The Honorable Richard A. Jones

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

STATE OF WASHINGTON, et al., Plaintiffs, v. UNITED STATES DEPARTMENT OF THE NAVY, et al., Defendants.	NO. 2:19-cv-01059-RAJ CITIZEN'S OF EBEY'S RESERVE AND PAULA SPINA'S OBJECTIONS TO MAGISTRATE'S RECOMMENDATION TO PARTIALLY DENY COER'S AND SPINA'S MOTION FOR SUMMARY JUDGMENT NOTE ON MOTION CALENDAR: JANUARY 28, 2022

I. REAL WORLD MEASUREMENTS WERE NEEDED TO VALIDATE THE NAVY'S NOISE MODEL

Models are abstractions. Monitoring produces real data. The Navy's noise model was not validated with readily available noise monitoring. The Magistrate accepted the failure, reasoning that any errors in the model would be replicated across each of the alternatives. "The point of the noise modelling software is comparison among alternatives. So long as a common tool is used to estimate noise, the differences will occur for each alternative." ECF 109 (hereinafter "Report" or "R & R") at 23. This reasoning is wrong. COER's concern was that the model is understating noise effects—not just for the preferred alternative, but for all of them, including the no action (existing conditions)

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alternative. ECF 87 at 18 ("Those actual noise measurements on the ground could then be compared to the model outputs for the no action scenario to assess the accuracy of the model"); ECF 99 at 11 ("modeled data consistently underestimates the actual on-site noise by 5 to 15 decibels").

The Navy, Congress, and the public need to understand not just the comparison among alternatives, but the absolute amount of noise that is and will be impacting the community. Thus, the Magistrate's reasoning that carrying the flaw through to each alternative excuses the defect is no excuse at all. With a model that understates noise, the EIS misleads everyone to think that the noise now and with each action alternative is less than monitoring would reveal.

The R & R adopts the Navy's rationale that its model forecasts were similar to the National Park Service's measurements. R & R at 23. In doing so, the Report ignores our refutation of that point: that the similarities were limited to certain parameters, but that as to the key parameter of noise levels generated by individual overflights, the model deviated greatly from actual noise levels recorded during NPS monitoring.[1]

In our summary judgment motion, we also cited the discrepancy between the model and Lilly's monitoring. The annualized number of overflights creating noise on the ground greater than 100 dBA was significantly underestimated by the FEIS modeling when compared against the 2013 and 2016 on-site recordings of JGL Acoustics.[2]

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[1] *See* ECF 99 at 10–11; GRR 116458 ("Data the NPS type 1 systems collected in the field and the Navy modeled data are inconsistent. . . .Table 3.2-4 [of the EIS] shows 267 events for an entire year, whereas just for one month NPS monitoring documented 281 aircraft events exceeding LAmax 70 dBA at the Reuble Farmstead").

[2] The statement in the text is based on of loudness of individual flyovers (*i.e.*, percent at 100 dB or more) as recorded by Lilly at each recording site. GRR 60544 to 60547. All four of Lilly's sites were under or immediately adjacent to the Track 32 flight path and closely mirrored FEIS points of interest (POI) R06, R19, P04, and P17 which the EIS used for forecasting extreme noise above 100 dB. GRR 60527 and 60539.

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The Navy did not respond, as we noted in our reply. ECF 99 at 11. But the Magistrate has filled that gap for Navy, referencing the EIS's attempt to discredit Lilly's monitoring. Report at 23–24. But the EIS's efforts to discredit fall short. Its main point was the Lilly's data were just "snapshots," not representative of the overall loudness dose. That assumes we were suggesting that Lilly's measurements could take the place of the Navy's model. That was not our point. Rather, the measurements—like the NPS data—indicated that the model's predictions were not consistent with real world conditions. The Navy could speculate that conditions on the various days monitored by NPS and Lilly were not representative, but they had no evidence to support that speculation. Notably, Lilly's monitoring was on various dates spanning three years, yet the results were nearly the same[3] (and consistent with NPS data that likewise documented far more very noisy events than forecast by the Navy's model, ECF 87 at 19).

The EIS also sought to discredit Lilly by noting that Lilly did not state whether the planes were arriving or departing during the monitoring and that sound levels would vary based on that. GRR 150267. But the Navy's critique applies only to supposed discrepancies where overflights from both path 14 and 32 were measured—and the EIS acknowledges that was only at Lilly's Location 1. *Id.* The discrepancies Lilly identified at all other locations are not in question. Even as to Location 1, the EIS only speculates that recording noise from two different flight paths would impact the results. The EIS states only that that "may" be the case, with no evidentiary support. *Id.*

The Report's reliance (at 24) on *Idaho Wool Growers Association v. Vilsack,* 816 F.3d 1095 (9th Cir. 2016) is misplaced. In *Idaho Wool,* the model used assumptions that were validated with on-site validation monitoring:

[3] For each site monitored by Lilly, the variation between noise levels in 2013 and 2016 was only 1.2 to 2.0 dB. GRR 60541.

