BRICKLIN & NEWMAN LLP

lawyers working for the environment

Reply to: Seattle Office

April 8, 2025

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

Doug Burgum
Secretary
U.S. Department of the Interior
1849 C St. NW
Washington, DC 20240

Paul Souza
Exercising delegated authority of:
Director
U.S. Fish and Wildlife Service
1849 C St. NW
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Pete Hegseth
Secretary of Defense
1000 Defense Pentagon
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1000 Navy Pentagon, Room 4D652
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Performing duties of:
Assistant Secretary of the Navy
Energy, Installations and Environment
Office of the Secretary of the Navy
1000 Navy Pentagon, Room 4D652
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Capt. Nathan Gammache
Commanding Officer
Naval Air Station Whidbey Island
3730 North Charles Porter Avenue
Oak Harbor, Washington 98278-5000

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

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

This notice letter supplements the September 26, 2024 notice letter presented on behalf of Citizens of Ebey's Reserve (COER). That September 26, 2024 notice letter is attached and is incorporated by reference in this supplemental notice letter. We have also attached the agencies' November 22, 2024 responses to that September 26, 2024 notice letter (without the 2006 Arcata Office Guidance[1] that was attached to the November 22, 2024 USFWS Response Letter) and respond to them herein.

[1] USFWS Memorandum from Field Supervisor, Arcata Fish and Wildlife Office, Arcata, California, to Interested Parties. Subject: Revised Transmittal of Guidance: Estimating the Effects of

The purpose of this letter is to notify you of violations of the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531–1544. These violations relate to the Northwest Training and Testing (NWTT) Supplemental Environmental Impact Statement (NWTT SEIS) and the Environmental Impact Statement for EA-18G "Growler" Airfield Operations at Naval Air Station Whidbey Island (Growler EIS). The projects analyzed by the NWTT SEIS and Growler EIS are referred to herein collectively as the "Projects."

U.S. Fish and Wildlife Service (USFWS) issued a Biological Opinion (BiOp) and Incidental Take Statement (ITS) for the Growler EIS on June 14, 2018,[2] and a reinitiated BiOp and ITS for the Growler EIS on January 15, 2020.[3] The Growler incidental take statements authorized the incidental take of marbled murrelets only.

USFWS issued a BiOp and ITS for the NWTT Project on July 21, 2016[4] and a reinitiated BiOp and ITS for the NWTT Project on December 11, 2018.[5] A third BiOp and ITS was issued on June 30, 2021.[6] The NWTT incidental take statements authorized the incidental take of marbled murrelets, bull trout, and short-tailed albatross. We address only murrelets in the rest of this notice letter.

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Auditory and Visual Disturbance to Northern Spotted Owls and Marbled Murrelets in Northwestern California (Oct. 28, 2020).

[2] https://media.defense.gov/2019/Feb/04/2002085751/-1/-1/1/APPENDIX%20C%20FEDERAL%20AND%20STATE%20AGENCY%20COORDINATION.PDF.

[3] NAS Whidbey Island EA-18G Growler Airfield Operations Final BO 15Jan2020. According to the reinitiated BiOp: "On August 20, 2019, the Navy requested reinitiation of formal consultation, for the purposes of clarifying the surrogate used for the Incidental Take Statement and refining the analysis pertaining to the alternative implemented by the Navy's ROD." *Id*. at PDF 9/154. The prior analysis needed refining because: "The selected alternative differed from the proposed action analyzed in the 2018 biological opinion. In particular, the selected alternative included a larger number of interfacility flights." *Id*.

[4] https://nwtteis.com/portals/nwtteis/files/2015-2016/NWTT_Final_USFWS_Biological_Opinion_7-21-2016.pdf.

[5] https://nwtteis.com/portals/nwtteis/files/2015-2016/U.S._Fish_and_Wildlife_Service_Reinitiated_Biological_Opinion_for_NWTT_Activities_%28Dec_2018%29.*pdf*. Consultation was reinitiated after the Navy requested that USFWS "amend the Opinion to replace reasonable and prudent measures 2 and 3 with geographic restrictions on where the Navy would perform certain activities within their training and testing activities. On October 3, 2017, the Service replied to the Navy's July 18, 2017 letter and suggested that the Navy request reinitiation of formal consultation to allow the Service to incorporate and evaluate the proposed changes to the action. On December 10, 2017, the Service received a letter from the Navy requesting reinitiation of formal consultation citing the proposed changes to the action." *Id*. at PDF p. 7/30.

[6] https://nwtteis.com/portals/nwtteis/files/biological_opinion/NWTT_USFWS_Final_BiOp.pdf.

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

First, significant new information about murrelet impacts is available but has not been considered by the agencies. The new information reveals that sound disturbances at or above 20 to 25 decibels over the ambient noise level may harm marbled murrelets in a manner or to an extent not previously considered by the agencies. The agencies are correct that the 20 to 25 decibels over the ambient noise level threshold for taking marbled murrelets (*i.e.*, the "*Above-Existing Threshold*") described in the 2020 USFWS Arcata Office Guidance was previously described in a 2006 USFWS Arcata office guidance document (Memorandum Transmittal of Guidance: Estimating the Effects of Auditory and Visual Disturbance to Northern Spotted Owls and Marbled Murrelets in Northwestern California dated July 31, 2006). But simply because information *existed* prior to a consultation does not mean it was *considered* during the consultation. Reinitiation is focused on whether the information was considered. New information that "reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent *not previously considered*" under 50 C.F.R. § 402.16(a)(2) (emphasis supplied) triggers reinitiation.

Second, while not stated in its earlier consultation documents, the agencies' latest response to our request offers a new reason for not reinitiating, but this new rationale is fundamentally flawed. The agencies now assert that the Arcata guidance states that its Above-Existing threshold does not apply to military planes. But the Arcata guidance says no such thing. The agencies' refusal to reinitiate on this basis is terribly flawed, arbitrary, and capricious.

Finally, the agencies' consultations and the biological opinions and incidental take statements are arbitrary and capricious for three additional reasons not directly related to the Arcata guidance. One, the agencies ignored significant Growler impacts resulting from Growler noise exposures on marbled murrelets within the Growler EIS action area. Two, the agencies failed to fully account for and apply common reasoning in translating noise exposures into biological effects on marbled murrelets in the NWTT consultations. Three, the agencies ignored significant Growler impacts resulting from Growler noise exposures on marbled murrelets outside the Growler EIS action area.

If USFWS and the Navy do not reinitiate consultation and cure the unlawful defects in the biological opinions and incidental take statements within 60 days of receiving this letter, COER intends to initiate a lawsuit to remedy these violations.

