

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

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CENTER FOR BIOLOGICAL DIVERSITY,)
TURTLE ISLAND RESTORATION) Civil Action No. 3:03-cv-4350 (EMC)
NETWORK, JAPAN ENVIRONMENTAL)
LAWYERS FEDERATION, SAVE THE)
DUGONG FOUNDATION, ANNA) Hearing Date: June 28, 2018
SHIMABUKURO, TAKUMA) Time: 1:30 pm
HIGASHIONNA, and YOSHIKAZU) Courtroom: 5
MAKISHI,)

Plaintiffs,

v.

JAMES MATTIS, in his official capacity as the
Secretary of Defense, and U.S. Department of
Defense,

Defendants.

**PLAINTIFFS’ NOTICE OF MOTION,
MOTION, AND MEMORANDUM IN
SUPPORT OF MOTION FOR
SUMMARY JUDGMENT**

(National Historic Preservation Act,
54 U.S.C. §§ 300101 *et seq.*)

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1 **NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT**

2 To Defendants and their Attorney(s) of Record:

3 You are hereby given notice that Plaintiffs, Center for Biological Diversity, *et al.*, hereby
4 move for summary judgment in the above-referenced case. A hearing on this motion will be held
5 on June 28, 2018 at 1:30 pm before the Honorable Edward M. Chen, in Courtroom 5 of the United
6 States District Court for the Northern District of California, San Francisco Division, 450 Golden
7 Gate Avenue, San Francisco, CA.

8 Plaintiffs request that this Court hold unlawful and set aside Defendants’ finding, issued
9 pursuant to section 402 of the National Historic Preservation Act (NHPA), 54 U.S.C § 307101(e),
10 that construction of a military base off the coast of Okinawa, Japan would have “no adverse effect”
11 on the resident population of critically endangered Okinawa dugong. Plaintiffs also request that this
12 Court order that DoD not undertake any activities in furtherance of the project until it complies with
13 section 402 of the NHPA. This motion is filed pursuant to Fed. R. Civ. P. 56(c) and Civil L.R. 7-2
14 and is made on the grounds specified in Plaintiffs’ memorandum in support of the motion, the
15 complete record before the Court in this matter, and upon such other evidence as may be presented
16 to the Court.

17 **STATEMENT OF ISSUES TO BE DECIDED**

18 Whether Defendants’ finding pursuant to section 402 of the National Historic Preservation
19 Act (NHPA), 54 U.S.C § 307101(e), that construction of a military base off the coast of Okinawa,
20 Japan would have “no adverse effect” on the resident population of critically endangered Okinawa
21 dugong was “arbitrary, capricious, an abuse of discretion, [and] otherwise not in accordance with
22 law,” 5 U.S.C. § 706(2)(A), and made “without observance of procedure required by law,” *Id.* §
23 706(2)(D), when the finding: (a) was made without public notification and consultation with
24 affected stakeholders as required by section 402; (b) relied upon information that did not meet the
25 agency’s own standards for scientific rigor; and (c) is unsupported by evidence in the record.

26 **INTRODUCTION**

27 The Okinawa dugong is an extremely endangered marine mammal that holds a central place
28 in the culture of Okinawa, Japan, and is officially protected as a cultural icon under Japanese law.

1 This case arises out of the obligation of the U.S. Department of Defense (DoD), pursuant to the
2 NHPA, to respect and protect foreign cultural heritage by taking into account the effect on the
3 dugong of DoD’s participation in the construction and operation of a new Marine Corps air base—
4 the Futenma Replacement Facility (FRF)—in Okinawa. Construction of the FRF will require
5 landfilling portions of Henoko and Oura Bay off the coast of Okinawa that are feeding grounds for
6 the dugong. Because construction and operation of the FRF may harm the dugong, section 402 of
7 the NHPA requires DoD to “take into account the effect [of the FRF on the dugong] for purposes of
8 avoiding or mitigating any adverse effects.” 54 U.S.C. § 307101(e).

9 In previous stages of this litigation, this Court held that section 402 applies to the Okinawa
10 dugong and that DoD had failed to comply with the obligations of the statute. The Court ordered
11 DoD to take into account the effect of the FRF on the dugong. In April 2014, DoD notified
12 Plaintiffs and the Court that it had completed “Findings” under section 402. However, the Findings
13 are procedurally and substantively flawed. For example, DoD did not afford any opportunity for
14 public comment or participation in its assessment of how the FRF might affect this culturally
15 significant species, which this Court has recognized to be a “basic element” of the section 402
16 process, and did not make its Findings, or any of the information on which they are based, publicly
17 available.¹

18 Substantively, although section 402 is intended to identify and address “any” adverse
19 effects, DoD inappropriately limited its inquiry into possible adverse effects to a non-exhaustive list
20 identified by this Court before DoD had undertaken any inquiry at all. DoD’s Findings conclude
21 that the FRF project will have “no adverse effect” on the dugong, but admit that available data are
22 “not sufficient” to evaluate essential questions such as the size, status and viability of the Okinawa
23 dugong population. Finally, DoD ignored substantial evidence in the record indicating that the FRF
24 will, indeed, have an adverse impact on the dugong.

25 These flaws in DoD’s “take into account” process made it impossible for DoD to generate
26 adequate information about the effects of the FRF on the dugong and render arbitrary and capricious
27 DoD’s conclusion that the FRF will have no adverse effect. Plaintiffs now move for summary

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¹ At least not until they were compelled to compile the administrative record in this case.

1 judgment and request that this Court set aside the Findings and enjoin DoD from taking actions in
2 furtherance of the FRF project until DoD remedies the flaws in its process.

3 BACKGROUND

4 I. Futenma Relocation and the FRF

5 Since 1945, the United States has maintained military bases on the island of Okinawa,
6 Japan, one of which is the Marine Corps Air Station Futenma. *Okinawa Dugong v. Gates*, 543 F.
7 Supp. 2d 1082, 1084-85 (N.D. Cal. 2008). The U.S. military presence in Okinawa has long been a
8 source of contention with the Okinawan civilian population. *See* Declaration of James P. Zumwalt
9 in Support of Defendants' Motion to Dismiss (Zumwalt Decl.), Sept. 29, 2014, ECF No. 164, ¶ 6
10 ("there were significant delays in executing the plan first identified in 1996," in part due to local
11 opposition); *see also* Emma Chanlett-Avery & Ian E. Rinehart, Cong. Research Serv., R42645, The
12 U.S. Military Presence in Okinawa and the Futenma Base Controversy, p. 6 (2016) (2016 CRS
13 Report), *available at* <http://fas.org/sgp/crs/row/R42645.pdf>.

