

1 THE HONORABLE THOMAS S. ZILLY

2  
3  
4  
5  
6  
7 UNITED STATES DISTRICT COURT  
8 WESTERN DISTRICT OF WASHINGTON  
9 AT SEATTLE

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

12 Plaintiff,

13 v.

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

19 Federal Defendants.

NO. 2:13-cv-01232-TSZ

REPLY IN SUPPORT OF MOTION  
FOR PRELIMINARY INJUNCTION

Oral Argument Requested

20  
21 **I. INTRODUCTION**

22 Only after Citizens of Ebey’s Reserve’s (“COER”) sued in 2013 to enforce the NEPA  
23 process did the Navy, for the first time, decide to prepare a full environmental impact statement  
24 (“EIS”) addressing operations at NAS Whidbey. After initially attempting to limit the scope of  
25 the noise analysis, the Navy now concedes that the EIS will, for the first time, “include a  
26 comprehensive noise assessment of NAS Whidbey Island and OLF Coupeville operations,

REPLY IN SUPPORT OF MOTION FOR PRELIMINARY  
INJUNCTION  
(NO. 2:13-cv-01232-TSZ) - 1

**GENDLER & MANN, LLP**  
615 Second Ave., Suite 560  
Seattle, WA 98104  
Phone: (206) 621-8868  
Fax: (206) 577-5371

1 including potential health impacts based on a thorough literature review.” Dkt. 22-16. The Navy  
2 does not anticipate release of its EIS, however, until 2017. Meanwhile the Navy fully intends to  
3 continue its harmful operations at OLF Coupeville.

4 In response to COER’s motion for preliminary injunction, the Navy agrees with COER  
5 that there is a wealth of scientific evidence documenting significant human health impacts from  
6 extremely loud noise. More significantly, the Navy fails to rebut the key conclusion of COER’s  
7 medical expert, Dr. James Dahlgren:

8  
9 The noise from the Navy’s Growler aircraft landing and taking off from  
10 Outlying Landing Field Coupeville (OLFC), Washington is causing and has  
11 caused serious adverse health effects in the residents as described in the  
thirteen declarations of residents living near the field.

12 Dkt. 23, ¶ 5. The Navy’s continued operations at OLF Coupeville are causing significant harm.

13 As discussed below, COER has met its burden to demonstrate that all of the necessary  
14 elements for a preliminary injunction are satisfied. This Court should exercise its authority and  
15 enjoin further FCLP operations at OLF Coupeville until the Navy has finally and completely  
16 evaluated the impacts of its operations on the environment and citizens living nearby.

## 17 18 **II. ARGUMENT IN REPLY**

### 19 **A. Success Is Likely On the Merits.**

20 A plaintiff is not required to demonstrate that it is more likely than not to prevail on the  
21 merits of its case. *Leiva-Perez v. Holder*, 640 F.3d 962, 966 (9th Cir. 2011). “[S]erious  
22 questions going to the merits and a balance of hardships that tips sharply toward the plaintiffs  
23 can support issuance of a preliminary injunction.” *Alliance for the Wild Rockies v. Cottrell*, 632  
24 F.3d 1127, 1135 (9th Cir. 2011). COER can demonstrate both that it will likely succeed on the  
25 merits and that the balance of hardships tips in its favor.  
26

1                   **1.       The Navy has essentially conceded COER’s claims have merit.**

