

The Honorable Richard A. Jones

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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

CITIZENS OF EBEBY’S RESERVE’S
REPLY BRIEF IN SUPPORT OF
SUMMARY JUDGMENT AND
RESPONSE TO NAVY’S MOTION
FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

	<u>Page</u>
I. GENERAL ISSUES	1
II. NEPA CLAIMS	3
A. The EIS Failed to Analyze a Reasonable Range of Alternatives	3
B. The Navy Failed to Take the Necessary Hard Look When It Failed to Validate Noise Models with Readily Available Real-World Monitoring	5
C. The EIS’s Use of DNL Masked Real Impacts	7

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

D. The EIS Relies on an Outdated Standard and Thus Fails to Accurately Describe the Likely Effects on Local Residents Caused by the Predicted Noise Exposure 9

E. The EIS Failed to Respond to Agency Requests to Consider Noise Monitoring as a Mitigation Measure 13

F. The EIS Understated Greenhouse Gas Emissions..... 15

G. NHPA Claim: The Navy Failed to Adequately Respond to the ACHP Recommendations 17

III. CONCLUSION 17

TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

<u>Cases</u>	<u>Page</u>
<i>Am. Lung Ass'n v. Env't Prot. Agency</i> , 985 F.3d 914 (D.C. Cir. 2021).....	15
<i>Am. Wild Horse Pres. Campaign v. Perdue</i> , 873 F.3d 914 (D.C. Cir. 2017)	2
<i>Animal Def. Council v. Hodel</i> , 840 F.2d 1432 (9th Cir. 1988), <i>amended</i> , 867 F.2d 1244 (9th Cir. 1989)	15
<i>Citizens to Pres. Overton Park, Inc. v. Volpe</i> , 401 U.S. 402, 91 S. Ct. 814, 28 L. Ed. 2d 136 (1971), <i>abrogated on other grounds by Califano v. Sanders</i> , 430 U.S. 99, 97 S. Ct. 980, 51 L. Ed. 2d 192 (1977)	1
<i>Department of Transportation v. Public Citizen</i> , 541 U.S. 752 (2004)	14
<i>Earth Island Inst. v. U.S. Forest Serv.</i> , 442 F.3d 1147 (9th Cir. 2006).....	12
<i>Friends of the Earth v. Hall</i> , 693 F. Supp. 904 (W.D. Wash. 1988).....	2, 13
<i>Idaho Wool Growers Association v. Vilsack</i> , 816 F.3d 1095 (9 th Cir. 2016).....	7
<i>Ilio 'ulaokalani Coal. v. Rumsfeld</i> , 464 F.3d 1083 (9th Cir. 2006)	2
<i>Lands Council v. Powell</i> , 395 F.3d 1019 (9th Cir. 2005)	15
<i>Massachusetts v. E.P.A.</i> , 549 U.S. 497, 127 S. Ct. 1438, 167 L. Ed. 2d 248 (2007)	16
<i>Morongo Band of Mission Indians v. FAA</i> , 161 F.3d 569 (9th Cir. 1998).....	5, 6
<i>Northern Spotted Owl v. Hodel</i> , 716 F.Supp. 479 (W.D. Wash. 1988)	2
<i>Oregon Natural Desert Association v. Jewell</i> , 840 F.3d 562 (9th Cir. 2016).....	1
<i>Seattle Audubon Society v. Espy</i> , 998 F.2d 669 (9th Cir. 1993)	12
<i>Sierra Forest Legacy v. Sherman</i> , 646 F.3d 1161 (9th Cir. 2011).....	16
<i>State of California v. Block</i> , 690 F.2d 753 (9th Cir. 1982)	13

1	<u>Statutes and Regulations</u>	<u>Page</u>
2	40 CFR 1502.7	1
3	46 Fed. Reg. 8316, 8343 (Jan. 26, 1981)	10
4	85 Fed. Reg. 43308 (July 16, 2020)	1
5	85 Fed. Reg. 43328 (July 16, 2020)	1
6	42 U.S.C. § 7607(d)(9)(A)	16
7		
8	<u>Other Authorities</u>	<u>Page</u>
9		
10	Federal Aviation Administration, 1050 Desk Reference, Chapter 11, "Noise and Noise Compatible Land Use"	
11	https://www.faa.gov/about/office_org/headquarters_offices/apl/environ_po licy_guidance/policy/faa_nepa_order/desk_ref/ (Feb. 2020).....	11
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I. GENERAL ISSUES

Before addressing the discrete issues on which summary judgment is sought, COER responds to several general issues raised by the Navy's brief. One, while the Navy is correct that COER disagrees with the Navy's substantive decision, COER is not asking this Court to reverse on that basis. Instead, as the Navy well knows, we seek review of the Navy's compliance with statutes designed to assure that the Navy's policy decision is fully informed as to environmental and historic preservation issues. If the Navy's decision was not fully informed as required by those statutes, it should be vacated.

