District Judge Thomas S. Zilly

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WASHINGTON

AT SEATTLE

CITIZENS OF THE EBEY'S RESERVE FOR A HEALTHY, SAFE & PEACEFUL ENVIRONMENT,

Plaintiff,

v.

U.S. DEPARTMENT OF THE NAVY; ADMIRAL PHIL DAVIDSON, in his official capacity as the Commander, Fleet Forces Command; and CAPTAIN MIKE NORTIER, in his official capacity as Commanding Officer Naval Air Station Whidbey Island,

Defendants,

No. 2:13-cv-1232-TSZ

DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION

ORAL ARGUMENT REQUESTED

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In 2005, the Defendants ("Navy") finalized an Environmental Assessment ("2005 EA") and signed a Finding of No Significant Impact ("FONSI") for the replacement of the EA-6B Prowler with the EA-18G Growler. That EA thoroughly studied the environmental effects of the proposed Growler operations on the areas surrounding Naval Air Station Whidbey Island ("NAS Whidbey") and OLF Coupeville. The Navy is currently operating OLF Coupeville within the parameters studied in the EA, and no new information has arisen that would trigger the need for a supplemental NEPA analysis. The Navy, therefore, is in full compliance with NEPA. Nonetheless, the Navy has also initiated the process of preparing an EIS for the addition of new squadrons at NAS Whidbey, and that EIS will serve the same function as a supplemental NEPA analysis when it is completed in 2017.

Ultimately, as the Citizens of the Ebey's Reserve ("COER") concedes, its only real argument is that it should be entitled to an injunction prohibiting all Field Carrier Landing Practice ("FCLPs") at OLF Coupeville until the new EIS is complete. The argument is baseless because the Navy is under no duty to supplement and, accordingly, has violated no law. But even if the Court were to find a violation of NEPA, it would not be appropriate to enjoin the Navy's operations because they are vital to national security and moving all FCLPs to other airfields would damage both the quality of the training and NAS Whidbey's ability to maintain military readiness. Accordingly, plaintiffs' motion should be denied.

BACKGROUND

I. Factual Background

OLF Coupeville was built in 1943 during World War II. *See Argent v. United States*, 124 F.3d 1277, 1278 (Fed. Cir. 1997). It was used continuously until 1963, when the Navy declared it excess and made plans to sell it. *Id.* But in 1967, it was reactivated for the Vietnam War, and has

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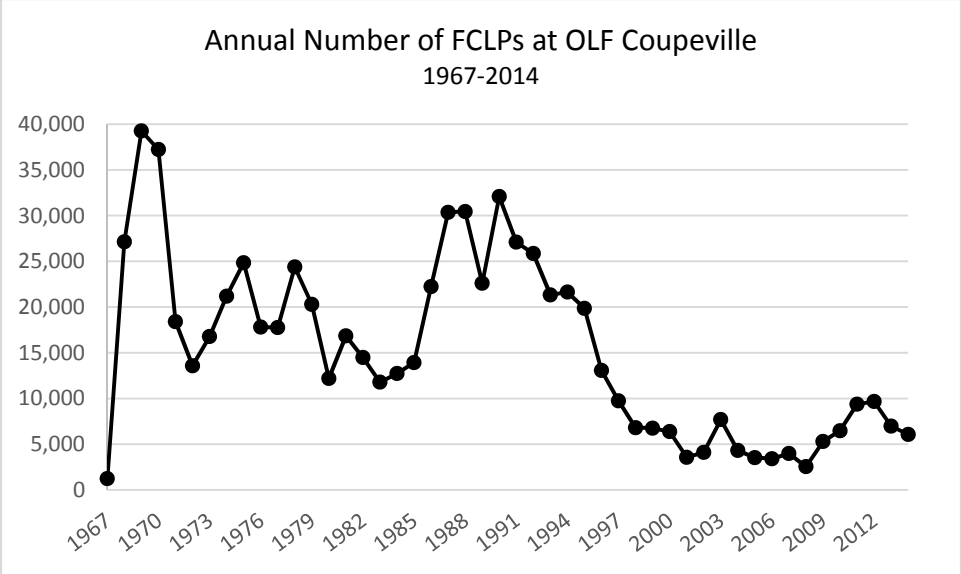
been used primarily for FCLPs by jet aircraft ever since. *See id.* The chart below summarizes annual FCLPs from 1967 through 2014.[1]



As the chart shows, OLF Coupeville has historically seen much greater usage than it has in the past decade and a half. It was only in 1997 that annual FCLP operations dropped below 10,000 for the first time, and the annual number of FCLPs has stayed below 10,000 ever since.

FCLPs are currently conducted by Growlers, which is now the Navy's only electronic attack aircraft. *See* Shoemaker Decl. ¶ 1. The Growler's mission "is to neutralize, suppress, and destroy enemy air defenses and communications systems," Shoemaker Decl. ¶ 5, therefore providing protection to other aircraft and other service members on the ground. All Growler aircraft are home-based at NAS Whidbey Island. Shoemaker Decl. ¶ 1. Each pilot must conduct 120 to 140 FCLPs before they are certified to deploy. Shoemaker Decl. ¶ 14.

In January of 2005, the Navy issued an EA that analyzed the impacts of replacing the

[1] The annual amount of FCLPs is detailed in Exhibit A to the Declaration of Rachel Roberts ("R. Roberts Decl."). Each FCLP is counted as two operations, one arrival and one departure. *See* ECF No. 22-1 at 23.

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Prowler with the Growler. ECF No. 22-1 at 5. In this EA, the Navy considered the impacts of noise, and determined that the change would result in less noise exposure to the community. *See* ECF No. 22-1 at 42–43. This conclusion was based in part on a 2004 noise study, *see id.*; R. Roberts Decl., Ex. B, which also formed the basis for an Air Installations Compatible Use Zone ("AICUZ") study update, published in March 2005. *See* R. Roberts Decl., Ex. C.[2] The EA, and the accompanying noise studies, analyzed the impacts of 6,120 FCLPs per year in 2013, versus 7,682 in 2003. *See* ECF No. 22-1 at Appx. A. The Navy issued a FONSI in July of 2005. *See* R. Roberts Decl., Ex. D. FCLPs have been ongoing ever since, with the exception of a hiatus in the latter half of 2013. *See* ECF No. 10-3. The Navy's current number of annual FCLPs and flight patterns are within the scope of operations analyzed in the 2005 EA.

In April of 2013, the Director, Air Warfare, requested that the Director, Energy and Environmental Readiness, conduct a review of NEPA requirements to base additional Growler squadrons at NAS Whidbey Island. *See* R. Roberts Decl., Ex. E. In response to this direction, the Navy issued a Notice of Intent ("NOI") to prepare an EIS for Growler airfield operations in September of 2013. *See* ECF No. 8-1; *see also* ECF No. 22-15 (revised NOI). This EIS is scheduled to be complete in early 2017. *See* ECF No. 17 at 3 (March 2015 JSR). In addition to analyzing impacts relating to additional Growler squadrons, the EIS will include a noise assessment of operations at NAS Whidbey and OLF Coupeville. *See* ECF No. 22-15; 22-16.

II. NEPA Statutory Background

The purpose and intent of NEPA is to focus the attention of the federal government and

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[2] While COER has also submitted excerpts from the 2004 Wyle Noise Study and the 2005 AICUZ study, Defendants are submitting their own excerpts because they rely on certain additional pages that COER did not.

