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United States District Court  
Northern District of California

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

OKINAWA DUGONG (DUGONG  
DUGON), et al.,

Plaintiffs,

v.

JAMES N MATTIS, et al.,

Defendants.

Case No. [03-cv-04350-EMC](#)

**ORDER DENYING PLAINTIFFS’  
MOTION FOR SUMMARY JUDGMENT  
AND GRANTING DEFENDANTS’  
CROSS-MOTION FOR SUMMARY  
JUDGMENT**

Docket Nos. 221, 222

This case concerns the planned Futenma Replacement Facility (FRF), a U.S. military facility in Okinawa, and its potential impacts on the Okinawa dugong, an endangered sea mammal important in Japanese culture. Negotiations between the United States and Japanese governments regarding the FRF have a long and fraught history. As explained in more detail below, they ultimately resulted in an agreement to relocate the Marine Corps Air Station Futenma from Ginawan City to an area adjacent to Camp Schwab and the Oura and Henoko Bays.

In 2003, Plaintiffs filed suit pursuant to Section 402 of the National Historic Preservation Act (“NHPA”), challenging Defendant U.S. Department of Defense’s plans to pursue the FRF without first “taking into account” (TIA) its potential adverse effects on the Okinawa dugong. Judge Patel, assigned to this case, agreed that Defendants had failed to perform an adequate TIA process and granted summary judgment in Plaintiffs’ favor. However, because of political uncertainty about the future of the FRF, Judge Patel administratively closed the case in 2012. In 2014, Defendants informed the Court that they had completed a TIA process.

Presently before the Court are the parties’ cross-motions for summary judgment concerning the adequacy of Defendants’ TIA process under Section 402 of the NHPA. Plaintiffs

1 contend that the process was inadequate because Defendants failed directly to consult Plaintiffs,  
2 cultural practitioners, local and Okinawa government officials, and failed to notify the public or  
3 Plaintiffs that the TIA process was underway. Plaintiffs also contend that, even if the Section 402  
4 TIA process was adequate, Defendants' finding that the FRF would have no adverse effect on the  
5 Okinawa dugong were arbitrary and capricious under the Administrative Procedure Act ("APA"),  
6 5 U.S.C. § 706, *et seq.*, because it ran contrary to the scientific evidence and failed to consider  
7 important aspects of the problem.

8 For the reasons explained below, the Court finds in favor of Defendants. Though  
9 Defendants' Section 402 process could possibly have been more inclusive, Defendants' efforts  
10 were sufficient to satisfy Section 402's modest procedural requirements. Further, Defendants  
11 adequately explained their conclusions based on the evidence available to them, such that their  
12 conclusions were not arbitrary or capricious under the APA. Plaintiffs' motion for summary  
13 judgment is **DENIED** and Defendants' motion is **GRANTED**.

#### 14 I. FACTUAL AND PROCEDURAL BACKGROUND

##### 15 A. The FRF and Okinawa Dugong

16 Since the end of World War II and pursuant to various treaty arrangements, the United  
17 States has maintained military facilities on the Japanese island of Okinawa. This case concerns  
18 the planned relocation of the existing Marine Corps Air Station Futenma ("MCAS Futenma") in  
19 Ginawan City. The United States and Japan agreed to relocate it because its current location  
20 became problematic after substantial population growth in the surrounding area. The new site is  
21 referred to as the Futenma Replacement Facility ("FRF"). The plans for the FRF have been  
22 evolving for more than a decade pursuant to negotiations between Japan and the United States.  
23 According to a 2006 roadmap agreement, the two countries agreed that the FRF would be located  
24 offshore the existing Camp Schwab, near Henoko Point. The FRF plan calls for a "V-shaped"  
25 runway that will be partially built on landfill extending into Oura and Henoko Bays.

26 The intrusion into the Bays prompted this litigation. The waters in question are a habitat  
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1 used by the Okinawa dugong, an endangered sea mammal. Plaintiffs,<sup>1</sup> a group of Japanese  
 2 individuals and environmental organizations concerned about the Okinawa dugong's fate and the  
 3 U.S.-based Center for Biological Diversity, filed suit in 2003 after relocation plans were first  
 4 announced under Section 402 of the National Historic Preservation Act (NHPA). Section 402 of  
 5 the NHPA provides:

6 Prior to the approval of any undertaking outside the United States  
 7 that may directly and adversely affect a property that is on the  
 8 World Heritage List or on the applicable country's equivalent of the  
 9 National Register, the head of a Federal agency having direct or  
 indirect jurisdiction over the undertaking shall take into account the  
 effect of the undertaking on the property for purposes of avoiding or  
 mitigating any adverse effect.

10 54 U.S.C. § 307101(e). Plaintiffs alleged that the Okinawa dugong was "property" on Japan's  
 11 equivalent of the National Register within the meaning of Section 402. Judge Patel, then-  
 12 presiding over the case, agreed and declined to dismiss the case. *See Dugong v. Rumsfeld*, 2005  
 13 WL 522106 (N.D. Cal. Mar. 2, 2005) ("*Dugong I*"). Consequently, the NHPA required that,  
 14 "[p]rior to the approval of any undertaking outside the United States [*i.e.*, the FRF] that may  
 15 directly or adversely affect [the Okinawa dugong]," Defendants "shall take into account the effect  
 16 of the undertaking on the [dugong] for purposes of avoiding or mitigating any adverse effect." 54  
 17 U.S.C. § 307101(e). After Judge Patel's earlier ruling and a 2006 announcement about a new  
 18 roadmap for the FRF, plaintiffs filed a second amended complaint and Defendants produced an  
 19 administrative record to prepare for summary judgment.

20 At summary judgment, Judge Patel held that the FRF was a "federal undertaking" within  
 21 the meaning of Section 402 of the NHPA, *Dugong v. Gates*, 543 F.Supp.2d 1082, 1101 (N.D. Cal.  
 22 2008) ("*Dugong II*"), and that Defendants were therefore required to "take into account the effect  
 23 of the undertaking on the property for purposes of avoiding or mitigating any adverse effect." 54  
 24 U.S.C. § 307101(e). This is referred to as the "take into account" (TIA) process. Judge Patel  
 25 sketched the basic outline of what a Section 402 TIA process should look like and held that

26 \_\_\_\_\_  
 27 <sup>1</sup> Plaintiffs are the Center for Biological Diversity, the Turtle Island Restoration Network, the  
 28 Japanese Environmental Lawyers Federation, the Save the Dugong Foundation, and individuals  
 Anna Shimabukuro, Takuma Higashionna, and Yoshikazu Makishi. *See* First Suppl. Compl.  
 (Docket No. 152-1) ¶¶ 8-15.

1 Defendants had failed to comply. *Dugong II*, 543 F.Supp.2d at 1102-1111. She entered summary  
 2 judgment for Plaintiffs and ordered Defendants to comply with NHPA Section 402. Due to  
 3 subsequent uncertainty over the future of the FRF, Judge Patel held the case in abeyance and  
 4 administratively closed it in February 2012, instructing the parties to move to re-open the case  
 5 “[w]hen plans for Henoko become more finalized or are abandoned.” Docket No. 147 at 4-5.

6 Over two years later, in April 2014, Defendants filed a notice that they had completed the  
 7 Section 402 TIA process. *See* Docket No. 151. With the Court’s leave, Plaintiffs thereafter filed a  
 8 supplemental complaint. *See* Docket No. 152-1. Defendants successfully moved to dismiss for  
 9 lack of jurisdiction, *see* Docket No. 186, 188, but the Ninth Circuit reversed and remanded. *See*  
 10 Docket No. 198. On remand, the parties filed cross motions for summary judgment concerning  
 11 the adequacy of Defendants’ TIA process and the soundness of their conclusions under the APA.  
 12 Those motions are now before the Court. *See* Docket Nos. 221, 222, 223.

13 B. Defendants’ “Take Into Account” Process

14 Subsequent to Judge Patel’s order, Defendants undertook a TIA process that involved  
 15 several components. Each is described in more detail below, but the steps included, *inter alia*, (1)  
 16 a report on the FRF’s potential impact on the dugong’s *biological* well-being prepared by Dr.  
 17 Thomas Jefferson (the “Jefferson Report”); (2) a report on the FRF’s potential impact on the  
 18 dugong’s *cultural* significance prepared by a private research institute, International Archeological  
 19 Research Institute, Inc. (IARII) (the “Welch 2010 Report”); (3) the Japanese government’s  
 20 Environmental Impact Statement (“EIS”) regarding the FRF; and (4) miscellaneous other reports  
 21 or sources of information described below. *See* US 10997. After considering these reports,  
 22 Defendants rendered their findings that the FRF would not have adverse effects on the dugong.

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The various reports make reference to certain locations, including Henoko Bay, Oura Bay, and Kayo; the maps below illustrate the geography of the FRF and those areas.

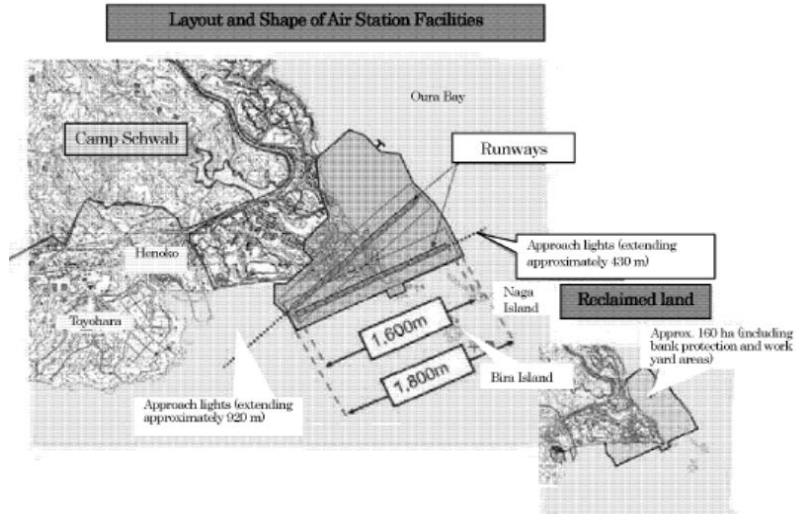


Fig. 2.2.5.1 Layout and Shape of Air Station Facilities

**US 4797 (Japanese EIS)-**

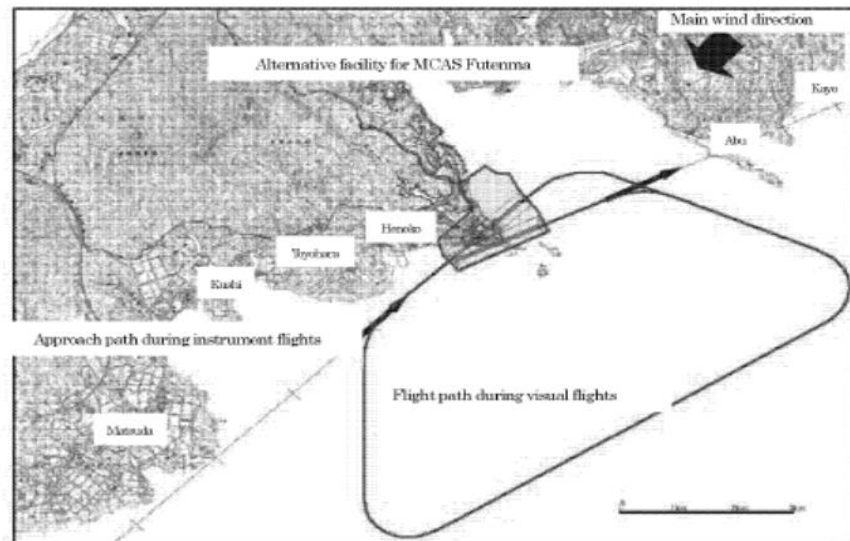


Fig. 2.2.6.1 Flight Path (In case of northeasterly wind)

**US 4803**

The following reports constitute part of Defendants' TIA process.

