires, instead of the 300 additional operational days per year which is actually planned. It says only that the new wharf is larger than the old wharf based upon a secret document, “Facility Design Criteria for P-990 Explosives Handling Wharf 2,” developed by Lockheed Martin in 2010.⁸

57. Illustrating the similarity of the examined alternatives, Page 2-3 of the final impact statement says, “Operations would be the same for all action alternatives.” Page 2-35 says “all alternatives would have the same types of environmental impacts.” Page 3.8-64 predicts “the same level of vessel and wharf activity under each alternative.”

⁸ See pages M-5 and 2-3 of the final impact statement.

1 58. The Navy defined its objectives in such narrow terms that only one course of
2 action, building an explosives handling wharf with excess capacity immediately south of
3 the existing explosives handling wharf, would satisfy the purpose and need.

4 59. The Navy did not rigorously explore and objectively evaluate all reasonable
5 alternatives, including “options” evaluated in the business case analysis associated with the
6 NEPA review, such as allowing the existing wharf to operate 24 hours a day, seven days a
7 week.
8

9 C. The Navy Concealed Key Elements of the Impact Statements.

10 60. The environmental impact statements for the second explosives handling wharf
11 discuss a 2010 document called “Facility Design Criteria for P-990 Explosives Handling
12 Wharf 2,” and a 2009 “Navy Waterfront Functional Plan” as providing justification for two
13 wharves in close proximity at Bangor. Both documents are described as secret and are not
14 attached to the impact statements for public review.
15

16 61. The purpose and need for the second wharf is discussed in Appendix A to the draft
17 and final impact statements. The publicly available version of Appendix A consists only
18 of the following “disclaimer”:
19

20 Due to the sensitive nature of DoD UCNI, this information is not available
21 for public dissemination. Chief of Naval Operations Instruction
22 (OPNAVINST) 5570.2, Department of Defense Unclassified Controlled
23 Nuclear Information (DoD UCNI) allows for requests for special access to
24 DoD UCNI. Persons granted access to DoD UCNI must have a need to
25 know the specific information and must meet OPNAVINST 5570.2
26 requirements.

27 62. The “alternatives considered” for the second wharf are discussed in Appendix B to
28 the draft and final impact statements. The publicly available version of Appendix B

1 consists only of a one-paragraph “disclaimer” stating “this information is not available for
2 public dissemination,” the same as in Appendix A.

3 63. The explosive safety arcs for the old and new explosives handling wharves at
4 Bangor are discussed in Appendix C to the draft and final impact statements. The publicly
5 available version of Appendix C consists only of the same disclaimer – “not available for
6 public dissemination” – that is stated in Appendices A and B.

7
8 64. The public was not allowed to read and comment on Appendices A, B and C before
9 the Navy issued the Record of Decision, although the appendices related to the comparison
10 of alternatives. Appendices A, B and C are relevant to the wharf decision, were prepared
11 in connection with the environmental impact statements for the wharf project, and
12 substantiated an analysis that was fundamental to the impact statements, but were not
13 circulated with the impact statements nor made readily available upon request.

14
15 65. The state Department of Ecology, which has some regulatory authority over the
16 second wharf project, commented that public and agency review of potential
17 environmental impacts was hampered by the concealment of Appendices A and B.

18
19 66. In response to public comments opposing concealment of appendices A, B and C,
20 the Navy stated that a NEPA regulation, 40 CFR 1507.3, allows the withholding of
21 “classified information” from NEPA documents.⁹ However, “UCNI” information is, by
22 definition, *not* classified, according to 32 CFR 223.6(b)(1).

23
24 67. The Navy has publicly released ESQD arc information for Bangor in the past
25 without any harmful consequences.¹⁰

26 ⁹ See pages M-108, M-194 and M-232 of the final impact statement.

27 ¹⁰ For example, the 1977 supplemental environmental impact statement for the Trident base at
28 Bangor discussed explosive safety risks publicly. Page M-262 of the final impact statement

1 68. The Navy states on page M-76 of the final impact statement that “the explosives
2 handled at the EHW-2 would mainly be in the form of missile motor propellant.” The
3 propellant is not a nuclear material.¹¹ Even if the Navy’s UCNI regulation applied to
4 discussion of non-nuclear material, the Navy failed to review and revise the regulation as
5 necessary to ensure full compliance with NEPA disclosure requirements.
6

