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' REPLY BRIEF IN SUPPORT OF CROSS MOTION FOR SUMMARY JUDGMENT

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

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I. INTRODUCTION

Plaintiffs have failed to meet their burden of demonstrating that the U.S. Department of Defense's (DoD) NHPA Section 402 process was unsound. Plaintiffs argue that DoD "did not adequately generate, collect, and consider information," that DoD did not sufficiently "engage 'Relevant Private Organizations and Individuals,'" and that DoD's finding of no adverse effect is not supported by the record. Pls.' Opp'n to Defs.' Mot. for Summ. J. & Reply in Supp. of Pls.' Mot. for Summ. J. (Pls.' Reply) 3, 7, 11 (ECF No. 223). All of Plaintiffs' arguments ignore or misinterpret the evidence in the record. The record actually shows that DoD closely followed this Court's guidance, sufficiently considered all of the important aspects of the "take into account" process, and made Findings that are consistent with the evidence before it. And all of Plaintiffs' arguments seek to expand unreasonably the scope of DoD's Section 402 obligations while unduly restricting the deference owed to DoD. The Court should reject Plaintiffs' challenges and grant summary judgment in favor of Defendants on all claims.

II. ARGUMENT

A. DoD is Entitled to Substantial *Skidmore* Deference.

DoD's interpretation and implementation of the "take into account" standard established by Section 402 is entitled to deference. An agency's statutory interpretation is "entitled to 'considerable weight'" and will be upheld if it is reasonable and does not conflict with the statute's clear language. *ONRC Action v. Bureau of Land Mgmt.*, 150 F.3d 1132, 1139 (9th Cir.1998) (citation omitted). Plaintiffs argue that DoD is entitled to minimal deference in scoping and implementing its Section 402 process and that the Court should evaluate DoD's interpretation of Section 402 with "near indifference" under the *Skidmore* deference inquiry. Pls.' Reply 3. Plaintiffs note that NHPA regulatory authority has not been expressly delegated to DoD, claim that "DoD has little experience or expertness in cultural preservation," and assert that DoD "has shown very little care and consistency." *Id*. (citing *United States v. Mead Corp*., 533 U.S. 218, 228 (2001)).

But *Skidmore* deference does not require that an agency be an expressly delegated authority to issue regulations for the relevant statute.[1] The Supreme Court has recognized that "whether or not they enjoy any express delegation of authority on a particular question, agencies charged with applying a statute necessarily make all sorts of interpretive choices," and, where the agency has specialized expertise and information, those choices merit deference. *See Mead Corp.*, 533 U.S. at 227. Here, DoD has specialized expertise and information that merit substantial *Skidmore* deference. Contrary to Plaintiffs' unsupported assertion that "DoD has little experience or expertness in cultural preservation," DoD is the steward for the Nation's largest inventory of federally managed historic properties and routinely implements projects that implicate potential cultural preservation projects,[2] and the Department of the Navy has its own cultural resources program and instructions for protection of cultural resources. *See* SECNAVINST 4000.35A (9 April 2001).[3] And, as discussed below, the record shows that DoD took great care in following the Court's guidance in its Section 402 review and in maintaining consistency with that guidance.

Finally, DoD is not seeking broad deference here; Judge Patel already attempted to annotate Section 402's sparse language by identifying five components that she believed must be included in DoD's "take into account" process. The record shows that DoD adhered closely to the Court's guidance as to those five components, and the U.S. Marine Corps Recommended Findings

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[1] The unique nature of Section 402 necessarily requires that courts afford substantial deference to the agency charged with applying it. Plaintiffs' proposal to revoke the interpretive choices of agencies applying Section 402 would create an unworkable scenario, as the statute does not tell agencies how to "take into account" an undertaking, and there are no implementing regulations for the agency to follow. If an agency applying Section 402 lacks any discretion to make choices to fill the Section 402 regulatory gap, then that agency is condemned to administrative stasis. Plaintiffs' attempt to undercut DoD's discretion is inconsistent with principals of administrative law and of the presumption of administrative regularity.

