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The Honorable Richard A. Jones

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE**

STATE OF WASHINGTON, *et al.*,

Plaintiff,

v.

The UNITED STATES DEPARTMENT
OF THE NAVY, *et al.*,

Defendants.¹

NO. 2:19-cv-01059-RAJ-JRC

WASHINGTON’S MOTION FOR
SUMMARY JUDGMENT

NOTE ON MOTION CALENDAR
AUGUST 3, 2021

¹ In accordance with Federal Rule of Civil Procedure 25(d), Washington substitutes Secretary of Defense Lloyd J. Austin III for former Secretary of Defense Mark T. Esper, Acting Secretary of the Navy Thomas W. Harker for former Secretary of the Navy Richard V. Spencer, and Todd Schafer as Acting Assistant Secretary of the Navy (Energy, Installations and Environment) for former Acting Secretary Todd C. Mellon.

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I. INTRODUCTION

1
2 Plaintiff the State of Washington respectfully moves this Court for summary judgment
3 on its claims against Federal Defendants for their failure to comply with the mandates of the
4 National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321–4347, and the National
5 Historic Preservation Act (NHPA), 54 U.S.C. §§ 300101–307108, and the Administrative
6 Procedure Act (APA), 5 U.S.C. § 706, in authorizing expanded Navy EA-18G Growler aircraft
7 (Growlers) training operations in Washington State.

8 Growlers are powerful machines that generate intensely loud, low-frequency sound as
9 they conduct take-offs, landings, and other flight trainings at the Naval Air Station on Whidbey
10 Island and around Puget Sound. *See* GRR150209; GRR159263; GRR167640. In March 2019,
11 the Navy issued a decision to increase dramatically its operation of Growlers, expanding its
12 fleet by 36 Growlers, adding two new expeditionary squadrons and additional personnel, and
13 increasing its training operations by 33%. GRR167640, GRR150143, GRR167646–47. The
14 Navy’s expanded Growler operations expose significantly more people and acres to disturbing
15 and disruptive high-decibel noise, with more than 12,684 people and 23,000 acres impacted by
16 noise levels above a day-night average of 65 decibels, *see* GRR150273–76, and noise impacts
17 extending across Puget Sound to Olympic National Park, *see* GRR151217.

18 Intense Growler noise raises significant concerns about adverse impacts to public
19 health, wildlife, and historic resources. Despite these concerns, the Navy failed to adequately
20 and rationally analyze the public health and wildlife impacts from a 33% increase in Growler
21 flight operations. In analyzing public health impacts, the Navy failed to analyze specific
22 impacts to childhood learning and relied on an unsupported and arbitrary standard to dismiss
23 non-auditory public health impacts, despite comments from the Washington State Department
24 of Health indicating Growler noise levels “*pose a threat to public health.*” GRR151315. The
25 Navy also failed to analyze species-specific impacts to birds and irrationally concluded that
26 birds will not be adversely affected by noise, despite conflicting record evidence. In addition,

1 the Navy failed to reach a rational decision regarding mitigation for impacts to historic
2 resources, including Ebey’s Landing Historical Reserve and the Central Whidbey Island
3 Historic District.

4 For these reasons, Washington requests that this Court grant its motion for summary
5 judgment on all claims and vacate and remand the ROD, Final Environmental Impact
6 Statement (Final EIS), and Section 106 determination.

7 **II. FACTUAL AND PROCEDURAL BACKGROUND**

8 **A. The Navy’s Growler Operations**

9 The U.S. Navy operates the Naval Air Station Whidbey Island Complex (NAS
10 Whidbey Island), which includes a main landing field called Ault Field near the town of Oak
11 Harbor and an outlying field ten miles south near the town of Coupeville, commonly referred
12 to as OLF Coupeville. GRR150141. Under the challenged action, the Navy uses both fields for
13 military training at any time, day or night. GRR106892.

14 Military jets like the EA-18G Growler “generate noticeable low-frequency noise
15 compared to other aircraft types.” GRR159263. Growlers have a higher low-frequency content
16 than their predecessor, the EA-6B Prowler aircraft, *id.*, and the National Parks Service has
17 noted that Growlers “are widely experienced as a louder and more intrusive aircraft” than the
18 Prowler, GRR151216. Low frequency noise transmits well through air, GRR32722, and can
19 induce vibrations at sound levels of 110 decibels or greater, GRR159263. In addition, humans
20 may perceive low-frequency sound differently as compared to mid- or high-frequency sound.
21 *Id.* The majority of laboratory measurements of annoyance from low-frequency noise “share
22 the same conclusion that annoyance caused by low frequencies increases rapidly with level and
23 that measurements of A-weighted sound level alone can underestimate the effects of low-
24 frequency noises.” *Id.*

1 **B. Ecological and Cultural Importance of Whidbey Island and Puget Sound**

2 Whidbey Island is a 40-mile irregularly shaped island located in Puget Sound's Island
3 County. GRR164965. The island has natural prairies, high bluffs, rugged beaches, protected
4 coves, farmlands, and forests. *Id.* Island County has an estimated population of more than
5 84,000 people with more than 130,000 people in nearby Skagit County. GRR150511.

6 The action area for the Navy's expanded Growler operations encompasses important
7 bird habitat including the San Juan Islands National Wildlife Refuge and five important bird
8 areas. GRR150473–76. The San Juan Island National Wildlife Refuge, which was created to
9 protect nesting seabird colonies, sits approximately six miles west of Ault Field. GRR150476.
10 The Skagit Bay Important Bird Area, which serves as an important wintering ground for tundra
11 swans and snow geese and as a key breeding area for bald eagles and great blue herons, is
12 located just four miles east of Ault Field. GRR150473, 150476. Approximately 230 migratory
13 bird species occur annually within the study area defined by the Final EIS, GRR150470,
14 several of these species have been designated by Washington as priority species, including
15 tufted puffins, great blue herons, harlequin ducks, and peregrine falcons. GRR151279. Tufted
16 puffins, which breed on Smith Island just west of Whidbey Island, are listed as endangered
17 under Washington State law. GRR151276. Marbled murrelets, which forage in the action area,
18 are federally listed as threatened and state listed as endangered. GRR150466–69; GRR159980.

19 Whidbey Island is also home to Ebey's Landing National Historic Reserve and Central
20 Whidbey Island Historic District. *See* GRR151216. A significant portion of OLF Coupeville
21 lies within the boundary of Ebey's Landing Historical Reserve. GRR160140. Congress created
22 Ebey's Landing National Historical Reserve in 1978, to preserve and protect "a rural
23 community which provides an unbroken historical record from nineteenth century exploration
24 and settlement in Puget Sound to the present time" and to commemorate exploration and
25 settlement of Whidbey Island. Pub. L. 95-625 § 508(a); GRR151216; GRR167459–60. The
26 boundaries of the Reserve coincide with Central Whidbey Island Historic District, which was

1 nominated to the National Register of Historic Places in 1973, due in large part to one of the
2 largest intact collections of nineteenth century residential and commercial structures in rural
3 Washington State. GRR151216–17; GRR164965–66. Together, the Reserve and District
4 celebrate rich and assorted natural and cultural resources that have great significance to Pacific
5 Northwest and national history. The area’s views and perceptual qualities, including the natural
6 soundscape, contribute to the landscape’s authenticity as a cohesive historical and cultural
7 landscape. GRR151216. Washington State Parks manages these historic sites in collaboration
8 with Island County, the Town of Coupeville, and the U.S. National Park Service as a member
9 of the Ebey’s Landing Trust Board. GRR167460.

10 **C. Growler Jet Noise Impacts on Public Health and Wildlife**

11 Increased noise exposure is the primary public health and environmental concern
12 related to the Navy’s Growler operations. *See* GRR167647. The Washington State Department
13 of Health has emphasized that “noise levels similar to those reported from NAS Whidbey
14 Island Complex described in all recent reports *pose a threat to public health.*” GRR151315
15 (emphasis added). The World Health Organization has similarly concluded that noise pollution
16 “is considered not only an environmental nuisance but also a threat to public health.”
17 GRR70181 (WHO 2011), *see also* GRR70191 (“There is sufficient evidence from large-scale
18 epidemiological studies linking the populations’ exposure to environmental noise with adverse
19 health effects.”). Most of these health effects are non-auditory, meaning psychological and
20 physiological effects on health and well-being caused by noise, including annoyance and
21 impacts to cardiovascular health, sleep, mental health, and cognitive abilities. *See* GRR151317;
22 GRR151322; GRR151324; GRR42087 (Department of Defense Noise Working Group
23 (DNWG) 2009). In a peer-reviewed analysis of the environmental burden of disease due to
24 environmental noise, the WHO estimated that environmental noise in Western Europe leads to
25 an annual collective premature loss of 61,000 years for ischemic heart disease, 45,000 years for
26 cognitive impairment of children, and 903,000 years for sleep disturbance. GRR70191,

1 GRR70181 (WHO 2011). As the European Network on Noise and Health explained
2 “environmental noise leads to a disease burden that is second in magnitude only to that from
3 air pollution.” GRR56316.