In addition, the ongoing failure of USFWS and the Navy to reinitiate consultation and cure the unlawful defects in the biological opinions and incidental take statements renders the ITSs invalid such that they no longer provide a safe harbor to the Navy for the taking of threatened and endangered species. If the Navy, relying on the invalid ITSs, engages in activities that will result

in the taking of ESA-listed species, that taking is unlawful and in violation of Section 9 of the ESA. To the extent the Navy is taking ESA-listed species in the Project areas prior to the completion of reinitiated consultation and new ITSs, COER intends to file a lawsuit under Section 9 of the ESA, alleging an unlawful take of ESA-listed species.

The violations alleged above are described in more detail in COER's attached September 26, 2024 notice letter, which we restate and incorporate here by reference. Below, COER responds to the agencies' responses to that September 26, 2024 notice letter.

## I. THE "ABOVE-EXISTING THRESHOLD" FOR TAKING MARBLED MURRELETS IS NEW INFORMATION THAT HAS NOT PREVIOUSLY BEEN CONSIDERED BY THE AGENCIES.

New information is available that was not considered by the agencies during their consultations. The agencies should reinitiate the consultations to consider this previously ignored information.

In the agencies' responses to our re-initiation request, the agencies offer a rationalization for not considering the new information. According to the agencies, the new information is not relevant to very loud noise sources, like military aircraft. The agencies have misread the new information. The "above-existing threshold" in the Arcata guidance document applies to military aircraft. The agencies' reason for not considering the Arcata guidance was arbitrary and capricious. The USFWS and the Navy admit the Projects will take ESA-listed marbled murrelets. The "Above Existing" threshold for take described in the Arcata guidance shows that the Projects may affect (and indeed are affecting) marbled murrelets to an extent not previously considered by USFWS or the Navy. *See* 50 C.F.R. § 402.16(a)(2). The 2020 USFWS Arcata Office Guidance describes a threshold for harm to murrelets: "Project-generated sound exceeds ambient nesting conditions by 20-25 decibels." 2020 USFWS Arcata Office Guidance at PDF 2/116.[7] The agencies did not previously consider this 20–25 dB "*Above-Existing Threshold*" in the Growler or NWTT consultations. The "*Above-Existing Threshold*" (called the 'aversion threshold' in COER September 26, 2024 notice letter) is new information not previously considered by the agencies that "reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered." 50 C.F.R. § 402.16(a)(2). Re-initiation of consultation is required.

The agencies are correct that the 2020 USFWS Arcata Office Guidance provided revisions to the Arcata Office guidance provided 14 years earlier, which did include a threshold based on the magnitude of the change in noise levels. (Memorandum Transmittal of Guidance: Estimating the Effects of Auditory and Visual Disturbance to Northern Spotted Owls and Marbled Murrelets in Northwestern California dated July 31, 2006). But the agencies never considered that earlier "*Above-Existing Threshold*," either, when preparing their biological opinions, incidental take

[7] *Available at*: https://citizensofebeysreserve.com/wp-content/uploads/2022/06/MaMu-Noise-Thresholds-USFWS.pdf.

statements, and jeopardy determinations for the Projects. It is thus new information to the agencies, that "reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent *not previously considered*." 50 C.F.R. § 402.16(a)(2) (emphasis supplied). The agencies were required to re-initiate consultation to consider this new information.

## II. THE AGENCIES' DECISIONS WERE ARBITRARY AND CAPRICIOUS BECAUSE THE AGENCIES' REJECTED USE OF THE *ABOVE-EXISTING THRESHOLD* BASED ON A MISAPPLICATION OF THE ARCATA GUIDANCE.

To the extent the agencies considered Arcata's *Above-Existing Threshold*, their consideration of that threshold was based on clearly inaccurate application of the Arcata guidance. The agencies' *post hoc* explanation (in response to our first notice letter) was that the threshold does not apply to very loud military aircraft. As demonstrated below, that rationale is wrong and contradicted by the 2020 USFWS Arcata Office Guidance. Once the take of marbled murrelets caused by sound disturbances at or above 20 to 25 decibels over the ambient noise level due to Growler overflights is taken into account, "the amount or extent of taking specified in the incidental take statement is exceeded." 50 C.F.R. § 402.16(a)(1). Therefore, reinitiation is required, *Id.* The agencies' failure to do so is arbitrary and capricious.

In addition, by ignoring the Arcata guidance, the agencies arbitrarily and capriciously ignored best available science. "Under the ESA, the agency must base its actions on evidence supported by 'the best scientific and commercial data available.' 50 C.F.R. § 402.14(g)(8); 16 U.S.C. § 1536(a)(2)." *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 601–02 (9th Cir. 2014).

Moreover, "Because the Navy and USFWS did not fully account for all Growler exposures and consider those effects (including the effect of Growler noise increasing ambient sound levels by 20–25 decibels or more), 'it cannot be determined whether the proposed project will result in a violation of the ESA's substantive provisions and cause jeopardy' to ESA-listed marbled murrelets. *Hoopa Valley Tribe*, 230 F. Supp. 3d at1134–35." COER to Haaland, *et al*. (Sept. 26, 2024 notice letter) at 7–8 (attached).

The agencies' error is due to their conflating two separate topics discussed in the 2020 Arcata Office Guidance. One topic sets forth the analytical methods "used to estimate *the approximate distance* at which project-generated sound exceeds ambient conditions to such an extent that owls or murrelets may be subject to sound or visual disturbance," 2020 Arcata Office Guidance at 3. A separate topic is that document's threshold for take, *i.e.*, identifying absolute and relative noise levels "suggesting that the safety or survival of the individual is at significant risk," *id.* at 4. The first topic relates to estimating distances. The second relates to setting noise level thresholds for take, including the 20–25 dB increase over ambient noise threshold.

The 2020 Arcata Office Guidance includes a detailed analytic tool for the first topic: estimating the distance at which noise impacts will occur. *Id.* at 6 *et seq*. The guidance states that its proposed distance estimation analysis should not be used for military aircraft and other extreme noise

sources. Instead, for these extreme noise sources, the distance within which impacts are expected should be estimated "in a more detailed site-specific analysis." *Id.* at 11. But the report does not say or suggest that the second topic (the absolute and relative thresholds) does not apply to these extreme noise sources.

Yet in their responses, the agencies assert that the "*Above-Existing Threshold*" for take does not apply to aircraft emitting noise above 110 decibels:

> Additionally, both the original and 2020 Arcata Guidance documents expressly state that the sound disturbance threshold guidance does not address "activities producing sound levels greater than 110 decibels…, such as open-air blasting, aircraft, or impact pile driving…" and that those activities "…should be evaluated through a more detailed site-specific analysis" (USFWS 2006, p. 11; USFWS 2020, pp. 11-12). We expect Growler aircraft to generate sound exposure levels up to 119 dBSEL (at a reference pressure of 20µPa, measured 50 feet from the aircraft) at the 78 percent power setting, and many activities use higher power settings, which would be louder. In other words, by its terms, the 2020 Arcata Guidance does not account for, and should not be used to analyze, the effects of activities including Growler overflights on marbled murrelets in northern Puget Sound, Washington.

