

The Honorable Richard A. Jones

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**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE**

STATE OF WASHINGTON, et al.,  
  
Plaintiffs,

v.

The UNITED STATES DEPARTMENT  
OF THE NAVY, et al.,  
  
Defendants.

NO. 2:19-cv-01059-RAJ

WASHINGTON’S INITIAL  
BRIEF ON REMEDY

NOTE ON MOTION CALENDAR:  
December 9, 2022

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**I. INTRODUCTION**

To remedy the Navy’s serious violations of the National Environmental Policy Act (NEPA), 42 U.S.C. § 4332, and the Administrative Procedure Act (APA), 5 U.S.C. § 706, the Court should apply the presumptive remedy of vacatur and remand. In authorizing a significant expansion of its EA-18G Growler jet operations, the Navy committed four significant legal errors: (1) it did not analyze impacts to childhood learning; (2) it failed to examine species-specific impacts to birds; (3) it failed to disclose greenhouse gas emissions; and (4) it failed to analyze in detail an alternative training location. These four flaws undermine the Navy’s entire environmental review process under NEPA because the Navy ignored relevant data and instead developed a record to support its planned expansion of Growler jet operations. As the Report and Recommendation adopted by the Court explained, the Navy’s analysis “selected methods of evaluating the data that supported its goal of increasing Growler operations ... at the expense of the public and the environment, turning a blind eye to data that would not support this intended result.” Dkt. 109, at 2.

While the State acknowledges that the Navy plays an important role in national security, the Navy must carry its burden, as with any other federal agency, to demonstrate why the presumptive remedy of vacatur would not apply here where this Court identified four serious flaws with the Navy’s NEPA and APA compliance. Absent that showing, this Court should apply the presumptive remedy under NEPA and the APA and vacate the Navy’s Record of Decision and the flawed portions of the Final EIS and remand to the Navy to comply with its obligations under NEPA and the APA.

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## II. BACKGROUND

### A. The Navy's Expanded Growler Operations<sup>1</sup>

On March 12, 2019, the Navy released a Record of Decision adopting Alternative 2A as described in the Final EIS to expand its EA-18G Growlers training operations at the Naval Air Station on Whidbey Island (NAS Whidbey Island). GRR167640–65. Growlers generate intensely loud, low-frequency sound as they conduct flight trainings at NAS Whidbey Island and around Puget Sound. *See* GRR159263; GRR167647. Growler training operations encompass several different kinds of flight operations, including departures, different types of arrivals, touch-and-go, field carrier landing practice, and ground controlled approach/carrier controlled approach. GRR150327–29. The Record of Decision authorizes the Navy to indefinitely increase its aircraft operations out of NAS Whidbey Island by 33%, amounting to more than 112,100 total operations at NAS Whidbey Island in an average training year. GRR167646–47; GRR150296–97. In a high tempo year, when the Navy operates more flights based on its training needs, total operations will climb to 116,000 annual flights or approximately 317 flights per day. GRR159413, GRR150588–89. Compared to prior training levels, the Navy's expanded Growler operations expose significantly more people and acres to disturbing and disruptive high-decibel noise and noise impacts. *See* GRR150273–76.

School children will experience repeated noise disruption. School day flight operations during a high-tempo year will include more than 40,000 Growler annual operations. GRR159393. The Navy's expanded Growler operations will increase “[t]he average number of interrupting events per hour ... by up to one-third at several schools.” GRR161324. Alternative 2A, the adopted alternative, allows for an average of up to six intrusive noise events per hour at Oak Harbor High School, five intrusive noise events per hour at Crescent Harbor Elementary School, and two intrusive noise events per hour at Coupeville Elementary

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<sup>1</sup> The Report and Recommendation and Washington's Motion for Summary Judgment provide a more detailed background of the Navy's environmental review process and decision to expand its Growler operations. *See* Dkts. 88, 109.

1 School, with windows open. GRR150681, GRR159194–95 (Appx. A, average year);  
2 GRR159623 (Appx. A, high tempo year). However, “[s]ince actual flight schedules and times  
3 would vary throughout the year, some days and hours would have more frequent interrupting  
4 events than the stated average....” GRR161324.

