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 CITIZENS OF EBEY'S RESERVE'S BRIEF ON REMEDY

I. THE RECORD OF DECISION SHOULD BE VACATED[1]

A. Vacatur is the Ordinary, Presumptive Remedy.

The Administrative Procedures Act ("APA") creates a presumption of vacatur if an agency acts unlawfully. The reviewing court shall "hold unlawful and set aside" arbitrary, capricious and illegal agency action. 5 U.S.C. § 706(2). *See also Nat. Res. Def. Council v. U.S. Forest Serv.*, 421 F.3d 797, 810 (9th Cir. 2005) ("We review NEPA claims under the APA and will set aside agency actions that are adopted 'without observance of procedure required by law.' 5 U.S.C. § 706(2)(D)"). The party

[1] The factual background, procedural history, and statutory framework for this case are set out in the State of Washington's initial brief on remedy, filed of even date with COER's brief. COER adopts by reference the State of Washington's explanation of the factual, procedural, and legal setting of this brief.

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seeking remand without vacatur has the burden to overcome that presumption. *Alliance for the Wild Rockies v. U.S. Forest Serv.*, 907 F.3d 1105, 1121–22 (9th Cir. 2018); *Nw. Envt'l Advocates v. U.S. Envt'l Protection Agency*, 2018 WL 6524161, at *3 (D. Ore. Dec. 12, 2018) ("Because vacatur . . . is the ordinary remedy, the Court concludes [that the party opposing vacatur] bears the burden of demonstrating vacatur is inappropriate").

The circumstances in which a remand without vacatur is appropriate are rare. *Coal. to Protect Puget Sound Habitat v. U.S. Army Corps. of Engineers*, 466 F. Supp. 3d 1217, 1219–20 (W.D. Wash. 2020), *aff'd sub nom. Coal. to Protect Puget Sound Habitat v. United States Army Corps of Engineers*, 843 F. App'x 77 (9th Cir. 2021).

Two factors are addressed when considering whether to override the ordinary presumption in favor of vacatur: "The decision whether to vacate depends on "the seriousness of the order's deficiencies (and thus the extent of doubt whether the agency chose correctly) and the disruptive consequences of an interim change that may itself be changed." *Allied-Signal, Inc. v. U.S. Nuclear Regul. Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993). *See also Coal. to Protect Puget Sound Habitat*, *supra*, 466 F. Supp. 3d at 1217; *Heartland Reg'l Med. Ctr. v. Sebelius*, 566 F.3d 193, 197 (D.C. Cir. 2009). These two factors are commonly referred to as the "*Allied Signal* factors" and we use that terminology here.

B. Neither *Allied Signal* Factor Justifies Remand without Vacatur.

1. The first *Allied Signal* factor: The Navy's errors are serious and, once corrected, it is unlikely that the Navy will be able to justify the decision in its prior FEIS and ROD.

The Court's summary judgment ruling did more than find that the EIS was inadequate. It found that the Navy's errors were extremely serious. First and foremost, the Court found that the "heart" of an EIS—its alternatives analysis—was inadequate. The EIS has failed to consider any alternative

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location for the project, including the reasonable alternative of El Centro, ECF 109 ("R&R") at 18:3—21:7.[2] *See also* ECF 87 at 12–13; *'Ilio'ulaokalani Coal. v. Rumsfeld*, 464 F.3d 1083, 1095 (9th Cir. 2006) ("the alternatives analysis section is the heart of the environmental impact statement."). The Navy's failure to consider a readily available, reasonable alternative bypassed a fundamental procedural step of NEPA, requiring vacatur.

The Navy cannot escape vacatur by arguing that even if it now analyzes El Centro in the SEIS it is apt to stand by its original decision to increase Growler operations at Whidbey. The issue presently is whether the Navy can justify not having considered El Centro in the first instance:

> When an agency bypasses a fundamental procedural step, the vacatur inquiry asks not whether the ultimate action could be justified, but whether the agency could, with further explanation, justify its decision to skip that procedural step. Otherwise, our cases explaining that vacatur is the default response to a fundamental procedural failure would make little sense.

Standing Rock Sioux Tribe v. United States Army Corps of Engineers, 985 F.3d 1032, 1052 (D.C. Cir. 2021), *cert. denied sub nom. Dakota Access, LLC v. Standing Rock Sioux Tribe*, 212 L. Ed. 2d 54, 142 S. Ct. 1187 (2022). That issue—whether the Navy was justified in not including a reasonable alternative site in the EIS—has been decided. This Court considered and rejected the Navy's arguments that would have eviscerated the heart of the EIS. As this Court found, the Navy "turn[ed] a blind eye" to data that did not support its goal of increasing Growler operations, "at the expense of the public and the environment[.]" R&R at 2.

