SARAH H. BURT (Cal. Bar No. 250378)
J. MARTIN WAGNER (Cal. Bar No. 190049)
Earthjustice
50 California Street, Suite 500
San Francisco, CA 94111
Tel: (415) 217-2000
Fax: (415) 217-2040
sburt@earthjustice.org
mwagner@earthjustice.org

Counsel for Plaintiffs Center for Biological Diversity, Turtle Island Restoration Network, Japan Environmental Lawyers Federation, Save the Dugong Foundation, Anna Shimabukuro, Takuma Higashionna, and Yoshikazu Makishi

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 U.S. Department of Defense, Defendants.	Civil Action No. 3:03-cv-4350 (EMC) Hearing Date: June 28, 2018 Time: 1:30 pm Courtroom: 5 **PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT** (National Historic Preservation Act, 54 U.S.C. §§ 300101 *et seq.*)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Regulations

Other Authority

INTRODUCTION

Defendant, the United States Department of Defense (DoD), recognizes that the Okinawa dugong, a rare and critically endangered species, is of cultural and spiritual significance to traditional Okinawan communities. DoD's own experts conclude that habitat destruction due to coastal development is a leading threat to this important species. DoD acknowledges that the few remaining dugong in Okinawa use the seagrass beds of Henoko and Oura Bays as feeding grounds. Nonetheless, DoD issued Findings concluding that destruction of portions of Henoko and Oura Bays for construction of the Futenma Replacement Facility (FRF), and operation of that military base, will have no adverse impact on the resident population of dugong. These Findings were made without consultation with Plaintiffs or impacted communities as required by the National Historic Preservation Act (NHPA), and despite ample evidence in the record demonstrating that the FRF will cause harm to the dugong. Plaintiffs are not asking this Court to substitute its own opinion for DoD's. Plaintiffs are simply asking this Court to hold DoD's Findings to the standards for sound administrative decision-making set forth in the Administrative Procedure Act (APA): DoD's Findings must be set aside as arbitrary, capricious, and contrary to law.

ARGUMENT

The APA sets standards for good agency decision making. It requires that proper procedure be followed, 5 U.S.C. § 552 *et seq.*, and provides for judicial review of agency decisions to ensure that those decisions are not "arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.* § 706. Contrary to DoD's argument that "Plaintiffs seek to expand the requirements of Section 402 beyond that which Congress intended," Defs.' Mem. of Authorities in Supp. of Mot. For Summ. J. (Defs.' Mem.), ECF No. 222 at 2, Plaintiffs simply seek to apply the APA standards for judicial review to DoD's NHPA process to ensure that it is procedurally sound and supported by "substantial evidence." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm*

Mut. Auto. Ins. Co., 463 U.S. 29, 43-44 (1983) ("Congress required a record of the rulemaking proceedings to be compiled and submitted to a reviewing court and intended that agency findings under the Act would be supported by 'substantial evidence on the record considered as a whole.'") (citation omitted); *see also Kappos v. Hyatt*, 566 U.S. 431, 435 (2012) (agency's factual determinations reviewed under substantial evidence standard).

In its 2008 decision holding that DoD failed to comply with the requirements of Section 402 of the NHPA, this Court held that the Section 402 "take into account" process "at a minimum, must include":

> (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.

Okinawa Dugong v. Gates, 543 F. Supp. 2d 1082, 1104 (N.D. Cal. 2008). In completing this process, a federal agency must "engage[] the host nation and other relevant private organizations and individuals in a cooperative partnership." *Id.*; *see also id.* at 1106.

