

**AGREEMENT REGARDING RESEARCH FUNDING BY AND AMONG THE U.S. DEPARTMENT OF THE NAVY, CONSERVATION COUNCIL FOR HAWAI'I, ANIMAL WELFARE INSTITUTE, CENTER FOR BIOLOGICAL DIVERSITY, OCEAN MAMMAL INSTITUTE, NATURAL RESOURCES DEFENSE COUNCIL, INC., CETACEAN SOCIETY INTERNATIONAL, ANIMAL LEGAL DEFENSE FUND, PACIFIC ENVIRONMENT AND RESOURCE CENTER, AND MICHAEL STOCKER**

The U.S. Department of the Navy ("Navy") and the Plaintiffs in *Conservation Council for Hawai'i, et al. v. National Marine Fisheries Service, et al.*, Civ. No. 13-00684 SOM/RLP (D. Hawai'i), and *Natural Resources Defense Council, Inc., et al. v. National Marine Fisheries Service, et al.*, Civ. No. 14-00153 SOM/RLP (D. Hawai'i) (the "Consolidated Actions"), including Conservation Council for Hawai'i, Animal Welfare Institute, Center for Biological Diversity, Ocean Mammal Institute, Natural Resources Defense Council, Inc., Cetacean Society International, Animal Legal Defense Fund, Pacific Environment and Resource Center, and Michael Stocker (collectively "Plaintiffs"), by and through undersigned counsel, state as follows:

WHEREAS, on March 31, 2015, the Court in the Consolidated Actions issued an Opinion and Order granting the Plaintiffs' motions for summary judgment as to the merits of their claims (ECF No. 98);

WHEREAS, having bifurcated proceedings on liability and remedy, the Court directed the Parties to the Consolidated Actions to submit, by April 14,

2015, a proposed schedule for further proceedings to determine appropriate relief (ECF Nos. 38, 100);

WHEREAS the Parties subsequently stipulated to multiple extensions of the April 14, 2015 deadline to allow for settlement negotiations, and the Court approved those stipulations (ECF Nos. 103, 105, 107, 111, 113, 115);

WHEREAS the Parties to the Consolidated Actions, through their authorized representatives, and without any admission of fact or law with respect to Plaintiffs' claims, reached a settlement resolving the claims raised in Plaintiffs' second amended complaints (ECF Nos. 40-41), except for Plaintiffs' claims for awards of attorneys' fees and litigation costs;

WHEREAS the terms of the Parties' agreement are set forth below and in a separate Stipulated Settlement Agreement that will be filed with the Court which, upon the Court's approval, will result in the dismissal of Plaintiffs' claims with prejudice;

WHEREAS, as part of the Parties' agreement, the U.S. Department of the Navy ("Navy") agreed to fund beaked whale research as described below, but the Navy and the Plaintiffs in the Consolidated Actions agreed that this provision of their agreement would be addressed in a separate agreement that would not be filed with or enforceable by the Court;

WHEREAS the Navy and the Plaintiffs in the Consolidated Actions agree that settlement in the manner described below and in the separate Stipulated Settlement Agreement is in the public interest and is an appropriate way to resolve the disputes between them;

THE NAVY AND THE PLAINTIFFS IN THE CONSOLIDATED ACTIONS THEREFORE AGREE AS FOLLOWS:

1. This Agreement shall take effect only when all three of the following conditions have been met: (a) the Agreement has been signed by the Navy and the Plaintiffs in the Consolidated Actions; (b) the separate Stipulated Settlement Agreement has been signed by all Parties to the Consolidated Actions and filed with the Court; and (c) the Court has entered the Stipulated Settlement Agreement as the Court's order, adopting the Stipulated Settlement Agreement's terms and dismissing the Consolidated Actions with prejudice.

2. All negotiations leading up to the execution of this Agreement, including, to the extent allowable by law, any correspondence or other documents exchanged during and for the purpose of settlement negotiations, are confidential, and will not be discussed or disclosed except to the Parties and their representatives.

3. The Navy agrees to spend \$3 million over the course of three years, from Fiscal Year ("FY") 2016 (October 1, 2015 through September 30, 2016) to

FY 2018 (October 1, 2017 through September 30, 2018), to fund research projects relating to Cuvier's beaked whales within the following research topic areas:

- Obtain additional data on the abundance, site fidelity, age-class distribution, and habitat use of Cuvier's beaked whales that are regularly exposed to Navy training and testing activities within the Southern California Range Complex, to better understand the population-level effects these activities may have on this species.
- Collect data and develop tools to help characterize beaked whale foraging ecology typical of areas within California (e.g., San Nicolas Basin), including beaked whale prey. Conduct demonstrations of these tools to test effectiveness.
- Use passive acoustic methods (e.g., drifting or glider-mounted hydrophones) to assess broader distribution and habitat preferences of beaked whales within the Southern California Range Complex outside the Southern California Anti-submarine warfare Range ("SOAR") across broad spatial and temporal scales.

4. Any work funded with FY 2016 to FY 2018 appropriations that is within the three research topic areas will be counted against the \$3 million, including work within the three research topic areas that Navy already planned to perform independent of this Agreement. The Navy also reserves the right to fund ongoing and new contracts and grants using FY 2016, FY 2017 and/or FY 2018 funds for work within the three research topic areas, and to have that funding count against the \$3 million, for projects that may build on work accomplished before the Agreement is executed. Thus, task orders, delivery orders or contract

modifications under existing contracts or grants that are funded after this Agreement and that are within the three research topic areas will be counted against the \$3 million, including options on existing contracts or ongoing grants that are funded after the Agreement is executed. New contracts or grants that are within the three research topics and are awarded after the Agreement is executed by all parties will also be counted against the \$3 million.

