BRICKLIN & NEWMAN LLP
lawyers working for the environment

Reply to: Seattle Office

July 10, 2019

VIA CERTIFIED U.S. MAIL, RETURN RECEIPT REQUESTED

David Bernhardt
U.S. Department of the Interior
1849 C St. NW
Washington, DC 20240

Margaret Everson, Principal Deputy Director
U.S. Fish and Wildlife Service
1849 C St. NW, Rm 3331
Washington, DC 20240

Jim Kurth, Deputy Director
U.S. Fish and Wildlife Service
1849 C St. NW, Rm 3331
Washington, DC 20240

Eric V. Rickerson
State Supervisor
Washington Fish and Wildlife Office
510 Desmond Dr. SE, Suite 102
Lacey, Washington 98503

Mark T. Esper
Acting Secretary of Defense
1000 Defense Pentagon
Washington, DC 20301

Richard V. Spencer
Secretary of the Navy
Office of the Secretary of the Navy 1000 Navy
Pentagon, Room 4D652
Washington, DC 20350

Todd C. Mellon
Acting Assistant Secretary of the Navy
Energy, Installations and Environment
Office of the Secretary of the Navy 1000 Navy
Pentagon, Room 4D652
Washington, DC 20350

Captain Matthew L. Arny
U.S. Navy
Commanding Officer
Naval Air Station Whidbey Island
3730 North Charles Porter Avenue
Oak Harbor, Washington 98278-5000

RE: Notice of Intent to Sue under the Endangered Species Act

Dear Officials of the U.S. Department of Defense, the U.S. Navy, and the U.S. Department of Interior:

On behalf of Citizens of the Ebey's Reserve for a Healthy, Safe, and Peaceful Environment and Paula Spina, we notify you of violations of the Endangered Species Act ("ESA"),[1] and its implementing regulations regarding the U.S. Fish and Wildlife Service's ("Service") June 14, 2018 Biological Opinion ("2018 BiOp") for marbled murrelets issued to the U.S. Navy concerning the Navy's expansion of its Growler program at Naval Station Whidbey Island. As explained in the Notice of Intent to Sue under the Endangered Species Act submitted today by

[1] 16 U.S.C. §§ 1531–1544.

the Attorney General of the State of Washington, the 2018 BiOp violates the Endangered Species Act by adopting an unlawful incidental take statement. By relying on the unlawful 2018 BiOp and incidental take statement, the Navy is also in violation of the ESA.

Citizens of the Ebey's Reserve for a Healthy, Safe, and Peaceful Environment and Paula Spina adopt and incorporate into this letter by reference the Notice of Intent to Sue under the Endangered Species Act submitted on today's date by the Attorney General of the State of Washington, a copy of which is attached to this letter as Attachment A.

In addition to the violations alleged in the Notice of Intent to Sue under the Endangered Species Act submitted on today's date by the Attorney General of the State of Washington, Citizens of the Ebey's Reserve for a Healthy, Safe, and Peaceful Environment and Paula Spina notify you that we intend to bring suit for your failure to consider the cumulative impacts on marbled murrelets from the Navy's expansion of its Growler program at Naval Station Whidbey Island in conjunction with the impacts from the Navy's Northwest Training and Testing (NWTT) proposed action. As the impacts from these two actions will have concurrent and overlapping impacts on marbled murrelets, you should have, but did not, consider them together as cumulative impacts in the 2018 BiOp.

If the Service and the Navy do not reinitiate consultation within 60 days of receiving this letter, Citizens of the Ebey's Reserve for a Healthy, Safe, and Peaceful Environment and Paula Spina intend to initiate a lawsuit to remedy these violations.

Thank you for your attention to this important matter.