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> Defendants used telemetry data from actual bighorn sheep movements gathered over twelve years. That data—described both in the FSEIS, and in the Modeling and Analysis Technical Report,—reflect actual bighorn sheep behavior, including their behavior in relation to forage, breeding, barriers, predators, and any number of other factors. **The data validated Defendants modeling**, revealing that bighorn sheep were 34 times more likely to be found in "source habitat" than in "non-habitat" and six times more likely to be found in "source habitat" than in "connectivity area."

Idaho Wool Growers Ass'n v. Vilsack, 7 F. Supp. 3d 1085, 1096 (D. Idaho 2014), *aff'd,* 816 F.3d 1095 (9th Cir. 2016) (administrative record citations omitted; emphasis supplied).

Here, the Navy never monitored actual flight operations around Coupeville to determine if flight paths, engine levels, and other operational parameters were consistent with the model's assumptions. The Department of Defense's "garbage in/garbage out" warning went unheeded. GRR 32741.

The Report also concludes that the Navy's response to requests for real world monitoring was adequate. R & R at 24–25. In addition to the flaws discussed above and in our summary judgment briefing, this conclusion ignores that the Navy never addressed the ease and low expense of conducting real-world monitoring or that—unlike most situations involving new proposed actions—there was a real world laboratory available for monitoring and validating the model outputs. ECF 87 at 18; GRR 151313–14.

II. AVERAGING NOISE ON QUIET DAYS WITH ACTIVE DAYS WAS MISLEADING

The Magistrate recommends upholding the use of a metric (DNL) that estimates noise impacts by averaging quiet days with noisy days. But the Report acknowledges that "this issue is a close call." R & R at 25. In support of its recommendation, the Report cites five old cases where other courts upheld the use of the DNL metric. *Id.* at 26. Space does not permit us to exhaustively address them

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all. But none compel the Magistrate's recommendation. Most notably, all of these old cases predate the Department of Defense 2005 Operational Noise Manual and the Navy's 2004 Whidbey study that warn against using the DNL average in cases like this with radically fluctuating flights per day. ECF 87 at 25.

Further, in *Valley Citizens v. Aldridge,* 886 F.2d 458 (1st Cir. 1989), the court approved the DNL metric, in part, because the plaintiffs had not proposed an alternative and because no one had raised the issue when commenting on the draft EIS, *id.* at 468–69, neither of which is the case here. Nor does that case address the arguments presented by the Navy here, (*i.e.,* that a DNL average gives more weight to noisy days). *Morongo Band of Mission Indians v. FAA,* 161 F.3d 569 (9th Cir. 1998) and *Citizens v. Dalton,* 48 F. Supp. 2d 582 (E.D. Va. 1998) did not address whether the DNL should be computed separately for quiet and noisy days (instead addressing whether a different metric—Single Event Noise—should have been used). *Communities, Inc. v. Busey,* 956 F.2d 619 (1992) and *Sierra Club v. USDOT,* 753 F.2d 120 (1985) did not involve projects with busy days and quiet days; the proposals involved expanded use of existing commercial airports. *See also, Berkeley Keep Jets Over the Bay Committee v. Board of Port Commissioners,* 111 Cal. Rptr. 598, 624, 91 Cal. App 4th 1344, 1378–79 (2001) (distinguishing four of the five cases cited by the Magistrate for similar reasons, *i.e.,* they all were "guided by factors not present here").

The Report lists various rationales provided in the EIS for using the average. R & R at 26–27. We addressed those in our opening brief. ECF 87 at 27–29. With but one exception, the Navy ignored our refutation of them in its response. ECF 99 at 12. Yet, the Report accepts the EIS's statements, as

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if they had been successfully defended by the Navy, and ignores the arguments we presented. R & R at 26–28.[4]

III. THE EIS FAILED TO UTILIZE CURRENT SCIENCE IN EVALUATING NOISE IMPACTS ON HUMANS

Assessing the amount of noise reaching human ears is an abstraction. The crux of the noise analysis is assessing the impact of that noise on human health, education, and well-being. We demonstrated that the EIS used outdated science that mislead decisionmakers, Congress, and the public about that crucial issue. ECF 87 at 29–32. The Report gives short-shrift to this vital issue. The Report accepts the Navy's use of an outdated standard—not because it reflects an impartial view of the science, but because it is encrusted in decades-old FAA policies. R & R at 29. The Report should have found that the failure of the FEIS to incorporate the current science was a major failing.

