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' OBJECTIONS TO MAGISTRATE'S REPORT AND RECOMMENDATION GRANTING IN PART PLAINTIFFS' MOTIONS FOR SUMMARY JUDGMENT

NOTE ON MOTION CALENDAR: 01/28/2022

ORAL ARGUMENT REQUESTED

U.S. Department of Justice
150 M Street, NE.
Washington, D.C. 20002

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INTRODUCTION

To meet the United States' national security needs, the Navy[1] seeks to expand Growler training operations on Whidbey Island to properly prepare Naval aviators for deployment to aircraft carriers.[2] After six years of hard work by service men and women—and other dedicated public servants—the Navy prepared a final Environmental Impact Statement ("***FEIS***") that thoroughly evaluates the environmental impacts of the proposed expansion. Magistrate Judge Creatura's Report and Recommendation (the "***R&R***"), however, dismisses this comprehensive record as offering "support" but not "illumination" for the Navy's decision. R&R at 2 (ECF No. 109). That conclusion trivializes the substance of the Navy's analysis, treats the record unevenly, and is the root cause of the four errors described below.

First, the R&R determined the Navy failed to disclose it was not including emissions for flights above 3,000 feet. That conclusion disregards the content of the record, fails to defer to U.S. Environmental Protection Agency ("***EPA***") guidance, and credits unproven extra-record materials in contravention of settled record review principles. Second, the R&R finds that the Navy should have considered the alternative of basing Growlers at Naval Air Facility El Centro in California. But the Navy reasonably excluded that alternative from further consideration because it did not meet the purpose and need of the project. Third, the R&R's finding that the FEIS did not sufficiently analyze the effects of increased operations on children's learning

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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 "***Navy***").

[2] The FEIS at issue here evaluates the effects of increased Field Carrier Landing Practice ("***FCLP***") operations performed with EA-18G Growler aircraft ("***Growler***") at Naval Air Station Whidbey Island ("***NASWI***"). FCLPs provide Navy pilots with the rigorous training necessary to land on a moving aircraft carrier.

improperly minimizes the Navy's analysis and draws improper conclusions from certain studies cited in the FEIS. Fourth, the R&R determines that the FEIS failed to include a "species-by-species" analysis of the effects of jet noise on birds. The studies reviewed in the FEIS, though, indicated such an analysis was unnecessary.

In sum, the Navy's reasonable analysis meets the standard for review under the National Environmental Policy Act ("***NEPA***"), 42 U.S.C. §§ 4321-4370m-11. The Court should reject those portions of the R&R granting Plaintiffs'[3] cross-motions for summary judgment, and instead enter summary judgment for Federal Defendants as to those aspects of Plaintiffs' claims.

STANDARD OF REVIEW

"The court reviews de novo those portions of the report and recommendation to which specific written objection is made." *Baker v. Astrue*, No. 12-1278-JLR, 2013 WL 2099722, at *1 (W.D. Wash. May 14, 2013) (citing *United States v. Reyna-Tapia,* 328 F.3d 1114, 1121 (9th Cir. 2003) (en banc)); *see also* 28 U.S.C. § 636(b)(1); Fed. R. Civ. P. 72(b)(3). "The district judge may accept, reject, or modify the recommended disposition; receive further evidence; or return the matter to the magistrate judge with instructions." Fed. R. Civ. P. 72(b)(3).[4]

ARGUMENT

I. The Navy Thoroughly Explained How it Calculated Growler Emissions; the R&R, Therefore, Should Not Have Relied on Extra-Record Materials.

The R&R finds the FEIS deficient as to its analysis of greenhouse gas ("***GHG***") emissions because "the FEIS does not reveal that fuel calculations above 3,000 feet were

[3] 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***").

