District Judge Richard A. Jones

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

STATE OF WASHINGTON, *et al.*

Plaintiffs,

v.

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

Defendants,

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

FEDERAL DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND CONSOLIDATED OPPOSITION TO PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT

NOTE ON MOTION CALENDAR: 08/03/2021

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

TABLE OF ABBREVIATIONS

AAD	Average Annual Day
ABD	Average Busy Day
ACHP	Advisory Council on Historic Preservation
APA	Administrative Procedure Act
BiOp	Biological Opinion
COER	Citizens of the Ebey's Reserve for a Healthy, Safe & Peaceful Environment
COER Mot.	Citizens of the Ebey's Reserve for a Healthy, Safe & Peaceful Environment's Mot. for Summ. J., ECF No. 87
dB	Decibels
dBA	A-Weighted Decibels
DNL	Day-Night Average Sounds Levels
EIS	Environmental Impact Statement
El Centro	Naval Air Facility El Centro
EPA	Environmental Protection Agency
ESA	Endangered Species Act
FAA	Federal Aviation Administration
FCLP	Field Carrier Landing Practice
Federal Defendants	United States Department of the Navy; United States Fish and Wildlife Service; Lloyd J. Austin, III, in his official capacity as Secretary of Defense, Thomas W. Harker, in his official capacity as Acting Secretary of the Navy, Todd Schafer, in his official capacity as Acting Assistant Secretary of the Navy (Energy, Installations and Environment); and Captain Matthew L. Arny, in his official capacity as Commanding Officer of Naval Air Station Whidbey Island
FEIS	Final Environmental Impact Statement
Growler	EA-18G Growler aircraft
HIA	Health Impact Analysis
IFR	Instrument Flight Rules
ITS	Incidental Take Statement
L_{max}	Maximum Sound Level
LTO	Aircraft Landing and Takeoff Cycle
NASWI	Naval Air Station Whidbey Island
NEPA	National Environmental Policy Act
NHPA	National Historic Preservation Act
NPS	National Park Service

OLF	Outlying Landing Field
Plaintiffs	State of Washington; Citizens of the Ebey's Reserve for a Healthy, Safe & Peaceful Environment; and Paula Spina
POIs	Points of Interest
Prowler	EA-6B Prowler aircraft
REPI	Readiness and Environmental Protection Integration
Reserve	Ebey's Landing National Historical Reserve
R&R	Report and Recommendation, ECF No. 72
ROD	Record of Decision
Section 106	National Historic Preservation Act, 54 U.S.C.A. § 306108
SHPO	Washington State Historic Preservation Officer
Washington or State	State of Washington
Wash. Mot.	State of Washington's Mot. for Summ. J., ECF No. 88

FEDERAL DEFENDANTS' CROSS-MOTION FOR SUMMARY JUDGMENT AND CONSOLIDATED OPPOSITION TO PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT

Defendants United States Department of the Navy, United States Fish and Wildlife Service, Lloyd J. Austin, III, in his official capacity, Thomas W. Harker, in his official capacity, Todd Schafer, in his official capacity, and Captain Matthew L. Arny, in his official capacity (collectively, the "***Federal Defendants***") hereby file their opposition to Plaintiffs Paula Spina's and Citizens of the Ebey's Reserve for a Healthy, Safe & Peaceful Environment's (together with Ms. Spina, "***COER***") Motion for Summary Judgment, ECF No. 87, and Plaintiff State of Washington's ("***Washington***" or "***State***," together with COER, "***Plaintiffs***") Motion for Summary Judgment, ECF No. 88. In addition, the Federal Defendants hereby cross-move under Federal Rule of Civil Procedure 56 for summary judgment in their favor as to all of the Plaintiffs' claims.

INTRODUCTION

In 2013, the Navy began an environmental impact analysis of a proposed increase in the number of EA-18G Growler aircraft ("***Growler***") and related activity at Naval Air Station Whidbey Island ("***NASWI***"). On March 12, 2019, the Navy issued a Record of Decision authorizing the addition of 36 Growlers at NASWI and an increase in Field Carrier Landing Practice ("***FCLP***") operations at Outlying Landing Field ("***OLF***") Coupeville, which is part of the larger NASWI complex. These FCLP operations are necessary to prepare Navy aviators to join carrier strike groups on deployment around the world protecting the United States' national security interests. Before deployment, the Navy must ensure its aviators are equipped with the specialized and highly perishable skills required to successfully complete one of the most

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Washington, D.C. 20002

difficult and dangerous tasks in military aviation: landing on a moving aircraft carrier. Pilots learn these critical skills through training that concludes with FCLP operations onshore.

The National Environmental Policy Act ("***NEPA***"), 42 U.S.C. § 4231, *et seq.*, and the National Historic Preservation Act ("***NHPA***"), 16 U.S.C. § 470, *et seq.*, are procedural statutes, and therefore only mandate a process to be followed, not substantive outcomes. In other words, a plaintiff may not rely on NEPA or the NHPA to overturn the result of a decision he or she simply disagrees with, but that was otherwise reached through an appropriate process. Instead, where citizens disagree on policy grounds with a Federal agency's decision, they must seek change legislatively, rather than through lawsuits in Federal courts. *Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, Inc.*, 435 U.S. 519, 558 (1978) ("[F]undamental policy questions appropriately resolved in Congress . . . are *not* subject to reexamination in the federal courts under the guise of judicial review of agency action.") (emphasis added).

Here, Plaintiffs seek to use NEPA and the NHPA to stop an action they disagree with on policy grounds: the increase of Growler training flights at NASWI. But the process by which the Navy reached that decision was thorough, detailed, and well-reasoned. The Navy began assessing the environmental impact of the proposed expansion of Growler activity in 2013. It reviewed over 7,800 comments, and generated a record of more than 170,000 pages. As part of that multi-year process, the Navy analyzed three alternatives and five scenarios for each, and considered the effects of increased noise caused by increased Growler flights on 16 "resource areas," including public health, air quality, land use, cultural resources, biological resources (such as birds and marine mammals), American Indian resources, climate change, water resources, socioeconomics, and environmental justice. And the Navy conducted a thorough and

scientific examination of the impacts of noise on public health and the Whidbey Island environment.

The administrative record demonstrates that before choosing a final course of action the Navy took a hard look at the environmental effects of the various alternatives under review, considered the evidence before it, including comments from affected parties, and made a reasoned decision as required by NEPA and the NHPA. Because the Navy conducted a thorough environmental review that complies with the law, the Court should deny Plaintiffs' motions and grant summary judgment in favor of the Federal Defendants on all claims.

LEGAL BACKGROUND

I. The National Environmental Policy Act

Under NEPA, federal agencies are required to prepare an environmental analysis for "major Federal actions significantly affecting the quality of the human environment . . . ." 42 U.S.C. § 4332(C). To ensure informed decisions, NEPA requires an agency to analyze and disclose significant environmental effects, but requires nothing further. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 350 (1989). "If the adverse environmental effects of the proposed action are adequately identified and evaluated, the agency is not constrained by NEPA from deciding that other values outweigh the environmental costs." *Id*; *see also id*. at 351 ("NEPA merely prohibits uninformed–rather than unwise–agency action.").

Relevant here, NEPA requires that, for "major Federal actions significantly affecting the quality of the human environment," a federal agency must prepare an environmental impact statement, which is a detailed statement on the environmental impact of the proposed action. 42 U.S.C. § 4332(2)(C). A court's task in reviewing an environmental impact statement is "simply

to ensure that the procedure followed by [the agency] resulted in a reasoned analysis of the evidence before it, and that the [agency] made the evidence available to all concerned." *Friends of Endangered Species v. Jantzen*, 760 F.2d 976, 986 (9th Cir 1985) (internal citations omitted). In other words, "[c]ourts may not use their review of an agency's environmental analysis to second-guess substantive decisions committed to the discretion of the agency." *Del. Riverkeeper Network v. F.E.R.C.*, 753 F.3d 1304, 1313 (D.C. Cir. 2014).

II. The National Historic Preservation Act

Like NEPA, Section 106 of the "NHPA is a 'stop, look, and listen' provision that requires each federal agency to consider the effects of its programs" on historic properties. *Mont. Wilderness Ass'n v. Connell*, 725 F.3d 988, 1005 (9th Cir. 2013); 54 U.S.C. § 306108. As part of the process, Section 106 requires federal agencies to confer with the State Historic Preservation Officer and seek input from the Advisory Council on Historic Preservation. *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 805 (9th Cir. 1999). The agency is not required to implement recommendations provided by the Preservation Officer or the Council, but must consider such comments in reaching a final decision. *Apache Survival Coal. v. United States*, 21 F.3d 895, 913 (9th Cir. 1994). The agency is not required to engage in any particular preservation activities, "[e]ven if cultural resources might be harmed," so long as the agency "satif[ies] its procedural obligations." *WildEarth Guardians v. Provencio*, 923 F.3d 655, 679 (9th Cir. 2019).

FACTUAL AND PROCEDURAL BACKGROUND

NASWI is located on Whidbey Island in Island County, Washington, in the northern portion of the Puget Sound. GRR_150209.[1] The NAWSI complex includes, in relevant part, Ault Field—NAWSI's main airfield—as well as OLF Coupeville, which is located approximately ten miles south of Ault Field. GRR_150209. NASWI, Ault Field, and OLF Coupeville were all constructed in the early 1940s shortly after the United States' entry into World War II. GRR_150434-35.

NASWI and Ault Field have remained in continuous operation since their construction, and NASWI is the only naval air station in the Pacific Northwest. GRR_150213; GRR_150433-34. OLF Coupeville was used continuously by the Navy until 1963, when the Navy declared it excess and made plans to sell the facility. GRR_150435. However, in 1967 OLF Coupeville was reactivated in response to increased training and operational demands associated with the Vietnam War. GRR_150435. Since that time, the Navy has conducted FCLP operations at OLF Coupeville to train its pilots and simulate the conditions and procedures of landing on an aircraft carrier. *See* GRR_150435.

Landing on an aircraft carrier is one of the most dangerous maneuvers a pilot can perform, and it is a perishable skill. GRR_150213. To provide pilots an opportunity to develop and maintain this skill in a safer environment, the Navy employs FCLP operations, which consist of graded flight exercises conducted at facilities on land. GRR_150213. FCLP is generally

[1] Citations to the Administrative Record are referenced as "GRR_" or "FWS_." The Administrative Record was lodged with the Court and provided to Plaintiffs on February 14, 2020. ECF Nos. 48, 49.

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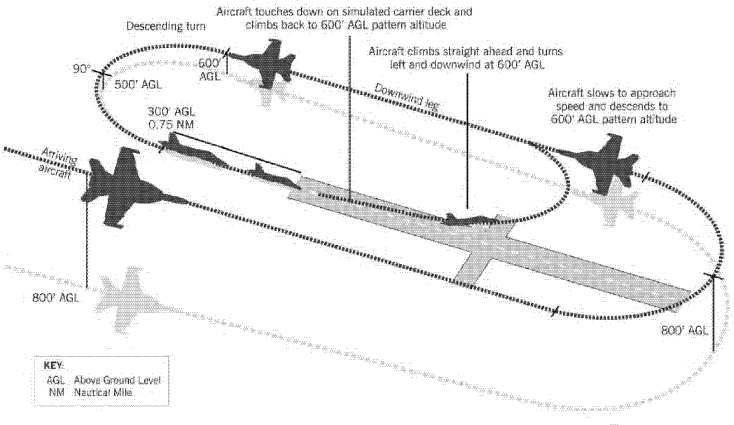
flown in a left-hand closed-loop racetrack-shaped pattern ending with a low approach or "Touch and Go Landing," meaning that the aircraft lands on the runway and—instead of coming to a full stop—immediately goes to full power and takes off again, as shown in the figure below:



GRR_150328. A Landing Signal Officer is present at the airfield and grades the proficiency of each Touch and Go. GRR_150328. Per Navy guidelines, a pilot must adequately perform a number of FCLP operations within a set period of time before he or she can attempt to qualify (or requalify) to land on an aircraft carrier. GRR_150213.

Given those training needs, existing infrastructure, and its location, over the past four decades NASWI transitioned into its current role as the United States' home base for all electronic attack aircraft, as well as the Navy's electronic attack community in the United States. GRR_150213-15. Electronic warfare has played a key role in combat operations since it was first introduced during World War II, and its importance continues to grow as potential adversaries invest in modern threat systems. GRR_150213; GR_150215. As part of America's efforts in this arena, in January 2005 the Navy announced that it would transition its electronic attack aircraft from the aging EA-6B Prowler ("***Prowler***") aircraft to the newer Growler. GRR_61302; GRR_150218.

