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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' BRIEF OPPOSING AIR FORCE MOTION TO STRIKE BARBER DECLARATION (ECF No. 22)**

INTRODUCTION

Disregarding this Court's direction that "motions to strike filed in response to a motion for summary judgment are disfavored,"[1] Defendant U.S. Air Force has moved to strike the Declaration of Dr. Jesse Barber (ECF No. 18-3), asserting it is an "improper 'expert' opinion that was not part of the record before the Air Force," is an "inappropriate . . . substantive critique of

[1]See Judge Dale's Motion Practice (available at: https://www.id.uscourts.gov/district/judges/dale/Motion_Practice.cfm)

the scientific merit of the Air Force's analysis and decision," and attempts "to entice the Court into a 'battle of the experts'." *See* AF Memo. in Support (ECF No. 22-1), at 1–2, 4–5.

Contrary to the Air Force's arguments, the Court may properly consider Dr. Barber's declaration under the well-established "NEPA exception" to the APA record review rule, as Plaintiffs noted in their opening summary judgment brief. *See* ECF No. 18-1 at 2, n.1 (addressing NEPA extra-record exception).

Here, Dr. Barber is an expert on noise impacts on birds and wildlife, who points out key omissions in the Air Force's Urban CAS Environmental Assessment (EA), including the Air Force's incomplete baseline noise evaluation and failure to consider extensive scientific literature and studies on aircraft noise impacts to birds and wildlife. Plaintiffs do not present Dr. Barber's declaration to engage in a "battle of the experts" with the Air Force, but to highlight the EA failure to consider potential environmental impacts, and to underscore the need for the Air Force to conduct a full Environmental Impact Statement (EIS), which is appropriate in APA cases challenging an agency's NEPA compliance. Accordingly, the Court should deny the motion to strike, and consider Dr. Barber's declaration in evaluating Plaintiffs' NEPA challenges to the Air Force Urban CAS Training EA.

ARGUMENT

I. EXTRA-RECORD EVIDENCE MAY BE CONSIDERED TO SHOW NEPA VIOLATIONS.

The U.S. Supreme Court has directed that courts must engage in a "substantial inquiry" to evaluate a federal agency's compliance with the APA's legal standards under 5 U.S.C. § 706. *See Citizens to Preserve Overton Park v. Volpe,* 401 U.S. 402, 415-16 (1971). The Ninth Circuit has explained, however, that it "cannot adequately discharge its duty to engage in a 'substantial inquiry' if it is required to take the agency's word that it considered relevant matters." *ASARCO,*

Inc. v. EPA, 616 F.2d 1153, 1160 (9th Cir. 1980). "It will often be impossible, especially when highly technical matters are involved, for the court to determine whether the agency took into consideration all relevant factors unless it looks outside the record to determine what matters the agency should have considered but did not." *Id. See also Public Power Council v. Johnson*, 674 F.2d 791, 793-94 (9th Cir.1982) (addressing extra-record exceptions).

The Ninth Circuit has thus held it proper for the courts to consider extra-record materials in NEPA cases. *See National Audubon Soc. v. U.S. Forest Serv.,* 46 F.3d 1437, 1447-48 (9th Cir. 1993) (approving extra-record evidence in NEPA cases where a plaintiff alleges agency "neglected to mention a serious environmental consequence, failed adequately to discuss some reasonable alternative, or otherwise swept stubborn problems or serious criticism under the rug"); *Idaho Conservation League v. Mumma,* 956 F.2d 1508, 1520, n. 22 (9th Cir. 1992) (allowing extra-record evidence to show alternative that agency failed to consider).[2]

The District of Idaho has followed these authorities in considering extra-record declarations underscoring scientific or factual omissions in an agency's NEPA analysis. *See, e.g., Western Watersheds Project v. Schneider,* 417 F.Supp.3d 1319 (D. Idaho 2019) (considering extra-record sage-grouse expert declaration on adequacy of BLM NEPA analysis); *Western Watersheds Project v. Dyer*, No. 04-cv-181-BLW, 2009 WL 484438, at *24 (D. Idaho Feb. 26, 2009) (extra-record exceptions apply to allow Plaintiffs' expert testimony on post-fire grazing