14 In November 1995, the United States and Japan formed the bilateral Special Action
15 Committee on Okinawa (SACO) "to reduce the burden [of the U.S. military presence] on the people
16 of Okinawa." Yukihiro Ikeda et al., U.S. Dep't of State Archive, SACO Final Report, (Dec. 2,
17 1996), *available at* http://1997-2001.state.gov/www/regions/eap/japan/rpt-saco_final_961202.html.
18 On December 2, 1996, the SACO issued a Final Report recommending the return of the Futenma
19 airbase to Japan after replacement facilities were constructed and operational. *Id.* In 1997, DoD
20 finalized its operational requirements, which detailed the design specifications for the replacement
21 facility that DoD required the Government of Japan to follow to proceed with the Futenma
22 relocation plan. *Dugong v. Gates*, 543 F. Supp. 2d at 1085.

23 On May 1, 2006, the Government of Japan and DoD issued a joint statement (the Roadmap)
24 announcing final agreement on the plan for the Futenma Replacement Facility (FRF), which would
25 relocate the facility to Cape Henoko, using landfill to extend the runways more than a mile into the
26 waters and seagrass beds of Oura and Henoko Bays. *Id.* at 1086. The joint statement included a
27 map of the proposed runway placement, showing that the proposed Cape Henoko runways would
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1 fill in areas of Henoko Bay that are currently rich in seagrass beds critical for dugong survival. *Id.*
2 at 1084, 1086.

3 The Government of Japan is responsible for funding and completing the construction of the
4 FRF. *Id.* at 1085. Nonetheless, the FRF is a federal undertaking, because “the United States has
5 been substantially involved in the design and site selection for the FRF, will continue to monitor
6 and oversee the construction of the facility to ensure that it meets U.S. requirements, and will have
7 exclusive authority to operate the facility once it is completed.” *Id.* at 1098; *see also id.* at 1101
8 (setting out facts supporting finding that FRF is a “federal undertaking” under the National Historic
9 Preservation Act).

10 Pursuant to requirements under Japanese law, the Government of Japan released a draft
11 environmental impact statement (EIS) for the FRF in 2009, and a final EIS in 2012. U.S. Marine
12 Corps Recommended Findings, April 2014 (Findings), Plaintiffs’ First Supplemental Complaint for
13 Declaratory and Injunctive Relief, July 31, 2014, ECF No. 152-1, Ex. 1 at 19. In December 2013,
14 despite substantial local opposition, then-Governor of Okinawa Hirokazu Nakaima approved an
15 offshore landfill permit required for construction of the FRF to begin. Zumwalt Decl., ECF No.
16 164, ¶¶ 6-8.²

17 On December 27, 2016, the Japanese government resumed construction of sea walls in
18 Henoko-Oura Bay. Once construction of the sea-wall is completed, soil and rock will be dumped
19 into the enclosed area, completely destroying approximately 78.1 hectares of seagrass beds.
20 Findings, ECF No. 152-1 at 24. Construction of the FRF requires DoD work entry permits for
21 access to Camp Schwab and to adjacent U.S.-controlled waters, *Dugong v. Gates*, 543 F. Supp. 2d
22 at 1101, and the status of construction work suggests that DoD has already issued those permits.
23 The new base is expected to be completed no earlier than 2022. 2016 CRS Report at 3.

24
25 ² In 2015, Takeshi Onaga was elected on an anti-base platform to replace Nakaima as governor and,
26 on October 13, 2015, Governor Onaga revoked the offshore landfill permit. 2016 CRS Report at 3.
27 On December 20, 2016, the Japanese Supreme Court ruled that Governor Onaga’s revocation of the
28 land reclamation permit was illegal, and Governor Onaga withdrew his revocation. *New US
Okinawa base backed by Japan Supreme Court*, BBC, Dec. 20, 2016, *available at*
<http://www.bbc.com/news/world-asia-38381107>. However, Governor Onaga has continued to
oppose the base and the resulting administrative and legal processes “could create significant delays
for the project and dredge up doubts about the viability of the FRF plan.” 2016 CRS Report at 3.

1 **II. The Okinawa Dugong**

2 The dugong is a globally threatened marine mammal species that is listed as “endangered”
3 under the U.S. Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.* The waters surrounding
4 Okinawa are home to the few remaining Okinawa dugong, a rare, genetically isolated, and unique
5 population of the dugong species. *See* Declaration of Ellen Hines, PhD., in Support of Plaintiffs’
6 Motion for Summary Judgment (Hines Decl.), May 18, 2007, ECF No. 85, Ex. 14, ¶ 14. The
7 Japanese Ministry of the Environment has listed the Okinawa dugong as “critically endangered” in
8 Japan. *Dugong v. Gates*, 543 F. Supp. 2d at 1084. In 1997, the Mammalogical Society of Japan
9 estimated the population at fewer than 50 individuals. Findings, ECF No. 152-1, Ex. 1 at 25. The
10 most recent surveys by the Government of Japan concluded that there are at least three remaining
11 Okinawa dugongs. *Id.* at 26.

12 Preservation of the Okinawa dugong depends entirely upon the preservation of its habitat.
13 *See generally* Hines Decl., ECF No. 85, Ex. 14. Despite the Okinawa dugong’s critically low
14 numbers, some Japanese scientists believe that the dugong population around Henoko Bay can
15 possibly recover if steps are taken to preserve: (a) deep areas off the outer edge of the coral reef
16 where dugongs rest and avoid human activities during the day; (b) seagrass beds used for foraging;
17 and (c) corridors used for dugong travel between the reefs and seagrass. *Id.* ¶ 29. However, the
18 proposed construction and operation of the FRF will harm Okinawa dugong habitat and food
19 sources, directly and adversely affecting the Okinawa dugong. *Id.* ¶¶ 30-35. Landfill from the
20 construction of the facility, storm-water runoff, water pollution, air pollution, noise, and light from
21 the operation of the FRF may directly and adversely affect the continued survival of the Okinawa
22 dugong. *Id.* ¶¶ 30-33.

23 Dugongs are deeply significant in Okinawan culture. *Dugong v. Gates*, 543 F. Supp. 2d at
24 1084. They are “associated with traditional Okinawan creation mythology, sometimes being
25 considered the progenitor of the local people.” *Id.* Because of its cultural significance, the
26 Okinawa dugong is a protected “Natural Monument” under Japan’s “Law for the Protection of
27 Cultural Properties.” The list of protected cultural properties under Japan’s Cultural Properties Law
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1 is the “equivalent” of the U.S. National Register of Historic Places and, as a result, the Okinawa
2 dugong is protected under the NHPA. *Id.* at 1100; *see also* 54 U.S.C. § 307101(e).

3 **III. Procedural History**

4 On September 25, 2003, Plaintiffs filed suit challenging DoD’s involvement in the design,
5 development, and approval of the FRF, claiming that DoD’s failure to “take into account” adverse
6 effects of the proposed FRF on the Okinawa dugong violated the NHPA, 54 U.S.C. § 307101(e),
7 and the Administrative Procedure Act (APA), 5 U.S.C. §§ 706(1), (2)(A), and (2)(D). Complaint
8 for Declaratory and Injunctive Relief, ECF No. 1.