The Navy notes that the administrative record is voluminous. ECF 92 at 13.¹ The issues presented to the Court are not related to the number of pages the Navy has compiled. Quality, not quantity, is the issue.² The Council on Environmental Quality has long been concerned with agencies that seek to "litigation-proof documents, increasing costs and time, but not necessarily quality." 85 Fed. Reg. 43308 (July 16, 2020) (*quoting* a 1997 CEQ report). The record in this case reveals that concern remains valid today.

Third, the Navy goes overboard in stressing the deference the courts provide to an agency's analysis of technical issues. Deference does not excuse the Navy from ensuring the scientific integrity of its analysis. *Oregon Natural Desert Association v. Jewell*, 840 F.3d 562, 570 (9th Cir. 2016). NEPA's hard look requires a "searching" assessment of the record.³ Confronted by competing technical claims, District Courts and Circuit Courts have plunged deeply into the record

¹ Citations to pleading page numbers use the page numbering appearing in the Court's added page headers.

² As President Carter stated in his First Environmental Message to Congress: "[EISs] must reflect a concern with quality, not quantity. We do not want impact statements that are measured by the inch or weighed by the pound." 85 Fed. Reg. 43328 (July 16, 2020). *See also* 40 CFR 1502.7 (EIS should normally be less than 150 pages and for projects of unusual scope and complexity less than 300 pages).

³ *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416, 91 S. Ct. 814, 824, 28 L. Ed. 2d 136 (1971), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99, 97 S. Ct. 980, 51 L. Ed. 2d 192 (1977).

1 to determine whether there is a legitimate difference of professional judgment or whether one
2 party’s analysis is flawed. Resolving technical disputes is not as simple as stating, “there are two
3 technical issues advanced; the court defers to the agency.” This Court should take the approach of
4 the court in *Friends of the Earth v. Hall*, 693 F. Supp. 904 (W.D. Wash. 1988), in which the court
5 conducted a lengthy and detailed, searching review of the highly technical record (as well as extra-
6 record scientific evidence) and concluded that “the Corps and the Navy failed to satisfy their NEPA
7 obligations.” *Id.* at 944. *See also Am. Wild Horse Pres. Campaign v. Perdue*, 873 F.3d 914 (D.C.
8 Cir. 2017) (agency decision reversed following detailed review and analysis of the scientific
9 record); *Northern Spotted Owl v. Hodel*, 716 F.Supp. 479, 482 (W.D. Wash. 1988) (same)
10 (“[j]udicial deference to agency expertise is proper, but the Court will not do so blindly”).
11

12 The foregoing cases demonstrate that a far more intensive assessment of the technical
13 information is required. That ‘hard look’ is a vital element of the Court’s review. Even in cases
14 involving national defense, trial courts have dug deeply to assess the validity of the agency’s claim.
15 *See Ilio’ulaokalani Coal. v. Rumsfeld*, 464 F.3d 1083, 1098 (9th Cir. 2006) (“the record is
16 unambiguous—compelling our finding that transformation of the 2nd Brigade outside of Hawaii
17 was a reasonable alternative that the Army was required to consider under NEPA”).
18

19 Fourth, the Navy frequently mischaracterizes the Court’s ruling on COER’s preliminary
20 injunction motion. The Navy characterizes the ruling as a substantive rejection of COER’s claims.
21 *See, e.g.*, ECF 92 at 26–27 (DNL); at 34 (validation). But the Magistrate recommended against
22 addressing the merits at the preliminary injunction stage (ECF 72 at 19) and the Court did not
23 address the merits in its ruling either (ECF 82). *See also* ECF 72 at 23 (“the Court should not further
24 inquire into the merits of plaintiff’s arguments at this early stage and should find that these
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1 arguments do not *yet* establish a likelihood of success on the merits”) (emphasis supplied). Neither
 2 the Magistrate nor the Court engaged in any analysis of the substantive claims. ECF 72; ECF 82.

3 II. NEPA CLAIMS

4 A. The EIS Failed to Analyze a Reasonable Range of Alternatives

5 In our motion, we cited the Navy’s own admission that El Centro provides “higher quality of
 6 training than could be achieved at either Ault Field or Coupeville.” ECF 87 at 14 (*citing* GRR
 7 121559).⁴ Our proposed alternative was not to split the Growlers between Whidbey and El Centro but
 8 to base them exclusively at El Centro (so-called “single siting”). The Navy’s response to our motion
 9 mischaracterizes it. The Navy quotes the EIS’s rejection of splitting the Growlers between multiple
 10 sites. ECF 92 at 57 (*quoting* GRR 150307). The Navy’s attack of that “straw man” should be ignored.
 11

