



By Order of the Court, Presiding Judge **ROBERTO C. NARAJA**



**E-FILED**  
**CNMI SUPERIOR COURT**  
E-filed: Jun 12 2025 10:51AM  
Clerk Review: Jun 12 2025 10:51AM  
Filing ID: 76445690  
Case Number: 23-0146-CV  
N/A

IN THE  
**SUPERIOR COURT**  
FOR THE  
**COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

**ALEXANDRIA J. DAVIS STEELEY,**

Petitioner,

v.

**DEPARTMENT OF LANDS AND NATURAL  
RESOURCES (“DLNR”);  
DIVISION OF FISH AND WILDLIFE (“DFW”);  
SYLVAN IGISOMAR, Secretary of DLNR; and  
MANNY PANGELINAN, Director of DFW,**

Respondents.

**CIVIL ACTION No. 23–0146**

**ORDER DENYING  
MOTION TO DISMISS FOR LACK OF  
SUBJECT MATTER JURISDICTION AND  
DIRECTING SUPPLEMENTAL  
AGENCY DECISION ON  
FINAL AGENCY ACTION**

**I. INTRODUCTION**

**THIS MATTER** came before the Court upon Respondents’ Notice of Issuance of Final Agency Action and Compliance with Court Order (“Final Agency Action”) and Request for a Status Conference, filed on June 3, 2025, and Respondents’ Motion to Dismiss Petition for Judicial Review for Lack of Subject Matter Jurisdiction (“Motion”), filed on June 9, 2025. Also before the Court is Petitioner’s Motion for Further Relief in opposition to the Motion, filed on June 10, 2025.

A status conference was held on June 11, 2025, at 9:00 a.m., in Courtroom 202A of the Superior Court, Guma’ Hustisia, Susupe, Saipan, Commonwealth of the Northern Mariana Islands (“Commonwealth”), to address the pending filings and to hear preliminary arguments on the Motion. Attorney Jeanne H. Rayphand appeared on behalf of Petitioner Alexandria J. Davis Steeley (“Steeley”). Assistant Attorney General Charles P. Reyes Jr. appeared on behalf of Respondents

1 Commonwealth Department of Lands and Natural Resources (“DLNR”), Division of Fish and  
2 Wildlife (“DFW”), Sylvan Igisomar, in his official capacity as Secretary of DLNR, and Manny  
3 Pangelinan, in his official capacity as Director of DFW (collectively, the “Agency”).

4 Following the hearing, the Court took the Motion under advisement and determined that no  
5 further hearings were necessary. The Court then undertook a comprehensive review of the Agency  
6 record, the Motion, Final Agency Action dated June 2, 2025, and all related filings.<sup>1</sup>

7 Upon review of the administrative record, applicable law, and for the reasons set forth below,  
8 the Court hereby **DENIES** the Motion and further **ORDERS** the Agency to submit a supplemental  
9 written decision that remedies the deficiencies identified herein. The supplemental decision must  
10 clearly articulate the legal and factual basis for the Agency’s conclusions and cite with specificity the  
11 supporting evidence in the record. All further proceedings are **STAYED** pending the Agency’s  
12 submission of a supplemental decision in compliance with this Order.

## 13 **II. FACTS AND PROCEDURAL HISTORY**

14 The relevant background of this matter is summarized in its Order on Petition for Judicial  
15 Review issued on May 15, 2025 (“Judicial Review Order”). *See* Judicial Review Order at 2–4.  
16 Because neither the evidentiary record nor the procedural posture has materially changed since the  
17 issuance of that Order, the Court finds no need to restate its prior findings or analysis herein.

18 In the Judicial Review Order, the Court remanded the matter to the Agency with specific  
19 instructions to issue a final written decision on Steeley’s site assessment application within twenty  
20 days. *See id.* at 26. The Court further directed that the Agency’s decision be based solely on the  
21 existing administrative record and the previously applied Saipan Upland Mitigation Bank (“SUMB”)   
22 calculation methodology, expressly prohibiting the Agency from introducing any new requirements  
23

---

24 <sup>1</sup> The Court has discretion to issue a ruling based on the parties’ briefs without hearing oral arguments. *See* NMI  
R. P. ADMIN. APP. 6(b).

1 or criteria not disclosed during the original permitting process. *See id.* In the event of a denial, the  
2 Agency was explicitly required to provide a written explanation supported by the record and  
3 grounded in specific legal authority. *See id.*

4 On June 2, 2025, the DFW issued its Final Agency Action denying Steeley’s application. The  
5 following day, on June 3, 2025, the Agency filed a notice of issuance of final agency action and  
6 compliance with court order, along with a request for a status conference. (Resp’ts’ Notice of  
7 Issuance of Final Agency Action & Req. for Status Conf.)

8 In response, on June 9, 2025, the Court issued an order scheduling a status conference to  
9 determine whether it retained subject-matter jurisdiction following the issuance of the Final Agency  
10 Action, and whether further judicial review remained appropriate. *See generally* Order Setting Status  
11 Conf. Later that same day, the Agency filed the present Motion. (Resp’ts’ Mot. to Dismiss Pet. for  
12 Judicial Review for Lack of Subject-Matter Juris.) The following day, on June 10, 2025, Steeley filed  
13 a motion seeking further relief in opposition to the Agency’s filing. (Pet’r’s Mot. for Further Relief.)

