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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

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| SAM KUNAKNANA, et al.,<br><br>Plaintiffs,<br><br>v.<br><br>UNITED STATES ARMY CORPS OF ENGINEERS, et al.,<br><br>Defendants,<br><br>and<br><br>CONOCOPHILLIPS ALASKA, INC., ARCTIC SLOPE REGIONAL CORPORATION, STATE OF ALASKA, KUUKPIK CORPORATION, and NORTH SLOPE BOROUGH,<br><br>Intervenor-Defendants. | Case No.: 3:13-cv-00044-SLG |

**CONOCOPHILLIPS ALASKA, INC.'S MEMORANDUM IN SUPPORT OF MOTION REGARDING FURTHER PROCEEDINGS**

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## I. INTRODUCTION

Intervenor-Defendant ConocoPhillips Alaska, Inc. ("ConocoPhillips") submits this memorandum in support of its Motion Regarding Further Proceedings. As required by this Court's Order re Motions for Summary Judgment,[1] the parties have conferred in good faith in an effort to agree upon a stipulation for further proceedings in this litigation. However, plaintiffs have demanded an order vacating in full the decision of the U.S. Army Corps of Engineers ("USACE") issuing ConocoPhillips a Clean Water Act ("CWA") § 404 permit for the CD-5 project, while ConocoPhillips believes vacatur is unwarranted because of the nature of the errors identified by the Court and the serious disruption vacatur would cause. In light of the parties' inability to agree upon a stipulation and the Federal Defendants' determination to separately respond to this Court's order, ConocoPhillips has filed a motion in which the other Intervenor-Defendants join, requesting a limited remand without vacatur.

This Court has held that USACE's determination that a supplemental environmental impact statement ("SEIS") was unnecessary failed to provide an adequate explanation addressing (i) the changes to the CD-5 project since the 2004 Alpine Satellites Final Environmental Impact Statement ("FEIS") and (ii) the new information relied upon by USACE in making its CWA § 404 permit decision.[2] The Court also discussed in its order, but did not expressly resolve, plaintiffs' claim that USACE's supplementation decision fails to provide an adequate explanation addressing post-2004 climate change information.[3] In light of the Court's decision, ConocoPhillips seeks an order remanding USACE's CD-5 decision for the specific purpose that

[1] Dkt. 175 at 58 (Conclusion ¶ 2(d)).

[2] *Id.* at 57-58.

[3] *Id.* at 54-56.

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the agency remedy the errors identified by the Court. In addition, ConocoPhillips requests that the scope of the remand regarding supplemental National Environmental Policy Act ("NEPA") process also include addressing post-2004 climate change information. Finally, based upon the limited scope of the remand and the exigencies associated with a complex Arctic construction project that is well underway, ConocoPhillips also urges the Court to establish a remand schedule that is completed within 90 days of this motion (*i.e.*, on or before September 15, 2014), and an expeditious litigation schedule thereafter.

In this memorandum, and in the accompanying Second Declaration of James I. Brodie and Second Declaration of Lynn A. DeGeorge, ConocoPhillips provides supporting grounds for the remand and associated terms proposed in its motion. This memorandum also addresses plaintiffs' anticipated contention that this Court must vacate the underlying CWA § 404 permitting decision for the CD-5 project.

## II. CD-5 LITIGATION AND CONSTRUCTION STATUS

### A. Litigation History and Status

USACE issued ConocoPhillips a CWA § 404 permit for the CD-5 project in December 2011. USACE documented the basis for its action in a Record of Decision ("ROD"), and determined that the Alpine Satellites FEIS without supplementation was sufficient for purposes of NEPA compliance.[4] Plaintiffs filed this litigation 14 months later, contending that USACE's decision violates NEPA, CWA § 404 and the Administrative Procedure Act ("APA").

After completion of summary judgment briefing, in January 2014, plaintiffs filed a motion to preliminarily enjoin construction activities for the CD-5 project.[5] Applying the four-

[4] AR 6763-6935 (ROD); AR 183-2730 (FEIS).

[5] Dkt. 149.

