



BRICKLIN & NEWMAN LLP
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Reply to: Seattle Office

February 9, 2021

*VIA CERTIFIED U.S. MAIL
RETURN RECEIPT REQUESTED*

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

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

This letter is presented on behalf of Citizens of Ebey's Reserve (COER). The purpose of this letter is to notify you of violations of the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531–1544. These violations result from your failure to reinitiate formal consultation under Section 7 of the ESA with respect to the Northwest Training and Testing (NWTT) Supplemental Environmental Impact Statement (NWTT SEIS) and the Environmental Impact Statement for EA-18G "Growler" Airfield Operations at Naval Air Station Whidbey Island (Growler EIS). The projects analyzed by the NWTT SEIS and Growler EIS are referred to herein collectively as the "Projects."

NOAA Fisheries (NMFS) issued a "concurrence letter" to the Navy for the Growler EIS on July 20, 2017, in which NMFS concurred "with the United States Navy that the proposed action is not likely to adversely affect" Southern Resident killer whales or Mexico and Central American humpback whales. Growler EIS at C-89–96.

NMFS issued a Biological Opinion (BiOp) and Incidental Take Statement (ITS) for the NWTT EIS on November 9, 2015.¹ NMFS does not appear to have revisited its 2015 BiOp and ITS in the context of the NWTT SEIS.

U.S. Fish and Wildlife Service (FWS) issued a Biological Opinion (BiOp) and Incidental Take Statement for the Growler EIS on June 14, 2018, and a reinitiated BiOp and ITS for the Growler EIS on January 15, 2020. FWS issued a BiOp and ITS for the NWTT Project on July 21, 2016² and a reinitiated BiOp and ITS for the NWTT Project on December 11, 2018.³

Notwithstanding the prior Section 7 consultation on the effects of the Project, it is clear that NMFS, FWS, and the Navy are currently violating the ESA by failing to reinitiate their consultations. Pursuant to 50 C.F.R. § 402.16, the agencies have a duty to reinitiate consultation when "new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered." 50 C.F.R. § 402.16(a)(2). The duty to reinitiate Section 7 consultation in these circumstances falls on both the consulting agencies (NMFS and FWS) and the action agency (the Navy). *See, e.g., Salmon Spawning & Recovery All. v. Gutierrez*, 545 F.3d 1220, 1229 (9th Cir. 2008) (duty to reinitiate consultation lies with both the action agency and the consulting agency).

Here, the duty to reinitiate Section 7 consultation is triggered by new scientific information relating to the depth to which Growler aircraft noise penetrates into the water column. If NMFS, FWS, and the Navy do not reinitiate consultation within 60 days of receiving this letter, COER intends to initiate a lawsuit to remedy these violations.

¹ https://nwtteis.com/portals/nwtteis/files/2015-2016/NWTT_NMFS_Biological_Opinion_11-09-2015.pdf

² https://nwtteis.com/portals/nwtteis/files/2015-2016/NWTT_Final_USFWS_Biological_Opinion_7-21-2016.pdf

³ https://nwtteis.com/portals/nwtteis/files/2015-2016/U.S._Fish_and_Wildlife_Service_Reinitiated_Biological_Opinion_for_NWTT_Activities_%28Dec_2018%29.pdf

In addition, the failure of NMFS, FWS and the Navy to reinitiate consultation in these circumstances renders the ITSs invalid such that they no longer provide a safe harbor to the Navy for the taking of threatened and endangered species. If the Navy, relying on the invalid ITSs, engages in activities that will result in the taking of ESA-listed species, that taking is unlawful and in violation of Section 9 of the ESA. To the extent the Navy is taking ESA-listed species in the Project areas prior to the completion of reinitiated consultation and new ITSs, COER intends to file a lawsuit under Section 9 of the ESA, alleging an unlawful take of ESA-listed species.

The violations alleged above are described in more detail below.

A. New Information Reveals that Growler Aircraft Noise Penetrates Much Deeper into the Water than Previously Assumed, Affecting Listed Species to an Extent Not Previously Considered.

New ground-breaking findings just published in the Journal of Marine Science and Engineering⁴ reveal that Growler noise is not largely attenuated within the first meter or two of water, as was previously incorrectly asserted in the NWTT SEIS and Growler EIS. Instead, Kuehne *et al.* (2020) found that noise penetrates at significant decibel levels to a depth of at least 30 meters (the deepest depth measured) and, presumably, continues on much further in all directions from its air-water interface.