14 The Court held the status conference on June 11, 2025, during which it invited preliminary  
15 arguments from both parties on the issue of continuing subject-matter jurisdiction. While the Agency  
16 presented its position in support of the Motion, Steeley briefly addressed the matter and stated that  
17 she would rely on the Court’s ruling. After hearing from both parties, the Court took the matter under  
18 advisement.

### 19 **III. LEGAL STANDARD**

#### 20 *A. Subject-Matter Jurisdiction After Final Agency Action and Remand*

21 A court’s jurisdiction to review an agency action arises from statutory authority. *See* 1 CMC  
22 § 9112(b).<sup>2</sup> The procedural framework governing judicial review in contested case proceedings is set  
23

---

24 <sup>2</sup> “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action,  
is entitled to judicial review . . . in the Commonwealth Superior Court.” 1 CMC § 9112(b).

1 forth in the Commonwealth Administrative Procedure Act (“APA”) and the Rules of Procedure for  
2 Administrative Appeals. *See generally* 1 CMC §§ 9101–9115; NMI R. P. ADMIN. APP.

3 Subject-matter jurisdiction is a threshold matter that must be addressed before reaching the  
4 merits and cannot be waived. *See Sullivan v. Tarope*, 2006 MP 11 ¶¶ 39–40. Even after remand, the  
5 court retains jurisdiction to oversee compliance with its prior order, to ensure the agency  
6 meaningfully addresses the identified legal deficiencies. *See Sullivan v. Hudson*, 490 U.S. 877, 885–  
7 86 (1989); *Richardson v. Wright*, 405 U.S. 208, 209 (1972); *Ford Motor Co. v. NLRB*, 305 U.S. 364,  
8 373 (1939).

#### 9 *B. Reviewability of the Agency’s Post-Remand Action*

10 Upon remand, the agency’s subsequent action must constitute a new “final” decision subject  
11 to judicial review. *See* 1 CMC § 9112(f). To qualify as a “contested case,” the agency proceeding  
12 must involve individualized determinations affecting legal rights or duties. *See* NMI R. P. ADMIN.  
13 APP. 1(f)(3). While the APA provides the governing framework for such review, where property  
14 rights or significant interests are at stake, constitutional due process may require heightened  
15 procedural safeguards. *See Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976); *Goldberg v. Kelly*,  
16 397 U.S. 254, 262–63 (1970).

17 An agency action is reviewable if it is “[a]rbitrary, capricious, an abuse of discretion, or  
18 otherwise not [in] accordance with law[.]” 1 CMC § 9112(f). Courts apply the “arbitrary and  
19 capricious” standard, which prohibits “willful and unreasonable action without consideration or in  
20 disregard of facts or without determining principle.” *Pac. Sec. Alarm, Inc. v. Commonwealth Ports*  
21 *Auth.*, 2006 MP 17 ¶ 14. Deficiencies in an agency’s contemporaneous reasoning cannot be cured by  
22 post hoc rationalizations. *See id.*; *Dep’t of Homeland Sec. v. Regents of the Univ. of Cal.*, 591 U.S.  
23 1, 66–67 (2020).

1 The agency must address all deficiencies identified on remand and issue a decision that is  
2 reasoned, supported by the record, and grounded in applicable legal authority. *See Sullivan*, 490  
3 U.S. at 885–86. Such review on remand ensures that the agency cures the identified error in a  
4 meaningful way, rather than treating the remand as a mere procedural formality. *See id.* at 886.

### 5 *C. Remedies and Consequences of Noncompliance*

6 The APA also authorizes courts to remand a matter to the agency where “the fairness of the  
7 proceedings or the correctness of the action has been impaired by a material error in procedure or a  
8 failure to follow prescribed procedure, and the error cannot be corrected in the trial court proceedings.”  
9 NMI R. P. ADMIN. APP. 6(e)(2). Courts may also issue “such interlocutory order as it finds necessary  
10 to preserve the interests of any party [. . .] pending further proceedings or agency action.” *Id.* R. 6(f);  
11 *see also Triple J Saipan, Inc. v. Muna*, 2019 MP 8 ¶ 27.

12 When remanding a matter, courts may issue specific instructions detailing “the scope of the  
13 remand, the evidence to be adduced, and the legal or factual issues to be addressed.” *Sullivan*, 490  
14 U.S. at 885. The agency must strictly comply with the remand order by addressing the identified legal  
15 errors and issuing a reasoned decision grounded in the record and relevant law. *See id.* at 885–86.  
16 “Deviation from the court’s remand order in the subsequent administrative proceedings is itself legal  
17 error subject to reversal on further judicial review.” *Id.* at 886.

