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THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

SAM KUNAKNANA, *et al*.,

Plaintiffs,

v.

UNITED STATES ARMY CORPS OF ENGINEERS, *et al*.,

Defendants,

and

CONOCOPHILLIPS ALASKA, INC., *et al.*,

Intervenor-Defendants.

Case No. 3:13-cv-00044-SLG

KUNAKNANA PLAINTIFFS' SUBMISSION ON FURTHER PROCEEDINGS

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INTRODUCTION

On May 27, 2014, this Court issued a decision resolving in part the parties' cross-motions for summary judgment.[1] The Court found that the U.S. Army Corps of Engineers' (Corps) determination that a Supplemental Environmental Impact Statement (SEIS) was unnecessary was arbitrary and capricious under the Administrative Procedure Act (APA) and violated the National Environmental Policy Act (NEPA) because the Corps did not provide an adequate explanation for its decision not to prepare an SEIS.[2] The Court did not determine whether the Corps complied with the Clean Water Act (CWA).[3] The Court requested that the parties provide additional briefing on the appropriate remedy for the Corps' violation and outline the further proceedings that should occur.[4]

The standard remedy in cases brought pursuant to the APA is for the Court to "set aside," or vacate, the illegal agency action.[5] The Kunaknana Plaintiffs therefore respectfully request that the Court issue an order vacating the Corps' CWA Section 404 permit and the 2011 Record of Decision (ROD)[6] and remand the Decision to the agency. Doing so will protect the valuable Colville River Delta and prevent further damage while the agency corrects its NEPA violation, and will uphold the integrity of the permitting process. In addition, the Court should provide declaratory relief directing the Corps to comply with NEPA and the Court's Order as further set out below.

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[1] Order re: Mots. for Summ. J. (Doc. 175).

[2] *Id.* at 57–58.

[3] *Id.* at 56. While Plaintiffs contend that the remand process for NEPA has no bearing on whether the Corps complied with the CWA, the Court can proceed with vacatur and remand based solely on finding the Corps in violation of NEPA.

[4] *Id.* at 56, 58. Counsel for Plaintiffs met and conferred with counsel for the Corps and counsel for ConocoPhillips Alaska, Inc. (Conoco), but were unable to agree upon a remedy.

[5] *See infra* Argument Part I.A; *see also* 5 U.S.C. § 706(2)(A).

[6] Plaintiffs collectively refer to the Section 404 permit and the 2011 ROD as "the Decision" in this brief.

ARGUMENT

I. REMAND WITH VACATUR IS THE APPROPRIATE REMEDY FOR THE CORPS' UNLAWFUL ACTION.

A. Remand with Vacatur Is the Standard Remedy Under the APA.

Vacatur is the normal remedy under the APA.[7] The APA directs that a court "shall . . . hold unlawful and set aside" any agency action found to be "arbitrary, capricious, . . . or otherwise not in accordance with law."[8] Accordingly, the Supreme Court and the Ninth Circuit have repeatedly held that vacatur is the proper remedy under the APA.[9] In explaining the APA's statutorily mandated remedy, the Supreme Court stated that Section 706(2)(A) requires that "[i]n all cases agency action must be set aside if the action was 'arbitrary, capricious, an abuse of discretion or otherwise not in accordance with law.'"[10] The standard APA remedy of vacatur applies to NEPA violations.[11]

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[7] *See* 5 U.S.C. § 706(2)(A); *Se. Alaska Conservation Council et al. v. U.S. Army Corps of Eng'rs*, 486 F.3d 638, 654 (9th Cir. 2007) ("Under the APA, the normal remedy for an unlawful agency action is to 'set aside' the action."), *rev'd on other grounds sub nom. Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 557 U.S. 261 (2009).

[8] 5 U.S.C. § 706(2)(A); *see Black's Law Dictionary* 1404 (8th ed. 2004) (stating "set aside" means "to annul or vacate"). Plaintiffs use to the terms "vacate" and "set aside" interchangeably in this submission.

[9] *See, e.g.*, *Fed. Commc'n Comm'n v. NextWave Personal Commc'ns, Inc.*, 537 U.S. 293, 300 (2003) ("The [APA] requires federal courts to set aside federal agency action that is 'not in accordance with law.'" (citation omitted)); *Fed. Power Comm'n v. Transcon. Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976) ("If the decision of the agency 'is not sustainable on the administrative record made, then the . . . decision must be vacated and the matter remanded.'" (quoting *Camp v. Pitts*, 411 U.S. 138, 143 (1973))); *Cal. Wilderness Coal. v. U.S. Dep't of Energy*, 631 F.3d 1072, 1095 (9th Cir. 2011) (indicating the appropriate remedy under the APA when an agency does not follow Congress' clear mandate is to vacate); *Nw. Envtl. Def. Ctr. v. Bonneville Power Admin.*, 477 F.3d 668, 681 (9th Cir. 2007) ("Under the APA, we must set aside BPA's action if it was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" (quoting 5 U.S.C. § 706(2)(A))); *Alsea Valley Alliance v. Dep't of Commerce*, 358 F.3d 1181, 1185–86 (9th Cir. 2004) ("Although not without exception, vacatur of an unlawful agency rule normally accompanies a remand."); *Idaho Sporting Cong., Inc. v. Alexander*, 222 F.3d 562, 567–68 (9th Cir. 2002) ("[A]gency action taken without observance of procedure required by law will be set aside."); *see also Organized Vill. of Kake v. U.S. Dep't of Agric.*, 776 F. Supp. 2d 960, 976 (D. Alaska 2011), *rev'd on other grounds*, 746 F.3d 970 (9th Cir. 2014).