2                   The “merits” of the underlying case ask whether the Navy had a duty to supplement the  
3 its 2005 EA when it learned “that the environmental effects of ongoing [FCLP Operations at  
4 OLF Coupeville] are significantly and qualitatively different or more severe than predicted in  
5 [the 2005 EA] prepared in connection with the [introduction of EA-18G Growler].” 32 C.F.R. §  
6 775.69(c). The Navy has effectively conceded its duty under NEPA. Three months after COER  
7 sent notice to the Navy requesting a supplemental environmental analysis, and two month after  
8 COER filed this action, the Navy announced its intent to prepare, for the first time, a full EIS  
9 addressing operations at NAS Whidbey Island. *See* Dkt 10-2 (Notice letter); Dkt 1 (Complaint);  
10 Dkt. 8-1 (Notice of Intent). After initially attempting to limit the scope of the noise analysis, in  
11 April of this year the Navy conceded that the proposed EIS would, for the first time, “include a  
12 comprehensive noise assessment of NAS Whidbey Island and OLF Coupeville operations,  
13 including potential health impacts based on a thorough literature review.” Dkt 22-16. By its  
14 actions, the Navy has conceded that it needs to conduct precisely the review COER requested.

15                   **2.       COER’s claim is not prudentially moot.**

16                   Admitting that it is finally preparing an EIS that will consider the effects of ongoing  
17 operations (as requested by COER), the Navy attempts to capitalize by claiming its two-year  
18 plan effectively renders COER’s claim “prudentially moot.” Dkt 43, p. 8, *l.* 16 – p.9, *l.* 18. Like  
19 Article III mootness, the “central inquiry” for the prudential mootness doctrine asks “[h]ave  
20 circumstances changed since the beginning of litigation that forestall any occasion for  
21 meaningful relief?” *S. Utah Wilderness Alliance (“SUWA”) v. Smith*, 110 F.3d 724, 727 (10th  
22 Cir. 1997). In *SUWA*, the plaintiff alleged that the Bureau of Land Management failed to obtain  
23 written concurrence from the Fish and Wildlife Service before taking action. *Id.* While the court  
24  
25  
26

1 agreed that a violation of the Endangered Species Act may have occurred, but the BLM had both  
2 completed and obtained the FWS's concurrence by the time the matter reached the court. There  
3 was no meaningful relief remaining for the court to grant, so the court dismissed as prudentially  
4 moot. *Id.* at 728. *See also Aluminum Co. of Am. v. Bonneville Power Admin.*, 175 F.3d 1156,  
5 1163 (9<sup>th</sup> Cir. 1999) (finding plaintiffs' claim that BPA had failed to prepare an EIS before  
6 operating the Federal Columbia River Power System prudentially moot because the Final EIS  
7 had been prepared and issued prior to the court hearing the case).

9 Here, however, the Navy has not completed its EIS. After initially setting 2016 as the  
10 completion date of the NEPA process, COER had to sue to obtain, the Navy has now pushed that  
11 date back to 2017. Dkt. 22-16. The Court can, in the meantime, still grant meaningful relief.  
12 The Court can enjoin FCLP operations at OLF Coupeville until the Navy completes an adequate  
13 EIS addressing the noise and public health impacts of EA-18G Growler operations at the OLF.  
14 Indeed, the Court recognized its authority shortly after the Navy issued its initial Notice of Intent  
15 to prepare an EIS. Based on the parties' stipulation, the Court stayed the case, required a joint  
16 status report within 14 days of issuance of the anticipated EIS, and left open the opportunity for  
17 plaintiff to pursue injunctive relief. Dkt. 10 (Stipulation); Dkt 11 (Minute Order Staying Case).  
18 Because the Navy has not completed the EIS sued for by COER, and because the Court can still  
19 grant effective interim relief while the Navy is preparing its EIS, the case is not moot.

22 **3. The environmental impacts of ongoing activities at OLF Coupeville**  
23 **are significantly and qualitatively different or more severe than**  
24 **predicted in the 2005 EA.**

25 Even if the Navy had not impliedly conceded that significant noise impacts require a  
26 preparation of a complete EIS, COER has demonstrated that *at least* a supplemental analysis is  
required. Pursuant to 32 C.F.R. § 775.69(c), the Navy is obligated to conduct additional