C. Jefferson Report (Biological Assessment)

Defendants commissioned an internal study by Dr. Thomas A. Jefferson titled "Biological Assessment of the Okinawan Dugong: A review of Information and Annotated Bibliography Relevant to the Futenma Replacement Facility." US 3356. The report consists of a literature

1 review concerning the taxonomy of the dugong, their distribution and abundance, typical lifespan,  
 2 ecology, behavior and social organization, and threats to their population. *Id.* The general threats  
 3 to the Okinawa dugong identified were hunting, bycatch, vessel traffic, chemical pollution, and  
 4 habitat loss/degradation. US 3368-69. The threats directly linked to military activities were  
 5 identified as pollution (noise, chemical, sedimentation, and radioactivity) and habitat  
 6 destruction/alteration. US 3369.

7 Dr. Jefferson concluded that, for conservation purposes, “[m]anagement actions must be  
 8 focused on human activities known to be actual causes of mortality for dugongs in this population,  
 9 and this generally means the closure or relocation of gillnet and setnet fisheries that catch dugongs  
 10 to locations outside the population’s range.” US 3373. He also noted that stopping the FRF  
 11 would be futile in preserving the dugong without additional conservation efforts: “Eliminating  
 12 activities that may have the potential to limit population recovery (*e.g.*, the FRF), while ignoring  
 13 the issues **known** to be causing population decline (*e.g.*, possible illegal hunting and incidental  
 14 catches in fisheries), will not help the population.” *Id.* (emphasis in original). Rather, “[a]n  
 15 integrated management plan . . . is the only way to preserve this dugong population.” *Id.*

16 D. Welch 2010 Report (Cultural Assessment)

17 Defendants commissioned the IARII, a private research consulting firm, to produce a  
 18 report on the cultural significance of the Okinawa dugong. US 4163. Although the bulk of the  
 19 report focuses on the cultural significance of the dugong, it also reviews biological and ecological  
 20 literature concerning the dugong, including threats to their existence. US 4175-4184.

21 1. Sources of Information

22 IARII assembled a team of archeologists, a cultural anthropologist, and a biologist to  
 23 prepare the report. The team consulted with cultural and natural resource specialists at Marine  
 24 Corps Base Camp Butler and ultimately interviewed 16 informants, including seven  
 25 archaeologists, two biologists, three archivists/professors, and four folklorists or individuals with  
 26 local traditional knowledge about the dugong. The researchers also visited a number of  
 27 organizations and museums, including Uruma City Cultural Sea Museum, University of the  
 28 Ryukyus Museum, Higashi Village Museum, Ishigaki City Yaeyama Museum, Nakijin Village

1 Museum of Culture and History, Nago Museum, Okinawa Churaumi Aquarium, and the Okinawa  
 2 Prefectural Archaeology Center (organizations which were on Plaintiffs' list). US 4170.  
 3 Additionally, the team visited the Okinawa Prefectural Board of Education and municipal Boards  
 4 of Education nearest to the proposed project (Chatan Town, Ginoza Village, Nakijin Village, and  
 5 Nago City). The researchers also conducted a review of relevant academic literature.

6 2. Findings of Adverse Effect

7 Based on their research, the authors of the Welch report discussed both direct and indirect  
 8 effects on the dugong's cultural significance. Direct effects were those that might directly affect  
 9 the *cultural* importance of the dugong, while indirect effects were those that might cause  
 10 *biological* harm to the species and thereby indirectly diminish its cultural significance.

11 With respect to the "direct" effects, the report concludes:

12 Based on the results of this study, the construction and operation of  
 13 the FRF should have little direct adverse impact on the cultural  
 14 significance of the dugong or on traditional cultural practices  
 15 associated with the dugong. Since the area in which the FRF will be  
 16 built . . . is already off-limits to the general Okinawan population, no  
 17 cultural events or social/religious ritual ceremonies involving the  
 18 dugong take place in these areas. Because of the dugong's rareness,  
 its status as a GOJ endangered biological species, and its designation  
 as a protected cultural property, hunting has not taken place, except  
 perhaps surreptitiously and only occasionally, since the immediate  
 post-war years. Because hunting is now illegal, the FRF will not  
 directly affect hunting.

19 US 4253. The study noted, however, that certain rituals honoring the sea deity are still held in  
 20 Henoko Village adjacent to Camp Schwab and that "temporary construction activities and later  
 21 operational activities could disturb the performance of these rituals." *Id.* It further concluded that  
 22 although the seagrass beds in the vicinity of Henoko might be impacted by the FRF because of the  
 23 feeding trenches in the area, "the project research found no indication that any culturally important  
 24 activities are conducted in or associated with this area." *Id.*

25 The Welch report then discussed "indirect" effects on the dugong's cultural significance  
 26 based on its assessment that "[i]f the dugong population is lost, then it is likely that those  
 27 traditions that help create Okinawan identity will become increasingly meaningless to future  
 28 generations." US 4254. The report identified six potential threats to the dugong's existence:

1 hunting, bycatch/incidental catch, vessel traffic, acoustic disturbance, chemical pollution, and  
 2 habitat loss/degradation. AR 4180-83. Among these, the report stated that habitat  
 3 destruction/alteration, pollution, and vessel collisions are the potential threats from military  
 4 activities. Based on review of biological literature, the report stated that although dugongs were  
 5 not currently living in Henoko Bay, “destruction of seagrass beds along Henoko Bay will limit  
 6 areas that could provide habitat in the event of recovery and increase in the current dugong  
 7 populations.” US 4254. It also states that “noise from the construction and operation of the FRF  
 8 could still affect the dugongs in [the area to the east of Oura Bay].” US 4255.

9 Although the Welch report identified these “potential” or “possible” effects, it made no  
 10 attempt to quantify the likelihood that the threats would materialize. In other words, the Welch  
 11 report does not analyze the FRF or related operations and the likelihood that they would cause  
 12 harm to the dugong. It merely identified a list of possible threats worth consideration.

13 E. Bi-Lateral Expert Study Group (2010)

14 The United States-Japan Security Consultative Committee also directed a group of experts  
 15 to study the FRF’s location, configuration, and construction method to help achieve the earliest  
 16 possible relocation. US 7306. This study evaluated two alternative construction plans in  
 17 consideration of the safety of local communities and U.S. military personnel, operational  
 18 requirements for U.S. forces, noise impact, environmental concerns, and effects on the local  
 19 community. US 7307. It concluded that one plan (the “V” plan) would require losing a beach on  
 20 the east side of Camp Schwab and thus “result[] in the loss of some animal and plant habitat,”  
 21 without further elaboration. US 7309. The other plan (the “I” plan) would preserve the beach but  
 22 “the impact on animal and plant habitat remains to be assessed.” US 7311. Plaintiffs have cited  
 23 the latter language as evidence of an incomplete process, but because Defendants have adopted the  
 24 “V” plan, the language regarding the “I” plan is not material to the question of compliance with  
 25 Section 402.<sup>2</sup>

26  
 27  
 28 <sup>2</sup> Plaintiffs have not argued, for example, that the “I” plan was an under-explored alternative that  
 would have been less harmful to the dugong.



1 F. Survey of Marine Mammals in Okinawa (SuMMO) (2011-2012)

2 This report was commissioned to update the Integrated Natural Resources/Cultural  
3 Resources Management Plan for Marine Corps Base Camp Smedly D. Butler, of which Camp  
4 Schwab is a part. US 9245. This report did not draw conclusions about the density of dugong  
5 presence in or around Henoko and Oura Bay. AR 9269. It is discussed where relevant below.

6 G. Japanese Environmental Impact Study (“EIS”)

7 Defendants relied heavily on an independent Environmental Impact Study undertaken by  
8 the Japanese government pursuant to Japanese law, a draft of which was released in in 2009 and a  
9 final version published in December 2012. *See* US 11056. The Japanese EIS is over 1600 pages  
10 long. US 4793. It involves a comprehensive analysis of how likely the FRF’s construction and  
11 planned manner of operation is to impact the Okinawa dugong. The Japanese EIS also underwent  
12 a robust public notice and comment process. These components are discussed below.

13 1. Public Notice and Public Comment

14 The Japanese EIS had 3 phases of public comment: first, about the planned scope of the  
15 EIS; second, about the draft EIS; and third, about the final EIS. *See* US 3032 (flow chart of  
16 process). The administrative record includes an English translation summary of 32-pages of  
17 public comments regarding the Japanese EIS’s proposed scoping. *See* US 1218. With respect to  
18 seagrass beds and dugong, the comments include, *inter alia*, concerns that “[t]he sea areas in the  
19 vicinity of Henoko are considered as very important breeding ground for the small population of  
20 Japanese dugongs,” comments regarding whether the planned survey period would be of sufficient  
21 duration, whether research about dugongs in other countries could be applied directly to the  
22 Okinawa dugong, whether the planned survey to observe dugong was sufficiently broad in its  
23 geographic scope, how the survey would account for measuring impact of sound on dugong, and  
24 so on. US 1238-41. Indeed, about four pages of translated public comment in the Japanese EIS  
25 are dedicated specifically to the Okinawa dugong.

26 Plaintiffs do not allege that they were unable to participate in this process. As explained  
27 above, the record indicates that members of the Japanese public were able to participate. The  
28 Okinawa Prefecture, akin to the regional government of Okinawa state, was also actively involved

1 in the public comment process. The then-governor of Okinawa, Hirokazu Nakaima, submitted  
2 public comment regarding the proposed scope of the Japanese EIS on December 21, 2007 and  
3 January 21, 2008. *See* US 1251, 1319. The translated documents are 28-29 pages long. The  
4 comments are robust and detailed, and include, among other things, recommendations for how to  
5 assess impact caused by acoustic noise and vibrations, aircraft noise, water contamination,  
6 turbidity caused by sediments, impact on seaweeds and seagrasses used by dugong, and impacts  
7 on the dugong themselves. *See, e.g.*, US 1269-71.

8 On March 4, 2008, the Department of Cultural and Environmental Affairs of the Okinawa  
9 Prefectural Government also submitted “Comments on the Additions and Revisions to the  
10 Environmental Impact Assessment Scoping Document” for the FRF. US 1567. This also includes  
11 comments regarding seagrass beds and dugong, including, for example, that the EIS should  
12 consider “[c]hanges in the use and visit to the sea area and seagrass beds,” “[c]hanges in the  
13 function and value of habitat, and their impacts on sustainability of individuals or population of  
14 dugongs in the Henoko coastal area,” and “[i]mpacts on sustainability of dugong’s population in  
15 Okinawa based on the degree of impacts on sustainability in the coastal area of Henoko.” *See* US  
16 1575-77.

17 Governor Nakaima also submitted comments regarding the final EIS document, sharply  
18 criticizing the Japanese central government’s report, generating significant attention in Japanese  
19 media. Defendants were aware of these criticisms and internally circulated media coverage. *See*  
20 US 8150-8158 (e-mail thread reproducing media coverage of Okinawa prefecture’s criticism of  
21 the Japanese EIS). This included criticism of the report’s findings regarding potential effects on  
22 the dugong but the substance of the critique is unclear from the record.

23 2. Substantive Findings of Japanese EIS

24 Whereas the Welch and Jefferson reports only identify *potential* adverse effects to the  
25 dugong from military activities, the Japanese EIS purports to determine the *likelihood* such harm  
26 will occur in light of the specific construction and operation plans for the FRF. The Japanese  
27 EIS’s analysis with respect to construction and operation are summarized below.

1 a. Adverse Effects Related to Construction

2 The Japanese EIS considered adverse effects related to noise, vibrations, night lighting,  
3 and ship collision as summarized below.

