

THE HONORABLE THOMAS S. ZILLY

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CITIZENS OF EBEBY’S RESERVE FOR A
HEALTHY, SAFE & PEACEFUL
ENVIRONMENT,

Plaintiff,

v.

U.S. DEPARTMENT OF THE NAVY;
ADMIRAL BILL GORTNEY, in his official
capacity as the Commander, Fleet Forces
Command; and COMMANDER MIKE
NORTIER, in his official capacity as
Commander Naval Air Station Whidbey
Island,

Federal Defendants.

NO. 2:13-cv-01232-TSZ

MOTION FOR PRELIMINARY
INJUNCTION

NOTE ON MOTION CALENDAR:
JUNE 5, 2015

Oral Argument Requested

I. INTRODUCTION

Plaintiff Citizens of Ebey’s Reserve for a Healthy, Safe, and Peaceful Environment (“COER”) seek a preliminary injunction prohibiting the U.S. Department of the Navy (“Navy”) from all further operations of the EA-18G Growler Aircraft at Naval Air Station Whidbey Island’s (“NASWI”) Outlying Landing Field Coupeville (“OLF Coupeville”) until the Navy completes its proposed Final EIS fully

1 evaluating the environmental impacts, including human health impacts, of aircraft operations at OLF
2 Coupeville.

3 **II. EVIDENCE RELIED UPON**

4 This motion is supported by the following evidence:

- 5 1. Expert declarations from James Dahlgren, M.D., Karen Bowman, MN, RN,
6 COHN-S, Ann Dannhaur, M.D., and Jerry G. Lilly.
7
8 2. Fact declarations from Cecelia Askins, Maryon Attwood, Isobel Kameros, Jan
9 Pickard, Kenneth Pickard, Bradley Portin, Katlaina Rayne, Gerald Roberts, Daniel Schurr, Janis
10 Schurr, Brenda Frische Wilbur, and Robert Wilbur.
11
12 3. The Declaration of David S. Mann identifying exhibits.

13 **III. STATEMENT OF FACTS**

14 **A. OLF Coupeville**

15 NAS Whidbey Island is located in Island County, Washington, approximately 80 miles
16 north of Seattle and approximately 34 miles northwest of Everett, on Whidbey Island.¹ Ault Field
17 is the primary operational facility for NAS Whidbey Island and the location of the central airfield.
18 As the primary air field, flight operations at Ault Field include arrivals, departures, and patterns
19 including Field Carrier Landing Practice (“FCLP”). This case concerns flight operations at the
20 Navy’s OLF Coupeville. OLF Coupeville is located approximately 10 miles southeast of Ault
21 Field and consists of a single runway oriented roughly north to south.² OLF Coupeville is used
22 primarily for Field Carrier Landing Practices (“FCLP”)” operations. FCLP sessions consist of a
23 squadron of up to 5 aircraft flying a low elevation “racetrack” type pattern where each plane
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26 ¹ Declaration of David S. Mann, Ex. 1, pp. 5-6 (Final Environmental Assessment for Replacement of EA-6B Aircraft with EA-18G Aircraft at Naval Air Station Whidbey Island, Washington (“2005 EA”)).

² Mann dec., Ex. 1, p. 7, Figure 1-1 (Map).

1 perform repeated simulations of landing and taking off (at full power) from an aircraft carrier.³
 2 FCLP sessions are conducted during both day and night hours. Sessions last approximately 45
 3 minutes to an hour.⁴

4 The Navy has designated two “flight paths” for OLF Coupeville. Flight path 32 is for
 5 aircraft arriving from the south and departing to the north. Flight path 14 is for aircraft arriving
 6 from the north and departing south. Currently almost all FCLP operations at OLF Coupeville use
 7 Flight path 32.⁵ The flight path for most daytime and nighttime FCLPs at OLF Coupeville passes
 8 directly over upwards of a 1000 homes, including the Admirals Cove residential neighborhood.⁶
 9 The Admirals Cove neighborhood alone is densely populated with over 600 homes and 1200
 10 residents including many children.⁷ Both flight paths cross directly over the Ebey’s Landing
 11 National Historic Reserve.⁸

12
 13
 14 The Navy has three levels of “Accident Potential Zones” or “APZs” that it applies to its
 15 active airfields.⁹ APZs are based on historical accident and operations data and are designed to
 16 provide for a margin of safety if an accident were to occur.¹⁰ The “Clear Zone” is required for all
 17 active runways and constitutes a trapezoidal area immediately beyond the end of the runway and
 18 extending 3000 feet. The “APZ-1” is a rectangle measuring 3000 feet wide by 5000 feet long
 19 extending beyond the Clear Zone. The APZ-2 is an additional rectangle measuring 3000 feet
 20

21
 22 ³ Mann Dec. Ex. 2 (“Field Carrier Landing Practices: The Foundation of Carrier Aviation” Naval Air
 Systems Command news (June 17, 2002)) *See also*, Mann dec., Ex. 3, p 3-4 (“AICUZ Study Update for Naval
 Station Whidbey Island’s Ault Field and Outlying Landing Field Coupeville, March 2005”).

23 ⁴ *Id.*

24 ⁵ Declaration of Maryon Attwood, ¶¶ 5-7.

25 ⁶ Mann dec., Ex. 3, p. 2-13; Ex. 4, p. I-8 (NAS Whidbey Island Operations Manual 3710.1Y, (October 31,
 2013)).

26 ⁷ Declaration of Cecilia Akins, ¶ 2.

⁸ Mann dec. Ex. 4, p. I-8, Ex. 5 (Maps of Ebey’s Landing National Historic Reserve). *See also*, Declaration
 of Kenneth Picard, ¶¶ 6-7.

⁹ Mann dec., Ex. 3, p. 5-9.