9 On May 17, 2004, DoD moved to dismiss the case, arguing that Plaintiffs had failed to state
10 a claim upon which relief could be granted because the dugong is not “property” within the
11 meaning of the NHPA, in part because the Japanese Law for the Protection of Cultural Properties is
12 not “equivalent” to the U.S. National Register of Historic Places. ECF No. 24, 8-9. DoD also
13 argued that the Court lacked subject-matter jurisdiction because section 402 of the NHPA did not
14 authorize the extraterritorial application of the statute to “matters that involve sensitive questions of
15 foreign affairs between the United States and Japan.” *Id.*

16 On March 2, 2005, this Court denied DoD’s motion, holding that the Japanese Law for the
17 Protection of Cultural Properties is “equivalent” to the National Register and that the Okinawa
18 dugong is “property” protected under section 402 of the NHPA. *Okinawa Dugong v. Rumsfeld*, C
19 03-4350 MHP, 2005 WL 522106 at *6, *12 (N.D. Cal. March 2, 2005). The Court also held that
20 section 402 applies extraterritorially because the NHPA expressly applies to federal undertakings
21 that “promise[] to have direct or adverse effects on protected foreign properties,” *id.* at *18, that
22 Plaintiffs’ complaint did “not thrust this court into issues of foreign affairs,” *id.* at *19, and that
23 DoD failed to show any act implicating the act of state doctrine. *Id.* at *19-20.

24 Following discovery as to whether DoD’s activities constituted a “federal undertaking”
25 under the NHPA, the parties filed cross-motions for summary judgment. On January 24, 2008, this
26 Court granted Plaintiffs’ motion and denied DoD’s motion, *Dugong v. Gates*, 543 F. Supp. 2d 1082,
27 holding that because the FRF “may directly and adversely affect” the Okinawa dugong, *id.* at 1101-
28 02, section 402 of the NHPA requires DoD to “take into account” effects of the proposed FRF on

1 the Okinawa dugong. *Id.* at 1102-07. DoD’s failure to have done so constituted agency action
2 “unreasonably delayed and unlawfully withheld.” *Id.* at 1111.

3 The Court ordered DoD to comply with section 402 of the NHPA, including by
4 “produc[ing], gather[ing], and consider[ing] information necessary for taking into account the
5 effects of the FRF on the Okinawa dugong and for determining whether mitigation or avoidance
6 measures are necessary and possible,” and held the case in abeyance “until defendants take the
7 information into account for the purpose of avoiding or mitigating adverse effects to the dugong.”
8 *Id.* at 1102.

9 On April 16, 2014, DoD notified this Court that it had issued “U.S. Marine Corps
10 Recommended Findings” under section 402 of the NHPA and an “Action Memo,” and had thereby
11 “completed the evaluation required by the Court’s January 28, 2008 Order.” *See* Defs’ Notice of
12 Completing NHPA Section 402 Findings, ECF No. 151. The Findings conclude that “project
13 construction and operation will have ‘no adverse effect’ on the dugong.” Findings, ECF No. 152-1,
14 Ex. 1 at 45. This was the first time that Plaintiffs were notified that DoD had undertaken a “take
15 into account” process concerning the FRF project. DoD did not consult with Plaintiffs and provided
16 no public notice that it intended to undertake the process at all. Plaintiffs’ First Supplemental
17 Complaint for Declaratory and Injunctive Relief (Pls. Suppl. Compl.), July 31, 2014, ECF No. 152-
18 1, ¶ 40. DoD did not make the Findings or supporting documents public. In its Findings, DoD
19 determined that its “undertaking” has “‘no adverse effect’ on the Okinawa dugong.” Findings, ECF
20 No. 152-1, Ex. 1 at 30. To reach this conclusion, DoD relied heavily on a 2010 study referred to as
21 “Welch 2010” and the Government of Japan’s EIS. *Id.* at 22-24.

22 On July 31, 2014, Plaintiffs filed their First Supplemental Complaint, challenging two
23 aspects of DoD’s compliance with the NHPA “take into account” process. Pls. Suppl. Compl., ECF
24 No. 152-1. First, Plaintiffs challenge DoD’s failure to satisfy the consultation and public
25 participation requirements of section 402. *Id.* at 15, ¶¶ 48-50. Second, because of numerous flaws
26 in DoD’s process of gathering and assessing information, Plaintiffs challenge DoD’s conclusion that
27 the construction and operation of the FRF will not adversely affect the Okinawa dugong. *Id.* at 15,
28 ¶ 51.

1 On September 29, 2014, DoD filed a motion to dismiss Plaintiffs' supplemental complaint,
2 arguing that, because this case concerns actions taken by the U.S. military in coordination with the
3 Japanese government, Plaintiffs' claims are barred by the political question doctrine. ECF No. 163.
4 On February 13, 2015, this Court dismissed Plaintiffs' action, holding that "Plaintiffs' injunctive
5 relief claim clearly presents a non-justiciable political question." *Ctr. For Biological Diversity v.*
6 *Hagel*, 80 F. Supp. 3d 991, 1011 (N.D. Cal. 2015). Although "Plaintiffs' requests for declaratory
7 relief and an order setting aside the NHPA Findings do not present political questions," *id.* at 1003,
8 the Court held that Plaintiffs lacked standing to pursue these claims. *Id.* at 1014-19.

9 Plaintiffs appealed, and on August 21, 2017, the Ninth Circuit reversed the Court's dismissal
10 of Plaintiffs' claims, holding that Plaintiffs have standing to seek both declaratory and injunctive
11 relief, and that the political question doctrine does not bar Plaintiffs' claims. *Ctr. for Biological*
12 *Diversity v. Mattis*, 868 F.3d 803 (9th Cir. 2017). The panel remanded for further proceedings. *Id.*

13 Plaintiffs now move for summary judgment declaring that DoD's Findings, and the process
14 DoD used to develop them, violate NHPA section 402 and the APA, 5 U.S.C. §§ 701-706.
15 Plaintiffs also request an order setting DoD's Findings aside, and an order that DoD not undertake
16 any activities in furtherance of the FRF project until it complies with section 402.

17 STANDARD OF REVIEW

18 Summary judgment must be granted where "there is no genuine issue as to any material fact
19 and ... the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); *Celotex*
20 *Corp. v. Catrett*, 477 U.S. 317, 322-27 (1986). The standard of review on the merits of the
21 Plaintiffs' NHPA claim is governed by the APA and limited to final agency action for which there
22 is no other adequate remedy in a court. 5 U.S.C. §§ 701-706; *San Carlos Apache Tribe v. United*
23 *States*, 417 F.3d 1091, 1095 (9th Cir. 2005).

