The Honorable Richard A. Jones

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

STATE OF WASHINGTON, et al., Plaintiffs, v. UNITED STATES DEPARTMENT OF THE NAVY, et al., Defendants.	NO. 2:19-cv-01059-RAJ CITIZEN'S OF EBEY'S RESERVE AND PAULA SPINA'S REPLY IN SUPPORT OF MOTION FOR PRELIMINARY INJUNCTION

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I. PLAINTIFFS ARE LIKELY TO PREVAIL ON THEIR CLAIMS[1]

A. NEPA: The Day-Night Metric

Our motion demonstrated that the Navy should have predicted the DNL for days with training flights and compared that with the DNL for days without training flights. Dkt. 29 at 10–14. The Navy admits that it did not do so, Dkt. 55 at 20, opting to calculate an average DNL value that made it impossible to compare the alternative scenarios' differences between the DNL on quiet days and noisy days. The Navy responds, though, that choosing the correct noise methodology is a matter to be left to the experts with no judicial review. Dkt. 55 at 17–18. But the issue here is not a dispute about which of several methodologies provides the best assessment of a particular issue. The question here is whether the Navy's methodology addresses the issue at all.

NEPA requires disclosure of impacts in a manner that allows a comparison among alternatives. 40 C.F.R. § 1502.14(b). In this instance, the objective was to use a methodology that would allow the Navy (and the public and other agencies) to understand the difference among the alternative scenarios when the Growlers are flying. But the way the Navy used the DNL metric precluded that comparison. The Navy muddied the analysis by not isolating the noise from the Growler overflights and comparing how that varied among the alternative scenarios. Instead, it used a version of the DNL that averaged noisy and quiet days together. That made it impossible to assess the extent to which the various alternative scenarios cause changes in the noise environment on noisy days.

We do not question that the DNL is an accepted metric for assessing community annoyance at civil airports with consistent use day to day. Dkt. 55 at 18. The issue is how to use the DNL for a

[1] The Navy argues that Mr. Lilly's evidence is improper because it is not part of the administrative record. Dkt. 55 at 16, n. 1. We have scrupulously avoided referencing Mr. Lilly's new information with regard to the merits. Instead, we cite Mr. Lilly's new evidence only with regard to the other prongs of the preliminary injunction test (*e.g.*, irreparable harm) where the parties are not limited to the administrative record.

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military airport with huge swings in use—from all to nothing. We documented that the method employed by the Navy—averaging together noisy and quiet days—is not the appropriate method when there are significant fluctuations in noise events from day to day or week to week. Dkt. 29 at 11–12 (quoting GRR 8359–60, 61; GRR 165605, GRR 32516). Indeed, in a noise study done for its Whidbey airfields, the Navy concedes this:

> For application to civil airports, where operations are consistent from day to day, DNL and CNEL are usually applied as an annual average. **For some military airbases, where operations are not necessarily consistent from day to day, a common practice is to compute a 24-hour DNL or CNEL based on an average busy day, so that the calculated noise is not diluted by periods of low activity.**

GRR 32516 (emphasis supplied). We quoted this passage in our opening brief. Dkt. 29 at 12. Tellingly, the Navy fails to address it. The Navy's silence speaks volumes. It has not provided a reasoned explanation for using this methodology in this manner nor has it tried to explain the inconsistency with its own Whidbey study. "The deference accorded an agency's scientific or technical expertise is not unlimited. The presumption of agency expertise can be rebutted when its decisions, while relying on scientific expertise, are not reasoned." *Brower v. Evans*, 257 F.3d 1058, 1067 (9th Cir. 2001) (internal citations omitted). When an agency's choice of a particular methodology is challenged, the agency must "articulate a satisfactory explanation for its action." *Owner-Operator Ind. Drivers Ass'n v. FMCSA*, 494 F.3d 188, 203 (D.C. Cir. 2007). An agency fails to show a "rational connection" when it provides no justification for the methodology selected, where the agency has acknowledged the methodology's limitations, or where it is based on irrelevant factors. *Judalong v. Holder*, 565 U.S. 42, 55, 132 S.Ct. 476, 485 (2011); *Native Ecosystems Council v. Dombeck*, 304 F.3d 886, 902 (9th Cir. 2002); *Fund for Animals v. Babbitt*, *ACWA v. EPA*, 734 F.3d 1115, 1154 (D.C. Cir. 2013); *New Orleans v. SEC*, 969 F.2d 1163 (D.C. Cir. 1992). All of those circumstances are present here.

