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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

ANNE HAUSRATH, JOHN WHEATON, JOANIE FAUCI, MEG FEREDAY, ROGER ROSENTRETER, KATHRYN RAILSBACK, DALE REYNOLDS, and GREAT OLD BROADS FOR WILDERNESS, Plaintiffs, v. UNITED STATES DEPARTMENT OF THE AIR FORCE, Defendant.	Case No. 1:19-CV-00103-CWD **PLAINTIFFS' COMBINED RESPONSE/ REPLY BRIEF ON CROSS-MOTIONS FOR SUMMARY JUDGMENT (ECF Nos. 18, 23 & 24)**

INTRODUCTION

The Air Force responds to Plaintiffs' summary judgment motion (ECF No. 18) by asserting that Plaintiffs just don't understand how the Urban CAS Training Project EA's noise analysis was performed, and repeating the EA's unfounded claims that the F-15 overflights will "blend naturally with the existing soundscapes" and cause no disruption to human sleep, conversation, or wildlife. *See* AF Br. (ECF Nos. 23 & 24-1). The Air Force also wants the Court to disregard Boise State University noise expert Dr. Jesse Barber, whose declaration (ECF No. 18-3) explains how the EA ignored well-established science in dismissing such impacts.[1]

As explained below, the Air Force's arguments themselves distort the scientific literature and do not cure the NEPA defects Plaintiffs identify. Rather than assess the differing baseline noise levels in the urban and natural areas under the CAS training areas, the EA assumed that urban noise levels apply across the entire 30 x 30 NM training airspaces, thus falsely claiming that ambient noise would not increase even in naturally quiet soundscapes. The EA also misstated the noise levels at which overflights may cause sleep and speech interference, and entirely failed to address impacts to people sleeping or conversing outside. And the EA simply assumed there would be no disproportionate impacts to low income or minority populations. All of these defects violate NEPA's "hard look" requirements.

Moreover, the Administrative Record reveals that the Air Force made its "no significant impact" determination before it launched the EA process, particularly regarding impacts to birds and wildlife. As the numerous comments in the record show, *see* EA Volume II, many Idaho residents are deeply concerned about how this Project will impact their communities, concerns the Air Force snubbed through a perfunctory, inaccurate, and pre-determined NEPA process. The

[1] Plaintiffs are separately opposing the Air Force's motion to strike the Barber Declaration, *see* ECF No. 25.

factual and scientific uncertainty and controversy that exist regarding the true nature and extent of Project impacts require that the Air Force prepare a full EIS.

Accordingly, the Court should grant summary judgment for Plaintiffs, deny the Air Force's cross-motion for summary judgment, and reverse and remand the Urban CAS Training Project EA and FONSI with instructions that the Air Force prepare a full EIS.

RESPONSE STATEMENT OF FACTS

In response to Plaintiffs' Separate Statement of Material Facts ("SOF") (ECF No. 18-2), the Air Force does not dispute many of Plaintiffs' factual statements, while quibbling about others. *See* AF Resp. SOF (ECF No. 23-1), at 2 (disputing Plaintiffs' SOF ¶ 2 that the Project is "permanent," yet admitting it will be used "so long as it continues to serve the Air Force's purposes and need"); *id.* at 3 (disputing Plaintiffs' SOF ¶ 5, saying "[g]round teams would be dressed in plain clothes, not 'disguised'"); *id.* at 4 (disputing Plaintiffs' SOF ¶ 19 citing record documents showing the EA process has been "closely monitored by other Air Force bases," without disputing the documents cited).

Such quibbles aside, the Air Force principally argues that Plaintiffs misunderstand the EA's noise analysis. *See id.* at 4–6 (disputing Plaintiffs' SOF ¶¶ 26, 30–34, 36–39). As explained below, the Air Force's brief relies on the same misrepresentations about noise impacts as set forth in the EA. In light of the numerous flaws in the EA's noise analysis, the Court should enter summary judgment for Plaintiffs despite the Air Force's "disputes."

ARGUMENT

I. THE EA FAILED TO TAKE A HARD LOOK AT NOISE IMPACTS.

Plaintiffs' opening submissions demonstrated that the EA violated NEPA by failing to establish accurate noise baselines for the affected areas within the scope of the F-15 training

overflights, and by not taking the required "hard look" at their potential noise impacts on natural soundscapes, human sleep and conversation, birds and wildlife, low income and minority populations, and cumulative impacts. *See* Pls. Br. at 14–21; Pls. SOF ¶¶ 29–44.