4 i. Noise

5 The report focused on construction activities likely to produce noise below the surface:  
6 piling work and riprapping work. US 6140. It calculated the decibel range that could affect  
7 dugongs and the geographic range in which harm could result. US 6141. It concluded that  
8 because there are shore reefs at the mouth of the Oura Bay between the construction site and sea  
9 areas off Kayo where dugongs live, “it is expected that these shore reefs will block the underwater  
10 noise.” *Id.* Thus, dugongs near Kayo would not be adversely affected. However, the report notes  
11 that noise could reach the dugong to the southwest if they were to move to that area or if they  
12 actually entered the Oura Bay. *Id.*

13 ii. Vibration

14 The Japanese EIS also analyzed the effect of construction-related vibrations of the sea  
15 floor. It noted the likely magnitude of such vibrations, how far they could be felt, and at what  
16 magnitude they might affect dugong. The report concluded that because “[d]ugongs rarely touch  
17 the sea bed except when they graze seagrasses,” and because “the feeding ground for dugongs that  
18 live around the project implementation site is located in sea areas off Kayo, over 5km away from  
19 the piling site,” “it is projected that sea bed vibrations during the construction work will have little  
20 practical effect on the behavior of dugongs.” US 6141.

21 iii. Night Lighting

22 The report explained that marine construction would only occur in the day time, and that  
23 night lighting was expected only to be used for a short three-month period during pavement work  
24 at the airport. Because dugongs “are highly likely to stay in sea areas off Kayo . . . it is assumed  
25 that little light from the lighting apparatuses . . . will reach [them].” *Id.*

26 iv. Navigation of Work Ships

27 The Japanese EIS noted that ship routes would be set to avoid areas where the dugong  
28 have been observed so encounters between the ships and the animals would be unlikely, but that if

1 dugong moved out of those spaces, they might encounter ships. US 6141. Alternatively, if they  
2 entered Oura Bay, the dugong might be caught in gill nets. US 6141.

3 In sum, with respect to construction activities, the Japanese EIS concludes: “it is projected  
4 that the effects of muddy water, noise, and the navigation of work ships during the construction  
5 work will not reach the sea areas where the seagrass beds that dugongs use as feeding grounds are  
6 distributed. It is also projected that if dugongs remain within their hitherto observed habitat, there  
7 is no possibility that implementation of the project will change the functions and value of  
8 dugongs’ living environment. Nor will implementation of the project practically affect the lives of  
9 individual dugongs that live around the project implementation site. [Finally] nor is there  
10 practically any possibility that implementation of the project affects the conservation of all  
11 individual dugongs in Okinawa prefecture.” US 6142.

12 b. Adverse Effects Related to Operational Use

13 The Japanese EIS considered the following impacts of operational use of the FRF (post-  
14 construction): decreased availability of sea surface (due to reclamation of sea land to expand the  
15 runways); water quality; aircraft noise; and ship navigation.

16 i. Reduction in Sea Surface

17 The report considered whether the reduction in sea surface would affect the dugong’s  
18 habitat or feeding grounds. It concluded that “the habitat . . . will not decrease much” and “will  
19 not decrease areas where seagrass beds . . . grow” because the main dugong feeding grounds are in  
20 a different location, off Kayo. AR 6145. The report also concluded that “changes in ocean flows,  
21 waves, and water quality due to the existence of facilities . . . will practically not alter the living  
22 environment of seagrass beds, the main feeding grounds for dugongs.” *Id.* The new marine  
23 structures will not interfere with dugong travel routes because they are not observed in the areas  
24 where the land will be reclaimed, or where fuel piers and approach lights are to be installed. *Id.*

25 ii. Aircraft Noise

26 The report considered the noise levels of aircrafts, their flight paths, and the extent to  
27 which noise might penetrate the sea in light of the particular flight trajectories and the noise levels  
28 that might affect the dugong. The report concludes that “it is projected that sound pressure levels

United States District Court  
Northern District of California

1 that exceed those which affect dugongs will be limited to small areas directly below the flight  
2 routes,” and that “low-frequency sounds . . . are projected to go below the lowest low-frequency  
3 sound pressure level that affects dugongs.” *Id.* at 6145-46.

4 iii. Water Quality

5 The report concludes “there will be practically no change to the quality of water around  
6 seagrass beds off Kayo, a major feeding ground for dugongs.” US 6146.

7 iv. Ship Routes

8 The report projected that ship routes would be unlikely to affect the dugong because the  
9 routes were planned through areas where dugong are not known to live and have not been  
10 observed. *Id.*

11 In sum, the Japanese EIS concludes that “if dugongs remain within their hitherto observed  
12 habitat, there is no possibility that implementation of the project changes the functions and value  
13 of their living environment,” and that “[t]here is practically no possibility that implementation of  
14 the project affects the conservation of all individual dugongs in Okinawa Prefecture.” US 6147.

15 H. Defendants’ Findings

16 Defendants considered the aforementioned reports in making their independent findings.  
17 They determined the dugong had cultural significance for four distinct segments of Japanese  
18 society, identified “those aspects of the dugong that are intrinsic to its cultural significance,” and  
19 then determined whether the FRF would adversely affect such aspects. As in the Welch report,  
20 Defendants considered both direct impacts on the dugong’s cultural significance and indirect  
21 impact that could result from biological harm to the dugong.

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1. Direct Effects on Cultural Significance

Defendants’ findings regarding cultural significance are summarized in the table below.

<b>Group For Whom Dugong Is Significant</b>	<b>Intrinsic Cultural Significance</b>	<b>Finding of Adverse Effect</b>
<p><b>1. <u>Researchers and scholars</u></b> who “perceive the Okinawa dugong as having cultural significance related to its historical role and its inclusion in Okinawa mythology, songs, and oral traditions,” US 10986</p>	<p>Cultural knowledge or data available for conducting research, which is contained in archives, archeological deposits, and memories of people who practice rituals and pass on oral traditions</p>	<p>Little or no potential to affect the repositories housing cultural knowledge</p>
<p><b>2. <u>Ritual practitioners</u></b> who “possess some specialized knowledge about the role of dugong in traditional myths, oral histories, rituals, and songs,” including some for whom “dugongs are perceived as intermediaries between the world of humans and the world of the supernatural,” US 10986</p>	<p>Cultural and historic knowledge embodied in songs, oral traditions, myths, and rituals, although the places where rituals are conducted and their timing may also have elements of significance</p>	<p>Little or no potential to affect because no rituals actually occur within the various named seagrass bed areas</p>
<p><b>3. <u>Aragusuku-jima Island community</u></b> for whom “oral traditions and records document[] the past requirement that they hunt the dugong and furnish dugong meat in lieu of paying taxes to the Kingdom,” US 10986</p>	<p>Oral traditions and written records regarding hunting dugong during the Ryuku Kingdom Period and practices such as hunting, dugong-related rituals, and the shrines where they occur</p>	<p>No potential to affect islands where rituals and festivals are performed and little to no potential to affect the knowledge of the people of the islands</p>
<p><b>4. <u>Popular culture</u></b> in the sense that “Okinawans have rallied [around the dugong symbol] to protest the continued use of areas on Okinawa by the U.S. military,” relating to “public perception of the animal as an endangered species having special ties to Okinawa,” <i>id.</i></p>	<p>The dugong’s image and arguably its survival as a local population because “symbols are more effective if they are tied to something tangible and able to be seen periodically by the community that uses the symbol,” US 10987</p>	<p>Minimal potential to result in extinction or significant degradation of the species, so “no potential to affect the use of the dugong as a political symbol”</p>

1 Relatedly, Defendants recognized potential indirect effects on the performance of dugong-  
2 related rituals in Henoko Village as a result of noise or visual intrusions during construction and  
3 operation. But “[t]he secretive nature of the ritual practitioners has prevented the USMC from  
4 acquiring information important to determining the affect [sic], if any,” US 10993, that would be  
5 caused. The report states that if the information becomes available, Defendants will make a  
6 determination. *Id.*

7 2. Indirect Effects on Cultural Significance Through Biological Harm

8 Defendants also recognized that biological harm to the dugong could adversely affect the  
9 creature’s cultural significance. Defendants’ analysis presumed that “an activity is deemed to  
10 have an adverse effect either on the dugong as a natural monument, or on an intrinsic element of  
11 the dugong from a cultural perspective, if the activity destroys, harms, or alters either the dugong  
12 or its intrinsic elements.” US 10987. Thus, “in order for the Undertaking to have an adverse  
13 effect on the Okinawa dugong, dugongs would have to be present in the [Area of Potential Effects  
14 (“APE”)] and subject to activities that could destroy, harm or alter those intrinsic characteristics  
15 that make the Okinawa dugong a natural monument.” US 10988.

16 A key basis for Defendants’ analysis is that although “the data are not sufficient to  
17 establish population size, status, and viability,” the data were “sufficient to conclude that a  
18 remnant population of dugongs exists around Okinawa,” sighted “sporadically” or “intermittently”  
19 in the FRF or FRF footprint area. US 10988. Moreover, seagrass beds used for feeding were  
20 found to the north of the FRF at Kayo and south in Henoko Bay, outside the FRF area. *Id.* The  
21 low density of dugong presence in the FRF area is critical to Defendants’ ultimate finding of “no  
22 adverse effect” “because of the extremely low probability of Okinawa dugongs being in the APE”  
23 and the conclusion that, to the extent they were present, “the construction and operational activity  
24 is primarily of the type that would not have an adverse effect.” *Id.* The only exception noted was  
25 construction noise. *Id.*

26 Defendants’ analysis of each of the adverse effects associated with construction and  
27 operation is summarized below.

28

1 a. Construction Effects

2 With respect to construction effects, Defendants considered vessel impacts, land  
3 reclamation, red soil runoff, and acoustic and visual disturbance:

4 Vessel Impacts: Defendants concluded that adverse effects from collisions “are highly  
5 unlikely given the observed low presence numbers of individual dugong in Henoko and Oura  
6 bays.” US 10988. Further, with respect to ship noise, Defendants cited a study that noise would  
7 interrupt feeding time only 0.8-6% of the time, which “would not affect survivorship.” *Id.*  
8 Though reduced nutrition could reduce reproductive rates, “due to the very small and infrequent  
9 presence of Okinawa dugong in the APE, there would be no adverse effect on reproductive rates.”  
10 *Id.*

11 Land reclamation: The FRF-construction will result in loss of 7.3% of the seagrass beds in  
12 the sea area in front of Henoko Bay and 37.7% of the seabeds on the side of Oura Bay (13% of the  
13 areas in both bays combined). US 10989. Defendants’ analysis of seabeds is specific and non-  
14 conclusory. Defendants explained:

15 As shown in Table 6.15.2.3.3 of the GoJ DEIS (Okinawa Defense  
16 Bureau 2009), the total area of seagrass beds with 5% coverage or  
17 more that would disappear due to FRF construction is 78.1 ha: 3.6  
18 ha in the sea area in front of Henoko Bay and 42.5 ha on the side of  
19 Oura Bay. This amounts to the loss of 7.5% of the seagrass beds in  
20 the sea area in front of Henoko Bay and 37.7% of the beds on the  
21 side of Oura Bay (13% of the 600.4 hectares in both bays  
22 combined). Based on an independent evaluation of the data  
23 provided in the GoJ DEIS and the data collected and presented in  
24 the USMC [United States Marine Corps]’s expert’s report (Encl 1),  
the USMC finds that, while the seagrass beds in Henoko and Oura  
bays are a potential natural habitat and food source for the Okinawa  
dugong, because these seagrass beds are not consistently or  
routinely used by resident dugong and there are other seagrass beds  
sufficient to maintain the current population of Okinawa dugong, the  
loss of some of the seagrass beds in Henoko and Oura bays is not  
considered an adverse effect on the Okinawa dugong as a natural  
monument. Accordingly, loss of seagrass beds from FRF  
construction will have no adverse effects on the Okinawa dugong.