1 environmental review for ongoing activities, including “existing training functions,” where the  
2 environmental effects of the ongoing activity are “significantly different or more severe” than  
3 predicted in the 2005 EA. COER has presented at least three lines of evidence demonstrating  
4 that the environmental effects are either “significantly different” or “more severe” than predicted  
5 in the 2005 EA: (1) The actual sound levels experienced by local residents exceed anything  
6 discussed in the 2005 EA; (2) the Navy is conducting all or nearly all operations over a single  
7 flight path; and (3) nearby residents are suffering real, and increasing, health impacts.  
8

9 *a. COER is not challenging the 2005 EA.*

10 Focusing solely on COER’s argument that the 2005 EA’s conclusion that the EA-18G  
11 would be quieter because of a reduced number of flights, the Navy asserts that the new evidence  
12 offered by COER is, in effect, a time-barred challenge to the 2005 EA. Dkt 43, p. 10, *l.* 11 – p.  
13 11, *l.* 9. The Navy ignores, however, that contrary to the 2005 EA’s assumption that the EA-  
14 18G would be limited to 6,120 FCLP operations at OLF Coupeville after introduction, the actual  
15 numbers were significantly higher. Beginning with the EA-18G’s introduction in 2009, the  
16 number of FCLP operation steadily increased from 6,476 in 2009 to 9,668 in 2012. Prior to  
17 halting FCLP operations at OLF Coupeville in June 2013, the Navy flew 6,972 operations. Dkt  
18 44-1. Overall, between 2010 and 2013, the Navy conducted an average of 8,123 FCLP  
19 operations per year at OLF Coupeville. This is significant new information that was not  
20 considered in the 2005 EA.<sup>1</sup>  
21  
22

23 More importantly, and as discussed below, each of the additional primary lines of  
24 evidence offered by COER to demonstrate “significantly different or more severe” impacts also  
25  
26

---

<sup>1</sup> While the Navy reduced FCLP operations to 6,072 in 2014, there is no “limitation” on the number of operations. The Navy demonstrated this between 2010 and 2013.

1 constitute new information that was not considered or available at the time the 2005 EA was  
2 prepared. COER is not challenging the adequacy of the 2005 EA. To the contrary, it has  
3 demonstrated that the actual environmental effects of using the EA-18G to conduct FCLP  
4 practice at OLF Coupeville are “significantly different or more severe” than predicted in the  
5 2005 EA.  
6

7 ***b. Noise impacts from the EA-18G Growler are more severe than***  
8 ***predicted in the 2005 EA.***

9 The Navy does not dispute that neither the 2005 EA (Dkt 22-1) nor the 2004 Wyle Noise  
10 Study (Dkt 44-2) it apparently relied on contain *any* evidence of actual noise measurements of  
11 EA-18G Growlers conducting FCLPs at OLF Coupeville. The EA-18G Growler did not arrive at  
12 NAS Whidbey Island until 2008 and did not begin operations at OLF Coupeville until June 2009.  
13 Dkt 22-9; Dkt 22-10. Thus, the 2013 noise measurements conducted by JGL Acoustics  
14 constitutes new evidence that was not available in 2005.  
15

16 The Navy’s attempts to discredit Mr. Lilly’s sound measurements fall short. Dkt. 43, pp  
17 13-14. For example, knowing which runway was active is irrelevant. Mr. Lilly’s report shows  
18 that Position 1, for example, was located directly in line with the single airstrip at OLF  
19 Coupeville at a residential home within the Admirals Cove neighborhood. Dkt. 25-2, p. 7.  
20 Regardless of which path was being used, Mr. Lilly recorded sound at that location. Similarly,  
21 complaints about weather conditions and distance from the airstrip are irrelevant. The  
22 measurements are just that – actual measurements of the noise conditions during FCLP practice.  
23 *See also*, Second Declaration of Jerry G. Lilly, ¶ 6 (Responding to Czech dec, ¶ 15).  
24  
25  
26

1 Relying on the Declaration of Joseph Czech, the Navy similarly attempts to nitpick and  
2 therefore discredit the conclusions presented in Mr. Lilly's Table 1. Mr. Lilly addresses each of  
3 Mr. Czech's criticisms of his sound measurements as follows:

4 In response to Paragraph 17 there are three very minor inconsistencies in  
5 Table 1 which could be due to typing or copying errors, I am not sure. After  
6 checking back with the raw data files, I have confirmed that the  $L_{\max,fast}$  values  
7 presented in Figures 4 and 5 are correct as shown. I did not present the  
8  $L_{\max,fast}$  value for Position 1 in Figure 3, but the correct value for  $L_{\max,fast}$  in  
9 Figure 3 is 119.3 dBA. Therefore, the  $L_{\max,fast}$  value in Table 1 for Position 1  
10 should be 119.3 dBA instead of 119.2 dBA. The  $L_{\max,fast}$  value in Table 1 for  
11 Position 2 should be 112.8 dBA instead of 113.4 dBA, and the  $L_{\max,fast}$  value in  
12 Table 1 for Position 3 should be 115.1 dBA instead of 115.7 dBA. All of  
13 these differences are much less than 1 dB, which is an insignificant amount in  
14 terms of human perception. I should also point out that these numbers have  
15 no effect on the other values presented in Table 1 or the conclusions of the  
16 study.

17 In response to Paragraph 18, the report identified both the  $L_{\max,fast}$  and the  
18 maximum 1-second  $L_{eq}$  for all Positions. Because the  $L_{\max,slow}$  uses a 1-  
19 second time constant, it is usually very close to the  $L_{\max,slow}$  value. For  
20 example, at Position 1 the maximum  $L_{\max,slow}$  level was 116.3 dBA, compared  
21 to 116.6 dBA for the maximum 1-second  $L_{eq}$ . The  $L_{\max,fast}$  sound pressure  
22 levels were included in the report because the  $L_{\max,slow}$  and 1-second  $L_{eq}$  levels  
23 do not capture the maximum sound levels perceived by the human ear, which  
24 has a time constant even less than the 125 milliseconds represented by  
25  $L_{\max,fast}$ .

26 In response to Paragraph 19, my study does not overstate the maximum sound  
level during these events. If a study were to present only the maximum  
 $L_{\max,slow}$  levels or the maximum 1-second  $L_{eq}$  values, it would actually be  
underestimating the maximum sound levels, because these statistics average  
the sound pressure over a full second. As mentioned above, the human ear  
can easily detect changes in sound level over time periods much less than the  
125 millisecond averaging time that is inherent in the  $L_{\max,fast}$  statistic.<sup>2</sup>

Despite the Navy's argument, Mr. Lilly's sound measurements confirm that the sound  
from EA-18G Growlers operating at OLF Coupeville reaches at least 119.3 dBA at residential

---

<sup>2</sup> Second Lilly dec., ¶¶ 7-9, referencing Zwicker & Fastl, *Psycho-acoustics Facts and Models*, Springer, 1999.

1 properties in the Admirals Cove neighborhood – a level that the Navy does not dispute is reaches  
2 the threshold of pain. Dkt. 22-12. Nowhere was this information presented in the 2005 EA.  
3 This is new information documenting that the effects of the EA-18G operating at OLF  
4 Coupeville are more severe than disclosed in the 2005 EA.  
5

6 While picking on Mr. Lilly’s sound measurements, the Navy fails to offer any of its own.  
7 Instead, the Navy continues to insist that it can ignore actual sound measurements and rely solely  
8 on its modeled “DNL” calculations. The Navy refuses to acknowledge that when operations are  
9 sporadic, annual DNL calculation that averages days *with* FCLP operations and “quiet” days  
10 without FCLP operations result in dramatically understating the actual sound levels experienced  
11 by humans. As explained by Mr. Lilly, and un rebutted by the Navy:  
12