[4] The standard of review for actions brought under NEPA is set out in Defendants' Motion for Summary Judgment. Defs.' Mot. Summ. J. at 12-14 (ECF No. 92) ("***Defs.' MSJ***").

omitted" from the Navy's emissions estimates. R&R at 12.[5] The factual basis for that finding is incorrect. *See* Defs.' MSJ at 47-50; Defs.' Reply Supp. Defs.' MSJ at 9-10 (ECF No. 103) ("***Defs.' Reply***").[6] The FEIS explains, as to "mobile source emissions" (which include aircraft emissions), that "[e]missions estimates were developed using the Navy's AESO [Aircraft Environment Support Office] emission factors" with "assumptions and calculations" provided in Appendix B. GRR_150392 (citing 2015 and 2017a, b ASEO reports); *see also* GRR_150778-79; GRR_151046-48; GRR_151137 (FEIS references include ASEO reports). Appendix B then notes use of those three ASEO reports to calculate Growler emissions. *See, e.g.*, GRR_159662 nn.1-3; GRR_159663; GRR_159665. The reports, in turn, explicitly reference the EPA guidance, *including limiting calculations to emissions below 3,000 feet. See* GRR_84018, GRR_84111; GRR_84126, GRR_84130; GRR_116019, GRR_116114; GRR_125955, GRR_125958.

As such, the FEIS adequately disclosed the Navy's reliance on the EPA guidance. Indeed, to the extent the R&R's finding is based on the premise[7] that NEPA required the Navy to explicitly quote the EPA's guidance in the body of the FEIS, that proposition is contrary to the well-established principle in APA cases that a court's review embraces the entire record. *See Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420 (1971) (court's "review is to be based on the full administrative record"), *abrogated on other grounds by Califano v. Sanders*, 430 U.S. 99 (1977); *Cal ex rel. Imperial Cnty. Air Pollution Control Dist. v. U.S. Dep't of Interior*, 767 F.3d 781, 792 (9th Cir. 2014) ("[A]gencies [may] incorporate by reference NEPA

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[5] As discussed further below, the Navy omitted emissions above 3,000 feet in accordance with EPA guidance. *See* GRR_14686. That guidance specifically provides that "[a]ircraft emissions above 3000 feet need not be included in either the base year emission inventory or in the modeling inventory." GRR_14699; *see also* GRR_14834-40.

[6] Citations are to actual page numbers, not those inserted by ECF.

[7] The R&R remarks that, "in the entirety of the FEIS, this Court could find only one reference to the omission of emissions above 3,000 feet." R&R at 12-13 (also referencing "statement[s] in the FEIS").

1 and non-NEPA documents" into EIS); *Friends of the River v. F.E.R.C.*, 720 F.2d 93, 106 (D.C.
2 Cir. 1983) (record documents "read in conjunction with the EIS" met NEPA requirements).

3 Similarly, the Navy catalogued the comments it received on this issue, GRR_150234-35,
4 indicated changes to the draft EIS, GRR_150285-86, categorized COER's expert's comments,
5 GRR_154092-93, and responded as part of its general response. GRR_161364-65. Specifically,
6 the Navy noted that greenhouse gas emissions were "calculated using the most recently available
7 data and methods from the [EPA] and Washington State Department of Ecology." GRR_161364.
8 That response is sufficient. *See, e.g.*, *Indigenous Env't Net. v. United States Dep't of State*, 347
9 F. Supp. 3d 561, 581 (D. Mont. 2018) (agency is "under no duty to set forth full length views of
10 its disagreements" beyond "responding to … categories" of comments), *amended. &*
11 *supplemented*, 369 F. Supp. 3d 1045 (D. Mont. 2018).

12 Last, it is unclear whether the R&R also found that the Navy's reliance on the EPA
13 guidance was inappropriate. *Compare* R&R at 2 ("[T]he Navy underreported the true amount of
14 Growler fuel emissions and failed to disclose that it was not including any emissions for flights
15 above 3,000 feet") *with* R&R at 38 (finding Navy only "fail[ed] to disclose the basis for
16 greenhouse gas emissions calculations."). Regardless, the Navy's reliance on the EPA guidance
17 is entitled to deference. *See, e.g.*, *City of South Pasadena v. Slater*, 56 F. Supp. 2d 1106, 1141
18 (S.D. Cal. 1999) (agency properly analyzed emissions by following EPA guidelines). And the
19 emissions estimates in the FEIS accurately capture the actual change in operations proposed by
20 the Navy in the FEIS.[8]