We are not asking this Court to serve as a scientific arbiter. But there has been no defense—in the Report or by the Navy—to our demonstration that the EIS omits modern science in assessing this issue. There is no credible scientific debate over 55 DNL approximating the established 13%

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[4] In one instance, the Report finds defense for an EIS claim that the Navy did not try to defend—that focusing on the average busy day "can itself mislead." R & R at 27. The supposed source of confusion is the scenario where a facility doubles operations but also doubles the days in use. In that situation, the average busy day metric will not change (though the number of busy days doubles). The obvious and easy solution to that concern is to state the noise levels on average busy days *and* clearly state the number of busy days per calendar year—as the National Park Service requested, GRR 151240. Little wonder the Navy did not try to defend the EIS's "misleading" claim in its briefs.

On a related note, the Report states that the "FEIS **clearly discloses** that there will be an increase in operations at OLF Coupeville," R & R at 27 (citing GRR 159155) (emphasis supplied), but the citation is to a table in a thousand page appendix and the table does not state the change in the number of busy days per year, either absolutely or relative to existing conditions. In fact, there will be a fourfold increase—though the Navy never could bring itself to state that so plainly. *See, e.g.,* R & R at 8 (calculating fourfold increase based on Navy data); ECF 87 at 8, n.1; *id.* at 23. The Report refused to address the Navy's patent obfuscation on grounds that the Navy was not required to be "subjectively impartial." R & R at 28 (quoting *Hawaii Cty. Green Party v. Clinton,* 124 F. Supp. 2d 1173, 1196 (D. Hawaii 2000). But failing to provide a clear statement of the increase in the number of "busy" days is an objective failing, contrary to NEPA's requirements. *See, e.g., Earth Island Inst. v. U.S. Forest Serv.,* 442 F.3d 1147, 1159 (9th Cir. 2006); ECF 87 at 27.

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significance threshold. The International Organization for Standardization (ISO) is composed of top scientists from over 160 nations worldwide, including the United States. Those scientists agreed in 2016 (ISO 1996-1:2016) that FICON's 1992 modified Schultz curve (the Navy's choice for use) was seriously flawed, off two-fold.[5] GRR 121931–33.

The Navy has not argued that the science underlying the old FAA standard is still valid or up-to-date.[6] Nor, more specifically, does the Navy refute ISO's findings. Nowhere in the EIS or the Navy's briefs is there mention of any scientist raising issue with ISO's 2016 report. Instead, page after page, the EIS regurgitates outdated annoyance curve comparisons, obsolete 1980s and 1990s studies (GRR 159291–295); an ongoing, but as-yet unpublished, FAA study (GRR 159296); and a discussion of noise health effect analytic issues that the EIS did not utilize in its analysis, *e.g.,* step-change annoyance response and hyperacusis, GRR 159296–298. Nothing in that discussion responds to or addresses the current scientific reality that 55 DNL equates to the 13% significant impact threshold that Navy has stated it employs.

The Navy's exclusive reliance on decades-old science, without a good faith analysis using the more modern science, is neither reasonable nor justified. The Court should go where the Report did

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[5] "ISO's 2016 dosage-response relationship is based on much more social survey information than was available in 1992, is specific to aircraft noise, and indicates that considerably greater percentages of the population are highly annoyed by aircraft noise than the 1992 'updated Schultz curve.' … At a DNL value of 65 dB, the FICON relationship underpredicts the prevalence of annoyance created by aircraft noise exposure by more than a factor of two. The now-superseded FICON relationship is plainly an incorrect and technically indefensible basis for any policy judgments purporting to define the significance of aircraft noise impacts." GRR 121933.

[6] As we stated in our summary judgment reply brief: "[T]he Navy brief does not argue that the science underlying the old FAA standard is still valid or up-to-date. It rotely urges the Court to reference the FAA standard without any consideration of the underlying science. But NEPA's mandate is to provide up-to-date *scientific* information, not simply to reference existing regulations. By failing to question the science underlying the current internationally accepted thresholds, the Navy's brief tacitly concedes that if *science*—not regulations—are to drive environmental review, the EIS should have fully utilized the ISO standard (International Organization for Standardization) and disclosed the number of humans and schools that would be within the larger 55 DNL contour." ECF 99 at 14–15.

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not; find that the EIS failed to incorporate modern science; and remand the EIS for a legitimate scientific evaluation of the impacts the increased noise will have on humans. As we said before, ECF 99 at 16, the Court need not decide which science is better; it need only decide that the EIS should have, at minimum, analyzed the impacts using the modern science alongside the older science that currently monopolizes the EIS.