The Navy's serious errors did not end with its hollowed-out alternatives analysis. The Court found that the Navy also failed to correctly evaluate greenhouse gas emissions (an existential issue for humanity); failed to adequately assess species-specific impacts to birds (including species listed by

[2] Citations to page numbers in pleadings use the page numbering appearing in the ECF headers.

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the State of Washington as threatened, endangered, or priority species); and failed to adequately address the impact of the horrific noise on childhood learning in the schools beneath the low-flying jets. Assessing these impacts accurately is essential to allowing the Navy to make an informed decision as to whether the Growlers should stay on Whidbey and, if so, the mitigation that is required. As with the alternatives, it is too late for the Navy to argue that it was justified in short-changing its analysis of these important issues.

2. The second *Allied Signal* factor: There are few disruptive consequences of vacatur.

The "second factor . . . focuses on the disruptions that would arise if a vacatur order were followed by appropriate agency action reinstating the original rule or permit. The equities tilt away from vacatur where 'the disruptive consequences of an interim change that may itself be changed' are significant, *Allied-Signal*, 988 F.2d at 150-51[.]" *Coal. to Protect Puget Sound Habitat v. U.S. Army Corps. of Engineers, supra*, 466 F. Supp. 3d at 1223–24. This second factor "'is weighty only insofar as the agency may be able to rehabilitate its rationale for the regulation,' *Comcast Corp. v. Fed. Commc'ns Comm'n*, 579 F.3d 1, 9 (D.C. Cir. 2009)." *Id.*

Courts in this Circuit remand an invalid agency action without vacatur when vacatur would cause the very kinds of harm that the statute with which the agency failed to comply is intended to prevent. So, for example, when an agency violated the Endangered Species Act, but vacatur could have wiped out a snail species, the agency rulemaking was left in place during remand. *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405–06 (9th Cir. 1995). Similarly, when an agency violated the Clean Air Act but vacatur would cause additional air pollution thus thwarting "the operation of the Clean Air Act in the State of California during the time the deliberative process [was] reenacted[,]" the agency action was not vacated on remand. *W. Oil & Gas Ass'n v. EPA,* 633 F.2d 803, 813 (9th Cir.

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1980). Likewise, when vacatur would have prevented construction of a new power plant in California, the court remanded without vacatur because "the region might not have enough power next summer, resulting in blackouts. Blackouts necessitate the use of diesel generators that pollute the air, the very danger the Clean Air Act aims to prevent." *California Communities Against Toxics v. U.S. E.P.A.*, 688 F.3d 989, 993–94 (9th Cir. 2012).

None of those considerations apply to the Navy's violations here. Vacating the Navy's ROD (including the ROD's implicit finding that the EIS was adequate) will further NEPA's purpose, not undermine it. On the other hand, allowing the Navy to proceed with a highly disruptive action[3] prior to completing environmental review will do great damage to NEPA's purpose. Agencies would realize that they can approach NEPA's requirements in a lackadaisical or wholly deficient manner, knowing that they could proceed with their plans while they take months or years to correct their errors. NEPA's environmental analysis would be relegated to a paperwork exercise, with no real-world consequences for failing to comply. "Congress did not intend [NEPA to be] a paper tiger. Indeed, the requirement of environmental consideration 'to the fullest extent possible' sets a high standard for the agencies, a standard which must be rigorously enforced by the reviewing courts." *Calvert Cliffs' Coordinating Comm., Inc. v. U. S. Atomic Energy Comm'n*, 449 F.2d 1109, 1114 (D.C. Cir. 1971).

Similarly, allowing the Navy to proceed with its proposed action, even after that action has been invalidated by this Court, would invite the Navy to engage in a process of *post hoc* rationalization on remand. With the new Growler operations proceeding at Whidbey, the Navy would have a strong

[3] *See* COER Mot. for Prelim. Inj, ECF 29, at 10–13 and declarations cited therein, *e.g.*, Blankenship Dec., ECF 31, at ¶5 ("The noise is deafening, so bad that we are unable to carry on a conversation inside our own home, nor can we watch TV, listen to music, or even sit and read quietly. We cannot go outside our house at all when the Growlers are flying because the noise is intolerable."); ECF 29 at 11, 3–7 ("Nearly 4,000 area residents are suffering from the loud noise of frequent low-flying Growlers that makes sleep impossible; interrupts conversation; interferes with work, study, and classroom education; and makes outdoor recreation a painful, horrifying experience rather than a solace and a joy.

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incentive to draft a new EIS that justifies that decision, rather than objectively analyze its impacts and compare them to impacts at an alternative location.

II. ON REMAND, THE NAVY SHOULD PREPARE A SUPPLEMENTAL EIS THAT ADDRESSES THE FAILINGS DESCRIBED IN THE R&R, FOLLOWED BY A NEW ROD.