Defendants assert that Plaintiffs "do not contend that DoD failed to follow this guidance," but rather "seek to expand the requirements of Section 402 beyond that which Congress intended and ask the Court … to substitute its own judgment for the reasoned judgment of DoD." Defs.' Mem. at 2. This characterization of Plaintiffs' position is mistaken. Plaintiffs do claim that DoD failed to follow the Court's guidance because DoD did not adequately generate, collect, and consider information pertaining to how the FRF will affect the dugong, *see* Pls.' Mem. of Authorities in Supp. of Mot. For Summ. J. (Pls.' Mem.), ECF No. 221 at 15-20, and DoD did not engage "relevant private organizations and individuals in a cooperative partnership." *See* Pls.' Mem. at 9-15. These claims do not seek to substitute Plaintiffs' own judgment for that of DoD, but instead seek to apply the standards of the APA to DoD's "take into account" process.

DoD cites *Skidmore v. Swift & Co.* for its assertion that it has "discretion to interpret the statutory provisions, as its views 'constitute a body of experience and informed judgment to which courts and litigant may properly resort for guidance.'" Defs.' Mem. at 12 (quoting *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944)). However, the Supreme Court has explained that, under *Skidmore*,

> the fair measure of deference to an agency administering its own statute has been understood to vary with circumstances, and courts have looked to the degree of the agency's care, its consistency, formality, and relative expertness, and to the persuasiveness of the agency's position. The approach has produced a spectrum of judicial responses, from great respect at one end to near indifference at the other.

United States v. Mead Corp., 533 U.S. 218, 228 (2001) (citations omitted). Here, DoD is entitled to very little deference. First, the NHPA is not a statute that has been expressly delegated to the Department of Defense and DoD has little experience or expertness in cultural preservation. Second, as demonstrated below and in Plaintiffs' motion for summary judgment, DoD has shown very little care and consistency in heeding the advice of its contracted cultural preservation and biological experts. Finally, DoD's determination of "no adverse effect" is entirely unpersuasive because it runs counter to substantial evidence in the record. For these reasons, this Court should treat DoD's claims to deference with "near indifference."

I. DoD Did Not Adequately Generate, Collect, and Consider Information Pertaining to How the FRF Will Affect the Dugong.

A. The record contains no reliable assessment of the resident dugong population and the effects of the FRF on that population.

DoD relied on three sources in support of its "no adverse effect" determination: the Japanese environmental impact assessment (EIA), a "biological assessment of the dugong

(Jefferson),[1] and an analysis of its cultural significance (Welch)".[2] Defs.' Mem. at 6. However, as Plaintiffs explain in their memorandum, none of these sources adequately assesses the impact that the FRF will have on the dugong as a culturally protected species. *See* Pls.' Mem. at 15-17. The Japanese EIA was deemed by DoD's own experts to be not "scientifically and legally defensible." Pls.' Mem. at 15-17. The biological assessment completed by Jefferson in November 2009 concludes that "a better understanding of the current status of the dugong population is needed in order to understand what impacts might be expected from construction of the FRF, and to determine if mitigation measures can reduce the impacts to acceptable levels." Jefferson Report, Administrative Record (AR) 3334. And while the Welch Report examined the significance of the dugong in Okinawan culture, it did not assess the impacts that construction and operation of the FRF would have on the dugong and its habitat. Pls.' Mem. at 13-15 (citing Welch 2010, AR 4295-4329).

DoD attempts to dismiss this lack of reliable information assessing the impact of the FRF on the dugong as "scientific disagreement among agency and project experts." Defs.' Mem. at 21. However, the record shows no disagreement. DoD's experts, including Jefferson, Welch, and Morgan Richie, a Marine Resources Specialist within the Department of the Navy, unanimously agree that the EIA is flawed, and that there has yet to be a reliable survey of the resident dugong population and assessment of the effects of the FRF on that population. *See* AR 4706 (EIA "was extremely poorly-done and does not withstand scientific scrutiny"); AR 4149 ("I am still not certain how we will do on dealing with the site specific impacts. It would have helped if the Japanese had not produced such a totally inadequate EIA."); AR 3334 ("a better understanding of the current

[1] Jefferson, Thomas A., *Biological Assessment of the Okinawan Dugong: A Review of Information and Annotated Bibliography Relevant to the Futenma Replacement Facility* (Jefferson Report), AR 3356-91.