The Navy analyzed the impacts of transitioning from the Prowler to the Growler in an Environmental Assessment, and signed a Finding of No Significant Impact in July 2005. *See* GRR_30908-31077. Growler jets began operating at NASWI in 2008. GRR_150434. Growlers are key to the United States' defensive and offensive capabilities as they can be used to disrupt land-based threats in order to protect the lives of U.S. ground forces and to suppress enemy air defenses and communications systems. GRR_150215. Although the Growler is a newer and more powerful tool in the United States' electronic warfare arsenal, the maximum sound level ("***L_{max}***") associated with the Growler is similar to that of its predecessor, the Prowler, with the Growler only one to two decibels louder at 1,000 ft. of altitude on approach and during the Touch and Go landing portion of an FCLP. GRR_96133-34; GRR_150245. And, in fact, the Prowler's L_{max} is actually five to seven decibels higher than the Growler's L_{max} during take-off and while flying the Instrument Flight Rules ("***IFR***") pattern.[2] GRR_96133-34.

On September 5, 2013, the Navy published a Notice of Intent to prepare an Environmental Impact Statement ("***EIS***") to analyze the impacts of basing additional Growlers at NASWI. *See* GRR_61302-03. The purpose of the proposed increase was to augment the United States' electronic attack capabilities in order to counter increasingly sophisticated threats and provide more aircraft per squadron to give operational commanders more flexibility in addressing future threats and missions. GRR_150141. The proposed action was needed to

[2] The Federal Aviation Regulations define IFR as "rules and regulations established by the FAA to govern flight under conditions in which flight by outside visual reference is not safe." GRR_150318. Ground Control Approach training is conducted in IFR conditions to practice and conduct arrivals under actual or simulated adverse-weather conditions. Air traffic controllers provide aircrews with verbal course and elevation information to allow aircrews to make an instrument landing. *See* GRR_150321, 150327-28

support the Navy's national defense requirements under 10 U.S.C § 8062(a), which requires the Navy to "be organized, trained, and equipped primarily for prompt and sustained combat incident to operations at sea." GRR_150213; GRR_150141.

The Navy conducted a robust environmental review process stretching over five years. GRR_167643-44. The Navy actively solicited public, tribal, and state and federal agency comments, and conducted a total of eight scoping meetings and five draft environmental impact statement public information meetings. *See generally* GRR_15220-36. The Navy received and reviewed over 3,500 scoping comments and 4,300 comments on the draft EIS. GRR_167643-44. In September 2018, the Navy issued the final EIS ("***FEIS***") evaluating "the potential environmental effects of continuing and expanding the existing Growler operations" as well as analyzing "aircraft operations conducted in the vicinity of Ault Field and OLF Coupeville . . . ." GRR_150144. The FEIS analyzes, among other things, noise impacts of operations in the vicinity of the NASWI complex and the potential effects of increased Growler operations on biological resources, public health and safety, and climate change and greenhouse gas levels. *See generally* GRR_150165-84; *see also* GRR_150146-53 (summary of impacts and effects by resource area); GRR_150164 (overview of FEIS by topic area). The FEIS also examined the possibility of basing some or all of the Growlers at another location and/or conducting FCLP operations somewhere other than OLF Coupeville. GRR_150304-12.

Specifically as to noise impacts, the FEIS analyzed noise—as measured in decibels ("***dB***")—using the day-night average sound level ("***DNL***"). GRR_150146; *see* GRR_150155-61 (summary of noise calculations and effects in FEIS). "The DNL metric is the energy-averaged

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Washington, D.C. 20002

sound level measured over a 24-hour period with 10-dB nighttime[3] adjustment. DNL does not represent sound level heard at any given time but instead represents long-term exposure." GRR_150333; *see also* GRR_150334 ("DNL values are average quantities mathematically representing the continuous sound level that would be present if all of the variations in sound level that occur over a 24-hour period were averaged to have the same total sound energy."). In addition to DNL, the FEIS also presented other noise metrics used to calculate various circumstances, such as the maximum dB heard during a single noise event like an aircraft flyover. GRR_150334-35.

Using noise modeling[4] the FEIS included noise analysis for each alternative, GRR_150175-76 (overview of noise calculations), as well a description of various noise effects, GRR_150336-40, and

> supplemental metrics [ ] to identify potential impacts from noise exposure that could be realized under the alternatives. These include additional events of indoor and outdoor speech interference, an increase in the number of events causing classroom/learning interference, an increase in the probability of awakening, and an increase in the population that may be vulnerable to potential hearing loss of 5 dB or more.

GRR_150146; *see also* GRR_150155-61 ("Noise and Health Reader's Guide"). Finally, the FEIS includes, in Appendix A, a separate noise study to "present the noise exposure associated

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[3] In the context of the DNL metric, "nighttime" or "acoustic night" covers the period between 10:00 p.m. and 7:00 a.m. GRR_150330-31.

[4] For those metrics considered, "[a]ircraft noise levels are represented in [the] EIS by various noise metrics that are generated by computer model and not actual on-site noise measurements at Ault Field or OLF Coupeville." GRR_150333. The models in the FEIS were generated using a program called "NOISEMAP," which draws from a library of actual aircraft noise measurements obtained in a controlled environment in order to obtain the most accurate measurements." *Id*.

with the additional EA-18G aircraft operations in the vicinity of the [NASWI] complex." GRR_159043; *see generally* GRR_159033 (Appendix A table of contents).

In conjunction with the FEIS and in keeping with Section 106 of the NHPA, the Navy also consulted with the Washington State Historic Preservation Officer (the "***SHPO***"), Indian tribes, representatives of local government, the Advisory Council on Historic Preservation (the "***ACHP***"), and other interested individuals and organizations, including COER. GRR_167660. During the course of the Section 106 process, the SHPO and the Navy agreed that increased Growler operations at OLF Coupeville could result in adverse indirect effects to perceptual qualities affecting the significance of the landscape at five specific points of interest ("***POIs***"). GRR_164595-97; GRR_164675. However, the Navy and the consulting parties ultimately reached an impasse regarding the scope of possible mitigation measures. *See* GRR_164171. The Navy focused on mitigating the identified indirect effects to the identified POIs while, in contrast, the SHPO and other interested parties advocated for broader relief for the community of Coupeville generally, such as sound-proofing historical homes and structures or large monetary grants to cover construction or repairs in areas with no agreed-upon adverse effects. *See, e.g.,* GRR_164891-98; GRR_164970-76; GRR_165023-31; GRR_165067-76; GRR_165277-78; GRR_165287-96.

As a result of the parties' impasse and in accordance with the NHPA, the Navy notified the ACHP that it was terminating further consultation and requested the Council's comments on the matter. GRR_164171. The ACHP provided its findings and recommendations on the Navy's decision to expand Growler operations. GRR_167458-65. The Navy carefully considered the ACHP's recommendations and implemented several of them, but declined to adopt others.

GRR_167574-78; GRR_162674. With respect to each of the ACHP's recommendations, the Navy provided a detailed response explaining its reasons for adopting or not adopting the given recommendation. *See generally* GRR_00167574-78.

The Navy issued a record of decision ("***ROD***") on March 12, 2019, authorizing expansion of "existing EA-18G 'Growler' operations at the NAS Whidbey Island complex" and the "increase [of] electronic attack capabilities by adding 36 operational aircraft to support an expanded U.S. Department of Defense [ ] mission" among other activities. GRR_167641. The ROD also authorizes an increase the complement of Growler aircraft at NASWI from 82 to 118 Growler aircraft. GRR_150238. Four months later, on July 9, 2019, Washington and COER filed separate lawsuits in this Court against the Federal Defendants challenging the sufficiency of the Navy's NEPA analysis and Section 106 determination. *See generally* Washington Complaint, ECF No. 1; COER Complaint, ECF No. 1, Case No. 2:19-cv-1062.[5]

In conjunction with their complaints, Plaintiffs also sent letters to the Navy and U.S. Fish and Wildlife Service on July 10, 2019, alleging that a 2018 Biological Opinion ("***BiOp***") relied upon by the Navy violated the Endangered Species Act ("***ESA***") and threatening claims under the ESA if the Navy and the U.S. Fish and Wildlife service did not reinitiate consultation within sixty days of the dates of the letters. *See* ECF No. 16-1, No. 2:19-cv-1062. In a letter dated August 20, 2019, the Navy requested that the U.S. Fish and Wildlife Service reinitiate formal consultation on Growler airfield operations at NASWI. FWS14364-66. In a letter dated August 23, 2019, the U.S. Fish and Wildlife Service acknowledged the Navy's request, agreed to

[5] The Court consolidated Case Nos. 2:19-cv-1059 and 2:19-cv-1062 by Minute Order dated October 22, 2019. *See* ECF No. 19, No. 2:19-cv-1059. Unless otherwise noted, any docket citations in this brief are to the docket associated with Case No. 2:19-cv-1059.

reinitiate consultation, and estimated it would issue a revised opinion—to supersede or replace the 2018 BiOp—in January 2020. FWS14362-63. Despite the United States' decision to reinitiate consultation and the expectation of a revised biological opinion, COER filed an amended complaint in October 2019 challenging the 2018 BiOp under the ESA. *See* ECF No. 16, No. 2:19-cv-1062. The Fish and Wildlife Service issued a revised biological opinion superseding the 2018 BiOp on January 15, 2020. Biological Opinion, Ref. No. 01EWFW00-2017-F-0826-R001 (Jan. 15, 2020), *available at https://ecos.fws.gov/tails/pub/document/15523423* (last visited on 5/11/2021).

On February 13, 2020 (almost one year after the ROD was issued and seven months after filing suit), COER filed a motion for preliminary injunction with this Court seeking to enjoin the Navy from continuing with its training operations at the level established in the ROD. *See generally* ECF No. 29. COER sought the preliminary injunction based on its claims that the Navy's FEIS and Section 106 determination were inadequate. *See id*. On July 22, 2020, Judge Creatura issued a Report and Recommendation ("***R&R***") recommending the denial of COER's motion for preliminary injunction. *See* R&R (ECF No. 72). In so recommending, Judge Creatura determined that COER had failed to demonstrate either a risk of irreparable harm or a likelihood of success on the merits of COER's claims. *Id.* at 19, 23. On March 2, 2021, this Court approved and adopted Judge Creatura's recommendation—over COER's objection—and without further discussion denied COER's motion for a preliminary injunction. ECF No. 82.

STANDARD OF REVIEW

The Administrative Procedure Act ("***APA***") governs a court's review of an agency's compliance with NEPA and NHPA. *See Morongo Band of Mission Indians v. F.A.A.*, 161 F.3d

569, 573 (9th Cir. 1998); *Inland Empire Pub. Lands Council v. U.S. Forest Serv.*, 88 F.3d 754, 760 (9th Cir. 1996). Under the APA, a court must uphold an agency action unless the action is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law . . . ." 5 U.S.C. § 706(2)(A). This standard is "highly deferential" and presumes the agency action is valid. *Cal. Wilderness Coal. v. U.S. Dep't of Energy*, 631 F.3d 1072, 1084 (9th Cir. 2011). And a court must be at its "most deferential" when the challenged action is "within the agency's expertise." *Lands Council v. McNair*, 629 F.3d 1070, 1074 (9th Cir. 2010) (citing *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council*, 462 U.S. 87, 103 (1983)). In particular, deference applies to review of "scientific judgments and technical analyses within the agency's expertise." *Lands Council*, 629 F.3d at 1074. As such, courts should not "act as a panel of scientists, instructing the agency, choosing among scientific studies, and ordering the agency to explain every possible scientific uncertainty." *Id*.

The Ninth Circuit has "repeatedly held [that] NEPA imposes procedural requirements on agencies and does not mandate substantive outcomes." *Nw. Environ. Advocates v. Nat'l Marine Fisheries Serv.*, 460 F.3d 1125, 1133 (9th Cir. 2006). As such, the sufficiency of an environmental impact statement is analyzed under a "rule of reason" using an "objective good faith standard." *Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1072 (9th Cir. 2002). Under that standard "[courts] must defer to an agency's decision that is 'fully informed and well-considered.'" *Id*. (citation omitted). So too, the NHPA "is a 'stop, look, and listen' provision that requires each federal agency to consider the effects of its programs." *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 805 (9th Cir. 1999); *see also Slockish v. U.S. Fed.*

Highway Admin., 682 F. Supp. 2d. 1178, 1193 (D. Or. 2010) ("NHPA and NEPA impose only procedural requirements").

