District Judge Richard A. Jones

IN THE UNITED STATES DISTRICT COURT
FOR THE 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 **FEDERAL DEFENDANTS' RESPONSE BRIEF AS TO REMEDY** NOTE ON MOTION CALENDAR: 12/09/2022 **ORAL ARGUMENT REQUESTED**

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INTRODUCTION

Growler training exercises[1] on Whidbey Island are essential to the Navy's ability to effectively deploy pilots to provide for the national defense. Plaintiffs[2] seek to curtail those exercises by requesting that the Court not only remand this matter to the Navy for further analysis but also vacate the ROD altogether, an action that would effectively enjoin the Navy from conducting critical training flights at operational levels essential for national security during the pendency of the remand. That broad request is, firstly, disproportionate to the content and scope of the Court's discrete findings that, in preparing the FEIS, the Navy[3] committed four violations of the National Environmental Policy Act ("***NEPA***"), 42 U.S.C. §§ 4321-4370m-12. Second, and as described in supporting declarations from senior Navy officers, Plaintiffs' proposed remedy would significantly hamstring the Navy's ability to train and deploy aircrews in sufficient numbers to meet the United States' current national security needs. Instead of ordering that drastic remedy, the Court should remand to the Navy, without vacatur, for further proceedings in keeping with NEPA's well-established requirements.[4]

BACKGROUND

Following extensive briefing and oral argument, Magistrate Judge Creatura issued a Report and Recommendation ("***R&R***") recommending summary judgment to Plaintiffs on four

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[1] The final Environmental Impact Statement ("***FEIS***") and Record of Decision ("***ROD***") at issue here evaluate the effects of increased Field Carrier Landing Practice ("***FCLP***") operations performed with EA-18G Growler aircraft ("***Growler***") at Naval Air Station Whidbey Island ("***NASWI***"). FCLPs provide Navy aircrews with the skills necessary to land on a moving aircraft carrier. *See generally* Decl. of Capt. David F. Harris ("***Harris Decl.***") (providing detailed overview of FCLP operations).

[2] Plaintiffs are Paula Spina and Citizens of the Ebey's Reserve for a Healthy, Safe & Peaceful Environment (together with Ms. Spina, "***COER***") and the State of Washington ("***Washington***" or "***the State***," together with COER, "***Plaintiffs***").

[3] Federal Defendants are United States Department of the Navy, United States Fish and Wildlife Service, Lloyd J. Austin, III, in his official capacity, Thomas W. Harker, in his official capacity, James D. Balocki, in his official capacity, and Captain Eric S. Hanks, in his official capacity (collectively, the "***Navy***").

[4] Here, likely supplemental analysis and an updated ROD tailored to address the Court's specific findings.

NEPA claims. ECF No. 109.[5] The R&R specifically found the Navy violated NEPA by: 1) not "quantify[ing] the degree of impact" of increased jet noise on classroom learning; 2) declining to "conduct a species-specific analysis" on the effects of increased Growler operations on birds; 3) "underreport[ing]" fuel emissions from increased operations; and 4) providing a "cursory rationale" to eliminate from detailed study the alternative of moving Growler operations to an airfield in El Centro, California. *Id*. at 2-3, 15.

On August 2, 2022, and over the Parties' objections, this Court adopted the R&R without modification. ECF No. 119. Plaintiffs filed their opening briefs on remedy on October 21, 2022. ECF Nos. 128 (COER), 129 (State).

STANDARD OF REVIEW

The Ninth Circuit has long recognized that the determination of whether to vacate an agency rule or action subject to remand is controlled by equitable principles. *See Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995) (noting court may decline to set aside an agency regulation "when equity demands"); *see also Humane Soc'y of U.S. v. Locke*, 626 F.3d 1040, 1053 n.7 (9th Cir. 2010); *W. Oil & Gas Ass'n v. U.S. E.P.A.*, 633 F.2d 803, 813 (9th Cir. 1980) (citing cases). "[T]he Court has discretion to leave the unlawful agency action in place while the agency corrects the identified errors or deficiencies." *Coal. to Prot. Puget Sound Habitat v. U.S. Army Corps of Eng'rs*, 466 F. Supp. 3d 1217, 1219 (W.D. Wash. 2020), *aff'd,* 843 F. App'x 77 (9th Cir. 2021).