[10] *NextWave Personal Commc'ns Inc.*, 537 U.S. at 300 (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 413–14 (1971)); *see also Transcon. Gas Pipe Line Corp.*, 423 U.S. at 331 (explaining that, "[i]f the decision of the agency 'is not sustainable on the

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Given the Court's finding that the Corps acted arbitrarily and capriciously because it failed to provide a reasoned explanation for its decision not to issue an SEIS under NEPA, the Court should vacate the Decision and remand to the Corps.

B. No Extraordinary Circumstances Exist to Justify Remand Without Vacatur.

Courts have carved out a very narrow exception to the standard remedy of vacatur and allowed remand without vacatur in extremely limited circumstances.[12] This exception does not apply to the Corps' decision and the facts of this case.

In *California Communities Against Toxics*, the Ninth Circuit adopted the D.C. Circuit's two-part test to determine when departure from the standard remedy of vacatur is appropriate.[13]

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administrative record made, then the . . . decision *must be vacated* and the matter remanded'" (emphasis added) (quoting *Camp v. Pitts*, 411 U.S. 138, 142 (1973))); *Nw. Coal. for Alternatives to Pesticides v. U.S. Envtl. Prot. Agency*, 544 F.3d 1043, 1047 (9th Cir. 2008) (indicating a court "must set aside an agency's decision if it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law'"); *Nw. Envtl. Def. Ctr.*, 477 F.3d at 681.

[11] *See, e.g.*, *Anderson v. Evans*, 371 F.3d 475, 494 (9th Cir. 2004) (vacating a whaling quota and setting aside a finding of no significant impact because the agency's decision not to prepare an Environmental Impact Statement (EIS) was arbitrary); *Metcalf v. Daley*, 214 F.3d 1135, 1146 (9th Cir. 2000) (setting aside the agency's finding of no significant impact and ordering preparation of a new Environmental Assessment (EA) to "ensure an objective evaluation free of the previous taint"); *Jones v. Gordon*, 792 F.2d 821, 823, 829 (9th Cir. 1986) (affirming a district court's decision to invalidate a permit where the agency did not adequately explain its reasons for failing to prepare an EIS); *Am. Bird Conservancy, Inc. v. Fed. Commc'ns Comm'n*, 516 F.3d 1027, 1034–35 (D.C. Cir. 2008) (vacating an order where the agency arbitrarily dismissed a request to prepare an EIS); *W. Watersheds Project v. Rosenkrance*, No. 4:09-CV-298-EJL, 2011 WL 39651, at *14 (D. Idaho Jan. 5, 2011) (vacating several grazing permits and remanding to the agency where the agency's EA was arbitrary and capricious); *Greater Yellowstone Coal. v. Bosworth* (*Greater Yellowstone*), 209 F. Supp. 2d 156, 163 (D.D.C. 2002) (vacating a permit where the agency failed to prepare an EA before reissuing the permit).

[12] *Humane Soc'y of the U.S. v. Locke*, 626 F.3d 1040, 1053 n.7 (9th Cir. 2010) ("In *rare circumstances*, when we deem it advisable that the agency action remain in force until the action can be reconsidered or replaced, we will remand without vacating." (emphasis added)); *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995) (refusing to vacate an invalid rule because vacatur would cause "potential extinction of an animal species"); *W. Oil & Gas Ass'n v. U.S. Envtl. Prot. Agency*, 633 F.2d 803, 813 (9th Cir. 1980) (describing its remand without vacatur as "unusual" and expressing concern that vacating the agency decision might "thwart[] . . . operation of the Clean Air Act" during reconsideration); *Ctr. for Food Safety v. Vilsack*, 734 F. Supp. 2d 948, 951 (N.D. Cal. 2010) ("[T]he 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]." (emphasis added)).

The two factors the Ninth Circuit considers are (1) the seriousness of the agency's error, and (2) "the disruptive consequences of an interim change that may itself be changed."[14] In other words, courts may decline to vacate an agency decision only when vacatur would cause serious and irreparable harms that significantly outweigh the magnitude of the agency's error. When setting out the two-pronged test, the Ninth Circuit acknowledged that "we have only ordered remand without vacatur in limited circumstances."[15] Courts consistently recognize that vacatur is the presumptive remedy.[16] As one district court explained, "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 court vacates the decision.[17]

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[13] *Cal. Cmtys. Against Toxics v. U.S. Envtl. Prot. Agency*, 688 F.3d 989, 992 (9th Cir. 2012).

[14] *Id.* (citing *Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n*, 988 F.2d 146, 150–51 (D.C. Cir. 1993)). The burden should be on the party seeking remand without vacatur to show that deviation from the standard rule of vacatur is warranted. The test from *California Communities* functions as an equitable defense, so a defendant should have the burden of raising and proving those factors outweigh the presumptive or ordinary remedy of vacatur. *See Locke*, 626 F.3d at 1053 n.7 (vacating an illegal action because the agency did not ask for remand without vacatur); *Reno Air Racing Ass'n v. McCord*, 452 F.3d 1126, 1138–39 (9th Cir. 2006) (stating that a party asserting equitable defense "must show" its applicability).

[15] *Cal. Cmtys. Against Toxics*, 688 F.3d at 994; *see also Locke*, 626 F.3d at 1053 n.7 (noting that remand without vacatur is extremely rare and is allowed only "[i]n rare circumstances, when [the court] deem[s] it advisable that the agency action remain in force").

