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

CENTER FOR BIOLOGICAL DIVERSITY; TURTLE ISLAND RESTORATION NETWORK; JAPAN ENVIRONMENTAL LAWYERS FEDERATION; SAVE THE DUGONG FOUNDATION; ANNA SHIMABUKURO; TAKUMA HIGASHIONNA; and YOSHIKAZU MAKISHI,

Plaintiffs,

v.

JAMES MATTIS, in his official capacity as the Secretary of Defense; and US Department of Defense,

Defendants.

Civil Action No. 3:03-cv-4350 (EMC)

Hearing Date: June 28, 2018
Time: 1:30 pm
Courtroom: 5

DEFENDANTS' NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT, RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM OF AUTHORITIES

(National Historic Preservation Act, 16 U.S.C. §§ 470 *et seq.*)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

STATUTES

RULES

NOTICE OF MOTION AND MOTION FOR SUMMARY JUDGMENT

To Plaintiffs and their Attorney(s) of Record:

You are hereby given notice that Defendants, James Mattis, in his official capacity as the Secretary of Defense, and US Department of Defense (DoD), hereby move for summary judgment in the above-referenced case. A hearing on this motion will be held on June 28, 2018 at 1:30 pm before the Honorable Edward M. Chen, in Courtroom 5 of the United States District Court for the Northern District of California, San Francisco Division, 450 Golden Gate Avenue, San Francisco, CA.

Defendants request that this Court deny Plaintiffs' motion for summary judgment and grant Defendants' motion for summary judgment. This motion is filed pursuant to Fed. R. Civ. P. 56(c) and Civil L.R. 7-2 and is made on the grounds specified in Defendants' memorandum in support of the motion, the complete record before the Court in this matter, and upon such other evidence as may be presented to the Court.

STATEMENT OF ISSUES TO BE DECIDED

Whether Defendants' finding pursuant to section 402 of the National Historic Preservation Act (NHPA), 54 U.S.C § 307101(e), that construction of a military base off the coast of Okinawa, Japan would have "no adverse effect" on the resident population of endangered Okinawa dugong was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), and made "without observance of procedure required by law." *Id.* § 706(2)(D).

INTRODUCTION

This case involves a challenge to joint plans by the United States and Japan to build a new Marine Corps air base (the Futenma Replacement Facility, or "FRF") to replace the existing Marine Corps Air Station Futenma, in Okinawa, Japan. Plaintiffs challenge these plans under National Historic Preservation Act ("NHPA") Section 402, 16 U.S.C. § 470a-2, asserting that DoD failed to properly "take into account" the FRF project's potential effects on the Okinawa dugong, a manatee-like marine mammal that is designated a "cultural property" under Japanese law. In 2008, this Court determined that Section 402 applies to the FRF project and provided guidance on the scope of the process required by Section 402's specific "take into account" requirement.

In response to the Court's 2008 order, DoD undertook an NHPA section 402 analysis. That

analysis included the commissioning of independent studies, active engagement with the Government of Japan ("Japan"), and review of multiple biological, environmental, and historical studies relating to the Okinawa dugong and the potential impact of the FRF on the Okinawa dugong. DoD also consulted with experts on the Okinawa dugong, drawn from the fields of archeology, biology, history, and folkloric and traditional knowledge. DoD concluded its analysis and issued its NHPA Findings ("Findings") in April 2014, finding that the FRF will have no adverse impact on the Okinawa dugong. Japan reached the same conclusion.

After DoD issued its Findings in April, 2014, Plaintiffs filed their Supplemental Complaint challenging the adequacy of those Findings. ECF No. 152. Plaintiffs claim that DoD's Findings are substantively and procedurally flawed. But Plaintiffs have failed to show that DoD's findings were arbitrary and capricious or otherwise contrary to law. The record shows that DoD carefully followed the Court's guidance in its "stop, look, and listen" review of the potential adverse effect on the Okinawa dugong. Plaintiffs do not contend that DoD failed to follow this guidance. Instead, Plaintiffs seek to expand the requirements of Section 402 beyond that which Congress intended and ask the Court, contrary to Ninth Circuit authority, to substitute its own judgment for the reasoned judgment of DoD. For these reasons, as more fully explained below, the Court should grant Defendants' cross-motion for summary judgment and deny Plaintiffs' motion for summary judgment. The Court should also deny Plaintiffs' request to enjoin DoD from taking actions in furtherance of the FRF project, as Plaintiffs, even if successful on the merits, are unable to meet the standards for the extraordinary remedy of injunctive relief. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 33 (2008) (plaintiffs' ecological, scientific, and recreational interests in marine mammals are plainly outweighed by the Navy's need to conduct realistic training exercises).

I. BACKGROUND

A. The Futenma Replacement Facility

The United States has maintained military bases on Okinawa, Japan since 1945. *Dugong v. Rumsfeld*, No. C 03-4350, 2005 WL 522106 at *1 (N.D. Cal., Mar. 2, 2005). On June 17, 1971, Japan and the United States signed the "Agreement Between the United States and Japan Concerning the Ryukyu Islands and the Daito Islands," under which the United States relinquished its post-war

administration of these island chains, which include Okinawa, and restored them to Japanese administration. *Id*. Under Article III of the 1971 agreement, Japan granted the use of "facilities and areas" in the islands to the United States in accordance with the Treaty of Mutual Cooperation and Security ("Security Treaty") and the Status of Forces Agreement ("SOFA") of 1960. *Id.*

The existing Marine Corps Air Station Futenma (MCAS Futenma) in Ginowan City, Okinawa, has been in use by the United States since 1945. *Okinawa Dugong v. Gates*, 543 F. Supp. 2d 1082, 1084-85 (N.D. Cal. 2008). In recent decades, the location of the Futenma Air Station in Ginowan City has become problematic, due to intensive population growth in the immediate area. *Id*. at 1085. The United States and Japan, have thus been working to create a replacement facility. *Id.* The project to relocate and replace MCAS Futenma is referred to as the FRF project. *Id.*

On May 1, 2006, Japan and the United States issued the "United States–Japan Roadmap for Realignment Implementation" ("2006 Roadmap"). *Id*. at 1086. The Roadmap stipulates for the FRF a "V-shaped" runway which will be partially built on landfill extending into Oura and Henoko Bays. *Id*. The new FRF V-shape design took into account both U.S. operational requirements and the need to limit impacts on the environment and local communities. *Id.* Japan is responsible for funding and completing the construction of the FRF. *Id.* at 1085.

