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IN THE UNITED STATES DISTRICT COURT

FOR DISTRICT OF OREGON

PORTLAND DIVISION

LEAGUE OF WILDERNESS DEFENDERS/BLUE MOUNTAINS BIODIVERSITY PROJECT, an Oregon nonprofit corporation,

Plaintiff,

vs.

UNITED STATES FOREST SERVICE, an agency of the United States Department of Agriculture; and **KENT CONNAUGHTON**, Regional Forester, Pacific Northwest Region of the Forest Service,

Defendants.

Case Number: CV-10-1397-SI

PLAINTIFF'S MEMORANDUM IN SUPPORT OF ITS MOTION TO PARTIALLY VACATE DEFENDANTS' ILLEGAL RECORD OF DECISION OR IN THE ALTERNATIVE FOR A PERMANENT INJUNCTION AGAINST CERTAIN HERBICIDE SPRAYING

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Federal Statutory Provisions

Federal Regulations

Other

INTRODUCTION

Plaintiff League of Wilderness Defenders/Blue Mountains Biodiversity Project (LOWD) has moved this Court for an Order vacating that portion of the Forest Service's April 2012 Record of Decision (AR 22620-22671) authorizing the use of herbicides on any national forest lands where herbicide use was not authorized under prior Forest Service decisions. This partial vacatur would still allow the Forest Service to fight invasives by: (1) using both old and new herbicides on the prior acreages where herbicide use was authorized by earlier decisions under certain circumstances, (2) using any method authorized in the ROD other than herbicide spraying on new acreages specifically identified in the ROD and under its Early Detection Rapid Response Program.

Under well-established case law, including numerous opinions from the U.S. Supreme Court, setting aside or vacating an agency decision that violates Section 706(2)(A) of the Administrative Procedure Act is the presumed or standard remedy. Many appellate court decisions, including most recently *California Communities Against Toxics v. EPA*, __ F.3d __, 2012 WL 3038520 (9th Cir. July 26, 2012), also have acknowledged that a district court maintains its equitable discretion to not, or only partially, vacate an illegal decision. However, those same court decisions also note the limited scope of that discretion and have carefully considered the nature of the underlying violation. In the case of NEPA violations, the courts have almost never remanded without also ordering significant restrictions on the agency's on-the - ground activities that have not yet been properly and publicly analyzed under NEPA. All of this case law also must be read in light of the U.S. Supreme Court's recent decision in *Monsanto v. Geertson Seed Farms,* 130 S.Ct. 2743, 2761(2010), which held that injunctions are an extraordinary remedy that can only be considered after a court has addressed the "less drastic

remedy" of vacatur.

Here ordering the partial vacatur requested by LOWD is entirely consistent with the test for vacatur set out in *California Communities*. Partial vacatur recognizes the serious NEPA violation identified by this Court. Ordering partial vacatur also would uphold NEPA's fundamental requirement that agencies not take actions until after they have fully and publicly analyzed the impacts of those proposed actions and enforces NEPA's more specific requirement that such analysis must include a meaningful consideration of cumulative impacts. Because this Court found that the EIS for the ROD did not properly analyze the cumulative impacts of any of the new invasive species control activities authorized by that ROD, Amended Order, Doc. 60 at 49-55, LOWD believes it would be justified in seeking total vacatur of the ROD. However, because LOWD acknowledges the serious nature of the invasive species problem, LOWD is seeking only a partial vacatur that would prevent the Forest Service from undertaking the activities with the most uncertain and possibly harmful cumulative impacts, herbicide spraying in newly authorized areas. By limiting its request to partial vacatur LOWD avoids any rational argument that, under the *California Communities* test, the disruptive consequences of such relief instead require the unusual and extreme "remedy" of remand without vacatur.

In the alternative, if the Court denies such partial vacatur, LOWD seeks, consistent with the test for such relief set out in *Monsanto,* a specific and targeted permanent injunction prohibiting any herbicide spraying in areas where there could be cumulative impacts, such as riparian areas near temperature impaired streams and areas with prior grazing activity, and in areas where spraying would cause harm to LOWD's members' use of the Wallowa-Whitman National Forest, such as areas where those members recreate or gather edible plants.