4 The Washington State Department of Health, Division of Environmental Public Health
5 (Health) and the U.S. Environmental Protection Agency (EPA) each submitted detailed
6 comments on the Draft EIS raising concerns about the adequacy of the Navy’s review of public
7 health impacts from the Navy’s Growler operations. GRR151312–30. The Health comments
8 recommended that the Navy’s environmental analysis test its noise modeling against on-the-
9 ground noise values, improve its scientific discussion concerning noise and non-auditory health
10 effects, not “require a ‘definitive causal and significant relationship’ between aircraft noise and
11 health prior to including a health outcome” in the Navy’s analysis, and include a health impact
12 assessment to better understand the on-the-ground health impacts of its Growler operations.
13 GRR151313–15. EPA’s comments similarly noted that the Draft EIS “does not contain
14 sufficient information to fully assess the environmental impacts that should be avoided to fully
15 protect the environment and nearby communities” GRR151252–53. To remedy this
16 deficiency, the EPA recommended that the Navy develop a “supplemental health assessment of
17 the affected population to characterize baseline conditions and projected health impacts of the
18 proposed action to inform a pathway forward.” GRR151252–53. The Health comments also
19 included a detailed report prepared by two Health epidemiologists that summarized recent
20 literature exploring the health effects of noise exposure and compared those findings to
21 reported noise levels at NAS Whidbey Island. GRR151317, GRR151319. This detailed report
22 concluded that “noise levels similar to those reported from NAS Whidbey Island Complex
23 described in all recent reports pose a threat to public health.” GRR151325.

24 Scientific studies also indicate that noise can adversely impact wildlife, even when
25 wildlife do not exhibit a visible response. *See* GRR151274–75. In fact, during the Endangered
26 Species Act review process for the Navy’s Growler operations, the U.S. Fish and Wildlife

1 Service (FWS) concluded that some federally listed marbled murrelets would experience
2 diminished health and increased mortality due to Growler noise. GRR160018–19. Similarly,
3 the Washington Department of Fish and Wildlife (WDFW) submitted comments on the Draft
4 EIS raising concerns about noise impacts to the array of wildlife in the area, including tufted
5 puffins and marbled murrelets and the adequacy of the Navy’s review of these impacts.
6 GRR151274–82. Among other things, the WDFW comments criticized the Navy for relying on
7 the unsupported assumption that “wildlife are habituated to current conditions and therefore
8 will habituate to increased noise and thus remain unaffected.” GRR151274. WDFW also
9 criticized the Navy for relying on old studies when more recent studies demonstrate the
10 “detrimental” impacts to wildlife from noise. GRR151275. The National Parks Service also
11 expressed concerns about the Navy’s conclusion that aircraft disturbances would not adversely
12 impact birds and criticized the Navy’s unsupported reliance on habituation. *See* GRR116648–
13 49 (“No evidence of the presumption of bird habituation is provided.”).

14 **D. Growler Impacts on Washington’s Cultural Resources and the Section 106 Process**

15 The Navy’s Growler operations also adversely impact Washington’s historic resources,
16 most notably Ebey’s Landing Historic Reserve and the Central Whidbey Island Historic
17 District. *See* GRR138453–54; GRR151216–17 (National Park Service comments: “The
18 increased noise [from expanded Growler operations] will significantly impact soundscapes
19 throughout the Reserve.”); GRR151261–63; GRR167459–60. Due to these impacts, federal
20 law required the Navy to consult with the Washington State Historic Preservation Officer
21 (SHPO) and other stakeholders to develop measures to mitigate these impacts. 36 C.F.R.
22 § 800.5. Although the Navy began this consultation process in 2014, *see* GRR167574, the
23 Navy did not release a Determination of Adverse Effects until June 2018, and shortly thereafter
24 the Navy indicated its plans to conclude the Section 106 process no later than October 2018,
25 GRR138453–54, GRR167463. On this rushed timeline, the consulting parties, including
26

1 Washington's SHPO, and the Navy were unable to reach an agreement on methods to avoid,
2 minimize, or mitigate the adverse effects from the Navy's operations. *See* GRR167463.

3 The Navy terminated consultation with the SHPO and other parties on November 30,
4 2018, and sought comments from the federal Advisory Council on Historic Preservation
5 (ACHP). GRR164171. The ACHP responded on February 19, 2019, recommending, among
6 other things, that the Navy mitigate adverse effects by: (1) working with stakeholders to
7 monitor noise impacts associated with expanded Growler operations to have a fuller
8 understanding of physical impacts on historic properties and effects to the historic and cultural
9 values of the area and measures to address them; (2) committing to working with stakeholders
10 to develop mitigation measures based on the results of the recommended monitoring; and (3)
11 working with stakeholders to identify potential changes to operational procedures to reduce
12 noise impacts or other measures such as sound insulation treatments. GRR167463–65. The
13 ACHP comments specifically recommended that the Navy consider a broader range of funding
14 to advance the long-term preservation of the historic characteristics of the Central Whidbey
15 Island Historic Reserve beyond the previously proposed funding for the National Park Service
16 to rehabilitate the Ferry House. GRR167464.

17 Just three weeks later, the Navy issued its final determination on the Section 106
18 process, which declined to adopt the ACHP's recommendation for additional noise monitoring
19 efforts, declined to engage in further discussions with stakeholders to identify mitigation
20 measures, and declined to examine other creative means for funding and carrying out
21 mitigation measures. GRR167574–78. Instead, the Navy adopted similar, but lessened
22 mitigation measures to those it proposed before terminating consultation: providing \$867,000
23 funding to the NPS to support Ferry House preservation projects; providing up to \$20,000 to
24 the NPS for interpretive historical signs at affected locations; and supporting partnership
25 opportunities with the federal REPI program and the federal Sentinel Landscape program. *Id.*;
26 GRR167640. Notably, the consulting parties had previously indicated that these mitigation

1 measures were insufficient to address the scope of adverse effects from the Navy's Growler
2 Operations. *See* GRR163843 (SHPO: stating that the Navy's proposed mitigation, which at that
3 time included more funds for Ferry House, were "not adequate" or proportional to address the
4 adverse effects of additional Growler operations); *see also* GRR166126 (Ebey's Landing
5 National Historical Reserve Board: stating that the Navy's draft memorandum of agreement
6 did not resolve the adverse effects of Growler operations); GRR166136 (Coupeville Mayor:
7 stating that "work on only one NPS owned building, the Ferry House" is not "of great enough
8 public benefit for the adverse effect that will be felt over the entire Historic District.")).
9 Nevertheless, the Navy did not explain how its adopted measures would mitigate the adverse
10 effects of its Growler operations. *See* GRR167574–78.

11 **E. The Navy's Final Decision and Environmental Review**

12 On March 12, 2019, the Navy released a Record of Decision (ROD) authorizing a
13 significant increase its EA-18G Growlers training operations. GRR167640–65. The ROD
14 authorizes the Navy to indefinitely increase its aircraft operations out of NAS Whidbey Island
15 by 33%, add an additional 36 Growlers for a total of 118 Growlers, and conduct more than
16 112,100 total operations at NAS Whidbey Island, with 88,000 operations at Ault Field and
17 24,100 operations at OLF Coupeville in an average year. GRR167646–47, GRR150296. In a
18 high tempo year when the Navy operates more flights based on its training needs, total
19 operations will climb to 116,000 annual flights under the selected alternative or approximately
20 317 flights per day. GRR159413, GRR150588–89.

21 The ROD relied on the Section 106 determination and the Navy's EIS. *See*
22 GRR167644, GRR167652–53 (ROD). The Final EIS considered three action alternatives and a
23 no-action alternative, which served as reference point for describing and quantifying the
24 potential impacts of the proposed actions. GRR167645–46. For the three action alternatives,
25 the Final EIS also considered scenarios A through E with different distributions of field carrier
26

1 landing practice flights between Ault Field and OLF Coupeville. Of the alternatives considered
2 during the environmental review process, the ROD selected Alternative 2A. GRR167646.

3 As the Final EIS notes, Alternative 2A “would have significant noise impacts in the
4 communities surrounding Ault Field and OLF Coupeville” with an increase in the number of
5 acres and number of people impacted. GRR150695. The Navy’s Growler flights will increase
6 by approximately 12% the number of people exposed to noise levels above the threshold the
7 Navy used to assess high levels of annoyances (65 decibel day-night average). GRR167647,
8 GRR167648. In total, more than 12,000 people in the action area, more than a quarter of them
9 children, will be exposed to noise levels at or above 65 decibel day-night average with more
10 than 5,000 people exposed to noise levels at or above 75 decibel day-night average in a typical
11 training year. GRR150762; GRR167650. Increased noise exposure will occur at Oak Harbor
12 High School, Coupeville Elementary School, Crescent Harbor Elementary School, Deception
13 Pass State Park, Ebey’s Landing National Historical Reserve, San Juan Islands National
14 Monument, and Cama Beach State Park, among other locations. GRR159180–84.

