The Honorable Richard A. Jones

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 REPLY BRIEF ON REMEDY

NOTE ON MOTION CALENDAR: December 9, 2022

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The Court should apply the standard remedy and vacate and remand the unlawful Record of Decision (ROD) and Final Environmental Impact Statement (EIS). *All. for the Wild Rockies v. U.S. Forest Serv.*, 907 F.3d 1105, 1121-22 (9th Cir. 2018). Although the Court may withhold vacatur in limited circumstances, the Navy has not carried its burden to show that exceptional remedy is appropriate given the seriousness of the Navy's NEPA violations.[1]

A. Under Any Standard, the Navy's NEPA Violations Are Serious

The Navy presents three considerations for determining the seriousness of an agency's legal violations. *See* Dkt. 135, at 3-4. Each confirms the seriousness of the Navy's errors and weighs in favor of vacatur.

First, as this Court held, the Navy's decision was not the result of reasoned decision making. Rather, "despite a gargantuan administrative record … the Navy selected methods of evaluating the data that supported its goal of increasing Growler operations. The Navy did this 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. These were not minor errors; they impaired the Navy's ability to make a reasoned decision. *See id*. As the Report and Recommendation explained: "One would think that with a nearly 200,000-page record, it would not be hard to convince a court that the Navy took a 'hard look' at the impacts on people and the environment. However, the value of the record is not in its breadth but in its ability to inform the Navy's decision. In this, unfortunately, the record is lacking." *Id*. at 10. Because this Court

[1] The Navy suggests that vacatur is not presumptive, Dkt. 135, at 3 n.6, but that issue is well settled. *See, e.g.*, *Env't'l Def. Ctr. v. Bureau of Ocean Energy Mgmt.*, 36 F.4th 850, 882 (9th Cir. 2022) ("We vacate the inadequate EA, which is the presumptive remedy for agency action that violates the NEPA as reviewed through the APA."). The out-of-circuit decisions cited by the Navy do not and cannot reverse this presumption, and, in any event, do not support withholding vacatur here. *See* Dkt. 135, at 6-7 (citing *N. N.M. Stockman's Ass'n v. U.S. Fish and Wildlife*, 494 F. Supp. 3d 850, 1035 (D.N.M. 2020) (suggesting balance tilts toward withholding vacatur only where there are no "concrete deficiencies" in agency's "methodology or decisionmaking"), *aff'd*, 30 F.4th 1210 (10th Cir. 2022) and *Black Warrior Riverkeeper, Inc. v. U.S. Army Corps of Engineers*, 781 F.3d 1271, 1291 (11th Cir. 2015) (remanding to district court to determine if vacatur is appropriate)). Nor does the case law support the Navy's unfounded assertion that the test for injunctive relief and remand without vacatur are "analogous." *Id*. at 8; *compare Cottonwood Env't'l Ctr. v. U.S. Forest Serv.*, 789 F.3d 1075, 1088 (9th Cir. 2015) (stating four-factor test for permanent injunctive relief), *with Pollinator Stewardship Council v. U.S. Env't'l Prot. Agency*, 806 F.3d 520, 532 (9th Cir. 2015) (stating two-factor test for determining whether to withhold vacatur).

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has held that the ROD was not a reasoned or informed decision, this factor weighs in favor of vacatur.

Second, the Navy contravened NEPA's "twofold purpose" for an EIS of "ensuring that the goals of NEPA are infused into the government's actions" and "provid[ing] important information to the public." *Ctr. for Biological Diversity v. Bernhardt*, 982 F.3d 723, 734 (9th Cir. 2020); *see also* Dkt. 129, at 4, 7-9. NEPA achieves these goals by requiring agencies to consider "any adverse environmental effects which cannot be avoided" and "alternatives to the proposed action." 42 U.S.C. § 4332(2)(C). Here, however, the Navy made the decision to indefinitely authorize a 33% increase in its EA-18G Growler training operations without understanding critical impacts of that decision: (1) how repeated classroom disruptions will impact childhood learning; (2) how Growler flights will impact the diverse bird species in the action area; and (3) the degree of greenhouse gas emissions from flight operations. Dkt 109, at 10-18. And (4) the Navy struck at the "heart" of the NEPA analysis by arbitrarily rejecting the El Centro alternative. *Pit River Tribe v. U.S. Forest Serv.,* 469 F.3d 768, 785 (9th Cir. 2006); Dkt. 109, at 18-21. Such uninformed decision making warrants vacatur under NEPA. *See Ctr. for Biological Diversity*, 982 F.3d at 738-40, 751 (vacating agency decision based on arbitrary and capricious calculation of greenhouse gas emissions under NEPA even where the agency could potentially correct its errors with further analysis or explanation).

