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Reviewing Officer Olympic National Forest Supervisor Reta Laford
1835 Black Lake Blvd. SW
Olympia, WA 98512
Electronic address: <https://cara.ecosystem-management.org/Public/CommnetInput?project=42759>

Re: OBJECTION Pacific Northwest Electronic Warfare Range, Olympic National Forest, from National Parks Conservation Association; Submitted electronically and via Certified Mail (Certified Mail # 7016 1370 0000 2834 5360)

Dear Objection Reviewing Officer Olympic National Forest Supervisor Reta Laford:

The National Parks Conservation Association (NPCA) submits this Objection, under 36 C.F.R. § 218, to the Pacific Northwest Electronic Warfare Range Draft Decision Notice and Finding of No Significant Impact (FONSI) (collectively the “Draft Decision”).¹ The Forest Service official responsible for that project is District Ranger Dean Millett. The affected national forest is the Olympic National Forest, Pacific Ranger District. The NPCA’s national headquarters is located at 777 6th Street NW, Suite 700, Washington, DC 20001, (202)-223-6722. NPCA’s Northwest Regional Director is Rob Smith, whose office is located at 1200 5th Avenue, Suite 1118, Seattle, WA 98101, (206)-903-1444. NPCA is an independent, nonpartisan, non-profit organization that, together with more than one million members and supporters, works

¹ NPCA’s Objection includes the draft Special Use Permit (“SUP”), which is attached as appendix C to the Draft Decision.

to protect and preserve our nation's national parks for present and future generations. NPCA has many members who visit Olympic National Park, and whose use of that Park would be directly and/or indirectly adversely impacted by the Forest Service's Proposed Action and its connected actions. NPCA's members also often use adjacent national forest lands when using or visiting Olympic National Park, including the national forest lands directly or indirectly adversely impacted by this Proposed Action. For purposes of this Objection, NPCA is represented by legal counsel, the Earthrise Law Center, through Tom Buchele, Earthrise's managing attorney. Mr. Buchele's mailing address, email address and phone number are set forth above. Please direct all correspondence and responses to this Objection to NPCA's legal counsel, Mr. Buchele.

NPCA has previously submitted timely, written comments regarding this project throughout the periods where public comments were requested. *See, e.g.*, Exhibit 1, NPCA (Comment Oct. 31, 2014). This Objection also addresses a number of issues that have arisen after any prior comment period. The current draft decision is significantly different than the Forest Service's June 2014 initial draft decision. The current Draft Decision also purports to incorporate much analysis from a 2015 EIS finalized by the Navy in 2015 and adopts a 2016 Biological Opinion.

Notice Published: The public notice regarding the Draft Decision was published on November 29, 2016. Therefore, under Section 218.7, this Objection is timely because NPCA submitted it electronically and by U.S. mail on January 12, 2017, which is within 45 days of that publication date.

NPCA submits its Objection electronically with a list of supporting exhibits and in hard copy via certified U.S. mail with an attached CD containing electronic copies of all of its supporting exhibits.

NPCA requests an Objection Resolution meeting to address the concerns raised in its Objection which are set forth below.

Issues addressed in this Objection:

NPCA has multiple objections to the Draft Decision, which it sets out in detail below. As its name and purpose suggest, many of NPCA's specific objections are related to the Draft Decision's almost complete failure to analyze and notify the public about impacts to Olympic National Park. Although the Draft Decision improperly attempts to limit its discussion and analysis to the relatively narrow question of direct impacts from the U.S. Navy's application for a special use permit ("SUP") to locate and operate electronic warfare ("EW") mobile emitter vehicles on roads within the Olympic National Forest (the "Proposed Action"), the Draft Decision acknowledges that the Proposed Action is directly connected with Navy "aircraft activities." In fact the Proposed Action has no purpose other than facilitating those "aircraft activities" which involve multiple flights by extremely loud military jets over what the Draft Decision and the other documents it references euphemistically call the Olympic Military Operations Areas ("Olympic MOAs"). Although this fact is never specifically acknowledged in the Draft Decision, the Olympic MOAs overlay large portions of Olympic National Park and many of the jet aircraft overflights connected to and facilitated by the Proposed Action will take

place over Olympic National Park. Those connected military jet overflights will have direct, adverse impacts on the rare and sensitive soundscape of that Park and on the visitors who come to the Park to enjoy its almost unique quiet and solitude.

As it sets out in more detail below, NPCA objects to:

- (1) The Forest Service's complete failure, in violation of the Freedom of Information Act ("FOIA") and the National Environmental Policy Act ("NEPA"), to produce any documents in response NPCA's June 2016 FOIA request before requiring NPCA to submit its objections to the Draft Decision;
- (2) The Draft Decision's failure, in violation of NEPA, to fully disclose and analyze the direct, indirect, and cumulative impacts of the Proposed Action (and its connected actions) on Olympic National Park;
- (3) The Forest Service and Navy's violations of NEPA by fragmenting, improperly incorporating, and improperly limiting the scope of its various NEPA analyses of the Proposed Action and the connected and related Navy aircraft activities;
- (4) The Draft Decision's failure, in violation of NEPA, to properly disclose the cumulative impacts of the Proposed Action;
- (5) The Draft Decision's failure, in violation of NEPA, to properly disclose and analyze the noise impacts of the Proposed Action and the connected and related Navy jet aircraft activities;
- (6) The Draft Decision's unduly narrow purpose and need statement and failure to fully consider many reasonable alternatives violates NEPA;
- (7) The Draft Decision's failure, in violation of NEPA, to analyze and disclose the noise impacts of the related and connected Navy aircraft activities on all native species;

- (8) The Draft Decision’s failure to comply with the Forest Service’s regulations for SUPs;
- (9) The Draft Decision’s failure, in violation of NEPA and the Endangered Species Act (“ESA”), to properly analyze and disclose impacts to listed species;
- (10) The Draft Decision’s FONSI as being arbitrary and capricious in violation of NEPA.

The Forest Service can address each and all of these objections by withdrawing its Draft Decision and the Forest Service and Navy should prepare a single comprehensive EIS that fully discloses all direct, indirect and cumulative impacts from the Proposed Action and the connected and related Navy aircraft activities, including in particular all impacts to Olympic National Park. The Forest Service must then allow the public to comment on that new, comprehensive NEPA analysis and then fully reconsider its Proposed Action in light of the analysis and public comments.

I. The Forest Service and the Navy Failed to Provide Information in a Timely Manner and Disregarded NPCA’s FOIA requests.

Informed public participation in federal agency decision-making is an essential part of the NEPA process. 40 C.F.R. § 1500.1(b). In order to participate effectively, the public is entitled under NEPA to receive not only the agency’s draft NEPA analysis itself, but also all incorporated documents and documents otherwise underlying the NEPA analysis and Proposed Action. 40 C.F.R. §§ 1502.21, 1506.6(f). CEQ regulations specifically require that federal agencies make such documents available pursuant to FOIA requests, and in order for that availability to be meaningful under NEPA, the public must have those documents before they comment on or object to any draft NEPA analysis. *Id.*; see generally *LOWD v. Connaughton*, 2014 WL 6977611, *14–*20 (D. Or. Dec. 9, 2014).

On June 10, 2016, Earthrise submitted, on behalf of NPCA, a FOIA request to the Forest Service. Exhibit 2. That FOIA request specifically sought documents “regarding the Forest

Service's NEPA and ESA processes associated with its upcoming decision regarding whether to issue a special use permit....” *Id.* at 2. As of today, more than seven months after it received that request, and well beyond FOIA's statutorily imposed deadlines, the Forest Service has failed to produce a single responsive document to Earthrise or NPCA.

The history of the Forest Service's "response" to NPCA's June 10, 2016 FOIA request is one of repeated excuses and delay. On July 19, 2016, the Forest Service acknowledged NPCA's FOIA request but produced no responsive documents. Exhibit 3. On October 20, 2016 Earthrise contacted the Forest Service to inquire about the status of the Forest Service's FOIA response. Exhibit 4. In its email Earthrise specifically noted that: "[t]he Forest Service's failure to respond to NPCA's request, and its failure to comply with the clear statutory deadlines of FOIA, materially prejudices NPCA's ability to effectively prepare for and respond to the Forest Service's [upcoming Draft Decision]." *Id.* The Forest Service responded on October 28, 2016, admitting that it had identified over 500 responsive documents and indicating it would produce them "within the next ten business days." Exhibit 5. When that did not happen Earthrise contacted the Forest Service again on November 17, 2016, and indicated it would accept an initial partial disclosure so long as a full response occurred as soon as possible. Exhibit 6. The Forest Service responded again on November 29, 2016 (the same day the Draft Decision was issued) and again admitted it had identified many responsive documents and would produce at least some of those responsive documents "before the end of this week." Exhibit 7.

When the Forest Service once again failed to produce responsive documents as it had promised, Earthrise contacted the Forest Service on December 5, 2016, and specifically explained that: "Given the fact that the Forest Service released its Decision Notice and FONSI ...on 11/29, NPCA is extremely prejudiced by the Forest Service's continued delay in

responding to NPCA's FOIA request which has now been pending for nearly 100 working days. The documents sought by NPCA in its FOIA request are critical to NPCA's ability to effectively object to the Forest Service's Draft Decision." Exhibit 8. The Forest Service responded on December 8, 2016 with more excuses but no responsive documents and no promise to produce any responsive documents by a date certain. Exhibit 9. On December 16, 2016, NPCA wrote the Forest Service and asked it to withdraw its Draft Decision and reissue it for comment only after the Forest Service had fully responded to the NPCA's FOIA request. Exhibit 10. At that point, two weeks into the 45-day objection period for the Draft Decision, the Forest Service still had failed to produce a single document in response to NPCA's FOIA request submitted more than six months earlier regarding that upcoming Draft Decision. The Forest Service did not respond to NPCA's December 16 letter in any way.

The Forest Service has totally failed to meet its NEPA and FOIA responsibilities with regard to NPCA's June 10 FOIA request and the related NEPA process for the Draft Decision. This dereliction of the Forest Service's statutory responsibilities under FOIA is completely unacceptable under any circumstances. However, the Forest Service has now compounded its procedural failures by issuing its Draft Decision before producing a single document in response to NPCA's timely and highly relevant FOIA request, requiring NPCA to submit this Objection to the Draft Decision without the benefit of the documents NPCA requested specifically to help it prepare for its response to this Draft Decision.² This violates NEPA as well as FOIA and is grounds for invalidating any resulting final decision that the Forest Service might issue. *See, e.g.*, 40 C.F.R. §1506.6(f); *LOWD*, 2014 WL 6977611, * 20; *LOWD v. Pena*, 2015 WL 1567444, *4

² NPCA also has a relevant FOIA request pending with the Navy. After an initial inadequate response, NPCA successfully appealed the Navy's original FOIA determination. However, following its appeal, NPCA has similarly not received a single responsive document from the Navy.

(D. Or. April 6, 2015) (failure to produce documents underlying draft NEPA analysis was “serious” error that justified vacatur of ROD and NEPA analysis).

In addition to the Forest Service’s complete failure to respond to NPCA’s timely and relevant FOIA request, the current objection period is tainted by other Forest Service actions. The Forest Service timed its release of the Draft Decision so that the 45-day objection period includes both the Christmas and New Year’s holidays. Moreover, several highly relevant documents that the public should have easy access to even without a FOIA request were not posted on the Forest Service’s webpage regarding this Proposed Action during the objection period. For instance, the original June 2014 Draft Decision was not there. Additionally, the current Draft Decision specifically references, on page 12, documents related to the Forest Service’s analysis of impacts to sensitive species, but only makes them available at the Forest Supervisor’s office. Perhaps most importantly, the 1988 Master Agreement, Exhibit 11, which was posted, specifically indicates that the Navy was required to give the Forest Service its “analysis and determination as to the unsuitability or unavailability of Department of Defense land to the affected Forest Supervisor.” The Forest Service has not made that “analysis and determination” available to the public. There was no rational reason for not making each of these documents immediately available to the public by posting them on the Forest Service’s webpage.

