The Honorable Richard A. Jones

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

STATE OF WASHINGTON, CITIZENS OF THE EBEY'S RESERVE FOR A HEALTHY, SAFE AND PEACEFUL ENVIRONMENT, and PAULA SPINA,

Plaintiffs,

v.

UNITED STATES DEPARTMENT OF THE NAVY, a military department of the United States; *et al.*,

Defendants.

NO. 2:19-cv-1059-RAJ

COER'S MOTION FOR PRELIMINARY INJUNCTION

NOTE ON MOTION CALENDAR: MARCH 6, 2020

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PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

The Navy's EA-18G Growler jets are extraordinarily noisy planes, generating more noise than ordinary jet planes. They are stationed on Whidbey Island and fly very low, repetitive loops over populated areas and Ebey's Landing National Historical Reserve. Residents and visitors are exposed to noise levels much louder than a chainsaw operated a few feet away—loud enough to cause permanent hearing loss.

Since March 2019, the Navy has increased the number of Growlers on Whidbey Island and shifted most of its Growler military jet operations to an area near the Reserve and the town of Coupeville. The result is a nearly fourfold increase in Growler flights in that area. Now the overflights subject residents in and near Coupeville to extreme noise for several hours of the day, day and night, many days of the week. These dramatically increased Growler operations implement a "record of decision" ("ROD") issued by the Navy on March 12, 2019.

Plaintiffs Citizens of the Ebey's Reserve for a Healthy, Safe, and Peaceful Environment and Paula Spina (collectively, "COER") filed this lawsuit alleging, among other things, that the environmental impact statement prepared by the Navy is inadequate and that the Navy's failure to meaningfully address impacts on the Reserve violates the National Historic Preservation Act. Because resolution of these and other claims is not likely for six months or longer, COER now seeks a preliminary injunction prohibiting the Navy from continuing to implement its increased operations.

I. FACTUAL BACKGROUND

A. The Navy's Action at Issue in this Case

Growlers are extremely loud military jets. *See infra,* Section I.B. Prior to the action at issue here, the Navy operated 82 Growlers at two airfields on Whidbey Island—Ault and Outlying Landing Field (OLF). The division of flights between the two airfields used to be 80% at Ault and 20% at OLF.

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The ROD adds 36 new Growlers and flips the allocation of the noisy carrier landing practice flights to 80% at OLF and 20% at Ault. The two changes combine to increase noisy low-level overflights at OLF from an average of 5,637 per year (2000 to 2017) to 24,100 per year, a four-fold increase. GRR 150313–15 (Table 2.6-1); GRR 160604.[1]

The training practices at OLF involve a low-level loop over the Reserve and other nearby private property adjacent to the runway, a landing to a brief touch-down on the runway, and immediate takeoff, *i.e.,* a "touch-and-go" without a full stop. GRR 159470; GRR159472. The planes are just a few hundred feet above the ground. GRR 113599; Monson Decl., Ex. A and B. The Navy calls these repetitive overflights "Field Carrier Landing Practices" or "FCLPs" that simulate landing on an aircraft carrier.[2] This loop pattern is repeated again and again by two to five jets, each conducting about 10–12 FCLP loops during a session lasting about 30 to 45 minutes.

Since the ROD, the jets frequently fly at OLF 4–5 days a week, often from late morning until after midnight, one overhead every 45–60 seconds, with only a few short breaks between sessions. Blankenship Decl. at ¶ 7. Growler operations have been occurring any weekday, day and night, but tend to be scheduled into weeks of concentrated practice separated by periods without operations. *Id.* at ¶ 11. The Navy also has increased the annual number of so-called "interfacility flights" between Ault Field and OLF from 846 to 2,964. GRR 159085 (Table 5-2) and GRR 159156 (Table 7-2).

The area around OLF subject to these low level, repetitive overflights is partially rural and includes the historic town of Coupeville and some dense residential developments. A large part of the

[1] All excerpts from the environmental impact statement ("EIS") and other documents in the Navy's draft administrative record are cited using the Bates-stamp numbers assigned to them by the Navy and are collected as exhibits to Mr. Griefen's declaration. The declaration also provides documents not in the Navy's draft record either because they relate to issues not limited to review of the record, (*i.e.,* irreparable harm, public interest or equities) or, in one instance, because we have requested the Navy to include the document in the record, but the Navy has refused to do so.

[2] In the Navy's parlance, "touch-and-go" and FCLP are different operations, but because both involve aircraft landing on the runway, going to full power, and taking off again without coming to a full stop, GRR 150328, we use the familiar "touch-and-go" terminology interchangeably with "FCLP."

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landscape is within Ebey's Landing National Historical Reserve. The Reserve was established by Congress in 1978 to "preserve, protect, and interpret the reserve's nationally significant historic, natural, cultural, scenic, and recreational resources." GRR 160559. As detailed below, the extremely loud, repetitive, low-elevation flights are causing irreparable harm to COER's members, to the public, and to their use and enjoyment of Ebey's Landing National Historical Reserve.

B. Growler Noise

It is difficult to describe in words the extreme noise created by Growler jets flying just a few hundred feet above the ground. A site visit might be appropriate. The noise from the Growler jets is far louder than the noise from commercial aviation or even other military jets. The noise at ground level from an airborne Growler routinely exceeds 100 decibels on an A-weighted scale (dBA) and often approaches and sometimes exceeds 120 dBA. Lilly Decl., Ex. B (hereinafter "Lilly 2019"), at 5, Table 1. This is not a matter of just annoyance and inconvenience. Permanent hearing loss can occur with exposure to this much noise. For its own personnel, the Navy's maximum permitted exposure time to 100 dB is 15 minutes, at 110 dB it is 90 seconds, and more than 115 dB is forbidden. GRR 113628. A sound level of 110 dBA is 2 to 4 times louder than typical chainsaws at 5 feet. Lilly 2019 at 6–7.