13 In my professional opinion the impact of the noise exposure received by the  
14 residents living near the Coupeville OLF is much greater than what would be  
15 expected from the results of the research that has been conducted on the  
16 impact of aircraft noise on the general public. This is primarily due to the fact  
17 that the bulk of the research has been conducted in areas near airports where  
18 there is relatively little variation in the daily volume of air traffic. In these  
19 areas the day to day variation of DNL is likely less than 5 dB, and an annual  
20 average DNL might make at least some sense. However, at the Coupeville  
21 OLF there may be only aircraft activity a few days per month, and the day to  
22 day variation of DNL could exceed 40 or even 50 dB (comparing a day with  
23 activity with a day without activity). Evaluation on the basis of an annual  
24 DNL makes no sense in this scenario. Taking this to the extreme, one could  
25 ask “what if all of the 4,834 over-flights in 2012 occurred on a single day  
26 (from 10 AM until 10 PM) with no over-flights on the other 364 days”? In  
this case, there would be one fly-over every 9 seconds, the instantaneous noise  
level would never drop below 110 dBA, and the single day DNL would be  
103.6 dB, yet the average annual DNL would only be 79 dB. In this extreme  
case the average annual DNL makes no sense at all. What would make sense,  
and what I believe should be done, is to evaluate noise on the basis of the  
average DNL over the entire year, but only including the days with aircraft  
activity. This would likely provide results that would more closely reflect the  
bulk of the research that has been conducted on the effects of aircraft noise on  
people.

Dkt. 25, ¶ 14.

1 The Navy claims it only conducts FCLP operations at OLF Coupeville 44 days a year.  
2 Dkt. 47, ¶ 16 (Nortier dec.). If true, this means the Navy is averaging sound from 44 days of  
3 FCLP operations with 321 quiet days without operations. This significantly misrepresents the  
4 noise impact during operations.

5  
6 ***c. The Navy's shift to exclusive use of Path 32 results in impacts***  
7 ***that are significantly and qualitatively different than addressed***  
8 ***in the 2005 EA.***

9 The 2005 EA assumed that FCLP operations at OLF Coupeville would be evenly split  
10 between flight path or runway 32 and flight path or runway 14. Dkt. 22-4, p. 5 (illustrating flight  
11 paths); Dkt. 22-1, p. 21. But as explained in COER's Motion, it appears that the Navy is now  
12 conducting most, if not all, operations over flight path 32. Dkt. 21, p. 3, *ll.* 7-13; Dkt 28, ¶¶ 5-7.  
13 The Navy concedes this point in its response. According to Captain Nortier, previously:

14 ... the EA 6B and A-6 could operate within accepted parameters and use  
15 runway 14 when meteorological condition favored this runway. The EA-18G  
16 has a slightly different required flight profile in the FCLP pattern due to  
17 differences in weight and flight characteristics. *As a result, the EA-18G*  
18 *cannot safely operate within the confines of the daytime runway 14*  
19 *parameters current in place.* The Navy is examining runway usage and  
20 historical noise abatement procedures as part of its ongoing EA-18G  
21 Environmental Impact Study. *Until that study is complete, runway 14 is*  
22 *rarely used for FCLPs.*

23 Dkt. 47, p. 3, ¶ 6 (emphasis added).

24 As a consequence of this shift in procedure, all FCLP operations at OLF-Coupeville  
25 arrive directly over, and at well under 1000 feet, over 1000 homes, including the Admirals Cove  
26 neighborhood. This is significantly different than contemplated in the 2005 EA: that half of the  
FCLP operations would use runway 14 which is largely over the water. Dkt. 22-4, p. 5  
(illustrating flight paths); Dkt. 22-1, p. 21. As a result, the residents within the runway 32 flight  
path are receiving nearly twice the number of overflight approaches and far more of the noise

1 impacts than predicted in the 2005 EA. The Navy's shift to exclusive use of runway 32 results  
2 in impacts that are significantly and qualitatively different than addressed in the 2005 EA.