18 If the agency fails to cure the deficiencies identified on remand, then under the APA, the  
19 reviewing court must set aside the action that is “[a]rbitrary, capricious, an abuse of discretion, or  
20 otherwise not [in] accordance with law[.]” 1 CMC § 9112(f). An agency action may be set aside if it  
21 is “[c]ontrary to constitutional right, power, privilege, or immunity,” exceeds “statutory jurisdiction,  
22 authority, or limitations,” or violates required legal procedures. *Id.* The Commonwealth Supreme  
23 Court has interpreted Section 9112(f) to afford deference to agency decisions. *See Pac. Sec. Alarm*,  
24 2006 MP 17 ¶ 14 (citing 1 CMC § 9112(f)(2)). However, no deference is given where the agency’s

1 interpretation is plainly unreasonable. *See id.* ¶ 12 (citing *In re San Nicolas*, 1 NMI 329, 333–35  
2 (1990)); *Triple J*, 2019 MP 8 ¶¶ 16, 28.

3 This legal framework establishes clear and binding expectations by requiring agencies to treat  
4 remand orders as authoritative mandates, while preserving the court’s broad supervisory authority to  
5 ensure compliance and correct legal errors. *See Sullivan*, 490 U.S. at 886; *Ford Motor*, 305 U.S. at  
6 373.

#### 7 IV. DISCUSSION

##### 8 A. Subject-Matter Jurisdiction

9 The Court addresses the Agency’s Motion challenging subject-matter jurisdiction, focusing  
10 on whether this matter constitutes a “contested case” under the Commonwealth Rules of Procedure  
11 for Administrative Appeals, and whether the Court retains jurisdiction following its prior remand.

##### 12 1. Contested Case

13 The Agency contends that this matter does not qualify as a “contested case” because no formal  
14 hearing occurred. (Resp’ts’ Mot. 5.) However, the Court finds the Agency’s argument misconstrues  
15 the legal standard. Rule 1(f)(3) defines a contested case as a proceeding “in which the legal rights,  
16 duties, or privileges of specific parties are required by law to be determined after an opportunity for  
17 agency hearing.” *See* NMI R. P. ADMIN. APP. 1(f)(3). The operative question is not whether a hearing  
18 was in fact held, but whether the law required the agency to provide an opportunity for a hearing  
19 before determining the legal rights or obligations of specific parties.

20 This interpretation is well-supported by due process jurisprudence. The U.S. Supreme Court  
21 has made clear that due process requires an opportunity to be heard “at a meaningful time and in a  
22 meaningful manner,” regardless of whether such an opportunity was actually provided. *See Mathews*,  
23 424 U.S. at 333 (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)); *see also Goldberg*, 397  
24 U.S. at 267–68. Where an agency’s decision implicates legal rights or privileges, the opportunity for

1 a hearing may be constitutionally or statutorily required. *See Joint Anti-Fascist Refugee Comm. v.*  
2 *McGrath*, 341 U.S. 123, 171–72 (1951) (Frankfurter, J., concurring) (“[A] person in jeopardy of  
3 serious loss [must be given] notice of the case against him and opportunity to meet it.”). That  
4 requirement, if triggered, suffices to characterize the proceeding as a contested case—even where the  
5 agency fails to provide the hearing.

6 Consistent with these principles, courts have routinely held that contested case status depends  
7 on the nature of the administrative action and the rights at issue, not on the procedural formalities the  
8 agency actually observed. The APA codifies this principle, identifying only limited exceptions to  
9 contested case status—such as rulemaking, examinations testing knowledge or ability, and  
10 applications for extraordinary remedies. *See* NMI R. P. ADMIN. APP. 1(f)(3). The present matter falls  
11 into none of these exceptions.

12 Applying these standards to the facts at hand, the Agency’s denial of Steele’s permit  
13 application constituted a final agency action affecting her substantive property rights. The denial was  
14 not based on a generalized policy, but rather on a discretionary, fact-specific assessment of site  
15 conditions and individualized circumstances. (Final Agency Action 2–4.) It therefore qualifies as an  
16 adjudicatory proceeding for which contested case procedures are required. *See Cody*, 2011 MP 16 ¶  
17 18 (a final agency action is one “by which rights or obligations have been determined, or from which  
18 legal consequences will flow”) (quoting *Marianas Ins.*, 2007 MP 24 ¶ 1).

19 The Agency’s narrow construction of Rule 1(f)(3) is both textually unsupported and conflicts  
20 with fundamental principles of administrative law. Accepting such a restrictive interpretation would  
21 effectively enable agencies to evade judicial review by failing to provide required procedures, thereby  
22 undermining the protections that the APA is intended to afford.

23 Accordingly, the Court concludes that the permit denial constitutes a contested case and that  
24 it has subject-matter jurisdiction over this matter.

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24

## 2. *Post-Remand Jurisdiction*

The Court further holds that it retains subject-matter jurisdiction following remand. When a court remands a matter to an agency, it retains authority to review the agency’s post-remand actions for compliance with the court’s instructions and applicable legal standards. *See Sullivan*, 490 U.S. at 886. This continuing jurisdiction ensures that courts retain the ability to enforce their orders and prevent agencies from evading judicial oversight through perfunctory or inadequate responses. *See id.*; *Richardson*, 405 U.S. at 209.

Courts possess inherent authority to ensure that their directives are properly effectuated. *See Ford Motor*, 305 U.S. at 373. As the U.S. Supreme Court has emphasized, “[t]he court retains the power in such situations to assure that its prior mandate is effectuated.” *Richardson*, 405 U.S. at 209. Without such authority, remand orders would amount to mere suggestions rather than binding judicial directives.