The Forest Service’s failure to produce these documents has clearly and obviously prejudiced NPCA’s ability to prepare its objections to the Draft Notice. The reviewing officer should therefore uphold the NPCA’s Objection and require the Forest Service to withdraw its Draft Decision. The Forest Service can reissue its Draft Decision after it has produced all the documents that are responsive to the June 10 request and posted the other documents on its website. NPCA’s prior comments did not address the Forest Service and Navy’s failure to

comply with NPCA's FOIA requests because those requests were submitted after the close of the comment period.

II. The Forest Service and Navy Failed to Adequately Disclose and Analyze Impacts to Olympic National Park.

The wild Olympic Peninsula, including Olympic National Forest and Olympic National Park, is like nowhere else. Its special qualities include a national park, significant wilderness areas, an International Biosphere Reserve, and a World Heritage Site. Olympic National Park is renowned for its diverse ecosystems, ranging from glaciers to old growth forest and is home to the longest undeveloped, wilderness coast in the contiguous United States. It is also sought out for its natural quiet, and its acoustic environment "is a valuable resource that can easily be degraded or destroyed by inappropriate sound levels and frequencies." Exhibit 12, National Park Service, RE: Proposed EA-18G Growler Airfield Operations at Naval Air Station Whidbey Island, Washington – Notice of Intent to Prepare an Environmental Impact Statement (ER-14/0661) (NPS Comments II), at 2 (Nov. 18, 2014). This valuable resource is currently threatened by naval training exercises on and above the Olympic Peninsula that "adversely affect the acoustic environment and visitor experience," through the "[t]he addition of human-made noise," such as aircraft overflights which "interfere[] with opportunities for solitude and primitive recreation." *Id.* at 1–2. Ultimately, "[m]aintaining or enhancing the natural soundscape [of Olympic National Park] is *significant* in providing for enjoyment of visitors, and is *vital* to the natural function of ecosystems." Exhibit 13, National Park Service, Re: ER-13/0596 Notice of Intent for EA-18G Growler Airfield Operations at Naval Air Station, Whidbey Island, Washington (NPS Comments I) (Jan. 3, 2014) (emphasis added).

One of the most serious flaws in the Forest Service and Navy's NEPA analyses is their failure to even come close to taking a "hard look" at their training activities' impacts on Olympic

National Park and its visitors. NEPA establishes “action-forcing” procedures that require agencies to take a “hard look” at environmental consequences. *Center for Biological Diversity v. Dept. of Interior*, 623 F.3d 633, 642 (9th Cir. 2010). Those consequences clearly would include any direct, indirect or cumulative impacts on a national park. In fact, 40 C.F.R. § 1508.27(b)(3) specifically lists close proximity to park lands as a mandatory factor to consider when evaluating the intensity of an action. The required analysis must even include impacts that the agency labels as “short-term” or infrequent harm. *See, e.g., Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1180 (9th Cir. 2011).

Of course, the primary impacts to Olympic National Park from the training activities are from the noise caused by Navy jet overflights. NPCA’s Objection separately addresses the numerous flaws in the Forest Service’s and Navy’s actual analysis of noise impacts. This part of NPCA’s Objection focuses on a separate and distinct NEPA violation—the failure to adequately disclose to the public that Olympic National Park will be significantly impacted by the Proposed Action and the associated Navy jet overflights.

This failure began with the Forest Service’s June 26, 2014 Scoping Notice. That Notice does not mention Olympic National Park. The included maps show the Olympic Peninsula and highlight national forest lands, which surround the park and outline many of its boundaries, but the Park itself is never identified. The Notice talks about impacts to the Olympic Military Operations Areas (“MOAs”) but never discloses that a significant portion of the MOAs overlay Olympic National Park lands. In light of all the other impacted lands that are labeled and identified on the maps included with the Notice, the failure to label or identify Olympic National Park lands raises serious questions.

This failure to disclose continues with the Navy’s Pacific Northwest EW Range

Environmental Assessment (2014 EA). The actual cover of the 2014 EA includes another map that highlights and labels national forest land and shows the boundaries of the MOAs, but fails to label or identify in any way Olympic National Park. Indeed, on the cover of the 2014 EA the Park appears to be simply a large mass of unlabeled and apparently unimportant land in the middle of the Olympic Peninsula. This sends the clear message that the actions being analyzed in the EA could not possibly impact the Park and, in fact, Olympic National Park is not mentioned a single time in the 2014 EA. Significantly, the Forest Service has adopted the 2014 EA as its own primary NEPA disclosure document for the Draft Decision.

Nearly as flagrantly as the 2014 EA, the Forest Service's Draft Decision mentions Olympic National Park only once. Draft Decision, at 14. However, while it acknowledges that Olympic National Forest is adjacent to the Park, it does not acknowledge that several of the proposed mobile emitter sites are immediately adjacent to the Park's boundaries. *See* Exhibit 14, (newspaper map showing proximity). Although a local newspaper had no trouble creating a map that showed how close the mobile emitter sites were to the Park, the Navy and Forest Service failed to disclose such facts. The Draft Decision then concludes, without including or citing to any analysis, that there will be no effects to the National Park. Then the Draft Decision states that "effects from noise from aircraft flights" were analyzed in two other Navy NEPA documents, the Navy's Northwest Training Range Complex Environmental Impact Statement/Overseas Impact Statement (2010 EIS) and Northwest Training and Testing Final Environmental Impact Statement/Overseas Environmental Impact Statement (2015 EIS). However the Draft Decision does not disclose or even acknowledge that Navy jet aircraft will in fact be flying over National Park lands as part of the training exercises made possible by the mobile emitters. Similarly, the Draft Decision does not disclose in any way how the other

referenced NEPA documents analyzed aircraft noise or what conclusions they reached. As noted below, this is not a proper “incorporation by reference” under NEPA.

If a curious reader nevertheless decided to consult the cited analysis from the 2010 EIS and 2015 EIS, she would discover several things. The Draft Decision gives only a general citation to the lengthy 2010 EIS, which contains only a handful of references to the Park and contains no analysis at all of the impacts of Navy jet overflight noise on Olympic National Park. The Draft Decision does more specifically reference Appendix J and Appendix K from the 2015 EIS. Appendix J does contain some analysis of “airspace noise,” but the text of Appendix J never mentions Olympic National Park.³ Appendix K, is labeled as a World Heritage Site Analysis, but in fact the only World Heritage Site it addresses is Olympic National Park. This very short, 7 page analysis, buried in a mislabeled Appendix, does finally address—in a very cursory and inadequate manner—impacts to the Park and its visitors from Navy jet overflights. However, approximately half of Appendix K is focused on simply describing the Park and attempting to downplay the significance of the Park’s soundscape as an important resource. Of course, a member of the public reviewing the Draft Decision would likely only find this analysis if she knew that a “World Heritage Site Analysis” in fact contained the Navy’s only analysis focused on impacts to Olympic National Park.

Olympic National Park and its many visitors will in fact be directly and adversely impacted by the Navy’s repeated overflights of the Park as part of the Navy’s training exercises and those impacts will increase because of the proposed location of mobile emitter trucks on national forest lands immediately adjacent to Park lands. Under NEPA, the legally required actual public disclosure and a “hard look” analysis of those impacts required much more than:

³ There is a map in Appendix J of the MOAs that, for the first time, does label Olympic National Park when it is outlining the boundaries of the MOAs. App. J at 20.

(1) multiple NEPA maps completely failing to disclose that the Olympic MOAs cover a significant amount of Olympic National Park lands, (2) no mention at all of the Park in the Scoping Notice, (3) a single sentence dismissal of impacts in the Draft Decision itself, (4) no mention at all of the Park in the primary NEPA analysis adopted by the Forest Service (the 2014 EA), and (5) the only actual analysis of impacts to the Park buried in a seven page Appendix to the 2015 EIS that is misleadingly labeled as a “World Heritage Site Analysis.” NEPA requires, and Olympic National Park deserves, an actual, clear disclosure and stand-alone, comprehensive analysis of impacts to the Park in the Forest Service’s and Navy’s primary NEPA disclosure documents.

The Forest Service should therefore uphold this part of NPCA’s Objection and address it by withdrawing the Draft Decision and preparing and allowing public comment on a new NEPA analysis that fully discloses impacts to Olympic National Park. This objection and recommendation are associated with NPCA’s prior comments regarding inadequate public outreach and a lack of comprehensive analysis regarding impacts to the Park, wildlife, and visitor use and enjoyment. *See* Exhibit 1, NPCA Comments, at 1–3.

III. Improper Scope, Fragmentation, and Incorporation of NEPA Analysis

Rather than do its own NEPA analysis that comprehensively examines and discloses to the public the environmental impacts of the proposed Special Use Permit (SUP) for the Navy’s mobile emitter trucks, the Forest Service has purported to adopt and incorporate various NEPA analyses done by the Navy. Adoption and incorporation are both allowed and encouraged by the CEQ regulations in order to avoid duplication of effort and to make NEPA documents more concise and understandable to the public. 40 C.F.R. §§1502.21, 1506.3. Here, however, the Forest Service’s attempt to adopt and incorporate certain parts of the Navy’s already seriously fragmented NEPA process has only caused greater confusion regarding where the public is

supposed to be able to find information and comprehensive analysis regarding the Navy's proposed actions.

At the same time, the Forest Service has improperly limited the scope of what it considers to be the Proposed Action by narrowly focusing on the impacts from the mobile emitter trucks and mostly ignoring the far greater impacts from the Navy's jets whose training exercises the trucks are intended to facilitate. The trucks in fact have no purpose without the directly connected Navy jet training exercises that will occur in the airspace above and around the mobile emitter trucks. Perhaps most importantly for the NPCA, this piecemeal, unduly narrow approach to the legally required NEPA analysis has allowed the Forest Service (and the Navy) to mostly ignore and hide from the public the serious impacts of the Proposed Action on Olympic National Park and its visitors. Several of the proposed mobile emitter locations are immediately adjacent to Olympic National Park and the Navy jets using most of the proposed mobile emitters would fly over large parts of Olympic National Park. But the Park itself is only mentioned once in the Draft Decision, at 14, and is completely ignored by the 2014 EA which the Draft Decision adopts as its primary NEPA disclosure document.

The Navy's impact on the Olympic Peninsula, and Olympic National Park, as a result of its cumulative training exercises and endeavors is immense. In the Pacific Electronic Warfare Range alone, there are at least seven current training actions affecting the Olympic Peninsula: (1) P-8A Poseidon Multi-Mission Aircraft; (2) Environmental Assessment for Replacement of EA-6B Aircraft with EA-18G Aircraft at Naval Air Station Whidbey Island, Washington; (3) Environmental Assessment for the Expeditionary Transition of EA-6B Prowler Squadrons to EA-18G Growler at Naval Air Station Whidbey Island, Oak Harbor, WA; (4) EA-18G Growler Airfield Operations at Naval Air Station Whidbey Island, Washington Environmental Impact

Statement; (5) Northwest Training Range Complex Environmental Impact Statements/Overseas Environmental Impact Statement (2010 EIS); (6) Pacific Northwest EW Range (2014 EA); and the (7) Northwest Training and Testing Environmental Impact Statement (2015 EIS). *See* 2014 EA, at 4-2-4-3. In addition to these actions, there is the Forest Service’s Draft Decision and Permit.

Of these eight actions—while not diminishing the impact of the other military actions—the Draft Decision, 2014 EA, 2010 EIS, and 2015 EIS are the most relevant to this Objection. In total, these four documents contain over 6,000 pages of analysis. However, while these documents purport to analyze different proposed actions, they are all in fact discussing one large training program operated by the Navy that takes place, in part, on and above the Olympic Peninsula. By splitting up its analysis of the Navy’s training exercises affecting the Olympic Peninsula, the Navy improperly segments its NEPA analysis and impedes public participation.

