



1-27-2020

The Sound of Freedom at Naval Air Station Whidbey: Environmental Impact Review Under the National Historic Preservation Act and National Environmental Policy Act

James K. Kelly

Follow this and additional works at: <https://digitalcommons.law.villanova.edu/elj>



Part of the [Environmental Law Commons](#)

Recommended Citation

James K. Kelly, *The Sound of Freedom at Naval Air Station Whidbey: Environmental Impact Review Under the National Historic Preservation Act and National Environmental Policy Act*, 31 Vill. Envtl. L.J. (2020). Available at: <https://digitalcommons.law.villanova.edu/elj/vol31/iss1/3>

This Comment is brought to you for free and open access by the Journals at Villanova University Charles Widger School of Law Digital Repository. It has been accepted for inclusion in Villanova Environmental Law Journal by an authorized editor of Villanova University Charles Widger School of Law Digital Repository.

2019]

THE SOUND OF FREEDOM AT NAVAL AIR STATION
WHIDBEY: ENVIRONMENTAL IMPACT REVIEW UNDER THE
NATIONAL HISTORIC PRESERVATION ACT AND NATIONAL
ENVIRONMENTAL POLICY ACT

“The issue is not just that overflights are harming resources here, it’s that the preserve is a rural, bucolic area The challenge is when Growlers flying over an area steeped in history are producing noise by 21st century machines. Those impacts are real.”¹

I. INTRODUCTION

In June of 2018, The Department of the Navy proposed a significant increase of Boeing EA-18G “Growler” jets and training missions at Naval Air Station Whidbey (NAS Whidbey), located on Whidbey Island, Washington.² Residents near NAS Whidbey have had issues with the noise pollution from the jets already there, and they are not taking the proposed fourfold increase in noise pollution lightly.³ In early December 2018, negotiations between the Navy and local government, that were intended to find a way mitigate the noise and potential environmental damage of the increase, fell apart when the Navy declined to negotiate further.⁴ The situation is complex because the base is located next to the federally

1. Jeannie McMacken, *Navy Ends Negotiations: Port Townsend Not Part of Talks on Jet Noise, Historic Properties*, PENINSULA DAILY NEWS (Dec. 7, 2018), <http://www.peninsuladailynews.com/news/navy-ends-negotiations-pt-not-part-of-talks-about-jet-noise-effects-on-historic-properties/> (discussing impact that jet flyovers have on Whidbey Island residents and protected areas).

2. Michelle Esteban, *Navy Plans to Increase Fighter Jet Traffic on Whidbey Island*, KOMO NEWS (June 27, 2018), <http://komonews.com/news/local/navy-plans-to-increase-fighter-jet-traffic-on-whidbey-island> (stating Navy’s preferred action is to increase Growler jet numbers and training missions at NAS Whidbey).

3. Joel Connelly, *Noisy Growler Jets – Coupeville Seeks to Curb Navy Buildup*, SEATTLEPI (Nov. 18, 2018), <https://www.seattlepi.com/local/politics/article/Noisy-Growler-jets-Coupeville-Ebey-landing-Whidbey-13400094.php#> (discussing coalition of residents against Growler increase).

4. Hal Bernton, *Navy Ends Talks to Ease Growler Jet Impacts on Whidbey Island Historic District*, THE SEATTLE TIMES (Dec. 3, 2018), <https://www.seattletimes.com/seattle-news/northwest/navy-terminates-talks-to-ease-growler-jet-impacts-on-whidbey-island-historic-district/> (describing Navy’s plan to walk away from negotiations with residents and local government about Growler increase).

protected Ebey's Landing National Historic Reserve and runs its training flights over the park.⁵

The federal land reserve's proximity to NAS Whidbey and the flight patterns that the Navy uses there bring the procedural protections guaranteed by both the National Historic Preservation Act (NHPA) and National Environmental Policy Act (NEPA) into the picture.⁶ Both acts have procedures that governmental entities must follow, including a review of the impact that its desired actions would have on the environment.⁷ NHPA's section 106 review process requires federal agencies to consider the effects that federally-funded projects will have on historic properties.⁸ NEPA's review process requires agencies to produce various forms of documented analysis concerning the future environmental impact of its undertakings.⁹

This Comment will begin by discussing the situation at NAS Whidbey, and then provide an overview of both NHPA and NEPA review, specifically looking at cases where the construction, maintenance, and operation of military operations presented environmental challenges and questions to courts.¹⁰ This Comment will then conclude by analyzing the potential outcomes of the current situation at NAS Whidbey under both the NHPA and NEPA structures.¹¹ In summary, this Comment will take the current situation at NAS Whidbey and use it as a window into the environmental review

5. *Ebey's Landing State Park – Maps*, NATIONAL PARK SERVICE, <https://www.nps.gov/ebla/planyourvisit/maps.htm> (last visited Jan. 18, 2019) (showing extent of Ebey's Landing National Reserve and naval airfields within its boundaries).

6. *Environmental Impact Statement for EA-18G Growler Airfield Operations at NAS Whidbey Island Complex*, U.S. NAVY, <http://www.whidbeyeis.com/Default.aspx> (last visited Jan. 18, 2019) (stating that both NEPA and NHPA protections apply to situation at NAS Whidbey).

7. *See National Environmental Policy Act Review Process*, ENVIRONMENTAL PROTECTION AGENCY, <https://www.epa.gov/nepa/national-environmental-policy-act-review-process> (last visited Jan. 18, 2019) (setting forth detailed process for review under NEPA); *see also Frequently Asked Questions About Section 106 of the National Historic Preservation Act*, NATIONAL ENDOWMENT FOR THE HUMANITIES, <https://www.neh.gov/grants/manage/frequently-asked-questions-about-section-106-the-national-historic-preservation-act> (last visited Jan. 18, 2019) (setting forth detailed process for review under NHPA).

8. *See* National Endowment for the Humanities, *supra* note 7 (providing specifics of NHPA § 106 review process).

9. *See* Environmental Protection Agency, *supra* note 7 (providing specifics of NEPA environmental review process).

10. *See infra* notes 91-159 (discussing cases where military bases' impact on environment came into question).

11. *See infra* notes 163-242 (outlining potential outcomes for current situation at NAS Whidbey).

processes of both the NHPA and the NEPA through prior caselaw.¹²

II. BACKGROUND

A. Whidbey Island and NAS Whidbey

Whidbey Island is part of Island County, Washington, located just off the state's western mainland.¹³ The island has 70,000 residents, most of whom live in either Oak Harbor or Coupeville, its two largest towns.¹⁴ This population is quite significantly bolstered by the presence of NAS Whidbey, which the Navy describes as the "premier naval aviation installation in the Pacific Northwest"¹⁵

Also situated on Whidbey Island is Ebey's Landing National Historic Reserve, the United States' first historic reserve that the National Park Service established.¹⁶ The Reserve presents an idyllic landscape, untouched by the constraints of modern life.¹⁷ The National Park Foundation describes Ebey's Landing as "the remaining area where a broad spectrum of Northwest history is still clearly visible in the landscape."¹⁸ As such, Ebey's Landing National Historic Reserve is not a "park" in the traditional sense, but instead a "unique conservation partnership . . . " in which "[eighty five] percent of the land . . . is privately owned."¹⁹ This area contains active

12. See *infra* notes 163-242 (analyzing NHPA and NEPA environmental review processes through established caselaw).

13. *Whidbey Island*, WHIDBEY ISLAND, <https://whidbeyisland.us/all-about-whidbey-island/> (last visited Jan. 18, 2019) (discussing basic facts about Whidbey Island, including geographic location).

14. See *id.* (discussing basic facts about Whidbey Island, including population).

15. *Welcome to Naval Air Station Whidbey Island*, NAVAL AIR STATION WHIDBEY ISLAND, https://www.cnic.navy.mil/regions/cnrtw/installations/nas_whidbey_island.html (last visited Jan. 18, 2019) (providing basic information about NAS Whidbey and its features).

16. *Celebrations, Events Planned to Honor 40th Anniversary of Ebey's Landing National Historical Reserve*, NATIONAL PARK SERVICE, <https://www.nps.gov/ebla/learn/news/40th-anniversary-events.htm> (last visited Jan. 18, 2019) (stating that Ebey's Landing National Historic Reserve was first reserve established under NHPA).

17. ". . . *Almost a Paradise of Nature*", NATIONAL PARK SERVICE, <https://www.nps.gov/ebla/index.htm> (last visited Jan. 18, 2019) (stating purpose for Ebey's Landing National Historic Reserve and reserve's features).

18. *Ebey's Landing National Historic Reserve*, NATIONAL PARK FOUNDATION, <https://www.nationalparks.org/explore-parks/ebey-landing-national-historical-reserve> (last visited Jan. 18, 2019) (providing basic information about Ebey's Landing and history of area).

19. *Basic Information – Welcome to Ebey's Landing National Historic Reserve!*, NATIONAL PARK SERVICE, <https://www.nps.gov/ebla/planyourvisit/basicinfo.htm> (last visited Jan. 18, 2019) (providing basic information about Ebey's Landing and National Park Service's activities in area).

farms and forests, century-old buildings still in active use, and, perhaps most critically, the entire town of Coupeville, Washington.²⁰

NAS Whidbey, located two miles north of Oak Harbor, Washington, is one of the Navy's largest air stations and is the Navy's only "center . . . for electronic combat warfare training."²¹ The Navy began planning the site's construction in early 1941, when the Office of the Chief of Naval Operations set out to build a location for Navy planes to re-arm and refuel in case the defense of the Puget Sound was required.²² A particular portion of land on the west coast of Whidbey Island was selected for the airfields and base, and in December of 1941, just days after the attack on Pearl Harbor, a huge number of citizens took jobs to help build the station.²³ Many of these Whidbey Island citizens voluntarily transferred title of their family property to the Navy so the station could be built.²⁴ Subsequently, in September of 1942, the Navy officially commissioned NAS Whidbey.²⁵

NAS Whidbey is a military base composed of three parts.²⁶ Two of these parts, the Seaplane Base and Ault Field, are located just two miles north of the city of Oak Harbor, Washington, on Whidbey Island.²⁷ Ault Field is NAS Whidbey's main airfield and was simultaneously constructed with the base itself.²⁸ Additionally, NAS Whidbey manages a second, off-base airfield, Outlying Land-

20. *Ebey's Landing National Historic Reserve*, NATIONAL PARK SERVICE, <https://www.nps.gov/ebla/planyourvisit/upload/ebeyslandingmap.pdf> (last visited Jan. 19, 2019) (providing detailed map of Ebey's Landing National Historic Reserve and highlighting features of reserve).