In response, the Air Force contends Plaintiffs' challenges are founded on "several misunderstandings," and "seem to confuse this high-altitude training with low-altitude aircraft overflights" that might actually be discernable. AF Br. at 1. But as explained below, the EA's own noise calculations demonstrate that the noise of these F-15 overflights will be intrusive—loud enough to interfere with sleep and communication. AR00053. The Air Force's assertions do not defeat Plaintiffs' showing that the EA failed to accurately identify baseline noise levels in the different areas subject to training overflights, and failed to evaluate potential impacts of the overflight noise levels in key respects, as discussed further below.

A. The EA Overstated Baseline Noise Levels to Claim that Aircraft Noise Will "Blend Naturally" Into Existing Soundscapes.

The Air Force argues that the Court must defer to its "expertise" in relying on noise modeling in the EA. *See* AF Br. at 6, 9–13. But Plaintiffs are not challenging the Air Force's ability to use modeling in its analysis. Instead, they are challenging the Air Force's wholesale failure to evaluate—whether through actual measurement or modeling—baseline noise levels for anything but the inner urban core of each training area.

The Project will utilize eight different airspace areas, each centered on an urban core but also encompassing outlying suburbs and natural areas within a 15 NM radius. Pls. SOF ¶ 2. As the Court is well aware, the Boise Foothills and many other public lands lie within 15 nautical

miles of the Boise city center, and are far quieter than noise levels of the traffic, construction, and other activities that normally occur within the city.[2]

The EA acknowledged that F-15s will spend substantial time flying over these outlying areas while circling in the "CAS wheel," and then fly toward the urban center point to identify and attack the "enemy" ground forces within the city. AR00025. Yet the EA never assessed baseline noise levels in the quieter rural and natural areas under each CAS wheel airspace. Instead, the Air Force assigned single baseline noise levels for each entire 15 x 15 NM training area based on the population density of the urban core, ranging from a DNL of 40 dBA (for "small" cities) to 57 dBA (for Boise). *See* AR00050. Thus, no effort was made to quantify baseline noise levels for completely undeveloped or scarcely populated areas, such as the Boise Foothills or the Snake River south of Boise. *Id.*

The Air Force's failure to reasonably evaluate baseline conditions violated NEPA. As the Ninth Circuit has held, the NEPA "hard look" requires an agency to evaluate, "in some reasonable way, the actual baseline conditions" of the affected resources, *ONDA v. Jewell*, 840 F.3d 562, 569 (9th Cir. 2016), and such baseline evaluations "must be based on accurate information and defensible reasoning." *Great Basin Res. Watch v. BLM*, 844 F.3d 1095, 1101 (9th Cir. 2016). *See also Northern Plains Res. Council v. Surface Transp. Bd.,* 668 F.3d 1067, 1084–87 (9th Cir. 2011) (agency violates NEPA when it lacks adequate baseline data to assess potential adverse impacts of a proposed action). An agency also violates NEPA when it relies on incorrect assumptions to avoid analyzing likely impacts. *See Native Ecosystems Council v. U.S.*

[2] A nautical mile equals approximately 1.151 statute miles, so the 15 NM radius from the Boise city center is about 17.265 miles. According to Google Maps, Bogus Basin ski resort is 18 miles by road from Boise City Hall, underscoring that the CAS wheel around Boise will have the F-15s circulating above the Boise Foothills and even Bogus Basin ski resort for extensive periods. Likewise, the F-15s will fly over public lands south of Boise including the Snake River past Kuna. *See* EA Figure 2.1 (AR00038) (map depicting 30 x 30 NM area around Boise).

Forest Serv., 418 F.3d 953, 964–66 (9th Cir. 2005). By incorrectly assuming that the target areas have single background noise levels that disregard the true variation in background noise levels, the Air Force thus violated NEPA.

Moreover, the Air Force misapplied its own reference in identifying baseline noise levels in the smaller towns (Grandview, Bruneau, Glenns Ferry, Hammett and Mountain Home). *See* Pls. SOF ¶¶ 36–38. The Air Force does not dispute this showing. *See* AF Br. at 10 (conceding EA analysis for the smaller towns was "not strictly in line with recommendations in the model"). This again violates NEPA. *See Nat. Res. Def. Council v. U.S. Forest Serv.*, 421 F.3d 797, 802 (9th Cir. 2005) (reversing where agency misapplied study it used to approve action).

These errors were not "harmless," nor did they result in a "conservative" analysis, as the Air Force wrongly claims. *See* AF Br. at 10–11. The Air Force relied on these elevated baseline noise estimates to claim that the "overall level of noise under all training scenarios [of 37 dBA DNL] would be below the existing background levels and would blend naturally with the existing soundscapes in these areas." AR00052. In reality, many portions of the training area are orders of magnitude quieter than 37 dBA. *See* Barber Decl. ¶ 11.

