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## ENVIRONMENTAL JUSTICE FOR ALL? THE NAVY'S RECENT FAILURE TO PROTECT NORTH CAROLINA'S CITIZENS

WILLIAM S. EUBANKS II\*

### I. INTRODUCTION

In recent campaigns to expand its domestic military training operations, the United States Navy singled out North Carolina as the preferred site for two of its projects. The Navy initiated the first project, the Outlying Landing Field (OLF), in October of 2000.<sup>1</sup> For seven years, the Navy persisted in its attempts to place an OLF in Washington County, North Carolina despite scrutiny and overwhelming political opposition.<sup>2</sup> Feeling the pressure of further litigation and mounting public disapproval, the Navy finally abandoned its Washington County OLF plans on January 22, 2008, but remains steadfast in its efforts to place an OLF in North Carolina or Virginia.<sup>3</sup> In 2003, the Navy announced plans for the second project, the Undersea Warfare Training Range (USWTR)<sup>4</sup>, and published its preliminary draft environmental impact statement (DEIS) for the project in October of 2005.<sup>5</sup> The USWTR is currently in its preliminary stages, but the Navy has identified a location off the North Carolina coast as its preferred site for the project.<sup>6</sup>

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\* LL.M. candidate in Environmental Law at Vermont Law School, July 2008; J.D., magna cum laude, from North Carolina Central University School of Law, 2007; B.A. from the University of North Carolina at Chapel Hill, 2004. I would like to dedicate this article to those residents of North Carolina that have bravely fought the Navy to prevent an injustice on their native soil. I would like to thank Michelle Nowlin and the wonderful, committed attorneys and staff at the Southern Environmental Law Center for the opportunity to work on these critical issues. Additionally, I would like to thank Helen, my family, and my friends for their constant support of my pursuit of social change.

1. Southern Environmental Law Center, Navy's Outlying Landing Field (NC), Timeline, [http://www.southernenvironment.org/cases/navy\\_olf/timeline.htm](http://www.southernenvironment.org/cases/navy_olf/timeline.htm) (last visited Feb. 22, 2008).

2. *See id.*

3. Press Release, Southern Environmental Law Center, No Outlying Landing Field for Washington County (Jan. 22, 2008), [http://www.southernenvironment.org/newsroom/2008/01-22\\_OLF\\_victory.htm](http://www.southernenvironment.org/newsroom/2008/01-22_OLF_victory.htm).

4. United States Navy, Project Summary for USWTR, <http://projects.earthtech.com/USWTR/PDFs/Fact%20Sheets/Project%20Summary.pdf> (last visited Mar. 25, 2008).

5. United States Navy, Draft Environmental Impact Statement for USWTR, <http://projects.earthtech.com/USWTR/EIS/DEIS.htm> (last visited Mar. 25, 2008).

6. United States Navy, Project Overview: USWTR Description, [http://projects.earthtech.com/USWTR/Project\\_Overview\\_index.htm](http://projects.earthtech.com/USWTR/Project_Overview_index.htm) (last visited Feb. 20, 2008).

At first glance, it appears that the Navy selected the North Carolina sites for each project after thorough reviews of possible alternatives, but the following analysis will show that the Navy failed to conduct appropriate research in preparation for these projects. Additionally, the Navy allowed personal preferences and political pressure to influence the selection process of the OLF site, which raises questions of credibility regarding the selection of the USWTR site. The two projects ultimately place the burden on a demographic in Eastern North Carolina primarily composed of minority citizens with substantially low socioeconomic status.

This article will first focus on the Navy's OLF by providing relevant background information and by analyzing the judicial opinion of the Fourth Circuit Court of Appeals to determine whether the Navy acted within the bounds of the law. Next, this article will examine the subjective intent of the Navy in reaching its decision in the OLF selection process and will highlight the Navy's failure to fairly conduct the process, which creates a serious environmental justice concern. The article will then discuss background information on the USWTR and will review the Navy's failures to date in the USWTR project. Finally, the article will conclude by emphasizing the lessons of the OLF process in order to protect North Carolina's citizens from similar abuses by the United States Navy in the USWTR project and in future projects that may be undertaken.

## II. THE OUTLYING LANDING FIELD

### A. Background

The OLF site that the Navy proposed in Washington County, North Carolina is located on 30,000 acres that overlap critical habitats and migratory resting areas for numerous animal species.<sup>7</sup> The OLF site would have been adjacent to parts of the Pocosin Lakes National Wildlife Refuge, which is estimated to accommodate 100,000 tundra swans and snow geese each winter and is also home to hundreds of thousands of other waterfowl.<sup>8</sup> More than eighty percent of the eastern population of tundra swans migrate to northeastern North Carolina each winter and one quarter of the entire population inhabits the wildlife refuge permanently.<sup>9</sup> In addition, endangered red wolves in-

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7. Southern Environmental Law Center, Timeline, *supra* note 1.

8. Southern Environmental Law Center, Navy's Outlying Landing Field (NC), What's at Stake?, [http://www.southernenvironment.org/cases/navy\\_olf/whats\\_at\\_stake.htm](http://www.southernenvironment.org/cases/navy_olf/whats_at_stake.htm) (last visited Feb. 22, 2008).