21. *About – Air Operations*, NAVAL AIR STATION WHIDBEY ISLAND – U.S. NAVY, https://www.cnrc.navy.mil/regions/cnrnw/installations/nas_whidbey_island/about.html (last visited Jan. 19, 2019) (discussing history and current uses of NAS Whidbey).

22. *History*, U.S. NAVY – NAVAL AIR STATION WHIDBEY ISLAND, https://www.cnrc.navy.mil/regions/cnrnw/installations/nas_whidbey_island/about/history.html (last visited Jan. 19, 2019) (providing historical background about planning and development stages of NAS Whidbey).

23. *Id.* (describing strong relationship between residents and personnel of Whidbey Island, particularly during construction phase).

24. *Id.* (noting residents' dedication to completing NAS Whidbey construction and willingness to give up their own title to certain properties so Navy could build NAS Whidbey).

25. *Id.* (describing completion and commissioning of NAS Whidbey in midst of World War II).

26. *Id.* (stating geographical makeup of NAS Whidbey and its two surrounding airfields).

27. *Naval Air Station Whidbey Island, Oak Harbor*, NAVAL TECHNOLOGY, <https://www.naval-technology.com/projects/naval-air-station-whidbey-island-oak-harbor/> (last visited Jan. 19, 2019) (providing specific information about personnel numbers at NAS Whidbey as well as information about NAS Whidbey's two airfields).

28. *See id.* (discussing details of airfield locations at NAS Whidbey).

ing Field Coupeville (OLF Coupeville).²⁹ OLF Coupeville is located fifteen miles southeast of NAS Whidbey and just four miles south of the city of Coupeville, Washington.³⁰ This airfield was constructed in its present form in 1967 in response to the “density of aircraft operations at NAS Whidbey.”³¹ OLF Coupeville has a landing strip that is perfect for simulating landing on an aircraft carrier, thus providing the Navy with significant training capabilities.³²

From World War II on, NAS Whidbey served as a major naval air base, playing host to a variety of different attack planes over time.³³ Presently, the base, which supports 9,900 personnel and their families, exclusively retains all United States Navy electronic attack squadrons that fly Northrop Grumman’s EA-6B “Prowler” and Boeing’s EA-18G “Growler” jets.³⁴

B. National Historic Preservation Act

Two pieces of legislation that greatly affect the situation at NAS Whidbey are the National Historic Preservation Act (NHPA) and the National Environmental Policy Act (NEPA).³⁵ The NHPA was passed in 1966 “to acknowledge the importance of protecting our nation’s heritage from rampant federal development.”³⁶ When it passed, the NHPA was termed “the most far-reaching preservation

29. *Id.* (stating existence of NAS Whidbey’s secondary airfield at OLF Coupeville, which provides different capabilities than Ault Field).

30. *See id.* (giving more detailed information about location of OLF Coupeville, NAS Whidbey’s secondary airfield).

31. *Naval Air Station Whidbey Island Air Field Operations Fact Sheet*, NAS WHIDBEY ISLAND, [https://www.cnic.navy.mil/content/dam/cnic/cnrnw/pdfs/NASWifact sheets/Air%20Operations%20Fact%20Sheet.pdf](https://www.cnic.navy.mil/content/dam/cnic/cnrnw/pdfs/NASWifact%20Operations%20Fact%20Sheet.pdf) (last visited July 15, 2019) (mentioning need for OLF Coupeville to allow for extra mission capabilities, squadrons, and training flights to meet needs of Navy).

32. *Jets on Whidbey – Naval Air Station (NAS) Whidbey Island Carrier Training and Schedules*, WHIDBEY AND CAMANO ISLANDS TOURISM, <https://whidbeycamanoislands.com/things-to-do/heritage/jets-on-whidbey/> (last visited Jan. 20, 2019) (discussing NAS Whidbey’s advantages as a location to train pilots on how to land on aircraft carriers).

33. *See History*, *supra* note 22 (detailing planes and squadrons that have been stationed at NAS Whidbey Island over last seventy-six years).

34. *See Naval Technology*, *supra* note 27 (stating numbers of personnel at NAS Whidbey Island and history of base).

35. *See NEPA and Section 106 of the National Historic Preservation Act*, NATIONAL PRESERVATION INSTITUTE, <https://www.npi.org/NEPA/sect106> (last visited Feb. 26, 2019) (describing features of the NHPA and NEPA and how they work together).

36. *National Historic Preservation Act of 1966*, NATIONAL CONFERENCE OF STATE HISTORIC PRESERVATION OFFICERS, <http://ncshpo.org/resources/national-historic-preservation-act-of-1966/> (last visited Jan. 20, 2019) (stating NHPA’s purpose and intent).

legislation ever enacted in the United States.”³⁷ At the NHPA’s core lies the establishment of four entities, each of which is meant to assist decision-makers who face challenges due to preservation concerns.³⁸

The first of these entities is the Advisory Council on Historic Preservation, which advises the President and Congress on historic preservation issues and generates related policy.³⁹ The second entity, the State Historic Preservation Office, coordinates federal and state management of historic properties.⁴⁰ The National Register of Historic Places, the third entity, generates an official list of areas, buildings, structures, and objects worthy of preservation and protection.⁴¹ The fourth entity, which this Comment will primarily focus on, is the review process outlined in section 106 of the NHPA, which states:

The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking, prior to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, shall take into account the effect of the undertaking on any historic property.⁴²

In short, section 106 of the NHPA requires federal agencies, including the Navy, to consider the effects that their projects might have on historic properties.⁴³ Though procedurally a four-step process, Section 106 is, in reality, a five-step process that begins with a determination of whether a particular federal “project has the po-

37. Lee Ann Potter, *Letter in Support of the National Historic Preservation Act of 1966*, ERIC, <https://eric.ed.gov/?id=EJ751209> (last visited Jan. 20, 2019) (discussing citizen’s letter sent to Congress about NHPA and its potential for evolving preservation practices in U.S.).

38. *See generally* 54 U.S.C. §§ 300101-305505 (1966) (discussing provisions of NHPA and specifying different programs established by NHPA).

39. *See generally id.* §§ 304101-304112 (providing parameters of Advisory Council on Historic Preservation and its purpose).

40. *See generally id.* §§ 302301-302304 (stating responsibilities and purpose of State Historic Preservation Programs).

41. *See generally id.* §§ 302101-302108 (enumerating statutory requirements for establishment and maintenance of National Register of Historic Places).

42. *Id.* § 306108 (stating purpose of NHPA and historic preservation efforts generally).

43. *See* 54 U.S.C. § 306108 (mentioning requirements placed upon federal agencies which undertake a particular action under NHPA).

tential to affect historic properties.”⁴⁴ Next, the agency must notify those individuals and groups who should be a party to the discussion and negotiations.⁴⁵ In coming to a decision, the agency should consider potentially valuable input from local governments, state historic preservation offices, tribes, and the public.⁴⁶ Third, the agency identifies the specific historic sites on which its project might have an impact.⁴⁷ Fourth, the agency is required to determine if any of the previously identified historic properties would be negatively impacted by the proposed project.⁴⁸ If those four requirements have been met, the agency must then examine alternatives to its plan to mitigate or avoid the negative impact that its proposed project might have.⁴⁹ Ultimately, NHPA does not require the agency to do anything because it lacks a true enforcement prong.⁵⁰

A. National Environmental Policy Act

The National Environmental Policy Act (NEPA) is a landmark piece of legislation passed in 1970 that requires agencies to evaluate the environmental impact of its actions.⁵¹ Specifically, NEPA requires that all agencies prepare environmental assessments (EAs)

44. *Introduction – An Introduction to Section 106*, ADVISORY COUNCIL ON HISTORIC PRESERVATION, <https://www.achp.gov/protecting-historic-properties/section-106-process/introduction-section-106> (last visited Jan. 20, 2019) (providing detailed information about beginning of NHPA § 106 process).

45. *Step 2 – Identifying Historic Properties*, ADVISORY COUNCIL ON HISTORIC PRESERVATION, <https://www.achp.gov/protecting-historic-properties/section-106-process/identifying-historic-properties> (last visited Aug. 10, 2019) (detailing NHPA § 106 process and steps governmental bodies must take to ensure compliance with regulations).

46. *Advisory Council on Historic Preservation*, *supra* note 44 (discussing second portion of § 106 process generally and specifics for identification of interested parties).

47. *Step 3 – Assessing Effects*, ADVISORY COUNCIL ON HISTORIC PRES., <https://www.achp.gov/protecting-historic-properties/section-106-process/assessing-effects> (last visited Aug. 10, 2019) (discussing third portion of § 106 process generally and process for identifying historic properties).

48. *Id.* (discussing final steps of § 106 process and assessment of negative effects of federal actions on historic properties).

49. *Step 4 – Achieving a Resolution*, ADVISORY COUNCIL ON HISTORIC PRESERVATION, <https://www.achp.gov/protecting-historic-properties/section-106-process/achieving-resolution> (last visited Aug. 10, 2019) (discussing completion of § 106 process).

50. *See generally* Advisory Council on Historic Preservation, *supra* note 44 (stating NHPA § 106 process does not necessitate action on part of agency but does encourage it).

51. *See generally* *The National Environmental Policy Act of 1969*, U.S. DEP’T OF ENERGY – OFFICE OF NEPA POLICY AND COMPLIANCE, <https://www.energy.gov/nepa/downloads/national-environmental-policy-act-1969> (last visited Jan. 20, 2019) (providing general information about NEPA and its requirements).

and environmental impact statements (EISs), both of which purport to state the environmental effects of proposed federal actions.⁵²

There are three steps to the review process stipulated by NEPA, the first of which is the determination of whether a categorical exclusion applies.⁵³ This step provides that a federal project can be “‘categorically excluded’ from a detailed environmental analysis if the federal action does not, ‘individually or cumulatively have a significant effect on the human environment.’”⁵⁴ If such an exclusion applies to a particular project, the NEPA review process ends.⁵⁵

If, however, such an exclusion does not apply, the second step in the NEPA’s review process, the EA or Finding of No Significant Impact, begins.⁵⁶ The EA is drafted to “determine[] whether or not a federal action has the potential to cause significant environmental effects.”⁵⁷ If, after completing an EA, the federal agency finds that their “action will not have significant environmental impacts,” a Finding of No Significant Impact (FONSI) is issued, which ends the NEPA review process.⁵⁸

If a significant environmental impact is found through the agency’s EA, then the agency drafts an Environmental Impact Statement (EIS).⁵⁹ For the EIS to be federally compliant, the agency must first “publish[] a Notice of Intent . . . [to] inform[] the public of the upcoming environmental analysis and . . . how the public can become involved in the EIS preparation.”⁶⁰ The agency then publicly produces a draft EIS, which is subject to “public review and comment for a minimum of 45 days,” and then, after edits and responses to those comments, published as a final version.⁶¹ Finally,

52. See U.S. Env’tl. Prot. Agency, *supra* note 7 (discussing various documents required under NEPA).

53. See *id.* (providing detailed information about categorical exclusion determinations and their role within NEPA review process).