¹⁰ *Id.*

1 wide by 7000 feet long extending beyond the APZ-1.¹¹ The Navy finds that certain land uses,
 2 including single family homes, are “incompatible in high noise areas and APZs.”¹² As a result,
 3 the Navy recommends that no residential uses be allowed within the APZ-1 and residential uses
 4 within the APZ-2 be limited to 1-2 dwelling units per acre.¹³

5
 6 The Navy has designated all three levels of APZs in proximity to Ault Field. *Id.*, p. 5-11.
 7 As a result, Island County has adopted an Airport and Aviation Safety Overlay, consistent with
 8 the Navy’s recommendations, limiting residential development within the Ault Field APZs.¹⁴
 9 Other than the mandatory Clear Zone already located on Navy property, the Navy has *not* adopted
 10 APZs for OLF Coupeville.¹⁵ If it had, an APZ-1 zone at OLF Coupeville would include the
 11 residential community of Admirals Cove.¹⁶ Since Island County’s Aviation Overlay does not
 12 include APZ’s for the OLF-Coupeville area¹⁷ essentially unrestricted and substantial residential
 13 construction within what would be APZ-1 and APZ-2 zones has proceeded and continues.¹⁸

14
 15 **B. The Navy’s 2005 Environmental Review of the Introduction of the EA-18G**

16 Between 1971 and 2008, the Navy used the EA-6B Prowler for its Airborne Electronic
 17 Attack (AEA) mission. In 2003 there were 14 squadrons with a total of 72 EA-6B Prowler
 18 aircraft operating out of NAS Whidbey Island. Nine of the 14 squadron were “carrier air wing”
 19 (CVW) squadrons. The CVW squadrons are deployed aboard aircraft carriers. The CVW
 20 squadrons are the primary aircraft practicing FCLPs at Ault Field and OLF Coupeville.¹⁹

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 22
 23

 24 ¹¹ *Id.*

25 ¹² *Id.*, p. 6-2.

26 ¹³ *Id.*, p. 6-12.

¹⁴ Mann dec., Ex. 6.

¹⁵ Mann dec., Ex. 3, p. 5-11.

¹⁶ Mann dec., ¶ 8, Ex. 7 (Map with overlay).

¹⁷ Mann dec., Ex. 6.

¹⁸ Askins Dec., ¶ 3.

¹⁹ Mann dec., Ex. 1, p. 5.

1 Beginning in 2003 the Navy proposed replacing the EA-6B aircraft at NASWI with the
2 EA-18G “Growler” – a variant of the F/A-18 F “Super Hornet” strike fighter aircraft.²⁰ The Navy
3 proposed replacing all of the aging EA-6B Prowlers with the newer, more powerful, EA 18-G
4 Growlers between 2008 and 2013.²¹ In January 2005 the Navy published its Final Environmental
5 Assessment for Replacement of EA-6B Aircraft with EA-18G Aircraft (“2005 EA”). The Navy
6 proposed replacing the existing 72 EA-6B Prowlers with 57 EA-18 Growlers by 2013. While the
7 Navy proposed reducing the overall number of aircrafts, it proposed *increasing* the number of
8 aircraft assigned to the “carrier wing squadrons” (those primarily practicing FLCP operations at
9 OLF Coupeville) by one aircraft per squadron, or 10 additional aircraft conducting FCLP practice
10 at OLF Coupeville.²²

11
12 The 2005 EA purported to analyze the environmental impact of noise from the EA 18G
13 Growlers on the residential community surrounding OLF Coupeville. The noise analysis was not
14 based on actual noise measurements. Instead the 2005 EA relied on a predictive model to
15 determine annual average noise levels. The noise analysis in the 2005 EA was prepared using the
16 Day-Night Average Sound Level (“DNL” or “L_{dn}”) metric. As the 2005 EA explained:
17

18
19 DNL is a composite metric that averages all noise events for a 24
20 hour period, with a 10-dB penalty applied during nighttime
21 events after 10 p.m. and before 7 a.m. It is an average quantity,
22 mathematically representing the continuous A-weighted sound
23 level that would be present if all of the variations in sound level
24 that occur over a 24 hour period were smoothed out to contain the
25 same total sound energy. DNL does not represent the sound
26 level heard at any particular time, but quantifies the total sound
energy received.²³

²⁰ The EA-18G is equipped with the same electronic weapons system as the EA-6B, allowing it to perform the same AEA mission that was being performed by the EA-6B. See Mann dec, Ex. 1 (2005 EA) at p. 15, Figure 1-3 for comparison. See also, Mann dec., Ex 3, pp. 3-2 to 3-3.

²¹ Mann dec., Ex. 1, p. 8.

²² Mann dec., Ex. 1, pp. 9 -10.

²³ Mann dec., Ex. 1, p. 36.

1 In other words, the DNL is a smoothed average and does not provide information on individual
 2 events that occur on any given day. While DNL is, by definition, a 24-hour metric, the 2005 EA
 3 applied the DNL as an annual average for the daily operations. *Id.*, pp. 37-38. Thus, the Navy's
 4 2005 noise analysis assumed annual averages that included non-operational or "quiet" days in
 5 order to reach its modeled noise predictions.²⁴

7 The EA did not include any actual noise measurements from operations at OLF
 8 Coupeville. Betraying the EA's true purpose, to justify the continued use of the OLF, it actually
 9 predicted that introduction of the EA-18G would *reduce* noise impacts. This prediction assumed
 10 that there would be a reduction in the number of flight operations at OLF Coupeville with the
 11 introduction of the EA-18G. The assumption of fewer operations was based on a distortion of the
 12 actual data. In order to arrive at this conclusion, the 2005 EA used as its baseline calendar year
 13 2003, in which 7,682 operations were conducted at OLF Coupeville.²⁵ The 2005 EA then
 14 projected that after the introduction of the EA-18G there would be 6,120 flight operations at OLF
 15 Coupeville by 2013.²⁶ Thus, according to the 2005 EA, FCLP operations at OLF Coupeville
 16 would be 20% less than 2003 operations.²⁷

19 The 2005 EA omitted to disclose, however, that calendar year 2003 was an anomalously
 20 high year for FCLP operations at OLF Coupeville. During the five year period between 2000 and
 21 2004, the following number of FCLP operations were conducted at OLF Coupeville:

22 2000 6537 operations

24 ²⁴ See Declaration of Jerry G. Lilly, ¶ 14.

25 ²⁵ Mann dec., Ex. 1, App A, Table A.1. Because each FCLP includes both a landing and a takeoff, a single FCLP counts as two flight "operations." 2005 EA, App A., Table A.1.