Accordingly, the Court concludes that it retains subject-matter jurisdiction both because the underlying matter qualifies as a contested case and because the Court maintains continuing authority to oversee compliance with its remand order.

///

### *B. Final Agency Action*

Having determined that subject-matter jurisdiction is proper, the Court now considers whether the Agency’s Final Agency Action complies with the Judicial Review Order.

The Final Agency Action rests principally on the 2009 Wildlife Section Standard Operating Procedures (“SOP”) and the United States Fish and Wildlife Service Biological Opinion (“BO”). However, the DFW continues to rely on guidance documents in a manner inconsistent with its own standards and the requirements set forth in the Judicial Review Order. *See id.*



1 As the Court previously noted, DLNR has not yet promulgated any formal regulations for  
2 SUMB, despite having argued that a remand was necessary for that purpose, a request which the  
3 Court denied that request. *See* Judicial Review Order at 25. Even if, *arguendo*, federal preemption  
4 principles were implicated and the DLNR was required to implement federal law, the BO—which  
5 the DFW cites as a basis for its final decision—is not binding federal law. Its recommendations,  
6 therefore, do not carry the force of law and cannot independently support the Final Agency Action.

7 Moreover, even assuming the BO had regulatory effect, the Court finds that the Final Agency  
8 Action fails to resolve several issues previously identified. The Court addresses each issue in turn.

### 9 *1. Site Surveys*

10 The Final Agency Action reflects a continuing misapprehension of the Court’s prior ruling  
11 and of the basic principles governing agency decision-making under administrative law.

#### 12 *a. Methodological Deviations*

13 The Court previously found that the Agency’s survey methodology was procedurally  
14 deficient due to unexplained deviations from its own SOP. *See id.* at 8. The Final Agency Action  
15 does not remedy these errors, instead offering post hoc justifications that were not  
16 contemporaneously documented in the administrative record.

17 The DFW’s claim that “performing surveys outside of the recommended times [. . .] does not  
18 invalidate positive detections” misunderstands the issue. (Final Agency Action 1.) The concern is not  
19 whether such detections are scientifically plausible, but whether the DFW followed its own  
20 procedures or documented a valid basis for any departure at the time of decision-making. As the  
21 United States Supreme Court emphasized, an agency must “articulate a satisfactory explanation for  
22 its action including a rational connection between the facts found and the choice made.” *State Farm*,  
23 463 U.S. at 43.

1       The administrative record reveals a particularly troubling pattern. The DFW initially  
2 conducted a survey within the recommended time window “to maximize the possibility of detecting  
3 threatened and endangered birds.” (Final Agency Action 1.) After this initial survey yielded no  
4 detections, the DFW conducted two additional surveys outside of the recommended window,  
5 ultimately detecting auditory evidence of the Nightingale Reed-Warbler (“Bird”) during the third  
6 survey. *See* Judicial Review Order at 2.

7       This progression suggests that the DFW’s approach may have been outcome-driven, rather  
8 than process-driven, in violation of its established protocols. The SOP is intended to ensure consistent  
9 and scientifically valid assessments, not to permit repeated surveys until a favorable outcome is  
10 achieved. *See Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 404 (1971) (finding  
11 that post hoc rationalizations offered during litigation are insufficient for judicial review). Such an  
12 approach undermines the integrity of the process and renders the decision arbitrary and capricious.  
13 *See Regents*, 591 U.S. at 66–67 (holding that agency action is arbitrary and capricious when lacking  
14 a contemporaneous reasoned explanation and rejecting post hoc rationalizations). The mere  
15 occurrence of a detection does not retroactively validate noncompliance with procedural safeguards.

16       Moreover, the DFW offers no contemporaneous justification or documentation explaining  
17 why the subsequent surveys—especially the third, which involved playback calls—were conducted  
18 outside the SOP’s prescribed timeframe. While the SOP allows for deviations under certain  
19 circumstances, such as weather, habitat variability, or species biology, it requires contemporaneous  
20 documentation and justification. (Pet’r’s Ex. 2, at 34.) The DFW’s explanation that it was constrained  
21 by the 21-day deadline under the OneStart MOA does not excuse its failure to comply with these  
22 requirements.

23       The agency’s duty to comply with established procedures cannot be subordinated to  
24 considerations of administrative convenience. The failure to provide contemporaneous

1 documentation constitutes a substantive procedural defect that renders the Final Agency Action  
2 arbitrary and capricious as a matter of law. *See J.G. Sablan Rock Quarry, Inc. v. Dep't of Pub. Lands*,  
3 2012 MP 2 ¶ 46 (holding that the administrative record must include all materials directly or  
4 indirectly considered by the agency and emphasizing that decisions must be based on the whole  
5 record, not selective or incomplete evidence).

6 *b. Playback Calls*

7 Although the Judicial Review Order did not previously address the use of playback calls or  
8 survey oversight, the DFW's current reliance on the third survey as the sole basis for denying the  
9 permit now requires judicial review of these specific methodological practices.