54. *Id.* (noting procedures for categorical exclusion within NEPA).

55. *Id.* (stating statutory background for NEPA categorical exclusion policy and what occurs when one is found).

56. *Id.* (setting forth process for second step of NEPA review, which requires basic documentary evidence of potential environmental effects).

57. U.S. Env’tl. Prot. Agency, *supra* note 7 (noting environmental assessment’s purpose and requirements within NEPA review procedures).

58. *Id.* (providing method for concluding this step of NEPA review and final documentary requirements placed on federal agencies).

59. *Id.* (describing initiation of third step of NEPA review process, which requires the drafting of highly-detailed EIS analysis).

60. *Id.* (stating ways in which general public may participate in drafting of EIS and how much consideration agency must give to that participation).

61. *Id.* (noting method for public response to draft EIS).

the agency issues a Record of Decision, which simply states the agency's official position on its project's environmental impact.⁶² Like the NHPA, the NEPA's requirements are strictly procedural in nature, and they do not guarantee that the agency will avoid negative impacts or even attempt to mitigate them.⁶³

B. Current Situation at NAS Whidbey

The requirements of both NEPA and NHPA are particularly relevant because of NAS Whidbey's location near Ebey's Landing Historic Reserve and the Reserve's special status as both a protected historical and environmental site.⁶⁴ In June of 2018, the Navy announced their preferred alternative to the already-in-development final and NEPA-compliant EIS regarding the proposed increase of "Growler" jets at NAS Whidbey.⁶⁵ This option would include the construction of additional facilities at NAS Whidbey, the stationing of additional personnel and family members at NAS Whidbey, and, most controversially, the addition of thirty-six "Growler" jets to support an expanded mission at NAS Whidbey.⁶⁶ This would result in a four-fold increase in training missions, which particularly affects OLF Coupeville because the increase would come in the form of low-altitude training missions based out of this area.⁶⁷ This option would bring the number of annual takeoffs and landings from 88,600 to 129,000.⁶⁸ This equates to roughly 353 takeoffs and land-

62. U.S. Envtl. Prot. Agency, *supra* note 7 (stating ways in which environmental review process can be completed).

63. *See id.* (listing all steps necessary to comply with NEPA review but never actually stating that agency has to enforce procedures to reduce environmental impact).

64. *See Environmental Impact Statement for EA-18G Growler Airfield Operations at NAS Whidbey Island Complex*, *supra* note 6 (stating how both NEPA and NHPA protections apply to situation at NAS Whidbey regarding Growler jets).

65. *Navy Announces EIS Preferred Alternative for Growler Operations at NAS Whidbey Island and Releases NHPA Section 106 Consultation*, U.S. NAVY (June 26, 2018), https://www.cnrc.navy.mil/regions/cnrnw/installations/nas_whidbey_island/news/news_releases/FFC12-18.html (announcing that U.S. Navy would be pursuing alternative solution at NAS Whidbey Island that called for significant increase in number of Growler jets).

66. *See id.* (detailing specifics for U.S. Navy's preferred alternative for solving issues at NAS Whidbey Island).

67. *Id.* (describing purpose of additional Growler jets on NAS Whidbey Island and benefits of flying out of OLF Coupeville).

68. Hal Bernton, *More Growlers on Whidbey Island Means More Noise Woes*, *Navy Study Says*, THE SEATTLE TIMES, (Nov. 10, 2016), <https://www.seattletimes.com/seattle-news/northwest/more-growlers-on-whidbey-island-increase-noise-levels-navy-study-says/> (discussing significant increase in "Growler" training missions at NAS Whidbey).

ings per day, if conducted every day of the year.⁶⁹ Whidbey Island residents expressed concerns with the decisions, centered on a “drastically diminished quality of life” due to the frequency of the flights and the jet noise.⁷⁰

In September of 2018, the Navy released its final EIS, which stuck to its preferred alternative, stating that the plan “would not result in significant adverse impacts” on Whidbey Island.⁷¹ Residents, however, pushed back on this conclusion, arguing that the Navy’s math in the EIS was, at best, questionable.⁷² The EIS stated that the decibel level of these jets would be sixty-five decibels (dBs), “which is under the limit for hearing damage but over the limit . . . for residential development.”⁷³ Sixty-five dBs is akin to the level of sound produced in the course of a normal conversation.⁷⁴ Residents had two issues in particular with the Navy’s EIS – first, the EIS only studied the decibel levels for the “Prowler” jets in 3005, not for the current “Growler” jets.⁷⁵ Second, the EIS calculated a total dB number and averaged that number for the entire year, thus discounting days on which no flights occurred.⁷⁶

A privately-produced study of the decibel levels of the “Growler” jets out of OLF Coupeville in both 2013 and 2016 led to a different conclusion.⁷⁷ The study found that average sound expo-

69. *Id.* (emphasizing increase in training missions out of NAS Whidbey Island due to influx of Growler jets).

70. Eric Wilkinson, *‘Just Buy Everybody Out:’ Neighbors Scoff at More Flights from NAS Whidbey*, KING 5 NEWS, (June 26, 2018), <https://www.king5.com/article/news/local/just-buy-everybody-out-neighbors-scoff-at-more-flights-from-nas-whidbey/281-567925751> (describing anger felt by Whidbey Island residents over Navy’s decision to increase Growler jet totals at NAS Whidbey Island).

71. Sarah Doyle, *Navy Releases Final Impact Study on NAS Whidbey Growler Fleet Expansion*, GOANACORTES, (Oct. 3, 2018), https://www.goskagit.com/anacortes/news/navy-releases-final-impact-study-on-nas-whidbey-growler-fleet/article_7c02d3b6-c67d-11e8-ad92-23c2536287a7.html (noting various conclusions made by Navy in its final EIS).

72. *Jet Noise*, CITIZENS OF EBEBY’S RESERVE, <https://citizensofebeysreserve.com/the-issues/jet-noise/> (last visited Jan. 30, 2019) (discussing residents’ disagreements with U.S. Navy’s assessment of jet noise at NAS Whidbey).

73. *Id.* (discussing levels of noise, measured in decibels, coming from Growler jet training missions at NAS Whidbey and effect that noise has on residents).

74. *Comparative Examples of Noise Levels*, IAC ACOUSTICS, <http://www.industrialnoisecontrol.com/comparative-noise-examples.htm> (last visited Jan. 30, 2019) (providing real-world equivalents of all decibel levels).

75. See Citizens of Ebey’s Reserve, *supra* note 72 (discussing residents’ objections to analysis provided by U.S. Navy in its EIS, specifically that numbers they analyzed were not accurate).

76. See *id.* (pointing out that Navy had not completed any re-testing in over decade).

77. See *Lilly Report #1 (JGL Noise Testing 2013)*, CITIZENS OF EBEBY’S RESERVE, <http://citizensofebeysreserve.com/References/Files/>

sure level, measuring level of noise over time, was 108.74 A-weighted decibels, or dBa.⁷⁸ This number is in the higher reaches of measurable loudness, comparable to an indoor rock band concert, and is significantly louder than a gas lawn mower from three feet away.⁷⁹ Further, this study discovered a maximum un-weighted peak level of 134.2 dB, which is actually higher than the average “military jet aircraft take-off from aircraft carrier with after-burner” from fifty feet away and just fifteen decibels below the point of near-certain eardrum rupture.⁸⁰ In short, the private study, containing more accurate methodologies than the Navy’s EIS, revealed decibel levels more than double that which the EIS purported to find, lending even more credence to the residents’ arguments.⁸¹ As previously mentioned, NEPA does not require the Navy to actually try and mitigate these factors, as they are allowed to move forward as they see fit as long as they receive the funding to

JGL%20Noise%20Report.pdf (last visited Jan. 30, 2019) (finding ultimately incorrect conclusions in U.S. Navy’s EIS stating that decibel levels on Whidbey Island were not harmful to humans); *see also Lilly Report #2 (JFL Noise Testing 2016)*, CITIZENS OF EBey’s RESERVE, <http://citizensofebeysreserve.com/Files/Lilly%20Report%202016.pdf> (last visited Jan. 30, 2019) (affirming conclusions found in 2013 study).

78. *See Lilly Report #1 (JGL Noise Testing)*, *supra* note 77 (summarizing results of study performed by private company on Whidbey Island into decibel levels caused by U.S. Navy flights).

79. *Lawn Mower – Noise and Pollution*, HANIXDIY., <https://hanixdiy.blogspot.com/2014/07/lawn-mower-noise-and-pollution.html> (last visited Nov. 11, 2019) (providing sliding scale of decibel levels and making comparisons from decibel numbers to common noises).

80. *See Lilly Report #1 (JGL Noise Testing)*, *supra* note 77 (describing decibel levels found on Whidbey Island from Navy flight patterns); *See also Noise Sources and Their Effects*, PURDUE U. CHEMISTRY DEP’T, <https://www.chem.purdue.edu/chem-safety/Training/PPETrain/dblevels.htm> (last visited Jan. 30, 2019) (comparing numerical decibel levels to everyday noises).