Summary judgment motions are an appropriate vehicle to resolve APA claims, *Nw. Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468, 1471-72 (9th Cir. 1994), because the questions before a court are solely "whether the agency action is supported by the administrative record and otherwise consistent with the APA standard of review," *Gill v. Dep't of Justice*, 246 F. Supp. 3d 1264, 1268 (N.D. Cal. 2017).

ARGUMENT

Plaintiffs raise a number of challenges to the Navy's analysis of the impacts of increasing the number of Growlers and associated training operations at NASWI. Under NEPA, Plaintiffs challenge the Navy's methodology for measuring noise, arguing that the methodology is flawed and misleading, and that it should have been tested against "real-world" data. In addition, the State argues that the Navy failed to take a hard look at the impacts of increased noise on public health and birds. And COER claims the Navy failed to appropriately consider mitigation measures, alternatives to increasing the number of Growlers at NASWI, and greenhouse gas emissions. For the reasons described below, each argument is thoroughly rebutted by the Navy's detailed analysis in the FEIS.

In addition, Plaintiffs challenge the Navy's analysis under NHPA Section 106. As with the Navy's NEPA analysis, however, here too Plaintiffs' arguments are belied by the record, which illustrates the Navy's responsiveness to historic preservation concerns and detailed evaluation of a variety of preservation measures.

I. The Navy Appropriately Evaluated the Noise That Would Result from an Increase in Growler Flights, and Reasonably Described the Impacts of that Noise.

A. The Navy's Noise Methodology in the FEIS is Reasonable and Entitled to Deference.

Plaintiffs challenge the methodologies employed in the FEIS on two principal grounds. First, COER believes the Navy's noise model is flawed because it both improperly conveys the increase in noise caused by more frequent Growler flights and understates the amount of people affected by that noise. Second, COER and the State believe the Navy failed to "validate" the results of its model with on-the-ground noise testing and a health survey, respectively. But, as described below, the Navy's choice of methodology is, in each instance, entitled to deference as it is supported by the record, within the agency's expertise, and well-reasoned. NEPA demands no more. *See Marsh v. Or. Nat. Res. Council*, 490 U.S. 360, 378 (1989) ("[w]hen specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive."); *see also Native Ecosystems Council v. Weldon*, 697 F.3d 1043, 1051 (9th Cir. 2012) ("A court generally must be 'at its most deferential' when reviewing scientific judgments and technical analyses within the agency's expertise under NEPA.") (citation omitted).

1. The Navy's Use of the DNL Metric was Not Misleading.

In a reformulation of its failed argument in support of its motion for a preliminary injunction, COER now argues that the Navy's *use* of the DNL metric—rather than the metric itself—is misleading, because COER believes the Navy's use of DNL "obscured the differences among alternatives." COER Mot. Summ. J. at 16[6] (ECF No. 87) ("***COER Mot.***"). Specifically,

[6] Page numbers throughout refer to actual page numbers, not those inserted by ECF.

COER claims the Navy should have presented two DNL calculations, one for days when flights are occurring (the "average busy day" or "***ABD***" metric) and one for when they are not, as opposed to one average metric (known as the "average annual day" or "***AAD***" metric), in order to inform the public as to the ramifications of the increase in Growler flights. *Id*. at 20.[7]

As an initial matter, COER offers no reason for this Court to depart from the determination it made in denying COER's earlier motion for a preliminary injunction. There, COER similarly argued that the Navy used "statistically misleading annual averages rather than comparing busy and quiet days before and after the increase in operations . . . ." R&R at 19; *see also id*. at 21 (COER asserts that "the way that defendants used the DNL metric is misleading where activity is intermittent—i.e. with 'busy' and 'quiet' days"). In response the Court found that those arguments were misplaced given that "a Court tasked with reviewing a choice of scientific analyses (such as choice of measurements, projections, or analyses) must be deferential to the Agency's technical judgments." *Id*. at 22; *see also id*. ("Most of plaintiffs' arguments fit within this category of challenging an Agency's decision between alternative types of analyses and measurement—where the Court's deference to the Navy is at its zenith."). The Court should adopt that same reasoning now.

Nevertheless, and even if the Court had not already resolved COER's arguments on this issue, COER's re-formulation of its prior arguments fail; the Navy's use of the DNL metric is not misleading. The Navy explained in detail the rationale for the noise methodology it

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[7] 40 C.F.R. § 1502.23 provides that "[a]gencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements.

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Washington, D.C. 20002

employed to analyze the Growler's potential impact on the environment. GRR_150329-330; *see also* GRR_150243-45; GRR_150333-48; GRR_159049-60; GRR_159281-91; GRR_161316-31. In particular, the Navy explained that

> use of AAD computation of DNL is consistent with the [Federal Aviation Administration's ("***FAA***")] methodology as described in FAA Regulation 14 CFR Part 150, as well as consistent with other DoD services (e.g., Air Force Instruction AFI 32-7063). This methodology defines yearly averaged DNL as the metric to be used for evaluating the cumulative impacts of multiple events, which consolidates the effects of intensity, duration, frequency, and time of occurrence.

GRR_150253; *see also* GRR_150333. As such, ADD accounts for all noise events during an assessment rather than a sound level heard at any given time. *See* GRR_150243; GRR_150333. Indeed, the Navy explained that measuring noise only on active flying days, as COER wishes, would not change the ultimate results in the FEIS, would fail to show the benefit of minimal weekend operations, and would not allow for accurate comparison among alternatives with multiple scenarios. GRR_161318-19; *see also* GRR_150329 (COER's desired methodology overestimates noise impacts because it "encourages the use of the most conservative assumptions regarding projected airfield operations."); GRR_150254 (ABD metric fails to account for "the benefit the Navy's minimal weekend operations would have on those days, which are days when people are less likely to be away from their homes at work.").[8]

[8] Ault Field and OLF Coupeville rarely conduct FCLPs on the same days. *See, e.g.* GRR_150214 (showing Ault Field and OLF Coupeville active days as 110 and 34 in 2015; 130 and 10 in 2016; and 110 and 34 in 2017); GRR_15161 (noting active days in 1988 for FCLP operations at Ault Field and OLF Coupeville were 176 and 143, respectively). As such, use of AAD allows for annual comparisons that encompass both facilities.

Against that detailed explanation, COER offers only its subjective views about what an alternative metric "would" or "should" show. COER Mot. at 21-22. But choice of methodology is well within the discretion afforded to the agency, "even if, as an original matter, a court might find contrary views more persuasive." *Price Rd. Neighborhood Ass'n v. U.S. Dep't of Transp.*, 113 F.3d 1505, 1511 (9th Cir. 1997) (quoting *Greenpeace Action v. Franklin,* 14 F.3d 1324, 1332 (9th Cir. 1992)); *Morongo,* 161 F.3d at 578; *cf. Sierra Club v. Fed. Energy Regulatory Comm'n*, 867 F.3d 1357, 1369 (D.C. Cir. 2017) ("The agency's methodology was reasonable, even where it deviated from what Sierra Club would have preferred.").

Indeed, in *Morongo* the Ninth Circuit approved the FAA's calculation of "average daily noise levels" because the agency was entitled to deference and the calculation was arguably required by the agency's regulations. *See Morongo*, 161 F.3d at 578-79; *see also Lee v. U.S. Air Force*, 354 F.3d 1229, 1243 (10th Cir. 2004) (citing cases upholding use of noise methodologies); *City of Bridgeton v. F.A.A.*, 212 F.3d 448, 460 (8th Cir. 2000) ("[C]ourts have consistently upheld the FAA's discretion to choose its cumulative noise impact methodology instead of single-event noise analysis."); *Hausrath v. United States Dep't of the Air Force*, 491 F. Supp. 3d 770, 788 (D. Idaho 2020) ("Courts have long accepted the FAA's DNL standard as the appropriate methodology for evaluating the impacts from aircraft noise.") (citing *Town of Cave Creek, Ariz. v. F.A.A.*, 325 F.3d 320, 328 (D.C. Cir. 2003)).[9]

[9] As a matter of fact, the Environmental Protection Agency ("***EPA***") Guidelines for Noise Impact Analysis characterize AAD as "a more exact estimate" than ABD. *See* GRR_8359. EPA's Guidelines also state that "if the project being analyzed involves a change in airport use (for example Sunday flights when there were previously none) the noise level typical of an average busy day may lead to *nonsensical* results." *Id.* (emphasis added). That example aligns with the Navy's proposed action here—an increase in "the number of days of OLF operations to

Moreover, this Court previously found that COER "may not challenge the use of DNL simply because some other metric exists that better suits its purposes." *Citizens of the Ebey's Reserve for a Healthy, Safe, & Peaceful Env't v. U.S. Dep't of the Navy*, 122 F. Supp. 3d 1068, 1079 (W.D. Wash. 2015); *see also Protect our Communities Found. v. Jewell*, No. 13-cv-575, 2014 WL 1364453, at *9 (S.D. Cal. March 25, 2014) ("NEPA does not require the agency to use an alternative methodology, even one that Plaintiffs believe is superior."). The Navy's methodology was reasonable, and that is all that NEPA requires.

Finally, COER is simply incorrect that the Navy intentionally altered the DNL metric to obscure "troublesome data." COER Mot. at 18-19. Instead, the FEIS lists the number of "fly" days at GRR_159155–57.

2. The Navy's Noise Model Reasonably Incorporated the FAA's Standard Noise Threshold.

COER next argues that the Navy improperly relied on outdated information to assess the impacts of noise on humans in violation of 40 C.F.R. § 1500.1(b) (thus rendering its noise model unreasonable),[10] because the FEIS evaluated the annoyance caused by noise starting at the 65 dB DNL level, rather than the 55 dB DNL level. COER Mot. at 23-24. In other words, COER contends that the Navy understated the number of individuals affected by the increase in Growler flights because the Navy should have determined more people were annoyed by a lower level of noise. *Id*. at 23, 25-27. In addition, COER alleges the Navy failed to respond when it was

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support a larger number of annual FCLPs." GRR_150254. Thus, the EPA's guidance supports a finding that the Navy reasonably analyzed the Growler's impacts by using the AAD calculation.

[10] Section 1500.1(b) provides, in relevant part, that information in a NEPA review "must be of high quality" and based on "[a]ccurate scientific analysis …."

presented with contrary studies on this point. *Id*. at 24. However, and as with the Navy's use of the DNL metric, the Navy reasonably based the decibel thresholds in its noise model on the federal standard adopted by the FAA, and that determination is entitled to deference. *Morongo*, 161 F.3d at 578 (finding agency's "reli[ance] on its standard methodology for airport noise studies . . . cannot be described as irrational or subjective" and that FAA's choice of methodology in determining threshold of significance for noise impacts rational).

Moreover, the Navy explained that "FAA Regulation 14 CFR Part 150 is the primary federal regulation guiding and controlling planning for aviation noise compatibility on and around commercial airports, and it *explicitly requires* the use of 65 dB DNL as a threshold for determining land use compatibility." GRR_150254 (emphasis added); GRR_150348 (the "65 dB DNL contour is the "established federal standard for determining potential for high annoyance."); *see also* GRR_150600; GRR_150603, GRR_150652; GRR_150696. In addition, the Navy explained that "[g]iven the uncertainty in predicting the proportion of populations highly annoyed and the variability due to many factors[,] the Navy analyzed populations within the 65 dB DNL noise contour but also geographically depicted noise levels for the 55 dB and 60 dB DNL noise contour …." GRR_15054–55; *see also* GRR_150281; GRR_150603 n.26.

The Navy's analysis is entitled to deference, as "agencies are permitted to determine a threshold of significance for noise impacts." *Save Strawberry Canyon v. U.S. Dep't of Energy*, 830 F. Supp. 2d 737, 749-50 (N.D. Cal. 2011) (citing *Seattle Cmty. Council Fed'n v. Fed. Aviation Admin.*, 961 F.2d 829, 833 (9th Cir. 1992). And as another court recently explained, "[t]he [FAA] has established 65 DNL as the threshold of significance for noise impacts." *Hausrath*, 491 F. Supp. 3d at 788 ("Actions that do not result in noise level increases of 1.5 dB

or more within the 65-or-more DNL contour are, by definition, insignificant under NEPA, because all land use activities at issue are compatible with noise levels below 65 DNL.").