The Air Force also wrongly complains that Plaintiffs "failed to identify any scientific authority supporting their assertion that another method exists to calculate background" noise levels below 50 dB. *See* AF Br. at 10, n.4. But as Dr. Barber explained, actual measurements can be made of low noise levels, as done in many studies of noise impacts on birds and wildlife. *See* Barber Decl. ¶¶ 9–17. The Air Force that has failed to justify why it did not employ that approach here.

By overestimating background noise levels, the Air Force understated the impact of new noise created by the Project. The faulty baselines thus "materially impeded NEPA's goals" of

informed decision-making and public participation, and cannot be considered harmless. *Ground Zero Ctr. for Non-Violent Action v. United States Dep't of Navy*, 860 F.3d 1244, 1252 (9th Cir. 2017) (error not harmless if it causes the agency or public "not to be fully aware of the environmental consequences of the proposed action").

B. The EA Never Evaluated Impacts to Quiet Soundscapes, and the Air Force Wrongly Suggests that "Land Use Compatibility" is the Only Relevant Metric for Such Impacts.

Plaintiffs' opening brief argued that the EA failed to take a "hard look" at impacts to natural soundscapes and quiet recreation within and around the selected urban centers. The Air Force concedes that the EA didn't expressly discuss these impacts, but argues that the EA implicitly addressed them by observing that the overflights "would be audible, but distant, to individuals who are outdoors," and by concluding that the Project would not increase overall noise to a "significant" degree anywhere. AF Br. at 13–14. Neither statement constitutes the "hard look" required under NEPA.

As for the first, the EA provided no support for its claim that the roar of an F-15 overhead would sound "distant" for anyone outdoors. The Air Force estimated that an individual flyover event would have an Lmax of up to 59.3 dBA. *See* AR00053 (Table 3-6). How loud is that? Roughly as loud as an air conditioning unit at 20 feet away, a decibel level which the Air Force itself previously deemed "intrusive." *See* AR02187. The EA's suggestion that a roughly 60 dBA noise emanating from an F-15 fighter jet would be only "distant" thus falsely downplays the disruptiveness of these exercises.

As for the second, the Air Force's measure of "significance" is 65 dBA DNL, which reflects the level above which aircraft noise is considered to cause a significant adverse impact in residential and other urban land uses. AR00051. This metric derives from a 1974 EPA report,

which suggested that "continuous and long-term noise levels in excess of DNL 65 dBA are normally unacceptable for noise-sensitive land uses such as residences, schools, churches, and hospitals." *Id.*

Thus, the 65 dBA represents the point at which noise is deemed incompatible with residential life, an extraordinarily high threshold. And the Air Force misrepresents the EPA report in asserting this threshold marks the point of "significant" noise increases in natural environments—especially those prized for quiet recreation—when the 1974 EPA study only talked about impacts on residential land uses. As the Air Force itself has recognized, "in rural and wildland areas, the analysis of effects is vastly different compared to areas near population centers," AR01129; and the Air Force excluded certain potential training areas for the Project "due to noise impacts on the recreational area," AR20322, confirming it arbitrarily disregarded such impacts in the EA here.

The Department of Defense (DoD) itself has warned that the DNL metric alone fails to fully communicate the adverse environmental effects from noise. The DoD Noise Working Group (DNWG)'s 2009 Technical Bulletin, "Using Supplemental Noise Metrics and Analysis Tools," which is cited in the EA and contained in the Administrative Record, questioned the appropriateness of using DNL as the sole indicator of noise impacts. *See* AR09852. It begins:

> Simply looking at the location of their home on a DNL contour map does not answer the important questions: how many times airplanes fly over, what time of day, what type of airplanes, or how these flights may interfere with activities, such as sleep and watching television. The number and intensity of the individual noise events that make up DNL are vitally important to broad public understanding of the effects of noise around airfields.

AR09854. The Bulletin discussed at length the faulty notion that noise impacts "do not extend beyond the DNL 65 dB threshold," AR09856–62, and acknowledged that community annoyance from noise is "extremely location dependent," AR09867, suggesting that anthropogenic noises

may be more intrusive in natural surroundings. This further undermines the EA's erroneous assumption that noises less than 65 dBA would not adversely affect natural soundscapes and outdoor recreation.