25 US 10989. For the proposition that other seagrass beds outside of Henoko and Oura Bays are  
26 sufficient, Defendants cite DEIS Figure 3.1.5.4 in the Japanese EIS. *Id.*, n. 5. The text  
27 accompanying that chart states that “[t]here is about 2,000 ha of seaweed beds distributed around  
28 Okinawa Main Island” and “the larger beds are concentrated on the east side of the island.” US



1 5008. The Japanese EIS identifies evidence of feeding trails showing that the dugong frequent the  
2 seabeds off of Kayo (outside the FRF area) and only use the Henoko Bay seabeds (in or near the  
3 FRF area) infrequently. *See* US 5020-5022. Thus, although the Henoko Bay seabeds represent  
4 69% (173 ha) of the 249 ha of available seabeds around Nago City and Ginoza Village, the  
5 dugongs do not presently utilize them with frequency. *Id.* Defendants explicitly considered this  
6 research in reaching their finding regarding the relationship between lost seagrass beds and  
7 potential adverse effects on the dugong.

8 Red Soil Runoff: Soil runoff has the potential to carry toxins into the sea and lead to bio-  
9 accumulation in seagrass beds. Defendants' review of the literature "indicates mixed findings  
10 regarding whether or not dugong are susceptible to toxin bio-accumulation." *Id.* Defendants state  
11 that despite the lack of evidence of harm to Okinawa dugong or the presence of contaminants in  
12 the red soil at Camp Schwab, various mitigation measures will be implemented to reduce the risk.  
13 Thus, Defendants conclude that "[w]ith implementation of these avoidance, minimization and  
14 mitigation efforts, combined with very low and infrequent presence of Okinawa dugong in the  
15 APE, the USMC finds there will be no adverse effects." US 10989-90.

16 Acoustic Disturbance: Defendants reviewed the Japanese EIS and agreed with its findings  
17 regarding impacts associated with noise. US 10990. Specifically, "the impact of underwater  
18 sound is not expected to cause physical damage to dugongs, should they be present while  
19 construction noise occurs." *Id.* "[A]lthough sound pressure levels during stage 1 of construction  
20 could cause impacts [if they are present], cumulative sound exposure is not expected to  
21 significantly affect dugong behavior in this area." *Id.* Underwater sound would not cause  
22 physical damage but could impact behavior, but only if dugongs are present. *Id.* In light of  
23 known dugong behavior, "[s]hould [they] be present when construction activities are initiated, it is  
24 anticipated that they will vacate the area while construction noise is occurring." US 10991. In  
25 consideration of all the factors, Defendants concluded that "no adverse effects will occur due (1)  
26 to the limited use of Henoko and Oura bays by dugongs, (2) the implementation by [Japan] of  
27 noise minimization techniques during construction, (3) the suspension by [Japan] of noise-  
28 generating activities when Okinawa dugongs are present, and (4) the tendency for Okinawa

1 dugongs to move to deeper waters when exposed to such noise.” *Id.*

2 Visual Disturbance: With respect to lighting that may make the area undesirable for  
3 dugong feeding, Japan “does not intend to conduct any marine construction at night hours with the  
4 possible exception of runway paving over a three month period,” for which Defendants  
5 recommended that Japan “place lighting cones to direct lighting up and away from the water so  
6 that light pollution is reduced in the water column.” *Id.* No adverse effect was anticipated.

7 b. Operational Effects

8 Defendants also considered possible adverse effects related to day-to-day operation of FRF  
9 after construction is completed, including vessel impacts, storm-water runoff, and acoustic and  
10 lighting disturbance.

11 Vessel Impacts: Defendants concluded such impacts were “highly unlikely” due to “the  
12 infrequency of individual dugong in Henoko and Oura Bays, and the minimal vessel traffic in and  
13 out of the FRF with most vessels being large, slow-moving support vehicles.” US 10992. If  
14 dugong sightings increase, the USMC will evaluate mitigation measures. *Id.*

15 Stormwater Runoff: Sedimentation from runoff presents “an indirect threat . . . due to  
16 potential decline of seagrass habitat.” *Id.* Accordingly, the FRF will release stormwaters through  
17 sewers that “avoid the seagrass areas in Henoko and Oura Bays.” *Id.* It will also use treatment  
18 plants and best management practices to ensure “there should be no operational adverse effects  
19 from stormwater runoff.” *Id.*

20 Acoustic Disturbance: Possible operational noise includes aircraft operations and  
21 relatively infrequent vessel traffic. Experts suggested that “dugong would have to be directly  
22 under the flight path of an aircraft to receive any significant sound exposure, and even this  
23 exposure would vary according to sea state.” US 10993. Japan conducted aerial surveys tracking  
24 dugong in helicopters for several hours but observed no behavioral effects on the dugong. *Id.*  
25 Accordingly, Defendants concluded there would be no adverse noise effects.

26 Lighting Disturbance: Night lighting is limited to approach lights along the runway, which  
27 is “generally low wattage and typically points upward and away from the water,” so it would not  
28 have adverse effects. *Id.*

1 c. Overall Effect on Dugong Population

2 Defendants also considered declarations previously filed by Plaintiffs in this litigation,  
 3 arguing that the FRF would contribute to the extinction of the dugong. US 11055 (“The process  
 4 of analyzing the potential effects of the Undertaking on the Okinawa dugong as a historic property  
 5 involved considering the declarations submitted by Plaintiffs . . . in the litigation . . .”).  
 6 Defendants concluded that “the construction and operation of the FRF will not have adverse  
 7 effects on the local Okinawa dugong population [Henoko and Oura bays] and consequently will  
 8 not substantially contribute to the extinction of the entire Okinawa dugong.” US 10993. The  
 9 substance of these declarations is discussed in further detail below in connection with Plaintiffs  
 10 challenge to Defendants’ failure to consult them directly during the take-into-account (“TIA”)  
 11 process.

12 3. Mitigation Measures

13 Defendants also considered and adopted several mitigation measures. *See* US 10994-  
 14 10996. These are not material to the parties’ cross-motions.

15 **II. STATUTORY CONTEXT AND LEGAL STANDARD**

16 Where, as here, a case involves review of a final agency action under the Administrative  
 17 Procedure Act (“APA”), 5 U.S.C. § 706, and review is limited to the administrative record, there  
 18 are no genuine issues of material fact and summary judgment is appropriate. *Nw. Motorcycle*  
 19 *Ass’n v. USDA*, 18 F.3d 1468, 1471-72 (9th Cir. 1994). The Court’s role is to “determine whether  
 20 or not as a matter of law the evidence in the administrative record permitted the agency to make  
 21 the decision it did.” *Occidental Eng’g Co. v. INS*, 753 F.2d 766, 769 (9th Cir. 1985).

22 Plaintiffs allege that the agency action was unlawful for failure to comply with procedural  
 23 requirements of Section 402 of the National Historic Preservation Act (NHPA), codified at 54  
 24 U.S.C. § 307101(e). Because the NHPA is a procedural statute which does not create a private  
 25 cause of action, Plaintiffs’ challenge is brought pursuant to the APA. *Ctr. for Biological Diversity*  
 26 *v. Mattis*, 868 F.3d 803, 816 n.5 (9th Cir. 2017). Section 402 of the NHPA provides:

27 **Prior to the approval of any undertaking outside the United**  
 28 **States that may directly and adversely affect a property** that is  
 on the World Heritage List or on the applicable country’s equivalent

1 of the National Register, **the head of a Federal agency** having  
 2 direct or indirect jurisdiction over the undertaking **shall take into**  
 3 **account the effect of the undertaking on the property for**  
 4 **purposes of avoiding or mitigating any adverse effect.**

5 54 U.S.C. § 307101(e) (emphasis added).

6 Section 402 is the international parallel to Section 106 of the NHPA, codified at 54 U.S.C.  
 7 § 306108, which similarly requires federal agencies to “take into account the effect of [an]  
 8 undertaking on any historic property” “prior to the approval of the expenditure of any Federal  
 9 funds.” *Id.* § 306108. Sections 106 and 402 of the NHPA are “‘stop, look, and listen’ provision[s]  
 10 that require[] each federal agency to consider the effects of its programs.” *Te-Moak Tribe of W.*  
 11 *Shoshone of Nev. v. U.S. Dep’t of the Interior*, 608 F.3d 592, 607 (9th Cir. 2010) (quoting  
 12 *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 805 (9th Cir. 1999)). Section 402’s  
 13 requirements are procedural. “If the Government has reached its conclusions about effects and  
 14 mitigation after a sound NHPA Section 402 process, then it has complied with NHPA Section  
 15 402.” *Ctr. for Biological Diversity*, 868 F.3d at 818. In contrast, “[i]f the Government has not  
 16 followed NHPA Section 402 [then] the underlying determinations about effects and mitigation  
 17 lack validity.” *Id.* Section 402 requires the agency to “take into account the effect of [the project]  
 18 *for purposes of avoiding or mitigating any adverse effects.*” 54 U.S.C. § 307101(e) (emphasis  
 19 added).

20 In addition to the procedural requirements of Section 402, findings thereunder are subject  
 21 to review under the APA. Plaintiffs challenge certain of Defendants’ findings as arbitrary and  
 22 capricious under the APA. *See* 5 U.S.C. § 706(2)(A). “The scope of review under the ‘arbitrary  
 23 and capricious’ standard is narrow and a court is not to substitute its judgment for that of the  
 24 agency.” *Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29,  
 25 43 (1983). Nevertheless, the agency must “examine the relevant data and articulate a satisfactory  
 26 explanation for its action,” and agency action may be struck down as “arbitrary and capricious if  
 27 the agency has relied on facts which Congress has not intended it to consider, entirely failed to  
 28 consider an important aspect of the problem, offered an explanation for its decision that runs  
 counter to the evidence before the agency, or if the agency’s decision is so implausible that it  
 could not be ascribed to a difference in view or the product of agency expertise.” *Turtle Island*

1 *Restoration Network v. U.S. Dept. of Commerce*, 878 F.3d 725, 732-33 (9th Cir. 2017) (quotation  
2 and citation omitted).

### 3 **III. DISCUSSION**

#### 4 A. Did Defendants Comply With NHPA’s “Take Into Account” Requirements?

5 Plaintiffs challenge Defendants’ failure to directly consult Plaintiffs; to consult the local  
6 Okinawa government; to speak directly with cultural practitioners; or to give public notice or  
7 solicit feedback from other interested parties. To the extent Defendants’ consultants spoke to  
8 academics and others to assess the dugong’s cultural significance, Plaintiffs challenge the  
9 consultants’ failure to specifically query their interlocutors about the FRF’s potential impact on  
10 cultural significance.

11 The Court addresses each argument in turn. However, before doing so, the Court  
12 determines the legal standard of review for Defendants’ compliance with Section 402.

#### 13 1. Legal Standard

14 Judge Patel held that the Section 402 TIA process should include “engag[ing] the host  
15 nation and other relevant private organizations and individuals in a cooperative partnership” and  
16 “consultation with interested parties and organizations.” *Dugong II*, 543 F.Supp.2d at 1104.  
17 Judge Patel did not, however, identify any particular organizations or persons that Defendants  
18 were required to consult. Section 402 itself does not offer any specific guidance on what  
19 Defendants’ “take into account” process must encompass. Nor have Defendants issued formal  
20 regulations or informal guidance interpreting Section 402.

21 In the absence of statutory text or formal regulations under Section 402, the Court looks to  
22 two other sources for guidance: (1) the regulations governing the analogous Section 106 domestic  
23 undertakings and (2) informal guidance issued by the U.S. Department of the Interior regarding  
24 Section 402 undertakings.