Under Japanese law, Japan was required to conduct an environmental impact assessment before construction of the FRF began. *Id*. at 1086. Japan issued its draft Environmental Impact Analysis (EIA) in 2009 and its final EIA in 2012. US10981. After over twenty years of negotiation, design, and study, construction of the FRF is now underway.

B. The Okinawa Dugong

The dugong is an herbivorous marine mammal related to the manatee. *Gates*, 543 F. Supp. At 1083. It is listed as "endangered" under the U.S. Endangered Species Act, "vulnerable" by the World Conservation Union, and "critically endangered" under Japanese law. *Id.* at 1084. The Okinawa dugong, the northernmost dugong population in the world, is not a genetically-distinct subspecies but an isolated relict population. US4164. Once common, its numbers declined in the early twentieth century due to traditional hunting (which is now illegal) and fisheries bycatch. US4176, 4181. The primary threat to the Okinawa dugong today remains bycatch, followed by

habitat destruction from coastal development and soil runoff that pollutes or kills seagrass beds. US4183. In 1997, the Mammalogical Society of Japan estimated that fewer than 50 Okinawa dugongs survive in the wild. US4156. The Okinawa dugong is listed as a "cultural property" under the Japanese Law for the Protection of Cultural Properties based on its importance in native Okinawan mythology and culture. *Okinawa Dugong v. Rumsfeld*, 2005 WL 522106 at *6,*7.

C. **The History of This Litigation**

Plaintiffs commenced this litigation in 2003, seeking declaratory and injunctive relief based on DoD's alleged failure to comply with NHPA § 402 in connection with the design, development and approval of the FRF. Complaint for Declaratory and Injunctive Relief, ECF No. 1. In an unpublished 2005 decision, the district court (Judge Patel) held, among other things, that: (1) Japan's "Law for the Protection of Cultural Properties . . . is an 'equivalent of the National Register' within the meaning of" Section 402; (2) the Dugong is a "property" within the meaning of Section 402; and (3) factual issues precluded findings on whether the FRF is a federal "undertaking" under Section 402 and whether Japan's degree of control over the siting of the FRF required judicial abstention under the act of state doctrine. *Rumsfeld*, 2005 WL 522106 at *8, *10-11, *19-20. The Court withheld decision as to whether the FRF would "directly and adversely" affect the dugong and whether the Secretary had completed the take-into-account process required by Section 402. *Id*. at *16-18.

In 2006, Plaintiffs filed their Second Amended Complaint. ECF No. 69. In a 2008 decision, the Court (again, Judge Patel) held that: (1) the Roadmap constituted "final agency action" under the APA, (2) most but not all of the Plaintiffs had standing, and (3) Plaintiffs' claims were ripe. *Gates*, 543 F. Supp. 2d at 1091-97. The Court held that DoD had failed to satisfy these requirements and ordered that DoD "comply with NHPA section 402." *Id*. at 1107-1112.[1]

The Court, based on its interpretation of the purposes of Section 402 and on the 36 C.F.R. pt. 800 regulations (which describe the take-into-account process for *domestic* undertakings), held that

[1] Rather than remanding to the agency, the Court ordered that the case be "held in abeyance until the information necessary for evaluating the effects of the FRF on the dugong is generated, and until defendants take the information into account for the purpose of avoiding or mitigating adverse effects to the dugong." *Gates*, 543 F. Supp. 2d at 1112.

to satisfy the requirements of Section 402, the take-into-account process must include, at a minimum:

> (1) identification of protected property, (2) generation, collection, consideration, and weighing of information pertaining to how the undertaking will affect the historic property, (3) a determination as to whether there will be adverse effects or no adverse effects, and (4) if necessary, development and evaluation of alternatives or modifications to the undertaking that could avoid or mitigate the adverse effects. *Id.* at 1104.

The Court further noted that "a federal agency does not complete the take into account process on its own, in isolation, but engages the host nation and other relevant private organizations and individuals in a cooperative partnership." *Id*.

In April 2014, DoD notified the Court and Plaintiffs that it had completed its Section 402 process. ECF No. 151. In response, Plaintiffs filed their First Supplemental Complaint seeking review of DoD's take-into-account process and no-effect finding. ECF No.152-1. The Supplemental Complaint requests (1) a declaration that "DoD's Findings and failure to involve Plaintiffs and the public" in the take-into-account process violate Section 402 and the APA, (2) an order setting aside DoD's findings, and (3) "[a]n order that DoD not undertake any activities in furtherance of the FRF project, including granting permits or approvals for contractor entry to Camp Schwab and/or the proposed FRF project area, and that DoD rescind any such permits or approvals already granted, until it complies with" NHPA § 402. *Id.* at 15-16.

The parties moved for summary judgment, and on February 13, 2015, the Court granted DoD's motion to dismiss. The Court held that Plaintiffs' claim for injunctive relief presents a non-justiciable political question and that the declaratory claims are non-justiciable for want of redressability. *Id*. Plaintiffs appealed, and on August 21, 2017, the Ninth Circuit reversed the Court's dismissal of Plaintiffs' claims, holding that Plaintiffs have standing to seek both declaratory and injunctive relief, and that the political question doctrine does not bar Plaintiffs' claims. *Ctr. for Biological Diversity v. Mattis*, 868 F.3d 803 (9th Cir. 2017). The Ninth Circuit remanded to the district court for further consideration of plaintiffs' claims but noted that "the plaintiffs may face challenges in securing relief on the merits." *Mattis*, 868 F.3d at 809 n. 2.

D. DoD's Section 402 Process

DoD's Section 402 process carefully followed Judge Patel's description of what Section 402 requires. In order to analyze the potential effects of the FRF on the Okinawa dugong, DoD gathered and assessed information on the proposed construction and operation of the FRF and defined the Area of Potential Effect ("APE") to include the geographic areas for which construction and operation of the FRF could directly or indirectly affect the Okinawa dugong. US10978. DoD considered data on the Okinawa dugong "population size, known vulnerabilities or threats to the population, behavior patterns within Henoko Bay, distribution of seagrass beds in the waters around Okinawa[,] and information on cultural practices related to the Okinawa dugong that occur within the APE for the Undertaking." US10980. In addition, because assessment of effect is based on the extent to which the Undertaking would alter the characteristics of the Okinawa dugong that make it cultural property, DoD collected and analyzed information to identify the historic and modern significance of the dugong in Okinawa culture, as well as the rationale for designating it for protection as a natural monument. DoD also considered in detail potential mitigation measures both for the Government of Japan to implement during construction and for the Marines to implement during operations. US10994-96.

