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14. ABSTRACT

My paper reviewed the Department of the Navy's recent termination of consultation under section 106 of the National Historic Preservation Act regarding the introduction of EA-18G Growlers at Whidbey Island. The paper focused on the Advisory Council on Historic Preservation's post-termination letter to the Secretary of the Navy, which commented on the Navy's handling of the consultation, to determine whether these comments created any litigation risk for the Navy.

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Arbitrary and Capricious? A Review of the Navy's Growler Consultation under Section 106 of the National Historic Preservation Act

By

John J. Battisti (Exam Number 70622)

April 29, 2019

A paper submitted to the faculty of Georgetown University Law Center in partial satisfaction of the requirements of the Master of Laws Program. The contents of this paper reflect the author's personal views and are not endorsed by the Department of the Navy.

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INTRODUCTION.

On November 30, 2018, the Department of the Navy ("Navy") terminated statutorily mandated consultation under section 106 of the National Historic Preservation Act of 1966[1] ("Preservation Act"). The Navy had determined that it was at an impasse with the other consulting parties over alternatives to "avoid, minimize, or mitigate" the adverse effects of increased EA-18G Growler operations at Naval Air Station Whidbey Island ("Whidbey Island") on nearby historic properties.[2] On February 19, 2019, the Advisory Council on Historic Preservation ("the Council") provided formal comments to the Secretary of the Navy Richard V. Spencer ("the Secretary") about the Navy's management of its Growler consultation.[3] On March 8th, the Secretary formally responded, notifying the Council that the Navy would begin moving forward with increased Growler operations and informing the Council which of its comments he accepted and which he declined.[4]

In this paper, I examine the Navy's termination of the Growler consultation, the Council's formal comments to the Secretary, and the Secretary's formal response to those comments to determine whether there is any undue risk of a

[1] 54 U.S.C.S. § 300101 *et. seq.*
[2] *See* Letter from Karnig Ohannessian, Federal Preservation Officer, Department of the Navy, to John Fowler, Executive Director, Advisory Council on Historic Preservation 1 (Nov. 30, 2018) (on file with the Department of the Navy).
[3] *See* Letter from Milford W. Donaldson, Chairman, Advisory Council on Historic Preservation, to Richard V. Spencer, Secretary of the Navy, Department of the Navy 1-8 (Feb. 19, 2019) (on file with the Advisory Council on Historic Preservation).
[4] *See* Letter from Richard V. Spencer, Secretary of the Navy, Department of the Navy, to Milford W. Donaldson, Chairman, Advisory Council on Historic Preservation 1-5 (Mar. 8, 2019) (on file with the Department of the Navy).

reviewing court concluding that the Navy acted in an "arbitrary and capricious"[5] manner. I explain that the Council's comments fully complied with the Preservation Act and the federal regulations that implement section 106 of the Act[6]. I assert that although the Council's comments did not exceed the scope of its authority, a court should not find the Secretary's rejection of the Council's recommendations to be "arbitrary and capricious." However, I caution that the Council's fifth finding[7]—that the discussion regarding alternatives to avoid, minimize, or mitigate was severely limited—may have imposed uncertain litigation risk on the Navy. Accordingly, I recommend that the Navy take a "hard look"[8] at the time it devoted to consulting over mitigation measures to protect itself from a reviewing court determining that it had acted in an "arbitrary and capricious" manner. Further, I recommend that the Navy reconsider accepting the Council's recommendation to have further discussions outside of the formal Growler consultation, which would minimize any possible litigation risk.

Part I provides background on the Navy's proposed increase in Growler operations. Part II provides background on the Preservation Act, the Advisory Council, and the section 106 process. Part III reviews the Council's comments and

[5] *See* 5 U.S.C. § 706(2)(A).
[6] *See generally* 36 C.F.R. Part 800.
[7] *See* Letter from Milford Donaldson to Richard Spencer 6 (Feb. 19, 2019) (on file with the Advisory Council on Historic Preservation).
[8] Hard-look doctrine is a principle of Administrative law that says a court should carefully review an administrative-agency decision to ensure that the agencies have genuinely engaged in reasoned decision-making.

the Secretary's response to determine the amount of litigation risk that potentially exists.

I. THE UNDERTAKING: PROPOSED INCREASE TO EA-18G GROWLER OPERATIONS.

A. Increased Growler Operations at Naval Air Station Whidbey Island.

The EA-18G Growler is an airborne electronic attack aircraft, which operates from either an aircraft carrier or a land base.[9] It has been developed as a replacement for the Vietnam-era EA-6B Prowler and is a derivative of the combat-proven two-seat F/A-18 Hornet—the Navy's maritime strike aircraft.[10] The Growler's main missions are electronic attack and suppression of enemy air defenses.[11]

In 2008, the Navy received its first Growler at Whidbey Island to begin operational testing onboard USS John C. Stennis (CVN 74).[12] In 2013, the Navy began planning to increase Growler capacity to support an expanded Department of Defense mission for identifying, tracking, and targeting in a complex electronic warfare environment.[13] It planned to expand field carrier landing practice at Ault Field[14] and the Outlying Landing Field ("OLF") Coupeville[15], and to add approximately 35 Growlers to bring the total number of such aircraft at Whidbey

[9] *See* Naval Technology, *available at* https://www.naval-technology.com/projects/ea-18g-growler/.
[10] *See* Id.
[11] *See* Id.
[12] *See* Id.
[13] *See* Letter from Milford Donaldson to Richard Spencer 2 (Feb. 19, 2019) (on file with the Advisory Council on Historic Preservation).
[14] Naval Air Station Whidbey Island is a naval air station of the U.S. Navy located on two pieces of land near Oak Harbor, on Whidbey Island, in Island County, Washington. Ault Field is the main portion of the base and is about three miles north of Oak Harbor.
[15] OLF Coupeville is a military airport located two miles southeast of Coupeville, Washington. It is 10 miles south of Naval Air Station Whidbey Island.