81. *See Citizens of Ebey’s Reserve*, *supra* note 72 (concluding that decibel levels caused by U.S. Navy flights on Whidbey Island were significantly higher than what were found by U.S. Navy’s own internal study of that issue). The Citizens of Ebey’s Reserve group has alleged that the Navy used poor methodology when completing its noise studies. *Id.* (stating residents’ issues with Navy’s noise-measuring processes). First, they noted that the Navy included days on which no flights occurred in its average decibel calculation, diluting the average decibel level. *Id.* (describing Navy’s scientific process for calculating noise levels near NAS Whidbey). Second, they pointed out that the decibel levels the Navy found were determined in 2005 for “Prowler” jets, not for the “Growler” jets currently at NAS Whidbey. *Id.* (describing methodologies used by Navy in its noise studies).

do so.⁸² For now, it does not seem as though there is much that the residents can do to fix this problem as it relates to NEPA.⁸³

A similar situation exists with respect to the NHPA's section 106 review process because in December 2018, the Navy walked away from NHPA section 106 talks with the community, citing major differences.⁸⁴ The state legislature initially pushed for the Navy to designate eight million dollars to protect the buildings and parks of Ebey's Landing from the jet noise.⁸⁵ The Navy offered one million dollars.⁸⁶ After a lengthy negotiation process, the Navy ended negotiations, citing the major and irreconcilable differences between the two parties.⁸⁷ Under the NHPA's section 106 review process, the Navy was well within its rights to walk away from the negotiations.⁸⁸ Thus, movement on the NHPA front seems unlikely.⁸⁹ The situation at NAS Whidbey is a case study in the methodology and effectiveness, or lack thereof, of both NEPA's environmental review process and NHPA's section 106 review process.⁹⁰

III. NHPA AND NEPA MILITARY BASE-CENTERED CASELAW

An analysis of four cases in which U.S. military plans were challenged under the NEPA, NHPA, or both, provides a basis for poten-

82. See Environmental Protection Agency, *supra* note 7 (detailing procedural requirements of NEPA review process but not formally requiring any particular outcome).

83. Kirk Boxleitner, *Civilians, Navy Dispute Proposed Change to Growler Operations*, THE PORT TOWNSEND LEADER, (July 11, 2018), <https://www.ptleader.com/stories/civilians-navy-dispute-proposed-change-to-growler-operations,3344> (discussing residents' disagreements with U.S. Navy's decisions and lack of options to mitigate).

84. See Bernton, *supra* note 4 (stating that U.S. Navy decided to walk away from negotiations about mitigation of jet noise from NAS Whidbey with community because of "fundamental differences").

85. See *id.* (discussing nature of breakdown of talks between U.S. Navy and community).

86. See *id.* (stating that U.S. Navy was only permitted to offer one million dollars to solve problems).

87. See *id.* (noting that U.S. Navy walked away from negotiation table with community).

88. See Advisory Council on Historic Preservation, *supra* note 44 (stating there is no requirement upon federal agencies to comply with results of a section 106 review process).

89. See Bernton, *supra* note 4 (announcing U.S. Navy's ending of negotiations would put any input and compromise from residents in question).

90. See Environmental Protection Agency, *supra* note 7 (stating that NEPA process does not require any particular outcome); see also Advisory Council on Historic Preservation, *supra* note 44 (intimating that no particular decisions are required).

tial outcomes of the current situation at NAS Whidbey.⁹¹ These four cases weigh heavily against any possible legal action taken by either the residents or local government on Whidbey Island to enjoin the Navy from increasing the number of “Growler” jets and training missions at NAS Whidbey.⁹² The first case, *Aluli v. Brown*,⁹³ is a suit involving both the NEPA and the NHPA.⁹⁴ The second case, *Okinawa Dugong v. Mattis*,⁹⁵ is concerned solely with the NHPA.⁹⁶ Both the third and fourth cases, *National Audubon Society v. Department of Navy*⁹⁷ and *Lee v. United States Air Force*,⁹⁸ involve exclusively the NEPA.⁹⁹ The opinion in *Aluli* explains how the NEPA and NHPA structures work in tandem.¹⁰⁰

Aluli v. Brown was originally decided in the United States District Court of Hawaii in 1977 and then partially overturned by the Ninth Circuit Court of Appeals in 1979.¹⁰¹ In *Aluli*, the Navy had been using Kahoolawe, Hawaii, the smallest of the Hawaiian Islands, as a bombing test site since 1941.¹⁰² In 1972, the Navy sub-

91. See *infra* notes 91-159 and accompanying text (discussing caselaw surrounding NEPA and NHPA processes as they relate to military bases).

92. See *infra* notes 163-242 (discussing impact that previously mentioned cases may have on NAS Whidbey situation).

93. *Aluli v. Brown*, 437 F.Supp. 602, 611-12 (D. Haw. 1977) (holding Navy’s bombing activities on Hawaiian island required updated environmental impact statement), overturned in part, *Aluli v. Brown*, 602 F.2d 876, 877 (9th Cir. 1979) (overturning lower court’s decision only with respect to annual environmental impact statements).

94. *Aluli*, 437 F.Supp. at 604 (stating that plaintiffs sued under NHPA, NEPA, their enacting executive orders, and regulations).

95. *Okinawa Dugong v. Mattis*, 330 F.Supp.3d 1167, 1197-98 (N.D. Cal. 2018) (holding Department of Defense properly followed NHPA environmental review process and procedures).

96. *Id.* at 1170 (stating plaintiffs brought NHPA suit).

97. *National Audubon Society v. Department of Navy*, 422 F.3d 174, 207 (4th Cir. 2005) (holding Navy’s environmental impact statements were ultimately insufficient).

98. *Lee v. United States Air Force*, 220 F.Supp.2d 1229, 1249 (D.N.M. 2002) (holding Air Force’s prepared environmental impact statements were sufficient for NEPA purposes), *aff’d*, *Lee v. United States Air Force*, 354 F.3d 1229, 1246 (10th Cir. 2004) (affirming summarily lower court’s decision).

99. See *National Audubon Society*, 422 F.3d at 180-81 (discussing suit under NEPA conditions); see also *Lee*, 220 F.Supp.2d at 1232 (discussing plaintiffs’ claim explicitly under NEPA provisions).

100. See *Aluli v. Brown*, 437 F.Supp. 602, 604 (D. Haw. 1977) (discussing operational frameworks of environmental review process under both NHPA and NEPA).

101. *Id.* 605-06 (D. Haw. 1977) (discussing procedural posture of case when it reached District Court of Hawaii); see also *Aluli v. Brown*, 602 F.2d 876, 876-77 (9th Cir. 1979) (discussing prior history of case).

102. *Aluli*, 437 F.Supp. at 605 (stating history of U.S. Navy action on Hawaiian island of Kahoolawe).

mitted a final EIS, which the District Court of Hawaii found met all NEPA requirements in the same year.¹⁰³ Following the final EIS, archaeological searches of the island uncovered ninety-two archaeological sites, four of which were located less than 500 yards from a target.¹⁰⁴ Eighty-nine of those ninety-two archaeological sites were believed to qualify for protection under the National Register of Historic Places.¹⁰⁵

Plaintiffs alleged the Navy was in violation of the NEPA by conducting bombing operations without submitting an EIS with an annual budget request.¹⁰⁶ In order to amend the violation, Plaintiffs claimed the Navy would need to submit a new final EIS, and submit an annual EIS along with its budget requests.¹⁰⁷ Plaintiffs also brought a NHPA claim, contending that the Navy both authorized and completed activities on the island that were destructive to various buildings and locations.¹⁰⁸

The *Aluli* court ruled in the plaintiffs' favor on nearly every part of their claim.¹⁰⁹ The court found the 1972 EIS to be based on incomplete archaeological surveys and required the Navy to submit both a new final EIS and an annual EIS along with its budget requests.¹¹⁰ On appeal, the Ninth Circuit overturned that decision concerning the annual EIS, but otherwise upheld the decision.¹¹¹ With respect to the NHPA claim, the *Aluli* court held: (1) a private right of action exists to enforce the NHPA; and (2) the Navy violated the NHPA by authorizing bombing on the island without ade-

103. *Id.* at 606 (noting Navy's submission of satisfactory final environmental impact statement and district court's prior holding that it met all NEPA requirements).

104. *Id.* (discussing in detail archaeological excavations which uncovered ninety-two sites).

105. *Aluli*, 437 F.Supp. at 606 (stating that almost all archaeological sites discovered on Kahoolawe would qualify for NHPA protections as part of National Register of Historic Places).

106. *Id.* at 604-05 (stating nature of plaintiffs' claim and that plaintiffs sought relief under both NHPA and NEPA).

107. *Id.* at 604-05 (describing NEPA connection to plaintiffs' claim).

108. *Id.* (discussing plaintiffs' NHPA claim and their specific allegations about Navy's destruction of historical sites).

109. *Id.* at 611-12 (giving ultimate holding and ruling exclusively in plaintiffs' favor).

110. *Aluli*, 43 F.Supp. at 612 (insisting Navy submit new environmental impact statement and finalize it within specified period of time, among other requirements).

111. *See Aluli v. Brown*, 602 F.2d 876-77 (9th Cir. 1979) (affirming lower court's decision in all respects except for reversing imposition on Navy to produce yearly environmental impact statements).

quately locating sites which would qualify for NHPA protections.¹¹² In short, the *Aluli* decision stands for three propositions: first, a private right of action exists under the NHPA; second, a new final EIS may be required when conditions change at a location where a federal agency proposes action; and third, enforcement of the NHPA can be expected in a general area even when specific protected sites have not been officially located.¹¹³

In *Okinawa Dugong v. Mattis*, Japanese citizens and environmental groups sued the U.S. Department of Defense (DoD) for alleged violations of NHPA.¹¹⁴ The DoD planned to construct a new U.S. military base in Okinawa, Japan, located near the Oura and Henoko Bays.¹¹⁵ These bays are the native home to the Okinawa dugong, “an endangered sea mammal important in Japanese culture.”¹¹⁶ In order to comply with the requirements of NHPA, the DoD produced extensive environmental surveys to ensure that its construction plans would not endanger the Okinawa dugong.¹¹⁷ Plaintiffs filed suit, alleging that the DoD’s environmental surveys were insufficient.¹¹⁸ After more than a decade of litigation, both parties filed motions for summary judgment, resulting in the court issuing its final ruling.¹¹⁹

The issue before the court was whether the DoD complied with the NHPA’s “take into account” requirements, which requires federal agencies to consider the effects their actions may have on historical properties.¹²⁰ After finding the provision applied to the Okinawa dugong and its habitat, the court found in the DoD’s favor on three points that are relevant to this analysis.¹²¹

112. *Aluli*, 437 F.Supp. at 609-10 (holding plaintiffs have a private right of action to enforce NHPA against Navy’s arguments).

