

The Honorable Richard A. Jones
The Honorable J. Richard Creatura

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**UNITED STATES DISTRICT COURT
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

WASHINGTON’S OBJECTIONS TO
THE REPORT AND
RECOMMENDATION OF THE
MAGISTRATE JUDGE

NOTE ON MOTION CALENDAR:
January 28, 2022

1 Plaintiff the State of Washington respectfully submits the following objections to the
2 Report and Recommendation (R&R). Dkt. 109.

3 **I. OBJECTIONS**

4 The State objects to the conclusion in the R&R that the Navy took a “hard look” at the
5 non-auditory health impacts of its expanded Growler jet operations in compliance with the
6 National Environmental Policy Act (NEPA), 42 U.S.C. §§ 4321–4347, and the Administrative
7 Procedure Act (APA), 5 U.S.C. § 706. Dkt. 109 at 31–33. The State objects to this conclusion
8 on three grounds: First, the R&R does not address the Navy’s arbitrary reliance on an
9 unjustified standard to assess and ultimately dismiss non-auditory health impacts. Second,
10 contrary to the R&R, the Navy’s conclusion that there is no link between noise and non-
11 auditory impacts to children’s health is contradicted by the record. Third, the Navy’s
12 discussion of its literature review in its Final Environmental Impact Statement (Final EIS) does
13 not “amount[] to an explanation of why it did not believe that additional information about
14 non-auditory health impacts was ‘essential’ to a reasoned choice among alternatives,” Dkt. 109
15 at 32–33, in satisfaction of the requirements of former 40 C.F.R. § 1502.22.¹

16 **A. The Navy Arbitrarily Relied on an Unjustified Standard to Analyze Non-Auditory**
17 **Health Impacts in Violation of NEPA**

18 With respect to the first basis for the State’s objection, the R&R focuses on the Navy’s
19 conclusion following its literature review that “there was no definite relationship between
20 aircraft noise and non-auditory health impacts,” Dkt. 109 at 31, and that “[t]he results of most
21 cited studies are inconclusive.” Dkt. 109 at 31 (quoting GRR150339). The R&R does not
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23 ¹ The Council on Environmental Quality (CEQ) revised its regulations implementing NEPA effective
24 September 14, 2020. Update to the Regulations Implementing the Procedural Provisions of the National
25 Environmental Policy Act, 85 Fed. Reg. 43,304 (July 16, 2020) (codified at 40 C.F.R. pt. 1500). CEQ’s prior
26 regulations, promulgated in 1978 with minor amendments in 1986 and 2005, govern Defendants’ Record of
Implementation of Procedural Provisions, 43 Fed. Reg. 55,978 (Nov. 29, 1978); Incomplete or Unavailable
Information, 51 Fed. Reg. 15,618 (Apr. 25, 1986); Other Requirements of NEPA, 70 Fed. Reg. 41,148 (July 18,
2005).

1 address, however, the standard that the Navy applied in reaching that conclusion: the
2 requirement that a study must definitively prove a cause-and-effect relationship between
3 aircraft noise and health impacts in order to warrant credit in the Navy’s analysis. *See*
4 GRR159319 (“there are no studies that definitively show a causal and significant relationship
5 between aircraft noise and health”); GRR150339 (“[n]o studies have shown a definitive causal
6 and significant relationship between aircraft noise and health”); GRR160912 (“there is no
7 definitive science to show that a cause-and-effect relationship between health effects and
8 intermittent exposure to noise”); *see also* Dkt. 88 at 14–18; Dkt. 101 at 7–13. Applying this
9 irrationally high standard of definitive proof to assess public health impacts—an area that the
10 Navy’s own expert suggests calls for greater caution, not less, *see* GRR118248—ultimately
11 resulted in the Navy disregarding numerous reports and studies in the record as too
12 inconclusive to warrant further consideration or additional restraint, despite those studies
13 showing a meaningful correlation between aircraft noise and non-auditory health impacts and
14 concerns from the Washington State Department of Health (Health). *See, e.g.*, GRR91499–508
15 (2016 study by Seidler, et al., finding a “statistically significant linear exposure-risk
16 relationship” between heart failure or hypertensive heart disease and aircraft traffic noise);
17 GRR63732–42 (2013 study sponsored by the Federal Aviation Administration finding “a
18 statistically significantly association between exposure to aircraft noise and risk of
19 hospitalization for cardiovascular diseases among older people living near airports”);
20 GRR151312–16 (Health comments); *see also* Dkt. 88 at 17–18; Dkt. 101 at 7–9.

