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Of Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

JUDY BUNDORF, *et al.*,

Plaintiffs,

v.

S.M.R. JEWELL, *et al.*,

Defendants,

and

SEARCHLIGHT WIND ENERGY, LLC

Intervenor.

CASE NO.: 2:13-cv-616-MMD-PAL

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR VACATUR, PERMANENT INJUNCTION, CLARIFICATION OF ORDER & AMENDMENT OF JUDGMENT

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GLOSSARY OF ACRONYMS AND ABBREVIATIONS

APA	Administrative Procedure Act
BiOp	Biological Opinion
BBCS	Bird and Bat Conservation Strategy
BGEPA	Bald and Golden Eagle Protection Act
BLM	Bureau of Land Management
DEIS	Draft Environmental Impact Statement
EA	Environmental Assessment
EIS	Environmental Impact Statement
ESA	Endangered Species Act
FLPMA	Federal Lands Policy and Management Act
FEIS	Final Environmental Impact Statement
MBTA	Migratory Bird Treaty Act
NDOW	Nevada Department of Wildlife
NOAA	National Oceanic and Atmospheric Administration
NEPA	National Environmental Policy Act
SEIS	Supplemental Environmental Impact Statement
USFWS	U.S. Fish & Wildlife Service

INTRODUCTION

Plaintiffs file this consolidated Reply in support of their Motion for Vacatur, Permanent Injunction, Clarification of Order & Amendment of Judgment (Dkt ## 97, 99–101) ("Pls' Mot."). Defendants do not challenge the fact that no court has previously remanded a claim under NEPA for amplification or augmentation of an administrative record. They assert, incorrectly, that this Court did not find a NEPA violation, despite its grant of summary judgment to plaintiffs on their claim that an SEIS is required to address the risk to eagles from the project. They misstate the law of vacatur, which *is* the presumptive remedy for violations of NEPA under the APA. Only departure from that presumptive remedy involves equitable considerations, and a defendant seeking remand *without* vacatur, as defendants do here, bears the burden of proving that this is one of the "rare circumstances" in which equity justifies such departure.

Under the Ninth Circuit's test for determining when such rare circumstances exist, the defendants' errors in failing to explain adequately multiple, significant aspects of the FEIS and BiOp, and to address the far higher prevalence of eagle nests and greater foraging ranges in the Searchlight area compared to what the BBCS reported, are serious errors which, under NEPA, require a process of *public* disclosure and review to rectify. In this case, any disruptive effects from vacatur are non-existent. Because defendants have not shown that equity warrants a departure from the presumptive APA remedy, the Court should vacate the challenged decisions.

The Court held that further explanation from defendants was necessary before the Court could review the merits of plaintiffs' claim that the FEIS violates NEPA. Defendants have now provided that explanation, and the Court could withdraw its Judgment and adjudicate plaintiffs' claims. If it chooses not to, it must insure the right to judicial review of the ROD, FEIS, and BiOp to which plaintiffs are entitled under APA § 702. As it stands, the disposition of this case denies plaintiffs that statutory right because, in the absence of the requested remedy, nothing prevents the defendants from proceeding with the project based on the ROD and other documents after completing a cursory SEIS regarding eagles—the outcome of which appears foreordained in light of defendants' forceful assertions that no SEIS is necessary. Nothing

guarantees that the Secretary will make a new decision that would be subject to judicial review, and plaintiffs will have been denied their right to obtain judicial review of the existing decisions.

ARGUMENT

I. NEPA AND THE LAW OF VACATUR

A. NEPA's Public Participation Principle Requires Vacatur.

Defendants' assertion that plaintiffs' argument is "purely rhetorical," Dfs' Opp. on Vac. at 3 (Dkt # 107), only highlights the fact that defendants can point to no case in which a court has disposed of a NEPA claim by remanding for further explanation without also vacating the underlying decision to ensure the agency makes a new decision after a proper NEPA process. They do not answer plaintiffs' showing that NEPA—with its public disclosure mandate—precludes a remand for amplification of the record unless accompanied by vacatur of the decisions. They tacitly concede that no court has ever remanded a NEPA claim for further explanation without vacating the decision supported by the NEPA analysis, or—as in *Bair*—granting summary judgment to plaintiffs and ordering preparation of a new NEPA analysis. *Bair v. Cal. State Dep't of Transp.*, 867 F. Supp. 2d 1058, 1061, 1068 (N.D. Cal. 2012).

Defendants' assertion that vacatur is an "extreme" position finds no support in the case law. Indeed, defendants do not even attempt to distinguish the Ninth Circuit's endorsement of vacatur as the appropriate remedy for an insufficiently explained decision in *Humane Society v. Locke* and when ordering an SEIS in *Oregon Natural Resources Council v. Marsh*. 626 F.3d 1040, 1053 (9th Cir. 2010); 52 F.3d 1485, 1491 (9th Cir. 1995); *see* Pls' Mot. at 12–14. Rather, it is defendants who take the extreme position that a NEPA claim can be remanded for unspecified additional "augmentation" where the public is not assured of the right to participate or even assured that a new decision, informed by a proper NEPA process, will even be made.[1]

Defendants assert that remand without vacatur for amplification of the record "is fully

[1] Defendants incorrectly state that the Court "ordered" remand without vacatur. Dfs' Opp. on Vac. at 3. The Court did not rule either way on plaintiffs' request for vacatur.

consistent with Ninth Circuit case law." Dfs' Opp. on Vac. at 3. This is not true: neither of the only two Ninth Circuit cases they cite involved a remand for amplification of an administrative record, and neither of the cases involved NEPA. *Cal. Cmtys. Against Toxics v. EPA*, 688 F.3d 989, 993–94 (9th Cir. 2012) (regulation promulgated under Clean Air Act allowed to remain in effect until agency issued new decision); *Idaho Farm Bureau v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995) (leaving in place a decision to list a snail species as endangered under the ESA to ensure the species's survival until agency issued new decision that complied with ESA).