5 Wildlife will also be exposed to increased noise from the Navy’s expanded Growler  
6 operations. The action area for the Navy’s expanded Growler operations encompasses important  
7 bird habitat, including the San Juan Islands National Wildlife Refuge, the Deception Pass  
8 Important Bird Area (IBA), the Crescent Harbor Marshes IBA, the Penn Cove IBA, the Skagit  
9 Bay IBA, and the Crocket Lake IBA. GRR150473–76; Declaration of Fenner Yarborough,  
10 Dkt. 88-1 ¶ 12. Approximately 230 migratory bird species occur annually within the Final EIS  
11 study area, including tufted puffins, great blue herons, harlequin ducks, and peregrine falcons,  
12 all four of which are designated by Washington as priority species based on their vulnerability  
13 and conservation needs. GRR150470, GRR151279; Dkt. 88-1 ¶¶ 14, 16. Scientific studies  
14 indicate that noise can adversely impact birds, even when they do not exhibit a visible response.  
15 See GRR151274–75. In fact, during the federal Endangered Species Act review process for the  
16 Navy’s Growler operations, the U.S. Fish and Wildlife Service concluded that some federally  
17 listed marbled murrelets would experience diminished health and increased mortality due to  
18 increased Growler operations over time. GRR160018–19.

19 Without the expansion authorized by the flawed Final EIS and Record of Decision, the  
20 Navy would still be able to conduct military readiness and training activities in the Pacific  
21 Northwest. GRR150236–37. Flight training operations would continue at NAS Whidbey Island,  
22 with approximately 70,400 annual Growler training operations in addition to training operations  
23 by other aircraft. GRR150296 (discussing the no-action alternative); GRR150330 (Annual  
24 Modeled Affected Environment Operations); GRR150590–91 (Comparison of Modeled No  
25 Action Alternative and Alternative 2).  
26

1 **B. Procedural History and Statutory Framework**

2 Washington and Citizens of Ebey's Reserve (COER) each filed suit against the U.S.  
3 Navy in July 2019, alleging that the Navy's decision to expand its EA-18G Growler jet  
4 operations on Whidbey Island by 33% and its supporting Final EIS violated NEPA and the APA.  
5 *See* State of Washington's Complaint, Dkt. 1; COER's First Amended Complaint, Dkt. 16, in  
6 *COER v. United States Dep't of Navy*, USDC 2:19-cv-01062-RAJ-JRC. NEPA and the APA  
7 both mandate that federal agencies follow specific procedures in making decisions to ensure that  
8 agencies make rational, transparent, and well-informed decisions. *See Motor Vehicle Mfrs. Ass'n*  
9 *v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (“[T]he agency must examine the  
10 relevant data and articulate a satisfactory explanation for its action including a rational  
11 connection between the facts found and the choice made.”) (cleaned up). Under NEPA, agencies  
12 must “consider every significant aspect of the environmental impact of a proposed action and  
13 inform the public that it has indeed considered environmental concerns in its decisionmaking  
14 process.” *Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 781 (9th Cir. 2006) (cleaned up).  
15 To effect NEPA's environmental protection purpose, this environmental review must happen  
16 before the agency action occurs. *See Robertson v. Methow Valley Citizens Council*, 490 U.S.  
17 332, 349 (1989). Notably, the Ninth Circuit has explained that “[t]here is no national defense  
18 exception to NEPA.” *No GWEN All. of Lane Cty., Inc. v. Aldridge*, 855 F.2d 1380, 1384 (9th  
19 Cir. 1988).