[5] *State of Washington v. U.S. Dep't of Navy*, No. 19-1059, 2021 WL 8445582 (W.D. Wash. Dec. 10, 2021), *adopted*, 2022 WL 3042001 (W.D. Wash. Aug. 2, 2022).

ARGUMENT

Although Plaintiffs argue vacatur is presumed,[6] particularly here, where vacatur would effectively enjoin the Navy from conducting the present level of Growler training operations, the Court must consider "[1] how serious the agency's errors are 'and [2] the disruptive consequences of an interim change that may itself be changed.'" *Cal. Cmtys. Against Toxics v. U.S. E.P.A.*, 688 F.3d 989, 992 (9th Cir. 2012) (per curiam) (quoting *Allied–Signal, Inc. v. U.S. Nuclear Regul. Comm'n,* 988 F.2d 146, 150–51 (D.C. Cir. 1993)).

The R&R did not identify "serious" errors in the Navy's environmental analysis. Instead, the Navy will be able to take reasonable steps on remand to correct the discrete deficiencies noted by the Court. And even if the Court were inclined to characterize any of the identified errors as "serious," vacatur is inappropriate because the consequences of limiting the Navy's Growler training operations would be so disruptive to national security.

A. Vacatur of the ROD is Unwarranted Because the Navy is Likely to Offer Stronger Reasoning for its Conclusions on Remand.

In evaluating the seriousness of errors, the Ninth Circuit has instructed courts to consider "whether the agency would likely be able to offer better reasoning or whether by complying with procedural rules, it could adopt the same rule on remand, or whether such fundamental flaws in the agency's decision make it unlikely that the same rule would be adopted on remand." *Pollinator Stewardship Council v. U.S. E.P.A.*, 806 F.3d 520, 532 (9th Cir. 2015); *see also Loc. Joint Exec. Bd. of Las Vegas v. Nat'l Lab. Rels. Bd.*, 840 F. App'x 134, 137 (9th Cir. 2020)

[6] Contrary to Plaintiffs' arguments, the Ninth Circuit has "not construed [the APA] to require vacatur in every case in which an agency action is determined to be unlawful." *Ramos v. Wolf*, 975 F.3d 872, 905 (9th Cir. 2020) (Nelson, J. concurring) (citation omitted); *Klamath-Siskiyou Wildlands Ctr. v. Nat'l Oceanic & Atmospheric Admin. (NOAA)*, 109 F. Supp. 3d 1238, 1242 (N.D. Cal. 2015) ("The Ninth Circuit, however, does not mandate vacatur.").

(remanding without vacatur where agency was "likely [to] be able to cure the identified flaw in its decisionmaking process."); *Pascua Yaqui Tribe v. U.S. Env't Prot. Agency*, 557 F. Supp. 3d 949, 955 (D. Ariz. 2021) (suggesting inquiry into whether any errors are "problems that could be remedied through further explanation."). "The first prong [of *Allied Signal*] may be measured in different ways, including: the extent the agency action contravenes the purposes of the statute in question; whether the same rule could be adopted on remand; and whether the action was the result of reasoned decisionmaking." *In re Clean Water Act Rulemaking*, 568 F. Supp. 3d 1013, 1022-23 (N.D. Cal. 2021).

Here, notwithstanding the discrete deficiencies identified in the R&R, the preponderance of the Navy's analysis was the result of "reasoned decisionmaking." *Id.* at 1023. Indeed, the R&R acknowledged that, aside from four isolated deficiencies, "[P]laintiffs have not otherwise shown that the Navy violated NEPA . . . ." R&R at 21. Given that foundation, and contrary to Plaintiffs' speculative arguments,[7] the Navy will "likely be able to offer better reasoning" for its same conclusions on remand. *Pollinator*, 806 F.3d at 532. Accordingly, each of the errors described in the R&R is curable on remand through supplemental analysis.