7 69. Page 1-9 of the final impact statement states that all “non-UCNI information
8 regarding purpose and need” for the second explosives wharf is discussed publicly in
9 Chapter 1, Section 2 of the statement. This is not true because the “business case analysis”
10 for the project is not designated as UCNI but was not included in the chapter.
11

12 70. Chapter 1, Section 2 of the final impact statement states that the second wharf is
13 needed to meet the Trident weapon system’s new requirement for 400 operational days per
14 year, and added: “Several different scenarios on how to fulfill this requirement were
15 analyzed in a business case analysis, and the only feasible solution was two EHWs.” No
16 other description of the business case analysis was included in the publicly released impact
17 statements. The business case analysis itself was not attached to the impact statements.
18 The final impact statement refers to the business case analysis as “Secret/Formerly
19 Restricted Data.”
20
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22

23 discusses the fact that ESQD arcs for both the existing and second explosives handling wharves
24 were released to Mr. Milner in response to a FOIA request about eight years ago. The United States
25 Supreme Court held in Milner v. Navy, 131 S.Ct. 1259, 1262 (2011), that ESQD arcs for the Indian
26 Island weapons depot could not be withheld under FOIA Exemption 2. The related Ninth Circuit
27 opinion, Milner v. Navy, 575 F.3d 959, 974 (2009) (Fletcher dissent), noted that ESQD arc maps
28 were publicly released for the Bangor base.

¹¹ The propellant’s primary explosive ingredient is HMX, or octogen, which is not regulated as a
hazardous substance under the Emergency Planning and Community Right to Know Act, 42 USC
11001 et seq.

1 71. A June 30, 2008 announcement in the Federal Register stated that the Navy “will
2 perform a thorough Business Case Analysis” for the second explosives handling wharf at
3 Bangor. The analysis was completed on November 6, 2008.

4 72. The Navy released “an unclassified non-sensitive portion” of the business case
5 analysis to Mr. Milner in response to a Freedom of Information Act request, as noted on
6 Page M-231 of the final impact statement.

7 73. The release of the redacted business case analysis to Mr. Milner signifies that it is
8 neither classified nor UCNI information.

9 74. The portion of the analysis which was released to Mr. Milner was not attached to
10 the draft or final impact statements, nor was it described in the publicly available text of
11 the impact statements.
12

13 75. The business case analysis, Appendices A, B and C, facility design criteria and
14 waterfront functional plan were prepared in conjunction with an action which requires a
15 NEPA analysis, but were not integrated into the environmental documentation.
16

17 76. The business case analysis was relevant to the choice among environmentally
18 different alternatives that were considered for the proposed second wharf, but was not
19 appended to the impact statement nor incorporated by reference as an aid in evaluating
20 environmental consequences.
21

22 77. On April 12, 2012, the undersigned attorney made a Freedom of Information Act
23 request for Appendices A, B and C, the business case analysis, the Facility Design Criteria,
24 the Waterfront Functional Plan and any other underlying documents to the environmental
25 impact statements for the second explosives handling wharf which were withheld from the
26 public review process. To date, the Navy has not released the requested documents.
27

1 D. The Navy Decided to Build a Second Wharf Before Completing the
2 Environmental Review.

3 78. The Navy's Fiscal Year 2013 Budget Estimates, submitted to Congress in February
4 2012, included a request for \$280 million to begin building a second explosives handling
5 wharf at Bangor. The request was submitted before the final impact statement for the
6 second wharf was completed on March 30, 2012.

7 79. The Navy's request for 2013 funding stated that design of the second wharf was
8 complete as of October 2011, that a design-build contract would be awarded in April 2012,
9 and that construction would start in July 2012 and be completed in December 2016. The
10 request to Congress described the project in detail, using the word "will," as if the project
11 already was certain to proceed.

12 80. The House Appropriations Committee voted on May 16, 2012, to approve the
13 Navy's \$280 million request for the second explosives handling wharf as part of the 2013
14 military construction budget. The vote came two days before the Navy issued the Record
15 of Decision for the project.

16 81. Last year, Congress authorized \$715 million for the second wharf project and
17 appropriated \$78 million to begin the project in fiscal year 2012. These decisions were
18 made long before the environmental review was completed.

19 82. On May 9, 2012, the Department of Defense announced on its Web site that EHW
20 Constructors of Virginia "is being awarded" a \$331 million contract "for construction of an
21 explosives handling Wharf No. 2" at Bangor. The press release said the first \$50 million
22 of the contract was "being allocated at the time of award." It identified Naval Facilities
23 Engineering Command Northwest, in Silverdale, Wash., as the contracting entity.
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1 83. The construction contract for the second explosive handling wharf was awarded
2 before the Record of Decision for the project was published on May 18, 2012.