C. The EA and Air Force Brief Misrepresent Potential Sleep Impacts.

Plaintiffs' opening brief argued that the EA's analysis of sleep interference is flawed because it ignored the possibility of people sleeping outdoors, did not assess impacts of multiple flyovers, and never addressed the possibility of impaired sleep. The Air Force's brief ignores the last two of these points and appears to misunderstand the first.

First, the Air Force's brief is incorrect in repeating the EA's claim that "the threshold at which aircraft noise may *begin to interfere with sleep* is 90 dBA." AF Br. at 12 (quoting AR00054) (italics in AF brief). The EA cited the DNWG 2009 Technical Bulletin (discussed above) as supposedly supporting this assertion. *See* AR00054. However, that 2009 Bulletin does not state any such thing. *See* AR09868. Instead, it provided a Table that identified the probability of a person being awoken by single and repeated noise events at the SEL 90 dB level, as follows:

Probability of Awakening at Least Once From Multiple Events at SEL 90 dB

NA90SEL	Windows Closed*	Windows Open**
1	1%	2%
3	4%	6%
5	7%	10%
9	12%	18%
18	22%	33%
27	32%	45%

* Windows Closed' assumes that there is a 25 dB noise level reduction (NLR) between the outdoors and indoors, e.g., 90 SEL outdoors is 65 SEL indoors.

**'Windows Open' assumes that there is a 15 dB NLR between the outdoors and indoors, e.g. 90 SEL outdoors is 75 SEL indoors).

Id. As the Table shows, the probability of people being awakened with "windows closed" rises from 1% to 32% as the number of overflights at the 90 SEL noise level increase, with 2% to 49% probability of being awakened with "windows open." *Id.* And as the footnotes to this Table

clearly state: "'Windows Closed' assumes that there is a 25 dB noise level reduction (NLR) between the outdoors and indoors, e.g., 90 SEL outdoors is 65 SEL indoors," while "'Windows Open' assumes that there is a 15 dB NLR between the outdoors and indoors, e.g., 90 SEL outdoors is 75 SEL indoors." *Id.* (underscore added).

Thus, rather than saying that sleep disturbance may only occur beginning at 90 dBA, the 2009 Bulletin in fact confirms that people can be awakened by outdoor noise levels of 90 SEL that are 65 dBA indoors. By arguing that sleep interference only starts at 90 dBA, when its own cited source states the opposite, the Air Force's assertions in the EA and to this Court are thus inaccurate, arbitrary, and capricious under NEPA and the APA. *See W. Watersheds Proj. v. Kraayenbrink*, 632 F.3d 472, 493 (9th Cir. 2011) (reversing where agency's finding was unsupported by data claimed). The Air Force is not entitled to deference in its misrepresentation of that 2009 Bulletin. *Earth Island Institute v. Hogarth*, 494 F.3d 757, 763-64 (9th Cir. 2007).

Moreover, the Air Force wrongly insists that the EA "did not assume a noise reduction attributable to a building envelope." Again, as underscored above, the Table from the 2009 Bulletin (on which the EA relied) assumed that the impacted sleeper was indoors in a structure that attenuated the 90 dBA noise by either 25 dBA or 15 dBA, depending on whether the windows were open or closed. AR09868. According to the 2009 Bulletin, someone sleeping outdoors or in a tent, without the benefit of noise attenuation, could be awakened at 65 dBA. The EA itself shows that four-aircraft F-15E and F-15SG formations will have SEL levels of 70.8 dBA and 72.3 dBA, respectively—levels far above 65 dBA. *See* AR00053. Thus, the Project is clearly loud enough to awaken those sleeping outdoors.

The Air Force also provides no defense for its failure to evaluate the possibility of greater sleep impacts from multiple flyovers. The 2009 Bulletin underscores the increasing probability

of people being awakened as the number of overflights increase, citing a readily-available formula for factoring in the number of flyovers. AR09868. Yet, as Plaintiffs pointed out in their opening brief, and the Air Force does not dispute, the EA failed to analyze the number of times that people might be subjected to repeated Project nighttime overflights, and thus failed to conduct the kind of analysis the 2009 Bulletin calls for.

By misrepresenting and failing to assess sleep impacts from the F-15 flyovers, the EA violated NEPA's "hard look" requirements. *See Kraayenbrink,* 632 F.3d at 491–93; *Earth Island Inst. v. U.S. Forest Service*, 442 F.3d 1147, 1159–60 (9th Cir. 2006), *abrogated on other grounds by Winter v. NRDC*, 555 U.S. 7 (2008) (both reversing because NEPA requires a "discussion of adverse impacts that does not improperly minimize negative side effects").