IV. THE EIS IMPROPERLY FAILED TO ADDRESS POST-IMPLEMENTATION MONITORING AS A MITIGATION MEASURE

The Report recognizes that an EIS must contain a "reasonably complete discussion of mitigation measures" and that the EIS failed to discuss post-implementation monitoring as a mitigation measure. R & R at 30 (quoting *Laguna Greenbelt, Inc. v. U.S. Dep't of Transp.,* 42 F.3d 517, 528 (9th Cir. 1994), *as amended on denial of reh'g* (Dec. 20, 1994). But the Report fails to acknowledge that numerous federal and state agencies urged the Navy to consider post-implementation monitoring as mitigation. ECF 99 at 18 (citing recommendations from Advisory Council on Historic Preservation, the EPA, and the National Park Service).[7]

Instead, the Report concludes that it "is reasonable to conclude that [post-implementation monitoring] would not reduce the environmental impact of the operation but would merely measure it." R & R at 30. This surprising statement is not supported by citation to evidence or case law. The reality, of course, is that if post-implementation monitoring reveals noise levels substantially exceeding EIS predictions, the Navy would act responsibly to address those impacts. Not even the Navy suggested that it would be so callous as to ignore monitoring results, if they revealed significantly greater noise impacts than predicted. Indeed, post-implementation monitoring is likely

[7] Our summary judgment brief and summary judgment reply erroneously cite GRR 151123 as the EPA request for post-implementation monitoring. The correct cite is GRR 151253.

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more important than monitoring to validate the model, as the former is more likely to result in operational changes that will benefit the community.

It appears the Report confused (1) the Navy's expectation that post-implementation monitoring would confirm the EIS predictions with (2) the issue of whether/how the Navy would respond if the post-implementation monitoring revealed higher noise levels. Certainly, the Navy boldly asserted that post-implementation would merely confirm the accuracy of the EIS forecasts: "[A]dditional noise monitoring would not change the results of the impacts presented in this [EIS Appendix] analysis." GRR 161320. But that is not the same as asserting that the Navy would ignore monitoring results if they revealed higher-than-expected noise levels. Yet the Report quotes the Navy's "would not change the results" statement immediately before stating that post-implementation monitoring would not reduce impacts, but would merely measure them. R & R at 30. It appears the Report misconstrued the Navy's statement that it expected post-implementation monitoring to confirm the EIS predictions with a statement that the Navy would take no remedial action, if the results were otherwise.

As the Advisory Council on Historic Preservation explained in the context of protecting Ebey's Reserve: "Continued monitoring and evaluation can provide the necessary information for developing and implementing long-term minimization and mitigation strategies . . ." GRR 167462. The Report was wholly unfounded in concluding otherwise.

V. THE NAVY'S RESPONSES TO THE ADVISORY COUNCIL FOR HISTORIC PRESERVATION WERE ARBITARY

The Report sets too low a bar for the Navy when it states that all the Navy must do is "demonstrate that it has read and considered [the ACHP's] recommendations." R & R at 35. The Court must review the record to determine whether the Navy's consideration was superficial or

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"conclusory." The Court should engage in a "'searching and careful' inquiry to determine if [the agency] actually *did* consider" the comments of other expert agencies. *Getty v. Federal S & L Ins. Corp.,* 805 F.2d 1050, 1055 (D.C. Cir. 1986) (quoting *Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 416 (1971) and rejecting as "conclusory" an agency statement that all relevant factors had been considered) (emphasis in original).

The Report does not reflect that "searching and careful" inquiry. The crux of our NHPA claims echoes one of our NEPA claims: that the Navy failed to provide a legitimate rationale for not employing post-implementation monitoring. As the National Park Service stated, post-implementation monitoring "can provide the necessary information for developing and implementing long-term minimization and mitigation strategies for the important historic resources." GRR 167462.

Despite the importance of this issue, the Report simply states that the Navy "declined" to implement post-implementation monitoring. The Navy had offered several rationales for its decision, GRR 167575, which we addressed in our summary judgment briefing, ECF 87 at 39–41; ECF 99 at 9–11. The Report mentions only one of them and then only fleetingly, R & R at 36 (mentioning the Navy's claim that NPS monitoring was consistent with EIS predictions). There is no "searching and careful" examination of the Navy's claim; no evaluation of the arbitrariness of the Navy's claim. *See supra* at 2, n.1.

This Court should provide that greater level of scrutiny. Upon doing so, we believe the Court will conclude that the Navy rejected the agencies' request for post-implementation monitoring for no rational reasoning. *See* ECF 87 at 40–41; ECF 99 at 21.

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VI. CONCLUSION

The Court should adopt the Report's recommendations on the issues where the Magistrate recommended granting COER's and Spina's motion for summary judgment, but decline to accept the Magistrate's recommendations on the five issues discussed above. The Court should grant plaintiffs COER and Spina summary judgment on the five issues discussed above.

Dated this 7th day of January, 2022.

Respectfully submitted,

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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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