40 C.F.R. § 1502.4 requires that “[p]roposals or parts of proposals which are related to each other closely enough to be, in effect, a single course of action shall be evaluated in a single impact statement.” “NEPA does not allow an approach that would permit dividing a project into multiple ‘actions,’ each of which individually has an insignificant environmental impact, but which collectively have a substantial impact.” *Kern v. Bureau of Land Management*, 284 F.3d 1062, 1078 (9th Cir. 2002). Additionally, NEPA “require[s that] an agency consider ‘connected actions’ and ‘cumulative actions’ within a *single EA or EIS*.” *Wetlands Action Network v. United States Army Corps of Eng’rs*, 222 F.3d 1105, 1118 (9th Cir. 2000) (emphasis added) (citing 40 C.F.R. § 1508.25). If proposed actions are similar, agencies should “assess them in the same document and should do so when a single document provides the best way to assess adequately the combined impacts of similar actions....” *Klamath-Siskiyou Wildlands Center v. Bureau of*

Land Management, 387 F.3d 989, 999 (9th Cir. 2004) (internal quotations omitted) (citing 40 C.F.R. § 1508.25(a)(3)). This requirement is all the more necessary “when the record raises ‘substantial questions’ about whether there will be ‘significant environmental impacts’ from the collection of anticipated projects.” *Id.* (quoting *Blue Mountains Biodiversity Project v. Blackwood*, 161 F.3d 1208, 1215 (9th Cir. 1998); *Thomas v. Peterson*, 753 F.2d 754, 759 (9th Cir. 1985)). “Significance cannot be avoided by terming an action temporary or by breaking it down into small component parts.” 40 C.F.R. § 1508.27(b)(7). Finally, “NEPA is not designed to postpone analysis of an environmental consequence to the last possible moment. Rather, it is designed to require such analysis as soon as it can be reasonably done.” *Kern*, 284 F.3d at 1072.

However, rather than assess all of the impacts associated with training activities on and above the Olympic Peninsula in one document, the Navy has split them up into several documents over the course of several years. First and foremost, this renders the subsequent analysis inherently confusing. By piecemealing the analysis out bit by bit, the Navy makes it incredibly difficult for the public to effectively comment on the proposed training activities. It also requires the public to remain constantly vigilant to each and every action analyzed by the Navy because the public can never be sure which actions may be discussed or when by the steady flow of new NEPA analysis for the Navy. All of that seemingly unending NEPA analysis appears to analyze connected, related or cumulative actions related to the Navy’s training exercises in the Pacific Northwest.

Second, it requires considerable effort on the part of the public to parse and understand all of these constantly intertwining analyses. For instance, the Draft Decision cites to three different NEPA documents and does not offer a clear explanation of which document has the pertinent analysis. By way of example, the Draft Decision claims that “[t]he 2010 [EIS] analyzed

EW range training activities and the concept of a fixed emitter on the Olympic Peninsula with aircraft activities that are currently conducting EW training. However, at the time the 2010 [EIS] was completed, details for the potential use of fixed and mobile signal transmitters were not available.” Draft Decision, at 1. It is unclear what this means. The 2010 EIS somehow analyzed the “concept of a fixed emitter,” but somehow did this without “details for the potential use” of that emitter? *Id.* It goes on to note that “[t]he 2014 [EA] addresses the components of EW training that were not analyzed in the 2010 [EIS].” *Id.* A member of the public could then reasonably be led to believe that the 2014 EA contained all of the relevant information regarding “EW range training activities and the concept of a fixed emitter on the Olympic Peninsula with aircraft activities that are currently conducting EW training.” *Id.* But the 2014 EA includes additional information about three mobile emitters never mentioned in the 2010 EIS. It also doesn’t include any analyses of “aircraft activities that are currently conducting EW training.” *Id.*

The Draft Decision goes on to state that the 2015 EIS “consolidates and updates the analyses of military readiness activities within the” 2010 EIS. *Id.* But does that mean the 2015 EIS is supplemental to the 2010 EIS, or that it replaces it? The 2015 EIS at first seems to suggest that it replaced the 2010 EIS. *See* 2015 EIS, at ES-8 (noting that the 2015 EIS “reassess the environmental impacts of Navy at-sea training and testing activities contained in three separate EISs” including the 2010 EIS”). However, the 2015 EIS later notes that, in regards to electronic warfare training, “[i]mpacts of overland air activities were analyzed previously [in the 2010 EIS] and remain valid.” *Id.* at 2-14. But how could that be the case if the mobile emitters were not part of the 2010 EIS’s analysis? If those impacts were previously analyzed, then why is there a need to re-analyze “[t]he land resources affected by the use of the Olympic MOAs A and B ... as they are directly impacts by overflights for at-sea activities[?]” *Id.* at 2-3. Does that re-analysis

contain an analysis of the electronic warfare activities that occur directly above the Olympic Peninsula which are not simply overflights for at-sea activities?

Whether intended or not, the result of this complexity is that the Forest Service and Navy have made it incredibly hard for the public to understand and comment on the environmental impacts associated with the naval training activities occurring on and above the Olympic Peninsula. This complexity is, in part, a result of the fact that the Navy has taken effectively one action (or one series of connected actions)—its training activities in the Pacific Northwest—and split it up into at least seven separate analyses. In doing so, “the public ... can[not] be assured that the [agency] provided the hard look that it is required to provide.” *Neighbors of Cuddy Mountain v. U.S. Forest Serv.*, 137 F.3d 1372, 1380 (9th Cir. 1998).

Here the Forest Service has compounded the Navy’s already scattered and confusing NEPA analysis by adopting the improperly narrow 2014 EA and selectively attempting to incorporate analysis from the 2010 EIS and 2015 EIS. Adoption of another agency’s NEPA analysis is allowed by 40 C.F. R. § 1506.3, but only if that adopted analysis “meets the standards for an adequate statement under these regulations.” The Navy’s 2014 EA improperly limits its scope to the impacts caused by the Navy’s EW emitters and other equipment and does not include any analysis of the impacts from the directly connected overflights by the Navy jets that would be conducting training based on the signals from those EW emitters. The EW emitters sole purpose is to facilitate those training overflights and those overflights are thus clearly connected actions under 40 C.F.R. § 1508.25(a)(1), and the impacts from those connected emitters and overflights had to be addressed in the same NEPA document. *See, e.g. Save the Yaak Comm. v. Block*, 840 F.2d 714, 719 (9th Cir. 1988) (finding that there was a “clear nexus” between timber contracts and road improvements whose impacts should have been analyzed

together); *see also Thomas v. Peterson*, 753 F.2d 754, 758–759 (9th Cir.1995) (finding a proposed forest road to access a timber sale was a connected action to that sale); *Wetland Actions Network*, 222 F.3d at 1118 (holding that a project that lacks a stand alone or independent purpose is found to lack “independent utility” and should be considered a “connected action”).

The 2014 EA, on which the Forest Service relies for its Draft Decision, improperly limited its scope to only consider:

(1) the installation and operation of a Mission Control and Debrief Center at Naval Air Station Whidbey Island (NASWI); (2) the installation and operation of a fixed emitter at Naval Station Everett Annex Pacific Beach, Washington, to include renovations to building 104; (3) the installation and operation of communication equipment on an existing tower in the Olympic Military Operations Area (MOA) at Octopus Mountain; (4) the movement and operation of mobile EW emitters in the Olympic Peninsula on U.S. Forest Service (USFS) and Washington State Department of Natural Resources (WSDNR) lands; and (5) the movement and operation of mobile EW emitters on USFS lands within Okanogan and Roosevelt MOAs.

2014 EA, at 1-1. The Navy limited the scope of its analysis because the 2010 EIS allegedly already analyzed all other attendant naval training activities and their impacts, such as the impacts of aircraft overflight. However, in doing so, the Navy failed to consider the new, unanalyzed impacts associated with the increase in proposed training activities on and above the Olympic Peninsula resulting from the proposed operation of mobile emitters in the Olympic National Forest. Instead, the Navy improperly sought to defer such analysis until the future 2015 EIS. But doing so not only improperly narrows the scope of the 2014 EA, it also inhibits the public’s ability to adequately comment on the 2014 EA.

The public’s ability to adequately comment was also severely curtailed by the fact that the 2014 EA was only available for comment for two weeks, *See* 2014 EA, at 1-8, and by the fact that the Navy’s publication of the comment period was incredibly limited. *See id.* This is evidenced by the fact that NPCA only learned of the 2014 EA and the Forest Service’s plan by

happenstance and not from any clear public outreach efforts on the part of the Forest Service and Navy. *See* NPCA Comments, at 1. Additionally, two weeks is a very short period of time in which to adequately comment on the 228 pages of environmental impacts outlined in the 2014 EA. The limitations of that time period are exacerbated by the Navy's severe limitation of the scope of its analysis. The public therefore had to independently seek out information regarding the true scope of the proposed electronic warfare training activities on and above the Olympic Peninsula.

The Forest Service cannot correct its adoption of the insufficient 2014 EA by purporting to tier to or incorporate analysis from the 2010 EIS and 2015 EIS. Tiering under 40 C.F.R. §§ 1502.20 and 1508.28 is only appropriate for incorporating broader or more generalized discussions from earlier NEPA documents into subsequent more specific NEPA analysis. *See, e.g., Klamath-Siskiyou Wildlands Ctr. v. U.S. Forest Serv.*, 2006 WL 1991414, at *9 (E.D. Cal. July 14, 2006) (finding that “[t]iering is appropriate only when an analysis of greater scope is utilized to assess an analysis of lesser scope[.]” and ruling that the Forest Service could not tier to prior site-specific environmental analyses). Tiering, furthermore, is not a method to completely avoid discussing the site-specific impacts of connected actions, such as the Navy jet overflights directly associated with the proposed EW mobile emitters. *See, e.g., Hudson River Sloop Clearwater, Inc. v. Dep't of Navy*, No. CV-86-3292, 1987 WL 14092, at *7, *7 n.9 (E.D.N.Y. July 14, 1987), *aff'd*, 836 F.2d 760 (2d Cir. 1988) (holding that the tiering regulation must be read in conjunction with the connected action regulation, and that the Navy could not rely on tiering to avoid addressing site specific impacts); *see also Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 812 (9th Cir. 1999) (finding that the Forest Service inappropriately tiered to an early EIS when that EIS's analysis of cumulative impacts was too

speculative). Thus while the Draft Decision can properly “tier” to the more generalized discussions of Navy jet aircraft overflights from the 2010 EIS and 2015 EIS, it cannot rely solely on that generalized analysis and avoid addressing the site-specific impacts caused by the mobile emitters (and the connected Navy jet overflights) that would be authorized by the Draft Decision.⁴ And that is especially true when those impacts include direct and indirect impacts on a national park that are not fully addressed by the general EIS analyses and are totally ignored or misrepresented by the 2014 EA and Draft Decision.

By the same token, incorporation by reference under 40 C.F.R. § 1502.21 is no substitute for including at least some site-specific analysis of impacts from Navy jet overflights in the 2014 EA or the Draft Decision. Incorporation by reference is only appropriate where it does not impede public review. As noted above, the Navy’s NEPA analysis regarding its training exercises over the Olympic Peninsula is already too scattered and confusing. By attempting to incorporate “analysis” from three different Navy NEPA documents—the 2014 EA, 2010 EIS and 2015 EIS—the Forest Service has added even more confusion rather than facilitating public review.

Moreover, 40 C.F.R. § 1502.21 requires that any incorporated material be accurately described. In terms of the impacts of aircraft noise on the Park, the Forest Service’s attempted incorporation of analysis from the 2010 EIS and 2015 EIS is both incomplete and misleading. The Draft Decision first says that there will be no impacts to the Park from the Proposed Action. Draft Decision at 14. Then the Draft Decision attempts to incorporate by reference the noise analysis regarding Navy jet overflights from the two EISs, but the Draft Decision does not indicate in any way what that incorporated analysis indicated. *Id.* Indeed, the Draft Decision’s

⁴ Of course the Draft Decision can only tier to and rely upon those parts of the 2010 and 2015 EIS that are specifically and properly referenced by the Draft Decision.

silence, coming directly after a declaration of “no impacts” clearly implies that the incorporated analysis found no impacts on the Park from Navy jet overflight, which is simply not true. *See* 2015 EIS, Appendix K, at K-3.⁵

Due to the Forest Service and Navy’s improper scoping, fragmentation, and incorporation, the Navy should therefore uphold this part of NPCA’s Objection, withdraw its Draft Decision and prepare one NEPA document that consolidates all of the analyses of impacts to the Olympic Peninsula from its training activities. It is not impossible for it to do so. In fact, the U.S. Fish and Wildlife Service did just that when it issued its Biological Opinion addressing the actions in the 2015 EIS and the Forest Service’s SUP. United States Fish and Wildlife Service, Biological Opinion Navy’s Northwest Training and Testing Activities (BiOp), at 1 (July 21, 2016). This objection and recommendation are associated with NPCA’s prior comments regarding the lack of detailed analyses in the Draft Decision and the failure to adequately analyze the impact of increased aircraft overflights above Olympic National Forest and Olympic National Park. *See* Exhibit 1, NPCA Comments, at 2–3.