Defendants do not contest that NEPA is unique in its requirement that agencies disclose their analyses publicly to allow democratic, informed decisionmaking. Despite being unable to cite a single case in which a court has remanded a NEPA claim for further explanation without vacatur, defendants' repeatedly argue that they can provide "additional explanation" through "augmentation of the administrative record" even though—as plaintiffs have demonstrated—this is meaningless and impermissible under NEPA unless there is a guarantee that public disclosure and a new decision will be forthcoming. Pls' Mot. at 5–11, 17–19.[2]

Defendants are vague about what, if any, "augmentation" they would provide on remand or even whether the public will be involved. They do not state how they intend to interpret or follow the Court's order, but their repeated statement that plaintiffs will be able to challenge a new decision "if" one is made highlights that a new decision actually is unlikely—underscored by defendants' utter refusal to acknowledge any deficiencies in their wildlife analyses or any obligation to prepare an SEIS. Defendants cite a single case for the proposition that plaintiffs can challenge a new decision "if" one is made, and therefore vacatur of the ROD, FEIS and BiOp is not necessary. Dfs' Opp. on Vac. at 5 (citing *Fund for Animals v. Norton*, 390 F. Supp. 2d 12, 15 (D.D.C. 2005)). That case, however, actually proves plaintiffs' argument, because it involved a

[2] "Augmentation" of an administrative record is a term of art for adding documents to the administrative record while a case is under a court's jurisdiction and before it rules on the merits. *See, e.g.*, *Klamath-Siskiyou Wildlands Ctr. v. U.S. Forest Serv.*, No. 2:05-CV-0299-MCE-PAN, 2006 WL 1991414, *4–5 (E.D. Cal. July 14, 2006). It has no meaning in the context of an agency conducting additional analysis under NEPA *after* a court has relinquished jurisdiction.

prior agency decision *that the same court had vacated*. *Fund for Animals*, 390 F. Supp. 2d at 14 (the court had "*vacated and remanded* the Service's 2003 Final Rule governing winter use of the Parks" (emphasis added)). The Park Service then issued a new decision in 2004. *Id.* Despite the new final action, plaintiffs moved to enforce the court's previous ruling to preserve some elements of the 2003 Rule, rather than filing a new lawsuit. The court denied plaintiffs' motion, holding that "the proper avenue for plaintiffs' arguments is a new lawsuit squarely challenging the validity of the 2004 Decision." *Id.* at 15. The ability for those plaintiffs to file the *new* lawsuit arose *only* because the court had vacated the prior one—just as plaintiffs have demonstrated is necessary here to ensure that there is a new, properly-informed decision regarding this project.

Here, without vacatur and the guarantee of a *new* decision, any "augmentation" to justify the previously-made decisions plaintiffs have challenged would be impermissible "post-decision information, which may not be advanced as a new rationalization either for sustaining or attacking an agency's decision." *Sw. Ctr. for Biol. Diversity v. U.S. Forest Serv.*, 100 F.3d 1443 1450 (9th Cir. 1996). Because it is axiomatic that an agency cannot retroactively justify a prior decision with post-decisional analysis, and because of the unique obligation NEPA places on federal agencies to conduct a "democratic decisionmaking" process, it is not surprising that defendants cite no cases where a court remanded a challenge under NEPA for amplification or augmentation of the administrative record without vacating the decision or issuing an injunction.

B. Vacatur is the Presumptive Remedy Under the APA, and Defendants Must Prove That Equity Warrants a Departure From That Remedy.

The fundamental error in defendants' description of vacatur is that Congress made vacatur the *legal, statutory* remedy for agency violations of law under the APA and therefore the presumptive remedy for violations of NEPA. *See* 5 U.S.C. § 702(2)(A) (a "reviewing court shall . . . hold unlawful and set aside agency action, findings and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"). Any *departure* from that legal remedy—the remand without vacatur defendants request—would be an equitable remedy that the federal agency bears the burden of proving it is entitled to. *See Cal. Cmtys.*, 688

F.3d at 992 ("when equity demands, the regulation can be left in place"). Vacatur under the APA is the statutory remedy for which the courts, as permitted by 5 U.S.C. § 702, have crafted a limited equitable defense.[3]

Defendants are wrong to assert that "vacatur is a form of equitable relief." Dfs' Resp. on Vac. at 5. Neither the statute nor the single case cited supports their argument. *Id*. The correct statement of the law is that vacatur is the presumptive remedy under the APA, while a *departure* from that presumption is a form of equitable relief. Pls' Mot. at 22–23. Defendants appear to concede that they bear the burden of proving that a remand without vacatur is equitable in these circumstances. Dfs' Opp. on Vac. at 3–6. The Ninth Circuit applies a two-factor test to determine the circumstances in which equity requires a remand without vacatur. Defendants cite the Ninth Circuit's leading case and couch their arguments consistent with the two factors, and attempt to meet their burden of showing these factors entitle them to the remedy they seek, but they do not explicitly set out the two factors. *Cal. Cmtys.*, 688 F.3d at 992–94. Whether a court should remand without vacatur depends on (1) "how serious the agency's errors are" and (2) "the disruptive consequences of an interim change that may itself be changed." *Id.* at 992 (internal quotation and citation omitted). As the Ninth Circuit has noted, remand without vacatur is only appropriate "[i]n rare circumstances." *Humane Soc'y*, 626 F.3d at 1053 n.7. The defendants' arguments do not show that the circumstances of this case warrant remand without vacatur.