[16] *See, e.g.*, *Idaho Farm Bureau Fed'n*, 58 F.3d at 1405 (noting that "[o]rdinarily" the remedy is vacatur); *In re Polar Bear Endangered Species Act Listing 4(d) Rule Litig.*, 818 F. Supp. 2d 214, 238 (D.D.C. 2011) (stating that "[b]oth the Supreme Court and the D.C. Circuit have held that vacatur is the presumptive remedy for this type of violation"); *Reed v. Salazar*, 744 F. Supp. 2d 98, 119 (D.D.C. 2010) (noting that "the default remedy is to set aside Defendant's action"); *Sierra Club v. Van Antwerp*, 719 F. Supp. 2d 77, 78 (D.D.C. 2010) (recognizing that the "presumptively appropriate remedy for a violation of the APA" is vacatur), *aff'd in part and rev'd on other grounds*, 661 F.3d 1147 (D.C. Cir. 2011); *Greater Yellowstone*, 209 F. Supp. 2d at 163 ("As a general matter, an agency action that violates the APA must be set aside."); *Am. Bioscience, Inc. v. Thompson*, 269 F.3d 1077, 1083–84 (D.C. Cir. 2001) ("If an appellant . . . prevails on its APA claim, it is entitled to relief under that statute, which normally will be . . . vacatur . . . ."); *Humane Soc'y of the U.S. v. Johanns*, 520 F. Supp. 2d 8, 37 (D.D.C. 2007) ("[V]acating a rule or action in violation of NEPA is the standard remedy."); *see also Bunyard v. Hodel*, 702 F. Supp. 820, 822 (D. Nev. 1988) (citing opinions from the Third, Fifth, and Eleventh Circuits for the proposition that "[w]here . . . agency misconduct occurs, the proper remedy is to vacate the agency decision at issue and remand the matter").

[17] *Ctr. for Food Safety*, 734 F. Supp. 2d at 951.

For example, in *Idaho Farm Bureau Federation*, the Ninth Circuit held that the U.S. Fish and Wildlife Service, in listing a snail as endangered, erred in not making a report available to the public, even though the report was central to the agency's listing decision.[18] Despite the agency's error, the Ninth Circuit concluded that vacatur was not appropriate in that case because "concern exist[ed] regarding the potential extinction of an animal species" if the court vacated the permit.[19] Similarly, in *Western Oil and Gas Association v. U.S. Environmental Protection Agency*, the Ninth Circuit declined to vacate a Clean Air Act decision made in violation of the APA's notice and comment provisions because the court did not want to risk "thwarting" the operation of the Clean Air Act to protect air quality.[20]

California Communities also illustrates the limited circumstances under which the court will remand without vacatur. In *California Communities*, the U.S. Environmental Protection Agency (EPA) committed a procedural (but ultimately harmless) error by not listing a document in an electronic docket, and a substantive error in approving a rule change related to a power plant.[21] The Ninth Circuit held that the "delay and trouble vacatur would cause are severe." Without the power plant, the region might not have enough power, and the blackouts could "necessitate the use of diesel generators that pollute the air, the very danger the Clean Air Act aims to prevent."[22]

In sum, remand without vacatur is only appropriate in limited circumstances — specifically, where vacatur would cause significant harm to the environment or where vacatur would actually thwart the objective of the statute at issue. Applying the two-part *California Communities* test, there is no reason to depart from the normal remedy of vacatur in this case. The Corps' failure to comply with NEPA is serious and there are no disruptive consequences from vacatur. To the contrary, vacating the permit will ensure that the wildlife, subsistence, and water resources of the Colville Delta are protected on remand and will ensure that NEPA's goals of informed decision making and robust public participation are achieved.

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[18] 58 F.3d at 1402–04.
[19] *Id.* at 1405, *discussed in Cal. Cmtys. Against Toxics*, 688 F.3d at 992.
[20] 633 F.2d at 813, *discussed in Cal. Cmtys. Against Toxics*, 688 F.3d at 992.
[21] 688 F.3d at 992–93.
[22] *Id.* at 993–94.

1. The Corps' Error Is Serious.

Under the first prong of the *California Communities* test, the Court must consider the seriousness of the Corps' errors.[23] The Corps' failures regarding NEPA are serious — they go to the heart of the matter. As this Court recognized, NEPA ensures that the agency will not act on incomplete information and that the public, as well as other government agencies, can react to the proposed action and meaningfully participate.[24] "NEPA procedures must insure that environmental information is available to public officials and citizens before . . . actions are taken," and "[a]ccurate scientific analysis, expert agency comments, and public scrutiny are essential to implementing NEPA."[25] This Court recognized that the project area is known for its importance to fish, wildlife, and subsistence resources, and that residents of Nuiqsut, including the Plaintiffs, have a subsistence-based economy that relies on subsistence resources as primary food sources.[26] Impacts to the area and subsistence resources are consequential to the substance way-of-life of the Plaintiffs. Informed decision-making that adequately addresses the impacts of the project on subsistence resources and the project area could not be any more serious for the Plaintiffs.

The Court found two distinct NEPA errors. First, this Court properly found that the Corps failed to provide a reasoned explanation for why no supplemental NEPA analysis was necessary to address substantive project changes. [27] The changes to road alignment, pad location, and bridge location all have a substantive and significant bearing on the project's impact to subsistence resources, making the failure to consider the changes significant and serious.