Island to 117.[16] Ault Field would support 88,000 total annual airfield operations (takeoffs and landings), which would represent an increase of 9,800 annual operations over current conditions.[17] OLF Coupeville would support 24,100 annual operations, which would represent an increase of 17,590 operations per year.[18]

B. The Navy's Undertaking and its Section 106 Consultation Requirements.

In 2014, the Navy determined that the proposed increase in Growler operations was an "undertaking," which the Preservation Act defines as any project, activity, or program.[19] Further, the Navy determined that the undertaking had the potential of adversely affecting historic properties in the area, due to increased noise exposure.[20] Once the Navy made these determinations, the Advisory Council regulations required the Navy to engage with those who would be affected by the increased operations, known as consulting parties.[21]

The Navy consulted with the Washington State Historic Preservation Officer ("SHPO"), local Indian tribes, representatives of local governments, the Advisory Council, and other interested individuals and organizations, over the possible

[16] *See* Letter from Milford Donaldson to Richard Spencer 2 (Feb. 19, 2019) (on file with the Advisory Council on Historic Preservation).
[17] *See* Id.
[18] *See* Id.
[19] *See* 54 U.S.C.S. § 300320; *see also* 36 C.F.R. § 800.16(y) (defining the term "undertaking" to mean a project, activity, or program funded in whole or in part under the direct or indirect jurisdiction of a Federal agency, including those carried out by or on behalf of a Federal agency; those carried out with Federal financial assistance; and those requiring a Federal permit, license or approval).
[20] *See* 36 C.F.R. § 800.3(a). Federal regulation requires an agency official to determine whether a proposed Federal action is an undertaking and, if so, whether it is a type of activity that has the potential to cause effects on historic properties
[21] *See* 36 C.F.R. § 800.2(a)(4).

increase in noise exposure to the Central Whidbey Island Historic District[22] ("Historic District") and Ebey's Landing National Historical Reserve[23] ("Ebey's Reserve"), from October 2014 through November 2018.[24] The Historic District is part of Ebey's Reserve.

The Advisory Council regulations required the Growler consultation to proceed through multiple stages. The Navy had to first identify the area of potential effects ("APE"): a geographic area within which an undertaking may directly or indirectly cause alterations in the character or use of historic properties, if any such properties exist.[25] Afterwards, the Navy had to identify the historic properties within the APE.[26] Between 2014 and 2017, the Navy engaged with the consulting parties to determine the APE and to inventory the historic properties within it.[27]

Next, the Navy had to determine whether any historic properties could be adversely affected by increased Growler operations.[28] When it determined there were such properties, the Navy had to notify the consulting parties of its finding.[29] Under the Advisory Council regulations, adverse effects include a change in the character of the property's use within the property's setting that contribute to its

[22] The Central Whidbey Island Historic District was listed on the National Register of Historic Places on December 12, 1973.
[23] Ebey's Landing National Historical Reserve is a unit of the National Park Service. It was established November 10, 1978.
[24] *See* Letter from Richard Spencer to Milford Donaldson 1 (Mar. 8, 2019) (on file with the Department of the Navy).
[25] *See* 36 C.F.R. § 800.4(a)(1); *see also* 36 C.F.R. § 800.16(d). The APE is influenced by the scale and nature of an undertaking and may be different for different kinds of effects caused by the undertaking.
[26] *See* 36 C.F.R. § 800.4(b).
[27] *See* Letter from Karnig Ohannessian to John Fowler (Exec. Sum. 1) (Nov. 30, 2018) (on file with the Department of the Navy).
[28] *See* 36 C.F.R. § 800.4.
[29] *See* 36 C.F.R. § 800.4(d)(2); *see also* 36 C.F.R. § 800.5.

historic significance or an introduction to visual, atmospheric, or audible elements that diminish the integrity of the property's significant historic features.[30]

In June of 2018, the Navy determined that an increase in noise would adversely affect characteristics of the Historic District and Ebey's Reserve that make them eligible for listing in the National Register of Historic Places, but also concluded that there were no other adverse effects.[31] The SHPO concurred with the Navy's findings.[32] Because the Navy had determined that increased Growler operations would expose the Historic District and Ebey's Reserve to increased noise, it had to explore alternatives that could avoid, minimize, or mitigate the noise.[33] For operational reasons, the Navy decided that it could not avoid increasing noise, so it focused the consultation on measures that could mitigate it.[34]

II. THE NATIONAL HISTORIC PRESERVATION ACT, THE ADVISORY COUNCIL ON HISTORIC PRESERVATION, AND SECTION 106 CONSULTATION.

A. The National Historic Preservation Act.

In 1966, Congress passed the Preservation Act thereby creating a comprehensive federal historic preservation program.[35] The Act created the National Register of Historic Places, a curated list of significant districts, sites,

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[30] *See* 36 C.F.R. § 800.5(2)(i)-(vii). Adverse effects also include (1) physical destruction or damage; (2) alteration of a property; (3) removal of a property from its historic location; (4) neglect of property causing deterioration; and (5) transfer, lease, or sale of property out of federal ownership without adequate restrictions to ensure long-term historic preservation.
[31] *See* Letter from Karnig Ohannessian to John Fowler (Exec. Sum. 3) (Nov. 30, 2018) (on file with the Department of the Navy).
[32] *See* Id.
[33] *See* 36 C.F.R. § 800.5(d)(2); *see also* 36 C.F.R. § 800.6.
[34] *See* Letter from Karnig Ohannessian to John Fowler (Exec. Sum. 2) (Nov. 30, 2018) (on file with the Department of the Navy).
[35] *See* Brown Sara C. & J. Peter Byrne, Historic Preservation Law 106 (1st ed. 2012).

buildings, structures, and objects in the United States.[36] To be eligible for listing in the National Register, a property must either be associated with significant historic events or activities, be associated with people important in our past, embody a distinctive design or physical characteristic, or have the potential to provide important information about our prehistory or history.[37] A property generally has to be 50 years of age or older to be eligible for listing.[38] Properties listed or eligible for listing on the National Register receive certain procedural protections under the Act.

The Preservation Act also created the Advisory Council and the section 106 consultation process, discussed *infra* in sections II.(B)-(C).[39] The Act makes all federal agencies responsible for the management of historic properties they own.[40] It further requires agencies to incorporate historic preservation planning into all of their programs and also requires each agency to designate a Federal Historic Preservation Officer that ensures the agency carries out its obligations.[41]

Additionally, the Preservation Act created SHPOs to provide historic preservation leadership in each state.[42] Under the Advisory Council regulations, a SHPO is a mandatory consulting party during a section 106 consultation because

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[36] *See* Id.
[37] *See* 36 C.F.R. § 60.4; *see also* J. Peter Byrne, Historic Preservation Law, at 61.
[38] *See* id.
[39] *See* 54 U.S.C.S. § 304101; *see also* id. § 306108.
[40] 54 U.S.C.S. § 306131; *see also* J. Peter Byrne, Historic Preservation Law, at 106; *see also* Government Accountability Office, Defense Infrastructure: Historic Properties within the Department of Defense, *available at* https://www.govinfo.gov/content/pkg/GAOREPORTS-GAO-01-497T/pdf/GAOREPORTS-GAO-01-497T.pdf. In 2001, the Navy had 2,135 properties listed on the National Register and 391 properties eligible for listing.
[41] *See* 54 U.S.C.S. § 306104; *see also* J. Peter Byrne, Historic Preservation Law, at 106.
[42] *See* 54 U.S.C.S. § 302303; *see also* J. Peter Byrne, Historic Preservation Law, at 106.