ARGUMENT

I. LOWD is Entitled to Partial Vacatur of the Forest Service's Record of Decision.

A. Vacatur and Remand is the Presumptively Appropriate Remedy for Violations of Section 706 (2)(A) of the APA.

In this case, the Forest Service's Record of Decision ("ROD")(AR 22620) and supporting Environmental Impact Statement ("EIS")(AR 21906) were properly before this Court as "final agency action" under the APA, 5 U.S.C. § 706(2). In its Order, this Court found the Forest Service's cumulative effects analysis in the EIS arbitrary and capricious in violation of the APA. *See* Order, Doc. No. 60 at 49-55. Accordingly, by adopting the ROD without a valid EIS, the Forest Service has violated Section 706(2)(A). *Oregon Natural Desert Assoc. v. BLM*, 531 F.3d 114, 1143 (9th Cir. 2008). This same section of the APA uses apparently mandatory language to instruct that, the "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." Id. § 706(2)(A). "Set aside" means to vacate. See BLACK'S LAW DICTIONARY 1404 (8th Ed. 2004) ("set aside" means "to annul or vacate."); *cf. Checkosky v. SEC*, 23 F.3d 452, 491 (D.C. Cir. 1994) (op. of Randolph, J.) ("Setting aside means vacating; no other meaning is apparent.").[1]

For decades, the Supreme Court, starting with its seminal APA decision in *Overton Park*, has explained that the statutory language in Section 706(2)(A) means 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.'" *Fed. Commc'ns Comm'n v. NextWave Personal Commc'ns Inc.*, 537 U.S. 293, 300 (2003) (quoting *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402,

413-14 (1971)) (emphasis added); *see also Fed. Power Comm'n v. Transcon. Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976) (explaining that "[i]f the decision of the agency is not sustainable on the administrative record made, then the . . . decision must be vacated and the matter remanded"); *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 25 (1998) ("If a reviewing court agrees that the agency misinterpreted the law, it will set aside the agency's action and remand the case."). Numerous Ninth Circuit cases have repeated this statutory admonition. E.g., *Southeast Alaska Conservation Council et al. v. U.S. Army Corps of Engineers*, 486 F.3d 638, 654-55 (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. Southeast Alaska Conservation Council*, 557 U.S. 261 (2009); *N.W. Envtl. Def. Ctr. v. Bonneville Pwr. 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.'"); *Idaho Sporting Cong. Inc. v. Alexander*, 222 F.3d 562, 567-68 (9th Cir. 2002) ("agency action taken without observance of the procedure required by law will be set aside.").

Despite this statutory language, and the repeated statements to the contrary from the Supreme Court, another line of lower court precedent has found that even when an agency decision violates Section 706 the APA, a federal court, when fashioning an appropriate remedy, has the discretion not to vacate the illegal agency decision. See *California Communities,* 2012 WL 3038520, *2, citing, *Idaho Farm Bureau Fed'n v. Babbitt*, 58 F.3d 1392, 1405 (9th Cir. 1995); *W. Oil & Gas Ass'n v. EPA*, 633 F.2d 803, 813 (9th Cir. 1980*); Allied-Signal, Inc. v. U.S. Nuclear Regulatory Comm'n,* 988 F.2d 146, 15051 (D.C.Cir. 1993). However, *California*

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[1] *See also* Ronald M. Levin, "Vacation" at Sea: Judicial Remedies and Equitable Discretion in Administrative Law, 53 Duke L.J. 291, 309-310 (2003) (recognizing that "set aside" literally means "vacate.")

Communities, 2012 WL 3038520, *3, *also* acknowledged that "we have only ordered remand without vacatur in limited circumstances." Indeed almost every court recognizing or applying this discretion has specifically acknowledged its limited applicability or explained, using varying language, that vacatur is in fact the "presumptive" or "ordinary" remedy for violations of Section 706. *Idaho Farm Bureau*, 58 F.3d at 1405 ("ordinarily"); Sierra *Club v. Van Antwerp*, 719 F. Supp.2d 77, 78 (D.D.C. 2010) ("presumptively appropriate remedy for a violation of the APA."), *aff'd in part, rev'd in part on other grounds*, 661 F.3d 1147 (D.C. Cir. 2011); "standard" (*Humane Society of U.S. v. Johanns*, 520 F.Supp.2d 8, 37 (D.D.C. 2007)), "presumptive" (*In re Polar Bear Endangered Species Act Listing 4(d) Rule Litig.*, 818 F. Supp. 2d 214, 238 (D.D.C. 2011)), "default" (*Reed v. Salazar*, 744 F. Supp. 2d 98, 119 (D.D.C. 2010)), and "normal[]" (*Am. Bioscience, Inc. v. Thompson,* 269 F.3d 1077, 1084 (D.C.Cir.2001)). *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.") Indeed just last week the District Court for the District of Idaho found NEPA violations regarding the Forest Service's approval of a mining exploration project and vacated the underlying agency decision without further briefing. *Idaho Conservation League v. U.S. Forest Service,* No. 11-CV-00341-ELJ, 2012 WL 3758161, *22 (D. Idaho. August 29, 2012).

B. The Presumption in favor of Vacating Illegal Agency Decisions Should Be Even Stronger after the Supreme Court's Decision in Monsanto.