[2] *See* https://www.denix.osd.mil/cr/home/ (last visited May 30, 2018).

[3] https://doni.documentservices.dla.mil/secnav.aspx?RootFolder=%2FDirectives%2F04000%20Logistical%20Support%20and%20Services%2F04-00%20General%20Logistical%20Support&FolderCTID=0x012000E8AF0DD9490E0547A7DE7CF736393D04&View=%7B38D89E07-AD50-407F-9B15-0FF1BDD0D5D5%7D (last visited May 30, 2018).

("Findings") (US00010977-11002) faithfully track that guidance. Plaintiffs cannot credibly claim that DoD, by following this Court's scoping guidance in interpreting Section 402, acted without care and contrary to the clear language of Section 402.

B. DoD Complied With Section 402's "Take Into Account" Requirements.

1. DoD sufficiently generated, collected, and considered information pertaining to how the Futenma Replacement Facility (FRF) will affect the dugong.

Plaintiffs assert that DoD failed to follow the Court's guidance for its Section 402 process because "DoD did not adequately generate, collect, and consider information pertaining to how the FRF will affect the dugong." Pls.' Reply 2. But as discussed in Defendants' opening brief (Defs.' Br.), DoD (1) collected survey data indicating the extent of dugong presence in the area and scientific data on the biology of the dugong and on the dugong habitat; (2) generated additional study of the biology and cultural properties of the dugong; (3) reviewed the Japanese Environmental Impact Analysis (EIA) and its analysis of potential impacts on the Okinawa dugong from the construction and operation of the FRF; and (4) performed an independent analysis of this information to take into account the possible effects of the FRF on the Okinawa dugong. Defs.' Br. 16-18 (ECF No. 222). Through this process, DoD satisfied the "generate, collect, and consider" step identified in the Court's guidance.

Plaintiffs claim that none of the sources cited by DoD in its Findings adequately assesses the impact that the FRF will have on the dugong as a culturally protected species. Pls.' Reply 4. Plaintiffs base this claim on their incorrect assertion that DoD only relied on three sources, two of which did not contain an analysis of the FRF's impacts and a third—the Japanese EIA—that they allege contains no credible scientific information and cannot provide "substantial evidence" for DoD's Findings. Pls.' Reply 4-5. In essence, Plaintiffs seek to discredit the EIA and then to argue that, without it, DoD has no reliable data on the potential effects of the FRF on the dugong. *Id*. This argument fails.

First, Plaintiffs ignore that DoD conducted its own independent analysis of the FRF's potential impacts to the Okinawa dugong. See US10988-93. As discussed more fully below, *see*

infra § B.2, the impacts analysis in the Findings document addresses various potential impacts to the dugong and its habitat as a result of aspects of the construction and operation of the FRF. It is also untrue that DoD relied on only three sources in support of its Findings. *See* Defs.' Br. 16-17 (description of sources used by DoD, including multiple types of surveys and external literature).

Second, Plaintiffs have not shown that the EIA contains no reliable data on the FRF's potential effects on the dugong or that DoD was unreasonable in relying on the EIA. As discussed in Defendants' opening brief, the EIA thoroughly analyzed and disclosed the FRF's potential effects on the Okinawa dugong. It contains specific discussion of the various environmental conditions that could arise from the FRF's construction and operation, and it contains an analysis of whether those conditions will adversely affect the dugong. Defs.' Br. 17-18. Plaintiffs do not cite any specific provision in the EIA that they claim is deficient and do not identify any methodological defect or scientific error therein. In lieu of identifying any actual deficiencies in the EIA, Plaintiffs refer to two documents in the record containing statements questioning the quality of the EIA as a whole. Pls.' Reply 4 (citing AR 4706, AR 4149). As discussed in Defendants' opening brief, these general criticisms of and scientific disagreements with the EIA do not prevent DoD from reasonably relying on it. *See* Defs.' Br. 22.

