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**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

COER'S REPLY TO FEDERAL DEFENDANTS' RESPONSE BRIEF ON REMEDY



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## I. VACATUR IS PRESUMED

Despite the Navy's claim to the contrary,[1] there is no argument: Vacatur is the presumed remedy for unlawful agency actions. *All. for the Wild Rockies v. U.S. For. Serv.*, 907 F.3d 1105, 1121–22 (9th Cir. 2018). Also contrary to the Navy's claim,[2] COER does not argue that vacatur is required in every case. We acknowledged exceptions, ECF 128 at 4:18–5:6, but demonstrated they do not apply here. It is the Navy's burden, not ours, to show that vacatur is not appropriate.

## II. THE NAVY'S ERRORS WERE SERIOUS

The Navy acknowledges that seriousness may be measured by "the extent the agency action contravenes the purposes of the statute in question[.]" ECF 135 at 9:4–8 (quoting *In re Clean Water Act Rulemaking*, 568 F. Supp. 3d 1013, 1022–23 (N.D. Cal. 2021)). The statute in question here is NEPA. The Navy's failure to consider alternatives is a serious error; it pierces the heart of NEPA. *'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").

Omitting the El Centro alternative was an extremely serious error because it may not just reduce environmental harm, but may improve the Navy's training program. The Navy itself says so. Referencing an earlier temporary deployment of Growlers to El Centro, the Navy concluded:

> The unmodified carrier landing pattern at NAF El Centro and the unique at-sea ambient lighting and environmental conditions of nearby San Clemente Island provided **higher quality** of training than could be achieved at either Ault Field or Coupeville reducing the need to maximize the use of Coupeville.

GRR 121559 (emphasis supplied). *See also* ECF 87 at 14–16.[3]

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[1] ECF 135 at 8:2. Citations use the page numbers in the ECF headers.

[2] ECF 135 at 8, n. 6.

[3] Likewise, the Navy has acknowledged that El Centro was extensively used for training until "[i]*ncreasing budgetary pressures* in the mid-2000s reduced the availability of resources *i.e.*, flying hours travel funds manpower and aircraft causing gradual drawdown of production detachments to NAF El Centro and steady increase



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The Navy's errors threaten serious human and environmental harms. The noise impacts from Growler overflights interfere with childhood learning, ECF 129 at 12:6–9; disrupt daily life, ECF 128 at 5, n. 3; and (according to the U.S. Fish and Wildlife Service) "take" federally listed marbled murrelets and likely harm other bird species, too, ECF 129 at 7:15–18. The missing alternatives analysis is the "heart" of NEPA because an alternative course of action may reduce or avoid entirely these very serious impacts. The Ninth Circuit has regularly vacated actions for similar or less serious errors. *Pollinator Stewardship Council v. U.S. E.P.A.*, 806 F.3d 520, 532–33 (9th Cir. 2015); *NRDC v. EPA*, 857 F.3d 1030, 1042 (9th Cir. 2017).[4]

## III. THE NAVY HAS NOT MET ITS BURDEN TO SHOW THAT THE CONSEQUENCES OF AN INTERIM CHANGE THAT MAY ITSELF BE CHANGED ARE AS DISRUPTIVE AS THE NAVY ASSERTS

The Court should reject the Navy's claim of disruptive consequences. As stated in the case quoted by the Navy, this factor "is weighty only insofar as the agency may be able to rehabilitate its rationale for the regulation." *Coal. to Protect Puget Sound Habitat v. Army Corps of Engineers*, 466 F. Supp. 3d 1217, 1223–24 (W.D. Wash. 2020), *aff'd* 843 Fed. Appx. 77 (9th Cir. 2021). The issue, then, is whether the Navy might be able to reach the same decision on remand, focusing on the procedural decision to refuse to consider El Centro—not the substantive decision of where to train Growler pilots:

> If, when an agency declined to prepare an EIS before approving a project, courts considered only whether the agency was likely to ultimately justify the approval, it would subvert NEPA's purpose by giving substantial ammunition to agencies seeking to build first and conduct comprehensive reviews later. If an agency were

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in the percentage of FCLP conducted at Coupeville from approximately 2008 to 2013." GRR00121559 (emphasis supplied). That had nothing to do with El Centro's inherent attributes for training Growler pilots safely and well.