26 ²⁶ *Id.*, App. A, Table A.2. The 2005 EA also projected a total of 18,282 FLCP operations at the main Ault Field in 2013. *Id.* .

27 ²⁷ *Id.*, pp. 42-43.

1 2001 3,568 operations
 2 2002 4,100 operations
 3 2003 7,682 operations
 4 2004 4,314 operations²⁸

5 The five year average (including the anomalous 2003) of 5,208 FCLP operations is
 6 significantly lower than the 7,682 operations presented as existing conditions in the 2005 EA.
 7 Thus, the projected 2013 level of 6,120 FCLP operations relied on in the 2005 EA to conclude a
 8 net reduction in anticipated FCLPs, actually represents an 18 percent *increase* in operations over
 9 the five year average at the time the 2005 EA was prepared. Further, in 2005, the year the EA
 10 was published, there were only 3,529 FCLP operations at OLF Coupeville. Thus, the 2005 EA
 11 projected a 73 percent increase in FCLPs from the level flown in 2005.²⁹

14 **C. Introduction of the EA-18G**

15 According to Navy records, the first EA-18G arrived at NASWI in June 2008.³⁰ After
 16 simulator training, the EA-18Gs began FCLP operations in June 2009.³¹ From then on the
 17 number of FCLP operations at OLF Coupeville steadily increased:

18 2009 5,292 operations
 19 2010 6,476 operations
 20 2011 9,378 operations
 21 2012 9,668 operations³²

24 ²⁸ *Id.* App. A, Table A-4; Mann dec. Ex. 8 (NAS Whidbey Island Air Traffic Activity Reports, 2001-
 25 2006).

26 ²⁹ A downward trend in OLF Coupeville operations continued until the EA-18G was introduced. In 2006
 there were 3413 FLCP operations at OLF-Coupeville. Mann dec., Ex. 8. In 2007 there were 3,976 FCLP operations
 and in 2008 there were 2,548 FCLP operations. Mann dec., Ex. 9.

³⁰ Mann dec. Ex. 10, p. 3 (July 17, 2014, FOIA Response).

³¹ Mann dec. Ex. 9, pp. 4-8.

1 Thus, by 2012, the actual number of FCLP operations at OLF-Coupeville exceeded the 6,120
 2 projected in the 2005 EA by over 50 percent. The actual number of operations exceeded the five
 3 year average between 2000 and 2004 by over 85 percent.

4 Meanwhile, at the main Ault Field FCLP operations remained significantly below the
 5 levels projected in the 2005 EA. While the 2005 EA projected up to 18,282 FCLP operations at
 6 Ault Field by 2013, only 10,116 FCLP operations were conducted in 2011, and 11,700 operations
 7 in 2012.³³ This trend continues with only 11,508 FLCP Operations conducted at Ault Field in
 8 2014. Dkt 17-3, p. 13.

10 **D. May 2013 Noise Analysis**

11 By 2013, members of COER living in proximity to OLF Coupeville became increasingly
 12 alarmed by the increase in the number of flight operations at OLF Coupeville.³⁴ It was evident
 13 that the EA-18G was a much louder airplane than the EA-6B, so there was increased from both
 14 individual flights as well as the noise during each training session.³⁵

16 The Navy recognizes that the EA-18G is so loud that it represents a hazard to human
 17 health. According to an October 2008 Naval Audit Service addressing the impacts of aircraft
 18 noise on military personnel:

20 the F/A-18E/F aircraft emits, and the EA-18G will emit, a
 21 maximum of 150 dBs, which is well above the noise level
 22 considered hazardous to hearing (greater than 84 dBs). According
 23 to PMA265, [the Navy acquisition program manager] made no
 initial attempts to mitigate flight line/deck jet noise hazard through
 design selection. This is contrary to the system safety design order

24 ³² Mann dec., Ex. 10.

25 ³³ Mann dec. Ex. 10.

26 ³⁴ Declaration of Kenneth Pickard, ¶ 4 (Describing COER and link to COER's website). *See also* link to [HTTPS://vimeo.com/raindagger/livingundertheflightpath](https://vimeo.com/raindagger/livingundertheflightpath) (video interview of family living under the flight path – at minute 4:00).

³⁵ *See e.g.*, Declarations of Isobel Kameros, ¶ 4; Kenneth C. Pickard, ¶ 3; Katlaina Rayne, ¶ 5; Gerald A. Roberts, ¶ 4; Robert Wilbur, ¶ 6.

1 of precedence specified in the [Military Standard]. Test results
 2 indicate that new technology hearing protection devices will
 3 reduce noise exposure on the flight deck by at least 43 dBs;
 4 however, this is still above the level considered hazardous to
 hearing. A professional audiologist further validated that a hazard
 will continue to exist even with the improved hearing protection.³⁶

5 In May 2013 COER retained JGL Acoustics, Inc., to measure actual noise levels in the
 6 vicinity of OLF Coupeville during FCLP operations.³⁷ JGL Acoustics installed five calibrated
 7 sound level meters at locations near OLF Coupeville in populated areas where people would be
 8 exposed to aircraft noise without hearing protection.³⁸ Monitoring location #1, for example, was
 9 located in the front yard of a home within the Admiral Cove neighborhood directly beneath the
 10 flight path for OLF Coupeville.³⁹ Monitoring location #5 was located inside a home.

12 Noise measurements were recorded at each station during a single session of FCLP
 13 operations at OLF Coupeville. JGL Acoustics measured the maximum A-weighted (dBA) sound
 14 pressures – a noise metric that filters out low frequency noise – as well as the un-weighted (linear)
 15 sound pressure (dB). Based on the overall noise level measured during a full session (SEL), and
 16 number of individual flyovers during that session, JGL was able to calculate the average noise
 17 level for each flight during a session – in other words, the level of noise experienced at that
 18 location each time an EA-18 flies over. The following table summarizes the sampling results:⁴⁰

Statistic	Pos. 1	Pos. 2	Pos. 3	Pos. 4	Pos. 5
Maximum A-weighted Level (dBA)	119.2	113.4	115.7	114.3	81.1
Maximum Un-Weighted Peak Level (dB)	134.2	126.7	130.6	131.4	101.8
Session SEL (dBA)	128.5	124.5	122.7	127.7	92.1
Session Duration (minutes)	39	58	45	36	25

25 ³⁶ Mann dec., Ex. 11, p. 5 (“Consideration of Hazardous Noise in the Acquisition of the F/A-18E/F Super
 Hornet and EA-18G Growler Strike Fighter Variants” Naval Audit Service (October 31, 2008)).