#### 25 a. Section 106 Regulatory Framework

26 Section 106 is the domestic analog for Section 402. Its language is identical to Section 402  
27 in all material respects, requiring that “[t]he head of any Federal agency having direct or indirect  
28 jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of

1 any Federal department or independent agency having authority to license any undertaking, prior  
2 to the approval of the expenditure of any Federal funds on the undertaking or prior to the issuance  
3 of any license, shall take into account the effect of the undertaking on any historic property.” 54  
4 U.S.C. § 306108. Regulations issued pursuant to that provision guarantee certain entities formal  
5 “consulting party” status, which confers the right to provide input regarding potential adverse  
6 effects for the agency’s consideration, 36 C.F.R. § 800.5(a), to review the agency’s draft finding  
7 of adverse effect and offer input before it becomes final, *id.* § 800.5(c), and, if an adverse effect is  
8 found, to provide input and review proposals for mitigation efforts, *id.* § 800.6. Only four groups  
9 of entities are entitled to formal consulting party status under those regulations: a designated State  
10 Historic Preservation Officer, Indian tribes and Native Hawaiian organizations, representatives of  
11 local governments in whose jurisdiction an undertaking occurs, and applicants for Federal  
12 assistance permits, licenses, and approvals. *See* 36 C.F.R. § 800.2(c)(1)-(4).

13           Section 106 regulations also permit agencies, at their discretion, to grant consulting party  
14 status to other “individuals and organizations with a demonstrated interest in the  
15 undertaking . . . due to the nature of their legal or economic relation to the undertaking or affected  
16 properties, or their concern with the undertaking’s effects on historic properties.” 36 C.F.R. §  
17 800.2(c)(5) (emphasis added). To qualify for this category, an individual or organization must  
18 submit a written request for the agency’s consideration. *See* 36 C.F.R. § 800.3(f)(3). An  
19 organization that fails to make a request for discretionary consulting party status cannot later  
20 challenge the Section 106 TIA process for excluding them. *See Neighborhood Ass’n of the Back*  
21 *Bay, Inc. v. Fed. Transit Admin.*, 407 F.Supp.2d 323, 334-35 (D. Mass. 2005) (plaintiffs who did  
22 not request admission to process as formal consulting parties were not entitled to such status and  
23 so their participation rights were comparable only to the general public’s).

24           Finally, the Section 106 regulations provide for public notice and comment to solicit “[t]he  
25 views of the public [which] are essential to informed Federal decisionmaking.” 36 C.F.R. §  
26 800.2(d)(1). This provides a mechanism for parties who do not qualify as “consulting parties” to  
27 submit their views to the agency for consideration, although the public at large does not have the  
28 same procedural rights as consulting parties to review and comment on the agency’s draft findings

1 regarding adverse effects and mitigation efforts.

2 The parties agree that the Section 106 regulations are not binding in this case.  
3 Nevertheless, Section 106 and Section 402 have broadly the same purpose; hence, the Section 106  
4 regulations may be informative. *Dugong II*, 543 F.Supp.2d at 1105-1107. At the same time,  
5 because Section 402 applies to overseas undertakings, it raises foreign affairs and international  
6 relations concerns absent from the Section 106 context. Keeping both these similarities and  
7 distinctions in mind, whether Defendants failed to consult with entities analogous to those entitled  
8 to consulting status as a matter of right under the Section 106 regulatory framework may be a  
9 relevant consideration here. The Court does so as noted below.

10 b. U.S. Department of the Interior Guidance Re Section 402

11 Although there are no formal regulations interpreting Section 402, in 1998, the U.S.  
12 Department of the Interior (DoI) issued “Standards and Guidelines” for federal agencies to follow  
13 when fulfilling their obligations under the NHPA, including Section 402. *See* The Secretary of the  
14 Interior’s Standards and Guidelines for Federal Agency Historic Preservation Programs Pursuant  
15 to the National Historic Preservation Act, 63 Fed. Reg. 20496 (Apr. 24, 1998). With respect to  
16 foreign historic properties under Section 402, Standard 4 provides that “[e]fforts to identify and  
17 consider effects on historic properties in other countries should be carried out in consultation with  
18 the host country’s preservation authorities, with affected communities and groups, and with  
19 relevant professional organizations.” *Id.* at 20504. In a section referring both to consultation  
20 under both Sections 106 and 402, the Guidelines provide that “[w]hile specific consultation  
21 requirements and procedures will vary among agencies depending on their missions and programs,  
22 the nature of historic properties that might be affected, and other factors, consultation should  
23 always include all affected parties.” *Id.*

24 The parties agree that the DoI guidelines are non-binding, and they are correct: the  
25 guidelines say so explicitly. 63 Fed. Reg. at 20496 (stating the guidelines “have no regulatory  
26 effect”). As “guidelines,” they are best understood as “goals, not requirements.” *Western*  
27 *Watersheds Project v. Bennett*, 392 F.Supp.2d 1217, 1228 (D. Idaho 2005); *see also Muckleshoot*  
28 *Indian Tribe v. U.S. Forest Serv.*, 177 F.3d 800, 807 (9th Cir. 1999) (noting that “[c]ontravention

1 of [DoI guidelines under NHPA Section 106], standing alone, probably does not constitute a  
2 violation of NHPA”). In light of the statute’s ambiguity and express delegation to the DoI the task  
3 of coordinating and directing federal agencies,<sup>3</sup> the Guidelines carry weight under *Skidmore v.*  
4 *Swift & Co.*, 323 U.S. 134 (1944) to the extent they have the “power to persuade.” *Id.* at 140.

5 In connection with the questions who Defendants should have consulted in this case and to  
6 what extent, the DoI guidelines are not of significant assistance. Although the guidelines urge that  
7 “consultation should always include all affected parties,” 63 Fed. Reg. at 20504, the guidelines’  
8 use of the word “should” means it is not directive. Moreover, they provide no standard for  
9 determining what parties meet the criteria for being “affected.” Nor do the guidelines consider the  
10 possibility that in some cases, the nature of a property or of a particular undertaking might be such  
11 that the number of interested parties is intractable. In this case, the property is the Okinawa  
12 dugong, an animal species without a fixed location, and the potential effects on the dugong range  
13 from cultural to biological. That sets this case apart from the typical NHPA Section 106 cases in  
14 which the cultural property is a geological or archeological feature with a fixed location and only a  
15 small number of groups with an entitlement to consulting party status claim to live in or use the  
16 affected property.<sup>4</sup> In contrast, here, the cultural significance of the dugong to Okinawan society  
17 at large means that a variety of different groups (if not *all* individuals), could claim an interest in  
18 the dugong. Moreover, special concerns arise because most potentially interested parties under  
19 Section 402, by definition, live in the jurisdiction of another sovereign nation, not in the United  
20 States. Because this case is unlike the typical Section 106 case, the Court affords minimal weight  
21

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22 <sup>3</sup> The NHPA charges the DoI with “direct[ing] and coordinat[ing] participation by the United  
23 States in the World Heritage Convention.” 54 U.S.C. § 307101(b). Section 402(e) codifies and is  
intended to carry out the United States’ obligations under the convention.

24 <sup>4</sup> See, e.g., *Te-Moak Tribe of Western Shoshone of Nev. V. U.S. Dept. of Interior*, 608 F.3d 592  
25 (9th Cir. 2010) (cultural property was a landscape inextricably linked with tribes’ religion and  
26 culture, a mountain summit used for prayer and meditation, pinyon pine trees with dietary and  
ceremonial importance, and burial sites); *Muckleshoot Indian Tribe v. U.S. Forest Serv.*, 177 F.3d  
27 800 (9th Cir. 1999) (claimed areas of historical importance were sites and trails near Huckleberry  
Mountain); *Tyler v. Cisneros*, 136 F.3d 603 (9th Cir. 1998) (cultural properties were privately-  
28 owned homes of historic importance); *Quechan Tribe of Fort Yuma Indian Reservation v. U.S.*  
*Dept. of Interior*, 755 F.Supp.2d 1104 (S.D. Cal. 2010) (cultural properties included burial sites,  
religious sites, ancient trails, and buried artifacts).



1 to the DoI guidelines to the extent they urge that “consultation should always include all affected  
2 groups.” 63 Fed. Reg. at 20504.

3 The Court, in interpreting Section 402 in the absence of persuasive agency guidance on  
4 point, must consider that this is a complex case where the nature of the property is atypical, the  
5 adverse effects are both tangible and intangible, and there are sensitive foreign relations concerns  
6 at play. Under these circumstances, Section 402 affords deference to an agency’s determination  
7 which parties should be consulted and to what extent. The agency’s choices need only be  
8 reasonable. *Cf. ONRC Action of Bureau of Land Mgmt.*, 150 F.3d 1132, 1139 (9th Cir. 1998) (an  
9 agency interpretation will be upheld if reasonable and does not conflict with the clear language of  
10 the statute). Such flexible standard is what Judge Patel envisioned. *See Dugong II*, 543 F.Supp.2d  
11 at 1106 (agreeing that “an agency has some discretion in deciding who will be consulted, to what  
12 extent, and at precisely what time”).

13 In sum, in the absence of any specific requirement that Defendants consult with any  
14 particular person or group, the Court will review the exclusion of certain parties for  
15 reasonableness, taking into consideration the analogous requirements under Section 106 described  
16 above.

17 2. Failure to Directly Consult Plaintiffs

18 In light of the litigation history, it is somewhat puzzling that Defendants did not notify  
19 Plaintiffs when they initiated the TIA process. But it is equally puzzling that, after pressing this  
20 litigation forward for a decade, Plaintiffs, after prevailing on summary judgment before Judge  
21 Patel, apparently did nothing to inquire with Defendants about the TIA process or attempt to  
22 insinuate themselves in it.

23 Though the reasons for this mutual silence are unclear, considering all of the  
24 circumstances, Defendants’ failure to directly consult with Plaintiffs during the TIA was not  
25 unreasonable. Plaintiffs are private individuals and environmental organizations with an interest  
26 in the dugong, but they do not qualify as a group analogous to those entitled to formal consulting  
27 party status under Section 106. They are not local government representatives or the Japanese  
28 equivalent of an official Indian tribe or Native Hawaiian organization in the United States. Thus,

1 even under the Section 106 regulatory framework, Plaintiffs would not be entitled to consulting  
2 party status.

3 Furthermore, Plaintiffs had other opportunities to make their views concerning the FRF's  
4 impact on the dugong known to Defendants. Nearly all of the Plaintiffs are Japanese nationals or  
5 organizations. They had an opportunity to participate in the public notice-and-comment EIS  
6 process conducted by the Japanese government, which was then considered by the United States  
7 government. Although Defendants had obligations under Section 402 independent of the Japanese  
8 government's own review, "[d]uplicative, inconsistent efforts are not required." *Dugong II*, 543  
9 F.Supp.2d at 1108. Plaintiffs do not allege that the Japanese notice-and-comment was inadequate  
10 to convey their views about the FRF and its potential impact on the dugong. Indeed, even under  
11 the analogous Section 106 framework, because Plaintiffs would not have been entitled to  
12 consulting party status, they would have been limited to a similar notice-and-comment framework.  
13 *See* 36 C.F.R. § 800.2(d)(1).

14 Additionally, Defendants *did* take Plaintiffs' views into account, albeit indirectly. In  
15 particular, four declarations that Plaintiffs filed in earlier stages of this litigation were ultimately  
16 included in the administrative record and considered by Defendants. *See* US 10980 ("The process  
17 of analyzing the potential effects of the Undertaking on the Okinawa dugong as a historic property  
18 involved considering the declarations submitted by Plaintiffs . . . in the litigation . . ."). These  
19 declarations include:

20 1. Declaration of Isshu Maeda, a Special Researcher at Okinawa Kokusai University.  
21 Maeda's specialty is "the significance of natural and living things on human culture in Okinawa  
22 Prefecture," and he prepared a declaration "for the purpose of explaining . . . various aspects of the  
23 Dugong's historic and cultural importance in Okinawa." Maeda Decl. ¶¶ 1-2 (US 164). In the 13-  
24 page declaration, Maeda describes the dugong's role in creation mythology and tsunami legends  
25 (*id.* ¶¶ 6-9), its source as a sacred royal food (*id.* ¶¶ 10-12), the use of dugong bones for tools  
26 based on religious beliefs (*id.* ¶¶ 13-20), the different names given to the dugong (*id.* ¶¶ 21-25),  
27 blessings related to the dugong (*id.* ¶¶ 26-34). Maeda does not opine on the impacts of the FRF.