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prong test for preliminary injunctive relief, this Court: (i) assumed that plaintiffs were likely to succeed on the merits of one or more of their NEPA or CWA claims; (ii) found it "questionable" whether plaintiffs had shown irreparable harm, but nonetheless, solely for the purposes of the motion, assumed irreparable harm to plaintiffs' subsistence interests from winter and early spring CD-5 construction; (iii) found that the balance of equities tipped far in favor of ConocoPhillips and the other Intervenor-Defendants; and (iv) similarly found that a preliminary injunction was not in the public interest.[6] Based upon these findings, this Court denied the motion.[7]

On May 27, 2014, this Court issued its Order re Motions for Summary Judgment. In relevant part, the Court held that USACE's determination that an SEIS was unnecessary was not supported by a sufficient explanation addressing (i) the changes to the CD-5 project since the 2004 FEIS, and (ii) the new information USACE relied upon in making its permit decision under CWA § 404.[8] The Court further discussed in its order, but did not decide, whether USACE's NEPA supplementation determination provides a sufficient explanation addressing post-2004 information regarding climate change.[9] In light of the foregoing, the Court declined to reach and to decide plaintiffs' CWA claim.[10] Finally, the Court directed the parties to file a stipulation or motions within 21 days of its order addressing further proceedings.[11]

**B. CD-5 Construction Status**

The current status of the construction process for CD-5 is described in the accompanying

[6] Dkt. 174 at 7-12.

[7] *Id.*

[8] Dkt. 175 at 57-58.

[9] *Id.* at 54-56.

[10] *Id.* at 56.

[11] *Id.* at 58.

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Second Declaration of James I. Brodie ("Brodie Declaration").[12] As detailed there, as of the date of this motion, construction activities have resulted in the installation of three principal types of project infrastructure. First, the entire gravel footprint authorized by the CWA § 404 permit issued for the CD-5 project has been established.[13] Second, structures for the four bridges associated with CD-5 have also been installed.[14] One bridge has been completed, and two bridges are structurally complete, but still require minor deck work. All in-water work (installation of the pilings and abutments) for the final bridge has been completed as well. Third, a temporary two-year ice pad was installed to serve as a staging area for construction materials and equipment.[15]

The Brodie Declaration also describes the construction activities that are planned for the summer and fall of 2014, with particular focus on the 90-day remand decision period that the Federal Defendants have proposed.[16] None of the planned activity entails in-water work or disturbance of aquatic resources. During the proposed 90-day remand, planned work consists of gravel seasoning that must be performed during the summer to compact previously laid gravel surfaces so that they are usable as transportation and working surfaces for the CD5 project and for the local community, minor bridge work on the two bridges that have been physically completed, installation of pipeline tie-in assemblies at pre-existing facilities, and project material and equipment staging.[17] Subsequent to the proposed 90-day remand decision period, in

[12] Brodie Decl. ¶ 7.

[13] *Id.* ¶ 7(a).

[14] *Id.* ¶ 7(b).

[15] *Id.* ¶ 7(c).

[16] *Id.* ¶ 8.

[17] *Id.* ¶¶ 8(a)-(d).

October, work is planned to install the bridge surface spans for the Nigliq Channel Bridge.[18] This work too entails activities limited to the existing project footprint (gravel surfaces and bridge pile foundations).[19]

## III. ARGUMENT

There is no absolute rule of law that dictates the remedy this Court must fashion. There are, of course, precedents and standards to apply in determining the appropriate remedy where, as here, the court has adjudged an agency's decision to lack a sufficient explanation. The caselaw in the Ninth Circuit and elsewhere demonstrates that district courts finding error in an agency decision have the discretionary authority to order remand in whole or in limited part without vacatur, remand with partial or full vacatur, remand with vacatur granted but stayed pending completion of the remand, or some other combination of relief, including fashioning of an appropriate injunction (provided that the applicable four-factor test is met). The unifying theme among the cases is that *a court should tailor its remedies to the circumstances and the equities presented in each case*.

As addressed below and in the declarations submitted to this Court, the nature of USACE's error here is such that the agency may take corrective action in a relatively short time period. Moreover, the disruptive consequences of vacating a permit authorizing construction that has been substantially performed, pending a remand that may be swiftly completed, are real, significant, irreparable, avoidable and inequitable. Accordingly, the circumstances and equities of this case strongly counsel in favor of a specific judicially supervised remand schedule and process, and against vacatur of the CD-5 CWA § 404 permit and decision.

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[18] *Id.* ¶ 8(e).

[19] *Id.*

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## A. This Court Is Not Compelled to Vacate USACE's Decision

### 1. The law does not dictate vacatur

There is no mandatory remedy applicable to this litigation. Instead, this Court should tailor a remedy to the specific legal and equitable circumstances of its decision on the merits. Unquestionably, this Court has the judicial power to remand all or a portion of the CD-5 CWA § 404 decision, without also vacating it, for further explanation in accordance with this Court's summary judgment decision.