9. *Id.*

habit the area in and around the proposed OLF.<sup>10</sup> Any naval operations, whether conducted on the ground or in the air, would cause problems for both the waterfowl and the endangered red wolf population in the refuge.<sup>11</sup> The proposed military operations to be conducted at the OLF are also very noisy, which is what initially prompted the Navy to seek a new site for an OLF.<sup>12</sup>

Currently, the Navy maintains an OLF at Fentress Field, which is located near Chesapeake, Virginia.<sup>13</sup> In October of 2000, the Navy stated that a new OLF would be considered to mitigate noise complaints from residents in Chesapeake and from residents in the nearby cities of Hampton and Virginia Beach.<sup>14</sup> In August of 2002, the Navy released its Draft Environmental Impact Statement (DEIS), which listed North Carolina's Washington County as one of its two preferred sites for the proposed OLF.<sup>15</sup> In July of 2003, the Navy released its final Environmental Impact Statement (EIS), which emphasized the Washington County site as its preference for the OLF.<sup>16</sup> After two months of public comment, the Navy announced its final decision to locate the OLF in Washington County, despite the potential destruction of critical habitats for multiple animal species.<sup>17</sup> Following this announcement, environmental groups immediately filed a lawsuit in the United States District Court for the Eastern District of North Carolina.<sup>18</sup> In February of 2005, the district court issued a permanent injunction against the Navy and required the Navy to supplement its EIS because it found that the Navy acted "in contravention of [the National Environmental Policy Act]" and took the "uninformed action that [the Act] was enacted to prevent."<sup>19</sup> On appellate review, the Fourth Circuit held that the Navy did not adequately comply with the applicable environmental laws and affirmed the district court's order for a Supplemental Environmental Impact Statement (SEIS), but limited the scope of the injunction.<sup>20</sup> The major issues presented to the Fourth Circuit are discussed below.

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10. Southern Environmental Law Center, Navy's Outlying Landing Field (NC), Red Wolf Habitat, [http://www.southernenvironment.org/cases/navy\\_olf/red\\_wolf\\_map.htm](http://www.southernenvironment.org/cases/navy_olf/red_wolf_map.htm) (last visited Feb. 22, 2008).

11. Southern Environmental Law Center, What's at Stake?, *supra* note 8.

12. Southern Environmental Law Center, Timeline, *supra* note 1.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. Washington County v. U.S. Dep't of the Navy, 357 F. Supp. 2d 861, 878 (E.D.N.C. 2005).

20. See Nat'l Audubon Soc'y v. U.S. Dep't of the Navy, 422 F.3d 174 (4th Cir. 2005).

## B. *Legal Analysis*

To properly exercise the authority to construct a project that “significantly affect[s] the quality of the human environment,”<sup>21</sup> a federal agency is required to conduct research and to prepare an EIS pursuant to the National Environmental Policy Act (NEPA).<sup>22</sup> Among other things, the EIS must discuss (1) the environmental impact of the agency’s proposed action,<sup>23</sup> (2) any unavoidable impacts,<sup>24</sup> (3) a comparative analysis of the preferred site for the current project to approved sites for prior projects with similar environmental concerns,<sup>25</sup> (4) the cumulative environmental impacts of the proposed action,<sup>26</sup> and (5) alternatives to the proposed action.<sup>27</sup> Courts have interpreted NEPA to impose a “hard look” standard, which requires agencies to engage in a “thorough investigation into the environmental impacts . . . and a candid acknowledgment of the risks that those impacts entail.”<sup>28</sup> Further, “[a]gencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements.”<sup>29</sup> In the OLF case, the Fourth Circuit found that “the Navy failed to undertake a hard environmental look,” thus defying the congressional mandate of NEPA.<sup>30</sup> The following discussion will provide specific examples of the Navy’s disregard for NEPA and its failure to protect North Carolina’s citizens and wildlife in its EIS process.

First, NEPA requires the Navy to reveal any environmental impacts, with special emphasis on impacts that will be unavoidable.<sup>31</sup> Due to the proximity of the proposed OLF to the Pocosin Lakes National Wildlife Refuge, the Navy had the burden of researching and disclosing the potential impacts on the different waterfowl populations in and around the refuge.<sup>32</sup> At trial, the Navy claimed that it met the “hard look” standard of NEPA by conducting Bird Aircraft Strike Hazard (BASH) evaluations, consulting with natural resource agencies, reading scientific literature reviews, doing a comparative analysis with other locations, and undertaking a cumulative impact

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21. 42 U.S.C. § 4332(2)(C) (2003).

22. 40 C.F.R. § 1501.4 (2007).

23. 42 U.S.C. § 4332(2)(C)(i).

24. 42 U.S.C. § 4332(2)(C)(ii).

25. *Nat’l Audubon Soc’y*, 422 F.3d at 194.

26. 40 C.F.R. § 1508.7.

27. 42 U.S.C. § 4332(2)(C)(iii).

28. *Nat’l Audubon Soc’y*, 422 F.3d at 185.

29. 40 C.F.R. § 1502.24.

30. *Nat’l Audubon Soc’y*, 422 F.3d at 198.

31. 42 U.S.C. § 4332(2)(C)(ii).

32. *Id.*

analysis.<sup>33</sup> Based on its investigation, the Navy determined in its EIS “that migratory waterfowl would not be affected by an OLF” at the Washington County site.<sup>34</sup> The Fourth Circuit held, however, that the EIS was “inadequate” because the first visit to the proposed North Carolina OLF site by the Navy’s contractor occurred during the summer of 2001 and lasted approximately four hours.<sup>35</sup> Not only did the short visit preclude any detailed investigation into the possible impacts, but the visit was also conducted at a time of year when the migratory waterfowl were not present in the wildlife refuge for examination.<sup>36</sup> Additionally, testimony showed that subsequent Navy visits to the refuge consisted of “driving around the site . . . focus[ing] mostly on agricultural patterns and residential developments . . . [and looking at] the effects of aircraft noise on nearby schools and churches.”<sup>37</sup> For these reasons, the Fourth Circuit concluded that the Navy did not have “a meaningful opportunity to conduct systematic observations or perform species-specific studies” of the waterfowl in preparation of its EIS, falling short of the burden imposed by NEPA.<sup>38</sup> In order to correct this deficiency, the Fourth Circuit ordered the Navy to supplement its deficient EIS with a more thorough Supplemental EIS (SEIS).