113. *Id.* at 602-612 (ruling for plaintiffs in all respects and establishing a private right of action to enforce NHPA).

114. *Okinawa Dugong v. Mattis*, 330 F.Supp.3d 1167, 1170 (N.D. Cal. 2018) (describing plaintiff’s institution of suit in 2003).

115. *Id.* (noting Department of Defense decision to place military base in particular area of Okinawa near two large bays).

116. *Id.* (describing Okinawa dugong and its natural habitat).

117. *Id.* at 1173-74 (detailing specifics of various environmental surveys prepared by both Department of Defense and non-governmental organizations).

118. *Id.* at 1171 (stating plaintiffs’ position that Department of Defense did not sufficiently account for its decisions’ effects on environment).

119. *Okinawa Dugong*, 330 F.Supp.3d at 1172 (stating disposition of case when district court ruled).

120. *Id.* at 1183-84 (questioning DoD’s compliance with NHPA).

121. *Id.* at 1187-88 (making essential rulings on case and deciding summarily in favor of DoD).

First, the court found that the DoD did not fail to directly consult the plaintiffs in the case, because (1) the plaintiffs were not “formal consulting” parties under § 106 of the NHPA; and (2) the plaintiffs had ample opportunity to make their views known to the DoD, yet failed to do so.¹²² Second, the court found that the DoD’s consultation with the Okinawa Prefectural Board of Education, municipal Boards of Education in close proximity, and the Governor of Okinawa, meant that they had consulted the local Okinawa government, as was required.¹²³ Third, the court found that the DoD followed the public notice and comment procedures in an adequate manner, and did not violate that portion of the NHPA.¹²⁴

Ultimately, the *Okinawa Dugong* court held that although the DoD’s NHPA review process “could possibly have been more inclusive, Defendants’ efforts were sufficient to satisfy . . . [the] modest procedural requirements.”¹²⁵ The court also found that the “[d]efendants adequately explained their conclusions based on the evidence available to them.”¹²⁶ In effect, this sets forth the standard for what a federal agency must do under the NHPA.¹²⁷ As long as an agency follows the modest procedural requirements and bases its conclusions on solid evidence, no violation will be found.¹²⁸ The low standard for agencies to pass judicial review of their NHPA process could massively impact a court’s decision regarding the situation at NAS Whidbey if a lawsuit were to arise.¹²⁹

In *Lee v. U.S. Air Force*, environmental activists brought suit against the U.S. Air Force (USAF) because of its decision to allow additional German aircrafts to be housed and operated out of a

122. *Id.* (discussing whether DoD failed to consult with plaintiffs and ultimately ruling in favor of Department of Defense).

123. *Id.* at 1190-91 (ruling that DoD sufficiently worked with Okinawan government on environmental effects of new base).

124. *Okinawa Dugong*, 330 F.Supp.3d at 1190-91 (ruling that DoD gave sufficient notice for public comment period concerning environmental impact studies).

125. *Id.* at 1170 (providing final disposition of court and ruling that while Department of Defense’s methods were not perfect, they were sufficient under statutory requirements).

126. *Id.* (concluding that Department of Defense made its conclusions based on sound scientific and evidentiary methods).

127. *See id.* (noting that foreign equivalent of NHPA, which has similar language to domestic version of NHPA, carries modest requirements).

128. *Id.* at 1170 (stating that no violation will be found if all NHPA procedures for environmental survey production are followed, regardless survey’s depth).

129. *See infra* notes 185-205 (discussing in detail how Okinawa Dugong court’s decisions will impact potential lawsuit at NAS Whidbey).

U.S. air base in New Mexico.¹³⁰ A 1994 agreement between the USAF and Germany's Federal Ministry of Defense (FMOD) allowed twelve German aircrafts to be housed there.¹³¹ In 1998, the USAF and FMOD amended their agreement to allow thirty additional German aircrafts to be placed at the base.¹³² The USAF prepared an EIS and a final decision approving the increase, which plaintiffs challenged.¹³³ Specifically, plaintiffs argued that the proposed increase violated the NEPA and the Noise Control Act.¹³⁴ This case is of particular relevance to the NAS Whidbey situation because it contains an in-depth review of potential increases to noise levels due to the upsurge of German jets at the air base.¹³⁵ With respect to noise levels, the plaintiffs argued that the USAF used "flawed noise methodologies . . . based upon incorrect assumptions," and "underestimated the average noise levels"¹³⁶

In analyzing the plaintiffs' claim about noise levels, the court made two critical rulings that would be quite persuasive to a court analyzing the NAS Whidbey situation.¹³⁷ First, the *Lee* court held that the USAF performed a "detailed analysis" of the increase's "potential noise impact using accepted noise metrics, methodologies, and assumptions."¹³⁸ This is crucial because private studies performed of the noise levels, as at NAS Whidbey, reached very different results than the USAF's studies.¹³⁹ The court did not state that

130. *Lee v. U.S. Air Force*, 220 F.Supp.2d 1229, 1232 (D.N.M. 2002) (holding that environmental impact statements prepared by Air Force were sufficient for purposes of NEPA), *aff'd Lee v. U.S. Air Force*, 354 F.3d 1229, 1246 (10th Cir. 2004) (affirming district court's ruling that NEPA procedures were adequately followed).

131. *Id.* at 1231 (describing 1994 agreement between United States Air Force and German Air Force, which allowed German Air Force to house aircraft in New Mexico).

132. *Id.* at 1232 (describing amendment to 1994 agreement that permitted significantly more German aircraft to be placed in New Mexico).

133. *Id.* (stating procedural history of case and questions before court).

134. *Id.* (noting specific statutory provisions under which plaintiffs brought suit).

135. *See infra* notes 227-232 (detailing how *Lee* impacts NAS Whidbey and their similarities in terms of subject matter).

136. *Lee*, 220 F.Supp.2d at 1238 (setting forth specific allegations made by plaintiffs in regard to insufficiencies they perceived in Air Force's prepared environmental surveys).

137. *See infra* notes 227-232 (discussing how *Lee* decision would impact potential lawsuit regarding NAS Whidbey situation).

138. *Lee*, 220 F.Supp.2d at 1238 (concluding that Air Force's methodologies were sufficient for NEPA purposes).

139. *See Citizens of Ebey's Reserve*, *supra* note 72 (discussing findings of private research regarding noise levels caused by Growler jets on Whidbey Island).

both studies are to be given serious consideration, requiring only that the agency use accepted methodologies.¹⁴⁰

Second, the court found that the USAF's studies were "based on models developed and data gathered, scrutinized, and then analyzed by recognized experts in the field of noise metrics."¹⁴¹ This is important because the court did not require any particular type of study to be performed, only that the USAF's conclusions be based on sound science.¹⁴² Ultimately, *Lee* follows *Okinawa Dugong* in that both cases set a low standard for federal agencies under both the NHPA and the NEPA.¹⁴³

In *National Audubon Society v. Department of Navy*, the Fourth Circuit Court of Appeals considered whether the U.S. Navy violated the NEPA by building an aircraft training landing field less than five miles from a wildlife refuge.¹⁴⁴ The U.S. Navy wanted to construct a new landing field in eastern North Carolina and settled on a site halfway between two major Navy and Marine Corps bases.¹⁴⁵ The site is also close to Pocosin Lakes National Wildlife Refuge, which is "'home to some of the most unspoiled habitat along the East Coast.'"¹⁴⁶ Plaintiffs brought suit, alleging that the Navy violated the NEPA by failing to fully address the impact that the landing field would have on the environment and on the waterfowl that called the refuge home.¹⁴⁷ The United States District Court for the Eastern District of North Carolina ruled in the plaintiffs' favor, finding that the Navy did not conduct a proper "hard look" analysis.¹⁴⁸

140. *Lee*, 220 F.Supp.2d at 1238 (ruling in favor of Air Force on question of whether their environmental study of noise levels met NEPA requirements).

141. *Id.* at 1239 (suggesting that basing environmental studies on sound science can alone be enough to meet requirements of NEPA, even if other questions persist).

142. *Id.* at 1238 (holding that by abiding by procedural requirements of NEPA, Air Force ensured that it did not violate substance of NEPA).

143. *See id.* (insinuating that following procedural requirements of NEPA, regardless of other evidence, may be enough to avoid violations of NEPA); *see also* *Okinawa Dugong v. Mattis*, 330 F.Supp.3d 1167, 1170 (N.D. Ca. 2018) (holding that Department of Defense did not violate NHPA by following baseline requirements of provided procedures).

144. *National Audubon Society v. Department of Navy*, 422 F.3d 174, 181 (4th Cir. 2005) (explaining case's background and question presented to Fourth Circuit).

145. *Id.* at 182 (describing Navy's decision to plan airfield halfway between two major bases under its control).

146. *Id.* at 183 (quoting *Washington Cty v. United States Dep't of the Navy*, 357 F.Supp.2d 861, 865 (E.D.N.C. 2005)) (discussing wildlife reserve near Navy's proposed airfield).

147. *Id.* at 183 (discussing specific allegations made by plaintiffs in their suit).

148. *Nat'l Audubon Soc'y*, 422 F.3d at 183, 207 (discussing case's procedural history).

The court stated it is difficult to precisely define a “hard look,” but it “[a]t the least . . . encompasses a thorough investigation into the environmental impacts of an agency’s action and a candid acknowledgment of the risks that those impacts entail.”¹⁴⁹ Further, the court stated that “an agency’s obligations under NEPA are case-specific.”¹⁵⁰ The court adopted a “holistic,” totality-of-the-circumstances-based test for determining when an agency has actually engaged in a “hard look” analysis.¹⁵¹ Due to the number of highly-specific shortcomings in the environmental studies done by the U.S. Navy, the Fourth Circuit stated that they did not meet the requisite burden of taking “particular care to evaluate how its actions will affect the unique biological features” of the area.¹⁵² As a result, the U.S. Navy was required to submit a supplemental EIS to address all of the issues that it failed to properly address in its final EIS.¹⁵³ While the supplemental EIS was being prepared, the Fourth Circuit permitted the U.S. Navy to conduct certain activities at the proposed site to ensure that the Navy’s military readiness was not being negatively impacted.¹⁵⁴

National Audubon Society exemplifies that some final environmental impact statements may be inadequate despite its proper execution and sound basis in science.¹⁵⁵ This is tremendously important for a potential NAS Whidbey suit because the facts of that case appear to be quite similar to *National Audubon Society*.¹⁵⁶ In summary, these four cases, *Aluli*, *Okinawa Dugong*, *Lee*, and *National Audubon Society*, all demonstrate how various parts of the NHPA and NEPA environmental review processes function.¹⁵⁷ Each case involves military bases or airfields and carries certain spe-

149. *Id.* at 185 (providing baseline requirements of “hard look” analysis under NEPA).