21 The Navy fails to justify or rationally explain its chosen standard and the record does
22 not support it. Instead, the Final EIS explicitly states that “[r]esearch studies seem to indicate
23 that aircraft noise may contribute to the risk of health disorders.” GRR159319. Moreover, the
24 Navy’s own expert counseled in favor of a less stringent approach:

25 To be direct – aircraft noise is an annoyance, at a minimum, and hazardous if the
26 intensity and frequency are sufficiently elevated. Links to other diseases are subjective

1 and very hard to disprove. Even when the literature does not support the association,
2 *there is enough doubt to take a more precautionary position.*

3 GRR118248 (May 2017 email from Dr. Christopher Rennix) (emphasis added) (citation
4 omitted).

5 In refusing to justify its insistence on the requirement of a “definitive causal
6 relationship,” the Navy did not squarely address comments from the Health and other agencies
7 that this standard was “unreasonably high” and “‘too high a standard’ for determining a
8 possible public health consequence.” GRR151313; GRR118252; *see also* GRR103624 (email
9 from the National Park Service Overflights Program Manager for the Natural Sounds and
10 Night Skies Division noting that “[t]here is plenty of emerging evidence” linking aircraft noise
11 and non-auditory health impacts and “a demand for consensus may be too strong a standard to
12 demand when public health may be at risk”). While the R&R correctly observes that “[t]he
13 Navy responded to criticisms of its discussion of nonauditory health impacts by considering an
14 additional 260 published articles, including those recommended by the State,” Dkt. 109 at 32,
15 the fundamental flaw of the Navy’s analysis remains unchanged by the volume of its expanded
16 literature review. Indeed, it hardly matters how many additional studies the Navy considered, if
17 it nevertheless applied the same arbitrary and unjustified standard to assess them. *See N. Plains*
18 *Resource Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1075 (9th Cir. 2011) (“[An]
19 agency must explain the conclusions it has drawn from its chosen methodology, and the
20 reasons it considered the underlying evidence to be reliable.”) (internal quotation marks and
21 citation omitted); *see also Oregon Nat. Desert Ass’n v. Bureau of Land Mgmt.*, 625 F.3d 1092,
22 1100 (9th Cir. 2010) (“‘NEPA’s purpose is not to generate paperwork—
23 even excellent paperwork—but to foster excellent action.’”) (quoting former 40 C.F.R. §
24 1500.1(c)).

25 The Navy’s refusal to justify its unreasonably high standard is not permitted by NEPA.
26 In *Native Village of Point Hope v. Jewell*, 740 F.3d 489 (9th Cir. 2014), the Ninth Circuit held

1 that a federal agency violated NEPA’s “hard look” mandate when it relied upon a specified
2 standard to assess the information before it, but failed to justify that standard and explain why
3 it was a rational one to apply. In that case, the Bureau of Ocean and Energy Management
4 (BOEM) analyzed the environmental impacts of potential oil and gas development leases under
5 agency consideration by estimating that one billion barrels of oil would be recoverable under
6 the leases at issue. *Id.* at 499. The Ninth Circuit held that BOEM’s analysis violated NEPA
7 because its one-billion-barrels estimate was based on an unjustified standard—the lowest
8 possible amount of oil that was economical to produce from the land in question—rather than
9 some other standard such as the mean estimate of economical oil production, which is “by
10 definition a more likely occurrence.” *Id.* at 502–505. Here, the Navy did even less than BOEM.
11 While BOEM at least considered other standards it could have applied in its analysis in *Native*
12 *Village of Point Hope*, and made some attempts to justify the standard it ultimately selected,
13 *see id.* at 499–501, the Navy made no attempts here to consider other standards it could have
14 used to assess the studies it reviewed, and gave no explanation for its insistence on requiring
15 definitive proof of a cause-and-effect relationship, despite the hesitation expressed by its own
16 expert and the criticisms it received from Health and federal agencies.