Second, NEPA requires the Navy to conduct detailed BASH analyses due to the strike hazards posed by birds.<sup>39</sup> According to its EIS, the Navy acknowledges “that bird strikes have been responsible for aircraft damage and occasionally pilot death[s] and serious injur[ies].”<sup>40</sup> The concern for pilot injury or death is magnified at the Washington County site due to the high volume of birds near the refuge and to the frequent low-altitude flight operations that the Navy plans to conduct from the OLF.<sup>41</sup> At trial, the Navy estimated that it would perform 31,650 annual operations, which amounts to a take-off or landing every fifteen minutes.<sup>42</sup> In its EIS, however, the Navy “reach[ed] the conclusion that the impact on waterfowl would be minor” and that the waterfowl near the refuge did not pose a significant threat to pilots.<sup>43</sup>

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33. *Nat'l Audubon Soc'y*, 422 F.3d at 186.

34. *Id.*

35. *Id.* at 188.

36. *Id.*

37. *Id.*

38. *Id.* at 189.

39. *See id.*

40. *Id.* at 189-90.

41. *Id.* at 181.

42. *Id.*

43. *Id.* at 191.

In contrast, many experts in the field of military flight operations commented that the Washington County site was a poor choice for an OLF. Jeffrey J. Short, a retired United States Air Force Colonel known as “the father of the United States Air Force Bird Avoidance Model,” sent a letter to the Navy in April of 2003 that stated, “In 25 years of dealing with military BASH issues, I cannot recall a worse place to situate an airfield for jet training.”<sup>44</sup> Additionally, Ronald L. Merritt, former Chief of the United States Air Force BASH Task Force, sent a letter to the Navy in October of 2003 that stated, “There are very few places in the United States where this level of threat exists.”<sup>45</sup> Despite these entreaties from BASH experts, the Navy claimed that it properly conducted BASH analyses in the EIS and that the risk of bird aircraft strikes was minor.<sup>46</sup> However, the Fourth Circuit held that the steps taken by the Navy in conducting its BASH analyses were “merely preliminary,” and “all the facts warranted a more searching investigation into BASH risk.”<sup>47</sup> Based on “the serious environmental consequences of BASH and the proximity of the proposed OLF to a bird sanctuary,” the Fourth Circuit required “a more extensive investigation into BASH issues” to be included in the SEIS.<sup>48</sup>

Third, NEPA requires the Navy to review relevant scientific studies detailing the effects of aircraft on the activity of waterfowl.<sup>49</sup> The Fourth Circuit held, however, that “[t]he Navy’s cursory review of relevant scientific studies . . . further illustrates its failure to take a hard look at the environmental impacts of an OLF” at the Washington County site.<sup>50</sup> Additionally, most of the studies cited by the Navy in its EIS and in its briefs to the Fourth Circuit “do not support the Navy’s conclusions that waterfowl ‘would not be affected’ by the OLF . . . or that its impacts on waterfowl in the area would be ‘minor.’”<sup>51</sup> Instead, the studies cited by the Navy “suggest, at the least, that Super Hornet [aircraft] activities around [the Washington County site] might lead to substantial disturbance of snow geese . . . [and] [t]he Navy neither distinguishes this evidence adequately nor provides sufficient counterevidence.”<sup>52</sup> Based on this disregard for NEPA, the Fourth Circuit held that the Navy “research[ed] in a cursory manner” and

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44. North Carolinians Opposed to the Outlying Landing Field, Facts and Timeline, <http://noolf.com/index.cfm/SID.370> (last visited Feb. 22, 2008).

45. *Id.*

46. *Nat’l Audubon Soc’y*, 422 F.3d at 191.

47. *Id.* at 192.

48. *Id.*

49. *Id.* at 193.

50. *Id.* at 192.

51. *Id.*

52. *Id.*

“swe[pt] negative evidence under the rug.”<sup>53</sup> As such, the court required the Navy to address this deficiency in the SEIS, ordering the Navy to support its conclusions with “a sufficient factual foundation.”<sup>54</sup>

Fourth, the Court of Appeals for the Fourth Circuit noted that NEPA requires a comparative analysis of the preferred site for the current project to sites approved under NEPA review for prior projects with similar environmental concerns.<sup>55</sup> To constitute a sufficient comparative analysis, an agency “must only supply enough background information to establish a rational basis for its conclusions.”<sup>56</sup> The Navy based its conclusions, which alleged minimal impact on waterfowl, on a comparative analysis of the Washington County site to three existing military facilities.<sup>57</sup> The Navy’s comparative analysis briefly focused on negligible bird flushing, quick bird acclimation, and high bird reproductive rates at the three comparative sites, which all maintain military aircraft operations.<sup>58</sup> Despite the low threshold imposed by a rational basis standard, the Fourth Circuit held that “the Navy has provided only the most cursory factual basis for its comparisons, to the extent it has offered any at all.”<sup>59</sup> Therefore, the court required “additional investigation by the Navy [to be included in the SEIS] . . . to demonstrat[e]” the sufficiency of similarity between the preferred sites and the comparison sites.<sup>60</sup>

Fifth, NEPA required the Navy to consider the cumulative environmental impacts of an OLF at the Washington County site “in conjunction with existing and proposed military airspace over North Carolina.”<sup>61</sup> An assessment of the cumulative environmental impacts “requires an agency to consider not only the direct effects of an action, but also the ‘incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency (federal or non-federal) or person undertakes such other actions.’”<sup>62</sup> Although the Navy briefly discussed the cumulative impacts of an OLF at the Washington County site in its EIS, the Fourth Circuit stated, “[t]he Navy’s consideration here of cumulative

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53. *Id.* at 194.