12 The Navy next contends that “COER’s contention that the Navy failed to engage in a
 13 ‘comparison of environmental impacts at the two sites’ is misplaced.” *Id.* But that statement is wholly
 14 unsupported. The Navy cites nothing from the administrative record where a comparison of the
 15 environmental impacts of the two sites was provided. That is *exactly* the analysis that we seek by
 16 including El Centro as an alternative in the EIS.
 17

18 Next, the Navy mischaracterizes our discussion of the cost issue. It claims that we argue that
 19 consideration of budgetary pressures is “improper.” *Id.* Our position is more nuanced. We explain that
 20 truly excessive costs can be a basis for disqualifying an otherwise reasonable alternative, but the
 21 agency must demonstrate that the costs are truly excessive and beyond the reach of further funding
 22 from Congress. ECF 87 at 15–16. In particular, we noted that the Navy presented no evidence that it
 23 sought funding to base the Growlers at El Centro (a site the Navy itself deems superior for training
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26 ⁴ We inadvertently stated that GRR 121559 is part of the EIS. It is not, but it is a Navy document analyzing alternatives to Ault Field and the OLF.

1 purposes) or that Congress had rejected such a request. *Id.* Tellingly, the Navy does not refute these
2 statements.

3 Instead, the Navy states that budgetary pressures were not the only basis for rejecting El
4 Centro. ECF 92 at 58. But the alternative justifications for rejecting El Centro referenced briefly in
5 parentheticals, *id.*, do not withstand scrutiny either. The first simply states that El Centro does not
6 currently have the infrastructure to house the Growler squadron. But this is just another version of the
7 cost argument. There is no claim that there are physical, legal or other non-cost constraints on
8 developing El Centro with adequate facilities for the Growlers. The issue is whether the superior
9 training opportunities and possibly lower environmental impacts at El Centro justify the additional
10 expense. Without the environmental comparison, neither the Navy nor Congress can make an
11 informed judgment.
12

13 The Navy also references air pollution issues related to El Centro but, as we explained in our
14 opening brief, a comparison of air quality impacts and all other environmental impacts at El Centro
15 and at Whidbey is exactly what is missing because of the Navy's rejection of El Centro as a reasonable
16 alternative. While basing Growlers at El Centro might—to some uncertain and unstated extent—
17 aggravate air quality impacts, those impacts should be evaluated in conjunction with an analysis of
18 noise impacts, historic resource impacts, wildlife impacts, and all the other environmental impacts that
19 are required to be analyzed in an EIS. The Navy cannot legitimately disqualify El Centro simply
20 because with regard to one aspect of the environment, a shift to El Centro could result in adverse
21 impacts.
22

23 The Navy does not dispute that the alternatives section is the heart of an EIS. This EIS is
24 missing its heart. There was no analysis of even one alternative site. The Court should find that the
25 EIS is inadequate.
26

1 **B. The Navy Failed to Take the Necessary Hard Look When It Failed to Validate**
2 **Noise Models with Readily Available Real-World Monitoring**

3 In our opening brief, we demonstrated that the Navy failed to take the simple step of
4 monitoring existing flights to determine whether the outputs from its model were accurate. ECF 87 at
5 17–21. The Navy does not respond by arguing that it monitored actual flights to determine if the model
6 output was accurate. Instead, it argues that the model has been validated in other situations and
7 demonstrated to be reasonably accurate. ECF 92 at 34. But this response ignores that the output of a
8 model is only as good as the input. As the Department of Defense states, “the axiom of ‘garbage in
9 equals garbage out’ (GIGO) is especially true for noise modeling.” GRR 32741. *See also* GRR 32768.
10 The model inputs include variables such as the precise location of the low flying jets (both horizontally
11 and vertically). If the pilots in the air regularly deviate from the assumptions inserted into the model,
12 the model outputs will be wrong. That is why multiple agencies requested validation monitoring here.
13 The Navy ignored these requests when they were made and ignores them again in its brief.

14 The Navy acknowledged that the noise from the Growlers already in operation when the EIS
15 was being prepared was representative of future noise impacts, as long as an adjustment was made to
16 reflect the greater number of flights that would occur in the proposed action: “Individual noise levels
17 for individual aircraft events will not change at Ault Field or Coupeville (it’s the same aircraft). What
18 residents are hearing now is what they will hear in the future; just more often.” GRR 138168. Thus, it
19 would have been a straightforward task to monitor the noise from the existing individual flights and
20 then scale that up to reflect the greater number of flights proposed in the EIS alternatives.
21