Moreover, the mere disagreement of COER's expert Sanford Fidell with the Navy's analysis, GRR_150251-53, is not sufficient to demonstrate that the Navy's use of the 65 dB threshold was unreasonable. The Ninth Circuit has consistently refused to "engage in a battle of the experts" regarding issues such as air quality and noise because "when specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts." *Price Rd.*, 113 F.3d at 1511 (internal quotation omitted); *see Inland Empire Pub. Lands Council v. Schultz,* 992 F.2d 977, 981 (9th Cir. 1993) ("We are in no position to resolve this dispute because we would have to decide that the views of [plaintiff's] experts have more merit than those of the [government's] experts." (internal citation omitted)). In other words, "NEPA [does not] require [a court] to resolve disagreements among various scientists as to methodology.'" *Conservation Nw. v. Rey*, 674 F. Supp. 2d 1232, 1249 (W.D. Wash. 2009) (citation omitted).

Turning to COER's second argument, the Navy responded to COER's comments regarding alternative noise thresholds by deciding to include a 55 dB DNL noise contour in the FEIS. GRR_150341; *see also* GRR_150348 ("In response to public comments, the Navy has expanded the analysis in the FEIS to show geographic areas subject to greater than 55 dB DNL and has analyzed 18 additional [points of interest]."). And the Navy acknowledged that although the FAA may lower the "annoyance" level to the 55 dB DNL threshold in the future, it has not yet done so. GRR_123375. That response satisfied NEPA's requirement that an agency provide a "meaningful response" that is "objective[ ] and in good faith." *W. Watersheds Project v.*

Kraayenbrink, 632 F.3d 472, 492-93 (9th Cir. 2011). Finally, the Navy explicitly responded to Mr. Fidell's comments in FEIS, even though COER believes its concerns unresolved. *See* GRR_150253-55. As such, COER's complaints fall short, given "an agency is under no obligation to conduct new studies in response to issues raised in the comments, nor is it duty-bound to resolve conflicts raised by opposing viewpoints." *California v. Block*, 690 F.2d 753, 773 (9th Cir. 1982).

3. The Navy Did Not Need to Provide "Real-World" Studies for Purposes of Analysis in the FEIS.

Both COER and the State allege that the Navy violated 40 C.F.R. § 1502.22, which requires, among other things, that an agency should update "incomplete or unavailable" information in an environmental impact statement if it is "essential to a reasoned choice among alternatives" or explain why the information could not be provided. But Plaintiffs read too much into what that regulation requires. At base, NEPA requires only that an agency "make sound scientific decisions." *California v. Bernhardt*, 472 F. Supp. 3d 573, 624 (N.D. Cal. 2000). Such decision-making may require an agency to disclose whether an environmental impact statement relies on "incomplete or unavailable relevant data." *Lands Council*, 395 F.3d at 1031. But "so long as an agency considers all relevant data, it may rely on that available evidence even when it is imperfect, weak, and not necessarily dispositive." *League of Wilderness Defs./Blue Mountain Biodiversity Project v. Connaughton*, 752 F.3d 755, 764 (9th Cir. 2014)

Specifically here, COER alleges that the Navy violated Section 1502.22 by failing to "validate" the noise model with real world data. The State, for its part, alleges that the Navy should have conducted a survey of real-world health impacts of jet noise. As discussed below,

both arguments fail, particularly in light of the detailed explanation the Navy provided in the FEIS as to both concerns.

a. A Thorough Analysis of Noise Did Not Require Post-Implementation Validation.

COER argues that the Navy violated Section 1502.22 because it allegedly failed to "validate" the noise measurements that the Navy used to predict the impact of the proposed increase in Growler flights and also failed to update its model when presented with evidence that the actual noise on the ground differed from that which was modelled. COER's Mot. at 10-13. As with COER's prior arguments, however, this Court has already rejected this argument, R&R at 22, and COER provides no reason to deviate from the Court's prior decision now. Nevertheless, and despite COER's arguments to the contrary, the Navy's noise model did not require "validation" or on-the-ground monitoring to be accurate for purposes of analysis in the FEIS. *See Morongo*, 161 F.3d at 577 (upholding FAA's decision to use estimated noise levels instead of measuring the noise in the area at issue). Instead, the Navy reasonably relied on a tested model that would provide accurate comparisons of the alternatives analyzed in the FEIS.

The Navy provided a rational explanation for why "validation" of the noise model was not appropriate or necessary to its consideration of the alternatives in the FEIS. First, the Navy explained that "NOISEMAP has already been validated as an accurate process through many years of use by the DoD." GRR_150241; *see* GRR_150333 (explanation of NOISEMAP validation and inputs); GRR_150343 (NOISEMAP updated and validated with one test case similar to Whidbey Island). Indeed, in response to the State's comments, the Navy stated that "[a]ll aircraft flight profiles were modeled with detailed altitude and power settings based on input from pilots and [air traffic control] personnel at NAS Whidbey Island." GRR_150256.

Second, the Navy also noted how monitoring would not be a prudent use of taxpayer resources given, among other reasons, noise monitoring conducted by the National Park Service ("***NPS***") in 2016 was largely consistent with the Navy's noise model. GRR_150263[11]; GRR_138168. That explanation is sufficient; NEPA does not obligate an agency to validate a tested model to determine a proposed action's potential impacts. *See Idaho Wool Growers Ass'n v. Vilsack*, 816 F.3d 1095, 1108 (9th Cir. 2016) (finding there was no need to validate Forest Service's model given deference owed to agency, use of model elsewhere, and fact model was based on reliable data).

Additionally, COER's argument mistakes the purposes of the noise models: "Noise contours produced by the model allow for comparison of existing conditions and proposed changes or alternative actions that do not currently exist or operate at the installation." GRR_150241. "The environmental analysis presents a comparison of potential impacts under the proposed scenarios to the existing conditions. With the focus on impacts as the difference between the Proposed Action and existing conditions, the use of NOISEMAP gives a valid comparison." GRR_150244. In short, validation was not necessary for the purposes of the FEIS, which is to compare proposed alternatives to the status quo. *See Vill. of Bensenville v.*

[11] COER cites to NPS's noise monitoring to support its assertion that the Navy's modeled noise "forecasts were inconsistent with real-world measurements done by the [NPS]." COER Mot. at 12. However, the Navy thoroughly addressed this report in the FEIS—including detailing the Navy's concerns with the NPS's methodology. GRR_150259–63. In particular, the Navy noted that "the NPS report confirms that while the Navy aircraft operations are highly intermittent and are loud when aircraft are flying, there are long periods of time between noise events during which there is no military aircraft activity." GRR_150260. Further, the Navy explained that, according to the NPS, "noise events [with] recorded noise above 60 dBA occurred less than 1 percent of the time at either recording location," and that this data was, "overall," "consistent with the Navy's modeled noise data." GRR_150260; *see also* GRR_150263. As such, COER's argument takes the record out of context.

F.A.A., 457 F.3d 52, 71 (D.C. Cir. 2006) (upholding FAA's chosen modeling data and deferring to the agency's "professional judgment that the later data would not alter [FAA's] conclusions"). Even if the model of the status quo differs minimally from real-world noise, as long as the model provides for an appropriate comparison between current conditions and the analyzed alternatives, it fulfills the purposes of the FEIS.

COER also claims the FEIS failed to acknowledge limitations in the modeling. COER Mot. at 14. But the FEIS plainly disclosed the inputs and confines of the model. *See Idaho Wool Growers*, 816 F.3d at 1109 (explanation of "assumptions on which it built the model and the uncertainties inherent in it" is "all that NEPA requires."); *Lands Council*, 395 F.3d at 1032 (when an agency uses models in its NEPA analysis, it must provide "up-front disclosures of relevant shortcomings in the data or models."). For example, the Navy stated that "[t]he noise environment for the Final EIS was modeled using a program called NOISEMAP Version 7.3" and that "NOISEMAP draws from a library of *actual aircraft noise* measurements obtained in a controlled environment in order to obtain the *most accurate* measurements." GRR_00150333 (emphasis added). In addition, the Navy explained that it used data from F/A-18E/F "Super Hornet" flyovers (rather than data from EA-18G Growlers) in the NOISEMAP program because the Super Hornet and Growler are substantially similar aircraft with "the same engines and airframes." *Id.*; *see also* GRR_125958 (stating the "EA-18G Growler are essentially the same aircraft as Super Hornet"). And the FEIS also explained that NOISEMAP's *actual military aircraft noise* measurements are in fact "validated through subsequent testing" and allow the Navy to compare "existing conditions" with the proposed increase of Growler flights. *See*

GRR_00150333. As such, the Navy sufficiently acknowledged the limitations of the noise modeling used.

Finally, COER alleges the Navy failed to respond to comments calling for further validation of its noise model. COER Mot. at 15. The administrative record demonstrates otherwise. The Navy responded directly to questions regarding ongoing noise monitoring by explaining why further validation of the NOISEMAP model was not necessary. In particular, the Navy explained that NOISEMAP was validated though "extensive study" and encompasses a database of actual military aircraft noise measurements, as well as the fact that on-site monitoring is not typically used at military air installations where "operational tempo [is] not uniform." GRR_150333.

b. The Navy Reviewed Information Equivalent to What Would be Studied During a Health Impact Assessment.

The State, for its part, claims that the Navy failed to comply with Section 1502.22 when it chose not to gather information about the on-the-ground health impacts of Growler flights through what is known as a health impact assessment ("***HIA***"), or adequately explain why it did not obtain that information. Wash. Mot. Summ. J. ("***Wash. Mot.***") at 20-21 (ECF No. 88). Neither argument is persuasive when considered in light of the administrative record.

As to the first, the State argues that a HIA was "essential" to choosing among the alternatives and therefore required by Section 1502.22. Wash. Mot. at 20. But the premise of the State's argument is simply incorrect. Rather, as the Navy thoroughly explained, the FEIS contained equivalent information. Specifically, the Navy responded to comments by stating that

> HIAs are [NEPA]-like documents associated with proposed actions and are often limited to reviews of current literature that may be relevant to certain health impacts associated with proposed action.

> To this end, an HIA would merely duplicate and in many cases would be far less comprehensive than this [EIS]. Not only did the Navy conduct comprehensive review of the best available science, it also conducted comprehensive qualitative analysis using several metrics to measure impacts to the human environment that far exceeds the analysis of an HIA.

GRR_161327; *see also* GRR_122489 ("[a]lthough the Navy's Growler Draft EIS did not include a HIA as separate document, . . . the Growler Draft EIS analysis met the intent, the scope and the contents of a HIA, including assessing potential effects, discussing mitigations, and assessing whether vulnerable population groups are more likely to be impacted."). In addition, "[w]hile none of the airport-related HIAs [the Navy surveyed] conducted public outreach, the Navy [ ] conducted 13 public meetings and the Navy had medical personnel . . . participate in five public meetings held in December 2016 specially to address the public's questions regarding potential hearing and non-auditory health effects." GRR_118253.[12]

As a result, the Navy determined that the final EIS would contain a separate appendix listing the "Community Health and Learning Review." GRR_142060; *see also* GRR_142065; GRR_160908-27 (Appendix I describing the results of the Navy's health and learning review); GRR_161328 (Navy's "extensive literature review and qualitative analysis of impacts us[es] best available science and long-standing government and industry standards"). And the EPA acknowledged placing this "substantial analysis" in one location would help to inform the public. GRR_161327. The State's claim that a HIA was necessary to inform the Navy's determination is belied by the record.

[12] Indeed, and as the Navy explained, "the analysis in the [ ] EIS exceeds industry standards for an airport-related HIA" as it included an analysis of a multitude of factors not considered "[m]ost airport-related HIAs." GRR_118253.

Second, and even if the Navy were incorrect that the FEIS renders the HIA superfluous, the Navy appropriately recognized the scope of its analysis. Specifically, in responding to comments, it stated that

> [n]ot only did the Navy conduct comprehensive review of the best available science, it also conducted a comprehensive qualitative analysis using several metrics to measure impacts to the human environment that far exceeds the analysis of an HIA. To the extent that the intent is not to perform an HIA but to conduct long-term, scientific research study on the impacts of aircraft noise and human health, such study is beyond the scope of this analysis.

GRR_161327. Washington argues that this explanation is insufficient because it is based on a "definitive causal relationship;" however, the Navy reasonably explained that a "long-term health study is beyond the existing scientific literature," and "[b]ecause the best available science does not definitively show a causal and significant relationship between aircraft noise and health, it would be speculative to link any nonauditory health data collected to aircraft noise instead of to other factors." GRR_161327-28. As such, the Navy appropriately questioned whether the study the State proposed would even result in useable data given the limitations of the available scientific methods, and gave a thorough explanation of the information in the FEIS. Nothing more was needed under NEPA. *See, e.g.*, *Seattle Audubon Soc. v. Espy*, 998 F.2d 699, 704 (9th Cir. 1993) ("if the [agency] concludes that it need not undertake further scientific study . . . [it] must explain in the EIS why such an undertaking is not necessary or feasible.").

