District Judge Richard A. Jones

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

STATE OF WASHINGTON, *et al.*

Plaintiffs,

v.

The UNITED STATES DEPARTMENT OF THE NAVY, *et al.*,

Defendants,

No. 2:19-cv-01059-RAJ-JRC

**FEDERAL DEFENDANTS' REPLY IN SUPPORT OF CROSS-MOTION FOR SUMMARY JUDGMENT**

NOTE ON MOTION CALENDAR: 08/03/2021

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## INTRODUCTION

As described in Federal Defendants'[1] cross-motion and opposition to Plaintiffs'[2] motions ("***Federal Defendants' Motion***" or "***Defs.' Mot.***"), ECF No. 92, this lawsuit is, at base, a disagreement about policy. To support the United States' national security interests, the Navy must train pilots, and that training, by necessity, must take place somewhere. After a detailed and time-intensive review, the Navy selected Naval Air Station Whidbey Island ("***NASWI***")[3] to provide the rigorous training necessary to prepare pilots to land on a moving aircraft carrier, and determined that, to meet those training needs, it needed to increase the number of Field Carrier Landing Practice ("***FCLP***") operations performed with EA-18G Growler aircraft ("***Growler***") based at NASWI. Plaintiffs disagree with that choice, and would prefer that training occur elsewhere, primarily due to their concerns about the noise generated by Growlers.

In an attempt to halt the Navy's proposed increase in FCLPs, Plaintiffs have challenged the Navy's Final Environmental Impact Statement ("***FEIS***") on the grounds that the Navy's environmental analysis neither complied with the National Environmental Policy Act ("***NEPA***"), 42 U.S.C. § 4321, *et seq.*, nor the National Historic Preservation Act ("***NHPA***"), 54 U.S.C. § 3016108, *et seq.*. But Plaintiffs fail to make the requisite showing that the Navy's analysis was arbitrary or capricious. Rather, Plaintiffs simply argue that the Navy was required to do more than it did, irrespective of the scope and content of the Navy's actual review and conclusions.

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[1] Federal Defendants are United States Department of the Navy, United States Fish and Wildlife Service, Lloyd J. Austin, III, in his official capacity, Thomas W. Harker, in his official capacity, James D. Balocki, in his official capacity, and Captain Eric S. Hanks, in his official capacity (collectively, the "***Federal Defendants***").

[2] Plaintiffs are Paula Spina and Citizens of the Ebey's Reserve for a Healthy, Safe & Peaceful Environment (together with Ms. Spina, "***COER***") and the State of Washington ("***Washington***" or "***the State***," together with COER, "***Plaintiffs***").

[3] Where possible, this brief uses those same abbreviations defined in the Federal Defendants' Motion and set forth in the Table of Abbreviations contained therein. *See* Defs.' Mot. at x-xi.

However, when evaluated under the well-defined standard courts have adopted for review of an environmental impact statement ("***EIS***"), the Navy's thorough review was more than sufficient, and is, ultimately, one the Court should decline to second-guess.

In light of this Court's order that their reply "be directed to those arguments raised in plaintiffs' opposition to the cross-summary judgment motion," ECF No. 102 at 3, the Federal Defendants will address or clarify the following issues addressed in Plaintiffs' responsive briefs: 1) the correct level of deference accorded to matters within an agency's expertise; 2) COER's reliance on new extra-record evidence in its reply; 3) COER's argument, raised for the first time in its reply, that the Navy failed to consider the effects of increased operations on climate change; 4) the Navy's analysis of the effects of increased Growler flights on public health; 5) whether the record supports the Navy's conclusions regarding the effects of increased operations on birds; and 6) Plaintiffs' failure to appropriately describe effects under the NHPA.[4] Any of Plaintiffs' arguments not specifically addressed below reflect an effort by the Federal Defendants to abide by the Court's Order, and not an acknowledgment that Plaintiffs have a superior argument or a waiver of the arguments raised in the Federal Defendants' Motion.

For the reasons stated below, as well as in the Federal Defendant's Motion, the Court should deny Plaintiffs' motions and grant summary judgment in favor of the Federal Defendants.

## ARGUMENT

Plaintiffs' arguments fall into three main categories. First, COER continues to contest the Navy's chosen methodologies, including those used by the Navy to estimate noise impacts and

[4] In its response COER makes no response to the Federal Defendants' argument that it waived its claims under the Endangered Species Act by failing to press those claims in its opening brief. Defs.' Mot. at 57. As such, those claims are conclusively waived. *See Husyev v. Mukasey*, 528 F.3d 1172, 1183 (9th Cir. 2008).

greenhouse gas emissions. But informed choice of methodology is entrusted to the discretion of an agency, so long as the choice is reasonable. *Lands Council v. McNair*, 629 F.3d 1070, 1074 (9th Cir. 2010) (deference applies to review of "scientific judgments and technical analyses within the agency's expertise."). And COER cannot now rely on extra-record evidence to challenge the Navy's detailed explanations in the FEIS or modify the arguments raised in its opening brief in an attempt to circumvent clear explanations in the record.

Second, Washington calls into question the sufficiency of the Navy's analysis of the effects of noise on human health and birds. But the State simply alleges Navy should have done more than it did. Courts, however, must defer to an agency's decision that is "fully informed and well-considered," *Kern v. U.S. Bureau of Land Mgmt.*, 284 F.3d 1062, 1072 (9th Cir. 2002), and one that includes a "reasonably thorough discussion of the significant aspects" of the action. *Or. Nat. Res. Council v. Lowe*, 109 F.3d 521, 526 (9th Cir. 1997). The Navy's analysis in the FEIS meets that standard.