54. *Id.*

55. *Id.*

56. *Id.* at 195.

57. *Id.* at 194.

58. *Id.* at 195 (“Flushing” of birds refers to the permanent displacement of a species, while “acclimation” of birds refers to their adjustment and adaptation to military operations.).

59. *Id.*

60. *Id.* at 196.

61. *Id.*

62. *Id.* (quoting 40 C.F.R. § 1508.7); *see also* 40 C.F.R. § 1508.27(b)(7) (stating that when evaluating intensity, officials should consider “[w]hether the action is related to other actions with individually insignificant but cumulatively significant impacts”).



impacts . . . was insufficiently comprehensive.”<sup>63</sup> Further, the court concluded:

The problems we have identified with the Navy’s site investigation, BASH analysis, scientific literature review, and comparative analysis bleed into the arena of cumulative impacts as well. These shortcomings cast doubt upon whether the Navy has fully comprehended the impacts of its actions in isolation, let alone in combination with others. Only when the Navy fully investigates and acknowledges both will it satisfy NEPA.<sup>64</sup>

Therefore, the Fourth Circuit ordered the Navy to conduct a more detailed assessment of the cumulative impacts at the Washington County site to be included in the SEIS.<sup>65</sup>

As seen in the foregoing discussion, the Navy failed to comply with the congressional mandate of NEPA. The Navy did not merely omit a minor piece of scientific evidence by accident; instead, it defied NEPA in order to pursue the Navy’s goal of placing the OLF in Washington County. In the course of its EIS preparation, the Navy came up short when it: (1) based its waterfowl activity findings on a few visits, most of which occurred when the majority of the birds were not present;<sup>66</sup> (2) disregarded the substantial warnings of bird aircraft strike hazards from military BASH experts;<sup>67</sup> (3) performed cursory review of relevant literary and scientific material;<sup>68</sup> (4) cited supporting materials that did not actually support its conclusions;<sup>69</sup> (5) failed to disclose negative evidence which would have weakened its position;<sup>70</sup> (6) failed to properly conduct a comparative analysis with existing sites;<sup>71</sup> and (7) did not assess the cumulative impacts of its proposed action.<sup>72</sup> These failures in the EIS preparation stage constitute a blatant disregard for the nation’s environmental laws and for North Carolina’s citizens and wildlife.<sup>73</sup>

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63. *Nat’l Audubon Soc’y*, 422 F.3d at 197.

64. *Id.* at 198.

65. *Id.* at 200.

66. *Id.* at 189.

67. *Id.* at 192.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 196.

72. *Id.* at 197.

73. See generally Southern Environmental Law Center, Timeline, *supra* note 1 (showing more recent developments with the OLF). It is important to note that although the current article focuses specifically on the legal analysis from the Fourth Circuit opinion delivered in 2005, the Navy continued in its efforts to place an Outlying Landing Field in Washington County, North Carolina. In February of 2007, the Navy issued its Draft Supplemental Environmental Impact Statement (DSEIS) to comply with the Fourth Circuit’s mandate. However, the United States Fish and Wildlife Service, along with environmental groups and politicians, disagreed with the Navy’s DSEIS findings of only “moderate impacts on waterfowl, minor impacts on the Pocosin Lakes National Wildlife Refuge, and no adverse effects on the endangered red wolves.”

### C. *Environmental Justice Concerns*

Pursuant to NEPA, a federal agency must fairly present alternatives to a preferred site in its EIS and should conduct a comparative analysis that shows the strengths and weaknesses of each alternative.<sup>74</sup> The alternatives analysis “is the heart of the environmental impact statement, [and] it should present the environmental impacts of the proposal and the alternatives in comparative form, thus sharply defining the issues and providing a clear basis for choice among options by the decisionmaker and the public.”<sup>75</sup> In its EIS, the Navy analyzed six potential siting alternatives for the OLF, located near eight potential homebasing alternatives.<sup>76</sup> In the EIS, the Navy alleged that it chose Site C, the Washington County site, because of its proximity to Cherry Point Air Station in Havelock, North Carolina and to Naval Air Station Oceana in Virginia Beach, Virginia.<sup>77</sup>

In addition to ordering the Navy to prepare an SEIS to comply with NEPA, the district court also issued a permanent injunction, which prohibited the Navy “from taking any further activity associated with the planning, development, or construction of an OLF in Washington . . . Count[y] without first complying with its obligations under NEPA.”<sup>78</sup> The district court based this sweeping injunction on both the systematic deficiency of the Navy’s EIS and the subjective intent of the Navy in placing the OLF in Washington County, North Carolina.<sup>79</sup> The Fourth Circuit agreed with the district court that the Navy’s numerous failures in the EIS “reveal neither a complete investigation into environmental impacts nor a frank admission of environmental harms.”<sup>80</sup> The Fourth Circuit disagreed, however, with the district court on the permanent injunction and chose not to question the Navy’s subjective intent because judicial inquiry into the adequacy of an EIS is limited to an objective analysis.<sup>81</sup> Despite the Fourth Circuit’s call for objectivity, NEPA expressly prohibits agencies from preparing an environmental impact statement merely to “justif[y]

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Therefore, with extensive litigation on the horizon, the Navy announced on January 22, 2008 that it was formally abandoning its plan to place an OLF in North Carolina’s Washington County. Despite the abandonment of the Washington County site, the Navy is still considering two sites in North Carolina, Sandbanks in Gates County and Hales Lake in Camden and Currituck Counties, for the final location of the OLF.