Third, the Navy is unlikely to adopt the same decision on remand. The Navy's four errors undermined the integrity of the Navy's ultimate decision, Dkt. 109, at 2-3, and are distinguishable from the single technical errors that justified withholding vacatur in *National Fam. Farm Coal. v. U.S. Env't Prot. Agency*, 966 F.3d 893, 929-30 (9th Cir. 2020) and *Alliance for the Wild Rockies v. Savage*, 375 F. Supp. 3d 1152, 1157 (D. Mont. 2019). Moreover, the D.C. Circuit has observed in the context of an agency's failure to prepare an EIS that "NEPA violations are serious notwithstanding an agency's argument that it might ultimately be able to justify the challenged action." *Standing Rock Sioux Tribe v. U.S. Army*

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Corps of Engineers, 985 F.3d 1032, 1053 (D.C. Cir. 2021), *cert. denied sub nom*. *Dakota Access, LLC v. Standing Rock Sioux Trib*e, 212 L. Ed. 2d 54, 142 S. Ct. 1187 (2022). *See also Klamath-Siskiyou Wildlands Ctr. v. Nat'l Oceanic & Atmospheric Admin. Nat'l Marine Fisheries Serv.*, 109 F. Supp. 3d 1238, 1244-45 (N.D. Cal. 2015) (rejecting argument that ESA and NEPA errors in an EIS could be easily corrected on remand).

The Navy faults the State for not providing a specific explanation for why the Navy may alter its decision on remand either by adopting a different or modified alternative or new mitigation measures. Dkt. 135, at 4 n.7. But as the Supreme Court has explained, detailed environmental review under NEPA is "almost certain to affect the agency's substantive decision" even if NEPA does not mandate particular results. *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 348-50 (1989). Accordingly, on remand, if the Navy concludes through subsequent analysis that certain impacts are more significant than it previously disclosed, then "it may well approve another alternative" or take other action to address the harm. *Ctr. for Biological Diversity*, 982 F.3d at 740. The ROD suggests as much by stating that it rests on the Navy's "balancing [of] the impacts of the proposed action on the human and natural environment," and "analysis of environmental effects in the Final EIS," GRR167641, GRR167665. If that analysis changes, then the ROD may change.

Take childhood learning as an example: The Navy concedes on remand that it must reassess the scientific literature and attempt to quantify the impact of Growler operations on childhood learning. Dkt. 135, at 5. Yet the Navy contends that such analysis is unlikely to alter its conclusion because the ROD acknowledged a potential increase in classroom interference. *Id*. This acknowledgment only highlights the critical deficiency in the Navy's decision because it is silent about "the extent to which increased operations would harm children's learning"—the legal error found by this Court. Dkt. 109, at 14.

Similarly, the Navy's "incomplete and arbitrary consideration of species specific impacts" to birds cannot be quickly corrected on remand. *Id*. at 18. Indeed, the Navy explains

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on remand that it intends to "update its literature review, review new and relevant information, and conduct additional species-specific analysis" of a number of vulnerable species, including tufted puffins, which the challenged EIS entirely ignored. Dkt. 135, at 5. Contrary to the Navy's suggestion that it already "addressed" many of these state-listed vulnerable species in the challenged EIS, *id*., the EIS merely acknowledged the presence of some of these species in the action area but it did not analyze specific impacts to them, *see* GRR150911-19; *see also* Dkt. 88, at 23-25; Dkt. 101, at 20-22. *Pacific Rivers Council v. U.S. Forest Service* is distinguishable because it concerned an agency's failure to "reanalyze impacts to individual fish species" in a programmatic decision that did not authorize immediate on-the-ground impacts. 942 F. Supp. 2d 1014, 1020-21 (E.D. Cal. 2013). Here, by contrast, the ROD authorizes on-the-ground activities for which the Navy has not analyzed the impacts to bird species, demonstrating the weight of the Navy's failure to consider these impacts.

The ROD also concludes that the greenhouse gas emissions from the adopted alternative "would not have a significant impact on Washington's [greenhouse gas] emission goals." GRR167658. On remand, the Navy may change this conclusion based on an accurate assessment of greenhouse gas emissions and Washington's new more stringent emission reduction limits adopted in 2020. *See* RCW 70A.45.020; Laws of 2020, Ch. 79, § 2; *see also* GRR151050-52 (discussing Washington's prior emission reduction goals).

Because the Navy has not adequately assessed childhood learning impacts, bird species impacts, greenhouse gas emissions, or the El Centro alternative, it could not possibly know for certain that the Navy fully considered "the ultimate effects of the increased Growler operations" in the challenged ROD and thus will not alter its decision in any respect on remand. *See* Dkt. 135, at 4 n.7. By suggesting that more detailed analysis on remand will not in any way alter its decision, the Navy foreshadows a repeat failure of informed decision making rather than a quick technical correction of a minor legal error, which further supports vacatur.