15 III. STANDARD OF REVIEW

16 Because neither NEPA nor the NHPA have a private cause of action, claims
17 challenging NEPA or NHPA violations are reviewed under the APA. *Pit River Tribe v. U.S.*
18 *Forest Serv.*, 469 F.3d 768, 778 (9th Cir. 2006). Where, as here, the material facts are not
19 genuinely in dispute and the questions before the Court are purely legal, the Court can resolve
20 APA challenges on summary judgment. *King County v. Azar*, 320 F. Supp. 3d 1167, 1171
21 (W.D. Wash. 2018) (citing *Fence Creek Cattle Co. v. U.S. Forest Serv.*, 602 F.3d 1125, 1131
22 (9th Cir. 2010)), *appeal dismissed*, 2018 WL 5310765 (9th Cir. Sept. 20, 2018).

23 Under the APA, a “reviewing court shall . . . hold unlawful and set aside” agency action
24 found to be “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with
25 law.” 5 U.S.C. § 706. An agency decision is “arbitrary and capricious if the agency has relied
26 on factors which Congress has not intended it to consider, entirely failed to consider an

1 important aspect of the problem, offered an explanation for its decision that runs counter to the
 2 evidence before the agency, or is so implausible that it could not be ascribed to a difference in
 3 view or the product of agency expertise.” *Greater Yellowstone Coal., Inc. v. Servheen*, 665
 4 F.3d 1015, 1023 (9th Cir. 2011) (quoting *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto.*
 5 *Ins. Co.*, 463 U.S. 29, 43 (1983) [hereinafter *State Farm*]). In short, “the agency must examine
 6 the relevant data and articulate a satisfactory explanation for its action including a ‘rational
 7 connection between the facts found and the choice made.’” *State Farm*, 463 U.S. at 43
 8 (quoting *Burlington Truck Lines v. United States*, 371 U.S. 156, 168 (1962)). Although courts
 9 “typically accord significant deference to an agency’s decisions that require a high level of
 10 technical expertise . . . such deference applies only when the agency is making predictions
 11 within its area of special expertise.” *Ctr. for Biological Diversity v. Bernhardt*, 982 F.3d 723,
 12 740 (9th Cir. 2020) (internal citations omitted) (declining to defer to agency decision that fell
 13 outside the agency’s scope of expertise).

14 IV. ARGUMENT

15 A. The Navy’s Failure to Take a “Hard Look” at Public Health and Bird Impacts 16 Violates NEPA

17 The Navy conducted a deficient, arbitrary, and unlawful review of public health and
 18 bird impacts from the Navy’s increased Growler operations in violation of NEPA. Each of
 19 these defects renders the Navy’s Final EIS and Record of Decision unlawful.

20 1. NEPA Requires a “Hard Look” at Environmental Impacts, including Public 21 Health Impacts

22 NEPA “is our basic national charter for protection of the environment.” 40 C.F.R.
 23 § 1500.1.² “NEPA requires a federal agency ‘to the fullest extent possible,’ to prepare ‘a

24 _____
 25 ² The Council on Environmental Quality (CEQ) revised its regulations implementing NEPA effective
 26 September 14, 2020. Update to the Regulations Implementing the Procedural Provisions of the National
 Environmental Policy Act, 85 Fed. Reg. 43,304 (July 16, 2020) (codified at 40 C.F.R. pt. 1500). CEQ’s prior
 regulations, promulgated in 1978 with minor amendments in 1986 and 2005, govern Defendants’ Record of
 Decision and Final EIS, and all regulatory references in this complaint are to those prior regulations.

1 detailed statement on . . . the environmental impact’ of ‘major Federal actions significantly
 2 affecting the quality of the human environment.’” *Ctr. for Biological Diversity v. Nat’l*
 3 *Highway Traffic Safety Admin.*, 538 F.3d 1172, 1185 (9th Cir. 2008) (quoting 42 U.S.C.
 4 § 4332(2)(C)(i)). In other words, agencies must “consider every significant aspect of the
 5 environmental impact of a proposed action and inform the public that it has indeed considered
 6 environmental concerns in its decisionmaking process.” *Pit River Tribe*, 469 F.3d at 781
 7 (quoting *Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147, 1153–54 (9th Cir. 2006)); *see*
 8 *also* 40 C.F.R. § 1500.1(c). “NEPA’s requirements are to be strictly interpreted to the fullest
 9 extent possible in accord with the policies embodied in the Act.” *Ctr. for Biological Diversity*,
 10 982 F.3d at 734 (internal quotations omitted). “There is no ‘national defense’ exception to
 11 NEPA.” *No GWEN All. of Lane Cty., Inc. v. Aldridge*, 855 F.2d 1380, 1384 (9th Cir. 1988).
 12 Rather, the Navy, like every other federal agency, must comply fully with NEPA’s procedural
 13 mandates even where the action implicates national security. *Concerned About Trident v.*
 14 *Rumsfeld*, 555 F.2d 817, 823 (D.C. Cir. 1976), *as amended* (1977).

15 “The EIS is the linchpin of NEPA’s procedural requirements.” *Ctr. for Biological*
 16 *Diversity*, 982 F.3d at 734. To be adequate, an EIS must take a “‘hard look’ at the potential
 17 environmental consequences of the proposed action.” *N. Plains Res. Council, Inc. v. Surface*
 18 *Transp. Bd.*, 668 F.3d 1067, 1075 (9th Cir. 2011) (quotations and alterations omitted). As part
 19 of this “hard look,” an EIS “shall provide a full and fair discussion of significant environmental
 20 impacts” that is “supported by evidence that the agency has made the necessary environmental
 21 analyses.” 40 C.F.R. § 1502.1. “Agencies [must] insure the . . . scientific integrity[] of the
 22 discussions and analyses in environmental impact statements,” *Idaho Wool Growers Ass’n v.*
 23 *Vilsack*, 816 F.3d 1095, 1107 (9th Cir. 2016) (quoting 40 C.F.R. § 1502.24), and ensure that
 24 EISs “contain high-quality information and accurate scientific analysis.” *id.* (quoting *Lands*

25 _____
 26 Implementation of Procedural Provisions, 43 Fed. Reg. 55,978 (Nov. 29, 1978); Incomplete or Unavailable
 Information, 51 Fed. Reg. 15,618 (Apr. 25, 1986); Other Requirements of NEPA, 70 Fed. Reg. 41,148 (July 18,
 2005).

1 *Council v. Powell*, 395 F.3d 1019, 1031 (9th Cir. 2005)). In addition, agencies must provide
2 “up-front disclosures of relevant shortcomings in the data or models.” *Id.* If relevant data is
3 incomplete or unavailable, the EIS “must disclose this fact.” *Lands Council*, 395 F.3d at 1031
4 (citing 40 C.F.R. § 1502.22).

5 **2. The Navy Did Not Take a “Hard Look” at Public Health Impacts**

6 The Navy’s review of public health impacts from its increased Growler operations
7 violates NEPA’s requirement that agencies thoroughly analyze the human health impacts of its
8 Growler expansion. *See* 42 U.S.C. §§ 4331, 4332. The Navy’s analysis is flawed in three key
9 respects: (a) the Navy did not adequately analyze impacts to child learning and cognition; (b)
10 the Navy relied on an unreasonably high standard to review and dismiss non-auditory public
11 health impacts; and (c) the Navy did not comply with its obligation to either obtain unavailable
12 information or explain why it could not do so under 40 C.F.R. § 1502.22.

13 **a. The Navy did not adequately analyze impacts to child learning**

14 The Navy failed to adequately analyze impacts to child cognitive development and
15 learning from increased noise exposure and classroom interference. Although the Navy
16 acknowledged that children would experience increased noise exposure and classroom noise
17 interference, the Navy did not determine how that increased noise interference would impact
18 cognitive learning of schoolchildren in the action area, particularly those who are already
19 scholastically challenged. *See* GRR150336–37; GRR159320–22. In short, the Navy failed to
20 analyze the effect its Growler operations would have on cognitive development and learning.

21 The Navy’s Growler operations will repeatedly expose school children to noise
22 disruption. The Final EIS estimated that classroom interference at several schools will increase
23 by “up to a third.” GRR161324. Some schools will experience up to two events per hour in an
24 average training year with windows open over an eight-hour period, totaling 16 interference
25 events in a single school day. GRR150633 (Alt. 1), GRR150679 (Alt. 2), GRR150723 (Alt. 3);
26

1 GRR159623–24 (high tempo Alt. 2). With windows closed, four schools will experience one
2 additional interference event per hour, or a total of eight additional interference events each
3 school day. GRR167649 (ROD). Under the adopted alternative, the highest exposure will
4 occur at Oak Harbor High School, Crescent Harbor Elementary School, and Coupeville
5 Elementary School, with Oak Harbor High School experiencing up to six intrusive noise events
6 per hour in an average training year, GRR150681, GRR159194–95 (Appx. A, average year);
7 GRR159623 (Appx. A, high tempo year).