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22 [8] Specifically the FEIS indicates that proposed operations for non-Growler aircraft are not expected to change. GRR150581; *see* GRR_150587-91 (Alternative 2 proposed operations). Instead, the proposed increase in
23 operations is mostly attributable to increased Growler FCLPs. *See* GRR_159155-57; *see also* GRR_159084-86 (no-action alternative detailed operations). And those Growler operations primarily occur below 3,000 feet. *See*

In light of the above, the decision to grant COER's motion to submit extra-record evidence is in error. The R&R overlooks the stringent standard for admission of extra-record evidence, *see* Defs.' Opp'n Mot. Submit Extra-Record Evidence at 5-6 (ECF No. 91), and ignores both the requirement that a party first establish the existing record is inadequate (which, as described above, it is not) and that use of extra-record materials to proffer an opposing expert's opinion (particularly one untested under traditional evidentiary standards) is inappropriate. *See id.* at 2-4, 6 (citing cases). In sum, COER's submission does not meet the high bar for consideration of extra-record evidence. *Fence Creek Cattle Co. v. U.S. Forest Serv.*, 602 F.3d 1125, 1131 (9th Cir. 2010) (party seeking to admit extra-record materials bears a "heavy burden" to show materials are necessary to court's review).

II. The Navy Properly Declined to Analyze the El Centro Alternative.

In concluding that "the Navy failed to take a 'hard look' at the alternative of moving operations to California," R&R at 18, the R&R ignores the purpose and need of the FEIS, overlooks the Navy's well-considered explanation, and fails to defer to the Navy's judgment.

As to the first error, the range of alternatives analyzed in an EIS must relate to the purpose of the proposed action. *See Westlands Water Dist. v. U.S. Dep't of Interior*, 376 F.3d 853, 865, 868 (9th Cir. 2004). An agency need not analyze alternatives that do not meet the agency's purpose and need, *League of Wilderness Defenders v. U.S. Forest Serv.*, 689 F.3d 1060, 1071 (9th Cir. 2012), or those that are "unlikely to be implemented or [are] inconsistent with its basic policy objectives." *Seattle Audubon Soc'y v. Moseley*, 80 F.3d 1401, 1404 (9th Cir. 1996).

GRR_159479-96 (including FCLPs, inter-facility, and touch-and-go operations, among others); *see also* Defs.' Suppl. at 1-2 (ECF No. 108). As such, COER's contention that the use of the EPA guidance under-represents emissions from the proposed change in operations is incorrect.

Here, the purpose of the proposed action is to "augment the Navy's existing Electronic Attack community *at [NASWI]* by operating additional Growler aircraft as appropriated by Congress." GRR_150141 (emphasis added); *see also* GRR_150289 (Navy intended to "expand existing Growler operations" at NASWI). Indeed, in 2005 the Navy completed an environmental assessment to evaluate basing Growlers at four alternative locations, and determined only NASWI met all operational requirements. GRR_143631.[9] The Navy tailored its analysis here accordingly.

In addition, the FEIS explained that the Navy "needs to *effectively and efficiently* increase electronic attack capabilities in order to counter increasingly sophisticated threats and provide more aircraft per squadron in order to give operational commanders more flexibility in addressing future threats and missions." GRR_150141 (emphasis added). The R&R's observation that the El Centro alternative would require "*excessive* cost and *major* new construction," R&R at 18 (emphasis added), therefore tacitly acknowledges El Centro is misfit for that purpose. *See* 43 C.F.R. § 46.420(b) ("[R]easonable alternatives … are technically and economically practical or feasible and meet the purpose and need of the proposed action"). Indeed, the Navy directly explained that basing Growlers at El Centro would not meet the purpose and need of the action. GRR_143630; GRR_143632-38.[10] The R&R fails to address that well-supported conclusion.

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[9] Although COER brought suit in 2013 to compel production of an EIS, it did not challenge the Navy's choice of alternatives in the 2005 environmental assessment. *See Citizens of the Ebey's Rsrv. for a Healthy, Safe & Peaceful Env't v. U.S. Dep't of the Navy*, 122 F. Supp. 3d 1068, 1072 (W.D. Wash. 2015).