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the public on the environmental impacts of a proposed action so that the consequences of the action can be studied before the action is implemented and potential negative environmental impacts can be avoided. 42 U.S.C. § 4321; 40 C.F.R. § 1501.1 (2012); *Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 371 (1989); *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989). NEPA's mandate to agencies is procedural, not substantive, and does not mandate particular results. *Methow Valley*, 490 U.S. at 350; *Strycker's Bay Neighborhood Counci, Inc. v. Karlen*, 444 U.S. 223, 227–28 (1980); *Vt. Yankee Nuclear Power Corp. v. Natural Res. Def. Council*, 435 U.S. 519, 558 (1978). A court may not require agencies to "elevate environmental concerns over other appropriate considerations." *Strycker's Bay*, 444 U.S. at 227.

NEPA directs each federal agency to prepare an Environmental Impact Statement ("EIS") prior to taking any major federal action significantly affecting the quality of the human environment. 42 U.S.C. § 4332(C); 40 C.F.R. § 1508.18. But not every "major federal action" requires the preparation of an EIS. Instead, an agency may prepare an Environmental Assessment ("EA"), which is a "concise public document," 40 C.F.R. § 1508.9, that "briefly provide[s] sufficient evidence and analysis to determine whether the agency must prepare an EIS or, in the alternative, issue a finding of no significant impact." *Presidio Golf Club v. Nat'l Park Serv.*, 155 F.3d 1153, 1160 (9th Cir. 1998); *see* 40 C.F.R. §§ 1501.3, 1501.4(c), (e), 1508.9. An EA is "less formal and less rigorous" than an EIS. *Conner v. Burford*, 848 F.2d 1441, 1446 (9th Cir. 1988). Courts review EAs under a "rule of reason" to determine whether the analysis contained a reasonably thorough discussion of the significant aspects of the probable environmental consequences and considered a reasonable range of alternatives. *See Okanogan Highlands Alliance v. Williams*, 236 F.3d 468, 473 (9th Cir. 2000).

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III. Review Under the Administrative Procedure Act

Where a statute, such as NEPA, does not provide a private right of action, the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701–06, provides for judicial review of challenges to final agency actions. *See Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882–83 (1990). Pursuant to 5 U.S.C. § 706, a reviewing court's task is to determine whether the agency's decision was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *Citizens to Pres. Overton Park v. Volpe*, 401 U.S. 402, 413–14 (1971). A claim for agency action unlawfully delayed or unreasonably withheld under § 706(1) "can proceed only where a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*." *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 64 (2004) (emphasis in original).

IV. Standard for a Preliminary Injunction

An injunction is "a drastic and extraordinary remedy, which should not be granted as a matter of course." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010); *accord Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008). A plaintiff seeking a preliminary injunction must establish that: (1) it is likely to succeed on the merits of its claims; (2) it is likely to suffer irreparable harm absent preliminary relief; (3) the balance of equities tips in its favor; and (4) an injunction is in the public interest. *Id.* at 20; *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir. 2011).

The Ninth Circuit reads this as being compatible with the sliding scale test, under which courts may be satisfied by a lower showing under one factor if there is a very strong showing under another. *See Alliance for the Wild Rockies*, 632 F.3d at 1131. Under that approach, the degree of irreparable injury that must be shown "increases as the probability of success" on the merits decreases. *Native Vill. of Quinhagak v. United States*, 35 F.3d 388, 392 (9th Cir. 1994).

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ARGUMENT

I. COER has Failed to Show a Likelihood of Success on the Merits

COER asks this Court to enjoin the Navy's continued use of OLF Coupeville for FCLP operations on grounds that the Navy was required to prepare a supplemental NEPA analysis. The claim fails, as an initial matter, because it is prudentially moot. The Navy is already in the midst of preparing a new EIS, and that process will be completed in 2017. Accordingly, even if supplemental NEPA analysis were required, it is already underway, so there is nothing for the court to compel. But COER's claim also fails because there is no duty to prepare supplemental NEPA analysis under the circumstances presented here. The Navy's current operations were analyzed in the 2005 EA, and any challenge to that EA is now time-barred, so COER cannot substantiate its claim by arguing that the EA used an improper baseline. In addition, the "new information" that COER proffers in support of its claim is insufficient to trigger a duty to supplement under 40 C.F.R. § 1502.9(c) or 32 C.F.R. § 775.6(c) because much of it was not presented for the Navy's consideration outside of this litigation, some of it is not reliable, and it is not new or significant within the meaning of NEPA.

A. COER's Claim is Prudentially Moot

COER's complaint essentially brings a 706(1) claim for agency action unreasonably delayed or unlawfully withheld. *See* ECF No. 1, ¶ 58 (quoting 5 U.S.C. § 706(1)). As discussed in more detail below, no supplemental NEPA review is required. However, as a practical matter, this claim is moot because the agency is in the process of preparing a new EIS for the addition of new squadrons that will consider the effects of ongoing operations. *See* ECF Nos. 22-15, 22-16. In short, the Navy is not "withholding" preparation of a new EIS.

Any relief the Court could grant would overlap with the Navy's existing EIS process. If

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the Court were to compel production of a supplemental NEPA analysis, that analysis would look at much of the same information considered by the Navy's new EIS. Thus, COER's claim is prudentially moot. *See Aluminum Co. v. Bonneville Power Admin.*, 175 F.3d 1156, 1163 (9th Cir. 1999) (claim challenging agency's failure to prepare EIS was moot "because a final EIS was prepared"); *Naik v. Renaud*, 947 F. Supp. 2d 464, 473 (D.N.J. 2013) (dismissing 706(1) claim as moot because Defendants did not fail to take a required action); *Los Alamos Study Grp. v. U.S. Dep't of Energy*, 794 F.Supp.2d 1216, 1222–26 (D.N.M. 2011) (claim for supplementation prudentially moot when the agency was in the process of preparing a supplemental EIS).

Prudential mootness is rooted in the court's equitable power to fashion remedies and withhold relief. *See Hunt v. Imperial Merchant Servs.*, 560 F.3d 1137, 1142 (9th Cir. 2009) (recognizing that the prudential mootness doctrine allows a court to dismiss an appeal that is not technically moot if "circumstances [have] changed since the beginning of litigation that forestall any occasion for meaningful relief.") (quoting *SUWA*, 110 F.3d at 727)). It is especially appropriate in cases pending against the United States, for which considerations of prudence and comity for coordinate branches come into play. *See Rio Grande Silvery Minnow v. Bureau of Reclamation*, 601 F.3d 1096, 1121 (10th Cir. 2010). Courts generally apply prudential mootness where a defendant (usually the government) is in the process of responding to the plaintiffs' claims and thus the court can offer no meaningful relief. Such is the case here.

B. The Navy is not Required to Prepare a Supplemental NEPA Analysis

NEPA only requires supplementation of existing NEPA analysis if there is a substantial change to the proposed action or significant new information about the effects of the action. *See* 40 C.F.R. § 1502.9(c)(1). Similarly, the Navy's NEPA regulations require supplemental NEPA for continuing activities where "there is a discovery that the environmental effects of an ongoing

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activity are significantly and qualitatively different or more severe than predicted . . . " 32 C.F.R. § 775.6(c). "The court reviews an agency's decision whether to prepare a supplemental [EA][3] under a 'rule of reason," [and] '[a]n agency need not supplement . . . every time new information comes to light,' . . . ." *League of Wilderness Defenders v. Bosworth*, 383 F. Supp. 2d 1285, 1298–99 (D. Or. 2005) (quoting *Marsh*, 490 U.S. at 373).