Sources used by DoD in the review process included the information and documentation prepared by GOJ, including both the draft and final environmental impact analysis ("EIA") prepared by Japan for the FRF. In addition to its analysis of existing resources and studies, DoD also commissioned a biological assessment of the dugong (Jefferson) and an analysis of its cultural significance (Welch). And DoD engaged GOJ and other relevant private organizations and individuals. *Id*. at 10996-97. At the end of the process, DoD prepared an analysis entitled the United States Marine Corps Recommended Findings ("Findings"). US10977-11002.[2]

[2] The official with the authority for NHPA 402 for the FRF is the Deputy Assistant Secretary of the Navy for the Environment ("DASN-E"), who is the Federal Preservation Officer for the Department of the Navy. Defendants' Resp. to Court Mem. & Order at 6, ECF No. 120. The United States Marine Corps, which falls within the Department of the Navy, is the action proponent for the Undertaking, the FRF.

II. LEGAL BACKGROUND

A. National Historic Preservation Act, Section 402.

The NHPA, 54 U.S.C. § 300101 *et seq.*,[3] generally requires federal agencies to "take into account the effect" of their "undertakings" on certain properties. 36 C.F.R. § 800.1. Like the National Environmental Policy Act ("NEPA"), the NHPA is a procedural statute. It does not prohibit projects that result in adverse effects; rather, it requires agencies "to 'stop, look, and listen' before proceeding with agency action." *Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep't of the Interior*, 608 F.3d 592, 610 (9th Cir. 2010).

Within the United States, federal projects are governed by NHPA § 106, 54 U.S.C § 306108 (formerly 16 U.S.C. § 470f). Section 106 requires federal agencies to "take into account the effect" that a federal project will have on "any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register," and to "afford the [Advisory Council on Historic Preservation (ACHP)] a reasonable opportunity to comment with regard to such undertaking." 54 U.S.C § 306108 & note (5. Undertaking – Generally). Implementing regulations for domestic federal undertakings establish a detailed four-step procedure to comply with Section 106. 36 C.F.R. pt. 800. First, the agency identifies "consulting parties," including the State Historic Preservation Office and interested Indian tribes. Second, the agency identifies historic properties that might be affected by the project. Third, the agency assesses whether there are adverse effects on those historic properties. Fourth, the agency endeavors to resolve any adverse effects. These steps occur in consultation with the consulting parties identified by the agency. *See, e.g.*, 36 C.F.R. §§ 800.4(3), 800.5(a).

Extraterritorial undertakings are addressed in NHPA § 402, which was added to the NHPA in 1980 to implement the U.N. Convention Concerning the Protection of the World Cultural and Natural Heritage. H.R. Rep. 96-1457 at 43-44 (Oct. 10, 1980). Section 402 provides:

[3] The NHPA, previously codified at 16 U.S.C. § 470 *et seq.*, was recently recodified in title 54. Pub. L. No. 113-287, § 3, 128 Stat. 3094 (2014). When discussing individual provisions of the statute, we follow the district court's practice of using the section numbers of the original public law – for example, "NHPA § 402" or "Section 402" – with parallel citations to the U.S. Code as necessary.

> Prior to the approval of any [Federal] undertaking outside the United States which may directly and adversely affect a property which is on the World Heritage List or on the applicable country's 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 the property for purposes of avoiding or mitigating any adverse effect.

54 U.S.C. § 307101(e) (formerly 16 U.S.C. § 470a-2). Unlike Section 106, no implementing regulations have been promulgated for Section 402. *Gates*, 543 F. Supp. 2d at 1089.[4]

III. STANDARD OF REVIEW

A. Administrative Procedure Act

The Administrative Procedure Act (APA) requires courts to uphold agency actions unless they are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Gardner v. U.S. Bureau of Land Mgmt.*, 638 F.3d 1217, 1224 (9th Cir. 2011) (quoting 5 U.S.C. § 706(2)(A)). An agency decision is arbitrary and capricious if it "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983); *see also Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 66 (2004).

B. Summary Judgment

The Ninth Circuit has endorsed the use of summary judgment to review agency actions governed by the APA. *See, e.g.*, *Nw. Motorcycle Ass'n v. USDA*, 18 F.3d 1468, 1471-72 (9th Cir. 1994). The court's role is not to determine whether there are genuine disputes of fact, but instead to "determine whether or not as a matter of law the evidence in the administrative record permitted the agency to make the decision it did." *Occidental Eng'g Co. v. INS*, 753 F.2d 766, 769 (9th Cir. 1985). "[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court." *Camp v. Pitts*, 411 U.S. 138,

[4] The Ninth Circuit, in its decision remanding this case on standing and political question grounds, provided some guidance for the procedural requirements for Section 402. It noted that, while the procedural requirements for NHPA Section 106 provide "a useful comparison point" for evaluation of NHPA Section 402 process, "the statutory text of Section 106 imposes more rigorous requirements than Section 402. *Mattis*, 868 F.3d at 824.

142 (1973) (*per curiam*). The administrative agency itself is the fact-finder; summary judgment is appropriate for determining "the legal question of whether the agency could reasonably have found the facts as it did." *Occidental Eng'g Co.*, 753 F.2d at 770.

IV. ARGUMENT

DOD COMPLIED WITH SECTION 402 "TAKE INTO ACCOUNT" REQUIREMENTS

The Ninth Circuit, in its 2017 decision, noted that "if the Government has reached its conclusions about effects and mitigation after a sound NHPA Section 402 process, then it has complied with NHPA Section 402." *CBD v. Mattis*, 868 F.3d at 818. Judge Patel's 2008 order, while acknowledging that the NHPA "section 106 process does not map directly onto the section 402 process," identified five components that the DoD section 402 process should include. *Gates*, 543 F. Supp. 2d at 1105. DoD's process addressed all five.

Plaintiffs assert that DoD's Section 402 review and finding of "no adverse effect" on the Okinawa dugong was arbitrary and capricious and "without observance of procedure." Pls.' Br. 1. Plaintiffs assert that DoD failed to properly conduct Section 402 consultation and that DoD's "no adverse effect finding" was flawed because it was improperly limited in scope and was not supported by sufficient science or by information in the record. *Id*. But Plaintiffs' arguments on consultation and impacts analysis requirements are premised on an unwarranted expansion of Section 402 procedural requirements, beyond what Congress contemplated for Section 402. DoD reasonably interpreted the Section 402 requirements in its consultations and in its impact analysis, and DoD's interpretation is entitled to deference. See *ONRC Action v. Bureau of Land Mgmt.*, 150 F.3d 1132, 1139 (9th Cir.1998) (agency interpretation of statute is entitled to considerable weight and will be upheld if it is reasonable and does not conflict with the statute's clear language). Plaintiffs have failed to show that DoD's process or finding was arbitrary and capricious.