The Growler EIS dismisses Growler noise transmission in water, stating that “the potential for sound to enter the water is low,” and goes on to speculate: “Due to the difference in acoustic properties of air and water, **most of the acoustic energy generated from the aircraft would be reflected away from the water column**, preventing noises from atmospheric sources from maintaining original sound qualities as they transmit through the air-water interface ...” Growler EIS at C-105, emphasis supplied.

The NWTT SEIS presumes likewise: “Animals would have to be **at or near the surface at the time of an overflight** to be exposed to appreciable sound levels... [and aircraft would] only produce in-water noise at any given location for a brief period of time as the aircraft climbs to cruising altitude. NWTT SEIS at 3-19, emphasis supplied.

The FWS reinitiated BiOp for the Growler EIS concludes: “Growlers performing FCLPs and T&Gs will only expose marbled murrelet marine habitat to disturbing sound **when they are above the water...**” Growler EIS reinitiated BiOp at 40–41, emphasis supplied.

The Navy and Services had assumed in the Growler EIS and NWTT SEIS that the Growler noise would only penetrate into the water (if at all) to a depth of approximately two meters. But the new

⁴ Kuehne, L.M., and 5 coauthors. 2020. Above and below: Military Aircraft Noise in Air and under Water at Whidbey Island, Washington. *Journal of Marine Science and Engineering*. 8(11): 923. The Kuehne *et al.* (2020) study is attached to this notice letter as Attachment A and is *available at*: <https://www.mdpi.com/2077-1312/8/11/923>.

scientific study conducted by Kuehne et al. in 2020 shows that those assumptions about Growler noise only affecting listed species when they are at or near the water surface are mistaken. As stated in the study's Abstract: "Using a hydrophone deployed near one runway, we also detected sound signatures of aircraft at a depth of 30 m below the sea surface, with noise levels (134 ± 3 dB re 1 μ Pa rms) exceeding thresholds known to trigger behavioral changes in fish, seabirds, and marine mammals, including Endangered Southern Resident killer whales."

This new information reveals that Growlers cause high levels of noise 30 meters under the water surface. Marine mammals, marbled murrelets, and fish (including Puget Sound Chinook salmon and bull trout) can find no refuge in deep water when Growlers are overhead, which can happen for hours at a time.

The Projects—which the Services and the Navy admit will take ESA-listed species—may affect those species to an extent not previously considered by NMFS or FWS. *See* 50 C.F.R. § 402.16(a)(2). Reinitiation of the Section 7 consultations is, therefore, required. The Projects cannot legally go forward without new biological opinions that consider the effects of Growler noise radiating great distances in all directions from the air-water interface, rather than only affecting 3–6 feet of the water column, as assumed in the Projects' consultation documents. Moreover, the new biological opinions must analyze the effects of Growler noise deep underwater in conjunction with the effects of vast and increasing amounts of anthropogenic noise affecting the underwater environment and the marine fauna that live and breed there.⁵

The triggering of a duty to reinitiate consultation under 50 C.F.R. § 402.16(a)(2) renders the NWWT SEIS and Growler EIS BiOps and ITSs no longer valid, halting the Projects until new BiOps are issued.⁶ Because NMFS and FWS did not consider the effect of deep water Growler noise, "it cannot be determined whether the proposed project will result in a violation of the ESA's substantive provisions and cause jeopardy" to ESA-listed whales, birds, and fish. *Hoopa Valley Tribe*, 230 F. Supp. 3d at 1134–35. Reinitiation is required.

⁵ *See, e.g.*, Duarte, C.M., L.M., and 24 coauthors. 2021. The soundscape of the Anthropocene ocean. *Science*. Vol. 371, Issue 6529. *See also* Sabrina Imbler, In the Oceans, the Volume Is Rising as Never Before, *N.Y. Times*, Feb. 4, 2021, available at: <https://www.nytimes.com/2021/02/04/science/ocean-marine-noise-pollution.html?referringSource=articleShare>.