II. THE COURT SHOULD VACATE THE ROD, FEIS AND BIOP

A. The Court Should Vacate the ROD and FEIS.

Defendants do not attempt to refute the Supreme Court's statement in *Camp v. Pitts* that

[3] Defendants are wrong that courts "hold, as a matter of routine, that vacatur is not a presumptive remedy" under the APA. Dfs' Opp. on Vac. at 3. As plaintiffs have explained, virtually every court that has considered the issue has explained that vacatur *is* the presumptive remedy under the APA, but a court may—in rare circumstances—exercise equitable discretion to *not* vacate a decision. Pls' Mot. at 20–23. None of the cases they cite holds that vacatur is not the presumptive remedy under the APA, because the language of the statute forecloses such a holding.

where there is "a contemporaneous explanation of the agency decision," albeit curt, "the validity of the [administrative officer's] action must, therefore, stand or fall on the propriety of that finding," and, if the "finding is not sustainable on the administrative record made," the "decision *must be vacated* and the matter remanded." *Camp v. Pitts*, 411 U.S. 138, 143 (1973) (emphasis added). Instead, they obliquely address the two factors in *California Communities*. But both factors weigh against remand without vacatur of the challenged decisions.

1. Defendants' Errors Under NEPA are Serious.

California Communities involved a request for remand without vacatur like defendants request here. 688 F.3d at 992. Although the court did not vacate the challenged rule, it specified that its order did "not authorize commencement of [the power plant's] operation without a new and valid EPA rule in place." *Id*. at 994. And, in that case, the EPA "admitted that the reasoning adopted in its final rule was flawed" and "recognized the merits of the petitioners' challenges." *Id*. Here, defendants continue to insist that they committed no error and that they do not need to prepare new NEPA analysis nor issue a new decision. Where an agency requests a remand to reconsider a decision without confessing error, a court should deny the agency's request. *See Lutheran Church-Mo. Synod v. FCC*, 141 F.3d 344, 349 (D.C. Cir. 1998) (expressing concern and skepticism about the agency's motivations for the voluntary remand request without confession of error, suspecting that the request was a tactic to avoid an adverse judicial ruling).

Defendants are wrong to claim that the Court found no NEPA violation. Dfs' Opp. on Vac. at 2. This Court found that BLM violated NEPA by not preparing an SEIS related to new eagle data and new survey information and granted summary judgment to plaintiffs on that claim. Order at 15–16. Defendants have not challenged plaintiffs' showing that an order to prepare an SEIS warrants vacatur of a challenged decision. Pls' Mot. at 13–14 (citing *Marsh*, 52 F.3d at 1491). Also, the Ninth Circuit recently issued a preliminary injunction halting logging based on a showing of likely success on only one claim: a NEPA violation for failure to produce an SEIS based on new information bearing on the logging's impacts to elk. *League of Wilderness Defenders/Blue Mtns. Biodiversity Project v. Connaughton*, 752 F.3d 755, 760-61 (9th Cir. 2014)

("*LOWD I*"). That case illustrates that, as in *Marsh*, courts routinely vacate decisions or enjoin activities when ordering the preparation of an SEIS based on NEPA's purpose to force agencies "to make available to the public high quality information . . . *before* decisions are made and actions are taken." *W. Watersheds Project v. Kraayenbrink*, 632 F.3d 472, 492 (9th Cir. 2011).

In addition, the Court identified a series of gaps in the FEIS's analysis of multiple factors involving wildlife. Order at 9–11, 15. Defendants have not attempted to distinguish the Ninth Circuit's holding in *Humane Society* that procedural errors, such as failing to provide a satisfactory explanation for an action or adequately explain elements of a decision, justify vacatur. 626 F.3d at 1048. The agency has not confessed error. Rather, it has refused to commit to *any* new public NEPA process or a new ROD, minimized the serious concerns the Court has about the FEIS's and BiOp's lack of reasoned, supported analysis of many critical factors related to the project's impacts on wildlife, and insisted that the Court found no NEPA violation when it in fact granted summary judgment on plaintiffs' claim that the BLM failed to act in response to new information showing its eagle risk analysis was inadequate and ordered an SEIS. These factors all counsel in favor of vacatur of the ROD and FEIS.

Finally, the Court stated also that further explanation from defendants was necessary before the Court could review the merits of plaintiffs' claim that the FEIS violates NEPA. Order at 15. Because "Federal Defendants believe the Motion for Reconsideration addresses the Court's request for further explanation," Dfs' Opp. on Vac. at 10, the Court could now, *sua sponte*, rule on plaintiffs' claim that the FEIS violates NEPA, grant summary judgment in favor of plaintiffs, and vacate the ROD, FEIS, and BiOp. *Albino v. Baca*, 747 F.3d 1162, 1176 (9th Cir. 2014) (granting summary judgment to nonmoving party where losing party had "full and fair opportunity to ventilate the issues involved in the matter").[4] Plaintiffs have explained, in

[4] This also would be consistent with how another court treated amplification where it found little explanation of an agency decision. *State of Maine v. Kreps*, 563 F.2d 1043, 1051–52 (1st Cir. 1977). There, it appeared that the Secretary of Commerce had misunderstood an applicable criterion, leading to an order "that the Secretary specify and file in court within ten days from the date of the present judgment the reasons that led [to her conclusions]." *Id*. at 1051–52.

response to the defendants' Motion for Reconsideration and in their briefing on the merits, why the Court would be amply justified in now granting summary judgment in plaintiffs' favor.

2. Vacatur of the ROD and FEIS Will Not Have Highly Disruptive Effects.

Defendants have not, and could not, make any argument that vacatur would be disruptive under the Ninth Circuit's standard in *California Communities*. This factor asks whether vacatur would be detrimental to the underlying purpose of the statute and to the environment if any protective conditions of the decision were eliminated by vacatur. *See Cal. Cmtys.*, 688 F.3d at 993–94 (vacating a Clean Air Act rule that authorized construction of a natural-gas-fired power plant would require use of diesel generators to address blackouts, polluting the air in conflict with the purpose of the Act, as well as being "economically disastrous"). In both Ninth Circuit cases cited in *California Communities* for the principle that a court can refuse to vacate an agency decision, the Court found that remand without vacatur was in fact the "remedy" that was more consistent with the underlying statutory purpose. *See Idaho Farm Bureau*, 58 F.3d at 1405 (no vacatur of ESA listing decision to preserve protection for the endangered species); *W. Oil & Gas Ass'n v. EPA*, 633 F.2d 803, 813 (9th Cir. 1980) (no vacatur of decision made in violation of the Clean Air Act so as not to disrupt operation of that statute); *see Ctr. for Food Safety v. Vilsack*, 734 F. Supp. 2d 948, 951 (N.D. Cal. 2010) ("the Ninth Circuit has only found remand without vacatur warranted by equity concerns in limited circumstances, namely [when] serious irreparable environmental injury" will occur if the decision is vacated).[5]