20 After merits briefing, Magistrate Judge Creatura issued a detailed Report and  
21 Recommendation finding that the Navy violated NEPA and the APA by (1) “arbitrarily  
22 conclud[ing]” that it did not need to analyze how increased operations would interfere with  
23 childhood learning at nearby schools; (2) failing to conduct a species-specific analysis of bird  
24 impacts, despite stating that bird species react differently to jet noise; (3) underreporting the true  
25 amount of Growler greenhouse gas emissions and failing to disclose that its analysis omitted  
26 omissions above 3,000 feet; and (4) arbitrarily rejecting an alternative location without detailed



1 analysis. Dkt. 109, at 2–3. The Court adopted the Report and Recommendation in full and  
 2 granted partial summary judgment to Washington and COER. Dkt. 119.<sup>2</sup>

3 The Court ordered further briefing on remedy in the event the parties did not reach a  
 4 stipulation regarding the appropriate remedy. *Id.* Although the parties engaged in good faith  
 5 discussions regarding the appropriate remedy in this case, they were unable to reach an  
 6 agreement. *See* Declaration of Aurora Janke. This briefing on remedy follows.

### 7 III. ARGUMENT

#### 8 A. The Court Should Apply the Presumptive Remedy and Vacate the Record of 9 Decision and Final EIS

10 “The presumptive remedy for violations of NEPA and the Administrative Procedure Act  
 11 is vacatur.” *350 Montana v. Haaland*, 29 F.4th 1158, 1164 (9th Cir. 2022) (citing 5 U.S.C.  
 12 § 706(2)(A)); *see also All. for the Wild Rockies v. U.S. Forest Serv.*, 907 F.3d 1105, 1121 (9th  
 13 Cir. 2018) (“vacatur of an unlawful agency action normally accompanies a remand”). Following  
 14 this precedent, district courts in the Ninth Circuit routinely vacate agency actions that violate  
 15 NEPA and the APA. *See, e.g., Citizens for Clean Energy v. U.S. Dep’t of the Interior*, \_\_\_ F.  
 16 Supp. 3d \_\_\_; No. 4:17-CV-00030-BMM, 2022 WL 3346373, at \*7 (D. Mont. Aug. 12, 2022)  
 17 (vacating environmental assessment and finding of no significant impact that violated NEPA  
 18 and reinstating the moratorium on federal coal leasing), *appeal filed Oct. 7, 2022; Coal. to*  
 19 *Protect Puget Sound Habitat v. U.S. Army Corps of Engineers*, 466 F. Supp. 3d 1217, 1219  
 20 (W.D. Wash. 2020) (partially vacating the Army Corps of Engineers’ Nationwide Permit 48  
 21 based on violations of NEPA and the Clean Water Act), *aff’d Coal. to Protect Puget Sound*  
 22 *Habitat v. U.S. Army Corps of Engineers*, 843 F. App’x 77 (9th Cir. 2021); *California v.*  
 23 *Bernhardt*, 472 F. Supp. 3d 573, 630 (N.D. Cal. 2020) (vacating the Bureau of Land  
 24 Management’s rescission of the Waste Prevention Rule that violated NEPA and the APA);

25 \_\_\_\_\_  
 26 <sup>2</sup> The Court denied Washington and COER’s other claims under NEPA and the National Historic  
 Preservation Act. Dkts. 109, 119.

1 *Se. Alaska Conservation Council v. U.S. Forest Serv.*, 468 F. Supp. 3d 1148, 1152 (D. Alaska  
2 2020) (partially vacating EIS and record of decision that violated NEPA).

3 Applying the presumptive remedy here, this Court should vacate and set aside the Record  
4 of Decision and the flawed portions of the Final EIS and remand the matter to the Navy to comply  
5 fully with NEPA, the APA, and this Court’s Order Adopting Report and Recommendation. *See*  
6 *California Wilderness Coal. v. U.S. Dep’t of Energy*, 631 F.3d 1072, 1095 (9th Cir. 2011)  
7 (“When a court determines that an agency’s action failed to follow Congress’s clear mandate the  
8 appropriate remedy is to vacate that action.”).