22 The Navy’s reliance on *Morongo Band of Mission Indians v. FAA*, 161 F.3d 569 (9th Cir.
23 1998) is based on a misleading characterization of the facts in that case. ECF 92 at 34. *Morongo* did
24 not involve a dispute between using a model and field measurements. Rather, in *Morongo*, the agency
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1 used actual field measurements. The issue was whether the particular site where the noise was
2 monitored was close enough to the subject site to be comparable. *Morongo*, 161 F.3d at 577. The
3 Court determined that the agency’s use of measurements from a similar site for background conditions
4 was reasonable. *Morongo* does not support the contention that an agency should not use readily
5 available measurements to validate the output of a model that has never been validated at this site.
6

7 The Navy’s claim that monitoring undertaken by the National Parks Service was consistent
8 with the model’s output was flatly contradicted by the National Parks Service itself. GRR 116458;
9 116462. The discrepancy noted by the NPS was the difference between the noise levels generated by
10 individual overflights compared to the model’s prediction of those noise levels.⁵ The Navy ignores
11 that critical discrepancy. Instead, to demonstrate that the NPS measurements and model outputs were
12 similar, it points to other parameters. First, it notes that the NPS data documented that the overflights
13 are “intermittent” and that “there are long periods of time between noise events.” ECF 92 at 35, n. 11.
14 But no one disputes that the overflights are intermittent. Claiming that the NPS measurements and the
15 noise model outputs are consistent based on *that* parameter is highly misleading.
16

17 The Navy then points to another consistency between the model results and that NPS
18 measurements—both indicated that noise events greater than 60 dBA would occur less than one
19 percent of the time. *Id.* Again, the Navy focuses on a parameter that is *not* in dispute. The issue is the
20 frequency of noise at much higher levels, in excess of 70 dBA, 80 dBA, 90 dBA, and 100 dBA. It is
21 those much higher noise levels where the noise measurements indicated a far greater problem than
22 forecast by the Navy’s model. For instance, the NPS drew the Navy’s attention to a 7 dBA difference
23 in the maximum noise levels at various locations where the noise was in excess of 100 dBA. GRR
24

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26 ⁵ See GRR 116458 (“Data the NPS type 1 systems collected in the field and the Navy modeled data are inconsistent. . . . Table 3.2-4 [of the EIS] shows 267 events for an entire year, whereas just for one month NPS monitoring documented 281 aircraft events exceeding LAm_{ax} 70 dBA at the Reuble Farmstead.”).

1 116462. The NPS, the Governor of Washington, other agencies, and other organizations were focused
2 on the discrepancy between the measurements at these very high levels of noise and the model's
3 downplaying of those most impactful noise levels. The Navy's reference to findings regarding noise
4 at much lower decibel levels is immaterial to this critical issue.

5
6 The Navy cites *Idaho Wool Growers Association v. Vilsack*, 816 F.3d 1095 (9th Cir. 2016)
7 for the proposition that validation of a model is not required where, among other things, the model
8 had produced reasonable outputs in other situations. ECF 92 at 35. But, again, we are not
9 challenging the model itself, but rather the validity of the output based on the accuracy of the input
10 in this particular application. Garbage in, garbage out. *Idaho Wool* did not examine the issue of
11 whether the agency was required to validate the model's output where there were questions about
12 the reasonableness of the input. Moreover, unlike the model in *Idaho Wool*, the NOISEMAP model
13 employed here has been found to produce misleading results in other situations. GRR 152230
14 ("modeled data consistently underestimates the actual on-site noise by 5 to 15 decibels").
15

16 The Navy ignores that the model output was inconsistent not just with the NPS on-site
17 measurements but with Jerry Lilly's on-site measurements, too. GRR 60526-50 (discussed at ECF
18 87 at 19, n. 9).

19 **C. The EIS's Use of DNL Masked Real Impacts**

20 In our summary judgment motion, we demonstrated that the manner in which the Navy
21 used the DNL metric provided misleading information and precluded comparing alternatives. ECF
22 87 at 23–29. We acknowledged that the DNL metric was commonly used and, in typical situations,
23 is calculated just once—because airport operations typically are uniform across the days and weeks
24 of a year. The problem here, though, is that Growler schedules are highly erratic. In that situation,
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1 the Navy and others have recognized the need to calculate the DNL twice—once when the aircraft
2 are operating and separately when they are not. ECF 87 at 24.

3 The Navy’s response ignores this crucial distinction. The Navy notes that in typical
4 situations, the DNL is computed just once. ECF 92 at 28. But the Navy does not address the
5 evidence—now undisputed—that when schedules and operations are erratic, the DNL must be
6 calculated separately for the “with” and “without” conditions. One of the documents we cited for
7 that proposition is the Navy’s own document, ECF 87 at 25 (citing GRR 32516). The Navy’s
8 response does not even address that document, prepared under its direction.