Sincerely,

CITIZENS OF THE EBEY'S RESERVE FOR A HEALTHY, SAFE AND PEACEFUL ENVIRONMENT; and PAUL SPINA,

By: /s/ Zachary Griefen
David A. Bricklin
Claudia M. Newman
Zachary K. Griefen
Bricklin and Newman, LLP
1424 Fourth Avenue, Suite 500
Seattle, WA 98101
Telephone: 206-264-8600
E-mail: bricklin@bnd-law.com
E-mail: newman@bnd-law.com
E-mail: griefen@bnd-law.com

Attorneys for Citizens of the Ebey's Reserve for a Healthy, Safe, and Peaceful Environment and Paula Spina

cc by email:

Clients

cc by registered mail:

Steve Guertin, Deputy Director
U.S. Fish and Wildlife Service
1849 C. St. NW, Rm 3331
Washington, DC 20240

Robyn Thorson, Pacific Regional Director
U.S. Fish and Wildlife Service
911 NE 11th Ave
Portland, Oregon 97232

Governor Jay Inslee
Office of the Governor
P.O. Box 40002
Olympia, WA 98504-0002

William R. Sherman
Assistant Attorney General
Aurora Janke
Special Assistant Attorney General
Counsel for Environmental Protection
Washington State Attorney General's Office
800 5th Ave Suite 2000
Seattle, WA 98104-3188

ATTACHMENT A

Bob Ferguson
ATTORNEY GENERAL OF WASHINGTON
Counsel for Environmental Protection
800 Fifth Avenue STE 2000 • Seattle WA 98104 • (206) 464-7744

July 9, 2019

VIA CERTIFIED U.S. MAIL, RETURN RECEIPT REQUESTED

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1849 C St. NW
Washington, DC 20240

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Dear Officials of the U.S. Department of Defense, the U.S. Navy, and the U.S. Department of Interior:

On behalf of the Attorney General of the State of Washington, we notify you of violations of the Endangered Species Act ("ESA"),[1] and its implementing regulations regarding the U.S. Fish and Wildlife Service's ("Service") June 14, 2018 Biological Opinion ("2018 BiOp") for marbled murrelets issued to the U.S. Navy concerning the Navy's expansion of its Growler program at Naval Station Whidbey Island. As explained below, the 2018 BiOp violates the Endangered Species Act by adopting an unlawful incidental take statement. By relying on the unlawful 2018 BiOp and incidental take statement, the Navy is also in violation of the ESA. If the Service and the Navy do not reinitiate consultation within 60 days of receiving this letter, Washington intends to initiate a lawsuit to remedy these violations.

I. LEGAL BACKGROUND

The ESA provides a comprehensive scheme to protect endangered and threatened species.[2] Sections 7 and 9 of the ESA provide an interlocking regulatory scheme to ensure federal agency actions do not undermine the ESA's overall purpose of protecting listed species.

Section 7 requires federal agencies, in consultation with the Service or the National Marine Fisheries Service, to ensure that agency actions are not likely to jeopardize the continued existence of any threatened or endangered species or result in the destruction or adverse modification of an endangered or threatened species' critical habitat.[3] An action will cause jeopardy to a listed species if it "reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species."[4]

To ensure compliance, Section 7 and its implementing regulations require federal agencies to prepare a biological assessment before beginning any major construction activities to determine whether listed species or critical habitat "are likely to be adversely affected" by the proposed action.[5] Where actions are likely to adversely affect a species or critical habitat, the action agency must consult formally with the Service or the National Marine Fisheries Service before undertaking the action.[6]

The formal consultation process requires the Service to develop a biological opinion that includes: "(1) A summary of the information on which the opinion is based; (2) A detailed discussion of the effects of the action on listed species or critical habitat; and (3) The Service's

[1] 16 U.S.C. §§ 1531–1544.

[2] *Ctr. for Biological Diversity v. Bureau of Land Mgmt.*, 698 F.3d 1101, 1106 (9th Cir. 2012).

[3] 16 U.S.C. § 1536(2).

[4] 50 C.F.R. § 402.02.

[5] *Ctr. for Biological Diversity*, 698 F.3d at 1107 (citing 50 C.F.R. § 402.12).

[6] *Id.* (citing 50 C.F.R. § 402.14).

opinion on whether the action is likely to jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat."[7]

If the Service concludes that an action and the associated incidental take of a listed species will not jeopardize the continued existence of a listed species or result in the destruction or adverse modification of critical habitat, then the Service will issue an incidental take statement to the consulting agency.[8] "Take" is defined to mean harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect, or attempt to engage in such conduct.[9]