9  
10 **B. This Case Does Not Present the Rare or Limited Circumstances that Warrant  
Withholding Vacatur**

11 Withholding vacatur is not appropriate in this case because the Navy’s NEPA violations  
12 are serious. Courts may decline to vacate an unlawful agency action as a matter of equity in  
13 “rare” or “limited” circumstances. *Coal. to Protect Puget Sound Habitat*, 466 F. Supp. 3d at  
14 1219 (cleaned up); *see also 350 Montana*, 29 F.4th at 1117 (Ninth Circuit orders remand without  
15 vacatur “only in limited circumstances”) (cleaned up). When determining whether to leave an  
16 agency action in place on remand, courts in the Ninth Circuit weigh the seriousness of the  
17 agency’s errors against the disruptive consequences of vacatur. *Pollinator Stewardship Council*  
18 *v. U.S. EPA*, 806 F.3d 520, 532 (9th Cir. 2015). Because the APA creates a “presumption of  
19 vacatur” if an agency acts unlawfully, the presumption must be overcome by the party seeking  
20 remand without vacatur. *Coal. to Protect Puget Sound Habitat*, 466 F. Supp. 3d at 1219.<sup>3</sup>

21  
22  
23 <sup>3</sup> As the presumptive remedy for NEPA and APA violations, vacatur is distinct from the extraordinary  
24 remedy of injunctive relief considered by the Supreme Court in *Winter v. Nat’l Res. Def. Council*, 555 U.S. 7 (2008)  
25 and discussed in the Report and Recommendation denying COER’s preliminary injunction motion in this case,  
26 Dkt. 72, at 7, 12–13. “Although the Supreme Court has cautioned courts against granting injunctive relief as a matter  
of course in NEPA cases, it did not question the use of vacatur as a standard remedy.” *League of Wilderness  
Defs./Blue Mountains Biodiversity Project v. Pena*, No. 3:12-CV-02271-HZ, 2015 WL 1567444, at \*2 (D. Or.  
Apr. 6, 2015) (citing *Monsanto Co. v. Geerston Seed Farms*, 561 U.S. 139, 165 (2010) (distinguishing vacatur from  
the “drastic and extraordinary remedy” of injunctive relief)).

1           **1. The Navy committed serious violations of NEPA**

2           The Navy’s four significant violations of NEPA support vacatur because they  
3 demonstrate that the Navy contravened NEPA’s core mandate of informed decision making by  
4 authorizing increased Growler flights without key information about the environmental and  
5 public health consequences of its action. “NEPA is intended to ensure that environmental issues  
6 are fully considered and incorporated into the Federal decisionmaking process.” 32 C.F.R.  
7 § 775.3(b) (Navy NEPA regulations). Because NEPA requires agencies to make decisions with  
8 full knowledge of their environmental consequences, “NEPA’s effectiveness depends entirely  
9 on involving environmental considerations in the initial decisionmaking process.” *Metcalf v.*  
10 *Daley*, 214 F.3d 1135, 1145 (9th Cir. 2000) (setting aside finding of no significant impact based  
11 on NEPA violations). The timing of this environmental review matters. To effect NEPA’s  
12 purpose, agencies should conduct detailed environmental review “at a time when they retain a  
13 maximum range of options.” *Pit River Tribe v. U.S. Forest Serv.*, 469 F.3d 768, 785 (9th Cir.  
14 2006); *see also Robertson*, 490 U.S. at 348–49.

15           The detailed environmental review process required by NEPA did not occur here.  
16 Instead, this Court held that the Navy violated NEPA in four key respects: (1) it failed to analyze  
17 how increased operations would interfere with childhood learning at nearby schools; (2) it failed  
18 to conduct a species-specific analysis of bird impacts, despite stating that bird species react  
19 differently to jet noise; (3) it underreported the true amount of Growler greenhouse gas emissions  
20 and failed to disclose that its analysis omitted emissions above 3,000 feet; and (4) it arbitrarily  
21 rejected an alternative location without detailed analysis. Dkts. 109, 119.