Third, Plaintiffs' NHPA argument misconstrues the effect that the Navy's mitigation was intended to rectify: the Navy sought to mitigate the negative perceptual experience at certain historic locations caused by increased Growler flights. But the Navy was not required to mitigate the cause of the negative effects (increased Growler noise), and it properly tailored its mitigation measures towards improving the perceptual experience at those historic sites, rather than noise reduction. In sum, and as explained below, Plaintiffs' arguments raised in opposition to the Federal Defendants' Motion fail when viewed together with governing case law and the administrative record on file in this case.

## I. COER Misstates the Proper Standard of Deference a Court Should Apply in Evaluating Agency Actions Under NEPA.

Where, as here, Plaintiffs challenge an agency's scientific judgments, courts are the "most deferential." *Balt. Gas & Elec. Co. v. Nat. Res. Def. Council, Inc.*, 462 U.S. 87, 103 (1983). COER's response attempts to minimize the high deference accorded to the Navy by suggesting that the Navy's analysis is flawed. COER Resp. Supp. Mot. Summ. J. and Resp. to Cross Mot. ("***COER Resp.***") at 1-2, ECF No. 99. COER's various arguments and inapposite cases, however, fail to identify any significant flaws in the Navy's methodology and fail to demonstrate that the standard identified and set forth in the Federal Defendants' Motion is improper.

For example, COER asserts that the Navy should have "calculate[d] the DNL twice—once when the aircraft are operating and separately when they are not." COER Resp. at 7-8.[5] But COER's assertion does not demonstrate a failure by the Navy to take a "hard look" at the issue, or identify any inconsistencies in the Navy's analysis. Rather, COER's arguments merely highlight its ongoing disagreement with the Navy's chosen methodology. *See* GRR_00150329 (explaining that COER's desired metric "encourages the use of the most conservative assumptions regarding projected airfield operations"); GRR_00150254 (clarifying that COER's desired metric fails to account for "the benefit the Navy's minimal weekend operations would have on those days, which are days when people are less likely to be away from their homes at work"). As it has throughout this case, COER continues to insist that the best analysis is one that

[5] The day-night average sound level ("***DNL***") is the "energy-averaged sound level measured over a 24-hour period with 10-[decibel] nighttime adjustment. DNL does not represent sound level heard at any given time but instead represents long-term exposure." GRR_150333.

begins with a baseline of zero flights—*i.e.* "quiet days." COER Resp. at 8 ("DNL must be calculated separately for the 'with' and 'without' conditions."). But because the Navy was considering an *increase* in existing Growler flights, it calculated the baseline as the current amount of flights and employed the methodology it determined best suited that situation. GRR_00150141.[6]

As such, COER's reliance on *Friends of the Earth v. Hall*, 693 F. Supp. 904 (W.D. Wash. 1988), and *Northern Spotted Owl v. Hodel*, 716 F. Supp. 479 (W.D. Wash. 1988), to advocate for less deference is misplaced. In *Hall*, the court recognized the "high degree of deference" that should be afforded to an agency but found the agency did not satisfy NEPA because it failed to disclose that its chosen method was "experimental, subject to a significant degree of uncertainty, and present[ed] a significant risk of failure." 693 F. Supp. at 922-23. Likewise, in *Hodel* the agency failed to comply with NEPA because it "provide[d] no explanation for its findings" and "lack[ed] any expert analysis supporting its conclusion." 716 F. Supp. at 482. But here COER's arguments do not rest on the Navy's failure to explain its methodology, but on COER's preference for a different approach.

To that end, the record demonstrates that the Navy's chosen methodology is well supported by a thorough explanation and expert analysis—which is all that NEPA requires. *See Lands Council v. McNair*, 537 F.3d 981, 1003 (9th Cir. 2008) (en banc), *overruled on other grounds* ("NEPA does not require us to 'decide whether an [EIS] is based on the best scientific methodology available.'"); *Friends of Rapid River v. Probert*, 427 F. Supp. 3d 1239, 1258 (D.

[6] COER previously challenged the analysis to *introduce* the Growler flights, but the Navy's determination was upheld. *See Citizens of the Ebey's Rsrv. for a Healthy, Safe & Peaceful Env't v. U.S. Dep't of the Navy* ("***COER I***"), 122 F. Supp. 3d 1068, 1079 (W.D. Wash. 2015).

Idaho 2019), *aff'd in part, dismissed in part*, 816 F. App'x 59 (9th Cir. 2020) ("[T]he fact that some of the data is 'old' does not mean that the data is unreliable."); *COER I*, 122 F. Supp. 3d at 1079 ("Courts should not 'second-guess' an agency's choice in analytical method simply because a plaintiff has presented an alternative.").

Finally, COER cites '*Ilio'ulaokalani Coalition v. Rumsfeld*, 464 F.3d 1083, 1098 (9th Cir. 2006), to urge the Court to "assess the validity" of the Navy's justification supporting its chosen alternatives. COER Resp. at 2. But in that case, the agency "never explained or justified" the basis for its decision, and "the [agency]'s own experts recognized that the failure to undertake [] analysis … created a problem under NEPA . . . ." *'Ilio'ulaokalani Coal.*, 464 F.3d at 1098. Here, in contrast, the Navy supplied the explanation that was missing in that case. *See, e.g.*, GRR_150308 ("Home basing Growler squadrons at NAF El Centro would consume airfield facilities and services reducing availability of the El Centro training complex to its current users and disrupting proven training practices and uses of training ranges."). In an effort to second-guess that explanation COER advances an improper "fly-specking" approach, rather than the "rule of reason" courts consistently use to evaluate alternatives under NEPA. *Friends of Se's Future v. Morrison*, 153 F.3d 1059, 1063 (9th Cir. 1998); *City of Carmel-By-The-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997) ("[t]he 'rule of reason' guides both the choice of alternatives as well as *the extent to which the Environmental Impact Statement must discuss* each alternative." (emphasis added)). Moreover, COER's argument is wrong because "[a]n agency is under no obligation to consider every possible alternative to a proposed action, nor must it consider alternatives that are unlikely to be implemented or those inconsistent with its basic policy objectives." *Seattle Audubon Soc'y v. Moseley*, 80 F.3d 1401, 1404 (9th Cir. 1996).