17 While agency decisions requiring technical expertise are generally afforded deference,
18 “such deference applies only when the agency is making predictions ‘within its area of special
19 expertise.’” *Ctr. for Biological Diversity v. Bernhardt*, 982 F.3d 723, 740 (9th Cir. 2020).
20 Here, because the Navy is not an expert on public health, the Court should not readily defer to
21 the Navy’s assessment of the scientific literature on the relationship between noise and non-
22 auditory health impacts. *See id.* (declining to defer to BOEM’s decision to exclude foreign oil
23 consumption because BOEM is an expert on energy management but not on the economic
24 analysis of greenhouse gas emissions). Even if deference were appropriate, the Navy’s analysis
25 does not constitute a “hard look” under NEPA when the Navy’s chosen standard conflicts with
26 its own expert’s recommendation “to take a more precautionary position,” GRR118248, and

1 similar concerns from State and federal agencies, *see, e.g.*, GRR118252 (Health view that
 2 requiring “a definitive and causal relationship between aircraft noise and health effects was too
 3 high a standard for determining a possible public health consequence”) (internal quotation
 4 marks omitted); GRR103624 (National Park Service view that “a demand for consensus may
 5 be too strong a standard to demand when public health may be at risk”). *See W. Watersheds*
 6 *Project v. Kraayenbrink*, 632 F.3d 472, 493 (9th Cir. 2011) (agency failed to take a “hard
 7 look” at environmental consequences of proposed action when it “gave short shrift to a deluge
 8 of concerns from its own experts, [federal agencies], and state agencies”). In refusing to justify
 9 its requirement of definitive proof, the Navy falls short of its obligation under NEPA and the
 10 APA, 5 U.S.C. § 706, to “articulate a satisfactory explanation for its action including a
 11 ‘rational connection between the facts found and the choice made.’” *Motor Vehicle Mfrs. Ass’n,*
 12 *Inc. v. State Farm Mut. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines v.*
 13 *United States*, 371 U.S. 156, 168 (1962)). The Navy’s analysis of public health impacts is
 14 therefore arbitrary and capricious in violation of NEPA’s hard look mandate. *See id.*; *N. Plains*
 15 *Resource Council, Inc.*, 668 F.3d at 1075 (explaining that the APA’s “arbitrary and capricious”
 16 standard governs judicial review of agency actions made pursuant to NEPA and that NEPA
 17 requires federal agencies to take a “hard look” at the environmental impacts of a proposed
 18 action); *see also* Dkt. 88 at 19; Dkt. 101 at 13.

19 **B. The Navy’s Analysis of Non-Auditory Health Impacts on Children Lacked Record**
 20 **Support in Violation of NEPA**

21 The State further objects to the finding in the R&R that the Navy’s conclusion that
 22 there is “no proven positive correlation between noise-related events and physiological
 23 changes in children” was rationally supported by record evidence. Dkt. 109 at 32 (quoting
 24 GRR150753). As the State previously argued, this conclusion by the Navy lacked rational
 25 basis because it was drawn from a Department of Defense technical bulletin that focused on
 26 hearing impairment risks only, and did not address non-auditory impacts to children’s

1 physiological health. *See* Dkt. 88 at 18–19. Both the R&R and the Navy’s summary judgment
2 briefing acknowledge this oversight and refer to two German studies as an alternate source of
3 support for the Navy’s conclusion that noise does not affect children’s physiological health.
4 *See* Dkt. 109 at 32 (citing GRR150753); Dkt. 103 at 16 (citing GRR159316–17; GRR159320;
5 GRR159323); *see also* GRR150752–53 (“Two studies that have been conducted, both in
6 Germany, examined potential physiological effects on children from noise.”). But one of those
7 studies actually reached the opposite conclusion, as the Navy itself summarized in Appendix
8 A1 to the Final EIS: that study found that after the new Munich Airport opened, “a significant
9 increase in systolic blood pressure was observed [among children living nearby], *providing*
10 *evidence for a causal link between chronic noise exposure and raised blood pressure.*”
11 GRR159323–24 (emphasis added). As to the second referenced German study, which is
12 described without citation in the Final EIS as a study that “was conducted in diverse
13 geographic regions and evaluated potential physiological changes (e.g., change in heart rate
14 and muscle tension) related to noise,” *see* GRR150753, the State has not been able to identify
15 it. Although the Navy contended in its briefing that this study was “discussed in detail in
16 Appendix A to the FEIS,” Dkt. 103 at 16, no such study is discussed there at all, let alone in
17 detail. Rather, the studies cited in support of this proposition, apart from the above-quoted
18 Munich Airport study, focused on heart disease and stroke in adults (GRR159316–17), child
19 learning (GRR159320), and children’s psychological health (GRR159323)—not on children’s
20 physiological health. This analysis falls short of NEPA’s requirement that agencies make
21 relevant information available to the public, *N. Plains Resource Council, Inc.*, 668 F.3d at
22 1085; *see also Pit River Tribe v. U.S. Forest Service*, 469 F.3d 768, 781 (9th Cir. 2006) (NEPA
23 requires federal agencies to inform the public of their decision-making process), and
24 demonstrates the arbitrariness of the Navy’s conclusion that there is “no proven positive
25 correlation between noise-related events and physiological changes in children,” GRR150753.
26 Because this conclusion is not rationally supported by the record, and is in fact contradicted by

1 it, the Navy failed to take a “hard look” at the non-auditory impacts its expanded Growler
 2 operations would have on children’s health in violation of NEPA. *See* Dkt. 88 at 18-19; Dkt.
 3 101 at 14-15.