Almost all of the case law addressing remedies for violations of the APA precedes the recent decision in *Monsanto*, an APA/NEPA case, where the Supreme Court specifically addressed the distinction between injunctive relief and vacatur, stating that vacatur is the "less

drastic remedy" and that injunctive relief is "extraordinary" and "not granted as a matter of course." 130 S.Ct. at 2761. Significantly, before *Monsanto*, much of the APA case law generally, and the NEPA case law specifically, granted the plaintiff injunctive relief without considering or even mentioning vacatur. See, e.g., *Neighbors of Cuddy Mountain v. USFS,* 137 F.3d 1372 (9th Cir. 1998). By the same token many of the cases addressing a court's discretion not to vacate an illegal agency decision were issued before the Supreme Court put new and significant restrictions on the alternative, injunctive relief available to a plaintiff to remedy illegal agency action. See, e.g., *Allied Signal Inc. v. U.S. Nuclear Regulatory Comm'n,* 988 F.2d 146(D. C. Cir. 1993). All of this case law must be read in light of the Supreme Court's recent clarification of the remedial hierarchy for agency violations of the APA and NEPA. See, e.g., *Sierra Club v. Van Antwerp,* 719 F.Supp. 2d 77, 78-80 (D.D.C. 2010)(seeking additional briefing after *Monsanto* on plaintiff's request for injunction and instead granting partial vacatur); *Center for Food Safety v. Vilsack*, 734 F.Supp 2d 948, 952 (N.D. Calif. 2010)(on remand from Supreme Court's *Monsanto* decision, district court denies plaintiff's request for injunction, but applies test from *Allied Signal* and orders vacatur with some limitations).

C. Vacatur is now a particularly important remedy for NEPA violations.

Partial Vacatur here is particularly appropriate because NEPA is a procedural statute whose primary purpose is to require federal agencies to analyze and publicly disclose the environmental impacts of their proposals before making or implementing any final decision. See 42 U.S.C. § 4332(c); 40 C.F. R. §§ 1500.1, 1501.2; *Robertson v. Methow Valley Citizens Council,* 490 U.S 332, 348-49 (1989). When remedying the violation of a statute, the courts have the duty to protect the underlying purposes sought to be served by that statute. *See Amoco Production*

Company et al. v. Village of Gambell, Alaska et al., 480 U.S. 531, 542-543 (1987). Where, as here, the statute is purely procedural, and the injury derives from a failure to follow the required process, the courts fashioning relief must focus on protecting the integrity of process. No remedy other than setting aside the decision at least in part can redress a NEPA injury, given the purpose of the statute. Remanding but not vacating, at least in part, a decision that violates NEPA, and thereby allowing the agency to continue to implement its illegal decision before it has corrected its NEPA violation, would turn the statutory purpose of NEPA on its head.

NEPA is "intended to ensure that environmental considerations are 'infused into the ongoing programs and actions of the Federal Government." *Idaho Sporting Cong. Alexander*, 222 F.3d 562, 567 (9th Cir. 2000). As a result, NEPA is only effective if environmental considerations are involved in the initial decision making process, prior to the federal agency taking action. *Metcalf v. Daley*, 214 F.3d 1135, 1141 (9th Cir. 2000); *Sierra Club v. Bosworth*, 510 F.3d 1016, 1033 (9th Cir. 2007)("allowing a potentially environmentally damaging program to proceed without an adequate record of decision runs contrary to the mandate of NEPA," *citing Neighbors of Cuddy Mountain v. Alexander*, 303 F.3d 1059, 1070 (9th Cir. 2002)). While courts of equity may choose among permissible means of enforcing a statute, including whether to order partial or complete vacatur, or even an injunction where necessary, it would be an abuse of such equitable discretion to chose simply not to enforce the statute, which is what would happen if the existing ROD were allowed to stand in its entirety.

For this reason, it was common practice, before *Monsanto*, to enjoin, at least in part, Forest Service projects that violated NEPA. *See e.g. Lands Council v. Powell*, 395 F.3d 1019, 1037 (9th Cir. 2005); *Idaho Sporting Congress, Inc. v. Rittenhouse*, 305 F.3d 957, 975 (9th Cir. 2002); *High Sierra Hikers v. Blackwell,* 390 F.3d 630, 640 (9th Cir. 2004)(explaining importance

of cumulative impacts analysis under NEPA, affirming cumulative impacts violation and upholding injunction against specific activities that could contribute to cumulative impacts). More specifically, in cases finding NEPA violations for agency decisions to authorize herbicide or pesticide spraying, injunctions against such spraying were the standard remedy. See *Southern Oregon Citizens Against Toxic Sprays, Inc. v. Clark,* 720 F.2d 1475 (9th Cir. 1983); *Save Our Ecosystems v. Clark,* 747 F.2d 1240, 1242 (9th Cir. 1984); *Citizens Against Toxic Sprays v. Bergland*, 428 F.Supp. 908 (D. Or. 1977), *supplemented*, 1978 WL 23466 (D.Or. Apr. 18, 1978); *Nw. Coalition for Alternatives to Pesticides v. Lyng,* 673 F.Supp. 1019 (D.Or. 1987), *aff'd*, 844 F.2d 588 (9th Cir. 1988)(lifting injunction against herbicide spraying only after agency issued SFEIS correcting NEPA violation).