USFWS Resp. Ltr., (Nov. 22, 2024) at 2.

> After coordinating with USFWS, the Navy has determined that re-initiation of consultation is not required for either of the Biological Opinions and ITS. As an initial matter, the 2020 Arcata Guidance states that its analysis explicitly excludes sound levels exceeding 110 dB, which includes sources such as jet engines and military over flights. (2020 Arcata Guidance, p. 9.) Thus, the Navy activities covered by the Biological Opinions and ITS at issue are not addressed in the 2020 Arcata Guidance.

NASWI Resp. Ltr. (Nov. 22, 2024) at 1.

This is a clear and hugely consequential error. The error led the agencies to conclude that the relative "*Above-Existing"* threshold standard (20/25 dB above ambient) does not apply to military aircraft when, in fact, there is nothing in the document to support that conclusion.

The Navy also is incorrect in stating that the 2020 Arcata Office Guidance does not apply "to intermittent noise events such as military aircraft operations." NASWI Response Letter (Nov. 22, 2024) at 2. The 2020 Arcata Office Guidance clearly applies to intermittent noise events:

> **Point Sources**
>
> Point sources are those where sound emanates from a single or localized point, such as stationary motors, a loudspeaker, hand tool, or human voice. Sound emanating from a point source attenuates in a circular (spherical in 3-dimensional space) fashion. A characteristic of point source sound measurement is that the duration of the measure is relatively short in relation to the rate of movement of the source. For example, if the duration of measure of sound of a slowly moving car were of less than one second, this *single* car would be a point source. Conversely, if the duration of measure of sound of that same car were several minutes (such as Leq,15 minutes), this would be recorded as a line source. Finally, a speeding vehicle might be considered a line source even if the duration of sound measure is quite short (such as Leq,10, 5 seconds).
>
> **Line Sources**
>
> Line sources are those where sound emanates from a linear source, such as relatively constant highway traffic, or a flowing stream. Sound attenuates at a lesser rate from a line source than from a point source of similar volume, because it attenuates in a linear (cylindrical in 3-dimensional space) fashion perpendicular to the line source. As with the example above, if the duration of measure of sound of the speeding car were of several seconds or more, the single car would be a line source. Multiple cars moving in close proximity will always be considered a line source. When considering sound sources such as automobiles, it is often best to consider them as line sources, except in unusual circumstances where vehicles are so intermittent as to not travel in close proximity, the sound measure is of very short duration, and the vehicle is traveling relatively slowly.

2020 Arcata Office Guidance at 34 (underlined emphasis supplied). The 2020 Arcata Office Guidance is replete with examples of intermittent noise to which the 20–25 dB "*Above-Existing"* threshold for take applies, including but not limited to a motorcycle on a trail, yelling, truck horns, large trees falling, jake brakes on trucks, helicopters, blasting, and jet overflights. 2020 Arcata Office Guidance at 13–15 (Table 2).

## III. THE AGENCIES' DECISIONS WERE ARBITRARY AND CAPRICIOUS FOR REASONS INDEPENDENT OF THE ARCATA GUIDANCE.

### A. The Agencies Ignored Significant Impacts within the Growler Action Area.

The 2020 Growler BiOp explained that the only way it could evaluate impacts of Growler noise on marbled murrelets was through use of a surrogate, which they identified as the number of exposures to noise over a disturbance (harassment) level. USFWS identified Growler noise of 92 decibels as the surrogate harassment threshold and further explained that it only considered Growler noise harassment impacts within the action area.

As defined in the BiOp, the outer boundary of the action area is where noise from a Growler is not noticeable above a presumed normal background noise level of 65 decibels.[8] Therefore, murrelets within the action area exposed to 91 decibel or less overflights were not tallied under the 92 decibel threshold, but many should have been tallied under the "*Above-Existing"* aversion threshold if their background noise level was 71 decibels or less (71 + 20 decibels = 91 decibels).

At Growler noise levels of 92 decibels or more, both the "*Above-Existing"* aversion and absolute thresholds would be simultaneously triggered. Those exposures were tallied in the BiOp under the 92-decibel threshold, but "*Above-Existing"* aversion threshold exposures less than 92 decibels were ignored. The Growler consultations arbitrarily and capriciously failed to fully enumerate all disturbance-level Growler noise exposures in the action area.[9]

### B. The Agencies Inaccurately Characterized the Biological Effects Associated with the Increased Noise.

USFWS mischaracterized the biological effects associated with the predicted increased noise. It is undisputed that Washington's Zone 1 and 2 endangered marbled murrelets are in a prolonged steep decline, even while the population in Oregon and northern California is stable or increasing. The Service did address the impacts of the exposures they incompletely tallied within the action area and actually elaborated on a long list of detrimental effects on breeding, feeding, and sheltering, all anchored in best available science. Yet, strangely, USFWS concluded the Navy actions would not put the species in jeopardy, when clearly all the best available science pointed towards impact risks and jeopardy for the species. The Service even opined that its tally of Growler noise exposures (incomplete as it is) could contribute to and hasten the rate of decline and ultimately,

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[8] The NWTT consult did not specifically consider Growler noise. The NASWI consult was limited to the area depicted at 2020 USFWS Growler BiOp PDF page 17/154, Figure 2.

[9] The NWTT analysis was based on surrogates for military-generated noise. The surrogates were grouped into various stressor categories: sonar, detonations, helicopter rotor wash, and various calibers of non-explosive projectiles. None of those surrogates are like the noise from Growler overflights. Moreover, even if one of these surrogates is like Growler noise, there is insufficient analysis in the NWTT consult regarding the amount of the surrogate noise that would be equivalent to the amount of noise impacting murrelets from a Growler overflight.

the murrelet's extirpation.[10] To the extent that there is any uncertainty as to what constitutes the best available scientific information, Congress intended "to give the benefit of the doubt to the species." *Conner v. Burford*, 848 F.2d 1441, 1454 (9th Cir. 1988). Failure to provide any substantive science or information to support its conclusion, in the face of strong opposing information, makes USFWS's no-jeopardy conclusion in the Growler BiOp arbitrary and capricious.

### C. The Agencies ignored significant Growler impacts outside the Growler action area.

Neither the Growler nor NWTT biological consultations considered Growler noise impacts outside the Growler action area, which limited the impacts consideration to the area around Whidbey Island. In that area, Growler noise is expected to dissipate and merge with an arbitrary ambient noise level of 65 decibels.[11] But it is undisputed that Growlers fly outside the Growler action area with potential impacts on Washington's declining population of marbled murrelets resident beyond the arbitrary action area. The Growlers operating over the Olympic MOA are loud enough to harass murrelets, and it is likely that the altitude and power settings for Growlers operating elsewhere outside the Growler action area cause noise loud enough to harass Washington's nestling, subadult, and adult marbled murrelets.