74. 42 U.S.C. § 4332(2)(C)(iii); 40 C.F.R. § 1502.14.

75. 40 C.F.R. § 1502.14.

76. *Nat’l Audubon Soc’y*, 422 F.3d at 182.

77. *Id.*

78. *Washington County v. U.S. Dep’t of the Navy*, 357 F. Supp. 2d 861, 878 (E.D.N.C. 2005).

79. *Id.* at 876-78.

80. *Nat’l Audubon Soc’y*, 422 F.3d at 200.

81. *Id.* at 198.

decisions already made.”<sup>82</sup> Although the Fourth Circuit dismissed the subjective intent of the Navy as irrelevant, it is necessary to discuss these issues as they relate to NEPA compliance and to environmental justice concerns in order to determine which court’s interpretation is correct.

First, it is important to determine why the Navy decided to construct a new OLF. The answer to this question can be found in the Navy’s correspondence, which is now part of the appellate Record of Decision.<sup>83</sup> At trial, the Navy claimed that the primary reason for a new OLF was the inadequacy of the Fentress Field OLF in Chesapeake, Virginia to accommodate the changing needs of the Navy.<sup>84</sup> This is in direct opposition, however, to a Navy letter in October of 2000, which stated, “It is precisely because of community concerns over jet noise that we are carefully exploring the establishment of an additional outlying field.”<sup>85</sup> Thus, it appears that the Navy chose to shift the noisy burden of the OLF from Chesapeake, Virginia, to a location in Washington County “precisely because of community concerns,” although the Navy testified at trial that the primary reason for the move was instead based on military need.

Further, an internal Navy e-mail in September of 2002 clearly revealed that the Navy pre-selected the Washington County site, “reverse engineered” analyses to make them fit that site, and used intentionally flawed data to make the Washington County site the “best site” in the EIS process.<sup>86</sup> “Reverse engineering” the alternatives analysis to make one site the most appealing is the exact type of action expressly prohibited by NEPA, which states that environmental impact statements shall not “justif[y] decisions already made.”<sup>87</sup> As inexcusable as these actions were, the Navy further complicated matters in 2003. In April of that year, another internal Navy e-mail stated that OLF training operations would soon become obsolete, which means that there would no longer be a need for an OLF at the Washington County site or at any other location.<sup>88</sup> In July of 2003, the Navy’s final EIS stated that the existing facilities at Fentress Field

82. 40 C.F.R. § 1502.2(g).

83. Introduction of the F/A-18 E/F (Super Hornet) Aircraft to the East Coast of the United States, 68 Fed. Reg. 53, 353, 53, 357-58 (Dep’t of the Navy, Dep’t of Defense, Sept. 10, 2003) (notice of record of decision).

84. *Nat’l Audubon Soc’y*, 422 F.3d at 181-82.

85. North Carolinians Opposed to the Outlying Landing Field, Facts and Timeline, *supra* note 44.

86. *Id.*

87. 40 C.F.R. § 1502.2(g).

88. North Carolinians Opposed to the Outlying Landing Field, Facts and Timeline, *supra* note 44.

were adequate to satisfy the Navy's foreseeable need.<sup>89</sup> Based on the totality of the Navy's own correspondence, it seems that there was no need for an OLF in Washington County because OLF operations will soon become obsolete and Fentress Field is adequate to meet the Navy's needs until the operations do become obsolete. So, why did the Navy begin this exhaustive OLF relocation process in the first place?

To answer this question, it must be determined why the Navy so heavily preferred the Washington County site that it "reverse engineered" the entire NEPA process. The answer boils down to simple economics and politics. The current OLF at Fentress Field is located in the independent city of Chesapeake, which is one of the wealthiest cities per capita in the state of Virginia.<sup>90</sup> The median household income in Chesapeake is approximately \$51,000 per year with only 7% of the city's residents living in poverty.<sup>91</sup> In contrast, the median income in Washington County, North Carolina is less than \$29,000 per year, and 22% of the population lives in poverty.<sup>92</sup> Additionally, only 29% of the population in Chesapeake is African-American, compared to 49% of the population in Washington County.<sup>93</sup> Thus, Washington County has three times the rate of poverty seen in Chesapeake, almost double the percentage of African-Americans, and its residents make half the median income of their Chesapeake counterparts.

Due to the cries from Virginia's wealthy Chesapeake constituents to move the noisy OLF, Virginia's major politicians unsurprisingly banded together early in the OLF siting process to encourage the move to the Washington County site. Virginia's former and current governors, Mark Warner and Tim Kaine, and one of Virginia's United States Senators, John Warner, were "supportive of the Navy's plans to annex the 35,000 acres of land in North Carolina" for implementation of the new OLF.<sup>94</sup> With proximity to Washington, D.C. and the overlap of federal facilities and personnel, Virginia has strong political ties to the federal government that the state's politicians may wield to benefit Virginia's citizens to the detriment of the residents of North Carolina.<sup>95</sup> As shown by the discrepancies in demographics, rural North Carolina residents do not have the same financial and political

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89. *Id.*

90. Southern Environmental Law Center, *What's at Stake?*, *supra* note 8.

91. *Id.*

92. *Id.*

93. *Id.*

94. Roy Roberson, *Navy, North Carolina Growers Tussle Over Flyway*, SOUTHEAST FARM PRESS, Apr. 21, 2006, <http://southeastfarmpress.com/news/042106-Navy-farmland>.