Now after *Monsanto* and its mandate to consider vacatur before ordering injunctive relief, ordering vacatur or partial vacatur is necessary to provide NEPA plaintiffs with a meaningful remedy that upholds the purposes of NEPA, and that is exactly the result you see in the post-*Monsanto* NEPA case law. See *Van Antwerp,* 719 F.Supp 2d at 79-80*; Center for Food Safety*, 734 F.Supp 2d at 954-55*; Reed v. Salazar*, 744 F.Supp. 2d 98, 119 (D.D.C. 2010)(citing *Monsanto* and *Allied Signal* when vacating agency decision that violated NEPA); *In re Polar Bear Endangered Species Act Listing*, 818 F.Supp. 2d 214, 238 (D.D.C. 2011)(vacating agency ESA decision not to list species because agency did not prepare EA in violation of NEPA).

Although in prior briefing the Forest Service cited pre-Monsanto cases that it said had refused to order vacatur of illegal agency decisions, See Doc. 57 at 4-5, in most of those cases the courts in fact did not even mention vacatur and instead ordered (or remanded to the district court to consider) substantial injunctive relief that restricted or prohibited all or most of the agencies' proposed actions that could cause environmental impacts. For example, in *Pit River Tribe v.*

USFS the Court refused to enjoin a gas lease, even though the lease was sold in violation of NEPA, because it was sufficient to enjoin "any surface-disturbing activity to occur on any of the leases until they have fully complied with NEPA." *Pit River Tribe v. USFS*, 615 F.3d 1069, 1080 (9th Cir. 2010) (*citing Oregon Natural Res. Council v. BLM*, 470 F.3d 818, 823 (9th Cir. 2006) (holding the BLM's environmental assessment of a project was inadequate and instructing the district court to enjoin the remainder of the project until the BLM provides a revised Environmental Assessment, including the required hard look at the cumulative impacts of the logging….). In *National Wildlife Federation v. Espy*, the issue of vacatur was not before the Court as the plaintiffs were seeking only injunctive and declaratory relief. The Ninth Circuit affirmed the dismissal of the plaintiff's NEPA claims and remanded to the district court to consider the plaintiff's request for injunctive relief to remedy other APA violations. *National Wildlife Federation v. Espy*, 45 F.3d 1337, 1343 (9th Cir. 1995); see also *N. Cheyenne Tribe v. Norton,* 503 F.3d 836, 844-45 (9th Cir. 2007)(upholding partial injunction against improperly authorized oil and gas leases); *Idaho Watersheds Proj.v. Hahn,* 307 F.3d 815, 833-34 (9th Cir. 2002)(imposing restrictions of continuing grazing while agency remedies NEPA violation); *Ctr. for Sierra Nevada Conservation v. USFS,* 832 F. Supp 2d 1138, 1178 (E.D. Calif. 2011)(suggesting total vacatur may not be necessary to remedy NEPA violation and requesting briefing on remedy). None of these cases, previously cited by the Forest Service, directly or indirectly support a remand without vacatur as a "remedy" for a significant NEPA violation like the Forest Service's failure here to analyze the cumulative impacts of their proposal.

D. Remand without vacatur is warranted only in unusual circumstances that do not exist here.

In the Ninth Circuit, remand without vacatur is extremely rare. *Humane Soc'y of the United States v. Locke*, 626 F.3d 1040, 1053 n.7 (9th Cir. 2010) (only "*[i]n rare circumstances*,

when [the court] deem[s] it advisable that the agency action remain in force…will [the Court] remand without vacating the agency's decision.") (emphasis added). 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 decision is vacated. *Ctr. for Food Safety*, 734 F. Supp.2d at 951 (emphasis added) [*citing Idaho Farm Bureau,* 58 F.3d at 1405 (refusing to vacate invalid rule because vacatur would cause "potential extinction of an animal species")]; *see also W Oil & Gas Ass'n v. EPA*, 633 F.2d 803, 813 (9th Cir. 1980) (expressing concern that vacating the decision might "thwart [the]…operation of the Clean Air Act" during reconsideration.").

The Ninth Circuit very recently revisited this issue and reaffirmed that remand without vacatur is only ordered in "limited circumstances". In *California Communities Against Toxics v. EPA*, 2012 WL 3038520 (9th Cir. July 26, 2012), the Court remanded an EPA rule without vacatur because:

> "[t]he delay and trouble vacatur would cause are severe. [The power plant] is scheduled to come on line in November, but vacatur…could well delay a much needed power plant. Without [it], the region might not have enough power next summer, resulting in blackouts. Blackouts necessitate the use of diesel generators that pollute the air, the very danger the Clean Air Act aims to prevent."