[10] COER did not challenge the reasonableness of the purpose and need statement; as such, any challenge now is waived. *See EEOC v. Peabody W. Coal Co.*, 773 F.3d 977, 990 (9th Cir. 2014) ("[W]e do not consider claims that are not 'specifically and distinctly argued' in the opening brief.") (citation omitted). COER also failed to respond to the Navy's argument that "the El Centro site … did not meet the purpose and need of the expanded Growler operations and was therefore properly eliminated from further consideration." Defs.' MSJ at 45.

Second, the R&R downplays many of the Navy's reasons for declining to conduct an in-depth analysis of the El Centro alternative. *See* GRR_150290-91 (criteria used to develop range of alternatives). For example, the Navy explained "[h]ome 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." GRR_150308. Such a relocation would contravene the Navy's policy objective to remain "organized, trained, and equipped primarily for prompt and sustained combat incident to operations at sea." 10 U.S.C. § 5062(a); *see* GRR_150141. On the other hand, the Navy explained in detail why continuing to base Growlers at NASWI promoted efficiencies and effective training. GRR_150305-07; *see also* GRR_121560 ("OLF Coupeville best replicates the carrier environment, thereby providing the highest quality of training available."). In addition, the R&R gives short shrift to the Navy's explanation that moving Growler operations to El Centro would aggravate California's Clean Air Act goals. *See* R&R at 20. The R&R failed to observe, however, that moving operations would impose disproportionate effects because the Whidbey Island region currently meets all National Ambient Air Quality Standards, even with the proposed increased operations, GRR_151125; GRR_150791, while El Centro is in a nonattainment area, GRR_150308. *See Sierra Club v. U.S. Dep't of Transp.*, 310 F. Supp. 2d 1168, 1182-83 (D. Nev. 2004) (in "serious nonattainment area … increased emissions may lead to further violations of national air quality standards which are set at a level aimed at protecting human health."). And while the R&R appears to accept COER's admission that it does not press for site-splitting, R&R at 21, the R&R either misunderstands that relocation would *necessarily* require splitting the Growler community, GRR_150307, or disputes that "re-locating new aircraft

at alternative locations would degrade the Growler community's overall effectiveness," GRR_150307, despite that determination falling squarely within the Navy's expertise.[11]

Finally, despite the errors discussed above, the R&R notes this issue was still "something of a close call." R&R at 18. As such, this issue should have been resolved in the Navy's favor given the deference owed to an agency's reasonable evaluation of alternatives. *City of Carmel-By-The-Sea v. U.S. Dep't of Transp.*, 123 F.3d 1142, 1155 (9th Cir. 1997) (courts review an EIS's range of alternatives under the "rule of reason.'") (citation omitted). High deference is particularly owed here given the choice of where to base Growlers implicates the Navy's expertise in training Naval aviators, as well as managing the United States' national security needs more broadly. *Winter v. Nat. Res. Defense Council*, 555 U.S. 7, 24 (2008) ("We give great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest.") (quotation marks and citation omitted).

In short, the R&R overlooks the Navy's stated purpose and need for the proposed action, improperly discounts reasonable explanations in the record, and gives no deference to the Navy's determination of the feasibility of various alternatives.

III. The Navy Sufficiently Analyzed the Effects of Increased Operations on Children's Learning.

The FEIS both acknowledged that the proposed action would increase the number of disruptive events per-school day, and provided estimates of how increased jet noise would impact child learning. *See* GRR_150336. The R&R nonetheless finds the FEIS deficient because

[11] The R&R makes much of the Navy's explanation that upgrading the El Centro facilities would impose excessive costs. R&R at 19-20. But the need for additional appropriations was offered by the Navy as an indication of the ways in which El Centro "is not resourced to provide the necessary personnel, logistics and training support functions and facilities to support home basing of Growler squadrons," GRR_150308, rather than the sole reason for not carrying that alternative forward.