9
10 During the environmental review process, the Navy identified several supposed
11 disadvantages of calculating the DNL twice. We addressed each of those in our opening brief, *id.*
12 at 27–29. The Navy’s response does not address any of the arguments we presented with regard to
13 those supposed disadvantages, with but one exception: a footnote that discusses a passage in an
14 EPA noise manual. The author of the footnote did not understand the import of the quoted passage.
15 The EPA manual recommends use of the DNL metric based on the *annual average*. But it notes
16 that sometimes that data on the average annual noise level is not available and it may be reasonable
17 to use a daily average instead. The document notes, for instance, that many airports have data on
18 their “average busy day” (ABD). In some circumstances, “it is quite reasonable to use such existing
19 noise information, even though it is not exactly the annual average.” GRR 8359. The manual then
20 notes an exception to that general rule—an exception applicable here. The exception occurs when
21 there are significant variations in air flights from day to day. The example used in the manual is an
22 airport eliminating a ban on Sunday flights. The manual notes that if the volume of flights on
23 Sundays is less than the other days of the week, including the Sunday data would *reduce* the daily
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1 average—even though the project’s impacts would be a huge increase in noise on Sundays. *Id. In this*
 2 *situation*, the manual notes that using the average busy day “may lead to nonsensical results.” *Id.*

3 The author of footnote 9 apparently construed this passage in the EPA manual to mean that
 4 using the average busy day always would lead to nonsensical results. That, obviously, is not the import
 5 of the passage. Rather, the import of the passage is that these metrics must be used carefully with an
 6 eye toward the fact pattern to which they are applied. The Department of Defense expressly provides
 7 that using daily averages under flight paths with sporadic conditions will underestimate annoyance.
 8 GRR 32663, 32679–80. The EPA guidance discussed in footnote 9 says nothing to the contrary.

9 In our Opening Brief, we cited the Navy’s acknowledgement that the “more intermittent the
 10 ops [operations] the stronger the case” for using average busy days. ECF 87 at 25 (*citing* GRR 93857).
 11 Because of this, the Navy sought to “stay away from specific number of fly days.” *Id.* We asserted
 12 that the Navy “followed through on its obfuscation plan, never stating the number of fly days in the
 13 EIS.” *Id.*

14 In response, the Navy claims that COER “is simply incorrect.” According to the Navy, the
 15 FEIS “lists the number of ‘fly’ days at GRR 159155–57.” ECF 92 at 30. But it is the Navy that is
 16 simply incorrect, not COER. Nowhere on the cited pages are the number of fly days set forth. Instead,
 17 the predictions on those pages are the total number of flights (GRR 159155) and those totals are
 18 disaggregated by type of aircraft and time of day (GRR 159156–57). But nowhere on those pages (or
 19 elsewhere) are the number of expected fly days and quiet days stated.
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23 **D. The EIS Relies on an Outdated Standard and Thus Fails to Accurately**
 24 **Describe the Likely Effects on Local Residents Caused by the Predicted Noise**
 25 **Exposure**

26 In our opening brief, we demonstrated that the EIS uses an outdated metric for estimating the
 extent of human annoyance likely to result from the noise levels at issue here. The EIS relies on the

1 so-called “updated” Schultz curve which is almost 30 years old and is widely recognized to
2 underestimate annoyance effects. ECF 87 at 29–32. The Navy took a quarter step in the right direction
3 by adding to its noise maps a 55 decibel contour line (reflecting the current science), but it did not take
4 the logical and necessary next steps of estimating the number of people and school children that would
5 be exposed in that wider area. *Id.* at 32.

7 In response, the Navy provides no explanation for its decision to map the 55 DNL contour line
8 but to omit information about the number of people and school children that would be exposed in that
9 larger area. If the larger area is lightly populated and no schools are located there, the effects will be
10 much less than if the broader area is more heavily populated and if schools are present. The Navy
11 understood that simply mapping contour lines is not sufficient to convey the bottom line information
12 of the *impacts on people*. Thus, with regard to the 65 DNL line, the Navy took the extra (necessary)
13 steps of estimating the number of people. *See, e.g.*, GRR 150654–656. That is the correct approach.
14 The Navy’s failure to do so with regard to the 55 DNL line or to identify the number of children at
15 school within that line is inexplicable, arbitrary, and capricious.

17 While the Navy implicitly acknowledges the relevance of the 55 DNL contour by including it
18 on its maps, the Navy’s brief argues that the 55 DNL contour need not be disclosed at all. According
19 to the legal argument (ECF 92 at 31), the Navy “reasonably” relied on the judicial FAA’s 65 DNL
20 threshold—which has been in place for 40 years⁶ and apparently was based on the original Schultz
21 curve; it preceded by at least a decade the now out-of-date 1992 Schultz curve. Notably, the Navy
22 brief does not argue that the science underlying the old FAA standard is still valid or up-to-date. It
23 rotely urges the Court to reference the FAA standard without any consideration of the underlying
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⁶ *See* 46 Fed. Reg. 8316, 8343 (Jan. 26, 1981).