150. *Id.* at 186 (stating that NEPA violations are to be determined on a case-by-case basis, due to wide variety of subjects that those cases can address).

151. *Id.* 186 (noting that courts reviewing environmental impact statements for compliance with NEPA must look at all circumstances in any situation).

152. *Id.* at 187 (stating that Navy failed to properly consider effects its decisions and plans would have on environment).

153. *Nat’l Audubon Soc’y*, 422 F.3d at 181 (requiring Navy to submit supplemental environmental impact statement to address issues in its initial environmental impact statement).

154. *Id.* at 207 (stating actions that Navy was allowed to take while in the process of drafting new environmental impact statement).

155. *See infra* notes 233-238 (comparing NAS Whidbey Situation to National Audubon Society decision).

156. *See supra* notes 91-162 (discussing caselaw surrounding environmental reviews under NHPA and NEPA regarding military bases).

157. For further comparison of NAS Whidbey’s situation to the *National Audubon Society* decision, *see infra* notes 233-238.

cial considerations that a court analyzing the situation at NAS Whidbey would also have to confront.¹⁵⁸ By using these four cases, it is possible to get a sense of a potential outcome of a legal battle over the influx of “Growler” jets at NAS Whidbey.¹⁵⁹

IV. IMPACT – POTENTIAL RESOLUTIONS FOR NAS WHIDBEY SITUATION UNDER THE NHPA AND NEPA

This portion of the Comment will describe what may occur if a party brings suit against the Navy concerning the NAS Whidbey situation through an application of the four cases discussed above.¹⁶⁰ Thus, the potential outcomes of this situation under both the NHPA and the NEPA may become apparent.¹⁶¹ Based on precedent, it appears that a reviewing court would rule in favor of the Navy because the NEPA and the NHPA proscribe exclusively procedural requirements which seem to have been met by the Navy.¹⁶²

A. NAS Whidbey Situation Viewed Through NHPA § 106 Review

To predict the result of a legal action that may allege violations of the NHPA section 106 review process, it is necessary to determine at what stage of the five-pronged section 106 process the Navy currently finds itself.¹⁶³ The first step of NHPA section 106 review requires the agency to determine if a particular action has the “potential to affect historic properties.”¹⁶⁴ Here, the answer is quite

158. For further discussion on military base-centered caselaw, see *supra* notes 91-162.

159. For further examination of the NAS Whidbey situation, see *infra* notes 164-249.

160. For a further analysis on potential outcomes of the NAS Whidbey situation under NHPA and NEPA, see *infra* notes 164-249.

161. For a further discussion on potential legal action regarding NAS Whidbey, see *infra* notes 243-253 and accompanying text.

162. See *Section 106 and NEPA*, INDIANA DEPARTMENT OF TRANSPORTATION – CULTURAL RESOURCES MANUAL, (March 2014), https://www.in.gov/indot/crm/files/Chapter_12-Section_106_and_NEPA.pdf (noting that both NHPA and NEPA require only prescribed procedures be followed for compliance purposes).

163. See *Advisory Council on Historic Preservation*, *supra* note 44 (detailing each step of NHPA § 106 review process and how it functions).

164. *Id.* (presenting threshold question for whether or not NHPA’s § 106 will apply to given situation).

clearly “yes,” an answer echoed by the Navy.¹⁶⁵ Thus, section 106 review is triggered.¹⁶⁶

The second prong of section 106 review requires the agency to locate and notify the parties that should be consulted throughout the review process.¹⁶⁷ The Navy released a section 106 “Consultation Determination Document,” which stated that the Navy would consult mainly with the Advisory Council on Historic Preservation and the Washington State Historic Preservation Officer.¹⁶⁸ The Navy then held a number of meetings on the subject that were open to the public, and invited residents and other groups to voice their opinions.¹⁶⁹

The third prong under section 106 review is to “identif[y] the historic properties that could be affected.”¹⁷⁰ Here, the Navy determined that “certain characteristics” of the Central Whidbey Island Historic District would be adversely affected by its action.¹⁷¹ Specifically, the Navy’s proposed increase of Growler jets would affect a variety of landscape viewpoints in Ebey’s Landing Historic Reserve and cause an increase in the noise levels experienced by residents.¹⁷² The Navy released a document detailing the flight plans its training missions would follow, which take the aircraft over

165. *Section 106*, U.S. NAVY, (last updated Dec. 3, 2018), <http://www.whidbeyeis.com/Section106.aspx> (noting negotiations as evidence that Navy thought “Growler” increase would have an impact on historic properties).

166. *See Advisory Council on Historic Preservation*, *supra* note 44 (stating that if agency finds its action will impact historic properties, it must conduct a § 106 analysis).

167. *Id.* (describing process by which agencies must identify historic properties their actions may impact).

168. *Section 106 Determination of Effect for the EA-18G “Growler” Airfield Operations at the Naval Air Station Whidbey Island Complex* [hereinafter *Section 106*], U.S. NAVY, (June 2018), http://www.whidbeyeis.com/Documents/Determination_with%20section%20numbering_PUBLIC.pdf (stating specific locations that Navy would be considering throughout § 106 process).

169. *See Section 106*, *supra* note 168 (detailing efforts made by Navy in order to consult with all interested parties and correctly identify historic properties its actions may impact).

170. *See Advisory Council on Historic Preservation*, *supra* note 44 (describing process by which federal agencies must locate and identify historic properties which their actions may negatively impact).

171. *Section 106*, *supra* note 168 (stating Navy’s conclusion that its actions on NAS Whidbey with respect to “Growler” jet increase would have adverse effects on portions of Whidbey Island).

172. *Navy Terminates Section 106 Consultation for Increased Growler Operations at NAS Whidbey Island*, SAN JUAN ISLANDER, (Nov. 30, 2018, 6:49 AM), <https://sanjuanislander.com/news-articles/government-news/federal/28416/navy-terminates-section-106-consultation-for-increased-growler-operations-at-nas-whidbey-island> (describing Navy’s conclusion that viewpoints in historic areas would be disturbed by its proposed action); *see also Citizens of Ebey’s Reserve*, *supra* note 72 (noting residents’ concerns and frustrations with Navy about jet noise levels).

NHPA-protected sites.¹⁷³ There is no shortage of protected historic properties which could be negatively impacted by the Navy's proposed "Growler" jet increase and planned flight patterns.¹⁷⁴

At this point, the Navy must make the conclusive determination of whether there would be "adverse effects" to historic properties.¹⁷⁵ As discussed previously, the Navy has acknowledged that five "landscape viewpoints" would be negatively impacted by their proposed action, and that there would be "indirect adverse effects" to the Central Whidbey Island Historic District from an increase in aircraft operations.¹⁷⁶ Perhaps most critically, the Navy has acknowledged that its flight path would go directly over a variety of NHPA-protected locations.¹⁷⁷ Because these four prongs were all met, the Navy must either explore alternatives to its proposed action or find a way to mitigate its adverse effects.¹⁷⁸

The Navy chose to walk away from section 106 negotiations in December of 2018.¹⁷⁹ The NHPA section 106 review process is a merely procedural statute which requires only that certain steps be followed.¹⁸⁰ The Navy has fulfilled its obligations and is free to move forward with its proposal.¹⁸¹ As a result, it may appear as though the parties with which the Navy was negotiating mitigation measures, such as state and local governmental bodies, residents, and environmental groups, are without recourse.¹⁸² The court in *Aluli v. Brown* established that a private right of action exists to en-

173. See *Section 106*, *supra* note 168 (outlining flight plans for "Growler" jets on NAS Whidbey Island).

174. See *id.* (noting plethora of historic properties that could be impacted by proposed flight plans).

175. See *Advisory Council on Historic Preservation*, *supra* note 44 (explaining process by which federal agency must determine whether particular properties will be negatively impacted by proposed action).

176. *SAN JUAN ISLANDER*, *supra* note 172 (detailing Navy's conclusion that aspects of Ebey's Landing would be negatively impacted by proposed increase of "Growler" jets).

177. See *Section 106*, *supra* note 168 (noting Navy's proposed flight plans for new flights at NAS Whidbey, which would result in jets frequently flying over NHPA-protected sites).

178. See *Advisory Council on Historic Preservation*, *supra* note 44 (describing conclusion of NHPA process, by which federal agencies must attempt to mitigate or eliminate adverse effects).

179. *Bernton*, *supra* note 4 (stating that Navy chose to walk away from NHPA-related negotiations with residents and local government with respect to NAS Whidbey).

180. See *id.* (detailing steps of NHPA § 106 review process).

181. See *id.* (providing requirements of NHPA § 106 review, all of which appear to have been met by Navy in relation to NAS Whidbey situation).

182. See *id.* (describing strictly procedural requirements of NHPA § 106).

force the NHPA.¹⁸³ Under that private right, the groups opposing the Navy at the negotiation over the situation at NAS Whidbey would certainly be able to bring suit.¹⁸⁴

Okinawa Dugong v. Mattis outlines the analysis for lawsuits alleging improper review under NHPA section 402, which is the “international parallel to [s]ection 106.”¹⁸⁵ That court made three findings that are of particular relevance to this situation.¹⁸⁶ First, the court found that the agency’s consultation with relevant governmental bodies is enough to satisfy the requirements of section 106, regardless of the outcome.¹⁸⁷

In the present situation, it is apparent that the Navy has performed the requisite consultation through direct negotiation with state and local government, as well as various other “local consulting parties.”¹⁸⁸ The Navy has been markedly transparent, even setting up an extraordinarily detailed website with a timeline of events and displaying all its documentation.¹⁸⁹ Presently, the Navy’s disengagement from negotiation is largely irrelevant, as the mere occurrence of a negotiation was enough to satisfy the court in *Okinawa Dugong* and, thus, likely be enough to satisfy a court here.¹⁹⁰

Second, the *Okinawa Dugong* court found that Section 402, unlike Section 106, did not impose an express obligation on defendants to follow public notice-and-comment requirements and that it was not unreasonable for them to refrain from doing so.¹⁹¹ By publishing its documents for public comment and substantively engaging with those comments, an agency can insulate itself from a

183. *Aluli v. Brown*, 437 F.Supp. 602, 609 (D. Haw. 1977) (holding that private right of action exists to enforce NHPA).