Second, this Court found that the Corps acted arbitrarily when it relied on post-2004 studies and reports to support its reversal of its least environmentally damaging practicable alternative (LEDPA) decision, while at the same time summarily disclaiming the significance of the post-2004 information for NEPA purposes.[28] In 2010, the Corps determined that alternatives utilizing horizontal directional drilling (HDD), which eliminated the road and bridge sought by

[23] *Id.* at 992.

[24] Order re: Mots. for Summ. J. at 6. The Ninth Circuit has noted, "NEPA's public comment procedures are at the heart of the NEPA review process." *California v. Block*, 690 F.2d 753, 770 (9th Cir. 1982).

[25] 40 C.F.R. § 1500.1(b).

[26] Order re: Mots. for Summ. J. at 9.

[27] *Id.* at 43–48.

[28] *Id.* at 50.

Conoco, had less impact on the environment.[29] As the Court noted, HDD was a "key feature" of the alternatives identified by the Corps.[30] After the appeal of the 2010 Corps decision, the Corps relied heavily on post-2004 information to support the reversal of its LEDPA decision.[31] The Court recognized that this information was critical to the Corps' reversal.[32] However, this information was never considered in the 2004 EIS, nor was it available for review by the public and subject to public comment in a subsequent NEPA process. The 2010 and 2011 LEDPA determinations authorize dramatically different projects with significantly different impacts to the environment and subsistence resources. Given the critical nature of the post-2004 information in justifying the Corps' LEDPA reversal, the Corps' failure to consider the significance of that information under NEPA was serious.

By vacating the permit and remanding the Decision back to the Corps, the Corps can properly evaluate the significance of the information and determine whether an SEIS is required. Only through reconsideration of the information, along with the consideration of comments from the public, as well as other government agencies, can the Corps address this serious error and meet NEPA's mandate to make an informed decision.

2. Vacatur Would Have No Disruptive Consequences.

Application of the second *California Communities* factor indicates that vacatur of the Corps' decision would have no disruptive consequences of the type other courts have found to warrant remand without vacatur — specifically, where vacating the permit would cause more environmental harm than it would prevent or where the objective of the statute would be thwarted.[33] Vacating the permit would not cause more environmental harm than it would prevent and there are no extraordinary circumstances that would justify remand without vacatur. There is no similarity between halting construction in sensitive and ecologically valuable wetlands and the disruptive consequences found in *California Communities* and related case law. Unlike *Idaho Farm Bureau*, where vacatur of the agency's protective rule would have placed an endangered

[29] *Id.* at 15.

[30] *Id.*

[31] *Id.* at 17, 48.

[32] *Id.* at 49 (noting that the post-2004 information "caused the Corps to modify its LEDPA determination from the HDD alternatives to the bridges").

[33] *See supra* Argument Part I.B (discussing the limited circumstances in which the court will depart from the standard remedy of remand with vacatur).

species at greater risk of extinction,[34] vacating the Corps' Decision would prevent further harm to the environment while the agency complies with NEPA. The facts of *California Communities* are also distinguishable. In that case, not only was the power supply for the region at risk, but vacating the permit might have led to the precise type of harm — more air pollution — the Clean Air Act was designed to prevent.[35] Conversely, vacatur in this case will ensure that no further environmental damage is done to the Colville River Delta while the Corps corrects its NEPA violation.[36]

Similarly, unlike the situation in *Western Oil and Gas*,[37] vacatur would not thwart the operation of NEPA. To the contrary, vacating the permit would ensure that the purposes of NEPA are met and that the agency does not simply defend a preordained conclusion. The purpose of NEPA is to ensure that "important effects will not be overlooked or underestimated only to be discovered after resources have been committed or the die otherwise cast."[38] A significant concern here is that the Corps, in having reached a particular result, "may become so committed to that result as to resist in engaging in any genuine reconsideration of the issues."[39] Remanding without vacatur would foster "the danger that an agency, having reached a particular result, may become so committed to that result as to resist engaging in any genuine reconsideration of the issues."[40] Vacatur is, therefore, appropriate to ensure that the Corps makes

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[34] 58 F.3d at 1405–06.

[35] 688 F.3d at 993–94.

[36] At this time, Kunaknana Plaintiffs do not seek a declaratory order directing Conoco to remove the bridge pilings, road, and pad. Such relief would be appropriate should the Corps, on remand, find that the road and bridge alternative, as proposed, is not the LEDPA.

[37] 633 F.2d at 813.

[38] *Robertson v. Methow Valley Citizens Council*, 490 U.S. 332, 349 (1989); *cf.* Order re: Mots. for Summ. J. at 56 ("NEPA procedures are designed to ensure that the agency and the public have an opportunity to consider all of the relevant environmental information 'before decisions are made and before actions are taken.'" (quoting 40 C.F.R. § 1500.1(b))); *Or. Natural Desert Ass'n v. Bureau of Land Mgmt.*, 625 F.3d 1092, 1099 (9th Cir. 2008) ("NEPA's purpose is realized not through substantive mandates but through the creation of a democratic decisionmaking structure that, although strictly procedural, is 'almost certain to affect the agency's substantive decision[s].'" (alteration in original) (quoting *Robertson*, 490 U.S. at 350)).

[39] *Food Mktg. Inst. v. Interstate Commerce Comm'n*, 587 F.2d 1285, 1290 (D.C. Cir. 1978).