Id. at *3. The Court stated that remand without vacatur was ordered so that construction of the power plant may proceed without delay to "save the power supply" and prevent environmental air quality degradation from increased diesel particulates. *Id*. However, the Court specifically stated that this remedy did not authorize commencement of operations at the power plant without a new and valid EPA rule in place. *Id.*

When addressing the propriety of vacatur, the Court in *California Communities* adopted a test from the D.C. Circuit's opinion in *Allied Signal, 988 F.2d at 150-51.* That test requires the

Court to balance the seriousness of the agency's errors against the "disruptive consequences" of vacating the agency's decision. *California Communities,* 2012 WL 3038520, *2-3. As noted above, the 9th Circuit concluded that vacating the agency decision was not appropriate under the unique facts of that case, but its opinion also clarified that its refusal to vacate would in fact not allow the power plant under construction to begin emitting pollution until the EPA had corrected its error.

LOWD will explain below why applying the test from *California Communities/Allied-Signal* requires a different result in this case—partial vacatur of the Forest Service's ROD. However before doing so LOWD must first highlight certain issues that the Ninth Circuit's brief, *per curiam* opinion in *California Communities* did not sufficiently address. That opinion does not address the specific, mandatory language from Section 706(2) of the APA and adopts a test for allowing remand without vacatur from the D.C. Circuit's *Allied-Signal* decision, which is also silent on that issue and in fact does not mention the APA at all.[2] Perhaps more significantly, in both Ninth Circuit cases cited in *California Communities* for the principle that a court can refuse to vacate an illegal agency decision, the courts 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 (refusing to vacate ESA listing decision that violated ESA in order to protect endangered species)[3]; *W.Oil & Gas*, 633 F.2d at 813 (refusing to vacate decision made in violation of the Clean Air Act in order to not disrupt operation of that statute). Neither of those

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[2] Other decisions from the D.C. Circuit that do 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 Section 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).

[3] More recently two district court decisions also have refused to immediately vacate a decision that violated the ESA in order to better protect the listed species. See *Nat'l Wildlife Federation v.*

cases involved NEPA violations or addressed how remand without vacatur for a NEPA violation could be consistent with that statute's underlying purpose. Indeed in prior briefing the Forest Service did not cite a single APA/NEPA case where a court refused to grant a plaintiff either substantial vacatur or substantial injunctive relief after issuing a final ruling finding a violation of NEPA (see discussion above at 8-9), and LOWD's research also has located no such case.[4] Thus *California Communities* and the test it adopts do not change the rule from prior case law that vacatur or partial vacatur is the presumptively appropriate, or the ordinary remedy, after finding a NEPA violation. And ordering such vacatur is also absolutely consistent with that decision and necessary to vindicate NEPA's underlying purpose of requiring agencies to fully consider and publicly disclose their proposal's environmental impacts before implementing such decisions.

E. The Forest Service bears the burden of showing vacatur is inappropriate.

Although the Plaintiff bears the burden of demonstrating that the equities in a case favor any extraordinary injunctive relief, the opposite is true for remand without vacatur. Once a plaintiff has proven a violation of the APA generally, and NEPA specifically, remand with vacatur is the "presumptively appropriate remedy." *Sierra Club v. Van Antwerp*, 719 F.Supp.2d at 78-79 (noting that "the Supreme Court…ha[s] held that remand, along with vacatur, is the presumptively appropriate remedy for a violation of the APA."); *In re Polar Bear Endangered Species Act Listing and 4(d) Rule Litigation*, 818 F.Supp.2d at 238 (same); see also *Am. Bioscience,* 269 F.3d at 1084 (finding that plaintiff entitled to remedy of vacatur under APA

NMFS, 839 F.Supp.2nd 1117 (D.Or. 2011); *Alliance for Wild Rockies v. Lynch*, 728 F.Supp.2d 1126 (D.Mt. 2010).

[4] In contrast courts do sometimes refuse to issue a preliminary injunction for likely NEPA violations where a plaintiff has not shown irreparable harm. See, e.g., *American Motorcycle Assoc. v. Watt*, 714 F.2d 962 (9th Cir. 1983); see also *Winter v. Natural Resources Defense Council*, 555 U.S. 7 (2008).

whether or not plaintiff has shown irreparable injury). [5] The reasons for denying vacatur under the *Allied-Signal* test in fact function more like an equitable defense to vacatur, and the party asserting such a defense, here, the Forest Service, has the burden of proving that those factors outweigh the presumptive or ordinary remedy of vacatur. *See Reno Air Racing Ass'n v. McCord*, 452 F.3d 1126, 1139 (9th Cir. 2006) (party asserting equitable defense "must show" its applicability). Thus, here, in its initial brief supporting its request for relief, LOWD is not obligated to prove the absence of or refute the factors identified in the *California Communities/Allied Signal* decisions that could justify a remand without vacatur. Nevertheless LOWD will address those factors and discuss why they do not support a denial of meaningful relief in this case (meaning remand without vacatur), where LOWD is only seeking partial vacatur. However, LOWD also reserves the right to respond more specifically in its reply brief to any arguments the Forest Service might make in its response to support remand without vacatur.