24 The Administrative Procedure Act provides that "[t]he reviewing court shall . . . hold
25 unlawful and set aside agency action, findings and conclusions found to be arbitrary, capricious, an
26 abuse of discretion, or otherwise not in accordance with law; [or] without observance of procedure
27 required by law." 5 U.S.C. §§ 706(2)(A), (D). This inquiry, while narrow, must be "searching and
28 careful." *Marsh v. Oregon Natural Res. Council*, 490 U.S. 360, 378, (1989). The Ninth Circuit

1 “will strike down agency action as ‘arbitrary and capricious if the agency has relied on factors
 2 which Congress has not intended it to consider, entirely failed to consider an important aspect of the
 3 problem, offered an explanation for its decision that runs counter to the evidence before the
 4 agency,’ or if the agency’s decision ‘is so implausible that it could not be ascribed to a difference in
 5 view or the product of agency expertise.’” *Turtle Island Restoration Network v. United States Dep’t*
 6 *of Commerce*, 878 F.3d 725, 732–33 (9th Cir. 2017) (citing *Motor Vehicle Mfrs. Ass’n v. State*
 7 *Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983)). The deference a court owes an administrative
 8 agency under the arbitrary and capricious standard of review of the APA is not unlimited; the court
 9 may not automatically defer to an agency’s conclusions, even when those conclusions are scientific.
 10 *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971 (9th Cir. 2014). *See also Brower v.*
 11 *Evans*, 257 F.3d 1058, 1067 (9th Cir. 2001) (“The presumption of agency expertise can be rebutted
 12 when its decisions, while relying on scientific expertise, are not reasoned.”) (citing *Defenders of*
 13 *Wildlife v. Babbitt*, 958 F. Supp. 670, 679 (D.D.C. 1997)).

14 ARGUMENT

15 **I. DoD’s Failure to Consult with Plaintiffs and the Lack of Transparency in the “Take** 16 **Into Account” Process Violate Section 402 of the NHPA.**

17 **A. The NHPA’s “take into account” provision requires engagement with the public** 18 **and consultation with interested parties.**

19 The National Historic Preservation Act establishes that “[i]t is the policy of the Federal
 20 Government, in cooperation with other nations,” to “provide leadership in the preservation of the
 21 historic resources of the United States and of the international community of nations.” 54 U.S.C. §
 22 300101(2). Congress enacted section 402 of the NHPA to comply with U.S. obligations under the
 23 Convention Concerning the Protection of the World Cultural and Natural Heritage (World Heritage
 24 Convention) and to mitigate the adverse effects of federal undertakings outside the United States.
 25 *See* 54 U.S.C. § 307101. Section 402 requires that,

26 [p]rior to the approval of any Federal undertaking outside the United States which
 27 may directly and adversely affect a property which is on ... the applicable country’s
 28 equivalent of the National Register, the head of a Federal agency having direct or
 indirect jurisdiction over such undertaking shall take into account the effect of the
 undertaking on such property for purposes of avoiding or mitigating any adverse
 effects.

1 54 U.S.C. § 307101(e).

2
3 In its 2008 Order, this Court held that Congress intended the “take into account process”
4 under section 402 to “follow the basic outline of [NHPA] section 106,” which governs the process
5 for taking into account the effects of agency actions on properties listed on the U.S. National
6 Register of Historic Places. *Dugong v. Gates*, 543 F. Supp. 2d at 1105 (citing 54 U.S.C. § 306108
7 (NHPA section 106); 36 C.F.R. § 800 (2004) (regulations implementing section 106)). The Court
8 explained that, “at a minimum, [the section 402 ‘take into account’ process] must include”:

9 (1) identification of protected property, (2) generation, collection, consideration, and
10 weighing of information pertaining to how the undertaking will affect the historic
11 property, (3) a determination as to whether there will be adverse effects or no
12 adverse effects, and (4) if necessary, development and evaluation of alternatives or
13 modifications to the undertaking that could avoid or mitigate the adverse effects.

14 *Id.* at 1104. In completing this process, a federal agency must “engage[] the host nation and other
15 relevant private organizations and individuals in a cooperative partnership.” *Id.*; *see also id.* at
16 1106.

17 “Congress’ intent that the section 402 take into account process [include] . . . consultation
18 with interested parties and organizations . . . is evident.” *Id.* at 1106. The U.S. Department of the
19 Interior (“DoI”), the agency with authority to “direct and coordinate” U.S. participation in the
20 World Heritage Convention, 54 U.S.C § 307101(b), issues guidance and bulletins, which the Ninth
21 Circuit considers authoritative interpretations of the NHPA. *See, e.g., Muckleshoot Indian Tribe v.*
22 *U.S. Forest Serv.*, 177 F.3d 800, 807 (9th Cir. 1999) (DoI’s National Register Bulletin 38 “provides
23 the recognized criteria for the [agency’s] identification and assessment of places of cultural
24 significance”); *Davis v. Latschar*, 202 F.3d 359, 362, 370-371 (D.C. Cir. 2000) (National Park
25 Service complied with NHPA because it conducted analysis required by the “implementing
26 guidelines” contained in National Register Bulletin 40). Pursuant to DoI guidelines, “efforts to
27 identify and consider effects on historic properties in other countries should be carried out in
28 consultation with the host country’s historic preservation authorities, with affected communities and
groups, and with relevant professional organizations.” Standards and Guidelines for Federal

1 Agency Historic Preservation Programs Pursuant to the National Historic Preservation Act (DoI
2 Guidelines), 63 Fed. Reg. 20,496, 20,504 (Apr. 24, 1998).

3 The Advisory Council on Historic Preservation (ACHP), the body tasked with promulgating
4 regulations to implement the domestic “take into account” process, 54 U.S.C. §304108, has issued
5 regulations prescribing specific review and consultation requirements. *See* 36 C.F.R. § 800. These
6 regulations emphasize that “[t]he views of the public are essential to informed Federal
7 decisionmaking in the section 106 process.” 36 C.F.R. § 800.2(d)(1). A federal agency “must . . .
8 provide the public with information about an undertaking and its effects on historic properties and
9 seek public comment and input.” *Id.* § 800.2(d)(2). Beyond notification to the general public,
10 “[c]ertain individuals and organizations with a demonstrated interest in the undertaking may
11 participate as consulting parties due to the nature of their legal or economic relation to the
12 undertaking or affected properties, or their concern with the undertaking’s effects on historic
13 properties.” 36 C.F.R. § 800.2(c)(5); *see also Tyler v. Cuomo*, 236 F.3d 1124, 1133–34 (9th Cir.
14 2000) (consultation required the plaintiffs and defendant government agency to “sit down together
15 in a face-to-face meeting,” so that the plaintiffs “could, conceivably, directly impact the City’s
16 decisions”). Given that the section 402 “take into account” process tracks the domestic process
17 outlined in the ACHP regulations, section 402 requires engagement with the public and consultation
18 with interested parties.