[40] *Id.* at 1290; *see also Metcalf*, 214 F.3d at 1146 (questioning whether, absent vacatur, a new NEPA document would "be a classic Wonderland case of first-the-verdict, then-the-trial").

a fully informed decision with the full benefit of robust public and expert agency review rather than simply be an exercise "designed to rationalize a decision already made."[41]

Overall, there are no extreme circumstances that would justify departing from the standard remedy of remand with vacatur. The NEPA violation was serious and vacatur would ensure that no additional harm to the environment or human health occurs, while also allowing the Corps the opportunity to review whether a supplemental environmental assessment (EA) or SEIS is necessary without simply providing a post hoc justification for its decision.[42]

II. ABSENT VACATUR, A PERMANENT INJUNCTION IS WARRANTED.

Vacatur is the appropriate remedy under the APA for the Corps' violation of NEPA. If, however, this Court does not vacate the Decision, an injunction halting construction of the project (e.g., further fill work, bridge, pad and road construction and improvements, etc.) until the Corps complies with NEPA and the court's order is warranted because continued activities will impact the environment and would further constrain any possible changes or mitigation to the project stemming from the Corps' review on remand. Without vacatur or an injunction, Conoco would be able to continue construction under an illegal permit.

In *Monsanto v. Geertson Seed Farms*, the Supreme Court indicated that injunctive relief should not be granted as a matter of course[43] — but, injunctive relief is still an available remedy. The Court in *Monsanto* addressed the distinction between injunctive relief and vacatur, stating that vacatur is the "less drastic remedy" and that the "additional" relief of an injunction may not

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[41] *Metcalf*, 214 F.3d at 1142. Remand with vacatur also ensures that the prohibition on *post hoc* justifications is enforced, as the agency's "failure to respect the process mandated by law cannot be corrected with post-hoc assessments of a done deal." *Natural Res. Def. Council v. Houston*, 146 F.3d 1118, 1129 (9th Cir. 1998); *see also Independence Mining Co. v. Babbitt*, 105 F.3d 502, 511 (9th Cir. 1997) ("The rule barring consideration of post hoc agency rationalizations operates where an agency has provided a particular justification for a determination at the time the determination is made, but provides a different justification for that same determination when it is later reviewed by another body.").

[42] *See Ctr. for Envtl. Law & Policy v. U.S. Bureau of Reclamation*, 655 F.3d 1000, 1006 (9th Cir. 2011) ("To avoid *post hoc* agency rationalizations, '[p]roper timing is one of NEPA's central themes.' The agency must complete an EA before the 'go-no go' stage of a project, which is to say before 'making an irreversible and irretrievable commitment of resources.'" (internal citations omitted) (quoting *Save the Yaak Comm. v. Block*, 840 F.2d 714, 718 (9th Cir. 1988); *Metcalf*, 214 F.3d at 1142)).

[43] 561 U.S. 139, 165–66 (2010).

be warranted if vacatur is sufficient to address a plaintiff's injury.[44] Before *Monsanto*, courts would often grant or deny the plaintiff injunctive relief without considering or even mentioning vacatur, or would grant both vacatur and injunctive relief.[45] But this case law should now be read in light of the Supreme Court's clarification that vacatur is preferred over injunctive relief; however, injunctive relief is still an available remedy, in addition to, or in the alternative to, vacatur.[46]

While courts still have discretion as to which remedy to apply under *Monsanto*, courts must provide a remedy sufficient to address the violation at issue.[47] If this Court finds vacatur inappropriate, the Court should exercise its equitable discretion to issue a permanent injunction enjoining all activities under the unlawfully issued permit until the Corps complies with NEPA. To determine whether a permanent injunction is warranted, Courts consider four factors: (1) whether plaintiff has suffered an irreparable injury; (2) whether available remedies, including monetary damages, will not adequately compensate for that injury; (3) whether an equitable remedy is warranted in light of the balance of hardships between the plaintiff and defendant; and (4) whether the public interest will not be disserved by a permanent injunction.[48] Plaintiffs meet all four of these criteria.

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[44] *Id.*

[45] *See, e.g.*, *Lands Council v. Powell*, 395 F.3d 1019, 1037 (9th Cir. 2004); *High Sierra Hikers v. Blackwell*, 390 F.3d 630, 640 (9th Cir. 2004); *Idaho Sporting Cong., Inc. v. Rittenhouse*, 305 F.3d 957, 975 (9th Cir. 2002).

[46] *See, e.g.*, *Van Antwerp*, 719 F. Supp. 2d at 78–79 (indicating that, in line with *Monsanto*, partial vacatur was the "presumptively appropriate remedy," but also requesting additional briefing on plaintiff's request for an injunction).

[47] *United States v. Oakland Cannabis Buyers' Coop.*, 532 U.S. 483, 497–98 (2001) ("[A district court's] choice . . . is simply whether a particular means of enforcing a statute should be chosen over another permissible means; their choice is not whether enforcement is preferable to no enforcement at all. Consequently, when a court of equity exercises its discretion, it may not consider the advantages and disadvantages of nonenforcement of the statute, but only the advantages and disadvantages of 'employing the extraordinary remedy of injunction[]' over the other available methods of enforcement." (citation omitted) (quoting *Weinberger v. Romero-Barcelo*, 456 U.S. 305, 312 (1982))); *see also Monsanto*, 561 U.S. at 174 (Stevens, J., dissenting) ("[I]t is important to observe that when a district court is faced with an unlawful agency action, a set of parties who have relied on that action, and a prayer for relief to avoid irreparable harm, the court is operating under its powers of equity. In such a case, the court's function is 'to do equity and to mould each decree to the necessities of the particular case.'" (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944))).