IV. The Navy Failed to Adequately Analyze Cumulative Impacts.

Another fundamental flaw in the Forest Service and Navy’s Draft Decision is its failure to adequately assess the cumulative impacts⁶ associated with the SUP issued by the Forest Service “to use National Forest System (NFS) roads for training exercises on the Pacific Ranger District *in connection* with aircraft activities conducting electronic warfare (EW) training.” Draft

⁵ Furthermore, the Draft Decision impermissibly seeks to minimize the noise impacts associated by Navy jet overflight by never substantively addressing them and referencing them only in footnotes. *See, e.g.*, Draft Decision Notice, 4 n.4, 11 n.2.

⁶ In this section, NPCA specifically objects to the cumulative impact analyses contained in the Draft Decision, 2014 EA, and 2015 EIS. However, NPCA notes that impacts from aircraft overflights associated with electronic warfare training conducted with the mobile emitters can also be characterized as direct or indirect impacts and that the aircraft overflights are connected actions. *See* 40 C.F.R. §§ 1508.8, 1508.25.

Decision, at 1 (emphasis added). However, although a cumulative impacts analysis must include all “past, present, and reasonably foreseeable future actions,” the Forest Service and the Navy failed to adequately analyze the impacts associated with the aircraft activities and overflights directly connected to the SUP and the Draft Decision. This fundamental flaw renders the Draft Decision, the SUP, and the underlying NEPA process on which they rest, arbitrary and capricious.

Cumulative impacts are impacts on “the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions....” 40 C.F.R. § 1508.7. Additionally, “[c]umulative impacts can result from individually minor but collectively significant actions taking place over a period of time.” *Id.* Therefore, an agency cannot discount impacts as irrelevant simply because they are minor. *See, e.g., Neighbors of Cuddy Mountain*, 137 F.3d at 1378 (citing *City of Tenakee Springs v. Clough*, 915 F.2d 1308, 1312 (9th Cir. 1990)). When analyzing cumulative impacts, the agency must take a “hard look” at all “past, present, and reasonably foreseeable future actions” connected to the proposed project and even an “EA’s analysis of cumulative impacts ‘must give a sufficiently detailed catalogue of past, present, and future projects, and provide adequate analysis about how these projects, and differences between the projects, are thought to have impacted the environment.’” *Gifford Pinchot Task Force v. Perez*, 2014 WL 3019165, at *34 (D. Or. July 3, 2014) (citing *Lands Council v. Powell*, 395 F.3d 1019, 1028 (9th Cir. 2005)). Agencies must also provide quantified and detailed information to support their analysis. “Without such information, neither the courts nor the public ... can be assured that the [agency] provided the hard look that it is required to provide.” *Neighbors of Cuddy Mountain*, 137 F.3d at 1380. Finally, “[t]he analysis must be more than perfunctory; it must provide a useful analysis of the cumulative impacts of past, present, and

future projects.” *Klamath-Siskiyou Wildlands Center*, 387 F.3d at 994 (internal quotations and citations omitted).

The Draft Decision issued by the Forest Service contains no substantive independent cumulative impacts analysis. Rather, the Draft Decision “adopts the Navy’s 2014 EW Range EA” and purports to “incorporate[] by reference analysis associated with the Navy’s [2015 EIS].” Draft Decision, at 2. The 2014 EA in turn states that it examined “cumulative effects as a result of the operation of an EW range[,]” and that “[t]he scope and nature of activities associated with the Proposed Action would not change from existing activities (as identified in the [2010 EIS])[.]” 2014 EA, at 4-1. The 2014 EA goes on to list actions relevant to its cumulative impacts analysis including other military actions involving: the P-8A Poseidon Multi-Mission Aircraft; Environmental Assessment for Replacement of EA-6B Aircraft with EA-18G Aircraft at Naval Air Station Whidbey Island, Washington; Environmental Assessment for the Expeditionary Transition of EA-6B Prowler Squadrons to EA-18G Growler at Naval Air Station Whidbey Island, Oak Harbor, WA; EA-18G Growler Airfield Operations at Naval Air Station Whidbey Island, Washington Environmental Impact Statement; 2010 EIS; and 2015 EIS. *Id.* at 4-2–3.

First, while the 2014 EA lists these military actions, simply listing them is not enough as it is not a description of the actual environmental effects. *See, e.g., Klamath-Siskiyou Wildlands Center*, 387 F.3d at 994–95 (noting that simply listing the total number of acres to potentially be harvested by proposed timber sales “is a necessary component of a cumulative effects analysis, but it is not a sufficient description of the actual environmental effects that can be expected from logging those areas”). While not disregarding the significance of the other actions, whose cumulative impacts the Forest Service and the Navy also failed to sufficiently take into account,

the most relevant cumulative impacts for this Objection are those associated with the 2010 EIS, 2014 EA, and 2015 EIS. Regarding the 2010 EIS, the 2014 EA's cumulative impacts analysis is substantively only that "[t]he [2010 EIS] did not involve extensive changes to the facilities, activities, or training capacities of the area; instead the action resulted in focused but critical enhancements and increases in training that was [sic] necessary to ensure the NWTRC supports the Navy training and readiness objectives." *Id.* at 4-3. Regarding the 2015 EIS, which was released after the 2014 EA was finalized, the 2014 EA assumed that "[b]ecause training levels would continue at present levels with regard to the Proposed Action, the net effect on cumulative impacts would be negligible." *Id.* The scope of analysis was so limited even though "[t]he continued training supported by the installation of the EW range that is covered in [the 2014] EA is being addressed in the [2015 EIS]." *Id.*

The Draft Decision adopts this perfunctory and improper analysis of the actions covered by the 2015 EIS. *See* Draft Decision, at 15 n.5 ("The actions proposed in the [2015 EIS] were considered in cumulative effects analysis in the [2014 EA at 4-3]."). The Draft Decision also finds, in conclusory fashion, that while the 2015 EIS "includes an airspace noise analysis for aircraft use associated with EW training over the Olympic Military Operations Areas originally addressed in the 2010 [EIS,] ... [t]he [2015 EIS] does not propose significant increases in numbers of flights." *Id.*

Furthermore, even though the Forest Service admits that the activities authorized by the Draft Decision, FONSI, and SUP directly connect to "aircraft activities conducting electronic warfare ... training[,]" Draft Decision, at 1, the entirety of the 2014 EA's Noise analysis is only ten pages long. Astoundingly, at no point in those ten pages does the Navy mention any analysis of noise impacts associated with the aircraft overflights conducting training runs in conjunction

with the proposed three mobile emitters. This clearly violates NEPA's imperative to study "present, and future projects, and provide adequate analysis about how these projects, and differences between the projects, are thought to have impacted the environment." *Gifford Pinchot Task Force*, 2014 WL 3019165, at *34 (citing *Lands Council*, 395 F.3d at 1028).

To the degree that the 2014 EA attempts to reference the analyses of noise impacts in the 2010 EIS and the 2015 EIS, that analysis is fleeting, inadequate, and conclusory. The 2014 EA addresses impacts originally analyzed in the 2010 EIS by perfunctorily stating that "[t]he [2010 EIS] did not involve extensive changes to the facilities, activities, or training capacities of the area; instead the action resulted in focused but critical enhancements and increases in training that was [sic] necessary to ensure the NWTRC supports the Navy training and readiness objectives." 2014 EA, at 4-3. Similarly, regarding the 2015 EIS, the 2014 EA asserts "[t]he continued training supported by the installation of the EW range that is covered in this EA is being addressed in the [2015 EIS,]" but "[b]ecause training levels would continue at present levels with regard to the Proposed Action, the net effect on cumulative impacts should be negligible." *Id.*

The 2014 EA's passing mention of the 2010 and 2015 EIS cannot, by any stretch of the imagination, be considered to be an "adequate analysis about how these projects, and the differences between the projects, are thought to have impacted the environment." *Lands Council*, 395 F.3d at 1028. If the 2014 EA were to be believed, then there is essentially no difference between electronic warfare training exercises addressed in the 2010 and 2015 EIS.

In contrast to the 2014 EA, even though the 2015 EIS attempts to minimize the impacts of the increased training exercises on and above the Olympic Peninsula, it does not attempt to report that there is no change. But the Forest Service's Draft Decision says exactly that when it

states that the actions authorized by the Draft Decision, FONSI, and SUP, “combined with the effects of past, present and reasonably foreseeable military activities will not have any significant cumulative effects.” Draft Decision, at 15 (footnote omitted). In doing so, the Draft Decision also obliquely cites to the 2015 EIS, stating that:

The actions proposed in the [2015 EIS] were considered in cumulative effects analysis in the [2014 EA, at 4-3]. The [2015 EIS] includes an airspace noise analysis for aircraft use associated with EW training over the Olympic [MOAs] originally addressed in the [2010 EIS]. The [2015 EIS] does not propose significant increases in numbers of flights. Annual flight requirements and actual flight activities tend to fluctuate from year to year based on many variables. To allow flexibility of training in these areas, the Navy has estimated that a 10 percent increase in flights may occur related to electronic warfare training activities, averaging to less than one additional flight per day.

Id. at 15 n.3. To the degree the Draft Decision incorporates the 2014 EA’s cumulative analysis, that analysis is deficient as shown above. The second sentence tacitly admits that noise impacts from aircraft overflights should be incorporated into the cumulative impacts analysis.

Regardless, the rest of the footnote is conclusory and inadequate. The mere alleged fact that “annual flight requirements and actual flight activities tend to fluctuate from year to year based on many variables[,]” *id.*, does not free the Forest Service or the Navy from analyzing those reasonably foreseeable impacts. *See, e.g., Kern*, 284 F.3d at 1072 (“An agency may not avoid an obligation to analyze in an EIS environmental consequences that foreseeably arise from an RMP merely by saying that the consequences are unclear or will be analyzed later.... Drafting an [EIS] necessarily involves some degree of forecasting.”) (internal quotations and citations omitted).

And, while they may fluctuate to some degree, the Navy has already provided the number of proposed aircraft in the Olympic MOAs per year. *See* 2015 EIS, Appendix J, at 14–18. Finally, as noted in the Noise Impacts Analysis Section, *see infra* Section V, The Forest Service and Navy Failed to Properly Address Aircraft Noise Impacts, at 31–42 and the Navy’s estimation of a 10% increase in flights is conclusory and lacks any factual support. Instead, the numbers they

do provide suggest an increase far greater than 10%. *See id.*

Beyond cumulative noise impacts, the Forest Service and Navy's analyses of cumulative impacts to Olympic National Park are woefully insufficient. The Draft Decision starkly states that "[t]here will be no direct, indirect, or cumulative effects to the National Park from this decision." Draft Decision, at 14. Taking it one step further, the 2014 EA does not contain a single mention of Olympic National Park. *See generally* 2014 EA. Again, the Forest Service and the Navy attempt to impermissibly narrow the scope of their analysis to include only the impacts immediately associated with the operation of the mobile emitters themselves, and not any of the attendant training exercises which are the sole reason for the mobile emitters existence. *See, e.g., Kern*, 284 F.3d at 1078 ("Such a restricted analysis would impermissibly subject the decisionmaking process contemplated by NEPA to 'the tyranny of small decisions.'") (quoting Council on Environmental Quality, *Considering Cumulative Effects Under the National Environmental Policy Act*, at 1, Jan. 1997).