In sum, the Court must "defer to agency expertise on questions of methodology unless the agency has completely failed to address some factor, consideration of which was essential to a truly informed decision whether or not to prepare an EIS." *Inland Empire Pub. Lands Council v. Schultz*, 992 F.2d 977, 981 (9th Cir. 1993) (internal quotation omitted) (citations omitted). Against the analysis provided by the Navy in the FEIS, COER's challenge to the Navy's chosen methodology fails.

## II. The New, Extra-Record Materials Relied on by COER Fail to Demonstrate the Navy Unreasonably Relied Upon the FAA's Noise Threshold Standard.

In its Motion for Summary Judgment, and citing to its own comments on the FEIS and those of its expert (Sanford Fidell), COER argued that the Navy acted unreasonably when it decided to use a 65 decibel ("***dB***") DNL metric as a threshold for determining noise impacts on humans. *See generally* COER Mot. Summ. J. ("***COER Mot.***") at 22-27, ECF No. 87. As set forth in its comments to the FEIS, COER advocated for the Navy to instead use a 55 dB DNL metric, consistent with more "recent studies." *See id.* at 23-27. But as Federal Defendants previously explained, the Navy—reasonably and in full compliance with NEPA—considered comments and studies advocating for use of the lower 55 DNL metric and then made a reasoned decision to use the 65 DNL threshold (consistent with the current FAA standard). *See generally* Defs.' Mot. at 19-22. That choice of methodology is entitled to deference from the Court. *Id.* at 21; *see also supra* Section I.

Now, and apparently conceding that the administrative record does not adequately support its arguments, COER's response contains citations to new materials not contained in the administrative record. *See* COER Resp. at 11-13 (citing the February 2020 edition of the FAA's 1050 Desk Reference, various statements by members of Congress, and the FAA's website). But

these materials do not demonstrate that the Navy's determination to use the FAA's current standard was unreasonable.

First the Court should disregard the materials relied upon by COER because they constitute an improper attempt to introduce extra-record evidence. *See Nw. Env't Advocs. v. Nat'l Marine Fisheries Serv.*, 460 F.3d 1125, 1144 (9th Cir. 2006) ("[The] review of agency action under NEPA is limited to the administrative record"). And COER has failed to identify extraordinary circumstances that would allow this Court to consider materials outside of the administrative record. *See* COER Resp. at 11-13; *see generally Fence Creek Cattle Co. v. U.S. Forest Serv.*, 602 F.3d 1125, 1131 (9th Cir. 2010) (explaining four exceptions to the record review rule and finding that plaintiff did not meet its "heavy burden to show that the additional materials sought are necessary to adequately review the [agency's] decision").[7] Further, a court may not rely on post-decisional materials in considering the reasonableness of an agency's decision, *Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir. 1996), and, here, the cited materials from the FAA all appear to post-date the FEIS (issued in September 2018), COER Resp. at 11-13.

Second, and even if the Court chooses to consider the extra-record materials, they do not alter the current FAA standard for noise effect studies, which is 65 dB, nor do they provide an alternative standard. *Id.* At most, the extra-record materials simply indicate that an agency should consider whether the current FAA standard is appropriate for the proposed agency action, rather

[7] Those exceptions are where: "(1) supplementation is necessary to determine if the agency has considered all factors and explained its decision; (2) the agency relied on documents not in the record; (3) supplementation is needed to explain technical terms or complex subjects; or (4) plaintiffs have shown bad faith on the part of the agency." *Id*. (citing *Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005)). COER fails to meet any of those specific exceptions.

than blindly employing that standard. But, as demonstrated in the record and described in the Federal Defendants' Motion, the Navy made an informed determination. *See generally* Defs.' Mot. at 19-22. Thus, while COER may disagree with the noise threshold employed by the Navy, it has failed to demonstrate that the Navy acted unreasonably.

## III. The Navy Thoroughly Analyzed Climate Change in the FEIS.

For the first time in its reply, COER now alleges that the Navy failed to analyze "the project's climate change impacts." COER Resp. at 15.[8] Specifically, while COER originally asserted that "the [FEIS] dramatically under-estimates fuel consumption and, correspondingly, [greenhouse gas] emissions," it now challenges the FEIS's analysis of climate change more broadly. *Compare* COER Mot. at 30 *with* COER Resp. at 15. But, even if this Court were to entertain this argument, it also fails. The Navy thoroughly examined the impacts of climate change, including emissions, in the FEIS. *See* GRR_151041-55.

In particular, the Navy discussed how greenhouse gas emissions "are the primary cause of climate change" and acknowledged that "[t]he Proposed Action would result in an increase in GHG emissions compared to the No Action Alternative primarily from the increase in the use of jet fuel for military aircraft operations." GRR_151041. As such, and to the extent COER appears to argue otherwise, COER Resp. 15-16, the Navy's reliance on guidance from the EPA as to calculating certain greenhouse gas emissions did not constrain its hard look at climate change. *See WildEarth Guardians v. Jewell*, 738 F.3d 298, 309 (D.C. Cir. 2013) (finding agency's

[8] In its Motion, COER did not challenge the EIS on the grounds that the Navy failed to describe the effect of the increase in Growler flights on climate change. Instead, COER claimed only that the Navy had underestimated the emissions from Growlers based on inaccurate fuel consumption records. COER Mot. 29-30. As such, this argument was waived given it was raised for the first time in COER's response. *Turtle Island Restoration Network, Inc. v. U.S. Dep't of Commerce*, 672 F.3d 1160, 1166 n.8 (9th Cir. 2012) ("arguments raised for the first time in a reply brief are waived.") (citation omitted)

emissions projects satisfied NEPA even though "it did not discuss specific global impacts that would result from additional emissions"); *see also WildEarth Guardians v. Bureau of Land Mgmt.*, 8 F. Supp. 3d 17, 35 (D.D.C. 2014) ("In plaintiffs' view, 'estimates [of GHG emissions] alone without an analysis of the impacts to climate resulting from these emission levels do not comply with NEPA's hard look requirement ….' But it is precisely because current climate science is uncertain (and does not allow for specific linkage between particular GHG emissions and particular climate impacts) that evaluating GHG emissions … is a permissible and adequate approach.").