D. The EA and Air Force Brief Misrepresent Potential Speech Impacts.

Similar to sleep impacts, the EA's analysis of speech interference ignored the possibility of outdoor communication, because it assumed 25 dBA of sound attenuation from being indoors. Pls. SOF ¶ 36; AR00053. The Air Force is again flatly wrong in claiming that the 75 dBA standard applies equally to outdoor communications, when the study it cites clearly states that the 75 dB threshold "includes the effect of a 25 dB building noise reduction," and thus assumes that 75 dB noise is attenuated to just 50 dB once indoors. AR09867. For someone conversing outside, without the benefit of a 25 dB noise attenuation, speech interference could occur from an outdoor noise of just 50 dB. Thus, the stated 59.3 dBA Lmax for the Project is sufficiently high to cause speech interference outdoors, a fact the EA entirely disregards.

E. Environmental Justice.

Again, the EA only looked at potential impacts of the F-15 overflights on individuals sleeping and communicating inside, where the cited 2009 Bulletin presumed a 25 dB noise

reduction from the building envelope with windows closed, and a 15 dB noise reduction with windows open. Even though commenters requested the Air Force look at impacts on people who might be camping and sleeping outside, and on homeless and other low-income or minority populations that might also sleep outside or in buildings with far less noise protection (such as mobile homes), the EA wholly ignored these considerations.

As Plaintiffs showed in their opening brief, this omission violates not only NEPA's "hard look" directive, but also the Air Force's own regulation that adopted Executive Order 12,898, which requires federal agencies to determine whether a project will have a disproportionately adverse effect on minority and low-income populations. *See* Pls. Br. at 21–22, *citing* 32 C.F.R. § 989.33 (Air Force regulation codifying E.O. 12,898).

The Air Force responds by arguing the Court "lacks subject matter jurisdiction" to consider this claim, pointing to the language of E.O. 12,898 stating it does not create any "enforceable right." *See* AF Br. at 15–16. But the Air Force wholly disregards its own regulation, 32 C.F.R. § 989.33, which requires the Air Force to implement and follow E.O. 12,898 in its NEPA analysis. An agency, of course, must follow its own regulations, and acts arbitrarily and capriciously under the APA when it fails to do so. *See, e.g., Idaho Watersheds Project v. Hahn*, 187 F.3d 1035 (9th Cir. 1999) (BLM acted arbitrarily in not following own regulations); *Way of Life Television Network, Inc. v. Federal Comm. Comm'n*, 593 F.2d 1356, 1359 (D.C. Cir.1979) ("well-settled rule that an agency's failure to follow its own regulations is fatal to the deviant action"). This Court certainly has jurisdiction under the APA to determine whether the Air Force was arbitrary and capricious in not following its own regulations. *See* 5 U.S.C. §§ 701–706.[3]

[3] The cases cited at page 16 of the Air Force brief are thus inapplicable, since they addressed whether E.O. 12,898 could be independently enforced, not the situation presented here where the Air Force is not following its own regulations that adopted the Executive Order's requirements.

On the merits of this claim, the Air Force relies on the same misrepresentations about the F-15 noise impacts generally to justify its refusal to carefully examine possible disproportionate impacts on low income and minority populations. As its brief states, "because the Air Force concluded that noise levels 'would not impact any populations,' it could not have a dis-proportionate effect on minority or low income populations." AF Br. at 16 (quoting AR00048). Yet as shown above, the Air Force's assertions that the military aircraft noise would cause no impacts was flawed in numerous ways. Since its overall noise impacts analysis was arbitrary and capricious, the Air Force's conclusion that low income and minority populations would not experience any disproportionate impacts is also arbitrary and capricious.

Moreover, the EA included environmental justice in its "Resource Categories Eliminated from Detailed Analysis," based on the assertion that:

> Because the training could occur anywhere within a 15 NM radius of the selected city centers, every population existing within the operating area for an urban center would be equally as likely to experience effects. . . .Therefore, the underlying communities would not have disproportionately high percentages of minority or low-income residents to be affected by the training.

AR00048 (underscore added). This is again inaccurate, since the F-15 training overflights will not "occur anywhere within a 15 NM radius," but will have the aircraft circling on the outskirts of towns in the CAS wheel, then attacking enemy ground forces in the urban centers. *See* AR00025. Again, the Air Force made no effort to identify whether low income or minority populations might be particularly impacted by those flight paths. By using unsupported assumptions to brush off any disproportionate impacts, the EA again failed NEPA's "hard look" requirements.