The NWTT consultations noted 92 dB as a harassment threshold. The 2016 NWTT BiOp states that, in the Olympic MOA, that threshold would be exceeded at least 55 hours each year.[12] While the number of hours is significant, USFWS's surrogate to assess Growler noise impacts is the number of murrelet exposures to over-threshold noise. Hours of exposure in the NWTT BiOp does not inform as to the number of exposures and cannot be added to the number of exposures in the Growler BiOp to provide a single, useful metric (total number of murrelets exposed to over-

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[10] "Throughout the listed range, all estimates of productivity indicate that reproductive rates are too low to support sustained population stability. Therefore, the DPS is not likely to recover, and the chances of long-term survival appear low, unless productivity can be increased." U.S. Fish and Wildlife Service Biological Opinion for NWTT Activities, 2021, at 88. "Because low recruitment [*i.e.,* of young birds into the population] is thought to be the major limiting factor for marbled murrelet populations (USFWS 2012b, p. 10), decreases in the already low reproductive rates in Conservation Zones 1 and 2 may contribute to some degree to further decline of the populations." 2020 USFWS Growler BiOp at PDF page 114/154.

[11] Growlers operating out of NASWI create noise above the harassment thresholds throughout the Olympic MOA, affecting Washington's two marbled murrelet subpopulations (Zones 1 and 2) there as much or more than within the arbitrary action area. It is disingenuous for the Navy and USFWS to consider the action (Growler noise) impacts on just a portion of the Washington population and ignore the impacts on murrelets elsewhere. The action area should have included all areas where Growler noise is capable of harassing murrelets.

[12] U.S. Fish and Wildlife Service Biological Opinion for NWTT Activities, 2016, at 212 ("aircraft training flights in the Olympic MOAs will expose marbled murrelet nesting habitat to noise exceeding the 92 dBA SEL disturbance threshold 55.5 hours each year") and 213 (Table 45).

threshold Growler noise) by which to analyze jeopardy to Washington's Zone 1 and 2 murrelets. To provide a reasoned jeopardy analysis based on an impact surrogate, all exposures must conform to the surrogate and be uniformly tallied and considered; the Services' failure to do that makes its BiOps arbitrary and capricious.

In addition, the NWTT consultations failed to enumerate any exposures that exceeded the 20-decibel "*Above-Existing"* aversion threshold. Failure of the consultations to enumerate and assess both the absolute 92-decibel and the 20-decibel aversion thresholds makes its BiOps arbitrary and capricious.

## IV. UNLAWFUL TAKING OF ESA-LISTED SPECIES

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

When the duty to reinitiate consultation is triggered, the prior Biological Opinion and ITS are rendered invalid and provide no safe harbor for the taking of listed species. As it has already been determined that the Projects will result in the taking of marbled murrelets, the Projects cannot go forward unless and until the Navy and USFWS comply with substantive duty to "'insure that any action authorized, funded or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification' of critical habitat of such species. 16 U.S.C. § 1536(a)(2)." *Envtl. Prot. Info. Ctr. v. Simpson Timber Co.*, 255 F.3d 1073, 1078–79 (9th Cir. 2001).

The Navy is already acting "on the ground" in ways that harm (*i.e.,* take) listed species. USFWS has already determined that the Projects will result in a taking of listed species. The ITSs providing the Navy with a safe harbor from liability for the take are invalid. Therefore, the Navy is unlawfully taking listed species in violation of Section 9 of the ESA.

## V. CONCLUSION

COER anticipates that during the 60-day period when the Navy and USFWS consider this supplemental notice, and before COER chooses whether to file suit, that the Navy and USFWS

may wish to meet and confer with COER as to the violations of the ESA alleged in this notice. COER welcomes such an engagement. Please feel free to contact Bricklin & Newman, LLP, if the Navy and/or USFWS are interested in meeting, or if you have any questions or concerns about this notice of intent to sue. Thank you for your attention to this important matter. If you would like to discuss this matter, please feel free to contact us at the phone number listed above, or at the following email addresses: bricklin@bnd-law.com and griefen@bnd-law.com.

Very truly yours,

BRICKLIN & NEWMAN, LLP

David A. Bricklin

Zachary K. Griefen

*Attorneys for Citizens of Ebey's Reserve*

cc: Client

Attachments: COER notice letter to agencies (Sept. 26, 2024)
USFWS Response Letter (Nov. 22, 2024) (without attachment)
NASWI Response Letter (Nov. 22, 2024)

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

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

This letter is presented on behalf of Citizens of Ebey's Reserve (COER). The purpose of this letter is to notify you of violations of the Endangered Species Act ("ESA"), 16 U.S.C. §§ 1531–1544. These violations result from your failure to reinitiate formal consultation on marbled murrelets under Section 7 of the ESA with respect to the Northwest Training and Testing (NWTT)

Supplemental Environmental Impact Statement (NWTT SEIS) and the Environmental Impact Statement for EA-18G "Growler" Airfield Operations at Naval Air Station Whidbey Island (Growler EIS) in light of new information. These violations also result from your arbitrary and capricious failures to consider all Growler aircraft noise exposures in both the NWTT and Growler consultations and assess those noise exposures and resulting biological impacts in the jeopardy determinations. The projects analyzed by the NWTT SEIS and Growler EIS are referred to herein collectively as the "Projects."

U.S. Fish and Wildlife Service (USFWS) issued a Biological Opinion (BiOp) and Incidental Take Statement (ITS) for the Growler EIS on June 14, 2018,[1] and a reinitiated BiOp and ITS for the Growler EIS on January 15, 2020.[2] The Growler incidental take statements authorized the incidental take of marbled murrelets only.

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Notwithstanding the prior Section 7 consultation on the effects of the Project, it is clear that USFWS and the Navy are currently violating the ESA by failing to reinitiate their consultations. Pursuant to 50 C.F.R. § 402.16, the agencies have a duty to reinitiate consultation when "new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered." 50 C.F.R. § 402.16(a)(2). The duty to reinitiate Section 7 consultation in these circumstances falls on both the consulting agency (FWS) and the action

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[1] https://media.defense.gov/2019/Feb/04/2002085751/-1/-1/1/APPENDIX%20C%20FEDERAL%20AND%20STATE%20AGENCY%20COORDINATION.PDF

[2] NAS Whidbey Island EA-18G Growler Airfield Operations Final BO 15Jan2020. According to the reinitiated BiOp: "On August 20, 2019, the Navy requested reinitiation of formal consultation, for the purposes of clarifying the surrogate used for the Incidental Take Statement and refining the analysis pertaining to the alternative implemented by the Navy's ROD." *Id*. at PDF p. 9/154. The prior analysis needed refining because: "The selected alternative differed from the proposed action analyzed in the 2018 biological opinion. In particular, the selected alternative included a larger number of interfacility flights." *Id*.