[2] Welch, David J., *An Anthropological Study of the Significance of the Dugong in Okinawa Culture* (Welch 2010), AR 4163-66.

status of the dugong population is needed in order to understand what impacts might be expected from construction of the FRF"); AR 8095 ("We do not recommend using data from the currently designed project to make legally defensible claims regarding the presence or absence of dugongs."); AR 9269 ("It is not possible to say anything definitive about densities of dugongs.").

> DoD concedes that "Jefferson did broadly criticize the EIA" but asserts that such criticism does not prevent DoD from considering it in combination with the results of other factors. 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.

Defs.' Mem. at 22. Tellingly, DoD does not identify or cite any "other factors," "independent inquiries," or "diverse set of data." To the contrary, the agency's experts were in agreement that the EIA was poorly-done, that it could not be used to make legally defensible claims, and that the impact on the dugong remain to be assessed. *See* Pls.' Mem. at 16-17.

DoD suggests that these internal critiques of the EIA demonstrate that DoD's Section 402 review was "thorough, deliberative, and inclusive of varying perspectives." Defs.' Mem. at 22 n 11. Again, these aren't "varying perspectives"; they are the *only* perspectives present in the record. Moreover, DoD's claim of inclusivity is belied by its exclusion of Plaintiffs and the public from its consultation process. *See* Pls. Mem. at 12-14.

Regardless, when evaluating whether DoD gathered sufficient information to understand the impacts of the FRF on the dugong, the inquiry is whether there is "substantial evidence" in the record to support DoD's conclusion of no adverse effects. *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 44. There is not. Defendants cite no evidence to counter its own experts' conclusions that DoD did not have reliable evidence on which to draw a conclusion about the impact of the FRF on the dugong.

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

DoD also failed to adequately generate, collect and consider information pertaining to how the FRF will affect the dugong because instead of considering all the effects of the FRF on the dugong, DoD improperly limited its inquiry to the non-exhaustive list of potential impacts this Court identified in its 2008 order. *See* Pls.' Mem. at 19-20. Important impacts of the FRF on the dugong that DoD did not consider include population fragmentation, disruption of travel routes, and loss of habitat that may be required to sustain a viable population. *Id.* Under the APA, a court "will strike down agency action as 'arbitrary and capricious' if the agency has . . . entirely failed to consider an important aspect of the problem." *Turtle Island Restoration Network v. United States Dep't of Commerce*, 878 F.3d 725, 732 (9th Cir. 2017).

DoD argues that "Plaintiffs seek to write into NHPA Section 402 procedural requirements that have no basis in the statutory text." Defs.' Mem. at 19. DoD argues that requiring consideration of the full range of adverse effects would "subsume" other environmental statutes such as the National Environmental Protection Act or the Marine Mammal Protection Act and argues that "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." Defs.' Mem. at 20. Plaintiffs do no such thing. The plain language of Section 402 requires DoD to "take into account the effect of the undertaking on such property for purposes of mitigating any adverse effect." 54 U.S.C. § 307101(e). Nothing in the statute indicates that DoD's inquiry should be limited to a subset of impacts. To the contrary, the statute clearly requires the agency to take into account *all* effects of the undertaking. Any other interpretation would undermine the statute's explicit purpose of requiring the agency to consider ways of mitigating "any" adverse effect by allowing the agency to define a subset of effects that precludes consideration of particular adverse effects. Thus, DoD's interpretation of the statute to allow the agency to omit consideration of

certain impacts is not entitled to deference, *Chevron v. NRDC*, 467 U.S. 837, 842-43 (1984), and DoD's failure to consider the full range of impacts of the FRF on the dugong violates Section 402.