A. DoD's Research and Examination Process Met the Requirements of Section 402

1. DoD's Research and Examination process was extensive and thorough

DoD contracted with International Archaeological Research Institute, Inc. (IARII) to:

> Conduct background and documentary archival research for geographical archaeological folklore historical ethnographic and any other type of cultural resources information related to the dugong (Dugong dugon) in Okinawa culture.

> The contractor shall also analyze available and pertinent biological information on the dugong and seagrass beds and the information received from reference and provide input as to dugong behavior, migratory movements and feeding patterns insofar as those topics are relevant to the dugong's status as cultural and historic property of Japan.

US4167. The team assembled by IARII included:

- Archaeologists Dr. David Welch and Ms. Judith McNeill from International Archaeological Research Institute Inc. Honolulu,
- Cultural anthropologist Dr. Arne Rokkum, professor at the University of Oslo,
- Biologist Dr. Thomas Jefferson of Claymene Enterprises in San Diego,
- Research staff from ARCGEO Inc. in Nishikawa, Okinawa, led by archaeologist Mr. Taku Mukai and archaeologist Mr. Naoki Higa, with translations prepared by Mr. Takashi Miyagi and Ms. Nariko Yogi, and
- Mr. Masayuki Yonaha, MCB Camp Butler archaeologist

US4164-65.

The outreach was extensive, and formulating the list of interviewees was itself a substantial undertaking:

> An initial list of persons to be interviewed was developed from several sources. The project anthropologist Arne Rokkum had formerly worked in Okinawa; his background includes four years of *in situ* fieldwork spanning a period of three decades. Participant observation during that period was carried out on Yonaguni, Ishigaki, Iriomote, Hatoma, Kohama, Aragusuku, and Miyako Islands. Archival research was conducted in library institutions on Okinawa Island. Dr. Rokkum knew individuals who were likely to have information about the dugong in Okinawan culture including those at the Okinawa Studies Institute in Tokyo with which he had previously been affiliated.
>
> The cultural and natural resource specialists at Camp Butler were consulted for names of individuals who might have expertise regarding the cultural role of the dugong. Naoki Higa, ARCGEO researcher formerly with the Okinawa Prefectural Archaeology Center, and Masayuki Yonaha the MCB Camp Butler archaeologist, knew the archaeologists who had studied dugong remains and were likely to be knowledgeable in this area… Mr Senzo Uchida, a biologist at the Churaumi Aquarium, had done extensive work and written numerous articles on the dugong and was contacted at the suggestion of the project biologist as well as being included on the plaintiffs' list of biological contacts.
>
> The plaintiffs in the court case had included their own list of individuals and organizations with expertise in regard to the cultural and historical role of the dugong. The research team made it a point to include a number of people from the plaintiffs' list, but field time was not sufficient to allow us to contact and interview all the people on the list. We selected six cultural experts who seemed most likely from their publications or who were known to members of the project team to have knowledge of the role of the dugong in Okinawa culture.

US4170.

The IARII consultation process, in the end, included:

Subject matter experts -- six archaeologists, two biologists, an archivist and two folklorists. US4172. Including the subject matter experts on the team itself, and others consulted by DoD, the experts consulted included seven archaeologists, two biologists, three archivists/professors and four folklorists or individuals with local traditional knowledge. US11072.

Museum personnel – including Uruma City Cultural Sea Museum, the University of the Ryukyus, Museum Higashi Village, Museum Ishigaki City, Yaeyama Museum, Nago Museum, Okinawa Churaumi Aquarium and the Okinawa Prefectural Archaeology Center. *Id*.

Prefectural cultural authorities[5] – including the Okinawa Prefectural Board of Education and those municipal Boards of Education located nearest the proposed project and those that were located along coasts where dugongs have been sighted: Chatan Town, Ginoza Village, Nakijin Village, and Nago City. *Id*.

The Japanese Government. Japan played a prominent role. During the summer of 2010 Japan and U.S convened a bi-lateral Expert Study Group to examine the FRF including its impacts on the environment. A member of the U.S negotiating team presented the preliminary results of the Government's findings to that Expert Group for their consideration. Finally the U.S conveyed its draft findings and mitigation measures to Japan through the Office of the Secretary of Defense Policy in sufficient time for the draft findings to be reviewed by GOJ as part of its environmental impact analysis. The Deputy Assistant Secretary of the Navy (Environment) -- the Department of the Navy's Federal Preservation Officer, responsible for making the final decision on DoD's take into account process -- considered the response received from GOJ and the mitigation measures clarified or added to Japan's 2012 EIA as well. *Id*.

[5] In the Okinawa government, the Board of Education and each of its prefectural offices includes a "Cultural Property Division" that has responsibility for maintaining an inventory of cultural properties within the prefecture, conducting cultural property investigations, and consulting on the potential impacts of various development/construction activities on cultural properties in their prefecture. This office is an equivalent to the State Historic Preservation Office in the U.S. (See US4185, 4188). The Navy's consultation with these Boards refutes Plaintiffs' assertion that "[a]t no time did DoD notify … Okinawa state or local government." Pl. Br. (ECF No. 221) at 17.

2. DoD's consultation process satisfied legal standards

Plaintiffs' challenge to DoD's consultation process ignores guiding legal principles and seeks to impose specific mandates that are neither practical nor legally supported.

a. **DoD's judgment as to how the consultation process should be scoped is entitled to deference**

Section 402 contains no specific requirements for completion of the take into account process. DoD has the discretion to interpret the statutory provisions, as its views "constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). The degree of deference given to DoD's interpretations depends on "the degree of the agency's care, its consistency, formality, and relative expertness, and ... the persuasiveness of the agency's position." *Nw. Ecosystem All. v. U.S. Fish & Wildlife Serv.*, 475 F.3d 1136, 1141 (9th Cir. 2007) (quoting *United States v. Mead Corp.*, 533 U.S. 218, 228 (2001)). The record shows that DoD carefully and methodically completed its Section 402 process, including consultation with GOJ and persons and organizations having relevant expertise. Under *Skidmore*, the Court must grant deference to DoD's interpretation of the scope of the process required by Section 402.[6] As the Court recognized in its January 24, 2008 Memorandum and Order, the Court must "allow[] the precise letter of the statute to be filled in by a particular agency depending on the agency's mission and undertaking…" *Gates*, 543 F.Supp.2d at 1105.

b. **DoD was not obligated to consult with specific local governments, or with plaintiffs.**