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The Navy misunderstands the EPA advice it quotes (Dkt. 55 at 19). The "more exact estimate" quote is from a statement that if the goal is to portray an overall annual impact, the average busy day can be used as a close approximation of the annual average. It is not addressing the issue here of assessing impacts that vary widely on a daily basis depending on whether planes are flying or not. GR 8359. The "nonsensical" quote relates to a scenario where flights are proposed for Sundays when there were none before, but the Sunday flight levels would be less than other days. In that scenario, the new Sunday flights would cause the *average* busy day metric to fall, thus hiding the impact on Sundays, which previously had been quiet, but now were noisy. In that scenario, use of the daily average would be "nonsensical." *Id.* That is not our situation. Actually, that quote supports our position that these metrics must be used with care. Averaging quiet and busy days together (as the Navy has done here) leads to "nonsensical" results just as in the EPA's example.

The Navy argues that calculating the DNL for busy days separately from the DNL for quiet days would not allow comparison between OLF and Ault Field because they "do not conduct FCLPs on the same days." Dkt. 55 at 20:3. That is nonsensical. The issue is the noise level on busy days (in absolute terms or compared to quiet days) around each field for each of the alternative scenarios. That noisy day contrast among the various alternative scenarios is important and valid regardless of the day of the week. (And if, as the Navy suggests, weekends should be calculated separately from weekdays, Dkt. 55 at 19:18, the calculations can easily distinguish weekdays from weekends.)

We have not misconstrued the reason for the Navy's NEPA analysis. Dkt. 55 at 20:7–13. That a particular metric has valid scientific uses does not mean any given application of that metric is scientifically appropriate. Misusing a metric to understate impacts is prohibited by NEPA. "Agencies shall insure the professional integrity, including scientific integrity, of the discussions and analyses in environmental impact statements." 40 CFR § 1502.24. The baseline can and should be the DNL for

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quiet days and noisy days calculated separately. That would be contrasted with the DNL for quiet and noisy days under the various alternative scenarios. That would provide *meaningful* comparisons (as opposed to the Navy's approach which has "averaged away" the distinctions by combining quiet and noisy days together).

The Navy argues *Pacific Coast Federation v. Nat'l Marine Fisheries Serv.*, 265 F.3d 1028, (9th Cir. 2001) is off point. Dkt. 55 at 20. The specifics are different, but the message is the same: Do not use an assessment method that dilutes impacts. There, the agency assessed impacts at a large geographic scale which made the impacts of any single logging operation appear miniscule. "[A] 128 acre project represents only 1% to 0.1% of a watershed." *Id.* at 1035. Here, the agency assessed impacts by combining projections for noisy days with projections for quiet days. Either way, the results are inappropriately "diluted to insignificance." *Id.* at 1036.