8 As the Navy acknowledged in the Final EIS, scientific studies indicate “that chronic
9 exposure to high aircraft noise levels may impair learning.” GRR159322; *see also* GRR150336
10 (“Several studies suggest that aircraft noise can affect the academic performance of school
11 children.”). A 2009 guide developed by the Department of Defense Noise Working Group
12 explained that scientific studies have demonstrated that “chronic exposure to aircraft noise
13 impaired long-term memory, reading comprehension and problem solving skills in children
14 ages 8 through 14.” GRR42159 (DNWG 2009). The Road-Traffic and Aircraft Noise and
15 Exposure and Children’s Cognition and Health study (RANCH study), which Health described
16 as the “most comprehensive study of noise and cognitive impairment in children to date,”
17 GRR151322, “showed a decrease in reading scores as the noise level increased, identifying ‘a
18 linear exposure-effect association between exposure to aircraft noise and impaired reading
19 comprehension and recognition memory in children.’” GRR42159 (DNWG 2009);
20 GRR31608–18 (RANCH). Other studies link aircraft noise and motivational depletion in
21 children, GRR42160, and show that chronic aircraft noise can cause physiological responses,
22 like elevate blood pressure, in children, GRR42160–62 (DNWG 2009). Indeed, after
23 conducting a detailed literature review of noise studies, Health concluded that “[t]here is
24 substantial evidence that noise impairs children’s cognitive function.” GRR151324.

25 Despite the record evidence indicating that children in the action area will experience
26 increased noise disruption and that such noise exposure can cause adverse cognitive impacts,

1 the Final EIS did not connect the dots between the level of noise disturbance from its Growler
2 operations and potential adverse impacts to school children. That is, the Navy did not analyze
3 whether and to what extent the level of classroom interference events from its Growler
4 operations will impair learning for schoolchildren in the action area. *See* GRR150336–37;
5 GRR159320–22. Because the Navy did not analyze the connection between known risks to
6 cognitive impairment in school children and the harm that could flow from its Growler
7 operations, the Navy failed to consider an important aspect of the problem. *See N. Plains Res.*
8 *Council, Inc.*, 668 F.3d at 1075 (an agency must rationally “explain the conclusions it has
9 drawn from its chosen methodology, and the reasons it considered the underlying evidence to
10 be reliable.”) (quotation and citation omitted); *Hausrath v. United States Dep’t of the Air*
11 *Force*, No. 1:19-CV-00103-CWD, 2020 WL 5848094, at *12–*13 (D. Idaho Oct. 1, 2020) (Air
12 Force’s analysis of noise impacts on sleep and sleep disturbance was inadequate when the Air
13 Force did not “conduct any analysis of the project’s effects upon sleep disturbance” and did not
14 analyze the impact of multiple training operations on speech disturbance); *see also Oregon*
15 *Nat. Res. Council Fund v. Brong*, 492 F.3d 1120, 1134 (9th Cir. 2007) (an agency “must do
16 more than merely state that past projects contributed to environmental harms”). The Navy’s
17 failure to adequately analyze impacts to child learning and cognitive health renders the Final
18 EIS and ROD unlawful.

19 **b. The Navy did not adequately analyze non-auditory public health**
20 **impacts**

21 The Navy also failed to adequately analyze non-auditory public health impacts because
22 the Navy relied on an irrational and unsupported standard to assess and ultimately dismiss
23 these impacts and failed to rationally justify its conclusion that its Growler operations would
24 not adversely impact public health when evidence in the record indicates such impacts may
25 exist. The Navy’s analysis thus violates NEPA’s hard look mandate and is arbitrary and
26 capricious. *See N. Plains Res. Council, Inc.*, 668 F.3d at 1075; *AquAlliance v. U.S. Bureau of*

1 *Reclamation*, 287 F. Supp. 3d 969, 1032 (E.D. Cal. 2018) (agency failed to consider important
2 aspect of problem in violation of NEPA when it did not “address or otherwise explain” how
3 information about potential climate change impacts could be reconciled with the agency’s
4 conclusion that those impacts would not be significant).

5 In the Final EIS and the ROD, the Navy repeatedly relied on its conclusion that “[n]o
6 studies have shown a definitive causal and significant relationship between aircraft noise and
7 health” to dismiss concerns about public health impacts from the Navy’s increased Growler
8 operations. GRR150339 (Final EIS); *see also* GRR 150246; GRR150650 (Alt. 1), GRR150695
9 (Alt. 2), GRR150738 (Alt. 2), GRR150835 (impacts to users of parks and recreational areas),
10 GRR160912 (App. I: “there is no definitive science to show that a cause-and-effect
11 relationship exists between health effects and intermittent exposure to noise.”); GRR167663
12 (ROD). The Navy also dismissed concerns about physiological impacts to children, stating that
13 “there is no proven positive correlation between noise-related events and physiological
14 changes in children” due to limited scientific literature on the subject. GRR150753; *see also*
15 GRR167650 (ROD). The Navy continued to rely on this definitive causal and significant
16 relationship standard to analyze non-auditory health impacts despite criticism from Health and
17 other agencies that the standard was “unreasonably high and resulted in non-auditory health
18 effects being excluded” from the Navy’s analysis of public health impacts. GRR151313,
19 GRR151314; *see also* GRR103624 (email from the National Park Service Overflights Program
20 Manager for the Natural Sounds and Night Skies Division noting that “[t]here is plenty of
21 emerging evidence” linking aircraft noise and non-auditory health impacts and “a demand for
22 consensus may be too strong a standard to demand when public health may be at risk”).
23 Although the Navy expanded its review of the scientific literature in response to Health’s
24 comments, the Navy continued to judge studies against this unreasonably high standard and did
25 not “change the overall findings of [its] original literature review.” GRR150399 (Final EIS).
26

1 The Navy has not rationally justified its reliance on this heightened standard to assess
2 non-auditory health impacts. *See* GRR159319, GRR150339–40, GRR167650, GRR167663. In
3 responding to Health’s comment related to this incorrect standard, the Navy provided no
4 justification for its continued reliance on this heightened standard. *See* GRR150255–56,
5 GRR150339–40. Elsewhere in the Final EIS, the Navy cited the Department of Defense Noise
6 Working Group’s 2013 technical bulletin on “Noise-Induced Hearing Impairment” to support
7 its conclusion that “it cannot be conclusively stated that a causal link exists between aircraft
8 noise exposure and the various type of nonauditory health effects.” GRR150339. However, as
9 its name suggests, that bulletin focuses only on hearing impairment risks, *see generally*
10 GRR56292–303 (DNWG 2013), and thus does not have any relevance to the *non-auditory*
11 impacts of increased Growler activity, which by definition exclude hearing impairment, *see*
12 GRR150339 (describing non-auditory health effects as stress response, blood pressure, birth
13 weight, mortality rates, and cardiovascular health).

14 The Navy also cited the Airport Cooperative Research Program 2008 (ACRP 2008)
15 synopsis on “Effects of Aircraft Noise: Research Update on Selected Topics” to support its
16 stringent standard. GRR150339. But while that synopsis indicated some uncertainty around the
17 link between health impacts and aircraft noise, it does not support the Navy’s use of a
18 definitive causal standard but rather suggests more research needs to be done. *See generally*
19 GRR36555–85. Moreover, the stale data in the ACRP 2008 synopsis is not a rational basis to
20 dismiss more recent studies in the record that indicate that while the data may be variable,
21 “sufficient evidence” exists to link “the population’s exposure to environmental noise with
22 adverse health effects.” GRR70191 (WHO 2011); *see also* GRR56316 (ENNAH 2013)
23 (“environmental noise leads to a disease burden that is second in magnitude only to that from
24 air pollution.”). Indeed, the World Health Organization concluded in 2011 that “environmental
25 noise should be considered not only as a cause of nuisance but also a concern for public health
26 and environmental health.” GRR70191 (WHO 2011). Similarly, a 2013 study done in

1 partnership with the Federal Aviation Administration’s Center of Excellence, the Boston
2 University School of Public Health, and the Harvard School of Public Health concluded that
3 “aircraft noise, particularly characterized by the 90th centile of noise exposure among census
4 blocks within zip codes, is statistically significantly associated with higher relative rate of
5 hospitalization for cardiovascular disease among older people residing near airports.”
6 GRR63737; GRR63743–44 (describing the study as showing “a small but positive link
7 between exposure to aircraft noise above 55 decibels (measured in day-night average sound
8 level) and increased risk of hospitalization for cardiovascular disease . . .”). The Navy cannot
9 rely on stale data to support its unreasonably high standard for analyzing the scientific
10 evidence of noise-related health impacts, particularly when that stale data conflicts with more
11 recent data in the record. *See N. Plains Res. Council, Inc.*, 668 F.3d at 1085–87 (agency
12 reliance on ten-year old data was arbitrary and capricious and violated NEPA’s hard look
13 requirement).