Here, COER argues that a supplemental analysis is necessary because the 2005 EA used an improper baseline for assessing the noise impacts of future FCLP operations at OLF Coupeville, and because COER has obtained "new information" about the noise caused by Growlers and the public health impacts of that noise. *See* ECF No. 21 ("Pl.'s Br.") at 16–17.[4] Each of these argument fails for the reasons discussed below.

1. COER's Direct Challenge to the 2005 EA is Time-Barred

COER argues that the Navy is required to supplement its NEPA analysis because the Navy's 2005 EA used an allegedly improper baseline in the course of predicting the noise impacts of future FCLPs at OLF Coupeville. Specifically, COER argues that the Navy's selection of 2003 as a baseline against which to measure future noise impacts was inappropriate because the number of FCLP operations conducted in 2003 was "anomalously high." *See* Pl.'s Br. 17. That argument fails because it is premised on an alleged inadequacy in the 2005 EA. The existing EA was finalized in January of 2005, and the FONSI issued that July. *See* ECF No. 22-1, R. Roberts Decl., Ex. D. Thus, the statute of limitations expired in July of 2011. *See Sierra Club v. Penfold*, 857 F.2d 1307, 1315 (9th Cir. 1988) (six-year statute of limitations of 28 U.S.C.

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[3] The "standard for supplementing an EA is the same as for an EIS." *Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1152 (9th Cir. 1998) (overruled on other grounds, *Lands Council v. McNair*, 537 F.3d 981 (9th Cir. 2008)).

[4] Plaintiff does not appear to argue in its motion that the Navy has made a substantial change to FCLPs from what was previously analyzed in the 2005 EA.

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§ 2401(a) applies to all cases brought under the APA, including NEPA claims); *Barnes v. Babbitt*, 329 F. Supp. 2d 1141, 1158-59 (D. Ariz. 2004) (NEPA claim accrues when a FONSI issues) (citations omitted). Courts disallow "back door procedural challenges by those who had the opportunity to seek direct review of" agency actions "but failed to do so in a timely fashion." *NRDC v. Nuclear Regulatory Comm'n*, 666 F.2d 595, 602 (D.C. Cir. 1981). Thus, it is too late for COER to challenge the 2005 EA itself. As other courts have noted, "[a] reviewing court cannot invoke the benefit of hindsight to condemn as arbitrary and capricious an action taken by [an agency]." *Alschuler v. HUD*, 686 F.2d 472, 487 n.23 (7th Cir. 1982); *see also Save Our Invaluable Land, Inc. v. Needham*, 542 F.2d 539, 543 (10th Cir. 1976).[5]

2. The "New Information" That COER Proffers is Insufficient to Trigger a Duty to Supplement under NEPA

COER's claim also fails because the "new information" it relies on is insufficient to trigger a duty to supplement under 40 C.F.R. § 1502.9(c)(1)(i) and (ii) or 32 C.F.R. § 775.6(c). Specifically, much of this information was not presented to the Navy outside of this litigation, and the information is not reliable or new.

a. COER Presents its Public Health Information for the First Time in Litigation

As an initial matter, the information proffered by COER solely in the context of this litigation should be given little weight because the Navy did not have an opportunity to consider that information in the course of its administrative process. In its letter of June 2013, COER

[5] Even if COER's challenge to the EA were not time barred, COER has also failed to show that using 2003 as a base year was arbitrary and capricious. The Navy used data from 2003 because it was the most recent year for which complete FCLP operations were available when the Wyle study was completed in 2004. R. Roberts Decl., Ex. B, 3-1 (available data was 1976-2003). Additionally, while the number of FCLPs in 2003 (7,682) was on the high end for the early 2000s, it is still in the lower to median range when considered in light of total use over the decade preceding it. See R. Roberts Decl., Exhibit A. Thus, even if COER had timely challenged the Navy's methodology in the 2005 EA, that challenge would have failed on the merits.

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provided the JGL study and argued that noise levels in 2012 were higher than predicted because of a greater number of flights and a greater percentage of night flights in 2012. *See* ECF No. 10-2 (*accord* Complaint, ECF No. 1, ¶¶ 32–56). But now that the number of flights has decreased from the amount flown in 2012, and is well within the parameters analyzed in the 2005 EA, COER changes its rationale. COER now argues that a new environmental analysis is needed because the Growler is allegedly louder than predicted and the public health impacts are more severe than predicted in the 2005 EA. *See* Pl.'s Br. at 17. COER presents information to substantiate this assertion for the first time in the Dahlgren and Bowman Declarations, but no such information was ever provided to the Navy outside the scope of this litigation. ECF Nos. 23–24. The Navy, not this Court through the motion process, should be allowed to determine in the first instance whether this information requires preparation of a supplemental NEPA analysis.

Because the Navy has not yet had the opportunity to consider this information through the administrative process, it should be given limited weight by this Court. As another court has noted, if information was not presented to the agency for its consideration in the first instance, courts must be "particularly deferential in [their] approach to allegedly new information." *See Citizens for Appropriate Rural Roads, Inc. v. LaHood*, No. 1:11-cv-1031-SEB-DML, 2012 WL 442747, at *4 (S.D. Ind. Feb. 10, 2012) (citing *Balt. Gas & Elec. Co. v. Natural Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983)); *c.f. Marsh* , 490 U.S. at 379–80 (1989) (documents subject to limited weight when plaintiffs did not argue that they represented new information until after commencement of litigation).

b. Plaintiffs' Own Noise Study is Not Reliable

The noise measurements provided in COER's JGL noise study, ECF No. 25-2, are

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unreliable.[6] The study has a number of methodological flaws, does not accurately portray its own findings, and presents false comparisons. Mr. Lilly, the author of the study, fails to specify important parameters typical of aircraft noise studies, such as which OLF runway was active, whether windows were open or closed at Position 5, a description of weather conditions (temperature, humidity, and wind speed) at the time measurements were taken, or the distance from the microphones to either the airfield or the aircraft. *See* Czech Decl. ¶ 15. The JGL study also used insufficient sampling and did not use simultaneous measurements. *See id.* at ¶ 16. Mr. Lilly also used a different setting on his sound meter than is typically used for aircraft noise studies. *See id.* at ¶ 18. For these reasons, the methodology that Mr. Lilly used is unreliable.

Moreover, the tables in the JGL report do not accurately portray Mr. Lilly's actual measurements as shown in the graphs in the back of his report. *See* Czech Decl. ¶ 17, 19. For example, in recording his maximum A-weighted sound level in Table 1, Mr. Lilly overstated his findings by up to 3.6 dB. *See* Czech Decl. ¶ 19, 17. Thus, it is not clear that Mr. Lilly is even presenting his flawed information accurately.

Mr. Lilly also makes a number of false comparisons in his report. In Table 3, the JGL report compares its own single-day measurements with the annual average used by the Navy, which Mr. Lilly admits used a different methodology than he did. ECF No. 25-2 at 4, Czech Decl. ¶ 23. In Table 4, the JGL report presents a calculated annual average day-night average sound level at measurement locations using the actual number of FCLPs in 2012, not the

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[6] Mr. Lilly's qualifications as expert in aircraft noise under Federal Rule of Evidence 702 are questionable. *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147–48 (1999) (all expert testimony must be qualified as being relevant and reliable). All of Mr. Lilly's research activities and publications seem to focus on minimizing environmental noise in the built environment, not on measuring aircraft noise in the community generally. *See* ECF No. 25-1 (Lilly CV).