26 ³⁷ Declaration of Jerry G. Lilly, ¶ 6.

³⁸ Lilly dec., ¶¶ 7-8, Ex. 2.

³⁹ *Id.*

⁴⁰ Lilly dec., ¶ 9, Ex. 2, Table 1.

Total Jet Flyovers	35	43	26	28	8
Average SEL per Jet Flyover (dBA)	113.1	108.2	108.5	113.2	83.1

Considering the Navy acknowledges that noise levels above 84 dBA are hazardous to hearing,⁴¹ these numbers are both striking and significant. Noise levels in a typical suburban neighborhood are approximately 50 dBA. Noise levels of 110 dBA are roughly equivalent to a rock concert and 16 times louder than background.⁴² Noise at 120 dBA is equivalent to standing next to an air raid siren and is considered the threshold of pain.⁴³

A good perspective on the health hazard to the residents associated with the noise levels measured by JGL Acoustics is provided by the Defense Safety Oversight Council of the Department of Defense, which limits *military* personnel to a maximum of 15 minutes *per day* at noise levels exceeding 100 dBA and a maximum of 108 seconds (1.8 minutes) *per day* at noise levels over 110 dBA without ear protection.⁴⁴ Based on the measurements conducted by JGL Acoustics, it is plain that OLF operations cause noise levels hazardous to residents' health.

JGL Acoustics calculated the total time that noise of EA-18 Growler operations exceeded various noise thresholds, including 100 dBA and 110 dBA. At position 1 within the Admirals Cove neighborhood, a single session lasting 39 minutes with 35 flyovers produced over two minutes of noise over 100 dBA and 11 seconds of noise over 110 dBA.⁴⁵ Currently the Navy is conducting multiple sessions per day with operations lasting 8 hours or more.⁴⁶ Based on May 2013 noise monitoring data, it is evident that in 8 hours of operations over a day, noise levels in

⁴¹ Mann dec., Ex. 11, p. 5

⁴² Mann dec. Ex. 12 (Except from Aircraft Noise Study for NASWI and OLF Coupeville, Wyle, 2004).

⁴³ *Id.*

⁴⁴ Mann dec., Exhibit 13, p. 7 (DSOC Briefing).

⁴⁵ Lilly dec., ¶ 10, Ex 2, p.3, Table 2.

⁴⁶ Attwood dec., 9-12; Mann dec, Ex.14 (March 26, 2015, Release)

1 the Admirals Cove neighborhood exceed 100 dBA more than 22 minutes and exceed 110 dBA for
 2 117 seconds (1.95 minutes) – in both cases surpassing DOD limitations for military personnel.⁴⁷

3 **E. COER Notice Letter to Navy**

4 Based on the JGL Acoustics Noise Analysis and the significant increase in FCLP
 5 operations between 2009 and 2013, on June 11, 2013, COER sent a letter to the Navy requesting a
 6 new environmental analysis of the ongoing FCLP operations at OLF Coupeville. Dkt 10-2. The
 7 COER Letter explained both that the Navy was conducting significantly more FCLP operations
 8 than identified and analyzed in the 2005 EA and that actual measured noise levels in the vicinity
 9 of OLF Coupeville are significantly louder than predicted by the 2005 EA. The COER Letter
 10 requested a response from the Navy within 30 days. The Navy did not respond directly to COER.
 11 But just 17 days after COER's letter, Navy Admiral Gortney ordered suspension of all FCLP
 12 operations at OLF Coupeville for the remainder of 2013. Dkt 10, p. 2, ¶ 3.

15 COER filed this action on July 15, 2013, alleging that the Navy was violating NEPA by
 16 conducting flight operations at OLF Coupeville without having prepared an EIS. Dkt 1.

17 **F. Notice of Intent to Prepare an EIS**

18 Two months after COER initiated this action the Navy issued a "Notice of Intent to
 19 Prepare an Environmental Impact Statement for EA-18G Airfield Operations at Naval Air
 20 Station Whidbey Island." Dkt. 8-1. According to the Notice
 21

22 [t]he EIS will evaluate the potential environmental effects associated
 23 with the introduction of two additional EA-18G Growler expeditionary
 24 squadrons (10 aircraft) and the addition of three EA-18G Growler
 25 aircraft to the Fleet Replacement Squadron (FRS) *when added to*
 26 *baseline conditions, including ongoing EA-18G Growler airfield*
operations at NAS Whidbey Island's Ault Field and Outlying Landing
Field Coupeville.

⁴⁷ Lilly dec., ¶ 13

1 Dkt. 8-1, p. 1. Thus, the Navy's proposed new EIS would address the impacts of adding up to 13
2 new proposed additional aircraft that would *not* routinely conduct FCLP practices at OLF
3 Coupeville.⁴⁸ The new EIS would exclude from consideration the extent to which operations and
4 their noise impacts have exceeded the predictions in the 2005 EA by treating current conditions
5 as "baseline."
6

7 On October 10, 2014, the Navy published a Revised Notice of Intent to Prepare an
8 Environmental Impact Statement.⁴⁹ The 2014 Revised Notice of Intent explained that the EIS
9 would now evaluate the impacts of adding an additional 13 to 36 new EA-18G Growler aircraft
10 at NAS Whidbey Island. This includes the alternative of adding an additional 2 aircraft to each
11 of the nine existing carrier wing squadrons for a total of 18 additional 18 EA-18G Growler
12 aircraft conducting FCLP operations at OLF Coupeville.
13

14 On April 9 2015, the Navy issued a press release confirming ongoing work on the EIS.
15 According to the press release the Navy expects to complete its Draft EIS in the late spring or
16 early summer of 2016 with a Final EIS and decision sometime in 2017.⁵⁰ For the first time the
17 Navy's press release asserts that "[t]he EIS will also include a comprehensive noise assessment
18 of NAS Whidbey Island and OLF Coupeville operations, including potential health impacts
19 based on a thorough literature review."
20

21 **G. FCLP Operations Continue.**

22 As discussed above, after receipt of COER's Notice Letter, the Navy halted FCLP
23 operations at OLF Coupeville in June, 2013. FCLP operations at OLF Coupeville re-started in
24

25 ⁴⁸ As discussed above, the Growler expeditionary squadrons and Fleet Replacement Squadrons are not
26 carrier based and are therefore not required to practice carrier landings. Only the carrier wing squadrons conduct
FCLPs. *Supra* at 4.