[4] The Navy's failure to adequately analyze greenhouse gas emissions also was a serious error. Agencies cannot be allowed to turn a blind eye to the climate impacts of each individual project on the ground that any one project taken alone will only have a small impact. *See Massachusetts v. E.P.A.*, 549 U.S. 497, 127 S. Ct. 1438, 167 L. Ed. 2d 248 (2007); *Preserve Our Island v. U.S. Army Corps of Engineers*, C08-1353RSM, 2009 WL 2511953, at *20 (W.D. Wash. Aug. 13, 2009) ("Which raindrop caused the flood?").



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> reasonably confident that its EIS would ultimately counsel in favor of approval, there would be little reason to bear the economic consequences of additional delay.

*Standing Rock Sioux Tribe v. United States Army Corps of Engineers*, 985 F.3d 1032, 1052 (D.C. Cir. 2021), *cert. denied* 212 L. Ed. 2d 54, 142 S. Ct. 1187 (2022).

Here, there is no likelihood that the Navy could justify its decision not to prepare an adequate EIS. Moreover, the expectation is that complying with NEPA is not a make-work exercise, but will result in a different decision. As the *Standing Rock* court went on to observe:

> In *Oglala Sioux Tribe v. U.S. Nuclear Regulatory Commission*, 896 F.3d 520 (D.C. Cir. 2018), we explained that because NEPA is a "purely procedural statute," where an agency's NEPA review suffers from "a significant deficiency," refusing to vacate the corresponding agency action would "vitiate" the statute. *Id.* at 536 (internal quotation marks omitted). As we made clear, "[p]art of the harm NEPA attempts to prevent in requiring an EIS is that, without one, there may be little if any information about *prospective* environmental harms and potential mitigating measures." *Id.* (internal quotation marks omitted). Put another way, *Oglala* strongly suggests that where an EIS was required but not prepared, courts should harbor substantial doubt that " 'the agency chose correctly' " regarding the *substantive* action at issue—in this case, granting the easement. *Id.* at 538 (quoting *Allied-Signal*, 988 F.2d at 150–51).

*Id.* at 1052–1053. Whether the flaw is a failure to prepare any EIS or an adequate EIS, the frustration of NEPA's purposes is the same. Because the Navy is unlikely to "rehabilitate" its argument that the original EIS was not flawed and because an adequate EIS is apt to result in a different decision (as to siting, mitigation or both), the disruptive consequences factor should be given little weight. *Coal. to Protect Puget Sound Habitat v. Army Corps of Engineers, supra.*

Even to the extent that impacts to the Navy's mission should be considered, the Navy's focus on the importance of Growler training is a red herring. As explained in our opening brief, the issue is not whether Growler training is important, but whether it all needs to be on Whidbey, with 80% at the OLF. The Navy devotes virtually all of its declarations and argument to the uncontested



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1 'Growler training is important' issue and virtually none to the decisive siting issue of whether it
2 must be as specified in the ROD: all on Whidbey with 80% at the OLF and 20% at Ault.
3 The Navy does not address that decisive siting issue in its filings because it has not
4 considered the issue in its own deliberations. In a recent FOIA request, we asked for all documents
5 relating to the Navy's consideration of alternative sites that could be used if the ROD is vacated.
6 The Navy responded that it has no documents. None. Griefen Dec. and Ex. 1 thereto at 3, ¶¶10, 12.
7 Captain Hanks testifies that there is no room to resume 80% of FCLPs at Ault. ECF 135-4,
8 ¶¶ 13–14. *See also* Harris Dec, ECF 135-2, at ¶ 36 (same). But tellingly, neither Hanks nor Harris
9 provide evidence to back up their assertions—and according to the Navy's FOIA response, there
10 is none. Nor has the Navy considered opportunities for freeing up space for FCLP training at Ault
11 Field by reducing operations of non-Growler aircraft and expeditionary Growlers (which do not
12 land on aircraft carriers) at Ault Field. Griefen Dec., and Ex. 1 thereto at 3, ¶¶10, 12.
13 Whitesell asserts that Whidbey's features "cannot be replicated anywhere else." ECF 135-
14 3, ¶20, but the R & R determined this to be false, R & R at 18:21–19:3, and Whitesell offers no
15 evidence to support his conclusory statement. The claim strains credulity. Were it true, our
16 country's security hangs by a slender thread. One earthquake or other disaster that knocks the OLF
17 out of commission supposedly leaves our country unable to protect itself. Somehow, we expect,
18 the Navy would figure out how to fill the gap. Their declarants' inability to admit that says more
19 about their credibility than about the supposedly unique attributes of OLF Coupeville.
20 Harris asserts that OLF Coupeville's proximity to emergency health care is a positive, ECF
21 135-2, ¶ 39, but he does not state that other options are not equally close. And, if other options are
22 further, he does not explain how the Navy has managed to use those facilities for flight operations
23 despite a longer distance from medical facilities. The Court should reject the Navy's irrelevant,
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conclusory, and unsubstantiated declarations of woe; find that the Navy has not met its burden; and vacate the ROD.[5]