B. The Navy Thoroughly and Reasonably Analyzed the Impacts of Noise from Increased Growler Flights.

The State's challenges to whether the Navy took an appropriately "hard look" at the health impacts of noise (as to children's learning, non-auditory health effects, and children's physiological health), as well as the impact of noise on birds, is without merit.

NEPA's "hard look" standard is designed to ensure that "in reaching its decision, [an agency] will have available, and will carefully consider, detailed information concerning significant environmental impacts" such that "adverse environmental effects of the proposed action are adequately identified and evaluated." *Methow Valley*, 490 U.S. at 349-50; *see Kleppe v. Sierra Club*, 427 U.S. 390, 410 n.21 (1976); *see also Or. Nat. Resources Council v. Lowe*, 109 F.3d 521, 526 (9th Cir. 1997) (a "hard look" means the agency took a "reasonably thorough discussion of the significant aspects of the probable environmental consequences.") (citations omitted). At base, the standard asks whether an agency "adequately considered a project's potential impacts," *N. Alaska Envt'l Cntr. v. Kempthorne*, 457 F.3d 969, 975 (9th Cir. 2006). A "'hard look' [however] does not require adherence to a particular analytic protocol.'" *Or. Nat. Desert Ass'n v. Bureau of Land Mgmt.*, 625 F.3d 1092, 1121 (9th Cir. 2010).

1. The Navy Took a "Hard Look" at the Relevant Public Health Impacts of Increased Noise.

a. The Navy Appropriately Assessed the Impacts of Noise on Children's Learning Within the Confines of Existing Research.

Despite the fact that the FEIS acknowledged children would experience increased noise and classroom disruption, GRR_150336, Washington claims that the Navy fell short in examining the impacts on child cognitive development and learning because it failed to specifically determine how that noise and disruption would impact classroom performance. Wash. Mot. at 12, 14 (claiming Navy failed to "connect the dots"). But the FEIS illustrates that the Navy did, in fact, take a "hard look" at the implications of increased noise on child learning.

The Navy assessed the impact of noise on classroom learning by looking at two metrics: the first quantifies cumulative noise effects during an 8-hour day, and the second looks at the

number of noise events above a certain threshold. GRR_150337. Those metrics were used to "show[] the number of hourly events above the 50 dB L_{max} level, which would represent the number of times a student would potentially be unable to hear an instructor in classroom setting." *Id*. Based on those metrics, the Navy then estimated the number of disruptive events per hour that students at various area schools would experience. GRR_150362; *see also* GRR_150363 (table of results); GRR_150530-33 (discussion of school population). The Navy also quantified the impact of classroom learning interference for various alternatives. *See, e.g.*, GRR_159093-4; GRR_159180-84; GRR_150159099-100; GRR_159194-99. And the Navy explicitly recognized that "the noise environment can impair learning in schools and may contribute to poor academic performance of an individual student." GRR_159321; *see also* GRR_160916 (assessment of academic performance). To receive deference an agency must only "support its conclusions with studies that the agency deems reliable" and "explain the conclusions it has drawn from its chosen methodology, and the reasons it considered the underlying evidence to be reliable." *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1075 (9th Cir. 2011) (quotations omitted). The Navy's analysis meets that standard.

As to whether it could quantify the effect classroom disturbances would have on child learning, the Navy acknowledged that "there has been limited research in the area of aircraft noise effects on children and classroom/learning interference." GRR_150336; *see also id*. ("Research on the impacts of aircraft noise and noise in general on the cognitive abilities of school-aged children has received more attention in recent years. Several studies suggest that aircraft noise can affect the academic performance of school children."); ("environments with sustained high background noise can have variety of effects on children including effects on

learning and cognitive abilities and various noise-related physiological changes."). The one-to-one analysis the State believes was lacking was simply not feasible. Indeed, the study Washington relies on merely concludes that noise above the 55 dB level *may* cause reading scores to fall below average. GRR_159321. In fact, the State itself acknowledged that the literature "reveals an increasing trend," not a definitive result. GRR_151315. Accordingly, the Navy satisfied NEPA by thoroughly analyzing research on the issue, GRR_159320-23. *See Protect our Communities Found.*, 825 F.3d at 584 (holding that the hard look standard was satisfied where the agency "canvassed the available literature"). Because a definitive causal study is not available, the Navy need not do more.

In addition, the Navy was responsive to comments from the State throughout the NEPA process. *See* GRR_161324 (explaining that "[a]dditional information and discussion on noise impacts to academic performance including state-wide assessments was added to Appendix I. Applicable peer-reviewed studies were incorporated into the analysis."). And the State Department of Health's comments on the draft EIS even implied that a HIA would be sufficient to address the issue of cognitive impacts from noise, GRR_151315. As described above, the level of analysis contained in the FEIS exceeds that contemplated in an HIA.

b. The Navy Thoroughly Analyzed Non-Auditory Health Impacts

Washington also alleges the FEIS did not adequately address "non-auditory public health impacts" because the ROD concluded that "[a]lthough Alternative 2A would result in both an increase in the number of people exposed to noise, as well as an increase in levels of noise to those exposed, research conducted to date has not made definitive connection between intermittent aircraft noise and nonauditory health effects." GRR_167650; *see also id*. ("the data

and research are inconclusive with respect to the linkage between potential nonauditory health effects of aircraft noise exposure."). Although it is not entirely clear what level of analysis the State believes was proper, the State appears to argue that the FEIS should have included supplemental noise metrics estimating the non-auditory health impacts of the affected population as to each alternative. Wash. Mot. at 14-15.

As an initial matter, the State's premise that the FEIS ignores non-auditory health impacts, GRR_151313-14, is incorrect. The FEIS contains a detailed discussion of non-auditory public health impacts. Section 3.2.3.7 of the FEIS ("Nonauditory Health Effects") discusses the problem of non-auditory health impacts, with the Navy forthrightly acknowledging that "[e]xposure to noise levels higher than those normally produced by aircraft in the community can elevate blood pressure and also stress hormone levels." GRR00150339. That analysis also looked at the effects of noise on elevated blood pressure and hypertension, heart disease and stroke, mental health, and obesity. GRR_159653. The Navy provided a discussion with respect to each alternative. *See* GRR_150601; GRR_150650 (Alternative 1); GRR_150695 (Alternative 2); GRR_150738 (Alternative 3). And the Navy *did* quantify other health impacts related to aircraft noise, such as potential hearing loss (GRR_159094-95, GRR_159185-87), residential night sleep disturbance (GRR_159096, GRR_159188-90), indoor speech interference (GRR_159097-98, GRR_159191-93), and recreational speech interference (GRR_159101-102, GRR_159200-03).

In addition, and based on discussions with the EPA and Washington's Department of Health, the Navy undertook additional analysis, ultimately reviewing an additional 260 studies and developing a separate, standalone "Community Health and Learning Review" index in

which it addressed more specific concerns related to "potential noise impacts to physical health, mental health, pregnancy, heart disease and cardiac arrest, cancer, gastrointestinal functioning, brain damage, and health risks to children and the elderly." GRR_159311-19; *see also* GRR_150339 ("In preparation of the Final EIS the Navy reviewed 260 published articles as suggested by public comment."); GRR_150245 ("The nonauditory health effects literature review was expanded using journals and research referred to by the [State] Department of Health, the [EPA], and the public in their comment letters.").

Based on its supplemental literature review, the Navy explained that "[n]o studies have shown a definitive causal and significant relationship between aircraft noise and health. Inconsistent results from studies examining noise exposure and cardiovascular health have led the World Health Organization to conclude that there was only weak association between long-term noise exposure and hypertension and cardiovascular effects …." GRR_150339; *see also* GRR_150246 ("Research studies seem to indicate that aircraft noise may contribute to the risk of health disorders along with other confounding factors such as heredity, medical history, smoking, alcohol use, diet, lack of exercise, and air pollution, but the measured effect is small compared to the effects of these other factors and often not statistically significant."); GRR_159319 (same).[13] As a 2008 study noted, "the effect of aviation noise on health is an intricately complex and notoriously difficult field of study" given various confounding factors "may distort the results of an aviation noise health effects study." GRR_160923.[14] Therefore,

[13] The Navy's conclusion is amply supported by studies cited in the AR. *See* GRR_27075; GRR_29606; GRR_39467; GRR_75252.

[14] "Effects of Aircraft Noise: Research Update on Selected Topics." GRR_36555.

and contrary to Washington's assertions, the FEIS did address non-auditory health impacts, but it also determined that research does not exist that would support the one-to-one comparison (dB increase to percentage risk of health effect) the State advocates for. *See* GRR_159319 ("there are no studies that definitively show a causal and significant relationship between aircraft noise and health.").[15] As such, the Navy engaged in a "reasoned analysis of the evidence." *Pacific Coast Fed. of Fishermen's Ass'ns v. Nat'l Marine Fisheries Serv.*, 482 F. Supp. 2d 1248, 1253 (W.D. Wash. 2007).

Further, the Navy was under no obligation to engage in the level of quantification advocated by the State. The Supreme Court only requires an agency to consider environmental impacts that have a "reasonably close causal relationship" to the proposed action, akin to "proximate cause in tort law." *Dep't of Transp. v. Pub. Citizen*, 541 U.S. 752, 767 (2004); *see also Sierra Club v. United States Dep't of Energy*, 867 F.3d 189, 198 (D.C. Cir. 2017) (explaining that NEPA requires consideration of "reasonably foreseeable" effects and also "'require[] a reasonably close causal relationship between the environmental effect and the alleged cause, analogous to proximate causation from tort law"). As one court said, "[the agency] does not act arbitrarily and capriciously by not evaluating a project-specific impact for

[15] *See also* GRR_159311 ("In these studies researchers usually present their results in terms of the Odds Ratio which is the ratio of the odds that health will be impaired by an increase in noise level of 10 dB to the odds that health would be impaired without any noise exposure. An OR of 1.25 means that there is 25-percent increase in likelihood that noise will impair health. The summary of these studies shows that the relationship between noise and impaired health is very weak one because none of the statistically significant ORs were greater than 1.5. Most of the ORs were less than 1.2."); GRR_150282 ("More recently, major studies have been conducted in an attempt to identify an association between noise and health effects, develop a dose-response relationship, and identify a threshold below which the effects are minimal. These studies have produced inconsistent results for associations between aircraft noise and heart health ranging from no statistical significance to marginal statistical significance.").

which the then-current scientific modeling and available information could not provide meaningful findings on which to base a decision." *Sierra Club v. Dep't of Transp.*, 310 F. Supp. 2d 1168, 1187 (D. Nev. 2004); *see also Metro. Edison Co. v. People Against Nuclear Energy*, 460 U.S. 766, 774 (1983) ("[s]ome effects that are 'caused by' a change in the physical environment in the sense of 'but for' causation, will nonetheless not fall within [NEPA] because the causal chain is too attenuated."). Given the above-referenced state of research on this issue, the Navy reasonably determined that it was uncertain whether jet noise is the proximate cause of certain non-auditory health effects.

c. The Navy's conclusions regarding child health were reasonable.

Washington also claims that the FEIS's conclusions regarding physiological impacts of noise on children are not supported and are based on an "irrational and unsupported" standard. Wash. Mot. at 18-19. In particular, the State alleges that the Navy focused only on hearing-related risks, rather than other non-auditory harms, and improperly dismissed studies that discussed the risks associated with infrequent noise. *Id*.

The State's first argument is based on a single citation in the FEIS to a Navy memorandum, GRR_150381, that, admittedly, only references *auditory* health risks. But the Navy also discussed in detail

> [t]wo studies [that] have been conducted both in Germany that examined potential *physiological* effects on children from noise. One examined the relationship between stress hormone levels and elevated blood pressure in children residing around the Munich airport. The other study was conducted in diverse geographic regions and evaluated potential physiological changes (e.g., change in heart rate and muscle tension) related to noise. The studies showed that there may be some relationship between noise and these health factors; however, the researchers noted that further study is

> needed in order to differentiate the specific cause and effect to understand the relationship.

GRR_150336 (emphasis added); *see also* GRR_150752-53. The Navy did not, as the State suggests, rely on a heightened standard, but rather required a threshold showing of causality. GRR_150336. Here, no such causal relationship has been shown beyond general conclusions about potential effects. GRR_150752-53. As such, consideration of studies of the physiological health effects on children caused by noise informed the Navy's conclusion that, "[b]ased on the limited scientific literature available[,] there is no proven positive correlation between noise-related events and physiological changes in children." GRR_150753. Nonetheless, the Navy also explained that "[c]hildren under the greater than 65 dB DNL noise contour are at greater risk of experiencing these [non-auditory] impacts (see Section 3.2)" even if they are not significant. GRR_150381; *see also* GRR_151061 (quantifying number of children affected by various alternatives).