None of these Ninth Circuit cases involved NEPA violations or addressed how remand

[5] The Court should be cautious in relying on cases from the D.C. Circuit because so many of that Circuit's APA decisions involve review of administrative regulations. *See, e.g., S. Coast Air Quality Mgmt. Dist. v. EPA*, 489 F.3d 1245, 1248-49 (D.C. Cir. 2007) (considering whether to vacate a partially valid regulation where vacatur might retard progress in improving ozone standards). The highly disruptive effect of vacating an entire regulation, which may otherwise have environmental benefits, is not implicated in the vacatur of project-specific decisions that do not involve an ongoing activity. Other decisions from the D.C. Circuit that address vacatur in the specific context of the APA find that remand without vacatur is *not* available when the court finds an actual violation of § 706. *See, e.g.*, *Checkosky v. SEC*, 23 F.3d 452, 454 (D.C. Cir. 1994); *see also Am. Bioscience v. Thompson*, 269 F.3d 1077, 1086 (D.C. Cir. 2001).

without vacatur to address inadequacies and violations in a NEPA analysis could be consistent with that statute's underlying purpose. Plaintiffs' research has disclosed no case where a court refused to grant a plaintiff either substantial vacatur or injunctive relief after identifying a violation of NEPA. Thus the test in *California Communities* does not change the rule from prior case law that vacatur is the presumptively appropriate, ordinary remedy for an inadequate NEPA analysis. Ordering such vacatur in this case is consistent with that case and necessary to vindicate NEPA's underlying purpose of requiring agencies to fully consider and publicly disclose their proposal's environmental impacts before making and implementing such decisions.

Vacating the FEIS and ROD would not have the "highly disruptive effects" in terms of setting back protection of the environment that would warrant remand without vacatur. The only "disruptive consequences" to which defendants point are disruptions to their desired absolute discretion on remand and possible administrative burdens on the agencies. However, these are not recognized equitable factors in evaluating remand without vacatur, and both are overstated. The only "disruption" that would justify not vacating the ROD or FEIS is damage that vacatur might cause to the purpose of the underlying statute. In such cases, "courts may decline to vacate agency decisions when vacatur would cause serious and irremediable harms that significantly outweigh the magnitude of the agency's error." *League of Wilderness Defenders/Blue Mtns. Biodiversity Project v. Peña*, No. 3:12–cv–02271–HZ, 2015 WL 1567444, *2 (D. Or. Apr. 6, 2015) ("*LOWD II*"). Here, it is *not* vacating the flawed FEIS and the ROD that would be detrimental to NEPA's purposes and procedures. The court in *LOWD II* rejected arguments that absolute agency discretion or administrative burdens justified remand without vacatur. *Id.* at *5.

And, contrary to defendants' suggestion, vacatur of the FEIS does not mean complete repromulgation of the document. In issuing a new decision, the Secretary can rely on, and BLM can tier a new SEIS to, even a flawed and vacated FEIS, so long as the SEIS corrects the errors identified in the vacated FEIS. *Valley County v. U.S. Dep't of Agric.*, Nos. 1:11–cv–233–BLW, 1:09–cv–275–BLW, 2015 WL 65543, *1–*2 (D. Idaho Jan. 5, 2015) (citing *Kern v. BLM*, 284 F.3d 1062, 1067–78 (9th Cir. 2002)). The court in *Valley County* explained, in a careful exegesis

of *Kern*, that an agency could issue new, more limited NEPA analysis tiered to an FEIS that had been vacated, so long as the subsequent analysis "standing alone" satisfies NEPA. *Id*. at *2. The only requirement of the SEIS here would be to revise those portions of the FEIS where the Court has found gaps or ordered preparation of a new eagle risk analysis.[6]

This means that BLM does not have to re-do the work it already has done, but rather, consistent with NEPA regulations and settled Ninth Circuit law, can prepare an SEIS limited to the issues this Court has found lacking in disclosure or analysis, yet allow the Secretary to rely on the vacated FEIS for issues that are not addressed in the SEIS. Plaintiffs even acknowledged in their Motion that a complete revision to the FEIS is not required. Pls' Mot. at 16 (citing 40 C.F.R. § 1502.9(c)(4) and its reference to the preparation of an SEIS "exclusive of scoping"). BLM's parade of horribles if the Court vacates the FEIS is not a realistic picture of what the law actually requires.[7] In addition, even if BLM chose to conduct scoping before preparing an SEIS to address the deficiencies identified by the Court, it could use the scoping process "*to deemphasize insignificant issues, narrowing the scope* of the [EIS] process accordingly." 40 C.F.R. § 1500.4(g) (emphasis added). That is, BLM can state that all of the analysis in the vacated FEIS is still appropriate *except* the particular issues it is addressing in the SEIS. Starting "afresh" to evaluate the inadequately-considered impacts to wildlife does not mean "starting from scratch," nor did plaintiffs ever imply that.[8] Vacatur of the ROD and FEIS would vindicate the purpose of NEPA, with few consequences, much less "highly disruptive" ones. Defendants

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[6] As plaintiffs described, this is exactly the process that BLM followed in preparing an SEIS and issuing a new ROD and re-issuing ROWs for the Ruby Pipeline. Pls' Mot. at 15. Defendants' attempt to distinguish that case fails because it relies on their assertion that this Court has not found any NEPA violation.

[7] Although it is within the Court's discretion to *partially* vacate the FEIS—for example, by vacating its sections on Wildlife Resources and Wildlife Impacts, AR 3153–64, 3277–3291, along with the related parts of the Appendix (including the BiOp (AR 4007–68) and BBCS (AR 4097–188)), the fact that BLM can tier to a vacated FEIS makes such parsing unnecessary.