Plaintiffs hired Jerry Lilly, a board-certified acoustical engineer, to take sound level measurements at their homes and nearby public recreational areas this summer after the Navy implemented the ROD. Mr. Lilly's report shows that the Growler overflights are above levels where hearing loss and other health impacts arise. For example, during a midnight Growler session on June 18–19, 2019, there were 37 overflights in 38 minutes. Thirty-six of these events exceeded 100 dBA; 20 events exceeded 110 dBA, and 1 event exceeded 120 dBA at 11:57 PM. Lilly 2019, at 20.

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Monitoring occurred at eight locations near OLF between June 18 and July 3, 2019. During that period, there were 29.2 hours of repeated low-level Growler overflights. For example, on June 24, 2019, residents in a densely populated residential area on Admirals Drive endured over 2.5 hours of repeated low-level overflights, 105 of them exceeding 100 dBA. The maximum was 117.8 dBA. Lilly 2019, at 5, 29. In all, more than 750 of the overflights exceeded 100 dBA. Between the March 12, 2019 issuance of the ROD and November 10, 2019 (when the Navy stopped use of the OLF for electrical repairs through December), the Navy had scheduled flying on 90 days (more than one out of every three days). The planned operations over residents living under FCLP Track 14 amount to nearly an hour of every working day of the year, while those living under FCLP Track 32 will be subjected to nearly 2–3 hours of jet noise each workday of the year.[3]

These noise levels can and do cause permanent hearing loss, as the Navy admits. While we expect that the Court will find that the Navy's estimates are low, even the Navy predicted that the new Growlers and flight patterns would put 686 more local residents near OLF at risk of permanent hearing loss compared to the No Action Alternative. GRR 159186 (Table 7-13).

The harms associated with permanent hearing loss are vast and include a reduced ability to converse, enjoy music, and appreciate the sounds of nature. Brabanski Decl., ¶ 11. Permanent hearing loss is irreparable harm. *Postlewaite v. Cole*, No. 14-CV-717-NJR-DGW, 2014 WL 5310698, at *2 (S.D. Ill. Oct. 17, 2014) (finding "irreparable harm in the form of hearing loss").

Growler noise also severely disrupts normal living and daily activities. The EPA's limits for speech interference and annoyance are 55 dBA for outdoors activities and 45 dBA for indoor activities. Lilly 2019 at 7. The Growler expansion exposes 1,300 additional residents to *average* noise levels

[3] Based on 24,000 operations/year, 30% on Track 14 and 70% on Track 32, and assumes 35 operations, 40 minutes per average session, and 250 workdays per year. Many residents under Track 32 are exposed to similar noise levels from Track 14 practices; *i.e.*, they are subjected to all 24,000 operations.

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over 75 dB in an average year, GRR 159178 (Table 7-11). Residents and users of Ebey's Reserve exposed to 105 dBA are suffering from noise levels 32 times greater than EPA's speech interference limits for outdoor noise.[4] Nearly 4,000 area residents are suffering from the loud noise of frequent low-flying Growlers that makes sleep impossible; interrupts conversation; interferes with work, study, and classroom education; and makes outdoor recreation a painful, horrifying experience rather than a solace and a joy.

The sworn declarations submitted herewith from citizens who live, work and recreate near the Navy's OLF Coupeville practice area describe these harmful impacts:

- Michael Browning and his wife have had to close themselves inside a walk-in closet in their home to make phone calls, due to the extreme noise from Growler overflights.

- Jodi Hinkelman has measured the noise level from the Growlers at 98 decibels inside her home, and is afraid to have her new grandson come visit because the extreme noise from the Growlers would frighten him and could damage his hearing.

- Sharon Stroble's family has lived on Whidbey for four generations and has witnessed the steadily enlarging Navy footprint on Central Whidbey Island. She testifies that nobody, who has not personally experienced it, can possibly understand the intensity of the Growler jet noise, which makes one's "entire body vibrate[.]" She is forced to wear, both inside and outside her home, the most robust ear protection she can find, but she "cannot sleep with these bulbous things on my head."

- Attorney Kurt Blankenship testifies that the Growlers "fly directly over my house at an altitude of no more than 200-300 feet in landing configuration with their landing gear and flaps in the down position. The noise is deafening, so bad that we are unable to carry on a conversation inside

[4] The decibel scale is logarithmic, which means that the intensity of a sound grows very fast: Every 10 decibel increases represents a 10-fold increase in acoustic energy and a doubling of perceived loudness. A noise level of 120 dBA is 100 times the acoustic energy of 100 dBA and a quadrupling of perceived loudness. Lilly 2019 at 6, 9.

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our own home, nor can we watch TV, listen to music, or even sit and read quietly. We cannot go outside our house at all when the Growlers are flying because the noise is intolerable." Nor can he consult with or discuss matters by telephone with his clients or other attorneys.

- Dr. Bruce Porter and his wife testify that the noise from Growler overflights makes it impossible to converse in person or on the phone, to watch television, and to otherwise conduct their normal daily lives at home. They must schedule their lives around the operational schedule published by the Navy for OLF, but the Navy often fails to adhere to that schedule, changing it at the last minute with little or no notice. They cannot have their 18 month-old grandson visit because the noise from Growlers flying overhead while they are out at the beach or on a walk could damage his hearing.