In addition to those two statements, Plaintiffs also misrepresent certain comments in the record, inaccurately asserting that those comments criticize specific aspects of the EIA. Plaintiffs cite: (1) the Jefferson report's statement 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" (US3334); (2) a statement by Morgan Richie that "[w]e do not recommend using data from the currently designed project to make legally defensible claims regarding the presence or absence of dugongs" (US8095); and (3) the SuMMO Report's statement that "[i]t is not possible to say anything definitive about densities of dugongs" (US9269). Pls.' Reply 4-5. None of these supports Plaintiffs' argument that the EIA is deficient and that DoD's reliance on it is *de facto* arbitrary and capricious.

As to the Jefferson report statement, Plaintiffs have taken that statement out of context.[4] Jefferson's statement, made in 2010 and prior to the final EIA, is discussing mitigation measures. US3334. In context, the statement does not discredit the draft EIA. It identifies the draft EIA's list of mitigation measures as "an important first step," recommends "a better understanding of the current status of the dugong population" in order to evaluate whether additional mitigation measures would be appropriate, and cites to specific possible mitigation measures. *Id*. Notably, the record shows that DoD took into account Jefferson's perspectives on mitigation: it recommended some of these same mitigation measures to the Japanese government. *See* US8073 (recommending to Japan, *inter alia*, the use of a bubble curtain and an expansion of dugong monitoring programs).

The Richie comment (US8095) and the SuMMO Report statement (US9269) also do not support Plaintiffs' arguments that the EIA is deficient, as they are not talking about the EIA at all. In her statement regarding "the currently designed project," Ms. Richie is not referring to the EIA; she is referring to a USMC-sponsored proposed marine mammal monitoring project in Okinawa.[5] US8095. And the statement that she does not recommend using data from that project indicates only

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[4] The full text of the statement is as follows:

> The Japanese Environmental Impact Assessment report for the FRF mentions a number of mitigation measures being considered for reducing impacts on the Okinawan dugong (Ministry of Defense 2009). Providing such a list of potential mitigation measures is an important first step for dugong management and conservation in Okinawa. However, 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. Therefore, comprehensive evaluation of what mitigation measures are appropriate and needed should be conducted before the project begins, based on the best available scientific information (for a description of mitigation measures used for dolphins in similar marine construction projects in Hong Kong, see Jefferson et al. 2009). For instance, the use of bubble curtain around noisy construction activities, such as percussive piling, can dramatically reduce construction noise and help to protect dugongs (see Würsig et al. 2000). In addition, pre-construction-, construction-, and post-construction-phase dugong and seagrass monitoring programs should be undertaken to evaluate actual impacts, the effectiveness of mitigation measures, and to provide information for use in adaptive management of the dugong population. (US3334.)

[5] This project was ultimate executed as the Survey of the Marine Mammals of Okinawa (SuMMO) Project. US00009243.

that Ms. Richie, at the time she made the comments, believed that the Marine Corps should expand the scope of its own study. *Id.* Ms. Richie's statement says nothing about the EIA and implicates nothing in the EIA's analysis. Likewise, the SuMMO statement that "it is not possible to say anything definitive about densities of dugongs" is not a criticism of data in the EIA. It is a reference to the limitations of the SuMMO study's use of passive acoustic monitoring (PAM). US9269. And while the PAM monitoring may have limited the SuMMO authors' ability to "say anything definitive about densities of dugongs," the EIA and the Findings did not exclusively rely on PAM data to analyze the extent of dugong presence in the Area of Potential Effect (APE). The EIA and DoD's Findings also relied on aerial surveys that Government of Japan (GOJ) conducted on a monthly schedule (US11059; US9996-10011) and on external literature (USREF1580 *et seq.*, USREF2064 *et seq.*).