[8] The developer, Searchlight Wind LLC, has not alleged any disruptive consequences if the ROD, FEIS and BiOp are vacated and the agencies compelled to correct them and render a new decision whether to approve the project. *See* Interv.'s Joinder to Opps. (Dkt # 110).

and intervenors have not carried the burden of showing that this is a "rare circumstance" that justifies remand without vacatur. *Humane Soc'y*, 626 F.3d at 1053 n.7.

B. The Court's Decision Ordering an SEIS Should Not Be Changed.

Defendants here argue that "[t]he Court should remand the decision *whether* to prepare an SEIS." Dfs' Opp. on Vac. at 6 (emphasis added). BLM's position grasps at thin air: they are unable to cite a single case in which a court has remanded to an agency to determine in the first instance whether to prepare an SEIS. The case they cite involved the Ninth Circuit invalidating an Environmental Assessment ("EA") but allowing the agency discretion, on remand, whether to prepare another EA or prepare an EIS. *Ctr. for Biol. Diversity v. NHTSA*, 538 F.3d 1172, 1225–27 (9th Cir. 2008). However, the Court did order the agency to prepare *some* new NEPA analysis; it did not leave the agency with absolute discretion to create no new NEPA document.

Defendants' suggestion for such unprecedented disposition of the SEIS question would violate NEPA's underlying purpose to make public the agency's data and analysis of impacts to golden eagles, and to rectify—through public participation and democratic decisionmaking—what even Ms. Klinger of NDOW now acknowledges was serious error on the part of Tetra Tech, which conducted too few surveys to support its statements about "active" and "inactive" nests and used a non-standard, idiosyncratic definition of those terms without disclosing that to the public. Klinger Dec. at 8–9 (Dkt # 105-1); *see* Pls' Resp. at 22–23 (Dkt # 113). It also is clear from the defendants' litigation position and the opinions offered in their new declarations that the outcome of a closed-door review would be a decision to *not* prepare an SEIS—despite their own declarant's acknowledgement of the errors and deficiencies in the existing analysis. Defendants' argument that the public would get to participate *if* there is an SEIS process is cynical when they request absolute discretion whether to prepare an SEIS at all.

BLM's request to remand even the issue whether to prepare an SEIS, and its insistence that the balance of the issues should be remanded without vacatur, is tantamount to a request for a voluntary remand without adjudication. *See Lutheran Church*, 141 F.3d at 349. In that case, the court refused an agency's motion for remand, noting that it was not based on confession of error,

but some kind of prospective policy statement that would not bind the agency—just as defendants refuse to commit to the public process NEPA requires on remand or issue a new, fully-informed decision here. *Id.* Without a "confession of error" by defendants that commits the agency to correct the mistakes, comply with NEPA, and issue new decisions, remand without vacatur is inappropriate. *See Lawrence v. Chater*, 516 U.S. 163, 168 (1996).

C. The Court Should Vacate the BiOp.

1. The Errors in the BiOp are Serious.

Defendants continue to insist that the errors in the BiOp are not serious, but their arguments repeat ones made in their previous briefing. Dfs' Opp. on Vac. at 7–11. The Court has identified that there are gaps in USFWS's analysis of "the adverse effects on desert tortoise habitat due to noise, and the remuneration fees." Order at 15. Plaintiffs have explained why defendants' additional explanation of those issues are unpersuasive, Pls' Resp. at 7–11, and addressed defendants' other arguments regarding the BiOp in prior briefing. These are serious errors that render the BiOp's conclusion that there will be no jeopardy to tortoises arbitrary and capricious. The assertion that there will be no jeopardy because tortoises do not rely on auditory cues for their survival goes to the very core of the USFWS's conclusion that it did "not expect any desert tortoises to be injured or killed as a result of project-related noise impacts." *Id*. at 8–9. Likewise, the remuneration fee is the only mitigation for loss of habitat, and the incorrectly low fee renders the no-jeopardy conclusion arbitrary and capricious. *Id*. at 9–11.

Defendants themselves have intertwined the BiOp with their NEPA arguments by relying almost exclusively on the former document for their NEPA analysis of the project's impacts to tortoises. *See, e.g.*, Dfs' Mot. at 5–10 (Dkt # 105); AR 3280 (FEIS citation to BiOp in Appendix). The BiOp's failure to adequately consider the impacts of noise or perform the required calculation of the remuneration fee justifies vacatur of the BiOp to ensure that the subsequent NEPA analysis also is fully informed. Also, plaintiffs' ESA claim *is* a separate claim challenging the validity of the BiOp's conclusion that the project will not jeopardize tortoises. First Supp. & Am. Complaint ¶¶ 102–114. Plaintiffs are entitled, under APA § 702, to judicial

review of that claim. They respectfully submit that, if the Court does *not* vacate the BiOp to ensure that the result of further review by the USFWS is a new BiOp addressing the deficiencies in analysis the Court itself has identified (which would afford plaintiffs an opportunity to seek judicial review if the new BiOp still is legally inadequate), then the Court should rule on plaintiffs' claim before remanding. Otherwise, plaintiffs will be deprived of their right of review of the existing BiOp because the USFWS has no obligation to prepare another one.

2. Vacatur Will Not Have Highly Disruptive Consequences.

In this case, vacatur would uphold, rather than thwart, the purpose of the ESA. The Searchlight Wind project is not currently affecting tortoises, and vacatur of the BiOp is likely to lead to a repromulgation that more accurately evaluates noise impacts and correctly calculates an appropriate remuneration fee. Because there is no ongoing threat from this project to the species, this is unlike cases where a court leaves in place, under the ESA, a protective regulation or a biological opinion for an ongoing action because they include protective elements that would disappear with vacatur. *See Idaho Farm Bureau*, 58 F.3d at 1405; *Nat'l Wildlife Fed'n v. NMFS*, 839 F. Supp. 2d 1117, 1129 (D. Or. 2011) (no vacatur of BiOp covering the operation of 31 hydropower dams and 12 irrigation projects to preserve protections for listed fish in that BiOp).