he or she represents the state's interests and those of its citizens in the preservation of their cultural heritage.[43] The Act also created consultation roles for tribal governments and Native Hawaiian organizations.[44]

B. The Advisory Council on Historic Preservation.

The Advisory Council is an independent federal agency responsible for advising the President of the United States on historic preservation, administering the Preservation Act, and playing a key role in the consultation process conducted by other federal agencies under the Act.[45] The Council is composed of 20 members most of whom are appointed by the President to four-year terms.[46] The Council's membership includes the Secretary of the Interior, the Architect of the Capital, the Secretary of Agriculture, the heads of four other federal agencies, the President of the National Conference of State Historic Preservation Officers, the Chairman of the National Trust for Historic Preservation, a mayor, four historic preservation experts, a member of a tribe or Native Hawaiian organization, and four members of the public.[47] By statute, the Council's Chairman is selected from the general public.[48]

[43] *See* 36 C.F.R. § 800.2(c)(1)(i).
[44] *See* 54 U.S.C.S. § 302701; *see also* J. Peter Byrne, Historic Preservation Law, at 106.
[45] *See* 54 U.S.C.S. § 304102; *see also* J. Peter Byrne, Historic Preservation Law, at 108.
[46] 54 U.S.C.S. § 304101; *see also* J. Peter Byrne, Historic Preservation Law, at 108.
[47] Id.
[48] Id.

The Council advises the President, Congress, federal agencies, and state and local governments on historic preservation.[49] Most importantly, the Council has an express statutory authority to issue regulations that govern the implementation of the section 106 consultation process conducted by other federal agencies.[50] These binding procedural regulations provide other federal agencies with detailed instructions on how to comply with their section 106 obligations.[51]

C. The Section 106 Review Process.

Section 106 of the Preservation Act establishes a review process whereby federal agencies assess the effect of their undertakings on certain historic properties.[52] Section 106 is considered the "heart of federal historic preservation law."[53] It provides:

> The head of any Federal agency having direct or indirect jurisdiction over a proposed Federal or federally assisted undertaking in any State and the head of any Federal department or independent agency having authority to license any undertaking shall, prior to approval of the expenditure of any Federal funds on the undertaking or prior to the issuance of any license, as the case may be, take into account the effect of the undertaking on any district, site, building, structure, or object that is included in or eligible for inclusion in the National Register. The head of a Federal agency shall afford the Advisory Council on Historic Preservation . . . a reasonable opportunity to comment with regard to such undertaking.[54]

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[49] *See* 54 U.S.C.S. § 304102.
[50] *See* 54 U.S.C.S. § 304108; *see also* J. Peter Byrne, Historic Preservation Law, at 108.
[51] *See generally* 36 C.F.R. Part 800; *see also* J. Peter Byrne, Historic Preservation Law, at 108.
[52] *See* 54 U.S.C.S. § 306108; *see also* J. Peter Byrne, Historic Preservation Law, at 106.
[53] *See* J. Peter Byrne, Historic Preservation Law, at 106.
[54] 54 U.S.C.S. § 306108.

The statute requires a federal agency to conduct consultation only with regard to undertakings, which is defined as any project, activity, or program.[55] Professor J. Peter Byrne has explained that Congress intended the term "undertaking" to be read broadly to encompass most specific agency activities.[56] The Act also requires a federal agency to consult about only properties that are either listed or eligible for listing on the National Register.[57]

The Act does not require a federal agency to forego an undertaking in order to preserve a historic property; instead, it requires the agency to "take into account" the effects of its undertaking on such property.[58] In other words, the Act mandates no substantive requirements on federal agencies. However, an agency must account for the effects of its undertaking prior to the approval of the expenditure of any federal funds on it.[59] Additionally, an agency has to afford the Advisory Council a reasonable opportunity to comment, especially when that agency terminates consultation without resolving the undertaking's adverse effects.[60]

Congress mandated the section 106 consultation process to prevent federal agencies, which are focused on accomplishing their primary mission, from

[55] *See* 54 U.S.C.S. § 300320; *see also* J. Peter Byrne, Historic Preservation Law, at 107.
[56] *See* J. Peter Byrne, Historic Preservation Law, at 112.
[57] *See* 54 U.S.C.S. § 306108; *see also* J. Peter Byrne, Historic Preservation Law, at 107.
[58] *See* 54 U.S.C.S. § 304108; *see also* J. Peter Byrne, Historic Preservation Law, at 107.
[59] *See* 54 U.S.C.S. § 306108.
[60] *See* 54 U.S.C.S. § 306108; *see also* 36 C.F.R. 800.7(c); *see also* J. Peter Byrne, Historic Preservation Law, at 107.

inadvertently destroying historic properties in pursuit of those missions.[61] The Preservation Act and the Advisory Council regulations confer important procedural rights on the consulting parties.[62] Professor Byrne explains that a federal agency that fails to properly consult with the appropriate consulting parties presents a reviewing court with a clear basis for holding that the agency failed to meet its section 106 obligations and thus acted in an "arbitrary and capricious" manner under the Administrative Procedure Act[63] ("APA").[64]

III. ADVISORY COUNCIL'S FORMAL COMMENTS: DO THEY EXCEED THE SCOPE OF THE COUNCIL'S AUTHORITY UNDER THE PRESERVATION ACT AND THE ADVISORY COUNCIL REGUALTIONS?

A. The Council's Do's and Don'ts after National Mining Association v. Slater.

On February 19, 2019, the Advisory Council provided the Secretary formal comments concerning the Navy's management of the Growler consultation. Specifically, the Council made five findings and five recommendations that seem substantive in nature, which causes a slight pause because of the D.C. district court's holding, in *Nat'l Mining Ass'n v. Slater*, discussed *infra*.[65] For example, the Council recommended that the Navy continue monitoring noise effects as Growler operations commence and pursue noise-reduction technology, despite the

[61] *See* J. Peter Byrne, Historic Preservation Law, at 107.
[62] Id. at 108.
[63] 5 U.S.C. § 500 et. seq.
[64] Id. at 145.
[65] 167 F. Supp. 2d. 265 (D.D.C. 2001)

fact that the Navy terminated the Growler consultation.[66] However, although most of these findings and recommendations seem substantive in nature, meaning that they request the Navy to take additional actions outside of the consultation process, under *Nat'l Mining* these comments would not be considered substantive and thus do not exceed the scope of the Council's authority.