Moreover, and to the extent COER now alleges the Navy should not have relied on EPA guidance in determining how to measure emissions from increased Growler flights, the Court should defer to the Navy's choice to employ guidance from an expert agency. *See California v. Bernhardt*, 472 F. Supp. 3d 573, 624 (N.D. Cal. 2020) (an agency's "chosen methodology must [only] be accurate and defensible") (citation omitted). Because COER fails to establish that the EPA's guidance is inaccurate—or that the Navy incorrectly applied the guidance—COER's mere disagreement is not sufficient grounds for this Court to determine the Navy acted arbitrarily and capriciously.

## IV. The Navy Sufficiently Evaluated the Effects of Noise From Growler Operations on the Health of Populations Around NASWI.

Washington's arguments concerning health effects are, at base, an attempt to move the goalposts for a second time. In its motion for summary judgment, Washington argued that the Navy failed to analyze the effects of noise on various health outcomes. *See* Wash. Mot. Summ. J. ("***Wash. Mot.***") at 10-21, ECF No. 88. Now, however, Washington acknowledges the Navy's analysis in the FEIS but claims that analysis was not thorough enough because the Navy failed to

"connect the dots." *See* Wash.'s Combined Resp. to Cross Mot. and Reply Supp. Mot. Summ. J. ("***Wash. Resp.***") at 7, ECF No. 101. In other words, Washington believes the Navy failed to reach some unspecified, but necessary, conclusions regarding the effects of noise on various health outcomes. But the Navy's analysis was detailed, thorough, and rational, and the conclusions it reached are well-supported by the record. *See* Defs.' Mot. at 29-35. NEPA requires no more. *See Protect Our Communities Found. v. Jewell*, 825 F.3d 571, 584 (9th Cir. 2016) (finding agency's review of "array of [ ] scientific research literature" and attendant conclusions satisfied NEPA).

In addition, a court reviews an EIS only to determine whether, under a "pragmatic" "rule of reason," an "'EIS's form, content and preparation foster both informed decision-making and informed public participation.'" *Churchill Cnty. v. Norton*, 276 F.3d 1060, 1071 (9th Cir. 2001) (citation omitted). As described below, the Navy's analysis as to health effects satisfies that standard. *See Protect Our Communities Found. v. LaCounte*, 939 F.3d 1029, 1035 (9th Cir. 2019) ("NEPA requires [ ] procedural steps but does not require an agency to reach any particular result.") (citation omitted).

**A. <u>The Navy Appropriately Considered the Effects of Noise on Child Learning.</u>**

Washington reiterates its complaint that the Navy failed to reach appropriate conclusions regarding the impact of increased Growler flights on child learning. Wash. Resp. at 3. In particular, the State argues that the Navy was required to "analyze how increased Growler noise may impair learning outcomes." *Id*. at 4. But the Navy *did* analyze those impacts by quantifying the increase in "noise events" schools near NASWI would experience as a result of the proposed increase in flights. *Id*. at 3. The State simply argues that the Navy should have gone further.

In its response, Washington claims it is not looking for a "one-to-one" analysis, only "reasoned analysis," but it fails to articulate how the Navy should have presented its findings differently. *Id*. at 4-5. Indeed, the State cannot insist on a specific format. *League of Wilderness Defs.-Blue Mountains Biodiversity Project v. U.S. Forest Serv.*, 549 F.3d 1211, 1218 (9th Cir. 2008) ("It is not for this court to tell the [agency] what *specific* evidence to include, nor how *specifically* to present it."). And the FEIS sets forth the "reasoned analysis" that NEPA requires. Defs.' Mot. at 29-31 (citing, *e.g.*, GRR_150363, GRR_150336-37). Nor did the Navy argue, as the State now claims, that its literature review alone satisfied NEPA; instead, the Navy noted that that review *and* the analysis in the FEIS constituted an appropriately "hard look." Defs.' Mot. at 31. And while Washington argues the Navy failed to consider the "logical next step," Wash. Resp. at 5, the FEIS demonstrates that the Navy reasonably analyzed the issue within the scope of the available scientific literature. *See* GRR_150336 ("environments with sustained high background noise can have variety of effects on children including effects on learning and cognitive abilities and various noise-related physiological changes."). The Navy's analysis is sufficient, particularly given "practical considerations of feasibility might well necessitate restricting the scope of comprehensive statements" in an EIS. *Kleppe v. Sierra Club*, 427 U.S. 390, 414 (1976).

Washington also claims that the Navy is relying on a *post hoc* rationalization by claiming that no definitive study links aircraft noise to decreased learning outcomes. Wash. Resp. at 6. But the FEIS did not refer to a study reaching a definitive result, *see* GRR_159322, GRR_150336, and indeed noted "that further study is needed in order to differentiate the specific cause and

effect to understand the relationship [between noise and learning outcomes]." GRR_150336. Federal Defendants' brief is therefore not at odds with the record.