More importantly, even if the Japanese survey data on dugong presence in the area is not as complete as some individuals would have liked, the comments identified by Plaintiffs do not support a finding that DoD required more data in order to conduct a sound "take into account" process of the FRF's effects on the dugong. The Findings ultimately included a determination that the "Okinawa dugong [is] found, at least intermittently, within the APE for the Undertaking." US10979. Thus, the analysis of potential impacts assumed dugong presence in the APE, and DoD did not base its determination of no adverse impact on an assumption that there would never be any dugong presence in the APE. *Id.* To the contrary, DoD found that:

> should dugongs in fact be present [in the APE], the construction and operational activity is primarily of the type that would not have an adverse effect. The exception to this, as discussed in Section 3.2.4, is construction noise; however, the GoJ has committed to noise minimization and monitoring efforts that the USMC finds likely to be effective in avoiding or minimizing impacts on dugongs if they are present during construction.

US10988.

While additional and exhaustive monitoring of dugong presence would have provided more complete information about the overall dugong population, this additional degree of certainty was not required by Section 402 or the Administrative Procedure Act (APA) for DoD to take into account the effects of the FRF on the Okinawa dugong. *See* US10993 ("Notwithstanding the

absence of recent total population data, we *do have* current and valid population data for Henoko and Oura bays . . . [T]he construction and operation of the FRF will not have adverse effects on the local Okinawa dugong population and consequently will not substantially contribute to the extinction of the entire Okinawa dugong") (emphasis added). DoD had substantial evidence on which to base its Findings, and there is no basis for Plaintiffs' claim that DoD was required to collect more exhaustive data on the dugong population prior to making its Findings.

2. DoD considered an appropriate range of potential impacts.

Plaintiffs next restate their claim that DoD "failed to consider the full range of impacts of the FRF project on the dugong." Pls.' Reply 6. But DoD did consider a wide range of potential impacts from construction and operation of the FRF, including the potential impacts of vessel strikes, ship noise, habitat loss or change, construction noise, destruction or contamination of seagrass beds by land reclamation and/or soil and wastewater runoff, visual disturbance, and acoustic or lighting disturbance from vessel traffic or aircraft overflights. US10988-10993. DoD did not, as Plaintiffs contend, limit its inquiry to an arbitrary "subset of impacts"; it followed Judge Patel's guidance on potential impacts, reviewed the EIA's analysis of potential impacts, and conducted its own analysis of the potential impacts that were necessary to take into account the effect of the FRF project. And, as discussed above, this Court must afford some deference to DoD in its interpretive choices in scoping its analysis.

Further, as discussed in Defendants' opening brief, Plaintiffs' proposed "full range of impacts" improperly seeks to write into Section 402 environmental analysis requirements that are not found in the statutory text. *See* Defs.' Br. 19; *Earth Island Inst. v. Carlton*, 626 F.3d 462, 472 (9th Cir. 2010) ("Courts may not impose procedural requirements not explicitly enumerated in the pertinent statutes.") (internal quotation marks and citation omitted)). Plaintiffs disclaim that they are trying to use Section 402 as a backdoor to enforce environmental requirements of other laws, asserting that "the plain language of Section 402" requires DoD to consider "population fragmentation, disruption of travel routes, and loss of habitat that may be required to sustain a viable population." Pls.' Reply 6. Section 402 of course does not mention population fragmentation,

marine mammal travel routes, or population sustainability. But even read broadly, Section 402's plain language does not compel federal agencies to consider every conceivable aspect of every potential impact to the relevant property.[6] Plaintiffs' attempt to read into the statutory text a requirement to take into account "*all* effects of the undertaking," *id*., creates an impossible standard that turns on its head the principles of APA deference and that directly violates the rule set forth in *Carlton* that courts are not to impose on agencies procedural requirements that have no statutory basis. Plaintiffs' argument that DoD has failed to consider an important part of the problem is without merit.