- Andrea Blubaugh was 32 weeks pregnant when the Navy started increasing operations in April 2019. The noise levels from Growlers reach 108 decibels inside her home. She could feel her baby react in utero to the extreme levels of noise, and was advised by her obstetrician that it was not safe to expose her unborn baby to those noise levels. Because of that warning, during the last months of her pregnancy, she was forced to take refuge in a 4-foot by 9-foot closet located under carpeted stairs in the interior of her home whenever the Growlers were conducting FCLP operations. Now that her baby is born, they retreat to that closet together during FCLP operations. This is extremely disruptive to their routine and upsetting for both her and her baby. Ms. Blubaugh states:

> I am personally angry and frustrated that it's come to this. This is our home and when we bought it there was a commitment from the Navy to fly under a certain threshold of flights, which were tolerable. We heard them directly overhead maybe once every few months. This spring changed everything. The idea that not only can the quiet use and enjoyment of my family's home be taken from us but that further than that, we have to wear hearing protection or hide in a closet to protect ourselves from physical harm on a very regular basis is incomprehensible.

While understating the significance (or ignoring the impact entirely, such as impacts to Ms. Blubaugh's fetus and newborn), the Navy's EIS acknowledges that the increased Growler overflights

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will awaken people at night and interfere with indoor and outdoor speech, including disrupting classroom learning at several schools. GRR 159189–203 (Tables 7-14 through 7-17).

C. Ebey's Landing National Historical Reserve

Ebey's Landing National Historical Reserve was established to "preserve and protect a rural community which provides an unbroken historical record from nineteenth century exploration and settlement in Puget Sound to the present time," 54 U.S.C. § 320101. As part of the National Park System, this "superlative natural, historic, and recreation area," 54 U.S.C. § 100101(b)(1)(A), must be "managed for the benefit and inspiration of all the people of the United States," § 100101(b)(1)(C), and "activities shall . . . not be exercised in derogation of the values and purposes for which the System units have been established, except as directly and specifically provided by Congress." 54 U.S.C. § 100101(b)(2). Those purposes include to "preserve, protect, and interpret the reserve's nationally significant historic, natural, cultural, scenic, and recreational resources." GRR 160559.

OLF abuts the approximately 17,000-acre Reserve. The Navy's action will quadruple the OLF touch-and-go overflights, causing noise levels to regularly exceed 90 decibels on the Reserve during training sessions. GRR 167459. The peace, tranquility and sense of timelessness sought to be preserved within the Reserve are destroyed by the fourfold increase in Growler overflights.

II. ARGUMENT

A. Preliminary Injunction Burden of Proof

The purpose of a preliminary injunction is to preserve the relative positions of the parties pending resolution on the merits. *University of Texas v. Camenisch*, 451 U.S. 390, 395 (1981). To obtain a preliminary injunction, a party must show: (1) a likelihood of success on the merits; (2) a likelihood of irreparable harm in the absence of preliminary relief; (3) that the balance of equities

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tips in their favor; and (4) that an injunction is in the public interest. *Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008).

The Ninth Circuit also employs an alternative "serious questions" test. *All. for the Wild Rockies v. Cottrell,* 632 F.3d 1127, 1131–32 (9th Cir. 2011). Under this test, a preliminary injunction may be granted "if there is a likelihood of irreparable injury to plaintiff; there are serious questions going to the merits; the balance of hardships tips sharply in favor of the plaintiff; and the injunction is in the public interest." *M.R. v. Dreyfus*, 697 F.3d 706, 725 (9th Cir. 2012). The Ninth Circuit judges the probability of success and balance of hardships on a sliding scale. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d at 1135. "Serious questions are substantial, difficult and doubtful, as to make them a fair ground for litigation and thus for more deliberative investigation. Serious questions need not promise a certainty of success, nor even present a probability of success, but must involve a fair chance of success on the merits." *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1362 (9th Cir. 1988) (internal quotations and citations omitted).

B. Serious Questions Going to the Merits

1. Standard of review

The courts are to "hold unlawful and set aside agency action" found to be arbitrary or capricious or "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (D). The Court must engage in a "thorough, probing, in-depth review." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971). Unlike substantive challenges, no deference is provided to the agency's claim that it met its procedural obligations. *Kern Cty. Farm Bureau v. Allen*, 450 F.3d 1072, 1076 (9th Cir. 2006). "[R]eview of an agency's procedural compliance is exacting, yet limited. We review de novo but are limited to ensuring that statutorily prescribed procedures have been followed." *Id*. (internal citations and quotations omitted). Regarding the substance, the agency "must examine the

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relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choices made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co*., 463 U.S. 29, 43 (1983) (internal citations omitted). The agency may not rely on explanations running counter to the evidence or fail to consider important aspects of the problem. *Id.*

Where a statute (like the historic preservation law at issue here) requires an agency to consult with and consider the input of other agencies, the administrative record must demonstrate not just that the consultation took place, but that it was meaningful. "'Stating that a factor was considered . . . is not a substitute for considering it.'" *Beno v. Shalala*, 30 F.3d 1057, 1075 (9th Cir. 1994) (footnote omitted) (quoting *Getty v. Federal Savs. & Loan Ins. Corp.,* 805 F.2d 1050, 1055 (D.C. Cir. 1986)). The Court should engage in a "'searching and careful' inquiry to determine if [the agency] actually *did* consider" the comments of other expert agencies. *Getty* at 1055 (quoting *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 416 (1971)) and rejecting as "conclusory" an agency statement that all relevant factors had been considered) (emphasis in original).

2. Plaintiffs are likely to prevail on their NEPA claims

a. Statutory overview

The National Environmental Policy Act of 1969 ("NEPA"), 42 U.S.C. § 4321 *et seq*., is "our basic national charter for protection of the environment." 40 C.F.R. § 1500.1(a). The "NEPA process is intended to help public officials . . . take actions that protect, restore, and enhance the environment," 40 C.F.R. § 1500.1(c). NEPA aims to "create and maintain conditions under which man and nature can exist in productive harmony," 42 U.S.C. § 4331(a), and "is designed 'to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man.' 42 U.S.C. § 4321." *Nat'l Audubon Soc'y v. Dep't of Navy*, 422 F.3d 174, 184 (4th Cir. 2005). To accomplish this, "NEPA imposes procedural requirements

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designed to force agencies to take a 'hard look' at environmental consequences." *Earth Island Inst. v. U.S. Forest Serv.,* 351 F.3d 1291, 1300 (9th Cir. 2003). The "comprehensive 'hard look' mandated by Congress and required by the statute must be timely, and it must be taken objectively and in good faith, not as an exercise in form over substance, and not as a subterfuge designed to rationalize a decision already made." *Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir. 2000).

"Accurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA." 40 C.F.R. § 1500.1(b). NEPA requires that an EIS be prepared for all "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C).

> [NEPA's implementing regulations] specify that the EIS should contain the environmental effects and impacts of the proposed action, 40 C.F.R. §§ 1502.15 – 16, reasonable alternatives to it, *id.* § 1502.14, possible mitigation measures for any negative environmental impacts that will result from it, *id.* §§ 1502.14(f), 1508.20, and the cumulative impacts of it combined with other past, present, or foreseeable future actions, *id.* §§ 1502.16, 1508.7–.8.

Nat'l Audubon Soc'y, 422 F.3d at 185. The regulations require the agency to first prepare a draft EIS, 40 C.F.R. § 1502.9(a), which the agency must circulate to obtain feedback from other agencies and the public. *Id.* § 1503.1. The lead agency must then respond to these comments and publish a final EIS. *Id.* §§ 1502.9(b), 1503.4. The agency must use the EIS in making its underlying decision, *Conservation Nw. v. Rey*, 674 F. Supp. 2d 1232, 1237, n. 2 (W.D. Wash. 2009), which is documented in a record of decision ("ROD"). 40 C.F.R. § 1505.2.

b. Specific claims

Refusal to use the day-night metric to compare base case with action alternative. The EIS noise analysis relied heavily on the "day-night noise" metric (DNL). *See, e.g.*, GRR 159071 (describing DNL contours). That metric sums the predicted noise throughout the day and calculates

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an average value. To understand the impact of the Growlers, the Navy should have predicted the DNL for days with training flights and compared that with the DNL for days without training flights. The DNL is, of course, much higher on days when training takes place. "Because the jets do not fly every day, when you average the 'noisy' days with the 'quiet' days the [DNL] values become lower." Lilly Decl., Ex. D at 4. The NAS Whidbey Island complex typically operates 5 days per week, or approximately 260 days per year. GRR 161318. But the Navy refused to model days with and without flights separately and compare the two. Instead, the Navy predicted the DNL by averaging together quiet and noisy days throughout the year. The Court is likely to find that the EIS is inadequate for failing to predict the DNL when the jets are flying and comparing that to the DNL when they are not.

The Navy has recognized the need to separately calculate DNLs when an airport's operations are not steady throughout the year. "For some military airbases, where operations are not necessarily consistent from day to day, a common practice is to compute [DNLs] based on an average busy day, so that the calculated noise is not diluted by periods of low activity." GRR 32516. The "average busy day" measure of operational levels counts only those days "when flight operations occur and concentrate[s] on those days when flight operations exceed the average number of flights[.]" GRR150329.

As noted by acoustics engineer Dr. Sanford Fidell, "Given that the proper goal of an [EIS] is to disclose environmental impacts, it is misleading to under-estimate immediate impacts by averaging them over inappropriately long time periods which include lengthy periods when no aircraft noise is present." GRR 165605. As stated in the EPA's Guidelines for Noise Impact Analysis:

> Day-night sound level is the primary measure of general audible noise and is appropriate for noise environments that affect community over an entire 24-hour day. There are two kinds of situations where such a measure is not appropriate,

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> however [including] those in which the noise is not present for enough of the day to greatly affect the [DNL] reading but is still subjectively judged as intrusive and disruptive when it is present. Examples of such noise sources may include . . . specific aircraft flyovers. . . .
>
> If the existing noise is expected to be substantially the same from day to day, measurements during a single typical 24-hour period may be adequate. . . . **In other situations where strong daily, weekly, monthly, or seasonal effects occur, it may be necessary to measure for a number of different daily periods suitably chosen to account properly for these variations.**

GRR 8359–60, 61 (emphasis supplied).

The Navy advanced a host of reasons for not calculating DNL separately for quiet days and comparing that to the DNL on active days (or the "average busy days" subset of all active days). None withstand scrutiny. One response was to note that the DNL averaged across all days is a commonly used metric. GRR 161318. But that common usage is not apropos for an airstrip which is not used "consistent[ly] day to day," as the Navy recognizes. GRR 32516.

The Navy also contends that there would be only a 1.5 decibel difference between a DNL calculated for all days and a DNL calculated for noisy days GRR 161318. But that is not the right comparison either. The comparison needs to be between the DNL on noisy days and the DNL on quiet days. That would be a larger contrast and the Navy continues to refuse to provide it. Unsurprisingly, data collected at OLF sites indicate that DNLs calculated for just busy days would be 5 to 10 dB greater than DNLs calculated across 365 days.[5]

The Navy claims that calculating the DNL for the average busy day would fail to account for the "benefits" of little noise on quieter days. GRR 161318–19. But if the Navy would analyze the DNL for busy and quiet days separately, the "benefit" of quiet days would be readily contrasted with the much higher noise levels on the busy days.

[5] Lilly Decl., Ex. D at 4, Table 3.

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In the EIS, the Navy said it refused to use the average busy day metric, in particular, for three reasons. First, the Navy noted that the average busy day metric is used to "help prevent incompatible development from encroaching on the flying mission of a Navy airfield." GRR 150329. But the average busy day metric is just as useful for assessing the impacts of the Navy's proposed expansion on existing homes as it is for assessing whether new homes should be built near an existing airfield. By contrast, the Navy's DNL metric that averages quiet and active days encourages encroachment by making the noise levels seem less impactful than they actually are. Second, the Navy complained that if it used the average busy day metric at OLF, it would have to use the same metric at Ault Field, because "an accurate analysis requires a common measure." We agree, but that common measure should one that allows a comparison between quiet days and active days (or average busy days).