Because the Navy's issuance of the EIS and ROD in this case was arbitrary and capricious, a supplemental EIS must be prepared, with an opportunity for public comment and the other procedural safeguards that NEPA provides for agency decision-making. The remand should provide guidance to limit the likelihood of the SEIS not meeting the intent of the remand.

A. Analysis of the El Centro Alternative

The remand order should make clear that the mandated analysis of El Centro must be done in a way that allows a comparison among alternatives. "The degree of analysis devoted to each alternative in the EIS is to be substantially similar to that devoted to the 'proposed action.'" Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations, 46 Fed. Reg. 18026, 18028 (Mar. 23, 1981), 1981 WL 149008. The alternatives should be discussed using similar metrics "so that reviewers may evaluate their comparative merits," 40 C.F.R. § 1502.14(b), and "provide a meaningful comparison of alternatives." *SE. Alaska Conservation Council v. United States Forest Serv.*, 443 F. Supp. 3d 995, 1014 (D. Alaska 2020), *appeal dism.*, 2020 WL 6882569 (9th Cir. Oct. 22, 2020). In sum, the Navy "must present a clear, cogent comparison of the alternatives[.]" *Friends of the Earth v. Hall*, 693 F. Supp. 904, 945 (W.D. Wash. 1988).

Here, not only did the Navy fail to adequately analyze impacts on childhood learning from Growler operations above Whidbey Island schools, it also did not compare those impacts with the impacts on school kids in the lightly populated desert around El Centro. NEPA requires not only a valid analysis of the impacts to Whidbey Island school children, but a comparison of those impacts

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1 with the impacts on school children around El Centro. The SEIS will need to include comparative
2 analyses for all the elements of the environment impacted at either site.
3 The mandate to discuss alternatives "so that reviewers may evaluate their comparative merits,"
4 40 C.F.R. § 1502.14(b), has particular significance regarding the noise analysis. NEPA requires that
5 an EIS "contain high-quality information and accurate scientific analysis." *Lands Council v. Powell*,
6 395 F.3d 1019, 1031 (9th Cir. 2005) "Accurate scientific analysis, expert agency comments, and
7 public scrutiny are essential to implementing NEPA." 40 C.F.R. § 1500.1(b) (Council on
8 Environmental Quality NEPA regulations).
9
10 The noise analysis in the original EIS used a metric that may no longer be valid. The R&R
11 referenced that issue, but declined to address some of the evidence because it post-dated the EIS. R&R
12 at 29. *See also* ECF 99 at 16–17; ECF 87 at 29–32; ECF 113 at 6–8. But that evidence and other recent
13 scientific studies should be used in the forthcoming SEIS for the El Centro alternative. To allow an
14 apples-to-apples comparison with Whidbey Island impacts, the Supplemental EIS should include that
15 science in its evaluation of the Whidbey Island alternatives, too.
16
17 We are not requesting that the Court direct the Navy to use a particular noise metric at this
18 juncture. But we do request that the remand direct the Navy to (1) use "high-quality information and
19 accurate scientific analysis," *Lands Council*, *supra*, and (2) allow a "meaningful comparison" among
20 them by using the same noise metrics for all alternatives. 40 C.F.R. § 1502.14(b).
21

22 **B. Analysis of Greenhouse Gas Emissions**

23 The Navy must not only disclose the basis for greenhouse gas emissions calculations, but must
24 also accurately report the complete amount of greenhouse gases emitted by Growlers operating out of
25 Whidbey Island at all elevations, including emissions above 3,000 feet. R&R at 2, 12–13. (The adverse
26 environmental effects of greenhouse gas emissions do not depend on the elevation at which fossil fuels

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are burned, ECF 99 at 19–20 (COER's Summ. J. Reply).) The Navy must compare its modeled Growler fuel consumption amounts with actual Growler fuel usage as shown by the amount of fuel issued to Growlers and explain any discrepancies between the modeled and actual fuel usage.

III. THE NAVY SHOULD PAY COER'S REASONABLE ATTORNEYS' FEES AND COSTS INCURRED IN OBTAINING THE SUMMARY JUDGMENT RULING.

COER's motion for interim fees and costs is fully briefed and pending before the Court (ECF 120, 123, and 125). COER respectfully requests that the Court find the Navy liable for COER's interim fees and costs at this stage of the litigation and establish an expedited schedule for determining the amount of the award. COER proposes the following schedule:

- Itemized request for fees and costs filed 30 days after entry of the Court's order;
- Objections filed within 30 days of the filing of the itemized request;
- Reply in support of fee and costs award filed within 15 days of the filing of the objections.

IV. CONCLUSION

For the foregoing reasons, the Court should vacate the ROD and remand this matter to the Navy to prepare a supplemental EIS, followed by a new ROD. The Court should grant COER's motion for interim fees and costs and set a briefing schedule to determine the amount of those fees and costs.

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Respectfully submitted,

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