F. The Air Force Wrongly Pre-Determined There Would Be No Impacts to Wildlife or Birds.

Similar to environmental justice, the EA listed potential impacts to wildlife and birds under "Resource Categories Eliminated from Detailed Analysis," asserting that "[n]oise levels

associated with the Proposed Action Alternative would not be of sufficient magnitude to result in the direct loss of individuals or reduce reproductive output." AR00047. The EA cited no studies or references to explain how the Air Force reached this conclusion, or decided these were the only appropriate metrics for evaluating potential impacts. Lacking any record evidence or explanation, the Air Force's decision to exclude consideration of wildlife and birds from analysis in the EA is again arbitrary and capricious. *See Humane Soc. of U.S. v. Locke,* 626 F.3d 1040, 1050-51 (9th Cir. 2010) ("agency must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made'") (*quoting Motor Vehicle Mfrs. Ass'n v. State Farm*, 463 U.S. 29, 43 (1983)).

Moreover, the record confirms that the Air Force pre-determined not to evaluate wildlife and bird impacts before it even launched the NEPA public scoping and comment process. *See* Pls. SOF ¶ 17, *citing* AR20342–44. Through calls conducted on November 20 and December 4, 2017, the Air Force team "approved streamlining the analysis to address" only certain issues, not including wildlife, birds or other biological resources. AR20344. The "supporting rationale" stated for this "streamlining" of the EA was that:

> Flight activities already occur over the urban centers to some extent, therefore, it is not likely that the number of flight ops added by Urban CAS proficiency training would result in a greater than negligible change from existing conditions. Also, because operators would practice prescriptive avoidance of water areas, wetlands, areas outside of the urban center where protected species would occur, impacts on water resources, wetlands, and biological resources would not be expected, and would not need to be addressed.

Id. Again, there is no scientific study or reference given here to support this pre-determination not to evaluate wildlife and bird impacts.

The EA similarly asserted that overflights would avoid sensitive wildlife habitats such as the Snake River Birds of Prey and islands in the Snake River, *see* AR00047, but provided no

explanation or requirements of how such prohibitions or "prescriptive avoidance" would be implemented. The FONSI itself has no such limitations. *See* AR00510. The lack of enforceable restrictions on the overflights, which the EA assumed would avoid adverse impacts, further underscores that it was arbitrary and capricious for the Air Force to avoid addressing potential impacts to wildlife and birds in the EA.

As the Ninth Circuit has emphasized, the NEPA "hard look" must be taken "objectively and in good faith, not as an exercise in form over substance, and not as a subterfuge designed to rationalize a decision already made." *Metcalf v. Daley*, 214 F.3d 1135, 1142 (9th Cir. 2000). The record reveals that the Air Force did exactly that here, pre-determining that there would be no impacts to wildlife and birds, again violating the NEPA "hard look" requirement.

The Declaration of Dr. Jesse Barber—the BSU expert on noise impacts to birds and wildlife—confirms the lack of scientific support or rational basis for the EA's refusal to consider possible noise impacts to wildlife and birds. *See* ECF No. 18-3. As Dr. Barber explained, the Air Force summarily dismissed noise impacts to birds and wildlife without any supporting studies, while ignoring a "rich literature in ecology that outlines substantial effects of anthropogenic noise on wildlife," *id.* ¶¶ 15–18; and potential noise impacts on song birds and greater sage-grouse were dismissed "without analysis or consideration of relevant science, and "should have been given express consideration in the EA, but were not." *Id.* ¶¶ 19–22.

As explained further in Plaintiffs' opposition to the Air Force motion to strike, *see* ECF No. 25, the Court may properly consider Dr. Barber's declaration to identify key omissions in the Air Force's EA, to underscore the NEPA violations. But even if the Court were to strike Dr. Barber's declaration, the lack of scientific or factual support for the Air Force's pre-determined refusal to consider wildlife and bird impacts in the EA still renders it arbitrary and capricious.

G. The Air Force Failed to Take A Hard Look at Cumulative Impacts.

The Air Force argues that its cumulative effects analysis is reasonable because the Project will simply redistribute existing aircraft operations. AF Br. at 23. This ignores the obvious: that the location and concentration of overflights can significantly change their environmental effects. *See, e.g., New Mexico ex rel. Richardson v. Bureau of Land Mgmt.,* 565 F.3d 683, 707 (10th Cir. 2009) (observing that location matters greatly in environmental analyses; the same activity "may produce wildly different impacts" in different locations); *Dubois v. U.S. Dep't of Agric.,* 102 F.3d 1273, 1291–92 (1st Cir. 1996) (different location of activities was a substantial change that must be considered under NEPA).