The Preservation Act provides that a federal agency conducting section 106 consultation must provide the Council a reasonable opportunity to comment.[67] The Advisory Council regulations state that the Council may provide advisory opinions on the substance of any finding, determination, or decision made by the federal agency conducting consultation, and also on the adequacy of that agency's compliance with the regulations' procedures.[68] Accordingly, the Council has regulatory authority to advise the Navy to continue monitoring, for example, because in so doing the Council is opining on the Navy's determination that it has adequately monitored the effects of increased noise on the Historic District and Ebey's Reserve.

Nevertheless, the Secretary does not have a statutory obligation to adhere to any Council recommendation because the Act authorizes the Council to issue only binding procedural regulations for the section 106 process.[69] The Council does not

[66] *See* Letter from Milford Donaldson to Richard Spencer 6-7 (Feb. 19, 2019) (on file with the Advisory Council on Historic Preservation).
[67] *See* 54 U.S.C.S. § 306108.
[68] *See* 36 C.F.R. § 800.9(a).
[69] *See* Nat'l Mining Ass'n v. Slater, 167 F. Supp. 2d 265, 281 (D.D.C. 2001). (stating that Advisory Council on Historic Preservation agrees with the proposition that it can only issue procedural regulations for Section 106.)

have statutory authority to direct the Navy to take substantive action (e.g., to make a particular decision, to spend money, etc.) as part of the Growler consultation.

In *Nat'l Mining*, the D.C. district court explained that the Preservation Act does not authorize the Council to issue substantive regulations.[70] The plaintiffs claimed that the Advisory Council regulations contained substantive provisions that exceeded the scope of the Council's statutory authority.[71] The court reviewed several provisions, including the one allowing the Council to provide opinions to other federal agencies on how they had managed a particular consultation.[72]

Before determining whether any provision of the Advisory Council regulations were substantive, the district court found that the regulations deserved *Chevron* deference because the Council has statutory authority to administer the Act.[73] Under a *Chevron*-step one analysis, the court concluded that the Council could promulgate binding procedural regulations that governed how other federal agencies conducted section 106 consultation, but it could not issue binding substantive regulations.[74]

The district court acknowledged the great difficulty in distinguishing between substantive and procedural rules, reasoning that procedures affect

[70] Id. at 286.
[71] Id. at 284-85.
[72] *See* id. at 275-276.
[73] *See* id. at 280.
[74] *See* id. at 282-84.

substance since processes impact outcomes.[75] To distinguish between a substantive and a procedural rule, the court used the "acting-at-all/directly interferes" test, which provides that a regulation is only substantive when it prevents another federal agency from acting at all or directly interferes with that agency's exercise of a statutory right.[76] Elaborating on this standard, the court stated that a regulation that does not directly interfere with an agency's ability to ultimately decide on the undertaking or impose limitations that prevent an agency from acting is not substantive, even when it makes consultation procedurally more complex and delays an agency's ability to approve an undertaking.[77]

The D.C. district court found that the Act's requirement for the federal agency conducting consultation to "take into account the effect" of its undertaking on historic properties was a duty and a right that Congress expressly delegated to that agency.[78] It determined that a regulation that interfered with that right or prevented the agency from carrying out that duty would be substantive and thus invalid.[79] Applying this framework, the court found many of the Advisory Council regulations that the plaintiffs had challenged to be procedural.[80] Notably, it found the provision allowing for Council comment of another agency's management of a

[75] *See* id. (citing JEM Broadcasting Co. v. FCC, 306 U.S. App. D.C. 11, 22 F. 3d 320, 326 (D.C. Cir. 1994)); *see also* id. at 285 n. 19 (the court cautions that its substantive versus procedural inquiry is not to be confused with the APA's distinction between substantive and procedural rules under 5 U.S.C. § 553).
[76] *See* id. at 285.
[77] Id. at 286.
[78] Id. at 286
[79] Id. at 286.
[80] Id. at 286.

section 106 consultation to be procedural because these comments were non-binding on the other agency.[81]

However, the district court invalidated two of the Advisory Council regulatory provisions, having found that they imposed substantive obligations on federal agencies conducting section 106 consultation.[82] The court invalidated a provision that required a federal agency to continue consultation at the Council's request and another provision that permitted the Council to review an agency finding when another consulting party disagreed with that finding.[83] The court held that these two provisions "crossed the line" because they required an agency to continue consultation despite that agency's contrary determination.[84]

In summary, the Advisory Council has statutory authority to mandate the procedural steps a federal agency takes when it engages in consultation. The Council may also comment when it considers that an agency has fallen short of complying with its section 106 obligations. Nonetheless, the Council has no authority to require an agency to continue consulting until that agency aligns its findings and determinations with those preferred by the Council.

B. Analysis of the Council's Comments of the Navy's Management of the Growler Consultation.

[81] Id. at 275.
[82] Id. at 288.
[83] Id.
[84] Id.

The Advisory Council prefaced its formal comments (five findings and five recommendations) to the Secretary by stating that balancing the Navy's operational needs with the Historic District's important historic values *demands efforts that transcend mere procedural compliance* with the Preservation Act.[85] This statement set the tone for all of the Council's comments to the Secretary. Most, if not all, of the Council's recommendations were factually substantive, since they advised the Navy to spend money on nonprocedural items outside of the formal Growler consultation.

However, none of these recommendations "crossed the line" to being legally substantive under the *Nat'l Mining* "acting-at-all/directly interferes" test. Due to their non-binding nature, the Navy was not prevented from making any decision, including terminating consultation and moving forward on increasing Growler operations. Because the Council's comments remained within the scope of its authority, a reviewing court would give them significant weight when it reviews the Navy's management of the Growler consultation for "arbitrary and capricious" behavior.

In the following subsections (III.(B)(1)-(9)), I only review the Council's comments that either agreed with the Navy's position and thus aid the Navy in any future litigation or make a recommendation that the Secretary declined, which may

[85] *See* Letter from Milford Donaldson to Richard Spencer 1 (Feb. 19, 2019) (on file with the Advisory Council on Historic Preservation).

impose litigation risk. I review all five findings and two of the five recommendations. The subsections of Part III of this paper are organized based on the Council's findings and recommendations. Though these sections are organized as such, the text within each subsection also provides information taken from the Advisory Council regulations, the Navy's termination letter, and the Secretary's response letter that relate to that particular finding or recommendation to provide a complete analysis.