Washington's complaints come back to its inchoate view that the Navy should have done more. Wash. Resp. at 7 (expressing Washington's request that the Navy "conduct an [unspecified] analysis" of noise and learning outcomes). But the Navy engaged in a thorough analysis, and reached a reasoned conclusion: "chronic exposure to high aircraft noise levels may impair learning." GRR_159322.[9] To the extent Washington simply disagrees with the substance of the agency's conclusion, as opposed to the process by which it reached the conclusion, that argument is not an appropriate ground for challenge under NEPA. *See Sierra Nev. Forest Prot. Campaign v. Rey*, 573 F. Supp. 2d 1316, 1343 (E.D. Cal. 2008) (EIS satisfied NEPA where agency "recognized scientific controversy" but "acknowledged concern" for issue) *aff'd in part, rev'd in part by Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1182-83 (9th Cir. 2011) (agency's analysis satisfied NEPA where, it "expressed uncertainty concerning [its] analysis," even though it did not "prioritize the concern of [plaintiffs'] scientific experts.")).

**B. The Navy Did Not "Dismiss" the Impacts of Jet Noise on Public Health.**

Washington claims that the Navy's analysis was insufficient because it purportedly "dismissed" the impacts of noise on public health by acknowledging that there is no "definitive

[9] Washington relies on *Hausrath v. U.S. Dep't of the Air Force*, 491 F. Supp. 3d 770, 792-94 (D. Idaho 2020) for the proposition that the Navy needed to specifically analyze how noise would impact area schoolchildren. Wash. Resp. at 5. In *Hausrath*, the court rejected an agency's conclusion that flight activities "would have negligible effects upon sleep in vastly different urban areas," where the agency had not considered the number of flights that could occur during a given operation, the number of training operations that could occur on a given night, or the effect of multiple aircraft not flying in a pre-determined flight path. 491 F. Supp. 3d at 791-93. In short, the agency had failed to conduct adequate studies in order to justify a finding of no significant effects. In contrast, here, the Navy acknowledged potential effects on child learning and provided detailed estimates of the number of classroom interferences that would be expected, GRR_150362-63, and the State does not appear to challenge the validity of those calculations.

causal study" on the issue. Wash. Resp. at 7. But this argument is at odds with Washington's own briefing, which admits that the Navy *did* analyze non-auditory health impacts. *Id*. at 12-13. As such, the State's argument on this issue (as with its arguments on the effects of noise on child learning) is nothing more than a strawman meant to encourage this Court to second-guess the FEIS. Indeed, and beyond its own briefing, Washington's claim that the Navy "dismissed" health impacts is belied by the Navy's acknowledgement that while "[n]o studies have shown a definitive causal and significant relationship between aircraft noise and health," GRR_150339, "[r]esearch studies seem to indicate that aircraft noise may contribute to the risk of health disorders along with other confounding factors." GRR_150246; *see also* Defs.' Mot. at 31-35.

The weakness in Washington's argument is further illustrated by its claim that the issue is "not whether the Navy considered non-auditory health impacts" of aircraft noise "at all" (the State admits that the Navy did), but whether it "*dismissed* non-auditory health impacts" based on application of a too-stringent causal standard. Wash. Resp. at 13 (emphasis added).[10] But the distinction between the standard Washington thinks should have been used and the standard the Navy applied is opaque at best, particularly given that Washington never specifies what causal standard it believes should have been applied, or what application of such a standard would have accomplished (*i.e.*, what would the Navy have done differently). *Id*.

Against Washington's nebulous standard, the United States Supreme Court set forth the

[10] The State also claims that: (1) the Navy relied on "stale" data, *id*. at 10; (2) some studies referenced by the Navy are more persuasive and should have merited a different conclusion, *id*. at 10; and (3) the Navy failed to "account" for non-auditory health impacts. *Id*. at 8-9. As discussed above, these arguments fail because they challenge the correctness of the Navy's decision rather than the process for reaching that decision. *See, e.g.*, *Bering Strait Citizens for Responsible Res. Dev. v. U.S. Army Corps of Eng'rs.*, 524 F.3d 938, 949 (9th Cir. 2008) (proper review under NEPA does not address "the substantive merits of the [agency's] scientific and factual conclusions" but instead "whether the [agency's] 'decision … was based on a consideration of the relevant factors and whether there has been a clear error of judgment.'") (citing *Marsh v. Oregon Nat'l Res. Council*, 490 U.S. 360 (1989)).

proper causal standard for agency determinations in *Department of Transportation v. Public Citizen*, 541 U.S. 752 (2004), and the Navy employed that standard in the FEIS. *See* Defs.' Mot. at 32-33. While Washington goes to great lengths to distinguish *Public Citizen*, the Navy's overarching point remains valid: based on the Navy's reasonable review of relevant literature, it determined the causal relationship between aircraft noise and non-auditory health effects was too attenuated to support the type of conjectural or speculative analysis the State desires. *See Sierra Club v. U.S. Dep't of Energy*, 867 F.3d 189, 198-99 (D.C. Cir. 2017) (while agency is required to consider reasonably foreseeable effects, it does not need to engage in "baseless speculation" such that "determination that [model] estimating localized impacts would be far too speculative to be useful is a product of its expertise … and is entitled to deference.").

Finally, Washington is incorrect that the Navy was "disingenuous" in claiming it was responsive to comments. Wash. Resp. at 10-11. Washington requested the Navy include certain information in the FEIS. GRR_151312-15. In response, the Navy made some changes to the FEIS, while rejecting calls for other modifications. *See* GRR_150245, GRR_161326-27. Thus, while Washington is correct that the Navy did not adopt its recommendations wholesale, the Navy was certainly responsive, as NEPA requires. *See* 40 C.F.R. § 1502.9(c) (noting an agency must discuss "at appropriate points in the final [EIS] . . . any responsible opposing view").[11]

### C. The Navy's Conclusions Regarding the Non-Auditory Health Effects of Jet Noise on Children are Supported by the Studies Provided in the FEIS.