10 While the SOP permits the use of playback calls, the BO limits their use to instances when  
11 they are "needed." (Resp'ts' Ex. AA, at 23.) The Final Agency Action fails to articulate why playback  
12 calls were employed during the third survey but not during the earlier efforts, especially in light of  
13 the DFW's assertion that its goal was to maximize detection. The DFW must provide a reasoned  
14 explanation for the timing and selective application of playback calls and demonstrate that the  
15 decision was made in conformity with both the BO and the SOP. *See FCC v. Fox TV Stations, Inc.*,  
16 556 U.S. 502, 515 (2009) (requiring agencies to provide reasoned explanations for their actions);  
17 *Regents*, 591 U.S. at 23 (holding that agencies must provide contemporaneous justifications for their  
18 actions) (quoting *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155 (2012)).

19 Likewise, the BO requires that surveys be "overseen by the Bank Manager." (*Id.*) While the  
20 SOP permits a single surveyor for small parcels (Pet'r's Ex. 2, at 34), that procedural flexibility does  
21 not override the BO's express oversight requirement. Given the DFW's heavy reliance on the third  
22 survey to justify its final decision, it is imperative that the survey's compliance with supervisory  
23 requirements be clearly established. *See Env't Def. Ctr., Inc. v. Bureau of Ocean Energy Mgmt.*, 36  
24

1 F.4th 850, 872–73 (9th Cir. 2022) (finding that agency’s failure to document compliance with  
2 environmental mandates violated procedural requirements).

3 Accordingly, the DFW is directed to clarify whether Bank Manager oversight occurred during  
4 the third survey, and if so, to produce documentary evidence verifying compliance with this  
5 requirement.

6 *c. Inconsistent Application of Standards*

7 The Court observes that the DFW applied its internal protocols when calculating buffer zones  
8 and mitigation credits in the Final Agency Action. However, it failed to apply the same level of  
9 procedural rigor to the survey methodology. This inconsistency undermines the credibility and  
10 integrity of the DFW’s decision-making process and suggests a selective, result-driven approach to  
11 regulatory compliance. *See Pac. Sec. Alarm*, 2006 MP 17 ¶ 14 (noting that agency actions must not  
12 disregard relevant facts or fail to consider important aspects of a claim, and that judicial review must  
13 ensure that decisions are based on reasoned principles); *State Farm*, 463 U.S. at 43 (“[T]he agency  
14 must examine the relevant data and articulate a satisfactory explanation for its action including a  
15 rational connection between the facts found and the choice made.”) (quoting *Burlington Truck Lines,*  
16 *Inc. v. United States*, 371 U.S. 156, 168 (1962)).

17 Until the procedural deficiencies are remedied and supported by appropriate evidence in the  
18 administrative record, the Court cannot conclude that the Final Agency Action satisfies the  
19 requirements set forth in the Judicial Review Order or applicable law.

20 *2. Buffer Zone*

21 The Court finds that the administrative record remains insufficiently developed to justify the  
22 DFW’s imposition of a 50-meter buffer zone on Steeley’s property. Although the Final Agency  
23 Action purports to rely on the BO to support the buffer designation (Final Agency Action 2), the  
24

1 record fails to explain how the BO was applied to the specific conditions of this site or to demonstrate  
2 that the DFW's final decision was grounded in sound scientific judgment and site-specific data.

3 The Final Agency Action states that a buffer zone was established following the BO, which  
4 permits such buffer zones in the absence of a positively identified nest. (Final Agency Action 2.)  
5 However, the BO itself states that the 50-meter buffer zones were originally developed "around active  
6 [Birds] nests discovered during monitoring of construction projects." (Resp'ts' Ex. AA, at 25.) The  
7 BO further indicates that such buffer zones may be extended further "to minimize edge effects, and  
8 other effects due to predation or noise." (*Id.* at 9.) It also notes that the Bird may "nest year round,"  
9 and that buffer protections are especially relevant where construction is to occur during nesting  
10 periods. (*Id.* at 25.)

11 In this context, the Court finds that the DFW's decision to impose a buffer zone based solely  
12 on an auditory detection—made outside the SOP-recommended survey window and lacking visual  
13 confirmation of the Bird or its nest—does not reflect a reasoned application of the BO's guidance. *See*  
14 *State Farm*, 463 U.S. at 43 ("Agency action is arbitrary and capricious if the agency [. . .] offers an  
15 explanation that runs counter to the evidence before the agency, or is so implausible that it could not  
16 be ascribed to a difference in view or the product of agency expertise."). While the BO permits  
17 flexibility to protect the species, the record fails to establish that the DFW exercised that discretion  
18 in a manner consistent with the BO's ecological intent. *See Marsh v. Or. Nat. Res. Council*, 490 U.S.  
19 360, 378 (1989) (noting that agency actions must reflect a reasoned evaluation of relevant factors  
20 and are subject to review for arbitrariness). The Court emphasizes that, although agencies retain  
21 discretion in implementing protective measures, such discretion must be exercised in a way that  
22 honors statutory mandates and is supported by scientific rationale. *See Tenn. Valley Auth. v. Hill*, 437  
23 U.S. 153, 156 (1978) (holding that statutory environmental protections may take precedence over  
24

1 competing concerns).<sup>3</sup> Here, the DFW’s reliance on generalized territorial behavior—without direct  
2 evidence of nesting or recent presence—risks converting a precautionary measure into a categorical  
3 development restriction without sufficient evidentiary support.