C. DoD's Consultation Process Satisfied Section 402.

DoD satisfied the legal requirements for consultation by properly consulting with an appropriate range of entities and individuals on the cultural impacts of the project and on the impacts to the Okinawa dugong. Like their argument on impacts above, Plaintiffs' arguments seek to impose requirements on DoD that are beyond those required by law. This court should defer to DoD's interpretation of the scope of the process required by Section 402 and grant summary judgment in favor of Defendants.

1. DoD engaged in thorough and wide-ranging consultation.

As demonstrated by the record, DoD has met the requirements of Section 402 and this Court's mandate to "engage[] the host nation and other relevant private organizations and individuals in a cooperative partnership." *Okinawa Dugong v. Gates*, 543 F. Supp. 2d 1082, 1104 (N.D. Cal. 2008). As the United States has explained, DoD engaged in an extensive consultation process. Defs.' Br. at 10-11. That process included close work with the GOJ. *Id*. at 11. It also

[6] Even under the more rigorous "hard look" standard under the National Environmental Protection Act (NEPA), federal agencies are not required to consider every possible environmental contingency. *See Earth Island Inst. v. U.S. Forest Serv.*, 697 F.3d 1010, 1021 (9th Cir. 2012).

included the work done by International Archaeological Research Institute, Inc. (IARII) to engage archaeologists, biologists, archivists/professors, folklorists or individuals with local traditional knowledge, museum personnel, and prefectural cultural authorities. *Id*. at 10-11.

Plaintiffs fault DoD's "failure to consult affected communities," Pls.' Reply 9, yet the record shows exactly the opposite. DoD consulted with cultural authorities from the municipalities 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). US11072. Notably, that work included consultation with the Okinawa Board of Education and its municipal Boards of Education – offices tasked with responsibilities regarding protecting cultural properties and functioning as the equivalent to the State Historic Preservation Office in the United States. Defs.' Br. at 11 n.5 (citing US4185, 4188).

Plaintiffs also suggest that this Court should second-guess DoD's decisions regarding the need to conduct additional interviews of cultural "practitioners." Pls.' Reply 9. However, there is no basis for this Court to overturn DoD's reasonable conclusions on this point. *Occidental Eng'g Co. v. INS*, 753 F.2d 766, 769 (9th Cir. 1985) (Court's review is 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."). DoD and its contractors specifically concluded that they had learned most, if not everything, the local practitioners could have taught them through consultation with cultural practice experts.[7] US4149, US4170-73. Plaintiffs fail to identify any particular information from practitioners that DoD allegedly overlooked that would have been material to its decision and that suggested a different outcome. *See e.g., Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep't of Interior*, 608

[7] The distinction Plaintiffs try to make between "cultural experts" and "cultural practitioners" is not clear, as DoD has noted that "both do have overlap with one another." US4149.

F.3d 592, 610 (9th Cir. 2010) (finding agency complied with the NHPA in part because "the [Plaintiff] Tribe has made no showing that it would have provided new information had it been consulted…earlier"). Moreover, one of the cultural experts DoD consulted, Mr. Isshu Maeda, was one of the experts with whom Plaintiffs specifically recommended DoD consult. US4170. Thus, Plaintiffs' disagreement with DoD's conclusion that additional interviews of cultural practitioners were not warranted is not a basis for finding that DoD's consultation process was arbitrary and capricious.

As discussed above, DoD examined the likely impact of the project on the dugong, and it consulted on that issue as well, despite Plaintiffs' claims to the contrary. *See* Pls.' Reply at 7-8. In particular, the United States consulted with the GOJ on impacts. DoD engaged with the bi-lateral Expert Study Group that was convened to examine the FRF and whose mandate specifically included consideration of "environmental concerns."[8] US11072; US7306. In addition, DoD provided its draft Findings and mitigation measures to the GOJ in sufficient time for the draft Findings to be reviewed by the GOJ as part of its environmental impact analysis. US11069-72 (providing a detailed list of specific mitigation measures and recommended actions). And DoD considered the response received from the GOJ and the mitigation measures clarified or added to Japan's 2012 EIA as well. *Id*.