5. In the event that project costs under the research topic areas do not realize \$3 million over three fiscal years, the Navy shall, subject to the availability of appropriated funds, apply FY 2019 funding towards projects in the research topic areas to achieve \$3 million over four fiscal years.

6. The Navy will provide written, post-award notice to Plaintiffs of the projects funded under the three research topics, with the following data elements: date of contract/grant; number of contract/grant; contractor's name; Principal Investigator's name; title of project (work being done); amount of contract/grant; performance period.

7. The Navy will provide Plaintiffs with progress reviews in the form of peer-reviewed publications or annual reports on the research projects funded under the three research topic areas. In addition, the Navy will provide annual information briefs at a mutually agreed location (including teleconference) to Plaintiffs on the research projects funded under this Agreement with the

opportunity for dialog that does not infringe on selection and oversight duties of Navy offices responsible for research.

8. Projects funded pursuant to the three research topic areas described in paragraph 3 will be funded through general appropriations, if made available by Congress, beginning in fiscal year 2016. Navy agreement to fund projects under the three research topic areas will be subject to the availability of appropriated funds. The Navy agrees to seek sufficient funding through its budgetary process to fulfill its obligations under this Agreement. Any requirement for the payment or obligation of funds by the Navy, however, shall be subject to the availability of appropriated funds, and no provision herein shall be interpreted to require the Navy or any Defendant to obligate or pay funds in violation of the Anti-Deficiency Act, 31 U.S.C. § 1341, or any other law or regulation.

9. Nothing in this Agreement shall be construed to modify or limit the discretion afforded to the Navy under the Marine Mammal Protection Act, the National Environmental Policy Act, the Endangered Species Act, or principles of administrative law. No provision of this Agreement shall be interpreted as constituting a commitment or requirement that the Navy take actions in contravention of the Endangered Species Act, the Marine Mammal Protection Act, the National Environmental Policy Act, the Administrative Procedure Act, or any other law or regulation, either substantive or procedural.

10. This Agreement does not constitute a concession by any signatory as to: (a) the potential impacts on beaked whales or any other form of marine life of any aspect of the Navy's training or testing activities within the Hawaii-Southern California Training and Testing Study Area; (b) the validity of any fact or legal position concerning the claims or defenses in the above-captioned consolidated actions; or (c) the extent of measures applicable to the Navy's training or testing activities in the Hawaii-Southern California Training and Testing Study Area required to comply with the Marine Mammal Protection Act, the National Environmental Policy Act, the Endangered Species Act, or any other provision of law.

11. This Agreement has no precedential value and shall not be used as evidence in any litigation or administrative proceeding except as necessary to enforce its terms.

12. This Agreement was jointly drafted by the Navy and the Plaintiffs in the Consolidated Actions. Accordingly, any and all rules of construction to the effect that ambiguity is construed against the drafting party shall be inapplicable in any dispute concerning the terms, meaning, or interpretation of this Agreement.

13. Nothing in this Agreement confers jurisdiction on a U.S. District Court to enforce any part of this Agreement.

14. This Agreement and the Stipulated Settlement Agreement constitute the entire agreement of the Parties to the Consolidated Actions, and no statement, agreement, or understanding, oral or written, that is not contained in this Agreement or the Stipulated Settlement Agreement shall be recognized or enforced. Except as expressly stated in this Agreement or the Stipulated Settlement Agreement, this Agreement and the Stipulated Settlement Agreement supersede all prior agreements, negotiations, and discussions between the Parties with respect to the subject matters discussed herein and in the Stipulated Settlement Agreement.

15. The undersigned certify that they are authorized to enter into this Agreement and to execute and legally bind the Party listed to the terms and conditions of this Agreement.

16. This Agreement may be executed in multiple counterparts, each of which shall constitute an original, and all of which taken together shall constitute one and the same agreement. This Agreement may be executed by a letter, electronically, by facsimile, or by electronic mail, and such an electronically delivered signature will be deemed to be as valid as an original signature.



EARTHJUSTICE  
850 Richards Street, Suite 400  
Honolulu, Hawai'i 96813

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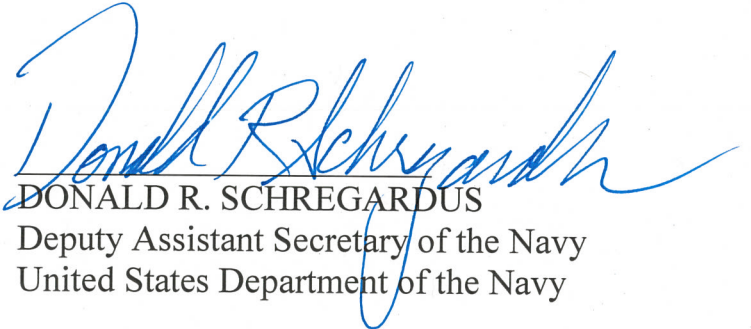
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Ocean Mammal Institute, Plaintiffs in  
Case No. 1:13-CV-00684-SOM-RLP  
(D. Hawaii)

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DATED: September \_\_, 2015

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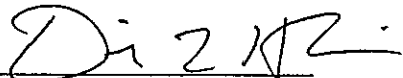
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00153-SOM-RLP (D. Hawaii)



DONALD R. SCHREGARDUS  
Deputy Assistant Secretary of the Navy  
United States Department of the Navy

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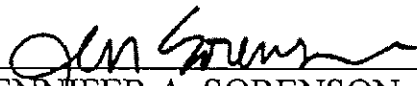
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DONALD R. SCHREGARDUS  
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