First, the R&R found that, although the Navy considered the "measurable links between aircraft noise and lower reading and mathematics scores, solving puzzles, deficits in long-term memory and reading comprehension, recognition memory, and failure rates," R&R at 15, it fell short by not quantifying those impacts. *Id*. at 14. The "technical nature" of this error weighs heavily in favor of remand without vacatur. *Nat'l Fam. Farm Coal. v. U.S. Env't Prot. Agency*,

[7] For example, the State baldly claims that on remand the Navy *could* determine a change in operations or additional mitigation is warranted. ECF No. 129 at 9-10. But the State provides no specific explanation as to why that would be the case, particularly given the ultimate effects of the increased Growler operations are plainly acknowledged in the ROD.

966 F.3d 893, 929 (9th Cir. 2020). On remand, the Navy will be able to supplement its analysis with any newly available information relevant to the potential effects of jet noise on childhood learning, and can also attempt to quantify the degree of impact on classroom learning based on the available scientific literature. In addition, the Navy can address the accuracy of its prior noise monitoring using the data gathered from the Congressionally mandated Real-Time Aircraft Sound Monitoring Report.[8] Given the Navy already expressly acknowledged "the potential for classroom interference" "*would increase*" under the ROD, GRR_167649 (emphasis added), it is unlikely any supplemental analysis will significantly alter the ultimate conclusions in the FEIS.

Second, the R&R faults the Navy for including an "incomplete" discussion of species-specific impacts of noise on birds. R&R at 18. But this error does not "permeate" the FEIS. *See, e.g. All. for the Wild Rockies v. Savage*, 375 F. Supp. 3d 1152, 1155-56 (D. Mont. 2019) (remanding without vacatur because Forest Service's flawed analysis was "limited in scope" and did not "compromise the integrity of the Project as a whole"). Rather, the incomplete discussion is "well-cabined" to discrete bird species, *id.* at 1157. Indeed, the FEIS addressed many State-listed birds of concern, *see* GRR_150478, and fully analyzed the most common Federally listed threatened bird in the study area, the marbled murrelet, GRR_150916-18. *See, e.g. Pac. Rivers Council v. U.S. Forest Serv.*, 942 F. Supp. 2d 1014, 1019 (E.D. Cal. 2013) (finding that agency's failure to discuss impacts on "individual fish species" did "not demonstrate a serious error"). On remand, the Navy intends to update its literature review, review new and relevant information, and conduct additional species-specific analysis of relevant species of concern.[9]

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[8] *Available at* Naval Facilities Engineering System Command, Aircraft Sound Monitoring, https://www.navfac.navy.mil/Business-Lines/Asset-Management/Products-and-Services/Aircraft-Sound-Monitoring/ (last accessed Nov. 21, 2022).

[9] To isolate those species, the Navy intends to determine which State-listed endangered, threatened, or sensitive species are also included on either the Whidbey Audubon Society "Birds of Whidbey Island List" or on the

Third, the R&R takes issue with the Navy's emissions calculations because the Navy did not clearly disclose it was not including jet emissions above 3,000 feet. *See* R&R at 10-13. This "technical" error can be corrected on remand through a revised presentation of data regarding the basis for emissions calculations. *See N. N.M. Stockman's Ass'n v. U.S. Fish & Wildlife Serv.*, 494 F. Supp. 3d 850, 1035 (D.N.M. 2020) (absent "concrete deficiencies" in agency's "methodology," balance tilts "strongly" in favor of leaving decision in place), *aff'd,* 30 F.4th 1210 (10th Cir. 2022). The Navy will also be able to expand on its responses to relevant comments. Here too, though, the ROD already acknowledged the ultimate effect of the action—an increase in emissions. GRR_167658.