14 The Navy’s own literature review also acknowledged that “[r]esearch studies seem to
15 indicate that aircraft noise may contribute to the risk of health disorders . . .” GRR159319.
16 Yet, the Navy quickly dismissed those studies because they do not show a definitive “causal
17 and significant relationship between aircraft noise and health.” *Id.* Again, the Navy failed to
18 articulate a rational basis for relying on its stringent definitive causal standard to dismiss health
19 impacts from its increased Growler operations when record evidence indicates such impacts
20 may result from the Navy’s Growler operations. *Id.* The Navy’s reliance on this standard also
21 conflicts with statements from one of the scientists conducting the literature review, who stated
22 in an email that “aircraft noise is an annoyance, at a minimum, and hazardous if the intensity
23 and frequency are sufficiently elevated.” GRR118248 (Dr. Rennix email). That same scientist
24 went on to state that “[l]inks to other diseases are subjective and very hard to disprove. Even
25 when the literature does not support the association, there is enough doubt to take a more
26 precautionary position.” GRR118248 (citing WHO 2011). In light of the evidence in the record

1 to the contrary, the Navy’s reliance on this stringent causal standard lacks a reasonable basis
2 and renders the EIS unlawful in violation of NEPA. *See Native Ecosystems Council v. U.S.*
3 *Forest Serv.*, 418 F.3d 953, 964 (9th Cir. 2005) (“To take the required ‘hard look’ at a
4 proposed project’s effects, an agency may not rely on incorrect assumptions or data in an
5 EIS.”); *Cf. Ocean Mammal Inst. v. Gates*, 546 F. Supp. 2d 960, 975 (D. Haw. 2008)
6 (concluding at the preliminary injunction stage that the Navy failed to articulate a rational
7 connection between the vast majority of the science and its adoption of a noise threshold for
8 marine species), *injunction modified*, No. CV 07-00254 DAE-LEK, 2008 WL 11348364 (D.
9 Haw. Mar. 19, 2008), and *injunction modified in part*, No. CIV. 07-00254DAELEK, 2008 WL
10 2020406 (D. Haw. May 9, 2008).

11 With respect to child health, the Navy’s conclusions also lack support in the record.
12 The Final EIS stated that while studies indicate there may be some relationship between noise
13 and health impacts, such as change in heart rate and elevated blood pressure, GRR150753,
14 “researchers noted that further study is needed in order to differentiate between the specific
15 cause and effect to understand their relationship.” GRR150381; GRR150753. As a result, the
16 Navy concluded that “[b]ased on the limited scientific literature available, there is no proven
17 positive correlation between noise-related events and physiological changes in children.”
18 GRR150753; GRR167650. In support of this conclusion, the Final EIS cited only the
19 Department of Defense Noise Working Group’s 2013 technical bulletin on “Noise-Induced
20 Hearing Impairment.” GRR150381; GRR150753. Yet, as explained above, that bulletin
21 focuses only on hearing impairment risks, not impacts to cognition or other physiological
22 effects in children. *See generally* GRR56292–303 (DNWG 2013). As such, the DNWG
23 technical bulletin on auditory impacts is not a rational basis for dismissing *non-auditory* health
24 impacts to children. The Navy also dismissed impacts to child health due to the intermittent
25 nature of aircraft noise. GRR150753; GRR167650–51(ROD). But, the Navy did not cite any
26 study to support dismissing physiological effects on these grounds, GRR150753, and the

1 Navy's conclusion conflicts with studies in the record demonstrating that the infrequent nature
2 of aircraft noise can be more disruptive to children than consistent road traffic noise, *see, e.g.*,
3 GRR31854 (noting a stronger association between aircraft noise exposure and child annoyance
4 and quality of life impairment than for road traffic noise). In short, the Navy's analysis of
5 physiological effects lacks a rational basis and violates NEPA. *See Oregon Nat. Res. Council*
6 *Fund*, 492 F.3d at 1134 (“[A] general statement about uncertainty does not satisfy the
7 procedural requirement that an agency take a hard look at the environmental effects of an
8 action.”).

9 Because the Navy relied on an irrational and unsupported standard to assess public
10 health impacts, failed to rationally justify its conclusions, and reached conclusions that conflict
11 with the record, the Navy's analysis of public health impacts is arbitrary and capricious and
12 fails to satisfy NEPA's hard look mandate. *See State Farm*, 463 U.S. at 43; *N. Plains Res.*
13 *Council, Inc.*, 668 F.3d at 1075. Moreover, because the Navy did not adequately analyze the
14 potential public health and cognitive and learning impacts from the Navy's Growler
15 operations, the Navy failed to sufficiently identify and assess mitigation measures to address
16 those impacts. *See* 40 C.F.R. §§ 1502.14(f); 1502.16(h).

17 **c. The Navy's failure to obtain information about health impacts**
18 **violates 40 C.F.R. § 1502.22**

19 In addition to being irrational and unsupported, the Navy's analysis of public health
20 impacts violates NEPA because the Navy failed to comply with 40 C.F.R. § 1502.22, despite
21 appearing to conclude that the science on non-auditory health impacts from military aircraft
22 noise is incomplete or unavailable. *See* GRR161327–28. Section 1502.22 requires that where
23 information is essential to a reasoned choice among alternatives, the EIS must include that
24 information if the cost of obtaining it is not exorbitant. *Id.* If, however, the information is not
25 obtainable, then the EIS must include a statement that identifies relevant unavailable or
26 incomplete information, discusses the relevance of that information to potential environmental

1 impacts, summarizes available credible scientific evidence, and describes the agency's
2 evaluation of those impacts based on generally accepted scientific approaches. *Id.* § 1502.22.

3 Here, the Navy violated section 1502.22 because it did not obtain information about on-
4 the-ground health impacts from its expanded Growler operations prior to approving those
5 operations, despite the fact that the missing information was obtainable through a health impact
6 study, informed by on-the-ground monitoring to better understand the noise levels impacting
7 communities and to inform any health assessments.³ GRR118252–53, GRR162330.⁴ As
8 Health, the EPA, and the Navy's own scientist noted, a more thorough review of health
9 impacts informed by on-the-ground information would have informed the Navy's
10 understanding of the non-auditory health impacts from the Navy's operations. *See* GRR118253
11 (summary of Navy meeting with Health in which Health reiterated that "a health survey and
12 public meetings are a prudent measure because noise levels around [NAS Whidbey Island] are
13 similar to noise levels attributed with potential health effects."); GRR151252–54 (EPA
14 comments); GRR118248 (email from Dr. Rennix, Navy and Marine Corps Public Health
15 Center, stating that "I cannot tell from the literature how the HIS would be changed without
16 some idea of the actual noise measurements for the populations at risk."). Indeed, in its review
17 of the Final EIS, the EPA continued to recommend that the Navy conduct "on-site monitoring
18 . . . to ground-truth the modeling data as well as to inform future health assessments [and] to
19 inform area and site-specific mitigation remedies and future adaptive management efforts."
20 GRR162331. Moreover, this information was essential to a reasoned choice among the
21 alternatives because the Navy may have adopted a different alternative, including the no-action
22

23
24 ³ The National Research Council defines a health impact assessment as "a systematic process that uses
25 an array of data sources and analytic methods and considers input from stakeholders to determine the potential
26 effect of a proposed policy, plan, program, or project on health of a population and the distribution of those effects
within the population. HIA provides recommendations on monitoring and managing those effects." GRR68372.

⁴ In fact, the Navy is currently engaged in real-time, noise monitoring at Naval Air Station Whidbey
Island. ECF 55-2 (Declaration of J. Dan Cecchini).

1 alternative, or different mitigation measures if it had a better grasp on the public health impacts
2 of its Growler operations. *See* 40 C.F.R. § 1502.22.

3 The Navy also did not adequately comply with section 1502.22’s requirement that the
4 Navy “include a statement explaining that the information is lacking, its relevance, a summary
5 of any existing credible evidence evaluating the foreseeable adverse impacts, and the agency’s
6 evaluation of the impacts based upon ‘theoretical approaches or research methods generally
7 accepted in the scientific community.’” *Ctr. for Biological Diversity*, 982 F.3d at 739 (citing 40
8 C.F.R. § 1502.22(b)(1)).