Third, the Navy asserts that "the sub-alternatives that provide for greater operations at OLF Coupeville, would make the average busy day an inappropriate measure based on volume of operations;" that the average busy day has a "potential for inaccuracy;" and notes that the Air Force is *considering* phasing out use of the metric. *Id*. (emphasis supplied). The Navy does not explain how averaging the noise on flight days would be more or less accurate than averaging the noise on all days. Nor does it explain why the average busy day would be an "inappropriate measure based on volume of operations." Nor is the reasoning behind the Air Force's *consideration* of phasing-out its use of the metric even cursorily revealed or its relevance explained. The only thing inappropriate is the Navy's averaging of noisy and quiet days to downplay the increased noise at OLF.

In sum, given that the purpose of an EIS is to disclose the impacts of the project, it will be impossible for the Navy to justify its use of a single, muddled, overall "average" DNL value which made it impossible to compare the difference between the DNL on quiet days and noisy days. S*ee*

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Pac. Coast Fed'n of Fishermen's Ass'n, Inc. v. Nat'l Marine Fisheries Serv., 265 F.3d 1028, 1036 (9th Cir. 2001) (stating that project effects should not be "diluted into insignificance").

Failure to Assess Noise with Noisier "Enhanced" Engines. The EIS does not assess the noise impacts of Growlers outfitted with the "F414 Enhanced Engine." The enhanced engines produce significantly more thrust and, hence, more noise than the standard F414 engine. In support of this concern, COER directed the Navy to the engine manufacturer's webpage that states that the enhanced engine increases thrust by 20%. GRR 171303. Growlers are currently being retrofitted with the louder F414 Enhanced Engine. *Id.* Yet, in its noise analyses, the Navy used the F414 standard engine. Plaintiffs are likely to prevail that the EIS is inadequate because it failed to analyze the extent to which retrofitted enhanced Growler engines would increase noise.

Failure to Validate Model with Real World Monitoring. The Navy never monitored noise levels on the ground around OLF to assess the accuracy of its modeling and refuses to even consider validation monitoring going forward. The Navy's refusal to conduct its own validation monitoring is inexplicable. Often times, predictive models cannot be validated because the proposal has not yet come to fruition. But here, Growlers were already flying the exact flights paths that will be used in the future. The primary change will be in the number of flights. In this situation, an affordable, real world laboratory was readily available to measure the precise noise levels generated by these planes at the locations of concern and then simply extrapolate from those measurements to predict the frequency that those noise levels would occur with the additional planes and the new 80-20 split. The Washington Department of Health explained that, unlike other modeling situations that preclude validation, ongoing operations at Whidbey allow for monitoring now to evaluate the model's predictive value:

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"model estimates need to be compared against these actual values . . . these metrics can be measured in a timely manner that is not cost-prohibitive". GRR 151313–14.[6]

The U.S. Environmental Protection Agency (EPA) rated the draft EIS as "EC-2," GRR 151256, which means "environmental concerns with insufficient information." GRR 151259. The EPA stated at GRR 151257:

> The EPA recommends that the Navy establish a monitoring program to verify that actual noise impacts are similar to those projected in this EIS. As part of this monitoring program, a protocol should be established that outlines when or if adaptive management measures are required. The EPA believes this on-the-ground validation would help provide an assessment of actual noise impacts projected to be experienced by Whidbey Island and surrounding area residents and wildlife due to the proposed expansion. For example, monitoring sensitive receptor sites within each projected DNL noise contour of 65dB and greater may help characterize more fully the actual duration, frequency, and intensity of exposures to noise-related impacts within these loudest projected contour zones.[7]

The Navy arbitrarily dismissed comments from COER, the Washington Department of Health, the EPA, the federal Advisory Council on Historic Preservation, and the Washington State Historic Preservation Officer seeking actual noise monitoring, with this vacuous response: "Measuring current noise conditions and/or monitoring future noise conditions, as well as collecting subjective/experiential data, are not being considered." GRR 161320.[8]

While the Navy has refused to validate its noise model by monitoring actual flights, plaintiffs' noise consultant did just that. Prior to issuance of the ROD, Mr. Lilly measured—not modeled—the actual noise levels generated by the same Growlers that are now being used under the proposed action. The EIS predicts the number of overflights that will generate peak noise levels above 100 dBA at

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[6] COER also pointed out in commenting on the draft EIS that a study of 36 sites around Raleigh–Durham airport "found the modeled data consistently underestimated the actual on-site noise by 5-15 decibels." GRR 152230.

[7] The EPA further recommended that the Navy conduct a Health Impact Assessment "of the affected population to characterize baseline conditions and projected health impacts of the proposed action[.]" *Id*.

[8] The strongly worded requests for monitoring from Washington's historic preservation officer and the federal Advisory Council on Historic Preservation are discussed further *infra* at 18.

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various locations. GRR150671–75 (Table 4.2-12). Mr. Lilly's data shows that for various locations there will nearly twice as many flights with noise levels above 100 dBA than predicted in the EIS. For example, at Rhododendron Park, the Navy predicted 4315 flights per year over 100 dBA for Alternative 2A (the alternative being implemented). *Id*. at 4-99. But Mr. Lilly's measurements indicate that there will be approximately 7845 flights per year exceeding the 100 dBA threshold at Rhododendron Park—81% more than the EIS prediction. Lilly Decl., Ex. C and D.[9]

The Court is likely to find that an EIS that is so far off in estimating extremely loud overflights is inadequate. The Navy's failure to conduct (or even consider) monitoring of Growler noise levels in order to verify that actual noise impacts are similar to those projected by computer modeling in the EIS, as requested by COER, the Washington Department of Health, Washington's Historic Preservation Officer, the federal Advisory Council on Historic Preservation, and the EPA is a stunning omission. NEPA requires that where information important to a reasoned decision is missing and can be readily obtained, the agency must obtain it and use it in the EIS. 40 C.F.R. § 1502.22. The Court is likely to determine that the Navy's failure to obtain validation monitoring data and use it to forecast future impacts renders the EIS inadequate.