95. *Id.*

resources to fight an uphill battle against the United States Navy and the Commonwealth of Virginia.

Due to this lack of political voice for the Washington County community, as compared to the Chesapeake community, the Navy, backed by the support of powerful Virginia politicians, pushed its agenda of shifting the burden of the noisy OLF from a wealthier, whiter area to a poorer, predominantly African-American area. Unlike Virginia's politicians, North Carolina's elected officials initially stood idle while the Navy moved forward with its plans to relocate the OLF in Washington County. The most likely reason for this reluctance is that the Department of Defense spends \$5.8 billion annually in North Carolina, and many of the state's residents, and thus constituents, depend on continued spending from the military.<sup>96</sup>

Although North Carolina's politicians were at first hesitant to criticize the Navy, these politicians gradually began to recognize the devastating impacts that the OLF would have on the Eastern North Carolina community and started to speak out against the Navy's actions. Washington County residents finally received much needed political support in early 2006 when one of their United States senators, Elizabeth Dole, wrote letters to the Navy expressing her concerns about placing an OLF at the Washington County site.<sup>97</sup> As Dole emphasized in one letter, the OLF would likely jeopardize completion of three local plants and endanger hundreds of jobs for North Carolina's already hard-pressed farm economy.<sup>98</sup> Dole was also concerned that the noise from the projected annual 31,650 take-offs and landings at the Washington County OLF would deter many people from visiting and possibly scare away the birds that attract visitors, further devastating the local economy. Estimates show that approximately 34,000 people visit the Pocosin Lakes National Wildlife Refuge each year, generating substantial revenue at local restaurants, hotels, and businesses.<sup>99</sup>

Realizing the economic and environmental consequences that would result from placement of the OLF in North Carolina, other politicians have more recently questioned the Navy's actions. In addition to Senator Dole, the OLF was publicly denounced in 2007 by United States Senator Richard Burr, United States Representative G. K. Butterfield, who represents the geographic district including the proposed OLF site, a majority of the North Carolina General Assembly, and

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96. *Id.*

97. *Id.*

98. *Id.*

99. Southern Environmental Law Center, *What's at Stake?*, *supra* note 8.

North Carolina Governor Mike Easley.<sup>100</sup> Specifically, North Carolina's politicians lobbied Congress to take national action on behalf of Washington County's residents by authorizing the National Defense Authorization Act for Fiscal Year 2008 only if appropriations for OLF construction in Washington County were removed from the legislation.<sup>101</sup> In a display of national unity against such unreasonable actions by the Navy, the United States House of Representatives removed the OLF appropriations and voted 397-27 to pass the revised act.<sup>102</sup> Despite the mounting political opposition, the Navy stubbornly continued to fight, as is evident in the Draft Supplemental Environmental Impact Statement (DSEIS) released in February of 2007, which still clearly preferred Washington County as the final location for the OLF.<sup>103</sup>

To forward its burden-shifting agenda, the Navy took 2,700 acres, of which "about half [was] sold willingly and half [was] condemned."<sup>104</sup> To meet the legal requirement of the United States Constitution's Fifth Amendment Takings Clause, a federal agency must provide "just compensation" where private property is taken for public use.<sup>105</sup> The Navy paid farmers \$1,800 per acre, which experts contend is "about half the value of an acre of the rich, black farmland" found in Washington County.<sup>106</sup> During the condemnation process, the Navy took land from individuals whose "families have worked the land for generations."<sup>107</sup> "[O]ne resident has the original deed of land signed by King George of England in 1742."<sup>108</sup> As described by a Washington County local, "For those who earn their livelihood on the family farm, this results not only in the loss of a home, but also in the loss of a job, a community, a heritage and a way of life."<sup>109</sup>

The Fourth Circuit chose not to look at these factors because the court felt that the subjective intent of the Navy was not relevant to the adequacy of the EIS or to the determination of whether the Navy

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100. Press Release, Southern Environmental Law Center, U.S. House Votes to De-authorize Navy OLF Site in NC (May 17, 2007), [http://www.southernenvironment.org/newsroom/2007/05-17\\_olf\\_deauthorization.htm](http://www.southernenvironment.org/newsroom/2007/05-17_olf_deauthorization.htm).

101. *See id.*

102. *Id.*

103. Southern Environmental Law Center, Timeline, *supra* note 1.

104. Roberson, *supra* note 94.

105. *See, e.g.,* Palazzolo v. Rhode Island, 533 U.S. 606, 617 (2001) (citing Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226, 41 L. Ed. 979, 17 S. Ct. 581 (1897) ("The Takings Clause of the Fifth Amendment, applicable to the States through the Fourteenth Amendment, prohibits the government from taking private property for public use without just compensation." (interpreting the Fifth and Fourteenth Amendments of the U.S. Constitution)).

106. Roberson, *supra* note 94.

107. Southern Environmental Law Center, What's at Stake?, *supra* note 8.

108. *Id.*

109. *Id.*

complied with NEPA.<sup>110</sup> Under the law, however, it seems that these environmental justice issues are very relevant to assessing the Navy's obligations and to determining whether the Navy satisfied those obligations. Pursuant to NEPA, agencies must take a "hard look" at the environmental impacts, which requires a thorough and fair assessment of alternatives.<sup>111</sup> Preparing an EIS solely to "justif[y] decisions already made" is expressly prohibited by NEPA.<sup>112</sup> The Navy fell very short of NEPA's mandate. This can be seen from Navy correspondence establishing that it selected the Washington County site before thoroughly analyzing the alternatives. Moreover, the Navy manipulated records and studies to accomplish its goal of burdening a poor, rural community with the OLF. Due to these environmental justice concerns, the Navy should have been required not only to reassess the substantive deficiencies discussed in section (II)(B) of this article, but also to conduct another fair alternatives analysis to determine the most appropriate site for the OLF, assuming a move is even deemed necessary. Thus, the district court's sweeping injunction, which would have prohibited any activity at the Washington County site until the Navy wholly complies with NEPA, appears to have been the correct outcome based on the Navy's subjective intent to defy NEPA in order to locate the OLF in Washington County. Since the Fourth Circuit decided not to require this approach, however, North Carolina's citizens must rely on lessons learned during the battle over the OLF in Washington County to prevent similar abuses by the Navy in the future.