There are many cases – among them, the ones surely to be cited by plaintiffs – in which courts have vacated, in whole or in part, an agency action. However, neither the APA nor any other applicable statute or rule of law compels vacatur. As a consequence, there are also many cases in which courts have remanded an agency action without vacatur.[20]

In *California Communities Against Toxics v. U.S. EPA*, the Ninth Circuit endorsed the long-standing two-pronged balancing test first established by the D.C. Circuit Court of Appeals to determine whether vacatur of agency action is appropriate.[21] Under this test, a court should

[20] *See, e.g., Heartland Reg'l Med. Ctr. v. Sebelius*, 566 F.3d 193, 198 (D.C. Cir. 2009) ("When an agency may be able readily to cure a defect in its explanation of a decision, the first factor in *Allied-Signal* counsels remand without vacatur."); *Am. Farm Bureau Fed'n v. EPA*, 559 F.3d 512, 528 (D.C. Cir. 2009) (remand without vacatur because the agency's "failure to adequately explain itself is in principle a curable defect"); *Milk Train, Inc. v. Veneman*, 310 F.3d 747, 755-56 (D.C. Cir. 2002) (remand rather than vacatur is appropriate where deficiencies may be corrected); *WorldCom v. FCC*, 288 F.3d 429, 434 (D.C. Cir. 2002) (remand without vacatur where "non-trivial likelihood" that agency would be able to justify rule on remand); *Humane Soc. of U.S. v. Locke*, 626 F.3d 1040, 1053 (9th Cir. 2010) (remand without vacatur appropriate "'[w]hen an agency may be able readily to cure a defect in its explanation of a decision'" (quoting *Heartland*, 566 F.3d at 198)); *Or. Natural Desert Ass'n v. McDaniel*, No. CV 09-369-PK, 2011 WL 3841550, at *3 (D. Or. July 8, 2011) ("A court should remand without vacating the agency action when the agency can cure a defect by providing further explanation of its decision.").

[21] 688 F.3d 989, 992 (9th Cir. 2012).

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evaluate "how serious the agency's errors are 'and the disruptive consequences of an interim change that may itself be changed.'"[22] Applying this balancing test, numerous decisions have been remanded *without* vacatur, including cases involving an agency's failure to provide an adequate explanation for purposes of NEPA or other substantive laws.[23]

In sum, neither the APA nor NEPA dictates vacatur as a remedy. Instead, the remedy in this case should be crafted to the specific legal and equitable circumstances relevant to this Court's decision and the facts now present. As set forth below, application of the two-pronged balancing test here strongly counsels against vacatur and in favor of a limited remand.

**2. USACE's failure to adequately explain its decision is a curable defect**

The first prong of the vacatur balancing test focuses on the nature and seriousness of the agency's errors.[24] ConocoPhillips does not contend that the errors identified by the Court are trivial. Nevertheless, the nature of the agency's errors and the surrounding circumstances do support remand without vacatur.

Although each case is decided on its own circumstances, the principle distinction between cases warranting vacatur and those that do not is the degree to which the identified defect or defects go to the heart of the agency's decision. Where the identified error pertains

[22] *Id.* (quoting *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993)); *accord Cook Inletkeeper v. U.S. EPA*, 400 F. App'x 239, 241 (9th Cir. 2010) (citing and following *Allied-Signal* to leave permit in place pending remand "to avoid the disruptive consequences that would flow from vacating the permit").

[23] *See* sources cited *supra* note 20; *Cook Inletkeeper v. U.S. EPA*, 400 F. App'x at 241; *see also Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995) ("when equity demands, [a challenged action] can be left in place while the agency" cures the defect). Some courts have vacated an agency's decision but stayed the mandate for vacatur pending completion of remand. *See, e.g., Haw. Longline Ass'n v. Nat'l Marine Fisheries Serv.*, 288 F. Supp. 2d 7, 11-12 (D.D.C. 2003) (district court is "vested with equitable authority to stay the mandate" pending completion of the remand).