9 The Navy’s apparent attempts at this statement suffer from the same fundamental flaw
10 as its analysis of public health impacts—the Navy tested everything against its unsupported
11 standard of a definitive causal and significant relationship between aircraft noise and health.
12 *See* GRR161328 (response to comments); GRR159319 (Appx A1: “there are no studies that
13 definitively show a causal and significant relationship between aircraft noise and health”);
14 GRR160912 (Appx. I: “there is no definitive science to show that a cause-and-effect
15 relationship exists between health effects and intermittent exposure to noise . . .”). The Navy’s
16 repeated reliance on a definitive causal connection between noise and public health impacts
17 renders its scientific analysis arbitrary and capricious. As such, that analysis does not satisfy
18 the Navy’s obligation to rationally evaluate adverse impacts from noise based upon generally
19 accepted theoretical approaches or research methods. *See Ctr. for Biological Diversity*, 982
20 F.3d at 739 (agency analysis insufficient when it ignored basic economic principles and stated
21 without support that the impact of the project would be negligible). The Navy also claimed that
22 given this standard, “it would be speculative to link any nonauditory health data collected to
23 aircraft noise instead of to other factors.” GRR161328. However, the Ninth Circuit has recently
24 explained that agencies cannot escape their NEPA obligations simply by claiming that
25 something requires speculation because “[s]ome ‘educated assumptions are inevitable in the
26 NEPA process.’” *Ctr. for Biological Diversity*, 982 F.3d at 740.

1 Moreover, the Navy arbitrarily concluded that further analysis is not necessary because
2 individuals living in Island County currently have positive health and academic outcomes.
3 GRR150246, GRR160912 (Appx. I), GRR167663. Yet evidence of a healthy population before
4 the 33% increase in its Growler operations is not indicative of a healthy population after a
5 significant increase in noise exposure, which the Navy acknowledges would result in “both an
6 increase in the number of people exposed to noise as well as those individuals exposed to
7 higher levels of noise” and “would have significant noise impacts in the communities
8 surrounding Ault Field and OLF Coupeville.” GRR150695 (Alt. 2), GRR150739–40
9 (comparing alternatives). Indeed, the data the Navy relied on for this analysis is from 2014 or
10 before and thus does not reflect health impacts from the Navy’s Growler operations when the
11 Navy did not complete its transition from Prowlers to Growlers at NAS Whidbey Island until
12 2014. *See* GRR160913–15 (App. I, Table 1); GRR150218. Nor does the Navy’s explanation
13 account for the populations newly affected by the Navy’s actions. GR159045-48 (discussing
14 newly affected points of interest and up to 17% increases in affected population). As the Ninth
15 Circuit has explained, it is not rational for an agency to rely on past data to predict future
16 trends. *See Greater Yellowstone Coal., Inc.*, 665 F.3d at 1027 (the Fish and Wildlife Service
17 irrationally relied on prior data of grizzly bear population growth to conclude that such growth
18 would occur during a decline of a major food source).

19 For all these reasons, the Navy’s analysis of public health impacts from its Growler
20 operations is arbitrary and capricious and violates NEPA.

21 **3. The Navy Failed to Take a “Hard Look” at Bird Impacts**

22 The Navy also violated NEPA by relying on a general discussion of impacts to birds
23 that ignored species-specific impacts and irrationally concluded that birds would not be
24 adversely impacted by Growler operations.
25
26

1 **a. The Navy did not analyze species-specific impacts to birds, despite**
2 **recognizing that bird species respond differently to noise**

3 Although the Navy acknowledged that bird species respond differently to noise, the
4 Navy arbitrarily refused to review species-specific bird impacts in the Final EIS. As a result,
5 the Final EIS ignored the distinction between species responses and entirely failed to address
6 impacts to certain species. As the Fourth Circuit has held, such deficient review violates
7 NEPA. *See Nat'l Audubon Soc'y v. Dep't of Navy*, 422 F.3d 174, 187 (4th Cir. 2005).

8 Specifically, the Final EIS recognized that “[b]ird responses to anthropogenic
9 disturbances, including aircraft noise, vary by species and may vary by situation.”
10 GRR150911; *see also* GRR150912 (“Behavioral reactions to aircraft overflights are dependent
11 upon species and activity at the time of the stimulus” and “not all species exhibit the same
12 pattern of habituation”). Yet, the Final EIS did not meaningfully consider species-specific
13 impacts from the Navy’s Growler operations nor did it consider how different alternatives and
14 scenarios will impact specific species differently. *See* GRR150906–07 (stating that
15 Alternatives 1 through 3 are discussed collectively); GRR161346 (explaining that despite
16 requests from governmental agencies and other commenters to include species-specific
17 information, the Final EIS continues to “present[] its impact conclusions for the species groups
18 as a whole, and not for individual species, with the exception of federally protected species.”).
19 In particular, despite receiving comments from WDFW highlighting studies that show
20 “individual shorebird species will react differently [to anthropogenic disturbances] and
21 therefore must be considered on a species by species basis,” GRR151276–77, the EIS did not
22 conduct species-specific evaluations for a variety of shorebirds, including for Red knots,
23 solitary sandpipers, and black oystercatchers, all of which are shorebirds of conservation
24 concern occurring within the study area. GRR150472. Moreover, the Final EIS entirely failed
25 to address impacts to tufted puffins, which breed within action area and are listed as a state
26

1 endangered species, despite comments from WDFW urging such analysis. GRR151276;
2 GRR150906–916.

3 This case is similar to *Nat'l Audubon Soc'y v. Dep't of Navy* where the Fourth Circuit
4 held that the Navy's review of impacts to waterfowl from the construction and operation of an
5 outlying field for Super Hornet aircraft training violated NEPA. *Nat'l Audubon Soc'y v. Dep't*
6 *of Navy* 422 F.3d 174, 187 (4th Cir. 2005). In that case, the Fourth Circuit held that the Navy's
7 review of impacts to waterfowl at a nearby wildlife refuge did not constitute a "hard look"
8 under NEPA when, among other things,⁵ the Navy failed to conduct sufficient site visits and
9 radar studies at the wildlife refuge to determine species-specific impacts to migratory birds, *id.*
10 at 187–90, the Navy failed to conduct an adequate review of the species-specific impacts of its
11 operations on snow geese, despite the Navy's position that "effects from aircraft activity are
12 species specific," *id.* at 192–94, and the Navy's comparative analysis of impacts at other sites
13 "provided only the most cursory factual basis for its comparisons, *id.* at 194–96. Here, too, the
14 Navy's cursory analysis of bird impacts and failure to conduct species-specific analysis,
15 including for the tufted puffin, renders the Navy's analysis deficient under NEPA. The Fourth
16 Circuit placed special weight on the nearby national wildlife refuge. *Id.* at 207. Similarly, here,
17 the Navy's actions impact the San Juan Island National Wildlife Refuge, which was
18 established to protect colonies of nesting seabirds and encompasses important breeding areas
19 for pigeon guillemots and tufted puffins, GRR161349 (acknowledging moderate impacts to the
20 Wildlife Refuge), GRR150476, GRR151276, as well as several important bird areas,
21 GRR150473–75.

22 Indeed, to the extent this case differs from *Nat'l Audubon Soc'y*, the Navy engaged in a
23 more cursory review of bird impacts from its Growler operations than it conducted for its
24 Super Hornet operations in that case, given that the Navy's analysis of bird impacts from its
25

26 ⁵ The Fourth Circuit also held that the Navy failed to conduct a sufficient investigation into species-specific collision risks due to the proximity of a wildlife refuge. *Nat'l Audubon Soc'y*, 422 F.3d at 190–92.

1 Growler operations primarily focused on its deficient scientific review and did not include any
2 site visits or radar studies. *Compare* GRR150150; GRR150748; GRR150924–26 (bird strike
3 analysis); GRR150911–16; GRR161346–48, *with Nat’l Audubon Soc’y*, 422 F.3d at 187–96.
4 Accordingly, the Navy’s analysis of bird impacts from its Growler operations, like its analysis
5 of impacts from its Super Hornet operations, violates NEPA.

6 **b. The Navy irrationally concluded that increased Growler flights will**
7 **not significantly impact birds, despite record evidence to the contrary**

8 In addition, the Navy failed to take a hard look at bird impacts by unreasonably
9 concluding that increased Growler operations will not significantly impact bird species.
10 GRR150916; GRR167654. The Navy supported this conclusion with three main points:
11 (1) some birds in the action area have habituated to the current level of aircraft operations;
12 (2) those that have not habituated or are new to the area may respond to aircraft activities by
13 exhibiting alert postures, flushing or diving, but will resume normal activities “within a short
14 period after overflights” and thus their “critical behaviors,” such as feeding and resting, will
15 not be affected; and (3) the Navy’s aircraft operations will present “minimal short-term
16 impacts on birds.” GRR150916. The record does not support these conclusions.

17 The Navy’s conclusion relied on unsupported and general assumptions about
18 habituation. First, the Navy irrationally assumed that bird species that have habituated to
19 *current* levels of aircraft operations will also habituate to a 33% increase in those operations
20 and thus failed to consider that species may react differently to future increased Growler
21 operations. GRR150913, GRR150916. Such “vague and conclusory statements, without any
22 support data, do not constitute a ‘hard look’ at the environmental consequences of the action as
23 required by NEPA.” *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 973 (9th Cir. 2006);
24 *see Hausrath*, 2020 WL 5848094, at *13 (“There is no logical connection between the [U.S.
25 Air Force’s] conclusion that birds and wildlife will not be affected because the number of
26

1 flights will not change, when the redistribution of these flights appears more relevant to the
2 analysis.”).