However, at one point, the 2014 EA defines "noise-sensitive areas" as "those areas where noise interferes with normal activities associated with its use." 2014 EA, at 3.3-3. It goes on to note that "[s]ensitive receptors underlying the Olympic MOAs are limited to populated areas near NS Everett Annex, Pacific Beach. Recreational users of USFS and WSDNR lands would also be considered sensitive receptors." *Id.* At no point in the 2014 EA does the Navy acknowledge the fact that the Olympic MOAs overlay significant portions of Olympic National Park or affect recreational users of Olympic National Park. *See* Exhibit 12, NPS Comments II, at 2 ("While the emitter sites identified in the [2014 EA] are not within the boundary of ONP, the military overflights are within the Olympic MOA which includes a portion of the non-coastal and nearly all of the coastal Congressionally-designated wilderness within ONP."); *see also id.*

(noting that the National Park Service “already receives complaints from visitors of very low flying military aircraft buzzing peaks and valleys within the wilderness area, outside of the Olympic MOA”). In any case, by noting that sensitive receptors underlie the Olympic MOAs the Navy tacitly admits that the Draft Decision, FONSI, and SUP are connected to aircraft overflights occurring in the Olympic MOAs. As such, the cumulative impacts section should have considered impacts associated with those flights on individuals and wildlife in Olympic National Park.

To the degree the 2015 EIS’s cumulative impacts analysis is relevant, if at all due to the Draft Decision’s failure to sufficiently incorporate it, it is significantly deficient even though it at least mentions Olympic National Park. The substantive discussion of cumulative impacts to Olympic National Park is contained in a single paragraph. *See* 2015 EIS, at 4-53. In it, the Navy first notes that “[b]ecause most of the Olympic National Park is designated as wilderness, the natural soundscape is an important element and prevalent in much of the park.” *Id.* However, the Navy goes on to assert that:

[N]oise impacts associated with military aircraft overflight activities within the park would be minor; when considered with other actions, the contribution of [the authorized increase in naval training activities] to these effects would be very small. [These new authorized increases in naval training activities] would not result in major adverse impacts ... on key resources or the value of Olympic National Park.

Id. The Navy supports this conclusion by pointing to the analysis of impacts on Olympic National Park contained in the 2015 EIS’s Appendix K: World Heritage Site Analysis. While that analysis recognizes that “noise associated with aircraft overflights ... could result in potential effects on the Olympic National Park and its soundscape[,]” 2015 EIS, Appendix K, at K-5, it also notes that “[t]he *Final General Management Plan/Environmental Impact Statement Olympic National Park* identified methods and assumptions for analyzing impacts to the

soundscape in the Olympic National Park.” *Id.* However, rather than rely on those methods and assumptions to carry out a robust study of noise impacts on Olympic National Park, the Navy states only that it has been retained for further analysis. 2015 EIS, at 4-5. But NEPA requires agencies to study impacts associated with proposed activities before they engage in them, not after. *See, e.g., Kern*, 284 F.3d at 1075 (“[C]umulative impacts analysis must be timely. It is not appropriate to defer consideration of cumulative impacts to a future date when meaningful consideration can be given now.”). Appendix K then sites to Appendix J to support its conclusion that “aircraft noise impacts associated with the Proposed Action would be negligible.”⁷ *Id.* at K-7. However, the Navy’s analysis in Appendix J is deeply flawed. *See supra* Section V, The Forest Service and Navy Failed to Properly Address Aircraft Noise Impacts, at 31–42.

While the 2015 EIS’s analysis on impacts to Olympic National Park is paltry, it clearly contradicts the Draft Decision and 2014 EA’s earlier conclusions that there will be no cumulative impacts to Olympic National Park, and when an agency’s analysis conflicts with past or present analyses, the agency must provide a reasonable explanation for why it is so. *Nw. Env’tl. Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d 668, 687 (9th Cir. 2007) (“[A]n agency changing its course must supply a reasoned analysis indicating that prior policies and standards are being deliberately changed, not casually ignored[.]”). But in this case, the document relied upon by the Draft Decision, the 2014 EA, was drafted prior to the 2015 EIS which says that there would be impacts on Olympic National Park. As such, the 2014 EA cannot offer a reasonable explanation for why its analysis differed. Furthermore, the public could not have commented on the adequacy

⁷ The Navy defines “Negligible” as “Natural sounds would prevail; human-caused noise would be absent or very infrequent, mostly immeasurable, and inaudible.” 2015 EIS, Appendix K, at k-6.

of the noise impact analysis contained in the 2015 EIS when commenting on the 2014 EA because that analysis had not yet been prepared and released to the public. Similarly, since the Draft Decision provides no additional cumulative impact analysis of its own, it cannot offer a reasonable explanation for why its cumulative impacts conclusion differs from the 2015 EIS's conclusion. Therefore, the cumulative impacts analyses in both the 2014 EA and the Draft Decision are arbitrary and capricious and violate NEPA. The Navy is thus required to go back and perform a comprehensive and sufficient cumulative impacts analysis regarding the impacts on Olympic National Park.

Therefore, the Forest Service should uphold this portion of NPCA's Objection, withdraw its Draft Decision and reconsider it after preparing an analysis of all the Proposed Action's cumulative, direct and indirect impacts and allowing the public to comment on that new analysis. This objections and recommendations in this section are associated with NPCA's prior comments regarding deficiencies in the Forest Service and Navy's cumulative impacts analysis. Exhibit 1, NPCA Comments, at 2.

V. The Forest Service and Navy Failed to Properly Address Aircraft Noise Impacts.

As noted above Olympic National Park and its acoustic environment "is a valuable resource that can easily be degraded or destroyed by inappropriate sound levels and frequencies." Exhibit 12, NPS Comments II, at 2. This valuable resource is currently threatened by naval training exercises on and above the Olympic Peninsula that "adversely affect the acoustic environment and visitor experience," through the "[t]he addition of human-made noise," such as aircraft overflights which "interfere[] with opportunities for solitude and primitive recreation." *Id.* at 1-2.

Similar to their efforts to cabinet the scope and cumulative impacts of naval training exercises on and above the Olympic Peninsula, the Forest Service and the Navy have sought to compartmentalize and minimize the acoustic environmental impacts associated with naval training exercises. For instance, the Forest Service noted that the “project is limited in scope and duration[,]” and that “[t]he Pacific Northwest EW range activities will be localized to specific sites within the Pacific Ranger District.” Draft Decision, at 10. Likewise, the 2014 EA only “assesse[d] the installation and operation of fixed and mobile EW emitters in the Olympic peninsula....” 2014 EA, at 1-5. The analysis of any associated activities was improperly deferred until the release of the 2015 EIS. *See* 2014 EA, at 4-3. By compartmentalizing the different connected training activities and by improperly limiting the scope of the Navy’s various environmental assessments and impact statements, neither the Navy nor the Forest Service has adequately analyzed the noise impacts associated with the Pacific Northwest Electronic Warfare Range, the operation of the three mobile emitters and one fixed emitter, and the attendant Naval training exercises on and above the Olympic Peninsula. This failure renders the Draft Decision arbitrary and capricious.

A fundamental flaw underlying both the Navy and Forest Service’s actions is the fact that neither has ever adequately analyzed the baseline acoustic levels in Olympic National Park, or the baseline acoustic levels under the Olympic MOAs. However, baseline data about ambient noise in an environment is necessary “to establish a baseline from which noise impacts can be assessed.” Exhibit 16, Lee, C., and MacDonald, J. 2016. Olympic National Park: Acoustical monitoring 2010. (Olympic Acoustical Monitoring) Natural Resource Report NPS/NRSS/NSNSD/NRR—2016/1310. National Park Service, Fort Collins, Colorado at 1. Without studying and quantifying these ambient acoustical levels—free from the noise impacts

associated with naval training exercises—decision makers and the public cannot adequately understand or appreciate the magnitude of the impact from the Naval training exercises on and above the Olympic National Park and the Olympic Peninsula.

NPS has stressed the importance of conducting baseline acoustic monitoring, *see* Exhibit 12, NPS Comments II, at 4, and conducted acoustical monitoring in Olympic National Park in the winter of 2010. *See generally* Exhibit 16, Olympic Acoustical Monitoring. This study, and “[t]he collection of ambient sound level data [generally] provide[] valuable information about a park’s acoustic conditions for use [in] decision making and in developing various types of park management and implementation plans.” *Id.* at 1. By failing to conduct studies regarding ambient acoustical levels, the Forest Service and Navy’s analyses lack a benchmark against which to measure impacts and are therefore arbitrary and capricious. *See, e.g., Gifford Pinchot Task Force*, 2014 WL 3019165, at *29 (“Without the baseline data, the agency cannot carefully consider information about significant environmental impacts and thus, the agency fails to consider an important aspect of the problem, resulting in an arbitrary and capricious decision.”) (citing *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1085 (9th Cir. 2011) (“[A]n agency cannot carefully consider information about significant environment impacts. Thus, the agency ‘fail[s] to consider an important aspect of the problem,’ resulting in an arbitrary and capricious decision.”)).

At one point in the 2014 EA, the Navy notes “an estimated ambient level of 40 dBA for undisturbed forested areas” in the Olympic National Forest. 2014 EA, at 3.3-3, 3.2-24. However, neither the Forest Service nor the Navy ever established ambient levels for Olympic National Park, and the difference may not be negligible. While the Olympic National Forest has five

designated wildernesses, over 95% of Olympic National Park is wilderness.⁸ Isolated from significant human impact, acoustic ambient sound levels in Olympic National Park are significantly lower. When NPS conducted monitoring in Olympic National Park, average natural ambient sound levels at their five monitoring sites ranged from 23.1 dBA to 35.6 dBA. Olympic Acoustical Monitoring, at 10. On the low end, such levels are quieter than a soft whisper at five feet. 2014 EA at 3.3-1. On the high end, they are still quieter than distant birdcalls.⁹ *Id.* These natural ambient sound levels are perceptibly lower than in the Olympic National Forest, *see*, 2014 EA, at 3.3-4 (“A long-term increase in the average hourly ambient sound level at any sensitive receptor of five or more dB ... would indicate a substantial degradation in the noise environment.”), and while the Navy did site to ambient noise levels in the Olympic National Forest, it did not then analyze the impact of aircraft overflights on natural ambient sound levels.¹⁰ Again, in failing to adequately determine background natural ambient noise, the Forest Service and the Navy have no benchmark against which to adequately measure the noise impacts of their actions.

⁸ In its comments addressing the Whidbey Island EIS, NPS notes that “[w]hile the emitter sites identified in the [2014 EA] are not within the boundary of ONP, the military overflights are within the Olympic MOA which includes a portion of the non-coastal and nearly all of the coastal Congressionally-designated wilderness with ONP.” *See* Exhibit 12, NPS Comments II, at 2

⁹ Given the quiet natural ambient sound levels in Olympic National Park, NPCA urges the Forest Service and the Navy to apply a 10dB penalty for all acoustical noise events, and not just nighttime events, as “[t]he 10dB penalty accounts for [the] generally lower background sound levels and greater community sensitivity to noise[.]” in Olympic National Park. *See* 2015 EIS, Appendix J, at 5. As noted by the Forest Service and Navy, “users of designated recreational areas are considered sensitive receptors.” Draft Decision, at 11; *see also* 2014 EA, at 3.3-3.

¹⁰ Additionally, the lowest L_{max} in the Olympic MOAs will be 84 dBA. 2015 EIS, Appendix J, at 22. While the Navy attempts to minimize this finding by stating that it will only occur for intermittent, short durations, this is significantly louder than the natural ambient sound levels in Olympic National Park and it will be incredibly disruptive to both humans and wildlife.

Similarly, the Navy and the Forest Service repeatedly attempt to minimize the noise impact of the electronic warfare training exercises on and above Olympic Peninsula by noting that the Navy has “historically” conducted training exercises in the Olympic MOAs, and that increased “aircraft noise impacts associated with the Proposed Action would be negligible.” 2015 EIS, at 3.10-4–10-5. But this simply states the problem as if it were an accepted and unavoidable condition. The relevant metric against which to measure noise impacts is not the Navy’s current training exercises, but rather the natural ambient soundscape. As it stands today, the natural soundscape predominates Olympic National Park. *See, e.g.*, Exhibit 16, Olympic Acoustical Monitoring, at 19 (noting that near the Hoh River measurement site no human sound is audible 83.4% of the time.) But even with the current scarcity of anthropogenic noise and current naval training activities on and above of the Olympic Peninsula, the National Park Service “already receives complaint from visitors of very low flying military aircraft buzzing peaks and valleys within the wilderness area, outside of the Olympic MOA.” Exhibit 12, NPS Comments II, at 2.