An incidental take statement must "specif[y] the impact of such incidental taking on the species," and "those reasonable and prudent measures ... necessary or appropriate to minimize such impact,"[10] and establish a clear threshold for triggering the ESA's requirement to reinitiate consultation in the event that an action's impacts exceed those anticipated in the biological opinion.[11] Where the Service uses a surrogate to specify the impact to the species, the Service must "[d]escribe[] the causal link between the surrogate and take of the listed species, explain[] why it is not practical to express the amount or extent of anticipated take or to monitor take-related impacts in terms of individuals of the listed species, and set[] a clear standard for determining when the level of anticipated take has been exceeded."[12]

If the incidental take statement complies with the ESA and its implementing regulations, it provides a "safe harbor" to the action agency from the ESA's prohibition on the unlawful take of a threatened or endangered species.[13] However, "[i]f during the course of the action the amount or extent of incidental taking, as specified [in the statement], is exceeded, the Federal agency must reinitiate consultation immediately."[14] "The action agency must also reinitiate consultation if the proposed action 'is subsequently modified in a manner that causes an effect to the listed species or critical habitat that was not considered in the biological opinion.'"[15]

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[7] 50 C.F.R. § 402.14(h).

[8] *Id.* at § 402.14(i).

[9] 16 U.S.C. § 1532(19).

[10] *Id.* at § 1536(b)(4)(C)(i)–(ii).

[11] *Id.* at § 1536(b)(4)(C)(i)–(iv); 50 C.F.R. § 402.14(i)(4).

[12] 50 C.F.R. § 402.14(i)(1)(i).

[13] *Or. Natural Res. Council v. Allen*, 476 F.3d 1031, 1038 (9th Cir. 2007).

[14] 50 C.F.R. § 402.14(i)(4).

[15] *Ctr. for Biological Diversity*, 698 F.3d at 1108 (citing 50 C.F.R. § 402.16(c)).

II. FACTUAL AND PROCEDURAL BACKGROUND

Marbled murrelets are small, fast-flying seabirds that inhabit nearshore marine environments and nest in old-growth conifer forests in Washington. Murrelets are found year-round in marine waters adjacent to Whidbey Island located in Puget Sound.[16] After a dramatic population decline in the 1980s and 1990s, the Service listed marbled murrelets in Washington, Oregon, and northern California as threatened under the Endangered Species Act in 1992.[17] Since 2001, the Washington marbled murrelet population has declined by 44% to just 7,500 birds, prompting Washington to list marbled murrelets as endangered within the state.[18] These declines are attributed, in part, to low reproductive rates resulting from the loss of terrestrial habitat, nest predation, degraded marine conditions affecting prey resources, and cumulative effects of multiple smaller impacts. In the marine environment, murrelets are adversely impacted by climate change, prey contaminated with polychlorinated biphenyls, changes in their prey base, entanglement in derelict fishing gear, and elevated sound levels leading to disturbance, injury, or death.[19]

Marbled murrelets forage for small schooling fish and invertebrates in shallow, nearshore marine waters where they spend most of their time.[20] Murrelet survival depends on the bird's ability to forage successfully in the marine environment.[21] Marbled murrelets have experienced a reduction in energy-rich food sources like herring and northern anchovy and now rely mostly on less energy-rich Pacific sand lance for the majority of its food source, requiring murrelets to catch more fish to meet their energy needs.[22] Successful foraging is particularly important during nesting because food limitation during this time "often results in poor growth, delayed fledging, increased mortality of chicks, and nest abandonment by adults."[23] The action area for the Navy's expanded Growler program "provides foraging habitat that is essential to marbled murrelet survival and recovery."[24]

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[16] 2018 BiOp at 28.

[17] Determination of Threatened Status for the Washington, Oregon, and California Population of the Marbled Murrelet, 57 Fed. Reg. 45,328 (Oct. 1, 1992).

[18] WAC 220-610-010; Desimone, S. M. 2016. Periodic status review for the Marbled Murrelet in Washington, Washington Department of Fish and Wildlife, Olympia, Washington.

[19] 2018 BiOp at 51.

[20] *Id.* App. B at 1–2.

[21] *Id.* App. B at 9.

[22] *Id.* at 43; App. B. at 3.

[23] *Id.* at 42–43.

[24] *Id*. at 15.