4 Moreover, the administrative record lacks necessary documentation defining either the spatial  
5 extent or the scientific justification for the buffer zone. (Pet’r’s Ex. 3, at 3.) The Court previously  
6 noted that the buffer zone appeared to have been applied “in a mechanical fashion, without sufficient  
7 regard for the site-specific ecological context.” Judicial Review Order at 9. That concern remains  
8 unaddressed. The sole map in the record merely outlines the parcel and depicts a shaded buffer zone,  
9 without indicating how the boundaries were calculated, where the Bird was allegedly detected, or  
10 what qualifications the individual who prepared the map possessed. (*Id.*) If the DFW intends to rely  
11 on auditory detections to impose development restrictions, it must provide detailed information  
12 regarding the time, location, and context of such detections and explain how they support the specific  
13 size and location of the resulting buffer zone. In the absence of this information, the Court cannot  
14 determine whether the buffer appropriately balances conservative objectives with the applicant’s  
15 property rights.

16 Furthermore, the Court notes that the administrative record contains inconsistent and  
17 undefined descriptions of habitat quality. At various points, the Bird’s habitat on the subject property  
18 is described as “reduced,” “disturbed,” or “lost.” (Pet’r’s Ex. 3, at 4.) The DFW must clarify the  
19 intended meaning of each of these terms—whether “reduced” refers to a quantifiable decrease in  
20 viable habitat area; whether “disturbed” reflects temporary or recoverable ecological impacts; and  
21 whether “lost” indicates permanent ecological degradation. Without a clear, consistent framework  
22

---

23 <sup>3</sup> After this decision, Congress codified a related principle in 16 U.S.C. § 1536(d), which prohibits agencies from  
24 irreversibly committing resources before considering reasonable and prudent alternatives to avoid jeopardizing  
endangered species. While Section 1536(d) was not directly at issue in *Hill*, it reflects the broader statutory  
commitment to preserving listed species that underpinned the Court’s reasoning.

1 for evaluating habitat condition, the Court cannot determine whether the DFW's conclusions are  
2 scientifically grounded or represent arbitrary characterizations. *See Ctr. for Biological Diversity v.*  
3 *Bernhardt*, 982 F.3d 723, 743 (9th Cir. 2020) (Relying on mitigation measures in a biological opinion  
4 requires making clear, definite, and enforceable commitments under agency control that specifically  
5 address threats to the species and meet jeopardy and adverse modification standards, rather than  
6 generalized or aspirational plans). In addition, if habitat is deemed "lost," the DFW must explain why  
7 the site continues to be treated as suitable or occupied for regulatory purposes.

8 The Court is also unpersuaded by the DFW's summary dismissal of adjacent roadways as  
9 potential wildlife barriers. The Final Agency Action states, without citation, that "roadways are not  
10 sufficient barriers to the movement of wildlife, no less flighted birds." (Final Agency Action 2.) This  
11 conclusory statement is unsupported by scientific study, policy guidance, or site-specific analysis.  
12 *See Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 971 (9th Cir. 2006) ("[a] proper consideration  
13 of the cumulative impacts of a project requires some quantified or detailed information; *general*  
14 *statements about possible effects and some risk[s] do not constitute a hard look absent a justification*  
15 *regarding why more definitive information could not be provided.*") (emphasis in original) (quoting  
16 *Klamath-Siskiyou Wildlands Ctr. v. Bureau of Land Mgmt.*, 387 F.3d 989, 993 (9th Cir. 2004))). If  
17 comparable developments have been permitted in similar proximity to roadways, the DFW must  
18 explain why Steeley's project is subject to different treatment. Without such clarification, the record  
19 suggests a potentially inconsistent application of regulatory standards. *See State Farm*, 463 U.S. at  
20 43.

21 Finally, the Court finds that the record would benefit from further clarification concerning  
22 the compatibility between the buffer's purported permanence and the mitigation-based construction  
23 authorization described in the Final Agency Action. The BO specifies that buffer zones are to be  
24 maintained "in perpetuity" to minimize edge effects. (Resp'ts' Ex. AA, at 9.) At the same time, the

1 Final Agency Action authorizes development upon the purchase of mitigation credits. (Final Agency  
2 Action 1.) If clearing or development is permitted within the buffer under this mitigation scheme, the  
3 DFW must explain how such activity aligns with the buffer’s intended protective purpose. This  
4 clarification is essential for enabling the applicant to make an informed decision regarding whether  
5 and how to proceed with the proposed project.

6 Accordingly, the Court directs the DFW to supplement the record with a scientifically  
7 supported and internally consistent explanation addressing each of the above issues.

8 ///

### 9 *C. Credit Calculation*

10 The Court finds that the Agency’s Final Agency Action lacks the reasoned explanation  
11 required by law to support the mitigation credit imposed on Steeley’s project. The DFW states that a  
12 uniform baseline requires mitigation for a two percent habitat impact—equivalent to 838 square  
13 meters—even though Steeley’s project affects only 617 square meters. (Final Agency Action 2.) This  
14 purported credit floor is neither established by the BO nor supported by substantial evidence or  
15 reasoned analysis in the record.