D. Vacatur and New Agency Decisions Are Necessary to Guarantee Plaintiffs Their Right to Judicial Review Under the APA.

NEPA guarantees the public the right to participate in an agency's decisionmaking process. *See Or. Natural Desert Ass'n v. BLM*, 625 F.3d 1092, 1099 (9th Cir. 2010). APA § 702, titled "Right of Review," in turn specifies that "[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is *entitled* to judicial review thereof." 5 U.S.C. § 702 (emphasis added). This Court therefore has an obligation to ensure that plaintiffs obtain the judicial review of their claims for relief to which the APA entitles them. Vacatur of the ROD, FEIS and BiOp will guarantee that BLM, USFWS, and Secretary Jewell issue new decisions which plaintiffs—if still aggrieved—can challenge. A remand without vacatur denies plaintiffs their statutory right of

review, in particular with respect to the claims on which the Court declined to rule. Order at 17.

The Court held "that further explanation from Federal Defendants is necessary *before the Court can review the merits* of Plaintiffs' claim that the FEIS violates NEPA." Order at 15 (emphasis added). The Court's apparent intent was to preserve the right to judicial review to which plaintiffs are entitled. Defendants appear to agree that the Court's intent was to rule on plaintiffs' claim that the FEIS violates NEPA after receiving further explanation from BLM. Dfs' Opp. on Vac. at 5. The Court therefore must assure that plaintiffs have a mechanism to obtain that ruling. Vacatur will insure the agencies undertake any additional analysis in new decisions. Without either vacating the ROD, FEIS, and BiOp, *or* retaining jurisdiction to adjudicate the merits of plaintiffs' NEPA claim and the other claims which the Court declined to review, plaintiffs will be deprived of their right to challenge the existing decisions.[9] The likelihood that federal defendants will issue *new* decisions in those circumstances is vanishingly small, because there will be no way for plaintiffs to have their current claims adjudicated and the agencies will have escaped judicial review. If the Court's intent was to require BLM to conduct further *analysis* of the missing factors, then the proper course, consistent with NEPA jurisprudence, is to hold that BLM's FEIS violated NEPA and vacate the decisions. *See* Pls' Resp. at 28 n.25.

III. THE COURT SHOULD ISSUE A PERMANENT INJUNCTION

The Supreme Court has expressed a preference for vacatur rather than a permanent injunction as the preferred remedy for a NEPA violation. *Monsanto Co. v. Geertson Seed Farms*,

[9] An alternative to ensure plaintiffs' right to judicial review—if the Court declines to grant summary judgment in favor of plaintiffs on the NEPA claim for which it found the analysis lacking or vacate the challenged decisions—is to withdraw the Judgment, reopen the case, expressly retain jurisdiction over all of plaintiffs' claims, and set a deadline for the agency to comply with the Court's Order. *See Keith v. Volpe*, 858 F.2d 467, 474 (9th Cir. 1988) (consent decree provided specifically that court retained jurisdiction over later developments); *Or. Natural Desert Ass'n v. McDaniel*, No. CV 09–369–PK, 2011 WL 3841550, *8 (D. Or. July 8, 2011) (remanding to the Department of Interior to issue a new decision but retaining jurisdiction to review the new decision); *Nat'l Wildlife Fed'n*, 839 F. Supp. 2d at 1129–30 (setting 2-year deadline for compliance with court's order, noting that "the court has discretion to impose a deadline for remand proceedings"). This also would preserve plaintiffs' right to judicial review, but would be more burdensome on the Court and potentially on the agency than vacatur.

561 U.S. 139, 165–66 (2010) ("[i]f a less drastic remedy (such as partial or complete vacatur of [the agency's action]) [is] sufficient to redress, . . . an injunction [is not] warranted"); *accord Sierra Club v. Van Antwerp*, 719 F. Supp. 2d 77, 78 (D.D.C. 2010) ("While the U.S. Supreme Court made clear in *Monsanto* that there is no presumption to other injunctive relief, . . . remand, *along with vacatur*, is the presumptively appropriate remedy for a violation of the APA." (citation omitted) (emphasis added)).[10] If the Court vacates the ROD, FEIS, and BiOp, plaintiffs agree that no injunction is needed because the "less drastic remedy" of vacatur will protect the wildlife threatened by the Searchlight Wind project, as well as the plaintiffs' right to judicial review of the agencies' new, fully-informed decision whether to approve the project.

However, if the Court declines to vacate, it should enter the requested injunction. *See McDaniel*, 2011 WL 3841550, at *8. Plaintiffs have demonstrated that they satisfy all elements of the test for a permanent injunction and defendants have not refuted that showing. Instead, defendants reiterate their position that the Court did not find that they failed to meet their statutory obligation under NEPA. The Court's Order *did* grant summary judgment in favor of plaintiffs on their NEPA claim that BLM is obligated to prepare an SEIS to evaluate the NDOW nest data and new information on eagle ranges that BLM has had at least since December 2012. *See* Pls' Resp. at 19–20. Clearly, BLM failed to comply with its obligation to be alert to new information and prepare a supplemental NEPA analysis, in violation of NEPA and the APA. *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 557 (9th Cir. 2000).

Defendants are wrong that the requested injunction—"prohibiting ground-disturbing or species-disturbing activities associated with this project until BLM and USFWS have issued the new evaluations this Court has ordered and the Secretary has issued a new ROD"—is not narrowly tailored to the harm the Court has identified. Pls' Mot. at 23. The Court has identified extensive failures by BLM to explain many aspects of the FEIS's evaluation of impacts to

[10] Defendants' citation to *Monsanto*, Dfs' Opp. on Inj. at 12, is inapt because the Supreme Court declined to enter an injunction only because it determined that vacatur was the appropriate and sufficient remedy. If the Court vacates the ROD, FEIS and BiOp, no injunction is necessary.

wildlife, including at least two that derive from the BiOp and thus implicate the BiOp's validity, as well as a need to evaluate potentially greater risk to eagles from the project based on new information. Order at 9–11, 15–16. The injunction is temporally tailored to preventing irreparable harm until defendants address the inadequacies the Court has identified in their analyses and the Secretary issues a new decision. Defendants' fierce objection to a prohibition on proceeding with project-related activities pending performing additional analysis under NEPA and the ESA belies their assertion that they do not ignore Court orders. Dfs' Opp. on Vac. at 5.