In considering non-auditory health impacts on children, the Navy rationally concluded

[11] The Council on Environmental Quality ("***CEQ***") promulgated regulations implementing NEPA in 1978, 43 Fed. Reg. 55978 (Nov. 29, 1978), and a minor substantive amendment to those regulations in 1986, *see* 51 Fed. Reg. 15618 (Apr. 25, 1986). More recently, CEQ published a new rule, effective September 14, 2020, further revising the 1978 regulations. The claims in this case arise under the 1978 regulations, as amended in 1986. All citations to CEQ's regulations in this brief refer to those regulations as codified at 40 C.F.R. Part 1500 (2018).

that "there may be some relationship between noise and these health factors" but that "further study is needed in order to differentiate the specific cause and effect to understand the relationship." GRR_150336. Nonetheless, the Navy explained that "[c]hildren under the greater than 65 dB DNL noise contour are at greater risk of experiencing [ ] [non-auditory] impacts." GRR_ 150381. In its response, Washington takes issue with the FEIS's "vague reference to two undefined German studies" in support of the above-conclusion. Wash. Resp. at 14. But those studies were discussed in detail in Appendix A to the FEIS. GRR_159316-17, GRR_159320, GRR_159323. In addition, Washington makes a halfhearted challenge to the Navy's conclusion, noting it "hardly carries the weight" the Navy gives it. Wash. Resp. at 14. However, the reasoned explanation in the FEIS defeats this argument as well. *See Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 868 (9th Cir. 2005) ("[g]eneral statements about possible effects and some risk" may suffice when "more definitive information" is unavailable.); *see also Stand Up for California! v. U.S. Dep't of Interior*, 919 F. Supp. 2d 51, 73 (D.D.C. 2013) (noting agency's reliance on "review of literature" to conclude "there was 'no definitive link between casinos and regional crime rates,'" was reasonable).

### D. The Navy Reasonably Declined to Conduct a Far-Reaching Study into Health Impacts as Part of the FEIS.

In its final health impacts challenge, Washington alleges that the Navy failed to comply with 40 C.F.R. § 1502.22 by declining to conduct a Health Impact Assessment ("***HIA***") as recommended by the State's Department of Health. Wash. Resp. at 15 (Washington now refers to the HIA as an "on-the-ground" health study, but the central request remains the same).

The State notes that it recommended on-the-ground monitoring, GRR_151315, to determine whether residents were actually suffering adverse health effects. Wash. Resp. at 15-16.

But, as the Navy explained, the State's request goes beyond the scope of an EIS, which is not a vehicle for a longitudinal health study. *See* GRR_161327 ("To the extent that the intent is not to perform an HIA but to conduct long-term scientific research study on the impacts of aircraft noise and human health, such study is beyond the scope of this analysis."); Defs.' Mot. at 26-28. In response, the State now claims the Navy improperly limited the scope of its analysis. Wash. Resp. at 16-17. But that too assumes that, despite the State's comments to the contrary on the draft EIS, the Navy's well-reasoned decision not to perform an HIA violates NEPA. It does not, given the Navy's explanation as to why such monitoring was unnecessary. GRR_161327; *see Oceana v. Bureau of Ocean Energy Mgmt.*, 37 F. Supp. 3d 147, 159 (D.D.C. 2014) (40 C.F.R. § 1502.22 does not "require[] the agency to halt action in the face of uncertain information—it just requires disclosure that such information is lacking, and commands the agency to provide as comprehensive an analysis it can with the information available to it."). Moreover, and contrary to Washington's assertion, the Navy's explanation regarding its decision not to perform on-the-ground monitoring was not based on application of an improper causal standard. Rather, the Navy appropriately responded to the State's comments by explaining "why the comments do not warrant further agency response." 40 C.F.R. § 1503.4(a)(5).

## V. The Navy Properly Analyzed the Impact of Growler Flights on Birds.

As with its arguments regarding health impacts, Washington claims that "record evidence" contradicts the Navy's conclusions as to the impact of noise from Growler operations on birds. Wash. Resp. at 18-19, 25-26. In particular, the State argues that: (a) the Navy should have conducted a species-specific analysis of the noise impacts on birds; and (b) the Navy unreasonably concluded that the increased Growler operations will not significantly affect birds.

*Id.* at 17-29. But Washington's arguments fail, as the Navy's conclusions in the FEIS are well-supported, and based on a reasonable synthesis of the available studies and information.

### A. A Species-Specific Analysis Was Not required Because the Record Supports That Only Minor Variations Exist in Birds' Responses to Noise.

The State contends that the Navy's explanation for declining to conduct a species-specific analysis was inadequate. *Id.* at 18. As an initial matter, the Navy's position is not "confused," as the State alleges, *id.*, given the Navy clearly asserted that a "species-by-species analysis was not required." Defs. Mot. at 36. To that end, while the FEIS included a thorough discussion of different species,[12] *see id.*, the Navy concluded that further analysis was unnecessary because variations in bird reactions to noise were "minor." *Id.* at 37 (quoting GRR_150911).

Washington challenges this conclusion by alleging that birds react "substantially" differently to aircraft noise. *See* Wash. Resp. at 19-20. However, none of the record citations offered by the State—set forth in bullet points on page 19 of its response—support its claim. For example, the State offers a citation that purportedly describes waterfowl species as having "great variability" in their "behavior." *Id*. at 19 (quoting GRR_150475). But nowhere in the record, let alone on the page cited, does the Navy suggest that the "great variability" relates to bird responses to aircraft noise. In fact, the literature referenced in the FEIS describes the variability as occurring in terms of feeding and nesting—not reactions to noise. GRR_28775 ("[W]aterfowl have diverse feeding habits."). Similarly, the State emphasizes that "*geese responded more*

[12] The State takes issue with the FEIS not directly "cit[ing] or otherwise discuss[ing]" certain studies, including Washington's Department of Fish and Wildlife reports, that are in the administrative record, and suggests that the Navy therefore failed to consider them. Wash. Resp. at 20, 22 n.4. But the very presence of these studies and reports in the administrative record establishes that the Navy did consider them. *See* ECF No. 48-2 at 2 (noting that the administrative record in this case contains "all the documents upon which the Navy *relied* directly or indirectly") (emphasis added). And if Washington wished to challenge the record, its time to do so has long since passed.