2. The Navy Took a "Hard Look" at Impacts on Birds.

a. A Species-by-Species Analysis Was Not Required.

With respect to the Navy's analysis of potential impacts on birds, Washington argues that the Navy should have conducted a species-by-species analysis of different populations. Wash. Mot. at 23 (citing *Nat'l Audubon Soc'y v. Dep't of the Navy*, 422 F.3d 174, 187 (4th Cir. 2005)). In particular, the State claims that despite acknowledging that different species respond differently to noise, the FEIS only addressed noise effects on birds generally. Wash. Mot. at 23-24. Contrary to Washington's claim, however, the FEIS includes a thorough discussion of different species of birds affected by the increase in Growler training operations. *See, e.g.,* GRR_150472; GRR_150461; GRR_150906; GRR_150466-69 (marbled murrelet);

GRR_150479 (species of local importance); GRR_150916-18 (analysis of marbled murrelet); GRR_85321 (pigeon guillemots); GRR_17857 (marbled murrelet food habits); GRR_75109-54 (bird observations and maps for species of local importance); GRR_57586 (marbled murrelet); GRR_75158 (tufted puffin); GRR_34387 (shorebirds); GRR_44287 (shorebirds); GRR_92892 (shorebirds); GRR_85280 (marbled murrelet); GRR_31375 (monitoring of multiple local species, including pigeon guillemot, marbled murrelet, tufted puffin, black oystercatcher). But based on the data it reviewed, the Navy concluded that "[a]lthough minor variations in reactions are likely between species, aircraft overflights associated with the Proposed Action would cause similar types of reactions (e.g., alerting, flushing) to the stimuli. As such the information regarding all categories of birds (e.g., shorebirds, wading birds) is synthesized in the analysis below except where specifically noted." GRR_150911. Accordingly, the Navy determined a species by species analysis was unnecessary.

Nor did the Navy ignore comments on the draft EIS, including from the State, disagreeing with the Navy's more generalized approach. *See* GRR_151274-82; GRR_151283-91. It considered these comments, but ultimately concluded that "although it would update[ ] its analysis … with scientific literature for additional species as appropriate [it would present] its impact conclusions for the species groups as whole and not for individual species with the exception of federally protected species …." GRR_161346; *see also* GRR_150284 (FEIS "revised to include information related to population density and estimates, breeding habitat and noise, and wildlife-strike impacts consistent with the U.S. Fish and Wildlife Service consultation."); GRR_161344 ("The sensory disturbance discussion has been expanded to include the most recent aircraft noise science and additional research related to other human-

U.S. Department of Justice
150 M Street, N.E.
Washington, D.C. 20002

made noise impacts on wildlife, including studies recommended during the public comment period."). Although Washington may disagree with Navy's conclusions, it has failed to demonstrate that the Navy's analysis was anything less than a "hard look" at the issue.[16]

In advancing its argument, Washington relies heavily on *Nat'l Audubon* for the proposition that an environmental impact statement that fails to conduct a species-by-species analysis of noise effects is *per se* unreasonable. Wash. Mot. at 23. NEPA has no such requirement. Moreover, there are a multitude of distinctions between *National Audubon* and this case. First and foremost, in *National Audubon*, the Navy was looking for a location for new training facilities, including an OLF, where none existed previously. *Nat'l Audubon*, 422 F.3d at 181. In contrast, OLF Coupeville has been located at NASWI since World War II, and the Navy had available historical data concerning wildlife and bird issues—and relied on that history—that was not available in *Nat'l Audubon*. *See, e.g.*, GRR_150924 (citing historical data on bird strikes). In addition, the proposed OLF in *Nat'l Audubon* was located next to a national wildlife refuge and a portion of the Navy's jets "eastern approach and holding pattern [were] within two-tenths of a mile of the Pungo Unit," an area of the reserve that "was established specifically as an inviolate waterfowl sanctuary." *Nat'l Audubon*, 422 F.3d at 182–83. In contrast—and although Washington seeks to make much of the proximity of the San Juan Islands National Wildlife Refuge—OLF Coupeville is approximately 10 miles from the San Juan Refuge, and no portion of the Navy's FCLP training operation at OLF Coupeville occur closer than 4-5 miles of the refugee. *See* GRR_150353 (San Juan National Wildlife Refuge marked as POI P10); *see also*

[16] And to the extent the State believes the Navy ignored certain information as to tufted puffins, "an agency need not respond to every single scientific study or comment." *Ecology Cntr. v. Castaneda*, 574 F.3d 652, 668 (9th Cir. 2009).

GRR_150412 ("No Congressionally designated wilderness areas are located within the NAS Whidbey Island complex affected environment DNL noise contours."); GRR_150415. Nor is the refuge an "inviolate waterfowl sanctuary" as in *National Audubon*.

There are also the important distinctions between the Navy's analyses in *National Audubon*, and this case. For example, the Court in *National Audubon* found that the Navy's failure to conduct a species-specific review of snow geese was unreasonable, because"[t]he only species-specific studies [cited] illustrate that snow geese may be especially sensitive to aircraft activity." *Nat'l Audubon Soc'y*, 422 F.3d. at 192-93. The State analogizes the *National Audubon* court's findings to the Navy's ostensible failure here to consider tufted puffins separately; but the State fails to cite to a study in the record indicating that puffins are prone to disturbance by aircraft in a way that merited individualized treatment in the FEIS. And, the Navy did acknowledge that "the health of seabird populations, particularly colony-nesting species, may be reflected to some degree in the pigeon guillemots stable to increasing populations on Whidbey Island … despite many years of exposure to high levels of aircraft and other human disturbances." GRR_150914; GRR_150478 (noting puffin's preferred habitat is "open marine water").

Additionally, *National Audubon* explained that "[a] hard look' is necessarily contextual" given "an agency's obligations under NEPA are case-specific" such that "[c]ourts may not flyspeck' an agency's environmental analysis, looking for any deficiency, no matter how minor." 422 F.3d at 186. To that end, the court acknowledged that "[t]he deficiencies in each area of the Navy's analysis [including the failure to conduct a specific review of snow geese] would not, on their own, be sufficient to invalidate the EIS." *Id*. at 187. Indeed, the *National Audubon* court

also found that the Navy's NEPA analysis was deficient on other issues not present here, such as its analysis of "Bird Aircraft Strike Hazard," *Nat'l Audubon*, 422 F.3d at 189, a major concern for the construction of a new airfield, but an issue not raised by Plaintiffs here, and, in any event, properly considered by the Navy using historical data from NASWI. GRR_150924.

b. The Navy Appropriately Analyzed the Impact of Noise on Birds.

The State also claims that the Navy irrationally concluded that noise impacts associated with increased FCLP operations would not significantly impact bird species. Wash. Mot. at 24-26. In particular, Washington asserts three arguments: (1) the Navy's conclusion that birds that have habituated to the current level of operations will also habituate to an increased number of flights is unreasonable, (2) the Navy's focus on habituation underrepresented harm to birds, and (3) the Navy's conclusion that noise will only have a minimal short term impact is unreasonable. Wash. Mot. at 25. None of these have merit.

As to Washington's first argument, the Navy did not speculatively assume that past habituation would carry forward notwithstanding increased jet noise. Instead, the Navy reviewed studies on wildlife habituation and its meaning. GRR_150913. Based on these studies—cited in the FEIS—the Navy concluded that "[h]abituation to repeated exposure to aircraft noise and visual disturbance has been noted in numerous species," such that at least some degree of future habituation could be assumed even with increased noise. *Id*. Washington's argument that the Navy's conclusion was "vague" and without support does not withstand scrutiny.

With respect to the State's second criticism, the FEIS does not underrepresent the risks of damage to birds by focusing on habituation. The Navy acknowledged that "wildlife in the study area are currently exposed to high levels of aircraft operations and other human disturbances, and

the Proposed Action may result in some additional sensory disturbance impacts, particularly from noise." GRR_150908. And the Navy further explained that

> [e]nergy lost by behavioral responses to sensory disturbances, should they occur, must be replaced, or the health of the individual exhibiting those behavioral responses may decline. Replenishing energy requires more time spent feeding and resting than the individual might have otherwise budgeted. If the affected individual is caring for an egg or chick, then the energy expenditures or altered activity budget may also negatively affect the young's health. The disturbances could also keep birds away from more productive feeding habitats.

GRR_150909; *see also id*. ("While difficult to measure in the field, all behavioral responses are accompanied by some form of physiological response …."). Nevertheless, and again based on its review of scientific literature and studies, the Navy concluded that "[b]irds in the study area that have not habituated to the current level of aircraft operations or those that are new to the area may respond to aircraft operations under the Proposed Action by exhibiting alert postures, flushing, or diving, but they would be expected to resume normal activities within a short period after overflights … therefore these disturbances are not expected to affect critical behaviors." GRR_150916. Again, the Navy took a hard look at habituation, which included consideration of various potential harms. *See Native Ecosystems Council v U.S. Forest Serv*., 428 F.3d 1233, 1241 (9th Cir. 2005) ("A 'hard look' should, of course, involve the discussion of adverse impacts.").

Indeed, Washington acknowledges that the "Navy's own analysis indicated that species may experience long-term impacts to their overall fitness regardless of whether they appear to habituate or not." Wash. Mot. at 27. In citing this statement, however, the State overlooks the substance of the Navy's analysis, including studies cited in the FEIS that support the Navy's

conclusion that there was insufficient evidence demonstrating long-term impacts from increased noise. *See, e.g.*, GRR_150913 ("No published research examining the impacts of aircraft or other anthropogenic noise on pigeon guillemots is available, but [one study] posited that the impacts of anthropogenic disturbances on wildlife may be best highlighted by population-level effects. Considering that the population of pigeon guillemots has remained stable in recent years and may have increased since the 1980s, it is probable that existing high levels of human disturbance, including decades of aircraft operations at the NAS Whidbey Island complex, have not significantly impacted this species.").

Third, as to short-term impacts, the State takes issue with the Navy's decision to estimate impacts based on annual time of exposure rather than some other unidentified metric. Wash. Mot. at 28-29. But the Navy's determination was based on its finding that "the 92 [dB] threshold is [a] better indicator of potential disturbance because it relates to more severe responses to disturbance such as flushing. The 92 [dB] threshold is derived from research on Mexican spotted owls exposed to helicopter noise (owls did not flush from their roosts until the noise exceeded 92 dBA) … and is used by the [U.S. Fish and Wildlife Service] [ ] as the threshold to determine potential effects on the marbled murrelet …). GRR_150914. The Navy's chosen methodology is entitled to deference. *Protect our Communities Found. v. Jewell*, 825 F.3d 571, 584 (9th Cir. 2016) ("We defer to the agency's discretionary judgment with respect to the 'evaluation of complex scientific data within the agency's technical expertise.'") (citation omitted). And that methodology, in turn, supported the Navy's conclusion that "[t]he data … indicate[s] that, although an increase in aircraft operations would occur under the Proposed Action, the increased percentage of time birds would hear noise above 92 dBA over the course of year would be

minimal." GRR_150914; *see also* GRR_150912 ("given the short period of exposure, hearing loss is not anticipated to occur to bird species in the study area."). As such, the Navy reasonably supported its conclusions as to limited short-term effects on birds.

3. The Navy Considered Noise Mitigation Measures.

Despite acknowledging that the Navy explained why it was not going to pursue ongoing noise monitoring as a mitigation measure, COER alleges that the discussion contained in the FEIS is insufficient. COER Mot. at 28. Alternatively, COER claims the Navy failed to respond to comments as to mitigation. Both arguments fail.

As an initial matter, COER's argument is undermined by its own admission that the Navy explained its decision not to pursue ongoing noise monitoring as mitigation. COER Mot. at 28. This is because an environmental impact statement must only include "a reasonably complete discussion of possible mitigation measures." *Methow Valley*, 490 U.S. at 352. As one court has explained, if the "EIS described the mitigating measures in general terms and relied on general processes, the agency took the requisite hard look and NEPA's mitigation measures requirement was satisfied." *Kempthorne*, 457 F.3d at 979. That said, an environmental impact statement must contain "*some* evaluation of effectiveness" as to mitigation measures. *South Fork Band Council of W. Shoshone of Nevada v. U.S. Dep't of Interior*, 588 F.3d 718, 727 (9th Cir. 2009).