19 Agency decisions made without adherence to these procedural requirements violate the
20 NHPA and should be set aside. *See Confederated Tribes & Bands of the Yakama Nation v. U.S.*
21 *Fish & Wildlife Serv.*, 2015 WL 1276811, at *9 (E.D. Wash. Mar. 20, 2015) (“[B]ecause the [Fish
22 and Wildlife] Service has not complied with the mandatory procedural requirements” for
23 consultation under the NHPA, its findings were “necessarily ‘arbitrary and capricious’ or otherwise
24 ‘without observance of procedure required by law[.]’ and must be set aside.”); *Quechan Tribe of*
25 *Fort Yuma Indian Reservation v. U.S. Dep’t of Interior*, 755 F. Supp. 2d 1104, 1119-20 (S.D. Cal.
26 2010) (because tribe not adequately consulted as required under NHPA, project “was approved
27 ‘without observance of procedure required by law’ [and] the Tribe [was] entitled to have the BLM’s
28 actions set aside under 5 U.S.C. § 706(2)(D)”).

1 **B. DoD kept its section 402 process secret and did not consult with key interested**
 2 **parties as required by the NHPA.**

3 Plaintiffs have demonstrated specific interest in the FRF and its potential to harm the
 4 Okinawa dugong. *See Dugong v. Gates*, 543 F. Supp. 2d at 1094 (Plaintiffs have demonstrated
 5 “concrete interests to preserve the dugong for cultural, educational, aesthetic, inspirational and
 6 economic benefits to themselves and their descendants,” which are “directly linked” to DoD’s
 7 failure to comply with the NHPA.); *see also* Declaration of Yoshikazu Makishi in Support of
 8 Plaintiffs’ Motion for Summary Judgment, August 8, 2007, ECF No. 107, ¶¶ 2-8. Yet Plaintiffs
 9 were not notified of DoD’s process for taking into account the impact of the FRF on the dugong
 10 until Defendants filed the Notice of Completing NHPA Section 402 Findings on April 16, 2014.
 11 ECF No. 151. At no time did DoD notify the public, Okinawa state or local government,³
 12 Plaintiffs, or other interested parties that DoD was undertaking this process, or invite public
 13 participation.

14 DoD’s NHPA Findings state that

15 [t]he USMC used several methods to engage the host nation and other relevant
 16 private organizations and individuals. The USMC’s contracted experts contacted a
 17 range of interested Japanese and non-Japanese organizations and individuals to
 18 solicit input regarding the cultural significance of the dugong and the potential
 19 effects of the proposed Undertaking on the dugong as cultural property.

19 ³ Indeed, on April 16, 2018, Governor Onaga sent a letter to Secretary Mattis and other DoD
 20 officials formally requesting that DoD “consult with the Okinawa Prefectural Government
 21 regarding the impact on the Okinawa dugong from the construction of the U.S. Marine Corps
 22 Futenma Air Base Replacement Facility” and stating that DoD “did not consult with the Okinawa
 23 Prefectural Government and Nago City” or “with experts and environmental organizations which
 24 could have provided views contrary to those presented in the [Japanese] EIA.” *See* Letter from
 25 Takeshi Onaga, Governor of Okinawa, to James Mattis, U.S. Secretary of Defense, Apr. 16, 2018,
 26 *available at* <http://www.pref.okinawa.lg.jp/site/chijiko/henoko/documents/requesteng.pdf>.

24 Under Federal Rule of Evidence 201(b), a court “may judicially notice a fact that is not subject to
 25 reasonable dispute because it: (1) is generally known within the trial court’s territorial jurisdiction;
 26 or (2) can be accurately and readily determined from sources whose accuracy cannot reasonable be
 27 questioned.” In particular, the Court may take judicial notice of public records, including facts
 28 within them that are not subject to dispute. *Lee v. City of Los Angeles*, 250 F.3d 668, 690 (9th Cir.
 2001). That extends to public documents downloaded from public agency websites. *Coal. for a
 Sustainable Delta v. Fed. Emergency Mgmt. Agency*, 812 F. Supp. 2d 1089, 1093 (E.D. Cal. 2011).
 The Onaga Letter is an official letter sent from the Okinawa government to the Secretary of Defense
 of the United States, available on the Okinawa government’s official website. It is a public record
 and is therefore judicially noticeable.

1 ECF No. 152-1 at 38. However, nothing in the record shows that DoD solicited input regarding the
2 FRF's potential impacts on dugongs.

3 In response to this Court's order that it take into account the effects of the FRF on the
4 dugong, DoD hired US-based contractors International Archeological Research Institute, Inc.
5 (IARII), to conduct an "Ethnographic Study" to "obtain information on the modern significance of
6 the Okinawa dugong." Welch, David J., *An Anthropological Study of the Significance of the*
7 *Dugong in Okinawa Culture* (Welch 2010), Administrative Record (AR) 4163-66. This study
8 included a literature review, AR 4168-9, a review of archival data on the anthropological
9 importance of the dugong, AR 4195-4219, a review of biological information, AR 4175-83, and
10 "informant interviews conducted for the ethnographic study." Findings, ECF No. 152-1, Ex. 1 at
11 38. However, the informants were all academics, and did not include any local community
12 members or cultural practitioners for whom the dugong was culturally significant. Welch 2010, AR
13 4172. Defendants' own political consultant, Mr. Hideo Henzan, recognized the relevance of local
14 elders and practitioners and advised "that if [DoD] really want[s] to learn about the role of Dugongs
15 in Okinawa life then they should go talk to the local ward mayors and/or the elders living around
16 Henoko Bay." E-mail from Ayako Kumura (U.S. Embassy) to Jason C. Hamm (The Pentagon),
17 Aug. 27, 2009, AR 3207; *see also* E-mail from Dr. Goodfellow "FW: Dugong Additional Info,"
18 Feb. 4, 2010, AR 4149 ("As I've mentioned before, the one place where we are really weak is that
19 we did not have sufficient time to contact and get meetings arranged with cultural practitioners.
20 And this is probably an area where the Marine Corps should expect to be challenged in any kind of
21 court case. To do this would have required the Marines to have radically altered the time allowed
22 for this project.").