1 science. But NEPA’s mandate is to provide up-to-date *scientific* information, not simply to reference
 2 existing regulations. By failing to question the science underlying the current internationally accepted
 3 thresholds, the Navy’s brief tacitly concedes that if *science*—not regulations—are to drive
 4 environmental review, the EIS should have fully utilized the ISO standard (International Organization
 5 for Standardization) and disclosed the number of humans and schools that would be within the larger
 6 55 DNL contour.
 7

8 The Navy’s adherence to the FAA regulation is further undermined by the FAA’s own
 9 equivocation regarding the 65 DNL threshold. Of particular relevance here, the FAA warns that
 10 “special consideration needs to be given to the evaluation of the significance of noise impacts on noise
 11 sensitive areas within Section 4f properties (including, but not limited to, noise sensitive areas within
 12 . . . historic sites, including traditional cultural properties) . . . For example, the 65 DNL dB threshold
 13 does not directly address the impacts of noise on visitors to areas within a national park or national
 14 wildlife and waterfowl refuge where other noise is very low and a quiet setting is a generally
 15 recognized purpose and attribute.”⁷ Likewise, the FAA admonishes:
 16

17 However, the part 150 guidelines may not be sufficient to determine
 18 the impact of noise on historic properties where a quiet setting is a
 19 generally recognized purpose and attribute (i.e., where it has been
 20 determined to be a contributing factor to the property’s historic
 21 significance), such as a historic village preserved specifically to convey
 22 the atmosphere of rural life in an earlier era or a traditional cultural
 23 property.

24 *Id.*

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 26 ⁷ Federal Aviation Administration, 1050 Desk Reference, Chapter 11, "Noise and Noise Compatible Land Use"
https://www.faa.gov/about/office_org/headquarters_offices/apl/environ_policy_guidance/policy/faa_nepa_order/desk_ref/
 / (Feb. 2020), at 11-11 (last accessed June 21, 2021).

1 The Navy contends that the EIS was free to omit the 55 DNL information because this is
2 merely a “battle of the experts” and while the FAA is considering lowering the annoyance threshold,
3 it has not done so yet. ECF 92 at 32. The Navy fundamentally misunderstands NEPA’s mandate and
4 the Court’s responsibility here. We are not asking the Court to decide whether the modern ISO
5 standard or the old Schultz curve represents the “better science.” The issue is whether the EIS should
6 have considered and disclosed both. NEPA requires a “complete discussion” that “does not improperly
7 minimize negative side effects.” *Earth Island Inst. v. U.S. Forest Serv.*, 442 F.3d 1147, 1159 (9th
8 Cir. 2006). “It would not further NEPA’s aim for environmental protection to allow the Forest Service
9 to ignore reputable scientific criticisms that have surfaced with regard to the once ‘model’ ISC
10 strategy.” *Seattle Audubon Society v. Espy*, 998 F.2d 669, 704 (9th Cir. 1993) (internal citation
11 omitted).
12

13
14 Recently, Congress has weighed in, questioning the FAA’s reliance on its archaic regulation.
15 P.L. 115-254, §187 (mandating FAA review of aircraft noise on nearby communities); H. Rpt. 116-
16 452 at 28 (Appropriations Committee “awaits the conclusion of the [FAA] Administrator’s ongoing
17 review of the relationship between aircraft noise exposure and its effects on communities around
18 airports”). As stated by Congressman Panetta (sponsor of the amendment requiring the FAA study),
19 “like many Members who have districts who have faced these types of airplane noise concerns, I
20 believe that the existing day-night level 65-decibel standard is out of date, out of touch, and inadequate
21 to measure the amount of sound pollution impacting our communities”) (164 Cong. Rec. H3657,
22 2018). As the FAA itself states:

23
24 While the Schultz Curve remains the accepted standard for describing
25 transportation noise exposure-annoyance relationships, its original
26 supporting scientific evidence and social survey data were based on
information that was available in the 1970s. The last in-depth review
and revalidation of the Schultz Curve was conducted in 1992. More

1 recent analyses have shown that aviation noise results in higher
 2 annoyance than other modes of transportation. Recent international
 3 social surveys have also generally shown higher annoyance than the
 4 Schultz Curve. These analyses and survey data indicate that the Schultz
 Curve may not reflect the current U.S. public perception of aviation
 noise.

5 https://www.faa.gov/regulations_policies/policy_guidance/noise/survey/ (last visited June 21, 2021).

6 The Navy breached its NEPA duty to more fully explore noise impacts at lower thresholds.

7 The Navy asserts that the EIS addressed Mr. Fidell’s concerns, ECF 92 at 33 (*citing* GRR
 8 150253–55), but that passage makes our point. There, the EIS responds to Fidell merely by referencing
 9 the existence of the old FAA regulation. There is absolutely no discussion of the science. There is no
 10 effort to address the substance of the more modern research. The so-called “response” is really no
 11 scientific response at all.