22           These violations are serious. As Magistrate Judge Creatura explained, the Navy’s  
23 violations undermine the integrity of the Navy’s entire environmental review for its expanded  
24 Growler operations by prioritizing a certain outcome over making an informed, transparent  
25 decision:  
26

1 Here, despite a gargantuan administrative record, covering nearly  
 2 200,000 pages of studies, reports, comments, and the like, the  
 3 Navy selected methods of evaluating the data that supported its  
 4 goal of increasing Growler operations. The Navy did this at the  
 5 expense of the public and the environment, turning a blind eye to  
 data that would not support this intended result. Or, to borrow the  
 words of noted sports analyst Vin Scully, the Navy appears to have  
 used certain statistics “much like a drunk uses a lamppost: for  
 support, not illumination.”

6 Dkt. 109, at 2. Although scientific studies in the record indicate a link between aircraft noise and  
 7 adverse impacts to reading comprehension, math scores, and long-term memory, the Navy does  
 8 not know the extent of the impact its Growler training operations will have on school children’s  
 9 learning when they experience multiple classroom interruptions per hour. Dkt. 109, at 13–15;  
 10 *see supra* Part II.A. The Navy also does not know how different bird species will react to Growler  
 11 flights over time, Dkt. 109, at 16–18, which is particularly significant when the U.S. Fish and  
 12 Wildlife Service’s Biological Opinion for the Navy’s Growler expansion project estimates that  
 13 the authorized Growler expansion will result in nearly three million airfield flight operations  
 14 over a thirty-year period based on average flight operations, GRR159974–75.<sup>4</sup> The Navy also  
 15 lacks important information about the extent of its greenhouse gas emissions because it excluded  
 16 emissions above 3,000 feet from its analysis. Dkt 119, at 12–13. This omission is particularly  
 17 notable when, even without this information, the Final EIS indicates that the adopted Alternative  
 18 2A will cause a 40% increase in the Navy’s mobile greenhouse gas emissions, the largest  
 19 increase of any alternative. GRR151041–42, GRR151047. The Navy also failed to conduct a  
 20 detailed review of an alternative training location, a violation that the Ninth Circuit has  
 21 repeatedly stated strikes at the “heart of the environmental impact statement.” *Pit River Tribe*,  
 22 469 F.3d at 785. The Navy’s unlawful environmental review further deprived the public of  
 23 information necessary for it to “play a role in both the decisionmaking process and the

24 \_\_\_\_\_  
 25 <sup>4</sup> The U.S. Fish and Wildlife Service revised its Biological Opinion in January 2020. The revised  
 26 Biological Opinion includes a similar but slightly higher estimate of total airfield operations. U.S. Department  
 of the Interior, U.S. Fish and Wildlife Serv., Biological Opinion: Naval Air Station Whidbey Island  
 Complex EA-18G “Growler” Airfield Operations Project, at 7 (Jan. 15, 2020),  
<https://ecos.fws.gov/tails/pub/document/15523423>.

1 implementation of that decision.” *Robertson*, 490 U.S. at 349. By authorizing expanded Growler  
2 operations without understanding and disclosing their impacts, the Navy’s NEPA violations  
3 contravene NEPA’s informed and transparent decision making mandate and warrant vacatur. *Pit*  
4 *River Tribe*, 469 F.3d at 787, 788 (setting aside lease extensions based on NEPA and other  
5 federal law violations); *see League of Wilderness Defs.*, 2015 WL 1567444, at \*5 (concluding  
6 that Forest Service’s NEPA violations were serious and weighed in favor of vacatur).

7  
8 Vacatur is also appropriate because the seriousness of the Navy’s legal errors make it  
9 unlikely that the Navy will adopt the exact same decision on remand once it conducts the  
10 required NEPA analysis. In determining whether to withhold vacatur, courts consider whether  
11 the agency could likely adopt the same rule on remand. *Pollinator Stewardship Council*, 806  
12 F.3d at 532 (vacating EPA decision to register pesticide that was not supported by substantial  
13 evidence documenting the pesticide’s risk to bees such that the agency’s violations could not be  
14 easily corrected on remand). “Courts generally only remand without vacatur when the errors are  
15 minor procedural mistakes, such as failing to publish certain documents in the electronic docket  
16 of a notice-and-comment rulemaking.” *See State v. U.S. Bureau of Land Mgmt.*, 277 F. Supp. 3d  
17 1106, 1125 (N.D. Cal. 2017).