23 Moreover, the interviews that IARII conducted for the Welch 2010 report addressed the
24 significance of the dugong in Okinawan culture but did not address the impact that construction or
25 operation of the FRF would have on the dugong or its habitat, and thus cannot be considered
26 consultation for purposes of taking into account the impacts of the FRF on the dugong as required
27 by the NHPA. *Montana Wilderness Ass'n v. Fry*, 310 F. Supp. 2d 1127, 1153 (D. Mont. 2004)
28 ("tribes known to have used the area should have been consulted to determine whether they had a

1 different view of potential adverse effects”). When IARII contacted “informants” to request
2 interviews for an “anthropological study” they did not disclose the context or purpose of the study.
3 In a “Letter of Introduction” to potential interviewees dated Oct. 1, 2009, AR 3252, David Welch
4 writes that IARII is conducting research and interviews “concerning the role of the dugong in
5 Okinawan culture” and states that “[t]he information collected through this research will be used
6 strictly by the Marine Corps to further its understanding of the significance of the dugong in
7 Okinawa” and “will help the Marine Corps carry out its mission and future planning in Okinawa in
8 way that will insure that the dugong is treated in accordance with its status as natural monument and
9 as rare and endangered species.” *Id.* at 1. This letter makes no mention of the federal
10 undertaking—the Futenma Replacement Facility—that may impact the dugong. *Id.* Nor does it
11 disclose that the purpose of the study is to determine whether the FRF will have an adverse impact
12 or that an obligation to avoid or mitigate any adverse effects hinges on the determination. *Id.* *Cf.*
13 DoI Guidelines, 63 Fed. Reg. 20,504 (“Whether consulting on a specific project or on broader
14 agency programs, the agency should . . . [m]ake its interests and constraints clear at the
15 beginning.”). Indeed, although transcripts of the interviews were not produced in the administrative
16 record, summaries of the interviews provide no evidence that the FRF and its impacts on the dugong
17 were ever discussed. Welch 2010, AR 4295-4329

18 Finally, DoD did not give any of the cultural experts interviewed an opportunity to review
19 drafts of DoD’s Findings or to comment on DoD’s conclusion that construction and operation of the
20 FRF would not adversely affect the Okinawa dugong. The only people allowed to review a draft of
21 the Findings were officials of the Japanese government, *see* Findings, ECF No. 152-1, Ex. 1 at 39;
22 AR 8073, and the contractors DoD hired to conduct an anthropological study of the importance of
23 dugong in Okinawan culture. *See, e.g.*, E-mail from Dr. Goodfellow to Civ Stephen Wenderoth and
24 Senior Executive Service Paul C Hubbell, Mar. 1, 2010, AR 4442 (circulating draft findings with
25 contractors and internal personnel).

26 Thus, although DoD’s contractors interviewed local academics about the historical
27 significance of the dugong in Okinawan culture, DoD provided no evidence that it consulted with
28 relevant private organizations and individuals, as ordered by this Court, or with affected

1 communities as recommended by DoI guidelines, about the FRF's impacts on the dugong. DoD's
 2 failure to notify the public and to engage Plaintiffs, who have demonstrated specific interest in
 3 impacts of the FRF on the dugong, violates the procedural requirements of section 402. *Dugong v.*
 4 *Gates*, 543 F. Supp. 2d at 1106. Thus, DoD's Findings are "arbitrary, capricious, an abuse of
 5 discretion, or otherwise not in accordance with law" and "without observance of procedure required
 6 by law" and should be set aside. 5 U.S.C. §§ 706(2)(A), (2)(D).

7 **II. DoD's Finding that Construction and Operation of the FRF Will Have No Adverse**
 8 **Effect on the Okinawa Dugong Is Arbitrary, Capricious, and Contrary to Law.**

9 **A. DoD based its Findings on information its own experts deemed not**
 10 **"scientifically and legally defensible."**

11 This Court has held that the NHPA is a procedural statute "similar to NEPA except that it
 12 requires consideration of historic sites, rather than the environment." *Pit River Tribe v. U.S. Forest*
 13 *Serv.*, 469 F.3d 768, 787 (9th Cir. 2006). "Both are 'stop, look, and listen' provisions, that are
 14 'design[ed] to ensure that Federal agencies take into account the effect of Federal or Federally-
 15 assisted programs.'" *Apache Survival Coal. v. United States*, 21 F.3d 895, 906 (9th Cir. 1994)
 16 (citations omitted). Under NEPA, agencies have a duty to ensure the scientific integrity of their
 17 analysis of the impacts of a federal action. *See Save the Peaks Coal. v. U.S. Forest Serv.*, 669 F.3d
 18 1025, 1037-38 (9th Cir. 2015); *League of Wilderness Defenders-Blue Mountains Biodiversity*
 19 *Project v. U.S. Forest Serv.*, 689 F.3d 1060, 1073-75 (9th Cir. 2012). "At a minimum, an agency
 20 must support its conclusions with studies that the agency deems reliable." *Tri-Valley CAREs v. U.S.*
 21 *Dept. of Energy*, 671 F.3d 1113, 1124 (9th Cir. 2012).

22 DoD relied primarily on two studies to support its conclusion that the FRF would have no
 23 adverse effect on the dugong: the Welch 2010 report and the Japanese Government's
 24 environmental impact statement (EIS) for the FRF project. Findings, ECF No. 152-1 at 40-43. As
 25 discussed above, the Welch report examined only the cultural significance of the dugong in
 26 Okinawa. While it did provide summary information on the "biological and ecological
 27 background" of the Okinawa dugong, AR 4175-84, it did not assess the impacts that construction
 28 and operation of the FRF would have on the biological aspects of the dugong and its habitat. AR
 4254. DoD's Findings acknowledge that "the dugong's status as a natural monument could be

1 affected if the dugong itself is harmed. In the current context, the obligation is to ensure that the
2 Undertaking does not harm individual dugongs or prevent the survival of the Okinawa dugong as a
3 local population.” Findings, ECF No. 152-1, Ex. 1 at 27.

4 DoD relied on the Japanese EIS for the critical information regarding the impacts that the
5 FRF will have on the dugong itself. *Id.* at 40-43. However, DoD’s own experts cautioned that the
6 Japanese EIS is scientifically flawed. In an email to the U.S. Marine Corps official overseeing the
7 Welch 2010 report, the marine biologist that DoD hired to review the Japanese EIS (and who also
8 contributed to the Welch 2010 study) warned DoD the Japanese EIS lacked scientific rigor:

9 The quality of the EIA itself think it *was extremely poorly-done and does not*
10 *withstand scientific scrutiny in my opinion* am happy to change the wording in
11 the report to reflect this but as we discussed we need to do this in diplomatic
12 fashion.