[3] https://nwtteis.com/portals/nwtteis/files/2015-2016/NWTT_Final_USFWS_Biological_Opinion_7-21-2016.pdf

[4] https://nwtteis.com/portals/nwtteis/files/2015-2016/U.S._Fish_and_Wildlife_Service_Reinitiated_Biological_Opinion_for_NWTT_Activities_%28Dec_2018%29.pdf. Consultation was reinitiated after the Navy requested that USFWS "amend the Opinion to replace reasonable and prudent measures 2 and 3 with geographic restrictions on where the Navy would perform certain activities within their training and testing activities. On October 3, 2017, the Service replied to the Navy's July 18, 2017 letter and suggested that the Navy request reinitiation of formal consultation to allow the Service to incorporate and evaluate the proposed changes to the action. On December 10, 2017, the Service received a letter from the Navy requesting reinitiation of formal consultation citing the proposed changes to the action." *Id*. at PDF p. 7/30.

[5] https://nwtteis.com/portals/nwtteis/files/biological_opinion/NWTT_USFWS_Final_BiOp.pdf

agency (the Navy). *See, e.g., Salmon Spawning & Recovery All. v. Gutierrez*, 545 F.3d 1220, 1229 (9th Cir. 2008) (duty to reinitiate consultation lies with both the action agency and the consulting agency).

Here, the duty to reinitiate Section 7 consultation is primarily triggered by new information revealing that sound disturbances at or above 20 to 25 decibels over the ambient noise level may harm marbled murrelets in a manner or to an extent not previously considered by the agencies.

The Agencies' consultations and the biological opinions and incidental take statements that were produced from those consultations are arbitrary and capricious for two reasons. One, the Agencies arbitrarily and capriciously ignored significant Growler impacts resulting from Growler noise exposures on marbled murrelets within and outside the Growler EIS action area. Two, the Agencies arbitrarily and capriciously failed to fully account for and apply common reason in translating noise exposures into biological effects on marbled murrelets in the NWTT consultations.

If USFWS and the Navy do not reinitiate consultation and cure the unlawful defects in the biological opinions and incidental take statements within 60 days of receiving this letter, COER intends to initiate a lawsuit to remedy these violations.

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

The violations alleged above are described in more detail below.

**A. New Information Reveals that Sound Disturbances At or Above 20 to 25 Decibels Over the Ambient Noise Level May Affect Marbled Murrelets in a Manner or to an Extent Not Previously Considered by the Agencies.**

The Projects—which the USFWS and the Navy admit will take ESA-listed marbled murrelets—may affect (and indeed is affecting) marbled murrelets to an extent not previously considered by USFWS or the Navy. *See* 50 C.F.R. § 402.16(a)(2). The 2020 USFWS Arcata Office Guidance describes a new threshold for harm to murrelets: "Project-generated sound exceeds ambient nesting conditions by 20-25 decibels." October 28, 2020 USFWS Memorandum from Field Supervisor, Arcata Fish and Wildlife Office, Arcata, California, to Interested Parties. Subject: Revised Transmittal of Guidance: Estimating the Effects of Auditory and Visual Disturbance to Northern Spotted Owls and Marbled Murrelets in Northwestern California ("2020 USFWS Arcata

Office Guidance") at PDF 2/116.[6] The agencies did not consider this 20–25 dB 'aversion threshold' in the Growler or NWTT consultations. The 'aversion threshold' is new information that "reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered" under 50 C.F.R. § 402.16(a)(2), requiring re-initiation of consultation.

Reinitiation of the Section 7 consultations is, therefore, required. The Projects cannot legally go forward without new biological opinions that consider this new information.

The USFWS has published new information regarding the thresholds for noise impacts to spotted owls and marbled murrelets. The prior guidance focused exclusively on the absolute noise levels, which recognizes 92 decibels and above for aircraft noise as the harm threshold. The new guidance reveals that action-generated sound below the prior absolute (92 decibel) threshold may nonetheless take and harm marbled murrelets wherever the sound is a significant increase over background ambient levels. The new guidance adds a second taking trigger—an 'aversion threshold'—focused on the degree of the increase, irrespective of the absolute magnitude:

The 2020 USFWS Arcata Office Guidance further elucidates:

> We conclude murrelets may be harmed from project-generated sound disturbance under one or both of two conditions:
>
> > 1. *Tolerance Threshold*: species may be harmed at or above an absolute limit of sound in its habitat. This upper sound limit was set as 82 decibels (92 for aircraft), which includes the action-generated and all existing sound sources;
> > 2. *Above-Existing Threshold*: the species may react to elevated sounds in relation to all existing sound sources. We determined this elevated decibel difference to be a 25 decibel difference between all existing noise (i.e., natural background ambient, line and point sound sources) and only the action-generated sound.

2020 USFWS Arcata Office Guidance at PDF 18/116.[7]

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[6] *Available at*: https://citizensofebeysreserve.com/wp-content/uploads/2022/06/MaMu-Noise-Thresholds-USFWS.pdf.

[7] Elsewhere in the 2020 USFWS Arcata Office Guidance, the absolute tolerance threshold for aircraft is said to be 90 decibels and the aversion threshold is said to be action-generated noise 20–25 decibels above existing levels. 2020 USFWS Arcata Office Guidance at PDF 2, 4/116. This discrepancy (25 rather than 20-25 decibels) is not explained.

The 2020 USFWS Arcata Office Guidance provided revisions to the guidance provided 14 years earlier, which did not include a threshold based on the magnitude of the change in noise levels. (Memorandum Transmittal of Guidance: Estimating the Effects of Auditory and Visual Disturbance to Northern Spotted Owls and Marbled Murrelets in Northwestern California dated July 31, 2006).

The 2020 USFWS Arcata Office Guidance goes on to explain, "Based on published avian studies in Table 1, we expect murrelets to have significant behavioral responses when project-generated sound exceed ambient nesting conditions by 20-25 dB based on differences between the recorded minimum ambient decibel levels." (2020 USFWS Arcata Office Guidance Appendix A, page 12) The 2020 USFWS Arcata Office Guidance summarizes how those responses become harms:

> For purposes of this guidance, we assume disturbance to the level of harm may occur when owls or murrelets demonstrate behavior suggesting that the safety or survival of the individual is at significant risk, or that a reproductive effort is potentially lost or compromised. Examples of this behavior include, but are not limited to:
>
> • An adult or juvenile is flushed from a nest during the incubation, brooding, or fledging period, that potentially results in egg failure or reduced juvenile survival.
>
> • An adult abandons a feeding attempt of a dependent juvenile, which potentially results in malnutrition or starvation of the young.
>
> • An adult delays feeding attempts of dependent birds on multiple occasions during the breeding season, potentially reducing the growth or likelihood of survival of young.
>
> ...We interpret the best available published data on owls, murrelets and appropriate surrogate species as indicating that the above behaviors may manifest when: (a) the action-generated sound level substantially exceeds (i.e., by 20-25 dB or more as experienced by the animal) ambient conditions existing prior to the project [aversion threshold]; (b) when the total sound level, including the combined existing ambient and action-generated sound, is very high (i.e., exceeds 90 dB, as experienced by the animal) [tolerance threshold]...