Plaintiffs complain that DoD did not consult with Plaintiffs themselves, or with local governments (which is not entirely true – *see* US11072), and did not initiate a process for participation by the Japanese public. What Plaintiffs are asking is for this Court to impose on Section 402 the formal consultation procedures found in the domestic regulations implementing NHPA section 106. 36 C.F.R. pt. 800. The 106 regulations establish formal "consulting parties" that include: (1) the State Historic Preservation Officer, (2) Indian tribes and Native Hawaiian

[6] Judge Patel cited *Chevron v. NRDC*, 467 U.S. 837 (1984), in her analysis of deference to be afforded DoD in this matter. *Gates*, 543 F. Supp. 2d at 1103-1107 (citing *Chevron*, 467 U.S. at 842). If that is the appropriate standard, the Court should, under *Chevron* step two, defer to DoD's specific formulation of the take into account process.

organizations, (3) representatives of local governments, and (4) applicants for Federal assistance permits, licenses and other approvals. *Id.* § 800.2(c). The regulations also provide the action agency discretion to grant consulting party status to "certain individuals and organizations with a demonstrated interest in the undertaking due to the nature of their legal or economic relation to the undertaking or affected properties, or their concern with the undertakings effects on historic properties." *Id.* § 800.2(c)(5). Under the regulations, only consulting parties that receive status from the agency are afforded special opportunities to comment during each phase of the identification and evaluation of impacts on listed properties. *Id.* §§ 800.2 - 800.7. If an adverse effect is found, the consulting parties are entitled to negotiate an agreement with the action agency identifying acceptable measures to avoid, minimize, or mitigate the adverse effect. *Id.* § 800.6.

First, none of the section 106 domestic regulations apply to foreign undertakings. *Gates*, 543 F.Supp.2d at 1105. Second, even under these domestic regulations, only government entities and the applicant are entitled to consulting party status – Plaintiffs, scientists, cultural experts, and allegedly affected individuals are not entitled to status absent the agency's grant of status. *Id.* § 800.2(c). Under section 402, where the historic properties under consideration fall under the governance of another nation, it would be highly inappropriate for the court to mandate that United States statutes or regulations entitle Japanese citizens or groups to have the right to negotiate and seek agreement with the United States Government on an equal footing with Japan, or to compel the DoD to grant a group consulting status. Only Japan, as a sovereign, can represent its interests as a sovereign. The Court must not undermine Japan's sovereignty by ordering DoD to grant consulting party status to Japanese citizens, local and prefectural governments, and Japanese non-governmental organizations. Certainly, if the situation were reversed, the United States would not be required to allow its citizens, local/state governments or non-governmental entities to enter into negotiations with the Government of Japan over a project that was agreed to by Japan and the United States.

And little would be gained by requiring DoD to invite public participation.[7] The Japanese equivalent of the National Environmental Policy Act (NEPA) allows fulsome public participation.

[7] This Court's consultation factor referred to the "… host nation and other relevant private organizations and individuals" and did not require or encourage the DoD to grant consulting status to

See Declaration of Takemasa Moriya, June 27, 2007, ECF No. 91-3, at ¶¶ 13-18 (description of the public's opportunities to comment during the Japanese EIA/EIS process).

c. The fact that DoD's contractors had limited exposure to dugong "practitioners" is immaterial

As Plaintiffs note, DoD's contractor did not interview local "practitioners" – that is, non-expert members of the community who may or may not regard the dugong as sacred or otherwise special. And it is true that at least one member of the team voiced the opinion that this omission represents a weakness in the "take into account" process. Pls.' Br. 13, citing AR 4149 (Feb. 4, 2010 email string). Such an observation does not, however, render the analysis or its conclusions unreasonable. In fact, Dr. Welch specifically addresses this in his report: "[w]hile conducting interviews with these additional experts and practitioners would no doubt have furthered the depth of information on particular topics regarding the cultural significance of the dugong, it is the opinion of the authors that additional information would not substantially alter the conclusions reached in this study." US4171. Plaintiffs offer no reason to believe otherwise.

Dr. Welch's observations are supported by the Navy's own cultural resource expert who, in the same exchange Plaintiffs cite, identifies two factors that make the absence of "practitioner" interviews *de minimis*. First, IARII's desire to do additional work is *modus operandi* for all conscientious researchers. AR 4149 ("[L]ike all studies they would have liked more time and funds.") Second, there is no evidence that practitioners would provide evidence not otherwise indirectly learned from other sources. *Id.* ("They differentiate between cultural experts and cultural practitioners but both do have overlap with one another so if they talked to one that could get the gist of what the other does.") This point was made by the IARII itself:

> A few of the informants had talked to cultural practitioners to whom the interview team could not get access and had information regarding rituals and other cultural practices that has never been published and would thus be unavailable from other sources. In particular as result of his own research Mr. Isshu Maeda possessed extensive knowledge of unpublished cultural practices related to the dugong.

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any particular organizations or individuals. *Gates*, 543 F. Supp. 2d at 1104.

US4172-73; *see also* US4171 ("These and several other informants were able to provide information from their own experience of the myths and folk stories associated with the dugong and of rituals that honored or invoked the dugong.") Plaintiffs offer no reason to question these observations. Indeed, Mr. Maeda was among the experts Plaintiffs themselves advanced. AR 4170.

And, in contrast with academics and other specialists who are (in many cases) public personae, interacting with private "practitioners" presents unique practical problems. First, as the principal author of the IARII report noted, conducting private interviews would likely have caused if nothing else considerable delay "given the requirement that the Japanese embassy approve all contacts." US4149. Also, experts expressed some skepticism about current "practitioners." Mr. Hideo Henzan, an official in Naha (Okinawa Prefecture's principal city) stated a view that local residents "should be able to tell the contractors that Dugongs are not at all perceived in Okinawa as a mythological figure (mermaids, etc.) but that they were in fact valuable dietary source of protein for the local population." US3207.

The record shows, in all events, that DoD's outreach and research initiatives were thorough and wide-ranging. And, as we show in the section that follows, it led to well-supported conclusions.

B. DOD's Finding of No Adverse Effect Met the Requirements of Section 402.

1. **DoD reached its conclusions about effects and mitigation after a sound NHPA section 402 process**

DoD concluded its analysis and issued its NHPA Findings in April 2014, finding that construction and operation of the FRF will have no adverse impact on the Okinawa dugong. Specifically, DoD found that the FRF will not adversely affect the Okinawa dugong as a cultural property "because of the extremely low probability of Okinawa dugongs being in the APE; or should dugongs in fact be present the construction and operational activity is primarily of the type that would not have an adverse effect." US10988. In doing so, DoD satisfied its duty to take into account the FRF's possible effects on the Okinawa dugong as a cultural property.