Finally, the R&R characterized as a "close call" whether the Navy's discussion of the El Centro alternative satisfied NEPA, persuasive evidence that the Court viewed this error as correctable with stronger reasoning. R&R at 18. And the R&R correctly recognized that alternatives may be properly eliminated from further consideration when an adequate rationale is provided. *See id*. at 18-19. As such, COER's contention that the El Centro alternative *must* be investigated further is erroneous; the Court found lacking the Navy's *explanation* for the determination not to further consider El Centro, not the ultimate legality of the decision itself. *Id.* at 19. On remand, the Navy will be able to further address why El Centro does not meet the purpose and need of the action, *see* GRR_167645,[10] and does not, in turn, merit full analysis in

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NASWI Integrated Natural Resources Management Plan (FEIS App'x F), excluding those species already analyzed in the FEIS under the Endangered Species Act or Bald and Golden Eagle Protection Act. *See also* ECF No. 129 at 3 (referencing State "priority species"). The Navy also intends to review whether any State-listed species occur within the 92dB contour area. At present, the Navy believes those criteria include, at minimum, the Sandhill Crane, Tufted Puffin, American White Pelican, and Common Loon. This initial analysis will allow the Navy to determine whether in-depth analysis for additional species is warranted, pending further comments from the State.

[10] In 2005 the Navy completed an environmental assessment to evaluate basing Growlers at four alternative locations and determined only NASWI met all operational requirements. GRR_143631. As such, and contrary to Plaintiffs' characterization of the issue, the stated purpose and need of the present action was to increase Growler operations *at NASWI*. GRR_150141; GRR_150289. COER's contention that the Navy skipped a procedural step,

the EIS. *See Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Eng'rs*, 781 F.3d 1271, 1290 (11th Cir. 2015) ("[W]here it is not at all clear that the agency's error incurably tainted the agency's decisionmaking process, the remedy of remand without vacatur is surely appropriate.").

In sum, all four of the identified NEPA violations are based on the Court finding the Navy provided insufficient explanations of its analysis to support some of its conclusions in the FEIS. Remand will accordingly permit the Navy to offer further explanations to remedy those violations.

B. Vacatur Would Significantly Impair Critical National Security Interests.

In addition, vacatur of the ROD would disrupt vital training exercises that support military preparedness. "[C]ourts may decline to vacate agency decisions when vacatur would cause serious and irremediable harms that significantly outweigh the magnitude of the agency's error." *NOAA.*, 109 F. Supp. 3d at 1242 (citation omitted). The Court should "focus[] on the disruptions that would arise if a vacatur order were followed by appropriate agency action reinstating the original rule or permit." *Coal. to Prot. Puget Sound*, 466 F. Supp. 3d at 1223.[11]

Plaintiffs' request for vacatur implicates critical national security concerns, specifically the Navy's ability to effectively train and deploy carrier-qualified aircrew to provide for the national defense. *See* Decl. of Vice Admiral Kenneth R. Whitesell ¶ 5 ("***Whitesell Decl.***").

ECF No. 128 at 3, is therefore misplaced, given the Navy already conducted scoping to determine the purpose and need of the action analyzed in the FEIS. *See Citizens of the Ebey's Reserve v. U.S. Dep't of Navy*, 122 F. Supp. 3d 1068, 1076-77 (W.D. Wash. 2015) (describing procedural background of EIS process).

[11] Despite claiming the Navy "must carry its burden," ECF No. 129 at 1, to demonstrate why vacatur is inappropriate, the State opposes the Navy's efforts to do just that through submission of a classified declaration. *Compare* ECF No. 129 at 1, *with* State's Resp. to Mot. to Submit Documents, ECF No. 132 at 2-3. The State also claims it does not need to address the second step of *Allied Signal* in its opening brief because the Navy is in the "best position" to show it has satisfied that test. ECF No. 129 at 10. The Court should disregard any arguments on this issue made for the first time in the State's reply given the State has failed to provide argument in the first instance. *Turtle Island Restoration Network, Inc. v. U.S. Dep't of Commerce*, 672 F.3d 1160, 1166 n.8 (9th Cir. 2012) ("[A]rguments raised for the first time in a reply brief are waived." (citation omitted)).