For example, one would expect the sleep and communication impacts of the Air Force trainings to increase substantially by relocating them to Idaho's major population centers. The record also shows that repeated noises over a single location intensifies the adverse impacts. *See* AR09866 (repeated noise events increases probability of sleep, speech impacts); AR16356 (recognizing that "expansion in numbers of flight operations . . . elicited strongly adverse reactions in communities"). By newly clustering trainings over these urban centers, the Project may also intensify the severity of existing noise impacts. Thus, the fact that the overall number of trainings may not increase does not excuse the Air Force's perfunctory cumulative effects analysis.

II. THE AIR FORCE WRONGLY REFUSED TO EVALUATE ANY REASONABLE ALTERNATIVE TO ITS PRE-DETERMINED ACTION.

In addition to the "hard look" violations above, the EA also violated NEPA in not evaluating any reasonable alternative(s) to the preferred action that the Air Force decided upon even before launching the NEPA process.

As the record confirms, the Air Force determined in August 2017 that the EA would only consider the "Preferred" and "No Action" alternatives. *See* Pls. SOF ¶ 15 (citing AR20359); AF SOF Resp. ¶ 15 (undisputed). In response to Plaintiffs' showing that public comments identified other potential options that the EA wrongly refused to consider—including more limited duration of the Project or employing simulators, *see* Pls. SOF ¶¶ 22–28—the Air Force argues that they were all properly excluded from analysis in the EA because "only the proposed alternative met the Air Force's purpose and need." *See* AF Br. at 23–24.

But one of Congress' key aims in enacting NEPA was to require agencies to evaluate potential alternatives in a public and scientific fashion—not reject all alternatives before starting the NEPA process, just because the agency has already made up its mind. *See Bob Marshall Alliance v. Hodel*, 852 F.2d 1223, 1228 (9th Cir. 1988) (NEPA requires consideration of reasonable alternatives to further its goals of objective and thorough analysis, by guaranteeing that agency decision-makers assess "all possible approaches to a particular project . . . which would alter the environmental impact and the cost-benefit balance"). The Ninth Circuit has previously stated in similar situations that "it is troubling that the [agency] saw fit to consider from the outset only those alternatives leading to that end result." *California v. Block*, 690 F.2d 753, 768–69 (9th Cir. 1982); *see also Muckleshoot Indian Tribe v. U.S. Forest Service*, 177 F.3d 800, 813–14 (9th Cir. 1999) (consideration of "two virtually identical" action alternatives was inadequate).

The Air Force argues that Plaintiffs "failed to meet their burden to show that the Air Force failed to consider a viable alternative." AF Br. at 23. But Plaintiffs identified at least one alternative that is obviously viable—splitting the airspace over Boise into "holding" and "employment" sides to minimize noise impacts, which the Air Force did when it conducted CAS

training exercises over Boise in the years before it was forced to prepare the NEPA analysis. *See* Pls. SOF ¶¶ 12, 26.

The Air Force now argues that this 'split' was included in the preferred alternative, because "aircraft would enter a holding pattern referred to a 'CAS Wheel' outside of an urban area (at the further outskirts of town or the outer edge of the 15 nautical mile radius of the city center) and wait to be called in to participate in the 60 to 90 minute training scenario." AF Br. at 24. That assertion is again factually mistaken. The "split" previously used for urban CAS training exercises over Boise is distinct from the CAS Wheel. It "involved use of airspace south of the city as a 'holding area' where aircraft would fly while waiting to be called into a particular training scenario directly over the urban center," AR20438, and is visually demonstrated by maps from 2012-2013 CAS training operations showing an "employment" side for aircraft on the northern side of Boise and a "holding" side south of Boise, all well within the 15 NM radius from the city center. *See* AR20529–30; AR20563. The record also confirms the Air Force explicitly decided to exclude this split from the EA. *See* AR20319 (possibility of split was raised); AR20320 (stating consensus that the "EA will assume use of the entire airspace"). Such a "split" in use of the Boise airspace could presumably reduce noise impacts on the Boise Foothills and other public lands north of the city—but how much is unknown, because this alternative was not explored in the EA.

Again, an agency's failure to examine a viable alternative violates NEPA, and requires reversal. *Friends of Yosemite Valley v. Kempthorne,* 520 F.3d 1024, 1038 (9th Cir. 2008); *Alaska Wilderness Recr. v. Morrison,* 67 F.3d 723, 729 (9th Cir. 1995).

IV. AN EIS IS REQUIRED BY UNCERTAINTY AND CONTROVERSY.

Finally, the Air Force disputes Plaintiffs' showing that an EIS is required because of the uncertainty and controversy associated with the Project, saying that the "Air Force took a hard

look at the environmental effects . . . to reasonably determine that the Training Program would not have a significant environmental impact and did not require an EIS." AF Br. at 18.