16 While the BO acknowledges the difficulty of precisely quantifying ecological harm and  
17 permits agencies to incorporate uncertainty into mitigation calculations (Resp’ts’ Ex. AA, at 28), it  
18 expressly requires that credit purchases be “commensurate with the size of the impact.” (*Id.* at 9, 28).  
19 Nothing in the BO authorizes a fixed minimum credit requirement. To the contrary, the BO  
20 emphasizes proportionality and distinguishes between “direct” and “indirect” effects. (*Id.* at 8–9.)  
21 The DFW’s blanket imposition of a two percent credit—regardless of actual project impact—violates  
22 this principle and risks over-mitigation. *See Fox*, 556 U.S. at 515 (providing a reasoned explanation  
23 for agency action requires acknowledging a change in position and avoiding departures from prior  
24 policy without notice or in disregard of existing rules).



1       The DFW’s reliance on its own consistent application of the two percent figure fails to cure  
2 the analytical deficiency. (Final Agency Action 2.) Post hoc rationalizations cannot substitute for a  
3 reasoned explanation contemporaneous with the decision. *See State Farm*, 463 U.S. at 43; *see also*  
4 *NLRB v. Metro. Life Ins. Co.*, 380 U.S. 438, 439 (1965) (finding agency action arbitrary where the  
5 reasoning was not articulated at the time of decision and later justifications were offered through  
6 counsel); *Sec. Indus. Ass’n v. Bd. of Governors of Fed. Reserve Sys.*, 468 U.S. 137, 143 n.1 (1984)  
7 (O’Connor, J., dissenting) (rejecting post hoc rationalizations and emphasizing that deference is  
8 limited to the agency’s contemporaneous reasoning). Indeed, the DFW concedes that its original  
9 authorization letter failed to explain the 838 square meter figure, undermining any later claim of  
10 transparency or consistency. (*Id.*)

11       Additionally, the Final Agency Action fails to address the specific context of Steeley’s project  
12 or reconcile its conclusions with the BO. The BO provides that vegetation clearing constitutes a  
13 “direct” effect, and if such clearing exceeds 29 percent of a Bird territory, the habitat is deemed fully  
14 destroyed. (Resp’ts’ Ex. AA, at 8.) Below that threshold, mitigation must be apportioned between  
15 direct and indirect effects. (*Id.* at 8–9.) The Final Agency Action does not indicate whether Steeley’s  
16 project was classified as causing direct or indirect effects, nor does it explain how that classification  
17 informed the two percent credit. *See Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 211 (2016)  
18 (holding that an unexplained inconsistency in agency policy is a reason for deeming an interpretation  
19 an arbitrary and capricious change from prior agency practice).

20       The ambiguity is compounded by inconsistencies of the parcel’s habitat condition, which is  
21 described as both “reduced” and “disturbed.” (Pet’r’s Ex. 3, at 4.) The DFW fails to define these  
22 terms or explain how they affect mitigation calculations. *See Burlington Truck Lines v. United States*,  
23 371 U.S. 156, 168 (1962) (“The agency must make findings to support its decision, and those findings  
24 must be supported by substantial evidence.”) (internal citations omitted)). The imposition of a flat

1 credit, absent analytical support, appears arbitrary. *See Weyerhaeuser Co. v. United States Fish &*  
2 *Wildlife Serv.*, 586 U.S. 9, 23–24 (2019) (noting that agency actions affecting private rights are  
3 routinely reviewed to ensure they are not arbitrary, capricious, or an abuse of discretion).

4 The BO also provides discretionary mitigation guidance for projects smaller than 0.04  
5 hectares with less than two percent direct impact, suggesting that mitigation “may” be required  
6 for indirect effects, such as invasive species control. (Resp’ts’ Ex. AA, at 9.) The Final Agency  
7 Action neither acknowledges this discretionary framework nor explains why such mandatory  
8 mitigation was nonetheless imposed. *See State Farm*, 463 U.S. at 58 (holding that an agency decision  
9 is arbitrary and capricious if it fails to consider important aspects of the problem or offers  
10 explanations counter to the evidence).

11 Further inconsistency arises from the DFW’s suggestion that Steeley may clear the remainder  
12 of the parcel. (Pet’r’s Ex. 3, at 4.) If such development is permissible, the rationale for mitigation  
13 credits based on direct habitat destruction becomes less coherent. The DFW has not explained how  
14 this allowance comports with its claim that the project necessitates mitigation, or how it aligns with  
15 its classification of the habitat impact. (Resp’ts’ Ex. AA, at 8–9.)

16 Accordingly, the Agency must clarify: (1) whether the project’s effects were deemed direct  
17 or indirect; (2) how that classification supports the imposition of a two percent credit; and (3) how  
18 mitigation obligations apply if the parcel may be lawfully cleared for development. Without these  
19 clarifications, the Court cannot determine whether the Final Agency Action is consistent with the  
20 BO, supported by substantial evidence, or responsive to the Judicial Review Order.