Courts should give "great deference to the professional judgment of military authorities concerning the relative importance of a particular military interest." *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008) (citation omitted); *see also Holder v. Humanitarian Law Project*, 561 U.S. 1, 33-34 (2010) ("This litigation implicates sensitive and weighty interests of national security and foreign affairs."); *Stagg, P.C. v. U.S. Dep't of State*, 673 F. App'x 93, 95-96 (2d. Cir. 2016) (noting "matters of national security . . . present the most compelling national interest."); *Strait Shipbrokers Pte. Ltd. v. Blinken*, 560 F. Supp. 3d 81, 100 (D.D.C. 2021) (agency actions that "are particularly important to national security . . . are subject to significant deference"); *FBME Bank Ltd. v. Lew*, 209 F. Supp. 3d 299, 342 & n.14 (D.D.C. 2016) ("In addition, the national-security interests underlying this rulemaking . . . make the Court especially hesitant to vacate the rule . . ."). This deference is equally applicable in the context of vacatur, as the tests for preliminary injunctive relief and remand without vacatur are "analogous." *Int'l Union, United Mine Workers of Am. v. Fed. Mine Safety & Health Admin*, 920 F.2d 960, 967 (D.C. Cir. 1990) (citation omitted).[12] As the Court recognized with respect to COER's prior request for a preliminary injunction, and equally relevant here, "the increased Growler presence for training at OLF Coupeville is essential for national security." *Washington v. U.S. Dep't of*

[12] The State contends that the rationale in *Winter* is inapposite because that case addresses preliminary injunctive relief rather than vacatur. ECF No. 129 at 6 n.3. While the State is correct that the posture of this case is different, "vacatur, like injunctive relief, is an *equitable* remedy that is only granted in particular circumstances . . . ." *Pac. Rivers Council*, 942 F. Supp. 2d at 1018 (emphasis added). And as the Supreme Court has explained, "when federal courts contemplate equitable relief, [they] must also take account of the public interest." *U.S. Bancorp. Mortg. Corp. v. Bonner Mall P'ship*, 513 U.S. 18, 26 (1994); *see also Sierra Forest Legacy v. Sherman*, 951 F. Supp. 2d 1100, 1106 (E.D. Cal. 2013) ("[T]he determination of when to remand without vacatur . . . should [ ] be based on a broader examination of the equities . . . ."). Indeed, the D.C. Circuit derived *Allied Signal* from a test used to evaluate injunctive relief. *See Int'l Union*, 920 F.2d at 967 (citing *Wash. Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844 (D.C. Cir. 1977)); *see also* Ronald M. Levin, *"Vacation" at Sea: Judicial Remedies and Equitable Discretion in Administrative Law*, 53 Duke L.J. 291, 378 (2003). As such, *Winter's* discussion of the public interest in military preparedness is directly applicable here. *See Winter*, 555 U.S. at 25-29.

Navy, No. 19-1059, 2020 WL 8678103, at *6 (W.D. Wash. July 22, 2020), *adopted*, 2021 WL 796552 (W.D. Wash. Mar. 2, 2021).

As described in Vice Admiral Whitesell's classified declaration, the Growler is essential to our nation's security, and the ability to conduct up to 29,600 FCLPs annually is required to meet the Department of Defense's strategy for defending against present threats to national security. *See generally* Classified Decl. of Vice Admiral Kenneth R. Whitesell; *see also* Decl. of Capt. Eric Hanks ¶ 7 ("***Hanks Decl.***"); Harris Decl. ¶ 31.

FCLP training is crucial to properly preparing Naval aircrews. As explained by Captain David F. Harris, "[t]he risks inherent in landing an aircraft on a carrier at sea cannot be overstated. It is one of the most difficult and dangerous tasks in the American military, and the complexity necessarily means it is an exceedingly perishable skill." Harris Decl. ¶ 14. "Without the necessary skill sets created by repeated FCLPs, the Growler . . . aircrews needed by Combatant Commanders will not be able to deploy to aircraft carriers in support of those missions. The highly refined and technical work that occurs at [NASWI] is critical life-saving work that is necessary to fulfill mission requirements." *Id*. ¶ 30; *see also id*. ¶ 32 ("[R]estricting or inhibiting the ability of aircrews to conduct FCLPs at the right point in the training cycle of a squadron preparing for a carrier deployment will disrupt the years-long pipeline of naval aviation training. Without flexibility to complete the required number of annual FCLPs, my naval aircrews cannot perfect the skills needed to perform the most difficult maneuver in all of aviation at the very moment in their training cycle when those skills are needed most.").