12 The Navy mistakenly cites *State of California v. Block*, 690 F.2d 753, 773 (9th Cir. 1982) as
 13 supporting its position. True, the Ninth Circuit said there that an agency is not obligated to conduct
 14 new studies nor to “resolve” conflicts raised by opposing viewpoints.” ECF 92 at 33. But the Court
 15 made that statement in the context of *rejecting* an agency claim that it had adequately responded to
 16 opposing viewpoints. The case requires the agency not simply to identify opposing views, but to
 17 include a “good faith, *reasoned analysis* in response.” *Id.* at 773 (emphasis supplied). Here, the Navy’s
 18 constant reference to the FAA regulation without providing a “reasoned analysis” for rejecting the
 19 science inherent in the ISO standard fails to satisfy longstanding Ninth Circuit precedent.

22 **E. The EIS Failed to Respond to Agency Requests to Consider Noise Monitoring**
 23 **as a Mitigation Measure**

24 “Adequacy of an EIS hinges, *inter alia*, on the completeness of the mitigation plan.” *Friends*
 25 *of the Earth v. Hall, supra*, 693 F. Supp. at 938 (W.D. Wash. 1988). In our motion, we demonstrated
 26 that the Navy failed to address post-implementation noise monitoring as a mitigation measure. ECF

1 87 at 35–36. In response, the Navy does not dispute that it failed to address post-implementation noise
2 monitoring as a mitigation measure. Instead, it cites its discussion of “other” mitigation measures.
3 ECF 92 at 54–55. The discussion of “other” mitigation measures is no excuse for failing to discuss
4 critical mitigation measures proposed by the Advisory Council on Historic Preservation, the EPA, and
5 the National Parks Service. GRR 151123; 151217; 167462.

6
7 The Navy’s failure to consider this key mitigation measure was coupled by a failure to provide
8 a meaningful explanation for failing to do so. As previously noted, the Navy’s only justification for
9 the omission was an assertion—unsubstantiated—that the monitoring would merely confirm the noise
10 model predictions. ECF 87 at 55–56. The Navy’s brief is devoid of any factual support for its claim
11 that the modeling was so accurate that mitigation would not generate new information.

12
13 The Navy references assertions that monitoring is not practical because operations are
14 intermittent. ECF 92 at 55. But the statement is in the context of comparisons to be made with
15 conditions that “do not currently exist” (GRR 150241)—which is not the situation here.

16 The Navy also asserts that COER cannot raise this argument because post-implementation
17 monitoring was raised only by federal agencies, not COER itself. ECF 92 at 55 (citing *Department of*
18 *Transportation v. Public Citizen*, 541 U.S. 752, 764 (2004)). *Public Citizen* states no such thing; its
19 rationale suggests the opposite. In *Public Citizen*, the court refused to consider an issue that no one—
20 neither the litigants nor anyone else—had raised because it precluded the agency from giving “the
21 issue meaningful consideration;” the agency “was not given the opportunity to examine any proposed
22 alternatives.” *Id.* In contrast here, the comments from three federal agencies were more than sufficient
23 to give the Navy the opportunity to provide meaningful consideration to post-implementation
24 monitoring as a mitigation measure. The Navy’s procedural objection to the Court considering this
25 argument should fail.
26

1 **F. The EIS Understated Greenhouse Gas Emissions**

2 In modeling and estimating greenhouse gas (GHG) emissions and climate change impacts
3 from the proposed action, the Navy failed to consider Growler GHG emissions above 3,000 feet and
4 failed to consider actual Growler fuel consumption at NAS Whidbey—both of which are relevant
5 factors in assessing the project’s climate change impacts. Defendants do not deny these failures,
6 instead advancing three justifications for the omissions. ECF 97 at 58–61. None are persuasive.
7

8 First, the Navy argues that this Court should ignore Dr. Greacen’s extra-record evidence. As
9 explained more fully in COER’s reply in support of its motion to admit extra record evidence, Dr.
10 Greacen’s declaration and its four exhibits (ECF 85, 86; collectively herein, the “Greacen
11 Declaration”) are admissible under the first and third *Lands Council* exemptions. *Lands Council v.*
12 *Powell*, 395 F.3d 1019, 1029–30 (9th Cir. 2005). It is necessary for the Court “to go outside the
13 administrative record to determine whether the [agency] ignored information[.]” *Animal Def. Council*
14 *v. Hodel*, 840 F.2d 1432, 1437 (9th Cir. 1988), *amended*, 867 F.2d 1244 (9th Cir. 1989).
15