[48] *Monsanto*, 561 U.S. at 156–57 (majority opinion).

If construction activity is allowed to proceed in spite of the Corps' NEPA violation, Plaintiffs will suffer both procedural injuries and irreparable substantive injuries from the environmental harms. The Supreme Court has explained that "[e]nvironmental injury, by its nature . . . is often permanent or at least of long duration, *i.e.*, irreparable."[49] Plaintiffs live, recreate, and conduct subsistence activities in the project area.[50] Plaintiffs' subsistence, cultural, recreations, and aesthetic interests will be irreparably harmed by allowing Conoco to continue construction.[51] These harms are sufficient to establish irreparable injury for injunctive relief purposes.[52]

Allowing activities to continue pursuant to a permit issued in violation of NEPA would also procedurally harm Plaintiffs. In the NEPA context, the Ninth Circuit has observed that "irreparable injury flows from the failure to evaluate the environmental impact of a major federal action."[53] Courts presume that there is "[i]rreparable damage . . . when an agency fails to evaluate thoroughly the environmental impact of a proposed action."[54] As one court noted, "the

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[49] *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987); *see also Winter v. Natural Res. Def. Council*, 555 U.S. 7, 23 (2008) (indicating harm is most likely to occur when "a new type of activity with completely unknown effects on the environment" is at issue); *id.* ("Part of the harm NEPA attempts to prevent in requiring an EIS is that, without one, there may be little if any information about prospective environmental harms and potential mitigating measures.").

[50] *See* Decl. of Sam Kunaknana in Supp. of Pls.' Mot. for Summ. J. at 1–3 ¶¶ 3–12 [hereinafter Decl. of S. Kunaknana] (Doc. 110); Decl. of Martha Itta in Supp. of Pls.' Mot. for Summ. J. at 1–3 ¶¶ 3–11 [hereinafter Decl. of M. Itta] (Doc. 111); Decl. of Robert Nukapigak in Supp. of Pls.' Mot. for Summ. J. at 1–3 ¶¶ 3–11 [hereinafter Decl. of R. Nukapigak] (Doc. 112); Decl. of John Nicholls in Supp. of Pls.' Mot. for Summ. J. at 1–3 ¶¶ 3–10 [hereinafter Decl. of J. Nicholls] (Doc. 114); Decl. of Clarence Ahnupkana in Supp. of Pls.' Mot. for Summ. J. at 1–3 ¶¶ 3–11 [hereinafter Decl. of C. Ahnupkana] (Doc. 113); AR 451; *see also* Mem. in Supp. of Mot. for Summ. J. at 12–15 (Doc. 108); Mem.in Supp. of Mot. for TRO and Prelim. Inj. at 11–14 (Doc. 150).

[51] *See* Decl. of S. Kunaknana at 1–3 ¶¶ 2–12; Decl. of M. Itta at 1–3 ¶¶ 2–11; Decl. of R. Nukapigak at 1–3 ¶¶ 2–11; Decl. of J. Nicholls at 1–3 ¶¶ 2–10; Decl. of C. Ahnupkana at 1–3 ¶¶ 2–11.

[52] *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1138 (9th Cir. 2011).

[53] *Sierra Club v. Bosworth*, 510 F.3d 1016, 1034 (9th Cir. 2007); *see also Blackwell*, 390 F.3d at 642 ("In the NEPA context, irreparable injury flows from the failure to evaluate the environmental impact of a major federal action."); *Sierra Club v. U.S. Army Corps of Eng'rs*, 645 F.3d 978, 994 (8th Cir. 2011) (noting that irreparable harms to plaintiffs "flow[] from a violation of NEPA itself").

[54] *Save Our Ecosystems v. Clark*, 747 F.2d 1240, 1250 (9th Cir. 1984); *see also S. Fork*

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public's interest in the NEPA process will be degraded if the process is reduced to a series of hurdles to be cleared en route to a predetermined result."[55] The Corps' NEPA violations have deprived Plaintiffs of the opportunity to participate in the NEPA process "at a time when such participation is required and is calculated to matter."[56] The harm to Plaintiffs is, therefore, irreparable.

Remedies available at law, such as monetary damages, are inadequate to remedy Plaintiffs' injuries. As both the Supreme Court and the Ninth Circuit have held, "[e]nvironmental injury, by its nature, can seldom be adequately remedied by money damages."[57] Plaintiffs' environmental injuries, which will have permanent and irreparable impacts to their subsistence activities and to the Colville River Delta, require equitable relief.

The balance of hardships also favors an injunction. When balancing hardships in a case where environmental harm is likely, "the balance of harms will usually favor the issuance of an injunction to protect the environment."[58] Here, Plaintiffs have a strong interest in protecting their subsistence resources and the Colville River Delta from further harm. The Colville River Delta is a unique, ecologically rich, and internationally significant area. If there is no injunction to maintain the status quo while the Corps complies with NEPA, there will be irreparable harm to Plaintiffs. Moreover, Plaintiffs are not seeking at this time to have Conoco remove the existing infrastructure and the injunction Plaintiffs request would remain in effect only until the Corps completes a lawful NEPA analysis.