### III. THE UNDERSEA WARFARE TRAINING RANGE

#### A. Background

One of the Navy's ongoing projects is the USWTR, which aims to implement "an instrumented undersea . . . range off the east coast of the United States for anti-submarine warfare training."<sup>113</sup> As part of the DEIS process, the Navy identified three potential alternatives: a site off of southeastern North Carolina, (2) a site off of northeastern

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110. *Nat'l Audubon Soc'y*, 422 F.3d at 198 (explaining that "[i]nquiries into subjective intent in the NEPA context open a Pandora's box that courts should in most cases attempt to avoid. Psychoanalyzing an agency's intent could restrict the open exchange of information within an agency, inhibit frank deliberations, and reduce the incentive to memorialize ideas in written form.").

111. See 42 U.S.C. § 4332(2)(C)(iii); 40 C.F.R. § 1502.14.

112. 40 C.F.R. § 1502.2(g) (2007).

113. Welcome to the U.S. Navy Official Website for the Undersea Warfare Training Range (USWTR), [http://projects.earthtech.com/USWTR/USWTR\\_index.htm](http://projects.earthtech.com/USWTR/USWTR_index.htm) (last visited Feb. 22, 2008).

Virginia, and (3) a site off of northeastern Florida.<sup>114</sup> The Navy released the DEIS for this project in October of 2005; a ninety-day public comment period followed in which 866 individuals, organizations, and groups responded to the Navy's proposal.<sup>115</sup> Based on the Navy's statements in the DEIS, it appears that the Navy favors the North Carolina site.<sup>116</sup> The Navy is currently preparing a Supplemental DEIS (SDEIS) for the project,<sup>117</sup> but it is important to remember the failures from the OLF project when questioning the Navy's preference of the North Carolina site for the USWTR.

In order to "construct the proposed undersea warfare training range, the Navy would instrument a 500-square-nautical mile area of the ocean offshore of the east coast of the United States."<sup>118</sup> This range would "be equipped with undersea cables and sensor nodes, and would be connected by a single trunk cable to a landside cable termination facility."<sup>119</sup> Further, "[t]he Navy would use the area for anti-submarine warfare (ASW) training that would typically involve up to three vessels and two aircraft on the site at any one time."<sup>120</sup> During the proposed training simulations, large numbers of sonar-emitting buoys, exercise torpedoes, and other waste will be released into the ocean waters.<sup>121</sup> The Navy claims that "the expended materials . . . will break down and become part of the sediment that makes up the ocean floor . . . over time."<sup>122</sup> There is no documentation in the DEIS,

114. United States Navy, Project Overview: USWTR Description, *supra* note 6.

115. United States Navy, USWTR Public Comments, [http://projects.earthtech.com/USWTR/Public\\_Involvement/Public\\_Comments.html](http://projects.earthtech.com/USWTR/Public_Involvement/Public_Comments.html) (last visited Feb. 22, 2008).

116. Draft Overseas Environmental Impact Statement/Environmental Impact Statement Undersea Warfare Training Range S-3 (Oct. 2005) ("In preparation of this OEIS/EIS, the [Department of the Navy] evaluated a series of alternative sites for the proposed USWTR. Siting of the USWTR offshore of southeastern North Carolina is the Navy's preferred alternative."), *available at* Executive Summary, <http://projects.earthtech.com/USWTR/PDFs/DEIS/Executive%20Summary.pdf>.

117. United States Navy, Activities to Date, [http://projects.earthtech.com/USWTR/Public\\_Involvement/Activities\\_to\\_Date.htm](http://projects.earthtech.com/USWTR/Public_Involvement/Activities_to_Date.htm) (last visited Feb. 22, 2008)

On September 21, 2007, the Navy announced its intent to revise the previously released Draft Environmental Impact Statement assessing potential environmental impacts of establishing an undersea warfare training range off the eastern coast of the United States for anti-submarine warfare training. Based on comments received from federal agencies, state agencies, and members of the public, the Navy determined that a new Draft Environmental Impact Statement should be prepared, incorporating suggestions received during the public review and comment period. The changes contemplated involve modification of the methodology used to analyze behavioral impacts on marine mammals.

118. United States Navy, Project Overview: USWTR Description, *supra* note 6.

119. *Id.*

120. *Id.*

121. United States Navy, Range Usage, [http://projects.earthtech.com/USWTR/Project\\_Overview/Range\\_Usage.htm](http://projects.earthtech.com/USWTR/Project_Overview/Range_Usage.htm) (last visited Feb. 22, 2008).