28 2. Declaration of Sekine Takamichi, a lawyer with the Japanese Environmental

1 Lawyers Federation (a plaintiff). US 177. This declaration explains the Japanese legal framework  
2 for preservation of cultural properties and that the dugong are considered cultural property under  
3 Japanese law.

4 3 & 4. Declaration of Dr. Ellen Hines, a professor of geography and human environmental  
5 studies who has researched dugongs. US 888. Dr. Hines' 30-page declaration is the most  
6 substantive with regard to the FRF's potential impact on the dugong. She discusses the threats to  
7 the dugong, the importance of seagrass beds to dugong sustenance, threats to seagrass beds,  
8 acoustic disturbances and their potential impact on the dugong, and then specifically threats to the  
9 Okinawa dugong, Hines Decl. ¶¶ 25-29. She also identifies prospective impacts of base  
10 construction and operation on the Okinawa dugong, including noise and acoustic pollution,  
11 destruction and degradation of seagrass beds, contaminant pollution, and increased activity  
12 (general disturbances and possibility of ship strikes). Hines Decl. ¶¶ 30-34. Dr. Hines later  
13 submitted a second declaration in opposition to Defendants' experts on the first round of summary  
14 judgment setting forth her critique of their views. *See* US 1195.

15 Thus, these fairly robust viewpoints about how the FRF might adversely affect the dugong  
16 and how the dugong had cultural importance were part of the record considered by Defendants.  
17 Indeed, all the prospective impacts identified by Dr. Hines were addressed in the Japanese EIS and  
18 Defendants' independent analysis.

19 In addition, Defendants consulted experts that Plaintiffs themselves had identified in the  
20 course of this litigation. *See* US 4170. Thus, Defendants consulted many persons designated by  
21 Plaintiffs as sources of relevant information.

22 Finally, Plaintiffs have not identified any additional information that they would have  
23 provided to supplement or broaden Defendants' analysis. Courts have considered the absence of  
24 prejudice in rejecting challenges to the sufficiency of consultation under the NHPA. *Cf. Te-Moak*,  
25 608 F.3d at 609 ("Plaintiffs do not identify any new information that the Tribe would have brought  
26 to the attention of the BLM had it been consulted earlier in the approval process," "fail to show or  
27 even argue that early consultation would have prevented any adverse effect on any yet-to-be-  
28 identified National Register eligible PCRI [properties of cultural and religious importance]," and

1 “do not identify any new information regarding how additional exploration would adversely affect  
 2 the identified PCRIs”); *Concerned Citizens and Retired Miners Coalition v. United States Forest*  
 3 *Serv.*, 279 F.Supp.3d 898, 942 (D. Ariz. 2017) (noting that tribe did not “identify any cultural sites  
 4 that were not properly considered in the EA”); *Coyote Valley Band of Pomo Indians of Cal. v.*  
 5 *United States Dept. of Transp.*, Case No. 15-cv-04987-JSW, 2018 WL 1569714, at \*11 (N.D. Cal.  
 6 Mar. 30, 2018) (tribe had adequate opportunity for consultation and “do[es] not identify any new  
 7 information they would have provided to the Federal Defendants if they had been consulted earlier  
 8 in the construction process”).

9 In light of all these factors, Plaintiffs have failed to demonstrate that Defendants acted  
 10 unreasonably by failing to directly consult them during this process.

11 3. Failure to Directly Consult Cultural Practitioners

12 Defendants retained IARII, a private research institute, to research the cultural significance  
 13 of the dugong. As explained above, IARII assembled a team of archeologists, a cultural  
 14 anthropologist, and a biologist to consult 16 interviewees. The team did not directly speak with  
 15 cultural practitioners. Instead, the research team formed a list of persons to be interviewed. A  
 16 team anthropologist, Dr. Arne Rokkum, with three decades of fieldwork in the region, conducted  
 17 archival research and “knew individuals who were likely to have information about the dugong in  
 18 Okinawan culture.” US 4170. Cultural and natural resource specialists were also “consulted for  
 19 the names of individuals who might have expertise regarding the cultural role of the dugong.” *Id.*  
 20 The research team “made it a point to include a number of people from the plaintiffs’ list [of  
 21 individuals and organizations with expertise in regard to the cultural and historical role of the  
 22 dugong from the court case], but field time was not sufficient to allow us to contact and interview  
 23 all the people on the list.” *Id.* Rather, the research team selected six cultural experts from  
 24 Plaintiffs’ list. *Id.* In addition, IARII’s team consulted subject matter experts, museum personnel  
 25 from several Okinawa area museums, prefectural cultural authorities and several local Boards of  
 26 Education located near the proposed project, and the Japanese government. US 11072.

27 Plaintiffs fault Defendants for failing to consult cultural practitioners directly rather than  
 28 indirectly through academics and other experts. It is true that two members of Defendants’ team

1 recognized the importance of local practitioners. *See* US 3207 (Mr. Hideo Henzan’s advice “that  
2 if [DOD] really want[s] to learn about the role of Dugongs in Okinawa life then they should take  
3 to the local ward mayors and/or the elders living around Henoko Bay”); US 4149 (Dr.  
4 Goodfellow’s e-mail stating that “the one place where we are really weak is that we did not have  
5 sufficient time to contact and get meetings arranged with cultural practitioners. And this is  
6 probably an area where the Marine Corps should expect to be challenged in any kind of court case.  
7 To do this would have required the Marines to have radically altered the time allowed for this  
8 project.”).

9           However, on the facts of this case, Defendants’ reliance on academic experts was not  
10 unreasonable under Section 402. The agency acknowledged it did not speak directly with cultural  
11 practitioners, but determined its analysis was nevertheless reliable because it obtained sufficient  
12 information on cultural significance from other sources. In the view of the Navy’s cultural  
13 resource expert, the “cultural experts [who were consulted] and cultural practitioners [who were  
14 not] both do have overlap with one another so if [the investigators] talked to one [group] that  
15 could get the gist of what the other does.” US 4149. Furthermore, some of IARII’s interviewees  
16 *had* spoken directly with cultural practitioners who passed on their views to the research team.  
17 *See* US 4172-73 (“A few of the informants had talked to cultural practitioners to whom the  
18 interview team could not get access and had information regarding rituals and other cultural  
19 practices that has never been published . . . . In particular as [a] result of his own research Mr.  
20 Isshu Maeda possessed extensive knowledge of unpublished cultural practices related to the  
21 dugong.”). Plaintiffs have not identified any information that cultural practitioners would have  
22 provided that might have led Defendants to discover adverse effects that were not considered.

23           In addition, the cultural practitioners do not appear to be analogous to any of the four  
24 analogous entities entitled to consulting party status as a matter of right under the Section 106  
25 guidelines. They are not analogous to State Historic Preservation Officers, local government  
26 representatives, applications for a permit or license, or native tribal organizations. *See* 36 C.F.R. §  
27 800.2(c)(1)-(4).

28           Finally, it is worth noting that Defendants did not have free access to the cultural

1 practitioners. *See* US 10987 (“[T]he secretive nature of this group has limited the ability of the  
2 study researchers to obtain detailed information concerning the locations, times and activities of  
3 most such rituals.”). As Plaintiffs’ counsel recognized at the hearing, “the traditional native  
4 Okinawan communities are quite secretive about some of their practices.” Docket No. 230 at  
5 27:9-10. Additionally, the researchers were required to obtain advanced permission from the  
6 Japanese embassy before speaking to any Japanese nationals. *See* US 4149. The limited access to  
7 the persons in question must be taken into consideration. Plaintiffs have not claimed that cultural  
8 practitioners attempted to consult with Defendants but were refused.

9 In light of these factors, Defendants’ decision to rely on academic cultural experts was not  
10 unreasonable where, in Defendants’ judgment, direct sources were inaccessible but the researchers  
11 could access the necessary information through other means.

12 4. Failure to Consult Local Okinawa Government

13 Plaintiffs also claim that Defendants did not consult the local Okinawa government. This  
14 is not an accurate characterization of the record.

15 In fact, Defendants’ researchers consulted the Okinawa Prefectural Board of Education and  
16 municipal Boards of Education in nearby towns, *see* US 11072, which have responsibility over  
17 cultural properties and are equivalent to State Historic Preservation Offices in the U.S. (with  
18 which consultation is required under Section 106 of the NHPA). *See* 36 C.F.R. § 800.2(c)(1).

19 Furthermore, as discussed above, Defendants indirectly took into consideration the views  
20 of the Okinawa Prefectural Government as set forth in detailed, comprehensive comments  
21 submitted by then-governor Hirokazu Nakaima during the Japanese EIS amounting to  
22 approximately 60 pages of comments. *See* US 1251, 1319, 8150. Defendants also considered  
23 comments from Okinawa’s Department of Cultural Affairs. *See* US 1567. These entities could be  
24 considered an analog to local government representatives under the Section 106 framework. *See*  
25 36 C.F.R. § 800.2(c)(3).

26 Plaintiffs’ only evidence of a failure to consult the local government is an April 2018 letter  
27 from Takeshi Onaga, a newly elected Governor of Okinawa, claiming the Okinawa Prefectural  
28 Government was not consulted or notified and that it would have provided (unspecified) views

1 contrary to those presented in the Japanese EIS. *See* Mot. at 12, n. 3. However, Mr. Onaga was  
2 elected *after* Defendants completed the TIA process, and his letter was sent four years *after* the  
3 process was completed. The record demonstrates that the views of Okinawa’s prior leadership  
4 were in fact considered.

5           Importantly, throughout this entire process, Defendants have been in direct consultation  
6 with the Japanese national government. Defendants’ direct consultation with the Japanese  
7 government is reasonable; “the Okinawa dugong is Japan’s cultural and historical property and  
8 therefore, Japan’s judgment regarding how best to protect that property should be of great concern  
9 to [Defendants].” *Dugong II*, 543 F.Supp.2d at 1108. Of course, it is rarely the case that a single  
10 government entity can purport to represent the full panoply of views held by a country’s entire  
11 population. Although the Japanese national government’s position regarding the FRF may be in  
12 tension with or different from the views held by the Okinawa Prefectural government or the  
13 population of Okinawa, Defendants did receive the views of local government actors and agencies.  
14 Given the political complexity of Japan’s internal political divisions on the matter, NHPA’s  
15 Section 402 should be read to afford deference to Defendants’ judgment of how to conduct a  
16 Section 402 consultation in a manner sensitive to Japan’s sovereignty, diplomatic relations  
17 between Japan and the United States, and international norms.

18           In light of these considerations, it was not unreasonable for Defendants to engage in direct  
19 consultation only with the Japanese national government, and to consider the views of the local  
20 Okinawa province indirectly through the Japanese EIS public-and-comment and through the  
21 contacts made by Defendants’ researchers with Okinawan cultural authorities and practitioners.  
22 Moreover, as above, Plaintiffs have not identified what information would have been obtained that  
23 might have led to the evaluation of additional potential adverse effects had Defendants engaged in  
24 direct (as opposed to indirect) consultation with local representatives.