A. Irreparable Harm.

Defendants have not refuted plaintiffs' showing that irreparable harm is likely in the absence of an injunction. The standard "for injunctive relief require the harm to be 'irreparable' and without a legal remedy, not 'imminent.'" *Sierra Club v. U.S. Fish & Wildlife Serv*., 235 F. Supp. 2d 1108, 1140 (D. Or. 2002). "In the environmental context, the court looks to see if the harm is sufficiently likely to occur." *Id*.[11] Apex Wind, Searchlight's Parent company, has a ROW entitling it to seek an NTP and, if approved, begin construction, and has recently declared its intention to begin project operation in 2016 or 2017—which would require construction to start soon. Pls' Mot. at 24. Irreparable harm from construction and turbine operation is therefore sufficiently imminent to warrant an injunction.[12]

Defendants suggestion that any harm to desert tortoises or eagles must be shown at the species level, Dfs' Opp. on Inj. at 6 n.1, is wrong as matter of settled Ninth Circuit law. Harm to even a single member of a listed species suffices to justify an injunction. *Defenders of Wildlife v. Bernal*, 204 F.3d 920, 925 (9th Cir. 2000) (in a case involving potential take of a single pygmy-

[11] The Ninth Circuit has affirmed injunctions against timber sales that are anticipated but which may or may not occur. *See, e.g.*, *Seattle Audubon Soc'y v. Evans*, 771 F. Supp. 1081, 1087–95 (W.D. Wash.) (injunction issued against future timber sales but not existing ones), *aff'd*, 952 F.2d 297, 298 (9th Cir. 1991). The cases defendants cite, Dfs' Opp. on Inj. at 6–7, discuss harm that may occur at some distant future time—not, as here, potentially, next year.

[12] The terse Declaration of Linda M. Bullen (Dkt # 110 Ex. A) does not contradict Apex's public announcement that the Searchlight Wind project will be operational by 2016 or 2017.

owl, "to prevail . . . [plaintiff] had to prove that the [defendant's] actions would result in an unlawful 'take' of a pygmy-owl. An injunction would be appropriate relief."). The likelihood of irreparable harm to desert tortoises—which suffices for an injunction—does not turn on whether there has been a violation of the ESA if the project nevertheless harms one or more of them.

Defendants' reliance on mitigation measures to dampen irreparable harm fails because, as plaintiffs have explained in previous briefing, BLM and Searchlight Wind's consultants have never evaluated whether mitigation actually will be effective, as NEPA requires. *See, e.g.*, Pls' Mot. for SJ at 22–23 (Dkt # 40) (tortoises); Pls' Resp. at 17–18 (bats). Nor have defendants submitted any additional evidence related to the injunction motion to prove that mitigation might be effective (*e.g.*, by submitting a declaration to support their incredible claim that desert tortoises will respond to explosive blasting 51 feet from their burrows the same way that they respond to sonic booms eight miles overhead). *See* Dfs' Opp. on Inj. at 8.

Defendants rely on the Klinger and Parker Declarations filed with their Motion for Reconsideration. As plaintiffs have explained in their Response, the opinions offered in those declarations are deeply flawed and are unsupported by either facts or data. Pls' Resp. at 20–27.[13] By contrast, Mr. Cashen either cited a page in the administrative record or attached a supporting document containing facts and data for virtually every sentence in both of his declarations. *See generally* First Cashen Dec. (Dkt #44); Second Cashen Dec. (Dkt #72). Without supporting facts or data, Ms. Klinger's and Ms. Parker's opinions, even if admissible, are not credible counterweights to Mr. Cashen's careful submissions. Furthermore, no deference is due to agency officials during proceedings on injunctive relief. *Sierra Forest Legacy v. Sherman*, 646 F.3d 1161, 1186 (9th Cir. 2011) ("the district court abused its discretion by deferring to agency views

[13] It is doubtful that the Klinger and Parker Declarations are even admissible as evidence regarding injunctive relief because they include no data or objective facts supporting their opinions. Even a qualified expert's testimony is only admissible to the extent it rests on "sufficient facts or data." Fed. R. Evid. 702(b). The facts and data underlying an expert's opinion are insufficient, and the proffered opinion premised thereon inadmissible, where—as here—the opinions rest on assumptions unsupported or belied by the facts in the record. *See McGlinchy v. Shell Chemical Co.*, 845 F.2d 802, 806–807 (9th Cir. 1988).

concerning the equitable prerequisites for an injunction"). "Deference to agency experts is particularly inappropriate when their conclusions rest on a foundation tainted by procedural error." *Id*.; *Klamath-Siskiyou Wildlands Ctr. v. BLM*, 387 F.3d 989, 996 (9th Cir. 2004) (expert opinions are inadequate unless supported by hard data). Thus, neither the Klinger nor the Parker Declaration undermines plaintiffs' showing that irreparable harm to tortoises, eagles, bats and other wildlife will result from construction and operation of this project. As defendants have acknowledged, this project will kill at least one federally-protected golden eagle every five years. AR 3289, 4132. This alone is sufficient for an injunction. *Defenders of Wildlife*, 204 F.3d at 925.

B. The Balance of Harms and Public Interest Justify an Injunction.

The facts of the Ivanpah Solar case defendants cite for the proposition that renewable energy projects are in the public interest are significantly different than those of the Searchlight Wind project. Dfs' Opp. on Inj. at 11 (citing *W. Watersheds Project v. Salazar*, 692 F.3d 921, 923 (9th Cir. 2012)). The Ninth Circuit noted the plaintiff's "delay in seeking a preliminary injunction until after construction began, was temporarily halted, and begun anew, and some $712 million had been expended among the equitable factors," and found that the public interest balancing involved only a "policy dispute" between the plaintiff's preference for rooftop solar panels and the industrial-scale solar project. *W. Watersheds*, 692 F.3d at 923.