E. In this case the *California Communities/Allied Signal* Factors do not Support Remand without Vacatur.

(1) The NEPA Cumulative Impacts Violation Identified by the Court is a Serious Violation of NEPA that can only be corrected by a Revised, Public NEPA Analysis before the agency implements its decision.

When considering the appropriateness of vacatur this Court must first consider "how serious the agency's errors are." *California Communities,* *2, citing *Allied Signal,* 988 F.2d at 150-151. Here the Court's summary judgment opinion found that the Forest Service decision had failed to properly analyze the cumulative impacts of its proposal in several different ways. For example, the Court found that the Forest Service's FEIS failed to consider the impacts of treating invasives with herbicides while still allowing the activities that often introduce invasives, it failed

[5] If evidence of irreparable injury is necessary for or relevant to vacatur, LOWD hereby incorporates its discussion below regarding its irreparable harm in support of its alternative

to consider the cumulative impacts of treatments other than herbicide use, and it failed to consider the cumulative impact of spraying herbicides along with the existing or continuing impacts of other activities like grazing or already impaired streams, which also add stress to native ecosystems. Amended Order, Doc. 60, at 52-55. The Court concluded that " "the potential for … serious cumulative impacts is apparent here, such that the subject requires more discussion' than the Project EIS provides." Doc. 60 at 66, quoting *Klamath-Siskiyou Wildlands Center v. BLM,* 387 F.3d 989, 996 (9th Cir. 2004).

As the Court's opinion recognizes, the Ninth Circuit considers the obligation under NEPA to analyze and disclose cumulative impacts to be a significant and important part of NEPA's requirements. Doc. 60, at 50, *citing* numerous Ninth Circuit opinions; see also 40 C.F.R. §§ 1508.7, 1508.25(c)(3), 1508.27(b)(7). Moreover, prior to *Monsanto*, the Ninth Circuit did not hesitate to enjoin agency decisions because of a failure to adequately address cumulative impacts. See, e.g., *Neighbors of Cuddy Mountain v. USFS,* 137 F.3d 1372, 1382 (9th Cir. 1998); *Idaho Sporting Congress v. Thomas,* 137 F.3d 1146, 1154 (9th Cir. 1998), *rev'd on other grounds, Lands Council v. McNair,* 537 F.3d 981, 997 (9th Cir. 2008)(en banc); *High Sierra Hikers Assoc. v. Blackwell,* 390 F.3d 630, 644-45 (9th Cir. 2004)(affirming injunction against certain activities in certain areas to remedy cumulative impacts violation); se also *Ocean Advocates v. U.S. Army Corps,* 402 F.3d 846, 875 (9th Cir. 2005)(remanding to district court to consider plaintiff's request for injunctive relief). After *Monsanto* this case law directly supports LOWD's request for the less drastic remedy of partial vacatur, and more recent case law from this Circuit in fact orders or affirms vacatur or partial vacatur after finding NEPA violations. *See, e.g., Center for Food Safety,* 734 F.Supp.2d at 953 (rejecting argument that agency's NEPA violations were

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request for an injunction.

"minor or insignificant"); *Southeast Alaska Conservation Council v. Federal Highway Admin.,* 649 F.3d 1050, 1059 (9th Cir. 2011)(affirming district court order vacating and enjoining agency decision because of NEPA violations); *cf. Northern Plains Resource Council v. Surface Transportation Board,* 668 F.3d 1067, 1100 (9th Cir. 2011)(order denying rehearing because agency admitted that effect of opinion finding APA and NEPA violations was to invalidate underlying agency decisions).

Moreover, as is set forth in the supporting Declaration of Dr. Susan Kegley, ¶ 15-22**,** there is in fact a real risk of cumulative impacts from the Forest Service's proposed spraying that the Forest Service has not properly assessed. Thus the Forest Service cannot simply argue that partially vacating and remanding the decision for additional analysis and reconsideration will result in the same outcome. Indeed, NEPA assumes that a complete analysis and disclosure of impacts will affect an agency's decision-making. *See* 40 C.F.R. § 1500.1(c).

(2) Partial Vacatur Will Not Unduly Disrupt the Forest Service's Need to Treat Invasive Plants.