On March 12, 2019, the Navy issued a Record of Decision ("ROD") for its Final Environmental Impact Statement ("FEIS") for EA-18G "Growler" Airfield operations at the Naval Air Station Whidbey Island Complex located in Washington State. The ROD authorizes an increase in Growler aircraft operations on Whidbey Island and in the Puget Sound region by 33 percent with an annual total of more than 97,500 Growler aircraft operations.[25] Growler operations will occur year round, any day of the week, and at any time of day or night.[26] The Navy anticipates that the expansion of its Growler operations will cover a period of 30 years or until 2048.[27]

In April 2017, the Navy sent a letter to the Service requesting informal consultation stating that the Navy had concluded that its expansion of Growler operations "may affect, but is not likely to adversely affect the marbled murrelet."[28] The Service responded in March 2018 that it did not concur with the Navy's determination that its proposed expansion of Growler operations was not likely to adversely affect the marbled murrelet and recommended that the Navy request formal consultation under the ESA.[29] The Navy then requested formal consultation.[30]

The Service issued its 2018 BiOp for marbled murrelets on June 14, 2018. The 2018 BiOp stated that "due to the relatively high densities of marbled murrelets in the action area and the large number of overflights per year, over thirty years, we conclude that sub-adult and adult marbled murrelets will be exposed to noise from Growler overflights year-round, during both the day and the night, over the thirty year term of the proposed action."[31] The 2018 BiOp further explained that exposure to noise from Growler operations may cause delayed or missed nestling feedings during nestling season and "[a] portion of the marbled murrelets that are exposed to aircraft overflights in their marine habitat will respond by altering their normal foraging and resting behaviors," including by engaging in energetically costly behaviors such as diving or flying in response to noise.[32] The Service found that "Growler overflights will adversely affect marbled murrelets by increasing the likelihood of injury due to behavior responses that have energetic consequences for both adults and chicks," increasing both susceptibility to injury or mortality from starvation or illness and "the likelihood that some chicks will die from starvation, falling, or

[25] Record of Decision for the Final Environmental Impact Statement for the EA-18G "Growler" Airfield Operations at Naval Air Station Whidbey Island Complex, Island County, Washington at 8 (Mar. 12, 2019) [hereinafter Growler Expansion ROD].

[26] 2018 BiOp at 4.

[27] *Id.*

[28] Letter from Captain G.C. Moore to Eric Rickerson requesting informal consultation (Apr. 20, 2018).

[29] Letter from Eric V. Rickerson to Captain G.C. Moore re Non-concurrence for Section 7 consultation on EA-18G "Growler" Airfield Operations at the Naval Air Station Whidbey Island Complex (Mar. 5, 2018).

[30] Letter from Captain G.C. Moore to Eric Rickerson (Mar. 16, 2018).

[31] 2018 BiOp at 44.

[32] *Id.*

predation."[33] Despite these findings, the Service ultimately concluded that Growler expansion would not "appreciably reduce marbled murrelet numbers" or jeopardize their continued existence.[34]

Because Section 9 of the ESA prohibits any harassing, harming, or killing of listed species, the Service issued an incidental take statement (ITS) authorizing the Navy to "take" or harass marbled murrelets during the course of its Growler operations. The Service anticipates the incidental take from the Navy's Growler operations to be harassment caused by exposure to aircraft flights that "will create a likelihood of injury by significantly disrupting normal behaviors such as foraging and reproduction."[35] The Service defines "harass" as "an intentional or negligent act or omission which creates the likelihood of injury to wildlife by annoying it to such an extent as to significantly disrupt normal behavioral patterns which include, but are not limited to, breeding, feeding, or sheltering."[36] Instead of setting a specific number of murrelets that may be harassed by the action, the Service identified a surrogate ITS that "anticipates incidental take of a subset of adult and juvenile marbled murrelets exposed to 1,981,590 incidents (created by 2,899,530 pattern maneuvers) over thirty years" and requires the Navy to submit annual monitoring reports describing its Growler flight operations as a reasonable and prudent measure.[37]

The Navy has agreed to these terms and will "submit an annual monitoring report to the [Service] describing Growler flight operations from the previous year to ensure the amount of activity does not exceed that which was evaluated in the Biological Opinion."[38]

III. THE INCIDENTAL TAKE STATEMENT IS UNLAWFUL

The Service's ITS violates the ESA and its implementing regulations by failing to establish a meaningful standard for reinitiation of consultation and by relying on an improper surrogate. Instead of setting a specific number of murrelets that may be harassed by the Navy's Growler operations without jeopardizing the species, the ITS states an anticipated level of take as "a subset of adults and juvenile marbled murrelets exposed to 1,981,569 incidents (created by 2,899,530 pattern maneuvers) over thirty years." As a reasonable and prudent measure to minimize take the Navy must monitor implementation of its Growler expansion program and

[33] *Id.* at 52–53, 55.