1. ***(Council Finding 1)**: The Council has no basis to question the Navy's determination that it must meet operational requirements by expanding existing Growler operations at Whidbey Island.*

Under the Advisory Council regulations, the Navy had to engage with the other consulting parties to develop and evaluate alternatives to "avoid, minimize, or mitigate" the adverse effects of increased operations on the Historic District and Ebey's Reserve.[86] Some consulting parties proposed that the Navy station the Growlers elsewhere to avoid noise increase.[87] Procedurally, the Navy had to consider this alternative.

Any finding, determination, or decision the Navy made during the Growler consultation is judicially reviewable under the APA.[88] Therefore, a reviewing court would take a "hard look" at the Navy's determination that it could not avoid the increase in noise by stationing the aircraft elsewhere. A plaintiff seeking

[86] *See* 36 C.F.R. § 800.9(a).
[87] *See* Letter from Milford Donaldson to Richard Spencer 2 (Feb. 19, 2019) (on file with the Advisory Council on Historic Preservation).
[88] *See* 5 U.S.C. §§ 702, 704.

review of this determination could use a contradictory finding of the Council to support an argument that the Navy acted in an "arbitrary and capricious" manner.[89]

Because the Council administers the Preservation Act, a reviewing court would give all of its findings significant weight. By having found there was not a basis to contradict the Navy's conclusion that it could not station the Growlers elsewhere, the Council provided the Navy with an expert opinion concluding that it did not act in an "arbitrary and capricious" manner by making this determination. As such, this finding made a future plaintiff's burden of persuasion on this issue significantly more difficult.[90]

The Council did not provide the Secretary with a recommendation relating to this finding, since it agreed with the Navy's position.

2. ***(Council Finding 2)**: Disagreements regarding the APE, which complicated the consultation, can be resolved through further monitoring of noise impacts if expanded operations go forward.*

To comply with the Advisory Council regulations, the Navy had to engage with the consulting parties to determine the APE, which it did.[91] After identifying the APE and the historic properties within it, the Navy found that increased Growler operations had the potential to indirectly affect five landscape

[89] *See* J. Peter Byrne, Historic Preservation Law, at 150-51.
[90] *See* id. at 151 (discussing that an Advisory Council opinion agreeing with an agency's decision that an undertaking will cause no adverse effects would make a plaintiff's burden of persuasion more difficult).
[91] *See* 36 C.F.R. § 800.4.

viewpoints[92] within the Historic District and Ebey's Reserve by increasing noise exposure in these areas.[93] In making this finding, the Navy used the 65-decibel (dB) day-night average sound level (DNL) noise contour—the standard reference point used by federal agencies for noise analysis.[94] The Navy relayed this finding to the consulting parties and the SHPO concurred.[95]

In its second finding, the Council acknowledged that the 65-dB DNL was the standard metric used by federal agencies to determine acceptable and unacceptable levels of noise exposure on nearby communities.[96] Despite this acknowledgment, the Council found that the Navy's rigid adherence to the standard metric was not the most effective way to address potential indirect and intangible adverse effects, such as changing perceptions of residents, property owners, and visitors about the Historic District and Ebey's Reserve, due to the increased noise.[97] It also found that predicting and measuring these types of effects could be elusive until expanded Growler operations are actually underway.[98]

Based on this finding, the Council offered the following recommendation.

3. ***(Council Recommendation A)**: The Navy, working with the stakeholders, should undertake additional efforts to monitor and, as needed, develop measures for addressing effects to the affected historic properties.*

[92] *See* Letter from Karnig Ohannessian to John Fowler (Exec. Sum. 3) (Nov. 30, 2018) (on file with the Department of the Navy). The Navy found that the undertaking would adversely affect the perceptual qualities of the entry to Coupeville from Ebey's Prairie into prairie and along Main Street, the view to Crockett Prairie and Camp Casey from Wanamaker Road, the view to Crockett Prairie and uplands from the top of Patmore Road, the view to Crockett Prairie and uplands from Keystone Spit, and the view from Smith Prairie from Highway 20, entering the Ebey's Landing National Historic Reserve.
[93] *See* id.
[94] *See* id.
[95] *See* id.
[96] *See* Letter from Milford Donaldson to Richard Spencer 5 (Feb. 19, 2019) (on file with the Advisory Council on Historic Preservation).
[97] *See* id.
[98] *See* id.

Based on the Council's second finding, it recommended that the Navy continue engaging with the consulting parties to develop a noise-monitoring program to measure the actual increase in noise after the Navy began the Growler undertaking.[99] It also recommended the Navy pay special attention to the interaction of property owners and tourists with the historic properties to gain a complete understanding of the intangible adverse effects Growler operations have on the Historic District and Ebey's Reserve.[100]

The Secretary responded to this recommendation by declining to pursue further noise-monitoring efforts with the consulting parties.[101] He reasoned that the Navy had already conducted a robust analysis of the potential adverse effects by employing the standard methodology for noise modeling.[102] He further reasoned that the Navy's findings closely correlated with independent noise measurements taken by the National Park Service for Ebey's Reserve.[103]

The Advisory Council regulations required the Navy to determine the potential adverse effects of increased Growler operations on historic properties within the APE.[104] This provision was a binding procedural requirement for the Navy. However, once the Navy made a finding, which it has a statutory duty to

[99] *See* id. at 6-7.
[100] *See* id.
[101] *See* Letter from Richard Spencer to Milford Donaldson 2 (Mar. 8, 2019) (on file with the Department of the Navy).
[102] *See* id.
[103] *See* id.
[104] *See* 36 C.F.R. § 800.5(a).

make under the Preservation Act, it did not have a requirement to reconsider the finding.[105] Moreover, once the Navy terminated the Growler consultation, the Council did not have the authority to direct the Navy to reengage in consultation or to continue monitoring outside of the section 106 process.[106]

The only portion of the Advisory Council regulations that even contemplates a federal agency continuing consultation after formal section 106 consultation ends is the section on memorandums of agreement ("MOA").[107] The MOA regulation describes continued consultation as a negotiated term of an agreement between a federal agency and the consulting parties.[108] Under this framework, a federal agency agrees to continue consultation as consideration for other negotiated terms. The Navy did not enter into a MOA during the Growler consultation because the parties could not agree on mitigation measures.[109] As such, while the Council was well within its regulatory authority to recommend that the Navy continue monitoring, the recommendation itself is somewhat far afield of the Council's regulatory scheme.