Agencies will likely always argue that vacating one of their decisions will be disruptive. Thus the standard for denying vacatur must require much more that the ordinary disruption involved in vacating an illegal agency decision. Here LOWD has specifically tailored its request for partial vacatur to give the Forest Service significant, continuing discretion to treat invasive species. At the same time such partial vacatur upholds NEPA's primary purpose by not allowing the agency to implement the most risky aspects of that decision—herbicide spraying in newly authorized areas—until after they have fully considered and publicly disclosed the cumulative impacts of such spraying. LOWD limits its request to partial vacatur even though, as a matter of law, the Forest Service's NEPA violation invalidates the entire decision. See *High Sierra Hikers*

Assn v. Powell, 2002 WL 240067, *6 (N.D. Calif. Jan. 9, 2002)(amended order granting partial injunctive relief), aff'd, *High Sierra Hikers, 390 F3d 630*.

If the Court orders partial vacatur as requested by LOWD, the Forest Service's prior decision authorizing the limited use of certain herbicides on approximately 5000 acres would be reinstated. See *Paulson v. Daniels,* 413 F.3d 999, 1009 (9th Cir. 2005). Moreover, LOWD is not seeking vacatur of the Forest Service's ability to use the seven additional herbicides authorized in the ROD on those 5000 acres where herbicide use was previously analyzed and authorized. LOWD believes that some of those new herbicides are possibly less harmful than the three previously authorized herbicides (which include the very persistent picloram and triclopyr) and LOWD therefore proposes to give the Forest Service the discretion to also have limited use of those newer herbicides. Finally, LOWD does not seek to vacate those portions of the ROD authorizing non-herbicide treatments on specific, additional acreages and under the ROD's Early Detection Rapid Response Program. Although the Forest Service did not properly analyze the cumulative impacts of such non-herbicide treatments, see Doc. 60 at 51-52, the impacts of such methods are fairly well understood and LOWD believes the need to give the Forest Service some tools to immediately address new invasive plant infestations outweighs the need for a prior, cumulative impact assessment of non-herbicide treatment methods.[6] However, the same cannot be said for that portion of the ROD authorizing significant new herbicide use on new specific new acreages and under the EDRR program. That part of the decision creates significant unanalyzed and undisclosed cumulative impacts and that portion of the ROD must therefore be vacated and reconsidered after the Forest Service completes a proper and public analysis of the cumulative impacts of those new, proposed treatments.

This request for partial vacatur is not unduly disruptive and properly balances the need for compliance with NEPA before implementing decisions and the risk created by failing to do so against the Forest Service's legitimate need to treat invasive plants. See *Van Antwerp,* 719 F.Supp. 2d at 79-80 (granting partial vacatur for NEPA violations); *Center for Food Safety,* 734 F. Supp 2d at 955 (granting limited vacatur for NEPA violations); *cf. High Sierra Hikers,* 390 F.3d at 642-43 (upholding carefully balanced partial injunction of implementation of illegal agency decision because of NEPA cumulative impacts violation).

II. In the Alternative, LOWD is Entitled to a Permanent Injunction Against Certain Herbicide Spraying.

In the alternative, and only if the Court denies LOWD's request for partial vacatur, LOWD requests on Order permanently enjoining the Forest Service from spraying herbicides in any area where there would be a risk of cumulative impacts and in areas that would cause irreparable harm to LOWD's members' use of the Wallow Whitman National Forest ("WWNF") until the Forest Service has publicly corrected its NEPA violation. In *Monsanto* the Supreme Court reiterated that:

> [A] plaintiff seeking a permanent injunction must satisfy a four-factor test before a court may grant such relief. A plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." *eBay Inc. v. MercExchange, L.L. C.*, 547 U.S. 388, 391, 126 S.Ct. 1837, 164 L.Ed.2d 641 (2006).

130 S.Ct. at 2756. Absent an Order from this court granting partial vacatur, LOWD can satisfy each of these elements.

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[6] However, an analysis of those impacts should be included in the revised analysis that the Forest Service must prepare to address all of the violations identified in the Court's Order.

A. LOWD Has Suffered Irreparable Injury.

The Supreme Court has explained that injury to the environment is often irreparable because "by its nature, [it] can seldom be adequately remedied by money damages and is often permanent or at least of long duration." *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531, 545 (1987). The Court has also recently explained that "[p]art of the harm NEPA attempts to prevent in requiring an EIS is that, without one, there may be little if any information about prospective environmental harms and potential mitigating measures." *Winter*, 129 S.Ct. at 376. For this reason, the NEPA process is especially crucial when an agency is considering an activity with unknown or uncertain effects on the environment. *Monsanto*, 130 S.Ct. at 2768 (Stevens, J. dissenting). Reflecting the importance of NEPA review, the Ninth Circuit has explained "in the NEPA context, irreparable injury flows from the failure to evaluate the environmental impact of a major federal action." *High Sierra Hikers Assn. v. Blackwell*, 390 F.3d 630, 642 (9th Cir. 2004).