[34] *Id.* at 52.

[35] *Id*. at 55.

[36] 50 C.F.R. § 17.3.

[37] *Id*. at 54–56.

[38] Final Environmental Impact Statement for the EA-18G "Growler" Airfield Operations at Naval Air Station Whidbey Island Complex, Island County, Washington, 4-344 (September 2018) [hereinafter Growler FEIS]; Growler Expansion ROD at 22.

submit an annual report to Service describing Growler operations, including the number of flight operations by type and the flight track.[39] If the Navy cannot record and report those numbers, then the Service allows the Navy to submit estimates of its flight activities.[40] This approach violates the ESA.

A. The Service Does Not Establish a Meaningful Standard for Triggering Reinitiation of Consultation

The ITS provides no meaningful standard for invalidating the safe harbor provided by the ITS and triggering reinitiation of consultation as required by the ESA.[41] Although the ITS claims that "a clear standard for take exceedance can be established under the monitoring requirements using this surrogate,"[42] there is nothing "clear" about the purported standard established by the monitoring requirements.

Instead, the monitoring requirements merely require the Navy to monitor and report annual Growler flight operation. If this monitoring "shows that the Navy is on a trend to exceed the level of take exempted" by the ITS, the Navy must request a meeting with the Service "to discuss implementation of additional conservation measures to ensure the proposed action does not exceed the level of take exempted" by the ITS.[43]

The ITS leaves critical issues unresolved. The monitoring requirements do not specify whether reinitiation will be triggered if the Navy exceeds its expected average annual number of flights as identified in the BiOp or whether reinitiation will be triggered only if the Navy exceeds its anticipated number of flights over a thirty-year period. Nor does the ITS explain how a "trend to exceed the level of take" would be quantified. The ITS also does not indicate whether increases to specific types of flights or locations of flights beyond what was considered in the 2018 BiOp would trigger reinitiation of consultation.[44] Moreover, the Service's allowance for estimates of flight operations based on any method chosen by the Navy allows for a situation where the annual monitoring report may not accurately capture actual Growler flight operations. In short, rather than identify a permissible level of take, or identify a reliable surrogate for a permissible

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[39] 2018 BiOp at 55–56.

[40] *Id.*

[41] *Or. Natural Res. Council*, 476 F.3d at 1038 (explaining that an incidental take statement must "set forth a 'trigger' that when reached, results in an unacceptable level of incidental take, invalidating the safe harbor provision [of the ESA] and requiring the parties to re-initiate consultation") (*quoting Ariz. Cattle Growers' Ass'n v. U.S. Fish and Wildlife Serv.*, 273 F.3d 1229, 1249 (9th Cir. 2001)); 50 C.F.R. § 402.14(i)(4).

[42] 2018 BiOp at 55 (emphasis added).

[43] *Id.* at 55–56.

[44] The vagueness of this standard is particularly concerning given that the 2018 BiOp acknowledges that the amount of marine habitat exposed to Growler operations depends on Growler flight tracks, altitudes, power settings, and the environmental conditions during operations. BiOp at 44.

take, the ITS merely tells the Navy to report its flights, with no indication whether a particular number of reported flights would or would not trigger reinitiation of consultation.

The inadequacy of the monitoring requirement to serve as a meaningful trigger is borne out by the Navy's Record of Decision authorizing its Growler expansion and the discretionary conservation recommendations in the BiOp. The Growler expansion Record of Decision authorizes annual Growler operations that exceed the annual flight levels considered in the 2018 BiOp by about 850 flights and contemplate approximately 8,000 more flights at OLF Coupeville than considered in the 2018 BiOp, raising the question of whether the Record of Decision itself invalidates the ITS's safe harbor function and triggers reinitiation of consultation.[45]

In addition, the BiOp identifies discretionary conservation recommendations to minimize murrelet impacts that recommend the Navy "[l]imit the number of [field carrier landing practices] performed at OLF Coupeville" because these require interfacility flights that "expose large areas of marine habitat along their flight tracks" and "[l]imit the use of flight tracks that expose a greater amount of marbled murrelet marine habitat to Growler overflights."[46] The discretionary nature of these recommendations suggests the Navy could increase these type of flight operations beyond the numbers considered in the 2018 BiOp without triggering reinitiation of consultation.