122. United States Navy, Proposed Underwater Warfare Training Range, Fact Sheet No. 6, Proposed Ecological Impacts, <http://projects.earthtech.com/USWTR/PDFs?Fact%20Sheets/FS6%20Non%Acoustic%20Effects.pdf> (last visited Feb. 20, 2008).



however, about the method in which these wastes will decompose over time and the effects that the decomposition will have on the marine ecology. Additionally, the Navy's DEIS for the project compared the three potential sites for the USWTR and discussed the possible consequences at each, but the DEIS minimizes the actual impacts that will likely result if the range is implemented off of North Carolina.<sup>123</sup> The Navy's lack of documentation, its inclusion of "supporting" evidence, and its exclusion of non-supporting, harmful evidence in its Draft Environmental Impact Statement draws uncanny parallels to the Navy's handling of the OLF.

### B. *Analysis of Deficiencies in the USWTR DEIS*

The first issue of concern with the implementation of the USWTR is the impact that the range would have on North Carolina's marine ecology. Many species live in or migrate through the proposed range, including two "critically endangered" species: the right whale and the loggerhead turtle.<sup>124</sup> Although the exact cause has not yet been identified, approximately forty whales "beached and died on the Outer Banks of North Carolina within hours of a U.S. Navy sonar training exercise" in January of 2005.<sup>125</sup> The Navy's DEIS, however,

grossly underestimates the impact sonar testing could have on marine life. Through comprehensive research and analysis of existing field data, [environmental groups] ha[ve] developed a more accurate and comprehensive picture of the marine life in and near the proposed testing range. This research has shown the area to be much more biologically productive, more diverse, more active, and more abundant than the Navy understands.<sup>126</sup>

Due to the potential dangers that daily sonar testing, increased boat traffic, and discarded waste will likely have on marine species, the Navy needs to comprehensively address these concerns in its upcoming SDEIS in order to comply with NEPA's "hard look" standard, which requires a candid acknowledgment of a project's risks.

The second issue of concern is the impact that the range would have on North Carolina's fishing and fishery industries. Not only would habitats be altered and destroyed from the constant training and expended waste, but the stable equilibrium of the local ecology could also be devastated. In addition, Eastern North Carolina's citizens would once again be economically disadvantaged by the Navy's ac-

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123. See generally Draft Overseas Environmental Impact Statement, *supra* note 116, at chapter 3, [http://projects.earthtech.com/USWTR/PDFs/DEIS/Chapter\\_3.pdf](http://projects.earthtech.com/USWTR/PDFs/DEIS/Chapter_3.pdf).

124. Southern Environmental Law Center, Navy Sonar Testing Range (NC), [http://www.southernenvironment.org/cases/navy\\_sonar/index.htm](http://www.southernenvironment.org/cases/navy_sonar/index.htm) (last visited Feb. 22, 2008).

125. *Id.*

126. *Id.*

tions; this time the disadvantage will stem from the flushing or extinction of animal species that will result in a suppressed fishing output and in decreased revenue from eco-tourism on the state's coast.<sup>127</sup> Currently, North Carolina fisheries alone "have a \$2.3 billion annual impact on the state's economy, among the highest in the nation, with the state's coastal waters playing a vital role" in that statistic.<sup>128</sup> The Navy claims in its DEIS, however, that (1) the effects on fish and fish habitats at the North Carolina site will be "negligible,"<sup>129</sup> and (2) "[t]he proposed USWTR activities would not significantly impact commercial or recreational fishing."<sup>130</sup> Based on the available scientific research, the Navy's conclusion of negligible impacts on marine life and on North Carolina's fishing and fishery industries seems untenable, implicating serious environmental justice concerns. Unless the Navy resolves this and other questionable items in its SDEIS, due in 2008, it appears that a court will again find that the Navy swept negative evidence under the rug and defied NEPA's mandate by failing to take a "hard look" at the project's environmental impacts.

#### IV. CONCLUSION

The USWTR is in its early stages, which means that North Carolina's citizens have the ability to act early to prevent injustices similar to those that occurred in the OLF case. After seeing the Navy sacrifice our state's underprivileged in the face of money and political power, it is essential to use the lessons learned to protect our fellow citizens, our coast, and our valuable biodiversity. The other alternatives for the USWTR, Virginia and Florida, both wield political clout in Washington, D.C. As discussed above, Virginia's power hinges on its proximity to our nation's capital and the overlap of federal facilities and personnel located there. Similarly, Florida exerts its influence with its large population, its financial imprint, and the close relationship between the current federal executive branch and many Florida state government officials. It is not a stretch to think that the Navy might have selected the North Carolina site for the USWTR prior to the DEIS, due to political pressure from powerful voices in those other states. Although the Navy may yet prove that North Carolina is

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127. See *id.* (stating that "[l]ittle is known about the impacts of sonar on various fish species, but scientific studies provide evidence that sonar can cause profound physical damage and cause fish to avoid noisy areas altogether. Such impacts, if realized, could be devastating to coastal communities and fishermen.").

128. *Id.*

129. See Draft Overseas Environmental Impact Statement, *supra* note 100, at ch. 4, available at [http://projects.earthtech.com/USWTR/PDFs/DEIS/Chapter\\_4.pdf](http://projects.earthtech.com/USWTR/PDFs/DEIS/Chapter_4.pdf).

130. United States Navy, Proposed Underwater Warfare Training Range, Fact Sheet No. 7, Potential for Effects on Fishing, Fish Habitat, and Fish, <http://projects.earthtech.com/USTWR/PDFs/Fact%20Sheets/FS7%20Effects%20on%20Fishing.pdf>. (last visited Feb. 20, 2008).

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the best site for the USWTR after conducting a fair assessment, it is clear that the DEIS for the training range is severely deficient and must be overhauled before the SDEIS is published. In anticipation of the SDEIS, the public can only look to the Navy's past track record. In light of these prior failures, North Carolinians must cautiously fight this battle until the Navy's actions regain the trust of our state's citizens.