25           5.       Failure to Give Public Notice or Solicit Public Comment

26           Plaintiffs also criticize Defendants for failing to give public notice of their TIA process or  
27 to solicit public comment from the Japanese public. Section 402 does not create an express  
28 obligation for such notice-and-comment. Although Section 106 regulations require such a process

1 in the context of domestic undertakings, no such input is mandated by the Section 402 guidelines.  
 2 It was not unreasonable for Defendants to refrain from doing so under the circumstances of this  
 3 case. As discussed above, the Japanese government performed its own robust public notice-and-  
 4 comment process in connection with its EIS. *See, e.g.*, 3032 (flow chart describing at what steps  
 5 there were opportunities for public comment in Japanese EIS process, including public comment  
 6 before and after the draft and final EIS); US 3062 (PowerPoint apparently summarizing local  
 7 residents' opinions on draft EIS); US 3069 (chart apparently indicating over 700 public comments  
 8 received); US 1218 (33-page English translation of the summary of public comments on EIS).  
 9 That EIS is part of the record considered by Defendants.

10 Plaintiffs claim that this process was inadequate because the Japanese EIS did not assess  
 11 the effects of the FRF on the dugong as a cultural resource. *See Reply* at 10. However, the  
 12 Japanese EIS involves extensive discussion of the dugong and potential impacts of the FRF. *See,*  
 13 *e.g.*, US 5015 (beginning of section summarizing surveys of dugong sightings); US 5027 (noting  
 14 that dugongs have been designated as “national protected animals under the Act on Protection of  
 15 Cultural Properties”); US 5108 (noting that one effect considered is on seaweed beds “which  
 16 provide a feeding ground to dugongs”). Furthermore, the public comment submitted in connection  
 17 with the Japanese EIS did, in fact, include extensive discussion of the FRF's potential impact on  
 18 the dugong. *See US 1238-41.* Plaintiffs have not established what would have been gained had  
 19 Defendants pursued their own, separate public notice-and-comment. *See Dugong II*, 543  
 20 F.Supp.2d at 1108 (“Duplicative, inconsistent efforts are not required.”).

21 Plaintiffs have thus failed to demonstrate that Defendants' reliance on the public notice-  
 22 and-comment undertaken by Japan's government was unreasonable under Section 402.

#### 23 6. Failure to Inquire About Adverse Impact

24 Plaintiffs also argue that Defendants' consultation with academics and cultural figures  
 25 through the Welch report was inadequate because they consulted those figures only regarding the  
 26 cultural significance of the dugong, without asking their views on “the *effect* of the undertaking  
 27 [i.e., FRF] on the property [i.e., dugong].” 54 U.S.C. § 307101(e) (emphasis added). It is true that  
 28 the informants contacted by the consultants were told only that they would be interviewed



1 “concerning the role of the dugong in Okinawan culture” to “help the Marine Corps carry out its  
2 mission and future planning in Okinawa.” US 3252. The outreach letter does not identify the FRF  
3 or state that the purpose was to understand “the effect” of the FRF on the Okinawa dugong. 54  
4 U.S.C. § 307101(e). Arguably, that reflects a weakness in the TIA process.

5 However, standing alone, that weakness does not render Defendants’ TIA process  
6 unreasonable under Section 402. The Section 402 TIA process does not necessarily require that  
7 every consultation address *both* the cultural significance of the monument *and* the expected  
8 effects. Indeed, certain interlocutors may have expertise on one aspect (cultural significance) but  
9 not the other (assessing the physiological or biological impact of the FRF). It was not necessarily  
10 unreasonable for the IARII consultants to speak with cultural experts about cultural significance,  
11 and then analyze separately the biological research to determine, scientifically, how the FRF  
12 would impact those cultural features. As Judge Patel noted, “an agency has some discretion in  
13 deciding who will be consulted, *to what extent*, and at precisely what time.” *Dugong II*, 543  
14 F.Supp.2d at 1106 (emphasis added). It was not unreasonable to limit the scope of consultation  
15 with certain parties to issues germane to their expertise or knowledge.<sup>5</sup>

16 Moreover, even if the IARII consultants did not specifically ask their interlocutors about  
17 the effects of the FRF, the Japanese public had an opportunity to comment through Japan’s EIS  
18 about such effects, as discussed above. The record demonstrates that Defendants’ analysis of the  
19 effects was based on a consideration of the information collected through both processes. Further,  
20 Defendants engaged in a full consultation with the Japanese government itself and considered the  
21 views of local agencies. The Court cannot conclude that the failure to specifically ask local  
22 cultural experts about the impacts of the FRF rendered the TIA process unreasonable or non-  
23 compliant under Section 402 in these circumstances.

24  
25 \_\_\_\_\_  
26 <sup>5</sup> Plaintiffs cite only *Montana Wilderness Ass’n v. Fry*, 310 F.Supp.2d 1127, 1153 (D. Mont.  
27 2004) as an example of inadequate consultation, but in that case the defendants failed to undertake  
28 any consultation at all. Here, the challenge is to the scope of consultation. Moreover, *Montana Wilderness* was a case under NHPA Section 106, for which the formally promulgated and binding regulations require consultation with Indian tribes regarding the effects of an undertaking. As noted, Section 106 regulations do not apply here, except by analogy.

1           7.       Conclusion

2           Plaintiffs have not shown that Defendants’ scoping of the consultation was unreasonable  
3 and violative of Section 402. Nor have Plaintiffs identified any new or additional material  
4 information that Defendants would have learned by consulting Plaintiffs or cultural practitioners  
5 directly. The Court **DENIES** Plaintiffs’ motion for summary judgment and **GRANTS**  
6 Defendants’ cross-motion for summary judgment with respect to Section 402 of the NHPA.

7       B.       Was Defendants’ Finding of “No Adverse Effect” on the Dugong Population “Arbitrary  
8           and Capricious”?

9           Plaintiffs’ remaining challenges are brought directly under the APA to challenge  
10 Defendants’ conclusions as arbitrary and capricious to the extent they rely on scientifically  
11 indefensible studies, fail to consider important aspects of the problem, or reach findings contrary  
12 to the evidence. Each issue is discussed below.

13           1.       Were Defendants’ Findings “Scientifically and Legally Defensible”?

14           Plaintiffs attack Defendants’ reliance on the Japanese government’s EIS despite statements  
15 by a few government consultants criticizing the Japanese EIS and recommending further study to  
16 come up with precise, scientifically-reliable estimates of the size of the total Okinawa dugong  
17 population in the affected area. Despite these criticisms, Defendants did not act unreasonably  
18 under these circumstances because they considered other sources of information about the  
19 intermittent and sporadic presence of Okinawa dugong in the affected FRF area. As explained  
20 below, that is sufficient under the arbitrary and capricious standard of review.

21           2.       Internal Criticism

22           Plaintiffs rely on certain examples of internal criticism but, as explained below, these  
23 remarks are taken out of context.

24           First, Plaintiffs identify a March 2010 e-mail by Dr. Thomas Jefferson who stated that  
25 “[t]he quality of the EIA itself think [sic] it was extremely poorly-done and does not withstand  
26 scientific scrutiny in my opinion am happy to change the wording in the report to reflect this but  
27 as we discussed we need to do this in diplomatic fashion.” US 4706. However, it is not clear to  
28 which specific aspect of the 1,600-page Japanese EIS Dr. Jefferson was referring. This stray

1 comment provides little insight about the nature of Dr. Jefferson’s criticism and whether it is  
 2 material in particular to Plaintiffs’ complaint about the population studies, or otherwise  
 3 undermines Defendants’ conclusions.

4 Second, Plaintiffs claim that Defendants “concede” that “the data are not sufficient to  
 5 establish population size, status, and viability” of the dugong and that “it would be beneficial for  
 6 [the Government of Japan] to conduct new systematic surveys or modeling” to develop  
 7 information about the Okinawa dugong population. US 10988, 10993. In fact, Defendants’  
 8 complete findings state:

9 The USMC has reviewed all available studies regarding the  
 10 distribution of the Okinawa dugong in waters around Okinawa.  
 11 Observations include at least one mother-calf pair, which indicates  
 12 that reproduction is still occurring in the population. Estimates  
 13 made over the past thirteen years of the Okinawa dugong population  
 14 range between 3 to 50 individuals. The available data are sufficient  
 15 to conclude that a remnant population of dugongs exists around  
 16 Okinawa. However, the data are not sufficient to establish  
 17 population size, status, and viability. In the immediate vicinity of  
 18 the FRF, seagrass beds are found to the north at Kayo and south of  
 19 the FRF, in Henoko Bay. As noted in Section 2.4, ***dugongs have  
 20 been sighted in the vicinity of the FRF or FRF footprint only  
 21 sporadically since June 2009.*** During that time, steady and routine  
 22 dugong activity has been documented off Kayo (north and east of  
 23 the FRF), ***with only sporadic dugong activity observed directly in  
 24 Henoko and Oura Bays*** (6/09, 4/12, 5/12, 6/1, 3/13, 5/13, and  
 25 11/13).

18 US 10988 (emphasis added).

19 Thus, although Defendants acknowledged the lack of scientifically reliable estimates about  
 20 the total size of the Okinawa dugong population, they had sufficient information about the  
 21 relatively sporadic and intermittent presence of dugong in the FRF-affected areas and those  
 22 immediately adjacent (Henoko and Oura Bays and Kayo). Further, with respect to their statement  
 23 that “it would be beneficial” if Japan conducted further studies, Plaintiffs ignore the immediately  
 24 subsequent statement that: “Notwithstanding the absence of recent *total* population data, *we do*  
 25 *have current and valid population data for Henoko and Oura bays.*” Findings at 17 (emphasis  
 26 added). Thus, Plaintiffs’ claim that no data was available about the dugong population in the  
 27 FRF-area is incorrect.

28 Third, Plaintiffs identify a July 28, 2011 e-mail from Morgan Richie, a Marine Resources

1 Specialist at the Naval Facilities Engineering Command—Pacific (Navfac-Pac) who co-authored  
2 the 2011-2012 Survey of Marine Mammals in Okinawa (SuMMO), which discusses the proposed  
3 scope of a project designed to monitor cetacean and dugong presence in the Henoko and Oura  
4 Bays. *See* US 8095. Richie states that “[a]s background . . . in the Fall of 2010, Navfac-Pac  
5 provided an estimate on placing 3 passive acoustic monitoring devices in the Henoko and Oura  
6 Bay area in order to monitor for dugongs. However, after performing additional analysis since  
7 that time, it became clear to us that monitoring for a population of dugongs *with such extremely*  
8 *low density* would require techniques in addition to the 3 PAM devices as well as increased  
9 monitoring effort overall.” *Id.* (emphasis added). She thereafter criticized the current proposal as  
10 providing “a greater understanding of the presence . . . of cetaceans,” but only “opportunistic  
11 detections of dugongs.” *Id.* She also stated that the data “will have a high likelihood of not being  
12 able to *conclusively* tell us if, where, when, or how dugongs are using seagrass beds near Henoko  
13 and Oura Bay,” and that she did not recommend using the resulting data “to make legally  
14 defensible claims regarding the presence or absence of dugongs.” *Id.* (emphasis added). In  
15 response, Dr. Sue Goodfellow, the supervisor of the project, stated that “[t]he USMC sees no need  
16 for the more elaborate SOW that NAVFACPAC is now proposing,” and noted that the lack of  
17 resolution was delaying execution of the survey contract and funds might be lost until the  
18 following budget cycle if not used soon. US 8094. In line with Richie’s prediction, the SuMMO  
19 final report states that “[i]t is not possible to say anything *definitive* about densities of dugongs,”  
20 because the study did not involve an “effective dugong monitoring program.” AR 9269 (emphasis  
21 added).