DoD carefully followed this Court's 2008 ruling in ensuring that it complied with the procedural requirements of Section 402. In scoping its Section 402 analysis, it determined that, in order for the FRF to have an adverse effect on the Okinawa dugong, "dugongs would have to be

present in the APE and subject to activities that could destroy harm or alter those intrinsic characteristics that make the Okinawa dugong a natural monument." US10987. The record shows that DoD met its "take into account" obligations under Section 402 and the standards set forth in Judge Patel's opinion by considering (1) the cultural significance of the Okinawa dugong, including the bases for this significance, (2) the potential impacts that the FRF project would have on the Okinawa dugong, and (3) any potential mitigation measures that could further protect the Okinawa dugong from any adverse effects.

a. DoD took into account the intrinsic characteristics that make the Okinawa dugong a natural monument

DoD determined that, to address whether the FRF will have an effect on the Okinawa dugong as cultural property, "it is necessary to first identify the character-defining features of the dugong as a cultural property." US10986. To that end, DoD reviewed information on cultural practices related to the Okinawa dugong that occur within the APE, as well as information to identify the historic and modern significance of the dugong in Okinawa culture and the rationale for designating it for protection as natural monument under Japanese law. US10980. DoD's consultation process is described in detail above. The culmination of these efforts was the 2010 report entitled: *An Anthropological Study of the Significance of the Dugong in Okinawa Culture* (Welch report), which evaluated in detail the cultural significance of the Okinawa dugong and found that "the disappearance of the dugong population from Okinawa would have an adverse cultural impact." US4254. By considering all of these characteristics of the Okinawa dugong, DoD satisfied the first step in Judge Patel's Section 402 guidance.

b. DoD took into account potential impacts from the FRF on Okinawa dugong

To account for the potential effects the FRF may have on the Okinawa dugong, DoD reviewed multiple sets of data to determine the extent of the presence of the Okinawa dugong within the identified APE. DoD reviewed a number of previously established GOJ surveys documenting dugong presence in the area in 2000, 2001, 2003, 2008 and 2009, (US10979; US5015-19), as well as continuous 24-hour video and passive acoustic monitoring survey data that Japan compiled to support its EIA. DoD also considered aerial surveys that GOJ conducted on a monthly schedule

(US11059; US9996) and DoD survey data concerning its natural resource management effort in Okinawa. US9243-400

The feeding trail information provided by GOJ, along with other studies, indicated "steady and routine dugong activity" north of the FRF "with sporadic dugong activity observed directly in Henoko and Oura Bay." (US7656; US5022). The surveys conducted by Japan between January 2008 and December 2013 observed routine use of seagrass beds off Kayo, an area north of Henoko Bay. US10979. DoD also noted that there were five observances of dugongs in Oura Bay between September of 2010 and November of 2013 and that feeding trails have been intermittently observed in the seagrass beds within the footprint of the FRF. *Id*. Based on these data, as well as review of external academic studies, e.g. USREF1580 *et seq.*, USREF2064 *et seq.*, DoD found that Okinawa dugongs are present, at least intermittently, within the APE. *Id*.

In addition to its review of the EIA and other studies to determine the presence of the Okinawa dugong in the area, DoD also commissioned its own analysis of the biology of the dugong, culminating in a report entitled *Biological Assessment Of The Okinawan Dugong: A Review Of Information And Annotated Bibliography Relevant To The Futenma Replacement Facility* (Jefferson Report) (US3356-91). Jefferson assessed the biological characteristics of the dugong and the past and current threats to the dugong, concluding that the primary current threat is bycatch and noting that habitat destruction and alteration from the FRF is a potential threat. US3369-70.[8] *See also*, US04735-4739 (review of available information on the vulnerability of dugongs to human activities, including (1) hunting; (2) bycatch/incidental catch; (3) vessel strikes; (4) acoustic disturbance resulting in injury to hearing systems, interference with acoustic communication signals, or causing behavioral changes; (5) habitat loss/degradation; and (6) chemical pollution.)

DoD then analyzed the potential impact on the Okinawa dugong by FRF construction and operations. DoD reviewed the Japanese EIA for its assessment of the potential impacts from the construction and operation of the FRF. US6139. The EIA disclosed and analyzed aspects of FRF

[8] Jefferson concluded that "eliminating activities that may have the potential to limit population recovery (*e.g.* the FRF) while ignoring the issues **known** to be causing population decline (*e.g.* possible illegal hunting and incidental catches in fisheries) will not help the population. An integrated management plan that examines each of the potential threats with objective scientific data and deals with them accordingly is the only way to preserve this dugong population." US3373.

construction that could have an impact on dugongs in the area, including water turbidity, noise, vibrations, and night lighting during the construction work, as well as the effects of the navigation of work ships. US6139. The EIA found that:

> [I]t is projected that the effects of muddy water, noise, and the navigation of work ships during the construction work will not reach the sea areas where the seagrass beds that dugongs use as feeding grounds are distributed. It is also projected that if dugongs remain within their hitherto observed habitat, there is no possibility that implementation of the project will change the functions and value of dugongs' living environment. US6142.

Similarly, the EIA disclosed and analyzed potential impacts on the Okinawa dugong from activities associated with operation of the FRF. The EIA reviewed the potential impacts of habitat loss or change, marine and air operational noise, wastewater, and marine navigation. US6144. The EIA found that:

> there is no possibility that implementation of the project changes the functions and value of [the dugong] living environment. Nor will implementation of the project practically affect individual dugongs that live around the project implementation site. US6147.

DoD's Findings also incorporated independent analysis and conclusions regarding the potential impacts from construction and operation of the FRF. For construction activities, DoD analyzed the potential impacts from increased vessel presence, land reclamation, red soil runoff, and acoustic or visual disturbance. US10988-91. As to each of these conditions, DoD found that the infrequent use of the APE by the dugong and the implementation of mitigation measures would result in no adverse effect to the Okinawa dugong. *Id*. For operational activities, DoD analyzed the potential impacts from increased vessel presence, stormwater runoff, and acoustic or lighting disturbance and determined that there would be no adverse effect on the dugong. US10992-93. DoD's analysis of FRF impacts and finding of no adverse effect meet the second and third "take into account" steps outlined by Judge Patel.

c. DoD took into account potential mitigation measures

Although DoD did not find any adverse effects on the Okinawa dugong, it nevertheless identified measures that could further reduce the likelihood of an adverse effect and recommended that the government of Japan implement these measures. The draft EIA identified mitigation measures to be implemented to further protect dugongs, in both the construction and operation of the

FRF. US6148-51. DoD reviewed these potential measures, and as part of its NHPA analysis, engaged with the Japanese government on those and other potentially available mitigation measures that could be implemented during the design and construction of the FRF. US8073-74. This engagement resulted in an enhancement of mitigation measures proposed in Japan's final EIA. *See* US10995. DoD also noted that GOJ made additional commitments to continue monitoring surveys after the completion of FRF construction. US10996.