16 Second, even without reference to the extra-record evidence, Dr. Greacen had raised the issue
17 that the GHG emissions were understated and the Navy has now confirmed a fundamental error in its
18 calculations. The Navy admits it did not consider GHG emissions above 3,000 feet, apparently
19 oblivious to the impact of those emissions on climate change. The Navy’s explanation for omitting
20 emissions above 3,000 feet is: “This is because emissions above the average mixing height will not
21 have a measurable impact on *local air quality*, which is the concern addressed in the FEIS.” ECF 92
22 at 59:14–15 (emphasis supplied). But the EIS was required to and purported to address climate change
23 impacts of the Proposed Action, not just concerns about local, ground-level air quality impacts. *See*
24 *generally* GRR 151041 *et seq.* Unlike so-called “criteria air pollutants,” “carbon dioxide emissions do
25 not pose localized concerns at the site of emission.” *Am. Lung Ass’n v. Env’t Prot. Agency*, 985 F.3d
26

1 914, 958 (D.C. Cir. 2021). Instead, “CO₂ is a global pollutant with global effects[.]” *Id.* (quotation and
2 citation omitted). “The harms associated with climate change are serious and well recognized.”
3 *Massachusetts v. E.P.A.*, 549 U.S. 497, 521, 127 S. Ct. 1438, 1455, 167 L. Ed. 2d 248 (2007). The
4 Navy’s failure to consider GHG emissions above 3,000 feet (and its failure to inform its model with
5 actual amount of fuel used by Growlers stationed at NAS Whidbey) caused it to ignore an important
6 aspect of the problem and was arbitrary and capricious. The Court should not defer to the Navy’s
7 faulty analysis of climate change impacts, because it is egregiously in error and because calculating
8 GHG emissions is not within the “unique expertise of the federal government.” *Sierra Forest Legacy*
9 *v. Sherman*, 646 F.3d 1161, 1186 (9th Cir. 2011).

11 Finally, the Navy claims that it properly responded to Dr. Greacen’s public comment regarding
12 GHG emissions and climate change impacts. Dr. Greacen’s comment raised concerns regarding the
13 Navy failing to account for significant flying that happens between takeoff and landing, discrepancies
14 in afterburner usage time, and a more than fourfold discrepancy between Growler fuel use assumptions
15 in the EIS and in the Department of Defense’s Selected Acquisition Reports. GRR 154092–154093.
16 The Navy’s comment response at GRR 161364–365 did not address Dr. Greacen’s comments. That
17 is immediately evident by comparing GRR 154092–154093 with GRR 161364–365.

19 Like the defendant agency in *Massachusetts v. E.P.A.*, the Navy “has offered no reasoned
20 explanation for its refusal” to consider GHG emission above 3,000 feet, and its action “was therefore
21 ‘arbitrary, capricious, ... or otherwise not in accordance with law.’ 42 U.S.C. § 7607(d)(9)(A).”
22 *Massachusetts v. E.P.A.*, *supra*, 549 U.S. at 534.

1 **G. NHPA Claim: The Navy Failed to Adequately Respond to the ACHP**
 2 **Recommendations**

3 The crux of our NHPA claim is that the Navy failed to provide a reasonable explanation for
 4 not adopting the ACHP’s request for post-implementation monitoring. The Navy’s brief continues the
 5 dodge. The Navy spends pages discussing *other* proposed mitigation (some of it adopted; some not).
 6 ECF 92 at 63–67. But there is virtually no discussion of the specific mitigation measure we raised in
 7 our motion—the request by the ACHP and SHPO for post-implementation monitoring. ECF 87 at 40–
 8 41. The Navy’s only direct response to that claim is its reference (with no discussion) to GRR 167574–
 9 78. *See* ECF 92 at 66:16–18. In those cited pages, the only reference to post-implementation
 10 monitoring is on GRR 167575. There, the Navy offered several justifications for not conducting post-
 11 implementation monitoring. But those are the rationales we addressed in our opening brief (ECF 89
 12 at 39–41 and *supra* at 5–9). The Navy still has not responded to any of that argument, which
 13 demonstrates that those explanations were irrational and arbitrary. In essence, our motion remains
 14 un rebutted.⁸

15
 16 **III. CONCLUSION**

17
 18 The Court should find the EIS inadequate and remand for preparation of an adequate EIS. If
 19 the Court so determines, we will address other potential remedies, *e.g.*, injunctive relief and its scope,
 20 in subsequent briefing.

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 26 ⁸ One of the several explanations at GRR 167575 relates to the supposed lack of utility of monitoring
 when the flights, as here, are sporadic. That issue arises also in the context of validation monitoring and is addressed *supra*
 at 6.

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Dated this 22nd day of June, 2021.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 22, 2021, I served a copy of the foregoing on counsel of record electronically through the court’s CM/ECF system.

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