II. DoD Did Not Engage "Relevant Private Organizations and Individuals in a Cooperative Partnership".

A. DoD did not consult with any private organizations or individuals on whether the FRF would adversely impact the dugong.

DoD describes a number of individuals and organizations interviewed by the International Archaeological Research Institution, Inc. (IARII), whom DoD contracted to prepare the Welch Report, and also claims that it engaged in consultation through a bi-lateral Expert Study Group. Defs.' Mem. at 9-11. However, neither the interviews conducted by IARII nor the Expert Study Group addressed the central inquiry under Section 402: whether the FRF would adversely impact the dugong. *See* Pls.' Mem. at 13-14.

IARII conducted an "Ethnographic Study" to "obtain information on the modern significance of the Okinawa dugong." Welch 2010, AR 4168. This study included a literature review, AR 4168-69, a review of archival data on the anthropological importance of the dugong, AR 4195-4219, a review of biological information, AR 4175-83, and "informant interviews conducted for the ethnographic study." Findings, ECF No. 152-1, Ex. 1 at 38. Although the interviews that IARII conducted addressed the significance of the dugong in Okinawan culture, they did not address the FRF or the impact that construction or operation of the FRF would have on the dugong or its habitat. *See* Welch 2010, AR 4295-4329. Indeed, the FRF is not mentioned at all in the interview summaries included in the record. *Id.* Thus these interviews cannot be considered consultation for purposes of taking into account the impacts of the FRF on the dugong as required by the NHPA. *Quechan Tribe of Fort Yuma Indian Reservation v. U.S. Dep't of Interior*, 755 F. Supp. 2d 1104, 1118 (S.D. Cal. 2010) ("the sheer volume of documents [relating to consultation] is not meaningful . . . [t]he number of letters, reports, meetings, etc. and the size of the various

documents doesn't in itself show the NHPA-required consultation occurred").

Similarly, the Expert Study Group discussed the FRF's "location, configuration and construction method" and "considered factors such as safety, operational requirements, noise impact, environmental concerns, and effects on the local community." AR 7306. However, it explicitly did not consider the FRF's impact on the dugong, as indicated by the group's statement that the "impact on animal and plant habitat remains to be assessed." AR 7311. Thus, DoD's participation in the Expert Study Group was also not consultation on the effects of the FRF on the dugong for purposes of Section 402.

B. DoD's failure to consult with people for whom the dugong is culturally significant undermines the purpose of the consultation requirement in the NHPA.

Effective consultation under the NHPA requires consultation with affected communities because DoD cannot fully understand the impact of its action on a cultural resource without consulting the communities and individuals whose culture is impacted. This is reflected in the regulations governing the domestic Section 106 process, which make consultation with Indian tribes and Native Hawaiian organizations mandatory. *See* 36 C.F.R. § 800.2(c). Department of Interior guidelines for consultation under Section 402 similarly require that "efforts to identify and consider effects on historic properties in other countries should be carried out in consultation with the host country's historic preservation authorities, *with affected communities and groups*, and with relevant professional organizations." The Secretary of the Interior's Standards and Guidelines for Federal Agency Historic Preservation Programs Pursuant to the National Historic Preservation Act, 63 Fed. Reg. 20,496, 20,504 (Apr. 24, 1998) (emphasis added). This is consistent with—and the appropriate interpretation of—this Court's statement that DoD must "engage[] the host nation and other relevant private organizations and individuals in a cooperative partnership." *Okinawa Dugong v. Gates*, 543 F. Supp. 2d at 1104.