3 Because COER can demonstrate that the noise impacts are both more severe and  
4 significantly and qualitatively different than predicted in the 2005 EA, there is a strong  
5 likelihood that COER will prevail in its claim that the Navy is required to supplement its 2005  
6 environmental review.  
7

8 **B. COER Has Demonstrated Irreparable Harm.**

9 **1. The Navy's procedural arguments against COER's evidence of**  
10 **irreparable harm fail.**

11 The Navy raises three essentially procedural arguments objecting to COER's evidence  
12 regarding the health impacts of the unanticipated noise increase. First, the Navy argues, based  
13 on a single unreported decision, that it is inappropriate for the Court to consider COER's medical  
14 evidence because it was not first presented to the Navy through the administrative process. Dkt.  
15 43, p. 11, *l.* 15 – p. 12, *l.* 20. This argument fails for two reasons. First, there was no active  
16 administrative process. The Navy prepared its EA for the introduction of the EA-18G aircraft in  
17 2005, thus ending the administrative process. Injuries to COER's members began only after the  
18 aircraft actually began operations. Second, COER's declarations demonstrating health impacts  
19 are submitted primarily in support of their motion for preliminary injunction – an appropriate use  
20 of declaration testimony.  
21

22 Second, the Navy argues that the scientific studies presented as background by Ms.  
23 Bowman and Dr. Dahlgren are somehow inappropriate because they are not “new” and were  
24 “within the scope of what the Navy already considered.” Dkt. 43, p. 16, *l.* 17. This argument  
25 also fails for two reasons. First, contrary to the Navy's claims, while an appendix to the 2004  
26

1 Wyle Noise Study may have identified potential health effects from noise, neither the 2005 EA  
2 nor the 2005 FONSI mention, much less discuss, the environmental health effects of noise from  
3 EA-18G operations at OLF Coupeville. Dkt. 44-2, pp. 41-51 (Wyle); Dkt. 22-1 (2005 EA); Dkt.  
4 44-4 (FONSI). Second, and more importantly, the largely un rebutted evidence presented by  
5 COER includes evidence of real, current, and increasingly significant medical problems directly  
6 related to the noise from the EA-18G Growler conducting operations at OLF-Coupeville – not  
7 simply studies. See Dkts. 23, 24, 26-39.

9 Finally, the Navy asserts that COER’s delay in bringing this motion “believes its claims of  
10 irreparable injury.” Dkt. 43, p. 21, *ll.* 19-20. This is not, however, a situation where a plaintiff  
11 waited years before seeking injunctive relief. See, e.g., *Lydo Enters. v. City of Las Vegas*, 745  
12 F.2d 1211, 1213-14, (9<sup>th</sup> Cir 1984) (City enacted zoning law prohibiting sex-related businesses,  
13 but gave businesses five years to comply; business waited five years until it was ordered to close  
14 before challenge the validity of the ordinance); see also *Oakland Tribute Inc. v. Chronicle Pub.*  
15 *Co.*, 762 F.2d 1374, 1377 (9<sup>th</sup> Cir. 1985). While COER filed its complaint in mid-2013, the  
16 Navy almost immediately ceased flights. When the Navy re-started FCLP operations in 2014,  
17 COER observed flight observations, reasonably collected evidence, and, upon learning that the  
18 Navy did not propose release of its Final EIS until sometime in 2017, informed the Navy and  
19 Court that it would seek injunctive relief. Dkt. 17.

22 **2. The Navy failed to rebut COER’s evidence of health impacts.**

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

1 EA-18G Growlers. These ailments include depression, anxiety, insomnia, elevated blood  
2 pressure, loss of concentration, hearing loss, and anger. Dkts. 26-39. COER also presented this  
3 Court with declarations from a treating physician, a public health nurse, and an expert medical  
4 doctor, all describing real, current, and increasingly significant medical problems directly related  
5 to the noise from the EA-18G conducting operations at OLF Coupeville. *See* Dkts. 23, 24, 26,  
6 39. The Navy again tries to nitpick individual statements through argument alone, but offers  
7 nothing in the way of contradictory expert testimony refuting the real and significant injuries  
8 described by individuals and confirmed by Dr. Dannhauer and Dr. Dahlgren.  
9