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projected number of FCLPs in 2013. ECF No. 25-2 at 5. This is misleading for two reasons. First, Mr. Lilly took his measurements in 2013, not 2012. *See* ECF No. 25-2 at 1. Second, because the 2005 EA projected noise contours for 2013, using the 2012 numbers does not present a clear comparison to the 2005 EA. Thus, COER fails to present a reasonable comparison of Mr. Lilly's measurements with the Navy's predictions.

A party proffering expert testimony has the burden of demonstrating that the methodology used is reliable, but COER has not presented any such evidence with respect to Mr. Lilly in this case. *See Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 584 (1993); *United States v. Sandoval-Mendoza*, 472 F.3d 645, 654 (9th Cir. 2006) ("Expert opinion testimony . . . is reliable if the knowledge underlying it 'has a reliable basis in the knowledge and experience of the relevant discipline'") (quoting *Kumho Tire*, 526 U.S. at 149). While *Daubert* creates a "flexible" standard, *see City of Pomona v. SQM N. Am. Corp.*, 750 F.3d 1036, 1043, COER has submitted no evidence whatsoever as to

> whether the reasoning or methodology underlying the testimony is scientifically valid" including whether it "can be (and has been) tested[,] . . . whether the . . . technique has been subjected to peer review and publication[,] . . . the known or potential rate of error . . . [and the] 'general acceptance' within the scientific community.

See Daubert, 509 U.S. at 592–94. Accordingly, Mr. Lilly's statements should be disregarded or, at the very least, attributed very little weight.

In contrast with Mr. Lilly's haphazard use of various metrics, the Navy's use of Day-Night Average Sound Level ("DNL") is based on widely-accepted methods. The Federal Interagency Committee on Urban Noise established DNL in 1980, and it was endorsed by the American National Standards Institute in 1990 as the "acoustical measure to be used in assessing compatibility between various land uses and outdoor noise environment." R. Roberts Decl., Ex.

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B at 1-2.[7] As the Wyle study notes

> [m]uch of that criticism [of DNL] stems from a lack of understanding of the basis for the measurement or calculation of DNL . . . . a time-average noise metric, such as DNL . . ., takes into account both the noise levels of all individual events that occur during a 24-hour period and the number of times those events occur.

R. Roberts Decl., Ex. B at A-10–A-11; *see also* Czech Decl. ¶ 13. DNL averaging is used "to obtain a stable representation of the noise environment free of variations" in operations and conditions. *See* R. Roberts Decl., Ex. C at 4-3. Courts have repeatedly upheld the use of a DNL metric as opposed to a single noise event metric, such as Sound Exposure Level ("SEL"). *See Citizens Concerned About Jet Noise, Inc. v. Dalton*, 48 F. Supp. 2d 582, 596 (E.D. Va. 1999) (collecting cases). The JGL report does not present any new criticisms of the methodology that the Navy used in the 2005 EA that the Navy has not already addressed, and has done nothing to justify its own use of a flawed methodology.

c. COER has Not Presented Any Significant New Information About Noise Levels or Public Health Impacts

COER has not presented any significant new information about the noise levels of the Growler, either as compared to the Prowler or as compared to forecasted noise levels in the 2005 EA. While some of COER's declarants opined that the Growler is louder than the Prowler,[8] *see e.g.*, ECF No. 33 ¶ 5, COER has not provided any measurements to support this contention. The JGL Report, ECF No. 25-2, does not actually compare the Prowler and Growler. Actual noise measurements show that the noise profiles of the Growler and the Prowler are similar, and in some cases, the Prowler is actually louder. *See* ECF No. 22-1 at 42 (2005 EA). This is

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[7] The Island County zoning ordinances also use a day-night average sound level metric to implement the noise zones in the AICUZ. *See* Island County Code, §§ 9.44.030–050 (1992).

[8] This may be due in part to the nonlinear response of the human ear to sound changes, responding to, for example, a 10 decibel ("dB") increase "as a doubling . . . of the sound's loudness . . . ." ECF No. 22-1 at 35 (2005 EA).

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attributable to the reduction in total operations as well as the fact that "the Growler performs better than the Prowler at lower power settings, which occur nearer the airfield. In addition, the Growler has a steeper climb-out rate, and thereby reaches a higher altitude more quickly . . . ." *Id.* at 43. At 600 feet of elevation, the Prowler can be louder on the downwind leg of the FCLP pattern than the Growler, although the Prowler is quieter upon departure and approach. *See* R. Roberts Decl., Ex. C, 4-7 (AICUZ study). Plaintiffs have not presented any information to show that this conclusion was incorrect.

The JGL report also fails to provide any new or significant information relating to the Growler's noise levels. To the extent the JGL report, despite its flaws, can be compared to the Navy's existing analysis, Mr. Lilly's measurements of individual noise events are within the scope of the noise levels forecasted in 2005. *See* Czech Decl. ¶ 28. Thus, the JGL study does not present new information about the sound levels of the Growlers.

Plaintiffs also have failed to present any significant new information about the public health impacts of noise, including stress, heart problems, sleep disturbance, hearing loss, and gastrointestinal issues. Much of the information they rely on pre-dates the 2005 EA and/or is based on studies of road or traffic noise. *See* ECF No. 23-2 at 21–24 ("Dahlgren Report"), 24-2 (Bowman literature review).[9] It is also within the scope of what the Navy already considered.

Stress and anxiety over potential future events, such as aircraft crashes, and the declarants' anger over the flights are not within the scope of NEPA. *See Metro. Edison Co. v.*

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[9] For their declarations to be accepted by the Court, Dr. Dahlgren and Ms. Bowman would have to be qualified as experts on the public health impacts of noise and their testimony would have to be reliable under *Daubert*. *See Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147–48 (1999). Defendants note that neither of Ms. Bowman's or Mr. Dahlgren's CVs discuss any work on noise-related health impacts, *see* ECF Nos. 23-1, 24-1, nor have either of them alleged that they have examined any of the declarants, some of whom have serious pre-existing conditions. Additionally, Dr. Dahlgren's background seems to be in toxicology, not noise. *See* ECF No. 23-1.

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People Against Nuclear Energy, 460 U.S. 766, 775–79 (1983). As the Supreme Court stated:

> it is difficult for us to see the differences between someone who dislikes a government decision so much that he suffers anxiety and stress, someone who fears the effects of that decision so much that he suffers similar anxiety and stress, and someone who suffers anxiety and stress that 'flow directly,' . . . from the risks associated with the same decision. . . Until Congress provides a more explicit statutory instruction than NEPA now contains, we do not think agencies are obliged to undertake the inquiry.

Id. at 777–78 (citations omitted); *see also Grunewald v. Jarvis*, 776 F.3d 893, 907 (D.C. Cir. 2015). Applying *Metro Edison*, the Ninth Circuit noted that "NEPA does not require that an agency take into account every conceivable impact of its actions, including impacts on citizens' subjective experiences. Rather, it requires agencies to take into account environmental impacts on the physical 'world around us.'" *Bicycle Trails Council of Marin v. Babbitt*, 82 F.3d 1445, 1466-67 (9th Cir. 1996), *as amended* (June 17, 1996) (citing *Metro. Edison*, 460 U.S. at 775). Thus, the stress that COER members have as a result of their anger over the FCLPs and any fears of what *may* be caused by the FCLPs in the future are not within the scope of the agency's analysis, and most certainly are not significant "new information" requiring preparation of supplemental NEPA analysis.

