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 AND PAULA SPINA'S MOTION FOR RECONSIDERATION

NOTE ON MOTION CALENDAR: SAME DAY MOTION

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I. THE COURT SHOULD RECONSIDER ITS DECISION NOT TO VACATE THE ROD ON REMAND.

The Court declined to impose the presumptive remedy of vacatur based on a balancing of the equities. But there were two items on the scale that the Court should reconsider.

In weighing the harm of not ordering a return to the pre-ROD allocation of field carrier landing practice flights ("FCLPs") between Ault Field and Outlying Land Field Coupeville ("OLF Coupeville"), the Court focused on the level of post-ROD FCLP overflights island-wide. ECF 140 at 8:5–7 ("The information provided to the Court indicates that the Navy has operated FLCPs around pre-ROD levels in two of the last three years *at Whidbey Island*" (emphasis supplied)). But the Court did not focus on the change in flights around OLF Coupeville. Post-ROD Growler overflights around the OLF have more than doubled since the ROD (and the ROD authorizes a four-fold increase in Growler overflights around OLF Coupeville). The failure to consider the impact on the thousands of people living in the immediate vicinity of OLF Coupeville is manifest error.

Doubling low level overflights around OLF Coupeville is causing extensive permanent harm to thousands of residents in the area. Maintaining the pre-ROD allocation of FCLPs (80% Ault Field / 20% OLF), as contemplated in the Navy's reasonable Alternative 2, Scenario C, would not reduce the total number of Growler training flights, would not interrupt Growler training and operations, and would not require relocating the Growler community elsewhere. Those are the asserted disruptions to the Navy that the Court put on the 'no vacatur' side of the balancing scale. ECF 140 at 8:10–17. This oversight alone should lead to a new balancing of the equities by the Court, one which tips in favor of vacatur.

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The second item on the scales requiring further consideration is the Court's finding that the post-ROD allocation is necessitated by national defense. The Court accepted the Navy's national defense explanation without giving it the scrutiny the Court provided to other Navy claims. While we recognize that deference is greatest when national defense is in the balance, that deference is not without limits. As shown below, factual information *in the Navy's own record* screams out that the national defense claim is overstated by far. The Navy's own files demonstrate that it has been able to protect our country and train its pilots without shifting 80% of these training flights to OLF Coupeville. Particularly combined with reconsideration of the harm to the community, reconsideration of the national defense claim should also lead the Court to order vacatur.

As the Court acknowledged, remand with vacatur is the presumptive remedy under the APA for an unlawful EIS and ROD. ECF 140 at 4:25. The Court ruled that Navy's analysis in the EIS and action in issuing the ROD were arbitrary and capricious and stated that "allowing the Navy to proceed with a highly disruptive action prior to completing environmental review will do great damage to NEPA's purpose." ECF 140 at 5:9–10 (internal footnote omitted). Yet, the Court did not order full or even partial vacatur.[1]

COER and Paula Spina (collectively herein "COER") are mindful of the high bar of "manifest error" that applies to motions for reconsideration under LR 7(h).[2] Here, that bar is met.

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[1] *See Coal. to Prot. Puget Sound v. U.S. Army Corps of Eng'rs*, 466 F. Supp. 3d 1217, 1226-27 (W.D. Wash. 2020), *aff'd* 843 F. App'x 77, 80 (9th Cir. Feb. 11, 2021) (finding partial vacatur appropriate where the relevant "equities [were] unclear"); *Wild Fish Conservancy v. Rumsey*, No. C20-417-RAJ-MLP, 2022 WL 18877886, at *7 (W.D. Wash. Dec. 13, 2022), *report and recommendation adopted,* No. 20-CV-417-RAJ, 2023 WL 3204697 (W.D. Wash. May 2, 2023) ("a district court ultimately possesses 'broad latitude' in fashioning equitable relief when necessary to remedy an established wrong") (internal quotation omitted).