10         Significantly, the Navy neither disputes much of the scientific literature relied upon by  
11 Dr. Dahlgren, nor, more importantly, offers any evidence or argument in response to Dr.  
12 Dahlgren's two primary expert medical conclusions:  
13

14         The noise from the Navy's Growler aircraft landing and taking off from  
15 Outlying Landing Field Coupeville (OLFC), Washington is causing and has  
16 caused serious adverse health effects in the residents as described in the  
17 thirteen declarations of residents living near the field. .... such levels of noise  
18 pressure are causing insomnia, anxiety, depression, impaired concentration,  
19 hearing loss, tinnitus (ringing in the ears), hypertension, worsening diabetes,  
20 gastrointestinal difficulties and a major decrement in quality of life.

21 And,

22         Any FLCP operations, much less existing operation levels, of the EA-18G  
23 Growler aircraft at OLF Coupeville will more likely than not result in  
24 irreparable injury to health for those citizens residing in proximity to OLF-  
25 Coupeville.

26 Dkt. 23, ¶ 5.

       COER has demonstrated that irreparable injury has occurred and is ongoing.

1           **C.     A Balance of the Equities Tips In COER’s Favor.**

2           The Navy does not dispute that it has the capacity and ability to shift all proposed FCLP  
3 operations from OLF Coupeville to the main Ault Field. The 2005 EA projected a benchmark of  
4 18,282 FCLP operations at Ault Field for 2013 and beyond. But in 2014, the Navy conducted  
5 only 11,508 FCLP operations at Ault Field. There is ample room to move all 6,120 FCLP  
6 operations from OLF Coupeville to Ault Field and stay below the projected benchmark. Dkt.17-  
7 3, p. 13. Instead, the Navy argues that it should be allowed to continue to cause injury to citizens  
8 residing in close proximity to OLF Coupeville because “Ault field is not nearly as ideal for  
9 FCLPs.” Dkt. 43, p. 29, *l.* 8. The Navy’s argument, however, ignores several key factors.

10           First, there is no dispute that the Navy actively already uses Ault Field for FCLP  
11 operations. It conducted 11,508 such operations there in 2014. Dkt.17-3, p. 13. If Ault Field  
12 were unsuitable for OLF practices either because of the flight pattern or light level obviously the  
13 Navy would find a more suitable location. Instead it continues FCLP operations at Ault Field.

14           Second, while Captain Nortier claims that shifting FCLPs from OLF Coupeville to Ault  
15 Field in 2013 caused delays for other aircraft “in some cases greater than 45 minutes,” Dkt. 47, ¶  
16 8, he does not assert that any aircraft missed training. He also fails to put these delays in  
17 perspective. If, as the Navy asserts, it only conducts FLCP operations at OLF Coupeville an  
18 average of 44 days out of the year, then even if shifting those operations to Ault Field caused  
19 some delay on 44 days, there would be no impact the other 321 days of the year. Dkt. 47, ¶ 16.  
20 Finally, Captain Nortier does not explain why the 2005 EA contemplated 18,282 FCLP  
21 operations at Ault Field – more than the combined total of all of the FCLP operations currently  
22 conducted at Ault Field and OLF Coupeville. Presumably, the Navy considered scheduling at  
23 Ault Field before it predicted that Ault Field could host over 18,000 FCLP operations.  
24  
25  
26