As for the declarants' alleged stress responses and annoyance as a direct result of the noise, this is within the scope of what the Navy already considered. The Wyle study noted that "[i]t is more likely that noise-related general ill-health effects are due to the psychological annoyance from the noise interfering with normal everyday behavior, than it is from the noise eliciting . . . reflexive response in the autonomic or other physiological systems of the body." R. Roberts Decl., Ex. B, A-19. An individual's perception of sound is subjective, based "largely on the listener's current activity, past experience, and attitude towards the source of that sound." *Id.* at A-2. Some disruption of speech, which is a source of annoyance, is also to be expected at the

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forecasted decibel levels. *See id.* at A-13. Both the Dahlgren report and the Wyle study rely on the same EPA document from 1978 to analyze community annoyance. *Compare* Dahlgren Report at 10 *with* R. Roberts Decl., Ex. B, A-52. The fact some of the people who live near OLF Coupeville, in areas that are zoned for high noise, experience stress and annoyance from the noise, is entirely within the scope of impacts analyzed in the 2005 EA.

The cardiac issues discussed by COER also fail to raise a significant issue that was not already considered by the Navy. Ms. Bowman's statements about increased hypertension, Bowman Decl. ¶ 3, are consistent with some of the studies that the Wyle study considered. *See* R. Roberts Decl., Ex. B, A-19. Nor does Dr. Dahlgren present new information about the cardiac impacts of noise. For example, the first part of Dr. Dahlgren's declaration discusses a 1990 study that is mentioned in the Wyle report as "a study of elderly volunteers." *Compare* Dahlgren Report at 3–6 *to* R. Roberts Decl., Ex. B, A-19 (both discussing a 1990 study by R. Michalak). Dr. Dahlgren goes on to discuss a 2011 World Health Organization ("WHO") report, *see* Dahlgren Report at 7–9, which did a meta-analysis of noise studies through 2005 on the effect of community noise on myocardial infarction. *See* R. Roberts Decl., Ex. F, 19.[10] The WHO report found that there was a lack of studies associating aircraft noise with ischaemic heart disease, although it did find evidence of a relationship with hypertension. *See id.* at 16. In another case dealing with airport noise, the court found that this same WHO report did not constitute "'significant new . . . information relevant to environmental concerns . . . .' sufficient to require a[n] SEIS" when the EIS at issue was published in 2008. *See City of Dania Beach v. U.S. Army Corps of Engineers*, No. 12-60989-CIV, 2012 WL 3731516, at *5 (S.D. Fla. July 6, 2012). As in

[10] Only "a few" of the cited studies considered the effects of military aircraft noise. *See* R. Roberts Decl., Ex. F, 19.

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City of Dania Beach, COER has not presented significant new information about the impacts of aircraft noise on cardiac health that have not already been addressed.

Information presented by COER about sleep disturbance also does not present any new information. Ms. Bowman and Dr. Dahlgren both assert that noise causes sleep disturbances. *See* Bowman Decl. ¶¶ 3, 6, 8; *see also* Dahlgren Report at 16. But the Navy recognized that some sleep disturbances are expected, particularly in older adults. *See* R. Roberts Decl., Ex. B, A-14–A-15 (Wyle Report). Sleep arousal and habituation to noise while sleeping are related to a number of factors, many of which are unique to each individual. *See id.*, A-14.

This multi-factor analysis for sleep disturbance is consistent with at least two of the sources that Dr. Dahlgren relied on for his analysis. First, a literature review from 2007 concluded that "[t]he effects of noise exposure depend on several factors, and the absence of a clear dose-effect relationship is certainly due to the complex interactions of these factors . . . ." *See* R. Roberts Decl., Ex. G, 141 (cited as source 55 in the Dahlgren Report).[11] Second, Dr. Dahlgren's Table 5.4, *see* Dahlgren Report at 15, is from the WHO's noise guidelines for the European Union, published in 2009, which recognized similar uncertainty regarding responses to aircraft noise. *See* R. Roberts Decl., Ex. H, 58, 108. Furthermore, the vast majority of the literature cited in the guidelines pre-dates 2005, and thus does not represent new information. *See id.* at 111–34. These guidelines are also similar to the EPA's noise guidance discussed in the Wyle study.[12] *Compare* Dahlgren Report at 15 *with* R. Roberts Decl., Ex. B, A-15. The

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[11] This review also noted that it is unclear whether elderly people complain more about noise because they are more sensitive or because they are more likely to wake up throughout the night and thus are more likely to already be awake when loud noises occur. R. Roberts Decl., Ex. G, 140.

[12] The EPA identifies an indoor DNL of 45 dB or less as necessary to protect against sleep interference, *see* R. Roberts Decl., Ex. B, A-15, but even at 80 dB, only ten percent of people are expected to awaken. *See id.* at A-17.

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information that COER has presented about sleep disturbance recognizes the same uncertainty and multi-factor analysis considered by the Navy in its own analysis.

COER has not presented new information about hearing loss. The Wyle study considered the impacts of jet noise on hearing loss in detail. The Wyle study noted that even the most protective federal work place standard, which assumes an eight hour work period for *forty years*, is a time-average level of 70 dB over a 24-hour period. *See* R. Roberts Decl., Ex. B, A-18. One of the federal workplace guidelines even allows a time-average level of 90 dB for an eight hour work period. *See id.* The internal Navy reports referenced by COER, Pl.'s Br. 8, recognize these standards. *See e.g.*, ECF No. 22-13 at 6. Both of these reports address continuous exposure by Navy personnel on the flight deck of an aircraft carrier, or on an airfield in close proximity to the aircraft. *See* ECF No. 22-11; Czech Decl. ¶ 29; ECF No. 22-13 at 5. They are not applicable to noise exposure from jet noise flying overhead, nor do they represent new information on the impacts of jet noise on hearing loss.

With respect to the impacts of noise on the gastrointestinal system, all COER has offered is its members' anecdotal claims that their gastrointestinal problems are made worse by the noise and Dr. Dahlgren's report. *See* ECF No. 26 ¶ 3; ECF No. 34 ¶¶ 5–6; ECF No. 36 ¶; Dahlgren Report at 17–19. In his report, Dr. Dahlgren second-guesses the authors of the very studies he cites. For example, he discusses hearing loss in patients with Crohn's disease, and states that "[t]he authors of the Crohn's disease studies have not ascribed the sensorineural hearing loss to noise injury but rather to autoimmune damage." Dahlgren Report at 18. He goes on to argue,

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Sleep disturbances are also the reason why the Navy included a 10 dB penalty for each operation between 10 p.m. and 7 a.m. *See id.* at A-16.