⁴⁹ Mann dec., Ex. 15.

⁵⁰ Mann dec., Ex. 16.

1 January 2014. Dkt. 16-2. It appears from the documentation provided this Court, that the Navy's
 2 intent is to conduct up to 6,120 FCLP operations at OLF-Coupeville each year. The Navy
 3 identifies this as the "FCLP NEPA benchmark at OLF Coupeville." *Id.* The Navy conducted
 4 6,072 FCLP operations at OLF-Coupeville in 2014. Dkt 17-3, p. 13. The Navy also conducted
 5 11,508 FCLP operations at Ault Field. *Id.* Operations continue in 2015. As described by nearby
 6 resident Kenneth C. Pickard:
 7

8 After last week with scheduled flying all five weekdays, mornings,
 9 afternoons and nights on various days, with us fleeing our home on
 10 Tuesday to camp out in freezing weather east of the mountains to
 11 avoid the noise, we returned home last night, March 20, 2015, to
 find this schedule of FCLP training for every day of the upcoming
 week:

12 Monday, March 23: "early evening to late night."

13 Tuesday, March 24: "mid-morning to mid-afternoon."

14 Wednesday, March 25: "mid-morning to mid-afternoon, then again
 from early evening to late night"

15 Thursday, March 26: "early evening to late night"

16 Friday, March 27: "mid-morning to mid-afternoon."⁵¹

17 IV. ARGUMENT

18 A. Standard for Preliminary Injunction

19 A plaintiff seeking a preliminary injunction must demonstrate: (1) that they are likely to
 20 succeed on the merits; (2) they are likely to suffer irreparable harm in the absence of preliminary
 21 relief; (3) that the balance of equities tips in their favor; and (4) that the injunction is in the
 22 public interest.⁵² In each case, courts "must balance the competing claims of injury and must
 23 consider the effect on each party of the granting or withholding of the requested relief."⁵³ "In
 24
 25

26 ⁵¹ Declaration of Kenneth Pickard, ¶ 5. *See also*, Attwood dec, ¶ 5-7; Mann dec. Ex. 16.

⁵² *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129 S. Ct. 365 (2008).

⁵³ *Amoco Production Co. v. Gambell*, 480 U.S. 531, 542, 107 S. Ct. 1396 (1986).

1 exercising their sound discretion, courts of equity should pay particular regard for the public
2 consequences in employing the extraordinary remedy of injunction.”⁵⁴

3 COER will demonstrate that each of the four elements necessary for injunctive relief are
4 present here, and therefore that this Court should enjoin further FCLP operations at OLF
5 Coupeville until the Navy completes an EIS that describes and analyzes the significant
6 environmental impacts resulting from flight operations at OLF Coupeville.
7

8 **B. Success Is Likely On the Merits**

9 The first showing a stay petitioner must make is “a strong showing that he is likely to
10 succeed on the merits.”⁵⁵ This does not require a petitioner to demonstrate that it is more likely
11 than not will win on the merits.⁵⁶ Indeed, the Ninth Circuit holds that this prong of the test may
12 be met when, “serious questions going to the merits ... can support issuance of a preliminary
13 injunction.”⁵⁷
14

15 COER can demonstrate that it will prevail on its claim that the Navy is required to
16 prepare an EIS because the environmental effects of its ongoing operations at OLF Coupeville
17 are “significantly and qualitatively different or more severe than predicted” in the 2005 EA. 32
18 C.F.R. § 775.69(c). The Navy virtually conceded the validity of COER’s NEPA claim by
19 issuing its Notices of Intent within months after COER filed this action.
20

21 **1. NEPA creates an on-going duty to evaluate continuing activities**

22
23

24 ⁵⁴ *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312, 102 S.Ct. 1798 (1982).

25 ⁵⁵ *Winter*, 555 U.S. at 20.

26 ⁵⁶ *Leiva-Perez v. Holder*, 640 F.3d 962, 966 (9th Cir. 2011).

⁵⁷ *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1135 (9th Cir. 2011). *See also Leiva-Perez*, 640 F.3d at 968 (requiring showing of substantial case for relief on the merits).

1 The National Environmental Policy Act of 1969 (“NEPA”), requires federal agencies “to
 2 the fullest extent possible” to prepare an environmental impact statement (EIS) for “every ...
 3 major Federal actio[n] significantly affecting the quality of the human environment.”⁵⁸ An
 4 agency is not required to prepare a full EIS if it determines—based on a shorter environmental
 5 assessment (EA)—that the proposed action will not have a significant impact on the
 6 environment.⁵⁹ NEPA “promotes its sweeping commitment” to environmental integrity “by
 7 focusing Government and public attention on the environmental effects of proposed agency
 8 action.”⁶⁰ “By so focusing agency attention, NEPA ensures that the agency will not act on
 9 incomplete information, only to regret its decision after it is too late to correct.”⁶¹

11 The EIS is NEPA's core requirement.⁶² The EIS requirement “ensures that important
 12 effects will not be overlooked or underestimated only to be discovered after resources have been
 13 committed or the die otherwise cast.”⁶³ “Publication of an EIS...also serves a larger
 14 informational role.”⁶⁴ It demonstrates that an agency has indeed considered environmental
 15 concerns, and “perhaps more significantly, provides a springboard for public comment.”⁶⁵ At the
 16 same time, it affords other affected governmental bodies “notice of the expected consequences
 17 and the opportunity to plan and implement corrective measures in a timely manner.”⁶⁶

20 In light of these objectives, the timing of an EIS is critical. CEQ regulations instruct
 21 agencies to “integrate the NEPA process with other planning at the earliest possible time to

22 ⁵⁸ 42 U.S.C. § 4332(2)(C) (2000 ed.).