13 E-mail from Dr. Thomas Jefferson to Dr. Sue Goodfellow, Mar. 24, 2010, AR 4706 (emphasis
14 added). Discussing “the need for a program of baseline biological and ecological studies of the
15 dugong,” AR 4257, the Welch 2010 report concludes:

16 The studies conducted for the EIA (Okinawa Defense Bureau 2009) provide little of
17 value here, as there are questions about the experience of observers and the
18 suitability of specific survey methods, and the surveys were not used to provide
19 quantitative measures of the population’s status. Without such a program, it will be
20 difficult to impossible to assess the potential adverse effects of the FRF, develop
21 appropriate mitigation measures, and evaluate the success of mitigation measures

22 *Id.* DoD concedes that “the data are not sufficient to establish population size, status, and viability”
23 of the Okinawa dugong, ECF No. 152-1, Ex. 1 at 30, and that “it would be beneficial for [the
24 Government of Japan] to conduct new systematic surveys or modeling” to develop valid
25 information about the total Okinawa dugong population. *Id.* at 33. Without a reasonable estimate
26 of the total Okinawa dugong population, DoD cannot assess the significance of the destruction of
27 seagrass meadows on the Okinawa dugong and cannot evaluate the significance for the entire
28 population of adverse effects on those dugongs that use Henoko and Oura bays.

These shortcomings were never cured. DoD’s Findings refer to a “bi-lateral Expert Study
Group” convened “to examine the FRF, including the impacts of the FRF on the environment,” ECF
No. 152-1, Ex. 1 at 39, but the group declined to make conclusions about impacts to the dugong,

1 stating that “impact on animal and plant habitat remains to be assessed.” Futenma Replacement
2 Facility Experts Study Group Report, Aug. 31, 2010, AR 7311.

3 In 2011-2012, DoD undertook a Survey of Marine Mammals in Okinawa (SuMMO) to
4 update the Integrated Natural Resources / Cultural Resources Management Plan for Marine Corps
5 Base Camp Smedley D. Butler (of which Camp Schwab is part). SuMMO, AR 9245. According to
6 one of the study’s authors, a Marine Resources Specialist at the Naval Facilities Engineering
7 Command—Pacific (NAVFAC PAC),

8 [t]he current focus of the project that has been requested is a general marine
9 mammal inventory of water surface areas around Okinawa, without a dugong-
10 specific component, albeit with possible opportunistic detection of dugongs. ...
11 However, we emphasize that the data will have a high likelihood of not being able
12 to conclusively tell us if, where, when, or how dugongs are using seagrass beds near
13 Henoko and Oura Bay.

14 Email from Morgan Richie, Marine Resources Specialist, Naval Facilities Engineering Command—
15 Pacific, Jul. 28, 2011, AR 8095. The Marine Resources Specialist went on to advise that “to gain
16 the information which will be scientifically and legally defensible we recommend a targeted dugong
17 monitoring project in the more rigorous manner which was proposed above.⁴ *We do not*
18 *recommend using data from the currently designed project to make legally defensible claims*
19 *regarding the presence or absence of dugongs.” Id.* (emphasis added). Nonetheless, Dr. Sue
20 Goodfellow, the USMC official overseeing the process, declined to authorize a more robust study.
21 AR 8094 (“The USMC sees no need for the more elaborate [scope of work] that NAFAC PAC is
22 now proposing.”). Accordingly, the SuMMO report concluded that “[i]t is not possible to say
23 anything definitive about densities of dugongs,” AR 9269, because the study did not involve an
24 “effective dugong monitoring program that would likely involve more focused dedicated surveys
25 involving one or more of the following aerial surveys diving surveys for detection of dugong

25 ⁴ The “more rigorous” dugong monitoring project proposed but not completed included
26 a 2-phase approach in which a pilot phase was implemented in order to a)
27 characterize the acoustic environment, b) ground truth feeding trail detection, and c)
28 determine the level of sampling necessary such that the results would be statistically
significant. The primary monitoring phase would therefore be better informed to
subsequently be developed and executed as a scientifically defensible project plan
for monitoring dugongs in Okinawa.
AR 8095.

1 feeding trails and passive acoustic monitoring with sensors specific to the low frequency sounds
2 made by dugongs.” *Id.* at 9288.

3 DoD’s disregard for the concerns of its experts regarding the scientific integrity of the
4 Japanese EIS and its failure to overcome these flaws by conducting its own rigorous assessment of
5 the impacts of the FRF on the dugong is arbitrary and capricious and contrary to the requirements of
6 the NHPA. This conclusion is consistent with the decision affirmed by the Ninth Circuit in
7 *Bonnichsen v. United States*, in which a group of anthropologists sought judicial review of the
8 Army Corps of Engineers’ decision to award the remains of an early human skeleton to a coalition
9 of Indian tribes and deny the plaintiffs’ request to study those remains. 217 F. Supp. 2d 1116,
10 1163–64 (D. Or. 2002), *aff’d*, 357 F.3d 962 (9th Cir. 2004), *amended by* 367 F.3d 864 (9th Cir.
11 2004). Among other claims, the plaintiffs challenged the agency’s determination that the remains
12 were “Native American” under the Native American Graves Protection and Repatriation Act
13 (NAGPRA), the agency’s failure to allow them to participate in the decision-making process under
14 NAGPRA and the NHPA, and the decision to bury the site of the discovery. *Id.* at 1131. The court
15 held that the record “does not support [the agency’s] contention that the Corps adequately
16 considered the effects of [burial of the site] and how the damage to the archeological value of the
17 site could be minimized.” *Id.* at 1163. In particular, the court noted that a Corps scientist
18 advised that “it would seem advisable to be cautious about long term deleterious
19 effects of engineering site protection measures.” Nevertheless, the project [to bury
20 the site] proceeded without significant study to determine the characteristics of the
21 site, including what archaeological resources might exist, and there is little evidence
22 that alternative methods of erosions control that might mitigate potential data loss
23 were seriously considered.

24 *Id.* (citations omitted). As a result, the court found that “the potentially negative effects of the
25 project” were not fully and carefully considered for purposes of the NHPA. *Id.* at 1164. Similarly,
26 DoD’s failure to heed the warnings of its own experts regarding the scientific integrity of the
27 Japanese EIS and determination to proceed with its Findings despite insufficient study of the
28 impacts of the FRF on the dugong fatally undermine the integrity of DoD’s take into account
process.

1 **B. DoD failed to consider the full range of impacts of the FRF project on the**
2 **dugong.**

3 DoD “failed to consider an important aspect of the problem,” *Turtle Island Restoration*
4 *Network*, 878 F.3d at 732, because it failed to consider the full range of impacts of the FRF on the
5 dugong. *See also Montana Wilderness Ass’n.*, F. Supp. 2d at 1153 (agency improperly limited
6 scope of NHPA analysis when it considered “just the narrow area where the pipeline is laid” instead
7 of the entire “affected area”). Important impacts of the FRF on the dugong that DoD did not
8 consider include population fragmentation, the disruption of travel routes, and the loss of habitat
9 that may be required in the future to sustain a viable population, which would be larger than the
10 present population. Hines Decl., ECF No. 85, Ex. 14, ¶¶ 14, 29.