2020 USFWS Arcata Office Guidance at PDF 4/116.

The Growler BiOp assumed 65 decibels represented busy "industrialized marine shorelines" in the northern Puget Sound area, based on ambient sound levels at Naval Base Kitsap (Bangor, Washington). That location is outside the action area and does not typify un-industrialized near shore areas that abound in Washington's inland marine and offshore waters. Nor is it applicable to murrelet breeding and nesting areas, which typically occur in isolated, undisturbed areas. The

Arcata Guidance notes that the typical natural sound level in "species habitat for isolated sites" is 35 to 45 decibels (*see* Scenarios 1-10, pages 20–27). Several independent noise research studies in the Olympic National Park and a National Park Service noise study of Ebey's Landing Historic Preserve found similar ambient levels.[8] It follows that Growler overflight noise at 55 to 65 decibels on the ground or water would exceed the aversion threshold. Even for the limited noisier areas that have an ambient level of 65 decibels, an overflight producing 85 decibels on the ground or water would exceed the aversion threshold. None of these exposures to aversion-level noise were accounted for in the consultations.

The 2020 USFWS Arcata Office Guidance states that it applies to a limited geographic area: "This guidance applies to activities occurring within the jurisdictional area of the Arcata Fish and Wildlife Office: Humboldt, Del Norte, and Trinity counties; western Siskiyou County; and Mendocino County; exclusive of the Russian River watershed."[9] There does not appear to be any biological reason why the guidance would not be applicable in other areas, such as in the forests of the Olympic Peninsula, nor does the Service offer any.

The guidance recommends using $L_{max}$ (instantaneous) or $L_{10}$ (10-second peak) sound level measurements, in keeping with the purpose of the guidance "to estimate the effect of near-peak sounds on wildlife[.]" The guidance specifically recommends against using sound level measurements that average sound levels ($L_{eq}$ or $L_{dn}$) over a period greater than 10 seconds.[10] In the USFWS BiOps for Growler impacts to murrelets, USFWS used sound exposure level ("SEL"), which measures the total sound energy of an overflight event (*i.e.*, time when noise begins until it ends): "The Service's disturbance threshold is in terms of Sound Exposure Level, which measures the total sound energy of an event, and longer-duration sounds can result in higher Sound Exposure Level (SELs). We refer to SL at 92 dBASEL or louder as 'disturbance-level' sounds." BiOp20 at PDF 45/154.

Table 1 of the guidance provides estimated distances within which murrelets will be disturbed by over-ambient sound levels. The higher the decibels, the farther from that noise source the birds can be and still be disturbed. For "extreme" (101–110 dB) sound levels in an existing "natural ambient" (≤50 dB) soundscape, the disturbance distance is 1,320 feet. But the guidance does not attempt to

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8 https://www.citizensofebeysreserve.com/Files/JGL-Noise-Study-2016-and-Letter.pdf (Appendix C, Table 10, page 26).

9 *Id*.

10 *Id*. at 55/116 ("Note: It is important that all measures for sound level entered into this model use a similar measurement standard. For purposes of this model (to estimate the effect of near-peak *sounds* on wildlife), use of $L_{10}$ measured over a period of less than 10 seconds or a similar measure such as Lmax is recommended. Use of mixed measurements, such as mixing $L_{10}$ and $L_{max}$ or $L_{eq}$, in the same model may yield unpredictable and often erroneous results. Use of measures such as $L_{eq}$ or $L_{dn}$ are specifically recommended against, as they provide a more general averaged sound level useful for determining noise disturbance, and may be less applicable to wildlife species. Mixed usage of $L_{10}$ and $L_{max}$ may be compatible when measured over very short time periods, as $L_{10}$ measures are often with 3 dB of $L_{max}$ under these circumstances.").

quantify a distance for jet engines and military overflights. These events are literally "off the chart."[11]

Moreover, the disturbance distance must be increased by one category for noises occurring within two hours of sunrise or sunset. The guidance states:

> It is known that murrelet flights into nests to feed nestlings and for nest-tending exchanges are concentrated around dawn and dusk (Nelson and Hamer 1995), during the period when ambient noise levels tend to be lower than average daytime levels (EPA 1974). Therefore, for murrelets, the disturbance threshold distances provided in Table 1 apply to noise-generating activities occurring during the midday period, when the risk of disturbance is lower. Specifically, for murrelets, the disturbance distances in Table 1 apply to noise-generating activities that are not within 2 hours of sunrise or sunset. If proposed activities will occur within 2 hours of sunrise or sunset, and if the ambient sound environment during the dawn and dusk period can reasonably be expected to be 5 dB or more quieter than the midday sound environment, then the estimated disturbance distance threshold should be calculated based on an ambient level 10 dB lower (i.e., one row up in the table) compared to the normal ambient rating in Table 1.[12]

None of the information above was considered by the Navy or USFWS with regard to the project biological consultations.

The triggering of a duty to reinitiate consultation under 50 C.F.R. § 402.16(a)(2) renders the NWTT SEIS and Growler EIS BiOps and ITSs no longer valid, halting the Projects until new BiOps are issued.[13] Because the Navy and USFWS did not fully account for all Growler exposures and consider those effects (including the effect of Growler noise increasing ambient sound levels by 20–25 decibels or more), "it cannot be determined whether the proposed project will result in a

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[11] *Id*. at 9/116.

[12] *Id*. at 7/116.

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

violation of the ESA's substantive provisions and cause jeopardy" to ESA-listed marbled murrelets. *Hoopa Valley Tribe*, 230 F. Supp. 3d at1134–35. Reinitiation is required.

**B. The Agencies arbitrarily and capriciously ignored significant Growler impacts within the Growler action area.**

The 2020 Growler BiOp explained that the only way it could evaluate impacts of Growler noise on marbled murrelets was through use of a surrogate, which they identified as the number of exposures to noise over a disturbance (harassment) level. USFWS identified Growler noise of 92 decibels as the surrogate harassment threshold and further explained that it only considered Growler noise harassment impacts within the action area.

As defined in the BiOP, the outer boundary of the action area is where noise from a Growler is not noticeable above a presumed normal background noise level of 65 decibels.[14] Therefore, murrelets within the action area exposed to 91-decibel or less overflights were not tallied under the 92 decibel threshold, but many should have been tallied under the aversion threshold if their background noise level was 71 decibels or less (71 + 20 decibels = 91 decibels).