The Navy also attempts to understate the issue by reporting that electronic warfare training flights were “already occurring in the Olympic MOAs, and it is estimated that this proposal will only result in an approximately 10 percent annual increase in actual flights, which equates to approximately one additional flight per day.” 2015 EIS, Appendix I, at I-793. However, it is unclear how the Navy came to this conclusion. In the Navy’s 2015 Air Space Noise Analysis, it states that the reference number of aircraft per year for electronic warfare activities in the Olympic MOAs is 360. 2015 EIS, Appendix J, at 9. It goes on to note that the proposed number of aircraft per year for electronic warfare activities in the Olympic MOAs is

817. *Id.* at 14. This is not an increase of 10%, but approximately 227%.¹¹ NPS has voiced similar concerns regarding the connected EA-18G Growler Airfield Operations at Naval Air Station Whidbey Island noting that “the Navy proposes an increase in Electronic Warfare training from 2,900 events per year to 5,000 events per year with the proposed increase of additional electronic threat emitters in the Study Area.’ This is an increase of 72.4%.” Exhibit 12, NPS Comments II, at 2. By emphasizing historic training activities in the Olympic MOAs the Forest Service and the Navy improperly downplay the impacts associated with its Proposed Action and they fail to fully inform the public of the acoustical impacts associated with its training activities undermining the purpose of NEPA. *See, e.g., Klamath-Siskiyou Wildlands Center*, 387 F.3d at 997 (finding the Forest Service improperly considered cumulative impacts by failing to provide the total number of acres of critical habitat lost to related timber projects).

Rather than provide a clear picture of the true impacts associated with naval electronic warfare training exercises on and above the Olympic Peninsula, the Navy and Forest Service pick and chose the acoustical metrics they use to analyze their noise impacts. In doing so, they minimize the true impact and fail to acknowledge the fact that jet aircraft overflights severely impact Olympic National Park. In fact, aircraft overflights are some of the loudest noises in Olympic National Park and severely impact visitors. *See* Exhibit 12, NPS Comments II (noting that “ONP already receives complaints from visitors of very low flying military aircraft buzzing peaks and valleys within the wilderness areas, outside of the Olympic MOA.”): *see also* Exhibit 17, National Park Service, Sound Amplitude and Frequency Spectrogram (noting that the loudest sounds in the park are mainly from high-altitude aircraft).

¹¹ NPCA also notes that a 10% increase in the number of flights is not de minimis. Regardless, the Forest Service and Navy’s analysis does not say whether 10% will result in “a cumulatively significant impact on the environment. Significance cannot be avoided by terming an action temporary or breaking it down into small component parts.” 40 C.F.R. § 1508.27(b)(7).

For instance, Day-Night Average Sound Level (DNL) is the primary metric relied upon by the Navy in its Airspace Noise Analysis. *See* 2015 EIS, Appendix J. But the Navy’s reliance on DNL is deeply flawed and ignores other important acoustic metrics. *See* Exhibit 15, NPCA Objection Supporting Noise Expert Letter in Support of NPCA’s Objection (Noise Expert Letter), at 6–8. Additionally, the Navy does not state what data was collected to justify its conclusions regarding DNL. *See id.* The Forest Service and the Navy further dilute their acoustical impact analysis by including Entry/Exit flights in their DNL calculation because these flights occur between 14,000 and 16,000 feet above the mean sea level (MSL) while electronic warfare activities that occur at elevations as low as 6,000 MSL. 2015 EIS, Appendix J, at 14. By including activities not directly associated to electronic warfare training exercises on the Olympic Peninsula that occur at a much higher average altitude, and are therefore quieter, the Navy further dilutes its cumulative impact analysis. Finally, even the Navy notes the shortcomings of relying on DNL, noting that while “[c]umulative noise metrics, such as DNL, are well suited for general land use planning, [they] fail to provide an understanding of individual events.” *Id.* at 21.

NPS also underscored the concern of relying on DNL when it commented that the Navy should “analyze the acoustic environment . . . using appropriate metrics for noise-sensitive areas.” Exhibit 12, NPS Comments II, at 3. Specifically, NPS notes that “since DNL is an averaging metric and assumptions regarding impacts from DNL levels are based on community response data, the DNL metric alone is not adequate to capture other characteristics of noise exposure and the impacts to park resources, values, and visitor experience.” *Id.* Therefore, “NPS strongly recommend[ed] the use of audibility-based and “time above” metrics to take into account the duration of aircraft noise events, the number of aircraft noise events, and sound level events[.]”

because “[t]hese metrics correlate better with flight operations than day-night average metrics, which obscure the dynamic range of acoustic events.” *Id.* NPS also called on the Navy to include other metrics such as maximum A-weighted sound levels (L_{\max}), sound exposure level (SEL), equivalent sound level (L_{eq}), and number-of-events-above a specified sound level (NA)[,]” as “[t]hese metrics and analyses would ... better satisfy the requirements under the National Environmental Policy Act to characterize impacts to the environment in terms of intensity, context and duration (40 CFR 1508.27).” *Id.* at 3–4.¹²

NPCA also believes the adoption of these additional sound metrics is necessary and legally required in order to provide a truly comprehensive analysis of the impacts to the acoustical environment in terms of intensity, context, and duration. *See* Exhibit 15, Noise Expert Letter, at 10; *see also* 40 C.F.R. § 1508.27. Audibility is especially important as the Navy admits that its own analysis “does not provide any quantification of the durations that the aircraft would be audible.” 2015 EIS, Appendix J, at 24. The Navy fails to do so even though “[p]ast research has shown that, even at high altitudes, aircraft will tend to be audible over long distances,” and that EA-18Gs may be audible for approximately 26 percent of the time over the course of the year.¹³ *Id.* As it stands, the Navy never established criteria or a threshold for the percent time aircraft would be audible while conducting training exercises in the Olympic MOAs. Rather, the Navy shows only the percent reduction in the lateral distance to the edge of audibility between the EA-6B and the EA-18G.

¹² NPS also notes that “[i]n characterizing natural and non-natural acoustic conditions in a park, knowledge of the intensity, duration, and distribution of the sound sources is essential.” Exhibit 16 Olympic Acoustical Monitoring, at 5.

¹³ NPCA notes that this fails to account for the audibility of training activities in the Olympic MOAs with other types of aircraft including, but not limited to, the P-C3P-8A, F-15, and F-16.

The Navy further dilutes its analysis by providing the percentage of time spent at each altitude in its reference and proposed training missions in terms of MSL. *See id.* at 14–18. However, elevation in Olympic National Park ranges from 0 ft. MSL to 7,980 ft. MSL and elevations within the Olympic MOAs range from 0 ft. MSL to 5,000ft. MSL. *Id.* at 21. By failing to measure altitude by Above Ground Level (AGL), rather than MSL, the Navy never discloses the amount of time spent at altitude in relation to visitors and wildlife on the ground in the Olympic National Park and under the Olympic MOAs.

As demonstrated by the convoluted manner in which the Navy picks and chooses different metrics against which to measure noise impacts—rather than informing decisionmakers and the public in a clear and transparent manner in order to ensure that decisions are based on a thorough and practical understanding of the environmental consequences—the Forest Service and Navy’s analyses require an individual to carefully parse their language, data, charts, and other information in order to have an idea of the true scope of the potential impacts. But NEPA places the burden on the agencies, not the public, to produce and analyze data. *See, e.g., League of Wilderness Defenders v. Connaughton*, 752 F.3d 755, 761 (9th Cir. 2014) (“When the public reviews an EIS to assess the environmental harms a project will cause and weights them against the benefits of that project, the public should not be required to parse the agency’s statements to determine how an area will be impacted, and particularly to determine which portions of the agency’s analysis rely on accurate and up-to-date information, and which portions are no longer relevant.”).

Even in documents intended to analyze acoustical data, the scope of the Navy’s analysis is unclear. For instance, in the Draft Decision, it never explicitly says that the noise impacts of any increased naval training exercises associated with the operation of an additional three mobile

emitters in the Olympic National Forest were analyzed in the 2010 EIS, 2014 EA, or 2015 EIS. The closest it gets is stating that the 2015 EIS “includes an airspace noise analysis of aircraft use associated with EW training over the Olympic Military Operations Areas originally addressed in the 2010 [EIS].” Draft Decision, at 15. But the 2010 EIS did not contemplate the operation of any mobile emitters. Additionally, the noise impact analysis in the 2015 EIS states that “[t]he purpose of this noise study is to document changes to the noise environment within the Special Use Airspace (SUA) of the Olympic MOA A, Olympic MOA B, and Warning Areas W-237A and W-237B during the transition from the EA-6B to the EA-18G.” 2015 EIS, Appendix J, at 3. It never mentions the operations of any mobile emitters.

This example underscores the point that it is not the public’s job to sift through thousands of pages of analysis in an attempt to understand the true impact and scope of the Forest Service and Navy’s proposed actions. Additionally, NEPA documents “shall be written in plain language ... so that decisionmakers and the public can readily understand them.” 40 C.F.R. § 1502.8. Even if agency specialists could understand the information in the NEPA documents, “the documents are unacceptable if they are indecipherable to the public.” *Klamath-Siskiyou Wildlands Center*, 387 F.3d at 996.

Even when an individual has parsed the Forest Service and Navy’s environmental impact documents, the Forest Service and the Navy fail to support their conclusions by failing to provide the data underlying their conclusions. *See, e.g.*, Exhibit 15, Noise Expert Letter, at 8. Because of this, many of the Forest Service and Navy’s ultimate conclusions are just that—conclusory statements. Instead of demonstrating to the public how they arrived at those conclusions, the Forest Service and the Navy tacitly ask the public to trust them that the conclusions provided are the correct ones. But this trust is severely eroded by the fact that the Forest Service and the Navy

have failed to respond to NPCA's FOIA requests in any substantive fashion.¹⁴ *See supra* Section I, The Forest Service and the Navy Failed to Provide Information in a Timely Manner and Disregarded NPCA's FOIA Requests, at 5–8.

This failure is endemic to the Forest Service and Navy's noise impact analyses. For instance, the Navy states that “for the cumulative noise metrics (L_{dn}) and (L_{dnr}), the highest level of noise exposure was computed to be 40 dBA for the reference activities and 41 dBA for the proposed activities for areas beneath the highest elevations of the Olympic MOA.” 2015 EIS, Appendix J, at 21. However, the noise modeling never shows how the Navy reached this value. The reference activities and the proposed activities only show the number of aircraft per year, the percentage of day time flights, the average minutes in airspace for each aircraft, the average power setting for the aircraft, the average speed, and the altitude above mean seal level. *See id.* at 8–18. At no point in its cumulative noise metric analysis does the Navy provide any data regarding the actual decibel readings of aircraft in flight. Without such a value, the Navy's conclusion lacks any foundation. *See, e.g., Klamath-Siskiyou Wildlands*, 387 F.3d at 996 (noting that “while the conclusions of agency experts are surely entitled to deference, NEPA documents are inadequate if they contain only narratives of expert opinions”); *see also Idaho Sporting Cong. v. Thomas*, 137 F.3d 1146, 1150 (9th Cir. 1998) (“[A]llowing the [agency] to rely on expert opinion without hard data either vitiates a plaintiff's ability to challenge an agency action or results in the courts second guessing an agency's scientific conclusions. As both of these results are unacceptable, we conclude that NEPA requires that the public receive the underlying environmental data from which a[n agency] expert derived her opinion.”).

¹⁴ Although the Navy did provide a cursory response, the sufficiency of that response was successfully appealed by NPCA on November 9, 2016. However, since then, NPCA has received no new documents from the Navy and their substantive FOIA request is still pending, long past all of the statutory deadlines imposed by FOIA.