3. Plaintiffs are likely to prevail on their NHPA claim.

a. Statutory overview

Section 106 of the National Historic Preservation Act (NHPA) requires federal agencies to consider the effects of federal undertakings on any district, site, building, structure, or object listed

[9] Lilly's reports include graphs showing peak noise levels for each overflight at various locations. Of the total number of overflights (peaks on the graphs), 93% were over 100 dB at Rhododendron, 99% at Lockwood/Stark, 93% at Keystone, 97% at Admiral/Byrd (assuming an average of Lockwood/Stark and Keystone), and 93% at Island Transit. Applying those percentages to the total overflights in the EIS forecast, (24,100 operations equals 12,050 overflights); GRR 167647, indicates that, based on these real world measurements, there would be 7845 flights per year at Rhododendron Park exceeding 100 dBA.

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in the National Register of historic resources. 54 U.S.C. § 306108; 36 C.F.R. § 800.1. "Like NEPA, section 106 of NHPA is a 'stop, look, and listen' provision that requires each federal agency to consider the effects of its programs." *WildEarth Guardians v. Provencio*, 923 F.3d 655, 676 (9th Cir. 2019) (internal quotations omitted).[10]

Section 106 of the NHPA requires an action agency to consult with the State Historic Preservation Officer (SHPO) in an effort to reach consensus on steps to protect historic resources. 36 C.F.R. §§ 800.4(a), 800.6(a). *See also, id.* §§ 800.5(2), 800.6(b), 800.8(c)(v). If, as here, the action agency determines that further consultation will not be productive and terminates the consultation with the SHPO, the matter is elevated to the federal Advisory Council on Historic Preservation. 36 C.F.R. § 800.7(a)(1). The ACHP is an independent federal agency tasked with the "preservation of historic property." 54 U.S.C. § 306101(a)(1). As is true in the NEPA context, the judgments of the ACHP "deserve great weight." *Pres. Coal., Inc. v. Pierce*, 667 F.2d 851, 858 (9th Cir. 1982). "The Advisory Council, tasked as it is with preserving America's historic resources, merits special attention when it opines on historic properties of transcendent national significance." *Nat'l Parks Conservation Ass'n v. Semonite*, 916 F.3d 1075, 1085 (D.C. Cir.), *amended on reh'g in part,* 925 F.3d 500 (D.C. Cir. 2019) (internal quotation and citation omitted).

b. The Navy failed to provide a meaningful explanation for its refusal to adopt the SHPO's and ACHP's recommendations to protect Ebey's Reserve.

Ebey's Reserve is, like other historic properties within the National Park System, of "transcendent national significance." The Navy should have given, but did not give, great weight to

[10] "An adverse effect is found when an undertaking may alter, directly or indirectly, any of the characteristics of a historic property that qualify the property for inclusion in the National Register in a manner that would diminish the integrity of the property's location, design, setting, materials, workmanship, feeling, or association." 36 C.F.R. § 800.5(a)(1).

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the recommendations of the SHPO and ACHP. Instead, those recommendations, originally advanced by the SHPO, "were summarily rejected by the U.S. Navy." GRR 163843.

During the Section 106 consultation process, the SHPO repeatedly stated that the Navy's proposed mitigation measures were inadequate to address the adverse effects on the impacted historic resources. *E.g.*, GRR 160334–36. The Navy terminated consultation with the SHPO and other consulting parties (including COER) because the Navy disagreed with the SHPO on the type and amount of mitigation appropriate to resolve adverse effects to Ebey's Landing National Historical Reserve. GRR 164171.

After terminating consultation with the SHPO, the Navy requested that the ACHP participate in an effort to resolve the dispute. *Id*. The Advisory Council echoed the State's position and recommended that the Navy monitor Growler noise and then work with stakeholders to develop mitigation measures based on the monitoring results. GRR 167458–65.

If the Navy had a good reason for not accepting the ACHP's recommendation, it was free to do so. But it is unlikely the Navy will persuade the Court that its rationales for rejecting the recommendations survive the "exacting," non-deferential review designed to assure that the Navy did not merely "go through the motions," *supra* at 9, but, instead, provided adequate reasons for rejecting the expert agencies' recommendations.

In response to the ACHP's and SHPO's request for a robust monitoring program, the Navy first stated that the SHPO agreed with the Navy's assessment that the overflights would "affect the perceptual qualities" in the Reserve. GRR 167575. We agree, but that is no reason to reject the ACHP and SHPO recommendations.

Next, the Navy stated that modeling is commonly used to assess potential noise impacts. *Id*. But neither the Navy nor anyone else has stated that computer models can perfectly predict noise

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levels. While in many cases it may not be possible to monitor in real time to influence the proposed action, the action here is an on-going operation that can be modified or stopped if after-the-fact monitoring documents noise levels significantly worse than predicted by the models. The Navy's assertion that models are commonly used prior to implementation or that the model has been validated at other locations is no response to the ACHP's call (echoing the earlier Washington Department of Health's call and the recommendation of USEPA) for after-the-fact monitoring to assess whether the modeled predictions are accurate and whether additional mitigation should be considered.