## IV. THE NAVY SHOULD BE ORDERED TO ADDRESS EL CENTRO IN AN SEIS

The Navy takes the position that it should not be ordered to prepare a SEIS that addresses the El Centro alternative, claiming that it is free to propound new justifications for not analyzing that site in detail. ECF 135 at 11:10–18. But the rationales the Navy floats as justifications are the same rationales the Court considered and rejected in its summary judgment ruling.

In its summary judgment briefing, the Navy argued that dividing the Growler community would not meet the Navy's purpose; ECF 92 at 57–58, ECF 112 at 9–12; that relocating new aircraft at alternative locations would reduce efficiency; *id*.; that relocating Growlers would be expensive, *id*.; and that OLF Coupeville best replicates the carrier environment, *id*. The Navy advances the same arguments now. The R & R rejected these specious excuses, concluding "*that the Navy failed to take a 'hard look' at the alternative of moving operations to California and that the Navy's rationale for rejecting the El Centro alternative was arbitrary and capricious*." ECF 109 at 18:7–9 (emphasis supplied). The Court should nip in the bud the Navy's efforts to further delay the detailed review required by NEPA by repackaging the same rejected excuses.

The Navy is priming the pump for perfunctory compliance on remand with no analysis of any alternative site. If the Navy does not compare the Whidbey and El Centro alternatives, the supplemental analysis on remand will contain no new meaningful analysis of an alternative site

[5] Nearly out of sight in the Navy's declarations are veiled admissions and innuendos that other options are available. For instance, Harris states: "At sea, the altitude of the landing pattern is 600 feet; ashore, *each outlying field* has individual course rules and restrictions in place to mimic that profile *as nearly as possible*." ECF 135-2 at ¶ 18 (emphasis supplied). Similarly, Whitesell states: "For Growler squadrons, the OFRP cycle consists of unit basic-level training, which *predominately* occurs at NASWI." ECF 135-3, at ¶ 16 (emphasis supplied). These are veiled admissions that there are other OLFs that can mimic the carrier landing profile and that Growler training occurs elsewhere, too.



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that could lessen, perhaps dramatically, the public health consequences of excessive noise and the impacts on childhood learning and wildlife at risk. Opportunities to meet the Navy's mission while reducing all of these (and other) impacts by training at the more remote El Centro site will be lost.

The information and analysis the Navy resists providing is not just for its benefit. NEPA demands that Congress and the public have it, too. An SEIS comparison of El Centro vs Whidbey would give Congress the information it needs when deciding whether to spend money to move Growlers to El Centro. *See Robertson v. Methow Valley Cit. Council*, 490 U.S. 332, 349, 109 S.Ct. 1835 (1989) (NEPA "guarantees that the relevant information will be made available to the larger audience that may also play a role in both the decisionmaking process and the implementation of that decision"). Given the Navy's intransigence, it apparently will take a direct order of the Court for the required disclosures to occur.

The Navy is wrong when it argues that "by mandating certain actions, COER's request constitutes one for injunctive relief," ECF 135 at 17:3–4. COER is not requesting an injunction. An order requiring a supplemental EIS that corrects the errors found by the Court is an appropriate part of the vacatur remedy. *See, e.g., Standing Rock, supra,* 985 F.3d at 1050. An order requiring an SEIS that corrects the court-determined deficiencies does not "restrain" the Navy "from pursuing other courses of action to reach the same or similar result as the vacated agency action." ECF 135 at 17 (quoting *Al Otro Lado, Inc. v Mayorkas,* 2022 WL 3135914 (S.D. Cal. 2022)). We seek none of the far-reaching relief beyond bare compliance with NEPA that triggers an injunction analysis. *See Monsanto c. v. Geerston Seed Farms,* 561 U.S. 139, 130 S. Ct 2743 (2010) (reviewing an order prohibiting agency from taking certain regulatory action and prohibiting private sector from using certain pesticide nationwide while NEPA violations are cured).



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1 DATED this 9th day of December, 2022.

2 Respectfully submitted,

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