At Growler noise levels of 92 decibels or more, both the aversion and absolute thresholds would be simultaneously triggered. Those exposures were tallied in the BiOp under the 92-decibel threshold, but the more peripheral aversion threshold exposures less than 92 decibels were ignored. The Growler consultations arbitrarily and capriciously failed to fully enumerate all disturbance-level Growler noise exposures in the action area.[15]

In addition, for the Growler noise exposures they did enumerate, USFWS stumbled in their consideration of the biological effects on the species. It is undisputed that Washington's (Zone 1 and 2) endangered marbled murrelets are in a prolonged steep decline while the population in Oregon and northern California is stable or increasing. The Service did address the impacts of the exposures they incompletely tallied within the action area and actually elaborated on a long list of detrimental effects on breeding, feeding, and sheltering, all anchored in best available science. Yet, strangely, USFWS concluded the Navy actions would not put the species in jeopardy, when clearly all the best available science pointed towards impact risks and jeopardy for the species. The Service even opined that their tally of Growler noise exposures (incomplete as it is) could contribute to and hasten the rate of decline and ultimately, the murrelet's extirpation.[16] To the extent that there

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[14] The NWTT consult did not specifically consider Growler noise. The NASWI consult was limited to the area depicted at 2020 USFWS Growler BiOp PDF page 17/154, Figure 2.

[15] The NWTT analysis was based on surrogates for military-generated noise. The surrogates were grouped into various stressor categories: sonar, detonations, helicopter rotor wash, and various calibers of non-explosive projectiles. None of those surrogates are like the noise from Growler overflights. Moreover, even if one of these surrogates is like Growler noise, there is insufficient analysis in the NWTT consult regarding the amount of the surrogate noise that would be equivalent to the amount of noise impacting murrelets from a Growler overflight.

[16] "Throughout the listed range, all estimates of productivity indicate that reproductive rates are too low to support sustained population stability. Therefore, the DPS is not likely to recover, and the chances of long-

is any uncertainty as to what constitutes the best available scientific information, Congress intended "to give the benefit of the doubt to the species." *Conner v. Burford*, 848 F.2d 1441, 1454 (9th Cir. 1988). Failure to provide any substantive science or information to support their conclusion, in the face of strong opposing information, makes USFWS's no-jeopardy conclusion in the Growler BiOp arbitrary and capricious.

### C. The Agencies arbitrarily and capriciously ignored significant Growler impacts outside the Growler action area.

Neither the Growler nor NWTT biological consultations considered Growler noise impacts outside the Growler action area, which limited the impacts consideration to the area around Whidbey Island where Growler noise is expected to dissipate and merge with an arbitrary ambient noise level of 65 decibels.[17] It is undisputed that Growlers fly outside the Growler action area with potential impacts on Washington's declining population of marbled murrelets resident both within and beyond the arbitrary action area. Upon information and belief, the altitude and power settings for Growlers operating outside the action area result in noise loud enough to harass Washington's nestling, subadult, and adult marbled murrelets.

The NWTT consultations noted 92 dB as a harassment threshold. The 2016 NWTT BiOp states that, in the Olympic MOA, that threshold would be exceeded for at least 55 hours each year.[18] While the number of hours is significant, USFWS's surrogate to assess Growler noise impacts is the number of murrelet exposures to over-threshold noise. Hours of exposure in the NWTT BiOp does not inform as to the number of exposures and cannot be added to the number of exposures in the Growler BiOp to provide a single, useful metric (total number of Growler noise exposures) by which to analyze jeopardy to Washington's Zone 1 and 2 murrelets. To provide a reasoned jeopardy analysis based on an impact surrogate, all exposures must conform to the surrogate and be uniformly tallied and considered; the Services' failure to do that makes its BiOps arbitrary and capricious.

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term survival appear low, unless productivity can be increased." U.S. Fish and Wildlife Service Biological Opinion for NWTT Activities, 2021, at 88. "Because low recruitment [i.e., of young into the population] is thought to be the major limiting factor for marbled murrelet populations (USFWS 2012b, p. 10), decreases in the already low reproductive rates in Conservation Zones 1 and 2 may contribute to some degree to further decline of the populations." 2020 USFWS Growler BiOp PDF page 114/154.

[17] Growlers operating out of NASWI create noise above the harassment thresholds throughout the Olympic MOA affecting Washington's two marbled murrelet subpopulations (Zones 1 and 2) there as much or more than within the arbitrary action area. It is disingenuous for the Navy and USFWS, to consider the action (Growler noise) impacts on just a portion of the Washington population and side-step the surrogate exposure count elsewhere. The action area should have included all areas where Growler noise is capable of harassing murrelets.

[18] U.S. Fish and Wildlife Service Biological Opinion for NWTT Activities, 2016, at 212 ("aircraft training flights in the Olympic MOAs will expose marbled murrelet nesting habitat to noise exceeding the 92 dBA SEL disturbance threshold 55.5 hours each year") and 213 (Table 45).

In addition, the NWTT consultations failed to enumerate any exposures that exceeded the 20-decibel aversion threshold. Failure of the consultations to enumerate and assess both the absolute 92-decibel and the 20-decibel aversion thresholds makes its BiOps arbitrary and capricious.

**D. Unlawful Taking of ESA-Listed Species**

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

When the duty to reinitiate consultation is triggered, the prior Biological Opinion and ITS are rendered invalid and provide no safe harbor for the taking of listed species. As it has already been determined that the Projects will result in the taking of marbled murrelets, the Projects cannot go forward unless and until the Navy and FWS comply with substantive duty to "'insure that any action authorized, funded or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification' of critical habitat of such species. 16 U.S.C. § 1536(a)(2)." *Envtl. Prot. Info. Ctr. v. Simpson Timber Co.*, 255 F.3d 1073, 1078–79 (9th Cir. 2001).

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

COER anticipates that during the 60-day period when the Navy and FWS consider this notice, and before COER chooses whether to file suit, that the Navy and FWS may wish to meet and confer with COER as to the violations of the ESA alleged in this notice. COER welcomes such an engagement. Please feel free to contact Bricklin & Newman, LLP if the Navy and/or FWS are interested in meeting, or if you have any questions or concerns about this notice of intent to sue. Thank you for your attention to this important matter. If you would like to discuss this matter, please feel free to contact us at the phone number listed above, or at the following email addresses: bricklin@bnd-law.com and griefen@bnd-law.com.

Very truly yours,

BRICKLIN & NEWMAN, LLP

David A. Bricklin

Zachary K. Griefen

*Attorneys for Citizens of Ebey's Reserve*

cc: Client

# United States Department of the Interior

FISH AND WILDLIFE SERVICE

Washington Ecological Services
1009 College Street SE, Suite 215
Lacey, Washington 98503


November 22, 2024

David A. Bricklin and Zachary K. Griefen
Bricklin & Newman, LLP
123 NW 36th Street, Suite 205
Seattle, Washington 98107
(206) 264-8600

Dear Mr. Bricklin and Mr. Griefen:

Subject: Notice of Intent to Sue under the Endangered Species Act; Growler and Northwest Training and Testing Biological Opinions

On October 10, 2024, we received a copy of your letter dated September 26, 2024, captioned as a notice of intent to sue the U.S. Department of Defense, the U.S. Navy, and the U.S. Fish and Wildlife Service (USFWS) (the agencies) on behalf of Citizens of Ebey's Reserve for violations of the Endangered Species Act (ESA) and its implementing regulations.