[2] COER has reviewed LR 7(h), Fed. R. Civ. P. 59(e), and Fed. R. Civ. P. 60. COER believes that LR 7(h) is the most appropriate vehicle for this motion. During the undersigned counsel's telephonic meet and confer session with counsel for the Navy, counsel for the Navy suggested that this motion is more

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The Court overlooked that the harms to people living near OLF Coupeville increased significantly after the unlawful ROD took effect and the Court did not provide any scrutiny of the Navy's national security argument.

A. The Court Erred in Failing to Conclude that the Harms to Local Residents have Worsened Significantly after the ROD.

It appears that the Court incorrectly concluded that harms to residents near OLF Coupeville have not significantly increased post-ROD. If it were true that the impacts to local residents are no worse now than they were pre-ROD, it would be understandable for the Court to deny vacatur. But that is not true. The Court manifestly erred in failing to conclude that the harms to local residents have worsened significantly after the ROD was issued due to the expanded FCLP flights at the OLF Coupeville as authorized by the unlawful ROD.

The unlawful ROD authorizes "a four-fold increase (90 hours per year to 360 hours per year) in aircraft activity at OLF Coupeville. GRR 167647." ECF 109 at 8:7–8. While the Navy has not fully exercised that authority yet, the Navy's FCLP overflights at OLF Coupeville have more than doubled since the ROD was issued. That is causing devasting harm to thousands of people trying to live and work below the deafening, low-level Growler flights, as demonstrated by the declarations of people living near the OLF submitted herewith. *See* Decl. of Robert Wilbur at ¶ 5 ("More than 3,400 Coupeville residents live in the area impacted by the increased flights at OLF post-ROD and nearly 2000 are in the most impacted area [citing GRR00150654–656]"); Decl. of Maryon Attwood at ¶ 5 ("Now, post-ROD, that unbearable noise is much more frequent because of the increased number of Growlers and increased numbers of operations post-ROD"), at ¶ 8 ("The

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appropriately brought under Fed. R. Civ. P. 59(e) or Fed. R. Civ. P. 60. To the extent that a motion under Fed. R. Civ. P. 59(e) or Fed. R. Civ. P. 60 is required, COER brings this motion under those federal rules, as well.

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impacts from the number of Growler operations at the OLF prior to the ROD were bad. The post-ROD increased operations at OLF Coupeville are unlivable and unworkable. . . . There is no comparison of the impact pre-and post-ROD, they are not similar"); Decl. of Kenneth Waters at ¶ 4 ("The frequency since the Record of Decision (ROD) for the Navy's expanded Growler operations has been greater than it ever was before the ROD"); Decl. of Patricia Warren at ¶ 4 ("FCLP activity is often scheduled on four consecutive nights and for consecutive weeks. There is no break. This was not the situation prior to the ROD. The current situation is unhealthy and intolerable"); Decl. of Patricia Dunn at ¶ 5 ("Returning Growler overflights at the OLF to pre-ROD levels would be a huge relief. Pilots would continue to get their training, and residents would benefit from a measure of restored peace and quiet: what Ebey's Reserve was intended to provide and conserve"); Decl. of Ken DeFrees at ¶ 2 ("When we purchased in 2014 the occasional flights were bad enough, but with the expansion after the Record of Decision it has become unbearable"); Decl. of Paula Spina at ¶ 4 ("Before the ROD the Navy would operate at the OLF for 3 to 5 weeks of FCLP training four or five times per year with no operations in between, now the Navy schedules and conducts operations at the OLF nearly every week of the year"), at ¶ 5 ("In my personal experience the Navy is flying two to three times as often over my house and property as they did prior to the ROD and it is just not true that since the ROD the number of their operations has remained similar to that of the pre-ROD time period at the OLF").