B. NEPA: Failure to Assess Noise with "Enhanced" Engines

The Navy only argues that COER is mistaken that the Navy's Growlers are being equipped with enhanced engines. But the standard F414-GE-400 engines can be retrofitted into an "enhanced" version. COER's comment (GRR 171303) directed the Navy to the engine manufacture's webpage which states: The "F414 Enhanced Engine incorporates additional technical advancements that can be retrofitted into the F414 to provide [. . .] up to a 20 percent increase in thrust[.]"[2] That website contains links to the F414 Enhanced Engine factsheet, which states: "The F414 Enhanced Engine upgrade will . . . provide a 18% increase in thrust with improved reliability for the United States Navy's F/A-18E/F Super Hornet and EA-18G Growler fleet."[3] Captain Illston's statement ("Nor has *the Navy* ever used the term 'enhanced' to describe the Growler engines," Dkt. 55-3 at 15:3–4 (emphasis supplied)) artfully dodges the question

[2] https://www.geaviation.com/sites/default/files/datasheet-F414-Family.pdf (Appendix A hereto).
[3] https://www.geaviation.com/sites/default/files/datasheet-F414-Enhanced.pdf (Appendix B hereto).

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of how many of the Navy Growler F414-GE-400 engines are or will be retrofitted with the enhanced engine (with 20% more thrust and more noise).[4]

C. NEPA: Failure to Validate Model with Real World Monitoring

We demonstrated that the Court likely will find that the EIS is inadequate because the Navy failed to validate the noise projections generated by its model. Dkt. 29 at 14–16. The Navy asks for deference to its experts' opinions, Dkt. 55 at 23:6, but it did not provide any expert opinion to justify its refusal to validate, only an unsupported vacuous response. Dkt. 29 at 15:16–18.

The Navy mischaracterizes *Morongo* as holding that an agency is "not obligated to 'monitor actual noise levels' to evaluate a proposed action's" noise impacts. Dkt. 55 at 21. There, the issue was not whether modeling should be validated by measurements. Rather, the issue was which set of measurements to use. The agency had measured background noise at various locations, but not on the tribe's reservation. The agency concluded that the off-reservation measurements provided a reasonable estimate for similar conditions on the reservation. The Court agreed. The case has nothing to do with whether computer model predictions should be validated by real world measurements.

Next, the Navy says that the model's "noise measurements are in fact validated through subsequent measurements." Dkt. 55 at 22:8 (citing GRR 105333). This is nonsensical, nonresponsive and misleading. Nonsensical: The model does not generate "measurements." It produces predictions. Nonresponsive: We are seeking validation of computer modeled predictions by on-the-ground measurements, not validation of one set of measurements by another set of measurements. Misleading: The citations for this statement in GRR 150333 are all 30 to 40 years old. Whatever

[4] COER has been trying to get a specific answer to this question for months, through a FOIA request to the Navy that was filed on October 17, 2019 seeking, *inter alia*: "All records showing the type of type of engine (*i.e.*, the standard F414-400 vs. the F414-enhanced engine) installed in the EA-18G Growlers conducting the FLCP pattern operations[.]" Five months later, the Navy has neither produced responsive documents nor provided COER with an estimated completion date. Griefen Decl., Ex. A.

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validation of "noise measurements" occurred then obviously had nothing to do with the forecasts of Growler jets flying low over Coupeville in 2019 and 2020.

Finally, the Navy notes that Congress has now compelled the Navy to initiate post-decision noise monitoring. *Id*. at 22:13. But NEPA requires that the analysis be conducted before decisions are made, not after. "NEPA's effectiveness depends entirely on involving environmental considerations in the initial decisionmaking process. *See* 40 C.F.R. §§ 1501.2, 1502.5 . . . " *Metcalf v. Daley*, 214 F.3d 1135, 1145 (9th Cir. 2000). That Congress felt compelled to mandate the noise monitoring demonstrates the importance of the monitoring and Congress's concern with the legitimacy of the model's forecasts, but it does not cure the Navy's error in failing to use the monitoring information to inform its decision *before* the ROD was issued.[5]

D. NHPA: Failure to Provide a Meaningful Explanation for Rejecting the SHPO and ACHP Recommendations

Our motion acknowledged that the Navy need not adopt the SHPO and ACHP recommendations, yet the Court must engage in a "searching and careful" inquiry to assure that the agency has "articulate[d] a satisfactory explanation for its action including a rational connection between the facts found and the choices made." Dkt. 29 at 9. The Navy agrees. Dkt. 55 at 23:20.