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B. The Navy Has Not Shown That the Disruptive Consequences of Vacatur Significantly Outweigh the Seriousness of Its Errors[2]

The Navy focuses most of its disruptive consequences argument on the general importance of Growler training operations to national security and personnel safety. Those issues are not in dispute. But they also do not address the specific question here: Do the disruptive consequences of vacating the Navy's decision to increase Growler operations until the Navy complies with NEPA *significantly* outweigh the seriousness of the Navy's errors? *See Coal. to Protect Puget Sound Habitat v. U.S. Army Corps of Engineers*, 466 F. Supp. 3d 1217, 1220, 1223-24 (W.D. Wash. 2020) (analyzing disruptions if vacatur were followed by appropriate agency action reinstating original decision), *aff'd* 843 F. App'x 77 (9th Cir. 2021).[3]

Here, the Navy has not carried its burden to show that restricting the Navy's Growler training operations to pre-ROD levels will cause disruptive consequences that outweigh the seriousness of the Navy's errors. Other than stating its need to maintain flexibility, the Navy has not provided any details about the anticipated number of annual FCLPs for 2023 or 2024, the likely time period for the Navy to correct it supplemental environmental review. Declaration of David. F. Harris, Captain U.S. Navy (Capt. Harris Decl.), Dkt. 135-2 at ¶ 31; 40 C.F.R. § 1501.10(b)(2) (setting a two-year expectation for EISs). Without this information, it is hard to determine whether the maximum 20,100 field carrier landing practices (FCLPs) and 53,600 other Growler operations per year that the Navy would be authorized to conduct even if the ROD were vacated would be sufficient to maintain the training flexibility the Navy states it needs. GRR159405 (summary of annual flight operations for no action alternative high-tempo

[2] The Navy did not respond to the State's request that the Court vacate the unlawful portions of the EIS. Dkt. 129, at 11. Accordingly, this Court should apply the standard remedy and vacate the EIS.

[3] The State did not waive its ability to respond to the Navy's arguments regarding disruptive consequences. Because the Navy bears the burden to establish disruptive consequences, *Coal. to Protect Puget Sound Habitat*, 466 F. Supp. 3d at 1226, the State has a right to respond to those arguments on reply, *see Cortland v. Pierce Cnty.*, 488 F. Supp. 3d 1027, 1035-36 (W.D. Wash. 2020) (indicating that moving party does not waive ability to respond where opposing party carries the initial burden). In any event, the State's arguments in reply flow from its initial remedy brief. Dkt. 129, at 3 (explaining authorized Growler trainings that would continue after vacatur).

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FCLP year); GRR159049 (describing no action alternative and maximum/high tempo year).[4] But the information the Navy does provide indicates that the Navy has operated around or below those pre-ROD levels in two of the last three years. Capt. Harris Decl., Dkt. 135-2, ¶ 31. With respect to non-FCLP Growler operations that make up the majority of the Navy's Growler flights, GRR159155 (Alt. 2A average year); GRR159413 (Alt. 2A high tempo year), the Navy provides no information about past flight numbers to show the necessity of maintaining those operations above the pre-ROD levels, and provides only a brief statement regarding future Growler expeditionary squadron flights, which comprise just a fraction of the training operations. *See* Capt. Harris Decl., Dkt. 135-2, ¶ 43; GRR159157. Indeed, the Navy's argument seems to ignore the Growler flights other than FCLPs authorized by the ROD. *See* Dkt. 135, at 1 n.1.[5] While the Court may grant deference to the Navy on matters of national security, the Navy must still carry its burden to show that the Court should depart from the standard remedy of vacatur and remand. It has not done so here.[6]

CONCLUSION

The State respectfully requests that the Court grant vacatur and remand of the ROD and EIS. Dkt. 129, at 11. If the Court decides to exercise its equitable authority to depart from the standard remedy, then it should consider withholding vacatur only for those training operations for which the Navy has established disruptive consequences. Alternatively, if the Court withholds vacatur it should retain jurisdiction, set a deadline for the Navy's review on remand, and require periodic status reports.

[4] The State's initial brief outlined flight operations for an average year under the no-action alternative, which are slightly lower than the high-tempo numbers. *See* Dkt. 129, at 3.

[5] This Court's prior conclusion that increased Growler training at OFL Coupeville is essential for national security also pertains to only a portion of the Navy's expanded Growler operations. Dkt. 72, at 8-13.

[6] To the extent the Navy's arguments and declarations address the adverse consequences of shifting Growler FCLPs to other installations, that issue is not before the Court because vacatur effectively undoes the unlawful decision; it does not mandate any affirmative action by the Navy. *See Alsea Valley All. v. Dep't of Com.*, 358 F.3d 1181, 1185-86 (9th Cir. 2004) (rejecting argument that vacatur is the practical equivalent of an injunction).

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