B. The Service Uses an Insufficiently Defined Surrogate and Fails to Monitor Project Impacts on Marbled Murrelets

The surrogate also does not provide a clear threshold at which the level of take would be exceeded. The Service defines the surrogate as a subset of adult and juvenile marbled murrelets exposed to Growler operations, but this definition fails to define what constitutes a "subset" of the population.[47] As the Ninth Circuit has explained, a "surrogate must not be so general that the applicant or the action agency cannot gauge its level of compliance."[48] Yet, here, it is not

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[45] *Compare* Growler FEIS at 4-16–4-17 (listing 73,800 average annual Growler operations at Ault Field and 23,700 average annual Growler operations at OLF Coupeville for a total of 97,500 annual flights; an operation is defined as one arrival or one departure) *with* BiOp at 8 (listing 79,166 annual average maneuvers at Ault Field, 15,541 annual average maneuvers at OLF Coupeville, and 972 interfacility flights for a total of 96,651 annual flights; a maneuver is defined as one arrival or one departure). In addition, Appendix A to the Growler FEIS provides data for "high-tempo" years where Growler flight operations could reach up to 75,500 at Ault Field and 26,100 at OLF Coupeville for a total of 101,600 annual Growler flights, exceeding by nearly 5,000 the number of flights contemplated by the Service in the 2018 BiOp. *See* FEIS 4-14–4-15; Appx. A-2 at 51.

[46] BiOp at 57.

[47] *See Sierra Club v. U.S. Dep't of the Interior*, 899 F.3d 260, 275 (4th Cir. 2018) (rejecting surrogates that use a "small percent" of the species as the limit because it is "impossible to know" what constitutes a "small percent" of the species).

[48] *Or. Natural Res. Council*, 476 F.3d at 1039.

possible for the Navy or anyone else to determine whether the contemplated "subset" of the population has been impacted by the Navy's operations.

Even if the surrogate established a clear threshold, the Service has not required monitoring impacts of the proposed action on murrelets, so there would be no way to determine whether the project's impacts exceeded that threshold.[49] The Ninth Circuit has previously rejected as unlawful the use of surrogates that are "coextensive with the project's own scope" because there is no meaningful way to measure impacts to a species until completion of the project.[50] Although the Service has expressed that in certain circumstances, a surrogate, such as a habitat surrogate, may be coextensive with anticipated "impacts" of the project, [51] the use of a coextensive surrogate nevertheless requires some form of monitoring of project impacts during the course of the action so that it is possible to determine if the anticipated impacts are exceeded before the project finishes.[52]

Here, however, the monitoring requirements imposed on the Navy address only the level of Growler operations and do not measure impacts to murrelets or their habitat as required by ESA regulations.[53] This failure to measure effects on murrelets is particularly striking because the Service states in the 2018 BiOp that it lacks information specific to marbled murrelet response to military jet overflights and thus must rely on studies of murrelet responses to boats and other bird responses to aircrafts to inform the Service's understanding of how and how often murrelets may respond to Growler operations.[54] Given this lack of information about murrelet responses to military aircraft activity, monitoring is particularly important to ensure that the Service's assumptions in the 2018 BiOp are correct and that murrelets are not adversely impacted at a rate higher than contemplated. In sum, the identified surrogate and monitoring measures used here do

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[49] *See id.* at 1040-41 (rejecting incidental take statement that allows the take of "all spotted owls" without an additional limit because it "prevents the action agencies from fulfilling the monitoring function the ESA and its implementing regulations clearly contemplate"); *see also* 50 C.F.R. § 402.14(i)(3)("in order to monitor the impacts of incidental take, the Federal agency or any applicant must report the progress of the action and its impact on the species to the Service as specified in the incidental take statement").

[50] *Or. Natural Res. Council*, 476 F.3d at 1040–41 (rejecting ITS that authorized taking of all spotted owls associated with a timber project). For similar reasons, even if the anticipated level of take were determined on an annual basis, it would still run afoul of *Oregon Natural Resources Council* because the measure of take would be the project itself.