Here, the FEIS contains a detailed discussion of noise mitigation measures in Appendix H. GRR_160888-907. And aside from that detailed discussion, the FEIS also contains numerous other references and analysis of noise mitigation. *See* GRR_150350 (noise abatement policies); GRR_150742-44 (discussion of noise mitigation techniques, such as jet modifications, new technology); GRR_150744-45 (noise abatement policy); GRR_151056 (summary of noise

mitigation measures under review); GRR_150159 (table of mitigation references in FEIS). In particular, Appendix H describes a variety of noise reduction techniques under consideration, including aircraft design technologies to reduce noise, the use of software to aid in landing the aircraft and reduce the need for FCLP operations, and construction of noise suppression facilities. GRR_160892-95. That description is more than sufficient under NEPA. *Okanogan Highlands Alliance v. Williams*, 236 F.3d 468, 473 (9th Cir. 2000) (agency must only make more than a "perfunctory description" of mitigation measures or do more than merely list those measures). Further, the Navy's commitment to studying various mitigation options satisfies NEPA, as a "mitigation plan need not be legally enforceable, funded or even in final form to comply with NEPA's procedural requirements." *National Parks & Conservation Ass'n v. United States Dep't of Transp.*, 222 F.3d 677, 681 n.4 (9th Cir. 2000).

As to COER's second argument, COER fails to cite to an instance where *it* commented on the lack of noise monitoring as a mitigation measure in the draft EIS, and thus it has waived its right to raise this claim. COER Mot. at 27 (citing to comments from the EPA and ACHP); *see Public Citizen*, 541 U.S. at 764 (party "forfeited" objection where it was not "identified in their comments" to the draft environmental assessment). But even if not waived, the Navy explained not only that "[a]dditional noise monitoring would not change the results of the impacts presented in this analysis" but also that noise monitoring was not a practical alternative given how military exercises ordinarily function. *Id.*; *see* GRR_150241 ("on-site noise monitoring is seldom used at military air installations for analyses especially when the aircraft mix and operational tempo are not uniform."); *see also* GRR_150281 (changes to noise mitigation between draft and final EIS). The Navy's decision not to pursue this mitigation

U.S. Department of Justice
150 M Street, N.E.
Washington, D.C. 20002

technique was reasonable because—based on its evaluation—noise monitoring would not result in actual mitigation of noise when compared to other viable options (such as those cited above).

II. The Navy Appropriately Analyzed Alternatives.

COER's argument that the Navy's alternatives analysis in the FEIS is inadequate ignores the Navy's considered justification for expanding operations at NASWI; to that end, the Navy appropriately determined that the Naval Air Facility El Centro ("***El Centro***"), located "in a remote desert in southeast California," should not have been considered in detail in in the FEIS. COER Mot. at 7.

"The regulations implementing NEPA require that an EIS must consider and assess the environmental consequences of the proposed action and reasonable alternatives to the action." *Westlands Water Dist. v. U.S. Dep't of Interior*, 376 F.3d 853, 865 (9th Cir. 2004). However, "NEPA does not require [an agency] to explicitly consider every possible alternative to a proposed action." *Id*. at 871. An agency is allowed to eliminate alternatives, so long as it "explain[s] its reasoning." *Kempthorne*, 457 F.3d at 978. Said differently, courts "review an EIS's range of alternatives under the 'rule of reason.'" *City of Carmel-By-The-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997). Under the rule of reason, the FEIS "need not consider an infinite range of alternatives, only reasonable or feasible ones." *Westlands,* 376 F.3d at 868. In other words, "an agency is not required to consider 'remote and speculative' alternatives." *Id*. (citing *Vt. Yankee N*, 435 U.S. at 555). As discussed below, not only was the El Centro site more expensive, it also did not meet the purpose and need of the expanded Growler operations and was therefore properly eliminated from further consideration.

First, there is no merit to COER's suggestion that the Navy's consideration of the El Centro alternative fell short. The Navy provided a detailed rationale for its decision not to carry forward an evaluation of an El Centro alternative. In particular, the Navy explained that all Growlers could not be based at El Centro, and that "[a]ny alternative that divides or splits the unique Electronic Attack community into multiple sites does not meet the purpose and need of the Proposed Action. This is because any alternative that divided or split this relatively small tactical community would reduce the efficiency and effectiveness of this highly specialized community …." GRR_150304. The Navy also explained that "re-locating new aircraft at alternative locations would degrade the Growler community's overall effectiveness and does not meet the purpose of and need of the Proposed Action." GRR_150307. In contrast, siting all Growlers at Ault Field would improve operational synergy, GRR_150305, allow Growlers access to electronic attack frequencies due to minimal air traffic, *id*., and efficiently use existing infrastructure. GRR_150306-07; *see also* GRR_150307 ("[n]o installation exists that could absorb the entire Growler community without excessive cost and major new construction."). And "OLF Coupeville best replicates the carrier environment, thereby providing the highest quality of training available." GRR121560. For this reason, COER's contention that the Navy failed to engage in a "comparison of environmental impacts at the two sites" is misplaced.

Second, COER argues that refusing to consider an alternative based on "budgetary pressures" is improper. *See* COER Mot. at 7 (citing GRR_121559 ("Increasing budgetary pressures in the mid-2000s reduced the availability of resources (i.e., flying hours, travel funds, manpower and aircraft), causing a gradual drawdown of production detachments to NAF El

Centro and a steady increase in the percentage of FCLP conducted at Coupeville from approximately 2008 to 2013.")).

Contrary to COER's arguments, the Navy did not exclude El Centro simply based on "budgetary pressures;" rather as the Navy explained, in addition to the other reasons set forth above, cost concerns also rendered El Centro infeasible. GRR_150308 ("El Centro] is not a homebase for Fleet or training squadrons and, therefore, is not resourced to provide the necessary personnel, logistics and training support functions …. It is a Fleet training complex resourced to provide temporary training detachment support …. home basing aircraft at NAF El Centro would fundamentally change the nature of the facility and could cost over $800 million, which is cost prohibitive."); ("NAF El Centro is also classified as a Clean Air Act nonattainment area, and adding additional aircraft, along with major new construction, would aggravate that condition…").[17] For this reason as well, the Navy properly eliminated El Centro as a reasonable alternative.

III. The Navy Properly Addressed Greenhouse Gas Emissions.

COER's claim that the FEIS understates greenhouse gas emissions by underestimating, by as much as 50%, the amount of fuel issued to Growlers in the "baseline" scenario analyzed in the FEIS is incorrect. COER Mot. at 29 (citing GRR_159665, which notes use of 64,124,685.7 pounds of fuel annually in the baseline evaluation, and claiming Growlers used over 138 million

[17] Against this explanation, COER offers speculation about possible future Congressional appropriations. But a "party challenging a final environmental impact statement for failure to consider all alternatives must 'introduce specific, evidentiary facts in support of their contention that the final EIS improperly failed to consider reasonable and viable alternative[s].'" *Cabinet Res. Grp. v. U.S. Fish and Wildlife Serv.*, 465 F. Supp. 2d 1067, 1097 (D. Mont. 2006). COER fails to do so.

pounds of fuel in FY2016). As an initial matter, COER again improperly predicates its argument on a methodological disagreement with the Navy. *See Marsh*, 490 U.S. at 378. COER also attempts to bolster its argument by asserting that the Navy failed to adequately respond to its comment[s] on this issue. To the extent COER's arguments are based on the extra-record evidence, they should be dismissed for the reasons set out in the Federal Defendants' Opposition to COER's Motion to Admit Extra Record Evidence. ECF No. 91. Where COER bases its claims on the administrative record, those arguments are misplaced.

First, as it pertains to estimating aircraft emissions, the EPA's mobile source guidance recommends only including emissions that occur up to 3,000 feet above ground level (what is referred to as the "average mixing height"). *See* GRR_14684; GRR_14699; GRR_14868; *see also* GRR0014834 (describing mixing zone below that altitude). Specifically, the EPA recommends measuring aircraft landing and takeoff cycle ("***LTO***") emissions[18] up to 3,000 feet, which includes approach, taxi/idle (in and out), takeoff, and climb-out functions. GRR_14699; GRR_ 14834. This is because emissions above the average mixing height will not have a measurable impact on local air quality, which is the concern addressed in the FEIS. GRR_84108; GRR_84126. That approach is consistent with Navy guidance on reporting emissions. GRR_66733. And this is the approach the Navy used in the FEIS. GRR_150391; GRR_159662.

[18] The EPA explains that the "LTO cycle provides [the] basis for calculating aircraft emissions" because emissions at each power setting for each portion of the cycle can be used to estimate total emissions based on aircraft activity. GRR_14835; *see also* GRR_14836 (describing specific emission concerns at different parts of LTO cycle).

Using that guidance, the Navy based the emissions calculations in the FEIS on the number of flights. GRR_150772-792 (emissions analysis for each alternative).[19] For each of those flights, the Navy calculated the estimated amount of fuel used "for all parts of each operation including flight time and time on the ground" below 3,000 feet. GRR_150392 (emissions estimate "assumes power settings time-in-mode and fuel flow rates for all parts of each operation including flight time and time on the ground."); *see also* GRR_159662; GRR_159663 n.7 (noting use of EPA's guidance as to LTO cycle). In making this estimate, the Navy used power settings from the the F/A-18 Super Hornet's LTO cycle, GRR_84108, subject to necessary modifications based on verification with Growler pilots. GRR_125955.[20]

COER does not offer any specific criticism of this analysis—noting only that "it is not our burden" to articulate supposed discrepancies in the FEIS. COER's Mot. at 29 n.18. Of course, that assertion is incorrect. *Kleppe*, 427 U.S. at 412 ("to prevail [plaintiffs] must show that [the agency] ha[s] acted arbitrarily."). Nevertheless, the FEIS appropriately details the methodology relied on by the Navy, and that methodology is entitled to deference given "[c]ourts must be '…most deferential' when reviewing scientific judgments and technical analyses within the agency's expertise." *Lands Council*, 629 F.3d at 1074. Courts are not to "act as a panel of scientists, instructing the agency, choosing among scientific studies, and ordering

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[19] While an FCLP touch-and-go is counted as two operations for noise analysis purposes, the entire circuit is counted as one operation for emissions calculations. GRR_159664 n.2; GRR_159665 n.4.

[20] The Navy used power settings from the F/A-18 Super Hornet because that aircraft and Growlers are "essentially the same aircraft … with the same airframe and engine except [with the Growler carrying] [a] more advanced electronic system." GRR_125958; *see also* GRR_93879.

the agency to explain every possible scientific uncertainty." *Id*. at 988 (internal quotation marks and brackets omitted).

Second, and contrary to COER's claims, the FEIS appropriately responded to comments regarding fuel usage. In response to its draft EIS the Navy received 130 comments regarding greenhouse gas emissions, GRR_150234-35, and the EIS was modified in response. GRR_150285-86. In particular, the Navy responded to Dr. Greacen's comments as part of its explanation regarding the specific emissions methodology and assumptions used in the FEIS. GRR_154092-93; GRR_161364-65. The Navy noted that greenhouse gas emissions were "calculated using the most recently available data and methods from the [EPA] and Washington State Department of Ecology." GRR_161364. That response is sufficient. *Block*, 690 F.2d at 773 (an "agency's obligation to respond to public comment is limited. Not every comment need be published in the final EIS.").

IV. The Navy Fully Complied With Its Obligations Under the National Historic Preservation Act.

Plaintiffs also challenge the Navy's decision to increase Growler operations under the NHPA by claiming that the Navy: (1) failed to provide "a good reason" for rejecting some of the ACHP's recommendations; and (2) failed to properly justify or explain its selected Section 106 mitigation measures. In making these claims Plaintiffs assert that the SHPO's and ACHP's opinions "deserve great weight" and "merit special attention," and that the SHPO believed that the Navy's proposed mitigation was inadequate. These argument are not new. COER raised substantially similar arguments in its Motion for Preliminary Injunction. In denying that Motion this Court has already determined that the Navy's Section 106 analysis and decision complied

with the NHPA and the ACHP's guidelines related thereto. R&R, at 23; ECF No. 72. Plaintiffs provide no grounds for departing from this Court's well-reasoned decision.