You allege that the agencies did not appropriately consider and analyze guidance from the USFWS Arcata, California Fish and Wildlife Office: "Estimating the Effects of Auditory and Visual Disturbance to Northern Spotted Owls and Marbled Murrelets in Northwestern California" (2020 Arcata Guidance). You assert that the 2020 Arcata Guidance was new information suggesting that effects resulting from U.S. Navy activities could impact marbled murrelets (*Brachyramphus marmoratus*) in a manner or to an extent not previously considered. Specifically, in light of this information, you allege that the agencies failed to reinitiate formal consultation on marbled murrelets under section 7 of the ESA and 50 C.F.R. § 402.16 for the January 15, 2020, EA-18G "Growler" Airfield Operations at Naval Air Station Whidbey Island and June 30, 2021, Northwest Training and Testing (NWTT) Biological Opinions and Incidental Take Statements issued by our office, the Washington Fish and Wildlife Office.

The U.S. Navy and USFWS have coordinated regarding your letter. Your assertion that the 2020 Arcata Guidance is "new information" not previously considered is incorrect. The 2020 Arcata Guidance reiterates suggested sound disturbance thresholds for noise impacts to northern spotted owls and marbled murrelets, and these thresholds are the same as those addressed in guidance issued by the Arcata Fish and Wildlife Office in 2006 (original guidance, attached).

Additionally, both the original and 2020 Arcata Guidance documents expressly state that the sound disturbance threshold guidance does not address "activities producing sound levels greater than 110 decibels…, such as open-air blasting, aircraft, or impact pile driving…" and that those activities "…should be evaluated through a more detailed site-specific analysis" (USFWS 2006, p. 11; USFWS 2020, pp. 11-12). We expect Growler aircraft to generate sound exposure levels up to 119 $dB_{SEL}$ (at a reference pressure of 20µPa, measured 50 feet from the aircraft) at the 78 percent power setting, and many activities use higher power settings, which would be louder. In other words, by its terms, the 2020 Arcata Guidance does not account for, and should not be used to analyze, the effects of activities including Growler overflights on marbled murrelets in northern Puget Sound, Washington.

Our office developed an analytical approach to address sound disturbance from aircraft, which uses the 92 $dB_{SEL}$ (at a reference pressure of 20µPa) disturbance threshold for evaluating aircraft noise. We used that analytical approach to inform our 2020 Growler and 2021 NWTT Biological Opinion analyses.

The USFWS applied the most current, and appropriate, analytical approaches and undertook its analyses using the best available information to inform the 2020 Growler and 2021 NWTT Biological Opinions. As the 2020 Arcata Guidance is not new information nor does it address the effects of Growler aircraft, in the USFWS' view, the U.S. Navy was not required to reinitiate consultation as a result of the 2020 Arcata Guidance.

If you would like to further discuss concerns raised in your September 26, 2024, letter, then please feel free to contact me at (360) 753-9440 and/or by e-mail at brad_thompson@fws.gov.

Sincerely,

BRADLEY THOMPSON
Digitally signed by BRADLEY THOMPSON
Date: 2024.11.22 11:41:31 -08'00'

Brad Thompson, State Supervisor
Washington Fish and Wildlife Office

Enclosure:
USFWS 2006

cc:
Department of the Navy, Silverdale, WA (J. Carson)
USFWS, Arcata Fish and Wildlife Office, Arcata, CA (V. Ryan)
USFWS, Arcata Fish and Wildlife Office, Arcata, CA (N. Papian)
USFWS, Arcata Fish and Wildlife Office, Arcata, CA (B. McIver)

DEPARTMENT OF THE NAVY
NAVAL AIR STATION WHIDBEY ISLAND
3730 NORTH CHARLES PORTER AVENUE
OAK HARBOR, WASHINGTON 98278

5700
Ser N00/023
November 22, 2024

Sent via Certified U.S. Mail
Return Receipt Requested

David A. Bricklin
Zachary Griefen
Bricklin & Newman
123 NW 36th Street, Suite 205
Seattle, WA 98107

Dear Mr. Bricklin and Mr. Griefen,

SUBJECT: NOTICE OF INTENT TO SUE UNDER THE ENDANGERED SPECIES ACT FOR GROWLER AND NWTT BIOLOGICAL OPINIONS

The Department of the Navy (Navy) is in receipt of your letter of September 26, 2024, which, on behalf of your client, the Citizens of Ebey's Reserve (COER), purported to provide notice of intent to sue the Navy, the Department of Defense (DoD), and the U.S Fish and Wildlife Service (USFWS) (collectively, "agencies") under the Endangered Species Act (ESA) related to the January 15, 2020, EA-18G "Growler" Airfield Operations at Naval Air Station Whidbey Island (NASWI) and June 30, 2021, Northwest Training and Testing (NWTT) Biological Opinions and Incidental Take Statements (ITS) issued by the USFWS Washington Fish and Wildlife Office (FWO). I am responding on behalf of the Navy in this matter.

In your letter, you allege the agencies failed to reinitiate formal consultation on marbled murrelets under section 7 of the ESA and 50 C.F.R. § 402.16 in light of the USFWS Arcata, California FWO memorandum entitled "Estimating the Effects of Auditory and Visual Disturbance to Northern Spotted Owls and Marbled Murrelets in Northwestern California" (2020 Arcata Guidance). You assert the agencies did not consider or analyze the 2020 Arcata Guidance, which you allege contains new information that suggests effects resulting from the Navy activities at issue could impact marbled murrelets.

After coordinating with USFWS, the Navy has determined that re-initiation of consultation is not required for either of the Biological Opinions and ITS. As an initial matter, the 2020 Arcata Guidance states that its analysis explicitly excludes sound levels exceeding 110 dB, which includes sources such as jet engines and military over flights. (2020 Arcata Guidance, p. 9.) Thus, the Navy activities covered by the Biological Opinions and ITS at issue are not addressed in the 2020 Arcata Guidance.

Additionally, the "aversion threshold" contained in the 2020 Arcata Guidance is not new information. Appendix A of that guidance reiterates suggested sound disturbance thresholds for noise impacts to marbled murrelets that are identical to those referenced in the Arcata FWO's

guidance issued in 2006. The 2020 Arcata Guidance acknowledges that it is based, in large part, on information gathered in 2004-2005. (2020 Arcata Guidance, p. 3.)

The 2020 Arcata Guidance for elevated sound levels does not provide new information, nor does the underlying science support its application to intermittent noise events such as military aircraft operations. Thus, the Navy was not required to reinitiate consultation with USFWS.

Should you wish to discuss this matter further, please contact Susannah Mitchell from the Navy Office of General Counsel at (202) 685-7729 or Susannah.mitchell@navy.mil.

Sincerely,

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