The public interest will also not be disserved by an injunction. It is well established that the public has a considerable interest in preventing irreparable harm to the environment.[59] The

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Band Council of W. Shoshone of Nev. v. U.S. Dep't of Interior (*W. Shoshone*), 588 F.3d 718, 728 (9th Cir. 2009) ("The likelihood of irreparable environmental injury without adequate study of the adverse effects and possible mitigation is high."); *Protect Key West, Inc. v. Cheney*, 795 F. Supp. 1552, 1563 (S.D. Fla. 1992) (granting an injunction based on the inadequacy of an Environmental Assessment because "[i]rreparable harm results where environmental concerns have not been addressed by the NEPA process").

[55] *Mont. Wilderness Ass'n v. Fry*, 408 F. Supp. 2d 1032, 1037 (D. Mont. 2006).

[56] *Save Strawberry Canyon v. Dep't of Energy*, 613 F. Supp. 2d 1177, 1189 (N.D. Cal. 2009) ("There is no doubt that the failure to undertake an EIS when required to do so constitutes procedural injury to those affected by the environmental impacts of a project.").

[57] *Bosworth*, 510 F.3d at 1033; *see also Amoco Prod. Co.*, 480 U.S. at 545.

[58] *Amoco Prod. Co.*, 480 U.S. at 545.

[59] *Lands Council v. McNair*, 537 F.3d 981, 1005 (9th Cir. 2008) (en banc) ("[P]reserving

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Ninth Circuit recognizes "the public interest in careful consideration of environmental impacts before major federal projects go forward, and [has] held that suspending such projects until that consideration occurs 'comports with the public interest.'"[60] The public interest in this case favors "issuance of an injunction because allowing a potentially environmentally damaging program to proceed without an adequate record of decision runs contrary to the mandate of NEPA."[61]

Therefore, Plaintiffs meet the requirements for a permanent injunction. If the Court does not vacate the Decision, the Court should exercise its equitable powers and enjoin all activities under the unlawfully issued Section 404 permit until the Corps complies with NEPA and the Court's order.

III. ABSENT VACATUR, THE COURT SHOULD ADDRESS THE CORPS' COMPLIANCE WITH THE CWA.

If the Court declines to vacate the Decision, Plaintiffs also respectfully request that the Court resolve the outstanding CWA claim. The Corps' 404 permit decision must stand on the record before the agency when it made its decision.[62] The Corps' NEPA obligations are distinct from its CWA duties. Whether the Corps has adequately supported its decision to reverse the CWA Section 404 determination has been fully briefed. The NEPA remand process cannot be used to provide additional support for the Corps' 404 permit decision because reliance on any NEPA remand analysis to support the existing CWA permit would be an unlawful post hoc rationalization for the Corps' 404 permit decision.[63] Because the decision must be supported by

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environmental resources is certainly in the public's interest."), *overruled on other grounds by Winter*, 555 U.S. 7; *see also Alliance for the Wild Rockies*, 632 F.3d at 1138 (indicating there is a "well-established 'public interest in preserving nature and avoiding irreparable environmental injury'" (quoting *McNair*, 537 F.3d at 1005)).

[60] *Alliance for the Wild Rockies*, 632 F.3d at 1138 (quoting *W. Shoshone*, 588 F.3d at 728).

[61] *Bosworth*, 510 F.3d at 1033; *see also Alliance for the Wild Rockies*, 632 F.3d at 1138.

[62] *See Nat'l Wildlife Fed'n v. U.S. Army Corps of Eng'rs*, 384 F.3d 1163, 1170 (9th Cir. 2004). While the Court has properly identified that NEPA procedures are designed to ensure informed decision making and to ensure that both the public and other agencies have an opportunity to consider all the relevant information *before* the Corps issues a new decision on remand, the Corps' efforts to address the NEPA violations will not have a bearing on whether the 404 permit decision is supported by the record, *i.e.*, whether the Corps violated the CWA in addition to violating NEPA.

[63] *See e.g.*, *Bosworth*, 510 F.3d at 1026 ("Post-hoc examination of data to support a pre-determined conclusion is not permissible because '[t]his would frustrate the fundamental purpose of NEPA, which is to ensure that federal agencies take a "hard look" at the environmental consequences of their actions, early enough so that it can serve as an important contribution to

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the record before the agency at the time of the decision, there is no reason to defer a decision as to whether the Corps complied with the CWA. Further, a summary judgment ruling on the CWA claim would benefit the Court and the agency in determining the scope for remand.

IV. FURTHER DECLARATORY RELIEF IS APPROPRIATE.

Plaintiffs sought declaratory relief, in addition to vacating the 404 permit and issuing appropriate injunctive relief.[64] Because the Court properly found that the Corps violated NEPA, declaratory relief is proper.[65] The Court has already provided a declaratory order that the "Corps' determination that a [SEIS] was unnecessary was arbitrary and capricious."[66] Plaintiffs now seek the standard declaratory relief from the Court vacating the Decision issued by the Corps, and requiring the Corps to conduct appropriate environmental analyses under NEPA prior to reissuing a 404 permit for Conoco.[67]

In *Oregon Natural Resources Council Action v. U.S. Forest Service*, the District Court directed the Forest Service to cure its NEPA violations on remand. Similar to this case, the

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the decision making process.'" (quoting *California v. Norton*, 311 F.3d 1162, 1175 (9th Cir. 2002) (citation omitted))); *Sw. Ctr. for Biological Diversity v. U.S. Forest Serv.*, 100 F.3d 1443, 1450 (9th Cir. 1996) ("[P]ost-decision information[] . . . may not be advanced as a new rationalization either for sustaining or attacking an agency's decision."); *Defenders of Wildlife v. Norton*, 258 F.3d 1136, 1146 n.12 (9th Cir. 2001) ("[W]e cannot affirm the decision of an agency on a ground that the agency did not invoke in making its decision." (quoting *Pinto v. Massanari*, 249 F.3d 840, 847 (9th Cir. 2001))); *Fort Funston Dog Walkers v. Babbitt*, 96 F. Supp. 2d 1021, 1032–33 (N.D. Cal. 2000) (holding the justification for a decision must be contemporaneous with the decision and cannot be supplied after the fact).