18 The Navy’s legal violations are not such minor technical errors. Rather, as the Report  
19 and Recommendation explained, the Navy’s flawed environmental review impaired its ability to  
20 make an informed decision: “One would think that with a nearly 200,000-page record, it would  
21 not be hard to convince a court that the Navy took a ‘hard look’ at the impacts on people and the  
22 environment. However, the value of the record is not in its breadth but in its ability to inform the  
23 Navy’s decision. In this, unfortunately, the record is lacking.” Dkt. 109, at 10. A lawful  
24 environmental review of childhood learning impacts, species-specific bird impacts, greenhouse  
25 gas emissions, and an alternative training location could lead the Navy to, among other things,  
26 adopt a different alternative, reduce or shift flight operations, alter flight patterns or training

1 schedules, or implement additional mitigation measures. Because the Navy’s NEPA violations  
 2 undermined its informed decision making under NEPA and the legal violations are not mere  
 3 technical errors easily corrected on remand, this case does not present the limited circumstances  
 4 for withholding vacatur.

5 **2. To defeat the presumptive remedy, the Navy must show that the disruptive**  
 6 **consequences of vacatur significantly outweigh the magnitude of the Navy’s**  
 7 **serious NEPA violations**

8 The Navy bears the burden of showing that its serious NEPA violations are significantly  
 9 outweighed by the disruptive consequences of vacatur. “[C]ourts may decline to vacate agency  
 10 decisions when vacatur would cause serious and irreparable harms that significantly outweigh  
 11 the magnitude of the agency’s error.” *Coal. to Protect Puget Sound Habitat*, 466 F. Supp. 3d at  
 12 1219 (quoting *AquAlliance v. U.S. Bureau of Reclamation*, 312 F. Supp. 3d 878, 881 (E.D. Cal.  
 13 2018)). In analyzing disruptive consequences, courts weigh “the disruptions that would arise if  
 14 a vacatur order were followed by appropriate action reinstating the original [decision].” *Coal. to*  
 15 *Protect Puget Sound Habitat*, 466 F. Supp. 3d at 1223–24. Even where vacatur will have  
 16 disruptive consequences, courts have applied vacatur. *See, e.g., Coalition to Protect Puget Sound*  
 17 *Habitat*, 466 F. Supp. 3d at 1219 (vacating challenged permit with certain limits to reduce  
 18 disruptive consequences of vacatur); *Se. Alaska Conservation Council*, 468 F. Supp. 3d at 1152  
 19 (“[T]he Court finds that the economic harm caused by partial vacatur of the Project EIS does not  
 20 outweigh the seriousness of the errors in that document, such that remand without vacatur is  
 21 appropriate.”). Here, the Navy bears the burden and is in the best position to show that the  
 22 disruptive consequences of vacatur significantly outweigh its four NEPA serious violations to  
 23 overcome the presumptive remedy of vacatur. Washington will address those arguments in its  
 24 reply.

25 ///

26 ///

1 **IV. CONCLUSION**

2 For the foregoing reasons, Washington respectfully requests that this Court vacate and  
 3 set aside the Record of Decision and the portions of the Final EIS held invalid by this Court,  
 4 and remand the matter to the Navy for further environmental review consistent with NEPA,  
 5 the APA, the Court's Order Adopting Report and Recommendation, Dkt. 119. On remand, the  
 6 Navy should be directed to comply with NEPA's procedures, including the requirement for  
 7 public comment.

8 In the event the Court withholds vacatur, Washington asks that the Court retain  
 9 jurisdiction over the matter and set a one-year deadline for the Navy's compliance with its  
 10 obligations under NEPA, the APA, and this Court's Order Adopting Report and  
 11 Recommendation, and require the Navy to file status reports every 60 days describing its  
 12 progress.

13 DATED this 21st day of October, 2022.

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