But as shown above and in Plaintiffs' opening brief, the EA did not take a "hard look" and instead substituted pre-determined conclusions and faulty claims about noise impacts. The Air Force's justification for avoiding an EIS is thus misplaced.

Moreover, the Air Force wrongly disputes the uncertainty and controversy associated with the Project. The Air Force first asserts that the "maximum of 160 annual training days . . . will be divided between eight different urban areas," and the "Air Force thus anticipates . . . that 45 days out of the year (approximately 12%) and 15 nights out of the year (approximately 4%) it will conduct two 60- to 90-minute training events over Boise." AF Br. at 18. But in fact, the EA and FONSI provide that the training exercises "ideally" will be divided between the eight urban areas, meaning that many more exercises could—and likely will—be conducted over Boise than claimed here, since is the largest urban area and provides the features most sought for the CAS training. *See* AR00020. Moreover, the EA states that up to "6 hours of dedicated flight activities over an urban center would be expected" when two day and two night exercises occur on the same day. AR00023. Six hours of concentrated trainings over Boise periodically during the year raise significant concerns about what the noise and other impacts might be, which the EA's misleading assertions of "indiscernible" noise levels do not answer.

The Air Force also unreasonably denies the precedential importance of the Urban CAS Training EA here. As noted above, the Air Force "disputes" Plaintiffs' SOF ¶ 19, which cited numerous Administrative Record documents underscoring that the EA is intended as a "template document" for other similar training programs, several of which are quoted in Plaintiffs' opening brief—stating things like "this is the first NEPA document to cover/address Urban CAS

operations. . . . that other installations are already planning to use," and "Urban CAS is a nut that [Special Operations Command] and the Air Force have been trying to crack for a long time." *See* Pls. Br. at 14 (quoting AR13976, AR22610 and AR20342). The Air Force cannot deny these record statements that the Air Force itself viewed the EA as precedential. Its reliance on *In Defense of Animals v. U.S. Dept. of Interior*, 751 F.3d 1054 (9th Cir. 2014), is thus unavailing because the facts here show the agency itself intends to follow this same "template" elsewhere.

The Air Force further disregards the NEPA standards establishing that if "substantial questions are raised" as to whether a proposed federal agency action may have a significant effect, then the agency must prepare an EIS. *See Klamath Siskiyou Wildlands Ctr. v. Boody*, 468 F.3d 549, 562 (9th Cir. 2006). Thus, in challenging a federal agency's decision not to prepare an EIS, a "plaintiff need not show that significant effects will in fact occur," rather, a plaintiff need only raise "substantial questions whether a project may have a significant effect." *Id*. "This is a low standard." *Id.* The record before the Court abundantly demonstrates that Plaintiffs have met that "low standard" in showing possible significant impacts that require an EIS.

The Court should also bear in mind the abbreviated public notice and comment procedures that the Air Force allowed during its NEPA process. The Air Force secretly began Urban CAS training activities over Boise by at least 2010 and continued them for several years with no public notice or environmental review—yet never disclosed those prior exercises in the NEPA process. *See* Pls.' SOF ¶¶ 8–11. Even the Boise mayor was not aware of the Air Force's urban training activities in Boise, and it took his inquiry to finally prod the Air Force to comply with NEPA. *Id.* ¶¶ 13–15. Before it even conducted public "scoping," the Air Force determined which Idaho cities and towns would be selected for the "preferred" alternative, and "approved streamlining the analysis" in the EA to exclude numerous topics—including impacts on wildlife and birds. *Id.* ¶¶

16–18. The Air Force did not alter its from its pre-determined course and analysis, underscoring that the public's questions, concerns, and input had no meaning to the Air Force's decision at all.

In light of the record before it, the only sure way for the Court to ensure that the Air Force complies with the letter and intent of NEPA is thus to require that it prepare a full EIS upon remand. *See, e.g., Western Watersheds Project v. Bennett*, 392 F.Supp.2d 1217, 1226–27 (D. Idaho 2005) (finding that uncertainty and significance factors supporting requiring an EIS).

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court enter summary judgment in their favor, and reverse and remand the Urban CAS Project EA and FONSI with instructions to prepare a fully NEPA-compliant EIS.

Dated: March 27, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on March 27, 2020, I electronically filed the foregoing PLAINTIFFS' COMBINED REPONSE/REPLY SUMMARY JUDGMENT BRIEF through the CM/ECF system, which caused the following parties or counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

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/s/ Laird J. Lucas
Laurence ("Laird") J. Lucas