1 the Navy did not "make any attempt to quantify the degree of impact on child learning caused by
2 the increase in Growler operations." R&R at 15; *see also id.* at 13-14.
3 To reach that determination, the R&R improperly discounts the Navy's analysis of
4 impacts, Defs.' MSJ at 29-31, Defs.' Reply at 11-13, and reads too much into certain studies.
5 The Navy quantified the effects of increased jet noise on children's learning by analyzing
6 changes to the expected cumulative noise environment at area schools (whether the indoor
7 ambient noise level would rise above 35-40 dB L_{eq}) as well as changes in the number of
8 disruptive sound events during an average school day at those locations (the average number of
9 hourly events exceeding 50 dB L_{max}). GRR_150337; *see* GRR_150362-63; GRR_150633-36;
10 GRR_150679-82; GRR_150723-25. For example, under Alternative 2, Scenario A, the Navy's
11 analysis shows that—with classroom windows closed—the ambient noise level would remain
12 below 45 dB at all locations (the threshold above which a student may be unable to hear a
13 teacher, GRR_150337), while the number of disruptive events would increase at only one school.
14 GRR_150681-82.[12]
15 Nevertheless, the R&R finds that the Navy's analysis was insufficient based on the view
16 that some studies cited in the FEIS provided "measurable links" between child learning and jet
17 noise such that the Navy could have gone further by estimating the adverse effects of changes in
18 noise levels (rather than just acknowledging the number and severity of those noise events).
19 R&R at 13-16. That finding misapprehends those studies and inflates their import. For example,
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21 [12] The R&R claims that the ROD stated a "significant increase" in classroom noise events would occur. R&R at 13-14 (citing GRR_167649). But the cited record page does not use the word "significant," and instead notes that, on-average, with windows closed, only four schools would experience a single disruptive event per-hour.
22 GRR_167649. The R&R once again violates the principle that "[t]he Court must not substitute its judgment for that of the agency concerning the prudence of a proposed action …." *Our Money Our Transit v. Fed. Transit Admin.*,
23 No. 13-1004, 2014 WL 3543535, at *4 (W.D. Wash. July 16, 2014), *aff'd*, 689 F. App'x 504 (9th Cir. 2017).

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the "RANCH" study[13] found reading fell below average as a result of chronic aircraft noise above 55 dB L_{eq}. GRR_159320-21. But the Navy's analysis illustrated that, using the example of Alternative 2, only one school would experience noise as loud as *54* dB L_{eq} when windows were open. GRR_150679. Similarly, a 2013 Sharp, *et al.*, study used a threshold noise level above 55 dB, again limiting its import. GRR_159322. Other studies also did not permit further extrapolation. *See* GRR_159321 ("further analysis adjusting for confounding factors is ongoing and is needed to confirm [ ] initial conclusions"); *id.* at GRR_159322 (metrics "hard to compare with the outdoor levels used in most other studies"); *id.* (noting contradictory results of studies at Frankfurt and Los Angeles airports).[14]

For the same reason, the R&R's finding that the Navy failed to obtain additional information[15] in violation of 40 C.F.R. § 1502.22(a) is not accurate, as an agency must only "use[] available data to explore the potential impacts and articulate[] the basis for its decision," not "use theoretical approaches or research methods." *Cabinet Resource Grp. v. U.S. Fish and Wildlife Serv.*, 465 F. Supp. 2d 1067, 1100-01 (D. Mont. 2006).

In light of the above, the Navy's conclusion that "available literature was inadequate to

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[13] The Navy explained this was the first study to "derive exposure-effect associations for range of cognitive and health effects," GRR_159322, making it highly relevant to whether further quantification was feasible.

[14] The R&R cites to *Off Road Bus. Ass'n v. U.S. Dep't of Interior*, No. 03-1199, 2006 WL 8455349 (S.D. Cal. Dec. 15, 2006) as an example of a case where the agency was not required to analyze certain impacts. R&R at 14-15. But that case found the agency's analysis sufficient given "there is not the same level of information to create a strong cause and effect relationship between proposed activity and its potential impact …." *Off Road Bus.*, 2006 WL 8455349, at *5. So too here, the available information did not support further quantification.

[15] The R&R does not specify what additional analysis would be acceptable. *See* R&R at 14 (noting FEIS did not "estimate[e] impacts on reading comprehension, test scores, or other metrics."). Given the number of confounding factors at play, it is uncertain whether such an analysis would be obtainable or statistically significant, particularly given schools on Whidbey Island were exposed to jet noise prior to the ROD. But, regardless, NEPA does not require never-ending study. *See Tri-Valley CAREs v. U.S. Dep't of Energy*, 671 F.3d 1113, 1129 (9th Cir. 2012) (agency not required to "compile an exhaustive examination" as "[s]uch a task is impossible, and never-ending."); *Coal. on Sensible Transp., Inc. v. Dole*, 826 F.2d 60, 66 (D.C. Cir. 1987) ("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.").