Recall, in *Nat'l Mining*, the D.C. district court invalidated a regulation authorizing the Council to direct federal agencies to continue engaging with

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[105] *See* 54 U.S.C.S. § 306108; *see also generally* 36 C.F.R. Part 800; *see also* Nat'l Mining 167 F. Supp. 2d at 288.
[106] *See* Nat'l Mining, 167 F. Supp. 2d at 288.
[107] *See* 36 C.F.R. § 800.6(c)(4)-(6).
[108] *See* id. (stating where signatories agree it is appropriate, a memorandum of agreement shall include a provision for monitoring and reporting on the undertaking's implementation and provisions to deal with the subsequent discovery or identification of additional historic properties affected by the undertaking).
[109] *See* Letter from Karnig Ohannessian to John Fowler 1 (Nov. 30, 2018) (on file with the Department of the Navy).

consulting parties after that agency had terminated consultation.[110] Though the Council, in the Growler case, essentially recommends an action (e.g., continued engagement over monitoring) for which it has no authority to direct, the recommendation does not "cross the line" under the *Nat'l Mining* test because it is non-binding and does not prevent the Navy from moving forward on the Growler undertaking. However, because this recommendation essentially opposes the Navy's decision to terminate consultation, a future plaintiff could attempt to use it to claim that the Navy acted unreasonably by not continuing to monitor.

Nonetheless, a reviewing court would likely not rule that the Navy acted unreasonably by declining to continue monitoring. To find the Navy acted unreasonably, a court would also have to determine that the monitoring the Navy had conducted was unreasonable, essentially having to conclude the use of the standard 65-dB DNL metric as a methodology was unreasonable. Additionally, the court would have to distinguish the noise measurements taken by the National Park Service from the Navy's findings, even though the Park Service's findings correlated with the Navy's findings for roughly the same geographic area.

A court would be unlikely to determine the standard metric was an unreasonable methodology; as such a finding would go well beyond the traditional role of a court to narrowly review agency action based on the administrative record

[110] *See* Nat'l Mining, 167 F. Supp. 2d at 288.

before an agency at the time it made its determination. As explained by the United States Supreme Court, in *Citizens to Preserve Overton Park v. Volpe*, when determining whether an agency's finding is "arbitrary and capricious," the court must consider whether the decision was based on a consideration of the relevant factors and whether there had been a clear error of judgment.[111] The *Overton Park* Court continued to explain that a court's inquiry into the facts should be searching and careful but also narrow.[112] A court is not empowered to substitute its judgment for that of the agency.[113]

Therefore, although a reviewing court may agree with the Council's opinion that the Navy should have used a more sensitive noise measurement metric, the court could not in good-faith conclude that by using the standard 65-dB DNL metric the Navy failed to consider the relevant factors or made a clear error of judgment. A court that would conclude the Navy acted unreasonably using the standard metric would have substituted its judgment for that of the Navy.

Additionally, a reviewing court that determines the Navy acted unreasonably by declining to continue a monitoring program would not be adhering to the long-standing administrative law presumption that a federal agency's spending decisions are "committed to agency discretion by law" and not judicially reviewable.[114] The Supreme Court, in *Lincoln v. Vigil*, explained the allocation of funds from a lump-

[111] 401 U.S. 402, 416 (1971).
[112] Id.
[113] Id.
[114] *See* 5 U.S.C. § 701(a)(2).

sum appropriation is an administrative decision regarded as committed to agency discretion.[115] This presumption exists to provide agencies the ability to adapt to changing circumstances and to meet their statutory responsibilities in ways they consider most effective.[116] In *Nat'l Trust for Hist. Pres. v. Blanck*, a historic preservation case concerning whether the Army was required to spend money on preserving historic buildings that it owned, the D.C. district court concluded that neither the Preservation Act nor the APA authorized the court to direct the Army to spend money on these buildings.[117]

Together, these two decisions show that neither the APA nor the Preservation Act authorize a reviewing court to direct federal agency spending. Accordingly, a court would likely refrain from ordering the Navy to spend funds on continued monitoring.

4. ***(Council Finding 3)**: Foreseeable adverse effects were considered by the Navy, but further study is advisable if the expanded operations are pursued.*

The Advisory Council regulations required the Navy to consult with the consulting parties over what types of adverse effects increased Growler operations would have on historic properties within the APE.[118] The term "adverse effect" means one that may alter any characteristic of a historic property that qualifies it

[115] 508 U.S. 182, 192 (1993).
[116] *See* id.
[117] 938 F.Supp. 908, 925 (D.D.C. 1996).
[118] *See* 36 C.F.R. § 800.5(a).

for inclusion in the National Register.[119] It includes reasonably foreseeable effects caused by an undertaking that occur later in time, are farther removed in distance, or are cumulative.[120]

After four years of consultation, the Navy determined that five landscape viewpoints that contributed to the Historic District and Ebey's Reserve were subject to indirect adverse effects from increased noise.[121] The Washington SHPO agreed.[122] However, some consulting parties claimed the Navy had not adequately identified or addressed the adverse effects on the agricultural and tourism industries for all of Whidbey Island, even for areas beyond the APE.[123]

The Council found the Navy had considered all reasonably foreseeable effects of increased operations on historic properties within the APE and acknowledged the Navy had satisfied this regulatory requirement.[124] The Council noted that determining whether historic property owners would stop investing in or abandon their properties because of the additional noise was not a reasonably foreseeable effect at the present time.[125] Nevertheless, the Council opined that the Navy should continue to monitor for these unreasonably foreseeable effects to see whether they ever become reasonably foreseeable.[126]

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[119] *See* 36 C.F.R. § 800.5(a)(1).
[120] *See* 36 C.F.R. § 800.5(a)(1).
[121] *See* Letter from Karnig Ohannessian to John Fowler (Exec. Sum. 2) (Nov. 30, 2018) (on file with the Department of the Navy).
[122] *See* id.
[123] *See* Letter from Milford Donaldson to Richard Spencer 5 (Feb. 19, 2019) (on file with the Advisory Council on Historic Preservation).
[124] *See* id.
[125] *See* id.
[126] *See* id.