The failure to provide the underlying data on which the Forest Service and Navy’s conclusions are based violates NEPA’s mandate that agencies take a “hard look” at how their actions affect the environment. The Ninth Circuit has held that part of this “hard look” is the requirement that agencies “place their data and conclusions before the public.” *Oregon Nat. Desert Ass’n v. Bureau of Land Mgmt.*, 625 F.3d 1092, 1099 (9th Cir. 2010) (citing *Or. Natural Res. Council Fund v. Goodman*, 505 F.3d 884, 889 (9th Cir. 2007)). In doing so, “NEPA relies upon democratic processes to ensure ... that ‘the most intelligent, optimally beneficial decision will ultimately be made.’” *Id.* (quoting *Calvert Cliffs’ Coordinating Comm. v. U.S. Atomic Energy Comm’n*, 449 F.2d 1109, 1114 (D.C.Cir. 1971)). Here, the Forest Service and Navy may have placed their conclusions before the public, but they never placed their data before the public. Regardless, the impacts to Olympic National Park, Olympic National Forest, and their visitors outlined in the Forest Service and Navy’s documents are unacceptable.

The Forest Service should therefore uphold this portion of NPCA’s Objection, withdraw the Draft Decision and prepare and complete and comprehensive analysis of the noise impacts of the Proposed Action and connected aircraft activities, based on proper methodologies and fully disclosed data. The public should then be allowed to comment on that new analysis and the Forest Service can then reconsider its Draft Decision in light of that new analysis and public comment. The objections and recommendations in this section are associated with NPCA’s previous comments concerning cumulative impacts, the potentially negative impacts to the soundscape of the National Forest and the National Park, impacts to wildlife, and visitor use and enjoyment. *See* Exhibit 1, NPCA Comments, at 2–3.

VI. The Forest Service's Adopted Purpose and Need Statement and Alternatives Analysis Violate NEPA and the 1988 Master Agreement.

NEPA requires the Forest Service to “study, develop, and describe appropriate alternatives to recommended courses of action in any proposal that involves unresolved conflicts concerning alternative uses of available resources.” 42 U.S.C. § 4332(E); *see also* 40 C.F.R. § 1508.9(b). It must “rigorously explore and objectively evaluate all reasonable alternatives” to the Proposed Action. *City of Tenakee Springs v. Clough*, 915 F.2d 1308, 1310 (9th Cir. 1990). An EA must give alternatives full and meaningful consideration. *Center for Biological Diversity v. Nat'l Hwy Traffic Safety Admin.*, 538 F.3d 1172, 1217 (9th Cir. 2008).

Because project alternatives are derived from the stated purpose and need, the goal of a project necessarily dictates the range of reasonable alternatives. *Westlands Water Dist. v. U.S. Dep't of Interior*, 376 F.3d 853, 865 (9th Cir. 2004). Courts evaluate an agency's statement of purpose and need under a reasonableness standard and will overturn a statement that is arbitrary and capricious. *Nat'l Parks & Conservation Ass'n v. BLM*, 606 F.3d 1058, 1070 (9th Cir. 2010). Courts will also overturn an EA that fails to consider a reasonable range of alternatives. *W. Watersheds Project v. Abbey*, 719 F.3d 1035, 1050–53 (9th Cir. 2013).

When defining the purpose and need of a project, an agency cannot define its objectives in unreasonably narrow terms such that the outcome is preordained. *Nat'l Parks & Conservation Ass'n*, 606 F.3d at 1070. Courts assess the reasonableness of a purpose and need statement by considering the statutory context of the federal action. *See Westlands Water Dist.*, 376 F.3d at 866. Here the Forest Service improperly adopted the Navy's purpose and need from the 2014 EA, which in turn led the Navy to illegally limit all reasonable alternatives to those that would allow the Navy to continue to conduct its training activities in the Olympic MOAs, which includes significant portions of the airspace above Olympic National Park. *See* 2014 EA, at 1-1.

The Forest Service illegally adopted this purpose and alternatives analysis which focuses on the Navy's desired actions and not on the Forest Service's statutory obligations regarding the management of national forest lands. By doing so neither the Navy nor the Forest Service ever considered any reasonable alternative that would have Navy aircraft not fly over Olympic National Park airspace or significantly reduce the number of such flights.

The 2014 EA defines the Proposed Action's purpose and need as:

The purpose of the Proposed Action is to sustain and enhance the level and type of EW training currently being conducted by assets using the NWTRC [which includes the Olympic MOAs], to provide the ability to accommodate growth in future training requirements, and to maximize the ability of local units to achieve their training requirements on local ranges.

2014 EA, at ES-1. A more appropriate purpose and need for the Proposed Action is to locate EW emitters so as to allow the Navy to conduct necessary training exercises. Locating those emitters so such training occurs only in the existing Olympic MOAs, which overlay significant portions of Olympic National Park, is not an essential part of that purpose of need.¹⁵ Therefore, defining the purpose and need as the Navy did in the 2014 EA was arbitrary and unreasonably limited the scope of reasonable alternatives. *See, e.g., Simmons v. U.S. Army Corps*, 120 F.3d 664, 666 (7th Cir. 1997) (holding that "if the agency constricts the definition of the project's purpose and thereby excludes what truly are reasonable alternatives, the EIS cannot fulfill its role").

In fact, both the 2014 EA and the Forest Service's Draft Decision expressly refused to consider in detail any alternative that did not allow the Navy to continue to train in the existing Olympic MOAs. The Navy and Forest Service could have considered a reasonable alternative

¹⁵ For instance, the mobile emitters could be located in the training areas near Mountain Home Air Force Base, where electronic warfare training already currently takes place. *See* 2014 EA, at 3.2-23 ("Under the No Action Alternative, very limited EW training, without the enhanced capability of fixed and mobile emitters, would continue to be conducted in the NWTRC and intermediate level EW training for certification would continue to occur at the Mountain Home Air Force Base approximately 400 nm southeast of NASWI.")

that changed the existing Olympic MOAs to reduce or even entirely avoid using airspace over Olympic National Park. None of the referenced NEPA analysis ever addresses why, or establishes that, flying over Olympic National Park is necessary for the Navy to conduct its training exercises. Indeed, the Navy's own maps appear to indicate it is not necessary and Navy jets could fly around the Park to reach their primary training areas. Entirely avoiding such park airspace might add flying time for Navy pilots, but the EA never addresses whether an alternative that required such additional flying time would have been worth it to avoid adverse impacts to the Park's soundscape. Moreover, if the burdens of complete avoidance were too much, the Navy could have considered an alternative that simply reduced such flyovers of Park airspace by, for example, not locating the mobile emitters so close to Park boundaries. But even that more limited alternative was not considered by the Navy or Forest Service.

Perhaps most importantly, in terms of NEPA's required alternatives analysis, the Draft Decision claims that it complies with the 1988 Master Agreement between the Department of Defense and the Department of Agriculture. *See* Draft Decision at 4. However, that Master Agreement specifically requires that before the Navy can ask to use national forest system lands, as its request for a SUP clearly does, the Navy must determine that Department of Defense lands are unavailable or unsuitable and it must provide the analysis showing that to the Forest Service. Exhibit 11, Master Agreement at Section III A.¹⁶ This requirement in the Master Agreement reinforces NEPA's requirement that the Navy and Forest Service must show that they considered

¹⁶ By the Navy's own admission, it does appear as though there is another available training location on Department of Defense lands near Mountain Home Air Force Base. *See* 2014 EA, at 3.2-23 ("Under the No Action Alternative, very limited EW training, without the enhanced capability of fixed and mobile emitters, would continue to be conducted in the NWTRC and intermediate level EW training for certification would continue to occur at the Mountain Home Air Force Base approximately 400 nm southeast of NASWI."). However, the Navy has never explained why training at Mountain Home is unsuitable.

an alternative that did not require the use of national forest lands for the location of their fixed and mobile emitters. The Forest Service did not include or reference such an analysis in its Draft Decision. Such an analysis would have been covered by the NPCA's FOIA request, discussed above, but the Forest Service has failed to produce such an analysis in response to the NPCA's FOIA request. Not producing such an important and legally required analysis to the public violates both FOIA and NEPA.

Therefore the Forest Service should uphold this portion of NPCA's Objection, withdraw its Draft Decision and reconsider it after preparing an analysis of a full range of reasonable alternatives, based on a more reasonable and less narrow statement of purpose and need, and allowing the public to comment on that new analysis. The objections and recommendations in this section are associated with NPCA's previous comments concerning impacts to Olympic National Park, cumulative impacts, the potentially negative impacts to the soundscape of the National Forest and the National Park, and visitor use and enjoyment. *See* Exhibit 1, NPCA Comments, at 2–3.

VII. The Forest Service Failed to Disclose and Analyze Impacts from Navy Jet Overflights on Native Species that are not Listed Under the ESA.

The Draft Decision acknowledges that NEPA requires that the Forest Service disclose and analyze impacts to all native species, including species not listed under the Endangered Species Act. In particular the Draft Decision discusses direct impacts from the Navy's mobile emitter trucks on Regional Forester Special Status and Sensitive Species.¹⁷ Draft Decision at 12.

¹⁷ However the Draft Decision improperly incorporated by reference specific analysis done by a forest service biologist and did not include that analysis as an appendix to its decision or post it on the Forest Service's website. The Forest Service also failed to produce this analysis in response to NPCA's FOIA request. This is also a NEPA violation. *See, e.g., LOWD v. Connaughton*, 2014 WL 6977611, at *20.

However, by limiting the scope of its analysis to only impacts from the emitter trucks, the Forest Service has, in violation of NEPA completely failed to disclose impacts to wildlife from directly connected Navy jet overflights. Recent scientific publications show that noise from such overflights has direct adverse impacts on wildlife species, including species native to the Olympic Peninsula and Special Status and Sensitive species. *See* Exhibit 18, Shannon et al., A Synthesis of Two Decades of Research Documenting the Effects of Noise on Wildlife. The Forest Service does not correct this error by adopting the 2014 EA, which also fails to consider impacts from aircraft noise, or by generally (and improperly) incorporating the 2015 EIS, which does not consider noise impacts on all native species, including Special Status and Sensitive species.

The Forest Service should uphold this part of NPCA's Objection, withdraw the Draft Decision, and reconsider that decision after preparing a new NEPA analysis of impacts to all native species and allowing public comment on that new, complete analysis. The objections and recommendations in this section are associated with NPCA's previous comments concerning impacts to wildlife. *See* Exhibit 1, NPCA Comments, at 2–3.

VIII. The Forest Service Failed to Include Provisions Protecting Scenic and Esthetic Values.

The Forest Service SUP can only be authorized in accordance with the procedures set forth in 36 CFR Part 251, Subpart B. *See* Appendix C, Draft Special Use Permit Pacific Northwest Electronic Warfare Range, at 1–2. As such, each SUP “must contain ... [t]erms and conditions which will ... [m]inimize damage to scenic and esthetic values and fish and wildlife habitat and otherwise protect the environment.” 36 C.F.R. § 251.56. However, the draft SUP has no specific provisions ensuring that the authorized action will not damage scenic and esthetic values. For instance, there is no provision that calls for the halting of aircraft overflights if they

interfere with visitors' enjoyment of Olympic National Park, an experience already heavily impacted by naval training activities on and above the Olympic Peninsula. *See, e.g.*, Exhibit 12, NPS Comments II, at 2 (noting that the National Park Service "already receives complaint from visitors of very low flying military aircraft buzzing peaks and valleys within the wilderness area, outside of the Olympic MOAs"). The closest the SUP ever comes to such conditions is meaningless boilerplate requirements that the permittee comply with environmental laws. *See, e.g.*, Appendix C, Draft Special Use Permit Pacific Northwest Electronic Warfare Range, at 3, 6.

The Forest Service should uphold this part of NPCA's objection, withdraw the Draft Decision, and reconsider its decision after preparing a new draft SUP that fully complies with applicable regulations and allowing the public to comment on that new draft SUP. NPCA's prior comments could not address the deficiencies of the SUP because it was not available at that time.

IX. The Forest Service and USFWS' Conclusions Regarding Impacts on ESA-Listed Species Are Arbitrary and Capricious in Violation of the ESA.