And more broadly, Growlers deploy in a Carrier Air Wing with "a variety of diverse aircraft," each of which must progress through their own individualized "complex, inter-woven, multi-year training process" involving several phases that must each be precisely synchronized to

enable them to train with other aircraft as well as surface ships and submarine elements. Whitesell Decl. ¶¶ 14; *see also* Harris Decl. ¶ 42 ("Without the ability to conduct up to 29,600 annual FCLPs, the Navy's Electronic Attack Wing will be unable to meet our nation's demand for combat-ready Airborne Electronic Attack forces, imperiling our military forces and the achievement of their objectives around the globe.").[13] "Even a temporary reduction in [Growler] operations would create a critical bottleneck of trained aircrew and may delay the larger [carrier strike group] training, and subsequent deployment in support of national defense requirements." Whitesell Decl. ¶ 24; *see Winter*, 555 U.S. at 26 ("[F]orcing the Navy to deploy an inadequately trained antisubmarine force jeopardizes the safety of the fleet.").

Given those interests, the public interest and the disruptive consequences of vacatur both weigh strongly against the relief requested by Plaintiffs. *Cf. Winter*, 555 U.S. at 31 ("The Navy contends that the injunction will hinder efforts to train sonar operators under realistic conditions, ultimately leaving strike groups more vulnerable to enemy submarines. Unlike the Ninth Circuit, we do not think the Navy is required to wait until the injunction 'actually result[s] in an inability to train . . . sufficient naval forces for the national defense' before seeking its dissolution." (alterations in original) (citation omitted)).

C. COER's Requested Relief Improperly Asks the Court to Substitute its Judgment for the Navy's; COER Also Cannot Meet the Standard for Injunctive Relief.

COER requests that the Court order the following:

[13] In addition, the use of an alternative airfield to OLF Coupeville "would be unsatisfactory to meet the critical mission of training aviators for carrier landings." Harris Decl. ¶ 33; *see also id*. ¶¶ 34-39; Hanks Decl. ¶¶ 10-13 (describing benefits of conducting FCLPs at OLF Coupeville). The Navy also cannot shift the additional FCLPs authorized by the ROD to other Navy installations across the nation because "airfield utilization rates across the Navy are at historically high levels"; there is simply no excess capacity. Whitesell Decl. ¶ 22. Indeed, the Court has already found that "OLF Coupeville is a unique location because it replicates a carrier landing pattern [among other reasons]." *Washington*, 2020 WL 8678103, at *4.

> The Navy shall provide a 'meaningful comparison' among the alternatives, including the El Centro alternative . . . The Navy must disclose the basis for greenhouse gas emissions calculations and accurately report the complete amount of greenhouse gases emitted by Growlers operating out of Whidbey Island at all elevations, including emissions above 3,000 feet. 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.

ECF No. 128-1. That request for relief violates two fundamental principles.

First, COER's request asks the Court to substitute its judgment for the Navy's by prescribing specific analyses to be performed on remand. *See Treichler v. Comm'r of Soc. Sec. Admin.*, 775 F.3d 1090, 1101 n.6 (9th Cir. 2014) (noting "rule that 'the court can order the agency to provide the relief it denied only in the unusual case in which the underlying facts and law are such that the agency has no discretion to act in any manner . . . .'" (citation omitted)). In particular, COER requests the Court order the Navy to carry El Centro forward as a reasonable alternative, and that the Navy perform certain calculations with respect to greenhouse gas emissions. Both requests are improper. As to El Centro, an agency need not analyze alternatives that do not meet the agency's purpose and need, *League of Wilderness Defs. v. U.S. Forest Serv.*, 689 F.3d 1060, 1071 (9th Cir. 2012), or those that are "unlikely to be implemented or [are] inconsistent with its basic policy objectives." *Seattle Audubon Soc'y v. Moseley*, 80 F.3d 1401, 1404 (9th Cir. 1996) (per curiam). Consistent with those standards, and as explained in Section I, *supra*, the R&R found the Navy failed to adequately explain its basis for not fully analyzing the El Centro alternative, not that it was required to include this alternative in any future NEPA analysis. Similarly, while the R&R found the Navy failed to adequately disclose the basis for its greenhouse gas calculations, R&R at 10-13, it did not prescribe the method by which the Navy should perform those calculations. Indeed, COER's requested relief arguably directs the Navy to

disregard guidance from the expert agency—the EPA. *See, e.g., City of South Pasadena v. Slater*, 56 F. Supp. 2d 1106, 1141 (C.D. Cal. 1999).