5. ***(Council Recommendation A (again))**: The Navy working with the stakeholders, should undertake additional efforts to monitor and, as needed, develop measures for addressing effects to the affected historic properties.*

Since the Council's second and third findings, discussed *supra*, are similar, the Council offered one recommendation for both findings. The Secretary responded to the Council's recommendation, as it relates to the third finding, by declining to further study the possibility that historic property owners would stop investing in or abandon their properties.[127] He reasoned that the Navy should not study effects that the Council had acknowledged were not reasonably foreseeable.[128]

Analyzing the Council's recommendation with regards to the third finding is essentially the same as analyzing it in relation to the second finding, discussed *supra*. By finding the Navy satisfied the regulation's requirement for determining foreseeable adverse effects, the Council insulated the Navy from a reviewing court determination that it had acted unreasonably. Though the Council recommended the Navy continue monitoring unreasonably foreseeable effects, a court would likely refrain from directing the Navy to expend funds on any such action because of the administrative law presumption that agency spending is committed to agency discretion by law. In addition, the Council had concluded that these effects were not reasonably foreseeable.

[127] *See* Letter from Richard Spencer to Milford Donaldson 2 (Mar. 8, 2019) (on file with the Department of the Navy).
[128] *See* id.

6. ***(Council Finding 4)**: Mitigation measures negotiated in accordance with Section 106 procedures reached and impasse due to disagreement on appropriate mitigation and also due to time constraints.*

After determining the potential effects of increased operations on historic properties within the APE and receiving concurrence from the Washington SHPO, the Navy had to continue to engage with the consulting parties to resolve these effects.[129] Specifically, the Advisory Council regulations required the Navy to develop and evaluate alternatives to its proposed undertaking that could avoid, minimize, or mitigate the additional noise on the historic properties[130] Between June and November of 2018, the Navy participated in meetings, conference calls, and visits with the consulting parties and also completed several rounds of public engagement to discuss mitigation measures.[131] However, on November 30, 2018, the Navy terminated the Growler consultation, having concluded that the parties were at an impasse over appropriate mitigation measures.[132]

The Navy, in its termination letter, explained that from its perspective the impasse occurred because the consulting parties wanted the Navy to pay for mitigation measures that were unrelated to the historic properties within the

[129] *See* 36 C.F.R. § 800.6.
[130] *See* id. § 800 6(a).
[131] *See* Letter from Karnig Ohannessian to John Fowler (Exec. Sum. 2) (Nov. 30, 2018) (on file with the Department of the Navy).
[132] *See* id. at 1.

APE.[133] The Navy considered such measures beyond the scope of the requirement to avoid, minimize, or mitigate effects on historic properties.[134]

Before terminating consultation, the Navy offered as a final proposal to spend up to $1 million to preserve the National Park Service's Ferry House located in Ebey's Reserve;[135] to advocate for the designation of Whidbey Island as a Sentinel Landscape;[136] and to pursue funding in future fiscal years for easements that would preserve the rural quality of the landscape.[137] As a counteroffer, the Washington SHPO proposed that the Navy provide $9.8 million for mitigation measures to include: (1) $3.8 million for the Ferry House; (2) $4 million for Coupeville Warf;[138] and (3) $2 million for Fort Casey[139] and Fort Ebey State Parks[140].[141]

Recall, the Council's first finding agreed with the Navy that avoiding additional noise within the Historic District and Ebey's Reserve by stationing the additional Growler's elsewhere was not a viable alternative for operational reasons.[142] In its fourth finding, the Council noted that it had received many

[133] *See* id. at (Exec. Sum. 2).
[134] *See* id.
[135] Built in 1860 by Winfield Scott Ebey, the Ferry House provided shelter and support for travelers making their way up and down Admiralty inlet and to families who settled on the island.
[136] Sentinel landscapes are working or natural lands important to the Nation's defense mission—places where preserving the working and rural character of key landscapes strengthens the economies of farms, ranches, and forests; conserves habitat and natural resources; and protects vital test and training missions conducted on those military installations that anchor these landscapes. The U.S. Departments of Agriculture, Defense, and Interior established the Sentinel Landscapes Partnership in 2013. The Partnership is a nationwide federal, state, local, and private collaboration dedicated to promoting resource sustainability and the preservation of agricultural and conservation land uses in areas surrounding military installations.
[137] *See* Letter from Karnig Ohannessian to John Fowler (Exec. Sum. 4) (Nov. 30, 2018) (on file with the Department of the Navy).
[138] Coupeville Warf was established in 1967, located on Whidbey Island in the Puget Sound.
[139] Fort Casey State Park is located on Whidbey Island. It is a Washington state park and a historical district within Ebey's Reserve.
[140] Fort Ebey State Park lies within Ebey's Reserve and overlooks the Strait of Juan de Fuca.
[141] *See* Letter from Karnig Ohannessian to John Fowler (Exec. Sum. 4) (Nov. 30, 2018) (on file with the Department of the Navy).
[142] *See* Letter from Milford Donaldson to Richard Spencer 4 (Feb. 19, 2019) (on file with the Advisory Council on Historic Preservation).

comments stating that no amount of mitigation would ever be adequate and that avoiding the adverse effects by stationing the aircraft elsewhere was the only agreeable alternative.[143] In response to these comments, the Council explained that the Preservation Act only requires a federal agency to consider alternatives to avoid, minimize, or mitigate adverse effects.[144] The Act does not mandate an agency to take specific mitigation measures or prescribe a substantive standard to judge the adequacy of the measures chosen by the agency.[145]

However, in the following recommendation, the Council advises the Navy to continue exploring mitigation measures.

7. ***(Council Recommendation B)**: The Navy should commit to carrying out mitigation measures in further discussions with stakeholders.*

The Council recommended that the Navy continue engaging with the consulting parties despite the Navy having terminated the Growler consultation, because the parties had not agreed on mitigation measures.[146] The Council further advised the Navy to develop additional mitigation measures based on the feedback it received from additional monitoring.[147] Additionally, it recommended the Navy pursue a broader range of mitigation measures, beyond merely transferring funds

[143] *See* id. at 5.
[144] *See* id. at 5-6.
[145] *See* id.
[146] *See* id. at 7.
[147] *See* id.

to the National Park Service, to include using the Council as a financial conduit to provide funding to organizations that the Navy could not directly fund.[148]

The Secretary responded to these recommendations by declining to pursue further engagement with the consulting parties and notifying the Council that he had decided to carry out the mitigation measures contained in the Navy's final offer.[149] The Secretary also declined to examine creative mitigation funding measures, such as using the Council as a middleman for moving money.[150]

As previously discussed, the Council does not have the authority to direct the Navy to continue engaging with the consulting parties outside of the formal Growler consultation or to direct Navy spending decisions. The Navy had to consult about alternatives that would avoid, minimize, or mitigate the additional noise during the Growler consultation; however, the Navy had the statutory right to determine which mitigation measures it would pursue. It could make this determination in agreement with the consulting parties or without an agreement as the Secretary has done in this situation.