Here, until Apex's recent public announcement that the Searchlight Wind project will be operational by 2016 or 2017, project development has moved at a glacial pace since it began in 2007. Pls' Mot. at 23–24. Ms. Bullen's cryptic declaration sheds no light on whether project construction is imminent—as Apex has said publicly—or whether it remains speculative. The declaration notably is silent as to whether there even is a power purchase agreement. By trying to have it both ways, and refusing to present any concrete evidence to the Court about the status of the project, intervenor's counsel undercuts any argument that *this* project is in the public interest.

Although there may be some public interest generally in developing energy projects, neither the federal defendants nor Searchlight Wind have introduced *any* evidence to support the claim that *this* industrial-scale energy project would be in the public interest, or that any public

interest would be realized any time soon. As noted above at 6, the Ninth Circuit issued the preliminary injunction in *LOWD I* after finding that the *only* claim on which plaintiff were likely to succeed was a NEPA claim that an SEIS was required to fully evaluate a logging project's impact to elk in light of new information. 752 F.3d at 760–61.[14] In balancing the irreparable harm from logging against the agency's claim that enjoining logging would not reduce forest fire and insect infestation, the Court of Appeals noted that such "fire and insect risks are to a degree speculative," as is any potential public benefit from the Searchlight Wind project. *Id*. at 766.[15] Without project-specific evidence of public benefit, the balance between defendants' general statements and specific harms to ESA-listed tortoises, federally-protected eagles and other wildlife that will occur if the project is built tip sharply in favor of an injunction. Also weighing in favor of an injunction is the public's interest, enshrined in NEPA, in a "full and fair" public analysis of the environmental impacts of the project *before* it proceeds. *See id.* at 761.

Moreover, the balance is not between *constructing* the Searchlight Wind project and *not constructing* it, but rather between moving blindly ahead based on the heretofore inadequate public disclosure and agency evaluations of the project's impacts to wildlife, or ensuring that construction of the project will not be undertaken until the public and Secretary Jewell have been provided with accurate information and analysis of those impacts—particularly to eagles—and the Secretary issues a new ROD, perhaps with more protective conditions, or decides not to approve the project after being fully informed of its likely impacts. Neither defendants, nor Searchlight Wind, have made any showing that they would be harmed in any way by an injunction against construction that may cause only a temporary delay until BLM completes an SEIS and Secretary Jewell reviews and—potentially—reissues a new ROD. *See id*. at 765.

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[14] The order of injunctive relief in *LOWD I* on a finding that an SEIS was required conclusively answers defendants' strange argument about "bedrock principles" and how an injunction "is not necessary because any future SEIS is not before the Court." Dfs' Opp. on Inj. at 5.

[15] *Lands Council v. McNair*, 537 F.3d 981, 1005 (9th Cir. 2008), is not apt because it weighed clear, project-specific, landscape scale benefits, and extensive evidence of harm to intervenors, which is not claimed in this case, against some risk to owls that had no federally-protected status.

Because intervenor Searchlight Wind in particular has asserted no equitable interest and no harm from a temporary delay, "the balance of equities tips toward the . . . plaintiffs, because the harms they face are permanent, while the intervenors face temporary delay." *Id.*

IV. PLAINTIFFS ARE NOT PRECLUDED FROM BRIEFING REMEDY ISSUES

Defendants do not contest that the Court's disposition of the merits of plaintiffs' NEPA claim is without precedent, and that plaintiffs could not reasonably have expected the need for additional extensive briefing except as to the scope of remedy after the Court's ruling on the merits.[16] Defendants argue perfunctorily that plaintiffs could have addressed remedy issues in their merits briefing. Dfs' Opp. on Amend. (Dkt # 109) at 2. But, given the 30-page limit for motions, and the literally endless permutations of potentially-appropriate remedies depending on the merits disposition—and the fact that remedy briefing is unnecessary at all if defendants prevail—there is no way plaintiffs could have raised the issues they raise in their motion prior to the Court's Order. Courts routinely grant separate briefing on remedy in complex environmental cases because the proper remedy depends on which, if any, claims are successful on the merits. *See, e.g.*, *Klamath-Siskiyou Wildlands Ctr. v. NOAA*, No. 13-cv-03717-NC, 2015 WL 1738197, *28 (N.D. Cal. Apr. 3, 2015). Plaintiffs respectfully submit that the Court improvidently entered judgment before allowing the parties to confer and brief the appropriate remedy and/or seek reconsideration of the Order, and request that the Court amend its Order and Judgment to specify that the ROD, FEIS and BiOp are vacated or the project is enjoined.

CONCLUSION

For these reasons, Plaintiffs respectfully request that this Court grant their motion.

[16] Plaintiffs' motion for extension of time related to the Bill of Costs explained that "Federal Defendants already have informally sought clarification of the status of the case, *and the parties expect to confer and seek further clarification* of the Court's disposition of the cross-motions for summary judgment." Dkt # 92 at 2 (emphasis added). Inartfully, plaintiffs did alert the Court that they intended to seek clarification, including requesting the chance to brief a motion for vacatur of the challenged decisions, an issue not addressed in the Court's Order. Plaintiffs did not move for entry of judgment under Fed. R. Civ. P. 58 because they anticipated being able to filing a motion regarding remedies, and regret that they did not ask to do so more clearly.

Respectfully submitted this 17th day of April 2015.

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CERTIFICATE OF SERVICE

Pursuant to Fed. R. Civ. P. 5(b); LR 5-1

I certify that on the date indicated below, I filed the foregoing document(s) with the Clerk of the Court using the CM/ECF system, which would provide notification and a copy of same to counsel of record.

Dated: April 17, 2015

/s David H. Becker