As to Plaintiffs' first argument, Section 106 of the NHPA requires federal agencies to consider the potential effects of proposed actions on historic properties. 54 U.S.C. § 306108. Through its regulations, the ACHP has establish a three step process to be followed by Federal agencies in satisfying their responsibilities under Section 106: in consultation with various interested parties—including the SHPO—agencies must "[1] identify historic properties potentially affected by the undertaking, [2] assess [the relevant Federal undertaking's] effects and [3] seek ways to avoid, minimize or mitigate any adverse effects on historic properties." *See* 36 C.F.R. § 800.1(a). While the NHPA requires federal agencies to confer with the SHPO and seek and consider the ACHP's input as part of the § 106 process, the NHPA does not require a federal agency to adopt the SHPO's—or ACHP's—recommendations. *Wisconsin Heritages, Inc. v. Harris*, 490 F. Supp. 1334, 1341 (E.D. Wis. 1980) ("The agency is not bound to follow the dictates of the council but 'shall take (the [ACHP]'s) comments into account in reaching a final decision in regard to the proposed undertaking.'"), cited with approval by *Apache Survival Coal. v. United States*, 21 F.3d 895, 913 (9th Cir. 1994).

With respect to the first two steps, in its Section 106 Determination of Effect the Navy determined that increased Growler operations at OLF Coupeville would not cause damage to structural components of any properties within the area of potential effect, result in direct effects to historic properties, or indirectly effect the potential area as a whole or generally. GRR_138506; GRR_138511–14. The SHPO concurred with these findings. GRR_164597; GRR_167460. Nevertheless, the Navy and the SHPO also agreed that the proposed increase in

Growler operations could have an indirect adverse effect on the perceptual experience at the five specific POIs located around the Central Whidbey Island Historic District, including the Ebey's Landing National Historical Reserve (the "***Reserve***"), due to an increase in the frequency of jet noise exposure in these areas over short periods of time. GRR_138453; GRR_138494; GRR_138518–21; GRR_164597.

After completing the first two steps in the Section 106 process, the Navy turned to the third and final step in the process by seeking to avoid, minimize, or mitigate the identified indirect effect at the POIs. Given that the proposed increase in Growler operations would increase the frequency of noise exposure (rather than introduce a new type of noise or a higher single event noise level), the Navy began its consultation by proposing mitigation targeted towards the perceptual experience of the POIs. GRR_138521; GRR_138453–54. Among other mitigation, the Navy proposed installing informational kiosks or panels at various points throughout the Reserve. *Id.* These kiosks or panels would mitigate indirect effects to the perceptual experience by providing visitors a context for the change in perceived noise at affected viewscapes. *Id.*; GRR_165005–06. The Navy also proposed increased support to the Readiness and Environmental Protection Integration ("***REPI***") program and other encroachment management programs at NASWI focused on acquiring conservation easements. GRR_138521; GRR_138453–54; GRR_165005. An increase in these encroachment programs would, again, support the perceptual experience by curbing high-density development and preserving the historic and scenic integrity of cultural landscapes around Whidbey Island's Historic District. GRR_138499.

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150 M Street, N.E.
Washington, D.C. 20002

The consulting parties, including the SHPO and COER, were not receptive to the Navy's proposed mitigation. GRR_142101–02; GRR_164891–98; GRR_164965–67. Instead, the consulting parties sought broader mitigation divorced from the specific indirect effects on the POIs identified by the Navy and concurred with by the SHPO. For example, the State suggested that the Navy consider providing funds to rehabilitate and/or sound-proof historic homes or barns and provide funds for schools located on Whidbey Island. GRR_163118. Other potential mitigation suggested by consulting parties included proposals for Navy operational changes, reducing the number of FCLP operations at OLF Coupeville, foregoing flights on weekends and during school hours, moving all flights to Ault Field, constructing a parallel runway at Ault Field, and moving FCLP operations somewhere outside of NASWI entirely. GRR_164891–98; GRR_164933–164935; GRR_164965–67; GRR_165009–11.

In response to comments from the consulting parties, the Navy proposed additional mitigation aimed at addressing concerns raised in the consultation process, while still tying such mitigation to the identified effect and ensuring the Navy had legal authority to implement any suggested measures. *See, e.g.*, GRR_165067; GRR_165076; GRR_165288–304; GRR_165329–46; GRR_165377–82; GRR_165401–04. These additional measures included supporting attempts to obtain a Sentinel Landscape designation for a portion of the Reserve and providing the NPS with funds to preserve and protect the "Ferry House," one of the iconic historical buildings located within the Ebey's Prairie landscape (and one of the POIs). GRR_165330–33; *see also* GRR_165357. The preservation of this group of historic buildings would "enhance the landscape integrity of the Ebey's Prairie landscape," preserving or offsetting potential negative

U.S. Department of Justice
150 M Street, N.E.
Washington, D.C. 20002

effects to the perceptual qualities of the POIs. GRR_167461; *see also* GRR_165332. Ultimately, however, the parties were unable to agree on an appropriate mitigation plan.

The ACHP regulations anticipate that there may be instances—as in this case—where the agency and the other interested entities will not be able to reach an agreement. *See* 36 C.F.R. § 800.7. In situations where the consulting parties cannot agree, the agency may terminate consultation and request and receive comments directly from the ACHP. 36 C.F.R. § 800.7(a)(1).

> The agency must take these comments into account in reaching a final decision on the undertaking, see 36 C.F.R. § 800.7(c)(4), and the agency is required to document that it did so by explaining its decision and providing evidence that it considered the ACHP's comments. *See* 36 C.F.R. § 800.7(c)(4)(i); *see also Concerned Citizens*, 176 F.3d at 696 (stating that the "relevant agency must demonstrate that it has read and considered" the opinions and recommendations of the ACHP).

Friends of the Atglen-Susquehanna Trail, Inc. v. Surface Transp. Bd., 252 F.3d 246, 254 (3d Cir. 2001). As previously noted, "under the rule of reason, a lead agency does not have to follow [another agency's] comments slavishly—it just has to take them seriously." *Citizens Against Burlington, Inc. v. Busey*, 938 F.2d 190, 201 (D.C. Cir. 1991) (upholding FAA's discussion on increased noise impacts despite EPA's criticism).

On November 30, 2018, the Navy notified the ACHP that it was terminating further consultation and requested the Council's comments on the Navy's decision to expand Growler operations. GRR_164171. The ACHP provided its comments to the Navy on February 19, 2019. GRR_00167458. In its comments, the ACHP provided several recommendations, including development of an ongoing noise monitoring program, investigation into the benefits of seeking Sentinel Landscape designations for areas within the potentially affected area, and

continuing efforts to minimize future noise impacts through community engagement and advances in noise suppression technology. *See generally* GRR_00167458-65. The Navy carefully considered the ACHP's recommendations, and provided a detailed response to each. *See generally* GRR_00167574-78.

Ultimately, by way of Section 106 mitigation, the Navy agreed to provide $867,000 to the NPS to support the Ferry House preservation project and $20,000 for the design, construction, and installation of interpretive historical signs at appropriate locations. GRR_167576. These steps would help mitigate any indirect negative effects to the perceptual experience at the POIs by providing context for jet noise exposure and preserving deteriorating characteristics. Additionally, the Navy agreed to implement the ACHP's recommendations that "it seek partnership opportunities through the [REPI] program" and "collaborate with stakeholders to evaluate the benefits of designating historic landscapes within the [potentially affected area] as Sentinel Landscapes." GRR_167576. The Navy also noted its ongoing efforts to reduce noise impacts through "land use planning and management[] and noise abatement operational procedures," and committed to continue these efforts along with efforts to develop viable aircraft noise reducing technologies. GRR_167576–77. Where the Navy chose not to adopt the ACHP's recommendations, the Navy provided an appropriate response explaining the reasons why. *See generally* GRR_167574-78. As demonstrated in the record, the Navy took the consultation process and ACHP's comments seriously, adopted the mitigation suggested by the ACHP as appropriate, and adequately "explain[ed] which parts of this feedback the Navy was not incorporating and why." R&R, at 23. The Navy therefore provided good reason for its determination as to ACHP's recommendations.

Turning to Plaintiffs' second argument, Plaintiffs are incorrect that the Navy failed to explain how its chosen mitigation was rationally tailored to mitigate or avoid the identified adverse effects.[21] On this issue, the Navy need only articulate a "rational connection between the fact found and choices made," and a court should uphold a decision of even "less than ideal clarity if the agency's path may reasonably be discerned." *Motor Vehicle Mfrs. Ass'n, Inc. v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted). As demonstrated at length above and in the record, the Navy met these requirements. The Navy identified historic properties that could be affected by an increase in Growler training operations, identified potential effects (harm to the perceptual qualities of the POIs), and then undertook efforts to identify and implement a plan to mitigate the identified effects. The record therefore demonstrates a clear rational connection between the identified indirect effects, the Navy's mitigation efforts, and the resulting protection of, or improvement to, the potentially affected perceptual qualities of the historic areas surrounding NASWI. That is all that is required. *WildEarth Guardians v. Provencio*, 923 F.3d 655, 679 (9th Cir. 2019) (noting that '[e]ven if

[21] In making this argument, Plaintiffs rely on *Neighbors of Cuddy Mountain v. U.S. Forest Service*, 137 F.3d 1372 (9th Cir. 1998), a decision that considered whether mitigation discussed in an EIS was adequate for purposes of NEPA. *See* Wash. Mot. at 32. However, although NEPA and the NHPA are closely related, the obligations imposed by the two statutes are separate and independent. As such, this Court should look to the NHPA and the ACHP's regulations related thereto in deciding this issue. Nevertheless and to the extent this Court does consider *Cuddy Mountain* in the NHPA context, the Navy's Section 106 determination at issue here is a far cry from the "perfunctory" mitigation discussion contained in the EIS at issue in *Cuddy Mountain*. 137 F.3d at 1380–81. In contrast to the robust discussion of potential effects and mitigation measures contained in the administrative record in this case, the record in the *Cuddy Mountain* case suggested that the agency "did not even consider mitigating measures for the" areas it determined could be negatively impacted. *Id.* at 1381. And, in fact, the agency's own expert stated that the measures were "so general that it would be impossible to determine where, how, and when they would be used and how effective they would be." *Id*.

cultural resources might be harmed as a result of [a Federal undertaking], that fact alone does not indicate that the [agency] violated the NHPA" where the agency "satisfied its procedural obligations").

V. As COER Failed to Press its Claims Under the Endangered Species Act, the Court Should Grant Summary Judgment to Federal Defendants on this claim.

In its First Amended Complaint, COER alleges that the U.S. Fish and Wildlife Service's BiOp and incidental take statement ("***ITS***") are arbitrary and capricious in violation of the APA. *See* Am. Compl. ¶¶ 189-92, *Citizens of the Ebey's Reserve, et al*, No. 2:19-cv-1062 (D. W.D. Wash., October 11, 2019), ECF 16 (fifth claim). Similarly, COER alleges that the Navy's reliance on that ITS violates Section 9 of the ESA. *Id.* ¶¶ 193-94 (sixth claim). It is COER's burden to advance these claims. *Kleppe*, 427 at 412 (1976); *Clyde K. v. Puyallup Sch. Dist.,* 35 F.3d 1396, 1398 (9th Cir. 1994).

COER failed to address either of these claims in its motion for summary judgment, and has, accordingly, failed to carry its burden and waived its fifth and sixth claims for relief. *See Husyev v. Mukasey*, 528 F.3d 1172, 1183 (9th Cir. 2008); *Jenkins v. Cnty. of Riverside*, 398 F.3d 1093, 1095 n.4 (9th Cir. 2005). Even if COER had not waived these claims, however, they are moot as the challenged 2018 BiOp and ITS have been superseded by the 2020 BiOp and ITS. *See, e.g., All. for the Wild Rockies v. Savage*, 897 F.3d 1025, 1031-32 (9th Cir. 2018); *Am. Rivers v. NMFS*, 126 F.3d 1118, 1124 (9th Cir. 1997) ("[T]he biological opinion in the present case has been superseded by the 1995 Biological Opinion. Therefore, any challenge to the 1994–1998 Biological Opinion is moot."); *Grand Canyon Tr. v. Bureau of Reclamation*, 691 F.3d 1008, 1017 (9th Cir. 2012) (holding that the ESA claims related to Reclamation's reliance on prior

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BiOps and ITS were moot); *see also* Biological Opinion, Ref. No. 01EWFW00-2017-F-0826-R001. Federal Defendants are entitled to summary judgment on these claims.

CONCLUSION

For the foregoing reasons, the Court should grant the Federal Defendants' Motion for Summary Judgment and deny Plaintiffs' Motions for Summary Judgment.

Respectfully submitted this 11th day of May, 2021.

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CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2021, I served a copy of the foregoing on counsel of record electronically through the court's CM/ECF system.

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