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without any support, that "it is more likely that the Crohn's disease is caused by noise exposure in susceptible people." *See id.* Dr. Dahlgren does not have a background as either a gastroenterologist, immunologist, or otorhinolaryngologist, and was not an author of any of these studies. His conclusion about the impact of noise on Crohn's disease is not reliable and should not be considered by this court. *See Sandoval-Mendoza*, 472 F.3d at 654. In no event is Dr. Dahlgren's report "new" information on the effects of noise on the gastrointestinal system.[13]

In sum, the "new information" that COER has provided, to the extent it is relevant, is simply more of the same information that the Navy already considered. As the Ninth Circuit has stated, "finding impacts that confirm what the agencies expected is not 'new' information necessitating any additional review." *Tri-Valley CAREs v. U.S. Dep't of Energy*, 671 F.3d 1113, 1125-26 (9th Cir. 2012) (upholding agency's determination that a supplemental EA was not required because new information would not show a "seriously different picture of the likely environmental harms stemming from [a] proposed project. . . . .") (citing *Wisconsin v. Weinberger*, 745 F.2d 412, 416-17 (7th Cir. 1984)). COER has not made the required showing that "the remaining action will affect the quality of the human environment in a significant manner or to a significant extent not already considered." *Marsh*, 490 U.S. at 374 (citations and quotations omitted). Even though some of the information that COER has submitted may have the potential to conflict with the Navy's analysis, "[w]hen specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts,

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[13] Generally, Dr. Dahlgren's report shows a lack of scientific rigor or objectivity. Dr. Dahlgren's report frequently makes conclusory, speculative, and unattributed statements such as "[t]he impact on the health of [Coupeville residents] is certain to be devastating and likely already increased morbidity and even shortened their lives," *see* Dahlgren Report at 9–10, but without any sort of supporting documentation that there is a higher rate of morbidity around OLF Coupeville.

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even if, as an original matter, a court might find contrary views more persuasive."*Id.* at 378. Nor is the agency required to "reassess its decision every time" a new study is released, since such a requirement would immobilize federal agencies. *See Weinberger*, 745 F.2d at 419 n.6. The information that COER has submitted does not require supplementation.

II. COER has Failed to Demonstrate Irreparable Harm

To succeed on its motion, COER must show that its members are likely to suffer irreparable harm in the absence of preliminary relief. *Winter*, 555 U.S. at 20. Under this standard, "[i]t is not enough for a court considering a request for injunctive relief to ask whether there is a good reason why an injunction should *not* issue; rather, a court must determine that an injunction *should* issue. . . ." *Monsanto*, 561 U.S. at 158 (emphasis in original). An injunction may issue only if it is "needed to guard against any present or imminent risk of likely irreparable harm." *Id.* at 2760. And, importantly, COER must show that these irreparable injuries are "likely to occur before the district court rules on the merits." *Greater Yellowstone Coal. v. Flowers*, 321 F.3d 1250, 1260 (10th Cir. 2003). There is also no presumption of harm where plaintiffs allege a violation of environmental statutes. *See Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 544–45 (1987); *Lands Council v. McNair*, 537 F.3d 981, 1005 (9th Cir. 2008) ("irreparable harm" should not be presumed in environmental cases).

A. COER's Own Delay Counsels Strongly Against Granting the Motion

COER's year-plus-long delay in bringing this motion belies its claims of irreparable injury. COER could have brought suit to challenge the FCLPs prior to their re-start in January of 2014. Instead, COER waited almost a year and a half to bring this motion. COER's use of this strategy militates against granting its motion. As the Ninth Circuit has stated, "[a] preliminary injunction is sought upon the theory that there is an urgent need for speedy action to protect the

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plaintiff's rights. By sleeping on its rights a plaintiff demonstrates the lack of need for speedy action." *Lydo Enters. v. City of Las Vegas*, 745 F.2d 1211, 1213 (9th Cir. 1984) (citations omitted); *Oakland Tribune, Inc. v. Chronicle Pub. Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985) ("Plaintiff's long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm."); *Kan. Health Care Ass'n v. Kan. Dep't of Soc. & Rehab. Servs.*, 31 F.3d 1536, 1543-44 (10th Cir. 1994) ("delay in seeking preliminary relief cuts against finding irreparable injury") (citations omitted). If the injuries from FCLPs are as dangerous as COER claims, it is difficult to understand why they waited so long to bring this motion.

Communication with COER's counsel indicates that this delay was intentional. In an email dated March 13, 2014, counsel for COER stated that it would not be filing a motion for a preliminary injunction, but if the Navy "start[ed] back up," COER would have "noise monitors and public health experts on standby to monitor and will file the motion." *See* R. Roberts Decl. Ex. I at 1–2.[14] Over a year and almost 6,000 FCLPs later, COER now allege that it is at risk of "irreparable injury." Pl.'s Br. 18; *see* ECF No. 17-3 at 14 (flight logs). It is unclear why COER chose to bring this motion now. As the courts have recognized, "equity aids the vigilant, not those who rest on their rights." *Valenti v. Mitchell*, 962 F.2d 288, 299 (3rd Cir. 1992).

B. COER Fails to Show that it is Irreparably Harmed by the Continuation of FCLPs.

The purpose of a preliminary injunction is to "preserve the status quo and the rights of the parties until a final judgment issues in the case," *U.S. Philips Corp. v. KBC Bank N.V.*, 590 F.3d 1091, 1094 (9th Cir. 2010). A plaintiff must show that "[t]he injury complained of [is] . . . of

[14] As of March 12, 2014, the Navy had flown FCLPs for at Coupeville for about six and a half hours over three days in January of 2014. *See* Nortier Decl., Attachment 2, pp. 1, 17.

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such imminence that there is a 'clear and present' need for equitable relief to prevent irreparable harm.'" *Nw. Envtl. Def. Ctr. v. U.S. Army Corps of Eng'rs*, 817 F. Supp. 2d 1290, 1316 (D. Or. 2011) (quoting *Chem. Weapons Working Group, Inc. v. U.S. Dep't of the Army*, 963 F. Supp. 1083, 1095 (D. Utah 1997) (internal quotation omitted)). An injunction should issue only where a plaintiff makes a "clear showing" and presents "substantial proof" that the injunction is warranted. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997) (per curiam).

COER's declarants allege that the Navy frequently conducts FCLPs at night, and often after midnight. *See, e.g.*, Askins Decl. ¶5, Kameros Decl. ¶ 6, Portin Decl. ¶ 7. In reality, flights occurring after 10 p.m. are a small portion of total FCLPs. Under the 2005 EA, the Navy flies about 83% of the FCLPs during the day, and 17% during "acoustic night," which is defined as between 10 p.m. and 7 a.m. *See* ECF No. 22-1 at 39. The Navy also records flights that occur after legal sunset, but before 10 p.m., as "night" flights in the tracker because they suffice for pilot training purposes. Since the time of sunset varies throughout the year, a non-acoustic "night" flight can occur as early as 4:19 p.m. on the shortest day of the year, *see* R. Roberts Decl., Ex. J, thus lessening the need to conduct flights after 10 p.m. during winter and late autumn. By contrast, because the sun goes down later in the spring, summer, and early part of autumn, flights after 10 p.m. are more frequent during those months. Consistent with that pattern, the Navy has only flown 18 FCLPs after 10 p.m. so far in 2015, all of which occurred on April 16, 2015.[15] *See* Nortier Decl. ¶ 16, Attachment 2, p. 16. With respect to 2014, the Navy flew FCLPs on a total of 44 days, but only fourteen of those days included flights after 10 p.m., and only two of those fourteen days included flights after midnight. *See* Nortier Decl. ¶ 16,

[15] This was after COER had already decided to file its motion. *See* ECF No. 17 (March 31 JSR).