[51] *See Incidental Take Statements Final Rule*, 80 Fed. Reg. 26832, 26834 (May 11, 2015); 50 C.F.R.

§ 402.14(i)(1), (3).

[52] *See Save Our Cabinets v. U.S. Fish and Wildlife Serv.*, 255 F.Supp.3d 1035, 1058–59 (May 30, 2017) (rejecting FWS's use of a surrogate where the surrogate did not provide a sufficient trigger to reinitiate consultation until after the project would be completed).

[53] *See* 50 C.F.R. § 402.14(i)(1), (3); *see also Wild Fish Conservancy v. Salazar*, 628 F.3d 513, at 531–32 (9th Cir. 2010) (ESA regulations "make clear that the Service is responsible for specifying in the statement how the action agency is to monitor and report the *effects of the action on listed species*") (emphasis added).

[54] BiOp at 38–40.

not provide a meaningful trigger or measure impacts to marbled murrelets in violation of the ESA.

C. The Service Does Not Describe the Causal Link Between the Surrogate and Monitoring Measures and Take of Marbled Murrelets

The Service also fails to demonstrate a causal connection between the selected surrogate and take of marbled murrelets.[55] As the Ninth Circuit has explained, "various components of the ecological landscape can be used as a surrogate for defining the amount or extent of a take if the conditions are linked to the take of the protected species."[56] Thus, FWS typically uses habitat, ecological conditions, or similar affected species as a meaningful surrogate for assessing take of a listed species.[57]

But, here, the Service has not identified any habitat, ecological condition, or affected species or even a geographical limit to provide a meaningful measure for assessing impacts of Growler operations on murrelets. The Service's vague statement that "[t]he coextensive surrogate is the direct source of the stressors causing the taking" does not overcome this deficiency.[58] The statement merely reiterates that the Navy's Growler operations will cause take of murrelets and does not provide a rational explanation as to how the selected surrogate or monitoring requirements will provide a meaningful measure for assessing take of murrelets. Such a vague statement "cannot be what Congress contemplated when it anticipated that surrogate indices might be used in place of specific numbers."[59]

D. The Service Fails to Explain Sufficiently the Impracticability of Expressing the Amount of Anticipated Take or Monitoring Take-Related Impacts

Finally, the ITS fails to explain adequately why it is not practical to express the amount or extent of anticipated take or to monitor take-related impacts in terms of individuals of the listed

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[55] 50 C.F.R. § 402.14(i)(1)(i).

[56] *Ctr. for Biological Diversity*, 698 F.3d at 1127.

[57] 50 C.F.R. § 402.14(i)(1)(i) (describing surrogate to include "similarly affected species or habitat or ecological conditions); *Incidental Take Statements Final Rule*, 80 Fed. Reg. 26832, 26834 (May 11, 2015) (in situations where it is impractical to detect or monitor take of individual listed species, "evaluating impacts to a surrogate such as habitat, ecological conditions, or similar affected species may be the most reasonable and meaningful measure of assessing take of listed species.").

[58] 2018 BiOp at 54.

[59] *Ariz. Cattle Growers' Ass'n*, 273 F.3d at 1250–51 (rejecting ITS condition stating that if "ecological conditions do not improve, takings will occur" as too vague and lacking an articulated, rational connection between the condition and the taking of species); *see also Sierra Club*, 899 F.3d at 275 (rejecting FWS's use of surrogates not reasonably tied to habitat).

species.[60] As courts have repeatedly noted, Congress indicated a preference for numerical take values.[61] Despite this preference, the ITS states that monitoring take impacts in terms of individual species is not practicable because it is difficult to monitor murrelet behavior in the action area and difficult to find dead or injured murrelets in the aquatic environment.[62] This explanation is insufficient and does not explain why the Service could not calculate a numerical value based on population numbers and the anticipated level of harassment caused by Growler activities.[63]

Moreover, the Service's claim that monitoring murrelet behavior in the action area is not practicable contradicts its recommendation that the Navy work with the Service to "design and conduct a study that evaluates marbled murrelets response to military aircraft overflights and the consequences of those reactions."[64] This recommendation indicates that some level of monitoring of take-related impacts is possible. Indeed, in its 2010 Biological Opinion on the Navy's Northwest training activities, the Service required the Navy to develop a monitoring plan prior to conducting explosive ordnance disposal training that would track impacts to marbled murrelets from underwater detonations by measuring transmission of sound underwater and monitoring murrelet response to underwater sound exposure.[65] Here, however, the Service claims such monitoring of murrelet response to above-water sound exposure is not practicable.