*significantly* when aircraft flew between 1,000 feet [above ground level] and 2,500 feet [above ground level].” Wash. Resp. at 19 (quoting GRR_150912). But, again, the literature referenced in the FEIS on that page reveals that the Navy was not comparing the behavioral response of geese to other bird species. *See* GRR_24723. Rather, the referenced literature simply concludes that geese had the “greatest response” to aircraft flights between 305 and 760 meters above ground level (approximately 1,000 feet and 2,500 feet), compared to any other altitude. *Id*.

In another citation, Washington selectively quotes from the FEIS to suggest that the increase in Growler operations affects the hearing of bird species in a “substantially” different manner. Wash. Resp. at 19. But within the same quoted paragraph, the FEIS explains that “given the short period of exposure [to aircraft noise], hearing loss is not anticipated to occur to bird species in the study area,” especially considering that “birds have the ability to regenerate hair cells in the ear, usually resulting in considerable anatomical, physiological, and behavioral recovery within several weeks.” GRR_150912. And the rest of the State’s bullet-point citations support only that a variation among species exists, but do not contradict the Navy’s overall determination that the variation is negligible. *See* Wash. Resp. at 19-20. As such, the State fails to point to record citations supporting its argument.

Indeed, the Navy provided a reasonable explanation for a synthesized analysis with respect to alleged impacts on birds: only minor variations in reactions are likely between species and thus increased Growler operations would cause similar types of reactions. GRR_150911. “It is of course always possible to explore a subject more deeply and to discuss it more thoroughly. The line-drawing decisions necessitated by this fact of life are vested in the agencies, not the courts.” *Coal. on Sensible Transp., Inc. v. Dole*, 826 F.2d 60, 66 (D.C. Cir. 1987); *accord*

*Ground Zero Ctr. for Non-Violent Action v. U.S. Dep't of Navy*, 383 F.3d 1082, 1089 (9th Cir. 2004) ("We have 'rejected the notion that every conceivable environmental impact must be discussed in an EIS.'" (quoting *No GWEN Alliance of Lane County, Inc. v. Aldridge,* 855 F.2d 1380, 1385 (9th Cir.1988))).

Finally, the State's continued reliance on *National Audubon Society v. Department of Navy* remains unpersuasive given the glaring distinctions between that case and the facts here. In particular, the court expressly noted that "the proximity of the proposed OLF to the Pocosin Lakes National Wildlife Refuge *bears heavily* on our inquiry in this case." *Nat'l Audubon Soc'y v. Dep't of Navy*, 422 F.3d 174, 186 (4th Cir. 2005) (emphasis added). And the Fourth Circuit did not broadly hold—as Washington argues—that the Navy is required to "consider species-specific impacts . . . where the Navy explicitly acknowledged that different bird species respond differently to aircraft noise . . . ." Wash. Resp. at 22. Instead, the *National Audubon* court found that the only available species-specific studies directly contradicted the Navy's determination that certain species would experience only minor impacts. 422 F.3d at 192-93. In contrast, here, and as described above, Washington has not identified any species-specific study undermining the Navy's conclusions.[13]

### B. The Administrative Record Supports the Navy's Reasonable Conclusion That Increased Growler Flights Will not Significantly Affect Birds.

In addition, the State contends that the record contradicts the Navy's finding that birds will not be significantly affected by the increase in Growler operations. Wash. Resp. at 24-29. As described below, the State's three-fold contention is without merit. First, the Navy relied on

[13] Indeed, when commenting on the draft EIS, Washington's Department of Fish and Wildlife submitted no species-specific study at all. *See* GRR_151274-82.

numerous studies to determine that birds habituate to repeated exposure to aircraft noise and visual disturbance and resume normal activities within a short period after overflights occur. GRR_150913; GRR_150916. Contrary to Washington's assertion, these studies support the Navy's conclusion.[14] For example, the 1993 Smit and Visser study determined that "[i]n areas where planes are common at least some habituation can be noted." GRR_15156. And the State's selective quotations from just two of the studies cited by the Navy do not cast doubt on the Navy's reasonable conclusion. *See* GRR_6857 (Grubb 1979 study acknowledged difficulty in drawing "hard conclusions," but concluded that "herons and egret are habituated to high noise levels"); GRR_24668 (Delaney 1999 study compared its findings to two previous studies that "observed a similar" habituation response in raptors).

Second, the Navy considered numerous scientific reports and studies and reasonably concluded that the increase in Growler operations will not result in significant long-term impacts on birds. *See* Defs.' Mot. 40-43. In response, Washington focuses its argument on three studies cited in the FEIS. Wash. Resp. at 27 (citing Goudie 2006; Bedjer 2009; and Francis and Barber 2013). In particular, the State relies heavily on the 2013 Francis and Barber report to argue that the Navy ignored long-term effects on the fitness of certain bird species. *Id.* But that report observes that "a direct link between increased physiological stress due to noise and decreased survival or reproductive success [i.e. fitness] has not been shown in wild animals." GRR_56493; *see also* Defs.' Mot. at 41-42 (summarizing Navy's review of the issue). "[G]iven that experts in every scientific field routinely disagree," Washington fails to establish that the Navy should have

[14] The State points out that "a number of studies" are "at least two decades old," despite having relied one of the exact same studies—Smit and Visser, 1993—to suggest that a species-specific analysis was necessary. Wash. Resp. at 25; *see* GRR_151276-77. However, "the fact that some of the data is 'old' does not mean that the data is unreliable." *Friends of Rapid River*, 427 F. Supp. 3d at 1258. The State does not argue otherwise.

focused on only these three studies to the exclusion of all other literature. *McNair*, 537 F.3d at 1001. In sum, while the FEIS forthrightly disclosed the "[a]mple research" about adverse effects, none of that research established that birds would be significantly affected by the increase in Growler operations in the long term. *See* Wash. Resp. at 27 (quoting GRR_150910).