3 84. The announcement of the construction contract limited the choice of reasonable
4 alternatives to building a second explosives handling wharf at Bangor before the Navy
5 issued the Record of Decision to proceed with the project.
6

7 85. The Navy's 2012 and 2013 capital funding requests for the second explosives
8 handling wharf, resulting in Congressional approval of the requests, limited the choice of
9 reasonable alternatives before the Navy issued the Record of Decision to proceed with the
10 project.

11 86. The Navy committed resources prejudicing the selection of alternatives before
12 making a final decision about the wharf project.
13

14 87. The final environmental impact statement served to justify a decision already made
15 rather than as a means of assessing the environmental impact of a proposed Navy action.

16 E. Environmental Impacts Were Not Analyzed Commensurate With Their
17 Importance or As Necessary to Compare Alternatives.

18 88. The majority of the final impact statement is devoted to discussion of potential
19 environmental harm from construction and operation of a second explosives handling
20 wharf immediately south of the existing wharf.
21

22 89. The final impact statement concludes that it is not possible to meet the purpose and
23 need for the project without certain "unavoidable" adverse impacts on the environment
24 which cannot be mitigated. Page 5-1 of the statement lists the "unavoidable" impacts as:

25 a. high levels of underwater and airborne noise from pile-driving, which would harm
26 fish, marine mammals and birds and also would adversely affect people who live near
27 Bangor and/or use the area for recreation;
28

- 1 b. an increase in turbidity of the water (which may increase salmon susceptibility to
2 infections and decrease their ability to catch prey);
- 3 c. loss of eelgrass which is important habitat for threatened species of juvenile
4 salmon;
- 5 d. loss of soft-bottom habitat for marine life;
- 6 e. changes in water circulation, shading, nighttime lighting, and sediment transport
7 and deposition, adversely affecting the abundance of fish, shellfish, marine mammals and
8 marine vegetation in the wharf area, and also changing the behavior of affected species;
- 9 f. permanent destruction of a small wetland due to road construction; and
- 10 g. “increased demand on the transportation system,” including traffic delays due to
11 more openings of the Hood Canal Bridge.

12 90. The Navy’s analysis was insufficient to reach the conclusion that adverse impacts
13 on water quality, marine mammals, fish, shellfish, birds, eelgrass, wetlands, traffic,
14 recreation, and residential noise levels are “unavoidable.” The Navy failed to analyze all
15 reasonable alternatives to building an excess-capacity wharf adjacent to the existing
16 explosives wharf at Bangor, failed to provide any meaningful analysis of the impacts of the
17 “no action” alternative, and failed to identify with specificity all plans for mitigating
18 adverse impacts, making it impossible to reasonably conclude that certain adverse impacts
19 are unavoidable.

20 91. The final impact statement is based partly on outdated data. For example, the Navy
21 used water quality data from 2005 to 2008 and sediment sampling data from 2007. Also,
22 the impact statement does not fully account for results of the Bangor Test Pile Program
23 which was completed in the fall of 2011 and measured impacts of pile-driving noise on
24 marine life.
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1 92. The final impact statement repeatedly asserts that the “no action” alternative would
2 have no impacts on the environment. For example, Page 3.9-49 states there are “no
3 construction or operations-related activities that would disturb marine mammals in the
4 project area under the No-Action Alternative.”

5
6 93. The no-action alternative would have adverse impacts on the environment, but such
7 impacts are not discussed in environmental impacts section of the draft and final impact
8 statements. For example, the pile replacement program already underway at the existing
9 wharf would continue to create harmful pile-driving noise and increased water turbidity.
10 Also, the planned removal of the fragmentation barrier, as part of the pile replacement
11 program, would increase the risk of harm from explosives accidents.

12
13 94. The final impact statement discusses plans related to the existing wharf, which
14 would be carried out under the “no action” alternative, in the cumulative effects section
15 rather than in the environmental impacts section.

16 95. The final impact statement lacks sufficient information to allow a comparison of
17 the impacts of the no-action alternative with the impacts of the action alternatives.

18
19 96. The existing explosives handling wharf is eligible for the National Register of
20 Historic Properties based on its association with the Cold War. Therefore, the
21 environmental impact statement for the second wharf project discusses potential impacts of
22 building the new explosives handling wharf on historic preservation of the old wharf.