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Attachment 2, pp. 6, 8 (showing that flights occurred until 12:17 a.m. on June 27, 2014, and until 12:30 a.m. on August 13, 2014). The Navy has not flown after midnight since. In sum, while the declarants attribute sleep disruptions to the FCLPs, the fact is the Navy only conducted FCLPs after 10 p.m. on fourteen days in all of 2014.

As discussed above, some of COER's alleged harms are based on fears of hypothetical future injuries.[16] *Supra* 15. Not only are these fears not cognizable under NEPA, but they are insufficient to establish irreparable harm. *See Amoco*, 480 U.S. at 545 ("improbable" harm tips the balance away from granting the motion); *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1151 (2013) (Plaintiffs "cannot . . . inflict[] harm on themselves based on their fears of hypothetical future harm. . . ."); *Ctr. for Food Safety v. Vilsack*, 636 F.3d 1166, 1171 n.6 (9th Cir. 2011) ("Of course, as our decision illustrates, a plaintiff may establish standing to seek injunctive relief yet fail to show the likelihood of irreparable harm necessary to obtain it.").

Some of COER's claimed harms are also unrelated to the FCLPs or are speculative. For example, Dr. Dannhauer claims that Ms. Kameros' health worsened between June and September of 2013, ECF No. 39 ¶ 3, but the Growlers did not fly at Coupeville from June to December of 2013. *See* Nortier Decl. ¶ 7 Therefore, Ms. Kameros' poor health during that period cannot be attributed to FCLPs, and it provides no support for the requested injunction. The other declarants speculate that their health impacts are related to the FCLPs, *see e.g.*, ECF Nos. 27–38, but speculative injury does not support claims of irreparable harm. *See Goldie's Bookstore, Inc. v. Superior Court of Cal.*, 739 F.2d 466, 472 (9th Cir. 1984) (holding that purely speculative

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[16] To the extent that the declarants' fears of accidents are based on the fact that they are living in an area that could, under other circumstances, be designated as an Accident Potential Zone ("APZ"), those circumstances do not exist here. *See* ECF No. 22-3 at 5-9 (AICUZ study stating that APZs are not generated by CY03 or CY13 operational levels); Nortier Decl. ¶ 15.

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injury "does not constitute irreparable injury"); *see Caribbean Marine Serv. Co. v. Baldridge*, 844 F.2d 668, 674–75 (9th Cir. 1988) (finding that unsupported allegations do not suffice to show irreparable harm).

Finally, COER's members' alleged harm is also in part due to their own decisions to move to an area zoned for high noise. Harm arising from the movant's own actions is not irreparable. *See Salt Lake Tribune Pub. Co., LLC v. AT & T Corp.*, 320 F.3d 1081, 1106 (10th Cir. 2003) (citing *Caplan v. Fellheimer Eichen Braverman & Kaskey*, 68 F.3d 828, 839 (3d Cir.1995); *Lee v. Christian Coal. of Am., Inc.*, 160 F.Supp.2d 14, 33 (D.D.C.2001); 11A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice & Procedure* § 2948.1, at 152–53 (2d ed.1995)); *see also Ventura Cnty. Christian High Sch. v. City of San Buenaventura*, 233 F. Supp. 2d 1241, 1253 (C.D. Cal. 2002). The Navy has been conducting FCLPs at OLF Coupeville since 1967, and at historically higher levels than currently. *See* R. Roberts Decl., Ex. A. As a result, Island County has zoned all of the area around OLF Coupeville as Noise Zones 2 and 3, meaning an average annual DNL of 65 dB or greater, since 1992. *See* R. Roberts Decl., Ex. K; Island County, Wash., Code Ch. 9.44 (1992).[17] Many of the declarants moved to the area after 1992, *see* Attwood Decl. ¶ 2 (2005); Kameros Decl. ¶ 3 (2003); Portin Decl. ¶ 4 (2010); G. Roberts Decl. ¶ 4 (1994); B. Wilbur Decl. ¶ 3 (2006); R. Wilbur Decl. ¶ 2 (same);[18] including one declarant who moved to the area after COER filed this suit. *See* Askins Decl. ¶ 3. Equitable

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[17] The Navy does not consider residential uses compatible with sound levels above 75 DNL. *See* R. Roberts Decl., Ex. C at 6-2 (AICUZ study). The Island County comprehensive plan prohibits residential construction in areas zoned above 70 DNL, but "existing platted developments [such as Admiral's Cove] are . . . 'grandfathered.'" *See id.* at 7-4. The Navy does not control zoning; it can only recommend what areas are not suitable for appropriate development through the AICUZ. *See id.* at 6-1.

[18] Mr. Wilbur also avers that he was living in Virginia at the time of his purchase, and upon first hearing the Prowlers after he purchased his home, he found the noise "distressing and wearing." *See* R. Wilbur Decl. ¶ 5.

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concerns disfavor an injunction because the Navy has done what it can to discourage people from residing in these areas, and many of those claiming harm purchased homes in areas zoned for loud noise.[19]

III. The Balance of the Hardships Favors the Navy

Enjoining FCLPs would gravely harm the Navy's ability to maintain military readiness by hindering the ability of individual pilots to train for the difficult task of landing on an aircraft carrier. "Although there is no national defense exception to NEPA ... the national well-being and security as determined by the Congress and the President demand consideration before an injunction should issue for a NEPA violation." *Weinberger*, 745 F.2d at 425. It is well established that courts "give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest." *Goldman v. Weinberger*, 475 U.S. 503, 507 (1986); *see also Gilligan v. Morgan*, 413 U.S. 1, 10 (1973) ("[I]t is difficult to conceive of an area of governmental activity in which the courts have less competence."); *Citizens for Peace v. City of Colo. Springs*, 477 F.3d 1212, 1221 (10th Cir. 2007) ("Courts have historically given special deference to other branches in matters relating to foreign affairs, international relations, and national security"). Matters of national security are important considerations in evaluating the public interest prong of a preliminary injunction in an action brought under NEPA. *See Winter*, 555 U.S. at 24.

An injunction would limit the Navy's ability to properly prepare for combat. Under Federal law, the Navy is required to train its forces to be ready "for prompt and sustained combat

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[19] Nor are noise complaints new. In 1992, in the *Argent* case, neighboring landowners brought an inverse condemnation claim against the United States for noise from flights at OLF Coupeville. *See Argent v. United States*, 124 F.3d 1277 (Fed. Cir. 1997).

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incident to operations at sea." *See* 10 U.S.C. § 5062(a). The Growler, as the Navy's only tactical electronic attack aircraft, is an essential part of the Navy's warfare mission. *See* Shoemaker Decl. ¶8, Hewlett Decl. ¶ 4. The Growler performs its mission by suppressing enemy air defenses and communication, allowing fighters on the ground and in the air to enter enemy space undetected. *See* Shoemaker Decl. ¶ 9. Currently, Growler pilots fly almost daily intense and exhausting missions against the Islamic State of Iraq and the Levant. *See* Hewlett Decl. ¶ 5.

For a carrier-based Growler pilot to successfully return from an electronic-attack mission, the pilot must land on a specific spot on a moving carrier. *See* Shoemaker Decl. ¶ 11. Doing so at night is generally regarded as the highest risk operation in aviation. *See* Hewlett Decl. ¶ 8. A mistake upon landing endangers not only the pilot and the aircraft, but the many sailors working on the carrier deck to recover the planes. *See id.* ¶7. While aircraft are landing on the carrier, the carrier must maintain a constant course and speed, which increases its vulnerability to attack. *See id.* Thus, pilots must land in rapid succession (forty-five to sixty seconds between landings), with little margin for error. *See* Shoemaker Decl. ¶ 12. FCLPs are intended to mimic that interval. *See id.* ¶ 15.