In sum, DoD's Section 402 process included all of the steps articulated by Judge Patel in her 2008 opinion. DoD's explanation for its decision is supported by the evidence in the record, and Plaintiffs' claims challenging DoD's Section 402 process as arbitrary and capricious fail.

2. DoD's scope of inquiry was appropriate, and it did not fail to consider an important aspect of the problem

Plaintiffs assert that DoD improperly limited its Section 402 inquiry and failed "to identify or consider the full range of possible adverse effects on the dugong caused by the FRF project." Suppl. Compl. ¶43, ECF No. 152-1. Plaintiffs allege that, while DoD scoped its review process based on the list of topics compiled by the Court in its 2008 Order, DoD was also required to go beyond those topics and to analyze issues such as dugong "population fragmentation, the disruption of travel routes, and the loss of habitat that may be required in the future to sustain a viable population, which would be larger than the present population." Pls.' Br. 19. Like their arguments regarding consultation, Plaintiffs seek to write into NHPA Section 402 procedural requirements that have no basis in the statutory text. *See Earth Island Inst. v. Carlton*, 626 F.3d 462, 472 (9th Cir. 2010) ("[c]ourts may not impose procedural requirements not explicitly enumerated in the pertinent statutes.") (Internal quotation marks and citation omitted)). Because Section 402 contains no specific requirements for completion of the take into account process, DoD has the discretion to interpret the statutory provisions in light of its "experience and informed judgment to which courts and litigants may properly resort for guidance." *Skidmore*, 323 U.S. at 140.

Further, Plaintiffs' claim that DoD "failed to consider an important aspect of the problem" relies on an expansive and untethered interpretation of Section 402 requirements. For example, Plaintiffs' assertions that DoD must also consider effects on dugong population fragmentation,

disruption of travel routes, and the need to increase the number of Okinawa dugongs in order to achieve future population sustainability are clearly outside of the scope of the "clear Congressional intent regarding the basic components of a take into account process under section 402." *Gates*, 543 F. Supp. 2d at 1104. The "problem," as defined by Plaintiffs, is in substance, akin to a NEPA requirement to take a "hard look" at environmental impacts or a Marine Mammal Protection Act (MMPA) requirement to achieve the least practical impact on a species or stock and its habitat.[9] *Cf.* 42 U.S.C. § 4321 *et seq.* (NEPA) 16 U.S.C.A. § 1371 (MMPA). But the NHPA Section 402 take into account process does not subsume these environmental statutes. Unlike NEPA, it does not require a hard look analysis of the full range of direct, indirect, and cumulative impacts. And unlike the MMPA, it does not compel a result. Plaintiffs may not, under the guise of an NHPA Section 402 claim, assert claims under environmental statutes whose reach Congress specifically chose not to extend extraterritorially.

Plaintiffs rely on *Montana Wilderness Ass'n v. Fry* in support of their position that DoD "failed to consider an important aspect of the problem" in its Section 402 review. Pls.' Br. 19. But *Montana Wilderness Ass'n* does not support Plaintiffs' attempt to expand the scope of Section 402. In that case, which dealt with claims under NHPA Section 106, the district court found that BLM used an improperly narrow geographic scope when defining and reviewing the "affected area" of a pipeline project. *Montana Wilderness Ass'n v. Fry*, 310 F. Supp. 2d 1127, 1153 (D. Mont. 2004). BLM had argued that, because a nearby archaeological site was outside the dimensions of the proposed right-of-way, BLM had no obligation to consult with tribes known to have used the area in order to seek their input on any adverse effects to the nearby site. *Id.* The district court disagreed, finding that the "affected area" included the site that lay 54 feet away from the pipeline dimensions. *Id*.

[9] Plaintiffs have not and cannot assert claims under these statutes, as NEPA and the MMPA do not apply extra-territorially. *See NEPA Coalition of Japan v. Aspin*, 837 F. Supp. 466 (D.D.C.1993) (DoD not required to conduct NEPA review for a United States military base in Japan); *United States v. Mitchell*, 553 F.2d 996, 1003 (5th Cir. 1977) (purpose of the MMPA is "the protection of marine mammals only within the territory of the United States and on the high seas. Conservation in other states is left to diplomatic negotiations.")

By contrast here, DoD did not unreasonably limit the geographic scope of the affected area. DoD defined the area of potential effects APE for the FRF as follows: during construction, the APE would include the construction footprint, inclusive of work yards and sea yards and those portions of Henoko and Oura Bays around the construction site subject to vessel traffic, acoustic disturbance, runoff or turbidity associated with the construction effort. US10978. For operations, the APE would include those portions of Henoko Bay subject to vessel traffic to and from the FRF, acoustic disturbance from FRF operations, and discharge of effluent and stormwater runoff from the FRF. *Id*. Thus, unlike BLM in *Montana Wilderness Ass'n*, DoD reasonably identified the area at issue to include the surrounding area that could be impacted by indirect effects of the undertaking. And more importantly, unlike BLM, DoD undertook a comprehensive consultation process to obtain information about any impacts within its properly scoped affected area. *See*, *supra*. Thus, DoD did not fail to consider an important aspect of the problem, and Plaintiffs' claims seeking the expansion of Section 402 procedural requirements fail.

3. DoD properly exercised its discretion in relying on scientific studies

Plaintiffs claim that DoD's Section 402 finding is arbitrary and capricious because it is allegedly based on "information its own experts deemed not 'scientifically and legally defensible.'" Pls.' Br. 15-18. Plaintiffs cite to evidence of internal criticism of several of the scientific studies relied upon by DoD and assert that this criticism equates to scientific "shortcomings that were never cured." *Id*. at 16. But the existence of scientific disagreement among agency and project experts does not equate to a scientific shortcoming, and there is no requirement under the NHPA or APA that scientific disagreements during an agency review process be "cured."