The court will likely find that the Navy failed to articulate a rational basis for rejecting the expert agencies' recommendations. Our motion demonstrated that several reasons advanced by the Navy for rejecting the expert agency's recommendations lacked any substance or rational thought. Dkt. 29 at 18:21–19:23. In response, the Navy does not attempt to defend any of those flawed rationales. None. Instead, it advances others. First, the Navy reasserts the argument it made with regard

[5] The Navy's response inaccurately states that Congress directed $1.6 million to be used for the monitoring program. Actually, that amount is to fund monitoring at two different locations. Dkt. 55-2 at 2:9–13. Presumably, roughly one-half of that amount will be used at Whidbey.

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to the EIS that "noise modeling incorporates *actual noise measurements*." Dkt. 55 at 24:3. We have addressed that *supra* at 5–6. Next, the Navy argues that its modeling agreed with actual noise levels measured by the National Parks Service. It did not. As the National Park Service explained:

> NPS monitoring results document a 7dBA difference in Lmax (113 dB at Reuble Farmstead versus 106 at Rhododendron Park), and a 5.2 difference in SEL (117 dB at the Farmstead versus 112 dB at Rhododendron Park). The differences between levels at the Ferry House and Ebey's Prairie are 8 dBA Lmax and 8.6 SEL. In both instances, **the DEIS modeling data** projected for Calendar Year 21 (full implementation of the proposed action) **significantly under represent the noise derived from NPS monitoring of current conditions**. Please explain this discrepancy.

GRR 116462 (emphasis supplied). *See also* GRR 116458 (NPS: "[The Navy's computer modeled] data is not consistent with data the NPS collected on the Reserve").[6, 7]

Finally, the Navy notes that it is now compelled by Congress to implement real-time noise monitoring. Dkt. 55 at 24:7. As with the NEPA process, *see supra* at 6, an NHPA consultation must occur *before* decisions are made, 36 C.F.R. § 800.1(c), to inform the Navy's decision on how to address the historic and cultural resources sought to be protected by the ACHP and SHPO. (And again, the Navy overstates (Dkt. 55 at 22:14–15) the financial commitment. *See supra* at 6, n. 5.)

II. THE NAVY IS CAUSING IRREPARABLE HARM

Our motion was supported by detailed declarations from 11 residents who documented actual harm currently being suffered because of the frequent Growler overflights. Dkt. 30–32; 34–35; 37; 40; 42; 44–46. Impacts *currently being suffered* included noise so loud that "my entire body vibrates;" inability to sleep with "bulbous" ear protection in place; "noises deafening, so bad that we are unable

[6] An increase of 6 dB represents a four-fold increase in acoustic energy. Dkt. 38-2 at 8. For every 6 dB increase, the allowable exposure time is reduced by 75%. GRR 113628.

[7] Despite NPS's request that the Navy "explain this discrepancy" and NEPA's requirement to do so, 40 C.F.R. § 1503.4(a), the Navy did not provide a meaningful response and instead just asserted without explanation that the NPS measurements "affirmed" the Navy's modeling predictions, GRR 161320 (Response No. 4.f).

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to carry on a conversation *inside our own home*;" and "quiet use and enjoyment of my family's home [has been] taken from us . . . we have to wear hearing protection or hide in a closet to protect ourselves." Dkt. 29 at 4–6 (summarizing declarations; emphasis supplied). Permanent hearing loss, reduced longevity from cardiovascular noise impacts, loss of quality family time, and diminished learning in classrooms are all irreparable harms.