Such a complex maneuver requires repeated practice. The Navy requires 120 to 140 FCLPs for each pilot prior to being certified to land on a carrier. *See id.* ¶ 14. The purpose of this repetition is to internalize the landing pattern, with precise points for descending and turning to land at the exact location on the runway. *See id.* ¶ 15. Upon touchdown, pilots add power and immediately take off as though they have missed the arresting wire on an aircraft carrier. *See id.* The ability to land on a carrier deck is a perishable skill, so FCLPs must be conducted within a very narrow window, preferably within five and no more than ten days of landing on a carrier. *See id.* ¶ 14. FCLP training is also part of a much larger training syllabus, and different pilots

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may be at different parts of the syllabus at any given time. *See* Shoemaker Decl. ¶ 21. The only part of the training syllabus that occurs at OLF Coupeville is FCLPs. Shoemaker Decl. ¶ 17.

OLF Coupeville is uniquely suited for FCLPs. There is low ambient light because of the low population density near the airfield. Shoemaker Decl. ¶ 16; R. Roberts Decl., Ex. L (density map). Because it is exclusively devoted to FCLPs, pilots can fly the correct pattern at the required intervals. Shoemaker Decl. ¶¶ 16–17. It is situated at sea level, and there are no limitations on the pilot's ability to fly at the required altitudes. *Id.* ¶16.

In contrast, Ault Field is not nearly as ideal for FCLPs. All aircraft flying at Ault Field are required to maintain a 1,000 foot altitude where they would normally maintain a 600 foot altitude during FCLPs. *See id.* ¶ 20. "Flying such a distorted approach teaches and reinforces unsafe procedures that must be unlearned when actually landing on an aircraft carrier." *Id*. Additionally, Ault Field has "significant cultural lighting," which makes it more difficult to replicate a night carrier environment. *See id*.

Shifting all of the FCLPs to Ault Field would also cause significant air traffic control problems at Ault. "Ault Field supports an average of 65,000 military operations a year, comprising operations from aircraft home-based at NAS Whidbey Island," including a variety of squadrons. Nortier Decl. ¶ 4. As the Navy discovered in 2013, shifting all FCLPs to Ault Field degrades the quality of training and negatively impacts all other operations at Ault. *See* Nortier Decl. ¶¶ 7–9. This is for three reasons. First, because Ault has two intersecting runways, and FCLPs last for forty-five minutes, no other planes can use Ault Field while FCLPs are ongoing without interrupting the FCLPs. *See id.* ¶ 8. This causes a back-up of aircraft waiting to land or take-off. *See id.* These backups lead to missed training windows in military operations areas and military training routes, which are tightly scheduled. *See id.* In 2013, to relieve this congestion,

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air traffic control lengthened the FCLP pattern to create an opening for other aircraft to take off or land, which degraded FCLP training and required aircraft conducting FLCPs to fly over different locations in the community than they would otherwise. *See id.* Thus, when the Navy does FCLPs at Ault, it must choose between degrading the realism of FCLP practice by interrupting the FCLPs, or negatively impacting other operations and training at Ault Field.

These operational impacts and decreased training quality are not sustainable in the long-term. It will take almost two more years for the new EIS to be complete, *see* ECF No. 17 at 3. As the Nortier Declaration explains, these impacts go beyond just the FCLPs to almost every operation at NAS Whidbey Island. Nortier Decl. ¶ 1. An injunction would impair the Navy's ability to maintain military readiness by degrading the quality of training at both OLF Coupeville and Ault Field. *See id.*, Shoemaker Decl. ¶ 22. The Navy would be irreparably harmed by not being able to use OLF Coupeville.

In *Winter*, the Supreme Court found that any irreparable harm to the plaintiff was outweighed by the public interest and the Navy's interest in "effective, realistic training . . ." that had been ongoing for the past forty years. *See Winter*, 555 U.S. at 23; *see also Guam Indus. Servs., Inc. v. Rumsfeld*, 383 F. Supp. 2d 112, 122 (D.D.C. 2005) ("[D]efendants['] interest in military readiness outweighs any speculative economic losses to the plaintiff."). Like the sonar training at issue in *Winter*, landing on a carrier is a "highly perishable skill that must be repeatedly practiced under realistic conditions,'" and has a long history of use. *See Winter*, 555 U.S. at 25; Shoemaker Decl. ¶¶ 14, 17. The court should continue the status quo and allow FCLPs at Coupeville to continue. *See Wash. Capitols Basketball Club, Inc. v. Barry*, 419 F.2d 472, 476 (9th Cir. 1969) ("[t]he function of a preliminary injunction is to maintain the status quo ante litem pending a determination of the action on the merits.").

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IV. An Injunction Would not be in the Public Interest

COER's burden of proof is especially heavy where, as here, the interim relief sought is to stop a governmental program intended to serve the public interest. *Yakus v. United States,* 321 U.S. 414, 440 (1944). "[T]he court may in the public interest withhold relief until a final determination of the rights of the parties, though the postponement may be burdensome to the plaintiff." *See also Weinberger v. Romero-Barcelo,* 456 U.S. 305, 312–13 (1981). The public has a strong interest in military training and general military readiness. *See Winter,* 555 U.S. at 26 ("The public interest in conducting training exercises . . . under realistic conditions plainly outweighs the interests advanced by the plaintiffs."); *Guam Indus. Servs., Inc.*, 383 F. Supp. 2d at 122 ("the public interest lies with the defendants in assuring military preparedness.").

Additionally, for all of COER's statements that Admirals' Cove is a "densely populated area," *see e.g.*, Pl.'s Br. 3, the area near Ault Field is actually more densely populated. *See* R. Roberts Decl., Ex. L (Map of Island County density); R. Roberts Decl., Ex. C, 7-11 (AICUZ study). As of 2004, there were 17,161 people living in an area zoned for at least 60 dB or greater near Ault field, as opposed to 5,933 people living in an area zoned for at least 60 dB near Coupeville. R. Roberts Decl., Ex. C, 7-11. The public interest does not favor shifting FCLPs from an area of lower population density to an area of higher population density.

This case presents a classic case of the public interest in military preparedness conflicting with private interests. As the Ninth Circuit has noted, "when a district court balances the hardships of the public interest against a private interest, the public interest should receive greater weight." *F.T.C. v. World Wide Factors, Ltd.*, 882 F.2d 344, 347 (9th Cir. 1989) (citing *Federal Trade Comm'n v. Warner Commc'ns, Inc.*, 742 F.2d 1156, 1165 (9th Cir.1984) (citations omitted)).

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CONCLUSION

Under the familiar four-factor test, COER's motion for a preliminary injunction should be denied. First, as discussed above, COER has failed to show a likelihood of success on the merits, since no action has been unreasonably withheld, and COER has not presented any significant new information that would require preparation of a supplemental NEPA analysis. Second, the injuries of COER's members are not sufficient to rise to the level of irreparable harm, particularly given their long delay in bringing this motion. Third, the balance of the harms favors the Navy's interests in military readiness and efficient operation. Fourth, the public interest in national security favors denial of this motion. For all of the reasons discussed above, COER's motion should be denied.

DATED this 29th day of May, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on May 29, 2015, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following:

David S. Mann

Dated May 29, 2015

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