In short, DoD engaged in a thorough and wide-ranging consultation process, and Plaintiffs have failed to demonstrate that the process was arbitrary and capricious or in violation of law.

[8] Plaintiffs' emphasis on the Expert Study Group's statement that the "impact to animal and plant habitat remains to be assessed," Pls.' Reply 8 (citing AR7311), is misplaced. That statement refers specifically to analysis of the I-shaped configuration, rather than addressing the V-shaped configuration that was selected.

2. DoD was not required to consult with the entities that Plaintiffs identify.

Plaintiffs premise their consultation arguments on the incorrect assumption that DoD was required to consult with particular parties identified by Plaintiffs, including the Plaintiffs themselves, certain scientists, specific cultural experts, or allegedly affected individuals. Pls.' Reply at 7-11. There is no legal basis for this assumption.

Plaintiffs cannot point to any legal authority requiring the type of consultation they demand with the particular entities they name. Plaintiffs cite to the Department of Interior guidelines for consultation under Section 402 and the regulations governing the domestic Section 106 process. *Id.* at 8. However, neither the Interior guidelines nor the Section 106 regulations impose the consultation requirements on this project suggested by Plaintiffs. The guidelines "have no regulatory effect," as they are merely "the Secretary's formal guidance to each Federal agency on meeting the requirements of section 110 of the Act." Secretary of the Interior's Standards and Guidelines for Federal Agency Historic Preservation Programs Pursuant to the National Historic Preservation Act, 63 Fed. Reg. 20496, 20500 (April 24, 1998). And the Court has already determined that the Section 106 regulations are inapplicable to foreign undertakings. *Gates*, 543 F.Supp.2d at 1105.

Plaintiffs now ask this Court to second-guess the decisions that DoD made regarding the scope of the required consultation without providing any justification to depart from the deference owed to DoD's reasonable interpretation of Section 402's requirements. *See Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944); *Chevron v. NRDC*, 467 U.S. 837, 844 (1984). In the absence of specific requirements for completion of the "take into account" process, DoD reasonably interpreted Section 402 and determined the scope of the required consultations, and this interpretation is entitled to deference. *See ONRC Action*, 150 F.3d at 1139 (citation omitted).

Deference to DoD's implementation of Section 402 is particularly appropriate here as it occurs in the context of international relationships. An inappropriately-designed consultation process has the potential to affront strategic partners. Plaintiffs' argument that "Japanese sovereignty and Plaintiffs' citizenship do not bar consultation," Pls.' Reply at 10-11, misses the point made by the United States, Defs.' Br. at 12-13. The United States does not argue that DoD was *barred* from consulting with Japanese citizens or groups. Instead, the United States opposes an interpretation of Section 402's consultation requirements that would establish, as a matter of United States law, that an agency is *required* to consult with particular foreign national entities. *Id*. Here, it is the DoD's position that it would be an affront to Japanese sovereignty for this Court to mandate that particular Japanese citizens, groups, or local governments be given consulting party status equal to that of the GOJ, such that the United States must negotiate with those entities.[9]

Even under the domestic Section 106 regulations – which do not apply to this foreign action – only government entities and the applicant are entitled to consulting party status, 36 C.F.R. § 800.2(c). Beyond that short list of required entities for consultation, the action agency has the discretion – but is not required to – grant consulting party status to other individuals and organizations. *Id*. § 800.2(c)(5). This decision is entrusted entirely to the agency, and here, DoD did not choose to grant consulting party status to the entities listed by Plaintiffs. Even under the inapplicable domestic Section 106 regulations, this Court has no basis to require DoD to consult with those entities.

This Court should grant Defendants summary judgment because DoD appropriately

[9] Despite Plaintiffs' suggestion that DoD was required to have consulted with at least the non-Japanese Plaintiffs, they failed to identify any legal mandate requiring such consultation. Pls.' Reply at 10-11. That is because there is no mandate requiring NHPA consultation with an entity simply because it is a party to litigation about the project.

determined the scope of the required consultation and conducted a thorough and wide-ranging consultation that fulfilled that scope.