[24] *Cal. Cmtys. Against Toxics*, 688 F.3d at 992.

either to the fundamental substance of the decision, or to a requirement for public process that has been denied, vacatur is generally favored.[25] However, where the identified error involves a failure to provide a sufficient explanation, or the deficiencies are otherwise plausibly curable, the first of the two balancing factors "counsels remand without vacatur."[26] In the present instance, USACE's errors are precisely the kind of defects that are, in principle, curable.[27] The errors identified by the Court, while not trivial or harmless, do not concern the substance, let alone the core, of USACE's permitting decision.

Other considerations related to the errors identified by the Court also mitigate the circumstances and so militate against vacatur. First, it bears emphasis here that a full and unchallenged 2,500-page FEIS was prepared for the CD-5 project in compliance with NEPA. Although preparation of an FEIS alone does not excuse USACE from explaining its decision not to supplement, a robust NEPA process has been followed with respect to this project. Second, USACE did expressly and repeatedly consider whether supplementation was required, and decided it was not based upon application of the correct legal standard.[28] Accordingly, although an adequate explanation is required to support agency decisions, this is not a situation where the

[25] *See, e.g., Heartland*, 566 F.3d at 199 ("Failure to provide the required notice and to invite public comment – in contrast to the agency's failure here adequately to explain why it chose one approach rather than another for one aspect of an otherwise permissible rule – is a fundamental flaw that 'normally' requires vacatur"); *Natural Res. Def. Council v. U.S. Dep't of Interior*, 275 F. Supp. 2d 1136, 1145 (C.D. Cal. 2002) (a "substantive . . . deficiency suggests . . . an agency will revise the rule during reconsideration," making courts "more reluctant to enforce the rule in the intervening remand period").

[26] *Heartland*, 566 F.3d at 198; *see* sources cited *supra* note 20.

[27] Uncertainty about whether USACE will succeed in substantiating its prior determination does not require or favor vacatur. *See Nat'l Ass'n. of Home Builders v. Norton*, No. CIV 00-0903-PHX-SRB, 2004 WL 3740765, at *6 (D. Ariz. June 28, 2004) ("[T]he mere possibility that FWS will be unable to substantiate its determination of endangered status [on remand] does not mandate vacatur.").

[28] AR 6899, 5766-67, 6811, 6814, 6816-17, 6831, 6835, 6837-38, 10200.

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agency entirely failed to recognize and to address supplementation. Third, this is not a situation where public process has been denied. The 2004 FEIS was the end product of extensive and lengthy public proceedings. Moreover, the Ninth Circuit has confirmed that an agency's decision whether to supplement an environmental impact statement ("EIS") does not require public notice and comment.[29] Finally, this Court has not reached plaintiffs' underlying challenges to the CD-5 CWA § 404 permit. Unless and until determined otherwise, USACE's substantive decision is still entitled to a presumption of regularity.[30]

**3. Vacatur would be unduly and unnecessarily disruptive**

The second prong of the Ninth Circuit's balancing test focuses on the disruptive consequences of vacatur. In evaluating disruption, practical consequences, including economic damages and public interest considerations, are relevant.[31] Here too, the circumstances of this case counsel against vacatur:

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[29] *See Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 560 (9th Cir. 2000) ("Although NEPA requires agencies to allow the public to participate in the preparation of an SEIS, there is no requirement for the decision *whether* to prepare an SEIS." (italics in original)); *California ex rel. Imperial Cty. Air Pollution Control Dist. v. U.S. Dep't of Interior*, Nos. 12-55856, 12-55956, 2014 WL 2038234, at *10 (9th Cir. May 19, 2014) (same).

[30] Notably, plaintiffs' pending claims are limited to assertions that USACE failed to provide an adequate explanation for two aspects of its permit decision. *See* Dkt. 108. Plaintiffs have not asserted CWA claims that, even if meritorious, would themselves necessarily warrant vacatur.

[31] *See Cal. Cmtys. Against Toxics*, 688 F.3d at 993-94 (finding that vacatur and resulting delay of power plant would be "economically disastrous" and necessitate legislative action); *W. Oil & Gas Ass'n v. U.S. E.P.A.*, 633 F.2d 803, 813 (9th Cir. 1980) (remanding without vacatur because "intervention into the process of environmental regulation, a process of great complexity, should be accomplished with as little intrusiveness as feasible"); *Pac. Dawn, LLC v. Bryson*, No. C10–4829 TEH, 2012 WL 554950, at *4 (N.D. Cal. Feb. 21, 2012) (remanding fishery quota regulations without vacatur because vacatur could, among other things, result "in millions of dollars of lost revenue to struggling coastal communities"); *Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, No. C 06-4884 SI, 2011 WL 337364, at *6 (N.D. Cal. Jan. 29, 2011) (remanding grazing lease renewals to the agency without vacating them because plaintiffs failed to show environmental harm from keeping the renewals in place and defendants' declarations indicated vacating would cause greater impacts to public lands).