The interviewees for the Welch Report were all academics and "subject matter experts," Defs.' Mem. at 11, and did not include any local community members or cultural practitioners for whom the dugong was culturally significant. Welch 2010, AR 4172. The local Okinawan communities for whom the dugong is culturally significant are culturally distinct from mainland Japanese citizens. Because "the beliefs, folk tales, and rituals associated with [the dugong] are distinctly part of Okinawan identity and not of an overall Japanese identity," traditional Okinawans offer a highly relevant and unique perspective on how cultural values associated with the dugong would be impacted by the FRF. AR 4248. They are thus "relevant private organizations and individuals" whom this Court held DoD must engage in a cooperative partnership. *Okinawa Dugong v. Gates*, 543 F. Supp. 2d at 1104. DoD's failure to consult with affected communities made it impossible for DoD to take into account the interests and concerns of the relevant communities surrounding possible adverse effects of DoD's activities on a cultural property that is of direct significance to them.

DoD argues that the "fact that DoD's contractors had limited exposure to dugong 'practitioners' is immaterial" because "there is no evidence that practitioners would provide evidence not otherwise indirectly learned from other sources." Defs.' Mem. at 14. However, DoD provides no basis for its conclusion that practitioners would not provide relevant evidence, which is particularly problematic given the recognition in the DoI guidelines and Section 106 that communities and groups with a direct interest in the cultural property should be consulted. Moreover, the reason the record does not show that practitioners would provide evidence not indirectly learned from other sources is that DoD did not consult with those practitioners and the record is comprised only of information that DoD considered in making its "no adverse effect" determination. The fact that an official in the Department of the Navy summarily concluded that there is "overlap" between cultural experts and cultural practitioners "so if [IARII] talked to one

that could get the gist of what the other does," cannot justify this lacuna in DoD's information gathering. AR 4149.

Finally, DoD argues that "little would be gained by requiring DoD to invite public participation" because the Japanese EIA process "allows fulsome public participation." Defs.' Mem. at 13. However, the Japanese EIA process does not assess the effects of the FRF on the dugong as a cultural resource and thus did not afford Plaintiffs, local government, affected communities, or cultural practitioners an opportunity to provide input on impacts of the FRF on the cultural elements for which the dugong is protected under Japan's "Law for the Protection of Cultural Properties" and the NHPA.

For all these reasons, DoD's failure to consult with people for whom the dugong is culturally significant undermines the purpose of the consultation requirement in the NHPA and demonstrates DoD's lack of engagement with "relevant private organizations and individuals in a cooperative partnership." *Okinawa Dugong v. Gates*, 543 F. Supp. 2d at 1104.

C. Japanese sovereignty and Plaintiffs' citizenship do not bar consultation.

DoD argues that it "was not obligated to consult with specific local governments, or with plaintiffs," Defs.' Mem. at 12, and that "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." Defs.' Mem. at 13. Defendants' also state that "[o]nly 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." Defs.' Mem. at 13. At a minimum, this argument fails because not all Plaintiffs in this suit are Japanese citizens. The Center for Biological Diversity is a non-profit organization based in the United States, whose staff and members are U.S. citizens with a demonstrated interest

in the impacts of the FRF project on the Okinawa dugong. *See* Decl. of Peter Galvin, May 15, 2007, ECF No. 85-12 at ¶ 2; Declaration of Jeff Shaw, May 17, 2007, ECF No. 85-16 at ¶¶ 1-3. Japanese sovereignty has no bearing on DoD's ability to consult with U.S. citizens.

Sovereignty concerns did not impede DoD's ability to engage in consultation with the Japanese citizens interviewed for the Welch 2010 Report, and DoD does not explain why sovereignty would bar consultation with Japanese Plaintiffs and local communities. Indeed, the process DoD describes, which involved contacting the local embassy for a list of individuals it could consult with for the Welch 2010 Report, demonstrates that consultation need not be overly burdensome nor a threat to Japanese sovereignty. *See* Defs.' Mem. at 9-11 (describing consultation process).

III. DoD's Finding of "No Adverse Effect" Is Not Supported by the Record.

Judicial review of agency action under the APA requires the reviewing court to "consider whether the decision was based on a consideration of the relevant factors and whether there was a clear error of judgment." *Motor Vehicle Mfrs. Ass'n*, 463 U.S. at 43. Engaging in such review is not, as DoD claims, "substituting Plaintiffs' own judgment for that of the agency," Defs.' Mem. at 23, but is instead an exercise of one of the courts' most fundamental roles.