⁶ *See, e.g.*, *Hoopa Valley Tribe v. Nat'l Marine Fisheries Serv.*, 230 F. Supp. 3d 1106, 1132 (N.D. Cal. 2017), *modified sub nom. Tribe v. U.S. Bureau of Reclamation*, No. 3:16-CV-04294-WHO, 2017 WL 6055456 (N.D. Cal. Mar. 24, 2017), *order clarified sub nom. Tribe v. Nat'l Marine Fisheries Serv.*, No. 16-CV-04294-WHO, 2018 WL 2010980 (N.D. Cal. Apr. 30, 2018) (quoting and citing *Mt. Graham Red Squirrel v. Madigan*, 954 F.2d 1441, 1451 (9th Cir. 1992), for the proposition that "[r]einitiation of consultation requires the Fish and Wildlife Service to issue a new Biological Opinion before a project may go forward."); *see also Pac. Rivers Council v. Thomas*, 30 F.3d 1050, 1056–57 (9th Cir. 1994) ("The Forest Service has not reinitiated consultation as required under § 7(a)(2). . . . accordingly, we reverse the district court's denial of an injunction barring all ongoing and announced activities that may affect the Snake River chinook from going forward. The Forest Service cannot go forward with these activities without first complying with the consultation requirements of the ESA").

B. Unlawful Taking of ESA-Listed Species

Section 9 of the Endangered Species Act provides that “with respect to any endangered species of fish or wildlife . . . it is unlawful for any person . . . to take any such species.” 16 U.S.C. § 1538(a)(1)(B). Take is defined as “to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or attempt to engage in any such conduct.” 16 U.S.C. § 1532(19). Through regulations, the term “harm” is defined as “an act which actually kills or injures wildlife. Such an act may include significant habitat modification or degradation where it actually kills or injures wildlife by significantly impairing essential behavioral patterns, including breeding, feeding, or sheltering.” 50 C.F.R. § 17.3. Section 9’s prohibition on taking listed species is not absolute, a person may obtain an Incidental Take Permit under ESA Section 10 and a federal agency may obtain an ITS allowing it to take endangered species during the proposed action if the taking will not jeopardize the continued existence of any listed species and is incidental to the purpose of the action. But in the absence of either of those safe harbors, any taking of listed species is flatly prohibited.

When the duty to reinitiate consultation is triggered, the prior Biological Opinion and ITS are rendered invalid and provide no safe harbor for the taking of listed species. As it has already been determined that the Projects will result in the taking of blue whales, fin whales, humpback whales, Sei whales, Southern Resident orcas, sperm whales, Guadalupe fur seals, leatherback sea turtles, bull trout, marbled murrelets, and short-tailed albatross, the Project cannot go forward unless and until the Navy, NMFS, and FWS comply with substantive duty to “‘insure that any action authorized, funded or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification’ of critical habitat of such species. 16 U.S.C. § 1536(a)(2).” *Envtl. Prot. Info. Ctr. v. Simpson Timber Co.*, 255 F.3d 1073, 1078–79 (9th Cir. 2001).

The Navy is already taking action “on the ground” that harms (*i.e.*, takes) listed species. NMFS and FWS have already determined that the Projects will result in a taking of listed species and the ITSs providing the Navy with a safe harbor from liability for the take are invalid. Therefore, the Navy is unlawfully taking listed species in violation of Section 9 of the ESA.

COER anticipates that during the 60-day period when the Navy, NMFS, and FWS consider this notice, and before COER chooses whether to file suit, that the Navy, NMFS, and FWS may wish to meet and confer with COER as to the violations of the ESA alleged in this notice. COER welcomes such an engagement. Please feel free to contact Bricklin & Newman, LLP if the Navy, NMFS and/or FWS are interested in meeting, or if you have any questions or concerns about this notice of intent to sue.

Scott de la Vega, et al.

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Thank you for your attention to this important matter. If you would like to discuss this matter, please feel free to contact us at the phone number listed above, or at the following email addresses: bricklin@bnd-law.com and griefen@bnd-law.com.

Very truly yours,

BRICKLIN & NEWMAN, LLP

A handwritten signature in blue ink that reads "David A. Bricklin". The signature is fluid and cursive, with the first name being the most prominent.

David A. Bricklin

A handwritten signature in blue ink that reads "Zachary K. Griefen". The signature is very stylized and cursive, with the first name being the most prominent.

Zachary K. Griefen

Attorneys for Citizens of Ebey's Reserve

cc: Client