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- Substantial CD-5 infrastructure has been constructed, including the placement of all gravel roads and pads, and the installation of all bridge abutments and pilings.[32] These structures and related activities are subject to substantial protective measures and management practices, and the payment of nearly $2 million in compensatory mitigation by ConocoPhillips. Vacatur of the existing CWA § 404 permit would retroactively render the ongoing presence of this infrastructure unauthorized, creating a regulatory morass rife with uncertainty. Consigning substantial infrastructure to some ambiguous extra-legal form of regulatory limbo would be the very definition of disruptive for the CD-5 project operator (ConocoPhillips), the responsible regulatory agencies (principally USACE), landowners (Kuukpik, ASRC and the State of Alaska), and the local community (NSB, Kuukpik and ASRC).[33]

- The construction activities planned in the coming few months, while limited in scope and environmental impact, either must be performed in the summer (gravel seasoning) or must be performed now in sequence (Nigliq Channel bridge span installation).[34] Because of the seasonality of work on the North Slope, the impact of delaying these activities would be to require an extra year of construction at enormous cost, with the attendant prolonged disturbance impacts on the local community. Delay of construction by a year also would result in a cascading series of secondary costly adverse consequences, including delayed production and delayed payment of substantial royalties.[35]

- The local community's access to emergency response facilities at Alpine is impaired and its access to subsistence activities is potentially impaired by the partially consolidated state of the existing gravel infrastructure. Local subsistence users have expressed a strong desire for ConocoPhillips to consolidate and compact the gravel as soon as practicable to form a stable surface that allows safe transit along and across it.[36]

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[32] *See* Brodie Decl. ¶ 7.

[33] Second Declaration of Lynn A. DeGeorge ("DeGeorge Decl.") ¶¶ 4-5; Dkt. 162 ¶¶ 8-15; Dkt. 169 ¶¶ 11-15; Dkt. 165; Dkt. 170-1.

[34] Brodie Decl. ¶¶ 9-12; Dkt. 161 ¶¶ 13-14.

[35] *Id.*; Brodie Decl. ¶¶ 9-16.

[36] *See* Dkt. 162 ¶ 14; Dkt. 170-1 ¶¶ 9-12 (North Slope Borough declaration that CD5 road is important to provide emergency response); Brodie Decl. ¶ 13 (community emergency response access); DeGeorge Decl. ¶ 8; *see also* Second Declaration of Isaac Nukapigak.

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The scope and undue nature of these serious and irreparable consequences are in stark contrast to the potentially curable nature of the identified errors, the relatively brief period of time needed by USACE to complete a remand, and the absence of any significant adverse impacts resulting from the planned construction activities.[37]

**B. Remand Should Be Ordered for Limited Purposes**

**1. The identified errors are discrete**

There is no controlling legal standard for when a court may order a specific or limited-purpose remand in contrast to a full remand. However, in their discretion, courts routinely remand agency decisions for specific purposes when circumstances warrant it. For example, in *Hapner v. Tidwell*,[38] the Ninth Circuit largely sustained the district court's grant of summary judgment in favor of the U.S. Forest Service, but also concluded that the agency had violated the

[37] ConocoPhillips opposes vacatur in the strongest terms possible. However, if the Court concludes that vacatur is the appropriate remedy, ConocoPhillips urges it to decide plaintiffs' remaining claims before ordering a remand. While courts are not required to address all issues presented when remanding an agency's decision, they have the discretion to, and frequently do, rule on all issues in the interests of efficiency, practicality and certainty, especially in instances, such as here, where extended delay is harmful. *See, e.g., N. Plains Res. Council, Inc. v. Surface Transp. Bd.*, 668 F.3d 1067, 1072 (9th Cir. 2011) (remanding inadequate NEPA impacts analysis but affirming in part agency's substantive decision); *San Luis & Delta-Mendota Water Auth. v. Jewell*, 747 F.3d 581, 625, 645 (9th Cir. 2014) (remanding to Bureau of Reclamation to prepare EIS, but upholding agency's ESA decision); *Te-Moak Tribe of W. Shoshone of Nev. v. U.S. Dep't of Interior*, 608 F.3d 592, 614 (9th Cir. 2010) (directing district court to remand inadequate NEPA analysis to BLM, but affirming summary judgment to Federal Defendants on NHPA and FLPMA claims). This reasoning is all the more applicable here, where plaintiffs' pending CWA claim is entirely premised upon contentions that USACE has failed to adequately explain its permitting decision, rather than on contentions that if sustained USACE would be unable to rectify without altering its decision. *See* Dkt. 108. Although ConocoPhillips believes that USACE's permit decision should be sustained against plaintiffs' CWA contentions, if this Court intends to vacate the permit decision, it would be inequitable, especially in light of the status of the construction, the huge economic harm and substantial regulatory disruption, to leave plaintiffs' remaining claim unresolved and, therefore, sure to be relitigated. *See generally* Fed. R. Civ. P. 1 (calling for the "speedy, and inexpensive determination of every action").