The Supreme Court in *Winter* clarified exactly in what context a NEPA violation could constitute irreparable harm:

> [In a] case in which the defendant is conducting a new type of activity with completely unknown effects on the environment….[p]art of the harm NEPA attempts to prevent in requiring an EIS is that without one, there may little information about prospective environmental harms and potential mitigating measures.

129 S.Ct. at 376. Chief Justice Roberts then contrasted that situation with the one before the Supreme Court, where the activity at issue had been ongoing for 40 years and a preliminary injunction was not justified. *Id*. Justice Stevens commented on this issue in *Monsanto*, explaining that courts confronted with NEPA violations and motions for preliminary injunctions should "remember that in many cases allowing an agency to proceed makes a mockery of the [NEPA]

process…." 130 S.Ct. at 2769 (2010) (Stevens, J. dissenting). Similarly, in *Sierra Club v. Marsh*, 872 F.2d 497, 500 (1st Cir. 1989), now Justice Breyer explained that the irreparable harm caused when an agency fails to comply with NEPA "is a harm to the environment, but the harm consists of the added risk to the environment that takes place when governmental decisionmakers make up their minds without having before them an analysis (with prior public comment) of the likely effects of the decision upon the environment."

In this case the Forest Service has created an unacceptable risk of irreparable harm to the WWNF's environment by failing to properly analyze the cumulative impacts of its proposal. See Amended Order, Doc. 60 at 49-55; *see also* Kegley Declaration, ¶ 15-22 **(**explaining how the Forest Service has not properly assessed the proposal's cumulative impacts). Consistent with this Court's Order, Doc. 60 at 49-55, that harm extends to all areas where there could be cumulative impacts from herbicide spraying, including areas already impacted by logging, ATV use, grazing and impaired streams.

Harm to the LOWD's member's aesthetic and recreational use of the WWNF from the Forest Service's Herbicide spraying is all irreparable harm that will support injunctive relief. *San Luis Valley Ecosystem Council v. USFWS,* 657 F.Supp.2d 1233, 1239–1242 (D.Colo. 2009).Here the declarations of LOWD's members set out how their use of the WWNF is harmed because they will not use sprayed areas that they otherwise would use for camping, hiking, wildlife observation, fishing and gathering edible plants. *See* Declaration of Lee Christie, ¶ 9 (harm to hiking, camping and bird watching) [Dkt.#14], Declaration of Frazier Nichol, ¶ 7,12,14 (harm to hiking and gathering edible plants)[Dkt.#15], Declaration of Jennifer Schemm-Williams, ¶ 9-10 (harm to camping, wildlife observation and consumption of fish and berries)[Dkt.#16].

B. LOWD Can also Satisfy the Other Three Requirements for Obtaining a Permanent Injunction.

In NEPA cases the Ninth Circuit has repeatedly recognized that "[e]nvironmental injury by its nature can seldom be adequately remedied by money damages…." *Idaho Sporting Congress, 222 F.3d at 569 (quoting Amoco Prod. Co*., 480 US. at 545). LOWD and its members are not seeking money damages and do not believe such damages would even begin to compensate them for the harm to the WWNF and the use of its resources.

Where injury to the environment is at stake because of a NEPA violation, "the balance of harms will usually favor the issuance of an injunction to protect the environment. *Amoco Prod Co., 480 U.S. at 545.* Because LOWD is limiting its request for injunctive relief to the Forest Service's spraying of herbicides, and is not seeking to enjoin other invasive plant controls authorized by the ROD, the balance here tips in further in LOWD's favor.

Finally, the public interest usually is served by enjoining federal action undertaken without "careful consideration" of environmental impacts. *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1138 (9th Cir. 2011); *see also Bosworth*, 510 F.3d 1016, 1033 (9th Cir. 2007) ("the public interest favor[s] 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").

CONCLUSION

For the reasons set forth above this Court should grant LOWD's motion for partial vacatur and issue an Order vacating that portion of the Forest Service's illegal Record of

Decision authorizing the use of herbicides on any Wallowa Whitman National Forest Land where herbicide use was not previously analyzed and authorized under prior Forest Service decisions. In the alternative, if the Court does not order such partial vacatur, the Court should enter an Order permanently enjoining the Forest Service from spraying herbicides in area areas of the Wallowa Whitman National Forest where such spraying could cause cumulative impacts and any area where spraying would cause harm to LOWD's members use of the Wallowa Whitman National Forest until the First Service has publicly remedied its NEPA violation.

Certificate of Compliance

This brief complies with the applicable word count under LR 7-2(b) because it contains 6481 words, including headings, footnotes, and quotations, but excluding the caption, table of contents, table of authorities, signature block, and any certificate of counsel.

DATED this 4th day of September, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 4, 2012, I electronically filed the foregoing document, with the Clerk of the Court for the United States District Court for the District of Oregon, Portland Division and I served a true copy on the following parties through their attorneys via the Court's CM/ECF filing system:

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