Second, by mandating certain actions, COER's request constitutes one for injunctive relief. *See, e.g., Al Otro Lado, Inc. v. Mayorkas*, No. 17-2366, 2022 WL 3135914, at *12 (S.D. Cal. Aug. 5, 2022) ("Plaintiffs are wrong to suggest this Court simply can issue an injunction disguised as vacatur relief; though the two remedies may overlap, they are not the same. Unlike an injunction, a vacatur does not restrain the enjoined defendants from pursuing other courses of action to reach the same or a similar result as the vacated agency action."). COER, however, completely fails to contend with the standard for requesting such relief by, for example, putting forward evidence of harm to its members. *See Winter*, 555 U.S. at 20-21. As such, the Court should deny COER's requested relief, which goes beyond that which the Court may order without the requisite showing by the moving party. *See Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 157 (2010) (a court should not "presume that an injunction is the proper remedy for a NEPA violation except in unusual circumstances.").[14]

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiffs' requests for remand with vacatur, and instead leave the ROD and FEIS intact while remanding to the Navy for further proceedings in keeping with NEPA.

[14] In any event, given the critical national security issues implicated here, it is unlikely COER could satisfy the *Winter* standard. *See, e.g., Pac. Aerospace & Elecs., Inc. v. Taylor*, 295 F. Supp. 2d 1188, 1203 (E.D. Wash. 2003) ("National security . . . concerns are valid public interest concerns in the context of [ ] injunctive relief.").

Respectfully submitted this 22nd day of November, 2022.

TODD KIM
Assistant Attorney General

By: /s/ *Gregory M. Cumming*
GREGORY M. CUMMING
BRIGMAN L. HARMAN
KRYSTAL-ROSE PEREZ
United States Department of Justice
Environment & Natural Resources Division
Natural Resources Section
150 M Street, NE
Washington, D.C. 20002
Phone: (202) 616-4119 (Harman)
(202) 305-0486 (Perez)
(202) 305-0457 (Cumming)
Fax: (202) 305-0506
Email: Brigman.Harman@usdoj.gov
Krystal-Rose.Perez@usdoj.gov
Gregory.Cumming@usdoj.gov

COBY HOWELL
U.S. Department of Justice
Environment & Natural Resources Division
Wildlife & Marine Resources Section
1000 S.W. Third Avenue
Portland, OR 97204
Phone: (503) 727-1023
Fax: (503) 727-1117
Email: coby.howell@usdoj.gov

Attorneys for the Federal Defendants

CERTIFICATE OF SERVICE

I hereby certify that on November 22, 2022, I served a copy of the foregoing on counsel of record electronically through the court's CM/ECF system.

By: /s/ *Gregory M. Cumming*
GREGORY M. CUMMING
BRIGMAN L. HARMAN
KRYSTAL-ROSE PEREZ
United States Department of Justice
Environment & Natural Resources Division
Natural Resources Section
150 M Street, NE
Washington, D.C. 20002
Phone: (202) 616-4119 (Harman)
(202) 305-0486 (Perez)
(202) 305-0457 (Cumming)
Fax: (202) 305-0506
Email: Brigman.Harman@usdoj.gov
Krystal-Rose.Perez@usdoj.gov
Gregory.Cumming@usdoj.gov

COBY HOWELL
U.S. Department of Justice
Environment & Natural Resources Division
Wildlife & Marine Resources Section
1000 S.W. Third Avenue
Portland, OR 97204
Phone: (503) 727-1023
Fax: (503) 727-1117
Email: coby.howell@usdoj.gov

Attorneys for the Federal Defendant