23 ⁵⁹ 40 CFR §§ 1508.9(a), 1508.13 (2007). *Winter*, 555 U.S. at 15-16.

24 ⁶⁰ *Marsh v. Oregon Natural Resources Council*, 490 U.S. 360, 371, 109 S.Ct. 1851 (1989).

25 ⁶¹ *Id.*

26 ⁶² *Department of Transportation v. Public Citizen*, 541 U.S. 752, 757, 124 S.Ct. 2204, 159 L.Ed.2d 60 (2004).

⁶³ *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 351–352, 109 S.Ct. 1835 (1989) (citing 40 CFR §§ 1508.25(b), 1502.14(f), 1502.16(h), 1505.2(c) (1987)).

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*, at 350.

1 insure that planning and decisions reflect environmental values.”⁶⁷ An EIS must be prepared
 2 “early enough so that it can serve practically as an important contribution to the decisionmaking
 3 process and will not be used to rationalize or justify decisions already made.”⁶⁸

4 The Navy’s NEPA obligation to identify and analyze the environmental impacts
 5 associated with the introduction of the EA-18G Growler to OLF Coupeville did not end with
 6 publication of the 2005 EA. The CEQ NEPA regulations define major federal actions subject to
 7 evaluation under NEPA to include, among other things, “new and continuing activities.”⁶⁹ The
 8 Navy has adopted regulations interpreting “continuing activities.” These regulations provide
 9 that:
 10

11 The term *continuing activities* which may necessitate the
 12 preparation of a NEPA document will be applied by the
 13 Department of the Navy to include activities which are presently
 14 being carried out in fulfillment of the Navy mission and function,
including existing training functions, where:

15 (2) *There is a discovery that the environmental effects of*
 16 *an ongoing activity are significantly and qualitatively different or*
 17 *more severe than predicted in a NEPA document prepared in*
*connection with the commencement of the activity.*⁷⁰

18 Thus, according to the Navy’s own NEPA regulations for continuing activities, explicitly
 19 including “existing training functions,” a new NEPA review must be conducted if the
 20 environmental effects of the ongoing activity are significantly different or more severe than
 21 predicted.
 22

23 **2. The environmental impacts of ongoing activities at OLF Coupeville**
 24 **are significantly and qualitatively different or more severe than**
 25 **predicted in the EA**

26 ⁶⁷ 40 CFR § 1501.2 (1987).

⁶⁸ *Andrus v Sierra Club*, 442 U.S. 347, 351–352, n. 3, 99 S. Ct. 2335 (1979) (quoting 40 CFR § 1502.5).

⁶⁹ 40 C.F.R. § 1508.18(a).

⁷⁰ 32 C.F.R. § 775.69(c) (emphasis added).

1 This regulation clearly applies to the Navy's ongoing activity conducting FCLP
2 operations with the EA-18G Growler aircraft at OLF-Coupeville. As discussed above, the
3 Navy's 2005 EA for the introduction of the EA-18G Growler predicted that the noise impacts of
4 FCLP operation at OLF Coupeville would be *less* than the ongoing operations of the EA-6B
5 Prowler. *Supra* at 5-6. This prediction was wrong for at least two reasons.

7 First, the 2005 EA projected that there would be fewer flight operations for the EA 18-G
8 Growlers by 2013. But this projection was based on the EA's reliance on the anomalously high
9 number of FCLP operations in a single year (2003). Compared with the five year average
10 between 2000 and 2004, however, the predicted (and actual current number of FCLP operations
11 at OLF Coupeville) is a significant *increase* over the number of operations on which the 2005
12 EA noise assessment was based. *Supra* at 6-8.

14 Second, the *actual* noise levels measured for the EA-18G Growler are significantly
15 louder and more severe than predicted or discussed in the 2005 EA. The 2005 EA did not
16 anticipate that residents would be subjected to both day and nighttime noise levels approaching
17 the pain threshold of 120 dBA or for durations of time in a given day that exceed the military's
18 own requirements for military personnel hearing protection. *Supra* at 8-10. Further, the 2005
19 EA did not anticipate or discuss the severity of human health impacts to the civilian population
20 surrounding OLF Coupeville caused by noise from the EA-18G Growlers. *Infra* at 18-21.

22 Because actual experience demonstrates that the environmental effects of the ongoing
23 activities at OLF Coupeville are significantly and qualitatively different or more severe than
24 predicted in the EA prepared in connection with the commencement of the activity, the Navy's
25 NEPA regulations mandate preparation of a new environmental analysis. COER is likely to
26 prevail on the merits of its case – that the Navy must address the environmental impacts of noise

1 from its operations on the civilian population surrounding OLF Coupeville. It appears the Navy
2 agrees.⁷¹ The question before the Court, therefore, is whether the Navy should be free to
3 continue subjecting the civilian population to noise impacts that are significantly and
4 qualitatively different and more severe than predicted in the 2005 EA during the two years that it
5 intends to spend preparing its required analysis.
6

7 **C. Irreparable Harm**

8 “Environmental injury, by its nature, can seldom be adequately remedied by money
9 damages and is often permanent or at least of long duration, *i.e.*, irreparable. If such injury is
10 sufficiently likely, therefore, the balance of harms will usually favor the issuance of an injunction
11 to protect the environment.”⁷² Plaintiffs must show a likelihood of irreparable injury, not just a
12 possibility, in order to meet this prong of the test.⁷³
13

14 In *Winter* the Supreme Court sided with the Navy in its argument that the training
15 program at issue had been going on for 40 years with no documented cases of sonar-related
16 injuries to marine mammals. *Winter*, 555 U.S. at 23. The present case is readily distinguishable
17 from *Winter* regarding harm. COER can demonstrate actual and ongoing irreparable injury to
18 the human population living in proximity to OLF-Coupeville, documented by the treating
19 physician and medical experts on the health effects of intense noise.
20

21 Residents surrounding OLF Coupeville are suffering ongoing and irreparable injury from
22 the ongoing noise assault created by the EA-18G Growlers practicing FCLP operations. COER
23 has filed with this motion the declarations of 13 nearby residents who are suffering from a wide
24 range of ailments attributable to the increases in number of operations and the introduction of the
25

26 ⁷¹ Mann dec. Ex. 16 (April 9, 2015 News Release).