11 Instead, DoD improperly limited its inquiry into the possible impacts of the FRF on the
12 dugong to a list of potential impacts identified by this Court before DoD had undertaken any inquiry
13 at all. Findings, ECF No. 152-1 at 22. In considering whether the NHPA applies to DoD’s
14 activities with respect to the FRF, the Court made a “threshold” determination “that the undertaking
15 may have direct and adverse effects on the dugong.” *Dugong v. Gates*, 543 F. Supp. 2d at 1101.
16 The Court found that “[t]hese potential adverse effects include physical destruction of the Okinawa
17 dugong resulting from contamination of seagrass feeding grounds and collisions with boats and
18 vessels, as well as long-term immune and reproductive damage resulting from exposure to toxins
19 and acoustic pollution.” *Id.* Because the question before the Court did not require the Court to
20 determine the full range of potential effects of the FRF on the dugong, the Court’s list was not
21 exhaustive. Indeed, section 402 requires DoD to conduct the “take into account” process “for
22 purposes of avoiding or mitigating *any* adverse effects,” 54 U.S.C. § 307101(e) (emphasis added),
23 and the process is intended to require the DoD, which has the best access to the relevant
24 information, to identify those effects. *Dugong v. Gates*, 543 F. Supp. 2d at 1105-06.

25 Despite the clear mandate to identify *any* potential adverse effects, DoD only “gathered and
26 assessed information on those aspects of the proposed construction and operation of the FRF
27 identified by the Court as having the potential to affect the Okinawa dugong.” Findings, ECF No.
28

1 152-1 at 22. DoD thus did not identify or consider the full range of possible adverse effects on the
2 dugong caused by the FRF project.

3 **C. DoD’s finding of “no adverse effect” is not supported by the record.**

4 The Supreme Court has made clear that, in considering an agency’s explanation for its
5 action, courts “must consider whether the decision was based on a consideration of the relevant
6 factors and whether there has been a clear error of judgment.” *Motor Vehicle Mfrs. Ass’n*, 463 U.S.
7 at 43. A “clear error of judgment” sufficient to constitute arbitrary and capricious agency action
8 includes when “the agency offer[s] an explanation that runs counter to the evidence before the
9 agency, or is so implausible that it could not be ascribed to a difference in view or the product of
10 agency expertise.” *Id.*

11 Contrary to DoD’s finding of “no adverse effect,” the record shows that the FRF project *is*
12 likely to adversely impact the dugong. As the Welch 2010 Report notes, “[t]he most likely cultural
13 impacts of the FRF will be indirect rather than direct and will stem from the biological harm that
14 might be done to the dugong population as result of the construction and use of the airfield in an
15 area where dugongs feed or at least fed in the past.” AR 4254. “[O]ur conclusion, based on this
16 study, is that the disappearance of the dugong population from Okinawa would have an adverse
17 cultural impact.” *Id.*

18 DoD determines that there will be “no adverse effect” on the Okinawa dugong “because of
19 the extremely low probability of Okinawa dugongs being in the [area of potential impact].” ECF
20 152-1, Ex. 1 at 30. However, the Welch 2010 report states that although adequate monitoring data
21 is not available, 19 dugongs and between 129 and 139 dugong feeding trails were observed by
22 Japanese government groups between 2000 and 2003, indicating that dugongs were still active in
23 the area. Welch 2010, AR 4177. In particular, “Henoko village was a reported hotspot for dugongs
24 in Okinawa.” *Id.*

25 DoD uses the fact that dugongs will move away from disturbances to justify its conclusion
26 that it is unlikely that a dugong would enter the project area. ECF 152-1, Ex. 1 at 33 (“When
27 exposed to human activities, dugongs are known to seek deeper waters away from that activity.”).
28 However, the Welch Report contradicts this reasoning, concluding that “the FRF has the potential to

1 impact the dugong population and could affect its recovery to sustainable numbers” because it “will
2 limit further the range and number of an already rare and endangered species and perhaps hinder
3 attempts to bring some recovery in the existing numbers.” AR 4254. Because the current
4 population is very small, effects on just a few dugongs could have substantial impacts on the
5 population as a whole. The Findings’ reliance on the physical presence of dugong in the project
6 area during construction is misplaced, because “[r]egardless of whether they are currently being
7 used by dugongs, destruction of seagrass beds along Henoko Bay will limit areas that could provide
8 habitat in the event of recovery and increase in the current dugong populations.” AR 4254. Given
9 the Okinawa dugong’s endangered status and “precariously low” population numbers, Findings,
10 ECF 152-1, Ex. 1 at 25, destruction of this habitat adversely affects the population.

11 **CONCLUSION AND PRAYER FOR RELIEF**

12 DoD’s Welch 2010 Report describes the dugong as “an inalienable animal (one that cannot
13 be lost) to Japanese culture.” AR 4255. Its preservation “as a viable species in Japanese waters is
14 essential to avoid adverse impacts to its cultural significance.” *Id.* at 4256. While other factors
15 contribute to the decline of the species and its possible extinction, “it is also clear that the FRF has
16 the potential to contribute to this decline.” *Id.* at 4254. The purpose of the extraterritorial provision
17 of the NHPA is to ensure that DoD fully understand the impacts of the FRF on the dugong and not
18 contribute to the extirpation of this inalienable animal.

19 DoD’s failure to consult with the Plaintiffs and engage the public as required by section 402
20 of the NHPA, and its reliance on flawed scientific data, make it impossible for DoD to generate
21 adequate information to assess the effects of the FRF on the dugong. DoD’s finding that the FRF
22 will have “no adverse effect” on the dugong is therefore without basis. Plaintiffs respectfully
23 request this Court to:

24 1) declare that DoD’s Findings and its failure to involve Plaintiffs and the public in the “take
25 into account” process violate section 402 of the NHPA;

26 2) set aside DoD’s Findings as “arbitrary, capricious, an abuse of discretion, or otherwise
27 not in accordance with law” and made “without observance of procedure required by law” under the
28 APA, 5 U.S.C. §§ 706(2)(A), (2)(D); and

1 3) order that DoD not undertake any activities in furtherance of the FRF project, including
2 granting permits or approvals for contractor entry to Camp Schwab and/or the proposed FRF project
3 area, and that DoD rescind any such permits or approvals already granted, until it complies with
4 section 402 of the NHPA, including by:

- 5 a. Producing, gathering, and adequately considering the necessary information for
6 taking into account *all* the potentially adverse effects of the FRF on the Okinawa
7 dugong and for determining whether mitigation or avoidance measures are necessary
8 and possible;
- 9 b. Making this information and other documentation relevant to the section 402 “take
10 into account” process available to the public; and
- 11 c. Consulting with all interested parties, including Plaintiffs, and inviting public
12 participation in the section 402 process.

13
14 Respectfully submitted this 27th day of April, 2018.

15
16 /s/ Sarah H. Burt
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