Finally, the Navy rejected monitoring because "operational conditions" at the Reserve "would be similar to levels" that occurred in the 1970s. *Id*. For multiple reasons, that response is arbitrary and capricious. One, the response is unintelligible. The sentence seems to say that "operational condition" levels are similar, but what are the "operational conditions?" Noise levels? The number of overflights? The types of engines? On its face, this response is no response at all. Two, if the sentence meant to refer to operation levels like the number of overflights and engines then in use, the response is irrational, because the planes and engines used in the 1970s were not the same as today. For example, the "Prowler" aircraft that immediately preceded the Growler at NAS Whidbey had engines that generate 10,400 lbf (pounds of force) of thrust, whereas the Growler's standard engines produce 22,000 lbf, more than twice as much as the Prowler. GRR 150245. Greater thrust means louder noise. The Navy made no effort to establish facts to support the unlikely factual predicate for its assertion. Three, the Navy provided no noise monitoring data from the 1970s, so it cannot be known whether the EIS model is in line with recorded noise levels from the 1970s.

While the ACHP's recommendations "deserve great weight" and "merit special attention," the Navy rejected them for no good reason—the epitome of arbitrary and capricious decision-making. *Kern Cty. Farm Bureau, supra; Beno, supra.* On-the-ground noise monitoring is low cost and provides

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important information. The Navy's reluctance to measure actual on-the-ground Growler noise levels begs the question: What is the Navy afraid of? Plaintiffs are likely to prevail on this issue.

c. Irreparable injury

The expanded overflights are causing serious and irreparable harm to hundreds of COER members who are losing their hearing, losing their ability to live peaceably in their homes, and losing their ability to use and enjoy their surroundings. The same noise is causing serious and irreparable harm to the ability of visitors to enjoy the peace and quietude of Ebey's Landing National Historical Reserve. "Injunctive relief is typically appropriate in environmental cases . . . because environmental injury, by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.,* irreparable." *N. Cheyenne Tribe v. Norton*, 503 F.3d 836, 843 (9th Cir. 2007) (internal quotation and citation omitted).

4. Increased Growler noise causes irreparable injury to human health and well-being

The increase in Growler operations and the shift in most of the low-flying, touch-and-go flights to OLF are creating a great risk and, in some cases, already are causing irreversible harm to the health and well-being of residents living beneath the flight tracks, including COER members. The increased Growler operations at OLF subject residents to noise well over 100 dBA, dozens of times per hour, often late at night and in the wee hours of the morning, putting them at risk of permanently losing their hearing. The health effects include abnormally high blood pressure, heart attacks, heart disease, and vascular disease caused by the stress of living in this periodically hellacious environment and are substantiated by Mr. Lilly's monitoring results, the Navy's own analyses, the Washington Department of Health's assessment,[11] recent peer-reviewed science,[12] and the sworn declarations of nearby

[11] GRR 151312–330.
[12] Bowman Decl., Ex. B.

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residents. Karen Bowman, an advanced practice nurse board certified as an occupational health nurse specialist, testifies that "the citizens around OLF Coupeville have increased risk of cardiac disease, specifically myocardial infarction from the frequent noise exposure from the EA-18G Growler jet aircraft field carrier landing practice (FCLP) operations at OLF Coupeville. The number of FCLP operations has greatly increased since the March 2019 Record of Decision, with a corresponding increase in the health risks faced by the citizens near the OLF." Bowman Decl., ¶ 16.

COERS members and the public at large also are being deprived of the use and enjoyment of their homes, outdoor living spaces, and public recreation areas. Parents of young children are compelled to seek refuge in interior closets in their homes to shield their children from the extreme noise of the Growler jets, for fear of damage to their children's hearing. Grandparents are afraid to invite their grandchildren to visit, because they do not want to risk their grandchildren's hearing. Central Whidbey is a beautiful and, until recently, largely quiet and peaceful area that should be a place to build pleasant, intergenerational memories. The parents and grandparents, and their young children and grandchildren, will never get this time back. And the stress induced health impacts are likely shortening the time left to them.

5. Increased Growler noise causes irreparable injury to Ebey's Landing and the plaintiffs who use and enjoy it

Every person, including COER members, who takes time from work and life's commitments to visit Ebey's Landing and has their experience ruined by a session of screaming-loud, low-flying Growlers can never get that time back and is irreparably harmed. The SHPO determined that the Navy's "mitigation is not adequate for the adverse effects of the additional Growlers and their operations." GRR 163843. "The frequent, extremely noisy overflights by "the additional Growlers will adversely affect the setting, feeling, and association of Ebey's National Historic Reserve." *Id.*

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These types of harms are substantial and hard to monetize or remedy by money damages and are, therefore, irreparable. *N. Cheyenne Tribe,* 503 F.3d at 843.

C. The Balance of Equities Favors an Injunction and an Injunction is in the Public Interest

This Court must consider the relative hardships to the parties if injunctive relief is granted or denied and must also consider the public interest. *Alliance for the Wild Rockies*, 632 F.3d at 1131. The balance of equities favors COER and a preliminary injunction is in the public interest.

COER's members will suffer great hardship if the injunction is denied, through no fault of their own. Homeowners and businesses have shaped their lives and livelihoods based on the Navy's statements of its planned use of the airspace at levels far below those approved in the ROD. *See, e.g.*, GRR 30937 (Table 1-3); GRR 30968 ("Operation of the EA-18G in replacement of the EA-6B results in less noise exposure to the local community"). But then the Navy reversed course and pushed past prior limits on overflights and shifted most of them to the area around OLF. *See, e.g.,* Spina Decl., ¶¶ 10, 12, and 14. This had upended the lives and businesses of COER's members and the entire community who have done nothing wrong.