The Draft Decision adopts and relies upon the analysis and conclusions from the 2016 BiOp. However, Fish and Wildlife's (FWS) decision in the BiOp that Navy actions "may affect, not likely to adversely affect" the Northern Spotted Owl (NSO) is arbitrary and capricious. In fact, FWS on October 30, 2015 informed the Navy that they did not concur that the actions "may affect, not likely to adversely affect" the NSO, before later concurring with the Navy's original opinion in the BiOp. 2016 BIOP at 1. "A biological opinion is arbitrary and capricious and will be set aside when it has failed to articulate a satisfactory explanation for its conclusions or when it has entirely failed to consider an important aspect of the problem." *Greenpeace v. NMFS*, 80 F.Supp.2d 1137, 1147 (W.D. Wash. 2000). FWS failed to take into account the effects of anthropomorphic noise on the NSO's immune response. Moreover, FWS relied on Exhibit 19, Busch & Hayward (2009), to assert that noise does not threaten the survival or reproductive

success of NSO, but this study explicitly states noise *can have* significant effects on a species immune response. *See* Exhibit 15, Noise Expert Letter, at 12–13. This immune response was not discussed, but yet it may have significant adverse affects on NSO survival because of the increased parasite load from the invading barred owl. *See id.* The BiOp is therefore arbitrary and capricious, in violation of the ESA, and the Forest Service’s reliance on it in the Draft Decision violates its obligations under NEPA and the ESA. NPCA’s comments do not address this point as the BiOp was not available during the comment period.

X. The Forest Service’s FONSI Finding is not Justified under 40 C.F.R. § 1508.27.

“If an agency decides not to prepare an EIS, it must supply a convincing statement of reasons to explain why a project’s impacts are insignificant. The statement of reasons is crucial to determining whether the agency took a hard look at the potential environmental impact of a project.” *Native Ecosystems Council v. Tidwell*, 599 F.3d 926, 937 (9th Cir. 2010) (finding that USFS violated NEPA in issuing FONSI based on inadequate analysis). “An agency cannot ... avoid its statutory responsibilities under NEPA merely by asserting that an activity it wishes to pursue will have an insignificant effect on the environment. Instead, an agency must provide a reasoned explanation of its decision.” *Jones v. Gordon*, 792 F.2d 821, 828 (9th Cir. 1986); *see also, Blue Mountains Biodiversity Project*, 161 F.3d at 1213–14 (ruling that an EIS was required where the Forest Service lacked information about how project may affect sediment input into streams); *Anderson v. Evans*, 371 F.3d 475, 489–93 (9th Cir. 2004) (holding that “uncertain” impacts required an EIS). “An agency is required to prepare an EIS when there are substantial questions about whether a project *may* cause significant degradation of the human environment.” *Native Ecosystems Council v. U.S. Forest Service*, 428 F.3d 1233, 1239 (9th Cir. 2005)

(emphasis in original). “[T]his is a low standard.” *California Wilderness Coalition v. U.S.*, 631 F.3d 1072, 1097 (9th Cir. 2011).

The FONSI failed to satisfy these requirements because the 2014 EA lacks the critical analysis and information detailed above – i.e., it failed to provide the “convincing statement of reasons.” NEPA required the Forest Service’s FONSI to address both context and intensity. In terms of “context,” the Draft Decision improperly determined that the impacts of the requested special use permits would be “localized” and limited to the “project area”, which the Draft Decision defined to only include the proposed locations of the mobile emitter trucks on Forest Service lands. However, the Draft Decision also acknowledges that the mobile emitters would be used by the Navy “in connection with its aircraft” conducting EW training. Draft Decision, at 1. That training occurs over the entire Olympic MOAs, including over significant portions of Olympic National Park. Because connected actions are under NEPA considered to be a part of the agency action being reviewed, *see* 40 C.F.R. § 1508.25, the Draft Decision improperly determined that the context of the project’s impacts were “localized.” The proper context includes a much broader area covering most of the western side of the Olympic Peninsula.

In addition, CEQ’s NEPA regulations contain ten “intensity” factors to consider in the “context” of the affected region, affected interests, and the locality to determine if an action may have a significant effect. 40 C.F.R. § 1508.27. Here, the Draft FONSI improperly and arbitrarily determined that none of the ten intensity factors were implicated by the Proposed Action. In fact, the decision is likely to cause impacts under at least 9 of the listed intensity factors in 40 C.F.R. § 1508.27(b).

- (1) As noted above the Draft Decision incorrectly disclosed and analyzed adverse impacts from noise and failed to consider impacts from noise on many native species. Thus the FONSI arbitrarily addresses the extent to which the Proposed

Action's adverse impacts outweigh its beneficial impacts. *See* 40 C.F.R. § 1508.27(b)(1).

- (2) The Draft Decision and the adopted analysis in the 2014 EA do not specifically consider at all the impacts from Navy aircraft overflight noise on human health or the effects from electronic radiation emitted during EW training on human health as required by 40 C.F.R. § 1508.27(b)(2). The Forest Service fails to properly incorporate any specific analysis from the 2010 EIS or 2015 EIS to address these issues.
- (3) As addressed above, the Draft Decision and any allegedly incorporated or purportedly tiered to NEPA analyses not only fail to address impacts to Olympic National Park and its visitors from Navy jet overflight noise, as required by 40 C.F.R. § 1508.27(b)(3), but also mislead the public regarding the potential for such impacts.
- (4) The impacts of the Proposed Action are controversial under 40 C.F.R. § 1508.27(b)(4) because NPCA's Objection provides specific scientific and factual criticism disputing the Forest Service and Navy analysis of the direct, indirect and cumulative impacts of noise from the connected Navy jet overflights. The fact that "a majority of comment letters" supposedly did not provide such specific criticism or support their criticism with factual or scientific evidence (*see* Draft Decision at 14) is not the legal standard for finding controversy under this factor. *See, e.g. Foundation for North American Wild Sheep v. U.S. Dept. of Agr.*, 681 F.2d 1172, 1182 (9th Cir. 1982) (defining the term controversial to refer to "cases where a substantial dispute exists as to the size, nature, or *effect* of the major federal action, rather than to the existence of opposition to a use").
- (5) None of the "evidence" cited by the Forest Service for why the impacts of this action are not "uncertain or involve unique or unknown risks" under 40 C.F.R. § 1508.27(b)(5) addresses impacts to a national park and its unique, fragile soundscape. As NPCA addresses above in its Objection such impacts are in fact not well documented and trigger this intensity factor as well.
- (6) The fact that the Forest Service and Navy effectively attempt to tier to what are essentially programmatic analyses, such as the 2010 EIS and 2015 EIS, instead of comprehensively analyzing specific site impacts, potentially establishes a precedent for doing so for similar future modifications to the Navy's training exercises within the meaning of 40 C.F.R. § 1508.27(b)(6).
- (7) NPCA's Objection addresses above how the proposal is likely to have cumulative impacts, thus triggering the intensity factor under 40 C.F.R. § 1508.27(b)(7).
- (8) The Draft Decision relies on a flawed analysis from the 2016 BiOp that understates impacts on the Northern Spotted Owl, which triggers the intensity factor under 40 C.F.R. § 1508.27(b)(9).
- (9) The action threatens a violation of NEPA, NFMA regulations, the ESA, and the Master Agreement between the Department of Defense and the Department of Agriculture, which is federal law, thus triggering the intensity factor under 40 C.F.R. § 1508.27(b)(10).

An EIS may be required even if only one intensity factor exists, *Ocean Advocates v. U.S. Army Core of Eng'rs*, 402 F.3d 846, 865 (9th Cir.2004) (holding that “[a] court may find substantial risk of a significant effect based on just one of these factors”), and here as many as 9 of those intensity factors apply. Under the admittedly “low standard” for determining whether an EIS is necessary, this Proposed Action and its admittedly connected Navy jet training activities, easily passes that low threshold. As such, it was arbitrary and capricious for the Forest Service to attempt to comply with NEPA by superficially adopting the Navy’s 2014 EA and improperly incorporating other NEPA analysis from the 2010 EIS and 2015 EIS. The Forest Service can correct this violation by withdrawing the Draft Decision and preparing a proper EIS. The objections and recommendations in this section are associated with NPCA’s previous comments concerning the lack of a comprehensive analysis of the impacts associated with the Proposed Action, impacts to Olympic National Park, cumulative impacts, the potentially negative impacts to the soundscape of the National Forest and the National Park, impacts to wildlife, and visitor use and enjoyment. *See* Exhibit 1, NPCA Comments, at 2–3.

Conclusion

Each of NPCA’s objections set forth above, individually and collectively, require the Forest Service to withdraw the Draft Decision. Then the Forest Service and Navy should prepare a single, comprehensive EIS to address in one accessible place all the direct, indirect, and cumulative impacts from the Navy EW training activities in the Olympic MOAs, on and above the Olympic Peninsula, with particular attention paid to impacts on Olympic National Park and its unique and sensitive soundscape. Then, after the Navy and Forest Service have allowed public comment on that new NEPA analysis, the Forest Service can reconsider the Navy’s proposed SUP and issue a new draft decision, subject to the Forest Service’s objection process.

Sincerely,



Counsel for NPCA

Objection Exhibit List

Copies of all Exhibits Included on CD Submitted with Objection submitted via Certified U.S. Mail/Exhibit 15 also Submitted with Objection Submitted Electronically

1–NPCA 10.31.14 Comments

Section 1—FOIA

2–6.10.16 FOIA Request

3–7.19.16 USFS Acknowledgement of 6.1016 FOIA Request

4–10.20.16 NPCA First email re FOIA resp. status

5–10.28.18 USFS First email re FOIA resp. status

6–11.17.16 NPCA Second email re FOIA Resp. status

7–11.29.16 USFS Second email re FOIA Resp. status

8–12.5.16 NPCA third email re FOIA Resp. status

9–12.8.16 USFS third email re FOIA Resp. status

10–12.16.16 Our letter demanding response and withdrawal of Draft Decision

11–1988 Master Agreement

Section 2—Park Impacts

12–11.18.14 NPS Comments II

13–1.3.14 NPS Comments I

14–Newspaper map showing emitter locations and park boundaries

Sec.5—Noise Impacts

15–1.12.16 Supporting Noise Expert Letter in Support of NPCA's Objection

Exhibits Incorporated Within the Supporting Noise Expert Letter

A. Luther CV
B. Gentry CV
C. Dumyahn & Pijanowski 2011
D. Barber et al. 2011
E. Pepper et al. 2003
F. Barbe et al. 2010
G. Natural Sounds and Night Skies Division
H. Pilcher et al. 2009
I. Szerenta & Zannin 2009
J: Lynch et al. 2011
K: Anderson & Mulligan 1983
L: Herbert Hoover National Historic Site Report 2014
O: Mace, Marquit & Bates 2013
P: Kim & Shelby 2011
Q: Olympic National Park Acoustical Monitoring Report 2010
R: Federal Interagency Committee on Noise 1992
S: National Park Service Director's Order #47 2000
T: Aviation Noise Abatement Policy 2000
U: Aylor 1972
V: Wiley & Richards 1978
W: Siemers & Schaub 2011
X: Department of Defense Noise Working Group 2009
Y: Davies et al. 2013
Z: Iglesias-Merchan et al. 2015
AA: Pijanowski et al. 2011
BB: Davies et al. 2013
CC: Davies, Bruce, Murphy 2014
DD: Merchan et al. 2014
EE: Benfield et al. 2013
FF: Busch & Hayward 2009
KK: Shannon et al. 2016
LL: Padgett & Glaser 2003
MM: Madden 2011
NN: Folt et al. 1999
OO: Darling & Cote 2008
PP: Peterson & Robins 2003
QQ: Lewicki et al. 2015
RR: Remple 2004
SS: Barrowclough & Gutierrez 1990
TT: Barrowclough et al. 1999
VV: Francis et al. 2013
WW: Siemers & Schaub 2011
XX: Wale et al. 2013
YY: Voellmy et al. 2014
ZZ: Bunkley & Barber 2015
AAA: Luo et al. 2015
BBB: Mason et al. 2016
CCC: Senzaki et al. 2016

16–Lee, C., and MacDonald, J. 2016. Olympic National Park: Acoustical monitoring 2010. (Olympic Acoustical Monitoring) Natural Resource Report NPS/NRSS/NSNSD/NRR—2016/1310.

17–National Park Service, Sound Amplitude and Frequency Spectrogram

Sec. 7—Native Species

18–2016 Article re effects of noise on wildlife

Sec. 9—ESA

19–Busch & Hayward 2009