21 ///

#### 22 *D. Remedies*

23 The Final Agency Action presents Steeley with an option that appears inconsistent with the  
24 administrative record. Specifically, the DFW instructs Steeley to contact the United States Fish and

1 Wildlife Service directly to initiate a separate consultation process—an option presented as a  
2 precondition to purchasing mitigation credits from SUMB. (Final Agency Action, 2.) However, the  
3 record reflects two distinct remedial paths for addressing the unauthorized clearing: (1) the purchase  
4 of mitigation credits from SUMB, or (2) a minimum six to twelve months of habitat regrowth  
5 followed by three additional wildlife surveys. (Pet’r’s Ex. 3, at 4.)

6 It is undisputed that more than twelve months have passed since the most recent wildlife  
7 survey, which included auditory evidence of the Bird. *See* Judicial Review Order at 2. Accordingly,  
8 the regrowth period required under Option 2 has already elapsed, and that path now appears ripe for  
9 implementation. There is no evidence in the record that Steeley has purchased credits, nor has she  
10 indicated an intent to do so. Option 2 therefore appears to be the only remaining remedy consistent  
11 with both the record and the remedial framework established by the Agency. *See Volpe*, 401 U.S. at  
12 416 (holding that the agency must consider all relevant factors and explain the choices it makes,  
13 particularly when alternatives exist). However, the Final Agency Action fails to acknowledge this  
14 option or explain its omission. *See State Farm*, 463 U.S. at 43 (holding that an agency changing its  
15 course must supply a reasoned analysis indicating that prior policies and facts have been considered).

16 The DFW’s silence regarding a valid, previously authorized alternative—particularly one that  
17 the record suggests may now be available—constitutes an unexplained deviation from its prior  
18 guidance. Such an omission amounts to agency inaction that may warrant judicial intervention. *See*  
19 *Cody*, 2011 MP 16 ¶ 17 (noting that administrative remedies must be adequate and timely, and that  
20 unreasonable delays in agency action may justify judicial intervention) (citing *Smith v. Illinois Bell*  
21 *Tel. Co.*, 270 U.S. 587 590 (1926)); *see also Weyerhaeuser*, 586 U.S. at 23–24.

22 The Agency must therefore clarify: (1) whether the regrowth-and-resurvey option remains  
23 available in light of the passage of time; (2) if not, the basis for its abandonment; and (3) what specific  
24 remedial course of action it intends to pursue and enforce. Agencies must act within reasonable

1 timeframes and provide clear guidance on available remedies to ensure compliance with legal  
2 obligations. *See Tano Group, Inc. v. Dep't of Pub. Works*, 2009 MP 18 ¶ 23 (emphasizing that  
3 agencies must act within statutory timeframes and maintain transparency in enforcement decisions);  
4 *see also Telecomms. Research & Action Ctr. v. FCC*, 750 F.2d 70, 79 (D.C. Cir. 1984). The Final  
5 Agency Action, as it stands, fails to satisfy these basic procedural obligations.

## 6 V. CONCLUSION

7 For the foregoing reasons, the Court finds that it retains subject-matter jurisdiction. The  
8 Agency's denial of Steeley's permit application qualifies as a contested case under Rule 1(f)(3) of  
9 the Commonwealth Rules of Procedure for Administrative Appeals. In addition, the Court maintains  
10 continuing jurisdiction to ensure compliance with its remand directives. Accordingly, the Agency's  
11 Motion is hereby **DENIED**.

12 The Court further finds that the DFW's Final Agency Action lacks clarity, internal  
13 consistency, and reasoned explanation necessary to determine whether the decision was rendered in  
14 a manner that is not arbitrary or capricious. Accordingly, the Court hereby **ORDERS** the Agency to  
15 submit a supplemental written decision, in strict compliance with the terms of the Judicial Review  
16 Order—as clarified and reiterated herein—within thirty days from the date of this Order.<sup>4</sup>

17 The Court emphasizes that it does not question the DFW's general authority to establish  
18 buffer zones or impose mitigation fees in its mandate to protect the Commonwealth's environmental  
19 resources. The preservation of these resources—particularly in an island jurisdiction with limited  
20 land and heightened ecological sensitivity—is an important and legitimate governmental function.  
21 At the same time, regulatory authority that affect individual rights must be grounded in the specific  
22 facts of the case, consistently applied, and supported by a reasoned explanation that meaningfully  
23

---

24 <sup>4</sup> In accordance with the directive stated on the record during the status conference, and as further clarified herein, Steeley is not required to submit any further filings related to the supplemental agency decision.

engages with the record, including any contrary evidence. Such transparency is necessary to uphold the integrity of the permitting process and ensure fairness under the law.

Following the submission of the supplemental decision, the Court will review the matter and consider appropriate remedies—including but not limited to, setting aside the Agency’s final action, ordering deemed approval of the permit, granting equitable relief, or initiating contempt proceedings—as may be necessary to ensure full compliance with the Judicial Review Order and applicable law. All further proceedings are **STAYED** pending full compliance.

It is **SO ORDERED** this 12th day of June 2025.

/s/

**ROBERTO C. NARAJA**, Presiding Judge