The Navy completely followed the "letter of the law" in consulting over mitigation measures, having spent six months engaging with the consulting parties. During this period, the Navy changed its mitigation proposal several times based on feedback it received from the other parties. Initially, it had offered $250,000 to

[148] *See* id.
[149] *See* Letter from Richard Spencer to Milford Donaldson 3 (Mar. 8, 2019) (on file with the Department of the Navy).
[150] *See* id.

support preservation of landscape features within the APE.[151] At the suggestion of two of the other parties, the Navy amended its offer to include $400,000 for a preservation project at the Ferry House.[152] Afterwards, at the suggestion of the Council and the Washington SHPO, the Navy agreed to spend up to $1 million on preservation projects for the Ferry House.[153]

The Navy decided to terminate consultation only when it had determined that the other parties wanted it to pursue mitigation measures outside the scope of the Preservation Act and that these parties would not budge from this position. The Navy felt this precluded productive discussion.[154] Hence, the Navy satisfied, at least in the technical sense, the procedural requirement to consult over alternatives that could mitigate the adverse effects of increased Growler operations.

8. ***(Council Finding 5)**: Challenges in the coordination of the Section 106 and NEPA review processes complicated timelines for consultation.*

The Advisory Council regulations encourage federal agencies to coordinate compliance with section 106 of the Preservation Act with its requirements under the National Environmental Policy Act ("NEPA").[155] The regulations also advise federal agencies to include consideration of an undertaking's likely affects on historic properties in its NEPA environmental impact statement ("EIS").[156]

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[151] *See* Letter from Karnig Ohannessian to John Fowler (Exec. Sum. 3) (Nov. 30, 2018) (on file with the Department of the Navy).
[152] *See* id.
[153] *See* id.
[154] *See* id. at (Exec. Sum 1-4).
[155] *See* 36 C.F.R. § 800.8.
[156] *See* id. § 800.8(a)(1).

Between 2014 and 2018, the Navy coordinated its Preservation Act and NEPA requirement by responding to approximately 400 cultural resource-related comments before publishing the Final EIS.[157] Additionally, the Navy shared a draft MOA for the Growler consultation on its website, to which it received over 70 comments that it reviewed and considered.[158]

In its termination letter, the Navy explained that it had to decide on the Growler undertaking because additional delay would jeopardize its ability to meet operational requirements.[159] The Navy further explained that it had to conclude the Growler consultation to complete its NEPA analysis, so that it could initiate the Growler undertaking.[160]

Most important to an analysis of the Navy's possible litigation risk, the Council found that the discussion regarding alternatives to avoid, minimize, or mitigate, which occurred between June and November of 2018, *was severely limited* given the timelines for concluding the NEPA process.[161] By burying this conclusion three-quarters of the way through its comments to the Secretary without any further elaboration, the Council has essentially hidden an "elephant in a mousehole."[162] Though the Navy absolutely complied with the "letter of the law" (the Advisory Council's procedures) by consulting over mitigation measures for

[157] *See* Letter from Karnig Ohannessian to John Fowler (Exec. Sum. 1-2) (Nov. 30, 2018) (on file with the Department of the Navy).
[158] *See* id. at (Exec. Sum. 2).
[159] *See* id. at (Exec. Sum. 4).
[160] *See* id.
[161] *See* Letter from Milford Donaldson to Richard Spencer 6 (Feb. 19, 2019) (on file with the Advisory Council on Historic Preservation).
[162] *See* Whitman v. Am. Trucking Ass'n, Inc., 531 U.S. 457, 468 (Scalia, J.) (stating that Congress does not hide elephants in mouseholes to mean Congress does not alter fundamental details of a regulatory scheme in vague terms or ancillary provisions).

six months, the Council essentially stated that the Navy failed to observe the "spirit of the law" by adequately consulting over these measures.

Professor Byrne explains that a federal agency presents a reviewing court with a clear basis for holding that it failed to meet its Section 106 obligations and thus acted in an "arbitrary and capricious" manner under the APA when it does not properly conduct consultation.[163] A reviewing court would give significant weight to this Council finding in particular. Unlike the other findings and recommendations that call for the Navy to continue engaging with the consulting parties outside of formal consultation or to spend money, this finding concerns the Navy's management of procedural aspects of the Growler consultation.

The Council has statutory authority to govern how federal agencies conduct section 106 consultation and has regulatory authority to issue advisory opinions regarding the adequacy of an agency's compliance with the Council's procedures.[164] The Council has found that the Navy inadequately complied with the requirement to develop and evaluate mitigation measures during the Growler consultation. Accordingly, this finding imposes and uncertain amount of litigation risk on the Navy.

9. *Revisiting **(Council Recommendation B)** in light of the Council's finding that the Navy severely limited discussion over mitigation measures.*

[163] *See* J. Peter Byrne, Historic Preservation Law, at 150-51.
[164] *See* 54 U.S.C.S. § 306108; 36 C.F.R. § 800.9(a).

In light of the Council's fifth finding, the Navy should take a "hard look" at the adequacy of the portion of the Growler consultation that dealt with mitigation measures and reconsider continuing informal discussions with the consulting parties.[165] Though the Council cannot direct the Navy to continue discussions, accepting the Council's recommendation may be a strategically optimal choice, as the Navy could still move forward with the Growler undertaking while also minimizing litigation risk. Continuing to engage in good-faith discussions over mitigation measures should minimize the risk that a reviewing court would find the Navy was acting unreasonably, even if it agreed with the Council's assessment that consultation over mitigation measures had been severely limited.

CONCLUSION

In managing the Growler consultation, the Navy adhered to all of the procedural requirements in the Advisory Council regulations. Accordingly, the Navy complied with its statutory duty under the National Historic Preservation Act.

In providing comments about the Navy's management of the Growler consultation, the Council did not exceed the scope of its authority. Nonetheless, there is essentially zero risk in the Secretary of the Navy declining most of the

[165] This paper only reviews the Navy's termination of the Growler consultation, the Advisory Council's comments, and the Secretary of the Navy's response to identify where there may be some degree of litigation risk for the Navy. It is beyond the scope of this paper to determine the level of risk that may exist.

Council's recommendations, since they call for the Navy to take action outside of the Growler consultation process and to spend funding.

However, the Council's conclusion that discussion over mitigation measures was severely limited imposes uncertain litigation risk on the Navy that a reviewing court would find that it had acted in an "arbitrary and capricious" manner. To protect itself from such a ruling, the Navy should take a "hard look" at its management of this portion of the consultation to develop a counterargument and also adopt the Council's recommendation to commit to carrying out mitigation measures in further discussions with stakeholders.