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The Court should reconsider its order denying vacatur, taking full account of the massive, harmful increase in low-level Growler overflights around the OLF post-ROD. Full consideration of that factor alone should cause the scales to tip in favor of vacatur or partial vacatur.[3]

B. The Court Erred in Failing to Scrutinize the Navy's National Defense Argument.

This Court previously found that the Navy arbitrarily and capriciously violated NEPA "at the expense of the public and the environment, turning a blind eye to data that would not support this intended result." ECF 109 at 2:10–12. While maximum deference to the military's judgment regarding national security matters is appropriate, the Court should not take the Navy's representations at face value here. Some scrutiny of the Navy's claims is required and even maximum deference can be overcome. But the Court's order on remand did not include *any* scrutiny of the Navy's claim that any action other than its preferred action (Alternative 2, Scenario A) would work grievous harm to national security. *See Northern Spotted Owl v. Hodel*, 716 F. Supp. 479, 482 (W.D. Wash. 1988) ("Judicial deference to agency expertise is proper, but the Court will not do so blindly").

The Navy's assertions that its preferred alternative is the only alternative that adequately protects national security are belied by the Navy's own documents. The Navy itself states that El Centro provides "higher quality of training than could be achieved at either Ault Field or Coupeville." ECF 87 at 14 (citing GRR 121559). The Navy itself put forward Alternative 2, Scenario C as a "reasonable" alternative that would serve the purpose and need of the proposed action. GRR 150290 (the Navy developed a "range of alternatives that meet the purpose of and

[3] While full vacatur would provide the greatest relief to the community (reducing the total flights *and* restoring the pre-ROD allocation with 80% at Ault), partial vacatur in the form of just restoring the pre-ROD allocation with 80% at Ault would provide substantial relief. COER's proposed order provides for either option.

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need for the Proposed Action"). Alternative 2, Scenario C includes the same increase in Growlers overall as the ROD's alternative (Alt. 2, Scenario A), but retains the pre-ROD allocation of FCLP flights (80% Ault / 20% OLF). GRR 150314 (Table 2.6-1). If the Court accepts the Navy's current assertion that only Alternative 2, Scenario A (moving 80% of FCLPs to the OLF) can adequately protect national security, that means that the Navy's analysis of other action alternatives in the EIS as reasonable alternatives was a sham.

Maintaining the pre-ROD allocation of FCLP flights at 80% Ault Field / 20% OLF as contemplated in the Navy's Alternative 2, Scenario C would neither reduce Growler training flights nor interrupt Growler training and operations. Nor would it require relocating the Growler community elsewhere. Those are the asserted disruptions to the Navy that the Court put on the 'no vacatur' side of the balancing scale. ECF 140 at 8:10–17. Maintaining the pre-ROD allocation of touch-and-go flights at 80% Ault Field / 20% OLF, as contemplated in the Navy's Alternative 2, Scenario C, would spare the people living near the OLF from the worst of the harm wrought by the unlawful ROD, while merely returning the area around Ault Field in Oak Harbor to the approximate *status quo ante*. Wilbur Dec., Ex. 1 at 1, Table 1. Ault Field, according to the Navy, has more than sufficient capacity to handle a return to the pre-ROD FCLP allocation. *Id.* at ¶ 8(c) ("In its EIS the Navy indicated it is able and anticipates handling 88,000 annual operations of all aircraft at Ault Field. The FOIA data in Table 1 of Exhibit A to this declaration, however, reveal that all-aircraft operations at Ault Field in recent years have been 28,687 to 49,267 operations"). The Navy's final EIS plans for 88,000 total annual aircraft operations at Ault Field under Alternative 2, Scenario A and 103,200 total annual aircraft operations at Ault Field under Alternative 2, Scenario C. GRR00150271.

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The Navy's assertions that only Alternative 2, Scenario A adequately protects national security does not withstand even a deferential independent assessment. Alternatives, both examined by the Navy and not, are available. COER recognizes that the Navy says those are unpreferred options, but to cast them as jeopardizing national defense seems hyperbolic. It is hard to imagine that our national security hangs by such a slender thread—that the Navy lacks any resiliency for training pilots if 80% of FCLPs could not be conducted at the OLF.