It is a "clear error of judgment" sufficient to constitute arbitrary and capricious agency action to "offer 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*, 463 U.S. at 43. In this case, DoD's "no adverse effect" determination was *not* founded on reasonable inferences from scientific data, *Protect Our Cmtys. Found. v. Jewell*, 825 F.3d 571, 583 (9th Cir. 2016) (cited in Defs.' Mem. at 23). To the contrary, there is ample evidence in the record, and in particular in the Welch 2010 Report on which DoD relied, that the FRF project *is* likely to adversely impact the dugong. *See* Pls. Mem. at 20-21.

DoD's "no adverse effect" runs counter to the evidence before it and is therefore arbitrary and capricious.

DoD implies that the Final EIA might have corrected the flaws in the EIA that were highlighted in the Welch Report. *See* Defs.' Mem. at 24 (Welch 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"). However, a Survey of Marine Mammals in Okinawa (SuMMO), completed on August 28, 2013 after Japan finalized the EIA in 2012, concluded that the data available to DoD at the time was still insufficient and had "a high likelihood of not being able to conclusively tell us if, where, when or how dugongs are using seagrass beds near Henoko and Oura Bay." Pls.' Mem. at 17 (citing SuMMO Report, AR 9243).

Moreover, DoD's claim that it "engage[d] with Japan on possible mitigation measures to further reduce any likelihood of adverse effect from the FRF project" is misguided. Defs.' Mem. at 6, 24; *see also* Findings, AR 10994-96. The mitigation measures listed mostly required after-the-fact monitoring to determine whether construction and operation of the FRF has, indeed, caused adverse impacts. AR 10996 ("Conduct monitoring surveys after the facilities are complete and the airfield is in operation to see whether the presence of the new underwater structures or aircraft noise is causing changes to dugong activity.") Such mitigation measures are irrelevant to the requisite *pre-action* assessment of adverse effects. Moreover, it is circular for DoD to base its determination of no adverse effects on its claim that Japan's mitigation measures will negate any such effects. *See* Defs.' Mem. at 18 ("implementation of mitigation measures would result in no adverse effect to the Okinawa dugong"). This circular reasoning is arbitrary and capricious.

IV. Plaintiffs' Request for a Temporary Injunction on DoD's Activities in Furtherance of the FRF Satisfies the *Winter* Standard for Injunctive Relief.

Winter v. Nat. Res. Def. Council, Inc. sets forth a four-part test for preliminary injunctive relief. 555 U.S. 7, 20 (2008). Plaintiffs seeking a preliminary injunction must establish that: 1) they are likely to succeed on the merits; 2) they are likely to suffer irreparable harm in the absence of preliminary relief; 3) the balance of equities tips in their favor; and 4) an injunction is in the public interest. *Id.* Defendants do not present any support for their assertion that, following success on the merits of Plaintiffs' claims, injunctive relief would not be warranted. *See* Defs.' Mem. at 2.

Once they have succeeded on the merits, the other criteria are easily met. First, as Plaintiffs have demonstrated, the FRF will adversely impact, and possibly even cause the extinction of the dugong. Pls.' Mem. at 5-6, 20-21. The Japanese Ministry of the Environment has listed the Okinawa dugong as "critically endangered in Japan," *Okinawa Dugong v. Gates*, 543 F. Supp. 2d at 1084, and DoD's own experts concluded that "habitat destruction from coastal development and run-off" is a key threat to the remaining dugong. AR 3369-70. Plaintiffs have shown that they would suffer irreparable harm if the few remaining dugong are extirpated. *See Okinawa Dugong v. Gates*, 543 F. Supp. 2d at 1094 ("plaintiffs have a concrete interest to preserve the dugong for cultural, educational, aesthetic, inspirational and economic benefits to themselves and their descendants"). DoD's failure to gather reliable data on the risks posed to the Okinawa dugong by the FRF project, and to consult with Plaintiffs and other impacted communities, prevents DoD from effectively mitigating adverse impacts of the FRF on the dugong and heightens the risk of extinction of the species. This failure to consider the impacts on the dugong for purpose of mitigation causes irreparable harm to Plaintiffs' cultural, scientific, recreational, conservation, aesthetic, and economic interests in the Okinawa dugong.