22 Although Richie stated a more thorough method was required to provide “conclusive” and  
23 “definitive” information about dugong density, that does not render Defendants’ ultimate  
24 conclusions arbitrary and capricious. Indeed, as Richie made clear in the e-mail, the need for  
25 more rigorous methods was caused by the very low density of dugong in the FRF area itself. *See*  
26 US 9269. In other words, the available data confirmed a very low density of dugong in the FRF  
27 area. *See, e.g.*, US 10979(citing data revealing intermittent observance in Oura Bay in several  
28 months between September 2010 and November 2013 and in the seagrass beds in the FRF-area

1 between June 2009 and November 2013); US 10984(citing Japan’s EIS surveys reporting  
2 sightings of dugong); US 5015-19 (citing surveys reporting sporadic sightings in Okinawa waters,  
3 analysis of feeding trails, and so on); USREF 1580, 2064 (external academic literature re: dugong  
4 sightings and feeding trails around Okinawa). Defendants’ conclusion of low dugong presence in  
5 the FRF area was not unreasonable in light of the available data. *Cf. Env. Protection Info. Ctr. v.*  
6 *U.S. Forest Serv.*, 451 F.3d 1005, 1018 (9th Cir. 2006) (under National Forest Protection Act,  
7 which imposes certain substantive requirements, “monitoring difficulties [of a species’ presence in  
8 a particular area] do not render a habitat-based analysis [of the species’ viability in that area]  
9 unreasonable, so long as the analysis uses all the scientific data currently available”).

10 That low density, in turn, was the basis for Defendants’ conclusion that the FRF was  
11 unlikely to have an adverse effect (*e.g.*, because of the low probability of vessel impact). Indeed,  
12 this close connection between the low density in the FRF-area and Defendants’ conclusion  
13 confirms why it was not unreasonable to refrain from a more detailed scientific study. Defendants  
14 recognized there was a lack of reliable global population studies. *See* US 9243 (“There are many  
15 recent records of sightings, strandings, and captures (both direct and indirect), although by all  
16 accounts the species is now badly depleted and considered endangered in Okinawa. There are no  
17 statistically-defensible estimates of abundance for the species around Okinawa, but six individuals  
18 were observed in a single group in 1999.”). But Section 402 did not require Defendants to  
19 determine the total global Okinawa dugong population; it only required them to take into account  
20 the impacts on the dugong in the FRF-area based on data sufficient to show their relative density  
21 in the affected area and resulting potential impact.

22 This situation is very much unlike the case cited by Plaintiffs, *Bonnichsen v. United States*,  
23 217 F.Supp.2d 1116, 1163-64 (D. Or. 2002), *aff’d*, 357 F.3d 962 (9th Cir. 2004), *amended by* 367  
24 F.3d 864 (9th Cir. 2004). There, in a dispute under Section 106 of the NHPA, the defendant was  
25 required to consider the potential adverse effects of burying a site where culturally significant  
26 human remains were found. An Army Corps of Engineers scientist had noted that “the erosion at  
27 the site was ‘not as serious as that occurring at many other Corps of Engineers Reservoirs,’” but  
28 advised “‘cautio[n] about long term deleterious effects of engineering site protection measures.’”

1 *Id.* Nevertheless, “the project proceeded without significant study to determine the characteristics  
2 of the site, including what archaeological resources might exist, and there [was] little evidence that  
3 alternative methods of erosion[] control that might mitigate potential data loss were seriously  
4 considered.” *Id.* at 1163-64.

5 In contrast, here, Richie did not warn about potential adverse effects that went unstudied,  
6 but rather, described what would be needed for a scientifically defensible population study of the  
7 dugong in light of their very low density. There is no reason to construe Richie’s criticisms  
8 (premised on the difficulty of a low density population) to suggest that the local dugong  
9 population was even greater than believed and thus at greater risk of negative encounters with FRF  
10 construction or operational activities. Plaintiffs do not suggest that a more detailed study would  
11 have revealed that the dugongs in fact traversed the area more than “intermittently” or feed more  
12 than “occasionally.” *See* US 10979. Defendants had sufficient material information on which to  
13 base their analysis. Defendants adequately explained why existing data was sufficient for their  
14 purposes. *See City of Carmel-By-The-Sea v. U.S. Dep’t of Transp.*, 123 F.3d 1142, 1151 (9th Cir.  
15 1997) (NEPA only requires “a ‘reasonably thorough’ discussion of the environmental  
16 consequences in question, not unanimity of opinion, expert or otherwise”); *see N. Plains Res.*  
17 *Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1078 (9th Cir. 2011) (holding that an agency  
18 is “afforded deference in choosing its scientific method for modeling data” even under NEPA’s  
19 more stringent “hard look” analysis); *Alaska Survival v. Surface Transp. Bd.*, 705 F.3d 1073, 1088  
20 (9th Cir. 2013) (under NEPA “hard look,” “[i]t is not the role of th[e] court to decide whether an  
21 [environmental impact study] is based on the best scientific methodology available” (citation  
22 omitted)).

23 3. Full Range of Impacts

24 Plaintiffs also argue that Defendants failed to consider the full range of impacts of the FRF  
25 on the dugong including “population fragmentation, the disruption of travel routes, and the loss of  
26 habitat that may be required in the future to sustain a viable population, which would be larger  
27 than the present population.” *Mot.* at 19; *see Turtle Island Restoration*, 878 F.3d at 732 (agency  
28 action may be arbitrary and capricious if the agency “entirely fail[s] to consider an important

1 aspect of the problem”). Instead, Defendants allegedly “limited [their] inquiry into the possible  
2 impacts of the FRF on the dugong to a list of potential impacts identified by this Court before  
3 [Defendants] had undertaken any inquiry at all.” *Id.*; see also US 10980. Judge Patel had  
4 identified potential effects to include “physical destruction of the Okinawa dugong resulting from  
5 contamination of seagrass feeding grounds and collisions with boats and vessels, as well as long-  
6 term immune and reproductive damage resulting from exposure to toxins and acoustic pollution.”  
7 *Dugong II*, 543 F.Supp.2d at 1101.

8 The Court agrees that Judge Patel did not purport to offer an exhaustive list of potential  
9 impacts on the dugong. Nevertheless, it is not accurate to state that Defendants simply limited  
10 their study to the impacts identified by Judge Patel. Rather, the Welch 2010 report identified six  
11 general threats to the dugong as a species: hunting, bycatch/incidental catch (including in gill  
12 nets), vessel traffic, acoustic disturbance, chemical pollution, and habitat loss/destruction. US  
13 4180-83. It opined that threats from military activities could include pollution, habitat  
14 destruction/alteration, and vessel collisions. US 4183. The Jefferson report identified the same  
15 six general threats and noted that the primary threats were bycatch and habitat  
16 destruction/alteration. US 3369-70. Notably, these are the same threats identified by Plaintiffs’  
17 expert, Dr. Hines. *See* Hines Decl. ¶¶ 30-34 (listing noise and acoustic pollution, destruction and  
18 degradation of seagrass beds, contaminant pollution, and increased vessel activity as potential  
19 threats to the dugong).

20 Defendants properly focused on and discussed each of the threats identified by all the  
21 relevant experts, both their own and Plaintiffs’. The Japanese EIS, which Defendants relied upon,  
22 considered the impact of ship routes, including the possibility of incidental capture in gill nets if  
23 dugongs entered the Bay, effects on water quality, and effects on habitat by harm to seabeds. *See*  
24 US 6141-47. Defendants considered those issues as well. US 10988-93. It was not unreasonable  
25 for Defendants to examine and consider the threats specifically identified by three experts as the  
26 most significant to the dugong possibly exacerbated by the FRF.

27 Although Plaintiffs suggest the study should have also considered population  
28 fragmentation, none of the experts (including Plaintiffs’ own expert, Dr. Hines) identified that

1 issue as a threat to the Okinawa dugong. Plaintiffs also claim Defendants did not consider the  
 2 disruption of dugong travel routes, but Defendants considered whether ship routes and aircraft  
 3 noise would alter dugong “behavior.” Finally, the Welch report explicitly notes that “[r]egardless  
 4 of whether [seabeds in Henoko and Oura Bay] are currently being used by dugongs, destruction of  
 5 seagrass beds along Henoko Bay will limit areas that could provide habitat in the event of  
 6 recovery and increase in the current dugong populations.” US 4156. Thus, the issue of how the  
 7 FRF might impede future recovery efforts (if not harm the current population) was before  
 8 Defendants.

9 In short, Plaintiffs have not shown a failure to consider an important aspect of the problem.  
 10 The NHPA 402 does not identify particular issues that must be considered, and the agency’s  
 11 identification of the scope of issues—based on the threats to the dugong identified in the Welch  
 12 and Jefferson reports, which were consistent with the threats identified by Plaintiffs’ expert Dr.  
 13 Hines—was reasonable.

14 C. Whether “No Adverse Effect” Is Supported By Record

15 Finally, Plaintiffs challenge Defendants’ conclusion of no adverse effect on the merits,  
 16 arguing that the record shows the FRF *is* likely to adversely impact the dugong. They claim that  
 17 Defendants’ conclusion runs counter to the 2010 Welch Report. However, the Welch report  
 18 identified *potential or possible* effects without any attempt to quantify the likelihood they would  
 19 materialize. As explained above, the Japanese EIS, like Defendants’ own findings, concluded that  
 20 because of the very low presence of dugong in the FRF-area, the potential adverse effects  
 21 identified in part by the Welch report were unlikely to materialize in practice. That conclusion,  
 22 though debatable, was based on a reasonable interpretation of the data, and was not arbitrary and  
 23 capricious. *See Protect Our Comtys. Found. v. Jewell*, 825 F.3d 571, 583 (9th Cir. 2016) (“When  
 24 the agency’s determination is founded on reasonable inferences from scientific data, a reviewing  
 25 court will not ‘substitute its judgment for that of the agency.’” (citation omitted)).<sup>6</sup>

26 \_\_\_\_\_  
 27 <sup>6</sup> An August 2010 bi-lateral expert study group that examined the FRF which stated that “the  
 28 impact on animal and plant habitat remains to be assessed,” US 7311, does not support Plaintiffs’  
 claim. As explained above, *supra* at 8, this language refers to the alternative “I” runway plan, not  
 the “V” runway plan that Defendants adopted and for which effects on animal habitat *were*





United States District Court  
Northern District of California

1 presented in this litigation. Defendants engaged in direct consultation with the Japanese national  
2 government. While Defendants’ outreach could and perhaps should have been broader to  
3 individuals, *inter alia*, Plaintiffs, the Court cannot say Defendants violated to procedural  
4 requirements of Section 402. On the facts of this case, defendants discharged their obligations to  
5 “take into account” potential adverse effects of the FRF on the Okinawa dugong under Section  
6 402 of the NHPA.

7 Furthermore, Defendants’ conclusions of no adverse effect were not arbitrary or  
8 capricious. They had sufficient scientific information upon which to conclude there was a very  
9 low density of dugong in the Oura and Henoko Bays. They reasonably concluded it was unlikely  
10 that events related to the FRF would harm the dugong, particularly in light of the particular details  
11 of their construction and operational plans. Their conclusion of no adverse effect was not arbitrary  
12 and capricious.

13 The Court is aware of the high stakes at issue. The Court understands the concern of  
14 Plaintiffs and those of affected citizens about the potential harm to the endangered dugongs of  
15 Okinawa. But Section 402, while requiring the U.S. government to take account the effect of its  
16 undertaking in constructing the FRF, offers a limited scope of judicial review. Under that limited  
17 scope of review, the efforts taken by Defendants to comply with Section 402, including  
18 implementation of mitigating measures, fulfill the requirements of Section 402 and support a  
19 finding of no adverse effect.

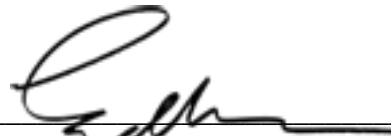
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1 For these reasons stated above, the Court **DENIES** Plaintiffs' motion for summary  
2 judgment and **GRANTS** Defendants' cross-motion for summary judgment. The Court's holding  
3 renders the question of remedies moot.

4 This order disposes of Docket Nos. 220 and 221. The Clerk is directed to enter Judgment  
5 for Defendants and to close the case.

6  
7 **IT IS SO ORDERED.**

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9 Dated: August 1, 2018

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12 EDWARD M. CHEN  
13 United States District Judge  
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