[2] Sister circuits have similarly recognized a "NEPA Exception" to the record rule. *See Cnty. of Suffolk v. Sec'y of the Interior*, 562 F.2d 1368, 1384–85 (2nd Cir. 1977), *cert. denied*, 434 U.S. 1064 (1978); *Izaak Walton League of Am. v. Marsh*, 655 F.2d 346, 369, n.56 (D.C. Cir. 1981); *Webb v. Gorsuch*, 699 F.2d 157, 159 n.2 (4th Cir. 1983). Under this exception, "courts generally have been willing to look outside the record when assessing the adequacy of an EIS or a determination that no EIS is necessary," *Webb*, 699 F. 2d at 159 n.2, permitting evidence that shows "either that the agency's research or analysis was clearly inadequate or that the agency improperly failed to set forth opposing views widely shared in the relevant scientific community." *Cnty. Of Suffolk*, 562 F.2d at 1385.

and fencing impacts to evaluate adequacy of BLM NEPA analysis); *Idaho Conservation League v. Bennett*, No. 04-cv-447-MHW, 2005 WL 1041396 (D. Idaho 2005) (considering plaintiff's extra-record expert testimony on omissions in NEPA analysis of timber sale). Even the case cited by the Air Force approved consideration of an extra-record expert declaration. *See Idaho Conservation League v. U. S. Forest Service*, No. 1:11-cv-341-EJL, 2012 WL 3758161, at *3 (D. Idaho Aug. 29, 2012) (denying motion to strike extra-record hydrologist declaration showing Forest Service EA failed to consider baseline groundwater hydrology, an important issue in approving a mining exploration project).

II. THE COURT MAY PROPERLY CONSIDER DR. BARBER'S DECLARATION UNDER THESE AUTHORITIES.

The Court may properly consider Dr. Barber's declaration under these authorities, to evaluate the Air Force's NEPA compliance.

Dr. Barber "identif[ied] numerous deficiencies" in the Air Force's EA, including "inaccurate scientific measurements, and a near-complete dismissal of impacts to wildlife, to find there will be no significant impacts." *See* Barber Decl. ¶¶ 2, 9, 23. As Dr. Barber explained,

> these flaws include reliance upon broadly generalized and unmeasured background noise levels and an omission of substantial scientific evidence on the effects of noise on wildlife. The discussion of background noise levels is incomplete and misleading and sound levels are unmeasured, calling into question the Air Force's conclusions based on acoustics.

Id. ¶ 9. Dr. Barber supported his analysis with detailed discussion, including that:

(a) the Air Force made no effort to measure background noise levels for natural environments and unincorporated lands surrounding each city, thus "underestimat[ing] the effects to many areas . . . that are significantly quieter" than the Air Force assumptions, and also misapplied the single noise study the Air Force cited, *id.* ¶¶ 11–14;

(b) 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

(c) 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.

Contrary to the Air Force's depiction, Dr. Barber's analysis did not present "substantive challenges" to the Urban CAS Training Project nor create some improper "battle of experts." Dr. Barber instead identified errors and omissions in the EA, such that it "did not present a scientifically credible analysis of the adverse impacts of aircraft noise exposure." *Id.* ¶ 23. Dr. Barber was clear that he was not opposing the training activities, just that the "Air Force should be required to re-analyze and fully disclose the potential noise impacts of the Urban CAS project using scientifically-valid methods and sources." *Id.* ¶ 24.

Moreover, the errors and omissions articulated by Dr. Barber go directly to Plaintiffs' NEPA claims that the EA failed to accurately address baseline noise levels in rural areas of wildlife and bird habitats, failed to take a "hard look" at potential impacts upon wildlife and birds, and wrongly avoided preparing a full EIS. NEPA requires that an agency provide "a reasonably thorough discussion of the significant aspects of the probable environmental consequences," *California v. Block*, 690 F.2d 753, 761 (9th Cir. 1982), including a "discussion of adverse impacts that does not improperly minimize negative side effects." *W. Watersheds Proj. v. Kraayenbrink*, 632 F.3d 472, 491 (9th Cir. 2011). Dr. Barber's declaration underscores that the Air Force violated these NEPA commands here.