184. *See id.* (stating that NHPA may be enforced through private right of action, and that plaintiffs, as environmental groups, had right to bring suit).

185. *Okinawa Dugong v. Mattis*, 330 F.Supp.3d 1167, 1183 (N.D. Cal. 2018) (discussing Section 402’s similarity to Section 106).

186. *Id.* at 1170 (holding generally that Department of Defense did not violate NHPA as it followed all necessary procedures).

187. *Id.* at 1187-92 (finding that Department of Defense did not violate NHPA through its consultation process).

188. *San Juan Islander*, *supra* note 172 (describing parties that Navy consulted with during course of NHPA § 106 review).

189. *See Environmental Impact Statement for EA-18G Growler Airfield Operations at NAS Whidbey Island Complex*, *supra* note 6 (explaining Navy’s efforts to consult with interested parties in relation to its proposed action at NAS Whidbey).

190. *Okinawa Dugong*, 330 F. Supp. 3d at 1170 (holding Department of Defense’s consultation met NHPA § 106 requirements).

191. *Id.* at 1191 (stating NHPA § 402 did not require Department of Defense to follow public-and-notice guidelines).

finding that it violated section 106 notice-and-comment procedures.¹⁹²

On October 19, 2018 the Navy invited public review and comment of a draft of a section 106 Memorandum of Agreement.¹⁹³ This document was produced with the Washington State Historic Preservation Officer and is designed to resolve “adverse effects to historic properties. . . .”¹⁹⁴ In this document, the Navy specified that it would accept comments up until the section 106 process was complete, but that it “preferred” to receive those comments by November 2, 2018.¹⁹⁵ This timeframe would give the public essentially two weeks to comment.¹⁹⁶ At the outset of the negotiations, the Navy acknowledged that it was working with the relevant parties and planned on continuing the relationship.¹⁹⁷ This changed in early December of 2018, when the Navy removed itself from those negotiations, citing irreconcilable differences between the parties’ positions.¹⁹⁸ Despite the Navy pulling out of the negotiations, it does appear that the Navy has met the modest requirements for notice-and-comment set forth in *Okinawa Dugong*.¹⁹⁹ The plaintiffs would have a difficult time proving a notice-and-comment violation under the court’s formulation of the rule in *Okinawa Dugong*.²⁰⁰

Third, the *Okinawa Dugong* court found that even if an agency’s section 402 review process “could possibly have been more inclu-

192. *See id.* at 1187, 1190-91 (explaining why Department of Defense’s reliance on Japanese government’s public notice-and-comment was reasonable under NHPA § 402).

193. *Section 106*, *supra* note 168 (detailing Navy’s procedures for public comment on its draft agreement).

194. *Id.* (describing Navy’s openness to public comment on draft agreement with local government to mitigate adverse effects to historical properties related to Navy’s actions at NAS Whidbey).

195. *Navy’s Draft National Historic Preservation Act Section 106 Memorandum of Agreement for EA-18G Growler Operations Increase at NAS Whidbey Island Open for Public Comment*, U.S. NAVY, (Oct. 22, 2018), https://www.cnrc.navy.mil/regions/cnrnw/installations/nas_whidbey_island/news/news_releases/18-105.html (noting Navy’s preferred action plan for public comments).

196. *Section 106*, *supra* note 168 (discussing Navy’s procedures for public comments to be submitted with respect to its § 106 mitigation efforts).

197. *Id.* (naming specific parties with which Navy negotiated in course of NAS Whidbey situation).

198. *See* Bernton, *supra* note 4 (describing how Navy walked away from negotiations with local government about NAS Whidbey situation and NHPA § 106 mitigation).

199. *Okinawa Dugong v. Mattis*, 330 F.Supp.3d 1167, 1170 (N.D. Cal. 2018) (holding ultimately that Department of Defense met admittedly modest requirements set by § 402 of NHPA).

200. *See id.* (setting low standard for agency action to be upheld under § 402 NHPA review).

sive,” its actions can be sufficient to meet the “modest procedural requirements” set forth by the NHPA.²⁰¹ This sets a very low bar for an agency to avoid violating the NHPA.²⁰² Further, the *Okinawa Dugong* court provided a framework for significant deference to the agency.²⁰³ By meeting these modest procedural requirements, even if the efforts were not entirely inclusive, an agency can avoid violating Section 106 if it “adequately explained . . . [its] conclusions”²⁰⁴ As a result, it would appear to prove difficult for any potential plaintiffs to succeed in a suit under section 106 of the NHPA.²⁰⁵

Although *Aluli* granted citizens access to the courts through a private right of action, any potential plaintiffs in the NAS Whidbey situation would ultimately struggle to succeed in any legal action under the pertinent facts.²⁰⁶ *Okinawa Dugong* sets a low bar for an agency to indemnify itself, and it appears as though for purposes of section 106 of the NHPA, the Navy has cleared that bar.²⁰⁷

B. NAS Whidbey Situation Viewed Through NEPA Process

To predict the result of legal action centered around an alleged violation of the NEPA’s review process, it is necessary to determine what stage of that process the Navy is currently in.²⁰⁸ The first step requires a determination of whether the agency’s action can be “categorically excluded” from further environmental analysis, which is only the case if the action is found to not have “a significant effect on the human environment.”²⁰⁹ Here, the Navy implic-

201. *Id.* (finding that minimal agency-led mitigation efforts may be sufficient for NHPA § 402 purposes).

202. *See id.* at 1170, 1198 (noting modest requirements set by NHPA § 402 and holding agency need not come to particular conclusion in order for its action to be deemed sufficient for § 402 purposes).

203. *See id.* at 1197-98 (determining no particular mitigation result is necessary in § 402 process, only that Section’s requirement are fulfilled).

204. *Okinawa Dugong*, 370 F. Supp. 3d at 1170 (stating if defendants are able to sufficiently explain their conclusions, courts will avoid altering their determination).

205. *See generally id.* (providing low standard for agency to meet in order to justify any particular action or result under NHPA § 402 or its domestic equivalent, NHPA § 106).

206. *See Aluli v. Brown*, 437 F.Supp. 602, 609 (D. Haw. 1977) (granting private right of action under NHPA but setting low bar for agency to shield itself from liability).

207. *See Okinawa Dugong*, 370 F.Supp.3d at 1170 (setting low bar for federal agencies to meet regarding review of NHPA § 106’s international parallel, NHPA § 402).

208. *See National Environmental Policy Act Review Process*, *supra* note 7 (summarizing entirety of NEPA’s review process).

209. *Id.* (discussing nature of categorical exclusions and process by which agencies may find them).

itly decided that a categorical exclusion would not apply to the NAS Whidbey situation by acknowledging that its proposed action will have an impact on the environment.²¹⁰

The second step is for the agency to prepare an EA, which will “determine[] whether or not a federal action has the potential to cause significant environmental effects.”²¹¹ Here, the Navy prepared and released an EA in November of 2012, detailing a plan to transition some outdated aircraft to the Growler jets.²¹² The November 2012 EA did not address the possibility of significantly increasing the number of “Growler” jets because the Navy did not make that specific proposal until eleven months later.²¹³ Notwithstanding the omission, the November 2012 EA indicated a “[f]inding of [n]o [s]ignificant [i]mpact.”²¹⁴ Residents then sent the Navy an official demand to conduct an EIS with updated noise measurements and “honest flight expectations.”²¹⁵ When residents hired a private firm to do noise testing, the results showed the noise was significantly louder than the Navy had previously stated.²¹⁶ As a result, the residents filed a lawsuit in the United States District Court for the Western District of Washington.²¹⁷ The residents alleged a variety of violations of the NEPA, specifically claiming that the Navy “failed to . . . undertake environmental review under

210. See generally *Environmental Impact Statement for EA-18G Growler Airfield Operations at NAS Whidbey Island Complex*, *supra* note 6 (noting Navy implicitly accepting its proposed action may impact environment).

211. *National Environmental Policy Act Review Process*, *supra* note 7 (outlining process for environmental assessments to be produced and made public).

212. *Navy Releases Final Environmental Assessment; Finding of No Significant Impact*, U.S. FLEET FORCES COMMAND, (Nov. 2, 2012), <https://www.public.navy.mil/usff/Documents/71-12%20VAQ%20Transition%20EA%20FONSI.pdf> (stating Navy’s position about whether EIS was required for NAS Whidbey situation).

213. See *Project Schedule - Environmental Impact Statement for EA-18G Growler Airfield Operations at NAS Whidbey Island Complex*, U.S. NAVY, <http://www.whidbeyeis.com/ProjectSchedule.aspx> (last visited Oct. 3, 2019) (noting Navy did not propose current plan until 2013).

214. *Navy Releases Final Environmental Impact Statement; Finding of No Significant Impact*, *supra* note 212 (concluding that proposed switch from “Prowler” jets to “Growler” jets would not have significant environmental impact).

215. *What COER Has Done So Far*, CITIZENS OF EBEBY’S RESERVE, <https://citizensofebeyreserve.com> (last visited Feb. 27, 2019) (stating residents of Whidbey Island believed Navy’s environmental assessment was inadequate).

216. See *Lilly Report #1 (JGL Noise Testing)*, *supra* note 77 (noting differences between private study of noise levels and Navy’s study of noise levels on Whidbey Island).

217. See *Complaint for Declaratory Judgment and Injunctive Relief at 1-13, Citizens of the Ebey’s Reserve for a Healthy, Safe & Peaceful Env’t v. United States Dep’t of the Navy*, 122 F. Supp. 3d 1068 (W.D. Wash. 2015) (No. 2:13CV01232), 2013 WL 3971341 (outlining ways in which Citizens of Ebey’s Reserve alleged that Navy violated NEPA).