23 97. The Navy failed to analyze the risk that an explosion at the second wharf could
24 damage or destroy the historic original wharf. The final impact statement lacks any
25 discussion whatsoever of any possible steps to prevent sympathetic detonation, such as a
26 fragmentation barrier or K-18 arc. Nor was there any analysis of the magnitude or
27

1 likelihood of loss to historic resources caused by placing a new explosives handling wharf
2 in close proximity to the original historic wharf.

3 98. The final impact statement implicitly recognizes the potential for a terrorist attack
4 at Bangor (i.e., stating on Page 4-6 that the Navy has implemented a Swimmer Interdiction
5 Security System there in response to the September 11, 2001 terrorism tragedy). However,
6 the final impact statement does not consider the increased potential for terrorism that will
7 result from building a second explosives handling wharf next to the existing wharf, and
8 does not discuss the potentially catastrophic impact of a terrorist attack at Bangor on the
9 historic existing wharf or other environmental and cultural resources in the Puget Sound
10 area.
11

12 99. In analyzing potential impacts to cultural, water, land and other resources, the Navy
13 repeatedly states that there will be no increase in activity as a result of the second wharf.
14 For example, Page 3.2-17 of the final impact statement asserts that the number and size of
15 accidental fuel and oil spills would not change due to construction of a second explosives
16 handling wharf “because the level of operations...would not increase.”
17

18 100. The assertions that the project will not change activity levels at Bangor - assertions
19 which are fundamental to and pervasive throughout the environmental impacts analysis -
20 are inconsistent with the Navy’s statements that the second wharf is designed to *double* the
21 number of explosives handling operational days per year. Also, the “no increased activity”
22 assertions fail to account for the fact that presently only one missile loading operation can
23 take place at a time, whereas the second wharf will permit two loading operations to occur
24 simultaneously, thereby *doubling* the amount of activity occurring at one time. In addition,
25 the assertions contradict information in the business case analysis, which was withheld
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1 from the public NEPA review process, and which shows that required explosives loading
2 operations will consistently exceed the current wharf's capacity of 200 to 300 operational
3 days per year through 2025.

4 101. Page M-36 of the final impact statement asserts: "No new or increased quantity of
5 explosives would be introduced as a result of the construction and operation of the EHW-
6 2." Page 3.16-1 similarly asserts "there would be no increase in danger." These assertions
7 are incorrect and unsupported by data or analysis.¹²

8 102. The risks of explosive accidents at Bangor have changed significantly since prior
9 studies were conducted.

10 103. The Navy failed to sufficiently analyze potential adverse impacts to the humpback
11 whale, an endangered species observed this year in Hood Canal.

12 104. The Navy failed to sufficiently analyze potential adverse impacts to geoducks.

13 105. The Navy failed to explain in sufficient detail the adverse noise impacts to marine
14 mammals, birds, fish and people from simultaneously conducting up to five pile-driving
15 projects at the same time as pile-driving for the second explosives handling wharf.
16 Although the cumulative effects analysis acknowledges that six pile-driving projects could
17 overlap in time, and "impact more marine mammals" than any one project alone, it lacks
18 discussion of particular impacts on particular species.

19 106. The Navy acknowledged "potential tsunami hazards" at Bangor but failed to
20 analyze reasonably foreseeable impacts, such as severe impacts of a tsunami occurring
21 during missile loading operations at the two explosives handling wharves.

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¹² The list of preparers of the final impact statement does not include anyone with explosive safety expertise.

1 107. The Navy failed to adequately plan and discuss mitigation of adverse
2 environmental impacts, as noted in agency and public comments. The Navy failed to
3 discuss the effect of mitigation on the particular species and particular areas of land and
4 water expected to be harmed by the project, and failed to explain how effective each
5 mitigation action will be.
6

7 108. The Navy failed to adequately respond to numerous criticisms, submitted by tribes
8 and agencies, of Table 4-1 of the supplemental draft environmental impact statement.

9 109. The Navy failed to take a hard look at environmental consequences before
10 committing to the wharf project.