For all these reasons, the ITS is invalid. Further, because the 2018 BiOp relies on the flawed ITS to reach its no jeopardy conclusion,[66] the unlawful ITS renders the 2018 BiOp unlawful.[67] By

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[60] 50 C.F.R. § 402.14(i)(1)(i).

[61] *Ariz. Cattle Growers' Ass'n*, 273 F.3d at 1250; *see also* H.R. Rep. 97-567 ("Where possible, the impact should be specified in terms of a numerical limitation on the federal agency …").

[62] 2018 BiOp at 54–55.

[63] *See Or. Natural Res. Council*, at 476 F.3d at 1037–38 (FWS did not establish a numerical measure's impracticality when it never stated that it was not possible to update survey data to estimate the number of takings); *Conservation Council for Hawaii v. Nat'l Marine Fisheries Serv.*, 97 F.Supp.3d 1210 (D. Hawaii 2015) (concluding that NMFS failed to explain why it could not practically obtain a numerical value and rejecting NMFS's claims that it was "very difficult" to estimate take of turtles in the study area).

[64] 2018 BiOp at 56.

[65] U.S. Fish and Wildlife Serv., Biological Opinion for the U.S. Pacific Fleet Northwest Training Range Complex (NWTRC) in the Northern Pacific Coastal Waters off the States of Washington, Oregon and California and Activities in Puget Sound and Airspace over the State of Washington, USA, at 134–37 (Aug. 12, 2010).

[66] 2018 BiOp at 55 ("In the accompanying Opinion, the Service determined that this level of anticipated take is not likely to result in jeopardy to the marbled murrelet or destruction [sic]").

[67] *See Wild Fish Conservancy*, 628 F.3d at 532 (holding BiOp arbitrary and capricious in part due to the Service's issuance of incidental take statement lacking adequate monitoring and reporting requirements); *Oregon Nat'l Res. Council*, 476 F.3d at 1036 ("The Incidental Take Statement must be associated with an underlying BiOp because the Incidental Take Statement's primary function is to authorize the taking of animals incidental to the execution of a particular proposed action.").

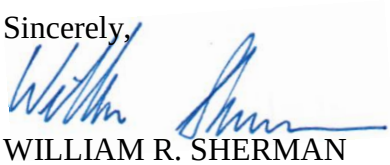
relying on a legally deficient biological opinion and incidental take statement, the Navy is in violation of the ESA.[68]

IV. CONCLUSION

For the reasons stated above, the Service and the Navy are in violation of the ESA and its implementing regulations. To remedy these violations, the Service and the Navy must reinitiate consultation and refrain from taking any action that would take marbled murrelets in the absence of a legal incidental take permit for the Navy's Growler activities. If the Service and the Navy fail to remedy these violations within sixty days, the state of Washington intends to file suit under the ESA to ensure protection of marbled murrelets.

Thank you for your attention to this matter. Please contact us with any questions.

Sincerely,



WILLIAM R. SHERMAN
Assistant Attorney General
AURORA JANKE
Special Assistant Attorney General
Counsel for Environmental Protection
Washington State Attorney General's Office
800 5th Ave Suite 2000
Seattle, WA 98104-3188
Phone: (206) 233-3391
Email: aurora.janke@atg.wa.gov

Attorneys for the State of Washington

[68] *See id.* (agency reliance on unlawful BiOp and incidental take statement violates substantive duty to ensure operations do not jeopardize listed species); *Ctr. for Biological Diversity*, 698 F.3d at 1127–28 (stating that "an agency cannot meet its section 7 obligations by relying on a Biological Opinion that is legally flawed …").

cc: by registered mail

Steve Guertin, Deputy Director
U.S. Fish and Wildlife Service
1849 C. St. NW, Rm 3331
Washington, DC 20240

Robyn Thorson, Pacific Regional Director
U.S. Fish and Wildlife Service
911 NE 11th Ave
Portland, Oregon 97232

Governor Jay Inslee
Office of the Governor
P.O. Box 40002
Olympia, WA 98504-0002