NEPA for its continuing operation” of the “Growler” jets at NAS Whidbey.²¹⁸ This lawsuit caused the stoppage of training flights for nearly six months.²¹⁹ When the Navy requested to dramatically increase its training operations from 6,100 flights per year to 35,100 flights per year, residents demanded that the Navy perform an EIS, and the Navy agreed.²²⁰

The third step of the NEPA environmental review process is to produce an EIS, which the Navy began to do in September 2013.²²¹ An extensive scoping process involving a number of public meetings took place and ultimately concluded in January 2015.²²² In November 2016, the Navy completed a draft EIS that fully explored the environmental impacts its proposed increase could have on the environment.²²³ From that release date until February 2017, the Navy held an open comment period and invited interested parties to respond to it.²²⁴ After receiving 4,335 comments, the Navy began preparation of its final EIS and officially announced its preferred alternative, the increase of “Growler” jets and training operations out of NAS Whidbey, in June 2018.²²⁵ In September 2018, the Navy released its final EIS, which affirms its decision to move forward with its preferred alternative.²²⁶

Lee v. U.S. Air Force is the first piece of previously discussed caselaw that is relevant to a potential NEPA suit.²²⁷ In this case, the

218. *Id.* at 2 (alleging Navy violated NEPA provisions by failing to provide EIS for its proposed action).

219. *See What COER Has Done So Far, supra* note 215 (stating that lawsuit forced Navy to stop flights for remainder of calendar year).

220. Patricia Guthrie, *Jet Noise Won't Be a Problem, Hospital Chief Says*, S. WHIDBEY REC. (Feb. 22, 2017, 10:00 AM), <http://www.southwhidbeyrecord.com/news/jet-noise-wont-be-a-problem-hospital-chief-says/> (describing drastic increase in number of flights operated out of NAS Whidbey).

221. *See Project Schedule – Environmental Impact Statement for EA-18G Growler Airfield Operations at NAS Whidbey Island Complex, supra* note 213 (noting Navy's production of EIS beginning in 2013).

222. *Id.* (detailing timeline of events by which Navy completed NEPA environmental review process).

223. *Id.* (describing Navy's NEPA environmental review process with respect to draft EIS).

224. *Id.* (explaining Navy's timeline in addition to release of draft EIS).

225. *See Project Schedule – Environmental Impact Statement for EA-18G Growler Airfield Operations at NAS Whidbey Island Complex, supra* note 213 (providing specific information about comment period to Navy's draft EIS).

226. *Environmental Impact Statement for EA-18G “Growler” Airfield Operations at Naval Air Station Whidbey Island Complex*, WA, U.S. NAVY, (Sept. 2018), <http://www.whidbeyeis.com/Documents/Final/Executive%20Summary%20and%20Front%20Matter.pdf> (concluding that Navy's preferred alternative would be “Growler” jet increase at NAS Whidbey).

227. *Lee v. U.S. Air Force*, 220 F.Supp.2d 1229, 1249 (D. N.M. 2002) (holding that Air Force's EIS process was sufficient for NEPA purposes).

court made the determination that if an agency provides a “detailed analysis” in its EIS, it may be sufficient to prevent a NEPA violation despite contradictory evidence.²²⁸ As long as the agency uses accepted methodologies in its study, the requirements of NEPA are met.²²⁹

Here, it appears that the requisite “detailed analysis” has been performed.²³⁰ While the Whidbey Island residents may fundamentally disagree with the Navy’s conclusions, there is no doubt that it performed a significant analysis of the environmental impact of an increase of “Growler” jets.²³¹ Because the court in *Lee* ruled for the agency in the face of competing studies, it would be difficult to envision a scenario in which the residents prove that private studies outweigh the Navy’s internal ones.²³²

National Audubon Society v. Department of Navy is also relevant and the most factually similar case to the current situation because it involves Navy jet training missions flying over NEPA-protected areas.²³³ In that case, the court held that a totality of the circumstances test, which can only be analyzed on a case-by-case basis, must be used to determine whether an agency completed the NEPA-required “hard look” analysis.²³⁴ The plaintiffs would likely rely on private studies on the noise and the Navy’s distortion of average decibel levels on Whidbey Island to argue that the Navy did not complete a “hard look” analysis.²³⁵ A court could apply the required totality of the circumstances test and decide in favor of the plaintiffs; however, it is more likely that it would rule in the Navy’s

228. *Id.* at 1239 (stating that agency’s detailed analysis is sufficient for NEPA purposes).

229. *Id.* at 1249 (finding that Air Force’s environmental analyses met NEPA purposes despite contrary evidence).

230. See *Environmental Impact Statement for EA-18G Growler Airfield Operations at NAS Whidbey Island Complex*, *supra* note 6 (discussing timeline of events plus procedures Navy followed with respect to NEPA compliance).

231. *Id.* (detailing efforts made by Navy to fulfill NEPA requirements).

232. *Lee*, 220 F.Supp.2d at 1249 (holding that agency’s efforts were sufficient for NEPA purposes); see also *Environmental Impact Statement for EA-18G Growler Airfield Operations at NAS Whidbey Island Complex*, *supra* note 6 (discussing Navy’s significant mitigation efforts for NEPA purposes).

233. *National Audubon Society v. Department of Navy*, 422 F.3d 174, 181 (4th Cir. 2005) (holding that Navy must complete new EIS to comply with NEPA requirements).

234. *Id.* at 186 (explaining that totality of circumstances test is to be applied to determine agency’s level of compliance with NEPA).

235. See *Citizens of Ebey’s Reserve*, *supra* note 72 (explaining Navy’s inconsistencies in its noise analyses).

favor because NEPA is ultimately a procedural statute.²³⁶ Here, the Navy appears to have fully complied with those procedural requirements.²³⁷ As such, it seems unlikely that a court would rule against the Navy.²³⁸

In conclusion, the Navy completed a “detailed analysis” of the environmental impact of its proposed action.²³⁹ Although private firms’ studies on the area’s noise levels may be significant, they are not controlling in the present case.²⁴⁰ By contrast, the Navy’s findings appear to be bolstered by sound science with little evidence suggesting that science-based determinations would be overturned.²⁴¹ Given that the Navy met the procedural requirements the NEPA set forth, it is difficult to envision a court overruling its decision to increase the number of “Growler” jets at NAS Whidbey.²⁴²

V. CONCLUSION

The current situation at NAS Whidbey is complicated, with conflicting interests and legitimate concerns on both sides.²⁴³ The controversy has continued for nearly seven years, and it is likely far from a final conclusion.²⁴⁴ The potential plaintiffs in this case have the option of bringing a suit under the NHPA or NEPA.²⁴⁵ Under the NHPA, it is improbable that a court will rule for potential plaintiffs, as the bar that the Navy has to surpass to ensure it does not

236. See *National Audubon Society*, 422 F.3d at 181 (explaining that totality of circumstances test would apply to NEPA cases but that NEPA compliance may depend on variety of factors).

237. See *Environmental Impact Statement for EA-18G Growler Airfield Operations at NAS Whidbey Island Complex*, *supra* note 6 (describing ways in which Navy attempted to meet NEPA’s procedural requirements).

238. *Id.* (stating Navy’s efforts to ensure its compliance with NEPA).

239. See *supra* notes 137-140 (explaining burden of proof for Navy to ensure its NEPA compliance).

240. See *Citizens of Ebey’s Reserve*, *supra* note 72 (discussing discrepancies in Navy’s noise studies).

241. See *Environmental Impact Statement for EA-18G Growler Airfield Operations at NAS Whidbey Island Complex*, *supra* note 6 (stating steps Navy has taken in order to comply with requirements of NEPA); see also *Lee v. U.S. Air Force*, 220 F.Supp.2d 1229, 1249 (D. N.M. 2002) (finding agency’s final draft of EIS sufficient for purposes of NEPA).

242. *Id.* (explaining Navy’s timeline in addition to NEPA/NHPA procedures).

243. See *McCracken*, *supra* note 1 (summarizing current situation at NAS Whidbey).

244. *Id.* (discussing complications at NAS Whidbey leading to significant entrenchment on both sides of negotiation table).

245. See *National Endowment for the Humanities*, *supra* note 7 (discussing procedural requirements of NHPA); see also *National Environmental Policy Act Review Process*, *supra* note 7 (explaining that requirements of NEPA are strictly procedural).

violate the NHPA is quite low.²⁴⁶ Under the NEPA, the case is closer due to the uncertainty in the law surrounding the totality of the circumstances test and private parties' studies that contradict the Navy's evidence.²⁴⁷ Still, it is more likely that the court would rule in the Navy's favor, as the statute is ultimately procedural and the proper procedure was followed.²⁴⁸ A reviewing court would likely find that the Navy's decision to increase the number of "Growler" jets and training flights out of NAS Whidbey does not violate either the NHPA or the NEPA.²⁴⁹

In summary, it seems to frustrate the purpose of the NHPA and NEPA that both are strictly procedural statutes.²⁵⁰ If the NHPA and NEPA lack the legal bite necessary to force an agency to take a particular action to avoid environmental damage, then the statutes cannot complete the objectives for which they were enacted.²⁵¹ With NAS Whidbey, even though the residents have done everything they can to ensure the protection of Ebey's Landing National Historic Reserve, none of their efforts will ultimately lead to what they would consider a positive result.²⁵² This outcome runs counter to the intent for which the NHPA and NEPA were enacted and as such, courts should re-examination their legal standards.²⁵³

*James K. Kelly**

246. *Okinawa Dugong v. Mattis*, 370 F.Supp.3d 1167, 1170 (N.D. Cal. 2018) (setting high bar to prove violations of NHPA).

247. *See supra* notes 248-249 (explaining outcome of NAS Whidbey situation as viewed under NEPA).

248. *Id.* (discussing NAS Whidbey situation through lens of NEPA procedural requirements).

249. *See supra* notes 206-207, 240-242 (presenting state of case under NHPA/NEPA to evaluate potential outcome of each).

250. *See supra* notes 160-242 (explaining strictly procedural nature of NHPA/NEPA and how situation at NAS Whidbey may be resolved under both statutes).

251. *Id.* (discussing NHPA/NEPA to highlight potential shortcomings of each).

252. *Id.* (stating steps Whidbey Island residents have taken to push back against Navy's decision-making process but how reviewing court would likely rule in favor of Navy because of procedural nature of both statutes).

253. *Id.* (highlighting potential drawbacks to current system of review under NHPA/NEPA that prevents potential plaintiffs from succeeding on claims).

* J.D. Candidate, May 2020, Villanova Charles Widger School of Law; B.A., Political Science; History, 2017, Loyola University Maryland. I would like to thank my father, Kevin Kelly, my friends, and my family, for their constant support. I would also like to thank the members of the Villanova Environmental Law Journal for making the publication of this Comment possible.