An injunction serves the public interest. The entire Central Whidbey community, not just COER's members, is suffering from the four-fold increase in Growler overflights at OLF. They are forced to cower in their homes when the Growlers are overhead. Inside or out, they are at serious risk of suffering health impacts. They suffer loss of business, they are forced to give up hobbies and outdoor activities, and they are in immediate jeopardy of losing their hearing and suffering other health impact risks including chronic stress-related illnesses and related cardiac events. Spina Decl., ¶¶ 16–17; Attwood Decl., ¶ 12; Brabanski Decl., ¶¶ 12, 15, 18; Browning Decl., ¶¶ 6–7; Hinkelman Decl., at ¶¶ 8–9; Porter Decl., ¶¶ 7, 9–10; Thompson Decl., ¶¶ 16, 23; Vaughn Decl., ¶¶ 9–11; Blankenship

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Decl., ¶ 5; Bowman Decl., *passim*. The public benefits extend as far at Port Townsend and the San Juan Islands. *See* Sandoval Decl.; Stephens Decl.

The State of Washington, representing the public, agrees that the Navy's EIS "arbitrarily dismisses evidence of nonauditory health impacts caused by noise exposure" and "relies on an inadequate and irrational analysis of the public health impacts related to the Navy's expansion of its EA-18G Growler operations at the Whidbey Island Complex." State of Washington Compl., Dkt. 1, at ¶¶ 46, 80. The public interest is best served by a temporary halt to the Navy's expansion of loud, low-flying Growlers while this court considers and, later this year, rules upon the claims brought by COER and the State of Washington.

The Navy will assert the public interest is served by allowing the Navy to continue training its pilots. But the Navy can continue to train its pilots at the pre-ROD level until a decision is reached on the merits of this case. Indeed, when it suits its purposes, the Navy has completely halted Growler operations at NAS Whidbey for extended periods of time since the issuance of the ROD, with no known consequences. Griefen Decl., Ex. 3.

The Navy also could opt to temporarily implement EIS Alternative 2C, which retains the same increase in Growlers overall, but differs from the selected Alternative 2A by maintaining the pre-ROD allocation of touch-and-go flights at 80% Ault Field, 20% OLF. GRR 150314 (Table 2.6-1). The Navy determined that this alternative would serve the purpose and need for the project, just like Alternative 2A. GRR 150290 (the Navy developed a "range of alternatives that meet the purpose of and need for the Proposed Action").

In addition, the Navy could take advantage of other training locations. From 2015 to 2017, the Navy conducted 5500 to 8500 FCLP operations in four states from California to Florida. Griefen Decl., Ex. 4.

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III. CONCLUSION

For all the forgoing reasons, the motion should be granted and the Navy enjoined from increasing and shifting the Growler flights above the baseline number of operations that existed before the ROD was issued, until this matter is resolved on its merits.[13]

[13] We expect the Navy will point to Judge Zilly's ruling in an earlier case involving COER and the Navy to support its request that this motion be denied. *COER v. Navy,* Case No. 2:13-cv-01232, Dkt. 59 (Aug. 11, 2015). As explained in that decision, in 2005, the Navy announced plans to replace the existing Prowler squadrons at Whidbey NAS with Growlers. The Navy decided an EIS would not be required because the number of planes would decrease, their flights paths would not change, and the total operations would not increase. Later, the Navy announced plans to add 35 more Growlers. At that point, the Navy agreed an EIS would be necessary. COER continued its lawsuit, though, asserting that the Growlers, even before the 35 additional planes were added, were causing significantly greater impacts than had been caused by the Prowlers. COER requested a preliminary injunction until the EIS was complete. Judge Zilly denied the request. He determined that there was no evidence the flight paths had changed and, while total flights had gone up temporarily, for the past two years they were back down to the 2005 levels. (In this case, there is no question that the number of flights and the proportion of flights at OLF have changed dramatically.) Judge Zilly determined that the Navy's use of the DNL metric instead of peak noise levels was reasonable. (This motion does not contend that the Navy cannot use the DNL metric, but rather that it has mis-used it, by averaging noisy and quiet days together, contrary to the Navy's and EPA's acknowledgement that the DNL should be calculated separately in situations like this with large day to day variations.) Judge Zilly determined that there were not new health studies at that time with significant new information. (We are not challenging in this motion the EIS's assessment of the health science literature.) Judge Lilly determined that OLF was a superior site for training which tipped the equities in the Navy's favor. (But now, the Navy has published an EIS which states that leaving 80% of the Growlers at Ault Field is a reasonable alternative that will meet the Navy's needs.) Judge Zilly found that COER had no evidence of public benefit from an injunction. (Here, we have supplied declarations from the Mayor of Port Townsend and the San Juan County Council attesting to widespread public benefits, as well as evidence of benefit to the public visiting the nearby Ebey's Landing Reserve.) For these and other reasons that can be addressed if raised by the Navy's response, Judge Zilly's ruling sheds little light on the proper disposition of this motion.

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Dated this 13th day of February, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 13, 2020, I served a copy of the foregoing on counsel of record electronically through the court's CM/ECF system.

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CERTIFICATE OF MEET AND CONFER

I hereby certify and declare that counsel of record for all the parties in this matter met and conferred by telephonic conference call on December 13, 2019 to discuss the substance of the forgoing motion and attempt to eliminate the need for the motion. The telephonic conference call was set after counsel for COER and the Defendants attempted to arrange an in-person discussion. Due to counsel's location on opposite coasts of the United States, an in-person conference was not feasible. Counsel of record for the parties engaged in a substantive discussion for approximately half an hour during the December 13, 2019 conference call and attempted to reach an accord that would eliminate the need for the motion. Counsel for COER described the substance of the contemplated motion and the reasons why the motion was needed. Counsel for COER suggested actions that the Defendants could take to mitigate the irreparable harms that COER's members were and are suffering. Despite their good faith efforts, counsel for the parties were not able to come to an accord that would eliminate the need for the motion. Following the December 13, 2019 conference call, the counsel for the parties exchanged several emails in a further attempt to reach an accord, but those efforts were unsuccessful.

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