11 110. The Navy failed to consider every significant aspect of the environmental impact of
12 the wharf project.
13

14 111. The Navy failed to inform the public that it has fully considered environmental
15 concerns in its decision-making process. The Navy failed to supply enough background
16 information to establish a rational basis for its conclusions.
17

18 112. The Navy failed to examine the reasonably foreseeable environmental effects of the
19 wharf project in conducting the NEPA review. The agency neglected or failed to mention
20 serious environmental consequences of the wharf project. For example, the Navy failed to
21 analyze the incremental increase in explosive hazards from building a second explosives
22 handling wharf at Bangor on top of the hazard caused by originally siting the existing
23 explosives handling wharf at Bangor.
24

25 113. The Navy's conclusions that there will be no increase in danger, and no increased
26 activity resulting from the second wharf, run counter to the evidence that was before the
27 agency.
28

FIRST CAUSE OF ACTION – APA (5 USC 701 et seq)
VIOLATION OF THE NATIONAL ENVIRONMENTAL POLICY ACT

1
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3 114. Plaintiffs hereby incorporate all paragraphs above as though fully set forth in full in
4 this cause of action.

5 115. The plaintiffs challenge a final agency action for which there is no other adequate
6 remedy in a court.

7 116. Plaintiffs are adversely affected and aggrieved, and are suffering a legal wrong,
8 because of the Navy's decision to proceed with the wharf project in the absence of an
9 adequate environmental review. Plaintiffs use the area affected by the wharf project for
10 recreation, speech activities, travel and, in the case of Ground Zero, routine organizational
11 activities at the property adjacent to the base. Plaintiffs are people for whom aesthetic,
12 cultural, environmental and recreational values of the area will be lessened by the
13 challenged actions. The NEPA procedures which were violated by defendants are
14 designed to protect the plaintiffs' interests in preserving the important aesthetic, cultural,
15 environmental, recreation, wildlife, and historic resources in the Bangor area. A favorable
16 decision is likely to redress the injury to plaintiffs' interests in an adequate environmental
17 review.
18
19

20 117. The defendant officers and employees of the Navy acted in an official capacity in
21 failing to meet requirements of NEPA and its implementing regulations.
22

23 118. The defendants' decision approving the wharf project was arbitrary, capricious, an
24 abuse of discretion and contrary to NEPA because of the inadequacy of the environmental
25 review, and therefore should be set aside pursuant to 5 USC 706(2)(A).
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1 119. The defendants acted without observing the procedure required by NEPA,
2 warranting relief under 5 USC 706(2)(D).

3 120. The NEPA regulations violated by the Navy include, but are not limited to, 40 CFR
4 1500.1, 1500.2, 1500.6, 1501.6, 1501.7, 1502.9, 1502.10, 1502.14, 1502.15, 1502.16,
5 1502.18, 1502.19, 1502.21, 1502.22, 1502.23, 1502.24, 1508.7 and 1508.27.

6
7 121. Relief is warranted under 5 USC 706(2)(C) because defendants acted in excess of
8 authority by withholding unclassified information used in the NEPA review and by
9 moving forward with the wharf project in the absence of an adequate environmental
10 review.

11 SECOND CAUSE OF ACTION – VIOLATION OF APA (5 USC 701 et seq)

12 122. Plaintiffs hereby incorporate all paragraphs above as though fully set forth in full in
13 this cause of action.

14 123. The Defendants offered an explanation for the challenged action which runs
15 counter to the evidence that was before the agency.

16 124. The challenged action is based in whole or in part on clear errors of judgment.

17 125. The Record of Decision should be set aside as arbitrary and capricious action.

18 **RELIEF REQUESTED**

19
20
21 Plaintiffs respectfully request that this court enter judgment in their favor and grant
22 the following relief:

- 23 1. Issue a declaratory judgment that defendants violated NEPA by approving an
24 explosives handling wharf project without first conducting an adequate
25 environmental review;
26

- 1 2. Issue a declaratory judgment that defendants violated NEPA by concealing key
- 2 elements of the environmental impact statement for the wharf project;
- 3 3. Hold unlawful and set aside the Record of Decision approving the wharf
- 4 project;
- 5 4. Issue an order pending review enjoining defendants from commencing
- 6 construction of any component of the wharf project;
- 7 5. Issue an order compelling defendants to complete an adequate environmental
- 8 impact statement before proceeding with the wharf project;
- 9 6. Issue an order postponing the effective date of agency action, and preserving
- 10 the status quo, pending conclusion of judicial review;
- 11 7. Grant leave to supplement the administrative record as needed to determine
- 12 whether defendants considered all relevant factors and explained the decision;
- 13 8. Grant leave to amend the Complaint to add claims under the Freedom of
- 14 Information Act, 5 USC 552.
- 15 9. Award plaintiffs their costs and reasonable attorney fees pursuant to 28 USC
- 16 2412;
- 17 10. Provide such other relief as the Court deems just and equitable.
- 18
- 19
- 20
- 21

22 DATED this ____ day of June 2012.

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