⁷² *Amoco Prod. Co. v. Vill. of Gambell, AK*, 480 U.S. 531, 545, 107 S. Ct. 1396 (1987).

⁷³ *Winter*, 555 U.S. at 22.

1 louder EA-18G Growlers, including depression, anxiety, insomnia, elevated blood pressure, loss
2 of concentration, hearing loss, and anger. *See* Declarations of Cecelia Askins, Maryon Attwood,
3 Gail Buehler, Isobel Kameros, Jan Pickard, Kenneth Pickard, Bradley Portin, Katlaina Rayne,
4 Gerald Roberts, Daniel Schurr, Janis Schurr, Brenda Frische Wilbur, and Robert Wilbur.⁷⁴
5

6 Janis Schurr is unfortunately typical:

7 I am 63 years old. I am married and live in Admirals Cove, one
8 quarter of a mile from OLF Coupeville, at 1137 Dewey Drive,
9 Coupeville, WA. I have lived in this house since 1992.

10 I was a Registered Nurse for 30 years in the Medical Surgical Unit
11 at Whidbey General Hospital. I retired 6 years ago. I volunteered at
12 [Whidbey Animal Improvement Foundation] for many years, and led
13 support groups at the hospital. I've been involved in my
14 community, one that I used to love.

15 The Growlers fly and turn right over my house, it seems like a
16 couple hundred feet over because I can see the pilots faces.

17 My health has steadily gone downhill in the last 3 years. I have
18 Tinnitus, Type II Diabetes, Immune Disease, Anxiety, Depression,
19 gastrointestinal problems, Barretts Esophagus, loss of sleep and lots
20 of anger at what's happening in my life. If I could just get a good
21 night's sleep, but I can't when they are flying, and I worry about
22 my husband who is also not sleeping, but has to get up at 4:00 a.m.
23 to go to work, and I worry about him driving and getting into an
24 accident. I am just so angry all the time.⁷⁵

25 Janis Schurr's injuries are confirmed by her treating physician Dr. Ann Dannhauer:

26 I hereby state with reasonable medical certainty that in the past
three years, subsequent to the introduction of the EA 18G Growler
aircraft at OLF Coupeville, WA, Jann's health has steadily and
seriously declined. The Growlers over the Shurr Residence at a
couple hundred feet high are creating an extreme amount of stress
for Jann, which stress is adversely exacerbating her Barretts

⁷⁴ Even those that have left the vicinity continue to suffer from the effects. *See, e.g.*, Declaration of Elizabeth Gerritsen.

⁷⁵ Declaration of Janis Schurr, ¶¶ 2-5.

1 Esophogas, her Diabetes, and also her anxiety/depression and sleep
2 disturbance.⁷⁶

3 The ongoing injuries being suffered by neighbors of OLF Coupeville are medically
4 consistent with well-known effects of repeated loud noises. Karen Bowman, an advanced
5 practice nurse specializing in occupational and environmental health with over twenty-five years
6 of experience has conducted an extensive literature review and reviewed confidential citizen
7 surveys from residents surrounding OLF Coupeville. Ms. Bowman's findings are explained in
8 her declaration and supporting literature review. Ms. Bowman summarizes her conclusions:
9

10 It is my professional opinion that the citizens around OLF
11 Coupeville have potential to suffer from the health effects
12 consistent with the above findings as a result of the constant
13 noise from the EA- 18G Growler jet aircraft field carrier landing
14 practice (FLCP) operations at OLF Coupeville. The nighttime
15 FLCP operations are exquisitely exacerbating the stress reaction
16 which causes a cascade of health effects listed.⁷⁷

17 Dr. James Dahlgren, a Diplomate of the American Board of Internal Medicine,
18 Occupational and Environmental Medicine and Toxicology, and familiar with the serious and
19 well documented adverse health effects of noise, has reviewed the Navy's environmental
20 documents, the noise measurements by JGL Acoustics and the declarations cited above.⁷⁸ Dr.
21 Dahlgren summarizes his professional opinions:

22 The noise from the Navy's Growler aircraft landing and taking off
23 from Outlying Landing Field Coupeville (OLFC), Washington is
24 causing and has caused serious adverse health effects in the
25 residents as described in the thirteen declarations of residents
26 living near the field. As predicted from hundreds of scientific
studies of health effects from noise at the levels measured near the
OLF Coupeville by JGL Acoustics in 2013, such levels of noise
pressure are causing insomnia, anxiety, depression, impaired

⁷⁶ Declaration of Ann C. Dannhauer, M.D., ¶¶ 3-4.

⁷⁷ Declaration of Karen R. Bowman, MN, RN, COHN-S., ¶ 10.

⁷⁸ Declaration of James Dahlgren, M.D., ¶¶ 2-4, Ex. 1.

1 concentration, hearing loss, tinnitus (ringing in the ears),
 2 hypertension, worsening diabetes, gastrointestinal difficulties and a
 3 major decrement in quality of life. The residents are justifiably
 4 frightened by the noise. Loud noise stimulates a significant stress
 response and would normally create a fight or flight response.
 Unfortunately, these residents are trapped and have no place to go.

5 Dr. Dahlgren continues:

6 *Any* FLCP operations, much less existing operation levels, of the
 7 EA-18G Growler aircraft at OLF Coupeville will more likely than
 8 not result in irreparable injury to health for those citizens residing
 9 in proximity to OLF-Coupeville. The testimony of the thirteen
 residents already shows that the types and variety of adverse health
 10 effects that one would expect to see in residents who are exposed
 to the levels of noise set forth in the JGL Acoustics 2013 report
 have in fact occurred.