Despite the voluminous first person accounts of current harm, the Navy boldly asserts we have proffered no such evidence. Dkt. 55 at 9:7. But the Navy never addresses any of the evidence summarized above. Instead, it cherry picks a few statements that do not fit the mold, latching onto statements regarding "fears" and *additional* harm that will occur from future overflights. *Id*. at 9–10. But ignoring the evidence of current actual harm does not make it go away. It stands unrebutted. That unchallenged evidence amply supports this motion.

Focusing on one of the many harms being suffered—hearing loss—the Navy asserts a lack of evidence of causation. Dkt. 55 at 11. The Navy ignores the Brabanski Declaration (Dkt. 34) which provided the scientific foundation linking increased noise to hearing loss. When dealing with populations, it is not necessary to identify any single individual. The Court is on firm ground in enjoining the Navy based on evidence that hundreds or thousands of people are being exposed to noise levels that cause hearing loss, combined with first person accounts of hearing loss.

The Navy asserts that all but one of the declarants brought this on themselves by moving to this area after the area had been zoned for high intensity noise in 1992. Dkt. 55 at 12. This not only ignores residents who have been there since before 1992, *see* Pickard Decl. at ¶ 8, but also that the Navy told the community that the noise levels that were extant in 2005 would likely not be increased

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further and would, in fact, decrease.[8] The Navy invited people to make peace with those noise levels, but fifteen years later increased them significantly. It is the Navy, not the residents, that has unclean hands. *See also infra* at 10 (discussing equities).

Irreparable injury is also suffered by plaintiffs and other members of the public who are unable to enjoy Ebey's Landing National Historical Reserve. Dkt. 29 at 21–22. The Navy completely ignores this aspect of our evidence of irreparable harm.

The Navy also argues that the irreparable injury claim is undercut by the plaintiffs' delay in filing this motion. On the contrary, COER moved expeditiously. To inform its injunction decision, upon ROD approval in the spring of 2019, COER immediately began to document impacts residents were experiencing from the increased Growler activity. COER hired a consultant to take noise measurements and prepare an expert report during the months of June and July, 2019. COER filed its complaint in early July 2019 and subsequently agreed to stipulate to the Navy's requested 30-day extension for filing its answer. Dkt. 13. During that time, COER and its counsel also were reviewing the voluminous files associated with this case. In early September 2019, the parties began to explore a potential settlement of this matter and held an in–person settlement discussion in October 2019. COER decided that it was premature to move for a preliminary injunction before the Navy's answer was filed, and until the potential for a settlement was explored. No settlement was reached. In October 2019, COER filed its amended complaint. In November 2019, the Navy ceased all operations at OLF and did not resume operations at OLF until January 8, 2020. During December 2019, counsel for COER and the Navy met and conferred via telephone and email in attempt to resolve or narrow the issues raised by COER's incipient motion. During those discussions, counsel for Navy requested that

[8] The Navy stated in its 2005 Environmental Assessment that "with replacement of the EA-6B with the EA-18G, the annual number of flight operations at NAS Whidbey Island is projected to decrease" and "Operation of the EA-18G in replacement of the EA-6B results in less noise exposure to the local community." GRR 30968.

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COER delay filing its motion until after the holidays, and COER agreed. COER finalized and filed its pending motion in February, after the flights at OLF resumed.

III. THE BALANCE OF EQUITIES FAVORS ENTRY OF A PRELIMINARY INJUNCTION

In our motion, we demonstrated that the equities favor plaintiffs, not the Navy. Homeowners and businesses were misled by the Navy's statements of its planned use of the air space at levels far below those approved in the ROD. Dkt. 29 at 22 (citing evidence). The Navy's only response to this argument is that many in the area moved here after their area was designated as a high noise area. We have addressed that argument *supra* at 8–9. The Navy does not dispute our evidence that the community was misled by the Navy's pronouncements that noise levels would not be rising further.