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quantify [the degree of] impacts on child learning," R&R 14, was reasonable. *See Ocean Advocates v. U.S. Army Corps of Eng'rs*, 402 F.3d 846, 868 (9th Cir. 2005) ("[S]ome quantified or detailed information" satisfied hard look standard) (citation omitted); *Lee v. U.S. Air Force*, 354 F.3d 1229, 1242-43 (10th Cir. 2004) (agency's analysis sufficient where it "used three different noise metrics to analyze the noise impact of the proposed action.").

IV. The Final EIS Reasonably Discussed the Impacts of Increased Operations on Various Bird Species.

The R&R finds that the Navy's evaluation of the effects of noise on birds was arbitrary because the Navy did not conduct a species-by-species analysis. R&R at 16-18. That conclusion is flawed for three reasons. First, many of the factual findings in the R&R on this issue are simply incorrect. For example, the R&R offers five examples from the FEIS that purportedly reflect differences in species' behaviors, R&R at 16, but none contradict the Navy's conclusion that any differences are *minor*. *See* GRR_150911 ("Although minor variations in reactions are likely between species, aircraft overflights … would cause similar types of reactions among species …."). The R&R found the Navy improperly drew conclusions from pigeon guillemots' ability to regenerate hearing, R&R. at 17, but the FEIS states *birds*—not just pigeon guillemots—have this ability. GRR_150912. And although the R&R criticizes the "more than two dozen citations that the Navy offered," contending they are void of any discussion, R&R at 16-17, the lone example provided in support of that criticism was not cited by the Navy. *Compare* R&R at 17 (citing GRR_150478), *with* Defs. MSJ at 36-37; *see also* Defs.' Reply at 17-23. So too, the R&R criticizes the Navy for citing studies "outside the FEIS," R&R at 16-

17,[16] but the FEIS explicitly references these studies. *See* Defs.' MSJ at 37 (citing GRR_150911); *Save the Peaks Coal. v. U.S. Forest Serv.*, 669 F.3d 1025, 1038 (9th Cir. 2012) (40 C.F.R. § 1502.24 requires agency to "disclose its methodologies and scientific sources").

Second, the R&R improperly substitutes the Court's judgment for the Navy's. *See supra* n.12. In particular, the R&R reasons that a species-specific analysis was required because "different species responded *very* differently to aircraft noise," R&R at 16 (emphasis added) (citing GRR_150911), such that the Navy's overall conclusion as to effects on birds was "fundamentally flawed." R&R at 18. But the Navy's review identified only minor variations, GRR_150911, and that determination is entitled to deference under the APA. *Nw. Ecosystem All. v. U.S. Fish & Wildlife Serv.*, 475 F.3d 1136, 1140 (9th Cir. 2007). The R&R also completely ignores the remainder of the Navy's thorough review of habituation and short and long-term effects (also challenged by the State). *See* Defs.' MSJ at 40-43; Defs.' Reply at 20-23.

Finally, the R&R overlooked the significant differences between the instant matter and *National Audubon Society v. Department of the Navy*, 422 F.3d 174 (4th Cir. 2005). In particular, that court found that the only available species-specific studies directly contradicted the Navy's determination and that the Navy failed to distinguish those studies. 422 F.3d at 192-93. But here, the Navy's conclusion was supported by studies cited in the FEIS. GRR_150911.

CONCLUSION

For the foregoing reasons, as well as those set forth in the Navy's summary judgment briefing, the Court should decline to adopt those portions of the R&R finding the Navy violated NEPA. Instead, the Court should grant summary judgment to the Navy.

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[16] As noted above, the Court's review should be based on the entire administrative record, not just the FEIS. *See supra* at 3-4; *see also. Ctr. for Biological Diversity v. Blank*, 933 F. Supp. 2d 125, 151-52 (D.D.C. 2013).

Respectfully submitted this 7th day of January, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on January 7, 2022, I served a copy of the foregoing on counsel of record electronically through the court's CM/ECF system.

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