[38] 621 F.3d 1239, 1251 (9th Cir. 2010).

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National Forest Management Act by failing to adequately explain how the proposed project complied with an elk-cover requirement contained in the applicable forest plan. The court ordered a remand and directed the agency to remedy this defect.[39] Following completion of the remand and affirmance by the district court, on further review the Ninth Circuit held that plaintiffs could not raise new NEPA claims "because we remanded for the limited purpose of allowing the Service to remedy its elk cover analysis."[40]

Here, defendants request a remand for the limited purpose of having the agency address the Court's decision that "the Corps' determination that a Supplemental Environmental Impact Statement was unnecessary was arbitrary and capricious because the Corps failed to provide a reasoned explanation for that determination that addressed the changes to the CD-5 project since the 2004 Environmental Impact Statement and the new information the Corps relied upon in making its Least Environmentally Damaging Practicable Alternative determination for purposes of Section 404 of the Clean Water Act."[41] Defendants also seek to include in the remand the issue of post-2004 climate change information, which the Court addressed in its opinion but did not resolve. These discrete issues are specifically identified in the Court's decision and are severable from the remainder of USACE's permit decision. Moreover, as previously addressed, an agency decision whether to supplement an EIS is not subject to any requirement for public

[39] *Id.* at 1250-51.

[40] *Hapner v. Tidwell*, 464 F. App'x 679, 681 (9th Cir. 2012)*; see Marathon Oil Co. v. EPA*, 564 F.2d 1253, 1271-72 (9th Cir. 1977) (identified defects in rule warranted only limited remand); *Am. Mar. Ass'n v. United States*, 766 F.2d 545, 568 n.32 (D.C. Cir. 1985) (ordering a "limited remand" of a "portion" of a final order); *Safe Foods & Beverages v. EPA*, 365 F.3d 46, 50 (D.C. Cir. 2004) (subjecting rule to a "limited remand"); *OXY USA, Inc. v. FERC*, 64 F.3d 679, 685 (D.C. Cir. 1995) (remanding "two aspects of [FERC's] methodology").

[41] Dkt. 175 at 57-58.

process.[42] A full remand would muddy the waters with contentions seeking new public process in order to assert different arguments and amended claims, thereby prolonging an already extraordinarily lengthy and complex project-specific permitting process, and defying finality.

**2. An agency explanation on remand is not a *post-hoc* rationalization**

Plaintiffs' counsel have stated they contend that remand to USACE without vacatur for the purpose of addressing the defects identified by the Court is an invitation for the agency to provide an unlawful *post-hoc* rationalization. However, this contention misapprehends well-established principles of administrative law and judicial review, and contradicts a myriad of cases remanding without vacatur an inadequately explained agency decision for further explanation.

To begin with, the U.S. Supreme Court has held that a remand for additional explanation by an agency in accordance with a court's finding of agency error is usually the appropriate remedy:

> If the record before the agency does not support the agency action, if the agency has not considered the relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation and explanation.[43]

The Supreme Court's decision in *Citizens to Preserve Overton Park v. Volpe* well demonstrates this point.[44] In *Overton Park*, the Department of Transportation ("DOT") approved the routing of an interstate highway through a Memphis park without addressing statutory requirements prohibiting the siting of federal highways through parkland absent certain findings. The

[42] *See* sources cited *supra* note 29.

[43] *Fla. Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985).

[44] 401 U.S. 402 (1971).