Second, the balance of equities tilts in favor of granting a temporary injunction on DoD's

activities in furtherance of the FRF project until the DoD satisfies the Section 402 "take into account" process. Plaintiffs do not seek a permanent injunction on FRF activities. Rather, they seek a temporary injunction that would give DoD time to gather and review information as prescribed by Section 402. DoD has not shown that it would suffer any hardship if its activities were paused to allow it to complete compliance with its NHPA obligations. DoD has presented no evidence that treaty or security arrangements with Japan require immediate action to construct the FRF. To the contrary, the U.S.-Japan security arrangements remain robust despite making time for Japan to conduct its own environmental impact study, which took from 2009 to 2012. AR 10981.

On the other hand, the dugong, the Plaintiffs, and the local communities for whom the dugong is culturally significant face considerable hardships if FRF activities proceed without compliance with the Section 402 "take into account" process. DoD's Welch 2010 Report describes the dugong as "an inalienable animal (one that cannot be lost) to Japanese culture." AR 4255. Its preservation "as a viable species in Japanese waters is essential to avoid adverse impacts to its cultural significance." AR 4256. Thus, the equities tilt decidedly in favor of taking into account adverse effects on the dugong before proceeding with FRF construction activity.

Finally, a temporary injunction on activities in furtherance of the FRF project until DoD remedies shortcomings in its Section 402 "take into account process" is in the public interest. The public has a clear interest in DoD's compliance with Section 402 to prevent irreparable environmental and social injury. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1138 (9th Cir. 2011) (recognizing "the well-established public interest in preserving nature and avoiding irreparable environmental injury") (citations omitted). Although the Supreme Court in *Winter* held that the public's interest in the scientific study of marine mammals was outweighed by the interest in naval training exercises, 555 U.S. at 26, the Court emphasized that "military interests do not always trump other considerations, and we have not held that they do." *Id.* Here, DoD has not

argued that its desire for an accelerated timeline for FRF construction is of equal or greater interest to the public than the interest in careful consideration of the impact of the U.S. government's actions overseas to ensure that the U.S. government isn't responsible for destroying an important cultural resource.

CONCLUSION

The NHPA requires federal agencies to "stop, look and listen" before taking action that might harm cultural resources. It does not mandate preservation of such resources, but instead requires agencies to understand, consider, and acknowledge the impacts of their activities on resources that have cultural or historic significance. DoD's failure to consult with the Plaintiffs and engage the public as required by Section 402 of the NHPA, and its reliance on flawed scientific data, make it impossible for DoD to generate adequate information to assess the effects of the FRF on the dugong. DoD's finding that the FRF will have "no adverse effect" on the dugong is therefore arbitrary and capricious. Plaintiffs respectfully request that this Court grant Plaintiffs' motion for summary judgment and deny Defendants' cross-motion for summary judgment.

Respectfully submitted this 25th day of May, 2018.

/s/ Sarah H. Burt
SARAH H. BURT (Cal. Bar No. 250378)
J. MARTIN WAGNER (Cal. Bar No. 190049)
Earthjustice
50 California Street, Suite 500
San Francisco, CA 94111
Tel.: (415) 217-2000
Fax: (415) 217-2040
sburt@earthjustice.org
mwagner@earthjustice.org

Attorneys for Plaintiffs Center for Biological Diversity, et al.