II. IF THE COURT DENIES RECONSIDERATION ON VACATUR, THE COURT SHOULD SET A DEADLINE FOR THE NAVY TO COMPLY WITH THE ORDER ON REMAND.

If the Court remands without vacating the unlawful ROD, all the harms to local residents from the Growler FCLP overflights at the OLF will persist, and possibly even double again. If the Court does not set deadlines for compliance with the order on remand, those harms may persist indefinitely. To assure that 'justice delayed does not become justice denied,' the Court should add deadlines for the Navy's compliance with the order on remand.

The Navy failed to analyze in detail in the EIS the El Centro alternative for basing the Growler squadrons. The Navy also failed to adequately explain its basis for not analyzing El Centro in detail. Instead, "the Navy rejected moving the Growler operations to El Centro, California out of hand." ECF 140 at 3:10–11. While the Court found that the Navy's explanation for not studying El Centro in detail in an EIS was lacking, the Court declined to order the Navy to prepare an EIS covering El Centro. Instead, the Court left the door open for the Navy to develop a better explanation for its decision not to study El Centro in detail. ECF 140 at 8:26–9:2. Thus, the Navy faces potentially two separate steps: First, it must decide whether to study El Centro in detail (and if not, provide a better reason for that decision) and, second, if the Navy decides to study El Centro in detail, it must then complete that EIS analysis.

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Those two steps involve different timeframes. A decision on whether to study El Centro in an EIS should not take the Navy as much time as preparing an EIS analysis of El Centro. If the Navy decides not to study El Centro, COER should be able to review and, if necessary, challenge that decision as soon as it is made. Thus, we request that the Court order the Navy to make that decision within three months (or explain to the Court at that time why more time is needed). If the Navy decides to proceed with an EIS for El Centro, the Court should also set an expected completion date for that undertaking.

Second, the Court should set a deadline for the Navy to issue the EIS. COER is aware that the remand requires the Navy to work with consultants to, among things, assess the impacts resulting from aircraft greenhouse gas emissions. Time will be required for the Navy's draft EIS to be circulated for public comment and for the Navy to respond to those comments. COER suggests that a deadline set twelve months from the Court's decision on this motion for reconsideration would provide the Navy with ample time to complete its scientific investigations, draft and circulate the draft EIS for comment, and issue the final EIS.

III. THE COURT SHOULD RETAIN JURISDICTION.

The Court should retain jurisdiction until the Navy complies with the order on remand (as issued in ECF 140 or as amended on reconsideration). There is a significant risk that disputes will arise between the parties during that time that may be efficiently resolved by the Court. For example, if the Navy again rejects the El Centro alternative out of hand, COER should be able to seek review of that decision by the Court. Similarly, this Court is in the best position to review a potential claim that the Navy's reassessment of the GHG issue remains lacking. Retaining jurisdiction would result in judicial efficiency, as well as cost savings for the Navy, the State, and the private parties.

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CERTIFICATION OF MEET AND CONFER

The undersigned declares and certifies that counsel for COER and the State of Washington met and conferred via telephone on September 6, 11 and 13, 2023, regarding the substance of COER's motion for reconsideration. The State of Washington informed the undersigned that it has no objection to the filing of this motion or the relief requested herein.

The undersigned declares and certifies that counsel for COER and federal defendants met and conferred via telephone on September 13, 2023, regarding the substance of COER's motion for reconsideration and the potential for a resolution of the issues raised in the motion. During that call, counsel discussed the substantive grounds for the motion and attempted to reach an accord that would eliminate the need for the motion. The parties were unable to resolve the issue during the meet and confer session. The Navy opposes this motion for reconsideration.

DATED this 15th day of September, 2023.

Respectfully submitted,

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