D. The Record Supports DoD's Determination of "No Adverse Effect."

Finally, Plaintiffs assert that DoD's determination of "no adverse effect" reflects a "clear error in judgment" because that determination runs counter to the evidence before it. Pls.' Reply 11-12. In support of this argument, Plaintiffs cite as allegedly contrary evidence the following quote from the record: "[the data will have] 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.' Reply 12. Plaintiffs claim that this statement was made after the publication of the Final EIA and that it shows that DoD's Findings, because they rely on the EIA, are clearly erroneous. *Id*. First, Plaintiffs misattribute this quote to the SuMMO Report and misidentify the date of the statement. It is not from the 2013 SuMMO report; it is from a 2011 email from Morgan Richie (also discussed above, *see supra*) wherein she recommends expanding the scope of the proposed SuMMO project. AR8095. And her disclaimer of the conclusiveness of "the data" refers only to her prediction of the usefulness of a certain aspect of the SuMMO study. It does not discredit the EIA or any other data on which DoD made its no adverse effect determination, and it does not demonstrate that DoD's Findings ran counter to the evidence that was before it.

Plaintiffs also find fault with DoD's engagement with Japan on possible mitigation measures to further reduce any likelihood of adverse effect from the FRF project. Pls.' Reply 12. According to Plaintiffs, DoD's finding of no adverse effect is erroneous because "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." *Id.*[10] But the record is clear that DoD's determination of no adverse effect was not

[10] Plaintiffs use a partial quote from Defendants' opening brief to make this circular reasoning argument. Pls.' Reply 12 (citing Defs.' Mem. 18). The full sentence is referring to analysis of FRF construction impacts and reads: "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." Defs.' Mem. 18.

dependent on the identified mitigation measures. For all but one of the potential impacts analyzed in the Findings (§§ 3.2-3.3), DoD determined that the FRF would have no adverse impacts on the Okinawa dugong.[11] None of those determinations relied exclusively on beneficial effects of anticipated mitigation measures to negate adverse effects. US10988-993. That DoD also considered potential mitigation measures (under the guidance provided by the Court) to further reduce the likelihood of any impacts does not mean that DoD made its findings contingent on expected mitigation measures and does not support Plaintiffs' assertions that the no adverse effect determination relied on circular reasoning. And there is nothing in the APA that prohibits DoD from taking a holistic approach to analyzing potential impacts by also considering mitigation measures to further reduce the likelihood of those impacts. This is particularly true for a Section 402 review, given that the explicit purpose of Section 402 is for federal agencies to take into account effects "for purposes of avoiding or mitigating any adverse effect." 54 U.S.C § 307101(e). Thus, it was not arbitrary and capricious for DoD to consider these possible measures in connection with its analysis of potential impacts. Plaintiffs' "clear error of judgment" argument fails.

E. This Court Should Defer Consideration of Plaintiffs' Request for Injunctive Relief.

The parties have conferred and stipulated that the Court should defer consideration of Plaintiffs' request for a temporary injunction. *See* Joint Stipulation Requesting Stay of Briefing on Remedy, ECF No. 224. Based on that stipulation, Defendants do not address here Plaintiffs' arguments regarding injunctive relief. Defendants reserve the right to address those arguments during remedy briefing, if any.

III. CONCLUSION

For the foregoing reasons and the reasons stated in Defendants' opening brief, Defendants respectfully request that the Court grant their cross motion for summary judgment and deny

[11] The only potential for adverse impact that DoD identified is related to construction noise. AR10990.

Plaintiffs' motions for summary judgment, and that the Court enter judgment accordingly.

Respectfully submitted, June 1, 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 1st day of June, 2018.

/s/ *Taylor Ferrell*

Taylor Ferrell