Moreover, the CEQ NEPA regulations—binding on all agencies, including the Air Force—require that federal agencies "shall ensure the professional integrity, including the scientific integrity," of their NEPA analysis, and must use "[a]ccurate scientific analysis." 40 C.F.R. §§ 1500.1(b), 1502.24. An agency must also disclose if information is incomplete or unavailable, and explain "the relevance of the incomplete or unavailable information to evaluating reasonably foreseeable significant adverse impacts." *Id.* § 1502.22(b)(1). Again, Dr. Barber's declaration underscores how the Air Force violated these NEPA commands.

Because Dr. Barber's declaration is directly relevant to Plaintiffs' NEPA claims and falls squarely within the NEPA extra-record exceptions to the APA record review rule, the Court may properly consider it and should deny the Air Force motion to strike.

III. PLAINTIFFS WERE NOT REQUIRED TO PRESENT THE BARBER DECLARATION DURING THE COMMENT PERIODS.

Neither is the Air Force correct in asserting that Plaintiffs must have provided the Barber Declaration during the initial scoping or draft EA comment periods that the Air Force held. *See* AF Memo at 7–8. The cases cited above all allowed similar evidence that was not part of the administrative record—that is the whole point of allowing extra-record materials to be considered by the courts to evaluate an agency's NEPA compliance.

The cases cited by the Air Force do not hold otherwise. In *Lands Council v. Powell*, 395 F.3d 1019, 1030 (9th Cir. 2005), the court "decline[d] to answer" the question of whether it should consider extra-record evidence regarding potential sedimentation impacts of "rain-on-snow events" from a challenged logging project, because the court reversed on other grounds and the plaintiff could submit such evidence for consideration on remand to the agency. Both *Dep't. of Transp. v. Pub. Citizen*, 541 U.S. 752, 764 (2004), and *Great Basin Mine Watch v. Hankins*, 456 F.3d 955, 965 (9th Cir. 2006), addressed structuring NEPA comment periods to encourage

public participation and ensure issues are timely raised before the agency, without any ruling barring extra-record declarations considered for the first time by district courts.

Plaintiffs here complied with those directives by submitting comments to the Air Force underscoring defects and omissions in its draft EA, echoing the same points detailed by Dr. Barber in his declaration. *See* AR17659–66; AR17899–929; AR17372–80; AR17763–68; AR17713–16; AR17698–17700. These comments specifically noted that the Air Force needed to accurately address noise impacts to natural soundscapes and to wildlife and birds, including "important species such as bighorn sheep and sage grouse." AR37175–77. EA Volume II contains other comments that also advised that the Air Force's analysis of impacts on natural soundscapes and wildlife and birds was "woefully inadequate," the "assertion that there are no impacts to wildlife is erroneous," and the Air Force "has not done sufficient analysis of . . . noise quality impact on humans and on wildlife," *see* AR00271–417. These comments alerted the Air Force to the concerns that the draft EA was not scientifically accurate and wrongly relied on unsupported assumptions of no significant impacts—all that is required under the APA and NEPA. *See Great Basin Mine Watch*, 456 F.3d at 965, 968 & 971 (finding that plaintiff comments pointing out unanswered questions about groundwater impacts, connected actions, and cumulative impacts were sufficient to raise NEPA claims).

IV. THE AIR FORCE HAS NOT DEMONSTRATED A NEED FOR DISCOVERY.

The Air Force further requests that, if the Court does not strike the Barber Declaration, it should "allow discovery" under Federal Rule of Civil Procedure 56(d)(2). *See* AF Memo. at 8. This request should be denied along with the rest of the Air Force's motion to strike.

The Air Force does not even attempt to explain why it thinks a deposition is necessary, when Dr. Barber has already detailed his assessment of the scientific errors and omissions in the

EA. Moreover, the Air Force has not filed the affidavit or declaration that Rule 56(d) requires to justify discovery during summary judgment proceedings. *See* F.R.Civ.P. 56(d)(2) ("If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may: . . . (2) allow time to obtain affidavits or declarations or to take discovery") (emphasis added). In disregarding this Rule 56(d) requirement, the Air Force reveals that its request for a deposition of Dr. Barber is nothing but a delaying or harassment tactic, which the Court should not permit.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny the Air Force's motion to strike Dr. Barber's declaration.

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' BRIEF OPPOSING MOTION TO STRIKE 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