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Supreme Court held in relevant part that while it was improper for the district court to merely rely upon *post-hoc* rationalizations contained in litigation affidavits of agency counsel, the district court could require DOT on remand to provide an adequate explanation for the challenged decision.[45]

Since *Overton Park*, courts routinely remand inadequately explained decisions to agencies to supply an explanation, with or without vacatur, depending upon application of the two-pronged test for whether to order vacatur.[46] In doing so, the distinction between *post-hoc* rationalizations and further agency explanations provided in response to a remand has been well-explained:

> [A]lthough the Court [in *Overton Park*] acknowledged the danger of some post hoc rationalization, it nevertheless specifically approved the procedure of requesting an administrative body to provide additional explanation for an inadequately articulated decision. The "post hoc rationalization" rule is not a time barrier which freezes an agency's exercise of its judgment after an initial decision has been made and bars it from further articulation of its reasoning. It is a rule directed at reviewing courts which forbids judges to uphold agency action on the basis of rationales offered by anyone other than the proper decisionmakers. Thus the rule applies to rationalizations offered for the first time in litigation affidavits, and arguments of counsel.

In sum, while a court should be sensitive to the *post-hoc* rationalization rule, no rule of law prohibits (or discourages) an agency from submitting an amplified articulation of the basis for its

[45] *Id.* at 420-21.

[46] *See, e.g.*, sources cited *supra* note 20.

prior decision *on remand* in order to remedy a district court's determination that the explanation the agency provided was not adequate.[47]

**C. Remand and Further Proceedings Should Follow an Established Schedule**

ConocoPhillips also urges this Court to establish a remand completion deadline for USACE of September 15, 2014 (*i.e.*, 90 days running from now).[48] Establishing a specific, reasonable and deliberate deadline for completing the limited remand would facilitate and ensure a timely decision by USACE without unduly cramping or intruding upon the agency's administrative process. Because CD-5 is a complex construction project proceeding under challenging Arctic conditions that require long lead times and careful planning, because substantial portions of the project have already been constructed and other aspects of the project are underway, and because the Court has not yet reached other pending claims of plaintiffs, a

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[47] *See, e.g.*, *Kunaknana v. Clark*, 742 F.2d 1145, 1149 (9th Cir. 1994) (explaining that in *Overton Park* the Supreme Court "expressly authorized the trial court to allow the Secretary of Transportation to 'prepare formal findings' in order to 'provide an adequate explanation for his action' which the court could then review"); *U.S. Steel Grp. v. United States*, 25 C.I.T. 1046 (2001) ("There is no *post hoc* rationalization problem where the agency re-examines its conclusion on remand, and, though arriving at the same conclusion, explains the conclusion in a reasoned way as guided by the facts of the case and its reasonable interpretation of the statute."); *In re Polar Bear Endangered Species Act Listing & 4(d) Rule Litg.*, 794 F.Supp. 2d 65, 89 n.26 (D.D.C. 2011), *aff'd*, 709 F.3d 1 (D.C. Cir. 2013) ("[I]t would make no sense for a court to order a remand for supplemental explanation only to reject that explanation as *post hoc* rationalization."); *see also Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 560-62 (9th Cir. 2000) ("Because an agency's duty to consider supplementation of its NEPA analysis occurs on an ongoing basis, courts including the Ninth Circuit commonly consider supplemental evaluation documents justifying a decision not to prepare an SEIS even when prepared during litigation and after the original decision not to supplement.").

[48] USACE, through counsel, has advised the plaintiffs and ConocoPhillips that it would be able to complete a remand limited to addressing the errors identified by the Court and the related post-2004 climate change issue within a 90-day period running from June 17, 2014.

court-supervised remand process is well-supported.[49] For similar reasons, and in light of the approaching 2014-15 winter construction season, for which very substantial planning and mobilization is underway, ConocoPhillips respectfully requests that upon completion of the remand this Court expedite its consideration of the remaining claims in this case.[50]

**D. Injunctive Relief Is Not Warranted During the 90-Day Remand**

In *Monsanto Co. v. Geertson Seed Farms*, the Supreme Court established both that "[a]n injunction is a drastic and extraordinary remedy, which should not be granted as a matter of course," and that injunctions do not issue automatically upon a determination that an agency has failed to comply with NEPA.[51] Instead, the Supreme Court has emphasized that the "traditional four-part test applies when a plaintiff seeks a permanent injunction to remedy a NEPA violation," and that if a less drastic remedy will redress the plaintiffs' injury, "no recourse to the additional and extraordinary relief of an injunction [is] warranted."[52]

As of this filing, plaintiffs have not informed ConocoPhillips of any intent to seek an injunction at this time. As a precautionary matter, should plaintiffs seek an injunction, ConocoPhillips emphasizes the following:

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[49] *See Alaska Ctr. for Env't v. Browner*, 20 F.3d 981, 986 (9th Cir. 1994) ("The district court has broad latitude in fashioning equitable relief.") (remanding to agency with specific schedule for remedial action).