Even in the NEPA context, Ninth Circuit authority is clear that an agency is afforded wide deference as to its scientific and technical findings.[10] A court is required to be "at its most deferential" when reviewing scientific judgements and technical analyses within the agency's expertise. *N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1075 (9th Cir. 2011) "The court is not to 'act as a panel of scientists that instructs [the agency] . . ., chooses among

[10] Because the "take into account" analysis of Section 402 is a less rigorous standard than NEPA's "hard look", the Court's deference to DoD's scientific judgments should be even more pronounced.

scientific studies . . ., and orders the agency to explain every possible scientific uncertainty' . . . '[w]hen specialists express conflicting views, an agency must have discretion to rely on the reasonable opinions of its own qualified experts even if, as an original matter, a court might find contrary views more persuasive.'" (all alterations but third ellipses in original) (internal citations omitted)). It is not the role of this Court "to decide whether [agency analysis] is based on the best scientific methodology available." *Alaska Survival v. Surface Transp. Bd.*, 705 F.3d 1073, 1088 (9th Cir.2013) (quoting *The Lands Council v. McNair*, 537 F.3d 981, 1003 (9th Cir.2008)(en banc). "As long as the agency engages in a 'reasonably thorough discussion,' courts do not require unanimity of opinion." *City of Carmel–By–The–Sea v. U.S. Dep't. of Transp.*, 123 F.3d 1142, 1151 (9th Cir.1997).

Here, Plaintiffs seek to emphasize disagreements over scientific views, in an attempt to undermine the basis of DoD's findings. Plaintiffs cite to an email from Dr. Thomas Jefferson, criticizing the quality of the EIA. Pls.' Br. 16. While Jefferson did broadly criticize the EIA, that criticism does not prevent DoD from considering it in combination with the results of the other factors.[11] Moreover, DoD's own experts ultimately determined, based on independent inquiries and a diverse set of data, that the EIA's analysis on the potential impacts from the FRF was sound and incorporated that analysis into its own finding. DoD is entitled to rely on the reasoned scientific judgments of its experts in making this determination.

Plaintiffs also point to disagreements in the record as to whether there was a sufficiently complete population study of Okinawa dugongs in order to establish a baseline for an effects analysis. *Id.* at 16-17. First, as stated above, this is not a NEPA process, and any baseline criteria that may apply in the NEPA context does not translate to a Section 402 analysis. Further, while there does appear to have been disagreement as to whether additional dugong population data should be collected, Plaintiffs are incorrect that those disagreements translate into the conclusion that DoD did not have a "reasonable estimate" of the total Okinawa dugong population. As noted above, DoD

[11] Contrary to being evidence of an arbitrary and capricious process, Dr. Jefferson's statement in the record demonstrates that DoD's Section 402 review was thorough, deliberative, and inclusive of varying perspectives.

relied on several sources of surveys of both dugong sightings and of seagrasses and feeding trails, to obtain an understanding of the extent to which the dugong was present in the APE. Thus, while there may have been questions about aspects of those surveys, DoD's determination that it did in fact have a reasonable estimate of the presence of dugongs in the APE was well-founded.

Plaintiffs cite *Bonnichsen v. United States* in support of their argument that the internal disagreements over the EIA's science render DoD's findings arbitrary and capricious. Pls.' Br. 18. But *Bonnichsen* is distinguishable, as the court there held that the agency violated the NHPA not because it failed to resolve all internal scientific disagreements, but because it did not perform any meaningful study of the site at issue. *Bonnichsen v. United States*, 217 F. Supp. 2d 1116, 1163–64 (D. Or. 2002), *aff'd and remanded*, 357 F.3d 962 (9th Cir. 2004), *amended and superseded on denial of reh'g*, 367 F.3d 864 (9th Cir. 2004). While the district court there noted that an agency scientist had questioned the project's urgency and advised caution, the court determined that the agency violated the NHPA because "the project proceeded without significant study to determine the characteristics of the site, including what archaeological resources might exist, and there is little evidence that alternative methods of erosions control that might mitigate potential data loss were seriously considered." *Id.* By contrast here, DoD's findings are based on several studies evaluating the dugong, the potential effects of the FRF on the Okinawa dugong, and potential mitigation measures. This constitutes a sound Section 402 process.

4. This Court may not substitute Plaintiffs' judgments for the reasoned judgments of DoD

Finally, Plaintiffs assert that DoD's finding of no adverse effect reflects a "clear error of judgment" and is therefore arbitrary and capricious. Pls.' Br. 20 (citation omitted). Plaintiffs argue that DoD's finding of no adverse effect is wrong and that "the record shows that the FRF project *is* likely to adversely impact the dugong." *Id.* With this argument, Plaintiffs are asking the Court to substitute Plaintiffs' own judgment for that of the agency. This is not the Court's function. *Protect Our Cmtys. Found. v. Jewell*, 825 F.3d 571, 583 (9th Cir. 2016) ("When the agency's determination is founded on reasonable inferences from scientific data, a reviewing court will not 'substitute its judgment for that of the agency.'" (internal citation omitted)).

Plaintiffs' "clear error of judgment" argument asserts that the Welch 2010 report, which analyzed the cultural significance of the Okinawa dugong, contains statements that undermine DoD's analysis of effects on the dugong. Pls.' Br. 20. First, as noted above, disagreements among experts regarding scientific methodology or analysis are not sufficient to render that analysis arbitrary and capricious. Second, the Welch 2010 report was finalized prior to the publication of the Final EIA and prior to DoD's engagement with Japan on possible mitigation measures to further reduce any likelihood of adverse effects from the FRF project. Third, Welch 2010 does not actually contradict DoD's findings. Plaintiffs note that Welch 2010 "indicat[es] that dugongs were still active in the area" between 2000 and 2003. *Id.* (citing US4177). But this doesn't contradict DoD's finding of no adverse effect, as DoD's Findings document states that "the Okinawa dugong [is] found, at least intermittently, within the APE . . . ." US10979. Plaintiffs also cite to discussions in Welch 2010 regarding the precariously low Okinawa dugong population and the need for seagrass beds along Henoko Bay as a future habitat, in the event that the population were to recover. Pls.' Br. 20-21. In addition to being far outside the scope of DoD's obligations under Section 402, this discussion about enhancing dugong habitat does not contradict DoD's finding of no adverse impact, and Plaintiffs' "clear error of judgment" argument fails.

CONCLUSION

For the foregoing reasons, Federal Defendants respectfully request that their cross motion for summary judgment be granted, Plaintiffs' motions for summary judgment be denied, and judgment be entered accordingly.

Respectfully submitted, May 11, 2018,

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CERTIFICATE OF SERVICE

It is hereby certified that service of the foregoing has been made through the Court's CM/ECF electronic filing and notification system on all system participants this 11th day of May, 2018.

/s/ *Peter Kryn Dykema*
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