Third, the record supports the Navy's determination regarding short-term, minimal effects on birds. For example, the FEIS explains that "[m]ost observations report a return to normal behaviors within 5 minutes of exposure (Goudie and Jones, 2004; Komenda-Zehnder et al., 2003; Black et al., 1984; Smit and Visser, 1985, as cited by Smit and Visser, 1993)." GRR_150912. And the FEIS explained longer responses were "unlikely to affect critical behaviors of breeding pairs, such as resting, foraging, and courtship (Goudie and Jones, 2004)." GRR_150913. Despite this explanation, the State relies on one study—Goudie and Jones 2004—to suggest that the frequency of flights is a necessary factor in the Navy's analysis. Wash. Reply at 29. However, that study does not express its findings based on the number of flights or even suggest that further analysis into the frequency of flights is necessary. *See id.*; *see also* GRR_30309. Instead, the study sets forth data in terms of effects that occur "before," "during," and "after" overflights and notes the overflights were of short duration, suggesting that the overall amount of exposure time to flight noise is more critical than the number of flights. GRR_30308 (Figure 4); GRR_30309 (Figure 5); GRR_30303. Thus, the Navy's choice to evaluate the annual time of exposure—rather than the frequency of operations—was not arbitrary. *See Tri-Valley CAREs v. U.S. Dep't of Energy*, 671 F.3d 1113, 1126 (9th Cir. 2012) (citation omitted) ("Under NEPA, we must refrain from acting as a type of omnipotent scientist,

and instead must restrict ourselves to inquiring only whether an agency took a 'hard look' at the potential environmental impacts at issue.").

In sum, the Navy adequately explained why the increase in Growler operations will not significantly affect birds in the long term. The State fails to identify any evidence to the contrary, and its challenge to the Navy's analysis of impacts to birds should be rejected.

## VI. Jet Noise is Not an "Adverse Effect" for Purposes of Section 106 of the NHPA.

As described in the Federal Defendants' Motion—and contrary to Plaintiffs' claims—the Defendants fully complied with the NHPA by (1) properly engaging in the Section 106 consulting process, including considering comments from the State Historic Preservation Office ("***SHPO***"), the Advisory Committee for Historic Preservation ("***ACHP***"), and other interested parties; and (2) adopting appropriate mitigation measures tailored to the specific "adverse effects" agreed on by the Navy and the SHPO: an indirect adverse effect on the perceptual experience at five specific points-of-interest ("***POIs***") located around the Central Whidbey Island Historic District. *See* Defs.' Mot. at 50-57. In its response, Washington now claims that the Navy acted arbitrarily and capriciously because the chosen mitigation, which was directed towards the specific identified adverse effects, does not have a "noise mitigation function." *See* Wash. Resp. at 30.[15] But Washington's argument misapplies Section 106 and ignores the specific adverse effect identified by the Navy and concurred with by its own SHPO.

[15] COER states that its arguments as to the NHPA remain "unrebutted" because the Federal Defendants only countered COER's claims that the Navy did not adequately consider post-implementation noise studies by citing to the administrative record (rather than engaging in extra-record *post-hoc* justification). *See* COER Resp. at 17. However, as this Court has previously recognized, the NHPA is a "statute[] mandating a procedure to be followed, not a result to be obtained." *See* Report & Recomm., at 23 (ECF No. 72). In response to COER's arguments, the Federal Defendants cited to that portion of the record containing the Navy's explanation of why it was not adopting any post-implementation noise monitoring. Defs.' Mot. at 55. No further discussion was necessary to "rebut" COER's argument.

In relevant part, Section 106 requires that an agency "assess [the relevant Federal undertaking's] effects and seek ways to avoid, minimize or mitigate any adverse effects on historic properties." *See* 36 C.F.R. § 800.1(a). Importantly, *jet noise* was not the "adverse effect" identified during the NHPA process. *See* Defs.' Mot. at 51-52. Instead, the Navy (and Washington) agreed that the adverse effect from increased Growler operations that needed to be "avoid[ed], minimize[d] or mitigate[d]" was the potentially indirect effect (caused by jet noise) on the *perceptual experience* at the POIs. In other words, increased jet noise at the POIs could distract from the rural and/or historical character of these locations. *See* GRR_138517-19.

However, simply because noise from increased jet operations might indirectly effect the perceptual experience at some POIs does not mean that reducing jet noise is the only way to "avoid, minimize or mitigate" those effects. The Navy's chosen mitigation measures, albiet not focused on reducing jet noise, were nonetheless rationally related to, and targeted toward, minimizing the actual identified adverse effect (potential changes to the perceptual experience at selected locations on Whidbey Island). Defs.' Mot. at 50-57. That is all that the NHPA requires.

## CONCLUSION

For the foregoing reasons, the Court should grant the Federal Defendants' Motion for Summary Judgment and deny Plaintiffs' Motions for Summary Judgment.

Respectfully submitted this 3rd day of August, 2021.

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**CERTIFICATE OF SERVICE**

I hereby certify that on August 3, 2021, I served a copy of the foregoing on counsel of record electronically through the court's CM/ECF system.

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