[50] *See* Brodie Decl. ¶ 16.

[51] 561 U.S. 139, 156-58 (2010).

[52] *Id.* at 157, 165-66; *see Winter v. Natural Res. Defense Council*, 555 U.S. 7, 32 (2008) ("An injunction is a matter of equitable discretion; it does not follow from success on the merits as a matter of course."); *Weinberger v. Romaro-Barcelo*, 456 U.S. 305, 313 (1982) ("a federal judge sitting as chancellor is not mechanically obligated to grant an injunction for every violation of law"); *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545-46 (1987) (court cannot presume elevation of subsistence interests over economic concerns); *Tribal Vill. of Akutan v. Hodel*, 859 F.2d 662, 664 (9th Cir. 1988) (court may weigh costs to industry and public of delaying oil and gas exploration activities). *See also* Dkt. 160 at 19 & n.69.

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- Fairness and due process dictate that defendants be afforded a reasonable opportunity to respond to and defend against any request for injunctive relief by plaintiffs.[53]
- This Court's conclusion that USACE has failed to adequately explain its decision that supplemental NEPA analysis is unnecessary is not alone sufficient to warrant an injunction. Instead, the Supreme Court has emphasized the importance of a robust evaluation of, and evidentiary basis for, the four traditional injunction factors.[54]
- The established facts are that the environmental consequences of the planned construction activities over the next 90 days are minimal, limited to activities performed on existing infrastructure, of no direct adverse impact to aquatic resources, and otherwise short in duration, local in impact and of only temporary consequence.[55] In contrast, the harmful consequences of delaying these activities are substantial, irreparable, far out of balance with the impacts that may be avoided, and contrary to the public interest.[56]

In sum, given the curable nature of the identified errors, the short time frame required by USACE for a limited remand to address these errors, the previous extent of construction, the limited impacts of planned construction activities over the next 90 days and the significant

[53] *See SEC v. McCarthy*, 322 F.3d 650 (9th Cir. 2003) ("Fairness and due process require that [a party] be given an opportunity to be heard before the district court issues a judgment impacting their rights and property.").

[54] *See Monsanto*, 561 U.S. at 158 ("It is not enough for a court considering a request for injunctive relief to ask whether there is good reason why an injunction should *not* issue; rather, a court must determine that an injunction *should* issue under the traditional four-factor test." (emphasis in original)).

[55] *See* Brodie Decl. ¶ 15; DeGeorge Decl. ¶¶ 6-8; Dkt. 162 ¶¶ 11-12.

[56] *Compare* Brodie Decl. ¶ 8 (describing summer/fall activities and limited impacts), DeGeorge Decl. ¶¶ 6-7 (summer/fall activities have limited impacts), *and* Dkt. 162 ¶¶ 3-6 (limited and mitigated impacts of CD5 construction), *with* Brodie Decl. ¶ 15, DeGeorge Decl. ¶¶ 9-11, *and* Dkt. 162 ¶¶ 11-12 (no net environmental benefits from stopping construction that is substantially underway; trade-off of carefully evaluated and mitigation impacts for different unanticipated and unregulated environmental effects).

disruptive and adverse impacts of delay, no injunction is appropriate during the 90-day remand period.

## IV. CONCLUSION

For the foregoing reasons, ConocoPhillips respectfully requests that this Court grant its motion and remand to USACE its decision that supplemental NEPA analysis is not required, for the limited purpose of addressing the specific errors identified in the Court's summary judgment order, as well as post-2004 climate change information, within a period of time ending September 15, 2014. ConocoPhillips further requests that this Court deny plaintiffs' demand that USACE's CD-5 permit decision be vacated.

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**CERTIFICATE OF SERVICE**

I hereby certify that on June 17, 2014, I filed a true and correct copy of the foregoing document with the Clerk of the Court for the United States District Court – District of Alaska by using the CM/ECF system. Participants in this Case No. 3:13-cv-00044-SLG who are registered CM/ECF users will be served by the CM/ECF system.

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