11 I would expect that a rational decision-maker would want to have a
 12 thorough presentation of the health impacts of jet aircraft noise that
 13 would accompany continued FLCP operation by the EA-18 G
 aircraft at OLF-Coupeville before approving further operations
 there.⁷⁹

14 Plaintiffs can demonstrate that irreparable injury has occurred and is ongoing.

15 **D. Balance of the Equities**

16 In deciding whether to grant a preliminary injunction, the court must “balance the
 17 competing claims of injury and must consider the effect on each party of the granting or
 18 withholding of the requested relief.”⁸⁰ In *Winter*, the Court emphasized the impact of “on the
 19 public interest in national defense” and, after giving “great deference” to the military’s judgment,
 20 balanced the equities in favor of the Navy.⁸¹ The Court’s balance, however, was premised on its
 21 conclusion that
 22

23 For the plaintiffs, the most serious possible injury would be harm
 24 to an unknown number of the marine mammals that they study and
 25

26 ⁷⁹ Declaration of James Dahlgren, M.D., ¶¶ 5, Ex. 2.

⁸⁰ *Amoco Production Co.* 480 U.S. at 542.

⁸¹ *Winter*, 555 U.S. at 14.

1 observe. In contrast, forcing the Navy to deploy an inadequately
2 trained antisubmarine force jeopardizes the safety of the fleet.⁸²

3 This case presents circumstance that are the opposite of those in *Winter*, and lead to the
4 opposite result in the balancing of equities. Of particular importance to the *Winter* Court was the
5 location in which the subject training exercises were taking place. The Court concluded that the
6 Navy's proposed use of the waters off the coast of southern California were "the *only* area on the
7 west coast that is relatively close to land, air, and sea bases, as well as amphibious landing
8 areas."⁸³ Were the Court to have granted the preliminary injunction it would have essentially
9 prevented the Navy from performing its training exercises at all.
10

11 Here, plaintiffs are not concerned simply with "possible injury" to "an unknown number
12 of marine mammals." Plaintiffs are suffering very real and substantial health injuries as a result
13 of the introduction of the EA-18G Growlers to OLF Coupeville. And in contrast to *Winter*, here
14 the Navy has an obvious and immediately available alternative for conducting its FCLP
15 operations with full efficacy. As the Navy demonstrated in the second half of 2013, it can easily
16 conduct all of its FCLP training operations at the main Ault Field and avoid entirely use of OLF-
17 Coupeville. There remains sufficient capacity at Ault Field even within the Navy's 2005 EA
18 predictions. The 2005 EA projected a benchmark of 18,282 FCLP operations at Ault Field for
19 2013 and beyond. But in 2014 the Navy conducted only 11,508 FCLP operations at Ault Field.
20 There is ample room to move all 6,120 FCLP operations from OLF-Coupeville to Ault Field and
21 stay below the projected benchmark. Dkt.17-3, p. 13. And Ault Field, unlike OLF-Coupeville,
22 is largely protected from noise impacts due to the Navy's imposition of APZs and Island
23
24
25
26

⁸² *Id.*, at 16.

⁸³ *Id.*, at 13-14 (emphasis added).

1 County's land use regulations. Unlike *Winters*, there is no evidence the Navy will be deprived of
2 a trained force if it discontinues use of OLF-Coupeville.

3 In *Winter*, plaintiffs sought an injunction to prevent "possible" harm to marine mammals
4 but would shut down important Navy training that had no ready alternative. Here, plaintiff seeks
5 an injunction to prevent ongoing, known harm to a significant human population where the Navy
6 has an alternative so readily available that it was used just a year ago. The balance of equities
7 here lies clearly in favor of plaintiff.
8

9 **E. Public Interest**

10 The final prong of the test for a preliminary injunction is whether the injunction is in the
11 public interest. "The public interest analysis for the issuance of a preliminary injunction requires
12 us to consider whether there exists some critical public interest that would be injured by the grant
13 of preliminary relief."⁸⁴ Further, "the public interest in preserving nature and avoiding
14 irreparable environmental injury outweighs economic concerns in cases where plaintiffs were
15 likely to succeed on the merits of their underlying claim."⁸⁵
16

17 While the Navy will assert that FCLP training at the OLF is in the public interest,
18 invoking national security, the use of Ault Field (a viable alternative, *supra* at 22) serves the
19 public interest far better than use of OLF Coupeville. Use of OLF Coupeville compromises the
20 visual and auditory integrity of a National Historic Preserved and the tranquility and safety of an
21 entire community with homes, schools, parks, and important public and private facilities,
22 including a hospital, local government, law enforcement, and commercial development. The
23
24

25 ⁸⁴ *Cal. Pharmacists Ass'n v. Maxwell-Jolly*, 596 F.3d 1098, 1114–15 (9th Cir.2010) (internal quotations
26 omitted).

⁸⁵ *The Lands Council v. McNair*, 537 F.3d 981, 1005 (9th Cir. 2008).

1 public interest is thus best served by ending OLF operations rather than allowing them to
2 continue while the Navy tardily carries out its NEPA obligations.

3 **V. CONCLUSION**

4 For the foregoing reasons, the Court should grant a preliminary injunction and prohibit
5 any further operations by the EA-18G Growler at OLF Coupeville until the Navy has completed
6 its proposed Final EIS fully evaluating the environmental impacts, including human health
7 impacts, of aircraft operations at OLF Coupeville and the then fully informed decisionmakers
8 have acted.
9

10 DATED this 27th day of April, 2015.

11
12
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CERTIFICATE OF SERVICE

I hereby certify that on April 27, 2015, I electronically filed the foregoing, along with the Declarations of David S. Mann, James Dahlgren, M.D.; Karen Bowman, MN, RN, COHN-S; Ann Dannhaur, M.D., Jerry G. Lilly, from Cecelia Askins, Maryon Attwood, Isobel Kamos, Jan Pickard, Kenneth Pickard, Bradley Portin, Katlaina Rayne, Gerald Roberts, Daniel Schurr, Janis Schurr, Brenda Frische Wilbur, and Robert Wilbur with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

Rachel K. Roberts

Brian C. Kipnis

Dated April 27, 2015.

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