[64] *See* Compl. at 29 (Prayer for Relief) (Doc. 1).

[65] *See* Order re: Mots. for Summ. J. at 57–58.

[66] *Id.*

[67] *See W. Watersheds v. U.S. Forest Serv.*, No. C 08-1460 PJH, 2012 WL 1094356 (N.D. Cal. Mar. 30, 2012) (issuing similar declaratory relief); *League of Wilderness Defenders v. Marquis-Brong*, 259 F. Supp. 2d 1115, 1128 (D. Or. 2003) (indicating Plaintiffs were entitled to a declaratory judgment establishing that proceeding with the logging project was not in accordance with applicable law, and would be an arbitrary and capricious agency action under the APA in violation of NEPA); *S. Fork Band Council of W. Shoshone of Nev. v. U.S. Dep't of the Interior*, No. 3:08-CV-00616-LRH-WGC, 2012 WL 13780 (D. Nev. Jan. 4, 2012) (indicating the court granted declaratory relief to the tribes on their claim that the Bureau of Land Management violated NEPA by failing to conduct an appropriate mitigation analysis for the environmental consequences of mine dewatering in the original EIS), *aff'd sub nom. Te-Moak Tribe of W. Shoshone Indians of Nev. v. U.S. Dep't of the Interior*, No. 12-15412, 2014 WL 1244275 (9th Cir. Mar. 27, 2014); *Blackwell*, 390 F.3d at 640 (indicating the district court's declaratory order directing the Forest Service to complete NEPA analysis by a date certain was proper).

Forest Service had failed to support its decision not to supplement its previous NEPA analysis.[68] The District Court found that the record failed to include a reasoned explanation for why certain information regarding the northern spotted owl was not significant and did not warrant supplemental NEPA analysis.[69] Eight years had passed between the Forest Service's decision and the EA it relied upon.[70] In that period, additional information about the northern spotted owl had come to light.[71] The court found that this information "justifie[d] taking another hard look at whether any logging of suitable owl habitat [was] a significant environmental impact warranting supplemental analysis."[72] On the matter of appropriate remedy and declaratory relief, the court ordered that

> the agency must provide a more careful, complete, and thorough explanation of why new information regarding the Northern Spotted Owl is, or is not, significant and whether it warrants additional supplementation of the EAs and [supplemental EAs] or preparation of an EIS. It must also evaluate the significance of other new information which it refused to consider in the Review & Analysis.[73]

In this case, the Court should issue similar declaratory relief, ordering the Corps to conduct a "hard look"[74] analysis of the post-2004 EIS information and project changes, and prepare a complete and thorough explanation of whether that information is significant and warrants supplemental NEPA analysis. The Court should further direct the Corps to consider any relevant climate change information that has come to light since 2004 and determine whether that information is significant and warrants supplemental NEPA analysis.[75]

In addition, Plaintiffs respectfully request that the Court direct the Corps to (1) make the draft of their assessment regarding whether supplemental NEPA analysis is required available to

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[68] *See* 445 F. Supp. 2d 1211, 1225–29 (D. Or. 2006).
[69] *Id*. at 1226–27.
[70] *Id*. at 1228.
[71] *Id*.
[72] *Id.*
[73] *Id*. at 1231–32.
[74] *See Marsh v. Or. Natural Res. Council*, 490 U.S. 360, 385 (1989) ("[R]egardless of its eventual assessment of the significance of this information, the Corps had a duty to take a hard look at the proffered evidence."); *Or. Natural Res. Council Action*, 445 F. Supp. 2d at 1228; *Friends of the Clearwater v. Dombeck*, 222 F.3d 552, 557 (9th Cir. 2000).
[75] *See Friends of the Clearwater*, 222 F.3d at 557 (recognizing that the agency has an independent obligation to be alert to significant new information and must continue to take a hard look at the environmental effects of the proposed action even after a proposal has received initial approval).

the public, (2) make all studies and reports that the agency relies upon available to the public and other government agencies, and (3) provide an opportunity for public comment prior to issuing a final decision on whether to supplement the 2004 EIS. This will ensure the public and other agencies have the opportunity to meaningfully participate and will uphold the integrity of the NEPA process.

CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that the Court vacate the Section 404 permit and 2011 ROD and remand the matter back to the Corps. In the alternative, Plaintiffs request that the Court enjoin all activities under the unlawfully issued permit until the Corps complies with NEPA, and that the Court decide the CWA claims. Plaintiffs also respectfully request that the Court issue declaratory relief requiring the Corps to conduct appropriate NEPA analyses with public involvement prior to reissuing a 404 permit for Conoco.

Respectfully submitted, this 17th day of June, 2014.

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CERTIFICATE OF SERVICE

I certify that on June 17, 2014, I caused a copy of **Plaintiffs' Submission on Further Proceeding** to be electronically filed with the Clerk of the Court for the U.S. District Court of Alaska using the CM/ECF system, which will send electronic notification of such filings to the attorneys of record in this case, all of whom are registered with the CM/ECF system.

__s/ Brian Litmans_____
Attorney