1 Third, while Captain Nortier claims that shifting FCLPs from OLF Coupeville to Ault  
2 Field results in extending flight hours in a given day into evening hours, he once again does not  
3 state that any aircraft missed any training operations. Dkt 47, ¶ 9. Instead, he asserts that  
4 extended flight hours caused increased impacts on the residents surrounding Ault Field. *Id.* ¶ 10.  
5 The Navy fails, however, to point to *any* increased noise complaints from residents living in  
6 proximity to Ault Field. Further, while asserting that there are more residents living within the  
7 Ault Field flight path, the Navy to compare the number of residents living beneath the FCLP  
8 flight paths at Ault Field and those living beneath the flight path at OLF Coupeville. As the  
9 2005 EA demonstrates, the 75 dB DNL noise contour for Ault Field lies primarily over military  
10 owned land, agricultural land, or water. The 75 dB DNL noise contour for OLF Coupeville, in  
11 contrast, includes both the residentially zoned Admiral's Cove neighborhood and parts of  
12 Coupeville. Dkt. 22-1, p. 21 (Fig. 3-5).<sup>3</sup> Finally, the Navy fails to recognize that, unlike the area  
13 surrounding OLF Coupeville, the area surrounding Ault Field is subject to a County-imposed  
14 Airport and Aviation Safety Overlay, which limits residential development within the Ault Field  
15 APZs. Dkt. 22-6.

16 Unlike the situation in *Winter v. Natural Res. Def. Council*, 555 U.S. 7 (2008), where the  
17 plaintiffs sought an injunction to prevent "possible" harm to marine mammals, COER seeks an  
18 injunction to prevent ongoing, irreparable injury to humans. And unlike the situation in *Winter*,  
19 where the injunction would have shut down important Navy training that had no ready  
20 alternative, here, the Navy has demonstrated that, but for some relatively minor inconvenience in  
21 scheduling, Ault Field can accommodate all of the FCLP operations proposed for OLF  
22  
23  
24  
25

26 <sup>3</sup> Because the number of overflights using Path 32 is close to double what was predicted in the 2005 EA and noise study, presumably the 75 dB DNL contour is even larger for Path 32, and includes even more of Admirals Cove and Coupeville.

1 Coupeville without loss of any training. The balance of equities here lies sharply in favor of  
2 COER.

3 **D. The Navy’s Public Interest Argument is Not Supported by the Facts.**

4 The Navy’s “public interest” argument is premised largely on the “public interest in  
5 military training.” Dkt 43, p. 31, l. 7. But, as discussed above, other than relatively minor  
6 inconvenience for 44 days out of the year, the Navy has not demonstrated that it will lose the  
7 ability to train its pilots by shifting 6,120 FCLP operations to Ault Field. Use of OLF  
8 Coupeville, however, compromises the visual and auditory integrity of Ebey’s Landing National  
9 Historical Reserve and the tranquility and health of an entire community, with homes, schools,  
10 parks, and important public and private facilities, including a hospital, local government, law  
11 enforcement, and commercial development. The public interest will be best served by  
12 suspending operations at OLF Coupeville while the Navy tardily performs its NEPA obligations.  
13  
14

15 **III. CONCLUSION**

16 For the foregoing reasons, the Court should grant a preliminary injunction and prohibit  
17 any further operations by the EA-18G Growler at OLF Coupeville until the Navy has completed  
18 its proposed Final EIS fully evaluating the environmental impacts, including human health  
19 impacts, of aircraft operations at OLF Coupeville.  
20

21 DATED this 5<sup>th</sup> day of June, 2015.

22 By: s/ David S. Mann  
23 David S. Mann, WSBA No. 21068  
24 Gendler & Mann, LLP  
25 615 2<sup>nd</sup> Ave. Suite 560  
26 Seattle, WA 98104  
Telephone: (206) 621-8868  
E-mail: [mann@gendlermann.com](mailto:mann@gendlermann.com)

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on June 5, 2015, I electronically filed the foregoing, along  
3 with the Second Declaration of Jerry G. Lilly with the Clerk of the Court using the CM/ECF  
4 system which will send notification of such filing to the following:  
5

6 Rachel K. Roberts

7 Brian C. Kipnis

8 Dated June 5, 2015.

9 By: s/ David S. Mann  
10 David S. Mann, WSBA No. 21068  
11 Gendler & Mann, LLP  
12 615 2<sup>nd</sup> Ave. Suite 560  
13 Seattle, WA 98104  
14 Telephone: (206) 621-8868, Fax: (206) 577-5371  
15 E-mail: [mann@gendlermann.com](mailto:mann@gendlermann.com)  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26