3 Second, the Navy irrationally assumed that a lack of species response to stimuli or
4 “habituation” represents a decreased impact on species when several studies in the record and
5 the Navy’s own analysis cast significant doubt on the Navy’s assumption and instead indicate
6 that aircraft operations may have long-term impacts on species fitness, including the ability to
7 survive to reproductive age, find a mate, and produce offspring. GRR150911–16. For example,
8 one study demonstrated that it is inappropriate to assume a species is unaffected based only on
9 the fact that the species remains in the area and questioned whether behavioral habituation
10 ultimately benefits a species. GRR39482–85 (Bedjer 2009: “the inappropriate application of
11 the term ‘habituation’ can mislead wildlife managers to conclude that particular human
12 activities have neutral, or even benign, consequences for wildlife when, in fact, the effects of
13 these activities are detrimental”). Another study concluded that even species that outwardly
14 appear to habituate may suffer from decreased fitness. GRR56493 (Francis and Barber 2013).

15 Indeed, the analysis in the Final EIS conflicts with the Navy’s conclusion that species
16 will habituate and will not be impacted by noise disturbance. As the Final EIS stated, “[a]mple
17 research has demonstrated that anthropogenic disturbances contribute to ecological effects on
18 wildlife, such as reduced species richness, time budgets, space use and habitat selection,
19 reproductive success, and predator-prey interactions, and greater nest abandonment in birds.”
20 See GRR150909–10. The Final EIS further acknowledged that some bird species may
21 experience “residual” effects from noise stimuli, GRR150913, that even where terrestrial
22 species like birds experience some habituation to stimuli “the physiological component might
23 not habituate completely,” GRR150909, and that “acclimation or tolerance to disturbances
24 might not release individuals from costs to their fitness,” GRR150910. Yet, in spite of these
25 studies and the Navy’s own analysis suggesting that habituation does not equal lack of species
26 impact, the Navy irrationally concluded that impacts to birds “would not be significant.”

1 GRR150916. The Navy’s reliance on an unsupported and irrational assumption to dismiss bird
2 impacts violates NEPA’s “hard look” mandate. *See Native Ecosystems Council*, 418 F.3d at
3 964 (“an agency may not rely on incorrect assumptions or data in an EIS”); 40 C.F.R.
4 § 1502.24 (an agency must “insure the professional integrity, including scientific integrity, of
5 the discussions and analyses in environmental impact statements”).

6 In addition, by relying on habituation or assuming that species that do react to Growler
7 noise will quickly resume normal activities, GRR150916, the Navy failed to consider the long-
8 term impacts to species health from its Growler operations despite evidence in the record
9 indicating such long-term impacts exist. As noted above, the Navy’s own analysis indicated
10 that species may experience long-term impacts to their overall fitness regardless of whether
11 they appear to habituate or not. *See supra*; *see also* GRR150909–10. In addition, for species
12 that do visually react to noise, the Navy acknowledged that “[e]nergy lost by behavioral
13 responses to sensory disturbances, should they occur, must be replaced, or the health of the
14 individual exhibiting those behaviors will decline” and that energy loss could negatively affect
15 the health of an egg or chick. GRR150909. FWS’s detailed review of impacts to federally
16 listed marbled murrelets from the Navy’s Growler operations similarly indicated that at least
17 some bird species will experience long-term impacts from Growler disturbances. In its review,
18 FWS concluded that some marbled murrelets exposed to Growler overflights will “deviate
19 from their normal behavior by increasing their diving or flying rates” and as a result, they “will
20 expend energy that they otherwise would have retained.” GRR160018. While some marbled
21 murrelets may be able to compensate for that lost energy, not all will be able to, leading to
22 long-term impacts of reduced survival or reproduction and impacts to nestling marbled
23 murrelets. GRR160019.⁶ In short, the record shows that some bird species will experience
24 long-term impacts from noise disturbance.

25 _____
26 ⁶ Notably, the Navy’s analysis in the Final EIS also failed to acknowledge these long-term consequences
for marbled murrelets despite the U.S. FWS’s findings to the contrary. *Compare* GRR150917–18 (stating that
evidence suggests that marbled murrelets “are habituated to existing high levels of aircraft activity” and other

1 The Navy has no rational basis on which to conclude otherwise. To support its
 2 conclusion that birds will experience only temporary impacts, the Navy relied on a 2004 study
 3 by Goudie and Jones. *See* GRR150916. But that study found evidence of “residual effects” in
 4 harlequin ducks exposed to military jet noise, indicating that studies focused only on “readily
 5 observed overt behaviors” may not capture long-term detrimental effects. GRR30310 (Goudie
 6 and Jones, 2004). A follow up study two years later confirmed that military jet overflights had
 7 “significant effects” on harlequin duck behavior and emphasized “the need to evaluate
 8 potential population consequences of aircraft disturbance.” GRR32999–33001 (Goudie 2006);
 9 *see also* GRR151275 (discussing Goudie 2006). As a result, the Navy cannot rationally rely on
 10 a study indicating long-term physiological stress and population-level impacts from military jet
 11 activities to dismiss such impacts. The Navy’s failure to rationally consider long-term impacts
 12 to birds from its Growler operations where evidence in the record demonstrates that such
 13 impacts may exist renders its analysis arbitrary and capricious in violation of NEPA and the
 14 APA. *See Idaho Sporting Congress, Inc. v. Rittenhouse*, 305 F.3d 957, 973–74 (9th Cir. 2002)
 15 (agency acted arbitrarily in analyzing cumulative wildlife impacts when it selected a scope of
 16 analysis that conflicted with record evidence); *Nat’l Audubon Soc’y*, 422 F.3d at 193 (“A hard
 17 look in this context, however, entails more than citing the articles or abstracts that contradict
 18 the conclusions reached.”).

19 The Navy also lacked rational support for its conclusion that Growler aircraft
 20 operations will result in only minimal, short-term impacts on birds. In addition to the flawed
 21 analysis above, this conclusion appears to rely on the Navy’s analysis of the annual time of
 22 noise exposure from Growler operations. GRR150915–16. Although the nature of the Navy’s
 23 flights may be intermittent, the Navy plans to operate over 112,000 flights, including 97,500
 24 Growler flights, in an average year. GRR159155. The Navy attempts to minimize impacts from

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 26 human-made disturbances” and “most individuals would not respond to aircraft overflights, and those that do may
 return to normal foraging and loafing activities relatively soon after the disturbances end”); *with* GRR160018–19
 (BiOp: indicating that some adult marbled murrelets and chicks will experience reduced health and survival).

1 these flights by calculating the number of hours that birds in the study area would be exposed
2 to Growler events greater than or equal to 92 decibels. GRR150915. But this simplistic
3 analysis ignores that each flight has the potential to impact birds both in the short and long-
4 term, regardless of the duration of the event. *See* GRR30309 (Goudie and Jones, 2004: noting
5 that a considerable increase in frequency of over-flights beyond the 94 flights documented
6 during the two months of study the study could impact the ability of harlequin ducks to budget
7 sufficient time for feeding). As a result, the overall amount of time of exposure does not
8 support the Navy's conclusion that the impact on birds will be minimal or short term.

9 In sum, the Navy's conclusion that birds would not be significantly impacted lacks a
10 rational basis, conflicts with the record and the Navy's own analysis, and fails to consider
11 long-term impacts to birds. As a result, the Navy's analysis violates NEPA's hard look
12 requirement and is arbitrary and capricious. *See Ctr. for Biological Diversity*, 982 F.3d at 739
13 ("An agency acts arbitrarily and capriciously when it reaches a decision that is 'so implausible
14 that it could not be ascribed to a difference in view or the product of agency expertise.'")
15 (quoting *State Farm*, 463 U.S. at 43); *Nat'l Audubon Soc'y*, 422 F.3d at 194 (Navy's analysis
16 both "falls short of providing adequate support" that impacts would be "minor" and "failed to
17 make a forthright acknowledgment of the likely environmental harm."). In addition, because
18 the Navy did not adequately analyze the potential bird impacts from the Navy's Growler
19 operations, the Navy failed to sufficiently identify and assess mitigation measures to address
20 those impacts. *See* 40 C.F.R. §§ 1502.14(f); 1502.16(h).

1 **B. The Navy’s Section 106 Determination Violated the NHPA and the APA Because It**
 2 **Failed to Rationally Explain Its Mitigation Measures⁷**

3 In its Section 106 determination, the Navy failed to engage in rational decisionmaking
 4 and arbitrarily adopted mitigation measures that are not reasonably targeted to minimize or
 5 avoid the harmful impacts of the Navy’s Growler operations.

6 **1. The NHPA Requires Agencies to Consider Meaningful Mitigation Measures**
 7 **and to Rationally Explain Its Decisions**

8 The NHPA seeks “to ensure the preservation of historical resources.” *Te-Moak Tribe of*
 9 *W. Shoshone of Nevada v. U.S. Dep’t of Interior*, 608 F.3d 592, 609 (9th Cir. 2010). “Like
 10 NEPA, ‘[s]ection 106 of NHPA is a “stop, look, and listen” provision that requires each federal
 11 agency to consider the effects of its programs.’” *Id.* at 607.