4 **C. The Navy’s Failure to Obtain Information About Non-Auditory Health Impacts**
 5 **Violates 40 C.F.R. § 1502.22**

6 Finally, the State objects to the R&R’s conclusion that the Navy’s discussion of its
 7 literature review “amounted to an explanation of why it did not believe that additional
 8 information about non-auditory health impacts was ‘essential’ to a reasoned choice among
 9 alternatives” and thereby satisfied the requirements of former 40 C.F.R. § 1502.22. Dkt. 109 at
 10 32–33. Section 1502.22 requires the Navy to either include information that is essential to a
 11 reasoned choice among alternatives in the EIS, unless it is exorbitantly costly to obtain, in
 12 which case the Navy must instead discuss its relevance in the EIS, summarize the available
 13 credible scientific evidence, and describe the agency’s evaluation of those impacts based on
 14 generally accepted scientific approaches. 40 C.F.R. § 1502.22; *see also* Dkt. 88 at 19–20; Dkt.
 15 101 at 15. Here, the Navy violated section 1502.22 because it did not obtain information about
 16 on-the-ground health impacts from its expanded Growler operations prior to approving them,
 17 even though this information was obtainable and essential to a reasoned decision, as
 18 recognized by the Navy’s own scientist, GRR118248 (email from Dr. Rennix stating, “I cannot
 19 tell from the literature how the [health impact assessment] would be changed without some
 20 idea of the actual noise measurements for the populations at risk”), as well as by the United
 21 States Environmental Protection Agency (EPA) and Health. GRR151253 (EPA comments
 22 stating that “on-the-ground validation would help provide an assessment of actual noise
 23 impacts projected to be experienced”); GRR162331 (EPA continued recommendation of on-
 24 site monitoring “to ground-truth the modeling data as well as to inform future health
 25 assessments [and] area and site-specific mitigation remedies and future adaptive management
 26 efforts”); GRR151315 (Health comments stating that whether Whidbey Island residents are

1 “actually experiencing” the adverse health effects associated with noise in the current scientific
2 literature “is a question beyond the scope of a literature review”) (emphasis in original);
3 GRR118253 (Health view that an on-the-ground survey is “a prudent measure because noise
4 levels around [Naval Air Station Whidbey Island] are similar to noise levels attributed with
5 potential health effects”).

6 The R&R cites an unreported decision, *Off-Road Business Association v. United States*
7 *Department of Interior*, No. 03 CV 1199-B(POR), 2006 WL 8455349 (S.D. Cal. Dec. 15,
8 2006), for the proposition that “if available literature is inadequate to link increased noise
9 levels to quantifiable impacts on non-auditory health,” the Navy need not “measure or attempt
10 to forecast such impacts in the FEIS.” Dkt. 109 at 31. But *Off-Road Business Association* is
11 inapposite because the record in that case offered virtually no insight into any correlation
12 between the proposed action and the potential effect of concern there (namely, the effect of
13 land use design on the spread of tortoise disease). *See Off-Rd. Bus. Ass’n.*, 2006 WL 8455349,
14 at *4 n.3 (noting that the only mention of a potential link between land use design and the
15 spread of tortoise disease in the record was a decade-old document acknowledging a possible
16 link but concluding that the advantages of interpopulation dispersal outweighed its
17 disadvantages). By contrast, the record here contains explicit findings of statistically
18 significant relationships between aircraft noise and non-auditory health impacts. *See, e.g.*,
19 GRR159315 (Final EIS noting study finding a statistically significant linear exposure-risk
20 relationship with heart failure or hypertensive heart disease for aircraft traffic noise);
21 GRR63737–42 (study finding “a statistically significant association between exposure to
22 aircraft noise and risk of hospitalization for cardiovascular diseases among older people living
23 near airports”); GRR159323–24 (Final EIS noting a significant increase in systolic blood
24 pressure observed among children living near the new Munich Airport as “evidence for a
25 causal link between chronic noise exposure and raised blood pressure”).
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1 DATED this 7th day of January, 2022.

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