IV. AN INJUNCTION IS IN THE PUBLIC INTEREST

The public at large, not just COER's members, will benefit from a preliminary injunction. Those public interest benefits are not limited to the environmental benefits that will serve COER members and other residents alike. Rather, the public interest is served by the economic advantages resulting from an injunction as documented by many of the individual declarants as well as by the declarations from the City of Port Townsend and San Juan County.

The Navy argues that the evidence of economic harm is not relevant to the merits of a NEPA claim. Dkt. 55 at 10:12. But we have not cited the evidence from San Juan County, Port Townsend, and area residents about economic impacts for purposes of demonstrating NEPA harm. Rather, this evidence goes to the issue of whether the public interest (broadly writ) is served by issuance of a preliminary injunction. Economic impacts are as much a part of the public interest analysis as is the Navy's national defense claims. Our evidence demonstrates the economic benefits of an injunction. The Navy has offered no evidence to the contrary. That an injunction's collateral economic advantages

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are enjoyed in Port Townsend and the San Juans (not just in Coupeville (GRR 142412)) does not make them any less relevant, the Navy's contrary suggestion notwithstanding (Dkt. 55 at 10:18).

The Navy's primary public interest argument is that the Growlers are vital to our national defense. Dkt. 55 at 13. That argument misses the point. It focuses on the role of Growlers in the Navy's national defense system and the importance of FCLP training generally. *Id.* It does not address the narrower issue presented here: Whether the national defense would be compromised by the Navy's return to the pre-ROD training patterns.

We anticipated this national defense argument in our motion. Dkt. 29 at 23:17. We pointed to the Navy's finding in its own environmental impact statement that an 80/20 split favoring Ault Field (Alternative 2C) would "meet the purpose of and need for the Proposed Action." GRR 150290. *See also* GRR 150142 ("the Navy is analyzing three alternatives, each of which has five operational scenarios that meet the purpose and need for the Proposed Action"); GRR 150314 (summary of alternatives). A 'reasonable alternative' is an alternative that "meet[s] the purpose of and need for the Proposed Action." GRR 150290 (EIS). The Navy's brief and declarations fail to address the inconsistency between its litigation claim that an injunction that would implement Alternative 2C would compromise the national defense and its own EIS which characterized that alternative as a practical, reasonable alternative.

The Court should be skeptical of the self-serving, after-the-fact declarations now submitted by the Navy that are inconsistent with the EIS (and never address the inconsistency). The Navy's declarations are clearly adversarial and argumentative in nature. While they laud the advantages of the training flights at OLF, including the darkness and absence of landmarks, *e.g.*, Dkt. 55-1 at ¶ 9, they never once acknowledge any of OLF's drawbacks. Among other things, the runway is too short (Sims Decl., Ex. A) and, contrary to the darkness/no landmarks claim, OLF is bordered by SR 20 and the

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approach for runway 32 goes over the top of a suburban density subdivision. *Id*. at ¶¶ 9–11. For these or other reasons, the Navy frequently runs its training programs from other bases. *Id*. at ¶ 16; Ex. B–C. None of this (nor the inconsistency with EIS Alternative 2C) is acknowledged by any of the Navy's declarants, seriously undermining their credibility, forthrightness, and weight.[9] The Navy's prior practice of using other bases more often than OLF, *id*., and using Ault for 80% of the local flights demonstrates that the new regime may be more convenient, but it is not a national defense necessity.

V. CONCLUSION

The motion should be granted and the Navy enjoined from increasing and shifting the Growler flights above the baseline number of operations that existed before the ROD was issued, until this matter is resolved on its merits.

Dated this 27th day of March, 2020.

Respectfully submitted,

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[9] The Navy makes a similar claim in arguing for consideration of its *in camera* evidence. *See, e.g.*, Dkt. 58 at 1 (last three lines). But the portion of Miller's declaration cited there makes no reference to shifting flights back to Ault.

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CERTIFICATE OF SERVICE

I hereby certify that on March 27, 2020, I served a copy of the foregoing on counsel of record electronically through the court's CM/ECF system.

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