12 Section 106 requires federal agencies to consider the effects of federal undertakings on
 13 any district, site, building, structure, or object that is included in or eligible for inclusion in the
 14 National Register prior to approving the undertaking. 54 U.S.C. § 306108; 36 C.F.R. § 800.1.
 15 If an agency finds that a project will have an adverse effect on historic resources, then the
 16 agency shall engage in further consultation, including with the State Historic Preservation
 17 Officer, to resolve adverse effects to historic properties through avoidance, minimization, or
 18 mitigation. *Id.* §§ 800.5(a)(2), 800.6; 800.8(c)(1)(v). “The goal of consultation is to identify
 19 historic properties potentially affected by the undertaking, assess its effects and seek ways to
 20 avoid, minimize or mitigate any adverse effects on historic properties.” 36 C.F.R. § 800.1. If
 21 the action agency and consulting parties are unable to agree on how adverse effects will be
 22 resolved, consultation may be terminated if further consultation would not be productive. 36
 23 C.F.R. § 800.7(a). Where the action agency terminates consultation, the head of the agency
 24 shall request comments from the ACHP and consider those comments in reaching a final

25 ⁷ At the preliminary injunction stage, this Court determined that “the Navy followed the NHPA
 26 guidelines,” in certain respects. ECF 72, at 22–23. Even if this Court reaches the same conclusion at summary
 judgment, the State of Washington’s argument is distinguishable in that it focuses on whether the Navy’s
 explanation for its chosen mitigation measures lacks a rational basis or is otherwise arbitrary and capricious.

1 decision on the undertaking. *Id.* § 800.7. A final decision on the undertaking must summarize
2 the decision, provide rationale for the decision, and demonstrate consideration of the Council's
3 comments. *Id.*

4 **2. The Navy's Section 106 Determination is Arbitrary and Capricious**

5 The Navy's final Section 106 determination lacked a rational basis and is arbitrary and
6 capricious. In authorizing the expanded Growler activities, the Navy failed to demonstrate how
7 its adopted measures would mitigate or avoid the adverse effects on historic resources in the
8 Central Whidbey Island Historic District and the Ebey's Landing Historic Reserve caused by
9 the Navy's expanded EA-18G Growler operations. *See* GRR167574–78; GRR167659–61
10 (ROD). In its determination of adverse effects, the Navy concluded that its Growler operations
11 would adversely affect the cultural landscapes in the Central Whidbey Island Historic District
12 at five specific locations. GRR138521. Ultimately, the Navy adopted mitigation measures that
13 would provide \$867,000 to the National Parks Service for preservation of the historic Ferry
14 House and an additional \$20,000 for the installation of interpretative historical signs.
15 GRR167640. The Navy also indicated it would seek other partnership opportunities under the
16 federal Readiness and Environmental Protection Integration Program (REPI Program) and
17 Sentinel Landscapes Program, but did not commit to any specific measures. *Id.* The Navy did
18 not explain how these measures would effectively mitigate the specific impacts identified in its
19 determination of adverse effects. *See* GRR167574–78; GRR167659–61 (ROD).

20 The Navy's failure to provide a rational explanation for its chosen mitigation measures
21 violates the NHPA and the APA. Although the Navy is not required to adopt specific
22 mitigation measures, it must provide a rational explanation for its decision. *See* 36 C.F.R.
23 § 800.7(b)(4); *Pit River Tribe*, 469 F.3d at 778 (NHPA claims reviewed under APA standard of
24 review). Given that impacts from the Navy's operations extend well beyond impacts to Ferry
25 House, the Navy's isolated commitment to mitigate impacts to a single historic resource, while
26 helpful, does not address the wider scale impacts to the Central Whidbey Island Historic

1 District that the Navy identified in its determination of adverse effects. GRR138521. In
2 addition, as the State Historic Preservation Officer noted, the interpretative historical signs and
3 the REPI program do not effectively mitigate the noise impacts from the Navy’s operations.
4 See GRR163818; GRR164966 (discussing inadequacy of informational kiosks and REPI
5 program to mitigate or resolve the adverse impacts to historical properties).

6 In its Section 106 determination and ROD, the Navy failed to acknowledge the
7 shortcomings of these mitigation measures or otherwise explain how they were rationally
8 tailored to mitigate or avoid the adverse effects of the Navy’s actions. See GRR167574–78;
9 GRR167659–61 (ROD). Instead, the Navy simply listed these mitigation measures. See
10 GRR167574–78; GRR167659–61 (ROD). In the NEPA context, which requires similar
11 procedures to the NHPA, the Ninth Circuit has admonished that “[a] mere listing of mitigation
12 measures is insufficient to qualify as the reasoned discussion required by NEPA.” *Neighbors of*
13 *Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1380 (9th Cir. 1998) (citation omitted)
14 (holding that Forest Service’s “broad generalizations and vague references to mitigation
15 measures . . . do not constitute the detail as to mitigation measures that would be undertaken,
16 and their effectiveness, that the Forest Service is required to provide”). Here too, the Navy’s
17 mere listing of mitigation measures in its Section 106 determination does not qualify as the
18 reasoned discussion required by the NHPA or the APA. See *Pit River Tribe*, 469 F.3d at 787
19 (“NHPA is similar to NEPA except that it requires consideration of historic sites, rather than
20 the environment.” (quoting *United States v. 0.95 Acres of Land*, 994 F.2d 696, 698 (9th
21 Cir.1993)). Accordingly, the Navy’s Section 106 determination is unlawful.

22 **C. Washington Has a Strong Interest in Protecting Public Health, Wildlife, and**
23 **Historic Resources**

24 Washington’s interests in protecting public health, wildlife, and historic resources are
25 impaired by the Navy’s failure to comply with NEPA, the NHPA, and the APA. Standing
26 requires a plaintiff to demonstrate (1) an “injury in fact” that is concrete and particularized; (2)

1 that the injury is fairly traceable to the challenged action; and (3) that the injury will likely be
 2 redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61
 3 (1992). For NEPA claims, causation and redressability requirements are relaxed where a
 4 plaintiff has established an injury in fact. *Pit River Tribe*, 469 F.3d at 779 (9th Cir. 2006). In
 5 establishing standing, states “are not normal litigants” and are “entitled to special solicitude.”
 6 *Massachusetts v. EPA*, 549 U.S. 497, 518, 520 (2007).

7 The Navy’s decision to expand its Growler operations directly harms Washington’s
 8 sovereign and propriety interests in its wildlife, state parks, public schools, public health, and
 9 historic resources. Wash. Revised Code § 77.04.012 (2000) (“Wildlife, fish, and shellfish are
 10 the property of the state”); Declaration of Fenner Yarborough (Yarborough Decl.) ¶¶ 5–18
 11 (attached as Exhibit 1); Declaration of Allyson Brooks (Brooks Decl.) ¶¶ 5–19 (attached as
 12 Exhibit 2). An order from this court vacating the Navy’s decisions and requiring the Navy to
 13 fully comply with the mandates of NEPA and the NHPA will remedy these harms to
 14 Washington’s interests. *See* Yarborough Decl. ¶ 19; Brooks Decl. ¶ 19. Accordingly,
 15 Washington has standing to bring this action. *See Sierra Forest Legacy v. Sherman*, 646 F.3d
 16 1161, 1179 (9th Cir. 2011) (California had standing based on “asserted actual harm to its
 17 procedural interest in federal management decisions made under the deliberation-forcing
 18 requirements of NEPA”).

19 V. CONCLUSION

20 For the reasons above, the Court should grant Washington’s motion for summary
 21 judgment and declare that Federal Defendants violated NEPA and the APA by adopting and
 22 relying on a legally deficient EIS in issuing the challenged ROD and violated the NHPA and
 23 the APA by relying on a legally deficient Section 106 process in issuing the challenged ROD.
 24 Accordingly, the ROD, Final EIS, and Section 106 determination should be vacated and set
 25 aside, and this matter should be remanded to the Navy to comply fully with NEPA, the NHPA,
 26 and the APA. *All. for the Wild Rockies v. U.S. Forest Serv.*, 907 F.3d 1105, 1121 (9th Cir.

1 2018) (“vacatur of an unlawful agency action normally accompanies a remand”); *California v.*
2 *Bernhardt*, 472 F. Supp. 3d 573, 630 (N.D. Cal. 2020) (“[v]acatur is the standard remedy under
3 the APA and NEPA if a court determines that an agency action is unlawful.”).

4 Respectfully submitted this March 30, 2021.

5
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CERTIFICATE OF SERVICE

I hereby certify that on March 30, 2021, I served a copy of the foregoing on counsel of record electronically through the court’s CM/ECF system.

By: /s/ Tricia Kealy
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